

IN THE UTAH COURT OF APPEALS

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Jimmy Zufelt, an individual,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20070140-CA
v.)	
)	
Haste, Inc., a Utah)	F I L E D
corporation; and Harry)	(July 25, 2008)
Gounaris, an individual,)	
)	2008 UT App 289
Defendants and Appellants.)	

Fourth District, Provo Department, 000403084
The Honorable Fred D. Howard

Attorneys: Nick J. Colessides, Salt Lake City, for Appellants
Steven F. Allred, Orem, for Appellee

Before Judges Greenwood, McHugh, and Orme.

McHUGH, Judge:

Haste, Inc. and Harry Gounaris (Defendants) appeal the trial court's ruling on Jimmy Zufelt's motion to dismiss. Specifically, Defendants argue the trial court erred when it dismissed Zufelt's complaint without first requiring him to repay approximately \$32,000 that was disbursed to him. That amount was disbursed after the trial court's October 28, 2004 grant of summary judgment but before this court's August 3, 2006 reversal, see Zufelt v. Haste, Inc., 2006 UT App 326, 142 P.3d 594.¹ Because Defendants' argument is unpreserved, we affirm.

Zufelt argues that this court lacks jurisdiction and that the issue on appeal is moot. We disagree with both of Zufelt's arguments, but even though this court has jurisdiction and the issue is not moot, Defendants must have preserved their contention in the trial court in order for us to review it on

1. The trial court disbursed approximately \$64,000. However, Defendants limit their arguments to the recovery of the \$32,000 received by Zufelt.

appeal.² See, e.g., State v. Holgate, 2000 UT 74, ¶ 11, 10 P.3d 346 ("As a general rule, claims not raised before the trial court may not be raised on appeal.").³ As part of this preservation requirement, "[Defendants] must [have] introduce[d] supporting evidence or relevant legal authority [in the trial court]." Pratt v. Nelson, 2007 UT 41, ¶ 15, 164 P.3d 366. "The mere mention of an issue without introducing . . . relevant legal authority does not preserve that issue for appeal." State v. Brown, 856 P.2d 358, 361 (Utah Ct. App. 1993) (internal quotation marks omitted); see also Pratt, 2007 UT 41, ¶ 15 ("[A] party may not claim to have preserved an issue for appeal by 'merely mentioning . . . an issue without introducing supporting evidence or relevant legal authority.'" (omission in original) (quoting State v. Cruz, 2005 UT 45, ¶ 33, 122 P.3d 543)). Here, the motion and memorandum Defendants filed in the trial court lacked citation to any legal authority. Accordingly, the issue is unpreserved, and we will not consider it on appeal.⁴ See, e.g.,

2. "[R]estitution upon the reversal of a judgment is not of mere right. It is ex gratia" Flake v. Flake, 2003 UT 17, ¶ 35, 71 P.3d 589 (quoting Atlantic Coast Line R.R. Co. v. Florida, 295 U.S. 301, 310 (1935)). Therefore, we reject Defendants' argument that this court's prior reversal of the trial court's ruling, see Zufelt v. Haste, Inc., 2006 UT App 326, 142 P.3d 594, automatically vacated the trial court's previous disbursal order without requiring any action by Defendants. Cf. Cox v. Dixie Power Co., 81 Utah 94, 16 P.2d 916, 921 (1932) ("Though the proceeding [for restitution may] be summary, the adverse party nevertheless must be notified to appear and be apprised of the nature and purpose of the proceeding by notice or motion or by complaint or affidavit which must show all facts necessary to support the proceeding." (emphasis added)).

3. Defendants have not argued that this court should review the issue under either the exceptional circumstances or plain error exception to this rule. See generally State v. Holgate, 2000 UT 74, ¶ 11, 10 P.3d 346 ("[W]e have held that the preservation rule applies to every claim, including constitutional questions, unless a defendant can demonstrate that 'exceptional circumstances' exist or 'plain error' occurred.").

4. The trial court denied Defendants' motion for restitution without addressing its merits because of the lack of citations to legal authority. Accordingly, this case is distinguishable from cases where an issue was inadequately argued to the trial court, but the trial court nevertheless directly ruled on the merits of that issue. See, e.g., Pratt v. Nelson, 2007 UT 41, ¶ 24, 164 P.3d 366 (determining issue was preserved when trial court

(continued...)

Holgate, 2000 UT 74, ¶ 11. On this basis, we affirm the trial court's ruling.

Carolyn B. McHugh, Judge

WE CONCUR:

Pamela T. Greenwood,
Presiding Judge

Gregory K. Orme, Judge

4. (...continued)
received some notice of the issue and "made a specific ruling on the issue," even though petitioner did not address it in a timely manner); Arbogast Family Trust v. River Crossings, LLC, 2008 UT App 277, ¶¶ 11-12 (determining issue was preserved despite inadequate argument by counsel because the trial court directly ruled on the specific question). See generally State v. Brown, 856 P.2d 358, 361 (Utah Ct. App. 1993) ("[F]or an issue to be sufficiently raised, even if indirectly, it must at least be raised to a level of consciousness such that the trial judge can consider it." (internal quotation marks omitted)).