1983

Wilderness Building Systems Inc., And Kerry R. Hubble v. Charles H. Chapman And Edythe S. Chapman : Reply 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.	:	CASE NO. 19009
CHARLES H. CHAPMAN and EDYTHE S. CHAPMAN,	:	
Defendants Respondents	:	

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REPLY BRIEF OF APPELLANTS

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

HONORABLE HOMER F. WILKINSON

PRESIDING

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Plaintiffs
Appellants,

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ARGUMENT ONE

Defendants/Respondents begin their presentation of [illegible] by suggesting that the Plaintiffs/Appellants nor either [illegible] were a registered corporation nor a registered assumed name.

On page 2, of the Defendants/Respondents brief, is the following:

> The Plaintiff, Wilderness Building Systems, Inc., is not (emphasis original) a registered corporation, nor is it a registered "d/b/a", let alone authorized to do business in the State of Utah . . .

If this were true, then the lower Court could have summarily disposed of this matter, pursuant to 42-2-10 of the Utah Code Annotated as amended in 1963, which states:

> 42-2-10. Penalties. Any person or persons who shall carry on, conduct or transact any such business under an assumed name without having complied with the provisions of this act shall not sue, prosecute or maintain any action, suit, counterclaim, cross complaint or proceeding of any of the courts of this state until the provisions of this chapter have been complied with.

However, the Plaintiffs/Appellants are properly registered with the State of Utah, Secretary of State, and there was never any mention or allegation of the anything to the contrary, at any time during the lower court proceedings.

At this point to suggest that the Plaintiffs/Appellants were not properly registered is merely an attempt to divert this Court's attention from the real issues of this case. Especially since, it was never raised before, when the same would have been dispositive before.

There was no evidence to show that the Plaintiffs/Appellants were not properly registered, consistent with the fact that the Plaintiffs/Appellants were at all times necessary to this action, properly registered with the Secretary of State, for the State of Utah.

ARGUMENT TWO

Defendants/Respondents suggest that there was a unilateral change on the costs of construction of the "packaged home."

On page 3 of their brief, they state:

> ". . . 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).

Plaintiffs/Appellants would think that the Defendants/Respondents would be too ashamed to make such an assertion.

According to the testimony of Charles Chapman both in his deposition and in Court, there were conversations about the costs for erecting the "packaged home" for some $2,500.00. As the negotiations continued, extras were included, and so when the matter was reduced to writing, the face amount on the contract was $3,850.00.

Chapman signed the first part of the agreement, calling for the increased amount of materials supplied but apparently did not sign the second page calling for additional costs of labor. The Plaintiffs/Appellants did not notice the same, until it was time to collect and there was a dispute.

However, the Defendant Chapman said nothing about it at the time, and continued to induce the Plaintiffs/Appellants

[illegible] pursuant to the written contract, fully expecting to [illegible] the same on the Plaintiffs/Appellants after all of [illegible] was done.

At the time of the said contract calling for the payment of $3,850.00, no work had been done. Defendant Chapman stated in his deposition and in trial that he was aware that the Plaintiffs/Appellants were expecting to be paid the full $3,850.00 for his labor, as the document stated, but he Chapman, remained silent about his wanting the same done for $2,500.00, and expressly stated that he was going to bring the matter up, only after the work had been done.

Quite apparently, the jury could see through the dishonesty in the same, just as the Defendants/Respondents were trying to avoid a just debt, by denying the arrangements with the Plaintiffs/Appellants to act as his own contractor and have them work for him. Then when all of the work was done, Defendants/Respondents could claim that they did not know and hence, get something for nothing, and use the licensing statute as "an unwarranted shield for the avoidance of a just obligation." Note Whipple vs. Fuller, 299 P.2d 837, Utah, 1956, at pages 838 and 839.

ARGUMENT THREE

Defendants/Respondents suggest on page 5 of their brief that the major complaint with the Plaintiffs/Appellants was not the fact that the latter was not licensed but was because of the improper construction.

On page 5, is the following:

> " . . . 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)."

Defendants/Respondents seem to be overlooking the Special Verdict Instruction #2, which was drafted into the said instructions at his insistance, which states:

> (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

If it is Defendants/Respondents position that the Honorable Homer Wilkinson, District Judge, granted the Directed Verdict because the Plaintiffs/Appellants fell short of "materially complying with the plans, labor contract, material contract, and mutually agreed to changes made by the Plaintiff and the Defendant," then the Court was clearly out of line. Note Efco Distributing, Inc., vs. Perry, 17 U 2d 375, 412 P.2d 375, Utah, (1966).

It is most critical to note the exhibits at this point to consider what was required of the Plaintiffs/Appellants. In doing so, Plaintiffs/Appellants suggest that they are flagrantly inconsistent. The plans and specifications drawn by the architect, employed by the Defendants/Respondents, have differing dimensions on the foundation, and the supports underneath the

[illegible] beginning with the foundation all of the way up [illegible] the cabin to the roof, there are inconsistent provisions [illegible] plans and specifications.

Now, as well as then, for the Defendants/Respondents to suggest that because the Plaintiffs/Appellants did not comply with all of the plans and specifications, is absurd. They could not, as a logical impossibility. Much like a married bachelor, a round triangle, it just could not happen.

However, the jury ended the matter for the parties. The jury said that the Plaintiffs/Appellants did in fact so comply, and from that point on it was not for the Court to substitute its judgment for the jury, Appellants/Plaintiffs respectfully submit.

ARGUMENT FOUR

The Defendants/Respondents suggest that the Plaintiffs/Appellants were listed on the building permit as the contractor as evidence that that is exactly what he claimed to be.

On page 10, of the Defendants/Respondents brief, is the following:

> ". . . The evidence additionally shows that Plaintiff Kerry R. Hubble, was listed as the contractor on the building permit (See Exhibit 28-D). . ."

Defendants/Respondents failed to tell the Court, however, that Mr. Hubble did not take out or apply for the permit, nor did he know that Mr. Chapman, when he took out the said application for a building permit, had put the same on the application.

As noted in 58-23-1, Utah Code Annotated, it is the [illegible] who takes out the permit, not necessarily what one writes [illegible] said application for the same, that is controlling.

Mr. Chapman took out the permit, and that ends it. Hence, he was the owner/contractor of the cabin, employing Plaintiffs/Appellants, along with their crews.

ARGUMENT FIVE

Defendants/Respondents suggest that Mr. Chapman was totally inexperienced in construction both of the following reasons: (1) that he was in the class of individuals to be protected by the licensing statute, and (2) that he could not be the owner/contractor for the building of his own cabin.

Note page 4 of the Defendants/Respondents brief and specifically page 12 wherein it states:

> ". . . 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 the laws was enacted to protect . . ."

However, Plaintiffs/Appellants suggest that the facts of this case are exactly the opposite, hence the matter should have been submitted to the trier of fact, ie: the jury.

According to the exhibits, the Defendants/Respondents employed their loved-one, who was an architect to help them with this project.

In addition, the Defendants/Respondents, were going

to do all of the additional work on this cabin, outside [illegible] work, which Mr. Chapman could not do because of [illegible].

Hence, the Defendants/Respondents, were going to do all of the plumbing, electrical, shingles, water proofing, insulating, all interior work, etc. So as a result, for the Defendants/Respondents to suggest that "there is no question that the Defendants were without knowledge in the field of construction and were the exact type of individuals to which the law was enacted to protect . . ." could not be further from the truth.

Plaintiffs/Appellants question the same, and so the matter should have been submitted to the trier of fact, the jury in this case.

CONCLUSION

The jury heard all of the evidence. The parties were fully and fairly allowed to present their respective positions to the trier of fact, and the result of the same should not be tampered with, unless justice so requires.

In the case of Berkeley Bank for Coops. vs. Meibos, Utah, 607 P.2d 789, (1980), the Utah Supreme Court referred to the age old law here in Utah, in the case of Campbell vs. Safeway Stores, Inc, 15 U.2d 113, 117, 388 P.2d 409, 412, (1964),

When the parties have had a full and fair opportunity

> to present their cause, and the jury has rendered its verdict, it should not be interfered with unless there appears some compelling reason why justice demands that it be done.

Plaintiffs/Appellants submit that in this case to set the jury verdict aside is a gross injustice. It turns the licensing statute into "an unwarranted shield for the avoidance of a just obligation." Whipple vs. Fuller, infra.

Also note, Bigler vs. Mapleton Irrigation Canal Co. Utah, (1983) ____ P.2d ____, Supreme Court opinion handed down on August 23, 1983:

> ". . . we dispose of the second assignment of error first by adhering to well established standards of review. A jury verdict must stand unless there is no competent evidence to support it."

Particularly when a jury makes a special verdict, this Court has consistently held that they should be upheld.

In the case of Stanger vs. Centenial Life Insurance, Utah, (1983) Case No. 17757, handed down on August 11, 1983, this Court stated:

> In reviewing the special verdicts in favor of the plaintiffs, we will review the evidence in light most favorable to the findings of the jury, Williams vs. State Farm Ins. Co. 656 P.2d 966 (1982) and uphold them, so long as there is competent evidence to sustain them. Time Commercial Financing Corp. vs. Davis, Utah, 657 P.2d 234 (1982) and cases therein cited.

In this case, the jury was given a special jury verdict on different issues. One of the issues was the question of whether or not the work was completely done or supervised by a licensed contractor.

Plaintiffs/Appellants submit that their determination

would be dispositive of that issue.

This factor coupled with the fact that this was a pre-sold home, purchased exclusively from the Plaintiffs/Appellants, would mean that the only exposure that the Defendants/Respondents would have would be for labor performed by the Plaintiffs/Appellants or their crews.

This is not like the Defendants/Appellants hired the Plaintiffs/Appellants to do the work and buy the materials as they do the same, and then submit some big bill at the end. Rather this is a case where the homeowner purchased all of the materials and then engaged the Plaintiffs/Appellants to put the same together for them.

Hence, they would have been in exactly the same position, had the Plaintiffs/Appellants been licensed. Yet they have chosen not to pay the Plaintiffs/Appellants for their materials nor for the labor, and now stand before this Court requesting that the licensing statute be used as "an unwarranted shield for the avoidance of a just obligation.

Respectfully submitted this 12th day of December, 1983.

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CERTIFICATE OF DELIVERY

I hereby certify that I caused the foregoing APPELLANTS REPLY BRIEF, to be personally delivered to the offices of J. KENT HOLLAND, ANDERSON & HOLLAND, ATTORNEYS FOR THE DEFENDANTS/RESPONDENTS, 623 East First South, Salt Lake City, Utah, this 14th day of December, 1983.

JOHN WALSH
ATTORNEY AT LAW