2008

Iron Head Construction, Inc. v. Alan K. Gurney and Vicki W. Gurney : Reply Brief

Utah Court of Appeals

IN THE UTAH SUPREME COURT

IRON HEAD CONSTRUCTION, INC., Plaintiff/Respondent, vs. ALAN K. GURNEY and VICKI W. GURNEY, Defendants/Petitioners.	: : : : : : : : : : :	Appeal of Decision Entered January 4, 2008 Utah Court of Appeals Appellate Case No. 20060841-CA Supreme Court Case No. 20080099

PETITIONERS' REPLY BRIEF

Marvin D. Bagley (4529)
669 North Main Street
Richfield, Utah 84701
Telephone: (801)896-9090

Attorney for Respondent

Edwin C. Barnes (0217)
Aaron D. Lebenta (10180)
CLYDE SNOW SESSIONS & SWENSON
201 South Main Street, Suite 1300
Salt Lake City UT 84111
Telephone: (801) 322-2516

Lloyd D. Rickenbach (9646)
P.O. Box 440008
Koosharem, Utah 84744
Telephone: (435) 638-7360

Attorneys for Petitioners

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Telephone: (801) 322-2516

Lloyd D. Rickenbach (9646)
P.O. Box 440008
Koosharem, Utah 84744
Telephone: (435) 638-7360

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

ARGUMENT

Defendants/Petitioners Alan K. and Vicki W. Gurney ("Gurneys") reply as follows to the arguments raised by Plaintiff/Respondent Iron Head Construction, Inc. ("Iron Head") in its brief on appeal:

I. ENTITLEMENT TO PREJUDGMENT INTEREST IS A QUESTION OF LAW.

Iron Head argues the trial court's prejudgment interest decision presents a mixed question of fact and law and must be affirmed because the Gurneys failed to marshal the evidence on appeal. This argument is meritless for two reasons.

First, Iron Head raised this issue before the Court of Appeals, which rejected it by holding that "'a trial court's decision to grant or deny prejudgment interests presents a question of law.'" *Iron Head Constr., Inc. v. Gurney*, 2008 UT App 1,¶ 5, 176 P.3d 453 (citation omitted). Iron Head did not file a cross-petition for certiorari on this issue. Thus, it is waived. *See* Utah R. App. P. 45, 47(a), 48(d); *Colosimo v. Roman Catholic Bishop of Salt Lake City,* 2007 UT 25, ¶ 11, 156 P.3d 806 ("On certiorari review, [the Supreme Court] reviews the decision of the Court of Appeals, not the decision of the district court.").

Second, even if this Court were to consider Iron Head's argument, the Gurneys have no marshaling burden. The duty to marshal is imposed only where an appellant challenges a fact finding. *See* Utah R. App. P. 24(a)(9); *Peirce v. Peirce,* 2000 UT 7,¶ 17 n. 4, 994 P.2d 193 ("[T]he marshaling requirement applies only to challenges of factual findings, not to conclusions of law.").

It is well established that "[a] trial court's decision to grant or deny prejudgment interest presents a question of law which [is] review[ed] for correctness." *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 16, 82 P.3d 1064. While Iron Head argues the Gurneys have a marshaling burden because the determination of whether to award prejudgment interest is a mixed question of law and fact, citing *Davies v. Olson,* 746 P.2d 264 (Utah Ct. App. 1987) and *Carlson Distributing Co. v. Salt Lake Brewing Co., LLC,* 2004 UT App 227, 95 P.3d 1171, neither case supports this assertion. *Davies* does not set forth a standard of review and *Carlson* confirms that the decision to grant or deny prejudgment interest is a question of law. *See Carlson,* 2004 UT App 227 at ¶ 15.

Iron Head has no legal entitlement to any prejudgment interest—regardless of the amount—because the award was based upon a compromise sum, arrived at through the litigants' agreement to settle all claims between them, including equitable claims, prior to and in lieu of pursuing a judgment on (or dismissal of) the underlying causes of action. This is not a fact-sensitive issue, but a legal one having equal application regardless of the facts at issue in that case. Thus, there is no duty to marshal.

II. THE EVIDENCE DOES NOT SUPPORT AN AWARD OF PREJUDGMENT INTEREST.

Even assuming *arguendo* that the Gurneys were required to marshal evidence, which they were not, they have amply fulfilled their burden. Specifically, the Gurneys set forth, in Fact paragraphs 10 through 18 of their initial brief, everything the trial court and Court of Appeals relied on in awarding prejudgment interest to Iron Head. The Gurneys further cited to the pleadings filed by Iron Head.

Iron Head argues that the Gurneys did not marshal the evidence because they did not cite all of the evidence adduced at trial and did not order a transcript of the trial.[1] Iron Head's argument itself reveals an inherent flaw in Iron Head's position that it is entitled to prejudgment interest: The trial was never completed and, as indicated in the April 14, 2004 Order of the trial court, the dispute was settled while Iron Head's first witness was still testifying, "without completing Iron Head's case and without the presentation of any evidence by the Gurneys." (R. 392-93; Appendix B to the Gurneys' Opening Brief.) No findings of fact were made. The Court of Appeals agreed "the Gurneys are correct that the trial court is not authorized to make fact findings without a trial," but, curiously, stated that the court needed to make a finding of the date payment was due in order to award prejudgment interest. *Iron Head,* 2008 UT App 1 at ¶ 21.

Iron Head's rationale misses the mark. Prejudgment interest requires, *inter alia,* that "damages" be measurable by "fixed rules of evidence." *Smith,* 2003 UT 41 at ¶ 17. Not only were no damages awarded, prejudgment interest could not properly be based on the incomplete evidence presented at the trial; this partial evidence was internally inconsistent and would have been further contradicted by the Gurneys if the trial had

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[1] The Gurneys cited an Affidavit of Patrick Kilbourne (R. 362-377) to describe the conflicting and inconsistent evidence submitted by Iron Head and demonstrating that it would be impossible to determine the actual amount of money owed to Iron Head (if any) without completing the trial. (Gurneys' Opening Brief, pp. 7-9, fn. 4). Although Iron Head now objects to the use of this affidavit, it raised no objection in the trial court and the Kilbourne Affidavit is part of the appellate record. Iron Head may not challenge the sufficiency of this affidavit for the first time on appeal. *State v. Irwin,* 924 P.2d 5, 7 (Utah Ct. App. 1996) ("It is a well-established rule that a [litigant] who fails to bring an issue before the trial court is generally barred from raising it for the first time on appeal.").

been completed. A trial transcript would add nothing. The rules of evidence ensure the fair and orderly presentation of evidence *by each party.* To rely on incomplete evidence or to make findings on partial evidence would be clearly erroneous, fundamentally unfair and incorrect as a matter of law.

III. THE PREJUDGMENT INTEREST AWARD WAS NOT BASED ON FACTS AND FIGURES.

Iron Head argues the $43,500 settlement amount represents mathematically certain "damages" comprised of stipulated costs, materials, labor and interest minus lost profits. (Iron Head's Br., pp.14-15, 17-18 *and* fn. 2.) As support, Iron Head cites to the trial clerk's minutes from the aborted trial referencing (a) evidence, including invoices, offered by Iron Head and admitted at trial and (b) the reduction of the settlement amount from $45,000 to $43,500 when Iron Head was unable to substantiate yet another claimed expense.

Iron Head distorts the meaning of the minutes: There was no agreement that the $43,500 settlement figure equaled all of Iron Head's costs and interest minus lost profits. The Gurneys did not agree that <u>any</u> amount was owed to Iron Head, and Iron Head has identified no such stipulation. The Gurneys agreed to pay the negotiated $43,500 as a nuisance amount to end the lawsuit and to avoid a lengthy continuance. Indeed, in doing so the Gurneys gave up their claim that all of Iron Head's alleged expenses were included in the sum set forth in the written contract prepared and signed by Iron Head.

Iron Head's own pleadings defeat its "costs and interest minus lost profit" argument. In its complaint, Iron Head sought $71,000 *plus* profit and interest. It

previously filed a mechanic's lien on the property claiming the sum of $119,051. (R. 1-8.) Each invoice yielded a different total yet, and all of these figures are at variance with Iron Head's written contract. (R. 15-16.) According to Iron Head itself, the $43,500 settlement amount did not equal Iron Head's damages minus lost profits.

Moreover, the statements of fact in Iron Head's brief do not support its assertion. In paragraph 12, Iron Head claims that it was required to borrow $61,800 to pay its subcontractors and for the costs of materials.[2] (Iron Head's Brief, p. 8.) In paragraph 13, Iron Head claims it had incurred interest on the loan of $13,048.32 as of the second day of trial. (*Id.*) However, the trial court made no finding connecting its award of prejudgment interest to the alleged bank debt or any other specified amount or factor.[3] Indeed, if, as Iron Head claims, the interest on the bank debt were part of its actual damages that were the basis for the settlement, then Iron Head incurred only around $30,000 ($43,500 minus $13,048.32) in construction costs—a different amount yet again than it has previously claimed.

Finally, that the parties reduced the settlement amount from $45,000 to $43,500 because Iron Head could not substantiate a claimed payment does not establish the settlement amount was based on measurable facts and figures. Iron Head's failure may

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[2] The Gurneys note that this and other record cites set forth in Iron Head's Statement of Facts are not to the record evidence, but rather to Iron Head's own characterizations of that evidence in Iron Head's Brief in Support of Claim for Prejudgment Interest, filed with the trial court on December 5, 2003. (R. 323-36.)

[3] The Gurneys demonstrated they were ahead on their payments at the time that Iron Head borrowed money, and that the loan was not required as a result of this project. (R. 372-74.)

have been a factor in the parties' agreement to settle the case for $43,500 instead of $45,000, but it does not establish how the remainder of the settlement amount was calculated. Iron Head's failure does not change the fact that the $43,500 settlement figure was a product of the parties' discretion, arrived at for the first time on November 13, 2003. As Judge Orme observed in dissent, from the record evidence, one "cannot tell how much of the settlement amount, if any, is for the kind of thing that may warrant an award of prejudgment interest and how much reflects the range of imponderables inherent in any settlement decision." *Id.* at ¶ 26. For the Gurneys, at least, the settlement arose from the costs and imponderables of having to resume the trial months later.

IV. THE PREJUDGMENT INTEREST AWARD WAS NOT LIQUIDATED PRIOR TO THE DATE OF SETTLEMENT.

Iron Head tries to support the award of prejudgment interest from December 31, 2000 by claiming a meeting occurred in early December 2000 where Richard Curtis (of Iron Head) allegedly carried (but did not present) an invoice to Alan Gurney, who refused to pay it. Iron Head claims it knew it would not be paid and was thus damaged as the date of this meeting. Once again, both the trial court's and Court of Appeals' reliance on this meeting is incorrect as a matter of law because there has never been a factual finding of what occurred at this meeting. Nor could there be, as only partial evidence had been adduced. Even then, an early December 2000 meeting would not justify an award of prejudgment interest from December 31, 2000. Finally, the partial trial evidence indicates that the invoice Richard Curtis claims to have taken to the December 2000 meeting was for $82,463.33, not $43,500, refuting Iron Head's argument that it was owed

$43,500 as of the date of the meeting. (R. 298, 333-34, 350-51, 384; *see also* Gurneys' Opening Brief, Fact 7.) Indeed, it was not. The $43,500 figure did not exist before the November 13, 2003 date on which it was negotiated.

V. THE AMOUNT OF LOSS MUST BE FIXED AS OF A PARTICULAR TIME.

Iron Head inaccurately argues that prejudgment interest does not require the "amount of damages to be liquidated as of the date such damages are ascertained." (Iron Head's Brief, p. 19.) To the contrary, prejudgment interest can only be awarded if, *inter alia,* "the amount of the loss is fixed as of a particular time." *Bennett v. Huish,* 2007 UT App 19,¶ 43, 155 P.3d 917. Although a dispute as to the amount of damages will not necessarily preclude imposition of prejudgment interest, *see id.* at ¶ 45, there must still be a determination of a mathematically quantifiable and calculable loss as of a particular date prior to the entry of judgment.

Here, the $43,500 is neither mathematically quantifiable nor calculable from any evidence. There was no determination that Iron Head suffered any loss caused by the Gurneys. There is no evidence to suggest that the sum of $43,500 was owed to Iron Head prior to November 13, 2003. And there was no judgment. Prejudgment interest was, therefore, improper as a matter of law.

VI. PREJUDGMENT INTEREST IS IMPROPER ON EQUITABLE CLAIMS.

The cases cited in the Gurneys' opening brief establish that prejudgment interest should not have been awarded to Iron Head on the additional ground that the settlement resolved all of Iron Head's legal *and* equitable claims, without distinction. *See e.g.,*

Shoreline Dev., Inc. v. Utah County, 835 P.2d 207, 212 (Utah Ct. App. 1992); *Dejavue, Inc. v. U.S. Energy Corp.*, 1999 UT App 355, 993 P.2d 222. Iron Head responds to these authorities by arguing that, since the Court of Appeals issued *Dejavue* and *Shoreline,* this Court should defer to the Court of Appeals' decision in *Iron Head* because the Court of Appeals is in the best position to interpret them. This rationale is faulty. The Court of Appeals is not in a better position to interpret Utah law on prejudgment interest than the Supreme Court. Moreover, this Court has independently determined that prejudgment interest is inappropriate on equitable claims. *See, e.g., Bellon v. Malnar,* 808 P.2d 1089, 1097 (Utah 1991).

VII. PREJUDGMENT INTEREST IS NOT JUSTIFIED AS CONSEQUENTIAL DAMAGES.

Finally, Iron Head tries to save the prejudgment interest award by arguing that it amounts to consequential damages for its unjust enrichment claim. This argument is fundamentally incorrect. Iron Head gave up any right to pursue a judgment for damages, compensatory or consequential, by settling the case. In making its argument, Iron Head ignores the fact that the trial court made no findings that would support an award of consequential damages, nor did the court enter such an award. Furthermore, Iron Head sought recovery primarily on its equitable claim for unjust enrichment, for which prejudgment interest is not allowed. *See Dejavue,* 1999 UT App 355 at ¶ 24.

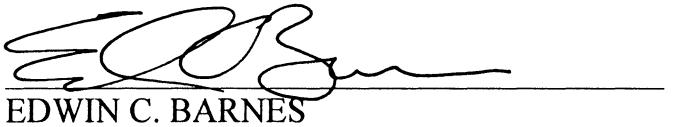
CONCLUSION

For the foregoing reasons, together with those listed in the Opening Brief, the Court of Appeals' decision must be reversed and the trial court's award of prejudgment

interest to Iron Head vacated. The Gurneys further request an award of their costs incurred herein in accordance with Rule 34 of the Utah Rules of Appellate Procedure.

Dated this 25th day of August 2008.

CLYDE SNOW SESSIONS & SWENSON



EDWIN C. BARNES
AARON D. LEBENTA

LLOYD D. RICKENBACH
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing Reply Brief were mailed, postage prepaid, to the following on the 25th day of August 2008:

Marvin D. Bagley
669 North Main Street
Richfield, Utah 84701
Attorney for Respondent