

1984

William Dean Rogers And Patricia Lee Rogers v. 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 : Brief of Respondents William Dean Rogers And Patricia Lee Rogers

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM DEAN ROGERS and
PATRICIA LEE ROGERS,

Plaintiffs-Respondents,

-v-

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 THEFT COMPANY, ROYAL
K. HUNT, JOHN S. DAVIS, HAROLD
H. BENNETT,

Defendants-Appellants,
Cross-Claimants-Respondents.

Civil No. 19224

BRIEF OF RESPONDENTS WILLIAM DEAN ROGERS
AND PATRICIA LEE ROGERS

Appeal from the Third Judicial District Court in and for Summit County, State of Utah, the Honorable Homer F. Wilkinson, presiding

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(Continued on Inside Cover)

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JOHNS, III, D. MURPHY, F. ALONZO :
BADGER, UTAH SECURITY MORTGAGE, :
BONNEVILLE THRIET COMPANY, ROYAL :
K. HUNT, JOHN S. DAVIS, HAROLD :
R. BENNETT, :

Defendants-Appellants, :
Cross-Claimants-Respondents. :

Civil No. 19224

STATEMENT OF THE NATURE OF THE CASE

Respondents, William Dean Rogers and Patricia Lee Rogers, filed this action to quiet their title to two building lots which they purchased from certain of the defendants and for damages resulting from delays in constructing the subdivision roads, water system and other improvements.

DISPOSITION IN THE LOWER COURT

The case was tried before the Honorable Homer F. Wilkinson sitting without a jury, on respondents' claims against appellant, M. O. Bitner Co., and defendants, Blaine B. Bitner, Westcor, Inc., Douglas Monson and John S. Davis. Respondents were unable to locate defendant Richard Johns so he was not served or made a party to the action. Prior to trial, the Court entered default judgment in favor of the respondents against defendants F. Alonzo Badger and Utah Security

Mortgage, and settlement was reached with defendants Dee Murphy, Harold H. Bennett and Royal K. Hunt. (Findings of Fact, Nos. 1 through 4, pp. 764-766).

Respondents' claim against defendant John S. Davis was limited to a recorded Assignment of Contract on each of the lots in which Mr. Davis was the named assignee. (Exh. 12P and 13P) The Court quieted respondents' title as to those encumbrances. (Judgment, paragraphs 2d and 2e, R. 794).

Following trial and two additional hearings concerning appellant's objections to proposed Findings of Fact and Conclusions of Law, the Court entered Judgment in favor of the respondents against the appellant and defendants Westcor, Inc., Douglas Monson, F. Alonzo Badger and Utah Security Mortgage, jointly and severally, in the total sum of \$56,422.57, and quieted respondents' title to their two lots of several recorded claims and encumbrances. No defendant but M. O. Bitner Co. has appealed this judgment, and its appeal is limited to the award of money damages.

Separate claims asserted by defendant Harold H. Bennett against the appellant and other defendants were litigated at the same time. Those claims were different from those of respondents William and Patricia Rogers and resulted in a separate judgment. (No issue relating to that judgment will be discussed in this brief since respondent Bennett will be filing his own brief.)

RELIEF SOUGHT ON APPEAL

Respondents request that this Court affirm the Judgment of the trial court in all particulars and award respondents their costs and

attorney's fees on appeal.

STATEMENT OF THE FACTS

Respondents dispute the appellant's statement of facts as not being either accurate or complete, and accordingly, appellants offer their own statement of facts as follows:

In 1978 the appellant was the sole title owner of certain real property located in Summit County, Utah, which it decided to develop into a residential subdivision containing 65 lots. (T. 127) Preliminary approval of the subdivision plat was granted by Summit County in about February, 1978. (T. 127) All that remained for final approval--which was required before any lots could be offered for sale--was proof of financing to construct the subdivision improvements such as the roads, water system, and the like. To that point in time, all work had been undertaken by the appellant alone. (T. 126-128; R. 766-767)

Before and after preliminary approval for the subdivision plat was granted, the appellant had discussions with various parties about the possibility of participating in the development. (T. 128) These negotiations were prompted at least in part by difficulties the appellant had encountered in raising funds to construct the subdivision improvements on its own. (T. 236, R.767)

On or about November 1, 1978, appellant signed an agreement with defendant Westcor concerning the subdivision development. (T. 129, 262-263) The agreement was written up as a "Uniform Real Estate Contract with several additional pages titled "Exhibits" plus another page entitled "Supplemental Agreement" which was apparently added at some unknown later date. (Exh. 23P) The parts of this agreement which

the trial court found pertinent to its decision include the following:

The Uniform Real Estate Contract was used at the insistence of the appellants so that its income from lot sales could be reported as long term capital gains instead of ordinary income. (M. 122, 123, 263-237; P. 767-768)

The purchase price for the land was based on an anticipated share of the proceeds from sale of the improved lots. (M. 137) All parties acknowledge that the \$400,000 stated in the contract was substantially higher than the market value of the undeveloped land. (M. 137, R. 768)

The payment terms merely stated the \$400,000 principal amount. No down payment was required and no interest was charged on the unpaid balance. Nor was any minimum periodic payment required. Instead, the contract specified a maximum annual payment, which was taken from the requirements of federal tax law for treating income as long term capital gains. The appellant was entitled to either one-half of the income from lot sales or assignment of executed lot sale contracts as payment for its share of the development.

Principals of the appellant were expressly authorized to offer lots for sale and were entitled to a four percent commission for any sold. The subject property is adjacent to the I-15 Freeway and certain principals of the appellant placed a billboard on the subdivision property facing the freeway which advertised lots for sale and listed those persons' phone numbers to call for information. (M. 69, 144, 204; Exh. 19) This billboard was erected prior to the time the lot sales began and the appellant's principals eventually sold nearly one-

third of the sixty-five lots in the subdivision (T. 216), for which they were paid sales commissions of more than \$12,000 during the three months from December, 1978 to February, 1979. (R. 768)

Defendant Westcor was responsible under the contract for arranging the financing to construct the subdivision improvements (T. 132) and for supervising their installation. The contract acknowledged that Summit County estimated the construction expense at \$284,400 and provided that the appellant was entitled to one-half of any savings if Westcor could complete the improvements for less. (T. 140; R. 769)

Finally, the contract required Westcor to complete construction of the subdivision improvements within one year following execution of the agreement. (T. 200, 265; R. 769)

Approximately nine days after the agreement with Westcor was signed, the appellant signed an Escrow Fund Agreement (Exh. 24P) that was filed with Summit County for the purpose of obtaining final approval of the subdivision plat. This agreement stated that the sum of \$284,400 had been deposited with defendant Utah Security Mortgage in an account assigned to Summit County to guarantee completion of the subdivision improvements. The agreement also required that the subdivision improvements be completed within twenty-four months. The appellant alone is named in and signed this document as the developer. (T. 201-202; R. 769)

No funds or account as represented in the Escrow Fund Agreement ever existed. (R. 770)

More than two months after the agreement with Westcor was signed, the appellant signed and recorded the Protective Covenants of

the subdivision. (T. 202-203; P. 770)

Except for some materials that were paid for by Westcor, all construction of the subdivision improvements was performed by a company owned and operated by Blaine B. Ritner, the appellant's president, or by others under contract with the appellant. (T. 140, 207-208; P. 771) Additionally, the entire development proceeded completely in accordance with the plans prepared by the appellant before Westcor became involved in the project. (R. 769)

In February, 1980, certain parties (none of whom are involved in this action) who had purchased lots in the subdivision brought suit in the Third District Court for Summit County titled Jim Lynn, et al. v. Westcor, et al. (Case No. 5985). None of the respondents herein were parties to that action, but defendants included Douglas Monson, the appellant and the appellant's president, Blaine B. Ritner. That action involved the same facts as in the instant case including allegations of fraud and misrepresentation in connection with the non-existent account described in the aforementioned Escrow Fund Agreement. John Davis represented all of the defendants named above in the Lynn case and in the instant case. In direct contradiction to its position in the instant case, the appellant in Lynn has consistently acknowledged that it was responsible for financing and installing the subdivision improvements. Additionally, the appellant has never asserted in Lynn that it was merely a seller of the land. (R. 770)

The appellant has never filed a cross-claim against Westcor (T. 226-228), and in the four years that have elapsed between the first hearing in Lynn and this appeal, the appellant has never objected to

its attorney simultaneously representing Westcor and its principal officer, Douglas Monson. (P. 771)

On or about June 30, 1980, the appellant and Westcor executed a new agreement concerning the subdivision development entitled "Trust Agreement" (Exh. 28P) which formalized negotiations conducted by the parties during the preceding several months. In this agreement the appellant expressly assumed sole and complete responsibility for the subdivision development and completion of the subdivision improvements (T. 210-211, 239-241; P. 771) The appellant also agreed to hold defendants Westcor and Douglas Monson harmless from any liability arising out of the subdivision development. (T. 211; P. 771) In exchange, Westcor assigned to the appellant any and all interests it held in certain lot sale contracts and deposits. Shortly afterwards, Westcor executed assignments on each of the listed contracts to attorney John Davis as Trustee for the appellant and also executed documents revoking prior assignments of the contracts. The Trust Agreement was revokable if Westcor did not cooperate in recovering the contracts it was to assign to the appellant in which event all assignments made to the appellant or John Davis as Trustee were to be assigned back to Westcor. No such contract has been assigned back to Westcor (T. 229, 351) and both Blaine R. Bitner, the appellant's president, and Douglas Monson, Westcor's principal officer testified at trial that the Trust Agreement was and had continuously been in full force and effect. (T. 230-231, 351)

Neither the appellant nor anyone associated with it had any prior dealings or acquaintance with Westcor or any of its principals.

Prior to signing the November 1, 1978 agreement with Westcor, the appellant requested no information about Westcor or its principals or about how Westcor was arranging for the financing for the subdivision improvements. (T. 130-139) An investigation would have revealed that Westcor did not even exist--it was eventually incorporated more than two months later in January, 1979. When it was formed, Westcor had only the statutory minimum of \$1,000 capital. (T. 266) Neither Mr. Monson nor any other principal associated with Westcor had a background in real estate development or financing nor any personal assets to contribute toward Westcor's obligations under the contract with the appellant. (R. 771-772)

Respondent William Dean Rogers is a licensed General Contractor who does business as W. Dean Rogers and Son Construction Company. (T. 15-16) Respondent Patricia Lee Rogers is his wife and assists in the business. (T. 16) During the times pertinent to this case the respondents were primarily involved in "spec building" residential homes, which means the respondents would select a building site, arrange for financing, construct the home then sell it on the open market, hopefully for a profit. (T. 16).

Respondents purchased two improved lots in the subdivision involved in this case. Closing took place in April, 1979, and respondents received a Warranty Deed to each lot which named Westcor, Inc. as the seller. (T. 17, 24-25; R. 772; Exh. 1,2)

The respondents first contacted the sellers' real estate agent about purchasing the lots in January, 1979. (T. 17) A few days later they visited the subdivision site but it was covered with snow so they

could only see the lot locations from a distance and could not see the state of the subdivision improvements. (T. 18, 172)

During that visit to the site and at other times prior to closing, the respondents stated to the sellers' agent that they intended to build homes on the two lots which would be offered for sale as soon as they were completed. (T. 21, 22, 18, 19, 172-176) The respondents also explained that the houses could not be offered for sale until the subdivision improvements were completed so they needed to know what improvements were to be put in and when they would be done. (T. 18, 22, 23) The real estate agent replied that the developers would provide a water system, sewer pipes, paved roads and all utilities. (T. 169, 173, 22, 23) All of these improvements, the agent represented, were to be completed before the end of 1979. (T. 173, 174, 23) The agent's information came directly from defendant Douglas Monson who authorized the agent to make those representations to prospective lot purchasers. (T. 168, 170, 265) The real estate agent in turn directly informed Westcor and Douglas Monson about the respondents' plans to construct homes during the upcoming summer before the respondents closed on the lots. (T. 175-176; P. 773)

In order to purchase the lots and construct the homes, the respondents obtained a construction loan from Prudential Federal Savings in the approximate principal sum of \$160,000. (T. 71) This loan required no monthly payments but was due and payable in full ten months later, which was about January, 1980. (T. 48; P. 773)

Respondents began constructing a house on each lot in June, 1979. (T. 33; P. 773) A short time later work on the subdivision

improvements began which consisted of excavation for water and sewer lines and a rough cut of the roads. (T. 33-34) Some time later that summer work on the subdivision improvements stopped. At that point, the road bed had been scraped out but not graveled or paved and the excavations for the sewer and water pipe lines were still not completed. Construction of the water reservoir and pumping station for the water system had not begun and no utilities had been brought into the subdivision. (T. 43-44) No further work was done on these improvements during 1979. In the following year, 1980, the excavation and installation of the water lines was completed. Construction of a reservoir and pump house for the water system, and the graveled and paving of the roads, were not begun until after the November 1, 1980 deadline specified in the Escrow Fund Agreement. (T. 46; Exh. 17, 28, 29) The water system was finally completed in the Spring of 1981, and the roads were finally graveled and paved in the Summer of 1981.

Respondents could have finished construction on their two houses during 1979 but halted their work at a point where the houses could survive the weather when it became apparent the subdivision improvements would not be completed in time for the winter season. (R. 773)

The work done on subdivision improvements during 1979 was performed by a company owned and operated by defendant Blaine Bitner, the appellant's president. (T. 140) Mr. Bitner was frequently on the site when the work was being done and most of the work was done by or under the direct supervision of Mr. Bitner's son. The respondents' two homes were plainly visible from every point in the subdivision and some

of the work on the improvements was performed adjacent to the two houses. (P. 774) Blaine Bitner testified that he visited the sites of the two homes on several occasions prior to August 29, 1979 to see how rapidly respondent was progressing on the construction. (T. 142-143) On at least one occasion in 1979, defendant Blaine Bitner and respondent William Dean Rogers had a conversation at the construction site during which Bitner stated the improvements would be completed before winter set in. (T. 37-38, 54) Beginning in the Summer of 1979 after work on the improvements had stopped, the respondents contacted defendant Blaine Bitner, other representatives of the appellant and representatives of defendant Westcor on several occasions to notify them that the respondents' construction loans were coming due or were past due and could only be paid by sale of the houses, which could not be sold because the subdivision improvements were not completed. (T. 55-57) Respondents were repeatedly assured by all of these parties that work on the subdivision improvements would begin again and be completed within a short time. (T. 55; P. 774)

The subdivision improvements could have been fully constructed in 1979 (T. 142), and when they were not, they could have been completed during the Summer and Fall of 1980. (P. 774)

When the respondents' construction loans came due in January, 1980, respondents requested and were granted a three month extension by the lender. (T. 48-49) When the new due date arrived and the respondents were still unable to pay the loans in full, the lender required conversion of the loans to thirty year installment mortgages which carried payments of more than \$2,000 per month. (T. 49-50) The re-

spondents were not able to make these monthly payments from their regular income and so had to take separate bank loans and then borrow from relatives to keep the payments current. (T. 53) Eventually they could borrow no more and fell into arrears in the Fall of 1980. (T. 50-51) In approximately November or December, 1980, the respondents received notice from the lender of its intent to foreclose its security interest in the two properties. (T. 51; Exh. 15, 16; R. 775)

Because of the continuing financial burden, the respondents substantially completed construction on the homes and placed them for sale in the Summer of 1980. During that time the respondents continued to receive assurances from the appellant's representatives, particularly John Davis, that construction on the subdivision improvements would commence and be completed soon. (T. 55) In July, 1980, an Earnest Money Agreement was signed on one lot specifying a sale price of \$130,000 but provided that closing would not take place until the subdivision improvements had been completed. In about September, an Earnest Money Agreement was signed on the other lot for essentially the same terms as the first. (T. 58-61; Exh. 8, 9) As November 1, 1980, came and passed, the homes remained uninhabitable for lack of water and generally unaccessible during wet weather over the ungraveled dirt roads. (R. 775)

When Prudential Federal Savings threatened foreclosure in late 1980, the respondents contacted the parties who had signed the earlier Earnest Money Agreements and other parties whom they thought might be interested and offered to sell the houses for a discount to avoid foreclosure and any injury to their credit rating. In about December

1980, a new agreement was reached with the parties who had signed the earlier Earnest Money Agreements. The buyers agreed to assume and bring current the construction loan obligation, reimburse the respondents for all their out-of-pocket costs, and assume all risk concerning completion of the subdivision improvements and other problems except for clearing the respondents' title of several spurious encumbrances. (R. 776) This amounted to a sum substantially lower than the \$130,000.00 originally offered in the earlier Earnest Money Agreements.

The buyers assumed the construction loans and paid the arrearages current beginning in January, 1981. In that same month, respondents hired an expert property appraiser to determine what the full market value of each property would have been if the subdivision improvements had been completed, \$136,000 and \$138,000 were the sums determined by the appraiser. (T. 150-151; Exh. 25-26) Lost profits were calculated by deducting the balance owed on the loans, the amounts paid to the respondents for their out-of-pocket expenses, and other setoffs allowed by the Court from the appraised values. (R. 776)

ARGUMENT

POINT I

THE EVIDENCE PRESENTED AT TRIAL CLEARLY ESTABLISHED A JOINT VENTURE BETWEEN THE APPELLANT AND DEFENDANT WESTCOR, INC.

The trial court expressly found that the appellant had engaged in a joint venture with defendant Westcor concerning the subdivision development. (Conclusion of Law No. 5, R. 786-787). This case was tried to the Court sitting without a jury. On review, this Court should sustain the decision below if it was based on findings supported by substantial evidence, Gibbons and Reed Company v. Guthrie, 123 Ut.

172, 256 P.2d 706 (1953), and the evidence should be viewed in the light most favorable to the respondents as the prevailing parties, Toomer's Estate v. Union Pacific R. Co., 121 Ut. 37, 239 P.2d 163 (1951). A review of the trial court's Findings of Fact and Conclusions of Law together with the supporting record shows that substantial evidence of a joint venture between the appellant and defendant Westcott was presented at trial.

This Court defined the primary components of a joint venture in Bassett v. Baker, 530 P.2d 1 (Ut. 1974) as follows:

A joint venture is an agreement between two or more persons ordinarily but not necessarily limited to a single transaction for the purpose of making a profit. The requirements for the relationship are not exactly defined, but certain elements are essential: The parties must combine their property, money, effects, skill, labor and knowledge. As a general rule there must be a community of interest in the performance of the common purpose, a joint proprietary interest in the subject matter, a mutual right to control, a right to share in the profits, and unless there is an agreement to the contrary, a duty to share any losses which may be sustained.

Id. at 2.

When the evidence is conflicting as to whether a joint venture was intended, this Court, in Strand v. Cranney, 607 P.2d 295 (Ut. 1980) has stated:

Whether a joint venture exists depends primarily upon the facts of a particular case rather than upon adherence to specific formalities [citation omitted]. As stated in Andrews v. Rush, 109 Cal. App. 511, 517, 293 P. 152, 154 (1930):

The law requires little formality in the creation of a joint adventure [citation omitted]. Such an agreement is not invalid because of indefiniteness in respect to its details. . . . In considering whether or not a relationship such as that of joint adventurers or partners

has been created, the courts are guided, not only by the spoken or written words of the contracting parties, but also by their acts.

Id. at 296-297.

The appellant in Strand had denied that a joint venture was ever intended or agreed upon with the respondents. This Court affirmed the trial court's finding that the parties had been engaged in a joint venture because:

. . . Despite possible misunderstandings as to the details, the parties conducted their dealings in a manner consistent with a joint venture. The intent of the parties was to deal with [the assets of the venture] in a manner consistent with a mutual enterprise.

Id. at 297.

In cases involving claims by third parties, an additional rule has been applied which states that a joint venture agreement ". . . will be determined from the facts rather than the conclusions of the co-partners as to the nature of their business relationship." Mercer v. Vinson, 336 P.2d 854, 859, 85 Ariz. 280 (1959).

In the instant case, the trial court had to decide whether the agreement between the appellant and Westcor was a simple sale of the land or a joint venture. The only proper way this decision could be made under the standards and tests described above was by considering the terms of the appellant's various agreements and the appellant's actions pursuant to the agreements. If the terms described a de facto joint venture then the Court made no error in finding the appellant a joint venturer with Westcor, at least with respect to third-party claims. In this regard it is important to note that the appellant never denied agreeing to the terms noted by the Court as the bases for

its finding of a joint venture.

The first consideration which supports of the finding of a joint venture is the terms by which Westcor obtained title to the land. Both Blaine B. Bitner, the appellant's president, and Douglas Monson, the principal officer of Westcor, acknowledged that the \$400,000 purchase price was actually a percentage of the anticipated gross proceeds from the sale of improved lots in the completed subdivision. Monson said it represented a 60-40 split (T. 277), Bitner a 50-50 split. (T. 137, 139, 232-235) Either way, it was a share of the profits. (T. 271, 272) The terms by which appellant was to be paid for its share are found in one of the many "exhibits" to the form Uniform Real Estate Contract and provide that appellant was entitled to a portion of the lot sale contracts or fifty percent of all payments received on lot purchases after deductions for sales commissions and closing costs. As such, debts would accrue to the appellant only as lots were sold. In the interim there was no other minimum payment or interest on the unpaid balance.

The contract did specify maximum annual payments that were stated as a percentage of the total proceeds from lot sales in any year. The appellant acknowledged that this rather unusual provision was included for tax purposes. The appellant's accountants had advised it to structure the transaction like a sale so the income could be reported as capital gains. (T. 130, 276) The maximum annual percentage was taken from IRS requirements for reporting long term capital gains.

Other provisions of the agreement provided for increases in

the appellant's share under certain circumstances. For example, the agreement provided that if Westcor was able to install the subdivision improvements for less than Summit County's estimate of their cost then the appellant was entitled to one-half of the savings. (T. 140, 273) Another provision entitled the appellant to one-half of any fees that Westcor collected for connections to the water or sewer system. It is certainly difficult to see why the appellant should be able to share in savings which Westcor might realize on the development costs unless it was much more than a mere seller of the land.

The contract also expressly authorized Bitner Company's principals to sell as many lots as they could in the subdivision. (T. 143) When the lots initially went up for sale, Westcor listed some of the lots with a real estate agent and engaged in no other selling activity. The appellant (or actually three of its principals) erected a large billboard on the property facing the adjacent I-15 Freeway which advertised lots for sale. (T. 144) During the next approximately three months those individuals sold one-third of the lots in the entire subdivision. For making those sales, Blaine B. Bitner and his brother, Willis Bitner, were personally paid sales commissions exceeding \$12,000.

The appellant further agreed with Westcor ". . . to sign any and all documents necessary for the completion of the project including covenants, agreements, application, etc." (Last page of Exhibit 23). Neither appellant nor any other defendant could remember exactly when this portion of their agreement was executed. However, it was clearly established that nine days after the Uniform Real Estate Contract was

signed, appellant, by its president, Blaine P. Bitner, signed the Escrow Fund Agreement (Exh. 24) filed with Summit County to obtain final approval of the subdivision plat. This agreement identified the appellant as "the corporation" which ". . . has agreed to undertake certain and various improvements in the development of real properties known as Parkridge Estates. . . ". Paragraph 1 of the Escrow Fund Agreement states: "The corporation agrees to complete, within a period of twenty-four months beginning from the date of final approval . . . of the official plat . . . " the subdivision improvements. Paragraph 2 states:

Escrow. In guarantee of the timely completion of said specified improvements, the corporation herein assigns and sets over to the county all its right, title and interest in the principal of that escrow account with Utah Security Mortgage . . . in the amount of \$284,400. . .

In January, 1979, approximately two months after the Escrow Fund Agreement was filed with Summit County, the appellant signed and recorded Protective Covenants for the subdivision development. (Exhibit 27P).

The appellant's president testified that he signed these documents on behalf of the appellant because the county required them to be executed by the record title owner of the land. However, no evidence was presented which showed any such requirement existed, even though a county commissioner and the director of planning for Summit County testified as witnesses.

The Court also noted evidence of a joint venture in the acts of the parties after the subdivision lots were first offered for sale.

Once started, the development proceeded according to the plan developed by the appellant and preliminarily approved by Summit County at the appellant's request. Additionally, except for some materials that were paid for by Westcor (T. 278), all construction of the subdivision improvements was performed by a company owned and operated by the appellant's president, or by others under contract with the appellant.

Another significant point was the position taken by the appellant in a companion case brought by other lot owners in February, 1980 Tim Lynn, et al. v. Westcor, et al. (Case No. 5985). That case involved allegations of fraud and misrepresentation against all the defendants, for which damages were requested together with a receivership to assure that the income from the lot purchases would be used for completing the subdivision improvements. The appellant herein as well as Westcor, Douglas Monson and Elaine B. Bitner, were defendants in that action. From the outset, John Davis represented all of those defendants, just as in the instant case prior to this appeal. In testimony during the trial of the instant case, principals and representatives of the appellant acknowledged that in Lynn all of the defendants represented by Mr. Davis had consistently represented to the Court that their respective positions in connection with the subdivision development were identical and all consented to the entry of orders which imposed on them joint and several liability for filing bonds and installing the subdivisions improvements within specified deadlines. The same witnesses further acknowledged that in neither the Lynn case nor the instant case have either the appellant or any of its principals or Westcor or any of its principals filed any cross-claims

against the others. These witnesses also acknowledged that prior to the instant case the appellant had not at any time taken the business. It was merely a seller of the property even though the Lynn case involved the same underlying facts.

Taken as a whole these facts describe a joint venture for profit. The appellant contributed its land and Westcor was to contribute financing for construction of the subdivision improvements. The sales were conducted jointly and the resulting income was split.

The appellant claims that under its agreement with Westcor it had no risk of loss, which, as a matter of law, prevents a finding of joint venture. But that is not a true description of the agreement under the law.

Losses are not mentioned at all in the agreement which implies that the issue was simply never considered. The principals and representatives of both the appellant and Westcor did testify that each expected the lots to sell fairly quickly for an anticipated total of about \$1,000,000 (M. 269) (which turned out to be a low but fairly accurate guess). Under that estimation, the lots could have sold for twenty percent less and both the appellant and Westcor still would have received \$400,000 each as a 50-50 split of the gross proceeds. Assuming then that Summit County's estimate of the expense for constructing the subdivision improvements of \$285,000 was correct, an \$800,000 gross would still have netted Westcor a profit of roughly \$115,000 for a minimal amount of work. There would have been a loss only if the sixty-five lots sold for less than a total of \$685,000 (\$400,000 for appellant and \$285,000 for improvements) or less than \$11,000 per lot.

Inasmuch as respondents paid the asking price of \$19,500 and \$20,000 respectively for the two lots they purchased, it's easy to understand why the possibility that the project would lose money was never considered by the appellant. In any event, there was no evidence presented at trial that such a possibility was considered or that the parties saw any other significant risk of loss in connection with this development. That is the most likely explanation of why the risk of loss is nowhere covered in the parties' agreement.

But even if the \$400,000 figure was construed as precluding the sharing of loss, the agreement still satisfies the test for a joint venture under Bassett v. Parker, supra. There the Court said that joint venturers should be obligated to share in any losses ". . . unless there is an agreement to the contrary. . ."

It should also be noted that the contract could be read as entitling appellant to one-half of all payments from the sale of lots, whether or not the eventual total exceeded or was less than \$400,000. Admittedly, this relates to an ambiguity in the contract, but one of the exhibits stating payment terms does entitle the appellant to one-half of all proceeds and Blaine Bitner testified he understood the appellant was entitled to one-half of all sales. If that is correct, then there could have been no losses unless the whole project sold for less than \$570,000 (\$285,000 times 2).

The trial court could also have made its finding of a joint venture by considering how well these same facts describe a simple sale of the property. The appellant presumes that if some element normally found in a joint venture agreement is missing then a joint venture

cannot be found and the transaction must be characterized as a simple sale of the property. That is not true. The court would have committed no error in finding a joint venture if the underlying facts were not consistent with a simple sale of the land.

The appellant claimed that it merely sold the property to Westcor, but the type of sale it describes is a conveyance of all the seller's rights and interests in the property except perhaps for a standard security interest. However, a security interest is not what the appellant retained in this property. Instead, it retained substantial and extensive interests in the development itself. It would actually be more accurate to say that the appellant only sold Westcor share of the development. A sale of all interests is a simple sale; sale of a part interest in a risk development is a joint venture and the definition cannot be otherwise. Therefore, the trial court had no choice about categorizing the appellant-Westcor agreement as a joint venture.

POINT II

THE APPELLANT IS SEPARATELY LIABLE AS A SOLE VENTURER
IN THE DEVELOPMENT PROJECT.

In addition to the finding of a joint venture, the trial court concluded that the appellant became the sole venturer in the subdivision development beginning in the Spring or early Summer of 1980. (Conclusions of Law No. 6, R. 787). The appellant's brief completely overlooks this point even though it renders the appellant independently liable for the respondent's damages whether or not this Court affirms the finding of a joint venture with Westcor.

As early as March, 1980, the appellant represented to the

court in 1966 that it had taken an assignment of all interests held by Westcor in the subdivision development and would henceforth be solely responsible for completing the subdivision improvements. The second agreement between the appellant and Westcor was put in writing and titled "Trust Agreement" which was signed on or about June 30, 1980 (Exhibit 28P). Under the terms of this Agreement, Westcor assigned to John Davis as trustee for the appellant all of its right, title and interest in several lot contracts and any funds then on deposit with Utah Security Mortgage. In exchange for this assignment, the appellant and Westcor released each other with full satisfaction of all obligations under the November 1, 1978 contract and the appellant agreed to hold Westcor and Douglas E. Monson " . . . harmless of any liability arising out of the development of [the subdivision] . . ." The clear purpose of this agreement was to remove Westcor from the project and restore full control to the appellant.

The appellant asserts this agreement can be given no significance because it contained a condition subsequent which was not satisfied. This claim is directly rebutted by the terms of the condition subsequent itself. Furthermore, both Blaine B. Ritner and Douglas Monson testified at trial that the Trust Agreement was then in effect and had always been in effect since the date it was executed.

The condition subsequent is found in paragraph 6 of the Agreement and reads in its entirety as follows:

Ritner and Westcor agree to both use their best efforts in obtaining clear title and possession of the Uniform Real Estate Contracts on the aforementioned lots. If said contracts cannot be recovered by November 15, 1980, this Agreement shall become

and the fact that the Trust Agreement was not a condition precedent to the delivery of the contracts, and that the Trust Agreement was not a condition precedent to the delivery of the contracts, and that the Trust Agreement was not a condition precedent to the delivery of the contracts.

Both Blaine Ritner and Doug Monson were involved in obtaining the contracts obtained by John Davis on behalf of the appellants, and the contracts were never assigned back to Westcor as was required in the event the condition subsequent was invoked. (T. 229). After admitting the appellants still held and was collecting on these contracts, Blaine Ritner testified as follows:

Q. You are certainly not asking the Court to believe, Mr. Ritner, that you want it both ways under this Trust Agreement; that you are saying that it is no longer in existence, but you are holding the assets that were delivered to you? You don't want it both ways, do you?

A. The Trust Agreement is still in effect.

Q. Okay. It is still in effect then?

A. That is right.

(T. 230-231).

Douglas Monson's testimony about the Trust Agreement was in accord:

Q. At at no time has Davis or Ritner ever said to you on behalf of Westcor that that Trust Agreement wasn't in full force and effect, have they?

A. No.

Q. And the first time you heard any question about that Trust Agreement being in effect is in this lawsuit here in Court, correct?

A. Yes.

Q. As far as you are concerned, that Trust Agreement still governs the obligations and rights as between Westcor and Ritners, does it not?

A. Yes.

Q. In fact, the appellants were not the sole and exclusive Trust Agreement beneficiaries and the appellants were not without recourse, were they?

A. Yes.

(T. 351).

Given the foregoing testimony, it is hard to understand how the appellant could in good faith represent to this Court that it is not bound by the Trust Agreement because of the condition subsequent.

Furthermore, the requirements of the condition subsequent were clearly satisfied. In its brief, the appellant asserts the condition subsequent was not satisfied because Westcor was required to give its best efforts in obtaining the listed contracts "... and it is evident that Westcor did nothing. . ." (Appellant's Brief, p. 24). This is completely untrue. Westcor revoked its earlier assignment of those contracts to Bonneville Thrift and executed assignments on each contract to John Davis as Trustee for appellant. Each of these assignments was duly recorded and as of the date of trial, Mr. Davis was either collecting or attempting to collect on each of those contracts. Given these facts it is hard to see how Westcor could have done more to deliver title to the appellants.

The appellant's sole and exclusive control over the subdivision development under the Trust Agreement beginning in early 1980 is crucially important. This gave the appellant a full annual construction season to put in the remainder of the subdivision improvements and still meet the November 1, 1980 deadline in the Escrow Fund Agreement. Both Blaine B. Bitner and his son, Roger Bitner (who was in charge of

most of this construction work) testified that nothing prevented completing construction of the subdivision improvements either in 1979 or in 1980. (Tr. 141-142, 927) It was merely a matter of making the necessary effort. If that effort had been made, no damages would have been suffered by the respondents and this lawsuit would not have been filed.

The respondents signed Earnest Money Agreements on each of their houses during the Summer and early Fall of 1980. The only thing necessary to close those sales was completion of the subdivision improvements. Foreclosure proceedings were not initiated against respondents until December, 1980. Thus, the respondents would not have been injured if the appellant had merely done what it was able and obligated to do when it had sole control and responsibility over this project. But instead of any good faith effort by the appellant to meet these obligations, the record shows that during the entire year of 1980 the only progress made on the subdivision improvements was completing the excavation work (which had largely been done the year before) and some further work on the road bed. The water reservoir, pump house, and connecting pipes remained to be done on the water system and the roads still needed to be graveled and paved. These latter items were finished in the Spring and Summer of 1981, respectively. Appellant's failure to complete these last items in 1980 left the respondents' houses without water and accesible only over dirt roads that were largely impassible except when they were dry. The reduced price which the respondents had to sell these houses for was prompted solely by the buyers agreement to assume all the risks concerning completion of these improvements.

POINT III

THE COURT PROPERLY FOUND THE RESPONDENTS TO BE THIRD PARTY BENEFICIARIES UNDER THE ESCROW FUND AND TRUST FUND AGREEMENTS.

The trial court's Conclusions of Law included the following:

3. Under the escrow fund agreement delivered to Summit County on or about November 9, 1979, to induce final approval of the subdivision plat for Parkridge Estates [the appellant] was responsible for obtaining the required financing and completing the construction of the subdivision improvements on or before November 9, 1980.

4. Plaintiffs are third party beneficiaries of the aforementioned escrow fund agreement.

. . .

7. [The appellant] is separately liable for all liabilities of Westcor arising out of the Parkridge Estates Developments pursuant to hold harmless provision in the Trust Agreement executed by those parties on or about June 30, 1980.

8. [The respondents] are each third party beneficiaries of the aforementioned Trust Agreement.

(R. 786-787).

There was abundant evidence presented at trial to support the finding that the two contracts mentioned were executed at least in part for the benefit of purchasers of the lots in the subdivision. The appellant presented no evidence in support of any other interpretation of these contracts. Accordingly, the trial court did not commit any error in finding that the respondents were third party beneficiaries.

It is a well established rule in Utah that in appropriate circumstances, parties may assert third party rights and benefits under a contract to which they were not signatory and for which they paid no consideration. Clark v. American Standard, Inc., 583 P.2d 618 (Ut.

1978); Mullins v. Evans, 560 P.2d 1116 (Ut. 1977); Schwinghammer v. Alexander, 21 Ut. 2d 418, 446 P.2d 414 (1968); and Walker Bank and Trust Company v. First Security Corporation, 9 Ut. 2d 215, 241 P.2d 93 (1959). In Schwinghammer, supra, this Court quoted with approval the tests cited by Professor Corbin for determining when a person qualifies as a third party beneficiary to a contract:

... A third party who is not a promisee and who gave no consideration has an enforceable right by reason of a contract made by two others (1) if he is a creditor of the promisee or of some other person and the contract calls for a performance by the promisor in satisfaction of the obligation; or (2) if the promised performance will be of pecuniary benefit to him, and the contract is so expressed as to give the promisor reason to know that such benefit is contemplated by the promisee as one of the motivating causes of his making the contract. A third party may be included within both of these provisions at once, but need not be.

Id., at 466 P.2d 415.

The cases have also held it essential that the original parties to the contract intended to confer a benefit on the third party if he is to be a beneficiary. Clark v. American Standard, Inc., supra. If such intent is found, the lack of privity is no defense to an action on the contract by the third party. This was made very clear in Walker Bank and Trust Company v. First Security Corp., supra:

It is often stated that privity of contract is a prerequisite to holding one liable for breach of a duty thereunder. But it is also recognized that there are duties to others than the immediate parties, where from the nature of the contract, it is plainly evident to the promisor that the contract is for the benefit of third persons, and that failure to discharge his duty would adversely effect them.

Id. at 341 P.2d 945, 946.

The facts in the Walker Bank case present a close analogy to those herein. The plaintiff was Guardian Ad Litem for minor children who were named beneficiaries of a life insurance policy purchased by their mother. The mother, while she was alive, maintained a checking account with the defendant bank and had made arrangements to have the premiums for that insurance paid out of her account automatically each month. The defendant bank complied with that arrangement for several months, then inadvertently neglected to make the payments, resulting in a termination of the life insurance policy shortly before the mother's death. In the resulting action against the defendant bank this court held the children were third party beneficiaries of the bank's agreement with their mother to make the insurance payment. The Court's opinion defined the relationship between the bank and the children's mother as:

. . . that of debtor-creditor to the extent of the customer's balance, and it is the bank's duty to pay up to that amount to anyone on the depositor's order and in conformity with his direction . . .

Under the circumstances here shown, it was evident to the bank that the monthly draft covered the insurance premiums and that failure to pay them would result in lapse of the policy and loss of protection thereunder. Having accepted the responsibility, the duty to fulfill it ran both to the [mother] and to her beneficiaries for whom she maintained the policy. . . Its failure to do so renders it liable to the beneficiaries who were harmed thereby despite lack of privity between them.

Id. at 341 P.2d 946.

The escrow fund agreement in the instant case is very much like the checking account agreement in the Walker Bank case in that the appellant was obligated to have a specific fund on deposit in a par-

Douglas F. Monson harmless of any liability arising out of the development of Parkridge Estates Subdivision." In large part the Trust Agreement was a response to the Lynn lawsuit. In fact, one paragraph of the preamble to the Agreement states:

WHEREAS, Westcor and Bitner are desirous of effecting compliance with the Court Order of March 3, 1980 (in the Lynn action) and preserving the assets. . .

Damages were claimed by the plaintiffs in the Lynn lawsuit, and given that context, it would appear very unlikely that the hold harmless was not intended to cover liabilities to the lot purchasers, particularly when the Agreement says "any liabilities" arising out of the subdivision development.

Moreover, it would be fundamentally unfair and unjust to exclude the lot purchasers from the protection of the hold harmless agreement. The consideration which Westcor gave to the appellant for the hold harmless was all of the assets which Westcor then held from the subdivision development. If these assets had not been conveyed to the appellant then they would have been available to liquidate and apply against the respondent's judgment against Westcor. Since the appellant received the assets, it seems only fair that it assume the related liabilities as well.

The appellant argues that the hold harmless should not be enforceable in any event because it violates public policy in allowing immunity in connection with the commission of fraud. Of course, that is not how the hold harmless would work in the instant case. Judgment was rendered against the appellant and Westcor jointly and severally and Westcor made no cross-claim against the appellant for any sums it

might be required to contribute to satisfy the judgment. Therefore, Westcor is not immunized by this provision. More importantly, the court made no finding of fraud against Westcor or Douglas Monson in connection with the claims of respondents William Dean and Patricia Rogers, and no portion of the judgment granted to these respondents was based on a finding of fraud. Fraud was found against Westcor and Douglas Monson in connection with transactions involving respondent Harold Bennett, but these transactions in no way involved respondents Rogers. Accordingly, the hold harmless would only provide immunization to Westcor against liabilities for breach of contract.

Finally, appellant asserts that the respondents can claim no benefit under the hold harmless clause because they are "incidental" beneficiaries. To support this claim, the appellant quotes an illustration from Corbin which appears in this Court's opinion in Schwinghammer, supra. Corbin's illustration says where A owes money to C and B promises to supply A with money to pay his debt to C, C cannot maintain a suit against B on the promise. Clearly, the instant situation is significantly different than that described in the illustration. In Corbin's example, B is not in any way involved in the transaction between A and C giving rise to the debt, so it would be improper to make B vulnerable to suit by C merely because of the completely separate agreement between A and B. In the instant case, the appellant is no disinterested lender. The debt to the respondents is directly tied in with the transaction between the appellant and Westcor, and the appellant is either a joint venturer in the project out of which the debt arises, or assumed all of the assets and liabilities when taking

sole and complete control of the project out of which the debt arises. This is radically different from the Corbin illustration and provides substantial support for the trial court's finding that the respondents were third party beneficiaries of this hold harmless agreement.

This result is consistent with other cases which have considered a similar fact situation. For example, in Mullins v. Evans, supra, the plaintiff claimed liability against the defendant based on a hold harmless clause in a contract between the defendant and a corporation whose business had been purchased by the defendant. The plaintiff's claim concerned a debt allegedly owed by the predecessor corporation. This Court found the plaintiff not entitled to a judgment against the defendant because it had no knowledge of the plaintiff's claim when the hold harmless was entered into. The Court went on to say that such a claim could stand, however, if notice had been given, even though the claim itself was contingent in nature:

If the purchaser knew of the contingent obligation of the [company purchased], there might be a basis for the claim against it by [the plaintiff] on a theory of a third party beneficiary contract. However, in this case there is no proof that [the defendant] knew or had any reason to know that [the plaintiff] would claim a commission on machines which it would manufacture and sell.

Id. at 1119.

In the instant case, a great deal of evidence was presented at trial showing that the respondents had notified the appellant of their claims on several occasions prior to the signing of the Trust Agreement.

In other cases involving the purchase of ongoing businesses where the purchaser gives a hold harmless to the seller, and the par-

ties had full knowledge of the claims at issue, the courts have consistently allowed third party claims against the purchaser. For example, in Treasure Valley Foods, Inc. v. I-M Poultry Packing Company, 564 P.2d 978, 98 Id. 366 (1977), the plaintiff sued the defendant for an unpaid debt which the defendant claimed had been offset and discharged. The plaintiff had previously purchased another company which owed the defendant money, and the plaintiff had agreed to hold the company purchased harmless of all of its debts. Relying on the hold harmless, the defendant deducted the amount owed to it by the company purchased from a separate amount the defendant owed to the plaintiff and paid the difference. The Idaho Supreme Court ruled the defendant was entitled to the setoff.

... Since the parties intended that [the plaintiff] assume and pay the debts of the [purchased] business, including the debt owed to [the defendant] and since this arrangement was supported by adequate consideration and not rescinded, it is clear that the [defendant] is a third party beneficiary of that contract. As such, it is entitled to assert and have judgment in its favor by way of setoff.

Id. 564 P.2d 980.

The same result occurred in Kennedy v. Lynch, 513 P.2d 1261, 85 N.M. 479 (1973). The plaintiff there was a contractor who sued the defendants for failing to pay a debt for ground improvements work on a trailer park. One of the defendants was the owner of the trailer park at the time the work was done and the other defendant was a subsequent purchaser of the trailer park who agreed to assume the debt owed to the plaintiff. The Court stated the following in affirming a judgment for the plaintiff against both defendants:

point in time. Those same debts and expenses were less in July and September of the preceeding year. For example, six months interest on the construction loans was more than \$8,000.00. Therefore, a calculation of lost profit at the time the earlier contracts were entered into would have produced a figure in about the same range as that calculated for January, 1981. The offset to these increased expenses was appreciation in that real estate market.

The appellant next asserts that the respondents should have been awarded less in damages because they failed to mitigate those damages. This is patently untrue. Respondents did not act unreasonably in holding out for as long as they could on the continuing hope that the subdivision improvements would eventually be completed and the houses could be sold for full value. If the respondents had been able to hold out long enough, there would have been no damages. The respondents sold before the subdivision improvements were completed only because they had no other option but to let the houses to go to foreclosure and risk losing their credit rating and all of the out-of-pocket expenses they had incurred. In these circumstances, it is difficult to see how the respondents could have done anything more to mitigate their damages.

The appellant also attacks the appraised values as being speculative. However, the appellant made no objection to appraiser's credentials when he testified at trial. Nor did the appellant offer any evidence to show that the value of the houses in January, 1981, was less than the value set by the appraiser. To contest those values now as being somehow unacceptably speculative is a poor and improper sub-

stitute for the appellant's failure to offer credible rebuttal evidence during the trial.

Finally, the appellant incorrectly argues that the respondent's loss should be set as of the Summer and Fall of 1980 because that is when the respondents' claims arose. The respondents could argue that their claims first arose on November 1, 1979, which is the date for completion stated to them by the real estate agent who sold them the lots and the deadline specified in the initial contract between the appellant and Westcor. Apart from that, the respondents' claim would arise only when a forced sale at discount occurred after November 1, 1980, which is the deadline stated in the Escrow Fund Agreement with Summit County. The respondents' claim arose when they lost profits due to the appellant's breach, and that event did not occur until January, 1981. The respondents were not damaged by loss of profit in July or September, 1980, since at that time they had no agreement with anyone to sell these properties at a discount.

The foregoing considerations constitute substantial support for the trial court's calculation of damages, and for that reason the amount awarded to the respondents should be affirmed in all respects.

POINT V

THE TRIAL COURT WAS CORRECT TO DENY THE APPELLANT'S
MOTIONS FOR MISTRIAL.

The appellant argues in Point III of its brief that the Court erred in denying "repeated" motions for a mistrial or for a new trial purportedly because of a conflict of interest which became apparent during trial. The description of those motions is completely false. What the record shows is that two motions for mistrial were made but

neither was based on a conflict of interest between John Davis and/or any of his clients. On the contrary, they were based in part on appellant's allegation that the suggestion of a conflict was being used to prejudice the Court and impair Mr. Davis' ability to do his job.

The first motion was made on December 9, the second day of trial. The motion was brought under Rule 63 of the Utah Rules of Civil Procedure which reads in pertinent part:

(b) DISQUALIFICATION. Whenever a party to any action or proceeding . . . or his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed no further therein, except to call in another judge to hear and determine the matter.

Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is known. . . . [Emphasis Supplied]

In this instance, the judge was alleged to be prejudiced against the appellant's trial counsel because of statements the judge had heard the preceding evening concerning John Davis' standing with the Bar. At the time Mr. Davis was the subject of proceedings brought by the State Bar before this Court to suspend his license as an attorney. Respondents first became concerned about the situation during the month prior to trial because suspension of Mr. Davis would almost certainly have caused another delay of the trial. This concern was initially alleviated when respondents learned a couple of weeks before the trial that the suspension had not gone into effect and Mr. Davis would be able to represent current clients for another thirty days.

after it did.

The Court had set aside two days for the trial of this case. It became apparent early on that two days would not suffice and the Court scheduled a third day. At the end of the second day, which was December 8, 1982, it became clear that another one or two days would be needed beyond the third. At the end of trial on the second day, when no one else was present but the attorneys and the Court, some discussions were held as to when the additional two days could be scheduled. One possibility discussed was moving the trial to Salt Lake County after the first of the year when Judge Wilkinson was replaced in Summit County by another Third District judge. The prospect of this much delay again raised the respondents' concerns about Mr. Davis's possible suspension. For that reason Mr. Davis was asked by another attorney if his situation with the Bar would cause any problem about continuing the trial to January. At that point, Mr. Davis merely responded that setting the additional days in January would not pose a problem.

The next day Mr. Davis asked for a conference with the Court in chambers where he made his motion asserting that the Court was prejudiced against him after hearing that he had problems with the Bar. After hearing everyone's statements about this incident, the Court advised Mr. Davis that it had no idea what the nature his problems with the Bar were and did not care, because in no event would any such information effect the Court's decision on the merits of the case. (T. 496-502)

A potential conflict was mentioned during argument on the motion, but not as a basis for the motion. Instead, the mention of a possible conflict by other counsel was merely cited by Mr. Davis as

another instance which would cause the trial court to be prejudiced against him. The transcript of the motion confirms this:

MR. DAVIS: I would make a motion under Rule 63 of the Utah Rules of Civil Procedure. This information made in the presence and hearing of the judge . . . constitutes malice and prejudice towards me, as counsel, and as a party, particularly because of the allegations that have been made against me personally in this case, as well as the potential conflict of interest situation that might be inferred from my representing parties in this action that may have adverse interest against each other. And on that basis, I believe that the two in connection with each other would constitute a bias and prejudice against me both as a party and as a counsel which would then reflect on my client's in this case.

(T. 499-500)

The truth about this motion then is that it was not brought because of a conflict of interest but because the mere suggestion of a conflict had supposedly biased the judge. Furthermore, no affidavit was filed as Rule 63 requires. This in itself made the Court's denial of the motion proper.

Basically the same reasons were cited in connection with the second motion, which was made at the close of plaintiff's case (T. 895-897). The exact nature of this motion is hard to describe, as can be seen from the motion itself:

MR. DAVIS: . . . I would renew, or maybe it is not a renewal, but I would make again a motion for mistrial in this case at this time, and I feel that this is the appropriate time to do. That based upon what has gone on thus far as an attorney I have been approached by other counsel outside of the court, as well as parties, I have been intimidated, I have been accused of various unethical practices and I have been called derogatory names, which I as an attorney am not able to respond because it is directly to a client.

Based on those feelings, as well as I feel that we have gone on now for three and a half days putting on the plaintiff's case and I have been continuously

pressured by the Court to try to wind this thing up. I have indicated to the Court previously about how many witnesses I have. There is absolutely no way that I can complete my case by the end of today and I feel that there might be some irretable feelings or prejudice on the part of the Court that I am in some way stalling or delaying, and I feel that possibly that might jeopardize my other clients to the extent that they ought to be given an opportunity to obtain other counsel in this case, if they so desire, so that they feel that they can be properly represented.

I feel that based on all of the circumstances that my other clients are not possibly being adequately represented in this case, and I would move for mistrial on that basis.

(T. 895, 896). The Court denied the motion, stating it did not know what Mr. Davis was talking about with respect to being called names or being intimidated. The Court noted that it was pressuring all the counsel in the case to proceed as well as Mr. Davis and then reiterated that it did "... not have any animosity or feeling either way against any attorney or any party." (T. 897) No other reason for denying the motion was given and Mr. Davis said nothing to indicate that the Court had misunderstood his motion. Like the first, this does not constitute a motion for mistrial on the ground that a conflict had developed between his clients which prevented him from continuing to represent any of them.

The appellant's statement that the purported conflict became clear "in the course of trial ..." (Appellant's Brief, p. 40) is also misleading and untrue. If there was any conflict here it was well known to all the parties from the outset. For example, Mr. Davis first appeared in this action on September 8, 1981, at a hearing on plaintiff's motion to enter default judgment against the appellant, Blaine

Bitner, Westcor, Douglas Monson and Mr. Davis personally. Mr. Davis appeared at that time representing only himself, the appellant and Blaine B. Bitner. During argument Mr. Davis made the following statement to the Court:

In that other action [referring to the Lynn case] I represented both Westcor and [the appellant] because in that position, there was no conflict of interest. I have been struggling with the fact as to the conflict in this position, so I am not representing Westcor today.

(Transcript of Plaintiffs' Motion for Entry of Default Judgment, p. 4)

Later in that same hearing, Mr. Davis stated:

. . . There was some confusion on resolving the claims between Westcor and [the appellant] and my own personal position as to whether I should represent both or the one. Whether or not [the appellant] should be claiming against Westcor . . .

(Transcript of Plaintiff's Motion for Entry of Default Judgment, p. 7)

It is interesting to note that this last statement was part of Mr. Davis' excuse for failing to file an answer on behalf of the appellant and four other defendants in the case for five months after they were originally served. When the Court subsequently set aside the default certificates and allowed these defendants to file answers, Mr. Davis filed answers on behalf of the appellant and Westcor so it was reasonable to assume that whatever conflict was involved between them had been resolved. It is also interesting to note that Mr. Davis also represented these same clients in the Lynn case. These lawsuits have been going on for more than four years now, which is rather remarkable if such a glaring conflict is present. There is no indication that any of his clients saw any conflict or had any problem with him representing them at any time prior to this appeal.

It is not the respondents' obligation to insure that the appellant was fairly represented. The appellant knew all of the facts pertinent to the claimed conflict from the very outset yet it did nothing and most likely would not have done anything if the point had been pressed because John Davis is a member of the Ritner family. The appellant's present counsel was retained only after the suspension against Mr. Davis mentioned previously finally went into effect. Despite all of this, the appellant now says that to serve justice this Court should invalidate more than four years of extensive litigation in two major lawsuits because it made a bad choice of counsel.

From the point of view of the respondents, it is no exaggeration to say that this type of argument is an insult to the concept of justice and equity. It would allow the appellant's own acts to deny the respondents the remedies to which they have proven themselves entitled after a great deal of unreimbursed expense. A retrial of this case could cost another several years of litigation and thousands of dollars in additional expenses. At the same time it is completely unnecessary because the appellant has another obvious remedy in a malpractice claim against Mr. Davis. Pursuing that remedy would have no adverse effect on the respondents whatsoever. The fact this option is ignored says a great deal about the appellant's real purpose for claiming a conflict now for the first time.

It should also be noted that the presence of a conflict is itself arguable. There is no conflict if the appellant was a joint venturer or if the Trust Agreement is valid. The Trust Agreement

requires the appellant to hold Westcor harmless from any liabilities which arose out of the subdivision development. Providing counsel to Westcor in each of the lawsuits which relate to the subdivision development is in accordance with that obligation.

Finally, the purported conflict is really much more significant as evidence of the validity of the Trust Agreement rather than evidence of error. The appellant simply would not provide counsel to Westcor unless it felt that it was obligated to do so.

POINT VI

ANY ERROR THE COURT MAY HAVE COMMITTED AT TRIAL IS HARMLESS BECAUSE THE APPELLANT SHOULD HAVE HAD DEFAULT JUDGMENT ENTERED AGAINST IT PRIOR TO TRIAL.

The appellant was served with the respondents Summons and Complaint on April 11, 1981. Service was made personally upon the appellant's registered process agent and president, Blaine B. Bitner. (R. 31-33). Mr. Bitner was also personally served as a defendant at the same time. (R. 29-30). The appellant did not answer the Complaint within the required twenty days and a default certificate was filed and entered by the Summit County Clerk on May 7, 1981. (R. 59). Approximately four months after the default certificates were entered, the respondents moved the Court to enter default judgment. Hearing on the respondents' motion was held before the Honorable Bryant Croft on September 8, 1981. Notice of this hearing was given to the appellant and John Davis appeared on its behalf to resist the motion. In his argument, Mr. Davis admitted that failure to file an answer " . . . was really a matter of inadvertence and neglect. I think, excusable, but anyway it was an oversight." (Transcript of Default Hearing, p. 4).

A short time later Mr. Davis repeated this explanation:

THE COURT: . . . What is your position for not filing your answer?

MR. DAVIS: Just inadvertence and neglect, Your Honor.

(Transcript of Default Hearing, p. 5). And again:

THE COURT: Well, the thing that troubles me, you are apparently taking a position "we don't care what the Rule says about a default," you see.

MR. DAVIS: That is not the case.

THE COURT: "Disregard all of those rules of procedure, judge, and let us file our answer because we are finally getting around to it" which doesn't quite set right with me.

MR. DAVIS: That is not the intent to be flagrant to the Court. We admit there was an inadvertence and oversight on that part. There was some confusion on resolving the claims between Westcor and Bitner and my own personal position as to whether I should represent both or the one. Whether or not Bitner should be claimed against Westcor and with that, because all of these other issues are presently involved in getting those improvements in, and my client having been involved in that, all for the benefit of the plaintiffs who have the only two homes in that subdivision right now, that it became an oversight. We are not trying to be flagrant. We are claiming that now that since we have received notice, just a few days ago, then, of course, it again brought it to our attention. There was no intent to abuse the rules or make a mockery of the Court in any way.

(Transcript of Default Hearing, p. 7).

The foregoing constitutes the entire explanation which the appellant gave to the Court for its failure to file an answer, which is to say it offered no excuse at all. Nevertheless, the Court set aside the default certificates and allowed the appellant to file an answer. Respondents respectfully submit that the Court's decision to relieve

appellant of its default under these circumstances constitutes clear error. Respondents filed notice preserving their right to appeal this decision. (R. 316).

The rule at issue here is 55(c) of the Utah Rules of Civil Procedure which reads:

SETTING ASIDE DEFAULT. For cause good shown the Court may set aside an entry of default. . .

To accept the explanation offered by Mr. Davis as good cause shown renders those terms meaningless. Under this standard, a party need only appear before the Court at some point in order to be relieved from an obligation to comply with the rules, which nominally revokes the requirement that an answer be filed within twenty days after service of a Summons set forth in Rule 12.

This was an intentional violation; the appellant did not just overlook the matter. Respondents' counsel explained to the Court that there had been some discussions between him and Mr. Davis about filing an answer a short time after the default certificates were filed. Respondents at that time agreed to sign a stipulation which would set aside the default certificate if the appellant would file its answer without further delay. Mr. Davis promised to do so. (Record of Default Hearing, p. 1) Despite that agreement no answer was forthcoming and a few weeks later the respondents' counsel sent a letter to Mr. Davis revoking the offer to stipulate. (Transcript of Default Hearing, p. 1) Mr. Davis did not dispute the occurrence or content of those discussions during his argument to the Court. The appellant simply refused to file an answer until the Court threatened it with default judgment and then the the Court allowed the appellant to file its

answer subject to no penalty whatsoever.

The reason given by the Court for its decision to set aside the Default Certificate was that it would be in the interests of justice where the case would proceed against other defendants who had filed answers and against the appellant upon certain cross-claims which have been filed by other defendants who could not claim default. However, it is hard to see how revoking the rules of procedure serves the ends of justice; in this instance it amounts to a reward for wrongful behavior. Furthermore, a significant degree of confusion or difficulty in proceeding with the appellant standing in default as to the respondents was not very likely. The respondents obtained default judgment against other defendants (Lon Badger and Utah Security Mortgage) who participated in the trial in defense of various cross-claims with no undue confusion or difficulty whatsoever. They simply were not allowed to get into any subjects which dealt exclusively with respondents' claims. The appellant would have been in the same position. Furthermore, the trial might have proceeded more smoothly with the dispute between the respondents and appellant removed.

While this Court has stated in many cases that reasonable doubts should be resolved in favor of setting aside defaults Pitts v. Pine Meadow Ranch, 589 P.2d 767, 768 (Ut. 1978), some point must be defined where defaults will be sustained. This case is clearly one where the appellant should not have been excused for failing to file an answer for nearly five months because no excuse was ever made, and the concerns described by the Court were too insignificant to warrant such tolerance of this contemptuous attitude toward the Rules of Procedure.

As such, this ruling was an abuse of the trial court's discretion, and since the case should have never gone to trial, any errors committed at trial are rendered insignificant.

POINT VII

ANY ERROR ALLEGED BY THE APPELLANT WAS HARMLESS BECAUSE THE APPELLANT SHOULD HAVE BEEN FOUND LIABLE TO THE RESPONDENTS FOR NEGLIGENT MISREPRESENTATION.

The respondents claimed the appellant was liable for damages resulting from its negligent misrepresentations concerning the existence of the escrow deposit and the dates on which installation of the subdivision improvements would be completed. The trial court made no finding concerning negligent misrepresentation but it did refuse to hold defendant Blaine B. Bitner personally liable and he is the party who made most of the misrepresentations. Respondents respectfully submit that it was error not to find liability against the appellant for negligent misrepresentation. Reversing this error would render harmless any other error this Court might find with respect to the trial court's findings concerning the breach of contract claims.

The elements of negligent misrepresentation were recently reiterated by this Court in Christenson v. Commonwealth Land Title Insurance Co., 666 P.2d 302 (Utah 1983) citing Jardine v. Brunswick Corp., 18 Utah 2d 378, 381, 423 P.2d 659, 662 (1967) as follows:

Where (1) one having a pecuniary interest in a transaction, (2) is in a superior position to know material facts, and (3) carelessly or negligently makes a false representation concerning them, (4) expecting the other party to rely and act thereon, and (5) the other party reasonably does so and (6) suffers loss in that transaction, the representor can be held responsible if the other elements of fraud are also present.

See also Dugan v. Jones, Utah 615 P.2d 1239 (1980); Restatement (Second) of Torts §552 (1965). See generally 1 F. Harper and James, The Law of Torts, §7.6 (1956); W. Prosser, The Law of Torts, §107 at 704-710 (4th Ed. 1971).

As the definition suggests, a casual statement or gratuitous advice from a stranger to a transaction cannot be the grounds for negligent misrepresentation. The recipient of such information could not reasonably rely on it because he could hardly expect the representor to exercise prudence and care in making the statement that would warrant reliance. If, however,

the information is given in the capacity of one in the business of supplying such information, that care and diligence should be exercised which is compatible with the particular business or profession involved. Those who deal with such persons do so because of the advantages which they expect to derive from this special competence. The law, therefore, may well predicate on such a relationship, the duty of care to insure the accuracy and validity of the information.

1 F. Harper & F. James, supra, §7.6 at 546 [footnotes omitted].

The evidence in the instant case concerning negligent misrepresentation begins with the Escrow Fund Agreement. As has been mentioned previously, the only party named or who signed that agreement as a developer was the appellant. The agreement stated that \$284,400 had been deposited into an account assigned to Summit County to guarantee the timely completion of the subdivision improvements but in fact no funds or account existed when the agreement was signed or afterwards. The agreement was given to Summit County as a condition for granting final approval for the subdivision plat and accepted by the County as satisfaction of its requirement that financing for uncompleted improvements be proven before lots can be sold. The misrepresentation concerning the funds and account was the proximate cause of the respon-

dents' damages because, "but for" it, lots would not have been offered for sale without adequate financing.

Since the Escrow Fund Agreement was required for the benefit of the lot owners, the respondents' claim is not disqualified due to lack of privity with the appellant. This Court has previously held that lack of privity is not fatal to a negligent misrepresentation claim, Dugan v. Jones, supra.

This leaves the question of whether the representation was negligent. Substantial evidence to make such a finding was provided by the appellant's president, Blaine Bitner. He testified that neither the appellant nor anyone associated with it knew anything about Westcor or its principals before or after signing the November 1, 1978 agreement. (T. 130-139) The reason the appellant did not know anything was because it never made any effort to get any information. It made no credit checks (T. 134) and did not request financial statements (T. 132) or resumes from any of Westcor's principals. The appellant did not even bother to ask how Westcor was going to raise the funds to pay for the subdivision improvements. (T. 134, 139) If even a minimal investigation had been made, the fraud being perpetrated by Westcor would have become immediately apparent. (T. 139).

A simple credit check would have revealed that Westcor did not even exist when the November 1 agreement was signed or for a few months after that. It would have also revealed that Douglas Monson had a bad credit history and Richard Johns, the other principal officer of Westcor, was unemployed. Financial statements would have revealed that neither Westcor nor any of its principals had any significant assets or

any financial analysis or other arrangements of funds necessary to meet Westoor's obligations under the development. Business would have revealed that none of the people involved in Westoor had any background in real estate financing or development.

More importantly, a check on the arrangements for Westoor's financing would have revealed at best a plan so implausible that no reasonable and prudent person would have accepted it without at least some additional verification. In his testimony both in deposition and trial Douglas Monson insisted that arrangements for the financing had been arranged with Bonnevillie Toolin and Lon Badger, who were also defendants below. (T. 266) But in his initial testimony Mr. Monson stated that no loan documents had been signed (T. 267), then he later recalled that a promissory note had been signed but he could not locate it. (T. 267). He also claimed the loan was unsecured. (T. 267). He said that prior to arranging for this loan he had met Mr. Badger but nothing more. (T. 267) His story thus was that he had arranged for a (possibly) oral and unsecured personal loan for \$284,400 from a lender who had never dealt with before. On its face, the possibility of such a loan arrangement was remote to say the least.

Blaine Ritner admitted knowing that raising \$285,000 was difficult. The appellant had tried earlier but had not succeeded. (T. 488) The appellant had also negotiated with other parties about joining in the development, but in most of those instances the negotiations failed because the other parties could not raise the development costs without pledging the title to the land as security, which the appellant found unacceptable. (T. 492)

In the end even Blaine Bitner admitted that if he had merely checked on Westcor's and Douglas Monson's credit at the outset, then an agreement would have been signed and this whole situation would never have occurred. No reasonable and prudent person would have failed to do at least that before entering into an agreement with so much at stake, particularly in view of the lack of any justification for reposing such blind trust in these virtual strangers.

If the foregoing facts do not establish the appellant's negligence the Court still should have granted judgment for negligent misrepresentation because the respondents claimed the right to have the burden shifted to the appellant to prove it was not negligent under the doctrine of res ipsa loquitur. To invoke this doctrine the respondents needed to prove three things: (1) the misrepresentation was of a kind which, in the ordinary course of events, would not have happened had due care been observed; (2) the respondents had nothing to do with making the misrepresentation; and (3) the cause of the misrepresentation was something under the control or management of the appellant, or for which it was responsible. Lund v. Mountain Fuel Supply Co., 15 Utah 2d 10, 386 P.2d 408 (1963), Wightman v. Mountain Fuel Supply Co., 5 Utah 2d 373, 302 P.2d 471 (1956).

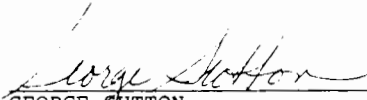
Without restating the facts, it is clear that the respondent's claim met the foregoing tests. Statements that funds and accounts exist are not usually false unless a great deal of carelessness is involved, the respondents had nothing to do with the making the false representation, and the cause of the misrepresentation was something under the control of the appellant and for which it was responsible by the terms of the contract itself.

The record clearly establishes that the appellant could not show it was not negligent if required to. Perhaps the most concise evidence on this point is Bruce Withers's testimony that at the time he signed the Escrow Fund Agreement, the only thing he knew about Westcor or its principals was "... that they said they had \$284,000." (T. 136).

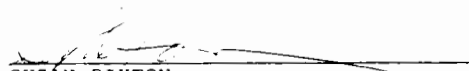
CONCLUSION

Considering all of the evidence presented at trial and viewing it in a light most favorable to the respondents reveals more than substantial support for each of the findings made by the trial court which are attacked in this appeal. Even if substantial evidence had not been presented, the appellant should have been defaulted before trial for its unexplained failure to file an answer for over five months after it was served. It should also have been found separately liable for negligent misrepresentation. Since the Court committed no error, or its errors were harmless, or the errors it committed were in not finding the appellant liable to the respondents on other grounds, the judgment entered by the court below should be affirmed in all respects and respondents should be awarded their costs and attorney's fees incurred in this appeal.

DATED this 13th day of April, 1984.



GEORGE SUTTON



SUZAN PIXTON

ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of Respondents William Dean Rogers and Patricia Lee Rogers to the following counsel of record on this 13th day of April, 1983.

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