

1989

Jack C. Daniels v. Deseret Federal Savings & Loan Association, et al. : Brief of Respondent in Opposition for Writ of Certiorari

Utah Supreme Court

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DOCKET NO:

Clerk, Supreme Court, Uta

IN THE SUPREME COURT OF THE STATE OF UTAH

JACK C. DANIELS,)	BRIEF OF RESPONDENT IN
)	OPPOSITION TO PETITION
Third-party Plaintiff)	FOR WRIT OF CERTIORARI
and Appellant,)	
)	
vs.)	
)	
DESERET FEDERAL SAVINGS & LOAN)	
ASSOCIATION, et al.,)	
)	
Third-party Defendants)	
and Deseret Federal)	
Savings & Loan also)	
Respondent,)	
)	
)	Case No. 890208
)	
CEN CORPORATION,)	Category No. 13
)	
Plaintiff,)	
)	
vs.)	
)	
JACK C. DANIELS, et al.,)	
)	
Defendants.)	

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TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED FOR REVIEW	1
OPINION OF THE COURT OF APPEALS	2
JURISDICTION.	2
CONTROLLING STATUTES AND RULES.	2
STATEMENT OF THE CASE	3
A. Nature of the Case.	3
B. Course of the Proceedings	3
C. Statement of Relevant Facts	4
ARGUMENT.	7
I. <u>DANIELS' ESTOPPEL ARGUMENT DOES NOT RAISE AN</u> <u>IMPORTANT AND UNSETTLED QUESTION OF STATE LAW</u>	8
II. <u>THE COURT OF APPEALS CORRECTLY DETERMINED THAT</u> <u>DANIELS' CLAIM WAS NOT LIENABLE, AND ANY ALLEGED</u> <u>ERROR IN THAT DETERMINATION WAS HARMLESS.</u>	14
III. <u>THE DECISION OF THE COURT OF APPEALS COMPLIES</u> <u>WITH RULE 30(c) OF ITS RULES, AND ANY ALLEGED</u> <u>VIOLATION OF THAT RULE DOES NOT CONSTITUTE A</u> <u>SPECIAL OR IMPORTANT REASON FOR GRANTING REVIEW</u> . .	16
CONCLUSION.	19
APPENDIX.	21

TABLE OF AUTHORITIES

Page

Cases

<u>AAA Fencing Co. v. Raintree Dev. & Energy Co.,</u> 714 P.2d 289 (Utah 1986).	8-9
<u>Belt Line Brick Co. v. Standard Home Bldg. Co.,</u> 170 Minn. 509, 213 N.W. 41 (1927)	13
<u>Daniels v. Deseret Federal Savings & Loan Association,</u> 771 P.2d 1100 (Utah Ct. App. 1989).	2, 7, 14
<u>Funk v. Anderson,</u> 22 Utah 238, 61 P. 1006 (1900).	12
<u>Harkness v. Woodmansee,</u> 7 Utah 227, 26 P. 291 (1891).	12
<u>In re Williamson,</u> 43 Bankr. 813 (Bankr. D. Utah 1984)	9
<u>Rice v. Granite School District,</u> 23 Utah 2d 22, 456 P.2d 159 (1969)	12, 13
<u>Smith v. Oregon Short Line R. Co.,</u> 30 Utah 246, 84 P. 108 (1906).	10-12
<u>Utah Savings & Loan Ass'n v. Mecham,</u> 12 Utah 2d 335, 366 P.2d 598 (1961)	9

Court Rules

Rules of Utah Court of Appeals 30(c).	2, 3, 16-19
Rules of Utah Supreme Court 43.	7, 17

Statutes

Utah Code Ann. § 38-1-3 (1988).	3, 14
Utah Code Ann. § 38-1-7	6
Utah Code Ann. § 78-2-2(3)(a)	2
Utah Code Ann. § 78-2-2(5).	2
Utah Code Ann. § 78-2a-4.	2

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Plaintiff,)	
)	
vs.)	
)	
JACK C. DANIELS, et al.,)	
)	
Defendants.)	

QUESTION PRESENTED FOR REVIEW

1. Do the following issues present special and important reasons for granting the appellant's petition for writ of certiorari:

a. Where the owners of a condominium project induce the general contractor not to file a notice of lien within the statutory filing period, is a lender that records its

trust deed after the general contractor records his notice of lien estopped from asserting as a defense to the contractor's foreclosure action the untimeliness of the notice of lien?

b. Did the Court of Appeals clearly err in concluding that the contractor's notice of lien covered his claim for "profits" on his investment and not for labor or materials?

c. Does a decision by a panel of the Court of Appeals in which one judge writes an opinion and the other two judges concur in the result without written opinion violate rule 30(c) of the Rules of the Utah Court of Appeals?

OPINION OF THE COURT OF APPEALS

The opinion of the Court of Appeals in this matter is found at 771 P.2d 1100 (Utah Ct. App. 1989).

JURISDICTION

The decision sought to be reviewed was entered on April 5, 1989. The Court of Appeals denied the appellant's petition for rehearing on April 26, 1989. The jurisdiction of this court is based on sections 78-2-2(3)(a), 78-2-2(5) and 78-2a-4 of the Utah Code.

CONTROLLING STATUTES AND RULES

This case involves the following statutes and rules, the pertinent text of which is set forth in the appendix: Utah

Code Ann. § 38-1-3 (1988); Rule 30(c), Rules of the Utah Court of Appeals.

STATEMENT OF THE CASE

C. Nature of the Case.

The plaintiff, CEN Corporation, brought this action against the appellant, Jack C. Daniels, and other defendants seeking, among other relief, to cancel of record Daniels' notice of mechanic's lien. Daniels filed a Third-Party Complaint against, among others, the respondent, Deseret Federal Savings & Loan Association, seeking to foreclose his mechanic's lien.

D. Course of the Proceedings.

Deseret Federal filed a motion to dismiss Daniels' Third-Party Complaint for failure to state a claim on the grounds that his notice of lien was not timely filed. By a memorandum decision dated April 6, 1984, the trial court held that Daniels' notice of lien was not timely filed and that Deseret Federal was not estopped from raising the untimely filing as a defense. The court therefore held that Daniels' lien was null and void as to Deseret Federal, and granted Deseret Federal's motion. A summary judgment was entered in favor of Deseret Federal, and Daniels appealed.

The Court of Appeals affirmed the decision of the trial court and denied Daniels' petition for rehearing.

F. Statement of Relevant Facts.

1. In 1980 a joint venture known as Park Avenue Development Company was formed to develop an eight-unit condominium project in Park City, Utah. Daniels invested \$28,000 in a limited partnership that was one of the joint venturers.

2. On August 14, 1980, Park Avenue entered into a Building Contract Agreement with Daniels whereby Daniels was to serve as the general contractor for the project. Record at 163. (A copy of the contract is included in the appendix to Daniels' Petition.)

3. The contract provided that Daniels was to be paid \$797,000 for "work and materials" plus an additional \$80,253 "profit and overhead." See Petition for Writ of Certiorari, appendix; Deposition of Jack C. Daniels (hereinafter "Daniels Depo.") at 22-23.¹ Although Daniels' testimony was less than clear as to what the "profit" was for, see Daniels Depo. at 54-60, he unequivocally testified that he was paid \$15,000 for his labor in supervising construction, that the \$80,253 was in addition to any construction funds covered by the construction loan, that he expected the profit to be paid from the proceeds from the sale of the units and that the \$80,253 was not supposed to compensate him for his work on or materials supplied to the project. Id. at 55, 58-59 & 75-78.

¹ The cited pages from the Daniels Depo. are included in the Appendix.

4. On July 30, 1981, all construction called for by the Building Contract Agreement had been completed. Id. at 46-48

5. As of July 30, 1981, Daniels had not been paid any of the \$80,253 "overhead and profit" despite the fact that there was \$13,000 remaining in the construction loan. Id. at 55 & 63.

6. In late October or early November 1981, one of the project owners asked Daniels not to file a mechanic's lien and told him that if he did not, his claim for the \$80,253 would be paid within two weeks. Record at 84, 136. Daniels was not paid the \$80,253 within two weeks. Id. at 149.

7. On or about December 1, 1981, several water pipes in the eight-plex broke. Daniels returned to the job site on December 1, 1981, to inspect the pipes but did no work on the building at that time. Daniels Depo. at 49-51, 65-66.

8. On February 3, 1982, Daniels filed a Notice of Lien with the Summit County Recorder claiming he had not been paid the \$80,253 and claiming that he had furnished the last labor on the project on December 1, 1981. Record at 36.

9. On February 25, 1982, the Honorable David B. Dee of the Third Judicial District Court entered an Order Discharging Claims, which ordered that Daniels' recorded claims be released from the project and that they have no effect as a lien on the project upon the posting of a \$75,000 bond. Id. at 13.

10. Daniels did not object to the sufficiency of the bond, and a \$75,000 bond was posted. See id. at 9.

11. On March 1, 1982, Deseret Federal recorded a deed of trust securing repayment of a note made by the then-owners of the project. Id. at 145.

12. On February 18, 1983, the court entered an Amended Order restoring Daniels' lien. Id. at 138.

13. On October 21, 1983, Daniels filed his Third-Party Complaint seeking to foreclose his claimed mechanic's lien, which he asserted was prior to Deseret Federal's interest in the property. Id. at 149.

14. On April 6, 1984, the Honorable Philip R. Fishler granted Deseret Federal's motion to dismiss. He held that Daniels' notice of lien was not timely filed because Daniels' activities in December 1981 were insufficient to extend the time in which to file his lien.¹ Daniels does not contest that determination for purposes of his petition. Petition for Writ of Certiorari at 7-8.

15. Judge Fishler also concluded that Deseret Federal was not estopped from raising the untimely filing as a defense because there was no evidence of concealment, misrepresentation

¹ Section 38-1-7 of the Utah Code requires that a notice of lien be filed within 100 days after the completion of an original contractor's contract. Because Daniels' activities in December 1981 did not extend the statutory filing period, the notice of lien recorded February 3, 1982--some six months after the contract was completed--was clearly untimely.

or other act by Deseret Federal upon which an estoppel could be based. Record at 238.

16. The Court of Appeals affirmed the trial court's ruling in an opinion written by the Honorable Richard C. Davidson with the Honorable Regnall W. Garff and Norman H. Jackson concurring in the result without written opinion. The Court of Appeals agreed with the trial court's conclusion that Daniels' notice of lien was untimely and that the work he did in December 1981 did not extend the time for filing his notice of lien. 771 P.2d at 1102. The Court of Appeals did not reach the merits of Daniels' estoppel argument because it found that Daniels' claim for the \$80,253 was not a claim for the value of the service Daniels rendered, the labor he performed or the materials or equipment he furnished for the construction or improvement of the condominium project. Id. at 1102-03. Accordingly, Daniels' notice of lien was invalid.

ARGUMENT

A party seeking review by writ of certiorari must show "special and important reasons" for granting review. R. Utah S. Ct. 43. Rule 43 of this Court gives four examples of reasons that might justify review by writ of certiorari:

(1) when there is a conflict between decisions of separate panels of the Court of Appeals;

(2) when the Court of Appeals has decided a question of law in a way that conflicts with a decision of this Court;

(3) when the Court of Appeals' decision "has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision"; and

(4) when the Court of Appeals has decided an important and unsettled question of law that should be settled by this Court.

None of these factors are present here, and there are not other "special and important reasons" for granting review in this case.

I. DANIELS' ESTOPPEL ARGUMENT DOES NOT RAISE AN IMPORTANT AND UNSETTLED QUESTION OF STATE LAW.

Daniels argues that whether or not an owner can be estopped from asserting that a mechanic's lien is invalid because notice of the lien was not timely recorded is an important question of state law that should be decided by this Court. However, that issue is not the issue in this case. The issue in this case is whether a mortgagee who did nothing to induce a mechanic to refrain from filing his notice of lien should be estopped from contesting the timeliness of the notice.

This Court has previously held that failure to comply with the time requirements of the mechanic's lien statute forecloses a claimant's statutorily created rights and is therefore not "subject to waiver or estoppel." AAA Fencing Co. v. Raintree Dev. &

Energy Co., 714 P.2d 289, 290-91 (Utah 1986).² AAA is settled law and is dispositive of this case.

However, even if AAA were not controlling, this Court should not grant certiorari to decide the abstract question of whether a mortgagee can ever be estopped from contesting the timeliness of a lien because, even if estoppel were possible, Deseret Federal could not be estopped under the facts of this case.

This Court has stated under what circumstances a mortgagee may be estopped from claiming priority over a mechanic's lien "[T]o establish an estoppel against a mortgagee, the lien claimant must show some concealment, misrepresentation, act, or declaration by the mortgagee upon which the lienholder properly relied and by which he was induced to act differently than he would otherwise have acted." Utah Savings & Loan Ass'n v. Mecham, 12 Utah 2d 335, 366 P.2d 598, 602 (1961). Accord In re Williamson, 43 Bankr. 813, 824-25 (Bankr. D. Utah 1984) (lienholders' estoppel argument failed where the lien notices were attacked by a creditor who had nothing to do with creating the defective notices) (applying Utah law). In other words, the mortgagee must have done something that would make it unjust for him to deny the lienholder's priority. It is undisputed in this case that Deseret Federal did nothing to induce Daniels not to file his notice of lien. For that reason, the trial

² This conclusion is supported by sound policy reasons, as Deseret Federal argued in the Court of Appeals. See Brief of Respondent at 25-30, 32-33.

court properly held Deseret Federal could not be estopped from contesting the lien's validity.

Daniels argues that Deseret Federal should nevertheless be estopped because the owner of the property should be estopped, and Deseret Federal, Daniels claims, was in privity with the owner.

Utah law recognizes that, under certain circumstances, one party may be estopped by the conduct of another. However, there must be good reasons for imputing the conduct of one party to an innocent third party. The only reason Daniels gives for imputing the owner's conduct to Deseret Federal is that Deseret Federal acquired its interest in the property through the owner. However, a grantor-grantee relationship alone is insufficient to impute the conduct of a grantor to the grantee in a case such as this.

Daniels argues that, under Utah law, a subsequent owner is estopped by the conduct of his predecessor-in-title. He relies on Smith v. Oregon Short Line R. Co., 30 Utah 246, 84 P. 108 (1906). In that case, the railroad's predecessor-in-interest entered upon a tract of land in 1874 without the owner's permission, built a railroad on the land and, for nearly thirty years, operated the railroad without any objection or protest from the owner of the land. In fact, the owner built fences on each side of the tract to keep his livestock from straying onto the track. In 1900, the railroad removed the fences, without permission or objection, and

built new fences enclosing an additional strip of land on each side of its track. In 1903, the owner conveyed the land to Smith who brought an action in ejectment against the railroad. The trial court awarded Smith damages for the additional strips of land enclosed by the railroad in 1900, but denied him relief as to the remainder of the property, and the Supreme Court affirmed.

Daniels takes one sentence from the court's opinion out of context to support his argument that anyone holding under an owner is estopped by the conduct of the owner. The Court stated, "Of course, if [Smith's] grantor at the time of his conveyance was estopped from maintaining an action of ejectment for the additional strips taken, then likewise is [Smith] estopped from maintaining such an action." 30 Utah at 250. However, it is clear from the rest of the court's opinion that, if the actions of Smith predecessor-in-title estopped Smith, it was only because those actions had created in the railroad a possessory interest in the property.³

³ According to the court, the trial court's findings showed that the property

was entered upon thirty years ago, permanent and valuable improvements were made thereon, and it was, during all that time, continuously and exclusively occupied by the [railroad] and its predecessors for railroad purposes without objection or interruption. From these facts, a license to occupy may well be implied, and, at the time of the conveyance, respondent's grantor would be estopped from ejecting the [railroad].

In this case, the actions of the owner that Daniels claims give rise to an estoppel would merely estop the owner from asserting the untimeliness of the notice of lien. They would not create in Daniels any possessory interest in the property. Therefore, Smith provides no basis for finding that Deseret Federal was estopped by the owner's actions.

Daniels also relies on Rice v. Granite School District, 23 Utah 2d 22, 456 P.2d 159 (1969), in which the Court held that a school district could be estopped by the actions of its insurer from asserting the untimeliness of the plaintiff's notice of a claim. However, the Court noted that the statute requiring notice expressly authorized the insurer to deal directly with the claimant on behalf of the school district and to approve or deny the claim. The court stated:

Implicit within this statutory designation of the insurance carrier to deal directly with the claimant is the acknowledgment that the insurance carrier's conduct may be such as to support an estoppel. . . . [W]e are not confronted by a fact situation wherein the agent's actions were not authorized by statute, and the governmental entity could not be estopped to assert the statute of limitations.

456 P.2d at 161.

30 Utah at 249. Although the court spoke of "a license to occupy," it is clear that the facts stated would also support a prescriptive easement. See, e.g., Funk v. Anderson, 22 Utah 238, 61 P. 1006 (1900); Harkness v. Woodmansee, 7 Utah 227, 26 P. 291 (1891) (prescriptive rights to an easement can arise from use of the easement for a period of twenty years).

In this case, the court was confronted with the fact situation not present in Rice: Here, the owner was not authorize by statute to act for Deseret Federal, the mortgagee. Thus, Rice clearly does not apply to this case, and Deseret Federal cannot be estopped to assert a timeliness defense.⁴

Finally, Daniels argues that Deseret Federal should be estopped because his notice of lien, which appeared timely on its face, at least put Deseret Federal on inquiry notice. However, had Deseret Federal inquired before it recorded its trust deed, it would have discovered Judge Dee's order releasing Daniels' claim. Although Daniels' claim was later restored, Deseret Federal would have been justified in relying on Judge Dee's order when it record its trust deed and should therefore not be estopped from contesting the validity of Daniels' lien.⁵

⁴ Daniels also cites Belt Line Brick Co. v. Standard Home Bldg. Co., 170 Minn. 509, 213 N.W. 41 (1927). The court in that case upheld the trial court's findings that the owner of property was estopped by its conduct from asserting that a lien statement was filed too late and that the owner's grantee, who acquired the property after the filing of the lien statement, was "also subject to such estoppel." The court did not explain the basis for its holding, and, to the extent that it recognizes estoppel and appears to impute the conduct of an owner to his successors-in-interest, it "seems to be contrary to Utah law." Record at 238. Of course, the fact that Minnesota law on this issue may be contrary to Utah law does not mean that Utah law on the issue is unsettled.

⁵ The facts of this case do not clearly present the estoppel issue for another reason: Daniels admitted in his brief in the Court of Appeals that he went along with the owner's request that he not file a notice of lien so that the owner could get refinancing for the property. Appellant's Brief at 4. In other words, Daniels knowingly participated in the owner's plan to induce Deseret Federal

In short, there is no reason for this court to review the decisions of the lower courts, which are fully supported by well-settled Utah law on estoppel.

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT DANIELS' CLAIM WAS NOT LIENABLE, AND ANY ALLEGED ERROR IN THAT DETERMINATION WAS HARMLESS.

The Court of Appeals did not reach the merits of Daniels' estoppel argument because, it held, even if Daniels had filed a timely notice for the \$80,253 owing him as "profit and overhead," he could not claim a lien for that amount since his claim was for "profits he was entitled to as an investor," which are not lienable.⁶ 771 P.2d at 1103.

The Court of Appeals' conclusion is supported by the record. Daniels was the general contractor on the project. All of the actual work on the project was subcontracted out. The only work that Daniels did on the project was to supervise construction, for which he was paid. Presumably, the amount he was paid for his time in supervision would have included any "profit" he was entitled to under the contract. Although he figured his \$80,253 profit as a percentage of the total construction loan, the \$80,253

to lend money secured by the property by making it appear that the property was unencumbered. Thus, if anyone should have been estopped it was Daniels.

⁶ Section 38-1-3 of the Utah Code gives a contractor a lien on property "for the value of the service rendered, labor performed, or materials or equipment furnished or rented" by him.

was to be paid out of the proceeds from the sale of the project and not as a construction draw, suggesting that it was meant as investor profit and not as payment under the construction contract.

Daniels claims that the \$80,253 "profit and overhead" was simply the "plus" portion of a "cost-plus" contract, not investor profit. He further claims that the Court of Appeals' decision precludes a contractor from recovering his profit and overhead under a cost-plus contract and eliminates owners as a class from mechanic's lien rights, warranting this Court's review in the exercise of its supervisory powers.

Of course, the Court of Appeals did not hold that a contractor cannot claim a lien for the "plus" portion of a "cost-plus" contract, nor did it hold that owners cannot claim mechanic's lien. Rather, the Court of Appeals concluded that Daniels' claim was for investor profits, which are clearly not lienable, and not for Daniels' profit as a general contractor.

Deseret Federal concedes that the purpose of the \$80,253 is not clear from the record. However, whether the money was meant as investor profit or something else, the Court of Appeals reached the right conclusion. Whatever the \$80,253 was for, it was clearly not simply the "plus" portion of a cost-plus contract. A contractor's legitimate profit margin, under either a cost-plus or a fixed dollar contract, is part of the value of his labor and materials on the project. Daniels unequivocally testified that the \$80,253

was not supposed to compensate him for his work on the project or for any materials supplied to the project. Daniels Depo. at 78. Thus, the Court of Appeals correctly concluded that Daniels' \$80,253 "profit" was for something other than his services, labor or materials provided as general contractor and was not lienable.

At best, Daniels' argument raises a factual question as to the purpose of the \$80,253 "profit." That question, however, does not justify granting certiorari because it is irrelevant under the facts of this case. The trial court's conclusion that Daniels' lien was untimely and hence invalid is amply supported by the record and is not contested. If Daniels' lien is invalid because he did not timely record a notice of his lien, it does not matter what the lien was for. Because the Court of Appeals' alleged error would make no difference in the outcome of this case, this Court should not grant review.

III. THE DECISION OF THE COURT OF APPEALS COMPLIES WITH RULE 30(c) OF ITS RULES, AND ANY ALLEGED VIOLATION OF THAT RULE DOES NOT CONSTITUTE A SPECIAL OR IMPORTANT REASON FOR GRANTING REVIEW.

This matter was heard by a panel of the Court of Appeals consisting of Judges Davidson, Garff and Jackson. Judge Davidson wrote the opinion for the Court, and Judges Garff and Jackson concurred in the result. Daniels claims that an opinion by the court in which two judges on a three-judge panel concur in the result without written opinion violates rule 30(c) of the Rules of the

Utah Court of Appeals and thus departs so far from "the accepted and usual course of judicial proceedings . . . as to call for the exercise of this court's power of supervision" under rule 43(3) of the Rules of the Utah Supreme Court.

Daniels' argument must fail for a simple reason: The opinion of the Court of Appeals complies with rule 30(c). Rule 30(c) states:

When a judgment, decree or order is reversed, modified or affirmed by the court, the reasons therefor shall be stated concisely in writing and filed with the clerk. Any judge on the panel concurring or dissenting therefrom may likewise give the reasons in writing and file the same with the clerk.

(Emphasis added).

Rule 30(c) only requires that the court state reasons for its decision in writing. Judge Davidson's opinion does just that. It states the judgment of the court and states reasons therefor. Judge Davidson's reasons may not have been the same reasons that Judges Garff and Jackson may have given for the decision, but rule 30(c) does not require all judges on a panel to agree as to their reasons or even to state their reasons. Any judge on the panel concurring in the result "may" give his or her reasons in writing, but he or she is not required to do so.

Daniels claims that, under rule 30(c), the court's written opinion must state the reasons of a majority of the court, or else a majority of the court must write separate opinions. The rule,

by its terms, contains no such requirement, nor does logic dictate such a result.

Under Daniels' first alternative, there could be no judgment of an appellate court unless a majority of the members of the court agreed not only on the judgment but also on the reasons for the judgment. Where, as often happens, the judges could not agree on their specific reasons for the court's decision, litigants would be consigned to a perpetual appellate limbo. Such a result is clearly not required by rule 30(c). And Daniels' second alternative (requiring separate opinions from a majority of the court) would only multiply paper, obscure the court's conclusion and lead to needless parsing of judicial opinions.⁷ Such a result may be appropriate for the House of Lords but is not required of the Court of Appeals.

Even if Daniels' construction of rule 30(c) were correct, the Court of Appeals' alleged failure to comply with the rule would be harmless. All three judges on the panel agreed that the judgment of the trial court should be affirmed. The remedy for any failure to comply with rule 30(c) would be to remand this matter to the Court of Appeals to allow either Judge Garff or Judge Jackson to write his reasons for concurring in the judgment. If the Court

⁷ It would also provide reviewing courts with alternative grounds on which to affirm lower courts' judgments, which might benefit respondents but would hardly help petitioners such as Daniels.

of Appeals' decision is supportable on the grounds stated by Judge Davidson--and it is--any reasons Judges Garff or Jackson gave for concurring in the judgment would not provide any basis for review by certiorari. Hence, the end result would be the same--the judgment of the court would stand--and any error would be harmless.

Finally, Daniels' argument, even if well taken, does not justify granting review. Rule 30(c) was promulgated under authority of this Court, and this Court is the ultimate interpreter of the rule. If, as Daniels suggests, the rule is unclear, this Court can amend the rule to clarify it without having to grant review by certiorari.

CONCLUSION

For the foregoing reasons, Daniels' Petition for Writ of Certiorari does not present "special and important reasons" for this Court to review the Court of Appeals' decision. His petition should therefore be denied.

DATED this 27th day of July, 1989.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari to be mailed, postage prepaid, this 27th day of July, 1989, to:

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Paul M. Simmons

APPENDIX

38-1-3. Those entitled to lien — What may be attached.

Contractors, subcontractors, and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, shall have a lien upon the property upon or concerning which they have rendered service, performed labor, or furnished or rented materials or equipment for the value of the service rendered, labor performed, or materials or equipment furnished or rented by each respectively, whether at the instance of the owner or of any other person acting by his authority as agent, contractor, or otherwise. This lien shall attach only to such interest as the owner may have in the property.

History: R.S. 1898 & C.L. 1907, §§ 1372, 1381, 1382, 1397; L. 1911, ch. 27, § 12; C.L. 1917, §§ 286, 3722, 3731, 3732, 3747; R.S. 1933 & C. 1943, 52-1-3; L. 1973, ch. 73, § 1; 1981, ch. 170, § 1; 1987, ch. 170, § 1.

Amendment Notes. — The 1987 amendment deleted "all persons who shall do work or furnish materials for the prospecting, development, preservation or working of any mining claim, mine, quarry, oil or gas well, or deposit"

following "manner" in the first sentence, rewrote the second sentence so as to delete a provision relating to the interest of a lessee of a mining claim, and made minor changes in phraseology.

Cross-References. — Bond to protect mechanics and materialmen under private contracts, § 14-2-1.

Rule 30. Decision of the court: Dismissal; notice of decision.

(a) **Decision in civil cases.** The court may reverse, affirm, or modify any order or judgment appealed from. If the findings of fact in a case are incomplete, the court may order the trial court or agency to supplement, modify, or complete the findings to make them conform to the issues presented and the facts as found from the evidence and may direct the trial court or agency to enter judgment in accordance with the findings as revised. The court may also order a new trial or further proceedings to be conducted. If a new trial is granted, the court may pass upon and determine all questions of law involved in the case presented upon the appeal and necessary to the final determination of the case.

(b) **Decision in criminal cases.** If a judgment of conviction is reversed, a new trial shall be held unless otherwise specified by the court. If a judgment of conviction or other order is affirmed or modified by the court, the judgment or order affirmed or modified shall be executed.

(c) **Decision and opinion in writing; entry of decision.** When a judgment, decree, or order is reversed, modified, or affirmed by the court, the reasons therefor shall be stated concisely in writing and filed with the clerk. Any judge on the panel concurring or dissenting therefrom may likewise give the reasons in writing and file the same with the clerk. The entry by the clerk in the records of the court shall constitute the entry of the judgment of the court.

(d) **Notice of decision.** Immediately upon the entry of the decision, the clerk shall give notice thereof to the respective parties and make the decision public.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

PARK CITY INVESTORS I, A :
CALIFORNIA LIMITED PARTNERSHIP, :
D/B/A PARK AVENUE DEVELOPMENT :
COMPANY, EUGENE E. DOMS AND :
MICHAEL R. MCCOY, :

PLAINTIFFS, :

VS. :

C.E.N. CORPORATION, A UTAH :
CORPORATION, ET AL., :

DEFENDANTS. :

DEPOSITION OF:
JACK DANIELS

CIVIL NO. C83-0504A

BE IT REMEMBERED, THAT ON THE 30TH DAY OF
SEPTEMBER, 1983, COMMENCING AT THE HOUR OF 2:00 P.M., THE
DEPOSITION OF JACK DANIELS WAS TAKEN IN THE LAW OFFICES
OF KAPALOSKI, KINGHORN, PETERS & GRUNDFOSSEN, 10 EXCHANGE
PLACE, SUITE 1000, SALT LAKE CITY, UTAH, BY EDWARD P.
MIDGLEY, RPR, A REGISTERED PROFESSIONAL REPORTER, AND
CERTIFIED SHORTHAND REPORTER AND NOTARY PUBLIC IN AND FOR
THE STATE OF UTAH.

APPEARANCES

GERALD H. KINGHORN, ESQUIRE, 10 EXCHANGE PLA
SUITE 1000, SALT LAKE CITY, UTAH 34111 TELEPHONE 364-8644
APPEARING ON BEHALF OF PARK CITY INVESTORS I AND EUGENE DOM
CARMAN E. KIPP, ESQUIRE, AND KAREN MCCLURG,
ESQUIRE, KIPP AND CHRISTIAN, 600 COMMERCIAL CLUB BUILDING,

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MANAGING PARTNER

EXAM BY KINGHORN

Q I'LL FOLLOW UP.

A NO.

Q WHAT WAS THE QUESTION ABOUT THE PROFITS THAT CAME UP THAT YOU JUST TESTIFIED ABOUT? YOU SAID SOME QUESTION CAME UP ABOUT THE PROFIT ON IT, AND CAN YOU TELL US ABOUT THAT?

A WELL, I THOUGHT WE WAS SPEAKING ON THIS CONTRACT. ON THIS CONTRACT THERE WAS A CROSSED-OUT--IT HAD BEEN CROSSED OUT, YOU KNOW. I FIGURED WHEN I TYPED THE CONTRACT UP I WAS FIGURING THE PROFIT ON \$875,000.

Q OKAY.

A BECAUSE I HAD NO IDEA WHAT THE BANK WAS GOING TO HOLD BACK AND WHAT THERE WOULD BE IN THE CONSTRUCTION LOAN ITSELF.

Q OKAY.

A AND USUALLY I TAKE MY PROFIT FROM THE HARD COST OF THE CONSTRUCTION, AND THIS IS WHERE WE WORKED THIS OUT AND DERIVED THIS OTHER FIGURE FROM THAT FIGURE AFTER I HAD ALL THE INFORMATION IN FRONT OF ME.

Q OKAY. SO THIS FIGURE THAT WAS WRITTEN IN HERE ON PAGE 4 OF THE CONSTRUCTION CONTRACT, IF I CAN READ IT UPSIDE DOWN, IS--THERE'S A FIGURE THERE FOR THE MAIN COST OF THE BUILDING, WHICH LOOKS LIKE \$797,000.

AND THEN IT SAYS, "PLUS PROFIT AND OVERHEAD OF"--IS THAT \$80,253?

1 A WELL, THAT INCLUDED--LET'S SEE IF I CAN--THIS
2 \$80,250 INCLUDED THE PROFIT AND OVERHEAD TO THE COMBINED--NOW,
3 IT SEEMED TO ME LIKE THE PROFIT, THAT WAS \$72,000, AND THE
4 OVERHEAD WAS \$7,500 OR SOMETHING TO THAT EFFECT. AND IT
5 TOTALLED THE \$80,253.

6 AND I GOT THAT FROM--AFTER I FOUND OUT THIS FIGURE
7 OF \$797,000.

8 Q SO YOUR PROFIT WAS INTENDED TO BE ROUGHLY 10 PERCENT
9 OF THE HARD COST; IS THAT CORRECT?

10 A RIGHT, AND THAT'S WHAT I FIGURED; 10 PERCENT OF THE
11 HARD COST.

12 Q OKAY. BEFORE YOU SIGNED THIS AGREEMENT OR GOT THE
13 CONSTRUCTION LOAN, HAD YOU GONE UP TO PARK CITY AND KNOCKED
14 DOWN ANY OF THE OLD HOUSES OR DONE ANY CLEARING WORK OR
15 ANY EXCAVATION OR ANYTHING LIKE THAT ON THE PROPERTY?

16 A NONE WHATSOEVER. I HAD LOOKED AT THE PROPERTY,
17 AND I HAD CONTACTED THEM, MY SUBS, TO SEE WHAT I HAD.

18 MY EXCAVATOR HAD SEEN THE PROPERTY SO WE COULD SEE
19 ABOUT WHAT WE HAD TO DO TO REMOVE THE OLD HOUSES THAT WAS
20 ON THE PROPERTY AND LEVEL IT.

21 Q WAS THERE A PORTION OF YOUR ESTIMATE THAT WAS
22 ALLOCATED TO THE DEMOLITION OF THE OLD HOUSES AND SO FORTH?

23 A YES.

24 Q OKAY.

25 A NOW, I DON'T KNOW WHAT THAT WOULD BE. IT WAS A TOTAL

EXAM BY KINGHORN

1 INSPECTION. AND I THINK THAT IT SHOWS IN THIS BOOK HERE.

2 Q LET ME JUST ASK YOU ABOUT THAT, THEN. THIS JUNE
3 15TH, EVEN THOUGH THIS WAS THE LAST DISBURSEMENT, YOU MAY
4 HAVE HAD SOME CLEANUP WORK AND SOME OTHER--MAYBE HAULING OF
5 DEBRIS OR LANDSCAPING OR SOME FINAL DETAILS THAT WERE PICKED
6 UP ON THE FINAL INSPECTION THAT YOU NEEDED TO COMPLETE; IS
7 THAT--

8 A RIGHT.

9 Q --A FAIR STATEMENT?

0 A THOSE WERE MOSTLY JUST CASH PAYMENTS FOR LABOR AND
1 THAT. NOW, OUR FINAL INSPECTION WAS ON THE 23RD.

2 MR. MADSEN: DON'T--.

3 Q THAT'S ALL RIGHT, YOU'RE REFERRING TO A PARK CITY
4 COMPLIANCE INSPECTION REPORT DATED JULY 23 OF 1981, AND
5 IS IT YOUR TESTIMONY THAT ON THAT DATE THE BUILDING WAS
6 FINALLY INSPECTED BY PARK CITY, AND THAT IT WAS FULLY COMPLETE
7 ON THAT DATE?

8 A RIGHT. AND IT WAS READY FOR THE OCCUPANCY REPORT
9 TO BE ISSUED.

30 Q AND THEY ISSUED AN OCCUPANCY CERTIFICATE AT THAT
31 TIME; IS THAT CORRECT?

32 MR. MADSEN: THREE DAYS LATER.

33 Q OR--.

34 A IT WAS TWO OR THREE DAYS.

35 Q WELL, YOU WERE ENTITLED TO ONE ON THE 23RD OF JULY;

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1 IS THAT CORRECT?

2 A RIGHT. I COMPLIED WITH--THERE WERE TWO OR THREE
3 ITEMS THAT HAD TO BE FIXED.

4 Q WHAT WERE THOSE ITEMS?

5 A I HAVE NO IDEA, AND I DON'T KNOW WHY THAT INSPECTION
6 REPORT IS.

7 MR. MADSEN: THAT'S THE ONE WE TRIED TO LOCATE.

8 A PARK CITY HAS IT.

9 Q DID YOU FURNISH THOSE ITEMS?

10 A WELL, YES.

11 Q BUT YOU CAN'T RECALL WHAT THEY WERE?

12 A NO, THEY WAS MINOR LITTLE--LIKE I THINK WE HAD
13 TO HAVE A HANDRAIL ON THE DRIVEWAY BECAUSE THE INCLINE WAS
14 MORE THAN TWO FEET OVER A GIVEN DISTANCE, OR 18 INCHES OVER
15 A GIVEN DISTANCE. SO WE HAD TO FURNISH A HANDRAIL FROM THE
16 SIDEWALK TO THE BUILDING.

17 THE OTHER ONE WAS A MINOR ELECTRICAL--MAYBE A
18 SWITCH THAT DIDN'T WORK OR SOMETHING, I DON'T RECALL. BUT
19 THEY WAS VERY MINOR.

20 IN FACT IT WAS AMAZING FOR THAT SIZE BUILDING WITH
21 EIGHT UNITS IN IT--MOST BUILDERS WOULD HAVE GOT FOUR OR FIVE
22 SHEETS THAT THEY WOULD HAVE HAD TO GO BACK AND REPAIR.

23 Q WITH REFERENCE TO THIS RAILING, WHEN WAS THE
24 RAILING INSTALLED?

25 A I DON'T KNOW.

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MANAGING PARTNER

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EXAM BY KINGHORN

Q DO YOU KNOW WHO YOU HAD DO THAT FOR YOU?

A I HAD ORNAMENTAL IRON? IT WAS A FELLOW I USED
DOWN IN SALT LAKE. IT WAS INTERMOUNTAIN ORNAMENTAL IRON.
THEY'RE DOWN IN DRAPER.

Q THEY WENT UP AND INSTALLED IT?

A YES.

Q WHEN WAS THAT DONE? YOUR RECOLLECTION IS THE
BUILDING WAS COMPLETED--.

A THE BUILDNG WAS ABSOLUTELY COMPLETED WHEN I WAS
ISSUED THAT OCCUPANCY REPORT, AND THAT WAS ISSUED ON THE
30TH OF JULY.

Q OKAY. DO I UNDERSTAND, THEN, THAT THESE OTHER
LITTLE MINOR THINGS WERE DONE BETWEEN THE 23RD, THE DATE OF
THE FINAL COMPLIANCE REPORT, AND THE 30TH, THE DAY THAT THE--.

A NO, NO; NO, OUR FINAL--THAT INSPECTION, THE FINAL
INSPECTION REPORT WE GOT WAS ON THE 23RD OF JULY.

NOW, THEY HAD COME OUT, AND THIS IS WHERE WE
DON'T HAVE THAT RECORD, THAT NEXT-TO-LAST INSPECTION REPORT.
I DON'T KNOW, I THOUGHT I HAD GIVEN IT TO YOU.

1 BUT THEY MARKED DOWN, LIKE I SAY, THREE ITEMS THAT
2 HAD NOT MET WITH THEIR CODE. SO WE RE-REPAIRED THOSE, CALLED
3 THEM BACK, AND THEY COME OUT ON THE 23RD OF JULY AND
4 INSPECTED THE BUILDING AND GIVE US THE FINAL OKAY FOR AN
5 OCCUPANCY.

THEN THEY MADE THAT OUT AND HANDED IT TO ME ON THE

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1 30TH OF JULY, AND THAT WAS IT.

2 Q THAT WAS IT?

3 A WELL, NOW, I STILL HELD THE RESPONSIBILITY, YOU KNOW.
4 YOU NEVER KNOW ALL OF THE PROBLEMS IN A BUILDING.

5 AND THE INSPECTOR DOESN'T KNOW, EITHER. AND
6 LIKE A PLUG WON'T WORK OR A FAUCET ISN'T WORKING PROPERLY
7 OR A TOILET'S LEAKING, ANY OF THESE THINGS CAN OCCUR.

8 WELL, THE BUILDER HAS THAT RESPONSIBILITY FOR A
9 YEAR AFTER COMPLETION.

10 BUT THEY'RE VERY MINOR; USUALLY ANNOYING THINGS.
11 BUT FROM THE 30TH OF JULY, THAT BUILDING, AS FAR AS I WAS
12 CONCERNED, I HAD COMPLETED MY JOB.

13 Q OKAY. DID YOU FURNISH ANY WORK TO THAT BUILDING
14 AFTER THE 30TH OF JULY, THAT YOU CAN RECALL?

15 A NOT UNTIL I WAS CALLED BACK UP ON THE JOB.

16 Q WHEN WAS THAT?

17 A IT WAS SOMETIME IN LATE NOVEMBER OR EARLY DECEMBER.

18 Q THAT WAS WHEN THE PIPES FROZE AND THE WATER--

19 A YES.

20 Q --BURST AND SO ON?

21 A YES, THAT WAS IT.

22 Q DID YOU FURNISH ANY WORK ON THE JOB AT THAT DATE?

23 A I WENT UP AND ASSESSED THE DAMAGE OR LOOKED IT
24 OVER TO SEE WHAT THE PROBLEM WAS. MCDONALD CALLED ME EARLY
25 THAT MORNING AND SAYS, "WE HAVE A PROBLEM UP HERE, COME ON UP."

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MANAGING PARTNER

EXAM BY KINGHORN

SO I WENT UP, AND I LOOKED IT OVER TO SEE, YOU KNOW,
WHAT WAS WRONG. AND THE PIPES HAD BROKE, AND IT'S MY
UNDERSTANDING THE REASON THE PIPES BROKE WAS BECAUSE ALL THE
HEAT IN THE BUILDING HAD BEEN SHUT OFF.

NOW, AFTER I HAD GOTTEN THE OCCUPANCY, THE BUILDING
WAS TURNED OVER TO CRYSTAL DEVELOPMENT.

THEY WAS THE ONES THAT WAS SUPPOSED TO MANAGE THE
BUILDING OR SELL IT OR WHATEVER. BUT AS THE CONTRACTOR, YOU
KNOW, I WAS THROUGH WITH MY PORTION.

THEN THEY CALLED ME TO COME UP THERE, AND I ASSESSED
ALL THE DAMAGE AND STARTED TO CALL AROUND TO GET PEOPLE TO
FIX IT.

I CALLED THE BANK TO SEE IF THERE WAS INSURANCE
COVERING THE BUILDING. WELL, I TALKED TO DON NIELSEN AT THAT
TIME, AND DON TOLD ME THAT THEY HAD--HAD REDUCED THE COVERAGE
OR SOMETHING, YOU KNOW, BUT THAT THE INSURANCE ON THE BUILDING
AT THAT TIME WOULD NOT COVER THE DAMAGE.

SO I WAS GETTING READY TO GO BACK UP, AND IN THE
MEANTIME OLD VANCE MCDONALD SAID, "YOU STAY AWAY FROM THE
BUILDING. WE DON'T NEED YOU UP THERE. WE'LL HANDLE IT
OURSELVES."

WELL, CONSEQUENTLY I NEVER WENT BACK UP AND HAD
ANY MORE TO DO WITH IT BECAUSE THEY DIDN'T WANT ME UP THERE.

Q IN YOUR MIND, WAS VANCE MCDONALD'S CALL TELLING
YOU ABOUT THE DAMAGE SOME REQUEST FOR FURTHER WORK ON THE

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1 BUILDING?

2 A WELL, YEAH. YEAH, I WOULD SAY IT WAS, BECAUSE
3 THERE WAS DAMAGE UP THERE AND VANCE COULDN'T HANDLE IT.

4 AND I WAS THE CONTRACTOR ON THE BUILDING. I WAS
5 ALSO A PARTNER IN THAT THING UP THERE. SO YES, THEY WANTED
6 ME BACK UP THERE TO GET IT FIXED. THAT WAS THE WAY I
7 INTERPRETED IT.

8 Q BETWEEN THE TIME VANCE MCDONALD CALLED YOU ABOUT
9 THE WATER DAMAGE AND THE TIME OF THE OCCUPANCY CERTIFICATE,
10 DID YOU GO TO PARK CITY OR SEND ANYBODY TO PARK CITY FOR
11 ANY REASON TO DO ANYTHING ON THAT BUILDING THAT YOU CAN RECAL
12 I REALIZE IT WAS A LONG TIME AGO.

13 A NO WORK. NO WORK. THERE WAS NO MORE WORK DONE
14 AFTER THAT PERIOD OF TIME THAT WAS IN NEED OF ANYTHING. IF
15 IT WAS, I DIDN'T KNOW. I HAD LEFT THE BUILDING AND I WAS
16 THROUGH WITH THAT JOB.

17 Q OKAY.

18 (WHEREUPON, AT THE APPROXIMATE HOUR OF 2:55
19 P.M., THE PROCEEDINGS STOOD IN BRIEF RECESS;
20 AFTER WHICH, AT THE HOUR OF 3:05 P.M., THE
21 FOLLOWING PROCEEDINGS CONTINUED:)

22 Q MR. DANIELS, CALLING YOUR ATTENTION TO NOVEMBER AND
23 DECEMBER OF 1981, DID YOU HAVE ANY DISCUSSIONS WITH MR. LINNE'
24 OR WITH MR. DANGERFIELD ABOUT SOME EFFORTS TO CHANGE THIS JOI
25 VENTURE AGREEMENT OR ENTER INTO SOME KIND OF NEW AGREEMENT TH,

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Edward D Middley RPR

MADE ME AN OFFER TO GET ME OUT, YOU KNOW.

AND I DIDN'T ACCEPT EITHER ONE OF THEM. ONE WAS FOR \$20,000 AND ONE WAS FOR \$15,000. AND BROWN WAS THE ONE THAT OFFERED \$15,000. HE STARTED AT \$5,000 AND WORKED UP TO \$15,000.

Q WHEN YOU SAY "TO GET YOU OUT," WHAT WAS HE GOING TO PAY YOU FOR? WHAT WAS IT SUPPOSED TO BE FOR?

A WELL, I THINK--I KNOW I HAD TOLD MCCOY I WAS GOING TO FILE THE LIEN ON IT.

AND MCCOY HAD TALKED ME OUT OF IT EACH TIME. AND IT WENT PAST THE LIMIT THAT I COULD FILE THE LIEN AND THEN THE WATER BROKE AND I WAS INVOLVED AGAIN, WHICH EXTENDED MY TIME LIMIT. AND I WAITED UNTIL ALMOST THAT WAS OVER BEFORE I FILED THAT LIEN ON THAT BUILDING.

Q NOW, I GOT CONFUSED THERE. WAS THAT THE REASON YOU AND VERN ROMNEY WENT TO SEE BROWN WAS ABOUT THE LIEN OR--.

A NO, I'M REALLY CLOUDY IN THAT AREA. I DON'T KNOW WHETHER IT WAS TO DISCUSS WITH BROWN HIS OFFER OR--REALLY, IT'S BEEN SO LONG AGO THAT--AND TEMPERAMENT HAS CHANGED SO DRASTICALLY, I JUST DON'T REMEMBER.

Q MR. DANIELS, WITH REFERENCE TO YOUR BUILDING CONTRACT, THERE'S A PROVISION IN THERE FOR A CERTAIN AMOUNT OF OVERHEAD AND PROFIT OF ABOUT \$80,000, IF I CAN RECALL, WITHOUT LOOKING AT THE DOCUMENT. IS THAT ROUGHLY THE NUMBER

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1 THAT YOU RECALL?

2 A THAT IS.

3 Q WAS THAT OVERHEAD AND PROFIT TO COMPENSATE YOU
4 FOR SOMETHING YOU WERE GOING TO DO DURING THE COURSE OF
5 CONSTRUCTION OF THE BUILDING?

6 A NO, THAT WAS MY PROFIT FOR ERECTING THE BUILDING.

7 Q WELL--.

8 A MAYBE I DON'T UNDERSTAND.

9 Q WAS THAT SEPARATE AND APART FROM BEING PAID FOR
10 SUPERVISING THE BUILDING?

11 A OH, YES; DEFINITELY, YES.

12 Q SO YOU WERE GOING TO--YOU WERE GOING TO GET PAID
13 FOR SUPERVISING THE BUILDING, AND THEN OVER AND ABOVE THAT
14 YOU WERE GOING TO GET PROFITS OF SOME KIND; IS THAT CORRECT?

15 A THAT'S RIGHT.

16 Q DO YOU KNOW HOW MUCH MONEY YOU GOT FROM SUPERVISING
17 THE BUILDING?

18 A \$15,000.

19 Q OKAY. HAS ANY PART OF THAT \$80,000 PROFIT FIGURE
20 BEEN PAID, TO YOUR MIND?

21 A NONE.

22 Q YOU'VE BEEN COMPENSATED FOR NONE OF THE OVERHEAD?

23 A NONE. I HAVE--I HAVEN'T, NO. I HAVEN'T RECEIVED
24 A DIME OTHER THAN THE \$15,000 I WAS PAID FOR SUPERVISION.

25 Q IS IT CUSTOMARY, TO THE BEST OF YOUR KNOWLEDGE, FOR

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1 A CONTRACTOR TO BE PAID FOR SUMS OVER AND ABOVE HIS SUPERVISION
2 AND DIRECTION OF THE MATERIALMEN AND SUBCONTRACTORS IN A
3 PROJECT?

4 A WELL, I CAN'T REALLY ANSWER YOUR QUESTION BECAUSE
5 I DON'T REALLY UNDERSTAND WHAT YOU MEAN.

6 Q WELL, YOU'VE BEEN A CONTRACTOR FOR SEVERAL YEARS?

7 A RIGHT.

8 Q AND AT THE TIME OF THIS, YOU HAD BEEN A CONTRACTOR
9 FOR ABOUT THREE YEARS?

10 A YES.

11 Q NOW, IN THAT TIME, THAT SIX YEARS, THE THREE YEARS
12 BEFORE THIS AND ABOUT THE THREE YEARS THAT HAVE ELAPSED SINCE
13 THAT TIME, HAVE YOU BECOME FAMILIAR WITH THE CUSTOMS IN THE
14 BUILDING CONSTRUCTION TRADE, CUSTOMS AND PRACTICES OF CONTRACTORS?

15 A ONLY MY OWN.

16 Q YOU NEVER TALK TO ANY OTHER CONTRACTORS ABOUT HOW
17 THEY CHARGE FOR THEIR SERVICES?

18 A NO.

19 Q IN ALL THE OTHER PROJECTS YOU'VE BUILT, HAVE YOU
20 RECEIVED AMOUNTS FOR PROFITS OVER AND ABOVE THE PAYMENTS YOU'VE
21 RECEIVED FOR SUPERVISING THE WORK OF SUBCONTRACTORS AND
22 DIRECTING AND MANAGING THE PROJECT?

23 A WELL, THAT IS DIFFERENT THAN THIS PROJECT. BUT THE
24 OTHER--WHILE I WAS BUILDING SINGLE HOMES, THE COSTS OF
25 BUILDING A HOUSE IS--YOU DON'T CONTROL THAT. YOU CONTROL THE

1 COST OF MATERIAL AND LABOR TO A POINT TO BUILD A PROFIT AT
2 THE END.

3 BUT SOMETIMES THAT PROFIT DOES NOT APPEAR AT THE
4 END. I MEAN IT JUST IS NOT THERE. I'VE BUILT SOME HOUSES--IT
5 FACT AN EXAMPLE WAS IN '80, THE SPRING OF '80, I PAID PEOPLE
6 A THOUSAND DOLLARS TO BUY THE HOUSE.

7 IN ESSENCE, THAT'S WHAT IT TURNED OUT, THAT I WAS
8 PAYING THEM A THOUSAND DOLLARS TO BUY THE HOUSE, BECAUSE THE
9 INTEREST THAT I WAS BEING CHARGED WAS EATING ME ALIVE. IT AT
10 UP ALL THE PROFIT THAT I WOULD MAKE OR REALIZE, YOU KNOW.
11 THAT'S WHEN THE INTEREST WENT UP TO 22 PERCENT AND I HADN'T
12 MADE PROVISIONS FOR ANYTHING LIKE THAT.

13 Q AND THAT'S A RISK THAT YOU USUALLY HAVE TO TAKE?

14 A THIS IS A RISK. BUT IN THIS SITUATION, NO, THE
15 RISK WASN'T THERE ON A PROFIT MARGIN.

16 Q YOU REALLY WERE AT NO RISK OF THAT IN THIS CASE?

17 A WELL, I SHOULDN'T HAVE BEEN AT RISK, BECAUSE IT
18 SHOULD HAVE BEEN THERE, AND IT WAS AGREED UPON THAT--YOU KNOW
19 SO ACTUALLY IT WAS SAFER IN THIS AREA THAN IT IS GOING OUT
20 AND BUILDING A HOME AND THEN EXPECTING TO SELL IT.

21 IF YOU SELL IT IN A SHORT TIME, YOU CAN MAKE A
22 PROFIT ON IT. IF YOU SIT ON IT FOR A PERIOD OF TIME, YOU'RE
23 GOING TO HAVE TO PAY SOMEBODY TO GET IT OFF. IT'S JUST
24 BETTER TO DO THAT.

25 Q IN CASE YOU WEREN'T GOING TO SELL THAT AND RECOVER

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1 YOUR PROFIT, WERE YOU--.

2 A SELL WHAT?

3 Q SELL THE BUILDING, THE EIGHT-PLEX.

4 A NO.

5 Q I'M TRYING TO DISTINGUISH IN MY MIND BETWEEN A
6 CONTRACTOR'S FEE WHICH IS CUSTOMARY IN THIS KIND OF
7 CONSTRUCTION--WHEN A DEVELOPER HAS A BUILDER BUILD A
8 BUILDING, THERE'S A CERTAIN AMOUNT FOR THE HARD COST,
9 THEN THERE'S A BUILDER'S FEE THAT REPRESENTS WORK IN
0 SUPERVISING AND DIRECTING THE SUBCONTRACTORS AND ORDERING
11 MATERIALS AND DOING THE PAPERWORK AND ALL OF THAT STUFF.

12 AND THAT'S THE KIND OF COMPENSATION THAT I'VE
13 SEEN BEFORE AND THAT I'M FAMILIAR WITH AS A CUSTOM AND
14 PRACTICE IN THE CONSTRUCTION INDUSTRY FOR THIS TYPE OF
15 BUILDING.

16 BUT THERE'S USUALLY NO IDENTIFIED ITEM FOR PROFIT
17 IN THERE FOR THE CONTRACTOR. IN THIS ONE, FOR SOME REASON,
18 THE WAY THAT CONTRACT'S WRITTEN--AND YOU DRAFTED THAT--THERE'S
19 A DIFFERENCE, THERE'S SOMETHING IN THERE FOR PROFIT, AND
20 I'M TRYING TO GET AN UNDERSTANDING OF WHAT YOU INTENDED WITH
21 THAT AGREEMENT, WHETHER THAT PROFIT WAS TO COMPENSATE YOU
22 FOR SOMETHING OR WHETHER IT WAS INTENDED FOR SOMETHING ELSE.
23 AND I'D LIKE YOU TO TELL ME ABOUT THAT IF YOU CAN.

24 A THE WAY THAT CONTRACT THAT I PRESENTED COULD HAVE
25 BEEN PRESENTED TWO WAYS: THE WAY IT WAS OR I COULD HAVE

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1 INCREASED THE COST OF THE BUILDING TO COVER MY PROFIT.

2 I WOULDN'T HAVE GOTTEN THE PROFITS OUT OF THE
3 CONSTRUCTION LOAN. THE BANKS ARE NOT GOING TO ALLOW ME TO
4 MAKE A PROFIT OFF THE CONSTRUCTION.

5 BUT IT WAS TO SHOW THAT THAT PROFIT, THAT I WASN'T
6 DOING THE BUILDING FOR FREE, THAT I WANTED TO MAKE A PROFIT
7 OFF OF THE BUILDING. AND I SHOWED THAT BY--PLUS I AGREED TO
8 BUILD A BUILDING FOR \$875,000 PLUS A PROFIT AND AN OVERHEAD,
9 AND THIS WAS AGREED UPON.

10 AND THAT WAS THE ONLY WAY--I THINK THEY WERE AT
11 THE MAX ON THE BANK LOAN, I'M NOT SURE.

12 Q BUT YOU DIDN'T BUILD THIS FOR FREE; DID YOU?

13 A NO, THAT'S WHERE THE \$80,000 PROFIT CAME FROM.

14 Q WELL, YOU HAVEN'T RECEIVED ANY PART OF THAT?

15 A SO IT'S BEEN FREE SO FAR, OR--.

16 Q WELL, BUT IT'S NOT BEEN FREE BECAUSE YOU HAVE
17 BEEN PAID FOR SUPERVISION; IS THAT CORRECT?

18 A WELL--.

19 MR. MADSEN: I THINK THE QUESTION IS ARGUMENTA

20 MR. KINGHORN: WELL, I'M TRYING TO DISTINGUISH
21 IN MY MIND BETWEEN--.

22 A NO, MY SUPERVISION WAS MY LABOR. I WENT UP THERE
23 EVERY DAY, MADE SURE THAT THAT BUILDING WAS BEING PROPERLY
24 PUT TOGETHER, AND IT WAS THROUGH MY EXPERTISE THAT I COULD
25 DO IT.

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EXAM BY KINGHORN

1 WELL, I WASN'T GOING TO GO UP THERE FOR ALMOST A
2 YEAR FOR NOTHING. I JUST WASN'T GOING TO DO IT. THE \$80,000
3 WAS FOR PROFIT THAT I WAS GOING TO MAKE OFF OF THE OVERALL
4 THING. BUT I WAS GOING TO BE PAID FOR THE TIME THAT I WENT
5 UP THERE AND--.

6 Q IN ADDITION TO THE PROFIT?

7 A WELL, YES. I MEAN I WAS GOING TO--.

8 Q THAT'S ALL. I'M JUST TRYING TO UNDERSTAND WHAT
9 THAT ALL MEANS, AND I THINK I UNDERSTAND THAT NOW, AND I
0 APPRECIATE YOUR BEING PATIENT WITH ME ABOUT THAT. I DON'T
1 THINK I HAVE ANYTHING ELSE. THANK YOU.

2 MR. JEFFS: MR. DANIELS, MY NAME IS DEAN JEFFS--
3 ARE YOU SAVING UP FOR THE LAST?

4 MS. MCCLURG: I JUST WANTED TO ASK A COUPLE OF
5 QUESTIONS. DO YOU MIND?

6 MR. JEFFS: NO, I THOUGHT I HEARD YOU TELL HIM--

7 MS. MCCLURG: WELL, I WASN'T GOING TO.

8 EXAMINATION

9 MS. MCCLURG:

0 Q LOOKING AT THIS EXHIBIT 118, THE COST BREAKDOWN
1 SUMMARY, I DON'T SEE A DATE ON THERE. AM I MISSING THAT?

2 A YES, MA'AM. IT'S RIGHT HERE. THIS WAS THE DATE
3 THAT I SUBMITTED THIS COST BREAKDOWN TO ALL OF THE PARTIES
4 INVOLVED, AND I JUST NEVER CHANGED IT.

5 MR. MADSEN: THE DISBURSEMENTS WERE LISTED

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and P Middley RDB

1 THIS WAS BEFORE WE GOT THE LOAN OR DURING THE PROCESS BEFORE
2 WE GOT THE LOAN, NEAR THE END, JUST BEFORE WE GOT IT, I COULD
3 HAVE BEEN--MCDONALD USED THAT FIGURE THAT THE BANK WAS WILLING
4 TO LOAN \$875,000 ON THE BUILDING, AND "CAN WE BUILD THE
5 BUILDING FOR THAT?"

6 AND THAT'S WHERE I FIGURED THIS--WELL, MY HARD COST
7 I KEPT THOSE WITHIN THAT HARD COST, YOU KNOW. THE REST OF IT
8 THERE, YES, THAT WOULD BE--AND I HAD TO REVISE SOME OF THOSE
9 FIGURES, BECAUSE IN A COUPLE OF THEM I WAS A LITTLE HIGH AND,
10 YOU KNOW, IT WAS GOING TO BE MORE ON THE SOFT THAN THE HARD
11 COSTS INVOLVED.

12 Q YOU MEAN YOU HAD TO REVISE THEM DURING THE COURSE
13 OF CONSTRUCTION?

14 A NO, NO; NO, IT WAS BETWEEN THE VERY FIRST ONE I GIV
15 THEM AND THIS ONE HERE. AND I COULDN'T TELL YOU WHAT THEY
16 WERE OR ANYTHING. I DO KNOW THAT IF EVERYTHING WAS TOTALED
17 UP, IT COMES TO WELL--NOT QUITE \$875,000.

18 Q IF WHAT EVERYTHING, WHAT IS TOTALED UP?

19 A ALL THE COSTS, SOFT AND HARD, AND EVERYTHING IS
20 TOTALED UP, AND THE INTEREST PAID, IT COMES TO LESS THAN
21 \$875,000, BECAUSE THERE WAS STILL \$13,000 REMAINING IN THE
22 CONSTRUCTION LOAN WHEN I STOPPED DRAWING.

23 Q ALL RIGHT. I HAVEN'T LOOKED THIS LIST OVER
24 CAREFULLY. IS THE INTEREST DURING THE TERM OF THE LOAN
25 INCLUDED ON THESE COSTS SOMEWHERE?

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1 Q DO YOU REMEMBER WHAT DAY IT WAS YOU SUBMITTED THAT
2 LAST DRAW REQUEST?

3 MR. MADSEN: WELL, THAT'S--.

4 A WELL, IT'S IN HERE. LIKE WE WAS JUST TALKING ABOUT,
5 IT'S THE 15TH OF JUNE WAS THE LAST--

6 MR. MADSEN: OF WHAT YEAR?

7 A --OF 1981.

8 Q NOW, THEN, I TAKE IT THEN THAT ON THE 15TH OF JUNE
9 YOU HAD SUBSTANTIALLY COMPLETED ALL THE WORK?

10 A YES.

11 Q AND I BELIEVE YOU TESTIFIED THAT BETWEEN THAT
12 DATE AND THE 23RD OF JULY, 1981, THE CITY INSPECTORS IDENTIFIED
13 A RAILING AND A COUPLE OF OTHER ITEMS THAT NEEDED TO BE FIXED
14 AND THAT YOU COMPLETED THOSE BY THE 23RD OF JULY?

15 A YES, SIR.

16 Q AND THAT THEN FROM THAT DATE FORWARD THERE WAS
17 NOTHING FURTHER FOR YOU TO DO ON THE PROJECT TO COMPLETE
18 YOUR CONTRACT?

19 A THAT'S RIGHT, SIR.

20 Q NOW, YOU INDICATED I THINK THAT YOU CONSIDERED
21 THAT WHEN YOU RECEIVED A CALL TO GO UP AND LOOK AT THE
22 WATER DAMAGE, THAT THAT EXTENDED THE TIME FOR YOU FILING A
23 MECHANIC'S LIEN?

24 A THIS IS WHAT THE BOARD OF CONTRACTORS ADVISED ME.

25 Q OKAY. AND NOW I THINK YOU SAID YOU WENT UP THERE

1 AND LOOKED IT OVER AND CONTACTED THE INSURANCE COMPANY, BUT
2 YOU DIDN'T DO ANY WORK; IS THAT RIGHT?

3 A BECAUSE THEY TOLD ME TO STAY AWAY FROM IT, BACK OFF,
4 THAT THERE WAS NOTHING I WAS GOING TO DO ON IT. VANCE MCDONALD
5 TOLD ME THIS.

6 Q SO IN FACT, THEN, YOU DIDN'T DO ANY WORK OR LABOR
7 IN CONNECTION WITH THE BUILDING ITSELF IN CONNECTION WITH
8 THE WATER DAMAGE OR ON THOSE DATES?

9 A NO, NO. NO PHYSICAL LABOR WAS DONE OTHER THAN MY
10 OWN.

11 Q YOU JUST WENT UP AND LOOKED IT OVER?

12 A RIGHT.

13 Q AND YOU ALSO CONTACTED DESERET FEDERAL SAVINGS AND
14 LOAN?

15 A TO SEE IF THE INSURANCE ON THE BUILDING WOULD COVER
16 THE DAMAGE. AND DON NIELSEN TOLD ME THAT IT WOULDN'T.

17 NOW, AT THAT TIME THE REASON I BACKED OFF WHEN
18 THEY TOLD ME TO BACK OFF IS BECAUSE I WAS NO LONGER IN
19 CHARGE OF THE BUILDING. I TURNED IT OVER TO THIS OTHER
20 ENTITY, AND--.

21 Q YOU DIDN'T DO ANY OTHER THINGS IN CONNECTION WITH
22 THE WATER DAMAGE THAN WHAT YOU'VE JUST TOLD ME?

23 A RIGHT.

24 MR. MADSEN: I DON'T THINK THAT'S A COMPLETE
25 SUMMARY, BUT I CAN RE-ASK IT ON CROSS.

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EXAM BY JEFFS

1 ANY LITTLE PROBLEM THAT WERE TO COME OUT OF NORMAL OCCURRENCES
2 IN THE BUILDING. I COULD HAVE DONE THAT.

3 Q BUT WHAT I'M TALKING ABOUT IS THAT THE THINGS YOU
4 DID AT THE TIME OF THE WATER DAMAGE, IN YOUR MIND, WERE AS
5 MUCH REQUIRED BECAUSE OF YOUR WARRANTY AS FOR ANY OTHER THING
6 IF IT TURNED OUT TO BE A BREACH OF WARRANTY; IS THAT RIGHT?

7 A I DON'T KNOW WHAT YOU'RE ASKING ME, REALLY. I
8 THOUGHT I ANSWERED YOU.

9 Q DIDN'T YOU HAVE, IN YOUR MIND, SOME OBLIGATION
10 UNDER YOUR WARRANTY TO SEE IF THAT WAS DAMAGE RESULTING
11 FROM--.

12 A I WORRIED ABOUT IT.

13 Q OKAY.

14 A I WORRIED ABOUT IT, BUT--.

15 Q NO FURTHER QUESTIONS.

16 MS. MCCLURG: I DO.

17 EXAMINATION

18 BY MS. MCCLURG:

19 Q MR. DANIELS, REFERRING AGAIN TO EXHIBIT 10, AND
20 I'LL HAND YOU THAT EXHIBIT, THE BUILDING CONTRACT AGREEMENT,
21 WHICH I THINK YOU STATED YOU PREPARED WHICH IS PART OF THAT
22 EXHIBIT--YOU MAY HAVE GONE OVER THIS BEFORE, AND I WAS READING
23 THE EXHIBIT IN THE INTERIM--AND I'M STILL NOT CLEAR, ON PAGE
24 4 OF THE EXHIBIT, THERE'S A REFERENCE THAT, THE THIRD LINE
25 DOWN, THAT "THE CONTRACTOR FOR SAID WORK SHALL BE PAID"--I

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1 THINK IT'S SUPPOSED TO BE \$797,000; IS THAT CORRECT?

2 A THAT THERE--THAT PART OF IT IS WHAT THE BANK,
3 AFTER THEY TOOK THEIR PART OFF OF THE TOP OVER THE AMOUNT
4 OF THE CONSTRUCTION LOAN, AFTER THE TOTAL AMOUNT OF THE
5 CONSTRUCTION LOAN WHICH WAS \$875,000.

6 NOW, THE BANK FROM 75--SO THEY TOOK \$78,000 BEFORE
7 ANYONE HAD A LOAN. THEY JUST TOOK IT.

8 Q THE BANK TOOK \$78,000 OFF THE CONSTRUCTION LOAN?

9 A YES, THAT'S THE WAY THAT WORKS.

10 Q WHAT WAS THAT FOR?

11 A I HAVE NO IDEA. THEIR SOFT COSTS, THEIR
12 PERCENTAGE OF CHARGING, AND MAYBE THIS GENTLEMAN COULD
13 ANSWER IT TO YOU.

14 Q NOW, WAS IT YOUR IMPRESSION THAT THE AMOUNT YOU
15 WERE SUPPOSED TO SPEND FOR THE MATERIALS AND THE SUPPLIES
16 WAS SUPPOSED TO BE APPROXIMATELY \$797,000?

17 A THAT WAS THE AMOUNT OF MONEY THAT WAS AVAILAEL
18 TO ME. AND IT WAS OUT OF THAT AMOUNT OF MONEY I KNEW THAT
19 THERE WAS AN INTEREST CHARGE GOING TO BE COMING OUT OF THAT.

20 THERE WAS OTHER CHARGES THAT--LIKE THE SEWER AND
21 THE WATER AND THE FEE THAT PARK AVENUE CHARGES, THEY HAD
22 TO COME OUT OF THAT.

23 MR. MADSEN: YOU MEAN PARK CITY, NOT PARK
24 AVENUE?

25 A YEAH, PARK CITY SERVICE FEES THAT HAD TO COME OUT

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Edward D. Middle

EXAM BY MCCLURG

OF THAT. THAT WAS THE TOTAL AMOUNT OF MONEY THAT WAS AVAILABLE TO ME TO BUILD THAT BUILDING WITH, AND THAT WAS MY BUDGET. THE \$797,000 WAS MY BUDGET.

Q OKAY. THEN LOOKING BACK AT EXHIBIT 118, DOES THAT INCLUDE THE FIRST FOUR ITEMS HERE?

A THAT INCLUDES--YES, THAT INCLUDES EVERYTHING (1) THAT PAGE DOWN TO LINE 57.

Q OKAY. ALL RIGHT, AND THEN YOU WERE TO BE PAID A PROFIT OF APPROXIMATELY \$80,000 OVER AND ABOVE THAT AMOUNT?

A YES.

Q DO YOU KNOW WHERE THAT MONEY WAS SUPPOSED TO COME FROM?

A WHEN THEY SOLD THE UNIT. IT WAS MY UNDERSTANDING THAT ALL OF THOSE UNITS WERE SOLD.

Q BEFORE THE CONSTRUCTION STARTED?

A YES.

Q NOW, AND I KNOW YOU DISCUSSED THIS WITH MR. KINGHORN, BUT WOULD YOU EXPLAIN AGAIN, PLEASE, WAS THAT \$80,000 SUPPOSED TO COMPENSATE YOU FOR YOUR SUPERVISION WORK ON THE PROJECT?

A NO, MA'AM; THAT WAS MY PROFIT.

Q THAT WAS SUPPOSED TO COMPENSATE YOU FOR ANY WORK THAT YOU DID ON THE PROJECT?

A THAT WAS MY PROFIT. IT WAS TO COMPENSATE THE GENERAL CONTRACTOR THAT BUILT THE BUILDING, AND THAT WAS HIS

1 PROFIT. LIKE ALL COMPANIES MAKE A PROFIT; THAT'S HOW THEY
2 EXIST, THAT'S HOW THEY GROW, AND THAT'S HOW THEY GO FORWARD.

3 THE \$15,000 WAS FOR MY LABOR TO SUPERVISE THAT JOB
4 UP THERE.

5 Q SO NOW IF YOU CAN ANSWER THIS YES OR NO, PLEASE
6 DO: WAS ANY PART OF THAT \$80,000 SUPPOSED TO COMPENSATE YOU
7 FOR YOUR WORK ON THE PROJECT?

8 A NO.

9 Q ALL RIGHT. WAS IT SUPPOSED TO COMPENSATE YOU FOR
10 ANY MATERIALS SUPPLIED TO THE PROJECT?

11 A NO.

12 MS. MCCLURG: THANK YOU. NOTHING FURTHER.

13 MR. JEFFS: NOTHING FURTHER.

14 MR. MADSEN: THAT'S ALL.

15 (WHEREUPON, AT THE HOUR OF 3:50 P.M., THE
16 PROCEEDINGS CAME TO A CLOSE.)

17
18
19 (TRANSCRIBED BY KIMBERLY K. ROYLANCE)
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