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THE COURT: Recross-examination.

RECROSS-EXAMINATION

BY MR. MCENTEE:

Q. How many hours total did this add up to, Ms. Simmons?

A. I believe it was close to 55.

Q. Did you total the amount of hours that appeared on this tape after you'd reviewed it?

A. Yes.

MR. MCENTEE: I don't have any other questions.

THE COURT: Any other redirect?

MR. MAUTNER: No, Your Honor.

THE COURT: May Ms. Simmons be excused?

MR. MAUTNER: Yes.

THE COURT: Mr. McEntee.

MR. MCENTEE: Yes.

THE COURT: Thank you, Ms. Simmons.

(Witness excused.)

THE COURT: Next witness.

MR. MAUTNER: The People's next witness is Ray Wetterlaund.

THE JUDICIAL ASSISTANT: Please raise your right hand.

- - -

RAY WETTERLAUND,

a witness called by the People, who, being first duly administered an oath to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

1 THE WITNESS: I do.

2 THE COURT: Sir, please state and spell your first  
3 and last names.

4 THE WITNESS: Ray Wetterlaund, R-a-y,  
5 W-e-t-t-e-r-l-a-u-n-d.

6 DIRECT EXAMINATION

7 BY MR. MAUTNER:

8 Q. Mr. Wetterlaund, how are you employed? What is  
9 your job?

10 A. I work for Doshier-Gregson in American Canyon. I  
11 work on water wells.

12 Q. And where do you live?

13 A. In Napa.

14 Q. Who's house?

15 A. Lolly Petree's house.

16 Q. Is that at 191 Chelsea in the City of Napa?

17 A. Yes.

18 Q. And were you residing there between December 15,  
19 2005 and March 11, 2006?

20 A. Yes.

21 Q. Okay. Are you familiar with the defendant in this  
22 matter Mr. Schultz?

23 A. Yes.

24 Q. Were you called upon at any time during the project  
25 at that address between those two dates to use your  
26 professional skills?

27 MR. MCENTEE: Objection. It's vague.

28 THE COURT: Sustained. The witness doesn't

1 understand, so let's ask it again.

2 BY MR. MAUTNER:

3 Q. What exactly do you for the Gregson company?

4 A. We put pumps in wells, and we do plumbing.

5 Q. Okay. And you were residing at the 191 Chelsea  
6 address the whole time the defendant was working on the  
7 project there, correct?

8 A. Yes.

9 Q. You're familiar with the details of that project?

10 A. M-hm.

11 Q. Did the defendant retain you as a subcontractor to  
12 do pump work?

13 A. No.

14 Q. Did you do pump work?

15 A. No.

16 Q. Okay.

17 A. I think I brought -- I had a pump out back, and I  
18 pumped out the foundation before he poured the concrete there  
19 because it was filling up with water, but that's the only  
20 thing that had to do with a pump.

21 Q. When did that happen?

22 A. It would have been, like, a couple of days or day  
23 before he poured the foundation. I'm not exactly sure of the  
24 date.

25 Q. All right. Did he ask you to do that?

26 A. Yes.

27 Q. Did he pay you to do it?

28 A. No.

1 Q. Did you use equipment from your employer?

2 A. It was equipment I had personally.

3 Q. Okay. You're familiar with the bathroom that was  
4 being reconstructed at 191 Chelsea.

5 A. Yes.

6 Q. Did you do any work on it while the defendant was  
7 also doing work on it?

8 A. No, I did not.

9 Q. Okay.

10 A. I went and got supplies for it.

11 Q. All right. What supplies did you go and get?

12 A. Well, some months ahead of time I had gotten the  
13 shower enclosure. And the day that he was installing it, he  
14 was going to put the old faucets and stuff in the new shower  
15 and leave the old steel pipes in the wall. And I told him  
16 that was ridiculous to leave the steel pipes in there,  
17 because I had told him some months before that I wanted it  
18 changed over to copper. So I ran to the store and went and  
19 got the copper pipe and went and got a new faucet and new  
20 drain for him to put in there.

21 Q. Did he pay you for any of those items?

22 A. No.

23 Q. Did he pay you for any of your time procuring them?

24 A. No.

25 Q. Did you do any work in installing them?

26 A. No.

27 Q. After Mr. Schultz and Mrs. Petree's professional  
28 relationship was terminated, did you have to do any work on

1 the bathroom?

2 A. Yes. The shower enclosure wasn't even screwed to  
3 the walls. I had to screw it to the walls. Then you could  
4 literally see inside there out to the backyard because there  
5 was no siding on the house and there was no Sheetrock around  
6 the shower, so I went and got some Sheetrock and Sheetrocked  
7 it in.

8 Q. Are you personally familiar with what happened with  
9 the previous Sheetrock inside?

10 A. I think it was -- I believe it was plaster walls  
11 that were in there, lathe and plaster, and they were all torn  
12 out to put the shower in there.

13 Q. When and by whom?

14 A. By Danny.

15 Q. You mean Mr. Schultz?

16 A. Mr. Schultz.

17 Q. Okay. After Mr. Schultz -- after March 11, 2006,  
18 when the professional relationship was terminated, was that  
19 bathroom in usable condition?

20 A. It depends if you didn't mind people being able to  
21 see you from outside. Not really, no.

22 Q. How about drainage? Was it capable of proper  
23 drainage?

24 A. The shower did drain, I believe, and the toilet  
25 there. The sink in there did not drain. I think it was  
26 plugged up from all the plaster that came off the walls.

27 Q. After the defendant left the project site at your  
28 home, was there any debris remaining on the site?

1 A. Oh, there was large amounts.

2 Q. How large?

3 A. Well, everything that came from that project plus I  
4 think he brought some from some other jobs too. He had  
5 brought I don't know how many yards of old carpeting from  
6 some job that he done just so he didn't have to walk in mud,  
7 and he had the whole backyard pretty much carpeted with this  
8 wet, soggy carpeting. That all had to be hauled off. And  
9 there was a lot of scrap wood and tile and plaster on the  
10 ground.

11 Q. Okay. Where did all that tile/plaster come from?

12 A. From the bathroom.

13 Q. From the demolition of the bathroom?

14 A. Yes.

15 Q. All right. And you hauled all that away?

16 A. Yes.

17 Q. You have a truck?

18 A. I got a trailer.

19 Q. How many trailer loads of debris did you have to  
20 haul away from the site?

21 A. I did one trailer load to the dumps, and I just  
22 filled up the garbage can that we had there each week filling  
23 it up. There's still some scrap lumber there now even, but  
24 for the most part it's all been cleaned up and gone.

25 Q. Did Mr. Schultz ever compensate you for cleaning  
26 and hauling the job site?

27 A. No.

28 MR. MAUTNER: I have no further questions.

1 THE COURT: Cross.

2 CROSS-EXAMINATION

3 BY MR. MCENTEE:

4 Q. Mr. Wetterlaund, you pumped out the footings about  
5 two or three days before Mr. Schultz poured the concrete; is  
6 that right?

7 A. M-hm.

8 Q. And that's because it had been raining pretty  
9 steadily for some time before that?

10 A. Yes. It had rained a few days before, and he said  
11 it needed to be dried out. Plus I believe he was waiting for  
12 some inspector to look under the house or something, so I  
13 wanted to make sure it was dry under there.

14 Q. Okay. But you didn't use your pump to eliminate  
15 water under the house, only in the footing, correct?

16 A. No, under the house also because it was all  
17 attached. There was no foundation yet, so all the water  
18 would just run under the house.

19 Q. So in order for all that water to be present it  
20 must have been raining pretty hard for quite some time before  
21 that, right?

22 A. Not really. For some reason in the Westwood area  
23 all the water off the Westwood hills seems to go through our  
24 backyard. And we actually have a little -- water actually  
25 flows through the backyard and out the driveway when it's  
26 raining hard, and it was not raining hard like that.

27 Q. How much water was standing in the bottom of the  
28 footing?

1 A. Oh, probably six inches.

2 Q. Throughout the footing?

3 A. Yeah.

4 MR. MCENTEE: I have no other questions.

5 THE COURT: Redirect.

6 MR. MAUTNER: None, Your Honor.

7 THE COURT: Thank you, Mr. Wetterlaund. You're

8 excused.

9 (Witness excused.)

10 THE COURT: And next witness.

11 MR. MAUTNER: Mr. Jackness.

12 THE JUDICIAL ASSISTANT: Please raise your right  
13 hand.

14 - - -

15 DAVID JACKNESS

16 a witness called by the People, who, being first duly  
17 administered an oath to tell the truth, the whole truth, and  
18 nothing but the truth, was examined and testified as follows:

19 THE WITNESS: I do.

20 THE JUDICIAL ASSISTANT: Thank you. Please have a  
21 seat over here.

22 THE BAILIFF: All the way around and have a seat  
23 and talk in the microphone.

24 THE COURT: Sir, please state and spell your first  
25 and last names.

26 THE WITNESS: My name is David, D-a-v-i-d. Last  
27 name Jackness, J-a-c-k-n-e-s-s.

28 THE COURT: Thank you. You may begin.



1 DIRECT EXAMINATION

2 BY MR. MAUTNER:

3 Q. Mr. Jackness, how are you presently employed?

4 A. I am semi-retired. I do some consulting and I do  
5 small -- at this point small remodeling jobs in and around  
6 the area where I live.

7 Q. How long have you been a licensed contractor,  
8 building contractor, in the State of California?

9 A. I've been licensed since 1978.

10 Q. And how many licenses and for what do you have?

11 A. I have five licenses. I have a general contracting  
12 license and then four supplemental licenses, painting and  
13 decorating, plumbing, flooring, and ceramic tile.

14 Q. And do you sometimes do work for the Contractors  
15 State Licensing Board?

16 A. Yes, I do.

17 Q. What kind of work?

18 A. They call me an industry expert. I go out and  
19 investigate claims usually by a homeowner against a  
20 contractor and evaluate those claims and do cost projections  
21 on what I think the cost for the job would take to correct.

22 Q. How do you do cost projections on a contracting  
23 job?

24 A. Well, sometimes that's more difficult than others.  
25 In some cases it's very clear cut. And I use a book called  
26 the National Construction Estimator which gives base rates  
27 with variable percentages for different parts of the country.  
28 And I use that as a basis plus my years of experiences in how

1 long I think it's going to take to do the job. And I also  
2 call local suppliers to find out what materials are costing  
3 at that time.

4 Q. And did you do an inspection and investigation of  
5 the property at 191 Chelsea Avenue in the City of Napa for  
6 the Contractors State Licensing Board?

7 A. Yes, I did.

8 Q. And did you inspect the property as part of that  
9 process?

10 A. Yes.

11 Q. And let's do this by the pictures. I'm going to  
12 show the witness and counsel first People's Exhibits 4, 5,  
13 and 6, which have already been discussed here today and 8 and  
14 9, which have not.

15 Do you typically take photographs when you make  
16 your reports for the Contractors State Licensing Board?

17 A. Yes, I do.

18 Q. I'm going to show you People's Exhibits 4, 5, and  
19 6. Did you take those photos?

20 A. Yes, I did.

21 Q. When did you do your inspection?

22 A. It was August of 2006.

23 Q. What is depicted in People's Exhibit Number 4 that  
24 was of significance to the conclusions that you made in your  
25 inspection of this job site?

26 A. They're photographs of a partial foundation that  
27 was constructed outside the back of the home approximately 8  
28 feet by 12 feet in dimensions. Excuse me, additionally it

1 shows that some of the siding had been removed from the  
2 existing building and some of the trim.

3 Q. How much siding and trim had been removed?

4 A. Approximately 86 lineal feet of trim and  
5 approximately 550 feet of siding.

6 Q. How long does it take to remove 86 lineal feet of  
7 trim if you're one person working alone?

8 A. I guess less than an hour.

9 Q. How long does it take to remove 500 feet of siding  
10 if you're doing the job yourself?

11 A. Perhaps another hour or two.

12 Q. The third photograph from the left in that lineup.  
13 I'd like you to lift that up so the Court can see it. Why  
14 did you take that picture, which is People's Exhibit 6?

15 A. There were two factors I was trying to -- two  
16 things I was trying to accomplish. One was the fact that  
17 there were no visible foundation vents, and the other is that  
18 the oriented strand board that was used as the platform, the  
19 floor, was pieced together using larger sheets and then a  
20 small strip at the corner on that photograph.

21 Q. Is that how it's done in the industry general  
22 speaking?

23 A. It's not how I would do it.

24 Q. Okay. How would you do it?

25 A. I would use fuller half sheets to go completely  
26 across or along the joist system.

27 Q. Why?

28 A. Well, it's stronger that way. And presumably

1 there's blocking underneath there but it's just -- I don't  
2 know if I could legitimately call it substandard, but it's  
3 not a very high quality building.

4 Q. Was there anything about the platform subfloor that  
5 felt odd to you in any way?

6 A. It felt a little spongy in spots, that is, bouncy.

7 Q. Is that supposed to be the way a subfloor feels?

8 A. No.

9 Q. Why not?

10 A. Because it's supposed to be constructed in such a  
11 way that you have a solid surface to walk on, solid surface  
12 to put finished flooring on so that it doesn't buckle and  
13 come up.

14 Q. All right. I'm going to show you People's Exhibits  
15 8 and 9. And if you would tell the Court -- first of all,  
16 did you take those pictures?

17 A. Yes, I did.

18 Q. Hold them up so the Judge can see them and tell us  
19 why you took them. What do they show of relevance to your  
20 investigation?

21 A. They show to me that work was not done in the  
22 existing kitchen as was specified to be done in the contract.

23 Q. Did you inspect the bathroom?

24 A. I did.

25 Q. And what did you find?

26 A. I found that there was a course of tile, ceramic  
27 tile, missing from the floor, not installed at the floor. I  
28 saw a window that was apparently removed and covered up from

1 the outside with oriented strand board. And I saw a bathtub  
2 that did not have overflow and drain connection.

3 Q. What do you mean by "overflow and drain  
4 connection"?

5 A. Well --

6 Q. For the uninitiated among us.

7 A. I'm sorry?

8 Q. For the uninitiated among us.

9 A. Tubs are required to have a drain, of course. And  
10 near the top rim of the tub there's supposed to be installed  
11 an additional drain called an overflow so that in the event  
12 that somebody starts putting water in the tub and then leaves  
13 to make a cup of tea and forgets, that it doesn't overflow on  
14 to the floor. If the tub should fill up, it drains down into  
15 that other drain, that overflow.

16 Q. Okay. Did you make any observations with respect  
17 to the subflooring in the back about the kind of wood that  
18 was used?

19 A. You're talking about the kitchen expansion?

20 Q. Yes.

21 A. Yeah. It was oriented strand board.

22 Q. What is that?

23 A. It's a composite made of wood products usually, I  
24 think, pressed together with phenolic resin under heat and  
25 pressure. I'm not certain of the means that they use to do  
26 that.

27 Q. Is that something that would be done in a standard  
28 job of this type?

1 A. It could be.

2 Q. Okay. Moving back to the bathroom for a minute,  
3 I'm going to show you People's Exhibit 19A and B, which I'm  
4 showing to counsel. Starting with 19A, can you tell us what  
5 that depicts.

6 A. That looks like the course of ceramic tile that was  
7 not installed or was missing when I inspected the work.

8 Q. All right. Let me show you 19B. Tell us what this  
9 is.

10 A. My guess is that that's --

11 MR. MCENTEE: Objection, speculation.

12 MR. MAUTNER: Okay.

13 THE COURT: Sustained.

14 BY MR. MAUTNER:

15 Q. Do you recognize the picture?

16 A. I do not. I've seen it before, but I did not take  
17 this photograph.

18 Q. Okay. After examining everything at the job site  
19 for the Contractors State Licensing Board, did you come to  
20 any conclusion about the amount of time and/or value of the  
21 work that had been done?

22 MR. MCENTEE: Objection. It's compound.

23 THE COURT: Sustained.

24 BY MR. MAUTNER:

25 Q. Okay. Was it your job for the Contractors State  
26 Licensing Board to formulate an opinion about what had been  
27 done at 191 Chelsea?

28 A. Yes, it was.

1 Q. All right. What were you supposed to render an  
2 opinion about?

3 A. I was supposed to render an opinion about the  
4 quality of the work done and the value of the work not done  
5 as well as done.

6 Q. What opinion, if anything, based on your  
7 observations did you render about the quality of the work  
8 done?

9 A. The quality of what I saw was of low quality.

10 Q. I heard some hesitation in your voice. What was  
11 the hesitation?

12 A. I didn't want to say it was substandard because I  
13 can't be certain that it was, but it was certainly -- it may  
14 have been of acceptable quality but it was not of the highest  
15 quality.

16 Q. Why can't you say it was substandard?

17 A. Because if it were accepted by the building  
18 department as acceptable, then I would have to say it was  
19 within tolerable limits. I would not do work like that.

20 Q. Okay. But you don't know if that was ever done in  
21 this case?

22 A. To the best of my knowledge it was not done.

23 Q. Did you make an estimate of the value of each  
24 completed piece of work?

25 A. I did.

26 Q. Okay. Let's start with the foundation. How did  
27 you come about arriving at an estimate of the value of the  
28 work done in making that room addition foundation?

1           A.    I had some difficulty in doing that because I could  
2 not access the under section of the foundation and could not  
3 be certain that it met building code requirements for  
4 example.

5           Q.    Okay.  You were not permitted to tear up and look  
6 under.

7           A.    I'm not allowed to do destructive testing.

8           Q.    Okay.  So despite that impediment what were you  
9 able to do to formulate an opinion as to value of the  
10 foundation?

11          A.    I was able to determine that some excavation was  
12 done, that a stem wall and probably a footing were put into  
13 place, and that framing was done and a floor put down.

14          Q.    And were you able to put a dollar-figure estimate  
15 on that value?  That is a "yes" or "no" question.

16          A.    Yes.

17          Q.    How were you so able?

18          A.    If I may, I put a range in there, because I could  
19 not determine for sure what more might have been needed  
20 underneath or what had been done.

21          Q.    Okay.  How did you make that determination?

22          A.    Well, I called the building department and found  
23 out that an inspection had been done for the footing and that  
24 is all.  I could not determine whether the excavations were  
25 done completely and so I guessed at -- I figured what the  
26 lowest limit would be on the construction of that and a  
27 *higher limit if more work were needed.*

28          Q.    What was that range, the high and the low?



1           A.    Between about 900 and approximately thirteen  
2 hundred and fifty-odd dollars.

3           Q.    That's for the construction of the whole floor out  
4 in the backyard there?

5           A.    The approximately 103 square feet.  Some of the  
6 work of which was done previously by someone else.

7           Q.    Did you make a similar estimate with regard to the  
8 work that was done in the bathroom?

9           A.    On the bathroom I made an estimate of what it would  
10 cost to complete the tub installation.

11          Q.    And what was that estimate?

12          A.    Approximately \$650.

13          Q.    And did you make an estimate of how much it would  
14 cost to complete the entire job?

15          A.    I made an estimate on the basis of square foot cost  
16 of new construction what the entire kitchen addition would  
17 cost.

18          Q.    What was that?

19          A.    Approximately \$18,000.

20          Q.    Would that have been -- that's a cost for  
21 everything not done, correct?

22          A.    That is a cost for everything starting from  
23 ground zero.

24          Q.    Okay.  Did you review the plans for this project as  
25 part of your work?

26          A.    I did.

27          Q.    And so you were familiar with what was supposed to  
28 be done versus what was done, correct?

1 A. Correct.

2 Q. Did you come up with a value outside of the  
3 foundation of the work that was done, the bathroom  
4 specifically?

5 A. No.

6 Q. Okay. Why not?

7 A. Well, the instructions I got from the Contractors  
8 State License Board were to evaluate what it would cost to  
9 correct what was not done.

10 Q. Okay. So with respect to the foundation in the  
11 back you got a value of what that was worth and that's a  
12 maximum of \$1,350, correct?

13 A. Approximately, yes.

14 Q. And when we say "that's the value," what does that  
15 mean? Does that mean -- what does it mean?

16 A. To me it means in this case the value of the work  
17 that went into time and materials that went into producing  
18 what I saw there.

19 Q. Okay. So that's what the homeowner should have  
20 expected to pay for it, correct?

21 MR. MCENTEE: Objection. Leading and misstates the  
22 testimony.

23 THE COURT: Sustained.

24 BY MR. MAUTNER:

25 Q. And then with respect to the other two you gave a  
26 cost to complete, correct?

27 A. Correct.

28 Q. Okay. And the cost to complete the tub

1 installation was \$650?

2 A. Correct.

3 Q. And the \$18,000 figure you mentioned, please  
4 clarify what it was of that --

5 A. That \$18,000 would have been what I estimate the  
6 cost to be if nothing were in place to construct the  
7 approximately 8 by 12 foot kitchen addition. That is  
8 foundation to roof.

9 Q. Okay. So that would include the 1,350 that  
10 actually was value added to the property?

11 A. Yes, it would.

12 THE COURT: Did that include the bathroom remodel?

13 THE WITNESS: No.

14 THE COURT: Okay. Just the kitchen addition.

15 BY MR. MAUTNER:

16 Q. Your estimate of \$650 for the tub installation,  
17 does that include repairing the wall of the bathroom that you  
18 observed in those pictures?

19 A. No, it does not.

20 Q. Do you have any idea how much that would take  
21 costwise?

22 A. I'd have to look at my notes if I may.

23 Q. Would that refresh your recollection?

24 A. Yep. I calculated it to install a bathroom -- a  
25 vinyl bathroom window in the location at the bathroom above  
26 the tub would be approximately \$200, and to replace  
27 approximately 550 square feet of exterior siding milled to  
28 match the existing would have been approximately \$2,355, and

1 then to prep and paint the exterior siding, approximately  
2 \$1,190.

3 Q. Okay. And that's what still needed to be done,  
4 right?

5 A. That's correct.

6 Q. Did you make any estimate of value added other than  
7 the nine- to thirteen-hundred-fifty-dollar foundation?

8 A. I calculated the cost to replace the existing  
9 kitchen cabinets and for appliances that were specified in  
10 the contract.

11 Q. Okay. That's work that wasn't actually done,  
12 correct?

13 A. That is correct.

14 Q. All right. Given all the work that you saw was  
15 done and based on the contract which you knew wasn't done,  
16 how much time do you estimate a contractor working alone  
17 should have spent on that? And you can break it down if you  
18 want. Well, let's do that. The foundation work addition.

19 A. I would estimate that, let's say, two people  
20 working together, assuming that some of the work had been  
21 done previously by another party did some of the digging,  
22 could probably form, pour concrete, strip the forms, and  
23 frame up that 8 by 12 platform in approximately 32 hours.

24 Q. Okay. Are you familiar with the forms of contract  
25 used in the construction industry?

26 A. To some extent, yes.

27 Q. How many years have you been doing this?

28 A. 40.

1 Q. You've seen a lot of construction contracts?

2 A. I have.

3 Q. Did you review the construction contract in this  
4 case?

5 A. I did.

6 Q. Was there anything unusual about it?

7 MR. MCENTEE: Objection. This is going to call for  
8 a legal conclusion. And "anything unusual."

9 MR. MAUTNER: It's overbroad.

10 THE COURT: I'm sustaining it. It's vague.

11 BY MR. MAUTNER:

12 Q. With respect to the compensation provision -- well.  
13 Let me back up.

14 When a contractor and a homeowner contract to make  
15 a project, what is the industry standard for how compensation  
16 is tied to completion of work? I'm talking about method.

17 A. Generally speaking, progress payments are made upon  
18 completion of certain portions of the work for an agreed upon  
19 value.

20 Q. Okay. Was that what this contract was?

21 A. When I last looked at the contract, which was a  
22 while back, I remember noticing that there were large  
23 payments to be made. It called for large payments to be  
24 made. Large percentages of the total price to be made by the  
25 homeowner like something on a two-week basis, every two  
26 weeks.

27 Q. Have you ever seen a contract like that before for  
28 this kind of work?

1 A. No, I never have.

2 MR. MAUTNER: I have no further questions.

3 THE COURT: Cross.

4 CROSS-EXAMINATION

5 BY MR. MCENTEE:

6 Q. Mr. Jackness, you said that the work to excavate  
7 footings and form the footings, pour the concrete, presumably  
8 put in the steel, and then frame a subfloor and put down  
9 underlayment on top of all that should have taken two people  
10 32 hours.

11 A. I did not include the digging which apparently had  
12 been previously done.

13 Q. Well, some digging had been done. But you're aware  
14 that the scope of the project changed which meant that  
15 additional digging was required.

16 A. I was not aware of that, no.

17 Q. Would that change your opinion at all?

18 A. It could.

19 Q. Okay. Was your opinion of the 32 hours necessary  
20 to do the foundation and carpentry work that you saw 32 hours  
21 for two people working together?

22 A. Give me just a moment, please. Yes. I figured two  
23 people working for three days. Excuse me, yes, four days.

24 Q. What rate of compensation were you using to derive  
25 a value of that labor?

26 A. I was assuming \$40 an hour for the contractor and a  
27 lower rate, \$20 an hour, for a helper.

28 Q. Well, just roughly it seems as if that would work

1 out to something over \$1,200 just for the contractor; isn't  
2 that right?

3 A. Yes; that is correct.

4 Q. And something about half of that for the helper,  
5 about \$600, right?

6 A. I'm sorry. Let me -- yes, you are correct.

7 Q. So just for the labor you're almost at \$2,000?

8 A. Yes, you are right.

9 Q. That's far in excess of the \$1,300.

10 A. You're right.

11 Q. So that estimate of yours is incorrect.

12 A. You are right; that is incorrect.

13 Q. Now, you also didn't include in your estimate the  
14 value of the work on the gutters that Mr. Schultz performed;  
15 isn't that right?

16 A. I was not aware of any work performed on gutters.

17 Q. And you didn't include in your estimate the value  
18 of the termite work that he did; isn't that right?

19 A. I was not aware of termite work done.

20 Q. Who was it that made you aware of the work that was  
21 performed on site?

22 A. The Contractors Board wrote up a statement and  
23 asked me to go out and evaluate that portion of the work that  
24 they itemized.

25 Q. So work on the eaves of the roof that were damaged  
26 and needed replacing, work on a mudsill that was damaged and  
27 termite infested, work on studs in the wall that was  
28 similarly damaged, none of that was brought to your

1 attention --

2 A. No.

3 Q. -- when you formed your estimate for the value of  
4 this work?

5 MR. MCENTEE: I don't have any other questions.

6 MR. MAUTNER: Neither do I.

7 THE COURT: Okay. Thank you, sir. You are  
8 excused.

9 (Witness excused.)

10 MR. MAUTNER: May we take a brief recess?

11 THE COURT: Yes, we can. Why don't we take our  
12 afternoon recess. We'll reconvene at five minutes to 3:00.

13 MR. MAUTNER: Thank you, Your Honor.

14 (Recess taken, 3:40 p.m.)

15 THE BAILIFF: Remain seated. Come to order. Court  
16 is now in session.

17 THE COURT: You can call your next witness.

18 MR. MAUTNER: The People's next witness is  
19 Dennis Dunne.

20 - - -

21 DENNIS DUNNE,

22 a witness called by the People, who, being first duly  
23 administered an oath to tell the truth, the whole truth, and  
24 nothing but the truth, was examined and testified as follows:

25 THE WITNESS: Yes I do.

26 THE COURT: Sir, please state and spell your first  
27 and last names.

28 THE WITNESS: Dennis James Dunne, D-e-n-n-i-s,



1 J-a-m-e-s, D-u-n-n-e.

2 THE COURT: Thank you. Make sure you have the  
3 microphone close up to you.

4 You may begin.

5 DIRECT EXAMINATION

6 BY MR. MAUTNER:

7 Q. Mr. Dunne, what is your job?

8 A. I'm a general contractor.

9 Q. And how long have you been so licensed in the State  
10 of California?

11 A. I've been licensed for approximately 14 years.

12 Q. All right. What did you do before you became a  
13 general contractor?

14 A. I worked in the construction fields since I was 19  
15 years old.

16 Q. How many years total experience in the construction  
17 field do you have?

18 A. Twenty-seven approximately.

19 Q. And are you familiar with the property at 191  
20 Chelsea in the City of Napa?

21 A. Yes, I am.

22 Q. And I'm going to show you what's been marked  
23 People's Exhibit 13 for identification. I'm going to show it  
24 to counsel first.

25 Now, Mr. Dunne, I'm going to hand this to you and  
26 ask if you recognize it.

27 A. Yes. I recognize it.

28 Q. What is it?

1           A.    This is an estimate for a kitchen addition per plan  
2   dated December 14, 2004.

3           Q.    Is that one you put together, your company did for  
4   Mrs. Petree?

5           A.    Yes.

6           Q.    Okay.  And what, if anything, did you do on the  
7   project on the kitchen remodel project as you described it?

8           A.    I excavated the footings.

9           Q.    And when did you do that?

10          A.    I honestly couldn't tell you from memory.  I'd have  
11   to look at previous testimony.

12          Q.    Let me ask you a different question.  You got the  
13   contract to do this work, correct?

14          A.    Yes, I did.

15          Q.    To add a room to Mrs. Petree's house, correct?

16          A.    Yes.

17          Q.    And to remodel the kitchen and the bathroom,  
18   correct?

19          A.    Yes.

20          Q.    How much money were you going to do that for?

21          A.    I was going to do the job for \$31,000.

22          Q.    Okay.  Did your bid include a schedule of progress  
23   payments?

24          A.    It did.  Yes, it did.

25          Q.    Is that the way you usually do business as a  
26   contractor?

27          A.    Yes.

28          Q.    And that exhibit indicates how you tie payment to

1 particular work done?

2 A. Yes.

3 Q. All right. And did you obtain permits from the  
4 City of Napa?

5 A. Yes, I did.

6 Q. Did you pay permit fees?

7 A. Yes.

8 Q. Did you do that on your own, or did you get the  
9 money from the homeowner?

10 A. No. I bill the homeowner. After something is  
11 completed, I bill, so I got the money after I pulled the  
12 permit.

13 Q. How do you front expenses for such things? What's  
14 the system in your business for doing that?

15 A. I try to keep enough capital in my company so I do  
16 not have to nickel and dime my homeowners or have homeowner  
17 liens put on the house by the lumber company. I have enough  
18 capital in my bank account so I can fund the job until the  
19 progress payments arrive.

20 Q. All right. And after agreeing to do this job, how  
21 much did you actually get finished?

22 A. I excavated the footings.

23 Q. Is that all?

24 A. That's all did I.

25 Q. Did you charge Mrs. Petree for that?

26 A. No. I refunded her money for it.

27 Q. What was the money that she gave you that you  
28 refunded?

1           A.    She gave me a thousand dollar retainer, and I just  
2 funded her retainer and charged her nothing for the footings.

3           Q.    And is that thousand dollars fairly standard as a  
4 down payment in the industry?

5           A.    If it's over 10,000, then it's a maximum.  If it's  
6 under 10,000, than it's too high.

7           Q.    Okay.  Were you called on later to look at that  
8 same job site after you had left the project?

9           A.    Yes, I was.

10          Q.    Was that sometime last year?

11          A.    Yes.  I believe it might have even been '06 or '07.  
12 I went and looked at this several times since this had  
13 happened, and I think put down on paper each time I went.  I  
14 can't be for sure it was last year, but, yes, I have been at  
15 her property previously a few times.

16          Q.    Okay.  I'm going to start showing you some  
17 pictures, and for the record I'll show them all to counsel at  
18 once.  They are marked 19B, 20A, 20B, 21, 22A, 22B, 22C, and  
19 23.

20                   For record Mr. McEntee has looked at all of those.

21                   And I'm approaching you with the first of these,  
22 Exhibit 19B.  Do you recognize what's depicted in that  
23 photograph?

24           A.    This is the void between the tub and the tile  
25 flooring.  And this line right here is where the old tub used  
26 to be.  And this is where the new tub is now installed.  So  
27 you have about two inches of difference between the old floor  
28 and the new tub.  And there's a little fungus left in that

1 flooring, and it was just filled with mortar. When I visited  
2 it, the mortar was wet and there was no paper underneath the  
3 mortar, which can contribute to further fungus and dry rot  
4 down the line.

5 Q. Did you take that picture?

6 A. Yes, I did.

7 Q. Now, for the record, I'm handing you Exhibit Number  
8 23. What is that a picture of?

9 A. This is a picture of the substructure pier. This  
10 right here is actually form boards left in the form. And  
11 that's a concrete column. And that's a pier underneath the  
12 house. And the form board should have been removed because  
13 it creates termites and fungus from reoccurring and leading  
14 to a disaster.

15 Q. That's under the flooring?

16 A. That's in the substructure of the new addition.

17 Q. So was there what has previously been called a  
18 destructive examination performed to get to see that?

19 A. I had to open up the subflooring on top of the new  
20 framing that was built to go underneath and find that  
21 picture, yes, take that picture.

22 Q. What kind of disaster can this lead to?

23 A. Termite and fungus, both of them are bad.

24 Q. Right. And why is it that this can lead to termite  
25 and fungus?

26 A. Because you have wood embedded in dirt, and there's  
27 no earth-wood contact allowed in construction.

28 Q. Okay. Thank you. I'm going to show you People's

1 Exhibit 19B. What is 19B?

2 A. This is a similar picture to the first one that you  
3 showed me.

4 Q. Okay.

5 THE COURT: That's what I had, 19B. He described  
6 that before.

7 BY MR. MAUTNER:

8 Q. I'm sorry, I mixed my photos up. Showing you  
9 what's been marked People's Exhibit Number 20A. If you hold  
10 that up so the Court can see it, tell us what it depicts.

11 A. What this is, their subfloor is right here and what  
12 the tub is supposed to be sitting on. This is the tub  
13 support pad. Sometimes tubs are required to be set on the  
14 pad. Sometimes you have to put paper and some mortar down  
15 underneath them so that they have a solid set. I don't know  
16 that this tub required it or not, but it should at least be  
17 sitting on the block. And then there's some foliage growing  
18 up into the substructure there.

19 Q. Should foliage be growing up into the substructure  
20 in that kind of area?

21 A. No.

22 Q. What would be the industry standard practice for  
23 preventing such growth?

24 A. Put siding over your house.

25 Q. I'm showing you what's been marked People's Exhibit  
26 Number 20B. It looks like bathroom tile to me. Did you take  
27 that picture?

28 A. Yes, I did.

1 Q. Why did you take that picture?

2 A. I took this picture because the tub was not sitting  
3 on the ground, and so I just was giving -- just looking at it  
4 and seeing these stress lines going through it and thought  
5 that might have contributed to the cause of the cracks,  
6 having the tub not being set properly. However, the insert  
7 is cracked and now is no longer good.

8 Q. All right. That's because it's not -- as you  
9 described with the previous picture, it's not resting on its  
10 base and so it's stressed and cracks.

11 A. That's right. That's exactly right.

12 Q. Okay. I'm going to show you what's been marked  
13 People's Exhibit Number 21. Did you take that picture?

14 A. Yes, I did.

15 Q. What does that depict?

16 A. This is where apparently some flooring has been  
17 removed by the defendant and repaired and now is molded and  
18 dry rotted again. And if he did remove all of the damage,  
19 you could see now there's damage again happening back in  
20 these 2 by 6s. So he may have repaired it and it re-infested  
21 due to time and whatever, and now it's re-infesting going  
22 further back into the kitchen even more. Anyway, that's what  
23 that shows.

24 Q. Okay. That's because of what?

25 A. That's because he didn't do his job properly.

26 Q. Okay. The removal of the tile, what caused that?

27 A. This is in the kitchen. This is in the kitchen,  
28 and this is the sliding glass door leak. That sliding glass

1 door needs to be replaced, and it should have been replaced  
2 at the time of this repair and/or removed. I mean, if he's  
3 going to go in with the addition, it should have been  
4 removed, framed up, and waterproofed, or he should have  
5 waterproofed that sill back on there and siliconed it so that  
6 the damage didn't continue to infest while he built his  
7 structure around it.

8 Q. Okay. I got you now. And People's Exhibit No. 2,  
9 2A, did you take that picture?

10 A. Yes, I did.

11 Q. Okay. What does that depict?

12 A. That shows a joist hanger which is normal.  
13 Although it's the wrong joist hanger for this size of wood.  
14 And then this is a four-inch block with a nail in it. And I  
15 imagine -- I don't imagine. That's in there because his  
16 joists are too short to reach the rim joist, so he plugged it  
17 with a four-inch piece of wood. And he did this quite often.  
18 Wherever there was a joist he would just use a four-inch  
19 piece to make up the difference. I don't know another reason  
20 why anybody would have done it.

21 Q. To make up the difference between what?

22 A. I have a feeling -- this piece of wood here that's  
23 called a joist. That's what holds the floor up that we're  
24 sitting on. I have a feeling that this joist was intended to  
25 go to that wall, and it was an inch and a half short. So I  
26 think he cut a four-inch block and put it in there and nailed  
27 a bracket to it and called it done. So that's what I see in  
28 that picture.



1 Q. All right. Did you manage to get under the floor  
2 after you tore up the entryway to do an inspection?

3 A. Yeah.

4 Q. And what kind of crawl space is there supposed to  
5 be underflooring?

6 A. 18 inches.

7 Q. Okay. How much was the excavation that you did?

8 A. I did 20. I did 20 inches from their foundation  
9 wall down to the bottom of my digging.

10 Q. Okay. Why 20 inches?

11 A. Because there's where your joists sit and you need  
12 18 by code, so 20 is over code.

13 Q. All right. And let's look first at 22. Let's look  
14 at 22B. What does that depict?

15 A. That's the hole I had opened up.

16 Q. And what did you discern, from what you observed,  
17 when you opened up the hole in that particular section of the  
18 flooring?

19 A. What I observed is that there's not enough room  
20 from the joist to the bottom. You have an area 14 inches, 16  
21 inches. I didn't measure every particular area, but it was  
22 under span or over span. And then you just get a clear view  
23 of what he's got going here as far as his framing. He's got  
24 little blocks between this plate. It's substandard work.  
25 That's all I could say.

26 Q. All those little blocks are to hold things in  
27 place?

28 A. I don't know why else to put them in there.

1 Q. All right. What's the purpose of the 18-inch crawl  
2 space in the code?

3 A. For guys like me getting down underneath there and  
4 go underneath the house to look around, service.

5 Q. Were you able to get under there? I'm going to  
6 show you People's Number 22C.

7 A. No. You see, I only wear a size 12. My shoes are  
8 at an angle. No. I wasn't able to get past that being  
9 there.

10 Here we go. Here's a girder. And so this joist,  
11 see how it's fastened here to a solid piece of wood. That's  
12 what we should have been looking at in that picture that you  
13 just showed me. It should have been fastened to a solid  
14 piece of wood just like that. We're sitting directly on top  
15 of the mudsill like that rim joist is doing there. And that  
16 girder should have some metal on it, some 835s, but what it  
17 has is just a little block that isn't even nailed. I could  
18 move the block with my hand. So that's what's holding that  
19 rim joist up.

20 Q. When you say "that picture" that I was just showing  
21 you, you mean this one, 22B?

22 A. Yeah. Yeah. Now, there's a good example. Here's  
23 a bad example.

24 Q. 22C is a good example of what?

25 A. You see that joist running into that piece of wood,  
26 that looks really good, nice and clean. Now you see that  
27 joist running into that? It's not in line with the mudsill.  
28 The hanger is bent over. Anyway, that's what I see.

1 Q. Okay. Let me take Exhibit 13 there.

2 MR. MCENTEE: Mike, may I see those? Thanks.

3 BY MR. MAUTNER:

4 Q. Were there any vents in the crawl space?

5 A. No. There was no ventilation in the crawl space.

6 Q. And is there supposed to be?

7 A. Yes.

8 Q. Why?

9 A. To stop the mold and fungus and all the bad things  
10 that people hate paying for when they sell their house from  
11 occurring.

12 Q. Got you. Is that something that's required by the  
13 building code?

14 A. Yes.

15 Q. Did you make any notations or observations about  
16 the kind of wood that was employed in both the bathroom and  
17 the room addition in the backyard?

18 A. Well, it's typical to salvage your floorboards and  
19 reuse them, but I think only if they actually span the  
20 distance you're meaning them to span, you know. But, yeah, I  
21 didn't see any particularly new lumber down there. Actually,  
22 most of it looks like it was salvaged.

23 Q. All right.

24 A. And the mudsill looked like it was newly  
25 pressure-treated. The 4 by 6 beam in the middle in the last  
26 picture, that was newly applied. The wafer board was new at  
27 some point, but the framing itself, yeah, it was all old.

28 Q. You had estimated \$31,000 for this job, correct?

1 A. Yeah.

2 Q. And how did you break that down?

3 A. I hand-do my estimates, so I broke it down for time  
4 on the job per the plans. I really can't do a remodel by a  
5 square-foot price. You have to figure on I'm going to remove  
6 this wall. I'm going to put in this floor. I'm going to put  
7 in these cabinets. So I broke it down like that.

8 Q. Okay. Now, you know that -- do you know the  
9 condition that you left the house in when you left the job?

10 A. Yes. I do know the condition.

11 Q. And then you subsequently inspected as you told us  
12 in looking at these photographs, correct?

13 A. Yes.

14 Q. And do you have an opinion as to the value of the  
15 work what someone should have paid for that what was actually  
16 done?

17 A. Well, I do have an opinion because I'm in the  
18 trade. And if I was walking onto that job with an excavated  
19 footing and all I had to do is form and pour, I would value  
20 that at probably twenty-five to three thousand. And the  
21 bathroom, demo the wall, pull out the tub, pull out some  
22 tile, whatever wall coverings needed to be installed, and  
23 purchase a new tub insert, new framing, and frame the wall  
24 up, so I would imagine two thousand, so about four/five  
25 thousand dollars for the work, labor, and material.

26 MR. MAUTNER: I have no further questions. Thank  
27 you.

28 ///

1 CROSS-EXAMINATION

2 BY MR. MCENTEE:

3 Q. Mr. Dunne, the lumber that was used as the floor  
4 joists was lumber that apparently had been stripped from the  
5 forms; isn't that right?

6 A. Some of it, yes.

7 Q. That's standard practice, isn't it?

8 A. Yeah.

9 Q. So there's nothing unusual about seeing lumber  
10 comprising the joists that had been used formerly?

11 A. No. There's nothing surprising about seeing some  
12 in there, no.

13 Q. The joists in this case were 2 by 6s on 16-inch  
14 centers; isn't that right?

15 A. Yes.

16 Q. And there was a girder down the middle of the span;  
17 isn't that right?

18 A. Yes.

19 Q. So the joists were spanning no more than six feet;  
20 isn't that correct?

21 A. I'd say so.

22 Q. So the joists were not overspanned at all, were  
23 they?

24 A. No, by no means. They just didn't reach the end of  
25 the foundation, so they didn't go far enough. They should  
26 have went an inch and a half further. Then he wouldn't have  
27 had to put in that four-inch block.

28 MR. MCENTEE: May I approach the witness, Your

1 Honor?

2 THE COURT: You may.

3 BY MR. MCENTEE:

4 Q. I'm going show you Number 22A again. Now, correct  
5 me if I'm wrong but I thought you testified that this  
6 depicted the block that you've just testified about?

7 A. See that block in your hand?

8 Q. Well, I see it. I'm having a hard time figuring it  
9 out. We're looking at 22B --

10 A. So this block right here --

11 (The court reporter asked the parties to  
12 speak slower.)

13 Q. We've got to slow down. It's my fault.

14 A. No, it's not. So this is 22A. 22A is a picture of  
15 a joist with a hanger on it on a four-inch block. The joist  
16 should have went all the way to this rim joist here on the  
17 very edge, but he put this little block in there. You can  
18 ask him why, but common sense, myself I would say because  
19 this joist was a little short.

20 Q. So what you're saying is this -- what you're  
21 calling this block that the joist is nailed into with the  
22 hanger does not sit in the same plane of the rim joist but it  
23 sits in front of the rim joist.

24 A. I'm saying this: What is that four-inch block  
25 doing there?

26 Q. Well, let me -- I have to ask questions. I can't  
27 comment.

28 A. I'm trying to answer your questions.

1 Q. Right. Let me see if I can frame another question.

2 A. Okay.

3 Q. Isn't it true that what we see in this picture is a  
4 rim joist, and the floor joist is nailed into this rim joist  
5 that does appear to be in several different sections?

6 A. You have got 90 percent correct.

7 Q. Okay. There's nothing nailed on to the floor joist  
8 to extend the floor joist, is there?

9 A. Actually, the rim joist is behind this block, so  
10 this would be called a rim block. And why would you put a  
11 rim block behind a rim joist? I don't understand myself why  
12 you would do that. So I'm just trying to come up with a  
13 reason why somebody would do that rather than just make a  
14 couple extra hours work for themselves. I would imagine  
15 their lumber was probably a little bit too short to make it  
16 to that first rim joist instead of putting in that rim block.

17 Q. Would you agree with a previous witness who  
18 qualified as an expert in construction that this method of  
19 framing that Mr. Schultz used does meet the requirements of  
20 the code; isn't that right?

21 A. I have no idea what a prior witness would have  
22 said, but I know the City building codes. And if one of  
23 their men walked up on one of my jobs and seen this, he  
24 probably would have called me.

25 Q. Called you what?

26 A. Probably would have called me and probably would  
27 have fired my guy. This is just substandard. I don't know  
28 that this meets code. I know that I would never build like

1 this or allow anybody in my company to build like this. I  
2 mean, you got a nail holding up a joist. You got a little  
3 four-inch block with one nail in it holding up a joist that's  
4 going to hold up a floor that's going to hold up a roof and  
5 walls.

6 Q. Now, showing Number 23, is that the picture that  
7 depicts the board that was used to make the form that was not  
8 stripped off of the foundation?

9 A. Yes.

10 Q. Where do you see the board in that picture?

11 A. This is all the board. That's all 2 by 4s.

12 Q. It looks like a sill that you're pointing at.

13 A. Doesn't it. It's all wood.

14 THE COURT: Could you aim it this way?

15 THE WITNESS: I'm sorry. What he's referring to  
16 and he thinks -- it looks like a sill, but really what it is  
17 it's wood with a little slurry coat of concrete on it. So it  
18 looks like concrete, but it's really a piece of wood.  
19 It's the form that held the pier together when he poured it.

20 BY MR. MCENTEE:

21 Q. So you signed your contract with Mrs. Petree on  
22 December 14, 2004; is that right?

23 A. Sounds fair.

24 Q. And then you began work almost six months later on  
25 May 20, 2005.

26 A. I can't tell you. I've got to go through my  
27 paperwork. I've done previous work for her, so you could be  
28 referring to another scope of work.



1 Q. When did you terminate the work on Mrs. Petree's  
2 house?

3 A. I think sometime in October.

4 Q. October of '05?

5 A. '05, yeah.

6 Q. So you signed the contract in December, you  
7 terminated the work in October of the next year, and all you  
8 accomplished in that time was excavating for the footings?

9 MR. MAUTNER: Objection. Misstates the witness's  
10 testimony.

11 THE COURT: Wait a minute. Overruled.

12 THE WITNESS: No. That's not true.

13 BY MR. MCENTEE:

14 Q. What happened between December of '04 and October  
15 of '08?

16 A. If you want, I can go to my office and go through  
17 my books, unless you have notes for me, and I can give you an  
18 answer to that.

19 Q. Well, no. We don't really want that.

20 It's true, isn't it, that of the work that was  
21 encompassed in the contract you signed with Mrs. Petree in  
22 December of '04, of that work what you were able to  
23 accomplish was excavating the footings.

24 A. Excuse me. I'm not -- I'm -- I would like to know  
25 when was the permit pulled.

26 Q. Well, I believed you testified you pulled the  
27 permit sometime in June of 2005?

28 A. I would say that would probably be closer to the

1 date that she signed it or decided to go ahead with it.  
2 Because why -- I mean, it doesn't make sense. Sometimes I  
3 will have a contract made two years prior to them signing it.  
4 And then I'll go in and do the work and I'll honor my price  
5 from two years ago. Sometimes I go in and they'll wait six  
6 months and then they'll hire me. Then I'll come up with the  
7 contract, and then they have to select their finish products.  
8 And sometimes the owner has reasons why they want to  
9 postpone. But I, myself, was very busy at that time of year,  
10 but I definitely cannot tell you for sure what day she signed  
11 it and what -- I mean, without looking at it.

12 Q. You know, I was mistaken. I may have mistaken your  
13 testimony. I'm looking at Government's Exhibit Number 13.  
14 It's a copy of your contract. If I could approach Mr. Dunne.  
15 I think the correct date was May 20, 2005. Does that refresh  
16 your memory --

17 A. Okay.

18 Q. -- when you signed the contract with her?

19 A. No. I don't see a signature, but I see May 5th,  
20 May 20, 2005, on this, and I see it was mailed on May 5th.  
21 So this contract was mailed on May 5th of '05. I know that  
22 much.

23 Q. So sometime in May of '05 is when you and Mrs.  
24 Petree entered into this contract; is that correct?

25 A. I would say it was mailed --

26 Q. Okay.

27 A. -- May '05.

28 MR. MCENTEE: All right. I don't have any more

1 questions. Thank you, Mr. Dunne.

2 THE COURT: Redirect.

3 REDIRECT EXAMINATION

4 BY MR. MAUTNER:

5 Q. Before May of '05, did you do termite work?

6 A. Yes.

7 Q. Okay. How much termite work did you do?

8 A. 7- to \$10,000 worth of work I did there. I  
9 replaced windows, doors. I've done a lot of work, so it's  
10 hard for me just to pull this out of my head right here, you  
11 know.

12 Q. Okay. Well, you wouldn't start work on a new  
13 project until the permit was issued, correct?

14 A. No.

15 Q. I'm going to show you the contents of what's been  
16 marked People's Exhibit 29 for identification. There's a  
17 copy of a building permit here. Does that look familiar to  
18 you?

19 A. Yes.

20 Q. How does it look familiar to you?

21 A. Because this is the one that we pulled and this is  
22 on 6/30 of '05.

23 Q. That's when the permit was issued?

24 A. That's when the permit was issued.

25 Q. Do you have any idea when you began your work under  
26 that particular permit?

27 A. No, I don't. I really don't. I can elaborate, but  
28 I don't know exactly when we did the work. But from the 6th

1 until October does not seem like an exceedingly long time to  
2 me.

3 Q. Do you recall a fish pond in the backyard at 191  
4 Chelsea?

5 A. Yeah. There's a big old birdbath I tell you. It's  
6 like ten feet across at least.

7 Q. And did you do any work with respect to that fish  
8 pond?

9 A. We demolished it and removed it for her.

10 Q. Okay. Did you do that before or after the permit  
11 for this project was issued?

12 A. Before. Before the work even started, she asked me  
13 would I mind removing that pond for her. I said, no, and I  
14 did it. I don't remember the time, but it was between --  
15 before the excavation and after the permit was pulled.  
16 Somewhere in there.

17 Q. Okay. Do you know what a Jenga toy is?

18 A. Jenga toy. Yes, I do.

19 Q. What is a Jenga toy?

20 A. It's a house of blocks that come tumbling down.

21 Q. Does that remind you of anything in this case?

22 MR. MCENTEE: Objection. Irrelevant. It's  
23 argumentative.

24 THE COURT: Sustained.

25 MR. MAUTNER: It's irresistible. I have no further  
26 questions.

27 THE COURT: Any recross?

28 MR. MCENTEE: No. Thank you.

1 THE COURT: May this witness be excused?

2 MR. MCENTEE: Yes.

3 THE COURT: Thank you, sir. You're excused.

4 (Witness excused.)

5 MR. MAUTNER: Thank you. Your Honor, the People's  
6 case is over subject to the proffer of exhibits.

7 THE COURT: Let's deal with the exhibits then.  
8 What else do you need to the offer?

9 MR. MAUTNER: We have the work permit about which  
10 Mr. Kavarian testified, Exhibits 28 and 29. We have the  
11 letter to the defendant, Exhibit 18.

12 THE COURT: Let's take them one by one or groups,  
13 by groups. You said 28 and 29?

14 MR. MAUTNER: Yes.

15 THE COURT: Any objection?

16 MR. MAUTNER: No.

17 THE COURT: Those will be received.

18 (People's Exhibits Nos. 28 and 29 were received  
19 into evidence.)

20 THE COURT: And then what else?

21 MR. MAUTNER: Number 13 is Mr. Dunne's estimate for  
22 the same project which Mr. McEntee just cross-examined him  
23 about.

24 THE COURT: Any objection?

25 MR. MCENTEE: I object on the grounds of relevance.

26 THE COURT: And what is the relevance?

27 MR. MAUTNER: It's relevant in terms of comparing  
28 the kind of contract that -- comparing this contract to

1 Exhibit 1 demonstrates the industry standard versus not  
2 industry standard as several witnesses have testified  
3 particularly with respect to the definition of progress  
4 payments. And that's one of the pieces of evidence of intent  
5 in this particular case, is that Article 4 of the defendant's  
6 contract says "progress payments" but just gives you dates  
7 without tying it to any kind of work requirement. Witnesses  
8 have testified that's not industry standard. Here is  
9 documentary corroboration of that witness's testimony.

10 THE COURT: Is this actually the contract, or is it  
11 just an estimate?

12 MR. MAUTNER: It's an unsigned estimate.

13 THE COURT: Does it contain progress payments then?

14 MR. MAUTNER: Yes.

15 MR. MCENTEE: Well, if we already know this from  
16 other witnesses, then it's cumulative. I don't think it's  
17 necessary, and I don't think it tends to prove anything or  
18 disprove anything that's at issue.

19 MR. MAUTNER: It just seems a writing that's  
20 corroborative to witnesses' testimony is useful to the finder  
21 of fact.

22 THE COURT: Okay. I will receive Exhibit 13.  
23 Maybe it's cumulative, but I think it's also corroborative  
24 and can go to the issue of intent in the case. So I'll  
25 receive Exhibit 13.

26 MR. MAUTNER: I'll try to put the photographs back  
27 in order.

28 MR. MCENTEE: Your Honor, if I could go back to the

1 contract. The other reason I object to it is that it's got  
2 much more than just the progress payments in it. It's a  
3 different dollar amount for what may or may not be the same  
4 scope of work. We really don't know. For that reason I  
5 think it could be misleading. In any event, it's irrelevant  
6 and cumulative.

7 THE COURT: Does it contain a scope of work?

8 MR. MCENTEE: Well, I think it does.

9 MR. MAUTNER: Yes, it does.

10 MR. MCENTEE: It's got -- it does. And while it  
11 may sound similar to the work that Mr. Schultz contracted to  
12 do, we have no way of knowing if it's the very same work, so  
13 it would tend to, I think, introduce an extraneous misleading  
14 issue here especially since we don't need it because it's  
15 cumulative to the testimony of the other witnesses. I urge  
16 the Court not to receive it.

17 THE COURT: I'm still going to receive it.

18 (People's Exhibit No. 13 was received  
19 into evidence.)

20 MR. MAUTNER: And the photographs in two lots,  
21 Exhibits 4, 5, 6, 8 and 9, which were all taken by Mr.  
22 Jackness.

23 THE COURT: Any objection?

24 MR. MAUTNER: No.

25 THE COURT: Those will be received, 4, 5, 6, 8, and  
26 9.

27 (People's Exhibits Nos. 4, 5, 6, 8, and 9 were  
28 received into evidence.)

1 MR. MAUTNER: The second lot of photographs  
2 testified to and taken by Mr. Dunne, 19A, 19B, 20A, 20B, 21,  
3 22A, 22B, 22C, and 23.

4 THE COURT: Any objection?

5 MR. MCENTEE: No.

6 THE COURT: Those exhibits will be received.

7 (People's Exhibits Nos. 19A, 19B, 20A, 20B,  
8 21, 22A, 22B, 22C, and 23 were received  
9 into evidence.)

10 MR. MAUTNER: And finally Exhibit 18 is the letter  
11 from the home owner to Mr. Schultz after he left the job  
12 requesting a meeting and maybe the only rebuttal evidence at  
13 this point.

14 THE COURT: I already received that.

15 MR. MAUTNER: Okay.

16 THE COURT: Do the People rest?

17 MR. MAUTNER: Yes.

18 THE COURT: Defense case.

19 MR. MCENTEE: First, I'd like to make an 1118  
20 motion.

21 THE COURT: Go ahead.

22 MR. MCENTEE: Especially as to Counts 1 and 2, the  
23 theft requires that the intent to steal arises at the same  
24 time as the property was taken and that the intent be a  
25 specific intent to deprive the victim permanently of his  
26 property. If when Mr. Schultz accepted the money, the first  
27 payment from Mrs. Petree, and when he accepted the second two  
28 payments, he didn't perform in the first instance and began



1 to perform and then didn't perform the work on this home, the  
2 work may not have been satisfactory or it may have been  
3 barely satisfactory, but the point is he intended, as  
4 evidenced by his actions, to do something for the money he  
5 received. He did not have the specific intent to steal it,  
6 so the Government's case has to fail. It could not have been  
7 a forgery or a fraud. There's no evidence of that. And  
8 there's no evidence of embezzlement because it wasn't  
9 property entrusted to him. It was property that was given to  
10 him, a payment. An embezzlement would have been if  
11 Mrs. Petree would have given him money to hold in trust for  
12 her or some property that he was to return at some time and  
13 he then converted to his own use. There's no evidence of  
14 that here that we've heard so far.

15 As to the second count, it's just another -- well,  
16 the first count has to do with theft from an elder. The  
17 second count is simply a ground of theft, a 487, so both of  
18 those counts must fail because of the failure of the  
19 Government to demonstrate that he had a specific intent to  
20 steal or take or carry away. And it fails because they have  
21 not met the elements of the other forms of theft that  
22 could be present here that they could prove.

23 As far as the third count, the withholding of the  
24 construction monies or failure to pay for the materials or  
25 labor on construction monies, I don't think the evidence  
26 shows beyond a reasonable doubt that he did that. I think it  
27 shows that he did some inferior work, but that it does not  
28 show that he kept money and didn't put it into the job here.

1 So I ask the Court to grant the 1118 motion. There's just no  
2 evidence of a theft, a forgery trigger device, or  
3 embezzlement.

4 THE COURT: Mr. Mautner.

5 MR. MAUTNER: First of all, theft is a general  
6 intent crime. I think in using the phrase "specific intent"  
7 Mr. McEntee is simply trying to focus in on the intent  
8 permanently to deprive, which is not a specific intent but  
9 part of a general intent of a theft case.

10 This is a case in which the defendant took \$27,500  
11 and gave about \$5,000 worth of value. He began the  
12 relationship. A relationship which while not a fiduciary  
13 relationship is akin to one of a confidential relationship  
14 that Section 368 certainly contemplates. Someone that you  
15 are giving money to and entrusting them to not only perform a  
16 job but procure supplies. At least part of that money,  
17 certainly more than \$400, was intended to go to the  
18 procurements of supplies.

19 The defendant made no accounting of anything. We  
20 know he contributed some materials. There's testimony that  
21 it looked like a great deal of it was salvaged materials. He  
22 provided no receipts to the homeowner or to the Contractors  
23 State Licensing Board. And in the beginning of their  
24 relationship he violated the law with respect to his ability  
25 as a licensed contractor to charge a down payment. He took a  
26 check for \$10,000 from her and basically a month later he  
27 starts work. He's there sporadically, maybe only 55 hours  
28 during this entire period. He performs considerable

1 demolition work. He takes more money without making any kind  
2 of explanation about what's going on. And when he's asked  
3 for one, he simply blows up and walks out and says you're  
4 breaching the contract. I'll see you in court.

5           The victim is obviously very concerned by that.  
6 She goes out and gets her keys because she knows he knows  
7 where they are. She's obviously concerned about this strange  
8 behavior. Nonetheless she makes efforts by writing and  
9 sending letters to restore the relationship. He doesn't do  
10 that. He says I'm keeping the money. Effectively by doing  
11 so and the fact he was willing -- even though a licensed  
12 contractor and presumed to know and understand how these  
13 things are supposed to work, he's willing to take \$10,000  
14 up-front from her. He does not do anything for it for about  
15 a month. He keeps taking money from her while hardly ever  
16 being there. And then if there's a moment in time where this  
17 changes from just a disagreement to a crime, it's when he  
18 leaves and doesn't come back and doesn't make efforts to  
19 restore this relationship. As soon as he wasn't going to get  
20 money immediately, he stops doing work. And at the theory of  
21 theft involved in all three of the felony counts, 1 through  
22 3, is essentially the same. It is the diversion of funds.  
23 The diversion of funds, not into the job, but into his own  
24 pocket, and that's pretty much the same as the conversion  
25 required for theft.

26           There's an element of embezzlement in this also  
27 because some of these materials were actually procured during  
28 the course of the job by family members who paid for it

1 themselves, or Mrs. Petree paid it for them, and the  
2 defendant had been given all of this money and wasn't using  
3 it to procure the supplies that were necessary to create the  
4 job. His intent was to keep the money for himself that  
5 should have been going into the project well over and above  
6 the worth of the work that he was doing.

7 MR. MCENTEE: Could I respond to something  
8 Mr. Mautner said and that is to correct him? The CALJIC  
9 definition of theft and theft by embezzlement require  
10 specific intent to permanently deprive the owner of the  
11 property, and the intent to steal must arise at the same time  
12 that the property is taken. So, you know, you could surmise  
13 that that happened. You could infer, perhaps draw a weak  
14 inference based on the kind of thinking that Mr. Mautner is  
15 engaging in, but it's impossible to say that beyond a  
16 reasonable doubt when Mr. Schultz accepted the money he did  
17 that with the specific intent to steal it and not that he  
18 intended to try to carry out what was in the contract. He  
19 kept showing up for months after that. It's impossible to  
20 say that at the same time he took the money he had the  
21 specific intent to steal it.

22 THE COURT: I'm looking at CALCRIM 1800. That's  
23 the theft instruction. And Element 3 states that when the  
24 defendant took the property, he intended to deprive the owner  
25 of it permanently or to remove it from the owner's possession  
26 for an extended period of time that the owner will be  
27 deprived of a major portion of the value or enjoyment of the  
28 property. So it's clear that the defendant needs to have the

1 intent whether you call it general or specific intent. It's  
2 the intent to deprive the owner of property permanently when  
3 the defendant took the property.

4 So let me ask you, Mr. Mautner, the first \$10,000  
5 payment that she made, do you claim that he had intent at  
6 that time to deprive her permanently of it?

7 MR. MAUTNER: I don't think -- I think the totality  
8 of the circumstances of the entire relationship beginning  
9 with the fact of the taking of the excessive down payment  
10 shows that he's there essentially to loot. That's what this  
11 job is to him. He's off doing other things most of the time,  
12 and this is somebody who is very, very trusting of him. And  
13 to answer Your Honor's question, yes, his subsequent behavior  
14 is suggestive of that. And particularly the way the  
15 relationship ends shows the way he's been thinking of it all  
16 along. The way his intent has been manifested. He's doing  
17 shoddy work for excessive money. He's getting shoddy  
18 materials, and he's taking too much up front. And as soon as  
19 even the prospect of being cut off for a day, he's gone never  
20 to return. And the majority of what he did wound up being  
21 demolition damages to the victim's property. I think that  
22 all -- those are all facts from which the intent from the  
23 beginning can be inferred.

24 MR. MCENTEE: You know, he's guilty of shoddy work.  
25 We could probably say that. But that's really all this is.  
26 It's a consumer matter. It's a civil matter, but this is not  
27 a theft. It simply doesn't rise to that level as much as  
28 Mr. Mautner wants to stretch it. The specific intent to

1 steal we cannot say is there, and when he accepted the money,  
2 there is a logical inference, a logical explanation, one  
3 logical explanation. He intended to keep working to try to  
4 fulfill as best he could the terms of the contract.

5 Mr. Mautner wants to impute to him some evil intent  
6 that existed at the very start. I guess you could imagine  
7 that that's true, but there's a better explanation. One that  
8 is at least as likely as Mr. Mautner's. The Court has to  
9 find him not guilty of the first two counts.

10 MR. MAUTNER: There's no explanation for the  
11 \$10,000 deposit. I mean, it's outrageous. It's enormous.  
12 It's beyond what the law allows. It's criminal.

13 MR. MCENTEE: And he's charged with that in  
14 Count 4.

15 MR. MAUTNER: But it's also evidence of what this  
16 whole relationship is which is predatory in nature as proved  
17 by both by its beginning, its end, and how little gets done  
18 in between.

19 THE COURT: Submitted?

20 MR. MCENTEE: Yes.

21 MR. MAUTNER: Submitted.

22 THE COURT: I have been focusing on the intent  
23 issue since the beginning of the case because that is key to  
24 Counts 1 and 2. Count 1 really is one that has to find there  
25 was theft before one can find him guilty of Count 1, theft  
26 from an elder. And as I just read, theft does require a  
27 showing of proof beyond a reasonable doubt that when the  
28 defendant took property he intended to deprive the owner of

1 it permanently. And I cannot find beyond a reasonable doubt  
2 that Mr. Schultz had that intent when he took these payments.

3 Mr. Mautner said all of these bits of evidence  
4 described are suggestive of his intent, and one can infer his  
5 intent, but in the totality of this situation I can't find  
6 beyond a reasonable doubt that Mr. Schultz had the intent to  
7 steal the monies when he received them at each time.

8 It's claimed that there's no other explanation for  
9 taking a \$10,000 down payment, and maybe he had the intent  
10 then to steal that and not provide services in return, but I  
11 just don't see that's been proven beyond a reasonable doubt  
12 primarily because Mr. schultz did perform services. He  
13 didn't do everything he said he was going to do, but he did  
14 come over a period of time and did services. Even if they  
15 were substandard, there was some value to those services.  
16 It's not as if he took the \$10,000, walked away, and kept  
17 coming back and asking for more money without doing anything  
18 in return. Clearly in that case I would find that there was  
19 an intent to deprive the owner permanently, but I can't find  
20 that in this case.

21 Therefore, as to Counts 1 and 2, I'm granting the  
22 1118 motion and I'm dismissing Counts 1 and 2. I'm denying  
23 the motion as to Count 3. So far the People have proven each  
24 of those elements to the Court's satisfaction, and so I'm  
25 denying the motion as to Count 3.

26 Is there any defense evidence?

27 MR. MCENTEE: There is, Your Honor. We intend to  
28 call Mr. Schultz. I wonder if the Court would entertain the

1 idea of adjourning until tomorrow?

2 THE COURT: I think we can do that. It's 4:00  
3 o'clock right now. We can re-group. Let's reconvene at 8:30  
4 tomorrow morning then.

5 MR. MCENTEE: I have --

6 THE COURT: Do you have any other witnesses?

7 MR. MCENTEE: No. It's just going to be  
8 Mr. Schultz. I have two, I hope, very brief matters in  
9 Department E tomorrow.

10 THE COURT: Then let's reconvene at 9:00 o'clock.

11 MR. MCENTEE: Thank you very much, Your Honor.

12 THE COURT: Thank you.

13 MR. MAUTNER: Thank you.

14 (Whereupon, proceedings were concluded and the  
15 Court orders the evening recess and orders the  
16 matter continued to March 24, 2009, at  
17 9:00 a.m. in Courtroom G.)

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1 STATE OF CALIFORNIA )  
2 COUNTY OF NAPA ) ss:

3 CERTIFICATE OF SHORTHAND REPORTER

4  
5 I, DONA M. COBLE, RPR, CSR #12295, a duly qualified  
6 and acting Official Shorthand Reporter of the Superior Court  
7 of the State of California, County of Napa, do hereby  
8 certify:

9 That on Monday, March 23, 2009, I reported in  
10 shorthand writing to the best of my ability the proceedings  
11 had in the case of People vs. Harold Daniel Schultz, Napa  
12 Superior Court No. CR138779.

13 That I thereafter caused my said shorthand writing to  
14 be transcribed into typewriting.

15 That the foregoing proceedings pages 901 through 1076  
16 constitute a full, true, correct and accurate transcription  
17 of my said shorthand writing, and a correct and verbatim  
18 record of the proceedings so had and taken, as aforesaid.

19 Dated this 9<sup>th</sup> day of July 2009.

20  
21  
22 Dona M. Coble  
23 DONA M. COBLE, RPR, CSR #12295  
24 Official Shorthand Reporter  
25 County of Napa  
26 State of California

27 ---oOo---

28 \*CERTIFICATION OF THIS TRANSCRIPT IS VALID ONLY WITH AN ORIGINAL SIGNATURE.