

1964

## Brimwood Homes Inc. v. Knudsen Builders Supply Co. et al : Reply to Petition for Rehearing

Utah Supreme Court

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Van Cott, Bagley, Cornwall & McCarthy; Attorneys for Defendant-Appellant;  
Bell & Bell; Attorneys for Plaintiff-Respondent;

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In the  
**Supreme Court of the State of Utah**

BRIMWOOD HOMES, INC.,  
*Plaintiff-Respondent,*

vs.

KNUDSEN BUILDERS SUPPLY  
COMPANY,  
*Defendant-Appellant,*

ELBERT G. ADAMSON, PETE J.  
BUFFO, CAROLINE P. BUFFO, his  
wife, DAVID RALPH STEWART,  
PHYLLIS G. STEWART, his wife,  
CONTINENTAL THRIFT AND  
LOAN COMPANY, and WESTERN  
STATES THRIFT COMPANY,  
*Cross Defendants-Respondents.*

Case No. 9794

REPLY TO PETITION FOR REHEARING

VAN COTT, BAGLEY, CORNWALL  
& McCARTHY  
Suite 300, 65 South Main St.  
Salt Lake City, Utah  
*Attorneys for Defendant-Appellant*

BELL & BELL  
303 East 2100 South  
Salt Lake City, Utah  
*Attorneys for Plaintiff-Respondent & Petitioners  
and Cross Defendants-Appellants & Petitioners*

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REPLY TO PETITION FOR REHEARING

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The Petition for Rehearing is based upon the single point that the Court erred in finding no consideration for the release of future liens. There is no pretense that this point was not fully and carefully considered by the Court in its decision. Neither is there any claim made that the Court failed to consider any material point or that any matters have been discovered which were unknown at the time the opinion was rendered. In this

status of the Petition, the prior decisions of this Court require that it be denied. See *Brown v. Pickard*, 4 Utah 292, 9 Pac. 573, 11 Pac. 512; *Cummings v. Nielson*, 42 Utah 157, 129 Pac. 619.

Petitioner's contention that there was consideration for the release of future liens rests upon a completely erroneous set of facts. Before pointing out these errors, we would emphasize that the issue of consideration is in no way controlling, and that the decision is fully sustained on other grounds. The case turns upon the construction to be placed upon the receipt release, and the question of consideration is purely a side issue.

Petitioner's assertion that the intention of the parties was never an issue in this case, either before the trial court or on appeal, is preposterous. On the contrary, the only point necessarily involved is what was the intention of the parties to the receipt-release. Since it is abundantly clear not only from the express language of the receipt release but also from the uncontradicted evidence that the parties never intended the release to free the property from any lien except as to the particular debt paid and receipted for, the question whether there was or was not consideration is not of any vital importance.

It must not be inferred that we concede that there was any consideration for any release of liens except as to the amount paid and receipted for. There simply is no consideration whatever for any release of liens except to the extent indicated. Neither the plaintiff nor Prudential did anything or promised to do anything nor paid

any amount except that which they were then legally and firmly bound to do or pay. They did not even make a payment at a time sooner than they were obligated to pay.

Petitioner attempts to convince the Court that it or Prudential paid defendant more than they were bound to pay by citing facts and figures which are neither within nor without the record.

The detail of the invoiced charges to Lots 203, 206 and 213, Jordan Village Subdivision No. 2, upon which plaintiff bases its claim for rehearing are set forth hereinafter in "Schedule A" attached hereto. Receipt releases identified in the record with respect to each of those lots are also reflected in Schedule A. Contrary to the facts asserted by plaintiff, the invoices attributable solely to Lot 203 as of March 15, 1961, totaled \$1,245.45. No receipt release was executed on March 15, 1961, but one was executed on March 22, 1961. The total receipt releases affecting Lot 203 as of and including March 22, 1963, amounted to \$775.78. Thus the total invoices attributable solely to Lot 203 on March 15, 1961, exceeded the total receipt releases affecting said lot on March 22, 1961, by \$469.67.

In addition to the invoices attributable solely to Lot 203, some invoices are identified with more than one lot. The detail of these invoices is set forth hereinafter in "Schedule B." Assigning an equal share of each of these invoices to each of the lots shown therein, the total in-

voices attributable to Lot 203 is increased by \$42.86 to \$1,288.31, and the excess of invoices over receipt releases is increased to \$512.53.

With respect to Lot 206, the invoices attributable solely thereto on February 15, 1961—the date singled out by plaintiff—totaled \$757.79 and exceeded the total receipt releases of \$702.84 by \$54.95. As indicated on Schedule B, the equal share attributable to Lot 206 of invoices on which other lots are also indicated is \$229.50. Hence, in total, the invoices attributable to Lot 206 as of February 15, 1961, total \$987.29, and exceed the total receipt releases by \$284.45.

The facts concerning Lot 213 as shown in Schedules A and B are comparable to those recited hereinabove with respect to Lots 203 and 206. On that date singled out by plaintiff, February 15, 1961, invoices attributable solely to Lot 213 exceeded total receipt releases by \$4.51, and total invoices attributable to Lot 213, on the same date, exceeded total receipt releases by \$47.37.

The decision of the majority of the Court gives full consideration to all points of law involved, and correctly disposes of each of them. The Petition for Rehearing is without any merit and should be denied.

Respectfully submitted,

Van Cott, Bagley, Cornwall & McCarthy  
 Grant H. Bagley  
 H. T. Benson  
*Attorneys for Defendant*  
 Suite 300, 65 South Main Street  
 Salt Lake City, Utah

## SCHEDULE A

<b>Lot</b>	<b>Invoice</b>	<b>Date</b>	<b>Amount</b>
206 .....	B03377	1-19-61	\$ 20.21
	B03374	1- 9-61	387.20
	B03463	1-11-61	18.68
	B05195	2-15-61	23.08
	B05193	2-15-61	122.86
	B05192	2-15-61	134.78
	B04485	2- 2-61	40.28
	B05085	2-13-61	10.70
Subtotal as of 2-15-61.....			\$ 757.79
Plus amounts invoiced with other lots.....			229.50
			<hr/>
Total as of 2-15-61....			987.29
Total Receipt Releases as of 2-15-61.....			702.84
Excess of Total invoices over Total Receipt Releases			\$ 284.45
Excess of invoices over Receipt Releases without considering amounts billed with other lots .....		(\$284.45 — \$229.50)	\$ 54.95

## SCHEDULE A

Lot	Invoice	Date	Amount
213 .....	B04101	1-23-61	\$113.09
	B04102	1-23-61	137.13
	B04009	1-23-61	236.38
	B04399	1-31-61	4.51
Subtotal as of 2-15-61.....			\$ 491.11
Plus amounts invoiced with other lots.....			42.86
Total as of 2-15-61....			<u>533.97</u>
Total Receipt Releases as of 2-15-61.....			486.60
Excess of Total invoices over Total Receipt Releases			47.37
Excess of invoices over Receipt Releases without considering amounts billed with other lots .....		(\$47.37 — \$42.36)	\$ 4.51



## SCHEDULE A\*

Lot	Invoice	Date	Amount	
203 .....	B03328	1-17-61	\$123.13	
	B03800	1-19-61	240.39	
	B03647	1-16-61	177.42	
	B06360	3- 9-61	239.17	
	B06110	3- 4-61	30.27	
	B06111	3- 4-61	118.82	
	B06112	3- 4-61	124.26	
	B05840	2-28-61	191.99	
Plus amounts invoiced with other lots**.....	B04489	2- 2-61	42.86	42,86
Subtotal as of 3-15-61 ....				<u>\$1,288.31</u>
				\$1,288.31
Total Receipt Releases as of 3-21-61 .....				775.78
Excess of Total invoices over Total Receipt Releases				\$ 512.53
Excess of invoices over Receipt Releases without considering amounts billed with other lots.....			(\$512.53 — \$42.86)	\$ 469.67

\*Schedules A and B are compiled from Exhibits D-2, D-3,  
and P-7 through P-12.

\*\*See Schedule B.

## SCHEDULE B

<b>Lots on Invoice</b>	<b>Invoice No.</b>	<b>Date</b>	<b>Total</b>	<b>Equal Amount to Each Lot</b>
203, 213 & Potter.....	B04489	2- 2-61	\$128.57	\$ 42.86 - lot 203 42.86 - lot 213 42.85 - Potter
7, 8, 31, 206 & 207.....	B03802	1-18-61	28.70	5.74 - lot 206
7, 8, 31 & 206.....	B03813	1-19-61	79.87	19.98 - lot 206
207 & 206.....	B03234	1- 6-61	249.99	125.00 - lot 206
206 & 208.....	B04969	2-10-61	157.56	78.78 - lot 206
Total.....				\$229.50 - lot 206