

1992

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

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

Reply Brief, *Hall v. Process Instruments and Control, Inc.*, No. 920332 (Utah Court of Appeals, 1992).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/4262](https://digitalcommons.law.byu.edu/byu_ca1/4262)

This Reply Brief 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.

UTAH COURT OF APPEALS  
BRIEF

UTAH  
DOCUMENT  
KFU  
50

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

.A19  
DOCKET NO. 920332

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 REPLY BRIEF  
\*  
\*  
\*  
\*  
\*  
\* Appeal No. 920332-CA  
\*  
\* Priority 16

\* \* \* \*

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

FILED

JAN 26 1993

COURT OF APPEALS

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	i
I. INTRODUCTION .....	1
II. POINT I OF APPELLEE'S "ARGUMENT" MAKES NO SENSE AT ALL .....	1
III. SINCE OBTAINING NEW COUNSEL AND FILING HER AMENDED COMPLAINT, THE THEORY OF MRS. HALL'S CASE HAS NEVER CHANGED .....	5
IV. THE DOCTRINE OF "PARTIAL INTEGRATION" IS NOT APPLICABLE .....	8
V. MR. TURLEY'S TESTIMONY WOULD CLEARLY HAVE BEEN RELEVANT AND HE SHOULD HAVE BEEN ALLOWED TO TESTIFY .....	10
CONCLUSION .....	17
MAILING CERTIFICATE .....	17

## **TABLE OF AUTHORITIES**

### **CASES**

<u>Dementas v. Estate of Tallas</u> , 764 P.2d 628 (Utah App. 1988) . . . . .	3
<u>Gorgoza v. Utah State Road Commission</u> , 553 P.2d 413 (Utah 1976) . . . . .	3,4,5
<u>Leger Construction, Inc. v. Roberts, Inc.</u> , 550 P.2d 212 (Utah 1976) . . . . .	14
<u>State v. Brown</u> , 577 P.2d 135 (Utah 1978) . . . . .	15
<u>Terry v. Zions Co-of. Mercantile Institution</u> , 605 P.2d 314 (Utah 1979) . . . . .	12,13,14
<u>Weber Basin Water Conservancy District v. Ward</u> , 347 P.2d 862 (Utah 1959) . . . . .	14

### **RULES**

Rule 401, Utah Rules of Evidence . . . . .	11
Rule 402, Utah Rules of Evidence . . . . .	11, 12
Rule 403, Utah Rules of Evidence . . . . .	12
Rule 404(b), Utah Rules of Evidence . . . . .	15

### **OTHER AUTHORITY**

McCormick on Evidence § 198 (4th ed.) . . . . .	14
---	----

## **DETERMINATIVE RULES**

Pursuant to Rule 24(c) of the Utah Rules of Appellate Procedure, Plaintiff sets forth the following determinative rules.

### **Utah Rules of Evidence**

#### **Rule 401, Utah Rules of 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.

#### **Rule 402, Utah Rules of Evidence**

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.

#### **Rule 403, Utah Rules of Evidence**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

#### **Rule 404(b), Utah Rules of Evidence**

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.

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 REPLY BRIEF  
\*  
\*  
\*  
\*  
\*  
\* Appeal No. 920332-CA  
\*  
\*

\* \* \* \*

Appellant (hereinafter referred to as "Mrs. Hall") submits the following reply to the Brief Of Appellee.

I. INTRODUCTION

The Brief Of Appellee is for the most part rambling and incoherent and appears to be aimed more at confusing the issues than at illuminating them. Accordingly, Mrs. Hall's reply will focus on attempting to bring some clarity to the confusion which Appellee has created.

II. POINT I OF APPELLEE'S "ARGUMENT" MAKES NO SENSE AT ALL.

Appellee begins point I of its Argument as follows:

One fundamental problem with [Mrs. Hall's] theory of this case is that she never plead that [Appellee] was the alter ego of John [i.e., Appellee's President and sole shareholder]. Judge Rokich did comment on that failure, but quite properly refused to allow it to influence his decision. All of her arguments transpose [Appellee] for John; however, she neglected to either

plead that theory or to present sufficient evidence to support it. Margaret did not anywhere plead that [Appellee] was merely the alter ego of John, nor did she ask the lower court to pierce the corporate veil.

Brief Of Appellee at pages 8-9.

The short answer to this transparent red herring is that not only has Mrs. Hall never plead any alter ego theory in this case, but she has never argued that that theory is applicable. It clearly is not.<sup>1</sup> Further, contrary to Appellee's nonsensical subheading, there is nothing in Mrs. Hall's Opening Brief which even remotely suggests that this is "an alter ego case".

Appellee next contends that "The consideration which [Mrs. Hall] claims to have given might have been arguably consideration to John, but not to [Appellee]."

Appellee is apparently referring to Mrs. Hall's claim that the consideration which she gave in exchange for Appellee's promises under the so-called "Employment Agreement" consisted of her return promise to forego any right to alimony which she might otherwise have had in connection with the divorce proceedings simultaneously taking place between herself and Appellee's President, John A. Hall (hereinafter referred to as the "Divorce Action"). Although not explicitly stated, Appellee is evidently arguing that Mrs. Hall's promise to forego alimony could not constitute consideration for any return promise from Appellee

---

<sup>1</sup> The only reference to "alter ego" in this entire case was made by the trial judge during closing argument: "I don't know why somebody didn't bring that up. Alter ego." (Trial Tr. p. 153, line 20) Mrs. Hall can only speculate as to what the trial judge was referring.

because Appellee received no benefit from Mrs. Hall's promise.<sup>2</sup>

Appellee's argument reveals a fundamental misunderstanding of the nature of consideration. In Dementas v. Estate of Tallas, 764 P.2d 628, 632 (Utah App. 1988), this Court recognized that:

"A generally accepted definition of consideration is that a legal detriment has been bargained for and exchanged for a promise .... [and that] there is consideration whenever a promisor receives a benefit or where the promisee suffers a detriment, however slight."

(Citations omitted)(emphasis added).

Clearly, Mrs. Hall's promise to forego her claim to alimony in the Divorce Action constitutes a "detriment". See, e.g., Gorgoza v. Utah State Road Commission, 553 P.2d 413, 416 (Utah 1976)(agreement not to challenge condemnation action constitutes adequate consideration regardless of benefit to promisee). Accordingly, Appellee's promises under the Employment Agreement were supported by adequate consideration.

Appellee next argues that Mrs. Hall's promise to forego alimony could not constitute consideration because she had "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." Brief Of Appellee at page 9.

---

<sup>2</sup> The trial judge also expressed his opinion during closing argument that there had been a failure of consideration because Appellee did not receive any benefit from Mrs. Hall's promise to forego alimony. (Trial Tr. p. 154, lines 12 thru 24)



This argument is not well taken.<sup>3</sup> Everyone involved in the Divorce Action, including Mr. Hall's attorney (who, not coincidentally, also drafted the Employment Agreement on behalf of Appellee) knew that Mrs. Hall vigorously disputed the validity of the antenuptial agreement.<sup>4</sup> Accordingly, Mrs. Hall's promise to forego her right to challenge that agreement provided adequate consideration for Appellee's return promises regardless of any benefit received by Appellee. Gorgoza, 553 P.2d at 416.

Gorgoza is directly on point with the case at bar. That case involved a breach of contract claim in which the plaintiff sought to recover for damages to its resort property resulting from the construction of highway I-80. The contract arose in connection with a prior condemnation action in which the plaintiff alleged that it had "agree[d] to an order of immediate occupancy of part of [its] land to be taken and used in the construction of the highway ... in exchange for a promise that certain provisions concerning the construction of the road and access to [its] property be incorporated into the order." 553 P.2d at 414.

When sued for its subsequent breach of the agreement, the

---

<sup>3</sup> During closing argument, Judge Rokich specifically advised Mrs. Hall's counsel that he did not consider the antenuptial agreement to be of any relevance and, therefore, that Mrs. Hall's counsel did not "have to argue about that." (Trial Tr. p. 149, lines 20-21)

<sup>4</sup> Mr. Hall's attorney testified not only that Mrs. Hall did not consider the antenuptial agreement to be enforceable, but that "She said they're going to go to the Supreme Court and fight tooth and nail." (Trial Tr. p. 94, line 23 thru p. 95, line 2)

defendant argued that the agreement was unenforceable for lack of consideration because "upon the filing of the condemnation proceeding it was entitled as a matter of law to take plaintiff's property and have an order of immediate occupancy." 553 P.2d at 415-16.

In other words, as in the case at bar, the defendant argued that because the plaintiff had merely agreed to something it was already under a legal obligation to do, the agreement was unenforceable for lack of consideration.

The Supreme Court rejected the Defendant's argument, holding that:

by its compliance with the Road Commission's request [the plaintiff] forewent its right to challenge and to have a hearing on those matters. It matters not that this may or may not have proved to be of much actual value. Sufficiency of consideration is not necessarily measured in terms of money value equivalents. If one party asks for and receives something he would not otherwise be entitled to from the other, that is consideration. It is obvious that what was done here falls within that formula.

553 P.2d at 416 (emphasis added).

It is likewise obvious in the case at bar that, regardless of the validity of the antenuptial agreement, Mrs. Hall's promise to forego her right to challenge its validity and to seek an award of alimony was adequate consideration for Appellee's return promises.

**III. SINCE OBTAINING NEW COUNSEL AND FILING HER AMENDED COMPLAINT, THE THEORY OF MRS. HALL'S CASE HAS NEVER CHANGED.**

The thread of point II of Appellee's Argument is difficult to follow, adorned as it is with unfounded statements of fact and

unsupported and vague pronouncements of law. There is one theme that Mrs. Hall will address, however; and that is Appellee's recurrent allegation that Mrs. Hall has continuously changed the theory of her case.

For example, Appellee asserts that:

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 [Appellee], not her former husband, to make a lump sum payment, payable in installments to Margaret whether she ever worked for the company or not.

Brief of Appellee at page 13.

It is telling that Appellee fails to identify anything in the record which supports this assertion. Instead, Appellee stretches beyond recognition

... a colloquy between the court and plaintiff's counsel, [in which] 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."

Brief Of Appellee at page 13.

The "colloquy" to which Appellee refers is found in the Trial Transcript at page 150, line 1 thru page 151, line 17, in which Mrs. Hall's counsel responds to the trial judge's request for clarification as to whether "this is an alimony agreement or an employment agreement?":

Mr. Mitchell: It's an agreement to pay Mrs. Hall ... a thousand dollars a month to forego any right she might have to alimony.

There was clearly a dispute as to whether Mrs. [Hall] was entitled to alimony. There was an antenuptial agreement. The parties disputed the ... validity of that agreement. They went in --

The Court: So you're saying this is a settlement agreement?

Mr. Mitchell: It's a settlement agreement.

The Court: Fine.

Mr. Mitchell: You can call it alimony. You can call it a settlement. You can call it alimony and a settlement. It is an agreement by the defendant corporation to pay Margaret Hall a thousand dollars [per month] in exchange for her agreement not to pursue alimony in the divorce decree.

(Emphasis added).

In response to further questioning by the trial judge, Mrs. Hall's counsel reiterated Mrs. Hall's position at page 154 of the Trial Transcript:

Mr. Mitchell: ... It was [an] agreement [that] she would receive a thousand dollars a month if she would forego her right to alimony.

The Court: Okay.

Mr. Mitchell: Now, if you say that's the payment of alimony, I guess that's fine if that's the way you see it. But it was an agreement to forego alimony. Alimony has separate and distinct legal rights that go with it, and if you agree to forego it for a thousand dollars a month, there's adequate consideration.

In short, Appellee's contention that Mrs. Hall changed the theory of her case and "[a]t closing argument, [] asked the court to reform the agreement to read as a settlement agreement ..." is baseless. Since retaining replacement counsel and amending her Complaint, the theory of Mrs. Hall's case has never wavered.

#### IV. THE DOCTRINE OF "PARTIAL INTEGRATION" IS NOT APPLICABLE.

In Point III of its Argument, Appellee contends that the Employment Agreement:

... 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.

Brief Of Appellee at page 15.

Again, Appellee fails to explain what it means by this curious contention. There was certainly no finding of fact or conclusion of law that the Employment Agreement was at least "partially integrated". Further, Mrs. Hall's claim that the parties never intended that she would go to work for Appellee under the Employment Agreement is obviously inconsistent with any acknowledgement that the agreement is partially integrated. Likewise specious is Appellee's contention that Mrs. Hall would somehow be faced with Statute of Frauds and res judicata problems unless the agreement were at least partially integrated.

Appellee also makes a number of misrepresentations in point III of its Argument which Mrs. Hall believes need to be addressed.

First, Appellee misrepresents that

"Mr. Ennenga [the attorney that drafted the Employment Agreement on behalf of Appellee and who also represented Mr. Hall in the Divorce Action] was emphatic, and despite persistent cross examination by Margaret's counsel, did not waiver (sic) on the point that the employment agreement was not entered into upon consideration of Margaret waiving her claimed right to alimony."

Brief Of Appellee at page 18 (Appellee's emphasis).

In point of fact, on direct examination Mr. Ennenga did unequivocally testify on Appellee's behalf that the Employment Agreement was not entered into by Appellee in consideration for Mrs. Hall's agreement to forego her claim to alimony in the Divorce Action. (Trial Tr. p. 118, lines 10-13) However, on cross-examination, Mr. Ennenga not only wavered on that point, he did a complete flip-flop, testifying that he did not know one way or the other whether Appellee's promises under the Employment Agreement were made in exchange for Mrs. Hall's promise to forego her claim to alimony. (Trial Tr. p. 137, line 14 thru p. 138, line 3) Mr. Ennenga also testified that, even though it was he that drafted the Employment Agreement, the terms of the agreement were neither negotiated nor discussed in his presence (Trial Tr. p. 138, line 3-21), that the terms of the agreement had been arrived at by the parties prior to his involvement (Trial Tr. p. 138, lines 9-16), and that he merely "put in there what [he] was told to put in there ..." (Trial Tr. p. 137, line 11 thru p. 138, line 3)

In short, Mr. Ennenga's testimony with respect to the terms of the Employment Agreement, including the consideration bargained for by the parties, was anything but "emphatic" and unwavering.

Appellee also misrepresents that Mrs. Hall failed "to advise the court that the statement by Judge Rokich [i.e., that 'I believe this is nothing more than an alimony agreement.'] was at

the close of Plaintiff's evidence." Brief of Appellee at page 17 (Appellee's emphasis). That is simply not true. To the contrary, Mrs. Hall specifically advised the Court that Judge Rokich's statements were made "When Defendant moved for dismissal after Mrs. Hall rested her case ..." Appellant's Opening Brief at page 16.

Finally, Appellee attempts to belatedly rehabilitate Mr. Hall's preposterous trial testimony by offering that "The fact that [Mr. Hall'] memory of events which had transpired ten years previously became confused upon cross-examination proves nothing." Brief Of Appellee at page 19. Exactly what Appellee is referring to is unclear. What is clear is that Mr. Hall's trial testimony was in most relevant respects identical to his previous deposition testimony. (Trial Tr. p. 66, line 4 thru p. 69, line 16; p.86, line 23 thru p. 88, line 25; and p. 103, line 5 thru p. 105, line 24) Mr. Hall's memory was not confused; to the contrary, he has steadfastly maintained his preposterous fabrications throughout this litigation.

**V. MR. TURLEY'S TESTIMONY WOULD CLEARLY HAVE BEEN RELEVANT AND HE SHOULD HAVE BEEN ALLOWED TO TESTIFY.**

In point IV of its Argument, Appellee first contends that the trial court's disallowance of the testimony of Brent Turley was proper because the "Turley episode ... was remote in time from the facts of this case, having occurred some five years previously." Brief Of Appellee at pages 20-21. According to Appellee, the the fact that the "Turley episode" occurred some five years earlier lessened its probative value to such an extent

that it had become irrelevant.

The short answer to this contention is that the trial judge's ruling on the admissability of Mr. Turley's testimony had nothing to do with remoteness. The specific ruling was that:

"The objection is sustained. You've got to show more than just one occasion. That may be a method under which he operates, but nevertheless I don't see where it's relevant to this case.

(Trial Tr. p. 61, lines 2-6) <sup>5</sup>

Even if the trial judge's ruling had been based upon remoteness, however, Appellee fails to offer any explanation as to why the passage of five years would have had any effect on the probative value of Mr. Turley's testimony, let alone explain how it would render the testimony completely irrelevant. Appellee also fails to recognize that a trial judge does not have discretion to exclude relevant evidence so easily.

In Utah, "[a]ll relevant evidence is admissible ..." Rule 402, Utah Rules of 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 ... than it would be without the evidence." Rule 401, U.R.E.

Mr. Turley's testimony would have been that Mr. Hall had attempted to use an employment contract with his company (containing terms virtually identical to those at issue in the

---

<sup>5</sup> This ruling is particularly puzzling. If Mr. Turley's testimony would have made it more probable that Mr. Hall had a method of operating whereby he used employment contracts with his company as consideration for his personal obligations, the testimony would clearly have been relevant. See Rule 401, Utah Rules of Evidence.



case at bar, including that Mr. Turley would not be required to go to work for Mr. Hall's company) as the down-payment on his purchase of Mr. Turley's home. This testimony would clearly have had a tendency to make it more probable that the consideration given by Mrs. Hall in the case at bar for Appellee's obligations under the so-called Employment Agreement was not her promise to go to work for Appellee, but, rather, was her promise to forego her claim to alimony in the Divorce Action.

By definition, then, Mr. Turley's testimony would have been relevant to the adequacy of consideration issue. Accordingly, Mr. Turley's testimony was admissible pursuant to Rule 402, U.R.E.

Notwithstanding its admissability, however, the trial judge could have excluded Mr. Turley's testimony under Rule 403, U.R.E., if he had determined that its probative value was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Terry v. Zions Co-op. Mercantile Institution, 605 P.2d 314, 323 (Utah 1979). The trial judge made no such determination. Instead, he simply ruled that the proffered testimony was not relevant.

The very caselaw upon which Appellee relies demonstrates that the trial judge abused his discretion in not allowing Mr. Turley to testify.

In Terry v. Zions Co-op. Mercantile Institution, 605 P.2d

314 (Utah 1979), the Court recognized that before a trial judge may exercise his discretion to exclude relevant evidence he must engage in a "delicate weighing process":

Since the decision to exclude relevant evidence involves a delicate weighing process, the extent of the probative value of the evidence must be considered by the trial judge, and, where "the probative value of offered evidence is not great, any such probative value may be outweighed by considerations such as those of surprise, unfairness, confusion of the jury, and prolonging of a trial." [Citation omitted]

605 P.2d at 323, fn. 30.

The Terry Court held that the trial judge had not abused his discretion in the case before it because:

the trial judge took into consideration the delay and confusion that would result from a re-trial of the prior conviction, the remoteness of the prior act, and the tendency the proffered evidence would have to mislead and prejudice the jury. By considering these factors and basing his decision upon conclusions drawn from these considerations, the trial judge did not abuse his discretion ...

605 P.2d at 323 (emphasis added).

Thus, not only must a trial judge engage in a "delicate weighing process" before he may properly exercise his discretion to exclude relevant evidence, but, if he is to exclude such evidence on the basis of remoteness, he must find that its probative value is lessened to such an extent that it is "outweighed by considerations such as those of surprise, unfairness, confusion of the jury, and prolonging of a trial."

605 P.2d at 323, fn. 30.

As indicated above, remoteness was not the basis for the trial judge's ruling on the inadmissibility of Mr. Turley's

testimony. However, even if it had been the basis for his ruling, the trial judge obviously did not engage in the requisite "delicate weighing process" to arrive at a determination that the remoteness of the prior incident lessened its probative value to such an extent that it was outweighed by other considerations "such as those of surprise, unfairness, confusion of the jury, and prolonging of a trial." *Id.* Accordingly, under Terry, Mrs. Hall submits that the asserted remoteness of the prior incident cannot provide a basis for upholding the trial judge's ruling that Mr. Turley's testimony was inadmissible.

The Terry decision is also of particular significance due to the fact that there was only one prior incident at issue in that case. In the case at bar, the only explanation given by the trial judge for his decision to exclude Mr. Turley's testimony was that "you've got to show more than one other occasion." As confirmed by the facts of Terry, that only "one other occasion" was involved is not a critical factor. See also, Leger Construction, Inc. v Roberts, Inc., 550 P.2d 212 (Utah 1976)(evidence relating to another similar construction job); Weber Basin Water Conservancy District v. Ward, 347 P.2d 862 (Utah 1959)(evidence related to a prior sale of real property); McCormick On Evidence § 198 (4th ed.)("[I]t seems clear that contracts of a party with third persons may show the party's ... course of dealing and thus supply useful insights into the terms of the present agreement. Indeed, even if there are but one or two such contracts, they may be useful evidence."). Accordingly,

Mrs. Hall respectfully submits that Mr. Turley's testimony should have been allowed regardless of the fact that it involved only one other occasion.

Appellee next argues that Rule 404(b) of the Utah Rules of Evidence provides a basis for upholding the trial judge's disallowance of Mr. Turley's testimony. This argument is frivolous. Rule 404(b) deals solely with "character evidence", i.e., evidence of other acts offered to "prove the character of a person in order to show that he acted in conformity therewith." Rule 404(b), Utah Rules of Evidence (emphasis added). Mr. Turley's testimony was clearly not being offered to prove Mr. Hall's "character".<sup>6</sup>

Finally, Appellee asserts that even if the trial judge's disallowance of Mr. Turley's testimony was in error, it was harmless error. Appellee offers two arguments in support of this assertion: (1) that "there were three other witnesses who gave direct testimony about the formation of the contract at issue"; and (2) that because this was a non-jury trial "it cannot be said that the Turley episode went unnoticed or was not given the weight it deserved." Brief Of Appellee at page 26 (Appellee's emphasis).

With respect to the former argument, as demonstrated above,

---

<sup>6</sup> Even if Mr. Turley's testimony had been offered to prove Mr. Hall's character, however, Rule 404(b) would not have been an obstacle because that rule specifically provides that character evidence is admissible for the purpose of proving "intent". See State v. Brown, 577 P.2d 135 (Utah 1978)(single unrelated offense involving similar criminal activity by defendant properly admitted as evidence of defendant's intent).

of the "three other witnesses who gave direct testimony" (i.e., Mr. Hall, Mr. Hall's attorney, Mr. Ennenga, and Appellant), two of the witnesses (Mr. Hall and Appellant) gave contradictory testimony. The third witness (Mr. Ennenga) testified that he did not know one way or the other whether Appellee's promises under the so-called Employment Agreement were made in exchange for Mrs. Hall's promise to forego her claim to alimony. (Trial Tr. p. 137, line 14 thru p. 138, line 3). Mr. Ennenga further testified that, even though it was he that drafted the Employment Agreement, the terms of the agreement were neither negotiated nor discussed in his presence (Trial Tr. p. 138, lines 3-21), that the terms of the agreement had been arrived at by the parties prior to his involvement (Trial Tr. p. 138, lines 9-16), and that he merely "put in there what [he] was told to put in there ..." (Trial Tr. p. 137, line 11 thru p. 138, line 3).

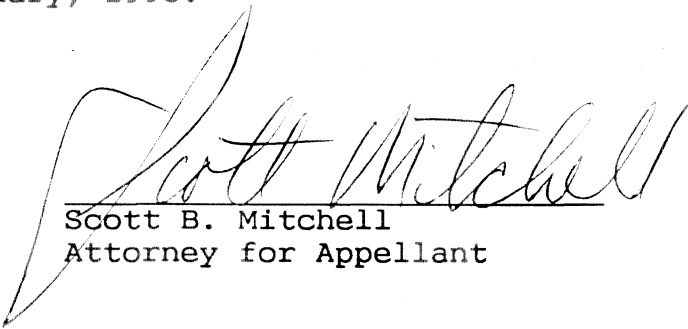
Under the circumstances, Mrs. Hall respectfully submits that Mr. Turley's testimony would have been extremely important corroboration in what is essentially a swearing match between herself and Mr. Hall.

Likewise unpersuasive is Appellee's suggestion that Mrs. Hall's proffer of the general substance of Mr. Turley's testimony was sufficient to render harmless the trial judge's refusal to allow Mr. Turley to testify in person. In a case such as this, where credibility is of such obvious importance, proffered testimony is simply not an adequate substitute for the real thing. Otherwise, why not conduct the entire trial by proffer.

### CONCLUSION

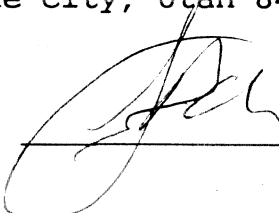
Mrs. Hall respectfully requests that the District Court's Judgment be reversed and that this action be remanded with instructions for further proceedings consistent with this Court's decision.

DATED this 25<sup>th</sup> day of January, 1993.

  
\_\_\_\_\_  
Scott B. Mitchell  
Attorney for Appellant

### MAILING CERTIFICATE

Undersigned certifies that he mailed four copies of the foregoing Appellant's Reply Brief to James A. McIntyre, Esq., 360 East 4500 South, Suite 3, Salt Lake City, Utah 84107, this \_\_\_\_ day of January, 1993.

  
\_\_\_\_\_