IN THE SUPREME COURT OF FLORIDA

FLORIDA STEEL CORPORATION,

Petitioner,

v. Case No. 66,560

ADAPTABLE DEVELOPMENTS (West Palm Beach), INC., et al.,

Respondents.

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Review of Opinion of the District Court of Appeal, Fourth District, Certifying a Question of Great Public Importance

DCA No. 84-448

# BRIEF OF RESPONDENTS

Brian G. Shannon
JAFFE, SNIDER, RAITT & HEUER,
Professional Corporation
1800 First National Building
Detroit, Mich. 48226
(313) 961-8380

Rosemary Cooney
PAXTON, CROW, BRAGG & AUSTIN
P.O. Drawer 1189
Barristers Building, Ste 500
1615 Forum Place
West Palm Beach, Fla. 33402
(305) 684-2121

Attorneys for Respondents

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## COUNTER-STATEMENT OF ISSUES PRESENTED

I.

Should the question certified by the Fourth District Court of Appeals be answered "yes"?

Kings Point says yes.

Florida Steel says no.

II.

Is the question of prejudgment interest before this Court?

Kings Point says no.

Florida Steel says yes.

## COUNTER-STATEMENT OF THE CASE

This mechanics' lien action was filed to determine which of two innocent parties should bear the loss resulting from a builder's breaches of the separate contracts it had with each of them. The innocent parties are the owner, Kings Point,[1] and a materialman, Florida Steel.[2] Florida Steel supplied reinforcing steel to defendant Logan & Clark, the contractor retained by Kings Point's agent to erect the shell of a high-rise condominium called the Envoy in West Palm Beach. Kings Point and Florida Steel have no contractual relationship. On April 6, 1981, Logan & Clark abandoned the work owing Florida Steel $186,575.07 (R. 68; A. 6).[3]

Florida Steel has a judgment for its damages against Logan & Clark (R. 106). The judgment, which was not appealed, remains unsatisfied. Kings Point owes nothing to Logan & Clark, as an arbitration board determined in an award confirmed by the trial court in Case No. 81-2156 CA (L) 01 J (R. 73; A. 11) and affirmed per curiam by the Fourth District Court of Appeals. Logan & Clark, Inc. v. Adaptable Developments, Inc., 450 So.2d 1189 (Fla. 4th DCA 1984).

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[1]Defendants-Respondents Kings Point Development Group, a general partnership and its partners, Adaptable Developments (West Palm Beach), Inc.; Moonglow Developments (West Palm Beach), Inc.; Moonbeam Developments (West Palm Beach), Inc.; High Plateau Developments (West Palm Beach), Inc.; Fairway Manor Developments (West Palm Beach), Inc.; Lydney Developments (West Palm Beach), Inc.; Cinnamon Ridge Developments (West Palm Beach), Inc.; Ravenhill Developments (West Palm Beach), Inc.; and Manbury Developments (West Palm Beach), Inc.

[2]Plaintiff-Petitioner Florida Steel Corporation.

[3]"R" refers to the record; "A" refers to the appendix appended to Florida Steel's initial brief on the merits; "FS" will be used in references to Florida Steel's brief.

The project was recommenced with a new contractor, also supplied by Florida Steel but not involved in this litigation (R. 68; A. 6). On May 6, 1982, Florida Steel filed this action against Kings Point, Logan & Clark and two other materialmen (id.). Florida Steel sought a declaration of priority over the defendant lienors which was mooted before trial by the discharge of those liens (R. 69; A. 7).

Kings Point and Florida Steel entered into a detailed pre-trial stipulation of facts (R. 67-74; A. 5-12) which the trial court found "disposed of every material fact" (R. 105), as Florida Steel still concedes (FS at 1). At the final hearing held October 6, 1983, the only testimony concerned Logan & Clark's contractual indebtedness to Florida Steel (R. 4-6, 105). It is stipulated that the total sum of Kings Point's proper payments to Logan & Clark and the reasonable cost to complete the work exceeded the contract price by "several hundred thousand dollars" (R. 73 at ¶3b (xxix); A. 11). Nonetheless, the trial court held as a matter of law that Kings Point's "failure to follow Florida Statutes §713.07(4) after abandonment of the construction . . . renders their property . . . liable for Plaintiff's claim of $186,575.07, principal" (R. 106).

On rehearing, the trial court held that Florida Steel was not entitled to recover prejudgment interest against Kings Point (R. 106). Florida Steel appealed from this decision (R. 112), and Kings

Point cross-appealed from the underlying decision that its property was liable to satisfy Florida Steel's lien (R. 114).

In the Fourth District Court of Appeals, the majority ruled for Kings Point on the cross-appeal, thus mooting the question of prejudgment interest (A. 1). The Court of Appeals certified to this Court that the case presented a question of great public importance, namely:

> DOES THE RULING IN Alton Towers, Inc. v. Coplan Pipe & Supply Co., 262 So. 2d 671 (Fla. 1972) APPLY TO A SITUATION WHERE A CONSTRUCTION PROJECT IS INTERRUPTED FOR A SIGNIFICANT PERIOD OF TIME BY THE CONTRACTOR'S ABANDONMENT OF THE JOB SITE? (A. 2).

Florida Steel also seeks to raise a question of prejudgment interest in this Court, although the certified question and this Court's order accepting the case for review say nothing whatever about prejudgment interest.

## COUNTER-STATEMENT OF FACTS

Florida Steel's statement of facts in its initial brief on the merits is a somewhat slanted selection from the stipulated facts in the record (R. 67-74; A. 5-12). Kings Point submits this short counter-statement to bring attention to stipulated facts not emphasized by Florida Steel.

Florida Steel knew from the beginning "that Logan & Clark was a shell corporation without any substantial assets" (R. 70, at

¶3b(viii); A. 8). It had conducted its own credit check (id.). Before entering into its contract with Logan & Clark, Florida Steel sought to protect itself by asking Kings Point's agent, Continental Construction Corporation of Florida, to make progress payments for the steel it supplied by joint check (id. at ¶3b(ix) and (vi)). Continental agreed to do so and in fact did so (id.). [For all purposes of the mechanics' lien law and this action, the parties are agreed that Logan & Clark was in the position of general contractor on a direct contract with Kings Point. Continental was merely an agent.]

At the end of each month Logan & Clark submitted to Continental a detailed progress payment request for work done and materials delivered to the site that month (id. at ¶3b(v)). Florida Steel's materials were paid for with checks made payable jointly to it and Logan & Clark (id. at ¶3b(vii) and (x)). Florida Steel was paid in this fashion until February 19, 1981, the date of the check covering its invoices through January 31 (R. 71 at ¶3b(xiii); A. 9). Florida Steel was not paid for steel it delivered between February 1 and April 6, 1981 (R. 69 at ¶3b(iii); A. 7).

In March 1981 Kings Point concluded that Logan & Clark was in breach of its contract (R. 72 at ¶3b(xvii); A. 10). Kings Point notified Logan & Clark that it would not be paid until its breaches were cured (id. at ¶3b(xviii)). It is stipulated that:

> Logan & Clark withheld this information from Florida Steel and misled Florida Steel into believing that Kings Point had promised that "the check was in the mail" and similar delaying tactics (id. at ¶3b(xxi)).

The "contract price" for Logan & Clark's work was $3,305,010 (R. 73 at ¶3b(xxix); A. 11). All progress payments made before Logan & Clark abandoned the project -- a total of $782,100 -- were concededly "proper payments" (R. 71 at ¶3b(xi); A. 9).[4] It is stipulated that the reasonable cost to complete Logan & Clark's work was several hundred thousand dollars more than the unpaid balance of the contract price (i.e., $2,522,910) (R. 73 at ¶3b(xxix); A. 11).

No progress was made on the Envoy shell between April 6, 1981, when it was abandoned by Logan & Clark (R. 72 at ¶3b(xxiii); A. 10), and January 6, 1982, when construction recommenced with Rogers & Ford Construction Company as the contractor and Florida Steel again supplying the reinforcing steel (R. 74 at ¶3b(xxxi); A. 12). Kings Point had begun the search for a potential replacement contractor even before Logan & Clark abandoned the work (R. 72 at ¶3b(xx); A. 10).

The circuit court referred the disputes between Kings Point and Logan & Clark to arbitration on June 10, 1981 (id. at ¶3b(xxiii)), and those disputes all were resolved in Kings Point's favor on May 6, 1982, the date Florida Steel began this action (R. 73 at ¶3b(xxiv); A. 11). On February 7, 1983, the circuit court

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[4] "Contract price" and "proper payments" are defined in the mechanics' lien law, discussed in Section I.A. of Argument, infra.

entered a final judgment affirming the arbitrators' decision (id.). As noted earlier, the Court of Appeals affirmed.

Florida Steel claimed its lien on June 1, 1981. Kings Point recorded a new notice of commencement on January 6, 1982 (R. 74 at ¶3b(xxxi); A. 12). Kings Point did not record the affidavit of intention to recommence permitted by the lien priority provisions of Section 713.07(4), Florida Statutes (1981) (id. at ¶3b(xxxii)). The trial court held that the affidavit was mandatory and that its absence disentitled Kings Point from reducing the contract price by the completion costs it incurred because of Logan & Clark's breach (R. 106). This was Florida Steel's position at trial, although now Florida Steel contends that Kings Point would not be entitled to offset completion costs as to it even if the affidavit had been filed (FS at 23).

## SUMMARY OF ARGUMENT

The answer to the certified question is yes. The rule of Alton Towers does not gradually become unsound as the period of post-abandonment inactivity lengthens. Rather, application of the rule may have differing results, depending on the length of and reasons for the interruption.

This is so because the rule of Alton Towers permits an owner to deduct only reasonable completion costs from the contract price. The owner bears the burden of proving reasonableness. If the lien claimant contends that the owner's cost to complete was

unreasonably high because the hiatus before recommencing work was unreasonably long, the owner must prove in defense that the time spent finding a new contractor, rebidding the work, arranging new financing, etc., was not excessive and did not unreasonably increase construction costs. A trier of fact might well conclude in an appropriate case that an owner's unreasonable delay in recommencing a project (or obtaining an estimate of completion costs) justified a downward adjustment of the amount actually paid (or estimated) to determine the "reasonable" completion costs.

In the case at bar, the reasonable completion costs are a matter of stipulated fact (R. 73 at ¶3b(xxix); A. 11). Kings Point, acting in a commercially reasonable manner, had to pay "several hundred thousand dollars" more than the balance of the contract price (id.). Because Florida Steel has stipulated that the cost to complete was reasonable, application of the rule of Alton Towers compels the conclusion reached by Chief Judge Anstead and Judge Barkett in the opinion appealed from (A. 1). The concern that led to the certified question is misplaced, because the rule of Alton Towers strikes the balance intended by the mechanics lien law and adequately protects the interests of materialmen.

## ARGUMENT

THE RULE OF ALTON TOWERS PERMITS THE REASONABLE COST OF COMPLETING AN IMPROVEMENT ABANDONED BY THE ORIGINAL CONTRACTOR TO BE SUBTRACTED FROM THE CONTRACT PRICE. THE RULE APPLIES EVEN IF A PERIOD OF TIME PASSES BEFORE RECOMMENCEMENT OF THE WORK, AND EVEN IF THE WORK IS NEVER RECOMMENCED; HOWEVER, IN SUCH CASES THE OWNER'S BURDEN OF PROVING THAT ACTUAL OR ESTIMATED COMPLETION COSTS WERE REASONABLE INCLUDES THE BURDEN OF PROVING THAT THE PASSAGE OF TIME DID NOT UNREASONABLY INCREASE THOSE COSTS.

### A. THE STATUTORY FRAMEWORK

Before discussing Alton Towers, an analysis of the statute may be useful to provide a frame of reference. The relevant section is not, as the trial court thought, Section 713.07(4), which deals with the priority of liens, but Section 713.06. Both sections appear in the appendix accompanying Florida Steel's brief (A. 15-19). It is Section 713.06(1) which establishes the right of persons not in privity with the owner (e.g., Florida Steel) to a lien (A. 15). It is also Section 713.06(1) which limits Kings Point's liability to "the amount of the contract price fixed by said direct contract" (id.), the key phrase "contract price" being defined in Section 713.01(3) (A. 14):

> 'Contract price' means the amount agreed upon by the contracting parties [i.e., Kings Point and Logan & Clark] for performing all labor and services and furnishing all materials covered by their contract and shall be . . . diminished by . . . any amounts attributable to . . . breaches of the contract. . . .

The mechanics' lien law takes into account the real world of construction projects by providing for adjustments to the contract price, both upward and downward, as experience has shown will best effectuate the balancing of interests the statute intends. In the case at bar, the contract price subject to Florida Steel's lien was "diminished by [the reasonable cost to complete, an amount] attributable to [Logan & Clark's] breaches of the contract."

Section 713.06 not only establishes the respective rights of Florida Steel and Kings Point, it also tells owners how to make proper payments during performance of the contract and how to comport themselves in the event of abandonment.

"Proper payments" are explained in Section 713.06(3). Subsection (a) begins by requiring an owner to record a notice of commencement before making any payments (A. 16). Subsection (b) makes it clear that payments are permitted "at any time after recording"; no suggestion is found that an affidavit of intention to recommence might also be required in some cases (id.). Subsection (c) provides methods by which the owner can protect itself while making progress payments (id.). (Here it is stipulated the joint check procedure resulted in only proper payments to Florida Steel and Logan & Clark's other suppliers.) Subsection (d) sets forth final payment provisions. Although Logan & Clark's breaches disentitled it to additional payment, these provisions remain of interest because they reveal again the principle of limiting the owner's liability to the contract price as adjusted in light of the

builder's breaches. Especially pertinent is subsection (d)3, which says that "[i]f the balance due [the contractor from the owner] is not sufficient to pay all lienors," and the contractor doesn't make up the difference,

> the owner shall determine the amount due each lienor and shall disburse to them the amounts due from him on a direct contract in accordance with the procedure established by subsection (4). Section 713.06(3)(d)3 (A. 17).

Likewise, Section 713.06(3)(d)2 refers to "any balance then remaining due the contractor" and "the balance due on a direct contract" (id.). These phrases take into account the fact that the fund available to lienors is measured by the owner's liability for the contract price, a liability diminished both by proper payments and builder's breaches.

The next subsection of Section 713.06(3) is one which Florida Steel erroneously believes entitled it to payment:

> (e) If the improvement is abandoned before completion, the owner shall determine the amount due each lienor giving notice and shall pay the same in full or prorate in the same manner as provided in subsection (4) of this section. (id.).

There is no question Kings Point knew the amount due Florida Steel -- it had copies of the unpaid invoices. However, subsection (e) plainly recognizes that the owner may not be holding a fund sufficient to pay lienors. That was the case here. Kings Point's damages resulting from Logan & Clark's breach reduces the contract price, as Section 713.01(3) expressly provides, and it is the contract price which limits Kings Point's exposure under

Section 713.06(1). Because it is stipulated in this case that Kings Point's proper payments before the breach and its damages resulting from the breach totalled more than original contract price, no fund remained liable to satisfy Florida Steel's lien, and pro rating in accordance with Section 713.06(4) would result in no payment to Florida Steel.

Section 713.06(4) is referred to repeatedly in Sections 713.06(3) and also in 713.07(4). It provides for three classes of liens (those of laborers, materialmen and the contractor); mandates that payments be made in that order, with the contractor receiving nothing unless the first two classes are paid, and establishes the principle that payments are to be made pro rata within a class if there is not enough to pay the class in full. This case does not involve any issue of lien ranking or priority.

Florida Steel and the trial court relied on Section 713.07(4) to support the judgment below. It reads:

> (4) If construction ceases before completion and the owner desires to recommence construction, he may pay all lienors in full or pro rata in accordance with §713.06(4), prior to recommencement in which event all liens for the recommenced construction shall take priority from such recommencement; or the owner may record an affidavit in the clerk's office stating his intention to recommence construction and that all lienors giving notice have been paid in full except those listed therein as not having been so paid in which event thirty days after such recording, the rights of any person acquiring any interest, lien or encumbrance on said property or of any lienor on the recommenced construction shall be paramount to any lien on the prior construction unless such prior lienor records a claim of lien within said thirty day period. A

> copy of said affidavit shall be served on each lienor named therein. Before recommencing, the owner shall record and post a notice of commencement for the recommenced construction, as provided in §713.13 (A. 19).

Florida Steel's position at trial was simple enough: It contended that the section requires owners to record a new notice of commencement and to either pay known liens or record an affidavit of intention to recommence. The parties are agreed about one requirement -- the section says that "the owner shall record and post a notice of commencement for the recommenced construction, as provided in §713.13." It is stipulated that Kings Point did so. (R. 74 at ¶3b(xxxi); A. 12). However, Kings Point does not agree that the alleged second requirement exists. Section 713.07(4) uses the verb "may", not "shall", with respect to both branches of Florida Steel's alleged second requirement. It is strictly a lien priority provision whose purpose is to enable owners to restart abandoned projects in 30 days rather than 90. See Section I.C.2. of Argument, infra.

At trial, Florida Steel contended that the statutory formulation "the owner may do A or the owner may do B" meant "the owner must do A or B." Florida Steel argued that if Kings Point did not want to do "A" (pay the lien), all it had to do was "B" (record and serve the affidavit). Now Florida Steel claims that Kings Point had to do "A" whether or not it did "B", because recording and serving the affidavit would have no effect on timely claimed liens like Florida Steel's (FS at 23).

Kings Point agrees with Florida Steel's present position in part. It is true that the filing of an affidavit of intention to recommence has no effect on already-claimed liens for preabandonment (or "Phase I," as Florida Steel puts it) work. The affidavit can affect the outcome in a priority dispute between Phase I and Phase II lienors, but no such dispute is presented in the case at bar. Florida Steel is simply wrong in characterizing this action as a priority dispute, and wrong in thinking that the reasonable cost to complete is to be disregarded.

## B. THE RULE OF Alton Towers

The law pertinent to this dispute was settled by this Court in Alton Towers, Inc. v. Coplan Pipe & Supply Co., 262 So. 2d 671 (Fla. 1972). In the plainest possible language, this Court adopted the view earlier expressed in Bryan v. Owsley Lumber Co., 201 So. 2d 246 (Fla. 1st DCA 1967), that no fund remains for lienors if the owner's proper payments under the first contract and reasonable cost to complete after abandonment total more than the original contract price.

In Alton Towers, a case identical to the present one in all material respects, an owner-builder (Alton) entered into a direct contract with a plumbing subcontractor. Before the project was completed, the plumber filed bankruptcy and abandoned the project. In a lien foreclosure action by the plumber's supplier (Coplan),

Alton defended on the ground that the reasonable cost of completion due to the breach, along with the proper payments, should be subtracted from the contract price to determine the amount subject to the lien, if any.

Although the Court of Appeals rejected Alton's formula, this Court fully adopted it, stating that:

> [t]he reasonable cost of completing the contract necessitated by the contractor's breach thereof properly diminishes the balance of the contract price remaining after deducting therefrom payments properly made to the contractor prior to default.

Alton Towers, supra, 262 So. 2d at 672, quoting Bryan, supra, 201 So. 2d at 250. This principle is a natural application to the abandonment situation of the general rule of Section 713.06(1), limiting the owner's exposure to the contract price.

The mechanics' lien statute does not make owners the insurers of all unpaid liens. This Court in Alton Towers commended and adopted the Bryan Court's conclusions regarding the legislative intent underlying the statute's treatment of owners and lienors:

> Such a legislative scheme seems to contemplate that persons furnishing labor and material to a contractor are in a favorable position to determine the extent to which credit shall be extended before requiring payment for the amounts to become due for the services to be performed and the materials to be furnished, and that if because of misplaced confidence or misjudgment on their part the contractor becomes either unwilling or unable to pay them the amount owed, they are relegated for the payment of their claims to such balance of the contract price as may remain due the contractor by the owner.

Alton Towers, supra, 262 So. 2d at 673, quoting Bryan, supra, 201 So. 2d at 249.

Florida's mechanics' lien law does not remove all risks of doing business from the supplier. Florida Steel entered into a contract with Logan & Clark, and in doing so, assumed the risk businessmen must that the other party may breach the contract. Indeed, in this case Florida Steel knew the risk was very great:

> At the time that Florida Steel began doing business with Logan & Clark, Florida Steel performed a credit check on Logan & Clark and determined that Logan & Clark was a shell corporation without any substantial assets. (R. 70, at ¶3b(viii); A. 8).

At trial, and now to a much lesser extent (FS at 18), Florida Steel attempts to distinguish Alton Towers as being applicable only where the owner has fully complied with the mechanics' lien law, which it half-heartedly asserts Kings Point did not. Only vestigial traces of this argument remain in Florida Steel's brief (FS at 18). The cases it relied upon in both lower courts no longer merit even a passing mention: Melnick v Reynolds Metal Co., 230 So.2d 490 (Fla. 4th DCA 1970); John T. Wood Homes, Inc. v Air Control Products, Inc., 177 So.2d 709 (Fla. 1st DCA 1965). This is understandable because, as the far more pertinent case of Meredith v Lowe's of Florida, Inc., 405 So.2d 1061 (Fla. 5th DCA 1981), makes clear, even an owner who has failed to comply with the mechanics'

lien law in some respect (there the owner made $3,420 in improper payments) remains entitled to application of the rule of Alton Towers. Id. at 1063.[5]

Florida Steel's main argument is no longer that Kings Point acted improperly under the mechanics' lien law. The gist of Florida Steel's present position is that the rule of Alton Towers simply does not apply to cases where a notice of recommencement is filed (FS at 9-10). Florida Steel attempts to distinguish between what it terms "abandoned contracts" and "abandoned improvements" (FS at 9; emphasis in original), Alton Towers allegedly being an example of the former and the case at bar the latter.

The Meredith case also involved an abandoned improvement as to which, if work was ever restarted (the opinion does not say), a new notice of commencement would have been required. Kings Point stresses that a reversal in the case at bar would necessarily be a disapproval of the Fifth District's holding in Meredith. There it appeared that lien foreclosure was sought before the work was recommenced, since the evidence of completion costs is given as an estimated range ($19,900 to $22,288.80) rather than a settled contract price. Id. at 1062. The Court of Appeals subtracted the owner's $3,420 in improper payments but rejected the argument that it should also disregard completion costs, pointing out that this

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[5]The exception, of course, is failing to file a new notice of commencement. All payments made in the absence of that notice are improper and do not reduce the contract price.

logic would strip an owner of all protection merely because a small sum was paid improperly, while an owner who did not pay that same small sum at all would remain fully protected. Id. at 1063 n. 2. The case at bar is even more compelling than Meredith because here there were no improper payments.

Another case which cannot be squared with Florida Steel's position is Torres v. MacIntyre, 334 So. 2d 59 (Fla. 3d DCA 1976) and, following remand, 358 So. 2d 101 (1978). In the earlier opinion, the Court of Appeals reversed a summary judgment for an owner because the record did not reflect that the owner had made proper payment of all funds due under the contract before abandonment or that the reasonable cost to complete exceeded the contract balance. The Court of Appeals said that the owner had not filed a new notice of commencement following abandonment. 334 So. 2d at 60. Following a remand in which the owner lost, the Court of Appeals reviewed the case again. This time the record was more complete and revealed that the owner had indeed filed a new notice of commencement after abandonment. 358 So. 2d at 102. However, there is nothing to suggest that the owner recorded an affidavit of intention to recommence construction. Nonetheless, the Court of Appeals again reversed the trial court:

> We hold that the evidence in the record of the payments under the original contract and the payments under the contract for completion adequately prove the defense that there is no fund . . . to which the plaintiff-lienor's claim can attach. Id.

This states the rule of Alton Towers, not the rule of Florida Steel (i.e., "completion costs are ignored as to Phase I lienors if a new notice of commencement is filed.")

To the same effect is a case heavily relied upon by Florida Steel in the lower courts, Tamarac Village, Inc. v. Bates & Daly Co., 348 So. 2d 23 (Fla 4th DCA 1977). In Tamarac the situation was reversed. There the owner filed its first notice of commencement late and never filed the second notice at all, resulting in enough improper payments to satisfy the outstanding lien. The Court of Appeals made no mention of the affidavit of intention to recommence as being in any way pertinent to the question at hand. Rather, it focused on the owner's failure to comply with the plainly mandatory requirement of Section 713.06(3)(a) and, after abandonment, to comply with the reiteration of that requirement in the last sentence of Section 713.07(4). This distinction is carefully explained in Meredith, supra, 405 So.2d at 1063.

Florida Steel consciously assumed the risk of exactly what happened: Logan & Clark might fail, Florida Steel might be unpaid for material delivered after the last proper payment and Kings Point's cost to complete might be greater than the balance of original contract price. Florida Steel took a deliberate chance and must look to Logan & Clark for recovery.

## C. THE ERRORS OF FLORIDA STEEL'S POSITION

### 1. Section 713.06(3)(e) applied in Alton Towers.

Florida Steel's lien rights arise out of section 713.06(1) because it is "[a] materialman . . . not in privity with the owner . . . [who is owed for] materials furnished in accordance with his contract and with the direct contract." The direct contract between the owner and the contractor sets forth the work to be done, and section 713.06(3) establishes how the work is to be paid for. Although subsection (3) describes the several different kinds of possible payments (progress payments, final payments, payments on abandonment), in every case what is meant is payment under the direct contract for the work described in that contract.

Subsection 713.06(3)(e), unlike 713.07(4), does not speak in terms of the cessation and recommencement of "construction." Rather, it begins: "If the improvement is abandoned before completion . . . ." The word "improvement" is defined in section 713.01(8):

> Improvement means any building, structure, construction, demolition, excavation, landscaping, or any part thereof existing, built, erected, placed, made or done on land or other real property for its permanent benefit. (Emphasis added)

Therefore, subsection (3)(e) applies to every case where the improvement called for in the direct contract (e.g., a building

shell, a building's plumbing, etc.) is abandoned by the contractor. It applied in Alton Towers exactly as it applies in the case at bar. It applies whether or not other direct contracts continue to be performed, and whether or not section 713.07(4) also applies.[6]

Florida Steel agrees that subsection (3)(e) is pertinent to the case at bar, but argues that it was not pertinent in Alton Towers. However, the decision in Alton Towers was expressly based on 713.06(1), which in turn refers to and depends upon 713.06(3).

Florida Steel refers to sections 713.06(3)(e) and 713.07(4) as though they were interchangeable, but this view is erroneous. Section 713.06(1), which limits an owner's liability for liens to the "contract price," contains only one exception, i.e., "except as provided in subsection (3)." This is a reference to 713.06(3), not to 713.07(4). The latter section deals with the separate subject of lien priority, while subsection (3) deals with proper payments. Payments which are improper under subsection (3) do not reduce the contract price, and hence do not reduce an owner's liability for liens.

It is fair to ask why Florida Steel even bothers with section 713.07(4) if section 713.06(3)(e) entitled it to immediate

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[6]Commonly, of course, an owner will have only one direct contract with a general contractor, who subcontracts as needed with others. In this usual situation, abandonment of the direct contract will perforce mean a complete cessation of construction. Alton Towers holds that the same rules apply when the owner has a direct contract with a contractor to perform a part of the work.

payment in June 1981 whether or not an affidavit of intention to recommence later was filed. Kings Point suspects that Florida Steel focused the trial court's attention on 713.07(4) so that it could claim Kings Point was liable because of an omission to do an act which would have protected it, and so that it (Florida Steel) would not have to take the position it now is taking that Kings Point was liable, period, without ever having had any means of protection.

Section 713.07(4) does not render Kings Point liable to Florida Steel. This is so even though "construction cease[d] before completion," as 713.07(4) puts it (A. 19). Conversely, section 713.06(3)(e) and Alton Towers do apply to the case at bar, because in both this case and Alton Towers the "improvement [was] abandoned before completion," as 713.06(3)(e) puts it (A. 17). Although section 713.06(3)(e) certainly does apply to the case at bar, it does not entitle Florida Steel to recover here any more than it entitled Coplan to recover in Alton Towers.

2. Lien priority is irrelevant in this case.

Because Florida Steel timely recorded its claim of lien, its lien rights relate back to the original notice of commencement and would be superior to the rights of any materialmen or laborers with unpaid claims for material supplied to or work performed for Rogers & Ford, the second contractor who completed the shell of the Envoy. To use Florida Steel's terminology, this is a case where the

"Phase I" lienor would beat all "Phase II" lienors (see FS at 13 n. 1).

Unfortunately for Florida Steel, there are no "Phase II" lien claimants in this case. Kings Point paid Rogers & Ford in accordance with their contract. Rogers & Ford paid its materialmen and laborers. Florida Steel stipulated that the cost to complete the shell of the Envoy was reasonable (R. 73 at ¶3b(xxix); A. 11). What Florida Steel fails to realize is that the senior priority of its lien did not affect Kings Point's right -- and obligation -- to pay Rogers & Ford for its work.

On the one hand, Kings Point was entitled to continue its project by contracting with and paying Rogers & Ford to complete the work abandoned by Logan & Clark. On the other hand, Florida Steel was entitled to claim that the cost of completion was unreasonably high, and to make Kings Point prove otherwise in court or find itself liable to Florida Steel. But Florida Steel concedes that Kings Point paid no more than a reasonable amount to complete the Envoy's shell, and that is why the unpaid contract price in this case is zero and why even the most senior lienor cannot recover.

Florida Steel persists in misunderstanding the rights which result from a determination of senior priority. A quotation from Florida Steel's brief illuminates its error. After correctly stating that the recording of a new notice of commencement establishes an anchor date for completion lienors which makes their liens junior to those of Phase I lienors, Florida Steel asserts:

> The owner [Kings Point] had no right to use monies for claims attaching to the property as of the Fall of 1980 [the anchor date for Florida Steel's lien] to satisfy claims which did not attach to the property until January, 1982 [the anchor date for completion lien claimants, had there been any], without taking advantage of the priority switching mechanism of Fla. Stat. §713.07(4). (FS at 16).

The plain fact is that section 713.07(4) provides no mechanism whatever which would have enabled Kings Point to "switch" the priority of a Phase I lienor like Florida Steel who had already recorded its claim of lien. The affidavit of intention to recommence affects only listed and unclaimed liens. It has no effect at all on a Phase I lienor in Florida Steel's position.

Significantly, Florida Steel recognizes that the affidavit is intended to "switch" the priority of unclaimed Phase I liens and to let owners and their lenders know where they stand before recommencement (FS at 21). The affidavit is simply an aid to the owner who is able to resume construction within 90 days of abandonment, by establishing a shorter 30-day period for the claiming of Phase I liens. Florida Steel is right that owners and lenders want to know the size, number and priority of Phase I liens, but the reason is that those liens may have to be paid ultimately, not that they must be paid immediately.

Section 713.07(4) can sometimes affect the relative priority of liens in abandoned and restarted projects, but to determine the amount recoverable from the owner, reference must be had to Section 713.06.

3. Kings Point never abandoned the improvement.

It is stipulated that Logan & Clark, not Kings Point, abandoned the Envoy Project (R. 72 at ¶3b (xxiii); A. 10). An arbitration panel, circuit court and the Court of Appeals have all agreed. The certified question to this Court asks about the effect of work interruptions caused "by the contractor's abandonment of the job site" (A. 2) (emphasis added). The per curiam opinion similarly speaks of "the contractor's wrongful abandonment of the project" (A. 1). The phrase "contractor's abandonment" or some variant of it was sprinkled liberally throughout Florida Steel's briefs in the Court of Appeals.

Despite all this, the dissenting opinion of Judge Glickstein states that "[t]he stipulated facts in this case establish that the owner abandoned the project for a period of time" (A. 3). This statement is completely inaccurate. Kings Point never abandoned the Envoy project for so much as a minute and certainly never stipulated to anything of the sort. The work was recommenced as soon as possible under the very difficult circumstances in which Kings Point found itself after Logan & Clark walked off the job. The dissenting opinion's conclusion that Kings Point had some hypothetical motive to, and in fact did, "close down the project" (A. 3) for nine months, is inexplicable and altogether unsupported in the stipulated facts.

The same disregard for the record is demonstrated by Florida Steel in a series of hypotheticals (FS at 24-27). The three hypotheticals assume "the owner abandons construction" (FS at 24), "[a]nother owner . . . stops progress on the job" (FS at 25) and "[t]he owner . . . starves out a contractor" (FS at 26). The last hypothetical is claimed to be "exceedingly similar, if not identical" to the case at bar (FS at 26 n.10). Florida Steel misrepresents the record in both this case and in the related case of Logan & Clark, Inc. v. Adaptable Development, Inc., 450 So.2d 1189 (Fla. 4th DCA 1984). As the Court of Appeals noted in that case, the arbitrators found that:

> LOGAN & CLARK, INC. materially breached their sub-contract on April 6, 1980 [sic; should be 1981] by unilaterally terminating work on the Envoy project without legal justification (Id. at 1190; A. at 21) (emphasis added).

In the case at bar, the stipulated facts are to the same effect: "On April 6, 1981, Logan & Clark abandoned work on the Envoy" (R. 72 at ¶3b (xxiii); A. 10). Logan & Clark's "abandonment" of its contract is also referred to in stipulated facts ¶3b (xxv) and (xxix) (R. 73; A. 11). It is not through inadvertence or sloppy drafting that the certified question speaks of "the contractor's abandonment" (A.2).

It may also be noted here that Florida Steel ascribes some highly improbable (not to mention Machiavellian) motives to owners. Florida Steel's hypotheticals ask this Court to suppose that owners

go around plotting how they will bring their own construction projects grinding to a halt for as many years as possible so that they can pay hundreds of thousands more in delay expenses, legal bills and higher completion costs. The supposition, in a word, is ridiculous.

4. The parties' stipulation that completion costs in this case were reasonable is a stipulation on all aspects of reasonableness, including the time element.

After careful thought and with full knowledge of the facts and the rule of Alton Towers, the parties stipulated as follows:

> The reasonable cost incurred by Kings Point to complete the work which was within the scope of the work under the Logan & Clark subcontract, after Logan & Clark abandoned its subcontract at the Envoy project, exceeded $2,522,910, which is the difference between the contract price of the Logan & Clark subcontract, $3,305,010, and the proper payments made under the Logan & Clark subcontract which totalled $782,100. That excess was several hundred thousand dollars (R. 73 at ¶3b (xxix); A. 11).

The concept of reasonable completion costs has a specific meaning in cases like this one, and is drawn directly from this Court's opinion in Alton Towers, 262 So.2d at 672, which adopted it from Bryan v. Owsley Lumber Co., 201 So.2d 246, 250 (Fla. 1st DCA 1967). It was precisely this concept that the parties had in mind when they sought to avoid the expense of evidentiary trial proceedings by stipulating to every material fact.

Because Kings Point has relied on Alton Towers all along, the reasonableness of its completion costs has always been an element of its defense and, therefore, something that had to be completely covered by the stipulated facts. On the other hand, because Florida Steel's trial position was that the reasonableness of completion costs did not matter if an affidavit of intention to recommence construction was not recorded and served, it had no reason to quibble about reasonableness.

The resulting stipulation, quoted above, was not merely an agreement on certain aspects of reasonableness, as Florida Steel asserted for the first time during oral argument in the Court of Appeals. Kings Point never intended to stipulate only that the completion costs were reasonable as of the date of recommencement but perhaps unreasonable as of some unascertained date (defined as the last date upon which recommencement would not have been unreasonably delayed). Stipulated fact ¶3b(xxix) was intended to remove from issue the entire question of reasonableness, including the time factor. If Florida Steel disagreed, it should not have declined the trial court's invitation "to present any other factual testimony or evidence other than what is included in this Stipulation" (Transcript 10/6/83 at 3; see also 7), and should not still be admitting that "[a]ll material issues of fact were stipulated to" (FS at 1).

Buried in a footnote in Florida Steel's argument on prejudgment interest is the claim that the damages suffered by Kings Point because of Logan & Clark's breaches "were never stipulated to"

(FS at 31 n. 11). In fact, the whole point of Alton Towers is that those damages are to be measured by the reasonable cost to complete, an amount which certainly was stipulated to. As the Court of Appeals expressed it in Bryan, supra:

> It would appear irrefragable that a default and abandonment of the work under a contract by the contractor would constitute a breach thereof within the meaning and intent of the foregoing provision of the statute, and that the reasonable cost of completing the contract would be an amount attributable to such breach.

201 So.2d at 248.

Finally, it is worth observing that even if reasonable completion costs were several hundred thousand dollars less than it is stipulated they were, there still would be no contract balance available for payment of Florida Steel's lien. This huge "cushion" of excess costs makes it pointless to speculate whether Kings Point might have saved a few dollars by recommencing a little earlier than it did. Kings Point submits that Florida Steel agreed to stipulated fact ¶3b (xxix) not only because its then-theory permitted it to, but also because it knew Kings Point could easily prove every word of the stipulation at trial. Completion costs would have consumed the entire unpaid contract price even if Rogers & Ford had started work the morning after Logan & Clark abandoned, as Florida Steel, the steel supplier to both contractors, was in an excellent position to know.

## II.

## THE QUESTION OF PREJUDGMENT INTEREST IS NOT BEFORE THIS COURT.

The Fourth District Court of Appeals did not even reach Florida Steel's question regarding prejudgment interest, much less certify it to this Court as a question of great public importance. If this Court should reverse the Court of Appeals on the substantive issue, the appropriate course would be to remand to the Court of Appeals for resolution of the interest question. In any event, Florida Steel's question is without merit and is interesting only insofar as it illustrates the inconsistencies of Florida Steel's position.

If this Court agrees with Kings Point's first argument, obviously the interest question raised by Florida Steel is mooted. However, even if this Court is not persuaded that Kings Point should prevail on the merits, it cannot be said that Kings Point's litigation posture was groundless or frivolous. No reported decision has ever attached the significance to the affidavit of intention to recommence given it by the trial court in this case. Kings Point's litigation posture has been deemed correct by the Fourth District Court of Appeals. Florida Steel's current theory that, quite apart from the affidavit, an owner can never offset reasonable completion costs in determining whether a fund exists for timely claimed liens, is apparently inconsistent with Alton Towers, Bryan, Meredith and Torres, to name a few.

Florida Steel is quick to agree -- because the case law leaves it little room to maneuver -- that generally a nonprivity lienor is not entitled to prejudgment interest from an owner. The exceptional circumstance which Florida Steel finds in this case is that the debt owed to it allegedly was due "from an established fund containing a sum certain," to quote from its argument heading (FS at 29). Florida Steel's entire argument hinges on its claim that Kings Point was holding a fund of $2,522,910 subject to its lien in June 1981 (FS at 30-31). Kings Point already has devoted considerable argument to disproving this contention and will not repeat it here.

Generally, as Florida Steel concedes, a nonprivity lienor is not entitled to recover prejudgment interest from an owner "who had a litigable position upon which to deny liability." Gerber Groves, Inc. v. Belle Glade Agricultural Contractors, Inc., 212 So. 2d 669, 672 (Fla. 2d DCA 1968). Accord, Horne v. C & R Building Materials, Inc., 321 So. 2d 617 (Fla. 3d DCA 1975); Sharpe v. Ceco Corp., 242 So. 2d 464 (Fla. 3d DCA 1971), cert. denied, 247 So. 2d 324 (Fla. 1971).

Florida Steel premises its argument that an exception to the general rule exists in this case on Flood v. Clark, 111 So. 2d 465 (Fla. 3d DCA 1959). The Flood Court allowed prejudgment interest on the following facts:

> The amount and validity of the liens has never been in dispute. Only the size of the fund available for their discharge has been in dispute. [The owner had retained only 20% of the contract price, $78,080, when his contract required 30% retention, or $110,712.] The appellants could have saved the interest by paying out the fund ratably to the lienors . . . . Id. at 468.

Plainly, the Court was saying that an owner who was admittedly holding $78,080 of the lienor's money had to pay it to avoid prejudgment interest. That is a very different situation indeed from the case at bar, where Kings Point's position has always been that it was not holding any fund whatever subject to Florida Steel's lien.

Even if this Court were to conclude that Alton Towers does not control this case, and that the question of prejudgment interest should not be left to the Court of Appeals on remand, Florida Steel should be denied the interest it seeks. Kings Points' legal position throughout this case has been compelling enough so that it should not have to bear the burden of prejudgment interest to litigate the question.

## CONCLUSION AND RELIEF REQUESTED

Following Logan & Clark's abandonment of the Envoy project, section 713.06(3)(e) instructed Kings Point to "determine the amount due" Florida Steel and to "pay the same in full or prorate in the same manner as provided in subsection (4) . . ." (A. 17). Section 713.06(4) clearly recognizes that there may not be a fund remaining sufficient to pay all liens. It expressly provides for the pro rata payment of liens. Its language demonstrates again that an owner's liability is limited by the contract price as 713.01(3) (A. 14) defines and adjusts it, less proper payments under 713.06(3). Here it is stipulated that Kings Point paid out hundreds of thousands

more than the contract price for the Envoy shell. Every penny Kings Point spent was either a proper payment to Logan & Clark or a reasonable completion payment to Rogers & Ford. Florida Steel had its eyes completely open when it contracted with the financially shaky Logan & Clark, and should not be allowed to turn Kings Point into its personal insurance company. Florida Steel, just like Coplan Pipe & Supply Co. and the Owsley Lumber Co., was "in a favorable position to determine the extent to which credit" should be offered to the contractor. Alton Towers, supra, 262 So.2d at 671. Like Coplan and Owsley, Florida Steel must look for payment to the party with whom it contracted.

For all the reasons discussed in this brief, Respondents Kings Point respectfully request that the certified question be answered "yes"; that the decision of the Court of Appeals for the Fourth District be affirmed; that this action be dismissed as to Kings Point; and that Kings Point be awarded its attorneys fees as requested in the motion accompanying this brief.

Brian G. Shannon
JAFFE, SNIDER, RAITT & HEUER,
Professional Corporation
1800 First National Building
Detroit, Mich. 48226
(313) 961-8380

Rosemary Cooney
PAXTON, CROW, BRAGG & AUSTIN
P.O. Drawer 1189
Barristers Building, Ste 500
1615 Forum Place
West Palm Beach, Fla. 33402
(305) 684-2121

Attorneys for Appellees & Cross-Appellants

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