

2008

# Young Living Essential Oils Inc. v. Carlos Marin : Reply Brief

Utah Court of Appeals

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Barnard N. Madsen; Scott D. Preston; Fillmore Spencer; Attorneys for Appellee.

Scott B. Mitchell; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

\* \* \* \*

YOUNG LIVING ESSENTIAL OIL,  
INC.,

Plaintiff/Appellee,

vs.

CARLOS MARIN,

Defendant/Appellant.

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**APPELLANT'S REPLY BRIEF**

Case No. 20080624-CA

\* \* \* \*

DEFENDANT'S APPEAL FROM FINAL ORDERS OF THE FOURTH  
JUDICIAL DISTRICT COURT, THE HONORABLE SAMUEL MCVEY PRESIDING

\* \* \* \*

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PUBLISHED DECISION REQUESTED

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## ARGUMENT

### I. YOUNG LIVING'S "INTEGRATION CLAUSE" DOES NOT INSULATE IT FROM THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

Utah appellate courts have repeatedly recognized that a breach of the covenant of good faith and fair dealing may result from an obligation, express or implied, which arises not from the language of the contract, but from the course of dealings and conduct of the parties. See, e.g., *Rawson v. Conover*, 2001 UT 24, ¶ 44, 20 P.3d 876; *Brown v. Moore*, 973 P.2d 950, 955 (Utah 1998); *St. Benedicts Dev. v. St. Benedicts Hosp.*, 811 P.2d 194, 200 (Utah 1991); and *Andolex Resources, Inc. v. Myers*, 871 P.2d 1041, 1048 (Utah App. 1994). For example, in *Brown* the Supreme Court explained that

"[i]n determining whether a party has breached the covenant of good faith and fair dealing, **we are not limited to an examination of the express contractual provisions; we will also consider the course of dealing between the parties.**"

973 P.2d at 954 (citations omitted) (emphasis added).

Nevertheless, Young Living fails to address this line of cases and asserts that the trial court properly refused to consider the parties' conduct and course of dealings in the case at bar because the agreement at issue contains a "clear integration clause." Relying on the Supreme Court's decision in *Tangren Family Trust v. Tangren*, 2008 UT 20, 182 P.3d 326, Young Living contends that "[i]f there is a clear integration clause,

the parties' course of dealing may not be used to add implied terms."<sup>1</sup> Young Living's reliance is misplaced.

*Tangren* is easily distinguishable from the case at bar. That case did not involve a claim for breach of the implied covenant of good faith and fair dealing and it did not address the *Rawson, Brown, St. Benedicts Development, Andolex Resources* line of cases. More importantly, as the *Tangren* Court recognized, the parol evidence rule has a "very narrow application," and operates only to exclude evidence of statements offered for the purpose of varying or adding to the terms of an integrated agreement. *Id.* at ¶ 11 (quoting *Hall v. Process Instruments & Control, Inc.*, 890 P.2d 1024, 1026 (Utah 1995)). The covenant of good faith and fair dealing, however, inheres in every contract as a matter of law. *See, e.g., Markham v. Bradley*, 2007 UT App 379, ¶ 18, 173 P.3d 865. Because the covenant was already part of the contract at issue in this case, it follows that Mr. Marin's testimony in support of his claim for breach of the covenant was not "offered for the purpose of varying or adding to the terms of" the contract.

The trial court, therefore, erred in concluding that the parol evidence rule barred Mr. Marin's testimony.

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<sup>1</sup>Brief of Appellee at p. 14.

## II. MR. MARIN'S TESTIMONY DOES NOT LACK FOUNDATION.

Young Living also relies on the trial court's statement that Mr. Marin's "assertions of Plaintiff's representations lack foundation as to the circumstances including who made the purported representation or representations and when such representations were made."<sup>2</sup> Unfortunately, Young Living fails to provide any analysis, explanation or support for this statement.

In point of fact, Mr. Marin's testimony is, for the most part, very clear as to who made the representations and when they were made:

....

4. ... plaintiff represented to me that it was nearing completion of a new mainstream marketing website, recruiting DVD, audio CD, and other marketing materials (hereinafter referred to as the "marketing tools"). It was clearly understood by both plaintiff and myself that these marketing tools would be absolutely necessary in order for me to be able to meet my performance guarantees under the Agreement and it was represented to me that they would be available for use by February 1, 2005.

....

7. **On or about February 7, 2005**, after plaintiff failed to provide the marketing tools as promised, I contacted Gary Young, plaintiff's Chief Executive Officer, and David Stirling, plaintiffs' Chief Operating Officer, with my growing concerns about my ability to meet the performance guarantees. **Mr. Young and Mr. Stirling acknowledged that plaintiff had failed to perform as promised, assured me that my inability to satisfy the performance guarantees would not**

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<sup>2</sup>Brief of Appellee at p. 17-18 (quoting from the trial court's March 26, 2008 Order (R. 462)).



effect my receipt of the advance payment of \$25,000 due February 15, 2005, and expressed their confidence that the marketing tools would be ready for my use by mid-February to early March 2005.

8. On or about March 16, 2005, Steve Bentley, plaintiff's Chief Financial Officer, informed me that due to my failure to meet the March 15, 2005 performance guarantee, plaintiff was considering withholding further payment to me under the Agreement. In response, I made it very clear to Mr. Bentley that my failure to satisfy the performance guarantee was the unavoidable result of plaintiff's failure to provide the promised marketing tools, that I could and would meet my performance guarantees when the tools were provided, and that I expected plaintiff to continue making payment to me in accordance with the terms of the Agreement. Mr. Bentley acknowledged that plaintiff had failed to perform as promised, represented that plaintiff anticipated that its website would be completed within approximately two weeks, and stated that plaintiff would be making a partial \$15,000 payment to me.

9. On April 12, 2005, I spoke again with Gary Young regarding plaintiff's failure to provide the marketing tools. Mr. Young responded by telling me that he would "get to the bottom" of the problem and see what he could do.

10. Despite its acknowledgment that it had failed to provide me with the marketing tools which I needed to do my job, and despite its requests that I remain patient while it continued in its efforts to provide the marketing tools, plaintiff failed to pay me \$10,000 of the advance payment due March 15, 2005 in accordance with paragraph 4 of the Agreement and failed to make any of the \$25,000 advance payment due to be paid to me on April 15, 2005.

11. On April 26, 2005, I telephoned Mr. Stirling regarding plaintiff's failure to provide the promised marketing tools. Mr. Stirling again assured me that they would be provided soon and again requested my patience.

12. On May 3, 2007, Mr. Stirling notified me that he had received an e-mail from Rainmaker Consulting (i.e., John's folks) "which indicated they are making progress" on the website. Mr. Stirling asked me to "hold tight". A copy of the e-mail is attached hereto. Thus, 49 days after plaintiff stopped making payments to me in accordance with

the Agreement, plaintiff acknowledged that it had still not provided me with the marketing tools which were absolutely essential for me to be able to do my job and again requested my continued patience.

13. On or about June 8, 2005, when plaintiff had still not provided any of the marketing tools which I needed in order to do my job, I spoke with Mr. Young and informed him that I believed I had been patient long enough in waiting for the repeatedly promised marketing tools and that I could no longer afford to continue to my contractual relationship with plaintiff.

(R. 0125-0122) (emphasis added).

Even if there is some foundational problem with Mr. Marin's testimony, for purposes of opposing summary judgment the nonmoving party need not produce evidence "in a form that would be admissible at trial," so long as the content and substance of the evidence would be admissible. *Thomas v. International Business Machines*, 48 F.3d 478, 485 (10<sup>th</sup> Cir. 1995) (quoting *Celotex Corp. v. Catret*, 477 U.S. 317, 324, 106 S.Ct. at 2553 (1986), and citing *Winskunas v. Birnbaum*, 23 F.3d 1264, 1267-68 (7<sup>th</sup> Cir. 1994)). For example, hearsay testimony and generalized, unsubstantiated, non-personal affidavits are not sufficient to defeat summary judgment. *Id.* (citations omitted). Mr. Marin's testimony does not suffer from any of these deficiencies. It is not hearsay because it is based upon admissions by a party-opponent, *Utah Rule of Evidence* 801(d)(2), and it is clearly based upon his own personal, specific knowledge.

Accordingly, Mr. Marin respectfully submits that his testimony is sufficient to defeat summary judgment.

**III. THE ISSUE OF ATTORNEY FEES WAS PRESERVED FOR APPEAL.**

Young Living does not attempt to defend the trial court's award of \$43,903 in attorney fees in this relatively simple breach of contract case in which neither party conducted any discovery and which was decided on summary judgment. Nor does Young Living attempt to justify its failure to "categorize the time and fees expended for 'successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there may be an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees.'" *Jensen v. Sawyers*, 2005 UT 81, ¶132, 130 P.3d 325 (quoting *Foote v. Clark*, 962 P.2d 52, 54 (Utah 1998)). Finally, Young Living does not explain why it is entitled to thousands of dollars in attorney fees incurred in connection with matters upon which it did not prevail. See *Foote v. Clark*, 962 P.2d 52, 57 (Utah 1998) ("the court should not reimburse counsel for time spent pursuing ungrounded and infeasible theories of recovery"); and *Gardner v. Madsen*, 949 P.2d 785, 792 (Utah Ct. App. 1997) (trial court should make adjustments to fee request so that the prevailing party "does not recover fees attributable to issues on which he did not prevail"). Instead, Young Living relies on Rule 7(f)(2) to support its contention that Mr. Marin

failed to preserve the issue of attorney fees for appeal. Mr. Marin respectfully submits that Young Living misreads the Rules.

Mr. Marin believes that the following time-line may be helpful to understanding the flaw in Young Living's argument.

1. The Order granting Young Living's Motion for Partial Summary Judgment was entered March 26, 2008. (R. 462) That Order, however, was not a final judgment because it "adjudicat[ed] fewer than all [of Young Living's] claims." Rule 54(b), *URCP*.

2. Accordingly, on May 27, 2008, Young Living filed the following documents with the trial court:

- a. Motion for Order of Voluntary Dismissal of Plaintiff's Second, Third, Fourth, Fifth and Sixth Causes of Action
- b. Order of Voluntary Dismissal of Plaintiff's Second, Third, Fourth, Fifth and Sixth Causes of Action
- c. Proposed Final Judgment
- d. Affidavit of Attorney's Fees and Costs

(R. 492, 502 and 505)

3. In accordance with Rules 6(a), 6(e), and 7(c)(1), *URCP*, Mr. Marin had until June 13, 2008, in which to file his memorandum in response to Young Living's Motion for Order of Voluntary Dismissal of Plaintiff's Second, Third, Fourth, Fifth and Sixth Causes of Action.

4. Mr. Marin timely filed his objection to Young Living's attorney fee affidavit and to the provision for attorney fees and

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Rule 7(f)(2), *Utah Rules of Civil Procedure*.

In support of its contention that Mr. Marin failed to preserve the issue of attorney fees for appeal, Young Living relies on the Rule 7(f)(2) requirement that "[o]bjections to the proposed order shall be filed within five days after service." Mr. Marin respectfully submits that Young Living misreads the Rule. The "five day" requirement applies only to orders served upon the other parties within "fifteen days after the court's decision" and does not apply to a "proposed order submitted with an initial memorandum." This is so for a number of reasons. First, it does not make sense that an objection to a "proposed order submitted with an initial memorandum" would be required to be filed in half the time allowed by Rule 7(c)(1), URCP, in which to file a memorandum in response to the initial memorandum itself. Second, Rule 7(f)(2) specifically excludes from its time limitations those situations like the case at bar where "the court approves the proposed order submitted with an initial memorandum." Third, the time for filing objections contained in the second sentence of Rule 7(f)(2) runs from the time of "service," it does not run from the time a proposed order is "submitted" within an initial memorandum:

... the prevailing party shall, within fifteen days after the court's decision, **serve** upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after **service**.

Rule 7(f)(2), *URCP*.<sup>3</sup>

In short, Rule 7(f)(2) does not specify a time limitation for filing an objection to a "proposed order submitted with an initial memorandum," and it would not be reasonable to interpret that Rule to require an objection to a proposed order submitted with an initial memorandum to be filed in half the time allowed for filing a response to the initial memorandum itself. Accordingly, Mr. Marin respectfully submits that his objection to Young Living's fee affidavit and the award of attorney fees contained in the Proposed Final Judgment (which was filed two days prior to the deadline for responding to Young Living's motion) was timely filed.

However, even if Young Living is correct that Mr. Marin's objections were filed later than required by Rule 7, they were still sufficient to preserve the issue of attorney fees for appeal. In *Groberg v. Housing Opportunities, Inc.*, 2003 UT App 67, 68 P.3d 1015, the Court explained that "for an issue to be sufficiently raised ... it must at least be raised to a level of

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<sup>3</sup>It is likewise clear that the time limits set forth in the final sentence of Rule 7(f)(2) apply only to proposed orders "served" within fifteen days after the court's decision, and do not apply to proposed orders "submitted" with an initial memorandum: "The party preparing the order shall file the proposed order upon being **served** with an objection or upon expiration of the time to object." It would, of course, be absurd to read the final sentence to require the filing of a proposed order submitted with an initial memorandum again "upon being served with an objection or upon expiration of the time to object."

consciousness such that the trial judge can consider it.” *Id.* at ¶ 19 (quotations and citations omitted). Two policy considerations underlie the rule that issues not raised before the trial court may not be raised on appeal:

First, the rule exists to give the trial court an opportunity to address the claimed error. [quotations and citations omitted] Second, requiring preservation of an issue prevents a party from avoiding the issue at trial for strategic reasons only to raise the issue on appeal if the strategy fails.

*Tschaggeny v. Millbank Ins. Co.*, 2007 UT 37, ¶ 20, 163 P.3d 615.

In the instant case, there is no suggestion that Mr. Marin failed to earlier object to plaintiff’s attorney fee request for strategic reasons. And, Mr. Marin respectfully submits that his objection (filed two days prior to the issuance of the Final Judgment) was sufficiently “raised to a level of consciousness that the trial judge [could have] considered it.” *Groberg, supra*, 2003 UT App 67, ¶ 19. The issue of attorney fees was, therefore, preserved for appeal.

**IV. THE COURT CAN CONSIDER THE ISSUE OF ATTORNEY FEES BECAUSE THE TRIAL COURT COMMITTED PLAIN ERROR AND THIS CASE INVOLVES EXCEPTIONAL CIRCUMSTANCES.**

If the Court determines that Mr. Marin failed to preserve the issue of attorney fees for appeal, it may still consider the issue of fees because the trial court committed plain error and this case involves exceptional circumstances. See *View Condominium Owners Ass’n v. MSICO*, 2004 UT App 104, ¶ 37, 90 P.3d



1042 (citing *State v. Brown*, 856 P.2d 358, 359-60 (Utah Ct. App. 1993)) (appellate courts will generally not consider an issue raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances).

**(A) The Trial Court's Award of Attorney Fees is Plainly Erroneous.**

**(i) The trial court failed to make findings of fact supported by the evidence and appropriate conclusions of law.**

"An award of attorney fees must generally be made on the basis of findings of fact supported by the evidence and appropriate conclusions of law." *Cabrera v. Cottrell*, 694 P.2d 622, 624 (Utah 1985) (citing *Bangerter v. Poulton*, 663 P.2d 100, 103 (Utah 1983)) (other citations omitted). One of the issues before the Court in *Cabrera* was whether the trial court committed plain error in awarding attorney fees without making a finding of reasonableness. The Court upheld the award even though the trial court did not enter findings and conclusions separate from its order and judgment because the order and judgment itself contained findings and legal conclusions, including a finding that the fee award was reasonable. The Court explained that:

As a matter of form, it would have been preferable for the trial court to have entered separate findings of fact and conclusions of law in addition to the order and judgment for attorney fees, but the order and judgment are not defective because they are combined with findings and conclusions.

694 P.2d at 625.

In the case at bar, however, the trial court did not make any findings of fact or conclusions of law with respect to Young Living's attorney fee request. And, unlike *Cabrera*, there is no finding of reasonableness in the Final Judgment.

Mr. Marin respectfully submits that the trial court committed plain error by awarding attorney fees without making appropriate findings of fact and conclusions of law.

**(ii) Young Living is not entitled to recover attorney fees related to its tort and other non-contract claims.**

In Utah, attorney fees are recoverable only if authorized by statute or contract. *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988) (citations omitted). Young Living relies on the following contractual provision to support its fee request:

6.1 MARIN hereby agrees to indemnify and save Company and hold Company harmless in respect to all causes of action, liabilities, costs, charges and expenses, loss and damage (including consequential loss) suffered or incurred by Company (including legal fees) arising from any willful or grossly negligent act or omission of MARIN or his employees, servants and agents or arising from contravention by MARIN of [sic] any of its [sic] employees, servants, and agents of any of the terms and conditions imposed on MARIN pursuant to this Agreement.

(R. 10)

In its Complaint, Young Living alleged six causes of action, entitled in order: (1) Breach of Contract; (2) Unjust Enrichment; (3) Quantum Meruit; (4) Fraud; (5) Breach of Implied Covenant of Good Faith and Fair Dealing; and (6) Negligent Misrepresentation.

After the trial court granted summary judgment with respect to the breach of contract claim alleged in its First Cause of Action, Young Living voluntarily dismissed its Second through Sixth Causes of Action. Accordingly, the only cause of action with respect to which Young Living might be entitled to an award of attorney fees is the breach of contract claim alleged in the First Cause of Action.

The trial court, however, granted summary judgment in Young Living's favor on the breach of contract claim at the conclusion of the hearing held October 1, 2007. Yet, Young Living seeks to recover tens of thousands of dollars in attorney fees incurred during the eight months after that date (R. 470-465), nearly all of which were related either to the tort and non-contract claims alleged in the Second through Sixth Causes of Action or to litigating "Defendant's Objection to Plaintiff's Proposed Form of Order" and "Plaintiff's Motion to Reconsider" upon which Young Living did not prevail. (R. 392, 448)

In *Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325, the Court recognized not only that an award of attorney fees must be based upon "specific findings of fact," but also that the party requesting attorney fees must "categorize the time and fees expended for 'successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there may be an entitlement to attorney fees had the claims been

successful, and (3) claims for which there is no entitlement to attorney fees.'" *Id.* at ¶132 (quoting *Foote v. Clark*, 962 P.2d 52, 54 (Utah 1998)).

Noncompliance with these requirements makes it difficult, if not impossible, for the trial court to award the moving party fees because there is insufficient evidence to support the award.

*Id.*

Thus, in the case at bar, not only did the trial court commit plain error by not making specific findings of fact, but it did not have sufficient evidence to support an award of attorney fees because Young Living failed to properly categorize its fee request.

**(iii) Young Living is not entitled to recover attorney fees in connection with issues on which it did not prevail.**

The trial court committed plain error by awarding Young Living attorney fees in connection with matters on which it did not prevail. See *Foote v. Clark*, 962 P.2d 52, 57 (Utah 1998) ("the court should not reimburse counsel for time spent pursuing ungrounded and infeasible theories of recovery); and *Gardner v. Madsen*, 949 P.2d 785, 792 (Utah Ct. App. 1997) (trial court should make adjustments to fee request so that the prevailing party "does not recover fees attributable to issues on which he did not prevail"). Young Living seeks thousands of dollars in attorney fees incurred in litigating "Defendant's Objection to Plaintiff's Proposed Form of Order" and "Plaintiff's

Motion to Reconsider.” (R. 470-465) The trial court, however, sustained Mr. Marin’s objections to Young Living’s proposed form of order (R. 392) and denied Young Living’s Motion to Reconsider. (R. 448) Mr. Marin respectfully submits that it was plainly erroneous for the trial court to reimburse Young Living for time spent on ungrounded and infeasible theories and upon matters on which it did not prevail.

**(B) This Case Involves Exceptional Circumstances.**

Finally, Mr. Marin respectfully submits that the following exceptional circumstances would justify the Court in considering the issue of attorney fees.

1. Young Living failed to comply with the time requirements of Rule 7, URCP, and should not be heard to complain of Mr. Marin’s failure to do so. Young Living filed its Motion for Partial Summary Judgment on March 21, 2007. (R. 74) Mr. Marin timely filed his Response to Motion for Partial Summary Judgment and Counter-Motion for Partial Summary Judgment on April 4, 2007. (R. 119) Young Living did not file its reply/response memorandum until August 13, 2007, nearly four months after it was due. (R. 170)

Similarly, the Order granting Young Living’s Motion for Partial Summary Judgment was entered March 26, 2008. (R. 462) In accordance with Rule 7(f)(2), Young Living should have served a proposed form of judgment within “fifteen days after the

court's decision." The Proposed Final Judgment was not served until May 27, 2008, 44 days late. (R. 505)

2. The trial court did not proceed in accordance with Rule 7, URCP. As set forth above, the trial court prematurely entered the Order of Voluntary Dismissal of Plaintiff's Second, Third, Fourth, Fifth and Sixth Causes of Action on June 12, 2008. (R. 502) It did so not only prior to the filing of Mr. Marin's response memorandum, but prior to the time when Mr. Marin's response memorandum was due, prior to the filing of plaintiff's Reply in Support of Plaintiff's Motion for Order of Voluntary Dismissal on June 23, 2008 (R.510), and without either party having filed a "Request to Submit for Decision" in accordance with Rule 7(d), URCP.

Accordingly, because neither Young Living nor the trial court proceeded in accordance with the requirements of Rule 7, it would not be reasonable to now hold Mr. Marin strictly to those requirements.

#### **CONCLUSION**

For the foregoing additional reasons, Mr. Marin respectfully requests that the trial court's March 26, 2008 Order granting plaintiff's Motion for Partial Summary Judgment be reversed, that the Final Judgment be vacated, and that this case be remanded to the trial court for further proceedings consistent with this Court's decision.

DATED this 5<sup>th</sup> day of June 2009.

  
Scott B. Mitchell  
Attorney for Appellant

**MAILING CERTIFICATE**

Undersigned certifies that two copies of the foregoing were mailed this 5<sup>th</sup> day of June 2009 via first class U.S. Mail, postage prepaid, to the following:

Barnard N. Madsen  
Scott D. Preston  
FILLMORE SPENCER, LC  
3301 North University Avenue  
Provo, Utah 84604

