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Keith E. Sohm; Attorney for Plaintiff and Respondent;

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IN THE SUPREME COURT OF THE

STATE OF UTAH

RUBY J. WOOD,

Plaintiff and Respondent,

vs.

G. ELDON ROBERTS, GEORGE A. DANSIE, BUILDERS AND ENGINEERS, INC.,

Defendants and Appellants.

BRIEF OF [illegible]

APPEAL FROM [illegible]

HONOR[illegible]

KEITH E. SOHM
Suite 81, Trolley Square
Salt Lake City, Utah 84102

Attorney for Plaintiff and Respondent

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IN THE SUPREME COURT OF THE

STATE OF UTAH

RUBY J. WOOD, :

Plaintiff and Respondent, : Case No. 15266

vs. :

G. ELDON ROBERTS, GEORGE A. DANSIE, BUILDERS AND ENGINEERS, INC., :

Defendants and Appellants.:

BRIEF OF DEFENDANTS AND APPELLANTS

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
HONORABLE JAY E. BANKS PRESIDING

MELVIN E. LESLIE
Ten Broadway Building
Ten West Broadway
Salt Lake City, Utah 84101

Attorney for Defendants and Appellants

KEITH E. SOHM
Suite 81, Trolley Square
Salt Lake City, Utah 84102

Attorney for Plaintiff and Respondent

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IN THE SUPREME COURT OF THE

STATE OF UTAH

RUBY J. WOOD,	:	
Plaintiff and Respondent,	:	Case No. 15266
vs.	:	
G. ELDON ROBERTS, GEORGE A. DANSIE, BUILDERS AND ENGINEERS, INC.,	:	
Defendants and Appellants.	:	

BRIEF OF DEFENDANTS AND APPELLANTS

NATURE OF CASE

This is an action by the Plaintiff and Respondent (hereinafter Respondent) against the Defendants and Appellants (hereinafter Appellants) and also Harlan Y. Hammond, and Pioneer Title Company for the balances purportedly unpaid on the purchase price for 45.109 acres of land in West Jordan City, Utah, owned by the Respondent and her late husband, Morris T. Wood (hereinafter collectively as Woods), for damages based upon fraud, for the imposition of a trust upon certain funds being received into escrow, for punitive damages of $50,000,

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attorney's fees, and costs. Appellants filed an Answer (R.
denying liability and alleging defenses of statutes of limi-
tion and later pursuant to order of the trial court filed a
Amended Answer and Counterclaim, including in same the basi
allegations of Appellants' Answer together with Counterclai
setting forth amounts the Appellants claimed were due and o
from Woods (R. 55-61), which Counterclaim the Respondent re
(R. 62-64). The other two original defendants were dismiss
as parties to this Action by Orders of the trial court (R.
and R. 54).

DISPOSITION IN THE LOWER COURT

The case was tried to the trial court without a j
A judgment was entered for Respondent on Respondent's claim
subject to Appellants' counterclaim pursuant to a Judgment
(R. 84-86), which was amended by the Amended Judgment that
subsequently entered (R. 140-141). Appellants appealed fro
both Judgments (R. 87 and R. 143), which appeals were later
consolidated by order of this Court.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the judgment of the tr
court as to Respondent's claims and the entry of a judgment

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in Appellants' favor on their Counterclaim or in the alternative that this Action be reversed and remanded for new trial.

STATEMENT OF THE FACTS

In 1967 Woods and Appellants entered into the first of two transactions concerning 45.109 acres of land owned by Woods in Section 28, Township 2 South, Range 1 West, S.L.B. & M., this land being located about 7100 South and between 2700 and 3200 West Streets in Salt Lake County, Utah (Ex. 5-P). This transaction was evidenced by the Agreement dated May 31, 1967 (Ex. 1-P) and covered a total of 9.125 acres of land situate west of the Salt Lake Canal (Ex. 29-D). This Agreement provided, among other things, for the payment to Woods of $3,000.00 per acre, or a total of $27,375.00, and for Woods to deliver clear title to same to Appellants. The acreage covered by this Agreement was subsequently subdivided into 13 lots by Appellants (Ex. 5-P) and became West Jordan Estates No. 1 Subdivision (hereinafter usually as First Subdivision),

Before the sale of the first of these 13 lots could be closed, Appellants determined that outstanding liens thereon exceeded the agreed-upon purchase price of $3,000.00 per acre (Tr. 49). This prompted the initiation of the following procedure to handle disbursement of the proceeds received upon

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sale of the lots in First Subdivision: deposit of the sale proceeds with an escrow agent (at first Beehive State Bank ar later Pioneer Title Company, both of Salt Lake City); execut by Woods of appropriate warranty deeds and authorizations of closings as sales were made; distribution of the sale procee first to the parties holding liens (Dean Nelson, mortgagee of Tremonton, Utah and Utah Farm Production Credit Association) and then to cover certain costs; and then payment to Appellar if in excess of $3,000.00 per acre had been previously disbu (Ex. 25-D and Ex. 21-P, Tr. 24-27). This continued until Wo had received either directly or indirectly in respect to Fir Subdivision $23,128.74 (R. 72, 96) with one remaining lot, Lot 5, yet unsold. This was subsequently sold to Merrill R. Bauer and Ethel Bauer with Appellants entering into a letter agreement under date of March 27, 1973, providing for its sa price to be $3,270.00 (Pages 13 and 14 of Ex. 17-P). Upon adding the amounts thus received by Woods or where this part cular letter agreement covered the situation, the result is Woods were then yet owed concerning First Subdivision the to sum of $976.26.

Commencing in 1968 Appellants and Woods began nego iations concerning further land that the latter had in this

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area (Ex. 5-P), these lands to be the basis of other subdivisions that the Appellants contemplated putting together. Apparently at least two and possibly three different forms of agreement were proposed either by Appellants or Woods (Ex. 2-P, 3-P and 4-P), although none of them was ever executed (Tr. 6, 8, 11, 39, 58). During the last portion of 1968, moreover, Appellants commenced some degree of preliminary work directed at further development of these proposed other subdivisions, which were to be termed West Jordan Estates No. 2, 3, 4, and 5 (Ex. 5-P) and included an older farm house and farmstead adjacent thereto (hereinafter usually collectively as Second Phase). This included some surveying, preliminary preparation of subdivisional plats, and proposed dedication of streets (Tr. 40, 47, Ex. 23-P). In early 1969 Appellants also entered into escrow with Mr. and Mrs. Fredrick M. Poulson regarding two lots in the proposed West Jordan Estates No. 2 (Tr. 47, 48, Ex. 32-P) but again found that Woods could not deliver clear title to the lands involved for the price per acre of $3,000.00 that had obtained in respect to First Subdivision. This was due to outstanding mortgages in respect to these lands held by Dean Nelson (hereinafter as Nelson), the Utah Farm Production Credit Association,

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the Federal Land Bank of Berkeley, and Valley Bank and Trust Company together with delinquent property taxes owed Salt Lake County (Tr. 47). The matter became more critical when Nelson through his attorney Peter G. Meloy of Helena, Montana, threatened to foreclose his mortgage on these and other lands of Woods unless payments onto this obligation were increased (Tr. 47, R. 4, 34, 56, 57).

Appellants then commenced negotiations first with Federal Land Bank of Berkeley and then with Nelson, through Mr. Meloy, to prevent the projected foreclosure and to protect as much as possible the Appellants' position in the situation (Tr. 20, 21). Through financing obtained from Valley Bank and Trust Company, Appellants obtained the funds that would be necessary to purchase the Promissory Note and the Federal Land Bank Mortgage executed by Woods under date of August 18, 19[illegible] (hereinafter collectively as Land Bank Mortgage) (Ex. 13-P, 26-D and 39-D, Tr. 21-23); to provide the initial payment on an Agreement with Nelson (Ex. 12-P and 36-D); and to pay the balance then yet unpaid on the mortgages held by Valley Bank and Trust Company (Ex. 27-D) and Utah Farm Production Credit Association (R. 97 as to $1,092.90 so paid); and to pay the

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delinquent general property taxes then owed on Second Phase (Ex. 28-D). Negotiations regarding the purchase of the lands covered by Second Phase (Ex. 5-P) were concluded with Woods by the execution and delivery by them to Appellants of a Warranty Deed dated April 5, 1969 (Ex. 6-P, Tr. 9, 12, 13, 49, 63, 64) and the execution and delivery by Nelson, Woods, and Appellants of the Agreement dated April 30, 1969 (Ex. 12-P, Tr. 21). Under this Agreement Appellants agreed to make certain specified payments to Nelson, subordinate the Land Bank Mortgage to the lien of Nelson's Mortgage, develop Lots 1 through 18 of West Jordan Estates No. 2 within certain time limits, and personally guarantee all payments due under this Agreement. No further agreements, aside from this Warranty Deed and this Agreement (Ex. 6-P and 12-P) were ever entered into between Woods and Appellants regarding the lands projected to be included in Second Phase.

As described above during April and May, 1969, Appellants made payments to the Federal Land Bank of Berkeley, Nelson, Valley Bank and Trust Company, Utah Farm Credit Association, and Salt Lake County that enabled Appellants to commence in earnest the development of Second Phase. Clear title could then

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be obtained on the lots in Second Phase, and Appellants pro
with developing the lands therein, among the first being th
conclusion of sales that had been made of two lots in West
Estates No. 2 to Mr. and Mrs. Frederick M. Poulson (Tr. 47,
Ex. 32-P and 40-D). In May, 1969, a Trust Agreement was ent
into between Appellants and Pioneer Title Company (Ex. 37-D
after Appellants had conveyed most of Second Phase to Pione
Title Company, as trustee, this to provide a means of handli
lot sales from Second Phase. Most of the proceeds from lot
that thereafter occurred were directed towards paying off th
obligation that Appellants had incurred under the Agreement
dated April 30, 1969 (Ex. 12-P); and Nelson was paid the tot
of the $41,000.00 due thereunder as follows:

Approximate Date of Payment	Amount Paid
May 22, 1969	$ 4,000.00
October 3, 1969	2,500.00
September 28, 1970	3,243.46
February 5, 1971	31,562.30

(Page 2 of Ex. 18-P, Ex. 19-P, 34-D, 36-D, and 38-D, Tr. 48)
As payments were made for lands sold, Pioneer Title Company,
as trustee, first would disburse to Nelson the amounts so

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scheduled to be paid to him, recording in each instance a release of Nelson's Mortgage as to the particular lands to be released in return for this payment (Tr. 14, Page 7 et seq. of Ex. 16-P); and Appellants would execute and deliver on the same lands a partial release of the Federal Land Bank Mortgage (Exemplary of which is Ex. 15-P). In conjunction with the last of the above-described payments to Nelson, Woods also paid to Nelson the sum of $26,412.76, which retired in full the Mortgage held by Nelson on Second Phase and also other lands of Woods near Herriman, Utah, and in Idaho (Tr. 68, Ex 41-D). Thus, in this manner the mortgage indebtedness on Woods' lands that had been so difficult for them to pay off was completely retired.

Thereafter, under date of March 20, 1973, Appellants sold to the Woods' daughter and son-in-law, Claudette Palmer and Paul Palmer, pursuant to a Uniform Real Estate Contract (Ex. 10-P) the old farm home and farmstead (hereinafter usually as farm property), that Appellants had acquired under the Warranty Deed to them from Woods (Ex. 6-P) but had excluded from the lands in Second Phase conveyed to Pioneer Title Company, as trustee (Ex. 7-P).

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ARGUMENT

POINT I

THE FINDINGS OF FACT MADE BY THE TRIAL COURT DESCRIBED IN THIS POINT ARE CONTRARY TO THE EVIDENCE AT THE TRIAL.

A. IT WAS ERROR TO FIND IN FINDING OF FACT NO. 4 THAT APPELLANTS BEFORE ANY DOCUMENTS COVERING SECOND PHASE HAD BE EXECUTED HAD FILED PLAT PLANS AND SECURED CLEARANCE FROM WEST JORDAN CITY.

After a majority of the lots comprising First Subdivision had been sold by Appellants, they commenced some of the preliminary work towards development of Second Phase (Ex. 5-P). This included some of the surveying and platting of these projected subdivisions and some preliminary steps towards clearing with West Jordan City (Tr. 40-47) and was apparently done in late 1968 and early 1969. No evidence was adduced at the trial in this Action which indicated that Appellants at this point in time had filed plat plans for any of these projected subdivisions and secured clearance from West Jordan City in respect thereto. The copy of the Owner's Dedication introduced into evidence as Ex. 23-P does not provide any further basis for this finding, being introduced for a limited purpose not extending to its being evidence that such Dedication was the one used in respect to the projected

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subdivisions nor that it was the one accepted by the proper governmental authorities (Tr. 37, 38).

B. IT WAS ERROR TO FIND IN FINDINGS OF FACT NOS. 4 AND 7. THAT WOODS DID NOT SEE ANY OF THE MONEY RECEIVED FROM FIRST SUBDIVISION.

While most of the gross proceeds realized from sale of the lots from First Subdivision prior to 1971 were directed towards retiring the outstanding liens thereon (Ex. 25-D), beginning in that year Woods and Appellants each received certain sums (Ex. 21-P and 22-P) therefrom. This was also borne out by testimony of both Appellants (Tr. 25, 56) and also the general effect of the Respondent's testimony in this regard (Tr. 63).

C. IT WAS ERROR TO FIND IN FINDINGS OF FACT NOS. 5 AND 6 THAT THE APPELLANTS AGREED TO PAY ALL MORTGAGES OUTSTANDING ON SECOND PHASE.

The extent to which Appellants agreed to retire any of the mortgage indebtedness or liens imposed on the lands in Second Phase is limited by that which Appellants did during April and May, 1969, or covenanted to do at this time. This included the total amount of $41,000.00 scheduled to be paid to Nelson under the Agreement of April 30, 1969 (Ex. 12-P) and the further sum of $4,259.11 Appellants paid to obtain

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releases of miscellaneous mortgages or liens on these lands (R. 76, 97). Nowhere was evidence adduced at the trial to the effect that Appellants agreed to pay off the entirety of all mortgages outstanding on Second Phase (Tr. 20, 31, 40, 5 their obligation in this regard being limited, primarily by the Agreement of April 30, 1969 (Ex. 12-P). The fact that Woods paid off $26,412.76 of the balance of Nelson's Mortgage on or about February 5, 1971 (Ex. 19-P) without further agreement from the Appellants in this connection would reinf Appellants' position regarding their limited obligation for payment of mortgages and liens.

D. IT WAS ERROR TO FIND IN FINDINGS OF FACT NOS. 5 AND 11 THAT THE SALE PRICE FOR LANDS IN SECOND PHASE WAS $3,000.00 PER ACRE.

Appellants and Woods very definitely agreed that $3,000.00 per acre would be the price per acre for the lands included in First Subdivision (Tr. 8, 9, Ex. 1-P), but this did not cover any lands other than those in this partic Subdivision. While various instruments appeared to have bee exchanged between Appellants and Woods regarding Second Phase (Ex. 2-P, 3-P and 4-P), none of these were ever executed (Tr. 6-11, 57). Before these or any instruments similar to

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them could be executed, both Appellants and Woods were made aware of the fact that Nelson proposed to foreclose his mortgage on all Woods' lands, including those in Second Phase, unless something could be done to increase the payments under Nelson's Mortgage (Tr. 47, 48. Par. 11 on R. 4, Par. 10 on R-34). This precipitated a crisis in dealings between Woods, Nelson, and Appellants and prompted the negotiations between Nelson, through his attorney, Mr. Meloy, Appellants, and Woods during the Spring of 1969 described above in STATEMENT OF THE FACTS. It resulted in execution and delivery of all of the instruments between these parties that was to cover Second Phase, namely, the Warranty Deed dated April 5, 1969, between Woods and Appellants (Ex. 6-P) and the Agreement dated April 30, 1969, between these parties and Nelson (Ex. 12-P). No other or further instruments were ever entered into between Woods and Appellants concerning the lands in Second Phase.

The evidence adduced at the trial was not sufficient to establish that a sale price of $3,000.00 applied to the lands in Second Phase. The two exhibits described above (Ex. 6-P and 12-P) do not provide for this. The testimony of both Appellants was to the effect that the consideration given for

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the lands in Second Phase was the Agreement of April 30, 1969 (Ex. 12-P) and that there was no agreement in this regard providing for payment of $3,000.00 per acre (Tr. 9, 40, 56). All that the Respondent could testify to in this regard was that she understood that they were to receive $3,000.00 per acre (Tr. 59), although it is abundantly clear from her cross-examination that she had not participated to any degree in business dealings between her late husband and Appellants, being present in but two meetings between her late husband and Appellants in which Woods' lands were discussed, once in regard to First Subdivision and once with respect to Second Phase (Tr. 65-67). This latter meeting was when Woods executed the Warranty Deed of April 5, 1969 (Ex. 6-P), and her testimony leads to an almost irrefutable conclusion that she did not know the elements of the transaction (Tr. 63-64). The fact that Woods executed and delivered Ex. 6-P and 12-P in respect to Second Phase leads, moreover, to the conclusion that the parties did not intend that the $3,000.00 per acre should apply to the Second Phase nothing appearing to this effect in either of these instruments. If this acreage figure was to apply to this Phase, what

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reasonable explanation is there of the execution and delivery of these two critical Exhibits.

E. IT WAS ERROR TO FIND IN FINDING OF FACT NO. 5 THAT THE FARM PROPERTY WAS INCLUDED IN THE DEED WITHOUT WOODS' KNOWLEDGE OR INTENT.

The Warranty Deed of April 5, 1969, (Ex. 6-P) very definitely included among its calls the farm property (Tr. 12, 13, Ex. 29-D). The description of the lands covering this farm property are there set forth in a metes and bounds description, but this is without ambiguity and in a direct and forthright manner, Respondent testified that she did not know that this farm property was included in this Deed (Tr. 58, 64), although Appellant G. Eldon Roberts testified that these lands were very assuredly subject to the negotiations that went on between Appellants and Woods concerning Second Phase (Tr. 13).

In construing conveyances such as this Deed the courts endeavor to effectuate the intent of the parties. In doing this, however, where there is no ambiguity in the language of the conveyance, this intention must be arrived at from such language, giving it its common and accepted meaning. 23 Am. Jur. 2d Deeds §159. The intention of the parties is to be

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derived from the language contained in the conveyance and not from other sources.

> "While all clauses and words in a deed will be considered in construing it, the courts are not concerned with what the parties meant to say, but the meaning of what they did say. The court cannot surmise as to intention, or even effectuate a manifest intention where the grantor has omitted to use words required to give effect to such intention; it must construe the instrument as written. The court can neither put words into a deed which are not there nor put a construction on words directly contrary to the plain sense of them." 23 Am. Jur. 2nd Deeds §161 at 209, 210.

With the language within this Deed being unambiguous, the court would have to determine the intent of the parties from this language, which leads to an irrefutable conclusion that the farm property was intended to be included despite testimony elicited from Respondent to contrary. In finding as it did in this connection the trial court erred.

If the language of this Deed was considered ambiguous in any sense, the court then could resort to certain generally accepted rules of construction in determining the intent of the parties. One of the more important of such rules is one to the effect that if there is an ambiguity in a conveyance permitting alternative constructions, then that construction which is more favorable to the grantee than the grantor will

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be adopted, all doubts being resolved against the grantor. 23 Am. Jr. 2d Deeds §165, §299, Meagher v. Uintah Gas Co., 123 Utah 123, 255 P.2d 989 (1953). The effect of this, if applied to this particular Deed, would be that the intent of the parties was to cover thereby the farm property.

F. IT WAS ERROR TO FIND IN FINDINGS OF FACT NOS. 5 AND 12 THAT THE FARM HOME PROPERTY IS CONSIDERED SEPARATE.

When Appellants obtained the Warranty Deed of April 5, 1969 (Ex. 6-P), the farm property was included. Subsequently in March 1973, this was sold in a separate transaction to the daughter and son-in-law of Woods (Ex. 10-P), and it was from the sales figure in this latter sale that the $12,000.00 included in these two Findings is derived. Even assuming, for purposes of argument, that there is sufficient evidence to warrant a finding of $3,000.00 per acre on all the lands in Second Phase, there certainly is insufficient evidence that this farm property should have been separated out of the basic transaction under which the lands included in Second Phase were obtained by Appellants and a substantially higher figure attached to it. All the evidence that does apply to any price of this farm property is derived from the Uniform Real

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Estate Contract under which the Appellants so sold it (Ex. 10-P), and this was entered into nearly four years after the Appellants first acquired this farm property.

G. IT WAS ERROR TO FIND IN FINDINGS OF FACT NOS. 5, 9, 11, AND 12 THE CALCULATIONS REGARDING THE ACREAGES THEREIN SET FORTH.

The acreages included in both First Subdivision and in Second Phase were set forth in Ex. 29-D, which was stipulated in evidence as the correct acreage amounts in each of these areas of land. Assuming again for purposes of argument that $3,000.00 per acre applied to both these tracts the respective resultant amounts are:

$3,000.00 x 9.125 = $27,375.00

$3,000.00 x 35.984 = $107,952.00

The calculations of Respondent when applied to the totality of the lands in each of these two areas, therefore, is in error where they depart from these resultant amounts.

While Finding of Fact No. 9 purports to cover all of First Subdivision that in Part II of Finding of Fact No. 12 also covers one of the lots in this particular Subdivision, Lot No. 5 (last page of Ex. 16-P). As such then, either the amount set forth in this Part II should be deduct-

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from the amount set forth in Finding of Fact No. 9 or stricken in its entirety, this due to it being a duplication.

H. IT WAS ERROR TO FIND IN FINDING OF FACT NO. 12 AMOUNTS FOR WATER STOCK SHOULD BE CHARGED APPELLANTS.

The water stock described in Part III of Finding of Fact No. 12 was part of the security for the Promissory Note executed in connection with the Federal Land Bank Mortgage (Page 3 of Ex. 39-D). This Land Bank Mortgage is still considered outstanding, at least until the termination of this Action; and until it is paid in full, Appellants are entitled to retain any security in respect to it. Upon such payment in full anything which served as security thereunder which cannot be returned to Woods would be the proper subject of compensation. Until then, Part III would have to be considered premature and made in error.

I. IT WAS ERROR TO FIND IN FINDING OF FACT NO. 7 THAT A TRUST RELATIONSHIP EXISTED BETWEEN WOODS AND APPELLANTS.

From the facts in respect to this Action the only express or direct trust that was in effect appears to have been that entered into between Appellants and Pioneer Title Company under date of May 29, 1969, regarding Second Phase

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(Ex. 37-D). Any trust relationship if in effect between Woods and Appellants, therefore, must have been one created by operation of law, an implied or involuntary trust. These implied trusts are generally classified as either resulting or constructive. 76 Am. Jur. 2d Trusts §189. While these are difficult in many instances to distinguish from each other a resulting trust arises from the nature or circumstances of consideration involved in a transaction, the holder of legal title holding the property involved for the benefit of those who furnished consideration for its acquisition: this type of trust is based on equitable consideration. 76 Am. Jur. 2d Trusts §197. Constructive trust arises only after an act of fraud or breach of confidence or duty and is a method of relief against same. 76 Am. Jur. 2d Trusts §222. It is apparently this kind of trust relationship that is referred in Finding of Fact No. 7.

Analysis of the relationship between Woods and Appellants throughout First Subdivision and Second Phase reveals that this was of the usual vendor-vendee relationship in real estate transactions. Where conveyances or other instruments

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were to be executed by Woods, they would in most cases go to the escrow agent, either Beehive State Bank or Pioneer Title Company, to execute the same (Ex. 25-D, Tr. 24-28). As Respondent's attorney characterized it, the degree of trust that Appellants and Woods put in each other through their many transactions were those in respect to "all business" (Tr. 28). This is hardly the confidence required to make Appellants trustees for Woods in these circumstances. This is particularly true in view of the reluctance of this Court in previous pronouncements to extend trust relationships to the degree included in Finding of Fact No. 7. Renshaw v. Tracy Loan & Trust Co., 87 Utah 364, 49 P. 2d 403, 100 A.L.R. 872 (1935); Bradbury v. Rasmussen, 16 U. 2d 378, 401 P. 2d 710 (1965).

POINT II

THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION INTO EVIDENCE OF UNEXECUTED INSTRUMENTS IN VIOLATION OF THE PAROL EVIDENCE RULE

The agreement that was entered into in respect to First Subdivision was the Agreement of May 31, 1967 (Ex. 1-P), but this covered only this particular Subdivision and no further lands of Woods. During the time when Woods and

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Appellants were negotiating regarding Second Phase in 1968 or early 1969 two and possibly three forms of agreement were submitted back and forth between them (Ex. 2-P, 3-P, and 4-P) but none of these were ever executed. That which was eventually entered into by way of agreements in respect to Second Phase was the Warranty Deed of April 5, 1969 (Ex. 6-P) and the Agreement of April 30, 1969 (Ex. 12-P).

All of the three above-described unexecuted instruments provided for a sale price of $3,000.00 per acre, and despite objections of Appellants at the trial (Tr. 10, 37), all three were eventually introduced into evidence at the trial court. It is apparently upon their basis that the trial court made in its Findings of Fact Nos. 5 and 11 finding that there was an implied contract that Appellants were to pay this figure of $3,000.00 per acre for all lands in Second Phase.

Whenever negotiations have been going on regarding a proposed transaction and it finally results in the execution and delivery of a final instrument or instruments, evidence of these negotiations if introduced to contradict, vary, add or subtract from terms of these final instruments is normally

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excluded under the well-known parol evidence rule. 30 Am. Jur. 2d Evidence § 1016; 3 Jones On Evidence 6th Edition §16.1; Fox Film Corp. v. Ogden Theatre Co., 82 Utah 279, 17 P. 2d 294, 90 A.L.R. 1299 (1932); Andrus v. Blazzard, 23 Utah 233, 63 Pac. 888 (1901). The written memorial is said to supersede the prior and contemporaneous negotiations, and extrinsic utterances from or in respect to these negotiations are excluded. The parol evidence rule applies not only to exclude merely oral utterances but also informal writings other than the single and final written memorial. 30 Am. Jur. 2d Evidence §1016; Evensen v. Pubco Petroleum Corp., 274 F. 2d 866 (1960); Re Gaine's Estate, 15 Cal. 2d 255, 100 P. 2d 1055 (1940); Hubacek v. Ennis State Bank, 159 Tex. 166, 317 S.W. 2d 30 (1958); Bond et al. v. Wiegardt et al., 36 Wash. 2d 41, 216 P. 2d 196 (1950).

The transaction between Woods and Appellants regarding Second Phase had resulted in execution and delivery of the above-described Warranty Deed (Ex. 6-P) and Agreement (Ex. 12-P). The three unexecuted forms of agreement that had been exchanged between Woods and Appellants prior thereto are at variance with these two executed instruments but were, nevertheless,

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admitted into evidence by the trial court. For it to do so was clearly in error as being violative of the parol eviden rule.

POINT III

THE TRIAL COURT ERRED IN HOLDING THAT THE STATUTE OF LIMITATIONS WAS TOLLED WHEREVER RAISED BY APPELLANTS AND NONE OF CLAIMS OF RESPONDENT WERE BARRED BY THIS STATUTE.

Appellants raised the defense of applicable statu of limitations at the trial court. This included the three-year limitation concerning fraud claims found in Subsection 78-12-26 (3), Utah Code Annotated 1953; the four-year limit concerning contracts, obligations, or liabilities not found upon an instrument in writing found in Section 78-12-25, Ut Code Annotated 1953; and the special one-year extension accorded successors of certain decedents found in Section 78-12-37, Utah Code Annotated 1953. The Findings of Fact m by the trial court appear not to have found that Appellants committed fraud, so the first of these statutes of limitati will not be considered in this Brief.

The trial court indicated in its Finding of Fact that the continuous dealings between Woods and Appellants tolled the statute of limitations. This completely disrega

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the distinction between First Subdivision, where development was made under an agreed-upon instrument in writing (Ex. 1-P), and Second Phase, where development was made under a very different set of circumstances with either two instruments executed and delivered to Appellants governing (Ex. 6-P and 12-P) or an implied contract being in effect. It is submitted that the trial court erred in blurring the distinction between these two developments.

The trial court made as one of its principal Findings of Fact the finding that there arose between Woods and Appellants in respect to Second Phase the above-described implied contract whereby Appellants were to pay $3,000.00 per acre for all lands in this Phase. This being the situation, then the four-year statute of limitations is applicable. Petty and Riddle, Inc. v. Lunt, 104 Utah 130, 138 P. 2d 648 (1942).

The initial inquiry then is as to when an action on this basis accrues, for that is when the statute of limitations commences to run. In actions based upon implied contracts, the statute begins to run on accrual of the action. 51 Am. Jur. 2d Limitation of Actions §134; 54 C.J.S. Limitations of Actions §158; Kimball v. McCornick, 70 Utah 189, 259 Pac. 313 (1927). The action is said to accrue whenever Woods

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could have maintained the action to a successful conclusion, the moment whenever the right of action is complete. 51 Am. Jur. 2d Limitation of Actions §107; 54 C.J.S. Limitations of Actions §109; Last Chance Ranch Co. v. Erickson, 82 Utah 475, 25 P. 2d 952 (1933); State Tax Commission v. Spanish Fork, 99 Utah 177, 100 P. 2d 575, 131 A.L.R. 816 (1940); O'Hair v. Kounalis, 23 U. 2d 355, 463 P. 2d 799 (1970).

When under this approach then would any causes of action accrue to Woods. Since Second Phase is the matter at issue, the most logical analysis would have it that this particular time coincided with the execution of the two instruments under which Appellants took title to the lands in this Phase, namely, the Warranty Deed of April 5, 1969 (Ex. 6-P) and the Agreement of April 30, 1969 (Ex. 12-P), these being distinctly at variance with the theory that Appellants were to pay $3,000.00 per acre for all lands in this Phase. That was when Woods could have first maintained an action against Appellants for the $3,000.00 per acre for the lands in Second Phase; and that would be when the four-year statute of limitations would commence to run. This is in excess of five years prior to filing of Respondent's

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Complaint in November, 1974.

Under the language of Section 78-12-25, Utah Code Annotated 1953, as in many similar statutes, there is an interruption or tolling of this statute of limitations when the last charge or payment is made. 54 C.J.S. Limitations of Actions §321. The approach apparently taken by the trial court was that when Appellants made payment to Nelson and others between 1969 and lastly in February, 1971, and thereby completely retired the Nelson Mortgage, there occurred a further payment upon the implied contract to pay $3,000.00 per acre. Thus, the statute of limitations was tolled.

For a payment to toll the applicable statute of limitations, however, the payment must be of a certain character. This is due to the fact that the tolling or interruption occurs because by thepayment there is an acknowledgment or admission of the existence of the indebtedness and from which there is implied by law a new promise to pay the balance. 54 C.J.S. Limitations of Actions § 321, 51 Am. Jur. 2d Limitation of Actions §366. For the part payment to be effectual to toll or interrupt the statute of limitations it must be clear, direct, voluntary, and absolute, intended to be a payment onto

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the larger debt, and free of any uncertainty as to the identification of the debt on which it is to be applied. It must be distinct, unequivocal, and without qualification, such as to indicate an intent on the part of the party making payment that it constitutes part payment of the debt in question and indicates his willingness to pay the balance. 54 C.J.S. Limitations of Actions §322; Upton v. Heiselt Const Co., 116 Utah 83, 208 P. 2d 945 (1949); Kelly v. McIntyre, 323 Mass 313, 81 N.E. 2d 825 (1948); In re Estate of Charles R. Hocking, 3 Wis. 2d 79, 87 N.W. 2d 811 (1958); Estate of Ruwe v. Ruwe, 190 Neb. 663, 21 N.W. 2d 610 (1973); Piccolino v. Massa, 33 A.D. 2d 643, 305 N.Y.S. 2d 79 (1969). The part payment is ineffectual to toll the statute of limitations if at the time of payment the paying party does not recognize the debt or has repudiated it. State ex rel. Hudson v. Finn et al., 102 Mo. 222, 14 S.W. 984 (1890); Philadelphia v. Holmes Electric Co., 335 Pa. 273, 6 A. 2d 884 (1939).

If the foregoing is applied to the circumstances of the payments made by Appellants to Nelson and others between 1969 and February, 1971, it is abundantly clear that these payments were not of the character as to toll the applicable

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statute of limitations. They were not made onto a contract that provided for payment to Woods of $3,000.00 per acre on Second Phase: they were made after approximately May, 1969, at least pursuant to the provisions of the Agreement of April 30, 1969 (Ex. 12-P), which is at variance with an indebtedness of $3,000.00 per acre being owed to Woods. Lacking is the unequivocal, distinct, certain type of payment without qualification that indicates Appellants' recognition of their obligation to pay the balance on this debt. Thus, these payments so made by Appellants did not toll the applicable four-year statute of limitations. The trial court erred in holding that such tolling occurred under the existing circumstances.

The application of Section 78-12-37, Utah Code Annotated 1953, to the foregoing four-year statute of limitation, moreover, does not afford Respondent any further extension of time. Only if the one year provided in this Section is later than the times when the four-year statute referred to above end will this Section add any time during which an action may be filed. Gray Realty Co. vs. Robinson, 111 Utah 521, 184 P. 2d 237 (1947). Here the one-year period ended July 10, 1972,

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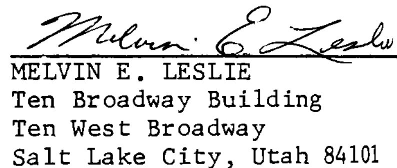
which is less than that afforded by the above four-year statute of limitation.

CONCLUSION

For the foregoing reasons the judgment of the trial court should be reversed as to Respondent's claims and judgment entered in Appellants' favor on their Counterclaim or in the alternative this Action be reversed and remanded for a new trial.

Respectfully submitted,



MELVIN E. LESLIE
Ten Broadway Building
Ten West Broadway
Salt Lake City, Utah 84101

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