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Geri Pasquin v. John Pasquin, Jimmie Pasquin, The Estate of Kory Pasuin, Quality Parts, Quality Transport Refrigeration Parts, INC., Thomas A. Duffin, Daniel O. Duffin and Does : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

~~DOCKET NO~~

980293-CA

GERI PASQUIN,
Plaintiff/Appellant,
vs.

JOHN PASQUIN, JIMMIE PASQUIN,
THE ESTATE OF KORY PASQUIN, QUALITY
PARTS, a Utah general partnership, QUALITY
TRANSPORT REFRIGERATION PARTS, INC.,
THOMAS A. DUFFIN, DANIEL O. DUFFIN and
DOES 1-40
Defendants/Appellees.

Case No. 980293-CA

BRIEF OF APPELLANT

Appeal From the Orders of the Third District Court,
Salt Lake County, State of Utah
Honorable J. Dennis Frederick

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STATEMENT OF JURISDICTION

This appeal arises from a civil action brought by plaintiff/appellant Geri Pasquin (“Mrs. Pasquin”) for declaratory relief (relating to her allegation that she is a partner in Quality Parts, and has an interest in the assets thereof), breach of fiduciary duty and malpractice, breach of employment contract, intentional interference with employment contract and intentional infliction of emotion distress.

Jurisdiction to hear this appeal is conferred upon the Utah Supreme Court based upon Article VIII, Section 5 of the Constitution of the State of Utah, U.C.A. 78-2-2(3)(j)(1995 Sup.) and Rule 3(a) of the Utah Rules of Appellate Procedure. This case was poured over to the Utah Court of Appeals by the Utah Supreme Court.

The order granting summary judgment to the Estate of Kory Pasquin (“Pasquin Estate”) was executed on October 21, 1997. The order granting summary judgment to John Pasquin, Jimmie Pasquin, Quality Parts and Quality Transport Refrigeration Parts, Inc. (the “Pasquin Defendants”) was executed on November 3, 1997. The order granting summary judgment to Thomas Duffin and Daniel Duffin (The “Duffin Defendants”) was executed on November 17, 1997. An amended order granting summary judgment to the Duffin Defendants was executed on November 26, 1997. The Order Denying Plaintiff’s Objection to Proposed Summary Judgment of Duffin Defendants was executed on December 19, 1997. The Minute Entry Ruling declaring plaintiff’s objection to the language of the Duffin Defendants’ proposed Summary Judgment to be untimely was executed on November 18, 1997. The Minute Entry Ruling denying Plaintiff’s Motion to Reconsider and to Vacate the Summary Judgment of Pasquin Related Defendants was executed on December 18, 1997.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was it reversible error for Judge Fredericks to rule that Mrs. Pasquin's claim of an interest in an oral partnership was barred under the Statute of Frauds in light of Mrs. Pasquin's sworn testimony that she became a partner immediately with the knowledge and consent of all partners, including John Pasquin? Related thereto, is an oral partnership agreement rendered unenforceable simply because the partnership contemplates existing longer than one year? Are all oral partnerships rendered unenforceable if the partnerships operate or contemplate operating for more than one year?

Preserved for appeal in Plaintiff's Memorandum in Opposition to The Estate of Kory Pasquin's Motion for Summary Judgment, **R. 87-112**, and Mrs. Pasquin's other memoranda opposing the defendants' motions for summary judgment, **R. 143-148, 155-162**.

2. Was it error for Judge Fredericks to rule that there was no writing satisfying the Statute of Frauds with respect to Geri Pasquin's claim of an employment-for-life agreement given the undisputed fact that the entities against which this employment agreement was sought to be enforced, the Quality Parts partnership and its successor corporation, answered an interrogatory admitting the existence of the employment-for-life promise and John Pasquin's statement reaffirming and committing to honor said agreement? Does an express, written acknowledgment of what otherwise was an oral agreement by way of an interrogatory answer constitute a "writing" sufficient to take the agreement out of the Statute of Frauds?

Preserved for appeal in Plaintiff's Memorandum in Opposition to The Estate of Kory Pasquin's Motion for Summary Judgment, **R. 87-112**, and Mrs. Pasquin's other memoranda opposing the defendants' motions for summary judgment, **R. 143-148, 155-162**.

3. Was it reversible error for Judge Fredericks to rule that the Statute of Frauds barred Mrs. Pasquin's partnership and employment-for-life claims given the fact that Mrs. Pasquin's opposing memoranda set forth verified statements of disputed facts which supported her claims that a factually intensive exception to the Statute of Frauds is present in this case, and/or that the defendants should be estopped for asserting said defense?

Preserved for appeal in Plaintiff's Memorandum in Opposition to The Estate of Kory Pasquin's Motion for Summary Judgment, **R. 87-112**, and Mrs. Pasquin's other memoranda opposing the defendants' motions for summary judgment, **R. 143-148, 155-162**.

4. Was it reversible error for Judge Fredericks to essentially rule that even though Mrs. Pasquin had opposed the motions with detailed sworn statements of disputed facts, the defendants' motions were not opposed by any "affidavits?" Is a factual statement in a memorandum in opposition to a motion for summary judgment, which is verified under oath, the equivalent of an "affidavit" under Rule 56?

Preserved for appeal in Plaintiff's Memorandum in Opposition to The Estate of Kory Pasquin's Motion for Summary Judgment, **R. 87-112**, Mrs. Pasquin's other memoranda opposing the defendants' motions for summary judgment, **R. 143-148, 155-162**, Mrs. Pasquin's Objection to Proposed Summary Judgment of the Duffin Defendants, **R. 179-180**, Mrs. Pasquin's Objection to Proposed Summary Judgment of the Pasquin Defendants (John Pasquin, Jimmie Pasquin, Quality Parts and Quality Transport Refrigeration Parts, Inc.), **R. 189-191**, and Mrs. Pasquin's Motion for Reconsideration Re Minute Entry Dated November 18, 1997 and to Vacate Execution of the Pasquin Defendants' Proposed Summary Judgment, **R. 208-211**.

4. Was it reversible error for Judge Fredericks to grant the motions for summary

judgment in light of the fact that Mrs. Pasquin's verified statements of disputed facts in opposition to the motions clearly demonstrated that there were material facts in dispute which needed to be resolved at trial?

Preserved for appeal in Plaintiff's Memorandum in Opposition to The Estate of Kory Pasquin's Motion for Summary Judgment, **R. 87-112**, Mrs. Pasquin's other memoranda opposing the defendants' motions for summary judgment, **R. 143-148, 155-162**, Mrs. Pasquin's Objection to Proposed Summary Judgment of the Duffin Defendants, **R. 179-180**, Mrs. Pasquin's Objection to Proposed Summary Judgment of the Pasquin Defendants (John Pasquin, Jimmie Pasquin, Quality Parts and Quality Transport Refrigeration Parts, Inc.), **R. 189-191**, and Mrs. Pasquin's Motion for Reconsideration Re Minute Entry Dated November 18, 1997 and to Vacate Execution of the Pasquin Defendants' Proposed Summary Judgment, **R. 208-211**.

5. Was it reversible error for Judge Frederick's to deny Mrs. Pasquin's Rule 56(f) motion for more time to conduct discovery on the grounds that Mrs. Pasquin had failed to timely conduct discovery, when the facts were clear that (a) most relevant documents were in the possession of the defendants, especially the Pasquin Related Defendants, (b) Mrs. Pasquin had served discovery requests and notices of deposition upon the defendants months before, but (c) the defendants had failed to provide the requested discovery or submit themselves to deposition due to an assertion that John Pasquin had been injured and could not participate in discovery?

Preserved for appeal in Plaintiff's Memorandum in Opposition to The Estate of Kory Pasquin's Motion for Summary Judgment, **R. 87-112**, Mrs. Pasquin's other memoranda opposing the defendants' motions for summary judgment, **R. 143-148, 155-162**, Mrs. Pasquin's Objection to Proposed Summary Judgment of the Duffin Defendants, **R. 179-180**, Mrs.

Pasquin's Objection to Proposed Summary Judgment of the Pasquin Defendants (John Pasquin, Jimmie Pasquin, Quality Parts and Quality Transport Refrigeration Parts, Inc.), **R. 189-191**, and Mrs. Pasquin's Motion for Reconsideration Re Minute Entry Dated November 18, 1997 and to Vacate Execution of the Pasquin Defendants' Proposed Summary Judgment, **R. 208-211**.

6. Did Judge Fredericks incorrectly construe and apply the rules for computation of time with respect to the filing of Mrs. Pasquin's objection to the language of the Pasquin Defendants' summary judgment?

Preserved for appeal in Mrs. Pasquin's Motion for Reconsideration Re Minute Entry Dated November 18, 1997 and to Vacate Execution of the Pasquin Defendants' Proposed Summary Judgment, **R. 208-211**

7. Was it error for Judge Fredericks to deny Mrs. Pasquin's Motion to Reconsider and Vacate the order granting the Pasquin Defendants summary judgment?

Preserved for appeal in Mrs. Pasquin's Motion for Reconsideration Re Minute Entry Dated November 18, 1997 and to Vacate Execution of the Pasquin Defendants' Proposed Summary Judgment, **R. 208-211**

8. Was it error for Judge Fredericks to grant orders dismissing all of Mrs. Pasquin's claims against the defendants even though the defendants' Statute of Frauds and other challenges were dispositive as to certain of Mrs. Pasquin's claims?

Preserved for appeal in Plaintiff's Memorandum in Opposition to The Estate of Kory Pasquin's Motion for Summary Judgment, **R. 87-112**, Mrs. Pasquin's other memoranda opposing the defendants' motions for summary judgment, **R. 143-148, 155-162**, Mrs. Pasquin's Objection to Proposed Summary Judgment of the Duffin Defendants, **R. 179-180**, Mrs.

Pasquin's Objection to Proposed Summary Judgment of the Pasquin Defendants (John Pasquin, Jimmie Pasquin, Quality Parts and Quality Transport Refrigeration Parts, Inc.), **R. 189-191**, and Mrs. Pasquin's Motion for Reconsideration Re Minute Entry Dated November 18, 1997 and to Vacate Execution of the Pasquin Defendants' Proposed Summary Judgment, **R. 208-211**.

Standard of Review: The granting of the motions for summary judgment was based upon issues of law, and the Supreme Court accords no deference to the trial court's resolution of the legal issues presented. Higgins v. Salt Lake County, 855 P. 2d 231, 235 (Utah 1993). This Court determines "whether the trial court erred in applying the governing law and whether the trial court correctly held that there were no disputed issues of fact." State v. Ferre, 784 P. 2d 149, 151 (Utah 1989). The denial of Mrs. Pasquin's Rule 56(f) motions should be reviewed to determine if the trial court abused its discretion, with deference given to the trial court's determinations unless they were clearly erroneous.

RELEVANT STATUTES, RULES AND REGULATIONS

Mrs. Pasquin believes that the proper interpretation and application of the following Constitutional provisions, statutes, ordinances, rules and/or regulations to this appeal may well be determinative:

Constitutional provisions: None.

Statutes:

U.C.A. 25-5-4 "Certain agreements void unless in written and signed.

The following agreements are void unless the agreement, or some note or memorandum of the agreement is in writing, signed by the party to be charged with the agreement:

(1) every agreement which by its terms is not to be performed within one year from the making of the agreement.

U.C.A. 48-1-15 “Rules determining rights and duties of partners.

The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between, by the following rules:

(7) No person can become a member of the partnership without the consent of all the partners.

Rules of Civil Procedure:

Rule 5. Service and filing of pleadings and other papers.

(a) Service: When required. Except as otherwise provided in these rules, every order ... and similar paper shall be served upon each of the parties. ...

(b) Service: How made. (1) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his known address

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter

Rule 6. Time.

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(e) Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

Rule 12(c) Motion for judgment on the pleadings.

After the pleadings are closed but within such time as not to delay the trial,

any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56 Summary Judgment

(c) Motion and proceedings thereon. ... The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. ...

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Code of Judicial Administration

Rule 4-501 (2) Motions for summary judgment.

(a) Memorandum in support of a motion. The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant

relies.

(b) Memorandum in opposition to a motion. The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portion of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

Rule 4-504. Written orders, judgments and decrees.

(2) Copies of the proposed ... orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

STATEMENT OF THE CASE

NATURE OF THE CASE AND COURSE OF PROCEEDINGS

This case involves allegations by Mrs. Pasquin that she was asked by her son Kory Pasquin, with the knowledge and consent of her ex-husband and Kory's father, John Pasquin, to join them as a partner in Quality Parts and to come to work for the business. After she became a partner, she began working for Quality Parts for minimum wage only and worked diligently to build the business. Mrs. Pasquin was promised by her partners, Kory and John, that she would be employed for life, and receive salary and benefits commensurate with that received by the other partners. The business conducted by the partnership was later incorporated, and Mrs. Pasquin was assured by Kory and John that her partnership interest would carry over into the corporation. Shortly thereafter, Kory Pasquin was killed in a boating accident. After Kory's death, John Pasquin asked Mrs. Pasquin to attend a meeting at the offices of Quality Parts'

attorneys, the defendants' Duffin. In this meeting, John asserted for the first time that Mrs. Pasquin can ever remember that she was not an owner in the business. The business' accountant, Boyd Simper, who was present in the meeting, objected that "Geri is a part of the company." John acknowledged that Mrs. Pasquin had been promised lifetime employment, and stated that he, Quality Parts and Quality Transport would honor that commitment and agreement.

When Mrs. Pasquin refused to agree that she was not an owner in the business, the defendants took various actions which Mrs. Pasquin believes were wrongful. She filed the instant suit seeking a determination of her rights in the partnership, the new successor corporation, and the assets of both of them, and to her promised lifetime employment; seeking damages for breach of fiduciary duty by her partners, John and Kory (via Kory's Estate); seeking damages for breach of fiduciary duty by what she believed were her attorneys, the Duffins; seeking damages for breach of her employment agreement arising from the partnership's and/or new corporation's failure to pay her promised wages, failure to give her promised perquisites, and failure to withhold and/or pay her taxes, among other things; seeking damages against certain individuals for intentional interference with her contract with the partnership and/or the new corporation; and seeking damages for intentional and/or negligent infliction of emotional distress.

Mrs. Pasquin served sets of discovery requests upon the defendants in the Spring of 1997, and then notices of the defendants' depositions. The Pasquin Defendants answered Mrs. Pasquin's interrogatories admitting that Kory Pasquin had asked Mrs. Pasquin to come to work for the business and had promised her employment-for-life, and that John Pasquin, in the meeting at the Duffins' offices referred to above, had admitted the existence of this agreement

and reaffirmed it. The Duffin Defendants tendered the production of what limited documents that they had, but before any documents were produced by the partnership and new corporation, and before depositions could be taken, defendant John Pasquin suffered serious head injuries in a fall from the roof of the businesses' building. The Pasquin Defendants requested several open-ended extensions of time to produce documents and to appear at depositions until John Pasquin recovered enough to assist in that discovery.

Before Mrs. Pasquin could obtain access to these potentially critical business documents, or take essential depositions, the Pasquin Estate filed a motion for summary judgment. The motion was not supported by any affidavits. It cited only to portions of Mrs. Pasquin's complaint, and then claimed that Mrs. Pasquin could not prevail on any of her claims because the Statute of Frauds barred the enforcement of oral agreements which take more than one year to perform. Specifically, the Pasquin Estate claimed that the oral partnership and employment-for-life agreement alleged by Mrs. Pasquin in her complaint both required more than one year to perform, such that claims related thereto were barred by the Statute of Frauds.

The Duffin Defendants (the attorneys), joined in the Pasquin Estate's motion, with no separate memorandum or statement of undisputed fact. The Duffin Defendants did, however, submit affidavits from Thomas and Daniel Duffin. These affidavits stated that these attorneys had never performed services directly for Mrs. Pasquin, that when they performed services for the partnership and new corporation they did not know or believe that they were providing services to Mrs. Pasquin, that there were no writings memorializing or documenting Mrs. Pasquin's claims that she was a partner in Quality Parts or that she had an employment-for-life agreement with the partnership and/or new corporation.

Mrs. Pasquin filed a Memorandum in Opposition to The Estate of Kory Pasquin's Motion for Summary Judgment which contained a "Statement of Disputed Facts." Rather than submit a separate affidavit restating the same facts, Mrs. Pasquin signed a sworn statement verifying under the penalty of perjury the truthfulness and accuracy of the statements made in her Statement of Disputed Facts. This verified memorandum in opposition disputed the Pasquin Estate's brief statements of fact and asserted that the partnership interest had been granted to Mrs. Pasquin immediately, and with the knowledge and consent of John Pasquin, such that the Statute of Frauds was not even applicable. Further, Mrs. Pasquin argued that the Pasquin Defendants' answers to interrogatories constituted a writing which sufficiently acknowledged and memorialized the employment-for-life agreement to satisfy the requirements of the Statute of Frauds. Mrs. Pasquin finally pointed out that there were claims for relief against the Pasquin Estate and other defendants with respect to which the Statute of Frauds defense asserted by the Pasquin Estate did not even apply. Mrs. Pasquin attached copies of documents and the interrogatory answers which she asserted supported her averments of fact and arguments of law.

Mrs. Pasquin filed a Memorandum in Opposition to Defendants' Duffin's Joinder To The Estate of Kory Pasquin's Motion for Summary Judgment and Rule 56(f) Motion. This memorandum incorporated by reference Her memorandum in opposition to the Pasquin Estate's motion, and made the additional arguments (1) that the agreement by the partners, Kory and John, to make Mrs. Pasquin a partner could be and was oral, (2) that for the purposes of the motions for summary judgment, Mrs. Pasquin's sworn testimony that she was in fact so made a partner with the knowledge and consent of John Pasquin had to be assumed to be true for the purposes of the motions; (3) that the factually intensive doctrines of "partial performance" and

“equitable estoppel,” as supported by Mrs. Pasquin’s sworn factual averments (which were also required to be assumed to be true for the purposes of the motions), precluded the granting of summary judgment on the defendants’ Statute of Frauds defense; (4) that the Statute of Frauds requires only that there be some writing which clearly references the claimed agreement which is by the party to be charged; and (5) that the partnership’s and new corporation’s signed interrogatory answers which acknowledged an employment-for-life agreement and that these entities had reaffirmed that agreement in a meeting at the attorneys’ offices satisfied the Statute of Frauds.

The Pasquin Defendants then filed a motion for summary judgment, submitted a memorandum of points and authorities which incorporated therein the arguments of the Pasquin Estate. The Pasquin Defendants’ memorandum contained no statement of undisputed facts. However, the Pasquin Defendants submitted an affidavit from John Pasquin in which he disputed Mrs. Pasquin’s version of the facts. The Pasquin Defendants’ memorandum incredibly argued that part of Mrs. Pasquin’s sworn testimony related to statements and promises made primarily by Kory Pasquin, and that since Kory is now deceased, Mrs. Pasquin’s sworn testimony in these regards should not be believed. (Attached hereto as Exhibit A are copies of affidavits of third-parties with respect to what these individuals heard Kory Pasquin promise Mrs. Pasquin) The Pasquin Defendants also asserted that since John Pasquin’s affidavit disputed Mrs. Pasquin’s sworn statements of disputed fact, the Pasquin Defendants’ motion for summary judgment should be granted. These two arguments are totally inconsistent with the legal requirement that the facts have to be construed in the light most favorable to the party opposing the motions for summary judgment, and that if the moving parties’ material facts are

disputed, the motions must be denied.

The Pasquin Defendants' memorandum also argued that an employment-for-life agreement is very unusual and can only be established under unusual circumstances. Mrs. Pasquin appreciated the fact that these defendants' memorandum acknowledged that employment-for-life agreements have been found enforceable. Mrs. Pasquin's memorandum in opposition to this motion incorporated her prior memoranda in opposition to the other defendants' joined motion for summary judgment, and argued that the facts that she verified under oath satisfied the requirements for finding an employment-for-life agreement as set forth in the cases cited by the Pasquin Defendants.

The reply memoranda of the Duffin Defendants and the Pasquin Defendants claimed incorrectly, among other things, that Mrs. Pasquin had not submitted "affidavits" opposing the defendants' statement of undisputed fact. This was an interesting argument given that (1) only the Pasquin Estate's initial memorandum had a "statement of undisputed fact," (2) the Pasquin Estate's statement referred only to paragraphs in Mrs. Pasquin's own complaint and was not accompanied by any affidavits whatsoever, and (3) Mrs. Pasquin's various memoranda either set forth separately and/or through incorporation by reference detailed "statements of disputed facts," verified under oath and penalty of perjury by Mrs. Pasquin, which were the functional equivalent of "opposing affidavits."

Rather than deal with the defendants' joined motions at the same time, and even while Mrs. Pasquin was still briefing the later-filed motions, Judge Frederick began ruling on the motions separately -- initially issuing a minute order granting the Pasquin Estate's motion "for the reasons set forth in the memoranda," and ultimately granting all the other defendants'

motions. Mrs. Pasquin objected to the language of the proposed orders granting summary judgment to the Duffin Defendants and the Pasquin Defendants. Judge Frederick never ruled on her objection to the Duffin Defendants' summary judgment. Judge Frederick signed the Pasquin Defendants' proposed order before the time had even run for Mrs. Pasquin to submit her objections thereto, and then ruled that Mrs. Pasquin's objection had been filed too late. Mrs. Pasquin disagreed with Judge Frederick's application of the Rules relating to the computation of the time for filing objections, and therefore filed a Motion for Reconsideration and to Vacate with respect to the Pasquin Defendants' summary judgment. Judge Fredericks denied this motion. Mrs. Pasquin filed this appeal seeking to reverse the granting of all of the defendants' motions for summary judgment.

STATEMENT OF FACTS

1. Mrs. Pasquin was approached by her son, Kory Pasquin, and asked to come to work for and be a partner in Quality Parts with him and his father, Mrs. Pasquin's ex-husband, John Pasquin. Kory told her that he, Kory, was handling sales, that John was handling the service/repair part of the business, and that Geri would handle the office. John Pasquin was aware of and consented to Mrs. Pasquin becoming a partner in Quality Parts (Plaintiff's Memorandum in Opposition to The Estate of Kory Pasquin's Motion for Summary Judgment ("Plaintiff's Pasquin Estate Opposition Mem."), Statement of Disputed Facts, and Exhibit A, **R. 87, 94-95**; Plaintiff's Memorandum in Opposition to Defendants' Duffins' Joinder To The Estate of Kory Pasquin's Motion for Summary Judgment and Rule 56(f) Motion ("Plaintiff's Duffin Opposition Mem."), p. 2, **R. 144**; Plaintiff's Memorandum in Opposition to Defendants' John Pasquin, Jimmie Pasquin, Quality Parts and Quality Transport Refrigeration Parts, Inc. Motion

for Summary Judgment and Rule 56(f) Motion (“Plaintiff’s Pasquin Defendants Opposition Mem.”), p. 2, **R. 156**)

2. Mrs. Pasquin agreed to become a partner and came to work for Quality Parts at only minimum wage because she was told that she was a “partner” and that the partnership needed to conserve money. Mrs. Pasquin’s wages were not raised for three years. The partnership paid for her health insurance, her car insurance and gas for her car. The partnership did not withhold any taxes from her wages, but at the end of each year prepared her tax returns and paid all of her accrued taxes. (Plaintiff’s Pasquin Estate Opposition Mem., Statement of Disputed Facts, and Exhibit A, **R. 87, 94-95**; Plaintiff’s Duffin Opposition Mem., pp. 2-3, **R. 144-45**; Plaintiff’s Pasquin Defendants Opposition Mem., pp. 2-5, **R. 156-59**)

3. Mrs. Pasquin’s services as manager of the office substantially contributed to the success of Quality Parts. Her fiscal conservativeness enabled the partnership to save enough money to purchase the land and building where the business is currently being operated. Although Mrs. Pasquin had frequent run ins with John Pasquin, Kory constantly reassured her that her contributions were essential to the success of the partnership’s business and that she was an important and valued partner; and, that when the business was sold, she would be able to retire on her share of the proceeds. Kory also told Mrs. Pasquin that she, like John and himself, were “employees for life” -- that she would have a job at a commensurate salary and equivalent benefits as himself and John for as long as she wanted. This induced Mrs. Pasquin to take the job, become a partner, and work for low wages for years to build the business and make it successful. Kory confirmed these promises and representations that he had made to Mrs. Pasquin to several other people as well (Exhibit A attached hereto). (Plaintiff’s Pasquin Estate Opposition

Mem., Statement of Disputed Facts, and Exhibit A, **R. 87, 94-95**; Plaintiff's Duffin Opposition Mem., pp. 2-3, **R. 144-45**; Plaintiff's Pasquin Defendants Opposition Mem., pp. 2-5, **R. 156-59**)

4. In early 1996, Kory and John incorporated the business, forming Quality Transport Refrigeration Parts, Inc. Mrs. Pasquin was led to believe by John and Kory that this was something that the lawyers recommended and that her interest would be taken care of therein. She trusted Kory and his promises. (Plaintiff's Pasquin Estate Opposition Mem., Statement of Disputed Facts, and Exhibit A, **R. 87, 95-6**)

5. In the Fall of 1996, Kory Pasquin was killed in a boating accident, without any will and with two illegitimate minor children, by different mothers, as his direct heirs. (Plaintiff's Pasquin Estate Opposition Mem., Statement of Disputed Facts, and Exhibit A, **R. 87, 96**)

6. Shortly thereafter, Mrs. Pasquin was called to attend a meeting at the offices of the Duffin Defendants (who had been the partnership's attorneys, and had organized the corporation). In this meeting, the attorneys said that John and Kory had been the only shareholders of the corporation. The partnership and corporation's accountant protested, stating that Mrs. Pasquin was a part of "the company." Mrs. Pasquin's daughter, Julie Flarrity, was in attendance at the meeting and objected and stated that Kory had told her many times that Mrs. Pasquin was an "equal partner" in the business and would be able to "retire when the business is sold." John Pasquin acknowledged in front of all present that Kory had promised Mrs. Pasquin continuous employment, and that this promise would be honored. (Plaintiff's Pasquin Estate Opposition Mem., Statement of Disputed Facts, and Exhibit A, **R. 87, 97**)

7. However, John Pasquin refused to acknowledge that Mrs. Pasquin should have a

one-third interest in Quality Parts and Quality Transport. Further, John Pasquin caused Quality Parts and/or Quality Transport to thereafter reduce Mrs. Pasquin's wages, refuse to pay her insurance any more, and refuse to prepare her tax returns and pay her taxes when they came due - all in violation of prior practice and agreements. John Pasquin told Mrs. Pasquin that he had done all of the foregoing at the direction and insistence of his attorneys, the Duffin Defendants. (Plaintiff's Pasquin Estate Opposition Mem., Statement of Disputed Facts, and Exhibit A, **R. 87, 97-98**)

8. As a result, Mrs. Pasquin was forced to file suit seeking a determination of her interest in the partnership and successor corporation and their assets; seeking an accounting; seeking a declaration that she is entitled to employment-for-life as promised and agreed; seeking damages for breach of her employment agreement (due to the reduction in her wages, to the failure to pay her insurance, and failure to accrue, account for and pay her taxes); seeking damages for intentional infliction of emotional distress; seeking damages against the attorney's for malpractice (if she is a partner, they were her attorneys and their actions were antagonistic to her interests); seeking damages against the attorneys and John Pasquin for inducing the business to breach their employment agreements with her; among other things. (Complaint, **R. 1-15**)

9. Mrs. Pasquin served discovery requests upon all the defendants. **R. 42, 44, 58, 59, 67** The Pasquin Defendants answered the interrogatories and admitted that Mrs. Pasquin had been promised lifetime employment and that John Pasquin on behalf of the partnership and new corporation had reaffirmed that agreement in the meeting at the Duffins' office referred to in paragraph 6 above. **R. 66, 108-112** The Duffin Defendants tendered what little documents they possessed to Mrs. Pasquin, but the remaining defendants, despite repeated demands, did not

tender or produce any documents to Mrs. Pasquin. Further, John Pasquin did not appear at his deposition because he had an accident, suffered head injuries and claimed that he was not well-enough to appear and/or participate in discovery. **R. 137, 141, 146-7, 159.**

10. The Pasquin Estate filed a motion for summary judgment asserting that since the agreement by which Mrs. Pasquin became a partner in Quality Parts was oral, and since the employment-for-life agreement was also oral, the Statute of Frauds barred Mrs. Pasquin's suit. This motion was not supported by any affidavits in support, but was instead based solely upon references to the factual averments in Mrs. Pasquin's own complaint (Pasquin Estate Motion and Memorandum, **R. 74-79**)

11. Mrs. Pasquin opposed the motion by (i) incorporating by reference in her statement of disputed facts all of the detailed allegations in her complaint, and by setting forth certain other material disputed facts, (ii) by verifying under oath and penalty of perjury the truthfulness of the incorporated allegations from her complaint as well as the additional factual averments in her memorandum in opposition. Based upon those detailed and sworn/verified "disputed facts," Mrs. Pasquin argued that the motion for summary judgment should be denied because (iii) the partnership was formed instantly (and therefore did not fall under the statute of frauds, (iv) there was a writing confirming that the employment-for-life agreement had been made (the Pasquin Defendants' answers to interrogatories in which John Pasquin admitted that Kory Pasquin had promised Mrs. Pasquin employment for life and that this promise/agreement would be honored), and (v) that even if the agreements were somehow subject to the Statutes of Frauds, there were various factually intensive exceptions to the Statute applicable to the instant case which precluded the granting of summary judgment. (Plaintiff's Pasquin Estate Opposition

Mem., **R. 87-112**)

12. The Duffin Defendants, attorneys Thomas and Daniel Duffin, joined in the Pasquin Estate's Motion for Summary Judgment. **R. 80-86** Mrs. Pasquin opposed the Duffin Defendants' joinder on the same basis as previously argued, plus by emphasizing that Mrs. Pasquin's sworn statement of disputed facts supported the "partial performance" and "estoppel" exceptions or defenses to the Statute of Frauds. Mrs. Pasquin also argued that there were causes of action (such as for breach of employment agreement with respect to wages, benefits and taxes; intentional infliction of emotional distress; and interference with contract, etc.) which were did not rely on finding of an oral partnership and of the oral employment-for-life agreement for their validity, and therefore could not be dismissed solely on the "statute of frauds" argument. **R. 143-148**

13. The Pasquin Defendants (the two Pasquins, the partnership and the corporation) joined in the Pasquin Estate's Motion for Summary Judgment. The Pasquin Defendants' memorandum incredibly argued that part of Mrs. Pasquin's testimony related to statements and promises made primarily by Kory Pasquin, and that since Kory is now deceased, Mrs. Pasquin's sworn testimony somehow should not be believed. These defendants also asserted that since John Pasquin's affidavit disputed Mrs. Pasquin's sworn statements of fact, the Pasquin Defendants' motion for summary judgment should be granted. **R. 121-130** Mrs. Pasquin opposed it on the same bases as against both of the other motions for summary judgment, and with her detailed sworn statements of disputed facts. **R. 155-162**

14. The Duffin and Pasquin Defendants filed reply briefs in which they asserted that Mrs. Pasquin had not filed an "opposing affidavit" -- ignoring the fact that a verified factual

statement disputed is the same as an affidavit -- and claiming in part that summary judgment should be granted as a result thereof. **R. 135-142, 165-169**

15. Judge Fredericks granted each of the motions for summary judgment “for the reasons set forth” in the moving parties’ memoranda. **R. 153, 172**

16. Mrs. Pasquin filed an objection to the proposed order granting summary judgment to the Duffin Defendants, **R. 179-180** which was never ruled on.

17. On Thursday, October 23, 1997, the Pasquin Defendants mailed their proposed order granting summary judgment to Mrs. Pasquin. **R. 187-88**. Under CJA, 4-504, objections are to be submitted within five days. Under URCP 6, if the time period is less than seven days, intervening weekends and holidays are not counted. Also under URCP 6, since the proposed order was mailed, three days are added to the time period -- essentially the proposed order is not considered served for the first three business days. Given these rules, Mrs. Pasquin had until on or before Tuesday, November 4, 1997, to submit her objection. On Monday, November 3, 1997, Mrs. Pasquin mailed and faxed her Objection to this proposed order to the defendants, and mailed it to the Court for filing. **R. 189-191**, and **Exhibit B** attached hereto (which contains copies of the FAX confirmation sheets showing that the objection was faxed to the defendants on November 3, 1997). Judge Fredericks executed the Pasquin Defendants’ proposed order granting summary judgment on November 3, 1997, before the time for objecting had even run. **R. 186**

Judge Fredericks issued a Minute Entry on November 18, 1997 in which he ruled that Mrs. Pasquin’s Objection to the Pasquin Defendants’ proposed order was “untimely.” **R. 206**

18. Mrs. Pasquin filed a motion to reconsider and vacate the summary judgment granted to the Duffin Defendants on the grounds that the objection had in fact been timely filed.

R. 208-209

19. Judge Fredericks denied the motion for reconsideration. **R. 240** Mrs. Pasquin filed her notice of appeal. **R. 221-222.**

SUMMARY OF ARGUMENT

The motions for summary judgment should never have been granted. The Duffin Defendants were simply wrong when they asserted in their Reply brief that Mrs. Pasquin cannot incorporate the allegations of her complaint and then verify them under oath as part of her statements of disputed fact. A verified statement of disputed fact, for the purposes of a motion for summary judgment, is the functional equivalent of an affidavit. Mrs. Pasquin's verified statements of disputed fact were detailed and not only supported her claims for relief, but also disputed the defendants' assertions of material fact. With the material facts in dispute, it was clearly inappropriate for Judge Frederick to have granted the motions for summary judgment.

The Pasquin Estate's original motion for summary judgment (which was joined in by all the other defendants) was based solely on the allegations in Mrs. Pasquin's complaint, and claimed that even if those allegations were true Mrs. Pasquin's claims for relief were barred by the Statute of Frauds (essentially a motion for judgment on the pleadings). That aspect of the defendants' motions for summary judgment relating to a purely legal Statute of Frauds challenge to Mrs. Pasquin's partnership claims should have been summarily denied because oral partnerships are not rendered unenforceable simply because the partnerships contemplate being in existence longer than one year. In the face of Mrs. Pasquin's sworn testimony that she had been admitted as a partner "immediately," the Pasquin Estate attempted to argue in its Reply that Mrs. Pasquin's partnership claims should still be dismissed because John Pasquin did not consent

to the admission of Mrs. Pasquin as a partner. However, this assertion of fact was not supported by any affidavit submitted by the Pasquin Estate -- which should have barred the Estate from even making this argument. But, more importantly, Mrs. Pasquin's sworn testimony that John Pasquin had in fact consented to her admission as a partner completely disputed this factual assertion. Mrs. Pasquin's version of the facts in this regard must be assumed to be true for the purposes of the motions. Consequently, the defendants' motions for summary judgment relating to Mrs. Pasquin's partnership claims should have been denied.

With respect to Mrs. Pasquin's oral employment-for-life claim, the defendants argued that this claim is clearly unenforceable without a writing under the Statute of Frauds because any such agreement would clearly involve performance over a period of more than one year. However, Mrs. Pasquin pointed out in her very first opposing memorandum that there was in fact a writing signed by the partnership and corporation -- their answers to interrogatories -- which admitted that Mrs. Pasquin had been promised lifetime employment and that John Pasquin had reaffirmed that agreement in the meeting at the Duffin attorneys' office. Those answers to interrogatories, as a matter of law, satisfied the requirements of the Statute of Frauds. The defendants' motions for summary judgment with respect to the employment-for-life agreement should have been denied for this reason alone.

Even if the Statute of Frauds otherwise somehow appeared to be applicable and a bar to Mrs. Pasquin's claims in these two claimed regards, there are at least two recognized exceptions to the Statute of Frauds: "partial performance" and "estoppel." If Mrs. Pasquin's opposing verified statements of disputed fact would support a finding by a jury that either of these exceptions applied in this case, the motions for summary judgment should have been denied.

Mrs. Pasquin's sworn statements of disputed fact clearly supported these exceptions as argued by Mrs. Pasquin in her opposing memoranda. It was reversible error therefore to grant the defendants' motions for summary judgment.

Even if Mrs. Pasquin's partnership claims and employment-for-life claims had been barred by the Statute of Frauds, her other claims should not have been dismissed. If Mrs. Pasquin was not entitled to be an employee for life, she still was an employee at will who was entitled to be paid currently and prior to termination pursuant to the parties' agreement as to remuneration and perquisites due her. She certainly should have been allowed to sue for breach of her employment agreement as to these issues. She is also entitled to seek damages for her claims that the partnership and/or new corporation were improperly induced to breach their agreements with her with respect to the payment of her salary and taxes. She is also entitled to pursue her claims for damages arising from the alleged intentional and/or negligent infliction of emotional distress. All of these claims were improperly dismissed regardless of the outcome of the Statute of Frauds defense and whether or not there was an enforceable oral partnership interest or employment-for-life agreement..

Judge Fredericks prematurely executed the Pasquin Defendants' summary judgment (because he did not wait for the time to run for Mrs. Pasquin to submit her objections thereto), and then incorrectly ruled that Mrs. Pasquin's objection thereto was untimely. This ruling and Judge Fredericks' ruling denying Mrs. Pasquin's Motion for Reconsideration and to Vacate incorrectly applied the rules to the facts and should be reversed.

At the very least, Mrs. Pasquin's Rule 56(f) motions should have been granted and a ruling on the defendants' motions delayed until after the Pasquin Defendants had produced the

requested documents to the plaintiff and submitted themselves for their previously noticed depositions. It was an abuse of discretion and clear error for Judge Fredericks to have denied plaintiff's Rule 56(f) motions.

ARGUMENT

I. STANDARD OF REVIEW

This appeal seeks reversal of Judge Frederick's orders granting summary judgment in favor of the defendants. Summary judgment is only appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Rule 56 (c) of the Utah Rules of Civil Procedure. Because entitlement to summary judgment is a matter of law, this Court accords no deference to the trial court's resolution of the legal issues presented.

Higgins v. Salt Lake County, 855 P. 2d 231, 235 (Utah 1993). This Court determines "whether the trial court erred in applying the governing law and whether the trial court correctly held that there were no disputed issues of material fact." State v. Ferre, 784 P. 2d 149, 151 (Utah 1989)

The trial court's determination as to whether an objection was timely or not involves the application of law. Similarly, whether a verified statement of disputed facts is the functional equivalent of an affidavit is a question of law. Such legal determinations are given no deference but are reviewed for correctness.

Because a motion for summary judgment denies a litigant its day in court, the trial court must carefully scrutinize the documents submitted. Rich v. McGovern, 551 P. 2d 1266 (Utah 1976) If, after such scrutiny, the "evidence presents a genuine issue of material fact which, if resolved in favor of the non-moving party, would entitle him to judgment as a matter of law, " the motion must be denied. Jackson v. Dabney, 645 P. 2d 613, 615 (Utah 1982). Where

reasonable minds could differ, a genuine issue of fact exists. Id. In addition, all reasonable inferences must be drawn in favor of the non-moving party -- Mrs. Pasquin. Beehive Brick Co. v. Robinson Brick Co., 780 P. 2d 827 (Utah App. 1989).

A proper application of these rules and cases to the facts herein requires the reversal of Judge Fredericks' orders as requested by Mrs. Pasquin herein.

II. MRS. PASQUIN'S VERIFIED STATEMENT OF DISPUTED FACTS WAS PROPER AND CLEARLY SUPPORTED HER CLAIMS AND OPERATED TO EFFECTIVELY DISPUTE THE DEFENDANTS' MATERIAL FACTS

A. It Was Procedurally and Substantively Impermissible for the Defendants to Attempt to Contradict, and for Judge Frederick to Ignore, the Allegations of Mrs. Pasquin's Complaint

The Pasquin Estate's first motion for summary judgment, joined in by all the other defendants, began as essentially a motion for judgment on the pleadings. The Pasquin Estate did not submit any affidavits. It merely referenced the allegations of Mrs. Pasquin's complaint, and argued that even assuming that those allegations were true, Mrs. Pasquin's claims were barred by the Statute of Frauds. As such, the trial court and the parties were required to assume to be true all of the allegations of Mrs. Pasquin's complaint. URCP, Rule 12(c)

Each of the other defendants joined in this original motion for summary judgment. None of their memoranda contained any new or additional "statement of undisputed facts" sections in the form required by CJA, 4-501(2)(a). All of the motions for summary judgment were bound, therefore, by the Pasquin Estate's "Statement of Undisputed Facts" -- which as indicated above referred only to the allegations of Mrs. Pasquin's complaint. Consequently, procedurally and substantively, none of the defendants should have been allowed to submit any affidavits

attempting to contradict the factual allegations in Mrs. Pasquin's complaint -- if one is required to assume the allegations to be true, it is not logically possible nor substantively permissible to attempt to dispute them.

CJA 4-501(2)(a) and (b) are instructive in this regard and state in part:

(a) The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. ...

(b) ... All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

Furthermore, URCP 56(e) states in part that:

... When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading”

A party moving for summary judgment must set forth all material facts upon which the motion depends in his or her statement of undisputed facts. Otherwise, the opposing party is under no obligation to dispute the same. It is procedurally improper to submit facts only in affidavits purporting to support a motion for summary judgment without having first set them forth in the movants' statement of undisputed facts.

This means that none of the motions should have gone beyond a determination of the purely legal issue of whether, assuming Mrs. Pasquin's factual allegations to be true, her claims were barred by the application of the Statute of Frauds. Mrs. Pasquin was entitled to rely upon the allegations of her complaint, whether verified or not, in opposing the motions. Judge Frederick's orders granting summary judgment must all be reversed because he did not clearly

and unequivocally keep the consideration of affidavit testimony which purported to contradict Mrs. Pasquin's version of the facts from affecting his decision making process. This is particularly demonstrated by the fact that if he had assumed Mrs. Pasquin's "Statement of Disputed Facts" to be true as required, he would have been required to deny the motions for summary judgment.

B. It Was Not Improper For Mrs. Pasquin To Incorporate by Reference In Her Statement of Disputed Facts the Factual Averments of Her Complaint

As argued in the previous section, it may well be that Mrs. Pasquin was procedurally not required to submit a true CJA 4-501(2)(b) "statement of disputed facts," since the original and subsequent motions for summary judgment on the face of their memoranda were in actuality motions for judgment on the pleadings. However, when the process became somewhat "polluted" by the defendants' submittal of affidavits purporting to contradict the factual allegations in Mrs. Pasquin's complaint, it was logical and certainly not improper for Mrs. Pasquin to specifically incorporate the allegations of her complaint by reference in the "Statement of Disputed Facts" section of her opposing memorandum. The defendants have not, nor can they, cite any rule or case holding which prohibits such an incorporation by reference. The defendants could have argued (but did not) the evidentiary sufficiency of the specific language incorporated by reference into the statement of disputed facts, but they cannot claim that one cannot incorporate matters by reference into such a statement. Incorporation by reference is a well-recognized and understood process in legal drafting.

C. A Sworn Verification of a Statement of Disputed Facts is the Functional Equivalent of Submitting An Affidavit Opposing Summary Judgment

When Mrs. Pasquin formally verified the truthfulness of the allegations of her complaint under oath as a part of her verification of the “Statement of Disputed Facts,” those allegations ceased to be “mere allegations ... of [her] pleadings.” URCP 56(e) Rather, they became part of a sworn submittal of factual information in opposition to the motions for summary judgment -- which is the functional equivalent of an opposing affidavit. It is well established that a verified statement of fact is the equivalent of an affidavit. It was reversible error for Judge Frederick to have entered orders granting the motions for summary judgment of the Duffin and Pasquin Defendants based in part upon the finding that Mrs. Pasquin had not properly opposed the factual bases of those motions.

D. Mrs. Pasquin’s Statements of Disputed Facts Sufficiently Supported Her Claims

None of the motions for summary judgment challenged Mrs. Pasquin’s claims for relief on any legal basis other than the application of the Statute of Frauds. Furthermore, the factual allegations of Mrs. Pasquin’s complaint were and are on their face sufficient to support Mrs. Pasquin’s legal theories for relief. Consequently, absent a finding that the Statute of Frauds bars her claims, it would have been, and Mrs. Pasquin believes it was, reversible error to grant summary judgment dismissing her claims.

E. Mrs. Pasquin’s Statements of Disputed Facts Disputed all of the Defendants’ Improper Affidavit Testimony

Even though it should not have been allowed, the defendants attempted to assert facts via their various affidavits or otherwise upon which they argued that Judge Frederick could grant

their motions for summary judgment. However, Mrs. Pasquin's verified Statements of Disputed Facts clearly placed all of these factual matters in dispute such that the motions for summary judgment should have been denied.

For example, the Pasquin Estate first attempted to argue that Mrs. Pasquin became a partner over time such that the Statute of Frauds should bar her suit. But, Mrs. Pasquin's sworn testimony contradicted this by stating that she was made a partner immediately. The Pasquin Estate then argued that even if Kory Pasquin had promised and/or attempted to make Mrs. Pasquin a partner in Quality Parts, Utah law requires that all partners consent to the admission of a new partner, and that John Pasquin (without any supporting affidavit) had not consented to Mrs. Pasquin becoming a partner. This statement of fact was disputed by Mrs. Pasquin's sworn testimony that John Pasquin was aware of and consented to her being admitted as a partner in Quality Parts. None of the motions for summary judgment could have been granted on the "lack of consent" grounds.

The Duffin Defendants similarly submitted their affidavits purporting to establish that Mrs. Pasquin was never a partner in Quality Parts, that they never considered her a client, and that they were not aware of any document which purported to grant Mrs. Pasquin lifetime employment, among other things. Based thereon, they argued that Mrs. Pasquin could not prevail on her claims, including her claims against them for breach of fiduciary duty, interference with contract and intentional infliction of emotional distress. However, Mrs. Pasquin's sworn testimony states that she was made a partner, that she did consider them to be her attorneys, that she was promised lifetime employment, and such. Mrs. Pasquin's sworn testimony disputed all material facts argued by the Duffin Defendants in their motion.

The Pasquin Defendants similarly submitted an affidavit of John Pasquin in which he stated that he had never agreed to Mrs. Pasquin being a partner or shareholder in the new corporation, that she had always been nothing more than a mere employee of the partnership and new corporation, and that Mrs. Pasquin had in actuality been more of a “charity case” than a significant contributor to the business, and the like. Again, Mrs. Pasquin’s sworn testimony disputed all of these factual assertions.

With all of these factual matters squarely placed in dispute, the motions for summary judgment could not and should not have been granted. Judge Frederick’s orders granting summary judgment should be reversed.

III. IT WAS REVERSIBLE ERROR TO RULE ON SUMMARY JUDGMENT THAT MRS. PASQUIN’S ORAL PARTNERSHIP CLAIMS WERE BARRED BY THE STATUTE OF FRAUDS

The Utah Statute of Frauds states in part as follows:

U.C.A. 25-5-4 “Certain agreements void unless in written and signed.

The following agreements are void unless the agreement, or some note or memorandum of the agreement is in writing, signed by the party to be charged with the agreement:

(1) every agreement which by its terms is not to be performed within one year from the making of the agreement.

The defendants all argued that this language barred Mrs. Pasquin from asserting that she had been granted an interest in the oral partnership, Quality Parts, ostensibly because the partnership contemplated existing and operating for more than a year.

A. An Oral Partnership Is Not Rendered Unenforceable Simply Because it Contemplates Operating, or In Fact Does Operate, For Longer Than One Year

The defendants’ motions must be denied because they urge an improper construction of

the phrase “is not to be performed within one year.” It is well-established law that partnerships can be oral and that the granting of an interest in a partnership can be oral. If such partnership agreements are rendered unenforceable simply because the parties are going to be and/or are partners for longer than one year, untold numbers of partnership agreements will be adversely affected. The answer lies in the phrase “agreement ... to be perform within one year.” A partnership can operate for longer than a year and a partner can become a partner for longer than one year. But a partner cannot enforce, for example, an agreement to become a partner which lasts longer than one year to perform and/or complete. It was reversible error to grant the defendants’ motions for summary judgment simply because Mrs. Pasquin, Kory Pasquin and John Pasquin contemplated being partners in Quality Parts for longer than one year.

B. Mrs. Pasquin’s Sworn Averments That She Was Made Partner Immediately, and With the Knowledge and Consent of John Pasquin, Precluded The Granting of Summary Judgment

Since Mrs. Pasquin’s complaint and other sworn statements asserts that she became a partner in Quality Parts immediately, the agreement by which she became a partner was not one which was “not to be performed in one year.” If Mrs. Pasquin’s sworn version of the facts is assumed to be true (as it must), the Statute of Frauds is not even applicable. The orders granting summary judgment should therefore be reversed.

C. Mrs. Pasquin Identified Legal Exceptions to the Statute of Frauds, Supported by Her Sworn Statements of Disputed Facts, Which Precluded the Granting of Summary Judgment

Even if the Statute of Frauds were applicable, there can be exceptions thereto. The verified complaint states that Mrs. Pasquin contributed her time and talents to the business after she was made a partner therein in reliance on the representations that she was a partner and

would have life-time employment upon terms essentially equivalent to that of Kory and John. Her compensation and tax returns were handled in a fashion that demonstrates the accuracy of these assertions. Assuming these facts for the purposes of the motions for summary judgment, a jury could reasonably find that the doctrines of “partial performance” and “equitable estoppel” precluded the defendants from prevailing on a Statute of Frauds defense. As the Court stated in Jacobson v. Cox, 202 P. 2d 714 (Utah 1949):

“Closely allied to the principles of protection against the assertion of the statute of frauds to accomplish a fraud upon the party who has acted in reliance upon an oral contract or the assertion of the statute as a shield to protect fraud is the doctrine of estoppel to assert the statute. It is universally conceded that the doctrine of equitable estoppel may be invoked to preclude a party to a contract from asserting the unenforceability of a contract by reason of the fact that it is not in writing as required by the statute of frauds. As is often said, the statute of frauds may be rendered inoperative by an estoppel in pais. Where one has acted to his detriment solely in reliance on an oral agreement, an estoppel may be raised to defeat the defense of the statute of frauds. This is based upon the principle established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme. It is called into operation to defeat what would be an unconscionable use of the statute, and guards against the utilization of the statute as a means for defrauding innocent persons who have been induced or permitted to change their position in reliance upon oral agreements within its operation. Id. at 722-23.

In the Jacobson case the Court found that the parties were all familiar with the agreement that had been made, had acted for years in accordance with said agreements, and as such were estopped from even raising a Statute of Frauds defense.

As Mrs. Pasquin argued in her opposing memoranda, Mrs. Pasquin could prevail against the defendants’ Statute of Frauds defense at trial herein on these theories. She acted in reliance upon the representations that she was a partner in Quality Parts. John was at all times aware of and consented to Kory making Mrs. Pasquin a partner and promising her life-time employment

(as acknowledged by the interrogatory answers). Mrs. Pasquin was treated as a partner both before and after the formation of the corporation -- up until Kory died and John seized control of the corporation. All of these facts were required to be assumed to be true for the purposes of the motions for summary judgment. If true, a fraud and great injustice would be perpetrated if the defendants are allowed to assert the Statute of Frauds to assist them in depriving Mrs. Pasquin of the fruits of her labor and that which she was promised and for which she had worked for many years. Further, upon summary judgment, these fact-intensive issues cannot be and should not have been resolved in defendants' favor. They can only be decided at trial. The trier of fact must be allowed to determine if the defendants' Statute of Frauds defense is barred by estoppel and the parties' partial performance.

IV. IT WAS REVERSIBLE ERROR TO RULE ON SUMMARY JUDGMENT THAT MRS. PASQUIN'S LIFETIME EMPLOYMENT CLAIMS WERE BARRED BY THE STATUTE OF FRAUDS

A. The Pasquin Defendants' Answers to Interrogatories Satisfied the Statute of Frauds With Respect to the Issue of Mrs. Pasquin's Lifetime Employment Claims

Mrs. Pasquin's lifetime employment claims clearly could be affected by the application of the Statute of Frauds because that was an agreement which was to be performed over a period of time longer than one year. However, the Pasquin Defendants' interrogatory answers satisfied the requirements of the Statute. They acknowledge that Kory did promise Mrs. Pasquin lifetime employment, and were signed by a representative of the partnership and the new corporation. It was reversible error for Judge Frederick to rule that the Statute of Frauds barred Mrs. Pasquin's claims relating to a lifetime employment agreement when the defendants own answers to interrogatories referenced and acknowledged the same.

B. Mrs. Pasquin Identified Legal Exceptions to the Statute of Frauds, Supported by Her Sworn Statements of Disputed Facts, Which Precluded the Granting of Summary Judgment

For the reasons set forth in section III. C., above, it was reversible error for Judge Frederick to rule that Mrs. Pasquin could not prevail at trial against a Statute of Fraud defense as to her claims to lifetime employment.

Further, the Pasquin Defendants' memorandum itself stated that:

"Under what circumstances, one may wonder, could a lifetime employment be found. In Green v. Oliver Realty, Inc., 526 A. 2d 1192 (PA. Super. 1987), the court found a contract where the employee agreed to work for less than union scale in exchange for a contract for employment for life. The court concluded that although a promise of lifetime employment should not be enforced merely on the basis of the promise itself, such a promise would be enforced if the surrounding circumstances indicated that the parties truly intended to overcome the presumption of employment-at-will or if there were additional considerations." **R. 128**

Mrs. Pasquin's sworn testimony satisfied the requirements of the defendants' own cited case. She worked extraordinary hours at only minimum wage rather than market rate. Further, the Pasquin Defendants' answers to interrogatories clearly indicate that "the parties intended to overcome the presumption of employment at will." Not only do these interrogatory answers acknowledge that the promise had been made, but they document the Pasquin Defendants' reaffirmation of the agreement at the meeting at the Duffin Defendants' office. These factually intensive issues can only be resolved at trial.

V. IT WAS REVERSIBLE ERROR TO DISMISS ALL OF MRS. PASQUIN'S CLAIMS

Even if the Statute of Frauds were a bar to Mrs. Pasquin's claims to a partnership interest and in lifetime employment, Mrs. Pasquin was nevertheless an employee of the business and entitled to be paid at all times prior to the termination of her employment strictly in accordance

with the parties' agreements as to remuneration and perquisites. Mrs. Pasquin was entitled to be free from having individuals induce her employer to breach her employment agreement in these regards. Mrs. Pasquin also was entitled to be free from being subjected to the intentional or negligent infliction of emotional distress. Mrs. Pasquin's complaint alleged that the defendants breached her contract with respect to wages, perquisites and the withholding, accounting and payment of her taxes. Mrs. Pasquin's complaint alleged that certain defendants interfered with her employment agreement and induced her employer to breach the agreement in these regards. Finally, Mrs. Pasquin's complaint alleged that the defendants committed acts which constituted the intentional and/or negligent infliction of emotional distress. It was reversible error for these claims to have been dismissed through the granting of the defendants' motions for summary.

VI. MRS. PASQUIN'S OBJECTION TO THE PASQUIN DEFENDANTS' PROPOSED ORDER GRANTING SUMMARY JUDGMENT WAS NOT UNTIMELY

With respect to the timeliness of Mrs. Pasquin's objection to the proposed order granting the Pasquin Defendants' motion for summary judgment, the following chronology and argument are illustrative:

1. The proposed order was mailed to Mrs. Pasquin on October 23, 1997 (see mailing certificate attached to the proposed order);
2. CJA, Rule 4-504 requires plaintiff to submit any objection within "five days;"
3. Under URCP, Rule 6 (a), whenever a time period "is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation;"
4. Under URCP, Rule 6(e), since the proposed order was mailed, three days are added to the time period;

5. This means that Mrs. Pasquin had eight (5+3) days to object, and weekends and holidays are not counted -- which means that the objection was not due until Tuesday, November, 4, 1997;

6. Mrs. Pasquin served her objection upon defendants by mail and fax on Monday, November 3, 1997 (before the deadline) in conformance with URCP, Rule 5(b) ("Service by mail is complete upon mailing")(see mailing certificate attached to Mrs. Pasquin's objection and Exhibit B attached hereto);

7. The plaintiff mailed the objection to the court on November 3, 1997 in conformance with URCP, Rule 5(d)("All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter" (see copy of the letter to the clerk accompanying the objection, attached hereto as part of Exhibit b);

8. The objection was not literally filed and stamped by the Clerk of the Court until November 6, 1997;

9. Judge Frederick signed the proper Summary Judgment on November 3, 1997 -- before the time to object had even run.

Consequently, it was error for Judge Frederick to execute the order granting the Pasquin Defendants summary judgment on November 3, 1997, then to rule in the November 18, 1997 minute entry that Mrs. Pasquin's objection was untimely, and then to deny Mrs. Pasquin's motion for reconsideration.

VII. IT WAS AN ABUSE OF DISCRETION AND CLEARLY ERRONEOUS TO DENY MRS. PASQUIN'S RULE 56(F) MOTIONS

At the time that the subject motions for summary judgment were filed, the Pasquin Defendants had not produced any documents nor submitted themselves for deposition. The requested but not produced documents and other discovery were likely highly relevant to these motions. Mrs. Pasquin had not delayed nor refused to engage in discovery. She had merely graciously acquiesced in the Pasquin Defendants' requests to postpone discovery until John Pasquin's health improved. Rule 56(f) provides that if a party opposing a motion for summary judgment asserts that he or she really needs certain discovery to be able to fully and fairly oppose a motion for summary judgment, a ruling on the summary judgment should be postponed until the requested discovery is undertaken and/or completed.


Only the Pasquin Defendants have the corporate and other business documents. Mrs. Pasquin cannot rebut their claims that there are "no documents" supporting her claims without being able to review the Pasquin Defendants' documents. This was the classic case where Rule 56(f) should be employed and relief granted. It was an abuse of discretion and clear error for Judge Frederick to rule that Mrs. Pasquin was not entitled to Rule 56(f) relief because she could have undertaken discovery but did not. This purported "fact" was simply untrue.

At the very least, the orders granting summary judgment should be reversed and Mrs. Pasquin given the opportunity to pursue and complete her requested and critically relevant discovery. Mrs. Pasquin should thereafter be allowed to supplement her oppositions as she sees fit, and then the motions can be ruled upon.

CONCLUSION

Based upon the foregoing, plaintiff/appellant Geri Pasquin respectfully requests that this Court (1) reverse Judge Frederick's orders granting summary judgment in favor of the defendants in their entirety, or (2) reverse that portion of Judge Frederick's orders granting summary judgment as to the claims not automatically resolved by the Statute of Frauds challenge, or (3) reverse Judge Frederick's ruling regarding the timeliness of objections and the computation of time with respect thereto, and/or (4) at the very least, set aside the orders granting summary judgment, find that Mrs. Pasquin's Rule 56(f) motion should have been granted, and directing that the motions not be ruled upon until the requested relevant discovery is completed and Mrs. Pasquin has had an opportunity to supplement her oppositions accordingly.

DATED this 28th day of August, 1998.



Brian W. Steffensen, P.C.
Attorney for Appellant Geri Pasquin

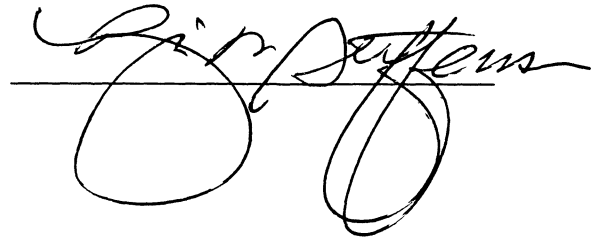
CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of April, 1968, I caused two true and correct copies of the foregoing instrument to be X mailed, postage prepaid; and/or hand-delivered by _____ fax and/or by _____ courier; addressed to:

Kipp & Christian, P.C.
Attn: Carman E. Kipp
10 Exchange Place - Newhouse Building
Fourth Floor
Salt Lake City, Utah 84111-2314
FAX 359-9004

Murphy, Tolboe & Mabey
Attn: Steven L. Taylor
124 South 600 East, #100
Salt Lake City, Utah 84102
FAX 533-8508

Robert Copier
243 East 400 South, #200
Salt Lake City, Utah 84111
FAX 531-7928

A handwritten signature in black ink, appearing to read "Steven L. Taylor", written over a horizontal line.

ADDENDA/EXHIBITS

A -- Third-Party Affidavits Re Oral Agreements

B -- Copies of Letters/FAX Confirmation Sheets re
Mrs. Pasquin's Service of Her Objection to the
Propose Order Granting Summary Judgment to
The Pasquin Defendants

Exhibit A

Third-Party Affidavits Re Oral Agreements

AFFIDAVIT OF KRISTIE DAWN MADSEN

I, Kristie Dawn Madsen, under penalty of perjury I declare the following:

1. I am a resident of the State of Utah, and if called to testify at trial would state the following of my own personal knowledge.

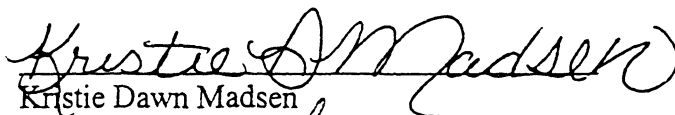
2. I first met Kory Pasquin in August of 1994 when he came to Madsen Transport, where I worked at that time, to borrow a fork lift. Shortly thereafter I began to date Mr. Pasquin. Soon we became intimate and off and on lived together until his death in October 1996. I became pregnant with Mr. Pasquin child, and gave birth to his daughter on February 5, 1996, who I named Karly. I lived in the apartment at Quality Parts from March of 1996 until October of 1996. Some of my personal belongings are still located at Quality Parts. I worked at Quality Parts in April and May of 1996.

3. During this relationship, Mr. Pasquin talked often about his business. Quality Parts, and his relationship with his father, John Pasquin, and mother, Geri Pasquin. During these conversations, Mr. Pasquin told me that John and Geri were his partners and had helped him build up the business. He said numerous times that the business would never have been successful without John and Geri. He told me that John was not "business oriented" enough to run the business, and that without Geri handling the office and other business affairs they would never have been successful. He told me that his goal was to build the business up to the point that he could sell it so that Geri, from her share of the three-way split of the proceeds of the sale, would be able to retire. Mr. Pasquin told me that he would probably keep the building for retirement but keep working.

4. When I was at Quality Parts, I saw and heard John and Kory talking about

business decisions many times, during which one or the other would say that they had "better talk to Geri" to get her opinion and vote on the matter. I saw the three of them often meet to discuss and decide business matters. It was always clear to me that John, Kory and Geri were equal partners, with equal say and influence in the business. At no time did I ever see John say or do anything which suggested in any way that Geri was not an equal partner, or did not have an equal vote, in the business. This was true both before and after the business was incorporated.

In witness whereof I set my hand this 7th day of March, 1997.


Kristie Dawn Madsen

Subscribed and Sworn before me this 7th day of March, 1997.



My Commission Expires:

March 25, 2000

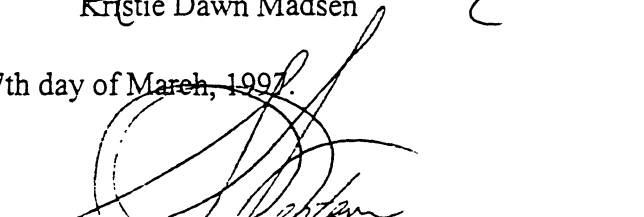

NOTARY PUBLIC
Residing at: Chris C. MT

Exhibit B

Copies of Letters/FAX Confirmation Sheets re
Mrs. Pasquin's Service of Her Objection to the
Propose Order Granting Summary Judgment to
The Pasquin Defendants

BRIAN W. STEFFENSEN

A Professional Law Corporation

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1600 Laird Avenue
Salt Lake City, Utah 84105
(801) 582-6737
Fax 582-6737

Plaza 7-21 Law Office:
675 East 2100 South, Suite 350
Salt Lake City, Utah 84106
(801) 485-3707
Fax 485-7140

November 3, 1997

Third District Court, Division I
Salt Lake Department
240 East 400 South
Salt Lake City, Utah 84111

Re: Geri Pasquin v. John Pasquin, Jimmie Pasquin, The Estate of Kory Pasquin,
Quality Parts, a Utah general partnership, et al
Case No. 970900011CV

Dear Clerk,

Enclosed for filing you will find the original **Objection to Proposed Summary
Judgement of the Pasquin Defendants**, for the above referenced case.

Please conform the copy of the Notice and send the document, to our office in the self-addressed, stamped envelope I have provided for your convenience.

If you have any questions, please do not hesitate to contact our office.

Sincerely,



Melisa Hansen
Legal Assistant

:mwh

BRIAN W. STEFFENSEN

A Professional Law Corporation

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Company: Murphy, Tolboe & Mabey
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