

1995

## D. Scott Nuttall v. Jordan North : Reply Brief

Utah Court of Appeals

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### Recommended Citation

Reply Brief, *Nuttall v. North*, No. 950525 (Utah Court of Appeals, 1995).  
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IN THE UTAH COURT OF APPEALS

D. SCOTT NUTTALL dba )  
NUTTALL CONSTRUCTION )  
COMPANY, )  
Appellee/Cross-Appellant )  
vs. )  
JORDAN NORTH )  
Appellant/Cross-Appellee )

Case No. 950525 - CA

Priority No. 15

REPLY BRIEF OF APPELLANT

UTAH COURT OF APPEALS  
BRIEF

UTAH  
DOCUMENT  
KFU

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Company

FILED

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COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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D. SCOTT NUTTALL dba	)	
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	)	
JORDAN NORTH	)	
	)	
Appellant/Cross-Appellee	)	

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REPLY BRIEF OF APPELLANT

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Defendant/Appellant Jordan North ("NORTH") hereby submits his Reply Brief.

STATEMENT OF ISSUES  
AND  
STATEMENT OF THE CASE

North takes exception to Nuttall's Statement of Issues and Statement of the Case, as contained in his brief. In his brief, Plaintiff/Appellee/Cross-Appellant D. Scott Nuttall ("NUTTALL"), in an apparent attempt to bolster his claim to entitlement of prejudgment interest, characterizes the underlying action as simply a mechanic's lien foreclosure action. However, in actuality, Nuttall's Complaint in the lower action had three causes of action under which he was seeking relief, mechanic's lien foreclosure, breach of contract and quantum meruit. [R. 3-10]. Nuttall sought relief under these alternative theories in the lower court action and did not abandon any of them. For Nuttall to now suggest that the lower court action was simply one for mechanic's lien foreclosure is a mischaracterization of that action, his conduct therein and his very complaint.

STATEMENT OF RELEVANT FACTS

North takes exception with Nuttall's statement of relevant facts. Nuttall claims in his brief that North's statement of facts are lengthy and convoluted. Nevertheless, he failed to allege or demonstrate that any such facts were inaccurate or unsupported. Nuttall's silence seems to be nothing short that he agrees with and acquiesces in North's statement of facts as supported by record references.

In his brief, Nuttall attempts to draw this Court's attention away from North's undisputed statement of facts by crafting a set of 'simplified" facts which he deemed relevant. Nuttall's statement of relevant facts fail to adequately explain and present this matter and tend to mischaracterize the case. As such, North objects to Nuttall's statement of relevant facts, particularly fact numbers 6, 7 & 8. Those facts, are nothing more than the testimony of Nuttall, allegedly supported by an inaccurate accounting summary prepared by Nuttall's counsel immediately prior to trial. These statements are neither factual nor accurate and are not supported by the evidence. Fact numbers 6, 7 & 8 are opinion statements only and should not be relied on by this Court. Inasmuch as North's facts are undisputed and are all supported by record references, this Court should rely upon North's statement of facts rather than Nuttall's inaccurate and brief summary of facts.

#### SUMMARY OF ARGUMENT

The difficulty with this matter arises from the fact that trial was spread out over three months and that the court failed to timely issue a memorandum decision. The Memorandum Decision was not issued for nearly 5 months after the conclusion of the trial in this matter and more than 8 months since the commencement of the first two days of trial. The trial court's Memorandum Decision, when finally issued, did nothing more than take an equitable approach of "splitting the baby", resulting in the filing of an appeal as well as a cross-appeal.

All of North's statements of fact, arguments and analysis are

referenced to the record in this matter. Curiously, Nuttall failed to dispute the substance or merits of any of North's factual statements and argument, obviously agreeing with them. Rather, Nuttall took the approach that North failed to marshall the evidence. As will be shown, North properly and adequately marshalled the evidence and Nuttall's assertions to the contrary should be disregarded. Furthermore, Nuttall is not entitled to prejudgment interest which the trial court correctly refused to award.

#### ARGUMENT

##### POINT I

#### **NORTH PROPERLY MARSHALLED ALL OF THE RELEVANT EVIDENCE AND AMPLY DEMONSTRATED THAT THE TRIAL COURT'S FINDINGS OF FACT ARE CLEARLY ERRONEOUS**

In his brief, Nuttall claims that North failed to marshall all of the evidence. Interestingly enough, Nuttall again fails to dispute the merit and substance of any of North's arguments, which are all amply supported by the record in this matter. Nuttall's silence can only be interpreted as acquiescence in and agreement with North's arguments. Having no defense to North's factual statements and arguments, Nuttall has cleverly crafted a brief that attempts to confuse and replace the issues through a smoke screen and mirrors approach. Nuttall's only defense to North's brief is a wild claim that North failed to properly marshall the evidence. Again, Nuttall attempts to distract this Court's attention away from the merits of the case by raising a form over substance argument that is nothing more than a red herring, and which should

be ignored.

A. North Property Marshalled the Evidence. Despite the fact that Nuttall correctly set forth the standard for challenging the findings of the trial court, he nevertheless failed to properly apply the facts to the law in this matter. North agrees that in order for him to successfully attack Judge Burningham's findings of fact that he must marshal all of the evidence in support of the court's findings of fact, including all reasonable inferences, and then demonstrate that the evidence is insufficient to support the court's findings. See Alta Industries Ltd. v. Hurst, 846 P.2d 1282 (Utah 1993); Heslop v. Bank of Utah, 839 P.2d 828 (Utah, 1992); Grayson Roper Ltd. v. Finlinson, 782 P.2d 467, 470 (Utah 1989).

North submits that he has fully complied with this requirement and has fully and completely marshalled the relevant evidence and has successfully demonstrated that the record evidence is insufficient to support Judge Burningham's findings of fact. North's brief, which has the maximum number of allowable pages of argument, is replete with record evidence. With the trial transcript comprising several hundred pages in four separate volumes, it is quite obvious that North could not reference and argue every rambling, vague generalization repeatedly uttered by Nuttall throughout the 4-day trial. Nevertheless, North included as much argument and record evidence in his brief as allowed by the rules of appellate procedure. A review of the specific findings of fact will demonstrate the North's brief adequate and properly marshalled the relevant evidence and provided ample evidence that

the finds are unsupported.

1. **Findings 7 and 13.** Nuttall's claim that North failed to marshall the evidence as it related to findings 7 and 13 is ludicrous. Much of the trial was spent discussing "changes". Unfortunately neither Nuttall or his witnesses offered any specific testimony regarding changes. Nevertheless, in his brief, North spent six full pages discussing the testimony of Nuttall and his witnesses, making references to the record. Thereafter, North spent another 4 pages demonstrating overwhelming evidence contrary to the vague and broad assertion of Nuttall and his witnesses. This is not a rehashing exercise of North's argument at trial. Rather it was a succinct and detailed treatment of the only credible evidence presented at trial. The only credible evidence presented at trial regarding Findings 7 and 13 was that presented by North. No evidence, whatsoever, was presented supporting Finding No. 13 that many of the delays were because of North's request that the subcontractors accept "trades" in payment for the work. Nuttall would have North marshall evidence that does not exist. The plain fact is that findings 7 and 13 are unsupported by any credible evidence in the record.

2. **Findings 8, 9 and 10.** Eleven pages of North's brief are spent in reviewing the evidence and testimony, or lack thereof, relating to findings 8, 9 & 10. North amply demonstrated how those findings are unsupportable as a matter of law. Nuttall's wild assertions that these findings are supported by the evidence are likewise unsupportable.

3. Findings 11, 14, 16 and 17. Nuttall alleges that North in passing referenced findings 11, 14, 16 and 18, again, attempting to minimize North's brief. However, the fact of the matter is that approximately 14 pages of North's brief are dedicated to arguments surrounding the lack of evidence for these findings of fact. Nuttall makes particular mention of finding 16, and again in typical fashion mischaracterizes North's argument, the trial exhibit 44 and Nuttall's own testimony. North offered trial exhibit 44 for to demonstrate that Nuttall's own calculations of what North allegedly owed were off by over \$40,000.00. The introduction of exhibit 44 resulted in Nuttall changing his testimony at trial and deducting \$41,250.62 from the amount he claimed he was owed. [R.991-996; Tr. Ex. 41] It is inconceivable that Nuttall now attempts to twist this issue.

North's brief clearly marshalls the relevant evidence and amply demonstrates that the trial court's findings are not only unsupported by the evidence, in some cases are contrary to the evidence adduced at trial. Nuttall's arguments to the contrary must be disregarded.

## POINT II

### NUTTALL IS NOT ENTITLED TO PREJUDGMENT INTEREST

Contrary to Nuttall's assertions, he is neither entitled to prejudgment interest, nor did the trial court err in not awarding him prejudgment interest. The awarding of prejudgment interest is a matter of discretion for the court and can be awarded in certain circumstances. Smith v. Linmar Energy Corp., 790 P.2d 1222 (Utah

1990). Nuttall is of course basing his claim for prejudgment interest on the fact that one of the causes of action in the underlying action was for the foreclosure of a mechanic's lien. However, Nuttall appears to have conveniently neglected to inform the court of his alternative theory of recovery for quantum meruit. Since quantum meruit awards are unliquidated they may not be the basis of an award of prejudgment interest. CKP, Inc., vs. GRS Const. Co., 821 P.2d 663, reconsideration denied, review denied, 841 P.2d 47 (Wash. Ct. Att. 1991). The undisputed evidence is that Nuttall's claim was unliquidated. Trial Exhibit 44 and Nuttall's associated testimony as previously referenced herein demonstrate that even as of the date of trial, Nuttall did not know how much money he claimed North owed to him. It is obvious from a reading of the court's memorandum decision and amendment thereto, that his decision was driven by equity, under Nuttall's quantum meruit theory. Nuttall simply is not entitled to prejudgment interest.

#### CONCLUSION

North has properly marshalled the evidence in his brief for this Court's review and decision. Nuttall, being unable to dispute North's facts and arguments has taken the only other possible approach of claiming North failed to properly marshal the evidence. Such a course of desperation should be disregarded and this court should render its judgment on the merits as they have been presented. With respect to Nuttall's claim for prejudgment interest, Nuttall's claim must also be disregarded. The trial court properly concluded that prejudgment interest should not be

awarded and Nuttall is unable to demonstrate that he is entitled to prejudgment interest as a matter of law.

Therefore, this court should remand this matter back to the trial court for the entry of facts consistent with the evidence presented at trial.

DATED this 2nd day of January, 1996

  
Larry L. Whyte  
Attorney for Defendant  
Jordan North

Certificate of Service

I hereby certify that on this 2nd day of January, 1996, I served the foregoing by causing a true and correct copy to be placed in the United States Mail, postage prepaid and addressed to Eric P. Lee, Dart Adamson & Donovan at 310 South Main Street Suite 1230, Salt Lake City, Utah.

