

1988

George Ronald Wright v. Westside Nursery, and Darrel Humphries : Brief of Appellant

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO.

88-0544

IN THE UTAH COURT OF APPEALS

GEORGE RONALD WRIGHT,)

Plaintiff and Appellant,)

vs.)

Case No. 880544-CA

WESTSIDE NURSERY, a Utah)
limited partnership, and)
DARREL HUMPHRIES, an)
individual,)

Defendants and Respondents.)

BRIEF OF APPELLANT

APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT IN
AND FOR WASHINGTON COUNTY, STATE OF UTAH, THE
HONORABLE J. PHILIP EVES, JUDGE PRESIDING

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January 31, 1989

FILED

FEB 2 1989

COURT OF APPEALS

Janice Ray
Case Manager, Utah Court of Appeals
400 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102

In Re:

George Ronald Wright Case No. 880544-CA
Plaintiff and Appellant,
and Cross-Respondent,
vs.
Westside Nursery, a Utah limited
partnership, and Darrel Humphries,
an individual,
Defendants and Respondents
and Cross-Appellant.

Dear Ms. Ray:

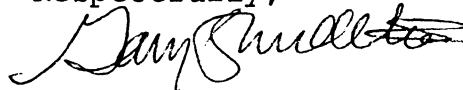
In response to your letter of January 26, 1989, please be advised that there is no statutory or constitutional provision which is dispositive of the central issues presented on this appeal.

We do rely upon the provisions of Rule 65A, Utah Rules of Civil Procedure, in disposing of one of the collateral issues presented. We have set forth, verbatim, the relevant provision of that rule on page 47 of the brief.

I apologize for not outlining this material in a separate portion of the brief as required by Rule 24. However, inasmuch as we do not rely upon any provision other than that quoted on 47 of the brief, I do not believe that there is any point in amending the brief or modifying the addendum which has been previously submitted.

I hope this letter adequately addresses the concerns which you expressed in your letter of January 26, 1989. If additional modifications need to be made please let me know.

Respectfully,



Gary W. Pendleton

GWP:cch
cc: Hans Q. Chamberlain

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IN THE UTAH COURT OF APPEALS

GEORGE RONALD WRIGHT,)

Plaintiff and Appellant,)

vs.)

WESTSIDE NURSERY, a Utah)

limited partnership and)

DARREL HUMPHRIES, an)

individual,)

Defendants and Respondents.

Case No. 880544-CA

BRIEF OF APPELLANT

APPELLATE JURISDICTION

Jurisdiction to hear this appeal is conferred upon the above-entitled court by provision of Section 78-2a-3(2)(j), U.C.A. 1953 as amended.

NATURE OF THE CASE

Plaintiff initiated this action for the purpose of establishing the enforceability and terms of a certain exchange agreement. Defendants counterclaimed seeking rescission of the contract and damages on a theory of fraudulent misrepresentation. Defendant Humphries also sought damages for the termination of his employment contract.

Prior to trial the district court summarily dismissed Defendants' counterclaim to the extent that it sought rescission of the exchange agreement.

The case was tried to a jury and submitted on special interrogatories. The jury concluded that both parties had breached the contracts and also found Plaintiff guilty of fraudulently misrepresenting the value of the real estate conveyed to Defendants as part of the exchange agreement.

Judgment was entered on the special verdict. Following the denial of motions for judgment notwithstanding the verdict and for new trial, Plaintiff filed this appeal seeking reversal of the judgment awarding damages for fraudulent misrepresentation and challenging other aspects of the proceedings and resulting judgment.

Defendants cross-appealed seeking the entry of a judgment awarding damages for wrongful termination of Defendant Humphries' employment contract and seeking reversal of the judgment to the extent that it held Defendants responsible for the payment of a certain promissory note executed in favor of a third party, Zions Bank.

STATEMENT OF THE ISSUES

1. Does the evidence support a finding that Plaintiff made any statement of material fact concerning the value of the subject real property?

2. Is a statement of opinion regarding the value of real property actionable as fraud?

3. Does the evidence support a finding that any statement made by Plaintiff was false?

4. Does the evidence support a finding that Plaintiff knew that any statement he made regarding the value of the subject real property was in fact false?

5. Does the evidence support a finding that Plaintiff acted recklessly with respect to any statement made regarding the value of the subject real property?

6. Does the evidence support a finding that Plaintiff fraudulently concealed any material fact relating to the value of the subject real property?

7. Is the principle which requires the elements of fraud to be proved by clear and convincing evidence relevant in determining the sufficiency of the evidence to support the jury's findings regarding fraud?

8. Did the district court err in refusing to instruct the jury that a good faith expression of opinion regarding value is not actionable as fraud?

9. Did the district court err in entering judgment on the verdict where it clearly appeared that the jury had included as damages a hypothetical real estate commission hypothetically incurred by Defendants in the subsequent sale of the subject property?

10. Is Defendant Humphries entitled to indemnification where he refused and failed to render an appropriate accounting?

11. Is Defendant Humphries entitled to reimbursement of any funds borrowed from Zions First National Bank following the issuance and service of the Temporary Restraining Order and Order to Show Cause dated December 23, 1985?

12. Did the district court err in refusing to instruct the jury that Defendant Humphries was entitled to indemnification or reimbursement of funds borrowed from Zions First National Bank only if Defendant established that the funds were actually used for the purpose of discharging Plaintiff's obligations, that the draw was authorized by Plaintiff, and that the funds were not withdrawn in violation of an order of the district court?

13. Are Defendants entitled to attorney's fees based upon contractual stipulation where the majority of the contract claims were resolved in favor of Plaintiff and against the Defendants?

14. Did the district court err in refusing to exonerate the injunction bond filed by Transamerica Insurance Services where the previous rulings of the court and the Special Verdict established the enforceability of the exchange agreement and Plaintiff's right to the possession of the nursery and where there was never a finding made or a judgment entered establishing that any temporary restraining order or preliminary injunction sought by Plaintiff was wrongfully issued?

15. Did the district court err in denying Plaintiff's motion for directed verdict, Plaintiff's motion for judgment notwithstanding the verdict, and Plaintiff's motion for new trial?

STATEMENT OF THE CASE

For the sake of clarity, Plaintiff will be referred to as "Wright" and Defendants Humphries and Westside Nursery will be collectively referred to as "Humphries" unless the context specifically requires a more exact designation of the individual defendants.

THE CONTRACT NEGOTIATIONS

Wright and Humphries became acquainted in the early summer of 1985 when Humphries, as general partner and manager of Westside Nursery, was landscaping Wright's residence in St. George. In the weeks that followed they developed a friendship as they began to discuss Wright's possible acquisition of the Westside Nursery. (T. 75-76, 409-411, 694-695)

Westside Nursery was a limited partnership with assets consisting of inventory (principally plant material), equipment and goodwill. (T. 73, 759-760, 834) The partners included Darrel Humphries (45%), his father-in-law (Gilbert Barnes)(45%), and James LaVae Smith (10%). (T. 72-75, 628; Defendant's Exhibit No. 9) The limited partnership owned no real estate and leased its business premises from James LaVae Smith. (T. 73)

Humphries' former partner, Ed Wootton, had recently sold his 45-percent interest in the business for \$20,500. (T. 71-72, 74-75)

Westside Nursery had suffered a financial loss each of the six years it had been in business with losses totaling \$183,597. (T. 78-79, 258-262) The actual negative cash flow in the business totaled \$206,668. (T. 258-262)

The local K-Mart store had recently opened a garden shop and three of Humphries' competitors had recently gone out of business. (T. 85-86, 417) Wright was convinced that the business would be more successful if it would not compete directly with K-Mart and similar establishments and instead offered plant material which was considered exotic or unusual in the St. George area. (T. 86-90, 417-418)

Despite prolonged negotiations the parties could not come to terms regarding the value of the nursery business. (T. 81-84, 415-416, 432-433, 701-702, 710-711) Wright made it clear that he was interested only in acquiring the plant material and that the other purported assets of the nursery were of no value to him. (T. 658-659, 759-760, 834, 1026)

The parties began to negotiate the transaction in terms of an exchange involving a portion of a 22-acre tract Wright owned in Weber County. (T. 419) Wright explained the reason for approaching the transaction as an exchange of properties:

Q. Okay. Were there any other reasons why you didn't determine the value?

A. Yes. Because every time we approached the price, Darrel and I suddenly were into disagreement. If we were -- as soon as we began to say -- interpret or exchange ideas in terms of price as opposed to value, the negotiations broke down and did so early on at my home.

And therefore, it was our suggestion that we involve ourself in a trade with enough inherent elasticity on either side to accommodate either party. Whether his inventory ended up being \$28,000 or \$35,000 or 40 or more was not what I was bargaining for, I was bargaining for the inventory. Whether my land turned out to be 28,000 or 35 or 40 was not what he was bargaining for. He was bargaining for those two acres¹ of land that had the excellent prospect of being developed along with my own property.

(T. 432-433)

Humphries traveled to Weber County at Wright's expense in August, 1985. He denied having seen the property on that occasion. (T. 81-83, 428-429, 674-675, 699-701)

¹ Initially Wright contemplated trading only two acres for the nursery inventory. Ultimately three acres were conveyed to Humphries as part of the exchange. (T. 419, 759)

On October 3, 1985, the parties traveled to Weber County for the purpose of negotiating the exchange. (T. 91-99, 215-217, 758) They spent the night in Wright's home near the 22-acre parcel. The next morning they spent more than four hours reviewing and revising the drafts of two written agreements which had been prepared by Wright's attorney, Timothy B. Anderson. (T. 94, 420, 435, 711-712) The first agreement related to the exchange agreement involving the real estate and the nursery. (Addendum A; Plaintiff's Exhibit No. 1) The second was an agreement relating to Humphries' employment as Wright's nursery manager. (Addendum B; Plaintiff's Exhibit No. 2)

The parties specifically discussed and included in the written contract provisions relating to the payment of a certain promissory note which Humphries had executed in favor of Zions First National Bank on January 3, 1985. (T. 366-367, 477-479) Wright's position throughout the litigation would be that it was Humphries' obligation to pay and discharge this note while Humphries would take the position that Wright had agreed to assume it. (R. vol.IV, pp. 19-20)

There is some conflict in the evidence concerning whether the agreements were signed before or after the parties and their wives viewed the property which was to be conveyed in exchange for the nursery assets.² (T. 95-

² In relating the events surrounding the inspection of the property, Mrs. Humphries stated:

Q. [BY MR. CHAMBERLAIN] Were you a participant in any of the conversations between Darrel and Ron Wright where the value of the property to be exchanged was discussed?

A. Not in the conferences they had.

Q. Were you on another occasion?

A. When we were in the vehicle of the car driving around that afternoon looking at property. Because I kept nudging Darrel and saying, "Where are we going and

96) Regardless of the exact chronology of events, it is apparent that Humphries voiced no objection to the exchange when he viewed the property on October 4, 1985.

Wright's 22-acre tract is located south of Ogden and approximately 1.6 miles from Interstate 15. (T. 422) It has easy access to the Interstate via Combe Road to Harrison Boulevard, a major artery. (T. 424)

The property is located south and west of Combe Road and is relatively level, the elevation dropping only approximately 10 feet in the 1600-foot length of the property. (T. 97-98, 426) The property is covered with tall grasses and there are numerous trees in the northerlymost portion which was conveyed to Humphries as a part of the subject transaction. (T. 97-100, 426, 447, 949) Humphries acknowledged the parcel's striking aesthetic appeal. (T. 97-98)

The property is bordered on the west and south by residential subdivisions which have developed into middle- to upper-income neighborhoods where there exists good pride of ownership. A public school and LDS chapel are located in the immediate vicinity and streets are paved to the subject property. (T. 435-439, 471-472, 938-939, 947)

The adjacent property located north and west of Combe Road is heavily wooded and ascends to a bench. (T. 425-426)

Wright had acquired the 22-acre tract in 1957 in connection with the

what are we doing?"

And he said, "We are going to go look at some property we are thinking of trading for the nursery."

(T. 674)

acquisition of approximately 350 acres. (T. 425) As the parties approached the property on October 4, 1985, he outlined its history for Humphries and his wife. Wright related the terms of numerous land sales which he had made in the area and pointed out the locations of these properties. A summary of the testimony regarding neighboring properties is attached hereto as Addendum C-2.³

No evidence was introduced which would indicate that Wright had recently obtained an appraisal of the property which he proposed to convey to Humphries and Wright never represented that the property had recently been appraised. Wright did, however, disclose the fact that he had recently mortgaged 5.93 acres located in the southeasterly end of the 22-acre tract to Sun Capital Bank which had loaned him \$20,000 per acre. (T. 589-590, 597-600, 661-665; Defendant's Exhibit No. 32)

Humphries conceded that Wright was not obligated to provide an appraisal as a part of their agreement and that he was satisfied with Wright's opinion regarding the value. (T. 134-137, 735)

At trial Humphries admitted several times that nothing that Wright told him regarding transactions involving the neighboring properties was false. (T. 137-138, 449-452, 689-690, 775-778)

As the parties walked the property, Wright disclosed the fact that there was no sewer currently servicing the area. (T. 109-111, 436, 715) The homes in neighboring subdivision were on septic tanks. (T. 111) Wright indicated to

³ Addendum C-1 is a reproduction of Plaintiff's Exhibit No. 5. Addendum C-2 is a reproduction of the same exhibit upon which figures regarding the sales prices or mortgage values of the neighboring properties have been superimposed together with supporting references to the record.

Humphries that he expected sewer to be on line within a year to a year and a half and that he intended to develop the property once the sewer was available. (T. 110-111, 715)

Several options for developing the land were discussed. These included merely holding the property as an investment, developing the property as a separate subdivision, and waiting and developing the property with Wright once sewer was available. (T. 97-98, 106-108, 112-113, 436-438, 594-595, 715-716)

Humphries recalls some of these conversations:

And that there would be a sewer -- something to do with the sewer would be coming to the property within the next year to year and a half, but if I wanted to develop the ground with him prior to that point, I could. He would show me how to develop it because he said, "I know all the tricks. I'm a developer. However, it is my recommendation that you wait, and we will develop this together in a year and a half down the road."

(T. 715)

Humphries and his wife both claim that Wright stated the subject three acres was worth \$30,000 an acre. Humphries testified:

Q. [BY MR. PENDLETON] And could you tell the jury what was said in the automobile about the value of this particular piece of property.

A. The exact words, I do not recall. Mr. Wright implied to both of us that the value of the property would be worth \$30,000 per acre.

Q. He implied that?

A. From the best of my recollection, that's correct. When I say "implied," let me restate that. "You will find the value of this particular property to be worth \$30,000 an acre."

(T. 774-775)

Once the agreements were signed, the parties went to Great Basin Engineering and then on to a local title company where the deeds were prepared. (T. 719-720) The same day, two deeds were executed and recorded conveying the northwesterly most three acres of the 22-acre tract. (Plaintiff's Exhibit Nos. 50 and 51) Humphries and his wife were, at their request, designated as the grantees. (T. 481-482)

Upon returning to St. George, Humphries continued in his position as manager of Westside Nursery pursuant to the terms of the management agreement which the parties had executed. (T. 121-122, 752-754) Under the terms of this agreement Humphries' salary was established at the sum of \$2500 per month. (Addendum B) He had been withdrawing a salary of only \$1000 per month prior to the exchange and his salary as Wright's manager was established with the understanding that Humphries would be responsible for his own taxes and insurance. (Addendum B; T. 80)

In early October 1985, Wright began to implement his vision of the future of the nursery business. (T. 490-491, 687) In this undertaking he invested approximately \$60,000 in the business during the following two months. (T. 490-492)

THE CONTROVERSY

Sometime between the execution of the agreements and Thanksgiving 1985, Gilbert Barnes wanted Humphries to have the Weber County property appraised. (T. 134)

Shortly thereafter one Chad Eskelsen contacted Humphries and began

to communicate to him rumors concerning Wright's alleged lack of integrity. (T. 1015-1016) Humphries became concerned about the value of the property in Weber County and after a cursory investigation concluded that he had been defrauded. (T. 739-741)

Humphries contacted Wright and demanded copies of the agreements. When he learned that Wright had gone into town for the purpose of making photocopies, Humphries took one of Wright's employees with him and literally assaulted Wright when they located him at the Washington County Library. Once Humphries had stripped them from Wright's hands he then gave the documents to the nursery employee who immediately left the area. (T. 139-143, 493-498) This incident occurred on December 5, 1985. Thereafter, Wright never returned to the nursery until he was given possession of the business by court order in March 1986. (T. 500-501)

On December 10, 1985, Humphries signed a second promissory note in favor of Zions Bank in the amount of \$30,000. (T. 991-992; Defendant's Exhibit No. 20)

On the same day, Humphries retained an attorney, Hans Q. Chamberlain, with a \$500 check drawn on Wright's nursery account. (T. 145-146; Plaintiff's Exhibit No. 53) Chamberlain immediately wrote a letter to Wright advising him that Humphries had reason to believe that the Weber County property had been misrepresented and that Wright had fraudulently concealed an impending building moratorium. The letter indicated that Humphries was willing to confirm the contracts and remain at the nursery as Wright's manager if Wright would

immediately pay the \$15,000 note to Zions Bank and deposit sufficient funds in the nursery bank account to cover existing overdrafts.⁴ (T. 801-806, 815-818; Defendant's Exhibit No. 69)

On December 13, Humphries drew \$15,000 against the \$30,000 note which he had executed on December 10. These funds were deposited in the nursery account. (T. 991-992)

On December 18, 1985, Chamberlain again wrote to Wright announcing that as a result of Wright's failure to comply with the demands of the December 10 letter, Humphries had repudiated and rescinded the written contracts. (Defendant's Exhibit No. 75)

THE LITIGATION BEGINS

On December 23 Wright, by and through his attorney, Timothy B. Anderson, initiated this action for the purpose of establishing his ownership of the nursery business and his right to the possession thereof. (R. vol.I, pp. 1-21A) On the same day the district court issued a temporary restraining order which, among other things, prohibited Humphries from incurring any further indebtedness in Wright's behalf or in behalf of Westside Nursery. (Addendum D; Plaintiff's Exhibit No. 3) A copy of this order was served on Humphries on December 26. This order was extended from time to time by stipulation of counsel until a hearing on

⁴ The jury would eventually decide that the \$15,000 note was Humphries' obligation and its findings would further demonstrate that the overdrafts would not have occurred but for Humphries' misappropriation of nursery account funds to his own use and his failure to reimburse the nursery account for the payment of obligations which he was to assume and discharge under the terms of the written agreements. (R. vol.IV, pp. 143-146)

the temporary possession of the nursery was conducted in March 1986. (T. 149-151, 365, Plaintiff's Exhibit No. 3)

On December 30, 1985, Humphries drew an additional \$5,000 against the \$30,000 note at Zions Bank. On January 8, 1986, he took another \$10,000 draw. Both draws were deposited in the nursery account. (T. 991-992)

Between December 1985 and March 1986, Humphries consistently repudiated the contracts, took the position that he was the owner of Westside Nursery and that the exchange and management agreements had been rescinded. (T. 186-187, 806-809) In his own words:⁵

Q. [BY MR. PENDLETON] "MR. CHAMBERLAIN: I'm not sure I understand the question.

"MR. ANDERSON: I asked him if he told Mr. Smith or represented to him that he owned the nursery, rather than Mr. Wright, at this point.

"THE WITNESS: Well, I think -- hey, I don't know. I could have, Tim. I could have. I haven't the slightest idea.

If you're asking me in my opinion who owns the nursery, as far as I'm concerned, I own the nursery flat out. No question about it in my mind at all. I own Westside Nursery."

Was that your statement on that occasion?

A. Yes. That was my statement as of March the 11th, at that particular day. Because I had not been paid from Mr. Wright.

(T. 808-809)

Following a hearing which was concluded on March 19, 1986, the district

⁵ The quoted language is from Darrel Humphries' deposition of March 11, 1986, regarding which he was questioned at trial.

court awarded Wright possession of the nursery pending adjudication on the merits and appointed John L. Miles, attorney-at-law and certified public accountant, to act as receiver. Wright, by order of the court, was required and did post an injunction bond in the amount of \$50,000 as a condition to his court-ordered possession of the nursery pending trial. (R. vol.I, pp. 303-305) The annual premium on this bond is \$1000. (T. 508)

Wright promptly discharged Humphries. (Defendant's Exhibit No. 29) Humphries demanded and was eventually paid the salary he claimed for services rendered from January through March 1986. (T. 810)

As court-appointed receiver, Miles took possession of the business records and requested the assistance of both parties in performing the duties imposed upon him by the court's order. (T. 249-250)

On March 31, 1986, Humphries answered Wright's Complaint and counterclaimed seeking, among other things, rescission of the exchange agreement and damages for fraud. Humphries specifically alleged the following misrepresentations:

A. That the real property to be conveyed had a fair market value in the sum of \$90,000.

B. That the real property to be conveyed was free and clear of all taxes and encumbrances.

C. That the real property could be developed immediately, and that there were no restrictions prohibiting development.

D. That the real property would be conveyed to Westside Nursery, a Utah limited partnership.

E. That the real property to be conveyed was the property viewed jointly by Wright and Defendants, and represented by Wright as the parcel having numerous trees located upon the same, thus enhancing its developmental potential.

(R. vol.II, p. 11)

Humphries also sought \$15,000 in damages for termination of his employment contract. (R. vol.II, pp. 15-16)

On September 17, 1986, the matter came on for hearing on several pending motions. Following that hearing, the district court made specific findings of fact which included the following:

1. Defendants accepted certain benefits of the October 4, 1985 Agreement for Purchase of Assets and Contract for Management Services, specifically, (A) A position as manager of the West Side Nursery from October 4, 1985, until plaintiff Wright obtained possession of the premises by order of the Court on March 25, 1986; (B) Payment of \$7,500 for managerial services for the months of January, February and March, 1986, during which time control of the nursery premises was in dispute; (C) Managerial compensation as manager for the months of October, November and December, 1985; (D) Monthly payment to defendant Humphries of a ten per cent (10%) surcharge over and above the regular rental payment from defendant Humphries to the lessor of the Westside Nursery property resulting in payment of over \$2,352.00 to defendant Humphries by plaintiff Wright since October 4, 1985; (E) Assumption [sic] by plaintiff Wright of the miscellaneous trade accounts of not more than \$5000.00, as setforth in paragraph 2 E of the Agreement for Purchase of Assets; (F) Regular and timely monthly rental payment on the West Side Nursery premises to Landlord pursuant to the terms of paragraph 8 of the Puchase [sic] of Assets Agreement.

2. Defendant Humphries has received no managerial fee since the business changed possession on March 25, 1986. His right to managerial compensation after that date remains an issue of dispute between the parties.

3. Acceptance of the benefits under the Purchase of Assets Agreement and the Contract for Management Agreement shows an affirmation of sufficient terms of the purchase and sale of the nursery that defendants have waived their rights to seek rescision [sic] of the Purchase of Assets Agreement and is further estopped from seeking such relief.

4. Defendants have received real property in Ogden, Utah, pursuant to the Agreement for Purchase of Assets and has

listed the same for sale by a licensed real estate broker.

5. Adequate remedies are available at law to satisfy defendant's claims herein.

* * *

Based upon these findings the district court made the following orders:

1. Defendants' Counterclaim as to their first Cause of Action for Recision [sic] shall be and is hereby dismissed with prejudice.

2. Defendants' Fifth Affirmative Defense based on the theory of recision [sic] is dismissed with prejudice.

3. Any and all defenses or causes of action by defendants herein seeking relief under the legal theory of recision [sic] are hereby dismissed with prejudice.

* * *

(R. vol.II, pp. 258-262)

Miles provided his report to the court on November 11, 1986, and was released from any further obligation to act as receiver. (R. vol.II, pp. 258-262)

Humphries never again viewed the Weber County property after he acquired it on October 4, 1985. (T. 100-101) As Humphries explained it:

Q. [BY MR. PENDLETON] And you've never gone back up there since you started this lawsuit to evaluate that property?

A. No. Because I have no authority to evaluate it. I wouldn't know if it was worth \$100,000 or 10 million dollars.

(T. 101)

He listed it for sale, and notwithstanding the fact that he was engaged in a lawsuit wherein he was contending the property was virtually worthless, he was able to sell it to a neighboring landowner for \$54,700 approximately one

month before trial. (T. 840-841, 862-863; Defendant's Exhibit No. 34)

Meanwhile, Wright continued his development of the portion of the property he had retained and eventually obtained approval of its subdivision. (Plaintiff's Exhibit No. 6)

While in possession of the business Darrel Humphries paid several of his personal obligations through checks drawn on Wright's nursery account. In addition to retaining Mr. Chamberlain by use of this account, Darrel Humphries paid pre-October 1985 taxes and accounts payable; paid \$5,544.75 against the obligations incurred in the purchase of his personal vehicles; paid his personal health insurance premiums; and paid a \$900 check to Ogden Appraisal, all with checks drawn on Wright's nursery account. (T. 145-147, 152-161, 227-229; Plaintiff's Exhibit Nos. 53, 54, 55, 57, and 58)

THE TRIAL

The matter was tried to a jury beginning on April 25, 1988.

Wright presented evidence for the purpose of establishing that he had not contracted to assume the January 1985 note at Zions Bank. (T. 366-367, 477-479)

The evidence at trial clearly established that Humphries, while employed as Wright's nursery manager, had misappropriated money to his own use (T. 145-147, 152-161, 227-229; Plaintiff's Exhibit Nos. 53, 54, 55, 57, and 58); that he had borrowed funds from Zions Bank without authorization and in violation of the restraining order (T. 511, 520-522, 526, 665-666); and that the need to borrow money for business purposes was necessitated only by Humphries'

misappropriation of funds (T. 783-799, 858).

Finally, Wright sought to establish that Humphries had failed to provide an adequate accounting and was therefore not entitled to reimbursement of any of the funds which he had borrowed and deposited in the nursery account following Wright's ouster.

Miles, the court-appointed receiver, testified that Humphries had failed to keep adequate business records. (T. 312-314) Specifically Miles testified that Humphries had failed to keep records from which the accounts receivable could be accurately reconstructed. (T. 251-252) Humphries' accountant, Grant Tucker, testified that ledgers containing that information existed. (T. 888) These ledgers were never produced for the receiver.

Miles also testified that Humphries had told him that no inventory had been taken in October 1985. Humphries failed to produce any such inventory for the receiver. (T. 318-320) Despite Miles' requests, Humphries also failed to provide a per-unit price which would enable the receiver to evaluate the physical inventory taken March 25, 1986. (T. 302-305)

Finally, Miles testified that the nursery accounts payable increased from \$11,772.86 on October 4, 1985 to \$50,492.60 when Wright regained possession of the business by court order on March 25, 1986. (T. 255-257)

Humphries then proceeded with proof on his counterclaim of fraudulent misrepresentation. Part of the evidence offered in support of that claim has been summarized earlier in this portion of the brief ("THE CONTRACT NEGOTIATIONS").

The thrust of Humphries' counterclaim lies in Wright's alleged statements

concerning the value of the subject land and the fact that on October 15, 1985, the Weber County commission declared a limited moratorium on all land lying within Uintah-Highlands Water and Sewer District. (Addendum E; Defendant's Exhibit No. 27)

The sewer servicing the subject property was completed and on line by July or August 1987. (T. 937, 975) Furthermore, the evidence clearly established that the subject property would have met the requirements of the limited moratorium and qualified for immediate development without the sewer. (T. 928-930, 980) Humphries' appraiser testified:

Q. [BY MR. PENDLETON] And, in fact, in your report, Mr. Schwartz - you report that Mr. Schwartz [Weber County Health Department] indicated that in his opinion, percolation tests and other tests would prove positive, and building permits could be obtained?

A. [BY MR. LESTER S. FROERER] Yes. Absolutely.

Q. And then you talked to Mr. Jay Anderson at the engineering office. Mr. Anderson had the same opinion about the perc tests on the subject property?

A. Right.

(T. 930)

Humphries attempted to establish fraud arising out of Wright's alleged failure to disclose the impending limited moratorium in the area. The only proof regarding Wright's knowledge of any pending moratorium is found in Wright's own testimony. He testified that he was contemplating the subdivision and development of his 22-acre tract and had approached officials of Weber County and the Uintah-Highland Water and Sewer District. He was advised that there had been complaints about ground water contamination in the area. He was also

advised by a deputy Weber County attorney that the health concerns that were being expressed were not of sufficient magnitude to justify further governmental regulation of the development of the property. (T. 496-498, 551-567)

Humphries' appraiser, using a developmental approach to value, testified that in his opinion the subject three acres had a value of \$64,000 on October 4, 1985.⁶ Under his first scenario, Froerer assumed that the property would pass required percolation tests and would qualify for development without the sewer. Froerer's opinion also assumed that the property would be divided into four building lots which could be sold for \$24,000 each. After subtracting the direct costs of development and indirect costs such as interest and sales commissions, he calculated the net sales proceeds to be \$69,900 which he reduced to "present worth" by applying a discount rate of 12 percent. (T. 906-914)

Froerer was also allowed to state an opinion regarding value based upon a second scenario in which he assumed that the property would not qualify for development until the sewer was on line and that the sewer would not be available to the property for a period of five years. The greatest variable in this formula was the reduction to present worth based upon the five-year delay in development. Under this scenario his opinion of value was \$35,000. (T. 918)

Wright called an appraiser by the name of Wib Cook who testified, using a market analysis approach, that in his opinion the property had a value of \$84,000 on the date of his appraisal in July 1986. He also testified that in his opinion the value would have been substantially the same on the date of the transaction,

⁶ This opinion was in fact based upon an appraisal of 2.81 acres. (T. 940-942)

October 4, 1985. (T. 962-972)

Cook testified that part of his initial investigation of the property included an examination of tax records which indicated that the subject three acres was valued at \$134,860 for property tax purposes and its assessed value was \$104,688. (T. 968)

During the course of the trial questions were raised concerning the value of the inventory which Wright received through the subject exchange. Humphries testified that he and an employee named Phil Tyler had inventoried the nursery property immediately prior to the exchange. Based on that inventory and in the course of their negotiations, Humphries advised Wright that the inventory had a value of \$60,000. (T. 759-771, 779-780) In fact, the written inventory in Humphries' possession totaled only \$45,911.90. (T. 779-780)

Humphries nevertheless insisted that he believed the inventory to be worth \$60,000 and further introduced testimony indicating that he had mistakenly understated its value at the time the trade was negotiated. (T. 759-771)

In support of his claim for indemnification Humphries sought to justify borrowing additional funds from Zions Bank on the basis that he was not obligating Wright or Westside Nursery but borrowed the funds in his personal capacity. (T. 373-374)

Following the presentation of all the evidence, Wright moved for a directed verdict against Humphries on the issues of fraud and indemnification. These motions were denied and the case was submitted to the jury by special verdict. (T. 1050-1056)

THE VERDICT

The jury determined that the \$15,000 note executed by Humphries in favor of Zions Bank on January 3, 1985, was Humphries' responsibility and that Wright had not contracted to assume the obligation. (Addendum F; R. vol.IV, pp.143-146)

The jury also found that Wright was entitled to the accounts receivable owed Westside Nursery as of October 4, 1985, and that Humphries had misappropriated \$6,805 of Wright's money for his personal use. Humphries was held responsible to pay the accounts payable as of October 4, 1985, to the extent that said accounts exceeded the sum of \$5,000. (R. vol.IV, p.144) In so concluding it was established that Humphries had used \$6,772 of Wright's money to service accounts payable which Humphries should have paid. (R. vol.IV, pp.143-146; T. 1146-1147)

The jury concluded that Wright should be required to reimburse Humphries the funds he had borrowed and deposited in the nursery account following Humphries' repudiation of the exchange contract. (R. vol.IV, pp.144-145)

The jury found that both parties had breached the agreements and that Humphries had been damaged in the amount of \$15,000 as a result of his termination as Wright's nursery manager and should recover \$10,000 in attorney's fees. (R. vol.IV, pp.143-146)

On the fraud issue, the jury by a 6-to-2 verdict concluded that Wright had made fraudulent misrepresentations concerning the value of the Weber County property. The jury then concluded that Humphries should be awarded

\$38,582 in damages. This figure was calculated by beginning with the sum of \$90,000 and subtracting therefrom \$54,700 which was the price obtained by Humphries in the subsequent sale of the property. The jury then added the sum of \$3,282 which was in fact a hypothetical six percent real estate commission which the jury assumed was includable as an element of damages.⁷ (R. vol.IV, p.145; T. 1147)

POST-TRIAL MOTIONS

Following the rendition of the verdict, Wright moved for judgment notwithstanding the verdict or, alternatively, for a new trial on the issues of fraud and indemnification. (R. vol.IV, pp.147-149)

Wright also argued that the application of well-established principles of law to the jury's findings should result in the entry of a judgment of no cause of action on Humphries' claim for wrongful termination. Alternatively, Wright moved

⁷ The jury understood the testimony relating to Mr. Froerer's developmental approach to value to indicate that a real estate commission was to be included as an element of damages. Note the foreman's response to the court's questioning:

THE COURT: All right. And the other area I'm wondering about is the \$38,582 for -
- under the fraud complaint.

What was the basis of that award?

[THE FOREMAN]: We subtracted from the sale price of the home, the price that the seller would have received. I think one of the appraisers stated that the real estate fee was 6 percent, which we thought was low, but that's what we used. We subtracted that from the \$54,000 and subtracted that from the \$90,000, which was claimed as the value of the property.

THE COURT: So it was based on the \$90,000 representation and the actual sale price of the property principal minus the real estate fee?

[THE FOREMAN]: The actual sale price less the commission price.

(T. 1147)

for a new trial on the issue of wrongful termination in the event the court were to determine that the jury's findings mandated a verdict in Humphries' favor on that issue. (R. vol.IV, pp.147-149)

Finally, Wright moved for exoneration of the injunction bond filed when he took possession of the nursery under court order in March 1986. This motion was made on the grounds that the evidence established and the court had previously ruled that Wright was entitled to the possession of the nursery. Consequently no finding had been made or judgment entered supporting a conclusion that the temporary restraining order or preliminary injunction had been wrongfully issued. (R. vol.IV, pp.185-193)

The district court concluded that the evidence did not justify a verdict in Humphries' favor on the wrongful termination claim and further concluded that an application of the law to the jury's findings established Wright's justification in terminating Humphries' employment. (Transcript of July 12, 1988, hearing pp. 10-11)

The district court denied Wright's motions for judgment notwithstanding the verdict and for new trial on the issues of fraud and indemnification and also denied Wright's motion to exonerate the injunction bond. (R. vol.IV, pp.249-251)

Judgment was entered on the verdict and this appeal was prosecuted from that judgment and from the court's denial of Wright's motions for judgment notwithstanding the verdict, new trial, and exoneration of the injunction bond. (Addendum G; R. vol.IV, pp.240-248, 252-253)

SUMMARY OF THE ARGUMENT

Humphries failed to establish a prima facie case of fraudulent misrepresentation. Statements regarding value are not as a general rule actionable as fraud and the facts of this case do not bring it within any of the recognized exceptions to this rule.

Even if an opinion regarding the value of the subject property is deemed actionable, the evidence fails to establish that Wright made any statement recklessly or with knowledge that it was false.

Humphries failed to keep or provide business records which would facilitate an adequate accounting of his management of the nursery business and should accordingly be denied indemnification. Furthermore, the district court erred in refusing to instruct the jury concerning the elements and burden of proof which Humphries was required to establish and carry in order to sustain his claim for indemnification.

Humphries failed to establish entitlement to any contractual remedy and is therefore not entitled to recover attorney's fees.

Finally, Humphries suffered no loss resulting from the issuance of the order giving Wright possession of the nursery and the injunction bond should be exonerated.

ARGUMENT

POINT I

HUMPHRIES FAILED TO ESTABLISH A PRIMA FACIE CASE OF FRAUDULENT MISREPRESENTATION.

A.

ELEMENTS OF FRAUD

The elements of fraud and deceit are well established in the law of this jurisdiction. Pace v. Parrish, 122 Utah 144, 247 P.2d 273 (1952) remains the leading case and outlines the nine elements of actionable fraud. They include the following:

(1) That a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

122 Utah at 144-145.

B.

STATEMENTS REGARDING VALUE AS FRAUD.

1. GENERAL RULE

It is a well-settled general rule that representations regarding the value of real property are ordinarily to be regarded only as mere expressions of opinion and do not constitute fraud. See generally 37 Am Jur 2d, Fraud and Deceit, Sections 112, 113, 119, and 122 (citing authority from the vast majority of the American jurisdictions).

In commenting on the basis for the general rule, American Jurisprudence, Second Edition, reads as follows:

The general rule that fraud cannot be predicated on representations as to value is based on the fact that value is largely a matter of judgment and estimation, about which men may differ, and it is

therefore unlikely that any statement as to value was material in the sense that it was an inducing cause of a transaction. Such representations can rarely have induced the other party to enter into the contract without negligence on his part. It has been declared that the extent of supply and demand relative to an article of commerce, upon which its value principally depends, is in a great measure a matter of opinion, upon which different minds may form different conclusions; to deprive the better informed, more enterprising, and more cautious party of the benefit of his contract, on account of representations, the correctness of which the other party ought to judge for himself, would tend more to encourage ignorance, sloth, and recklessness than to repress dishonesty. The law does not deny its aid in such case because it looks with indulgence upon a want of candor and sincerity, but because it will not encourage that indolence and inattention which are no less pernicious to the interest of society, and will not relieve those who suffer damage by reason of their own negligence or folly.

37 Am. Jur. 2d, Fraud and Deceit, Section 113 (1968).

The Utah case which appears to be most directly on point is Baird v. Eflow Inv. Co., 76 Utah 232, 289 P. 112 (1930). In that case the plaintiff sought rescission of a contract involving the exchange of real property claiming that he had been fraudulently induced to trade his ranch, which he valued at \$50,000, for the defendant's interest in the Prescott apartments in Salt Lake City. Plaintiff complained that the value of the apartment building had been represented to be \$125,000, subject to an indebtedness in the amount of \$75,000. At trial, plaintiff produced evidence that the apartment building was only worth \$82,000 while defendants produced testimony indicating its value at somewhere between \$95,000 and \$125,000. At the close of the case, the court refused to submit the matter to the jury for determination and dismissed plaintiff's complaint. Plaintiff appealed.

After concluding that plaintiff had failed to produce evidence of an alleged misrepresentation regarding actual rents generated in connection with the

operation of the apartment building, the Utah Supreme Court turned its attention to the issue of whether or not a fraud claim could be maintained where the allegations of misrepresentation are limited to opinions of value in the absence of proof of any misrepresentation regarding any specific fact upon which an opinion of value would likely be based. In affirming the judgment of dismissal, the Court announced its adherence to the general rule:

It is the general rule that misrepresentations as to value do not ordinarily constitute fraud, as they are regarded as mere expressions of opinion or "trader's talk" involving matter of judgment and estimation as to which men may differ. [Citations omitted]

76 Utah at 238.

In Chaney v. Cahill, (App) 11 Ohio L. Abs. 472 (1931), the plaintiff traded his 200-acre farm for a brick business property in the city of Columbus, Ohio. Concluding that he had been defrauded he abandoned the property, refused to receive the rent and brought suit to set aside the transaction. He alleged that the Columbus property was represented to him as being worth \$30,000 to \$35,000 when in fact it was not worth over \$15,000 and that the existing leases on the brick business property had been made for the purpose of inducing the transaction, were not in good faith, and did not reflect the true rental value of the property.

The Ohio court concluded that there was no evidence that the rental value of the city property had been misrepresented and then addressed the issue of the disparity in the values assigned to the property:

While it appears that Chaney has suffered considerable property loss by reason of the trade, it is such a loss as frequently happens where parties are dealing in property with which they are unfamiliar. Chaney was a farmer and when he undertook to deal in city property he was probably out of his business element. Cahill had the right to place such value on his property as he desired.

11 Ohio L. Abs. at 473.

Plaintiff's petition for rescission was dismissed.

The Court's attention is directed to the recent case of Dolson Co. v. Imperial Cattle Co., Mont., 624 P.2d 993 (1981). In Dolson, the defendant had become obligated to the plaintiff for the sum of approximately \$142,000. Following lengthy negotiations, the amount of the obligation was liquidated at \$55,000. Defendant owned certain property which he represented to be commercial property located in "downtown" Kalispell, Montana. This property was to provide security for the payment of the agreed settlement. Plaintiff was to receive a copy of the property description, title insurance, and a copy of the recent appraisal which defendants had allegedly obtained indicating that the Kalispell property had a market value of \$45,000.

Thereafter negotiations continued by phone and correspondence and approximately three months later plaintiff agreed to accept the Kalispell property in payment of \$45,000 of the \$55,000 settlement. A warranty deed was tendered and accepted notwithstanding the fact that the property had never been identified for plaintiff.

Plaintiff then traveled to Kalispell where he contacted a local realtor for the purpose of listing his newly-acquired property. At that time plaintiff discovered that the property consisted of slightly over one acre of undeveloped ground situated directly between a Pacific Power and Light substation and the railroad tracks. While there was a narrow corridor leading from the public street along and behind the substation to the subject property, the property itself had no frontage

on any public road. Furthermore, there existed substantial questions regarding legally enforceable access to the property. At its closest point, the property was a distance of five blocks from downtown Kalispell.

Plaintiff engaged an MAI appraiser who appraised the parcel at between \$1,250 and \$8,900, depending upon the resolution of uncertainties regarding access.

Plaintiff initiated an action for fraudulent misrepresentation and from an adverse judgment appealed to the Supreme Court of Montana which affirmed the trial court noting:

This Court has long adhered to the rule that statements of opinion are pre-eminently subject to the common law doctrine of caveat emptor. [Citation omitted] Statements as to the value of property are generally considered declarations of opinion and will not constitute a proper basis for rescission. [Citation omitted]

* * *

The common law provides reasonable protection to purchasers against fraud and deceit. However, it does not go to the romantic length of offering indemnity against the adverse consequences of folly and indolence or a careless indifference to information which would enlighten the purchaser as to the truth or falsity of the seller's assertions as to value. In such an instance, every person reposes at his own peril in the face of another's opinion when he has ample opportunity to exercise informed judgment. [Citation omitted]

624 P.2d at 996.

Other courts have even gone further in denying relief based upon allegations of fraudulent misrepresentation of the value of land. In Eaton v. Sontag, 387 A.2d 33 (Maine 1978), the Supreme Judicial Court of Maine reaffirmed a precedent which had been the law of Maine for over 100 years when it announced that "misrepresentations as to value and quality of land made by the

vendor, even though made with fraudulent intent, are not actionable." 387 A.2d at 37. See generally Am. Jur. 2d, Fraud and Deceit, Section 53 (1968).

While the court noted that the result would likely be different had a misrepresentation of any material fact reflecting upon the value had been made, where the only alleged misrepresentations were opinions of value and general statements regarding the quality of the real estate, relief would be denied. It is also noted that in Eaton, past association between vendors and purchasers as social friends for 15 years did not establish a confidential relationship which would have required a higher standard of conduct.

In Frazier v. Southwest Sav. and Loan Ass'n., 134 Ariz. 12, 653 P.2d 362 (1982), the Arizona Court of Appeals reversed a judgment against defendant Southwest Savings and Loan Association entered upon a jury verdict and remanded the case to the trial court with directions to enter judgment in favor of Southwest.

Southwest had made a loan secured by 68 lots in a certain subdivision located in Scottsdale, Arizona. Later plaintiff became interested in trading some unmounted gems for the equity in the subdivision. When the parties met to discuss the proposed exchange, Southwest's vice president attended for the purpose of obtaining information necessary to qualify plaintiff to take over the loan on the subdivision. During the meeting the owners of the subdivision apparently made misrepresentations concerning the status of the subdivision and the required municipal and state approval. Southwest did not make any misrepresentations concerning governmental approval of the subdivision but had appraised the

property at \$1,020,000.

Plaintiff then entered into a contract to purchase the subdivision following which he attempted, through his real estate agent, to make sales of subdivision lots. Unable to sell the lots, plaintiff could not raise the funds necessary to service the Southwest obligation and defaulted. Discussion commenced between plaintiff and Southwest began discussing the execution of a deed in lieu of foreclosure at which time Southwest had reappraised the property downward to \$832,000.

Ultimately plaintiff brought an action for fraud and negligent misrepresentation contending that Southwest had made affirmative misrepresentations in appraising the property at a value of \$1,020,000 and in representing to plaintiff that the lot sales would be so good that plaintiff would not have to come up with any other money to meet his mortgage obligations.

The jury found for plaintiff and following the trial court's denial of Southwest's motion for judgment notwithstanding the verdict, the appeal was prosecuted.

In reversing the trial court and remanding with instructions to enter judgment in favor of Southwest, the court of appeals reasoned:

Mere representations as to value are generally considered expressions of opinion and will not support a claim for fraud. [Citations omitted] Furthermore, to constitute actionable fraud, a representation must relate to a past or existing fact, and cannot be based on unfulfilled promises or statements as to future events unless such are made with the present intention not to perform. [Citations omitted]

The alleged misrepresentation concerning the appraisal is a mere representation as to value, the alleged misrepresentation concerning the sales of lots is a statement as to future events. Accordingly, in the absence of other alleged misrepresentations, [plaintiff's] action for fraud cannot be based on affirmative misrepresentations.

653 P.2d at 365-366.

2. REPRESENTATIONS OF PRICE IN AN ESTABLISHED MARKET

In the district court Humphries correctly argued that misrepresentation as to the value of property may constitute fraud where the representation relates to the market value of property consistently sold at an established price in a recognized market. See generally 37 Am. Jur. 2d, Fraud and Deceit, Section 118 (1968). This exception to the general rule is recognized in Utah.

In Beaver Drug Co. v. Hatch, 61 Utah 597, 217 P. 695 (1923), plaintiff purchased a certain business in Beaver, Utah. Plaintiff alleged that under the terms of the contract, the business was represented as having an inventory of stock of merchandise and drugs which "at cost price in Beaver City, would total at least \$4,000." Plaintiff alleged that this representation was false and untrue and that defendant knew it to be untrue because of his long familiarity with business, the stock therein and the cost thereof. Defendant contended that any representations as to value were mere expressions of opinion and not actionable as fraud. The Utah Supreme Court agreed with the general statement of law but found the case to fall within an exception to the rule:

This doctrine is unchallenged. However, it has no application in the instant case. Representation as to the price of the goods was not a mere expression of opinion, but a statement of fact. The statement was that the goods would inventory for \$4,000.00 and that defendant would guarantee the same. [Emphasis added]

61 Utah at 603.

On petition for rehearing the Court made the following clarification:

Appellant on application for a rehearing erroneously assumes that the opinion of the court holds him liable for mere expressions of opinion as to value. Such is not the case. Appellant represented that the goods would inventory a certain price and that he would guarantee the same.

61 Utah at 605.

See also Schwartz v. Tanner, 576 P.2d 873 (Utah 1978).

Statements regarding the value of personal property sold in recognized wholesale and retail markets at prices established or suggested by manufacturers or wholesalers are obviously statements of fact rather than mere expressions of opinion. Conversely, the law recognizes that each parcel of real estate is unique. It is the recognition of the fact that "no piece of land has its counterpart anywhere else" that demonstrates the inadequacy of legal remedies and allows a suit in equity for specific performance. See generally 71 Am. Jur. 2d, Specific Performance, Section 112 (1973).

In opposition to Wright's motion for judgment notwithstanding the verdict, Humphries contended that Wright had represented that the surrounding property "consistently sold for \$30,000 an acre" and that therefore the case was brought "squarely on point" with the exception to the general rule relating to statements regarding the value of property consistently sold in a recognized market. (R. vol.IV, pp.202-203)

The evidence in fact demonstrated the opposite: the surrounding properties had sold at markedly diverse prices depending upon its location and individual qualities. See Addendum C-2. In commenting upon transactions involving neighboring properties, Humphries himself observed:

Q. [BY MR. CHAMBERLAIN] What amount of dollars did he tell you

had been spent?

A. Different values for different properties. Some, I believe, were going as high as \$100,000 per acre, is what he explained to me.

* * *

(T. 714)

3. REPRESENTATIONS INTENDED AS STATEMENTS OF FACT VS. OPINION

In response to Wright's motion for judgment notwithstanding the verdict, Humphries cited 37 Am. Jur. 2d, Fraud and Deceit, Section 112 (1968) quoting the following portion of that section:

Whether a misrepresentation as to value is merely an expression of opinion, or an affirmation of fact or intentional misrepresentation to be relied upon, it is generally regarded as a question of fact to be determined by the trier of facts.

The cases cited in support of the above-quoted proposition are clearly distinguishable from the case at bar. In each of these cases the party making the representations regarding value either had knowledge that their representation was false or made the representation in connection with other misrepresentations regarding facts which would materially affect the value of the property.

Wright submitted the following proposed instruction:

The owner of property who proposes the sale or exchange thereof may express his opinion regarding the value of the property, and if his opinion is stated in good faith, a discrepancy between that opinion and the appraised value of the property is not actionable as fraud. (R. vol.IV, p.45)

Opposing counsel contended that "good faith" was not a defense to a claim for fraudulent misrepresentation citing Smith v. Warr, 564 P.2d 771 (Utah

1977). The trial court concluded that evidence of good faith may be admissible for some purposes and inadmissible for others and ultimately refused to give any instruction on good faith fearing that any attempt to instruct would confuse rather than enlighten the jury. (R. vol.IV, p.45; T. 448-466, 1057-1060)

C.

CONCEALMENT AS FRAUD

The limited moratorium declared by the Weber County commission has received much attention. The only testimony regarding the nature and extent of Wright's knowledge regarding any proposed moratorium was provided through testimony during which he explained the inquiries he had made of Richard Schwartz, Graham Shirra and a deputy county attorney. The evidence is un rebutted that Wright was advised that ground water conditions were not serious enough to justify further governmental intervention.

When the limited moratorium was eventually declared it apparently had little impact upon the potential development of the subject property. Humphries' own appraiser conceded that both Schwartz and Anderson were of the opinion that the subject property would meet all of the requirements of the limited moratorium and could be developed immediately.

Humphries acknowledged that Wright had advised him that there was no sewer on the property and that Wright expected the sewer to be installed within 18 months. The sewer was in fact completed approximately 21 months after the date of the exchange.

Humphries contends that Elder v. Clawson, 14 Utah 2d 379, 384 P.2d

802 (1963), is instructive. In Elder, plaintiffs sought and were granted rescission of a land contract on the basis that defendants' real estate agent had failed to disclose the fact that the land was under quarantine for a noxious weed known as Russian knapweed. Under the quarantine, feed produced on the property could not be sold or used elsewhere. In that case the district court specifically found that (1) the quarantine had been in place for some seven years prior to the date of the sale; (2) the defendants and their agent had actual knowledge of the quarantine; (3) before the sale defendants' agent not only failed to disclose the fact of the quarantine but also made statements which inferred that the weeds could be eradicated;⁸ and (4) the existence of the weed and the quarantine materially affected the economic use of the farm.

The distinctions between Elder and the instant case are more than technical and superficial. First, in the instant case, the limited moratorium had not been declared at the time the parties negotiated and executed the subject contract. Furthermore, there is no evidence that Wright knew the moratorium was pending. Even after the limited moratorium was declared, the testimony clearly established that officials of Weber County and other knowledgeable individuals held the opinion that the subject property would meet all the conditions of the

⁸ In his concurring opinion, Justice Crockett elaborated on the extent of the conversation between defendants' agent and plaintiffs regarding the presence of the weed:

[Defendants' agent] pointed out the weeds to Mr. Elder and asked him if he knew what they were to which the latter replied: "Yes, that is ragweed * * *?"

[Defendants' agent] replied, "That is all it is. It is just starting. Get yourself a spray can and spray it and you will be done with it."

14 Utah 2d at 384.

moratorium and would qualify for immediate development.

In resisting Wright's motion for judgment notwithstanding the verdict, Humphries argued:

The fact that [the limited moratorium] was enacted less than two weeks after this transaction occurred could, in the minds of the jury, could [sic] give rise to an inference that Plaintiff knew more than he disclosed at the time of trial, particularly when viewed with the circumstances surrounding his abrupt desire to get the closing document signed. (R. vol.IV, p.208)

The position taken by Humphries is troubling because it suggests that the jury should be allowed to speculate concerning what, if any, additional information Wright had concerning the limited moratorium when in fact there is no evidence to indicate that there was anything else to be known. Indeed, to suggest that the jury should be allowed to speculate on the extent of Wright's knowledge and from that conjecture draw a conclusion of fraudulent concealment is to suggest an entirely new standard relating to the proof of fraud claims.⁹

D.

KNOWLEDGE OF FALSITY

The record is absolutely devoid of any evidence indicating Wright possessed knowledge of the falsity of any representation made. On the contrary, the evidence is un rebutted that:

1. At the time of the transaction Weber County valued the subject three acres at \$134,860 for property tax purposes and placed upon it an assessed value

⁹ From an ethical standpoint, the position taken by counsel is most disturbing in light of the fact that counsel participated in the depositions of Richard Schwartz and Graham Shirra and is fully aware of the fact that their depositions contain nothing which significantly contradicted Wright's testimony.

of \$104,688. (T. 968)

2. Wright was aware of a letter of opinion (Defendant's Exhibit No. 32) written by Brent Dopp, a Weber County real estate broker, to Ed Sappington at Sun Capital Bank stating that in his opinion the 5.39 acres located on the south end of the same 22-acre tract had a value of \$32,500 per acre.

3. There is nothing in the record indicating that Wright had recently had the subject three acres appraised or received any letter of opinion indicating that the property was worth less than \$30,000 an acre.

E.

RECKLESSNESS AS FRAUD

Recklessness was the theme most forcefully argued by Humphries' counsel in closing. The evidence will not support a finding of recklessness.

The values placed upon the subject property for property tax purposes, the values placed upon adjacent property for commercial loan purposes, and Wright's own personal knowledge of comparable sales in the area all indicated a value in the neighborhood of \$30,000 per acre.

F.

THE "CLEAR AND CONVINCING" STANDARD ON REVIEW

In examining the sufficiency of the evidence to support the jury's finding of fraud, the appellate court should examine the evidence with reference to the standard of proof required to sustain such a finding. See generally Northcrest, Inc., v. Walker Bank and Trust Co., 122 Utah 268, 248 P.2d 692 (1952); Lynch v.

MacDonald, 12 Utah 2d. 427, 367 P.2d 464 (1962).¹⁰ In Northcrest, supra, the Utah Supreme Court defined the term "clear and convincing evidence" and approved the application of that standard of proof in the review of cases on appeal:

For evidence to be clear and convincing it must be such that there is no serious or substantial doubt as to the correctness of the conclusion. [Citation omitted] The evidence so satisfied the mind of the trial court. His finding should not be disturbed unless we must say that no one could reasonably find the evidence to be clear and convincing. [Emphasis added]

122 Utah at 280.

Lynch, supra, was a fraud case where the finding of fraud was sustained on appeal with the following observation:

A careful reading of the entire record establishes by clear, satisfactory and convincing proof that the respondents were the victims of a fraud perpetrated by their coadventurer, Doc MacDonald, assisted by Morgan, who knowing all the facts, actively aided and abetted Doc MacDonald in the consummation of this fraud. Morgan, therefore, was as much guilty as was Doc MacDonald. [Citation omitted] Where the findings and judgment are supported by the degree of proof mentioned they cannot be disturbed on appeal. [Citation omitted] [Emphasis added]

12 Utah 2d at 433.

The evidence of fraud presented in the instant case is anything but clear and convincing. From the allegations of fraudulent misrepresentations to fraudulent concealment to scienter and recklessness, the evidence falls far short of establishing fraud by such a degree as to remove all "serious and substantial

¹⁰ See also Russell v. Larkin, Case No. 870264-CA, an unpublished opinion of the Utah Court of Appeals, filed October 25, 1988, wherein this Court acknowledged the application of the clear and convincing evidence standard in affirming a directed verdict dismissing a complaint alleging fraudulent misrepresentation.

doubt."

POINT II

THE JURY'S DETERMINATION OF THE VALUE OF THE REAL PROPERTY IS UNSUPPORTED BY THE EVIDENCE AND UNFOUNDED IN LAW.

The jury awarded Humphries the sum of \$38,582 on his claim of fraudulent misrepresentation. This figure was arrived at by reference to the sale price Humphries actually obtained when he sold the property in March 1988. (T. 1147) There was no evidence indicating that the property had been sold at fair market value. "One sale does not make the market."

To the figure of \$35,300 (\$90,000 minus \$54,700), the jury added the sum of \$3,282, a figure representing six percent of the sale price, \$54,700, concluding that the obligation to pay the real estate sales commission should be imposed upon Wright. (T. 1147)

POINT III

THE EVIDENCE DOES NOT SUPPORT A JUDGMENT REQUIRING PLAINTIFF TO INDEMNIFY DEFENDANT HUMPHRIES ON HIS EXECUTION OF THE \$30,000 PROMISSORY NOTE IN FAVOR OF ZIONS BANK

The evidence presented at trial clearly demonstrated that the overdrafts in the Westside Nursery account in mid-December 1985 were directly attributable to the payment of obligations which should have been paid by Humphries. Had no further funds been withdrawn from Zions Bank after the initial withdrawal of the \$15,000 on December 13, 1985, it is obvious that Wright would have had no

obligation to reimburse or indemnify Humphries because the first \$15,000 does nothing more than reimburse the account the funds which Humphries was required to repay.

The difficulty in Humphries' position arises out of the fact of the issuance of a temporary restraining order on December 23, 1985, enjoining him from incurring further obligations for which Wright or the nursery would be responsible. Notwithstanding the fact that this order was served upon Humphries on or about December 26, 1985, he withdrew an additional \$15,000 from Zions Bank.

While it is undisputed that these funds were deposited into the Westside Nursery account, Humphries should be denied indemnification therefor for three reasons: (1) the funds were not necessary to cover obligations which Wright had already incurred, (2) the funds were withdrawn from the bank and deposited in the Westside nursery account in direct violation of express instructions from Humphries' employer and the court order, and (3) Humphries failed to comply with the legitimate requests of the court-appointed receiver who was attempting to account for the expenditure of all loan proceeds which accounting could only be accomplished by a comparison of the October 4, 1985, inventory and the March 25, 1986, inventory.

It must be borne in mind that from mid-December through late March, Humphries was in possession of the nursery, denying Wright's ownership and any corresponding duty to Wright as his employer.

As a general principle of law, an agent is under a duty to keep and render to his principal an account of all money or other property which he has

received or paid out on behalf of his principal. If the principal proves or the agent admits that the agent has come into possession of money or other property for the principal, the agent has the burden of proving that he had paid it to the principal or disposed of it in accordance with his authority. See generally Restatement Second, Agency, Section 382, Comment e.

An agent who is disloyal or insubordinate is not entitled to indemnity if he knowingly acts without authority and officiously. Furthermore, even if he acts in good faith believing that his actions are authorized, he is entitled to indemnity only to the extent that the principal has in fact benefited as a result of the agent's acts. See generally Restatement Second, Agency, Section 469, Comment d, and Section 439, Comment i. Comment i reads in relevant part as follows:

An agent who, without authority and officiously pays a debt of the principal or assumes an obligation on the principal's account is not entitled to indemnity although the payment results in a benefit to the principal. [Citation omitted] If, however, he acts in good faith mistakenly believing that he is authorized or that his principal's interest require his action, he may be entitled to indemnity to the extent that the principal has benefited, in accordance with the principles of restitution. [Citations omitted]

The evidence clearly established that Humphries knew that his authority to incur further debt on behalf of Wright or Westside Nursery had been terminated by order of the district court.

Even if the jury believed that Humphries was acting in good faith, mistakenly believing that he was authorized or that Wright's interests required his action, his right to indemnity is commensurate with his ability to establish, through an appropriate accounting, the extent of the benefit conferred upon his principal.

Wright requested and proposed numerous instructions advising the jury

of the nature of Humphries' duty to Wright as his nursery manager and the extent of Humphries' burden of proof on his claim for indemnification.¹¹ These instructions were refused and exceptions were taken. (R. vol.IV, pp. 46-55; T. 1057-1060)

Without appropriate instruction the jury was left without guidance concerning the burden Humphries must carry in order to establish the right to reimbursement or indemnification. Once Humphries established that the funds had been initially deposited into the nursery account the district court in effect shifted the burden of proof to Wright. The result was that Humphries' ouster of his employer, his violation of his employer's instructions and the court's order were without consequence.

POINT IV

DEFENDANTS ARE NOT ENTITLED TO ATTORNEY'S FEES

Attorney's fees are awardable only if authorized by statute or by contract. Golden Key Realty, Inc. v. Mantas, 699 P.2d 730 (Utah 1985); Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667 (Utah 1982). If an award of attorney's fees is based on contractual stipulation, any such award is allowed only in accordance with the terms of the contract. Trayner v. Cushing,

¹¹ One of the refused instructions read as follows:

You are instructed that before Defendant Humphries is entitled to seek indemnification for any funds borrowed in connection with his execution of a certain promissory note in favor of Zions First National Bank dated December 5, 1985, he must show that in truth and in fact any funds withdrawn on said promissory note were used for the purpose of discharging Plaintiff's obligations, that the draw against the promissory note was authorized by Plaintiff, and that the funds were not drawn in violation of the order of this court. (R. vol.IV, p.48)

688 P.2d 856 (Utah 1984); see also L&M Corp. v. Loader, 688 P.2d 448 (Utah 1984) (contractual provision allowing attorney's fees was not applicable where the contract was not subject of litigation).

The only relevant contractual provision relating to liability for attorney's fees is contained in the Agreement for Purchase of Assets (Plaintiff's Exhibit No.

1). Paragraph 10(c) states:

In the event of any legal action brought by either party for the purpose of enforcing performance of any covenant or representation hereunder or for damages for breach thereof, the prevailing party shall be entitled to recover from the breaching party attorneys' fees and costs as shall be determined by the Court.

Wright succeeded in establishing the enforceability of the subject contracts. He obtained a declaratory judgment establishing that he had not contracted to assume Humphries' obligation to discharge the January 1985 promissory note in favor of Zions Bank. He also established his entitlement to \$13,577 which Humphries had misappropriated in the course of his management of the nursery.

Humphries failed in his attempt to avoid the enforceability of the contracts but succeeded in obtaining a money judgment on his claim of fraudulent misrepresentation. Whether or not the claim for fraudulent misrepresentation is sustained on appeal, this claim does not provide a basis for an award of attorney's fees since it falls outside the contractual provision relating to liability for attorney's fees.

It is respectfully submitted that Wright has or should prevail on all issues related to the enforcement of the underlying contracts and therefore Humphries is

not entitled to recover attorney's fees incurred in connection with the prosecution and/or defense of this action.

POINT V

THE DISTRICT COURT ERRED IN DENYING THE EXONERATION OF THE PRELIMINARY INJUNCTION BOND.

The relevant provisions of Rule 65A, Utah Rules of Civil Procedure, read as follows:

Except as otherwise provided by law, no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. [Emphasis added]

The injunction bond posted by Wright only provides security for damages as a result of a party being "wrongfully enjoined or restrained". The injunction bond covers liability only for damages resulting from the operation of the injunction.

A party applying for relief under Rule 65A is not required to give security for the payment of any judgment which may be taken against him on any theory. His obligation to provide security is limited to costs and damages incurred as a result of the wrongful issuance of the temporary court order. See generally 42 Am.Jur.2d, Injunctions, Section 315. Accordingly, liability on the bond does not arise, and a cause of action does not accrue, until there is a final adjudication establishing that the plaintiff was not entitled to injunctive relief. See generally 42 Am.Jur.2d, Injunctions, Section 362. Such a determination has never been made

in this case and in fact the district court, on November 11, 1986, dismissed Humphries' Counterclaim for rescission thus extinguishing any claim for damages arising out of Wright's court-ordered possession of the nursery business.

None of the damages awarded Humphries in this action arise out of the wrongful issuance of any court order. Wright has posted a cash supersedeas bond in connection with the prosecution of this appeal. This bond provides adequate security for the payment of any sum to which Humphries may be entitled.

There is no justification for requiring the injunction bond to remain in force and effect through the pendency of this appeal. Wright is obligated to continue to pay a annual premium in the amount of \$1,000 while the bond remains in force. Furthermore, in the event Humphries takes any action in an attempt to enforce the forfeiture of the bond, Wright will incur liability to his bondsman for the payment of attorney's fees and other costs associated with the defense of any forfeiture proceedings.

CONCLUSION

The value of real property is subjective. It is a matter of opinion. The fair market value of property is the price which would induce a willing seller to sell and a willing buyer to buy.

In this case the jury was charged with the duty of determining the value of the subject real estate by clear and convincing evidence. Such a finding would not only establish the extent of the damages but, under Humphries' theory of the case, establish whether or not fraud had in fact been committed.

The jury accomplished its task by disregarding the opinions of the licensed appraisers and fixing the value based upon the price obtained by an owner who had demonstrated little interest in the property and who was in fact engaged in litigation asserting its virtual worthlessness.

An owner of real property must be allowed to state his good-faith opinion regarding its value without fear of liability in the event someone disagrees with his assessment or, as in this case, the property later sells at a price below his stated opinion.

The fraud verdict cannot be sustained without exalting consumerism above enterprise, cynicism above initiative.

While it may be easier for the Court to submit to the verdict of a jury than it is to assign reasons why it is unable to do so, it is respectfully submitted that the gravity of this verdict and the stigma resulting therefrom mandate a most thorough review of the entire record.

It is respectfully submitted that the judgment should be reversed and remanded with instructions to enter judgment in favor of Wright on the claims of fraudulent misrepresentation and indemnification, no cause of action.

The judgment should also be reversed to the extent that it awards Humphries attorney's fees and the order denying Wright's motion to exonerate the injunction bond should also be reversed.

Finally, Wright should recover his costs and attorney's fees incurred in

the prosecution of this appeal and in the defense of Humphries' cross appeal.

DATED this 25 day of January, 1989.

15/
Gary W. Pendleton
Attorney for Plaintiff and
Appellant, George Ronald Wright

MAILING CERTIFICATE

I do hereby certify that on this 25 day of January, 1989, I did personally mail four true and correct copies of the above and foregoing Motion to Hans Q. Chamberlain, Attorney for Defendant at 250 South Main, P. O. Box 726, Cedar City, Utah 84720.

15/
Gary W. Pendleton

ADDENDUM A

AGREEMENT FOR PURCHASE OF ASSETS

Final
2/24
THIS AGREEMENT is entered into as of this ~~4th~~ *10th* day of ~~September~~ *October*, 1985, by and between WESTSIDE NURSERY, a Utah Limited Partnership ("Seller"), and its principal general partner DARREL HUMPHRIES, an individual of ~~Utah~~ *ST. GEORGE, Utah* ("Humphries"), and GEORGE RONALD WRIGHT, an individual ("Buyer").

RECITALS OF FACT

A. Seller is a Utah Limited Partnership in the business of operating a nursery in St. George, Utah. the Limited Partnership has also improved and maintained certain leasehold property used in connection with its business at 1425 West Sunset Boulevard, St. George, Utah.

B. Seller and Humphries desire that Seller sell, and Buyer purchase, substantially all of the assets of Seller, except the leasehold interest of Seller, as hereinafter detailed.

C. Humphries desires to remain as the manager of the nursery business at the presently existing location under a management contract with Buyer, to which the parties have agreed pursuant to a separate Employment Agreement related hereto.

NOW, THEREFORE, in consideration of the premises and the mutual covenants contained herein, it is hereby represented, agreed and covenanted between the parties as follows:

1. Subject of Sale. The property to be sold pursuant to this Agreement (collectively referred to as the "Assets" herein) shall consist of substantially all of the Assets of Seller, including, without limitation:

(a) All of the rights to the nursery business presently belonging to Seller, rights of assignment of business licenses and other intangibles relating thereto;

(b) The right to use the trade name of "West Side Nursery" or any variation thereof, for the exclusive use of Buyer;

(c) All personal property belonging to Seller and pertaining to the nursery business including all inventory on the premises of Seller as of the date hereof, together with all tools, equipment, machinery, motor vehicles and all appurtenances thereto as more fully detailed and scheduled on Exhibit A attached hereto;

(d) Accounts receivable held on the books and/or belonging to Seller.

In addition, it has been agreed among the parties that Seller shall continue to lease the premises but shall allow Buyer to operate the business to whatever extent it deems appropriate so long as the terms of the lease are not violated by such use.

2. Terms of Sale. Seller will sell the Assets pursuant to this Agreement and Buyer hereby purchases the Assets for the amounts and payable for the following consideration:

get (a) Buyer shall deliver to Seller, certain real estate located in Weber County, Utah, specifically described on the deeds attached hereto as Exhibit B. The original deeds transferring title to the property shall be executed and delivered as a part of this Agreement. Buyer warrants that title thereto is free and clear, subject to taxes which are unpaid and due for the year 1985. In addition, Buyer shall provide at its own expense a policy of title insurance covering the value of the land conveyed.

(b) Buyer shall contract with Humphries to provide management services on a contract basis as hereinafter set forth in the Contract for Management Services which is incorporated herein by reference as Exhibit C.

(c) Seller shall assume all debts and obligations incurred by the business prior to the date of this Agreement. Seller represents that such debts and obligations are fully described on the attached Exhibit "D".

(d) All accounts receivable incurred by Seller and/or Humphries in connection with the operation of the business as described herein. A list of such accounts is attached hereto as Exhibit E.

(e) Buyer shall not assume any liabilities or obligations of Seller and Humphries, and Seller and

Humphries hereby warrant and represent to Buyer neither of them shall have any remaining obligations due to creditors upon closing of this transaction, except one Promissory Note to Zion's First National Bank in the amount of \$ 15,000 ^{plus interest to date of closing} which shall be paid by Oct 30, 1985 or any time thereafter and miscellaneous trade account of not more than \$ 5,000 to be assumed by Buyer.

3. Trade Names. By reason of the assignment to Buyer hereunder the right to use the name "West Side Nursery" or any derivative thereof, Seller agrees not to use said names or any names similar thereto in connection with any other business engaged in by Buyer. Humphries makes the same covenant to the extent that Humphries, in the future, may engage in any other business. Seller further agrees that it will change its name in accordance with such laws in order to avoid any potential conflict with the business purchased by Buyer hereunder.

4. Sales Taxes. Seller agrees that, without diminishing the accounts receivable, it will pay all Utah state sales and use taxes due for all periods ending as of the date hereof. Buyer will be liable for all such taxes from and after such date.

5. Bulk Sales Compliance. Seller agrees that as to any creditors of Seller who would not be paid in due course by Buyer pursuant to Paragraphs 1 and 2(a) hereof, Seller has

obtained waivers of the application of the Bulk Sales Act of the laws of the State of Utah or can establish an exemption from such law, and Seller will obtain an opinion of its counsel supporting the representations of this paragraph.

6. Management. Pursuant to the Contract for Management Services, Exhibit C, Buyer has agreed to contract Humphries, and Humphries has agreed to perform services, as the manager of the nursery business at 1425 West Sunset Boulevard, St. George, Utah, as set forth in the Contract for Management Services attached hereto as Exhibit C. Furthermore, both Seller and Humphries have agreed to a noncompetition covenant for a period of ~~TWO (2) YEARS~~ ^{ONE (1) YEAR} after the termination of Humphries' contract covering the geographical service area of Buyer at the time of termination. In addition to contractual arrangements with Humphries, it is agreed that Buyer shall be responsible for employing and paying employees as may be necessary for the continued operation of the nursery business. However, Humphries shall be responsible for day-to-day supervision of Buyer's employees.

~~7. Repurchase: In the event of the death or disability of Buyer within a period of one year from the date hereof, Seller shall have the right to repurchase any and all of the rights conveyed hereunder for the then fair market value of the property originally transferred by Buyer to Seller as of the date of such death or disability, plus the value of any~~

~~indebtedness of Seller assumed by Buyer as of the date of this Agreement, with interest accrued at the rate of fifteen percent (15%) per annum during the one-year period. Fair market value shall be established by appraisal of the property transferred by Buyer to Seller. Seller shall pay the cost of such appraisal. In the event the parties are not in mutual agreement with the findings of the appraiser hired by Seller, then each shall select additional appraisers who shall then select an appraiser to perform an appraisal, the results of which shall be presumed to be the proper considerations for the repurchase. For purposes of this section, disability shall mean one hundred percent disability as certified by a medical doctor.~~

~~The foregoing repurchase provision is subject to the right of any member of Buyer's immediate family to take over and continue the business in the place of Buyer and assume and perform all of the Buyer's obligations under this Agreement and the Contract For Management Services, Exhibit C, entered into simultaneously herewith. The election by a member of Buyer's immediate family to continue the business must be made in writing to Seller within Ten (10) days of Seller's written request to Buyer to exercise the repurchase provisions of this section.~~

8. Maintenance of Lease. Buyer shall, on or before the 19th day of each month, pay the amount due under Sellers rental Agreement with James La Vae Smith, dated February 23, 1985, plus

ten percent (10%). Seller shall maintain and keep the lease of the premises paid up and current at all times. In the event any Notice of Default is delivered to Seller, Seller shall deliver a copy of the same to Buyer and cure such default within Ten (10) days of such notice. In the event Seller fails to cure default within Ten (10) days, Buyer may, at his discretion make the lease payment in the Seller's stead and may, at his discretion, terminate the contract for Management services, Exhibit C.

9. Representations of Seller. In addition to covenants and representations hereinabove stated, Seller hereby represents to Buyer as follows:

(a) Seller is a Utah Limited Partnership duly organized and existing under the laws of the State of Utah with full power to enter into this Agreement and execute all documents pertaining hereto;

(b) Seller has been duly authorized by its General Partner to sell substantially all of the Assets and otherwise carry out the terms of this Agreement and perform its covenants hereunder; and

(c) Seller has provided to Buyer ample opportunity to inspect the Assets sold hereunder together with the books of account and other documents and records pertaining thereto, and has no knowledge of any material obligations or contingent liabilities of Seller which would impact this Agreement and which have not already been disclosed to Buyer or would be easily discoverable

by an examination of the books and records of Seller.

10. General.

(a) It is expressly understood that Buyer assumes no indebtedness or obligation of any nature presently or at any time in the future owed to any creditor by Seller or Humphries, except as expressly set forth in this Agreement, and Buyer disclaims any intent that this Agreement or any document related hereto shall be construed to create benefits for any other such creditor.

(b) This Agreement shall be governed by the laws of the State of Utah in its interpretation.

(c) In the event of any legal action brought by either party for the purpose of enforcing performance of any covenant or representation hereunder or for damages for breach thereof, the prevailing party shall be entitled to recover from the breaching party attorneys' fees and costs as shall be determined by the Court.

(d) In the event any written notice is required under this Agreement, the parties shall agree to effect either personal delivery or delivery by U.S. mail, first class postage prepaid, addressed to the addresses opposite the signatures hereunder or any other address which either party may subsequently confirm in writing to the other.

IN WITNESS WHEREOF, the parties have hereunto executed
this Agreement effective as of the day and year first above
written.

WESTSIDE NURSERY,
a Utah Limited Partnership

By Darrel E. Humphries
Darrel Humphries, General Partner

SELLER:

Darrel E. Humphries
Darrel Humphries

BUYER:

George Ronald Wright
George Ronald Wright

A1-20

EXHIBIT "A"

PERSONAL PROPERTY OF SELLER

*ALL PLANT MATERIALS, SUPPLIES, AND PERSONAL PROPERTY NOW EXISTING
AT THE WEST SIDE NURSERY*

EXHIBIT "E"

DEEDS TO OGDEN PROPERTY

EXHIBIT "D"

SCHEDULE OF DEBTS AND OBLIGATIONS OF SELLER

- (1) Zions Bank unsecured loan principal unpaid balance -- \$15,000⁰⁰ plus intacc.
- (2) Accounts payable less than 5,000⁰⁰
- (3) 1984 TRUCK FORD GAS 3/4 TON 4 wheel Drive -- -- -- 9,000⁰⁰
- (4) 1983 Mercury Cougar -- -- -- -- -- 3,000⁰⁰

ADDENDUM B

CONTRACT FOR MANAGEMENT SERVICES

AGREEMENT made between DARREL HUMPHRIES, of Veyo, Utah, County of Washington, State of Utah, ("Contractor") and GEORGE RONALD WRIGHT, whose principal place of business is located at City of St. George, County of Washington, State of Utah, ("Owner").

RECITALS

1. Owner is engaged in the business of operating a plant nursery at wholesale and retail and related products, and maintains or will maintain an ongoing business in St. George, County of Washington, State of Utah.


2. Contractor has been engaged and has had a great deal of experience in the above-designated business.

3. Contractor is willing to perform services and Owner is willing to engage Contractor for management services on the terms, covenants, and conditions hereinafter set forth.

4. Owner has purchased the nursery from, among others, Contractor himself as of the date hereof.

For the reasons set forth above, and in consideration of the mutual promises and agreements hereinafter set forth, Owner and Contractor agree as follows:

APR 25 1988



SECTION ONE

TERMS OF PERFORMANCE

Owner hereby engages Contractor as a manager of the West Side Nursery and Contractor hereby accepts and agrees to such engagement, subject to the general supervision and pursuant to the orders, advice, and direction of Owner. Contractor shall perform such other duties as are customarily performed by one holding such position in other, same, or similar business or enterprises as that engaged in by Owner. It is understood that Contractor is an independent proprietor and not an employee of Owner.

SECTION TWO

BEST EFFORTS OF CONTRACTOR

Contractor agrees that he will at all times faithfully, industriously, and to the best of his ability, experience and talents, perform all of the duties that may be required of and from him pursuant to the express and implicit terms hereof, to the reasonable satisfaction of Owner.

SECTION THREE

TERM OF CONTRACT

The term of this Agreement shall be a period of one (1) year, commencing ~~September~~ ^{Oct 4} ~~1985~~ ¹⁹⁸⁶, and terminating ~~September~~ ^{Oct 4} ~~1986~~ ¹⁹⁸⁷, subject, however, to prior termination as hereinafter provided. At the expiration date this Agreement may be renewed for periods of one year subject to negotiation and further agreement between the parties.

SECTION FOUR

COMPENSATION

Owner shall pay Contractor, and Contractor shall accept from Owner, in full payment for Contractor's services hereunder, compensation at the rate of \$30,000.00 ^{per year} Thousand Dollars (\$ 30,000.00) per year, payable twice monthly as of the 1st and 15th day of each month while this Agreement shall be in force.

Owner shall reimburse Contractor for all necessary expenses incurred by Contractor while traveling pursuant to Owner's directions.

SECTION FIVE

TERMINATION DUE TO DISCONTINUANCE OF BUSINESS

Anything herein contained to the contrary notwithstanding, in the event that Owner shall discontinue operating its business at St. George, State of Utah, then this Agreement shall terminate as of the last day of the month on which Owner ceases operations at such location with the same force and effect as if such last day of the month were originally set as the termination date hereof.

SECTION SIX

OTHER TIME OBLIGATIONS

Contractor shall devote substantially all of his time, attention, knowledge, and skills solely to the business and interest of Owner, and Owner shall be entitled to all of the benefits, profits or other issues arising from or incident to all

work, services, and advice of Contractor, and Contractor shall not, during the term hereof, serve as officer, director, employee, or in any other capacity in any other business similar to Owner's business or any allied trade; provided, however, that nothing herein contained shall be deemed to prevent or limit the right of Contractor to manage personal and family investments that do not compete with Owner's business.

SECTION SEVEN

RECOMMENDATIONS FOR IMPROVING OPERATIONS

Contractor shall make available to employer all information of which Contractor shall have any knowledge and shall make all suggestions and recommendations that will be of mutual benefit to Owner and himself.

SECTION EIGHT

TRADE SECRETS

Contractor shall not at any time or in any manner, either directly or indirectly, divulge, disclose or communicate to any person, firm or corporation in any manner whatsoever any information concerning any matters affecting or relating to the business of Owner, including without limiting the generality of the foregoing, any of its customers, the prices it obtains or has obtained from the sale of, or at which it sells or has sold, its products, source of supply, or any other information concerning the business of Owner, its manner of operation, its plans, processes, or other data without regard to whether all of the foregoing matters will be deemed confidential, material, or impor-

tant, the parties hereto stipulating that as between them, the same are important, material, and confidential and gravely affected the effective and successful conduct of the business of Owner, and Owner's good will, and that any breach of the terms of this paragraph shall be a material breach of this Agreement.

SECTION NINE

AGREEMENTS OUTSIDE OF CONTRACT

This contract contains the complete agreement concerning the arrangement between the parties and shall, as of the effective date hereof, supersede all other agreements between the parties. However, this contract shall be consistent with a Purchase of Assets Agreement of even date herewith. The parties stipulate that neither of them has made any representation with respect to the subject matter of this Agreement or any representations including the execution and delivery hereof except such representations as are specifically set forth herein and each of the parties hereto acknowledges that he or it has relied on its own judgment in entering into this Agreement. The parties hereto further acknowledge that any payments or representations that may have heretofore been made by either of them to the other are of no effect and that neither of them has relied thereon in connection with his or its dealings with the other.

SECTION TEN

MODIFICATION OF CONTRACT

No waiver or modification of this Agreement or of any covenant, condition, or limitation herein contained shall be

valid unless in writing and duly executed by the party to be charged therewith and no evidence of any proceeding, arbitration, or litigation between the parties hereto arising out of or affecting this Agreement, or the rights or obligations of the parties hereunder, unless such waiver or modification is in writing, duly executed as aforesaid, and the parties further agree that the provisions of this section may not be waived except as herein set forth.

SECTION ELEVEN

TERMINATION

In the event of any violation by Contractor of any of the terms of this contract, Owner thereon may terminate this Management Agreement without notice and with pay only to the date of such termination. It is further agreed that any breach or evasion of any of the terms of this contract by either party hereto will result in immediate and irreparable injury to the other party and will authorize recourse to injunction and/or specific performance as well as to all other legal or equitable remedies to which such injured party may be entitled hereunder.

SECTION TWELVE

NONCOMPETITION COVENANT

Upon termination of this contract for cause or upon expiration hereof by its terms, Contractor agrees that for a period of ~~five (5) years~~ ^{TWO (2) YEARS} after the date of such termination he shall not compete with the nursery, gardening sales and/or plant sales, related business of Owner by serving in any competing

proprietorship, partnership, corporation or otherwise, in the States of Utah, Nevada, Oregon or Arizona. Contractor acknowledges that the restrictions above stated are reasonable. It is agreed between the parties that the consideration for the non-competition covenant is the Agreement for Partial Purchase of Assets executed on the same date hereof, pursuant to which Owner purchased the personal property assets of West Side Nursery, the former business owned by Contractor in his capacity as General Partner.

SECTION THIRTEEN

SEVERABILITY

All agreements and covenants contained herein are severable, and in the event any of them shall be held to be invalid by any competent court, this contract shall be interpreted as if such invalid agreements or covenants were not contained herein.

SECTION FOURTEEN

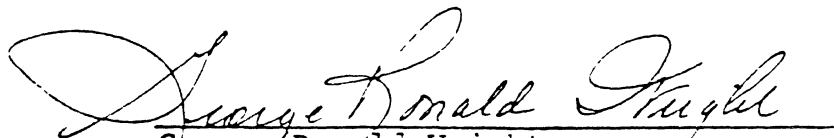
CHOICE OF LAW

It is the intention of the parties hereto that this Agreement and the performance hereunder and all suits and special proceedings hereunder be construed in accordance with and under and pursuant to the laws of the State of Utah.


IN WITNESS WHEREOF, the parties have hereunto executed

this contract effective as of ^{Oct 4}~~September~~ _____, 1985.

OWNER:


George Ronald Wright

CONTRACTOR:


Darrel Humphries

A1-21

ADDENDUM C-1

N.W. 1/4

86-1

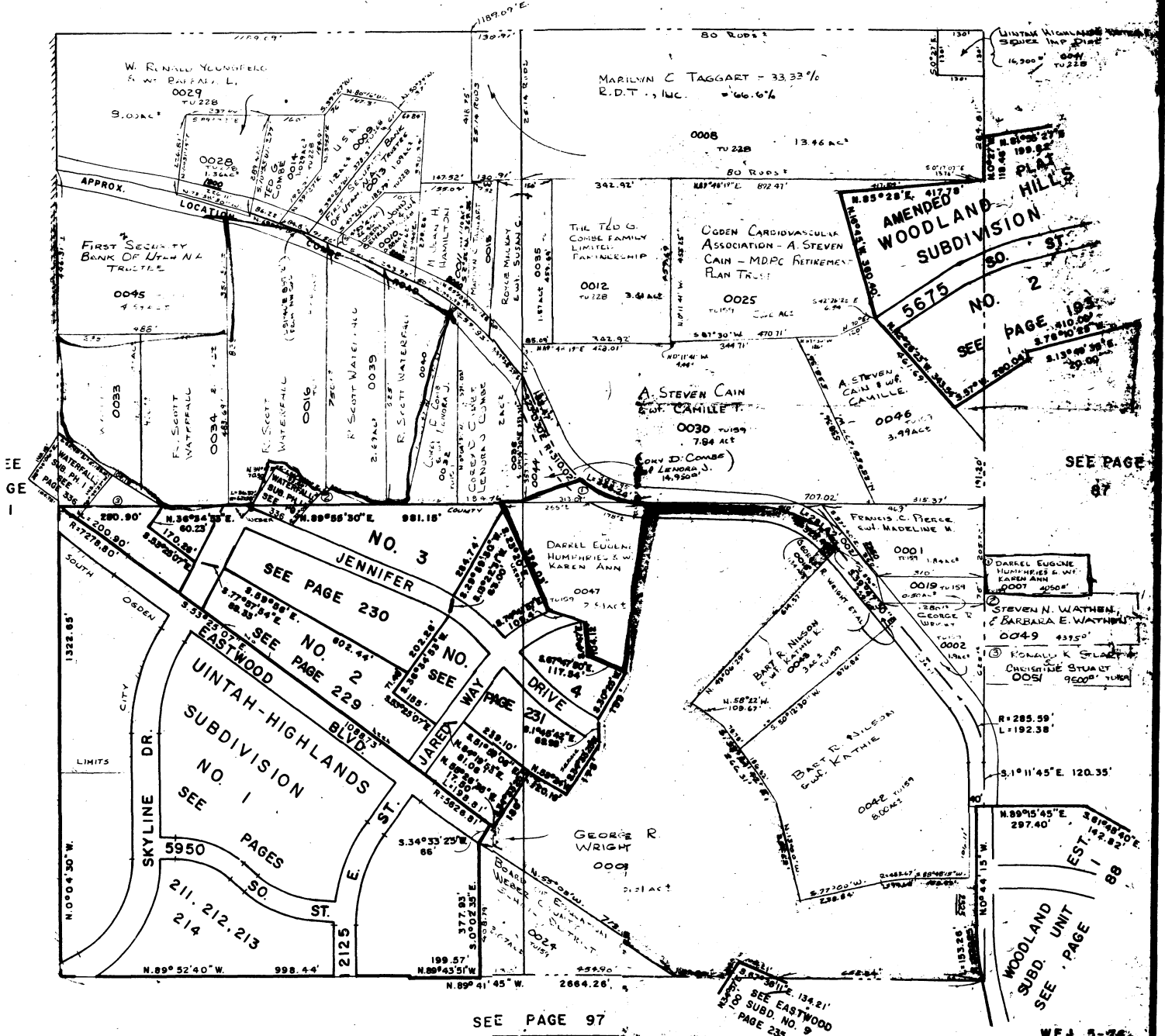
SECTION 23, T.5N., R.1W., S.L.B. & M.

TAXING UNIT: 75,159,228

UINTAH DISTRICT & SOUTH OGDEN CITY PREFIX: 07-086

SCALE 1" = 200'

SEE BOOK 6, PAGE 121



ADDENDUM C-2

NW 1/4

86-1

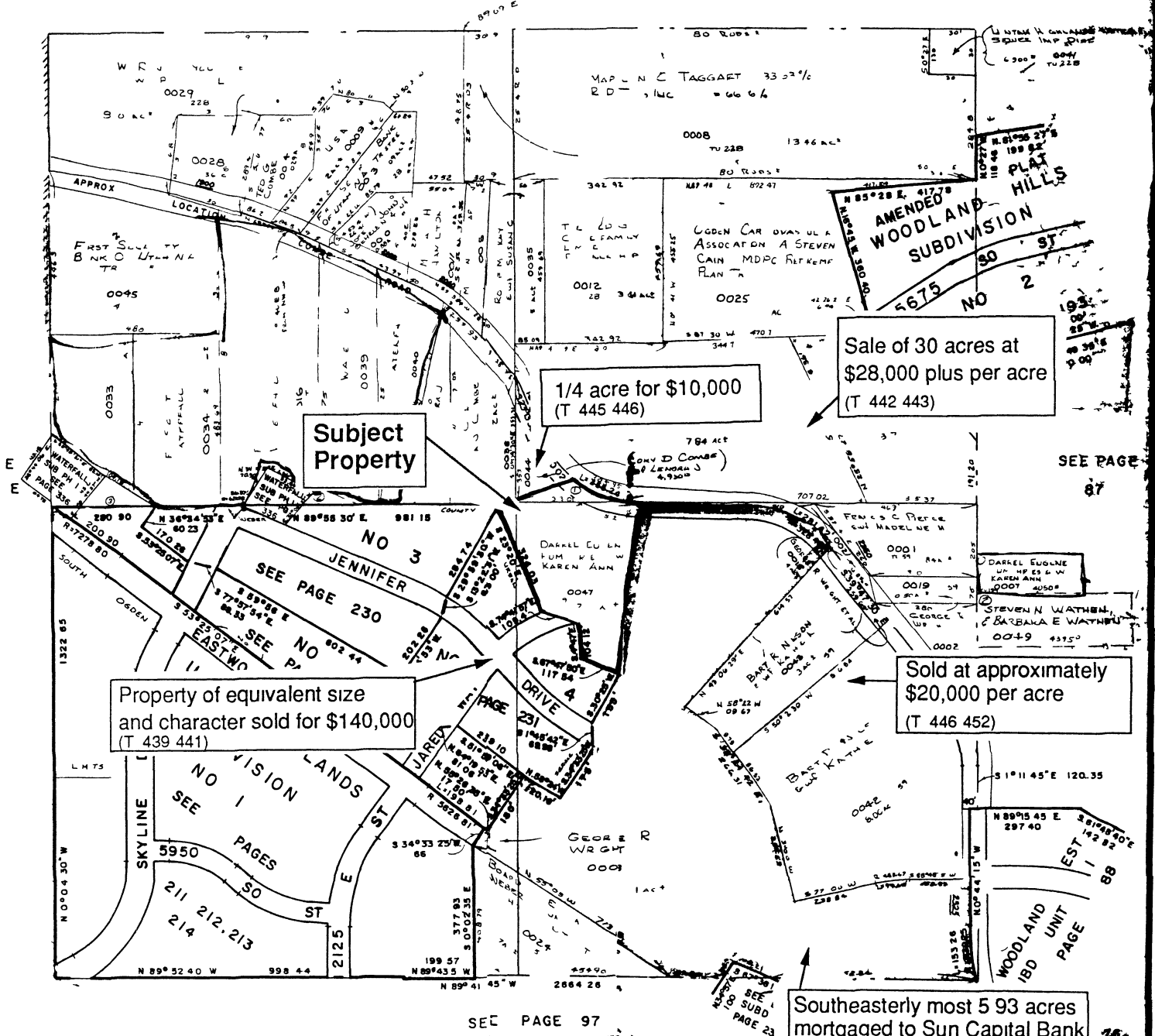
SECTION 23, T.5 N., R.1 W., S.L.B. & M.

TAXING UNIT 75,159,228

UINTAH DISTRICT & SOUTH OGDEN CITY PREFIX 07-086

SCALE 1"=200'

SEE BOOK 6, PAGE 121



SEE PAGE 97

Southeasterly most 5.93 acres mortgaged to Sun Capital Bank at \$20,000 per acre, (T 589 590 597 600 661 665 Defendant's Exhibit 32)

ADDENDUM D

Timothy B. Anderson of
JONES, WALDO, HOLBROOK & McDONOUGH
One South Main, Suite 300
St. George, UT 84770
Telephone: (801) 628-1627

DARREL HUMPHRIES
At St George 1541
12-20-85
by Dominguez

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

---ooo0ooo---

GEORGE RONALD WRIGHT,	:	
	:	TEMPORARY RESTRAINING
Plaintiff,	:	ORDER AND ORDER TO
	:	SHOW CAUSE
vs.	:	
	:	
WESTSIDE NURSERY, a Utah	:	
limited partnership and	:	
DARREL HUMPHRIES, an	:	Civil No. <u>85-0536</u>
individual,	:	
	:	
Defendants.	:	

---ooo0ooo---

The above entitled Court, having reviewed the plaintiff's Ex Parte Motion for Temporary Restraining Order and Order to Show Cuase, and the Verified Complaint of Geroge Ronald Wright, now finds as follows:

1. It appears from the Verified Complaint that plaintiff purchased from the defendants the business known as Westside Nursery on or about October 4, 1985, and that plaintiff has since that date purchased additional substantial plant materials and other personal property and placed these on the Westside Nursery business premises for resale to the public.

2. It appears that the defendant Darrel Humphries has been in possession and control of the Westside Nursery with all of its property, books and accounts since the sale to the plaintiff, pursuant to a management contract between plaintiff and defendant.

3. It appears that defendants now allege that the agreements of October 4, 1985, are rescinded and terminated.

4. It appears, from the defendants' letters that defendants' assert an ownership interest in all of the property which was purportedly sold to plaintiff on October 4, 1985.

5. It appears from the defendants' letters, that defendants intend to conduct the business at the Westside Nursery for their own account and benefit.

6. It appears from the defendants' letters, that defendants intend to assume control and ownership of plant material and other property purchased by plaintiff after the sale, and to remove from the business premises other property purchased by the plaintiff for resale and to deliver the same to plaintiff's personal residence.

7. It appears that plaintiff alleges that defendant Humphries has assaulted and physically abused him and interfered with his person and conduct of his business.

8. It appears that unless the defendants are restrained or prevented from selling, hypothecating, removing, altering or damaging the business, property and books, are restrained from entering into new debts or obligations in the business name, and

restrained from harassing and interfering with the plaintiff, that the plaintiff's business will suffer irreparable damage.

TEMPORARY RESTRAINING ORDER

WHEREFORE, the Court enters its Temporary Restraining Order as follows:

1. Defendants are hereby restrained from removing, selling, injuring, destroying, wasting, hypothecating or encumbering any of the personal or real property associated in any way with Westside Nursery, including motor vehicles, regardless of who purchased said property or brought it to the premises, except as such property may be sold to the public for fair consideration in the normal course of business.

2. Defendants are hereby restrained from compromising, releasing, altering, or destroying any of the books or accounts of the Westside Nursery, except to reflect new transactions, and are restrained from incurring any debt or obligation in the name of plaintiff or Westside Nursery.

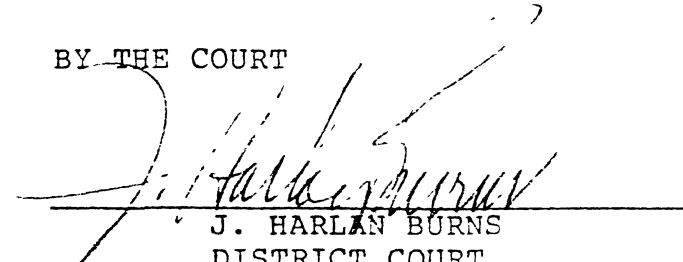
3. Defendants are hereby restrained from entering the the plaintiff's personal residence.

4. Defendants are hereby restrained from communicating with the plaintiff, except as reasonably necessary to conduct the business, or touching the person of the plaintiff, or otherwise harassing the plaintiff or interfering in the plaintiff's conduct of his business.

5. This Order is issued on the giving of security by plaintiffs in the form of a bond or undertaking supported by adequate and proper sureties in the sum of \$1000⁰⁰, for payment of costs and damages as may be incurred or suffered by the defendants if they have incurred or suffered damages having been wrongfully enjoined or restrained.

ISSUED this 27 day of December, 1985, at the hour of 2:45 P.M..

BY THE COURT

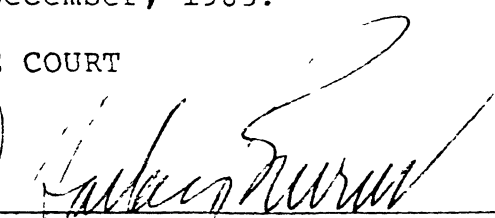

J. HARLAN BURNS
DISTRICT COURT

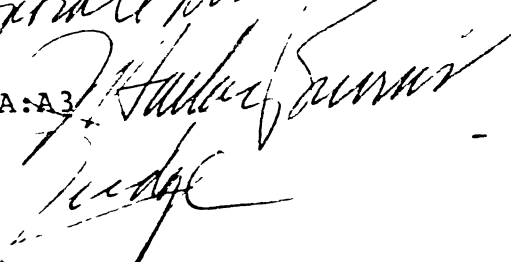
ORDER TO SHOW CAUSE

The defendants are ordered to appear on the 30 day of December, 1985, at the hour of 10:00 A.m., at the Hall of Justice, 220 North 200 East, St. George, Utah, and show cause, if any they have, why this Temporary Restraining Order should not become a preliminary injunction pending resolution of the issues on the merits.

DATED this 27 day of December, 1985.

BY THE COURT


J. HARLAN BURNS
DISTRICT JUDGE

*Since set \$1000.00
Cash or corporate bond*
WRIGHTA:A3 

ADDENDUM E

RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS
OF WEBER COUNTY, UTAH

(5) SR
m+i
JK

WHEREAS, the public health and welfare concerns of citizens of Weber County dictate that it is necessary to impose a limited moratorium on development of any property located within the boundaries of the Uintah Highlands Water and Sewer Improvement District.

NOW, THEREFORE, IT IS RESOLVED AND ORDERED, pursuant to the authority of the Weber County Commission granted under Utah Code Annotated Sections 17-5-35, 17-5-49, and 17-5-77, that a limited moratorium on the development of any property located within the boundaries of the Uintah Highlands Water and Sewer Improvement District is hereby implemented under the following terms until an adequate, approved public sewer system has been constructed and is operational:

1. As of the effective date of this moratorium, no new subdivisions in the Uintah Highlands Water and Sewer Improvement District will be approved.

D.K. [unclear]
not

2. Any proposed exception to paragraph 1 must be approved by the Weber County Commission and be substantiated by a written statement from the Weber-Morgan District Health Department that the subdivision is located in an area where its development will not contaminate, aggravate, depreciate, or in any manner have a negative impact on present soil, groundwater, surface water, or drainage conditions in the Uintah Highlands Water and Sewer Improvement District.

3. Prior to the development of any individual lot, including those located in existing subdivision, the developer must first obtain written approval from the Weber-Morgan District Health Department to ensure that:

a. A current, comprehensive soils and groundwater evaluation has been made of the site;

APR 25 1988



b. Soil and groundwater conditions are in full compliance with all state and local rules, regulations, codes and ordinances pertaining to individual wastewater disposal systems; and

c. The proposed development will not contaminate, aggravate, appreciate, or in any manner have a negative impact on present soil, groundwater, surface water or drainage conditions in the Uintah Highlands Water and Sewer Improvement District.

d. It is contemplated that these lots will be considered and approved or rejected on an individual, case-by-case basis.

In the opinion of the Weber County Board of Commissioners, it is necessary that this policy go into effect immediately upon publication in order to preserve the health of the inhabitants of Weber County.

PASSED AND ADOPTED by the Board of County Commissioners of Weber County, Utah at a regular meeting thereof held on the 15 day of October, 1985.

BOARD OF WEBER COUNTY COMMISSIONERS


ROGER F. RAYSON, Chairman


ROBERT A. HUNTER


WILLIAM BAILEY

ATTEST:

RICHARD GREENE

By David G. Jenkins
DEPUTY CLERK

ADDENDUM F

APR 29 1988

CLERK

DEPUTY

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

GEORGE RONALD WRIGHT,)	
)	
Plaintiff,)	SPECIAL VERDICT
)	
vs.)	Civil No. 85-0536
)	
WESTSIDE NURSERY, a Utah)	
limited partnership and)	
DARREL HUMPHRIES, an)	
individual,)	
)	
Defendant)	

We the jury, duly-empaneled in the above-entitled matter,
find, by the agreement of at least six of our number:

1. Did defendant Darrel Humphries breach the agreements
between the parties by actions inconsistent with the terms of the
agreements? YES X NO

2. If your answer to No. 1 is Yes, what damages should be
awarded to Plaintiff George Ronald Wright as a result of the breach?

\$ 6865⁰⁰

3. Did Plaintiff George Ronald Wright breach the agreements
between the parties by terminating Defendant Darrell Humphries as an
employee under the Management Agreement? YES X NO

4. If your answer to No. 3 is Yes, what damages should be awarded to Defendant Darrel Humphries as a result of the breach?

\$ 15,000⁰⁰

5. Did Plaintiff George Ronald Wright breach the agreements in any other respect? YES X NO

6. If your answer to No. 5 is Yes, what should be the amount of damages awarded to Defendant Darrel Humphries as a result of that breach? \$ 0

7. Under the agreements, who was to pay the first \$5,000 of the accounts payable as of October 4, 1985?

PLAINTIFF X DEFENDANTS

8. Under the agreements, who was to pay the accounts payable in excess of \$5,000 as of October 4, 1985?

PLAINTIFF DEFENDANTS X

9. Under the agreements, who was to receive the accounts receivable owed to Westside Nursery as of October 4, 1985?

PLAINTIFF X DEFENDANTS

10. Under the terms of the agreements, between Plaintiff and Defendant Darrel Humphries, who is obligated to pay the Promissory Note in favor of Zions First National Bank in the sum of \$15,000, plus accrued interest, dated January 3, 1985.

PLAINTIFF DEFENDANT X

11. As between Plaintiff and Defendant Darrel Humphries, who is obligated to pay the Promissory Note in favor of Zions First

National Bank in the sum of \$30,000, plus accrued interest, dated December 1985?

PLAINTIFF X DEFENDANT _____

12. Did Plaintiff George Ronald Wright make fraudulent misrepresentations concerning the value of the Weber County property to defendants? YES X NO _____

13. If your answer to question No. 12 is Yes, what amount of damages should be awarded to Defendants Westside Nursery and Darrel Humphries for the difference in the actual fair market value of the land in Weber County and the misrepresented value of that land?

\$ 38,582.⁰⁰

14. What is the amount of attorney's fee, if any, that should be awarded to:

PLAINTIFF, GEORGE RONALD WRIGHT \$ 0

DEFENDANTS - WESTSIDE NURSERY

AND DAPREL HUMPHRIES \$ 10,000.⁰⁰

THE ABOVE STATES THE OPINION OF THIS JURY.

DATED this 29 day of April, 1988. 7th

Charles A. Brown
Foreperson

DISSENTING JURORS

By each answer number, list the names, if any, of the jurors dissenting from that answer:

<u>ANSWER NUMBER</u>	<u>NAMES OF JURORS DISSENTING</u>
1.	
2.	
3.	
4.	
5.	
6.	
7.	
8.	
9.	
10.	
11.	
12.	<i>Wendell L. Barwick - Frank Lilly</i>
13.	
14.	

ADDENDUM G

'00 003 8 PM 1 05

HANS Q. CHAMBERLAIN [0607]
CHAMBERLAIN & HIGBEE
Attorneys for Defendants
250 South Main
P. O. Box 726
Telephone: (801) 586-4404

CLERK
DEPUTY:

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

GEORGE RONALD WRIGHT,)	
)	
Plaintiff,)	JUDGMENT ON THE VERDICT
)	
vs.)	
)	
WESTSIDE NURSERY, a Utah)	
limited partnership and)	
DARREL HUMPHRIES, an)	
individual,)	Civil No. 85-0536
)	
Defendants.)	

The above-entitled matter came on for jury trial pursuant to notice duly given on April 25th, 1988, in the Washington County Courthouse before the Honorable J. Philip Eves, District Court Judge presiding. Present were Plaintiff George Ronald Wright, and his counsel, Gary Pendleton. Also present was Defendant Darrel Humphries, general partner in Westside Nursery, a Utah limited partnership and Darrel Humphries, an individual, and their counsel, Hans Q. Chamberlain.

This matter has been the subject of prior orders which are affirmed in this Judgment. These orders include:

1. Temporary Restraining Order and Order to Show Cause dated December 23rd, 1985.
2. Temporary Restraining Order; Order Appointing Receiver;

Handwritten: 14-57

Judgment; and Denial of Motion for Summary Judgment dated March 25th, 1986.

3. Findings of Fact and Temporary Order dated July 2nd, 1986.

4. Findings and Order dated November 10th, 1986.

The jury was empaneled and the parties proceeded to give opening statements. Plaintiff proceeded with the presentation of his case. Plaintiff rested. Defendants thereafter presented their case.

After the Defendants rested their case pursuant to their counterclaim, Plaintiff moved for a dismissal or directed verdict against Defendants' counterclaim alleging fraud. After hearing said argument, the same was denied by the Court.

Following the order of the Court entered denying Plaintiff's motion to dismiss, the jury was called in and instructed. Arguments were made, and the matter was duly submitted to the jury. The jury returned a verdict as follows:

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

GEORGE RONALD WRIGHT,)	
)	
Plaintiff,)	SPECIAL VERDICT
)	
vs.)	
)	
WESTSIDE NURSERY, a Utah)	
limited partnership and)	
DARREL HUMPHRIES, an)	
individual,)	Civil No. 85-0536
)	
Defendants.)	

1 We the jury, duly empaneled in the above-entitled matter,
2 find, by the agreement of at least six of our number:

3 1. Did Defendant Darrel Humphries breach the agreements
4 between the parties by actions inconsistent with the terms of the
5 agreements?

6 YES X NO

7 2. If your answer to No. 1 is Yes, what damages should be
8 awarded to Plaintiff George Ronald Wright as a result of the
9 breach?

10 \$ 6,805.00

11 3. Did Plaintiff George Ronald Wright breach the agreements
12 between the parties by terminating Defendant Darrel Humphries as
13 an employee under the Management Agreement?

14 YES X NO

15 4. If your answer to No. 3 is Yes, what damages should be
16 awarded to Defendant Darrel Humphries as a result of the breach?

17 \$ 15,000.00

18 5. Did Plaintiff George Ronald Wright breach the agreements
19 in any other respect?

20 YES X NO

21 6. If your answer to No. 5 is Yes, what should be the
22 amount of damages awarded to Defendant Darrel Humphries as a
23 result of that breach?

24 \$ 0

25 7. Under the agreements, who was to pay the first \$5,000 of
the accounts payable as of October 4, 1985?

PLAINTIFF X DEFENDANT

8. Under the agreements, who was to pay the accounts payable in excess of \$5,000 as of October 4, 1985?

PLAINTIFF _____ DEFENDANT X

9. Under the agreements, who was to receive the accounts receivable owed to Westside Nursery as of October 4, 1985?

PLAINTIFF X DEFENDANT _____

10. Under the terms of the agreements, between Plaintiff and Defendant Darrel Humphries, who is obligated to pay the Promissory Note in favor of Zions First National Bank in the sum of \$15,000, plus accrued interest dated January 3, 1985.

PLAINTIFF _____ DEFENDANT X

11. As between Plaintiff and Defendant Darrel Humphries, who is obligated to pay the Promissory Note in favor of Zions First National Bank in the sum of \$30,000, plus accrued interest, dated December 1985?

PLAINTIFF X DEFENDANT _____

12. Did Plaintiff George Ronald Wright make fraudulent misrepresentations concerning the value of the Weber County property to Defendants? YES X NO _____

13. If your answer to question No. 12 is Yes, what amount of damages should be awarded to Defendants Westside Nursery and Darrel Humphries for the difference in the actual fair market value of the land in Weber County and the misrepresented value of that land? \$ 38,582.00

14. What is the amount of attorney's fee, if any, that should be awarded to:

PLAINTIFF GEORGE RONALD WRIGHT \$ _____

DEFENDANTS WESTSIDE NURSERY and

DARREL HUMPHRIES \$ 10,000.00

THE ABOVE STATES THE OPINION OF THIS JURY.

DATED this 30th day of April, 1988.

/s/ Clayton Prince
Foreperson

DISSENTING JURORS

By each answer number, list the names, if any, of the jurors
dissenting from that answer:

ANSWER

NUMBER

NAMES OF JURORS DISSENTING

1. _____

2. _____

3. _____

4. _____

5. _____

6. _____

7. _____

8. _____

9. _____

10. _____

11.

12. Vondell L. Barrick, Evon R. Seely

13.

14.

The Court made some inquiry of the jury concerning specific findings. Neither counsel requested that the jury be polled after returning the verdict and the jury was then excused.

NOW, THEREFORE, based upon the findings of the jury and upon applicable principles of law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant Humphries shall have and recover against Plaintiff Judgment in the amount of \$20,198.21 computed as follows:

A. Plaintiff is entitled to Judgment in the amount of \$37,305.21 as reimbursement for funds borrowed from Zions First National Bank and deposited directly into the Westside Nursery checking account. Against this sum, Plaintiff is entitled to setoffs in the amount of \$6,805.00 as reimbursement for monies misappropriated by Defendant Humphries from the Westside Nursery account for the payment of personal obligations and \$6,772.00 as reimbursement for funds withdrawn from the Westside Nursery account after October 4th, 1985, for the purpose of paying accounts which should have been assumed and discharged by Defendants. The amounts specified herein constituting Plaintiff's right of

1 setoff also includes interest which has been calculated at
2 the legal rate on the above-mentioned items from the date of
3 the misappropriation or expenditure.

4 2. Defendants Westside Nursery and Humphries are awarded
5 Judgment against Plaintiff for the difference in the actual fair
6 market value of the land in Weber County and the misrepresented
7 value of said land in the sum of \$38,582.00. The damages awarded
8 by the jury were calculated by the jury based on a fraudulent
9 misrepresentation concerning the value of the Weber property to
10 be \$90,000.00, less the sum of \$54,700.00 and less the real
11 estate commission Westside Nursery and Humphries had to pay in
12 selling the property of \$3,282.00, thus totaling a difference of
13 \$38,582.00. Said Judgment shall bear interest at the rate of
14 twelve percent (12%) per annum until paid in full. The Court
15 will not award interest to Defendants on the sum of \$38,582.00
16 from and after October 4th, 1985 until time of Judgment, even
17 though requested to do so by Defendants.

18 3. Plaintiff is not contractually bound to assume or
19 indemnify Defendant Humphries against any obligation in favor of
20 Zions First National Bank arising out of the execution of a
21 certain Promissory Note dated January 3rd, 1985.

22 4. Defendants are obligated to pay and discharge all
23 accounts payable as of October 4th, 1985, to the extent that said
24 accounts exceeded the sum of \$5,000.00 and are further obligated
25 to pay all outstanding tax obligations, federal, state or local,
 accruing on or before October 4th, 1985.

1 5. Even though the jury found that Plaintiff breached the
2 agreements between the parties by terminating Defendant Humphries
3 as an employee under the Management Agreement and awarded
4 Humphries damages in the sum of \$15,000.00 by reason of the same,
5 the Court concludes and orders that Defendant Humphries' claim
6 for wrongful termination of the Management Agreement is dismissed
7 with prejudice, the jury's findings regarding specific issues of
8 fact establishing the defense of justification as a matter of
9 law.

10 6. Defendants Westside Nursery and Humphries are awarded
11 Judgment against Plaintiff in the sum of \$10,000.00 as and for
12 attorney's fees incurred in the prosecution of this action.

13 7. Defendants Humphries and Westside Nursery are therefore
14 awarded a total Judgment against Plaintiff in the sum of
15 \$68,780.21, said Judgment to bear interest at the rate of twelve
16 percent (12%) per annum until paid in full.

17 DATED this 4th day of August, 1988.

18 J. Philip Eves
19 J. PHILIP EVES
20 District Court Judge

21 APPROVED AS TO FORM:

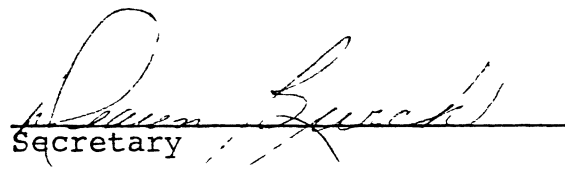
22 Gary W. Pendleton
23 GARY W. PENDLETON
24 Attorney for Plaintiff

25 Hans Q. Chamberlain
HANS Q. CHAMBERLAIN
Attorney for Defendants

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CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the within and foregoing JUDGMENT ON THE VERDICT to Mr. Gary W. Pendleton, Attorney at Law, 150 North Second East, Suite 202, St. George, Utah 84770, first-class postage prepaid, on this 5th day of August, 1988.


Secretary