

1962

# Marian Cornwall v. Willow Creek Country Club : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

JAN 29 1962

MARIAN CORNWALL,  
*Plaintiff and Respondent,*

vs.

WILLOW CREEK COUNTRY  
CLUB,  
*Defendant and Appellant.*

Clerk, Supreme Court, Utah

Case No. 9568

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RESPONDENT'S BRIEF

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APPEAL FROM THE JUDGMENT OF THE  
THIRD DISTRICT COURT OF SALT LAKE  
COUNTY. HON. MARCELLUS K. SNOW, JUDGE

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} Case No. 9568

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RESPONDENT'S BRIEF

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STATEMENT OF THE KIND OF CASE

This is an action to recover compensation on  
a written personal service contract.

DISPOSITION IN LOWER COURT

The case was tried to the court; from a verdict  
and judgment for the plaintiff, defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of a portion of the  
judgment and judgment in its favor as a matter of  
law.

## STATEMENT OF FACTS

Plaintiff is a professional interior decorator. On September 22, 1959, defendant engaged the services of plaintiff by written contract to perform interior decorating services in connection with defendant's new club house facilities located in Salt Lake County, Utah (the contract is part of the record at Pages 4 and 5). Plaintiff's services were to include the selection of carpets, drapes, furniture, light fixtures, fabrics and colors, and to supervise the installation of the furnishings and fixtures. Her fee was six (6%) percent of the cost of certain of the furnishings.

The contract was for the term of one year. Appellant had an option under the contract to renew the same for an additional year. If the contract was not renewed, appellant would owe to respondent the sum of \$1,000.00 as additional fee.

The contract was not renewed and defendant refused to pay the \$1,000.00 additional fee and certain items of account not involved in this appeal. Suit was commenced January 24, 1961.

## ARGUMENT

### POINT I.

THE TERMS OF THE CONTRACT ARE CLEAR AND UNAMBIGUOUS AND WERE PROPERLY ENFORCED BY THE LOWER COURT.

Paragraph 6 of the contract provides the basis of contention on this appeal. It reads:

“This contract shall be for a term of one (1) year from the date hereof, and may be renewed by the Club upon the same terms, for an additional one (1) year, by giving written notice of renewal to the decorator at least thirty (30) days prior to the date of expiration. In the event that the contract is not renewed, the Club shall pay the decorator an additional fee of One Thousand (\$1,000.00) Dollars.”

Appellant (who prepared the contract, R. 20) is now dissatisfied with the clear meaning and effect of Paragraph 6 and is asking this court to modify it.

Appellant now wants Paragraph 6 to read and mean that the sum of \$1,000.00 would be owing to Miss Cornwall (respondent) only in the event that other work were yet to be done by the decorator for which a fee would be payable.

In this request, appellant is met squarely with a well settled principal of law.

“A court cannot make a new contract for the parties”. *Elgren vs. Snyder*, 285 Pac. 640 (Utah).

"Generally speaking, neither of the parties, nor the court has any right to ignore or modify conditions which are clearly expressed merely because it may subject one of the parties to hardship, but they must be enforced "in accordance with the intention as . . . manifested by the language used by the parties to the contract." *Ephraim Theatre Company vs. Hawk*, 321 Pac. 2d 221 (Utah).

In an effort to overcome the effect of these decisions, appellant urges that the record be searched and the contract construed and interpreted in the light of the negotiations and circumstances of the parties at and after the execution of the contract. Appellants do not, indeed can not contend that the contract is ambiguous as written, but state that it becomes so after reference is made to extraneous matters.

Here again, appellant is confronted with well settled law.

"It would defeat the very purpose of formal contracts to permit a party to invoke the use of words or conduct inconsistent with its terms to prove that the parties did not mean what they said, or to use such inconsistent words or conduct to demonstrate uncertainty or ambiguity where none would otherwise exist." *Ephraim Theatre Company vs. Hawk*, (supra).

"Elementary it is that in construing contracts we seek to determine the intentions of the parties. But is also elementary and of extreme practical importance that we hold con-

tracting parties to their clear and understandable language deliberately committed to writing and endorsed by them as signatories thereto . . . It is not unreasonable to hold one responsible for language which he himself espouses." *Jensen's Used Cars v. James T. Rice*, 323 P. 2d 259, (Utah).

12 Am. Jur. Contracts §233

"As already intimated, preliminary negotiations can not be allowed to contradict or vary the terms of a written contract."

IBID. §248

"The foregoing rule that the surrounding circumstances should be considered in the interpretation of a contract applies for the language considered alone is susceptible to more than one meaning. All authorities agree that the surrounding circumstances should be considered where the meaning conveyed by the words alone is not plain. That is, where the meaning conveyed is not plain if the surrounding circumstances are not considered. *Apparently, however, the rule that the surrounding circumstances should be considered does not apply where the language of a written agreement is plain and is not susceptible of more than one meaning.*" (Italics supplied)

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Additionally, it should be pointed out that the record does not support appellant's theory that a condition be *interpreted* into Paragraph 6.

Both parties testified to the purpose of this paragraph.



Appellant: (Mr. Safford who negotiated the contract)

“... it was put in there for a specific purpose which Miss Cornwall and I discussed on several different occasions, the purpose of it being to make sure that the contract was completed.”

Respondent:

“When I met with Norval Safford in discussion pertaining to the contract, the \$1,000.00 clause was put in to assure me of adequate compensation for doing this particular project.”<sup>1</sup>

Mr. Safford testified further on direct examination:

“Q. Now, did you have any discussion with her concerning whether or not that sum would be paid in the event all the work was done; that is, as outlined or contemplated at that time?

A. To the best of my knowledge, the question never even came up in my mind. It was simply a question of completing the work.”

We thus see that the condition appellant seeks to engraft upon Paragraph 6 was not even a subject of discussion between the parties and the testimony cited by appellant is not inconsistent with the enforcement of this term of the contract.

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<sup>1</sup> Excerpts of testimony taken from Page 5 of Appellant's Brief.

To *interpret* Paragraph 6 in the manner appellant wishes, it would be necessary to

- (1) completely change and overrule the law regarding written instruments.
- (1) find and declare that this unambiguous contract is in fact ambiguous, and
- (3) without any supporting evidence, speculate on the intent of the parties and construct for them a new contract that neither envisioned.

## POINT II.

THE CONTRACT WAS NOT TERMINATED BY PERFORMANCE AS APPELLANT SUGGESTS.

Appellant states that during the initial year of the contract, it was completed and, therefore, there was nothing to renew. It bases its argument on its claim that it had purchased all its furnishings during the year. This argument is untenable because appellant has overlooked the nature of the contract, its terms and the testimony and exhibits of respondent.

The contract is one for services. The fee is based on six (6%) percent of the purchase price of *certain* furnishings and fixtures with provisions of a minimum fee and an option to renew. A primary term of one year is provided. One of the duties incumbent upon respondent during the one year term is "to advise and consult with the building committee and work in cooperation with it (R. 4)." Even if other duties under the contract such as purchase and installation of furnishings were discharged, the duty to advise and consult can not possibly be discharged until the year ends. She must remain available to advise and consult with the building committee at any time during the year.

This contract is not unlike that of an attorney and client contract wherein an attorney is retained for a period of one year for the purpose of advice

and prosecution of claims with provision that his fee would be based on a percentage of sums collected. No one would contend, certainly, that the contract had terminated because all the claims had been collected in six months.

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There is, furthermore, adequate evidence that the contract had not been terminated by performance.

“Q. Let me ask you this, Miss Cornwall. Do you consider that your services are completed for the Willow Creek Country Club?

A. No, I do not.” (R. 27)

An exchange of letters corroborated this testimony (Exhibits P9 and P10). Miss Cornwall outlines certain modifications and additions, she thought necessary for the club house facilities. The President of the Club replied stating that she would probably be contacted by the building committee. She was not, however, contacted by the building committee.

A fair interpretation of the contract shows that it could not by its terms be terminated by performance, and furthermore, the record shows that there was work yet to be done.

## NOTE:

Appellant does not ask that Paragraph 6 be voided on the grounds that it is a penalty, but its repeated reference to Paragraph 6 as a "penalty clause" in the record and in its brief does merit a comment.

This action was brought on the contract for the agreed compensation. It is not an action for breach of contract.

The applicable rules are set forth in the California case of *Payne vs. Pathe Studios*, 44 Pac. 2d, 598. (Cal.):

"That the supplemental provision to pay the \$5,000.00, as representing four weeks' guarantee, was neither in the nature of a penalty nor an effort to provide for liquidated damages, appears clear to us. This action is not one for damages based upon the breach of a contract of hiring, but is an action based upon the contract itself, as construed and interpreted, upon an express promise to pay for at least four weeks' services . . . Such agreements are upheld and the minimum rate or wage has been sustained as the true measure of recovery, the promise to pay such sum being a part of the direct obligation of the contract and in no sense a covenant for liquidated damages in cases of breach . . . The same reasoning and authorities furnish a negative answer to appellant's question as to whether the promise to pay the \$5,000 was a penalty. Provisions for a penalty as well as for liquidated damages apply only in case of a breach of a contract."

## CONCLUSION

The contract in this case was properly interpreted and enforced by the lower court. Its decision should be affirmed.

Respectfully submitted,

EDWARD M. GARRETT

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