

1988

Michael J. Hoth, Jeffrey R. Hoth, dba Hoth Brothers, a Utah partnership v. Karl R. White and Amy H. White, husband and wife; Karl R. White and Amy H. White, husband and wife v. Dean R. Morgan, Charles R. Team, Dean R. Morgan dba Polar Bear Homes, and Charles R. Tean dba Team Realty : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

88-0308-CA

MICHAEL J. HOTH, JEFFREY R.)
HOTH, dba HOTH BROTHERS, a)
Utah partnership,)

Plaintiffs,)

vs.)

KARL R. WHITE and AMY H.)
WHITE, husband and wife,)

Defendants.)

BRIEF OF APPELLANT

KARL R. WHITE and AMY H.)
WHITE, husband and wife,)

Third Party Plaintiffs)
and Respondents,)

Case No. 880308-CA

vs.)

DEAN R. MORGAN, CHARLES R.)
TEAM, DEAN R. MORGAN dba)
POLAR BEAR HOMES, and CHARLES)
R. TEAM dba TEAM REALTY,)

Third Party Defendants)
and Appellants.)

APPEAL FROM A FINAL JUDGMENT BY THE
HONORABLE TED S. PERRY, FIRST CIRCUIT COURT
OF THE STATE OF UTAH, LOGAN CITY DEPARTMENT
(WHICH COURT WAS KNOWN AT THE TIME OF THE
ENTRY OF SAID JUDGMENT AS THE SECOND CIRCUIT
COURT OF THE STATE OF UTAH IN AND FOR
COUNTY OF CACHE, LOGAN CITY DEPARTMENT

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Priority No. 14(b)

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IN THE UTAH COURT OF APPEALS

MICHAEL J. HOTH, JEFFREY R.)	
HOTH, dba HOTH BROTHERS, a)	
Utah partnership,)	
Plaintiffs,)	
vs.)	
KARL R. WHITE and AMY H.)	BRIEF OF APPELLANT
WHITE, husband and wife,)	
Defendants.)	

KARL R. WHITE and AMY H.)	
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Third Party Plaintiffs)	
and Respondents,)	Case No. 880308-CA
vs.)	
DEAN R. MORGAN, CHARLES R.)	
TEAM, DEAN R. MORGAN dba)	
POLAR BEAR HOMES, and CHARLES)	
R. TEAM dba TEAM REALTY,)	
Third Party Defendants)	
and Appellants.)	

JURISDICTION OF COURT

The judgment from which this appeal is taken was signed and filed by the Court on April 13, 1988. The notice of appeal was filed on May 12, 1988. A cross-appeal was subsequently filed by Third-Party Plaintiffs/Respondents in this matter, and, on its own motion, this Court issued an order of consolidation on June 28, 1988, consolidating these appeals for consideration and briefing under Case No. 880308-CA.

This Court has jurisdiction over the appeal in this matter by virtue of the Constitution of Utah, Article VIII, Section 1 et seq. (specifically Section 5), Section 78-2(a)-3(2)(c) Utah Code Annotated (1953 as amended), and Rules 3 and 4 of the Rules of the Utah Court of Appeals.

NATURE OF PROCEEDINGS

In April of 1987, Third-Party Plaintiffs in this matter (hereinafter "Whites"), as the owner of certain property in Hyde Park, Utah, filed suit in the First Judicial District Court for the State of Utah, Cache County, to challenge the validity and amount of a mechanic's lien filed against such property by the Plaintiffs in this matter (hereinafter referred to as "Hoths"). Shortly after filing the District Court proceeding, however, Whites dismissed their attorney of record therein, and the case was subsequently dismissed for lack of service of process. In September of 1987, Hoths filed this action in Circuit Court to foreclose their mechanic's lien, as subcontractors for the construction of a residence upon the property owned by the Whites in Hyde Park, Utah. On September 25, 1987, Whites filed an answer in Circuit Court, stating a counterclaim against Hoths for substandard work, and disputing the amount and character of items identified by Hoths in their lien as "extras" not within the scope of the original subcontract. In addition to their counterclaim, Whites also filed a third-party complaint on September 25, 1987, whereby they seek indemnity

from Third-Party Defendant Dean R. Morgan (hereinafter "Morgan") as the general contractor for the construction of their residence, and against Third-Party Defendant Charles R. Teames (hereinafter "Teames") as a real estate agent/broker involved in the sale of the constructed residence, and as the alleged partner of Morgan in this construction project.

On October 7 and October 27, 1987, Third-Party Defendants Teames and Morgan, respectively, were served with summons and complaint in this action, and on November 18, 1987, an answer to the third-party complaint was filed on their behalf. On November 20, 1987, counsel for Whites filed a notice of readiness, indicating therein that the expected time for trial would be one day. On November 25, 1987, trial was set in Circuit Court for a non-jury trial on March 3, 1988. On March 3, 4, 7 and 9, 1988, this matter was tried before the Honorable Ted S. Perry in Circuit Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court committed error in concluding that Morgan and Teames were partners, finding that they had "entered into a joint venture in which the profits would be shared and where each would be subject to any losses that may be incurred." Such conclusion appears to be contrary to and not supported by the evidence produced at trial.

2. Whether the trial court committed error in holding the Appellants herein responsible for the payment of the balance of the Hoths' original subcontract, given the fact that the amount thereof is acknowledged as being reasonable and the Whites' obtained the full benefit thereof, and that there were several items which were completed at the expense of the Whites, which items were still in controversy and were ultimately determined by the Court to be appropriate offsets in Whites' favor, and specifically in light of the fact that the evidence shows that Morgan did not have sufficient funds provided to him by the Whites to satisfy all of the remaining construction cost obligations.

3. Whether the trial court committed error by failing to find that the Appellants herein, to the extent of their actual liability for the construction contract obligations, were discharged by the interference of the Whites in the construction project itself, and Whites' significant and continuing assumption of control thereof.

4. Whether the trial court committed error by failing to find that the Appellants herein, to the extent of their respective liability on the construction contract, were discharged by the inadequacy of the plans and specifications provided for the construction of this residence by the Whites.

5. Whether the trial court committed error in finding that amounts were paid to Morgan and to Teames in January of

1987 which should have been paid by them to Hoths, avoiding the subsequent filing of a lien by Hoths and the necessity of any lawsuit; and, whether the trial court committed error by determining that such a failure to pay amounts over to Hoths constituted a breach of the contract by Appellants.

6. Whether the trial court committed error by making no findings whatsoever, or conclusions, with respect to the counterclaim of Appellants herein against Whites, by way of damages, costs or fees.

7. Whether the trial court committed error, given the reasonable and anticipated duration of this trial as noticed by Whites, by failing to allow Appellants herein recovery of their attorneys' fees in an amount which would be reasonable for a 4-day trial.

8. Whether the court abused its discretion, upon learning of Third-Party Defendants' intention to appeal its decision, by countermanding its own directions to counsel, rejecting Plaintiffs' and Defendants' proposed findings of fact and conclusions of law and judgment, filed pursuant to Rule 2.9 Utah Rules of Civil Procedure, and substituting its own findings and conclusions in a form substantially more prejudicial to the Third-Party Defendants and inconsistent with its own prior conclusions and those proposed by counsel pursuant to its order.

DETERMINATIVE STATUTES

The interpretation of the following general partnership statutes may be determinative with respect to the issue concerning the liability of Charles R. Teames as a partner with the general contractor, Dean R. Morgan, in this matter, and for that reason the following statutes are set out verbatim in the addendum to this brief: Utah Code Annotated, Sections 48-1-3 ("Partnership" defined), 48-1-3.1 ("Joint Venture" defined), and 48-1-4 ("Rules for Determining the Existence of a Partnership").

STATEMENT OF THE CASE

NATURE OF THE CASE

This is a civil action to foreclose a mechanic's lien filed by a framing subcontractor for the recovery of the unpaid balance of his framing subcontract, together with the value of additional work or "extras" performed by him. The owner of the property has counterclaimed against the subcontractor alleging that the work performed by the subcontractor was substandard, and disputing the character and value of the additional services which the subcontractor claims to be "extras". The owner has also filed a third-party complaint for indemnity against the general contractor and the agent/broker, and the general contractor has counterclaimed against the owner for the recovery of his out-of-pocket losses which he suffered by paying materialmen and laborers more than he had received from the owner in

progress payments, since the owner removed all financial controls from the general contractor and allegedly assumed the responsibilities of the general contractor during the course of construction.

COURSE OF PROCEEDINGS

As indicated hereinabove, this matter came on for trial before the Honorable Ted S. Perry in Circuit Court on March 3, 4, 7 and 9, 1988. On the last day of trial, upon the conclusion of closing arguments, the court announced its ruling and instructed the attorneys for Plaintiffs and for Defendants to prepare appropriate findings of fact, conclusions of law, and judgment. Within the following two weeks, counsel for Third-Party Defendants contacted the court to obtain an estimate of the cost of the transcript of proceedings in order to appeal the decision, and requested the court to meet briefly with attorneys for each of the parties in order to clarify its findings with respect to Third-Party Defendant Charles R. Teames.

On March 23, 1988, and March 29, 1988, proposed findings of fact, conclusions of law, and a judgment were filed with the court by Plaintiffs' and Defendants' counsel, respectively, pursuant to the court's order. On March 29, 1988, however, the court, on its own motion, requested that all three attorneys appear before the court, whereupon the court (without receiving anything or hearing comments or questions from counsel) rejected the proposed findings of

fact and conclusions of law submitted by counsel, and instead issued to counsel its own such documents.

On March 29, 1988, counsel for Plaintiff submitted a letter to the court drawing the court's attention to an "apparent typographical error" in the court's findings and conclusions with respect to the Third-Party Defendants. It appeared that the court's own findings had duplicated the award of attorneys' fees clearly announced by the court on the last day of trial, and the written findings by the court were therefore \$1,000 over-stated. Similarly, on April 4, 1988, counsel for Third-Party Defendants filed objections to the findings of fact and conclusions of law prepared by the court, also noting the \$1,000 duplication as an "apparent typographical error".

On April 5, 1988, the court issued a memorandum decision indicating that the extra \$1,000 for attorney fees as set forth in the court's findings of fact and conclusions of law did not represent a typographical error, and judgment would be entered by the court on April 13, 1988, accordingly. On April 13, 1988, Plaintiffs' revised proposed judgment, consistent with the court's written findings and conclusions, was signed by the court with respect to both the judgment on the complaint and the judgment for Defendants on their third-party complaint. Said judgment bears a mailing certificate dated March 31, 1988.

On May 12, 1988, Third-Party Defendants filed their notice of appeal; and, on May 31, 1988, Third-Party Plaintiffs/Respondents filed a cross-appeal. On its own motion, and pursuant to an order of consolidation, this Court consolidated these appeals under Case No. 880308-CA on June 28, 1988.

DISPOSITION AT TRIAL COURT

The trial court awarded judgment to the Hoths in the amount of \$2,500, which was the unpaid balance of the original \$6,000 framing subcontract. Of the \$1,410 in "extras" claimed by the Hoths in their complaint, the court entered judgment for Hoths in the amount of \$1,009; however, although the court found that the Hoths had substantially completed their subcontract, the court allowed an offset against the awarded "extras", which offset was in the amount of \$516 and was for the cost to complete a portion of the subcontract not properly completed by Hoths. Plaintiffs were thus awarded a net judgment of \$2,993 against Defendants, plus attorneys' fees in the amount of \$1,000, plus costs. In announcing its ruling at the conclusion of trial, the court erroneously computed judgment for the Hoths for "extras" as a total of 64 hours at \$15 per hour, when in fact the total was 63 hours, which accounts for the discrepancy between the record (which shows such judgment at \$3,008, rather than \$2,993) and the court's written findings.

The court then concluded that since Morgan had paid himself \$3,007 in January, 1987, when Hoths were to be paid, and since Morgan had a duty to keep subcontractors from filing liens, and further since no lien would have been filed and this action would have been unnecessary if Morgan had paid the Hoths, judgment against Third-Party Defendants would be entered for the amount of \$3,008, plus attorneys' fees of \$1,000, plus costs. The court's later written findings concluded, however (at paragraph 13, Findings of Fact), that the owners had paid the sum of \$3,000 to Dean Morgan in January, 1987, and the additional sum of \$2,000 had been paid by Dean Morgan to Third-Party Defendant Charles Teames; and, that neither Morgan nor Teames were entitled to any money under the contract until they had first satisfied the costs of construction of the house; and, that the failure of Morgan and Teames to pay the Hoths was a breach of "the contract".

Although the court's rulings at the conclusion of trial spoke of duties owed by Morgan, the court's written Findings of Fact, paragraph 1, also concluded that "for the purpose of the contract with the Defendants, the said Third-Party Defendants had entered into a joint venture in which the profits would be shared and where each would be subject to any losses that may be incurred." The court further found in its written Findings of Fact, paragraph 3, that Morgan entered into the "Earnest Money Sales Agreement for

Residential Construction" with the Whites "for and in behalf of both Third-Party Defendants".

STATEMENT OF FACTS

1. On or about August 26, 1986, a written "Earnest Money Sales Agreement for Residential Construction" was entered into for the construction of the residence of the Third-Party Plaintiffs (which may be referred to hereinafter as "Whites" or "Owners"). (Defendant's Exhibit 7.) This contract was signed by Owners as "Buyer" and by Third-Party Defendant Morgan as "Contractor" with Morgan signing on behalf of the business Polar Bear Homes, an assumed business name used in the State of Utah by Morgan. (Findings of Fact, paragraph 1.) Third-Party Defendant Teames did not sign this agreement, but his realty firm "Team Realty" (a dba registered with the State of Utah by Third-Party Defendant Charles R. Teames) was acknowledged therein as an "Agent/Broker company". (Findings of Fact, paragraph 1; Transcript, page 841, lines 2-10.) Although Whites acknowledge that Teames or Team Realty was acting as an "agent/broker" for Morgan in this transaction, they further allege that Teames is a partner of Morgan. (Third-Party Complaint, paragraph 3.)

2. Construction of the residence was to have been according to plans and specifications provided by the Whites. (Defendants' Exhibit 7; Findings of Fact, paragraph 1; Transcript, page 14, line 24-line 11, page 15.)

3. Soon after the execution of the construction contract, Morgan subcontracted with Hoths, Plaintiffs in this matter, to do the framing of the home at a price of \$6,000, a price acknowledged as being the agreed upon subcontract price, and further acknowledged as being a reasonable price according to the original plans and specifications. (Findings of Fact, paragraph 4; Transcript, page 449, lines 4-12; page 944, lines 6-10.)

4. Pursuant to the subcontract with Hoths, Morgan paid Hoths \$3,500, leaving a balance to be paid to Hoths thereunder of \$2,500. (Findings of Fact, paragraph 6; Transcript, page 944, lines 6-10; Defendants' Exhibits 11, 12 and 13.)

5. After substantially completing the framing subcontract, Hoths filed a lien on March 16, 1987, claiming the \$2,500 balance on the framing subcontract, and \$1,410 for extra work or material supplied by them beyond the scope of the initial subcontract. (Findings of Fact, paragraph 5; Plaintiff's Exhibit 10; Plaintiff's Exhibit 11.) Hoths testified at trial that almost all of the changes or requests for additional work from them were made directly by the Whites, and neither Morgan nor Teames were involved in those extra work agreements. (Transcript, page 213, line 18-line 1, page 214; page 197, line 24-line 21, page 199.) The trial court found 17 items of extra labor for which it awarded judgment to Hoths against Whites, and of those, 14

were specifically noted by the court to have been at the request of Whites. (Findings of Fact, paragraph 7(b), (c), (d), (f), (g), (h), (j), (m), (n), (p), (q), (r).) Four items of extra labor were found by the court to have been due to a deficiency in plans or design. (Findings of Fact, paragraph 7(a), (e), (g), (h).) One item of extra work was found by the court to have not been required under the original subcontract, but it reflected necessary work done at the request of Morgan for the benefit of Whites. (Findings of Fact, paragraph 7(1).) One additional extra item was found by the court to have been approved by the owners and ordered for them by Morgan (Findings of Fact, paragraph 7(i)).

6. Although Defendant Karl White had informed certain creditors that Morgan was overpaid on the construction contract, having received \$60,000 from Whites (Third-Party Defendants' Exhibit 7; Transcript, page 801, line 17-line 16, page 807), Karl White testified at trial that in fact Whites had only paid Morgan \$32,000. Of that amount, \$2,000 was a down payment and there were two subsequent payments of \$15,000 each as progress payments prior to the end of 1986. (Transcript, page 771, lines 5-12; page 779, lines 17-20; page 716, lines 5-7.)

7. Whites financed the construction of the project without involving a conventional lending institution, initially providing funds to Morgan for payment of

construction costs. (Defendants' Exhibit 7, paragraph 6(a); Transcript, page 340, line 11-line 13, page 341; page 390, lines 9-21; page 697, lines 10-25.) In early January of 1987, when Morgan approached Whites for additional funds to pay construction costs, Whites refused to provide Morgan any further funds, and requested an accounting from Morgan. (Transcript, page 793, lines 1-16; page 340, line 11-line 13, page 341.)

8. At trial, the parties acknowledged that Morgan had provided Whites with four separate accountings or statements identifying the payments made to date by Morgan, and on the first two of those accountings, Morgan also identified outstanding construction bills that needed to be paid. Those accountings were provided to Whites on or about January 6, April 10, June 11, and November 18 of 1987. (Defendant's Exhibits 11, 12 and 13; Transcript, page 695, lines 15-25; page 698, lines 16-18; page 699, lines 17-20; page 700, lines 18-22; page 701, lines 7-12; and page 883, line 19-line 19, page 893.)

9. At trial the parties acknowledged that by January of 1987, Whites had begun paying the construction bills directly, and refused to provide Morgan with any further funds. (Transcript, page 802, lines 9-16; page 340, line 11-line 13, page 341; page 875, line 14; page 876, line 15.)

10. On the last day of trial, Morgan took the stand in his case in chief and thoroughly reviewed and explained the

accountings which he provided to Whites in January, April and June of 1987. In this testimony, he testified that on each of those occasions there were construction bills which exceeded the amount of the total funds provided to him by Whites, and that as he continued to make payments toward construction costs, Dean Morgan had \$3,007.44 of undisbursed funds remaining available to pay the much larger bills in January; \$850.70 remained undisbursed in April; and, by June of 1987, Morgan had paid construction costs which exceeded the funds Whites had provided him for such purpose by the amount of \$1,227.94. (Transcript, page 883, line 19-line 19, page 893.)

11. Included within the expenditures shown in the January, April and June, 1987 accountings from Morgan to Whites was a \$2,000 payment by Morgan to Teames. (Defendants' Exhibits 11, 12 and 13.) At trial, Defendant Karl White noted that such payment was not shown in the November, 1987 accounting (Transcript, page 702, lines 5-7), and Morgan explained that the \$2,000 was an advance against the commission on this sale (which, in the Transcript at page 856, lines 11-25, Teames testified was the standard 6 percent of the sale price of the home). However, Morgan further testified that because he had insufficient funds to pay construction costs and was unable to finish the project, Team Realty refunded the \$2,000 advance and Morgan used it to pay construction costs. Even after such refund, Morgan

still had paid from his own funds \$1,227.94 more in construction bills than he had received, leaving both Morgan and Teames without any compensation at all from the project. (Transcript, page 699, lines 17-20; page 700, lines 18-20; page 890, line 9-line 23, page 891; page 891, line 24-line 19, page 893.)

12. Third-Party Plaintiff Karl White's review of the Morgan accountings is found in the transcript beginning at line 13, page 796, and continuing through line 12 of page 801. In reviewing that accounting, Karl White testified that he understood that Morgan had \$3,000 left, that had not been paid out by Morgan for construction expenses in early January of 1987. (Transcript, page 799, lines 13-16.) Mr. White further testified that if the subsequent payments were actually made by Morgan as shown in Morgan's April and June accountings, then Morgan has in fact expended more money in construction costs than was paid to him by Whites. (Transcript, page 801, lines 4-12.)

13. Having concluded at trial that Morgan paid himself \$3,007 in January when Hoths were to be paid, and had that amount instead been paid to Hoths, the lien and this lawsuit would have been avoided (Transcript, page 994, lines 7-22), the court found in its written Findings of Fact, paragraph 13, as follows:

That the owners paid the sum of \$3,000 to Dean Morgan in January, 1987, and the additional sum of \$2,000 which Dean Morgan paid to Third-Party Defendant

Charles Team. That had said sums been paid to the Plaintiffs, no lien would have been filed and this action would have been unnecessary. That neither Dean Morgan and Charles Team were entitled to any money under the contract until they had first satisfied the costs of construction of the house. That the failure of Dean Morgan and Charles Team to pay the Plaintiffs was a breach of the contract.

14. In its written Findings of Fact, paragraph 1, the trial court concluded that, for the purposes of the contract with the Whites, Teames and Morgan had entered into a joint venture in which the profits would be shared and where each would be subject to any losses that may be incurred. The court further found, in its Findings of Fact, paragraph 3, that Morgan entered into the written "Earnest Money Sales Agreement for Residential Construction" for and in behalf of both Third-Party Defendants.

15. With respect to his involvement in this transaction, Teames testified that he is a real estate broker by profession, and that he is the principal broker of Team Realty. (Transcript, page 838, lines 6-17.) He further testified that his relationship with Morgan is one of a real estate broker contracted to sell homes built by the contractor for a standard market rate commission, and that he has no other business relationship with Morgan or with Polar Bear Homes. (Transcript, page 839.) Teames explained that Team Realty is his sole proprietorship, in which he employs other associates who are engaged with him

in the general sale of real estate, involving many other transactions than those in relation to Dean Morgan or Polar Bear Homes. (Transcript, page 841.) Teames testified that he has never derived "profits" from the sale of homes built by Morgan or Polar Bear Homes, and that he has been paid standard commissions with respect thereto. (Transcript, page 840, line 24-line 1, page 841.) Teames specifically denied having a proprietary interest of any kind in common with Mr. Morgan or Polar Bear Homes (Transcript, page 841, lines 11-13), and he further denied that he ever made any representations whatsoever to Karl or Amy White of a partnership relationship existing between himself and Morgan or Polar Bear Homes. (Transcript, page 843, line 7.) The earnest money deposit of \$100 paid by Whites upon execution of the written construction contract was payable to and deposited with Team Realty as the "Agent/Broker". (Defendants' Exhibit 7; and Check No. 1428 shown on Third-Party Defendants' Exhibit 10.)

SUMMARY OF ARGUMENT

1. Partnership Issue. The evidence and testimony at trial clearly reflects activities and representations which characterize a broker/client relationship, rather than the existence of a co-ownership between these individuals with the attendant expectation that all profits and losses would be shared. The conclusion by the trial court that a joint venture relationship existed between Teames and Morgan in

this transaction is not supported by any evidence of co-ownership or of an intention to become associated in a business project for the purposes of sharing in profits or losses, as required by law. Instead, the facts and testimony presented at trial simply show a real estate broker with an exclusive sales marketing agreement, entitling him to the payment of a standard market commission, conditioned upon the usual completion of the construction project and closing of the sale. The payment of the \$2,000 from Morgan to Teames was properly explained to be nothing more than an advance against the expected commission from this contract; which, upon the failure of this contract to be completed and properly closed, was refunded by Team Realty to the contractor.

2. The General Contractor Herein Should Not Be Liable for Hoth's Award. The major share of the award granted to Hoths upon their complaint herein is attributable to the virtually undisputed and acknowledged \$2,500 remaining subcontract balance, for which there is no reason to require the general contractor to reimburse the owner, inasmuch as the owner has obtained the benefit of the performed subcontract. With respect to the award for "extras" allowed in favor of Hoths, and for which the court has required Third-Party Defendants to indemnify the Whites, the general contractor should certainly not be responsible to pay these amounts inasmuch as they arise from separate agreements or

contracts to which the general contractor is not even a party. The court specifically found that, with respect to any such "extras" performed by Hoths at the request of Morgan, the owners gave their assent thereto and derived the full benefit in value therefrom.

3. General Contractor Should Not Be Required to "Pay Over" Funds to Hoths. The general contractor should not be required to pay over the balance of any remaining progress payments, inasmuch as such progress payments are normally construed to be made for the convenience of the contractor, and Morgan would be as entitled to payment therefrom as Hoths, or any other contractor or materialman. In any event, however, the testimony and accounting provided at trial clearly indicates that Morgan did not retain any of such progress payments, but instead expended all funds given to him by Whites to pay legitimate construction expenses on this project. Hoths had already been paid \$3,500 more than Morgan was allowed to retain from this project, and, in January of 1987 (when the court found that Morgan had paid himself \$3,000), the amount to be paid to Hoths was still in dispute. The contractor could have breached its duty to Whites by making such a payment at that time. Moreover, the payment to Hoths was not yet due. Even if Hoths had been so paid by the contractor, since the amount of their claims apparently exceeded the funds available to Morgan, a lien and lawsuit would ultimately have been filed by Hoths

anyway. Since Morgan suffered out-of-pocket losses by paying construction costs on this project, had he paid Hoths, he would have suffered a larger out-of-pocket loss, or withheld payments to other potential lien claimants, resulting in multiple lien filings and foreclosure actions.

4. The General Contractor's Performance Herein Should Be Excused. The general contractor in this case should be excused from any further performance as of January, 1987 because of the inadequate and significantly deficient plans provided by the Whites for the construction project; and because of the substantial and continuing interference of the Whites upon the property with the general and various subcontractors performing services there; and, because of the almost complete assumption of control of the project by the Whites in January and February of 1987.

5. Abuse of Discretion Regarding Appeal. The trial court abused its discretion by carefully detailing and preparing its "balanced" award of judgments, whereby it determined (before Morgan had testified and explained his accountings and the disbursement of funds received by him) that Dean Morgan had \$3,007 in January of 1987, and that since Hoths were to be awarded \$3,008, the net result would be a "wash" to the owners, essentially having the general contractor pay all the claims of the subcontractor. Having been somewhat critical of counsel for Whites during trial, it seemed that it was the court's desire to lessen the

impact of its criticisms by awarding judgment in favor of Whites. Subsequently thereto, upon learning that the matter was to be appealed, the court further abused its discretion by revising its ruling in a manner significantly more detrimental to Third-Party Defendants/Appellants herein.

6. Attorney Fees. Since the bulk of the approximately \$3,000 principal judgment awarded to Hoths consists of the acknowledged and undisputed \$2,500 remaining balance of the subcontract, the court abused its discretion by requiring the Third-Party Defendants to pay 100 percent of the allowable attorneys' fees awarded to Hoths as part of their judgment. Third-Party Defendants should not have to pay fees for Whites to defend the action brought by Hoths since, as the court determined, the Whites should have paid Hoths (directly or indirectly), in the first place. Moreover, the court abused its discretion by requiring Third-Party Defendants to pay attorneys' fees attributable to an action brought to collect for the value of "extras" pursuant to agreements to which the Third-Party Defendants are not even a party.

ARGUMENT

I

THE COURT'S FINDING OF A JOINT VENTURE
RELATIONSHIP BETWEEN TEAMES AND MORGAN
IS NOT SUPPORTED BY THE EVIDENCE, AND IS
NOT CONSISTENT WITH THE STATUTORY
REQUIREMENTS FOR SUCH A RELATIONSHIP.

Utah Code Annotated Section 48-1-3 defines a partnership in this state as being "an association of two or more persons to carry on as co-owners a business for profit." Similarly, Section 48-1-3.1 defines a "joint venture" as "an association of two or more persons to carry on as co-owners of a single business enterprise." This section continues by indicating that joint ventures are to be governed by Chapter 1 of Title 48 of Utah Code Annotated, which law governs general partnerships. It is significant that both of these provisions require more than a mere business relationship between the parties to constitute a joint venture or partnership. Even a joint venture carries with it the implied essential ingredient that the co-owners are associated in this business enterprise for the purpose of sharing "profits". Nupetco Associates v. Jenkins, 669 P.2d 877 (Utah 1983). To find, as the trial court did in this case, the existence of a partnership relationship without any evidence of co-ownership or of an intention to determine and share in profits would make a mockery of the statutory requirements as set forth in the Uniform Partnership Act as adopted in this state, and potentially

subject everyone from subdivision tract home salesmen to Sears appliance salespeople who give out cards with their names on them to the potential classification as a partner with their clients or employers, complete with the resulting reciprocal agency authority and liability that pertains to such a partnership. Every real estate agent, every auctioneer, and every commissioned salesperson who is compensated for services on a commission basis would similarly be subject to such a classification.

In this case, there has been no showing of a community of interest in profits; nor has there been a showing of co-ownership. Instead, the Third-Party Defendants testified that they are each proprietors of their own business operations, and that they share no proprietary interest or common business relationship with each other other than that of a real estate broker performing services for a contractor who is in the business of building and selling homes. Teames testified that he is in fact engaged in many other real estate marketing activities other than those involving Dean Morgan or Polar Bear Homes; and, his associates or employees employed with Team Realty also have business cards with their names printed upon them with the similar intention of marketing Polar Bear Homes on a commission basis. Defendant's Exhibit 31, which is a copy of a business card attached to someone's magazine, is nothing more than a business card with Charlie Teames' name printed

upon it. The card does not represent Mr. Teames to be a partner, manager, co-owner, or any other party which in some way would have an interest in the profits and losses of the company building and selling Polar Bear Homes.

At trial, Mr. Teames testified that he never made any representations whatsoever to Karl or Amy White that a partnership relationship between himself and Dean Morgan existed. (Transcript, page 843, line 7.) The Earnest Money Sales Agreement (Defendants' Exhibit 7) clearly identifies Team Realty as the "Agent/Broker company"; and, although the agreement does not reflect provisions for the payment of a specific real estate commission on this particular transaction, Teames testified that the reason for not setting out a specific commission therein is because of paragraph G of the "General Provisions" of the agreement, indicating that "Selling Agent/Broker Company may have entered into an agreement to represent the Contractor". Teames testified that because of that agency disclosure, they did not provide for the specific commission provisions in this agreement, since they already have a master agreement retaining the services of Team Realty as a commissioned real estate agent on behalf of Polar Bear Homes. It should also be noted that paragraph F of the "General Provisions" of the contract (Defendants' Exhibit 7) contains a provision wherein the buyer acknowledges that the Agent/Broker Company (Team Realty) has made no

representations or warranties concerning the property or the parties, unless otherwise noted in the agreement.

On the January and April accountings, the \$2,000 payment to Teames is shown as one of the itemized construction costs, along with materialmen, laborers and subcontractors. The initial \$3,007 balance in January (which the court concluded was "paid" by Dean Morgan to himself at that time (Transcript, page 994, lines 7-16)), and the \$850 balance in the April accounting, were shown, however, as the balance of funds remaining in the possession of Dean Morgan at those times, which could have been used for further bill payment, or paid to the general contractor. (Defendants' Exhibits 11 and 12.) It is clear from these accountings that Morgan was representing the payment to Teames as an expense of the project--not as a distribution of profits. That fact is even more clear in the June accounting, where the schedule is typed and includes a description of the reason for each payment, which in the case of Charlie Teames, shows that the payment to him was a commission.

In closing arguments, counsel for Whites argued that Teames should be regarded as a partner to Morgan, indicating that, pursuant to Utah Code Annotated Section 48-1-4(4), "receiving funds is prima facie evidence of partnership." (Transcript, page 964, line 24-line 1, page 965.) If this was in fact true, every subcontractor and materialman paid

by Morgan would be regarded as his partner! Section 48-1-4(4) actually indicates that:

The receipt by a person of a share of the profits of the business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(a) As a debt by installments or otherwise;

(b) As wages of an employee or rent to a landlord;

(e) As consideration for the sale of ... property by installments or otherwise.

(Emphasis added.)

Section 48-1-4 further provides that, with a limited exception, persons who are not partners as to each other are not partners as to third persons (Section 48-1-4(1)); and, Section 48-1-4(3) provides:

The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(Emphasis added.)

An actual reading of Section 48-1-4, rather than the erroneous expression of it by Attorney Kane in closing arguments; together with reference to Section 48-1-3 and Section 48-1-3.1 discussed hereinabove, clearly reveals that much, much more should be required in order to find Teames is a partner of Morgan than the single payment by Morgan of

an advance against commissions; and the record clearly shows that these parties' relationship with each other characterizes employment by a builder of a sales agent, rather than the statutorily required association as co-owners of a business enterprise with the expectation of "sharing" profits and losses.

The court abused its discretion in determining that, contrary to the evidence at trial and to the statutory prerequisites for the existence of a partnership relationship, a joint venture had been established between Teames and Morgan.

II

THE TRIAL COURT ABUSED ITS DISCRETION BY HOLDING THE GENERAL CONTRACTOR LIABLE FOR THE PAYMENT OF THE BALANCE OF THE HOTH CONTRACT, AND FOR PAYMENT OF "EXTRAS" PURSUANT TO AGREEMENTS TO WHICH THE GENERAL CONTRACTOR WAS NOT A PARTY.

In its ruling at the conclusion of the trial, the court held that Morgan had paid himself \$3,007 at the time when the Hoths were to have been paid. (Transcript, page 994, lines 7-22). The Court is obviously basing that conclusion upon the accounting provided by Morgan to Teames on January 6, 1987, wherein Morgan shows that amount of funds remaining available to meet substantially higher outstanding construction costs. (Defendant's Exhibit 11.) Nevertheless, in the notice of lien filed by Plaintiffs herein, Hoths do not indicate that their debt became due until sometime on or about February 12, 1987. Moreover, in Whites' own counter-

claim against Hoths, Whites acknowledge that it was not their understanding or intention to pay Hoths in January of 1987, but instead they assert that an agreement existed between Hoths and Whites (independent of Morgan) when the permanent financing was later obtained, presumably meaning that Hoths were to be paid from a bank loan rather than from funds paid to Morgan. (Whites' Counterclaim, paragraphs 10, 11). Thus, the Hoths' debt was not yet due in January of 1987 when Morgan had funds available to make payment, and Hoths had concededly already been paid \$3,500 of their contract, which subcontract had not yet been fully completed.

The trial court abused its discretion by determining that the general contractor in this transaction should be responsible for the balance of the subcontract for framing. Each of the parties at trial acknowledged that \$6,000 was the subcontract price for framing, and that that amount was a reasonable amount therefor, and that \$3,500 of that had been paid. Moreover, the Whites acknowledged that the \$2,500 amount is also a reasonable balance for the subcontract, subject to any legitimate offsets which may be awarded to the Whites for properly completing the subcontract of Hoths. (Transcript, page 944, lines 6-10). Inasmuch as the trial court granted Whites \$516 in offsets for the cost of completing the Hoth subcontract, Hoths have now fully received the benefit of the framing subcontract,

and there is no reason at law or other rationale why the general contractor should be responsible to pay the balance of the framing contract for the Whites. Similarly, with respect to the "extras" awarded to Hoths, substantially all of those extras were negotiated and agreed to between Hoths and Whites independent of any involvement or consideration of the general contractor. To the extent that Morgan was involved with the "extras" performed by Hoths, the court specifically found that those extras were either approved by the Whites, or done for the benefit of the Whites, or both. Therefor, as the general contractor and agent of the Whites, Morgan had fulfilled his responsibility to the Whites with respect to these extra services, and he should not be held responsible therefor inasmuch as Whites had received the benefit or value of the services, consented or approved to such services, and/or negotiated and entered into agreements with Hoths for such services independent of Morgan.

To hold the general contractor liable for the balance of the properly performed subcontract is a rather upside down legal conclusion, resulting in the Whites obtaining the benefit of the framing services without cost. Indeed, had the subcontractor sued the general contractor for a properly performed subcontract, the general contractor would normally be regarded as having a legitimate complaint over against the owner for indemnification. Similarly, it is improper to hold the general contractor responsible for payment of

additional work agreements entered into directly between the subcontractor and the owner, without the general contractor's involvement. Thus, the result obtained by the court in this case is clearly erroneous, and should be reversed.

III

THE TRIAL COURT'S CONCLUSION THAT MORGAN AND TEAMES WERE IN THE POSSESSION OF FUNDS IN JANUARY, 1987 WHICH SHOULD HAVE BEEN PAID TO HOTHs TO AVOID THE FILING OF A LIEN AND LAWSUIT IS CLEARLY ERRONEOUS AND CONSTITUTES AN ABUSE OF DISCRETION.

The trial court's finding at the conclusion of the trial that Morgan had paid himself \$3,007 at a time when the Hoths should have been paid, and the court's written Findings of Fact, paragraph 13, indicating that in addition to this \$3,000 an additional sum of \$2,000 had been paid by Morgan to Teames, which sums could have been paid to Hoths and avoided the filing of a lien and lawsuit by Hoths, appears to be nothing more than a clear desire of the court not to disturb its carefully preconceived and "balanced" judgment, whereby it awarded \$3,008 to Hoths and held the Third-Party Defendants responsible since they had at least \$3,007 of funds to pay anyway. Such a conclusion ignores the entire testimony given by Dean Morgan when he finally was able to take the stand in his own case in chief, and carefully and thoroughly explain his various accountings provided to Whites, which clearly show that he expended more than all of the funds given to him by Whites in payment of

construction costs on this project. The court's conclusion with respect to paragraph 13 of its Findings of Fact is erroneous for a number of reasons.

First, the trial court held that neither Morgan nor Teames were entitled to any money under the contract until they had first satisfied the costs of construction of the house, and therefore the failure to pay Hoths constituted a breach of contract. It has generally been held, however, that progress payments made in a construction contract are generally thought of as being designed for the convenience of the contractor, by providing him with funds from time to time as the work progresses, or for the mutual convenience of both parties. Superintendent and Trustees of Public Schools v. Bennett, 27 N.J.L. 513. The general contractor in this situation should be as entitled to progress payments as the framing subcontractor. To make contractors wait until all costs of construction of a building are paid before taking any compensation whatsoever would not only be unreasonable but would be a departure from normal business practices, especially where the contract does not require otherwise. Even if there had been a wrongful refusal by Morgan to complete the building contract, then, with respect to the remaining amounts of progress payments provided him, Whites would only have been entitled to the return of such balances. United States v. United States Fidelity Company, 236 U.S. 512, 35 Sup.Ct. 298. In essence, even without a

breach of contract, Morgan has returned all progress payments made to him to Whites by application of those funds for the benefit of Whites through payment of legitimate construction costs.

Second, even acknowledging that the \$3,000 and the \$2,000 payments were received by Morgan and Teames respectively, it was the clear testimony of Morgan at trial that the \$2,000 payment to Teames was an advance towards commissions that was refunded to him, and that the full \$5,000, and more from his own funds, was ultimately paid by Morgan for construction costs of the Whites' residence, leaving absolutely no compensation to either Teames or Morgan for their time and efforts on this project. Dean Morgan's explanation of his accountings (Defendants' Exhibits 11, 12 and 13) given to the Whites, which is found in his testimony in the Transcript beginning on line 19 of page 883 and continuing through line 19 of page 893, can essentially be summarized as follows:

Dean Morgan Payments for Const. Costs	\$34,467.94
Less Refunded Advance toward Commission	<u>(2,100.00)</u>
Adjusted Payments by Morgan per Defendants' Exhibit 13	\$32,367.94
Plus, Additional Payments to Roofer	<u>960.00</u>
Morgan's Total Construction Cost Expenditures	\$33,327.94
Amounts Received from Whites (includes \$100.00 Earnest Money Deposit)	<u>(32,100.00)</u>
Morgan's Out-Of-Pocket Losses	\$ 1,227.94

This summary of Morgan's accounting shows the total amount spent by him for construction costs on this project, after taking into consideration the refund of the advance toward commissions tentatively paid to Teames, and after adding the additional \$960 to the roofer which had been inadvertently omitted by Morgan when preparing his June accounting (Defendants' Exhibit 13). At the conclusion of his case in chief, and after carefully explaining and accounting for all funds received by him from Whites, Morgan sought and obtained leave to amend his pleadings in open court to conform to proof, stating a counterclaim against Whites for his out-of-pocket losses and attorneys' fees.

Third, the finding by the court that if Morgan had paid Hoths in January of 1987, no lien would have been filed and litigation would have been avoided is short-sighted and unrealistic. Hoths were claiming \$1,410 for extras, of which the trial court ultimately granted more than \$1,000. Whites have never disputed that \$6,000 was the subcontract price, and that \$3,500 was paid, leaving a balance of \$2,500. Whites simply disputed the value of extra work done by Hoths, and asserted certain offsets, some of which the trial court allowed. Thus, to say no lien would have been filed and the suit would not have been brought ignores the reality that the essence of this suit was not the remaining subcontract balance, but in fact, was the legitimacy of claimed extras and the value of the offsets. In light of

Whites' position thereon in this trial, particularly regarding the offsets and counterclaims asserted, if Morgan had paid off even the \$2,500 subcontract balance to Hoths, he may have compromised Whites' position or breached a duty to Whites by doing so. This may be particularly true inasmuch as the court, in paragraph 9 of its Findings of Fact, has verified the legitimacy of some of the offsets claimed by Whites so that payment by Morgan to Hoths might have prejudiced those claims. Moreover, Morgan's uncontroverted testimony at trial was that, except for the \$3,500 acknowledged as a down payment to Hoths, he never received any funds from Whites for the purpose of paying Hoths. (Transcript, page 342, lines 9-13.) This is consistent with Whites' contention that they thought they had an agreement with Hoths that Hoths would receive no further payment until such time as the permanent financing was arranged by Whites. (Defendants' counterclaim, paragraphs 10 and 11.)

Under these circumstances, it would have been foolish for Morgan to pay amounts to Hoths, particularly since their work was not completed until February 12, 1987, and since there was a dispute between Hoths and Whites regarding the extras and offsets. Even if Morgan had paid the relatively undisputed \$2,500 subcontract balance, however, Hoths were still claiming \$1,410 of extras above and beyond that amount, for which presumably Hoths would still have filed a

lien and pursued the matter to litigation; and, in that case, there would be other potential lien claimants which would not have been paid because of the diversion of funds to the Hoths, resulting in multiple lien claims and litigation.

The trial court's conclusions in paragraph 13 of its Findings of Fact are an abuse of discretion because they entirely ignore the essential accounting from Morgan explaining his appropriate disbursement of those funds, and they incorrectly analyze the due date for payment of the Hoths, and they ignore the mathematics of the situation which indicate that if Hoths had in fact been paid, Hoths and a multitude of other potential lien claimants would in all likelihood have filed liens and pursued their cases to litigation.

IV

THE TRIAL COURT ABUSED ITS DISCRETION BY
FAILING TO FIND THAT THE GENERAL
CONTRACTOR'S CONTINUED PERFORMANCE HAS
BEEN EXCUSED.

Both Whites and Morgan testified at trial that by January of 1987, Whites had removed any financial control of the project from Morgan, and had begun paying suppliers and laborers directly. Plaintiff Michael Hoth testified that in January of 1987 he was told by Morgan that Whites would have to pay the Hoths, inasmuch as Morgan had lost financial control of the project; and, Hoths independently verified that with other suppliers and also found that other liens

were then being filed. (Transcript, page 211, line 18-line 5, page 213.) Robert Heiner, a laborer, testified that he was hired directly by Karl White to do work on the site in late January or the first week of February, 1987. (Transcript, page 232, lines 5-12.) Vernon Lewis, a laborer, testified that he was hired along with Gary Kendrick by the Whites to do sheetrock work on the residence in late 1986 or early 1987. (Transcript, page 561, lines 11-14.) Then, although Dean Morgan had indicated to Whites that he wanted to do the finish work on the residence to help hold the costs of completion down, Dean Morgan was mailed a letter by the Whites, dated February 23, 1987, wherein the Whites indicate that a finish carpenter which they liked best had been hired by them directly to begin work on Monday, February 23, whereas Dean Morgan would have been unable to start until the following Thursday. The letter continues by indicating that "Amy has to be able to interact frequently with whoever is doing the finish work. Given the past difficulty you have had working with her, I think it is best not to create a situation in which you would need to work together." (Third-Party Defendants' Exhibit 4.) Upon receipt of that letter, Morgan testified at trial, Morgan felt that he had finally lost all control on the project, because Whites were now not only controlling the funds, but they were also controlling the hiring and firing on the construction premises. (Transcript, page 879, line 24-line

20, page 881.) The trial court should have recognized that the assumption of control by the Whites was so complete by late January and early February of 1987, that any further performance by the general contractor under the original contract should have been excused.

Even before the assumption of complete control by Whites, however, there was substantial testimony at trial about their continuous harassment of workers and interference with construction progress. Plaintiff Michael Hoth testified at trial that Amy White was in the way making changes all the time, until she finally agreed to stay away from the jobsite so the construction could continue, but she did not do so. (Transcript, page 214, line 11-line 5, page 215.) Mr. Hoth further testified that the Whites hovered over the job, harassing workers and interfering with performance; that they were present on the jobsite on an almost daily basis, and on one occasion one of their children fell through the hole for the fireplace on the jobsite. (Transcript, page 197, line 24-line 21, page 199.) In his testimony at page 204, line 10-line 13, page 210 of the Transcript, Mr. Hoth testified that Whites were constantly interfering and making changes in the plans, or in their own prior directions for work; that the plans provided by the Whites were incomplete and inadequate, as were the subsequent directions from Whites, and were repeatedly changed and revised by Whites; that Whites

appeared in a constant quandary, not knowing what they wanted, changing their minds, and being dissatisfied with work done according to their prior directions, and yet portraying an attitude that all problems that developed were someone else's fault; that other workers, contractors and suppliers appeared to be similarly intimidated by Whites; that Whites accused Morgan of theft and of being untrustworthy; that Whites became increasingly demanding of contractors, assuming control and interfering with their work to the point that Michael Hoth wanted to be fired, so he wouldn't have to put up with it anymore. Tom Muirhead, a laborer performing roofing services, also testified that Whites were on the premises giving directions to the workers daily, and in his case, giving him conflicting directions for the roofing work on two consecutive days. (Transcript, page 310, line 11-line 13, page 311.)

The Restatement of Agency 2d Section 434 indicates that "a principal who has contracted to afford an agent an opportunity to work has a duty to refrain from unreasonably interfering with his work." Similarly, in the case of Montgomery Ward v. Tacket, 163 Ind.App. 211, 323 N.E.2d 242 (Ct.App.Ind. 1975), the court held that a:

principal owes to the agent the obligation of exercising good faith in the incidents of their relationship and must use care to prevent the agent from suffering harm during the prosecution of the agency enterprise Further, a contract of agency carries an implied obligation of the principal to do

nothing to thwart the effectiveness of the agency.

In the New York case of M.L. Rider Building Company v. Albany, 187 App.Div. 868, 176 N.Y.S. 456, the court held that in every express contract for the erection of a building or for the performance of other construction work, there is an implied term that the owner or other person for whom the work is contracted to be done, will not obstruct, hinder, or delay the contractor, but on the contrary will in every way facilitate the performance of the work to be done by him. In this case, the activities by the Whites in their constant intervention and interference with the contractors, their constant change in directions and plans, and in their ultimate assumption of control, clearly show that as a matter of law the general contractor should be excused from any further performance in the face of such conditions. The failure by the trial court to make such findings is erroneous, and the further or continued performance by him after January 6, 1987 should be excused.

In his testimony referred to above, Plaintiff Michael Hoth also testified that the plans provided by the Whites were inadequate and incomplete. The plans were in fact drawn by Amy White (Transcript, page 14, line 24-line 11, page 15), and the plans were wrought with latent defects. So much trouble and difficulty was encountered because of the plans that John Nelson, head of the Cache County Building Inspection Department, testified that because of

the problems experienced with this home, the county changed its policy and would now require such an application for a building permit to have an engineer or architect stamp, and the applicant would have to pay a "plan check fee" to allow the county to take the plans to an independent engineer for review. Mr. Nelson testified that if Whites were applying now, they would not get a building permit based on the plans as drawn by Amy White and submitted to the county for a permit. Because the county had originally issued the building permit, however, Mr. Nelson testified that the county hired an engineering firm to revise the plans for the Whites' home and properly engineer and design them, the costs of which were borne by the county. (Transcript, page 521, line 5-line 23, page 522.)

In an annotation entitled "Construction Contractor's Liability to Contractee for Defects of Insufficiency of Work Attributable to the Latter's Plans and Specifications", 6 A.L.R.3d 1394, by S. Bernstein, the article indicates:

The rule has become well settled in practically every American jurisdiction in which the matter has been involved, that a construction contractor who has followed plans or specifications furnished by the contractee, his architect, or engineer, and which have proved to be defective or insufficient, will not be responsible to the contractee for loss or damage which results

... from the defective or insufficient plans or specifications ...

The annotation continues by citing Professor Corbin at 6 Corbin, Contracts, page 394, as indicating that when the defects in a completed structure

are caused by the representations of the owner on which the contractor reasonably relied, or by defects in plans and specifications supplied by the owner which the contractor was required to follow, the contractor will not be liable in damages for non-performance and will not be denied a judgment for compensation, since in such a case the non-performance is caused by the owner and is not a breach of contract.

In the case of Montrose Contracting Company v. County of Westchester, 80 F.2d 841 (2nd Cir. 1936), cert. denied 298 U.S. 662, 56 S.Ct. 746 (1936), the court held that defective specifications not only provide an excuse for non-performance, but also a basis for an action for recovery of increased expenses involved in producing the desired result. In this case, the plans were sufficiently inadequate to cause the county to hire an engineering firm and redesign and engineer the plans for the completion of the home, and immediately change its building permit policy. Whites' residence was the last home built on the old policy. Because of the gross inadequacy of the plans provided by Whites, and the significant difficulties which arose as a result of the problems with the plans, and because the Whites did not very well accept suggestions to remedy the deficient plans (Transcript, page 203, line 13), the general

contractor should be released from his further performance under the contract as of January 6, 1987.

V

THE TRIAL COURT ABUSED ITS DISCRETION BY ARBITRARILY IGNORING DEFENDANTS' ACCOUNTING TESTIMONY, AND BY REVISING ITS FINDINGS IN ANTICIPATION OF THIS APPEAL.

In a rather abrupt and critical colloquy between counsel for Whites and the court, the court indicated to counsel on one occasion (when explaining why an objection to testimony was sustained) that "its the first thing I ever learned in evidence, and I would think that some of you attorneys ought to go back and take evidence." (Transcript, page 923, lines 1-7.) Soon thereafter the court indicated: "I'm not going to teach a course in elementary evidence, Mr. Kane. I've already tried to explain to you, we're trying a specific issue here. Let's limit it to those facts." (Transcript, page 924, lines 18-21.) On the final day of trial, however, as the court pronounced its ruling and addressed the issue of attorneys' fees, the court noted that "the Court sat here very patiently, I guess I lost my patience a couple of times; ... " when it appeared that the case could have been tried in one day if the parties had properly used discovery procedures. (Transcript, page 923, lines 17-18.)

Inasmuch as the \$2,500 subcontract balance was essentially acknowledged, and inasmuch as there were

legitimate extras which should be paid to the Hoths, the court appeared to be softening the impact of liability to the Whites by holding the Third-Party Defendants responsible therefor to the Whites, to compensate, perhaps, for its concededly sharp remarks to counsel for Whites during trial; but at the same time, in absolute ignorance of Third-Party Defendants' entire case in chief. The court proceeded to announce its obviously preconceived, detailed and carefully worked-out ruling at the conclusion of oral arguments after the morning in which Third-Party Defendants put on their case in chief. In his case in chief, Third-Party Defendant Dean Morgan accounted for all funds provided to him, and for additional funds of his own, as being properly expended toward construction billings by other parties. The court appeared to desire a "wash" effect to the Whites, owing \$3,008 to Hoths, but recovering \$3,007 from the Third-Party Defendants. In so doing, however, its conclusion ignores the obvious facts of the record, and offends justice through an arbitrary and capricious resolution which is not supported by the facts nor by the law.

Moreover, at the conclusion of the trial and the ruling by the court, this attorney questioned the court with respect to the exact amounts of the judgment on the third-party complaint, specifically as it pertained to attorneys' fees and the indemnity claims of Whites. After having been asked for several clarifications, the court specifically and

succinctly indicated that the Hoths would recover judgment against Defendants for \$3,008 plus \$1,000 attorneys' fees; and, Third-Party Plaintiffs recover judgment against the Third-Party Defendants of \$3,008, plus \$1,000 attorneys' fees. (Transcript, page 995, lines 20-25.) Nevertheless, over the objections of counsel who obviously thought that the court had made a mistake, the court signed its own findings of fact and conclusions of law adding an additional \$1,000 in attorneys' fees against the Third-Party Defendants, and specifically finding such things as the existence of a joint venture and joint and several liability, which items had not been previously announced by the court in its ruling at the conclusion of trial.

The entry by the court of its obviously pre-conceived and detailed judgment in favor of Hoths, and balanced by the judgment against Third-Party Defendants, is a significant abuse of discretion, whereby the court entirely ignores Defendant Morgan's entire case in chief, and the accounting rendered therein by Morgan, which would clearly have shown the court's position to be without basis in fact or in law.

VI

THE TRIAL COURT ABUSED ITS DISCRETION BY ASSESSING ATTORNEYS' FEES FOR HOTHs AGAINST THIRD-PARTY DEFENDANTS, AND BY ASSESSING SUCH FEES IN A DISPROPORTIONATE AMOUNT.

Of the approximate \$3,000 principal award to Hoths, most of that amount is attributable to the essentially

undisputed \$2,500 remaining balance of the framing subcontract. Particularly since the trial court concluded that Whites should have paid the balance of the subcontract (directly or indirectly) in the first place, it is inappropriate to require Third-Party Defendants to pay for the attorneys' fees of Hoths in bringing this foreclosure action--that responsibility should properly be the obligation of Whites. Similarly, since the balance of the award to Hoths against Whites represents the cost of bringing the action to determine the nature and value of extra work performed by the Hoths, most of which was at the direction and request of the Whites, it is not appropriate to require the Third-Party Defendants to pay Hoths' fees in bringing such an action, when the extra work agreements that give rise to the action do not in any way involve the Third-Party Defendants. Moreover, in light of the errors set forth herein, the assessment of any attorneys' fees against Third-Party Defendants, whether for Plaintiffs or Defendants in this matter, is absolutely inappropriate. Instead, Third-Party Defendants should be entitled to recovery of their fees and costs in defense of this action and for bringing this appeal.

CONCLUSION

The trial court has abused its discretion and committed reversible error by its findings and conclusions in this matter with respect to the Third-Party Defendants. The

overwhelming weight of evidence at trial reflects that the Third-Party Defendants were engaged in a broker/client business relationship, rather than co-owners engaged in a joint venture with the expectation of sharing in both profits and losses.

Inasmuch as the subcontract balance of \$2,500 is acknowledged as being due and owing from the Whites, subject only to the court's determination with respect to offsets and extra work done by the Hoths pursuant to agreements between the Hoths and the Whites, and since the Whites have obtained the full benefit of the subcontract as adjusted by the court for the offsets, it was reversible error for the trial court to hold the Third-Party Defendants responsible for the payment of the framing subcontract benefiting the Whites, and for the payment of the value of extra work done pursuant to agreements to which the Third-Party Defendants were not even a party.

The trial court committed reversible error and abused its discretion by holding that the Third-Party Defendants were in possession of funds that should have been paid to Hoths in January of 1987, thereby alleviating the need for this trial because Hoths would not have filed the lien. By making a payment as the court has indicated, Morgan may have prejudiced the claims asserted by Whites at that time, and would have paid Hoths before their payment came due, either as shown in the Hoths' notice of lien, or as shown in the

Whites' counterclaim. Making such a payment at that time to the Hoths would still have not satisfied the entire claim by the Hoths, in which case a lien and subsequent suit would in all likelihood have been filed by the Hoths anyway; and, various other potential lien claimants may have pursued litigation as well. Moreover, Morgan has adequately and thoroughly accounted for all funds received and expended by him on this project, clearly revealing that he experienced an out-of-pocket loss on this project, and had no funds available to him to pay the Hoths inasmuch as the Whites would not provide him additional funding.

The court committed reversible error by refusing to recognize that the plans which were furnished by the Whites were clearly inadequate; that the Whites interfered on a regular and constant basis with the work being done on the construction site; and, that the Whites completely assumed financial and other control of the construction progress, continuing to perform services themselves as general contractors thereon. Had the court properly evaluated and determined these conditions, the court would have excused any further performance on the part of the Third-Party Defendants on or after January 6, 1987.

The court has abused its discretion and committed reversible error by ignoring the accounting information presented in Morgan's case in chief, and instead choosing to maintain its preconceived and delicately balanced award of

judgments to Hoths and against the Third-Party Defendants herein. The court further abused its discretion, upon learning of the Third-Party Defendants' intention to appeal this matter, by rejecting the proposed findings and conclusions of counsel, filed with the court pursuant to its order, and instead substituting its own such documents in a form substantially more detrimental to the Third-Party Defendants.

The court has abused its discretion by assessing the attorneys' fees for the Plaintiffs and the Defendants against the Third-Party Defendants, inasmuch as that award would be extremely disproportionate given the nature of the actions and claims involved here. In finding that the Third-Party Defendant Morgan has suffered an out-of-pocket loss in this matter, entitling him to judgment against the Whites, the court would have and could have properly entered such a judgment including reasonable attorneys' fees for a 4-day trial in favor of Third-Party Defendants, but the court failed to do so, thereby further abusing its discretion and committing reversible error.

For these reasons, Third-Party Defendants request the Court reverse the judgment entered by the trial court herein, and enter judgment appropriately in favor of Third-Party Defendant Morgan against Whites, and dismissing any further claim against Third-Party Defendant Teames.

Dated this 26th day of September, 1988.

HILLYARD, ANDERSON & OLSEN

DALE G. SILER
Attorney for Third-Party
Defendants and Appellants

CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing BRIEF OF APPELLANT were mailed, postage prepaid, to Kevin E. Kane, Attorney for Respondents, at 108 North Main, Suite 200, Logan, Utah 84321, this 26th day of September, 1988.

Dale G. Siler

ADDENDUM

1. Judgment signed April 13, 1988
2. Findings of Fact and Conclusions of Law signed March 29, 1988
3. Letter from Plaintiff's Counsel to Court Re: Apparent Error in Findings
4. Objection by Counsel for Third-Party Defendants to Court's Findings and Conclusions
5. Memorandum Decision dated April 1, 1988, Mailed April 4, 1988
6. Notice of Appeal filed May 12, 1988
7. Sections 48-1-3, 48-1-3.1, 48-1-4 Utah Code Annotated
8. Earnest Money Sales Agreement for Residential Construction (Defendants' Exhibit #7)
9. January 6, 1987 Accounting (Defendants' Exhibit #11)
10. April 10, 1987 Accounting (Defendants' Exhibit #12)
11. June 10, 1987 Accounting (Defendants' Exhibit #13)
12. Overlooked Payment to Mike Thomas on June Accounting (Third-Party Defendants' Exhibit #6)
13. Check for \$100 Earnest Money (Third-Party Defendants' Exhibit #10)
14. Letter from Whites to Creditors claiming payment of \$60,000 to Morgan (Third-Party Defendants' Exhibit #7)
15. Bill from Whites for General Contracting Services (Third-Party Defendants' Exhibit #5)
16. Letter from Whites to Morgan dated February 23, 1987 (Third-Party Defendants' Exhibit #4)
17. Copy of Charlie Teames' business card (Defendants' Exhibit #31)
18. List of Extras claimed by Hoths (Plaintiff's Exhibit #10)
19. Notice of Lien filed March 16, 1987 (Plaintiff's Exhibit #11)
20. Excerpted pages from the Transcript of Proceedings

Jeffrey "R" Burbank 3918
JENKINS, McKEAN & ASSOCIATES
Attorneys for Plaintiffs
67 East 100 North
Logan, Utah 84321
Telephone: (801) 752-4107

IN THE SECOND CIRCUIT COURT OF THE STATE OF UTAH
IN AND FOR THE COUNTY OF CACHE, LOGAN CITY DEPARTMENT

MICHAEL J. HOTH, JEFFREY R.
HOTH, dba HOTH BROTHERS, a
Utah partnership,

Plaintiffs,

vs.

KARL R. WHITE and AMY H.
WHITE, husband and wife,

Defendants.

JUDGMENT

KARL R. WHITE and AMY H.
WHITE, husband and wife,

Third Party Plaintiffs,

vs.

DEAN R. MORGAN, CHARLES R.
TEAM, DEAN R. MORGAN dba
POLAR BEAR HOMES, and CHARLES
R. TEAM dba TEAM REALTY,

Third Party Defendants.

Civil No. 873000618

This matter having been tried March 3, 4, 7 and 9th, 1988,
before the Honorable Ted S. Perry, non-jury, and the Court having
entered Findings of Fact and Conclusions of Law, it is now
therefore adjudged and ordered as follows:

1. Plaintiffs are awarded judgment against the Defendants
Karl R. White and Amy H. White in the amount of \$2,500.00 as the
remaining balance under a \$6,000.00 contract;

2. Plaintiffs are awarded judgment against Defendants Karl R. White and Amy H. White in the amount of \$1,009.00 for extras performed by Plaintiffs; however, said Defendants are granted an off-set in the amount of \$516.00 leaving a net award of \$493.00.

3. Plaintiffs are further awarded judgment against Defendants Karl R. White and Amy H. White in the amount of \$1,000.00 as and for attorneys fees, and \$52.25 costs.

4. The total monetary judgment hereby awarded Plaintiffs against said Defendants is \$4,045.25, together with accrual of interest thereon at the statutory rate of 12% per annum and additional allowable costs incurred until paid.

5. It is further ordered that Plaintiffs' materialman lien duly filed and noted be foreclosed and the Defendants' property herein described as follows;

BEG S 89*44'41" W 345 FT FROM SE COR OF NE/4 SW/4 SE/4
SEC 2 T 12N R 1E SD PT S 0*15'19" E 2008.155 FT & S
89*44'41" W 1665 FT FROM NE COR SE/4 SEC 2 & TH N
0*15'19" W 340 FT TH S 89*44'41" W 543.83 FT TO E LN OF
CANAL TH ALG CANAL S 22*19'43" W 149.25 FT S 50*29'50"
E 179.69 FT S 36*35'29" E 108.34 FT TH N 89*44'41" E
398.82 FT TO BEG WITH & SUBJ TO R/Ws CONT 4.078 AC.
ALSO BEG S 0*15'19" E 1668.15 FT & S 89*44'41" W
1895.07 FT FROM E/4 COR OF SD SEC 2 & ON W LN OF 700 E
ST & TH S 89*44'41" W 313.76 FT TO E BANK OF CANAL TH
ALG CANAL N 22*19'43" E 80.05 FT & N 7*35'48" E 81.14 FT
TO S LN OF 300 N ST TH N 89*44'41" E ALG S LN 273.38 FT
TH 31.42 FT ALG CURVE TO RIGHT (R=20 FT LC BEARS S
45*15'19" E 28.28 FT) TH S 0*15'19" E ALG W LN OF 700 E
ST 134.38 FT TO BEG 1.03 AC. CONT 5.11 AC IN ALL

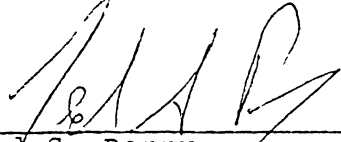
be sold as provided by law to satisfy this judgment; and that Plaintiffs be awarded judgment for any remaining deficiency as allowed by law. The Sheriff of Cache County is hereby directed to notice and sell said real property in accordance with law.

6. That the Third Party Plaintiffs (the Defendants) are awarded a judgment against the Third Party Defendants and each of

them the sum of \$3,993.00 plus costs (\$52.25) assessed in favor of the Plaintiffs plus attorneys fees in the amount of \$1,000.00 plus costs of Third Party Defendants in bringing this action.

DATED this 13 day of ^{April}~~March~~, 1988.

BY THE COURT



Ted S. Perry
Circuit Court Judge

MAILING CERTIFICATE

I do hereby certify that a true and correct copy of the above and foregoing Judgment was mailed postage prepaid and properly addressed to the following by depositing said item in the U.S. Mail on this 31st day of March.

Kevin Kane
DAINES & KANE
108 North Main
Suite 200
Logan, Utah 84321

Dale Siler
HILLYARD, ANDERSON & OLSEN
175 East 100 North
Logan, Utah 84321



Jacquie Black

hoth2.jud
d.72 jjb

IN THE CIRCUIT COURT, STATE OF UTAH, COUNTY OF CACHE

MICHAEL J. HOTH, JEFFREY R. HOTH,
dba HOTH BROTHERS, A UTAH
PARTNERSHIP,

Plaintiffs)

vs.

KARL R. WHITE and
AMY H. WHITE husband and wife,

Defendants)

and

Third Party Plaintiffs)

FINDINGS OF FACT

AND

CONCLUSIONS OF LAW

No. 873000618

vs.

DEAN R. MORGAN, CHARLES R. TEAM
DEAN R. MORGAN dba POLAR BEAR
HOMES and CHARLES R. TEAM dba
TEAM REALTY,

Third Party Defendants)

This matter came before the Court sitting without a jury on March 3, 4, 7 and 9, 1988, the plaintiffs appearing personally and by their attorney Jeffrey R. Burbank, the defendants appearing personally and by their attorney Kevin Kane, and the Third Party Defendants appearing personally and by their attorney Dale R. Siler. Witnesses were sworn and evidence introduced and the Court being fully advised in the premises now enters its

FINDINGS OF FACT

1. The Court finds that the Plaintiffs are partners and that the Plaintiff Michael J. Hoth is a licensed contractor under the laws of the State of Utah. The defendants are owners of the property described in paragraph 2 of the Plaintiff's complaint and are husband and wife. The Third Party Defendants are individuals doing business under their trade names as set forth in the caption of these findings, but that for the purpose of the contract with the defendants, the said third party defendants had entered into a joint venture in which the profits would be shared and where each would be subject to any losses that may be incurred.

2. The Court finds that the cause of action arose in Cache County where the defendants reside and the amount claimed is less than \$10,000.

3. The Court finds the Defendants and Third Party Defendant, Dean Morgan, for and in behalf of both Third Party Defendants, entered into a written contract on or about August 26, 1986 (see defendants' exhibit #7 and #6 and plaintiffs' exhibits 1 through 8), for the construction of a house on defendants' property described in paragraph 2 of plaintiffs' complaint in accordance with the plans and specifications.

4. The Court finds that the Plaintiffs and Third Party Defendant Dean Morgan entered into a subcontract for the framing of said house and some other miscellaneous items in the amount of \$6000. That the sum of \$6000 was a reasonable price for said subcontract work under the original plans and specifications.

5. The Court finds that the Plaintiffs substantially completed the work required by their subcontract.

6. The Court finds that the Third Party Defendant paid the sum of \$3500 to the Plaintiffs and that the balance owing on the basic subcontract is \$2500.00.

7. The Court finds that the following additional work was ordered by the defendants as owners or by the third party defendants as contractors and the plaintiffs performed said work and are entitled to reasonable compensation for the same:

a. Changing basement stairs due to a design error in location of plumbers pipes a total of 10 hours of labor.

b. Remodel of master showerlid at the request of the owners a total of 4 hours.

c. Moving the bearing wall in the kitchen and dining room at request of the owners a total of two hours of labor.

d. Changing the two back doors to a different size at the request of the owners for a total of 4 hours.

e. Changing the reinforcing trusses which were originally built to the plans but which did not meet the building inspector's requirements for a total of 2 hours of labor.

f. Putting a doorway under the stairs not included on the plans at the request of the owner a total of 1 hour of labor.

g. Relocating the bedroom window in the northeast bedroom due to a defect in the plans at the request of the owner for a total of 1 hour.

h. Extra framing for the Octagon tower due to lack of detail in the plans at the request of the owner for a total of 6 hours.

i. Extra door in the tower approved by the owners and ordered by the third party defendant Dean Morgan for a total of 3 hours.

j. Remodeling the front porch as requested by the owners and changing the plans for a total of 8 hours of labor.

k. Cost of one case of nails used in installing the extras for a total of \$64.00.

l. Placing tar paper on the roof. Not required under original subcontract done at the request of the third party defendant Dean Morgan for the benefit of the owners for a total of 10 hours.

m. Additional work on the tower requested by the owner for a total of 2 hours of labor.

n. Remodel of dining room window to match the change in plans for the octagon tower at the request of the owners for a total of 3 hours of labor.

o. Additional work on the upstairs bathroom window in the Northeast for a total of 1 hour.

p. Caulking the second floor plywood which was an extra approved by the owners for a total labor of 2 hours.

q. Changing the upstairs bath room doors at the request of the owners for a total of 2 hours.

r. Installing a laundry room under the stairs not on original plans at the request of the owner for a total of 2 hours.

8. That a reasonable cost for the labor for the extras was \$15 per hour for a total of 63 hours or \$945 plus \$64 for the extra nails equals a total for the extras of \$1009 for which the plaintiffs are entitled to compensation.

9. That the plaintiffs failed to complete a portion of their subcontract and the owners were required to obtain the labor from other sources as follows:

a. For work done by Robert Smith and Pat Christensen: a total of 42½ hours of labor at an hourly rate of \$10.00 per hour for a total cost of work not performed by the plaintiff but which was performed by Robert Smith and Pat Christensen in the amount of \$425.00.

b. For work done by Robert Reiner having a reasonable value of \$91.

c. That other work which the owners contracted to be performed was not the responsibility of the plaintiffs and the owners are not entitled to a set off therefor.

10. That there is owing to the plaintiffs for work performed the sum of \$6000 plus \$1009 for extras less \$516 for work not performed, less \$3500 paid or the net sum of \$2993.00.

11. That the plaintiffs hired an attorney to represent them in filing a mechanics lien and in bringing this action to foreclose the lien. That a reasonable attorneys fee for the plaintiffs including costs of filing the mechanics lien is \$1000.

12. That the plaintiffs timely filed a mechanics lien in the office of the Cache County Recorder. That there were no inaccuracies in the mechanics lien as understood at the time of filing by the plaintiffs.

13. That the owners paid the sum of \$3000 to Dean Morgan in January 1987 and the additional sum of \$2000 which Dean Morgan paid to third party defendant Charles Team. That had said sums been paid to the plaintiffs, no lien would have been filed and this action would have been unnecessary. That neither Dean Morgan and Charles Team were entitled to any money under the contract until they had first satisfied the costs of construction of the house. That the failure of Dean Morgan and Charles Team to pay the plaintiffs was a breach of the contract.

14. That the contract between the defendants and the third party defendants provided for the award of attorneys fees in the event of a breach. That a reasonable attorneys fee for bringing this action is \$1000.

From the foregoing findings of fact the court concludes:

CONCLUSIONS OF LAW.

1. Plaintiff is entitled to recover from the defendants the sum of \$2993.00, plus the sum of \$1000 attorneys fees plus plaintiffs' costs.

2. That in the event the defendants fail to pay said sum the plaintiffs may proceed and foreclose the mechanic's lien in a matter provided by law.

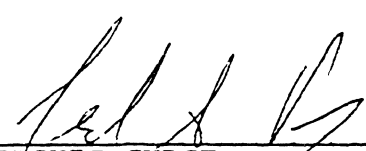
3. That the third party plaintiffs (the defendants) are

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to recover from the third party defendants and each of them
the sum of \$3993 plus costs assessed in favor of the plaintiffs
plus attorneys fees in the amount of \$1000 plus the costs of
the third party ^{PLAINTIFFS} ~~defendants~~ in bringing this action.

Let judgment be entered accordingly.

Dated March 29, 1971


CIRCUIT JUDGE

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COPY

JENKINS, McKEAN AND ASSOCIATES

Attorneys at Law

GARY O. McKEAN*
JAMES C. JENKINS

67 EAST 100 NORTH
LOGAN, UTAH 84321

TELEPHONE
(801) 752-4107

JEFFREY "R" BURBANK**

March 29, 1988

*ADMITTED UTAH AND FLORIDA
**ADMITTED UTAH AND CALIFORNIA

Honorable Ted S. Perry
Circuit Court Judge
160 North 100 West
Logan, Utah 84321

RE: Hoth vs. White

Dear Judge Perry:

A review of Paragraph 3 of the Conclusions of Law indicates that there is a typographical error as pertaining to the \$3,993.00 which should be \$2,993.00 and also that the costs should be of the Third Party Plaintiffs rather than the Third Party Defendants.

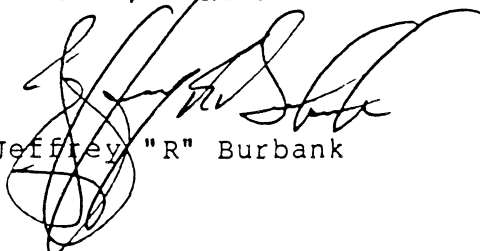
I have prepared a Judgment containing both figures if in fact there is a typographical error the Court may disregard the one judgment and sign the other.

A copy of this letter along with both judgments have been mailed to both attorney Kevin Kane and Dale Siler.

The findings, conclusions of law and written correspondence prepared by Attorney Kevin Kane were mailed to the wrong law office and were not received by my office until March 29, 1988, the same day the court signed its own findings.

Very truly yours,

JENKINS, McKEAN & ASSOCIATES



Jeffrey "R" Burbank

JRB/jjb
enclosures
c. Kevin Kane
Dale Siler

HILLYARD, ANDERSON & OLSEN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
175 EAST FIRST NORTH
LOGAN, UTAH 84321
TELEPHONE (801) 752-2610

IN THE SECOND CIRCUIT COURT OF THE STATE OF UTAH
IN AND FOR THE COUNTY OF CACHE, LOGAN CITY DEPARTMENT

MICHAEL J. HOTH, JEFFREY R.
HOTH, dba HOTH BROTHERS, a
Utah partnership,

Plaintiffs,

vs.

KARL R. WHITE and AMY H.
WHITE, husband and wife,

Defendants.

KARL R. WHITE and AMY H.
WHITE, husband and wife,

Third Party Plaintiffs,

vs.

DEAN R. MORGAN, CHARLES R.
TEAM, DEAN R. MORGAN dba
POLAR BEAR HOMES, and CHARLES
R. TEAM dba TEAM REALTY,

Third Party Defendants.

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OBJECTIONS TO FINDINGS
OF FACT AND CONCLUSIONS
OF LAW

Civil No. 873000618

COME NOW Third-Party Defendants, Dean R. Morgan and Charles R. Team, by and through their counsel, Dale G. Siler of Hillyard, Anderson & Olsen, P.C., and enter their objection to the Findings of Fact and Conclusions of Law in the above-referenced matter, as prepared and executed by the Court in this matter on March 29, 1988. Third-Party Defendants object to said Findings of Fact and Conclusions of Law based on what appear to be typographical or inadvertent errors contained therein, and specifically described as follows:

1. The first paragraph of said Findings of Fact and Conclusions of Law should indicate that Third-Party Defendants were appearing therein personally and by their attorney, "Dale G. Siler".

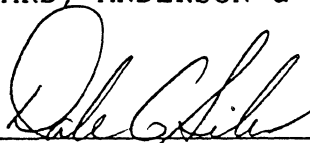
2. Paragraph 3 of the Conclusions of Law appears to contain a typographical error by requiring Third-Party Defendants to pay the sum of \$3,993.00, plus costs and fees; while it is believed the Court's intention was to require the Third-Party Defendants to pay the sum of "\$2,993.00 plus costs".

3. Paragraph 3 of the Conclusions of Law appears to contain a further inadvertent error by requiring the Third-Party Defendants herein to pay Third-Party Plaintiffs "the costs of the Third-Party Defendants in bringing this action"; while it is believed that the Court's intention was to require the Third-Party Defendants to pay the Third-Party Plaintiffs "the costs of the Third-Party Plaintiffs in bringing this action".

Inasmuch as these errors appear to be inadvertent or typographical errors in nature, Third-Party Defendants hereby waive any rights to a hearing regarding these objections, so long as the Court simply modifies its Findings and Conclusions as set forth above herein, and enters its judgment in accordance therewith as corrected.

Dated this 4th day of April, 1988.

HILLYARD, ANDERSON & OLSEN

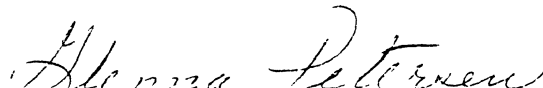


DALE G. SILER

Attorney for Third-Party Defendants

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW was mailed, postpaid, to Kevin E. Kane, Attorney at Law, at 108 North Main, Suite 200, Logan, Utah 84321, and to Jeff Burbank, Attorney at Law, at 67 East 100 North, Logan, Utah 84321, this 4th day of April, 1988.


Secretary

LAW OFFICES, HILLYARD, ANDERSON & OLSEN, 175 EAST FIRST NORTH, LOGAN, UTAH 84321

IN THE CIRCUIT COURT, STATE OF UTAH, COUNTY OF CACHE

MICHAEL J. HOTH, ET AL

Plaintiffs)

MEMORANDUM DECISION

vs.

No. 873000618

KARL R. WHITE et ux,

Defendants and
Third Party Plaintiffs)

vs.

DEAN R. MORGAN, et al

Third Party Defendants)

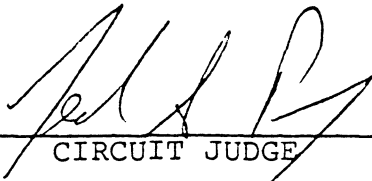
In filing the proposed judgment counsel for the plaintiff noted a typographical error in awarding costs to the third party defendants instead of the third party plaintiffs in the conclusions of law. This has been corrected by interlineation so that the conclusions of law now award costs to the third party plaintiffs.

The award of \$1000 to the third party plaintiffs is not a typographical error. The Court found as a fact that the written contract contained a provision for award of attorneys fees and the Court fixed those at \$1000. The third party plaintiffs are entitled to collect the full judgment awarded in favor of the plaintiffs against them from the third party defendants which was the amount of \$3993. Third party plaintiffs are entitled to collect an additional \$1000 attorneys fees plus costs against

the third party defendants.

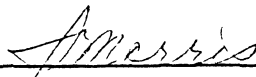
The Court will sign the proposed judgment on April 13, 1988 unless objections are filed prior to that time.

Dated April 1, 1988.


CIRCUIT JUDGE

I certify that a copy of the foregoing was mailed to the attorneys for the parties, Jeff Burbank, Kevin Kane and Dale Siler, on

April 4, 1988


CLERK

Dale G. Slier & 350
HILLYARD, ANDERSON & OLSEN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
175 EAST FIRST NORTH
LOGAN, UTAH 84321
TELEPHONE (801) 752-2610

IN THE FIRST CIRCUIT COURT OF THE STATE OF UTAH
LOGAN CITY DEPARTMENT

MICHAEL J. HOTH, JEFFREY R.)
HOTH, dba HOTH BROTHERS, a)
Utah partnership,)
Plaintiffs,)

vs.)

KARL R. WHITE and AMY H.)
WHITE, husband and wife,)
Defendants.)

NOTICE OF APPEAL

KARL R. WHITE and AMY H.)
WHITE, husband and wife,)
Third Party Plaintiffs)
and Respondents,)

Civil No. 873000618

vs.)

DEAN R. MORGAN, CHARLES R.)
TEAM, DEAN R. MORGAN dba)
POLAR BEAR HOMES, and CHARLES)
R. TEAM dba TEAM REALTY,)
Third Party Defendants)
and Appellants.)

Notice is hereby given that Dean R. Morgan, Charles R. Team, Dean R. Morgan dba Polar Bear Homes, and Charles R. Team dba Team Realty, Third-Party Defendants above-named, hereby appeal to the Utah Court of Appeals from the Findings of Fact, Conclusions of Law, and Judgment signed and filed by the Honorable Ted S. Perry, Circuit Judge, of the First Circuit Court of the State of Utah, Logan City Department,

(which Court was known at the time of the entry of said Judgment as the Second Circuit Court of the State of Utah in and for County of Cache, Logan City Department). This appeal is taken from such Findings of Fact, Conclusions of Law, and Judgment insofar as the same pertains to Third-Party Plaintiffs' complaint against Appellants herein, and insofar as they pertain to the Third-Party Defendants' cross-claim against the Respondents herein. Said Findings of Fact, Conclusions of Law, and Judgment were signed in this matter by the Court and entered on April 13, 1988.

Dated this 12th day of May, 1988.

HILLYARD, ANDERSON & OLSEN

DALE G. SILER
Attorney for Third-Party
Defendants and Appellants

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing NOTICE OF APPEAL was hand-delivered to Kevin E. Kane, Attorney at Law, at 108 North Main, Suite 200, Logan, Utah 84321, and mailed, postage prepaid, to Jeffrey "R" Burbank, Attorney at Law, at 67 East 100 North, Logan, Utah 84321, this 12th day of May, 1988.

Secretary

47-2-7. Elimination from private property on request.

Abandoned horses may be eliminated from privately owned land by the board of county commissioners in the same manner as from the open range when requested so to do by the owner of such land.

1953

TITLE 48**PARTNERSHIP****Chapter**

1. General Partnership.
2. Limited Partnership.

CHAPTER 1**GENERAL PARTNERSHIP****Section**

- 48-1-1. Definition of terms.
- 48-1-2. Interpretation of knowledge and notice.
- 48-1-3. "Partnership" defined.
- 48-1-3.1. Joint venture defined — Application of chapter.
- 48-1-4. Rules for determining the existence of a partnership.
- 48-1-5. Partnership property.
- 48-1-6. Partner agent of partnership as to partnership business.
- 48-1-7. Conveyance of real property of partnership.
- 48-1-8. Partnership bound by admission of partner.
- 48-1-9. Partnership charged with knowledge of or notice to partner.
- 48-1-10. Partnership bound by partner's wrongful act.
- 48-1-11. Partnership bound by partner's breach of trust.
- 48-1-12. Nature of partner's liability.
- 48-1-13. Partner by estoppel.
- 48-1-14. Liability of incoming partner.
- 48-1-15. Rules determining rights and duties of partners.
- 48-1-16. Partnership books.
- 48-1-17. Duty of partners to render information.
- 48-1-18. Partner accountable as a fiduciary.
- 48-1-19. Right to an account.
- 48-1-20. Continuation of partnership beyond fixed term.
- 48-1-21. Extent of property rights of a partner.
- 48-1-22. Nature of a partner's right in specific partnership property.
- 48-1-23. Nature of partner's interest in the partnership.
- 48-1-24. Assignment of partner's interest.
- 48-1-25. Partner's interest subject to charging order.
- 48-1-26. "Dissolution" defined.
- 48-1-27. Partnership not terminated by dissolution.
- 48-1-28. Causes of dissolution.
- 48-1-29. Dissolution by decree of court.
- 48-1-30. General effect of dissolution on authority of partner.
- 48-1-31. Right of partner to contribution from co-partners after dissolution.
- 48-1-32. Power of partner to bind partnership to third persons after dissolution.
- 48-1-33. Effect of dissolution on partner's existing liability.
- 48-1-34. Right to wind up.

Section

- 48-1-35. Rights of partners to application of partnership property.
- 48-1-36. Rights where partnership is dissolved for fraud or misrepresentation.
- 48-1-37. Rules for distribution.
- 48-1-38. Liability of persons continuing the business in certain cases.
- 48-1-39. Rights of retiring or estate of deceased partner when the business is continued.
- 48-1-40. Accrual of actions.

48-1-1. Definition of terms.

In this chapter:

"Court" includes every court and judge having jurisdiction in the case.

"Business" includes every trade, occupation or profession.

"Person" includes individuals, partnerships, corporations and other associations.

"Bankrupt" includes bankrupt under the federal bankruptcy laws or insolvent under any state insolvency law.

"Conveyance" includes every assignment, lease, mortgage or encumbrance.

"Real property" includes land and any interest or estate in land.

1953

48-1-2. Interpretation of knowledge and notice.

(1) Within the meaning of this chapter, a person is deemed to have knowledge of a fact not only when he has actual knowledge thereof, but also when he has knowledge of such other facts that to act in disregard of them shows bad faith.

(2) A person has notice of a fact within the meaning of this chapter when the person who claims the benefit of the notice:

(a) States the fact to such person; or,

(b) Delivers through the mail, or by other means of communication, a written statement of the fact to such person, or to a proper person at his place of business or residence.

1953

48-1-3. "Partnership" defined.

A partnership is an association of two or more persons to carry on as co-owners a business for profit.

But any association formed under any other statute of this state, or any statute adopted by authority other than the authority of this state, is not a partnership under this chapter, unless such association would have been a partnership in this state prior to the adoption of this chapter; but this chapter shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

1953

48-1-3.1. Joint venture defined — Application of chapter.

(1) A joint venture is an association of two or more persons to carry on as co-owners of a single business enterprise.

(2) This chapter governs the property and transfer rights of joint ventures.

1985

48-1-4. Rules for determining the existence of a partnership.

In determining whether a partnership exists these rules shall apply:

(1) Except as provided by Section 48-1-13, persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by entireties, joint property, common property, or

part ownership, does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

- (a) As a debt by installments or otherwise.
- (b) As wages of an employee or rent to a landlord.
- (c) As an annuity to a widow or representative of a deceased partner.
- (d) As interest on a loan, though the amounts of payment vary with the profits of the business.
- (e) As the consideration for the sale of the good will of a business or other property by installments or otherwise. 1953

48-1-5. Partnership property.

All property originally brought into the partnership stock, or subsequently acquired by purchase or otherwise on account of the partnership, is partnership property.

Unless the contrary intention appears, property acquired with partnership funds is partnership property.

Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor, unless a contrary intent appears. 1953

48-1-6. Partner agent of partnership as to partnership business.

(1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument for apparently carrying on in the usual way the business of the partnership of which he is a member, binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter and the person with whom he is dealing has knowledge of the fact that he has no such authority.

(2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership, unless authorized by the other partners.

(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all of the partners have no authority to:

- (a) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership.
- (b) Dispose of the good will of the business.
- (c) Do any other act which would make it impossible to carry on the ordinary business of the partnership.
- (d) Confess a judgment.
- (e) Submit a partnership claim or liability to arbitration or reference.

(4) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction. 1953

48-1-7. Conveyance of real property of partnership.

Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property, unless the partner's act binds the partnership under the provisions of Section 48-1-6(1), or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner in making the conveyance has exceeded his authority.

Where title to real property is in the name of the partnership a conveyance executed by a partner in his own name passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of Section 48-1-6(1).

Where title to real property is in the name of one or more but not all of the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property, if the partners' act does not bind the partnership under the provisions of Section 48-1-6(1), unless the purchaser or his assignee is a holder for value without knowledge.

Where the title to real property is in the name of one or more or all of the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of Section 48-1-6(1).

Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property. 1953

48-1-8. Partnership bound by admission of partner.

An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this chapter is evidence against the partnership. 1953

48-1-9. Partnership charged with knowledge of or notice to partner.

Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operates as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner. 1953

48-1-10. Partnership bound by partner's wrongful act.

Where by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act. 1953

EARNEST MONEY SALES AGREEMENT

FOR RESIDENTIAL CONSTRUCTION

Legend Yes (X) No (0)

This is a legally binding contract. Read both front and back carefully before signing.



EARNEST MONEY SALES AGREEMENT FOR RESIDENTIAL CONSTRUCTION

EARNEST MONEY RECEIPT

DATE August 21, 1986

The undersigned Buyer Karl & Amy White
deposits with Agent/Broker Company as EARNEST MONEY the amount of 142,250.00
Dollars (\$ 142,250.00)

the form of check
which shall be deposited in accordance with applicable State Law

Team Realty
Agent Company

Received by _____

AGREEMENT

1. **IDENTIFICATION OF PARTIES.** The Buyer who makes the aforesaid EARNEST MONEY Deposit is Karl & Amy White
whose present residence address is 691 East 2160 North Logan, Utah 84326
and present telephone number is 801 753 1396. The contractor who will build the Residence and related improvements described herein
Polar Bear Homes, whose office address is 7209 Pine Cone St SLC, Utah 84121
and telephone number is 242-6924 Contractor's License # 29737

2. **DESCRIPTION OF THE PROPERTY.** The EARNEST MONEY Deposit is given to secure and apply on the purchase price of a new
residence described hereafter to be constructed on a parcel of real property located at 670 East 300 North Hyde Park UT
the city of Hyde Park county of Cache State of Utah which is more particularly described as
Lot No _____ of the _____ Subdivision or alternatively
follows _____

The purchase price ☐ includes ☒ does not include, the parcel of real property described above Contractor shall construct a new residence and
related improvements in accordance with

FHA/VA Approved Plan No _____

The _____ Model Houseplan

The Plans and Declaration of Condominium (check one) ☐ as recorded, ☐ as proposed for Unit No _____ of the
Condominiums

Other (specify) Custom

3. **CONNECTIONS, UTILITIES AND OTHER RIGHTS.** Contractor represents that the property, upon completion of construction, will have
the following improvements which are included in the purchase price

public sewer ☐ connected
septic tank ☒ connected
other sanitary system _____

public water ☒ connected
private water ☐ connected
well ☐ connected ☐ other _____

irrigation water/secondary system _____

telephone ☐ connected ☒ prewired

TV antenna ☐ master antenna ☒ prewired

Contractor agrees to pay for building permit fees and all connection fees except the following fees to get water, gas, & electricity to property

☒ natural gas ☒ connected

☒ electricity ☒ connected

☐ ingress & egress by private easement ☐ paved _____

☐ dedicated road ☐ paved _____

☐ sidewalk _____

☐ curb and gutter _____

☐ other rights _____

4. **SURVEY** In the event the property corners are not marked by survey stakes, a survey ☒ will be made ☐ will not be made to mark the
property corners at the expense of owner prior to commencement of
construction and/or an ALTA title policy endorsement insuring Buyer against error in the legal description and placement of the residence on the
real property ☐ shall not be furnished, ☒ shall be furnished at the expense of owner at closing

5. **PURCHASE PRICE.** The total purchase price for the property is One Hundred Forty Two Thousand Two Hundred and Fifty
dollars (\$ 142,250.00) which shall be paid as follows

100.00 which represents the aforesaid EARNEST MONEY DEPOSIT

2000.00 representing the additional CASH DOWN PAYMENT to be paid by Buyer on or before August 26, 1986
WHICH AMOUNT SHALL BE NON-REFUNDABLE EXCEPT AS SPECIFIED BELOW AND SHALL BE USED IN CONSTRUCTION OF THE RESIDENCE

(other) 140,250.00 representing the approximate balance if any to be paid in cash by Buyer at the final closing or from proceeds of
permanent financing as provided in Section 6 below

142,250.00 TOTAL PURCHASE PRICE

The amount of the purchase price may be increased if additional costs are incurred for extras as described hereafter. Buyer agrees to pay for
the cost of all such extras as agreed to in a written change order as part of the purchase price of the property

6. **FINANCING** Financing for the property shall be provided as follows

(a) **Construction financing** (check one)

☐ Shall be provided by Contractor

☒ Shall be provided by Buyer in the amount of \$ 40,000.00 Upon funding progress payments shall be made

in accordance with the requirements of the construction lender

(b) **Permanent financing.** If permanent financing is required, Buyer shall apply for funds for payment of the total purchase price less any cash down payment or advances. Said loan shall be (check one) ☐ FHA, ☐ VA, ☒ CONVENTIONAL, ☐ OTHER.

(c) When construction and/or permanent financing is required, Buyer agrees to use best efforts to obtain financing, and apply at institution of the buyer's choice within 15 days of the Effective Date of this Agreement, and to sign the necessary documentation. If Buyer does not qualify within 30 days of the original application(s), this Agreement shall be voidable at the option of Buyer or Seller upon written notice. If voided, all monies deposited herewith shall be returned to the Buyer.

(d) Once Buyer has been approved for permanent financing, Buyer shall be obligated to close the loan at the prevailing interest rate on that loan as of the date of closing, provided the interest rate has not increased to the point where Buyer can no longer qualify. Contractor shall not be obligated to pay more than 2 discount points under the permanent financing without an increase in the purchase price equal to the change in discount points. Closing shall be no earlier than October 15, 1986.

(e) Subject to the exceptions in Section C of the General Provisions, substantial completion shall be no later than December 10, 1986. For delays in substantial completion not excepted under section C of the General Provisions, Contractor agrees to pay and Buyer agrees to accept as liquidated damages the amount of \$ 50.00 per day for every day of delay beyond the agreed date of completion for a period not to exceed 30 days. After that period, Buyer may, at Buyer's option, elect to accept further delays and accrual of liquidated damages, or pursue other remedies available at law.

7. PLANS AND SPECIFICATIONS. No changes shall be made to the Plans and Specifications or the purchase price except as agreed to in a written change order signed by Buyer and Contractor which sets forth the change to be made and the amount of adjustment in the purchase price required by said change. Plans and Specifications shall be provided to the Buyer as follows: (Check One)

☐ The Buyer is purchasing the residence based on inspection of a model home of an FHA/VA Registered Plan or other Plan referred to in Section 2 above, and the Contractor shall provide an addendum attached hereto which specifies the finish material and structural options which are included in the total purchase price of the residence. Any deviations from the addendum referenced in this Section shall be agreed to in writing indicating the nature and cost of the changes.

☒ The Buyer is purchasing a custom-built residence not based on a model, and detailed Plans and Specifications for the residence have been reviewed and approved by the Buyer and are attached hereto and incorporated herein by reference.

8. SELECTION OF COLORS AND FINISH MATERIALS. The Plans and Specifications contain descriptions of the grade and type of materials to be used in finishing the residence or a dollar allowance for such items. The cost of said materials is included in the purchase price. To the extent that a choice of color or type of material is required, Buyer shall notify Contractor in writing of such selections no later than Sept 15, 1986. If Buyer has not notified Contractor in writing of such selections as set forth above, Contractor shall have the right to make said selections at Contractor's sole discretion, reasonably exercised, to avoid delay in completion of construction. If Buyer's selection of color, grade, or type of finishing materials pursuant to this Section are for materials more or less expensive than those described or allowed for in the Plans and Specifications, or the attached addendum referred to in Section 7 above, any expense adjustments shall be paid for or credited as agreed to by Buyer and Contractor in writing.

9. INSURANCE. During the period of construction and until closing, Contractor shall maintain in full force and effect, at Contractor's expense, an all-risk insurance policy for the full replacement value of all completed portions of improvements included in the residence; and all construction materials located on-site; complete coverage workmen's compensation insurance to insure against all claims of persons employed to complete the residence; and public liability insurance in the amount of \$100,000 or \$ 150,000, whichever is greater.

10. CONDITION AND CONVEYANCE OF TITLE. There ☐ are, ☒ are not, deed, protective, or restrictive covenants affecting the subject property. Buyer ☐ has, ☒ has not, reviewed those covenants prior to signing this Agreement. Where Buyer does not have title to the lot upon which the residence is to be constructed, Contractor agrees to furnish good and marketable title to the property by Warranty Deed at closing. Evidence of title shall be in the form of a standard coverage ALTA owner's policy. Exceptions to the above including taxes, municipal assessments, easements and rights of way are as follows:

11. VESTING OF TITLE. Title shall be vested in Buyer as follows: Karl & Amy White

12. CONTRACTOR WARRANTIES. Contractor warrants that: (a) Contractor has received no claim or notice of any building or zoning violation concerning the property which has not or will not be remedied prior to closing; (b) all obligations against the property including taxes, assessments, mortgages, liens or other encumbrances of any nature shall be brought current on or before closing; and (c) the plumbing, heating, and electrical systems (including all gas and electric appliances), and structural elements of the residence are warranted for a period of one (1) year from date of closing.

13. CLOSING PROCEDURES. The Contractor shall provide the Buyer written notice of substantial completion of the residence. Buyer and Contractor agree to close within 5 days of Buyer's receipt of notice of substantial completion. If after receipt of such notice, minor items of corrective or repair work remain, then Buyer, pending completion of such work, may withhold in escrow at closing a reasonable amount agreed to by Contractor and Buyer sufficient to pay for completion of such work. If such work is not completed within thirty (30) days after closing, the amount so escrowed may, at Buyer's option, be released to Buyer as liquidated and agreed damages for failure to complete. Prorations, including the items listed in Section 12(b) above, shall be based on ☐ date of possession ☒ date of closing ☐ Other _____ Other prorations shall include the following: nothing

There shall be no deviation from the closing schedule set forth herein except upon the written agreement of Buyer and Contractor.

14. GENERAL PROVISIONS. Unless otherwise indicated herein, the General Provisions on the reverse side hereof are incorporated into this Agreement by reference.

15. SPECIAL CONSIDERATIONS AND CONTINGENCIES. This Agreement is made subject to the following special conditions and/or contingencies which must be satisfied prior to closing:

16. PERFORMANCE BOND. Contractor ☐ shall, ☒ shall not, be required to furnish a performance bond in the amount of the purchase price (excluding the lot) or \$ _____, whichever is greater prior to the commencement of work hereunder, and to deliver the bond to Buyer

17. **AGREEMENT TO PURCHASE AND TIME LIMIT FOR ACCEPTANCE.** Buyer offers to purchase the property on the above terms and conditions. Contractor shall have until 5:00 (AM/PM) August 27, 1986, 19 to accept this offer. Unless so accepted, this offer shall lapse and the EARNEST MONEY shall be returned to Buyer.

DATE August 26, 1986

SIGNATURE OF BUYER

Karl A. White
August 26, 1986

CHECK ONE

ACCEPTANCE OF OFFER TO PURCHASE

Contractor hereby ACCEPTS the foregoing offer on the terms and conditions specified above.

COUNTER OFFER

Contractor hereby accepts the foregoing offer SUBJECT TO the exceptions or modifications as specified in the attached Addendum and presents said COUNTER OFFER for Buyer's acceptance.

DATE 8-27-86

TIME 8:30 (AM/PM)

SIGNATURE OF CONTRACTOR

Sam S. [Signature]

REJECTION

Contractor hereby REJECTS the foregoing offer _____ (Contractor's initials)

AGREEMENT TO PAY REAL ESTATE COMMISSION

CHECK ONE

☐ This property is listed by _____ the Listing Agent/Broker Company, and a real estate commission of _____ shall be paid in accordance with the Sales Agency Agreement. The Selling Agent/Broker Company is _____.

☐ Agent/Broker Company is _____ and has been authorized to offer this property for sale, and Contractor agrees to pay a real estate commission of _____% of the total purchase price (including extras) as consideration for its efforts in procuring Buyer. Said commission shall be payable at closing or upon Contractor's default on this Agreement, whichever occurs first. The amount or due date thereof cannot be changed without the prior consent of Agent/Broker Company.

DATE _____

SIGNATURE OF Contractor

DOCUMENT RECEIPT

State Law requires Broker to furnish Buyer and Contractor with copies of this Agreement bearing all signatures. (One of the following alternatives must therefore be completed)

A ☒ I acknowledge receipt of a final copy of the foregoing Agreement bearing all signatures.

SIGNATURE OF CONTRACTOR

Sam S. [Signature] 8/27/86
Date

SIGNATURE OF BUYER

Karl A. White 8/26/86
Date

Date

Date

B ☐ I personally caused a final copy of the foregoing Agreement bearing all signatures to be mailed on _____ 19____ by Certified Mail and return receipt attached hereto to the ☐ Contractor ☐ Buyer. Sent by _____.

This is a legally binding contract. Read both front and back carefully before signing.

GENERAL PROVISIONS

A. DEFAULT/INTERPLEADER AND ATTORNEY'S FEES. In the event of default by Buyer, Contractor may elect to either retain the monies deposited pursuant to this Agreement as liquidated damages or to institute suit to enforce any rights of Contractor. Both parties agree that, should either party default in any of the covenants or agreements herein contained, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this Agreement or in pursuing any remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise. In the event the Agent/Broker company holding the EARNEST MONEY DEPOSIT is required to file an interpleader action in court to resolve a dispute over the EARNEST MONEY DEPOSIT referred to herein, the Buyer and Contractor agree that the defaulting party shall pay the court costs and attorney's fees incurred by the Agent/Broker Company in bringing such action.

B. CONTRACTOR COMPLIANCE. Contractor agrees to construct the residence in accordance with the standards and requirements of all applicable Federal, State, and Local governmental laws, ordinances and regulations. If the permanent financing to be obtained by the Buyer is based on an FHA or VA loan, Contractor agrees to meet all FHA or VA requirements relating to construction of the residence and closing of the permanent financing.

C. UNAVOIDABLE DELAY. In the event the residence may not be substantially complete by the date provided in Section 6(e) herein due to interruption of transport, availability of materials, strikes, fire, flood, extreme weather, acts of God or similar occurrences beyond the control of Contractor, Contractor shall immediately provide Buyer written notice of the nature and projected time of the delay. If any of the above actually cause a delay in substantial completion and Contractor has provided written notice of the delay to the Buyer, the completion date shall be extended for a reasonable period based on the nature of the delay, but in no event shall the extension be more than forty-five (45) days beyond the completion date set in Section 6(e) herein. After that date, Buyer may, at Buyer's option, elect to accept further delays in exchange for liquidated damages as provided in Section 6(e) herein, or pursue other remedies available at law.

D. CLOSING Contractor and Buyer shall each pay one-half (1/2) of the escrow closing fee, unless the sale is FHA, VA or conventionally financed, in which case fees shall be paid according to FHA, VA or conventional lending regulations. Costs of providing title insurance shall be paid by Contractor. Unless otherwise agreed to in writing, taxes and assessments for the current year, and insurance, shall be prorated as set forth in Section 13. "Closing" shall mean the date on which all necessary instruments are signed and delivered by all parties to the transaction.

E. AUTHORITY OF SIGNATORS. If Buyer or Contractor is a corporation, partnership, trust, estate or other entity, the person executing this Agreement on its behalf warrants his or her authority to do so and to bind Buyer and Contractor.

F. AGENT'S REPRESENTATIONS. Contractor and Buyer acknowledge that neither the Selling or Listing Agent/Broker Company has made any representations or warranties concerning the condition of the property, boundary lines or size, Buyer's financing ability, or any other matter concerning the property or the parties, unless otherwise noted herein.

G. AGENCY DISCLOSURE. Selling Agent/Broker Company may have entered into an agreement to represent the Contractor.

H. TIME IS OF ESSENCE. Time is of the essence in this Agreement.

I. COMPLETE AGREEMENT — NO VERBAL AGREEMENTS. This instrument constitutes the entire Agreement between the parties and supercedes and cancels any and all prior negotiations, representations, warranties, understandings or agreements between the parties. There are no verbal agreements which modify or affect this Agreement. This Agreement cannot be changed except by mutual written agreement of the parties.

J. SUBSTANTIAL COMPLETION. The residence shall be substantially complete when occupancy of the residence is allowable under the rules, ordinances, and laws of the appropriate civil jurisdiction in which the property is located. In the absence of such governmental regulations, substantial completion shall be when the residence is ready for occupancy and only minor work remains which is corrective or repair in nature.

K. MECHANIC'S LIENS — NOTICE. Under Utah Law, any contractor, subcontractor, laborer, supplier or other person who performs labor or provides material to improve the property but is not paid for his work or supplies, has a right to enforce a claim against the property. This means that after a court hearing, the property could be sold by a court officer and proceeds of the sale used to satisfy the indebtedness. This can happen even if the contractor has been paid in full, if the labor or material suppliers remain unpaid.

L. CASH ADVANCES. All cash payments and advances provided directly by Buyer under this Agreement (other than EARNEST MONEY deposited with a real estate brokerage) shall be deposited, together with escrow instructions, with an escrow agent selected by Contractor. The selection of escrow agent shall be limited to Agent/Broker Company or any entity authorized to act as a trustee under Utah law. The use of such deposits shall be limited to construction of the residence described in this Agreement.

Page four of a four part form Buyer's Initials () () Date / / Contractor's Initials () Date / /

1	Building Permit			
2	Fees	100000	-	100000
3	Water			
4		<u>Total</u>	<u>Unpaid</u>	<u>Paid</u>
5	Teamies	200000		200000
6	Darrell Sarter	14500	14500 ✓	
7	Darrell Sarter	40000	40000	
8	Phlox Olsen	6000	-	6000
9	Harry Hansen	194655	194655 ✓	
10	Butterfield Lumber	14684	5272	9412
11	IN-HUMIN Concrete	1819	-	1819
12	Parson Ready Mix	812927	133722	179199
13	Kink Hull	65000	-	65000
14	Sorensen Masonry	507250	507250 ✓	
15	Cantwell Lumber	1784032	606022	1178010
16	Cake Valley Builders	180160	-	180160
17	Builders Component	179611	179611 X	
18	Cannon Overhead	127223	127223	
19	Weather-shield	133415	133415	
20	Triple I INSL	264231	264231 ✓	
21	STA-COTE	120387	84122 X	36265
22	Bullough INSL	68221	-	68221
23	DeLaRosa	816638	186719 X	629919
24	Harrington	146993	146993	
25	Mike H.	100000	-	100000
26	Walt Palmer Supply	39821	-	39821
27	E.T. Bartell	34525	34525	
28	E.O.I.	80736	80736 X	
29	W.P. White Co.	18263	-	18263
30	Keth Johnson Plumb	226300	226300 ✓	
31	Ralph Septic	177700	177700 ✓	
32	Bonnieville Plumbing	60725	60725	
33	Utah Power	8957	3127	5830
34	Mike Hoth	600000	250000	350000
35	Mark Turner Elec	154500	-	154500
36	Tom Muirhead	149500	-	149500
37	Parson	23722	-	23722
38	TERKINS CONST	60250	-	60250
39	Ernesto Garza	150500	-	150500
40	Tim Young Elec	200000	200000 ✓	
		5463245	365654	4106301

APPROVED BY

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(15)

HILLYARD, LOW & ANDERSON

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
175 EAST FIRST NORTH
LOGAN, UTAH 84321

LYLE W. HILLYARD
GORDON J. LOW
GARY N. ANDERSON
HERM. OLSEN
LARRY E. JONES
DALE G. SILER

TELEPHONE 752 2610
AREA 801

10 April, 1987

APR 1987
RECEIVED

Mr. Kevin E. Kane
Attorney at Law
108 North Main
Logan, UT 84321

Re: Dean Morgan/Karl White

Dear Kevin:

In compliance with our representation to you and Mr. White that we would respond in writing to his settlement demands, you may consider this that response.

I do not consider a resolution of this matter less than difficult as it is a very convoluted problem and in my opinion, your client approaches things in a most unusual way, and that is that nearly all the problems regarding his house seem to be someone else's fault. His immense involvement in the project from the very start, almost taking over the construction of the same to the point where, after January, 1987, he seems to have taken almost full responsibility therefor and has compounded problems earlier existing with the lack of specificity in the plans, requiring almost a "build as you go" situation. Your client's position seems to be that every time a question of the adequacy of the plans comes up, he falls back on the remark, "Well, I hired a general contractor, it's his responsibility."

It would be our position that legally the performance of the contract on my client's part has been so frustrated by your client's activities and involvement in the performance, other than what has been accomplished would be next to impossible.

I have other major concerns relative to the allegations in your client's letter relative to slander, fraud and dishonesty. Those remarks appear libelous and publication makes them actionable. I hope that kind of talk will stop during and after the resolution of this problem. Mr. White suggested that in making our proposal for resolution that we substantiate the same with reasons. I am not going to do the same thing he did by going over arguments and justification, as I do not think that is productive, but you may rest assured that there are plenty of facts substantiating the difficulties that Mr. Morgan has had in building this home which resulted in the delays and problems which are now existent.

Def. Ex #12

HILLYARD, LOW & ANDERSON
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Mr. Kevin E. Kane
10 April, 1987
Page Two

By way of settlement proposal, however, I would suggest the following: It is our understanding that the following liens and claims are outstanding against the property:

Keith Johnson	\$1,763.00
Schulsen	1,861.00
Third Title III	2,415.00
Butterfield	352.00
Hoth	<u>1,410.00</u>
	<u>7,910.00</u>
TOTAL	\$8,810.00

With respect to the Hoths, their claim is actually \$3,910.00 but \$2,500.00 of that is on the original contract, \$1,410.00 is for extras. My client will assume those obligations and have them released from the property by lein waivers and/or lien releases, and will work out the payment to them himself. The \$2,500.00 on the original Hoth contract would be Mr. White's responsibility.

As to the \$5,000.00 which Mr. White has indicated has been kept by Mr. Morgan, \$2,100.00 of that has been spent on additional materials and labor, leaving a balance of \$2,900.00. Mr. Morgan, however, has performed more than \$2,700.00 worth of extras against which that should apply as follows:

Enlargement and changing of engineering of the tower	\$1,000.00
Bay extension	200.00
Garage clear lamp beam	250.00
Roof design change	
Basement stairs	60.00
Back door to deck	200.00
Shower lie	50.00
Front porch extension and change	150.00
Extra window in bedroom and change	50.00

Def & #12

HILLYARD, LOW & ANDERSON
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Mr. Kevin E. Kane
10 April, 1987
Page Three

Structural beam and TJI change and doubling due to lack of engineering	<u>50.00</u>
SUB-TOTAL	\$2,460.00
Plus 10%	<u>240.00</u>
TOTAL	\$2,700.00

With respect to the items on the March 10th list that we reviewed with Mr. White at the visit to the home, it is apparent that there is no desire on Mr. White's part to have Mr. Morgan at the site to finish those items, and the feeling is mutual. The estimated cost is between \$1,000.00 and \$1,500.00. Our proposal is that Mr. White complete those himself at his expense. This would result in approximately a \$7,000.00 gain to the Whites in having Mr. Morgan effectuate a removal of the liens or claims as above mentioned, and would entirely end the contract between the two parties.

Your client suggested it will take until the 15th of June to complete the home. That completion then would be under his own control and he can take as long as he desires.

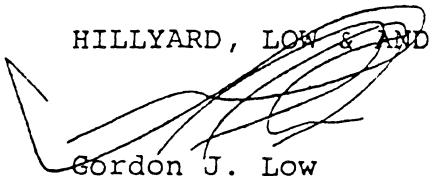
I have enclosed herein an accounting, copies of the checks and billings for the same, and the \$2,100.00 as indicated above will have to be supplied Monday or Tuesday.

If this kind of a proposal is amenable to Mr. White, then I suggest that we conclude it as rapidly as possible in order to facilitate the closing on his financing.

I look forward to hearing from you.

Sincerely,

HILLYARD, LOW & ANDERSON



Gordon J. Low
Attorney at Law

GJL/gp

cc: Dean Morgan

Def Ex #12

	1	2	3	4
Paid	2000 00			
	15000 00			
	150000 00			
	25000 00			
	1107135			
	4467135			
	4126991			
	300744			
	-215674			
	85070			

	1	2	3	4
Bens Plumbing	22415		22415	
Scholzen Products	196095	196095		
Harrington	21655	21655		
Cache Valley Bldg	3544		3544	
Stanland Builders	2000		2000	
Triple I Supply	124268	124268		
C. J. Bartell	-	134525	34525	
Butterfield Lumber	30287	30287		
Delabro Millwork	13017		13017	
Cartwells	121680	121680		
Marshall Industries	21939		21939	
Utah Power	8525	(3125) 8525	3125	
Labon	115107		115107	
	680533	764852	215674	

Johnson 1703
Shulson 1961.00
Triple III 2415.00
Butterfield 352.00
Hath 1410.00

	1	2	3	4
Allowances				
Compet & Lino		6200		
Cabinets		7000		
Counter Tops		500		
Hand ware		1000	150	
appliances		1200		
lights		1000		
mirrors		500		
windows		8000		
Railings		3170		Int 1550 Ext 1000 Inv 100
Engineer doors		1000		
tile		2500		
Painting		3000		
Inter com		250	250	
		35320		
		- 400		
		34920		
To Complete				
Foundation Plaster		150		
Finish MTLs		5500		
Finish Country		2000		
Dry wall		7551		
Siding		10100		
Butter		500		
shower Door		250		
plumbing		4000		
Electric		3200		
		33854		
		34920		
		6805		
		77633		
		153212		
m. Kc Bath		1410		
		154622		
		146250		
		8370		

(24)

HILLYARD, LOW & ANDERSON

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
175 EAST FIRST NORTH
LOGAN, UTAH 84321

LYLE W. HILLYARD
GORDON J. LOW
GARY N. ANDERSON
HERM OLSEN
LARRY E. JONES
DALE G. SILER

752 2010
TELEPHONE | AREA 80

June 11, 1987

Mr. Karl White
651 East 2160 North
Logan, UT 84321

Re: Dean Morgan

Dear Mr. White:

I have enclosed herein the key to the home forwarded to me by Dean Morgan. With respect to the question about him returning to the home, I have informed you earlier and reiterate here that he has no intention of doing so. You have forced him off the same and chose to finish the home yourself, and whatever time table you take thereon is your own responsibility.

With respect to the heating system, his instructions to you are as follows: The heating system is simple with a self-explanatory manual which you received many months ago. It would be very easy for most heating contractors to take care of any problems you may have. A guarantee is out of the question over that which the manufacturer warrants. Of the remaining 12V wires to go into the machine, the red ones are to be attached to the blue wires and the white ones to the white wires. On the other end, wire to be attached to the 12V timer switch. Mr. Morgan to you the humidistat. The air pipe needs two green to let the fresh air in and that is all done.

#13

stand that Mr. Morgan has no intention to
er and feels justified in what has been done.
counting and I have supplied the same herein.

Sincerely,

HILLYARD, LOW & ANDERSON

Gordon J. Low
Attorney at Law

GJL/rb
Enclosure
cc: Dean Morgan

Money Spent on Karl White Residence

Walt Palmer Supply	496.19	Heating materials
W.R. White Co	182.63	Underground air pipe
St-Cote Products	954.96	Vaper Barrier
Bullough Insulation	1426.69	Styrofoam
Cashe Vally Builders	1801.60	Trusses
Rulon L. Olsen	60.00	Tar Foundation
Cantwell Bro. Lumber	708.75	Rebar foundation
Parson Ready-mix Co	6791.98	Concrete
Kirk Buthe Hull	650.00	Excavation
Parsec Inc	237.22	Air Barrier
Michael Hoth	3500.00	Framing
Jenkins Const.	602.50	Footing labor
Charlie Teames	2100.00	Sales Commission
Intermountain concrete	18.19	Sona tube
Delabro Millwork	6429.36	Windows
Utah Power	219.25	Temp Power
Ernesto Garza	1505.00	Foundation Labor
Bens Plumbing	224.15	Gas Pipe
Cashe Valley Builders	35.44	Rollers Pocket door
E.J. Bartell	345.25	Heating duct
Marchall Industries	219.39	Intercom
Mark, Paul, Tom, John, Steve	4191.07	Labor
Colonial Lumber	87.07	Materials
Harrington Co.	1681.24	Roof Shingles
Total Paid	<u>34,467.94</u>	
Total cash received	<u>32,100.00</u>	
Total Overpaid	<u><u>2,367.94</u></u>	

Money Spent on Karl White Residence

Wall Paper Supply	496.19	Heating materials
V.R. Mills Co	182.63	Underground air pipe
St-Crete Products	976.96	Vapor Barrier
Ballough Insulation	1426.62	Synfoam
Cable Valley Builders	1801.66	Trusses
Pulmon L. Olsen	60.00	Bar Foundation
Cartwell Bros. Lumber	708.73	Concrete
Parsons Ready-Mix Co	6791.96	Excavation
Elfr Butho Mill	650.00	Air Barrier
Parsons Inc	237.22	Plumbing
Michael Roth	3500.00	Roofing labor
Jenkins Const.	602.50	Salts Commission
Charlie Thomas	2100.00	Soma tube
Intermountain concrete	18.19	Windows
Delaware Millwork	6469.76	Temp Power
Orin Power	219.25	Foundation labor
Ernst & Gorta	1505.00	Cas Pipe
Boas Plumbing	224.15	Rollers Pocket door
Cable Valley Builders	35.44	Roofing foot
E.J. Bartell	35.25	Interior
Marshall Industries	219.39	Labor
Matt, Paul, Tom, John, Steve	4191.07	Materials
Colonial Lumber	87.07	Roof Shingles
Harrington Co.	1681.24	

Total Paid 34,467.94

Total cash received 32,100.00

Total Overpaid 2,367.94

Ernst & Gorta 4 ~~4477.70~~

Marshall Industries 960.00

Mike McNeil 4477.70

DEFENDANT'S EXHIBIT NO. (37) Def #16

VS

C. J. J. CASE NO.

Mon. McNeil (16) to have spent on High End House

Label	Amount	Off. Label
✓ wall Paper Supply	496.19	798.11
✓ w/r whole company	182.63	182.63
✓ 3/4. oak plywood	954.96	362.45
✓ Ballough Insulation	1426.62	682.11
✓ Cable Valley Builders	1801.66	1801.66
✓ Pulmon L. Olsen	60.00	60.00
✓ Cartwell Bros	708.73	708.73
✓ Parsons Inc	237.22	6591.96
✓ Jenkins Const.	602.50	602.50
✓ Charlie Thomas	2100.00	2100.00
✓ Intermountain concrete	18.19	18.19
✓ Delaware Millwork	6469.76	6469.76
✓ Orin Power	219.25	58.30
✓ Ernst & Gorta	1505.00	1505.00
✓ Boas Plumbing	224.15	224.15
✓ E.J. Bartell	35.44	35.44
✓ Marshall Industries	219.39	219.39
✓ Matt, Paul, Tom, John, Steve	4191.07	3010.00
✓ Colonial Lumber	87.07	87.07
✓ Harrington Co.	1681.24	1681.24
✓ Mike McNeil		94.12
		1000
	34,467.94	

P.O. BOX 248
PHONE (801) 752-2000
LOGAN, UTAH 84321



EMONTON PLANT • BEAR LAKE PLANT • SODA SPRINGS PLANT
(801) 257-5132 (801) 846-3222 (208) 547-3500

K. WHITE
1 EAST 2160 NORTH
RTH LOGAN, UT

84321

#43

AMOUNT
ENCLOSED \$

ACCOUNT NUMBER	DATE
W0920	06/30/87

ACCOUNT NUMBER	DATE
W0920	06/30/87

REMIT TO:

L. GRAND JOHNSON CONSTRUCTION CO.
P.O. BOX 248
LOGAN, UTAH 84321

PREVIOUS BALANCE	43925	484.11	-476.96	BAL	484.11
PAYMENT				43925	-476.96
CURRENT CHARGES		.00		CHRG5	.00
476.96					
7.15					
297.50					
4.46					
786.07					

★ Karl R. White
Amy H. White
678 East 300 North 563-3132
Hyde Park, Utah 84318

1958

June 23, 1987

Pay to the Order of L. Grand Johnson Construction \$ 476.96

Four Hundred Seventy Six and 96/100 Dollars

ZIONS FIRST NATIONAL BANK
LOGAN CITY CENTER OFFICE 99 NORTH MAIN
LOGAN, UTAH 84321

For Karl R. White

⑆124300220⑆ 61 39991 1* 1958 ⑈0000047696⑈

Pay to the Order of Robert Heimer \$ 91.00

Ninety one and 00/100

ZIONS
FIRST NATIONAL BANK #41 Karl R. White

USU CAMPUS OFFICE/LOGAN 84322

⑆124300220⑆ 61 30177 3* 0287 ⑈0000009100⑈

★ Karl R. White
Amy H. White
651 East 2160 North 753-1396
10/78 Logan, Utah 84321

1428

14

42

Aug 27, 1986

Pay to the Order of Team Realty \$ 100.00

One Hundred and 00/100 Dollars

ZIONS FIRST NATIONAL BANK
LOGAN CITY CENTER OFFICE 99 NORTH MAIN
LOGAN, UTAH 84321

For TREASURY Karl R. White

⑆124300220⑆ 61 39991 1* 1428 ⑈0000010000⑈

★ Karl R. White
Amy H. White
651 East 2160 North 753-1396
10/78 Logan, Utah 84321

1709

43 see next page

Feb 5, 1987

Pay to the Order of L. Grand Johnson Construction \$ 297.50

Two Hundred Ninety Seven and 50/100 Dollars

ZIONS FIRST NATIONAL BANK
LOGAN CITY CENTER OFFICE 99 NORTH MAIN
LOGAN, UTAH 84321

For Karl R. White

⑆124300220⑆ 61 39991 1* 1709 ⑈0000029750⑈

★ Karl R. White
Amy H. White
651 East 2160 North 753-1396
10/78 Logan, Utah 84321

1334

44

Sept 24, 1986

Pay to the Order of Hyde Park City \$ 1000.00

One thousand and 00/100 Dollars

ZIONS FIRST NATIONAL BANK
LOGAN CITY CENTER OFFICE 99 NORTH MAIN
LOGAN, UTAH 84321

For Amy H. White

⑆124300220⑆ 61 39991 1* 1334 ⑈0000010000⑈

3 TRAIL CITY
Hyde Park, Utah
Sept 24, 1986
No 1192
1000.00
DOLLARS

#44
By Robert L. Heimer
TREASURER

DEFENDANT'S EXHIBIT NO. C. D. 10
VS
CRIMINAL CASE NO. _____

370 * 10

#40

Aug 1 10 1987

Gordon Low
115 East 100 North
Lugan, Utah 84321

Dear Mr Low

As you know I have been waiting to do a final accounting of the construction costs on our home in Hyle Park until Mr Morgan supplied us with the oft-promised documentation for the money he has allegedly spent. Because the documentation has not been forthcoming I have proceeded as best I could, but the resulting figures are tentative. Nonetheless they should provide a beginning point to initiate discussions aimed at resolving this matter.

The attached information is generally straightforward and I don't think you'll have any trouble following it. I have not yet received the estimates of the items which were included in the original specifications that have not been done yet, or the estimated value of the work Amy and I did in taking over the general contracting responsibilities when Mr Morgan stopped coming. When I receive those numbers we can adjust the totals in the summary you have. I'm sure Mr Morgan will also want to suggest several changes so we can do it all at the same time.

The list of construction costs assumes Mr Morgan will be able to substantiate everything included in his latest accounting. Those numbers will need to be adjusted to the degree that is not true. Notice that I have indicated on the left hand side of each page, the status of the documentation for each item and have included a copy of the complete package for your use.

At this point it appears that Mr Morgan owes us at least \$25,130.16 plus the money for items referred to above that has not been estimated. I look forward to hearing from you soon concerning this matter.

Sincerely,
Karl R. White

7/11/87

TOTAL COST OF HOUSE

① Expenses up to allowances	120,530.35	
② Allowances to date	40,913.50	
③ Extras	5,216.53	
④ Attorney's fees	1,027.75	\$167,748.22

all the way
to the
house

Money still owed to Whites (see next page for details)

1 Cost overrun	10,652.41	+ \$20 paid to Bob Smith on 8/1/87
2 Cost of uncompleted items	?	
3 Penalty payment for delay	8,950.00	
4 Attorney's fees	1,027.75	
5. <u>Cost of general contracting work</u>	3,500.00	24,130.16 + 0.00 + \$20.00

Current Status \$143,618.06

DEFENDANT'S EXHIBIT NO. Co.D-5
____ VS ____
CRIMINAL CASE NO. _____

Dean Morgan
7209 Pine Cone St.
Salt Lake City, Utah
84121

Dear Dean,

Since I've been unable to contact you the last several days concerning the finish work on the house, I thought it would be best to write you a letter summarizing our current position. For the following reasons, we have decided to have the all finish done work using a finish carpenter here from Cache Valley instead of having you do the paintable and someone else do the oak and the railings.

1. As per our discussions on Wednesday, February 11th we proceeded to get bids to do all of the finish work in the house. We have obtained 3 different bids and the person we feel best about has bid \$3740.00 to do all of the finish work (oak, paintable, and railings). We think that is a very reasonable bid.

2. All of the finish men were very hesitant to do only part of the job, and it is questionable whether they would even agree to do just the oak and the railings.

3. All of them said that the paintable finish work would take two men at least one week. Given a job of that size, we are very hesitant about your ability to do all of the paintable finish work in time, given all of the other tasks that still need to be finished (see list of items from February 14th attached).

4. The finish carpenter we like best can begin working Monday February 23rd, whereas you would be unable to start until next Thursday.

5. Amy has to be able to interact frequently with whoever is doing the finish work. Given the past difficulty you have had working with her, I think it is best not to create a situation in which you would need to work together.

For all of the above reasons we have proceeded to contract with a finish carpenter here in Cache Valley to do all of the finish work. He began work this morning. I look forward to talking with you when you are here on Thursday about all of the other items that need to be finished.

Sincerely,



Karl R. White

cc Kevin Lane

Professional Builder

MID-MARCH 1986

New House Plans
Choose Working Blueprints
From Over 250 Designs

POLAR BEAR
HEAT TIGHT HOMES
7848 WILLOWCREST CIR. SALT LAKE CITY, UT 84121

CHARLIE TEAMES (801) 943-1120

PRICE: \$25

205 #21

----- ON ABOVE SHEET NOTE

1. Due to imcomplete plans and the absolute lack of details, there will be a minimum charge of 20 hours at \$15.00/hr totaling \$300.00.
2. \$15.00 for one flannel shirt ripped by Amy during a temper tantrum.
3. Basement stairs built according to plans, then changed to a straight stairway. 10 hours at \$15.00 per hour - totaling \$150.00.
4. Master Bedroom entry door changed and remodeled three times - 5 hours at \$15.00 per hour - totaling \$75.00.
5. Master shower lid remodeled and changed - 4 hours at \$15.00 per hour - totaling \$60.00.
6. Library door remodeled two times - 6 hours at \$15.00 per hour - totaling \$90.00.
7. Main hallway closet doors remodeled two times - 3 hours at \$15.00 per hour - totaling \$45.00.
8. Arch into living room from main hall remodeled two times - 3 hours at \$15.00 per hour - totaling \$45.00.
9. Moving of bearing wall between kitchen and living room - 2 hours at \$15.00 per hour - totaling \$30.00.
10. Enlargement of two back doors - 4 hours at \$15.00 per hour - totaling \$60.00.
11. Reinforcement of trusses above kitchen because of designer putting bearing wall in wrong place - 2 hours at \$15.00 per hour - totaling \$30.00.
12. Windows in garage installed, but not on plans - 3 hours at \$15.00 per hour - totaling \$45.00.
13. Reinforcement of 2 x 10 beam - 2 hours at \$15.00 per hour - totaling \$30.00.
14. Doorway under stairs - 1 hour at \$15.00 per hour - totaling \$15.00.
15. Cutting in and installing small window in NE bedroom - 3 hours at \$15.00 per hour - totaling \$45.00.
16. Extra framing on tower roof - 6 hours at \$15.00 per hour - totaling \$90.00.
17. Tower entrance walls - 3 hours at \$15.00 per hour - totaling \$45.00.
18. Front porch roof extension and remodel on north end - 8 hours at \$15.00 per hour - totaling \$120.00.
19. Two cases of nails used in remodeling at \$60.00 each - totaling \$120.00.

TOTAL EXTRAS \$1,410.00 (Labor)

Plaintiff's Ex #10

500019

600

COPIES
FILED
Hoth Bros
K1 1/1 3-04-87

NOTICE OF CLAIM OF LIEN

TO WHOM IT MAY CONCERN:

NOTICE IS HEREBY GIVEN that the undersigned, Michael J. Hoth and Jeffery R. Hoth, partners in Hoth Brothers, a Partnership, claim and intend to hold and claim a lien against the following described real property owned and reputed to be owned by KARL R. and AMY H. WHITE, located in Cache County, State of Utah, more particularly described as follows:

BEG S 89°44'41" W 345 FT FROM SE COR OF NE/4 SW/4 SE/4 SEC 2 T 12N R 1E SD PT S 0°15'19" E 2008.155 FT & S 89°44'41" W 1665 FT FROM NE COR SE/4 SEC 2 & TH N 0°15'19" W 340 FT TH S 89°44'41" W 543.83 FT TO E LN OF CANAL TH ALG CANAL S 22°19'43" W 149.25 FT S 50°29'50" E 179.69 FT S 36°35'29" E 108.34 FT TH N89°44'41" E 398.82 FT TO BEG WITH & SUBJ TO R/Ws CONT 4.078 AC. ALSO BEG S 0°15'19" E 1668.15 FT & S 89°44'41" W 1895.07 FT FROM E/4 COR OF SD SEC 2 & ON W LN OF 700 E ST & TH S 89°44'41" W 313.76 FT TO E BANK OF CANAL TH ALG CANAL N 22°19'43" E 80.05 FT & N 7°35'48" E 81.14 FT TO S LN OF 300 N ST TH N 89°44'41" E ALG S LN 273.38 FT TH 31.42 FT ALG CURVE TO RIGHT (R=20 FT LC BEARS S 45°15'19" E 28.28 FT) TH S 0°15'19" E ALG W LN OF 700 E ST 134.38 FT TO BEG 1.03 AC. CONT 5.11 AC IN ALL

to secure the payment of the sum of \$3,910.00 and interest thereon from and after the date of February 12, 1987, which sums are now past due for construction work on the above-referenced real property.

Said construction work was done pursuant to a contract between the undersigned and DEAN MORGAN, general contractor, whereby the undersigned agreed to provide construction work on the above-referenced real property, payment due and payable February 12, 1987.

The first of such construction work was done on or about October 9, 1986, and the last of said construction work was done on or about February 12, 1987. The amount presently due and owing to the undersigned, after application of all offsets and credits and despite repeated demands and billings, is the sum of \$3,910.00, together with interest thereon at the legal rate from and after February 12, 1987.

WHEREFORE, the undersigned have and claim to have a lien on the real property particularly described as security for the payment of said sum of \$3,910.00 and interest as aforesaid, and for attorney fees for preparing this lien as provided by the statutes of the State of Utah in cases made and provided.

A TRUE COPY
CERTIFIED THIS 3rd DAY OF
March 1988
BY S. Albrecht
CLERK

DATED this 16 day of March, 1987.

HOTH BROTHERS, a Partnership

Michael J. Hoth
Michael J. Hoth

Jeffery R. Hoth
Jeffery R. Hoth

STATE OF UTAH)
: ss.
County of Cache)

MICHAEL J. HOTH and JEFFERY R. HOTH, being first duly sworn, depose and say: That they are the partners of HOTH BROTHERS, a partnership, which is the lienor named and described in the foregoing Notice of Claim of Lien; that they have read the said Notice, know the contents thereof and that the state-ments contained therein are true to their own knowledge, and they are authorized to sign on behalf of said partnership.

Michael J. Hoth
Michael J. Hoth

Jeffery R. Hoth
Jeffery R. Hoth

SUBSCRIBED and SWORN to before me this 16 day of March, 1987.

[Signature]
Notary Public
Residing at: Pinetree

My Commission expires:

7-23-88

1 referring to in that area?

2 A When we received the plans, we knew that they
3 were incomplete as far as details, and when I say details,
4 I mean details as far as the intricate works of the house,
5 the different engineering and whatever, we knew that when
6 we started; but we also figured that from our previous
7 knowledge in the construction industry, that there would be
8 no problem, that we could go ahead and build from that set
9 of plans.

10 Q All right. Let me direct your attention to some
11 plans that I have here, and I'd like you to look through
12 those, and if you would, identify for the Court which or if
13 all those plans are the original plans that you initially
14 received when you made your bid.

15 A Yes. They are.

16 Q These--all these plans were what you received
17 when you--that you had prior to making your bid; is that
18 correct?

19 A Correct. There--with one exception. There is an
20 added foundation plan that was added to that, after.

21 Q And can you show me which plan that was?

22 A This is the one that was added. The original is
23 down in here.

24 Q Would you pull that out, please?

25 So, for the record, you're referring to Plaintiffs'

1 Exhibits 2, 3, 4, 5, 6, 7 and 8, being the original plans
2 that you received to make your bid from; is that correct?

3 A Yes.

4 Q And do you know who drew those plans or drafted
5 the plans?

6 A I do.

7 Q And who was that?

8 A It was Amy White.

9 Q Amy White? And that's one of the defendants in
10 this matter, is it not?

11 A It is.

12 Q And going back to Item No. 1 on that sheet of
13 paper that you have in front of you, you indicated, as a
14 result of incomplete plans; could you explain specifically
15 what you're referring to?

16 A In the normal procedure of building a home, or
17 framing a home, in this case, we expect that there will be
18 a few inconsistencies in the plans, and a few problems as
19 we go along, which we normally anticipate working out.
20 In this particular one, there was an over-abundance of
21 those, and there was also a lot of changes as we went along,
22 and that's why the extra charge for consultation, because
23 there was a lot of problems, as far as engineering goes,
24 and the structure itself. And I had to consult with Amy
25 White concerning this, just so that we could build the house.

1 Q Do you know who they were installed by?

2 A Mr. Morgan.

3 MR. KANE: I have no further questions.

4 CROSS-EXAMINATION

5 BY MR. SILER:

6 Q Mr. Hoth, I'll try to be as brief as I can.

7 Getting back to the beginning of your testimony
8 earlier today, you indicated that the--you felt that the
9 contract, I believe, was actually formed as of the date that
10 you met with the Whites and solidified the contract at that
11 time; is that correct?

12 A As far as the actual contract to begin, or do the
13 construction, yes.

14 Q The framing work?

15 A Right. The price had not been settled at that
16 time, as I recall.

17 Q And was it settled on the day that you were there
18 with them?

19 A No, not to my recollection.

20 Q Did you feel that the Whites needed to approve
21 that contract?

22 A No. There was nothing between the Whites and me
23 at all. It was between Mr. Morgan and myself.

24 Q Okay. At the outset of this project, I think you
25 indicated that you knew the plans were really not adequate;

1 is that correct?

2 A That's correct.

3 Q How did you assume that they would be used then by
4 you in performing the framing work?

5 A Well, with my knowledge as a contractor, and as a
6 framer, and in the past some-odd 30, 40 houses that I've
7 been involved in building, I felt that I could make any
8 adjustments that needed to be made, as far as building the
9 house.

10 Q Who would you think you would need to discuss
11 those adjustments with?

12 A Mr. Morgan.

13 Q Why?

14 A Because he was the contractor, and he was the one
15 I had the contract with.

16 Q And yet in, at least the list of the 27 or some-
17 odd extras that you listed here today, as I listened, I think
18 I only counted about two that were discussed with Dean
19 Morgan; is it fair to say that most of those extras and
20 requests and changes and details were filled in on the plans,
21 with the result of the involvement of the Whites, rather
22 than Dean Morgan?

23 A Correct.

24 Q I think you commented earlier today that sometimes
25 contractors insist owners stay away until the framing is

1 complete on the job site; is that correct?

2 A Yes.

3 Q Why would a contractor do that?

4 A Because it's much easier to get the job done if
5 you don't have somebody hovering over you, making changes.

6 Q Do you feel like the Whites hovered over you
7 during the period of this contract?

8 A Definitely.

9 Q Would it be fair to say that you felt that they
10 hovered you to the extent of interfering with your
11 performance?

12 A I would even put it harrassing.

13 Q Were they present on the job site, frequently?

14 A I cannot remember too many days when they were not
15 there.

16 Q Were members of their family also there?

17 A Yes.

18 Q Children? Relatives?

19 A Yes. In fact, one of their children was there
20 one day, and fell through the--the fireplace opening to the
21 basement floor.

22 Q You, I believe, hold a general contracting license,
23 is that--

24 A That's correct.

25 Q Have you been a general contractor on construction

1 of the defendant, Amy White. I think you've testified that
2 she was involved in actually doing some of the framing, is
3 that correct, on the wall that included the doors that were
4 too low? She helped you lay the wall out?

5 A She was standing right above me, as I was on the
6 floor laying it out.

7 Q She was there, and aware of how high the doors
8 were being framed, is that correct?

9 A You--in a lay-out, you can't tell how high the
10 doors are going to be framed, but--and I'm not sure whether
11 she was there when we had the complete wall framed or not.
12 She was there the next day.

13 Q Did you ever offer to make suggestions to the
14 Whites in terms of filling in some of the detail that was
15 missing on the plans, recommendations to them?

16 A Yes. Frequently.

17 Q Were they generally well-accepted, in your
18 opinion?

19 A No.

20 Q What would happen in those situations, typically,
21 if you could expand on that?

22 A For example, on the gable end that we conferred
23 with her about, or that I conferred, Jeff was standing
24 right there, we suggested several different things, and took
25 two-and-a-half hours to try and help her decide what she

1 wanted. She apparent--or she had decided what she wanted,
2 and we were prepared to build it that way, and the next day
3 she came back with something totally different.

4 Q Did you find it on more than that occasion, or
5 perhaps even often occasions, when you would be given some
6 direction by Karl or Amy White, and then find soon after
7 that, they had changed their mind and wanted something
8 different?

9 A Yes.

10 Q I'd like to ask, Mr. Hoth, for your opinion and
11 perhaps explain to us just briefly, if you care to, as to
12 some statements that are made, and I will for the record,
13 at least, quote most of these almost directly from the
14 interrogatory responses recently given by the third-party
15 defendant, Morgan, in this action.

16 I'd like to know whether you agree, based on your
17 experience and involvement in this project, with the
18 sentiment that is expressed here.

19 First, the Whites constantly interfered with the
20 construction project itself.

21 A We experienced that before Mr. Morgan did.

22 Q You've already indicated that--let's see, strike
23 that, you've testified to this.

24 Defendants were in constant communication
25 directly with all subcontractors, the statement made here

1 by the third-party defendant. I realize you may not be
2 aware if that was a constant communication, but did you
3 witness their involvement similar to their supervision of
4 you, with other contractors who were on the site?

5 A We did.

6 Q Defendants were constantly making changes in the
7 construction plans, either as shown on the plans or
8 specifications, or previously directed by them to the
9 general contractor or the subcontractors.

10 A That's correct.

11 Q The plans provided by defendants were incomplete,
12 inadequate, and subsequent directions from the defendants
13 were either inadequate as well, or repeatedly changed and
14 revised by defendants.

15 A Correct.

16 Q Engineering services for the project were either
17 not furnished or entirely inadequate.

18 A That's correct.

19 Q Defendants were in a constant quandry, not knowing
20 exactly what they wanted, and repeatedly changing their
21 minds, being dissatisfied even with work done according to
22 their prior directions.

23 A That's correct.

24 Q Defendants claims and attitude portrayed their
25 obvious perception that any problems or difficulties that

1 arose were always the fault of some other party rather than
2 themselves.

3 A I would agree with that.

4 Q Defendants and others, at their direction, worked
5 on the job site without prior authorization from the
6 general contractor or communication with--strike that
7 question.

8 The workers, contractors and suppliers were
9 intimidated by defendants and their professional advice was
10 disregarded by the defendants.

11 MR. KANE: Objection. He's asking if he agrees
12 that the defendants--that the--I'm sorry. Are you on 11?

13 MR. SILER: Let me just lay a little foundation
14 for this question.

15 MR. KANE: Yeah. I don't think he can respond to
16 what--

17 MR. SILER: I'm only asking--

18 MR. KANE: --what others--

19 MR. SILER: Yes. I realize that.

20 MR. KANE: --felt.

21 Q (By Mr. Siler) I'm only asking, based upon your
22 observations, being on the job site perhaps at the time when
23 you had interaction with other workers or the general
24 contractor or suppliers who were there, and limited only to
25 that kind of a perception, not upon statements made to you,

1 perhaps, by others; would you agree with the fact that the
2 defendants intimidated, or appeared to intimidate, in your
3 opinion, other workers, contractor or suppliers?

4 MR. KANE: Objection. I don't think he can give
5 an opinion of whether others were intimidated or not, only
6 whether he was. I think he's already testified to that.

7 THE COURT: He's only asking if, in his opinion,
8 they appeared to be intimidated. I'll let him answer.

9 THE WITNESS: Yes. They appeared to be.

10 Q (By Mr. Siler) Defendants accused the general
11 contractor of theft and of being untrustworthy; do you have
12 any personal knowledge of an accusation such as that?

13 A Yes. Directly to me.

14 Q From whom?

15 A From Amy.

16 MR. KANE: Could you lay a foundation?

17 MR. SILER: Yes. I think in fact we've asked
18 previously about the comments that were made with respect
19 to the character of the defendant, or the third-party
20 defendant, and the allegations that were made by the
21 defendants against him. And this particular question is
22 simply designed to see whether or not this witness has a
23 personal knowledge of any of those kinds of derogatory
24 statements that would perhaps cause the third-party
25 defendant to feel threatened in his position as the general

1 contractor.

2 Q (By Mr. Siler) Will you answer?

3 A Yes. That's correct.

4 Q Are you familiar at all with the way the financing
5 actually happened on this project?

6 A I am.

7 Q Would you tell us what you understand the
8 financing to have been?

9 A I understand the financing to have been that
10 Whites had their own amount of money, I'm not sure exactly
11 how much money, but they were going to take care of the
12 construction costs up until the time that that money ran
13 out, and then the house was supposed to have been completed
14 so that they could get long-term financing beyond that.
15 That was my understanding.

16 Q Let me continue and ask you just a couple more
17 statements as to your opinion and whether you agree or not
18 with these.

19 The defendants became increasingly, as the
20 project continued, inclined to give orders and directions
21 to the contractor or other subcontractors, telling them
22 exactly what they wanted them to do and specifically how
23 to do it. As a result, the contractor or those subcon-
24 tractors felt like they lost control of their own
25 responsibilities in the project and did not have adequate

1 supervisory control.

2 A Speaking for myself, I lost that, yes.

3 Q Defendants' attitude throughout the construction
4 of this project was very impatient, with repeated telephone
5 calls and demands, which demands were unreasonable in nature
6 and often made at unreasonable times.

7 A Yes.

8 Q Defendants were constantly changing their minds
9 and ordering different materials or providing for their
10 own labor; do you have any knowledge or comment about that?

11 A Would you repeat that, please?

12 Q That they were--you've already testified, I think,
13 as to the fact that they'd change their mind. Did they
14 order any of the materials that you're aware of, to be
15 used in the framing?

16 A The actual framing, no; other than the windows and
17 doors, which are part of the framing.

18 Q And who ordered those?

19 A Most of the windows were ordered, I believe with
20 Mr. Morgan and Whites in conjunction. The doors were ordered
21 by Amy White from Weather-Shield, along with the two
22 windows in the garage.

23 Q All right. The final question I think I have for
24 you. Again, agree or disagree with this statement.

25 Defendants generally interferred and badgered the

1 subcontractors and employees of the contractor or sub-
2 contractors, to the point where the workers did not want to
3 return to the property to do any follow-up work or complete
4 their assigned responsibilities.

5 MR. KANE: Again--

6 Q (By Mr. Siler) To the extent of your personal
7 knowledge.

8 A I'll give you my personal knowledge, and others
9 can testify to this. At one point, it had gotten so bad,
10 that I asked Dean to fire me, so I could leave the job. I
11 wouldn't walk off, because I could get in trouble that way,
12 but I wanted to be fired because I did not want to put up
13 with it any more.

14 Q When was it again that you had a shirt ripped off
15 your back by the defendant?

16 MR. KANE: Objection. That's a mischaracterization
17 of what happened.

18 MR. SILER: Let me rephrase that. I apologize.
19 And I don't want to mischaracterize it.

20 Q (By Mr. Siler) Why don't you just tell me again
21 when the incident that involved your flannel shirt occurred,
22 in terms of the process of how far along was the framing in
23 this project, at that time?

24 A We were in the attic floor, framing the tower
25 area and the upper roof area.

1 Q And at about what point in time, do you remember?

2 A It would have been approximately the first part of
3 November.

4 Q Did you notice that as the project continued,
5 relationships became more and more strained?

6 A Definitely.

7 Q Did you sense any feeling that the Whites were
8 becoming more and more in control of the project, and
9 giving more and more direction to the workers on the job
10 site?

11 A At what point?

12 Q As the job progressed. Did it increase, in terms
13 of their involvement?

14 A Yes. It did.

15 MR. SILER: No further questions.

16 REDIRECT EXAMINATION

17 BY MR. BURBANK:

18 Q Mr. Hoth, I have just a couple more questions to
19 follow up on what Mr. Kane asked, and Mr. Siler.

20 You indicated that prior to February 12th, 1987,
21 that you had a conversation with Mr. Morgan concerning the
22 finishing of this project and payment for the services
23 rendered; is that correct?

24 A That's correct.

25 Q And do you know approximately when this

1 conversation would have taken place?

2 A There were several conversations.

3 Q And as the tone of those conversations, did any
4 of the mood change as to who was going to be paying who,
5 during these conversations?

6 A The mood changed to the fact that we didn't know
7 whether we were going to get paid, period.

8 Q And did Mr. Morgan ever indicate to you that he
9 had lost control of the project, and that he wouldn't be
10 able to pay you?

11 A Yes. He did.

12 Q And do you recall approximately when that
13 conversation would have taken place?

14 A Approximately mid-January.

15 Q And that was prior to filing your lien, is it not?

16 A Correct.

17 Q And in fact, prior to filing the lien, according
18 to what your general contractor had told you, you weren't
19 going to be paid by him; you knew that, did you not?

20 A We knew that from him, as well as from suppliers
21 and the fact that we had checked, and there were already
22 liens being filed.

23 Q And as a result of that information, you went to
24 Attorney Low; is that correct?

25 A That's correct.

1 Q And had a lien placed upon the property--

2 A That's--

3 Q --and that was after you had completed your
4 services; is that correct?

5 A That's correct.

6 Q There's been some concern, defense counsel is
7 concerned about notice given to Mr. and Mrs. White about
8 the extras. Isn't it a fact, Mr. Hoth, that--that to your
9 recollection, if you recall--

10 MR. KANE: Objection. Leading.

11 THE COURT: Sounds like it's going to be leading.
12 He hasn't asked the question yet.

13 MR. KANE: I'm sorry. I'll wait.

14 MR. BURBANK: I think you're probably right,
15 Counsel, as I--when I start drawing them out, they intend
16 to do that.

17 MR. KANE: I do that, too.

18 Q (By Mr. Burbank) Mr. Hoth, the extras which
19 Mr. Kane asked you about; how many of those extras were at
20 the direction of the Whites, to your knowledge?

21 A I would have to look back through there, but
22 there was only a couple of them that were directed to us
23 by Mr. Morgan.

24 Q So, when the Whites' attorney indicate that they
25 didn't have knowledge of these extras, that's untrue?

1 A Yes. They told us to do them.

2 Q You also indicated that the square footage on the
3 house was 2,500 square feet. After taking a break, do you
4 recall if you could be incorrect in that area?

5 A I think I was. We've built several houses since
6 then and bid on several others, and I don't recall exactly
7 it was; all I know is it was big.

8 Q All right. But that doesn't really affect
9 anything you're asking of this Court today, does it?

10 A No.

11 Q Do you recall that during the time you were
12 building this house, whether or not Amy White was actually
13 requested by the general contractor with you being present,
14 to stay away from the site?

15 A At the time that I asked Mr. Morgan to fire us so
16 that we could get off, he intervened, and made an agreement
17 with Karl and Amy White, that she would stay away from the
18 job, and that all future communications would be through him.

19 Q And why--

20 MR. KANE: Your Honor, I'd object. I'd ask that
21 that testimony come from the parties involved in the
22 conversation, unless he had direct knowledge.

23 Q (By Mr. Burbank) You were there, were you not?

24 A I was standing right there.

25 Q And heard the conversation?

1 A Yes.

2 Q And why was the contractor and subcontractors
3 concerned about Mrs. White's presence, if any?

4 A Because of the changes that occurred when she
5 was around.

6 Q Mr. Hoth, you were present in the courtroom and
7 heard an individual with the last name of Golightly, I
8 believe it was, Craig Golightly, or excuse me, yeah,
9 Craig Golightly testify; were you not?

10 A Yes. I was.

11 Q And I'm going to show you what has been received
12 as Defendants' Exhibit 2 and refer you to that. Concerning
13 Item No. 3, which is dealing with the framing on the windows,
14 can you tell this Court what specifically you did in
15 fulfilling your responsibility as a framer?

16 A As a framer, we put in the windows and the
17 treatment on the outside, unless specifically stated as
18 otherwise, the siding contractor will always take care of.
19 That's been the case on all of our jobs.

20 Q And the siding contractor has handled those?

21 A Yes.

22 Q And were you familiar with the siding contractor
23 that was originally supposed to come in and fulfill this
24 responsibility?

25 A With the first one, yes.

1 address, please?

2 A Robert Heiner. Aetna, Wyoming.

3 Q Okay. And you were subpoenaed to be here today?

4 A Yes, sir.

5 Q Did you have an occasion in 1987, to be contacted
6 by Karl White to do some work on his home?

7 A Yes, sir.

8 Q Do you recall approximately, at least the month
9 when that would have occurred?

10 A Not really. I was going to school, and I was just
11 part-time. January or February, maybe.

12 Q Okay. January or February of 1987?

13 A Yes, sir.

14 Q And you were going to school here in Logan?

15 A Yes, sir.

16 Q Okay. And do you recall what Karl White wanted
17 you to do for him?

18 A Yes, sir. There was some roofing that--on the
19 roof, we had to do some--a little bit of nailing on the
20 veneer that was on the roof. There were a few sheets that
21 were just tacked in the corners, and then--

22 Q And this was on his home in Hyde Park, Utah?

23 A Yes, sir.

24 Q Okay.

25 A And there was some, on the framing inside, in the

1 and she told me that it wasn't necessary, and I said I
2 thought it was, 'cause I had done roofing before.

3 Q Were you up on the roof at that time?

4 A Yeah. Yeah.

5 Q Did she stand on the ground and yell up at you,
6 or--

7 A No. I think she was talking through the window,
8 there's a window that opens--maybe she did come out, but I
9 know a few times, she spoke through the window, I believe,
0 on that occasion.

1 Q Okay. Go ahead and tell us what happened then
2 with the roofing that you were doing.

3 A Well, she said that it wasn't necessary to use
4 flashing, and I objected and said I thought, you know, it
5 was necessary, I thought it was absolutely vital; otherwise,
6 the roof would probably leak.

7 Q Did she say why you shouldn't use flashing?

8 A As far as I can recall, she had it secondhand from
9 somebody, that it would be better without flashing. I--she
0 didn't say who, but--

1 Q So, how did you complete that shingling, with or
2 without the flashing?

3 A So, I did it--you know, I told her, and I made
4 strong objection, that I thought it needed flashing, and I
5 just went ahead and shingled it without any flashing

1 underneath.

2 Q As she had instructed you?

3 A Yeah. Yeah.

4 Q To your knowledge, did it remain that way?

5 A No. The--well, part of the roof I was roofing
6 was more than just--there was more than one day's work there,
7 and the next day when I was working there, I believe she
8 told me then that they had found out that flashing would be
9 necessary, and in order to do that, I would have to tear up
10 all the shingles I had put down, and I said I wasn't
1 prepared to do that, because I thought I had made my case
2 clear the day before. Maybe I acted out of turn, but I,
3 you know--

4 Q What was her reaction, at that time?

5 A I think she was a bit annoyed with me, probably.
6 She probably thought she was within her rights to be
annoyed, I don't know.

Q How many days, approximately, do you think you
spent at the job site?

A Oh, total? You mean total time?

Q Yes.

A I would guess about three months.

Q During that time, did you observe the Whites on
the property?

A I did.

1 Q And these ones that are listed on Plaintiff's
2 Exhibit 10, you were aware of, as the general contractor?

3 A Yes.

4 Q And you're aware that he should be paid for
5 those, were you not?

6 A Yes.

7 Q And according to the terms of the contract that
8 you entered into with the Hoths, that these are in fact not
9 called for as part of that contract; is that correct?

10 A Correct.

11 Q Mr. Morgan, did you ever communicate to the
12 Whites that you needed financing to pay subcontractors,
13 particularly the Hoths?

14 A Yes.

15 Q Do you recall when that conversation would have
16 taken place?

17 A No. There were two times that there were
18 conversations.

19 Q And who were the conversations with?

20 A Amy White.

21 Q And what was the subject matter and content of
22 those conversations?

23 MR. KANE: I'd object to the materiality of
24 financing, what it has to do with this case.

25 THE COURT: Objection overruled.

1 THE WITNESS: I was requesting money in the early
2 stage of the construction to take care of the subcontractors
3 and materials that were being placed and done on the job.

4 Q (By Mr. Burbank) And at the first, were you
5 receiving compensation?

6 A I did.

7 Q And as you progressed through the job, did
8 anything change?

9 A Yes.

10 Q And what was that, specifically?

11 A They no longer gave me any compensation and were
12 directly taking care of materials and subcontractors, and
13 so on, themselves.

14 Q And do you know how they were compensating those
15 other subcontractors?

16 A No.

17 Q You weren't compensating them?

18 A No.

19 Q In fact, in regards to the Hoth situation, did
20 you ever have a conversation with my client, telling him
21 that he should probably go ahead and file a lien because
22 the Whites were not paying you any money?

23 A That's correct.

24 Q And you encouraged him to do so?

25 A Yes.

1 question. Again, I think he's--he's doing what I was doing
2 earlier, and that is to try to interpret the contract terms.
3 The contract speaks for itself.

4 THE COURT: It's a very broad question, and unless
5 you're going to talk about specific occurrences, the Court
6 really can't tell what in the world the witness is talking
7 about.

8 MR. SILER: Let's move on, your Honor.

9 Q (By Mr. Siler) I'd like to ask you a question,
10 Mr. Morgan, to clarify again the compensation. You indicated
11 that you were receiving compensation from the Whites. By
12 compensation, what did you refer to? What kind of a
13 payment was that? Was it part of your profits?

14 MR. KANE: Leading. Objection.

15 THE COURT: I'll let him answer.

16 THE WITNESS: I received payment from Whites to
17 take care of those items within the contract.

18 Q (By Mr. Siler). So, by your reference to
19 compensation, were you referring them to payments used to
20 meet the expenses of the job?

21 A Yes.

22 Q What was your understanding with respect to
23 construction financing when the contract was initially
24 signed? Was--let me ask in relation to that. If there was
25 a bank loan contemplated, to your knowledge?

1 THE COURT: Oh, I think it's relevant.

2 MR. KANE: Well, there's no dispute about the
3 amount of the contract, the original contract.

4 THE COURT: You don't dispute the \$6,000?

5 MR. KANE: We don't dispute that that's the amount
6 that they're saying their contract was.

7 THE COURT: Do you dispute it's a reasonable
8 price, is my question? \$6,000?

9 MR. KANE: No.

10 THE COURT: You don't dispute \$6,000 is a
11 reasonable price?

12 MR. KANE: No.

13 THE COURT: Okay.

14 Q (By Mr. Burbank) You indicated, Mr. Smith, that
15 you had submitted a bid to Karl and Amy White, directly for
16 the finish carpentry work?

17 A I did.

18 Q And your bid was for how much?

19 A I don't remember.

20 Q And when were you paid?

21 A I got two--I believe it was two checks from them.
22 I got--when I made--excuse me. When I made the agreement
23 with them, it was for labor only, in the beginning. Later
24 on, I agreed to get the materials, because I could get them
25 for a better price. I told her I had to have checks on or

1 identical to those submitted to you at the time for the
2 building application; who was it that applied for the
3 building permit?

4 A Karl White.

5 Q And if these plans were presented to you today
6 for the building permit application, would a permit be
7 issued, based on those plans?

8 A No.

9 Q What would need to be done?

10 A May I make a general statement?

11 Q Yes.

12 A Before I answer that?

13 Due to the problems we had on this house, and the
14 expenses incurred by our Department, in that we had to go
15 hire an outside engineer partway through this, and so on,
16 our Department, at my discretion, changed the way we're
17 handling houses out of the ordinary. And at this time, if
18 this--if they applied for that same home today, we would
19 require them to have an engineer and/or architect licensed
20 in the State of Utah stamp them, and we would take them, and
21 they would also pay a plan check fee, to then take them to
22 an independent engineer or architect, have them check them.
23 We've got a certification checklist we use, and if they
24 disagree, we then would force the two to get--the two
25 architects to get together, resolve a set of plans to be

1 built off of, at which time, we would issue the permit.

2 Q So, the policy now, at least, would be to require,
3 with a set of plans like this, an engineer's stamp and
4 certification; is that correct?

5 A Correct.

6 Q At the expense of the applicant?

7 A That's true.

8 Q All right. But that was not the policy at the
9 time that this building permit was applied for; is that
10 correct?

11 A That's true.

12 Q Is this in fact not the last home that was done,
13 under that former policy, and that the change came soon after
14 this permit was issued?

15 A If I can use some quotes of much out of the
16 ordinary, true. If it appears to be a complicated type
17 situation, out of the ordinary, then it would require the
18 staffing of plans and et cetera, as I described.

19 Q All right. Was this very process with the Karl
20 White home, the problems that developed influential in your
21 decision to change the County policy?

22 A That was primarily the--the primary one that
23 caused it.

24 Q Did Amy White ever tell you that these plans were
25 in fact engineer's?

1 Q (By Mr. Burbank) Mrs. White was also performing
2 it as well?

3 A She was working there every day.

4 Q And do you recall approximately what time of year
5 it was that you were working there?

6 A I can't remember for sure, but it seems like it
7 was cold weather.

8 Q So, it could have been anywhere from, what,
9 November to February?

10 A Could have been.

11 Q Or, do you even recall if it was 1987, or '86?

12 A I think it was '86.

13 Q '86 that you were there?

14 A I think so.

15 Q All right.

16 MR. BURBANK: I have no other questions.

17 MR. SILER: No questions, your Honor.

18 MR. KANE: I just have one question.

19 REDIRECT EXAMINATION

20 BY MR. KANE:

21 Q Did you--while you were hanging sheetrock, ever
22 observe Amy White stuffing insulation in the walls--

23 A Yes.

24 Q --before it was covered?

25 And was--was she stuffing insulation--where was

DIRECT EXAMINATION

BY MR. KANE:

Q Could you state your full name and your address, please?

A Karl R. White. 670 East 300 North, Hyde Park.

Q Did you ever have any discussion with Mr. Teams or Mr. Morgan with respect to any kind of a commission, sales commission to be paid to Mr. Teams?

A I did not. The first I learned of anything of that matter was in one of their billings about that--one of their partial accountings which I received through their attorney, after numerous requests. I believe it was in April, but I can check that later, where it was listed as a sales commission to Mr. Teams, and I was quite surprised.

Q How many accountings did you receive from Mr. Morgan?

A There was never a complete accounting. There have been a number of partial accountings. He agreed, in November, early November, to provide us with lien waivers and cancelled checks--

MR. BURBANK: Your Honor, I'm going to object.
It's not responsive to the question.

Q (By Mr. Kane) Okay. How many accountings did you receive, complete or incomplete?

A Four partial accountings.

Q And do you recall when the first accounting was received?

A Early January.

Q And do you recall why that was provided to you?

A It was shortly after the meeting we held with Mr. Morgan at our--at the Hyde Park job site, where he informed us that the costs were running substantially over what he had estimated they would be, said they were running about 10,000 more than he had thought they--than what was in the contract, and asked us to split the difference with him.

Q Now, let me stop you there. The \$10,000, that doesn't refer to the overrun on the Hoths?

A No. The Hoths were never mentioned at that point. He just said that his costs were running higher, and he estimated that it would be 10,000 more than what we'd signed the contract for, and said, why don't you pay half and I'll pay half of that.

Q And what was your response?

A We said that we thought it was too early to make that kind of an agreement, that we were certainly willing to talk about it, later, when the house was finished, but that at this point, as far as we were concerned, that the original contract should stand, and we should abide, both of us, by all of its contents. And when the house was

1 finished and we'd moved in, that that was the point to
2 talk about that.

3 Q Did you ask for the first accounting at that
4 meeting, or had you received it?

5 A No. We had asked for accountings previously in--
6 when we gave him checks in October and November, we asked
7 for accountings, lien waivers, cancelled checks, and he
8 agreed to provide them on every instance that we talked
9 about it.

10 At that January meeting, he said, well, I'm--
11 I'm out of money, essentially, and I--I've got to pay off
12 some of my suppliers, they're getting very anxious. And I
13 pointed out to him that the agreement called for \$40,000
14 to be provided to him prior to our obtaining permanent
15 financing, which would be at the sheetrock stage, and that
16 we had already given him \$43,000. And he said, well, I
17 can't get any more work done unless you give me more money.

18 And I suggested to him then that I was
19 uncomfortable giving him more money, since he hadn't
20 accounted for what we had given him yet, but that if he
21 would give me a list of who was owed money, that I would
22 make payments to some of them, that I couldn't cover all
23 of it, because it was way above what we had agreed to
24 already, but that I could pay them some, to keep them
25 happy. And he provided me then a list.

1 Q And do you have a copy of that list?

2 A I do.

3 Q And is there a date on it?

4 A No. It's an undated list that he provided to me.
5 I have dates on it as to when I paid some of those people,
6 but that's in my handwriting.

7 Q Do you have any recollection of when you would
8 have received that list?

9 A It would have been shortly after that January
10 3rd meeting. I think it was on January 6th, when he then
11 came to our home. He had proposed that we pay--split this
12 \$10,000 overrun item on January 3rd. I said my tendency
13 right now is not to do that, but I'm willing to think about
14 it, let's get back together in a few days, and we can
15 discuss it.

16 He came back to our home on the 6th of January,
17 and I believe that's the time that he provided me with
18 this list.

19 Q Okay. Did that list indicate how much money had
20 been paid to the Hoths?

21 A Yes, it did. At that point, there was \$3,500
22 that had been paid to the Hoths.

23 Q And that's the amount that we--do you now
24 acknowledge that that amount has been?

25 A I have never seen a cancelled check on it, or a

1 partial lien waiver. I mean, as far as I know, it's been
2 paid--

3 Q Okay.

4 A --but in spite of repeated requests, I've never
5 been given documentation of that, that I recall.

6 Q Okay. Does that list show money paid to Charlie
7 Teams?

8 A It does. It says that there was \$2,000 paid to
9 Charlie Teams.

10 Q Okay. Did you then later receive a second
11 accounting?

12 A Yes. Again, it was a partial accounting that I
13 received on--in a letter sent from Mr. Low, on April 10th,
14 1987, again, that was after repeated requests, and after a
15 meeting that I held with Mr. Morgan and Mr. Low at the job
16 site, and they promised such an accounting.

17 Q Okay. And do you have a recollection as to when
18 you received that second accounting?

19 A The letter was dated April 10th. It would have
20 been shortly thereafter.

21 Q Okay. And does that accounting show how much
22 was paid to Mr. Teams?

23 A That accounting again shows \$2,000.

24 Q Does it also show \$3,500 to Hoth?

25 A I believe so. Yes, it does.

Q Okay. Did you receive with that, any lien waivers or cancelled checks?

A No. In--in the original letter, there was nothing attached. It--the letter says that there were attachments, but there was nothing. I called Mr. Low, explained that, and later, he sent me checks for some of them, but not all of them.

Q Okay. Then--and none--and I believe you answered that none of them included payments to the Hoths?

A I'd have to check my records to be sure on that.

Q Okay.

A There could have been some.

Q Okay. Then, when does--

A But there was no lien waiver, and that's what I was most interested in.

Q Okay.

A Was a partial lien waiver.

Q Were there any other--did you then receive another, a third accounting, later?

A Yes. On June 11th, again, a letter from Mr. Low, I received another accounting and as I recall, this was just a list of dollars.

Q Do you have a copy of that list?

A Yes. Uh huh (affirmative).

Q Does that list show a payment to Charlie Teams?

A Yes. This one shows a payment of \$2,100 to Mr. Teams.

Q Okay. Does it show a figure for the Hoths?

A Yes. This one shows 3,500 for the Hoths.

Q So, that was consistent through the three?

A Uh huh (affirmative).

Q Okay. Did you receive another accounting?

A Yes. On November--a letter dated November 18th, so it would have been shortly after that, I received another accounting--

Q November?

A November 18th, 1987.

Q Didn't you testify that the last accounting was in--on June 11th, or thereabouts?

A Yes, uh huh (affirmative).

Q Okay. And the--and then you're saying this one, the last one you're going to refer to was receive in November?

A Right. A letter from Mr. Siler; I had numerous conversations with Mr. Siler, repeatedly asking for a complete accounting. I had to, either Mr. Low, who was the previous attorney, or Mr. Siler, I don't remember which one now, a--my summary of accounting that far, and had asked them to review it and to get back to me. And then he sent me this letter--reading from it--"When I met

with Dean, he also provided me with a bundle of papers, which he explains are his accounting for monies received and paid by him under the construction contracts for the Whites' residence."

That accounting was very inconsistent with previous accountings. For example, Mr. Teams now does not appear on that accounting anywhere. The Hoths are now listed as 3,600 instead of 3,500. There were vendors who were listed on earlier accountings who didn't appear. There were, for example, Mark Tressner, Paul Tressner, and some of Dean's employees on the 6-11 accounting was \$4,100, on the 8--but on this accounting, there were checks for almost \$9,000 for them; but there was no indication as to--

MR. BURBANK: Your Honor, I'm going to object at this point. It appears this entire testimony has been based on hearsay, and I would object, and ask that it all be stricken.

MR. KANE: Well, it's accountings that were provided by the third-party defendant.

MR. SILER: I'd like to see copies of those. I don't know what accounting, for sure, you're referring to. I need to look at the dates.

MR. KANE: We can provide you with copies, but they're--they're accountings that your clients provided to us, as per Mr. White's testimony.

1 MR. KANE: Oh. Okay.

2 Let's see, now I've lost track of one of the
3 exhibits. I have--

4 THE CLERK: Yes. You had D-11, D-12, you might
5 have two D-11's.

6 MR. KANE: Okay. D-11 is the one that's been
7 marked that I (inaudible) apparently.

8 MR. SILER: And 12 is April 10; right?

9 (Inaudible)

10 MR. KANE: Okay. Now--

THE WITNESS: He--he's got it, too, No. 10.
Right there.

MR. KANE: Okay. You don't have the right--

THE WITNESS: I'm down to two.

MR. KANE: I'm sorry.

Q (By Mr. Kane) What I've given you is, I've given
you copies of Defendants' Exhibit D-13, which is--has the
June 11 letter on the top, and a copy of, and it has the
24--No. 24 circled in the right-hand corner, and Defendants'
Exhibit 12, which has the No. 15 on the top corner. I
don't have extra copies, but I can provide you with them
after the lunch break, if we break for lunch, of
Defendants' Exhibit 11.

A Okay.

Q Okay. Now--

1 to Dean Morgan.

2 Q Okay. Did he indicate if that was for a specific
3 task on the job?

4 A No. Just said to Dean Morgan.

5 Q Okay. And what was the total amount of cash that
6 was paid directly to Dean Morgan as of March 16, 1987?

7 A \$32,100.

8 Q And the balance of monies that were paid on the
9 house, were those either paid directly to materialmen or
10 directly to labor men, from you?

11 A Yes, sir. Many of those in--like in January and
12 February, at Mr. Morgan's request.

13 Q Okay.

14 A Later, it was when I started getting liens on
15 my house; often from people I had never heard of.

16 Q Now, have you provided a breakdown, and an
17 itemization of the payments that you made, or better said,
18 an accounting of the \$118,030.35 figure that you've put on
19 the board, to Mr. Morgan?

20 A I provided it to his attorney, Mr. Siler, on
21 August 10th. It may have been Mr. Low at that time, I
22 don't remember right now, but--

23 Q Okay.

24 A And at that point, it did include--it was a
25 little higher, it was 120, because I had Roths' figure in

1 Q I take it from that, you were anticipating some
2 problems prior to what my clients have indicated the finish
3 date of February 12th, 1987; is that correct?

4 A Yeah.

5 Q You also indicated that you have paid Mr. Morgan,
6 to him specifically, the sum of, what was it, \$32,000; is
7 that correct?

8 A Yes. Checks made out directly to him; 32,000.

9 Q And you also indicated, I believe, on direct,
10 that monies that you have expended, did not include the
11 \$2,500 which my clients are asking for; is that correct?

12 A That's correct.

13 To avoid possible conclusion later, but that's
14 different from the letter I sent to Mr. Siler, that 25
15 was in there.

16 Q All right.

17 A So...

18 Q And it's also my understanding, Mr. White, from
19 what was said previously, that you're not contesting the
20 reasonableness of the contract, contractual agreement of
21 \$6,000?

22 A No, sir.

23 Q And that \$3,500 of that had been paid on the
24 contract to the Hoths?

25 A I--I don't know whether I have cancelled checks on

of them that weren't done.

Q Now, also--

A And I don't know who did them.

Q Mr. Hoth was still on the job at the time, was he not?

A The rockers were there, they were moving ahead, they were saying, late one night, if this isn't done tomorrow morning, we can't proceed, and I couldn't get ahold of Mr. Hoth. He had been told previously about it, he had been told their schedule previously, and it wasn't done.

Q And but, was Mr. Hoth there on the job, when the sheetrockers arrived?

A When they arrived? You mean was he physically present when they showed up? No. Wait. I--I don't recall that for sure, but he seldom arrived before 9:30, 10:00, sometimes later. The sheetrockers always arrived between 7:00 and 8:00, and so--

Q But Mr. Hoth was on the job, was he not, during that period of time?

A During that period of time.

Q And Mr. Hoth was obviously--

A But only for two days.

Q Obviously, Mr. Hoth was working during that period of time as well?

1 Q In terms of the accounting, you
2 believe, that the first accounting was fur:
3 January of 1987; early January, I think?

Jan. Acctg. -
Showing things
that needed to be
paid (see next few
pages - KW
wouldn't give any
money to pay them)

4 A Yeah. I probably ought to clarify. An
5 accounting is probably over-stated. What was provided to
6 me was a list of materialmen and laborers with a column
7 that said paid, a column that said unpaid, and the reason
8 that was provided to me was Mr. Morgan approached me and
9 said we've got to have more money, I've got to get some of
10 these people paid off. And then he checked the ones that
11 were most urgent to provide some money to.

12 Q Was the list that he provided to you only a
13 list of things that had to be paid, then?

14 A No. He checked the ones that were most urgent to
15 be paid, and on--and on that list, there were many that
16 had been paid--many; there were some.

17 Q Can I see the copy of that?

18 MR. SILER: Kevin, can I look at Defendants'--
19 Kevin, which is the first number? It looks like 11.

20 I don't see it here. No. 11, Defendants' Exhibit.

21 MR. BUPBANK: I don't think it was received.

22 MR. SILER: Do you have the accountings? Are
23 those--they were received.

24 THE COURT: D-11 through 14, 15 were never
25 offered.

1 MR. SILER: Pardon?

2 MR. BURBANK: This is the original, with this
3 handwritten stuff in it?

4 MR. SILER: No, but it's a lot cleaner.

5 THE WITNESS: Show it to me, and I--if you want,
6 I'll tell you what it is.

7 MR. BURBANK: We have no objection, your Honor.

8 THE COURT: What are you offering?

9 MR. SILER: Defendants' 11, 12 and 13, your Honor.

10 THE COURT: 11, 12 and 13 will be received.

11 Q (By Mr. Siler) Karl, I suspect that we can
12 reconcile some of these accountings.

13 This must be the first accounting that you were
14 referring to, in January; is that correct?

15 A It is.

16 Q It's marked Defendants' No. 11?

17 A Uh huh (affirmative).

18 Q Are there any marks on that sheet that were
19 made by you?

20 A This one is, that's a total of that column, I
21 believe.

22 Q Would you tell us what you're referring to, on
23 the--

24 A 1,608.74, I believe is a total of that column,
25 unpaid.

1 Q And then is that your initial and check on the
2 bottom right-hand corner?

3 A And that's my initial and check, indicating that
4 that's summed correctly, I think.

5 Q And a phone number, it appears, or a number on
6 the bottom in pencil?

7 A Yeah. That looks like my wife's handwriting,
8 and I suspect that's Dennis Carbine, one of the electrician
9 helpers. And this where it says "roofer" right there, is
10 Amy's handwriting.

11 Q There are no other accounting or other designa-
12 tions of any significance made by you on the second page;
13 is that correct?

14 A There's some hot chocolate right there.

15 Q I didn't know how we'd prove that; but all right.

16 In looking at that, is it your conclusion then,
17 by looking at the second page that Dean has represented to
18 you there, the amounts that were paid by you to him?

19 A Well, the Cantwell payment needs an explanation.
20 I mean, I don't think Dean's claiming that I paid that to
21 him. He requested that I pay that for him. My recollection
22 is that it was almost 5:00 o'clock and closing, and that he
23 had to get back to Salt Lake, and he had a bill outstanding
24 there that unless it was paid the next day, would incur a
25 substantial interest charge, and we took the check directly

1 to Cantwell.

2 Q Okay.

3 A On his account.

4 Q If we look at the first sheet of this accounting
5 and we identify on that sheet the \$1,000 that was actually
6 paid by you; is that correct?

7 A That's correct.

8 Q And the Cantwell payment of \$11,780, of which you
9 paid approximately 11,070, as I recall; is that correct?

10 A Yes, uh huh (affirmative).

11 Q And remembering that those items were paid by
12 you, the balance of the items in that column would have
13 been items that were paid by Dean Morgan; is that correct?

14 A Right. This--this figure isn't what would have
15 been paid by him, because you have to subtract the 11,000
16 from it.

17 Q That's what I mean.

18 A Yeah.

19 Q If you take out the thousand dollar building
20 permit--

21 A Uh huh (affirmative).

22 Q And the portion of the Cantwell payment that you
23 made--

24 A Uh huh (affirmative).

25 Q --then the balance of this \$41,063.91 would have

1 been paid by Dean Morgan?

2 A That would be logical.

3 Q All right.

4 A I haven't checked it lately. I could.

5 Q You mean as to the accuracy of the totals?

6 A Right. Right.

7 Q But the concept is correct?

8 A Right.

9 Q Except--

10 A Exactly.

11 Q --for those two payments?

12 A Uh huh (affirmative).

13 Q All right. And you understand then what he's done
14 for you here on the second page?

15 A Yeah. I believe so. It shows that he still has
16 \$3,000 left that's not paid out yet.

17 Q And that's computed by taking the 2,000 and two
18 \$15,000 payments to make 22,000 shown as the total; is
19 that correct?

20 A Yep.

21 Q And then he has taken the amount of the Cantwell
22 payment that you paid, 11,071.35 and added that to monies
23 for which he's gotten credit here, is that correct? Showing
24 total received.

25 A Yeah. That's correct.

Q Let me ask if the bottom here, which is the \$3,000, what do you understand that number to mean?

A I understand that to mean that as of this time, Dean Morgan still has \$3,000 in his possession; and in fact, in a later conversation, he said that, and when we questioned him and said, well, how come you're taking money, he said, all contractors take money, they've got to have something to live on. And we said, our understanding was that you didn't do that until the con--the project was all over, and he said, well, then what would I live on in the meantime.

Q In the meantime, didn't he in fact have other expenses attributable to your project that had to be paid?

A There were lots of expenses; for example, the Hoths had an outstanding bill, but I--nothing that he had ever indicated in any sort of listing, or--

Q Well, in the subsequent accounting that you received in June, which is Defendants' Exhibit No. 13, it shows that he had been paid the \$32,000 plus 100, 32,100, which I think you indicated was the amount he had been paid; isn't that correct?

A That's the June, and it does--it does indicate that, but I've never received any lien waivers, or cancelled checks, and still haven't for many of those. And so I have no way of knowing whether those were just

1 numbers on a list, or whether they were actual expenditures.

2 Q I submit to you that we've provided you with
3 copies of checks and invoices for these amounts; but let
4 me ask you: Assuming that those are there, isn't this
5 then, the amount that he's been paid--or that he has paid
6 out, less the amount that you indicate he's been paid,
7 32,100, to come up with the amount that he refers to as
8 total overpaid, meaning overpaid by him as--

9 A The--the logic is correct.

10 Q And if those amounts are correct, then he's
11 actually paid more than you've paid him; isn't that correct?

12 A He has expended more money than I have given him,
13 but--

14 Q All right.

15 A --he--

16 Q That's what I asked. Thank you.

17 If you've paid Mr. Morgan \$32,100, why did you
18 tell other people that you have paid him in fact
19 substantially more than that?

20 A Because in fact, I was acting, for example, with
21 the Cantwell payment, I could have handed that check to
22 Mr. Morgan, and then I could have said I had paid him
23 \$43,071, or 171; he told me to take it to Cantwell's,
24 myself. So, it's just a technicality as to whether the
25 money passed through his hands first. It was money that

1 went towards building the home, and in fact, in later
2 conversations, I also included, if you'll pull back Exhibit
3 D-11, I believe, the amounts that I had paid to people he
4 asked me to pay, such as EBI Engineering Systems in
5 Colorado, Stoke-Hoke(?) Products, et cetera.

6 Q That was Exhibit 11 you were referring to?

7 A That one right there. I don't know what it is.

8 Q That shows EBI, and so on?

9 A Right. So, he--these are his checks, he told me
10 which ones of those needed to be paid most, and instead of
11 giving him the money, because at that point, I had some
12 indication that the money I gave him didn't go to places
13 where he said it would go, I paid them directly.

14 Q And you started doing that, when you received this
15 listing then, I take it, in January?

16 A Uh huh (affirmative).

17 Q All right. And the column to the right still
18 represents the amounts that were paid to Dean Morgan--or
19 that were paid by Dean Morgan, I'm sorry? Okay. In
20 Exhibit 11.

21 A Assuming they're correct.

22 Q All right. And didn't you write a letter then to
23 various creditors, including Schulson(?) Products and
24 Northern Brick & Steel, indicating that--indicating that
25 when you paid them, in reality, you had already paid \$60,000

1 to Dean Morgan, and the real reason he cannot pay their
2 debt is because he's so far behind schedule, and the
3 permanent financing couldn't be obtained? Didn't you
4 indicate--

5 MR. KANE: Your Honor, I'd object. I think
6 we're well beyond the issues of the case.

7 THE COURT: Well, no, I don't think we are, in view
8 of the coun--cross-claim.

9 Q (By Mr. Siler) Isn't it true, Mr. White, that
10 you indicated to various parties, the State Consumer
11 Products Division, for example, that you had paid, I think
12 in that letter, it was \$70,000; but in that letter, you
13 may have indicated that you might have paid that amount or
14 part of it to the subcontractors. On these letters,
15 specifically to creditors, you indicated that you had paid
16 Dean Morgan \$60,000?

17 A I indicated that I had paid debts that he had
18 incurred in the building of my home, far excess of the
19 \$40,000; and indeed, said 20,000 more than the originally-
20 agreed amount of \$40,000.

21 Q I'll show you what's been marked as exhibit,
22 our Exhibit No. 3; do you recognize that paid receipt as
23 being a sheet that you've submitted to--

24 A Schulson--

25 Q --Dean Morgan, or to myself, on his behalf?

A Oh. Yeah, definitely. That was a part of my accounting on August 10th.

Q All right. And that letter that accompanies the payment to Schulson relates to those checks?

A It does.

Q What was the purpose of that letter?

A Schulson Products had placed a lien on my home, that I found out about for the first time, when I received a certified lien in the mail. I had never been told by anyone, including Mr. Morgan, that he'd even purchased products from them, in the building of my home, nor had I been instructed that we had a debt there, and suddenly, I got a lien in the mail in the amount of, I don't know, \$4,900, is that right? In some amount.

I called Schulson to ask them what it was about. They told me that a Mr. Dean Morgan had incurred debts there in conjunction with building my home, and that he had in fact come in to them, and asked them to put a lien on my home because I wasn't going to pay that.

Q Was it your understanding that pursuant to your original contract, Dean Morgan was under an obligation to provide you with an invoice for every item that was purchased on that home, at the time that he purchased it?

A I'd have to review the contract to answer that; but it was my understanding as per our agreement on

1 November--that was summarized in my letter of November 24th,
2 that he had agreed to do that.

3 Q Did Dean Morgan ever sign anything with you, or
4 indicate that he would do that?

5 A He indicated that on numerous occasions. He
6 never signed anything that said he would do that, but he
7 did verbally indicate it on at least a dozen occasions.

8 Q And on at least two or three occasions, he has
9 provided you with documents which are represented as being
10 in support of the expenses that he incurred on this project;
11 isn't that correct?

12 A That is not correct. He has never supplied me
13 with documents that he has represented as being a complete
14 accounting of the expenses he incurred on this project.

15 Q Didn't I send you a package of documents that
16 were purported to be a--I can see them, I know what they are,
17 just answer within your knowledge, weren't they purported to
18 be an accounting and documentation of his expenses?

19 A According to your letter, it says a bundle of
20 papers which he explains are his accounting for monies
21 received and paid by him under the construction--

22 Q Didn't you just said that he never told you, or
23 that you were never represented, or received--

24 A A complete accounting.

25 Q --accounting. All right.

1 A Right.

2 Q I'm not going to split semantics on complete or
3 incomplete accounting.

4 A I think it's a very important distinction.

5 Q Isn't it true that this letter that you're holding
6 that's been marked was written, maybe to eliminate some
7 penalties and interest, or late payment fees that were on
8 that account, in which you told them to go after Dean
9 Morgan, instead of you?

10 A The letter was written to them to explain that I
11 had no knowledge of the debt that had been incurred, that
12 I was anxious to resolve the debt and get the lien removed,
13 and that contrary to what Mr. Morgan had told them, I had
14 not refused to pay debts.

15 Q All right. Doesn't the document indicate in fact
16 that apparently Dean Morgan had told creditors he couldn't
17 pay them, because we've not paid him amounts, I presume,
18 sufficient to make that payment against that creditor; is
19 that correct?

20 A I'll have to read the whole letter to--or else
21 you can point it out to me. Is it--where--

22 Q In the second paragraph, it says, "Apparently he
23 has told some of the creditors that he cannot pay"--

24 A Right.

25 Q --"yet, because we have not paid him. In reality,

1 we have already paid him \$20,000 more than the originally-
2 agreed upon amount of \$40,000."

3 A That's right. And by that, what I intended to
4 indicate was that our contract with him was for \$40,000,
5 we had already paid more than 60,000 on debts that he had
6 incurred; granted, it did not pass through his hands, some
7 of that, but I wasn't paying money to anybody at that point
8 that he had not--

9 Q You did indicate that.

10 A --incurred.

11 Q I think your answer stands.

12 A But--

13 Q You did tell creditors that you had paid him
14 \$60,000, didn't you?

15 A Uh huh (affirmative). And I think the spirit of
16 that is correct.

17 Q That's enough. I'll get a copy of the April 2nd
18 letter, which is--I think that one has been received.

19 THE COURT: Try D-13--17, I mean. D-17.

20 MR. KANE: Do you have that?

21 MR. SILER: There we are. Thank you.

22 Q (By Mr. Siler) I'm concerned about this letter,
23 Mr. White, because I have seen a copy of it, but have
24 never seen the attachment to it. Would you look at that
25 letter, and would you review it with me?

1 witness, after having been first duly sworn, assumed the
2 witness stand, and was examined and testified in his own
3 behalf as follows:

4 DIRECT EXAMINATION

5 BY MR. SILER:

6 Q For the record, Mr. Teams, will you indicate your
7 full name and address?

8 A Charles R. Teams, 7848 Willow Crest Circle, Salt
9 Lake City.

10 Q What is your present occupation?

11 A I am a real estate broker, principal broker.

12 Q And your occupation in--from the month of August
13 to--August of '86, through May of '87; would you please
14 state that occupation as well?

15 A Real estate broker.

16 Q In the same capacity?

17 A Yes.

18 Q Are you acquainted with the parties here?

19 A I am.

20 Q Will you tell us how you came to be involved in
21 the construction of this project in Hyde Park for the Karl
22 White residence?

23 A Yes. I received a phone call from Amy White.

24 Q What did she want?

25 A She indicated that the window people, Delabro had

1 Q that we built an energy efficient home, and we
2 A spent some time on the phone.

3 Q Do you know why she called you?

4 A I assume it was to gain information on exactly
5 Q what Dean Morgan built, as far as Polar Bear Homes.

6 Q You say that Dean Morgan builds; would you tell
7 A me what your relationship is with Mr. Morgan?

8 A Dean Morgan is a contractor and I'm a real estate
9 Q broker, and he employed my services to sell his homes.

10 Q Did you have an agreement between the two of you
11 A to that effect?

12 A We do.

13 Q And what is the nature of that agreement?

14 A It's a listing agreement where I provide the
15 Q selling arrangements for his homes, and he builds them,
16 A for a commission.

17 Q Do you have any other business relationships with
18 A Mr. Morgan?

19 A I do not.

20 Q Do you co-own any business entities with
21 A Mr. Morgan?

22 A No. I don't.

23 Q Do you have an interest in Dean Morgan
24 A Construction or Polar Bear Homes?

25 A None.

1 Q When you sell a home for Dean Morgan or Polar
2 Bear Homes, would you tell the Court what you would normally
3 do and how you would expect to be compensated for what you
4 do?

5 A Well, when we initially wrote up our contract, we
6 sat down and discussed the--the services that I would
7 provide; I've had a great deal of experience in marketing
8 new homes, and we discussed that, and in my experience over
9 the years, I told him that I felt that there were certain
10 responsibilities that I felt the--the broker should have to
11 facilitate having an ongoing relationship with the owners of
12 the property, so that problems could be avoided.

13 MR. KANE: Your Honor, I would object to the
14 question and ask that it be stricken. I don't--if there is
15 a contract between Mr. Morgan and Mr. Teams, I think it
16 would speak for itself, and the best evidence rule would
17 require that it be produced.

18 MR. SILER: We can ask what the nature of the
9 agreement is with respect to this particular home.

10 THE COURT: Well, I still think the best evidence
11 would be the agreement itself.

12 MR. SILER: All right. Let me ask this question,
13 then.

14 Q (By Mr. Siler) Do you ever derive any profits,
15 other than a commission?

1 A I never have, no.

2 Q Do you have employees that work for you?

3 A I do.

4 Q Who is Team Realty?

5 A Team Realty is a sole proprietorship of myself.

6 Q What other clients or--what other clients do you
7 do work for, or do you have other clients?

8 A Oh, yeah. It's an ongoing basis. People contact
9 me to either sell their properties or to find them
10 properties.

11 Q Again, you have no proprietary interest in common
12 with Mr. Morgan in any business then; is that true?

13 A None whatsoever.

14 MR. KANE: Again, objection, your Honor. If
15 there's a--

16 THE COURT: Well, he's answered that.

17 MR. SILER: All right.

18 Q (By Mr. Siler) Would you tell us now in terms of
19 this particular project, what were your responsibilities,
20 as you understood them then, as a real estate agent?

21 MR. KANE: Objection.

22 THE COURT: We just got through going through
23 this, saying the original contract would be the best
24 evidence of what his duties are.

25 MR. SILER: All right. Let me--well, the best

1 evidence of what his duties may be that--may be this
2 contract in which he has signed as a real estate agent and
3 broker. I don't know, from what I've asked him, yet, what
4 exactly the contract between he and Morgan requires, but I
5 could ask him what he thought he was expected to do under
6 this contract, the way it was written.

7 THE COURT: Well, I would like to see the listing
8 agreement. That is the best evidence of the relationship
9 between he and Mr. Morgan.

10 THE WITNESS: It's in my files, at home.

11 MR. SILER: All right.

12 Q (By Mr. Siler) Would that agreement have
13 controlled what your responsibilities are under this
14 agreement?

15 A Any--

16 MR. KANE: Same objection.

17 THE COURT: Objection sustained.

18 MR. SILER: All right.

19 Q (By Mr. Siler) What did you do in this project?

20 A After Amy contacted me, and we discussed and
21 answered many of the questions on the Polar Bear Homes, I
22 set an appointment with Amy, and she said that she would
23 like to meet with me, along with her husband, and--and go
24 through one of the homes that Dean had built.

25 Q And then what did you do?

1 A We set up an appointment. I believe I met with
2 them on two separate occasions, showed them one of the
3 homes, I believe both of them were completed. Answered
4 many of their questions, went through the scenario of what
5 Mr. Morgan does in building an energy efficient home, and
6 answered all of their questions.

7 Q At that time, or any other subsequent time, did
8 you make any representations to either Karl or Amy White,
9 as to a partnership relationship between you and
0 Mr. Morgan?

1 A None whatsoever.

2 Q What happened then next in terms of your
3 involvement with this project?

4 A Well, like as in other cases, after meeting with
5 people, and they feel comfortable with what Mr. Morgan does
6 in the construction of Polar Bear Homes, and going through
7 those procedures, then it's a matter of setting up an
8 appointment with Dean, the contractor, and going over the
9 set of plans, answer questions with them, on an ongoing
0 negotiating basis.

1 Then, generally what happens is, Dean takes time
2 to prepare that bid, we set up subsequent meetings, which
3 we did in this case, we meet with the client, go over the
4 terms of the contract, write up the contract, if they're
5 agreeable with it, then Dean Morgan signs it as the

1 A I had no communications with the Hoths.

2 Karl White would call me, on occasion, yes.

3 Q Now, Mr. White testified, I believe, about letters
4 that were mailed, and copies sent to you; do you remember
5 receiving letters from Mr. White?

6 A I received one or two, yes.

MR. SILER: No further questions right now.

MR. BURBANK: I don't have any.

CROSS-EXAMINATION

BY MR. KANE:

Q Mr. Teams, isn't it true that this wasn't a real
estate contract--or a real estate transaction, but simply
an agreement between Polar Bear Homes and the Whites, to
build a home?

A Well, of course it's a real estate transaction.
That's what it is.

Q How did you figure your commission?

A The standard six percent commission.

Q Six percent of what?

A The sales price of the home.

Q And what was the sales price of this home?

A I believe it was 142-something.

Q So, if my figures are correct, your position is
that you are entitled to be paid \$8,535?

A That is correct.

1 Q To your knowledge, was such a written agreement
2 prepared?

3 A Yes, I did. I received it--it later, and reviewed
4 that. In reviewing it extensively, I felt that it was
5 totally one-sided, that all it did was further protect
6 Karl White in--in his accusations and in the things that he
7 wanted to be accomplished and everything, and there was
8 absolutely no--no protection for me whatsoever.

9 Q Did you sign that agreement?

10 A I did not.

11 Q At the February 11th meeting, did you enter into
12 such an agreement, or any agreement with Karl White that
13 would alter your relationship as you understood it with
14 him on the job site, at that time?

15 A No. I don't think that any agreements was reached
16 at that time. The meeting did end up being somewhat
17 heated and one-sided again, as--as if I was totally at fault
18 and that no one else was to blame for anything.

19 Q Do you recall in February that--any subsequent
20 conversations or communications that you had then with the
21 Whites?

22 A There were conversations, here again, mostly one-
23 sided, but nothing specifically that I can remember.

24 Q Let me show you a letter that has been marked
25 and received as Third-Party Defendants' Exhibit No. 4. Is

1 you recognize that letter?

2 A Yes. I do.

3 Q When did you receive that letter?

4 A I don't know the exact date, but this was dated
5 February the 23rd, and I received it shortly thereafter.

6 Q I'd like to ask you about your response to this
7 letter, and particularly with respect to Paragraphs 4 and
8 5, which indicate that Karl White had already hired a
9 finish carpenter, who could begin working, and did begin
10 working that day.

11 What was your reaction to receiving that letter?

12 A Well, I was somewhat shocked, because I had
13 indicated that I wanted to come and do the finish work,
14 myself; for a couple of reasons, one, just to be there on
15 the job and take care of whatever problems or situations
16 that maybe arise, do the finish work to help compensate for
17 perhaps some of the overages that were occurring. And I
18 did proceed, I ordered the doors and materials for that--
19 that job.

20 This letter indicated to me that--informed me that
21 I was not to do the finish work, and that somebody else had
22 already been hired, and that there was just nothing I could
23 do.

24 Q What was your reaction to Paragraph 5, that, in
25 the case that Amy has to be able to interact frequently with

1 whoever is doing the finish work, and given the past
2 difficulty you had working with her, I think it is best not
3 to create a situation in which you need to work together.
4 What did you understand it to mean by that statement?

5 A Well, that just testified to--

6 MR. KANE: Well, your Honor, I'd object. If
7 he's speculating as to what was meant by the letter written
8 by Mr. White.

9 THE COURT: Well, the letter really speaks for
10 itself.

11 MR. SILER: All right, your Honor.

12 THE COURT: Objection sustained.

13 Q (By Mr. Siler) Tell me then if you feel like
14 your relationship with the Whites was altered in terms of
15 your obligation to perform, as the general contractor,
16 after receiving this letter?

17 A I felt at that time that they had taken over the
18 project in its entirety, because they had--had total
19 control of the funds, and also now, control of hiring and
20 not hiring whomever they pleased.

21 Q I'd like to show you what was entered as
22 Defendants' Exhibit No. 10. Do you recognize that note?

23 A No.

24 Q Have you ever seen it before this trial?

25 A Not before the trial, no.

1 Q Yes, uh huh (affirmative).

2 A Yes. I often asked Mike to come up and do things
3 that needed to be done.

4 Q Did they do those things, to your knowledge?

5 A Upon my request, yes. They did.

6 Q Had you been allowed to continue and do the
7 finish work as you wanted to, what kinds of things would
8 you have anticipated that you might have done in that
9 capacity?

10 A There would always be--necessitate some blocking
11 and backing, so that the finish materials could be applied
12 appropriately, and in correcting deficiencies in, perhaps,
13 stairs and so forth.

14 Q Would you have put on hurricane ties, for
15 instance, on the front porch?

16 A I probably would have.

17 MR. KANE: Leading. Objection.

18 THE COURT: Well, it'll stand.

19 Q (By Mr. Siler) As we finish here, Mr. Morgan,
20 I would like to ask you about these accountings that are
21 entered as Defendants' Exhibits, I believe they're 11, 12
22 and 13. Let me have you look first at Exhibit 11. Do you
23 recognize that exhibit?

24 A Yes. This is an--an accounting that I sent to
25 Mr. White.

1 Q Now, it's been a couple of days, so let me just
2 represent to you that in Karl White's testimony, as he looked
3 at this exhibit, the items in Column 3, I believe, were
4 acknowledged to be items that you had paid, with the
5 exception of the building permit on Line 2 for a thousand
6 dollars, and on Line 15, about \$11,070 of the Cantwell
7 Lumber bill; were the rest of those items in that column
8 all paid by you?

9 A Yes.

10 Q Can you explain the second sheet that's attached
11 to that exhibit?

12 A Yes. The 2,000 was the initial payment at the
13 signing of the contract, and then I received two other
14 payments of \$15,000, each, totaling \$32,000.

15 Q And that's the amount that's shown on Line 4?

16 A That's correct.

17 Q I believe the earlier testimony indicated that you
18 had been paid \$32,100 by the Whites. Do you know what the
19 \$100 discrepancy would be?

20 A That would be the check issued to Team Realty
21 for \$100.

22 Q Would you go on then, below that line, 32,000,
23 and tell us what this attachment or the second page of this
24 exhibit is?

25 A It says--Line 5 shows a payment to Cantwell.

1 Q And is that the payment that was made by--

2 A By Karl White, the Whites, yes, that was reflected
3 on the other side, as total paid to Cantwell's at that
4 time.

5 Q What does the amount on Line 6 represent, then?

6 A That's the total amount of money paid out.

7 Q Either to you or--

8 A Received or paid out on the job, yes.

9 Q Either to you or to Cantwells?

10 A That's correct.

11 Q Does that amount that's shown there, \$44,071, is
12 that a correct addition?

13 A No, it's not.

14 Q Why not?

15 A Because if you was to add those two, you'd come
16 up with 43,000, instead of 44.

17 Q Why is that?

18 A The thousand dollars from the Line No. 2
19 should have been added in with the Cantwells as other
20 monies paid.

21 Q And then would the total be correct?

22 A Then it would be correct.

23 Q And then what is the amount on Line 7?

24 A The amount paid out by myself to suppliers and
25 contractors.

1 Q Is that number found on this exhibit?

2 A Yes. It's on the first page in the third
3 column.

4 Q Okay. And then what is the amount on Line 8?

5 A That indicates \$3,000 of funds to Dean Morgan.

6 Q All right. And that number is exactly how much?

7 A \$3,007.44.

8 Q What is the amount shown on Line 9 then?

9 A My copy doesn't show anything on Line 9.

10 Q All right. Let me--Exhibit, yeah. Let me refer
11 you then to the April, 1987, accounting, Defendants' Exhibit
12 D-12, and ask you if you see as an attachment to this
13 exhibit, those same two pages?

14 A Yes. I do.

15 Q All right. Can you tell me now, is--what the
16 number is on Line 9?

17 A Yes. It's 2,156.74.

18 Q And is that--does that appear to be the same page
19 as the second page to Exhibit D-11?

20 A Yes. Except an additional--

21 Q Subtraction item?

22 A --subtraction item, yes.

23 Q What is that subtraction item?

24 A That--there's this other--that reflects the
25 schedule also on this letter that states some more

1 encumbrances on the property.

2 Q Let me ask you, as we proceed down, I believe you
3 indicated the total on Line 6 was, \$44,071.35; is that
4 correct?

5 A That's correct.

6 Q And from that, you subtracted forty-one oh-six~~ty~~
7 ~~and~~ three ninety-one; is that correct?

8 A Yeah. This is kind of a fuzzy copy here.

9 Q All right. That left the \$3,007.44 that you
10 have testified to?

11 A Right.

12 Q Is that correct? Now, what is that subtraction
13 item that's shown then on that page in the April accounting?

14 A That would show additional amounts of money paid
15 for other items.

16 Q How much was that?

17 A 2,156.74.

18 Q And what balance does that leave, then?

19 A \$850.70.

20 Q Now, will you tell us then what that subtraction
21 of the 2,156.74 represents?

22 A Yes. There's another schedule of the three
23 columns that show more encumbrances, balance still owing,
24 and then the amounts paid.

25 Q Is that attached to that April accounting, the

1 schedule that you're referring to?

2 A Yes.

3 Q And does that detail then what this \$2,156.74
4 represents?

5 A It does.

6 Q Does it show additional amounts, in addition to
7 this amount, the 2,156.74, that are billed and owing on
8 this project?

9 A It does.

10 Q How much more in addition to the 2,156.74 does
11 it show that were outstanding bills at that time?

12 A 4,648.58.

13 Q Four thousand?

14 A 648.58.

15 Q And is it your understanding that those are
16 legitimate bills that needed to be paid on this project?

17 A Yes. That was materials used on the White
18 residence.

19 Q How much money did you have remaining from what
20 Whites had paid you, to pay those bills?

21 A That shows \$850.70.

22 Q I'd like you now to look at what is shown as
23 Defendants' Exhibit D-13; do you recognize that?

24 A Yes. This was the June accounting.

25 Q And on the June accounting, what do the columns

1 represent?

2 The column to the left has a series of names;
3 what are they?

4 A That's the suppliers or persons working up on
5 the job.

6 Q And the central column, which are numbers?

7 A Numbers.

8 Q What do the numbers represent?

9 A Amounts paid to those suppliers or individuals
10 or contractors.

11 Q Are those amounts that were actually paid by you?

12 A Yes.

13 Q Are those the parties that they were actually
14 paid to?

15 A Yes.

16 Q What's the right-hand column?

17 A It indicates the trade or performance that they
18 did on the job.

19 Q The reason for the payment?

20 A Yes.

21 Q What is the total amount then that you show as
22 having paid out on that exhibit?

23 A 34,467.94.

24 Q And from that, did you subtract a figure?

25 A Yes, 32,100.

1 Q What is that number?

2 A That is the amounts received from Whites, with the
3 exception of \$100.

4 Q Which--how do you account for the 100, then?

5 A That was received by Team Realty.

6 Q All right. What is the balance then that's shown
7 there?

8 A 2,367.94.

9 Q On that--on that schedule, is there an amount
10 shown as a payment to Charles Teams?

11 A Yes. There is.

12 Q How much is that payment?

13 A 2,100.

14 Q Did you actually pay Charles Teams \$2,100?

15 A No.

16 Q How much did you pay him?

17 A Two thousand.

18 Q Why did you list it as 2,100?

19 A That is the amount of money--if we were to take
20 the total contract and total dollars, that's the money that
21 would have been in his possession.

22 Q So, if you paid him \$2,000, where did the other
23 \$100 come from?

24 A The earnest money receipt of \$100.

25 Q What happened to that \$2,100?

1 A In--eventually, or--

2 Q Let me ask you this: Did you ever get that
3 money back?

4 A Yes.

5 Q What happened in terms of that repayment? How
6 did you get that 2,100, or did you get the \$2,100 back?

7 A It--it was credited back to me, in lieu of
8 another commission that I was to pay him.

9 Q So, in terms of the \$2,367.94, you actually
10 received back \$2,100?

11 MR. KANE: Objection. Leading.

12 MR. SILER: All right.

13 THE COURT: Well, it's accounting. I will let
14 him answer.

15 MR. SILER: It will help us get there quicker.

16 THE WITNESS: Yes. I received it as a credit.

17 Q (By Mr. Siler) And is this 2,367.94 the amount
18 that you were representing as your over-payments, or loss
19 incurred on the project directly?

20 A That's correct.

21 Q Do you know what the difference is here, if we
22 credit back the 2,100?

23 A Yes. 267.94.

24 Q Now, in your--in your documentation that you've
25 provided to Karl White, did you discover that there were

1 amounts not listed on that accounting in June 10th?

2 A Yes. There was.

3 Q How many items?

4 A One line item of the amount of two checks paid
5 to Mike Thomas.

6 Q I'll ask you to look at what's been identified
7 as Co-Defendants' Exhibit No. 8, and tell me if you can
8 identify that document?

9 A Yes. These are two checks that were issued to
10 Mike Thomas, totaling \$960.

11 Q Do you know where those--that photocopy came from?

12 A The accounting that I sent to Mr. White.

13 Q Is the number in pink, up in the right-hand
14 corner, No. 20, in your handwriting?

15 A No. And I'm not sure whose it is, exactly. It
16 may have been the secretary that helped me prepare this.

17 Q Were you trying to number the checks and documents
18 in some way, to his--

19 A I think the 20 referred back to an accounting
20 received from Mr. White, as to an item that needed some
21 identification as to whether those items, that had been
22 paid.

23 Q As you look at that copy, are those copies exact
24 copies of checks that were written by you--

25 A Yes.

1 Q --in payment of those amounts?

2 A Yes.

3 MR. SILER: I'd move for the admission, your
4 Honor, of Exhibit No. 8.

5 MR. BURBANK: No objection.

6 MR. KANE: Could I see?

7 MR. SILER: Yes. I'm sorry.

8 Let me see if I've got a copy for you.

9 MR. KANE: No objection.

10 THE COURT: Exhibit 8 will be received.

11 Q (By Mr. Siler) Now, after acknowledging the
12 \$2,100 that you received back from Mr. Teams, leaving
13 267.94, would you tell me what the amount is on that
14 payment?

15 A \$960.

16 Q If you were to indicate to the Court today then
17 what the total amount of actual direct over-payments by
18 you on this project were, what would that amount be?

19 A The 1,227.94.

20 Q In addition to these expenses, did you also
21 incur other expenses on the job?

22 A Yes, there would be overhead expenses of travel
23 and telephone calls and--and expenses in office and so
24 forth, that would be in addition to that.

25 Q Did you also retain an attorney to represent you

1 THE COURT: It's very elementary in the law that
2 the Court determines if there's an agreement based on
3 conversation. You asked him if he agreed.

4 MR. KANE: Oh. Okay.

5 THE COURT: It's the first thing I ever learned
6 in evidence, and I would think that some of you attorneys
7 ought to go back and take evidence.

8 Proceed.

9 Q (By Mr. Kane) Do you recall whether there was a
10 discussion about whether you were going to do the oak
11 finish work, at the meeting on February 11th, 1987?
12 Excuse me, yes, 1987.

13 A Yes. The finish work was discussed at that
14 meeting.

15 Q And isn't it true that you said you weren't going
16 to do it?

17 A That I was not going to do the finish work?

18 Q Yes. On the oak.

19 A I don't recall of it being segregated out,
20 distinctly.

21 Q Isn't it true that you said you were going to do
22 only the paint finish, only?

23 A That would be initially, yes, because the paint
24 has to be done before the oak work can be done.

25 Q Well, my question was, didn't you agree--or excuse

me. Didn't you say that you were going to do only the
1 painted finish work? And not the oak finish work?

3 MR. BURBANK: Well, I'm going to object, your
4 Honor.

5 THE COURT: Sustained.

6 MR. BURBANK: The contract speaks for itself.

7 MR. KANE: What contract? We're talking about
8 an oral contract.

9 THE COURT: Objection sustained.

10 Q (By Mr. Kane) Mr. Morgan, you--you had a
11 discussion with Mr. White about who was going to do the
12 finish work at the February 11 meeting, did you not?

13 A Yes. We did talk about that.

14 THE COURT: I think I already sustained the
15 objection.

16 MR. KANE: I don't understand the basis for the
17 objection.

18 THE COURT: I'm not going to teach a course in
19 elementary evidence, Mr. Kane. I've already tried to
20 explain to you, we're trying a specific issue here. Let's
21 limit it to those facts.

22 MR. KANE: But, your Honor, if I--

23 THE COURT: Objection sustained.

24 MR. KANE: If I can understand--

25 THE COURT: Proceed to another point.

Nor had they not raised an issue which I believe the Court has found to be immaterial based on contracts that are already before the Court, that is intervention or interference, then I also don't believe we would have had to sit here for three-and-a-half days.

Your Honor, it is true that the Whites have indicated that the contractual amount of \$6,000 was reasonable; therefore, the \$2,500 which remains owing would be reasonable, but that's only under the assumption that they did all the framing.

The May 11th letter, which is a letter, apparently from Mr. Morgan, to them, indi--commending them for their work, speciicly says for your framing. The release that Mr. Morgan signed said specifically for your framing.

There's been testimony by experts, who have indicated that the work they didn't do that the Whites had to hire others to do, with the exception, of course, of the finish work, was work that the framers normally do in the standard of the trade.

Your Honor, the facts establish that the original contract price was 142,250, that's been said many times, and I don't want to be repetitive, but the evidence is also clear that, even by Mr. Morgan's own testimony, that the house was costing at least an additional \$10,000 to be completed, even under the original terms and conditions.

1 and just go on what they knew at that particular time,
2 rather than finding out through counsel what they can and
3 can't charge for.

4 And I would also submit for purposes of the record
5 in this incident that the evidence was brought up by
6 Mr. Dean Morgan that not only were my clients responsible
7 for framing of this house, they were responsible to do the
8 vapor barrier and the insulation of all exterior walls,
9 which brings them into compliance with any licensing
10 provision that Counsel has read.

11 And I would submit, your Honor, that my clients
12 are entitled to a reasonable attorney fees, and entitled to
13 the monies, and for the services which they have performed.
14 Thank you.

15 MR. KANE: Your Honor, can I reply to Mr. Morgan?

16 THE COURT: No. You've had your change.

17 MR. KANE: I should be entitled to reply to
18 Mr. Morgan, should I not, since I'm the plaintiff in that
19 action?

20 THE COURT: Well, I've ruled that you've had
21 your change.

22 The Court finds that there was a written contract
23 entered into between the parties. The Court finds there
24 was substantial completion by the Hoths, at--and of course,
25 their contract price, they're entitled to \$6,000.

1 The Court finds as to the extras claimed by the
2 Hoths, no allowance, because number one, they knew that
3 there was some detail lacking on the plans, they never
4 made any attempt to even look at the specifications.

5 As to No. 2, the flannel shirt; the Court finds
6 they didn't carry their burden of proving to the Court
7 that the shirt was in fact torn, and in the event that the
8 Appellate Court finds that the shirt was torn, there was no
9 price as to what the reasonable value of a used shirt would
0 be, which is substantially less than the original cost.

1 No. 3. Changing of the stairs, it's evident to
2 the Court that the stairs were defective, that the stairs
3 had to be changed. The Court allows the Hoths ten hours
4 on Item No. 3.

5 On Item No. 4, the master bedroom problem arose
6 because the foundation didn't follow the plans, and had
7 the Hoths taken the time to measure the foundation, or the
8 general contractor taken the time to check out the
9 foundation, the problem would never have started, so the
0 Court's not going to allow anything on Item 4.

 As to the master shower lid on Item 5, the
testimony convinced the Court that Amy White requested that
it be modified, and that four hours is reasonable time to
modify it.

 As to Items 6 and 7, these all appear to the

1 Court to have arisen because their foundation started out
2 wrong, then everything else changed. The Court's not
3 going to allow anything on Items 6 and 7.

4 As to Item 8, the arch in the living room, still
5 seems to rise to the Court's interpretation of the
6 testimony from the original foundation problems. The
7 Court's not going to allow any extra for that.

8 This Item 9, moving the bearing wall in the
9 kitchen, it appears the testimony was clearly the request
10 of Amy to move that three inches after it was completed
11 according to plans. The Court's going to allow the two
12 hours in Item 9.

13 As to Item 10, the two back doors, the Court
14 finds that they were enlarged at Amy's request, and it was
15 an extra, and the Court's going to allow the four hours in
16 Item 10.

17 As to Item 11, the Court finds the reinforcing
18 trusses were originally built to the plans, and because the
19 bearing walls did not match up, it was necessary to do
20 two hours additional in labor.

21 As to Item No. 12, there was no detail put in
22 on the two-by-ten beams, but the Court finds that any
23 reasonable builder would have made sure that it would be
24 adequate, and the inspector found that to require three-
25 by-tens, that's the responsibility of the sub and the prime

contractor. The Court's going to allow the--not going to allow any extras for Item 12.

As to Item 13, the doorway under the stairs, the evidence shows that Amy specifically asked the subs to cut it in, the Court's going to allow one hour on Item 13.

Item 14, the roof line was wrong in the plans and the subs are entitled to one hour to straighten that problem out in Item 14.

As to Item 15, the details on the drawings are not sufficient to convince the Court there was sufficient detail to frame that octogan tower, that it would be an extra, and the Court's going to allow the six hours on Item 15.

As to Item 16, it was another change because of insufficient details in the plans, the Court's going to allow three hours on Item 16.

As to Item 17, the front porch remodel, really was at the request of the owner, was a change. The Court's going to allow eight hours in Item 17.

As to Item 18, the Court's going to speculate here. The testimony was he used two barrels of nails, two cases of nails; there's no evidence how many--the total number of nails he used, so the Court's unable to find any reasonable basis for assuming he's correct, so the Court's going to allow him one case of nails, probably

1 wrong, but I'm just speculating.

2 Item 19, tarpapering the roof, it had to be done
3 by someone. Morgan requested the sub to do it, the subs
4 should be entitled to recover. They asked for 12 hours,
5 the Court's going to allow them 10 hours in view of the
6 defects that showed up in tarpapering the roof.

7 As to Item 20, Amy requested the extra on the
8 towers, the Court's going to allow two hours extra, claimed
9 there.

10 Item 21, the dining room bay window had to be
11 modified, the Court's going to allow the three hours there.

12 Item 22, that dealt with Item 14, after the roof
13 line appeared to be wrong, and so Item 22, the two hours
14 should be allowed.

15 As to Item 23, the Court finds no basis for any
16 excess clean-up; there's always a problem in construction
17 jobs, the subs should have anticipated it.

18 Item 24--

19 MR. BURBANK: Excuse me, your Honor. In regards
20 to Item 22, was that one hour or two hours?

21 THE COURT: Item 22 is two hours in addition to
22 14, so it would be a total of three on 14 and 22.

23 MR. BURBANK: Okay. Thank you.

24 MR. KANE: Your Honor, you're adding to what
25 they've put down; are you aware that they put one hour?

1 In Item 22?

2 THE COURT: Well, there was a number of different
3 testimonies on that.

4 MR. KANE: Okay. I just wanted to clarify.

5 THE COURT: I'm allowing two hours on 22, one
6 hour on 14.

7 Item 24, caulking had to be done, it was rainy,
8 the storm was coming, the weather, whether it's part of
9 the subcontract or not, they're still entitled to cover the
10 extras. Two hours will be allowed on Item 24.

11 Item 25, Morgan ordered it, but it was in the
12 specs, so I'm not going to allow him any extras on that.
13 If they had looked at the specs, they would have found they
14 had an obligation to do the sheetrock blocking on the third
15 floor.

16 Item 26, upstairs bathroom doors were changed at
17 the request of Amy, allow two hours there.

18 Item 27, laundry room under cabinet was changed
9 at Amy's request and allow two hours there.

0 As to the additional consulting time, I'm not
1 going to allow that, they had a chance to look at the
2 plans and to look at the specifications, they could have
sat down and reviewed everything and understood where they
were going. They had to assume that as part of the job.

As I totaled it, it came to 64 hours, and I--if

1 my addition is wrong, then you'll have to change it in
2 making your findings.

3 As to the offsets against the original work and
4 the extras, Mr. Smith presented a bill, but on cross-
5 examination, he testified to certain hours. On Item No.
6 1, I'm going to allow him four hours; Item No. 2, one-
7 half hour; Item No. 3, 3-1/2 hours; Item No. 4, four hours;
8 Item No. 5, I'm not going to allow anything; Item No. 6,
9 1-1/2 hours; Item No. 7, five hours; Item No. 8, three
10 hours; Item No. 9, 6-1/2 hours; Item No. 10, 2-1/2 hours;
11 I'm going to allow an additional 12 hours on the TJI repair
12 and putting in the extra beam, which I total 42-1/2 hours,
13 again, the Court may be wrong, but if that's correct, that
14 would be \$425 at \$10 an hour.

15 All of Mr. Heiner's work appeared to be reasonable,
16 as part of what the Hoths should have done, I'm going to
17 allow the full \$91, to make a total of \$516 in offset.

18 I didn't allow anything for Golightly, because it
19 wasn't clear to the Court the plans were clear in exactly
20 what backing was required before he could do his aluminum
21 siding, and so none of those extras--or none of those
22 offsets will be allowed.

23 So, assuming that 64 hours are allowed, plus the
24 \$64 for a case of nails, it comes to--

25 MR. KANE: Your Honor, is it--I believe it's \$60

1 On the--
2

3 THE COURT: Sixty hours?

4 MR. KANE: \$60 each for each case, the bottom of
5 the first page.

6 THE COURT: Well, I wrote down 64, so that totals
7 different.

8 MR. KANE: Okay.

9 THE COURT: That's \$960 for the hours and \$64 for
10 the case of nails, a total of \$1,024, \$560 in offsets, which
11 will leave \$508, plus the original contract price owing of
12 \$2,500.

13 MR. KANE: Your Honor, just for clarification,
14 excuse me. Were you figuring the 64 hours at \$15 an hour?

15 THE COURT: Yes.

16 MR. KANE: Okay.

17 THE COURT: Which would make a total of \$3,008.

18 As to attorney's fees, the Court sat here very
19 patiently, I guess I lost my patience a couple of times;
20 it appeared to the Court that this is a case that could
1 have been tried in one day if the parties used discovery
2 and all the rules pertaining thereto, and in view of the
fact that Rule 1 of the Utah Rules of Procedure say that
these rules shall be liberally construed to secure the
just, speedy and inexpensive determination of every action.
The Court just cannot allow that much attorney's fees, and

1 the Court's going to limit your allowance to a total of
2 \$1,000, which includes any allowance for Mr. Low in preparing
3 the lien and recording it.

4 Make a total judgment of plaintiffs against the
5 defendants for \$4,016, plus their court costs which will have
6 to be established as the record.

7 Now, on the claim from the defendants to third-
8 party defendants, the Court finds the evidence is clear that
9 at the time the Hoths were to be paid, Mr. Morgan paid
10 himself \$3,007; had he done that, we would never be in this
11 lawsuit today. There may be another suit between the
12 Whites and the Morgans, but it seems to me under the terms
13 of the contract, Mr. Morgan had a duty to keep the subs
14 from filing liens, where he had--paid himself \$3,007, had
15 he done that, the Hoths wouldn't have been here, they'd have
16 been happy.

17 So, I'm going to enter judgment in favor of the
18 third-party plaintiffs against the third-party defendants
19 in the sum of \$3,008, which they have to pay the Hoths,
20 and for the same reason, I'm going to limit attorney's
21 fees to \$1,000, plus allow the third-party plaintiffs to
22 recover their costs against the third-party defendants.

23 Now, I presume, Mr. Burbank, since you are the
24 primary winner, it's your duty to prepare the findings and
25 conclusions; however, I would suggest that Mr. Kane, it's

1 probably your obligation to prepare the findings and
2 conclusions in regard to the third-party plaintiff to the
3 third-party defendant. Now, if the two of you will work
4 together and submit them to each other and the other
5 attorney before signing by the Court.

6 MR. KANE: Yes, your Honor.

7 MR. SILER: Your Honor, I'm sorry, I wasn't clear
8 on the award of attorney's fees between the third-party
9 plaintiff and defendant.

0 THE COURT: Same--same award; \$1,000.

1 MR. SILER: In favor of the third-party
2 plaintiff?

3 THE COURT: Yeah. Plus costs. You make sure you
4 get all the exhibits.

5 Court will be in recess.

6 (Off the record.)

7 MR. SILER: I'm sorry. I thought I understood
8 you to say that the judgment of the \$3,008 was to be paid
9 to the Hoths.

0 THE COURT: Hoths recover judgment against the
1 defendants for 3,008 plus \$1,000 attorney's fees.

2 MR. SILER: Yes.

3 THE COURT: Third-Party plaintiffs recover
4 judgment against the third-party defendants of \$3,008,
5 plus \$1,000 attorney's fees.

MR. SILER: That's what I wanted to know. We
pay them.

THE COURT: Both of the prevailing plaintiffs
recover the costs.

MR. SILER: Thank you.

(Whereupon, this trial was concluded.)

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