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IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 790745

MICHAEL WISNIEWSKI, ET. AL.

Appellants

v.

THOMAS W. JOHNSON, ET. AL.

Appellees

JOINT APPENDIX

John R. Stevens
Moncure & Goggin
P. O. Box 38
Stafford, Virginia 22554

Counsel for Appellants

James W. Haley
619 Jefferson Davis Highway
Fredericksburg, Virginia 22401

Daniel M. Chichester
P. O. Box 66
Stafford, Virginia 22554

Counsel for Appellees

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

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VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF STAFFORD

THOMAS W. JOHNSON and SUZANNE T. JOHNSON — Plaintiffs

v.

HAROLD R. GEARHART, Trustee for River Bend Partnership
106 Old Landing Court
Fredericksburg, Virginia (Stafford County)

and

HAROLD R. GEARHART, Partner for River Bend Partnership
106 Old Landing Court
Fredericksburg, Virginia (Stafford County)

and

WALTER M. LUCHAKA and OLGA G. LUCHAKA, husband and wife, partners for River Bend Partnership
1809 Drury Lane
Alexandria, Virginia

and

HAROLD R. GEARHART and CHERYL GEARHART, husband and wife, partners for River Bend Partnership
106 Old Landing Court
Fredericksburg, Virginia (Stafford County)

and

MICHAEL WISNIEWSKI, partner for River Bend Partnership — Defendants
Widewater Beach, Virginia

MOTION FOR JUDGMENT

TO THE HONORABLE J.M.H. WILLIS, JR., JUDGE OF THE CIRCUIT COURT OF STAFFORD COUNTY:

1. On the 14th day of September, 1975, River Bend Partnership, by their sales representative, Cheryl Gearhart, entered into an agreement of sale wherein River Bend Partnership would sell unto Thomas W. Johnson and Suzanne T. Johnson Lot 9 of River Bend Subdivision in Stafford County, Virginia, with a dwelling completed thereon. Said agreement of sale is attached hereto and made a part hereof as "Exhibit 1".

2. On the 23rd day of July, 1976, the defendant, Harold R. Gearhart, Trustee for River Bend Partnership did convey, with General Warranty deed, unto the Plaintiffs the following described real estate, to-wit:

> All that certain tract or parcel of real estate together with all buildings and improvements thereon and rights and privileges thereto appurtenant, located in George Washington Magisterial District, Stafford County, Virginia, and more particularly described as Lot 9, revised, of River Bend Subdivision as shown on the attached plat of Henry W. Cropp, Jr., Certified Land Surveyor, dated July, 1976, being a part of the same property conveyed unto Harold R. Gearhart, Trustee, by deed dated September 10, 1973, from Michael Wisniewski and Kathleen R. Wisniewski, his wife, recorded in the Clerk's Office of the Circuit Court of Stafford County, Virginia, in Deed Book 248, page 129.

That on the 3rd day of August, 1976, the Plaintiffs paid Seventy-nine Thousand Three Hundred Three and no/100 Dollars ($79,303.00) to the Defendants and specifically Defendant Harold R. Gearhart, Trustee for River Bend Partnership, in consideration for the purchase of the above described property and that the Plaintiffs have duly performed all acts which were to be performed by them in the confirmation of this real estate transaction.

3. That the Defendants are all partners in the partnership which trades as River Bend Limited Partnership, the certificate for which is

recorded among the Land Records of the Circuit Court of Stafford County, Virginia, and sets forth that the partnership's principal place of business is in the State of Virginia; that the said certificate for River Bend Limited Partnership purports to be a certificate for a limited partnership but is in fact a certificate for a general partnership in that it does not comply with the requirements of Sections 50-45 of the Code of Virginia and therefore establishes no limited partnership but rather a general partnership.

4. That at the time of entering into the agreement of sale on September 14, 1975, and at the time of conveyance by deed on July 23, 1976, the Defendants herein represented unto the Plaintiffs that the residential dwelling which is the subject of this suit would be and was completed in a workmanlike manner and that the said house was warranted for a period of one (1) year from the date of settlement which was held on August 3, 1976.

5. That the said dwelling was not constructed in a workmanlike manner but in fact was constructed in an unworkmanlike, unskillful and negligent manner in particular with regard to those items which are attached hereto and made a part hereof as Plaintiffs' "Exhibit 2". After numerous timely demands on the part of the Plaintiffs the Defendants, all and each of them, have failed and refused to repair or replace those deficiencies in a workmanlike manner and have failed and refused to bring said dwelling to such a state of repair which can be considered by the Plaintiffs and competent builders in the area as a dwelling of a workmanlike and skillful like quality. The Defendants failure has constituted a breach of their warranty.

6. That in any event the Defendants, each and all of them, represented unto the Plaintiffs at the time of the sale of said residence, that there was an implied warranty of merchantability and fitness for the use to which the property would be placed. In fact, the said residence is

not fit for use as a residence due to the unskillful and unworkmanlike quality of construction of the said residence by the Defendants.

7. That as a result of the Defendants' failure to construct said dwelling in a workmanlike manner, your Plaintiffs aver that, in order to repair the damage and place said dwelling in the manner which will be considered a workmanlike quality and in a manner in which it was represented to be at the time of purchasing said dwelling, it will be necessary for your Plaintiffs to expend the sum of Twenty Thousand Dollars ($20,000.00). In addition, as a result of the Defendants' failure to construct said dwelling in a workmanlike manner, your Plaintiffs have had expenditures in the amount of Five Thousand Dollars ($5,000.00).

Wherefore, your Plaintiffs pray that judgment, against all Defendants, jointly and severally, be granted in the amount of Twenty-five Thousand Dollars ($25,000.00) together with their court costs, attorney's fees and other expenses of this suit.

THOMAS W. JOHNSON and SUZANNE T. JOHNSON

BY Daniel M. Chichester

Daniel M. Chichester

Daniel M. Chichester, p.q.
P. O. Box 66
Stafford, Virginia 22554

3

EXHIBIT 2

1. Ceiling leaks in family room (several locations)

2. Ceiling leaks in kitchen

3. Ceiling leaks in foyer closet

4. Ceiling leaks in dining room bay window

5. Improper installation of bay window unit

6. Ceiling leaks in small bedroom bay window

7. Windows leak in small bedroom bay window

8. Leak under left window of master bathroom

9. Leaks around all attic vents during rains

10. Outside window frames were not painted in many places

11. Patched wallboard in kitchen ceiling, foyer closet, master bathroom and bay windows needs final repair and painting

12. Damp and leaking basement walls

13. Improper installation of weatherstripping on front and side doors

14. Improper or no flashing of windows and door openings

15. Exterior panels on west facing side of house are buckled, chipped, split and otherwise damaged. Rain comes through this damaged paneling and into attic where it runs down inside the walls and into the bay window areas on the floors below

16. Flashing is improperly installed on outside of exterior paneling under front foyer windows and under master bath windows. Leaks in the vicinity of both eareas.

17. Exterior paneling around the front bedroom windows is unevenly cut leaving large gaps between the window frame and the exterior paneling which lets in cold air and moisture

18. One screen is missing from dining room window

19. Plumbing exhaust pipe is located adjacent to master bath windows and allows noxious fumes to enter the house when the window is open

20. Various roof leaks to include total improper flashing of the roofing system

21. Improper installation of siding

22. Damaged siding

23. Improperly installed steps at side doorway

24. Damaged drywall due to water leaks

25. Improperly finished drywall

26. Improperly painted home ranging from parts having no paint, parts having one coat of paint and parts having several coats of paint

Filed in the Clerk's Office this 24 day of February 1978

Writ Tax $5-00 Teste:

Fee 25-00

200 ~~Deposit~~ 6.25 Clerk

Total Paid $36.25 D. C.

Exhibit 1

RIVER BEND, Ltd.

BUILDERS – DEVELOPERS
(703) 371-2548 or (703) 373-0198

This Agreement OF SALE entered into this 1st day of September, 1975, by and between River Bend, Ltd., hereinafter referred to as Seller, and Thomas W. and Susan J. Johnson hereinafter referred to as Purchaser.

Witnesseth

In consideration of a deposit in the sum of One thousand and xx/100 ($1,000.00) Dollars (Cash, Check or Note) paid by Purchaser to Seller, Seller agrees to sell and Purchaser agrees to buy:

Lot 9, Block N/A, Subdivision River Bend,
County Stafford, State Virginia,
Known as Habitat II, with Sellers Standard,
Model, Front Style Standard dwelling completed thereon, for a price of Seventy three thousand nine hundred fifty and xx/100 ($73,950.00) Dollars, on the following terms and conditions.

1. Purchaser agrees to make payment as follows:
   a. A cash payment of twelve thousand and xx/100
   of which the above deposit shall be a part ($13,000.00)
   b. By proceeds of note in the amount of sixty-one thousand nine hundred fifty and xx/100
   payable
   with interest at 8½% secured by a first deed of trust on the premises ($61,950.00)
   c. By note payable to Seller in the amount of N/A
   payable (.....) monthly with balance due and payable five (5) years from date of same, with interest at .....% secured by a deferred purchase money second deed of trust on the premises. ($.....)

   Total Purchase Price ($73,950.00)

Purchaser agrees to use due diligence to obtain or accept a firm commitment from an established lending institution to place the first deed of trust loan and shall, upon obtaining or accepting such commitment furnish Seller with satisfactory evidence thereof; if within thirty (30) days from the date hereof, Seller has not received satisfactory evidence of such commitment, Seller may, at its option at any time thereafter, return the deposit to Purchaser, whereupon this agreement shall be null and void. Trustees in all deeds of trust shall be named by the parties secured thereby.

2. Seller agrees to execute and deliver at settlement a general warranty deed conveying marketable title good of record and to pay for revenue stamps required on the deed. The property shall be conveyed subject to any covenants, conditions and restrictions of record, but free and clear of all liens and encumberances except as otherwise provided herein. If there is a title defect which cannot be readily

cured by legal action, the Seller shall return the deposit to Purchaser and this agreement shall become null and void. If legal action is necessary to perfect title such action shall be taken promptly by and at the Seller's expense, whereupon the time specified herein for full settlement shall thereby be extended for the period necessary for such action. The Seller shall not be liable for any claim or damages by reason of any defect in title.

Settlement shall be made at the office of the Title Company searching the title. Deposit with the Title Company of the deed of conveyance and such other papers as are required by the terms of this contract shall be deemed and construed as a good and sufficient tender of performance of the terms hereof.

3. Seller assumes the risk of loss or damage to said property by fire or other casualty until the executed deed of conveyance is delivered at settlement.
4. Seller shall deliver possession of the premises to Purchaser at settlement. Taxes, water, rent, insurance, interest on existing encumbrances, if any, annual benefit charges and other assessments, if any, against the property shall be adjusted to the date of settlement and assumed thereafter by the Purchaser.
5. Examination of title, tax certificate, conveyancing, notary fees, state revenue stamps, survey if required, and all recording charges, including those for purchase money trust, if any, are to be at the cost of the Purchaser, who hereby authorizes the Seller to order the examination of title from .....
Lewis Chichester
.....; provided however, that if upon examination, the title should be found defective and is not remedied as aforesaid, the Seller hereby agrees to pay the cost of examination of the title.
6. Within Five months hereof days* from the date hereof, or as soon thereafter as a report on the title can be secured if promptly ordered and subject to Seller's standard check-out of premises, the Seller and Purchaser agree to make full settlement in accordance with the terms hereof. If the Purchaser shall fail so to do, the deposit herein shall be forfeited to Seller, or at its option Seller may without forfeiting the deposit, avail itself of any legal or equitable rights which it may have under this agreement. The entire deposit shall be held by River Bend Limited Partners.
7. At the time of settlement the Seller shall have completed the dwelling except for any items shown on Seller's Standard Check-out Form and Guarantee Letter, in accordance with its Standards of Construction for this community, a copy of which has been furnished Purchaser. The Purchaser hereby represents that he has fully inspected the premises.
8. The Purchaser may, by selections from the Seller's Standard Construction Options, add to the basic plan for the model selected, provided however:

   1. That such selections must be made at one time only and must be agreed upon in writing; and
   2. That if the Seller's standard price for selections agreed upon increases the purchase price stated above, the deposit shall be increased by the amount required for such selection; and
   3. That it is understood that this provision does not permit the Purchaser to select any standard construction option if construction has proceeded beyond the stage where the option is available in the normal course of Seller's standard construction practices.

   Purchaser may make such interior decorating and color selections from Seller's standard selections as have not already been made, provided that such selections are completed and delivered to Seller in writing in time to be incorporated in Seller's production schedule and that any overages are paid in cash at the time the selections are made. Seller shall exercise reasonable care to see that all extra items are performed, however, Seller's responsibility for omission of any extra item shall be limited to the agreed price thereof, and any such omission shall not invalidate this agreement. Seller reserves the right to make such changes as become necessary in Seller's opinion by site or job conditions. All grading and landscaping including the disposition of trees and control of waterflow shall be at the discretion of the Seller.

   Seller assumes no responsibility for trees left on the premises, if any. Seller reserves the right to substitute materials or equipment of comparable quality, and to make necessary structural changes which are in accordance with the applicable building codes.
9. It is further understood that the time of settlement set forth above may be extended upon a showing by the Seller that there has been a delay in construction caused by any one or more of the following: An Act of God, a national emergency, a strike, imposition of restrictions upon materials,

Should Purchaser default in the payment of any installment or other sum due under this agreement, Seller may at its option declare the entire balance of the purchase price immediately due and payable, and Purchaser shall forfeit the deposit

failure of municipality or public utility company to provide necessary utilities, unusual soil conditions, or other valid cause which Seller could not foresee or anticipate, provided the same is beyond the control of the Seller to correct or remedy in the exercise of care and diligence. In the event there is a delay in the period of construction covered by the foregoing provision, the settlement date shall be extended for a period equal to the allowable period of delay. Purchaser agrees to cooperate with Seller in inspecting the premises prior to settlement, for the purpose of preparing a check list of any work remaining to be performed to meet Seller's Standards of Construction.

* Settlement date will be June 25th, 1976 - Deposit of
- On January 15, 1976, an additional $2,000 shall be required from the purchaser before construction may commence.
- Purchaser's check for $1,000 dated September 14, 1975, will not be deposited before September 22, 1975.
- A planning conference will be held on or about January 15, 1976, at which time purchaser will make final selections of colors and materials as are offered by builder-seller.

10. The terms of this agreement shall be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns. The provisions hereof shall survive execution and delivery of the deed aforesaid and shall not be merged therein. This is the entire and final agreement between the parties hereto and they shall not be bound by any terms, conditions, statements, warranties, or representations, oral or written, not herein contained.

By ..... (Sales Representative)

9/14/75 (Date) ..... Thomas W. Johnson (Purchaser)

9/14/75 (Date) ..... (Purchaser)

RIVER BEND, LTD.

..... (Date) By ..... (Seller)

On the 1st day of February, 1979, came the parties to this action, in person and by counsel, the pleadings having been filed and the issues having been joined, and upon the stipulation of counsel and the case having been docketed and set for trial.

Thereupon all parties having waived trial by jury, all issues of fact and law were submitted to the Court for determination without the intervention of a jury.

WHEREUPON, the opening statements were waived by the attorneys for both sides and Plaintiffs introduced their evidence in chief and rested.

All the Defendants, by counsel, then moved the Court to enter summary judgment on behalf of all Defendants on the grounds stated at the bar of the Court, which motion the Court overruled, to which action of the Court all Defendants duly excepted.

WHEREUPON, Defendants then advised the Court that they would introduce no evidence as to liability and rested the case and renewed their motions to the Court to enter a summary judgment on behalf of the Defendants on the grounds previously stated at the bar of the Court, which motion the Court overruled, to which action of the Court the Defendants duly excepted.

WHEREUPON, Defendants then offered evidence in mitigation of damages only and rested.

law order book 18 P-121

The Court then heard argument of counsel and rendered its decision.

It is, therefore, ADJUDGED and ORDERED in accordance with the decision rendered by the Court, that Plaintiffs have and recover $20,000 from Harold R. Gearhart, Cheryl Gearhart, Walter M. Luchaka, Olga G. Luchaka and Michael Wisniewski, Partners, trading as River Bend Partnership, in this action at law, to all of which the Defendants, by counsel, objected and excepted.

WHEREUPON, the Defendants, by counsel, indicated to the Court their intention to apply to the Supreme Court of Virginia for a Writ of Error from the judgment of the Court on the 16 day of February, 1979. And thereupon, it is ADJUDGED and ORDERED that execution on said judgment is hereby suspended for a period of 30 days, or until the Supreme Court of Virginia has acted on and rendered an opinion on said appeal, conditioned on said Defendants entering into a good and sufficient bond before the Clerk of this Court in the penalty of $20,000, with approved security conditioned according to law within 21 days of the date of entry of this Order.

The Court doth ORDER that the court reporter's transcript of the proceedings in this case is hereby made a part of the record when filed by the reporter within the time required by law.

Nothing further remaining to be done in this action, the same is hereby stricken from the docket.

ENTER:

Judge February 16, 1979

WE ASK FOR THIS ORDER:

Daniel M. Chichester, p.q.
P. O. Box 66, Stafford, Va. 22554

James W. Haley, Jr.
1619 Jefferson Davis Highway
Fredericksburg, Va. 22401

Counsel for Plaintiffs

WE OBJECT TO THIS ORDER:

David B. Hart
Smeltzer & Hart
P. O. Box 12545
Roanoke, Virginia 24026

John R. Stevens
P. O. Box 38
Stafford, Virginia 22554

Counsel for Defendants

WRITTEN STATEMENT OF FACTS TO MOTION FOR SUMMARY JUDGMENT

Come now the defendants Michal Wisniewski, Walter Luchaka and Olga Luchaka, by counsel, to propound a Written Statement of Facts to be entered as part of the record for purposes of appeal to the Supreme Court of Virginia in reference to a Motion for Summary Judgment in the above styled case; said Motion was heard and argued before the trial court on September 5, 1978, and an Order denying said Motion was entered over defendants' objections on November 15, 1978.

The following is tendered as a true and accurate statement of facts in the Motion for Summary Judgment in the above styled cause argued before the trial court on September 5, 1978.

1. That the defendants alleged that the limited partners of River Bend Limited Partnership were immune from personal liability by virtue of their status as limited partners.

2. Plaintiffs alleged and argued that none of the defendants were limited partners, but were, in fact, general partners since the certificate of formation of the limited partnership was fatally defective and did not conform to §50-45 of the Code of Virginia, as amended because the requirements of swearing to the certificate was not met and that this requirement is an integral part of the Uniform Limited Partnership Act.

3. Defendants objected to this allegation of a technical defect on the grounds that:

a. The acknowledgment of itself was sufficient compliance with the requirement that the certificate be "subscribed and sworn to"; and

b. The acknowledgment constituted "substantial compliance in good faith" of the terms set forth in Section 50-45 of the Code of Virginia, 1950, as amended.

4. The trial court took the motion under advisement and by its Order of November 15, 1978, denied said motion to which defendants duly objected and noted their exceptions.

5. The Defendants Motion for Summary Judgment was renewed at trial on February 1, 1979, and again denied based on the evidence presented and citing the defendants' failure to adhere to the requirements of Section 55-45 of the Code of Virginia, as amended.

The Court being of opinion that the above is an accurate statement of facts to the Motion for Summary Judgment heard on September 5, 1978, does hereby Order it entered as part of the record in the above styled cause.

Enter this 13 day of April, 1979.

JUDGE

I ASK FOR THIS:

JOHN R. STEVENS
Counsel for Defendants:
Michal Wisniewski
Walter Luchaka
Olga Luchaka

SEEN:

JAMES W. HALEY, JR., p.q.

DANIEL M. CHICHESTER, p.q.

II

ASSIGNMENTS OF ERROR

1. The Court erred by ruling that the limited partnership, "Riverbend Limited Partnership" was not properly formed and that the limited partners were liable as general partners.
2. The Court erred by ruling that Michal Wisniewski was liable as a general partner of River Bend Limited Partnership because of his alleged participation in the business of the partnership.
3. The Court erred in refusing to grant defendants' Motion for Summary Judgment pursuant to its Order dated November 15, 1978.
4. The Court erred in refusing to grant defendants' Motion for Summary Judgment made at the conclusion of plaintiffs' evidence.
5. The Court erred in refusing to grant defendants' renewed Motion for Summary Judgment after defendants rested.
6. The evidence presented by the plaintiffs was insufficient as a matter of law and fact and the Court erred in ruling the limited partners as general partners.
7. The Court's finding of judgment in favor of the plaintiffs was contrary to the weight of the evidence.
8. The Court's finding of judgment in favor of the plaintiffs was contrary to the law and the evidence.

direct - Johnson

Q Tell the Court when you first became interested in that and what occurred.

A In June of 1975 my wife and I first visited River Bend Subdivision in Stafford County, Virginia. We visited the then model home which is now 100 Old Landing Court, and were greeted by two sales persons, one of whom was Mrs. Cheryl Gearhart. Mrs. Gearhart showed us the neighborhood, walked us through the model home, walked us through other homes in the neighborhood in the subdivision that were in various stages of completion, and in every sense of the word, absolutely sold us the neighborhood. I think I can safely say that we were not prepared to seriously consider moving, but after we saw River Bend Subdivision, as what Mrs. Gearhart showed us, we absolutely fell in love with the place.

Walking through the model home, we noticed on the wall in a room that is adjacent to the dining room in the model, a document that described a procedure whereby defects or problems or whatever in homes that were purchased in River Bend Subdivision would be corrected.

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MR. HART: I am going to object to this testimony, if you please. I believe that the parol evidence rule excludes any evidence of this nature. They signed a contract dated September the 14th, 1975, and I believe the parol evidence rule is to the effect that all negotiations that led up to the execution of the contract are not admissible in evidence to alter the terms of the contract.

THE COURT: Mr. Hart, that is, of course, the rule. At this point there is no contract in evidence. I am going to hear this testimony as a description of the events that led up to the making of a contract and I will just have to sort it out when the time comes.

MR. HART: I appreciate that, but just let the record show that I do have an objection and a continuing objection to any negotiations that led up to it.

THE COURT: The record will so show.

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BY MR. CHICHESTER: (continuing)

Q Go ahead.

A This document indicated, as I said, a procedure whereby problems would be corrected, and said that a list should be prepared by the purchaser no sooner than thirty days after the closing, and that problems would be fixed by the builder within ninety days of receipt of the list under a standard builder's warranty.

We indicated to Mrs. Gearhart at that time that even though we were absolutely in love with the development, that we really wanted to think about it more seriously, and we really did not want to move until the following June, the next summer of 1976, and that we really had our hearts set on building our own home rather than an existing model home.

MR. HART: Excuse me, did you say Mr. or Mrs.?

THE WITNESS: Mrs.

A (continuing) Mrs. Gearhart called us in Fairfax and made us a good offer on the model home at

COPY

direct - Johnson

100 Old Landing Court. We seriously considered it and then reminded ourselves and then told her that our interest was simply to move the following summer, and to "build our dream house in a sence that we could choose our own carpet, and our own tile rather than buy an existing home."

In the period June through August of 1975, my family took several trips to River Bend Subdivision simply because we were absolutely in love with the place. In one of these visits I first met Mr. Gearhart, this was in latter July or early August of 1975, in front of a house, whose address currently is 104 Old Landing Court.

Q What Mr. Gearhart is that?

A Mr. Harold Gearhart.

Q All right.

A At that time I introduced myself and told him that, which I had been telling his wife for a couple of months, that I was very, very interested in buying a home at River Bend, but that I really wanted to build my own home, and that the timeframe I had in mind was the following summer. I indicated to him at that time one of

COPY

the major reasons that I wanted to move, other than liking the house, was the opportunity to buy a well-built, warm home, because one of the problems I had in Fairfax was that the Fairfax house that we owned was extremely cold and drafty. At the time when I expressed to Mr. Gearhart for a well-built, draft-free, warm home, he told me that he would build me an excellently built home and I would be extremely pleased with the quality of workmanship and the quality of materials that went into my home. I then discussed with him this document on the wall of the model, because this was very similar to the arrangement that I had when I bought my house in Fairfax, and he assured me at that time that my problems, while I would be pleased with the workmanship, that any problems that would occur would be corrected under a standard builder's guarantee under a procedure as described in that document on the wall of the model home. In September --

THE COURT: (interjecting) When was that, Mr. Johnson?

THE WITNESS: Let me scratch those two words, please. During June through September of 1975 --

COPY

THE COURT: Let me interrupt you a minute. This last meeting that you just described that you had with Mr. Gearhart, when was that?

THE WITNESS: In the latter part of July or the first part of August of 1975.

THE COURT: All right, go ahead.

A (continuing) During June through September of '75, my wife and I had been in contact with Mrs. Gearhart for other reason, one very important reason, as a matter of fact. Living in Fairfax, it was nothing to us to see a model development sell out completely in a matter of days, it seemed like. So I stayed in constant touch with Mrs. Gearhart throughout this June through September period to understand the process or how the sales were going or how the development was growing. So that while I wanted to move the following summer, if I had to move earlier, I would have. During these conversations, she indicated to us that, well, during these conversations she indicated that it was her understanding that the price of the home which was then seventy-three thousand, nine

COPY

hundred and fifty dollars, would remain as such until January of 1976. However, on September 13th, 1975, Mrs. Gearhart called my wife and I at our Fairfax home and told us that, for whatever reason, the price of my home was going to go up ten thousand dollars the following Monday, and that if I wanted to complete or get a contract on my house at the going rate, I had to do it that very weekend. My wife and I traveled to River Bend Subdivision on Sunday, September 14th. We met with Mrs. Gearhart. She presented me a contract that was, I believe, printed by River Bend Limited and was filled out in writing by Mrs. Gearhart. My wife and I read the contract, noted paragraph seven of the contract with reference the existence of the guarantee, presented River Bend Limited with a one thousand dollar deposit, and signed the contract.

MR. HALEY: Mr. Johnson, during this period of time that you were talking with Cheryl Gearhart, was she the active sales representative with whom you were dealing throughout all of this?

THE WITNESS: Yes.

COPY

direct - Johnson

reference to a guarantee with reference to a guarantee letter. Ask him about what's in the contract.

Q All right, with respect to the guarantee letter set forth in paragraph seven of the contract, did Mr. Gearhart explain to you what that meant?

A Yes, he did.

Q Tell the Court what he told you.

A He told me that my house would be built -- he would guarantee that my house would be built in a good and workmanlike manner; that my house would be built free of defects, and that he would put the house under a one year warranty.

Q And when did he tell this to you?

A He told me this in this July through August, 1975, experience, and more specifically he told me on January 22, 1976.

Q And did he say that the warranty would go from what period of time to what period of time?

A It would be for one year following date of closing.

COPY

which he has already testified that Mr. Gearhart told him about the guarantee, which he has stated to the Court, and I am asking him with respect to that statement of what the guarantee was, the length of time and what it consisted of. I am asking him when that was told to him and on what different occasions.

A During the September, '75, to actual closing of the house, which took place in August of '76, I met with Mr., either Mr. or Mrs. Gearhart on several occasions. There are two instances in particular that I would like to relate to the Court. One occurred on January 22, 1976, when we met, my wife and I met with Mr. Gearhart for the specific purpose of getting my new home under construction. I presented Mr. Gearhart with a two thousand dollar check, which was the final payment of the contractural deposit, so that my home could get started, and we began to discuss the options that would go into my new home. During this conversation, I repeated to Mr. Gearhart my concern for a well-built, warm house, because at this stage I was willing

COPY

direct - Johnson

to pay for whatever he would at least seriously consider any options that I could put into my house that would guarantee that. In the strongest manner possible Mr. Gearhart assured me that I would get an extremely well-built, well-constructed, top quality material home. He again repeated that there are problems with any home and that these problems would be satisfied through a one year's builder's warranty and that the procedure would be such that I would provide him a list of these defects at least thirty days after settlement and that these items would be completed within ninety days.

Q Now, I believe you made reference to a period of time prior to the signing of the contract that he said essentially the same thing, is that correct?

A Yes.

Q And when was that?

A Late July, early August of 1975.

Q Tell the Court again what he told you then.

A Essentially the same conversation that I just described to you that I mentioned for the first time

COPY

point and time. A discussion was held in Mr. Chichester's office and Mr. Gearhart agreed to complete the house within a two week's period and correct the problems or deficiencies that the house at that time had and that we would go to settlement and we arranged for settlement on August 3, 1976. On August 3, 1976, Mr. Grannum; Mr. Gearhart; my wife; myself; and Mr. Chichester, who was my lawyer, met in Mr. Chichester's office for the purpose of settling on my new home. At that time Mr. Grannum indicated that it was his opinion again that the house was still not completed, but that because he knew Mr. Gearhart and knew him to be an honorable man, that the house was close to being completed, that he recommended that I go through with the settlement. At that time Mr. Gearhard indicated that at this point I needed to trust him and that any deficiencies or problems that remained with my house at that point and time would be corrected under the one year's builder's guarantee.

THE COURT: This was August 3rd?

THE WITNESS: Yes, sir.

Q Of what year?

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BY MR. CHICHESTER: ~~(continuing)~~

Q Who did you say prepared the contract which you signed, which is Exhibit Two?

A The contract was provided by River Bend Limited and was completed in writing by Mrs. Cheryl Gearhart.

Q All right, now, you settled on August 3, 1976. Now, after you moved in, did there come a time that you noticed anything wrong with the house?

A Yes, sir.

Q I'd like for you to tell the Court exactly what you found wrong with it and when you relaid this information to Mr. Gearhart, if you did.

A May I use notes?

Q Are they notes that were made at the time or shortly after the time of the occurrence?

A Yes.

Q All right, go ahead.

A We settled on the house in August of 1976.

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Q The items that you have that you initially talked about and that you have spoken about in these photographs, were they ever fixed?

A There were attempts to fix them.

Q Were they ever fixed?

A No, sir.

Q Now, did Mr. Gearhart ever supply to you the guarantee letter which is mentioned in paragraph seven of the contract, which is Exhibit Two?

A No.

Q What's that?

A No.

Q Did he ever deny that he had given you a warranty which is set forth in the letters and that you have originally told us about?

A No.

Q Now, let me ask you whether or not you ever saw Mr. Wisniewski at your place?

A I saw Mr. Wisniewski in June of 19 -- June or July of 1976, yes, at the, on the grounds of my future home.

direct - Johnson

Q And what was the state of construction? What progress had been made in the construction of your home at that point?

A It was near completion. We were hoping to get to settlement in June, which we later delayed until July and then in August.

Q What occurred when you saw Mr. Wisniewski?

A We introduced ourselves. He informed me, not informed me, he told me that he was an investor in the area and that he was very interested in my satisfaction.

Q What, if anything, did you see him do or say?

A There was some grading going on at the time and he was giving instructions to the person who was driving the vehicle.

Q And what period of time was that?

A It was in June or July of '76. I was living in a motel at the time. It was local to Fredericksburg.

Q And in this grading that was being done that Mr. Wisniewski you say was directing, grading of what particular lot or area?

COPY

direct - Johnson

A He was grading my lot, my area, and just smoothing the dirt out in front of my house.

Q Is this the same house that is the subject of the contract which is Exhibit Two?

A Yes.

Q What county is that in?

A Stafford County.

Q What, if anything else, did Mr. Wisniewski do other than direct the grading operation?

A I don't know of anything in particular. He looked like he was interested in what was going on and giving assistance.

MR. CHICHESTER: If I might have a moment, Your Honor.

Q Can you tell the Court approximately how many times you have asked Mr. Gearhart to fix the problems that you have testified here about, either orally or in writing.

A The number of times?

Q Yes.

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MR. STEVENS: I have some questions as far as Mr. Wisniewski, Your Honor.

THE COURT: All right.

CROSS EXAMINATION

BY MR. STEVENS:

Q You said you first met Mr. Wisniewski in June or July of 1976?

A That is correct.

Q All right, and at that time what stage of development was your house in at that point?

A It was a frame, some siding had been placed on the house, the roof had not been completed, and they were grading the area in the immediate area around the house.

Q And when you got there, was he there already or did he come after you arrived?

A He was there already.

Q He was already there and he came up and introduced himself to you?

cross - Johnson

A I was putting a mailbox up in the front yard and I think we both jointly saw each other and we sort of walked to one another and introduced ourselves.

Q And you say he was giving instructions to the man on the grader, is that correct?

A That is correct.

Q Were you with him at the time that this was going on? Were you able to hear what he was saying or what?

A He and I talked about how I wanted my driveway and the kinds of dirt we wanted shoved around and we talked about it and then I saw him going over and motioning with his finger to the driver of the bulldozer.

Q You don't know what he said?

A No, sir.

Q When you entered into the contract, which is Exhibit Two, for the sale of this home, you were aware this purported to be, the organization was the River Bend Limited, is that correct?

MR. CHICHESTER: Now, I would object to

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that, Your Honor. That would call for this witness to make a legal conclusion that this Court has already --

THE COURT: (interjecting) The contract speaks for itself.

Q Did you examine the certaificate of limited partnership at the Courthouse prior to settlement on this, your Exhibit One, I believe?

A (no reply from the witness)

Q I show you Plaintiffs' Exhibit One and ask you if you had occasion to examine that certificate of limited partnership.

A No, I did not.

Q Have you ever examined it?

A No, sir.

Q Are you aware of any false statements in the certificate of limited partnership?

A I don't believe I understand what I am being asked.

Q Are you aware of any statements in the certificate which are false that I just showed you?

COPY

cross - Johnson

A No.

Q You said you talked to Mr. Wisniewski, and you both apparently introduced yourselves, and you said he told you he was an investor, is that correct?

A That is correct.

Q Did he tell you he was also a limited partner in River Bend?

A No, sir.

MR. STEVENS: That's all the questions, I have.

MR. CHICHESTER: Now, if I might ask one question on redirect, just one, Your Honor.

REDIRECT EXAMINATION

BY MR. CHICHESTER:

Q As a result of Mr. Wisniewski's pointing his finger when you saw him go over to the bulldozer driver, how did the bulldozer driver react to this?

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direct - Gearhart

Q Now, Cheryl Gearhart, that lady is your wife, is she not?

A She is.

Q And she's very active in the sales of these properties, wasn't she?

A She sold two or three of the properties, yes.

Q She had cards printed up with her name, Cheryl Gearhart, and River Bend?

A That's correct.

Q And she presented this contract, drew it up?

A She filled in the blanks.

Q She filled in the blanks; she signed it?

A She signed it as sales representative, yes.

Q So she was helping with the sales of these properties, wasn't she?

A Yes.

Q And this property at the time you

COPY

direct - Gearhart

closed and the time you contracted, was subject to a deed of trust securing Mr. Wisniewski, wasn't it?

A Yes.

Q And every time a lot was sold, Mr. Wisniewski would get paid some money?

A Mr. Wisniewski would get paid, yes.

Q And the amount he got paid, I presume, was when the lot was sold and how much interest it run, is that correct?

A Yes. It's called a release clause.

Q Did you ever tell Mr. and Mrs. Johnson, well, our contract here that you have signed, we prepared on our form, talks about a guarantee letter, but we don't have one and you are not really going to get one?

A I never spoke to Mr. and Mrs. Johnson to my recollection before the signed the contract.

Q You have talked to them a lot afterward, haven't you?

A Quite a bit, yes, Mr. Johnson primarily.

Q And water is still coming in the house, isn't it?

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THE COURT: Plaintiffs rest. Do you all have that new case?

MR. HALEY: I do.

MR. HART: Yes, sir.

MR. CHICHESTER: I have it right here.

THE COURT: Let me have it and let's take a ten minute recess.

NOTE: A brief recess is now taken. After which, all parties present as before, the matter continues as follows:

MR. STEVENS: I have a motion, if you are ready, Your Honor.

THE COURT: I am ready.

MR. STEVENS: Your Honor, on behalf of Mr. Wisniewski as an individual in this suit on his personal liability, I wish to move the Court to strike the evidence against him personally in this and limit any liability he may have to the issues of his involvement as a limited partner in River Bend Limited. The reason I say that is

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that the evidence before the Court today is that the contract was signed as River Bend Limited in big bold letters on the contract. Mr. Wisniewski, there is no evidence that he took any part, and, of course, his signature is not on the contract. There is no evidence he took any part in making the Johnsons believe that he was any more than a limited partner in this organization to the effect that there is no evidence that the Johnsons gave that they relied on him as being anybody, except that Mr. Johnson met him once, and in his very statement he remembers Mr. Wisniewski saying that he was investor in this organization or in this area where they were.

THE COURT: Are you saying that for a partner to be held liable for a partnership debt that the person relying on the receipt against the partnership or dealing with the partnership must rely on that part?

MR. STEVENS: In reference to limited partnerships, Your Honor?

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THE COURT: No, I am talking about a partner. Isn't the question whether or not this certificate is sufficient to establish a limited partner?

MR. STEVENS: Well, that's been raised once before and I am going to address that part, yes, and I think that that is the issue. I am not arguing if he is declared by the Court as a general partner, and I think that the issue is in the evidence that I think the cases are mixed on this as far as limited partnership cases. Some say there should be reliance to declare a limited partner as a general partner. Some say they shouldn't. The problem is it hasn't come up that often. The whole idea, in speaking to the certificate, which is in evidence, and list Mr. Wisniewski as a limited partner, the whole idea in being here is that in this limited partnership, uniform limited partnership act was adopted by the states, it was to prevent the very same thing that is happening here today. In other

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words, a man puts in money and property to his business,,and attacking a small corporation, not incorporated, so to speak. It's something less than a corporation. It gives people a chance to invest their money and that's it, you know, their money and their property. This act was adopted some time in Virginia around 1918, according to the statute, and there are very few cases on this type of thing from the Virginia Supreme Court. There are more coming up in the Courts across the country to different issues involved in the limited partnership act, but as I have argued before on this issue as to the certificate that is filed there, I believe that substantial compliance has been made to make him a limited partner and that it was made in good faith. I think the section having been, that section being 50-45 of the Code of Virginia in referring to substantial reliance. Now, before, the statutes before did not have that part of substantial compliance with the above described things in it,

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in good faith. This was a part of the uniform limited partnership act to incorporate that type of language, which to me is a little ambiguous, but the whole idea, the whole purpose and spirit of the act was to allow people to take a chance in investing in this without it being so much of a gamble, and the evidence is that that certificate was filed in the Circuit Court of Stafford, and that there is no evidence here that Mr. Wisniewski did anything in reference to this particular issue of the home, the buying and selling of it, except that he met Mr. Johnson on or near the homesite and that he described himself as an investor, which is exactly what he was purported to be, and if you get to reliance, there is no reliance here. There is no issue of reliance as far as them relying on him, and I think it violates the intent of the statute, and I really believe the whole idea was to prevent this sort of thing from occurring, and that's my position.

MR. HART: On behalf of Mr. Luchaka

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and the other limited partners who are in this, on their theory that the partnership was not properly formed, I make the same motion on behalf of all of them for the reasons stated by Mr. Stevens.

MR. CHICHESTER: If Your Honor please, some months ago we argued this very point to the Court and the Court took the point under advisement and ruled that that which purported to be a limited partnership certificate having been filed in the Clerk's Office was not, in fact, a limited partnership, because it did not comply with the statute. Now, in addition to that, we have in evidence today, in the first place, that Mr. Wisniewski at one point met Mr. or it was a chance meeting, the evidence was, but nevertheless, met him at the site, and in Mr. Johnson's words, was direction the operation of the bulldozer. In addition to that, there is in evidence that he was taking money from the sales of these of these in order to release the property. But in

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addition to that, Your Honor has before you evidence that Cheryl Gearhart, whom, under the same partnership agreement that Your Honor has said is not a limited partnership agreement, she was actively involved in the selling of the houses, signing contracts, showing people the housing site, raising prices, conferring with the Johnsons. All of that is before the Court. But, frankly, I thought, Your Honor had ruled on this. But, and I think Your Honor was right in ruling on it, based on the Solimite case that I presented to the Court when we argued this before. But in addition to that, we have all of this other evidence of these other two so-called limited partners actually involved in the operation of River Bend Limited. So I ask that that motion be denied.

MR. STEVENS: Your Honor, it's true, in fact, that Mr. Wisniewski may have held a first deed of trust on the property. The idea of limited partnership, I think, it's a totally

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1 independent issue, myself, as far as what
2 property he held, but the idea is that a limited
3 partner can provide money and property to the
4 limited partnership, and he is supposed to get
5 something back in return for it. That's the
6 whole idea in engaging in an economic situation
7 for the purpose of profit. I see nothing there
8 to show that that would declare him as being a
9 general partner in these things. As to the case
10 that the Virginia case came up on and which is
11 cited in Am Jur sometimes, that's a 1911 case
12 which predates the adoption of the uniform
13 limited partnership act as stated in the date of
14 the act of sections that I have cited, which is
15 Section 50-45 of the Code in 1918, and the
16 Overton was a 1911 decision of the Virginia
17 Supreme Court. It was a pre-uniform limited
18 partnership act case. The case that Mr. Chichester
19 relied on, the Solimite case from California,
20 referred to one, in the first place, I think it
21 referred to only one, it made only one small

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statement about it. That case was not turning on that issue, but it made one statement about it that the admission of the acknowledge was a technicality, and, therefore, it was invalid. California law, if Your Honor would accept this argument, doesn't require a swearing to or a certificate to begin with at this stage. Now, they cited one more case which was to -- in order to cite that technicality as being valid, they cited the Russell v. Warner case, which is another California case, which I read, and in that case it didn't apply factually to this, and it's almost indicative the way they said it, because it, too, didn't have that much to do with the facts of the case. Most of these cases in California involved fraud and the limited partners did not know what was going on. And the case I find to substantiate what I am saying is a case in Georgia which was decided in 1977, which was --

MR. CHICHESTER: He's going into new matters now. I would like a chance to rebut the new matters.

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1 THE COURT: He's arguing the law. I
2 will let him argue the motion.
3 MR. STEVENS: Thank you. The case I
4 find, Your Honor, as far as a more recent case
5 than the California cases, which was a Georgia
6 case in 1977. The California cases are, of
7 course, California law sometimes is different
8 from everybody else anyway, but the Georgia case
9 was D. M. Franklin v. Griggs, and in that case
10 the certificate for the limited partnership wasn't
11 filed in the case until some months after the
12 limited partnership came into being, but it was
13 filed later on, the certificate was, and in that
14 case the Georgia Supreme Court in an action
15 against the limited partners trying to declare
16 them as general partners, they overturned the
17 lower Court's decision and would not find against
18 them, although the facts were a little bit
19 different as far as what was going on, and their
20 language was, in the absence of such language,
21 when you are supposed to file these things, the

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Court must construe each case according to its own circumstance. The uniform limited partnership act as adopted in Georgia is obviously intended as ameliorate legislation. One of its main purposes being to insure that where there has been substantial compliance with the law, limited partners do not find themselves exposed to the liability of the general partnership because of a mere technical, and they cite Lewis and limited partnerships and University of Pennsylvania Law Review, and they went on to say it is obvious in the present case the plaintiff was in no way harmed by the late filing of the certificate. He dealt initially with the corporation which he became a general partner and a purchaser and with its president, who was the other general partner, and that's where it comes in to some Courts will take evidence as to any reliance taken by the parties dealing with the limited partnership, whether they dealt with the limited partner or who is being declared a general partner, and that

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is the reason I mentioned that is that that is the case, and I don't think there is enough evidence here to show that, and I ask the Court to strike the evidence against Mr. Wisniewski

THE COURT: The motion is denied.

MR. STEVENS: Note my exception.

THE COURT: Your exception is noted. Are there any other motions, gentlemen, before we proceed?

MR. HART: Yes, sir. If Your Honor please, I would like to make a motion on behalf of all the people that I represent in this. I filed an answer with Mr. Wisniewski, so I presume to a certain extent I represent him too, but I would like to make a motion to strike the evidence or judgment or whatever you do when there is not a jury. I understand it's for summary judgment, but please understand it's also to be a motion to strike, if that is appropriate.

Now, the plaintiff has sued in this case under two theories. Well, I

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~~THE COURT: Your exception is noted.~~

MR. HART: If Your Honor please, I believe we objected and excepted to the ruling of the Court on the motion to strike. The defendants declined to present any evidence except as to mitigation of damage. We are going to rest, renew our motion to strike, and reserve the right to put on evidence in mitigation of damage, only we intend to rely on our motion to strike in this case.

THE COURT: All right.

MR. HART: So, at this point, we rest.

THE COURT: You are relying on your motion to strike so far as liability is concerned?

MR. HART: So far as liability is concerned and now at the conclusion of all the evidence we renew our motion to strike.

THE COURT: That renewed motion is denied and your exception is noted.

~~MR. HART: All right, now, call Mr.~~

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1 room may at this point appreciate what a
2 difficult case this is, but the lawyers have
3 appreciated it from the beginning. These are very
4 technical, difficult cases from a legal point of
5 view.
6 The evidence shows that
7 Mr. Gearhart and the other defendants associated
8 themselves in a profit-making enterprise in
9 developing this subdivision and building and
10 selling these houses. Mr. Gearhart and his wife
11 have been shown by the evidence to have
12 participated particularly actively in the
13 enterprise as a business, and the evidence is
14 that Mr. Wisniewski was a participating, at
15 least to some extent, on at least one occasion.
16 On one has named the other defendants in the
17 evidence today, but they filed a certificate
18 which they acknowledge their involvement in the
19 enterprise. For me to hold that that certificate
20 is sufficient to provide them the insulation
21 that goes along with a limited partnership would

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1 require me to hold that the oath requirement is
2 of no consequence, and I ruled before that I am
3 unwilling to do that, and I have held that these
4 people are all general partners.
5 The partnership prepared
6 a written contract form and as a part of paragraph
7 seven it contracted to furnish a guarantee letter
8 and it made that undertaking despite the Johnsons'
9 specific inquiry as to what it would be. The
10 Gearharts made representations as to what it
11 would be and all that despite the fact that there
12 was no letter in existence, no letter contemplated,
13 and they never had any idea of giving that letter.
14 Gentlemen that takes this case out of the ambit
15 of the parol evidence rule.
16 Furthermore, when asked
17 specifically by the Johnsons as to what the
18 undertaking of providing of this house would be
19 constructed according to standards of construction,
20 Mr. Gearhart made representations as to what those
21 standards were and he said, in effect, that there

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would be a one year warranty; that the house was built in a good and workmanlike manner, and the Gearharts acted for the partnership, permitted the Johnsons to go through with this deal, left them expecting a guarantee and relying on the language of paragraph seven, when all the while they had no intention of making a guarantee, and that takes this case out of the parol evidence rule.

Then they came along on August 3rd, 1976, for closing when the house was not completed and the partnership induced the Johnsons to close, again on the assurance that they were trustworthy and on the assurance that this warranty was being provided and that, in my opinion, plainly supports the plaintiff's right to recover against the defendants.

As counsel said, it's just a question of which witnesses I find more reliable. I find Mr. Chaves completely reliable. He's an architect of good reputation and experience

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in this community and I am accepting his testimony and judgment is rendered for the plaintiffs against all the defendants for twenty thousand dollars.

MR. HALEY: Thank you, sir.

MR. HART: Judge, if Your Honor please, could I prepare the order in the case?

THE COURT: If that is acceptable to Mr. Chichester.

MR. HART: And forward it down to counsel for the plaintiff and I will ask the Court to direct the Court Reporter to make a transcript a part of the record in the case, in the order, and I will also provide for a suspending bond.

THE COURT: All right, gentlemen, I was going to ask you to prepare an order, because the Clerk is sick.

Mrs. Haley, will you -- You want the transcript written up?

MR. HART: I am sure we do, yes, sir.

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CERTIFICATE OF FORMATION OF
RIVERBEND LIMITED PARTNERSHIP

Pursuant to the provisions of Section 50-45, et seq. of the Code of Virginia, the undersigned do hereby certify as follows:

1. That they have formed a limited partnership, the name of which is Riverbend Limited Partnership.

2. The character of the business to be conducted is the purchase and development of real estate in Stafford county, Virginia.

3. The location of the principal place of business of the partnership is the business office of General Partner Harold R. Gearhart at 1106 Prince Edward Street, Fredericksburg, Virginia.

4. The name and place of residence of each member of the partnership is as follows:

Pl Ex #1
2/1/79

General Partner - Harold R. Gearhart
1106 Prince Edward Street
Fredericksburg, Virginia 22401

Limited Partners - Michal Wisniewski and Kathleen R. Wisniewski as tenants by the entirety with survivorship
Widewater, Virginia

Walter M. Luchaka and Olga G. Luchaka as tenants by entirety with the right of entirety with survivorship
1809 Drury Lane
Alexandria, Virginia

Harold R. Gearhart and Cheryl Gearhart, as tenants by the entirety with right of survivorship 1106 Prince Edward Street, Fredericksburg, Virginia

5. The term for which the partnership is to exist is fifteen (15) years from August 26, 1973.

6. The amount of cash or other property to be contributed by each limited partner is as follows:

Michael and Kathleen R. Wisniewski $28,000.00 cash and a note for $3,500.00

Wlater M. and Olga G. Luchaka $14,000.00 cash and a note for $3,500.00

Harold R. and Cheryl Gearhart $10,500.00 cash and a note for $3,500.00

7. No additional contributions are required of any limited partner.

8. The contribution of each limited partner is to be returned upon sale of all or substantially all of the assets of the partnership.

9. The limited partners shall divide ninety (90%) per cent of the profits of the partnership in accordance with their respective porportionate interests in the partnership.

10. A Limited partner may substitute an assignee as a contributor in his place only with weitten consent of the General Partner.

11. No right is given to the partners to admit additional limited partners.

12. No priority is given to any limited partner to refund of contribution or compensation or other income.

13. Provision is made in the Partnership Agreement for termination of the partnership upon the resignation, withdrawal, bankfuptcy or incompetency of the General Partner. Provision is made in the Partnership Agreement for continuation of the Partnership upon the death of the Gneral Partner provided that a majority in interest of the Limited partners elect a new General Partner.

14. No right is given to any limited partner to demand or receive property other than cash for his contribution.

Given under our hands this 26th day of August, 1973.

Harold R. Gearhart
General Partner

Michael Wisniewski and

Kathleen R. Wisniewski
Limited Partner

Walter M. Luchaka and

Olga G Luchaka
Limited Partner

Harold R. Gearhart and

Cheryl Gearhart
Limited Partner

STATE OF VIRGINIA

ty/ COUNTY OF Fredericksburg, to-wit:

The foregoing instrument was acknowledged before me this 26 day of March 1974, by Harold R. Gearhart and Cheryl Gearhart.

Dorothy M. Hendley
Notary Public

Notary Seal

My commission expires: July 31, 1977.

STATE OF VIRGINIA

CITY/COUNTY OF FREDERICKSBURG, to-wit:

The foregoing instrument was acknowledged before me this 26 day of March, 1974, by Walter M. Luchaka and Olga G. Luchaka.

Dorothy M. Hendley
Notary Public

My Commission Expires: July 31, 1977

Notary Seal

The foregoing instrument was acknowledged before me this 26 day of March, 1974, by Michael Wisniewski and Kathleen R. Wisniewski.

Dorothy M. Hendley
Notary Public

Notary Seal

My Commission exxpires: July 31, 1977.

STATE OF VIRGINIA

COUNTY OF STAFFORD, to-wit:

In the Clerk's Office of the Circuit Court for the said County of Stafford the 5th day of April 1974, this certificate was presented and with the certificate annexed duly recorded at 10:00 A.M.

Teste:

Lillian T. Knight
Deputy Clerk

A COPY, TESTE:

Lillian T. Knight
Dept. Clerk

Pl Ex #2
2/1/79

RIVER BEND, Ltd.
BUILDERS – DEVELOPERS
(703) 371-2548 or (703) 373-0198

This Agreement OF SALE entered into this 14 day of September, 1975, by and between River Bend, Ltd., hereinafter referred to as Seller, and Thomas W. and Susan I. Johnson hereinafter referred to as Purchaser.

Witnesseth

In consideration of a deposit in the sum of One thousand and xx/100 ($1,000.00) Dollars (Cash, Check or Note) paid by Purchaser to Seller, Seller agrees to sell and Purchaser agrees to buy:

Lot 9, Block N/A, Subdivision River Bend,
County Stafford, State Virginia,
Known as Habitat II, with Sellers Standard,
Model, Front Style Standard dwelling completed thereon, for a price of Seventy-three thousand nine hundred fifty and xx/100 ($73,950.00) Dollars, on the following terms and conditions.

1. Purchaser agrees to make payment as follows:
   a. A cash payment of twelve thousand and xx/100
   of which the above deposit shall be a part ($12,000.00)
   b. By proceeds of note in the amount of sixty-one thousand nine hundred fifty and xx/100
   payable
   with interest at 8½% secured by a first deed of trust on the premises ($61,950.00)
   c. By note payable to Seller in the amount of N/A
   payable (.....) monthly with balance due and payable five (5) years from date of same, with interest at .....% secured by a deferred purchase money second deed of trust on the premises. ($.....)

   Total Purchase Price ($73,950.00)

Purchaser agrees to use due diligence to obtain or accept a firm commitment from an established lending institution to place the first deed of trust loan and shall, upon obtaining or accepting such commitment furnish Seller with satisfactory evidence thereof; if within thirty (30) days from the date hereof, Seller has not received satisfactory evidence of such commitment, Seller may, at its option at any time thereafter, return the deposit to Purchaser, whereupon this agreement shall be null and void. Trustees in all deeds of trust shall be named by the parties secured thereby.

2. Seller agrees to execute and deliver at settlement a general warranty deed conveying marketable title good of record and to pay for revenue stamps required on the deed. The property shall be conveyed subject to any covenants, conditions and restrictions of record, but free and clear of all liens and encumberances except as otherwise provided herein. If there is a title defect which cannot be readily

cured by legal action, the Seller shall return the deposit to Purchaser and this agreement shall become null and void. If legal action is necessary to perfect title such action shall be taken promptly by and at the Seller's expense, whereupon the time specified herein for full settlement shall thereby be extended for the period necessary for such action. The Seller shall not be liable for any claim or damages by reason of any defect in title.

Settlement shall be made at the office of the Title Company searching the title. Deposit with the Title Company of the deed of conveyance and such other papers as are required by the terms of this contract shall be deemed and construed as a good and sufficient tender of performance of the terms hereof.

3. Seller assumes the risk of loss or damage to said property by fire or other casualty until the executed deed of conveyance is delivered at settlement.
4. Seller shall deliver possession of the premises to Purchaser at settlement. Taxes, water, rent, insurance, interest on existing encumbrances, if any, annual benefit charges and other assessments, if any, against the property shall be adjusted to the date of settlement and assumed thereafter by the Purchaser.
5. Examination of title, tax certificate, conveyancing, notary fees, state revenue stamps, survey if required, and all recording charges, including those for purchase money trust, if any, are to be at the cost of the Purchaser, who hereby authorizes the Seller to order the examination of title from ..... Daniel Chichester .....; provided however, that if upon examination, the title should be found defective and is not remedied as aforesaid, the Seller hereby agrees to pay the cost of examination of the title.
6. Within ..... days* from the date hereof, or as soon thereafter as a report on the title can be secured if promptly ordered and subject to Seller's standard check-out of premises, the Seller and Purchaser agree to make full settlement in accordance with the terms hereof. If the Purchaser shall fail so to do, the deposit herein shall be forfeited to Seller, or at its option Seller may without forfeiting the deposit, avail itself of any legal or equitable rights which it may have under this agreement. The entire deposit shall be held by River Bend Limited Partners.
7. At the time of settlement the Seller shall have completed the dwelling except for any items shown on Seller's Standard Check-out Form and Guarantee Letter, in accordance with its Standards of Construction for this community, a copy of which has been furnished Purchaser. The Purchaser hereby represents that he has fully inspected the premises.
8. The Purchaser may, by selections from the Seller's Standard Construction Options, add to the basic plan for the model selected, provided however:

   1. That such selections must be made at one time only and must be agreed upon in writing; and
   2. That if the Seller's standard price for selections agreed upon increases the purchase price stated above, the deposit shall be increased by the amount required for such selection; and
   3. That it is understood that this provision does not permit the Purchaser to select any standard construction option if construction has proceeded beyond the stage where the option is available in the normal course of Seller's standard construction practices.

   Purchaser may make such interior decorating and color selections from Seller's standard selections as have not already been made, provided that such selections are completed and delivered to Seller in writing in time to be incorporated in Seller's production schedule and that any overages are paid in cash at the time the selections are made. Seller shall exercise reasonable care to see that all extra items are performed, however, Seller's responsibility for omission of any extra item shall be limited to the agreed price thereof, and any such omission shall not invalidate this agreement. Seller reserves the right to make such changes as become necessary in Seller's opinion by site or job conditions. All grading and landscaping including the disposition of trees and control of waterflow shall be at the discretion of the Seller.

   Seller assumes no responsibility for trees left on the premises, if any. Seller reserves the right to substitute materials or equipment of comparable quality, and to make necessary structural changes which are in accordance with the applicable building codes.
9. It is further understood that the time of settlement set forth above may be extended upon a showing by the Seller that there has been a delay in construction caused by any one or more of the following: An Act of God, a national emergency, a strike, imposition of restrictions upon materials,

Please see my number & phone home by noon settlement date, so does River Bend agree & pay any costs for furniture storage & pay the balance of the purchase price.

failure of municipality or public utility company to provide necessary utilities, unusual soil conditions, or other valid cause which Seller could not foresee or anticipate, provided the same is beyond the control of the Seller to correct or remedy in the exercise of care and diligence. In the event there is a delay in the period of construction covered by the foregoing provision, the settlement date shall be extended for a period equal to the allowable period of delay. Purchaser agrees to cooperate with Seller in inspecting the premises prior to settlement, for the purpose of preparing a check list of any work remaining to be performed to meet Seller's Standards of Construction.

* Settlement date will be June 25th, 1976 - On January 15, 1976, an additional deposit of $2,000 shall be required from the purchaser before construction may commence.
- Purchaser's check for $1,000 dated September 14, 1975, will not be deposited before September 22, 1975.
- A planning conference will be held on or about January 15, 1976, at which time purchaser will make final selections of colors and materials as are offered by Builder-Seller.

10. The terms of this agreement shall be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns. The provisions hereof shall survive execution and delivery of the deed aforesaid and shall not be merged therein. This is the entire and final agreement between the parties hereto and they shall not be bound by any terms, conditions, statements, warranties, or representations, oral or written, not herein contained.

By _____ (Sales Representative)

9/14/75 (Date) _____ (Purchaser)

9/14/75 (Date) _____ (Purchaser)

RIVER BEND, LTD. 9/15/75

9/15/75 (Date) By _____ (Seller) Trustee R. B. Assoc PTD.