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NO. 24490

IN THE SUPREME COURT OF THE STATE OF COLORADO

K. W. CARLSON, E. F. COTTER, C. R. NELSON, KENNETH R. OUTWATER, and JAMES J. TRINDLE,	)	Error to the District Court of the City and County of Denver State of Colorado
Appellants,	)	
v.	)	
VINCENT J. BORYLA,	)	HONORABLE JOHN BROOKS, JR. Judge
Appellee.	)	

BRIEF OF APPELLEE

FILED
SUPREME COURT
OF THE STATE OF COLORADO
JUN 30 1970

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PROFESSIONAL CORPORATION
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June, 1970

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VINCENT J. BORYLA,	)	HONORABLE JOHN BROOKS, JR. Judge
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BRIEF OF APPELLEE

SUPPLEMENTAL STATEMENT OF THE CASE

The statement of the case submitted by the Defendants (Appellants' Brief, pp. 2-5) is adequate with two exceptions. First, the stipulation regarding amended pleadings referred to by Defendants as having been filed on the last day of trial (Appellants' Brief, pp. 2, 3) was made prior to the commencement of trial. The stipulation

and amended pleadings were intended to be submitted to the court at that time but the actual typing was delayed. The court was advised before the trial commenced that the amended pleadings would be filed during the progress of the trial. Defendants concede that the trial was, in fact, conducted on the amended issues and make no claim respecting any prejudice resulting from the trial having been so conducted (Appellants' Brief, p. 3).

Second, Instruction No. 19 on damages is incorrectly referred to by the Defendants (Appellants' Brief, p. 4). Instruction No. 19 did not assess damages "less the amount Plaintiff had admittedly earned" because Exhibit BB (f. 2378, offered at ff. 1304-1306) set forth the stipulated facts relating to the income Plaintiff anticipated he would earn under his new employment.

SUPPLEMENTAL STATEMENT OF FACTS

Plaintiff submits the following Statement of Facts to supplement and correct the Statement of Facts submitted by the Defendants.

On March 9 and 10, 1967, Defendant Trindle met with Plaintiff Boryla in Denver to assess the suitability of Denver as a site for a franchise in the ABA (ff. 749, 752). Boryla reviewed

the potential of Denver as a site for an ABA franchise, showed Trindle the City, and introduced Trindle to the Mayor and others. Trindle asked Boryla if he would be interested in participating in the Defendants' basketball venture (ff. 753, 768, 770). Boryla replied that he would like to be the general manager of the team and that he would accept a position on the basis of a five-year contract at $30,000 a year, to be personally guaranteed by Trindle and his four associates. Further, Boryla advised Trindle that he would not be interested in participating in any deal that involved moving out of Denver, and that he would want a stock option in the franchise (ff. 771-773, 775, 776).

During this visit, Trindle told Boryla that he was participating in the basketball venture with four business associates, Defendants Nelson, Carlson, Outwater and Cotter; and Trindle explained to Boryla that each of the Defendants was in charge of various projects for the group, the group looked to the person in charge of the particular venture to steer the group in it, that the basketball venture was his individual project ("his baby") and that he was the one who spoke for the group on it (ff. 773, 811, 1380).

Each of the Defendants had commenced his participation in the basketball venture and had invested money in it prior to the meeting with Boryla on March 27, 1967 (ff. 2019, 2020, 2066, 2178, 2237). Further, each Defendant was a co-holder of the ABA Denver franchise, which had already been issued in their individual names (Exhibit FF, f. 2381, offered at f. 1882). Each of the Defendants intended to utilize the franchise to operate a basketball team in the ABA (ff. 2067, 2186, 2239, 2240) and by their own testimony, expected to share in the profits and losses of the venture (ff. 2187, 2239, 2245). At all times material to this litigation, each of the Defendants retained his right to participate in the management of the venture (ff. 2067, 2188, 2240).

On March 13 Trindle called Boryla and advised him that his group was very much interested in coming to Denver and that they would like to meet him in Los Angeles on Monday, March 27 to discuss the possibility of an agreement (ff. 780, 783). Boryla was met in Los Angeles by Trindle who told him that everyone would be at

the meeting except Cotter, but Cotter would go along with whatever the group determined (f. 1449).

The item most discussed at the meeting was the $30,000 five-year contract which Boryla had told Trindle he would want if he was to participate in the venture. After extended discussion, they agreed, according to Boryla's testimony, that Boryla would be employed by the Defendants to implement their professional basketball franchise in Denver and to perform all of the acts and assume all of the responsibilities necessary to get the franchise going, including hiring and firing players and controlling the ordinary affairs of the business (ff. 800, 1067, 1068). The agreement was to be for a period of three years commencing March 27, for which he was to be paid $100,000 in monthly installments and receive an option to purchase $50,000 worth of stock at the same cost as the original holders of the franchise (ff. 1069, 1079, 1080). They agreed to Boryla's requirement that he wanted the contract personally guaranteed by the Defendants, but Carlson pointed out that Boryla would be the only employee with such a guarantee (ff. 798, 799).

Defendants agreed that if the Club moved from Denver Boryla would not be required to go but he would still be

paid for the full term of the contract (ff. 804, 1073) and that they would be personally liable to reimburse Boryla's expenses incurred in the operation of the franchise (ff. 804, 1069). It was also determined that Boryla would be general manager of the franchise and vice president of a Colorado corporation to be formed to conduct the franchise activities (ff. 806, 807, 1077). Boryla's contract could be assigned to the corporation, provided that the Defendants were to remain personally responsible for payments to him (ff. 1075, 1079).

Boryla also testified that the Defendants agreed that by involving himself in the franchise, Boryla would be making a public commitment to the Defendants' project and in a sense putting himself on the line, so that if they wanted to terminate his duties thereafter they would have to pay him his full compensation for the three years, regardless of any financial difficulties incurred in the operation of the franchise (ff. 804, 1070, 1071).

At one point, when Boryla was discussing the contract with Carlson, Nelson leaned over to Boryla and said, "Don't worry about Kenny; he's awfully tough, but as long as Jim [Trindle] is satisfied, this is Jim's baby." (f. 809)

The participants in the meeting not only reached an agreement, but actually did business under it, and discussed hiring Marian and Don Fredericks, as secretary and business manager, the possibility of hiring Johnny Dee as a coach, the talent available in the Eastern Basketball League, particularly Connie Hawkins, hiring Dan Hoffman as attorney for the team and opening various bank accounts (ff. 800-804).

After the discussion was concluded, Boryla shook hands with the Defendants present and they all said it was a deal (ff. 812, 813). Boryla then went with Outwater and Trindle to Trindle's office (f. 815) and there discussed putting their agreement in writing (ff. 817, 825). According to Defendant Nelson, Trindle told Boryla to write something up when he got back to Colorado (ff. 2103, 2104).

Trindle's testimony contained several substantial admissions as to what had been agreed upon on March 27. Trindle testified that they did reach an agreement that Boryla was going to do some work (f. 1961), and that they did agree on a three-year term instead of a five-year term, and that he would have written down three years at $100,000 if he had been writing the agreement down at that time (ff. 1965, 1967). Further, Trindle conceded that they were in general agreement on the stock option and that a

corporation was to be formed to conduct the franchise (ff. 1968, 1980).

Boryla immediately commenced his activities as general manager. On March 28, he offered Johnny Dee a contract to coach the Denver franchise (f. 801). The ABA player draft was coming up within the week (f. 819) and Boryla commenced accumulating information about possible draft choices (f. 824). On March 29 Trindle called Boryla and Boryla advised him that he had offered Johnny Dee the coaching position (f. 837). Two days later Boryla read to Trindle over the phone the news release announcing both the Denver franchise and Boryla's appointment as "General Manager" (Exhibit B, f. 2352, offered at f. 845). Trindle did not object to the contents of the release and it was given to the Denver news media on April 1, 1967 (f. 843). Immediately following the news conference held in connection with the release (f. 845), Boryla left for the league meeting in Oakland, and participated in the draft (ff. 970, 988). Although Trindle was present at the league meeting and during the draft, Boryla made all of the draft selections and otherwise represented the Denver franchise (ff. 991, 992).

After the draft had been completed, Boryla returned to Denver and contacted the players that he had drafted for the Denver franchise (f. 1002). He phoned Marian and Don Fredericks, and told them to get ready to come to Denver (f. 1005), checked office space locations for the

franchise offices and contacted Max Brooks of The Central Bank and Trust Company regarding a bank account for the proposed corporation (f. 1006). He also reviewed the league player contracts with Dan Hoffman, who was to be the attorney for the team (f. 1007), and checked with the local universities regarding their playing dates so that the scheduling could be set up without substantial conflicts (f. 1020).

Trindle was aware of the arrangements Boryla had made with respect to contacting players, obtaining office space and working with public relations people (f. 1903) and had advised Carlson that Boryla was going to Oakland for the draft (f. 2026). Carlson kept getting reports that Boryla was giving information to the newspapers (f. 2032), and Nelson was aware that Boryla attended the draft and was talking to players on behalf of the franchise (f. 2082). Outwater was aware that Boryla came to Oakland to participate in the draft within a week after the draft had actually been conducted (f. 2247).

Trindle came to Denver on April 5 to meet with Boryla and attend a press conference, which Boryla had scheduled (f. 1045). They then looked at office space and Trindle decided the Hilton Office Building would be best and told Boryla to go ahead and make arrangements for it (f. 1054). Boryla and Trindle went to The Central Bank and Trust Company and signed a bank resolution setting up an account for Denver Enterprises, Inc. showing Boryla as vice president and giving Boryla authority to withdraw funds

on his signature alone (Exhibit S, f. 2369, offered at f. 1113).

During the week of March 27, Boryla had asked Dan Hoffman to put into written form that which had been agreed to in California. Hoffman set down the agreement, based on what Boryla had told him, in two documents, Exhibit E (f. 2355, offered at f. 858) and Exhibit F (f. 2356, offered at f. 858). When Boryla went to Oakland on April 1 for the ABA meeting and draft, he gave Trindle copies of Exhibits E and F (ff. 857, 858), which Trindle showed his lawyer and one or more other Defendants before going to Denver on April 5 (ff. 1970, 1971, 2210).

On April 5, Trindle discussed Exhibit F with Boryla and Tom Cox (f. 1062). The only changes which Trindle wanted to make in Exhibit F were to delete the provision in Exhibit F prohibiting changes in the capital structure of the corporation without the prior written consent of Boryla (ff. 1063, 1656) and to increase the corporation's capitalization from $650,000 to $1,000,000 (f. 1056). Exhibit F was to be retyped by Mr. Cox to reflect these changes (f. 1063). Messrs. Boryla, Trindle, Cox and Hoffman then discussed the employment agreement, Exhibit E (ff. 1063, 1645). Trindle asked to change the phrase "total incapacity" in paragraph 8 to "substantial incapacity" and Boryla agreed (ff. 1063, 1064, 1647, 1648). Trindle also wanted to change paragraph 4 to limit expenses to budgeted amounts and delete the language "except as to expenses so incurred after,

and in the event of, the assignment of this contract to a corporation," Boryla agreed to these changes (ff. 1064, 1646, 1947). Trindle stated that he would take the contract (Exhibit E) back, make the actual changes and together with his other associates sign it and send it back (ff. 1085, 1648).

Following that discussion, on April 6, Boryla and Trindle agreed to a budget of $614,000 (f. 1092). On April 6, Exhibit F had been retyped to the form of Exhibit AA (f. 2377, offered at f. 1125, admitted at f. 1143), Trindle read it and said it was okay (f. 1117). Boryla asked Trindle to sign it and he said fine and did (ff. 1117, 1662).

Boryla and Trindle were in agreement that Boryla should start signing ball players after April 6 but Boryla was never able to do this or make other commitments because, although Trindle had represented that there was between $200,000 and $300,000 in the Defendants' Kansas City basketball franchise account, only $20,000 was available and actually transferred to the new Denver account (ff. 1093-1095).

During the weeks following April 6, Boryla received only a few telephone communications from the Defendants (ff. 1146, 1147, 1149, 1150, 1153). In a phone conversation with Trindle on April 18, Boryla expressed his concern that they were losing precious time in signing ball players and Trindle told him that he thought things would be worked out and that Boryla would be hearing from him (f. 1155).

However, after the April 18 phone call, Boryla never did hear directly from Trindle (ff. 1156, 1157).

On April 22, Boryla was contacted by one Dennis Murphy (f. 1174) whom Trindle had named to him as the former employee who had interested the Defendants in the ABA (f. 1173). Murphy said he was back with Trindle and would like Boryla to come to Oakland to discuss any problems that Boryla might be having with Trindle and his associates (f. 1174). Defendants contend that Murphy was not acting on their behalf and that Murphy in his conversations and dealings with Boryla was not their agent. However, the Defendants never advised Boryla of that fact, even though they knew of Murphy's activities and meetings with Boryla (ff. 1766, 1767).

After the meeting in Oakland with Murphy on April 24 (f. 1180), a further meeting took place between Murphy, one Ron Morgan (a public relations man with Murphy), attorney Hoffman and Boryla on May 3 or 4 in Denver (ff. 1191, 1194). Murphy made it clear at the May meeting that he represented Trindle and his associates (f. 2164). Although Trindle found out about Murphy's meeting with Boryla and told Murphy he was a "bad boy" for contacting Boryla, he never advised Boryla that Murphy had no authority to speak for the Defendants (f. 1791).

On June 2, Boryla received a telegram from Trindle advising him that he never

had had a contract (Exhibit Z, f. 2361, offered at f. 1228).

The only evidence offered on the question of mitigation of damages was a stipulation as to testimony (Exhibit BB, f. 2378, offered at f. 1305) which stated that Boryla had obtained employment as the president, principal executive officer and a member of the board of directors of a corporation organized to conduct a sports venture, at a salary of $30,000 per year, commencing March 1, 1969. Boryla was also to have a stock option in the corporation. The stipulation also provided that the venture was in its organizational stages and would not have any income for some time from its activities, and that Boryla's employment would not have any effect on his activities with Roberts-Boryla Investments.

Boryla testified that there was nothing in his activities in connection with Roberts-Boryla Investments which would interfere with his ability to hold full time employment elsewhere. Further, Boryla testified that he had explored all of the employment opportunities in the sports field available to him since June, 1967, and that he had made himself available for a position as a basketball coach and athletic director at a university, but

the position never materialized (f. 1303). The only other employment opportunity which Boryla had was that referred to in the stipulation, Exhibit BB (ff. 1303-1306).

SUMMARY OF ARGUMENT

I. A. PLAINTIFF'S PROOF OF THE TERMS AND TIME OF THE CONTRACT WERE SUFFICIENTLY DEFINITE TO PERMIT SUBMISSION OF THAT CLAIM TO THE JURY.

I. B. 1. INSTRUCTION NO. 1 PROPERLY PRESENTED PLAINTIFF'S EXPRESS CONTRACT CLAIM TO THE JURY IN ACCORDANCE WITH THE EVIDENCE SUBMITTED AT THE TRIAL.

I. B. 2. THE EVIDENCE AT THE TRIAL WITH RESPECT TO THE INCORPORATION OF EXHIBIT E BY REFERENCE IN EXHIBIT AA WAS SUFFICIENT TO JUSTIFY SUBMISSION OF THAT ISSUE TO THE JURY PURSUANT TO INSTRUCTION NO. 13.

II. THERE WAS NO QUESTION OF FACT WITH RESPECT TO THE LEGAL FORM WITHIN WHICH DEFENDANTS CONDUCTED THEIR BASKETBALL ACTIVITIES.

II. A. THE TRIAL COURT CORRECTLY RULED AS A MATTER OF LAW THAT DEFENDANTS WERE ENGAGED IN A JOINT VENTURE.

II. B. THE TRIAL COURT CORRECTLY SUBMITTED THE QUESTION OF DEFENDANT TRINDLE'S AUTHORITY TO ACT ON BEHALF OF THE OTHER DEFENDANTS IN ACCORDANCE WITH INSTRUCTION NOS. 9 AND 10.

III. THE EVIDENCE SUSTAINS THE TRIAL COURT'S DECISION TO PERMIT THE JURY TO CONSIDER HEARSAY STATEMENTS BY DENNIS MURPHY AND, UNDER INSTRUCTION NOS. 6, 7 AND 8, FIND THAT MURPHY WAS THE AGENT OF THE DEFENDANTS.

IV. THE TRIAL COURT CORRECTLY DENIED THE STATUTE OF FRAUDS DEFENSE.

IV. A. THE TRIAL COURT CORRECTLY DETERMINED THAT COLORADO LAW WAS APPLICABLE TO THE CLAIMED CONTRACT, SINCE COLORADO LAW WAS EXPRESSLY AGREED UPON BY THE PARTIES, THE WRITTEN DOCUMENTS WERE MADE AND EXECUTED IN COLORADO AND IT WAS TO BE PERFORMED PRIMARILY IN COLORADO.

IV. B. THE CLAIMED CONTRACT WAS NOT WITHIN THE CALIFORNIA OR COLORADO STATUTE OF FRAUDS, SINCE IT COULD, BY ITS TERMS, BE PERFORMED WITHIN ONE YEAR.

IV. C. THE AGREEMENT, EXHIBIT AA, EXECUTED BY PLAINTIFF AND DEFENDANT TRINDLE, CONSTITUTES A SUFFICIENT MEMORANDUM

TO COMPLY WITH THE REQUIREMENTS OF THE COLORADO AND CALIFORNIA STATUTE OF FRAUDS.

V. THE TRIAL COURT PROPERLY CONCLUDED THAT NO QUESTION OF FACT WAS PRESENTED WITH RESPECT TO THE AMOUNT OR MITIGATION OF DAMAGES.

V. A. INSTRUCTION NO. 19 CORRECTLY STATED THE LAW OF DAMAGES AND MITIGATION APPLICABLE TO THE EXPRESS CONTRACT CLAIM IN THIS CASE.

ARGUMENT

I. THE TRIAL COURT'S DENIAL OF DEFENDANTS' MOTION FOR DISMISSAL OR DIRECTED VERDICT ON EXPRESS CONTRACT AND THE TRIAL COURT'S INSTRUCTIONS RELATING TO THAT CLAIM SHOULD BE AFFIRMED.

A. Plaintiff's Proof Of The Terms And Time Of The Contract Were Sufficiently Definite To Permit Submission Of That Claim To The Jury.

The record is clear that at one time or another Jim Trindle agreed to every term of the agreement alleged in the Amended Complaint. Defendants really are claiming not that there was insufficient proof, but rather that they should have been allowed to exclude most of the proof by forcing Plaintiff to select one particular magic moment of agreement as the only time with respect

to which proof of facts bearing on the existence of an agreement could be offered. Acceptance of such a proposition would establish a precedent contrary both to the reality of the contractual process and to the parties' actual conduct in this case.

Businessmen entering into contracts customarily discuss the essential terms that they desire or require in a contract and reach oral agreement on the essential terms, as they did here on March 27. Businessmen may also, for reasons of convenience and certainty, agree to incorporate their oral agreements in a written document, as happened here.

An oral agreement containing the essential terms of a contract is not invalidated, however, by such a determination to prepare a written agreement unless the parties agree that the oral contract won't be effective until it is written down. Moreover, an agreement--here the original oral agreement--is not invalidated by a subsequent decision to add supplemental or amendatory provisions. The parties may also agree that the additional terms are effective as of the original date.

Boryla testified that his meeting with the Defendants on March 27, 1967, resulted in an oral agreement for his employment as general manager of their Denver professional basketball franchise at a salary of $100,000 for three years (ff. 794-796, 806, 812, 813; see Plaintiff's Statement

of Facts for a summary of the meeting and related subsequent events). Boryla's testimony did not attempt to portray this meeting as one at which each term was discussed and then a vote taken by the Defendants present. Rather, he related the substance of the discussion and the agreement which was reached as to each of the essential terms of the employment contract.

There is no evidence that any Defendant ever told anyone the contract would not exist--or that Boryla would be excused from performance of his obligations as general manager--until a written document was prepared. Certainly, when Trindle signed Exhibit AA at Boryla's request, incorporating Exhibit E by reference, he thereby confirmed Defendants' agreement both to all of the terms of the oral agreement and to all of the additional provisions incorporated in Exhibits AA and E.

Actually, there is no evidence in the record of a dispute as to whether there was a meeting of the minds on Boryla's employment, but only as to the extent of the agreement on March 27. The Defendants' contention that no agreement of any kind was reached, on March 27 or ever, flies in the face of Trindle's testimony that they did in fact reach an agreement to employ Boryla to perform at least some services, and that if he had written down the terms of that agreement on March 27, he would have included the central terms of the employment agreement: Boryla's compensation

of $100,000 over a three-year period and the $50,000 stock option (ff. 1965-1968).

Perhaps the best evidence that all the parties believed they had reached an agreement on March 27 is the action commenced immediately by Boryla as general manager with the Defendants' knowledge, acquiescence, approval and, in some instances, participation, as more fully described in the Statement of Facts. Perhaps most significantly, Defendants even deposited their basketball funds in a bank account from which Boryla was authorized to make withdrawals without the signature of anyone else.

During the week following the draft Trindle reviewed some of Boryla's activities with various Defendants and showed the employment agreement, Exhibits E and F, dated as of March 27 to some of them and to his counsel. Defendants' counsel prepared a memorandum (Exhibit 2, f. 2393, offered at f. 1984) and suggested certain changes, none of them with respect to the essential terms of Boryla's employment. Two modifications suggested by Trindle and his counsel were made in Exhibit F, which was retyped in the form submitted as Exhibit AA, incorporating Exhibit E by reference in paragraph 6, and signed by Trindle at Boryla's request on April 6. Nevertheless, the Defendants did not

decide to notify Boryla or the news media of their alleged belief that he had not been employed as general manager of their Denver franchise, or that Exhibit AA was not effective, until Trindle's telegram of June 2, 1967, Exhibit Z.

The Defendants were fully aware of all these circumstances through the pleadings, discovery and their own experience. Certainly Plaintiff is fully entitled to submit his claim to the jury on the basis of these same facts for a determination as to whether a meeting of the minds had indeed occurred.

Plaintiff's Complaint as amended sets forth exactly the contract which Plaintiff proved through the evidence described above. The fact that the parties proceeded to attempt to reduce their agreement to writing only presents a question of fact as to whether the parties intended their written agreement to merely incorporate their oral agreement or whether they intended not to be bound by their oral agreement until it was reduced to writing and was properly submitted to the jury by Instruction Nos. 11 (f. 263), 12 (f. 264), 15 (f. 267), and 16 (f. 268). Coulter v. Anderson, 144 Colo. 402, 357 P.2d 76 (1960); Pierce v. Marland Oil Co. of Colorado, 86 Colo. 59, 278 P. 804 (1929);

Universal Products Co. v. Emerson, 36 Del. 553, 179 A. 387 (1935); Peoples Drug Stores v. Fenton Realty Corp., 191 Md. 489, 62 A.2d 273 (1948); Columbia Pictures Corp. v. De Toth, 87 Cal. App. 2d 620, 197 P.2d 580 (1948); and 1 Corbin on Contracts § 30, pages 98-99.

The oral agreement of March 27 was enforceable despite the fact that there was no discussion of such items as notice and the applicable law provisions, because any terms which may have been left for future agreement were not essential. See 1 Corbin on Contracts § 29, pages 84-85 and 94-95; Accord, Metropolitan Water District of Southern California v. Marquardt, 59 Cal. 2d 159, 28 Cal. Rptr. 724, 379 P.2d 28 (1963).

Further, as an alternative argument, Boryla has contended that in the event the jury concluded that no agreement was reached on March 27, it could nonetheless conclude that an agreement in the form of Exhibits E and AA, as modified by the oral agreement made with respect to changes in paragraphs 4 and 6 of Exhibit E, was reached on April 5 and 6. As will be discussed in detail below, this theory of the Plaintiff's case, upon which Plaintiff submitted all of his proof, is embodied in Instruction No. 1 (ff. 242-251).

Contrary to Defendants' assertion (Appellants' Brief, p. 25), the oral agreement which Boryla testified was

reached on March 27 was not first attempted to be shown at trial, but rather was pleaded in the Complaint and in the Complaint as amended. The fact that the Complaint alleges contractual terms additional to those agreed upon on March 27 does not establish a variant between the pleading and the proof because Plaintiff's alternative theories on his express contract case both included the additional terms and conditions agreed upon between Boryla and Trindle on April 5 and 6.

Defendants seek to avoid Exhibit AA by claiming it does not represent the agreement of the parties because of a typographical error. Attorney Hoffman testified that the typographical omission did not change any aspects of the agreement from those which the parties had intended (ff. 2149, 2152, 2153). Further, the Defendants can point to no testimony that establishes other than a meeting of the minds between Boryla and Trindle on the terms of Exhibit AA.

Defendants contend that paragraph 6 of Exhibit AA was not intended to be operative (Appellants' Brief, p. 19). The question of the parties' intentions with respect to Exhibit AA was properly submitted to the jury in accordance with Instruction No. 15 (f. 267). The jury verdict on the express contract claim obviously resolved any question of fact as to the operative character of paragraph 6 of Exhibit AA in favor of the Plaintiff.

Contrary to the position taken by the Defendants (Appellants' Brief, pp. 18, 19), the fact that Trindle and Boryla orally agreed to three modifications of paragraphs 4 and 6 of Exhibit E does not render the contract void. See Welch v. Jakstas, 401 Ill. 288, 82 N.E.2d 53 (1948). Trindle's testimony established that on April 5 and 6 the parties had reached agreement as to the substance of the modifications of paragraphs 4 and 6 of Exhibit E (ff. 1993-1998, 2001) at his own instance. The party requesting such an amendment to a written agreement cannot invalidate the contract simply by failing to put orally agreed-upon changes in writing.

Plaintiff does not contend the contract was made solely through acquiescence of the Defendants in Plaintiff's acts on behalf of the Denver franchise. Plaintiff submitted proof as to Defendants' acquiescence primarily to prove two elements of his express contract claim: First, their acquiescence demonstrates that they too understood that an agreement had been reached on March 27; second, it established that even if they had not authorized, or even had specifically prohibited, Trindle's acts in entering into the agreement with Boryla, Defendants were estopped from relying on such restriction and, having accepted the benefits of the contract, are bound by it. See Welch v. Jakstas, supra.

Defendants' attempt to characterize Plaintiff's presentation here as similar to that held insufficient in Kurtz v. Ford Motor Co., 62 F. Supp. 255 (E.D. Mich. 1945) (Appellants' Brief, p. 23), is without foundation. In Kurtz the court did not summarize the plaintiff's evidence on his contract claim so there is no way to compare the proof held deficient in Kurtz with the proof in this case.

Defendants have clouded the issues in this section of their brief in two respects. First, they have argued that there was something remaining to be done before the parties had reached an agreement (Appellants' Brief, p. 18). This is not the case, however, because a writing is not required to establish a contractual relation. Second, the Defendants have misconstrued the facts here as presenting a question of the application of the law of offer and acceptance (Appellants' Brief, p. 20). Three observations should be made with respect to this misconception.

First, the agreements (Exhibits E and F) tendered by Boryla to Trindle were not offers but rather Boryla's attempts through counsel to reduce the oral agreement reached on March 27 to writing. Second, even if Exhibits E and F could be construed as offers, Exhibit F was accepted and signed in the version submitted into evidence

as Exhibit AA, and Exhibit E was accepted by Boryla and Trindle, who also agreed orally on certain modifications which Trindle requested. Third, Defendants have misconstrued the difference between an expressed contract and a written one. An expressed contract can be oral or written. If Defendants had wished to require Plaintiff to specify in his Complaint whether his contract was written or oral, they should have filed an appropriate motion before the trial.

While the Defendants strenuously contend that the proof varied from the pleadings (Appellants' Brief, pp. 25, 26) they do not show any clause in the agreement pleaded about which there was no proof at trial, or any other specific variant between the pleading and proof. Although Plaintiff believes that evidence was presented at trial to prove the exact contract alleged in the Complaint, such exactitude is not even required by the law under the Colorado Rules of Civil Procedure or supported in any manner by the case cited for this principle, page 25 of Appellants' Brief, Seifert v. Gildersleeve, 84 Colo. 31, 268 P. 589 (1928).

Defendants urge that a directed verdict be granted because Plaintiff failed to establish the terms of the contract (Appellants' Brief, p. 28), but a comparison of the case cited Stice v. Peterson, 144 Colo. 219, 355 P.2d 948 (1960), with this case reveals that

in Stice the plaintiff did not prove any of the essential terms of his contract, such as when the obligation under it arose, how it was to be paid, and what the terms of payment were. In this case, the very terms absent in Stice, in addition to being supplied by the testimony of Boryla and Hoffman, were even forthcoming in Defendant Trindle's testimony (ff. 1961, 1962, 1965-1968).

B. The Trial Court Properly Instructed The Jury On The Contract Claim.

1. Instruction No. 1 (ff. 242-251).

Plaintiff agrees that an Instruction No. 1 should submit to the jury the contentions of the parties not as they may have initially been raised by the pleadings but as they stand at the end of the trial. Moreover, an Instruction No. 1 should state only the essential elements of the claim using as simple language as possible. Colorado Jury Instructions Civil, Colorado Supreme Court Committee on Jury Instructions, § 2:1, p. 10. The language of the pleading need not be submitted verbatim to the jury in an Instruction No. 1. Furthermore, a verbatim submission would conflict with the Defendants' contention (Appellants' Brief, p. 28) that an Instruction No. 1 should present the contentions of the parties as they stand at the end of the trial.

Instruction No. 1 submitted by Plaintiff reflected Plaintiff's claim based on the

pleadings and the evidence submitted at the trial. Defendants' tendered Instruction No. 1 (ff. 287-307) sets forth virtually verbatim the allegations contained in the Complaint as amended, but did not point out which were the essential terms of the agreement claimed by Plaintiff, or reflect the evidence about the agreement which was presented at the trial.

Instruction No. 1 presented to the jury Plaintiff's claim that he entered into an employment contract with the Defendants on or after March 27 and/or April 5 and 6, 1969. This claim was continuously made by Plaintiff throughout the trial in the presentation of evidence and constituted two factual alternatives upon which the jury could conclude that there was an agreement:

1. The agreement was made on March 27, 1967, and was incorporated into the written agreements made on April 5 and 6 (Exhibits E and AA), with oral modifications of Exhibit E;

2. If the jury determined there was no agreement on March 27, nonetheless an agreement was made on April 5 and 6, as set forth in Exhibits AA and E.

The claim submitted by the court to the jury was that in accordance with the above alternatives Boryla had reached an agreement with Defendants whose essential terms were: (1) Boryla was employed as general manager, (2) that he would use his best

efforts and have the authority to conduct the activities of the franchise, (3) the term of the agreement was for three years, (4) his salary was $100,000 over the term, (5) he would be reimbursed for expenses, (6) the Defendants would be personally liable, (7) Boryla would not be required to move with the franchise but would be entitled to his full salary if the franchise moved, (8) a corporation would be formed to carry on the activities of the franchise, (9) Boryla's employment agreement could be assigned, but the Defendants would remain personally liable, (10) Boryla would be vice president of the corporation, and (11) Boryla would have a $50,000 stock option in the corporation. Instruction No. 1 further provided not that Exhibit E was the contract between the parties, but rather that Plaintiff claimed the essential terms and conditions, in the form written down in Exhibits AA and E and with the additional language included in those documents, were agreed to by the Defendants through Trindle's acceptance of them and signing of Exhibit AA. This instruction directly squares with the facts established by Plaintiff's proof.

Defendants' contention in section I.B. of their brief assumes that every word in any contract is an "essential term." In this case, where the written contract is a lawyer's expression of an oral agreement and included language added by the attorney as customary for such agreements, the additional language does not constitute an essential term. Moreover, agreement was reached as to the nonessential terms on

April 5 and 6. Instruction No. 1 accurately reflects those facts and, contrary to Defendants' contention (Appellants' Brief, p. 29), did not require the jury to speculate as to what the terms of the contract were, because the jury was furnished with the substance of all the terms of the contract either as summarized in Instruction No. 1 or through the reference to Exhibits E and AA in Instruction No. 1.

The essential terms and conditions of the contract are numbered 1 through 11 in Instruction No. 1 and the testimony demonstrates that they were agreed to and incorporated in Exhibits E and AA as follows:

Instruction No. 1	Incorporated in Exhibits E & AA	Established by Testimony
1.	Exhibit E;¶1	(f. 806)
2.	Exhibit E;¶1	(ff. 800, 1067, 1068)
3.	Exhibit E;¶2	(ff. 1069, 1965, 1966)
4.	Exhibit E;¶3	(ff. 795, 796, 1069, 1997)
5.	Exhibit E;¶4	(ff. 804, 1069, 1993, 1997)
6.	Exhibit E;¶5A	(ff. 1070, 1071)
7.	Exhibit E;¶5B	(ff. 804, 1073)
8.	Exhibit AA;¶1	(ff. 1079, 1980)
9.	Exhibit E;¶8	(ff. 798, 799, 1075, 1079)
10.	Exhibit AA;¶3	(f. 1078)
11.	Exhibit AA;¶5	(ff. 795, 796, 1079, 1080)

Defendants object that the oral modifications of paragraphs 4 and 6 were not

submitted to the jury in the form those changes were set forth in the Plaintiff's Complaint as amended and protest that the jury was left to speculate just how Exhibit E would have been modified to reflect those understandings (Appellants' Brief, p. 30). However, the substance of the claimed modifications of paragraphs 4 and 6 of Exhibit E was proven (ff. 1063, 1064, 1646, 1647, 1648, 1993-1995, 1997, 1998, 2001) and submitted to the jury by numbered paragraph 5 of Instruction No. 1 which summarized paragraph 4 of the Complaint and incorporated the oral modifications of paragraph 4 of Exhibit E, and by paragraph 6 of Exhibit E which reflects the essence of the parties' agreement with respect to Boryla's incapacity. The fact that the word "total" preceded "incapacity" in paragraph 6 of Exhibit E did not in any way confuse the jury, as the testimony explicitly established that the parties had orally agreed to change the word "total" to "substantial" (ff. 1063, 1647, 2001).

Defendants' position that Plaintiff had to elect the one moment in time when the contract was made seeks to place Plaintiff at an inequitable disadvantage cognizable under no theory of contract law. Defendants' contention that "without a firm statement by Plaintiff as to when the minds met and the terms which such meeting involved, there is simply no proven contract" (Appellants' Brief, pp. 31-32) in no way relates to the case at hand. Such

an election would force Plaintiff to overlook in his proof significant events which are relevant to establishing a contractual relationship between himself and the Defendants.

Clearly Plaintiff from his own lay point of view believed that he had entered into an agreement with the Defendants at the moment that they shook hands on March 27, 1967, and said, "It's a deal." Should Plaintiff therefore be forced to disregard all that after March 27, 1967, in his proof of a contract? Should Plaintiff be required to disregard the fact that he performed services as general manager and was held out to the press and the other teams in the ABA as the general manager of the Denver franchise continuously from March 27, 1967, through June 2, 1967 (ff. 801, 824, 910, 911, 981, 988, 1002, 1005, 1007, 1011, 1020, 1954); that on April 5 and 6 in Denver Trindle approved and signed Exhibit AA, which incorporated Exhibit E by reference; and that all of the other Defendants were aware of at least some of these events (ff. 1771, 1772, 2026, 2032, 2082, 2210, 2211, 2247, 2252)? In essence, the question is should Plaintiff be forced to limit his proof of a contract to only a small portion of the facts of his relationship with the Defendants? The answer is obvious that all of the facts relating to Boryla's relationship with the Defendants are relevant to his contract claim.

Defendants contend that the trial court erroneously refused to permit them to read into the record as evidence a portion of Boryla's deposition (Appellants' Brief, p. 31) which states, by way of summary, that the agreement upon which Boryla bases his complaint is the March 27 agreement. The trial court pointed out that Boryla was not a lawyer and that the court did not think that he did know what his Complaint was based upon (f. 2297). Quite correctly the court refused to permit Defendants to use the deposition testimony to in effect force Boryla to select those facts that he himself would have utilized in framing his Complaint.

Defendants' argument that Plaintiff contends Boryla's impression as to when and where the meeting of the minds occurred is irrelevant, is a misstatement of Plaintiff's position (Appellants' Brief, p. 31). Plaintiff's position, as expressed by his counsel, was that even if Boryla believed that a meeting of the minds took place on March 27 and would have based his Complaint on the events of that day, he is not competent to express a legal conclusion as to whether an agreement resulted solely from the events of that day or from other circumstances either taken together with the events of that day or separate from them (ff. 2298, 2299).

Defendants also suggest that the lack of absolute identity between the language in Exhibits E, F and AA, citing March 27 as the date of making, and that in the Complaint, which states that the parties entered into an agreement "effective as of March 27, 1967," evidences some default in Plaintiff's selection of a time for the "meeting of the minds." As has been previously stated, Plaintiff's Complaint as well as his proof presented to the trier of facts two alternative theories (See Argument I.A., infra). Under either theory, the agreement was effective as of March 27, 1967. It is inexplicable why Defendants seek to emphasize as some flaw in Plaintiff's case the frequent drafting practice of making written agreements referrable to the date at which the parties reached their oral understanding, even though the writing is actually signed or to be signed on some later date.

Two terms in the contract have come under special scrutiny because of their relevance to the application of the Statute of Frauds defense. These are the construction of agreement provision (f. 28) and the death or total incapacity provision (f. 81). Defendants' argument is that because these terms are significant with respect to their Statute of Frauds defense, they must have been essential terms and as such should have been explicitly set forth in Instruction No. 1 in order for the Plaintiff to be

permitted to rely on them in resisting the Statute of Frauds (Appellants' Brief, p. 34). This argument evidences some misunderstanding as to just what an essential term of a contract really is.

An essential term of a contract is a part of the contract that the parties must agree upon in order for them to have an agreement. Defendants contend that an agreement containing the essential terms listed in Instruction No. 1 but omitting the construction and incapacity clauses, cannot, as a matter of law, constitute an enforceable contract. While these clauses may be important to Boryla's case in terms of resisting the Statute of Frauds, they are not essential parts of an enforceable employment contract. See the discussion of Defendants' contentions with regard to the Statute of Frauds, Argument IV, infra.

Ginsberg Machine Co. v. J & H Label Processing Corp., 341 F.2d 825 (2d Cir. 1965), cited by Defendants (Appellants' Brief, p. 34) does not support their argument. The contractual term held essential in Ginsberg concerned the duration of plaintiff's exclusive right to sell and manufacture defendant's machine. This term was absent from the memorandum upon which the plaintiff there sought to rely to avoid the Statute of Frauds, and the court also held there was a serious factual dispute as to what the parties had actually agreed on in this regard. Thus the "essential"

term in Ginsberg differs from the construction and incapacity clauses here in two respects. First, the terms here are nonessential in the context of whether the parties did have an agreement; second, there was no dispute on the facts established at this trial with respect to the parties' agreement on these additional terms (ff. 1645, 1647, 1648, 1729, 2001).

2. Instruction No. 13 (f. 265).

Defendants do not contest the accuracy of the statement of the legal principle in Instruction No. 13 that "a document can incorporate all of the terms of another document by referring to it." Rather, Defendants claim that this instruction is an abstract statement of the law and not applicable to the facts in evidence.

Exhibit AA signed by Defendant Trindle states in paragraph 6, "All of the provisions of the Employment and Personal Service Contract of March 27, 1967, not inconsistent with the terms of this supplement, are incorporated as part hereof by reference." Boryla testified that paragraph 6 of Exhibit AA referred to and incorporated the language in Exhibit E. While Defendants claim this instruction is meaningless because the parties orally agreed to modifications of paragraphs 4 and 6, the fact of incorporation is established by Trindle's signature and thus the instruction is both correct in law and clearly related to the evidence.

II. THE TRIAL COURT CORRECTLY RULED AS A MATTER OF LAW THAT DEFENDANTS WERE ENGAGED IN A JOINT VENTURE AND THAT DEFENDANT TRINDLE WAS THE AGENT OF THE OTHER DEFENDANTS IN CONNECTION WITH THE BUSINESS OF THAT JOINT VENTURE AND IT PROPERLY SUBMITTED THE ISSUE OF TRINDLE'S ALLEGED LACK OF AUTHORITY UNDER INSTRUCTION NOS. 9 AND 10 (ff. 261, 262).

Defendants' entire presentation on the issue of joint venture rests on the proposition that because they hoped their liability for losses would be limited to their initial capital investment, their group did not have one characteristic of a joint venture: an obligation to share in losses. Defendants concede that "the manner in which the Defendants had conducted their exploratory investigation into the field of professional basketball probably could be said to have constituted a joint venture, and an agency in Defendant Trindle, as to the funds advanced by the Defendants" (Appellants' Brief, p. 37, emphasis omitted), but not as to claims in excess of that amount. This hope was only wishful thinking in the absence of a corporation or limited partnership.

The evidence was abundant that the Defendants were engaged in a common enterprise directed at operating a

professional basketball franchise in Denver. The Defendants jointly held the Denver ABA franchise evidenced by Exhibit FF (f. 2381, offered at f. 1882). Each of the Defendants made an investment in the venture (ff. 1877, 2019, 2020, 2066, 2178, 2237); at all times material hereto the Defendants each maintained their rights to control the activities of the venture (ff. 2067, 2188, 2240).

Dennis Murphy was authorized to contact and hire players (ff. 1798, 1799) and did hire Wayne Hightower (f. 1802), Ron Horn and Willie Thomas (f. 1803). Trindle conceded that the Defendants would have had to pay the salaries of the players which Murphy had signed (ff. 1806, 1807, 1808). This obligation was at least $40,000 and thus substantially in excess of the remainder of the funds invested by the Defendants (ff. 1095, 2212-2215).

The Defendants admitted they expected to share in the profits of the venture (ff. 2187, 2239). In fact, the only element of a joint venture which the Defendants contend was not proven by their direct testimony was an agreement to share in losses in excess of their investment. Even this is disproved, however, by the testimony of Cotter and Outwater that the Defendants would share in the losses

and would be obligated for a proportionate share of the expenses incurred in the venture (ff. 2187, 2239, 2235, 2245).

Nonetheless, even without explicit proof of an agreement to share losses, a joint venture existed. The Defendants agreed that they would utilize their ABA franchise to operate a basketball team in Denver and would share in the profits and control of the venture. It is implicit in the agreed consequences of that basic arrangement that the parties were to share the losses, if any, of the venture. Albina Engine and Machine Works, Inc. v. Abel, 305 F.2d 77 (10th Cir. 1962). Without a corporation or limited partnership, their personal liability could not depend on any express agreement to share losses as liability for losses was established by law. See Anderson v. National Producing Co., 253 F.2d 834 (2d Cir. 1958), and 44 Am. Jur. 2d, Joint Adventurers, § 4.

Even if the Defendants demonstrated, which they did not, that they had expressly agreed to do other than share proportionately in the losses, if any, of the venture, such an agreement in the absence of notice would not be

binding on a third person in the position of Boryla and would not serve to avoid the joint and several liability of the Defendants as joint venturers or to defeat the existence of that relation. See Aiken Mills v. United States, 53 F. Supp. 524 (E.D.S.C. 1944).

One case cited by the Defendants on another point, Nels E. Nelson, Inc. v. Tarman, 163 Cal. App. 2d 714, 329 P.2d 953 (1958),(Appellants' Brief, p. 40), is directly in point on the question of whether an agreement to share losses must be explicit in order for there to be a joint venture.

> The facts of this case do not infer or show an agreement on the sharing of losses. However, that factor is immaterial as the law will supply that provision as an agreement to share profits implies an agreement to share proportionately in the losses. [Citations omitted.] 329 P.2d at 958 and 959.

Thus, the obligation to share losses existed as a matter of law despite Defendants' aspirations to the contrary. With all elements of the joint venture thus established, there was no question of fact remaining for the jury; and the court properly determined as a matter of law that the Defendants' basketball activities were conducted

as a joint venture. See Albina Engine and Machine Works, Inc. v. Abel, cited supra; and Taylor v. Brindley, 164 F.2d 235 (10th Cir. 1947).

Defendants also contend that the issue of Trindle's authority to contract for the other Defendants should have been submitted to the jury, and that in the absence of a special agreement, one joint venturer does not have the right to bind the others (Appellants' Brief, p. 40). This latter assertion is an incorrect statement of the law. Under both Colorado and California cases, one member of a joint venture acting for a purpose relating to the joint venture binds the other members of the joint venture by his act. Bushman Construction Co. v. Air Force Academy Housing, Inc., 327 F.2d 481 (10th Cir. 1964); Block v. D. W. Nicholson Corp., 77 Cal. App. 2d 739, 176 P.2d 739 (1947); see Wood v. Western Beef Factory, Inc., 378 F.2d 96 (10th Cir. 1967) (cited at Appellants' Brief, p. 39):

> It is elementary that one joint venturer can bind the other joint venturers in matters that are within the scope of the joint enterprise. 378 F.2d at 98 and 99.

It is only when a member of a joint venture has a restriction on his authority in conducting the business activities of the venture and when the person with whom he is dealing has knowledge of such restriction that his actions are not binding on the joint venture. See Block v. D. W. Nicholson Corp., supra.

The court was mindful of these legal principles in submitting the question of whether Boryla knew of any restriction on Trindle's authority at the time of the signing of Exhibit AA, in accordance with Instruction No. 9 (f. 261). Thus, contrary to Defendants' assertation, this factual question was submitted to the jury.

The jury's factual determination that Boryla was not cognizant of any such restriction on Trindle's authority is manifested by the jury's verdict on expressed contract and is amply supported by the evidence (ff. 773, 811, 1379, 1380, 1416, 1417, 2027, 2029, 2080, 2081).

Defendants' arguments that Trindle's agency must be proven independently

(Appellants' Brief, pp. 40, 41) are beside the point in any event. Once having established a joint venture the agency relationship arises therefrom and does not have to be independently proven.

III. THE COURT PROPERLY RULED THAT THERE WAS SUFFICIENT EVIDENCE REGARDING THE AGENCY RELATIONSHIP OF DENNIS MURPHY AND THE DEFENDANTS TO PERMIT HEARSAY TESTIMONY OF MURPHY TO BE PRESENTED TO THE JURY AND TO BE CONSIDERED BY THEM IN THE EVENT THEY DETERMINED THAT MURPHY WAS THE DEFENDANTS' AGENT.

Prior to the presentation of the testimony summarized below, the court would not permit hearsay testimony of Dennis Murphy (ff. 1177, 1183). The court's finding with respect to the agency of Dennis Murphy was only that there was sufficient evidence to indicate that such a relationship existed (f. 2277). The court in Instruction No. 8 (f. 260) merely permitted the jury to find that Dennis Murphy was the agent of the Defendants, and if they so found, to consider his acts or omissions as the acts or omissions of the Defendants.

Thus, the only question presented with respect to Dennis Murphy is whether or not there was sufficient evidence to justify submitting the issue of Murphy's agency to the jury.

The evidence relating to Dennis Murphy's agency was largely established by the testimony of the Defendants themselves. Murphy was a former employee of the Defendants who had first interested the Defendants in participating in the ABA (f. 1173). Trindle testified that Murphy was to be a stockholder and was active in the franchise while it was in Kansas City (f. 1753),, and that prior to Boryla's first meeting with Murphy on April 23 or 24 (f. 1176), Murphy had been authorized by the Defendants to obtain additional investors with the understanding that if he did so he would be given an interest in the Denver franchise (ff. 1776, 1779, 1978). Murphy was further authorized to contact and hire players and he signed Wayne Hightower, Ron Horn and Willie Thomas pursuant to that authorization (ff. 1798, 1799, 1802, 1803).

Although Trindle was aware of Murphy's two meetings with Boryla, he did not make any effort to advise Boryla that Murphy had no authority to engage in such discussions (ff. 770, 786, 1790, 1791). Even though the Defendants sought to show that Murphy was not

acting for them in his negotiations with Boryla, Trindle repeatedly referred to Murphy as his "associate" in connection with the basketball venture (ff. 1836-1840).

Certainly these facts show that Murphy was clothed with apparent authority making his acts binding upon the Defendants under Bemel Associates, Inc. v. Brown, 164 Colo. 414, 435 P.2d 407 (1967). At the least the evidence permitted reference of the question of Murphy's agency to the jury under the theory of agency by estoppel. 2 C.J.S., Agency, § 29b, p. 1063.

The Defendants have not set forth any aspect of the testimony relevant to Murphy which could serve as a foundation for a claim of prejudice and merely assert that evidence of Murphy's conduct was detrimental to the Defendants. Plaintiff did not rely on testimony concerning Murphy to establish the fact that the Defendants acknowledged having reached an agreement with him. Rather, Plaintiff presented testimony regarding Murphy only to demonstrate that he acted in good faith in not contacting Trindle throughout the latter part of April and May 1969 because he (Boryla) believed that he was in contact with Trindle through Murphy.

IV. THE TRIAL COURT WAS CORRECT IN STRIKING THE STATUTE OF FRAUDS DEFENSES.

A. The Trial Court's Choice Of Colorado Law Was Proper.

Plaintiff claimed the parties agreed to the following language which was incorporated in Exhibit E and the Complaint as amended (f. 84) (Instruction No. 1; ff. 246, 247): "Construction of Agreement: This agreement and the provisions herein shall be construed in accordance with the law of the State of Colorado." (Complaint as amended, f. 84) The trial court agreed that this provision was part of the agreement between the parties, if they had reached agreement. The jury did determine, in effect, that there was an express contract between Plaintiff and the Defendants, which included the provision for the application of Colorado law.

The proof that this term had been assented to by the Defendants through Trindle was not contested. The applicable law provision of the contract, while supplied by attorney Hoffman (f. 854) was submitted by Boryla to Trindle on April 1 (ff. 857, 858). There was no request or agreement to modify in any way paragraph 9 of Exhibit E, providing for construction of the agreement in accordance with Colorado law.

The Defendants first seek to avoid this provision by suggesting (Appellants' Brief, p. 48) that the March 27 date on Exhibits E, F and AA binds Boryla to those terms of the alleged contract which were actually final on that date. Although a contract is presumed to have been made at the time it is dated, the authority cited by Defendants for that point, 17A C.J.S., Contracts, § 581(f), also specifies that "this presumption is not conclusive, and may be overcome by showing that it was executed on a different date." Here the evidence clearly established the events of April 5 and 6.

Defendants' second argument presumes that there was no agreement between the parties as to the applicability of Colorado law. This is factually incorrect, and Defendants are unable to point to any evidence to support it. The cases cited at pages 48 and 49 of Appellants' Brief setting forth the place-of-making rule, in the face of an express agreement as to applicable law are thus not relevant because where an expression by the parties as to the law applicable to their transaction overrides the "place-of-making rule" generally followed in Colorado, Gossard v. Gossard, 149 F.2d 111 (10th Cir. 1945). The submission of the question of express contract to the jury and its determination in favor of Boryla on that issue unequivocally resolves any doubt that the agreement included that term.

Even if this Court determines that this question was not settled by agreement of the parties, there are two other bases upon which Colorado law should, nonetheless, be applied. First, Defendants' reliance on the place-of-making rule assumes that the only place where the contract could possibly have been made was in California on March 27, 1967. However, the proof also demonstrated that agreement was reached in Denver, Colorado, on April 5 and 6 when Trindle and Boryla executed Exhibit AA while making no change in the choice-of-law provisions of Exhibit E.

Second, the actions of Boryla and Trindle on April 5 and 6, the other actions actually taken by Boryla on behalf of the Defendants' franchise, the fact that Boryla was not obligated under the contract if the franchise was moved from Colorado, and the fact that the contract contemplated employment of Boryla to manage a Colorado corporation, conducting basketball activities in Denver, emphasize that the transaction was virtually entirely Colorado oriented.

The place-of-making rule in Colorado has not been reconsidered by this Court, so far as Plaintiff can determine, in the 57 years since Cockburn v. Kinsley, 25 Colo. App. 89, 135 P. 1112 (1913) (cited at Appellants'

Brief, p. 48). Denver Truck Exchange v. Perryman, 134 Colo. 586, 307 P.2d 805 (1957), cited by Defendants (Appellants' Brief, p. 48) raised a question as to whether the Colorado Workman's Compensation Act was applicable to an employment relationship entered into outside of Colorado, and not a conflicts question as to which state law was applicable. Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817 (D. Colo. 1968), while being a recent application of the place-of-making rule adopted decades ago in Colorado, did not and could not under Klaxton Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941), independently establish the present law of this state.

Therefore, it is appropriate to bring to the Court's attention the very significant recent developments in the conflict of laws field by which numerous jurisdictions have adopted a more analytical approach in determining which state's law should properly govern contractual relationships. See, e.g., Baffin Land Corp. v. Monticello Motor Inn, Inc., 70 Wash. 2d 893, 425 P.2d 623 (1967); Fleet Messenger Service, Inc. v. Life Ins. Co. of North America, 315 F.2d 593 (2d Cir. 1963); Cochran v. Ellsworth, 126 Cal. App. 2d 429, 272 P.2d 904 (1954); In re Rubin's Will, 280 App. Div. 348, 113 N.Y.S.2d 70 (1952); and Restatement 2d Conflict of Laws, § 332, Tentative Draft No. 6 as modified, 1960 (1961), which replaced

the place-of-making rule of the former § 332 of the Restatement.

The recent decision of the Supreme Court of the State of Washington in Baffin Land Corp. v. Monticello Motor Inn, Inc., supra, represents a determination by that court to adopt the contacts or center of gravity test and no longer adhere to the place-of-making rule. The Washington court stated there that the factors to consider in determining choice of law are (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the situs of the subject matter of the contract, (e) the domicile, residence, nationality, place of incorporation or place of business of the parties, and (f) the place under whose local law the contract will be most effective. An application of these factors here points to the applicability of Colorado law because Colorado is the state with which the transaction between the parties had its most pervasive and fundamental contacts.

Most significantly, the Washington court in Baffin observed that its state legislature had adopted the Uniform Commercial Code which in § 1-105 provides for a contact test where the parties have not reached any agreement as to applicable law. The adoption of the U.C.C. in Colorado on July 1, 1966, with this same provision, similarly suggests that the place-of-making rule has outlived its usefulness.

Defendants' contention that the trial court ignored California law in its ruling that as a matter of law a joint venture existed and that Trindle was the agent for the venture (Appellants' Brief, p. 49) is without meaning because Defendants point to no distinction between the Colorado law of joint venture and agency and that of California which would have had a bearing on the court's rulings.

B. Under Either The California Or Colorado Statute Of Frauds The Agreement Upon Which Plaintiff Has Based His Suit Is Not One Which Is Within The Statute.

The question presented here with respect to the applicability of either the California or Colorado Statute of Frauds is simply "is the contract one which by its own terms is not to be performed within one year from its making?" The trial court held that the agreement alleged in the Complaint as amended was not within the Statute of Frauds because its inclusion of the following provision made possible the performance of the contract within one year:

> Death or Total Incapacity of Boryla: In the event of the death or substantial incapacity of Boryla for a continuous period of six months, this Agreement shall be terminated, provided, however, that Boryla shall be entitled to the installments for compensation, provided in Paragraph 3, to the date of

> death or to the end of the six-month period of substantial incapacity. (f. 81).

As with the clause relating to the application of Colorado law, the death or incapacity clause was inserted by attorney Hoffman (f. 1074) and Boryla accepted Trindle's request to substitute the word "substantial" for "total". The fact that Trindle and Boryla agreed on the explicit language of this provision in paragraph 6 of Exhibit E, which was incorporated by reference into Exhibit AA, was not contested (ff. 1647, 2001).

While the precise factual situation here has not been presented to this Court, the Colorado statutory provision, C.R.S. 1963, 59-1-12(1)(a), has been the subject of several opinions, which are instructive as to the manner in which the statute terms should be applied here. In order for the one-year provision of the statute to be applicable, the contract, by its own terms, must exclude performance within a year, Clark v. Perdue, 70 Colo. 589, 203 P. 655 (1922), and "must by its own expressed provisions and terms make the performance impossible within the year." Woodall v. Davis-Creswell Mfg. Co., 9 Colo. App. 198, 200, 48 P. 670 (1897). If the agreement is one which under any circumstance can, under its terms, be performed within a year, then such agreement is not one falling under the statute. See, e.g., Kuhlmann v. McCormack, 116 Colo. 300, 180 P.2d 863 (1947).

The application of California's Statute of Frauds is in substance the same: only those agreements which by their terms cannot be performed within one year are invalid under Subsection 1 of the California statute. See, e.g., Hollywood Motion Picture Equipment Co. v. Furer, 16 Cal. 2d 184, 105 P.2d 299 (1940). See also Berkey v. Halm, 101 Cal. App. 2d 62, 224 P.2d 885 (1950).

California's application of the statute is lucidly described in the recent case of White Lighting Co. v. Wolfson, 66 Cal. Rptr. 697, 438 P.2d 345 (1968). In White the contract of employment was of indefinite duration and provided for computation of the employee's compensation in terms of the annual receipts of the employer. In holding that the Statute of Frauds did not apply, the court reviewed the cases decided under Subdivision 1 of the California statute and stated:

> The cases hold that section 1624, subdivision 1, applies only to those contracts which, by their terms, cannot possibly be performed within one year. [Citations omitted.] White, 66 Cal. Rptr. at 701.

The case citations omitted herein were followed in White by a footnote approving the following language from Corbin on Contracts:

> . . . the cases indicate that there must not be the slightest possibility

> that it can be fully performed within one year. [Italics added by California court.] (2 Corbin on Contracts § 444 at 535.)

Even where a contract specifically provides for a term in excess of one year, the statute does not apply if the contract can, by its own terms, be terminated within one year. Pecarovich v. Becker, 113 Cal. App. 2d 309, 248 P.2d 123 (1952). (Three-year contract for professional football coach, terminable on 90 days' written notice by payment of $2,500.) Pecarovich is cited by Williston (3 Williston on Contracts § 498A) as being an expression of a strong minority view which ". . . holds that where a contract is subject to termination during the course of the year, the Statute of Frauds will not apply even though it is probable the contract may continue for a much longer time." 3 Williston, § 498A, pp. 597-598. Williston is relied on by the Defendants (Appellants' Brief, p. 56) and it is interesting to note that while Defendants contend that California law is applicable, they nonetheless cite Williston who acknowledges that this California case is contrary to the position that author has taken.

Defendants' argument that the general rules applicable to statutory construction prohibit the parties from agreeing on terms which take a contract out of the Statute of Frauds (Appellants' Brief, p. 57) have never been approved by the

courts in their construction of the Statute of Frauds, as evidenced by the Colorado and California cases referred to above.

Defendants cite Tostevin v. Douglas, 160 Cal. App. 2d 321, 325 P.2d 130 (1958) (Appellants' Brief, p. 52); Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88 (1910) (Appellants' Brief, p. 52); Duncan v. Clarke, 308 N.Y. 282, 125 N.E.2d 569 (1955) (Appellants' Brief, p. 54); and Allen v. Moyle, 84 Idaho 18, 367 P.2d 579 (1961) (Appellants' Brief, p. 56), as cases in which the Statute of Frauds was held applicable to contracts which like the one before the Court in this case were for a term in excess of one year. However, in none of these cases was there a clause such as here, which would terminate the obligations of the parties upon Plaintiff's death or incapacity.

The principle underlying the application of Subsection 1 of the statute in both Colorado and California is that where the contract by its own terms can be concluded within a year in such a manner as to terminate the obligations of the parties under the contract itself, the contract does not fall under the Statute of Frauds. A decision applying this principle to a contract which could be terminated within one year on the death or substantial disability of a party, has not been found in either the Colorado or California cases.

One case, Sessions v. Southern California Edison Co., 47 Cal. App. 2d 611, 118 P.2d 935 (1941), contrary to the interpretation urged by Defendants (Appellants' Brief, p. 53) is sensitive to this distinction. In Sessions, a contract with a term extending beyond one year was held to be within the statute in the face of the argument that the death of the person to perform under the contract could occur within one year and thus take the contract out of the statute. The court responded to this argument simply:

> The difficulty with the plaintiff's position here, and throughout his brief, is that he fails to observe the distinction between performing a contract and being discharged from liability under it. [Citations omitted.] Sessions, 118 P.2d at 938.

The error in Defendants' argument with respect to Sessions is that it overlooks the distinction between discharge and termination. If the contract in Sessions had provided that the obligations of a party would be terminated by death, as in this case, the contract itself would terminate the party's obligations. This is in contrast to a situation of the death of a party discharging an obligation by operation of law.

A further distinction results from the fact that the contract in this case not only is terminated by death or substantial incapacity of Boryla for a continuous period of six months, but also

provides that Boryla is to be compensated by installments to the date of death or to the end of the six-month period. Thus, the parties' relationship does not merely end when the event of incapacity occurs, but rather the relationship is terminated by a payment of Boryla's compensation for a period of six months, and only after this are the Defendants fully relieved of their obligations under the contract. Boryla clearly would not be entitled by operation of law to payment of his salary during a six-month period of incapacity. For this reason, Defendants' reliance on Williston (Appellants' Brief, pp. 55, 56) is misplaced, as the parties have agreed to much more than termination of their contract by reason of the death of a party.

Subsequent to the jury verdict in this case, the Supreme Court of Washington rendered a decision on facts identical to those in Sessions, supra, Dudley v. Bosie Cascade Corp., ___ Wash. ___, 457 P.2d 586 (1969), which confirms Plaintiff's interpretation. In Dudley, plaintiffs brought suit on an oral employment contract with a four-year term of employment. The plaintiffs urged that because death or disability might terminate their obligations under the contract, the contract was one which could be performed within one year. In rejecting this argument, the court stated that the plaintiffs did not allege that "the parties expressly or by reasonable implication considered the contingencies of death or impossibility." 457 P.2d at 589. The court held that:

> The termination of an obligation because of impossibility, including

> death or disability of one of the parties, when this contingency is not covered by the agreement, results because performance is excused rather than because performance is completely rendered. (Emphasis added.) 457 P.2d at 589.

A contract for a term of more than one year with a provision terminating it on the death of the employee was held not to be within the one-year clause in Kouchoucos v. Gilliam, 328 S.W.2d 817 (Tex. Civ. App. 1959). On appeal to the Texas Supreme Court, however, the decision was reversed, Gilliam v. Kouchoucos, 161 Tex. 299, 340 S.W.2d 27 (1960). (Cited at Appellants' Brief, p. 58.) The portion of the opinion from Gilliam v. Kouchoucos, supra, quoted by Defendants (Appellants' Brief, pp. 58, 59) ("The fact that the parties expressed the result that otherwise would have occurred (anyway) by operation of law does not take this case out of the Statute of Frauds." 340 S.W.2d at 28.) demonstrates that the pronouncement of the Texas Supreme Court in that case could not possibly be applicable here because of the terms of the death or incapacity provision in Boryla's contract.

The majority of the Texas Supreme Court in Kouchoucos cited Corbin on Contracts as authority to the contrary of its holding. A strong dissent cites § 445 and quotes § 447 of Corbin. Discussing

these cases, Corbin (2 Corbin on Contracts § 447, pocket parts) states:

> It is not surprising that this author supports the dissent. If termination at death is by express agreement, the promised performance is fully rendered even though the parties agreed on performance for 10 years if death did not sooner occur. If termination at death is solely by operation of law, there being no such agreement, and the express promise was for employment for 10 years, the promised performance is not fully rendered at death. 2 Corbin on Contracts § 447, pocket parts at 131.

C. The Supplemental Agreement Constitutes A Sufficient Memorandum.

Even if this Court should deem Boryla's employment contract to be within the Statute of Frauds, the Supplemental Agreement (Exhibit AA) signed by Boryla and Trindle constitutes a writing sufficient to comply with the requirements of both the Colorado and California statutes.

Both statutes required not that a contract must be in writing, but that there must be some note or memorandum of the contract in writing and signed by the party to be charged. All that the memorandum must set forth is the essential elements of the contract. Straus v. de Young, 155 F. Supp. 215 (S.D. Cal. 1957) (applying California law).

Here the terms of the agreement are set forth in two separate writings, only one of which is signed. The signed writing, however, does incorporate by reference the unsigned writing. Together these two documents set forth all of the essential elements of the agreement. The use of multiple memoranda, not all of which are signed, to satisfy the requirements of the Statute of Frauds has repeatedly been upheld. See Beckwith v. Talbot, 95 U.S. 289 (1877) (applying Colorado's territorial Statute of Frauds which, in substance, is identical with the present Colorado statute) and Kelley-Clarke Co. v. Leslie, 61 Cal. App. 559, 215 P. 699 (1923).

The signature of Trindle on Exhibit AA is sufficient to bind all of the Defendants pursuant to the principles of joint venture discussed in Argument II, supra. Defendants contend that California law is applicable and that unlike Colorado law it requires the authority of an agent to bind his principal to any memorandum of agreement within the Statute of Frauds to itself be in writing. (See Addendum to Appellants' Brief, § 2309 of the California Civil Code.) Plaintiff objects to any reference to this statutory section as the Defendants failed to cite that section in their pleadings and are thus precluded from raising it now. See Pando v. Jasper, 133 Colo. 321, 295 P.2d 229 (1956) and

Bean v. Westwood, 101 Colo. 288, 73 P.2d 386 (1937).

If this Court does permit Defendants to raise § 2309 of the California Civil Code, it should nonetheless determine that § 2309 is not applicable. First, for the reasons set forth in Argument IV.A., supra, Colorado law should govern the transaction between the parties. Second, even if California law should govern the validity of the contract and the joint venture status of the Defendants, the acts of Trindle as a member of the joint venture, and thus as agent for the joint venture, which were performed in Colorado are to be governed by Colorado law. See Gallagher v. Washington County Savings, Loan & Building Co., 125 W. Va. 791, 25 S.E.2d 914 (1943), and Mercier v. John Hancock Mutual Life Ins. Co., 141 Me. 376, 44 A.2d 372 (1945). In determining to apply the law of the state in which an agent acted to resolve the issue of the agent's authority, the court in Mercier quotes from the Restatement, Conflict of Laws:

> "But whether or not a particular act of the agent or partner is authorized, the law of the state where the act is done determines whether the principal is bound by a contract with a third person." [Emphasis added.] 44 A.2d at 375.

Trindle's authority to bind the other Defendants is then governed by the Colorado Statute of Frauds which does not require an agent's authority to be in writing in order for his principal to be bound by his signing of a memorandum such as Exhibit AA.

Section 2309 is also inapplicable because it relates only to agents acting pursuant to oral authority. Here, Trindle acted as principal (a member of the joint venture) and as agent for the other members. See Smith v. Grenadier, 203 Va. 740, 127 S.E.2d 107 (1962).

The fact that signature space for Trindle and the other four Defendants was included on Exhibit AA is immaterial as one member of a joint venture can bind the others, and Trindle explicitly represented that the changes which he wished to have made in Exhibit E and Exhibit F were the changes that the other Defendants had wanted and authorized (ff. 1652, 1729).

Furthermore, subsequent to Trindle's signing of Exhibit AA, the other Defendants knowingly accepted the

benefits of Boryla's services under the contract (ff. 2026, 2032, 2082, 2247). Where a party named in a contract accepts benefits under it such as to indicate acceptance, such party is held bound by the contract's terms even though he has not signed it. Welch v. Jakstas, supra.

V. THE COURT PROPERLY INSTRUCTED THE JURY ON THE MEASURE OF DAMAGES ON THE EXPRESS CONTRACT CLAIM.

Defendants' arguments with respect to damages (Appellants' Brief, pp. 59-64) would have this Court believe that the trial court usurped the jury's function as to the factual question of whether Plaintiff had mitigated his damages and further that the trial court deprived the Defendants of the benefit of this defense. Both these suggestions bear no relation to what took place at trial.

The uncontested proof at trial established that aside from his basketball experience, Boryla had no background for any other kind of work (f. 1302) and that he had explored all available employment opportunities in the sports management field available to him during the period (f. 1303, Exhibit BB). Further, Boryla testified that because of the peculiar nature of sports management positions, one could not apply for them as one can for other

types of employment (f. 1259). Boryla was not aware during the period following June 2, 1967, of any openings for a professional basketball manager (f. 1257), and the position that he was eventually able to obtain was one in an allied sports field (Exhibit BB).

The stipulation as to testimony, Exhibit BB, established that after Boryla commenced employment March 1, 1969, his salary of $2,500 per month was subject to increase by $1,000 per month if his employer's business involved more than one sport and, further, that Boryla was entitled to a stock option. The stipulation also set forth that the business was only in the organizational stage. The court concluded that any extra compensation which Boryla might obtain as a result of these provisions was speculative and thus could not be considered to reduce the amount of damages, just as it could not be available under converse circumstances to found a claim for damages. The trial court therefore determined that any resulting reduction of damages was nominal and, in accordance with Colorado Jury Instructions, § 23:36, valued them at one dollar and framed its instruction accordingly.

A further contention of the Defendants is that the jury should have at least been permitted to consider the

value to Boryla of a vacation from work and reduce his damages in that sum. This type of "mitigation" is not an element of the law of mitigation of damages. Annot. 17 A.L.R.2d 968, 972, 973 (1951) (cited in Appellants' Brief at p. 59).

The peculiar requirement of "election" described by Defendants (Appellants' Brief, p. 60) is not supported by Saxonia Mining and Reduction Co. v. Cook, 7 Colo. 569, 4 P. 1111 (1884), cited by Defendants (Appellants' Brief, p. 60), which fully permits a plaintiff in the position of Boryla to sue for his losses anticipated over the entire term of a breached contract.

There being no evidence relating to the mitigation of damages other than Exhibit BB, there was no question of fact left for the jury and the court could properly make the determination as to the amount of Plaintiff's damages. The general principle applied by the court in doing so is that expressed in Colorado Jury Instructions § 23:39. See School District No. 3 v. Hale, 15 Colo. 367, 25 P. 308 (1890); Annot. 17 A.L.R.2d 968 (1951); Annot. 22 A.L.R.3d 1047 (1968). The trial court determined that Boryla's damages were the amount he would have received during the full term of the contract less any expenses arising from the contract saved by him, of which there

were none, and less any amount he earned and any amount he could reasonably have earned in the same or similar occupation. Thus the court simply subtracted the amount it was anticipated he would earn under his new employment together with one dollar representing the nominal value of the possibility his salary would be increased and his stock option rights.

Defendants mistakenly suggest that Plaintiff was required to seek employment outside the sports field or outside the Denver area. However, his duty to mitigate required him only to "seek and accept" other like employment. Williams v. Robinson, 158 Ark. 327, 250 S.W. 14, 15 (1923); 5 Corbin on Contracts, § 1095, p. 516. This principle is the law in Colorado. See School District v. Nash, 27 Colo. App. 551, 140 P. 473 (1914). See also, Bang v. International Sisal Co., 212 Minn. 135, 4 N.W.2d 113 (1942), and Zeller v. School District, 259 Minn. 487, 108 N.W.2d 602, 606 (1961) (Wrongfully discharged school teacher was held to have no duty to accept "employment of a different or inferior kind, or in a different locality. . . .").

Further, the Defendants had the burden of proof on this issue. Saxonia Mining and Reduction Co. v. Cook, 7 Colo. 569, 4 P. 1111 (1884). Annot. 17 A.L.R.2d 968, § 5 (1951). (Citing over 200 cases

from 35 jurisdictions including Saxonia, cited supra.) The Defendants do not have an automatic right to go to the jury on this issue when they failed to introduce sufficient proof to raise a factual question. Colorado Jury Instructions § 23:39, notes on use. Defendants' assertation that "facts are for juries, not for the court" (Appellants' Brief, p. 64) is incorrect. Questions of fact in a jury trial are for juries. Where there is no question as to the facts, the court may make a determination as a matter of law.

CONCLUSION

The Defendants in their argument regarding Plaintiff's proof of his contract with the Defendants entirely overlooked the realities of how people negotiate, agree on, and formalize the elements of their contractual relations.

The evidence demonstrated that even prior to Boryla's conversations with them in California on March 27, the Defendants had been advised through Trindle of the basic elements which Boryla would desire in a contract. The discussions in California proceeded much further than merely reaching agreement on a contract, and actually consisted in part of doing business under one. Certainly the Defendants cannot now say that the meeting was merely "an exploratory discussion," after all that then took place.

The fact that the agreement on which suit was brought contained terms in addition to those which had been agreed upon on March 27, 1967, does not serve as a defense. Obviously, the way people reduce a contract to writing is to seek the advice of an attorney who will almost always formalize their relationship with a written document which includes certain language in addition to that which the parties expressly agreed upon. Moreover, Trindle did in fact expressly agree upon the language of the contract upon which suit was brought by his signing of Exhibit AA incorporating Exhibit E, and his oral agreement as to the language of Exhibit E and the changes in it to which Boryla agreed.

Not one equity is asserted on behalf of the Defendants, but rather their plea is that the trial court did not assist them in hiding behind certain technical defenses which they thought could insulate them from their actions. Thus, the Defendants contend that they were not a joint venture because some of them did not desire to participate in losses beyond their original investment. Such might be the wish of all joint venturers, but it is not the legal reality.

The facts were clear that the Defendants did understand their agreement--and that now, after accepting the benefit

of Boryla's services to obtain a fine public acceptance in Denver, a superb draft, and Boryla's other efforts to initiate their basketball venture in Denver, their claim that they were not bound by their agreement is only a wishful afterthought.

For these reasons and for the others set forth in this brief, the Court should affirm the jury verdict rendered below.

Respectfully submitted,

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