

2015

**Rocky Mountain Builders Supply, Inc., Dba Ck Builders Plaintiff/
Appellant, v. Steve Marks, Defendant/ Appellee.**

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 Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

Recommended Citation

Reply Brief, *Rocky Mountain Bu v Marks*, No. 20150456 (Utah Court of Appeals, 2015).
https://digitalcommons.law.byu.edu/byu_ca3/3596

This Reply Brief 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 (2007–) 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

---oo0oo---

ROCKY MOUNTAIN BUILDERS)
SUPPLY, INC., dba CK BUILDERS)

Plaintiff/Appellant,)

v.)

STEVE MARKS,)

Defendant/Appellee.)

**REPLY BRIEF OF THE
PLAINTIFF/APPELLANT**

Appellate Case No. 20150456-CA

---oo0oo---

Appeal from Order of Dismissal of the Fourth District Court,
Utah County

The Honorable Samuel McVey, District Court Judge, Presiding District Court Case
No. 140500095

---oo0oo---

Steve Sumsion
SUMSION BUSINESS LAW, LLC
3651 N. 100 E., Suite 300
Provo, Utah 84604

George L. Chingas, Jr.
MACARTHUR, HEDER & METLER
3319 North University Avenue
Provo, UT 84604

Attorneys for Defendant/Appellee

Attorneys for Plaintiff/Appellant

**FILED
UTAH APPELLATE COURTS**

DEC 30 2015

IN THE UTAH COURT OF APPEALS

---oo0oo---

ROCKY MOUNTAIN BUILDERS)
SUPPLY, INC., dba CK BUILDERS)

Plaintiff/Appellant,)

v.)

STEVE MARKS,)

Defendant/Appellee.)

**REPLY BRIEF OF THE
PLAINTIFF/APPELLANT**

Appellate Case No. 20150456-CA

---oo0oo---

Appeal from Order of Dismissal of the Fourth District Court,
Utah County

The Honorable Samuel McVey, District Court Judge, Presiding District Court Case
No. 140500095

---oo0oo---

Steve Sumsion
SUMSION BUSINESS LAW, LLC
3651 N. 100 E., Suite 300
Provo, Utah 84604

George L. Chingas, Jr.
MACARTHUR, HEDER & METLER
3319 North University Avenue
Provo, UT 84604

Attorneys for Defendant/Appellee

Attorneys for Plaintiff/Appellant

TABLE OF CONTENTS

I. INTRODUCTION..... pg. 1

II. ARGUMENT.....pg. 2

 A. Enforcing the Forum Selection Clause Would
 Not be Unfair or Unjust.....pg. 3

 B. Like Jacobson, Appellant’s Principal Place
 of Business in Utah is Sufficient to Satisfy
 the Rational Nexus Test.....pg. 5

VIII. CONCLUSION.....pg. 7

TABLE OF AUTHORITIES

1. Cases:
 - a. *Carnival Cruise Lines, Inc. v. Shute*,
499 U.S. 585, 111 S.Ct. 1522,
113 L.Ed.2d 622 (1991).....pg.6
 - b. *Coombs v. Juice Works Dev. Inc.*,
2003 UT App 388, ¶ 15, 81 P.3d 769.....pg. 3
 - c. *Jacobsen Const. Co. v. Teton Builders*,
2005 UT 4, ¶43, 106 P.3d 719.....pgs. 1, 4, 5
 - d. *Phone Directories Co. v. Henderson*,
2000 UT 64, 8 P.3d 256.....pgs. 1, 5
 - e. *Prows v. Pinpoint Retail Sys., Inc.*,
868 P.2d 809, 812 (Utah 1993).....pgs. 1
 - f. *Ventura & Associates, L.L.C. v.*
HBH Franchise Co., LLC,
No. 2:11CV631, 2012 WL 777270,
(D. Utah Mar. 7, 2012).....pg. 3
2. Statutes:
 - a. Utah Code Ann. §13-8-3.....pg. 4

I. INTRODUCTION

Appellee's argument that the forum selection is the subject forum selection clause is unjust and unreasonable should be rejected. Appellee does not even argue that litigating the case in Utah would be "so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809, 812 (Utah 1993). He simply argues that litigating the case in Utah would significantly increase his costs especially considering the small amount at issue in the case. However, he cites no case law which supports and argument that increased costs of litigation make a forum selection clause unenforceable and in fact, fails to distinguish case law cited by Appellant holding mere increased costs of litigation is insufficient.

Furthermore, Appellees efforts at distinguishing the instant case from *Jacobsen Const. Co. v. Teton Builders*, 2005 UT 4, ¶43, 106 P.3d 719 ring hollow. There is no indication from *Jacobson*, that the result should be any different where one of the parties is a property owner rather than a contractor or subcontractor. The simple analysis in *Jacobson* is that if one of the parties has a principal place of business in Utah, that is sufficient to satisfy the rational nexus test articulated in *Phone Directories Co. v. Henderson*, 2000 UT 64, 8 P.3d 256.

Accordingly, Appellant respectfully requests that the court reverse the trial court's decision and hold that the forum selection clause in this case is enforceable to exercise personal jurisdiction over Appellee before Utah courts.

II. ARGUMENT.

A. Enforcing the Forum Selection Clause Would Not be Unfair or Unjust.

It is sometimes difficult to decipher where Appellee's argument on the enforceability of the forum selection clause begins and ends. It appears that Appellee makes the same argument basic arguments whether he is talking about the enforceability of the forum selection clause or the rational nexus test set for the in *Jacobson*. Nonetheless, Appellee seems to argue that the forum selection clause unjust and unfair and therefore, unenforceable because forcing Appellee to litigate the case in Utah would significantly increase his costs especially *vis a vis* the small amount at issue in this case (Appellee's Brief, pg. 6). However, significant by its absence in Appellee's argument is any authority which supports the argument that 1) increased cost of litigation alone is sufficient to make a forum selection clause unenforceable; and 2) that the amount at issue in the case plays any part in the

analysis of whether the forum selection clause is so prejudicial that the out of state party would essentially be deprived of his day in court.

In reality, none of the cases analyzing forum selection clauses have found that increased costs of litigation alone is sufficient to hold a forum selection clause unjust or unreasonable. *See Prows*, 868 P.2d 809; *Coombs v. Juice Works Dev. Inc.*, 2003 UT App 388, 81 P. 3d; *Ventura & Assoc., LLC v. HBH Franchise Co., LLC*, No. 2:11CV631, 2012 WL 777270 (D. Utah 2012).

Under Appellee's reasoning, any forum selection clause could be invalidated because costs of litigation will always be increased for the out of state party when a forum selection clause is enforced. This is likely why no authority located by Appellant (or Appellee) support this argument. Accordingly, the Court should hold that the forum selection clause is enforceable.

Appellee's argument that enforcing the forum selection clause in this case would incentivize other Utah companies to do incomplete and incompetent work is unpersuasive (Appellee's Brief, pg. 6). The free market and good business practices should dissuade such companies from performing shoddy work. Furthermore, there is no factual basis for Appellee's argument. Appellant did finish the work under the contract *to Appellee's satisfaction*, however, Appellee

has refused to pay the contract amount because he has had to retain an attorney (as has Appellant) as a result of the dispute.

Appellee's argument regarding Utah Code §13-8-3 is confusing. Appellee has ignored the argument in Appellant's Brief regarding the fact that §13-8-3 does not apply because both parties to the contract are not contractors, subcontractors, suppliers etc.

Appellee also conveniently ignores the fact that *Jacobson* actually held that §13-8-3 *supports the enforcement* of a Utah forum selection clause because:

[T]he policy expressed by section 13-8-3 would be best served by enforcing the forum selection clause at issue in this case and allowing Jacobson to litigate its claims in its home state.

Jacobson at ¶28. Likewise, the enforcement of the forum selection clause in this case would uphold the policy expressed in section 13-8-3 because it would allow Appellant to litigate its claim in its home state.

In the end, Appellee's argument for finding the forum selection clause in this case unenforceable are unpersuasive, unsupported by authority and worse, contradict clear authority to the contrary. Accordingly, the Court should reverse the trial court and hold that the forum selection clause in this case is enforceable.

B. Like *Jacobson*, Appellant's Principal Place of Business in Utah is Sufficient to Satisfy the Rational Nexus Test.

In his Brief, Appellee acknowledges that the fact that Appellant's principal place of business is in Utah is sufficient to satisfy the rational nexus test, "in some cases." (Appellee's Brief pg. 7). Of course, there is no authority cited by Appellee holding that in some instances, the principal place of business of one of the litigants in the forum state is an insufficient nexus.

The rational nexus test set forth in *Phone Directories* states that there must be "a rational nexus between the forum selected and/or consented to, and *either* the parties to the contract or the transactions that are the subject matter of the contract." *Phone Directories Co. v. Henderson*, 2000 UT 64, ¶ 14, 8 P.3d 256 (emphasis added).

The primary issue in *Jacobson* was to determine whether, absent any significant contacts between the transaction at issue and Utah, is the connection between Utah and one of the parties alone sufficient to satisfy the rational nexus test. The court answered this question in the affirmative. *Jacobson* at ¶43.

Therefore, Appellee's citation of facts showing that the *transaction* between the parties had no connection is irrelevant to the issue before the court here.

Appellant has not argued that there is a connection between the transaction between the parties and Utah is a sufficient connection to satisfy the rational nexus test. But Appellant does not need to do so give the holding in *Jacobson*.

Appellee contends that this case is distinguishable from *Jacobson* because this contract involved a private resident of Montana and not two businesses like in *Jacobson*. (Appellee's Brief pgs. 8-9). Again, however, Appellee cites no case law which supports his argument that this makes a difference when analyzing forum selection clauses.

This is likely an argument which should be made in relation to the enforceability of the forum selection clause, not the rational nexus analysis. Nonetheless, other courts have failed to distinguish the analysis when a private party is involved as opposed to two businesses. (See for example, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595, 111 S.Ct. 1522, 113 L.Ed. 2d. 622 (1991) (holding a forum selection clause in a non-negotiated form contract between the cruise line and a passenger is valid, so long as it is not fundamentally unfair)).

The fact that Appellant's principal place of business is in Utah is sufficient to satisfy the rational nexus test based on the holding in *Jacobson*. Accordingly, Appellant respectfully requests that the court reverse the trial court in this case and

hold that the forum selection clause is enforceable for the court to exercise personal jurisdiction over the Appellee in this case.

III. CONCLUSION

In sum, Appellee's attempts at distinguishing this case from *Jacobson* are unpersuasive. Had Appellee located some case law, somewhere which supports his argument that the amount in controversy is a significant factor in the analysis or that that fact that both parties to the contract were not businesses merits some weight, he would at least have something to talk about. Without such authority, his arguments should be rejected.

The fact remains that many Utah businesses which do business out of state rely on forum selection clauses to limit their liability and the costs which would be associated with litigation if they were forced to litigate throughout the nation where they conduct business. Invalidating the forum selection clause in this case calls into serious question forum selection clauses used by Utah businesses which rely on the holding from *Jacobson*. Appellee's argument that the holding here can be narrowly tailored to only involve contracts for residential construction under \$11,200 is not persuasive and would cause Utah trial courts to have to analyze

these cases solely on a case by case basis without any firm direction from Utah Appellate Courts.

The holding in *Jacobson* is clear. One party's connection to Utah, based on the location of its principal place of business, is sufficient to satisfy the rational nexus test.

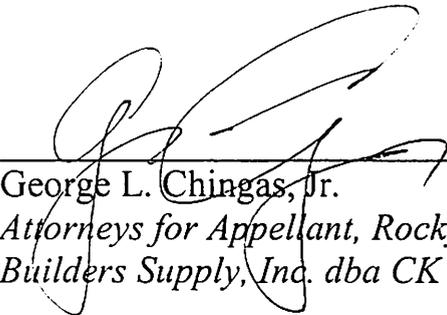
Based on the foregoing facts, law and argument, Appellant requests the following relief from the court:

1. That the court reverse the trial court's ruling that the Forum Selection Clause is unenforceable;
2. That the court reverse the trial court's ruling that there is not a sufficiently rational nexus to Utah to justify the exercise of personal jurisdiction over appellee;
3. That the court reverse the trial court's ruling that the application of §13-8-3 makes enforcement of the Forum Selection Clause unjust;
4. That the court reverse the Trial Court's Order dismissing Appellant's Complaint without prejudice;

5. That the court enter a ruling instructing the trial court that the Forum Selection Clause should be enforced in this case to exercise personal jurisdiction over Appellee in this matter.

DATED and SIGNED this 29th day of December, 2015.

MACARTHUR, HEDER & METLER

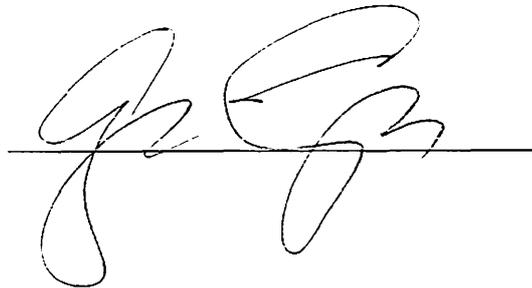


George L. Chingas, Jr.
*Attorneys for Appellant, Rocky Mountain
Builders Supply, Inc. dba CK Builders*

MAILING CERTIFICATE

I hereby certify that on the 29th day of December, 2015, I caused to be mailed two (2) true and correct copies of the foregoing *Reply Brief of the Plaintiff/Appellant*, to the following, by U.S. First Class Mail, postage prepaid and addressed as follows:

Steve Sumsion
Sumsion Business Law
3651 N. 100 E., Suite 300
Provo, Utah 84604
Attorneys for Defendant/Appellee Steve Marks



Certificate of Compliance With Rule 24(f)(1)

- 1) This brief complies with the type-volume limitation of Utah App. P.24(f)(1) because this brief contains 2,097 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).

- 2) This brief complies with the typeface requirements of Utah R. App. P.27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt. Times New Roman style.