

1992

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

Utah Court of Appeals

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BRIEF

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920332

IN THE UTAH COURT OF APPEALS

MARGARET B. HALL

Plaintiff/Appellant,

vs.

PROCESS INSTRUMENTS AND
CONTROL, INC. a Utah corporation,

Defendant/Appellant.

Case No 920332-CA

Priority Classification 16

BRIEF OF APPELLEE

APPEAL FROM JUDGMENT OF THE THIRD DISTRICT COURT,
SALT LAKE COUNTY, HONORABLE JOHN A. ROKICH, JUDGE

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Clerk
Utah Court

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IN THE UTAH COURT OF APPEALS

MARGARET B. HALL,

Plaintiff/Appellant,

vs.

PROCESS INSTRUMENTS AND
CONTROL, INC., a Utah corporation

Defendant/Appellee.

Case N° 920332-CA

STATEMENT OF JURISDICTION

The Utah Court of Appeals has appellate jurisdiction of this matter pursuant to the authority granted by UTAH CODE ANN. § 78-2a-3(2)(k) (1992) and specifically over this case by virtue of a pour over order entered by the Supreme Court in case # 920189 following the notice of appeal filed by Appellant from a Judgment granted by the Third Judicial District Court of Salt Lake County, dismissing Plaintiff's action, no cause of action.

STATEMENT OF ISSUE ON APPEAL

Appellant's statement of the issues presented for appeal correctly sets forth both the issues and the standard of review with the exception that questions of fact are reviewable under the clearly erroneous standard. See *Wade v. Jobe*, 818 P.2d 1023 (Utah 1991); *Bell v. Elder*, 782 P.2d 545 (Utah App. 1989).

DETERMINATIVE STATUTE

UTAH CODE ANN. § 78-25-16 (1953)¹

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

1. This matter was originally filed on May 26, 1982 as an action for wrongful discharge of Plaintiff Margaret B. Hall (hereinafter "Margaret") as an employee of Defendant Process Instruments and Control, Inc. (hereinafter "PIC").²
2. The parties had entered into an employment agreement³ on February 20, 1981 which agreement had been drafted by attorney Peter Ennenga at the request of John Hall, PIC's president and sole stockholder.
3. The PIC filed an answer timely on the 18th of June 1982.⁴
4. On April 5, 1984 PIC filed a motion to dismiss.⁵
5. On June 18, 1984 PIC's counsel sent notice to the court and opposing counsel that he had relocated his office.⁶

¹ See Addendum 1

² Record on appeal p. 2

³ Record on appeal p. 154; Trial Exhibit 1-p

⁴ Record of Appeal p. 6

⁵ Record on appeal p. 8

⁶ Record on appeal p. 9

6. On August 16, 1990 Margaret filed a motion for leave to file an amended complaint, a memorandum of points and authorities and a motion to submit for decision all of which were apparently sent to PIC's counsel at a previous address from which he had moved and given notice of such six years previously.⁷

7. Not surprisingly PIC's counsel filed no responsive pleading and the court granted the motion to amend on September 13, 1990⁸. Perhaps by typographical error, the wording of the order was ultimately prophetic.⁹

8. The only substantive amendment of Margaret's original complaint is found in paragraph three of her amended complaint wherein she alleges that she was induced to enter in to the employment agreement by John's promise that she would never have to go to work and that the money which she would receive would be in lieu of alimony.¹⁰

9. John A. Hall (hereinafter "John") was never made a party to this action, nor was any claim plead that PIC was his alter ego¹¹, nor any attempt made to pierce the corporate veil.

10. At trial Margaret presented her case and upon her counsel resting, PIC made a motion to dismiss. In response Judge Rokich made the statement quoted partially in Margaret's brief (page 17): "He [John] never expected her to come to work in the first place. I believe this is

⁷ Record on appeal p. 12

⁸ Record on appeal p. 22

⁹ Record on appeal p. 22, "the Amended Complaint attached to Plaintiff's Motion for Leave to File Amended Complaint is deemed filed as of this **late**." [emphasis added]

¹⁰ Record on appeal p. 14 compare p. 2

¹¹ Record on appeal p. 148-152 {pretrial order}; 332-333 closing arguments wherein the court states "I don't know why somebody didn't bring that up. Alter ego." and it was pointed out to the court that there is no pleading to support such a claim. p. 334

nothing more than an alimony agreement...[**I'm not making that judgment**, but I will take it under advisement.]"¹² {bracketed portion missing from appellant's quote}

11. PIC thereafter presented its case, Judge Rokich heard testimony of other witnesses and changed his opinion from that stated in the previous paragraph.

12. At the close of the evidence no motion was made to conform the pleading to the evidence.

13. Margaret and John had entered into an antenuptial agreement prior to their marriage which provided among other things that Margaret would not receive alimony.¹³

14. The decree of divorce between Margaret and John provided that Margaret would not receive alimony.¹⁴

SUMMARY OF ARGUMENT

I. This appeal is not an appeal of an alter ego case as appellant's brief suggests.

Margaret's entire appeal relies on the erroneous premise that this is an alter ego case. Margaret filed suit against PIC for terminating her employment agreement with the corporation. The relief which she sought was the entire contract benefits for the term of the agreement. PIC responded that they had terminated her because she failed to report to work. Moreover, the employment agreement itself provides for semi-monthly payments to Margaret for the work which she was to perform, not a lump sum payable in installments.

At trial Margaret responded that she was not required to go to work because she had a

¹² Record on appeal p. 251; [emphasis supplied]

¹³ Record on appeal p. 154, Exhibit 7-D

¹⁴ Record on appeal p. 154, Exhibit 6-P

prior oral understanding with John by which he agreed on behalf of the corporation that she would **never** be required to actually perform services for PIC. John was never made a party to the action and Margaret never asked the court below to pierce the corporate veil.

II. It is irrelevant whether the employment agreement would have terminated automatically upon Margaret's remarriage.

This is because there was never any factual finding that the agreement was anything other than an employment agreement. Margaret's first argument on appeal is that her employment contract did not terminate on remarriage, which is factually correct - as far as it goes. It terminated on her failure to honor its clear terms. In her appeal, Margaret acknowledges, indeed argues, that the agreement was entered into by her with PIC, and *not* with John Hall. PIC concedes that the agreement was between them solely, and also concedes that it did not terminate on remarriage. Alimony was not a subject of the contract, nor for the first eight years this case languished did Margaret plead that it was.

What Margaret actually sought at trial was a decision that not only was the agreement entered in lieu of alimony, but that it was one that would continue even if she remarried. Margaret's disagreement is not with the trial court's true legal conclusion, which is correct regarding the law; her disagreement is with the interrelationship between that legal conclusion and the facts of this case. The trial court indeed stated that her claim that the employment agreement was entered into in lieu of alimony failed because alimony terminates upon remarriage, absent a written agreement to the contrary. However, there was never a finding that the agreement was entered into in lieu of alimony. Indeed, the trial court found just the opposite: Margaret failed to show that the agreements intent and meaning was anything other

than what it said it was - an employment agreement to provide her income and benefits during sickness, and wages and benefits when she could work. And although this is termed a conclusion of law, it is clearly a factual determination. Thus, whether the agreement terminated by operation of law upon remarriage was relevant to this case only if the agreement was in fact (and only questionably then) an agreement in lieu of alimony. That, however, was not the finding of the court.

III. The trial court's findings of fact are supported by ample evidence and its conclusion of law with respect to the parol evidence rule is correct.

Margaret lost and appealed because the trial court failed to accept her version of the facts as true, which would have required that the lower court ignore, among other things, the plain language of the agreement which Margaret admits is clear and unambiguous on its face. Margaret has failed to marshal the evidence in support of the lower court's findings.

The trial court allowed the introduction of parol evidence over objection; however, after having heard the testimony presented by Margaret's counsel in support of his contention that the agreement was not an integration, then excluded it for the reason that he found the employment agreement to be clear and unambiguous. The evidence was heard, but apparently not believed

Margaret was the plaintiff and was claiming that the plain meaning of the written contract was ambiguous. Margaret had the burden of proof and failed to sustain her burden. Under her theory of the case she needed to prove that:

- (1) the terms of the written agreement which would have otherwise required that she actually go to work in fact meant that she did not have to go to work; and,

(2) that the contract really provided for the payment of a lump sum (\$36,000.00) payable in 72 semi monthly installments of \$500.00 each together with the other fringe benefits which all of PIC's employees received.

Margaret offered the fact that at the time she entered into the employment agreement she was suffering from hepatitis and was unable to attend to her work duties as proof that the agreement was entered into in lieu of alimony. To sustain her burden of proof Margaret offered her own testimony, which was contradicted by both John and attorney Peter Ennenga as to her first claim, that the intention of the parties was that she would never have to attend work.

Margaret offered nothing in support of her second claim that the contract was really a contract for the payment of a lump sum payable in installments. Margaret's own testimony does not even suggest that the parties intended to pay Margaret \$36,000 over the life of the contract.

In contrast to Margaret's arguments, which were inconsistent throughout this litigation, PIC has consistently claimed that the employment agreement means exactly what it says. PIC paid Margaret during her period of illness in precisely the same manner as it treated other employees on sick leave. The fact that PIC entered into the employment agreement at a time when Margaret was ill and unable to presently come to work makes the consideration simply gratuitous.

IV. The trial court properly disallowed Brent Turley's testimony.

His testimony would have been about a specific act by John Hall some five years earlier, which act has no direct bearing on the events of this case. As such, that act was

greatly attenuated from this case. Not only was the act far removed in time, it dealt with subject matter and actors that were different than those involved here. Moreover, Mr. Turley's testimony was offered merely as a prior specific act to show that John Hall later acted in conformity with that act. This type of evidence, however, is deemed as irrelevant generally in civil cases and, furthermore, is inadmissible under the Utah Rules of Evidence except to show something other than propensity. Thus, the testimony would have been inadmissible, both as irrelevant and as specifically prohibited by the Utah Rules of Evidence.

Even if disallowance of Brent Turley's testimony was error though, it was harmless error. Here the trial court had the direct testimony of three witness as to the facts in question. Thus, Brent Turley's attenuated and circumstantial testimony offered little if anything to the fact finder's understanding. Because this was a bench trial, the fact finder had the benefit of Margaret's proffer and acknowledged the testimony would be irrelevant. Thus, there is a reasonable likelihood that a more favorable result *would not* have been obtained had Brent Turley testified. Hence, any error was harmless.

ARGUMENT

I

This appeal is not an appeal of an alter ego case as appellant's brief suggests

One fundamental problem with Margaret's theory of this case is that she never plead that PIC was the alter ego of John. Judge Rokich did comment on that failure, but quite

properly refused to allow it to influence his decision.¹⁵ All of her arguments transpose PIC for John; however, she neglected to either plead that theory or to present sufficient evidence to support it.¹⁶ Margaret did not anywhere plead that PIC was merely the alter ego of John, nor did she ask the lower court to pierce the corporate veil.

The consideration which she claims to have given might have been arguably consideration to John, but not to PIC. Margaret admits that she entered into an antenuptial agreement prior to her marriage to John which provided that in the event of divorce she would not ask for, nor be entitled to alimony. Thus, her claim that the consideration for the employment agreement (being non-terminable by PIC under any circumstances) was the foregoing of alimony is an argument constructed of whole cloth. Margaret never had a right to expect alimony, thus the foregoing of alimony would not have been consideration even for an agreement with John.

Margaret never explained why she originally filed her complaint based on her

¹⁵ *Combe v. Warren's Family Drive-Inns, Inc.*, 680 P.2d 733 (Utah 1984) "It is error to adjudicate issues not raised before or during trial and unsupported by the record. *Curran v. Mount*, Ala., 657 P.2d 389 (1980). The trial court is not privileged to determine matters outside the issues of the case, and if he does, his findings will have no force or effect. *Brantley v. Carlsbad Irr. Dist., N.M.*, 587 P.2d 427 (1978). In law or in equity, a judgment must be responsive to the issues framed by the pleadings, and a trial court has no authority to render a decision on issues not presented for determination. Any findings rendered outside the issues are a nullity. *Matter of Estate of Hurlbutt*, Or. App., 585 P.2d 724 (1978); *Credit Investment and Loan Co. v. Guaranty Bank & Trust Co.*, Colo., 444 P.2d 633 (1968). A court may not grant judgment for relief which is neither requested by the pleadings nor within the theory on which the case was tried, whether that theory was expressly stated or implied by the proof adduced. *Leonard Farms v. Carlsbad Riverside Terrace, N.M.*, 559 P.2d 411 (1977).

¹⁶ See *Ringwood v. Foreign Auto Works, Inc.*, 786 P.2d 1350 (Utah App. 1990) "The corporate form protects shareholders from personal liability and will be pierced by the courts with great reluctance and caution. *Colman v. Colman*, 743 P.2d 782, 786 (Utah Ct. App. 1987). In order to disregard the corporate entity, two circumstances must be shown: (1) such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, but the corporation is, instead, the alter-ego of one or a few individuals; and (2) if observed, the corporate form would sanction a fraud, promote injustice, or result in an inequity. *Id.* See also *Salt Lake City Corp. v. James Constructors*, 761 P.2d 42, 46 (Utah Ct. App. 1988). One of the factors deemed significant in determining whether this test has been met is the use of the corporation as a facade for operations of the dominant stockholder. *Colman*, 743 P.2d at 786."

wrongful termination by PIC, rather than what she later claimed at trial was the true basis for the claim - a claim which arose only after eight years of reflection and the realization that her original claim was going to be dismissed for failure to prosecute.¹⁷ Margaret knew she would be unable to prevail on her original theory. Margaret did testify that she had read the employment agreement prior to signing it,¹⁸ that she understood the plain meaning of the wording of the agreement would require that she go to work,¹⁹ but that she believed that she was not really required to do so because of a **prior oral** understanding between herself and John.²⁰

Both John and attorney Peter Ennenga testified that they understood the plain meaning of the agreement to require that Margaret actually go to work upon her recovery from hepatitis from which she was suffering at the time of the execution of the agreement.

II

Appellant mistakenly argues that "[t]he Defendant corporation's obligation under the Employment Agreement did not terminate upon Mrs. Hall's remarriage"
{the court simply never made a finding that the agreement involved alimony}

Appellant is factually correct. Whether Margaret remarried had no effect on the employment agreement; as long as she went to work she would get paid. However, the evidence was uncontroverted that she never went to work. In fact PIC's obligation to pay Margaret ended when she had refused to come to work after being instructed to do so and

¹⁷ Record on appeal p. 338

¹⁸ Record on appeal p. 222, l. 5

¹⁹ Record on appeal p. 223, ll. 18-23

²⁰ Record on appeal, p. 224, l.24 - 225, l.2

PIC sent her a termination notice (on May 20, 1982). As the trial court properly concluded in its memorandum decision, "The employment agreement is clear and unambiguous on its face and not subject to change by parol evidence."²¹ The clear and unambiguous terms of the employment agreement contemplate that Margaret would perform work for PIC which she admitted she never did at any time relevant to these proceedings.

The trial court correctly applied the standards set forth by the Supreme Court in *Winegar v. Froerer Corp.*, 813 P.2d 104 (Utah 1991). As Justice Durham stated:

In interpreting a contract, the intentions of the parties are controlling. If the contract is in writing and the language is not ambiguous, the intention of the parties must be determined from the words of the agreement. A court may only consider extrinsic evidence if, after careful consideration, the contract language is ambiguous or uncertain. A contract provision is ambiguous if it is capable of more than one reasonable interpretation because of "uncertain meanings of terms, missing terms, or other facial deficiencies." *Faulkner v. Farnsworth*, 665 P.2d 1292, 1293 (Utah 1983). Whether ambiguity exists in a contract is a question of law. [numerous citations omitted]

The trial court properly took note of the fact that Margaret had claimed for a period of eight years (1) that the employment contract had a clear and unambiguous meaning, (2) that she had performed her obligations and (3) that she was able and willing to continue to do so. Margaret only amended her complaint when "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."²² Thus, the trial court did not find that the employment agreement had been entered into in lieu of alimony which was Margaret's allegation in her amended complaint.

Margaret argues that the lower court erred when it concluded as a matter of law that

²¹ Record on appeal p. 157

²² Record on appeal p. 172

"absent a written agreement to the contrary, alimony terminates upon remarriage".²³ This conclusion of law, however is absolutely correct and, in fact is an almost verbatim statement of the statute. Hypothetically an agreement to pay the alimony obligation of another, assuming it complied with the statute of frauds would terminate upon remarriage, unless the written agreement provided otherwise, (e.g. for a lump sum payable in installments), even under the cases upon which Margaret had relied below.

What Margaret really is arguing is that the predicate to the legal conclusion is in error, the predicate being that "Plaintiff's claim that the employment agreement was entered into in lieu of alimony fails because,...". PIC understands that what the court meant was that **if** the employment agreement was in fact an agreement on behalf of PIC to pay Margaret alimony owed by John, it does not provide that it will continue in force after remarriage or for a definite term. Thus, it was terminated by operation of law upon Margaret's remarriage.

Margaret was not only asking the trial court to find that the employment agreement had been entered into in lieu of alimony, but also that it would continue in full force and effect for a period of three years. Margaret simply did not produce any evidence in support of her claim on appeal that the employment agreement was non-terminable by PIC for a period of three years.²⁴

PIC concedes that cases exist in other jurisdictions²⁵ under which agreements entered

²³ Record on appeal p. 172

²⁴ The court concluded "Plaintiff fail to establish that the meaning or intent of the employment agreement was anything other than its clearly written terms which would give raise to an enforceable agreement under any one of the legal theories advanced during the course of this litigation." Record on appeal p. 172-173

²⁵ *Taliaferro vs Taliaferro*, 270 P. 2d 1036 (Cal. App. 1954)

into in lieu of alimony have been enforced even after remarriage. However, those cases follow the logic that parties may contract reasonably among themselves and the plain meaning of their agreements will not be disturbed. This is not such a case, in fact Margaret is urging the reverse.

She is asking this court to torture the plain meaning of an employment agreement and reform it. From Margaret's initial amendment of her complaint in 1990 until more than half way through the trial of this matter, she claimed that the employment agreement was in reality an agreement on behalf of the company to pay alimony on behalf of John. It is extremely significant that she did not claim until very late in the proceedings that the agreement was in reality a settlement agreement to pay its **entire** benefits regardless of whether she worked.

At closing argument, Margaret asked the court to reform the agreement to read as a settlement agreement to require PIC, not her former husband, to make a lump sum payment, payable in installments to Margaret whether she ever worked for the company or not. The trial court made short work of her argument, which was presented to the lower court for the first time in Plaintiff's closing argument. In a colloquy between the court and plaintiff's counsel, Mr. Mitchell told the court that the agreement was neither an employment agreement (Plaintiff's original claim) nor an alimony agreement (Plaintiff's amended claim), but "it's a settlement agreement."²⁶

Margaret's argument on appeal presupposes the trial court had concluded as a factual matter that the employment agreement was an agreement on behalf of the corporation to pay

²⁶ Record on appeal p. 150-151

an alimony obligation of its president John. Judge Rokich specifically found that Margaret first made the claim that the employment agreement had been entered into in return for a promise to forego alimony only when she realized that she would be unable to prove that she had performed the obligations of the contract which was her claim for more than eight years of litigation.²⁷ Judge Rokich considered the fact that Margaret had waited eight years before filing her amended complaint as a significant fact in his determination and stated on the record " I probably should never have allowed the amended complaint, but I always like to give everybody their day in court."²⁸

Further the trial court found that the purpose of the employment agreement was to provide Margaret with income and medical insurance during a period while she was suffering from hepatitis. A condition from which she was suffering at the time the agreement was signed.²⁹ The lower court did not find that the corporation ever had any obligation to pay alimony to Margaret and Margaret did not allege that the corporation stood in the shoes of John. Nor did the court make a finding that Margaret was suffering from any terminal disease or permanent disability and in fact she appeared quite well during the course of the proceedings, a fact which would only be apparent to the trial court and those in attendance, not to the appellate court. Thus, the trial court did not conclude that the purpose of the agreement would necessarily continue indefinitely.

III

The lower court's findings of fact are supported by ample evidence and its conclusion of

²⁷ Record on appeal p. 172

²⁸ Record on appeal p. 335

²⁹ Record on appeal p. 171

law with respect to the parol evidence rule is correct.

Margaret's second argument on appeal is that the lower court's findings of fact and conclusions of law with respect to the parol evidence rule are unsupported by the evidence or the law. Margaret fails to note that the court did allow parol evidence to be introduced, subject to exclusion, so that she would have the opportunity of proving that the written agreement was neither an integration nor a partially integrated contract.³⁰ Having allowed the evidence to be admitted conditionally, the trial court properly did not allow the parol evidence to alter the clear and unambiguous meaning of the written agreement.

The written agreement between Margaret and PIC was clearly at a minimum a partially integrated contract. Margaret's claim has never been that the employment agreement was not at least a partially integrated agreement, otherwise she would have been faced with a myriad of nasty alternatives, e.g., "Statute of Frauds" and *Res Judicata*.

"The doctrine of partial integration is that where a written contract is obviously not, or is shown not to be, the complete contract, parol evidence not inconsistent with the writing is admissible to show what the entire contract really was, by supplementing, as distinguished from contradicting, the writing. In such a case parol evidence to prove the part not reduced to writing is admissible, although it is not admissible as to the part reduced to writing.

³⁰ Record on appeal p. 172; *Ringwood v. Foreign Auto Works, Inc.*, 671 P.2d 182 (Utah 1983) Since the issue of whether a contract is integrated is a factual question, the trial court's determination will be sustained on appeal if there is substantial evidence to support it. *Bullfrog Marina, Inc. v. Lentz*, 28 Utah 2d 261, 501 P.2d 266 (1972); 3 Corbin on Contracts §582, at 457 & n.86 (1960). See also *Ute-Cal Land Development v. Intermountain Stock Exchange*, Utah, 628 P.2d 1278 (1981); *Berkeley Bank for Cooperatives v. Meibos*, Utah, 607 P.2d 798 (1980); *Elton v. Utah State Retirement Board*, 28 Utah 2d 368, 503 P.2d 137 (1972).

30 AM.JUR.2D, *Evidence* § 1043."³¹

The trial court found that Margaret had failed "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."³²

"There is a rebuttable presumption that a written contract which appears to be complete and certain is integrated. Courts are not obligated to rewrite contracts entered into by parties dealing at arms' length, to relieve one party from a bargain later regretted, simply on supposed equitable principles. The mere raising of a non-integration claim will not result in automatic admission of extrinsic evidence."³³

The trial court's conclusion is not erroneous and Margaret's failure to rebut the presumption is fatal to her claim on appeal.

Margaret premises her arguments against the trial court's factual findings on her view of what the evidence should have proven.

In *Smith v. Utah Central Credit Union*, 727 P.2d 219 (Utah 1986) the Supreme Court stated:

When an appellant challenges the failure of the trier of fact to accept his version of the facts, our review is strictly limited. We view the evidence and its inferences in a light most favorable to the judgment and findings. They will not be disturbed when based upon substantial, competent, admissible evidence. *Kimball v. Campbell*, 699 P.2d 714 (Utah 1985). When the evidence conflicts, we necessarily give deference to the fact finder and acknowledge his advantageous position vis-a-vis

³¹ *Stanger v. Sentinel Security Life Insurance Co.*, 669 P.2d 1201 (Utah 1983)

³² Record on appeal pp. 172-173

³³ *Webb v. R.O.A. General, Inc.*, 804 P.2d 547 (Utah App. 1991)[citations omitted]

the witnesses, the evidence, and the parties. *DeVas v. Noble*, 13 Utah 2d 133, 137, 369 P.2d 290, 293 (1962). Accordingly, because the evidence is sufficient to support the determination of the court below, we do not undertake to reweigh the evidence or redetermine the facts. We will not disturb the trial court's determination that there was no agreement between the parties as alleged by plaintiff. See *Ringwood v. Foreign Auto Works, Inc.*, 671 P.2d 182 (Utah 1983) .

First Margaret claims that the consideration given to PIC was her agreement to forego her claim to alimony against John and secondly she claims that the agreement, contrary to its written terms was an agreement to pay a lump sum of \$36,000.00 in \$1,000.00 per month installments.

In support of her first claim Margaret cites this court to a portion of the record where Judge Rokich stated "I believe this is nothing more than an alimony agreement. ...**I'm not making that judgment, but I will take it under advisement.**"³⁴ Significantly Margaret failed to quote the emphasized portion of the transcript, nor to advise this court that the statement by Judge Rokich was at the close of **Plaintiff's** evidence. Defendant had not presented its case at that point. Upon hearing all of the evidence Judge Rokich was apparently persuaded that the agreement was not an alimony agreement, but rather an agreement which provided Margaret with insurance and income benefits during a period of illness.

Perhaps the most telling testimony presented on the subject of whether the employment agreement had been entered into in lieu of alimony was that of Peter Ennenga who testified that he was a friend of both parties,³⁵ that he had refused to represent either in a

³⁴ Record on appeal p. 251 [emphasis supplied]

³⁵ Record on appeal p. 292, l. 5

contested divorce,³⁶ but that he had later processed an uncontested divorce for them³⁷ and that he had drafted the employment agreement.³⁸ Mr. Ennenga was emphatic, and despite persistent cross examination by Margaret's counsel, did not waiver on the point that the employment agreement was not entered into upon consideration of Margaret waiving her claimed right to alimony.³⁹

The simple explanation for why payments had been made for 14 months was that Margaret had been ill at the time the agreement was executed and it was not contemplated that she would immediately go to work, but that she would commence her employment upon her recovery.⁴⁰ When she had recovered and was able to go to work she obtained other employment and was ultimately terminated by PIC.

The second prong of Margaret's argument is not supported by any evidence whatsoever. No one testified and no document supports her claim that the employment agreement was for a lump sum payable in installments. No pleading makes such a suggestion and in fact the theory arose for the first time in closing arguments.

Margaret suggests that she has marshalled all of the evidence in support of the trial court's factual findings. She acknowledges that the agreement is clear and unambiguous on its face. She acknowledges that both John and attorney Peter Ennenga testified that the

³⁶ Record on appeal p. 292, l.l. 9-15

³⁷ Record on appeal p. 293, ll. 9-22

³⁸ Record on appeal p. 314, ll. 11-14

³⁹ Record on appeal p. 297, l. 13

⁴⁰ See testimony of Peter Ennenga, Record on appeal pp. 297-299; 310

agreement was not entered into in lieu of alimony, which was contrary to her contention.

Margaret then goes on to characterize the explanations given for why she continued to receive benefits even after she had recovered from her illness and had obtained other employment as "comical."⁴¹ The fact that John's memory of events which had transpired ten years previously became confused upon cross-examination proves nothing. That the company continued to pay Margaret after it might have otherwise terminated her is not evidence of an agreement to pay a lump sum in installments. One can speculate that perhaps she was paid because she was such an incredibly difficult ex-wife concerning the sale of John's house that no one wanted the responsibility of terminating her prior to that date, or perhaps a payroll clerk felt sorry for her, or perhaps that she concealed her working for another company, or perhaps almost any other explanation, but it is all speculation and does not constitute evidence.

If a party is attempting to prove that the plain meaning of a written agreement was not what the parties intended, it appears that the minimum she should have to do is show what was really intended. Margaret has failed to prove her case. If the employment contract didn't have the plain meaning of its words, then what was it? Judge Rokich asked Margaret's

repeatedly what he claimed the agreement represented.⁴² Clearly there is ample support of the fact that it was not an agreement to pay alimony. Margaret had no antenuptial agreement prior to her marriage to John. The Decree of Divorce provides that she will not receive alimony. Margaret did not testify that the agreement was a settlement agreement, much less anyone else.

Appellant's brief p. 15

Record on appeal p. 329

In *Webb v. R.O.A. General, Inc.*, 804 P.2d 547 (Utah App. 1991) this court has quoted *State Bank of Lehi v. Woolsey*, 565 P.2d 413, 418 (Utah 1977) "parol evidence of 'contemporaneous conversations, representations or statements will not be received for the purpose of varying or adding to the terms of the written agreement'. Therefore, in most instances, where a binding agreement exists, whether completely or partially integrated, evidence of prior or contemporaneous agreements or discussions is not admissible to contradict terms of the written agreement. RESTATEMENT (SECOND), CONTRACTS § 215."

IV

The trial court properly disallowed the testimony of Brent Turley.

A. There was no abuse of discretion.

According to Brent Turley's preliminary testimony and counsel's proffer, the gist of Mr. Turley's disallowed testimony was that, sometime in 1977, John verbally offered to purchase Brent Turley's house using an employment contract for the down payment.⁴³ Margaret contended this evidence was relevant to show that John had a supposed tendency or propensity to use employment contracts in certain contexts having to do with personal obligations. The trial court, however, had ample reason to determine that this episode (the "Turley episode") was irrelevant to this case. Thus, there was no abuse of discretion in disallowing Brent Turley's testimony.

The Turley episode was so attenuated from this case as to be irrelevant for several

⁴³ Record on appeal p.p. 0238 and 0239.

reasons. First, the episode was remote in time from the facts of this case, having occurred some five years previously. Although the issue of remoteness generally goes to the weight, rather than admissibility of evidence, it is clearly a factor in the weighing process used to determine relevance and admissibility.⁴⁴ The more remote in time an event is, the less its probative value becomes.⁴⁵ Thus, at some point in time, the probative value of evidence, such as prior specific acts, becomes nil. Evidence of no probative value is irrelevant by definition and therefore inadmissible.⁴⁶

It is unclear exactly when any given type of evidence loses its probative value due to the passage of time. Moreover, no Utah civil cases deal with the effect of time on propensity evidence such as the Turley episode would have presented. But the relevance of evidence similar to the Turley episode has been addressed elsewhere, and this provides guidelines for this court to determine whether the trial court abused its discretion in disallowing Brent Turley's testimony.

In *Rocky Mountain Helicopters, Inc. v. Bell Helicopters Textron , A Division of Textron, Inc.*,⁴⁷ the appellate court ruled the trial court had correctly deemed as irrelevant, a chief pilot's evaluation of another pilot's skills five *months* before an accident. The five month time frame was too remote with respect to the accident and, hence, the trial court properly disallowed its introduction to show the pilot was acting in a similar manner on the

⁴⁴ *Terry v. Zion's Coop. Mercantile Inst.*, 605 P.2d 314, 330 n.30 (Utah 1979).

⁴⁵ *Weber Basin Water Conservancy Dist. v. Ward*, 10 Utah 2d 29, 347 P.2d 862 (1959).

⁴⁶ UTAH R. EVID. 401 and 402 (1992); *see Shorr v. Unsell*, 497 P.2d 1060 (Idaho 1966) (when remoteness becomes so great that there is no probative value, proffered evidence should be excluded).

⁴⁷ 805 F.2d 907 (10th Cir. 1986).

day in question.⁴⁸

In *Leigh v. Swartz*,⁴⁹ the plaintiff had sued for fraudulent misrepresentations involving a real estate contract. The Arizona court held that a real estate closing statement involving the subject property and created 10 1/2 months before the contract was inadmissible. It was too remote in time and the conditions were not shown to be the same.

The Utah Supreme Court in *Jensen v. Logan City*, addressed the issue of remoteness in the context of negligence actions and has held that the trial court did not err in allowing testimony as to the condition of a wire fence two hours before the accident.⁵⁰ In assessing the impact of remoteness on the trial court's decision to allow or exclude evidence of previous conditions the Court said:

Between certain limits it must be left to the trial court to determine whether the observations of a witness [are] too remote to be probative. . . . It is that class of cases which lie in the zone where minds could reasonably differ as to whether the observation was too remote. . . . [that] the matter should be left entirely to the trial judge's discretion.⁵¹

Although the context of that case differs, the concept is applicable. Roughly five years passed between the time of the Turley episode and the execution of the contract at issue. That is 12 times the amount of time at issue in *Rocky Mountain Helicopters*, and over 5 times the amount of time in *Leigh*. Notably, the evidence that was held admissible in *Jensen*, was evidence of conditions only two *hours* prior. Whether an occurrence is too

⁴⁸ *Id.*

⁴⁹ 74 Ariz. 108, 245 P.2d 262 (1952).

⁵⁰ 89 Utah 347, 57 P.2d 708 (1936).

⁵¹ *Id.* at 717 (citing 1 WIGMORE ON EVIDENCE, 517, § 438).

remote to be relevant is a fact sensitive inquiry and many factors may impact it. But here, based on the length of time alone, it cannot be said that the trial abused its discretion in ruling evidence of the Turley episode as irrelevant.

Remoteness aside though, there are other factors from which the trial court could determine Mr. Turley's testimony was irrelevant. In addition to time, the relevance of specific instance evidence of other contracts has been held in Utah to depend on two factors: (1) identicalness of the contracts and (2) similarity of the parties to the contracts.⁵² With respect to identicalness, the circumstances of the Turley episode differ so radically from the contract at issue here as to make them incomparable. For example, the Turley episode had nothing to do with alimony or agreements to forgo alimony, which was the eventual thrust of Margaret's argument at trial. Nor is there any conceivable explanation of how an offer on real estate could relate to the contractual dispute in this case. Finally, and the trial court made specific note of this fact, no contract ever resulted from the Turley episode. Thus, there is no identicalness between the Turley episode and the employment agreement.

The issue of similarity of parties also points to irrelevancy. PIC and Margaret are the parties to this action, but neither of them was a participant in the Turley episode. Nor did that episode involve persons remotely similar to the parties in this action. Admittedly, Margaret's counsel opined that John Hall made an offer to Turley as "agent" for PIC. But if, by comparing the contract at issue to the Turley episode, Margaret seeks to ascribe the acts of the defendant PIC to John Hall, or vice versa, she must fail. The issues of alter ego and piercing the corporate veil were *never* raised at trial, nor alleged in any pleading. And

⁵²

See *Leger Construction Inc. v. Roberts, Inc.*, 550 P.2d 212 (Utah 1976).

absent this, the Turley episode is completely irrelevant to this case.

Thus, the excluded testimony was amply attenuated from this case in terms of time, subject matter and the parties involved. The trial court had a substantial basis to determine its probative value was nil and exclude Mr. Turley's testimony. There was no abuse of discretion.

B. The Utah Rules of Evidence prohibit the admission of Brent Turley's testimony.

Even if it were slightly relevant, the Utah Rules of Evidence obligated the trial court to exclude Mr. Turley's testimony. Those rules state that even relevant evidence of certain kinds is not admissible if the rules of evidence so provide.⁵³ Just such a prohibition operates in this case, for those rules also state:

Evidence of other . . . acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.⁵⁴

The Turley episode had no direct bearing on this case; it was evidence of an act offered merely to show that Mr. Hall somehow acted in conformity with that act on a subsequent occasion. Thus, it falls squarely within that type of propensity evidence that is generally inadmissible under Rule 404(b).

It appears that at the appellate level, this rule has only been applied in criminal cases in Utah. Perhaps this is because the general consensus is that, even without Rule 404(b),

⁵³ UTAH R. EVID. 402 (1992).

⁵⁴ UTAH. R. EVID. 404(b) (1992).

propensity or character evidence is inadmissible in civil trials - period.⁵⁵ Nonetheless, Rule 404(b) is applicable and has been applied in civil cases.⁵⁶

Although not mentioned specifically, Rule 404(b) was an implicit basis on which the trial court excluded testimony about the Turley episode. Evidence of prior specific acts may be admissible if introduced to show something other than that the party acted in conformity with that prior act, *e.g.* to show knowledge or plan.⁵⁷ Following counsel's proffer of Brent Turley's testimony, the court stated: "You've got to show more than just one other occasion. That may be a method under which he operates, but nevertheless I don't see where it's relevant to this case."⁵⁸ Thus the court determined that even if it was a method under which John operated, the proffer of the episode was inadequate to show a common scheme or plan.⁵⁹ Indeed, under these circumstances, had the trial court admitted Brent Turley's testimony, it would have committed error by admitting evidence that is inadmissible under the rules of evidence.

C. If Exclusion of Brent Turley's testimony was error, it was harmless error.

⁵⁵ WEINSTEIN ON EVIDENCE, ¶ 404(01) (July 1992); 1A WIGMORE, EVIDENCE, § 64 (Tiller's Rev. 1983).

⁵⁶ *Rocky Mountain Helicopters*, 805 F.2d 907 (10th Cir. 1986); *see* *Turley v. State Farm Mutual Auto Ins. Co.*, 944 F.2d 669 (10th Cir. 1991) (evidence of prior bad acts admissible in civil case to show intent, knowledge, lack of mistake, etc.).

⁵⁷ UTAH R. EVID. 404(b) (1992); *see* *State v. Hamilton*, 174 Utah Adv. Rep. 7, (1991) (for evidence of another specific act to be admissible, it must have some purpose other than showing that the charges are consistent with the defendant's character).

⁵⁸ Record on appeal p. 239.

⁵⁹ And it was clearly inadequate as evidence of habit under UTAH R. EVID. 406 (1992).

The rule is that, to be reversible, an error must have been substantial and prejudicial; unless there is a reasonable likelihood that a more favorable result would have been obtained absent the error, the error is harmless.⁶⁰ Applied here this means that even if Brent Turley's testimony had some probative value, excluding it was harmless error. First, there were three other witnesses who gave *direct* testimony about the formation of the contract at issue. Brent Turley's indirect testimony offered little, if anything, that was not already addressed by evidence of more probative value. Thus, there was a significant quantity of separate competent evidence upon which the trier of fact could base its findings.

Second, this was a nonjury trial. Judge Rokich heard Margaret's counsel's proffer as to Brent Turley's testimony and, indeed, he acknowledged that "[t]hat may be a method under which he operates."⁶¹ Thus, even if Brent Turley's testimony was not formally "admitted," it cannot be said that the Turley episode went unnoticed or was not given the weight it deserved.⁶² Indeed, even had it been "admitted", its probative value would have been virtually nil, as the finder of fact, understandably, could not see its relevance. Such an "error" is neither substantial or prejudicial; nor would the result have been likely to differ. Hence, exclusion of the testimony, if error it was, was harmless error.

CONCLUSION

The judgment of the lower court should be affirmed. The lower court's findings of

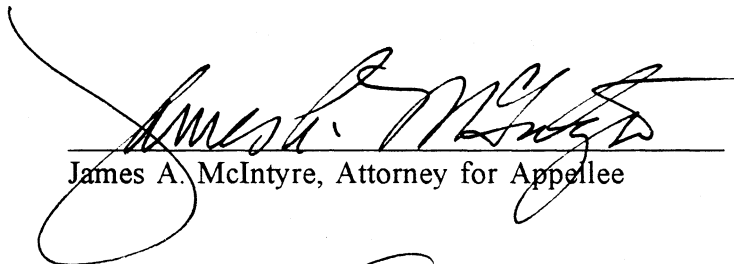
⁶⁰ *Harris v. Utah Transportation Authority*, 671 P.2d 217 (Utah 1983); *Eager v. Willis*, 17 Utah 2d 314, 410 P.2d 1003 (Utah 1966); *In re Baxter's Estate*, 16 Utah 2d 284, 399 P.2d 442 (1965).

⁶¹ Record on appeal p. 239.

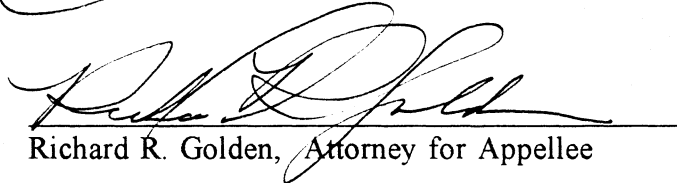
⁶² See e.g. *Leigh v. Swartz*, 74 Ariz. 108, 245 P.2d 262 (1952) (where otherwise inadmissible exhibit was accepted "for what it was worth," appellate court assumed it was disregarded as case was before the bench.)

fact are not clearly erroneous and its conclusions of law are correct. Margaret has presented nothing more on appeal, nor could she have legitimately, than she did to the court below. The evidence submitted to the lower court simply did not warrant a judgment in her favor under any of her three separate theories of recovery.

Respectfully submitted this 24th day of November, 1992.



James A. McIntyre, Attorney for Appellee



Richard R. Golden, Attorney for Appellee

MAILING CERTIFICATE

I certify that I served four copies of the foregoing brief by mailing same to Scott B. Mitchell, 136 S. Main, Suite 721, Salt Lake City, Utah 84101 on the 24th day of November, 1992.



Addendum 1

FULL TEXT OF STATUTES & RULES

Statutes

UTAH CODE ANN. § 78-2a-3(2) (1953 as amended 1992) Court of Appeals jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a-j)...

(k) cases transferred to the Court of Appeals from the Supreme Court.

(3) ...

UTAH CODE ANN. § 78-25-16 (1953) - Parol evidence of contents of writings -- When admissible.

There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

(1) When the original has been lost or destroyed, in which case proof of the loss or destruction must first be made.

(2) When the original is in the possession of the party against whom the evidence is offered and he fails to produce it after reasonable notice.

(3) When the original is a record or other document in the custody of a public officer.

(4) When the original has been recorded, and the record or a certified copy thereof is made evidence by this code or other statute.

(5) When the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

Provided, however, if any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law; and such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not, an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of

the original.

In the cases mentioned in subdivisions (3) and (4), a copy of the original, or of the record, must be produced; in those mentioned in subdivisions (1) and (2), either a copy or oral evidence of the contents.

(as last amended by Chapter 165, Laws of Utah 1983)

Rules

UTAH R. EVID. 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

UTAH R. EVID. 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

UTAH R. EVID. 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in , , Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

UTAH R. EVID. 608. Evidence of character and conduct of witness.

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

(c) Evidence of bias. Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.