

2011

Jason Ross v. Epic Engineering : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Stephen Quesenberry; Aaron R. Harris; Hill, Johnson, and Schmutz.

Brent E. Johnson; Rebecca A. Ryon; Holland and Hart .

Recommended Citation

Brief of Appellant, *Jason Ross v. Epic Engineering*, No. 20110537 (Utah Court of Appeals, 2011).
https://digitalcommons.law.byu.edu/byu_ca3/2915

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

JASON ROSS,

Plaintiff/Appellant

vs.

EPIC ENGINEERING, PC,

Defendant/Appellee

Case No. 20110537

BRIEF OF APPELLANTS

Appeal from the Eighth Judicial District Court, Duchesne County, State of Utah
The Honorable Edwin T. Peterson

BRENT E. JOHNSON
REBECCA A. RYON
HOLLAND & HART LLP
222 South Main Street
Suite 2200
Salt Lake City, Utah 84101
Telephone (801) 799-5800
Facsimile (801) 799-5700
Attorneys for Defendant/Appellee

STEPHEN QUESENBERRY (8073)
AARON R. HARRIS (12111)
HILL, JOHNSON & SCHMUTZ, L.C.
RiverView Plaza
4844 North 300 West, Suite 300
Provo, Utah 84604
Telephone (801) 375-6600
Facsimile (801) 375-3865
Attorneys for Plaintiff/Appellant

FILED
UTAH APPELLATE CO
OCT 28 2011

COPY

IN THE UTAH COURT OF APPEALS

JASON ROSS,

Plaintiff/Appellant

vs.

EPIC ENGINEERING, PC,

Defendant/Appellee

Case No. 20110537

BRIEF OF APPELLANTS

Appeal from the Eighth Judicial District Court, Duchesne County, State of Utah
The Honorable Edwin T. Peterson

BRENT E. JOHNSON
REBECCA A. RYON
HOLLAND & HART LLP
222 South Main Street
Suite 2200
Salt Lake City, Utah 84101
Telephone (801) 799-5800
Facsimile (801) 799-5700
Attorneys for Defendant/Appellee

STEPHEN QUESENBERRY (8073)
AARON R. HARRIS (12111)
HILL, JOHNSON & SCHMUTZ, L.C.
RiverView Plaza
4844 North 300 West, Suite 300
Provo, Utah 84604
Telephone (801) 375-6600
Facsimile (801) 375-3865
Attorneys for Plaintiff/Appellant

TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u>	ii
<u>STATEMENT OF JURISDICTION</u>	1
<u>STATEMENT OF THE ISSUES</u>	1
<u>CONSTITUTIONAL PROVISIONS, STATUTES, ETC.</u>	2
<u>STATEMENT OF THE CASE</u>	3
<u>STATEMENT OF FACTS</u>	4
<u>SUMMARY OF ARGUMENTS</u>	11
<u>ARGUMENT</u>	13
I. THE TRIAL COURT ERRED WHEN IT REVERSED ITS PRIOR DECISION AND GRANTED APPELLEE'S MOTION FOR SUMMARY JUDGMENT.	13
A. <i>A genuine issue of material fact exists regarding what the contract between Appellant and Appellee required Appellee to do; therefore, summary judgment was not appropriate.</i>	15
B. <i>Appellee's position (which the trial court adopted) that Appellant is obligated to establish a standard of care for his breach of contract claim is incorrect...</i>	17
C. <i>Smith v. Frandsen is not applicable to this case and was not a valid basis for summary judgment.</i>	18
D. <i>The trial court's determination of the dispute over the exact terms of the parties' contract was unjustifiably narrow.</i>	18
II. THE TRIAL COURT ERRED WHEN IT EXCLUDED APPELLANT'S EXPERT WITNESS.	19
III. THE TRIAL COURT IMPROPERLY DISREGARDED RULE 7(c) OF THE UTAH RULES OF CIVIL PROCEDURE.	21
A. <i>The trial court abused its discretion in excluding Appellant's expert witness when it did not even allow Appellant to formally oppose the Motion in Limine.</i>	21
B. <i>The trial court erred when it ruled that a rule requiring that responses to motions in limine be filed five days after service supersedes Rule 7(c) of the Utah Rules of Civil Procedure.</i>	23
<u>CONCLUSION</u>	24

ADDENDUM A: Order Granting Defendant's Motion in Limine to Exclude the Expert Testimony of James E. Nordquist, PE and Granting Defendant's Motion for Summary Judgment on Breach of Contract Claim

TABLE OF AUTHORITIES

UTAH CASES

<i>Adams v. State</i> , 2005 UT 62, 123 P.3d 400	2
<i>Bair v. Axiom Design, LLC</i> , 2001 UT 20, 20 P.3d 388	17
<i>Bodell Const. Co. v. Robbins</i> , 2009 UT 52, 215 P.3d 933	15
<i>Bowen v. Riverton City</i> , 656 P.2d 434 (Utah 1982)	14
<i>Brigham Young University v. Tremco Consultants, Inc.</i> , 2007 UT 17, 156 P.3d 782	23
<i>Café Rio, Inc. v. Larkin-Gifford-Overton, LLC</i> , 2009 UT 27, 207 P.3d 1235	15
<i>Daines v. Vincent</i> , 2008 UT 51, 190 P.3d 1269	15
<i>Draper City v. Estate of Bernardo</i> , 888 P.2d 1097 (Utah 1995)	13, 14
<i>Edwards v. Power Mountain Water and Sewer</i> , 2009 UT App 185, 214 P.3d 120	2
<i>Eskelson v. Davis Hosp. & Med. Ctr.</i> , 2010 UT 59, 242 P.3d 762	2
<i>Express Recovery Svcs., Inc. v. Rice</i> , 2005 UT App 495, 125 P.3d 108	16
<i>Hermansen v. Tasulis</i> , 2002 UT 52, 48 P.3d 235	17
<i>Kleinert v. Kimball Elevator Co.</i> , 854 P.2d 1025 (Utah Ct. App. 1993)	14
<i>Macintosh v. Staker Paving & Const. Co.</i> , 2009 UT App 96	19
<i>Parduhn v. Bennett</i> , 2002 UT 93, 61 P.3d 982	15
<i>Poteet v. White</i> , 2006 UT 63, 147 P.3d 439	1
<i>Smith v. Frandsen</i> , 2004 UT 55, 94 P.3d 919	11, 18
<i>The Doctor's Co. v. Drezga</i> , 2009 UT 60, 218 P.3d 598	15

UTAH RULES OF CIVIL PROCEDURE

Utah R. Civ. P. 1	23
Utah R. Civ. P. 7	2, 6, 21, 23, 24

STATEMENT OF JURISDICTION

This Court's jurisdiction rests upon Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF THE ISSUES

ISSUE 1: Did the trial court err in granting Appellee's motion for summary judgment?

Standard of Review: De novo. "Because, by definition, a district court does not resolve issues of fact at summary judgment, we consider the record as a whole and review the district court's grant of summary judgment de novo, reciting all facts and fair inferences drawn from the record in the light most favorable to the nonmoving party." *Poteet v. White*, 2006 UT 63, ¶ 7, 147 P.3d 439.

Preservation for Appeal: R. at 663-665, 712-737.

ISSUE 2: Did the trial court err when it excluded all of the expert testimony from Appellant's engineering expert?

Standard of Review: Abuse of discretion as to the ruling to strike the proffered evidence, but de novo (for correctness) as to the trial court's interpretation of the legal standards used as a basis for striking the evidence. "The trial court has wide discretion in determining the admissibility of expert testimony. Accordingly, we disturb the district court's decision to strike expert testimony only when it exceeds the limits of reasonability. Our review of the district court's exercise of its discretion includes review to ensure that no mistakes of law affected a lower court's use of its discretion. Thus, if the district court erred in interpreting [the governing legal standard] when it [ruled on the request to strike the expert testimony at issue], it did not act within the limits of

reasonability, and we will not defer to the evidentiary decision.” *Eskelson v. Davis Hosp. & Med. Ctr.*, 2010 UT 59, ¶ 5, 242 P.3d 762 (internal quotations and citations omitted).
Preservation for Appeal: R. at 663-665, 712-737.

ISSUE 3: Did the trial court err when it decided, without prior notice to the parties and without any agreement between the parties, that (1) Appellant would not have the time allowed by Rule 7(c) of the Utah Rules of Civil Procedure to file a formal response to Appellee’s Motion in Limine and (2) to rule on the Motion before receiving any formal response from Appellant, despite Appellant’s entitlement to file such a response?

Standard of Review: De novo. The Court of Appeals “review[s] the interpretation and application of a rule of procedure for correctness.” *Edwards v. Powder Mountain Water and Sewer*, 2009 UT App 185, ¶ 14, 214 P.3d 120; *see also Adams v. State*, 2005 UT 62, ¶ 8, 123 P.3d 400 (conflating the correctness standard with de novo review).

Preservation for Appeal: R. at 663-665, 712-737.

CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

None.

STATEMENT OF THE CASE

Plaintiff/Appellant Jason Ross ("Ross") filed a Complaint on February 1, 2008 in which he alleged claims for breach of contract and negligence against Defendant/Appellee Epic Engineering, Inc. ("Epic"). Epic filed separate motions for partial summary judgment on each of Mr. Ross's claims, and the trial court heard oral argument on both motions on July 22, 2010. At the conclusion of the hearing, the trial court granted Epic's Motion for Partial Summary Judgment on Plaintiff's Second Cause of Action for Negligence and denied Epic's Motion for Partial Summary Judgment on Plaintiff's First Cause of Action for Breach of Contract.

The trial court set a trial date for May 19 and 20, 2011 and set a final pretrial hearing for April 28, 2011. The trial court also ordered that any motions in limine be filed on or before April 22, 2011. On April 20, 2011, Epic filed a Motion in Limine to Exclude the Expert Testimony of James E. Nordquist, PE. At the final pretrial hearing on April 28, 2011, the trial court granted Epic's Motion in Limine. Upon granting the Motion in Limine, the trial court, sua sponte, reopened the Motion for Partial Summary Judgment on Plaintiff's First Cause of Action for Breach of Contract and granted that Motion based solely upon its ruling on Epic's Motion in Limine. The Court entered its written order granting Epic's Motion for Partial Summary Judgment on May 23, 2011. Mr. Ross filed a Notice of Appeal on June 17, 2011.

STATEMENT OF FACTS

GENERAL FACTS

Appellant and Appellee entered into a contract whereby Appellee was to provide engineering services for the construction of a commercial building in Roosevelt, Utah. (R. at 2.) Appellee actually visited the construction site, conducted a topographic survey of the building site, and drafted a stamped set of construction drawings and calculations for the construction of the commercial building. (R. at 2, 267.) Relying upon Appellee's engineering expertise, Appellant proceeded to construct the building according to the plans that had been revised, stamped, and approved by Appellee. (R. at 2.)

Since completion of the commercial building in February 2007, significant settling of the building has occurred. (R. at 2.) Three-fourths of the building has settled between three to four inches since the building's completion. (R. at 2.)

PROCEDURAL BACKGROUND

On or about July 22, 2010, the trial court heard argument on Appellee's Motion for Partial Summary Judgment on Plaintiff's First Cause of Action for Breach of Contract. (R. at 674.) At that hearing, the Court ruled that genuine issues of material fact existed and denied Appellee's Motion. (R. at 700.) The court specifically stated, on the record, that

there are disputed facts in this matter regarding 1) what the contractual rights were, because nobody seems to be able to come up with a contract that anybody agrees they signed, and 2) what the professional duty of care, I believe, is disputed as far as the different experts are concerned.

(R. at 700.) The trial court also ruled that a material disputed fact between the parties was “what the contract is” and also stated that, “[a]lone, what the contract is requires presentation of evidence.” (R. at 700.)

The trial court then ruled that a professional duty of care analysis would only be relevant if the factfinder could not establish what the parameters of the agreement were between the parties, and that Appellant had presented facts sufficient to create a genuine issue of material fact as to the issue of a duty of care. (R. at 700-01.) The trial court also ruled that “Plaintiff has presented facts that, if believed by a jury,” he could prevail. (R. at 700.) Based upon this ruling, the trial court entered a written order re: Defendant’s Motion for Partial Summary Judgment on Plaintiff’s First Cause of Action for Breach of Contract on or about July 30, 2010. (R. at 391.)

On or about November 1, 2010, the trial court held a telephone conference in which it set a trial date (May 19, 2011) as well as a date (April 22, 2011) by which the parties were obligated to file any motions in limine. (R. at 704-710.) The trial court memorialized these dates in a written Pretrial Order entered on November 29, 2010. (R. at 404.) Then, on March 16, 2011, the trial court, *sua sponte*, set a final pretrial hearing for April 28, 2011 (which was only four business days and six calendar days after the deadline for the filing of any motions in limine). (R. at 407-408.)

At no time during the telephone conference on November 1, 2010 or at any time thereafter did the trial court inform the parties that all briefing regarding any motions in limine was to be complete and submitted to the trial court for consideration prior to the pretrial hearing on April 28, 2011. (R. at 407-408; 704-710.)

On April 20, 2011, Appellee filed a Motion in Limine to Exclude the Expert Testimony of James E. Nordquist. (R. at 491.) Mr. Nordquist was an expert that Plaintiff had disclosed during the discovery phase of the litigation between the parties. (R. at 53.) Appellee served the Motion in Limine upon Appellant by U.S. Mail. (R. at 493.)

On April 28, 2011, which was only eight days (six business days) after Appellee had filed the Motion in Limine and eleven days prior to the date on which Appellant was obligated to respond to the Motion in Limine under the requirements of Rule 7(c) of the Utah Rules of Civil Procedure, the trial court heard argument on Appellee's Motion in Limine. (R. at 712-13.) Counsel for Appellant objected to the trial court's decision to hear argument on April 28, 2011, stating on the record that Appellant had not yet had the time granted by Rule 7(c) of the Utah Rules of Civil Procedure to respond to Appellee's Motion in Limine and had not prepared to argue the Motion at the pretrial hearing. (R. at 659, 713-714.) The trial court overruled the objection, based in part, at least, upon the trial court's apparent understanding that a rule exists that allows a party only five days to file a response to a motion in limine. (R. at 713.)

The trial court ruled that the Appellee's Motion in Limine stood unopposed and that Appellant could only respond to the Motion in Limine in oral argument. (R. at 713.) After hearing argument on the Motion in Limine, the trial court granted Appellee's Motion in Limine. (R. at 735.) The trial court's decision to hear the Motion in Limine at the final pretrial hearing was neither disclosed before the actual hearing nor stipulated to by the parties and it left Appellant without any opportunity to present (1) a written

opposition to the Motion in Limine or (2) any facts, other than generalized proffer during oral argument, that would support Appellant's position.

The trial court also, sua sponte, reopened the Motion for Partial Summary Judgment on Plaintiff's First Cause of Action for Breach of Contract and granted that Motion based solely upon its ruling on Appellee's Motion in Limine. (R. at 736-37.) The trial court ruled, through the written order entered on May 23, 2011, that "[w]ithout expert testimony [Appellant] will be unable to establish that [Appellee] breached the parties' contract," that "[t]he expert evidence offered by [Appellee] to demonstrate that [Appellee] performed its contractual duties stands un rebutted," that "[i]t is the responsibility of the contractor, as a matter of law, 'to be familiar with the conditions in the subsurface of the ground,'" and that, "the dispute over the exact terms of the parties' contract is not material and does not prevent judgment as a matter of law on [Appellant's] breach of contract claim." (R. at 658-662.) Because Plaintiff had only a claim for breach of contract pending for trial, the trial court's ruling disposed of all of Plaintiff's remaining claims, and the case was dismissed with prejudice. (R. at 658-662.)

FACTS RELEVANT TO MOTION FOR PARTIAL SUMMARY JUDGMENT

Appellant contacted Appellee in early 2006 to retain Appellee's services for the design of a small commercial building that Appellant intended to build in Roosevelt, Utah. (R. at 120.) Appellant discussed his general needs and ideas for the building with Appellee's engineer, Adam Huff, P.E. (R. at 120.) After this meeting, Appellant signed the first page of the Epic Engineering, P.C. Short Form Consulting Services Contract as well as Exhibit A of that Contract (titled Project Task Order No. 1). (R. at 261.)

Appellee contends that a second page of the Contract exists and that Appellant agreed to the provisions therein. (R. at 121.) Appellant disputes that he ever saw page 2 of the Contract, and Appellee never produced a copy of that page 2 that Appellant sent to Appellee when he returned both page 1 and Exhibit A of the Contract to Appellee. (R. at 261.) Facsimile notations within the purported Contract presented by Appellee demonstrate that Appellant sent page 1 and Exhibit A to Appellee, but did not send page 2 to Appellee (the purported page 2 contains no facsimile notations). (R. at 147-149, 261.)

Page 2 of the purported Contract (which Appellant specifically denies he ever saw or agreed to) includes a paragraph 10, which states that Appellee's services would be rendered without any warranty other than that Appellee would perform in accordance with a degree of care and skill generally exercised by professionals performing similar work under similar conditions. (R. at 148.) Appellant specifically denies that he ever saw or agreed to this paragraph (or any of the provisions on the purported page 2 of the contract). (R. at 237.) Appellee produced, at different times during the briefing stage of its Motion for Partial Summary Judgment, different versions of the purported page 2 and was unable to ever definitively state which page 2 Appellant apparently accepted. (R. at 147-149, 156-160.)

Exhibit A to the Contract includes a description of the work that Appellee was to undertake pursuant to the Contract; however, Appellant disputes that the end work product as contemplated by Exhibit A was limited to a stamped set of construction drawings and calculations for submission for a building permit. (R. at 149, 262.)

Appellant specifically contracted for civil engineering services that included structural engineering and a promise by Appellee to design a structure that was structurally sound, a good building, and one that would not fall. (R. at 262.) In other words, Appellant specifically contracted for designs for a structure that was fit to be built on his specific property. (R. at 262, 274.)

Both parties designated engineer experts as witnesses in this case; appellant designated a geotechnical/soils engineer and Appellee designated a structural engineer. (R. at 53-69, 73-81.) Neither expert undertook any specialized study to determine an industry standard of care and whether or not Appellee met that industry standard of care. (R. at 271-272.) Appellant's expert had previously testified, through a disclosed expert report, that, based upon his professional experience, a licensed engineer that looked at the property in question in this case would (or at least should) immediately be concerned about the obvious fill and slope on the property. (R. at 271.) Appellee did nothing to warn or otherwise notify Appellant of the fill and slope problems on the property prior to, during, or after creating plans for the construction of the commercial building. (R. at 695-697.)

FACTS RELEVANT TO MOTION IN LIMINE

Appellee's Motion in Limine argued Appellant's expert was not qualified to offer any opinion regarding the standard of care applicable to structural engineers, contractors, or excavators and that Appellant's expert had no opinion regarding what Appellee was required to do, or failed to do, pursuant to its contract with Appellant. (R. at 494-567.)

Based upon the purported lack of opinion and expertise, Appellee moved that the trial court exclude any testimony by Appellant's expert at trial. (R. at 491-493.)

Because the trial court heard argument on the Motion in Limine six business days after the Motion was mailed to Appellant, Appellant had not prepared or filed any written response to the Motion in Limine. (R. at 713-714.) Appellant was unable to present any details (either through written opposition to the Motion in Limine or through documentary submission at the hearing) regarding the expert's 32 years of experience dealing with soil settlement issues (including numerous interactions with structural engineers) in residential and commercial structures as well as the expert's specific knowledge and expertise regarding the specific facts of this case to the trial court. (R. at - 720-23.) The trial court's position was that the Appellee's Motion in Limine was unopposed (R. at 714) and, after hearing oral argument, granted Appellee's Motion in Limine prior to receiving any formal response from Appellant (despite generalized proffer from Appellant regarding the content of such a formal response). (R. at 713-734.)

SUMMARY OF ARGUMENTS

The trial court's decision to reverse its prior ruling and grant summary judgment that it had previously denied was in error, and this Court should reverse the trial court's entry of summary judgment on Appellant's claim for breach of contract. The trial court weighed disputed facts and ignored Appellant's genuine dispute regarding the actual content of the contract; in doing so, the trial court inappropriately acted as a finder of fact.

The trial court also imposed an obligation upon Appellant to demonstrate a standard of care in order to maintain his claim for breach of contract. Such an imposition was improper, as it is irrelevant to Appellant's claim for breach of contract. The trial court's application of *Smith v. Frandsen* as an additional justification for summary judgment was improper; the *Smith* case has no application in the breach of contract context.

The trial court's decision to exclude Appellant's expert witness should also be reversed. The trial court, without prior notice to the parties, truncated the time for Appellant to respond to Appellee's Motion in Limine. The trial court, in justifying its actions, stated that motions in limine are subject to a different rule that allows only five days for a party to respond. Such a rule does not exist. The trial court abused its discretion when it excluded Appellant's expert witness without allowing Appellant to even formally respond to Appellee's Motion.

That decision deprived Appellant of an opportunity to respond to the Motion and proffer vital foundational evidence that would have supported the expert's qualification

as an expert that is competent to testify at trial. The trial court erred when it excluded the expert based upon him not being a structural engineer. Appellant's expert is a licensed engineer that has years and years of experience dealing with the exact issues that were going to be tried in this case. The trial court erred when it excluded the witness simply because he is not a structural engineer.

[This space intentionally left blank.]

ARGUMENT

The trial court erred when it granted Appellee's Motion for Summary Judgment on Plaintiff's claim for breach of contract. The trial court's prior ruling and order denying the Appellee's Motion for Summary Judgment was correct, and the trial court did not have a basis to reopen the previously-decided Motion and reverse its decision. Furthermore, the trial court's decision to exclude all of the expert testimony from Appellant's engineering expert was incorrect; as the trial court had previously ruled when it initially considered (and denied) the Motion for Summary Judgment, such testimony would be relevant if the factfinder was unable to determine the parameters of the contract between the parties. Finally, the trial court's position that Appellant was subject to an unstated rule that required a response to a motion in limine within five days and that Appellee's Motion in Limine stood unopposed was incorrect. No such five day rule exists, and Appellant was entitled to file a formal response to Appellee's Motion in Limine.

I. THE TRIAL COURT ERRED WHEN IT REVERSED ITS PRIOR DECISION AND GRANTED APPELLEE'S MOTION FOR SUMMARY JUDGMENT.

Summary judgment is proper where there is no genuine issue of material fact and where the moving party is entitled to a judgment as a matter of law. Utah R. Civ. P. 56(c). When a court addresses a motion for summary judgment, the court's function is not to weigh disputed evidence or to decide which side has the stronger case. Rather, the court's "sole inquiry should be whether material issues of fact exist." *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1100 (Utah 1995).

On a motion for summary judgment, the nonmoving party is not required to “prove” its case in order to defeat the motion. Rather, the nonmoving party is only required to submit evidence “sufficient to raise a genuine issue of fact.” *Kleinert v. Kimball Elevator Co.*, 854 P.2d 1025, 1028 (Utah Ct. App. 1993). In addition, if there is “any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party [and] the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment.” *Bowen v. Riverton City*, 656 P.2d 434, 436 (Utah 1982). Finally, the nonmoving party’s evidence is to be believed for purposes of the motion, and if there is a conflict in the evidence as to a material fact, the motion must be denied. *See, e.g., Draper City*, 888 P.2d at 1100-01.

In this case, the trial court initially ruled that Appellee was not entitled to summary judgment on Appellant’s claim for breach of contract because a genuine issue of material fact existed as to the terms of the contract. The trial court also ruled that, if the fact finder would be unable to determine the terms of the contract, expert testimony to determine a general standard of care that the factfinder would then use to determine the parameters of the parties’ contractual relationship would be relevant. However, this expert inquiry, if it happened at all, would only be relevant after the factfinder (in this case, a jury) determined what the terms of the contract actually were. The trial court’s position after considering the Appellee’s Motion in Limine completely ignored the first genuine issue of fact—what contract existed between the parties.

A. *A genuine issue of material fact exists regarding what the contract between Appellant and Appellee required Appellee to do; therefore, summary judgment was not appropriate.*

When a court is presented with an issue of “a contractual obligation,” it will “first look to the contract and construe its terms to give effect to the intentions of the parties.” *The Doctors’ Co. v. Drezga*, 2009 UT 60, ¶ 12, 218 P.3d 598. However, a trial court cannot interpret a contract as a matter of law if ambiguity exists within the contract’s terms. *See Café Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 2009 UT 27, ¶ 25, 207 P.3d 1235. An “[a]mbiguity exists if a provision of a contract is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies.” *The Doctors’ Co.*, 2009 UT 60, ¶ 12 (internal citations omitted).

To determine if a provision within a contract is ambiguous, “any relevant evidence must be considered” to determine whether or not “contrary, tenable interpretations” exist. *Daines v. Vincent*, 2008 UT 51, ¶¶ 26, 30, 190 P.3d 1269 (internal citations omitted). Any competing “interpretations argued for must be reasonably supported by the language of the contract.” *Id.* at ¶ 30 (internal citations omitted.) If “there is an ambiguity in the terms of the contract,” a court “may ... ascertain the parties’ intent from extrinsic evidence.” *Bodell Constr. Co. v. Robbins*, 2009 UT 52, ¶ 19, 215 P.3d 933. If that extrinsic evidence points to two reasonable interpretations of the same contractual language, the contract cannot be interpreted as a matter of law and summary judgment upon the meaning of an ambiguous contractual provision is not appropriate. *See Parduhn v. Bennett*, 2002 UT 93, ¶ 29, 61 P.3d 982 (J. Durrant, dissenting) (citing to prior Utah

law as support for the principle that “where ambiguity exists in a contract, the intent of the parties is a question of fact to be determined by the trier of fact”).

Ambiguity exists regarding Appellee’s obligations under the contract at issue in this case. Appellant asserts that he interpreted the contract for structural engineering services to include precautions, warnings, and/or recommendations regarding the possibility of unsuitable soils present upon the property upon which the building was constructed. Appellant’s interpretation is buttressed by his own expert’s statements that such an interpretation was not unreasonable and that a licensed engineer should have been concerned by the contours and appearance of the Property. Even Appellee’s expert stated that a licensed engineer “that deals with excavation and buildings” would “have [the] responsibility to see that [a building is] being put on native material.” (R. at 298-299.)

Appellee argues that the contract included a specific standard of care on page 2 of the contract. However, whether or not page 2 was even part of the contract between the parties is a hotly contested issue. Appellee has supported its own claims that page 2 was part of the contract and that the standard of care included within that page 2 with evidence; however, simply supporting those claims with evidence does not entitle Appellee to summary judgment. *See also Express Recovery Services, Inc. v. Rice*, 2005 UT App 495, ¶ 3, 125 P.3d 108 (stating that ambiguities within a contract are construed against the drafter of the contract).

The trial court’s order, that “without expert testimony Ross will be unable to establish that Epic breached the contract,” has no basis, for the terms of the contract have

not yet been established. The first time that the trial court considered the Motion for Summary Judgment, the trial court specifically ruled that “nobody seems to be able to come up with a contract that anybody agrees they signed.” (R. at 700.) Only if Epic’s page 2 is adopted as part of the contract (which the trial court specifically refused to do when it ruled on the Motion for Summary Judgment) does this order have any basis. However, the trial court has no authority, when considering a summary judgment motion, to determine a disputed fact (and, in fact, specifically ruled that it could not determine whether page 2 was part of the contract).

B. *Appellee’s position (which the trial court adopted) that Appellant is obligated to establish a standard of care for his breach of contract claim is incorrect.*

To establish a claim for breach of contract, Appellant must show that a contract exists, that he performed under the terms of the contract, that Appellee breached the contract, and that he suffered damages. *See Bair v. Axiom Design, LLC*, 2001 UT 20, ¶ 14, 20 P.3d 388. None of these elements requires that Appellant present evidence of a standard of care or that Appellee violated a standard of care. Neither the trial court nor Appellee ever identified one case or any other governing in which a party is obligated to separately establish some independent standard of care when suing on for breach of contract. In fact, the entire point of the economic loss rule, as applied in Utah, is that, unless an independent duty recognized by Utah law exists, a party is limited to the duties created by the parties’ agreement. *See Hermansen v. Tasulis*, 2002 UT 52, ¶¶ 16-17, 48 P.3d 235.

C. *Smith v. Frandsen is not applicable to this case and was not a valid basis for summary judgment.*

The trial court's ruling that *Smith v. Frandsen*, 2004 UT 55, 94 P.3d 919 absolves Appellee of any possible liability for breach of contract is incorrect. The *Smith* case identified an independent duty, to be enforced through tort claims, that builder-contractor-owners have when selling residential property to a homeowner. The *Smith* case in no way addresses breach of contract claims (such a claim was not even at issue in the *Smith* case), and it certainly does not stand for the proposition that Appellee was absolved of a contractual duty based upon a contractor's presence on the property (a contractor that had no ownership interest in the property prior to Appellant's purchase of the property). *Smith* is not applicable to this case, and the trial court's use of *Smith* as justification for summary judgment is in error.

D. *The trial court's determination of the dispute over the exact terms of the parties' contract was unjustifiably narrow.*

Appellant, in his initial opposition to Appellee's Motion for Summary Judgment, clearly and substantively disputed Appellee's assertion that Appellant received and agreed to be bound by a page 2 of Appellee's short form contract. The trial court recognized this dispute and even pointed out that Appellee could not even establish which page 2 it contended Appellant saw and agreed to follow. It was this dispute that was the central reason for the trial court's initial decision to deny the Motion for Summary Judgment. (R. at 692-93, 700.) However, when the trial court reconsidered Appellee's Motion for Summary Judgment, the trial court simply compared the

differences between the different versions of page 2 and determined that the differences were not material. (R. at 660-61, 736-37.)

In essence, the trial court ignored the dispute regarding the validity of any version of page 2, despite Appellant making such a dispute very clear. The trial court had no authority to simply disregard Appellant's dispute of the validity of page 2 (especially after the same trial court had refused to disregard the dispute during argument on the actual Motion for Summary Judgment), and in doing so, the trial court weighed evidence and essentially agreed with Appellee's contention that page 2 was binding.

II. THE TRIAL COURT ERRED WHEN IT EXCLUDED APPELLANT'S EXPERT WITNESS.

The trial court should not have excluded Appellant's expert witness with regards to Appellee's standard of care in the event that the trial court determined that the contract between the parties (to the issue of whatever default duty Appellee may owe to Appellant) is ambiguous. When a "matter at issue requires special knowledge not held by the trier of fact, the standard of care in a trade or profession generally must be determined by testimony of witnesses in the same trade or profession." *Macintosh v. Staker Paving & Construction Co.*, 2009 UT App 96, 2009 Utah App. LEXIS 97, *3 (internal citations omitted).

Appellant's expert is a licensed engineer, and therefore is in the same trade or profession as Appellee. Appellant's expert stated unequivocally that "[a] licensed engineer, looking at the lot in question, would (or should have been) immediately be concerned about the obvious fill and the slope on the lot." (R. at 323.) Appellant's expert

also stated that expecting a structural engineer to recognize such a concern and exercise a level of care that “would include pointing out the possibility of problematic fill soil,” is legitimate. (R. at 323.)

That Appellant’s expert did not undertake a more detailed study regarding an overall standard of care for engineers in the area is inapposite. Utah law does not require that he do so, and he based his recommendations upon his professional experience. Notably, Appellee’s expert conceded that he, too, relied upon nothing other than his professional experience to make his determinations regarding Appellee’s standard of care. (See R. at 293 (stating that Appellee’s expert established the standard of care “[j]ust by professional experience”).) The position that Appellant’s expert is obligated to undertake additional research and that Appellant is obligated to incur additional costs to support Appellant’s evidence regarding standard of care, but that Appellee’s expert can rest solely upon his professional experience, is an untenable one.

Utah law requires that an expert use his expertise gained from working in the same profession as Appellee to formulate an expert opinion. Whether or not the expert utilized solely his professional experience or relied upon further targeted research would go towards the weight to be given to specific expert testimony and opinions, not the admissibility of the testimony and opinions. In fact, the trial court ignored the proffer from Appellant at the hearing regarding Appellant’s expert’s numerous years of experience dealing with the exact issue to which he would testify in this case.¹

¹ As explained further below, Appellant was denied an opportunity to specifically demonstrate the foundation necessary to qualify Appellant’s expert in this case, as the

Therefore, the trial court's position that Appellant's expert lacks the expertise to testify regarding the duties of structural engineers, despite the expert being a licensed engineer, is directly contradictory to the standard created by the *Macintosh* case. The trial court erred in interpreting the standard applicable to Appellant's expert. This Court owes no deference to the trial court's decision to exclude Appellant's expert witness, and it should reverse that decision by the trial court.

III. THE TRIAL COURT IMPROPERLY DISREGARDED RULE 7(c) OF THE UTAH RULES OF CIVIL PROCEDURE.

The trial court's decision to disregard Rule 7(c) was both legally incorrect as well as an abuse of discretion. The trial court had no justification for, without any prior notice, truncating the Appellant's ability to file a formal response to Appellee's Motion in Limine. This Court should reverse the trial court's decision.

- A. The trial court abused its discretion in excluding Appellant's expert witness when it did not even allow Appellant to formally oppose the Motion in Limine.*

To the extent that this Court defers to the trial court's decision to exclude Appellant's expert, the trial court abused its discretion when it excluded the expert. The trial court decided the Motion in Limine at the pretrial hearing despite giving no prior notice, of any kind, to any party that the trial court would decide the motions in limine at that time. In doing so, the trial court completely disregarded Rule 7(c) of the Utah Rules of Civil Procedure, which states that "[w]ithin ten days after service o the motion and

trial court did not permit Appellant to file any written response to Appellee's Motion in Limine.

supporting memorandum, a party opposing the motion shall file a memorandum in opposition.”

On November 1, 2010, when the parties participated in a telephonic status conference, the trial court set a due date for motions in limine. (R. at 708.) The trial court made no indication during that status conference that any deadlines would be compressed or that any other timelines, other than those that had governed every aspect of the case up to that point, would be used for motions in limine. (R. at 708-710.) Later, on March 16, 2011, the trial court scheduled a pretrial conference and gave no additional instructions regarding timelines to respond to motions filed by April 22, 2011. (R. at 407-408.) At the pretrial hearing (which was only eight calendar days after Appellee had mailed its Motion in Limine to Appellant), the trial court stated, at the outset, that it considered the Motion in Limine to be “unopposed at this time.” (R. at 714.) Upon Appellant’s objection to the undisclosed truncated briefing schedule, the trial court then allowed Appellant only to respond orally, at the time of the hearing, to the arguments supporting Appellee’s Motion. (R. at 714).

In support of the trial court’s position that Appellant should have opposed the Motion in Limine by the time of the pretrial hearing, the trial court stated that “in a motion in limine you have five days to file a response.” (R. at 714.) When Appellant’s counsel indicated that he was unaware of such a rule, the trial court provided no reference to any rule that would support the trial court’s position. (R. at 714.) The trial court also stated that it had given ten days between (apparently) the deadline for filing motions in limine and the pretrial hearing. (R. at 714.) Such a statement was incorrect, as the

deadline for filing motions in limine was April 22, and the pretrial conference was held six days later (on April 28, 2011).

Appellant then argued against the Motion in Limine, and several times specifically referred to his right to at least provide a particularized and specific proffer of the expert's qualifications. (R. at 720-21, 730-31.) Again, despite Appellant notifying the trial court of this right, the trial court disregarded Appellant's requests and ruled on the Motion. In making this ruling, the trial court imposed its own calendar limitations of which Appellant had no notice and to which Appellant was unable to adjust (as Appellant was given no time, after disclosure of the trial court's intentions on the day of the pretrial hearing, to file any formal response of any kind). Such actions were an abuse of discretion. The trial court, in essence, expected counsel to anticipate the trial court's otherwise unstated intent. Such an expectation is unreasonable; this Court should reverse the exclusion of Appellant's expert and allow Appellant to respond to the Motion in Limine as set forth in the Utah Rules of Civil Procedure.

B. The trial court erred when it ruled that a rule requiring that responses to motions in limine be filed five days after service supersedes Rule 7(c) of the Utah Rules of Civil Procedure.

Utah's civil procedure rules "govern the procedure in the courts of the state of Utah in all actions, suits, and proceedings of a civil nature." Utah R. Civ. P. 1(a). The rules are to "be liberally construed to secure the just, speedy, and inexpensive determination of every action." *Id.* These rules "are designed to provide a pattern of regularity of procedure which the parties and the courts can follow and rely upon." *Brigham Young University v. Tremco Consultants, Inc.*, 2007 UT 17, ¶ 29, 156 P.3d 782.

The trial court's purported justifications for ignoring Rule 7(c) and imposing a compressed briefing schedule for the Motion in Limine is not supported by any prior order that the trial court made in this case. It is not supported by any agreement between the parties. When the trial court imposed its own ad hoc rule upon how the Motion in Limine was to be briefed, the Appellant was deprived of his right to a just determination of every action and was prejudiced for relying upon the very rule that governs the briefing schedule for motions filed in civil cases. The trial court supplanted Rule 7(c)'s time allowances with reference to a non-existent rule purportedly applicable to motions in limine. Such a decision was incorrect, and this Court should reverse it.

CONCLUSION

The trial court erred when it granted summary judgment against Appellant and dismissed his claim for breach of contract. The trial court also erred and abused its discretion in deciding to exclude Appellant's expert witness. This Court should reverse both of these rulings.

Respectfully submitted this 28th day of October 2011.

HILL, JOHNSON & SCHMUTZ, L.C.



Stephen Quesenberry

Aaron R. Harris

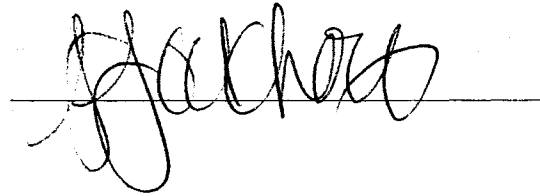
Attorneys for Petitioners/Appellants

PROOF OF SERVICE

I hereby certify that, on the 28th day of October 2011, two true and correct copies
of the foregoing **BRIEF OF APPELLANTS** were ~~mailed via US Mail~~ to the following:

hard delivered

BRENT E. JOHNSON
REBECCA A. RYON
HOLLAND & HART LLP
222 South Main Street
Suite 2200
Salt Lake City, Utah 84101

A handwritten signature in black ink, appearing to read "B. Johnson", is written over a horizontal line.

ADDENDUM A

FILED
DISTRICT COURT
DUCHESNE COUNTY, UTAH

MAY 23 2011

BY

[Signature]

Prepared and proposed by:

Brent E. Johnson, 7558

Rebecca A. Ryon, 11761

HOLLAND & HART LLP

222 South Main, Suite 2200

Salt Lake City, Utah 84101

Telephone: (801) 799-5800

Facsimile: (801) 799-5700

Attorneys for Epic Engineering, P.C.

IN THE EIGHT JUDICIAL DISTRICT COURT
IN AND FOR DUCHESNE COUNTY, STATE OF UTAH

JASON ROSS,

Plaintiff,

vs.

EPIC ENGINEERING, P.C.,

Defendant.

ORDER GRANTING
DEFENDANT'S MOTION IN LIMINE
TO EXCLUDE THE EXPERT
TESTIMONY OF JAMES E.
NORDQUIST, P.E. AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT ON BREACH
OF CONTRACT CLAIM

Civil No. 080800020

Judge Edwin T. Peterson

On April 28, 2011, a final pretrial hearing was held in this matter in Duchesne, Utah.

The Court heard oral arguments on a motion in limine filed by Defendant Epic Engineering, P.C. ("Epic") to exclude James E. Nordquist, P.E. from testifying as an expert witness on behalf of Plaintiff Jason Ross ("Ross"). Appearing on behalf of Epic, were Brent E. Johnson and Rebecca A. Ryon of Holland & Hart LLP. Aaron R. Harris of Hill, Johnson & Schmutz, L.C. appeared on behalf of Ross.

After carefully considering Epic's motion in limine and the supporting documentation

RECEIVED

MAY 13 2011

8th District Court

submitted therewith, the arguments of counsel, and revisiting the parties' briefing on the summary judgment motion filed by Epic seeking judgment as a matter of law on Ross' first cause of action for breach of contract¹, the Court now makes the following ruling:

EPIC'S MOTION IN LIMINE

1. Epic argues that Mr. Nordquist, a geotechnical engineer, is not qualified to opine as to the duties of structural engineers, such as Epic, and that the other opinions that Mr. Nordquist would offer go to undisputed matters, are contrary to Utah law, or are otherwise irrelevant.

2. The Court agrees. Under Utah Rule of Evidence 702, a witness must have the necessary knowledge, skill, experience, training, or education to be qualified as an expert. The testimony offered by the expert must also be helpful to the jury in understanding the evidence or determining a fact in issue.

3. Mr. Nordquist lacks the necessary knowledge, skill, experience, training, or education to be qualified as an expert as to the duties of structural engineers. Mr. Nordquist testified in deposition that he has no expert opinion to offer on the standard of care observed by structural engineers as it relates to the issues present in this case.

4. Mr. Nordquist's opinions and the proffered testimony as to the cause of the settlement of Ross' building (the presence of unconsolidated fill material on the site) and that using piers to stabilize the building would be an appropriate remedy go to issues that are not

¹ Epic's motion for summary judgment on Ross' breach of contract claim was also premised on a challenge to Mr. Nordquist's qualifications and the admissibility of his expert opinions. The arguments presented in Epic's prior motion largely track the motion in limine now before the Court. Ross objected to the Court considering Epic's motion in limine before his time for responding had expired, however, Ross opposed the prior motion for summary judgment in writing and was given the opportunity to raise any additional points in opposition to the motion in limine at the final pretrial hearing.

disputed by Epic. Therefore, Mr. Nordquist's testimony is neither necessary nor would it be helpful to the trier of fact.

5. Mr. Nordquist's opinion on the capabilities of general contractors is directly contrary to Utah law. In *Smith v. Frandsen*, 94 P.3d 919 (Utah 2004), the Utah Supreme Court held that "the law imputes to builders and contractors a high degree of specialized knowledge and expertise with regard to residential construction." *Id.* at 925. "In particular, builder-contrators are expected to be familiar with conditions in the subsurface of the ground." *Id.* (concluding that although the defendant had limited experience, it was "deemed to possess the knowledge of a reasonably prudent builder-contractor under similar circumstances, and, as a matter of law, a builder of ordinary prudence would have discovered the insufficient compaction on [the building site]").

6. Accordingly, Mr. Nordquist's opinion that "when digging the footings a machine operator or contractor wouldn't necessarily be able to determine if the soil they were digging into was native or fill" is inadmissible.

7. For these reasons, and those stated on the record at the final pretrial hearing, Epic's motion in limine to exclude Mr. Nordquist from testifying as an expert witness on behalf Ross is hereby GRANTED.

EPIC'S MOTION FOR SUMMARY JUDGMENT

7. Without expert testimony Ross will be unable to establish that Epic breached the parties' contract.

8. The expert evidence offered by Epic to demonstrate that Epic performed its contractual duties stands un rebutted.

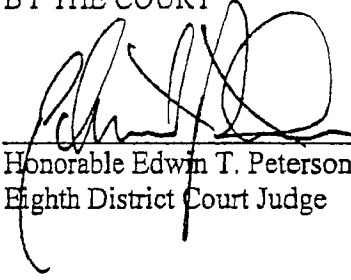
9. Furthermore, Epic's position that it was the failure of Ross' contractor to ascertain the subsurface conditions that caused Ross' damages finds support in the controlling Utah authority set forth in *Smith v. Frandsen*, 94 P.3d 919 (Utah 2004). It is the responsibility of the contractor, as a matter of law, "to be familiar with the conditions in the subsurface of the ground." *Id.* at 925.

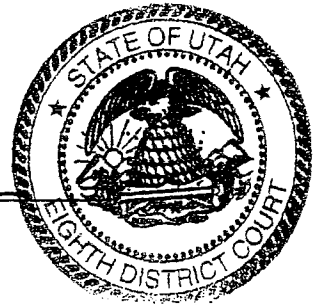
7. As a result, the dispute over the exact terms of the parties' contract is not material and does not prevent judgment as a matter of law on Ross' breach of contract claim.

8. Therefore, for the foregoing reasons and those stated on the record at the final pretrial hearing, Epic's motion for summary judgment on Ross' first cause of action for breach of contract is hereby GRANTED.

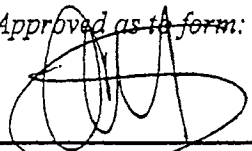
SO ORDERED this 23rd day of MAY, 2011.

BY THE COURT


Honorable Edwin T. Peterson
Eighth District Court Judge



Approved as to form:


Stephen Quesenberry
Aaron R. Harris
Attorneys for Plaintiff Jason Ross

5095854_2.DOC


CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 080800020 by the method and on the date specified.

MAIL: STEPHEN QUESENBERRY 4844 NORTH 300 WEST, SUITE 300 PROVO, UT 84604

MAIL: REBECCA A RYON 222 S MAIN STE 2200 SALT LAKE CITY UT 84101

Date: 5.23-2011


Deputy Court Clerk