

1962

# Zion's Service Corporation v. H. A. Danielson : Respondent's Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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Arthur H> Nielsen; Nielsen, Conder and Hansen; Attorneys for Respondent;

Norman Wade; Attorney for Appellant;

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IN THE SUPREME COURT OF THE

STATE OF UTAH

**FILED**

JAN - 5 1962

**ZION'S SERVICE CORPORATION,**

**Plaintiff & Respondent,**

**vs.**

**H. A. DANIELSON,**

**Defendant & Appellant.**

Clerk, Supreme Court, Utah

**Case No. 9232**

**RESPONDENT'S PETITION FOR REHEARING**

**and**

**BRIEF IN SUPPORT THEREOF**

**Appeal from the Judgment of the Third  
District Court for Salt Lake County  
Honorable Stewart M. Hanson, Judge**

**Arthur H. Nielsen  
Nielsen, Conder and Hansen  
510 Newhouse Building  
Salt Lake City, Utah  
Attorneys for Respondent**

**Norman Wade  
First Security Bank Bldg.  
Salt Lake City, Utah  
Attorney for Appellant**

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ZION'S SERVICE CORPORATION,

Plaintiff and Respondent,

v.

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CASE  
No. 9232

RESPONDENT'S PETITION FOR REHEARING

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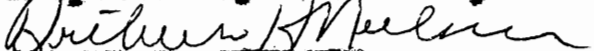
Plaintiff and Respondent, Zion's Service Corporation, respectfully petitions the Court to withdraw its decision herein and grant a rehearing on the appeal in the above entitled cause upon the grounds and for the following reasons:

1. The decision and opinion fail to make an important distinction between the Masterbuilders case and the instant matter which results in perpetuating a wrongful conclusion as to the public policy involved.

2. At all events the decision and opinion fail to give effect to the finding of the lower court, supported by competent evidence, to the effect that between January 3, 1956 and July 1, 1958 "Plaintiff corporation furnished services to Defendant of the reasonable value of not less than \$7,000.00," so that after crediting Defendant with the sum of \$1,662.00 paid by him, he would still be indebted to the corporation for the reasonable value of the services rendered in an amount in excess of that sued upon; that to permit Defendant to escape liability would result in an unjust enrichment to him.

Respondent submits the attached brief in support of the foregoing petition.

Respectfully submitted,



ARTHUR H. NIELSEN

NIELSEN, CONDER AND HANSEN

510 Newhouse Building

Salt Lake City, Utah

Attorneys for Respondent

B R I E F

ARGUMENT

POINT I

THE COURT HAS IMPROPERLY ADOPTED THE DECISION OF THE MASTERBUILDER CASE AS DETERMINATIVE OF THE INSTANT MATTER.

The decision of the Kansas Supreme Court in the case of Masterbuilders Assn. of Kansas v. Carson (1932), 132 Kan. 606, 296 Pac. 693, was adopted by this Court as determinative of the issues in the instant matter notwithstanding this case was decided more than thirty years ago, does not reflect the modern social thought as to organizations formed for the purpose of supplying members with engineering data and other assistance which the members are not financially able to supply on an individual basis; and it is entirely distinguishable from the instant matter on the crucial point involved. As this Court points out in its opinion, the Kansas Supreme Court held that the contract to pay a percent of the contract as a fee for the services rendered was void upon three grounds:

(1) That the contractor is likely to add the cost of this service to his bid and therefore pass it on to the consumer; (2) that five others who did not do any services or any work for this, benefited from the contractor's bid; and (3) free competition is diminished where all contractors use the same service from the same source.

As to the first ground, that the cost of the services is likely to be added to the bid and passed on to the consumer, it is impossible to see how such an argument could be used as the basis of voiding any contract to pay for services rendered, because all costs incurred by a contractor must be added to his bid and passed on to the consumer. The cost of maintaining a central office, of counsel fees, and other services not related to any particular contract must be considered by a contractor and added to the various bids made by him. In addition, his own idea of the value of his time and service, as well as the margin of profit which he intends to receive, are included in every bid. That



the cost of any services will be added to the amount which the consumer will ultimately have to pay is such an obvious conclusion that it seems most difficult to understand how such a factor could be made the basis of a determination to void an agreement to pay for such services after the same have been rendered.

Likewise, the third ground used by the Kansas Court for its determination, that "free competition is diminished where all contractors use the same service from the same source," is amply answered by the various cases cited in Respondent's Brief. In fact, this Court in its opinion recognizes the right of individuals to associate or organize "to provide essential information of a general nature that may be applied to specific problems of the members," but the opinion apparently limits such organizations to "trade associations non-profit in nature." Surely the nature of the organization does not determine whether the information furnished to the members of the organization is or is not proper. No less a court than the Supreme



Court of the United States, in *Maple Flooring Manufacturers Assn. v. United States*, 268 U.S. 563, 45 S.Ct. 578, held that the compilation and distribution of the average cost to association members of all dimensions and grades of flooring, the compilation and distribution of a booklet showing freight rates, and the gathering of statistics showing the quantity and kind of flooring sold and the prices received, was a proper service to be rendered without violation of the Sherman Antitrust Law. The Court said:

"...the Sherman Law neither repels economic laws nor prohibits the gathering and dissemination of information. Sellers of any commodity who guide the daily conduct of their business on the basis of market reports would hardly be deemed to be conspirators engaged in restraint of interstate commerce. They would not be any more so merely because they become stockholders in a corporation or joint owners of a trade journal, engaged in the business of compiling and publishing such reports."  
(emphasis added)

The Supreme Court of the United States further recognized that the type of organization was not significant, as indicated in the underscored portion of the above quotation.

The services rendered by the corporation in the instant matter related to furnishing data as to the quantities of various materials which would be required in any contract open for bid. As testified by Mr. Whitaker, these estimates were furnished so that the Contractors could double check their own computations and avoid mathematical errors or mistakes resulting from improperly reading the plans and specifications. In addition, the corporation furnished other services to the members with respect to employee relations and contract interpretation where a contract was in progress of completion.

This leaves as the only justification for the Court's decision in the Kansas case the second ground referred to above, to the effect that five others who did not do any services or any work benefited from the successful contractor's bid.

Under the alleged agreement in the Kansas case, one half of the fee to be paid by the contractor was to be distributed equally to the five lowest unsuccessful bidders on the contract. We do not quarrel with the contention that such an agreement was improper, and if the Kansas court wishes to make it the basis of a conclusion to the effect that the agreement to pay to the unsuccessful bidders a portion of the fee was against public policy and rendered the contract void, we do not feel that this Court need to concern itself with such a determination. No such agreement is involved in the instant matter. In fact, the entire fee charged, as found by the trial court, is not disproportionate to the service rendered, and would go entirely to the corporation furnishing the services. The Court's opinion calls attention to the fact that a dividend of \$1,000.00 was paid by the corporation to its members. The Court should also have indicated that each of the members put in \$1,000.00 to start the organization going. Surely

there is nothing wrong with the members expecting to have the organization pay its expenses out of its income and to build up a sufficient surplus to carry it over what might be considered to be "lean" periods of time. There is no evidence in this case that the corporation expected to make substantial profits on the fee schedule set up, and no innuendo or inference to that effect is justified from the fact that investments were going to be made.

The Court's opinion fails to give any consideration to the more recent decisions which have been handed down in other jurisdictions on this question, and particularly the decision by the Ninth Circuit Court of Appeals in the case of Griffiths & Sprague Stevedore Co. vs. Waterfront Employers' Ass'n., 162 Fed. 2nd 1017, which refused to follow the reasoning of the Kansas Court in the Masterbuilders case.

In view of the foregoing, Respondent urges

this Court to reconsider its decision and grant a rehearing in order that the matter may be more thoroughly analyzed and reviewed in respect to the public policy involved.

POINT II

AT ALL EVENTS, RESPONDENT CORPORATION SHOULD BE ENTITLED TO RECOVER THE REASONABLE VALUE OF THE SERVICES ACTUALLY RENDERED.

This Court in its decision and opinion has apparently failed to give any consideration to Finding No. 6 of the lower court to the effect that the services rendered to the defendant during the period in question were of a reasonable value of not less than \$7,000.00. Therefore, even though this Court should conclude that the specific agreement to pay a percentage of each successful bid is unenforceable, this determination should not preclude Respondent from recovering the reasonable value of the services which it rendered as found by the trial court and which is not challenged

on this appeal. In the forepart of its opinion this Court states:

"When the defendant received the job in each of the six instances in question an enforceable obligation ripened requiring that he pay in accordance with his agreement."

Thereafter, the Court concludes that the agreement to pay the specified amount is unenforceable because the contract to pay is in restraint of trade and against public policy. This, however, should not preclude payment for the services which have heretofore been rendered in good faith, the benefit of which has been completely received by Appellant so that to permit him to escape liability (after he has allegedly added these fees on to his contract bid and passed them on to his consumer) would result in his being unjustly enriched.

What is it that this Court has held to be against public policy and in restraint of trade? Obviously the agreement to pay a fixed fee out of all successful contracts obtained by the contractor. Surely this Court does not intend to



preclude a corporation from furnishing quantity analyses and other services to a stockholder or other person and charge a reasonable fee therefor. This Respondent should be entitled to recover the reasonable value of its services actually rendered to, and the benefits thereof received by, Appellant. It was for this reason that evidence was received on the reasonable value of the services in the event the court should find no agreement to pay a specific amount or should otherwise conclude that the agreement to pay a fixed fee was unenforceable.

In the case of *Fabian v. Wasatch Orchard Co.* (1912)., 41 Utah 404, 125 Pac. 860, the Court held that even though a contract of employment was within the Statute of Frauds and unenforceable, nevertheless the plaintiff was entitled to recover the reasonable value of the services rendered prior to the agreement being repudiated.

Although the general rule is that illegal contracts are unenforceable, there is a well

recognized exception in a situation where the services rendered by one party are of a nature which are not in themselves illegal but the method or agreement for compensation is illegal or against public policy. In such a situation the party rendering the service is entitled to be compensated for the reasonable value of the services actually rendered in good faith.

Such a case is Trumbo v. Bank of Berkeley, 77 Cal. Ap. 2d. 704, 176 Pac. 2d. 376. There the plaintiff entered into a contract with defendants whereby plaintiff was to assist the individual defendants in organizing a bank in consideration of which the defendants agreed to employ plaintiff, upon incorporation of the defendant Bank of Berkeley, as vice-president for life, at a minimum salary of \$300.00 per month. The lower court found the contract to be against public policy and void but permitted the plaintiff to recover the reasonable value of the services rendered by him in connection with the incorporation and securing a license. On appeal the Court affirmed

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"There can be no doubt that a contract by a director or shareholder, at least of an existing corporation, whereby it is agreed that a designated person will be put or maintained in office, or by which, in any other way, a director attempts to contract away his discretionary vote on the board of directors, is violative of public policy and is void. . . . In this case respondent was not allowed to recover for breach of the oral contract to employ, but for the reasonable value of the services rendered to the promoters prior to incorporation. There was nothing illegal or against public policy in the nature of those services. While the major consideration expected by respondent was a position in the bank, it would be most unjust and inequitable to allow the promoters to take the benefits of respondent's efforts, all of which were legal, and then to be allowed to escape all liability on the ground that the consideration they agreed to furnish was illegal. The proper rule, amply supported by authority, is thus stated in 27 Cal. Jur. p. 210, sec. 17: 'The law does not imply a promise to pay for services illegally rendered under a contract expressly prohibited by statute. But if the services rendered under a void contract by one party thereto were not intrinsically illegal and the other party fails voluntarily to perform on his part, the former may recover as upon a quantum meruit for what the latter actually received in value, though no recovery can be had upon the contract.'" (Emphasis added)

The Court relied upon other decisions, which we commend to this Court, as follows:

Sims v. Pataluma Gas Light Co., 131 Cal. 656,

63 Pac. 1011 (where plaintiff was allowed to recover for the reasonable value of his services, although the written contract between the president of defendant corporation on behalf of the corporation and the president as an individual was held to be invalid and against public policy); Wiley v. Silsbee, 1 Cal. App. 2d 520, 36 P. 2d 854, (where an attorney was permitted to recover for the reasonable value of his services although his written contract of employment was held to be void as against public policy).

In the Wiley Case, the Court held:

"It is likewise now established as a proposition of substantive law that, in a case of a contract to pay for services which is void as against public policy, there arises an implied contract to pay for services rendered thereunder, and the remedy of action sounding in quantum meruit is available to recover the reasonable value thereof."

See, also, Baca v. Padilla, 26 N.M. 223, 190 Pac. 730, 11 A.L.R. 1133, the court emphasizing that "where the illegality was not in what the plaintiff was to do but in the manner in which he was to be compensated for doing the legal thing, then he can recover upon a quantum meruit



CONCLUSION

Respondent respectfully submits that this Court should grant a rehearing for the purpose of having the issue of the validity of the contract for services reviewed and reconsidered in the light of the matters herein discussed; or in any event the judgment of the lower court should be affirmed upon the basis of its finding that the reasonable value of the services rendered by Respondent to Appellant was in excess of the amount sought to be recovered.

Respectfully submitted,

ARTHUR H. NIELSEN  
NIELSEN, CONDER AND HANSEN  
510 Newhouse Building  
Salt Lake City, Utah

Attorneys for Respondent