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James C. Groscost, an individual v. Robert Deane Alder, an individual : Reply Brief

Utah Court of Appeals

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COURT OF APPEALS

DOCKET NO. 950234-CA

STATE OF UTAH

JAMES C. GROSCOST, an individual,	)	
Appellee,	)	Case No. 950234-CA
vs.	)	Priority No. 16
ROBERT DEANE ALDER, an individual,	)	Priority No. 15
Appellant.	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY STATE OF UTAH THE HONORABLE KENNETH RIGTRUP

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ARGUMENT

I. THE TRIAL COURT ERRED IN AWARDING GROSCOST PROFITS FROM THE SALE OF THE HOUSE RATHER THAN THE REASONABLE VALUE OF THE BENEFIT CONFERRED.

As noted in Alder's initial brief, it is not entirely clear from the district court's decision opinion whether the court found liability under a contract implied in fact, or under a contract implied in law. Under either theory of unjust enrichment, the district court applied an erroneous measure of damages.

A. Contract implied in fact.

Groscost's complaint alleged only an implied-in-fact theory of unjust enrichment. (R. 63-64). Given the ambiguity in the district court's opinion, and the absence of any contrary indication from the court, it is reasonable to assume that the district court intended his ruling to correspond to the pleadings. Accordingly, the appropriateness of the damages awarded by the district court should be determined by comparing it to the legal measure of damages applicable to claims for contract implied in fact.

The law is quite clear that the measure of damages under the contract-implied-in-fact branch of unjust enrichment is the amount intended by the parties. Davies v. Olson, 746 P.2d 264, 269 (Utah App. 1987). If the amount intended cannot be ascertained, it is presumed to be the reasonable value. *Id.* In this case, where both parties testified that their intent was for the Alders to pay for "the cost" of the house, that is the amount which should have been awarded (to the extent proven). Groscost's brief contains no argument to the contrary, and the judgment should be reversed.

B. Contract implied in law, or "quasi contract".

If the district court's opinion is assumed to be based upon contract implied in law or "quasi-contract," the measure of damages is still insupportable.

In that regard, Groscost misapprehends Alder's argument as to the measure of damages in a quasi-contract case. Alder does not argue that the measure of damages is the detriment incurred by the plaintiff. Courts have correctly rejected such contentions, which would unfairly limit recovery to a plaintiff's actual costs, reduced for overhead, etc., when the fairer amount is what the other party should reasonably have expected to pay for the services.

Alder agrees that the measure of damages in a quasi-contract case is the benefit conferred upon the defendant. Where Alder and Groscost differ, however, is in what constitutes the "benefit conferred." Alder submits it is the reasonable value of services conferred upon the defendant; Groscost claims it is the profits realized by the defendant.

In his initial Brief, Alder discussed at length the precedent and policy considerations undermining Groscost's theory. Both the Utah Supreme Court and this Court have expressly stated that the measure of damages in a quasi-contract case -- in other words, the benefit that is conferred -- is the reasonable value of the services received by the defendant. *See* Brief of Appellant, Point I, pp. 9-17, and cases cited therein, including J & M Construction, Inc. v. Southam, 722 P.2d 779 (Utah 1986); General Leasing Co. v. Manivest Corp., 667 P.2d 596, 598 (Utah 1983); Rapp v. Mountain States Tel. and Tel. Company, 606 P.2d 1189, 1193 (Utah 1980); Fowler v. Taylor, 554 P.2d 205, 209 (Utah 1976); Wooldridge v. Wareing, 120 Utah 514, 236 P.2d 341, 343 (1951); Baugh v. Darley, 112 Utah 1, 184 P.2d 335, 337, 339 (1947); Fabian v. Wasatch Orchard Company, 41 Utah 404, 125 P. 860, 861 (1912); Shoreline

Development, Inc. v. Utah County, 835 P.2d 207, 210 (Utah App. 1992); Olson v. Park-Craig-Olson, Inc., 815 P.2d 1356, 1360 (Utah App. 1991); Scheller v. Dixie Six Corp., 753 P.2d 971, 975 (Utah App. 1988); Davies v. Olson, 746 P.2d 264, 269 (Utah App. 1987); *see also* Restatement of Restitution, § 155.

In his brief, Groscost contends that, if a project is sold at a profit, the contractor/plaintiff is entitled to the profits. Groscost then indicates that if a project sells at break even or at a loss, the contractor/plaintiff is still entitled to recovery. Groscost does not explain how that recovery would be calculated; presumably he would then argue the measure is the reasonable value of services.

Groscost's position illustrates the extreme unpredictability of a measure of damages dependent upon the level of profit of a particular defendant. Under Groscost's theory, a plaintiff loses out if a defendant incurs excessive costs on a project, if property taxes go up, if a defendant sells the house for less than its maximum value because of a buyer-favorable market conditions, if the house is sold in a hurry because the owner has been transferred, etc. A defendant/owner loses out if a large company announces expansion nearby after the house lot has been purchased, if the contractor keeps the cost of the house lower by performing mediocre work, etc.

Under Groscost's theory, a plaintiff's entitlement to recovery, and the amount of recovery, are subject to innumerable variables, many beyond the control of either party. Under the correct measure of damages applied in Utah case law, however, the entitlement to and amount of damages is readily determinable: Did the defendant receive services having an objective value? If so, that value is the amount of damages awardable to the plaintiff.

Another illustration of the inherent problem with Groscost's position is the question of what happens if a subsequent owner of the house makes claims regarding alleged defects in the house. If the contractor who worked on the house has received all the profits, such claims seemingly should be directed to the contractor, who cannot accept all the benefit without accepting any of the risk. This logical corollary of the district court's ruling raises interesting questions of liability, muddying the waters surrounding owners' and builders' obligations to each other and to third parties.

Groscost unfairly asserts that "Alder wants Groscost to take nothing and he wants to keep everything for himself." *(Brief of Appellee, p. 11).* Alder does not dispute Groscost's entitlement to recover the reasonable value of services conferred upon Alder (to the extent he proves that the services were actually provided to Alder and the services' value).[1] Alder simply contends that the amount of his liability should have been determined under a legally appropriate measure of damages.

Groscost suggests that the district court could apply a different measure of damages because this case involved (ex-)family members. That suggestion has several patent flaws. First, measures of damage are established by law to provide some predictability by which parties can predict the effect of the choices they make. These legal standards are not modified for each new set of facts. Moreover, there is no indication that the district court intended to devise a new

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[1] In fact, Alder submits that Groscost has already received exactly that. As noted in Alder's initial brief, Groscost has been paid the amount that he claimed to be the full cost of the house at the time of closing. The remaining portion of Groscost's claim -- the same portion for which no evidence was offered at trial -- consisted primarily of costs originally charged to other projects which Groscost asserted late in the litigation "really" were attributable to the Alders. (*See* Brief of Appellant, Point II, pp. 18-25 and nn. 9-10). Because of the theory of damages applied below, the district court did not address this contention.

measure of damages applicable to contractor--ex-son-in-law cases. If it had, the next question would seem to be what standard will apply to current sons-in-law, or to (former) best friends, or to neighbors?

There simply is no basis in logic or law to measure damages in this case by profits rather than reasonable value of the benefit, *i.e.*, services, conferred upon the defendant. The district applied an erroneous measure of damages, and the judgment should be reversed.

II. APPLYING THE CORRECT MEASURE OF DAMAGES, GROSCOST FAILED TO ADDUCE SUFFICIENT EVIDENCE ON PORTIONS OF HIS DAMAGES CLAIM.

Applying the correct measure of damages, Groscost was required to adduce sufficient evidence of the cost or reasonable value of material and labor provided in connection with the Alder home. Alder has set forth detailed analysis of certain portions of Groscost's claim for which Groscost failed to adduce any, or legally sufficient, evidence. (*See* Brief of Appellant, Point II, pp. 17-25).

Groscost does not dispute any of Alder's specific observations, but states that Alder did not offer his own testimony on those items of damage. Groscost fails to recognize that a defendant is not required to rebut legally insufficient (or absent) evidence. If a plaintiff fails to offer testimony in support of a required element of his claim, in this case the element of damages, a defendant is entitled to argue such failure as a basis for denying that portion of the claim.

CONCLUSION

For the reasons set forth above and in his initial Brief, appellant Robert Alder respectfully requests the Court to reverse the district court's award of damages in this case upon

two grounds: First, the measure of damages applied was erroneous; and second, under the correct measure of damages, Groscost failed to adduce evidence to sustain the award of damages.

DATED this 23rd day of October, 1995.

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CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of October, 1995, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** were mailed, postage prepaid, to:

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