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IN THE SUPREME COURT OF THE

STATE OF UTAH

WILDERNESS BUILDING SYSTEMS, INC., and KERRY R. HUBBLE,	)	
Plaintiffs-Appellants,	)	CASE NO. 19009
vs.	)	
CHARLES H. CHAPMAN and EDYTHE S. CHAPMAN,	)	
Defendants-Respondents.	)	

BRIEF OF DEFENDANT-RESPONDENT

APPEAL FROM AN ORDER OF THE THIRD

JUDICIAL DISTRICT COURT, IN AND FOR

SUMMIT COUNTY, STATE OF UTAH

HONORABLE HOMER F. WILKINSON

PRESIDING

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Clerk, Supreme Court, Utah

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Defendants-Respondents.	)	

BRIEF OF DEFENDANTS-RESPONDENTS

NATURE OF THE CASE

The Appeal in this matter is from a Directed Verdict granted against plaintiffs and in favor of defendants. The Directed Verdict is premised on the Court's determination, that whether the plaintiffs were a general contractor, i.e. a licensed contractor or not, was a matter of law. Further, the Court determined that they were not entitled to recover.

RELIEF SOUGHT ON APPEAL

Defendants-Respondents respectfully request that the judgment of the Trial Court be affirmed.

STATEMENT OF THE FACTS

The Plaintiffs-Appellants, hereinafter referred to as "Plaintiffs", in their Statement of Facts, set forth in part, the applicable and pertinent facts. Many of the statements in that section of plaintiffs' Brief on Appeal are not supported by the record and are merely gratuitous. Accordingly, it is necessary to state the appropriate and relevent facts with references to the available record and address statements of fact asserted by the plaintiff that are outside the record.

The Respondent-Defendant, hereinafter referred to as "Defendant", Charles H. Chapman, is a retired Air Force enlisted man, without any building construction experience. The other Respondent-Defendant, hereinafter referred to as "Defendant", Edythe S. Chapman, is a housewife and nurse, who has no other connection with this matter other than a co-owner of the property upon which the cabin was constructed.

The plaintiff, Wilderness Building Systems, Inc. is not a registered corporation, nor is it a registered "d/b/a", let alone authorized to do business in the State of Utah; nor is it a licensed contractor, licensed to construct cabins or any structures in the State of Utah (R-051) of the Court documents). Its co-plaintiff who

represents himself as the President of that nonexistent corporation, Kerry R. Hubble, and was not, at the time of the contract, construction, nor trial, a licensed contractor in Utah or any other state (R-052).

The defendant, Charles H. Chapman, purchased outright from plaintiff, Wilderness Building Systems, Inc., a log kit which consisted of the logs to construct the outside shell of a log cabin in May of 1981 (See Exhibit 3-P). This purchase is not contested and was not the subject matter of this lawsuit.

Later, the defendant, Charles H. Chapman, negotiated with plaintiff and reached a signed agreement to purchase the additional materials needed to erect the cabin in Summit County (See Trial Exhibit 4-P). At the same time, the parties orally agreed to have plaintiff construct the cabin utilizing the previously purchased log kit and the additional log home framing package as shown in Exhibit 4-P for the sum of $2,500.00. When the oral agreement was reduced to writing, the erection cost was unilaterally changed by plaintiffs to $3,850.00, which was $1,350.00 more than the original price of $2,500.00 (See Exhibits 5-P and 17-P). The change in price is what prevented the Respondent, Charles H. Chapman from signing the document. Other than the change in price, the document reflects the intent of the parties that plaintiff, Wilderness Building Systems, Inc., as contractor, build

the cabin.

The Respondent, Charles H. Chapman, as a total inexperienced individual in construction, hired an assumed licensed contractor, Appellant, Wilderness Building Systems, Inc. and Kerry R. Hubble, to act as the general contractor, to properly construct his cabin as shown by the building permit (See Exhibit 28-D).

The cabin was to be constructed, based upon architectural drawings and sketches provided by plaintiffs (See Exhibits 9-P, 10-P, 11-P, and 12-P). During the progress of construction, it became apparent to Respondent, Charles H. Chapman, that the specified and purchased materials were not being used, and that the construction itself was not consistent with the architectural drawings, nor the sketches furnished by plaintiffs (See Exhibit 17-P).

At that time, defendant, Charles H. Chapman, requested that plaintiffs cease and disist any further construction on the cabin (See Exhibit 18-P). Further, defendant, Charles H. Chapman, contacted the State of Utah, Department of Business Regulations, Division of Contractors, to lodge a Complaint against plaintiffs, Wilderness Building Systems, Inc. and/or Kerry R. Hubble. It was at this time, that defendants learned for the first time that neither of the plaintiffs were licensed contractors. Defendant, Charles H. Chapman, then proceeded to file a Complaint against the plaintiffs at the above-referenced Division

of Contractors (See Exhibit 17-P).

After it had become evident that the Division of Contractors was powerless to act against plaintiffs since they were unlicensed and therefore had no license upon which the Division of Contractors could act upon, defendants prepared, through an attorney, a Complaint. However, before it could be served upon the plaintiffs, a Complaint filed by plaintiffs was served upon the defendants. Said Complaint being filed on February 24, 1982 (See R-001, 002, 003 and 004). An Answer and Counterclaim was filed by defendants on March 17, 1982 (R-001, 012, 013, 014, 015 and 016). Contrary to the statement made by plaintiffs in their Brief, defendants Answer and Counterclaim is not premised solely on the fact that plaintiffs were unlicensed, but primarily because of improper construction (R-11, 012, 013, 014, 015, and 106). After the completion of discovery, defendants filed a Motion for Partial Summary Judgment premised on statute. Said statutes were Utah Code Annotated, Sec. 58-1-26, 58A-1-1 or their predecessor, 58-23-26 and 58-23-1.

UTAH CODE ANNOTATED, SEC. 58A-1-26, ACTION FOR COMPENSATION AS CONTRACTOR PROHIBITED WITHOUT A LICENSE.

No contractor may act as agent or commence or maintain any action in any court of the state for collection of compensation for the performance of act or acts for which

a license is required by this chapter without alleging and proving that he was a duly licensed contractor when the contract sued upon was entered into and when the alleged cause of action arose.

> UTAH CODE ANNOTATED, SEC. 58A-1-1 LICENSE REQUIRED FOR CONTRACTING - PRIMA FACIE EVIDENCE OF CONTRACTING.
>
> It shall be unlawful for any person, firm, copartnership, corporation, association, or other organization, or any combination of any thereof, to engage in the business or act in the capacity of contractor within this state without having a license therefor as provided in this code, unless the person, firm, copartnership, corporation, association or other organization is specifically exempted. Evidence of the securing of any construction or building permit from a governmental agency, <u>or the employment of any person on a construction project, or the offering of any bid to do the work of a contractor as herein defined</u>, shall be accepted in any court of the State of Utah as prima facie evidence of engaging in the business or acting in the capacity of a contractor.

The Motion for Partial Summary Judgment was heard on November 15, 1982 before the Honorable Homer F. Wilkinson, District Court Judge, found that questions of fact were raised, and denied the Motion (See R-058).

Trial proceeded on November 18, 1982 before a jury, presided over by the Honorable Homer F. Wilkinson. At the close of plaintiffs' case, after the Court had received testimony from plaintiffs' witnesses that they were unlicensed at the time of the contract, construction, and even were still unlicensed during the trial to construct

other structures, testimony was elicited that individuals employed on the cabin, which is the subject matter of this case, were employed by plaintiffs' and were paid by plaintiffs. Defendants made a Motion for Directed Verdict, again based upon the aforementioned statutes.

At that time, the Court took defendants' Motion under advisement and defendants proceeded with their portion of the trial, rebutting plaintiffs allegations and laying the foundation for their Counterclaim. The Motion for Directed Verdict was again renewed at the close of defendants case, but was still taken under advisement, and the matter was then given to the jury. The jury came back in favor of plaintiffs and against defendants in the sum of $7,250.00. At this time, defendants made a Motion for Directed Verdict and/or Motion Not Withstanding Verdict, but was advised by the Court that this matter would be ruled upon at a later date (See R-58-A-B-C).

On the 20th day of December, 1982, further argument was heard on defendants Motion, and a Motion for Directed Verdict was granted, and it is from this Motion for Directed Verdict that plaintiffs appeal.

ARGUMENT

POINT I.

THERE IS NO COMPETENT EVIDENCE THAT EITHER PLAINTIFF WAS A LICENSED CONTRACTOR AUTHORIZED TO CONSTRUCT CABINS OR OTHER STRUCTURES IN THE STATE OF UTAH, SO AS TO JUSTIFY VACATING THE ORDER GRANTING DIRECTED VERDICT.

The Certificate of Custodian of Records on file herein, and dated November 15, 1982, state unequivocally that neither plaintiff was a licensed contractor ever in the State of Utah, either previously or at that time. These Certificates are a total impeachment of plaintiff, Kerry R. Hubble's statement in his deposition taken three (3) months previously on the 4th day of August, 1982 (Pg. 14, Line 17 et seq.).

Further, the testimony of plaintiffs at the time of trial, was unable to rebut the aforementioned Certificate of Custodian of Records, and even further admitted that they were not licensed in any other state. Therefore, it is an unimpeachable fact that neither of the plaintiffs

were licensed contractors in the State of Utah or anywhere at the time of contracting, construction or trial. [illegible] for the license are set forth in Meridian Corp. vs. McGlynn/Garmaker Co., 567 P2d 1110 (1977), where the Utah Supreme Court stated:

> "This Court has held that the contracts of unlicensed contractors are void. In the case of Olsen vs. Reese, we held:
>
> The authorities are fairly uniform to the effect that failure to obtain a license which is required by a statute enacted solely for revenue purposes does not render contracts made by the offending party void. On the other hand, contracts made by an unlicensed contractor when in violation of a statute passed for the protection of the public are held to be void and enforceable. Our statute is so worded as to indicate a legislative intent to protect the citizens from irresponsible contractors. The statute, while not comprehensive provides for a small license fee. Control over the contractor is given to the Department of Registration. Upon an appropriate hearing, the Department may, for unprofessional conduct, suspend or cancel the license. Good reputation and integrity are essential to obtaining a license and the entire object of the statute is protection of the public against fradulent and illegal practice, which have always been recognized as a distinct characteristic of statutes, which are not mere revenue measures. The statute being enacted for the protection of the public, Plaintiff's written contract is void..."

In the Meridian case, an out-of-state contractor who held a license in another state and not Utah, was denied the right to recover under construction contracts. The Court would not allow a substitution of license from another state to Utah. Neither of plaintiffs held a license

anywhere. Therefore, plaintiffs have no basis to request vacation of the Order granting Directed Verdict.

POINT II

THERE IS NO COMPETENT EVIDENCE THAT PLAINTIFFS DID NOT ACT AS THE CONTRACTOR ON THE CABIN.

The evidence that is before this Court is that plaintiffs contracted to erect the cabin (See Exhibit 5-P). The evidence additionally shows that plaintiff, Kerry R. Hubble, was listed as the contractor on the building permit (See Exhibit 28-D). There is no question that plaintiffs contracted the erection of said cabin for a pre-determined amount albeit $2,500.00 as defendants contend or $3,850.00 as the agreement only signed by plaintiffs states (See Exhibit 5-P). Plaintiffs did not contract to build the cabin for wages. Plaintiffs hired employees to perform the construction on the cabin, and as employers, paid wages to the employees. The defendants did not pay wages and were therefore not owner-contractors.

The applicable statute, 58-A-1-1, and its predecessor, 58-23-1, Utah Code Annotated, (1953), establishes prima facie evidence of contracting. It states that if the plaintiffs employed any person on the construction project (the cabin) which they have testified to, both in deposition (Kerry R. Hubble deposition, Pg. 31

line 14, et. seq.), and at trial, or the offering of any [illegible] to the work, which is exactly what plaintiffs did [illegible] the "Log Home Framing Package Erection Agreement" (See Exhibit 5-p), then plaintiffs are prima facie established as contractors under the contract. The Trial Court Judge allowed plaintiffs to put on their case to rebut the prima facie evidence that they were acting as contractors and as such, were required to be licensed, particularly if they wished to maintain an action for recovery of work performed. Even at Trial, plaintiff, Kerry R. Hubble, admitted that he had plead guilty to a misdemeanor charge of contracting without a license on this exact project, the Chapman cabin, filed by the Summit County Attorney.

In the discretion of the Trial Court Judge, plaintiffs failed in their case to establish sufficient evidence to rebutt the presumption that they have acted as a licensed general contractor, when in fact, they were not. Plaintiffs were required to be licensed, and they were not.

POINT III

THERE HAS BEEN NO COMPETENT EVIDENCE PRESENTED TO THIS COURT TO PROVIDE ANY BASIS FOR THIS COURT TO FIND ANY EXCEPTION TO PREVENT ENFORCEMENT OF UTAH STATE STATUTE, PREVENTING RECOVERY FOR WORK DONE BY UNLICENSED CONTRACTORS.

The Legislature, at the time of the enactment

of this law, felt that the public, especially the public without sufficient construction knowledge, should be protected from incompetent and unqualified contractors. The method chosen for enforcement, was that of testing and licensing qualified individuals and companies and not allowing those individuals and companies who are unlicensed, to collect for their work performed, regardless of its quality. There is no question that defendants were without any knowledge in the field of construction, and therefore, were the exact type of individuals to which this law was enacted to protect (See Chapman deposition, Pg. 71, Line 2 through 4). The testimony elicited both at the depositions and at the trial, unequivocally show that the cabin structure was not built according to the blueprints, the sketches provided (See Exhibits 9-P, 10-P, 11-P, and 12-P) by plaintiffs themselves, nor utilyzing materials they sold defendant, Charles H. Chapman, as listed in the Log Home Framing Package Agreement (See Exhibit 4-P). Further, testimony at trial by one of the Summit County Building Inspectors, showed that said structure had never been passed as a finished structure to allow occupancy. Therefore, it is apparent that what occurred on the Chapman cabin, i.e. shoddy and improper construction, was exactly what the Legislature intended to hopefully prevent by the enactment of the aforementioned statutes.

There has been one area of inroad in this doctrine

[illegible] forth above. There appears to be a three pronged test [illegible] be met in order for an unlicensed contractor [illegible]. This test is set forth in Lignell vs. Berg, [illegible] 300. The test is as follows:

> 1. Has the license inadvertently lapsed and or was there a good faith effort made to satisfy the licensing requirements.
> 2. The contracting parties knew or had knowledge of the contractor's abilities and thus did not rely on the competence of the contractor.
> 3. The contractor supplied a performance bond.

This test is shown in the Lignell case wherein this Court stated as follows:

> 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 consistently 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 P2d 149 and Meridian Corp. vs. McGlynn/ Garmaker Company, Utah 567 P2d 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 other means.
>
> In Fillmore Products vs. Western States Paving, 561 P2d 687, we adopted the point of view expressed by Professor Corbin, viz., "the general rule" (of nonenforceability) is not to be applied mechanically but in a manner "permitting the court to consider

the merits of the particular case and to avoid unreasonable penalties and forfeitures."

In this case, the denial of recovery to BBC would indeed impose, unreasonable penalties and forfeitures, particularly because the Owners were never deprived of the kind of protection the licensing statute was designed to afford. We consider the following circumstances to be of controlling significance in this regard:

1. BBC has not failed to satisfy the licensing authority of its technical competence and financial qualification for license. It had inadvertently permitted its license to lapse. Restoration of license status involved no new demonstration of qualification, but only payment of fee.

2. The Owners did not rely on any BBC competence they inferred from BBC's having advertised itself as a general contractor. They had previously employed BBC as a builder in apartment house construction. Moreover, the Owners usurped the general contractor's prerogatives in constructing the Terace Incline complex. They relied on their own competence.

3. BBC supported a performance bond as well as labor and material suppliers payment bond. The Owners were infinetely better assured of adequate and complete performance without financial exposure beyond the contract price than they would have been by BBC's mere compliance with the licensing statute.

Plaintiffs do not satisfy any of the three prongs of the test. They never had a license, the defendants did not have knowledge of the contractor's ability, and relied on their competence, and neither plaintiff provided a performance bond.

The only other possible inroad against the mentioned statutes is, if the unlicensed contractors or a licensed contractor supervise the total construction performed by plaintiffs. This was not the situation in the case at bar. In Motivated Management International vs. Finney, 604 P.2d 467, Utah, 1979, the court was ruling on a Motion to Dismiss a Complaint for failure to state a claim, when a Motion to Amend the Compalint was before the Court and had not been ruled upon. In that case the plaintiff had not had a chance to present the evidence to demonstrate that he was entitled to an exception to the applicable statutes. Plaintiff apparently was not even allowed to amend its Complaint, although defense counsel, at the hearing, requested that the court should consider the Motion on the basis of the Amended Complaint. In the present case, the court wisely did not rule on Defendants' Motion for Partial Summary Judgment. The court determined that Plaintiffs should be allowed to present their case to determine if they were entitled to be an exception to the statute. The Plaintiffs presented their case and the court, in its discretion, determined the facts were not sufficient; that is, met the three prong test of Lignell or had the construction been supervised by a licensed contractor.

The only similar fact contrary to what Plaintiffs state, is that both cases involved a "package home" type

structure, and that is where the similarities end. Therefore, Plaintiffs are not allowed to come under any of these exceptions.

CONCLUSION

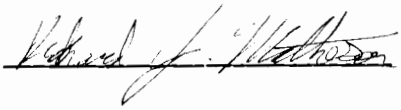
The defendants respectfully submit that the plaintiffs did not provide the Trial Court with any reasonably competent evidence upon which the Trial Court would be or would have been justified in denying Defendants' Motion for a Directed Verdict. The statutes are clear and unequivocal. The statute specifically prevents recovery by Plaintiffs and Plaintiffs failed to prove to the Trial Court that they were entitled to be an exception to the statute.

It is well within the Trial Court's discretion to grant defendants' Motion for Directed Verdict, and that there is no evidence that the Trial Court abused its discretion in granting defendants' Motion for Directed Verdict. Therefore, the decision of the Trial Court granting defendants' Motion should stand.

RESPECTFULLY SUBMITTED this 5th day of August,

ANDERSON & HOLLAND

J. KENT HOLLAND
Attorney for Defendants-Respondents

CERTIFICATE OF HAND DELIVERY

I HEREBY CERTIFY that on the 4th day of August, 1983, I hand delivered a true and correct copy of the foregoing Brief of Defendants-Respondents, to JOHN WALSH, Attorney for Plaintiffs-Appellants, Suite 202 Cove Point Plaza, 3865 South Wasatch Boulevard, Salt Lake City, Utah 84109.