1983

Wilderness Building Systems Inc., And Kerry R. Hubble v. Charles H. Chapman And Edythe S. Chapman : Brief of Appellants

IN THE SUPREME COURT OF THE

STATE OF UTAH

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WILDERNESS BUILDING SYSTEMS INC., and KERRY R. HUBBLE,

Plaintiffs Appellants,

vs.

CHARLES H. CHAPMAN and EDYTHE S. CHAPMAN,

Defendants Respondents.

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BRIEF OF APPELLANTS

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

HONORABLE HOMER F. WILKINSON

PRESIDING

JOHN WALSH
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SUITE 202 COVE POINT PLAZA
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623 East First South
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IN THE SUPREME COURT OF THE

STATE OF UTAH

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WILDERNESS BUILDING SYSTEMS
INC., and KERRY R. HUBBLE,

Plaintiff-Appellant,

vs. Case No. 19009

CHARLES H. CHAPMAN and
EDYTHE S. CHAPMAN,

Defendants-Respondents.

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BRIEF OF APPELLANTS

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a Directed Verdict, entered against the Plaintiff-Appellant, after a jury had awarded the Plaintiff-Appellant $7,250.00. This was tried before the jury of three theories: (1) lien foreclosure, (2) breach of contract and (3) quantum merit. The jury verdict was set aside on the basis that the Plaintiff-Appellant was not a licensed contractor at the time of the contract between the parties.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant respectfully requests that the matter be reversed and remanded with instruction to enter

judgment for the Plaintiff against the Defendant in the amount of $7,250.00, along with interests and costs, and attorneys fees in the sum of $2,500.00.

STATEMENT OF THE FACTS

In the early spring of 1981, the Plaintiff advertised the sale of a "package home". This packaged home was a log cabin kit and consisted of the logs and certain limited construction materials.

The Defendants answered the advertisement, put money down for the same, and subsequently purchased the same outright.

During the months of May and June of 1981, the Defendants frequented the place of business of the Plaintiff to learn more about the construction of said kit. Then, at or about the first of June, the parties entered into an agreement for the erection of said kit as follows: (1) the parties agreed on the purchase of additional materials that were not included in the kit. Note Exhibit 4-P and (2) the Plaintiff agreed to erect the kit, which consisted of these additional materials and the basic logs. Note Exhibit 5-P. It should be noted that the Defendant was going to do all of the plumbing, electrical work, insulation, water proofing, shingles, and all of the interior work, and the Plaintiff was only going to do the log work.

At the time of trial, the Plaintiff and his witnesses testified that it was agreed at the time of the contract that the Plaintiff would work for the Defendant, and the Defendant

[illegible] the general contractor and building his own home. Defendant denied the same at trial and testified that he first learned that the Plaintiff was not licensed when the work was terminated.

The Plaintiff worked through the summer to erect the Defendants' log kit. Through the course of the erection there were various change orders and finally in the month of August, the Defendant requested that the Plaintiff just put the roof on and be done.

At this time, the Defendants engaged an attorney who wrote the Plaintiff a letter, indicating that since the Plaintiff was not licensed he could not collect for the work that he had done. The letter further stated that if the Plaintiff would leave the job and file no liens then the Defendant would take no action against the Plaintiff for contracting without a license. Note Exhibit 18-P.

However, Plaintiff demanded payment and the Defendants refused the same.

Thereafter, the Plaintiff filed two liens, (1) for additional materials based upon the contract, Exhibit 4-P, and the change orders along the way, and (2) for labor. Note Exhibit 16-P for materials and 15-P for labor.

Plaintiff filed suit to foreclose the said liens and asserted three causes of action: (1) foreclose the liens, (2) damages stemming from breach of contract and (3) money damages from unjust enrichment.

Defendants answered and counterclaim on the basis of a refund as well as for faulty workmanship, each based on the fact that the Plaintiff was not licensed.

After discovery was completed, the Defendants filed a Motion for Partial Summary Judgment, on the basis that the Plaintiff was not a licensed contractor and hence his contracts and particularly the one with the Defendants are void. The motion was heard on November 15, 1982, before the Honorable Homer F. Wilkinson, District Judge, just three days before trial. According to the minute entry on page 58 of the file: "Court finds that questions of fact have been raised that are material thereby denies the motion and indicates that trial will take 2 days, it now being a jury trial, and it will proceed on schedule."

The trial proceeded as scheduled and the Plaintiff put on evidence to substantial the following: (1) That the Defendants were as protected from inept and financially irresponsible builders as they otherwise would have been if Plaintiff had in fact been licensed. (2) That the Defendants knew or should have known that the Plaintiff was not licensed and still went ahead and did business with him, and reaped the benefit of a reduced price for his services because he was not a general contractor. (3) That there was a licensed contractor on location who oversaw all the construction of the Defendants cabin. (4) That the Defendants were the sole owners of the property and that the cabin was being built by the Defendants and that it was for their own personal use.

During the course of the trial, Court and counsel [illegible] in chambers and reviewed and revised the jury instructions. [illegible] many hours of the same, Judge Wilkinson drafted jury instruction #11, which reads as follows:

> You are instructed that the contract between the parties is enforceable if you find that all work was performed by a licensed contractor or the work done by defendants employees was completely supervised by a licensed contractor.

Note the proposed jury instruction, as found on page 67, of the record, with the accompanying notation thereon, "Given in substance H.F.W."

After the Plaintiff had put on his case, as set forth above, he rested and the Defendants made a motion for a directed verdict, which the Court took under advisement.

Defendants thereafter, presented their case and the matter was submitted to the jury.

Along with the regular jury instructions, a special verdict was submitted to and responded to by the jury as follows:

> (1) Do you find that the work done by the Plaintiff on the Defendants' cabin was performed by a licensed contractor or that the work of the employees was completely supervised by a licensed contractor?
>
> ANSWER: (yes)YES ____ NO
>
> (2) Do you find that the Plaintiff materially complied with the plans, labor contract, material contract, and mutually agreed to changes made by the Plaintiff and the Defendant?
>
> ANSWER: (yes)YES ____ NO

(3) If your answer to question (1) and (2) is yes then state what sum if any the Plaintiff is entitled to recover for labor performed and [illegible] supplied.

SUM $($7,250.00)

(4) If your answer to Ouestion 2 was no then state what sum if any the Defendant is entitled to recover for Plaintiff's failure to comply with the Plaintiff's plans, labor contract, material contract, and mutually agreed to changes made by the Plaintiff and Defendant

SUM $_____

Dated this (19th) day of November, 1982

(6:50 P.M.)

(Melvin A. Jensen)
JURY FOREPERSON

While the jury was deliberating, Court and Counsel agreed that a reasonable attorneys fee, no matter who prevails was the sum of $2,500.00.

Several days later, Defendants' Counsel noticed up his Motion for a Directed Verdict and the same was heard by the Honorable Homer F. Wilkinson, District Judge, on December 1982.

The bottom of the minute entry reads as follows:

> Court indicates that the defense at the time of the trial when Plaintiff rested made a motion to dismiss and the Court took motion under advisement. Court feels the question of whether the Plaintiff was a general contractor or not was a matter of law and the instructions given to the jury were not appropriate. Court finds that the Plaintiff was not a general contractor and not entitled to recover and dismisses the case indicating the jury ruled on the counter-claim and it's (sic) verdict will stand.

From this order, the Plaintiff appeals, and submits that the matter should be reversed and sent back to the Dis-

court to enter judgment against the Defendants-Respondents in the amount of $7,250.00 plus interests and costs, and an attorneys fee in the sum of $2,500.00

In the alternative, Plaintiff submits that the matter be remanded to the District Court with instructions to retry the matter with corrected jury instructions, so the Plaintiff can assert his claims for the total $9,272.45.

STATEMENT OF THE LAW

ARGUMENT ONE

PLAINTIFF CAN COLLECT FOR BOTH LABOR AND MATERIALS WHEN HE SUPPLIES THE SAME TO AN OWNER BUILDING HIS OWN HOME FOR HIS OWN PERSONAL USE.

In the facts of this case, the Plaintiff testified that he had several conversations with the Defendant Charles Chapman, to the effect that Plaintiff was not a licensed contractor, but he could work for the Defendant and the Defendant could build his own home himself without be a general contractor.

According to the building permit for the cabin, the same was taken out and signed for by the Defendant. Note Ex. 28-D.

While it is true that the Defendant denied any such conversations and concommitantly any such agreement, Appellant submits that the matter should have been submitted to the jury.

According to 58-23-2(5), Utah Code Annotated as amended in 1953: "Sole owners of property building structures thereon for their own use." are exempted from the statute requiring a contractors license.

Then in 58-23-1, Utah Code Annotated as amended the legislature set forth what would be considered as prima facia evidence of one acting in the capacity of a contractor:

> Evidence of the securing of any construction or building permit from a governmental agency . . . shall be admissible in any court of the State of Utah as prima facia evidence of engaging in the business or acting in the capacity of a contractor.

Hence, in the facts before this Court, the Plaintiff asserts that Defendants agreed to be the general contractor and that he the Plaintiff would work for him, and that as a result the permit for the construction of the cabin was taken out by the Defendant.

Consistent herewith, the Plaintiff submitted the following jury instruction: (Note page 69 in the record)

> You are instructed that the Plaintiff need not be licensed and the contract between the parties is enforceable if you find all of the following (1) the Defendants were the sole owners of the property, (2) the Defendants were building the cabin on the said property and (3) the cabin was for the Defendants own use.
>
> (Denied H. F. W.)

Appellant submits that this is error. Surely, as is express in the statute, a person can build his own home without being a licensed contractor. It may not be wise for him to do the same, but that is up to the legislature, and its express provision for the same surely was no oversight.

Respondent may contend that Defendant equally denies the existence of such an arrangement, but that only raises

issue to a question of fact which should have been submitted to the jury.

ARGUMENT TWO

AN UNLICENSED CONTRACTOR CAN STILL COLLECT FOR BOTH HIS LABOR AND MATERIALS WHEN THE OWNERS ARE OTHERWISE PROTECTED FROM INEPT AND FINANCIALLY IRRESPONSIBLE BUILDERS.

According to the testimony before the lower Court, the Plaintiff was to erect the log cabin kit and the Defendant was to do all of the additional work. ie: plumbing, electrical, shingles, water proofing, insulating, all interior work, etc.

Essentially, the Plaintiff was to do the heavy work and the Defendant was to do the technical work.

As a result, Plaintiff submits that it is hard to imagine someone embarking on the same without having a certain degree of both knowledge and expertise.

In the case of Lignell vs. Berg, 593 P.2d 800, (Utah) 1979, at page 805, the Supreme Court stated that the statute requiring individuals to be licensed was intended to protect the public.

> This Court has had frequent occasion to comment on the status of unlicensed contractors, and has persistently construed the cited statute as having been designed to protect the public and consequently to bar recovery by unlicensed contractors for services rendered under their contracts. The most recent Utah cases so holding are Mosely vs. Johnson, 22 Utah 2d 348, 453 P.2d 149, and Meridian Corp v. McGlynn Garmaker Company, Utah, 567 P.2d 1110. The rationale of those cases is, however, that the party from whom the contractor seeks to recover is in the class the legislature intended to protect. A litigant is not a member of that class if the required

protection (i.e., against inept and financially irresponsible builders) is in fact afforded by another means. (emphasis added)

In the facts before the Court, the "financially irresponsible" element, Appellant submits, is not applicable. The Defendant was the one purchasing all of the materials from Plaintiff. Plaintiff was not to engage any subcontractors, nor materialmen, nor any laborers outside his own crews

It should be noted that payment for labor, etc., was due after performance of the contract, hence, no exposure to the Defendants financially because they could withhold payment until the Plaintiff had complied with the contract.

Hence, any material was to be paid for by the Defendant pursuant to the agreement, as well as any additional costs for subcontractors or laborors which the Defendant would have engaged independant of the Plaintiff. So the Plaintiff being licensed or not licensed would have had no effect on the Defendant. Therefore Plaintiff-Appellant submits that the only remaining criteria is the "inept builders" criteria.

In the Lignell, supra, case however, the Court concluded that because of the knowledge and expertise of the owners they were not in the class of those to be protected. Hence, the Court allowed recovery.

Note significantly, the case of Fillmore Products vs. Western States, 561 P.2d 687, Utah, 1977, which holds that when an individual engages one who he knows is not licensed

work for him, he can not thereafter assert that he can walk away from a valid debt, when the same was incurred with his knowledge, request and approval, and moreover his experience.

So it is in this case, the Defendant-Respondent was to do all of the technical work both inside and out of his cabin. The Plaintiff was to do only the heavy work for the elderly couple, and the balance was to be completed by them.

Plaintiff submits that because the Defendants were not members of the class intended to be protected by the statute requiring individuals to be license contractors, they are precluded from asserting that Plaintiff can not collect a just debt because he was in fact not licensed.

Accordingly, Plaintiff submitted a jury instruction involving the same, as noted on page 68 in the record.

> You are instructed that the Plaintiff need not be licensed and the contract between the parties is enforceable if you find that the Defendants were as protected from inept and financially irresponsible builders, as they otherwise would have been if Mr. Hubble had in fact been licensed.
>
> (Denied H.F.W.)

Plaintiff-Appellant submits that whether the Defendants were protected from inept and financially irresponsible builders, was a question of fact, and therefore should have been submitted to the jury.

ARGUMENT THREE

THERE IS NO MECHANICAL RULE DECLARING ALL CONTRACTS BY UNLICENSED CONTRACTORS VOID AND THE PENALTY SHOULD FIT THE OFFENSE.

The Utah Supreme Court has stated more recent[ly] the provision in the Utah Code Annotated requiring indiv[iduals] contracting to be licensed, should not be applied mechanic[ally] to allow unjust enrichment.

In Mosley vs. Johnson, supra, Chief Justice Crocke[tt] in his dissenting opinion states on page 154:

> In reference to this rule, Corbin on Contracts, Vol[ume] Sec. 1512, observes that the rule which precludes [re]covery by one unlicensed to perform a particular se[rvice] should not be arbitrarily applied and that:
>
> ******* even in these cases enforecment of the wron[g] bargains is not always denied him. The statute may clearly for protection against fraud and incompetenc[e] but in very many cases the statute breaker is neith[er] fraudulent nor incompetent. He may have rendered e[x]cellent service or delivered goods of the highest quali[ty] his non-compliance with the statute seems nearly har[d] and the real defrauder seems to be the defendant wh[o] enriching himself at the plaintiff's expense. Alth[ough] many courts yearn for a mechanically applicable rule they have not made one in the present instances. Jus[tice] requires that the penalty should fit the crime; and justice and sound policy do not always require the e[n]forcement of licensing statutes by large forfeitures going not to the state but to repudiating defendants. (emphasis original)

Also, in Whipple vs. Fuller, 299 P. 2d 837, Utah, [1]956 the Court stated on pages 838 and 839:

> For the appellant to escape liability on "the failu[re] to be licensed theory" would subvert the theory [of] As the California court said in Matchett vs. Gould [2]99 P.2d 524, at page 529.
>
> * * * recovery can be had upon the contract in the absence of a license when equity and good conscience dictate such relief as an alternative to a judgment which would convert a law intended "for the safety [and] protection of the public" into "an unwarranted shield for the avoidance of a just obligation."

It was observed by the Federal Circuit Court for the Tenth Circuit in considering our licensing statute:

> Neither these statutory provisions nor any others called to our attention provide in express language that a contract employing an unlicensed contractor to perform services falling within the field of his trade shall be unenforceable * * *

Note Dow vs. United States, for the Use and Benefit of 154 F.2d 710.

Note also Butterfield vs. Chaney, 366 P.2d 607, Utah, 1961 and Platt vs. Locke, 358 P.2d 95, Utah, 1961.

Even assuming that the Plaintiff had no agreement about the Defendant acting as his own contractor, according to the facts before this Court, the Defendant knew or should have known that Plaintiff was not licensed and still went ahead and did business with him.

Consistent with the testimony of the Plaintiff, Exhibit 5-P, states before itemizing the labor to be performed:

> Wilderness Building Systems proposes to perform all labor as necessary to complete the following by experienced or licensed personnel in good workmanlike manner.

As a result, Plaintiff submitted the following jury instruction as found on page 70 of the record:

> You are instructed that the Plaintiff need not be licensed and the contract between the parties is enforceable if you find that the Defendants knew or should have known that the Plaintiff was not licensed and still went ahead and did business with him.
>
> (Denied H.F.W.)

Counsel for the Plaintiff submits that it is hard to imagine a more unfair and unjust situation than where an individual knows that he is engaging the services of one who

is not licensed, and reaps the benefit of a lower cost for so doing, and then when the work is completed he refuses to pay for the same on the basis that the individual was not licensed.

Again, whether the Defendant-Respondent knew that the Plaintiff was licensed or not was a question of fact, which should have been submitted to the jury.

ARGUMENT FOUR

AN UNLICENSED CONTRACTOR CAN COLLECT FOR BOTH LABOR AND MATERIALS IF THE WORK IS COMPLETELY SUPERVISED BY A LICENSED CONTRACTOR.

In the case of Motivated Management International v. Finney, 604 P. 2d 467, Utah, 1979, the Utah Supreme Court was faced with a set of facts which Counsel submits are uniquely similar to the case at bar.

In that case, the Plaintiff was selling a "packaged home". Plaintiff was doing the rough framing. Defendant was to act as his own contractor. A licensed contractor oversaw the work of the Plaintiff and was paid by the Plaintiff. Plaintiff supplied the packaged home. Defendant received the labor at a reduced price because he did not have to pay a general contractor to do the same work. Defendant had the benefit of the assistance of an architect.

All in all the facts are almost identical to the case before this Court, as each of the aforesaid facts are true in this case.

According to the Motivated Management case, supra,

. . . licensed contractor can collect for both labor and material when the work is overseen by a licensed contractor.

In the case before this Court, the Special Verdict, by the jury, Counsel submits, is dispositive:

> (1) Do you find that the work done by the Plaintiff on Defendant's cabin was performed by a licensed contractor or that the work of the employees was completely supervised by a licensed contractor?
>
> ANSWER (Yes) YES ___ NO

This Court has very strongly recognized the right to trial by jury and the sanctity of their verdicts.

In Efco Distributing, Inc. vs. Perry, 17 Utah 2d 375, 412 P.2d 375, Utah, 1966, the Court stated:

> . . . unless some such error or impropriety as just stated is clearly shown, the verdict of the jury should stand. We have heretofore receited the values and the importance of trial by jury. It provides a means of protection of individual rights, and of redress against any form of injustice, real or imagined, by an appeal to a group of ordinary citizens as distinguished from being compelled to submit to any other authority. This method of settling disputes is the leaven in our system of law and justice which keeps it close to the people who are the ultimate source of power, both in the creation and in the enforcement of the law. For these reasons it is properly regarded an essential ajunct to and in harmony with, our whole democratic system which the Courts have taken care and exercised restraint to safeguard.
>
> Consistent with that viewpoint, when the parties have had the opportunity of presenting their evidence and arguments concerning their dispute to the jury, the judgment of the jury should be allowed to swing through a wide arc within the limits of how reasonable minds might see the situation; and the court should not upset a verdict merely because it may disagree. if it did so, the right of trial by jury would be effectively abrogated and the trial may as well be to the Court in the first place . . .

It should be noted that the Defendant raised t
that the Plaintiff was not a licensed contractor on a
Partial Summary Judgment, just three days before the tri

The Honorable Homer Wilkinson, District Judge, ar
concluded, according to the minute entry: "Court finds t
questions of fact have been raised that are material there
denies the motion and indicates that trial will take 2 da
it now being a jury trial, and it will proceed on schedule

Between the said motion and the trial, there was n
change in the facts. Defendants argued that the Plaintiff
not a licensed contractor at the time of the contract, and
Plaintiff argued that he had a licensed contractor on sigh
that oversaw the construction of the Defendants cabin.

The Special Verdict instruction, was prepared by t
Honorable Homer Wilkinson, again on the basis that a licens
contractor completely supervised the work.

Counsel submits that in light of the Motivated Mana
case, supra, these Defendants would have been in no better
of protection had the Plaintiff been licensed, and the jur
verdict so holding should not have been altered by the Cour

In conclusion, according to the facts, the Plaintiff
filed two liens. Exhibit 15-P for labor and Exhibit 16-P
materials.

Even assuming that the Plaintiff was not licensed
that he is therefore precluded from recovery for his labo
is no basis to say that he is not entitled to be paid for
materials.

for only should the Plaintiff be entitled to collect on a foreclosure basis, but he should on a breach of contract theory and an unjust enrichment theory. It should be noted he plead and proved, Counsel submits, each theory.

SUMMARY

Counsel submits that Plaintiff should be allowed to recover to total amount sued upon on the basis that the Defendants were acting as their own contractor, and Plaintiff worked for him. The fact that the Defendant took out the permit is prima facia evidence that he was the contractor. Surely, the Plaintiff should be able to submit the same to the jury, the trier of fact.

Plaintiff should be allowed to collect on the basis that the Defendants were in exactly the same position as they would have been, re: inept and irresponsible builders, if the Plaintiff had in fact been licensed. There was no exposure to the Defendants. The only ones who could make claim against the Defendants would be laborers of the Plaintiff, and the Defendants could have paid them upon the return of a Lien Waiver. This coupled with the knowledge and experience of the Defendants puts them is the exact same position as if the Plaintiff had in fact been a licensed contractor.

The penalty should fit the offense. According to the version of the Plaintiff, the Defendant enters into an agreement for the construction of his log cabin, for both labor and materials. Defendants knowingly engage the Plaintiff to do the same as an unlicensed contractor. They pay less because of this fact, and

then refuse payment all together because the Plaintiff was not licensed. Like one who uses the statute of frauds to perpetrate a fraud, Defendants cause a greater harm, than the licensing statute was designed to prevent. The injustice perpetrated by the Defendants is the most intollerable unjust enrichment.

Lastly, the Defendants were protected to same degree as they would have been if the Plaintiff was in fact licensed as the jury concluded that the work was completely supervised by a licensed contractor.

As a result, the matter should be reversed and sent back to the lower Court with instructions to enter judgment for the Plaintiff and against the Defendants in the sum of $7,250.00 plus interest and costs and attorneys fees on the amount of $2,500.00 on the basis of either, lien foreclosure, breach of contract or unjust enrichment.

In the alternative, the matter should be reversed and set back to the lower Court with instructions to enter judgment for the Plaintiff and against the Defendants in the sum of $4,831.45 plus interest and costs and attorneys fees in the sum of $2,500.00 on the basis of materials supplied.

Should this Court find that none of the above remedies are appropriate, Counsel submits that this matter should be reversed and remanded to the lower Court, with instructions to retry the matter on the basis of the excluded jury instruction.

RESPECTFULLY submitted this 2nd day of June, 1983.

JOHN WALSH
ATTORNEY FOR APPELLANT

CERTIFICATE OF DELIVERY

I hereby certify that I delivered two (2) copies of the BRIEF OF THE APPELLANT to J. KENT HOLLAND, ANDERSON & HOLLAND, ATTORNEY FOR THE DEFENDANTS, 623 East First South, Salt Lake City, Utah, 84102, this 3rd day of June, 1983.

JOHN WALSH
ATTORNEY FOR APPELLANT