

2000

UTCO Associates LTD., and Robert D. Kent v. K. Demarr Zimmerman, Somerset Houseboats, DIV.SMI, and James E. Sharpe : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

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

Blake S. Atkin; Jonathan L. Hawkins; Atkin, Lilja; Attorneys for Appellees.

Jeffrey M. Jones; J. Mark Gibb; Durham, Evans, Jones; Attorneys for Appellant.

Recommended Citation

Brief of Appellee, *UTCO Associates v. Zimmerman*, No. 20000339 (Utah Court of Appeals, 2000).
https://digitalcommons.law.byu.edu/byu_ca2/2738

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

UTCO ASSOCIATES, LTD, a
Utah limited partnership,
by and through its general
partner, Robert D. Kent

v.

Defendants/Appellees.

Argument Priority 15

Appeal from a Judgment on Jury Verdict and Order of the
Third Judicial District Court for Salt Lake County,
Honorable Timothy R. Hanson, District Court Judge

Blake S. Atkin, Esq.
Jonathan L. Hawkins, Esq.
ATKIN & LILJA, P.C.
136 South Main, Sixth Floor
SLC, Utah 84101
Attorneys for Appellees
Sumerset Houseboats, Div. SMI,
and James E. Sharpe

Paulette Stagg
Clerk of the Court

UTCO ASSOCIATES, LTD, a)
Utah limited partnership,)
by and through its general)
partner, Robert D. Kent)
)
Plaintiff/Appellant,)
)
v.)
)
K. DEMARR ZIMMERMAN,) No. 20000339-CA
SUMERSET HOUSEBOATS, DIV. SMI;) 930904174
and JAMES E. SHARPE,)
)
Defendants/Appellees.)
)

Appeal from a Judgment on Jury Verdict and Order of the
Third Judicial District Court for Salt Lake County,
Honorable Timothy R. Hanson, District Court Judge

Blake S. Atkin, Esq.
Jonathan L. Hawkins, Esq.
ATKIN & LILJA, P.C.
136 South Main, Sixth Floor
SLC, Utah 84101
Attorneys for Appellees
Sumerset Houseboats, Div. SMI,
and James E. Sharpe

TABLE OF CONTENTS

| | |
|---|----|
| TABLE OF CONTENTS | i |
| TABLE OF AUTHORITIES | iv |
| I. STATEMENT OF JURISDICTION: THIS COURT LACKS JURISDICTION OVER THIS MATTER AS IT WAS IMPROPERLY CERTIFIED UNDER RULE 54(b) OF THE UTAH RULES OF CIVIL PROCEDURE. | 1 |
| II. STATEMENT OF ISSUES PRESENTED FOR REVIEW | 2 |
| III. DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS. | 5 |
| IV. STATEMENT OF THE CASE. | 6 |
| A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW | 6 |
| B. STATEMENT OF RELEVANT FACTS | 11 |
| V. SUMMARY OF ARGUMENTS | 15 |
| A. This Court Lacks Jurisdiction Over This Appeal As The Trial Court Improperly Certified The Judgment Under Rule 54(b) Of The Utah Rules of Civil Procedure As The Claims Against Mr. Zimmerman Based On The Same Transaction And Same Facts Are Not Separate | 15 |
| B. The Trial Court Properly Refused To Instruct The Jury On UTCO's Equitable Promissory Estoppel Claim. | 16 |
| 1) UTCO Failed To Exhaust Its Claims Against Zimmerman And UTCO Had An Adequate Remedy At Law | 16 |
| 2) UTCO Did Not Rely On Any Alleged Promise. | 17 |
| C. The Trial Court Properly Precluded Admission Of Evidence Regarding The Assignment Of The Tentatively Reserved Serial Number To A Different Boat Three Months After The Transaction And Mr. Zimmerman's Cancellation Of The Houseboat Purchase. | 17 |

| | | |
|------|--|----|
| 1) | UTCOC Was Allowed To Introduce All Relevant Evidence | 17 |
| 2) | The Evidence Could Properly Be Excluded Under Rules 402 and 403 Of The Utah Rules Of Evidence. | 18 |
| 3) | Assuming The Exclusion Of Evidence Was Error, UTCOC Has Failed To Show That "The Likelihood Of A Different Outcome In The Absence Of The Error Is 'Sufficiently High So As To Undermine Confidence In The Verdict.'" | 19 |
| VI. | ARGUMENT | 20 |
| A. | THIS COURT LACKS JURISDICTION OVER THIS APPEAL AS THE RULE 54(b) CERTIFICATION WAS IMPROPER. | 20 |
| VII. | THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON UTCOC'S PROMISSORY ESTOPPEL CLAIM. | 22 |
| A. | UTCOC'S PROMISSORY ESTOPPEL CLAIM WAS BARRED AS UTCOC FAILED TO EXHAUST ITS CLAIMS AGAINST MR. ZIMMERMAN. | 23 |
| B. | UTCOC's Promissory Estoppel Claim Is Also Barred As UTCOC Had Adequate Legal Remedies Against Sumerset And Mr. Sharpe. | |
| C. | THERE ARE SEVERAL OTHER BASES UPON WHICH THE TRIAL COURT'S DENIAL TO INSTRUCT THE JURY ON THE PROMISSORY ESTOPPEL CLAIM WAS PROPER AS A MATTER OF LAW. | 27 |
| 1. | UTCOC'S PROMISSORY ESTOPPEL CLAIM WAS BARRED AS THERE WAS AN EXPRESS AGREEMENT BETWEEN UTCOC AND MR. ZIMMERMAN FOR REPAYMENT OF THE FUNDS AT ISSUE. | 27 |
| 2. | UTCOC'S PROMISSORY ESTOPPEL CLAIM WAS PROPERLY NOT SUBMITTED TO THE JURY AS THE EVIDENCE CONCLUSIVELY ESTABLISHED UTCOC DID NOT RELY ON THE ALLEGED PROMISES. | 28 |
| a. | No Reliance As UTCOC's Decision To Loan And The Loan Itself Was Made Before Alleged Promise. | 29 |
| b. | No Reliance To Its Detriment As UTCOC Had No Interest In The Funds Wired To Sumerset | 30 |

| | | |
|-------|---|----|
| VIII. | THE TRIAL COURT CORRECTLY PRECLUDED EVIDENCE THAT THE SERIAL NUMBER TENTATIVELY RESERVED FOR MR. ZIMMERMAN'S HOUSEBOAT WAS REASSIGNED TO ANOTHER BOAT MORE THAN THREE MONTHS AFTER THE ALLEGED MISREPRESENTATION AND AFTER MR. ZIMMERMAN CANCELED THE SALE. | 31 |
| A. | UTCO WAS ALLOWED TO INTRODUCE ALL EVIDENCE REGARDING THE SUBSEQUENT REASSIGNMENT OF THE SERIAL NUMBER TO ANOTHER HOUSEBOAT. | 33 |
| B. | THE EVIDENCE WAS PROPERLY EXCLUDED UNDER RULE 402 OF THE UTAH RULES OF EVIDENCE AS IT WAS PATENTLY IRRELEVANT. | 35 |
| C. | THE EVIDENCE WAS PROPERLY EXCLUDED UNDER RULE 403 OF THE UTAH RULES OF EVIDENCE AS ITS INTRODUCTION WOULD HAVE CREATED CONFUSION OF THE ISSUES AND UNFAIR PREJUDICE, AND WOULD HAVE BEEN A WASTE OF TIME. | 36 |
| D. | UTCO HAS FAILED TO SHOW THAT EVEN IF THERE WAS AN IMPROPER EXCLUSION OF EVIDENCE THAT THE ADMISSION OF THAT EVIDENCE WAS LIKELY TO RESULT IN A DIFFERENT OUTCOME | 38 |
| | CONCLUSION AND RELIEF SOUGHT | 39 |

TABLE OF AUTHORITIES

Cases

| | |
|---|--------------------|
| <u>Bennion v. Pennzoil Co.</u> , 826 P.2d 137, 139 (Utah 1992) . . . | .2,20-21,22 |
| <u>Charters Valley School Dist. v. Virginia Mansions Apartments, Inc.</u> , 489 A.2d 1381, 1386-1387 (Penn. 1985) | .26 |
| <u>Commercial Fixtures and Furnishing v. Adams</u> , 564 P.2d 773, 774 (Utah 1977) | .5, 16,23,25,27,28 |
| <u>Cornia v. Wilcox</u> , 898 P.2d 1379 (Utah 1995) | .3 |
| <u>Council of and for the Blind of Delaware County Valley, Inc. v. Regan</u> , 709 F.2d 1521, 1550 n. 76 | .26 |
| <u>Furniture Distrib. Ctr. v. Miles</u> , 821 P.2d 1165, 1166-1167 (Utah 1991) | .2,20 |
| <u>Heslop v. Bank of Utah</u> , 839 P.2d 828 (Utah 1992) | .3,33 |
| <u>Joufflas v. Fox Television Stations, Inc.</u> , 927 P.2d 170, 173 (Utah 1996) | .4 |
| <u>Justice v. United States</u> , 6 F.3d 1474, 1482 n. 16 (11th Cir. 1993) | .26 |
| <u>Kennecott Corp. v. Utah State Tax Comm'n</u> , 814 P.2d 1099, 1104-1105 (Utah 1991) | .1-2, 20,22 |
| <u>Knight v. Post</u> , 748 P.2d 1097, 1099-1100 (Utah App. 1998) . . . | .5,16, 23-25 |
| <u>Nay v. General Motors Corp.</u> , 850 P.2d 1260 (Utah 1993) . . . | .3,33 |
| <u>Powers v. Gene's Bldg. Materials, Inc.</u> , 567 P.2d 174 (Utah 1977) | .27 |
| <u>State v. Hamilton</u> , 827 P.2d 232, 238 (Utah 1992) | .3 |
| <u>State v. Knight</u> , 734 P.2d 913, 920 (Utah 1987) | .4, 20,38 |
| <u>State v. Robertson</u> , 923 P.2d 1219 (Utah 1997) | .3 |
| <u>State v. Wetzel</u> , 868 P.2d 64, 67-70 (Utah 1993) | .4,20, 38 |

| | |
|--|--------|
| <u>State v. Winward</u> , 909 P.2d 909 (Utah App. 1995) | .37-38 |
| <u>Thompson v. Allen County</u> , 115 U.S. 550, 554 (1885). | .26 |
| <u>Weese v. Davis County Comm'n</u> , 834 P.2d 1 (Utah 1992) | .29-30 |
| <u>West v. Carson</u> , 49 F.3d 433 (8th Cir. 1995) | .38 |

Rules

| | |
|---------------------------------|----------|
| Utah R. App. P. 11(b) | .6 |
| Utah R. Civ. P. 12 | .22 |
| Utah R. Civ. P. 41 | .22 |
| Utah R. Evid. 402 | .5,35-36 |
| Utah R. Evid. 403 | .5,36-38 |

Other Authorities

| | |
|--|----|
| Restatement (Second) of Contracts § 90 | 29 |
| McCormick, <u>Evidence</u> , § 185 | 38 |

I. STATEMENT OF JURISDICTION:
THIS COURT LACKS JURISDICTION OVER THIS MATTER AS IT
WAS IMPROPERLY CERTIFIED UNDER RULE 54(b)
OF THE UTAH RULES OF CIVIL PROCEDURE

Appellant UTCO Associates, Ltd. ("UTCO") appeals a Judgment of the Third Judicial District Court of Salt Lake County, Honorable Timothy R. Hanson presiding, entered on a jury verdict in favor of Appellees Sumerset Houseboats Div. SMI ("Sumerset") and its President, James E. Sharpe ("Mr. Sharpe"). The Judgment was certified as final under Rule 54(b) of the Utah Rules of Civil Procedure. In addition to the claims against Sumerset and Mr. Sharpe which were decided by the jury, UTCO brought claims against co-defendant K. Demarr Zimmerman ("Mr. Zimmerman") arising from the same transaction. At the time of trial, Mr. Zimmerman had filed bankruptcy and UTCO had chosen not to pursue those claims until after this matter was tried. To this day, the claims against Mr. Zimmerman remain pending in the lower court.

The Judgment from which this appeal was taken was certified by the trial court under Rule 54(b) of the Utah Rules of Civil Procedure. Such certification was improper, however, as the factual overlap between UTCO's claims against Sumerset and Mr. Sharpe raised in this appeal, and UTCO's claims against Mr. Zimmerman which remain pending before the trial court are based on the same operative facts. Thus, the Judgment at issue was not eligible for certification under Rule 54(b) of the Utah Rules of Civil Procedure. E.g., Kennecott Corp. v. Utah State Tax Comm'n,

814 P.2d 1099, 1104-1105 (Utah 1991); Furniture Distrib. Ctr. v. Miles, 821 P.2d 1165, 1166-1167 (Utah 1991)¹.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following issues are presented for review in this appeal:

1. Did the trial court err in certifying as final the Judgment dated September 4, 1996 which disposed of claims against Appellants Sumerset and Mr. Sharpe, but not the claims against Mr. Zimmerman which are based on the same transaction and operative facts, and remain pending before the trial court?

The standard of review for a trial court's certification under Rule 54(b) of the Utah Rules of Civil Procedure is one of correctness, with no deference given to the trial court. E.g., Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099, 1100 (Utah 1991).

2. Did the trial court err in declining to instruct the jury on UTCO's equitable promissory estoppel claim despite uncontroverted evidence establishing that:

- a) UTCO failed to exhaust its claim in bankruptcy against Mr. Zimmerman?

¹ Moreover, the trial court's Order Granting Plaintiff's Rule 54(B) [sic] Motion to Certify Judgment Dated September 4, 1996 [R3210-3213] fails to properly set forth findings "explain[ing] the lack of factual overlap between the certified and remaining claims and thus satisfy the Kennecott criterion for certification to be proper." Bennion v. Pennzoil Co., 826 P.2d 137, 139 (Utah 1992).

- b) UTCO had a valid, enforceable contract with Mr. Zimmerman for repayment of the funds sought from Sumerset and Mr. Sharpe?
- c) UTCO had agreed to loan and had loaned the funds to Mr. Zimmerman prior to the alleged promise by Sumerset and Mr. Sharpe?
- d) UTCO admitted that the money transferred to Sumerset was Mr. Zimmerman's money, not that of UTCO?

The standard of appellate review for a trial court's refusal to give a proposed jury instruction is a question of law for which no deference is given to the trial court. E.g., Cornia v. Wilcox, 898 P.2d 1379, 1386 (Utah 1995); State v. Robertson, 923 P.2d 1219, 1231 (Utah 1997) (citing State v. Hamilton, 827 P.2d 232, 238 (Utah 1992)).

3. Did the trial court err in excluding evidence that the serial number tentatively reserved for the Zimmerman houseboat was, three months after the alleged fraud and after Mr. Zimmerman had canceled the purchase, assigned to another boat being manufactured for sale to an unrelated third-party?

The standard of appellate review for a trial court's evidentiary ruling is an abuse of discretion and the trial court's ruling is given deference in light of its advantageous position. E.g., Nay v. General Motors Corp., 850 P.2d 1260, 1262 (Utah 1993) ("abuse of discretion and reverse only if the ruling is beyond the bounds of reasonability"); Heslop v. Bank of Utah, 839 P.2d 828, 838

(Utah 1992) ("court's rulings regarding admissibility will not be overturned 'unless it clearly appears that the lower court was in error'"); State v. Wetzel, 868 P.2d 64, 67 (Utah 1993).

4. If the trial court erred in issuing a ruling precluding the introduction of evidence describing the houseboat to which the serial number was eventually assigned more than three months after the alleged fraudulent representation, was UTCO prejudiced as it was allowed to introduce evidence: (1) That, at the time of the alleged fraudulent statement, there was no houseboat in existence with the serial number as set forth in the invoice between Sumerset and Mr. Zimmerman; (2) That no houseboat with that serial number was ever built to the specifications in the invoice between Sumerset and Mr. Zimmerman; and (3) That a houseboat bearing the serial number initially intended for the Zimmerman houseboat was sold to another party? The standard of appellate review of a trial court's evidentiary rulings is whether there was error and whether such error was "harmful". Joufflas v. Fox Television Stations, Inc., 927 P.2d 170, 173 (Utah 1996). An error is "harmful" only where "the likelihood of a different outcome in the absence of the error is 'sufficiently high as to undermine confidence in the verdict.'" Id. at 174 (quoting State v. Knight, 734 P.2d 913, 920 (Utah 1987)); see, also, State v. Wetzel, 868 P.2d 64, 67-70 (Utah 1993) (improper evidence ruling reversed only if showing of prejudice (i.e., "reasonable likelihood that the error affected outcome of the proceedings"))).

III. DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

The following cases are determinative of the issues pertaining to the trial court's refusal to instruct the jury on UTCO's promissory estoppel claims: Knight v. Post,² 748 P.2d 1097, 1099-1100 (Utah App. 1988) (pending bankruptcy claims against third-party barred equitable claims because of failure to exhaust all available legal remedies); Commercial Fixtures and Furnishing v. Adams,³ 564 P.2d 773, 774 (Utah 1977) (existence of valid contract with third-party to recover debt bars equitable claim seeking to imply contract against another).

The following Utah Rules of Evidence are determinative of the issues pertaining to the trial court's refusal to allow evidence pertaining to the reassignment of the serial number:

**Rule 402. Relevant evidence generally admissible;
irrelevant evidence inadmissible.**

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States of the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

**Rule 403. Exclusion of relevant evidence on grounds of
prejudice, confusion, or waste of time.**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

² Attached as Addendum "A".

³ Attached as Addendum "B".

IV. STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

UTCO brought this action against Sumerset, Mr. Sharpe and Mr. Zimmerman asserting claims for breach of contract, unjust enrichment, quantum meruit, contract implied in law, breach of the covenant of good faith and fair dealing, promissory estoppel, misrepresentation, negligent misrepresentation, conspiracy, conversion, and implied in fact contract. [R561-577]⁴ All of the UTCO's claims arise from a single transaction whereby Mr. Zimmerman purchased a houseboat from Sumerset. Subsequent to the filing of this action, Mr. Zimmerman filed a Chapter 7 bankruptcy. [R108-109]⁵

On July 11, 1996, Sumerset and Mr. Sharpe filed a Motion in Limine which sought the exclusion of evidence: (1) that the serial number tentatively reserved for Mr. Zimmerman's houseboat was eventually assigned to another houseboat more than three months after the alleged misrepresentations and after Mr. Zimmerman canceled the order and directed Sumerset to apply his \$58,384 to Mr. Zimmerman's then existing debt owed to Sumerset, and (2) that the second houseboat

⁴ All citations are to the record as indexed by the Clerk of the Third Judicial District Court pursuant to Rule 11(b) of the Utah Rules of Appellate Procedure.

⁵ While UTCO filed a claim in Mr. Zimmerman's bankruptcy, it chose to not pursue those claims and instead chose to wait and see how its claims against Mr. Sharpe and Sumerset were resolved.

was eventually sold to a third-party. [1486-1490] The grounds for this Motion were that these subsequent events were irrelevant to UTCO's claims and, moreover, under Rule 403 of the Utah Rules of Evidence, any probative value would be substantially outweighed by the danger of unfair prejudice and confusion of the issues, and would unnecessarily lengthen the trial. [Id.] On July 22, 1996, UTCO filed a Memorandum in Opposition. [R1744-1752] On July 22, 1996, the Court granted the Motion and stated:

I'm going to grant the motion. I can't see any relevance to the proposition that the, at least based on what I've heard so far, that the reassignment of a serial number to another boat, to a third person who is not claiming to be involved in this situation, has any relevance to the state of mind of the Defendant for purposes of committing fraud at the time these representations were made. I recognize after events may have some probative value, but in this case I can't see what it might be.

The fact that the boat with a serial number did not exist, and was never built to the specifications in the original invoice, is all the Plaintiff needs in that regard. The rest of it is surplusage and a waste of time. Unless the evidence changes, it's not coming in. The Motion is granted.

That doesn't mean you can't put in evidence that there was never a boat with that serial number, or that was the serial number on the invoices and there is no such boat, but it's not, I don't see any relevance to the fact that serial number now appears on some other boat. The Motion is granted.

[R1910]

UTCO's claims against Sumerset and Mr. Sharpe proceeded to trial before the Third District Court, Honorable Timothy R. Hanson presiding. The matter was tried to a jury on July 22, 23, 25, 29 and 30, 1996. During the course of the trial, UTCO voluntarily dismissed its claims for conversion, quantum meruit,

breach of the covenant of good faith and fair dealing, foreclosure of security interest, and conspiracy.

The evidence at trial further established that UTCO's claims were still pending against Mr. Zimmerman in the bankruptcy proceeding, [R2364] and that UTCO would receive a distribution under the bankruptcy. [R2447] Additionally, UTCO had filed a nondischargeability action in Mr. Zimmerman's bankruptcy which it had not pursued to completion and which UTCO stopped pursuing pending the outcome of the instant action. [R2448-2449]

On July 25, 1996, after UTCO rested its case, Sumerset and Mr. Sharpe filed Defendants' Combined Motion for Directed Verdict and Supporting Memorandum. [R1572-1584] Sumerset and Mr. Sharpe's Motion for Directed Verdict sought judgment in their favor on, inter alia, UTCO's promissory estoppel claim. [R1573-1575 & 1580-1582] The Motion for Directed Verdict presented the following bases for directing verdict against UTCO on its equitable promissory estoppel claim: (1) UTCO's promissory estoppel claim is barred as UTCO failed to exhaust its legal remedies because it had an express contract with Mr. Zimmerman for repayment of the very funds sought against Sumerset and Mr. Sharpe in its equitable claims, and claims under that contract were pending in the bankruptcy court along with a complaint for nondischargeability; [R1580-1582] and (2) UTCO's promissory estoppel claim is barred as there was no reasonable reliance as UTCO had already loaned Mr. Zimmerman the \$58,384 prior to any alleged promise and UTCO admitted it had no ownership interest in

that money. [R1573-1575, 1582] The issues raised by Defendants' Motion for Directed Verdict were extensively and fully argued by all parties. [R2390-2416].

While the trial court initially indicated that it was denying the Motion for Directed Verdict, [R2416] the trial court, based in part on the position asserted in the Motion for Directed Verdict, subsequently refused to instruct the jury on UTCO's promissory estoppel claim and stated:

I've indicated in chambers that I was not instructing on the equitable causes [sic] of action of promissory [sic] estoppel. For the record, the reasons I have determined not to do that is, I am satisfied the Plaintiffs [sic] have an adequate remedy at law and, I believe, it is the rule that equitable remedy is not available as long as there is an adequate remedy at law. And I believe there is here.

Also, I am satisfied that the concept promissory estoppel basically mirrors the causes of action that are being asserted in this case by the Plaintiff. And they'll just be surplusage.

Finally, I'm satisfied that the Court of Appeals case that was cited to me by Plaintiff's counsel, saying that they seem to suggest that the Court must send equitable causes of action to the jury, is factually distinguishable in this case and I'm satisfied that it would be inappropriate to submit that equitable claim to a jury, if it was otherwise proper.

[R2606-2607]

At the conclusion of the trial, the jury was instructed on UTCO's claims of fraud, negligent misrepresentation, punitive damages and breach of contract, and the jury found in favor of Somerset and Mr. Sharpe on all claims. [R1670-1672] Pursuant to the jury's verdict, the trial court entered judgment of no cause of action in favor of Somerset and Mr. Sharpe. [R1771-1773]

UTC's claims against Mr. Zimmerman based on the same transaction and the same operative facts remain pending before the trial court.

On October 1, 1996 UTC filed its first notice of appeal of the trial court's Judgment. [R1774-1779] That appeal was dismissed sua sponte by the Court as it was not a final judgment as the claims against Mr. Zimmerman remained pending before the trial court. See Exhibit "K" to Brief of Appellant.

On March 24, 2000, subsequent to the trial of UTC's claims against Sumerset and Mr. Sharpe, UTC and Mr. Zimmerman entered into a Stipulation for Nondischargeability of Debts in the bankruptcy proceeding whereby Mr. Zimmerman acknowledged owing UTC \$66,000 plus interest under the promissory note, the same monies UTC sought at trial (and continues to seek) from Sumerset and Mr. Sharpe. [R3149-3153] On March 26, 1998 UTC obtained a Judgment in its favor against Mr. Zimmerman in the amount of \$81,209.26 (the \$66,000 plus interest). At that time, UTC stipulated and agreed to accept from Mr. Zimmerman the amount of \$7,000, less than ten-percent (10%) of the outstanding Judgment, in full satisfaction of that Judgment. [R3149-3153] UTC also maintained its rights to pursue its unsecured claim in Mr. Zimmerman's Chapter 7 case. [R3152]

UTC then filed a motion to certify the Judgment as a final judgment under Rule 54(b) of the Utah Rules of Civil Procedure, which motion was opposed because of the factual overlap between the claims on appeal and UTC's claims against

Mr. Zimmerman which remained pending before the trial court. UTCO's motion was granted by an Order dated March 22, 2000. [R3210-3213] In that Order, however, the trial court failed to make findings explaining how the certified and remaining claims were separate and did not factually overlap. [Id.] UTCO has not dismissed its claims remaining in the trial court against Mr. Zimmerman.

On April 19, 2000 UTCO filed its Notice of Appeal from the September 4, 1996 Judgment and the trial court's order certifying that judgment. [R3216-3225]

B. STATEMENT OF RELEVANT FACTS

Sumerset is a Kentucky corporation engaged in the business of manufacturing and selling houseboats, [R1958] and has been in that business since 1953. [R1972] Mr. Sharpe was, at all relevant times, the President of Sumerset. [Id.]

In early 1991, Mr. Zimmerman was starting a business, Lake Powell-N-Houseboats, whereby he would purchase houseboats and then sell weekly shares in the boat to individuals, much like a time-share arrangement. [R1964-1965 & 1967-1968] Mr. Zimmerman visited Sumerset's sales office in Atlanta, Georgia and then visited Sumerset's manufacturing plant in Somerset, Kentucky. [R1964-1965] Over the next several months Mr. Zimmerman purchased six (6) houseboats from Sumerset. [R2126]

On approximately November 20, 1992 Mr. Zimmerman's company, Lake Powell-N-Houseboats, approached Sumerset regarding

the purchase of a 1993 model-year houseboat.⁶ [R2047] In connection with this proposed transaction, Sumerset created an invoice describing the specifications and amenities of the houseboat to be custom built and indicating the purchasers as "Lake Powell-N-Houseboats/Demarr [Zimmerman]." [R2048] It was anticipated that manufacture of the boat would be completed in March, 1993, [R2079] and the purchase price would be \$120,000.00. [R2051]

To finance this purchase, Mr. Zimmerman contacted UTCO, a lending source he had previously used, seeking \$75,000 to be paid toward the purchase price. [R2178-2179] UTCO refused to make a \$75,000 loan to Mr. Zimmerman, but did agree to a loan in the amount of \$60,000. [R2178-2179] In connection with UTCO's loan to Mr. Zimmerman, as was the case with their prior loans, Mr. Nelson, UTCO's counsel, prepared a promissory note, security agreement, acknowledgement and UCC-1 Financing Statement, which were executed by Mr. Zimmerman on December 21, 1992. [R2179-2181, 2195, 2292, 2582-2583] Sumerset was not a party to these agreements nor were these documents provided to Sumerset. [R2540-2541]

Neither Sumerset nor Mr. Sharpe had any business dealing directly with UTCO. In fact, Mr. Sharpe testified that he did not know UTCO was lending money to Mr. Zimmerman and, for

⁶ After this transaction Sumerset sold four houseboats to Mr. Zimmerman and related entities. [R2126] These transactions are not at issue in this litigation.

all Mr. Sharpe knew, Mr. Nelson was Mr. Zimmerman's lawyer.

[R2538-2541]

After the loan was made, Mr. Nelson purports to have had two conversations with Mr. Sharpe which serve as the sole basis for, inter alia, UTCO's promissory estoppel claim. With respect to these conversations, Mr. Nelson testified at trial as follows:

A. . . . I talked to [Mr. Sharpe] on the 19th, 20th, 21st. I don't have a calendar. I don't recall the day I talked to him, the week before Christmas, where I confirmed to him -- I think the 21st because that's the day Zimmerman signed the loan document. I confirmed to Mr. Sharpe that UTCO had made the loan, that Demarr [Zimmerman] had signed the documents, and that we were prepared to wire \$60,000 to fund the loan.

Q. What did he say to you?

A. He said that is great, wire the money.

[R2196; see also R2201, 2226, 2240] (emphases added).

Mr. Nelson further testified as follows:

Q. And during that conversation you told Mr. Sharpe that Mr. Zimmerman had signed the loan documents?

A. I believe that I did, yes.

Q. All right. And going on in your deposition, question, line 20, page 39. "Just so I understand the timing of this conversation, did this occur before or after UTCO had made the decision to actually loan funds to Mr. Zimmerman?

"Answer: It was after.

"Question: Did this conversation occur before or after the conversation you had with Mr. Zimmerman in which you informed him that UTCO would, in fact, loan him \$60,000.00?

The answer was after. Do you recall giving those answers to those questions during your deposition?

A. I don't recall the specific questions or answers but I have read them and the answers are correct.

Q. And that is consistent with your testimony here at trial, right?

A. That's correct.

[R2241-2242] (emphases added)⁷

On December 29, 1992, Sumerset received a wire transfer in the amount of \$58,384. [R2129] That wire transfer indicated it was to be applied to "Demarr Zimmerman Account", without mention of any particular boat. [R2129-2130, 2272] These funds belonged to Mr. Zimmerman and, based on its own admissions, UTCO had no interest in these funds wired to Sumerset.⁸ [R2552-2553]

Prior to completion of the Zimmerman houseboat, Mr. Zimmerman informed Sumerset not to ship the houseboat as he would not be able to pay for it. [R2127] Mr. Zimmerman instructed Sumerset to apply the funds in the amount of \$58,384 received by

⁷ Mr. Nelson was the only individual associated with UTCO that had any discussions with Sumerset or Mr. Sharpe prior to the initiation of this litigation. More particularly, Mr. Kent, UTCO's sole general partner, expressly testified that he had no contact, conversations or communications with Mr. Sharpe at any time prior to this action. [R2363]

⁸ With respect to the request for admission, the trial court stated to the jury as follows:
All right. The request is as follows. The Defendant, Sumerset, sent to the Plaintiff the following request and it reads as follows.
"Admit that you did not wire any funds to Sumerset that belonged to Plaintiff." Plaintiff is, of course, UTCO. The answer is, says, "See general objection." You don't need to worry about that, "but admitted," that it was admitted.

[R2552-2553]

Sumerset to another boat, and Sumerset complied. [R2133, 2541-2542]

After Mr. Zimmerman cancelled the order for the houseboat, Sumerset "sidetracked" the Zimmerman boat by taking it out of the production line and setting it aside until a purchaser could be found so the boat could be completed to the buyer's specifications. [R2542-2543] More than three months later and after the sale with Mr. Zimmerman had been canceled, the serial number tentatively reserved for the Zimmerman houseboat was assigned to another houseboat that was sold to an unrelated, third-party. [R1487, 1905, 2210-2211]

No serial numbers were altered or changed as the serial number had not been affixed to the Zimmerman houseboat before Mr. Zimmerman canceled the order.

V. SUMMARY OF ARGUMENTS

A. This Court Lacks Jurisdiction Over This Appeal As The Trial Court Improperly Certified The Judgment Under Rule 54(b) Of The Utah Rules Of Civil Procedure As The Claims Against Mr. Zimmerman Based On The Same Transaction And Same Facts Are Not Separate.

This matter comes before the Court pursuant to the trial court's certification pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. That certification was improper, however, as UTCO's claims against Mr. Zimmerman which remain pending before the trial court are based on the same transaction and the same operative facts. Moreover, the trial court's certification improperly fails to set forth sufficient findings

to show that the claims on appeal and the claims remaining before the trial court do not factually overlap.

B. The Trial Court Properly Refused To Instruct The Jury On UTCO's Equitable Promissory Estoppel Claim.

1) UTCOT Failed To Exhaust Its Claims Against Zimmerman And UTCOT Had An Adequate Remedy At Law.

The trial court correctly held UTCOT had an adequate remedy at law and declined to instruct the jury on UTCOT's equitable claim of promissory estoppel. The only evidence at trial was that UTCOT loaned the \$58,384 to Mr. Zimmerman under an express contract to which neither Sumerset nor Mr. Sharpe were parties. The uncontroverted evidence also showed that UTCOT had filed claims against Mr. Zimmerman which were pending in the bankruptcy court seeking to collect those very funds, and those collection efforts were put on hold while UTCOT pursued this equitable claim against Sumerset and Mr. Sharpe. Under this Court's holding in Knight v. Post, 748 P.2d 1097, 1099-1100 (Utah App. 1988) this attempted end-run around available legal remedies cannot be allowed and the trial court properly dismissed the equitable promissory estoppel claim. See also Commercial Fixtures and Furnishing v. Adams, 564 P.2d 773, 774 (Utah 1997) (existence of valid contract with third-party to recover debt bars equitable claim seeking to imply contract against another).

In addition, UTCOT's promissory estoppel claim was barred as UTCOT had an adequate remedy at law against Sumerset and Mr. Sharpe. Thus, the existence of the legal remedy, which

remedy was the same as the equitable remedy, barred the equitable claim.

2) UTCOC Did Not Rely To Its Detriment On Any Alleged Promise.

The trial court's refusal to instruct on the promissory estoppel claim was also proper on the independent bases that the evidence conclusively established that UTCOC did not reasonably rely on the alleged promise as: (1) UTCOC had already agreed to loan and had loaned the funds to Mr. Zimmerman before the promise was purportedly made by Mr. Sharpe; and (2) The funds wired to Somerset belonged exclusively to Mr. Zimmerman and UTCOC had no ownership interest in them.

C. The Trial Court Could Properly Preclude Admission Of Evidence Regarding The Assignment Of The Tentatively Reserved Serial Number To A Different Boat Three Months After The Transaction And Mr. Zimmerman's Cancellation Of The Houseboat Purchase.

1) UTCOC Was Allowed To Introduce All Relevant Evidence.

At trial, UTCOC was allowed to introduce substantial evidence regarding the subsequent reassignment of the serial number to another houseboat after Mr. Zimmerman canceled his order. In fact, the very evidence UTCOC, in framing the issues at page 1 of its Brief, claims was improperly excluded was actually admitted, namely the later sale of the boat to a third party bearing the serial number tentatively assigned to the Zimmerman houseboat. UTCOC, as it did at trial, completely fails to

articulate what evidence it claims was improperly excluded and the relevance of that evidence.

2) The Evidence Could Properly Be Excluded Under Rules 402 And 403 Of The Utah Rules Of Evidence.

Contrary to UTCO's implication throughout its Brief, there was no proffer or evidence of any alteration or changing of any serial number. The evidence excluded by the trial court was simply Sumerset's reassignment of the serial number tentatively reserved for Mr. Zimmerman's houseboat three months after any alleged misrepresentation and Mr. Zimmerman's cancellation of the purchase. That evidence was properly excluded under Rule 402 of the Utah Rules of Evidence as it had no relevance. That Sumerset reassigned the sequential serial number three months after the transaction at issue had absolutely no relevance as demonstrated by UTCO's repeated inability to articulate why or how the evidence was relevant.

This evidence was also properly precluded under Rule 403 of the Utah Rules of Evidence, even if it were somehow deemed relevant, as the evidence would have created unfair prejudice, confusion and a waste of time. Instead of focusing on the pertinent issues, UTCO sought to interject this evidence to attempt to raise the question that Sumerset somehow technically violated some statute concerning the assignment of hull identification numbers. While there was no evidence to support a violation by Sumerset, the jury would have been inundated with vast amounts of evidence concerning the propriety of maintaining serial numbers in a sequential order and focusing on things that

occurred three months after the transaction giving rise to UTCO's claims. Additionally, the jury would have been confused regarding the effect of the evidence and, assuming a violation occurred, may have rendered a verdict on that fact instead of focusing on the relevant conduct which occurred at the time of the transaction between the parties themselves. Rule 403 is designed precisely to prevent this type of distraction and confusion during a trial and the trial court was clearly within its discretion in precluding this evidence.

- 3) Assuming The Exclusion Of Evidence Was Error, UTCO Has Failed To Show That "The Likelihood Of A Different Outcome In The Absence Of The Error Is 'Sufficiently High So As To Undermine Confidence In The Verdict.'"

A trial court's evidentiary rulings will be upheld on appeal unless it is shown that had the incorrect ruling was "harmful error". To meet this showing, UTCO must establish that had the error not occurred it was likely to result in a different outcome and that the confidence in the jury's verdict was undermined. UTCO has not and cannot make this showing. It appears that UTCO was allowed to introduce at trial all of the evidence which is now claims it was entitled to introduce. UTCO was allowed to introduce evidence: (1) That, at the time of the alleged fraudulent statement, there was no houseboat in existence with the serial number set forth in the invoice between Sumerset and Mr. Zimmerman; (2) That no houseboat with that serial number was ever built to the specifications in the invoice between Sumerset and Mr. Zimmerman; and (3) That a houseboat

bearing the serial number initially intended for the Zimmerman houseboat was sold to another party. Thus, even if the trial court's exclusion of this evidence under Rules 402 and 403 of the Utah Rules of Evidence was improper, it was not "harmful error". To meet this burden, UTCO must establish that "the likelihood of a different outcome in the absence of the error is 'sufficiently high as to undermine confidence in the verdict.'" Id. at 174 (quoting State v. Knight, 734 P.2d 913, 920 (Utah 1987)); see, also, State v. Wetzel, 868 P.2d 64, 67-70 (Utah 1993) (improper evidence ruling reversed only if showing of prejudice (i.e., "reasonable likelihood that the error affected outcome of the proceedings"))). Such is not the case and the Judgment must be affirmed.

VI. ARGUMENT.

A. THIS COURT LACKS JURISDICTION OVER THIS APPEAL AS THE RULE 54(b) CERTIFICATION WAS IMPROPER.

To be properly certifiable under Rule 54(b) of the Utah Rules of Civil Procedure, the claims must be separate from the claims remaining before the trial court. To satisfy this criteria, the claims being certified and the claims remaining must not have significant factual overlap. E.g., Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099, 1104-1105 (Utah 1991); Furniture Distrib. Ctr. v. Miles, 821 P.2d 1165, 1166-1167 (Utah 1991). Moreover, a lower court's certification must set forth findings "explain[ing] the lack of factual overlap between the certified and remaining claims and thus satisfy the Kennecott criterion for certification to be proper. Bennion v. Pennzoil

Co., 826 P.2d 137, 139 (Utah 1992). These requirements were not met in this case.

This Court previously dismissed UTCO's appeal of the Judgment on the basis that it was not final because UTCO's claims against Mr. Zimmerman remained pending before the trial court. Thereafter, UTCO moved for and obtained an Order from the trial court certifying the Judgment against Sumerset and Mr. Sharpe as final under Rule 54(b) of the Utah Rules of Civil Procedure.⁹ UTCO's claims asserted against Mr. Zimmerman which remain pending before the trial court are based on the same transaction and the same facts as UTCO's claims against Sumerset and Mr. Sharpe. For instance, the promissory estoppel claim which is the subject of this appeal was pled jointly against Sumerset, Mr. Sharpe and Mr. Zimmerman and the facts not only overlap, but are often identical. With respect to the reliance element, UTCO's Second Amended Complaint claims that its reliance of loaning and wiring the funds "were induced by the defendants' [i.e., Sumerset, Mr. Sharpe and Mr. Zimmerman] promises". [R000569] That claim then asks for the remedy of recovering \$58,384 plus interest against Zimmerman, Sharpe and Sumerset.¹⁰ Clearly there is substantial factual overlap between the claims remaining before the trial

⁹ It should be noted that UTCO did not dismiss its claims against Mr. Zimmerman, which would have made the Judgment final as a matter of law. Instead, UTCO chose to move for a Rule 54(b) certification and leave those claims against Mr. Zimmerman pending before the trial court.

¹⁰ UTCO's other claims, including breach of contract, misrepresentation, conspiracy, etc., also have substantial factual overlap. [See R0561-0578]

court and those at issue on this appeal such that certification was improper. E.g., Kennecott, 814 P.2d at 1103; Bennion, 826 P.2d at 138.

Finally, the trial court's certification is improper because its findings fail to "explain the lack of factual overlap between the certified and remaining claims" as required by the Utah Supreme Court. Bennion v. Pennzoil Co., 826 P.2d 137, 139 (Utah 1992). Thus, the certification was improper and this appeal should be dismissed for lack of jurisdiction.

VII. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON UTCO'S PROMISSORY ESTOPPEL CLAIM.

The trial court, at the conclusion of the evidence and after receiving and hearing argument from all parties on Sumerset's and Mr. Sharpe's Motion for Directed Verdict on the promissory estoppel claim, refused to instruct the jury on UTCO's promissory estoppel claim. A primary basis for declining to instruct the jury on this claim (i.e., that UTCO had an adequate remedy at law which barred its promissory estoppel claim) mirrors a chief basis upon which the Motion for Directed Verdict on the promissory estoppel claim was made by Sumerset and Mr. Sharpe. While the trial court did not expressly reference the immediately preceding Motion for Directed Verdict in its ruling, as UTCO concedes on appeal that the trial court's failure to specify whether it relied on Rule 12 or Rule 41, is not "significant". UTCO's Brief at p. 9 The trial court was correct, as a matter of law, in declining to instruct the jury on UTCO's promissory estoppel claim and the judgment should be affirmed.

A. UTCOS PROMISSORY ESTOPPEL CLAIM WAS BARRED AS
UTCOS FAILED TO EXHAUST TITS CLAIMS AGAINST MR.
ZIMMERMAN.

It is generally held that one must first exhaust his legal remedies before he may recover on the basis of an equitable claim. Knight v. Post, 748 P.2d 1097, 1099-1100 (Utah App. 1988); Commercial Fixtures and Furnishing v. Adams, 564 P.2d 773, 774 (Utah 1977) (exhaustion of remedies required before pursuit of any equitable claim); see also UTCOS's Brief at p. 12 ("It is generally true that where there is an adequate remedy at law, no equitable remedy will be implied"). As the evidence shows, UTCOS had an adequate remedy at law, namely the claim filed in Mr. Zimmerman's pending bankruptcy. As a matter of law, UTCOS's pending claim in Mr. Zimmerman's bankruptcy was a legal remedy available to UTCOS which barred them from pursuing the equitable promissory estoppel claim against Sumerset and Mr. Sharpe. E.g., Knight v. Post, 748 P.2d at 1099-1100; Commercial Fixtures, 564 P.2d at 774.

This Court's decision in Knight is dispositive of this issue. In Knight, the plaintiff brought an equitable claim against defendant for work plaintiff performed for a third-party which benefitted defendant. The plaintiff also had filed a claim in the third-party's pending bankruptcy. This Court, reversing the lower court's judgment against defendant and in plaintiff's favor, held as follows:

As a general rule, one must first exhaust legal remedies before he may recover on the basis of the equitable doctrine of quantum meruit. [citations omitted] The

legal remedies available to [plaintiff] included. . . pursuit of the [third-party's] assets as a creditor in the [third-party's] bankruptcy proceeding, neither of which [plaintiff] successfully exhausted.

. . . . [Plaintiff] raised his claim in the corporation's bankruptcy proceeding, but at the time he initiated his lawsuit, he modified his claim to recover from the corporation only the amount that he did not recover from [defendant]. He did not pursue his claim in bankruptcy to its end to attempt to recover from corporate assets, but brought this action during the pendency of the bankruptcy action. Neither did he submit evidence to the lower court that pursuit of the bankruptcy claim would, in all likelihood, be fruitless. Thus, he did not adequately pursue this remedy.

[Defendant] should not be held liable as a consequence of [plaintiff's] failure to successfully assert his legal rights.

Knight, 748 P.2d at 1099-1100 (emphases added).

That is the identical scenario present in this case. The undisputed evidence establishes that UTCO filed claims against Mr. Zimmerman in his bankruptcy to recover the same \$58,384 that is the subject of UTCO's promissory estoppel claim against Sumerset and Mr. Sharpe. [R2363-2364, 2445-2447] UTCO's claims were still pending against Mr. Zimmerman in the bankruptcy proceeding, [R2364] and UTCO presented no evidence its claims in the bankruptcy would be fruitless. In fact, the only evidence at trial established that UTCO would receive a distribution under the bankruptcy. [R2447] Additionally, UTCO had filed a nondischargeability action in Mr. Zimmerman's bankruptcy which it had not pursued to completion and which UTCO stopped pursuing pending the outcome of the instant action. [R2448-2449] Thus,

UTC0 had a legal remedy available which it had voluntarily failed to exhaust and, as this Court held in Knight, Sumerset and Mr. Sharpe "should not be held liable as a consequence of [UTC0's] failure to assert its legal rights." Knight, 748 P.2d at 1100; see also Commercial Fixtures, 564 P.2d at 774 (affirmed summary judgment as "[t]he action brought by plaintiff is one in equity and brought without any attempt to exhaust any legal remedies available."). Accordingly, the trial court properly refused to instruct the jury on the equitable promissory estoppel claim as UTC0 had failed to exhaust its legal remedies and, therefore, could not recover under that claim as a matter of law.¹¹

B. UTC0's Promissory Estoppel Claim Is Also Barred As UTC0 Had Adequate Legal Remedies Against Sumerset And Mr. Sharpe.

In addition to the claims against Mr. Zimmerman, UTC0's legal claims against Sumerset and Mr. Sharpe were "adequate" and precluded UTC0 from pursuing its equitable claim of promissory estoppel. As UTC0 itself acknowledges, the test for determining

¹¹ Subsequent to the trial of this matter, UTC0 obtained a Judgment against Mr. Zimmerman in the bankruptcy action for more than \$81,000.00, the entire outstanding obligation it sought (and continues to seek) to recover from Sumerset and Mr. Sharpe. Thereafter, UTC0 agreed to accept less than ten-percent (10%) of that amount in full satisfaction of that Judgment. This subsequent evidence does not revive UTC0's claims as it remains undisputed that at the time of trial UTC0 had chosen not to pursue its legal claims against Mr. Zimmerman thus barring its equitable promissory estoppel claim. Knight, 748 P.2d at 1099-1100. Moreover, even if such evidence were properly considered, it is just further evidence of UTC0's failure to pursue to exhaustion of its remedy against Mr. Zimmerman. Accepting only pennies on the dollar in full satisfaction of Mr. Zimmerman's obligation is not exhaustion and Sumerset and Mr. Sharpe "should not be held liable as a consequence of [UTC0's] failure to successfully assert his legal rights." Id.

whether a legal remedy is "adequate" for purposes of denying equitable relief is whether "'the legal remedy, both in respect to the final relief and the mode of obtaining it, [is] as efficient as the remedy which equity would afford under the same circumstances.'" UTCO's Brief at p. 12 (citing Council of and for the Blind of Delaware County Valley, Inc. v. Regan, 709 F.2d 1521, 1550 n.76 (D.C. Cir. 1983)). Despite the foregoing, however, UTCO then argues that because it did not prevail on its legal claims against Sumerset and Mr. Sharpe, they did not have an adequate remedy at law. Such is not the case:

Significantly, the adequacy of the legal remedy is not measured by the success or failure of a legal claim. Rather, in deciding whether a remedy is adequate, it is the remedy itself, and not its possible lack of success, that is the determining factor.

Charters Valley School Dist. v. Virginia Mansions Apartments, Inc., 489 A.2d 1381, 1386-1387 (Penn. 1985).

This is not to say that a legal remedy must succeed to be adequate. The law is plain that inadequacy means only that "in its nature or character it is not fitted or adapted to the end in view"; inadequacy does not mean that the remedy is ineffectual.

Justice v. United States, 6 F.3d 1474, 1482 n. 16 (11th Cir. 1993) (quoting Thompson v. Allen County, 115 U.S. 550, 554 (1885)).

The fact that UTCO's legal claims were unsuccessful is of no moment. UTCO's legal remedies against Sumerset and Mr. Sharpe provided the same remedy (i.e., money damages) and were adequate as a matter of law. Therefore, UTCO's equitable promissory estoppel claim was barred as a matter of law and the trial court's ruling should be affirmed.

C. THERE ARE SEVERAL OTHER BASES UPON WHICH THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE PROMISSORY ESTOPPEL CLAIM WAS PROPER AS A MATTER OF LAW.

Even if Utah law were ignored and the Court were to assume that somehow UTCO's failure to pursue its claims in Mr. Zimmerman's bankruptcy and the existence of UTCO's legal remedies against Sumerset and Mr. Sharpe did not bar its promissory estoppel claim in this action, there are several independent legal bases upon which the trial court's refusal to instruct the jury was proper and should be affirmed.¹² They are addressed in turn.

1. UTCOS PROMISSORY ESTOPPEL CLAIM WAS BARRED AS THERE WAS AN EXPRESS AGREEMENT BETWEEN UTCO AND MR. ZIMMERMAN FOR REPAYMENT OF THE FUNDS AT ISSUE.

As a matter of law, the trial court also properly refused to instruct on UTCO's promissory estoppel claim as UTCO had a valid contract with Mr. Zimmerman for repayment of the very funds it sought to recover under its promissory estoppel claim. Commercial Fixtures and Furnishing v. Adams, 564 P.2d 773, 774 (Utah 1997). This issue was also briefed in connection with the Motion for Directed Verdict filed by Sumerset and Mr. Sharpe and

¹² As the Utah Supreme Court has noted, the trial court is vested with discretion to properly advise the jury, which discretion also includes refusing to give instructions when they would be inappropriate. Powers v. Gene's Bldg. Materials, Inc., 567 P.2d 174, 176 (Utah 1977). The Utah Supreme Court has stated: It is well recognized that the parties are entitled to have their theories of the case presented to the jury in the form of instructions, but only if they are supported by the evidence. Id. (upholding trial court's refusal to instruct the jury on several theories).

was argued to the Court. On this issue, as with the failure to exhaust legal remedies, Utah case law is determinative.

In Commercial Fixtures, plaintiff sued defendant for unjust enrichment seeking to recover for improvements plaintiff made to defendant's premises pursuant to a contract with defendant's lessee. The lessee was not a party to the action. The Utah Supreme Court affirmed the trial court's rejection of the equitable remedy by stating:

It is also noted that there was an express contract between plaintiff and the lessee for the furnishing of materials, and when an express agreement exists one may not be implied.

Commercial Fixtures, 564 P.2d at 774.

UTC0, as did the plaintiff in Commercial Fixtures, asked the trial court to imply an agreement between itself and Somerset or Mr. Sharpe, even though the evidence conclusively established that UTC0 had an agreement with Mr. Zimmerman whereby Mr. Zimmerman was already obligated to repay the very funds UTC0 was seeking to recover. Thus, the trial court's refusal to instruct on UTC0's promissory estoppel claim should be affirmed on this additional ground.

2. UTC0'S PROMISSORY ESTOPPEL CLAIM WAS PROPERLY NOT SUBMITTED TO THE JURY AS THE EVIDENCE CONCLUSIVELY ESTABLISHED UTC0 DID NOT RELY ON THE ALLEGED PROMISES.

As a matter of law, the trial court also properly refused to instruct on UTC0's promissory estoppel claim as there was no basis upon which a jury could find that UTC0 reasonably relied upon the promise alleged to have been made by Somerset.

This issue was also briefed in connection with the Motion for Directed Verdict filed by Sumerset and Mr. Sharpe and was argued to the Court.

To prevail on its promissory estoppel claim, UTCO must establish that, inter alia, it reasonably relied upon the purported promise. E.g., Weese v. Davis County Comm'n, 834 P.2d 1, 4 (Utah 1992); Restatement (Second) of Contracts § 90. The evidence adduced at trial conclusively established that UTCO failed to prove this element.

a. No Reliance As UTCO's Decision To Loan And The Loan Itself Was Made Before Alleged Promise.

UTCO's promissory estoppel claim was based on Sumerset's alleged misrepresentation which, as described by Mr. Nelson, UTCO's counsel and witness,¹³ occurred in the course of phone calls he had with Mr. Sharpe. Mr. Nelson testified on direct examination that during the conversation during which the alleged promise was made, Mr. Nelson confirmed to Mr. Sharpe that UTCO had made the \$60,000 loan and Mr. Zimmerman had signed the documents.

On cross-examination, Mr. Nelson then confirmed twice that his own deposition testimony accurately reflected the timing of the conversation he had with Mr. Sharpe:

Q. Just so I understand the timing of this conversation, did this conversation occur before

¹³ Mr. Nelson was the only witness presented at trial with any personal knowledge of the alleged promise. UTCO had conceded that no one other than Mr. Nelson had any communications with anyone from Sumerset regarding this transaction.

or after UTCO had made the decision to actually loan funds to Mr. Zimmerman?

A. After.

Q. Did this conversation occur before or after the conversation you had with Mr. Zimmerman in which you informed him that UTCO would in fact loan him \$60,000?

A. After.

Thus, the undisputed evidence established that UTCO's decision to loan \$60,000 to Mr. Zimmerman and the loan itself occurred before the alleged promise. Accordingly, as a matter of law, there was no evidence upon which the jury could have concluded that UTCO relied (reasonably or otherwise) on the alleged promise underlying the promissory estoppel claim. E.g., Weese v. Davis County Comm'n, 834 P.2d 1, 4 (Utah 1992) (promissory estoppel requires showing of reasonable reliance). UTCO had already committed to make the loan, and had already made the loan when the purported promise was made to Mr. Nelson. Accordingly, as a matter of law UTCO did not reasonably rely on the promise to its detriment and the trial court's refusal to instruct the jury on UTCO's promissory estoppel claim must be affirmed.

b. No Reliance To Its Detriment As UTCO Had No Interest In The Funds Wired To Sumerset.

As a matter of law, the trial court also properly refused to instruct on UTCO's promissory estoppel claim as there was no reliance by UTCO to its detriment as Mr. Zimmerman, not UTCO, owned the funds wired to Sumerset. The undisputed evidence, including UTCO's own admission, established that UTCO had no ownership interest in the funds that were wired to

Sumerset. Moreover, as discussed above, UTCO agreed to make the loan and made the loan before the alleged promise. Accordingly, there simply was no detriment suffered by UTCO as a result of any alleged promise and the promissory estoppel claim failed as a matter of law.

VIII. THE TRIAL COURT CORRECTLY PRECLUDED EVIDENCE THAT THE SERIAL NUMBER TENTATIVELY RESERVED FOR MR. ZIMMERMAN'S HOUSEBOAT WAS REASSIGNED TO ANOTHER BOAT MORE THAN THREE MONTHS AFTER THE ALLEGED MISREPRESENTATION AND AFTER MR. ZIMMERMAN CANCELED THE SALE.

Prior to trial, Sumerset and Mr. Sharpe filed a Motion in Limine seeking to exclude the introduction of the following evidence:

- (1) That the serial number tentatively assigned to the Zimmerman houseboat was reassigned more than three months after the alleged misrepresentation, and after Mr. Zimmerman canceled the sale and instructed Sumerset to apply the funds to his then-existing debt owed to Sumerset; and
- (2) That thereafter the second, different houseboat was sold to a third-party.

The Motion in Limine sought exclusion of this evidence under Rules 402 and 403 of the Utah Rules of Evidence.

UTCO, in response to the Motion just as in its Brief on appeal, was unable to articulate how this evidence concerning conduct occurring three months after the transaction at issue was relevant in any manner. Instead UTCO simply repeats the general proposition that the court, in a fraud case, is to consider all facts and circumstances. That explanation simply begs the question. For instance, under UTCO's conclusory logic the trial court would err in excluding evidence that Sumerset's production

facility was painted a different color in March, 1993. While equally irrelevant, it is a fact and circumstance that under UTCO's logic would have to be presented to the jury. UTCO's position notwithstanding, fraud allegations are subject to the evidentiary requirements and limitations set forth in the Utah Rules of Evidence as are all other claims.¹⁴ E.g., State v. Winward, 909 P.2d 909, 913 (Utah App. 1995) (Evidence of misconduct surrounding subsequent sale of property, sought to show fraudulent intent, was properly precluded under the Utah Rules of Evidence.).

UTCO's inability to articulate the relevance of this evidence simply left the trial court without an explanation as to how something which occurred more than three months after the cancellation of the transaction at issue could have any possible relevance. After briefing and substantial argument to the court, the trial court granted the Motion and explained:

I'm going to grant the motion. I can't see any relevance to the proposition that the, at least based on what I've heard so far, that the reassignment of a serial number to another boat, to a third person who is not claiming to be involved in this situation, has any relevance to the state of mind of the Defendant for

¹⁴ UTCO's true intention for introducing this evidence was to create unfair prejudice and confusion. It is clear that UTCO intended to use the evidence to attempt to create a question regarding some perceived technical violation of the hull identification statute and then have the jury base its decision on this purported technical violation [R1519] instead of the actual issue in this case -- namely, Sumerset's and Mr. Sharpe's conduct toward UTCO which the jury ruled upon and found did not support UTCO's claims. While Sumerset disputes any violation of any law, it would be irrelevant, unfairly prejudicial and simply confuse the jury even if it were deemed to have occurred. Thus, the evidence was properly precluded.

purposes of committing fraud at the time these representations were made. I recognize after events may have some probative value, but in this case I can't see what it might be.

The fact that the boat with a serial number did not exist, and was never built to the specifications in the original invoice, is all the Plaintiff needs in that regard. The rest of it is surplusage and a waste of time. Unless the evidence changes, it's not coming in. The Motion is granted.

That doesn't mean you can't put in evidence that there was never a boat with that serial number, or that was the serial number on the invoices and there is no such boat, but it's not, I don't see any relevance to the fact that serial number now appears on some other boat. The Motion is granted.

[R1910]

In reviewing the trial court's evidentiary ruling, deference is given to the trial court's advantageous position in making this ruling and its decision will be affirmed unless "it clearly appears that the lower court was in error." E.g., Heslop v. Bank of Utah, 839 P.2d 828, 838 (Utah 1992); cf. Nay v. General Motors Corp., 850 P.2d 1260, 1262 (Utah 1993) ("reverse only if the ruling is beyond the bounds of rationality").

A. UTCOWAS ALLOWED TO INTRODUCE ALL EVIDENCE REGARDING THE SUBSEQUENT REASSIGNMENT OF THE SERIAL NUMBER TO ANOTHER HOUSEBOAT.

In its Brief to this Court, UTCO raises the issue of whether the trial court erred by excluding evidence of "defendants' assignment of the serial number sent to UTCO to a different boat and the sale of that second boat to a third party." UTCO's Brief at p. 1. At trial, UTCO was allowed to

introduce all evidence that had any potential relevance to its claims. UTCO introduced the following evidence:

- 1) The houseboat at issue was never constructed; [E.g., R1910, 1928, 2097-2098]
- 2) The houseboat at issue did not exist on the date Sumerset received Mr. Zimmerman's \$58,384; [Id.]
- 3) There was no houseboat constructed matching the MSO and invoice created for Mr. Zimmerman's houseboat; [Id.]
- 4) The houseboat at issue never existed; [R1910, 1929, 2097-2098]
- 5) The houseboat described in the November, 1992 invoice with the serial number in that invoice was never manufactured by Sumerset; [R1910, 2097-2098]
- 6) The houseboat with the serial number on the Zimmerman invoice and MSO was sold to someone else. [R2210]¹⁵

All evidence potentially relevant to the issues in this case was presented to the jury. UTCO does not describe in its Brief (nor did it describe by proffer at trial) what additional evidence it believes was improperly excluded from the trial court. And as discussed below, the exclusion of any further evidence on this issue, assuming UTCO had some that it was not allowed to present, was proper under the Utah Rules of Evidence.

¹⁵ This evidence appears to be the very evidence UTCO is now claiming it was error for the trial court to exclude. As admitted by UTCO in its Brief at p. 19, however, UTCO was permitted at trial to introduce evidence "that a boat bearing the serial number sent to Nelson [UTC's lawyer] was sold to someone else."

B. THE EVIDENCE WAS PROPERLY EXCLUDED UNDER RULE 402 OF THE UTAH RULES OF EVIDENCE AS IT WAS PATENTLY IRRELEVANT.

Rule 402 of the Utah Rules of Evidence expressly provides that "[e]vidence which is not relevant is not admissible." The trial court clearly acted within its discretion when it precluded the introduction of this evidence on the grounds it was irrelevant.

UTCOC brought this action asserting claims for breach of contract, fraud, negligent misrepresentation and other miscellaneous claims arising out of the canceled sale of a houseboat by Summerset to Mr. Zimmerman. UTCOC's claim is centered on a \$60,000 loan it made to Mr. Zimmerman, a portion of which was forwarded to Summerset in December, 1992 to be applied to "Demarr Zimmerman Account." A few months later, Mr. Zimmerman canceled the purchase and directed Summerset to apply the \$58,384 to Mr. Zimmerman's then-existing debt owed to Summerset. Summerset then "sidetracked" the production of the houseboat Mr. Zimmerman had ordered.

After Mr. Zimmerman canceled the purchase and the houseboat at issue was sidetracked, and more than three months after any alleged misrepresentation, Summerset assigned the serial number initially reserved for Mr. Zimmerman's houseboat to another entirely different boat eventually sold to a third-party. The assignment of the serial number to a different houseboat and the sale of that boat to a third-party all occurred more than three months after the transaction at issue in UTCOC's claims and

that evidence is irrelevant to any of UTCO's claims. Therefore, the evidence was properly precluded under Rule 402 of the Utah Rules of Evidence.

C. THE EVIDENCE WAS PROPERLY EXCLUDED UNDER RULE 403 OF THE UTAH RULES OF EVIDENCE AS ITS INTRODUCTION WOULD HAVE CREATED CONFUSION OF THE ISSUES AND UNFAIR PREJUDICE, AND WOULD HAVE BEEN A WASTE OF TIME.

Rule 403 of the Utah Rules of Evidence provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah R. Evid. 403.

As under Rule 402, it was within the trial court's discretion to preclude this evidence under Rule 403 of the Utah Rules of Evidence.

Even assuming there was some probative value to the subsequent assignment of the serial number to another houseboat months later, that probative value would have been substantially outweighed by the danger of unfair prejudice and confusion of the issues, and would have unnecessarily lengthened the trial by several days. UTCO's apparent motivation in seeking to introduce evidence of the subsequent reassignment of the serial number and sale was to prejudice Sumerset and Mr. Sharpe and introduce confusion into the issues. UTCO intended to use this evidence to attempt to create some question that Sumerset subsequently violated the law regarding assignment and affixing of hull identification numbers to the Zimmerman houseboat or the second,

different houseboat. [R1519] Such a use of this irrelevant evidence would directly violate Rule 403 of the Utah Rules of Evidence, particularly where there is no evidence of any alteration or changing of a serial number but merely a reassignment on paper of a serial number to avoid a gap in serial numbers. While Sumerset (which has been in the houseboat business for nearly 45 years) did not violate any laws in this transaction, even assuming that more than three months after the transaction at issue Sumerset somehow technically violated a statute regarding the assigning of hull identification numbers, the evidence would have been irrelevant, unfairly prejudicial, and result in nothing but confusion. The relevant issues for the jury to determine were whether the acts of Sumerset and Mr. Sharpe were fraudulent as to UTCO, not whether Sumerset later broke the law or defrauded some third-party. E.g., State v. Winward, 909 P.2d 909, 913 (Utah App. 1995).

If UTCO had been allowed to introduce evidence of the reassigning of the serial number months later, Sumerset and Mr. Sharpe would have been forced to counter that evidence demonstrating why their subsequent actions were proper. This would have entailed several witnesses, substantial costs and expenses, and would have consumed a number of trial days. Additionally, it would have been unlikely that the jury would have perceived that its verdict should not turn on whether the subsequent reassignment of the serial number was proper, especially after the bulk of the trial would have been focused on

this issue which is tangentially related, at best. It is precisely this type of confusing and prejudicial sidetrack that Rule 403 was designed to prevent. See McCormick, Evidence § 185; State v. Winward, 909 P.2d 909, 913 (Utah App. 1995) (evidence sought to prove fraudulent intent properly precluded under Rule 403 where the proffered evidence posed risk of diverting jury's attention from pertinent issue and would prejudice defendant); West v. Carson, 49 F.3d 433, 434-35 (8th Cir. 1995).

Thus, based on the foregoing the trial court's ruling excluding the evidence of the subsequent reassignment of the serial number to a second, different houseboat that was eventually sold was within the trial court's discretion and was proper under the Utah Rules of Evidence.

D. UTCOC HAS FAILED TO SHOW THAT EVEN IF THERE WAS AN IMPROPER EXCLUSION OF EVIDENCE THAT THE ADMISSION OF THAT EVIDENCE WAS LIKELY TO RESULT IN A DIFFERENT OUTCOME.

Finally, even assuming there was some evidence that was improperly excluded from the trial of this matter, UTCOC has failed to show that the incorrect ruling was "harmful error". To meet this burden, UTCOC must establish that "the likelihood of a different outcome in the absence of the error is 'sufficiently high as to undermine confidence in the verdict.'" Id. at 174 (quoting State v. Knight, 734 P.2d 913, 920 (Utah 1987)); see, also, State v. Wetzel, 868 P.2d 64, 67-70 (Utah 1993) (improper evidence ruling reversed only if showing of prejudice (i.e., "reasonable likelihood that the error affected outcome of the proceedings")). UTCOC has not and cannot make this showing.

It appears that UTCO was allowed to introduce at trial all of the evidence which it now claims it was entitled to introduce. It is undisputed that UTCO was allowed to introduce evidence: (1) That, at the time of the alleged fraudulent statement, there was no houseboat in existence with the serial number as set forth in the invoice between Somerset and Mr. Zimmerman; (2) That no houseboat with that serial number was ever built to the specifications in the invoice between Somerset and Mr. Zimmerman; and (3) That a houseboat bearing the serial number initially intended for the Zimmerman houseboat was sold to another party. The jury heard all of this evidence and unanimously ruled that neither Somerset nor Mr. Sharpe had committed fraud or negligent misrepresentation.

UTC0's Brief is devoid of any attempt to show how the omission of any evidence of the subsequent reassignment of the serial number, which occurred three months after the alleged fraud, would have changed the outcome. Moreover, given the evidence that UTCO was allowed to and did present on this issue, there simply was no harmful error. Thus, even if the trial court's exclusion of this evidence under Rules 402 and 403 of the Utah Rules of Evidence was improper, it was not "harmful error".

CONCLUSION AND RELIEF SOUGHT

The trial court properly declined to instruct the jury on UTCO's equitable promissory estoppel claim as UTCO failed to exhaust its legal remedies, had adequate legal remedies available, had a valid contract with Mr. Zimmerman for repayment

of the funds, and, moreover, failed to rely to its detriment on the alleged promise. The trial court also acted within its discretion in precluding UTCO from introducing evidence of the subsequent reassignment of the serial number tentatively reserved for Mr. Zimmerman's houseboat to another boat three months after the transaction at issue and after Mr. Zimmerman canceled the purchase. That ruling was proper under Rules 402 and 403 of the Utah Rules of Evidence. Accordingly, the Judgment rendered in favor of Sumerset and Mr. Sharpe by the jury should be affirmed and this appeal dismissed.

DATED this 7th day of December, 2000.

ATKIN & LILJA, P.C.

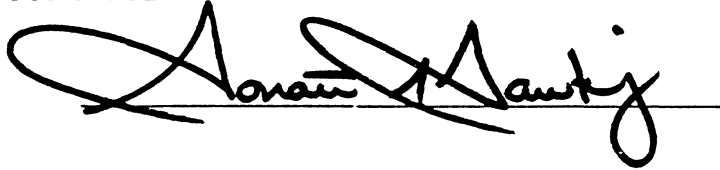
A handwritten signature in black ink, appearing to read "Jonathan L. Hawkins", is written over a horizontal line. The signature is stylized with large loops and a prominent dot at the end.

Jonathan L. Hawkins
Attorneys for Appellees
Sumerset and Mr. Sharpe

CERTIFICATE OF SERVICE

This is to certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLEES was mailed, first-class, postage prepaid, this 31st day of December, 2000, to the following:

Jeffrey M Jones
DURHAM, EVANS, JONES & PINEGAR
50 South Main, Suite 850
Salt Lake City, Utah 84144

A handwritten signature in black ink, appearing to read "Donald Hawkey", is written over a horizontal line.

Tab A

*1097 748 P.2d 1097

Stan KNIGHT, dba Stanco Insulation Services,
Plaintiff and
Respondent,
v.
George P. POST, dba Post Petroleum Company,
Defendant and
Appellant.

No. 860120-CA
 Court of Appeals of Utah
 Jan. 22, 1988.

Company contracted with corporate operator of oil well to improve oil well site. When corporate operator did not pay and filed bankruptcy, company brought action against proprietorship which owned working interest in oil well to recover for services performed in improving oil well. The Seventh District Court, Uintah County, Richard C. Davidson, J., found in favor of company on basis of quantum meruit, and proprietorship appealed. The Court of Appeals, Garff, J., held that restitution based on quantum meruit was improper where company failed to first exhaust legal remedies, company did not show that proprietorship had been unjustly enriched, and company had no contractual relationship, either express or implied, with proprietorship.

Reversed.

1 APPEAL AND ERROR ⇨845(2)

30 ----

30XVI Review

30XVI(A) Scope, Standards, and Extent. in General

30k844 Review Dependent on Mode or Trial in Lower Court

30k845 In General

30k845(2) Cases submitted below on agreed case or statement.

Utah App. 1988.

Where parties have stipulated facts for purposes of appeal, reviewing court does not apply clearly erroneous standard but will sustain court's decision only if convinced of its correctness.

2. IMPLIED AND CONSTRUCTIVE CONTRACTS ⇨30

205H ----

205HI Nature and Grounds of Obligation

205HI(C) Services Rendered

205Hk30 Work and labor in general, quantum

meruit.

Utah App. 1988.

One must first exhaust legal remedies before he may recover on basis of equitable doctrine of quantum meruit.

3. MINES AND MINERALS ⇨109

260 ----

260III Operation of Mines, Quarries, and Wells

260III(C) Rights and Liabilities Incident to Working

260k109 Contracts for testing or working.

Utah App. 1988.

Company which made improvements on oil well site pursuant to contract between company and corporate operator of well and which did not receive payment for work could not seek recovery on basis of quantum meruit since company did not first exhaust legal remedies where company failed to bring action enforcing mechanics' lien within statutory period, company did not pursue claim in bankruptcy to its end when corporate operator filed for bankruptcy, and company did not submit evidence to lower court that pursuit of bankruptcy claim would be fruitless.

4. BANKRUPTCY ⇨2397(1)

51 ----

51IV Effect of Bankruptcy Relief; Injunction and Stay

51IV(B) Automatic Stay

51k2394 Proceedings, Acts, or Persons Affected

51k2397 Mortgages or Liens

51k2397(1) In general

[See headnote text below]

4. MECHANICS' LIENS ⇨260(4)

257 ----

257XI Enforcement

257k260 Time to Sue, Limitations, and Laches

257k260(4) Commencement of suit.

Utah App. 1988.

Corporation's bankruptcy action does not necessarily preclude recovery under properly filed mechanics' lien nor does it toll requirement of bringing action to enforce such lien within statutory 12-month period. U.C.A.1953, 38-1-5, 38-1-11.

5. IMPLIED AND CONSTRUCTIVE CONTRACTS ⇨30

205H ----

205HI Nature and Grounds of Obligation

205HI(C) Services Rendered

205Hk30 Work and labor in general, quantum

meruit.

Utah App. 1988.

Two branches of quantum meruit are contracts implied in law, also known as quasi-contracts or unjust enrichment, which are not actions to enforce contract but are actually actions to require restitution, and contracts implied in fact, which are contracts established by conduct.

6. IMPLIED AND CONSTRUCTIVE CONTRACTS

⌘2.1

205H ---

205HI Nature and Grounds of Obligation

205HI(A) In General

205Hk2 Constructive or Quasi Contracts

205Hk2.1 In general.

Formerly 205Hk2

[See headnote text below]

6. IMPLIED AND CONSTRUCTIVE CONTRACTS

⌘3

205H ---

205HI Nature and Grounds of Obligation

205HI(A) In General

205Hk2 Constructive or Quasi Contracts

205Hk3 Unjust enrichment.

Utah App. 1988.

To prevail under theory of contract implied in law or unjust enrichment, plaintiff must show that plaintiff conferred benefit upon defendant, defendant was aware of benefit, and defendant retained benefit under such circumstances as to make it inequitable for him to retain benefit without payment of its value

7 MINES AND MINERALS ⌘109

260 ---

260III Operation of Mines, Quarries, and Wells

260III(C) Rights and Liabilities Incident to Working

260k109 Contracts for testing or working.

Utah App. 1988.

Although company conferred benefit of improvement of oil well site upon proprietorship which owned working interest in oil well, company did not show that proprietorship retained benefit under circumstances that would make it inequitable for it to retain benefit without payment of its value where company introduced no evidence to indicate that proprietorship requested services of company or deliberately misled it.

8. MINES AND MINERALS ⌘109

260 ----

260III Operation of Mines, Quarries, and Wells

260III(C) Rights and Liabilities Incident to Working

260k109 Contracts for testing or working

Utah App. 1988.

Company failed to show that there was either express or implied contract between it and proprietorship owning working interest in oil well on which company made improvements for which it was never paid where company did not know of proprietorship's existence at time it entered into contract with corporate operator of well and so could not have had any direct dealings including express contract with proprietorship.

9. IMPLIED AND CONSTRUCTIVE CONTRACTS

⌘35

205H ---

205HI Nature and Grounds of Obligation

205HI(C) Services Rendered

205Hk33 Rendition and Acceptance of Services in General

205Hk35 Effect of request or promise to pay.

Utah App. 1988.

Required elements of recovery on theory of contract implied in fact are that defendant requested plaintiff to perform work, plaintiff expected defendant to compensate him, and defendant knew or should have known that plaintiff expected compensation

10 MINES AND MINERALS ⌘109

260 ----

260III Operation of Mines, Quarries, and Wells

260III(C) Rights and Liabilities Incident to Working

260k109 Contracts for testing or working.

Utah App. 1988.

Company did not have implied-in-fact contract with proprietorship which owned working interest in oil well on which company had made improvements pursuant to contract with corporate operator of well where company did not know of or deal with proprietorship prior to bankruptcy proceedings of corporate operator of well, proprietorship did not request company to perform work or expect to pay him because proprietorship did not deal with company, and company could not have expected proprietorship to pay it because it did *1097 not know of proprietorship's existence.

*1098 F. Alan Fletcher (argued), Pruitt, Gushee & Fletcher, Salt Lake City, for defendant and appellant.

John R. Anderson (argued), Vernal, for plaintiff and respondent.

Before BILLINGS, GARFF and JACKSON, JJ.

OPINION

GARFF, Judge:

The trial court found defendant/appellant, George P. Post, a part owner of an oil well, liable for labor and materials provided by plaintiff/respondent, Stan Knight, to improve the oil well site pursuant to a contract between Knight and the corporate operator of the well. Post seeks reversal of the judgment.

The parties agreed to the following statement of the record on appeal: Knight conducted an insulation business known as Stanco Insulation Services. Post, doing business under a proprietorship named Post Petroleum Company, owned a 33.75% working interest in an oil well located in Uintah County, Utah. Post Petroleum Company, Inc. (the corporation), was the corporate operator of the oil well. The corporation is not a party to this action and is a separate entity from Post's proprietorship.

In March 1982, Knight orally contracted with the corporation to furnish labor and materials for insulating an oil tank battery and erecting two buildings at the well site. At this time, he was unaware of the existence of the proprietorship, Post Petroleum Company, and did not know who owned the well. He satisfactorily completed the contracted work between March 18, 1982 and April 26, 1982, and then, according to instructions given by the corporation's president, *1099 Larry McLane, submitted his invoice for \$18,437.13 to the corporation. There was no dispute that this was a reasonable price for the work. Knight did not deal with George Post personally during the course of this work, nor was he aware of any relationship between the corporation and Post Petroleum Company.

The corporation never paid Knight, and, in the course of his several inquiries about the unpaid bill with McLane, Knight was never advised that he should bill any other party. However, both Post and the corporation knew that Knight was billing the corporation and not the proprietorship.

On July 14, 1982, Knight, unaware that the corporation had no possessory interest in the oil well, attempted to record a mechanics' lien on the oil well property, but placed an incorrect property description on his lien.

Several months later, the corporation filed a petition

in bankruptcy. On January 10, 1983, Knight filed a creditor's claim against the corporation in the bankruptcy proceedings, seeking payment of the entire amount due. Subsequently, Knight learned that the corporation had no interest in the well location, but was merely the operator of the well, and that George Post had an ownership interest in the well.

In March 1983, Post Petroleum Company, Post's proprietorship, which had taken over operation of the well, contracted with Knight to do additional work on the well for which it paid him \$395.60. Knight then sought payment from Post on his \$18,437.13 claim, but was refused. Knight initiated this lawsuit, seeking to recover the \$18,437.13 claim, 18% interest, and \$2,500 in attorney fees from Post. He then amended his still-pending bankruptcy claim, seeking only those sums which he did not recover from Post.

The trial court found in favor of Knight on the basis of quantum meruit, reasoning that the relationship between George Post and the corporation had unjustly confused Knight as to the proper party from whom to seek payment, and that Post was the ultimate beneficiary of the contract between Knight and the corporation. However, the court reduced the amount due Knight under the contract by the 66 25% of the well owned by non-parties to the lawsuit.

On appeal, Post argues that the trial court erred in awarding judgment against him on the basis of quantum meruit. We agree, reverse the trial court, and find that restitution based on quantum meruit was improper because: (1) Knight failed to first exhaust his legal remedies; (2) Knight did not introduce sufficient evidence to show that Post had been unjustly enriched; and (3) there was no contractual relationship, either express or implied, between Knight and Post.

[1] The Utah Supreme Court, in *Sacramento Baseball Club, Inc. v. The Great Northern Baseball Co.*, 748 P.2d 1058, 1060 (Utah 1987)(citation omitted), stated that "[w]hen a trial court relies on stipulated facts to decide a case, this Court does not apply the clearly erroneous standard, but will sustain the lower court's decision only if convinced of its correctness. Thus, we examine the facts de novo." Although, in the present case, the parties have stipulated facts for the purposes of appeal, we see no distinction, and the standard of review remains the same. *Christensen v. Abbott*, 671 P.2d 121, 123 (Utah 1983). Thus, we review both factual and legal issues.

I

Failure to Exhaust Legal Remedies

[2][3][4] As a general rule, one must first exhaust his legal remedies before he may recover on the basis of the equitable doctrine of quantum meruit. See *Interiors Contracting, Inc. v. Navalco*, 648 P.2d 1382, 1388 (Utah 1982); *Commercial Fixtures and Furnishings, Inc. v. Adams*, 564 P.2d 773, 774 (Utah 1977). The legal remedies available to Knight included a mechanics' lien on the well property and pursuit of the corporation's assets as a creditor in the corporation's bankruptcy proceeding, neither of which Knight successfully exhausted.

*1100 Knight failed to perfect his mechanics' lien against Post because he incorrectly described the affected property, thus not complying with Utah Code Ann. Sec. 38-1-7 (1981). See *Westinghouse Elec. Supply Co. v. W. Seed Prod. Corp.*, 119 Ariz. 377, 580 P.2d 1231, 1233 (App.1978); *Buehner Block Co. v. Glezos*, 6 Utah 2d 226, 310 P.2d 517, 520-21 (1957).

Further, Knight failed to bring an action enforcing the lien within the statutory period. Under Utah Code Ann. Sec. 38-1-11 (1974), (FN1) an action to enforce a mechanics' lien must be commenced within twelve months from the completion of the work. An untimely action under this section is jurisdictional and forecloses the parties' rights. (FN2) *AAA Fencing Co. v. Raintree Dev. and Energy Co.*, 714 P.2d 289, 290-91 (Utah 1986); *Morrison v. Carey-Lombard Co.*, 9 Utah 70, 33 P. 238, 239 (1893). Therefore, Knight did not exhaust this remedy, and, at this point in time, may not because his rights and remedies under the mechanics' lien statutes are extinguished. *Commercial Fixtures*, 564 P.2d at 774.

Knight raised his claim in the corporation's bankruptcy proceeding, but at the time he initiated this lawsuit, he modified his claim to recover from the corporation only the amount that he did not recover from Post. He did not pursue his claim in bankruptcy to its end to attempt to recover from corporate assets, but brought this action during the pendency of the bankruptcy action. Neither did he submit evidence to the lower court that pursuit of the bankruptcy claim would, in all likelihood, be fruitless. Thus, he did not adequately pursue this remedy.

Post should not be held liable as a consequence of Knight's failure to successfully assert his legal rights. See *Utschig v. McClone*, 16 Wis.2d 506, 114

N.W.2d 854 (1962). As in *Commercial Fixtures*, Knight has failed to exhaust his legal remedies, so may not recover on the basis of quantum meruit.

II

Quantum Meruit

Because the trial court based its ruling upon quantum meruit, we address that question even though our ruling on failure to exhaust legal remedies is dispositive of the case.

[5] In *Davies v. Olson*, 746 P.2d 264, 269 (Utah Ct.App.1987), this Court has identified two branches of quantum meruit: (1) contracts implied in law, also known as quasi-contracts or unjust enrichment, which are not actions to enforce a contract but are actually actions to require restitution; and (2) contracts implied in fact, which are contracts established by conduct. Knight cannot prevail under either of these branches.

[6] First, to prevail under the first branch of quantum meruit, contracts implied in law or unjust enrichment, Knight must show the following three elements: (1) Knight conferred a benefit upon Post; (2) Post was aware of the benefit; and (3) Post retained the benefit under such circumstances as to make it inequitable for him to retain the benefit without payment of its value. *Berrett v. Stevens*, 690 P.2d 553, 557 (Utah 1984); *Davies*, 746 P.2d at 269.

[7] It is undisputed that Knight conferred a benefit upon Post and that Post knew about and was using the benefit. However, Knight did not show that Post *1101. retained the benefit under circumstances that would make it inequitable for him to retain it without payment of its value. In *Commercial Fixtures*, the Utah Supreme Court defined inequitable circumstances as:

[t]he mere fact that a third person benefits from a contract between two others does not make such third person liable in quasi-contract, unjust enrichment, or restitution. There must be some misleading act, request for services, or the like, to support such an action. Mere failure of performance by one of the contracting parties does not give rise to a right of restitution.

Commercial Fixtures, 564 P.2d at 774 (emphasis added) (citation omitted).

Knight relies upon the reasoning in *Paschall's, Inc.*

v. Dozier, 219 Tenn. 45, 407 S.W.2d 150 (1966), which states that recovery on a quantum meruit action may be had in some instances in which a materialman or subcontractor furnishes labor or materials which benefit the property of a person with whom there is not privity of contract. However, this is at variance with Commercial Fixtures.

Knight introduced no evidence to indicate that Post requested services of Knight or deliberately misled him. In fact, the parties stipulated that Knight did not even know of Post's existence until after the corporation had filed for bankruptcy. The only evidence introduced even suggesting a misleading act is the similarity in names between the corporation and the proprietorship. While we recognize the possibility that Post created a corporation and a proprietorship with the same name to deliberately defraud creditors, if and when the corporation went bankrupt, Knight has not introduced any such evidence. Therefore, he has not shown that it would be inequitable for Post to retain the benefit without payment of its value.

[8] Second, Knight has failed to show that there is either an express or implied contract between himself and Post, on which he may base recovery. See Commercial Fixtures, 564 P.2d at 774.

The stipulated facts indicate that Knight did not know of Post's existence at the time he entered into the contract, so could not have had any direct dealings, including an express contract, with Post.

[9][10] Also, Knight did not prove the required elements of the second branch of quantum meruit, contracts implied in fact, to show the existence of an implied contract with Post. To prevail under this theory, Knight was required to show that: (1) Post requested Knight to perform the work; (2) Knight expected Post to compensate him; and (3) Post knew or should have known that Knight expected compensation. Davies, 746 P.2d at 269.

The facts indicate that Knight did not know of or

deal with Post prior to the bankruptcy proceedings, so Post did not request Knight to perform the work or expect to pay him because he did not deal with Knight, and Knight could not have expected Post to pay him because he did not know of Post's existence.

On the contrary, Knight had an express contract with the corporation, and dealt exclusively with it in contracting to do the work, attempting to collect his bill, and filing his mechanics' lien. Thus, Knight did not have an implied contract with Post. See Commercial Fixtures, 564 P.2d at 774.

Since there was no express or implied contract with Post, Knight cannot recover.

The judgment of the trial court is reversed. Costs awarded to Post.

BILLINGS and JACKSON, JJ., concur.

FN1. This statute reads, in relevant part, as follows:

Actions to enforce the liens herein provided for must be begun within twelve months after the completion of the original contract.... Within the twelve months herein mentioned the lien claimant shall file for record with the county recorder of each county in which the lien is recorded a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action.

FN2. We note that the corporation's bankruptcy action did not necessarily preclude recovery under a properly filed mechanics' lien nor did it toll the requirement of bringing an action to enforce such a lien within the statutory twelve month period. See Utah Code Ann. Sec. 38-1-5 (1974); Munson v. Risinger, 114 So.2d 59, 61 (La.Ct.App.1959).

Tab B

*773 564 P.2d 773

**COMMERCIAL FIXTURES AND
FURNISHINGS, INC., a Utah
Corporation, Plaintiff and Appellant,**

v.

**Eldon ADAMS, an Individual, and New Life
Health Spa, by and
through Eldon Adams, Defendants and
Respondents.**

No. 14700.

Supreme Court of Utah.

May 13, 1977.

A supplier of materials incorporated into leased property at the request of the tenant brought an action against the landlord after default under the lease had occurred, seeking recovery for the value of the materials under a theory of unjust enrichment. The Fourth District Court, Utah County, George E. Ballit, J., entered summary judgment for the landlord, and the supplier appealed. The Supreme Court, Hall, J., held that no basis for recovery was shown.

Affirmed

Maughan, J., dissented and filed opinion in which Crockett, J., concurred.

1. MECHANICS' LIENS ⚙️63

257 ----

257II Right to Lien

257II(C) Agreement or Consent of Owner

257k60 Necessity for Contract or Consent by Owner

257k63 Improvements by lessee.

Utah 1977

As general rule, tenant's creditors have no greater right to charge land with value of improvements or repairs than tenant would have.

2. CONTRACTS ⚙️188

95 ----

95II Construction and Operation

95II(B) Parties

95k188 Duties and liabilities of third persons.

Utah 1977.

Mere fact that third person benefits from contract between two others does not make such third person liable in quasi-contract, unjust enrichment, or restitution; there must be some misleading act, request for services, or the like, to support such action, and mere failure of performance by one of the

contracting parties does not give rise to right of restitution.

3. IMPLIED AND CONSTRUCTIVE CONTRACTS

⚙️31

205H ----

205HI Nature and Grounds of Obligation

205HI(C) Services Rendered

205Hk31 Materials furnished.

Formerly 412k3 WORK AND LABOR

Utah 1977.

Where tenant, who had agreed in lease to complete such improvements in and upon leased property as its business needs might require and to pay and discharge all costs and expenses incident thereto to the end that no liens would be placed on leased property, contracted with supplier for certain materials, which were incorporated into leased premises, and then defaulted under lease, landlord was not liable to supplier for value of such incorporated materials on theory of unjust enrichment.

Jack Fairclough, Salt Lake City, for plaintiff and appellant.

V. Pershing Nelson, Provo, for defendants and respondents.

HALL, Justice:

This is an appeal from a summary judgment of no cause of action rendered by the district court.

Detendant, Eldon Adams, is the owner of real property located at 1140 South State Street, Orem, Utah. He entered into a written lease with Great Outdoors, Inc. under the terms of which the lessee agreed to complete such improvements in and upon said property as its business needs might require and to pay and discharge all costs and expenses incident thereto to the end that no liens would be placed on the leased property. Great Outdoors, Inc. thereafter contracted with plaintiff for the purchase of materials which were ultimately furnished and incorporated into the building on the leased premises. The appellant was not privy to that agreement. Great Outdoors subsequently defaulted in the performance of the covenants of said lease and by court judgment the lease was terminated and the property restored to defendant. Plaintiff filed no lien against the lessee's interest in the property and the time limited for filing has expired.

Plaintiff has never instituted suit against the lessee

and brought this action directly against the defendant on a theory of unjust enrichment.

The foregoing recitation of facts are those stipulated to by the parties at the time they presented their respective motions for summary judgment to the trial court.

*774 [1] This appeal may be disposed of by the application of some very elementary principles of law. As a general rule, a tenant's creditors have no greater right to charge the land with the value of improvements or repairs than the tenant would have (FN1) and here the tenant had no such right having contracted it away.

The right of plaintiff to recover for the goods incorporated into defendant's real property must be based upon an agreement, either express or implied, and the stipulated facts are clear that none existed. Plaintiff placed no reliance at all on the credit of defendant and the lease agreement specifically imposed upon the lessee the sole obligation of payment. A case in point is *Howard v. Societa Di Unione E Beneficenza Italiana, et al.*, 62 Cal.App.2d 842, 145 P.2d 694.

[2] The mere fact that a third person benefits from a contract between two others does not make such third person liable in quasi-contract, unjust enrichment, or restitution. See 66 Am.Jur.2d 960. There must be some misleading act, request for services, or the like, to support such an action. Mere failure of performance by one of the contracting parties does not give rise to a right of restitution.

It is also noted that there was an express contract between plaintiff and the lessee for the furnishing of materials, and when an express agreement exists one may not be implied. (FN2)

[3] The action brought by plaintiff is one in equity and brought without any attempt to exhaust any legal remedies available. Also, the stipulated facts are that plaintiff has brought no suit against the lessee nor did he initiate any action to enforce a mechanic's lien, if any he had. As a consequence, such lien right was lost by passage of time. Nor has plaintiff shown any legal and sufficient excuse for his inaction against the lessee.

The authorities cited by plaintiff are distinguishable on the facts presented here and do not compel support of its position.

Judgment affirmed. Costs to defendant.

ELLETT, C.J., and WILKINS, J., concur.

MAUGHAN, Justice (dissenting):

Defendant is the owner of property located in Orem, Utah. In March 1974, the defendant leased the property to Great Outdoors, Inc. (hereinafter, lessee). Under the terms of the lease, Great Outdoors agreed to make improvements in the property and to operate a health spa business thereon.

Lessee contracted with the plaintiff to install certain fixtures. Plaintiff performed the contract at a cost of \$3,149.87. Lessee did not pay the plaintiff, and subsequently defaulted on the lease. Defendant lessor brought a successful action to regain possession of the property. After taking possession, the defendant continued to operate a health spa business on the premises under the name New Life Health Spa. Plaintiff brought this action to recover costs for materials and labor furnished. On simultaneous motions for summary judgment, the lower court held for the defendant finding the plaintiff failed to state a claim upon which relief could be granted. Thus Court should reverse.

The theory of plaintiff's case is that the defendant has been unjustly enriched at plaintiff's expense and should, therefore, make restitution to the plaintiff. The lower court found the plaintiff was precluded from maintaining this action, because there was no privity of contract between the plaintiff and defendant. This finding mistakes the nature of a claim based on unjust enrichment. Unjust enrichment is premised on a theory of quasi-contract, or a contract implied in law.

A contract implied in law is not a contract at all, but an obligation imposed by *775 law for the purpose of bringing about justice and equity without reference to the intent or the agreement of the parties and, in some cases, in spite of an agreement between the parties. (Emphasis supplied.)

It is a non-contractual obligation that is to be treated procedurally as if it were a contract . . . (Emphasis in original.) (FN1)

The plaintiff's cause of action does not fail for lack of privity.

Defendant referred to several cases he claims support the lower court's judgment. These cases are

distinguishable and do not support defendant's assertions. For example, defendant claims, as a general rule, a tenant's creditors have no greater right to charge the value of the landlord's land with (the costs of improvements) than the tenant could have. In support of this position defendant relies on, among others, *American Bonding Co. v. Pueblo Investment Co.*, 10 Cir., 150 F. 17 (1906) and *Grizzle v. Runbeck*, 74 Riz. 92, 244 P.2d 1160 (1952). *American Bonding* involved a suit by a tenant's creditor against the tenant's surety. The case turned on whether the tenant had agreed, by the terms of the lease, to pay for improvements and whether the surety had, by incorporating the lease into the bonding agreement, agreed to pay for the improvements upon tenant's default. In the context of interpreting the terms of the lease, the court stated a lessee may not make repairs at the expense of the lessor unless there is an express agreement between them to do so. 150 F. at 28. There is no question in this case that the tenant agreed to pay for the material and labor furnished, both parties agree that he did. The question here is whether, as between plaintiff and defendant, defendant has been unjustly enriched, not whether the tenant defaulted on his obligation. The *Grizzle* case is also distinguishable. In that case, tenants brought suit against the landlord for the costs of repairs. The case turned on whether the landlord was under a duty to repair and the court held that without an agreement to the contrary the landlord was under no such duty. The question of the landlord's duty to the tenant is not involved here.

Defendant also relies on *Howard v. Societa Di Unione E Beneficenza Italiana*, 62 Cal App.2d 842, 145 P.2d 694 (1944). In that case the lessor (Society) entered into an agreement with lessee for the rental of a baseball field. The lessee agreed to be responsible for the costs of repairs and improvements and then failed to pay for plaintiff's services. Plaintiff brought suit against the lessor claiming that lessor and lessee were joint venturers and therefore, the lessor was liable on lessee's debt based on a partnership theory. The court found no evidence of partnership or joint venture. The language quoted by defendant from that case is not only dicta, it was made in the context of determining the question of the existence of a partnership, and related to a finding of an implied in fact contract, not unjust enrichment.

Addressing himself directly to plaintiff's unjust enrichment claim, defendant argues that plaintiff's claim is barred because the enrichment of defendant was not unjust. Defendant cites a number of cases in support of this proposition, including *Buell v. Orion*

State Bank, 327 Mich. 43, 41 N.W.2d 472 (1950); *Utschig v. McClone*, 16 Wis.2d 506, 114 N.W.2d 854 (1962). The *Buell* case involved a transfer of stock that at the time of the transfer was of questionable value. The stock later became worth a great deal of money. Plaintiff brought suit claiming that when her husband transferred the stock he was not competent and that defendant had been unjustly enriched by the transfer. The court held the decedent was competent to make the transfer and although the defendant was enriched, he had taken considerable risk in accepting the stock and his enrichment was not unjust. The services of plaintiff, here, were not of questionable value and defendant took no risk in accepting them. The *Utschig* case involved a suit by a subcontractor against a homeowner for the value of labor and materials furnished. The court held that a subcontractor could not maintain an action against the homeowner unless there was an express agreement between the two that the homeowner would be responsible for the debts of the principal contractor. The court stated that the homeowner was not liable on an implied contract simply because he had received services or goods. The court was not clear whether it was talking about an implied in fact contract or one implied in law. However, the case would not seem applicable here. The rules preventing a subcontractor from seeking payment directly from homeowners are based on the assumption that the homeowner has already paid the principal contractor and cannot be held liable twice on the same debt. That is not the case here. The other cases cited by defendant are similarly unpersuasive.

The question, then, remains has the defendant been enriched and is enrichment unjust. As was stated in *Baugh v. Darley*, 112 Utah 1, 184 P.2d 335, 337 (1947).

Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another. . . . The benefit may be an interest in money, land, chattels, or choses in action; beneficial services conferred; satisfaction of a debt or duty owed by him; or anything which adds to his security or advantage.

On the facts of the *Baugh* case, the court held against the plaintiff. The case is, however, clearly distinguishable from the facts at hand and the general definition given of unjust enrichment is applicable to the case at bar. See also, *Fleming v. Wineberg*, 253 Or. 472, 455 P.2d 600 (1969). It would seem clear the defendant has been enriched. Improvements were made to his property that made it possible for him to

run a health spa business on the premises. In the lease the defendant required that these improvements be made. Presumably, the defendant would not have required these improvements if he did not expect to benefit from them.

Defendant did in fact regain possession of the property and is running a business with the aid of improvements that, without the lease, he would have had to pay for himself. In other words, defendant has obtained the benefit of plaintiff's services without having to pay for them. The case of *Paschall's, Inc. v. Dozier*, supra, is directly in point. In that case the daughter of the defendant contracted with the plaintiff to remodel a bathroom in defendant's house. The daughter was living with the defendant at the time. Plaintiff performed the services, but the daughter was unable to pay. Plaintiff sued the defendant homeowner on a theory of unjust enrichment. The court held that the plaintiff was entitled to restitution. The court stated:

The defendant asserts that an implied undertaking cannot arise against one benefited by the work performed, where the work is done under a special contract with another. While this may be the general rule, we do not think that it is applicable in every case. Indisputably, where one is afforded recovery from the person with whom he has a contract, he cannot also recover from third persons incidentally benefited by his performance. . . . However, the situation is dissimilar where a person furnishes material and labor under a contract for the benefit of a third party and that contract becomes unenforceable or invalid. In that situation there is certainly no reason to preclude the furnisher . . . from seeking recovery against the third person on the theory of (unjust enrichment). 407 S.W.2d at 154--155. (FN2)

While it is true, as defendant notes, that in these cases the defaulting party and the *777. defendant had some special relationship (father/daughter, mother/son, etc.) the basic reasoning of the cases applies to the facts at hand. In the case at bar, plaintiff entered into a contract with a defaulting party. That contract was at least in part for the

benefit of a third party--the defendant. The contract has become unenforceable, the defendant is enjoying the benefits of the contract without paying for them. The question to be answered in an unjust enrichment is, do justice and equity require that the defendant be forced to make restitution. Under the facts of this case, they do so require.

The plaintiff is not precluded by the Uniform Commercial Code from pursuing the remedy of restitution. Section 70A--1--103, U.C.A., provides that the principles of law and equity supplement the Code and are not usurped by it.

From the foregoing it can be seen that summary judgment was not proper. This being an action in equity, a wider exploration of the facts is called for. I would reverse and remand for an evidentiary determination of the central question, 'Why should plaintiff not recover.'

CROCKETT, J., concurs in Justice MAUGHAN'S dissent.

FN1 49 Am.Jur.2d 702, Section 765, citing authorities.

FN2. 66 Am.Jur.2d 948, Section 6, citing *Verdi v. Helper State Bank*, 57 Utah 502, 196 P. 225, 15 A.L.R. 641.

FN1. *Continental Forest Products, Inc. v. Chandler*, 95 Idaho 739, 518 P.2d 1201, 1205 (1974). As stated in *Paschall's, Inc. v. Dozier*, 219 Tenn. 45, 407 S.W.2d 150, 154 (1966): 'It is well established that want of privity between parties is no obstacle to recovery under quasi-contract.' See also: *Fowler v. Taylor*, Utah, 554 P.2d 205 (1976); *Rapp v. Salt Lake City*, Utah, 527 P.2d 651 (1974); *Trollope v. Koerner*, 106 Ariz. 210, 470 P.2d 91 (1970).

FN2. See also, *De Gasperi v. Valicent*, 198 Pa.Super. 455, 181 A.2d 862 (1962); *Karon v. Kellogg*, 195 Minn. 134, 261 N.W. 861 (1935); *Beacon Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E.2d 434 (1966).