

Case No. A09-1822

STATE OF MINNESOTA

IN COURT OF APPEALS

T.E.S. Construction, Inc.
Plaintiff/Respondent,

vs.

STEPHEN J. CHICILLO
Defendant/Appellant,

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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ISSUES

- I. IS THERE A BASIS IN THE RECORD FOR A FINDING THAT APPELLANT MISAPPLIED PAYMENTS TO HIM FOR AN IMPROVEMENT MADE BY RESPONDENT?

TRIAL COURT HELD: Trial court did not rule on this precise question but did make a finding that proceeds of a payment made to Appellant were not used to pay Respondent.

- II. DOES MINNESOTA STATUTES, §514.02 APPLY TO PAYMENTS MADE TO THE OWNER OF REAL ESTATE?

TRIAL COURT HELD: Trial court found that Appellant arranged to borrow money from lenders to purchase and construct homes and awarded judgment against appellant based upon his failure to pay proceeds to Respondent.

- III. DOES MINNESOTA STATUTES, §514.02 APPLY TO MORTGAGE PROCEEDS RECEIVED BY APPELLANT?

TRIAL COURT HELD: Payment of mortgage proceeds to Appellant when Respondent was not paid for improvements to real estate made by Respondent created civil liability under Minnesota Statutes, §514.02.

- IV. IS THERE ADEQUATE SUPPORT IN THE RECORD FOR AWARD MADE TO RESPONDENT?

TRIAL COURT HELD: Trial court ordered judgment in the amount of \$67,080.50 (including attorney fees and costs).

STATEMENT OF FACTS

For a number of years Chicilo Homes, Inc. has been in the business of constructing new homes. Respondent has provided various building and construction services and labor for many of the projects of Chicilo Homes, Inc. Appellant, as President of Chicilo Homes, Inc. would find suitable parcels of real estate and borrow money from various lenders to finance the purchase of the real estate and construction of new homes. When the housing market deteriorated and the sale price of residential property sunk, Chicilo Homes, Inc. was unable to complete the construction of a number of homes. Properties were foreclosed upon by lenders and Appellant suffered substantial losses. In the process Respondent and other creditors were not paid for all the services and labor they provided.

Respondent's Complaint asserts a civil claim against Appellant for violation of Minnesota Statutes, §514.02. See Appellant's Appendix, pp. A1-A3. The evidence showed that Chicilo Homes, Inc. borrowed funds to purchase real estate and erect a home on each of five parcels of real estate. Findings of Fact, Conclusions of Law and Order for Judgment, Appellant's Appendix, p. A6, Finding 3. In each case Chicilo Homes, Inc. executed a promissory note and mortgage to secure payment of the borrowed sums. Findings of Fact, Conclusions of Law and Order for Judgment, Appellant's Appendix, p. A7, Finding 5.

Respondent argued it provided labor, services, equipment and skill in connection with the improvement of Respondent's real estate. See Complaint, Appellant's Appendix,

pp. A1-A3. Respondent alleged that Appellant, as a principal of Chicilo Homes, Inc., violated Minnesota Statutes, §514.02 by not paying Respondent the amounts it billed for its contribution to the improvement of the various parcels of real estate.

The trial court found that the Appellant “took possession” of payment proceeds received for the construction services on the five parcels of real estate in question and failed to “forward the payment proceeds to Plaintiff.” Findings of Fact, Conclusions of Law and Order for Judgment, Appellant’s Appendix, p. A8, Conclusions 1 and 2. The court concluded that these actions constituted theft of proceeds under Minnesota Statutes, §514.02. Findings of Fact, Conclusions of Law and Order for Judgment, Conclusion 2 (Appellant’s Appendix, p. 8). An Amended Order of Judgment added additional recovery for attorney fees and costs. Appellant’s Appendix, pp. A13-A14.

Appellant filed his Notice of Appeal, appealing from the Judgment on October 2, 2009. Appellant’s Appendix, p. A15.

ARGUMENT

I. Standard of Review. Statutory construction is a question of law, which this court reviews de novo. Siemens Bldg. Technologies, Inc. v. Peak Mechanical, Inc., 684 N.W.2d 914, (Minn.App.,2004) citing Brookfield Trade Center, Inc. v. County of Ramsey, 584 N.W.2d 390, 393 (Minn.1998). In Siemens the Court of Appeals stated,

Certain rules of construction apply when this court reviews a district court's statutory interpretation. The object of construction

of a law is to ascertain and give effect to the legislature's intent. Minn.Stat. § 645.16 (2002). If a law is not ambiguous in its application to an existing situation, however, a court may not ignore the letter of the law in order to pursue what it perceives to be the spirit of the law. *Id.* Thus, unless there is an inherent ambiguity in the law, this court applies the plain meaning of an act using the usual conventions of syntax and grammar. *First National Bank of the North v. Automobile Finance Corp.*, 661 N.W.2d 668, 670 (Minn.App.2003), review denied (Minn. Aug. 5, 2003).

II. Overview.

The sole count asserted in the Complaint and at the trial was violation of Minnesota Statutes, §514.02. See Appellant's Appendix, pp. A1-A3. The remedy provided in §514.02 is purely statutory. This law provides that,

"514.02. Nonpayment for improvement; penalties and remedies
Subdivision 1. Proceeds of payments; acts constituting theft. (a) Proceeds of payments received by a person contributing to an improvement to real estate within the meaning of section 514.01 shall be held in trust by that person for the benefit of those persons who furnished the labor, skill, material, or machinery contributing to the improvement. Proceeds of the payment are not subject to garnishment, execution, levy, or attachment. Nothing contained in this subdivision shall require money to be placed in a separate account and not commingled with other money of the person receiving payment or create a fiduciary liability or tort liability on the part of any person receiving payment or entitle any person to an award of punitive damages among persons contributing to an improvement to real estate under section 514.01 for a violation of this subdivision.

(b) If a person fails to use the proceeds of a payment made to that person for the improvement, for the payment for labor, skill, material, and machinery contributed to the improvement, knowing that the cost of the labor performed, or skill, material, or machinery furnished remains unpaid, and who has not furnished the person making such payment either a valid lien waiver under section 514.07, or a payment bond in the basic amount of the contract price for the improvement, conditioned for the prompt payment to any person entitled thereto for the performance of labor or the furnishing of skill, material, or machinery for the improvement, shall be guilty of theft of the proceeds of the payment and is

punishable under section 609.52. For an improvement to residential real estate made by a person licensed, or who should be licensed, under section 326B.805, a shareholder, officer, director, or agent of a corporation who is responsible for the theft shall be guilty of theft of the proceeds.

(c) The penalties and remedies provided in this section do not apply to a third party who receives a payment in the ordinary course of business.

(d) For purposes of this section, "residential real estate" has the meaning given in section 326B.802.

Subd. 1a. Civil action. A person injured by a violation of subdivision 1 may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney fees, and receive other relief as determined by the court, including, without limitation, equitable tracing. A civil action under this subdivision may be brought:

- (1) against the person who committed the theft under subdivision 1; and
- (2) for an improvement to residential real estate made by a person licensed, or who should be licensed, under section 326B.805, against a shareholder, officer, director, or agent of a corporation who is not responsible for the theft but who knowingly receives proceeds of the payment as salary, dividend, loan repayment, capital distribution, or otherwise.

Subd. 2. Notice of nonpayment. Notice of nonpayment of the cost of labor, skill, material, and machinery contributing to the improvement of the real estate to the person paid for such improvement may be given by the person who made payment for such improvement, or by any person furnishing the labor, skill, material, or machinery contributing to the improvement and who has not been paid for the contribution. Notice may be given in any reasonable manner. Notice shall be in writing and in any terms that identify the real estate improved and the nonpayment complained of.

Subd. 3. Proof of knowledge of nonpayment. Proof that such person failed to pay for labor performed, or skill, material, or machinery furnished within 15 days after receiving notice that the cost of such labor performed, or skill, material, or machinery furnished remains unpaid will be sufficient to sustain a finding that the proceeds of such payment were used for a purpose other than the payment for labor, skill, material, and machinery for such improvement, knowing that the costs of labor performed, or skill, material, or machinery furnished remains unpaid, unless the person;

- (1) Establishes that all proceeds received from the person making such payment have been applied to the cost of labor, skill, material, or machinery furnished for the improvement; or
- (2) Within 15 days after receiving notice shall give a bond or make a deposit with the court administrator of district court, in an amount and form approved by a

judge of district court, to hold harmless the owner or person having the improvement made from any claim for payment of anyone furnishing labor, skill, material, or machinery for such improvement."

As part of the mechanics lien statute (*Minnesota Statutes*, Chapter 514), this provision must be strictly construed to establish whether the right claimed by the Respondent has actually been created by the statute. As the Court of Appeals stated in *Eischen Cabinet Co. v. Hildebrandt*, 671 N.W.2d 609 (Minn.App.,2003),

"Mechanics' liens are statutory creations, depending for their existence on rights and procedures granted by the legislature, and are strictly construed so as not to give the statutory language "an application and meaning not intended by the legislature." *Pella Prods., Inc. v. Arvig Tel. Co.*, 488 N.W.2d 316, 318 (Minn.App.1992), review denied (Minn. Sept. 30, 1992)."

Minnesota Statutes, §514.02 does not provide a remedy for Respondent under the facts found by the trial court for several reasons.

III. There Is No Basis in the Record for a Finding that Appellant Misapplied Payments Made to Him for an Improvement Made By the Respondent.

The civil action that is the subject of this case is founded on *Minnesota Statutes*, §514.02, Subd. 1a. This subdivision creates a civil action against a person who violates the criminal part of §514.02, §1a which provides that a

"person injured by a violation of subdivision 1 may bring a civil action and recover damages" ... "A civil action under this subdivision may be brought (1) against the person who committed the theft under subdivision 1; and (2) for an improvement to residential real estate made by a person licensed, or who should be licensed, under section 326B.805, against a shareholder, officer director, or agent of a corporation who is not

responsible for the theft but who knowingly receives proceeds of the payment as salary, dividend, loan repayment, capital distribution, or otherwise.”

Thus, the civil action is derivative of the criminal action set out in Minnesota Statutes, §514.02, Subd. 1(b). Put another way, there can be no action under §1a unless there is a predicate “theft” under Subd. 1. Minnesota Statutes, §514.02, Subd. 1(b) makes it a crime to fail to use the

“proceeds of a payment made to that person for the improvement, for the payment for labor, skill, material, and machinery contributed to the improvement, knowing that the cost of labor performed, or skill, material, or machinery furnished remains unpaid, and who has not furnished the person making such payment either a valid lien waiver under section 514.07, or a payment bond ...

The subsection provides that “such person shall be guilty of theft of proceeds of the payment and is punishable under section 609.52.”

Hence, a potential plaintiff must demonstrate that *a payment* on which liability was founded was made to a defendant *for an improvement*. As applied to the instant case, the Respondent must demonstrate that the Appellant failed “to use the proceeds of a payment made to” him for the improvement made by Respondent to the property. However, there is no finding by the Court that any ‘payment’ was taken and misapplied by Appellant. The “proceeds” referred to in the Court’s findings were *not* payments made to Appellant for any improvements made by Respondent. In fact, the findings state that the proceeds were funds borrowed by Appellant or one of his companies to pay one of his other wholly

owned companies. *Appellant's Appendix*, p. A6, Finding 2. There is no finding that the loan proceeds were borrowed to pay Respondent. In fact, the findings appear to set out a plan by Appellant to defraud Respondent, which presumably would not include paying it.

In other words, the proceeds referred to in the Findings and Conclusions were loan proceeds borrowed by the Appellant. The statute is clearly designed to protect a homeowner when the homeowner pays a contractor who fails to pay a subcontractor. It was not written to protect a contractor who is not paid by the owner.

Further, the civil action authorized by Subd. 1a creates a civil action only for "A person injured by a violation of subdivision 1", which refers to the criminal action for theft of proceeds. Like any criminal matter, the presumption of innocence would apply as well as the requirement that the essential elements of a crime must be decided by the fact finder and by proof beyond a reasonable doubt. *State v. Ouellette*, 740 N.W.2d 355 (Minn. App.,2007). (citing *State v. Bluhm*, 457 N.W.2d 256, 259 (Minn.App.1990)). "[A defendant] is entitled to have all the elements of the offense with which he is charged submitted [to the jury] even if the evidence relating to these elements is uncontradicted." *State v. Carlson*, 268 N.W.2d 553, 560 (Minn.1978). There is no indication in the trial court's findings and conclusions that the court applied such a standard in making its factual determinations.

IV. §514.02 Does Not Apply to Payments to the Owner of Real Estate.

Minnesota Statutes, §514.02 applies only to proceeds of payments "received by a

person contributing to an improvement of real estate within the meaning of section 514.01". *Minnesota Statutes*, §514.01 is the general enabling provision of the mechanic's lien statute. It grants liens to those who contribute to the improvement of real estate under contract with the owner or at the instance of an agent, contractor or subcontractor of the owner.

Respondent would apply §514.02 to mortgage proceeds received by the Appellant. However, Appellant did not contribute to the property under contract with himself and did not act at the instance of himself. Hence, the Appellant was *not* a person contributing to the improvement of real estate within the meaning of §514.01. *Minnesota Statutes*, §514.01 provides (in its entirety) that:

"Section 514.01. Mechanics, laborers and material suppliers.
Whoever performs engineering or land surveying services with respect to real estate, or contributes to the improvement of real estate by performing labor, or furnishing skill, material or machinery for any of the purposes hereinafter stated, whether under contract with the owner of such real estate or at the instance of any agent, trustee, contractor or subcontractor of such owner, shall have a lien upon the improvement, and upon the land on which it is situated or to which it may be removed, that is to say, for the erection, alteration, repair, or removal of any building, fixture, bridge, wharf, fence, or other structure thereon, or for grading, filling in, or excavating the same, or for clearing, grubbing, or first breaking, or for furnishing and placing soil or sod, or for furnishing and planting of trees, shrubs, or plant materials, or for labor performed in placing soil or sod, or for labor performed in planting trees, shrubs, or plant materials, or for digging or repairing any ditch, drain, well, fountain, cistern, reservoir, or vault thereon, or for laying, altering or repairing any sidewalk, curb, gutter, paving, sewer, pipe, or conduit in or upon the same, or in or upon the adjoining half of any highway, street, or alley upon which the same abuts."

By its wording, this statute does not apply to the owner who contributes to his own

property or to payments made by a third party to the owner.

In Nelson v. Nelson, 415 N.W.2d 694 (Minn. App. 1987) a vendee of a contract for deed lost his interest in land through a cancellation of his contract by the vendor. The vendee attempted to file a mechanic's lien on the land citing his improvements and alleging unjust enrichment. The Court of Appeals held Minnesota Statutes, §514.01 did not apply to contributions by an owner of land. It explained,

"A lien of a person on his own property, which is and has always been his, in favor of himself, is a novelty which only the necessities of this case could suggest. Id. at 195, 5 S.Ct. at 823. The Michigan and Iowa supreme courts have adopted this premise. See Wiltse v. Schaeffer, 327 Mich. 272, 285, 42 N.W.2d 91, 96 (1950); and Federal Land Bank of Omaha v. Boese, 373 N.W.2d 118, 121 (Iowa 1985).

"Furthermore, a review of the language used in the mechanics' lien statute indicates that the legislature intended to provide a remedy for a person who had not received full payment for improvements carried out on land owned by another. The relevant section provides that:

"Whoever performs engineering * * * services with respect to real estate, or contributes to the improvement of real estate by performing labor, or furnishing skill, material or machinery * * * whether under contract with the owner of such real estate or at the instance of any agent, trustee, contractor or subcontractor of such owner, shall have a lien upon the improvement, and upon the land on which it is situated * * *. Minn.Stat. § 514.01 (1984).

"We note with approval the reasoning of the Iowa supreme court that:

"[A]n essential element in establishing a lien is showing a debt or an obligation of the landowner. This element cannot be satisfied when a property owner claims a lien on his own real estate because an owner cannot owe himself a debt. Boese, 373 N.W.2d at 121. We hold, therefore, that the only reasonable interpretation of section 514.01 is that it precludes the filing of a mechanics' lien by an owner upon his own property.

"Appellant argues also that he was not in fact the owner of the land either at the time it was improved or when the mechanics' lien was filed. The trial court determined that appellant was the equitable owner of the lots at the time the land was improved, and we agree.

"The status of the parties to a contract for deed was discussed in Summers

v. Midland Co., 167 Minn. 453, 209 N.W. 323 (1926). In that case, the supreme court held:

"The vendor holds the legal title merely as security for the payment of the purchase price. He has a lien thereon for his claim. * * * The vendee is the equitable and substantial owner subject only to the payment of the balance of the purchase price. Possession is important. He cannot be ousted by the vendor in the absence of default. * * * The vendor holds the title in trust for the vendee. Summers, 167 Minn. at 455, 209 N.W. at 323-24. See also Gilbert Builders, Inc. v. Community Bank of DePere, 407 N.W.2d 706, 708 (Minn.Ct.App.1987), pet. for rev. denied (Minn. Aug. 19, 1987).

§514.02 cannot be used to establish liability of Appellant because §514.01 cannot be used for contributions to improvement of real estate by an owner. Appellant simply could not be "a person contributing to an improvement of real estate within the meaning of section 514.01" as required by §514.02.

This reading of §514.02 comports with holdings of reported cases. The statute has often been described as protection for landowners who might be subject to claims of subcontractors. The provision described in this way in MacArthur Company v. Crea, 31 B.R. 239, 245 (Bky. Dist. Minn. 1983):

"in considering whether or not Minn.Stat. § 514.02 provided a basis for a supplier's claim that a debt be held nondischargeable, I became concerned that the proposed use of this statute was not that intended by the legislature. § 514.02 is in the mechanics lien section the Minnesota statutes, however, it appears to me that it was actually designed to protect the consumers of labor and materials rather than their suppliers. Minn.Stat. § 514.01 gives a supplier who furnishes materials a lien upon the improvements made with them and upon the land on which they are situated. Where a contractor fails to pay a supplier, the consumer may be compelled to pay for the improvements twice if the supplier forecloses his lien. Minn.Stat. § 514.02 is designed to deter subcontractors from forcing this unjust result on consumers. It seems inappropriate to allow a material supplier who, but for § 514.02, would have to prove independent grounds for dischargeability, to use it alone to support a

claim of nondischargeability of a debt in bankruptcy. A suppliers statutory remedy is to file a mechanics lien.

"I think this is particularly true in a case such as this, where the contractor and supplier transacted business on an open account basis. When the contractor pays the supplier, the manner in which those payments were credited are within the complete control and discretion of the supplier. It is inequitable to find the contractor guilty of theft where the conduct for which he is held liable is completely beyond his control. At very least, if suppliers are going to be allowed to use § 514.02 as proposed, they will have to be more cautious in identifying materials purchased with the corresponding payments from proceeds."

In State of Minnesota v. Reps, 223 N.W.2d 780, 787 (Minn. 1974) the Supreme Court described §514.02 as applying to the use of payments by an owner, not to an owner:

"With regard to the required relationship between the parties, Minn.St. 514.02 expressly incorporates the provisions of s 514.01 in its definition of the basic, underlying event as 'any improvement to real estate within the meaning of section 514.01,' and the required relationships are clearly identifiable when the two sections are read together. Section 514.02, subd. 1, punishes the failure to use proceeds of any payment made by the owner for the payment of labor, skill, material, and machinery 'contributed to such improvement.' The necessary relationships are tied to this 'contribution,' as described in section 514.01- 'Whoever contributes to the improvement of real estate by performing labor, or furnishing skill, material or machinery * * * whether under contract with the owner of such real estate or at the instance of any agent, trustee, contractor or subcontractor of such owner * * *.' This language defines the relationship between the defendant and those persons to whom he owes a duty as prescribed by the statute."

Similarly, in State of Minnesota v. Bren, 704 N.W.2d 170, 177 (Minn. App. 2005) the Court of Appeals characterized §514.02 this way:

"The statute criminalizes a contractor's misapplication of funds paid by a homeowner for an improvement to real estate, not the failure to pay a debt owed to a subcontractor."

Earlier, in United States Fidelity and Guarantee Company v. Excel Bank of Minnesota (Unpublished, No. A04-726 Dec. 21, 2004) the Court had described the purpose of this law,

"The purpose of this provision is to protect landowners from unscrupulous contractors, reducing the risk that landowners will face a mechanic's lien when subcontractors are unpaid. Hearing on H.F. No. 2563 Before the House Comm. on Civil Law (Feb. 2, 2000). But discrete limits are placed on the scope of the statutory trust, in that "[t]he penalties and remedies provided in this section to not apply to a third party who receives a payment in the ordinary course of business."

V. §514.02 Does Not Apply to Mortgage Proceeds Received by Appellant.

Minnesota Statutes, §514.02 was designed to protect owners whose payments were taken by contractors who did not in turn pay subcontractors they had hired to work on an improvement. This is clear from part (b) of subdivision 1 which states

"if a person fails to use the proceeds of a payment made to that person for the improvement, for the payment for labor, skill, material and machinery contributed to the improvement, knowing that the cost of the labor performed, or skill, material of machinery furnished remains unpaid..."

This subdivision cannot be applied in the instant case. The statute creates a trust over a payment tied to an improvement. A contractor is in essence required to hold funds paid for a given improvement in trust for the benefit of the subcontractors hired to complete the improvement. The statute was *not* intended to be used against an owner who takes out a mortgage to purchase a parcel of real estate and build a home upon it.

The Court of Appeals described the use of §514.02 with these words:

"Minn. Stat. §514.02 deals with the unscrupulous or failing contractor who collects from an owner, but fails to pay subcontractors, and provides both the subcontractor and the owner with a means of recovery and some protection. Nothing in the statute creates a theory of recovery that promotes the rights of an unsecured creditor over those of a secured creditor, with whom the former has no privity of contract." Siemens Bldg. Tech., Inc. v. Peak Mechanical, 684 N.W.2d 914, 918 (Minn. App. 2004).

The mortgage money received by the Appellant was of a different character than payments made by a home owner to a contractor for an improvement. The trial court's Findings of Fact describe the transaction as follows:

"Once Defendant would find a suitable parcel of real estate he would borrow money from various lenders to finance the purchase of real estate and the construction of a new home."
Appellant's Appendix, p. A6, Finding 2.

The funds provided by the mortgagee were not a payment in the sense that "payment" is used by the statute. Mortgage money borrowed by Appellant is not like the money paid to a contractor for an improvement. It was not a transfer of money made to *discharge* an obligation. Rather it was a loan transaction which *created* an obligation. After the funds were paid out, the Appellant had a legal obligation to repay the loan, secured by an interest in the real estate. The instant case does not fit the court's description of Minnesota Statutes, §514.02 in Bren, supra. The mortgage proceeds were received as part of a loan transaction secured by a project, not money paid to a contractor for an improvement.

It would be patently unreasonable to describe lump sum mortgage proceeds as a

type of trust for the payment of subcontractors. To begin with, as shown by the trial court's findings, the mortgages were taken out not just to pay subcontractors for their assistance in constructing a building, but also to purchase land, pay permit fees, secure administrative and legal services, market the building for sale and other sundry expenses.

To criminalize the use of a homeowner's mortgage proceeds for purposes other than paying a contractor would extend the reach of this statute to countless situations it was never intended to cover. Any home equity loan would carry with it a trust like obligation to pay any contractor or subcontractor prior to using any part of the loan for another purpose. Since §514.02 creates both criminal and civil liability, the trial court's use of this section could easily criminalize the cases of many homeowners with a cost overrun when even a small part of the original loan was intended for use labor and services of subcontractors.

It is also inequitable to impose a trust obligation where no natural obligation arises to pay contractors and subs prior to other creditors. §514.02 was designed for the situation where an owner paid a contractor for an improvement and the contractor did not in turn pay subcontractors (who in many cases would assert mechanic's liens against the improved premises). The imposition of a trust in the instant case does not fit the Supreme Court's description of the statute in *State of Minnesota v. Reys*, 223 N.W.2d 780, 786 (Minn. 1974):

"A reasonable and practical construction of these provisions is that the contractor, unless he has furnished a lien waiver or

payment bond, accepts payment for the improvement in a fiduciary capacity. This imposes a trust character on the payments, and it is a knowing violation of that trust, rather than a failure to pay a debt that the statute makes punishable."

In *Reps* this construction was crucial to the constitutionality of the statute. It said that

"Because Minn. St. 514.02, subd. 1, establishes a fiduciary relationship, the proceeds are not absolutely received by the contractor, but rather received in trust. As such, the requirement that they be applied to the costs is an expression of a fiduciary duty rather than a taking of property." *Id.* at p. 786.

It is inequitable and unreasonable to impose a trust to pay a subcontractor against mortgages taken out to purchase land and erect residences, particularly when most of the money borrowed was always intended to be used for purposes other than Respondent's 'improvements' and the Respondent was well aware of that fact.

Moreover, at the time the mortgage proceeds were distributed, the nature and extent of the services and materials to be provided by Respondent had not yet been decided. Creation of a fiduciary trust obligation to devote the proceeds to an indefinite future project is simply not contemplated by §514.02. The statute applies to "proceeds of payments received by a person contributing to the improvement of real estate." The use of the word "contributing", in its present tense, may apply to some definite future projects contemplated at the time of the payment. However, the application of this language creating a trust to inchoate, indefinite future planned projects which were firmed up well after the mortgages were secured, would clearly contradict the plain meaning of the

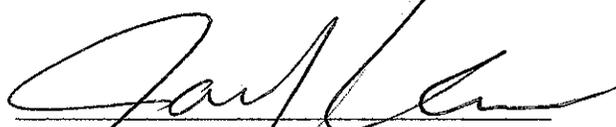
language.

Conclusion.

The claims of Plaintiff under Minnesota Statutes, §514.02 are not supported by the record. The trial court's order and judgment must be reversed.

Dated: December 18, 2009.

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