

1988

Scott Machinery, Marshall Fastening Systems v. Jack Van Gerven, J & M Construction Co. : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

88 0069

STATE OF UTAH

SCOTT MACHINERY d/b/a MARSHALL :
FASTENING SYSTEMS, :

Plaintiff, :

vs. :

CASE NO. 88-0069

880245 CA

JACK VAN GERVEN d/b/a J & M :
CONSTRUCTION CO., INC., J & M :
CONSTRUCTION CO., INC.,; et :
al., :

Defendants and :
Respondents and :
Cross-Appellant :

ARGUMENT PRIORITY
CLASSIFICATION 14(b)

S.G. LARSEN & SONS EXCAVATING, :
INC., a Utah corporation, :

Plaintiff in :
Intervention, :

vs. :

BROWN & ELLIOTT CONSTRUCTION :
COMPANY, INC., a Utah :
corporation and UNITED :
PACIFIC INSURANCE, a Washington :
corporation, et al. :

Additional Cross :
Claim Defendants :
and Appellants. :

FILED

MAR 27 1989

REPLY BRIEF OF
CROSS-APPELLANT

COURT OF APPEALS

Appeal from Judgment in the Third Judicial
District Court in Summit County, Honorable
Homer Wilkinson, Judge

IN THE UTAH COURT OF APPEALS

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CROSS-APPELLANT

Appeal from Judgment in the Third Judicial
District Court in Summit County, Honorable
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PARTIES TO THE APPEAL ARE:

United Pacific Insurance Company and Brown & Elliott Construction
Company, Appellants

J & M Construction Company, Respondent and Cross-Appellant

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SUMMARY OF ARGUMENT

J & M plead, presented evidence on, and argued to the Court its theory that the misinterpretation of the elevations shown on the plans for the project constituted a misrepresentation. The trial court's Findings of Fact are sufficient to make such a finding, and the lack of any Conclusions of Law specifically on that point do not prevent raising that issue on appeal.

J & M is entitled to relief on the basis of mistake resulting from Scott Brown's misinterpretation of the elevations shown on the plans. Even if the trial court were correct in finding that J & M was negligent in relying on that interpretation, such negligence was not a violation of any positive legal duty owed by J & M, and J & M is therefore not prevented from obtaining relief for the mistake under the standard stated by the Utah Supreme Court in Mountain States Telephone and Telegraph v. Sohm, 755 P.2d 155 (Utah 1988).

The claim by Brown & Elliott and United Pacific that J & M is barred from seeking rescission because the the alleged failure to timely elect to rescind the contract is a claim which was not plead, argued or raised in any fashion in the court below, and cannot be considered on appeal.

ARGUMENT

I.

J & M'S CLAIM OF MISREPRESENTATION REGARDING PLAN ELEVATIONS WAS PLEAD AND TRIED IN THE TRIAL COURT

In their Reply Brief, Brown & Elliott (hereinafter "B & E") and United Pacific (hereinafter "UP") claim that J & M did not argue its claim of misrepresentation regarding the elevations shown on the plans in the trial court. The principle relied on, that matters not presented to the trial court may not be raised for the first time on appeal, is undoubtedly correct. However, J & M did raise the issue. J & M plead the facts sufficient to establish misrepresentation.

In its Third Amended Cross-Claim and Counterclaim (R. 710-730), J & M claimed "Brown & Elliott represented to J & M that excavated material from the uphill portion of the project could be stored on site and used as backfill and fill to obtain final grades around the downhill units. Because of the inaccuracies, inconsistencies, and incompleteness of the preliminary plans. . . J & M was in fact required to use a large number of dump trucks and drivers to remove excavated material." (¶9, R. 714). J & M further plead that "by virtue of the misrepresentations and omissions of Brown & Elliott Construction with regard to . . .the ability to use material excavated from the uphill portion of the job on the downhill portion of the job and that the job would essentially

balance, requiring little removal of material, and by virtue of the inaccuracies of the preliminary plans and changes between the preliminary plans and the final plans, the written excavation contract between Brown & Elliott and J & M is voidable as the result of misrepresentation and mistake." (§12, R. 715). In fact, J & M plead a separate cause of action for misrepresentation, the Sixth Cause of Action. (R. 726). In its trial brief, J & M argued misrepresentation resulting from Scott Brown's misinterpretation of plan elevations. (J & M's Trial Brief, R. 1012-1014). Although J & M's argument regarding the misrepresentation has been developed in more detail on appeal, that does not prevent this Court from considering the claim. The rule requiring adherence to the theory relied on below does not mean that the parties are limited in the appellate court to the same reasons or arguments advanced in the lower court on the matter in issue. First National Bank v. Gardner, 376 S.W.2d 311 (Ky. 1964).

J & M believes that the trial court's Findings of Fact are sufficient to justify a finding of misrepresentation. Although the trial court did not make Conclusions of Law regarding misrepresentation regarding plan elevations, that does not prevent this Court from reviewing the issue, since the appellate court is not bound by the trial court's Conclusions of Law but reviews them for correctness in any event. Scharf v. BMG Corp., 700 P.2d 1068 (Utah 1985).

II.

EVEN IF NEGLIGENT, J & M'S RELIANCE
ON SCOTT BROWN'S REPRESENTATIONS
AS TO THE MEANING OF PLAN ELEVATIONS
DOES NOT PROHIBIT RELIEF FOR MISTAKE

J & M believes that the trial court's Findings of Fact are sufficient to allow it relief from its contract on the grounds of the mistake as to the meaning of plan elevations which was induced by Scott Brown's misrepresentation as to those elevations. The only reason the trial court did not award relief from such mistake was its finding that J & M should have asked the architect about any questions it had regarding the plans and unreasonably relied on the statements of Scott Brown as to the meaning of the elevations shown on the plans. (Conclusion of Law No. 4; R. 1154). In its earlier brief, J & M argued that, in order to prevent it from obtaining relief from this mistake, its negligence would have to be gross negligence. (Brief of Respondent and Cross-Appellant at 18-19). The Reply Brief of B & E and UP cites Mountain States Telephone and Telegraph v. Sohm, 755 P.2d 155 (Utah 1988) as clarifying the standard as to the degree of fault which would prevent relief from a mutual mistake of fact. There, the Utah Supreme Court clarified statements in other cases that relief from mutual mistake will not be awarded to one who is inexcusably negligent. The Supreme Court reaffirmed its holding in McMahon v. Tanner, 122 Utah 33, 249 P.2d 502 (1952), and stated:

We qualified the aforementioned rule and limited its application to only those cases where there is a violation of a positive legal duty or where the other party has been prejudiced by the mistake.

Mountain States Telephone and Telegraph v. Sohm, supra at 159.

J & M had no positive legal duty to seek advice about the interpretation of the plans from anyone other than the contractor to whom it was requested to make a bid. It had no contractual relation with anyone at the time of making its bid which would have required any consultation with the architect or anyone else. B & E on the other hand, was already party to a contract with the developers of the property which required it to present questions of plan interpretation to the architect. The architect testified he would expect subcontractors to direct their questions to the general contractor, and that he would receive questions from the general contractor. Even if J & M were negligent in accepting the plan interpretation given by the president of the general contractor to whom it was asked to give a bid, there was no violation of a positive legal duty in inquiring of that contractor about the meaning of the plans which it had provided and on which it sought a bid. Although J & M does not believe the trial court's conclusion that it failed to exercise reasonable diligence is supported by the findings of fact, even if that ruling were correct, J & M is not prevented from recovering for the mistake induced by Scott Brown's representations about plan elevations because

that reliance was not any violation of a positive legal duty.

B & E was not prejudiced by the mistake. At the time J & M submitted its bid, B & E has already entered into its general contract with the owner of the project. That bid included a category which consisted only of the excavation and site work covered by J & M's contract at a price of \$178,794, more than double the amount of J & M's bid based on the misrepresentation which induced its mistake regarding plan elevations.

III.

THE CLAIM THAT J & M DID NOT
TIMELY ELECT TO RESCIND THE CONTRACT
CANNOT BE CONSIDERED BECAUSE IT IS
RAISED FOR THE FIRST TIME ON APPEAL

In their reply brief, B & E and UP claimed that J & M did not timely elect to rescind the contract, and therefore that rescission is barred. The Reply Brief is the first time that issue has been raised, either at trial or on appeal. The Answer of B & E and UP makes no such claim about the timeliness of the election to rescind, though rescission is sought in J & M's Cross-Claim and Counterclaim. (Answer of B & E and UP to J & M's Third Amended Cross-Claim, R. 753-758). No memorandum to the trial court mentioned that issue, it was not argued to the trial court, and the trial court made no Findings of Fact or Conclusions of Law regarding the timeliness of J & M's election to rescind. Defenses not raised by the parties in the trial court cannot

be considered for the first time on appeal. Bangerter v. Poulton, 663 P.2d 100 (Utah 1983). Although J & M believes it made timely election to rescind, by making that election at its first legal opportunity, that issue need not be reached. Since the claim of timeliness of the rescission remedy was not raised in the trial court, it cannot be raised here for the first time.

CONCLUSION

J & M's mistake regarding the elevations was induced by Scott Brown's representation regarding the meaning of those elevations. J & M believes that the evidence is that it was reasonable for it to ask the general contractor its questions about elevations, but at any rate that action by J & M, in its reliance on the unequivocal answer given by Scott Brown did not constitute any violation of a positive legal duty such as would prohibit relief for mistake. In addition, the statements made by Scott Brown regarding the elevations constituted a misrepresentation, an issue which was raised in the trial court and is properly before this Court on appeal. On the basis of this misrepresentation and mutual mistake, J & M is entitled to have this Court modify the judgment to award J & M rescission and restitution in the form of its total reasonable billings of \$123,677.30 less the amount it was paid of \$55,221.83, and to increase the attorney's fees awarded by the trial court by \$17,630.75 since the trial

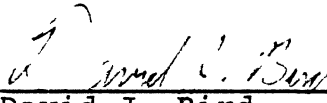
court reduced J & M's fees by 1/2 because it did not prevail on the mistake or misrepresentation issue regarding the elevations.

J & M also requests that it be awarded its attorney's fees incurred in this appeal as against UP, pursuant to former Utah Code Annotated Section 14-2-3.

J & M also requests that the relief sought by UP and B & E in their appeal be denied.

Respectfully submitted this 29th day of March, 1989.

RICHARDS, BIRD & KUMP



David J. Bird

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of March, 1989, I served a copy of the foregoing REPLY BRIEF OF CROSS-APPELLANT by hand delivering four true and correct copies thereof, to the following:

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