1984

William Dean Rogers And Patricia Lee Rogers v. M. 0. Bitner Co., a Utah Corporation, Blaine B. Bitner, Westcor, Inc., A Utah Corporation, Douglas Monson, Richard F. Johns, Iii, D. Murphy, F. Alonzo Badger, Utah Security Mortgage, Bonneville Thrift Company, Royal K. Hunt, John S. Davis, And Harold H. Bennett : Brief of Respondent Bennett

IN THE SUPREME COURT OF THE STATE OF UTAH

- -

WILLIAM DEAN ROGERS, and
PATRICIA LEE ROGERS, his wife,

Plaintiffs-Respondents,

vs.

M. O. BITNER CO.,

Defendant-Appellant,

WESTCOR, INC., DOUGLAS MONSON
and F. ALONZO BADGER,

Defendants, No. 19224

HAROLD H. BENNETT,

Defendant-Cross-Claimant-
Respondent,

and

BLAINE B. BITNER, et al.,

Defendants.

- -

BRIEF OF RESPONDENT BENNETT

- -

Appeal from the Judgment of the
Third Judicial District Court, Summit County
Honorable Homer F. Wilkinson

- -

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IN THE CUPREME COURT OF THE STATE OF UTAH

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WILLIAM DEAN ROGERS and
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Plaintiffs-Respondents,

vs.

M. O. BITNER CO., a Utah
corporation, BLAINE B. BITNER,
WESTCOR, INC., a Utah corporation,
DOUGLAS MONSON, RICHARD F. JOHNS,
III, D. MURPHY, F. ALONZO BADGER,
UTAH SECURITY MORTGAGE, BONNEVILLE
THRIFT COMPANY, ROYAL K. HUNT, JOHN
S. DAVIS, and HAROLD H. BENNETT,

Civil No. 19224

Defendants-Appellants,
Cross-Claimants-Respondents.

- -

BRIEF OF RESPONDENT BENNETT

- -

STATEMENT OF THE CASE

This lawsuit was initiated by the plaintiffs who sought damages from various defendants arising out of Plaintiffs' purchase of two lots in a Park City Subdivision. Respondent Harold H. Bennett was made a party to the original lawsuit because of Bennett's claim to a lot purchased by Plaintiffs. Bennett filed a crossclaim against other defendants alleging that he had been fraudulently induced to lend money for the benefit of the developers of the Park City subdivision and that such obligation was not paid.

Bitner Co. began the work necessary to prepare a subdivision plat and obtain official approval of that plat from Summit County. (Blaine Bitner, Tr. 126-127; Ex. 76-D). By early 19[illegible] all planning and engineering work necessary for preliminary approval of the project had been done and preliminary approval of the plat was granted by Summit County in about February, 1978, subject to the submission of a bond or escrow agreement to guarantee the financing necessary to construct the subdivision improvements. (Blaine Bitner, Tr. 128,483). Up to that point, all work had been undertaken by Bitner Co. as a sole venture. (Id., Tr. 484-487).

7. Before and after preliminary approval for the subdivision plat had been granted, Bitner Co. had discussions with various parties about the possibility of participating in the project. (Blaine Bitner, Tr. 486-487; Leland Bitner, Tr. 941). In about the spring of 1978, an agreement was almost reached with one party that was described as a "joint venture". It would have provided for a 60/40 split of the gross proceeds from lot sales. Bitner Co. would have contributed the land and the subdivision plat and the other party would have put up the cost to construct the subdivision improvements. (Blaine Bitner, Tr. 491-495). This offer was eventually rejected by the Bitner Co. because the other party required the title to the land to be put up as collateral for a loan to pay for the subdivision improvements. (Blaine Bitner, Tr. 129, 495; Leland Bitner, Tr. 1024).

8. On or about November 1, 1978, Bitner Co. signed an

agreement with Westcor concerning the subdivision development. (Ex. 23). That agreement consisted of a Uniform Real Estate Contract and several additional pages titled "Exhibits", plus another page titled "Supplemental Agreement" that apparently was added at some unknown later date. (Douglas Monson, Tr. 357-358). The essential features of this agreement were the following:

(a) The sale price stated for the land was based on an anticipated profit share from sale of lots in the completed subdivision development. (Blaine Bitner, Tr. 137-138, 232). According to Westcor, at least, that profit share was a 60/40 split of the anticipated gross sales. The price bore no relation to the value of the entire tract as undeveloped land. (Douglas Monson, Tr. 272; John Davis, Tr. 1112).

(b) The Uniform Real Estate Contract was used at the insistence of Bitner Co. on advice of its accountants principally so it could claim certain tax benefits incident to installment sales of land. (Blaine Bitner, Tr. 236-237).

(c) The term of sale concerning the land stated a principal amount only. No down payment was required and no interest was charged on the unpaid balance under the terms of the contract although an accountant for Westcor testified that interest was carried on Westcor's books. (Douglas Monson, Tr. 272, Ex. 23, p. 7). No minimum periodic payment was required either. Instead a maximum annual payment was specified that was a requirement for claiming the tax benefit mentioned above. (Ex. 23-P, p. 4). The agreement further provided that payment for the land was to be made either from a percentage of the funds received from individual lot sales or by assignment of executed lot sale contracts. (Douglas Monson, Tr. 270-272; Ex. 23, p. 4).

(d) Principals of the Bitner Co. and Westcor were expressly allowed to sell lots and were entitled to a commission for any sold. (Ex. 23-P, p. 7). Pursuant to that provision, Bitner Co. put a billboard on the property facing the adjacent I-15 freeway advertising lots for sale and listing the phone number of three principals of Bitner Co. (Blaine Bitner, Tr. 144; Dean Rogers, Tr. 69-70; Ex. 19. Those principals of the Bitner Co. eventually sold nearly one-third of all the lots in the

subdivision, for which they were paid sales commission of more than $12,000 during the period of December, 197[illegible] to February, 1979. (Blaine Bitner, Tr. 143, 217; Stanl[illegible] Kilbourne, Tr. 171).

(e) Westcor was to be responsible for arranging the financing for construction of the subdivision improvements and for installing the same. If it was able to do that for less than the $284,000 estimated by Summit County, then Bitner Co. was entitled to receive one-half of those savings, plus one-half of any connection or similar fees that might be collected from the lot purchasers at a later time. (Blaine Bitner, Tr. 139-140, 234-235; Douglas Monson, Tr. 273; Ex. 29, p. 7).

(f) Westcor was required to complete construction of the subdivision improvements within one year following execution of the agreement. (Blaine Bitner, Tr. 199-200; Douglas Monson, Tr. 265; Ex. 23-P, p. 7).

9. The entire project was completed and sold in accordance with the plans and specifications prepared by Bitner Co. previously. (Blaine Bitner, Tr. 231).

10. After Bitner Co. and Westcor signed their agreement on November 1, Bitner Co. executed an Escrow Fund Agreement (Ex. 24-P) that was delivered to Summit County for the purpose of obtaning final approval of the subdivision plat. (Blaine Bitner, Tr. 220). Although Westcor was supposed to make all financial arrangements incident to that document, Bitner Co. alone signed as the entity responsible for the development. (Blaine Bitner, Tr. 139). Said agreement also contained representations that Bitner Co. guaranteed completion of the subdivision improvements within 24 months and that the sum of $284,000 was on deposit with defendant Utah Security Mortgage to guarantee the timely completion of those improvements. (Blaine Bitner, Tr. 201-202).

11. In January, 1979, more than two months after the Bitner Co. and Westcor agreement was signed, Bitner Co. executed the Protective Covenants of Park Ridge Estates that were recorded with Summit County (Ex. 27-P). (Blaine Bitner, Tr. 220).

12. Except for some materials that were paid for by Westcor, all construction of the subdivision improvements in Park Ridge Estates was performed by a company owned and operated by Blaine B. Bitner, the president of Bitner Co. or by others under contract with Bitner Co. (Dean Rogers, Tr. 34; Blaine Bitner, Tr. 140-141).

13. No funds had been or were later deposited to the escrow account at Utah Security Mortgage described in the aforementioned Escrow Fund Agreement (Ex. 24-P). (Douglas Monson, Tr. 395-396).

14. Defendants Blaine Bitner, Douglas Monson, and John Davis testified that in February, 1980, certain lot owners initiated a lawsuit in the Summit County Court (Jim Lynn, et ux. v. Westcor, et al., Case No. 5985) that alleged among other things, fraud and misrepresentation in connection with the aforementioned Escrow Fund Agreement. Bitner Co., Blaine B. Bitner, Westcor and Douglas Monson (an officer of Westcor) were named defendants in that action and all were there represented by John Davis, just as in the instant case. (Blaine Bitner, Tr. 253; Douglas Monson, Tr. 348, 386). Those witnesses acknowledged that they took the position in the Lynn case that their respective positions in connection with the Park Ridge project are identical, and that they consented to the entry of certain

orders in the Lynn case that imposed joint and several liability on Westcor and Bitner Co. for the filing of bonds and installation of the improvements in Park Ridge Estates. (Douglas Monson, Tr. 419-20; John Davis, Tr. 1104). Those witnesses further acknowledged that in neither the Lynn action nor the instant case have said defendants filed any crossclaims against each other despite Bitner Co.'s denial in this action that it was a joint venturer with Westcor or otherwise responsible for the Park Ridge project after November 1, 1978. (Blaine Bitner, Tr. 225-227; Douglas Monson, Tr. 384-385; John Davis, Tr. 1104).

15. On or about June 30, 1980, Bitner Co. and Westcor executed a new agreement entitled "Trust Agreement" (Ex. 28-P) that formalized negotiations conducted by the parties over the past several months. (Blaine Bitner, Tr. 208-209, 230). One provision of that agreement was that Bitner Co. would assume full, complete and sole responsibility for the Park Ridge development and completion of the subdivision improvements therein, and hold Westcor and Douglas Monson harmless from any liability arising out of the Park Ridge project. (Blaine Bitner, Tr. 210-211, 537; Douglas Monson, Tr. 351).

16. Construction of some of the subdivision improvements in Park Ridge was begun in the summer of 1979, but only a rough cut of the road and a portion of the excavation and laying of sewer and water pipes was completed before the end of that year. (Blaine Bitner, Tr. 207). In the following year, 1980, the excavation and installation of the sewer and water pipes was completed. (Dean Rogers, Tr. 44). Construction of the water reservoir

the remainder of the water system, and the laying of road bed and paving of the roads were not completed until the spring and summer of 1981, respectively. (Dean Rogers, Tr. 86, 94).

17. Neither Bitner Co. nor anyone associated with it had any prior dealings or acquaintance with Westcor or any of its principals. (Blaine Bitner, Tr. 130). Prior to signing the November 1, 1978 agreement with Westcor, Bitner Co. did not request or pursue any investigation of Westcor or its principals or the assets it would contribute to the Park Ridge development. (Blaine Bitner, Tr. 132-136).

18. Westcor was not incorporated until January, 1979, more than two months after Douglas Monson signed the agreement with Bitner Co. as Westcor's vice president. (Douglas Monson, Tr. 1049-1050; Ex. 106). Mr. Monson testified that Westcor had only the statutory minimum of assets or capital when formed. (Douglas Monson, Tr. 266). No documents or records were produced to substantiate that there was ever a meeting of stockholders or directors, or that any resolution was ever adopted by the Board of Directors, or that any action was taken to form and maintain the corporation itself beyond filing the original Articles of Incorporation with the Lieutenant Governor's Office in January, 1979. (Douglas Monson, Tr. 415-416).

19. The payments received by Westcor from lot purchasers as monthly payments on lot purchase contracts, and from the assignment of such contracts to other parties, were used by Douglas Monson and Westcor in other business ventures or for other purposes having nothing to do with Park Ridge Estates,

when obligations on Park Ridge Estates were unpaid or otherwise unsatisfied. (Douglas Monson, Tr. 277; Blaine Bitner, Tr. 538; John Davis, Tr. 805).

* * *

25. During the summer of 1979, Blaine Bitner, the president of Bitner Co. was fully aware that plaintiffs were constructing the two houses. (Blaine Bitner, Tr. 143). Bitner's excavating company was at that time digging the trench for the sewer and water pipes and laying the same next to the plaintiffs' lots. (Blaine Bitner, Tr. 140-142). On at least one occasion during that summer, Blaine Bitner and plaintiff William Dean Rogers had a conversation at the construction site and Mr. Rogers' testimony was that Blaine Bitner stated that improvements would be complated before winter set in. (Dean Rogers, Tr. 54-56). Later in 1979, and on a large number of occasions prior to November 1980, plaintiffs contacted Blaine Bitner, other representatives of Bitner Co., and representatives of Westcor, to notify them that the plaintiffs' loan were not due, or were past due, and could only be paid by sale of the house, which could not be sold until the subdivision improvements were completed. Plaintiffs were repeatedly told by these men that the improvements would be completed first within 1979, then before the deadline stated in the Escrow Fund Agreement with Summit County, November 1, 1980. (Dean Rogers, Tr. 54-55; Patricia Rogers, Tr. 568-570).

* * *

35. Prior to August 2, 1979, the defendant Alonzo Bair

(hereinafter "Badger") owed the defendant Harold H. Bennett (hereinafter "Bennett") the sum of $81,078 plus interest. (Alonzo Badger, Tr. 659-660; Harold Bennett, Tr. 841).

36. Just prior to August 2, 1979 Badger contacted Bennett and represented that if Bennett would make a loan to Westcor, that he would receive an assignment of contract receivables from the Park Ridge Estates Subdivision which would be sold to a third party financial institution to fund payment of the $81,078 plus interest, together with the loan to be made to Westcor. (Alonzo Badger, Tr. 661-662; Harold Bennett, Tr. 845-846).

37. On August 2, 1979 Bennett made a loan of $50,000 to Westcor by promissory note signed by Badger personally, and by Douglas Monson (hereinafter "Monson") as president of Westcor. (Ex. 72-D). The loan was made on the representation of both Badger and Monson acting for Westcor, that the entire obligation of $131,078, being the existing Badger obligation, and the $50,000 referred to on the promissory note, would be paid in full, on or before Novmeber 30, 1979. (Douglas Monson, Tr. 297, 1059; Alonzo Badger, Tr. 665; Harold Bennett, Tr. 852-853).

38. The aforementioned agreement was supported by consideration since Bennett would not have made the additional loan of $50,000 but for the agreement of both Badger and Monson (acting on behalf of Westcor) that by making the loan, the entire obligation of $131,078 plus interest would be paid in full. (Alonzo Badger, Tr. 667; Harold Bennett, Tr. 844, 854, 859).

39. In order to provide funds to pay the obligation, Badger and Monson provided assignments of contract and/or note

receivables on lots in the Park Ridge Estates subdivision covering Lots 12, 13, 16, 17, 28, 29, 32, 36, 39, 40, 41, 4[illegible], 51, 53, 61, and 62, representing that the same had a total [illegible] value, then due and owing of $208,348.48, sufficient to pay the $131,078 obligation, together with interests. (Douglas Monson, Tr. 305; Alonzo Badger, Tr. 668; Exs. 40, 42, 44, 46, 48, [illegible], 51, 53, 55, 57, 58, 60, 62, 64, 67 and 69).

40. Badger and Monson (acting on behalf of Westcor) represented that the contract receivables would be sold to a third party financial institution by them, on Bennett's account and the entire obligation would be paid from the sale of the same, or in the alternative, that Bonneville Thrift Company would purchase the contracts. (Douglas Monson, Tr. 303, 371; Alonzo Badger, Tr. 673-674; Harold Bennett, Tr. 845, 850; Ex. [illegible]

41. At the time of the agreement between Bennett, Badger and Westcor, Badger and Monson were partners and had agreed to provide assistance to each other in the funding of Westcor. (Douglas Monson, Tr. 294, 395, 399; Alonzo Badger, Tr. 671, [illegible] 718).

42. The $50,000 received by Westcor on August 2, 197[illegible], was used by Monson in Westcor and in development of the Park Ridge Estates subdivision. (Douglas Monson, Tr. 301, 372-[illegible] 407; Alonzo Badger, 661; Ex. 68).

43. On behalf of Westcor, Monson executed the assignment on all of the aforementioned contracts and/or note receivable to Bennett, and maintained a list of the assignments within records of Westcor. (Douglas Monson, Tr. 317, 350; Alonzo Badger, Tr. 677).

44. In relation to the aforementioned lot numbers assigned to Bennett, Monson (acting on behalf of Westcor) and Badger represented that each contract receivable was valid, current in payments, and was available for assignment. (Harold Bennett, Tr. 850). As to the following lots, the representations made were false from the inception:

1. Lot 29. Lot 29 was a contract receivable represented to be due and owing from William Dean Rogers. Bennett received an assignment of real estate contracts receivable represented to be owing from Mr. Rogers on Lot 29. (Douglas Monson, Tr. 306). However, Lot 29 was not sold to William Dean Rogers but was in fact sold to a Ronald Jacobsen. In addition, the balance represented to be owing on said contract was not as represented. (Douglas Monson, Tr. 333-335; Ex. 70, Ex. 71).

2. Lots 53, 61, and 62. As to Lots 53, 61, and 62, each of the contract receivables on said lots had been assigned to Utah Security Mortgage, Inc. on March 26, 1979, several months prior to the August 2, 1979 agreement between Bennett, Monson (on behalf of Westcor) and Badger. (Douglas Monson, Tr. 325, 332-333; Ex. 66, 71).

45. The court finds that Bennett was frauduently induced to enter into the August 2, 1979 agreement with Monson (on behalf of Westcor) and Badger, referred to in these Findings. This finding of fraud is based upon the following facts found by clear and convincing evidence:

A. Badger and Monson/Westcor made representations to Bennett that if he would advance an additional $50,000 that the entire amount of $131,078 plus interest would be paid from the proceeds of sales of contract receivables assigned to him. (Harold Bennett, Tr. 850).

B. Badger and Monson/Westcor represented to Bennett that he should not record his assignments since the same would be immediately marketed and sold. (Douglas Monson, Tr. 319, 332; Alonzo Badger, Tr. 673).

C. The assignments were in fact given to Bennett. He did not record the same based upon the representations of Badger and Monson/Westcor, and Bennett did advance the additional $50,000 which he borrwed from his own bank,

all in reliance on the representations of Monson/Westcor and Badger. (Harold Bennett, Tr. 855, 858).

D. As evidence of the fraudulent intent of Monson (on behalf of Westcor) and Badger, the following assignments of the same contract receivables given to Bennett were made to other individuals and entities as follows:

(1) Twenty-nine days after entering into the agreement with Bennett as described above, and knowing that Bennett had not recorded his assignments, Monson assigned Lot Nos. 12, 13, 16, and 17 to Citizens Bank knowing that these had already been assigned to Bennett. (Douglas Monson, Tr. 316-318, 376; Exs. 41, 43). Further, Monson gave no notice or warning of the further assignment of the contract receivables prior to doing so. (Douglas Monson, Tr. 318-319; Alonzo Badger, Tr. 675).

(2) On February 13, 1980, Lot Nos. 29 and 51 were assigned to Bonneville Thrift Co. by a document containing the signature of Monson. (Ex. 49-D).

(3) On November 28, 1979, at the request of Monson, Lots 39, 53, 61 and 62 were released to John S. Davis and were assigned to M. O. Bitner Co., who in turn assigned them to other individuals not a party to the above action. (Blaine Bitner, Tr. 245-246; Douglas Monson, Tr. 330; Exs. 29, 30, 31, 32, 33, 34, 35, and 36).

(4) On June 30, 1979 (sic) as president of Westcor, Monson assigned Lots 36, 40, 41, and 51 to John S. Davis, as Trustee. (Douglas Monson, Tr. 321-324).

E. Throughout the period that the defendants Badger and Monson were making assignments of the same contracts previously given to Bennett, Bennett was maintaining periodic contact with both Badger and Monson concerning the status of the payment of the agreed-upon obligation. During said contracts (sic) at no time did either Badger or Monson notify Bennett that assignments of his contract receivables had been made to other individuals. (Douglas Monson, Tr. 332; Alonzo Badger, Tr. 675; Harold Bennett, Tr. 857).

F. The representations of Badger and Monson/Westcor were false and known to be so as is clearly indicated by their actions in immediately assigning the contracts to other individuals and entities knowing that an assignment of the same had already been made to Bennett. Badger and Monson/Westcor knew that Bennett had not recorded his

assignments, and the represented receivable assigned to him would not be available to pay the obligation as promised. (Douglas Monson, Tr. 319; Alonzo Badger, Tr. 676-678).

G. The representations made by Badger and Monson/ Westcor were the only reason Bennett considered making the additional advance and did induce him to do so. (Harold Bennett, Tr. 854, 880-881).

H. Bennett made a reasonable inquiry and investigation into the receivables involved and based upon the representations that the contracts would be sold, that they were all current in payments, that he was dealing with the president of Westcor (the listed seller on the contract documents) Bennett acted reasonably and did not know the falsity of the representations when he relied upon the same. (Harold Bennett, Tr. 849-850, 855, 868).

I. By relying and being induced to act on the representations of Badger and Monson/Westcor, Bennett was damaged when the contract receivables were no longer available to be used by him or on his account to pay the aforementioned obligations. (Douglas Monson, Tr. 344; Harold Bennett, 855). (R. 766-772, 774, 778-783).

In reliance upon these Findings of Fact the court made its Conclusions of Law (R. 785-790) and subsequently entered a Judgment and Decree of Quiet Title. (R. 792-797). It is from this Judgment that the present appeal is taken by appellant M. O. Bitner Co. (R. 811).

ARGUMENT

POINT I

THE TRIAL COURT WAS CORRECT IN HOLDING BITNER CO. JOINTLY AND SEVERALLY LIABLE WITH DEFENDANTS WESTCOR, MONSON, AND BADGER AS TO THE CROSSCLAIM OF RESPONDENT BENNETT.

Appellant Bitner Co. attacks the Judgment entered in favor of respondent Bennett on seven separate grounds. While

respondent Bennett believes that some of the arguments advanced by Appellant overlap and are not properly separable, for the convenience of this Court, Respondent will address each of the arguments raised by Appellant in its brief. (Appellants' Brief, pp. 32-40). The question of the representation of Appellants' counsel will be discussed in a subsequent point in this Brief. (Appellants' Brief, pp. 40-44).

A. The Findings of the Lower Court as to a Joint Venture Between Bitner Co. and Westcor is Based Upon Substantial Evidence Which Must be Affirmed on Appeal.

Appellant argues that the lower court erred in concluding that a joint venture existed between Bitner Co. and Westcor. It reincorporates the arguments advanced against the plaintiffs that such joint venture did not exist. Appellant states, "These arguments are even stronger with regard to Bennett who never had any contact with Park Ridge, he merely loaned money to Westcor, Monson and Badger who purported to assign contracts to secure the loan." (Appellants' Brief, p. 32).

Respondent Bennett believes that the arguments advanced by Appellant as to its claim that no joint venture exists has been thoroughly treated in the Brief filed by respondents Rogers. (Brief of Plaintiffs, pp. 13-22). Respondent Bennett therefore, incorporates and adopts the reasoning advanced by them in their Brief.

Some additional comments, however, are appropriate. First it cannot be emphasized enough that the question as to whether a joint venture exists is one of fact. Strand v. Cranney,

607 P.2d 295 (Utah 1980). Stone v. First Wyoming Bank, 625 F.2d 332 (10th Cir. 1980); P & M Cattle Co. v. Holler, 559 P.2d 1019 (Wyo. 1976). Only in those cases where but one inference can be drawn by a reasonable man can the question be decided as a matter of law. Long v. State Industrial Accident Commission, 424 P.2d 236 (Ore. 1967).

Second, the "existence of the joint venture must depend upon the facts of each case and formality of agreement is less important than the acts and conduct of the parties, and the facts that exist in each particular case." Score v. Wilson, 611 P.2d 367, 369 (Utah 1980); Strand v. Cranney, 607 P.2d 295, 296 (Utah 1980).

Furthermore, the intent of the parties is controlling and is to be gleaned from the conduct, the surrounding circumstances, and the transactions between the parties. Stone v. First Wyoming Bank, 625 F.2d 332, 340 (10th Cir. 1980).

It is also a well-settled rule for the factfinder to discard terminology utilized by the parties themselves in characterizing their relationship and, for example, the inclusion of the term "joint venture" in an agreement does not necessarily make it one if the elements of a joint venture are missing. Betenson v. Call Auto and Equipment Sales, Inc., 645 P.2d 684 (Utah 1982). Conversely, the exclusion of that term or the characterization by the parties that a joint venture does not exist is also not controlling since it is facts not characterizations that determine the existence of a joint venture. Mercer v. Vinson, 336 P.2d 854 (Ariz. 1959).

Finally, this Court has applied the traditional standard of appellate review in cases involving a joint venture dispute and has held that where the trial court's findings and judgment are supported by substantial, credible evidence they are entitled to a presumption of correctness. Score v. Wilson, 611 P.2d 367 (Utah 1980); Lynch v. MacDonald, 367 P.2d 464 (Utah 1962). In such cases the findings and judgment cannot be disturbed on appeal.

Further, this Court has the duty to review evidence in the light most favorable to the trial court's findings and will not disturb the trial court's determination as trier of fact in weighing the credibility of the witnesses where reasonable men could differ as to the weight to be given to conflicting evidence. Koesling v. Basamakis, 539 P.2d 1043 (Utah 1975).

Applying the preceding principles to the facts and the findings in this case result in the inescapable conclusion that the lower court was justified in concluding that a joint venture existed between Bitner Co. and Westcor. The lower court in its Conclusions of Law summarized its basis for making this determination as follows:

> Taken together, the elements of the agreement between Bitner Co. and Westcor, and the actions of those parties, both jointly and severally and before and after entering into their agreement, constitute a joint venture partnership. Of particular significance to that determination are the de facto sharing of profits, the combining of assets (the land and development plan by Bitner Co. and the financing and construction of the subdivision improvements by Westcor), the mutual right to market lots in the project, the assumption of responsibility for the project by Bitner Co. as developer on several occasions after entering into the agreement with Westcor, the sharing of savings from

installing the subdivision improvements, and the other instances enumerated in Findings of Fact No. 6 through 15 (contained in this Brief, pp. 3-8, supra) where Bitner Co. retained substantial control and responsibility over the Park Ridge project at all times. These numerous considerations, and the degree of shared responsibility and control generally, are consistent with a joint venture partnership and inconsistent with the claim of Bitner Co. that it was merely a seller of the undeveloped land that retained nothing more than a selier's security interest in the land after entering into the agreement with Westcor. (R. 786-787).

It would serve no useful purpose to repeat the many factors which the lower court considered in determining that a joint venture existed. However, certain of the arguments now raised by Appellant in its brief must be briefly addressed. It should be observed that the appellant attempts to dissect the totality of circumstances which occurred during the entire transaction and focus upon specific clauses contained in the contracts or upon specific events. As noted earlier, however, it is the circumstances and facts viewed as a whole which determine a joint venture and not isolated instances pointed out by one or the other party. With this precept in mind, it remains to examine the specific arguments made by Appellant.

There Was an Element of Loss.

First, Appellant claims that there was no element of loss in the transaction and therefore no joint venture can be said to exist. (Appellants' Brief, pp. 12-13). The absence of "loss" language in the agreement is easily understood since neither party at the time the transaction was entered into thought they could sustain a loss. This belief, however, proved wrong as will be discussed.

As to Bitner Co. it refused to give up title to its proj as had been proposed by other developers who wanted to joint venture the project. (Tr. 492, 1023-1024). Bitner Co. was definitely against these proposals since it would lose the interest in the land and be subordinated to the efforts of the developers. The offer by Westcor, however, was different in that Bitner Co. retained title to the land and specifically under the contract was to receive a percentage of the proceeds of the sale of each lot as it occurred. (Ex. 23-P, p. 4). Only when Bitner Co. received its full share of the proceeds of the sale was it required to give up title to its land. Thus if Westcor was unable to sell the lots or did not fully develop the land as agreed, Bitner Co. lost nothing since it still retained the land and gained the benefit of any work and improvements actually made by Westcor. (Leland Bitner, Tr. 1025-1026).

Bitner Co. believed that Westcor was risking $284,400 which it had supposedly deposited with Utah Security Mortgage as an escrow as required by Summit County. Bitner Co. undoubtedly believed that this escrow would protect it against any losses incurred as a result of Westcor's improvement work. This is the only explanation as to why Bitner Co. was not even concerned with any of the financial history or assets of Westcor since the officers of the company obviously assumed that the escrow amount was a sufficient contribution into the joint venture protecting Bitner Co. from any loss.

Unbeknownst to Bitner Co., however, Westcor had different plans. Because of its arrangement with Utah Security Mortgage

owned by Alonzo Badger, a false certification of the escrow was made. Badger and Monson agreed that they would utilize the money obtained from the sales of the lots to cover the improvements and therefore no out-of-pocket money was required by either Badger or Monson once the false certificate of deposit had been made. (Tr. 702, 716). Under this arrangement Westcor had nothing to lose and everything to gain since it would provide the improvements only as the lots were sold.

Had Westcor properly utilized the money obtained from the sale of the lots then this scheme would have succeeded. By diverting a portion of the funds from the sales of the lots, however, funds were not available to make the improvements and the subsequent lawsuits and other events therefore occurred.

As Bitner Co. found out the old addage was true that "the best laid plans of mice and men oft go astray." Bitner Co. and its principals discovered subsequently that the lack of a real bond with Utah Mortgage Co. and the failure of Monson to do his agreed upon improvements created a true "loss" situation. Since it had signed the escrow agreement with Summit County and, even more importantly, was named as a defendant in a lawsuit by various property owners who were claiming damages for the loss of improvements being completed, it became necessary for the Bitner brothers to mortgage their various houses in order to come up with the court-ordered bond protecting the property owners. (Tr. 995-998).

Thus, while it appeared to both Westcor (under the guise of its fraud) and to Bitner Co. that no loss could be sustained

to either party, the realities of the situation resulted in Bitner Co. being liable for the misappropriation of funds by Westcor. These facts certainly give rise to the finding that a joint venture agreement existed in spite of Appellant's assertion that the written words of the contract did not mention the word "loss".

There Was Profit Sharing.

Appellant argues that "Westcor was obligated to pay Bitner Co. the total purchase price for the land no matter what the financial results of the development to Westcor would be." (Appellants' Brief, p. 13). Under this theory Bitner Co. simply sold a piece of real estate to Westcor and had no further concern as to what occurred to it. Thus, according to the theory, if Westcor defaulted Bitner Co. could sue Westcor for its damages.

This "theory" was argued to the court below which rejected it categorically. Such rejection was entirely proper. Had Bitner Co. been looking to Westcor as a buyer of undeveloped real estate it certainly would have investigated its financial status and been concerned as to whether it would have been able to develop the property and make the payments as the contract required. However, this was not the case. A review of the contract agreement shows that the $400,000 sales price was merely a guesstimate of the anticipated profits that the subdivision would bring in after it had been developed.

The contract contemplated that the money from the sale of each lot would be divided as it accrued. There was no minimum

payment required under the contract nor was any interest charged. This open-ended contract therefore permitted Bitner Co. to receive half of the proceeds of the sale of the lots as they were sold thereby automatically making a "profit" with each sale.

Since the lots were sold in accordance with the Bitner plans and specifications and the prices projected as to each lot, the $400,000 contract price included the built-in projected profits. The unusual nature of this contract arrangement clearly substantiated the lower court's finding that the contract price was really not material and that the arrangement was made in order to allow Bitner Co. the tax advantages of an installment contract sale (which is based not upon the stated contract sale price but upon the amount of each installment as it is received annually).

The statement by Blaine Bitner that he had agreed to split the profits with Westcor (Tr. 234) and the statement made by Mr. Davis (as attorney for both parties in the Lynn case) to the same effect (Tr. 1112) directly contradicts the position now argued by Appellant.

Finally, the fact that Bitner Co. and its partners were given financial rewards for selling lots and, in addition, were to be credited with any savings in the projected cost of development indicated that Bitner Co. was indeed a partner in the development of this property and not merely a vendor of raw land.

Bitner's Control Over the Development.

Appellant next argues that Bitner Co. was to have no control

[illegible] and the [illegible] determine a [illegible].

Bitner's Control [illegible]

It is equally immaterial who of Bitner Co. chose to control the finances for the development of Park Ridge. As between the two joint venturers any agreement, just as in a partnership, can be made and the fact that Westcor was delegated to control the finances is immaterial in determining a joint venture. 68 C.J.S. Partnerships, §89, p. 528-529.

The Relevant Documents Support the Lower Court's Conclusion.

A review of the pertinent documents in this case require a finding of joint venture rather than a finding against it. Exhibit 23-P is the Uniform Real Estate Contract which under any analysis is nothing more than an agreement to share the profits as they are made. Exhibit 24-P is an Escrow Fund Agreement whereby Bitner Co. agreed to complete all the improvements within the subdivision despite its claim that this obligation was solely up to Westcor.

Exhibit 27-P is the Protective Covenants for Park Ridge Estates which again was signed entirely to M. O. Bitner Co. even though it had allegedly sold the property to Westcor and was no longer the "owner" as was stated in the Covenant Agreement.

Finally, the Trust Agreement entered into between Westcor and M. O. Bitner Co. could be termed analogous to a buy-out agreement of a partnership rather than to a foreclosure of a sales agreement.

These documents together with the various court orders in the Lynn case requiring joint obligations by both Westcor and Bitner Co. clearly substantiate the lower court's conclusion that a joint venture existed and any claims to the contrary are simply without merit.

Finally, as to respondent Bennett, Appellant argues that "Bitner Co. incurred no risk of loss and no profits from dealing with Bennett and had no control of any sort over any loan from Bennett. Bennett's transactions meet none of the joint venture criteria recognized by this Court with regard to Bitner Co." (Appellants' Brief, pp. 32-33). This misstates the applicable law relating to joint ventures. Once a joint venture has been established between Westcor and Bitner Co. it is immaterial whether Bitner Co. was aware of the developer obligation incurred by Westcor to Bennett. Bitner's knowledge of the transaction has no bearing upon Bitner's liability. Stauffer v. Ti Hang Lung & Co., 84 P.2d 209 (Cal. App. 1938); M.J.B. Investments v. Coxwell, 611 P.2d 440 (Wyo. 1980).

For these reasons, therefore, a joint venture clearly existed between M. O. Bitner Co. and Westcor and Bitner Co. is now responsible to respondent Bennett for the debt incurred therein.

B. The Lower Court Correctly Found that Bitner Co. Was Liable for the Wrongful Acts Perpetrated by Westcor and Badger in Defrauding Bennett.

Appellant in its Brief states the following subheading: "There was no Joint Venture by Estoppel for a Third Party in

Regard to Bennett." (Appellants' Brief, p. 33). The argument advanced under this subpoint is to the effect that Bennett never has claimed or alleged that Bitner Co. was a member of the partnership between Westcor and Badger and therefore Bitner Co. cannot be liable for the actions of that partnership. (Id.)

It is impossible to respond directly to the argument raised by Appellant since it has formulated a concept which is both legally incorrect and which has never been raised by Bennett. Bennett has never made a claim that there is any liability on the part of M. O. Bitner Co. by way of estoppel. Partnership by estoppel is statutorily defined in §48-1-13, U.C.A and is modeled after the Uniform Partnership Act. In order to have a partnership by estoppel it is necessary that the person to whom the representation is made rely upon such representation and believe that person to be a partner. Bates v. Simpson, 239 P.2d 749 (Utah 1952).

In this case it is clear that respondent Bennett was never told by anyone that Bitner Co. was a partner of Monson, of Badger, or of Monson-Badger. Similarly, Bennett never relied upon the existence of M. O. Bitner Co. in lending the money as requested by Monson and Badger. Thus, none of the elements of estoppel have ever been claimed by Bennett and therefore the discussion by Appellant is irrelevant and meaningless.

On the other hand, Appellant seems to be stating that because Bennett was not aware of the existence of M. O. Bitner Co. that it necessarily follows therefore that M. O. Bitner Co. cannot be liable for the debts incurred by Westcor. If

this is the argument now being advanced by Appellant it is clearly incorrect.

It is elementary that joint venturers bear the same relation to each other as to partners in a partnership. Hammer v. Dyer & Reed Co., 510 P.2d 1104 (Utah 1973). This Court many years ago established that a joint venture is governed by the law of partnership insofar as the rights of the parties are concerned. Forbes v. Butler, 242 P. 950 (Utah 1925); Lane v. Peterson, 251 P. 374 (Utah 1926).

As noted before, the lower court was entirely correct in concluding that M. O. Bitner Co. and Westcor comprised a joint venture and therefore were essentially partners for purposes of legal analysis. The objective of the partnership in this case was the development of the Park Ridge Estates project. Such joint ventures or partnerships are not uncommon. As noted by the Oregon Supreme Court in a similar type of case:

> They were engaged in a business venture for the development of a subdivision. That business venture required construction of curb, grading of roads and installation of gas, electricity, sewer and water lines. The extensive development of property in such a manner, together with the intent to exert joint control and share the profits or losses, is sufficient to establish a partnership or joint venture. Stone-Fox, Inc. v. Vandehey Development Co., 626 P.2d 1365 (Ore. 1981).

The Westcor-M. O. Bitner Co. partnership is the only one which has been claimed by either plaintiffs or respondent Bennett. The relationship of Alonzo Badger to Monson was that of a sub-partnership. The concept of a sub-partnership is described as follows:

> A sub-partnership is a so-called partnership formed between a member of a partnership and a third person for a division of the profits coming to him from the partnership enterprise, by an agreement of such character as to disclose the essentials necessary to a partnership between the partner and the third person. How profits between the members of a sub-partnership are to be divided is immaterial, and the mere fact that the one who is not a partner of the original partnership is to receive the entire profits of the business will not prevent the formation of a sub-partnership. The sub-partners are partners inter se, but a sub-partner does not become a member of the partnership since there is no agreement between him and the other partners, even though the sub-partnership agreement is known to the other members of the firm. 59 Am. Jur.2d, Partnership, §16, p. 941.

The testimony of both Monson and Badger show unequivocably that their relationship was that of a sub-partnership. Alonzo Badger represented himself at trial and as such cross-examined Douglas Monson. The following dialogue occurred:

Q. (By Mr. Badger) Do you recall the discussion in trying to put this venture together where a proposal was made that we enter into a partnership and that I take a percentage of your share from the project?

A. Yes.

Q. Do you recall what that percentage was?

A. No, I don't.

Q. Was there ever any agreement signed or prepared?

A. No. You were always going to formalize something, but you never did.

Q. And did you ever make any attempt to formalize or

A. No.

Q. Sign any agreement. Do you think that could have been the reason that I entered into an agreement and pledged $284,000 in assets?

A. I'm sure it was.

Q. And that agreement was never executed, is that correct?

A. To my knowledge, No.

(Tr. 399-400).

Likewise, in a dialogue between Mr. Badger and Mr. Davis (attorney for both Westcor and M. O. Bitner Co.) the following statements were made:

Q. (By Mr. Davis) All right. Was it your understanding under the document (the Summit County Escrow Agreement) that you did tell Mr. Murphy to sign that you had an obligation of some sort relating to Park Ridge Estates?

A. Absolutely.

Q. In the amount of $284,000?

A. Absolutely. Absolutely.

Q. Was that obligation to in some way pay for the improvements that go into Park Ridge Estates?

A. No. It was to act as a guarantee that if the improvements weren't in that funds could be drawn against by the county to pay for the improvements.

Q. What was your reason for taking on that obligation?

A. Doug Monson and I had a partnership, verbal partnership agreement, that was never executed that I would participate in his share of the partnership proceeds . . . (Tr. 701-702).

* * *

Q. (By Mr. Davis) Now, when you entered into this partnership agreement with Mr. Davis, which resulted in you taking on an obligation of $284,000, what did you get in return?

A. I received probably $15,000 or $20,000 in the spring of 1980. . . .

* * *

Q. In the spring of when? 1980?

A. 1981. I think.

Q. What were you supposed to receive?

A. One-half of these proceeds, or share. One-half of the net.

Q. Was there any documentation which showed what that one-half might be?

A. No.

Q. Did you have some basis for delivering (sic) what the one-half might be?

A. Yes.

Q. What was that basis?

A. Just reviewing the subdivision and the potential sales and potential, the estimated development costs and the amount of the bond.

Q. Had you seen the document whereby Westcor purchased the land.

A. No.

Q. From M. O. Bitner Co.?

A. No, not at that--

Q. What did you estimate Westcor's interest to be before you were to get your 50%? What was the full amount that Westcor was to receive in your estimation?

A. I had in mind some half million dollars gross.

Q. And you were to get half of that?

A. No. Half of the net.

Q. Did you understand that Westcor had the obligation of putting in--

A. Yes.

Q. $284,000?

A. Yes.

Q. Westcor then was to receive a half million, and if they put in $284,400 then they were to have roughly $250,000?

A. That is approximately.

Q. Then you were to get half of that?

A. Yes. One half.

Q. Did you understand that you may have to put out the full $284,000?

A. Yes.

Q. Was that calculated in this?

A. That was in the gross.

Q. Did you figure then that you would pay this and then you would get half of this?

A. Yes, but I may have to pay the $284,000, yes.

Q. Okay. Did you receive any contracts to cover the $284,000?

A. Yes.

Q. And what was the total face value of those contracts?

* * *

A. Well, I think the records I put up yesterday was probably the best estimate. But in addition to that there was, there was a couple of other contracts It would have been about $250,000, I would recollect-- (Tr. 702, 711-713).

Thus, the testimony is clear that the partnership in this case was between Westcor and M. O. Bitner Co. with a side sub-partnership between Westcor and Badger. The liability of M. Bitner Co. is thus predicated on the actions of Monson and Westcor in incurring the debt for the benefit of the venture.

With this clarification of the relationship among Monson Westcor, M. O. Bitner Co. and Badger it remains to examine whether Bennett's lack of knowledge of the M. O. Bitner Co. relationship is fatal to a claim against this company. Appel alleges "Bennett neither saw nor could allege that he thought

there was privity or any relationship with or between Bitner Co. and his loan." (Appellants' Brief, p. 33). Again, this statement is not disputed by respondent Bennett since knowledge of Bennett as to Bitner Co.'s partnership is immaterial to Bitner's liability. 68 C.J.S. Partnership, §161(c), pp. 606-607.

In Gardenhire v. Ray, 23 N.E.2d 927 (Ill. 1939) the court held that where a partnership relation existed between a defendant and a co-defendant for the development of an oil well the defendant was liable on a contract executed by the co-defendant with plaintiff for drilling of the well whether or not the plaintiff knew of the defendant's connection with the well.

Likewise, in Raymond S. Roberts, Inc. v. White, 97 A.2d 245 (Vt. 1953) the Supreme Court of Vermont held that where one partner purchases property upon his individual credit for the partnership but the seller is not aware of the existence of the partnership the seller may, when he discovers it, have benefit of the partnership liability.

Finally, as noted in a leading treatise, the liability of an undisclosed joint venture is no different than that of an undisclosed partner.

> As in the case of partnerships, the undisclosed joint venturer is liable for acts performed by his associates providing they are acting within the scope of their authority. This is consistent with the general rules of agency. §186 of the Restatement of the Law of Agency provides:
>
> > An undisclosed principal is bound by contracts and conveyances made on his account by an agent acting within his authority . . . . It is elementary that the fact that a third person has theretofore

> dealt with the agent as principal does not affect the liability of the principal upon discovery. Even after discovery of the identity of the principal, the fact that such a third person looks only to the agent for payment or performance does not affect the principal's liability. C.C.H., Business Organizations, §41.10 [2, p. 1166-67].

As noted earlier, it is also immaterial whether or not Bitner Co. was aware that Monson had entered into a loan agreement with Bennett in order to obtain financing for the development. All partners are jointly and severally liable for the acts of a partner concerning partnership business. Stauffer v. Ti Hang Lung & Co., 84 P.2d 209 (Cal. App. 1938); see §48-1-6, U.C.A. (1). For these reasons, therefore, the arguments raised by Appellant in its "Estoppel" section are without merit and must be rejected.

C. The Debt Owing to Bennett Was For the Benefit of the Park Ridge Estates Development and Therefore M. O. Bitner Co. is Liable.

Next, Appellant argues that even if a joint venture existed between Bitner Co. and Westcor/Monson that the Bennett obligation was made solely to another partnership consisting of Westcor/Monson and Badger and therefore Bitner is not liable. (Appellant's Brief, pp. 34-35).

As discussed in the previous section, however, this characterization is incorrect. The evidence is undisputed that Badger and Monson only entered into an arrangement for the sole purpose of sharing the profits from the Park Ridge Estate venture. [illegible] unlike the examples cited in Appellants' Brief, this is not a

instance where a person is a member of two separate and distinct partnerships each having a separate and independent purpose.

Alonzo Badger testified that he had been informed by Monson that the subdivision investment was faltering because Monson was unable to meet the improvement obligations and had been served with notices of default by various persons. (Tr. 661). It was Badger's idea that the needed financing could be obtained from Bennett provided that real estate contracts could be given to Bennett so that he would feel secure in making any loans. Monson verified this testimony and again stated that the money was needed in order to pay bills on the Park Ridge project. (Tr. 370).

Monson/Westcor was obviously desperate for money in order to keep the venture alive. Monson was therefore willing to agree with Bennett that if Bennett would lend the necessary cash, Westcor would secure the debt obligation with over $200,000 of contract receivables, would pay Bennett the full amount borrowed plus a previous amount owed to Badger, and would pay the total obligation within three months after the loan had been made by Bennett.

Appellants' attempt to create two separate partnership entities is fruitless based upon the record. The lower court concluded correctly that money given to Monson/Westcor for the purpose of developmental expenses was for the benefit of the joint venture with Bitner Co. and therefore Bitner Co. was liable for this obligation. It is immaterial that the money advanced

by . . . . 's partnership . . . . w . . . . It is elementary . . . . third party . . . not affected by any agreement between partner . unless that third party is specifically aware of such agreement. M.J.B. Investments v. Foxwell, 611 P.. . 446 (Wyo. 1980).

Under the preceding principles, therefore, the debt . . . . incurred by . . . . Westcor is directly imputable to Bitner . . and a judgment against it is proper.

D. Any Claim of Illegality Under the Uniform Partnership Act Has Been Waived by Appellant and, Even if Such Waiver did not Occur, the Partnership Act was not Violated.

Appellant contends that if a joint venture between Bitner Co. and Westcor did in fact exist then the failure of Bitner . . . specifically authorize the assignment of the partner. . . . . Bennett voided any such transactions. Appellant . . . . . . §48-1-6(3)(a), U.C.A. which is a portion of the Uniform Partnership Act. (Appellants' Brief, pp. 35-36). . . . . . st of Appellant's argument is that the transaction among Westcor, Badger and Bennett was illegal since Bitner Co. . . authorize the assignment of the real estate contracts to . . as a creditor.

The argument . . . advanced by Appellant is improper in . . it was not raised in the lower court. Rule 8(c) of the . . Rules of Civil Procedure clearly require that the defense . illegality be set forth affirmatively. This Court has . . occasions stated that the failure to properly plead and . . .

affirmative defense constitutes waiver of that defense. Pratt v. Board of Education of Uintah County School District, 569 P.2d 294 (Utah 1977); Bezner v. Continental Dry Cleaners, Inc., 548 P.2d 898 (Utah 1973).

A review of the Answer filed by M. O. Bitner Co. to the Crossclaim of Harold Bennett shows that no such defense was ever raised. (R. 679-682). Other affirmative defenses such as waiver and contributory negligence were plead, however.

At no time in the trial did Bitner Co. claim that Monson had exceeded his partnerhsip authority by assigning the contracts to Bennett. In fact, quite to the contrary, Bitner Co. has argued throughout this litigation that it has never been a partner with Monson/Westcor and therefore is not liable for any acts of Monson.

The failure to raise this defense in the lower court precludes Bitner's attempt to now do so in this Court. It is fundamental that defenses and claims not raised by the parties in the trial court cannot be considered for the first time on appeal. Bangerter v. Poulton, 663 P.2d 100 (Utah 1983); Heath v. Mower, 597 P.2d 855 (Utah 1979).

Even assuming arguendo, however, that this defense has not been waived, there is sufficient evidence to conclude that the Uniform Partnership Act was followed. The California Supreme Court in one of the few cases dealing with that section of the Uniform Partnership Act codified as 48-1-6, U.C.A. held that there is no requirement that assent to assignment of partnership property for the benefit of a creditor be reduced

same period of time, while preparing the defenses in the Lynn lawsuit, Monson prepared a record of the assigned lots, including those assigned to Bennett and showed them to Davis. (Tr. 350, 423). Blaine Bitner stated that during this same period of time he began to suspect that something was seriously wrong when people started suing him. (Tr. 224). He further stated that he did not feel he could trust Monson by the time the agreement in June of 1980 was made. (Tr. 539).

In June of 1980 the "Trust Agreement" was executed by Westcor and Bitner acting through Douglas Monson and Blaine Bitner respectively. Shortly thereafter on July 22 at the Jim Lynn hearing, Mr. Davis, again representing M. O. Bitner Co., made a statement to the court that he foresaw a dissipation to those parties who had not yet recorded their contracts and that he felt it necessary to give some kind of recording on the public record to give notice in order to mitigate the damages and protect the assets. Davis testified that he was referring to the Trust Agreement when he made this statement. (Tr. 816-817).

Davis further admitted that on five different occasions during the Lynn proceedings he told the court of his concern at the time of entering into the Trust Agreement in that Badger or whomever held the contracts had assigned them to unknown people. (Tr. 828).

Whether the contracting party to an agreement intended to make a person or class of persons a beneficiary is a question of fact which must be decided by the trier of fact. Clark v.

American Standard, Inc., 583 P.2d 618 (Utah 1978). Based upon the evidence before the court there was every reason for the court to conclude that Bennett fell within the category of those persons the hold harmless agreement was designed to encompass. Obviously, Bitner Co. through its president or its attorney had sufficient knowledge that wrongdoing was prevalent as to the real estate contracts held by both Badger and Monson. It was reasonable for the court to conclude that Bennett, both as a contract holder and as a creditor of the subdivision improvements, could be asserting claims against Monson/Westcor in the future and that therefore Bitner Co. was assuming such obligations.

Since Bitner Co. negligently placed itself in the position of allowing Monson and Badger to cause the chaos and fraud which resulted in 1979 and 1980 it is only equitable that Bitner Co. be held to an agreement which it entered solely for the purpose of eliminating the Monson/Westcor liability and allowing it the opportunity to salvage the project and protect it interest. (Tr. 208).

F. The Lower Court Correctly Found Bitner Co. Jointly Liable for any Fraudulent Conduct Committed by Monson/Westcor.

Appellant contends that because the lower court found that Monson/Westcor and Badger had specifically committed fraud against Bennett whereas Bitner Co. neither participated in nor was aware of the fraud committed against Bennett, that it is therefore improper to assess joint liability against Bitner Co.

for the fraud of others. (Appellants' Brief, pp. 38-39). The argument further continues that this joint liability was necessarily based upon the hold harmless clause of the Trust Agreement and such clause is therefore invalid as a matter of public policy. (Id.)

There are two reasons why this argument is invalid. First, the question as to the validity of the hold harmless agreement in a fraudulent context is academic since under the laws of partnership Bitner Co. is liable for Westcor's fraud regardless of any contractual agreement between the partners. Second, the authority relied upon by Appellant is distinguishable and does not apply to this situation.

The Findings of Fact and Conclusions of Law entered by the lower court recognize that a debt on behalf of the partnership was incurred to Bennett. The fraud of Monson and Badger, as noted by Appellant himself (Appellants' Brief, p. 38) in no way affects the debt but only the security which was given for the debt. In other words, the contracts which were assigned to Bennett were dissipated by the fraudulent actions of Monson and Badger. The elimination of the security, however, does not eliminate the underlying debt which still exists to the partnership.

It is fundamental partnership law that a partnership is bound by a partner's wrongful acts. Section 48-1-10, U.C.A. states the following:

> Where by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his co-partners loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is

liable therefor to the same extent as the partner so acting or omitting to act.

In addition, Section 48-1-11 provides:

> The partnership is bound to make good the loss: (1) where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and, (2) where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.

Finally, Section 48-1-12 provides:

> All partners are liable: (1) jointly and severally for everything chargeable to the partnership under Sections 48-1-10 and 48-1-11; (2) jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.

This statutory concept emanates from the Uniform Partnership Act. Courts applying this same act have stated the following:

> There is no merit in the contentions that fraudulent concealment by one partner may not be imputed to another partner. "The individual partners . . . are liable in a civil action for the fraudulent misconduct of a partner within the course or scope of the transactions and business of the partnership, whether such misconduct be by fraudulent representations or otherwise, even though the co-partners had no knowledge of the fraud and did not participate therein. . ." 68 C.J.S. Partnership §170, p. 620; Kearns v. Sparks, 260 S.W2d 353, 360 (Mo. App. 1953). Martin v. Barbour, 558 S.W.2d 200, 209 (Mo. App. 1977).

See also, A. Sam & Sons Produce Co. v. Campese, 217 N.Y.S.2d 275 (N.Y. App. 1961).

Thus, under Utah law and general partnership law concepts Bitner Co. is jointly liable for any fraud committed by Monson/Westcor independent of the Trust Agreement which was entered into in June of 1980. Appellant's trial counsel acknowledged to the lower court that a finding of fraud as to Westcor would be

imputed to Bitner Co. (Tr. 976). It is therefore unnecessary to utilize the Trust Agreement in order to sustain the lower court's finding of joint liability for the Bennett obligation.

Even so, the June 1980 Trust Agreement would still form a basis for Bennett's enforcement of any obligation based upon fraud. The Trust Agreement provided that Bitner Co. agrees to hold Westcor and Monson harmless of any liability arising out of the development of the Park Ridge Estates subdivision. Since the evidence showed that Bitner did not trust Monson at the time the agreement was made (Tr. 539) and in fact believed that Westcor had cheated Bitner Co. as to the original November 1978 agreement (Tr. 225) it is not reasonable to assume that Bitner Co. was aware that fraud could have been committed by W[illegible] but nevertheless agreed to make good on such fraud even though it was already obligated to do so under the partnership act.

On the other hand, as between Monson/Westcor and Bitner Co. the argument now raised by Appellant could certainly be made that any agreement by Bitner Co. to assume the full responsibility for the partnership debts is invalid since some of these debts were fraudulently induced. The Lamb case cited by Appellant would then be applicable because to allow the enforcement of the debt as between Westcor and Bitner Co. would immunize Westcor from its own fraud. Since this question, however, does not concern Bennett and since no crossclaim has ever been filed by either Westcor or Bitner Co. against each other the answer to these questions is irrelevant to this appeal.

The lower court correctly found that Bitner Co. was joint-

liable upon the debt to Bennett under traditional partnership law regardless of whether the debt was induced by fraudulent means and whether the security for such debt had been fraudulently misued by Monson. The obligation on the debt must still be paid by Westcor's partner Bitner Co.

G. The Lower Court was Correct in Declaring Bitner Co. Severally Liable for Punitive Damages and Attorneys' Fees.

Finally, Appellant argues that it is improper for Bitner Co. to be held liable for punitive damages and for attorneys' fees when it did no wrong itself and is in effect punishing an innocent party. Likewise, Bitner Co., according to Appellant, should not be assessed attorneys' fees since it was not involved in the fraud committed by Monson and Badger. (Appellants' Brief, pp. 39-40).

For the same reasons stated in the previous section this argument is without merit. A partnership under §48-1-10, U.C.A. is liable for any penalties assessed against a partner "to the same extent as the partner so committing or omitting to act." Section 48-1-12 provides that all partners are jointly and severally liable for everything chargeable to the partnership under §48-1-10 and 48-1-11.

Bitner Co. has misstated the concept of partnership. Essentially the law views Bitner Co. and Westcor as one individual and it is immaterial whether Bitner Co. was innocent of any wrongdoing if it was a partner of Westcor and if Westcor itself committed a wrongful act. Partnerships have been held liable for assaults by partners (30 A.L.R.2d 859) and for the embezzle-

[illegible]

[illegible] Mr. Davis [illegible]

[illegible] in lieu of a [illegible] examination of himself. The following [illegible]:

> But I have also made it clear to the Court that I did not necessarily believe that either's position and Wescor's position were identical in all respects. But as related to particular issues they were the same as regards, you know, between particular parties on particular issues, and therefore I represented both parties because there was no conflict of interest in that regard. And I believe that my position has been consistent. Even at the beginning of this trial, I felt that the issues at hand here were not such that would create a conflict so I think that when you consider that, you need to take this as to file into consideration. (Tr. 11-4 .

It is obvious from this statement that even to the end of the trial Davis did not recognize any conflict of interest existed between the two clients and, as noted by the plaintiffs, flatly denied that any conflict was present and only took exception to the innuendos that such conflict may exist.

There was clearly nothing earth shattering which occurred during the trial which would give rise to any claim of surprise on the part of any of the parties of Mr. Davis. All of the issues were well framed prior to trial and it was apparent from even a cursory reading of the pleadings and the questions asked during the depositions that the plaintiffs and Bennett would be claiming a joint tort and interest between Wescor and [illegible]. Likewise, it was apparent that they were both going

to rely upon the TRust Agreement as one means of obtaining liability against both entities.

The Canons of Ethics as quoted by Appellant are simply that. They are a guideline to attorneys as to what conduct they may and may not ethically perform. It was Davis' obligation many years prior to the actual trial of this case to disassociate himself with one or the other client if he believed a conflict even possibly could have existed. He did not do so, nor did any of the respective clients request him to do so.

It is extremely unlikely that had Bitner Co. prevailed in this trial and had an appeal been prosecuted by these respondents that any claim would then be made that a new trial was required because of a conflict of interest by Bitner's attorney. It was Bitner Co.'s decision to retain Davis throughout this litigation and it is therefore Bitner Co.'s problem or Davis' problem but certainly is not the problem of either Plaintiffs or respondent Bennett. Since, as noted by the plaintiffs, the lower court was never asked to declare a mistrial because of this conflict, it would be a misstatement to say that the lower court correctly denied such mistrial. Perhaps more correctly it could be stated that had Appellants properly raised the issue during trial then the lower court should certainly have denied it and any issue on appeal should be resolved in favor of these respondents.

CONCLUSION

Entering into a joint venture or a partnership is a serious decision. While there are unquestionably numerous

advantages that can be derived from such a relationship there are also liabilities and disadvantages. In this case Bitner Co. failed to exercise reasonable care in selecting a company to co-develop the Park City subdivision. Bitner Co. failed to check on the background, the assets, or the reliability of Westcor or Douglas Monson. Bitner Co. assumed that since it still retained title to the land that it had little to lose by joining with an unknown entity. This assumption was obviously incorrect.

Because of Bitner Co.'s carelessness in placing Monson and Westcor in a position to deal with third parties, Bitner Co. is jointly and severally liable for the acts and omissions of its joint venturer. This liability arises not only from traditional laws of partnership but also from Bitner Co.'s decision to hold Westcor harmless for any acts concerning its involvement with the subdivision.

After Bitner Co. took over the sole control of the development a successful subdivision was completed. Bitner Co., according to the testimony of its president, is now financially successful in the venture and is receiving income from the numerous lots which were sold. (Tr. 540-542). Thus, aside from any legal theories or requirements it is only right that Bitner Co. compensate both the plaintiffs and respondent Bennett for their losses incurred as a result of their involvement with the subdivision.

In summary, the lower court carefully weighed the evidence which was introduced by the parties during a five-day trial.

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MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing Brief of Respondent Bennett were mailed to the following this 13th day of June, 1984:

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