

1993

# Yvonne Gillham dba Concepts West Interior v. Donald E. Armstrong : Brief of Appellant

Utah Court of Appeals

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Brent A. Gold; Attorney for Appellee.

Kenneth Allen; Attorney for Appellant.

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## Recommended Citation

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IN THE UTAH COURT OF APPEALS

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YVONNE GILLHAM, dba  
CONCEPTS WEST INTERIOR

Plaintiff/Appellee

vs.

DONALD E. ARMSTRONG,

Defendant/Appellee

)  
) APPELLANT'S SUPPLEMENTAL  
) BRIEF

)  
) Case No. 930236-CA

)  
) District Court No. 923000086

)  
) Category 15

)  
) Priority No. 15

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APPEAL FROM JUDGMENT GRANTED BY THE THIRD CIRCUIT  
COURT OF SUMMIT COUNTY, STATE OF UTAH  
HONORABLE ROGER A. LIVINGSTON

---

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IN THE UTAH COURT OF APPEALS

---

YVONNE GILLHAM, dba	)	
CONCEPTS WEST INTERIORS,	)	APPELLANT'S SUPPLEMENTAL
	)	BRIEF
	)	
Plaintiff/Appellee,	)	Case No. 930236-CA
	)	
vs.	)	District Court No. 923000086
	)	
DONALD E. ARMSTRONG,	)	Category 15
	)	
Defendant/Appellant.	)	

---

APPEAL FROM JUDGMENT GRANTED BY THE THIRD CIRCUIT  
COURT OF SUMMIT COUNTY, STATE OF UTAH  
HONORABLE ROGER A. LIVINGSTON

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### III.

#### STATEMENT OF JURISDICTION

The Utah Court of Appeals has original jurisdiction of this matter pursuant to the provisions of § 78-2a-3(2)(d), Utah Code Ann. (1953, as amended) and Rules 3(a) and 4 of Utah Rules of Appellate Procedure.

### IV.

#### STATEMENT OF THE CASE

##### A. Nature of the Case

This is an appeal from the judgment granted by the Third Circuit Court, Summit County, the Honorable Roger A. Livingston presiding. Plaintiff sued defendant for breach of service contract. Parties entered into an agreement, partly written and partly oral, for plaintiff to perform interior design work on defendant's home. Plaintiff's work was unsatisfactory and defendant terminated the contract before the work had been substantially completed. Appellant contends that he was not given sufficient time to prepare his defense and was not given a fair trial. Appellant maintains that the following acts by the trial court prevented a fair trial:

a. Defendant's Motion for Continuance was granted for either one week after the trial date (when defendant was to be out of town), or granted for the same day the trial date was previously set. The trial was held on the date of the original trial date set.

b. Defendant was told by the trial judge that

depositions might result in an attorneys' fees judgment against the defendant regardless of whether there was in fact an attorneys' fee provision.

c. The trial court did not allow admission of relevant evidence relating to the amount of work addressed in the contract by either party.

d. The trial court found that plaintiff substantially completed the interior design work and therefore the total design fee of \$8,000 was due to plaintiff, minus the amount that defendant had already paid towards satisfaction of this amount.

e. The trial court found that the type of contract entered into by the parties was not terminated by defendant; defendants' attempt to terminate the contract was not sufficient to warrant such termination.

#### **B. Course of Proceedings to Date**

Appellant, by and through his attorney, submitted his Statement of Proceedings and Evidence Omitted From the Record, to the trial court pursuant to the Utah Court of Appeals Order, dated February 22, 1994, and in accordance with Rule 11(g), Utah Rules of Appellate Procedure. Appellee filed his Appellee's Objection to Appellant's Statement of Proceedings and Evidence Omitted From the Record along with a Proposed Order entitled "Statement of Evidence Where Transcript is Unavailable". On March 23, 1994, the trial court judge signed the Proposed Order entitled "Statement of Evidence Where Transcript is Unavailable".

Consequently, Appellant is now submitting this Supplemental

Brief addressing only the issues related to the amendment to the record, as set forth in the trial court's Statement of Evidence Where Transcript is Unavailable, pursuant to this Court's Order dated February 22, 1994.

V.

ARGUMENT

I. THE PROCEDURES PROVIDED BY RULE 11(g) ARE INADEQUATE FOR RECONSTRUCTING AND SETTLING THE RECORD IN THIS CASE.

Pursuant to this Court's Order dated February 22, 1994, appellant served his Statement of Proceedings and Evidence Omitted From the Record on the appellee's counsel in accordance with Rule 11(g), Utah Rules of Appellate Procedure ("U.R.A.P."). Appellee responded with her Appellee's Objection to Appellant's Statement of Proceedings and Evidence Omitted From the Record and prepared and attached a proposed order of the Statement of Evidence Where Transcript is Unavailable for the trial court judge to execute. Upon such above-mentioned submissions by appellant and appellee, the trial court judge unilaterally, and without any court initiated hearing or discussion on the matter, signed the proposed order entitled "Statement of Evidence Where Transcript is Unavailable", which was prepared by the appellee's counsel.

What is most disturbing about the recent course of the proceedings is that it defeats the fundamental principle of the impartiality of the trier of fact. In the case at bar, the appellant is appealing his case based upon the foundation that he



did not receive a fair and equitable trial. Because a crucial portion of the trial transcript was omitted from the record, this Court temporarily remanded the case to the very same trial court where the appellant was unable to receive a fair trial, for settlement and approval of the evidence or proceedings omitted from the record.

Based upon the record, and the lack thereof, the trial court judge is not in the most "objective" position to determine whether he had any "recollection" of appellant trying to introduce documentary evidence in the form of a summary report. The appellant continues to contend that the summary report was of probative value to the very issue of substantial performance, and it would not be in the best interest of the trial court judge to "recollect" a portion of testimony that was omitted from the record and substantiates the very basis of this appeal.

The fact that the appellee's counsel prepared the proposed order of the Statement of Evidence Where Transcript is Unavailable, which the trial court subsequently signed, presents yet another problem of impartiality. More particularly, the appellant makes note that the proposed order, which was prepared by appellee's counsel, provides the trial court judge with an opportunity to stray from impartiality by preparing leading statements for the trial court judge to adopt unilaterally without any further discussion or settlement with counsel. Specifically, the Statement of Evidence Where Transcript is Unavailable states that the trial court judge has:

no recollection of any evidence or exhibits submitted by the witness Susan St. James that were rejected by the court and not allowed to be admitted.

See Exhibit "A", para. 7).

Rule 11(g), U.R.A.P, specifically provides that:

[t]he statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and, as settled and approved, shall be included by the clerk of the trial court in the record of appeal.

The word "settlement" is defined as "determination by agreement". Black's Law Dictionary, Fifth Edition, 1983. In the case at bar, it is obvious that the trial court judge did not consult with either counsel to make a "determination by agreement". The trial court judge unilaterally approved of the appellee's proposed order and signed it without any "settlement" amongst counsel to determine what testimony was omitted from the record. The trial court judge did not make an "objective" Statement of Evidence Where the Transcript was Unavailable. To the contrary, the trial court judge merely adopted the "subjective", "no recollection" statements prepared by appellee's counsel. Based upon this, the trial court judge did not in fact make an "objective" "settlement and approval" of the evidence or proceedings omitted from the record pursuant to Rule 11(g), U.R.A.P..

The primary purpose of Rule 11, U.R.A.P., is to avoid the court's attempting to recreate, based upon conflicting testimony of counsel, what oral arguments were made by counsel at a hearing. Guardian State Bank v. Humphreys, 762 P.2d 1084 (Utah

1988).

In the case at bar, the procedures of Rule 11(g), U.R.A.P., have not adequately avoided this court's attempt to recreate the record based upon conflicting testimony of counsel. In fact, the procedures of Rule 11(g) has compounded the main issue on appeal. By allowing the trial court judge to determine, via the appellee's subjective and leading statements, what testimony and evidence was omitted from the record, Rule 11(g) has not alleviated the problem of recreating a record based upon conflicting testimony of appellee's counsel and the appellant who was a pro se litigant at the trial level. For all practical purposes, the trial court judge has not fulfilled its obligation to come to a settlement between counsel on what testimony and evidence was omitted.

This has put appellant's counsel in the very precarious position of trying to reconstruct a crucial portion of the trial through the recollection of the appellant and his witness, appellee's counsel, and the trial court judge who's manner of conducting the trial was allegedly unfair to the pro se litigant and who merely adopted appellee's proposed order as his Statement of Evidence Where Transcript is Unavailable, without any attempt to further discuss or come to a settlement with counsel. All these factors have effectively denied the appellant his constitutional right to properly appeal the judgment of the trial court.

In Emig v. Hayward, 703 P.2d 1043 (Utah 1985), the Utah

Supreme Court stated that to prove that the loss of the reporter's notes from an earlier hearing effectively denied an appellant his constitutional right to appeal the judgment of that hearing, the appellant must show that the procedures provided by Rule 11 for reconstructing and settling the record were inadequate.

In our case, as explained above, appellant has shown that effectively, the procedures of Rule 11(g) have not provided an objective, adequate means of reconstructing and settling the record. Consequently, the appellant has been effectively denied his constitutional right to appeal the judgment of the trial court.

As stated in the affidavit of Ms. Susan St. James, a major portion of her testimony on direct examination by appellant was omitted from the record. See Exhibit "B", para. 2. Specifically, Ms. St. James states in paragraph 12 of her affidavit that:

... the appellant attempted to introduce some documentation, in the form of a spreadsheet, that I had prepared which summarized invoicing, billing dates, check numbers, dates of payments, room by room breakdowns, who actually located the needed furnishings, and who actually arranged for the purchase of the furnishings regarding this case.

See Exhibit "B", para. 12

The summary report that appellant attempted to introduce as evidence during the direct examination of Ms. St. James, was exactly that, a summary of all the invoicing, billing dates, check numbers, and dates of payments which the appellee had

provided to the appellant. In addition, the summary report went into detail concerning room by room breakdowns, who actually located the needed furnishings, and who actually arranged for the purchase of the furnishings.

In the trial transcript page 35, lines 18-20, the appellant makes the following statement: "[w]hat isn't in all these documents is what we did on our own. And so there's still things we haven't finished. That is - - -. See Exhibit "C". This statement made by the appellant gives some reference to the information that was contained in the summary report that was denied admission at the trial court level, thereby suggesting that the summary report was in fact, at least mentioned during the omitted portion of the trial transcript.

All throughout the trial transcript it is quite apparent that the trial court judge does not allow the appellant to proceed asking questions regarding what the summary report contained, mainly about what work was done, which is relevant to the issue of substantial performance. See Trial Transcript, pages 31-42. However, the trial court judge does allow appellee's counsel to proceed asking questions along those same lines without interruption or objections. See Trial Transcript, from page 41. Such unequal treatment by the trial court judge has in fact denied the appellant an opportunity to present his case adequately in order to receive a fair trial.

Appellant continues to contend that the summary report was of probative value to the main issue at the trial court level,


that being the issue of substantial performance. The trial court's decision not to admit such relevant documentary evidence was improper and an abuse of its discretion.

VI.

CONCLUSION

Based upon the foregoing arguments and the course of the proceedings to date, the appellant contends that he has been effectively denied his constitutional right to appeal the judgment of the trial court. Consequently, the appellant respectfully requests that the judgment of the trial court be reversed and/or remanded to the trial court to be tried to an impartial jury in the interest of justice.


DATED this 14<sup>th</sup> day of April, 1994.

  
\_\_\_\_\_  
Kenneth Allen  
Attorney for Appellant

CERTIFICATE OF MAILING

On this 15<sup>th</sup> day of April, 1994, I hereby certify that I mailed by first-class, postage-prepaid, two (2) true and correct copies of the attached APPELLANT'S SUPPLEMENTAL BRIEF to the following:

Brent A. Gold  
333 Main Street, Second Floor  
P.O. Box 1994  
Park City, Utah 84060

  
\_\_\_\_\_  
Kenneth Allen

## ***Exhibit A***

BRENT A. GOLD  
Attorney for Plaintiff/Appellee  
333 Main Street, Second Floor  
P.O. Box 1994  
Park City, Utah 84060  
Telephone: (801) 649-8406

---

IN THE THIRD CIRCUIT COURT IN AND FOR SUMMIT COUNTY  
PARK CITY DEPARTMENT, STATE OF UTAH

---

YVONNE GILLHAM, dba	)	
CONCEPTS WEST INTERIORS	)	
	)	
Plaintiff/Appellee,	)	STATEMENT OF EVIDENCE
	)	WHERE TRANSCRIPT IS UNAVAILABLE
vs.	)	
	)	
DONALD E. ARMSTRONG,	)	Civil No. 92300086CV
	)	(Utah Court of Appeals
	)	Case No. 930236-CA)
Defendant/Appellant.	)	

---

The Trial Court, having reviewed Defendant/Appellant's Statement of Proceedings and Evidence Omitted From Record, and Appellee's Objection to Appellant's Statement of Proceedings and Evidence Omitted From the Record, and having reviewed the file and transcripts in this matter, now herewith makes its Statement of Evidence where Transcript is not available, pursuant to the requirements of Rule 11(g) of the Utah Rules of Appellate Procedure, as follows:

1. Susan St. James was called as a witness for defendant/appellant at the February 10, 1993 trial in the above referenced matter.

2. A portion of Susan St. James' testimony upon direct examination of the appellant, which began on page thirty (30) of the trial transcript was inadvertently omitted.



3. The witness Susan St. James was sworn in and was questioned by Donald E. Armstrong, the defendant, who was acting as his own attorney.

4. The testimony of Susan St. James that is omitted from the record was not significant. Any such omitted statements were also made during portions of the direct examination and cross examination that have not been omitted from the record.

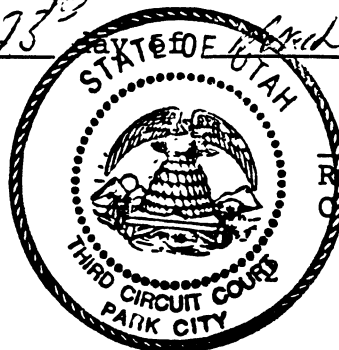
5. The vast majority of the purported testimony of Susan St. James was consumed by argument and attempted testimony by Donald E. Armstrong acting as his own attorney. Pages thirty through forty-one (30 - 41) of the Trial Transcript of February 10, 1993, are a clear indication of the nature of the direct examination conducted by the defendant.

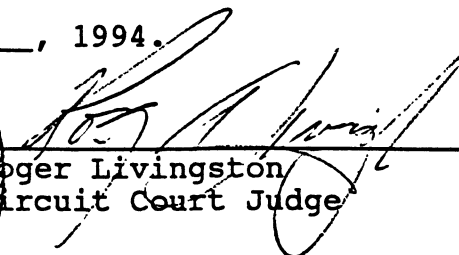
6. The Trial Court allowed wide discretion in permitting the defendant to testify and argue, again as indicated in the Trial Transcript.

7. The Trial Court has no recollection of any evidence or exhibits submitted by the witness Susan St. James that were rejected by the Court and not allowed to be admitted.

8. The Trial Court has no recollection of any testimony, matters or evidence that was rejected in the trial of the matter and gave full consideration to all matters submitted by the defendant/appellee.

DATED this 25<sup>th</sup> day of March, 1994.



  
\_\_\_\_\_  
Roger Livingston  
Circuit Court Judge

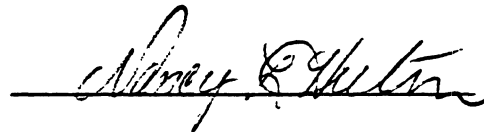
# Third Circuit Court

## MAILING CERTIFICATE

I HEREWITH CERTIFY THAT ON THIS 31ST DAY OF MARCH, 1994  
A TRUE AND CORRECT COPY OF THE STATEMENT OF EVIDENCE WHERE  
TRANSCRIPT IS UNAVAILABLE WAS MAILED BY FIRST CLASS U.S.  
MAIL POSTAGE PREPAID TO PLAINTIFF/APPELLEE AND DEFENDANT/  
APPELLANT'S ATTORNEYS AT THE ADDRESSES AS FOLLOWS:

BRENT A. GOLD  
333 MAIN STREET, SECOND FLOOR  
P. O. BOX 1994  
PARK CITY, UTAH 84060

KENNETH ALLEN  
10 WEST BROADWAY  
SUITE 500  
SALT LAKE CITY, UTAH 84101

A handwritten signature in cursive script, appearing to read "Audrey E. Hutton", is written over a horizontal line.

NH

## ***Exhibit B***

Kenneth Allen (6162)  
Attorney for Defendant/Appellant  
10 West Broadway, Suite 500  
Salt Lake City, UT 84101  
Telephone: (801) 322-2458

---

IN THE UTAH COURT OF APPEALS

---

YVONNE GILLHAM, dba	)	
CONCEPTS WEST INTERIORS,	)	
	)	AFFIDAVIT OF
Plaintiff/Appellee,	)	SUSAN ST. JAMES
	)	
vs.	)	
	)	
DONALD E. ARMSTRONG,	)	
	)	CIVIL NO. 930236-CA
Defendant/Appellant.	)	

---

STATE OF UTAH            )  
                              : ss.  
County of Salt Lake )

SUSAN ST. JAMES ("Affiant"), being first duly sworn upon her oath, deposes and states as follows:

1. Affiant was called as a witness for appellant at the February 10, 1993, trial in the above referenced case.

2. That a major portion of my testimony by way of direct examination by appellant which began on page thirty (30) of the trial transcript was omitted. That the entire swearing in, several questions and answers were not recorded.

3. On direct examination by appellant, I was asked whether I handled paying the appellee for the services she rendered. I

answered that I did handle making the payments to appellee for her services under the agreement.

4. On direct examination by appellant, I was asked whether I paid appellee on time. I answered that we made an extra effort to pay the appellee on time, and in fact paid her in advance at times. The appellee would call me up and ask for a check with no supporting documentation or billing statements. I had to insist that appellee send some form of documentation supporting her expenses.

5. On direct examination by appellant, I was asked whether I did any purchasing of furniture and/or fixtures for the house. I answered that I did personally do some purchasing of furniture and fixtures for the house.

6. On direct examination by appellant, I was asked whether the interior design of our house was finished in March of 1992. I answered that the interior of the house was not finished in March of 1992.

7. On direct examination by appellant, I was asked whether there was any instance where I needed appellee's services after March of 1992. I answered there was, and I explained I needed additional fabric and had to go directly to the vendor and then get another designer to place the order. I explained that the

appellee had not completed the work she was obligated to complete under the agreement and that there were stills things that needed to be completed.

8. On direct examination by appellant, I was asked about the working relationship between appellee and I. I answered that our working relationship had deteriorated over time into an adversarial working relationship.

9. On direct examination by appellant, I was asked how the working relationship with appellee affected my marital relationship. I answered that the stress had caused continual conflict between myself and my husband, which eventually developed into a factor that led to the termination of appellee's services.

10. During the direct examination by appellant, the trial court judge repeatedly interrupted appellant's line of questions and my responses. The trial court judge stated that he was only focusing on the agreement and all other information was irrelevant.

11. On direct examination by appellant, I was asked about what services were provided by the appellee. I answered by referring to a spreadsheet document that I prepared, which summarized and evidenced invoicing, billing dates, check numbers,

dates of payments, room by room breakdowns, who actually located the needed furnishings, and who actually arranged for the purchase of the furnishings regarding this case.

12. During the direct examination by appellant referenced in statement 11, the appellant attempted to introduce some documentation, in the form of a spreadsheet, that I had prepared which summarized invoicing, billing dates, check numbers, dates of payments, room by room breakdowns, who actually located the needed furnishings, and who actually arranged for the purchase of the furnishings regarding this case.

13. During the direct examination by appellant referenced in statement 12, appellee's attorney objected to the admission of the spreadsheet that summarized invoicing, billing dates, check numbers, dates of payments, room by room breakdowns, who actually located the needed furnishings, and who actually arranged for the purchase of the furnishings regarding this case. Appellant responded to appellee's attorney's objection by stating that the documentation to be entered was merely a summary of the information that appellee had already prepared and admitted into evidence (i.e. invoices, payments).

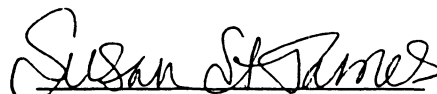
14. The trial court judge sustained appellee's attorneys objection and denied the admission of the summary documentation.

15. On direct examination by appellant, I was asked whether it was hard to reach the appellee due to her travel schedule. I answered that it was hard to reach the appellee.

16. On direct examination by appellant, I was asked if I ever contacted the vendors directly to expedite matters. I answered that I did in fact contact vendors directly to expedite matters when appellee was not available.

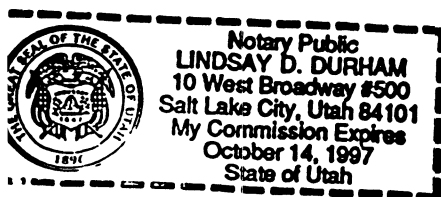
17. On direct examination by appellant, I was asked whether contacting vendors directly ever created problems. I answered that contacting vendors directly did create problems. I explained that in one instance I did contact a Park City vendor directly because we were told by the appellee that it was appropriate. However, when appellee found out that we had contacted a vendor directly, the appellee told me that it was inappropriate and that we would have to wait and go through her.

DATED this 3rd day of March, 1994.

  
Susan St. James

The foregoing instrument was acknowledged before me by SUSAN ST. JAMES on this 3rd day of March, 1994.

  
Notary Public





## ***Exhibit C***

IN THE THIRD CIRCUIT COURT IN AND FOR THE STATE OF UTAH  
SUMMIT COUNTY, PARK CITY DEPARTMENT

-ooo-

YVONNE GILLHAM, dba CONCEPTS :  
WEST INTERIORS, :

Plaintiff, :

-vs- :

DONALD E. ARMSTRONG, :

Defendant. :

Civil No. 92300086CV

Judge: Roger Livingston

Transcript of Trial

-ooo-

**CERTIFIED COPY**

Date:

February 10, 1993

A P P E A R A N C E S

For the Plaintiff:

BRENT A. GOLD

Attorney at Law

333 Main, 2nd Floor

P.O. Box 1994

Park City, Utah 84060

Telephone: (801) 649-8406

For the Defendant:

PRO SE

-ooo-

INDEPENDENT REPORTING  
SERVICE

Certified Shorthand Reporters

1710 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111  
(801) 538-2333

I N D E X

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1 right. If she didn't like--

2 THE COURT: Well, Mr. Armstrong, see the problem was  
3 you ended it after she did it. That's the key. I don't think  
4 there's any question--regardless of this contract, what was  
5 said orally to amplify it or regardless of how inexact this  
6 agreement is--had you terminated the agreement on August 15th,  
7 1991 before she ordered item 1 for you and said, I don't like  
8 you, you're miserable to work with, you're causing frustration  
9 in my home, it's too much stress, it's supposed to be fun and  
10 pleasant or whatever to go buy things with you and it's a big  
11 pain in the bottom, I wouldn't for ten seconds enforce this  
12 agreement. I wouldn't let Mr. Gold prevail in a lawsuit to  
13 have you pay your \$8,000. You have a right to terminate it.  
14 Absolutely, you're dissatisfied with it, you can terminate it.

15 The problem is under the uncontested facts, she did  
16 what she was supposed to do. And you didn't like it but you  
17 still did it. And that's the point.

18 MR. ARMSTRONG: What isn't in all these documents is  
19 what we did on our own. And so there might be 30,000 more and  
20 there's still things we haven't finished. That is--

21 THE COURT: So, your next theory is that you're not  
22 going to pay her because there's furniture you bought, too.  
23 And frankly--I understand there's some real emotion here,  
24 Mr. Armstrong, and I'm trying to help you focus a little bit  
25 that it doesn't--that you're not connecting, really. That's