

1990

James A. Hatch v. Thair H. Blackburn : Petition for Writ of Certiorari

Utah Supreme Court

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

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BRIEF

900445

IN THE UTAH SUPREME COURT

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

Civil No. 900445

THAIR H. BLACKBURN,)
)
Third-Party Plaintiff,)
)
vs.)
)
ST. BENEDICT'S ENTERPRISES, INC.,)
)
Third-Party Defendant.)

Priority No. 13

PETITION FOR WRIT OF CERTIORARI

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

SEP 27 1990

Clerk, Supreme Court, Utah

IN THE UTAH SUPREME COURT

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| JAMES A. HATCH, |) | |
| |) | |
| Plaintiff-Appellant, |) | |
| |) | |
| vs. |) | |
| |) | |
| THAIR H. BLACKBURN, |) | Civil No. |
| |) | |
| Defendant. |) | |

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| THAIR H. BLACKBURN, |) | |
| |) | |
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| |) | |
| vs. |) | |
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IN THE UTAH SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals apply a more strict standard than that standard followed by the Supreme Court when it refused to consider the merits of the Appellants challenges to the trial court's findings?

2. Did the Appellant discharge his duty to marshall all of the evidence supporting the trial court's finding by setting forth the evidence in his Statement of the Case?

3. Did the Appellant attempt to demonstrate that even when considering all the facts supporting the trial court's findings, such evidence was insufficient to support the trial court's findings?

4. Should the merits of Appellant's appeal have been considered by the Court of Appeals?

REFERENCE TO OPINION ISSUED BY THE COURT OF APPEALS

The Court of Appeals issued its Memorandum Decision on or about May 16, 1990. A copy of said Memorandum Decision is attached as an Addendum to this Petition.

JURISDICTION

The Memorandum Decision sought to be reviewed was filed by the Court of Appeals on May 16, 1990. The Appellant petitioned the Court for re-hearing on May 30, 1990. Upon receipt of the Petition for Re-Hearing, the Court of Appeals ordered the entire record to be transmitted to the Court from the District Court pending the decision on the Petition for Re-Hearing. Having finally received the entire record, the Court of Appeals denied the Petition for Re-Hearing on August 28, 1990. It is believed that Rules 4 and 46 of Utah Rules of Appellate Procedure confer upon the Supreme Court jurisdiction to review the decision in question by writ of certiorari.

STATEMENT OF THE CASE

This is an appeal of a judgment for architects fees. The Plaintiff-Appellant (Hatch) is a developer who was attempting to develop real property owned by St. Benedict's, a Third Party Defendant below but not a party to this appeal. The Defendant-Respondent (Blackburn) is an architect whose services were used by Hatch in securing a long term lease with St. Benedict's. The actions of the parties came before the

Honorable Ronald Hyde of the Second District Court in and for Weber County, State of Utah on February 11, 1988. The trial court rendered judgment in favor of Blackburn. Hatch appealed the decision to the Utah Supreme Court. Pursuant to its statutory authority, the Utah Supreme Court transmitted the case to the Utah Court of Appeals. After being briefed and advised through oral argument, the Utah Court of Appeals rendered its Memorandum Decision affirming the trial court's judgment.

In 1983, Hatch had approached St. Benedict's with a proposal for the building of a medical office building on property adjacent to the St. Benedict's Hospital. T.8, 158. As a result of those discussions, St. Benedict's granted Hatch an option to lease up to four (4) acres of land. Because St. Benedict's wanted to review a site plan of the proposed building before entering into the long-term lease, Hatch requested Blackburn to prepare the drawings. T.8, 158. It was anticipated between Hatch and Blackburn that a standard form architect agreement (AIA Agreement) would be entered into between them, similar to their agreements in the past. T.12. However, before any agreement was signed, St. Benedict's decided against the project.

Hatch was able to revive the project and then again requested Blackburn to provide the necessary drawings. Because of the change in demands of St. Benedict's, Blackburn was

requested to prepare several different versions of the proposed building. He went through at least five (5) schematics before finally meeting the approval of St. Benedict's. Having met with their approval, St. Benedict's entered into a long term lease with Hatch on or about May 16, 1986. By August 1986, Hatch notified Blackburn to go full steam ahead with the project and to prepare a written agreement to be submitted with the finance package. T.191, 194. At about the same time, Blackburn received \$10,000.00 from Hatch as required under the AIA Agreement prepared by Blackburn.

During this time, Blackburn presented a second AIA standard form agreement to Hatch for his signature. However, before the agreement was executed by the parties, St. Benedict's again had a change of heart and indicated that it wanted to be released from its obligations under the lease agreement. Hatch was requested to submit a proposal for the buy out of the lease. As part of that proposal, he was asked to submit those expenses that he had incurred on the project. Hatch then requested Blackburn to prepare his final billing so that a figure could be negotiated with St. Benedict's. Accordingly, Blackburn prepared his October 18, 1986 billing.

The October 18, 1986 billing set forth the architect fees based on the percentages found in the AIA Agreement submitted to Hatch for signature. Those percentages were calculated against Blackburn's estimate of construction costs.

It included termination fees of \$65,724.00 with a reference to Article 10.4 of the AIA Agreement for those fees. It also included \$27,647.75 for those services that were rendered in the beginning when the project was originally cancelled by St. Benedict's.

The October 18, 1986 billing was used by Hatch in his negotiations with St. Benedict's. Had St. Benedict's known that Blackburn's bill could not be substantiated, St. Benedict's likely would have negotiated for a lower figure. Dan Wolterman depo. pg. 24. A release was subsequently negotiated and Hatch released St. Benedict's from its obligations under the lease. Hatch subsequently paid Blackburn another \$18,000.00 for his fees. T.260.

Fearing Hatch would not pay all of his billed fees, Blackburn filed a lien on the property in December 1986. Receiving notice of Blackburn's lien, St. Benedict's withheld its agreed payments from Hatch. Hatch then brought suit against Blackburn to have the lien removed. Blackburn counter sued for his fees. In addition, he brought a third party action against St. Benedict's for foreclosure of his lien.

The action came before the Honorable Ronald Hyde of the Second District Court. Hatch and Blackburn each testified. They also offered expert testimony through other architects. Blackburn's witnesses testified that Blackburn's fees were

reasonable. In addition to the expert witnesses and the parties testimonies, the depositions of two of St. Benedict's employees were offered into evidence. After hearing the evidence, the Court issued its Memorandum Decision granting judgment to Blackburn for the total amount of his October 18, 1986 billing. The Court found that the AIA Agreement represented the fees agreed to and that the fees sought by Blackburn were reasonable. It also found that the reasonable value of Blackburn's services were the fees billed, less the termination fees.

ARGUMENT

The Utah Supreme Court in the matter of Estate of Bartell, 776 P.2d 885 (Utah 1989) explained the standard for review of a judge's findings.

When an appellant claims that the evidence is insufficient to support the trial court's findings of fact, we do not weigh the evidence de novo; great deference is given to the trial court's findings, especially when they are based on an evaluation of conflicting live testimony. (Citations omitted). When the appeal is from a jury's fact finding, we have said that the appellant has the obligation to marshal all the evidence in support of those findings and, considering that evidence in a light most favorable to the jury, still demonstrate that the findings lack substantial evidentiary support. (Citations omitted). The burden of proof is somewhat less when the appeal is from a judge's findings because we need only conclude that the findings are clearly erroneous under Rule 52(a), but the mode of presentation and demonstration that must be followed by an appellant is the same. An appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be "against the clear weight of the evidence", thus making them "clearly erroneous". (Citation omitted). Whether the facts have been found by

a jury or a judge, appellant should recognize that the burden of overturning factual findings is a heavy one, reflective of the fact that we do not sit to retry cases submitted on disputed facts.

In the present case, the Court of Appeals has concluded that Hatch did not meet his burden because he failed to marshall all the evidence in support of the trial court's findings and then demonstrate that even viewing it in a light most favorable to the trial court, the evidence is insufficient to support the findings. The Appellate Court concluded that instead of doing this, Hatch simply emphasized his own evidence which is contrary to the findings. The Court therefore declined to reach the merits of Hatch's challenge to the trial court's findings.

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, 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. Benedict's.

Hatch challenged the trial court's findings by demonstrating that the evidence referred to above was insufficient to support those findings for the following reasons:

1) Blackburn's testimony concerning the calculation of the figures in the October 18, 1986 billing were inconsistent with the provisions of the AIA Agreement which he was seeking to have enforced. This inconsistency was argued in the following areas:

a) Blackburn's inclusion of \$27,647.75 in the October 18, 1986 billing representing the work done prior to St. Benedict's first cancellation was inconsistent with Blackburn's own admissions that there was one project being worked on as well as being inconsistent with the terms of the AIA Agreement;

b) The termination fees were inconsistent with the plain language of the AIA Agreement. Reference was made to the AIA Agreement. In fact, the AIA Agreement was the only evidence where such penalties were established by the evidence as being agreed to between the parties;

c) The fees are calculated from "construction costs" as estimated by Blackburn. These "construction costs" are inconsistent with the provisions of the AIA Agreement.

2) The expert testimony related to the percentages charged for the penalty in the regular fees rather than the total fee charged by Blackburn. This argument was supported by the admission to confusion between the witnesses over how termination penalties should be calculated, if they are to be calculated;

3) The findings relative to Hatch's use of the October 18, 1986 billing were challenged by arguing the following:

a) Blackburn's own conduct contradicted the Court's findings;

b) The depositions of Carol Stuckey and Dan Wolterman contradicted the Court's findings.

In addition to challenging the sufficiency of the evidence supporting the trial court's findings, Hatch argued that the Court's conclusions were contrary to the law in the following ways:

1) The Court cannot fabricate a contract for the parties, especially in regards to penalties;

2) The October 18, 1986 billing is not enforceable as a separate contract because of a lack of consideration;

3) Estoppel is not available as a theory because Blackburn did not rely on Hatch's actions to his detriment.

By declining to reach the merits of Hatch's challenges to the findings of the trial court, the Court of Appeals has set a standard higher than that standard set by the Supreme Court. Hatch had marshalled together the evidence supporting the trial court's findings and has attempted to demonstrate that the trial court's findings are against the clear weight of the evidence. Hatch recognizes that great deference is given to the trial court's findings and that the burden of overturning the trial court's findings is a heavy one. He is not seeking to have the Appellate Court retry the matter. However, he is seeking to enforce his right to appeal, which the Court of appeals has effectively withdrawn by its overly restrictive standard for review. The Supreme Court's power of supervision is therefore needed and requested in protecting this right. The merits of Hatch's appeal must be considered.

DATED this ____ day of September, 1990.

Kevin V. Olsen
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) true and correct copies of the foregoing Petition for Writ of Certiorari on this ____ day of September, 1990, postage prepaid to:

Michael D. Lyon
4768 Harrison Boulevard
Ogden, Utah 84403

FILED

MAY 16 1990

Gary J. 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.

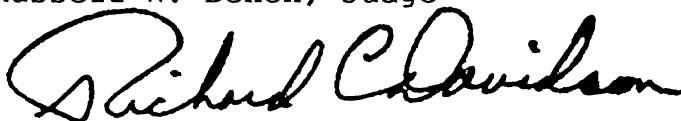


Gregory K. Orme, Judge

WE CONCUR:



Russell W. Bench, Judge



Richard C. Davidson, Judge

FILED

AUG 29 1990

Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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| James A. Hatch, |) | |
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| Plaintiff and Appellant, |) | ORDER DENYING REHEARING |
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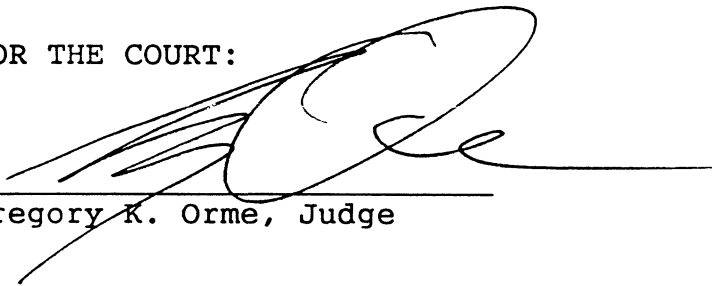
Before Judges Bench, Davidson and Orme.

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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Ogden, UT 84403

DATED this 29th day of August, 1990.

By


Deputy Clerk