

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 On Appeal of Defendant-Appellant M.O. Bitner Co.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiffs-Respondents,

v.

M.O. BITNER CO.,

Defendant-Appellant,

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

No. 19224

Defendants-Respondents,

HAROLD H. BENNETT,

Defendant-Cross-Claimant-Respondent,

and

BLAINE B. BITNER et al.,

Defendants.

BRIEF ON APPEAL OF DEFENDANT-APPELLANT M.O. BITNER CO.

Appeal From The Third Judicial District
For Summit County (Wilkinson, J.)

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(continued on inside cover)

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Bitner Co. was entitled to its sales price. Its principal could earn money in his individual capacity by making referrals, but these would not inure to Bitner Co.'s benefit.

3. BITNER CO. HAD NO CONTROL OVER THE DEVELOPMENT. 14

All development was the responsibility of Westcor, and Bitner Co. had no management or other duties.

4. BITNER CO. DID NOT CONTROL THE FINANCES. 15

Bitner Co. sold its land and had no influence (let alone control) over any funds Westcor might obtain or expenses it might incur in its development.

5. THE RELEVANT DOCUMENTS DISPROVE ANY JOINT VENTURE BY INTENT. 15

The underlying documents do not set forth the elements of joint venture or set up circumstances to permit a joint venture.

- B. THERE IS NO CONCRETE AVERMENT NOR SUBSTANTIATED FINDING OF FACT WHICH WOULD ALLOW THE TRIAL COURT TO FIND A JOINT VENTURE BETWEEN BITNER CO. AND WESTCOR-MONSON AS TO ROGERS BY THE THEORY OF JOINT VENTURE BY ESTOPPEL TOWARD THIRD PARTIES. 16

By their testimony, Rogers relied only on Westcor as its seller and the developer when Rogers decided to buy lots, build houses and obtain construction loans in hopes of selling the houses and lots at a profit. Rogers never knew Bitner Co. or relied on it when it embarked on its actions. Union Tank Co. v. Wheat Brothers, 15 Ut. 2d 101, 387 P. 2d 1000 (Utah 1964).

- C. THE PLAINTIFFS WERE NOT INTENDED THIRD PARTY BENEFICIARIES OF THE PURPORTED TRUST AGREEMENT BETWEEN BITNER CO. AND WESTCOR. 23

When Bitner Co. attempted to resolve Westcor's breach to it, it did not in any document recognize any obligation to Roger or create a beneficiary situation for Rogers. See Walker Bank and Trust Co. v. First Security Corp., 9 Ut. 2d 215, 341 P. 2d 944 (1959).

1. THE PURPORTED TRUST AGREEMENT WAS VOID FROM ITS INCEPTION DUE TO FAILURE OF A CONDITION SUBSEQUENT. 23

Since Westcor failed to do anything the condition subsequent essential to the trust agreement was never made, making that agreement a nullity.

2. EVEN IF THE TRUST AGREEMENT IS NOT NULL AND VOID, THE ENFORCEMENT OF THE HOLD HARMLESS CLAUSE COULD NOT EXCULPATE WESTCOR AND MONSON FROM THEIR OWN WRONGFUL AND FRAUDULENT ACTS. 25

Even if the trust agreement were not a nullity, hold harmless clauses cannot be enforced to cover fraud. Lamb v. Bangart, 525 P. 2d 602 (Utah 1974).

3. EVEN IF THE TRUST AGREEMENT WERE VALID (WHICH BITNER CO. DOES NOT CONCEDE), THE PLAINTIFFS ARE NOT, AS A MATTER OF LAW, INTENDED THIRD PARTY BENEFICIARIES OF THAT CONTRACT WHO COULD DIRECTLY ENFORCE THE HOLD HARMLESS CLAUSE OF THE TRUST AGREEMENT AGAINST BITNER CO. 27

Even if the trust agreement were valid and were to construed to cover fraudulent conduct, the agreement does not make Rogers an intended beneficiary with an enforceable claim against Bitner Co. Rogers is at most an incidental beneficiary. Schwinghammer v. Alexander, 21 Ut 2d 418, 446 P. 2d 414 (Utah 1968).

4. THE TRUST AGREEMENT AND THE JOINT VENTURE THEORY ARE NOT SUPPORTED BY ANY COLLATERAL ESTOPPEL THEORY. 27

An action to require improvements to be made pursuant to an escrow agreement with Summit County does not show that Bitner Co. could be held liable to Rogers for alleged consequential damages.

- D. IF, AS THE TRIAL COURT FOUND, ROGERS IS A THIRD PARTY BENEFICIARY OF THE ESCROW AGREEMENT, ROGERS' RIGHTS OF ENFORCEMENT UNDER THAT AGREEMENT ARE ONLY EQUAL TO THOSE OF SUMMIT COUNTY AND DO NOT EXTEND TO AN ACTION FOR CONSEQUENTIAL DAMAGES. 28

The escrow agreement, like any other agreement, does not confer greater benefits on a third party beneficiary than it does upon the promisee. Rogers thus cannot obtain consequential damages not provided for in the agreement. Moreover, Rogers is not in the category of beneficiaries that could have been contemplated by the escrow agreement since Rogers' improvements were completed at no cost to itself. See, Continental Bank and Trust Company v. R.W. Stewart, 4 Ut.2d 228, 291 P.2d 890 (Utah 1955).

- E. THE TRIAL COURT ERRED IN CALCULATING DAMAGES TO ROGERS. 32

If, despite all the above, Bitner Co. is held liable to Rogers, Rogers must calculate damages on the basis of his own bargain and cannot promote them.

- II. THE TRIAL COURT ERRED IN HOLDING BITNER CO. JOINTLY AND SEVERALLY LIABLE WITH DEFENDANTS WESTCOR, MONSON AND BADGER TO BENNETT. 32

Since Bennett had a preexisting loan to Badger and then loaned money to Westcor so Westcor would eventually be able to repay him for both sums, and since Bitner Co. had no part in either transaction, there was no basis for finding Bitner Co. to be a joint venturer as to Bennett's loans. The cases and arguments concerning joint venture set forth in Section 1A are incorporated here as to Bennett's claim.

- A. THERE WAS NO JOINT VENTURE OF INTENT. 32

Relying on the legal arguments made with regard to joint venture on the Rogers claim, Bitner Co. emphasizes that Bennett had even less basis to claim a joint venture than did Rogers.

- B. THERE WAS NO JOINT VENTURE BY ESTOPPEL TOWARD THIRD PARTIES IN REGARD TO BENNETT. 33

Bennett, a sophisticated businessman, took care to know the parties to his transaction and to get their signatures. He never relied on Bitner Co. in making his loans and had no knowledge, experience or reason to rely on Bitner Co.

- C. EVEN IF A FORMAL JOINT VENTURE BASED ON THE DOCUMENTS COULD BE FOUND, THERE IS NO EVIDENCE OR FINDING THAT WESTCOR, MONSON AND BADGER WERE ACTING IN BEHALF OF SUCH AN ALLEGED JOINT VENTURE WHEN THEY OBTAINED A LOAN FROM BENNETT. 34

Even if Bitner Co. was involved in any kind of joint venture with Westcor, that joint venture did not deal with Bennett in obtaining the Bennett loan.

- D. EVEN IF AN ALLEGED JOINT VENTURE INCLUDING BITNER CO. DID EXIST, THE ACTIONS OF WESTCOR, MONSON AND BADGER IN RELATION TO BENNETT WERE, BY STATUTE, NOT ACTIONS OF THAT JOINT VENTURE. 35

Under the Uniform Partnership Law, U.C.A. §48-1-6(3)a, all of the partners must authorize an assignment of partnership assets in trust for creditors. Bennett received such an assignment from Westcor, Monson and Badger: to comply with the law, Bennett must admit that he had dealt with all partners and that Bitner Co. was not one of them.

- E. THE TRIAL COURT ERRED IN FINDING BENNETT TO BE A DIRECT THIRD PARTY BENEFICIARY UNDER THE TRUST AGREEMENT AMONG BITNER CO., WESTCOR AND MONSON.

36

Bennett was even more remote from the trust agreement than was Rogers; his loans could not be encompassed in the agreement in order to make him into an intended beneficiary. Schwinghammer v. Alexander, supra and the arguments in Section IC3 above.

- F. EVEN IF BENNETT WERE AN INTENDED THIRD PARTY BENEFICIARY OF THE TRUST AGREEMENT (WHICH HE IS NOT), HE COULD NOT ENFORCE THE AGREEMENT BECAUSE THE AGREEMENT IS SPECIFICALLY UNENFORCEABLE BY WESTCOR OR MONSON AS TO THEIR OBLIGATION TO BENNETT.

38

As with the Rogers, when a party has committed fraud (as did Westcor), it cannot by contract place liability for its fraud upon anyone else. Bennett's remedy for the fraud of Westcor, Monson and Badger is against them directly, not by way of a contract clause whose enforcement would violate public policy. Lamb v. Bangart, supra.

- G. THE TRIAL COURT ERRED IN DECLARING BITNER CO. JOINTLY AND SEVERALLY LIABLE FOR PUNITIVE DAMAGES IN THE AMOUNT OF \$10,000.00 TO BENNETT, EVEN IF JOINT AND SEVERAL LIABILITY IS UPHELD AS TO THE REST OF BENNETT'S CLAIM.

39

Even if Bitner Co. could somehow be held liable to Bennett despite the foregoing, Bitner Co., which did not directly commit fraud, should not be liable for punitive damages arising from the direct and specific fraud of Westcor, Monson and Badger. Likewise, an award of an attorney's fee against Bitner Co. is inappropriate.

III. THE TRIAL COURT ERRED IN DENYING THE MOTIONS FOR A MISTRIAL MADE BY DEFENDANTS' COUNSEL JOHN S. DAVIS WHEN IT BECAME CLEAR THAT HE, AS COUNSEL, COULD NOT ADEQUATELY REPRESENT BITNER CO. AND WESTCOR AND MONSON BECAUSE OF SERIOUS AND COMPELLING CONFLICT OF INTEREST.

40

Bitner Co.'s former counsel John S. Davis undertook representation of parties whose interests were in direct and obvious conflict so that he was unable to represent each adequately. Although recognizing the severe problem, the trial court refused to remedy the problem on Davis' repeated motions for mistrial or a new trial. As an alternative, the Court should grant Bitner Co. a new trial on any issues not resolved in its favor on this appeal. U.R. Civ. P. Rule 61, Disciplinary Rules 5-102, 5-105.

CONCLUSION

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BRIEF ON APPEAL OF DEFENDANT-APPELLANT M.O. BITNER CO.

NATURE OF THE CASE

Defendant-appellant appeals from an order and judgment after trial in the Third Judicial District Court for Summit County (per Wilkinson, J.) which awarded damages and other relief to plaintiffs and to cross-claimant on the theory that defendant-appellant was a joint venturer with certain other defendants.

DISPOSITION IN THE LOWER COURT

The trial court found three defendants, including the defendant-appellant, jointly and severally liable to the plaintiffs for damages, costs and attorney's fees on the grounds, first, that the failure of certain of the defendants to provide improvements to lots purchased by the plaintiffs had harmed the plaintiffs and, second, that the defendants against which the judgment was so rendered were engaged in a joint venture. In the alternative, the court found, third, that the plaintiffs were third party beneficiaries of certain agreements between the defendant-appellant and the other defendants against whom liability was found directly.

The trial court further found the defendants against whom the cross-claim had been filed jointly and severally liable to the cross-claimant, the defendants other than the defendant-appellant directly liable to the cross-claimant because of breach of contract and the defendant-appellant liable jointly and severally on the grounds either that the defendant-appellant was involved in a joint venture with other defendants or that the cross-claimant was a third party beneficiary of a hold harmless agreement between the defendant-appellant and the defendants against which the cross-claimant had a

direct claim. The trial court also granted punitive damages because of the misconduct committed by certain defendants, costs and attorney's fees to the cross-defendant jointly and severally against the defendants including the defendant-appellant.

The trial court denied two motions for mistrial and a new trial. The motions were based on the conflicts of interest among defendants represented by the same trial counsel.

NATURE OF THE RELIEF SOUGHT

The defendant-appellant requests this Court to reverse the decision of the trial court and enter judgment in the following particulars:

a. As to the findings for the plaintiffs, to:

1. Reverse, as a matter of law, any finding by the trial court that the defendant-appellant was engaged with any other defendants in a joint venture by intent.

2. Reverse, as a matter of law or fact, any finding of the trial court that the defendant-appellant was engaged with any of the other defendants in a joint venture by estoppel as to the plaintiffs, or, in the alternative, find that the facts as presented in trial are inadequate for determination of that issue.

3. Reverse, as a matter of law, the holding by the trial court that the plaintiffs are third party beneficiaries of the hold harmless clause in the trust agreement between the defendant-appellant and other defendant defendants.

4. Find, as a matter of law and equity, that the hold harmless agreement is void and unenforceable because of fraud.

5. Reverse as a matter of law the trial court's holding that the plaintiffs are third party beneficiaries of the escrow agreements with

defendant-appellant and Summit County, at least as far as consequential damages may be concerned.

6. Reverse the judgment finding the defendant-appellant jointly or severally liable to the defendants for the damages claimed or awarded to the plaintiffs, or in the alternative, recalculate and reduce the damages awarded to plaintiff or grant a new trial on the issue of joint venture by estoppel (third parties); or

7. In the alternative, grant defendant-appellant a new trial on plaintiffs' claims because of conflicting interests between it and other defendants represented by the same counsel.

Note: The defendant-appellant does not appeal from that portion of the judgment which quieted title to two lots for the plaintiffs.

As to the finding for the cross-claimants, to:

1. Reverse, as a matter of law, the finding of the trial court that there existed a joint venture by intent between the defendant-appellant and the other defendants against which the cross-claim was brought.

2. Reverse, as a matter of fact and law, any finding by the trial court that the defendant-appellant is jointly and severally liable to the cross-claimant on any theory arising out of joint venture by estoppel as to third parties;

3. Find, as a matter of law, that the defendant-appellant had no part in any loan agreement entered into by certain other defendants even if a joint venture existed, that any alleged joint venture involving defendant-appellant had no part in the loan agreement either because of absence of privity between the cross-claimant and that joint venture, or because the acts of the other defendants were, by statute, not acts of the alleged joint venture.

4. Find, as a matter of law, that the cross-claimant is not a third party beneficiary of the hold harmless clause in a trust agreement between the defendant-appellant and the other defendants cross-claimed against;

5. Find, as a matter of law and equity, that the hold harmless agreement as among the parties involved in the cross-claim is void as against public policy on the basis of fraud;

6. Find, as a matter of law and equity, that the defendant-appellant may not be held jointly and severally liable for punitive damages granted because of fraud, the trial court having specifically found that the defendant-appellant did not participate in the fraud by the other defendants;

7. Reverse as a matter of law the findings of the trial court that the defendant-appellant is liable for damages to the cross-claimant, either jointly or severally with the other defendants against whom the cross-claim has been brought.

8. In the alternative, grant defendant-appellant a new trial on the cross-claim because of the conflicting interests between it and other defendants represented by the same counsel.

STATEMENT OF FACTS

1. The Parties and the Underlying Agreements.

The defendant-appellant M.O. Bitner Co. ("Bitner Co."), was the owner of the real estate which is, in part, the subject matter of this case and called Park Ridge Estates ("Park Ridge"). Bitner Co.'s principal is Blaine Bitner, who was one of the defendants ("Blaine Bitner").

By early 1978 Bitner Co. had planned and plotted a subdivision and had obtained preliminary approval for its development of Park Ridge from Summit County.

On November 1, 1978, Bitner Co. entered into a Uniform Real Estate Contract ("Real Est. Contract") (Exhibit ["Ex."] 23P), which, together with certain exhibits attached to it, created an agreement with defendant Westcor, a corporation in formation ("Westcor"). Westcor's principal officer, owner and vice president was defendant Monson ("Monson"). Westcor's president, defendant Richard Johns III, was not served in this action, and there is little evidence concerning his actions. The trial court found that Monson acted for Westcor and became its only principal. It thus treated the two as alter egos and referred to them interchangeably. (Findings of Fact and Law ["Findings"] Record ["R."] 787 #9) The record supports the trial court's determination of identity between Westcor and Monson and their interests.

Under the Real Est. Contract, Bitner Co. agreed to sell Park Ridge and all rights and obligations of improvement in Park Ridge to Westcor for \$400,000 and other consideration. An undated supplemental agreement was attached to the Real Est. Contract. (Ex. 23P) Under the supplementary provisions, principals of Bitner Co. and Westcor could earn referral fees for each purchaser referred by them to Westcor for any of the lots in Park Ridge. These fees were payable to individuals and not to their respective companies.

The Real Est. Contract provided that Westcor accepted all development responsibility in Park Ridge and was to complete improvements within one year. If the development costs incurred by Westcor proved to be less than anticipated, Bitner Co. would receive an additional sum beyond the \$400,000 selling price. (Ex. 23P)

Westcor arranged for an escrow agreement in favor of Summit County, guaranteeing completion of improvements within two years. Westcor also obtained Bitner Co.'s signature on that agreement, having informed Bitner Co. that it must sign the agreement as the selling land owner. (Transcript

["Tr."] 220-2) Westcor then filed the escrow agreement with the County (the "Escrow Agreement") (Ex. 24P). The trial transcript indicates that the Escrow Agreement was extended, but no copy of the extended Escrow Agreement was entered into the record.

Westcor, through real estate agents, the principals of Westcor and Bitner Co. and otherwise, was able to sell all the lots in Park Ridge within a few months after the signing of the Real Est. Contract. All sales agreements were signed solely by Westcor (as seller), and all contract payments were to be made solely to Westcor. (See, Exs. 31D-36D, 40D, 77D-88D) However, Westcor never funded the Escrow Agreement with Summit County as required by the Real Est. Contract. (Findings R. 770 #13)

On or near August 29, 1979, Westcor contracted with Bitner Excavation Company, ("Excavation Co."), a Utah corporation existing separately and independently from Bitner Co., to install certain improvements in Park Ridge. (Tr. 223) However, Westcor did not pay Excavation Co. for work done, and when Westcor made payments by check for materials for the improvements, its checks failed to clear the bank. (Tr. 206) The trial court found that, except for paying for minimal amounts of materials, Westcor never made any effort to fulfill its obligation to install the improvements at Park Ridge. (Findings R. 770 #12)

In the months following the signing of the Real Est. Contract, Westcor failed to fulfill its obligation to make improvements at Park Ridge. It also breached the Real Est. Contract by failing to make required payments to Bitner Co. (Tr. 221-22) and even told some persons that it was no longer a part of the Park Ridge development. Faced with Westcor's breach and eventual repudiation of the Real Est. Contract, Bitner Co. attempted to reach some kind of resolution of its problems with Westcor and to recover the land.

On June 30, 1980, Bitner Co. and Westcor signed a Trust Agreement (Ex. 28P) recognizing that Westcor had defaulted on the Real Est. Contract and returning all rights in the property to Bitner Co. The Agreement contained a Hold Harmless Clause from Bitner Co. to Westcor, subject to Westcor's complying with certain requirements of the agreement (the "Trust Agreement" and the "Hold Harmless Clause").

Initial construction of the improvements to Park Ridge began in 1979, but they were not completed until the summer of 1981, as was required in an extension of the escrow agreement with Summit County obtained by Bitner Co. in late 1980.

2. The Rogers Claim.

On April 18, 1978, the plaintiffs William Dean Rogers and Patricia Lee Rogers (collectively "Rogers") purchased two lots in Park Ridge through a real estate agent representing Westcor. The agent told Rogers that Westcor had represented to him that the improvements to Park Ridge would be completed by fall, 1979. Rogers purchased the lots, intending to build two homes on speculation and to sell them for profit. (Findings, R. 772-74)

In order to build the homes, Rogers obtained construction loans which were fully payable with interest in January, 1980. Rogers began to construct the homes in late spring, 1979. He alleges that the homes could have been finished and sold in 1979 if the improvements to Park Ridge had been completed in 1979, but the construction itself was not completed in 1979. (Id.)

Rogers further alleged that because the improvements were not completed, he was not able to sell the homes and therefore was not able to pay off the construction loans. After having obtained a three month extension on

the loans and still not having sold the homes, Rogers converted the loans to 30 year mortgages in or about April, 1980. (Id.)

In the summer of 1980, Rogers found purchasers for both homes and entered into earnest money agreements to sell one home in July, 1980 for \$130,000 and the other in September of 1980 for \$130,000 (hereinafter referred to as "Earnest Money Agreements.") Those Agreements are not part of the record but are mentioned by the trial court in its Findings of Fact (Findings R. 775). The Earnest Money Agreements were subject to the completion of the improvements, which, according to Rogers, were not completed while the Earnest Money Agreements were valid and binding on the prospective buyers. (Id.)

Rogers alleged that by late 1980, he was no longer able to pay the mortgage payments on the two homes and was forced to avoid threatened foreclosure by agreeing to transfer all rights and obligations he had in the homes and property to the prospective buyers who had earlier signed the Earnest Money Agreements. Those buyers assumed the mortgages on the homes. One mortgage amounted to \$105,419.95 and the second amounted to \$106,689.00. Rogers alleged that the difference between these loans assumed by the buyers and the appraised value at the time of the assumption of the mortgages by his buyers is the measure of damages resulting from loss of contractual opportunity. The trial court found for Rogers on these allegations. (Findings R. 775-76 #30)

Rogers also demanded that title to the lots he purchased in Park Ridge be quieted. The trial court's judgment to quiet title is not challenged in this appeal, but Bitner Co. considers that quiet title claim relevant because the trial court found that the cloud on title arose from fraudulent actions by Westcor and defendant Alonzo Badger (hereinafter "Badger"). The trial court also found that Westcor had taken a number of actions which amounted

fraud by Westcor against Rogers by not funding the Escrow Agreement and
fraud in the actions by Westcor, Monson and Badger which clouded Rogers'
(Findings R. 777 #34)

The Cross Claim.

As of August 2, 1979, Badger owed defendant and cross-claimant
Harold H. Bennett ("Bennett") the sum of \$81,078.00 plus interest. The reason
for this debt is unstated, but the record is completely clear that the loan
and debt had nothing to do with Park Ridge or with Bitner Co. Badger was the
principal in the defunct company, Utah Security Mortgage. Although the record
is somewhat unclear, apparently Badger and Monson had agreed to participate
together in Westcor's development of Park Ridge and in other activities the
two men were engaged in. (See Findings R. 726 #41)

Shortly before August 2, 1979, Badger contacted Bennett and told
Bennett that if he would make a loan to Westcor, Westcor would assign him
contract receivables from Park Ridge and Badger would then sell the contract
receivables to a third party financial institution. The proposed assignment
and sale would allow Westcor and Badger to repay the \$81,078.00 Badger owed
and to repay any new loan to be made by Bennett to Westcor. Bennett agreed to
the transaction. (Id. at ##36, 37)

On August 2, 1979, Bennett made a loan of \$50,000.00 to Westcor and
received a promissory note signed personally by Badger and by Monson as vice
president of Westcor. (Ex. 72D) The note required the total amount of
\$131,078, the amount already owed by Badger and the \$50,000.00 loaned to
Westcor, to be paid to Bennett in full on or before November 30, 1979. (Id.)

To secure payment on the note, Westcor assigned to Bennett contracts
and receivables on Park Ridge with a face value of \$208,348.48. Badger and
Monson, acting as and stating that they were a partnership, represented that

the contracts or receivables would be sold by them on behalf of Bennett, or Bennett would then be repaid from the proceeds of those sales, or, that as an alternative, Bonneville Thrift Company, a company owned and controlled by Badger, would purchase the contracts with the same effect. Bonneville Thrift Company was named as a defendant in the action but has become defunct. (Findings R. 779 ##39, 40, 41) On information and belief, it was the target of investigation and subsequent legal proceedings by Utah State authorities.

Westcor represented to Bennett upon borrowing the money that the proceeds (or at least a part of the proceeds) were to fund Westcor's obligations relating to Park Ridge, but the testimony at trial revealed little evidence that any of the proceeds of the loan were so used. (See Id. R770-2), which directly contradicts R. 779 #42. Monson testified that "some" of the money went into Park Ridge but did not remember how much. Tr. 407)

When Westcor, Monson and Badger made the alleged assignments of contracts to Bennett to cover the value of the note, they asked Bennett not to record the assignments because the contracts were to be sold by Badger to obtain funds to repay Bennett. Bennett did not then record those assignments. (Findings R. 781 ##45a, b, c)

At the time the assignments were being made to Bennett, at least four of the same contracts had already been assigned by Monson and Badger to someone else. The trial court thus found that Bennett was fraudulently induced to enter into his loan agreement with Westcor and Badger. It was found that Monson, Westcor and Badger committed fraud against Bennett after the loan arrangement had been made, since on August 31, 1979, within 29 days after Westcor, Monson and Badger had made their loan agreement with Bennett, both Monson and Badger made even further assignments of the contracts they assigned to Bennett on August 2, 1979. (Findings R. 726-28 #43)

The Conflicts of Interest.

Throughout the trial in the present case, Blaine Bitner, Bitner Co., Westcor and Monson were all represented by another defendant, John S. Davis ("J.D."), then a practicing member of the Utah State Bar. (See, e.g., Tr. 2) J.D. also represented himself. Davis also testified at trial, having been called by Rogers. (Tr. 1103 et seq.) Davis made two motions on the record for a mistrial or for relief because of conflicts among himself and his other clients on issues relating to the existence of a joint venture among them as to Rogers and as to the Bennett loan. (Tr. 500, 896) Bitner Co. replaced Davis as its counsel after the trial court had entered its judgment.

ARGUMENT

THE TRIAL COURT ERRED IN FINDING BITNER CO. JOINTLY AND SEVERALLY LIABLE WITH WESTCOR, MONSON AND BADGER FOR DAMAGES TO ROGERS.

In order for Bitner Co. to be held liable to Rogers, either jointly or severally, the trial court had to find as a matter of fact and law that Bitner Co. had an obligation either jointly or severally to Rogers which Bitner Co. breached to the detriment of Rogers. In finding such an obligation, the trial court declared that there was a joint venture between Bitner Co. and Westcor and Monson, or that, in the alternative, Rogers was an intended third party beneficiary of the Hold Harmless Clause in the Trust Agreement and of the Escrow Agreement required by Summit County. On this conclusion, the trial court awarded Rogers damages against Bitner Co. for the losses suffered. The trial court erred in all of these findings.

The facts do not show a joint venture of intent between Bitner Co. and Westcor or Monson as a matter of law.

This Court has stated the essential elements for a joint venture by analogy in a number of cases:

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 a common purpose, a joint proprietary interest in 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 in any losses which may be sustained.

Bassett v. Baker, 530 P.2d 1, 2 (Utah 1974) (emphasis added). These standards were reaffirmed in Bettenson v. Call Auto and Equipment Sales, Inc., 645 P.2d 684, 686 (Utah 1982). A number of the elements essential for finding a joint venture by intent are missing in the present situation.

1. There was no element of loss.

Bitner Co. entered into the Real Est. Contract (Ex. 23P) under which Westcor agreed to pay Bitner Co. \$400,000.00 for title to the land in Park Ridge. That \$400,000.00 was due and payable whether or not Westcor succeeded in developing and marketing Park Ridge. Any failure of Westcor or Monson to make whatever profit they expected from their development of Park Ridge would not result in a loss of any sort to Bitner Co.

While there were ancillary agreements to the Real Est. Agreement, (considered as one agreement in the trial), none of those agreements placed any affirmative obligation on Bitner Co., and none of them required Bitner Co. to share in any losses. (See Ex. 23P) Indeed, the subsequent agreements were designed solely to provide an opportunity for Blaine Bitner and other individuals (not the companies) to obtain finders' fees by assisting Westcor to find buyers for the lots, since these persons already knew of some prospects. (Ex. 23P, Tr. 511-15)

The clause in the Real Est. Contract allowing Bitner Co. to share in any savings on the development of Park Ridge added to the possibility of further income for Bitner Co. but did not create any possibility of loss to Bitner Co. The clause simply meant that if Westcor were able to save money on the improvements so that the improvements cost less than anticipated, Westcor

would pay Bitner Co. more money for the land itself. It was the sole obligation of Westcor to pay and bear all development costs, all sales costs and all other costs relating to the development of Park Ridge. (Ex. 23P)

As this Court found in Bassett:

While the agreement to share losses need not necessarily be stated in specific terms, the agreement must be such as to permit the courts to infer that the parties intended to share losses as well as profits.

Bassett, supra, 530 P.2d at 2. There is nothing in the Real Est. Contract that allows any inference whatsoever that Bitner Co. would share losses or costs of development with Westcor. Since Bitner Co. was party to a straightforward, uniform Real Est. Contract, it could sue Westcor for any failure by Westcor to meet the terms of the sale; Bitner Co. could obtain damages to cover its losses or regain the property in order to avoid any loss because of a failure or default by Westcor. In the absence of the element of loss, then, there was no joint venture between Bitner Co. and Westcor or its principal Monson.

2. There was no profit sharing.

Rogers' contention that the price of the land in the sale to Westcor was based on sharing expected profits from the development of Park Ridge so that the simple sales agreement should be considered to be sharing of profits in the nature of a joint venture ignores the fact 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. Thus, the purchase price to be paid by Westcor was not a sharing of profits. (Ex. 23P)

During the trial Rogers made great issue of the tax planning aspects of the sale, with the apparent hope of showing that the sale was illusory and reflected a mere contribution of assets. This argument is strained and fallacious. The tax planning done by Bitner Co. is common, legal and

perfectly legitimate grounds to motivate Bitner Co. not to proceed with any joint venture or other transaction that might have been considered. The sale was a sale. Why the sellers chose the form of sale they did is irrelevant to that fact that the choice was made and reduced to writing. That writing is the best evidence of the transaction it memorialized. (Ex. 23P)

3. Bitner Co. had no control over the development.

Other elements of a joint venture by intent enumerated by this Court are missing from the relationship between Bitner Co. and Westcor and Monson. Blaine Bitner and witness Roger Bitner testified without contradiction that Bitner Co. and Blaine Bitner as an individual had no right to control the development of the subdivision and that Westcor did intend it to have any control. (Tr. 140, 524-25, 904) Bitner Co. derived no control over Park Ridge from the separate relationship Excavation Co. developed with Westcor as a subcontractor at Park Ridge. Westcor or Monson did hire the separate and independent Excavation Co. to install improvements at Park Ridge, but Excavation Co. had no power or control over the project. It is the uncontroverted testimony of Blaine Bitner, president of Excavation Co. and of Roger Bitner, who signed the contract on behalf of Excavation Co. (Ex. 102D) and was actually engaged in the work, that Excavation Co. was not hired for the job nor allowed to begin work upon the site until August 29, 1979. Excavation Co. was hired and allowed to work at the site only after reaching a contractual agreement with Westcor and Monson about what work Excavation Co. would perform. (Id.)

Thus, the trial court's contention that all improvement was done by Bitner Co. or persons under contract with it is simply not substantiated in any way by the record. (Finding R. 717 #13)

It is thus clear and uncontroverted on the record that Excavation Co. (which is not the same as or an alter ego for Bitner Co.) entered a separate understanding with Westcor-Monson to provide certain excavating services for which Excavation Co. was to be paid certain sums by Westcor. (Tr. 140, 404) Excavation Co.'s purely contractual obligations to perform services cannot be attributed to Bitner Co. and do not entangle Bitner Co. into any new relationship with Westcor or Monson. The trial court's assumption that the excavating services performed by an independent company were related to the sale of property by another company is clearly erroneous. The two companies are not only separate legal entities, but the trial court had no grounds for looking beyond their legal status.

4. Bitner Co. did not control the finances.

It is also clear from the record and the documents that Bitner Co. had no control over the finances for the development of Park Ridge. All sales in the development were made in the name of Westcor, and all accounts receivable from those sales were payable to Westcor. Bitner Co. was not a party to any of those agreements and was not a payee under any of them. (See, inter alia, Exs. 29D-36D, 40D, 77D-88D)

5. The relevant documents disprove any joint venture by intent.

The plaintiffs emphasize the fact that Bitner Co. signed the Escrow Agreement with the County, alleging that Agreement evidences Bitner Co.'s alleged status as a joint venturer. The record shows that Westcor made all contact relevant to the establishment of the Escrow Agreement. (Tr. 432-33) In its Answer to Plaintiffs' Second Amended Complaint, Bitner Co. stated that the signing "...was done only to satisfy the Summit County requirements because fee title [to Park Ridge] had not passed to Westcor, Inc., at that time." (R. 677; see also Tr. 220-21) Rogers did not contradict this

statement even though the question as to why Bitner Co. signed the Escrow Agreement was raised at the trial. The Escrow Agreement, then, is not proof of a joint venture.

Throughout the trial, as the trial court examined any relationship between Bitner Co. and Westcor or Monson, Rogers demanded that the Real Est. Contract (with the ancilliary agreements), must be allowed to speak for themselves, and so they do. (Tr. 355-56, 360, 525; see Ex. 23P) It is the very agreements to which Rogers referred, (Ex. 23P) which contain no provision and not even any inference that Westcor intended to share losses with Bitner Co. The agreements obviate any argument that Bitner Co. had any control over the development or the finance of Park Ridge after the signing of those agreements. Rogers should be held to his own evidentiary demands, and on those demands, he loses his claim.

B. There is no concrete averment nor substantiated finding of fact which would allow the trial court to find a joint venture between Bitner Co. and Westcor or Monson as to Rogers under the theory of joint venture by estoppel toward third parties.

The trial court, in finding an alleged joint venture between Bitner Co. and Westcor or Monson, appears to rely primarily on the documentation discussed above. However, the trial court also makes some references to surrounding circumstances and appearances, which, though ambiguous, may have suggested to the trial court that it could find a joint venture by estoppel to a third party. That conclusion does not, however, withstand scrutiny.

A joint venture by estoppel toward a third party occurs when, despite the intent of parties, their actions lead a third party first, to believe that the requirements for a joint venture between the alleged joint venturers have been met, second, to place reasonable reliance on those appearances, and third, to act upon that reasonable reliance to its detriment. 46 Am. Jur. 2d 59, pp. 30-31.

This Court has accepted the doctrine of estoppel and has said:

We do not question the soundness of that doctrine under proper circumstances. But it is a doctrine of equity which the plaintiff could claim the benefit of only by showing the facts required to justify its application. These would include that the defendants were aware of all the material facts; that in such awareness they made the promise when they knew that the plaintiff was acting in reliance on it; that the latter, observing reasonable care and prudence, acted in reliance on the promise and got into a position where it suffered a loss.

Union Tank Car Co. v. Wheat Brothers, 15 Ut.2d 101, 387 P.2d 1000, 1003-04 (Utah 1964). Those conditions are not met by Rogers here, and the trial court's conclusion that there was a joint venture is clearly erroneous.

Rogers and his wife both admitted that from 1979 through early 1980 both of them relied entirely on Westcor. Rogers' reliance on Westcor was justified by the sales agreement with Westcor alone. Rogers planned the construction of the houses, the obtaining of construction loans and the planned sales of the houses when only Westcor was on the scene. Cross-examination of Rogers elicited the following admissions:

Q Did he [a representative of Westcor] ever indicate to you that there was any kind of a contract between Westcor and Milton O. Bitner Company?

A No.

Q Did he ever indicate to you that Westcor and Milton O. Bitner Company were either partners or joint ventures in this project?

A No.

Q Did he make any representations to you that Westcor was in fact the developer?

A At that time, yeah. That is what I understood anyway.

Q In your conversations with Mr. Bitner on the construction site, did he ever indicate to you that Milton O. Bitner Company and Westcor were partners or joint venturers?

A No.

- Q Did he ever indicate to you by what authority Bitner Excavating was putting in improvements?
- A No.
- Q Did he ever indicate that he was operating under contract from Westcor?
- A Blaine didn't, no.
- Q So it is your testimony then that you observed the improvements going in but you had no idea who was putting them in or by what authority?
- A I know who was putting them in.
- Q All right. Let me reword that. You had no idea who was responsible ultimately for putting them in?
- A Well, at the very early stage of it I assumed that Westcor had the responsibility to do it.
- Q How early?
- A Oh, all the way up to probably have to be maybe right in July and August of '79.
- Q And what did you base that assumption on?
- A Well, just through conversations, really.
- Q Do you remember with who?
- A No. Well, let's see, I am losing track now.
- Q Is it your conversation, your testimony then that you went for a period of three months, you obtained a large construction loan and then you proceeded ahead on construction for maybe two or three months or possibly even longer before you had any idea who the developer was and who was responsible for putting in the improvements?
- A No, that is not right. I knew who the developer was.
- Q Okay. Well, then that was my question. When did you find out who the developer was?
- A Well, at the time that I closed out the loan or even, yeah, I guess it was about the time when we closed out the loan.
- Q So was it Mr Hunt that you found that out from, or was it Mr. Kilbourne?

A It might have been Kilbourne. I am not too sure of that.

Q Did Mr. Kilbourne or Mr. Hunt ever indicate to you that Michael [sic, Milton] O. Bitner Company was either the developer or had responsibility for putting in the improvements?

A No. Not at this time, no.

(Tr. 96-99, see, also Tr. 642-43, Tr. 741)

In early 1980, Westcor had defaulted as to Rogers because the improvements Westcor had promised were not installed. Westcor had also defaulted as to Bitner Co. under the Real Est. Contract. Westcor was then negotiating its way out of the Real Est. Contract, and the Trust Agreement was being developed as the vehicle to resolve that problem with Bitner Co.

Rogers learned from other purchasers that they were planning to bring suit pursuant to the Escrow Agreement with Summit County. Rogers, despite this information, took no action. He never even checked on the status of the Escrow Agreement. (Tr. 740-44)

Because of the disputes raised by the other purchasers and because of Westcor's various defaults, Bitner Co. funded the extended Escrow Agreement and also signed the Trust Agreement with Westcor, hoping to be able to protect the value of the land which would thereupon revert to it because of Westcor's breach. Bitner Co. had been induced by Westcor to sign the Escrow Agreement in the first place because Bitner Co. understood that the original seller of the land was required by the County to sign the Escrow Agreement. When a court order enforcing the Escrow Agreement as to the County was obtained, Bitner Co. was required by its earlier signature to make the improvements at Park Ridge in 1981. Blaine Bitner testified why Bitner Co. signed the original Escrow Agreement:

Q Nine days later you signed an escrow fund agreement with Summit County, though didn't you?

A That is right. They [Westcor] came back to us and said they had to have it.

Q And then two months or so later you signed protective covenants with Summit County?

A Whatever was needed, why that was handled through the [Westcor's] attorney.

Q And Summit County told you you had to sign that, too?

A That is right.

Q As landowners?

A As the original fee holder.

Q Even though you didn't have any of the property any more?

A That is right.

Q Isn't it true that you really did want to keep a finger in the pie?

A No, we didn't. We wanted to get rid of it because we were interested in other, we had, I had plenty of work to do. I was working in the livestock and those of you that know, it is a 24-hour emergency. Constantly.

(Tr. 221-22) Bitner Co., because it had sold the land and signed the Escrow Agreement was, in effect, being forced to cure the breach and default by Westcor.

At some time, after realizing Westcor's defaults, Rogers contacted Blaine Bitner to complain of Westcor's default. Blaine Bitner responded that he guessed something would have to be done. But by that time, Rogers had already taken all his actions to build the houses in reliance on Westcor. Bitner Co. had no relationship or responsibility to Rogers at that time or before that time. Bitner Co.'s only responsibility thereafter arose from the Escrow Agreement and was limited only to the terms and requirements of that Agreement as interpreted through the judgment in the case brought by other purchasers. Lynn, et al. v. Westcor, et al., Third District Summit Co. (Civil No. 5985, 1980)

The trial court, however, may have decided that there was reliance by Rogers and seems to convince itself of this conclusion primarily because Blaine Bitner appeared from time to time at the development site and because he was the president of Excavation Co. which was doing part of the work there under contract with Westcor. (Findings, R. 717 #13) Rogers never claimed that he relied on these appearances.

Blaine Bitner's appearances at the development site were either those of an interested creditor, concerned with whether or not the party with which Bitner Co. stood in a contractual obligation was going to be able to pay Bitner Co. for the land or those of the president of Excavation Co., which had a separate contractual duty to perform excavating services. It is not unusual for the principal of a creditor company, especially when the creditor is the seller of land, to be interested in the progress of the debtor's business operations, as it is not uncommon for a creditor to examine his debtor's operations, assessing the debtor's ability to repay the debt.

Blaine Bitner's visits to the site as president of Excavation Co. no more created the appearance of a joint venture than would the appearance of any other creditor or contractor on the site of a developer. There is no allegation in the complaint and no factual statement or evidence in the trial testimony to show that Rogers was even aware that Bitner Co. existed when Rogers first saw Blaine Bitner at the site or even at the time Rogers began to realize that Westcor would probably not succeed in providing the improvements Westcor alone had promised.

Joint ventureship by estoppel, as in any other case of estoppel, must arise from a reasonable expectation based on promises or appearances. The only reasonable appearance was that Excavation Co. was a contractor to Westcor, the party with whom Rogers had a contractual relationship. Rogers

could see that Westcor had engaged Excavation Co. to perform services; Rogers had no reason to see or infer anything other than that. Seeing Blaine Bitner supervise excavating work would not suggest to a reasonable person that he could rely on an excavator as a joint venturer.

The record also shows that Rogers made little or no effort to determine Westcor's standing or to determine why or whether Westcor would or would not be able to complete development of the subdivision improvements it had promised, even though other purchasers had told Rogers of the Escrow Agreement and their planned suit. Rogers admitted that he had not asked Summit County who was the escrow guarantor of the development until well after he had decided to buy the lots and build the houses and had obtained loans and begun the construction. (Tr. 741-44) Bitner Co. was nowhere present on the project. Any reasonable investigation by Rogers would have revealed the relationship among the parties with whom he had contact, i.e., Westcor and Excavation Co.

To sustain an allegation of joint venture by estoppel toward a third party, Rogers (as the third party) must allege and prove that he acted in reliance on the existence of the alleged joint venture in taking actions leading to the losses. Rogers may not, after having acted and sustained damage, piece together information to allege the creation of a joint venture relationship. Hindsight will not create actual reliance to prove an estoppel. Rogers cannot create such obligations from whole cloth and then use the creation to prove a joint venture by estoppel reliance. Rogers and Mrs. Rogers did not so rely. Like Rogers, Bitner Co. was caught by Westcor's breaches. Being a fellow victim with Rogers, however, no more makes Bitner Co. a joint venturer with Westcor than Rogers himself was.

- C. The plaintiffs were not intended third party beneficiaries of the purported trust agreement between Bitner Co. and Westcor.

This brief uses the term "intended beneficiary" rather than the older "creditor third party beneficiary" to refer to third party beneficiaries, who as a matter of law, may obtain direct benefit of an agreement to which they are not promisees. "Creditor" beneficiary is a term of art, which, as this court noted in Clark v. American Standard, Inc., 583 P.2d 618, 620 (Utah 1978), is confusing. Simply being a creditor in the debtor-creditor sense is not enough to make such a creditor an intended third party beneficiary. As this Court stated in Walker Bank and Trust Co. v. First Security Corp., 9 Ut. 2d 215, 341 P.2d 944 (Utah 1959), an intended beneficiary arises "...where, from the nature of the contract, it is plainly evident to the promissor that the contract is for the benefit of third parties..." (Emphasis added.) The trial court in this case simply used the term "third party beneficiaries", leaving unclear what brought it to find intended beneficiaries. Bitner Co. did not create or agree to any document or take any action which made Rogers an intended beneficiary.

1. The Trust Agreement was void due to failure of a condition subsequent.

Paragraph 6 of the Trust Agreement between Bitner Co. and Westcor (Ex. 28P) contains a condition subsequent which must be fulfilled or the agreement (and hence the Hold Harmless Clause) becomes null and void. The Trust Agreement provides:

6. Bitner 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 null and void, the original contract shall become in full force, and all amounts received and disbursed by Davis shall be accounted for and applied against the original contract, and all items assigned to Davis shall be assigned back to Westcor.

Bitner Co. testified that the condition subsequent had not been fulfilled and that Bitner Co. considered the agreement null and void. Blaine Bitner testified on direct examination:

Q You're holding Westcor harmless right now, aren't you?

A No. And that was, when that agreement was signed, I would have to ask Mr. Davis, but there is a stipulation in there that if certain things weren't done within thirty days that was null and void, and that is what I told you previously.

(Tr. 226) Blaine Bitner continued:

Q Why didn't you file anything against them in this lawsuit? If they cheated you and double-crossed you why are you still standing on the same side of the fence as Westcor, if they are the ones you did the damage? ...

THE WITNESS: We don't, we don't hold them harmless. We, I contradict you on that.

(Tr. 227, 228)

Since the condition required Westcor's best efforts and it is evident that Westcor did nothing, Bitner Co. is correct despite Monson's testimony that Westcor disagreed. The inactions of Westcor cannot be overcome by the mere assertions of Monson's opinion. Because of the obvious conflict between the views of Bitner Co. and Westcor, their joint counsel did nothing more to strengthen the record. (See Section III below.) But on the preponderance of evidence in the record, the trial court could properly find only that the Agreement between Bitner Co. and Westcor is null and void as a matter of law. Thus, no Trust Agreement (or Hold Harmless Clause) exists under which Westcor can be held harmless by Bitner Co. or under which Rogers may claim to be a third party beneficiary. An agreement which is null and void also cannot support a joint venture theory.

2. Even if the Trust Agreement is not null and void, the enforcement of the Hold Harmless Clause cannot be enforced to exculpate Westcor and Monson from their own wrongful and fraudulent acts.
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The trial court found that Westcor had failed to fund the Escrow Agreement guaranteeing the completion of improvements in Park Ridge. (Finding R. 717 #14) It also found that Westcor was a "show" corporation without proper capitalization (Finding, R. 719 #19) and that Monson and Westcor had diverted funds received from payments on contracts on lots sold in Park Ridge to other business enterprises or to purposes having nothing to do with Park Ridge, despite the fact that Westcor's obligations at Park Ridge were unpaid or otherwise unsatisfied. (Finding R. 719 #20) The trial court also found, specifically in regard to Rogers, that Westcor and Monson had made assignments or purported assignments of contracts or deeds on the lots Rogers had bought, which assignments had no validity whatsoever at any time. (Finding R. 726 #43) The trial court also found that Westcor and Monson had clouded the title to the Rogers' property by those fraudulent assignments and thus quieted title in Rogers. (Finding R. 732 #15) The findings show by clear and convincing evidence that Westcor and Monson were guilty of fraud. (Finding R. 724 ##34, 35) The trial court specifically found no fraudulent acts whatsoever on the part of the principals of Bitner Co. There was no evidence at all, let alone clear or convincing evidence, that Blaine Bitner, as principal and only actor for Bitner Co., did anything wrong, let alone anything fraudulent. (Finding R. 734 #21) Hence, there was no evidence of fraud committed by Bitner Co. itself.

The trial court, in finding Rogers to be a third party beneficiary of the Trust Agreement, would allow Rogers to recover against Bitner Co. in place of Monson or Westcor, who themselves are barred from recovering under the Trust Agreement because of their own fraud. To allow Westcor or Monson to

be exculpated from their wrongful and fraudulent acts and to be held harmless of those acts offends public policy. While a party may contract out of its negligence, it cannot contract out of fraud; fraud involves a high degree of intent, wrongfulness and distasteful activity for which the defrauder must bear its own responsibility. In Lamb v. Bangart, 525 P.2d 602, 608 (Utah 1974), this Court stated:

The law does not permit a covenant of immunity which will protect a person against his own fraud as a matter of public policy. A contract limitation ... is valid only in the absence of allegations or proof of fraud.

The Hold Harmless Clause simply cannot be used to exonerate Westcor and Monson, even if the Trust Agreement were not a nullity. To allow a third party beneficiary to recover when his promisee cannot recover allows the promisee to escape the consequences of his fraudulent acts as much as if the promisee were able to recover directly. Such a recovery by a third party is equally in violation of equitable principles. Indeed, at that level, there is no Hold Harmless Clause. If the Trust Agreement is not null and void, it is valid and operative only within the limits that the law and public policy permit.

Alleged third party beneficiaries can take no greater benefit than the actual parties to such an agreement. They have nothing more than the original contract promised. Once the trial court found fraud had been committed by Monson and Westcor, Monson and Westcor were outside the limits of the Hold Harmless Clause, and so were any potential third party beneficiaries. This is particularly true on the explicit finding that the representatives of Bitner Co. were innocent of fraud and committed no wrongful acts. Any taint of fraud against Bitner Co. can come only through the alleged but unsubstantiated claims of partnership with Westcor. Rogers' remedy, then, lies against Westcor and Monson; that Rogers has won, and that portion of the judgment

awarding Rogers damages against Westcor and Monson should not be disturbed. Indeed, Rogers' remedy there is direct and clear; it need not be padded or enhanced by a spurious attempt to ensnare Bitner Co. into paying for the fraud of others.

3. Even if the Trust Agreement were valid (which Bitner Co. does not concede), the plaintiffs are not, as a matter of law, intended third party beneficiaries of that contract who could directly enforce the Hold Harmless Clause of the Trust Agreement against Bitner Co.

Even assuming, arguendo, that the Hold Harmless Clause in the Trust Agreement were valid and could have been enforced by Westcor, Rogers is merely an "incidental" beneficiary to it. In Schwinghammer v. Alexander, 21 Ut.2d 418, 420, 446 P.2d 414, 416 (Utah 1968), this Court cited with approval Corbin's illustration describing incidental third party beneficiaries:

Where A owes money to creditor C or several creditors, and B promises A to supply him with money necessary to pay such debts, no creditor may maintain a suit against B on this promise.

Corbin's illustration is exactly the same as the relationship between Rogers and Bitner Co. if the Trust Agreement were not null and void. Bitner Co. had, at most, promised under the Trust Agreement to pay Westcor should claims arise out of the situation described in the Trust Agreement. Thus, Rogers, as creditors to Westcor, cannot maintain suit against Bitner Co. because of its Corbin-like promise.

4. The Trust Agreement and the joint venture theory are not supported by any collateral estoppel theory.

Rogers and Bennett both attempted to introduce into trial a discussion of the Lynn case, Lynn et al. v. Westcor, et al., 3rd District Summit County, (unreported, Civil No. 5985, 1980) involving only the Escrow Agreement. Though their intent in introducing the case is ambiguous, they seem to argue that the decision in the unrelated case creates collateral estoppel which prevents Bitner Co. from arguing the nullity of the Trust Agreement or

proving that there was no joint venture. The trial court mentions the Lynn case in its findings of fact. (Findings, R. 717-18 #15) However, no party, neither Rogers nor Bennett, alleged collateral estoppel in the complaint or the cross-claim. They proffered no evidence at trial to show that an equivalent damage situation in Lynn to create collateral estoppel. If, and to the extent, the trial court relied on any collateral estoppel theory, it erred in doing so, because no orders or rulings in that case and no evidence or averment that the factual situation was identical to that controlling this case was proffered in evidence. Thus, any finding based on Lynn should be ignored. If such a finding was of substantial help to the trial judge in reaching conclusions of law and fact, such a finding constitutes reversible error.

D. If, as the trial court found, Rogers is a third party beneficiary of the Escrow Agreement, Rogers' rights of enforcement under that agreement are only equal to those of Summit County and do not extend to an action for consequential damages.

It is black letter law that the rights of a third party beneficiary to an agreement do not and cannot exceed the rights accorded the main parties to the agreement. In Continental Bank and Trust Company v. R.W. Stewart, 4 Ut. 2d 228, 291 P.2d 890, 894 (Utah 1955), this Court found a right of third party to enforce a contract. However, the Court specifically held that the third party could not recover more than that which was due and recoverable by the original promisee. The Court stated:

The law is well settled that the rights of a third person to sue on a contract made for his benefit depend on the terms of the agreement and are not greater than those of the promisee.

The trial record shows that Summit County, exercising its reasonable discretion, extended its Escrow Agreement with Bitner Co. beyond the original 24 months. Bitner Co., to the extent it was required by the County to perform, did so within the allowed extension. There was thus no uncured breach

by Bitner Co. to the County, and no question of further action to be taken by the County.

The Escrow Agreement between Bitner Co. and Summit County was limited in nature. The County could require only that the monies held in the escrow fund be used to complete subdivision improvements if the improvements were not finished by the time specified in the Escrow Agreement or in its extension. The Escrow Agreement did not foresee or create other causes of action and does not purport to allow consequential damages. The Escrow Agreement was designed solely to provide for improvements when and if the improvements had not been completed.*

Since the object of the Escrow Agreement is to assure that improvements will be made, the interest of the purchaser in any lot in a subdivision is that they be made and that the purchaser himself not be obligated to pay for them. If the County must exercise its rights under the Escrow Agreement, its right is to cause improvements to be made. The funds being held are required in order to prevent the County from incurring loss in requiring the improvements to be made. The County could use the escrow funds to reimburse itself for its use of its own employees and equipment if it decided to install the improvements or, in the more usual case, to pay an independent contractor to make the improvements.

The true third party beneficiary to such an Escrow Agreement is the independent entity which becomes engaged to make the improvements at the request of the County if there is a failure by the obligee. The County's job

It appears that the result of the Lynn case, in which the County was made a mandatory party, was a new escrow agreement between Bitner Co. and the County. The County was satisfied with the result in that case and with the actions carried out as a result of it. The County felt no further need to act and has taken no further act pursuant to the Escrow Agreement.

is to see that the improvements are done at no cost to the purchaser and at no cost to itself and to see that the costs are paid to the entity who did the work or supplied any materials necessary to the improvements. The County is not and cannot be concerned with alleged consequential damages; it insures that the improvements will be made by requiring an escrow fund; it neither does, nor has an obligation to, insure against anything else. The County itself suffers no damage from delay; so long as it has funds to provide for improvements at no cost to itself or a purchaser of an unimproved lot who also purchases the promise that there will be improvements, the County has satisfied itself and any regulations it may have with regard to the improvement of land.

In this case, Rogers did not pay for the improvements or any of the materials that went into them. He thus cannot stand in the County's shoes to collect the costs of improvements against the escrow fund; Rogers' sole recourse lies against Westcor and Monson in a simple contract action. Upon the completion of the subdivision improvements, the Escrow Agreement was fulfilled and no other right or obligations between the parties pertained.

E. The Trial Court Erred in Calculating Damages to Rogers.

Even if this Court should determine that Bitner Co. is somehow liable to Rogers for damages allegedly arising from delays in completion of improvements, any damages awarded must be properly calculated. The award by the trial court is too high and should be reduced. Rogers claimed damages for loss of profit on Earnest Money Contracts made to sell the houses he constructed because of the alleged failure of Westcor to perform contractual obligations timely. Had Westcor performed, Rogers would have made a profit based upon the Earnest Money Agreements with the prospective buyers. (Findings R. 722 #30)

Those Earnest Money Agreements were binding contractual obligations, subject only to the condition that the improvements of the subdivision be completed, which was the obligation of Westcor. It was upon failure of the Earnest Money Agreements that Rogers' cause of action arose. Rogers' two contracts were to sell the two homes (which he said cost him \$105,419.95 and \$106,689.00), for \$130,000.00 each. By the terms of the Earnest Money Contracts, then, Rogers had contracted for sales which would have given them profits of \$47,891.05.

Rogers should not, as a matter of equity and law, be allowed to purport that other, unproven contractual agreements could have been entered into because Rogers would have had no opportunity to enter into later contractual agreements without breaching the existing ones. The possibilities of making such new contracts are speculative on their face, and thus an inadequate basis for alleged damages.

To the extent Bitner Co. may be, despite the arguments already raised, liable for any damages to the plaintiffs, those damages should be calculated on the realities of the contractual situation existing when this cause of action arose, not on hypothetical damages based on an inflated, subsequent appraisal. Had there been no breach, Rogers' profits were fixed by his own agreements at \$47,891.05. Rogers should not be permitted to increase the benefits of his own bargain at the expense of Bitner Co., which never had any direct obligation to Rogers. Furthermore, the obligation of a party who is being damaged by a breach of contract is to mitigate his damages, not to promote them.

Rogers did, of course, mitigate by selling. The eventual buyers of the property were those very same persons who had entered into the original Earnest Money Agreements. To purport that they would have paid a higher price

than what they had originally bargained to pay only a few months after the Earnest Money Agreements were signed is pure speculation, just as it is pure speculation to claim that other, unknown persons would have bought despite the well-known problems in the housing market.

The maximum permissible award to Rogers, then, is the selling price under the earnest money agreements (\$260,000.00 on the houses and two lots) minus the mitigating, actual sale price (\$212,108.95) on the two houses and lots), or \$47,891.05. The judgment should, at minimum, be reduced to that amount, and interest recalculated on the basis of the reduced figure.

II. THE TRIAL COURT ERRED IN HOLDING BITNER CO. JOINTLY AND SEVERALLY LIABLE WITH DEFENDANTS WESTCOR, MONSON AND BADGER TO BENNETT.

To find Bitner Co. jointly and severally liable to Bennett, the trial court had to find that either there was some privity of contract among Bitner Co., Westcor, Monson and Badger with regard to Bennett and his loan or that the Trust Agreement created an intended third party beneficiary interest in Bennett as to Bitner Co. Although the trial court is less than clear on the law, it seems to have found liability primarily on the basis of the second theory. Nonetheless, neither theory was proven on the facts.

A. There was no Joint Venture of Intent.

Bitner has argued above under sections 1A and 1B, that there was never a joint venture of any kind between Bitner Co. and Westcor or Monson. It reincorporates those arguments with direct reference to Bennett's cross-claim and respectfully refers the Court to them. Those 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. Bitner Co. incurred no risks 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. Bassett v. Baker, 530 P.2d (Utah 1974).

12. There was no joint venture by estoppel toward a third party in regard to Bennett.

Bennett made no claim and offered no proof that a joint venture by estoppel toward a third party was created among Bitner Co., Westcor, Monson and Badger by the actions of those parties. (See Tr. 840-60) In his second amended answer and cross-claim, Bennett did not allege that the Westcor, Monson and Badger partnership represented to him that they or any one of them were engaged in any joint venture or partnership with Bitner Co. He made no offer of evidence at trial that Westcor, Monson and Badger stated or even felt that they were acting other than for themselves individually or as a partnership comprised only of themselves in obtaining loans from Bennett. Neither Bennett nor anyone else offered any evidence or made any allegation that Bennett thought otherwise when he made the loans.

Bennett, the former president of a major bank, described himself as a sophisticated investor. He testified with satisfaction about his successful efforts to obtain the signatures of Monson for Westcor and of Badger individually, to assure himself of Badger's personal liability and obligation on his loans to Westcor, Monson and Badger. (Tr. 854) He did not want liability just from Westcor and Badger's now defunct corporations, but the liability of their principals as well. Bennett neither saw nor could allege that he thought there was privity or any other relationship with or between Bitner Co. and his loans. Indeed, in the trial court's findings of fact and law, it is unclear whether the trial judge found any privity which would have made Bitner Co. jointly and severally liable for the debts of Westcor, Monson and Badger. (See Findings, R. 725-29) However, any ambiguity which exists in this regard must be resolved in favor of Bitner Co.

- C. Even if a formal joint venture based on the documents could be found, there is no evidence or finding that Westcor, Monson and Badger were acting in behalf of such an alleged joint venture when they obtained a loan from Bennett.
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While it is clear in the law that any partner acting by himself may represent and bind the partnership to which he belongs in the course of the partnership's business, it does not follow that a partnership or joint venture is responsible for all obligations of its venturers. A person may be a partner in several separate partnerships or ventures, and he cannot by himself link all his various dealings by the simple fact of the multiplicity of his own ventures and activities. A partner in a law firm may enter into a partnership or venture with his accountant brother to develop a plot of land into condominiums, and he may promise his cut of the profits at the law firm to build the condominium, but that does not entitle someone purchasing a condominium unit to sue the law firm because the lawyer and the accountant did not pay to put the roof on the condominium, nor can the law firm sue to obtain any profits from the construction and sale of the condominium, even if it knew the lawyer was making such investments with his cut. Partnership liability does not extend nearly so far.

In this case, Westcor and Monson had an obligation to install certain improvements in Park Ridge. To obtain financing to fulfill that obligation, or so Monson testified, (Tr. 285-96) he agreed with Badger to form a partnership which would borrow money for that purpose. Bennett neither alleged nor attempted to prove through his own testimony that the loans he made were made to any person or entity other than Westcor, Monson and Badger or a partnership composed of those three (or any part of them). Thus, even if the alleged joint venture between Bitner Co. and Westcor-Monson ever existed, Bennett's loans were not made to that joint venture, but rather to Westcor and

Monson (and their partner Badger) to allow Monson and Westcor to fulfill Westcor's obligations to make the improvements.

Bennett's loan to Westcor-Monson and Badger was, as far as Bennett was concerned and as far as they were concerned and represented at the time, made only to those parties. Bennett knew with whom he dealt, and he took precautions to protect himself--but not with regard to Bitner Co., because it was never connected to his loans.

- D. Even if an alleged joint venture including Bitner Co. did exist, the actions of Westcor, Monson and Badger in relation to Bennett were, by statute, not actions of that joint venture.

The Uniform Partnership Act of Utah, U.C.A. §48-1-6(3)a, states that:

Unless authorized by the other partners...one or more but less than all of the partners have no authority to:

- a. Assign the partnership property in trust for creditors....

Monson and Badger, in dealing with Bennett, assigned the alleged assets of a partnership in trust for their creditor Bennett. They thus did exactly that which cannot be done without the authority of all of the alleged partners. Those assets assigned to Bennett were contracts and notes payable to Westcor, as previously described. Those assets, which would have been assets of any broader partnership if it existed, were assigned to Bennett as a creditor and were to be acted upon by the Monson-Badger partnership in trust for Bennett. Badger was to arrange to discount and sell those assets to repay the loans Bennett had made to Monson, Westcor and Badger. By statute, Bitner Co. cannot be found a party to the assignment and trust because Bitner Co. neither signed nor consented in any way to the agreement. All the partners did approve the assignment into trust for their creditor Bennett, and all the partners were Westcor, Monson and Badger. The Uniform Partnership Act requirements were thus met. Bitner Co. was no part of the whole partnership.

Bennett, as a self-described sophisticated businessman and in his actions as he testified to them, in fact acknowledges the statutory limitations when he states that he was careful to require all parties, Westcor, Monson and Badger to sign the note on his loan. (Tr. 853-55) Bennett never contemplated any liability or obligation on the part of Bitner Co. when he made the loan, and he did not think of it as a partner. The possibility of claiming against Bitner Co. was a pleasant afterthought developed by him when he learned that a hitherto unheard of entity, "M.O. Bitner Company" had originally owned the land at Park Ridge. Since it is evident that Bitner Co. never consented to the assignments to Bennett, if Bennett is to claim recovery pursuant to those assignments, he must concur with and acknowledge the statutory requirements by asserting that all parties to the partnership consented. Since he has the acknowledged consent of Westcor, Monson and Badger, he must acknowledge that they are the only partners involved. These three, Westcor, Monson and Badger, are the partners who could and did consent to the assignment to him in trust as their creditor, just as they were the obligors he sought for the loans.

- E. The trial court erred in finding Bennett to be a direct third party beneficiary under the Trust Agreement among Bitner Co., Westcor and Monson.

The trial court held that Bennett was an intended primary beneficiary of the Hold Harmless Clause in the Trust Agreement between Bitner Co. and Monson. (Findings R. 731 #8) In its reasoning, the trial court stated that:

The other parties to the agreement knew that there might be allegations to individuals in the position of Bennett and that the agreement would give those in the position of Bennett the benefits of promises and representations made by Monson/Westcor.

(Findings R. 729 #47) (Emphasis added.) While Bitner Co. denies this finding of fact, even if it were the case, the trial court erroneously reached the

conclusion of law, based on that erroneous finding, that Bennett was an intended third party beneficiary of the Hold Harmless Clause of the Trust Agreement.

The trial court had to use the word "might" because there is no evidence in the record to convince it that Bitner Co. knew of the existence, nature or extent of Westcor or Monson's debts and obligations to Bennett. The trial court thus made a finding which is only a guess. Even if Bitner Co. had such knowledge, it would not have made Bennett any more than what he was, an incidental beneficiary of the Hold Harmless Clause of the Trust Agreement. If a person such as Bennett "might" have been contemplated when the Trust Agreement was made, then there is and can be no direct link between the Trust Agreement and Bennett. Bennett is even worse off than Rogers in demonstrating that he is beneficiary. Schwinghammer v. Alexander, 21 Ut.2d 418, 446 P.2d 414, 416 (Utah 1968). The Court is respectfully referred to the discussion in sections IB and IC above.

A hold harmless agreement is subject to a condition subsequent, namely, that the party to be held harmless must show a claim by another relevant to and covered by the hold harmless agreement. Bennett's claim is totally outside the scope of the Trust Agreement. Furthermore, Bennett cannot meet the standards in situations in which this Court did find a third party beneficiary to a contract. In the Continental Bank case, supra, 4 Ut.2d 228, 291 P.2d 890 (Utah 1955), the Court found a direct third party beneficiary interest in a creditor solely because the debt to the third party was specifically referred to in the agreement between the first and second parties. The agreement in that case specified that the first party would pay directly to the third party beneficiary the debts owed by the second party. That created a situation in which the third party or the beneficiary was known as a

"creditor" beneficiary (or, as this court now describes this relationship, an "intended" beneficiary) at the time the two primary parties entered their agreement. Bennett and his loan are not mentioned in the Trust Agreement, and there is no evidence that Bennett's debt was contemplated by Bitner Co. in order to enhance Bennett's status beyond that of an incidental beneficiary. Thus, Bennett has no rights or claim under the Trust Agreement.

- F. Even if Bennett were an intended third party beneficiary of the Trust Agreement (which he is not), he could not enforce the Agreement because the Agreement is specifically unenforceable by Westcor or Monson as to their obligation to Bennett.

The trial court found Westcor and Monson's relationship with Bennett fraught with fraud, both in the inception and in the failure to pay their obligation to Bennett. (Findings, R. 726-28 #43) Were Monson or Westcor allowed to enforce the Hold Harmless Clause of the Trust Agreement against Bitner Co. in respect to Westcor's obligation to Bennett, Westcor and Monson would be allowed to exculpate themselves from and be held harmless from their own fraudulent acts, a result which would violate an express public policy against such an occurrence. See Lamb, supra, 525 P.2d 602 (Utah 1974), and the discussion in Section IC2 above.

Absent fraud against Bennett by Westcor, Monson and Badger, their debts to Bennett would have been fully satisfied by the contracts they assigned to Bennett and held in trust for him, as was intended. Thus, the debt to Bennett remains unpaid solely because of the fraud of Monson, Westcor and Badger. Maintaining joint and several liability in Bitner Co. under a hold harmless agreement will allow Monson and Badger to escape unscathed from their own evil acts. The result is a gross violation of public policy and an offense against equity. The inequitable results of such a holding are doubly clear because nowhere in its findings of facts and law did the trial court find that Bitner Co. participated in or was aware of the fraud committed

against Bennett, and in its findings of law held that Blaine Bitner, the principal of Bitner Co. (through whom any fraud of Bitner Co. would have been committed if such were the case), specifically was not party to any fraud. (See Findings R. 734 #21) Westcor and Monson cannot be permitted to commit fraud with impunity by shifting the costs of fraud to others not part of their fraud.

- G. The trial court erred in declaring Bitner Co. jointly and severally liable for punitive damages in the amount of \$10,000.00 to Bennett, even if joint and several liability is upheld as to the rest of Bennett's claim.

The trial court (R. 739) granted Bennett punitive damages in the amount of \$10,000.00 because of fraud on the part of Westcor, Monson and Badger. However, as noted above, the trial court did not find Bitner Co. directly guilty of fraud or even knowledgeable of the occurrence of fraud with regard to Bennett's claims.

The purpose of punitive damages, as their name implies, is to punish the intentional wrongful acts of those against whom such damages are levied. They provide recoupment for the intangible damages to the victim of wrongful, malicious or even criminal actions. They also provide deterrence and assuage the public outrage against wrongs such as fraud which are more aggravated than, for example, negligence or simple breach of contract. To hold Bitner Co. jointly and severally liable for punitive damages is inequitable and unjust. Bitner Co. was not a participant in the acts of fraud which punitive damages are designed to punish. Awarding such damages to persons or entities who did no wrong would detract from their intended effect against Westcor, Monson and Badger. The public has no interest in punishing someone who committed no wrongful act. Those defendants would not feel the brunt or the punitive effect of those damages, but would simply expand the number of victims to their fraud.

The award of an attorney's fee against Bitner Co. is likewise incorrect. There was no reason under the traditional rules governing attorney's fee awards or under any agreement to which Bitner Co. was a party which would justify such an award, since Bitner Co. was not directly involved in the fraud of Westcor, Monson and Badger. Such an award is likewise incorrect as to Rogers.

III. The trial court erred in denying the motions for a mistrial made by defendants' counsel John S. Davis when it became clear that he, as counsel, could not adequately represent himself, Blaine Bitner, Bitner Co. Westcor and Monson because of serious and compelling conflicts of interest.

In the course of the trial, it became clear to Davis, to the Judge and to counsel for both Rogers and Bennett that Davis was involved in a serious conflict of interest in representing more than one defendant. (Tr. 357, 360, 361, 373, 494, 500, 525-26, 896) As the trial judge commented in colloquy during Davis' cross-examination of Blaine Bitner:

Q Was it ever your impression that Milton O. Bitner Corporation was going to assume any previous liability or assumption of risk or anything that had been incurred by Westcor?

A No.

MR. BELNAP: Your Honor. Your Honor.

THE WITNESS: No.

MR. BELNAP: The document speaks for itself.

In addition that question goes right to the heart of the potential conflict between Mr. Davis' client. Mr. Monson on the stand yesterday testified that that trust agreement was in full force and effect in his mind, and that it was to hold Westcor harmless from their obligations and liabilities arising out of Park Ridge.

And Mr. Davis we allege, or I allege in this objection, in addition to the fact that the document speaks for itself is placing now this client in opposition now to his other client, which I don't think he should be entitled to do, even though he is representing both of them, Your Honor.

MR. DAVIS: Just asking his understanding of the interpretation of this provision, which they have brought up three or four times and hammered away at on the hold harmless provision.

THE COURT: Of course that is not what he is saying, and I am not saying you don't have the right to. But they have brought that up, except for the fact that you have two different parties here and you are asking them the same question and getting conflicting answers on the question.

MR. DAVIS: Now--

THE COURT: And the question is whether you have the right to represent both of the parties.

(Tr. 525-26) The trial court had already stated that:

THE COURT: Mr. Davis, I think you are treading a very fine line as far as the individuals or the corporation, the entities you are representing here. I think you've got to be very careful in that situation. I think what Mr. Belnap says is really true.

(Tr. 361) Davis was in fact unable to represent any of the defendants which he purported to represent adequately.

Davis himself was named as a defendant because of his participation in the attempted assignments of contracts which had already been assigned to Bennett. The trial court did not award any damages against him. His role was presumably a nominal one, and no one claimed that he was other than a nominal defendant. But with Davis as defendant and as counsel for other defendants, no opportunity could be afforded to Bitner Co. (or Westcor and Monson and Badger for that matter) to examine in pre-trial or courtroom proceedings anything the others knew which might have helped its defense.

Davis should not have continued representation of Bitner Co. or of any other defendant whose interests were opposite or inimical to the interests of Bitner Co. Rogers and Bennett wanted Bitner Co. to be held party to a joint venture with Westcor and possibly others so they could, inter alia, seek contribution for any liability. Bitner Co., obviously, had an interest in

proving its independence from Westcor and Badger in case there had been any damage to Rogers or Bennett. The interest of Bitner Co. is clearly separate and distinct from the interests of Westcor, Monson and Badger.

Twice in the course of the trial, Davis moved for a mistrial and to require a new trial with separate counsel for the defendants represented by him. (Tr. 500, 896) Davis also moved orally under Rule 63 to have the trial judge recuse himself. The trial court did not follow the procedures set forth in Rule 63 and denied that motion at the same time it refused to grant the motion for a mistrial and new trial based on the conflicts among Davis' clients. (See Tr. 496-502; 895-97)

The clear conflicts among clients made it impossible for Davis to defend any of them adequately and placed him in a severe and unjustifiable ethical quandary. His problem was compounded by objections from Rogers' counsel and Bennett's counsel that Davis was playing his clients off against each other in presenting the defense and by comments from the trial court itself that Davis was walking a very thin line as far as procedure and propriety were concerned. (See Tr. 361)

In Davis' testimony, he was asked to clarify the relationship among the defendants he represented. The trial court asked questions, taking him beyond the direct questioning of Rogers' counsel so that Davis appears, in response to the Court's questions, to be testifying in behalf of the defendants. It is clear from part of his testimony that he could have assisted Bitner Co. by testifying directly in its behalf. (See Tr. 1123-25)

The Canons of Ethics adopted by this Court for the State of Utah, Canon 5, Disciplinary Rule 5-102 states that:

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his

firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

The trial court, in not granting Davis' motion for a mistrial and in requiring him to continue to represent those several defendants created a situation in which substantial injustice resulted to Bitner Co. (See Davis testimony, Tr. 1123 et seq.)

Canon 5, Disciplinary Rule 5-105 states that:

(C) In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

The language is conjunctive in this Rule. It must be obvious that the counsel can adequately represent both parties and the potential problems must be explained to all parties and their consent for mutual representation be obtained. In this case it was obvious that counsel could not represent all defendants he purported to represent. Opposing counsel said so, and the trial court itself said so.

Davis's conflicts were particularly harmful to Bitner Co. The record shows that Westcor was defenseless against the charges of both Rogers and Bennett. Therefore, while it was in the best interest of Bitner Co. that a joint venture be found between it and Westcor, as it would be bound to carry all financial liabilities, the case was exactly the opposite for Westcor for the same reason. It was to Bitner Co.'s advantage to have the Trust Agreement declared void for Westcor's failure to meet its terms and

conditions. It was Westcor's advantage to be held harmless under that Agreement. Most inequitable, Westcor was found directly liable for fraud to both Rogers and Bennett. Bitner Co. was found not guilty of any direct fraud.

By denying the motions for mistrial, the trial court allowed the conflict situation to persist and to cause gross injustice to Bitner Co. Under the Utah Rules of Civil Procedure, Rule 61, this Court may determine that a new trial be granted as a result of error of the trial court only if the error is "inconsistent with substantial justice." Bitner Co.'s not having the advantage of representation by independent counsel did result in substantial injustice; that injustice was permitted to develop into full flower by the findings and order of the court below. An initial decision to engage the same counsel cannot be permitted to persist to the point of prejudice, especially when the problem was so prominent that counsel's testimony is even inimical to the interest of one of his clients. (See, Tr. 1106-15)

The trial court apparently denied the motions for mistrial and new trial because of its concerns for judicial economy. However, the equities of the situation make judicial economy secondary to reaching a just and equitable solution among the parties. As an alternative remedy, this Court should grant Bitner Co. a new trial on any matters not resolved in its favor on this appeal.

CONCLUSION

For the foregoing reasons, Bitner Co. respectfully requests that it be relieved from liability as to Rogers and to Bennett and judgment of no liability be entered on its behalf. In the alternative, Bitner Co. seeks a new trial. It also requests such other and further relief as may be just and proper.

Dated: Salt Lake City, Utah
March 14, 1984

Respectfully submitted,

KIRTON, McCONKIE & BUSHNELL

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MAILING CERTIFICATE

I hereby certify that I mailed two copies of the Brief on Appeal of Defendant-Appellant M.O. Bitner Co. to each of the following, by United States mail, postage prepaid, this 14th day of March, 1984:

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