

1982

# Rodney L. Phillips v. JCM Development Corp et al : Brief on Appeal

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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RODNEY L. PHILLIPS, :  
Plaintiff-Respondent, :  
vs. : Case No. 18211

JCM DEVELOPMENT CORPORATION, a Utah:  
corporation; JAMES C. McGARRY, JR.;  
LINDA McGARRY; JAMES R. GLAVAS, dba:  
J. G. REALTY; JAMES GLEASON; ROBERT  
G. ANDERSON; UNITED FARM AGENCY, :  
INC., a Utah corporation; CLAN  
STILSON; and DOES I through XV, :  
Defendants-Appellants. :

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BRIEF ON APPEAL

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APPEAL FROM THE JUDGMENT OF THE SEVENTH JUDICIAL  
DISTRICT COURT IN AND FOR GRAND COUNTY, HONORABLE BOYD  
BUNNELL PRESIDING

---

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Appellant UFA, Inc., a Utah  
corporation

FILED

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BRIEF OF APPELLANT

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NATURE OF THE CASE

This is an action by the plaintiff against the defendant, United Farm Agency, Inc., a Utah corporation, for damages arising out of a real estate transaction.

DISPOSITION IN THE LOWER COURT

The case was tried before the Honorable Boyd Bunnell on the 29th and 30th day of July, 1981. The Court granted judgment in favor of the plaintiff on July 30, 1981, against all of the defendants and took under advisement the amount of the damages suffered by the plaintiff. On September 4, 1981, the Court filed its Memorandum Decision (R. 213-215), and on October 14, 1981, the Court signed and filed its Findings of Fact, Conclusions of Law and Judgment (R. 232-243).

The defendant, United Farm Agency, filed its Motion for a New Trial which was denied by the Court by its Order filed Decem-



ber 24, 1981 (R. 285). The notice of appeal was filed on January 8, 1982 (R. 304).

#### RELIEF SOUGHT ON APPEAL

The appellant requests that this Court reverse the lower court's decision or in the alternative, remand the case for further hearing.

#### STATEMENT OF FACTS

The plaintiff Rodney Phillips operated, as a sole proprietorship, a construction company known as Phillips Construction Company from 1970 to the first part of 1978. During the first of 1978 and before the transactions that precipitated this action (Tr. 242-43), the plaintiff formed a corporation known as Phillips Construction Company (Tr. 131-32). After the formation of the corporation, all of the business and business assets were owned by the corporation, with the exception of the equipment of which Mr. Phillips retained personal ownership (Tr. 132).

During 1978, the plaintiff went through a divorce (Tr. 135) and was facing substantial financial difficulty in that his checks were bouncing (Tr. 287-88). Accordingly on January 25, 1978, the plaintiff listed his home and construction business for sale with the defendant Robert Anderson, a real estate agent (Ex. 6, Tr. 14). At a later time, a separate listing was made for the construction business alone which listed the selling price of \$200,000 (Tr. 14-15). None of the listings were signed by Clan Stilson or a person in authority for United Farm. Mr. Phillips communicated to the real estate agent that the business had grossed over a million dollars during the last year and that the business had a

waiting list for new construction (Ex. 8), although the records of the business did not reflect any of those representations (Ex. 43, 44, 45 and 46). On June 13, 1978, two additional listings were signed by the plaintiff on the shop and business lowering the price to \$185,000 in an attempt to expedite the sale of the business (Tr. 27-28, Ex. 14, 15).

Mr. Gerald (Bud) Stocks introduced the defendants, James Gleason and James McGarry to Mr. Anderson as persons who were interested in buying Phillips Construction Company (Tr. 37, 343-45). On July 17, 1978, James C. McGarry, James Gleason, Bud Stocks and Robert Anderson met Rodney Phillips on the site of one of Phillips's jobs to discuss the possible sale of the business (Tr. 38, 136). At that time, Gerald (Bud) Stocks was introduced as a referring real estate agent from First Realty Group, Mr. McGarry as president of JCM Development Company and James Gleason as an associate of McGarry's and agent of J. G. Realty (Tr. 136-37, 341-42, 38-39). The afternoon of July 17, 1978, was spent looking at some of the corporation's jobs and equipment, meeting employees and reviewing some of the documents relating to the business operation of the construction company (Tr. 40-41, 137-38, 142, 344-45).

On July 18, 1978, the parties met mid-morning and went to the construction company's office. The parties reviewed documents, looked at equipment and engaged in discussion relative to a possible sale (Tr. 41-43, 143-44). During the late afternoon or evening of July 18, 1978, Bob Anderson, James McGarry, James Gleason and Rodney Phillips met at Mr. Anderson's office (Tr. 43, 143).

There is a dispute in the evidence as to the extent of Larry Anderson's involvement in the meeting, but Rodney Phillips, acting for the corporation, James McGarry for JCM Development Company and James Gleason for J. G. Realty came to terms and signed an earnest money agreement: A check for \$5,000.00 was presented to the plaintiff, but no closing date was set (Ex. 18, Tr. 43, 50-51, 144-45).

After the plaintiff Phillips had met with McGarry and Gleason, the defendant Robert Anderson, learned that the parties were going to complete the sale by means of a simple stock transfer and a bill of sale (Tr. 43). Mr. Anderson advised the plaintiff that the transaction should not be handled that way and commented that the Bulk Sales Act would not be complied with and that other essential elements of a typical sale were being omitted (Tr. 43-45, 49). The defendant Anderson testified that after he had protested the manner in which the transaction was being handled, Mr. Gleason stated that Mr. Anderson should let Gleason handle the transaction and accordingly the earnest money was written on Mr. Gleason's forms (Tr. 45, 47, 48). Mr. Anderson did not see the signed earnest money until almost a month later (Tr. 52), and assumed that the plaintiff knew that he was not representing him because Phillips signed an agreement against Anderson's advise on another real estate company's forms (Tr. 53). The Court found that Anderson never expressly advised the plaintiff that he was no longer representing Phillips (R. 234, Findings No. 13).

Contemporaneous to the time of the transaction that he was negotiating for the plaintiff with McGarry, Gleason and JCM Development Company, the defendant, Robert Anderson, had been

requested to sell 20 acres of his land in Spanish Valley to McGarry, Gleason and JCM Development Company and to help in the development of other property (Tr. 37, 38). At the time of the negotiation, Robert Anderson was behind on his \$1,000.00 payments to First Security Bank on the Spanish Valley property (Tr. 32-33). On July 18, 1978, Anderson signed an earnest money with J. G. Realty and JCM Development Company for the purchase of his 20 acres (Ex. 19, Tr. 55, 56). Anderson testified that the plaintiff knew of the transaction because he told him and because Phillips was asked to do work on the subdivision property by Skipper Resources (R. 59). In fact, the plaintiff admitted at trial that he knew about the development (Tr. 155, 156).

In addition, Anderson was negotiating to obtain exclusive listings on the lots that would be developed on the land he had sold to JCM Development and the surrounding acreage that was to be developed into a mobile home subdivision (Tr. 60-62), by JCM Development, McGarry and Gleason. McGarry and Gleason intended to use Phillips Construction Company to construct the development (Tr. 65-66).

The plaintiff contended that the defendant Anderson represented to him on several occasions that JCM Development Company was worth millions of dollars (Tr. 153, 154), but Anderson testified that he reported only what Gleason and McGarry had told him (Tr. 67-68). Obviously Anderson would not have dealt with the other defendants personally, if he knew of any financial problems or financial risk.

The parties continued their preparation for closing and on



August 14, 1978, the plaintiff met with James McGarry, James Gleason and Robert Anderson (Tr. 161). Calculations and computations were made by the parties, and adjustments to the inventory were made. The accounts receivable and payable were adjusted by the plaintiff and the defendants McGarry and Gleason (Tr. 161-62). The earnest money had provided for a Forty Thousand Dollar (\$40,000.00) down payment which, at the meeting of August 14th, was converted to a Thirty-five Thousand Dollar (\$35,000.00) promissory note, signed by JCM Development Corporation which together with the Five Thousand Dollar (\$5,000.00) down payment totaled Forty Thousand Dollars (\$40,000.00) (Tr. 162-63, Ex. 24). The remainder of the plaintiff's equity was evidenced by another promissory note in the amount of Forty-four Thousand Dollars (\$44,000.00), payable over a period of years, signed again by JCM Development Corporation (Tr. 163, Ex. 25).

In addition to the two promissory notes, the plaintiff, on behalf of the corporation, signed warranty deeds, stock transfer papers and other related documents transferring all of his interest in the corporation to the defendant, JCM Development (Tr. 163-165). The plaintiff testified that the signing of the documents took over two hours (Tr. 163). Robert Anderson testified that he typed some of the documents and compiled information as requested by the various parties (Tr. 82-83). Robert Anderson testified that he didn't think he was conducting a closing in that United Farm's policy required that a closing through their agency be done by the broker or through an attorney, neither of which occurred in this case (Tr. 29).

The plaintiff testified that he relied on certain representations of the defendant, Anderson, as to the financial solvency of the defendants in accepting the promissory notes without security (Tr. 164-165). The defendant, Robert Anderson, denied making any such representations and stated that he had communicated only what had been communicated to him by McGarry and Gleason (Tr. 74, 88-89).

After the execution of the documents on August 14, 1978, the promissory notes signed by these defendants were not paid.

There was no evidence at trial to directly connect the defendant, United Farm Agency or the broker Clan Stilson to this transaction. The only liability of United Farm Agency and Clan Stilson is derivative. No one acting in the furtherance of United Farm's interest participated in the transaction. Additionally United Farm never received any monetary benefit or any portion of a commission from the sale.

#### POINT I

THERE WAS INSUFFICIENT EVIDENCE INTRODUCED  
AT TRIAL TO BASE A VERDICT AGAINST THE  
DEFENDANT, UNITED FARM AGENCY, INC., A  
UTAH CORPORATION.

In the Court's Findings of Fact and Conclusions of Law, the Court found that the defendant, Robert Anderson, breached his fiduciary duty to the plaintiff (1) by by unilaterally deciding not to further represent the plaintiff in the sale of his property and by not advising the plaintiff of said decision (Findings No. 25, R. 236); (2) by failing to discharge his duty to verify the solvency of JCM Development and by representing the worth of JCM to the plaintiff (Findings No. 26, R. 237); (3) by failing to discharge his duty, imposed by United Farm Agency

policy, to see that an attorney conduct the plaintiff's closing (Findings No. 27, R. 237); (4) by preparing unsecured notes and allowing the plaintiff to accept said notes and to part with his assets (Findings No. 28, R. 237); and, (5) by failing to investigate J. G. Realty and assuring the plaintiff of J. G. Realty's legitimacy (Findings No. 29, R. 237).

The evidence in this case, simply does not support the imputation of Robert Anderson's liability to the broker, Clan Stilson, or to United Farm Agency, a Utah corporation. The only proof elicited regarding the issue of agency or employment was done during the examination of Robert Anderson. Mr. Anderson testified that he was a sales representative for United Farm Agency of Utah and that his duties included responsibilities for the listing and selling of property (Tr. 4). Further, Robert Anderson testified that he was a real estate agent, having been licensed in the state of Utah since 1975 and that Mr. Clan Stilson was the broker for United Farm Agency in the State of Utah (Tr. 5-6).

When specifically asked what role Clan Stilson played in the transaction which precipitated this lawsuit, Mr. Anderson testified that Mr. Stilson had no involvement and further testified that United Farm Agency policy required its salespersons to obtain approval of the broker for preliminary matters and that United Farm Agency required the involvement of a broker or attorney to handle the closing. He further testified that on prior occasions, Mr. Snow, the attorney in Moab, acted as the person who handled the closing and that particularly, in other

transactions in which Mr. Phillips had been involved, Mr. Snow was the person who prepared the documents and supervised the closing transaction (R. 122-123).

In this case, the listing of the business was evidenced by Business and Income Exclusive Listing Agreements of United Farm Agency (Ex. 6, 14, 15). After the signing of the listing agreements, United Farm Agency, a Utah corporation nor its broker, Clan Stilson, had any involvement with any of the remainder of the transaction. Particularly, the earnest money agreement signed in this action was not a United Farm Agency document (Ex. 18), and the parties understood that to be the case (Tr. 45, 145-147). No attorney or broker for United Farm Agency participated in or became involved in the Phillips-JCM Development transaction or closing. There were no sellers' or buyers' statements furnished by United Farm Agency as required by their policies and procedures. Simply put, if the Court adopts the entered findings of the trial court, the transaction and the exchange of documents that occurred on August 14, 1978, were in complete violation of the United Farm Agency policies and practices as established by the plaintiff in his case.

The relationship of broker and real estate salesman is defined in the State of Utah by legislative enactment. Utah Code Annotated, 1953 as amended, §61-2-1 et seq., sets forth the relationship of agent and broker as it pertains to the sale of real estate in the State of Utah. The term "real estate salesman," is defined to include:

. . . any person employed or engaged  
by or on behalf of a licensed real



broker to do or to deal in any act or transaction set out or comprehended by the definition of a real estate broker in §61-2-2 for compensation or otherwise. (Emphasis added.)

Utah Code Annotated §61-2-3, 1953, as amended.

Utah Code Annotated §61-2-20, 1953, as amended, sets forth the specific rights and duties of a real estate salesman as follows:

It is expressly provided that a real estate salesman shall have the right to fill out and complete an earnest money receipt and agreement in form to be approved by the commission and forms provided by statute and that a real estate broker shall have the right to fill out and complete forms of legal documents necessary to any real estate transaction to which the said broker is a party as principle or agent, and which forms have been approved by the commission and Attorney General of the State of Utah. Such forms shall include a closing real estate contract, a short-form lease, and a bill of sale of personal property.

In fact, on all of the United Farm Agency earnest money agreements and even as indicated on Exhibit 18, introduced at trial, there is a space provided on Line 44 for the broker of the real estate company to sign, evidencing his review of the document. In this case, neither the broker for United Farm Agency, Clan Stilson, nor any other agent or employee of United Farm Agency, a Utah corporation, endorsed Exhibit 18 or any of the other documents exchanged between the parties. The closing was not supervised by the broker for United Farm Agency or by an attorney. The closing documents and the documents evidencing the transaction in this case do not meet the statutory requirements of Utah Code

Annotated §61-2-20 in that there was not a closing real estate contract used in conjunction with a bill of sale for personal property or other closing statements. Needless to say, no real estate documents evidencing the sale were executed on United Farm Agency forms or signed by the broker in charge.

In essence, the only involvement of United Farm Agency, a Utah corporation, is that of the listing agreement. All of the transactions after that point in time were handled by Robert Anderson without complying either with the statutory requirements set out above or with United Farm Agency policy and procedure.

In analyzing the question of when United Farm Agency would be liable for the acts of Robert Anderson, several Utah Supreme Court cases are instructive. The Utah Supreme Court dealt with a similar matter in Wilkerson v. Stevens, 16 Utah 2d 424, 403 P.2d 31 (1965). In that case, the vendor brought an action against a real estate salesman to recover a sum of money received by the salesman as an intermediary in connection with the sale of a house, and against the realty company as an undisclosed principle. The trial court entered summary judgment in favor of the realty company and the vendor appealed. In affirming the decision, the Supreme Court, through Justice Crockett, stated the criteria to be applied in analyzing the responsibility of the realty company. The Court noted that since the plaintiff had dealt with the real estate agent on a personal basis and sought to go beyond that agent to hold a third party liable, it was the plaintiff's burden to prove that such a principal and agency

relationship existed. Wilkerson, supra at 32. See also, Cote v. A. J. Bayless Markets, Inc., 128 Az. 438, 626 P.2d 602 (1981); B & D Investment Corp. v. Petticord, 48 Or.App. 345, 617 P.2d 276 (1980) (Further, the cases speaking to that issue have held that there is no presumption of agency and that evidence must be put on by the person who alleges it. Sturm v. Green, 398 P.2d 799 (Okla. 1965); Seattle-First National Bank v. Pacific Bank of Washington, 22 Wash.App. 46, 587 P.2d 617 (1978)).

Justice Crockett in Wilkerson supra, specifically pointed to the fact that there had been prior dealings between the plaintiff and the defendant, Stevens, and that in one such transaction, the real estate agent had agreed to terms other than cash for the payment of his commission. Justice Crockett pointed to the fact that the real estate agent had acted in his own name and that there was no listing agreement with the realty company and that its name did not appear on any document nor was it mentioned in any way. Further, the Court concluded that the plaintiff had not relied upon the agent in connection with the realty company. Justice Crockett stated that inasmuch as the realty company did not receive or claim a commission on the transaction and that it did not participate in any manner or know anything about the transaction until the lawsuit was filed, the realty company ought not to be held responsible for the acts of the agent. Wilkerson, supra at 32-33.

The meaningful differences between the facts in Wilkerson, supra, and the facts of this case are that in this case, there is a listing agreement on a United Farm Agency form, although

the broker's signature does not appear thereon and because there is no undisclosed principle in this case. As in the Wilkerson case, Robert Anderson and the plaintiff had extensive prior dealings. In fact, the plaintiff, in tracing that history of prior dealings between Phillips and Anderson consumed from page 7 of the transcript through page 30. Throughout the transcript, there is reference to prior dealings between Robert Anderson individually with the plaintiff. In accord with the Wilkerson case, there had been a prior instance between Anderson and Phillips in which Anderson did not get a cash commission but simply received office space in a building and in addition, was charged no rent for three months (Tr. 7, 132-33). Further, in accord with the Wilkerson case, the plaintiff, Phillips, testified that his reliance on Robert Anderson came because of his prior experience with him.

The plaintiff testified explicitly as follows:

Bob was-had-he handled all my dealings and I had complete trust with him. He had done a fantastic job closing my home and my motel, and we were doing exactly the same thing. We were putting together the closing papers on this transaction the exact same way we had done with my motel. We went over all these papers and filled them all and then we took them down to Harry Snow, and he finalized it, and I thought that's what we were going to do on this sale and I expected that the same process to take place.

(Tr. 165). Despite the fact of the prior dealings, Harry Snow was never contacted, a closing statement was never made, (Tr. 170), and neither Harry Snow nor the broker for United Farm Agency was ever contacted regarding the case.



The Utah Supreme Court in Wells v. Walker Bank & Trust Co., Inc., 590 P.2d 1261 (Utah 1979), stated this rule again in a case which involved an action by an assignee for the benefit of the creditors of a trust against banks, alleging that the banks had negligently honored "altered" checks drawn on the trust account. In that case, the Court stated the general principles relative to this issue:

Walker Bank urges that the doctrine of respondeat superior is applicable. As is true in other areas of the law, the general rule regarding the liability of a master for such acts of his servant, is that an alteration of a negotiable instrument (or other document) by an agent is, in effect, the act of his principal if such alteration is made within the scope of the express or implied authority of the agent. It is of course to be recognized that if the employee is not so authorized and is acting for his own interest, and not in furtherance of the employer's business, the latter would not be bound by his act. (Emphasis added.)

Wells, supra, at 1263-64. A further statement of this legal principle is found in 3 Am.Jur.2d, Agency, §267

Fundamentally, and according to both the restatement and the American Courts, there is no distinction to be drawn between the liability of a principal for the tortious act of his agent and liability of a master for the tortious act of his servant. In both cases, the tort liability is based on the master and servant, rather than any agency, principle; the liability for the tortious act of the employee is grounded upon the maxim of "respondeat superior" and is to be determined by considering, from a factual standpoint, the question whether the tortious act was done while the employee, whether agent or servant, was acting within the scope of his employment.

3 Am.Jur.2d Agency, supra at 632.

Accordingly, the issues presented in this point are two in number: First, whether the relationship of employer-employee existed between Anderson and United Farm Agency, and second, whether the actions of Anderson were authorized or whether they were acts for his own interests and not in furtherance of his employer's business.

Various courts have looked at a variety of factors to determine whether a person is an employee or an independent contractor. A list of some of the factors to be considered are found in Stewart v. Midani, 525 F.Supp. 823, 849 (N.D.Ga. 1981). The Court listed eight factors as being indicative of an employee-employer relationship: (1) the right of the employer to direct the work step by step; (2) contracts to perform a service rather than to accomplish a task; (3) the employer's authority to control the employee's time; (4) the employer's right to inspect the employee's work; (5) who supplies the equipment; (6) the right to terminate the contract; (7) the nature or skill of the employee's work; and, (8) the method of payment.

The Utah Supreme Court, in the context of the statutory definition of "independent contractor" in workman's compensation matters, has stated the following:

Speaking in generality: an employee is one who is hired and paid a salary, a wage, or at a fixed rate, to perform the employer's work as directed by the employer and who is subject to a comparatively high degree of control in performing those duties. In contrast, an independent contractor is one who is engaged to do some particular project or piece of work,

usually for a set total sum, who may do the job in his own way, subject only to minimal restrictions or controls and is responsible only for its satisfactory completion.

The main facts to be considered as bearing on the relationship here are: (1) whatever covenants or agreements exist concerning the right of direction and control over the employee, whether express or implied; (2) the right to hire and fire; (3) the method of payment, i.e., whether in wages or fees, as compared to payment for a complete job or project; and, (4) the furnishing of the equipment.

Harry L. Young & Sons, Inc. v. Ashton, 538 P.2d 316; 318 (Utah 1975).

It is respectfully submitted that the plaintiff did not put on sufficient proof to establish the employment relationship and that the evidence which was introduced proves that an employer-employee relationship did not exist and that any acts of Anderson were for his own interests not within the authority given him by United Farm Agency.

The evidence introduced at trial indicates that Mr. Anderson was not an employee of United Farm Agency. There was no showing that United Farm Agency had the right or ability to control or direct the work step by step. In fact, aside from setting out its policies and procedures as to how a proper transaction should be handled for United Farm Agency, there was no supervision at all of Mr. Anderson's activities and conduct. In fact, the work that was done, in closing this transaction on August 14th, did not involve any of United Farm Agency forms nor did it comply with its established procedures. In this case, Robert Anderson

agreed to perform a service for a set fee as opposed to some hourly compensation. There was no evidence that withholding taxes were taken from Mr. Anderson's commission and established practice indicates that such would not be the case. There was no evidence as to any employee health or pension benefits. Further, there was no evidence at all that United Farm Agency had furnished Mr. Anderson with any accouterments for his office or for use in real estate transactions. In addition, no monetary benefit was ever received by United Farm for Anderson's efforts in this transaction. The evidence is simply insufficient to establish an employer-employee relationship between United Farm Agency and Robert Anderson.

Even aside from the employer-employee issue, the way that the transaction was handled, as found by the Court in the Findings of Fact and Conclusions of Law, clearly established that the manner in which the transaction went forth was in direct contravention with the policies and procedures of United Farm Agency and in contravention of the requirements of the Utah State statute. Accordingly, as noted in the two Supreme Court cases discussing the issue, the activities of Mr. Anderson as found by the trial court were outside of his authority and done for his own interest. The Court explicitly found that at the time that Mr. Anderson was negotiating the real estate transaction for Mr. Phillips, he himself had dealt with JCM Development Company, Mr. McGarry and Mr. Gleason in selling his 20 acres in Spanish Valley and further had been working with the development and sale of other real property in the area. As found by the



Court in the Walker Bank case, Mr. Anderson was acting for his own benefit.

Based upon the evidentiary record established at trial, it is respectfully submitted that the decision imputing the conduct of Mr. Anderson to Clan Stilson and United Farm Agency, a Utah corporation, is without support in the record and should be reversed. In as much as the relationship between real estate salesman and broker is established by statute, there should be no vicarious liability based on that relationship alone in light of the clear violations of policy and statute pertaining to the real estate salesman's involvement in the transaction. It would create an impossible burden for a real estate company to be burdened with liability for a transaction it never reviewed or participated in. The statute requires broker approval and absent that involvement, it is simply unjust to impose liability. Alternatively, justice requires that at least more evidence be taken on the issue and the plaintiff be required to establish facts warranting the imposition of the respondeat-superior doctrine.

## POINT II

AN INDIVIDUAL CANNOT MAINTAIN AN ACTION  
IN HIS OR HER NAME FOR WRONGS DONE BY  
THIRD PARTIES TO A CORPORATION WITH WHICH  
THE INDIVIDUAL IS ASSOCIATED.

In the present case, the plaintiff has sued in his name, as an individual, for wrongs done to the corporation known as Phillips Construction Company.

The plaintiff alleged in his complaint two distinct types of damages. The first type was money due to him personally

for his equity in the corporation. This obligation was evidenced by two promissory notes in the amounts of Thirty-five Thousand Dollars (\$35,000.00) and Forty-four Thousand Dollars (\$44,000.00) respectively. The second type of damage alleged was the failure of the defendants JCM, McGarry and Gleason to assume corporate debts of approximately Ninety Thousand Dollars (\$90,000.00) (Tr. 317), for which the plaintiff claimed to be ultimately liable, which was never plead in the complaint and are thereby waived under Rule 9(g) of the Utah Rules of Civil Procedure. See Point III of Appellant's brief.

The plaintiff did not claim or submit proof that the assumption of said corporate debts was evidenced by a writing of any kind at the time of closing.

Appellant's position is that the plaintiff can only sue for damages resulting from default in payment of the promissory notes. The corporation is the only party entitled to sue with regard to the failure of the defendants to assume its liabilities. Although the plaintiff may have some ultimate liability on those corporate debts, he produced no evidence of any kind that he had been pursued individually for said obligations on the majority of the debts or that the corporation had insufficient assets to satisfy said obligations or that he is entitled to pierce the corporate veil of Phillips Construction to pursue the defendants individually. The evidence was that the corporation had assets of Sixty-two Thousand Dollars to Sixty-three Thousand Dollars (\$62,000.00 to \$63,000.00) in accounts receivable (Tr. 306).

The defendant testified that Exhibit 45 was the inventory

prepared for this sale which described all of the other assets of Phillips Construction Company. As indicated on the document itself, Mr. Phillips indicated that the assets of the business' exclusive of accounts receivable, totaled Ninety-two Thousand Four Hundred Twenty-seven Dollars (\$92,427.00). Accordingly, the total assets of the business at the time that it was sold to the defendants McGarry, Gleason and JCM Development Company entailed the Ninety-two Thousand Four Hundred Twenty-seven Dollars (\$92,427.00) in the property and equipment and Sixty-two to Sixty-three Thousand Dollars (\$62,000.00 to \$63,000.00) in accounts receivable for a total of One Hundred Fifty-two Thousand Four Hundred Twenty-seven Dollars (\$152,427.00). As indicated in the statement of facts, the plaintiff incorporated his business in the early part of 1978 and testified that all of the business, was owned by the corporation and belonged to the corporation with the exception of the equipment over which he would retain personal control (Tr. 132). Thus the accounts payable as well as the receivables were the property of the corporation.

The plaintiff claims in this action that he is entitled to judgment on the two promissory notes executed by JCM Development Company and in addition thereto, the plaintiff contends that he is entitled to judgment for all of the accounts payable of the corporation as he understood them to be at the time of trial. It is the defendant, United Farm's position, that the plaintiff has no right to recover under the present state of the pleadings.

Plaintiff's equity was paid to him in the form of two pro-

missory notes, as explained above. Another part of the transaction, according to the plaintiff's testimony, was the oral agreement that the defendants, JCM Development Company, Gleason and McGarry would assume the debts and obligations of the corporation. Although Phillips may have some ultimate liability on those debts, there was no proof as to the bulk of the debts and obligations that Phillips had been pursued individually and that the corporation, with all of its assets, was not able to satisfy the obligations of the creditor.

The case of Norman v. Murray First Thrift & Loan Co., 596 P.2d 1028 (Utah 1979) is illustrative of this point. In Norman, supra, the defendant moved to dismiss the plaintiff corporation as a party and substitute the individual who was the owner of nearly all the stock in the corporation. The trial court granted that motion and the plaintiff corporation took an interlocutory appeal. On appeal, the trial court's decision was reversed and the corporation was reinstated as the plaintiff. In its holding, the Court stated:

The facts of this case should be reiterated. Plaintiff is seeking damages it allegedly has sustained by reason of the improper disposition of collateral, the title to which plaintiff held and which defendant sold pursuant to an agreement executed by plaintiff. Under such circumstances, plaintiff is the real party in interest under Rule 17(a), for even though a shareholder owns all, or practically all, of the stock in a corporation such a fact does not authorize him to sue as an individual for a wrong done by third party to the corporation."  
(Emphasis added.)

Norman at p. 1031, 1032 citing Erlich v. Glasner, CA 9th, 1969,

418 F.2d 226; Gentry v. Howard, W.D. La., 1973, 365 F.Supp. 567. See also 13 Fletcher Cyclopedia Corporations, §5927, p. 346.

Plaintiff's lack of authority to bring the case in his own right is a complete incapacity to sue. He possessed no cause of action as an individual and, therefore, failed to state a cause of action.

In its answer, the defendants plead the plaintiffs failure to state a cause of action, however, even a failure to so plead would not waive this defect in the plaintiff's complaint. In 61A Am.Jur. Pleading §390, p. 374, this principle is stated as follows:

The doctrine of waiver as applied to pleadings has well established limitations. It cannot be invoked in respect to all faults in the pleading irrespective of their gravity, for there are some defects and omissions so vital and radical that want of objection cannot cure them, since they go to the very substance of the matter in litigation. Of such character is an objection . . . . that it wholly fails to state a cause of action which will support a judgment. Failure to state a cause of action is never waived unless aided or cured by the answer or subsequent proceedings.

The subsequent proceeding in this case did not cure the defect that plaintiff never possessed a cause of action.

The plaintiff attempted to state that he had personal liability for the debts of the corporation (Tr. 222), however, a shareholder of a corporation is not responsible for obligations of the corporation regardless of how they were incurred. Parker v. Telegift International, Inc., 29 Utah 2d 87, 505 P.2d 301 (1973).



The appellants concede that the plaintiff, as an individual, hypothetically could state a cause of action against the defendants if there was a valid agreement by them to assume corporate obligations for which the plaintiff was held responsible. However, no such agreement exists. See Point III of this brief.

In the absence of such agreement, the plaintiff can look only to the corporation to satisfy its obligations out of its assets.

In this case, the plaintiff transferred all his stock and ownership in the corporation to the defendants. It is axiomatic that if the corporation failed to pay and discharge those debts and obligations, then the plaintiff must file a lawsuit against the corporation alleging the right to indemnification by the corporation. If the plaintiff wishes to assert any personal liability against the defendants for those debts and obligations, then he must allege some theory that will allow him to pierce the corporate veil and attach the responsibility to individual officers and shareholders. In this case, not only did the plaintiff file the lawsuit in his personal name for debts and obligations that the corporation is responsible for, he also failed to name the corporation as a defendant or allege any theory against individuals which would allow the court to pierce the corporate veil.

It is established law that the plaintiff must do more than simply state that in his opinion, he is legally liable for the corporate debts and obligations. Certainly, there must be some evidence

that as to all of the debts and obligations, the creditor has been unable to satisfy his obligation against the corporation and is, at the present time, seeking to collect those amounts from the plaintiff. The plaintiff put on such evidence with regard to two of the obligations, but totally failed to meet that task with regard to the bulk of the over One Hundred Thousand Dollars (\$100,000.00) of debts and obligations that he testified to at trial. A simple analogy might be helpful. If Phillips had co-signed with any of the defendants on a loan for the purchase of an automobile, he could file suit for indemnification from the defendants only if he could prove that the amount was not paid, that the creditor had sought relief against him and that he had either paid or became obligated to pay. In this case, there was no evidence that the assets of the corporation had been liquidated, or that the creditors had somehow been unsuccessful in applying the corporate assets against the corporate liabilities.

Accordingly, it is respectfully submitted that the failure to pay the corporate debts and obligations may be a cause of action of the corporation against its officers and directors but certainly is not a cause of action for Rodney Phillips, individually. Absent the essential proof that he has become legally liable for the debts and obligations he testified to at trial from the bankruptcy schedule, there is no evidence on that issue to support the judgment.

Of equal importance in this matter is the bankruptcy issue. Plaintiff testified at trial that although he was having difficulties in meeting his obligations, he was not forced to file

bankruptcy until after this transaction occurred. The plaintiff, as a bankrupt, in bringing this action has violated two fundamental rules. First, he has no right to recover debts that have been discharged in bankruptcy. Second, upon the filing of the petition for bankruptcy, the trustee is the person who has title to all of the assets, causes of action and property of the bankrupt. Section 70 of the Bankruptcy Code, 11 U.S.C. §110 explicitly provides that the trustee upon the filing of the petition for bankruptcy is vested by operation of law as the trustee. Clause 6 of §78 provides that the trustee is vested with title to all rights of action arising from "the unlawful taking or detention of or injury to" the bankrupt's property. Under this category, the courts have included actions for conversion, and actions based upon fraudulent misrepresentation and deceit through which the bankrupt has incurred heavy losses. 1 Collier's Bankruptcy Manual, §70-2[7]. See also In Re Gay, 25 Am.B.R. 111, 182 F. 260 (D.Mass. 1910); Constant v. Kulukundis, 125 F.Supp. 305 (S.D.N.Y. 1954). Rule 610 of the Rules of Bankruptcy Procedure provides clearly that the trustee or receiver is the one who prosecutes or enters his appearance in defense in the pending action by or against the bankrupt on behalf of the estate. Because Mr. Phillips has filed bankruptcy, he is an improper party plaintiff in this action and again there are independent grounds for the case to be reversed.

Because the plaintiff is an improper party plaintiff, the Court has ample authority to reverse on the basis that the plaintiff does not state a cause of action. The plaintiff has not



extinguished his remedies against the corporation, alleged grounds to pierce the corporate veil and further has failed to allege that the individual creditors have been paid by him or that the creditors have initiated some sort of action against him.

### POINT III

THAT PORTION OF THE JUDGMENT WHICH REFERS TO THE DEFENDANTS OBLIGATION TO ASSUME CORPORATE LIABILITIES OF PHILLIPS CONSTRUCTION COMPANY IS VOID AS A MATTER OF LAW IN VIOLATION OF THE STATUTE OF FRAUDS

In the Court's Findings of Fact, the Court concluded that the plaintiff had \$99,270.21 in obligations which were not paid in addition to the additional interest on the First Security and Northwest Carriers obligations in the amount of \$2,624.69 and \$4,283.40 respectively. (R. 236, Finding #23.)

It is respectfully submitted that before the Court can find the amount of the obligations as an item of damage for the plaintiff, there must be a showing that the assumption of those obligations was one of the matters negotiated and arrived at between the plaintiff and the defendant JCM Development Company, James McGarry and James Gleason and memorialized in writing. Plaintiff at the time of trial introduced several warranty deeds but failed to introduce any of the documents evidencing the transfer of the stock in the corporation and failed to show any instrument which perpetuated the agreement in the earnest money to assume any obligations of the corporation.

The necessary corollary of the failure to have an agreement signed by the party to be charged agreeing to pay the debts and

obligations of the corporation, is a finding that the obligation is void. If the original agreement is void, the Court cannot impose the void obligation upon the defendants.

Utah Code Annotated §25-5-4 states in pertinent part as follows:

In the following cases, every agreement shall be void unless such agreement or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith: . . .

(2) every promise to answer for the debt default, or miscarriage of another. . . .  
(Emphasis added).

The import of the statute is that any agreement to assume the debts and obligations of another that is not in writing, signed by the person to be charged is void. The Utah Supreme Court has referred to that statute on three different occasions and has held that where the agreement to pay the obligation is not an original promise, (a promise made at the time the debt is incurred,), but is a collateral promise (a promise made after the debt is incurred), the failure to have a writing evidencing that fact, signed by the person to be charged, is fatal. O'Hair v. Kounal, 23 Utah 2d 355, 463 P.2d 799 (1970); Sugar v. Miller, 6 Utah 2d 433, 315 P.2d 862 (1957); Brasher Motor and Finance Co. v. Anderson, 20 Utah 2d 104, 433 P.2d 608.

The earnest money receipt and offer to purchase, plaintiff's Exhibit 18, contains the following language on Line 21,

\$40,000.-Total down payment and assume existing loans on company-building-equipment leaving a balance of \$38,950.00.

The phrase in the earnest money agreement that the buyer was to

assume the existing loans on the company, building and equipment, is certainly vague and ambiguous and the agreement itself contemplates a final contract of sale as shown on Lines 35, 36 and Lines 41 through 43 (Pl. Ex. 18). In any event, plaintiff offered proof at trial that went way beyond the loans on the company, building and equipment and introduced evidence of building supplies, petroleum bills for the business and many other miscellaneous expenses (Tr. 198-233).

Particularly, the plaintiff testified to a (a) tax lien in the amount of \$11,000.00 (Tr. 198); (b) two obligations owing to the State Tax Commission in the amounts of \$761.17, \$98.72 and \$104.86 (Tr. 212); (c) the Division of Employment Security in the amount of \$739.47 (Tr. 214); (d) the State Tax Commission in the amount of \$1,106.93 (Tr. 215); (e) Riverside Accoustics in the amount of \$695.07 (Tr. 216); (f) Kelly Insurance Company for medical insurance for his employees in the amount of \$1,562.00 (Tr. 222-23); (g) Lou Schwabb for gas for the company's equipment in the amounts of \$674.43 and \$243.79 (Tr. 223); (h) Skipper Resources in the amount of \$275.00 for surveying offices (Tr. 223); (i) Strong Construction Company in the amount of \$1,754.00 for gravel (Tr. 224); (j) Motor Parts Company in the amount of \$400.00 (Tr. 225); (k) R & R Radio for advertising expenses in the amount of \$900.00 (Tr. 226); (l) M & J Sheet Metal in the amount of \$500.00 (Tr. 226); (m) Associated Capital in the amount of \$2,298.06 for radios (Tr. 228); (m) Jerry Pruett in the amount of \$5,000.00 for a deposit on a proposal on a building (Tr. 228); (o) Plateau

Supply in the amount of \$54.82 (Tr. 228); (p) Continental Phone in the amount of \$109.64 (Tr. 228-29); (q) Utah Power & Light in the amount of \$548.00 (Tr. 230); (r) Mahoney Chevrolet in the amount of \$439.62 (Tr. 230); (s) New World Life Insurance in the amount of \$1,617.43 for employee insurance (Tr. 231); (t) Plateau Supply Company in the amount of \$8,000.00 for materials including insulation and doors (Tr. 231); (u) Western Construction Specialties in the amount of \$269.00 (Tr. 231-232); (v) K. U. McDonald in the amount of \$3,700.00 (Tr. 232); (w) Thompson Body and Glass in the amount of \$400.00 (Tr. 232); (x) Spencers in the amount of \$500.00 for office desks and chairs (Tr. 232); (y) Lewis Hardware in the amount of \$780.13 (Tr. 232); (z) New England Life Insurance for \$3,111.36 for employee insurance (Tr. 232-233); (aa) the Employment Security Office of Utah State in the amounts of \$938.80 and \$6.11 (Tr. 233); (bb) the Unemployment Office in the amount of \$731.74 (Tr. 234); and, (cc) the Internal Revenue Service in the amount of \$826.46 (Ex. 39, Tr. 234).

The debts and obligations set out above are simply that portion of the proof which has no bearing or connection with the terms written on the earnest money and offer to purchase relating to debts on loans on the company, buildings and equipment. It is respectfully submitted that there was no writing between the parties evidencing an agreement to pay for the debts and obligations set out above and that any judgment which entails those items is void on its face.

The other issue relating to the statute of frauds is whether or not the debts and obligations on the building and equipment

are enforceable in light of the fact that the parties exchanged warranty deeds and the plaintiff conveyed all of his right, title and interest in the corporation to the defendant JCM Development. The Utah Supreme Court has been active on the doctrine of merger and has stated unequivocally that the execution of a warranty deed extinguishes the obligations under the earnest money agreement.

In Kelsey v. Hansen, 18 Utah 2d 226, 419 P.2d 198 (1966), the Supreme Court held that where the real estate broker and his agent agreed to pay for draperies and other extras involved in the transfer of property under the terms of the earnest money with the words "to be arranged", and also provided that the earnest money would be abrogated by execution of the final deed, that the subsequent conveyance by deed merged the prior agreement and the agent was not liable on the promise to pay for the draperies.

In Bowen v. Olsen, 576 P.2d 862 (Utah 1978), the Court held that the delivery and acceptance of a deed, executed pursuant to the provisions of a precedent contract for the sale of real property merges the rights conferred by the contract into the deed. The Court explicitly noted that unless there is new consideration for the additional promise, the clause would be termed inseverable.

In Rasmussen v. Olsen, 583 P.2d 50 (Utah 1978), the Court restated again that where the deed is given in full execution of the contract of the sale of the land, all provisions of the prior contract are merged therein, and when merger is contested by a party, the burden is upon him to show the contrary by clear



and convincing evidence. See also, Neeley v. Kelsch, 600 P.2d 979 (Utah 1979); Baxter v. Stubbs, 620 P.2d 68 (Utah 1980).

In this case, the evidence is undisputed that there was no additional consideration for the promise of the defendants to assume the debts and obligations of the corporation. Since the plaintiff could not enforce that agreement against the defendants, in that it violates the statute of frauds, it is an improper item of damage to be assessed against the defendants in this action. Accordingly, since there was no agreement between the plaintiff and the defendant JCM Development Company to assume the obligations, there is no evidence before the Court to establish that Phillips would not have been forced to pay those obligations regardless of who purchased the business. If there was no contract to assume debts, a solvent buyer would have refused to discharge them.

One final matter should be mentioned. The statute of frauds has been held by the Supreme Court to be an affirmative defense, which, must be plead. There is no question in this case that the answers filed by the defendants do not raise the affirmative defense of the statute of frauds. It is the defendants' position that there was no obligation on the part of the defendants to raise the statute of frauds in that the plaintiff in his fourteen page complaint alleges the right to recover on the \$35,000.00 and \$45,000.00 promissory notes and specifically alleges in paragraph 18 of the Fifth Cause of Action that he has not been paid for his assets and stock but alleges nothing about the debts and obligations (R. 1-14). Plaintiff alleges injury and damage in the amount of \$200,000.00 which is not

specifically delineated. The plaintiff, under Rule 9(g) of the Utah Rules of Civil Procedure has an affirmative duty to specifically plead special damages. The Rule states:

when items of special damage are claimed,  
they shall be specifically stated.

There was no indication in the pleadings throughout the course of the trial that would inform and apprise the defendants of the special damages claimed by the plaintiff and accordingly, the plaintiff has waived, as a matter of law, his right to recover for the debts and obligations. See Cohn v. J.C. Penney Co. 537 P.2d 306 (Utah 1963).

It is respectfully submitted that the plaintiff has waived his right to claim the debts as damages or, in the alternative, any duty the defendants had to make an affirmative defense is obviated by the plaintiff's failure to specify the items of special damage which he contended he was entitled to recover.

#### POINT IV .

THERE IS INSUFFICIENT EVIDENCE IN THE  
RECORD TO SUSTAIN A JUDGMENT AGAINST  
ROBERT ANDERSON FOR BREACH OF DUTIES OWED  
TO THE PLAINTIFF.

In the case of Hutcheson v. Gleave, 632 P.2d 815 (Utah 1981), the Utah Supreme Court stated the rule to be followed in reviewing the findings and judgment of the trial court. The Court's statement in that regard is a quotation from the Utah case of Charleton v. Hackett, 11 Utah 2d 389, 360 P.2d 176 (1961), which quotation is as follows:

In considering the attack on the findings  
and judgment of trial court it is our  
duty to follow these cardinal rules of  
review: to indulge them a presumption

of validity and correctness; to require the appellant to sustain the burden of showing error; to review the record in the light most favorable to them; and not to disturb them if they find substantial support in the evidence.

Hutchison, supra, at 816, 817. See also, Hove v. McMaster, 621 P.2d 694 (Utah 1980); Hopkins v. Wardley Corp., 611 P.2d 1204 (Utah 1980).

As stated by the Utah Supreme Court in Ranch Homes, Inc. v. Greater Park City Corp., 592 P.2d 620, (1978), it is the prerogative of the trial court to determine the facts and the Supreme Court will generally affirm when its determination thereof is supported by substantial evidence. However, when the findings is so plainly unreasonable that no trier of fact could fairly make such finding, it cannot be said to be supported by substantial evidence and the finding will be rejected as a matter of law.

In this case, the defendant, United Farm Agency, has argued for reversal of the trial court's decision assuming that the court's findings as to the defendant, Anderson's conduct were warranted. It goes without saying that if Robert Anderson is not liable for breach of fiduciary duty, as found by the Court, there is no liability for Clan Stilson or United Farm Agency.

It is respectfully submitted that the evidence is insufficient to support a verdict against Robert Anderson as to a breach of fiduciary duty. The Court, in finding No. 25 of the Findings of Fact and Conclusions of Law (R. 236), stated that the defendant Anderson breached his fiduciary duty by unilaterally



determining not to represent the plaintiff and by not advising the plaintiff that he was not representing him in the sale of his business. It is respectfully submitted that there was insufficient evidence to justify such a finding. The defendant, Anderson, testified that he never explicitly advised the plaintiff that he was no longer representing the plaintiff but testified that he told the plaintiff, Mr. Phillips, that he would not negotiate and complete the sale using a simple stock transfer and a bill of sale (Tr. 52). As indicated in the statement of facts, under the listing agreement signed by Mr. Phillips, he retained the right to sell the property himself. Accordingly, it was not unusual or unexpected for Mr. Phillips to meet privately with Mr. Gleason and Mr. McGarry in a back office for an hour to negotiate the deal. At that point, the plaintiff had taken upon himself to negotiate the terms of the sale (Tr. 43).

It is respectfully submitted that even under the test as set out in Duggan v. Jones, 615 P.2d 1239 (Utah 1980), the real estate agent does not have a duty to force himself upon a client. After being advised that he was using an improper means to finance the transaction, he is certainly liable for all of the consequences of that decision.

In finding No. 26, the Court concluded that the defendant Anderson had breached his fiduciary duty in that he did not check into the solvency of JCM Development Company (R. 237, Finding No. 26). The defendant, Anderson testified that any amounts or figures relative to the worth of JCM Development Company or the individual defendants was simply a parading of the figures provided him by the defendant (Tr. 74, 88-89).

As indicated in the statement of facts, the defendant, Anderson, would not have dealt personally with JCM Development Company had he thought that the defendants were not solvent. It is respectfully submitted that there is no duty on the part of a real estate agent, to investigate the financial solvency of a person buying property. That is especially true in light of the fact that when the defendant was offered the \$35,000.00 promissory note on August 14, 1978, in lieu of the cash which he was expecting, he stated that fact alerted him to the problem (Tr. 283). As stated in counsel's question at trial, it would seem strange for a company which had substantial assets to have trouble coming up with \$40,000.00 for the down payment. In light of the fact that the plaintiff, Phillips, knew of those problems, he went ahead and signed the notes. The defendant respectfully urges that the plaintiff's conduct was unreasonable and that his concerted effort to sell the business because of his financial troubles warrants the imposition of liability on him.

The Court in finding no. 27 (R. 237), states that the defendant Anderson breached his fiduciary duty by failing to have an attorney conduct the plaintiff's closing. As testified to by the defendant Anderson, he simply typed information that was requested by the parties. The defendant, Mr. Anderson, testified that he did not see the earnest money until almost a month later and was not aware that the August 14, 1978 meeting was a closing. Further, since James Gleason on behalf of the realty company in Salt Lake City was the person who conducted

the closing, there is absolutely no authority to impose the burden upon the defendant Anderson to obtain an attorney.

It is respectfully submitted that the evidence is insufficient as a matter of law to impose liability upon Anderson and that the legal test used by the Court in defining the standard of care to be imposed upon the agent is improper.

#### CONCLUSION

The appellant is not responsible for the conduct of Robert Anderson because Robert Anderson was not acting on their behalf or in furtherance of their interest. Robert Anderson was, in fact, an independent contractor with whom the appellant had no employer-employee or master-servant relation with regard to the transactions in question. While it cannot be said that the plaintiff was unaware of Robert Anderson's nominal affiliation with appellant, it likewise cannot be said that the plaintiff had any dealings with anyone other than Robert Anderson nor can it be said that the broker or any other person in authority for appellant signed any of the required documentation pertaining to the transaction in question.

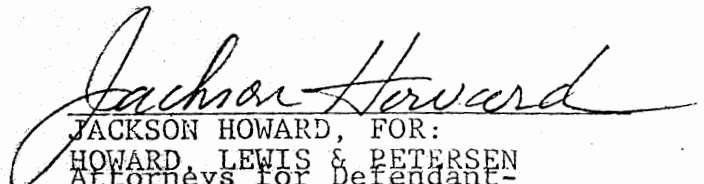
If the appellant is vicariously liable for any wrong done to the corporation, Phillips Construction Company, the corporation possess the exclusive rights to any causes of action arising therefrom. The only theory upon which the plaintiff can sue individually is that the corporation, or its alter ego, if any, failed to satisfy its own obligations, causing the plaintiff to be liable therefor. The plaintiff never introduced any evidence that the corporation was unable to satisfy


its obligation or that he had been pursued individually therefor. The plaintiff committed further procedural error as to the form of causes of action alleged by failing to comply with the requirements of the bankruptcy code.

The plaintiff failed to specifically plead its special damages against appellant. This failure was fatal to the plaintiff's ability to recover said damages and obviated any need for the appellant to state affirmative defenses against such special damages, which, in fact, are barred by the statute of frauds.

Finally, an examination of the record in this case shows that there is such a complete absence of evidence in support of the plaintiff's position that Robert Anderson violated any duty owed to plaintiff that as a matter of law the decision must be reversed.

DATED this 20th day of April, 1982.

  
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MAILED a copy of the foregoing BRIEF OF APPELLANT to Mr. Paul W. Mortensen, Attorney for Plaintiff-Respondent, P.O. Box 339, Moab, Utah 84532; dated this 20th day of April, 1982.

*Julie Heelis*  
SECRETARY