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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

SALT LAKE CITY, UTAH

HERBERT BURTON and FLORENCE BURTON, his wife,

Plaintiffs-Respondents,

vs.

ALAN H. COOMBS, CARLA H. COOMBS, his wife, FOUR SEASONS MOTOR INN, INC., a Utah corporation, and FOUR SEASONS MOTOR INN II, INC., a Utah corporation,

Defendants-Appellant.

Sup. Ct. No. : 14245

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APPELLANT'S BRIEF

ON APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF UTAH, IN AND FOR THE COUNTY OF WASHINGTON

HON. J. HARLAN BURNS, DISTRICT COURT JUDGE

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FILED

JUN 11 1976

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

SALT LAKE CITY, UTAH

HERBERT BURTON, and FLORENCE BURTON, his wife, Plaintiffs, vs. ALAN H. COOMBS, CARLA H. COOMBS, his wife, FOUR SEASONS MOTOR INN, INC., a Utah corporation and FOUR SEASONS MOTOR INN II, INC., a Utah corporation, Defendants.	Sup. Ct. No. : 14245

APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This case is one wherein the Plaintiffs, HERBERT BURTON and FLORENCE BURTON, his wife, are seeking a money Judgment against Defendants, ALAN H. COOMBS, CARLA H. COOMBS, his wife, FOUR SEASONS MOTOR INN, INC., a Utah corporation, and FOUR SEASONS MOTOR INN II, INC., a Utah corporation, as a result of an alleged breach of a management contract for the management of a motel complex in St. George, Utah, known as FOUR SEASONS MOTOR INN, INC. The Defendant, FOUR SEASONS MOTOR INN, INC. seeks a money judgment against Plaintiffs on its Counterclaim on the basis of an alleged breach of the responsibilities imposed on the Plaintiffs to manage under the terms of said management contract.

DISPOSITION IN THE LOWER COURT

The trial court, sitting without a jury, entered Judgment

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in favor of Defendants, ALAN H. COOMBS, CARLA H. COOMBS, his wife, FOUR SEASONS MOTOR INN, II, INC., of no cause of action against each of said Defendants on the Plaintiffs' Complaint, granted Judgment in the amount of $21,333.00 principal, together with interest of $1,050.0 together with attorneys' fees in the amount of $10,000.00, for a total Judgment of $32,383.00 in favor of the Plaintiffs and against Defendan FOUR SEASONS MOTOR INN, INC., a Utah corporation, and the trial court denied the relief sought by the Defendants and each of them on their Counterclaim.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the Judgment awarded in favor of the Plaintiffs and against the Defendant, FOUR SEASONS MOTOR INN, INC., or in the alternative that the case be remanded to the trial court for a new trial. Appellant bases the request for reversal or remand on the grounds that the court erred as follows:

1. In finding that the Defendant breached the original management agreement;

2. The trial court erred in failing to find Plaintiffs in breach of the original management agreement;

3. The trial court erred in assessing damages against Defendant, FOUR SEASONS MOTOR INN, INC. as follows:

(a) There is no basis for the assessment of damages against this Defendant, as there is no basis in fact or law for determining a breach of contract;

(b) The amount of damages assessed are excessive and no basis for the amount of Judgment entered by the court can be established from the facts or

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evidence.

4. The finding by the trial court that the management agreement was a binding and effective contract between the Plaintiffs and the Defendant, FOUR SEASONS MOTOR INN, INC., was in error in that it was beyond the scope of the evidence, outside the scope of the pleadings and contrary to the request of any party to the action and not supported by the facts and evidence in the case.

STATEMENT OF THE FACTS

In November, 1971, Defendant, ALAN H. COOMBS, began construction on a forty (40) unit motel in St. George, Utah. In February of 1972, Defendant COOMBS formed a corporation known as FOUR SEASONS MOTOR INN. On or about February 24, the corporation entered into an agreement with Plaintiffs, HERBERT and FLORENCE BURTON, wherein they agreed to purchase twenty per cent of the corporation stock for $80,000.00. In addition, said agreement provided (1) that BURTONS would be given a Management Contract, whereby they could have the right to manage the forty unit motel; and (2) that BURTONS would have first option to invest in a second motel which was contemplated to be built directly across the street, with the same name. The terms of the Management Agreement provided that if the BURTONS ever decided to cease managing or if for cause, the corporation terminated their Management Agreement, the BURTONS could sell their Management Contract to a third party.

(The Court should note at this time that there is no issue raised as to the saleability or value of BURTON'S stock and Management Contract. Plaintiffs did not present any testimony that the value of their purchase was worthless or that Defendant defrauded them in any way. In fact,

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Plaintiff testified the value had increased from $80,000.00 to $125,000.00 (Tr. 90 and 92). Defendant also was willing to give BURTONS their $80,000.00 back, plus an additional $10,000.00, (Tr. 30, FLORENCE BURTON; Tr. 98 and 113 COOMBS), if they were unsatisfied with the agreement.

The Court should also note that Defendant is not claiming that BURTONS should be deprived of their twenty per cent interest in the corporation because of their default. If the Court should find that BURTONS breached the Management Contract, only the Management Contract is affected.)

BURTONS began their employment as Managers in May of 1972, ai a harmonious relationship existed between the parties for most of the following year. In November of 1973, COOMBS started construction on a second motel directly across the street on the North side, which was twice the size of the South side motel and which contained a Convention Center, restaurants, beauty shop and lounge. BURTONS were given the first option to purchase the Management rights to the larger motel, but declined to do so. Before the first motel was open, BURTONS and COOMBS agreed to call the second motel by the same name as the first motel in order to capitalize on advertising and so that the first motel could be associated with the Convention Center and restaurants.

A new corporation was formed under the name FOUR SEASONS MOTOR INN II, INC., and a twenty per cent interest and Management Contract was sold to Mr. Derrill Larkin for $160,000.00. It was the intent of FOUR SEASONS MOTOR INN, INC., FOUR SEASONS MOTOR INN II, IN(and the BURTONS to operate the two motels separately even though the motels would have the same name and FOUR SEASONS MOTOR INN I would be located physically on the South side of the street and FOUR SEASONS

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MOTOR INN, II, INC. with the Convention Center and related facilities on the North side of the street. However, the parties entered into negotiations to determine if there would not be a mutual advantage to combining the two motels under one management agreement with the Plaintiffs as the Managers of the motels and Mr. Larkin, the General Manager for the Convention Center. The advantages to such an arrangement were discussed and included the following:

1. A reduction of responsibility for the BURTONS to allow for eight hour shifts and General Management and sepervision responsibilities, rather than a twenty-four hour responsibility then imposed by the original Management Agreement for the operation of the motel on the South side.
2. An increase in salary to the BURTONS with a guaranteed $1,500.00 per month.
3. The association of the smaller forty-unit motel on the South side with the larger motel and related facilities such as restaurant and Convention Center on the North side for a savings in advertising and related costs effected by the joint operation and thereby reducing the per-unit cost for such items.

Negotiations continued until the new motel was opened. At the insistence of Mrs. BURTON, Mr. COOMBS moved the telephone system to the larger unit motel to establish a central telephone system. Mrs. BURTON worked with the accountants to develop an accounting method for the joint operation. The BURTONS cooperated with COOMBS and other employees of FOUR SEASONS I and FOUR SEASONS II in establishing the combined management of the two motels. The parties coordinated their effort under the apparent assumption that a new contract between the

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BURTONS and the corporation had been, or eventually would be, agreed upon. When the new motel was completed, the BURTONS assumed the management of the combined operation and acted as Managers from April 6, 1973, to April 27, 1973.

On April 27, 1973, Mrs. BURTON was visibly and audibly complaining to the other employees. (Tr. P. 47, BURTON; Tr. 94 COOMBS) The complaint of Mrs. BURTON was relative to the status of the new contract for the management of the two motels under one Management operation. Mr. COOMBS approached Mrs. BURTON in the presence of the other employees and said, "Florence, we can't have this dissention in the lobby or in the office where customers and other employees are being affected - please go across the street and Derrill (Mr. Larkin, the owner of twenty per cent of the North side motel) and I will come over and talk and we will get this matter settled." (Tr. 94, COOMBS)

Mrs. BURTON left to go to her apartment, which is located in the South side motel. Later, during the afternoon of the same day, Mr. COOMBS and Mr. Larkin went to the BURTONS' apartment to find the reasons why Mrs. BURTON was so upset and to see if they could not convince the BURTONS that they should continue as Managers. Mr. COOMBS began by asking, "What is the problem? What is it going to take to make you happy and to get this thing settled so you can go back to work and feel good about it?" (Tr. 95, COOMBS)(Tr. 28, line 29, BURTON) (Tr. 101, lines 9 through 11, LARKIN). This was a meeting held to explore alternative offers and to encourage the BURTONS to continue to act as Managers. There is conflicting testimony as to the terms Defendant offered BURTONS to induce them to stay, but all the testimony of all of the witnesses indicates that there were offers made back and forth to induce the BURTONS to stay. The BURTONS would

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not agree to any of the terms offered by Defendant and refused to continue acting as Managers unless the corporation met their demands for more money. Before the meeting terminated, the parties agreed to hold a meeting the next day, in an effort to reach an agreement satisfactory to all parties.

The next day on April 28, BURTONS and COOMBS met again in the BURTONS' apartment. Mr. COOMBS testified that he stated at that meeting that if the BURTONS would come back and manage the motels, he would agree to an increase in their salary from $1,500.00 to $1,800.00 per month and also that Florence would not have to work. (Tr. 97, COOMBS). Mr. BURTON confirmed that the meeting was held for the purpose of working out "an equitable solution to the problem . . . there were offers made back and forth." (Tr. 72, BURTON) Mr. BURTON'S final demand was that if they continued in the joint operation management, that the BURTONS would require seven and one-half per cent of the total gross receipts. Mr. COOMBS indicated that this was excessive. The anticipated gross receipts would result in a monthly salary to the BURTONS of between $3,500.00 and $4,000.00.

Mr. COOMBS stated that he "couldn't obligate the motel to that kind of an obligation . . . let's just move you across the street. Would you then just come back and manage across the street?" (Tr. 98, lines 1 through 6, COOMBS) "I told them I would move the telephone system at my expense across the street (back to the South side) and that Mr. Larkin would continue to manage the eighty units and you continue to manage your forty units." (Tr. 98, lines 18 through 20, COOMBS) "I said, Okay, then, I will repeat this once more, will you not manage your forty-unit motel?" (Tr. 98, COOMBS)

BURTONS refused to return to the joint operation unless they received seven and one-half per cent of the gross from the joint

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operation. They would not return to managing the forty-unit motel, unless the name was changed on the new North side eighty-unit motel. Mr. COOMBS then offered to pay the BURTONS $90,000.00 for their interest and the BURTONS refused, asking $120,000.00. (Tr. 99, COOMBS)

The meeting ended with BURTONS agreeing to exercise the clause in their Management Agreement wherein they would offer their interest for sale to a third party if they every wanted to cease acting as Managers. On May 1, a listing agreement was signed with a Salt Lake Real Estate firm offering the BURTONS' interest in the forty unit motel for sale for $125,000.00. (Tr. 50-51, BURTON)

At the request of Mr. COOMBS, a meeting was arranged between Mr. COOMBS, Mr. Stewart Poelman, attorney for FOUR SEASONS MOTOR INN, INC., the Plaintiffs and their attorney, David E. West, Esq. At the meeting Mr. COOMBS made the BURTONS four offers (Tr. 112-113, COOMBS).

1. Offer - work as Managers of the combined operation for a base salary of $1,800.00 or four and one-half per cent of the gross (which would actually have netted BURTONS $2,250.00 per month, estimated.)

BURTONS' Reply - Offer rejected.

2. Offer - Will you work as Managers of the forty-unit motel under the original contract signed in February, 1973?

BURTONS' Reply - BURTONS indicated that they would return to work as Managers of the forty-unit motel under the original contract only on three conditions:

(a) That COOMBS changes the name of the new motel;

(b) That COOMBS pay BURTONS' attorney $10,000.00;

(c) That COOMBS resign as President of FOUR SEASONS MOTOR INN, INC.

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3. Offer - Will you take $90,000.00 for your interest?

BURTONS' Reply - No, it is worth $120,000.00 (Tr. 129, COOMBS)

4. Offer - Will you agree to place the property for sale? If you agree to sell the entire motel and/or the corporation to a third party, I would agree to give BURTONS twenty per cent of the profit or $80,000.00, whichever was greater.

BURTONS' Reply - Refused (Tr. 129, COOMBS)

All offers were rejected and refused by the BURTONS and they thereafter refused to perform as Managers under the joint operation or the original Management Contract for the operation of the South side motel.

BURTONS filed this action, claiming Defendants breached the original Management Contract of February, 1972.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN FINDING THE DEFENDANT IN DEFAULT OF THE ORIGINAL MANAGEMENT AGREEMENT.

A. THE EVIDENCE PRESENTED AT THE TRIAL WAS NOT SUFFICIENT TO ESTABLISH A BASIS FOR A FINDING OF FACT BY THE TRIAL JUDGE THAT WOULD SUPPORT THE CONCLUSION THAT DEFENDANT - APPELLANT BREACHED THE MANAGEMENT CONTRACT.

Paragraph 9 of the Findings of Fact entered by the Court provides as follows:

" Defendant, FOUR SEASONS MOTOR INN, INC., has breached its agreement with Plaintiffs by making it effectively impossible for them to continue to perform under their Management Contract."

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This would actually appear to be a Conclusion of Law rather than a Finding of Fact. The trial court having refused the request of Defendant that the trial court set forth the actual elements and facts upon which the trial court relied in making the determination of breach. The trial court failed to state in written Findings of Fact one single Finding to support the conclusions of breach. Consequently, this court must look to the transcript of record and the memorandum decision of court in addition to the actual written Finding of Fact to determine what acts the Defendant committed that would constitute a breach of contract.

In the transcript of record there appears to be three statements upon which the trial court must have relied on in concluding that the Management Contract was beached by the Defendant. We respectfully submit that the evidence does not constitute a basis in law or fact upon which the trial court could have made such a conclusion and requests this court to examine said Findings and compare the same to the information set forth in the transcript of record.

It would appear that the statement hereinafter set forth is the primary basis for the trial court's decision, since the language used in the court's written Conclusions is very similar to that used in this statement (In Court proceeding February 10, Tr. 8, Lines 18-22)". . . That FOUR SEASONS MOTOR INN, INC., through Alan Coombs, its principal officer and moving agent, moved the effective management of the South side of the operation across the street to the North side in violation of the paragraph 1 under grant of management rights and duties which granted to the BURTONS the sole and exclusive right to operate and manage the FOUR SEASONS MOTEL on the property described in the exhibit." (South side motel)

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It would appear that this statement in the transcript of the Judge's decision on February 10, 1975, is the basis for the alleged breach of contract. The language found in the Conclusions is similar to that used in this statement. However, a close reading of the same transcript four pages earlier (Page 4) reveals that this could not constitute a breach because the BURTONS cooperated in the move. On page 4 the Court made the exact opposite finding to the above statement on page 8. (Tr. 4, Line 9-19, Court proceeding) "The court further finds that the Plaintiffs knew or reasonably should have known that the Defendant intended to build a motel across the street; that they knew about it, were advised of it, had an opportunity to invest and participate in the construction; that they declined, that they agreed either tacitly or factually to the construction of the motel across the street; that they went over there voluntarily and entered into a working agreement with the Defendant." (emphasis added)

(Tr.5, Lines 203, Court proceedings) "The Court finds that shortly thereafter and while the (Burtons) were in operation of and managing the units, both the one that they were originally investors in and the one across the street, that the relationship broke down. The court doesn't find either party in default of the contract before that point." (emphasis added)

The breakdown occurred after the parties had voluntarily cooperated to move the offices to the North side in anticipation of managing the two motels jointly. Therefore, the court didn't find either party in default in moving the effective management of the South side across the street to the North side.

The finding set forth by the court on pages 4 and 5 clearly contradicts the finding later set forth on page 8 (Tr. of proceeding).

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There is no written finding of fact indicating which of the contradicting statements that the court ultimately takes as true. We cannot readily assume that the court did intend to base its conclusion of breach by the Defendant by this act, (i.e., of moving the operating facilities from the South side to the North side). Furthermore, the trial court's finding that neither party was in default in moving the operating facilities from the South side to the North side was fully supported by the evidence and testimony at the trial. Neither the Plaintiff or the Defendant presented any evidence, testimony or claim that would suggest the BURTONS did not approve, support and assist in the moving of the operating facilities to the North side.

Since the Court found no fault with either party in the moving of the office to the North side, then what act did the Defendant commit that breached the Management Contract? We ask this court to turn its attention to page 5 of the transcript of court proceedings.

> ". . . they were ordered back to their side of the street. That is a breach of the original agreement between the parties."
>
> (Tr. 5, Lines 16-17, Court)

It is inconceivable that the trial court could consider this act by the Defendant COOMBS to constitute the act which made it "effectively impossible" for the BURTONS to perform their Management Contract. The original Management Agreement was to manage a forty-unit motel on the South side, wherein Plaintiff BURTON resided. When Mr. COOMBS "ordered" Mrs. BURTON back to the forty-unit motel across the street, he was, in fact, telling her to go to the side where she had a Management Contract. The only way he would be in

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breach was to have ordered her not to go across the street. There is absolutely no evidence that Mr. COOMBS denied the BURTONS' access to the motel in which they had a Management Contract, but rather the BURTONS were merely asked to leave the North side in which they had no interest. The ordering of Mrs. BURTON to go across the street could only constitute a termination of the combined Management Agreement, an agreement which was never fully concluded. The court should also note that only Mrs. BURTON was asked to leave the North side lobby, and neither Mr. or Mrs. BURTON interpreted Mr. COOMBS' act as an intent to terminate their employment.

The true purpose of asking Mrs. BURTON to leave the North lobby was to relieve a situation which was disturbing normal business practices, and to give Mrs. BURTON time to cool off. The actions of the parties after the "order" to go across the street are probative in demonstrating that Mr. COOMBS' action could not be grounds for breach of contract, since there was no termination intended by COOMBS and no termination interpreted by the BURTONS. We would first ask the court to read Mr. COOMBS' testimony regarding his alleged ordering of Mrs. BURTON across the street. (Tr. 94, Lines 1-11, 20-25, COOMBS) Mrs. BURTON confirmed Mr. COOMBS' testimony that she was upsetting the help, (Tr. 46, Lines 1-5 BURTON) and visibly unhappy. (Tr. 28, Lines 27-28, BURTON) Mrs. BURTON did in fact go across the street and Mr. COOMBS and Mr. Larkin followed shortly thereafter. Mr. BURTON could not attend the full meeting because he was still working on the North side. (Tr. 29, Lines 26-28, BURTON) The testimony of Mrs. BURTON when Mr. COOMBS came across the street is as follows: (Tr. 28, Lines 29-30, BURTON) "The first words Alan said was, "What does it take to make you happy?" Mr. Larkin testifies to a similar statement by Mr. Coombs: (Tr. 161, Line 9-10, Larkin) "Mr. COOMBS

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opened by saying, "We see you have a problem, what can we do to work it out?" Mr. COOMBS testified that he stated as follows: (Tr. 95, Lines 15-18, COOMBS) "What is the problem, what is it going to take to make you happy and get this thing settled so you can go back to work and feel good about it?"

A discussion then followed wherein various offers and counter-offers were explored. (Tr. 95 and 96, COOMBS)

It is clear that these statements do not carry any threat of termination nor did BURTONS consider themselves terminated. Mr. BURTON was still working and performing managerial duties. Mr. COOMBS did not tell them to "get out of the South side" or "your're fired from your management contract". He was there to solve the problem. According to Mrs. BURTON, he asked them, "What would it take to make you happy?" Mr. COOMBS wanted them back working. He was proposing terms, compromising, asking them to come back to work. Termination of their employment was not even considered. It was just a matter of coming to terms so that the relationship would continue.

The court should note that the negotiations at the April 28th meeting were attempts to induce BURTONS to manage the combined motels. The next day, however, on April 29th, another meeting was held between the parties and at this meeting, Mr. COOMBS offered to move the telephone switchboard back to the old office where the BURTONS could operate the forty-unit motel under the original Management Agreement. (Tr. 98, Lines 1-6, 19-21 COOMBS)

We invite the court to read the testimony given by Mr. COOMBS (Tr. 96-97, COOMBS) Mr. BURTON (Tr. 71, BURTON) and Mrs. BURTON (Tr. 30, BURTON) to determine for themselves that at this meeting on April 29th there was no suggestion by Mr. COOMBS that the original Management Contract was terminated. The purpose of the meeting was

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solely to induce the BURTONS to continue as managers either on the North side as Managers of both units, or the South side, under the original agreement.

Was there any evidence presented by the BURTONS which would indicate COOMBS made it "effectively impossible" for them to manage the South side? Only one paragraph on page 104, BURTON states that the office equipment, including the telephone was moved to the North side. (The discussion on Point I already shows that they cooperated in this move.) BURTON further states on Line 30 that on June 12, a wooden stake and neon sign was placed which said "Office across the street". But the court should not fail to note that this was placed a month after the May 14 meeting when BURTONS had already rejected COOMBS' proposal that he move the telephone switchboard back to the South side and re-establish the office there. Coombs did everything "effectively possible" to induce BURTONS back to the original Management Agreement and BURTONS refused. We challenge the court to find any testimony presented by Plaintiff that would support a finding that Defendant made it effectively impossible for BURTONS to continue to perform the Management Agreement.

In fact, the BURTONS refused to perform the original Management Agreement because they wanted to sue COOMBS for damages over the full life of the contract . (Tr. 75, Line 18) BURTONS didn't want to work. (Tr. 72, Lines 13-3- and Tr. 99, Lines 17-24) and that they could get over $200,000.00 without ever working again. (Tr. 127, Line 26-29). COOMBS offered to let them work but their trial strategy was already planned.

If the act of ordering Mrs. BURTON across the street was in fact the breaching act, we find that the trial court has gone beyond the testimony of the parties, and has made a finding that

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cannot be supported in law or fact.

The question still remains, "What act did the Defendant commit which constituted the breach?"

We now ask the court to focus on the time period of April 29th until May 14th. It is in this time period that the breach would have had to occur since it is obvious that neither the act of moving the office to the North side nor the act of asking Mrs. BURTON to leave the North side could be the breaching act It is concerning this time period that the trial court made the following finding:

> "Any offer of re-employment made by Defendant, Alan H. Coombs acting for the Defendant, Four Seasons Motor Inn, Inc., was conditioned upon the Plaintiffs' operating the motel under an addendum agreement to which the Plaintiffs had not agreed.

(Supplemental Findings)

We again implore the court to consider this ruling in light of the transcript of the record. This finding completely ignores the unrebutted testimony of Mr. COOMBS.

Mr. COOMBS testified that he returned to the BURTONS' apartment on April 29th. During this meeting, the various offers were again discussed in an attempt to induce BURTONS to act as Managers of the joint operation of the North side. (Tr. 96-97, COOMBS). All efforts in that regard failed. Mr. COOMBS then testified that he was willing to move the telephone system back to the South side if they would just come back and manage their own forty units. (Tr. 98, Lines 1-6, 18-30, COOMBS) This was an unconditional offer to set up a separate office on the South side so that the BURTONS could perform the original Management Agreement. Again, this was an unconditional offer to perform the original Management Agreement. This had nothing to do with an addendum agreement.

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Mr. COOMBS further testified that on May 14, he made the same unconditional offer to let BURTONS perform the original Management Agreement in the presence of Mr. West, Mr. Burton and Mr. Stuart Poelman. (Tr. 112, Lines 26-28, COOMBS). Mr. Poelman was then sworn for the purpose of supporting Mr. COOMBS' unconditional offer. After an objection to the use of Mr. Poelman as a witness, it was agreed that Mr. Poelman would not testify on condition that Mr. COOMBS' testimony remain unrebutted. (Tr. 186, Lines 9-13, POELMAN)

And, in fact, his testimony was not rebutted by the Plaintiffs even though they had the opportunity to get back on the witness stand and deny this unconditional offer.

That the fact trier may discount testimony of self-interested party is undisputed, but there must be some recognition of the testimony and good reasons why the trial Judge should not believe the witness. The general statement of the law on unrebutted testimony is found in 81 Am.Jr. 2d "Witnesses" § 660, which states as follows:

> "It is established as a general rule that when a disinterested witness who is in no way discredited by other evidence, testifies to a fact within the knowledge of such witness which is not in itself improbably, or in conflict with other evidence, the witness is to be believed and particularly where his testimony is fully corroborated. A like rule has been applied to the uncontradicted testimony of a party or interested witness."

See also 30 Am.Jur. 2d "Evidence" § 1084, weight of uncontradicted testimony of interested party.

As a corollary to the above, the principle has been announced that testimony given by an interested party should not be wholly disregarded or arbitrarily rejected, but should be accepted as proof of the issue for which it is tendered where it is uncontradicted

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or unreasonable, contrary to natural laws, opposed to knowledge or contradictory within itself. The Utah Supreme Court discussed this issue at length in the case of American Scale Mfg. Co. v. Zee, 120 Utah 402, 235 P 2d 361 (1951). In the Zee case the Plaintiff brought suit to recover the costs of scales sold to Defendant for $837.90 down and the balance in monthly installments. The Defendant refused to pay the balance and counterclaimed for his downpayment back on the grounds that Plaintiff's salesman was guilty of fraudulent promises at the time of sale. The trial court held that Plaintiff did not make any misrepresentations to the Defendant.

Defendant assigned this finding as error and contended that the issue of fraud was proven by clear and convincing evidence and asked for a reversal. The Supreme Court reversed the lower court's holding and stated in pertinent part as follows:

> "We recognize the fact that trial Judge is in a better position to observe the manner and demeanor and adjudge the credibility of a witness than we are and we recognize the law that the trial Judge can disbelieve a witness in part or entirely under certain circumstances.
>
> "Our specific problem is, however, under what circumstances can the trial Judge disbelieve the positive and uncontradict testimony of a witness on a given subject when there is no other evidence whatever on the same subject.
>
> "The general rule as to the effect of positive uncontradicted testimony is found in National Bank of Commerce of N.Y. v. Bottolfson, 55 S.D 196, 225 N.W. 385, 386, 69 A.L.R.892, wherein the court said, 'where the testimony of a witness is uncontradicted and not inherently improbably and there are no circumstances tending to raise a doubt of its truth, the facts so proven should be taken as conclusively established and verdict directed or decision entered accordingly."

The Utah court then went on to discuss the circumstances when this rule would not be followed and looked at the facts of the case to determine whether the Zee case would fall within this rule. The court then stated,

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> "After examining the record closely, we cannot find any circumstances that would raise a doubt as to the truth of Defendant's testimony. It seems reasonable and consistent with truth to us. We hold, therefore, that Defendant's testimony was clear and convincing in support of his Answer and Counterclaim."

We request the court to examine the record of the case at bar. The circumstances surrounding the facts clearly support Defendant's testimony that he made two unconditional offers to re-open the South side motel lobby. The testimony of BURTONS and COOMBS is clear and convincing that COOMBS never intended to terminate the BURTONS' employment and made many offers to induce them to work.

The defense offered to corroborate the testimony of Mr. COOMBS by proferring the testimony of Mr. Stuart Poelman regarding the negotiations and offer of May 14. Counsel for Defendants challenged the Plaintiffs to rebut the COOMBS testimony, but the Plaintiffs chose to remain silent.

How can the trial court ignore these offers and find that any offer of reemployment was conditioned upon Plaintiffs operating under an Addendum Agreement? Can the trial Judge disregard COOMBS' and Poelman's positive and uncontradicted testimony? We contend that the rule expressed in the Zee case must be applied in the instant case.

Why did the court ignore the testimony? We think it is important to ask this question since it is possible that the trial Judge missed this testimony altogether. It is one thing for the trial Judge to hear testimony, understand it and assess it for the weight it carries. However, it is an altogether different problem if the trial court did not hear the testimony or did not understand the testimony or mistakenly believed that COOMBS referred to the Addendum Agreement when he referred to the original Management Agreement.

Four months passed between the trial on August 14 and the

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issuance of the Findings of Fact and Conclusions of Law on February 4. The contradictions and vagueness found in the court's transcript is a strong indication that the complex issues became confused and many of the facts presented at the trial were undoubtedly forgotten by the court by the time the court made its decision.

We believe the complex nature of the testimony in discussing the North-side South-side bifurcation and original agreements and the Addendum Agreement may have created confusion in the Judge's mind and he did not fully comprehend that COOMBS was referring to the South sic when he made the unconditional offers to let BURTONS manage under the original Management Agreement.

The manner in which the trial Judge write his findings indicates that he was not aware of the unconditional offers made by COOMBS. The trial court simply does not acknowledge in his findings that he was aware of such offers or that he knew of such offers. He did not chose to disbelieve COOMBS, he simply failed to understand or remember COOMBS' testimony. If, in fact, the trial court Judge made his ruling under a mistaken assumption, then the court should remand the case back to the lower court and require the court to clarify its position on this critical issue.

Ultimately, though no finding exists on this point, COOMBS' testimony remains unrebutted. The Plaintiffs had the opportunity to deny or otherwise explain the testimony of COOMBS on the unconditional offer, but declined to do so and the testimony must stand.

Thus, the trial court erred in finding that any offer of reemployment was conditioned upon Plaintiffs operating the motel under an Addendum Agreement. The testimony is clear and unrebutted that there were offers made to the Plaintiffs by Defendant to establish the South side office and allow them to perform according to the original

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agreement. The Defendant has no argument with the trial court's conclusion that the Plaintiffs were not required to work on the North side under an Addendum Agreement. We agree that there is no enforceable agreement which would require BURTONS to manage the combined units. However, once it was determined that the parties could not agree on the terms to a new contract, the BURTONS had the obligation to accept COOMBS' offer to reinstate the office in the old motel and to commence performance under the original Management Agreement.

In summary of Point I, it would therefore appear conclusive that the Findings of Fact entered by the court bear no relationship to the testimony and evidence and are the result of error and/or confusion. Since the Findings were contradictory, incorrect and unsupported by the testimony, the conclusion of the Court that the Defendant breached the original Management Agreement is clearly wrong.

POINT II.

THE TRIAL COURT ERRED IN FAILING TO FIND PLAINTIFFS IN BREACH OF THE ORIGINAL MANAGEMENT CONTRACT.

The Management Agreement entered into in February of 1972, by and between FOUR SEASONS MOTOR, INC., Defendant-Appellant herein, therein referred to as "Corporation", and HERBERT and FLORENCE BURTON, defines the responsibilities of each of the parties thereto. The agreement provides among other things the following:

GRANT OF MANAGEMENT DUTIES: . . .

> Paragraph 2-B "Upon completion of said motel, BURTONS or their designated assistant shall occupy the Manager's quarters and shall devote their best efforts to the management and operation of said motel and the office thereof on a twenty-four hour daily schedule."
>
> Paragraph 2-C "BURTONS shall have the responsibility to see that the motel is maintained in a clean, sanitary,

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orderly condition at all times, in keeping with the highest standards of maintenance and operation of the motel and hotel industry."

The records and evidence in the trial court proceedings show that the BURTONS did undertake and discharge the responsibilities imposed by the Management Agreement from the time of completion of the South side motel up to the point in time when they joined in the discussions and efforts to combine the management responsibilities on the South side motel with the management responsibilities on the North side motel. Reference is made to the narrative as more particularly set forth in Point I hereinabove set forth as to the date, time and sequence of these various events.

Appellant contends that the following undisputed facts establish the basis for the breach of the Management contract by the Plaintiffs:

1. On February 28, 1973, they left their responsibilities as Managers of the motel without prior notice thereof and they thereafter repeatedly refused to return.

2. On Sunday, April 29, 1973, the Plaintiffs told Mr. COOMB that they would not return to their duties as Managers of the first motel under the terms of the written Management Agreement, unless the Defendants were willing to change the name of the second motel, a condition which was not a responsibility of the corporation under the terms of the written Management Agreement.

3. On May 14, 1973, in the offices of David E. West, Esq., Plaintiffs' attorney, Mr. COOMBS gave the Plaintiffs the option of returning to the management of the first motel under the terms of the original written Management Agreement or of reassuming the management of the joint operation of both motels under the terms of their oral agreement in the "addendum" (Plaintiffs' Exhibit 5). At

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that time, the Plaintiffs rejected both proposals, indicating that they would not return to the management of the first motel unless the Defendants agreed:

(a) To change the name of the second motel;

(b) To have Mr. COOMBS resign as President of the first corporation; and

(c) To pay attorneys' fees to the Plaintiffs' attorneys in the amount of $10,000.00.

Reference is made again to the fact that this testimony was presented to the trial court and was uncontroverted by Plaintiffs.

4. By letter dated April 2, 1974, Mr. COOMBS in behalf of the FOUR SEASONS MOTOR INN, INC. - Appellant, again tendered the unconditional offer to the Plaintiffs to return to the management of the first motel under the terms of the written Management Agreement. Plaintiffs rejected said tender by letter from their counsel to counsel for Defendants, dated April 12, 1974, and indicated that they did not intend to return to the management of the motel, but rather, stated, We intend to stand on our claim for damages (Tr. 113, Coombs).

5. Both Plaintiffs testified during the first day of trial that they could not return to their duties as Managers of the motel. These statements were clear, unequivocal and unconditional.

A contract may be breached either by a simple non-performance of essential conditions of the contract or by an advance repudiation of the contract which constitutes a present total breach of a contract to be performed in the future or over a period of time. Plaintiffs are guilty of both types of breach. Their breach by non-performance is clear by their failure to perform their management duties and their repudiation of the contract is made clear by each of the rest of their actions as just enumerated.

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The acts of the Plaintiffs and the lawful effects thereof can best be analyzed by first reviewing the law with regard to the breach of a contract and its consequences. A clear statement of the law is set forth at 17 AmJur 2d, Contracts, Section 448, as follows:

> "According to the general view prevailing now in nearly all American jurisdictions, where there has been an anticipatory breach of the contract by one party thereto the other party may treat the entire contract as broken and may immediately sue for the breach. An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evincing an intention to refuse performance in the future . . . In many cases, however, assuming to apply the doctrine of anticipatory breach, the breach involved is a present breach accompanied by a repudiation, and the real question involved is whether the breach is total and whether damages, as for a total breach, are recoverable.
>
> "In ascertaining whether an anticipatory breach of contract has been committed by a party, it is the intention manifested by his acts which controls, not his secret intention. Moreover, in order to predicate a cause of action upon an anticipatory breach, the words or conduct evidencing the breach must be unequivocal and positive in nature."

The Utah Supreme Court clearly adopts the doctrine of anticipatory breach. Such is reaffirmed in the recent case of University Club v. Invesco Holding Corporation, 29 Utah 2d 1, 504 P.2d 29 (1972), where the court stated:

> "The recognized rule is that where one party definitely indicates that he cannot or will not perform a condition of a contract, the other party is not required to uselessly abide time, but may act upon the breached condition. Indeed, in appropriate circumstances, he ought to do so to mitigate damages."

Fitting the above declarations of law to the facts of this case, it is clear that the Plaintiffs engaged in both a present breach and an anticipatory breach of their contract, first by leaving work and failing to ever return and second by their expressed and implied renunciation of the contract as a whole. Such a renunciation is

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evidenced by (1) the fact that the Plaintiffs have, since May 1, 1973, maintained a consistent position that they would not return to the management of the motel; and (2) the Plaintiffs' clear, unequivocal and unconditional sworn testimony that they could not return to the management of the motel; and (3) the Plaintiffs' requirement that additional terms of the Management Contract be agreed to by the Defendants before they would perform their management duties.

The position taken by the Plaintiffs that they would not return to the management of the motel after they left it about May 1, 1973, is demonstrated by the fact that they have not returned. It is also demonstrated by the fact that they filed a lawsuit seeking damages rather than restitution. The letter signed by Plaintiffs' counsel, dated April 12, 1974, makes it further clear that the Plaintiffs did not intend to return to the management of the motel, but instead were going to stand on their claim for damages.

The Plaintiffs' renunciation of the Management Contract could not have been more clear or unequivocal than was stated by the Plaintiffs in their sworn testimony during the first day of trial. They stated very simply and unconditionally that they could not return to the management of the motel. This was not only a reaffirmation of their prior position, but was in itself a declaration of repudiation. It was there clearly confirmed that the Plaintiffs did not want a reinstatement of the contract since they could not perform it.

The Utah court has also made it clear that whenever a party insists that the other party perform additional acts or gives additional concessions beyond the terms of the contract itself before

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the party demanding such concessions will himself perform the conditions of the contract, such conduct constitutes a repudiation of the contract. In the case of Jordan v. Madsen, 69 Utah 112, 252 P.570, 573 (1926), the Utah court stated:

> "It, of course, is well settled that a renunciation or repudiation of a contract by one party before the time fixed for performance constitutes a breach and gives an immediate right of action to the adverse party. 5 Page on Contracts, Section 2885; 13 C.J.651. It also is well settled that if one of the parties to a contract notifies the other party that he will not perform unless such other assents to a material modification of the contract, or by the addition of new terms, such conduct amounts to a renunciation of the contract. 5 Page on Contracts, Section 2904. The breach here as alleged operated as a discharge of the contract, which gave the Plaintiff, who was not in default, the right to ignore the contract as a basis of his rights and to sue as he did in quasi contract to recover reasonable compensation for what he furnished in partial performance of the contract (5 Page on Contracts, Section 3023) - here the value of his old car, alleged to be $900. The renunciation discharged the Plaintiff from further performance. 5 Page, Section 2883; 13 C.J. 653. (emphasis added)

Thus, the fact that the Plaintiffs both on Sunday, April 29, 1972, and on May 14, 1972, required additional concessions from the Defendants before they would proceed with their performance of the Management Agreement constitutes a renunciation of the contract under the law as stated by the Utah court.

It appears clear that the Plaintiffs not only failed to perform their contract, but renounced the contract so as to constitute a total breach thereof.

An explanation of the remedies available against a party who has breached a contract through renunciation is set forth at 17 AmJur 2d, Contracts, Section 449, as follows:

> "Nearly all the courts considering the question have reached the conclusion that a renunciation or repudiation of a contract before the time for performance, which amounts to a refusal to perform it at any time, gives the

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> refusal to perform it at any time, gives the adverse party the option to treat the entire contract as broken and to sue immediately for damages as for a total breach. There is no necessity in such case for a tender of performance, or compliance with conditions precedent, or waiting for the time of performance to arrive, although this is optional. If the injured party does not wish to bring such an immediate suit for damages, he may elect between two other alternatives - that is, (1) to treat the contract as still binding and wait until the time arrives for its performance by the promisor, and at such time to bring an action on the contract; or (2) to rescind the contract and sue for money paid or the value of services or property furnished. Also, if the contract is of that general class which equity will specifically enforce, the injured party may, at his election, sue for specific performance notwithstanding that the time has not arrived for complete performance of the contract. (emphasis added)

The Utah Supreme Court has adopted this line of reasoning in the case of Jordan v. Madsen, supra, when it announced, as quoted above: "The breach here as alleged operated as a discharge of the contract, which gave the Plaintiff, who was not in default, the right to ignore the contract on a basis of his rights and to sue as he did in quasi contract to recover reasonable compensation for what he furnished in partial performance of the contract . . . the renunciation discharged the Plaintiff from further performance." 252 Pac at 573. (emphasis added)

It should be noted that the Defendants have appropriately applied to the court for the alternative remedy of rescission. In the Pre-Trial Order, the First Counterclaim asserts:

> "Defendant Four Seasons Motor Inn, Inc. claims that Plaintiffs have breached the written Management Agreement which forms the basis for the First Cause of Action under the Plaintiffs' claims herein and that because of such said breach of contract on the part of the Plaintiffs, Defendants are relieved from any further obligation of performance under said contract."

Defendants did, at the time of the trial, elect the remedy of recision and requested the court to issue its order declaring that

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the Defendants were relieved from any further obligation of performance under the Management Agreement.

Because the method of operating the motels was substantially changed just prior to the Plaintiffs' refusal to work, (this being occasioned by the effort to operate jointly under the proposed addendum agreement), Defendants were not able to furnish the court with a precise calculation of the extent of their damage. There was evidence produced by the Plaintiffs that the apartment which the Plaintiffs continued to occupy even while they refused to work had a rental value of about $250.00 per month. There is also evidence that the corporation stood the costs of utilities used by the Plaintiffs during that period. The Defendants produced evidence concerning expenses which they had to incur to hire and train additional employees to assume the work which the Plaintiffs were supposed to have been performing and both Mr. COOMBS and Mr. Larkin testified concerning the probably loss of business and inefficiencies of operation which were occasioned by the Plaintiffs' unexpected termination of services. Mr. Larkin explained that because of the BURTONS' non-performance, he was required to assume the motel management even though he was not qualified to do so, and that by doing so, he was required to neglect his duties as Manager of the Convention Center and restaurants, which, in his opinion, resulted in a loss of business and was a significant factor in requiring the sale of the Convention Center and restaurants at a significant loss. Based upon such evidence the court is in a position to award some or at least nominal damages to the Defendants as well as their attorneys' fees.

There is ample justification for the award of attorneys' fees to the Defendants. The Management Contract provides for same. It states at page 8 thereof:

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"In the event either party hereto resorts to legal action in order to enforce the terms hereof, the defaulting party agrees to pay all costs incurred in such action, including a reasonable attorneys' fee."

Obviously, the Defendants have been put to great costs and legal expense in this case. Counsel has been required to travel to St. George on four different occasions, to bring witnesses into court including one who had to travel from Salt Lake City and counsel has engaged in hundreds of hours in connection with conferences, preparation, research, depositions, trial, etc. Plaintiffs did, at the time of trial, stipulate that the reasonable value of the attorneys' fees to be awarded was in the sum of $10,000.00. Defendants respectfully request the court to award said sum as a part of their judgment against the Plaintiffs.

POINT III.

THE TRIAL COURT ERRED IN ASSESSING DAMAGES AGAINST DEFENDANT, FOUR SEASONS MOTOR INN, INC., AS FOLLOWS:

(a) There is no basis for the assessment of damages against this Defendant, there is no basis in fact or law for determining a breach of the contract;

Reference is made to the narrative and argument set forth in Point I hereinabove set forth. Absent a showing of breach based upon appropriate Findings of Fact and Conclusions of Law found in the evidence, the Court was not justified in assessing damages.

(b) The amount of damages assessed are excessive and no basis for the amount of Judgment entered by the Court can be established from the facts or evidence.

The determination by the Court that the Plaintiffs were entitled to relief in the amount of $1,000.00 per month for each month

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that they were "effectively deprived" of the right to manage the South side motel is likened to a magician pulling a rabbit out of a hat. The trial court had no basis whatsoever upon which to predicate the sum of $1,000.00 per month and to award such an amount for the period of time awarded by the Court was erroneous both as to the amount and the period of time. The evidence was clear and uncontroverted that the BURTONS were invited to return to the management of the South side motel on April 28, 1973, April 29, 1973, on May 14, 1973, and by letter of April 2, 1974.

The sum of $1,000.00, the maximum fixed amount in the management contract, per month, determined by the Court disregards the obligation imposed upon the Plaintiffs to mitigate any such loss that they would otherwise incur, it being established that the BURTONS and each of them, refused to seek out and obtain employment. The evidence showing that a proper mitigation of damage by the Plaintiffs would have resulted in their having earned more money than they would likely have been paid under the Management Contract.

In the event, for some reason, this Court were to find from the record and facts that Defendant, FOUR SEASONS MOTOR, INC., was responsible in some manner for the breach of the Management Contract, and that some award of damage should be made to the BURTONS, it is clear from the record and evidence that the amount awarded by the court is excessive. By letter of April 2, 1974, the Plaintiffs were unconditionally invited to return to the management of the motel on the South side and to assume and discharge their responsibility as imposed therein. No basis whatsoever exists to determine that a breach of the Management Contract on the part of the Defendant-Appell existed from that date forward and the maximum period that the trial court should have considered in evaluating the impact of a breach wou

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have been from the period April, 1973, to April, 1974. Thereafter, and assuming for discussion purposes, that the $1,000.00 per month found by the trial court to be the amount of damages was supported by the evidence, the Plaintiffs were obligated to mitigate their damages. It is noted that the BURTONS were allowed to live in the apartment at the motel during this period of time, enjoy the use of utilities and related benefits at no cost to them. Consequently, the trial court erred in failing to offset the per month amount determined as damages by the benefits received by the BURTONS during the period of alleged breach and by the amount of income that the BURTONS could have reasonably earned from outside and available employment.

POINT IV.

THE FINDING BY THE TRIAL COURT THAT THE MANAGEMENT AGREEMENT WAS A BINDING AND EFFECTIVE CONTRACT BETWEEN THE PARTIES, PLAINTIFFS AND DEFENDANT, FOUR SEASONS MOTOR INN, INC., WAS IN ERROR IN THAT IT WAS BEYOND THE SCOPE OF THE EVIDENCE, OUTSIDE THE SCOPE OF THE PLEADINGS AND CONTRARY TO THE REQUESTS OF ANY PARTY TO THE ACTION AND NOT SUPPORTED BY THE FACTS AND EVIDENCE IN THE CASE.

The Plaintiffs were seeking a determination by the trial court that the Management Contract was breached and that said Plaintiffs were entitled to damages. The Defendants were seeking a determination by the court that the Management Contract was breached and that they, the Defendants were entitled to damages. No request was made by any party or reserved in the Pre-Trial Order or contended as an element of relief requested or sought by any party at the end of the trial that the Management Agreement should be considered as being in full force and effect. The record being replete with indications by the Plaintiffs that they could not continue with the Managment Agreement.

The decision of the court to impose upon the parties a

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determination that the Management Agreement was in full force and effect was in error. It was beyond the scope of the evidence and contrary to the desire of any party to the action.

CONCLUSION

Having failed in their proof that the Defendants had renounced the Management Agreement so as to justify a remedy based on anticipatory breach, the Plaintiffs are left without any evidence to sustain a claim of present breach by reason of non-performance. The most that can be said is that the Defendants refused to pay compensation to the Plaintiffs during the period they refused to work. The Defendants had every right to do so under the law.

Even if Defendants had breached the contract by non-performance, the evidence shows that a proper mitigation of damage by the Plaintiffs would have resulted in their having earned more money than they would have likely been paid under the Management Contract. Thus, they incurred no damage. Moreover, the Plaintiffs admitted their design to attempt to enhance rather than mitigate their damages by refusing to seek or accept other employment until after the trial. This is sufficient justification for the court to refuse to award any damages to the Plaintiffs.

On the other hand, much of the same evidence which want to prove that Defendants had not breached the Management Contract also provided proof that the Plaintiffs had themselves breached the contract by refusing to perform, by requiring additional concessions from the Defendants not contained in the contract and by outright statements that they would not and could not return to their Management duties.

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The law supports the Defendants' claim that the renunciation of the contract by the Plaintiffs entitle them to rescind the contract. This the defendants have pleaded in the Pre-Trial Order and have asserted at trial as their chosen remedy. In the alternative, however, Defendants are entitled to a Judgment awarding them damage in some amount, and, in addition, an award of attorneys' fees as provided by the express terms of the Management Agreement and in the stipulated amount of $10,000.00.

The court should not fail to consider the effect of the court's granting to the Defendants all that Defendants pray for in this case. Such will not deprive the Plaintiffs of their ownership interest in one of St. George's finest motels. The Plaintiffs will continue to possess all of their rights as stockholders, including their right to receive twenty (20%) per cent of all profits. Moreover, in connection with such stockholder rights, they will retain all claims which they may have in connection with their stockholders derivative suit filed with this Court under Civil No. 5165.

Defendant-Appellant respectfully prays that this Court reverse the decision heretofore entered by the trial court or in the alternative that the case be remanded back to the District Court for a new trial.

DATED this 9th day of June, 1976.

Respectfully Submitted,

CLINE, JACKSON, MAYER & BENSON

BY: Joseph E. Jackson
JOSEPH E. JACKSON, ESQ., of
Attorneys for Defendant-Appellant

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