

1990

James A. Hatch v. Thair H. Blackburn : Unknown

Utah Supreme Court

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Kevin V. Olsen; Anderson and Dunn; Attorney for Appellant.

Michael D. Lyon; Lyon, Helgesen, Waterfall, and Jones; Attorney for Appellee.

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UTAH SUPREME COURT

BRIEF

900445

UTAH SUPREME COURT

JAMES A. HATCH,)	
)	
Plaintiff - Appellant,)	
)	
vs.)	
)	
THAIR H. BLACKBURN,)	
)	
Defendant - Appellee,)	Case No. 900445
)	
<hr/>		Priority No. 13
THAIR H. BLACKBURN,)	
)	
Third-Party Plaintiff,)	
)	
vs.)	
)	
ST. BENEDICT'S ENTERPRISES, INC.,)	
)	
Third-Party Defendant.)	

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Response to petition for review of the decision
of a panel of the Court of Appeals, the Judges
Davidson, Bench and Orme sitting.

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FILED

NOV 29 1990

Clerk, Supreme Court, Utah

UTAH SUPREME COURT

JAMES A. HATCH,)	
)	
Plaintiff - Appellant,)	
)	
vs.)	
)	
THAIR H. BLACKBURN,)	
)	
Defendant - Appellee,)	Case No. 900445
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THAIR H. BLACKBURN,)	
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whatever measures necessary to try to get it out of me." (T. 252, 254.) Hatch had paid Blackburn only \$10,000.00 out of the \$94,261.44 approved by St. Benedict and paid none of the \$27,647.75 that was between him and Blackburn.

To protect his fee, Blackburn filed a lien against St. Benedict. (T. 258; R. 25.)

ARGUMENT

Point One

HATCH DID NOT PROPERLY MARSHAL HIS EVIDENCE IN THE COURT OF APPEALS. RATHER, HE MERELY EMPHASIZED HIS OWN EVIDENCE WHICH IS CONTRARY TO THE FINDINGS.

The Court of Appeals ruled that Hatch failed to marshal correctly his evidence and to show that it was insufficient. Quoting the standard of review promulgated by this Court, the Court of Appeals stated, "To mount a successful attack on the trial court's findings of fact, an appellant must marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings." Scharf v. EMG Corp., 700 P.2d 1068, 1070 (Utah 1985) (emphasis added). The Court of Appeals further found that Hatch did not do this, but instead simply emphasized his own evidence which is contrary to the findings.

In his request for review by this Court, Hatch gainsays these conclusions by stating on page seven of his brief:

The conclusions of the Court of Appeals are erroneous for the following reasons. In his statement of the case, Hatch set forth the evidence supporting the trial court's findings that Hatch retained Blackburn's architectural services and agreed to pay the fees set forth in the AIA Agreements. After setting forth the evidence, Hatch then demonstrated that the facts which the Court would have relied upon in its findings were insufficient to support those findings. Specifically, in the evidence supporting the court's findings were:

1) Blackburn's testimony as to his understanding of the Agreement;

2) The testimony of Blackburn's expert witnesses as to the reasonableness of the fees set forth in Blackburn's October 18, 1986 billing;

3) Hatch's use of the October 18, 1986 billing in his negotiations with St. Penedict's.

After making these general statements, unsupported by references to his brief that he actually did what he said he did, he launches into his own evidence on page eight which is contrary to the findings, just as he did in the Court of Appeals.

In any event, let us first see if he did what he said he did in the Court of Appeals. Take subparagraph 3) above, for example. Here he is telling this Court that he specifically submitted evidence supporting the court's findings regarding Hatch's use of the October 18, 1986 billing in his negotiations with St. Benedict. Blackburn invites this Court to look at pages 13 and 14 of Hatch's statement of the case in his brief in the Court of Appeals, where Hatch supposedly presented evidence in support of the trial court's findings regarding the October 18, 1986, billing. It is clear that he offered no evidence in support of the trial court's finding of fact no. 9 that Hatch

submitted Blackburn's bill "to St. Benedict as part of the buy-out figure and used it in his negotiation with St. Benedict," leading the trial court to conclude: "By utilizing Blackburn's final bill in his negotiations for his final settlement with St. Benedict, Hatch is in no position to deny that Blackburn's charge in his bill of October 18, 1986, is too high." (Conclusion of Law no. 2.)

If Hatch had properly marshalled the evidence, the following vital evidence would have been in his brief in support of the trial court's finding of fact no. 9, but was not:

1) Hatch's buy-out bill to St. Benedict for \$304,086.66 that included the full amount of Blackburn's bill to Hatch of \$121,919.19. (R. 18 and 17, respectively; Appendix, Exhibit no. 6 and no. 5, respectively.)

2) St. Benedict's final payment schedule to Hatch detailed payment in full to Blackburn, less \$27,647.75 for architectural services predating the long-term lease between Hatch and St. Benedict, which St. Benedict deemed to be a contractual liability of Hatch only. (T. 249; R. 49; Appendix, Exhibit no. 7.)

3) The testimony of Dan Wolterman, president and CEO of St. Benedict, that if Hatch's final bill to St. Benedict had not included Blackburn's claim for \$94,261.44 (\$121,909.19 less \$27,647.75), St. Benedict's final settlement to Hatch would have been less that amount. (T. 360.)

If Hatch had marshalled the evidence on finding no. 9, and also on the other findings, he would have realized that it

clearly preponderated in favor of Blackburn. At the very least, he would have realized that the evidence in support of the court's findings were certainly not lacking in support as to be "against the clear weight of the evidence," making them "clearly erroneous." Rule 52(a), Utah Rules of Civil Procedure; State v. Walker, 743 P.2d 191, 193 (Utah 1987). In short, Hatch failed to "recognize that the burden of overturning factual findings is a heavy one, reflected by the fact that [an appellate court does] not sit to retry cases submitted on disputed facts." Matter of the Estate of Bartell, 776 P.2d 885, 886 (Utah 1989).

By misapprehending his responsibility, or by deliberately ignoring the preponderating evidence, Hatch, in the main, wrote his fact statement in his statement of the case in a tenor favorable to his case by emphasizing his evidence, calculated to posture later his arguments that the evidence supported different findings of fact. His statement of facts even improperly included references to testimony from depositions, which although published at trial in a group with other depositions, were never used or read at trial in order to bring particular evidence to the consciousness of the trial judge. (See, for example, references to Carol Stuckey's deposition on pages 13 and 14 of Hatch's brief in the Court of Appeals.) In short, Hatch never focuses on specific findings of fact; therefore, he never established a basis on which to marshal the evidence in support of the court's findings.

Second, even the general areas of findings that Hatch identifies in his brief before this Court do not comprise the totality of findings essential to the court's conclusions of law and judgment. For example, nowhere does Hatch discuss in his brief before this Court or the Court of Appeals finding of fact no. 10 and its implications in the trial: "St. Benedict accepted Blackburn's billing of October 18, 1986, of unpaid services in the amount of \$121,909.19, except for item seven in the billing in the sum of \$27,647.45, because the latter amount was for services performed prior to the execution of the lease." (emphasis added)

Point Two

THE COURT OF APPEALS MAY REFUSE TO CONSIDER THE MERITS OF HATCH'S APPEAL, AND ACCEPT THE FINDINGS AS VALID, IF HE FAILS TO MARSHAL PROPERLY HIS EVIDENCE IN SUPPORT OF THE TRIAL COURT'S FINDINGS AND THEN DEMONSTRATE THAT EVEN VIEWING IT IN THE LIGHT MOST FAVORABLE TO THE TRIAL COURT BELOW, THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS.

On appeal, the appellate court presumes the findings of fact to be correct. Hal Taylor Assoc. v. UnionAmerica, Inc., 657 P.2d 743, 747 (Utah 1982). This presumption accords with considerable deference that is given the trial judge due to his advantaged position to the witnesses and his opportunities to hear their testimony and observe their demeanor. Jeppson v. Jeppson, 684 P.2d 69 (Utah 1984); Shijoi v. Shijoi, 712 P.2d 197 (Utah 1985). Accordingly, on review, the Court of Appeals "views the evidence

and all inferences that can reasonably be drawn therefrom in a light most supportive of the trial court's findings." (Forton v. Forton, 695 P.2d 102, 106 (Utah 1984)).

To have overcome this presumption of correctness of the court's findings, Hatch had a heavy burden on appeal of challenging the sufficiency of the evidence supporting the court's findings, not to emphasize his own evidence which is contrary to the findings. In this regard, the Court of Appeals accurately observed and ruled:

The fact that Hatch's evidence may have supported different findings--or even that much of the evidence is at odds with the findings--is of no consequence where the findings that were made are not shown, through the marshaling process, to have been lacking adequate evidentiary support. See Mountain States Broadcasting Co. v. Neale, 783 P.2d 551, 553 (Utah Ct. App. 1989) ("When the duty to marshal is not properly discharged, we refuse to consider the merits of challenges to the findings and accept the findings as valid."). This result is particularly appropriate where the key findings turn on the credibility determinations of the trial court, a matter on which we defer to that court's advantaged position. See Southland Corp. v. Potter, 760 P.2d 320, 321 (Utah Ct. App. 1988); Utah R. Civ. P. 52(a).

In sum, the policy requiring the proper marshaling of evidence, harsh as it may seem to Hatch, ensures that before an appellate court can consider reversing the trial court on the facts, it must at least have the opportunity to see the evidence the trial judge saw or heard.

Point Three

HATCH HAS NOT DEMONSTRATED THAT THE COURT OF APPEALS HAS RENDERED A DECISION THAT DEPARTED FROM THE USUAL COURSE OF JUDICIAL

PROCEEDINGS THAT IT CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Hatch failed to state in his brief, "with [regard to] each question [he] presented, a direct and concise argument explaining the special and important reasons as provided in Rule 46 for the issuance of the writ." See Rule 49(a)(9), Utah Rules of Appellate Procedure. Nonetheless, the nature of his request for review seems premised in the last paragraph of his brief, where he states that the Court of Appeals set a higher standard of review in his case than has been established by this Court, thereby calling for an exercise of this Court's power of supervision. Blackburn submits that it is Hatch who misapprehends the standard of review, not the Court of Appeals. The previous analysis in this brief and the authorities cited amply demonstrate that the Court of Appeals applied the proper standard of review; therefore, no special or important reasons have been stated by Hatch calling for a review by this Court.

Aside from the issue of the standard of review, this case involves only ordinary questions of contract law and damages. A review of this case by this Court on those issues would add nothing to the development of the law. Accordingly, no special or important reasons exist for a review of this case.

Point Four

HATCH'S REQUEST FOR A REVIEW BY THIS COURT IS FRIVOLOUS, ENTITLING BLACKBURN TO AN AWARD OF ATTORNEY'S FEES AND COSTS.

Rule 33(a) of the Utah Rules of Appellate Procedure provides "...[I]f the court determines that [an]...appeal taken under these rules is frivolous..., it shall award just damages, which includes single or double costs, defined by Rule 34, and/or reasonable attorney's fees, to the prevailing party." A frivolous appeal under Rule 33(b) is "one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse its law."

In his brief before the Court of Appeals, Hatch failed to abide by the fundamental rule of marshalling his evidence properly. The memorandum decision of the Court of Appeals explained clearly his failing and supported it with well-established law; yet he now asks this Court for a review without stating a "direct and concise argument" for each of his questions presented on review, as required by Rule 49(a)(9), nor has he stated any "special or important reasons" for a review, as required by Rule 46. His general assertion that the Court of Appeals applied an overly restrictive standard of review is not supported in fact by references to his Court of Appeals' brief and not supported by existing law. Blackburn believes that all he has done is wail at the wall of authority without complying with the standards required for filing an appeal, both in the Court of Appeals and in the Supreme Court. In the process, however, he has continued to burden Blackburn with the needless increase in costs of litigation. It seems only equitable that Hatch pay Blackburn's expenses connected with this appeal.

CONCLUSION

Hatch had his opportunity for an appeal. In that appeal, he failed to marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings were so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous. Instead, he chose to essentially reargue his evidence submitted in the trial court, construing that evidence in a light most favorable to his case and largely ignoring the evidence supportive of the trial court's findings. As the Court of Appeals observed, "the fact that Hatch's evidence may have supported different findings--or even that much of the evidence is at odds with the findings--is of no consequence where the findings that were made are not shown, through the marshaling process, to have been lacking adequate evidentiary support." Consequently, when the duty to marshal is not properly discharged, the Court of Appeals, based on the authority previously cited, must refuse to consider the merits of the challenges to the findings and accept them as valid. Therefore, Hatch having stated no special or important reasons for review, his request for review must be denied.

Furthermore, Hatch's appeal is not only without merit, it is

on its face frivolous. It is just that he pay Blackburn's attorney's fees and costs on this appeal.

Respectfully submitted this ____ day of November, 1990.

MICHAEL D. LYON
Attorney for Appellee

Certificate of Mailing

I hereby certify that I mailed four true and correct copies of the foregoing Response to Petition for Writ of Certiorari on this ____ day of November, 1990, postage prepaid, to:

Kevin V. Olsen
ANDERSON & DUNN
2089 East 7000 South, Suite 200
Salt Lake City, Utah 84121

APPENDIX

1. Court of Appeals memorandum decision of May 16, 1990.
2. Court of Appeals order of August 29, 1990, denying rehearing.
3. Findings of fact and conclusions of law.
4. Judgment.
5. Blackburn's bill for \$121,909.19 dated October 18, 1986.
6. Hatch's bill to St. Benedict dated October 23, 1986.
7. St. Benedict's settlement statement with Hatch.

FILED

MAY 16 1990

Gary Noonan
Gary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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James A. Hatch,)	
)	
Plaintiff and Appellant,)	MEMORANDUM DECISION
)	(Not For Publication)
v.)	
)	
Thair H. Blackburn,)	Case No. 880503-CA
)	
Defendant and Appellee.)	

Second District, Weber County
The Honorable Ronald O. Hyde

Attorneys: Kevin V. Olsen, Salt Lake City, for Appellant
Michael D. Lyon, Ogden, for Appellee

Before Judges Davidson, Bench, and Orme.

ORME, Judge:

This case was tried to the court. There was conflicting evidence presented by the parties. Following trial, the court issued a detailed memorandum decision, from which followed the court's findings of fact and conclusions of law. The court's factual findings in this case adequately support its legal conclusions and the legal conclusions warrant the judgment that was entered.

Hatch makes several arguments on appeal, but in essence he attacks the sufficiency of the evidence supporting the trial court's findings. However, the trial court's findings are not properly challenged unless the evidence is correctly marshaled and shown to be insufficient. "To mount a successful attack on the trial court's findings of fact, an appellant must marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings." Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985) (emphasis added). See In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989); Harker v. Condominiums Forest Glen, Inc., 740 P.2d 1361, 1362 (Utah Ct. App. 1987). Hatch has not done this, but instead has simply emphasized his own evidence which is contrary to the findings. He suggests the findings are against the clear weight of the evidence.

The fact that Hatch's evidence may have supported different findings--or even that much of the evidence is at odds with the findings--is of no consequence where the findings that were made are not shown, through the marshaling process, to have been lacking adequate evidentiary support. See Mountain States Broadcasting Co. v. Neale, 783 P.2d 551, 553 (Utah Ct. App. 1989) ("When the duty to marshal is not properly discharged, we refuse to consider the merits of challenges to the findings and accept the findings as valid."). This result is particularly appropriate where the key findings turn on the credibility determinations of the trial court, a matter on which we defer to that court's advantaged position. See Southland Corp. v. Potter, 760 P.2d 320, 321 (Utah Ct. App. 1988); Utah R. Civ. P. 52(a).

The single argument on appeal that survives the foregoing discussion is Hatch's claim that he is not liable for payment under the contract due to the ultimate frustration of the contract's purpose. Although the trial court made no findings or conclusions on this issue, Hatch claims that the court committed legal error in not precluding recovery by Blackburn on the grounds of frustration. While we doubt whether this doctrine would apply to the facts of this case, we need not consider the issue since it was not raised below and we will not consider an issue raised for the first time on appeal. See, e.g., Zions First Nat'l Bank v. National Am. Title Ins. Co., 749 P.2d 651, 655 (Utah 1988).

While Hatch's appeal is not frivolous, as Blackburn suggests, it is without merit. The judgment is accordingly affirmed.



Gregory K. Orme, Judge

WE CONCUR:



Russell W. Bench, Judge



Richard C. Davidson, Judge

FILED

AUG 29 1990

CLERK OF COURT
UTAH COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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James A. Hatch,)	
)	
Plaintiff and Appellant,)	ORDER DENYING REHEARING
)	
v.)	Case No. 880503-CA
)	
Thair H. Blackburn,)	
)	
Defendant and Appellee.)	

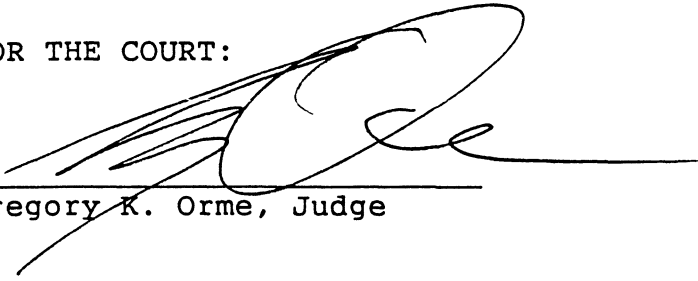
Before Judges Bench, Davidson and Orme.

The court having considered the petition for rehearing and the additional portions of the record filed in this Court on May 31, 1990,

IT IS HEREBY ORDERED that the petition for rehearing is denied.

DATED this 28th day of August, 1990.

FOR THE COURT:



Gregory K. Orme, Judge

CERTIFICATE OF MAILING

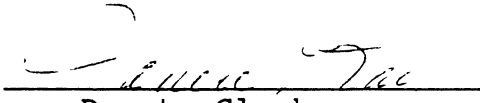
I hereby certify that on the 29th day of August, 1990, a true and correct copy of the foregoing ORDER DENYING REHEARING was deposited in the United States mail.

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Michael D. Lyon, Esq.
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DATED this 29th day of August, 1990.

By


Deputy Clerk

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Telephone: 621-4015

IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

JAMES A. HATCH,)	
Plaintiff,)	
vs.)	
THAIR H. BLACKBURN,)	
Defendant.)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
<hr/>		
THAIR H. BLACKBURN,)	Civil No. 99011
Third-Party)	
Plaintiff,)	
vs.)	
ST. BENEDICT'S ENTERPRISES,)	
INC.,)	
Third-Party)	
Defendant.)	

The above matter came on for trial on February 11, 1988, before the Honorable Ronald O. Hyde. Lawrence R. Peterson, Jr., appeared on behalf of plaintiff James A. Hatch; Michael D. Lyon and Robert R. Wallace appeared on behalf of defendant and third-party plaintiff Thair H. Blackburn; and James W. Freed and Steven J. Aeschbacher appeared on behalf of third-party defendant St. Benedict Enterprises, Inc.

The court having heard the testimony and having examined the proofs offered by the parties, and having heard the argument of counsel, and this cause having been submitted for decision, the

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FINDINGS OF FACT AND CONCLUSIONS OF LAW
CIVIL NO. 99011

court, being fully advised herein, now finds and decides as follows:

Findings of Fact

1. On or about May 25, 1984, St. Benedict Enterprises, Inc. ("St. Benedict") granted James A. Hatch ("Hatch"), a developer, an option on real property on the campus of St. Benedict Hospital in Ogden, Utah, to work up a feasibility and architectural schematics for the construction of a medical professional building ("the project" or "the building") on said campus, with the further agreement that Hatch would be given a long-term lease agreement on the property if he performed under the conditions of the option.

2. On or about August 15, 1984, Hatch requested Thair H. Blackburn ("Blackburn"), a licensed Utah architect, to prepare a site plan, schematics, and other related architectural services in connection with the project.

3. Prior to August 15, 1984, Hatch had contracted with Blackburn to perform services on other projects and was familiar with Blackburn's fee arrangements. Hatch directed Blackburn to prepare an AIA (American Institute of Architects) contract.

4. On or about July 8, 1985, Hatch asked Blackburn to prepare an AIA contract. On or about July 22, 1985, Blackburn submitted to Hatch an AIA contract, but it was not signed because it was a construction management form of the standard AIA owner-

HATCH v. BLACKBURN v. ST. BENEDICT
FINDINGS OF FACT AND CONCLUSIONS OF LAW
CIVIL NO. 99011

architect contract, wherein Hatch was named as the construction manager. Hatch directed Blackburn to prepare only an owner-architect form of the AIA contract. Before a revised agreement could be entered into, Hatch's option with St. Benedict terminated. At this time, at Hatch's request, Blackburn prepared and submitted to Hatch a bill dated August 10, 1985, for services in the sum of \$27,647.75.

5. In September of 1985, Hatch revived the project and directed Blackburn to proceed again with his architectural services.

6. On or about May 12, 1986, Hatch and St. Benedict entered into a long-term land lease for Hatch to construct and operate the building. The lease more than merely authorized, or acquiesced in, the construction of the project on the leased property; it required Hatch with due diligence to complete the project or the lease would be null and void and without force and effect. In addition, the use of the building was limited solely and exclusively to the medical profession, and it prohibited other activities and services within the building which would in any manner be incompatible with the St. Benedict Hospital.

7. The improvements to the leasehold required by the lease would have substantially enhanced the value of the freehold even though the term of the lease was 35 to 55 years.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW
CIVIL NO. 99011

8. On or about August 25, 1986, Hatch again requested Blackburn to provide him with an AIA contract, which Blackburn provided on or about September 6, 1986. Hatch retained but never signed the contract.

9. On or about October 15, 1986, St. Benedict desired to abandon the project and requested Hatch to submit a figure for a buy-out of the lease. Accordingly, Hatch asked Blackburn to submit a final bill, which Hatch in turn submitted to St. Benedict as part of the buy-out figure and used it in his negotiations with St. Benedict.

10. St. Benedict accepted Blackburn's billing of October 18, 1986, of unpaid services in the amount of \$121,909.19, except for item 7 of the billing in the sum of \$27,647.45, because the latter amount was for services performed prior to the execution of the lease.

11. Hatch retained Blackburn to provide architectural services for the total project and not just the shell.

12. When Blackburn realized he was not going to be paid by Hatch, Blackburn filed a lien on St. Benedict's property on December 10, 1986, and served the same on an authorized agent for St. Benedict on January 7, 1987.

13. Although no AIA contract was signed, the fees set out in the AIA contract were the ones that Hatch and Blackburn agreed to. Moreover, Blackburn's architectural fees were reasonable,

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FINDINGS OF FACT AND CONCLUSIONS OF LAW
CIVIL NO. 99011

including the termination fee of \$64,711.00. The termination provision was reasonable to cover such things as loss of profit, loss of work the architect is not able to undertake, the cost of closing out the job, etc.

14. Hatch's testimony that he told St. Benedict, during settlement negotiations, that he thought Blackburn's bill was too high and that he would probably pay him only another \$10,000.00 was not true. Likewise, Hatch's representations to Blackburn that St. Benedict had approved for Blackburn only \$45,329.00 was also not true.

15. Prior to the termination of the project, Hatch paid Blackburn \$18,000.00 toward Blackburn's total bill of \$139,909.19. After termination of the project, he paid Blackburn \$10,000.00 from the settlement proceeds received from St. Benedict, reducing Blackburn's unpaid claim to \$111,909.19.

16. Although Blackburn's claim for attorney's fees does not segregate the lien action from the Hatch action, an award of \$5,000.00 to foreclose the lien would seem reasonable, based on the observation of time and work in court regarding the lien against the total claim of attorney's fees.

From the foregoing findings, the court concludes:

Conclusions of Law

1. While the AIA contract was not signed, the fees set out

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FINDINGS OF FACT AND CONCLUSIONS OF LAW
CIVIL NO. 99011

in the AIA contract were the ones to which Hatch and Blackburn agreed.

2. By utilizing Blackburn's final bill in his negotiations for his final settlement with St. Benedict, Hatch is in no position to deny that Blackburn's charge in his bill of October 18, 1986, is too high.

3. Blackburn is entitled to a judgment against Hatch for \$111,909.19.

4. Prejudgment interest on the judgment is not authorized because the damages were not readily determinable, despite the court's adoption of Blackburn's October 18, 1986, billing.

5. Blackburn is not entitled to recover an attorney's fee against Hatch because there was no written agreement for payment of attorney's fees. Further, the imposition of attorney's fees under Utah Code Ann. §78-27-56 is not warranted.

6. No contractual relationship existed between Blackburn and St. Benedict, either express or implied.

7. There was no direct agency relationship between Hatch and St. Benedict; however, because the lease required or obligated Hatch to construct improvements which would substantially enhance the value of the freehold, Hatch was St. Benedict's implied agent to the extent of subjecting the premises to a lien.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW
CIVIL NO. 99011

8. Although the \$139,909.19 is a reasonable fee between Blackburn and Hatch, and the statute entitles Blackburn to a lien upon or concerning property which he rendered service, performed labor, or furnished materials, the lien can only be for the value of the service rendered, labor performed, or labor provided to the land owner. That value would not include the termination fee of \$64,711.00. Also excluded from the judgment lien would be the architectural services covering the original wood frame building, since those services were completed prior to the lease between St. Benedict and Hatch and would, therefore, not be part of the value services contemplated under the lien statute.

9. Blackburn's lien was properly filed and served upon St. Benedict.

10. Blackburn is entitled to a judgment against St. Benedict for \$19,550.44 for the value of architectural services and \$5,000.00 attorney's fees for the foreclose of his lien, for a total judgment of \$24,550.44, together with interest thereon at the rate of 12% per annum until paid.

11. Blackburn is also entitled to a judgment validating his lien upon the real property owned by St. Benedict described in Blackburn's lien.

12. Blackburn is also entitled to a judgment foreclosing said lien and ordering said real property to be sold as provided

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FINDINGS OF FACT AND CONCLUSIONS OF LAW
CIVIL NO. 99011

by law to satisfy Blackburn's judgment, together with expenses of sale and accruing costs.

13. Because Hatch is responsible for the whole action, costs of the action in the sum of \$916.97 should be awarded to the plaintiff against Hatch.

14. Blackburn is also entitled to a judgment dismissing with prejudice Hatch's complaint and St. Benedict's counterclaim, both no cause of action.

Let judgment be entered accordingly.

Dated this 28 day of March, 1988.

151 Ronald O. Hyde
RONALD O. HYDE
DISTRICT JUDGE

Rule 2.9 Notice

To Lawrence R. Peterson, Jr., Attorney for James A. Hatch, and James W. Freed, Attorney for St. Benedict Enterprises, Inc.:

Pursuant to 2.9 of the Rules of Practice of the District Court and Rule 6(e), Utah Rules of Civil Procedure, the undersigned will submit the foregoing findings of fact and conclusions of law to the Honorable Ronald O. Hyde for signature upon the expiration of five days from the date of service of these findings of fact and conclusions of law, unless written

HATCH v. BLACKBURN v. ST. BENEDICT
FINDINGS OF FACT AND CONCLUSIONS OF LAW
CIVIL NO. 99011

objection is filed prior to that time.

Dated this 18 day of March, 1988.



MICHAEL D. LYON
Attorney for Defendant/
Third-Party Plaintiff

MICHAEL D. LYON (2031)
Attorney for Defendant
2650 Washington Blvd., Suite 102
Ogden, Utah 84401
Telephone: 621-4015

IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

JAMES A. HATCH,)
Plaintiff,)
vs.)
THAIR H. BLACKBURN,)
Defendant.)

AMENDED JUDGMENT

THAIR H. BLACKBURN,) Civil No. 99011
Third-Party)
Plaintiff,)
vs.)
ST. BENEDICT'S ENTERPRISES,)
INC.,)
Third-Party)
Defendant.)

The above matter came on regularly for hearing on February 11, 1988, before the Honorable Ronald O. Hyde. Lawrence R. Peterson, Jr., appeared on behalf of plaintiff James A. Hatch; Michael D. Lyon and Robert R. Wallace appeared on behalf of defendant and third-party plaintiff Thair H. Blackburn; and James W. Freed and Steven J. Aeschbacher appeared on behalf of third-party defendant St. Benedict Enterprises, Inc.

The trial was conducted upon the issues raised in plaintiff's complaint, defendant and third-party plaintiff's

HATCH v. BLACKBURN v. ST. BENEDICT
AMENDED JUDGMENT
CIVIL NO. 99011

counterclaim and third-party complaint, and third-party defendant's counterclaim.

The evidence and arguments of the parties having been heard and considered, and this cause having been submitted for decision, the court, being fully advised herein and having entered its findings of fact and conclusions of law, now hereby orders, adjudges and decrees as follows:

1. Thair H. Blackburn is hereby awarded judgment against James A. Hatch, of 1268 East 5500 South, Ogden, Utah, for architectural fees in the sum of \$111,909.19 and court costs in the sum of \$916.97, for a total judgment in the sum of \$112,826.16, together with interest thereon at the rate of 12 percent per annum until paid.

2. Included in Blackburn's judgment against Hatch, Blackburn is awarded judgment against St. Benedict Enterprises, Inc., of 5475 South 500 East, Ogden, Utah, for \$19,550.44 and interest thereon at the rate of 12% per annum until paid. In addition, and not included in the Blackburn judgment against Hatch, defendant is awarded judgment against St. Benedict for \$5,000.00 attorney's fees and interest thereon at the rate of 12% per annum until paid. The judgments against St. Benedict are secured by the lien validated below.

3. Blackburn's lien filed December 10, 1986, as entry no 991954 in the office of the Weber County Recorder is a valid and

HATCH v. BLACKBURN v. ST. BENEDICT
AMENDED JUDGMENT
CIVIL NO. 99011

subsisting lien upon the following-described real property in Weber County, Utah: St. Benedict Hospital campus bounded by 5350 South Street and 5450 South street on the north, Adams Avenue on the east, Washington Terrace corporate limits on the south, and Parsons Development Company on the west, also described by the following legal description:

Beginning at the SE Corner, Section 17, T. 5N., R. 1W., SLM, thence N00-26'-00" E 638.27 feet along the section line thence; West 432.46 feet to a point of beginning which point is the northeast corner of the here described parcel. Thence; S00-26'-00" W 230.0 feet thence; N89-34'-00" W 508.0 feet thence; N 00-26'-00" E 218.08 feet thence; S89-37'-03" E 81.55 feet thence; N00-21'-46"E 125.0 feet thence; S89-34'-00" E 122.62 feet thence; N72-25'-34" E 130.49 feet more or less to the exterior wall of the St. Benedicts Hospital thence; along said wall the following four (4) courses: S17-34'-26"E 91.93 feet, S65-01'-18"W 11.21 feet, S18-11'-01"E 26.24 feet, N74-27'-37"E 10.84 feet, thence; leaving said exterior wall and running S17-34'-26"E 41.40 feet thence; S89-34'-00"E 130.0 feet to the point of beginning.

Beginning at a point which is N00-26'-00"E 405.50 feet along the section line thence; West 66.00 feet ferom the SE Corner, Section 17, T.5N., R.1W., SLM thence; N89-34'-00"W 366.45 feet thence; N00-26'-00"E 50.0 feet thence; S89-34'-00"E 366.45 feet thence; S00-26'-00"W 50.0 feet to the point of beginning.

Beginning at a point which is N00-26'-00"E 630.19 feet along the section line thence; West 940.47 feet from the SE Corner, Section 17, T.5N., R.1W., SLM thence; S00-26'-00"W 218.08 feet thence; N89-34'-00"W 155.55 feet thence; N00-26'-00"E 217.94 feet thence; S89-37'-03"E 155.55 feet to the point of beginning.

Beginning at a point which is the existing southeast corner of Wing 5, St. Benedicts Hospital which point is N00-26'-00"E 701.38 feet along the section line thence; West 505.16 feet from the SE Corner, Section 17, T.5N.,

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AMENDED JUDGMENT
CIVIL NO. 99011

R.1W., SLM, thence; S72-25'-34"W 84.67 feet thence; N18-11'-01"W 26.24 feet thence; N65-01'-18"E 11.21 feet thence; N17-34'-26"W 204.90 feet thence; N72-25'-34"E 74.18 feet thence; S17-34'-26"E 36.83 feet thence; S72-25'-34"W 6.0 feet thence; S17-34'-26"E 168.10 feet thence; N72-25'-34"E 5.65 feet thence; S17-34'-26"E 27.65 feet to the point of beginning. Said description shall begin on the surface of an existing concrete deck (elevation +/-4729.78) and extend vertically thirty one (31) feet to a plane of similar description.

4. The lien adjudged above is hereby foreclosed. The above property is hereby ordered to be sold in satisfaction of the lien in the sum of \$19,550.44, \$5,000.00 attorney's fees, accruing interest, expenses of sale, and accruing costs, as in the case of the foreclosure of mortgages, subject to the right of redemption. If Blackburn's claim is not satisfied as herein provided, he may have judgment docketed for the balance unpaid, and execution therefor against St. Benedict.

5. Hatch's complaint and St. Benedict's counterclaim are hereby dismissed with prejudice, both no cause of action.

Dated this 29 day of March, 1988.

/s/ Ronald O. Hyde
RONALD O. HYDE
DISTRICT JUDGE

THAIR H. BLACKBURN, ARCHITECT

3643 WASHINGTON BLVD , OGDEN, UTAH 84403

PHONE 392-4773

October 18, 1986

ST. BENEDICTS MEDICAL ARTS CENTER

1.	<u>Estimated Total Cost:</u>	\$5,730,251	
2.	<u>Total Architectural Fee:</u>		
	(\$5,730,251 x 0.06)		<u>\$343,815.00</u>
3.	<u>Schematic Fee Earned to Date:</u>		
	(\$343,815 x 0.10)	34,381.50	
4.	<u>Third Floor Shell Design:</u>		
	(\$337,615 x 0.06 x 0.65)	13,168.94	
5.	<u>Termination Fee - Third Floor Shell:</u>		
	(\$337,615 x 0.06 x 0.05)	1,013.00	
6.	<u>Termination Fee - Project Remainder:</u>		
	(\$323,555 x 0.20)	64,711.00	
7.	<u>Termination Fee - Original Building:</u>		
	(10-10-85)	<u>27,647.75</u>	
8.	<u>Total Amount Earned to Date:</u>	\$139,909.19	
9.	<u>Payments to Date:</u>	<u>18,000.00</u>	

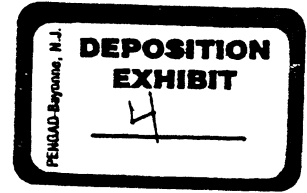
TOTAL-AMOUNT DUE TO DATE: - - - - - \$121,909.19

Refer to Agreement Article 10.4 for Termination Fees

REGIONAL DEVELOPMENT

October 23, 1986

St. Benedict's Hospital
5475 S. 500 E.
Ogden, Utah 84405
Attention: James P. Lane



Dear Jim:

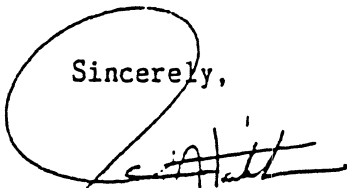
This is a Buy-Out offer on the Land Lease at St. Benedict's broken down as follows:

Regional Development

a. Bank of Utah Washington Terrace	\$ 6,829.78
b. Bank of Utah South Ogden	\$ 3,474.70
c. Davis County Bank	\$ 47,480.32
d. South Valley National (Paid Off)	\$ 11,112.12
e. Zions National Bank	\$ 4,441.00
Holbrook Heating and Air Conditioning	\$ 2,000.00
Anderson Engineering (Approx.)	\$ 5,800.00
Bradford Group	\$ 5,000.00
Thair Blackburn (Architect)	\$121,909.19
J. Hatch Value of cash buy-out	<u>\$490,196.00</u>
 TOTAL	 \$698,243.13

It would be appreciated if you could let me know by November 1, 1986. If there is a problem or you have any questions, please feel free to contact me.

Sincerely,



Jim Hatch

1123m
St Ben

DETAIL OF AMOUNTS
DUE JAMES HATCH
FOR COSTS INCURRED IN DEVELOPMENT OF
MEDICAL OFFICE BUILDING FOR
ST. BENEDICT'S ENTERPRISES

Thair Blackburn, Architect	\$ 94,261.44
121,909.19 - 27,647.65 (Original building design)	
Pre Construction Financing	70,000.00
Anderson Engineering	5,800.00
Bradford Group	5,000.00
Holbrook Heating & Air Conditioning	2,000.00
Regional Development	
(73,337.02 x 110%) - \$3,636.49	<u>77,025.22</u>
(money remaining in pre-construction loan account)	
total	\$254,086.66