

2001

Herbert Burton and Florence Burton v. Alan H. Coombs, Carla H. Coombs, Four Seasons Motor Inn, Inc., and Four Seasons Motor Inn II, Inc. : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Burton v. Coombs*, No. 14245.00 (Utah Supreme Court, 2001).

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

BRIGHAM
J. Rea

HERBERT BURTON and FLORENCE
BURTON, his wife,

Plaintiffs and Respondents,

vs.

Case No. 14245

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 and Appellants.

BRIEF OF RESPONDENTS

An Appeal from a Judgment of the District Court
of the Fifth Judicial District, The Honorable J.
Harlan Burns, District Judge.

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FILED

AUG 10 1976

Clerk, Supreme Court, Utah

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the period of time from the date of breach to the date of judgment, together with attorney's fees and interest.

RELIEF SOUGHT ON APPEAL

Respondents seek to have the factual determinations of the lower court affirmed. However, respondents have filed a cross-appeal claiming that the lower court erred in failing to find that defendants were bound by a partial settlement offer accepted by the plaintiffs in open court, and further erred in applying an improper measure of damages. Respondents therefore seek to have the judgment modified in these particulars.

STATEMENT OF FACTS

Appellants statement of facts is not entirely accurate. It assumes numerous factual matters which were in dispute and which were contrary to the weight of the evidence and the findings of the court. It omits several material facts, it refers to bits of testimony out of context, and it is filled with statements and conclusions not supported by the evidence. For this reason the respondents desire to make their own statement of facts that are relevant and material to the issues in this appeal.

Defendant and appellant Alan H. Coombs (hereinafter referred to as Coombs) was the promoter of a corporation and a forty-unit motel in St. George, Utah known as Four Seasons

Motor Inn. Coombs, an attorney at law, was also the builder of the motel (TC-3)¹. In the early part of 1972 Coombs was looking for an investor-manager and became acquainted with the plaintiffs and respondents, Herbert and Florence Burton (hereinafter referred to as Burtons) through a real estate agent (T-5, TC-3). At that time Mr. Burton worked for a hardware company in Salt Lake City, and the Burtons had been looking for an investment in a motel (T-5), although they had never had any prior experience in any motel operation (T-62). The initial contact was followed by various negotiations between the parties, the execution of a preliminary agreement (T-6), and eventually the execution of a Stock Purchase Agreement and Management Agreement (T-8, Exhibits P-2, P-3). The terms of the agreement between Burtons and Coombs called for investment by the Burtons of \$80,000.00. Burtons sold their home in Salt Lake City and liquidated their savings and stocks and bonds and made this investment (T-13). For the \$80,000.00 investment the Burtons received 1) a management contract for the operation of the forty unit motel², 2) 20% of the stock of the corporation and, 3) the right to be represented on the

-
1. The record contains two transcripts, one for defendant Coombs and the other for all other witnesses. References to the Coombs transcript will be designated as TC.
 2. The management contract was the most important part of the consideration. It was a 30 year contract and provided that the managers would receive 10% of the gross revenue from the operation of the motel.

Board of Directors of the corporation (Exhibits P-2,P-3). The remaining 80% of the stock in Four Seasons Motor Inn, Inc. was issued to Coombs and his wife, Carla H. Coombs (TC-8). The only consideration given by Coombs for his stock was his promoting services in finding the land, and arranging for financing and construction of the motel (TC-9-12). At the time Burtons made their investment the motel was still under construction and was approximately 50-70 percent complete (T-14). The Burtons moved to St. George on April 10, 1972 and the motel opened for business on May 6, 1972 (T-15). Burtons managed the motel from May 6, 1972 until approximately April 30, 1973 (T-16). During the time that Burtons managed the motel it was acknowledged by Coombs that Burtons were good managers and did an excellent job (TC-14).

Problems between Burtons and Coombs began to develop when Coombs began to promote a second motel complex (an eighty unit motel and convention center) across the street from the Four Seasons Motor Inn (TC-14). The written agreement between Burtons and Coombs (Exhibit P-2) had anticipated the eventual construction of a second motel and had given the Burtons an option to purchase an equivalent interest. However, Coombs had told the Burtons that he did not expect to build the second motel for a period of at least five years (T-21,64,80).

Coombs advised Burtons in approximately July of 1972 that he was going ahead with the second motel (T-21). The Burtons objected because they felt it was premature in that the first motel had not yet had time to become established (T-21). Coombs advised them that he was going ahead anyway (T-21). He told the Burtons, however, not to worry and that he would give them a management contract for the new motel to be built across the street (T-21,23). Coombs proceeded with his plans for the second motel and organized another corporation which he named Four Seasons Motor Inn II, Inc. The Burtons did not invest in the second motel and an interest was sold to another investor, Derrill Larkin.

During the time the second motel was under construction Burtons began to worry about their position (T-23). In a number of conversations Coombs told Mrs. Burton "just don't worry about it you are going to be the managers, you are going to be protected, I have always dealt fairly with you and just don't worry" (T-23). Burtons on numerous occasions, expressed their concern and apprehension not only to Coombs, but to Derrill Larkin (T-172). Burtons didn't like the situation, but continued to work along with Coombs hoping that everything would eventually be worked out.

As the second motel neared completion, Burtons became more and more concerned about their management contract. They

tried to formulate a contract on various occasions but could not come to any definite proposal on the terms. In a meeting held on approximately September 30, 1972, the Burtons were offered a proposal which was unacceptable (T-24,66). At that meeting Coombs offered to replace their 10% management contract with a 3% contract which the Burtons considered to be grossly unfair (T-24,66). The meeting ended on a friendly note and Coombs continued to assure Burtons that this was merely a preliminary offer and that eventually something satisfactory could be worked out (T-25,66). In approximately February of 1973 Coombs reduced another proposal to writing and presented it to the Burtons (T-25,69; Exhibit P-5). This proposal had several objectionable terms, the most unacceptable being that Coombs was offering the Burtons a one year contract on the combined motel operation to replace their existing 30 year management contract (T-27,68). When the written proposal was rejected Coombs told the Burtons emphatically that they were never going to get anything more than a one year contract and repeated that to them many times up until April 30, 1972 (T-27). On another occasion Coombs told Mr. Burton that he would never get more than a one year contract; that he was an attorney and at times people sued him; but that he always turned the matters over to his counsel and

would never hear anything more about it (T-69).

The second motel opened in April of 1973 (T-27). At the time of the opening the Burtons were still hoping to work something out and assisted for two weeks in getting the second motel opened and going (T-28,29). Frustrations were continuing to build and on approximately April 25, 1973, the Burtons demanded a showdown to get something resolved (T-28). The parties met and Coombs asked "what is it going to take to make you happy", to which Mrs. Burton replied "permanency", pointing out that they had bought a thirty year contract with all their savings to assure themselves an income for life and that they weren't going to give it up (T-29). Again the response from Coomb was "a one year contract and that is it" (T-29). Another meeting was held on April 29, 1973, in which Coombs made another unreasonable take it or leave it offer and then told them in the meeting that he would make their stock worthless, their management contract had no value, and that they were merely employees of his and he didn't want them to operate the place anymore, and that they were through (T-30,72,103). By this time the two motels had been constructed to appear to the public as one motel under the same management; the office had been closed on the

Burtons' side of the street and moved to the new motel; the telephone system had been taken out of the first motel; the cash registers and office equipment had been moved across the street; a new office sign had been installed; and a neon sign on the old building was installed designating that the office was across the street (T-104). The next day when Mrs. Burton attempted to go to work in the new offices she was ordered off the premises by Coombs (T-31).

Based upon the above facts the trial judge concluded in his findings of fact and conclusions of law that Coombs, in acting for the defendant corporation Four Seasons Motor Inn, Inc., had breached its management contract with the Burtons by making it effectively impossible for them to continue to perform under their management agreement (R-285). The court further found that there had been considerable negotiating back and forth over a new management agreement; that no new agreement was ever reached; that the original management agreement was still in full force and effect; and that Burtons had never done anything to breach the original contract (R-282). The court also found that after the breach had taken place any subsequent offers of re-employment were conditional upon Burtons operating the motel under a

new and unsatisfactory agreement and that they were justified in refusing to do so (R-284,311).

As a part of this case Burtons also filed other claims and causes of action against defendant Coombs and defendant Four Seasons Motor Inn II, Inc. in the nature of derivative relief seeking damages for mismanagement of the corporation, co-mingling of assets, improper use of the corporate name by Four Seasons Motor Inn II, Inc., improper withdrawals of capital from the corporation, the issuance of watered stock, and the making of secret profits (R-1,21). These issues were severed at the pre-trial and it was ordered that they be tried in a separate action (R-140). Thus, the only issues on appeal in the present action relate to the breach, or lack of breach, of the management contract and the consequences of said breach.

ARGUMENT

POINT I

THE EVIDENCE CLEARLY ESTABLISHED THAT APPELLANTS BREACHED THE MANAGEMENT CONTRACT.

After a very lengthy trial in this case the trial court made findings that the appellants breached the management contract with the Burtons, and that the Burtons had never done anything to breach their agreement. The entire

issue as to who breached the contract is a factual issue, and there was a sharp conflict in the testimony on many critical points. Appellants have attempted to convince the reviewing court that the lower court committed error by stating and arguing their version of the facts. However, on appeal the respondents are entitled to have the court consider all of the evidence, and every inference and intendment fairly arising therefrom, in the light most favorable to them. Toomers Estate vs. Union Pacific Railroad Company, 121 Utah 37, 239 P.2d 163. The reviewing court will not substitute its judgment for that of the trial court and is not concerned with a preponderance of the evidence but only with the question of whether there is substantial evidence to sustain the judgment. Leon Glazier and Sons, Inc. vs. Larson, 26 Utah 2d 429, 491 P.2d 226. On appeal, the evidence in favor of the respondent must be considered to the exclusion of contrary evidence. Hoggan & Hall & Higgins, Inc. vs. Hall, 18 Utah 2d 3, 414 P.2d 89. The court is further obliged to consider uncontradicted evidence in composite with all of the other evidence. Super Tire Market vs. Rollins, 18 Utah 2d 122, 412 P.2d 132.

In light of the above fundamental and basic rules of appellant review, the evidence supporting the findings and judgment of the lower court may be summarized as follows:

It is undisputed that the Burtons did, in fact, have a management contract. The terms of the contract were not in dispute. It was a thirty year contract and provided for compensation at the rate of 10% of the gross revenue of the operation. It was purchased by the Burtons, together with a minority stock interest of doubtful value, for the sum of \$80,000.00. It is further undisputed that the Burtons operated under the contract for a period of almost one year and that they did an excellent job as managers. From this point the evidence began to get conflicting as to the circumstances of the Burtons' termination.

If the trial court believed the testimony of the Burtons it appears clearly that there was a great deal of concern, apprehension, disagreement and unhappiness about the building of the second motel. These concerns were expressed on numerous occasions and they had been given assurances upon assurances that a satisfactory arrangement would be worked out. Up until the actual opening of the second motel the parties were still on friendly and amicable terms.

It was only after the second motel was actually opened that the Burtons came to realize that a satisfactory offer for the management of the combined operation was not going to be extended. Among other things, the Burtons were

simply not willing to give up a thirty year contract for which they invested their life savings of \$80,000.00 for a one year contract on the combined operation. There was a conflict in the testimony as to conversations to the effect that the one year was to be a trial period, after which the parties could revert back to the old contract - the Burtons strongly denied the existence of such conversations (T-68), while Coombs testified that such was discussed. The fact is, however, that the proposed agreement prepared by Coombs (Exhibit P-5) which Coombs requested the Burtons to sign and which he claimed at trial embodied the terms of a modified oral agreement, clearly provided for a one year term. It purports to be an "addendum" to the original management contract. It provides at paragraph 2 on page 1 that "the management agreement entered into by both parties on February 15, 1973, shall be incorporated into this agreement and shall apply to the operation of both units with the following exceptions". Then listed under the exceptions is the provision at paragraph 7 stating that, "this agreement shall continue for a period of one (1) year with the intent that it shall continue thereafter if the management proves to be satisfactory to all persons". Nowhere in this proposed contract does it say that the parties will revert

back to the old contract after a one (1) year trial period. Had the Burtons ever signed such an agreement, the above provisions would clearly modify the original management contract as to its terms. The Burtons, further, would have been forever precluded under the Parol Evidence Rule to claim that the parties had some oral agreement different from what was reduced to writing. The affirmative testimony of the Burtons was also to the effect that they were told not once but on many occasions when the negotiations started to break down that all they would ever get was a one (1) year contract, that he (Coombs) was eighty percent and they were twenty percent so that he could fire them at will, and that their management contract had no value. And so, when the final showdown came and the Burtons refused to accept the terms that were being forced upon them, Coombs told the Burtons they were both through and later ordered Mrs. Burton off the premises. Coombs' contentions that he then offered to sever the combined operation and reinstate Burtons to the management of the forty unit motel are flatly denied by the Burtons.

It is further clear from the evidence in this case that at the time the Burtons were fired by Coombs, the

physical circumstances were such that it would have been impossible for them to have continued their contract. By that time, the office had been moved across the street. All of the telephone equipment and office equipment had been moved, signs had been changed and installed designating that the office was across the street.

There was some testimony that after the blow up, Coombs asked Mr. Burton to come over across the street and work in the combined operation. Certainly Mr. Burton had no obligation to go over and work without a contract in an operation in which he had no ownership interest. Further, had he done so, the defendants would have claimed his working to be an acknowledgment of the existence of some new oral contract--which is the very position that they took throughout the whole case in attempting to imply a new contract from the two weeks help that the Burtons extended when the second motel was opened. The court might note on pages 3 and 5 of the Pre-Trial Order (R-142) that up until the time of trial defendants' position has always been that the management contract was modified, and that plaintiffs' breached the modified agreement. On page 5 of the Pre-Trial Order defendants specifically claim that the conduct of the parties

was a basis for establishing the modified contract. Nowhere in the Pre-Trial Order or in the other pleadings do the defendants contend that the amended agreement was only temporary and that the parties could later revert back to the first agreement.

The evidence in this case further showed that after the Burtons had been terminated Coombs leased all of the assets of Four Seasons Motor Inn, Inc. to Four Seasons Motor Inn II, Inc. (Exhibit P-8, PC-19) for a period of thirty years. At trial Coombs offered to cancel the lease, claiming the power to do so inasmuch as he owned eighty percent of both the lessor and lessee corporations. It is unreasonable to think that Burtons would have known this. They naturally would assume that a formal twenty year lease is a twenty year lease.

The hypocrisy of appellants' evaluation of the facts is further demonstrated by their tender of performance made shortly before the commencement of the trial (R-150). They have continually attempted to make it appear as though Burtons could have returned to their management contract at any time, yet even in open court when Burtons attempted to accept an offer of re-employment it was immediately refused (this point is discussed in detail under Point I of respondents' cross-appeal).

A recent case that may be of some significance to the court is Holley vs. Sullivan, 28 Utah 2d 3, 497 P.2d 630. In that case, plaintiff was employed by the defendant as a hostess and waitress in a cafe. She was fired under the following circumstances as quoted by the court:

"After a couple of months of seemingly harmonious relations, there was a falling out over the work of another employee, and the plaintiff called the defendant a "dirty double-crossing liar", whereupon the defendant said, "young lady, you can go home right now". In the next breath, he told her not to leave. However, she did leave, saying, "You fired me, and now you rehire me in less than two seconds, and you're not playing cat and mouse with me".

Under this evidence, the trial judge found that the plaintiff was fired; and while he may not have ruled as he did, yet we do not say that he could not so find."

The above merely illustrates the type of evidence upon which a finding of improper termination may be based. Plaintiffs place no special significance on this case, as the facts of plaintiff in the instant case are so much stronger than Holley that there can be no reasonable comparison.

Respondents would contend, not only that there is sufficient evidence to support the findings of the trial court, but that the total evidence clearly preponderates in favor of them. It is simply unreasonable to believe

that the Burtons would simply have walked off the job and risked losing their entire lifetime savings without being ordered to do so. The greater credibility lies with the respondents.

POINT II

THE TRIAL COURT COMMITTED NO ERROR IN FAILING TO FIND THAT RESPONDENTS BREACHED THE MANAGEMENT CONTRACT.

Point II of appellants' brief is filled with statements of fact that are disputed. The question of whether appellants, or whether the respondents, breached the management contract is a factual issue and Burtons' responsive argument as to the factual issues is fully covered under Point I of this brief.

It may again be significant to note, however, that appellants' argument under Point II is entirely inconsistent with the claims that were made in the trial court. In the pleadings in Pre-Trial Order (R-140) it has always been the position of appellants that the original management contract was modified by a subsequent oral agreement and that the Burtons breached the new agreement (not the old), by refusing to manage the combined operation of the two motels. Now that the trial court has made findings that no new agreement was ever made between the parties (R-284), the

appellants make an about face and claim that it was the original contract that was breached by the Burtons. This is but a typical example of how the appellants have continually vacillated their position, to fit the expediency of the moment, and have kept the Burtons in a continual state of frustration. It is little wonder that the trial court didn't think much of the appellants' credibility.

CROSS-APPEAL

POINT I

THE COURT ERRED IN FAILING TO FIND THAT THE DEFENDANTS WERE BOUND BY THEIR PARTIAL SETTLEMENT OFFER WHICH WAS ACCEPTED IN OPEN COURT.

The facts upon which respondents rely for their cross-appeal are not included in their statement of facts and will therefore be stated herewith. Approximately one week before the trial, the defendants tendered an offer to the plaintiffs which was put in the form of a formal pleading and filed in the case (R-150). The pleading was entitled "Reaffirmation of Tender of Performance" although Burtons evidence was to the effect that such an offer had never been previously made. Under the terms of the written offer, the defendants agreed to the following:

- (a) To reinstate the plaintiffs in their management contract.

- (b) To change the name of the convention center and motel operated across the street by Four Seasons Motor Inn II, Inc.
- (c) To perform whatever acts are required to sever the two motels and allow the plaintiffs to properly perform under their management contract.
- (d) To permit all parties to continue to pursue without prejudice any claims against the other to the date of acceptance of the tender.

During the course of the trial counsel for the defendants on three occasions made reference to the offer and made representations to the court that it was available for acceptance by the plaintiffs even during the trial (unfortunately the oral arguments of counsel in making these representations were not reported, (T-3,26,141)). Burtons had not responded to the offer and had proceeded through trial on a theory of anticipatory breach. That is, they claimed that they were entitled to damages over the full unexpired period of the management contract. Plaintiffs proof of damages was to this effect. They called an expert witness Dr. Boyd Fjeldsted, a consulting research economist from the University of Utah Economic Business and Research Department to testify on the subject of damages. Dr. Fjeldsted made a very scholarly study and concluded that after taking into consideration the projected future receipts of the motel,

the value of the furnished apartment to the managers, reductions for present worth, and additional reductions for age based upon motel industry statistics, that the total damages to Burtons on an anticipatory breach theory was \$237,760.00 (See T-112-134).

After plaintiffs had rested their case, the court met with counsel in chambers. He did not make any rulings, nor did he tell counsel how he was going to rule, but suggested that the parties ought to get the case settled. In following the suggestion of the court, plaintiffs decided to accept defendants' offer. They thereupon re-entered the courtroom and made the following statement on the record (T-141):

"Now, then, the court will recall Civil No. 4940. Counsel are present as is the parties, are you ready to proceed?

Mr. West: Yes, your Honor. I have a matter which I would like to present at this time to the Court. Following our discussion in chambers with the Court we have met with counsel and discussed this matter with our clients and at this time, your Honor, we would like to refer to the Court the formal tender of performance which is in the file, dated October the 3rd of 1974, it would have been filed last week, and at that time the defendants in this case made a tender of performance where, and I might just review this,

(The document was then read in its entirety into the record)

At this time, your Honor, the defendants or the plaintiffs in this case make an unconditional acceptance of this tender that has been proposed and that counsel has represented throughout the trial. We will go back and resume the management, so it would be our position at this time, then, that this is without prejudice as far as any other claims that we might have, and so the only issue, as I see it, at this point, would be the damages in the interim period, what they are and if in fact we are entitled to damages during that period."

Mr. Lybbert then immediately repudiated the offer after which the following additional record was made:

"The Court: Well, the Court is advised of the statement by Mr. West in behalf of the plaintiffs in this case, they accept unconditionally in form and content your reaffirmation of tender of performance filed in this case and I take it at the time that you would like to withdraw that; on the other hand, it is under advisement and the Court is advised of your position at this juncture in the lawsuit, Mr. West. And so the record is clear, the Court, and the record should show that the Court did in fact call counsel into chambers and off the record and in an effort to encourage the parties in this case to settle their differences if they could at this juncture in the lawsuit, at least indicated some of the views of the Court on some of the issues and state of the proof. However, Mr. West and Mr. Lybbert, Mr. Jackson, Mr. Poelman, you all agree with the Court that the Court advised you, don't misinterpret the statements of the Court, the Court didn't intend that to be any ruling but just to assist you, if it could, in reaching some settlement among yourselves, and that is correct, isn't it, Mr. West?

Mr. West: Yes, your Honor, I understand. I don't make any claim that the Court made any ruling in Chambers or that the Court indicated how the

Court would rule on the issues, and as far as our acceptance of this tender is concerned it's been represented right in this courtroom not once but on at least three occasions that I can remember by Mr. Lybbert himself that that offer is outstanding, it is still outstanding, it remains outstanding throughout the course of this trial and it has never been--I would represent to the Court that it's never been revoked and that our acceptance is an unconditional acceptance."

By making an unconditional acceptance of defendants' offer plaintiffs gave up their claim for damages under the anticipatory breach theory. The terms of the written offer provided that it was without prejudice as to any existing claims up to the date of acceptance, and the balance of the case was devoted to resolving the factual issues of who breached the management contract, and the amount of plaintiffs' damages during the interim period to the date of reinstatement under the offer.

It is also significant that the court at the conclusion of this case made a statement to the effect that he thought defendants were bound by their tender offer (T-193). However, when the judge made his final ruling he ruled in favor of the Burtons on the breach of contract issue and concluded "that no good purpose would be served by ruling as a matter of law, that the acceptance of the offer is binding on any party, and hence rules that it is not binding"

(T-286; see also separate transcript of court proceedings, pages 13,14). Obviously, the trial judge felt in light of his findings and judgment that a ruling on the acceptance of the offer made no difference. But the fact is that it made a very important difference. That is, that the part of the offer relating to a change of name by the second motel is left unresolved. This point is of extreme importance to the Burtons. Under the ruling of the court the Burtons have gone back and resumed the management of the original motel. While, of course, there is no evidence before this court as to what has happened since the judgment, it takes little imagination to realize the confusion and problems that would exist where two motels with separate ownership across the street from each other in the same town attempt to operate under the same name. Burtons gave up a very valuable right when they accepted defendants' offer in open court. They gave up the right to pursue any additional claim for anticipatory breach. They are now entitled to the full benefits of the contract that came into being, which includes the changing of the name of their competing corporation.

At no time prior to acceptance was defendants' offer ever revoked, nor was there ever any intervening counteroffers.

Burtons' position is that under the most elementary contract principles of offer and acceptance, both parties are bound by the contract that was formed. If the position of the parties were reversed, it is inconceivable to think that plaintiffs could have revoked the contract and continued to seek damages for anticipatory breach after having made an unconditional acceptance in open court; likewise defendants must be bound by the terms of their own proposal.

POINT II

THE COURT ERRED BY AWARDING PLAINTIFFS INSUFFICIENT DAMAGES.

A. Plaintiffs' Measure of Damages in This Case.

Having found that the defendants breached the management contract and that the Burtons were justified in not returning to work until after the issues in this case were resolved, it became the duty of the trial court to determine and award damages. In this case the trial court arbitrarily awarded plaintiffs the sum of \$1,000.00 per month from the date of breach until the date of the court's decision (R-285,287,289). Burtons contend that the figure of \$1,000.00 is not supported by the evidence.

Ordinarily the measure of damages for the breach of an employment contract by the employer is the amount that the discharged employee would have received or would have

earned had the contract been performed. 22 Am. Jur. 2d
Damages, Section 70, Russell -vs- Ogden Utah Ry, 122 Utah
107, 247 P.2d 257.

In this case, the rate of compensation to the employee managers is tied to gross receipts from the motel operation. Thus, it is impossible to determine with exact precision what the damages are. Under such circumstances, the principles set forth in the case of Gould -vs- Mountain States Telephone Company, 6 Utah 2d 187, 309 P.2d 802 become very important. That case involved a suit for damages against the telephone company by an attorney for failure to include his name in the telephone directory. The argument of the defendant was that the cause of action should fail because of the impossibility of determining damages. In rejecting that argument, the Supreme Court held as follows:

"Where the plaintiff has shown actual loss of business during the period as a result of defendant's breach of contract, he will not be denied recovery because the exact amount of damages cannot be readily ascertained. To this effect is the rule laid down by this court that where the fact of substantial damages shown, the court or jury cannot award nominal damages only on the ground that the amount of substantial damage has not been shown with reasonable certainty.

The rule against recovery of uncertain damages is generally directed against uncertainty with respect to cause rather than to measure or extent, so that a party who has broken his contract will not ordinarily be permitted to escape liability because of uncertainty in amount of damage resulting, and the fact that the full extent of damages for breach of contract must be a matter of speculation is not a ground for refusing all damages."

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Justice Crockett concurred specially in favor of allowing damages and stated as follows:

"I am also in accord with the idea expressed in the main opinion, that where substantial damages shown to have resulted from the breach of a duty, the fact that the injured person may have difficulty in proving the amount of his damage should not resound to the benefit of the wrongdoer. Rather than conferring an advantage upon him, doubt should be resolved in favor of compensating the injured person for his injury. We can see no objection to placing before the jury all of the facts and circumstances of the case having any tendency to show damages so as to enable them to make the most intelligible and probable estimate which the nature of the case will admit."

With the above principle in mind, we can examine the evidence in the instant case. According to the evidence of Newel Jackson (the accountant) taken by deposition (T-111), the gross receipts for the first year of operation of Four Seasons Motor Inn, Inc., was \$138,000.00. This did not include the month of April, 1973, which would have been the last month of the fiscal year. Mrs. Burton testified that the gross receipts for April attributable to the forty unit motel only was in excess of \$20,000.00 (T-18). Also, the testimony was that in May of 1972, being the first month of operation, that the motel opened on May 6 with only 5 or 6 units ready for occupancy and that all of the units were not completed until Decoration Day (T-15). If the

motel had been open throughout the entire month of May, 1972, it conservatively would have produced at least another \$10,000.00 of revenue. Thus, the income for the first year's operation was \$169,000.00 calculated as follows:

Gross receipts as shown on	
books of corporation.	\$138,000.00
Additional receipts for April, 1973 . .	21,000.00
Estimate of additional receipts	
for May, 1972, if the motel had	
been completed.	<u>10,000.00</u>
TOTAL.	<u>\$169,000.00</u>

The above is close to Coombs projection which was made prior to construction that the revenue would be \$163,520.00 (Exhibit P-4).

It is reasonable to assume that the motel would have done better in its second year of operation. Particularly is this true in light of Mrs. Burton's testimony that the repeat business was building up substantially (T-18), and in light of Mr. Coombs' testimony that there were two increases in room rental rates after the first year (T-116,117).

Based upon the above evidence, plaintiffs contend that the receipts for the second year had the Burtons been permitted to continue with their contract would have been at least \$180,000.00. Ten percent (10%) of that amount

would equal \$18,000.00 or \$1,500.00 per month. It is undisputed that the last month for which the Burtons were paid was April, 1973, and that nothing has been paid since that time. All of the damage evidence was virtually undisputed. Thus, the court should have awarded plaintiffs damages based upon \$1,500.00 per month and not \$1,000.00 per month.

B. Under the Facts of this Case, No Mitigation Factors Should be Considered by the Court. In its findings the court made the statement that in awarding damages it had taken into consideration all matters of mitigation. It is Burtons' position that it would have been improper in this case to consider any mitigating circumstances. The authorities are generally in agreement that the breaching employer has the burden of proof to establish that substantially similar employment opportunities were available in the same locality and that the employee cannot be compelled to take a different type job or a job in a different area. Crillo -vs- Curtola, (Cal.) 204 P.2d 941; Farrell -vs- School District, 98 Mich. 43, 56 N.W. 1053. No such evidence was offered by the defendants in this case, and they have failed in meeting their burden of proof.

Aside from the above, however, there is an even more compelling reason why it would be improper to consider any mitigation in this case. The leading case upon which plaintiffs rely is Chioda -vs- General Waterworks Corporation, 17 Utah 2d 425, 413 P.2d 891. In that case, plaintiff was the owner of the Bear River Telephone Company in Northern Utah. He sold all of his corporate stock to the defendant, and, in connection with the sale of the business retained a ten year employment contract. After the sale was made, the plaintiff worked for a short period and was discharged. The grounds for the discharge were claimed dishonesty, disloyalty and insubordination of the employee. The plaintiff thereupon filed suit to recover his compensation under the employment contract. The court found that there had not been sufficient justification for the discharge and awarded plaintiff judgment for the full balance that he would have earned had the contract been performed. One of the issues on appeal was whether the trial court should have required mitigation of future damages. On that issue, the court held as follows:

"There are two reasons why the trial court was justifiably not impressed with the defendant's insistence upon mitigation of damages. First, as the deal was worked out, the payment of this salary for ten (10) years, could well

be regarded as a deferred payment of part of the overall consideration plaintiff required for his telephone company. Second, inasmuch as the plaintiff is 60 years old, it would be unrealistic to conjecture as to his ability or desire to get another position and earn money for the purpose of mitigating defendant's damages."

In other words, since the employment contract was part of the consideration for the sale of the business, the court in Chioda did not consider the employment contract in the usual sense. The very same considerations apply to the instant case. We are dealing with a management contract that was purchased. The Burtons paid \$80,000.00 to acquire it. We are not dealing with a typical contract where the services to be performed are the consideration for the contract. Here, a very substantial part of the consideration was the payment of money. It is totally unreasonable to believe that Coombs would have offered a thirty year contract with compensation at the rate of ten percent of gross revenues to anyone, regardless of their capabilities, in the absence of the \$80,000.00 investment. If the reasoning of Chioda is followed by the court, it is clear that no mitigation factor should be applied.

C. Effect of Offers of Re-employment. Although the trial court did not appear to have reduced plaintiffs' damages because of defendants alleged and fictitious offers

of employment, respondents in answer to Point III of appellants' brief feel that perhaps some comment should be made on this point. Plaintiffs acknowledge that under certain circumstances, an employee may be under a duty to accept an offer of re-employment if it is a bona fide offer and made in good faith. Defendants' formal offer which they tendered in court was designated as a "reaffirmation" of tender of performance. As a part of their evidence, they offered a letter dated April 2, 1974 (after the date of the Pre-trial herein) upon which they apparently rely in establishing the prior offer (Exhibit D-10). The implication would be that plaintiffs should be precluded from recovering damages after April of 1974.

In order for an offer of re-employment to have any effect whatsoever, it must be made in good faith and it must be totally unconditional in that the employee must not be required to suffer any loss or give up any rights by accepting it. Larsen -vs- Fisher, 48 N.W. 2d 502. The letter of April 2 is obviously a conditional offer in that it compels the plaintiff to recognize a modified agreement that plaintiffs claim did not exist. It, further, does not preserve the existing claims of the Burtons. Also, the claimed offer was rather empty in that it recites that

Burtons should resume the duties of management but provides for no practical way in which the duties can be performed. Further, no resumption of salary was ever extended.

A case involving the good faith of an offer of re-employment is Grey -vs- Pacific Section Cleaner Company, 155 Pac. 469. This case involved the question of whether the employee was ever in good faith given the opportunity to resume his duties. Again, there was an employment contract for a definite period. When the plaintiff did not receive his monthly paycheck, he sued for his back wages and was immediately fired. Two days later, he began an action for wrongful discharge. The offer of re-employment that the defendant relied on in mitigation of damages was made through a series of five letters. The plaintiff refused the offer of re-employment because he felt it was made in bad faith. The court made some interesting observations on what constitutes a good faith offer:

"It is to be observed that all of this occurred after the action was begun. The contents of the letters of the defendant indicate that they were prepared either by the attorneys for the defendant or under their direction. The correspondence and the circumstances shown in the evidence justify the inference that the defendant was much more desirous of laying a foundation for mitigation of damages in the suit than of taking the

plaintiff back into its service. The motive is, of course, apparent. A reasonable person would easily perceive that the continuance of Grey in the service of the company after the occurrences leading up to the beginning of the action would most probably be disagreeable and undesirable to both parties, and would necessarily cause friction between them. Without further discussion, we think it's sufficient to say that upon all the evidence the court was justified in drawing the conclusion that the offer was made in bad faith, and that the finding to that effect is supported by the evidence."

The court also observed that the apparent ambiguity in the offer of re-employment as to payment of costs of plaintiff for legal action taken was another circumstance tending to show bad faith on the part of the plaintiff.

Approximately one week before the trial date, the defendants made the first unqualified offer of re-employment to the plaintiff. It is obvious that this document was prepared by defendants' attorney for the sole purpose of mitigating damages and was not a good faith offer. This is apparent by the defendants' attempt to withdraw the offer after the plaintiff accepted the same. This course of action on the part of the defendants confirmed plaintiffs continuing concern that the offer was not made in good faith.

Another case concerning good faith offers of re-employment is Dahl -vs- the SS Amigo, 202 F. Supp. 890. This case involved an action by two seamen for breach of contract of employment and some other relief relating to

maritime law not applicable here. However, the breach for contract of employment is applicable in that the court relies on the common law in formulating its decision. These officers were employed for one year and discharged without cause after three months. Only after the plaintiffs obtained counsel did the defendant offer them re-employment. The court held as follows:

"It is established law that upon the breach of the contract of employment, the employee must endeavor to mitigate his damages by seeking other employment; and if a bona fide offer of re-employment is made by the same employer, it must be accepted in mitigation of damages. An offer of re-employment must be a genuinely sincere and bona fide offer, made in good faith, to be considered in mitigation. Whitmarsh v. Littlefield, 46 Hun 418, 11 N.Y.S. 815. If there are reasonable grounds for rejection of an offer of re-employment, the discharged employee is under no obligation to accept re-employment. Levin v. Standard Fashion Company, 16 Daly 404, 11 N.Y.S. 706. If anything has occurred that would render further association between the parties offensive, then in that event, the employee is not obligated to accept the offer or re-employment. Levin v. Standard Fashion Company, supra; Birdsong v. Ellis, 62 Miss. 418; Connell v. Averill, 8 App. Div. 524, 40 N.Y.S. 855. The court is not convinced that there was a sincere bona fide offer of re-employment. However, if the offer of re-employment was such, the court is of the opinion that the existing circumstances (that is the wrongful discharge, the living conditions that prevail aboard the vessel, the fact that there was no unconditional tender of wages along with the offer of re-employment, the ill feeling that had been engendered, and the fact

that libelants had engaged the services of attorneys) constituted reasonable grounds for the libelants' rejection of the offer of re-employment."

All five of these elements are present in the case before the court.

The case of Price -vs- Davis, 173 S.W. 64, stands for the proposition that ill will can be an insuperable barrier between the parties justifying not accepting an offer of re-employment. The court held as follows:

"In the quarrel between the parties which preceded the discharge, things were said and done which tended to place an insuperable barrier between them and to make their further association in business unprofitable and degrading to the plaintiff.

The rule in such cases, as stated in Birdsong v. Ellis, supra, is that: 'If anything had occurred to render further association between the parties offensive or degrading, or if the plaintiff had engaged in any other employment incompatible with his return to the defendant, he might reject the offer with safety and without suffering diminution of his damages on the ground that it was an offer he should have accepted'."

If the wrong of the employer in discharging the employee is of such character that the parties could not be restored to their former relationship, then an offer of re-employment should not be construed as imposing upon the employee any obligation to accept it, and his refusal to accept such offer should not subject him to the penalty of the diminution of the damages caused by his wrongful discharge."

As mentioned previously, the only unconditional offer of re-employment made by the defendants was made one week before trial under circumstances that were apparently more concerned with mitigating damages than with actually renewing the business relationship of the parties. The authorities cited show that plaintiffs were justified in not accepting defendants' offer until the time they did so. Under the circumstances of this case, plaintiffs were clearly entitled to interim damages at the rate of \$1,500.00 per month as calculated under Point IIA of Respondents Cross-Appeal.

D. Damages in the Event Respondents Fail Under Point I of Their Cross-Appeal. In the event the trial court is upheld in its determination that defendants are not bound by their offer in open court which was unconditionally accepted by the respondents (see Point I of this Cross-Appeal) then in such event plaintiffs are likewise not bound and would be entitled to revert to their original claim of total and anticipatory breach. In Restatement of Agency 2d, Section 432, Comment B, it is stated as follows:

"A breach of duty by the principal may be partial or total; a partial breach may or may not be material. If the breach is not material the agent has no privilege to refuse to continue but can maintain an action for the breach; if it is material, but not total, the agent can refuse to con-

tinue until the breach is cured, a material breach may become total. If the breach is total, the agent can elect to terminate his obligations under the contract and maintain an action for the entire amount due under the contract, or he can offer to continue, maintaining action for the amount due at the time of the breach. . ."

Revocation of the offer of re-employment by the defendants herein would be an acknowledgment on their part that plaintiffs will not be permitted to perform their contract in the future and would constitute a total breach. In this event, the testimony of plaintiffs' expert witness on damages would become of critical importance. Dr. Fjeldsted testified that the total damages, including the reasonable value for the loss of the apartment in future years, was \$237,760.00. This figure is on the ultra conservative side. It assumes gross receipts for the base year of \$169,000.00 which is the figure projected by Coombs and is substantially less than the actual first year's operations. It assumes a discount factor for present worth of 7.25 percent. It considers a reduction for age factors based upon professional studies. It assumes a cost of living increase of only 2.25 percent, and it is projected only until age 75 and allows nothing for the last ten years of the contract. If the court permits defendants' offer

to remain revoked plaintiffs would be entitled to an immediate judgment of \$237,760.00.

CONCLUSION

Based upon all the arguments and authorities as cited herein, respondents respectfully urge the court as follows:

1. To affirm the factual determinations of the trial court regarding the breach of contract issues.
2. To modify the judgment of the lower court by determining that appellants are bound by all of the provisions of their written offer which was accepted by plaintiffs in open court.
3. To modify the amount of damages awarded plaintiff by increasing the award from \$1,000.00 per month to \$1,500.00 per month to conform with the evidence.
4. In the alternative, to award plaintiffs total damages of \$237,760.00 as established by the evidence.
5. To award plaintiffs costs and reasonable attorney's fees for this appeal (the management contract provides for attorney's fees to the prevailing party, and the award of attorney's fees included in the judgment only covered the services rendered through the date of trial).

Respectfully submitted,

ARMSTRONG, RAWLINGS,
WEST & SCHAERRER

David E. West