

1977

Time Commercial Financing Corp v. Carol  
Brimhall, William Hesterman, Stephen D. Schultz  
And Brimhall Products, Inc., A Corporation, And  
4-Spectra, Inc And Walker Bank & Trust Company,  
Administrator With The Will Annexed of The  
Estate of Ray S. Brimhall, Deceased v. Brimco  
Hydraulics & Engineering, Inc., A Corporat: On,  
John B. Fairbanks, Jr., And Western Research And  
Manufacturing Company : Response To  
Appellant's Reply Brief By Dependets-Respondents  
Carol Brimhall Davis And Walker Bank

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Respondents Carol Brimhall Philip A. Mallinckrodt, Robert R. Mallinckrodt, A. Wally Sandack;  
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IN THE SUPREME COURT  
OF THE STATE OF UTAH

TIME COMMERCIAL FINANCING CORP.,  
a Utah corporation,

Plaintiff-Appellant,

vs.

CAROL BRIMHALL, WILLIAM HESTERMAN,  
STEPHEN D. SCHULTZ and BRIMHALL  
PRODUCTS, INC., a corporation, and  
4-SPECTRA, INC.,

Defendants-Respondents,

and

WALKER BANK & TRUST COMPANY,  
Administrator with the Will annexed  
of the Estate of Ray S. Brimhall,  
deceased,

Defendant-Respondent  
and Third-Party Plaintiff,

vs.

BRIMCO HYDRAULICS & ENGINEERING, INC.,  
a corporation, JOHN B. FAIRBANKS, JR.,  
and WESTERN RESEARCH AND MANUFACTURING  
COMPANY,

Third-Party Defendants-  
Respondents.

Case No 15134

FILED

NOV 15

Clk, Supreme Ct.

RESPONSE TO APPELLANT'S REPLY BRIEF  
BY DEFENDANTS-RESPONDENTS CAROL  
BRIMHALL DAVIS AND WALKER BANK

APPEAL FROM THE ORDER OF THE THIRD  
DISTRICT COURT IN AND FOR SALT LAKE  
COUNTY, STATE OF UTAH, DATED APRIL 11, 1977,  
BY THE HONORABLE JAMES S. SAWAYA, DISTRICT JUDGE.

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## RESPONSE REQUIRED

The defendants-respondents Carol Brimhall Davis (hereinafter "Davis") and Walker Bank & Trust Company, Administrator with the Will annexed of the Estate of Ray S. Brimhall, deceased (hereinafter "Walker Bank"), respectfully submit this response to Appellant's Reply Brief. A response to that brief is regarded as necessary in view of improper, unsupportable and misdirected argument therein presented and in view of a recent trial court pronouncement which bears directly on the issues before this Court in this appeal.

## THE ISSUES RAISED ON APPEAL

This appeal arises from a post-judgment proceeding in which the trial court held that a particular product (a "Black Cab Latch") is a royalty bearing product (R-754) under and pursuant to the final Amended Decree of July 30, 1975 (R-624). The plaintiff-appellant Time Commercial Financing Corporation (hereinafter "TIMECO") claims that it was denied due process in the proceedings immediately precedent to that holding. In turn TIMECO seeks reversal of that holding and a "remand to the lower court to consider additional evidence" (TIMECO's Brief, page 2). The defendants-respondents Davis and Walker Bank urge that the appeal is not perfected and that TIMECO was not denied due process.

## THE APPEAL IS NOT PERFECTED

The defendants-respondents Davis and Walker Bank assert

that the appeal is not perfected on several grounds as set forth in their Brief. TIMECO disagrees by asserting distinctions without substance.

Notice of Appeal  
Fatally Defective

In their main Brief (page 7), Davis and Walker Bank argue that the Notice of Appeal is fatally defective because it takes appeal from the trial court Order of April 11, 1977 (R-798) which denied TIMECO's Motion For Review And Withdrawal Of Memorandum Decision of January 31, 1977 (R-755) rather than from the substantive trial court decision of January 24, 1977 (R-754) of which TIMECO complains.

TIMECO challenges the position of Davis and Walker Bank on the grounds that TIMECO's motion of January 31, 1977 (R-755) was not a motion for a new trial under Rule 59 as Davis and Walker Bank argue. Rather, TIMECO asserts that its motion of January 31, 1977 was "in substance and effect.....a motion to alter or amend the Judgment of January 24, 1977, as provided for by Rule 59(e)..." (Reply Brief, page 4). The distinction is without material difference. It does not make the Notice of Appeal any less defective. A motion to alter or amend a judgment is also not appealable. The case of Walker v. Bank of America National Trust & Savings Association, 268 F.2d 11 (CCA 9th, 1959), cert. den., 361 U.S. 903, 80 S.Ct. 211, 41-2d 158 (1959) so holds except where the order denying the motion

is challenged as a manifest abuse of discretion. However, TIMECO has not here presented such a challenge.

### Appeal Untimely

Defendants-respondents Davis and Walker Bank argue that the appeal presented by TIMECO is not timely on the basis that the Motion For Review And Withdrawal Of Memorandum Decision filed by TIMECO on January 31, 1977 (R-755) was not a motion for a new trial under Rule 59. In its Reply Brief at page 7, TIMECO responds by characterizing the January 31, 1977 motion as a motion to alter or amend a judgment (i.e., the Order of January 24, 1977). The distinction is meaningless.

Davis and Walker Bank assert that TIMECO's motion of January 31, 1977 was a motion for reconsideration prohibited under the doctrine expressed by this Court in Drury v. Lunceford, 18 Utah 2d 74, 415 P.2d 662, 663 (1966). In the post-trial and post-judgment environment of the instant case, the purpose of a motion of the kind submitted by TIMECO could only be to seek reconsideration. No new trial could be had since the trial was completed in 1972. No alteration of a judgment could be made because the judgment at issue is the Amended Decree of July 30, 1975 (R-624) which was clearly res judicata. The memorandum decision or Minute Order of January 24, 1977 (R-755) by which the trial court reasserted the meaning of the July 30, 1975 Judgment was being challenged by TIMECO. A motion for a new trial or to alter or amend under Rule 59 was not then claimed



and does not comport with the factual and procedural environment.

Nevertheless, TIMECO aggressively asserts the motion of January 31, 1977 was under Rule 59(e). Such an assertion is without foundation for reasons as set forth on pages 11-13 of the Brief of Davis and Walker Bank and for the reason that the motion did not seek to alter or amend anything. No error either legal, grammatical or otherwise was claimed to exist in any judgment or order. Rather, TIMECO's motion of January 31, 1977, if anything, sought reconsideration on the basis that the trial court should take additional evidence. Accordingly, the January 31, 1977 motion could not have been under Rule 59(e) in substance or in effect. Therefore, the motion did not toll the appeal period; and the appeal is untimely.

#### PLAINTIFF WAS NOT DENIED DUE PROCESS

The "Black Cab Latch", which is the centerpoint of dispute, is not a new product. TIMECO didn't start making it or selling it last week or even last year. It was being made and sold long before the Amended Decree of July 30, 1975 (R-19) was entered. The trial court knew of the existence of the "Black Cab Latch" by testimony presented as early as June 12, 1975 (R-217). Indeed, much testimony is of record presenting facts and details pertinent to the "Black Cab Latch" (R-229, R-230, R-220). Accordingly, the trial court was quite familiar with the accused product when it was brought before the court.

December 22, 1977. The court was there asked to decide whether or not the "Black Cab Latch" was intended to be within or without the scope of its Amended Decree of July 30, 1975. It certainly could decide that question without any evidence because the trial court was in effect and in fact simply reasserting and restating the scope and intent of its Amended Decree of July 30, 1975. At a recent hearing in the trial court before the Honorable James S. Sawaya, the trial court said with respect to the question of TIMECO's liability for royalties on the "Black Cab Latch" and the findings now on appeal to this Court:

"I have found as a matter of fact, a matter that I submit is subject to review of the Supreme Court because you (TIMECO) have made that on issue on appeal, that the black cab latch is sufficiently identical with the original cab latch that royalties should be paid on it..... I said you have got a license by reason of succession because you (TIMECO) foreclosed and nobody really took issue with my findings on that. You (TIMECO) paid royalties until you (TIMECO) started manufacturing a cab latch that was in my mind sufficiently identical that you (TIMECO) should be paying royalties on that as well pursuant to the Court's Order. I found that and frankly I think it was an attempt to change the thing in some minute, minor detail so that you (TIMECO) wouldn't have to pay royalties and I don't think that that's---I don't think that's fair quite frankly...." Extracted from transcript of proceedings before the Honorable James S. Sawaya on September 23, 1977 (emphasis added).

Based on the above statement, it can be seen that the trial court was familiar with the "Black Cab Latch" and properly ruled that it was a royalty bearing product within the scope of its Amended Decree of July 30, 1975. No due process violation is extant.

## IMPROPER ARGUMENT

In its Reply Brief, TIMECO presents argument which is improper, unsupportable or misdirected. Brief response that is made below.

### Nordell-Kimball Patent Not of Record

On page 10, at line 11 of its Reply Brief, TIMECO admits that it withdrew the Nordell-Kimball patent from the record. In other words, that patent is not of record and is not evidence. Accordingly, any and all argument by TIMECO based on that patent is improper, unsupportable and misdirected. It should not be considered by this Court because it is based on evidence not of record.

### Resistance to Royalty Payments

TIMECO accuses Davis and Walker Bank of making various misleading statements to the effect that TIMECO has demonstrated a position of resisting royalty payments. Reply Brief, page 1, lines 1-10. On page 2, lines 1 and 2, of its Reply Brief, TIMECO flatly admits that it resisted royalty payments. TIMECO's accusation is thus groundless.

### The December 22, 1976 Hearing

TIMECO now maintains that it objected to continuance of any proceedings after the court reporter departed. Indeed, TIMECO asserts that the statement of Davis and Walker Bank to the contrary is "false". The transcript of those proceedings

shows no objection being voiced by TIMECO. The minute entry (R-726) shows no such objection. The record is devoid of any such objection (R-726-754). Any such objection was not presented in TIMECO's Motion For Review And Withdrawal of January 31, 1977 (R-755). Counsel for Davis and Walker Bank recall no such objection. In other words, TIMECO asserts the existence of such an objection without any foundation therefore in the record. Accordingly, it should be disregarded by this Court.

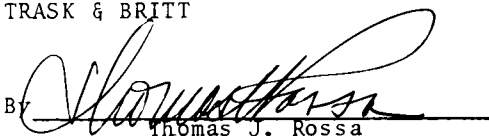
#### CONCLUSION

For the reasons as set forth in the Brief of the Defendants-respondents Davis and Walker Bank of August 19, 1977 and for the additional reasons as herein set forth, this Court is urged to dismiss this Appeal or in the alternative to affirm the trial court.

Respectfully submitted,

TRASK & BRITT

By



Thomas J. Rossa


CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing RESPONSE TO APPELLANT'S REPLY BRIEF BY DEFENDANTS, RESPONDENTS CAROL BRIMHALL DAVIS AND WALKER BANK were hand delivered on the 15<sup>th</sup> day of November, 1977, as follows:

(a) Two copies to Philip A. Mallinckrodt, Mallinckrodt & Mallinckrodt, 10 Exchange Place, Salt Lake City, Utah, 84111;

(b) Two copies to A. Wally Sandack, Sandack & Sandack, 370 East Fifth South, Salt Lake City, Utah, 84111;

(c) Original and nine copies to the Clerk of The Supreme Court of the State of Utah.

  
Thomas J. Rossa