

1992

# Margaret B. Hall v. Process Instruments and Control, Inc. : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Scott B. Mitchell; Attorney for Appellant.

James A. McIntyre; Attorney for Appellee.

---

## Recommended Citation

Brief of Appellant, *Hall v. Process Instruments and Control, Inc.*, No. 920332 (Utah Court of Appeals, 1992).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/3260](https://digitalcommons.law.byu.edu/byu_ca1/3260)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

SCOTT B. MITCHELL (5111)  
Kearns Building, Suite 721  
136 South Main Street  
Salt Lake City, Utah 84101  
Telephone: (801) 532-7858

Attorney for Plaintiff/Appellant

IN THE UTAH COURT OF APPEALS

\* \* \* \*

MARGARET B. HALL,

Plaintiff/Appellant,

vs.

PROCESS INSTRUMENTS AND  
CONTROL, INC., a Utah  
corporation,

Defendant/Appellee.

\*  
\* APPELLANT'S OPENING BRIEF  
\*  
\*  
\*  
\*  
\*  
\* Appeal No. 920332-CA  
\*  
\* Priority 16

\* \* \* \*

PLAINTIFF'S APPEAL FROM A FINAL JUDGMENT OF THE THIRD JUDICIAL  
DISTRICT COURT THE HONORABLE JOHN A. ROKICH PRESIDING

\* \* \* \*

Scott B. Mitchell (5111)  
Kearns Building, Suite 721  
136 South Main Street  
Salt Lake City, Utah 84101  
Attorney for Appellant

James A. McIntyre  
360 East 4500 South, Suite 3  
Salt Lake City, Utah 84107  
Attorney for Appellee

UTAH COURT OF APPEALS  
BRIEF

UTAH  
DOCUMENT  
KFU  
50

110  
DOCKET NO. 920332

**FILED**

SEP 23 1992

Ma... Noonan  
Clk... Court

SCOTT B. MITCHELL (5111)  
Kearns Building, Suite 721  
136 South Main Street  
Salt Lake City, Utah 84101  
Telephone: (801) 532-7858

Attorney for Plaintiff/Appellant

IN THE UTAH COURT OF APPEALS

\* \* \* \*

MARGARET B. HALL,

Plaintiff/Appellant,

vs.

PROCESS INSTRUMENTS AND  
CONTROL, INC., a Utah  
corporation,

Defendant/Appellee.

\*

\*

\*

\*

\*

\*

\*

\*

\*

\*

APPELLANT'S OPENING BRIEF

Appeal No. 920332-CA

Priority 16

\* \* \* \*

PLAINTIFF'S APPEAL FROM A FINAL JUDGMENT OF THE THIRD JUDICIAL

DISTRICT COURT THE HONORABLE JOHN A. ROKICH PRESIDING

\* \* \* \*

Scott B. Mitchell (5111)  
Kearns Building, Suite 721  
136 South Main Street  
Salt Lake City, Utah 84101  
Attorney for Appellant

James A. McIntyre  
360 East 4500 South, Suite 3  
Salt Lake City, Utah 84107  
Attorney for Appellee

## TABLE OF CONTENTS

JURISDICTION . . . . .	1
STATEMENT OF ISSUES AND STANDARDS OF REVIEW . . . . .	1
DETERMINATIVE STATUTES AND RULES . . . . .	3
STATEMENT OF THE CASE . . . . .	3
SUMMARY OF ARGUMENTS . . . . .	6
ARGUMENTS . . . . .	9
(1) The Defendant corporation's obligations under the Employment Agreement did not terminate upon Mrs. Hall's remarriage. . . .	9
(2) The District Court's findings of fact and conclusions of law with respect to the "parol evidence rule" are neither supported by the evidence nor in accordance by the law. . . . .	10
(3) The District Court abused its discretion in disallowing the testimony of Brent Turley. . . . .	20
CONCLUSION . . . . .	21
MAILING CERTIFICATE . . . . .	22
ADDENDA	

## TABLE OF AUTHORITIES

### CASES

<u>Colonial Leasing Co. v. Larsen Bros. Const.</u> , 731 P. 2d 483 (Utah 1986) . . . . .	13,19
<u>Dementas v. Estate of Tallas</u> , 764 P. 2d 628 (Utah App. 1988) . . . . .	18
<u>George v. Peterson</u> , 671 P. 2d 208 (Utah 1983) . . . . .	2
<u>Intermountain Physical Medicine Associates v. Micro - Dex Corp.</u> , 739 P. 2d 1131 (Utah 1987) . . . . .	2
<u>Soukop v. Snyder</u> , 709 P. 2d 109 (Hawaii Ct. App. 1985) . . . . .	19
<u>Webb v. R.O.A. General, Inc.</u> , 804 P. 2d 547 (Utah App. 1991) . . . . .	13
<u>Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.</u> , 744 P. 2d 1376 (Utah 1987) . . . . .	1,2

### STATUTES

UCA § 78-2a-3(2)(j) . . . . .	1
UCA § 30-3-5(5) . . . . .	3,6,9,13

### OTHER AUTHORITIES

Restatement (Second) of Contracts § 218(2) . . . . .	19
--	----

SCOTT B. MITCHELL (5111)  
Kearns Building, Suite 721  
136 South Main Street  
Salt Lake City, Utah 84101  
Telephone: (801) 532-7858

Attorney for Plaintiff/Appellant

IN THE UTAH COURT OF APPEALS

\* \* \* \*

MARGARET B. HALL,

Plaintiff/Appellant,

vs.

PROCESS INSTRUMENTS AND  
CONTROL, INC., a Utah  
corporation,

Defendant/Appellee.

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

APPELLANT'S OPENING BRIEF

Appeal No. 920332-CA

\* \* \* \*

JURISDICTION

This Court has jurisdiction to hear and determine this  
matter pursuant to Utah Code Annotated § 78-2a-3(2)(j).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

(1) Whether the District Court's Conclusion of Law that:

"Plaintiff's claim that the employment agreement  
was entered into in lieu of alimony fails because,  
absent written agreement to the contrary, alimony  
terminates upon remarriage"

is contrary to law. This is solely a question of law reviewable  
under the "correction-of-error" standard. See Western Kane  
County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d  
1376 (Utah 1987).

(2) Whether the District Court's "Conclusion of Law" that:

"Plaintiff fail (sic) to establish that the meaning or intent of the employment agreement was anything other than its clearly written terms which would give rise to an enforceable agreement under any one of the legal theories advanced during the course of this litigation"

is supported by the record. This is a question of fact reviewable under the "substantial evidence" standard. See George v. Peterson, 671 P.2d 208 (Utah 1983).

(3) Whether the District Court's "Conclusion of Law" that:

"The employment agreement is clear and unambiguous on its face and not subject to change by parole (sic) evidence"

is supported by the record and in accordance with the law. This is both a question of fact and one of law. The factual aspect is reviewable under the "substantial evidence" standard. See George v. Peterson, 671 P.2d 208 (Utah 1983). The legal aspect is reviewable under the "correction of error" standard. See Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376 (Utah 1976).

(4) Whether the District Court abused its discretion in refusing to allow Brent Turley to testify regarding John Hall's offer to make the down-payment on the residence which Mr. Hall purchased from Mr. Turley in the form of an employment agreement with Mr. Hall's company. This issue is reviewable under the "abuse of discretion" standard. See Intermountain Physical Medicine Associates v. Micro-Dex Corporation, 739 P.2d 1131 (Utah 1987).

### **DETERMINATIVE STATUTES AND RULES**

Pursuant to Rule 24(a)(6) of the Utah Rules of Appellate Procedure, Plaintiff sets forth verbatim the following determinative statute.

#### **Section 30-3-5(5), Utah Code Ann.**

Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

### **STATEMENT OF THE CASE**

#### **I. Nature of the Case**

This is an appeal from the final Judgment of the Third District Court ruling that "Plaintiff have judgment against the Defendant of no cause of action."

#### **II. Statement of Facts**

(1) At all relevant times prior to June 8, 1981, Plaintiff (then Margaret B. Hall and for the sake of simplicity hereinafter referred to as "Mrs. Hall") and Defendant's President and sole shareholder, John A. Hall, were husband and wife. (R. 00148 and Addendum 1 attached hereto)

(2) On or about February 20, 1981, John A. Hall filed an action in the Third Judicial District Court of Salt Lake County, civil no. D-81-695 (the "Divorce Action"), seeking to terminate the marital relationship then existing between himself and Mrs. Hall. (See Trial Exhibit 6-P)



(3) On or about June 8, 1981, a Decree Of Divorce was entered in the Divorce Action dissolving the marital relationship between Mr. and Mrs. Hall. (R. 00148 and Addendum 1 attached hereto)

(4) The Decree Of Divorce provided that Mrs. Hall would receive no alimony. (Trial Exhibit 6-P)

(5) On or about February 20, 1981 (approximately the same date as that upon which Mr. Hall filed the Divorce Action) Mrs. Hall entered into an agreement with Defendant which was nominally entitled "Employment Agreement". (R. 00148 and Addendum 1 attached hereto)

(6) Under the terms of the so-called Employment Agreement, Defendant agreed to pay Mrs. Hall \$1,000.00 per month commencing March 1, 1981, and continuing through February 1984. Defendant also agreed that Mrs. Hall would be entitled to participate in Defendant's Profit Sharing Plan. (Trial Exhibit 1-P)

(7) Neither Mrs. Hall nor Defendant ever intended that Mrs. Hall would go to work for Defendant under the so-called Employment Agreement. (Trial Tr. p. 18, line 13 through p. 19, line 14; p. 29, lines 21-25; p. 30, lines 19-24; p. 43, lines 10-13; p. 44, lines 9-12)

(8) The consideration which Defendant requested and which Mrs. Hall agreed to provide in exchange for Defendant's promises under the so-called Employment Agreement was Mrs. Hall's promise to forego any claim which she might have had to receive alimony in connection with the Divorce Action simultaneously taking place between Mrs. Hall and John A. Hall. (Trial Tr. p.19, lines 5-14; p. 44, lines 9-12)

(9) Mrs. Hall in fact never went to work for Defendant under the so-called Employment Agreement. (R. 00149 and Addendum 1 attached hereto)

(10) In spite of the fact that Mrs. Hall never went to work for Defendant, Defendant paid Mrs. Hall the sum of \$15,000.00 over a period of approximately fourteen and one-half months in accordance with the terms of the so-called Employment Agreement. (R. 00149 and Addendum 1 attached hereto)

(11) In or around May of 1982, Defendant discontinued payments to Mrs. Hall under the so-called Employment Agreement. (R. 00149 and Addendum 1 attached hereto)

(12) Mrs. Hall remarried on or about May 31, 1982, shortly after Defendant's termination of payments to her under the so-called Employment Agreement. (R.00149 and Addendum 1 attached hereto)

(13) Mrs. Hall filed her original Complaint commencing this action on or about May 25, 1992. (R. 00002)

(14) Thereafter, Mrs. Hall moved to the State of Arizona with her new husband and (with the exception of the filing of Defendant's Motion To Dismiss on March 23, 1982; which was submitted for decision on November 23, 1990; and which was denied by the District Court on November 30, 1990) this action remained inactive until on or about June 26, 1990, when Mrs. Hall's new counsel filed a Motion For Leave To File Amended Complaint. (R. 00016)

(15) The District Court granted Mrs. Hall's motion to amend on September 13, 1990. (R. 00022)

(16) The District Court entered a PRE-TRIAL ORDER jointly prepared by the parties on November 16, 1992. (R. 00148 and Addendum 1 attached hereto)

(17) A bench trial of this action was held before the Honorable John A. Rokich on November 14, 1991. (R. 00153)

(18) At the conclusion of the trial, Judge Rokich took the matter under advisement. (R. 00153) On March 4, 1992, Judge Rokich entered Judgment that Mrs. Hall "have judgment against Defendant of no cause of action." (R. 00169 and Addendum 2 attached hereto)

(19) Mrs. Hall timely filed her Notice Of Appeal on April 2, 1992. (R.00175)

#### SUMMARY OF ARGUMENTS

(1) The Defendant corporation's obligations under the Employment Agreement did not terminate upon Mrs. Hall's remarriage.

The district court ruled that Defendant's obligations under the Employment Agreement terminated automatically upon Mrs. Hall's remarriage by virtue of the provisions of Utah Code Annotated § 30-3-5(5). It is Mrs. Hall's position that Section 30-3-5(5), U.C.A., did not terminate the Defendant corporation's obligations under the Employment Agreement upon her remarriage for three reasons. First, the Employment Agreement is not an "order of the court". Section 30-3-5(5) expressly applies only to "any order of the court". More importantly, the Employment

agreement was not entered into by parties to divorce proceedings; it was entered into by Mrs. Hall and the Defendant corporation. Finally, the Defendant corporation was obviously not paying Mrs. Hall alimony; corporations do not pay alimony. The Defendant corporation was paying Mrs. Hall to forego any right which she might otherwise have had to seek alimony in the Divorce Action simultaneously taking place between Mrs. Hall and Defendant's President and sole shareholder.

(2) The district court's findings of fact and conclusions of law with respect to the "parol evidence rule" are neither supported by substantial evidence nor in accordance with the law.

The parol evidence rule only applies to exclude evidence of contemporaneous conversations, statements, or representations of the parties for the purpose of varying or adding to the terms of a written agreement where the written agreement was intended by the parties to represent their full and complete agreement. In the case at bar it is clear that neither party intended for the Employment Agreement to represent their full and complete agreement. Both parties, as well as the attorney that drafted the Employment Agreement on Defendant's behalf, testified that there were contemporaneous oral agreements between the parties relating to its subject matter which were not included in the Employment Agreement.

Furthermore, the circumstances of this case clearly reveal that Defendant's contention that Mrs. Hall was intended to go to work under the so-called Employment Agreement is preposterous and not supported by substantial evidence.

Moreover, Judge Rokich made it very clear both at the time Defendant moved to dismiss after Mrs. Hall rested her case and again during closing argument that he considered absurd Defendant's contention that the parties intended that Mrs. Hall would be required to go for Defendant under the Employment Agreement.

Even if the parol evidence were otherwise applicable, however, the rule does not prevent the introduction of evidence to show that there was a different consideration supporting Defendant's obligations under the Employment Agreement than that stated in the agreement itself.

Finally, while the terms the Employment Agreement may not be ambiguous, the character of the agreement itself is ambiguous rendering the parol evidence rule inapplicable.

(3) The district court abused its discretion in disallowing the testimony of Brent Turley.

Mrs. Hall attempted to introduce (and preferred) the testimony of Mr. Brent Turley that, when Mr. Hall purchased Mr. Turley's home, Mr. Hall offered to pay the down payment on the home in the form of an employment agreement with his company pursuant to which Mr. Turley would receive a monthly "salary" and benefits, but would not be required to go work for Mr. Hall's company. The district court sustained Defendant's objection to Mr. Turley's testimony on the grounds of relevance.

Mrs. Hall submits that, contrary to the District Court's ruling, Mr. Turley's testimony would clearly have been relevant. Mr. Hall's offer to pay the down payment on the purchase of Mr.

Turley's home shows that on at least one other occasion Mr. Hall had used an employment agreement with his company as consideration for a personal obligation under circumstances in which it was clear that the "employee" would not be required to actually go to work for Mr. Hall's company. Accordingly, it is Mrs. Hall's position that the district court abused its discretion in disallowing Mr. Turley's testimony.

#### ARGUMENTS

(1) The Defendant corporation's obligations under the Employment Agreement did not terminate upon Mrs. Hall's remarriage.

The Pre-Trial Order governing the trial of this matter identified the first "Question Of Law Remaining For Determination" as:

Whether Defendant's obligations under the Employment Agreement terminated automatically upon Plaintiff's remarriage by virtue of Utah Code Annotated Section 30-3-5(5).

(R. 00148 and Addendum 1 attached hereto)

In its Conclusions Of Law, the District Court answered this first question in the affirmative. (R. 00172 and Addendum 3 attached hereto) It is Mrs. Hall's contention that the District Court's ruling on this question is contrary to law.

Section 30-3-5(5), UCA, provides in pertinent part that "Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse." (Emphasis added).

There are at least three reasons why § 30-3-5(5) did not operate to terminate Defendant's obligations under the Employment Agreement. First, the Employment Agreement is not an "order of the court". Section 30-3-5(5) expressly applies only to "any order of the court." More importantly, however, the Employment Agreement was not entered into between parties involved in divorce proceedings; it was not entered into between Mrs. Hall and Mr. Hall. It was entered into between Mrs. Hall and the Defendant Process Instruments and Control, Inc., a Utah corporation. Finally, the Defendant corporation was obviously not paying Mrs. Hall "alimony"; it was paying her to forego any right to alimony which she might otherwise have had in connection with the Divorce Action simultaneously taking place between Mrs. Hall and Defendant's President and sole shareholder.

Accordingly the District Court's Conclusion Of Law that:

"The Plaintiff's claim that the employment agreement was entered into in lieu of alimony fails because, absent written agreement to the contrary, alimony terminates upon remarriage"

is contrary to law and should be set aside.

(2) The District Court's findings of fact and conclusions of law with respect to the "parol evidence rule" are neither supported by the evidence nor in accordance with the law.

The Employment Agreement provides that Mrs. Hall "agrees to faithfully perform the duties assigned to her to the best of her ability and to devote such time and skills as shall be necessary therefor." (Trial Exhibit 1-P). It is Mrs. Hall's position that, notwithstanding this language, the parties never intended that she would ever go to work for Defendant. Rather, the

consideration being given by Mrs. Hall was her agreement to forego any right to alimony which she may have had in connection with the Divorce Action.

Accordingly, the Pre-Trial Order identifies the first "Factual Dispute Remaining For Trial" as:

Whether the consideration given by Plaintiff for Defendant's promises under the Employment Agreement was her agreement to forego any claim to alimony in connection with the divorce proceeding simultaneously taking place between Plaintiff and Defendant's President and sole shareholder, John A. Hall.

(R. 00150 and Addendum 1 attached hereto)

At trial, Mrs. Hall testified that, notwithstanding the language of the Employment Agreement, neither she nor Defendant ever intended that she would actually go to work for Defendant. (Trial Tr. at p. 18, lines 13 through p. 19, line 14; p. 29, lines 21-25; p. 30, lines 19-24; p. 43, lines 10-13; p. 44, lines 9-11).

Mrs. Hall also proffered <sup>1</sup> the testimony of Mr. Brent Turley that "Mr. Hall offered to purchase ... Mr. Turley's home, using as the down payment an employment contract just like the one we [have] here [under] which Mr. Turley would be an employee of [Mr. Hall's] company, receive salary and benefits in exchange for the down payment on his home." (Trial Tr. at p. 60, lines 16-22) Mr. Turley's testimony was being offered to show that Mr. Hall had on at least one other occasion used an employment

---

<sup>1</sup> The District Court sustained Defendant's objection to Mr. Turley's testimony on the grounds of relevance. Trial Tr. at p. 60, lines 14-15. That this ruling was erroneous will be demonstrated in part (3) below.



contract with his company as consideration in connection with his own personal obligations under circumstances where it was clear that neither party intended that the "employee" would actually go to work for Mr. Hall's company.

Defendant, however, objected to the introduction of any evidence to support Mrs. Hall's contention that, despite the language of the Employment Agreement, the parties never intended that she would ever go to work for Defendant on the basis that such evidence was barred by the "parol evidence rule".

Accordingly, the Pre-Trial Order identifies the second "Question Of Law Remaining For Determination" as:

Whether the "Parol Evidence Rule" precludes Plaintiff from introducing evidence of contemporaneous conversations, statements, or representations of the parties for the purpose of varying or adding to the terms of the Employment Agreement.

(R. 00150 and Addendum 1 attached hereto)

In its Conclusions of Law, the District Court ruled with respect to the parol evidence issue as follows:

6. Plaintiff fail (sic) to establish that the meaning or intent of the employment agreement was anything other than its clearly written terms ...

7. The employment agreement is clear and unambiguous on its face and not subject to change by parole (sic) evidence.

(R. 00172-73 and Addendum 3 attached hereto)

As will be demonstrated below, Conclusion of Law number 6 is in reality a finding of fact which is not supported by substantial evidence and Conclusion of Law number 7 is contrary to law.

The operation and effect of the parol evidence rule was explained by the Utah Supreme Court in Colonial Leasing Co. v. Larsen Bros. Const., 731 P.2d 483, 486 (Utah 1986):

[The parol evidence rule] operates ... to exclude contemporaneous conversations, statements, or representations offered for the purpose of varying or adding to the terms of an integrated contract.

(Emphasis original).

Of greater importance to the case at bar, the Court further explained that "the parol evidence rule applies only if it was intended by the parties to represent the full and complete agreement of the parties ..." 731 P.2d at 486 (emphasis added). In determining whether a particular contract was intended by the parties to be an integrated agreement, the trial court must weigh all relevant evidence, both parol and written. See, e.g. Colonial Leasing, 731 P.2d at 487; and Webb v. R.O.A. General, Inc., 804 P.2d 547, 551 (Utah App. 1991).

In the case at bar, it is absolutely clear that neither party intended for the Employment Agreement to represent their "full and complete agreement".

Mrs. Hall will first marshal the evidence in support of Defendant's contention that the Employment Agreement was intended to be the "full and complete agreement" between the parties:

1. First, there is the Employment Agreement itself, which appears to be clear and unambiguous on its face. (Trial Exhibit 1-P)

2. Second, Mr. Hall testified that the Employment Agreement was nothing more than an agreement pursuant to which Mrs. Hall would be paid \$1,000.00 per month and receive benefits to come to work for the Defendant. (Trial Tr. at p. 84, lines 12-16)

3. Finally, the attorney that drafted the Employment Agreement on behalf of the Defendant, Mr. Peter Ennenga, testified that he did not know one way or the other whether the Employment Agreement represented the full and complete agreement between the parties. (Trial Tr. at p. 137, line 14 through p. 38, line 21)

Mrs. Hall submits that under the circumstances of this case, the evidence marshalled in support of Defendant's contention that the Employment Agreement was intended by the parties to represent their "full and complete" agreement is not substantial. Besides Mrs. Hall's testimony that neither party ever intended that she would actually go to work for Defendant, the following evidence further demonstrates beyond question that the Employment Agreement was never intended to represent the parties' full and complete agreement:

1. Even though Mrs. Hall never went to work for Defendant for even one minute, Defendant sent Mrs. Hall \$15,000.00 at the rate of \$1,000.00 per month over a period of approximately fourteen and one-half months. (R. 00149 and Addendum 1 attached hereto) Ironically, Defendant attempted to explain this extraordinary circumstance as the result of an alleged oral agreement reached between the parties at the time of the execution of the Employment Agreement. Mr. Hall testified that, in light of the fact that Mrs. Hall was ill and needed money to live on, Defendant orally agreed to pay her \$1,000.00 per month salary even though she would not be expected to come to work until she had recovered from her illness (Mr. Hall testified that he anticipated that might be about six months). Preposterously,

Mr. Hall further testified that the alleged oral agreement was that Mrs. Hall would be required to repay Defendant for the salary received by her prior to the time when she actually went to work for Defendant by working for an identical period of time without any compensation after the expiration of the three year term of the agreement. (Trial Tr. at p. 64, lines 8-22). In his published deposition testimony, Mr. Hall explained how this curious orally agreed to arrangement would work:

Question: ... Would this agreement, this oral agreement that is not part of this employment contract ... suppose the six-month period in which Mrs. Hall was sick actually came to pass and []at the end of six months she came to work [] after that, and the contract terminates ... February 28, 1984, would she reimburse the company by performing services for an additional six months after that period for free?

Answer: Essentially, that is correct. It is not for free, she was paid in advance.

(Trial Tr. at p. 68, line 21 through p. 60, line 7; see also the June 25, 1991, deposition of John Hall at p. 24, line 19 through p. 25, line 4).

2. Likewise comical is Mr. Hall's testimony regarding the circumstances surrounding Defendant's decision to terminate Mrs. Hall's "employment". Mr. Hall testified that the termination, which occurred on or about May 14, 1982, was a result of the fact that Defendant learned that Mrs. Hall had gone to work for a company by the name of Struve Distributing. However, Mr. Hall testified that Defendant learned of Mrs. Hall's employment at Struve Distributing in the Fall of 1981, six to nine months prior to the decision to terminate Mrs. Hall's "employment". Mr. Hall further testified, incredibly, that when he discovered that Mrs. Hall had gone to work for Struve he telephoned her at Struve and

advised her that: "If you are going to work with Struve you are in a position where you should work at our company." According to Mr. Hall, Mrs. Hall's response was "Go to Hell." (Trial Tr. at p. 100, line 14 through p. 106, line 2; see also Deposition of John A. Hall at p. 33, lines 4-24). Yet, according to Mr. Hall, in spite of the fact that sometime in the fall of 1981 Mrs. Hall had informed him in no uncertain terms that she was not going to go to work for Defendant, Defendant continued to pay Mrs. Hall her \$1,000.00 per month "salary" for between six and nine months before terminating her "employment" for "failure to report to work." (Deposition of John A. Hall at p. 32, line 16).

3. After Defendant supposedly discovered that Mrs. Hall was employed at Struve Distributing, Defendant sent Mrs. Hall her regular semi-monthly \$500.00 "paycheck" date April 30, 1992, with the notation "final check" (See Exhibit 3-P, check no. 1188). When Mrs. Hall refused to cash the April 30, 1992 check, Defendant sent her a second check, again with the notation "final check" (see Exhibit 3-P, check no. 1201), however, this second "final check" was accompanied by a Utah Department of Employment Security - Separation Notice explaining that Mrs. Hall was being "fired" because she was "working for Struve Dist. in SLC". (See Exhibit 4-P) Query, why would Defendant send Mrs. Hall a final check if it was truly "firing" her for "failing to report to work" (Deposition of John A. Hall at p. 32, line 16) and for working for Struve Distributing. The short answer is that Defendant's explanation is a transparent fabrication.

4. When Defendant moved for dismissal after Mrs. Hall rested her case, Judge Rokich made very clear that he did not

believe Defendant's contention that Mrs. Hall was expected to go to work for Defendant under the Employment Agreement:

The Court: ... 14 months went by and he makes the payments and then arbitrarily cuts it off because she doesn't show up for work. He never expected her to come to work in the first place. I believe this is nothing more than an alimony agreement .... Despite all the writings, why would you have somebody receive checks for 14 months? ...

Mr. McIntyre: Your Honor, one other thing that I have a real problem with -- and then still getting back to the old parol evidence rule problem.

The Court: That doesn't bother me. He knew what they were attempting to do. All of us know they were attempting to do something for some reason unbeknownst to this court, and so I'm not so naive to be sitting here saying they drew up this employment agreement, that they actually intended for her to go to work. They didn't get along before, so how would they get along in the same office? Let's be practical and realistic.

(Trial Tr. at p. 72, lines 14-17; p. 73, lines 3-4; p. 74, lines 9-20).

5. During closing argument, Judge Rokich foreclosed Plaintiff's counsel from even arguing on the issue of whether the parties ever intended that Mrs. Hall would go to work for Defendant, indicating that his concern was the effect of Section 30-3-5(5), UCA, on Defendant's obligations under the Employment Agreement. (Trial Tr. at p. 149, lines 9-25)

6. Mr. Hall's and Defendant's attorney, Mr. Ennenga, testified that the Employment Agreement did not represent the full and complete agreement between the parties. As did Mr. Hall, Mr. Ennenga testified that, at the time of the parties' execution of the Employment Agreement, they entered into an oral agreement that, in light of her poor health at that time, Mrs. Hall would not be required to report to work until she had

recovered from her illness. (Trial Tr. at p. 119, lines 13-23)

7. As indicated above, Plaintiff preferred that Brent Turley would have testified that Mr. Hall attempted to pay the down-payment on the home which he purchased from Mr. Turley in the form of an employment contract with his company under which Mr. Turley would have received salary and benefits for a period of time in lieu of a cash down-payment. (Trial Tr. at p. 60, lines 16-22)

In short, there is no substantial evidence supporting the District Court's conclusions of law/findings of fact on the parole evidence question. Both parties (as well as Defendant's counsel) testified that there were additional oral agreements and understandings not included in the Employment Agreement; the evidence presented with respect to the surrounding circumstances renders absurd Defendant's contention that the Employment Agreement was intended to be the "full and complete" agreement between the parties; and the Court made very clear at the close of Plaintiff's case and again during closing argument that it did not believe that the parties ever intended that Plaintiff would go to work for Defendant.

Furthermore, even if it might otherwise have been proper for the District Court to find or conclude that the Employment Agreement was subject to the parole evidence rule, the rule does not prevent the introduction of extrinsic evidence for the purpose of proving "whether or not there is consideration for a promise, even though the parties have reduced their agreement to a writing which appears to be a completely integrated agreement." Dementas v. Estate of Tallas, 764 P.2d 628, 631 (Utah App.

1988)(quoting from the Restatement (Second) of Contracts § 218(2) (1981); and also citing Soukop v. Snyder, 709 P.2d 109, 113 (Hawaii Ct. App. 1985)).

That is precisely the situation in the case at bar. Defendant contends that it was entitled to stop payments to Mrs. Hall under the Employment Agreement because she did not come to work, i.e., there was a failure of consideration. Conversely, Mrs. Hall contends that the parties never intended that she would ever go to work for Defendant; rather, that the consideration for Defendant's promises under the Employment Agreement was her promise to forego any claim to alimony in the Divorce Action simultaneously taking place between herself and Defendant's President and sole shareholder.

The Restatement (Second) of Contracts § 218 in comment (e) explains that "An incorrect statement of a consideration [contained in an apparently integrated agreement] does not prevent proof either that there was no consideration or that there was a consideration different from that stated." Thus, even if the Employment Agreement could properly be characterized as "integrated", Mrs. Hall was entitled to introduce extrinsic evidence to prove that the consideration given by her under the agreement was her promise to forego any claim to alimony in the Divorce Action.

Finally, even though the terms of the Employment Agreement may be unambiguous, the above discussed circumstances under which the agreement was entered into clearly show that the character of the Employment Agreement itself is ambiguous and, therefore, not subject to the parol evidence rule. E.g. Colonial Leasing Co. v.



Larsen Bros. Const., 731 P.2d at 487 (parol evidence is admissible "where the character of the written agreement itself is ambiguous even though its specific terms are not ambiguous").

Accordingly, Plaintiff respectfully submits that the District Court's conclusions/findings with respect to the parol evidence issue are neither supported by substantial evidence nor in accordance with the law and must be rejected.

(3) The District Court abused its discretion in disallowing the testimony of Brent Turley.

As noted above, Plaintiff attempted to introduce and preferred the testimony of Mr. Brent Turley that:

Mr. Hall offered to purchase ... Mr. Turley's home, using as the down payment an employment contract just like the one we [have] here in which Mr. Turley would be an employee of the company, receive salary and benefits in exchange for the down payment on his home.

(Trial Tr. at p. 60, lines 16-22).

The District Court sustained Defendant's objection to Mr. Turley's testimony on the grounds of relevance. (Trial Tr. at p. 60, lines 14-15)

Plaintiff submits that Mr. Turley's testimony would clearly have been relevant and that the District Court abused its discretion in ruling to the contrary.

The Pre-Trial Order identifies the "Factual Disputes Remaining For Trial" as:

1. Whether the consideration given by Plaintiff for Defendant's promises under the Employment Agreement was her promise to forego any claim to alimony in connection with the divorce proceeding simultaneously taking place between Plaintiff and Defendant's President and sole shareholder, John A. Hall.

2. Whether the parties ever intended that Plaintiff would actually go to work for Defendant under the Employment

Agreement.

3. Whether the written Employment Agreement was intended by the parties to represent the full and complete agreement of the parties.

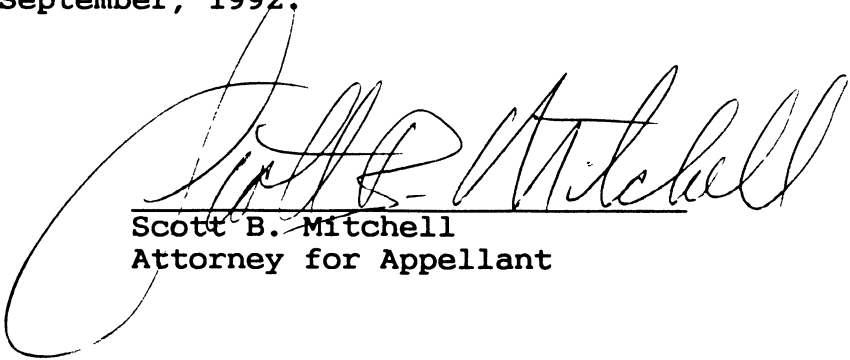
(R. 00150 and Addendum 1 attached hereto)

Clearly, Mr. Turley's testimony would have been relevant to each of these questions. Mrs. Hall's position is that Mr. Hall attempted to buy out of his alimony obligation by giving her an Employment Contract with his company. Mr. Turley would have testified that Mr. Hall attempted to do essentially the same thing with respect to the down-payment on the home he purchased from Mr. Turley. Thus, in a case like the one at bar, which is essentially a swearing contest between the parties, Mr. Turley's testimony would not only have been highly relevant it would have been extremely important corroboration.

#### CONCLUSION

Based upon the foregoing, Plaintiff respectfully requests that the District Court's Judgment be reversed and that this action be remanded to the District Court with instructions for further proceedings consistent with this Court's decision.

DATED this 23<sup>rd</sup> day of September, 1992.



Scott B. Mitchell  
Attorney for Appellant

**MAILING CERTIFICATE**

Undersigned certifies that he mailed a copy of the foregoing Appellant's Opening Brief to James A. McIntyre, Esq., 360 East 4500 South, Suite 3, Salt Lake City, Utah 84107, this 25th day of September, 1992.

September

## Addendum 1

SCOTT B. MITCHELL (5111)  
Kearns Building, Suite 721  
136 South Main Street  
Salt Lake City, Utah 84101  
Telephone: (801) 532-7858

NOV 1 1991

SALT LAKE COUNTY  
By W. B. [Signature]  
Deputy Clerk

Attorney for Plaintiff

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

\* \* \* \*

MARGARET B. HALL,

Plaintiff,

vs.

PROCESS INSTRUMENTS AND  
CONTROL, INC., a Utah  
corporation,

Defendant.

\*

\* PRE-TRIAL ORDER

\*

\*

\*

\*

\*

\* Civil no. C82-4399

\*

\* Honorable John A. Rokich

\* \* \* \*

By agreement of the parties, the Court hereby issues the following Pre-Trial Order.

**I. UNDISPUTED FACTS**

1. At all relevant times prior to June 9, 1981, Plaintiff and Defendant's President and sole shareholder, John A. Hall, were husband and wife.

2. On June 9, 1981, a Decree of Divorce was entered in Third Judicial District Court of Salt Lake County, Civil No. D-81-695, dissolving the bonds of matrimony theretofore existing between Plaintiff and John A. Hall. The Decree became effective as of September 9, 1981.

3. On or about February 20, 1981, Plaintiff and Defendant entered into an agreement entitled "Employment Agreement".

00148

4. Plaintiff never went to work for Defendant under the Employment Agreement.

5. Defendant paid Plaintiff the sum of \$15,000.00 pursuant to the Employment Agreement between March of 1981 and May of 1982.

9. Defendant has failed to make any payments called for under the Employment Agreement from and after May 14, 1982.

10. Plaintiff remarried on or about May 31, 1982.

11. The parties have stipulated that if the Court determines that the Employment Agreement is enforceable, Plaintiff is entitled to recover the sum of \$21,500.00, plus interest at the rate of eight percent per annum from the respective dates of Defendant's breach of the Employment Agreement until the date of judgment and thereafter at the rate of twelve percent per annum until paid, for Defendant's failure to pay to Plaintiff the \$1,000.00 per month salary called for under the agreement after May 14, 1982.

12. The parties have stipulated that if the Court determines that the Employment Agreement is enforceable, Plaintiff is entitled to recover the sum of \$1,506.10, plus interest at the rate of eight percent per annum from March 31, 1984, until the date of judgment and thereafter at the rate of twelve percent per annum until paid, for Defendant's failure to pay Plaintiff's share of the Defendant's Profit Sharing Plan.

13. Plaintiff and John Hall executed an Ante-Nuptial Agreement on or about February 2, 1976, pursuant to which they agreed on the terms of any alimony award in the event of divorce.

## **II. FACTUAL DISPUTES REMAINING FOR TRIAL**

1. Whether the consideration given by Plaintiff for Defendant's promises under the Employment Agreement was her agreement to forego any claim to alimony in connection with the divorce proceeding simultaneously taking place between Plaintiff and Defendant's President and sole shareholder, John A. Hall.

2. Whether the parties ever intended that Plaintiff would actually go to work for Defendant under the Employment Agreement.

3. Whether the written Employment Agreement was intended by the parties to represent the full and complete agreement of the parties.

## **III. QUESTIONS OF LAW REMAINING FOR DETERMINATION**

1. Whether Defendant's obligations under the Employment Agreement terminated automatically upon Plaintiff's remarriage by virtue of Utah Code Annotated Section 30-3-5(5).

2. Whether the "Parol Evidence Rule" precludes Plaintiff from introducing evidence of contemporaneous conversations, statements, or representations of the parties for the purpose of varying or adding to the terms of the Employment Agreement.

3. Whether Plaintiff breached the Employment Agreement by failing to go to work for Defendant.

4. Whether an enforceable contract exists between the parties.

## **IV. WITNESSES TO BE CALLED TO TESTIFY AT TRIAL**

(A) Witnesses to be called by Plaintiff

Plaintiff intends to call the following witnesses to testify

at the trial of this matter:

1. Plaintiff
2. John A. Hall
3. Brent Turley
4. Any witness called to testify by Defendant

**(B) Witnesses to be called by Defendant**

1. John A. Hall
2. Plaintiff
3. Pete Ennega

**V. EXHIBITS TO BE INTRODUCED AT TRIAL**

**(A) Exhibits to be introduced by Plaintiff**

1. Employment Agreement dated February 20, 1981.
2. All pleadings, exhibits and other papers on file in this matter.
3. Defendant's responses to Interrogatories and all documents produced by Defendant in response to Plaintiff's requests for production of documents.
4. The depositions of John A. Hall, Margaret Martin, and Pete Ennega, and all deposition exhibits.
5. Copies of PIC check numbers 1201 and 1188; and PIC check stubs for check numbers 1129, 1160, 1091, 1106, 1066, 1081, 1019, 1054, 1008; and PIC check stubs dated 09-30-1981, 08-31-1981, 09-15-1981, 06-15-1981, 06-30-1981, 07-31-1981, 05-28-1981, 04-30-1981, 5-15-1981, 04-15-1981, 03-31-1981, 03-13-1981, 02-27-1981.
6. Hand-written memo from J to Maggie.
7. Decree Of Divorce entered in civil no. D-81-695



8. Complaint and Answer filed in civil no. D-80-2725

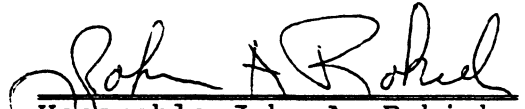
9. Assignment dated February 20, 1981, relating to 450 SL  
Mercedes

**(B) Exhibits to be introduced by Defendant**

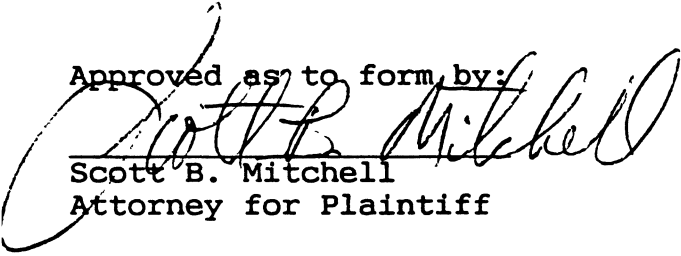
Defendant intends to introduce the following exhibits at  
trial:

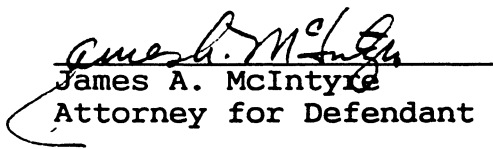
1. Ante-Nuptial Agreement dated February 26, 1976

DATED this 13 day of November, 1991.

  
Honorable John A. Rokich  
District Court Judge

Approved as to form by:

  
Scott B. Mitchell  
Attorney for Plaintiff

  
James A. McIntyre  
Attorney for Defendant

00152

## Addendum 2

JAMES A. McINTYRE - 2196  
Attorney for Defendant  
360 East 4500 South, Suite 3  
Salt Lake City, Utah 84107  
Telephone: (801) 266-3399

Third Judicial District

MAR 4 1992

*[Signature]*  
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

MARGARET B. HALL,  
Plaintiff,

vs.

PROCESS INSTRUMENTS AND  
CONTROL, INC., a Utah  
Corporation,

Defendant.

JUDGMENT

Civil No. C82-4399

Judge John A. Rokich

BASED upon the Findings of Fact and Conclusions of Law on file  
herein and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff have  
judgment against the Defendant of no cause of action. Each party  
shall bear their own costs and fees herein.

DATED this 4 day of March, 1992.

BY THE COURT:

*[Signature: John A. Rokich]*

HONORABLE JOHN A. ROKICH  
District Court Judge

APPROVED AS TO FORM:

SCOTT B. MITCHELL

00169

## Addendum 3

JAMES A. McINTYRE - 2196  
Attorney for Defendant  
360 East 4500 South, Suite 3  
Salt Lake City, Utah 84107  
Telephone: (801) 266-3399

THIRD JUDICIAL DISTRICT

MAR 4 1992

SALT LAKE COUNTY  
By W. C. [Signature]

IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

MARGARET B. HALL,  
  
Plaintiff,  
  
vs.

PROCESS INSTRUMENTS AND  
CONTROL, INC., a Utah  
Corporation,  
  
Defendant.

**FINDINGS OF FACT &  
CONCLUSIONS OF LAW**

Civil No. C82-4399

Judge John A. Rokich

This cause came on regularly for hearing on the 14th day of November, 1991, at the hour of 9:30 o'clock a.m. before the Honorable John A. Rokich, District Judge of the above-entitled Court. The Plaintiff appeared personally with her attorney, Scott B. Mitchell. The Defendant appeared personally with its attorney, James A. McIntyre. The Court heard the testimony of witnesses, admitted documentary evidence, read the memoranda submitted and took the matter under advisement, the Court having been fully advised in the premises finds as follows:

Findings of Fact

1. Plaintiff was formerly married to John A. Hall, the sole shareholder of Defendant.
2. Plaintiff and John A. Hall were divorced on June 8, 1981.
3. The decree of divorce provided that no alimony be awarded to

Plaintiff.

4. The decree of divorce provided with specificity the distribution of the marital estate and did not refer to the settlement agreement between those parties; however, the decree makes no reference to the employment agreement as being a part of the settlement agreement.

5. On February 20, 1981 plaintiff and defendant entered into an employment agreement the terms of which were clear and unambiguous and appear to be complete and certain.

6. The parties testified that the underlying purpose of the employment agreement was to provide income and medical insurance coverage inasmuch as Plaintiff was suffering from hepatitis at the time the agreement was executed.

7. Defendant paid plaintiff for a period of 14 months even though plaintiff never performed any work.

8. Defendant thereafter terminated plaintiff and sent her a termination notice ( on May 20, 1982 ).

9. Plaintiff remarried and moved from the State of Utah shortly following the termination of the agreement ( on May 31, 1982 ).

10. Plaintiff filed suit herein to enforce the terms of the employment agreement.

11. Plaintiff alleged in her initial complaint that "Plaintiff has fully performed the obligations and rendered the services contemplated by said agreement and plaintiff continues to be able and willing to perform such obligations.

12. The evidence did not support plaintiff's claim that she had

fully performed the obligations and rendered the services contemplated by the employment agreement.

13. Eight years after the filing of her original complaint plaintiff amended her Complaint to allege that the employment agreement had been entered into in return for plaintiff's promise to forego alimony because she realized that she was unable to prove that she had performed or was willing to perform her obligations under the employment agreement as written.

14. At trial defendant interposed an objection to all evidence of the agreement of the parties other than the writing itself based upon the parole evidence rule.

15. Plaintiff was allowed to introduce parole evidence, subject to exclusion, in order to attempt to establish that the agreement was not either an integration or a partially integrated contract.

16. Plaintiff's claim for relief under any of her theories was the total of benefits conferred by the terms of the written agreement.

#### Conclusions of Law

1. The Plaintiff's claim fails under the employment agreement because she failed to perform the obligations of that agreement.

2. The Plaintiff's claim that the employment agreement was entered into in lieu of alimony fails because, absent written agreement to the contrary, alimony terminates upon remarriage.

3. The employment agreement was not included in the decree of divorce, therefore it is unenforceable as a part of the decree of divorce.

4. Plaintiff fail to establish that the meaning or intent of the

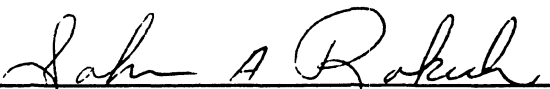
employment agreement was anything other than its clearly written terms which would give rise to an enforceable agreement under any one of the legal theories advanced during the course of this litigation.

5. The employment agreement is clear and unambiguous on its face and not subject to change by parole evidence.

6. Since Plaintiff failed to meet her burden of proof on any of her legal theories she is entitled to a judgement of no cause of action.

DATED this 4 day of March, 1992

BY THE COURT:

  
HONORABLE JOHN A. ROKICH  
District Court Judge