1966

Vincent Chiodo v. Bear River Telephone Company : Reply Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

VINCENT CHIODO,
Plaintiff and Respondent,

vs.

BEAR RIVER TELEPHONE COMPANY,
Defendant and Appellant.

Case No. 10473

REPLY BRIEF OF APPELLANT

Appeal From a Judgment Of The First ~~Third~~ District Court of ~~Salt Lake~~ Box Elder County
Honorable ~~Stewart M. Hanson~~ Lewis Jones

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This reply brief is filed pursuant to the provisions of Rule 75(p) of the Utah Rules of Civil Procedure and will be limited to answering new matters set forth in respondent's brief.

Argument

I. THE EMPLOYMENT CONTRACT IN QUESTION WAS NOT AN ANNUITY AND WAS TERMINABLE FOR GOOD CAUSE.

Although respondent under the "Statement Of Kind Of Case" (Br. 1-2) states that his contention at the trial level was that the contract in question provided him "a guaranteed employment for 10 years with no right in Bear River to terminate his employment or, at least, the payments required thereunder" this contention is not an issue before this Court. Respondent agrees under point 1 of his argument (Br. 20) that the trial court did determine that the employment agreement could be terminated for good cause and while he wistfully recalls this theory (Br. 22 and 55-56), the respondent has not attempted to contest the trial court's determination and has taken no cross appeal on this issue. It is, therefore, clear that the primary issue before this Court is whether Vincent Chiodo's actions as established by defendant-appellant constitute legal justification for the termination of his employment contract.

II. THE FINDINGS OF FACT DO NOT MEET THE REQUIREMENTS OF RULE 52 OF THE UTAH RULES OF CIVIL PROCEDURE AND MUST BE CONSIDERED TOGETHER WITH THE ORAL OPINION OF THE COURT BELOW.

Respondent, on page 44 of his brief, cites this Court's opinion in *Wasatch Oil Refining Co. v. Wade*, 92 Utah 50, 63 P.2d 1070, 1075 (1936), for the proposition that the oral or written opinion of the trial court cannot be looked to to ascertain what the trial court

has decided once findings have been entered. In that case, decided long before Rule 52 was adopted, the trial court had not made any findings and this Court concluded that no reviewable decision had been entered until findings and a judgment were made and filed. It also stated that the oral opinion of the Court could not be substituted for findings. However, it neither said nor implied that inadequate findings could not be examined in light of the court's oral opinion, for such is not the law. *Sprague v. Boyles Bros. Drilling Co.*, 4 Utah 2d 344, 294 P.2d 689 (1956).

There are two basic reasons why respondent's claim of sanctity for the Findings in this case is without merit —both having their basis in Rule 52, Utah Rules of Civil Procedure.

In the first place the findings were prepared by counsel for plaintiff and adopted verbatim by the trial court. The Supreme Court of the United States has recently commented on this aspect of appellate review of findings drafted by counsel and mechanically adopted by the trial court contrary to the provisions of Rule 52, Federal Rules of Civil Procedure, which is similar to Utah Rule 52.

In *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 (1964), the Court said:

> "There was a trial, and after oral argument the judge announced from the bench that judgment would be for appellees and that he would not write an opinion. He told counsel for ap-

pellees 'Prepare the findings and conclusions and judgment.' They obeyed, submitting 130 findings of fact and one conclusion of law, all of which, we are advised, the District Court adopted verbatim. Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence. United States v. Crescent Amusement Co., 323 US 173, 184-185, 89 L ed 160, 169, 65 S Ct 254. Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court.[4] See 2B Barron and Holtzoff, Federal Practice and Procedure (Wright ed. 1961) § 1124. Moreover, these detailed findings were 'mechanically adopted,' to use the phrase of the late Judge Frank in United States v. Forness, 125 F2d 928, 942, and do not reveal the discerning line for decision of the basic issue in the case."

Footnote 4 to the opinion is as follows:

"4. Judge J. Skelly Wright of the Court of Appeals for the District of Columbia recently said:

" 'Who shall prepare the findings? Rule 52 says the court shall prepare the findings. "The court shall find the facts specially and state separately its conclusions of law." We all know what has happened. Many courts simply decide the case in favor of the plaintiff or the defendant, have him prepare the findings of fact and conclusions of law and sign them. This has been denounced by every court of appeals save one. This is an abandonment of the duty and the trust that has been placed

in the judge by these rules. It is a noncompliance with Rule 52 specifically and it betrays the primary purpose of Rule 52—the primary purpose being that the preparation of these findings by the judge shall assist in the adjudication of the lawsuit.

" 'I suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeal they won't be worth the paper they are written on as far as assisting the court of appeal in determining why the judge decided the case.' Seminars for Newly Appointed United States District Judges (1963), p. 166."

While the factual findings of the trial court are not to be rejected "out-of-hand" if supported by evidence, appellant does not so contend with respect to the so-called "findings" in this case. This points up the second failure of the findings to meet the requirements of Rule 52. The findings do not include any specific or direct findings on the fundamental issues of fact before the court which the rules require. *Harmon v. Rasmussen,* 13 Utah 2d 422, 375 P.2d 762 (1962); *Gaddis Investment Co. v. Morrison,* 3 Utah 2d 43, 278 P.2d 284 (1954); *Featherstone v. Barash,* 345 F.2d 246 (10th Cir. 1965). It is appellant's position that the trial court made no finding of fact with regard to the specific conduct of Vincent Chiodo on which appellant

relied as justification for the discharge of Vincent Chiodo. The trial court could not, in fact, find that Vincent Chiodo had not engaged in the alleged conduct because the evidence of such conduct is clear. What the trial court did was to conclude that the actions of Vincent Chiodo did not provide a legal basis for his discharge—in light of the community morals at the time. Even the findings prepared by respondent's counsel do not purport to find, as a fact, that the alleged conduct of Vincent Chiodo did not occur. Said findings merely conclude that Vincent Chiodo was discharged "without just cause and excuse." This conclusion is a result of the trial court's erroneous view of the law applicable to termination of employment contracts having a specified duration.

Appellant can hardly attack the findings of fact as to the specific conduct of Vincent Chiodo because there are no such findings. If findings had been prepared by respondent's counsel and they had been contrary to the facts as shown by the evidence then they would have been attacked on that ground. Defendant did file its "Objections to Plaintiff's Proposed Findings of Fact and Conclusions of Law and to the Proposed Judgment" (R. 678) in an effort to cause the court to make findings relating to specific conduct of Vincent Chiodo. However, these objections were overruled "out-of-hand" and the findings prepared by plaintiff's counsel were "mechanically adopted."

It is recognized that what Vincent Chiodo did or did not do is a matter of fact, but the legal consequence

of such acts is clearly a matter of law. There are no findings of fact relating to the specific charges of misconduct of Vincent Chiodo and, therefore, this Court should and must look to the underlying evidence. It is appellant's position that its discharge of Vincent Chiodo was legally justifiable because of his proven misconduct as outlined in our opening brief. The trial court made no finding that such conduct did not in fact occur, but in its oral opinion attempted to find a legal excuse for its general conclusion that despite such conduct on his part plaintiff was entitled to recover. Appellant submits the trial court erred as a matter of law in concluding that no justifiable cause existed for the discharge of Vincent Chiodo.

The failure of counsel for plaintiff to prepare and submit specific findings of fact as required by Rule 52 could be attributed either to a fear that following the court's oral opinion in framing findings of fact and conclusions of law would expose all too clearly the court's erroneous view of the law or to a concern that specific findings in accord with the conclusions of law would result in findings of fact that the trial court would reject as contrary to its view of the evidence. The resulting camouflage of generalities is not entitled to be regarded as a shield to preclude this court from finding and correcting the erroneous conclusions of law of the court below.

A recent opinion of the Court of Appeals for the Tenth Circuit, written by District Judge Christensen,

reviews the requirements for findings under Rule 52. *Featherstone v. Barash,* supra p. 5. Judge Christensen concludes at page 250:

> "And when findings wholly fail to resolve in any meaningful way the basic issues of fact in dispute, they become clearly insufficient to permit the reviewing court to decide the case at all, except to remand it for proper findings by the trial court."

This step is not necessary in the case at bar as this court has before it the oral opinion of the trial court which may be considered together with the findings. *Sprague v. Boyles Bros. Drilling Co.,* 4 Utah 2d 344, 294 P.2d 689 (1956). This court there noted that where the findings are inadequate, as they are in the case at bar, an opinion or memorandum of decision of the trial court may be consulted. Such resort to the oral opinion of Judge Jones announcing the basis for his conclusion that plaintiff should recover (R. 588-592) clearly shows the errors of law committed below.

III. THE ACTIONS OF VINCENT CHIODO DURING THE COURSE OF HIS EMPLOYMENT WERE INCONSISTENT WITH THE EMPLOYMENT AGREEMENT.

A. Payroll Padding.

Respondent's brief demonstrates an ability to rationalize and find excuses for conduct which is generally regarded by right thinking people as improper and dishonest. The most striking example of this ability

is respondent's efforts to gloss over the documentary evidence of falsification of payroll records by Vincent Chiodo for his son, Don Chiodo.

On page 25 of his brief, respondent argues that while it is true that the payroll records of Bear River Telephone Company were falsified by Vincent Chiodo and by Mr. Staples at the direction of Vincent Chiodo, this falsification was justified because of "the answering testimony . . . that Don Chiodo had time coming to him because of work that he had been required to do for Bear River during his vacation period and some extensive night work which he had performed for Bear River without charge."

Even if this excuse were accepted as being true, which it is not, it would not justify the preparation of what was patently a false and fraudulently written report. If Don Chiodo had time coming, his time record, while he was absent from the state, could very well have shown his contention without the obvious and deliberate falsification of company records. The very fact that the plaintiff is trapped by written evidence of his willingness to change facts to support his own purposes is strong evidence that the other testimony introduced by him is suspect.

In a strained effort to show that it was not wrongful for Vincent Chiodo to falsify payroll records, defendant points to the testimony of Mr. Staples who testified that Vincent Chiodo told him to tell the truth if he was ever called as a witness. It is really rather amazing

that plaintiff can hope to prove a fact by taking two entirely unrelated statements — bring them together as one and prove the desired fact. It is true that Mr. Staples testified that Vincent Chiodo told him and other employees to tell the truth when Vincent Chiodo was telling them that he was going to have a court battle over his contract as early as six months after he sold his Bear River Telephone Company stock to General Waterworks Corporation (R. 324). It is entirely untrue that Vincent Chiodo ever told Mr. Staples to tell the truth regarding his fraudulent reporting of Don Chiodo's time and it was only through the process of discovery that this fact was ascertained by defendant. There is no evidence that there was anything whatever said to Mr. Staples by Vincent Chiodo with respect to the false payroll reporting except to instruct him what to write down.

The excuse proposed by plaintiff, that Don Chiodo had time coming, is not supported by anything stronger than Don Chiodo's self-serving declaration that he was diligent and worked many hours overtime. The record (Ex. 104) shows that he was actually paid for 204¼ hours of overtime in 1962 in addition to his having been allowed 33.1 days off from work on holidays, vacation and jury duty. Exhibit 104 shows that Don Chiodo was actually off work and on vacation over 15 days in 1962 and the company policy would permit him only 15 days of vacation (R. 418). In addition to his days away from work, the overtime paid him and his claim that he was doing subcontract work for Max Fonnesbeck for

which he received at least $3,700 over a period of a year and a half makes his excuse for falsification of payroll records incredible and beyond belief.

The statement "that there was nothing wrongful or hidden with respect to Don Chiodo's taking nine days off" and that Vincent Chiodo had a "clear conscience and freedom from guilt" (Br. 25-26) all because he had often told his employees he would have a court battle over his employment contract and that they should tell the truth if called as witnesses is indeed remarkable. Clearly Vincent Chiodo felt that he was in the right in everything he did. He apparently believed that he could sell his company and continue to exercise the same control over the company as manager for a new owner as he did while manager for himself. This attitude is demonstrated by the following statement from respondent's brief (p. 33):

> "Plaintiff did become exercised on several occasions because of the irritations that developed as a result of New London's interference and failure to permit him to manage the company as had been agreed. Under all of the circumstances it appeared that plaintiff exercised a remarkable amount of restraint."

There can be little doubt that a great deal of the friction between Vincent Chiodo and the other officers of Bear River Telephone Company was a result of his feeling that he had the right to do as he pleased with the company without control or direction from the owners of the company. There was no such right granted Vincent

Chiodo, but his assumption that his employment contract gave him such right may help to explain how he could rationalize to the point where he convinced himself that all his problems were caused by the fact that his superiors informed him from time to time how they desired the company to be operated.

On pages 26-29 of his brief, respondent once again attempts to prove a given fact by connecting unrelated statements made as to separate unrelated facts or occurrences together as if they were related. This is equivalent to a Bible reader finding a statement that "Cain slew Abel" and an admonition by Christ that one should "go and do likewise" and prove by that that Christ approved of murder. Steve Anderson testified (R. 353-355) that he helped splice aerial cable shown on Exhibit 58. This cable was at plant 78 as identified by Mr. Fonnesbeck (R. 226). Plaintiff's reply brief reports the testimony of Don Chiodo relative to Exhibit 53 (R. 543-545) which related to underground conduit installation at the Thiokol R & D plant and argues that because Don Chiodo testified that he did some correction of the Henkels-McCoy splicing with company help on company time that the testimony of Steve Anderson is "unsupported by any evidence, is false, for the testimony established that the cable splicing was not part of the Fonnesbeck contract at all . . . ." The underground conduit at the R & D plant had nothing to do with splicing aerial cable at plant 78 about which Steve Anderson testified and for which splicing Max Fonnesbeck paid Don Chiodo $2,000.00 (R. 230). The plain

fact is that there is no competent evidence to show that Steve Anderson did not do exactly what he said he did, i.e., help Don Chiodo, on Bear River Telephone Company time, splice the aerial cable at plant 78 which was under contract to Max Fonnesbeck and under subcontract to Don Chiodo for splicing.

On page 29 of his brief, respondent attempts to excuse Vincent Chiodo causing the company to pay his 14-year-old granddaughter $354.20 for delivering telephone directories that were delivered by Don Chiodo and his wife while Don Chiodo was on Bear River Telephone Company time by alleging that Mr. Warner had himself delivered directories for Bear River Telephone Company and had been paid. What plaintiff forgets is that Mr. Warner did his delivery on his own time and that even if he had done it on Bear River Telephone Company time it would not excuse Vincent Chiodo from paying his granddaughter for doing work which Don Chiodo did on company time.

While respondent accuses appellant of making baseless accusations (Br. 27), of beating a "hasty retreat" from a previous position (Br. 26), of "desperation" in attempts to justify respondent's discharge (Br. 29) and of dredging up evidence (Br. 23), it is submitted that such claims — with no support in any evidence—should not be a substitute for an examination of the facts.

B. Instructions From Donald Bell.

It is untrue that defendant ever abandoned the defense of the failure of Vincent Chiodo to comply with instructions from Mr. Bell as one of the bases for the discharge of Vincent Chiodo as alleged on page 23 of respondent's brief. Also, it did not affirmatively appear from any of the evidence that Vincent Chiodo had substantially complied with said instructions. The testimony of Mr. Bell revealed that Vincent Chiodo never answered his letter but that he had his attorney, Calvin Rampton, write a letter for him in which general propositions were set forth giving no bona fide explanation of what was requested (R. 170; 178-182).

One of the items requested by Mr. Bell's letter (Ex. 46, para. 6) was an explanation of why Thiokol had not been billed for approximately $1,500.00 in additional charges for WATS service retroactive to June 6, 1963. These are the same charges about which Mr. Warner testified that Vincent Chiodo instructed him to furnish no information to New London (R. 439):

> "Q. As a result of this letter you received, what did you do?
>
> "A. I took the letter to Mr. Chiodo.
>
> "Q. What did he say?
>
> "A. He said that anything pertaining to the watts bands charges was to be referred directly to him, that I was to make no communication to anyone in New London regarding them."

and also about which Vincent Chiodo said (R. 444):

> " . . . if they can't figure out that they are losing or making money from those figures, that that was their fault, that it didn't mean anything to us here."

As the preparation for the trial of this lawsuit revealed even stronger justification for the discharge of Vincent Chiodo than his failure to furnish the information demanded by Mr. Bell, defendant has naturally placed primary emphasis on its strongest points and has not placed great emphasis on what would otherwise be ample justification for Vincent Chiodo's discharge. This is in no way an abandonment by Bear River Telephone Company of the defense based upon the default of Vincent Chiodo in failing to furnish the information sought by Mr. Bell.

C. Condonation Of Respondent's Insubordination.

On pages 31 and 32 of his brief, respondent quotes from Am. Jur. to the effect that retention of an employee after actual discovery of an act of misconduct will *in some circumstances* amount to condoning the act. In some circumstances this may well be true, but in the case of Vincent Chiodo those acts which were discovered before commencement of this lawsuit were never condoned[1] and it was only because of remarkable forebearance that Vincent Chiodo was not terminated long before he was. The letter of Mr. Butcher (Ex. 25) clearly states that if Vincent Chiodo continued to fail to obey orders and continued to foment trouble he would be fired. There is certainly nothing in the record of this

[1] See e.g., Ex. 11, 25, 28, 30, 32, 34, 46, 49.

case to indicate that Vincent Chiodo's actions were condoned. On the contrary, there were warnings given with respect to each infraction, culminating when Vincent Chiodo was discharged because Mr. Bell finally became convinced that "he was impossible to live with. . . . Impossible for anybody to get along with" (R. 176). This action was not taken until all efforts to obtain the cooperation of Vincent Chiodo had failed (R. 171-176). The reluctance of Bear River to take the final step of discharge, despite Chiodo's deliberate provocations, was not condonation but out of consideration for the personal relationship of Chiodo and his family to the company. For plaintiff to claim condonation in such circumstances does indeed put strain upon the quality of mercy.

D. Disclosure Of Confidential Information.

On pages 36 and 37 of his brief, respondent states that Vincent Chiodo was justified in advising the Public Service Commission of Utah and the R.E.A. of pending negotiations between Mountain States Telephone and Telegraph Company and General Waterworks Corporation for the exchange of Bear River Telephone Company. Mr. Chiodo testified (R. 40-41) that he went to a meeting in Denver at the request of Mr. Sanders where he was informed of the pending negotiations. He testified in pertinent part (R. 40-41):

> "A. We were informed by Mr. Sanders that his firm had found it convenient to trade the property to A. T. & T., who in turn had con-

tacted Mountain States Telephone and Telegraph Company for some sort of a trade; that the Mountain States Company would take over all of the employees except Vincent Chiodo, and that he was through.

"Q. What did you say?

"A. I was shocked and I recall saying under my breath and—

"Q. Well, now what did you say to them? I don't care what you said under your breath.

"A. I didn't say anything to them.

"Q. Well, just tell me what you said.

"A. Other than that I would be willing to cooperate, that I suppose my contract could be compromised, but received no further comment."

While Vincent Chiodo said nothing about Mr. Sanders' agreement to honor the contract, Mr. Bell testified without contradiction that this information was given to Vincent Chiodo by both Mr. Sanders and Mr. Bell. Mr. Bell testified (R. 109-110):

"Q. Now in this conversation when it was made clear to Mr. Chiodo that if the exchange were made with the Mountain States people that they probably wouldn't want him, was anything said to him by either you or Mr. Sanders with respect to what you would do on his contract?

"A. Yes.

"Q. What was said?

"A. I recall that Mr. Sanders made the statement to Mr. Vince Chiodo, in outlining the possible exchange of properties, that it would

not be possible for Mountain States or that Mountain States would not be interested in taking Mr. Chiodo, Mr. Vince Chiodo, with the trade. But that he would see or that we would see, Bear River Telephone Company would see, I assume he meant, that his contract was honored. And I recall myself assuring him of this before the meeting broke up, before we separated."

Mr. Bell also testified that this same information was communicated to Mr. Rampton, Vincent Chiodo's lawyer (R. 111-112):

"Q. Now why didn't you tell me when I called you on the phone that you'd take care of Mr. Chiodo?

"A. Certainly it was my recollection that we didn't leave any doubt in your mind that we had every intention of observing our contract with Mr. Chiodo. I have no other recollection.

"Q. Weren't our negotiations pretty much on a 'maybe we will and maybe we won't' basis when you and I broke off?

"A. Not to my recollection, sir.

"Q. It's your recollection that that you gave me assurance that the —

"A. That we would observe his contract.

"Q. Wasn't it a fact that what you said to me, 'Well, we might have to'?

"A. No, I think what I said to you was, 'We have no choice, and we have no intention of doing otherwise'."

It was obviously not fears for his employment contract which caused Chiodo to run to the R.E.A. and the Public Service Commission of Utah contrary to express instructions from his superiors, but a desire to prevent the trade with Mountain States Telephone and Telegraph Company — a matter which did not concern him in light of Sanders' commitment to honor his employment contract.

E. Disloyalty.

On page 38 of his brief, respondent attempts to excuse his underhanded attempt to act as agent for a third party in a negotiation with his principal by asking to whom he owed loyalty as manager of Bear River. Respondent concludes that as manager of Bear River "the attempted purchase of stock from General Waterworks Corporation was not a breach of any responsibility that plaintiff might owe as manager of Bear River Telephone Company." It is obvious that respondent still does not believe that as a company officer and director his responsibility and fiduciary duty is to the corporate shareholders. See, e.g., *Elggren v. Woolley,* 64 Utah 183, 228 Pac. 906 (1924); *Glen Allen Mining Co. v. Park Galena Mining Co.,* 77 Utah 362, 296 Pac. 231 (1931). The shareholder of Bear River Telephone Company was General Waterworks Corporation.

It is recognized that Vincent Chiodo had a deep emotional involvement in the Bear River Telephone Company and that he had a strong resentment against Mountain States Telephone and Telegraph. It is under-

standable that Vincent Chiodo would, in looking to his own desires, do everything he could to prevent the Bear River Telephone Company from passing to a company which he had been fighting many years. What plaintiff forgets is that after he disposes of his property he has no legal right to control its destiny from that point on. His excuse that he went to the Utah Public Service Commission and the R.E.A. "to find out what the legalities might be on that" is simply not true. He went to his attorney to see about the "legalities" and he went to the Utah Public Service Commission and the R.E.A. to block the contemplated transfer. If the contemplated transfer had taken place, Vincent Chiodo would have his employment contract honored as was told him by Mr. Sanders and Mr. Bell and he had no right to attempt to satisfy his own desires as to the ownership of Bear River Telephone Company once he had sold it to General Waterworks.

Plaintiff alleges (Br. 38-39) that Vincent Chiodo not only wanted to protect himself but "also clearly wished to preserve Bear River Telephone Company and insure that it would be owned and operated by a responsible organization." As a resident of the Tremonton area, he may have had such an interest but his overriding obligation to Bear River Telephone Company was to the actual owners of Bear River Telephone Company and his obligation was not to take it upon himself to find an owner more suitable to his own interest. His interference in the Mountain States negotiations and his attempt to buy the company for Independent Tele-

phone Company are but two instances of Vincent Chiodo's volatile nature and effort to do what he wished in utter disregard of his duties to his employer, demonstrated over and over again in the record in this case.

IV. THE TRIAL COURT'S ORIGINAL DECISION WITH RESPECT TO APPLICATION OF THE PAROLE EVIDENCE RULE TO THE EMPLOYMENT AGREEMENT IN ISSUE WAS CORRECT.

Beginning on page 47 of his brief, respondent sets forth his contention that the employment agreement in this case can be varied by parole evidence and cites cases which he contends support his contention. None of the cited cases are in point here. The reason that these cases are inapposite is that there is no basis for contention in the present case that the written contract was ambiguous or susceptible of more than one construction.

In *Read v. Forced Underfiring Corp.*, 82 Utah 529, 26 P.2d 325 (1933), this Court bottomed its right to look to the circumstances at the time the contract was entered into because of the use of the term "net profits" in the contract which term the Court felt was ambiguous.

Respondent in this case refers to no language in the written agreement which is ambiguous or which he believes to mean something different from what appellant believes it to mean. However, at page 51 of his brief, respondent points to the language "to confirm our understanding . . ." and argues out that "confirm"

means "to complete or establish that which was incomplete or uncertain. . . ." Appellant agrees with this meaning. However, the contention by respondent that this language can be interpreted to incorporate by reference all the prior negotiations whether written or oral is not supported by any authority cited by him.

In *Hawaiian Equipment Company v. Eimco Corp.*, 115 Utah 590, 207 P.2d 794 (1949) there was some question as to the identification of goods covered by the contract and this Court said that parole evidence may be received "for a limited purpose." That purpose was to "apply the memorandum to the subject matter."

In *Maw v. Noble,* 10 Utah 2d 440, 354 P.2d 121 (1960) this Court stated:

> "We are in agreement with the well-recognized rule urged by the defendants that where there is uncertainty or ambiguity the contract should be strictly construed against him who draws it. But it is to be kept in mind that this rule applies only where there is some genuine lack of certainty, and not too strained or merely fanciful or wishful interpretations that may be indulged in. The primary and a more fundamental rule is that the contract must be looked at realistically in the light of the circumstances under which it was entered into, and if the intent of the parties can be ascertained with reasonable certainty it must be given effect." (P. 123.)

The case of *Ross v. Stricker,* 275 P.2d 991 (Okla. 1953) is concerned only with the question of whether the period of an agreement may be proven by parole evi-

dence where no duration is stated in the writing. The court held, with one strong dissent, that because the writing in issue was only a memorandum of a prior oral agreement and was not a contract, parole evidence of the duration of the contract was admissible. The present case does not involve any question concerning the duration of the employment agreement and is not a mere written memorandum of a prior agreement. The agreement at issue in this case is the only contract entered into by the parties.

In *Laskey v. Rubell Corp.*, 100 N.E.2d 140 (Ct. App. N.Y., 1951), the court determined that the contract in question was partly oral and partly written because the parties had actually entered into an oral contract and then later reduced a portion of the agreement to writing. The writing was entitled "Terms and Conditions of Employment" and was signed by the parties. The written document stated that the employment contract was "terminable, at any time, at the option of the Company" but the plaintiff desired to prove that the oral agreement was for employment for one year. The court ruled that parole evidence could not be introduced to vary the written agreement and then in dictum stated that the portion of the oral contract which was not reduced to writing could be proven by parole evidence if there were any dispute about the terms of the oral agreement. The holding and dictum of the *Laskey* case are of no importance in the present case because there never was an oral contract between the parties hereto and the written contract is the only agree-

ment ever entered into by them. Even if General Waterworks Corporation were the party defendant, which it is not, there is no evidence that the parties entered into an oral contract prior to the execution of the employment agreement.

It may well be that both respondent and appellant agree as to the law governing parole evidence, but differ as to its application here. Respondent points to no ambiguity in the written agreement (Ex. 6) but relies as did the court below (R. 589) when it reversed its earlier conclusion (R. 584) on the use of the word "confirm" in the second paragraph of Exhibit 6. It is submitted that the phrase in its context and the quoted definition from Black's Law Dictionary clearly connote the letter is intended as an integration of all earlier oral "understandings" — the classic example of the application of the parole evidence rule. A reading of the rest of the letter agreement "confirms" this intent. It covers all the essentials of the employment arrangement — terms, duties and salary. The last paragraph of the letter proper and the acceptance below "reconfirm" that intent. Any attempt to conjure an ambiguity or patent omission of an essential term can only make a mockery of the rule and its purpose. The original decision of the trial court (R. 584) was sound on this point. ***Bullock v. Deseret Dodge Truck Center, Inc.,*** 11 Utah 2d 1, 354 P.2d 559, 563 (1960).

V. THE ALLEGED MALICE OF DEFENDANT IS NOT AN ISSUE IN THIS CASE.

Respondent in his so-called "Statement of Facts" (Br. 19) claims the discharge of Vincent Chiodo's two sons demonstrate malice and bad faith on the part of defendant. Such charge is groundless. Vincent Chiodo's sons had no vested rights of employment and their continued employment was at the pleasure of the employer. *Held v. American Linen Supply Co.,* 6 Utah 2d 106 307 P.2d 210 (1957); *Bullock v. Deseret Dodge Truck Center,* 11 Utah 2d 1, 354 P.2d 559. Respondent points out that their work was not criticized and they were fired because they were "fomenting trouble" and not because their work was unsatisfactory as stated on the termination slip. It is hard to imagine how an individual's work could be more unsatisfactory than when he is fomenting trouble. Vincent Chiodo commenced this very action against the Bear River Telephone Company on January 9, 1964, yet his sons were retained until March 13, 1964, when it became apparent that the sons' loyalty was more to Vincent Chiodo than it was to the company. They had to be terminated in order to continue the company's business without involving the employees in problems with the Chiodo family.

The letter of James L. Morrison to Mr. Calvin L. Rampton, which plaintiff also cites as showing malice, was a letter from one attorney to another in which terminology common among lawyers was used. It is commonly said by lawyers that a witness is "destroyed" by certain evidence. Respondent in this case, while making accusations that appellant is desperately attempting to justify its discharge of Vincent Chiodo, is himself

doing exactly what he accuses appellant of doing. To attempt to color the motives of appellant by claims of malice and bad faith because of a letter from one attorney to another is certainly grasping at straws. The testimony of James L. Morrison confirms that he was merely referring to the belief that proof of Vincent Chiodo's activities would destroy his reputation for honesty and integrity which he presumably had in the community.

Finally, plaintiff's claim of malice was rejected by the trial court and he has taken no appeal from that ruling. To raise it here is a mere red herring directed to plaintiff's emotional reactions rather than to the issues before this Court.

CONCLUSION

A review of the record in this case amply demonstrates that appellant established just cause for the discharge of Vincent Chiodo. The general conclusions captioned "Findings of Fact" are not supported by the record and the trial court's theories in support of its conclusion are contrary to law. The judgment below should be reversed.

Respectfully submitted,

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