1987

Richard S. Smith v. Rocky Mountain Helicopters : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS

STATE OF UTAH

RICHARD S. SMITH, Plaintiff, Appellant, and Cross Respondent vs. ROCKY MOUNTAIN HELICOPTERS, INC., a Utah corporation, Defendant, Respondent, and Cross Appellant and EXECUTIVE ESCROW SERVICES, a Utah corporation, Defendant.	Court of Appeals No. 870511-CA Supreme Court No. 870265 Priority No. 14b

BRIEF OF RESPONDENT AND CROSS APPELLANT

Appeal from the Fourth Judicial District Court
Of Utah County
Honorable Boyd L. Park, District Judge

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I hereby certify that an original and seven copies of the Brief of Respondent and Cross Appellant were furnished by mail to the Clerk of the Utah Court of Appeals at 400 Midtown Plaza, 230 South 500 East, Salt Lake City, UT 84102 and four copies to McDonald & Bullen at American Plaza III, 47 West 200 South, Suite 450, Salt Lake City, UT 84101 this 15th day of December, 1987.

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DESIGNATION OF CASE AND PARTIES
AS THEY APPEARED IN TRIAL COURT

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

RICHARD S. SMITH, Plaintiff, vs. ROCKY MOUNTAIN HELICOPTERS, INC., a Utah corporation, and EXECUTIVE ESCROW SERVICES, a Utah corporation, Defendants.	)	Civil No. 68775

DESIGNATION OF PARTIES
AS THEY APPEAR IN COURT OF APPEALS

UTAH COURT OF APPEALS

STATE OF UTAH

RICHARD S. SMITH, Plaintiff, Appellant, and Cross Respondent vs. ROCKY MOUNTAIN HELICOPTERS, INC., a Utah corporation, Defendant, Respondent, and Cross Appellant and EXECUTIVE ESCROW SERVICES, a Utah corporation, Defendant.	)	Court of Appeals No. 870511-CA Supreme Court No. 870265 Priority No. 14b

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STATEMENT OF JURISDICTION

The decision of the Honorable Boyd L. Park, District Judge, Fourth Judicial District Court of Utah County, was reduced to judgment and entered June 23, 1987. (R. 313) Plaintiff appealed to the Utah Supreme Court on July 23, 1987. (R. 317) Thereafter, on August 6, 1987, Defendant, Rocky Mountain Helicopters, Inc., filed its Notice of Cross Appeal. (R.568) Pursuant to the authority vested in the Supreme Court of the State of Utah, this case was poured-over to the Court of Appeals for disposition on or about November 6, 1987. Notice of the pouring-over was given by letter of the same date, a true and correct copy of which is attached as an addendum hereto and incorporated by reference in support of this Statement of Jurisdiction.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is there sufficient evidence to support a finding of wrongful termination of an employment contract?

2. Is there sufficient evidence to support a finding of monetary damages suffered by Plaintiff as a result of the alleged wrongful termination of the employment contract?

3. Is there sufficient evidence to support a finding that 500 of the shares issued as part of Certificate No. 103 should appropriately be distinguished from the remaining 11,445 shares issued under the same certificate and returned to Plaintiff?

4. Is there sufficient evidence to support a finding that Defendant, Rocky Mountain Helicopters, Inc., or any of its agents

or officers prevented Plaintiff from performing under the consulting arrangement?

5. Is it appropriate, under the facts of this case, to assume Plaintiff could have performed the conditions under the consulting arrangement necessary to permit him to obtain, without restrictions, the disputed stock?

6. Is Defendant, Rocky Mountain Helicopters, Inc., entitled to return of the disputed shares of stock as a matter law?

(a) Did Plaintiff give adequate consideration for the disputed shares?

(b) Did Plaintiff give adequate consideration for Rocky Mountain's alleged relinquishment of the right to recall the stock?

(c) Is Defendant entitled to return of the stock under the terms of the consulting and escrow agreements?

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS

Defendant, Rocky Mountain Helicopters, Inc. is unaware of any constitutional provisions, statutes, ordinances, rules, or regulations whose interpretation is determinative of the foregoing issues.

INTRODUCTION

Defendant, Executive Escrow Services, has essentially been dormant throughout this dispute. It simply holds stock Certificate No. 103 awaiting the order of the court. As a

result, all references to "Defendant" used herein are to Defendant Rocky Mountain Helicopters, Inc., except as otherwise stated.

In the beginning, this was a dispute over 11,945 shares of stock of Rocky Mountain Helicopters, Inc., issued to Mr. Smith. Smith acknowledged as much in response to Defendant's first requests for admission stating "Plaintiff had reason to believe that Defendant would attempt to obtain Plaintiff's stock and only then took legal action to preclude Defendant from doing so." (R. 50 emphasis added)

Smith never intended to state a case of monetary recovery for himself based upon a contention of wrongful termination of the consulting arrangement. The evidence is clear Plaintiff never worked under the consulting arrangement and was to be paid only if he did. This proceeding was commenced simply to prevent Rocky Mountain from its "attempt to obtain Plaintiff's stock." As a result the evidence relating to the nature of the "employment contract" is somewhat sparse.

With the trial court's ruling, this appeal must now deal with issues concerning the existence of an employment contract and whether that contract was wrongfully terminated. While Defendant does not necessarily agree with the legal reasoning of the trial court and some aspects of the ruling, it does believe the court attempted to rule equitably under the circumstances. Defendant was willing to abide by the ruling since it achieved what it intended to accomplish from the beginning, return of

(most of) its stock.

Defendant's cross-appeal, challenges the trial court's ruling as it concerns the award of damages to Plaintiff and the order permitting Plaintiff to retain ownership of 500 shares of stock in Defendant, without restrictions.

STATEMENT OF THE CASE

Nature of the Case

This is an action to determine the disposition of 11,945 shares of stock in Defendant Rocky Mountain Helicopters, Inc., issued to Plaintiff during the time of his employment with Defendant. In addition, this case seeks to determine whether Plaintiff suffered damages resulting from termination of a consulting arrangement between Plaintiff and Defendant.

Course of Proceedings Below

In the trial court, Defendant took the position it was entitled to return of the stock as a matter of law.

On three separate occasions, Defendant filed motions for partial summary judgment with respect to the disposition of the stock. (R. 80, 99, and 182) It was the belief of Defendant's counsel that following resolution of the stock dispute, the other disputes would quietly go away.

Only two of the motions for summary judgment were heard and ruled upon by the court. (R. 153 & 231) Following Defendant's first filing of a motion for summary judgment, Plaintiff's counsel requested the opportunity to take the deposition of Defendant's president, James B. Burr. (R. 97) As a result,

hearing of the first motion was not scheduled. Following the taking of the deposition, Defendant submitted a second motion for partial summary judgment and a modified memorandum. Oral argument was requested. (R. 99 & 148) The court denied Defendant's motion for partial summary judgment. (R. 153)

Thereafter, Defendant renewed its motion for summary judgment just prior to trial. (R. 182) Aqain the motion was denied and the matter proceeded to trial on March 11, 1987. Defendant continues to contend its motions for summary judgment were well-taken and the court erred in failing to order return of the stock to Defendant, as a matter of law.

Trial occurred on March 11, 1987 before the Honorable Boyd L. Park, Fourth Judicial District Court in and for Utah County, State of Utah. (R. 290)

In a memorandum decision dated May 12, 1987, the court held the consulting agreement between Plaintiff and Defendant was wrongfully terminated "as it relates to (a) $600.00 for a gasoline benefit," and "(b) $2,699.55 for medical and insurance expenses the Plaintiff incurred during the term of the consulting agreement." (R. 299) The court further held Plaintiff was not entitled to any compensation under the consulting agreement since he did not work and there was no absolute provision providing a minimum of work days. (R. 299) In addition, the court ordered return of 11,445 shares of company stock inasmuch as the consulting agreement and the escrow agreement provided for the return of stock in the event the company was not sold or a public

or private sale of equity was not effected. (R. 299 & 314) The company was not sold nor was there a public or private sale of equity. (R. 299) Finally, the court distinguished 500 (five hundred) shares of stock issued to Plaintiff from the remaining 11,445 shares of stock, ruling Plaintiff would be entitled to own the 500 shares. (R. 300)

The order reflecting the court's decision was entered on the 23rd day of June, 1987. (R. 313) Plaintiff filed its notice of appeal on July 23rd, 1987. (R. 317) Defendant filed its notice of cross appeal on August 6, 1987. (R. 568)

STATEMENT OF RELEVANT FACTS

1. In January of 1981, Richard Smith, Plaintiff, Appellant, and Cross Respondent (hereinafter sometimes referred to as "Smith") was employed by Rocky Mountain Helicopters, Inc., Defendant, Respondent, and Cross Appellant (hereinafter sometimes referred to as "Rocky Mountain") through James B. Burr, Defendant's President, to act in the capacity of Vice President of Finance. (Tr. 13 & 159)

2. Without the benefit of a written employment contract (Tr. 13), Smith and Rocky Mountain agreed Smith would act as Rocky Mountain's Vice President of Finance under an original compensation package agreement calling for a salary, plus a 20% bonus on that salary if the company achieved a certain profitability level. (Tr. 16)

3. At the time of the original discussions between Smith and Rocky Mountain, Mr. Smith's charge or job description was

outlined for him by Rocky Mountain's President, James B. Burr. (Tr. 13-16)

4. The responsibilities of his job included, inter alia, an attempt to make peace with certain creditors, including Teachers Insurance and Rocky Mountain's preferred shareholders, (Tr. 14 & 15) attempting to find new sources of financing, (Tr. 16) and attempting to obtain a buyer for the company. (R. 291)

5. Approximately twelve months into the relationship and after Mr. Smith had become actively involved in the job responsibilities previously outlined, Mr. Smith proposed to Rocky Mountain's President, James B. Burr, an arrangement suggesting Mr. Smith be permitted to have a stock ownership interest in the company whereby he might benefit from its growth. (Tr. 22 and Ex. 2, P. 8)

6. Although he was never favorably inclined to do so (Tr. 169), on two separate occasions, Mr. Burr approved issuance of stock to Mr. Smith. On the first such occasion, Mr. Burr approved issuance of certain shares previously owned by a former Rocky Mountain employee, Gary Fitzgerald. (Tr. 172)

7. The stock previously owned by Gary Fitzgerald was issued to Mr. Smith without restrictions and no claim has been made for the return of those shares. (Tr. 173)

8. This dispute is principally concerned with the rights, terms, and conditions governing 11,945 shares of stock issued to Smith on or about December 7, 1982. (Ex. 26) The 11,945 shares of stock were issued subject to certain restrictions, including a

right of recall, outlined in letters dated September 20th and December 8th, 1982. (Tr. 30 & 173 and Ex. 3 & 4)

9. Mr. Burr's understanding of the right of recall outlined in the letter agreements governing the issuance of the disputed stock was very simple. So long as the stockholder was employed by the company he or she could retain the stock. If the stockholder was not employed, the stock was to be returned. (Tr. 174) The letters of September 20th and December 8th, 1982, speak for themselves with respect to the understanding. (Ex. 3 & 4)

10. At the time of issuing the disputed shares of stock Mr. Smith was fully aware of the terms and conditions governing the issuance, including the right to recall the stock, as outlined in the letters of September 20th and December 8th, 1982. (Tr. 33 & 95 and R. 305)

11. Mr. Smith further confirmed his understanding of Rocky Mountain's right to recall the disputed shares of stock by expressing, in his letter of September 20, 1982, a hope that his further performance would eliminate Rocky Mountain's right to recall the stock. (Tr. 33 and Ex. 3)

12. Although Mr. Smith had expressed a hope his performance would eliminate Rocky Mountain's right to recall the stock, there were no discussions held regarding the level of performance necessary to eliminate the right of recall. (Tr. 96)

13. Mr. Smith understood, however, the only manner in which he could force the elimination of the recall provisions was through sale of Rocky Mountain's stock under certain

circumstances. (Tr. 96)

14. During 1983, Mr. Smith negotiated with Offshore Logistics for the sale of Rocky Mountain and in October of 1983, a letter of intent for the sale of Rocky Mountain to Offshore Logistics was prepared and executed. (R. 306 & Ex. 9)

15. During this same period of time, the latter part of 1983, as a result of differences regarding corporate policy, a rift arose between Mr. Burr and Mr. Smith. (R. 306)

16. On or about November 15, 1983, the execution by Rocky Mountain of the letter of intent to Offshore Logistics, was approved by Rocky Mountain's board of directors. (R. 306 & Ex. 9 & 23)

17. Prior to finalization of the sales contract the offer from Offshore logistics to purchase Rocky Mountain was substantially reduced and the arrangement and all negotiations essentially fell apart. (Tr. 182 and R. 306)

18. At the same time the negotiations with Offshore Logistics were falling apart, the employment arrangement between Smith and Rocky Mountain was also collapsing. As a result of the major differences between Smith and Mr. Burr, Smith's position with the company was changed by Mr. Burr in a handwritten memo to Smith. (Ex. 11) In addition to outlining the change in position, the memo stated: "If the present sale proposal fails you will be asked to return your shares of stock December 31, 1983." (Ex. 11) The sale proposal to which reference is made in the handwritten memo is that sale proposal to Offshore Logistics.

(R. 306)

19. While Mr. Smith understood Mr. Burr expected return of the stock if the sale proposal failed (Tr. 105), Mr. Smith had no intention of doing so and told Mr. Burr that he was not going to return the stock. (Tr. 106) Mr. Smith believed that his efforts in connection with the Offshore Logistics negotiation permitted him to retain his stock due to Mr. Burr's refusal to complete the transaction with Offshore Logistics. (Tr. 106 & 108)

20. On or about December 27, 1983, Mr. Smith proposed, as a counter-offer to the handwritten memorandum (Ex. 11) a consulting arrangement pursuant to which Rocky Mountain would retain his services as a consultant. (Tr. 53 & Ex. 12)

21. While the consulting arrangement dated December 27, 1983 was never executed, Rocky Mountain ultimately agreed to a modified consulting arrangement dated February 15, 1984. (Ex. 12 & 13 and Tr. 55)

22. At the time of executing the consulting arrangement, Mr. Smith resigned "as Chief Financial Officer, Vice President--Finance and Treasurer of Rocky Mountain Helicopters, Inc. as well as any other positions of officership which I might hold with any subsidiary companies of Rocky Mountain Helicopters, Inc." The resignation had effect from January 1, 1984. (Ex. 13)

23. Thereafter, on or about March 2, 1984, Mr. Smith resigned as a Director of Rocky Mountain. (Ex. 27)

24. Following Mr. Smith's resignation as Vice President Finance and Treasurer, but prior to his resignation as a

Director, he and Rocky Mountain entered into an escrow agreement (dated February 27, 1984) pursuant to which the disputed shares of stock were placed in escrow. (Ex. 14)

25. Among other things, the escrow agreement contains language indicating it "replaces the letter agreements evidenced by letters dated September 20, 1982 and December 8, 1982 and is the sole agreement between [the parties] governing the disposition of the stock...." (Ex. 14, P. 2) It is the foregoing language that is the basis for Mr. Smith's position that the rights of recall outlined in the letters of September 20th and December 8, 1982 were eliminated. (Tr. 118-119) The language was proposed by Mr. Smith. (Tr. 119)

26. Regarding disposition of the stock, the escrow agreement essentially provides if Rocky Mountain was sold during the one year period of the escrow agreement, the stock would be returned to Mr. Smith. If the company was not sold during the one year period, the stock would revert to Rocky Mountain. (Ex. 14 and R. 301)

27. Mr. Smith and Mr. Burr did not discuss the parameters under which Rocky Mountain would agree to sell its stock or participate in a public or private sale of its stock. (R. 298)

28. At no time during the one year period of the escrow agreement did Rocky Mountain sell any of its stock or assets nor did it participate in a public or private sale of its stock or the stock of any subsidiary. (R. 308) In fact, at no time, since September 1982, has the company been sold or engaged in any

private or public offering of its stock (Tr. 177)

29. At the time of executing the consulting agreement, there were no discussions between Mr. Smith and Mr. Burr regarding elimination of the rights of recall. (Tr. 121 & 186)

30. It is Mr. Burr's testimony Rocky Mountain never relinquished its right to recall the stock and Mr. Smith never offered anything in exchange for Rocky Mountain's alleged agreement to give up its right to recall the stock. (Tr. 187)

31. On April 23, 1984 Mr. Burr terminated the consulting agreement due to Mr. Smith's unavailability. (Ex. 20 and Tr. 187)

32. A little less than one year later, on the anniversary of executing the consulting arrangement, Plaintiff filed suit. (R.1)

33. The case was submitted to the Honorable Judge Boyd L. Park. The court held Mr. Smith's consulting agreement was wrongfully terminated as it relates to: (a) $600.00 for a gasoline benefit, and (b) $2,699.55 for medical and insurance expenses the Plaintiff incurred during the term of the consulting agreement. (R. 299) The court further held Mr. Smith was not entitled to any compensation for work days under the consulting agreement, "inasmuch as he did not work, nor was there an absolute provision providing a minimum of work days." (R. 299)

34. With respect to the disputed shares of stock, the Court held 11,445 shares of stock should be returned to Rocky Mountain since Rocky Mountain "was not sold nor was there a public or

private sale of equity. To believe the Plaintiff could have sold the company or effected a public or private sale of equity within one year, when there was no agreement as to the terms of either would be speculative." (R. 299)

35. Finally, the court held 500 shares of the company stock issued to Mr. Smith should be distinguished from the remaining shares issued in connection with Certificate No. 103 ordering Plaintiff was entitled to the 500 shares. (R. 300)

SUMMARY OF ARGUMENT

Rocky Mountain's brief is intended to establish, among other things, the following. First, the court, in ruling the consulting arrangement was wrongfully terminated, failed to enter a finding establishing the consulting arrangement was subject to wrongful termination, i.e. the court did not find, and Defendant contends the evidence does not support a finding that, the consulting arrangement was something "more than an indefinite general hiring...terminable at the will of either party." Defendant's position is the consulting arrangement amounted to an indefinite general hiring and was not subject to wrongful termination, as a matter of law.

Second, the evidence is insufficient to support, and the court erred in making, a finding that the consulting arrangement was wrongfully terminated in any respect. Mr. Smith's unavailability, as reflected by the fact he did not work a single day under the consulting arrangement, constituted "just cause" for terminating the arrangement. Moreover, the termination

amounted to nothing more than cutting off the ongoing flow of benefits to Mr. Smith, without consideration in return.

Third, the court erred in awarding a gasoline benefit, in the amount of $600.00, to Mr. Smith, since Smiths' testimony estimated his loss at no more than $450.00. In addition, Smith's evidence on dental expenses is much too speculative to support an award. Finally, with respect to damages, Smith's evidence on medical expenses violates the best evidence rule and should not support an award.

Fourth, all 11,945 shares of stock (the disputed stock) issued to Smith were governed by the same terms and conditions. The court erred in distinguishing 500 shares from the remaining 11,445 shares and ordering return of the 500 shares to Smith.

Fifth, contrary to Plaintiff's contention at trial and in his brief on appeal, the evidence simply does not support a finding that Defendant prevented Plaintiff's performance under the consulting arrangement. The court's finding that Plaintiff was not completely frustrated and prevented from finding a buyer has ample support in the record.

Sixth, regardless of whether Defendant prevented Plaintiff's performance under the consulting agreement, it is entirely inappropriate, under the facts of this case, to assume Plaintiff could have performed. Again, the court's finding that Smith and Burr had not agreed upon any specific parameters for the sale of Rocky Mountain or additional infusion of capital and that it would be highly speculative to determine Plaintiff could have

performed, has ample support in the record.

Finally, Rocky Mountain is entitled to return of the stock, as a matter of law, under at least three different theories. First, there was no consideration from Smith at the time of issuing the stock. Second, Mr. Smith's claim that Rocky Mountain relinquished its right to recall the stock at the time of executing the escrow agreement, clearly describes a modification of the original arrangement. The alleged modification was not supported by consideration and must fail as a result. Consequently, Rocky Mountain retained the right to recall the stock as outlined in the letter agreements. (Ex. 3 & 4) Finally, under the terms and conditions outlined in the consulting arrangement and escrow agreement, Rocky Mountain is presently entitled to return of the disputed stock.

ARGUMENT

POINT I

THE CONSULTING ARRANGEMENT WAS NOTHING MORE THAN A PERSONAL EMPLOYMENT CONTRACT TERMINABLE AT THE WILL OF EITHER PARTY.

The trial court's finding of wrongful termination of the consulting arrangement, as it relates to certain items, is necessarily based upon a premise, not reflected in the court's findings, that the consulting arrangement was something more than a personal employment contract terminable at the will of either party. A contract terminable at the will of either party, cannot be wrongfully terminated. It may be terminated for "no cause, good cause, or even cause morally wrong without fear of

liability." Rose v. Allied Development Co., 719 P.2d 83, 84 (Utah 1986)

Defendant questions the premise that the employment contract was other than terminable at will. Regarding personal employment contracts terminable at the will of either party, the Utah Supreme Court has stated:

> The general rule concerning personal employment contracts is, in the absence of some further express or implied stipulation as to the duration of the employment or of a good consideration in addition to the services contracted to be rendered, the contract is no more than an indefinite general hiring which is terminable at the will of either party. Bihlmaier v. Carson, 603 P.2d 790, 792 (Utah 1979)

It is apparent the parties intended the original employment arrangement to be an arrangement terminable at the will of either party. Several factors reflect that intent.

First, no written employment contract was executed. (Tr. 13) Second, on at least one occasion Mr. Smith and Mr. Burr discussed Mr. Burr's belief that Smith considered Rocky Mountain "only as a place to sit while waiting for a better opportunity to come." (Ex. 2, P. 8) Third, Smith, by memo, suggested to Mr. Burr there was "nothing to tie me to the company" and proposed he ought to own 10% of the outstanding stock not only to compensate him for his perceived "major accomplishments and contributions to the company," but also because the ownership interest would have the effect of "tying me much more closely to Rocky...." (Ex. 2, P. 8 & 9) Finally, the letter agreements of September 20th and December 8th, 1982, governing issuance of the disputed stock, clearly contemplate Smith's freedom to resign at any time, though

he would be required to return the disputed stock. (Ex. 3 & 4)

There simply can be no question, with respect to the original hiring of Smith, "the final employment contract contained no express terms concerning the duration of the Plaintiff's employment. Rather, the evidence indicates that both parties intended the employment to be indefinite and terminable at the will of either party." (Bihlmaier at 792)

Presumably then "plaintiff contends that this informal at-will employment contract metamorphosed into a contract for a definite term, a contract which could only be terminated for cause." (Rose at 85)

The exceptions necessary to successfully remove an employment contract out of the at-will category, initially outlined by the Utah Supreme Court in Bihlmaier, were reiterated in Rose. The court stated:

> [In] the absence of some further express or implied stipulation as to the duration of the employment or of a good consideration in addition to the services contracted to be rendered, the contract is no more than an indefinite general hiring which is terminable at the will of either party. Rose at 85.

If Plaintiff contends the consulting arrangement amounts to "some further express or implied stipulation as to the duration of the employment or...a good consideration in addition to the services contracted to be rendered..." Defendant disputes the contention. Defendant believes the consulting arrangement "is no more than an indefinite general hiring which is terminable at the will of either party."

Mr. Smith's memo, outlining the consulting arrangement (Ex. 13) is intended to outline "the basis on which I would continue to be of service to Rocky Mountain Helicopters, Inc. over the next year." Although it makes reference to "the next year," the memo falls far short of committing either party to a one-year obligation. In fact, Rocky Mountain had no ability to require Smith to work under the consulting agreement since he merely agreed to "target eight days a month of work based on my availability concurrent with the work requirements of RMH." (Ex. 13, P. 2, Par. 3)

If Smith chose not to work, claiming he was unavailable, Rocky Mountain had no legal basis to compel him to do so. In other words, Smith was able to eliminate or terminate his obligations under the agreement by simply being unavailable. It is precisely that unavailability, along with the ongoing provision of benefits to Smith without consideration in return, that precipitated Mr. Burr's termination of the consulting arrangement. Furthermore, if Rocky Mountain had no "work requirements" for Smith there is nothing in the consulting arrangement compelling Rocky Mountain to use his services.

Defendant likewise believes Plaintiff is hard pressed to show "a good consideration in addition to the services contracted to be rendered" as part of the consulting arrangement. The issues of consideration will be discussed in more detail later in this brief. Suffice it so say Plaintiff, in proposing the consulting arrangement, agreed to do nothing more than he had

previously agreed to do. The consulting arrangement simply provided Plaintiff with a one-year opportunity to sell Rocky Mountain after Plaintiff had resigned his position. Certainly Rocky Mountain never had an obligation to provide the additional one-year opportunity and should not now be penalized for its generosity in doing so.

As a final brief argument, it seems incongruous to contend a consultant has a right to work and be paid irrespective of a need for consulting services. If a businessman has no need for the professional advise and opinion of a consultant, what law compels that businessman to provide work to the consultant. The very nature of a consulting agreement is to provide professional services as needed and must be terminable at the will of either party.

POINT II

ASSUMING ARGUENDO A VALID EMPLOYMENT CONTRACT *EXISTED IT WAS TERMINATED WITH JUST CAUSE.*

Assuming the consulting arrangement was not terminable at-will, it is Defendant's position the arrangement was terminated with "just cause." Regarding termination for good cause the Supreme Court of New Mexico has stated:

> Termination for good cause shown is a restriction on the employers right to discharge an employee at will. Such a provision is an employment condition guaranteeing...against the whim or caprice of an employer allowing discharge only for legal cause, i.e., some causes inherent in and related to the qualifications of the employee or a failure to properly perform some essential aspect of the employee's job function. Danzer v. Professional Insuror's, Inc., 101 N.M. 178, 679 P.2d 1276, 1280 (N.M. 1984).

Although the trial court made no finding as to whether good cause did or did not exist to terminate the consulting arrangement, again it must be presumed the court's ruling regarding wrongful termination of certain aspects of the arrangement is premised upon a conclusion there was no just cause for the termination. Termination for just cause does not amount to wrongful termination. Once again, Defendant questions the premise.

Within eighteen weeks of his employment, Smith and Mr. Burr had "strong basic disagreements over the course [Mr. Smith] was taking." (Ex. 2, P. 1) Within six months of Smith's employment, Mr. Burr expressed to Mr. Smith his disappointment in Smith's performance as an employee and officer of the company. (Tr. 179) Burr further indicated if Smith's performance did not improve, he would have to terminate him. (Tr. 179) Mr. Smith acknowledges Mr. Burr had questioned his commitment to Rocky Mountain. (Ex. 2, P. 8)

An additional factor creating friction between Mr. Smith and Mr. Burr was the issue of ownership. Mr. Burr testified "that from almost the first day we met on our first interview, the issue of ownership with Richard was very important. He discussed it very frequently purposed [sic] it often throughout the term of his employment at the company." (Tr. 168) Issuing stock to Mr. Smith was something Mr. Burr was "never favorably inclined to do...." (Tr. 169)

Contrary to what Plaintiff would have the court believe,

facts contributing to his termination existed long before the consulting arrangement and, in fact, considerably before any stock was issued to him.

While Smith disputes the testimony, Mr. Burr is clear that the consulting arrangement was terminated due to Smith's unavailability. (Tr. 187-189 & Ex. 20) Mr. Burr attempted to contact Smith over a two month period of time, on "more than five and less than ten" occasions. (Tr. 189) Despite these attempts Smith did not work a single day under the consulting arrangement. (Tr. 62 & R. 310) While Smith provided no services to Rocky Mountain under the consulting arrangement, Rocky Mountain continued to provide Smith the benefits outlined in the arrangement. (Ex. 13, par. 4-5) Finally, the agreement was terminated. (Ex. 20)

It seems apparent Smith's unavailability amounts to "a failure to properly perform some essential aspect of the employee's job function." As a result, termination occurred with just cause. The evidence is simply not sufficient to support a finding of wrongful termination in any respect.

POINT III

THE DAMAGES AWARDED BY THE COURT ARE NOT SUPPORTED BY COMPETENT EVIDENCE.

The trial court awarded Plaintiff $600.00 for a gasoline benefit and $2,699.55 for medical and insurance expenses incurred during the consulting agreement. Evidence on damages was proffered by Plaintiff's counsel without objection from Defendant.

Regarding the gasoline benefit, Plaintiff's counsel proffered an amount of $600.00. (Tr. 76) After consulting with his client, Plaintiff's counsel reduced the proffer to $500.00. (Tr. 77) Thereafter, Plaintiff testified he estimated his losses on the gasoline benefit to be "maybe $400.00, $450.00." (Tr. 77)

Despite the foregoing colloquy, the court awarded $600.00 to Plaintiff. Defendant contends the court erred in establishing the award and believes the award should not have exceeded $450.00, Plaintiff's highest estimate.

The award for medical and insurance expenses consists, as near as Defendant can determine, of a mathematical error and $708.15 for the cost of medical insurance purchased by Plaintiff (Tr. 77), $1,111.40 in actual medical expenses incurred (Tr. 77), and $850.00 for Smith's dental work "that would have been done but they...simply did not have the funds." (Tr. 78) The three items total $2,669.55, yet the court awarded $2,699.55.

Regarding the award for dental work, Defendant's objection is simply that the award is much too speculative. Plaintiff's counsel was certainly aware of that fact in prefacing his proffer with the remark "I don't know whether it would be compensable or not...." (Tr. 78) Had he known it would be compensated, I am certain he and his client could have thought of many other things "that would have been done but they...simply did not have the funds." The award should be reversed.

Finally, while counsel for Defendant did not object to Plaintiff's counsel proffering evidence, he certainly objected to

the proffer regarding sums expended for medical insurance and actual medical expenses. The objections were made both at the time of the proffer (Tr. 77) and during closing arguments (Tr. 234).

Plaintiff's proffer regarding sums expended for medical insurance and actual medical expenses was nothing more than a verbal representation to the court outlining the amounts Plaintiff claimed to have spent. This court will note the record is completely void of physician's or other invoices or Plaintiff's cancelled checks. Plaintiff's proffer amounts to nothing more than pleading damages. In that regard the Supreme Court of Wyoming has stated:

> Appellant has entirely overlooked the necessity of proving damages. He apparently equates pleading damages with the proof of damages. We know of no cases nor statutes that permit damages based solely on an allegation of damages. Damages cannot be presumed. One who claims damages has the burden of proving them. Consequently, absent proof, a claim for damages fails. State ex rel. Scholl v. Anselmi, 640 P.2d 746, 749 (Wyoming 1982)

Furthermore, Plaintiff's proffer on medical expenses violates the best-evidence rule. The Utah Supreme Court has indicated a Plaintiff's burden of proof to establish a basis for an award of damages is met "where the Plaintiff has provided the best evidence available to him under the circumstances." Penelko, Inc. v. John Price Associates, Inc., 642 P.2d 1229, 1233 (Utah 1982). Certainly Plaintiff has failed to meet that burden.

Plaintiff's lack of documentary evidence, placed Defendant at an extreme disadvantage during cross-examination. Plaintiff

sought and recovered expenses both for purchase of health insurance and payment of medical expenses. While Plaintiff's counsel indicated the medical insurance was purchased after the payment of medical expenses, Defendant was not in a position to dispute the representation due to the complete lack of documentary evidence. Recovery for medical expenses incurred and for purchase of health insurance seems duplicative.

Defendant contends Plaintiff failed to meet its burden of proof on medical damages, that there is no competent evidence to support such an award, and the court's order should be reversed.

In summary, regarding Plaintiff's damages, Defendant contends, assuming arguendo the wrongful termination occurred, Plaintiff's damages amount only to $450.00 for a gasoline benefit. The remaining damages are either too speculative or not supported by competent evidence.

POINT IV

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE COURT'S CONCLUSION THAT 500 OF THE SHARES ISSUED TO PLAINTIFF SHOULD BE DISTINGUISHED FROM THE REMAINING 11,445 SHARES WHEN ALL SHARES WERE ISSUED UNDER THE SAME CERTIFICATE SUBJECT TO THE SAME TERMS AND CONDITIONS.

In its memorandum decision, the trial court ruled "Plaintiff is entitled to own the 500 shares of company stock issued to him as a bonus. Since the company elected to issue such shares as a stock bonus, such shares so issued should not be a part of the stock issued under the call provisions of the letter agreements or the provisions of the consulting agreement and the escrow agreement." (R. 300)

The evidence revealed that at the same time the disputed shares of stock were issued to Plaintiff, stock in the company was issued to other key employees based upon completed years of service. (Ex. 23) Of the 11,945 shares issued to Plaintiff, 500 were issued based upon his one year of service to Rocky Mountain. (Ex. 23 & R. 292-293)

In distinguishing the 500 shares of stock issued to Smith, under a years of service incentive, the trial court appears to overlook the fact the stock issued to other employees was issued under similar restrictions. (Tr. 174) Regarding the stock issued to Smith and to the various employees, Mr. Burr explained: "The understanding is very simple and that is that as long as the stockholder involved in these and other shares of stock similar to them we have discussed today were employed by the company actively engaged as an employee they could retain the stock. If they were not the stock was to be returned pure and simple." (Tr. 174)

As Defendant attempted to introduce evidence establishing that other employees received stock under conditions similar to those under which the disputed shares were issued, the court, following the objection of counsel for Plaintiff, refused to permit the introduction of such evidence. (Tr. 174) Thereafter, having refused to admit evidence regarding the similarities in the stock issued to other employees, the court determined, and ruled, the stock issued to Smith under the years of service incentive was distinguishable from the remaining stock issued to

Smith and ordered Smith should be permitted to retain the 500 shares.

The fact of the matter is all 11,945 shares of stock issued to Mr. Smith were issued under one stock certificate (Ex. 26) and all 11,945 shares of stock were governed by the same terms and conditions. (Ex. 3 & 4) The court's distinction is simply not supported by the evidence.

POINT V

WITH OR WITHOUT A FINDING OF WRONGFUL TERMINATION, THE EVIDENCE IS COMPLETELY INSUFFICIENT TO SUPPORT A FINDING THAT DEFENDANT OR ANY OF ITS AGENTS OR OFFICERS PREVENTED PLAINTIFF FROM PERFORMING UNDER THE CONSULTING ARRANGEMENT.

In his brief, Plaintiff claims Defendant prevented him from performance under the consulting arrangement. Relying upon Williston On Contracts and various decisions from surrounding states, Plaintiff contends his performance under the consulting arrangement should be assumed if Rocky Mountain engaged in conduct precluding Plaintiff from the possibility of performance. Presumably, Plaintiff asks this court to assume he could have sold Rocky Mountain, but was prevented from doing so.

Plaintiff acknowledges the lower court found "despite termination of the contract, Smith was not completely frustrated and prevented from finding a buyer for the company within the one year time period stated in the contract." (R. 299) Plaintiff claims such a finding is in direct conflict with a finding of wrongful termination of the contract. Irrespective of whether the two findings are in conflict, the court's conclusion that

Smith was not prevented from finding a buyer for the company is adequately supported by the evidence.

Smith claims following the termination of the consulting arrangement he was prevented from selling Rocky Mountain because he was no longer "retained by Jim Burr or on behalf of him to do anything." (Tr. 127) He acknowledges, however, termination did not prevent him from going to Jim Burr with an offer of a buyer nor did it prevent him from asking for financial records to present to a buyer. (Tr. 127)

Smith further claims that, following termination of the consulting arrangement, he was prevented from making further efforts to sell the company because he was not going to be paid for those efforts. (Tr. 128) Apparently, he ignores the fact that if he were successful in selling the company, his interest, including the disputed and non-disputed shares of stock, would have been slightly less than one quarter of one million dollars. (Tr. 212) With such an incentive he should not be heard to claim he was prevented from performance because he was not to be paid.

Certainly Mr. Burr never believed that in terminating the consulting arrangement he was terminating Smith's ability to sell Rocky Mountain. He testifies, "matter of fact I specifically remember discussing that with him and he said that well maybe I can find somebody else to buy it and I said, please feel free to do that." (Tr. 190)

The one witness who was able to testify without bias, Lewis Tippetts (who replaced Mr. Smith at Rocky Mountain (Tr. 146)),

indicated: "I guess my feelings were of cooperation. I liked Richard and I wanted to work with him as best I could to get the company sold if there was a buyer out there." (Tr. 152) Mr. Tippetts further testified that Mr. Burr's attitude was "generally cooperative." (Tr. 152)

Mr. Smith was simply unable to produce a buyer ready, willing, and able to purchase Rocky Mountain. Had he done so, there is absolutely no evidence indicating he would not have received complete cooperation.

Finally, Mr. Smith claims he was prevented from meeting with "investors from New York, who were working on the equity sale of the company." (Brief P. 10) The evidence makes clear the individuals from New York were consultants and not investors. (Tr. 219) Mr. Smith's argument essentially takes the position Rocky Mountain had an obligation to provide him with a buyer with whom he could negotiate the sale of Rocky Mountain. Certainly there is no agreement or understanding between Smith and Rocky Mountain that would require Rocky Mountain to provide Smith with investors to negotiate a sale. Likewise, there is nothing that would prevent Rocky Mountain from retaining additional consultants for the purpose of attempting to negotiate a sale or for any other purpose. Mr. Smith was perfectly able to bring to Rocky Mountain, at any time, a buyer for the company. Nothing Rocky Mountain did, prevented Smith from doing so.

POINT VI

UNDER THE FACTS OF THIS CASE IT IS ENTIRELY INAPPROPRIATE TO ASSUME MR. SMITH COULD HAVE PERFORMED THE CONDITIONS UNDER THE CONSULTING ARRANGEMENT NECESSARY TO PERMIT HIM TO OBTAIN, WITHOUT RESTRICTIONS, THE DISPUTED STOCK.

The only condition Plaintiff was required to satisfy in order to obtain the disputed stock was to see that Rocky Mountain was sold or engaged in a successful public or private offering of its common stock. (Ex. 3, 4, & 14) As previously noted, the condition simply was never satisfied.

It is interesting to note the Williston language upon which Plaintiff relies in support of his position that his performance should be assumed (Brief P. 10) is prefaced by the statement: "[I]t is not enough that the promisor evidently would have prevented performance of the condition. If the promisee could not or would not have performed the condition or it would not have happened whatever had been the promisor's conduct, the condition is not excused." (Williston on Contracts Third Edition Sec. 677 at 232)

It is a rather substantial assumption to believe Plaintiff could have or would have performed the condition, i.e. Plaintiff could have or would have been able to see to it that Rocky Mountain was sold or participated in a successful public or private offering of its stock. Williston outlines the scenario as follows:

> The illustrations of this principle are legion. Any number of cases involving in this principle may be found in connection with contracts where brokers are seeking to recover their commissions claiming

> that the owner of land has prevented the sale by a refusal to pursue the contract with a bona fide purchaser...
>
> The contention...is that...when an agent procures a purchaser on the terms proposed by the principal, and the latter accepts the purchaser, then he is entitled to his commissions whether the defaulting purchaser is or is not responsible.
>
> The contention, on the other hand, is that before the agent is entitled to compensation, the purchaser must not only have entered into an agreement to purchase but must also have actually complied with its terms, unless compliance is prevented by the fault of the principal. (Williston Sec. 677 at 225-230)

Plaintiff's position is obviously flawed in at least two respects. First, Plaintiff and Mr. Burr never agreed upon "the terms proposed by the principal" for the sale of Rocky Mountain or for additional infusion of capital into the company. (R. 298) Second, while a letter of intent was executed between Offshore Logistics and Rocky Mountain (Ex. 9), Offshore Logistics never "actually complied with its terms." The original proposal, outlined in the letter of intent was for $1,000,000.00 cash upon closing, and $2,000,000.00 in the form of a promissory note and/or Offshore Logistics preferred stock. (Ex. 9) The offer was ultimately reduced to "approximately $1,000,000.00 in notes" (Tr. 182), and the discussions between Offshore Logistics and Rocky Mountain fell apart. (Ex. 25)

Knowing Smith and Rocky Mountain never agreed to the terms and conditions acceptable for the purchase of Rocky Mountain by Offshore Logistics, Inc., Offshore Logistics, Inc., never actually complied with the terms of the letter of intent and

there were no other discussions pending with a prospective purchaser, it is entirely inappropriate to assume Smith could have satisfied the conditions necessary to obtain an unrestricted right to the disputed stock. The trial court specifically so found, concluding it would be "speculative on the part of the court to determine that Plaintiff could have performed, given the chance he believe [sic] he was prevented by Burr from having." (R. 298)

POINT VII

CONSIDERING ALL MATERIAL FACTS, ROCKY MOUNTAIN IS ENTITLED TO RETURN OF THE DISPUTED STOCK AS A MATTER OF LAW.

During the proceedings below, on two occasions, Defendant attempted to resolve the issues related to the disputed stock through motions for partial summary judgment. (R. 99 & 182) Defendant continues to believe the issues related to the disputed stock can be resolved as a matter of law.

In addition to the two principal arguments presented at the time of arguing Defendant's motions for partial summary judgment, Mr. Smith's testimony, at the time of trial, gives rise to a third argument that the stock should be returned as a matter of law. The arguments are based upon the clarity of the written documents governing issuance of the stock and issues of consideration.

POINT VII(A)

DEFENDANT IS ENTITLED TO RETURN OF THE STOCK SINCE IT WAS ISSUED WITHOUT CONSIDERATION FROM PLAINTIFF.

"If one party asks for and receives something which he would

not otherwise be entitled to from the other, that is adequate consideration." Gorgoza v. Utah State Road Commission, 553 P.2d 413, 416 (Utah 1976) In other words, "when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor, and, although by taking advantage of the necessities of his adversary, he obtains a promise for more, the law will regard it as nudum pactum, and will not lend its process to aid in the wrong." Williston on Contracts Third Edition, Sec. 130 at 532

At trial, Mr. Smith outlined his job description and responsibilities. (Tr. 13-16) In addition, Smith stated: "The original compensation package agreement...was a salary plus a 20% bonus on that salary if the company achieved a certain profitability level." (Tr. 16) Smith acknowledges the original arrangement included no provision for stock compensation. (Tr. 81)

The board of directors resolution approving the issuance of the disputed shares of stock to Mr. Smith identifies the consideration for that issuance as "Smith's performance in securing releases by the preferred shareholders of their stock conversion rights via letters of credit...." (Ex. 23)

It is Defendant's contention the consideration identified in the resolution of the board of directors and the testimony offered by Mr. Smith at the time of trial regarding what he had done to "earn the stock" fail to identify any performance on the part of Mr. Smith that was not included in his original job

description. Plaintiff understood his job responsibilities from the beginning and agreed to perform them in exchange for a salary plus a bonus contingent upon Rocky Mountain's profitability. As a result, he is unable to show that in consideration of its agreement to issue stock to Smith, Rocky Mountain asked for or received "something which [it] would not otherwise be entitled to from [Smith]...." Since Smith's performance amounts to nothing more than "what he...already obligated himself to do, he cannot demand additional compensation therefor...." As a result, Defendant is entitled to the disputed stock due to the complete lack of consideration from Plaintiff at the time of issuance.

POINT VII (B)

DEFENDANT IS ENTITLED TO RETURN OF THE STOCK PURSUANT TO THE RIGHTS OF RECALL OUTLINED IN THE LETTERS OF SEPTEMBER 20TH AND DECEMBER 8TH, 1982.

In the proceedings below, Plaintiff made abundantly clear his position that the rights of recall outlined in the letters of September 20th and December 8th, 1982 were eliminated at the time of entering into the escrow agreement. (Tr. 119) Since Smith also acknowledges he was well aware of the terms and conditions governing the issuance of the stock, as outlined in the letter of September 20th, 1982, and Rocky Mountain's right to recall the stock (Tr. 95), it is apparent his position regarding the elimination of the rights of recall amounts to a modification of the original agreement.

The law is clear that "a subsequent agreement modifying an existing contract must be supported by new consideration

independent of the consideration involved in the original agreement." Boardman v. Dorsett, 685 P.2d 615, 617 (Wash. App. 1984) cf. Williston on Contracts Third Edition, Sec. 1826 at 487.

Utah courts have identified the requirement as a need for mutual assent.

> "It is true that parties to a written contract may modify, waive, or make new contractual terms, even if the contract itself contains a provision to the contrary. (Citations omitted) However, the minds of the parties must have met upon an asserted contract modification....(Citations omitted)" Provo City Corp. v. Nielson Scott Company, Inc., 603 P.2d 803, 806 (Utah 1979)

In response to a question as to what he had done to "earn the stock", or eliminate the rights of recall, Smith spent, without much success, a considerable amount of time attempting to identify just what he had done in return for Rocky Mountain's agreement to eliminate the right of recall. (Tr. 109-113) Smith's difficulty in explaining the consideration given is rather simply explained by the fact Rocky Mountain received nothing which it was not otherwise previously entitled to. In addition, after attempting to explain what he had done to earn the stock, Mr. Smith ultimately acknowledged the stock was to be "earned" by the sale of Rocky Mountain. (Tr. 114)

With respect to mutual assent, the conflicting testimony between Mr. Smith and Mr. Burr makes evident the fact that mutual assent was never reached. While Mr. Smith claims the language in the escrow agreement eliminated the rights of recall (Tr. 118), Mr. Burr testified there were never any discussions regarding elimination of the rights of recall, Rocky Mountain was never

offered anything to give up the rights of recall, and Mr. Burr never believed Rocky Mountain had relinquished its rights of recall. (Tr. 187) The trial court failed to resolve the conflicting testimony, finding simply that the testimony was in dispute. (R. 297, Par. 22 & 23)

The complete lack of consideration and mutual assent makes evident the fact Rocky Mountain never agreed to eliminate the rights of recall governing the original issuance of stock. As a result, upon termination of Smith's employment, Rocky Mountain was entitled, as a matter of law, to return of the stock.

POINT VII (C)

ASSUMING ARGUENDO THE CONSULTING AND ESCROW AGREEMENTS GOVERNED THE DISPOSITION OF THE DISPUTED STOCK, ROCKY MOUNTAIN IS ENTITLED TO RETURN THEREOF AS A MATTER OF LAW.

Ignoring virtually every argument previously made in this brief, Defendant is entitled to return of the stock under the terms and conditions of the consulting arrangement and the escrow agreement. Under cross-examination Mr. Smith acknowledged that under the consulting arrangement, if Rocky Mountain "was not sold to a third party or parties or there was no private or public placement of stock that I was able to affect [sic] during that one year period then the stock would revert." (Tr. 125)

Based upon Smith's acknowledged understanding, the argument is very simple. Rocky Mountain has not been sold since September of 1982, nor has it engaged in a private or public offering of stock. (Tr. 177) While Mr. Smith claims he was prevented from selling Rocky Mountain, the evidence, as discussed in Points V

and VI herein, simply does not support such a contention. As a result, Rocky Mountain is entitled to return of the stock.

CONCLUSION

The trial court's finding of wrongful termination of the consulting arrangement rests on an inadequate foundation. The original understanding negotiated between Smith and Mr. Burr falls within the category of " an indefinite general hiring...terminable at the will of either party." The subsequent consulting arrangement falls into the same category. It stretches the imagination to believe one could be compelled to receive and pay for consulting services. Nothing in the consulting arrangement compels Smith to work or Rocky Mountain to accept his service. As such, the consulting arrangement is also terminable at will and not subject to wrongful termination as a matter of law. If the "employment contract" is not subject to wrongful termination, the damages awarded due to its wrongful termination must fail.

Assuming the consulting arrangement was something more than "an indefinite general hiring...terminable at the will of either party" the record contains ample evidence to support a finding of termination with "just cause." Termination with "just cause" cannot, as a matter of law, amount to wrongful termination. Again, without wrongful termination, the damages awarded to Plaintiff must fail.

The evidence proffered by Plaintiff fails to support the court's award. Assuming a valid employment contract existed and

was wrongfully terminated, the evidence supports, at best, an award of $450.00 for a gasoline benefit.

All 11,945 shares (the disputed shares) issued to Plaintiff are governed by the same terms and conditions. The court erred in distinguishing 500 shares from the remaining 11,445 and ordering return of the 500 shares to Plaintiff. The order should be reversed and all 11,945 shares ordered returned to Rocky Mountain.

Defendant did not, in any respect, prevent Plaintiff's performance under the consulting arrangement. The court's finding, in that regard, has ample support in the record.

To assume Plaintiff could have performed under the consulting arrangement without any parameters establishing just what would amount to "performance" is entirely too speculative. Again, the court's finding, in that regard, has ample support in the record.

Through this appeal Rocky Mountain seeks an order of this court reversing the trial court's finding of wrongful termination on the grounds the consulting arrangement between Smith and Rocky Mountain was not subject to wrongful termination as a matter of law or was terminated with just cause. In addition, Rocky Mountain seeks an order reversing the trial court's award of damages for the reasons outlined herein. Rocky Mountain also seeks an order requiring return to it of the 500 shares of stock distinguished by the trial court. Finally, Rocky Mountain seeks an order affirming the remaining portions of the trial court's

ruling.

Respectfully submitted this 15th day of December, 1987.

Robert S. Young
Attorney for ROCKY MOUNTAIN HELICOPTERS, INC.

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

November 6, 1987

OFFICE OF THE CLERK

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Richard S. Smith,
Plaintiff, Appellant,
and Cross-Respondent.
v. No. 870265

Rocky Mountain Helicopters,
Inc., a Utah corporation, and
Executive Escrow Services, a
Utah corporation,
Defendants, Respondents,
and Cross-Appellant.

Not briefs

Pursuant to the the authority vested in this Court, this case is poured-over to the Court of Appeals for disposition. All further pleadings and correspondence should be directed to that Court. Their address is 230 South 500 East, Suite 400, Salt Lake City, Utah 84102.

Geoffrey J. Butler, Clerk