

1988

# Vernon E. Bush v. Commerce Properties, Inc., Richard C. Bennion : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

John L. McCoy, Peter N. Ennenga; attorney for respondent.

Marcus G. Theodore; attorney for appellants.

---

## Recommended Citation

Brief of Respondent, *Bush v. Commerce Properties*, No. 880254 (Utah Court of Appeals, 1988).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/1024](https://digitalcommons.law.byu.edu/byu_ca1/1024)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH COURT OF APPEALS  
BRIEF

CKET NO. 880254 IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

---

VERNON E. BUSH, :  
Plaintiff-Respondent, :  
vs. : Supreme Court No. 880100  
COMMERCE PROPERTIES, INC., :  
a corporation, and RICHARD C. BENNION, : Court of Appeals  
No. 880254-CA  
Defendants-Appellants :  
and :  
District Court No. C87-1224  
PROCESS INSTRUMENTS & CONTROL, INC., and JOHN A. HALL, :  
Defendants-Respondents : #146

---

RESPONDENTS' BRIEF

---

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
HONORABLE JUDGE SCOTT DANIELS

---

PETER M. ENNENGA  
BRETT D. POULSEN  
Attorneys for Hall & PIC  
Defendants-Respondents  
5525 South 900 East, #200  
Salt Lake City, Utah 84117  
(801) 263-1112

MARCUS C. THEODORE  
Attorney for Bennion & Commerce  
Defendants-Appellants  
275 East South Temple, #303  
Salt Lake City, Utah 84111  
(801) 359-8622

JOHN L. MCCOY  
Attorney for Vernon E. Bush  
Plaintiff-Respondent  
310 South Main Street, #1309 SEP 23 1988  
Salt Lake City, Utah 84101  
(801) 355-6400

IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

---

VERNON E. BUSH, :  
Plaintiff-Respondent, :  
vs. : Supreme Court No. 880100  
COMMERCE PROPERTIES, INC., :  
a corporation, and RICHARD C. : Court of Appeals  
BENNION, : No. 880254-CA  
Defendants-Appellants :  
and :  
District Court No. C87-1224  
PROCESS INSTRUMENTS & CONTROL, :  
INC., and JOHN A. HALL, :  
Defendants-Respondents :

---

**RESPONDENTS' BRIEF**

---

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
HONORABLE JUDGE SCOTT DANIELS

---

PETER M. ENNENGA  
BRETT D. POULSEN  
Attorneys for Hall & PIC  
Defendants-Respondents  
5525 South 900 East, #200  
Salt Lake City, Utah 84117  
(801) 263-1112

MARCUS C. THEODORE  
Attorney for Bennion & Commerce  
Defendants-Appellants  
275 East South Temple, #303  
Salt Lake City, Utah 84111  
(801) 359-8622

JOHN L. MCCOY  
Attorney for Vernon E. Bush  
Plaintiff-Respondent  
310 South Main Street, #1309  
Salt Lake City, Utah 84101  
(801) 355-6400

## TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS	1
STATEMENT OF ISSUES PRESENTED ON APPEAL	2
DISPOSITIVE STATUTES AND RULES	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	4-5
ARGUMENT	5-10
POINT I:	
BENNION AND COMMERCE HAVE WAIVED OR ARE ESTOPPED FROM ASSERTING BY THIS APPEAL ANY EXCEPTION OR OBJECTION TO THE TRIAL COURT'S CONCLUSION OF LAW.	5-6
POINT II:	
SECTION 48-1-15, UTAH CODE ANNOTATED (1953), AS AMENDED, HAS NO APPLICA- TION TO A JOINT VENTURE.	7-8
POINT III:	
THE FINDINGS OF FACT AND OTHER EVIDENCE SUFFICIENTLY SUPPORT THE CONCLUSION OF LAW THAT BENNION/ COMMERCE ARE LIABLE FOR AT LEAST FIFTY PERCENT (50%) OF THE JUDGMENT DEBT.	8-10
POINT IV:	
THIS APPEAL IS FRIVOLOUS AND WITHOUT MERIT, AND THE RESPONDENTS HALL AND PIC SHOULD BE AWARDED DAMAGES, INCLUDING REASONABLE ATTORNEY'S FEES.	10
CONCLUSION	10-11

Table of Contents continued:

CASES CITED

<u>Duthweiler v. Hansen</u> , 28 P.2d 210 (Idaho 1933)	9
<u>Kimball v. McCornick</u> , 259 P. 313 (Utah 1927)	10
<u>Potts v. Lux</u> , 166 P.2d 694, 161 Kan 217 (1946)	9

TABLE OF AUTHORITIES

3 <u>American Jurisprudence</u> 2nd, "Appeal and Error", Section 545, pp. 29-30.	6
4 <u>Corpus Juris Secundum</u> , "Appeal and Error", Section 310, pp. 993-994.	6
Rule 33(a) of the Utah Court of Appeals.	3, 10
Utah Partnership Act, Section 48-1-3.	2, 7
Utah Partnership Act, Section 48-1-3.1(1).	2, 7
Utah Partnership Act, Section 48-1-3.1(2).	2, 7
Utah Partnership Act, Section 48-1-15.	2, 7, 8
<u>Webster's New Collegiate Dictionary</u> , G.& C. Merriam Company, 1981, p. 255 & p. 912.	9

IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

---

VERNON E. BUSH,	:	
Plaintiff-Respondent,	:	
vs.	:	Supreme Court No. 880100
COMMERCE PROPERTIES, INC.,	:	
a corporation, and RICHARD C.	:	Court of Appeals
BENNION,	:	No. 880254-CA
Defendants-Appellants	:	
and	:	
PROCESS INSTRUMENTS & CONTROL,	:	District Court No. C87-1224
INC., and JOHN A. HALL,	:	
Defendants-Respondents	:	

---

**RESPONDENTS' BRIEF**

---

**STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS**

Pursuant to Rule 4A of the Rules of the Utah Supreme Court, this case was transferred to the Court of Appeals by order entered April 11, 1988.

Appeal has been taken from the Third District Court judgment which determined that the defendants Richard C. Bennion ("Bennion"), Commerce Properties, Inc. ("Commerce"), John A. Hall ("Hall"), and Process Instruments & Control, Inc. ("PIC"), were jointly and severally liable to the plaintiff Vernon E. Bush

("Bush") for an amount relating to architectural services rendered.

**STATEMENT OF ISSUES PRESENTED ON APPEAL**

1. Did Bennion and Commerce waive or are they otherwise estopped from asserting by this appeal any exception or objection to a conclusion of law by the trial court?

2. Does Section 48-1-15, Utah Code Annotated (1953), as amended, have application to a joint venture?

3. Do the Findings of Fact and other evidence sustain the conclusion of law that Bennion/Commerce and Hall/PIC are each liable for fifty percent (50%) of the amount awarded to the plaintiff?

4. Is the appeal taken by Bennion and Commerce frivolous or without merit?

**DISPOSITIVE STATUTES AND RULES**

Issue numbers 2 and 3 above may be determined by interpretation of the following Utah statutes:

**48-1-3. "Partnership" defined.** A partnership is an association of two or more persons to carry on as co-owners a business for profit. . . .

**48-1-3.1. Joint Venture defined-Application of chapter.**

(1) A joint venture is an association of two or more persons to carry on as co-owners of a single business enterprise.

(2) This chapter governs the property and transfer rights for joint ventures.

**48-1-15. Rules determining rights and duties of partners.** The rights and duties of the partners in

relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(1) Each partner . . . must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profit. . . .

Issue number 4 above may be determined by interpretation of the following Rule of the Utah Court of Appeals:

**Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.**

(a) Damages for delay or frivolous appeal. If the Court determines that a motion made or an appeal taken under these rules is either frivolous or for delay, it shall award just damages and single or double costs, including reasonable attorney's fees, to the prevailing party . . . .

#### **STATEMENT OF THE CASE**

Bush sought to recover from Bennion, Commerce, Hall and PIC for the value of architectural services rendered. The services were provided in connection with a proposed building to be constructed by Bennion, sold to Hall (with Commerce as sales agent), and leased by Hall to PIC. The trial court entered judgment in favor of Bush and against Bennion, Commerce, Hall and PIC, jointly and severally, in the sum of Thirteen Thousand Dollars (\$13,000.00), plus interest and costs.

Bennion and Commerce appeal from the trial court's Conclusions of Law that Bennion and Commerce, jointly, should pay fifty percent (50%) of the judgment debt and that Hall and PIC, jointly, should pay the other fifty percent (50%) of the judgment debt.

### STATEMENT OF FACTS

In July, 1984, Bennion contacted Bush and discussed a potential project involving the construction of a commercial office building. (R. 26). Subsequently, Bennion instructed Bush to prepare preliminary drawings for the project. (R. 29)

Bennion is the principal owner of Commerce (R. 153). Hall is the principal owner of PIC. By Earnest Money Sales Agreement dated June 28, 1985, (Exhibit "D-11"), Bennion agreed to sell to Hall the subject property improved by a building described in plans and specifications annexed thereto. The Agreement was subject to the condition that Hall would obtain an appropriate loan within sixty (60) days from the date thereof, which condition was not satisfied. (Finding 8).

If the sale had been closed, Commerce would have received a commission equal to ten percent (10%) of the sales price. The sales price was defined by the parties as the project cost. (p. 92). The trial court found that Bennion/Commerce and Hall/PIC were involved in a joint venture from which Bennion/Commerce would ultimately earn ten percent (10%) of the total cost of the joint venture project. (Finding 3).

### SUMMARY OF ARGUMENT

Bennion and Commerce are subject to the doctrines of waiver or estoppel by virtue of their failure to have timely objected to any Conclusion of Law by the trial court. Any exception to a Conclusion should have been brought before the trial court with an opportunity granted to it to make any required correction.

A joint venture is not a partnership and, except in certain situations, is not to be treated as one. The provisions of the Utah Partnership Act cited by the appellants have no application to a joint venture, including the joint venture which is the subject of this appeal.

There is sufficient evidence to support the Conclusion of Law that Bennion/Commerce are liable for at least fifty percent (50%) of the judgment debt. It is improper to analyze the joint venture interest of Bennion/Commerce by reference to "profits." Such analysis should focus only upon the concept of "cost". Since these terms are not equivalent, statutes dealing with "profit" are irrelevant to this case. Moreover, even if a discussion of "profit" was relevant, absent an agreement regarding the allocation of profits and losses, they should be divided or shared equally.

The appellants' appeal is frivolous and without merit and, accordingly, the appellants should be required to pay damages, including a reasonable attorney's fees.

#### ARGUMENT

##### POINT I

BENNION AND COMMERCE HAVE WAIVED OR ARE ESTOPPED FROM ASSERTING BY THIS APPEAL ANY EXCEPTION OR OBJECTION TO THE TRIAL COURT'S CONCLUSIONS OF LAW.

There were no objections or exceptions by the appellants to any of the trial court's Conclusions of Law either within the time permitted by the Rules of Practice of the District Courts or at any other time prior to the filing of the

appellant's Docketing Statement. By virtue of the failure of Bennion and Commerce to have previously raised the issue of the insufficiency of evidence to support any conclusion of law, they have waived or are estopped from asserting any objections thereto. As stated in 3 American Jurisprudence 2nd, "Appeal and Error", Section 545, pp.29-30:

In order to avoid the delay and expense incident to appeals, reversals and new trials upon grounds which might have been corrected in the trial court if the question had been properly raised there, the appellate courts have developed and applied the rule that they will normally only consider questions which were raised and reserved in the lower court and in some jurisdictions this principal has been embodied in statutes. The reported cases show numerous applications of the principle that waiver or estoppel to take advantage on appeal of a certain error in the Court below may arise from unexcused silence or failure to take appropriate action below. The general rule that errors not raised below are waived has been applied even where the record on appeal contains evidence bearing on the matter in question . . . .

In further support of the above proposition, it is stated in 4 Corpus Juris Secundum, "Appeal and Error", Section 310, pp. 993-94:

As a rule, only objections to the findings of fact or conclusions of law, or to the want thereof, which have properly been brought to the attention of the trial court will be considered on appeal, except where no opportunity was given to present the question, or where there is a failure to make the findings of fact or conclusions of law in support of the judgment as required by statute.

Accordingly, it cannot be objected for the first time on appeal that the findings are indefinite or incomplete, informal, ambiguous, or not sufficiently specific; . . .

## POINT II

SECTION 48-1-15, UTAH CODE ANNOTATED (1953), AS AMENDED, HAS NO APPLICATION TO A JOINT VENTURE

The trial court found that the relationship between Bennion/Commerce and Hall/PIC was a joint venture. The appellants do not dispute this finding. However, the appellants submit that the joint venture should be deemed a partnership for purposes of applying Section 48-1-15, Utah Code Annotated (1953), as amended. The said section relates to the rights and duties of partners and, in pertinent part, to the manner in which partners shall contribute toward losses of a partnership.

The appellants assume, without reference to any authority, that a joint venture is to be treated as a partnership. By enactment in 1985, the Utah Legislature has declared otherwise. Section 48-1-3.1(1), Utah Code Annotated (1953), as amended, defines a joint venture. Section 48-1-3, Utah Code Annotated (1953), as amended, defines a partnership. The two entities are clearly distinguished by statute in that a joint venture involves "a single business enterprise" whereas a partnership involves a "business for profit".

Moreover, the Utah Partnership Act (Title 48, Chapter 1) has limited application to joint ventures by virtue of Section 48-1-3.1(2), Utah Code Annotated (1953) as amended. Thereunder, the act only "governs the property and transfer rights" of a joint venture. As stated earlier, Section 48-1-15 deals with a different subject matter, to-wit: the relative rights and duties

of partners in a partnership, including the allocation of losses between partners.

If the Utah legislature had wished to cause the Act to be generally and comprehensively applied to joint ventures, it had every opportunity to do so. Instead, the adopted legislation creates a meaningful distinction between joint ventures and partnerships and specifies that only certain provisions of the act shall apply to joint ventures. Since Section 48-1-15 is not one of such provisions, its provisions are irrelevant to this case and an improper foundation for the appellants' argument.

### POINT III

THE FINDINGS OF FACT AND OTHER EVIDENCE SUFFICIENTLY SUPPORT THE CONCLUSION OF LAW THAT BENNION/COMMERCE ARE LIABLE FOR AT LEAST FIFTY PERCENT (50%) OF THE JUDGMENT DEBT.

Finding of Fact No. 3 states that Commerce and Bennion "were to receive ten percent (10%) of the total cost of said venture" (emphasis added). The appellants would have this Court believe, and has taken the liberty to treat as a "fact" of this case, the proposition that Bennion/Commerce was a "ten percent joint venture partner". As a result of such improper, self-serving logic, the appellants further submit that Bennion/Commerce had a ten percent (10%) interest in joint venture profits. The obvious objective of such reasoning is to permit the application of Section 48-1-15, Utah Code Annotated (1953), as amended, whereunder a partner shall contribute toward partnership losses according to his share of partnership profits.

However, the appellants' argument is transparent and fallacious when it is recognized that they have attempted to convert an interest based upon "cost" into an interest in "profits". "Cost" may be defined as "the outlay or expenditure made to achieve an object." Webster's New Collegiate Dictionary, G.&C. Merriam Company, 1981, p. 255. "Profits" may be variously defined as " the excess of returns over outlays", "that sum remaining, if any, after all expenses, including salaries or wages, were deducted from the amounts realized", or "the excess of returns over expenditures in a transaction". Potts v. Lux, 166 P2d 694, 161 Kan. 217(1946); Duthweiler v. Hansen, 28 P2d 210 (Idaho 1933); Webster's New Collegiate Dictionary, G. & C. Merriam Company, 1981, p.912. From the foregoing, it is fundamentally obviously that "costs" are an **element** of "profits", not their **equivalent**. The appellants' interest in the joint venture was exclusively related to a "cost" analysis and any discussion of "profits" is simply not relevant.

Further, assuming arguendo that the joint venture between Bennion/Commerce and Hall/PIC should be deemed a partnership, and that the allocation of profits is a proper issue, there is no evidence in the record nor any finding of fact by the trial court to suggest any agreement between the parties (or even the contemplation of an agreement) regarding a divisions of profits or losses. As the only support for their argument, appellants cite Finding of Fact No. 3 which, as discussed above, does not include any reference to profits, nor imply any relationship of the parties based upon profits, nor involve any

agreement with regard to profits. Thus, if it is further assumed that the obligation to the plaintiff should be deemed a "loss", the optimum result to be obtained by Bennion/Commerce would be to share the judgment debt. Therefore, applicable rule, as stated many years ago by the Utah Supreme Court, is: ". . . (I)n the absence of any agreement or proof of an agreement to the contrary, the partners will divide the profits and the losses equally." Kimball v. McCornick, 259 P. 313 (Utah 1927).

#### POINT IV

THIS APPEAL IS FRIVOLOUS AND WITHOUT MERIT, AND THE RESPONDENTS HALL AND PIC SHOULD BE AWARDED DAMAGES, INCLUDING REASONABLE ATTORNEY'S FEES.

By a convenient distortion of the meaning of essential terms, Bennion and Commerce have created an issue where none legitimately exists. Although there is no reasonable relationship between the concepts of "costs" and "profits", the appellants have purposefully misstated the trial court's Findings in an unsuccessful effort to make it so appear.

Inevitably, it becomes obvious that the appellants have no basis in fact or law for their appeal and that the appeal is merely frivolous. Pursuant to Rule 33(a) of the Rules of the Utah Court of Appeals, Hall and PIC should be awarded damages, including their reasonable attorney's fees.

#### CONCLUSION

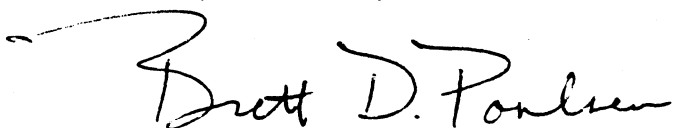
The appellants argue that they had a ten percent (10%) interest in the profits of the joint venture and, therefore, their contribution to the judgment debt should be correspondingly

limited to ten percent (10%). They justify this assertion by elevating their argument. In truth, no such fact exists nor did the lower Court make any such finding. The concept of "profits" is not relevant to this case and the appellants' interest in the joint venture had absolutely no relationship thereto. Their interest was to be determined exclusively with reference to the "cost" of the joint venture project.

The appellants are grasping for straws and, in so doing, have rendered their argument meritless and frivolous. As a result, they should be held liable to the respondents for damages including a reasonable attorney's fee.

Respectfully submitted this 23rd day of September, 1988.

TAYLOR, ENNENGA, ADAMS & LOWE



PETER M. ENNENGA

BRETT D. POULSEN

Attorneys for Defendants and  
Respondents Process Instruments and  
Control, Inc., and John A. Hall

**CERTIFICATE OF HAND DELIVERY**

I hereby certify that I hand delivered four copies of Respondents' Brief to Marcus C. Theodore, Attorney for Appellants, Bennion & Commerce, at 275 East South Temple, #303, Salt Lake City, Utah 84111; and four copies to John L. McCoy, Attorney for Respondent, Vernon E. Bush, at 310 South Main Street, #1309, Salt Lake City, Utah 84101 on this 23rd day of September, 1988.

