

1978

L. Keith Lignell et al v. Clifford M. Berg et al : Brief of Plaintiffs-Appellants

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Lignell v. Berg*, No. 15001 (Utah Supreme Court, 1978).
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Plaintiffs and
Appellants,

Case No. 15001

Defendants' and Respondents.

Appeal from the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable Gordon R. Hall, Judge

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Construction Company

FILED

DEC 12 1977

Clark, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

E. KEITH LIGNELL, MARIAN H.
LIGNELL, his wife, BURTON M.
TODD and PHYLLIS W. TODD,
his wife,

Plaintiffs and
Appellants,

v.

Case No. 15001

CLIFFORD M. BERG and
WILLIAM R. BERG, a partner-
ship, d/b/a BERG BROTHERS
CONSTRUCTION COMPANY, and
FRANK C. BERG, an indivi-
dual, a joint venture, d/b/a
BERG CONSTRUCTION COMPANY,
and FIDELITY AND DEPOSIT
COMPANY OF MARYLAND, a cor-
poration,

Defendants and
Respondents.

BRIEF OF PLAINTIFFS-APPELLANTS

Appeal from the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable Gordon R. Hall, Judge

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PREFACE

This appeal is taken in only one of the three cases which were consolidated for trial, No. 224,441, Lignell and Todd v. Berg Construction Co. and Fidelity and Deposit. In this brief the parties are identified as follows:

1. Plaintiffs are E. Keith Lignell and Burton M. Todd and their wives, and are sometimes called "Lignell and Todd," or the "owners."

2. Defendants are Clifford M. Berg and William R. Berg, a partnership, d/b/a Berg Brothers Construction Company, and Frank C. Berg, an individual, a joint venture, d/b/a Berg Construction Company (sometimes called "contractor" or the "joint venture"), and Fidelity and Deposit Company of Maryland (sometimes called the "bonding company" or "surety"). Reference is sometimes made to Clifford M. Berg and to Clifford M. Berg and William R. Berg, a partnership, d/b/a Berg Brothers Construction Company which is referred to as "Berg Brothers" or the "partnership." Though neither the individual nor the partnership is a defendant, as such, their positions as joint venturers require frequent reference to them.

Parties to the cases consolidated with the instant case are:

1. Hendrik Coppinga and Brent Greenwood, d/b/a Western Drywall, a partnership (sometimes called "drywaller" or "Western").

2. Claron Bailey, called "Bailey."
3. Comstock Electric of Utah, Inc., called "Comstock."
4. Murray Electrical Services, Inc., called "Murray."

The reporter's transcript is referred to herein as "T. ____." The Clerk's records have been designated by him as "A," "B," "C" and "D" and are referred to as "R. A____" or R. C____," etc., in this brief.

Unless otherwise indicated all statutory references are to Utah Code Annotated, 1953.

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IN THE SUPREME COURT OF THE STATE OF UTAH

E. KEITH LIGNELL, MARIAN H.
LIGNELL, his wife, BURTON M.
TODD and PHYLLIS W. TODD,
his wife,

Plaintiffs and
Appellants,

v.

Case No. 15001

CLIFFORD M. BERG and WILLIAM
R. BERG, a partnership, d/b/a
BERG BROTHERS CONSTRUCTION
COMPANY, and FRANK C. BERG,
an individual, a joint
venture, d/b/a BERG CONSTRUC-
TION COMPANY, and FIDELITY
AND DEPOSIT COMPANY OF MARYLAND,
a corporation,

Defendants and
Respondents.

BRIEF OF PLAINTIFFS-APPELLANTS

STATEMENT OF CASE

On October 9, 1973, the drywall subcontractor, Western Drywall, commenced suit in the Third Judicial District Court, No. 214954, against Berg Brothers Construction for breach of its subcontract agreement and against Fidelity and Deposit Company of Maryland on the labor and material bond provided by it relating to the Incline Terrace Apartments, Salt Lake City, Utah. The drywallers also sought to foreclose a mechanics lien on the premises and, in addition thereto, claimed a direct cause of action against the owners, Lignell and Todd. A materialman, Claron Bailey, later joined

that suit as a third-party Plaintiff and alleged a mechanic lien against the property, a direct cause of action against the surety, a direct cause of action against Lignell personally and against both Lignell and Todd. On September 23, 1974, Murray Electric commenced suit against Berg Brothers Construction Company, No. 222531, alleging \$21,360.00 due by breach of contract, and against the surety on the labor and material bond (R. D2-6). In August of 1975 that complaint was amended to include some seven causes of action directly against Lignell and Todd. In addition, the amended complaint added Comstock as a party Plaintiff, alleged several alternate theories of recovery against the surety and recognized the joint venture, Berg Construction Company, as the proper Defendant (R. C276-302). That complaint was amended a second time on April 20, 1976 (R. C593-610).

In December of 1974 Lignell and Todd brought suit, No. 224,441, against the joint venture for a refund or return of monies which Lignell and Todd claimed had been paid in excess of any sums due under the construction contract, and against the bonding company as the obligee on its performance bond. In January of 1975 all cases were consolidated for trial upon motion of the partnership (R. C252-254). Thereafter, Clifford M. Berg and William R. Berg, d/b/a Berg Brothers Construction Company, filed a counterclaim to the action of Lignell and Todd.

DISPOSITION IN THE LOWER COURT

Trial was had on the issues commencing on August 14, 1976, and concluding on October 1, 1976. All claims of the drywallers, the materialmen and the electricians directly against Lignell and Todd were either dismissed or disposed of by a verdict of no cause of action. The drywallers and materialmen obtained a judgment against the partnership, Berg Brothers Construction Company, and the bonding company in the sum of \$42,653.68. Murray Electric received a judgment against the partnership and the bonding company in the sum of \$61,693.01. Clifford Berg and William Berg, d/b/a Berg Brothers Construction Company (the partnership) obtained a judgment over against Lignell and Todd for the sums awarded to the electrician and the drywaller plus an additional \$54,801.99 for a total judgment of \$159,148.68.

On November 30, 1976, the trial court allowed the imposition of interest on the judgment against Lignell and Todd in the sum of \$25,535.55 and, in addition thereto, awarded attorney's fees on behalf of the partnership and the bonding company against Lignell and Todd in the sum of \$21,000.00 each, and passed through to Lignell and Todd the attorney's fees that were awarded to the subcontractors in the sums of \$11,000.00 and \$21,000.00 respectively, for a total award of attorney's fees amounting to \$74,000.00 (R. C1395-1397, 1409-1417).

RELIEF SOUGHT ON APPEAL

The Plaintiffs ask this Court to reverse the judgment of the trial court or in the alternative to grant Plaintiffs a trial in their case only.

STATEMENT OF FACTS

In February of 1971 E. Keith Lignell and Burton M. Todd began investigating the possibility of constructing an apartment complex on the corner of 4th South and 10th East in Salt Lake City, Utah. As originally envisioned, the complex would contain 125 units located in three buildings (designated "A," "B," and "C"). In February of that year they commenced discussions with Clifford M. Berg regarding the construction of the complex (T. 1231). Lignell and Todd had dealt with Berg previously on the construction of another apartment house in the area. They also, at that time, commenced negotiations with several lending institutions to finance the construction of the project. Lignell and Todd further proceeded to have plans and specifications for the project prepared by an architect Ronald Molen. Preliminary plans were generated and submitted to the lending institution for its approval. By September 15, 1971, a detailed set of plans and specifications was completed and given to Berg. Mr. Berg thereafter transmitted the plans to the Salt Lake City Building Department to obtain a building permit. The plans were reviewed by Mr. Virgil Dick who indicated on the plans in red marking that they were deficient in certain areas (T.

976-980). On or about October 20, 1971, Berg met with representatives of the Salt Lake City Building Department, including Mr. Dick, discussed the plans with them and received back one set of plans with the notations and markings of the Department on them (T. 1009, 1018, 2675). Mr. Berg obtained a footing and foundation permit for the project from the City on October 22, 1971.

Prior to the time the contract was signed Berg had presented to Lignell and Todd a detailed itemization of the bid (T. 1238, 2677, Ex's. 127, 139). After discussing the required changes with the City, he reviewed the figures several times and determined that no change would be made in the bid (T. 1019, 2678). Thereafter, on November 16, 1971, Clifford Berg entered into a contract with Lignell and Todd for the construction of the Incline Terrace Apartment project. The completion date for the entire project was November 16, 1972, but Berg agreed to construct the buildings sequentially so that Lignell and Todd could commence renting them. The C building was to be completed first, then B, then A (T. 1172-1173, 1263-1264).

The agreed price for constructing the project was \$1,455,000.00; excluded from the contract were certain items, including the demolition, carpets, drapes, landscaping, excavation in excess of \$30,000.00, swimming pool and patio which Lignell and Todd agreed to have done themselves. The parties also agreed that the funds would be disbursed by Lignell upon the receipt of a draw request

from Clifford Berg (T. 1179-1181, 1206, 1250-1251).

During the same time that Berg was negotiating with the owners, he was also attempting to procure the necessary bonding capacity from Fidelity and Deposit Company of Maryland. Berg, by himself, was not able to obtain a bond of the size required, therefore, he approached his older brother, Frank, and promised him \$7,500. from the profits on the job if he would go in with him on the bond (T. 1067). Frank Berg agreed to do this. William Berg and Clifford Berg had signed a bond application relating to the project on July 27, 1971 (Ex. 256). Frank Berg signed an application for the bond on November 24, 1971, whereon the applicant was identified as Berg Construction Company, the joint venture (Ex. 255).

Mr. Berg did not start the actual work on the project until some time in February, 1972 (T. 664). At about that time the original contract was changed, on the insistence of the bonding company, to include as parties not only Lignell and Todd but also their wives, who were also owners of the property. In addition, the contracting entity was changed from Clifford M. Berg to "Clifford M. Berg and William R. Berg, d/b/a Berg Brothers Construction Company, and Frank C. Berg, an individual, a joint venture d/b/a Berg Construction Company" (T. 2146-2147, Ex. 9). Various subcontracts relating to the project were also changed to reflect the fact that the joint venture was the party constructing the project (Ex. 20). Clifford Berg

was in charge of the project for the joint venture and was authorized to bind the joint venture, all participants thereon and all members thereof (Ex. 164). Lignell was authorized to act on behalf of the four owners and virtually all of the problems in the process of construction were handled by Berg and Lignell in their representative capacities.

One of the original bidders, the electrician, could not meet the requirements for participating in a bonded project. Thereafter, Mr. Berg contacted Mr. Wilford Comstock of Comstock Electric and asked him to participate in the project in his place. Comstock's original bid was for \$171,000.00. Berg, however, had only allowed \$117,000.00 for the electrician in the bid to the owners; therefore, that bid was rejected as being too high. Thereafter, Berg and Comstock negotiated the price of the electrical bid down to \$107,000.00 which was accepted (T. 311-312).

Construction was disorganized and proceeded slowly (T. 1271, 2185). The contractor was unsure of its ability to construct a project of that size (T. 1268-1270). It had no bookkeeper for the project and no superintendent (T. 2235). Until later in 1973 no telephone was installed on the project which required Berg to travel several blocks to the Arctic Circle to phone the subcontractors and suppliers (T. 1871). Later on, Berg asked Mrs. Schoppe, the apartment manager, to contact the subcontractors for him

(T. 2185, 2210). There was no scheduling of the subcontractors and a great deal of confusion on the job (T. 1870, 2184-2185). Subcontractors and others complained about the quality of the work but nothing was done (T. 163, 1876-1879, 2191-2192, 2210).

In September of 1972 Lignell and Todd decided to add an extra floor to the B and A buildings and increase the number of units from 125 to 147. This was to be accomplished by adding 10 units on the new floor in the B building, 8 units on one new floor in the A building and adding four units in other portions of the buildings, one in C, two in B and one in A (T. 1253). Lignell and Berg engaged in negotiations concerning this modification of the plans. At Lignell's request Berg provided several documents setting forth the price of the added units and the amount of extras to the contract (Ex's. 105, 128, 129). In April of 1973 Lignell and Berg executed an Addendum to the contract with the joint venture covering the additional 22 units, plus extras and extending the completion date to July 15, 1973 (T. 1272, Ex. 11). All parties agreed that after that document was executed, the contract price amounted to \$1,759,003.00.

Mr. Berg commenced to make construction draws in April of 1972; Lignell and Todd prepared checks for the subcontractors and materialmen based thereon. Berg continued to make draw requests until October of that

year. During the months of October, November, December of 1972 and January of 1973 Berg made no draws.

In the fall of 1972 the project was refinanced to include the addition of the extra floors and the expansion of the number of units in the complex. The new construction financing was to terminate on November 1, 1973 (T. 1283). In addition, Lignell and Todd sold the ground upon which the project was being built for some \$250,000.00 and then leased it back with a limited option to purchase.

Mr. Berg recommenced making construction draws in February of 1973 and continued to do so until the fall of that year. At trial Mr. Berg contended that payments had not been timely made by Lignell; however, Berg's expert, Mr. Mark Hatch, acknowledged that the payments by Lignell were made, in the most part, promptly upon receipt of the required draw requests.¹ (T. 3158-3172).

1972 was a time of high building activity in the valley. The original sheetrocker, Harry Nichols, did not maintain an adequate crew on the job. In September or October of that year Lignell insisted that Berg fire him. At the time that Mr. Nichols was dismissed he had completed the drywalling on just 32 units, although the completion date for the entire project was only two months away (T.

¹Some of the subcontractors also claimed that they were not paid timely, however, a review of the draw requests by Berg to Lignell relating to their accounts again revealed that, in the most part, all sums requested by Berg were paid promptly within a few days (T. 1990-1993, 2870-2878).

2756-2747; Ex. 226). Thereafter, Lignell contacted an acquaintance of his, Hendrik Copinga, and requested that he come up to the project and discuss the drywall matter with Mr. Berg. Mr. Copinga did this and ultimately he and his partner, Brent Greenwood, d/b/a Western Drywall, became engaged in the remainder of the drywall application on the Incline Terrace Apartments.

In January of 1973 Comstock Electric was experiencing financial difficulties; therefore, it left the project and was replaced by Murray Electrical Services, Inc., a non-union electrical contractor owned by Mrs. Joyce Comstock, the wife of Wilford Comstock. Mr. Comstock served as the master electrician for both Comstock and Murray.

The work did not proceed in an orderly fashion from the start and Lignell, or his representative, found that it was necessary for them to assume a more active role in the construction of the project in an effort to get it completed on time. By July of 1973, the date the entire project was to be completed, there remained much to be done. Lignell was concerned that the project would not be completed before the long-term loan commitment expired. In addition, it had been anticipated by Lignell and Todd that the project would be completed far enough in advance of the expiration of the permanent financing takeout that the project could achieve a substantial occupancy rate which was required by the permanent lender (T. 3301-3302).

In the fall of 1973 Berg became involved with several other projects and was frequently absent from the Incline Terrace, thus delaying the completion of the project and increasing the possibility that the owner's permanent financing would be lost (T. 1870-1871). Lignell made written demands upon the contractor informing it that it was in default under the terms of the contract and demanding that the project be completed immediately (Ex's. 87, 88). At the same time, Lignell was working with the insurance company to receive an extension of the final takeout commitment date, which he was ultimately able to do.

In October of 1973 Lignell demanded that Berg terminate the electrician, Murray Electrical Services, Inc., because it was not diligently prosecuting the work and was delaying the completion of the buildings. Mr. Berg, who was aware that the owners' financing was in jeopardy, was also concerned about the progress the electrician was making (T. 688, 690). Berg terminated Murray and thereafter contacted Mr. Lynn Bateman of Bateman Electric and requested that he come up and complete the job. In the early part of October, 1973, Bateman and Berg met on the job and reviewed the work that had to be done. Mr. Berg stated that what was left to be done was "pretty obvious." (T. 2452). Thereafter, Bateman commenced to complete the electrical work on the project, for which he was paid directly by Lignell.

Lignell, anticipating the closing of the project, requested from Berg a final list of all the extras that were claimed for the project. On November 1, 1973, Berg submitted a list to Lignell which Lignell assumed was the final list of extras (Ex. 130). In January of 1974, Lignell, Todd and Clifford Berg met at Berg's house to resolve some of the conflicts relating to additional costs and expenses on the project and agreed, they thought, to certain set-offs relating to work that had not been done.

In February of 1974, some seven months late, the project was finally ready to close. To this end, Title Insurance Agency, which was representing the permanent lender on the project, obtained from the contractor a list of the final pay-off amounts and holdbacks remaining on the project. In addition, a statement was signed by Clifford Berg, William Berg and Frank Berg reciting the existence of the joint venture and releasing any claims it had against the premises (Ex's. 164, 165). Lignell and Todd, although claiming that they had overpaid on the construction contract, provided Title Insurance Agency with the necessary funds to pay the remaining debts on the project. In reliance upon the documents executed by the brothers Berg, Title Insurance Agency disbursed the funds to all the subcontractors, with the exception of the drywaller, and closed the project. Mr. Ellertson, president of Title Insurance Agency, testified that but for the work of Lignell and Todd and their

providing the funds necessary to clear off the liens or claims which could become liens on the premises, the project could not have been closed (T. 1676).

Evidence adduced at the trial, but not permitted to go to the jury, indicated that the joint venture was never licensed as a contractor by the State of Utah and that the partnership, although previously licensed, had not been licensed from April, 1971, to July, 1974. The partnership obtained a new license in July, 1974, which was revoked by the State in December, 1974 (T. 3038-3048, R. C993).

ARGUMENT

POINT I

THE JURY VERDICT IN THE CASE OF LIGNELL AND TODD VERSUS BERG CONSTRUCTION COMPANY WAS CONTRARY TO THE LAW AND THE EVIDENCE.

The partnership, Berg Brothers Construction Company, recovered a judgment against Lignell and Todd in the amount of \$159,148.68 (R. C1391). This sum was apparently composed of \$42,653.68 which was awarded to the drywallers against the partnership (R. C1390), \$61,693.01 which was awarded to the electrician (Murray) against the partnership (R. C1391), both of which were then passed through to Lignell and Todd, and in addition thereto, \$54,801.99 was added for extras claimed by the partnership in its own behalf (Ex. 252).

Both the partnership and the Surety agreed throughout the trial that they were indebted to the subcontractors

in the amount of their claims (T. 252). In fact, they actually assisted the subcontractors in presenting their cases and in obtaining their judgments. Plaintiffs are not contesting in this appeal the judgments rendered against surety and the partnership in favor of the subcontractors, although there were numerous defenses to those claims that surety and the partnership either waived or chose not to assert. It does not follow, however, that a judgment against the surety and the partnership resulting from the waiver of defenses and the failure to distinguish among the parties should, or can, be passed through and become a judgment against the owners as was done in this case.

A. Neither the contract standards nor the parties involved in the subcontract were the same as those between the owners and the contractor. As far as the joint venture was concerned the standard of workmanship required was set forth in the Construction Contract (Ex. 9). Therein it is stated, in ¶11.4:

"The Contractor warrants to the Owner and the Architect that all materials and equipment incorporated in the work will be new unless otherwise specified, and that all work will be of good quality, free from faults and defects and in conformance with the Contract Documents. All work not so conforming to these standards may be considered defective." (emphasis added)

The subcontracts with the drywallers and the electrician, however, contained no standards or warranties concerning the quality of the work to be performed (Ex's. 15, 57).

As a result, work which might be permissible under the subcontracts would not necessarily meet the standards of the construction contract. Plaintiffs submit that such was the case in this suit.

B. Much of the work performed was defective.

The testimony was uncontroverted that after the drywall had been painted there were numerous streaks and shadows on the joints (T. 1325, 1846, 1873, 1878, 1899, 1922). Some of the witnesses indicated that this was the fault of the drywaller because of improper sanding (T. 1843-1845, 1872, 1879, 2321). The drywaller contended, however, that it was relieved of any responsibility because the walls had been painted. No one disputed that the streaks and shadows existed or that the owners had spent in excess of \$28,000.00 to correct the problem (Ex's. 153, 154). Similarly, there was uncontroverted testimony that some of the halls were wavy and "looked like a snake." (T. 1843, 2211). The drywaller accused the carpenter and the carpenter claimed that he was relieved of responsibility because the drywaller had nailed its wallboard on the studs. Again, there was no dispute that the defective work existed, the dispute revolved around which subcontractor was responsible. In this regard it mattered not to the owners which subcontractor was at fault, since they had no privity with any of them. The owners, under their contract, looked exclusively to the general contractor to deliver

a building free of defects. This it failed to do. The owners had no responsibility to show which of the subcontractors was at fault, this was the burden of the general contractor if it chose to contest the subcontractors' claims.

Here, the subcontractors' claims were not contested by the contractor, but that can in no way shift the burden of proof concerning the cause of the defects to the owners. All the owners were required to do was to show that the building was tendered to them in defective condition under the terms of the construction contract. This they did. Thus, although a subcontractor might have convinced the jury that the defects were either not its fault or that it had been relieved of the responsibility therefor, such a showing would not relieve the general contractor from the ultimate responsibility for the defect.

There is absolutely no dispute that one of the units 508-A, contained a noxious, vomitous odor which commenced in the spring of 1973, when it was sprayed with wall spray by the drywaller (T. 1334, 1908-1909, 2203). The testimony was uncontroverted that the smell persisted, in spite of numerous attempts to alleviate it, until the apartment was completely gutted, the wall board, tile, drapes and carpets, cabinets and doors were replaced and the apartment repainted (T. 1440-1442, 1493, 2203-2205). Although Mr.

Copinga, the very person who applied the spray, admitted that when he last checked the apartment in the spring of 1976 it still smelled; he, nonetheless, disclaimed any responsibility for it (T. 2329). No one contended that the smell was the owners' fault. Plaintiffs clearly showed that the apartment smelled when the building was delivered to them and that as a result the apartment was uninhabitable and that they were required to forego two years of rental income and expended \$3,700.00 to correct the defect (T. 1441-1447, Ex. 207). The contractor presented no evidence refuting Plaintiffs' claim that the building was defective.

With respect to the drywall, Berg acknowledged that the construction contract required good work, but admitted that the job, in his estimation, was "average" (T. 161, 2790). Mr. Jay Memmott testified that the work was not of good quality and characterized it as being "poor to mediocre" (T. 1853). Further testimony indicated that the wall spray texture was inconsistent, which in some apartments resulted in big "globs" on the walls (T. 1324-1325, 1842, 1851, 1880). There were gaps in the sheetrock (T. 1893, 1969), doorbells covered by sheetrock (T. 935-90), holes for electrical outlets cut too large (T. 1877) and round holes cut for square doorbells all of which had to be repaired at the owners' expense (T. 1899).

Wiring that did not meet the code was installed by the electricians (T. 935.72-935.73, 935.91-935.92).

This had to be replaced at the expense of Lignell and Todd (T. 1814). Many of the electrical connections did not work, appliances were not hooked up and switches were installed seven feet off the ground (T. 2185, 2206-2207, 2209, 2396, 2397, 2421). The owners were required to pay more than \$40,000.00 to complete the electrical work and correct the defects, and bring the building up to an acceptable standard (Ex's. 153, 154).

Although Berg did not contest the electricians' charge for their work, it is clear that that work did not meet the contract standard of "good" quality for purposes of determining amounts due between the owners and the general contractor. In addition, doors swung the wrong way (T. 1895) and light fixtures were hung so that they were broken off by opening doors (T. 1894, 1969). Gobs of glue were left by the cabinet subcontractor (T. 1884-1886, 2217) and numerous areas of the project had to be repainted (T. 1883, 1886). These defects were all paid for by the owners.

C. The project was delivered late to the owners. Mr. Berg testified that the arrangement with the owners was that the project would be built sequentially starting in reverse alphabetical order with the C building first (T. 1172-1173). The original completion date for the entire project was November 16, 1972 (1173). When the additional floors were added to the B and A buildings,

the completion date for the project was extended to July 15, 1973. Although the changes to the C building were very modest, it was not completed until January, 1973, and the entire project was not closed until February of 1974.

It was important to the owners that the project be completed promptly so as not to jeopardize the long-term financing. Further, the owners anticipated achieving a substantial rental volume prior to the time the long-term loan was to be closed (T. 766, 767, 2285-2286). This was well-known by Berg (T. 690). Due to the delay in completion not only were the rentals lost, but \$200,000.00 was withheld by the permanent lender until the required rental level was achieved (T. 3301-3302).

D. The charges for electrical extras were duplicative, did not distinguish between the owners' and the contractor's responsibility and often related to defective or uncompleted work. The evidence on the electrical portion of the case clearly showed that many of the electricians' change orders were duplicated, often several times over (T. 337, 345, 351, 361, 364, 366, 371, 381-A, 384, 388, 409, 419, 420, 422, 424, 486, 488, 490, 493, 495-497, 500). The duplicate tickets, however, usually contained different prices for the same item or contained no price at all (T. 493-495). Mr. Comstock readily admitted the duplications but was often unable to identify the ticket for which he was seeking compensation or state how much he

was charging (T. 498). Several times, in response to inquiries from his counsel concerning his charges, he responded that he "didn't know," "would only be guessing," "didn't know what was done" or that he "didn't handle the books" (T. 363, 368-369, 377, 380, 386, 488, 492, 498-499, 528, 551, 570, 935-112, 935-24). Although Mr. Comstock acknowledged that there were some credits due for work not done, he did not know how much (T. 369-371).

In addition to the voluminous work tickets generated by the electricians (Ex's. 21, 22, 26, 58), Mr. Comstock on December 18, 1972, sent a letter to Berg telling him that all prior change orders were void and that new change orders would be issued (Ex. 35). At trial, however, Comstock sought compensation for these "void" change orders as well as the new ones issued in their place. Because of the voluminous and duplicative change orders and Comstock's letter voiding them out Lignell requested a clarification of the electrician's billings (T. 770-771, 820). On or about March 1, 1973, Lignell and Berg met with the Comstocks to determine the exact status of the electrical charges. At that meeting, the Comstocks presented a list of all the claimed change order (Ex. 100), which list Lignell reviewed; he approved some and rejected some. It was his understanding that there were no other change orders relating to the electrical work on the project at that time (T. 768-779).

In January, 1973, Comstock left the project because of financial difficulties and was replaced on March 1, 1973, by Murray. Although there was a dispute concerning how much electrical work remained to be done, in March and again in April Comstock sent a bill to Berg stating that the total amount due to it for work on the Incline project amounted to \$7,412.04 (Ex's. 51, 52).

Mr. Comstock, the architect's representative, Mr. Huss, and the Comstock foreman all testified that when Comstock left the job in January, 1973, some two months after the entire project was originally to have been completed, there had been no electrical work done in the A building (T. 530, 884, 910). At the trial, however, Comstock presented numerous change orders relating directly to the A building or the additional 22 units, part of which were located in that building (Ex's. 21-A, 21-B, 21-C, 21-J, 22-V, 21-EE, 21-Y, 21-FF), all of which were apparently charged to the contractor and agreed to by Berg at the trial. However, any charge over to the owners for these items would be duplicative, since the work involved was part of the original, or the amended, price fixed by the construction contract. In addition, Comstock admitted that many items billed to the contractor by Comstock were not completed. Some items had even been refused by Berg but were, nevertheless, included in Comstock's billings (T. 557-559).

When Murray left the job in October, it sent Berg a bill for \$7,050.00 representing the total amount it claimed was due to it (Ex. 62, p. 7). Based upon a document prepared by its foreman, Mrs. Comstock maintained that when Murray left there were only six apartments remaining to be wired (Ex. 116). Mr. Weaver, the Murray foreman, testified, however, that he meant that there were six apartments remaining to be rough wired. Weaver further testified that rough wiring constituted approximately 40% of the job, and that in addition to the six apartments there were numerous apartments that had to be finished, which included the installation of the plugs and switches, hanging the fixtures, etc. (T. 1758-1759, 935-71). Further Mr. Weaver testified, the outside wiring remained to be done as did the elevators, recreation rooms, main services air conditioners, furnaces, appliances and many other items (T. 1753-1755). Mr. Bateman testified that when he came onto the project in October he wired the kitchens, connected appliances, installed circuit breakers, installed plugs and switches, wired the storage areas, elevators and recreational rooms and did all the exterior lighting. In addition, the air conditioners were connected in the spring (T. 1804-1812).

Although there were only two apartments added to the original portion of the B building, Comstock apparently charged for three (T. 381, 478). Comstock also charged

\$865.00 "to add an apartment to Building C" (Ex. 21-U) and also charged \$195.10 for the subfeed to that added apartment (Ex. 21-II). Later, however, when Murray came on the project it charged \$875.00 for wiring the additional 22 units (Ex. 58-1). Thus, the added apartment in the C building was charged for at least once by Comstock and once again by Murray, as were the two extra apartments in Building B. Berg testified, however, that the wiring charge for all the added apartments was included in the total bid to the owners for the extra units (T. 2908).

Comstock submitted at least three tickets relating to three-phase power for the elevators (T. 497, Ex's. 22-V, 21-P, 21-Z). Nevertheless, one of the first changes requested by Murray was to "install 3-phase power and meter for elevator in Building A." (Ex. 58-2). The 3-phase wiring, however, was done by Mr. Bateman at the owners' expense (T. 1833).

At the trial both Comstock and Murray produced change orders for "wiring the rec. room" (T. 374, 595, 2952). Comstock also charged Berg for the "added services" to three of the additional apartments in the A and B buildings (T. 315, Ex. 21-A) and then later charged him for "12 additional services" in Building B (T. 353, Ex. 21-L). Thus, Berg apparently agreed to pay twice for the services run to at least two apartments. In addition, these items were also included within the charge by Murray for the additional 22 units.

Comstock's charges to the contractor also contained several items that clearly were not the owners' responsibility (Ex's. 21-N, 21-O, 26-65, T. 404). In addition, one change ticket which related to the elevator in Building A was dated June 15, 1972, although that building originally did not have an elevator and the decision to install one was not made until sometime in August or September of that year (T. 1503, 2925-2926).

Mrs. Schoppe, the apartment manager, testified that many of the electrical outlets did not work and that there were several instances where stoves and other appliances in the apartments had not even been wired (T. 2186, 2206-2207). Mr. Weaver testified that he repaired numerous items of Comstock's work that did not function properly (935-88 to 935-90). Bateman also testified that he did a great deal of electrical repair work (T. 935-75). Mr. Weaver testified that there should have been no charge for correction of these errors (T. 1756). Apparently, however, there was (Ex's. 58-6 to 58-43).

The tickets submitted by Murray charging for this repair work are revealing. Exhibit 58-22, for instance, which relates to the repair of a disposal contains the notation "Hot lead not in wire nut." Exhibit 58-16, a Murray charge to repair a plug in a kitchen refrigerator states, "Outlet box behind refrigerator not made up, both hot leg and neutral left open in box." Further, Exhibit 58-14, an "extra" to repair a duplex receptacle, states:

"Found feed wires (hot and neutral)
tucked back in box. Neither were stripped
or had ever been connected to the duplex."

Other tickets contain similar notations and indicate that Comstock made many mistakes in its wiring (Ex's. 58-10, 58-20). Mr. Weaver recalled one instance where the refrigerator would not work unless the light was turned on (T. 1756). These charges were apparently passed on to Berg as "extras" but clearly were not the responsibility of the owners.

Mrs. Comstock testified that the hourly charge for her employees was \$12.00/hour (T. 2375). Some of the Murray tickets, however, showed a charge greatly in excess of that. Fifteen minutes to repair a short, which was probably guarantee work anyway, was billed at \$12.00 (Ex. 58-43) which is an effective rate of \$48.00/hour. Other tickets reflect similar charges (Ex's. 58-25 & 26, 58-23 & 24, 58-21 & 22, 58-17 & 18). All of these charges were apparently accepted by Berg at the trial. In addition, several of the tickets apparently making up the claim of Comstock and Murray were never admitted into evidence (Ex's. 21E, 21F). Nevertheless, Berg also accepted those "extras."

It is against this background of duplicate tickets, charges for nonexistent work and work not completed, varying rates, invoices relating to repair items and charges for items that were not the owners' responsibility that the testimony of Mr. Berg must be considered.

E. The trial court committed serious evidentiary errors. The partnership's judgment was premised upon three exhibits: 210, which was a schedule of "extras" to the contract; 234, which was a schedule of the payments made by the owners which the partnership "agreed" were chargeable to the contract; and 252, which was a summary of the other two exhibits. The jury used the precise figures from Exhibit 252 in awarding its judgments.

During the course of the trial the electricians found themselves in quite a dilemma. They had submitted a multitude of purported change orders and other letters and documents in an attempt to establish their claim against the partnership but had been unable to get a summary of their claims admitted; thus, the precise amount they were claiming remained a mystery. To this end, Exhibits 210 and 252, prepared by the surety and the partnership, solved this problem for the electricians and got to the jury a figure it could easily pick out even though there was no testimony to support it. The admission of these exhibits was erroneous because Berg lacked the necessary knowledge to lay an adequate foundation for their admission, a fact he readily admitted.

1. Exhibits were admitted without adequate foundation. Exhibit 210 presented a lump sum figure for claimed "electrical extras." When quizzed about the specifics of that figure, Berg repeatedly testified that he "wasn't sure" (T. 2906, 2908) or "did not know" (T. 2924).

When confronted with duplicate tickets and asked for which ticket the owners were being charged, how much and whether the same item was being charged twice, Berg stated over and over again that he did not know (T. 2902, 2906-2909, 2916, 2923-2924, 2929-2930, 2935-2935, 2938-2939, 2942). Berg stated he was "not familiar" with the list of extras from Cosmtock (T. 2905). Although Berg acknowledged that it would be an error to charge for the duplicated items, he could not state that that had not been done (T. 2919, 2942). Berg stated that he took the figures from the electrician and was relying on him (T. 2909). When asked by the trial court whether there was any document he would like to review before he proceeded further, Berg responded that he had to get an accounting from the electrician (T. 2910). When pressed for an explanation of the \$40,069.01 figure, which was on the exhibit from which the jury took the figure awarded against the owners, Berg declared that it was not his figure and stated repeatedly that the figures were those of the electrician (T. 2924, 2931-2932). The electrician, however, had also repeatedly testified that he did not know the details of the figures.

Although Berg did admit that certain charges, including some \$19,250.00 for wiring the additional units, would be an extra to the contractor from the electrician but would not be properly chargeable to the owners since it was included in the fixed price for the extra units, he could not say whether or not that \$19,250.00 was, in fact,

included in the figure for electrical extras shown on the exhibits (T. 2935-2936, 2942-2943).

Berg testified that he did not think it should be an extra to the owners to get the electrical current to the added units (T. 2905), and that the bid for the extra elevator was for one that worked when the buttons were pushed and that it would not work without electricity (T. 2924-2925). Berg further testified that no extra charge was being made for extending the air conditioner feeds (T. 2916), yet, all these items were apparently included in the electrician's charges to the contractor and passed on to the owners (Ex's. 21-A, 21-L, 22-V, 22-SS, 22-RR).

Plaintiffs submit that they were entitled to know the composition of the lump sum electrical figure on the exhibits and that it is not too much to ask that any claim damages be stated in sufficient detail so that the owners could ascertain what items had been excluded or included in that figure. Mr. Berg could not tell whether Plaintiffs had been charged once, twice, three times or four times for some items (T. 2931); whether they were charged for mistakes of other subcontractors; whether they were charged for items not done; whether they were charged for those items Berg said were not extras to them or whether they were, in fact, charged for items for which Berg testified that no charge was being made. Further, Plaintiffs could not tell whether they had received a credit for those items acknowledged by Mr. Comstock (T. 369-371), or for

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work that had not been done.²

Rule 19 of the Rules of Evidence provides:

"As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof."

The record is clear that Berg had absolutely no knowledge of the contents of the electrical figure in Exhibit 210. In fact, he admitted that it came from someone else; clearly, Berg lacked the required personal knowledge for the exhibits to be admitted. Plaintiffs timely interposed an objection to the admission of the exhibit setting forth the grounds enumerated herein (T. 2628, 2307), nevertheless, the trial court received that exhibit over Plaintiffs' objections. Plaintiffs also timely objected to the admission of Exhibit 252 (which was a summary of the conclusions contained in Exhibits 210 and 234 (T. 3077)), because of the defects in Exhibit 210 and because it did not meet the statutory requirements of §78-25-16(5); nevertheless, the court also admitted that exhibit (T. 3077-3078). There can be no dispute that those exhibits had a substantial impact in bringing about the verdict since the jury awards corresponded to the penny with the amounts set forth therein (R. C1017, 1033, 1037). This pivotal evidentiary error alone would require sending the

²Even if there remained only six apartments to be wired, a position that is clearly not supported by the evidence, a credit therefor would come to \$5,250.00 (6 x \$875.00).

damages issues between the owners and the contractor back for a new trial.

Plaintiffs submit that the admission of those exhibits were contrary to the rules of evidence and the statutes of this state, and were prejudicial to their cause. By claiming a lack of knowledge concerning the details of the exhibit, Berg was able to thwart any effective investigation into the possibility that the figures were erroneous while not suffering any adverse affect because of this lack of knowledge. If this type of conduct is sanctioned by this Court, future witnesses in this state will need only claim lack of knowledge, either real or feigned, to the details of any exhibit, in order to stifle cross-examination, while at the same time receiving the benefits of the unsupported exhibit.

2. Blatantly erroneous exhibits were allowed into evidence. Another evidentiary error was committed by the court with relation to Exhibit 235 and Exhibit 251, which was its visual counterpart.

Mr. Mark Hatch testified that Exhibit 235 represented an analysis of the draws and disbursements on the Inland Terrace project. Mr. Hatch readily admitted, however, that the "checks paid" column included only those items "chargeable to Berg." What was "chargeable to Berg" was derived by Mr. Hatch from the testimony of Dwayne Liddell with certain "adjustments" (T. 3025, 3086).

Mr. Liddell, however, indicated that his calculations did not cover all expenditures on the project. His testimony went only to those expenditures that were attributable to the contractor; therefore, items that were outside the construction contract, such as landscaping, carpets, drapes, demolition, swimming pool, etc., were excluded from his calculations (T. 1712-1713, 1722, 1729). From Mr. Liddell's figures Mr. Hatch further deducted some \$85,000.00 of actual cash payments by the owners for such items as additional painting, concrete and electrical work and cleanup. Because a portion of the construction was assumed by the owners and paid for directly by them, the expenditures for those items were not reflected in Mr. Hatch's exhibit, although the funds borrowed to pay for those items appeared as draws. Thus, as presented in the exhibit, the "checks paid" amount actually reflected considerably less than was actually paid by the owners for a project free from defects. The "loan receipts" column, on the other hand, included all funds deposited into the Incline Terrace account by the lending institutions. The exhibits were contrived in such a way that "checks paid" would never equal "draws" because of the different composition of the two columns; therefore, they presented the erroneous impression that the owners had withdrawn substantial sums of money from the project. While Lignell did admit that some funds were withdrawn, the

testimony was uncontroverted that it was done with the approval of the lender and that all funds were paid back plus an additional \$211,000.00 (T. 1510, 1648-1649, 1800).

Mr. Hatch acknowledged that the exhibit was not accurate (T. 3088, 3107-3110) and that many more funds had expended on the project than his exhibits showed. Further, Mr. Hatch admitted that a considerable amount of the "draws" may not have actually been received by the owners (T. 3089, 3098-3106) and that the "draws" column was in fact, overstated (T. 3114).

The court, over the objections of Plaintiffs, nevertheless admitted the exhibits into evidence (T. 3026-3032). Plaintiffs submit that the exhibits were not a fair analysis of the evidence, were based upon erroneous conclusions and were prepared solely for the purpose of inflaming the jury. These exhibits and the erroneous implications they conveyed most assuredly misled the jury and were extremely prejudicial to Plaintiffs; their admission was clearly error.

F. Omissions by the contractor or subcontractors in their bids and construction blunders were erroneously passed through to the owners. Mr. Berg testified that the joint venture had a fixed price contract with the owners and that if an item were more than the subcontractor's bid, it would be stuck with it; if less, it would make a greater profit (T. 1068-1069). In the instant case,

however, when an item turned out to be more than the bid it was passed through to the owners in the form of an "extra."

Lignell received a firm price bid for the additional elevator in Building A. Although Berg testified that the price included a properly functioning elevator, he apparently passed through as an "extra" the cost of wiring the elevator so it would work.

The owners received a "fixed price" bid for the 22 additional apartment units. Berg testified that this included the wiring (T. 2943), but then later changed his mind and testified that that price did not include getting the electricity to the apartments. Berg also testified that the extension of the air conditioner feeds was included in the bid for the extra units but apparently this cost was also passed through to the owners.³

Lignell testified that the price quoted him by Berg for the recreation room in the C building was \$8,000.00 (T. 3292-3294). At the trial a charge was made on Exhibit 210 for an additional \$3,000.00 for a furnace in that room although the plans from the very beginning showed a furnace was required (T. 2673-2674) and Mr. Hatch admitted that there had never been a similar charge by the subcontractor for that item (T. 3127). Apparently, the cost of wiring

³Berg apparently passed on to the owners whatever electrical charges came to him, regardless of the source or cause and without distinguishing whether they were already included in the construction contract (T. 2517, 2951).

the recreation room was also added to the list of "extras" although the original plans provided for numerous electric outlets and switches in that area (T. 2937).

The range hood fans were listed by brand name and model number on the specifications. Berg testified that they were a part of the contract (T. 1164). The electrician acknowledged that he knew about them before he submitted his bid (T. 510) and the Comstock bid sheets contained numerous references to the hood fans (Ex. 43). Nevertheless, this, too, was apparently lumped into Berg's list of extras (Ex. 210), although Mr. Weaver testified that the hood fans were not connected when he left the project (T. 935-100). In addition, although Berg knew that hood fans were required prior to the time that he submitted the bid for the additional 22 units and the addendum was signed (T. 2922), he also apparently charged an extra for wiring the hood fans in those additional 22 units.

The sheet metal subcontractor "forgot" to include bath fans in his bid, Berg testified. It was undisputed, however, that the bath fans were on the plans from the very beginning; nonetheless, an "extra" was charged to the owners for that item (Ex. 210).

Berg admitted that in October, 1971, he was aware that the City required wet and dry standpipes, stairs to the roof, enclosed stairs and other items to be installed in the building. After obtaining that knowledge, the

construction contract was executed. Berg made no changes or modifications in the bid to the owners although he stated that he went over it several times to make sure it was right (T. 2678). The items required by the City were also passed through to Lignell and Todd as "extras" (Ex. 210).

Berg was erroneously informed by a city building inspector that certain fire doors were not required. Although they were on the plans, Berg did not put them in. Thereafter, the lender's architect determined that as built, the building did not meet the fire code and that the fire doors would have to be installed (T. 1572-1573, 3358-3360). The cost of redoing the work and hanging the fire doors was passed to the owners as an "extra."

G. The contractor's accounting was erroneous.

Although "extras" were liberally passed on to the owners the owners charges usually fell victim to certain "adjustments" by the contractor's accountant. Thus, a \$3,000.00 retaining wall that was on the plans but not built (T. 2326) was grudgingly "accepted" as a back charge by the contractor in the amount of \$1,000.00 (Ex. 210). Some \$60,000.00 of other work that was not done, however, was completely ignored (T. 2254, 3308-3313, Ex. 207, 257).

Actual out-of-pocket expenditures to complete the project and cure the defects, amounting to some \$75,000.00, primarily for painting, concrete and electrical work, were

likewise omitted from the contractor's accounting (Ex's. 153, 210, 234). Further, Mr. Hatch admitted that the schedule of charges "acceptable" to the contractor (Ex. 234), was based on 21 additional units when, in fact, there were really 22 (T. 3125-3126).

Mrs. Schoppe, the apartment manager, was hired by Berg to do the heavy construction cleaning of the apartments (T. 2197, 2221). She hauled lumber and debris, chipped gobs of plaster and glue out of the tubs and off of the cabinets and scraped paint off of the windows. The value of the construction cleaning was placed at \$3,675.00 (T. 2213). Apparently, because she was paid directly for work by the owners, that too was excluded.

Mr. Berg testified that the maximum profit expected from the project was \$56,000.00 (T. 1067). Since the contract amounted to \$1,455,000.00 this would have been a margin of 3.84%. Nevertheless, Exhibit 210 claimed a 15% markup, amounting to \$12,726.07, on the "extras" of selected subcontractors because that was "standard" in the community (T. 2625). Berg did not testify, however, that he expected to make that markup on the subcontractors' work on the project. In addition, Berg could not and did not differentiate between those subcontractors' "extras" that were included in the fixed price bid for the additional units and those that were not (T. 2628). In spite of this, the partnership was allowed to recover the requested

POINT II

THE TRIAL COURT ERRED IN AWARDING JUDGMENT AGAINST PLAINTIFFS AND IN FAVOR OF BERG BROTHERS CONSTRUCTION COMPANY, A PARTNERSHIP.

The entry of a judgment against Plaintiffs and in favor of Berg Brothers Construction Company, the partnership, constituted clear error because:

A. The construction contract which is the subject of this action was between Plaintiffs and a joint venture called Berg Construction Company.

B. Berg Construction Company is a different legal entity than Berg Brothers Construction Company.

C. Any confusion in names should be chargeable to the Bergs, who chose the names utilized.

D. The joint venture, the entity which was the only defendant in the suit which is the subject of this appeal, made no counterclaim.

E. The Defendant joint venture, the partnership, the partners constituting said partnership, and the individual Frank C. Berg, are all estopped to deny the existence of the joint venture and the fact that the joint venture was the contracting party to the construction contract and the performance bond.

The error complained of herein was raised by a Motion to Strike, a Motion to Dismiss, a Motion for Directed Verdict, a Motion to Reconsider, Objections to Instructions,

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Proposed Instruction, a Motion for Judgment Notwithstanding the Verdict and a Motion for New Trial (T. 2544, 3196-3203, 3235-3251, 3383, R. C1360-1364). In each instance the trial court ruled against Plaintiffs. Plaintiffs contend that the trial court erred on this point at each stage of the proceedings, culminating in the award of an erroneous judgment and the erroneous denial of the Motion for Judgment Notwithstanding the Verdict. The heading of this point is intended to embrace in one argument the entire series of errors on this point.

A. The entities involved in the construction contract were not properly distinguished by the trial court. Other than Plaintiffs there were three separate legal entities involved in the written construction contract which is the subject of this litigation (Ex. 9). One is an individual; one is a partnership and one is a joint venture. Because all are of the family Berg and because they chose to do business in ways which are very similar, there was a great potential for confusion among the separate entities, particularly between the ongoing construction partnership between Cliff and Bill Berg and the joint venture formed between them and their brother Frank Berg for the sole purpose of handling the one construction project which is the subject of this litigation

⁴Although Cliff Berg testified that he had built other apartments with his older brother (T. 1006), this particular joint venture was to terminate upon completion of the subject project (T. 2660).

Those legal entities are:

1. Frank C. Berg, an individual;
2. Clifford M. Berg and William R. Berg, a partnership, d/b/a Berg Brothers Construction Company, and
3. Clifford M. Berg and William R. Berg, a partnership, d/b/a Berg Brothers Construction Company, and Frank C. Berg, an individual, a joint venture, d/b/a Berg Construction Company. The underlining has been added to point up the two entities which the trial court persistently, and erroneously, failed to distinguish from one another, and the confusing similarity of their names. The record indicates, and counsel's observation of the trial court's handling of this matter affirms, that the trial court didn't recognize that the two names denominated separate legal entities until September 23, 1976 (T. 3066-3068), at which time he felt it to be too late in the trial to change his prior stance.

B. The failure to distinguish between the joint venture and the partnership was prejudicial to Plaintiffs. The obfuscation of the distinction between the joint venture and the partnership was critically prejudicial to Plaintiffs for the following reasons.

(a) The joint venture never, at any time, had a contractor's license in Utah or elsewhere. This was known to all parties very early in the litigation and the joint venture recognized the effect of being unable to so plead.

(b) A counterclaim by the Defendant joint venture would have been subject to dismissal for lack of a contractor's license--a defense that was recognized in dismissing the claim of Western Drywall (an unlicensed partnership) against the Plaintiff owners. (The partners: Berg Brothers, however, refused to raise the issue of lack of license; as result, Western Drywall's claim against it was not dismissed and ultimately ripened into a judgment.)

(c) Dismissal of the joint venture's counterclaim would have defeated the bonding company's claim over against the owners, so the bonding company had an interest in perpetuating the confusion over the legal entities.

(d) Instead of counterclaiming for the joint venture, the counterclaim was carefully drawn to be that of only Clifford and William Berg, d/b/a Berg Brothers Construction Company, a partnership, one of the two entities comprising the joint venture. Prior to the trial, all counsel believed that this partnership had a valid Utah Contractor's License when the construction agreement was made and performed, so that the contractor and bonding company believed that the ploy of thus limiting the counterclaim would finesse the fatal flaw in the joint venture's power to recover on the construction contract. [As is fully developed in Point V below, it was discovered during trial that the partnership did not have a valid Utah Contractor's License, but the trial court refused to admit evidence on that point.]

The contractor and bonding company correctly predicted the effect of their ploy. The trial court did not catch the finesse and the contractor and bonding company achieved what must, indeed, be a judicial rarity--a partnership which had no contractual relation with the owners recovered a judgment based upon a contract between the owners and an unlicensed third party, to-wit, the joint venture. Indeed, the partnership which recovered the judgment was not even a party to the action in which it recovered the judgment (See Amended Complaint R. B181-188, R. C636-643). As a simple reading of the Amended Complaint shows, the single Defendant named therein was the joint venture, and the partnership was named solely in its capacity as a joint venturer--one of those who formed together for the limited venture. A careful reading of the transcript shows that there is no evidence whatever of any agreement between the owners and the partnership, Berg Brothers Construction Company. On that point the jury had no conflicting evidence to weigh. The joint venture made no counterclaim and the counterclaimant had no contract (T. 2558).

C. The Defendants should be estopped to deny the existence of the joint venture. The Defendants, in justifying the interposition of one of the joint venturers, have claimed that no joint venture existed because Frank C. Berg did not sign a written joint venture agreement, despite the multitude of documents admittedly signed

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by the joint venture and all of the joint venturers. Plaintiffs have responded that, even if it were true that Frank C. Berg did not sign the proposed written joint venture agreement, he and the partnership were estopped to deny the existence of the joint venture. The issue of estoppel was put to the jury, which decided it adversely to the Plaintiffs.

When the evidence was in, Plaintiffs moved for a directed verdict in their favor on the counterclaim because (a) the joint venture made no counterclaim (the only counterclaim made was the one pleaded by the partnership, Berg Brothers Construction Company (R. A21-27; R. C827-833; T. 2558)) and (b) the parties to the joint venture were, on the evidence adduced, estopped to deny the existence of the joint venture. That motion was denied, objections were timely made to Proposed Instructions permitting the counterclaim of the partnership to be considered by the jury, instructions of estoppel as a matter of law were proposed by Plaintiffs, and refused by the trial court, Motions for a New Trial and for Judgment Notwithstanding the Verdict were made and denied. Everything necessary to preserve consideration of this matter on appeal was done.

The undisputed evidence required a ruling of estoppel as a matter of law:

(a) The written Construction Agreement was between the Plaintiff owners and the joint venture (Ex. 9). (Copies of the face page and the signature page of that Exhibit are included in the appendix.) Frank C. Berg had been consulted about the project and knew the bonding company required his assets and credit on the construction contract (T. 3183-3184).

(b) The performance bond, issued by the Defendant bonding company for the benefit of the Plaintiffs and verified to Plaintiffs' lenders, showed the joint venture as the principal and the Plaintiff owners as the obligee (Ex. 18). (An exact copy of this document is included in the appendix.)

(c) Frank C. Berg personally signed an application for that performance bond (Ex. 255). (A copy of the front and signature pages are included in the appendix.) He testified that he didn't know whether the document was filled in when he signed it, ^{but} that he knew what it was to be used for (T. 3183).

(d) When it came time to close the permanent loan and pay off the construction loan, there were still unpaid bills, liened or lienable. The Plaintiff owners had arranged for funds borrowed by them to be deposited with Title Insurance Agency so that lienable claims could be paid and the permanent financing closed. Mr. Keith Ellertson, president of Title Insurance Agency, testified that he had custody

of the funds of the owners and that he required certain written affirmances before he would release the sum of \$115,576.10 belonging to Plaintiffs and being held by him. Those affirmances consist of Exhibit 164, signed and sworn to by Clifford Berg on behalf of the joint venture, and Exhibit 165, signed on behalf of the joint venture by all three natural persons involved in the joint venture, Clifford, William and Frank C. Berg. (Copies of these documents are incorporated in the appendix.) Mr. Ellertson testified that he relied on these documents signed for the joint venture by all natural persons involved in it, disbursed the \$115,576.10 in reliance thereon (Ex. 162) and would not have so disbursed the money but for those documents (T. 1666-1667). This took place February 1, 1974, at the close of the construction phase.

D. All participants executed documents acknowledging the existence of the joint venture. Exhibit 164 is an Affidavit sworn to by Clifford Berg. It recites:

"2. He is a partner in Berg Brothers Construction Company and is a member of that certain joint venture doing business as Berg Construction Company.

3. He is authorized to execute documents on behalf of Berg Construction Company which are binding upon the said joint venture, all participants therein and all members thereof." (Ex. 164, page 1, lines 5-13)

Thereafter he lists the persons to whom the Plaintiffs' debt should be paid, affirming there to be no other liens or claims.

which could result in liens on the project.

Exhibit 165 subordinates the lien rights of the joint venture to those of Traveler's Insurance Company, the permanent lender, and Zions First National Bank, another lender. It is significant in that it recites that the joint venture, Berg Construction Company, subordinates its liens and claims and in that it bears the signatures of all three of the brothers under the following designation:

"Clifford Berg & William Berg, d/b/a Berg Brothers Construction, a partnership and Frank Berg, an individual, a joint venture, d/b/a Berg Construction Company. By /s/ Clifford M. Berg; By /s/ William Berg; and By /s/ Frank C. Berg. (Ex. 165, page 1)

All three of the Berg Brothers either testified that their signatures were genuine and they knew the contents of the documents and that they would be relied upon in disbursing the Plaintiffs' money, or such was stipulated to by their counsel (T. 1684, 3185).

E. There was no contrary evidence respecting the joint venture. This Court has only recently had an occasion to reaffirm the necessity for making a clear and precise distinction among entities involved in multi-entity transactions. In Mullins v. Evans, 560 P.2d 1116, (Utah 1977), the court distinguished among Ralph M. Evans, an individual, R. M. Evans and Company, Inc., and Royal Industries Corporation, Inc. Reversing a judgment in favor of one Mullins against Ralph M. Evans, the individual, and Royal Industries Corporation, the court noted:

"If anybody owed any obligation to Mr. Mullins, it was the R. M. Evans Company, Inc., but that company was not made a party to this action." Mullins v. Evans, supra.

In the instant case, if anybody has a claim against the Plaintiffs it was the joint venture, but the joint venture made no counterclaim.

The errors embraced in the above rulings and judgment compel reversal. The multitude of arguments in the ensuing points, alone and in combination, support that view.

POINT III

THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES AGAINST PLAINTIFFS AND IN FAVOR OF THE PARTNERSHIP, BERG BROTHERS CONSTRUCTION COMPANY.

In spite of the fact that the law of the State of Utah is clear that in the absence of an agreement or an express authorization by statute, attorney's fees cannot be awarded, Cluff v. Culmer, 556 P.2d 498 (Utah 1976); Hawkins v. Perry, 123 Utah 16, 253 P.2d 372 (1953); Hollan v. Brown, 15 Utah 2d 433, 394 P.2d 77 (1964), the trial court after a hearing, and somewhat at variance with its Memorandum Decision, awarded judgment for attorney's fees to the bonding company and to Berg Brothers Construction Company, the partnership, against the owners, in the sum of \$74,000.00. The Memorandum Decision (R. 1395-7) sets out the trial court's rationale and determination on the matter of attorney's fees as follows:

[The Court finds and concludes]

- "4. That Western, Bailey, Murray, Comstock, Berg & Fidelity are the successful parties within the provisions of Chapter 14, U.C.A., 1953.
5. That Western & Bailey are entitled to recover from Berg & Fidelity the sum of \$11,000.00 attorneys' fees who in turn are entitled to recover a like amount from plaintiffs Lignell & Todd.
6. That Murray & Comstock are entitled to recover from Berg & Fidelity the sum of \$21,000.00 attorneys' fees who in turn are entitled to recover a like amount from plaintiffs Lignell and Todd.
7. That Berg is entitled to recover from Lignell & Todd the sum of \$21,000.00 attorneys' fees.
8. That Fidelity is entitled to recover from Lignell & Todd the sum of \$21,000.00 attorneys' fees."

It is noteworthy that, even at this late stage, no attempt was made by the trial court to distinguish between the partnership and the joint venture. The court simply used the all-embracing, non-specific term "Berg" in a Memorandum Decision adjudicating \$74,000.00 in attorney's fees and some \$25,000.00 in interest.

A. There was no contract which provided for an award of attorney's fees. Prior to this decision many issues which should have foreclosed the question of attorney's fees as it related to Plaintiffs had been resolved. The written contract upon which the suit of Lignell and Todd was based was not with the entity to whom the attorney's fees were awarded and did not provide for attorney's fees (Ex. 9). The contract upon which the suit between Lignell

and Todd and Fidelity was based, the performance bond, similarly made no provision for attorney's fees (Supp. T. 44, Ex. 18). In addition, the contract upon which the subcontractors had sued Fidelity, the Labor and Material Bond, contained an express provision assuring Lignell and Todd against costs and expenses in suits upon that bond (Ex. 18). Since no tort claim was made by the contractor or the bonding company against Lignell and Todd, Plaintiffs submit that there was no rational basis upon which the attorney fees could be awarded.

B. Plaintiffs were the prevailing party in all suits brought by the subcontractors against them. While a portion of the suits by the electrical subcontractors and the drywallers and materialmen were actions brought under §14-2, et seq., Plaintiffs were not involved in those portions of the consolidated cases. As between the Plaintiffs and the electrical subcontractors, Murray and Comstock, all issues submitted to the jury were determined in favor of the Plaintiffs, resulting in a verdict and judgment of no cause of action, and Lignell-Todd were awarded their costs as the successful party (R. C1355-1356, 1421, 1436-1437, 1451). As between the Plaintiffs and the drywall subcontractor and supplier, Western and Bailey, all issues submitted to the jury were similarly determined in favor of the Plaintiffs, resulting in a judgment of no cause of action, and Lignell-Todd were likewise awarded

their costs⁵ (R. C1421). In both those cases, if attorney's fees were to have been awardable, they must necessarily have been awarded to the Plaintiffs, not against them. Since Title 14 (erroneously called "Chapter 14" by the court) provides, where applicable, that attorney's fees "shall be taxed as costs in the action," the intent of the statute would appear to preclude taxing the Comstock-Murray-Western-Bailey attorney's fees, amounting to some \$32,000.00, against Lignell and Todd, the prevailing party to whom costs had been awarded as an adjunct to their judgments of "no cause." It further seems clear that, had those "labor and material bond" actions not been consolidated with the Lignell-Todd suit on the construction contract, the matter as to that \$32,000.00 of the attorney's fees would have been totally and finally foreclosed in each separate action, favorably to Lignell and Todd. Plaintiffs submit that the mere fact that the cases were consolidated should not obligate them to pay the attorney's fees for all parties involved.

The record is clear that in spite of the consolidation neither the trial court nor the various parties considered Lignell and Todd to be participants in the suits by the subcontractors on the labor and material bonds (T. 263-264). Nevertheless, in a curious and inexplicable

⁵Plaintiffs also prevailed on the question of a mechanics lien asserted by Western and Bailey thereby making Plaintiffs the "successful party" under §38-1-18.

feat of legal gymnastics, the trial court, after properly awarding attorney's fees against the bonding company in the "contractor's bond" suits, transferred the burden of the bonding company's loss to Lignell and Todd in the Memorandum Decision by simply adding the words "who in turn are entitled to recover a like amount from Plaintiffs Lignell and Todd." This despite the fact that no legal theory for such a pass-through had ever been pleaded, and no issues respecting an award over had ever been tried.

C. The statutory attorney's fees relate only to direct claims premised on a labor and material bond. The subject statute, §14-2 et seq., was enacted to protect subcontractors, laborers and materialmen. Crane Company v. Utah Motor Park, Inc., 8 Utah 2d 413, 335 P.2d 837 (1959); Deluxe Glass Company v. Martin, 116 Utah 144, 208 P.2d 1127 (1949). As far as the partnership is concerned Plaintiffs brought no bond action of any kind against them; theirs was a contract action. Plaintiffs did sue surety on the performance bond, but that can in no way be construed to be an action on the labor and material bond, further, surety cannot, by any stretch of the imagination, be deemed to be a "subcontractor or a materialman."

Section 14-2-1, "Action on bond to protect mechanics and materialmen," requires an owner to obtain from a contractor a bond equal to the contract price running to the owner and others, and provides a direct right of action on the bond against the surety for those who have

furnished materials or performed labor.

Section 14-2-2, provides for direct liability against an owner who fails to post the bond. This liability is limited, however, to persons who have furnished materials or performed labor.

Section 14-2-3 provides as follows:

"Action on bond to protect mechanics and materialmen--Attorney's fee.--In any action brought upon the bond provided for under this chapter the successful party shall be entitled to recover a reasonable attorney's fee to be fixed by the court, which shall be taxed as costs in the action." (emphasis added).

Combined for trial in this case were:

(1) The action by subcontractor Western and materialman Bailey on the Labor and Material Payment Bond, and other assorted claims;

(2) The action by subcontractors Murray and Comstock on the Labor and Material Payment Bond; and other claims not within the provisions of the bonding statute; and,

(3) The action by Lignell and Todd on the construction contract as to the Defendant joint venture and the performance bond as to Fidelity, the bonding company.

The only actions "brought upon the bond provided for under this chapter [Chapter 14-2]" were portion of (1) and (2) next above. Hence, they are the only actions to which §14-2-3 can, by its very terms, have any application. Action (3) above was on the performance bond purchased by the owners for their own protection. This is not a "bond

provided for under this chapter."

Western, Bailey, Comstock and Murray were the "successful party" as the term is used in §14-2-3 against Berg Construction and Fidelity, and properly recovered attorney's fees. In those actions, the ones to which §14-2-3 applies, Lignell and Todd were the "successful parties" as noted above, adjudged such and awarded costs. Clearly there is no statutory basis for an award of fees against them. No contract or tort basis was even claimed by the contractor or surety. It follows that the award of attorney's fees against Todd and Lignell was erroneous and should be set aside.

Plaintiffs contend that the trial court erred in this award in a number of respects, to-wit:

(a) No award of any kind should have been made to the partnership, Berg Brothers Construction Company, for the reasons set forth in Point II above, since that entity was not a party to any contract with the Plaintiffs and should not have been permitted any standing in the suit.

(b) There was no contract between Plaintiffs and any of the Defendants providing for the award of attorney's fees. Although lack of such a contract would be immaterial to the award of attorney's fees to a subcontractor against the bonding company under §14-2-3, it would be necessary to show that such a contract existed between the surety and the owners in order to charge those fees over against

Lignell and Todd.

(c) The trial court erred in ruling that the provisions of Chapter [sic] 14, U.C.A., authorize an award of attorney's fees between the contractor and the owners and the surety and the owners. While Section 14-2-3 permits an award of attorney's fees between the subcontractors and the bonding company in cases where a bond has been posted, where, as here, the owners have actually furnished the bond required by §14-2-1, they have met their entire burden and the bond is exculpatory as to them.

(d) Section 14-2-3 only provides for an award of attorney's fees in an action brought upon a bond to protect mechanics and materialmen. No such action was brought by or against Plaintiffs.

(e) Even if the contentions in (a), (b), (c) and (d) above were decided by this Court against the Plaintiffs, there would still be no legal basis for awarding judgment against Plaintiffs for the attorney's fees awarded to the subcontractors against the contractor and bonding company under §14-2-3.

(f) §14-2-3 provides, where applicable, for attorney's fees to be taxed as costs. As previously noted, Plaintiffs were awarded their costs against the electrical subcontractor and the drywall subcontractor and supplier, and this precludes assessing the subcontractors' \$32,000.00 in attorney's fees over against Lignell and Todd.

(g) The Labor and Material Payment Bond with the

joint venture as principal and the bonding company as surety provided with respect to suits by unpaid subcontractors and materialmen that the owner (Plaintiffs Lignell and To) would not be liable for the payment of any costs or expenses of any such suit. Plaintiffs are entitled to the benefit of that bond provision as a duly enforceable contract covenant (See sub-point E of this Point III). The Labor and Material Bond containing that provision was found to have been properly executed and delivered (See sub-point D of this Point III).

D. Plaintiffs posted the necessary bond and should have been exonerated from liability. The rationale of the trial court is clear from its Memorandum Decision, but represents a lack of precision of analysis and an unwarranted expansion of the reach of Chapter 14-2 that would, if affirmed by this Court, furnish a whole new field for the recovery of attorney's fees in construction cases. The trial court awarded the subcontractors', the contractor's and the bonding company's attorney's fees against an Owner who had complied with Chapter 14-2 and had furnished a full, valid and sufficient bond. There is no precedent for such a result. The rule in this state is that once an owner furnishes the bond required by Chapter 14-2, he is exonerated from liability. That such is the law in Utah is made clear by the holding in two cases dealing with this statute.

In Deluxe Glass Company v. Martin, supra, tried

by Judge Ellett, the surety defended claiming that unpaid materialmen could not recover directly against it. Sections 17-2-1 and 17-2-2, U.C.A., 1943, the statutes involved, were the same as the present §§14-2-1 and 14-2-2. A bond had been provided by the owner which the bonding company claimed to be inadequate to meet the requirements of §17-2-1. The court held against the bonding company. In reaching its decision this Court dealt with the effect of an owner furnishing the bond required by the statute. The salient portion reads as follows:

"We have hereinabove discussed the sufficiency of the bond as a common law obligation to sustain the right of the materialmen to sue. It is also sufficient under the statute to exonerate the owner of liability. Title 17 of our statutes was enacted for the protection of laborers and materialmen. Liberty Coal & Lumber Co. v. Snow, 53 Utah 298, 178 P. 341, and Bamberger Co. v. Certified Productions, Inc., 88 Utah 194, 48 P.2d 489. By its provisions, they, on default of the contractor, are given recourse, in the alternative, against the owner or the sureties on the contractor's bond." (emphasis added). Id. at 1132.

The alternative referred to is an action (1) against the owner if he fails to post the bond or (2) against the surety if the owner does post the bond.

In Whipple v. Fuller, 5 Utah 2d 211, 299 P.2d 837, (1956), this Court held an owner who failed to post the bond liable to an unlicensed subcontractor and stated (at page 838):

"This is particularly true when we consider the fact that the owner could have avoided any personal obligation had he himself complied with Section 14-2-1." supra. (emphasis added)

That Plaintiff owners, Lignell and Todd, furnished a valid and sufficient bond is undisputed. Finding No. 8 at R. Cl412, reads:

"8. Berg Construction Company as Principal and Fidelity and Deposit Company of Maryland as Surety executed and delivered a Labor and Material Payment Bond and a Performance Bond at the request of the owners of the Incline Terrace and in compliance with Chapter 2 of Title 14, Utah Code Annotated, 1953. Said bond is dated February 16, 1972, and is in the face amount of \$1,351,755.00."

It follows that Lignell and Todd were exonerated from liability to Murray-Comstock-Western and Bailey. There is no exception to the exoneration rule for attorney's fees and the Legislature has not provided for any round-about route to the owners' pocketbook through the contractor or surety.

E. Surety contracted with Plaintiffs that they would not be liable for any costs relative to suits on the material bond. Not only does the Utah law exonerate the Plaintiffs from liability for the attorney's fees, but, in addition thereto, the bonding company ("Fidelity" in the Memorandum Decision) specifically contracted with the Plaintiffs that they would not be liable for any of the costs or expenses of any suits brought by subcontractors on that particular bond. The Labor and Material Payment Bond (2nd page of Ex. 18) contains the following provision:

"The above named Principal [Berg Construction Co.] and Surety [Fidelity] hereby jointly and severally agree with the Owner [Lignell and Todd] that every claimant as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such claimant's work or labor was done or performed, or materials

were furnished by such claimant, may sue on this bond for the use of such claimant, prosecute the suit to final judgment for such sum or sums as may be justly due claimant, and have execution thereon. The Owner shall not be liable for the payment of any costs or expenses of any such suit." (Emphasis & bracketed material added.)

Certainly one of the costs or expenses that must have been contemplated by the parties at that time was attorney's fees.

F. Consolidation of the actions should not make Plaintiffs responsible for all parties' attorney's fees.

The Defendants argued, and the court evidently held, that since the actions were combined, everyone in them became parties to "an action brought upon the bond provided for under this chapter," thereby making Lignell and Todd liable for the attorney's fees of all the parties involved. Plaintiffs submit that consolidation for trial does not alter the substantive rights of the parties to the consolidated actions. If the court's ruling on attorney's fees were to be sustained, a new and substantial substantive change would occur in the rights of anyone whose action was consolidated for trial with a labor or material claim being pursued under a Chapter 14-2 bond. Such person, dragged against his will into other multiple suits, would run the risk of having to pay the attorney's fees of all parties, those he succeeds against, those he loses to and anyone else "in the action." Only the Legislature should have the power to thus expand the effect of a statutory bonding

provision. It has not yet seen fit to do so.

G. The trial on the subcontractor's bond was a sham. Plaintiffs submit that the only reason Defendant surety required the subcontractors to go through the lengthy trial was so that they, in concert with surety and the partnership, could marshal their forces against Lignell and Todd and prevail by sheer weight of numbers and the creation of mass confusion. To require the electricians and the drywallers to participate in the trial against Lignell and Todd apparently was one of the main elements of surety's trial strategy. From early in the development of this case, surety took the position that it had no dispute with the claims made by the different subcontractors and that any claim they made would not be contested. Defendant surety also admitted, both prior to and at the time of trial, that the Labor and Material Payment Bond was binding upon it and valid as to the subject subcontractors and that it would pay the legitimate claims of Murray, Comstock, Western Drywall and Claron Bailey (T. 262, 303). The fact that there was no serious contention regarding surety's attitude towards the claims of the subcontractors was demonstrated throughout the trial by the conduct of Mr. Nebeker, counsel for

. . .

. . .

surety.⁶ The record clearly shows that both Defendants did little, if any, cross-examination of the subcontractors' witnesses and called no witnesses in their own behalf.

Even had the surety put up a legitimate defense to the claims of the subcontractors, the award of attorney's fees against Lignell and Todd would have been error. But based upon the performance of surety, vis-a-vis the subcontractors, there can be no question that the subcontractors' portion of the trial was solely for the benefit of surety and the Bergs.

That the Plaintiffs should be required by the trial court to pay for something that was designed and orchestrated solely by Fidelity and Deposit Company of Maryland for its benefit is contrary to justice.

⁶Nebeker assisted the subcontractors and their counsel in presenting their claims and offered absolutely no resistance thereto. On many occasions Mr. Nebeker lodged objections to questions by counsel for Lignell and Todd seeking to establish that the workmanship of the various subcontractors was defective. Particularly, Mr. Nebeker became actively involved when Mr. Bateman was attempting to establish, among other things, that some of the electricians' charges for extras were excessive and that the work had not been done in accordance with the National Electric Code. On various occasions questions were posed to Mr. Bateman to which counsel for the electricians did not object, but to which Mr. Nebeker did object, although the questions went to the issue of the quality of the work done and the proper charges therefor, and thus would logically have been in the best interest of Mr. Nebeker and his client (T. 935-61 to 935-69; 935-72 to 935-76). On one occasion Mr. Nebeker even objected to Plaintiffs evidence that dealt solely with issues between the subcontractors and the owners and was not related in any way to any claims against his client (T. 935-66).

Point IV

THE AWARD OF INTEREST BY THE TRIAL COURT TO THE PARTNERSHIP AND AGAINST PLAINTIFFS AFTER THE JURY VERDICT WERE RETURNED WAS IMPROPER.

A. The only issue reserved by the trial court was attorney's fees. On July 16, 1976, a pre-trial conference was held wherein various motions were presented. All of the parties to the consolidated case were represented by their counsel. One of the issues dealt with at that time concerned the claims of the surety and the partnership to an award of attorney's fees. During the hearing on that issue, Mr. Nebeker, counsel for the surety, suggested that the court ask for briefs on the subject of "attorney's fees and costs on contractor's bonds." (Supp. T. 44). In response to Mr. Nebeker's suggestion, the court stated:

"It is obvious to the Court maybe some of this matter will resolve itself at the time of the trial. If it's a matter the Court will have to rule on anyway I'll reserve my ruling on the motion and anyone that desires to may present any authorities to support their position." (Supp. T. 45-47) (emphasis added).

In attempting to clarify the state of the proceedings Mr. Tanner inquired of the court whether or not that aspect of the case was to be tried by the court after the jury trial (Supp T. 47). In response thereto, the following dialogue took place:

"THE COURT: I thought that's what we had and this would be the only way to approach it. Mr. Tanner.

MR. TANNER: I would too. I do not recall we had determined that.

THE COURT: It was mentioned here by Mr. Nebeker and maybe we hadn't determined it. My ruling contemplated that I had no intention of permitting that matter to be presented to the jury.

MR. TANNER: Thank you, your Honor, I just wanted to settle that."

THE COURT: That's the reason I prefaced my remarks by saying that this is a matter the Court would have to handle at that time anyway and dependent upon the outcome of the case it would determine which side would be entitled to prove any attorney's fees anyway. That should be reserved as a matter of law." (Supp. T. 47-48) (emphasis added).

From the above, Plaintiff submits that the record is clear that the trial court reserved only the issue of attorney's fees for a determination after the jury verdict. Further evidence of this fact is clearly disclosed by other portions of the record.

While discussing the Plaintiff's Motion for a Directed Verdict upon the discovery of the evidence that neither the joint venture nor the partnership had a proper contractor's license, the court stated that it had gone back and reviewed its notes of the July 16th hearing and that it remembered reserving the matter of attorney's fees (T. 1392). It is important to note that the trial court made no reference at all to the reservation of the issue of interest. On September 24, 1976, in relation to another motion, the

court again stated with reference to the pre-trial on July 16th:

"In connection with your motion earlier in Chambers talking about the Court having under advisement a motion to dismiss, that had to do only with the attorney's fees, did it not?" (T. 3240) (emphasis added).

The court further stated that the matter of attorney's fees was left until after the time of trial according to its notes (T. 3240). There then ensued a discussion as to what exactly had transpired at that prior hearing in relation to other subjects and the court declared, "Well, I'll stand on what the record may say. I think the reporter made a record and I would be surprised if it's anything different than I have just read you."⁷ The discussion continued and the court then stated:

"Can we all agree on this, Mr. Tanner, that's the only subject matter topic at all that was reserved until trial was attorney's fees and had nothing to do about affirmative defenses or anything of that nature?" (T. 3241) (emphasis added).

At that time, counsel for both the surety and joint venturers were present and participated in the discussion.

B. The Findings of the court relating to interest are not supported by the record. On October 12, 1976, after the jury had been dismissed, counsel for surety filed a notice of a hearing wherein it was indicated for the first:

⁷The complete record of that portion of the hearing is found in Supp. Trans. 36-48.

time that the matter of interest would be determined by the court (R. C1352-1353). A hearing was held on that matter at which time plaintiffs timely raised their objection to any award of interest by the court (R. C1389). The court erroneously concluded that it had reserved the issue of interest until after trial (R. C1396) and thereafter, awarded interest to surety and the partnership and signed Findings of Fact and a Judgment relating thereto prepared by surety (R. C1409-1417). Plaintiffs submit that the record is wholly lacking of any mention of the reservation of the matter of interest until long after the judgments were entered, that the issues determinative of entitlement to interest were submitted to the jury, and that the entry of Findings of Fact and Conclusions of Law relating thereto was erroneous and unlawful in light of the record. As a consequence, the Findings of Fact must be set aside and the award of interest based thereon must be reversed.

C. The jury considered and rejected an award of interest. The jury brought in a verdict for the partnership, as if the partnership were the contractor. As is clear from the Instructions, the counterclaim was premised on the Construction Agreement (Ex. 9) as supplemented by the Addendum and certain extras. That agreement provided for certain conditions to be met before the contractor was entitled to receive the final 10%. With the Addendum, the fixed price contract was for \$1,759,003.00. Ten percent

thereof is \$175,900.00. The sum awarded counterclaimant was \$159,801.99, which is less than the amount of the first 10%.

The exact wording of the Construction Agreement at this point is:

"The final 10% will be disbursed when the improvements are completed to Pacific Mutual's satisfaction and are free and clear of liens or claims which might result in liens. Each disbursement must be evidenced by an architect's and/or engineer's statement certifying as to compliance with plans and specifications approved by Pacific Mutual, Uniform Building Code, and as to the state of completion of the various subcontracts, such certificate to be on form approved or furnished by Pacific Mutual. In addition, a condition of any disbursement will be compliance with all title company or other requirements imposed so that A.L.T.A. policy of title insurance may be issued without exception to mechanics' and materialmen's liens." (Ex. 9, p. 3) (emphasis added).

The Plaintiff owners contended that the contractor never met the condition for its final draw and presented evidence to that effect (T. 1672-1676-A). The testimony was that of Mr. Ellertson, president of Title Insurance Agency, and there was no evidence contrary to his testimony adduced by anyone. He said:

"Q. Mr. Ellertson, at the time this closing was being prepared for, was the Incline Terrace project in condition that an A.L.T.A. policy of title insurance could be issued by your firm or its correspondents without exception to Mechanic's and Material Men Liens?

A. It was not." (T. 1673, lines 12-17).

He further testified that the property was not free and clear of liens and lienable claims at the time of closing (February 1974), and that the closing was only possible because the owners furnished some \$115,000.00 and posted a \$42,000.00 bond. In short, the contractor never met the condition for payment of the final 10% and the owners did those things necessary to close and avoid losing the project. The record is clear and without dispute that the contractor was not entitled to its last 10% in February of 1974. However, the court ignored this facet of the record, and it became lost in the complex and confusing maze created by the consolidation of the cases.

Nonetheless, the jury had before it the issue of the amount of counterclaimant's recovery, including the issue of whether anything due was due as of February 1974, or as of the time of their verdict. Their verdict was for the exact amount shown by Ex. 252, necessarily implying that they found the condition precedent to the owners' obligation for the final 10% had not been met and that interest was not due for the period prior to the verdict. This is even a stronger case than that which was before this Court in Wilson v. Gardner, 10 Ut.2d 89, 348 P.2d 931 (1960), where this court held:

"The jury verdict represents the money owed defendant at the time of the verdict. Whether the jury included interest in their verdict cannot be determined but there is indication that they did consider it because

it was claimed in plaintiff's complaint, and their verdict, from the indications in the record, represents what the defendant owed the plaintiff at that time."

Point V

THE JUDGMENT OF BERG BROTHERS CONSTRUCTION COMPANY MUST BE REVERSED BECAUSE IT DID NOT HAVE A VALID CONTRACTOR'S LICENSE.

Our statutes provide that:

"It shall be unlawful for any person, firm, co-partnership, corporation, association or other organization, or any combination of any thereof, to engage in the business or act in the capacity of contractor within this state without having a license therefor . . ."
§58-23-1.

It is uncontroverted that the contracting party, the joint venture, did not have a valid contractor's license issued by the State of Utah and, in fact, had never made an application for such a license (T. 3048).⁸ Although the trial court refused to allow plaintiffs to present evidence of lack of license to the jury, the evidence established at trial, outside the presence of the jury, showed that the partnership, Berg Brothers Construction Company, also was not licensed at any time relevant to this cause (T. 3045-

⁸ An individual license was issued by the Department of Contractors to Berg Construction Company but this was in the name under which the individual, Frank Berg, did business. That license was first issued in 1940 (T. 3050). This, however, is not the equivalent of a license to the joint venture which also did business under the name of Berg Construction Company (T. 3048, 3068).

3047, 3049) and the trial court so found (T. 1688). As a result, neither the partnership, nor the joint venture would be entitled to recover under the laws of this state. Meridian Corporation v. McGlynn/Garmaker Co., 567 P.2d 1110 (Utah 1977).

The uncontroverted evidence in this matter shows that prior to trial, Plaintiffs' attorneys made inquiries to the Department of Contractors concerning the existence of contractor's licenses for Mr. Clifford Berg, for Berg Brothers Construction Company and for Berg Construction Company. They were informed that Berg Brothers Construction Company was properly licensed and that the license had originally been issued in 1969; but that the files were out of their place and unavailable for examination (R. C992-999, 1365-1369). As the trial drew near, Plaintiffs' counsel made additional attempts to verify the status of the contractor's license, but were prevented from doing so either by the actions of employees of the Department of Business Regulation, Contractors Division, or by the absence of the files relating thereto from their normal place in that Department (R. C992-994). On September 1, 1976, Plaintiffs finally gained access to the records of the Department and ascertained at that time that there was, in fact, no contractor's license in existence at the times critical to this suit. Plaintiffs thereupon immediately notified opposing counsel and moved for a directed verdict based on this lack of

licensing. This was done between the first and the second days of the trial of the owners' suit against the contractor and after the close of the electricians' case in chief.

Mr. Robert Frome, director of the Contractors Division, testified that his records indicated that the partnership, Berg Brothers Construction Company, was originally licensed on December 11, 1969, but that its license lapsed on April 30, 1971. Thereafter, the partnership was unlicensed throughout the remainder of 1971, all of 1972 and 1973. Mr. Frome testified that a license was issued in July 1974 but was different from the one that had previously been issued to the partnership; it contained a different number, had a different bid limit and was a Class "B-1, labor only" license, while the original license had been a Class "B" license.

It was uncontroverted that the partnership neither alleged in any of its pleadings that it was, in fact, properly licensed, nor sought to cure that defect by amendment (T. 1390). Further, it is uncontroverted that as a result of the partnership's failure to plead a license, Plaintiffs as their first defense in their Reply to the Counterclaim alleged that the counterclaim failed to state a cause of action upon which relief could be granted (R. C962-964, R. A38-40). Nonetheless, the trial court concluded that "lack of license" is an affirmative defense under Rule 8(c) and that Plaintiffs' failure to so plead before trial con-

stituted a waiver under Rule 12(h) (T. 1687, R. C1395-1396). This is error requiring a reversal of counterclaimant's judgment.

A. A contractor must prove, as an element of his prima facie case, that he held a valid Utah Contractor's license when he entered into the construction contract.

It is the clear law of this state that the failure to obtain a license which is required by a statute enacted for the safety and protection of the citizens of the state is fatal to a claim for affirmative relief in our courts. Meridian Corp. v. McGlynn/Garmaker Co., supra; Mosley v. Johnson, 22 Utah 2d 348, 453 P.2d 149 (1969); Lyman v. Taylor, 14 Utah 2d 362, 384 P.2d 407 (1963); Eklund v. Elwell, 116 Utah 521, P.2d 849 (1949); Olsen v. Reese, 114 Utah 411, 200 P.2d 733 (1948); Smith v. American Packing and Provision Co., 102 Utah 351, 130 P.2d 951 (1942). This rule of law was reaffirmed by this Court on July 29th of this year. Meridian Corp. v. McGlynn/Garmaker Co., supra.

There is no doubt that the license required by Section 58-23-1 is for the protection of the citizens of the State of Utah (Meridian v. McGlynn/Garmaker Co., supra; Olsen v. Reese, supra), and that the partnership was required to have such a license.

B. The trial court improperly placed upon the owners the burden of ascertaining the existence or non-existence of the required license. Although the established rule in this

state is that in order for a contractor to recover upon a contract it is necessary for him, as part of his case in chief, to allege and prove that he was a licensed contractor at the time the contract was entered into, Meridian Corp. v. McGlynn/Garmaker Co., supra; Olsen v. Reese, supra; Eklund v. Elwell, supra, the trial court took the position that the contractor had no duty to even allege, let alone prove, the existence of a valid license, rather that the burden was upon the owners to negate that proposition. This precise position, however, was rejected by this Court as early as 1942 in the case of Smith v. American Packing and Provision Co., supra. Therein this Court stated:

"Appellant contends that all of the matters raised by defendant constitute matters of defense which plaintiff does not have to negative. However, the general rule is that where a person seeks recovery for professional services for which a license is required as a condition precedent to the rendition of such services for a fee, such person must allege and prove facts, which show he was licensed at the time such services were performed or that he was exempted from the class required to have such license The facts as to license and qualifications for performing professional services are almost without exception better known to the person holding such a license than to the other party. It might be extremely difficult for a person defending an action based on alleged professional services to negative the existence of a license or show that claimant does not come within the exceptions of the statute." (emphasis added).

The very problems envisioned by this Court in the Smith case were, in fact, realized in the instant case. The facts as to the existence or non-existence of the required

license were clearly better known to the partnership. In fact, Mr. Berg knew as early as July 24, 1974, that Berg Brothers Construction Company had not been properly licensed during the period in question (Ex. 242). Nevertheless, that unlicensed partnership proceeded to file the Counterclaim in the instant action, omitting therefrom, either intentionally or unintentionally, an allegation that it was properly licensed as required by law (R. A21-27, T. 1390). As set forth in the affidavits of counsel for Plaintiffs, a diligent effort was made on Plaintiffs' behalf to determine whether or not Berg Brothers Construction Company was indeed properly licensed but in spite of this effort, they were unable to verify that Berg Brothers Construction Company was in fact not licensed until after the consolidated trial had commenced. In spite of the fact that Plaintiffs were prevented from obtaining the necessary information, and further in spite of the fact that Berg, the managing partner of the partnership, had known for over two years that the partnership had no license, the trial court erroneously placed upon the owners the burden of proving the non-existence of the contractor's license.

Although, in Plaintiffs' view, the case of Smith v. American Packing and Provision is clear, if any doubt remained as to who had the burden of proof regarding licensing, that matter was disposed of in 1949 in the case of Eklund v. Elwell, supra. In that case, a contractor was denied

recovery on his contract because he was not properly licensed. In a concurring opinion Justice Wolfe stated, at page 840:

"I concur in the results. I have had a lingering doubt as to the correctness of our holding that a plaintiff in a licensed business is required to plead that at the time of the making of the contract, he was licensed to do the business in pursuance of which the contract was made. Each time the question comes up there is renewed in my mind the question of whether it should not be pleaded as a defense, but I bow to the law already laid down in that respect in this jurisdiction." (emphasis added)

This Court has recently again affirmed the proposition set forth in Smith v. American Packing and Provision Co. that it is necessary for a party seeking to recover where a license is required to allege that he had the license in order to state a cause of action. Meridian Corp. v McGlynn/Garmaker Co., supra. Thus, for the trial court to shift this burden to the owners was clearly an error. Since the record establishes beyond question that neither the partnership nor the joint venture was licensed, the proper remedy is to reverse the judgment on the counterclaim.

C. The trial court erred in refusing to admit evidence that the counterclaimant had no contractor's license. After shifting to Plaintiffs the burden of disproving the existence of the contractor's license, the court then ruled that Plaintiffs had waived the right to raise that defense under Rule 8(c), U.R.C.P., and refused to allow Plaintiffs to present any evidence to the jury on that point. Rule 8 enumerates 19 affirmative defenses which must be alleged.

One of those enumerated defenses is "license". The court erroneously concluded that the use of the term "license" meant that the owners had to prove "lack of license". It is submitted, however, that the term "license" is not synonymous with the term "lack of license".⁹

In the first instance "license", if it had anything at all to do with such things as a contractor's license, would normally be interpreted to mean that the proponent of the proposition must establish that he had a license. The only occasions when having a "license" would constitute a defense would be in an administrative or court procedure alleging that a contractor lacked a license or is practicing without a license. In such cases "license" would be a defense.

In a case based upon a construction contract--or for a broker's fee or attorney's fee or medical fee, etc., the defense to the claim that money is due would be "lack of license". "License" is not a defense at all, let alone an affirmative defense in cases involving regulated occupations requiring licensing under the state law.

The use of the defense "license" had its derivation as a defense or plea of justification to an action in trespass, Black's Law Dictionary, Rev. 4th Ed., "license" p. 1068, and, as used in Rule 8(c), is synonymous with "consent". Cone v. Iverson, 4 Wyo. 203, 35 P.2d 1933 (1893). The defense

⁹Plaintiffs submit that Rule 8(c) similarly does not require a party to plead "lack of accord and satisfaction", "lack of duress", "lack of waiver", etc.

of license appears in actions for trespass, Raser v. Qualls, 4 Blackf. 286 (Ind. 1837); Knowles v. Dow, 22 N.H. 387 (1838); Shiffman v. Hickey, 101 Or. 596, 200 P. 1035 (1921); and converse, Cone v. Iverson, supra. In each of the cited cases, plaintiff complained of an act on the part of defendant, and defendant answered by admitting that although he had done the act complained of it was done with the "license" or "consent" of plaintiff. As used in Rule 8(c), "license" does not mean a physical document but, rather, refers to the prior approval to do some act; therefore, that term is not synonymous with "lack of license" as applied by the trial court.

By construing the term "license" to include the term "lack of license", the trial court required Plaintiffs to assume a portion of the partnership's affirmative case and shifted the burden on that issue to plaintiffs, which is contrary to the law of this state, Meridian Corp. v. McGee Garmaker Co., supra; Smith v. American Packing and Provision Co., supra, and contrary to the provision, purpose and scope of the rules of procedure.

The court went even further in reallocating burden of pleading and proof. In the instant case the sole contractor defendant, the joint venture, had not even counterclaimed. No one but the defendant may counterclaim. Nonetheless, despite the fact that the defendant joint venture had made no claim of any kind, the trial court held that Plaintiffs were required under Rule 8(c) to allege as an

affirmative defense that one of the constituent parties to the joint venture lacked a license (T. 2565), and further held that Plaintiffs' failure to so allege prior to trial barred them forever from showing that the interloping joint venturer was unlicensed. The court did not elaborate on the procedures that Plaintiffs should have employed, but one must assume that the trial court was of the opinion that Plaintiffs should either have included this "affirmative defense" in their Complaint, or should, at the time the non-defendant volunteered to interpose a claim, have filed some additional pleading wherein the "affirmative defense" was set forth.

D. The trial court erroneously concluded that the 1950 adoption of the Rules of Procedure shifted the licensing burden to Plaintiffs. The trial court was of the erroneous opinion that the duty to allege and prove the existence of a contractor's license was procedural, rather than substantive, and that it had been changed by the adoption of the Utah Rules of Civil Procedure in 1950. This clearly is not the case. The Utah Rules of Civil Procedure were adopted by this Court pursuant to the authority given to it by Section 78-2-4. Therein it is provided that this Court has the power to prescribe, alter and revise the rules of practice and procedure in all civil actions. That statute, however, has a clearly stated limitation of particular significance to this case. It provides that such rules "may

not abridge, enlarge or modify the substantive rights of a litigant."¹⁰

There can be little doubt that the rules determining the elements needed to constitute a cause of action are substantive in nature. As has been stated, "the elements of plaintiff's prima facie case are determined by applicable substantive law," 2A J. Moore, Federal Practice, ¶8.27[4], p. 1858.

"It is a matter of substantive law whether certain elements do or do not constitute a part of the plaintiffs' prima facie case." 2A J. Moore, supra, ¶8.27[2], p. 1843. See also, U.S. For the Use and Benefit of Greenville Equipment Co. v. U.S. Cas. Co., 278 F. Supp. 653 (D. Del. 1962).

There can be no doubt that under the clear mandate of our Legislature, the Utah Rules of Civil Procedure did not change the components of any cause of action known to the law at the time the rules were adopted. What was a necessary element in order to recover under code pleading is still a necessary element under notice pleading. Cf. Meridian C. v. McGlynn/Garmaker Co., supra.

Of special interest on this subject is the case of Management Search, Inc. v. Kinard, 231 Ga. 26, 190 S.E. 2d

¹⁰The Federal Rules of Civil Procedure were adopted pursuant to a similar mandate; Title 28, U.S.C.A., Section 2072 provides that the Federal Rules of Civil Procedure are to regulate only "practice and procedure" and are not to abridge, enlarge or modify any substantive right. See Sibbach v. Wilson and Co., 312 U.S. 1 (1941); Mississippi Pub. Corp. v. Murphree, 326 U.S. 438 (1946).

899 (1973), decided by the Supreme Court of Georgia after the adoption by it of their Rules of Practice which are comparable to our Rules of Civil Procedure.¹¹ In that case, the Supreme Court of Georgia was faced with a situation similar to the one presented here. An unlicensed employment agency was attempting to recover a fee in the face of a regulatory statute requiring a license. The courts of Georgia had long ago determined, as this Court has, that proof of a valid, regulatory license was a prerequisite to recovery for such a claim. The issue presented was, as here, the effect of the adoption of the rules of procedure upon the established substantive law of the state. The court there resolved the precise issue here in question when it held that "lack of license" was not a defense that must be raised by the opposing party. This holding was under the very language that the trial court in the instant case was required to interpret when it held that Plaintiffs had the burden under Rule 8(c) of pleading and proving "lack of license" as an affirmative defense. The Georgia court spec-

¹¹Georgia in 1966 enacted the Civil Procedures Act, which is comparable to both the Utah Rules of Civil Procedure and the Federal Rules of Civil Procedure. Section 81A-108(c) of that Act deals with affirmative defenses and is almost identical to our Rule 8(c). It states:

"Affirmative defenses - In a pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, and waiver. . ."

ifically held that adopting the rules of procedure did not alter the substantive burden of proving a valid license as part of the case in chief, precisely the position reaffirmed by the Supreme Court of Utah in Meridian Corp. v. McGlynn/Garmaker Co., supra.

E. The counterclaimant's action should have been dismissed for failure to plead or prove that it was a license contractor. Since the partnership's counterclaim must be vested with all the prerequisites of a complaint, State by and Through Road Commission v. Parker, 13 Utah 2d 65, 363 P.2d 585 (1962), the partnership's failure to state a prima facie cause obviated the necessity of defendant pleading any affirmative defense. Indeed, an affirmative defense only goes to those facts which the plaintiff, or in this case the counterclaimant, is not bound to prove. West Nichols Hills Presbyterian Church v. Folks, 276 P.2d 255 (Okla. 1954). Or stating it differently, evidence which controverts facts necessary to be proven by the plaintiff need not be pleaded by way of affirmative defense but may be shown under a general denial. Elston v. Wagner, 216 Or. 386, 337 P.2d 326 (1959). This Lignell and Todd did in the instant case by alleging that the Counterclaim failed to state a cause of action upon which relief can be granted (R. A38-40). When the licensing issue was raised by Plaintiffs on a motion to dismiss the Counterclaim, that motion should have been granted.

F. The matter of lack of a valid contractor's license may be raised at any time in a proceeding in which an unlicensed contractor seeks to recover for construction work. As set forth above the law in Utah is clear that a contractor must plead the existence of a license in order to state a claim upon which relief can be granted. Meridian Corp. v. McGlynn/Garmaker Co., supra. Under the wording of Rule 12, the defense of failure to state a claim can be raised at any time. Rule 12(h), U.R.C.P., provides that a party waives all defenses and objections which he does not present either by motion or in his answer or reply except failure to state a claim upon which relief can be granted, which defense can be raised by a later pleading, by a motion for judgment on the pleadings or at the trial on the merits. It is clear that plaintiffs raised the matter of the failure to state a claim "at the trial on the merits" as soon as the fact became known to them that the partnership was not properly licensed (T. 1373-1377). This was clearly permissible under the express terms of Rule 12. As has been stated:

"Rule 12(b)(2) provides that a defense of failure to state a claim upon which relief may be granted . . . may be made in any pleading permitted or ordered under Rule 7(a) or by motion for judgment upon the pleadings or at the trial on the merits. Hence, these substantial defenses are expressly preserved against waiver under Rule 12(h)(1) or by the operation of Rule 12(g)." 5 Cyc. Fed. Pro. §1547, p. 53 (emphasis added).

A party may move to dismiss the Complaint after filing his answer where the right to make such a motion is reserved or incorporated in the answer. 5 Cyc. Fed. Proc., supra, §15: p. 48. Plaintiffs in the instant case made such a reservation in their Reply to the partnership's counterclaims (R. 40). Plaintiffs promptly moved the trial court during the trial to dismiss the counterclaim for lack of license once that information was known to them. That motion was well taken. As the court in the Management Search case stated:

"At whatever stage of the proceedings it appears that the plaintiff is seeking to recover upon a contract to be permitted to be entered into only by persons holding licenses issued as a regulatory measure, it becomes imperative for the plaintiff to prove they hold such a license and held such a license at the time the contract was entered into in order to authorize a recovery." Id. at 901-902.

Thus, once the issue of lack of license came into focus it was incumbent upon the partnership to prove the existence of the required license. This it failed to do.

G. Even if lack of license were an affirmative defense Plaintiffs should have been allowed to raise that matter by motion under the circumstances of this case. Even if the Court should determine that the term "license" as used in Rule 8(c) placed upon Plaintiffs the burden of raising that matter by way of an affirmative defense. Plaintiffs' motion to dismiss, nevertheless, should have been granted.

An affirmative defense, even though not pleaded, may be raised by a motion to dismiss under Rule 12(b)(6). As

Professor Moore has stated in his treatise:

"Rule 8(c) may seem to imply that affirmative defenses may be raised only by a pleading (where one is required or permitted), and not otherwise. This, however, is too narrow of a construction of that Rule. A defendant may move for summary judgment under Rule 56 where there is 'no genuine issue as to any fact' and he 'is entitled to a judgment as a matter of law'; it is clear that summary judgment is proper where the defendant shows the existence of an affirmative defense even though he has filed no answer. Under the 1946 amendment to Rule 12(e), it is also made clear that a defendant may raise an affirmative defense by motion to dismiss for failure to state a claim; that the Court may treat such a motion as a motion for summary judgment . . . By analogizing the motion to a motion for summary judgment, however, the amended Rule 12(b) clearly permits affirmative defenses to be raised by motion. The affirmative defense raised by motion may be handled solely under Rule 12(b), without resort to summary judgment procedure, where the defense appears on the face of the complaint itself. And by authorizing the motion under Rule 12(b) to be treated as one for summary judgment under Rule 56, amended Rule 12(b) clearly permits an affirmative defense based on matters outside the complaint to be raised by motion." 2A J. Moore, supra, ¶8.28, p. 1863-64.

Further, Professor Moore states:

"Affirmative defenses may be raised on a motion for summary judgment even though not pleaded." 6A J. Moore, supra, ¶56.17[5], p. 735-741. "There is, therefore, no question that affirmative defenses may be presented by a motion for summary judgment." 2A J. Moore, supra, ¶12.09, p. 2295.

The pleadings in this case clearly indicate that on every occasion Plaintiffs preserved their right to challenge the sufficiency of the partnership's case by alleging that the counterclaims failed to state a cause of action.

Pursuant to our Rules and the authorities above cited, a motion to dismiss for failure to state a claim may be raised at any time in the proceedings and cannot be waived. When coupled with affidavits dealing with matters outside the pleadings such a motion is to be treated as one for summary judgment. Plaintiffs were, therefore, free to raise their motion at anytime.

Plaintiffs raised the motion of failure to state a claim immediately upon obtaining the factual information supporting their motion. Plaintiffs' motion was supported by affidavits that were accepted by the court; therefore, it became a motion for summary judgment under the Rules. Plaintiffs' motion should have been granted because the uncontested facts showed that the partnership was not entitled to recover due to its lack of license.

H. The trial court erroneously precluded the Plaintiffs' affirmative defense of lack of license. On July 9, 1976, the partnership served on Plaintiffs an Amended Answer and Counterclaim (R. C827-832). The Amended Answer and Counterclaim reiterated their defenses to three causes of action pled by Plaintiffs, raised the new issue of entitlement to attorney's fees and, in addition thereto, stated, "Defendants incorporate herein all affirmative defenses, cross-claims and counterclaims which have previously been alleged against the plaintiffs Lignell and Todd." Plaintiffs immediately moved for a dismissal of that portion of the

counterclaim relating to attorney's fees but did not file a reply responding to the other allegations of the Counterclaim. The trial court, on July 16, 1976, took the motion under advisement.

Although they felt that the trial court's views regarding the requirement of alleging lack of license as an affirmative defense were in error, Plaintiffs, in addition to filing a written Motion for Summary Judgment, also filed a Reply to the last Amended Counterclaim of the partnership setting forth therein as an affirmative defense the failure of the partnership to be properly licensed under the laws of this state (R. C962-964). The Court permitted the reply to be filed (T. 1687), but some 11 days later ordered, on its own motion, that the affirmative defense relating to lack of license set forth in that Reply be stricken (T. 2557). Plaintiffs submit that this clearly was an error since there was no motion made by any party to strike any portion of Plaintiffs' Reply. See Rule 12(f), U.R.C.P. In addition, at the time the Reply was filed, the partnership was some two weeks away from commencing the presentation of their evidence relating to the Counterclaims. The Reply did nothing to change Plaintiffs' theory of its case in chief and it did nothing to impact the cases of the subcontractors that had previously been concluded in the earlier phase of the consolidated matter. Plaintiffs submit that they had an absolute right under Rule 7 to file the

Reply and that in addition thereto, the court permitted the Reply to be filed without qualification. Absent a motion from some other party, the trial court could not thereafter properly strike a portion of that responsive pleading.

I. Plaintiffs should have been permitted, as a minimum, to amend their pleadings. Even had plaintiffs sought to amend rather than file an original pleading, such an amendment would have been proper. Under Rule 15, U.R.C.P., amendments to pleadings are to be freely granted when justice so requires. Rule 15(b) provides that when issues not raised by the pleadings are tried by the parties they should be treated in all respects as if they had been raised in the pleadings. This Court, in Chaney v. Rooker, 4 Utah 2d 205, 381 P.2d 86 (1963), has indicated clearly that it favors liberal amendments to the pleadings so that all the parties are afforded the privilege of presenting whatever legitimate contentions may pertain to their dispute. In the instant case, however, Plaintiffs were prevented from doing that by the trial court.

The court's failure to allow the Plaintiffs to raise the issue of lack of license under all the facts and circumstances of this case was clearly prejudicial and, in Plaintiff's view, constituted reversible error for the reasons set forth above.

Point VI

CONSOLIDATING THE ACTIONS FOR TRIAL MADE THE ISSUES AND THE EXHIBITS SO NUMEROUS AND COMPLEX, AND THE TRIAL SO LONG AND COMPLICATED AS TO EFFECTIVELY DEPRIVE THE OWNERS OF A FAIR TRIAL OF THEIR CLAIM AGAINST THE CONTRACTOR AND SURETY.

On January 15, 1975, upon a motion by the partnership and the surety, the Honorable Stewart M. Hansen, Sr. consolidated all three cases for the purpose of trial. This was done over the objections of Plaintiffs and the drywallers. The result was a trial that was inordinately long, unnecessarily complex, burdened with many issues that could not be adequately dealt with in the context of the consolidated proceedings, and caused, in Plaintiffs' view, total confusion on the part of the jury, resulting in its inability to adequately review the evidence, make the necessary distinctions and render a just verdict.

Any one of the three cases would, by itself, have constituted a full and major effort on the part of counsel if it were done properly. But the combination of the three, as the size of the record and the number of exhibits reflects,¹² created a situation that was totally unmanageable and substantially impaired Plaintiffs' rights to a fair trial in their

¹²Two Hundred and Sixty Three exhibits were marked; some contained as many as 60 separate parts. The transcript is over 3500 pages long.

claim against the contractor and the surety.

A. The different issues and contractual standards between the parties made consolidation improper. Consolidation is not proper where the parties, the court and the jury are burdened with an overcomplication of issues and instructions. Atkinson v. Roth, 297 F.2d 570 (3d Cir. 1961), or where it results in prejudice to any party. United States v. Lustig, 16 F.R.D. 277 (S.D.N.Y. 1954). That there was an enormous complication of issues and complex and voluminous instructions in the consolidated case cannot be denied (R. C1039-1109). Plaintiffs claim that consolidation was highly prejudicial to them.

Claron Bailey, the materialman, maintained in his action that Lignell had acted fraudulently toward him; the jury found in Lignell's favor on that issue. There was no issue between the owners and the contractor and surety. In the same vein, the electricians, in their lawsuit, claimed that Lignell had made certain oral statements to them which Lignell vehemently denied, and again the jury found for Lignell. These issues were totally unrelated to the Plaintiffs' claims and no such allegations could have been argued or presented to the jury except through the device of combining the actions. Obviously, such claims tend to prejudice the jury and weigh heavily on the matter of credibility. Plaintiffs, in their suit against the contractor and surety, should not have been required to deal with the intemperate and

accusing remarks of counsel for the subcontractors while the jury was weighing the heavy and complex accounting and contract issues. The claims challenging Lignell's integrity were primarily a device to permit irrelevant and besmirching testimony to be used to improperly appeal to prejudice and sway the jury. In short, the tactic was to smear Lignell and broaden the impact by the device of consolidating with the owners' suit cases containing unfounded, but derogatory allegations, not otherwise admissible. This is prejudicial and should warrant a new trial free of such improprieties.

In the consolidated trial, all of the other parties combined against the owners, even to the extent that counsel for the bonding company and counsel for the contractor assisted the drywaller and electricians, alleged that their claims were just and helped them maximize the dollar amounts awarded them. Thus, Plaintiffs found themselves in the difficult and unenviable position of having to point^{cut} to the jury that many of the claims for extras by the subcontractors were not legitimate while Berg acquiesced to duplicate charges and shoddy work. The tactics employed by Defendants and the subcontractors allowed them to obscure the differences between the standards and requirements of the construction contract (Ex. 9) and the standards, or lack thereof, in the agreements between the contractor and the subcontractors, as previously set forth in Point I. Thus, the jury was given the impossible task of recognizing and applying at least two different contract

standards to the testimony and to the exhibits, and segregate in the mass of detail those charges of the subcontractors, were the owners' responsibility from those which were the contractor's responsibility, although the exhibits were wholly lacking in the detail necessary to permit the differing standards to be applied. Had the cases not been consolidated, differing standards would not have been present.

Permitting the intermingling of the evidence was prejudicial error, and was the direct result of the consolidation; thus, consolidation was improper, Bascom Launder Corp. v. Coin Corp., 15 F.R.D. 277 (S.D.N.Y. 1953); United States v. Lustig, supra, particularly in view of the fact that the trials were to a jury and there were different issues and different contracts controlling the legal consequences of the various cases. Cf. Holbert v. Aetna Life Ins. Co., 14 F.R.D. 148 (Penn. 1953).

B. The consolidated trial resulted in confusion. By the end of such a lengthy trial the jury had such a mass of evidence before it, some presented early in the trial and involving other issues, that it could not reasonably be expected to keep it all straight.

As early as August 19th, the fourth day of the trial, the court, after listening to the testimony concerning the voluminous change orders submitted by Comstock, and Mr. Comstock's acknowledgement that many of them were duplicates, stated that although he thought he wasn't going to get confused, he was "running into a problem." (T. 374). Mr. Com-

the author of many of the change orders, also testified that, although he had a good memory, he was having trouble keeping the various exhibits separate (T. 420) and further stated that he was totally confused, and that his mind could only handle "so many" (T. 424).

Plaintiffs submit that if a distinguished juror, who had the benefit of many years of trial experience and the author of many of the documents were both confused, then a jury of laymen, without the benefit of notes or of previous instructions concerning what they were to look for in the evidence, must also have been totally and hopelessly lost at that point. Plaintiffs submit that this perplexed and uncomprehending condition continued throughout the remainder of the trial and was a direct result of the erroneous consolidation and intentional tactics of the parties who had fostered the confusion.

C. Consolidation resulted in the admission of much evidence that should properly have been excluded. Because of the consolidation of the cases, there are many instances where the evidence was objected to and inadmissible as to the Plaintiffs, but properly admissible under the issues among the other parties or in the other cases. Although the court repeatedly cautioned the jury respecting that matter (T. 93, 264), Plaintiffs submit that such cautioning did not cure the prejudicial effects of the admission of the evidence. Examples are the testimony on the abortive fraud and misrepresentation claims, and testimony impacted by the differing contract standards.

While there are numerous other examples in the record of this occurring, Plaintiffs will detail only two.

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1. The surety was allowed, over Plaintiffs' objections, to present to the jury evidence that the brother Berg had signed an indemnity agreement with the surety and that any judgment that was rendered against the surety would be passed through to them. In order to hammer that point home, counsel for surety was even allowed to read the indemnity provision to the jury! All this, despite the fact that there was no dispute between the surety and the Bergs concerning the validity of the documents or the authenticity of the signatures, and despite the fact that such testimony had no relevance to Plaintiffs' claim against surety.

This type of testimony was clearly improper and prejudicial to Plaintiffs. It had only one real purpose -- to get the jury's sympathy. Surety wanted the jury to clearly understand that if it awarded any money to the owners, payment would come not from company funds but from the "poor" individuals. This is the converse of the "insurance policy" argument that is universally rejected by the courts, i.e., "it's not the individual but the 'rich' insurance company that will end up paying the judgment."

The trial court excluded that evidence with respect to Plaintiffs (T. 3184), but it is submitted that such cosmetic surgery was wholly ineffectual in removing that information from the minds of the jury as they weighed the issues.

2. Although the contractor refused to claim that the drywall work was defective, the drywallers, nevertheless

less, presented evidence regarding the quality of the work done during the third phase of the suit, i.e., the owners vs. the contractor and surety. An objection was timely made to that evidence on behalf of the owners which was sustained by the trial court (T. 2266, 2269-2270). The evidence was admitted, however, for the limited purpose of resolving any disputes between the drywallers and the contractor relating to drywall quality. Between those parties, however, there were no such disputes. The contractor and surety both readily admitted that the sum requested by the drywaller was due from them. Thus, the testimony coming as it did long after the drywall phase of the consolidated cases had been concluded, without opposition, could only have had one purpose -- to dispute the testimony of the owners' witnesses that the smelly apartment and wavy walls failed to meet the contractor's standard of performance, work "free from faults and defects." But as to the owners, that testimony was excluded, and could not be considered by the jury for that purpose. The result was that the Plaintiffs were again finessed by the consolidation. The record is clear and unchallenged that as between the contractor and the owners the drywall did not meet the contract standard but the jury heard some evidence that as between the contractor and the subcontractor the work was acceptable -- a fleeting and transitory distinction shortly merged into a general impression.

Thus, the consolidation placed upon the jury the diff-

icult and, in Plaintiffs' view, impossible task of segregating the testimony applicable to only some of the parties from the admissible only as to others. Bascom Launder Corp. v. Telecoin Corp., supra.

Under the circumstances of this case, Plaintiffs submit that the jury could not distinguish between those items that were admissible for only a limited purpose and those that were not, and exclude from their deliberations that evidence that may have been admitted as to one party but not as to Plaintiffs. See Mays v. Liberty Mutual Insurance Co., 35 F. 234 (E.D. Penn. 1964). Thus, Plaintiffs' case could not be properly evaluated by the jury; the "excluded" testimony necessarily having permeated their deliberations.

D. Consolidation created insurmountable practical problems. Because of the plethora of issues in the separate cases, Plaintiffs were required to devote a considerable amount of time to each of the claims responding in turn to all four sets of opposing counsel, both during the trial and in oral argument. Thus, although the court allowed liberal time for making closing arguments, etc., the number of issues in the combined suits limited the time and diffused the attention that Plaintiffs could give to each.

There can be no doubt that consolidation, with its attendant multiplication, confusion and obfuscation of the issues, and the inclusion of otherwise inadmissible and inflammatory accusations against the owners, was the deliberate

trial strategy of the surety and the partnership. Prior to trial, counsel for surety freely acknowledged that his client, the contractor and the subcontractors had all "banded together" against the owners (Supp. T. 15).

If any doubt exists that the so-called "claims and controversies" between the subcontractors and the surety and contractor were a charade, one need only review the record of this case. Neither surety nor the contractor offered any resistance to the subcontractors' claims. Cross-examination by them was minimal or non-existent. No witnesses were called by the surety or contractor to rebut the subcontractors' cases in chief. No motions were made by surety or the contractor challenging the sufficiency of the evidence presented by the subcontractors. As previously pointed out in Point I, both the contractor and surety freely admitted that the money was due and actually assisted the subcontractors in presenting their cases.

The combination of the parties against Plaintiffs allowed the subcontractors, the partnership and the surety to collaborate together and divide up areas of responsibility. It allowed four "separate" parties to cross-examine and recross-examine any witnesses of Plaintiffs, and to remain unanimously, approvingly and, to the jury, impressively silent when a witness of any of them was challenged by Plaintiffs. Thus, much of the testimony adverse to Plaintiffs was repeated to the jury over and over again, while favorable testimony was effectively

buried. Four voices were often raised in support of, or against, a particular matter, as opposed to one on the opposite side. This numerical disparity, in Plaintiffs' view, encouraged the jury to "get on the bandwagon" and had an unfair influence on their determinations.

When the trial concluded, the jury had only the dim memory of what had been said earlier and how it impacted the issues of the various cases. In Plaintiffs' view that was a significant factor in causing the jury to render its general verdict, and pick the ultimate figure off the Defendants' exhibits (see Ex. 252), without making the distinctions that Plaintiffs have heretofore outlined, without giving Plaintiffs credit for admittedly defective work, and without giving Plaintiffs' claims the careful consideration to which they were entitled and which they would have received had the separate suits not been lumped into one mass before the jury.

E. Consolidation abridged Plaintiffs' substantive rights. Plaintiffs were further prejudiced by consolidation because they were precluded, as a result thereof, from raising the issue of the lack of contractor's license on the partnership and the joint venture. The court indicated that one of the motivating factors in its denial of Plaintiffs' Motion for a Summary Judgment on that issue was the fact that the subcontractors had already presented their claims to the court (T. 1686-1687; R. C1396). This, however, should have and would have had no effect on Plaintiffs' separate claims

but for consolidation. Thus, substantive rights of Plaintiffs were abridged solely because of the fact that the cases had been consolidated for purposes of trial.

By its own admission, the court did not evaluate Plaintiffs' motion wholly upon its merits, but based its decision upon the impact a ruling in Plaintiffs' favor would have on other portions of the consolidated case that were wholly extraneous to Plaintiffs.

As mentioned previously in Point VI, the erroneous imposition of attorney's fees upon Plaintiffs, which was a direct result of the consolidation, also constituted an abridgement of Plaintiffs' substantive rights.

F. Consolidation caused prejudicial evidence rulings and prejudicial and improper Findings to be entered. The court, in Plaintiffs' view, committed numerous evidentiary errors throughout the course of the trial. This is not to be unduly critical of the trial court, but is another evidence of the confusion and difficulty occasioned by the consolidation of the three cases for purposes of trial. The two most egregious such rulings have previously been dealt with in Point I, but one additional item requires mention.

Three months after the rendition of the jury verdict, and after the hearing on attorney's fees, the court allowed counsel for surety to prepare Findings of Fact and Conclusions of Law. The Findings proposed and adopted went far beyond the evidence in the attorney's fee hearing and dealt with issues

and facts that were solely within the province of the jury (R. C1409-1419). Such Findings should be ignored by this Court. There is absolutely no indication anywhere that the jury, in reaching any of its verdicts, made the Findings respecting fault or breach of contract signed by the court. Plaintiffs submit that there is no provision under Rule 52, U.R.C.P. authorizing the court to speculate concerning the rationale of a jury verdict through the entry of the Finding of Fact dealing with issues determinable solely by that body. Such Findings should be set aside by this Court as being improper under Rule 52.

The arguments presented in this Point VI either individually or in combination show, in Plaintiffs' view, that the consolidation resulted in substantial prejudice to Plaintiffs. As such, reversible error was committed. Atkinson v. Roth, supra; United States v. Knauer, 149 F. 2d 519 (7th Cir. 1945).

CONCLUSION

Plaintiffs respectfully submit that the errors complained of require either a complete reversal of the judgment on the counterclaims of the partnership and the surety or, at a minimum, a remand for a new trial without consolidation.

If this Court concurs that an unlicensed contractor may not recover under a construction contract or that one member of a joint venture may not recover on the contracts

of the joint venture in the absence of a special contract and thus avoid an absolute defense which the owner has against the joint venture, the judgment should be reversed. At a minimum, the award of attorney's fees and interest should be promptly vacated.

If, on the other hand, this court concludes that consolidation was prejudicial, or evidentiary rules abused, or the trial was unfair or confused, the remedy would be a new trial of the issues between the owners, contractor and surety, with the prejudice, confusion and unfairness resulting from consolidation removed.

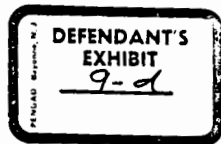
The cumulative effect of the errors complained of herein has been to deprive Plaintiffs of their proper day in court and of a fair hearing, to facilitate an erroneous and unjust verdict compounded by an unlawful addition of enormous attorney's fees and interest. Plaintiffs pray this Court to rectify that injustice.

Respectfully submitted,

EARL D. TANNER & ASSOCIATES
Earl D. Tanner
J. Thomas Bowen

Attorneys for Plaintiffs
Lignell and Todd

THE AMERICAN INSTITUTE OF ARCHITECTS



AIA Document A101

Standard Form of Agreement Between Owner and Contractor

where the basis of payment is a
STIPULATED SUM

This document is a Standard Form of Agreement Between Owner and Contractor, published by the American Institute of Architects. It is only with the latest Edition of AIA Document A201, General Conditions of the Contract for Construction. This document has important legal consequences; consultation with an attorney is encouraged with respect to its completion or modification.

AGREEMENT

On this Sixteenth day of November in the year of Nineteen hundred and Seventy-One.

TWEEN **E. KEITH LIGNELL, MARIAN H. LIGNELL, BURTON M. TODD and**

PHYLLIS W. TODD, the Owner, and
JEFFORD M. BERG and WILLIAM R. BERG, a partnership, dba BERG BROTHERS CONSTRUCTION
COMPANY and FRANK C. BERG, an individual,
JOINT VENTURE, dba BERG CONSTRUCTION COMPANY the Contractor.

Owner and the Contractor agree as set forth below.

This Agreement executed the day and year first written above.

OWNER

E. KEITH LIGNELL, MARIAN H. LIGNELL,
BURTON M. TODD and PHYLLIS W. TODD

By

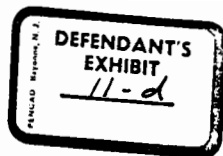
CONTRACTOR

CLIFFORD M. BERG & WILLIAM R. BERG,
dba BERG BROTHERS CONSTRUCTION COMPANY
FRANK C. BERG, an individual, A JOINT
dba BERG CONSTRUCTION COMPANY

By

ADDENDUM TO CONTRACT

SEP 9, 1973



This supplements that certain Contract dated November 16, 1971 between E. Keith Lignell, Marian H. Lignell, Burton M. Todd and Phyllis W. Todd, the Owner, and Clifford M. Berg and William R. Berg, a partnership, dba Berg Brothers Construction, A Joint Venture, dba Berg Construction Company, the Contractor, at Incline Terrace Apartments, Salt Lake City, Utah.

In consideration of \$407,248.00, the Contractor agrees to perform all the work required by the Contract Documents for an additional twenty-two units (including extras) at the Incline Terrace Apartments. This increases the contract sum from \$1,351,755.00 to \$1,759,003.00.

The work to be performed under this Contract for the entire project shall be completed by July 15, 1973.

Clifford M. Berg
E. Keith Lignell
Burton M. Todd

Exhibit D-1
Witness Lignell
Date 8-27-74
Reporter W. B.

Fidelity and Deposit Company

HOME OFFICE

OF MARYLAND

BALTIMORE

Performance Bond

KNOW ALL MEN BY THESE PRESENTS: Clifford M. Berg and William R. Berg, Partnership, dba, Berg Brothers Construction Company and Frank C. Berg, That Individual, a Joint (Here insert the name and address or legal title of the Contractor) Venture, dba, Berg Construction Company, 4363 Camilla Drive, Salt Lake City, Utah 84117, as Principal, hereinafter called Contractor, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation of the State of Maryland, with its home office in the City of Baltimore, Maryland, U. S. A., hereinafter called Surety, are held and firmly bound unto E. Keith Lignell, Marian E. Lignell, Burton M. Todd and Phyllis V. Todd, 223 South 7th East, Salt Lake City, Utah 84102

(Here insert the name and address or legal title of the Owner)

as Oblige, hereinafter called Owner,

in the amount of One Million Three Hundred Fifty-One Thousand Seven Hundred Dollars (\$1,351,755.00), for the payment whereof Contractor and Surety bind themselves, their executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Contractor has by written agreement dated November 16, 1972 entered into a contract with Owner for performing work required by the Contract for Incline Terrace Apartments at 450 South Tenth East, Salt Lake City, Utah 84102

in accordance with drawings and specifications prepared by Ronald L. Molen, 610 East South Temple, Salt Lake City, Utah 84102

(Here insert full name, title and address)

which contract is by reference made a part hereof, and is hereinafter referred to as the Contract.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if Contractor shall promptly and faithfully perform said contract, then this obligation shall be null and void; if it shall remain in full force and effect.

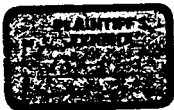
The Surety hereby waives notice of any alteration or extension of time made by the Owner.

Whenever Contractor shall be, and declared by Owner to be in default under the Contract, the having performed Owner's obligations thereunder, the Surety may promptly remedy the default; or

- (1) Complete the Contract in accordance with its terms and conditions, or
- (2) Obtain a bid or bids for completing the Contract in accordance with its terms and conditions, and upon determination by Surety of the lowest responsible bidder, or, if the Owner upon determination by the Owner and Surety jointly of the lowest responsible bidder, for a contract between such bidder and Owner, and make available as work progress though there should be a default or a succession of defaults under the contract or contracts of contract arranged under this paragraph) sufficient funds to pay the cost of completion less the balance of contract price; but not exceeding, including other costs and damages for which the Surety may be hereunder, the amount set forth in the first paragraph hereof. The term "balance of the contract" as used in this paragraph, shall mean the total amount payable by Owner to Contractor under the Contract and any amendments thereto, less the amount properly paid by Owner to Contractor.

Any suit under this bond must be instituted before the expiration of two (2) years from the date which final payment under the contract falls due.

No right of action shall accrue on this bond to or for the use of any person or corporation other than the Owner named herein or the heirs, executors, administrators or successors of Owner.



Signed and sealed this 16th day of February 1973

Subscribed and sworn to before me this

16th day of Feb. 1973

E. Keith Lignell, Notary Public

My Commission expires: 4/1/73

BERG CONSTRUCTION COMPANY

Principal

X Clifford M. Berg

Title

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

2 Yr. Prem. \$9,136.00

By

Earl D. Brown

Title

Attorney-in-Fact

FORM-60M, 12/31/55

Approved by The American Institute of Architects, A.I.A. Document

Fidelity and Deposit Company

HOME OFFICE

OF MARYLAND

BALTIMORE

Labor and Material Payment Bond

Note: This bond is issued simultaneously with Performance Bond in favor of the owner conditioned on the full and faithful performance of the contract.

KNOW ALL MEN BY THESE PRESENTS: Clifford M. Berg and William R. Berg, a Partnership, dba, Berg Brothers Construction Company and Frank C. Berg, an Individual, a Joint Venture (Here insert the name and address or legal title of the Contractor) dba, Berg Construction Company, 4363 Camille Drive, Salt Lake City, Utah 84117 as Principal, hereinafter called Principal, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation of the State of Maryland, with its home office in the City of Baltimore, Maryland, U. S. A., as Surety, hereinafter called Surety, are held and firmly bound unto 3. Keith Lignell, Marian H. Lignell, Burton M. Todd and Phyllis M. Todd, 223 South 7th East, Salt Lake City, Utah 84102 (Here insert the name and address or legal title of the Owner)

as Oblige, hereinafter called Owner, for the use and benefit of claimants as hereinbelow defined, in the amount of One Million Three Hundred Fifty-One Thousand Seven Hundred Fifty-Five Dollars (\$1,351,755.00) (Here insert a sum equal to at least one-half of the contract price), for the payment whereof Principal and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Principal has by written agreement dated November 16, 1972, entered into a contract with Owner for performing work required by Contract Documents for Incline Terrace Apartments at 450 South Tenth East, Salt

in accordance with drawings and specifications prepared by Ronald L. Molen
610 East South Temple, Salt Lake City, Utah 84102

(Here insert full name, title and address)
which contract is by reference made a part hereof, and is hereinafter referred to as the Contract.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if Principal shall promptly make payment to all claimants as hereinafter defined, for all labor and material used or reasonably required for use in the performance of the Contract, then this obligation shall be void; otherwise it shall remain in full force and effect, subject, however, to the following conditions:

1. A claimant is defined as one having a direct contract with the Principal or with a sub-contractor of the Principal for labor, material, or both, used or reasonably required for use in the performance of the contract, labor and material being construed to include that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the Contract.

2. The above named Principal and Surety hereby jointly and severally agree with the Owner that every claimant as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such claimant's work or labor was done or performed, or materials were furnished by such claimant, may sue on this bond for the use of such claimant, prosecute the suit to final judgment for such sum or sums as may be justly due claimant, and have execution thereon. The Owner shall not be liable for the payment of any costs or expenses of any such suit.

3. No suit or action shall be commenced hereunder by any claimant:

(a) Unless claimant, other than one having a direct contract with the Principal, shall have given written notice to any two of the following: The Principal, the Owner, or the Surety above named, within ninety (90) days after such claimant did or performed the last of the work or labor, or furnished the last of the materials for which said claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the materials were furnished, or for whom the work or labor was done or performed. Such notice shall be served by mailing the same by registered mail or certified mail, postage prepaid, in an envelope addressed to the Principal, Owner or Surety, at any place where an office is regularly maintained for the transaction of business, or served in any manner in which legal process may be served in the state in which the aforesaid project is located, save that such service need not be made by a public officer.

(b) After the expiration of one (1) year following the date on which Principal ceased work on said Contract, it being understood, however, that if any limitation embodied in this bond is prohibited by any law controlling the construction hereof such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

(c) Other than in a state court of competent jurisdiction in and for the county or other political subdivision of the state in which the project, or any part thereof, is situated, or in the United States District Court for the district in which the project, or any part thereof, is situated, and not elsewhere.

4. The amount of this bond shall be reduced by and to the extent of any payment or payments made in good faith hereunder, inclusive of the payment by Surety of mechanics' liens which may be filed of record against said improvement, whether or not claim for the amount of such lien be presented under and against this bond.

Signed and sealed this 16th day of February A.D. 19 72

Subscribed and sworn to before me this

16th day of Feb 1972

Ernest H. Thordson Notary Public

My Commission expires: 6/21/73

BERG CONSTRUCTION COMPANY (SEAL)

Principal

X Clifford M. Berg per Clifford M. Berg

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By Clifford M. Berg (SEAL)

Title

Attorney-in-Fact

DBR
L

AFFIDAVIT

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

CLIFFORD M. BERG, being duly sworn upon his oath, de-
says that:

1. He is a partner in Berg Brothers Construction Company
member of that certain joint venture doing business as Berg Construction
Company.

2. He is authorized to execute documents on behalf of Berg
Construction Company which are binding upon the said joint venture, all
therein and all members thereof.

3. The project known as the Incline Terrace Apartments
and there are to your affiant's knowledge no liens or claims which
result in liens on the said project, except:

- a. Toy Hansen Plumbing
- b. Bateman Electric
- c. Western Sheet Metal
- d. S & H Painting
- e. Western Drywall & Claron Bailey
- f. Western International Industries dba
Lady Fair Kitchens, Time Commercial
Financing Corporation, Pioneer Wholesale
Supply Company, Intermountain Lumber Company
- g. Standard Builders Supply
- h. Dahn Brothers, Inc.
- i. Elias Morris & Sons Co.
- j. John H. Gerstner, Jr.
- k. Superior Insulation
- l. Olympus Glass Co.

Dated this 12th day of February, 1974.

Clifford M. Berg
CLIFFORD M. BERG

Subscribed and sworn to before me this 12th day of February,

My Commission Expires:

Wm. R. [Signature]
Notary Public
Residing in Salt Lake County

SUBORDINATION OF LIEN RIGHT

Based upon the mutual consideration exchanged between the below mentioned parties, Clifford Berg and William Berg dba Berg Brothers Construction, a partnership and Frank Berg, an individual, a Joint Venture dba Berg Construction Company hereby subordinate any and all liens or claims which may result in liens on the below described premises to the rights, title and interests of the Travelers Insurance Company, a Connecticut corporation, on the subject premises arising pursuant to that certain Deed of Trust dated March 28, 1973, executed by E. Keith Lignell and Marian H. Lignell, his wife, and Burton M. Todd and Phyllis W. Todd, his wife, as Trustors, in the sum of \$1,700,000.00, to Title Insurance Agency of Utah, Inc., as Trustee in favor of the Travelers Insurance Company, a Connecticut corporation, as Beneficiary and also to the rights, title and interests of Zions First National Bank on the subject premises arising pursuant to that certain Deed of Trust dated January 29, 1974, by E. Keith Lignell and Marian H. Lignell, his wife, and Burton M. Todd and Phyllis W. Todd, his wife, as Trustors, in the sum of \$267,000.00 to Zions First National Bank, as Trustee, and in favor of Zions First National Bank, as Beneficiary.

The premises to which the subordination agreement applies are known as the Incline Terrace Apartments, more particularly described as follows:

- 1.) Com 132 ft S fr NW cor Lot 5, Blk 20, Plat F, SLC Sur. S 37 ft E 82.5 ft N 39°6' E 48.18 ft N 30° 22'20" E 56.19 ft W 30139 ft S 39°6' W to point due E fr beg W to beg.
- 2.) Com 5 rds S fr NW cor Lot 5, Blk 20, Plat F, SLC sur. S 39.5 ft E 82.26 ft N 39°6' E to a point due E of beg W 110.97 ft to beg.
- 3.) Com 2-1/2 rd S of NW cor Lot 5, Blk 20, Plat F, SLC Sur. S 2-1/2 rd E 5 rd N 2-1/2 rd W 5 rd to beg.

AND as described on Exhibit "A" attached hereto.
Dated this 1st day of February, 1974.

Clifford Berg & William Berg dba Berg Brothers Construction, a partnership and Frank Berg, an individual, a Joint Venture dba Berg Construction Company

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By Frank L. Berg

EXHIBIT "A"

PARCEL A

BEGINNING at a point 33 feet North of the Southwest corner of Lot 4, Block 20, Plat "F" Salt Lake City Survey and running thence North 0°00'46" West 28 feet, thence North 89°57'54" East 82.50 feet; thence South 0°00'46" East 28 feet, thence North 89°57'54" East 65.25 feet, thence North 0°00'46" West 28 feet, thence North 89°57'54" East 242.25 feet, thence South 0°00'46" East 28 feet, thence South 89°57'54" West 36.01 feet, thence South 0°00'46" East 28 feet, thence South 89°57'54" West 353.99 feet, to the point of beginning.

TOGETHER WITH a right-of-way over a 12 foot alley described as follows: Commencing 7 1/3 feet West of the Northeast corner of Lot 4, Block 20, Plat "F", Salt Lake City Survey, and running thence South 12 feet; thence East 137 feet; to 11th East Street; thence North 12 feet; thence West 337 1/3 feet to place of beginning.

EXCEPTING THEREFROM:

BEGINNING at a point 33 feet North and 158 feet East from the Southwest corner of Lot 4, Block 20, Plat "F", Salt Lake City Survey, running thence North 12 feet, thence East 6 feet, thence South 12 feet, thence East 127 1/3 feet, thence South 120 feet, thence West 133 1/3 feet to the point of beginning.

PARCEL B

A Leasehold Estate In:

BEGINNING at a point 33 feet North and 158 feet East from the Southwest corner of Lot 4, Block 20, Plat "F", Salt Lake City Survey, running thence North 12 feet, thence East 6 feet, thence South 12 feet, thence East 127 1/3 feet, thence South 120 feet, thence West 133 1/3 feet to the point of beginning.

All as reflected in that certain lease agreement dated April 15, 1971, between Wayne N. Mason and Pearl B. Mason, his wife, Lessors, and E. M. Lignell and Marian H. Lignell, his wife; and Burton M. Todd and Phyllis M. Todd, his wife, Lessees, and such lease being recorded as Entry No. 240248, and Lease and Option to Purchase was recorded April 10, 1973, as Entry No. 240249, in Book 3298, page 399, records of Salt Lake County, State of Utah.

TOGETHER WITH, and without limitation of any kind, all improvements of a permanent nature constructed or located on said described property; and together with all after-acquired title to the land described in Parcel B.

JLB
W B
BmB



Corroon and Black

Name of Agent

APPLICATION FOR CONTRACT OR BID BOND MADE TO THE

Fidelity and Deposit Company

HOME OFFICE

OF MARYLAND

BALTIMORE, MD. 21203

NOTE—Copy of Contract, Specifications, Plans, Bond Form required (in case Bid Bond, Advertisement and Instructions to bidders), and Applicant's Financial Statement must accompany this Application and all questions be fully answered.

Clifford M. Berg and William R. Berg, a partnership, dba Berg

1. Full name of Applicant VENTURE, dba BERG CONSTRUCTION COMPANY Age A, JOINT
(If corporation, give exact corporate title)2. Business address (street, city and state) 4363 Camille Drive, Salt Lake City, Utah 84117

3. If Applicant is a firm, name all partners of firm; if a corporation, name principal officers and directors

NAME	AGE	ADDRESS

4. Kinds and amounts of bonds required; Proposal Bond, \$ _____; Contract Bond, \$ 1,351,755.Labor and Material Bond, \$ 1,351,755; Maintenance Bond, \$ _____5. To whom is bond to be given? E. Keith Lignell, Marian H. Lignell, Burton M. Todd andAddress Phyllis W. Todd
(Give full name and address. If a corporation, give exact title)

6. If bond applied for is Proposal Bond, will it operate as a final bond? _____ State date bids to be opened

_____, 19____. Approximate amount of bid, \$ _____

What bids for other contracts have you outstanding? _____

7. The amount of Contract is: \$ 1,351,755 Date awarded _____

(If contract price is per unit of measure, give also probable total of contract)

8. Nature of Contract (Give concise description of proposed work and locality) _____

Perform all the work required by the Contract Documents forIncline Terrace Apartments, 450 South 10th East, Salt Lake City, Utah9. Name and address of Architect or Engineer in charge Ronald L. Molen

What is his estimate of cost of work? \$ _____ Your estimate? \$ _____

10. Other Bidders on above contract including highest and lowest:

NAME	ADDRESS	BID
1.		
2.		
3.		
4.		
5.		

If more than five bids, tabulate them on separate paper and attach to above

TERMS OF CONTRACT

11. Date work is to be commenced _____ Date work is to be completed _____

12. Penalty for non-completion on time _____ Premium for advance completion _____

13. Is there a strike clause in the contract? _____ An arbitration provision? _____

14. Payments, when to be made on contract? _____

15. Amount of advance payment, if any \$ _____

NOTE—If the required information is not given in response to the questions herein listed, it will be necessary to return this blank for completion.

or corrections, when so made, shall be *prima facie* correct; **FOURTH**, that the Company is authorized and empowered, without notice to or knowledge of the undersigned, to assent to any change whatsoever in said bond or bonds and/or any contracts referred to in said bond or bonds and/or in the general conditions, plans and/or specifications accompanying said contracts and to assent to or take any assignment or assignments, to execute or consent to the execution of any continuations, extensions or renewals of said bond or bonds and to execute any substitute or substitutes therefor, with the same or different conditions, provisions and obligations and with the same or larger or smaller penalties, it being expressly understood and agreed that the undersigned shall remain bound under the terms of this Agreement even though any such assent by the Company does or might substantially increase the liability of the undersigned; and the undersigned agree to waive, and do hereby waive, notice of any breach or breaches of any such bond or bonds, or of any act or default that may give rise to claim hereunder; **FIFTH**, to assign, transfer and set over, and does or do hereby assign, transfer and set over to the Company, as collateral, to secure the obligations herein and any other indebtedness and liabilities of the undersigned to the Company, whether heretofore or hereafter incurred, such assignment to become effective as of the date of said contract bond but only in event of (1) any abandonment, forfeiture or breach of said contract or of any breach of said bond or bonds, or any of them, or of any other bond or bonds executed or procured by the Company on behalf of the undersigned; or (2) of any breach of the agreements in any of the paragraphs herein contained; or (3) of a default in discharging such other indebtedness or liabilities when due; or (4) of any assignment by the undersigned for the benefit of creditors, or of the appointment, or of any application for the appointment, of a receiver or trustee for the undersigned, whether insolvent or not; or (5) of any proceeding which deprives the undersigned of the use of any of the machinery, equipment, plant, tools or material referred to in the following paragraph; or (6) of the undersigned's dying, absconding, becoming a fugitive from justice, or being convicted of a felony, if the undersigned be an individual; (a) All the right, title and interest of the undersigned in and to all sub-contracts let or to be let in connection with said contract and in and to all machinery, equipment, plant, tools and materials which are now, or may hereafter be, about or upon the site of said work or elsewhere, for the purpose thereof, including as well materials purchased for or chargeable to such contract, which may be in process of construction, or storage elsewhere, or in transportation to said site; (b) All the rights of the undersigned in, and growing in any manner out of, said contract, or any extensions, modifications, changes or alterations thereof, or additions thereto, or in, or growing in any manner out of, said bond or bonds, or any of them; (c) All actions, causes of actions, claims and demands whatsoever which the undersigned may have or acquire against any subcontractor, laborer or material man, or any person furnishing or agreeing to furnish or supply labor, material, supplies, machinery, tools or other equipment in connection with or on account of said contract; (d) Any and all percentages retained on account of said contract, and any and all sums that may be due under said contract at the time of such abandonment, forfeiture or breach, or that thereafter may become due; **SIXTH**, that liability hereunder shall extend to, and include, the full amount of any and all sums paid by the Company in settlement or compromise of any claims, demands, suits and judgments upon said bond or bonds, or any of them, on good faith, under the belief that it was liable therefor, whether liable or not, as well as of any and all disbursements on account of costs, expenses and attorneys' fees, as aforesaid, which may be made under the belief that such were necessary, whether necessary or not; **SEVENTH**, that in event of payment, settlement or compromise, in good faith, of liability, loss, costs, damages, expenses and attorneys' fees, claims, demands, suits, and judgments as aforesaid, an itemized statement thereof, sworn to by any officer of the Company, or the voucher or vouchers or other evidence of such payment, settlement or compromise shall be *prima facie* evidence of the fact and extent of the liability of the undersigned, in any claim or suit hereunder, and in any and all matters arising between the undersigned and the Company; **EIGHTH**, to waive, and does or do hereby waive, all rights to claim any property, including homestead, as exempt from levy, execution, sale or other legal process under the law of any state or states; **NINTH**, that this obligation shall, in all its terms and agreements, be for the benefit of and protect any person or company joining with the Company in executing said bond or bonds, or any of them, or executing, at the request of the Company, said bond or bonds, or any of them, as well as any company or companies assuming reinsurance thereupon; **TENTH**, that separate suits may be brought hereunder as causes of action accrue, and the bringing of suit or the recovery of judgment upon any cause of action shall not prejudice or bar the bringing of other suits upon other causes of action, whether theretofore or thereafter arising; **ELEVENTH**, that nothing herein contained shall be considered or construed to waive, abridge, or diminish any right or remedy which the Company might have if this instrument were not executed; **TWELFTH**, that the Company shall have the right to decline to execute said bond or bonds, or any of them, and that if said bond shall be a bid or proposal bond and the Company shall execute the same, the Company shall have the right to decline to execute any or all other bonds that may be required in connection with any award that may be made under the proposal for which the bid or proposal bond is given; **THIRTEENTH**, that this agreement shall be binding upon the undersigned and each of them whether signing as applicant for said bond or bonds or as indemnitor, jointly and severally and upon the respective heirs, executors, administrators, successors and assigns of the undersigned, and shall be liberally construed as against the undersigned.

Signed, sealed and dated this 24th day of November, 19 71

Witness: Benny H. Longman If INDIVIDUAL sign here: Frank C. Berg (SEAL)

Witness: Benny H. Longman If Co-PARTNERSHIP sign here: BERG BROTHERS CONSTRUCTION COMPANY (SEAL)

Beatrice R. Berg (SEAL)

(Individually and as a co-partner) (SEAL)

(Individually and as a co-partner) (SEAL)

(Individually and as a co-partner) (SEAL)

If CORPORATION sign here:

(Name of corporation)

Attest: Secretary By President

ADDITIONAL INDEMNITY

In consideration of the FIDELITY AND DEPOSIT COMPANY OF MARYLAND executing, or procuring the execution of the bond or bonds herein applied for, we jointly and severally join in the foregoing agreement; and the undersigned, if a corporation, warrants that it is financially interested in the performance of the obligation which said bond or bonds applied for are given to secure, and asserts that it is fully empowered to obligate itself hereby.

Signed, sealed and dated this 24th day of November, 19 71

Witness: Benny H. Longman (Witness) Beatrice R. Berg (Indemnitor) (SEAL)

(Witness) (Indemnitor) (SEAL)

(Witness) (Indemnitor) (SEAL)

Must be acknowledged before Notary Public by Indemnitor(s).

STATE OF Utah ss:

COUNTY OF Salt Lake

On this 24th day of November, 19 71, before me personally appeared

Beatrice R. Berg

to me known to be the person(s) or member(s) of the partnership or officer(s) of the corporation that signed the foregoing instrument and acknowledged the execution of the same to me.