

1978

## Naon Winkel v. J. Harold Call : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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NAON WINKEL, )

Plaintiff-Respondent, )

vs. )

Case No. 15942

J. HAROLD CALL, Executor )

of the Estate of William )

J. Ercanbrack, deceased, )

Defendant-Appellant. )

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BRIEF OF RESPONDENT

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APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL  
COURT IN AND FOR SUMMIT COUNTY, STATE OF UTAH  
THE HONORABLE STEWART M. HANSEN, JR. PRESIDING

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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NAON WINKEL,

Plaintiff-Respondent,

vs.

Case No. 15942

J. HAROLD CALL, Executor  
of the Estate of William  
J. Ercanbrack, Deceased,

Defendant-Appellant.

---

BRIEF OF RESPONDENT

---

STATEMENT OF THE NATURE OF THE CASE

This is an action brought by the plaintiff seeking recovery from the estate of William J. Ercanbrack, deceased contribution for the purchase of a mobile home and for collection under a promissory note executed by the decedent.

DISPOSITION OF THE LOWER COURT

Respondent agrees with the statement of the disposition of the lower court, but adds that judgment was granted respondent on her claim against the estate on a promissory note executed by the decedent and for attorneys fees thereon.

STATEMENT OF FACTS

Respondent disagrees with the statement of facts of the Appellant in that said statement of facts did not set forth the underlying facts of the case.

Respondent and the decedent were close personal friends and had been since 1970 to the time of his death in October, 1976 (Finding of Fact No. 14) and that the parties had contemplated marriage.

Further, the decedent had assisted the Respondent in purchasing the mobile home in question and had assisted in the selection of the furniture to be placed therein and had stayed therein from time to time up to the time of his death. (Findings of Fact No. 12, 13)

The decedent signed the Installment and Purchase agreement as a buyer, and the Court found as a matter of fact that the Respondent and the decedent were co-purchasers of the mobile home. (Finding of Fact No. 10)

The uncontroverted evidence showed that the decedent had borrowed from the Respondent the sum of \$1,600. and had repaid to her certain sums leaving a balance of \$759.00. Respondent filed timely a claim for the debt owing her and the Court awarded her a judgment for \$759 plus uncontroverted attorneys fees of \$275.00. (Conclusion of Law No. 1)

Appellant failed to file for probate a codicil to the Last Will and Testament of the decedent and the Respondent filed a copy of the same for probate whereupon the Appellant produced the original and stipulated that it could be admitted to probate. This codicil was construed by the trial court as having been a forgiveness of the claimed off set against the claims of the Respondent and held that the Appellant was not entitled to recover under his counter-claim.

## ARGUMENT

### POINT ONE

THE TRIAL COURT'S FINDINGS ARE BASED UPON SUFFICIENT EVIDENCE TO BE SUSTAINED UPON APPEAL.

The law of Utah is well settled that the Supreme Court is constrained to look at the whole of the evidence in the light favorable to the trial courts findings including any fair inferences to be drawn from the evidence and all of the circumstances shown. Hanover Ltd. v. Fields, (1977, Utah) 568 P.2d 751. Further, the Court must view all of the fair inferences and circumstances in the light most favorable to the successful party below. Carnesecca v. Carnesecca, (1977, Utah) 572 P.2d 708.

A review of the record of the trial in this matter shows that the findings of the court and the conclusions of law reached by the Court are in fact sustained by the record and that based thereon, the Supreme Court should deny the relief sought by the Appellant on appeal.

### POINT TWO

THE COURT DID NOT ERR WITH RESPECT TO CONSIDERING EVIDENCE BARRED BY THE DEAD MAN'S STATUTE

The record of this case is abundantly clear that the trial court scrupulously adhered to the mandates of the dead man's statute to the point that if any err was committed it was committed against the interests of the Plaintiff-Respondent. The Supreme Court has repeatedly ruled that as the dead man's statute is one of exclusion of otherwise

proper evidence, it should be construed and applied strictly.  
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according to its terms. Timpanogos Highlands, Inc. v. Harper, (1975, Utah) 544 P.2d 481.

The record shows that the Court refused the testimony of the plaintiff and of the seller of the mobile home, his being on the theory that as he was contingent liable under the recourse provisions of the assignment to Walker Bank, he had an interest in the out-come of the case and his position was adverse to that of the decedent.

Appellant cites no authority nor points out any testimony which violated the terms of the dead man's statute.

Appellant claims that the Respondent sought to defraud the estate by filing a false claim, however, this is belied by the fact that the amended complaint of Plaintiff sought only that which Plaintiff believed was owing her, to-wit: \$829.98 and not \$1,600 which the Appellant would have the Court believe that the Respondent pressed for. This contention is without merit and the allegations of minor children or other children is without foundation in the record.

### POINT THREE

THE CODICIL TO THE WILL SPEAKS FOR ITSELF AND THE TRIAL COURT PROPERLY INTERPRETED THE INTENT OF THE DOCUMENT.

Appellant speaks of the "purported Codicil". This is in error. Appellant in open court admitted that the document in question was a codicil and allowed the same to be admitted into the probate proceedings without objection. In fact, after the Respondent filed a copy of the codicil and asked that it be probated as a codicil, the Appellant then produced the original and stipulated that it could be probated as the



codicil to the decedent's will.

The Court properly gave the entire document its clear and unambiguous meaning and ruled that the intent of the decedent was to declare the promissory note owing by the Respondent as fully paid, and therefore no offset was, as a matter of law, permissible against the debt that the decedent owed the Respondent. The trial court's findings must stand unless the evidence clearly preponderates against the findings. Timpanogos Highlands, Inc. v. Harper, op cit.

#### POINT FOUR

DECEDENT WAS A CO-MAKER WITH THE RESPONDENT AND THEREFORE JOINTLY LIABLE.

Appellant attempts to allege that the relationship between the Respondent and the decedent with respect to the purchase of the mobile home was that of a principal (Respondent) and an accommodation maker (Decedent). The trial court found to the contrary and ruled that based upon the facts of the case the relationship was that of co-makers as between the two parties.

Such a ruling precludes the application of the Statute of Frauds as the statute is not applicable to a primary maker.

This Court pointed out in Sugar v. Miller, (1957) 6 U.2d 433, 315 P.2d 862 that the intention of the parties governed and that the question of intention was a question of fact to be determined by the trial court, unless the language used, the relationship between the parties and the surrounding circumstances were such that there could be no reasonable

dispute. Followed in O'Hair v. Kounellis, (1970) 23 U.2d 355, 356. Scanned by the S. Quentin Law Library. Funding for Digitization provided by the Institute of Museum and Library Services and Technology Act, administered by the Utah State Library.

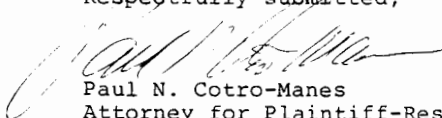
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The law is well settled that co-obligors must contribute equally in discharging their common obligation. 64 A.L.R. 213; 18 Am Jur 2d 33, Contribution §19. See also Rule 69 (h), Utah Rules of Civil Procedure. The Court's conclusions of law with respect to this matter were without error.

CONCLUSION

It is respectfully submitted that Appellant's appeal is without merit and that the same should be dismissed and the judgment of the trial court affirmed with costs to Respondent.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on the 30<sup>th</sup> day of November, 1978, I mailed, postage prepaid, two copies of the Respondents Brief in this matter to James J. Smedley, Esq., Attorney for Defendant-Appellant at 30 North Main, Heber City, Utah 84032.

  
Paul N. Cotro-Manes