

1996

Western Rock Products Corporation v. Tri-County Confinement Sysystems, Inc. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WESTERN ROCK PRODUCTS)
CORPORATION, a Pennsylvania)
Corporation.)

Plaintiff/Appellee,)

vs)

TRI COUNTY CONFINEMENT)
SYSTEMS, INC , a Pennsylvania)
Corporation.)

Defendant/Appellant)

) Appeal No 960838 CA

Priority No. 15

REPLY BRIEF OF APPELLANT

AN APPEAL FROM THE DECISION OF THE
FIFTH JUDICIAL DISTRICT COURT IN AND FOR
BEAVER COUNTY, STATE OF UTAH
THE HONORABLE J PHILIP EVES

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Utah Court of Appeals
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Julia D'Alesandro
Clerk of the Court

WESTERN ROCK PRODUCTS
CORPORATION, a Pennsylvania
Corporation,

Plaintiff/Appellee,

vs.

TRI-COUNTY CONFINEMENT
SYSTEMS, INC., a Pennsylvania
Corporation,

Defendant/Appellant.

VS.

TRI-COUNTY CONFINEMENT)
SYSTEMS, INC., a Pennsylvania)
Corporation,)
)
Defendant/Appellant.)
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ARGUMENT

POINT I

WESTERN ROCK MISAPPREHENDS THE STATUS OF THIS CASE ON APPEAL

Western Rock misapprehends this Court's standards of review when reviewing a motion for summary judgment. Western Rock states the standards of review as follows:

Although a trial court's summary enforcement of a settlement agreement is not reversed on appeal unless it is shown that there was an abuse of discretion, the issue as to whether a contract exists between the parties is a question of law which is reviewed for correctness. (citing *John Deere Co. v. A & H Equipment, Inc.*, 876 P.2d 880, 883 (Utah App. 1994)¹

This Court does not review this case under an abuse of discretion standard, if such a standard actually exists, but under the standards applicable to summary judgment. The difference is significant.

In *State v. Pena*, 869 P.2d 832, 937-38 (Utah 1994), the Utah Supreme Court discussed the Appellate Court's standards of review. The Pena Court likened the degrees of discretion afforded trial courts to a pasture surrounded by fences representing the law. The Court further stated that to the extent that a pasture is small because the trial court is fenced in closely by the appellate courts, the operative standard of review approaches a de novo review. *Id.* at 937. To the extent that the pasture is large, the trial court has considerable freedom in applying a legal principle to the facts, freedom to make decisions that appellate judges might disagree with, but will not reverse. Said another way, the freedom to be wrong without incurring reversal. *Id.*

¹ As discussed below, this case does not include the summary enforcement of a settlement agreement, but instead the trial court's grant of summary judgment in an action involving a contract dispute.

Western Rock urges that this Court review the proceedings below as if the trial court were operating in a large, nearly unbounded pasture. In fact, all the cases cited by Western Rock were reviewed by the appellate courts in this manner. *See, e.g., John Deere Co. vs. A & H Equipment, Inc.*, 876 P.2d 880, 883 (Utah App. 1994) (holding that "a trial court's summary enforcement of a settlement agreement will not be reversed absent an abuse of discretion). Couched in terms recognizable to *Pena*, the trial court operates within a large pasture when summarily enforcing settlement agreements. So large is the pasture, that the trial court can even be wrong without incurring reversal. This is a very difficult standard of review to overcome on appeal.

However, and this is important, the present case is before this Court for a review of the trial court's grant of a motion for summary judgment. Tri-County borrows from its main Brief its previous statement with respect to the applicable standard of review for a summary judgment motion, as follows:

Summary judgment is appropriate only when there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Utah Rules of Civil Procedure 56(c); *Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist*, 773 P.2d 1382, 1385 (Utah 1989). This Court accords "no deference to the trial court's conclusion that the facts are not in dispute nor the court's legal conclusions based on those facts." *Kitchen v. Cal. Gas Co., Inc.*, 821 P.2d 458, 460 (Utah App. 1991), *cert. denied*, 832 P.2d 476 (1992). Additionally, this Court "review[s] all relevant facts, including all inferences arising from those facts, in a light most favorable to the losing party." *Id.* This has been interpreted to mean that this Court must accept Appellant's facts as set forth before the trial court and in sworn testimony and they determine whether the facts create genuine issues of material fact. *See, e.g., Beehive Brick Co. v. Robinson Brick Co.*, 780 P.2d 827 (Utah App. 1989). Under applicable standards of review, this Court must resolve all doubts in favor of Appellant. *Draper Bank & Trust Co. v. Lawson*, 675 P.2d 1174 (Utah 1983). "If, after a

review of the record, it appears that there is a material factual issue, [this Court is] compelled to reverse the trial court's grant of summary judgment." *Amica Mut. Ins. Co. vs. Schettler*, 768 P.2d 950, 957 (Utah App. 1989). **"One sworn statement under oath [involving a material fact] is all that is necessary to create a factual issue, thereby precluding the entry of summary judgment."** *Id.* With respect to this Court's handling of its review of the facts in an appeal from a summary judgment motion, it is improper for the trial court or this Court on appeal to weigh the evidence or assess its credibility or make any determination about the opposing party's ultimate chance of prevailing in a trial on the merits. *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles*, 681 P.2d 1258, 1261 (Utah 1984); *accord Reeves v. Geigy Pharmaceutical, Inc.*, 764 P.2d 636, 639 (Utah App. 1988)."

(Emphasis added.)

If this standard of review were to be couched in terms recognizable to *Pena*, there is no pasture. Metaphorically, the trial court is locked in the barn and not even allowed out to pasture. This Court reviews everything the trial court did in granting the motion for summary judgment as a matter of law or, as stated by *Pena*, de novo. Also significant to this review is that this Court must accept Appellant's facts as set forth before the trial court and in sworn testimony and then determine whether the facts create genuine issues of material fact, irrespective of the actions of the trial court.

There is a reason for critical review of summary judgment motions. Such motions are generally made early in the proceedings before a party has had a full opportunity to develop and present its case to the court. It follows, therefore, that one single material fact in dispute will defeat a motion for summary judgment, thus affording the opposing party the opportunity to present the issue to the fact finder. Western Rock is essentially attempting to boot strap a review of a grant of summary judgment into a proceeding where it would be reviewed for an

abuse of discretion. This position is contrary to law and would eviscerate this Court's ability to carefully and critically review trial courts' grants of motions for summary judgment.

POINT II

WESTERN ROCK MISAPPREHENDS THE STATUS OF THIS CASE BEFORE THE TRIAL COURT

Western Rock argues extensively on appeal that this case involves the summary enforcement of a settlement agreement. All of the cases cited by Western Rock address the summary enforcement of settlement agreements. As defined by the cases cited by Western Rock, a settlement agreement is an agreement entered into **after the initiation of litigation** and it is expressly and exclusively **designed to end the litigation** short of going to trial. *See, e.g., John Deere Co. v. A & H Equipment*, 876 P.2d 880 (Utah App. 1994); *Zions First National Bank v. Barbara Jensen Interiors*, 781 P.2d 478 (Utah App. 1989).² The present case does

2 As stated in the text, the cases cited by Western Rock in support of its position are not applicable to the present case. These cases are distinguishable based on the fact that they involve settlement agreements entered into during litigation for the purpose of ending the litigation and not disputes over contracts entered into prior to litigation and, further, none of them involve a summary judgment proceeding.

In *Tracy Collins Bank & Trust Co. v. Travelstead*, 592 P.2d 605 (Utah 1979) the court was addressing the enforcement of a settlement agreement and not a contract dispute involving a summary judgment proceeding.

In *Zions First Nat. Bank v. Barbara Jensen Interiors, Inc.*, 781 P.2d 478 (Utah App. 1989), the court was addressing the enforcement of a settlement agreement and not a contract dispute involving a summary judgment proceeding.

In *John Deere Co. v. A & H Equipment, Inc.*, 876 P.2d 880 (Utah App. 1994), the court was addressing the enforcement of a settlement agreement and not a contract dispute involving a summary judgment proceeding.

In *Goodmansen v. Liberty Vending Systems*, 866 P.2d 581 (Utah App. 1993), the court was addressing the enforcement of a settlement agreement and not a contract dispute involving a summary judgment proceeding.

not involve a settlement agreement--it involves a contract dispute and a summary judgment proceeding.

Western Rock complained against Tri-County for breach of contract--breach of an alleged contract entered into well in advance of the initiation of any litigation. (*See* Western Rock's Complaint attached hereto as Exhibit A). Tri-County filed an Answer and included therein the affirmative defenses that there was no meeting of the minds; that there was no mutual assent; and that the money placed in escrow was done as a show of good faith and not pursuant to any contract. (*See* Tri-County's Answer attached hereto as Exhibit B). This case, as framed before the trial court, involves nothing more than a contract dispute including disputes over classic contract principles such as "meeting of the minds" and "mutual assent." It does not involve a settlement agreement.

As discussed above, the cases cited by Western Rock, without exception, involve settlement agreements entered into between litigants during litigation for the purpose of settling the litigation. If Western Rock and Tri-County had, after the initiation of litigation, entered into settlement negotiations designed to end the litigation and had Western Rock brought a motion to enforce a settlement agreement, Western Rock's cases and arguments may have some merit and applicability to the present case. However, Western Rock and Tri-County have had no discussions nor have they made any attempts to settle the present litigation--in fact, the law does not require them to do so. As a result, the trial court was not called upon to summarily enforce a settlement agreement entered into between the parties during the course of litigation, but instead to interpret a contract allegedly entered into between the parties long before any litigation--a far different determination. Additionally, the Court was not called upon to decide

a motion to enforce a settlement agreement, but instead to decide a motion for summary judgment - - again, a far different determination.

POINT III

WESTERN ROCK INAPPROPRIATELY ARGUES THE MERITS OF ITS CASE BEFORE THE TRIAL COURT ON APPEAL

In an appeal from a summary judgment proceeding, the merits of the case are beyond the mandated review by this Court. Stated another way, the only question before this Court is whether there is a material fact in dispute--not whether Western Rock or Tri-County would ultimately prevail on the claims each has made to the trial court. *See White v. Deseelhorst*, 879 P.2d 1371 (Utah 1984) (holding that it is inappropriate for the appellate court to consider the merits of the underlying claims on an appeal from a summary judgment--the court is obligated to resolve all doubts in the opposing party's favor regardless of how the court feels about the party's ability to ultimately succeed at trial). Nevertheless, and despite these mandates, Western Rock attempts to argue the merits of its case on appeal without addressing or comprehending the limited scope of this appeal. Based on this miscomprehension, Western Rock makes the following arguments on appeal that, in reality, are in dispute before the trial court:

A. Confirmation Memorandum

Western Rock argues that both it and Tri-County intended to be bound by Tri-County's Confirmation Memo. However, Tri-County submitted an affidavit to the trial court from Terry Weaver, who drafted the Confirmation Memo, which stated, in pertinent part, that:

It was my intention at the time that the terms discussed would not be binding upon either party until the escrow documents had been prepared by the attorney for Western Rock, reviewed by us and our attorney, and signed by the parties. This was specifically

discussed by Mr. Smith and myself in our telephone conversation and we agreed that neither party would be bound until the final documents had been prepared and signed.

See Affidavit of Weaver, at ¶ 8, attached to Appellant's main Brief as Exhibit B). Thus, Western Rock claims that Tri-County intended to be bound by a document that Tri-County claims, through a sworn affidavit, that it had no intention to be bound by. This Court is required, under the mandate of its standard of review in this matter, to accept the fact that Tri-County did not intend to be bound by the Confirmation Memo and then determine whether this creates a genuine issue of material fact. *See, e.g., Beehive Brick Co.*, 780 P.2d 827. Since this issue goes to the very heart of the litigation in this matter, this is a genuine issue of material fact that should have precluded summary judgment.

B. Escrow Agreement

Western Rock argues that the Escrow Agreement contained the same terms and conditions as the Confirmation Memo. Further, Western Rock argues that because Tri-County signed the Escrow Agreement there was a mutual intent to be bound thereby. However, Tri-County submitted to the trial court an affidavit of Mr. Ronald Solt, Tri-County's Chief Financial Officer, which stated, in pertinent part, that:

3. On or about November 8, 1995, I received a telephone call from Wayne Smith, from Western Rock Products. I also received a fax transmission by which an escrow agreement and a document entitled Agreement were submitted to Tri-County for signature. These documents were submitted pursuant to discussions between Mr. Smith and Terry Weaver of Tri-County.

4. After reviewing the documents, Mr. Wayne Smith and I had a telephone conversation. Mr. Smith was in Utah. I was in Pennsylvania. Mr. Smith advised me that unless Tri-County signed the documents immediately, as drafted, Western Rock intended to file a mechanic's lien. I expressed objection to his, stating that Tri-County needed time to consult with its attorneys

and to review the documents in detail. At the time I did not know the specifics of the terms discussed between Mr. Weaver and Mr. Smith the day before.

5. Initially, Mr. Smith remained firm in his position that the documents had to be signed and returned, and the funds paid, that day.

6. I contacted our attorney. Because he was in another meeting, I only had the chance to talk to him briefly and he only had the opportunity to review the documents briefly.

7. After the discussions with our attorney, I again contacted Mr. Smith and explained to him the objections which I had to the documents. Those objections included the following:

A. Tri-County objected to the release clause obtained in the documents.

B. Tri-County objected to the fact that Western Rock could unilaterally decide what efforts, if any, it wanted to expend in pursuing Precise Concrete.

C. We did not have sufficient time to review the agreement.

D. The agreement was couched in the terms of payment to Western Rock, rather than as a reserve deposit.

E. The agreement eliminated the mutuality of performance.

8. Mr. Smith continued to insist that the funds had to be paid that day, and that the documents had to be signed. I continued to insist that we would not sign the document as drafted.

9. As a matter of compromise, I agreed to pay the funds into escrow, and to sign the escrow agreement with Southern Utah Title company. As Mr. Smith and I discussed, this was done as a show of good faith but was not intended to be a final agreement of the parties since the terms of the agreement had not been reached.

10. I signed the escrow agreement, I deposited the funds by wire transfer, and I sent a letter to Mr. Smith indicating that all of this was done pending finalizing the final terms of the agreement. A copy of my letter to Mr. Smith is attached hereto as Exhibit A and incorporated herein by this reference.

11. Mr. Smith and I expressly discussed and agreed that this was not a final completed agreement because of the unagreed terms.

12. There have been subsequent drafts of the agreement exchanged since then. At this point, Tri-County does not desire to pursue negotiations or discussions further and believes that the

negotiations are at an end without the completion of the contract and believes that the funds should be returned to Tri-County.

(Emphasis added.) This Court is required, under the mandate of its standard of review in this matter, to accept the fact that Tri-County did not intend the Escrow Agreement to be binding because of disputed terms, and that Tri-County deposited the money and signed the agreement under duress, but did so as a sign of good faith. *See, e.g., Beehive Brick Co.*, 780 P.2d 827. Since this issue again goes to the very heart of the litigation in this matter, this is a genuine issue of material fact that should have precluded summary judgment.

C. Western Rock's and Tri-County's Performance

Western Rock argues that the parties partly performed under the Escrow Agreement thereby manifesting their intent to be bound thereby. Tri-County assumes that Western Rock is referring to the money Tri-County placed in escrow as the basis for its "part performance" argument. However, as discussed above, Tri-County submitted to the trial court Mr. Solt's affidavit that discussed the reason the money was placed into escrow and that it was not pursuant to an agreement and cannot be considered part performance. The relevant portion of Mr. Solt's affidavit is revisited here:

9. As a matter of compromise, I agreed to pay the funds into escrow, and to sign the escrow agreement with Southern Utah Title company. As Mr. Smith and I discussed, this was done as a show of good faith but was not intended to be a final agreement of the parties since the terms of the agreement had not been reached.

(Emphasis added.) Western Rock argues that the money placed into escrow by Tri-County demonstrates part performance while Tri-County argued, through a sworn affidavit, that the money was placed in escrow as a show of good faith and not pursuant to a contract. This Court

is required, under the mandate of its standard of review in this matter, to accept the fact that Tri-County placed the money in escrow as a show of good faith and not pursuant to contract and that it therefore cannot be considered part performance of a contract. *See, e.g., Beehive Brick Co.*, 780 P.2d 827. This issue again goes to the very heart of the litigation in this matter and therefore is a genuine issue of material fact that should have precluded summary judgment.

Conclusion

Tri-County raised genuine issues of material fact with respect to all of Western Rock's claims before the trial court and this Court should, therefore, reverse the trial court's grant of summary judgment.

POINT IV

WESTERN ROCK'S ATTEMPTS TO DISTINGUISH *CRIMSON V. WESTERN COMPANY OF NORTH AMERICA* FROM THE PRESENT CASE MUST FAIL

Western Rock attempts to distinguish *Crismon v. Western Company of North America*, 742 P.2d 1219 (Utah App. 1987) from the present case because it involved a five year lease agreement and was therefore, by operation of the Statute of Frauds, required to be in writing. This argument is not compelling. The question in *Crismon* was whether there was a meeting of the minds with respect to entering into the lease agreement. A lease agreement is contract that, like any other contract whether written or oral, requires that there be a meeting of the minds before the parties can be bound thereto. *Crismon* involved facts substantively similar to the present case and is therefore worth revisiting.

In *Crimson*, the issue before the Court was whether an exchange of correspondence with conflicting terms and statements constituted a meeting of the minds sufficient that the parties

could be bound by the terms and statements in the correspondence. The Court held that the correspondence, even though it expressed the terms of the leases, did not constitute a contract between the parties because they contemplated that another agreement to formalize the transaction would be prepared. The Court stated, in pertinent part, that:

Under basic contract law principles, a contract is not formed without a meeting of the minds. [C]ontractual mutual assent requires assent by all parties to the same thing in the same sense so that their minds meet as to all terms. Determining whether the specific terms omitted were essential to the agreement requires an examination of the entire agreement and the circumstances under which the agreement was entered into.

In this case, the language in Eppes' January 11 letter indicates that the parties were still negotiating. The letter states that Western's legal department would be sending a prepared [contract]. This statement indicates that both parties understood that a binding contract would be entered into in the future. Subsequent correspondence between the parties also demonstrates that the January 11 letter evidenced preliminary negotiations. . . .

Finally, the subsequent leases exchanged by the parties demonstrate that there was no meeting of the minds. Eppes sent Crimson a [contract] which Crimson rejected by sending back a lease with different terms with regard to term, rent, maintenance, insurance and default. The parties' exchange of proposed leases clearly demonstrates that they did not have a meeting of the minds as to all the essential terms of the lease.

Id. at 1221-1222 (emphasis added).

Before making the obvious comparisons between *Crimson* and the present case, it is worth noting that it is not incumbent upon this Court to actually determine whether there was or was not a meeting of the minds, only whether there is a genuine issue of material fact as to whether there was a meeting of the minds. Tri-County submits that there are numerous genuine issues of material with respect to whether there was a meeting of the minds.

In both *Crismon* and the present case, the parties exchanged initial writings that expressed that a subsequent document would be prepared. In both cases, one of the parties subsequently prepared a more detailed agreement that contained terms and conditions that were not covered in the original negotiations or correspondence. In both cases, the parties subsequently exchanged several drafts of the anticipated final agreement. In *Crismon*, the Court held that the preliminary correspondence did not demonstrate a meeting of the minds and that it did not therefore constitute an agreement. In this case, while the correspondence does reflect that there was not a meeting of the minds, there certainly is a genuine issue of material fact as to whether there was a meeting of the minds--and that is all this Court need determine.

Based on *Crismon*, there was no meeting of the minds in the present case. However, as stated above, this Court need not make such a determination. This Court need only determine whether there is a genuine issue of material fact with respect to whether there was a meeting of the minds. Based on the sworn affidavits Tri-County submitted to the trial court, it is clear that there are continuing issues of material fact with respect to this critical issue. This Court should therefore reverse the trial court's grant of summary judgment.

POINT V

TRI-COUNTY'S EXCUSE FOR NON-PERFORMANCE IN THIS MATTER IS IRRELEVANT TO THE PRESENT PROCEEDINGS

Western Rock argues that this Court should enforce the Settlement Agreement because Tri-County's excuse for non-performance is comparatively unsubstantial. However, and again, this is not an action to enforce a settlement agreement as settlement agreements have been defined by the cases relied upon by Western Rock. This is, in fact, a classic contract dispute and a review of a summary judgment proceeding. The issue is, therefore, not whether Tri-County's performance can be considered substantial or unsubstantial, but whether there was or is a genuine issue of material fact with respect to the existence or non-existence of a contract. As set forth above, there are considerable genuine issues of material fact with respect to whether or not the parties entered into a contract and this Court should reverse the trial court's grant of summary judgment.³

POINT VI

THE ENFORCEMENT OR NON-ENFORCEMENT OF THE FORMALIZED AGREEMENT IS IRRELEVANT IN THESE PROCEEDINGS.

Western Rock argues that because Tri-County did not attempt to enforce the terms of the formalized agreement it is, therefore, not relevant to the issue of whether or not the parties entered into a contract. Such an argument is without merit. If anything, the formalized agreement demonstrates that there were considerable genuine issues of material fact with respect

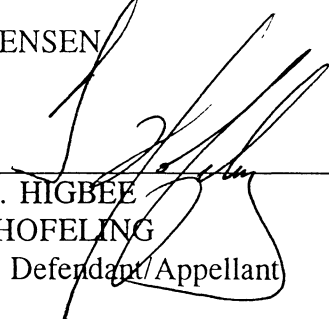
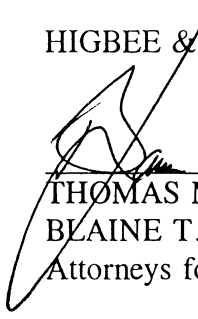
³ The issue of substantial and unsubstantial performance is a fact-sensitive issue that must be determined by the trier of fact and is completely irrelevant to the present proceeding before this Court.

to whether there was a meeting of the minds between the parties. In *Crismon*, the court held that the additional terms in the subsequent agreement was demonstrative of the fact that there was no meeting of the minds. *Crismon* at 1221-1222. In the present case, the formalized agreement is a clear indication that there is a genuine issue of material fact with respect to whether there was a meeting of the minds between the parties and the trial court therefore erred in granting Western Rock's Motion for Summary Judgment.

CONCLUSION

For the reasons set forth above, as well as those set forth in Tri-County's main Brief, there are numerous and substantial issues of material fact that preclude summary judgment. The trial court therefore erred in granting Western Rock's Motion for Summary Judgment. This court should therefore reverse the trial court's grant of summary judgment.

HIGBEE & JENSEN



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CERTIFICATE OF MAILING

I hereby certify that two (2) true copies of the foregoing Appellant's Brief were mailed, first class, postage prepaid, on this 19th day of August, 1997.

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Exhibit A

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IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR BEAVER COUNTY, STATE OF UTAH

WESTERN ROCK PRODUCTS
CORPORATION, a Pennsylvania
Corporation,

Plaintiff,

vs.

TRI-COUNTY CONFINEMENT SYSTEMS,
INC., a Pennsylvania corporation,

Defendant(s).

COMPLAINT

Civil No. _____
Judge _____

COMES NOW the Plaintiff, by and through its counsel, Snow, Nuffer, Engstrom, Drake, Wade & Smart, a professional corporation, and alleges against the Defendant as follows:

PRELIMINARY ALLEGATIONS

1. Plaintiff, WESTERN ROCK PRODUCTS CORPORATION (hereinafter "Plaintiff"), is a Pennsylvania corporation doing business in Washington County, State of Utah.
2. Defendant, TRI-COUNTY CONFINEMENT SYSTEMS, INC. (hereinafter "Defendant Tri-County"), is the General Contractor on a construction project

(hereinafter "the Project") owned by Circle Four Realty, a dba of Carroll's Foods of UT, Inc., West Isle Partners, Inc., Prestage Farms of Utah, Inc., and Smithfield of Utah, Inc. (hereinafter "Circle Four") located in Beaver County, Utah.

3. Tri-County entered into a subcontract with Precise Concrete, Inc. (hereinafter "Precise") whereby the latter agreed to perform concrete work on the Project.

4. On or about May 10, 1995, Precise entered into a Credit Agreement (hereinafter the "Agreement") with Plaintiff, whereby Plaintiff agreed to furnish materials to Precise on an open credit account for use on the aforescribed Project. Said Agreement provided that regular payments were to be made to Plaintiff by the 15th of each month and that interest would accrue on past due monthly balances at the rate of 21% per annum.

5. Precise purchased materials on credit from Plaintiff between the dates of approximately May 11, 1995, and August 30, 1995.

6. The balance owing on Precise's account as of October 25, 1995, was \$190,332.37.

7. Plaintiff has fully performed under the aforesaid Agreement by supplying Precise with labor and materials.

8. Notwithstanding Plaintiff's performance under the Agreement, Precise has failed and refused to pay Plaintiff the balance of the correct amounts due and owing under the Agreement, with interest, to-wit: \$190,332.37.

9. Plaintiff has made demand for the amount owing, but Precise has wholly failed, neglected and refused to perform under the Agreement by paying all sums due and owing to Plaintiff. As a result of Precise's refusal to pay the sums now due and owing, Plaintiff has been damaged in the sum of \$190,332.37, which includes interest, at the rate of 21% per annum to October 25, 1995.

FIRST CAUSE OF ACTION
(Anticipatory Breach Of Contract)

10. Paragraphs 1 through 9 of this Complaint are incorporated herein by this reference.

11. Plaintiff notified Circle Four (the owner of the Project) and Defendant Tri-County (the general contractor on the Project) of Precise's default in its payment obligations to Plaintiff.

12. Furthermore, Plaintiff notified Circle Four and Defendant Tri-County of its intention to file a mechanic's lien upon the Project.

13. Due to a pending financial transaction involving the Project as security, Circle Four and Defendant Tri-County wished to avoid the filing of a mechanic's lien upon the Project.

14. To avoid the filing of a mechanic's lien by Plaintiff upon the Project, Defendant Tri-County entered into an agreement with Plaintiff on or about November 7, 1995 (hereinafter the "Tri-County Agreement").

15. Pursuant to the Tri-County Agreement, Plaintiff agreed to forebear filing a mechanic's lien upon the Project, and to use its best effort to collect monies owed and resolve differences with Precise.

16. Defendant Tri-County, pursuant to the Tri-County Agreement, placed \$185,317.26 in an interest-bearing escrow account. These funds (hereinafter "Escrowed Funds") were sent on or about November 8, 1995 and were payable to Southern Utah Title Company in its capacity as escrow agent.

17. Pursuant to the Tri-County Agreement, if after a six-month period (such period ending May 8, 1996) Plaintiff had not collected the monies owed by Precise, Plaintiff was entitled to receive the Escrowed Funds without interest and Defendant Tri-

County was to receive a sum consisting of the interest which accrued on the Escrowed Funds while in the escrow account.

18. On or about January 22, 1996, Defendant Tri-County repudiated the Tri-County Agreement informing Plaintiff and Southern Utah Title Company that the Escrowed Funds should be returned to Defendant Tri-County.

19. Because of Defendant Tri-County's anticipatory breach of the Tri-County Agreement, Plaintiff is entitled to treat the Tri-County Agreement as broken and collect damages from Defendant Tri-County.

20. Plaintiff has been damaged in the amount of \$185,317.26.

21. Additionally, pursuant to the Tri-County Agreement (as set forth in the escrow instructions), Defendant Tri-County agreed to pay costs and reasonable attorney's fees in enforcing the Tri-County Agreement.

22. Plaintiff has, in fact, incurred costs and attorney's fees as the result of Defendant Tri-County's failure to perform the Tri-County Agreement, and is therefore entitled to be reimbursed for the same.

WHEREFORE, Plaintiff prays judgment against Defendant TRI-COUNTY, for \$185,317.26, pursuant to the Tri-County Agreement, costs of collection, a reasonable attorney's fee and such other relief as the Court deems just and proper.

SECOND CAUSE OF ACTION
(Breach of Contract)

23. Paragraphs 1 through 22 of this Complaint are incorporated herein by this reference.

24. Plaintiff alleges that Defendant Tri-County's actions on or about January 22, 1996, constitute a present breach of the Tri-County Agreement.

25. Because of Defendant Tri-County's breach of the Tri-County Agreement, Plaintiff has been damaged.

26. Plaintiff has been damaged in an amount equal to the amount of the Escrowed Funds plus reasonable attorney's fees and costs in bringing the present action.

WHEREFORE, Plaintiff prays judgment against Defendant TRI-COUNTY, for \$185,317.26, pursuant to the Tri-County Agreement, costs of collection, a reasonable attorney's fee and such other relief as the Court deems just and proper.

THIRD CAUSE OF ACTION
(Declaratory Relief)

27. Paragraphs 1 through 26 of this Complaint are incorporated herein by this reference.

28. Despite Plaintiff's performance of the Tri-County Agreement in forbearing to file a mechanic's lien and pursuing collection proceedings against Precise; and Defendant Tri-County's partial performance of the Tri-County Agreement in placing Funds in escrow, Defendant Tri-County presently claims there is no binding agreement.

29. Defendant Tri-County asserts that reference to a future, formal agreement in the escrow instructions prevents the formation of a valid, present agreement.

30. Despite reference to a future, formal agreement in the escrow instructions, Plaintiff claims Defendant Tri-County received benefits from the Tri-County Agreement, signed a memorandum and escrow instructions representing the essential terms of the Tri-County Agreement, and performed obligations evidencing an agreement, and is presently estopped from urging that the Tri-County Agreement is not enforceable because not reduced to a more formal writing.

WHEREFORE, Plaintiff seeks Declaratory Judgment determining:

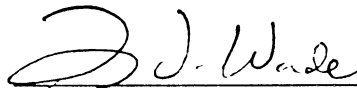
1. That a valid and enforceable agreement exists between Plaintiff and Defendant Tri-County;

2. That Plaintiff is entitled to attorney's fees, court costs, and other related expenses incurred in the prosecution of this matter; and,

3. Such other and further relief as to which the Court deems Plaintiff justly and equitably entitled.

DATED THIS 24th day of January, 1996.

SNOW, NUFFER, ENGSTROM, DRAKE,
WADE & SMART
A Professional Corporation



TERRY L. WADE
Attorneys for Plaintiff

Plaintiff's address is:

820 North 1080 East
St. George, Utah 84770

Exhibit B

FILED

FEB 23 1996

Paul B. Barton Clerk

THOMAS M. HIGBEE (1484)
HIGBEE & ASSOCIATES, P.C.
Attorneys for Defendant
250 South Main Street
P. O. Box 726
Cedar City, Utah 84721
Telephone: (801) 586-4404

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
BEAVER COUNTY, STATE OF UTAH

WESTERN ROCK PRODUCTS)	
CORPORATION, a Pennsylvania)	
Corporation,)	ANSWER
)	
Plaintiff,)	
)	
vs.)	
)	
TRI-COUNTY CONFINEMENT)	Civil No. 96-CV-15
SYSTEMS, INC., a Pennsylvania)	
Corporation,)	Judge J. Philip Eves
)	
Defendant.)	

The Defendant above named, by and through counsel, hereby answers the Plaintiff's Complaint as follows:

FIRST DEFENSE

1. The Plaintiff's Complaint fails to state a claim against the Defendant upon which relief can be granted.

SECOND DEFENSE

The Defendant responds to the specific allegations of Plaintiff's Complaint as follows:

COPY

2. Paragraphs 1 and 2 are admitted.

3. As to paragraphs 3, 4, 5, 6, 7, 8 and 9, this Defendant is without sufficient knowledge, information or belief to respond thereto and therefore denies same.

4. As to paragraph 10, the Defendant incorporates herein by reference its answers to paragraphs 1 through 9.

5. As to paragraphs 11 and 12, this Defendant admits that Plaintiff notified the Defendant of the items referenced, but has no knowledge as to the truth or falsity of the items stated.

6. Paragraph 13 is admitted.

7. Paragraphs 14 and 15 are denied, in that the Defendant denies that a binding agreement was ever reached. There were negotiations along these lines but there was not a formal contract.

8. Paragraph 16 is admitted.

9. As to paragraph 17, this Defendant denies that there was ever a binding agreement reached. Paragraph 17 is denied.

10. Paragraphs 18, 19, 20, 21 and 22 are denied.

11. As to paragraph 23, this Defendant incorporates herein by reference its answers to paragraphs 1 through 22.

12. Paragraphs 24, 25 and 26 are denied.

13. As to paragraph 27, the Defendant incorporates herein by reference its answers to paragraphs 1 through 26.

14. As to paragraph 28, the Defendant admits that Tri-County presently claims there is no binding agreement. The remainder of paragraph 28 is denied.

15. Paragraph 29 is admitted.

16. Paragraph 30 is denied.

17. The Defendant denies each and every allegation of Plaintiff's Complaint that is not specifically admitted herein.

AFFIRMATIVE DEFENSES

18. There was no meeting of the minds in the formation of the alleged contract in this case since the entire escrow agreement claimed by the Plaintiff is to be governed by a future, formal agreement which was never reached.

19. There was no mutual assent to the formation of the alleged contract.

20. At the time the money was conveyed into escrow, it was done as a demonstration of good faith, and nothing more, with the express understanding that the future formal agreement was necessary in order to complete the escrow contract.

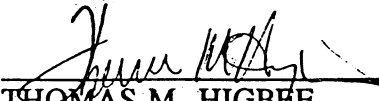
21. The Plaintiff is estopped from asserting the enforcement of the escrow contract.

WHEREFORE, the Defendant prays that Plaintiff take nothing by its Complaint, that the Plaintiff's cause of action be dismissed, and that this Court enter its declaratory judgment that the alleged agreement set forth in the Plaintiff's Complaint is of no force and effect and that the

Defendant is entitled to return of its funds from the Southern Utah Title Company escrow, plus its costs, attorney's fees and such other and further relief as to the Court appears proper.

DATED this 21st day of February, 1996.

HIGBEE & ASSOCIATES, P.C.

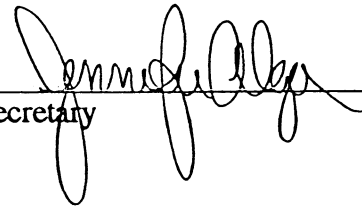


THOMAS M. HIGBEE
Attorneys for Defendant

CERTIFICATE OF MAILING

I hereby certify that on the 21st day of February, 1996, a true and correct copy of the within and foregoing ANSWER was mailed, first-class postage prepaid, to the following:

Terry L. Wade, Esq.
Snow, Nuffer, Engstrom, Drake, Wade & Smart
Attorney for Plaintiff
P.O Box 400
St. George, Utah 84771



Secretary