2011

Bowen v. Hart Family Living Trust : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
FOR THE STATE OF UTAH

ELMER BOWEN, Plaintiff/Appellant, v. KENNETH HART, CLARK HART, and KNNETH E. and CLARA WATTS HART FAMILY LIVING TRUST, Defendants/Appellees.	REPLY BRIEF OF APPELLANT Case No. 20110447-CA District Court No. 100700010

APPEAL FROM THE FOURTH DISTRICT COURT,
MILLARD COUNTY, HONORABLE JUDGE BRADY

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I. STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

ISSUE 1: Regarding this issue, the Appellant is satisfied with his initial Brief and will not comment further herein except as follows. The Appellee's position is basically that the issue was not preserved. However, the Appellant has clearly demonstrated that the issue was preserved.

ISSUE 2: Regarding this issue, the Appellant is satisfied with his initial Brief and will not comment further herein except as follows. The Appellees basically argue that since there was a contract, the Appellant has no right to pursue unjust enrichment. This position is a legal question and will be addressed in the argument section of Issue 2.

ISSUE 3: Regarding this issue, the Appellant is satisfied with his initial Brief and will not comment further herein except as follows. The Appellees basically argue that since there was a contract, the Appellant has no right to pursue unjust enrichment. This position is a legal question and will be addressed in the argument section of Issue 3.

ISSUE 4: Regarding this issue, the Appellant is satisfied with his initial Brief and will not comment further herein except as follows. The Appellees basically argue that the Appellant is not entitled to Rule 59 and 60 motions. This position is a legal question and will be addressed in the argument section regarding Issue 4.

ISSUE 5: The Appellees insert a fifth issue asking for attorney's fees and cost arguing that the appeal is without merit. As the following demonstrates, the appeal is with merit—in fact the Appellant is of the opinion that he will prevail.

STATEMENT OF THE CASE

A. Nature of the Case

Regarding this issue, the Appellant is satisfied with his initial Brief regarding the nature of the case and will not comment further herein except as follows. The Appellant disputes several of Appellant's alleged factual allegations, but he will address these disputes in the factual section of this brief.

B. Course of Proceedings

Regarding this issue, the Petitioner is satisfied with his initial Brief and will not comment further herein except as follows. In any fashion that the Appellants' representation is contrary to Appellant's position, Appellant requests that the Court defer to the Appellant's Brief.

STATEMENT OF THE FACTS

Regarding the Statement of Facts, the Petitioner is satisfied with the facts as stated in Appellant's initial Brief and will not comment further herein except as follows. The Appellees have mischaracterized the trial testimony in some instances and have over-stated the testimony in other instances as indicated herein.

2. The Appellees assert in paragraph 2 of their statement of facts as follows: *The property was liveable, having been improved by Defendants in or about the summer of 2005. (R. 330, pg. 232: 19-24).*

Appellant's Response: The Appellant is of the position that Appellees' allegation is not accurate and takes inappropriate liberties with the testimony. The property at the time Elmer moved on the property was more appropriately characterized as a hunting camp. *Id at P. 51, L.18-24.* The property was not livable unless you like cockroaches and mice along with gusts of wind coming through huge gaps in the floors. The

apartment was filthy, had a faulty heater and had unpainted, moldy walls. The apartment was not rentable. The Appellant, which was not disputed, in paragraph 6 of his Statement of Facts, indicated that Appellees had somewhat improved the studio apartment in summer 2005, bringing in running water, a water heater, and a stove. *Id. [R. 330, pg. 232: 19-25, 233: 1-10].* Appellant's Statement of Facts in his in initial Brief, paragraph 7, which Appellees did not dispute, stated that the Property was in terrible shape when Appellant moved in. Appellant immediately began working to make the Property truly livable, including cleaning, painting the floors and walls, and repairing large holes and cracks to keep the wind and numerous cockroaches and mice out of the apartment. Elmer also rented heavy equipment, at his own expense, to bring in fill dirt to plug a gaping hole under the apartment where pigs had been rooting. (*Id.* at pgs. 52-56).

5. The Appellees assert in paragraph 5 of their statement of facts as follows: *There was very little work needed to be done to the property before the Plaintiff took possession of the same. R. 330, pgs. 11:25, 12: 1-4.*

Appellant's response: See the Appellant's response to Appellees' Statement of Facts paragraph 2 above.

10. The Appellees assert in paragraph 10 of their statement of facts as follows: *From 2006 until sometime in 2008, the Plaintiff, along with the Defendants and other family and friends, contributed labor to clean, repair and maintain the buildings and the premises, and removed offending structures from the property. (R. 96-102; 112-120)*

Appellant's response: Again, the Appellees over-state the amount of work they performed on the property in their statement of facts. The Appellees do not cite to the

Trial Court's Memorandum Decision or Findings nor do they provide an adequate cite to transcript of testimony. The record indicates that Elmer's son and his family came out and helped with the painting of the apartment and some weeding. See R: 330, pgs. 12: 10-25; 13: 9-25, 14-17; 21:22-5, 22: 1-3; 68: 2-24; 128-129; 131-133 (fill); 133-137 (describing fencing projects); 184: 4,10; 205: 12-13). Kenneth Hart does mention at R.330, pg. 292: 4-22, that he had a friend come help him salvage the ties, retrieving them from the pile and pulling out nails and loading them into the truck. However, Elmer testified that he had completed his part of the salvaging process as Harts requested prior to the work done with the tires. Furthermore, the trial testimony indicates that the only individuals who worked on removing the structures (as well as doing all of the heavy equipment fill work and fence work) were Kenneth and Elmer. Clara Hart helped plant the trees (but implied in the testimony is that she mostly directed Elmer in his backhoe work).

14. The Appellees assert in paragraph 14 of their statement of facts as follows: *The Defendants never made request of the Plaintiff to buy a backhoe, nor to use the backhoe to work around the property. (R. 96-103; 112-120; 330, pgs. 260: 17-20, 275; 18-25, 276:1.*

Appellant's Response: Again, the Appellees exaggerate and over-state their position in their statement of facts. Also, the Apellees fail to cite to the Trial Court's Memorandum Decision or Findings. Kenneth Hart's testimony does not support the Appellees' statement of fact in that he testified that Kenneth Hart never asked Elmer to use the backhoe to improve the property. See, R. 330 p. 275: 18-25 & 276:1. Clearly the trial testimony was that Kenneth Hart drove Elmer around for the purpose of shopping

for the backhoe. In addition, Kenneth Hart obviously helped him get the backhoe moved to the property and then moved it to Cedar City. Instead, Appellant's position is as stated in Elmer's statement of facts found in his initial Brief as follows:

> 18. Defendant Kenneth Hart drove Plaintiff to where Plaintiff purchased the heavy equipment and accompanied him throughout the transactions. (R: 330, pp. 74-79).
> 19. Plaintiff purchased the backhoe in October 2006. (R: 330, pp. 76-77, 279).
> 20. From approximately October 2006 until September 2008, Plaintiff used his heavy equipment to help grade the Property, bring in fill dirt, build fences, remove offending structures and concrete pads, and plant about a dozen and a half trees for Defendants. The Trial Court found that Plaintiff worked for approximately 500 to 580 hours performing heavy equipment work during an approximate two-year period. (R. 330, pp. 13-16, 125-129, 131, 134-137; R. 112-120, Finding No. 11.b).
> 21. The Defendants acknowledged that the Plaintiff's heavy equipment work was professional and met appropriate standards. (R: 330, p. 259).

18. The Appellees assert in paragraph 18 of their statement of facts as follows: *Defendant Kenneth Hart paid $10.00 to the Plaintiff while both were in the bank where the Bill of Sale was notarized. (R. 96-103; 112-120; 330, pgs. 239: 13-21; 267. 6-12).*

Appellant's response: The Appellant disputes this fact. The Appellant testified that this $10.00 was not paid. See, Appellant's testimony at R. 330, pgs. 105: 16-20; 300: 1-11.

24. The Appellees assert in paragraph 24 and paragraph 25 of their statement of facts as follows: *From 2007 to 2008, the Defendants paid for all maintenance and repairs on and to the backhoe. (R. 96-103: 112-120; 330, pgs. 116: 22-23; 256:7-17; 257:1-3; 258: 15-25; 259; 280: 14-17; 281:12-19). 25.* The Appellees assert in paragraph 25 of their statement of facts as follows: *From 2006 to 2008, the Defendants*

provided an open account to supply the Plaintiff with fuel, oil and services for the backhoe. R. 96-103; 112-120; 330, pgs. 116:22-23; 256:7-17; 257:1-3; 258:15-25; 259; 280:14-17; 281:12-19).

Appellant's Response: Again, the Appellees exaggerate and over-state the amount of work they performed in their statement of facts. The Appellees cite to testimony as to repairs and expenses that Kenneth Hart claimed he paid from March 2007 through April 2008. What is missing is any testimony as to what Elmer paid. Elmer testified regarding his own gas receipts and payments that he paid to Bob Nafus. R. 330 p. 202. There is no independent testimony to support the Appellees' position that they had an open account from 2006 to 2008 of which Mr. Bowen charged items or that he even used or exclusively used the account.

30. The Appellees assert in paragraph 30 of their statement of facts as follows: *Plaintiff never requested payment nor submitted a bill to the Defendants for his heavy equipment work until on or about April 10. 2009. approximately three (3) years after the Plaintiff began work on the property, when he made a demand through his attorney for compensation for" 1500 hours of back hoe work.- "without an indication of the amount due. (R. 96- 103; 112-120; 330. pgs. 217:16-18: 239:13-22: 270:20-25).*

Appellant's response: Again, the Appellees exaggerate and over-state their position. The trial testimony supports the assertion that Elmer never sought payment until 2009. At the end of the first of Appellant's major heavy equipment demolition projects, in 2007, he verbally communicated to the Defendants that he expected payment for that project. R. 330 pgs. 111-112: 22-25, 117:23, 120:19, 119: 2-25. Further, the

record shows that Appellant reduced his Social Security payments in expectation of payment for his heavy equipment work for the Defendants. (R. 330 pgs. 117-118). Finally, the Appellant stopped doing heavy equipment work for Defendants in September 2008, and at that time he told Kenneth Hart that he was not going to work anymore because he was not getting paid, and that he felt he was owed for 1500 hours equipment time -- conservatively 500 to 520 hours. (R. 330, pgs. 141: 1-22, 142: 3-14, 148:1-24 179: 8-19).

ARGUMENT

ISSUE 1: THE TRIAL COURT SHOULD ENTER ADDITIONAL FINDINGS AND CONCLUSIONS TO ESTABLISH CLEAR DIRECTIVES IN ITS DECLARATORY JUDGMENT AND AFFORD THE PARTIES RELIEF FROM UNCERTAINTY

In this matter, pursuant to Utah Code Ann. § 78B-6-401 et seq. and Utah Rules of Civil Procedure 57, the Appellant sought declaratory judgment to define the Appellant's rights, obligations and protections regarding the use of the Defendants' property. R: 1-5, Complaint, First Cause of Action. At trial the parties agreed that the Court should enter such a judgment. (R: 330, p. 301).

Utah Code Ann. § 78B-6-412 states the provisions allowing declarative judgments is for the purpose "to settle and to afford relief from uncertainty and insecurity with respect to rights status, and other legal relations; and is to be liberally construed and administrated." In fact, it seems the Court's only discretion is to deny declaratory judgment only when "a judgment or decree, if rendered or entered, **would not** terminate the uncertainty or controversy giving rise to the proceeding." Utah Code Ann. §

78B-6-404. The Court's declaratory judgment did neither—it does not define the parties' rights and obligations and does not terminate the uncertainty or controversy.

The Appellees' response to the Appellant's position basically is that the Trial Court's ruling meets the specificity requirements of the law regarding Declaratory Judgments. As the following and as provided in Appellant's initial Brief demonstrates, the Court's declaratory judgment does not contain enough specificity to alert the parties as to their respective duties and obligations.

The Appellant is of the position that a review of the Trial Court's Conclusions of Law regarding the declaratory aspect of the Court's rulings supports and established the Appellant's position that the Trial Court's declaratory ruling lacked specificity.

1. "The Plaintiff is entitled to a declaratory judgment that the Plaintiff is entitled to live in the studio apartment on the Property for the remainder of the Plaintiff's life, rent free, subject to the condition that he maintains the Property in good appearance and repair." R. 112-120, P. 6; Findings of Fact, Conclusion No. 1.
2. "The Plaintiff's work of cleaning up and maintaining the Property is consideration for receiving free rent for the rest of his life." Id. at Conclusion No. 2.
3. "There is no separate agreement between the parties regarding the heavy equipment work." Id. at Conclusion No. 3.
4. "There was no mutual understanding or meeting of the minds between the Plaintiff and the Defendants that the Plaintiff's heavy equipment work was based on a separate agreement." Id. at Conclusion No. 4.
5. "The heavy equipment work performed by the Plaintiff on the Property was work that the Plaintiff either did in exchange for living on the Property rent free for the rest of his life, or was work he did voluntarily, as a friend helping a friend." Id. at Conclusion No. 5.

The only specific ruling found in the Trial Court's declaratory ruling was that the Appellant is allowed to live rent free. But that finding is not even accurate because the Appellant has to pay consideration for the privilege—it is just that nobody knows what

that consideration is or what he is to receive in return. The Court's Conclusions of law is that Elmer is required to "maintain the Property in good appearance and repair." If Elmer's obligation was left to that, the Appellant would be hard pressed to disagree with the Appellees' position. What muddies the water is the Court's Conclusions stating the "heavy equipment work performed by the Appellant on the Property was work that the Appellant did in exchange for living on the Property rent free for the rest of his life, or was work he did voluntarily, as a friend helping a friend." The parties are left not knowing whether the Court is declaring the heavy equipment work, 500-580 hours over a two year period, is part of Elmer's continuing obligation to live rent free. If Elmer is required to continue providing 500-580 hours of backhoe work to live rent free during a two year period, the rental agreement is unconscionable. See the Section titled Issue 2, which follows.

The second aspect of the Trial Court's ruling that left the parties uncertain is what obligations the Appellees have relating to this rental agreement. The Appellees argue that the Trial Court's ruling apprised the parties of their obligations. Appellate Brief, p.27. The Appellees do not answer the question if the Appellees are obligated to replace the hot water heater if it goes bad. The Utah Fit Premises Act answers in the affirmative by stating as follows: "Each owner and his agent renting or leasing a residential rental unit shall maintain that unit in a condition fit for human habitation . . . . Each residential rental unit shall have electrical systems, heating, plumbing, and hot and cold water." Utah Code Section 57-22-3 (1). Rental agreement is defined as "any agreement, written or oral which establishes or modifies the terms, conditions, rules, or any other provisions regarding the use and occupancy of a residential rental unit." Utah

Code Section 57-22-2 (2). It appears that since the Appellant's and the Appellees' agreement meets the definition of a rental agreement, the Utah Fit Premises Act should apply. The Appellant argued and maintains his position that the Court should specifically indicate that the Act applies and that the heavy equipment work is not an ongoing obligation.

The Appellee challenges whether the Appellant preserved the issues. Appellant Brief, p.29. However, the record indicates that this issue has been preserved. After the Trial Court entered its Findings and Conclusions, Appellant preserved this issue when he filed a Motion to Enter the Attached Order (R. 125-127) and his subsequent Motion to Amend Judgment or Set Aside Judgment with supporting Memorandum pursuant to Rule 59 and/or Rule 60 Motions (R.146-151, at 149-150). See also discussion relating to Issue 4.

In conclusion, to afford both parties relief from continuing uncertainty and insecurity with respect to their rights, status and legal relations, the Trial Court should issue additional findings and conclusions respecting its Declaratory Judgment

ISSUE 2: THERE IS INSUFFICIENT SUPPORT FOR THE TRIAL COURT'S LEGAL CONCLUSION THAT DEFENDANTS WERE NOT UNJUSTLY ENRICHED BY PLAINTIFF'S "HEAVY EQUIPMENT" WORK BECAUSE THE TRIAL COURT DID NOT CORRECTLY APPLY THE APPLICABLE LAW

In this case, Plaintiff claimed Defendants had been unjustly enriched by him providing 500-580 hours of heavy equipment work to improve Appellee's property. In summary, unjust enrichment "is an action initiated by a plaintiff to recover payment for labor performed in a variety of circumstances in which that plaintiff, for some reason, would not be able to sue on an express contract." *Ashby v. Ashby*, 2010 UT 7, 227 P.3d 246

(Utah 2010) (citing *Davies v. Olson*, 746 P.2d 264, 268 (Utah Ct.App.1987)). To establish unjust enrichment, Plaintiff must establish (1) he conferred a benefit on Defendants, (2) Defendants appreciated or had knowledge of the benefit, and (3) Defendants accepted or retained the benefit under circumstances making it inequitable to retain the benefit without making payment of its value.

In his initial brief, the Appellant argued in detail that the Trial Court's rulings regarding unjust enrichment were clearly erroneous. The Appellant does not intend to discuss each of his positions again in this Reply but instead will attempt to address the Appellees' arguments as they apply to the three necessary elements to establish unjust enrichment as established by the evidence presented at the trial.

1. The Trial Court's finding that Appellant was not entitled to recovery based upon unjust enrichment because the parties had an agreement was erroneous.[1]

   As to this issue, the Trial Court found as follows:

   a. "There is no separate agreement between the parties regarding the heavy equipment work." (R: 112-120, p.6; Findings & Conclusions, Conclusion No. 2.
   b. There was no mutual understanding or meeting of the minds between plaintiff and defendants that plaintiff's heavy equipment work was based on a separate agreement. (*Id.* at 6; Conclusion No. 4).
   c. The heavy equipment work performed by the plaintiff on the Property was work that the Plaintiff either did in exchange for living on the property rent free for the rest of his life, or was work he did voluntarily, as a friend helping a friend. (*Id.* at 6; Conclusion No. 5)

The Appellant's uncontested testimony was that he began living in the apartment rent free in the Winter of 2005 in exchange for cleaning, repairing and maintaining the property. Id. Findings at para. 2-3. There is absolutely no evidence that the parties

1. The Court found as follows: "The Plaintiff's cause of action for recovery of money for heavy equipment work under both the contract and unjust enrichment theories should be dismissed. (*Id.* at 7; Conclusion No. 10).

contemplated, discussed or envisioned that the Elmer would purchase heavy equipment for the purpose of doing demolition work for the Appellees. So the parties' agreement as to what consideration Elmer was to pay to live on the property excludes heavy equipment work. The Appellant purchased the backhoe in October 2006, about a year after he and the Appellees made the deal to move to the property. Heavy equipment work could not have been within the parties' contemplation at the time Appellant moved onto the property.

Implied within the Trial Court's Finding and the Appellees' argument is that because the parties had an agreement that allows Elmer to live rent-free in exchange for up-keep of the properties there cannot be any subsequent agreement. This conclusion simply does not follow reality. Furthermore, the Appellant's argument is that he is entitled to damages based upon the doctrine of unjust enrichment. As indicated in his initial Brief and as follows, the Appellant is entitled to damages based upon unjust enrichment.

As to the first element necessary to establish unjust enrichment, the Appellees did not challenge in any significant fashion that the Appellees received not only a benefit but a true windfall in this situation.

Next, as to the second element of unjust enrichment, the Appellant established that Appellees "appreciate[d] or ha[d] knowledge of the benefit." *See, e.g., Estate of Higley v. State, Dept. of Transp.*, 2010 UT App 227, ¶ 19, 238 P.3d 1089 (citing *Allen v. Hall*, 2006 UT 70, ¶ 26, 148 P.3d 939). The Appellees did not challenge this element. The Appellees were aware of the benefit the Appellant was conferring on them.

Next, as to the third element, the standard for determining whether the Defendants had been unjustly enriched required the Trial Court to determine whether the Defendants

accepted and retained benefits conferred by Plaintiff "under such circumstances as to make it inequitable for Defendants to retain those benefits without compensating the Plaintiff." *See, e.g., Estate of Higley v. State, Dept. of Transp.*, 2010 UT App 227, ¶ 19, 238 P.3d 1089. Again, the Appellees did not challenge Appellant's position.[2]

In conclusion, for the Trial Court's legal conclusion denying Appellant's unjustly enriched claim for payment of "heavy equipment" work is erroneous. Rather, based on the elements of unjust enrichment as correctly interpreted and applied to the Trial Court's findings and the evidence presented, it would be inequitable to allow the Defendants to benefit by all of Plaintiff's heavy equipment work without compensating him. For these reasons, the Plaintiff should have prevailed on his unjust enrichment claim with respect to his heavy equipment work.

2. The Trial Court's findings that the Appellant failed to establish value/damages for his services were clearly erroneous.

As to this issue, the Trial Court found as follows:

a. Although plaintiff presented evidence regarding rates charged for back hoe services performed by others, there was no evidence of what a reasonable amount of compensation would be for the work performed by plaintiff.(*Id.* at 7; Conclusion No. 7).
b. Although there was evidence of the estimated time spent by plaintiff, there was no evidence that it represented a "reasonable" amount of time to do the work.(*Id.* at 7; Conclusion No. 8).
c. The Plaintiff failed to provide evidence of the value by which his labors benefitted defendants.(*Id.* at 7; Conclusion No. 9).

As to the issue whether or not the Appellant presented sufficient evidence regarding "what a reasonable amount of compensation would be for the work performed by

2 The Appellee does claim that Elmer conferred the benefit as friends helping friends; however, this is not the case which is discussed herein. See pg. 16 herein.

Plaintiff," as the following demonstrates, the Trial Court's finding constitutes clear error. The Appellees argue that the Trial Court was correct in this ruling. Appellees' Brief. P. 34.

Plaintiff presented uncontroverted testimony establishing in detail that the normal, customary and reasonable value of the heavy equipment services with an operator was $80/hour while operating, and $35/hour while on standby. (R: 330, pp. 81-85) In fact, Appellees testified that they had previously hired a backhoe with an operator for $65 an hour (R: 330, pp. 271-272). The trial testimony clearly described the extensive work Elmer had completed, which the Appellees did not dispute. (R: 330, pp. 112-115, 120-123, 125-129, 131-137, 159-162). The testimony clearly established, and the trial court found, that Elmer had spent 500 to 580 hours doing heavy equipment work. (R: 330, pp. 141-148; R: 112-120, Findings & Conclusions, Finding No. 12(d)). The testimony presented to the Trial Court clearly established that $85 an hour was a "reasonable amount of compensation...for the work performed by Plaintiff."

As to the Trial Court's finding that Elmer failed to establish that "the work he completed [500-580 hours] was reasonable," the Appellees never challenged this position during the trial. Instead, the Apellees testified that the Appellant's work was professional and met appropriate standards. R.330, p. 259. The fact that Appellant testified that he performed 500-580 hours, and the fact that the Appellees testified that his backhoe work was professional, without any testimony disputing the reasonable of the hours, establishes the reasonableness of his hours.

The Appellees argued in their response brief, that the Appellant could only claim the increase of value to the property. Appellees' Brief, p. 34. See also R. 330, p.8,

Conclusion No. 9. However, the Utah Supreme Court has clearly held that where the benefit is in the form of services, "the measure of damages, by the great weight of authority, is the reasonable value **of the services rendered**." The Appellees did not provide any counter argument to this line of cases. In short, under the applicable case law, Plaintiff establishes that he provided at least nearly $46,400.00 worth of services on behalf of the Defendants without compensation.

The Appellees argue that Plaintiff erroneously equates his hours on a backhoe multiplied [by] a recognized hourly rate as the value of his services." Appellees' Brief, p. 34. The problem with the Appellees' argument is they failed to present any alternative theory of damages at trial or in their Brief. In fact, instead they testified that Elmer's work was professional and met appropriate standards. R. 330, p. 259. Thus, Plaintiff sufficiently demonstrated the value of the benefit conferred on Defendants by his services, and the trial court's legal conclusions with respect to this element of unjust enrichment were erroneous.

To dispute the calculation of damages by assessing the reasonable rate times the hours worked, the Appellees used the analogy of determining the value of the services of an attorney when attorney's fees have been awarded. This analogy is helpful, but not for the reasons contemplated by the Appellees. In a situation where a trial court is determining the reasonable value of an attorney's work and the attorney seeking an award presents testimony regarding the amount of time spent and the "going rate" for attorney's fees in the area, the court will consider that attorney's testimony as to the value. If the party opposing the attorney's fees presents no contrary evidence, and in fact agrees the work was professional and met appropriate standards, the trial court would have no option

but to accept the attorney's testimony. Such is the case here. The Appellees neither presented contrary evidence nor an alternative theory as to determine damages.

The Appellees did argue in their Brief that at the time Elmer performed the work he was 87 to 89 years old. This is a true fact that was established at trial; however, the Appellees cannot cite from the record any testimony, or argument for that matter, where they disputed the reasonable value of Appellant's heavy equipment work because of his age. In fact, the Appellees testified just the opposite—his work was professional and met standards.

Throughout the Appellees' Brief, Appellees argue that Appellant's 500 to 580 hours of heavy equipment work was offered "gratuitously" or as "friends helping friends." For example, see Appellees' Brief, p. 30 and 33. Reviewing what the Trial Court found as Kenneth Hart's contribution to this "friendship" is helpful. Outside the issues surrounding this case, the Trial Court found that Kenneth Hart had "gave Plaintiff a wood stove and firewood for use in a former home."[3] Kenneth Hart's contributions, however, pale compared to the $85.00 x 500 plus hours worth of services that Elmer provided.

Perhaps, Appellees use of the attorney analogy is suggestive as to this issue as well. An attorney might have a friend that he hunts and fishes with from time to time, exchanges minor "gifts" of items and services, and from time to time answers a legal question or two. However, where the friend has his attorney friend perform a full blown jury trial that takes between 500-580 hours— is an entirely different matter than friends helping friends.

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3 The Trial Court also found that "the Defendants bought appliances (gas range and water heater) for their studio apartment so that the Plaintiff could live there during the winter of 2005-2006. The Trial Court also referenced that the Appellees "provided paint, equipment and labor to help with the cleaning up, painting and removal of debris on the property." Id. First, the Appellant disputes that the evidence supports the assertion that the Appellees contributed much towards preparing the property for him; however, this is minor compared to the nearly $50,000.00 worth of services that Elmer provided. The Kenneth Hart also testified vaguely that he took Elmer hunting and fishing as well.

Setting aside ethical considerations unique to attorneys, the friend should not be surprised if the attorney expects compensation for his time.

The Appellees complain throughout the entire case that Elmer never told him that he was going to charge them for the heavy equipment work.[4] Perhaps some discussion is warranted regarding the "assumption of risk" in an unjust enrichment case when one person contributes an extensive service to another and the person receiving the service stands by and accepts the service. This is important in that the record is void of any testimony in which the Appellees verified with the Appellant that he was doing the work for free. The elements of unjust enrichment do not allow a person to simply sit back and receive a windfall and then be surprised that payment is expected.[5]

3. Trial Court's finding that the Appellant had waived his right to unjust enrichment was clearly erroneous.

The Trial Court found that the "Plaintiff waived his right to claim payment for unjust enrichment, when he completed his work in 2008, and did not submit a bill, request for payment, or statement of services to plaintiff." (*Id.* at 6; Conclusion No. 6). Appellant claims that the Trial Court's ruling regarding this issue was erroneous.

First, at trial, Appellant testified that in September 2008 he verbally informed Defendants he would do no more work until he was paid. (R: 330, pp. 141, 316). The Appellee did not challenge this testimony. Second, the Appellant argued in his initial Brief that "waiver" is a legal term of art, and that the Appellees themselves waived this defense by failing to properly raise it as an affirmative defense in their answers. *See*

Elmer disputes this position in that he testified that he orally requested payment.

Again, to establish unjust enrichment, Plaintiff had to show (1) he conferred a benefit on Defendants, (2) Defendants ppreciated or had knowledge of the benefit, and (3) Defendants accepted or retained the benefit under circumstances aking it inequitable to retain the benefit without making payment of its value. These elements indicate that the erson receiving the benefit is assuming the risk that payment might be expected if he stands by and does nothing.

Answer R: 6-11 and Amended Answer R:45-50 See Utah Rules of Civil Procedure 8(c) and Rule 15(b) of the Utah Rules of Civil Procedure. Again, the Appellee did not challenge this testimony, neither at trial nor in their Brief.

ISSUE 3: UNDER APPLICABLE "CONTRACT" LAW AND "UNJUST ENRICHMENT" LAW, THE TRIAL COURT'S FACTUAL FINDINGS ARE INSUFFICIENT TO SUPPORT ITS CONCLUSION THAT DEFENDANTS ARE ENTITLED TO RETAIN THE 50% INTEREST IN PLAINTIFF'S BACKHOE.

1. The Trial Court failed to adequately analysis Appellant's breach of contract claim.

Appellant claimed that the Appellee breached the contract created by the bill of sale by failing to provide "valuable consideration" for the backhoe. The Trial Court failed to analyze Appellant's "breach of contract" claim. As the legal discussion in Appellant's initial Brief indicates, there must be a "meeting of the minds," an offer, an acceptance and terms sufficient to determine whether or not there has been a breach of the contract. Here, the evidence from the Trial Court's own findings shows that Appellant paid $15,300.00 for the backhoe and that the Defendant Kenneth Hart was present and helped negotiate the purchase of the backhoe. (R: 112-120, p.3; Finding No. 11.a). The Bill of Sale, the only writing between the parties, states as follows: "in consideration of *valuable consideration* Dollars (*$10.00*) and other valuable consideration." [Italicized indicates hand written].

This bill of sale, was either a contract or it was not. In finding that the bill of sale was an agreement, the Trial Court completely disregarded the ambiguity of this double reference to "valuable consideration." The Trial Court found that Kenneth Hart paid $10.00 consideration but did not indicate any further consideration. This $10.00 may satisfy the first reference to "valuable consideration," but does not address what the parties meant by the second. Both parties had different opinions as to what was meant by this

double reference. These different opinions are classic examples of failure to come to a meeting of the minds. If there was no meeting of the minds, then the parties failed to create a contract and the backhoe must be returned.

The other option that the Court has is to "fill in the term" as to the "other valuable consideration." As the Appellant argued in his initial Brief, where a contract is missing a term, the fact-finding body has the responsibility to consider the "extrinsic evidence" to "fill in" this term. For example, see Utah Code Section 70A-2-201: "A writing is not insufficient because it omits or incorrectly states a term agreed upon . . . ."; and Utah Code Section 70A-2-204: "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." Since Kenneth Hart was present when Elmer purchased the backhoe for $15,300.00 and then Kenneth Hart took possession of the backhoe immediately after the sale, he had full knowledge of the value of the backhoe. The Court has a clear basis to fill in the compensation requested for one-half of the purchase price of the backhoe.

The Appellees also argued that the backhoe was an unconditional gift or advancement on an inheritance from Appellant to Defendants. (R: 330, p. 264-267). The Court, however, does not state in the Findings and Conclusions or in the Order that it considered the transfer of the backhoe as a gift or advancement, or even that it was intended as such by the Appellant. Furthermore, the Appellees failed to address the Utah Supreme Court finding that no contract existed if the contract lacked consideration and "would be to permit one party to retain what appears to be an unjust enrichment of $169,501.75." *England v. Horbach*, 944 P.2d 340 (Utah 1997).

The Appellees also argue that the letter attached to as Exhibit "A" to their Brief establishes "Plaintiff acknowledged that he had already received the consideration" for the backhoe. Appellees' Brief, p. 40 and repeated several times throughout the Brief. First, it is difficult to imagine that a letter from one attorney to another attorney could constitute an "acknowledgment." This letter did not meet that standard and must be considered with all the testimony presented at trial. Second, this letter does not support this position. In fact, the letter in question clearly states that Elmer has the backhoe and if the Appellees attempt to obtain the backhoe, "we will consider it an attempt to obtain possession of the backhoe without a valid purchase agreement." Appellees' Brief, Exhibit "A." There was no acknowledgement of receipt of "valuable consideration."

Appellees also use the analogy of a conveyance of real property in that deeds often contain language regarding "other valuable consideration." First, deeds are a unique legal transaction in that the parties' agreement "merges" with the deed. The deed is then filed with the county's property records. Neither aspect is true with a bill of sale. Second, backhoes are not titled by the state—so no title transfers. This is why the Trial Court's finding that the "Plaintiff did not file a lien on the backhoe to protect an anticipated payment of the money from the Defendants" makes no sense. R. 112-120, p. 6, para. 19. Appellant had no mechanism to put a lien on the untitled backhoe. In fact, the only way to protect an interest in untitled equipment is to retain possession of the property. Clearly, in this case, Elmer protected his anticipated payment of "valuable consideration" by retaining possession of the backhoe from the time he began work on the Appellees' property and demanding payment. Finally, if a deed made the double reference to payment of "valuable consideration" as is the case with this bill of sale, there would be ambiguity also

in a property deed. That situation would create the same problem that we have with this case.

If the Trial Court finds that the parties did not come to a meeting of the minds and if the Trial Court cannot "fill in" the missing terms, then the Court must undo the transaction. The evidence submitted at trial, together with the Trial Court's own findings and conclusions, taken as true here, show that under the circumstances of this case, it is inequitable for Defendants to retain the 50% interest in the backhoe.

ISSUE 4: THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO CONSIDER APPELLANT'S RULE 60(b) MOTION

The Appellant filed a Rule 59 Motion for the purpose of addressing two issues that had been left unanswered. First, whether or not the Plaintiff's work that he provided in cleaning the property and heavy equipment work is the consideration allowing him to stay rent free on the property. Is the Appellant obligated to do anything in the future to maintain the right to live on the property rent free; and/or perform 500-580 hours of heavy equipment work. Second, whether or not Utah Code Section 57-22-1 [Utah Fit Premises Act] applies to their rental agreement.

The Appellant filed a Rule 60 Motion to set aside the April 21, 2011 judgment only because it had been entered without notice to the Appellant, so that he could protect his Rule 59 rights which must be filed within 10 days of the Court's Findings. This is the reason that the Rule 59 and Rule 60 motions were filed in the same pleading. The Appellant's Rule 60b Motion, which was not a Motion for Reconsideration, clearly stated that he had no issue with the language of the order in that it paralleled the Court's ruling.

Instead, Plaintiff simply requested that it be set aside and re-entered to preserve the 10-day requirement of Rule 59.

Furthermore, the Court's ruling completely disregarded Rule 5(a)(1) which states in pertinent part as follows: "every judgment, every order required by its terms to be served . . . shall be served upon each of the parties."

The Appellees failed to address these issues. The Appellant will not comment further regarding this issue and will instead rely on the argument presented in his initial Brief.

In conclusion, Appellant's Motion explicitly identified his grounds for relief in accordance with the requirements of Rule 60(b) under Utah law, and Appellant also clearly stated with particularity the relief he sought, i.e., the opportunity to submit additional evidence or oral argument in order to address two important questions that had not been addressed in the Trial Court's already issued Findings and Order. Therefore, it was an abuse of discretion for the Trial Court not to at least consider Appellant's Motion for relief under Rules 59 and 60(b).

ISSUE 5: THE APPELLEES ARE NOT ENTITLED TO ANY ATTORNEY'S FEES AND COSTS.

The Appellees insert a fifth issue asking for attorney's fees and cost arguing that the appeal is without merit. As the above demonstrates, the Appellant has presented meritorious claims on appeal—in fact the Appellant is of the opinion that he will prevail.

Instead, Plaintiff simply requested that it be set aside and re-entered to preserve the 10-day requirement of Rule 59.

Furthermore, the Court's ruling completely disregarded Rule 5(a)(1) which states in pertinent part as follows: "every judgment, every order required by its terms to be served . . . shall be served upon each of the parties."

The Appellees failed to address these issues. The Appellant will not comment further regarding this issue and will instead rely on the argument presented in his initial Brief.

In conclusion, Appellant's Motion explicitly identified his grounds for relief in accordance with the requirements of Rule 60(b) under Utah law, and Appellant also clearly stated with particularity the relief he sought, i.e., the opportunity to submit additional evidence or oral argument in order to address two important questions that had not been addressed in the Trial Court's already issued Findings and Order. Therefore, it was an abuse of discretion for the Trial Court not to at least consider Appellant's Motion for relief under Rules 59 and 60(b).

ISSUE 5: THE APPELLEES ARE NOT ENTITLED TO ANY ATTORNEY'S FEES AND COSTS.

The Appellees insert a fifth issue asking for attorney's fees and cost arguing that the appeal is without merit. As the above demonstrates, the Appellant has presented meritorious claims on appeal—in fact the Appellant is of the opinion that he will prevail.

CONCLUSION

Based upon the foregoing arguments and the arguments presented in his initial Brief, is entitled to the relief that he has sought.

DATED this 24th day of September, 2012.

James K. Slavens
Attorney for Plaintiff/Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 24th day of September, 2012, I caused to be mailed, first class postage prepaid, unless otherwise indicated below, a copy of the foregoing **REPLY BRIEF OF APPELLANT** to the following:

Utah Court of Appeals
450 South State
Salt Lake City, UT 84114
FILED
[Original and 7 Copies]

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