

2010

McNeil Engineering, Inc., McNeil Engineering and Land Surveying, L.L.C., Engcad, L.L.C., and Scott Mcneil v. Benchmark Engineering and Land Surveying, L.L.C., Benchmark Cad Services, L.L.C., Land Development Cadd, Inc., Dale K. Bennett, and Florence Alhambra, individually : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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McNEIL ENGINEERING, INC.,  
McNEIL ENGINEERING AND LAND  
SURVEYING, L.L.C., ENGCAD,  
L.L.C., and SCOTT McNEIL,

Plaintiff/Appellant,

vs.

BENCHMARK ENGINEERING AND  
LAND SURVEYING, L.L.C.,  
BENCHMARK CAD SERVICES,  
L.L.C., LAND DEVELOPMENT  
CADD, INC., DALE K. BENNETT,  
AND FLORENCE ALHAMBRA,  
individually,

Defendant/Appellee.

Appeal No. ~~20080319~~ *2008067-CA*

ORAL ARGUMENT REQUESTED

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BRIEF OF APPELLEE

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APPEAL FROM ORDER AND JUDGMENT DATED OCTOBER 20, 2010 OF  
THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,  
STATE OF UTAH THE HONORABLE PAT B. BRIAN  
TRIAL COURT CASE NO. 050917315

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UTAH APPELLATE COURTS  
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IN THE UTAH COURT OF APPEALS

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McNEIL ENGINEERING AND LAND  
SURVEYING, L.L.C., ENGCAD,  
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### **STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction under Utah Code Ann. § 78A-4-103(2)(j) pursuant to an Order of the Utah Supreme Court entered November 1, 2010.

### **STATEMENT OF THE ISSUES**

POINT I. Appeal of the Judgment and Underlying Orders is Properly Before This Court.

POINT II. Under the Clear and Unambiguous Terms of the ME&LS Operating Agreement, Dale Bennett Did Not Terminate His Employment with the Company (ME&LS) So Is Still a Member of ME&LS.

POINT III. The Relevant Language of the Operating Agreement Is Not Ambiguous and the Intentions of the Parties Are Clear from a Plain Reading of the Operating Agreement.

POINT IV. Plaintiffs' Position Ignores the Clear Language of the Operating Agreement and Unnecessarily Relies on Irrelevant Facts Outside the Operating Agreement.

POINT V. Proper Construction of the Clear Language of the Operating Agreement Does Not Lead to Absurd Results or to Nullification of its Terms.

POINT VI. Plaintiffs' Attempt to Restructure the  
Operating Agreement, Without Notice to Bennett,  
Is Invalid and a Violation of Judge Boyden's  
Previously Announced Order.

**STATEMENT OF THE CASE**

The plaintiffs filed this suit, claiming, among other things, that the resignation of Dale K. Bennett ("Bennett") as an "employee" of McNeil Engineering, Inc. ("MEI") automatically constituted a "withdrawal" by him as a "member" of McNeil Engineering & Land Surveying, LLC ("ME&LS"). Following briefing and argument on the parties' Cross-Motions for Partial Summary Judgment, Judge Ann Boyden ruled that Bennett remains a member of ME&LS and is entitled to all of the benefits of a member. Plaintiffs' Motion to Reconsider was denied by Judge Pat Brian.

Thereafter the District Court, Judge Brian, entered a Judgment in favor of Bennett for Bennett's unpaid percentage share of ME&LS distributions for 2005 and 2006.

This Court held that the judgment had not been properly certified for appeal and the first appeal was dismissed.

Upon remand ME&LS filed a Motion to Revise Orders and Judgment that was denied by Judge Dever. Also upon remand,



Bennett filed his Motion to Enforce Judgment that was granted.

Thereafter Bennett filed a Motion for Certification, joined in by ME&LS, that Judge Boyden's judgment is final for purposes of Rule 54(b) and for appeal that was granted.

### **STATEMENT OF FACTS**

1. Scott F. McNeil ("McNeil") formed McNeil Engineering, Inc. ("MEI") in 1983, and since has been the sole owner of MEI. (R.1168)

2. Upon its formation, Bennett became an employee of MEI and remained an employee of MEI from 1983 until he resigned as an employee of that company on August 17, 2005. (R.1187; R.6630)

3. In 1996, McNeil formed three limited liability companies associated with MEI to perform the engineering and surveying services to its clients theretofore carried on by MEI itself. ME&LS was one of the three LLCs created. (R.1169-1170, 1173; R.6627)

4. MEI remained the employer of all personnel and leased them to ME&LS and to the other two companies. (R.1178) MEI also provided administrative services through its staff employees for all of the companies. (R.1175-

1177; R.6628) MEI has provided no engineering or surveying services since 1996. (R.1174)

5. Bennett became a 25% member owner of ME&LS at its inception in 1996 and thereafter rendered services on ME&LS projects as a leased "employee" of and for MEI. (R.6628) In 2005 Bennett owned 252 shares for a total of 26.53% of the membership interest in ME&LS. (R.6618)

6. Both McNeil and Bennett were members and managers, but never employees, of ME&LS. (R.6601) In fact, ME&LS has never had any employees. All services on ME&LS projects were provided to ME&LS by leased employees of MEI working for MEI, not for ME&LS, on work of ME&LS. (R.1178; R.6628, emphasis added.)

7. Both McNeil and Bennett understood from the beginning that Bennett was an employee of MEI. (R.1175; R.5445)

8. MEI provided and paid for all of the services required of an employer to all of its employees, including Bennett. (R.5444-5445) These included things such as salary, bonuses, insurance, office, secretarial help, internet, telephone, automobile and professional association membership, etc.

9. An Amendment No. 2, dated November 1, 2001, to the Operating Agreement ("Operating Agreement") of ME&LS provided in Sec 12.1 that a member

"shall cease to be a member . . . upon the withdrawal of a member,"

and in Section 12.3 that

"a member shall be deemed to withdraw when the member voluntarily resigns or terminates the member's employment with the Company for reasons other than bankruptcy, death, disability or incompetence." (R.6618-21, emphasis added.)

10. Under definitions of the ME&LS Operating Agreement, in Section 1.10, the "Company" is defined as

"McNeil Engineering and Land Surveying, L.C., a liability company formed under the laws of Utah, and any successor company." *Id.*

11. MEI is not referred to in either the ME&LS Operating Agreement or in Amendment No. 1 or Amendment No. 2, nor is there any definition of "employment," "employee" or "withdrawal." There is also no reference to the term "leased employee."

12. On August 17, 2005, Bennett submitted a letter to McNeil stating that he was resigning his employment with MEI. (R.2600-2601) Bennett did nothing to withdraw from, sell or otherwise give up his valuable ownership interest in ME&LS. Nor was there any reason why he should do so.

13. In August, 2006, the parties filed cross motions for summary judgment on Bennett's status as a member of ME&LS and his rights, if any, as a member. (R.2510-2581; R.2585-2644)

14. On November 17, 2006, Judge Boyden ruled that Bennett is still a member of ME&LS and is entitled to:

"All of the rights of a member, including, for example, the same right to current information, accounting, disbursements, and other benefits that any other member of ME&LS is entitled to receive."

(R.3119-22) That ruling was confirmed by Judge Boyden's Order dated December 21, 2006. *Id.*

15. None of the documents related to ME&LS had ever referred to MEI until an Amendment No. 4 was purportedly adopted unilaterally on November 29, 2006, without notice to or approval of Bennett, just twelve days after Judge Boyden's ruling on November 17, 2006. (R.5772-75)

16. Amendment No. 4 is a clear attempt to overrule and void Judge Boyden's Order. Amendment No. 4 omitted Bennett as a member and his membership interest was transferred to McNeil and the other members of ME&LS without consideration to Bennett.

17. Appellants filed a motion to reconsider Judge Boyden's Order which was denied by Judge Brian on April 2, 2008. (R.6791-6793)

18. During the year 2005, ME&LS made distributions to members totaling \$320,136.10. These distributions were paid out quarterly. In January 2005, a distribution of \$100,000 was paid, and Bennett was paid \$26,526.32, or 26.53%. In April 2005, a distribution of \$90,000 was paid and Bennett was paid \$23,873.68, or 26.53%. In September 2005, a distribution of \$30,136.10 was paid. In November 2005, a distribution of \$100,000 was paid. Bennett was not paid his share of either the September or November distributions. (See Yearly General Ledger Detail Report. Bates numbered ME 0009934, attached as Exhibit 2.) (R.6432-6433)

19. During the year 2006, ME&LS made distributions to members totaling \$405,740.40. In February 2006, a distribution of \$105,740.40 was paid. In April 2006, a distribution of \$90,000 was paid. In July 2005, a distribution of \$100,000 was paid. In October 2005, a distribution of \$100,000 was paid. Bennett was not paid

his share of any of the distributions paid to all the other members during 2006. *Id.*

20. In January, 2007, Bennett filed a Motion for Order of Judgment seeking an order requiring payment to him of his unpaid share of ME&LS distributions for 2005 and 2006 in the amount of \$142,974.42. (R.6432-6435) *Id.*

21. On December 21, 2006, Judge Boyden granted that motion subject only to an accounting as to what funds Bennett had received and what he had not received. (R.6421-6427)

22. On April 3, 2008, following briefing and oral argument, Judge Brian entered an Order and Judgment in favor of Bennett in the amount of \$142,174.93, representing Bennett's share of unpaid distributions in 2005 and 2006. The Court also found that there was no just reason for delaying entry of the judgment and certified the judgment as final. (R.6791-6793)

23. ME&LS filed its first Notice of Appeal and this Court dismissed the appeal because it was not properly certified as final for purposes of appeal. (Attachment 1 - Court of Appeals Decision.)

24. Thereafter, Bennett filed his Motion for Certification, joined in by ME&LS, that Judge Brian's Order and Judgment on April 3, 2008 was final for purposes of appeal and that was granted on October 19, 2010. (Attachment 2 - Order Granting Certification, including findings.)

### **SUMMARY OF ARGUMENT**

During the time Bennett was an employee of MEI from 1996 until he resigned as an employee on August 17, 2005, MEI provided to him all of the services and support usually provided by an employer to its employees.

Bennett has never been an employee of ME&LS. ME&LS has provided no employer support or services to Bennett. In fact, ME&LS, as structured by McNeil, has never had any employees.

McNeil's contention that Bennett's status and termination of employment as an "employee of MEI" somehow automatically constitutes his "withdrawal as a member of ME&LS" is a forced and strained construction beyond any reasonable interpretation of the terms of the ME&LS Operating Agreement. Bennett's work was performed for, and as an employee of MEI, on tasks MEI undertook for ME&LS.

Three judges of the District Court properly ruled, following full briefing and argument on three separate occasions, that the ME&LS Operating Agreement is unambiguous and that Bennett remains a member of ME&LS.

The District Court properly entered the Order and Judgment in the amount of unpaid member distributions for 2005 and 2006 because McNeil did not have a right to offset uncertain, unproven, disputed and unliquidated claims against the distributions Bennett should have received. The District Court's second determination that there was no just reason for delay was proper under the facts of this case.

#### **ARGUMENT**

##### **POINT I. APPEAL OF THE JUDGMENT AND UNDERLYING ORDERS IS PROPERLY BEFORE THIS COURT.**

This appeal is taken by ME&LS from both the Judgment and the underlying Orders of 2010, December 21, 2006, April 2, 2008, and October 19, 2010. The Judgment was certified as final upon remand under Rule 56(b) of the Utah Rules of Civil Procedure by the District Court, and it was determined that "there is no just reason for delay."

This second appeal meets the three requirements set out by the Utah Supreme Court in *Kennecott Corp. v. Utah State*



*Tax Comm'n*, 814 P.2d 1099, 1101 (Utah 1991), and the decision of this Court in the prior appeal. First, there are "multiple claims for relief" by "multiple parties" to this action. Second, "the Judgment and certification entered would otherwise have been appealable absent the other claims," and the District Court made a determination "that there is no just reason for delay" of the appeal.

**POINT II. UNDER THE CLEAR AND UNAMBIGUOUS TERMS OF THE ME&LS OPERATING AGREEMENT, DALE BENNETT DID NOT TERMINATE HIS EMPLOYMENT WITH THE COMPANY (ME&LS) SO IS STILL A MEMBER OF ME&LS.**

Under the unambiguous wording of the ME&LS Operating Agreement, in order to withdraw as a member, Bennett had to resign his "employment" with or withdraw from ME&LS. The unwarranted interpretation plaintiffs attempt to apply to the ME&LS Operating Agreement contradicts the plain and simple meaning of its terms. The undisputed facts are that Bennett was never employed by ME&LS. ME&LS has never had any employees. He resigned his employment from a totally separate and independent company, MEI. Plaintiffs are asking the Court to ignore the plain language of the Operating Agreement and rule that upon his resignation from MEI he withdrew from ME&LS which is a wholly different entity. This transparent attempt to apply terms of the

ME&LS Operating Agreement to MEI is without support in any documents related to either of these entities.

Because Dale Bennett was not employed by and did not resign employment from ME&LS, his membership interests and ownership rights in ME&LS could not have been affected by his August 2005 resignation from MEI under the very clear and carefully crafted provisions of the ME&LS Operating Agreement or under the provisions of any document related to MEI. Plaintiffs' argument would require the Court to ignore the plain language of the Operating Agreement.

ME&LS is a manager-managed limited liability company. Its members include Bennett, McNeil and four other persons. MEI is, and always has been, owned solely by McNeil. The ME&LS Operating Agreement is the governing document for this company. Section 1.10 of the Operating Agreement defines "Company" as "McNeil Engineering and Land Surveying." This definition is determinative of the question of law before the Court. Plaintiffs want the Court to overlook this very clear definition and create, then import into the Operating Agreement, provisions that have no basis in fact, or in usual or customary use, or in any document related to either of these entities. Those

documents crafted by McNeil say what they say and are not subject to manipulation by McNeil to suit his present interests.

The parties do not dispute that the provisions of Amendment No. 2 to the ME&LS Operating Agreement pertaining to the dissociation of a member govern Bennett's membership status in ME&LS. It is also uncontested that under Section 12.1 of Amendment No. 2, a person ceases to be a member if that member terminates employment or withdraws as a member. Section 12.3(a) provides:

"For purposes of this Section, a Member shall be deemed to withdraw when the Member voluntarily resigns or terminates the Member's employment with **the Company** for reasons other than bankruptcy, death, disability or incompetency."

(Emphasis added.) However, at no time has Bennett terminated or withdrawn as a member of ME&LS. His status and his role as a member and manager of ME&LS must not be confused with his role as an employee of MEI.

**POINT III. THE RELEVANT LANGUAGE OF THE OPERATING AGREEMENT IS NOT AMBIGUOUS AND THE INTENTIONS OF THE PARTIES ARE CLEAR FROM A PLAIN READING OF THE OPERATING AGREEMENT.**

The interpretation of a contract begins with the examination of the contract itself. See *Utah Transit Authority v. Salt Lake City Southern R.R. Co., Inc.*, 2006

UT App 46, 131 P.3d 288 ("When interpreting a contract, a court first looks to the contract's four corners to determine the parties intentions, which are controlling.")(quotations and citations omitted); *Trolley Square Associates v. Nielson*, 886 P.2d 61, 63 (Utah Ct. App. 1994)(same). "If the contract is in writing and its language is not ambiguous, the parties' intentions should be determined from the words of the agreement." *Turner v. Hi-Country Homeowners Association*, 910 P.2d 1223, 1225-26 (Utah 1996); see also *ELM, Inc. v. M.T. Enterprises, Inc.*, 968 P.2d 861 (Utah Ct. App. 1998)(holding that if a contract's terms are clear and unambiguous, the court must construe the writing according to its plain and ordinary meaning). "When the contract is not ambiguous, the court may not look beyond the plain and ordinary meaning of the terms therein," *Uintah Basin Medical Center v. Hardy, M.D.*, 2005 UT App 92, 110 P.3d 168.

Section 12.3(a) of the ME&LS Operating Agreement is not ambiguous. The plain and ordinary meaning of its terms are not contested here. To constitute a withdrawal as a member, paragraph 12.3(a) requires that the member voluntarily resign or terminate his employment with "the

Company." This provision could arguably be ambiguous if the term "Company" was not a defined term in the Operating Agreement. "Company", however, is defined only as McNeil Engineering and Land Surveying. Therefore, the "plain and ordinary meaning" of the terms are that in order to be a withdrawing member, the member must voluntarily resign or terminate his employment with ME&LS. That simply has never happened in this case because Bennett has never been an employee of ME&LS. He has not resigned or terminated an employment he has never had nor has he withdrawn so there could have been no effect on his membership.

Bennett stated in his August 17, 2005 letter of resignation, "I therefore resign as an employee of McNeil Engineering, Inc." Thus, Bennett was always employed by, and only resigned his employment from MEI, not from ME&LS. A plain and simple interpretation of the ME&LS Operating Agreement is that Dale Bennett is still a member of ME&LS because he has not withdrawn as a member pursuant to the clearly defined terms of the Operating Agreement and his letter of resignation.

**POINT IV. PLAINTIFFS' POSITION IGNORES THE CLEAR LANGUAGE OF THE OPERATING AGREEMENT AND UNNECESSARILY RELIES ON IRRELEVANT FACTS OUTSIDE THE OPERATING AGREEMENT.**

Plaintiffs ask the Court to look beyond the plain meaning of the terms of the Operating Agreement and conclude that Bennett is no longer a member of ME&LS because his August 17, 2005 "resignation" from MEI was "in effect" also a "withdrawal" from ME&LS. This strained attempt to write new and wholly unsupported terms into the ME&LS Operating Agreement is patently wrong. See *Utah Transit Authority*, 2006 UT App 46 at ¶ 12 (stating that to merit consideration, an alternative interpretation must be based upon the usual and natural meaning of the language used and may not be the result of a forced or strained construction).

Plaintiffs' argument cannot succeed because they attempt to interpret the Operating Agreement using terms that are nowhere found within it. MEI, Bennett's employer, is not mentioned anywhere in the ME&LS Operating Agreement. Bennett's resignation from MEI can have no impact on his ownership interests in ME&LS. Bennett's membership rights in ME&LS stand separate and apart from his status as an employee of MEI.

The fact that Bennett was one of many employees leased by MEI to ME&LS is immaterial to the question before the Court. Because Bennett was employed by MEI, he could have been leased to any or all of the three McNeil LLCs, or he could have remained as an employee of MEI itself, or ME&LS could have leased employees from another employee leasing company. To whom MEI chose to lease Bennett is not relevant to the interpretation of the ME&LS Operating Agreement. Plaintiffs' argument that Bennett's close day-to-day association with ME&LS somehow changed his actual employment status and therefore the meaning of the express terms of the Operating Agreement must be rejected. Plaintiffs are distorting the undisputed facts about Bennett's employment in order to deprive him of his right as a member of ME&LS.

**POINT V. PROPER CONSTRUCTION OF THE CLEAR LANGUAGE OF THE OPERATING AGREEMENT DOES NOT LEAD TO ABSURD RESULTS OR TO NULLIFICATION OF ITS TERMS.**

Plaintiffs claim that any interpretation of Section 12.3 of the Operating Agreement, other than their own, would necessarily "nullify" its terms and lead to "absurd" results. A review of that section, however, demonstrates

that such is not the case. Section 12.3 provides in material part that:

"A member shall be deemed to withdraw when the member voluntarily resigns or terminates the member's employment with the Company . . ."

To begin with, ME&LS and the other two companies had the ability, never invoked, to hire employees of their own to perform the same services as those that were being performed by leased employees of MEI. Thus the word employment clearly would have application had ME&LS decided, or should it at some point decide, to hire its own employees. The word termination cannot be applied to Bennett as a member or as a manager of ME&LS because he did not either voluntarily resign or terminate as to ME&LS. His only termination was as an employee from a wholly different entity, MEI. Thus, plaintiffs' claim that his resignation as an employee of MEI triggered his withdrawal from ME&LS is nonsensical.

Plaintiffs refuse to acknowledge the simple fact that under usual, accepted and customary business practice, the role, rights and duties of an "employee" of a corporation differ markedly from the role, rights and duties of a "member" of an LLC. Plaintiffs do not want to recognize



that under usual and customary practice, the resignation of an "employee" from a corporation has no effect on the employee's position as a "member" of a clearly distinct and different entity, an LLC. Plaintiffs also refuse to acknowledge that under the usual and customary business practices, employees of an employee leasing company do not become employees of the company that leases their services from their employer simply because services for the leasing company's client are provided by the leasing company's leased employees. This is so even though these services benefit their employer's client. Nor is there a limitation on the kinds, quality, or volume of work a leased employee can perform for his employer's clients.

It is a simple fact that employee leasing companies lease their employees to perform services for their employer on work undertaken for clients of their employer, often at the client's place of business. And leased employees of a given leasing company often perform such services for multiple clients. That fact does not make them employees of each of the leasing company's clients.

As applied to this case, that relationship has existed where Bennett, as an employee of MEI, the employee leasing

company, directed the work of MEI's other employees to perform the work for MEI on engineering and surveying projects of MEI's client, ME&LS. The work of both Bennett and the other MEI employees was for their employer MEI who was by that means meeting its obligation to perform on projects of its client, ME&LS. That didn't make them employees of ME&LS. Under plaintiffs' construction, where a leasing company's leased employees worked on different projects for multiple clients it would make them employees of each such client. That result would indeed be absurd. And if, as plaintiffs claim, Bennett became the employee of ME&LS, was he also at the same time still an employee of MEI? That result would also be absurd.

The case *Pro-Benefit Staffing, Inc. v. Board of Review*, 771 P.2d 1110 (Utah Ct. App. 1989), cited by ME&LS, is highly instructive under the facts of the present case to confirm that ME&LS was not the employer of Bennett.

In that case, Pro-Benefit Staffing merely

. . . calculated the client's payroll, cut checks for wages and taxes drawn on its account and delivered paychecks to client for distribution to employees in return for a check from client for amount of payroll plus its fee and which designated owner of client business as "on-site" supervisor, lacked requisite decision-making power to qualify as an "employer".

*Id.*

In the present case, it cannot be truthfully claimed that "the requisite decision-making power to qualify as an employer did not in fact rest in MEI and its sole owner, Scott McNeil."

In that case

[t]he net result of the formal maneuvering via the contract between Pro-Benefit and the Client is little different, as a practical matter, from the situation that existed before Pro-Benefit became involved, except that Pro-Benefit handles payroll, employee benefits, and a few other personnel-related administrative matters.

*Id.*

As noted supra, the employment arrangements after the reorganization in 1996 did not change the arrangement that had existed since 1983 wherein MEI and Scott McNeil had and exercised all decision making authority.

The Court there concluded:

Applying those factors to this case, it is apparent that Pro-Benefit lacks the requisite decision-making power to qualify as an employer. The supervision by Pro-Benefit is, as the appeal referee found, merely the "facade of control." The "on-site supervisor" designated by Pro-Benefit is the Client's owner or manager, who does not look to Pro-Benefit for instructions in running the business or even communicate with Pro-Benefit, except to notify Pro-Benefit of information needed to perform administrative and clerical functions. As a practical matter, it is the Client's owner or

manager who performs all of the following elements of the employer's role:

1. Directs the work and specifies the manner and method of accomplishing it.
2. Trains the employees in how to perform the work.
3. Determines if, when, and which employees will be hired, dismissed, or laid off.
4. Determines rates of pay and the availability of employee benefits.
5. Assigns tasks; schedules hours of work and vacations.
6. Directs and leads the employees in the general conduct of the Client's business activities.

These elements describe the role and authority of MEI and McNeil in the present case.

**POINT VI. PLAINTIFFS' ATTEMPT TO RESTRUCTURE THE OPERATING AGREEMENT, WITHOUT NOTICE TO BENNETT, IS INVALID AND A VIOLATION OF JUDGE BOYDEN'S PREVIOUSLY ANNOUNCED ORDER.**

It is significant that plaintiffs' statement of material facts does not include or even refer to ME&LS Amendment No. 4 that was adopted November 29, 2006, without notice to Bennett. That Amendment purports to eliminate Bennett's membership interest and apportion the same among McNeil and the other members of ME&LS. This attempt to write off and appropriate Bennett's membership came after, and was in direct violation of, Judge Boyden's ruling.

Within twelve (12) days following Judge Boyden's ruling, and in clear violation of the terms and effect of that ruling, McNeil deliberately proceeded, unilaterally, and without any notice to the Court or to Bennett, to retroactively restructure the Operating Agreement to terminate and appropriate Bennett's valuable membership interest.

Without permission of the Court on the very matter that was pending before the Court for resolution, and without notice to Bennett, plaintiffs added new terms to the Operating Agreement to accomplish what the Court had denied and what they have claimed was already provided in the Agreement before that amendment was adopted. If plaintiffs truly believed their interpretation of the Operating Agreement was valid, they would not have needed to provide in Amendment No. 4 what they claim was already provided under the existing terms of the Operating Agreement. These actions show contempt for Judge Boyden's ruling and also demonstrate the lengths to which McNeil will go to damage Bennett financially.

Rather than show respect for the Court's ruling and pursue a proper course to seek a reversal, the plaintiffs,

unilaterally and without notice, took prompt action to overrule and void that ruling retroactively by self help. And despite that ruling the plaintiffs have still refused to accord any of those member's rights to Bennett. They still have refused to pay distributions or give Bennett any required notice of their attempted manipulation of ME&LS' core documents.

#### CONCLUSION

The Order of Judge Boyden confirmed by Judge Brian, the Order of Judgment of Judge Brian, and the Order to Enforce Judgment of Judge Dever, should be affirmed.

DATED this 1st day of March, 2011.

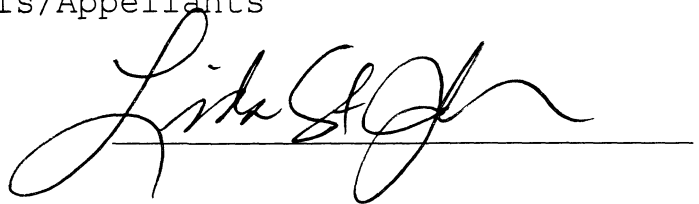
SNOW, CHRISTENSEN & MARTINEAU

By: Reed L. Martineau  
Reed L. Martineau  
Keith A. Call  
Derek J. Williams  
Attorneys for Appellee

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 1<sup>st</sup> day of March,  
2011, I caused a true and correct copy of the foregoing  
**BRIEF OF APPELLEE** to be mailed to the following:

Matthew C. Barneck  
Paul P. Burghardt  
Richards, Brandt, Miller & Nelson  
Wells Fargo Center, 15th Floor  
299 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110-2465  
Attorneys for Plaintiffs/Appellants

A handwritten signature in cursive script, appearing to read "Linda St. John", is written over a horizontal line.

22658-1 1668469

## ADDENDUM



IN THE UTAH COURT OF APPEALS

-----ooOoo-----

<u>McNeil Engineering and Land</u>	)	MEMORANDUM DECISION
<u>Surveying, LLC; McNeil</u>	)	(Not For Official Publication)
<u>Engineering, Inc.; and Scott</u>	)	
<u>McNeil,</u>	)	Case No. 20080319-CA
	)	
Plaintiff, Counterclaim	)	F I L E D
Defendant, and Appellant,	)	(May 21, 2009)
	)	
v.	)	2009 UT App 138
	)	
<u>Dale K. Bennett; Benchmark</u>	)	
<u>Engineering and Land</u>	)	
<u>Surveying, LLC; et al.,</u>	)	
	)	
Defendant, Counterclaim	)	
Plaintiff, and Appellee.	)	

-----

Third District, Salt Lake Department, 050917315  
The Honorable Pat B. Brian

Attorneys: Matthew C. Barneck and Paul P. Burghardt, Salt Lake  
City, for Appellant  
Reed L. Martineau, Keith A. Call, and Derek J.  
Williams, Salt Lake City, for Appellee

-----

Before Judges Thorne, Bench, and Davis.

DAVIS, Judge:

Appellant McNeil Engineering and Land Surveying, LLC (ME&LS) filed suit against Appellee Dale K. Bennett for various claims, and Bennett asserted several counterclaims. The parties eventually filed cross-motions for summary judgment on the issue of whether Bennett's employment resignation from McNeil Engineering, Inc. triggered his withdrawal as a member of ME&LS. The district court determined that Bennett did not withdraw as a member of ME&LS and was therefore due his share of disbursements. ME&LS filed a motion for reconsideration, which the district court denied. The district court then, on Bennett's motion, determined there was "no just reason for delaying entry of judgment as requested by Bennett" for his share of cash distributions. ME&LS now appeals.

The threshold issue before us is whether we have subject matter jurisdiction to address the other issues that the parties

raise on appeal, that is, we must first determine whether the order being appealed from was properly certified for appeal under rule 54(b) of the Utah Rules of Civil Procedure. Although the parties assert that this case is properly before us via a rule 54(b) certification, this consensus is not dispositive.

"'Acquiescence of the parties is insufficient to confer jurisdiction and . . . a lack of jurisdiction can be raised at any time by either party or by the court.'" Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099, 1100 (Utah 1991) (omission in original) (quoting Olson v. Salt Lake City Sch. Dist., 724 P.2d 960, 964 (Utah 1986)).

Rule 54(b) of the Utah Rules of Civil Procedure provides as follows:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment.

Utah R. Civ. P. 54(b). The Utah Supreme Court has further elaborated on the requirements of certification under rule 54(b):

First, there must be multiple claims for relief or multiple parties to the action. Second, the judgment appealed from must have been entered on an order that would be appealable but for the fact that other claims or parties remain in the action. Third, the trial court, in its discretion, must make a determination that there is no just reason for delay of the appeal.

Pate v. Marathon Steel Co., 692 P.2d 765, 767 (Utah 1984) (emphasis added) (internal quotation marks omitted). Thus, proper certification under rule 54(b) does not occur when the district court simply directs that judgment be entered and makes the order final. See id. at 768. The district court must additionally determine "whether there was any just reason for delaying the appeal. If it found none, it would then be free to enter such a certification, permitting the appeal to proceed." Id. Neither of these two determinations alone is sufficient for certification under rule 54(b):

Tab 1

We must emphasize that all of these requirements must be met. An order that is "final" as to a claim or a party in a multi-claim or multi-party suit is appealable under Rule 54(b) only if it is accompanied by a district court certification that no just reason exists for delaying the appeal; an order that does not wholly dispose of a claim or a party is not "final" under Rule 54(b) and will not be appealable, even with such a certification.

Id. (emphasis added).<sup>1</sup>

The parties argue that the district court properly certified this case under rule 54(b) because the court's Order and Judgment stated, "The Court finds that there is no just reason for delaying entry of judgment as requested by Bennett." Although this reflects the district court's determination that the Order was a final order, it is unclear whether the court meant the Order was a final order for purposes of 54(b).<sup>2</sup> Moreover, the

---

<sup>1</sup>District courts have been directed to provide findings supporting both the determination that a judgment is final under rule 54(b) and the determination that there is no just reason for delay of the appeal. See Bennion v. Pennzoil Co., 826 P.2d 137, 139 (Utah 1992) ("In order to facilitate this court's review of judgments certified as final under rule 54(b), trial courts should henceforth enter findings supporting the conclusion that such orders are final."); id. ("[T]his court has yet to see a single instance where a trial court has advanced a rationale as to why there was no just reason for delay. Because this determination by the trial court is subject to judicial review under an abuse of discretion standard, a brief explanation should accompany all future certifications so that this court may render an informed decision on that question.").

<sup>2</sup>Under the facts of this case, that determination would be inappropriate in any event. The approach adopted by the Utah Supreme Court "requires that before a claim can be considered separate, the facts underlying it must be different than those underlying other claims in the action." Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099, 1103 (Utah 1991). Thus, to determine whether an issue certified for appeal is separate from the issues remaining in district court, we "focus[] on the degree of factual overlap between [the issues]. When this factual overlap is such that separate claims appear to be based on the same operative facts or on the same operative facts with minor variations, they are held not to constitute separate claims for

(continued...)

Order lacks an accompanying determination that there is no just reason for delay in bringing an appeal. This conclusion is underscored by the following exchange at the hearing on Bennett's motion to enforce the prior summary judgment ruling:

[ME&LS's counsel]: And I presume that order is going to make the--state the language under Rule 54(b) that it's--there's an express determination of final judgment. I think that's what they were asking for.

[Bennett's counsel]: Your Honor, we simply requested a judgment. We didn't request that it be certifiable so it could be appealed on an interlocutory basis.

THE COURT: The Court simply granted the relief prayed for in the motion, and orders counsel for [Bennett] to so reflect in the order.

All right, next matter.

[ME&LS's counsel]: I'm sorry, Your Honor. I have to ask for some clarification, because I'm at a loss here. [Their] moving papers did ask for a final judgment, and the Court is entering a ruling that is, in fact, a final judgment. You['re] ordering my client to make payment by a date certain.

THE COURT: Is counsel not correct? That was the specific relief that defense counsel sought, and the specific relief the Court granted.

[Bennett's counsel]: We sought a judgment--an order of judgment in that amount, Your Honor. We did not specifically request that it be certified as [a] final order for--as a final judgment for purposes of appeal. So I don't know what--exactly

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<sup>2</sup>(...continued)  
rule 54(b) purposes." Id. (citations and internal quotation marks omitted). Here, where the majority, if not all, of the issues in this case are related to Bennett's resignation and the events surrounding it, and where there remains pending an ME&LS claim that Bennett breached the operating agreement, there is factual overlap between the claim before us and claims pending in the district court.

what we're asking for here. We wanted a judgment that we could collect upon. Your Honor, has ruled that the payment is to be made, and--

THE COURT: Cite the specific language in your motion regarding the relief sought, and that is the order of the Court--whatever the specific language of your motion reads.

The district court therefore clearly made no determination as to whether there was any just reason for delaying an appeal but simply granted Bennett's motion, which requested only "an order of judgment for Bennett's share of member distributions."<sup>3</sup> Thus, there was no proper certification under rule 54(b), and we do not have subject matter jurisdiction to consider the issues raised in this appeal.

"When a matter is outside the court's jurisdiction it retains only the authority to dismiss the action." Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct. App. 1989). We therefore dismiss the appeal.

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James Z. Davis, Judge

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WE CONCUR:

---

William A. Thorne Jr.,  
Associate Presiding Judge

---

Russell W. Bench, Judge

---

<sup>3</sup>Bennett's motion was devoid of the "no just reason for delay" language but instead stated, "There is no reason the Court cannot enter a judgment against ME&LS for this amount and order that Plaintiffs pay Bennett this amount." Bennett's supporting memorandum used language closer to that of rule 54(b), stating, "Bennett is entitled to this judgment based upon the Court's prior ruling and there is no just cause for delaying the entry of this judgment." Neither filing, however, requested the court to make a determination that there was no just reason for delaying an appeal.

## **EXHIBIT “3”**

RECEIVED

SEP 23 2010

Richards, Brandt  
Miller & Nelson

FILED DISTRICT COURT  
Third Judicial District

SEP 21 2010

SALT LAKE COUNTY

By DC Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY  
STATE OF UTAH

McNEIL ENGINEERING, INC., McNEIL  
ENGINEERING AND LAND  
SURVEYING, LLC, and, SCOTT  
McNEIL, an individual,

Plaintiffs,

vs.

BENCHMARK ENGINEERING AND  
LAND SURVEYING, LLC, BENCHMARK  
CAD SERVICES, LAND  
DEVELOPMENT CADD, INC., DALE K.  
BENNETT, an individual, and,  
FLORENCE B. ALHAMBRA, an  
individual,

Defendants..

MINUTE ENTRY

Case No. 050917315

Judge: L.A. DEVER

The above entitled matter is before the Court on Defendants' Notice to Submit for Decision their Motion to Enforce Judgment and Motion for Leave to (1) Serve Third Set of Interrogatories, (2) File Fourth Request for Production of Documents, and (3) Take Second 30(b)(6) Deposition, filed July 21, 2010. The Court having reviewed Defendants' Motions and Plaintiffs' Opposition thereto, and being duly advised in the premises of each, makes the following ruling.

*Defendants' Motion to Enforce Judgment*

Defendants request the Court to enforce the April 3, 2008, Order and Judgment



issued by the Honorable Pat Brian. The Order and Judgment entered in favor of Defendant Dale K. Bennett ("Bennett") in the amount of \$142,174.93. On April 21, 2008, the parties stipulated a joint motion to stay the pending trial while Plaintiffs appealed in part, the Court's Order entered December 21, 2006, which ruled that Bennett is a member of ME&LS and an Order entered April 2, 2008, which denied reconsideration of the December 21, 2006, ruling.

Pursuant to the terms of the April 21, 2008, stipulation Bennett agreed that the stay of any execution of the Order and Judgment may be entered without the need to post a supersedeas bond. On May 21, 2009, the Court of Appeals dismissed Plaintiffs' appeal for failure to show certification of the finality of the trial court's order. A remittitur was entered on August 10, 2009.

Defendants now seek enforcement of the April 3, 2008, Order and Judgment as the basis for the earlier stipulation no longer apply.

This Court finds the following explanation regarding such matters helpful in its consideration:

[T]he "law of the case" doctrine is employed to avoid delay and to prevent injustice. "The purpose of [this] doctrine is that in the interest of economy of time and efficiency of procedure, it is desirable to avoid the delays and the difficulties involved in repetitious contentions and rulings upon the same propositions in the same case." Richardson v. Grand Central Corp., 572 P.2d 395, 397 (Utah 1977). See Conder v. A. L. Williams & Assocs., Inc., 739 P.2d 634, 636 (Utah Ct. App. 1987). "Although a trial court is not inexorably bound by its own precedents, prior relevant rulings made in the same case are generally to be followed." People ex. rel. Gallagher v. District Court, 666 P.2d 550, 553 (Colo. 1983).

The law of the case doctrine is particularly applicable when, in the case of summary judgment, a subsequent motion fails to present the case in a different light, such as when no new, material evidence is introduced. Sittner v. Big Horn Tar Sands & Oil, Inc., 692 P.2d 735, 736 (Utah 1984); Richardson v. Grand Central Corp., 572 P.2d at 397; Hammer v. Gibbons & Reed Co., 29 Utah 2d 415, 510 P.2d 1104, 1105 (Utah 1973).

Salt Lake City Corp. v. James Constructors, 761 P.2d 42, 45 (Utah Ct. App. 1988).

Upon review of the case, the Order and Judgment issued on April 3, 2008, was intended to serve as the final order on Defendants' counterclaim for declaratory relief. See e.g. Pasquin v. Pasquin, 1999 UT App 245, ¶12, 988 P.2d 1 ("In this case, the October 21 Order was properly certified because it granted summary judgment for all claims against the Estate. Further, the trial court also made the required finding that there was 'no just reason for delay,' and expressly ordered the entry of judgment as required by Utah Rule of Civil Procedure 54(b).")

Similarly, Judge Brian's Court found "that there is no just reason for delaying entry of judgment as requested by Bennett." The Order and Judgment was entered into the Registry of Judgments on April 9, 2008.

Accordingly, it is HEREBY ADJUDGED AND DECREED that the Order and Judgment, issued and entered on April 3, 2008, is a final order on Defendants' counterclaim for declaratory relief.

*Defendants' Motion for Leave*

Defendants' seek leave from this Court to continue certain discovery proceedings because of Plaintiffs' alleged actions which are contrary to the ruling of the Honorable

Ann Boyden. Specifically, while Judge Boyden declared in a ruling issued November 17, 2006, that Bennett was entitled to all of the rights of other ME&LS members, Plaintiffs have allegedly been acting contrary to this ruling by failing to provide Bennett with information he is claimed to be entitled to including: tax returns, financial statements, disbursements of any kind to other members, etc.

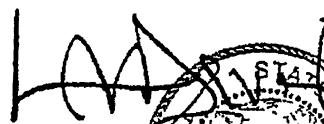
Defendants fail to present any viable legal argument and analysis to the Court that would address their claimed entitlement to additional discovery in light of a final ruling on Bennett's claim for declaratory relief and dismissal of his accounting claim on January 29, 2008.

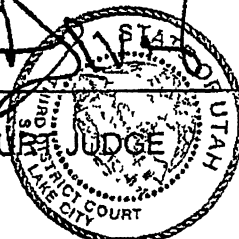
Based upon the foregoing, the Court DENIES Defendants' Motion for Leave.

This Ruling serves as the Order of the Court. No further order is required.

Dated 21<sup>st</sup> day of September, 2010.

BY THE COURT:

  
\_\_\_\_\_  
L.A. DEVER  
DISTRICT COURT JUDGE


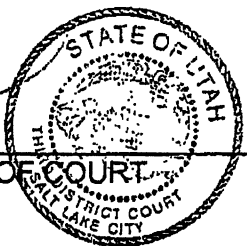


### CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Ruling dated this 21<sup>st</sup> day of September, 2010, postage prepaid, to the following:

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299 South Main Street  
P.O. Box 2465  
Salt Lake City, UT 84110

  
CLERK OF COURT  


Tab 2

✕

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[Paul-Burghardt@rbmn.com](mailto:Paul-Burghardt@rbmn.com)  
Telephone: (801) 531-2000  
Fax No.: (801) 532-5506

FILED DISTRICT COURT  
Third Judicial District  
OCT 19 2018  
SALT LAKE COUNTY  
By \_\_\_\_\_ Deputy Clerk

---

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

McNEIL ENGINEERING, INC; McNEIL  
ENGINEERING AND LAND SURVEYING,  
LLC; and SCOTT McNEIL, an individual,

Plaintiffs and Counterclaim  
Defendants,

vs.

BENCHMARK ENGINEERING AND  
LAND SURVEYING, LLC; BENCHMARK  
CAD SERVICES, LLC; LAND  
DEVELOPMENT CADD, INC; and  
DALE K. BENNETT, an individual;  
FLORENCE B. ALHAMBRA, an individual,

Defendants and Counter Claimants.

**AMENDED ORDER CERTIFYING  
ORDER AND JUDGMENT AS FINAL**

Civil No. 050917315

Judge L.A. Dever

---

This matter comes before the Court pursuant to the Motion to Alter or Amend Order filed by Plaintiff McNeil Engineering and Land Surveying, LLC (“ME&LS”) on October 1, 2010, and also the Motion for Certification That The April 3, 2008 Order and Judgment is Final for Purposes of Rule 54(b) and for Appeal, recently filed by the Defendants. Based on the foregoing, the Court hereby finds and ORDERS as follows:

1. An Order and Judgment was entered in this case by the Honorable Pat Brian of the Third District Court for Salt Lake County on April 3, 2008.

2. ME&LS filed a Notice of Appeal on April 8, 2008.

3. The Utah Court of Appeals issued a Memorandum Decision on May 25, 2009 ruling that the Order and Judgment were not final for purposes of Rule 54(b) of the Utah Rules of Civil Procedure. The Court of Appeals specified certain language to be used when the District Court certifies an order as final. Additionally, the Court of Appeals held that the District Court must make a determination that the operative facts underlying the claims to be appealed are separate and distinct from those on which the remaining claims are based.

4. This Court issued a Minute Entry on September 21, 2010 finding that the “Order and Judgment, issued and entered on April 3, 2008, is a final order on Defendants’ counterclaim for declaratory relief.” The Minute Entry was intended to be the Order of the Court.

5. This Order modifies the Minute Entry and is intended to certify the Order and Judgment as final under Rule 54(b) of the Utah Rules of Civil Procedure. Pursuant to Rule 54(b), this Court makes the express direction for entry of a final judgment as to one or more but fewer than

all of the claims or parties in this action. The Court hereby determines that the Order and Judgment entered April 3, 2008 was and is intended to be final under Rule 54(b). The Court also determines that there is no just reason for delaying an appeal from the Order and Judgment.

6. This Court also makes the determination that the operative facts underlying the adjudicated claims are separate and distinct from those underlying the claims which remain in the District Court. The operative facts relating to Bennett's Counterclaim, in this action on which the Order and Judgment is based, are summarized as follows:

- a. The language of the ME&LS Operating Agreement and its amendments.
- b. The history of ME&LS and its relationship with McNeil Engineering, Inc. ("MEI").
- c. The voluntary nature of Bennett's resignation.
- d. The payments to members and the changes of ownership in ME&LS after Bennett's resignation.

7. By contrast, the claims of the Plaintiffs which remain in the District Court are based upon a distinctly different set of operative facts, which are summarized as follows:

- a. Bennett's subsequent establishment of a competing engineering firm, and whether his conduct before and after departure breached duties to ME&LS or the Operating Agreement of ME&LS.
- b. Bennett's interactions with the Engcad entities set up to outsource drafting work to the Philippines, and whether his conduct interfered with ME&LS' business relationship with Engcad or breached duties to Engcad.
- c. Bennett's subsequent use of ME&LS' design practices, tools, and procedures, and whether such conduct is a misappropriation of trade secrets.
- d. Whether the logo and slogan of Bennett's new company infringe upon the rights of ME&LS and MEI.




8. Based on the foregoing, this Court certifies the Order and Judgment of April 3, 2008 as final for all purposes under Rule 54(b), as described above.

IT IS SO ORDERED.


DATED this 11 day of October, 2010.

BY THE COURT:

  
\_\_\_\_\_  
HONORABLE L.A. DEVER  
THIRD DISTRICT COURT JUDGE

APPROVED AS TO FORM:

SNOW CHRISTENSEN & MARTINEAU

  
\_\_\_\_\_  
REED L. MARTINEAU  
*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was sent by first-class mail, postage prepaid, on this \_\_\_\_ day of October, 2010, to the following:

Reed L. Martineau, Esq.  
SNOW CHRISTENSEN & MARTINEAU  
10 Exchange Place, Eleventh Floor  
P.O. Box 45000  
Salt Lake City, UT 84145  
*Attorneys for Defendants*

---

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