

1988

Mountain States Broadcasting Company, a corporation, and Dan Lacy, an individual v. Sterrett Neale and Neale Broadcast Alliance : Petition for Rehearing

Utah Court of Appeals

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BRIEF

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IN THE COURT OF APPEALS

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DOCKET NO. 880192-CA OF THE STATE OF UTAH

MOUNTAIN STATES
BROADCASTING COMPANY,
a corporation, and DAN
LACY, an individual,

Plaintiffs-
Appellants,

vs.

STERRETT NEALE and NEALE
BROADCAST ALLIANCE,

Defendants-
Respondents.

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Case No. 880192-CA

Category 14b

APPELLANTS' PETITION FOR REHEARING

APPEAL FROM THE FINAL JUDGMENT OF THE
FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,
STATE OF UTAH, THE HONORABLE BOYD L. PARK PRESIDING

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T. Noonan

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

MOUNTAIN STATES	:	
BROADCASTING COMPANY,	:	
a corporation, and DAN	:	
LACY, an individual,	:	
	:	
Plaintiffs-	:	Case No. 880192-CA
Appellants,	:	
	:	
vs.	:	
	:	Category 14b
STERRETT NEALE and NEALE	:	
BROADCAST ALLIANCE,	:	
	:	
Defendants-	:	
Respondents.	:	

APPELLANTS' PETITION FOR REHEARING

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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

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BROADCASTING COMPANY,	:	
a corporation, and DAN	:	
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BROADCAST ALLIANCE,	:	
	:	
Defendants-	:	
Respondents.	:	

PETITION

Pursuant to Rule 35(a) of the Rules of the Utah Court of Appeals, plaintiffs-appellants hereby petition the Court for a rehearing of this case. The ground for this petition is that the Court erred in holding as a matter of law that Neale Broadcast Alliance was the prevailing party and thus the only party entitled to recover its attorney fees.

The undersigned counsel hereby certifies that this petition is presented in good faith and not for delay.

ARGUMENT

POINT I

NEALE BROADCAST ALLIANCE'S COUNTERCLAIM DID NOT INCREASE ITS RECOVERY, AND IT IS NOT THE PREVAILING PARTY.

The Court holds, on page 9 of its opinion, that Neale Broadcast Alliance (NBA) was the prevailing party because it recovered the net judgment. Mountain States respectfully submits that this conclusion is in error for at least two reasons: First, Mountain States deposited the full amount due under the promissory note prior to the time that NBA filed any counterclaim. Second, the "net judgment" rule should not be applied to a declaratory judgment action where the full amount of the note was not due when suit was filed, where the plaintiff deposited the full amount due into court, and where not all of the amount "recovered" by defendant was disputed.

Mountain States' deposited the entire unpaid balance due under the promissory note into court, and sought a declaratory judgment that Mountain States was entitled to certain offsets and claimed that NBA had breached certain other obligations under the contracts. NBA's Counterclaim sought (1) payment of the amount due under the note, which Mountain States had already deposited into court, and (2) punitive damages of \$50,000.00.

The judgment in this case awarded certain offsets to Mountain States, and ordered that the corrected balance due under the promissory note be paid to NBA, all in accordance with Mountain States' complaint. NBA was denied the affirmative

relief it sought, in that its request for punitive damages was denied.

Based on these facts, this Court held that NBA had a net recovery of approximately \$85,000, and that NBA was the prevailing party.

Carried to its logical extreme, the rule established by this Court would also mean that NBA would have been the prevailing party even if Mountain States had established a right to an \$89,000 offset, yielding a net judgment to NBA of \$1,000.00. The rule in essence means that the payor under a promissory note can never be a prevailing party in litigation under the note.

Several factors dictate that such a mechanical rule should not be applied in this case. First, although Mountain States deposited the entire unpaid balance into court at the time it filed its complaint, the note was not then due.¹ The note was amortized over ten years, with the final payment due June 30, 1992.

A second factor is that Mountain States deposited the unpaid balance into court at the time it filed its complaint, and not in response to a counterclaim from NBA.

In Highland Construction Co. v. Stevenson, 636 P.2d 1034 (Utah 1981), the case relied upon by the Court in this case as

¹NBA asserted in its Answer and Counterclaim that it had declared the entire unpaid balance to be due. There was no evidence that NBA had accelerated the note prior to the time that Mountain States made its deposit. (Three notices of default were admitted into evidence, but none purport to accelerate the note. (Exhibits 71, 78, 79.)

support for the proposition that money voluntarily paid during litigation should be treated as obtained by judgment, the facts were much different. The Court there stated as follows:

Highland claims to be "the prevailing party" because 164 days after it filed this action and while this action was pending in the court below, Stevenson admitted that he owed and he voluntarily paid Highland \$10,300.78 of the amount it was suing for. . . . It should make no difference whether the plaintiff recovers money from the defendant during the course of the action by voluntary payment or whether the plaintiff recovers that amount by a judgment. In both instances the plaintiff has recovered money by virtue of its action. See Joseph Magnin Co., Inc. v. Schmidt, 152 Cal.Rptr. 523, 89 C.A.3d Supp. 7 (1978). In the instant case, the \$10,300.78 was long past due when paid by Stevenson and since it was paid, albeit voluntarily, after plaintiff's action was commenced the plaintiff Highland was indeed the prevailing party" on that particular cause of action.

636 P.2d at 1038. In Joseph Magnin, cited in Highland, it similarly appears that the debt was past due at the time suit was filed, and the award of attorney fees was based on a specific statute somewhat similar to Utah R. Civ. P. 68(a).

In the instant case, in contrast, the sums paid by Mountain States were not "voluntarily" paid during the pendency of the suit--they were paid before suit, at the time the complaint was filed. In addition, the sums were not "long past due," but in fact would not have become due for several years. Mountain States attempted to show its good faith by depositing the full balance due into court. Such deposits should be encouraged as a

matter of policy. Under this Court's ruling, there would be no incentive to make such a deposit.

The "net judgment" rule may be appropriate in cases similar to those cited by this Court in support of the rule. For example, in Ocean West Contractors, Inc. v. Halec Construction Co., 123 Ariz. 470, 600 P.2d 1102 (1979), the plaintiff (sub-contractor) sued the defendant (general contractor) for the unpaid balance claimed to be due under a construction sub-contract, and the defendant counterclaimed for damages for the plaintiff's failure to complete the subcontract. The trial court found that the plaintiff had breached the contract first, but awarded both parties some relief. The net judgment was in favor of the plaintiff, and the plaintiff was therefore awarded its costs and attorney fees.

In Ocean West, therefore, and in the other cases cited by this Court in support of the "net judgment" rule, the claims arose out of the same transaction, but were dissimilar. (The plaintiff sued for the unpaid balance due; the defendant sued for damages for failure to complete.) In the instant case, in contrast, the defendant's "counterclaim" was identical to plaintiffs' complaint. With the exception of defendant's claim for punitive damages, defendant did not seek any relief which was not inherent in plaintiff's complaint.

Plaintiffs in this case obtained a judgment that they were entitled to some offsets, although the offsets were not as great as claimed. Defendant was awarded a judgment, but only for that

which had been offered in plaintiffs' complaint--payment of the promissory note less offsets.² Plaintiffs were the prevailing party, and should be awarded their attorney fees.

CONCLUSION

The "net judgment" rule should not be applied to a declaratory judgment action seeking a determination of offsets against a promissory note, where the unpaid balance, although not then due, is deposited in court at the inception of the lawsuit. NBA recovered nothing by its counterclaim--the relief it received was inherent in Mountain States' complaint.

This Court should grant the petition for rehearing, and should determine that plaintiff was the prevailing party as a matter of law.

DATED this 5th day of July, 1989.



DON R. PETERSEN, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiffs

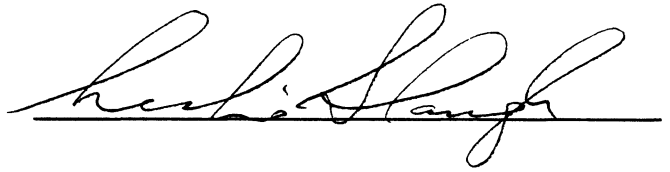
²As shown on the attached amortization schedule, the amount deposited into court actually overpaid the promissory note. Mountain States should be entitled to a refund from NBA.

This amortization is based on the fact that the entire \$89,587.16 was deposited in court at the time the complaint was filed in May, 1983. Although the trial court treated \$30,000.00 of the total as having been deposited in January, 1984, the \$30,000.00 paid in January, 1984, was not new money, but just replaced the check which had been deposited earlier. (The trial court's findings on this issue conflict. Finding no. 24 states the \$30,000.00 was paid on July 24, 1984. Finding no. 27 states the \$30,000.00 was paid on January 25, 1984. (R. 318-19.)) The check for \$89,587.16 was not withdrawn until after the \$30,000.00 had been deposited.

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 5th day of July, 1989.

Stephen L. Henriod
Marilynn P. Fineshriber
NIELSEN & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

A handwritten signature in cursive script, appearing to read "Stephen L. Henriod", is written over a horizontal line.

APPENDIX "A"

Mountain States Broadcasting Co. v. Neale,
Case No. 880192-CA, slip op. (Utah Ct. App. June 20, 1989).

IN THE UTAH COURT OF APPEALS

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Mountain States Broadcasting)
Company, a corporation, and)
Dan Lacy, an individual,)
)

Plaintiffs, Appellants and)
Cross-Respondents,)
)

v.)
)

Sterrett Neale and Neale)
Broadcast Alliance,)
)

Defendants, Respondents and)
Cross-Appellants.)

OPINION
(For Publication)

Case No. 880192-CA

FILED

JUN 20 1989
Mary T. Noonan
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

Fourth District, Utah County
The Honorable Boyd L. Park

Attorneys: Don R. Petersen, Leslie W. Slauch, Provo, for
Appellants
Stephen L. Henriod, Marilyn P. Fineshriber, Salt
Lake City, for Respondents

Before Judges Davidson, Greenwood, and Orme.

ORME, Judge:

This appeal arises from a dispute over the purchase of two radio stations and their assets. Mountain States Broadcasting Company, the corporate purchaser, and Dan Lacy, Mountain States' president and guarantor of the promissory note given for the purchase price, commenced this action seeking a declaration of their entitlement to certain offsets against the note balance otherwise due. Neale Broadcast Alliance ("NBA"), the corporate seller, and Sterrett Neale, NBA's president and guarantor of the seller's performance, were named as defendants. NBA counterclaimed for the entire note balance. Both parties successfully secured certain aspects of the relief they sought, but now appeal various decisions of the trial court. We affirm in substantial part, but reverse and remand in limited respects.

FACTS

NBA owned and operated radio stations KONI and KTMP in Utah County. On November 21, 1981, NBA agreed to sell these stations to Mountain States, and the parties entered into an Asset Purchase Agreement. In June 1982, the sale transaction closed and Mountain States delivered a promissory note for the deferred portion of the purchase price to NBA. The purchase agreement provided that NBA warranted "all of the personal property listed in Schedule 2 which is presently in active use in the operation of the Stations will be in good repair and working order unless otherwise noted" on the schedule. Following the closing, Dan Lacy inspected the premises of both radio stations and the personal property found thereon. Lacy compiled a list of items mentioned on Schedule 2 that were, in his opinion, either missing or inoperable. Accordingly, Mountain States claimed a substantial offset against the note balance.

After making two small payments on the note, Mountain States and Lacy brought this action seeking a judicial determination of their entitlement to the claimed offsets for the allegedly missing or inoperable equipment. Mountain States deposited a check for \$89,587.16, the balance then due on the note, with the court.¹ NBA disputed the propriety of any offset and counterclaimed for the entire amount due and owing on the note, including interest.

Following a bench trial, the court found that the items claimed to be missing were either excluded from the sale or had been found, so that "no material items" were missing. However, the court found that a "control design brain" and two carousels used in the operation of the stations were not in "good repair and working order" at the time of transfer. Accordingly, the court awarded Mountain States an offset of \$6,000, the approximate amount the court concluded was necessary to restore those items to the condition warranted.

NBA was awarded a judgment on its counterclaim for the entire amount due on the note, less the offset. Relying on

1. At a subsequent hearing convened for another purpose, it was agreed that the trial court would return this check to Mountain States, which would then immediately pay \$59,587.16 to NBA and deposit the remaining \$30,000 to an interest-bearing account pending resolution of the dispute.

language in the promissory note, the court concluded that interest due on the unpaid balance should be compounded monthly. Finding each side had prevailed to some extent, the trial court also awarded both sides their attorney fees in full.

On appeal, Mountain States claims: 1) It is entitled to further offsets against the purchase price to compensate for missing or inoperable equipment or to reflect the proper measure of damages; 2) the court erred in compounding the interest on unpaid interest installments; and 3) the court erred in awarding both sides attorney fees because only plaintiffs were "the prevailing party" as contemplated by the purchase agreement.²

NBA cross-appeals, challenging the propriety of any offset and claiming that they, not plaintiffs, are entitled to attorney fees as "the prevailing party."

MISSING AND INOPERABLE EQUIPMENT

The parties' claims concerning the proper offset amount are essentially a challenge to the trial court's findings of fact. Specifically, Mountain States argues the findings concerning the amounts attributable to missing and inoperable equipment are not supported by the evidence but are instead significantly higher. NBA argues the evidence does not support the findings in support of even a \$6000 offset.

2. Mountain States also claims the trial court erred by denying its claim for consequential damages relating to extra payroll expense incurred by reason of the control design brain's "inoperable" condition. We agree with the trial court that Mountain States failed to meet its burden of proving that, but for the condition of the control design brain, those expenses would not have been necessary.

Mountain States also objects to the trial court's post-trial amendment of the judgment to permit disbursement of the deposited funds to Sterrett Neale personally rather than directly to NBA. The court granted the motion to amend the judgment ex parte, apparently regarding this modification as merely clerical in nature. While we agree that the court should have allowed Mountain States sufficient time to respond to the motion, its failure to do so is harmless error in light of our decision favorable to defendants.

In order to challenge a trial court's findings of fact, a party "must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them "clearly erroneous.'" In re Bartell, 105 Utah Adv. Rep. 3, 4 (1989) (emphasis added) (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987)). See also, e.g., Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985); Henderson v. For-Shor Co., 757 P.2d 465, 468 (Utah Ct. App. 1988). Appellants often overlook or disregard this heavy burden. When the duty to marshal is not properly discharged, we refuse to consider the merits of challenges to the findings and accept the findings as valid. See, e.g., Deeben v. Deeben, 106 Utah Adv. Rep. 55, 57 n.1 (Utah Ct. App. 1989); Demetropoulos v. Vreeken, 754 P.2d 960, 963 (Utah Ct. App. 1988); West Valley City v. Borrego, 752 P.2d 361, 364-65 (Utah Ct. App. 1988); Fitzgerald v. Critchfield, 744 P.2d 301, 304 (Utah Ct. App. 1987); Harker v. Condominiums Forest Glen, Inc., 740 P.2d 1361, 1362 (Utah Ct. App. 1987). Here, the parties have done an admirable job of marshaling the evidence. Indeed, the benefits of the requirement are demonstrated by the fact that Mountain States, after its careful review of the evidence, candidly concedes the adequacy of the evidence to support the findings as to all but five of its original claims for missing or inoperable equipment. Furthermore, Mountain States' five remaining challenges are well supported by precise and thorough references to record evidence supporting the particular finding as well as evidence supporting Mountain States' challenge. Accordingly, we turn to the merits of those challenges.

After carefully reviewing the marshalled evidence, we conclude the trial court's factual findings regarding the alleged missing equipment are sufficiently supported by the evidence, with only two minor exceptions. We have been shown no evidence on which the trial court could have relied in denying the claims for the missing oscilloscope and a noise and distortion meter. Thus, we hold on the undisputed evidence in the record that Mountain States is entitled to additional offsets in the amount of \$120 for the oscilloscope and \$377.80 for the noise and distortion meter.

Additionally, both Mountain States and NBA challenge the trial court's findings supporting its award of damages to Mountain States for inoperable equipment. The evidence readily supports the majority of the findings in this regard, but those concerning the control design brain and two carousels present

closer questions. Mountain States claims the \$3,000 award based on the cost to repair the control design brain is insufficient as the evidence demonstrates that the brain is beyond repair. Thus, Mountain States contends replacement cost is the appropriate measure of its damages. On the other hand, NBA contends the evidence demonstrates the control design brain and carousels were as warranted and the court should not have awarded any such damages to Mountain States.

The court received a wide range of testimony regarding the condition of the control design brain and carousels. However, the evidence does not compel a finding that the equipment was beyond repair, as Mountain States contends, nor that it was in the condition warranted at the time of sale, as NBA contends. The middle ground taken by the trial court, namely that this equipment was not as warranted but could be repaired, has ample evidentiary support. Of course, in view of the divergent positions taken by the parties at trial, the evidence concerning repair costs is somewhat sparse. It appears that in formulating its ultimate award, the court relied on an evaluation report prepared by an electronics technician suggesting approximate repair costs.³ The award is consistent with the estimates contained in the report. Thus, we find sufficient evidence to support the court's award to Mountain States of a \$6000 offset for equipment in disrepair, and we affirm it.

INTEREST

Mountain States next contends the trial court erred in awarding compound interest to NBA on the unpaid interest

3. Hoping to persuade us to adopt replacement cost as the measure of its damages, Mountain States argues this document should not be considered by us because it was not admitted as evidence of repair costs. However, our attention is drawn to no indication in the record that the court admitted the document for a limited purpose, nor to any objection by Mountain States to the document's admission for particular purposes. In view of our affirmation of repair cost as the appropriate measure of damages in this case, we note that if this evidence were disregarded, this offset in favor of Mountain States would have to be set aside altogether. No other evidence in the record bears on the cost to repair this equipment.

installments. See generally 45 Am.Jur.2d Interest and Usury § 76 (1969) ("Compound interest means interest on interest, in that accrued interest is added periodically to the principal, and interest is computed upon the new principal thus formed; it is to be distinguished from the mere allowance of interest on overdue installments of interest, which is not strictly compound interest."). The court relied on the following provision in the promissory note as the basis for its award:

This Note shall bear interest upon the unpaid principal balance hereof from the date hereof until paid, at a rate of ten percent (10%) per annum. Should interest not be paid when due, it shall thereafter bear like interest as the principal.

In Utah, compound interest is not favored by the law. Watkins & Faber v. Whiteley, 592 P.2d 613, 616 (Utah 1979) (per curiam). The court's award here can be affirmed only if we conclude the parties expressly agreed to compound interest by the terms of the above provision. In this regard, we observe that the note does not explicitly provide that interest on unpaid interest should be compounded monthly.⁴ Instead, it provides that unpaid interest will bear interest "as the principal," which bears simple interest. Therefore, we hold NBA is only entitled to simple interest at a rate of 10% per annum on the unpaid interest installments, and we remand to the trial court to recalculate the interest due.⁵

4. Cf. 28 U.S.C.A. § 1961(b) (1989) (expressly providing for interest "compounded annually").

5. A close reading of Jensen v. Lichtenstein, 45 Utah 320, 145 P. 1036 (1915), relied on by NBA, reveals the Court's intention that the unpaid interest earn interest, but it is not clear it intended the interest upon the interest to bear interest. Id. at 1041. The interpretation favoring simple interest is supported by the overall result in Jensen. The interest payments in that case were \$175 per month. The Court said:

When therefore the several sums of \$175, with interest thereon at the rate of 8 per cent per annum from the date they severally became due until the judgment was entered as aforesaid, are all added to

ATTORNEY FEES

Mountain States and NBA also challenge the trial court's award granting both sides their attorney fees based on the attorney fee provision in the Asset Purchase Agreement.⁶ That provision provides in part, with our emphasis, as follows:

In the event of commencement of suit by either party to enforce the provisions of this Agreement, the prevailing party shall be entitled to receive attorneys' fees and costs as a court may adjudge reasonable in addition to any other relief granted.

Attorney fees are awardable only if provided for by statute or contract and, if by contract, only as the contract allows by its terms. See, e.g., Dixie State Bank v. Bracken, 764 P.2d

(Footnote 5 continued)

the principal, the total amount is the amount for which judgment should be entered.

Id. If the Court had intended the missed interest installments to bear compounded interest, these particular installments would have been added to the principal once overdue, rather than making sure they existed as "several sums of \$175" and waiting until judgment to add them to the principal. Furthermore, the provision in Jensen is distinguishable from the provision at issue here.

6. There are actually three attorney fee provisions in the record. The individual guaranty of Dan Lacy provides that Lacy will "reimburse Neale for all costs and expenses including attorney's fees incurred in the enforcement of this guaranty." Since the trial court had no occasion to award NBA a judgment on the guaranty, we need not consider this provision.

The promissory note also provides that "[t]he undersigned [Mountain States] promises to pay costs of collection and attorneys' fees in reasonable amount if default is made in the payment of this Note." Because NBA is the party due fees under this provision and also, as we will explain, the "prevailing party" under the fees provision in the purchase agreement, we need not separately consider the note provision, which is merely duplicative given the posture of this case.

985, 988 (Utah 1988). As the award of fees here is based on a contract, we must determine if the trial court properly concluded that both parties "prevailed" and were therefore entitled to fees under the contract. Both sides argue the fee provision mandates that there can be only one "prevailing party," an interpretation consistent with the plain meaning of the provision, particularly its reference in the singular to "the prevailing party." Of course, both claim to be that party.

Typically, determining the "prevailing party" for purposes of awarding fees and costs is quite simple. Plaintiff sues defendant for money damages; if plaintiff is awarded a judgment, plaintiff has prevailed, and if defendant successfully defends and avoids an adverse judgment, defendant has prevailed. However, this simple analysis cannot be employed here because both plaintiff and defendant obtained some monetary relief against the other.⁷ Our review of the relevant case law convinces us that under the provision at issue, there can be only one prevailing party even though both plaintiff and defendant are awarded money damages on claims arising from the same transaction.⁸ See Lawrence v. Peel, 45

7. The determination of a "prevailing party" becomes even more complicated in cases involving multiple claims and parties, see Pioneer Roofing Co. v. Mardian Constr. Co., 152 Ariz. 455, 733 P.2d 652 (Ct. App. 1986); the granting of non-monetary relief to one or more parties, see Watson Constr. Co. v. Amfac Mortgage Corp., 124 Ariz. 570, 606 P.2d 421, 435-36 (Ct. App. 1979); Food Pantry, Ltd. v. Waikiki Business Plaza, Inc., 58 Haw. 606, 575 P.2d 869, 879 (1978); and where the ultimate award of money damages does not adequately represent the actual success of the parties under the peculiar posture of the case. See Owen Jones & Sons, Inc. v. C.R. Lewis Co., 497 P.2d 312, 313-14 (Alaska 1972). These cases demonstrate the need for a flexible and reasoned approach to deciding in particular cases who actually is the "prevailing party."

8. It appears that where both plaintiff and defendant recover in the same action but the counterclaim does not arise from the same transaction as the plaintiff's claim, both parties may be considered to have prevailed and, therefore, to be entitled to a portion of their fees. See, e.g., Elder v. Triax Co., 740 P.2d 1320, 1321-22 (Utah 1987); Moran v. Lewis, 131 Conn. 680, 41 A.2d 905, 905 (1945). However, this rule would not apply here because Mountain States' claim and NBA's counterclaim arose from the same transaction.

Or. App. 233, 607 P.2d 1386, 1392 (1980); Marquam Inv. Corp. v. Myers, 35 Or. App. 23, 581 P.2d 545, 548-49 (1978). See also Checketts v. Collings, 78 Utah 93, 1 P.2d 950, 953 (Utah 1931) ("There can be but one prevailing party in an action at law to recover a money judgment.").⁹ But see Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984) (per curiam) (both sides entitled to award of some attorney fees where relevant agreement did not employ "prevailing party" phraseology). We hold that in the present circumstances the party in whose favor the "net" judgment is entered must be considered the "prevailing party" and is entitled to an award of its fees. See, e.g., Ocean West Contractors, Inc. v. Halec Constr. Co., 123 Ariz. 470, 600 P.2d 1102, 1105 (1979); Trollope v. Koerner, 21 Ariz. App. 43, 515 P.2d 340, 344 (1973); Moss Constr. Co. v. Wulffsohn, 116 Cal. App. 2d 203, 253 P.2d 483, 485 (1953); Szoboszlay v. Glessner, 233 Kan. 475, 664 P.2d 1327, 1333-35 (1983); E.C.A. Envtl. Management Servs., Inc. v. Toenyes, 208 Mont. 336, 679 P.2d 213, 218 (1984). See also Annotation, Who Is The "Successful Party" Or "Prevailing Party" For Purposes Of Awarding Costs Where Both Parties Prevail On Affirmative Claims, 66 A.L.R.3d 1115 (1975).

Based on the foregoing, we conclude that NBA, in view of its net recovery of approximately \$85,000, is the sole "prevailing party" as a matter of law. Accordingly, we reverse the award of fees to Mountain States. Even though we affirm NBA's entitlement to an award of attorney fees, we must reverse the award as made and remand for a determination of a reasonable fee.¹⁰ See Moss Constr. Co., 253 P.2d at 484-85.

9. We note the limited reliance we purposefully place on Checketts. While we agree that there can be but one "prevailing party" in an action such as this, we think that the result reached in Checketts, to the effect that a defendant who defeats a plaintiff's claim, but also loses on its counterclaim, is the "prevailing party" entitled to fees as a matter of course, 1 P.2d at 953, makes little sense and is probably no longer valid.

10. The trial court in this case, in awarding fees to both sides, simply awarded each the total amount of its accumulated billing statements. On remand, the trial court's calculation of a reasonable fee should comport with Dixie State Bank v. Bracken, 764 P.2d 985, 989-90 (Utah 1988). Of course, a reasonable fee will compensate NBA only for those fees necessarily incurred in resolution of issues in NBA's favor,

Finally, plaintiffs argue that they acknowledged owing a portion of the debt both before the action was commenced and, subsequently, at an early stage of the action. See note 1, supra. Additionally, they note that they deposited the entire sum due into court. Accordingly, plaintiffs contend NBA cannot be deemed to have "prevailed," at least as to the amount never seriously contested by Mountain States. We cannot agree, and hold that NBA has "prevailed" to the extent of its entire recovery, including the amount Mountain States voluntarily paid after NBA filed its counterclaim. See Highland Constr. Co. v. Stevenson, 636 P.2d 1034, 1038 (Utah 1981) (for purposes of an award of fees to the "prevailing party," sums voluntarily paid during the course of the action are treated as if obtained by judgment). Cf. Maher v. Gagne, 448 U.S. 122, 100 S. Ct. 2570, 2575 (1980) (a party has "prevailed" for purposes of awarding fees under 42 U.S.C. § 1988 even if resolution of its claim is through settlement).

CONCLUSION

The trial court's \$6,000 award to Mountain States as an offset for missing or inoperable equipment is affirmed, but must be increased by \$120 for the missing oscilloscope and \$377.80 for the missing noise and distortion meter. The court's award of compound interest is reversed. Finally, the court's award of attorney fees to both parties is reversed. On remand, then, the trial court must determine and enter an award of reasonable attorney fees in NBA's favor, increase the offset in favor of Mountain States as indicated, and recalculate interest to award NBA only simple interest on the interest

(Footnote 10 continued)
and should not include fees relating to the issues resolved in Mountain States' favor. See Stacey Properties v. Wixen, 766 P.2d 1080, 1085 (Utah Ct. App. 1988) (party entitled to attorney fees "was entitled to attorney fees for the claims on which it was successful"). Cf. Graco Fishing & Rental Tools, Inc. v. Ironwood Exploration, Inc., 766 P.2d 1074, 1079-80 (Utah 1988) (suggesting need to "differentiate between the time spent on the successful claim[s] and the time spent on unsuccessful claims" and propriety of awarding fees only for the former); Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984) (per curiam) ("[A] party is entitled only to those fees attributable to the successful vindication of contractual rights within the terms of their agreement.").

installments not paid when due. Additionally, NBA, while not enjoying total success on this appeal, is clearly the "prevailing party," and is entitled on remand to an award of its attorney fees reasonably incurred on appeal.¹¹ See Management Servs. v. Development Assocs., 617 P.2d 406, 408-09 (Utah 1980).

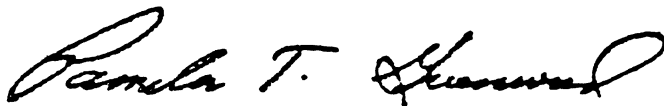


Gregory K. Orme, Judge

WE CONCUR:



Richard C. Davidson, Judge



Pamela T. Greenwood, Judge

11. Of course, the point made in footnote 10 about the recoverable aspects of NBA's overall attorney fee applies with equal force to the reasonable fee awardable on remand for attorney services rendered on appeal.

APPENDIX "B"
Amortization Schedule

MOUNTAIN STATES BROADCASTING CORPORATION
VS
NEALLE BROADCAST ALLIANCE

AMORTIZATION SCHEDULE --

Original Note Amount	\$90,929.99
Court Directed Offset	6,497.00
New Note Amount	\$84,432.99

TERM OF LOAN -- 120 Months

INTEREST RATE -- 10% Per Annum

Date	Add Interest	Subtract Payments	Balance
7-30-82	703.50		85,136.49
(30 days at 23.45/day)			
8-30-82	703.50		85,839.99
9-30-82	703.50		86,543.49
10-1-82		2,403.30	84,140.19
10-30-82	701.10		84,841.29
(30 days at 23.37/day)			
11-30-82	701.10		85,542.39
12-1-82		1,201.65	84,340.74
12-30-82	702.90		85,043.64
(30 days at 23.43/day)			
1-30-83	702.90		85,746.54
2-28-83	702.90		86,449.44
3-30-83	702.90		87,152.34
4-30-83	702.90		87,855.24
5-5-83	140.58		87,995.82
(6 days at 23.43/day)			
5-5-83		89,587.16	(1,591.34)
5-5-84	159.13		(1,750.47)
5-5-85	175.05		(1,925.52)
5-5-86	192.55		(2,118.07)
5-5-87	211.81		(2,329.88)
5-5-88	232.99		(2,562.87)
5-5-89	256.29		(2,819.16)
7-1-89	42.90		(2,862.06)
(55 days at \$.78/day)			

Interest accrues thru 5-5-90 at \$.78/day or \$23.40/month