

2009

Melvyn Bircoll and Janine Bircoll v. Southwest Marble & Granite, Inc. : Brief of Appellee

Utah Court of Appeals

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Melvyn Bircoll, Janine Bircoll; Appellants Pro Se.

Shawn T. Farris; Farris & Utley; Attorney for Appellee.

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IN THE UTAH COURT OF APPEALS

**MELVYN BIRCOLL and JANINE
BIRCOLL,**

Plaintiffs/Appellants,

v.

**SOUTHWEST MARBLE &
GRANITE, INC,**

Defendant/Appellee.

Appellate Case No. 2009179

BRIEF OF APPELLEE

Melvyn Bircoll and Janine Bircoll
Appellants
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ADDENDUM

- A. Order on Objection to Judgment and Amended Judgment
- B. Findings of Fact and Conclusions of Law
- C. Objection to Form and Content of Proposed Order and Judgment

JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. §78A-4-103(j). This appeal arises from the Order on Objection to Judgment and Amended Judgment entered by the Fifth Judicial District Court, in and for Washington County, Utah in the case of Melvyn Bircoll and Janine Bircoll v. Southwest Marble & Granite, Inc., 050501733.

STATEMENT OF THE ISSUES and STANDARDS OF REVIEW

FIRST ISSUE¹: Whether the trial court appropriately acted within its discretion when it awarded Appellants an award of attorney's fees which corresponded to the claims actually prevailed upon by the Appellants at trial, but which was less than the total amount requested by Appellants?

Standard of Review: The trial court has broad discretion in determining what constitutes a reasonable fee, and we will consider that determination against an abuse-of-discretion standard. (Dixie State Bank v. Bracken, 764 P.2d 985, 991 (Utah 1988)).

SECOND ISSUE: Whether the trial court's reduced award of attorney's fees is against public policy or inequitable?

¹ The Appellants in the instant case do not comply with Rule 24 of the Utah Rules of Appellate Procedure in that the Brief of the Appellants does not contain the required statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and citation to the record showing that the issue was preserved in the trial court; or a statement of grounds for seeking review of an issue not preserved in the trial court. (URAP Rule 24(a)(5) 2009). Nevertheless, the Appellee herein states the issues on appeal with the corresponding standards of review.

Standard of Review: The trial court has broad discretion in determining what constitutes a reasonable fee, and we will consider that determination against an abuse-of-discretion standard. (Dixie State Bank v. Bracken, 764 P.2d 985, 991 (Utah 1988)).

STATUTORY PROVISION

The following is the statutory provision referenced in the present appeal:

UCA §38-1-18(1):

(1) Except as provided in Section 38-11-107 and in Subsection (2), in any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys fee, to be fixed by the court, which shall be taxed as costs in the action.

STATEMENT OF THE CASE

In the present case, Plaintiffs, Dr. Melvin Bircoll and Janine Bircoll (hereinafter “Appellants”) hired Southwest Marble & Granite, Inc (hereinafter “Appellee”) to fabricate and install counter-tops in their newly-constructed residence. (Record at 71, ¶25). The records and notes in the Appellee’s project file indicated that the correct counter-tops were installed in the residence of the Appellants. (Record at 74, ¶60). However, after the installation, Appellants expressed dissatisfaction to employees of the Appellee with the counter-tops installed in the master-bathroom. (Record at 72, ¶¶34-35). The Appellants alleged that these counter-tops were completely and entirely wrong; including the wrong

thickness, the wrong color of the stone and the wrong edge of the countertops installed in the master bathroom. (Record at 72 ¶43 of Findings).

The Appellee believed that the counter-tops were of the same color, thickness and edge which had been ordered by the Appellants. The Appellee sent invoices for payment to the Appellees in the amount of the contracted price of \$2,182. (Record at 70, ¶20). However, Appellants refused to pay anything to the Appellee for the master-bathroom counter-tops. (Record at 72, ¶43). The Appellee asked Appellants if they were willing to pay just \$900.00 for the bathroom counter-tops; however, Appellants indicated that they were not interested in paying \$900.00 for the counter-tops. (Id.)

The Appellants conveyed the message to the Appellee that “the countertops were of no value to them and that the Bircolls [Appellants] intended to initiate a lawsuit against Southwest Marble [Appellee] for these countertops. (Record at 74, ¶60). Appellants threatened litigation and demanded “that the invoice be written down to zero” which gave the Appellee the impression that Appellants did not have any willingness to discuss this matter and that they were unwilling for any result except a total reduction of the billing. However, from the project file, it appeared that the countertops installed were according to the specifications of color, edge and thickness.” (Record at 74, ¶60 of Findings).

Subsequently, in an effort to protect its lien rights and pursuant to UCA §38-1-7, the Appellee timely filed a mechanic’s lien upon Appellant’s real property in the amount of \$2,182. (Record at 74 ¶62 of Findings). Thereafter, Appellants filed a complaint

against Appellee in which they allege four (4) separate causes of action; namely, (1) Abuse of Lien, (2) Breach of Contract, (3) Breach of Modification Agreement, and (4) Breach of the Duty of Good Faith and Fair Dealing. (Record at 1-7). In response, Appellee filed its Answer along with a counter-claim for (1) Breach of Contract, (2) Unjust Enrichment, and (3) Foreclosure of Lien. (Record at 11-16).

After the bench trial had concluded, the Trial Court awarded the Appellants the difference between the cost of a new countertop and the amount Appellants should have paid for the countertop installed, two sinks, replacement of back-splash, plumbing work and repainting for a total of \$1,565.00. (Record at 76, ¶72 of Findings). The Trial Court concluded that Appellee had not installed countertops of the wrong thickness. (Record at 77, ¶6 of Conclusions). The Appellants did not prevail on their allegations that the countertops were the wrong color of stone or edge. (Record at 132). The Trial Court correctly noted that the Appellants had expended “a considerable amount of time and energy” on the unsuccessful claim that the color of the stone was not “Juperana Bordeaux.” (Id).

The Trial Court concluded that the Appellants were excused from paying the contracted price of \$2,182 due to the countertops being the wrong thickness and subsequently, Appellee was not entitled to maintain its mechanic’s lien. (Record at 78, ¶¶9 and 17). The Trial Court then concluded that the Appellants were entitled to an award of attorney’s fees to be determined at a later date. (Record at 79, ¶ 20).

The Trial Court issued a written opinion with supporting caselaw which concluded that since the Appellants had not prevailed on three of their four causes of action (Abuse of Lien, Breach of Modification Agreement and Breach of Duty of Good Faith and Faith Dealings) that the Trial Court would not award entire amount of attorney's fees claimed by the Appellants. (Record at 129-133). After considering the factors outlined in several Utah cases, the Trial Court awarded the Appellants \$1,565.00 in principal along with \$4,310.88 in attorney's fees and \$369.00 in costs. (Record at 132).

Subsequently, the Appellants filed a Notice of Appeal and allege that the Trial Court should have awarded them \$17,243.50 in attorney's fees, being the total amount claimed to be expended on all four of their causes of action. (Brief of Appellants at 2). The Appellants allege on appeal that the Trial Court's award of attorney's fees is "against public policy" and "inequitable." (Id at 3-8).

STATEMENT OF FACTS

1. On the 23rd of January, 2008, the parties came before the Trial Court for bench trial on Plaintiffs'/Appellants' Complaint and Defendant's/Appellee's Counter-Claim. (Record at 66-67).
2. The total money judgment awarded in the favor of the Appellants on their Second Cause of Action: Breach of Contract claim was \$1,565.00 plus attorney's fees and costs to be determined by the Trial Court. (Record at 76, ¶72).

3. The Appellants did not prevail on three (3) of their four (4) causes of action.
(Record at 132).
4. On the 22nd of April, 2008, Appellee filed its Objection to Form and Content of Proposed Order and Judgment. (Record at 83-90).
5. On the 28th of April, 2008, Appellants submitted a request for attorney's fees and costs in the amount of \$17,243.50 in the form of an Affidavit of Counsel and Memorandum of Costs and Disbursements. (Record at 91-95).
6. The Appellants did not separate out nor categorize the attorney's fees and costs allegedly expended for the successful claim for which they may be entitled to *reasonable* attorney's fees and the unsuccessful claims for which there would not be an entitlement to attorney's fees. (Record at 131-132).
7. The amount of attorney's fees claimed by the Appellants was more than one thousand one hundred percent (1100%) of the actual damages awarded by the Trial Court. (*Cf.* Record at 76, ¶72 *with* Record 91-95).
8. That Trial Court concluded that since the Appellee did not prevail on its counter-claim for Breach of Contract, Appellee could not, therefore, maintain a lien for the contract price against the real property of the Appellants. (Record at 80, ¶ 21).
9. That while the Trial Court concluded that the Appellee could not maintain its lien, the Trial Court specifically found and concluded that the lien was **not** an abusive lien under UCA §38-1-25. (*Id.*)

10. That the Trial Court specifically concluded that the Appellee had not caused the lien to be filed with the “intent to cloud title,” or, “to exact more than [Appellee] believed was due, or to gain any unjustified advantage or benefit.” (Id.)
11. That the Trial Court also concluded that although the Appellants found the countertops to be “a disappointment”, the Trial Court did not “find bad faith or an improper purpose in [Appellee’s] disagreement in valuation and its desire to be paid for services and materials actually provided ... and ... “[Appellants’] claim for abuse of lien right fails.” (Record at 80, ¶¶ 22-23).
12. On the 7th of May, 2008, the Order and Judgment was entered. (Record at 102-104). However, the Court entered this Judgment under the mistaken belief that there was not any Objection to Form of the proposed judgment filed by the Appellee. (Cf Record 83-90). The Trial Court had been experiencing a heavy volume and associated problems at this time period. (See e.g., Record at 148-150).
13. On the 29th day of September, 2008, the final judgment entitled “Order on Objection to Judgment and Amended Judgment”, the subject matter of this appeal, was entered which provides for a money judgment in favor of the Appellants for \$1,565.00 in damages plus \$369.00 in costs and \$4,310.88 in attorney’s fees. (Record at 129-134).
14. On the 26th of January, 2009, an Order Granting Plaintiff’s [Appellants’] Extension to File Appeal was entered. (Record at 163-164).

15. On the 9th of February, 2009, a Notice of Appeal was filed by the Appellants.

(Record at 165-166).

SUMMARY OF THE ARGUMENT

In the present case, Appellants prevailed on their breach of contract claim and the court determined that since the Appellee had not prevailed on its breach of contract claim, then the mechanic's lien could not be maintained nor foreclosed. (Record at 129-134). Appellants made a claim for attorney's fees which exceeds the amount of recovery by more than 1100%. In sum, the Appellants allege that they were obliged to logged one hundred five (105) hours of attorney time, more than \$17,243.50 in time and costs, over a claim of only \$2,182. Although the Appellants pursued three other claims, Abuse of Lien, Breach of Modification of Agreement and Breach of the Duty of Good Faith and Fair Dealing, Appellants only prevailed in their Breach of [Oral] Contract claim.

In the post-trial proceedings, the Trial Court exercised it broad discretion in fashioning an award of attorney's fees which it believed was appropriate and reasonable. The adjudication of reasonableness should be upheld in this case since there was not any abuse of discretion, violation of public policy or inequity.

Moreover, as a procedural matter on appeal, the Appellants fail to marshal the evidence, fail to provide an adequate record to support their allegations on appeal, fail to provide supporting legal authority, and fail to follow the proper documentation and format of the briefing requirements. Appellants claim they because they are filing this brief pro

se that they should be excused from compliance. It is interesting to note that on appeal that Mr. Bircoll refers to himself as “Mel” when during the trial proceedings there was immediate offense taken by the Appellants when Melvyn Bircoll was inadvertently referred to as “Mr. Bircoll” instead of “Dr. Bircoll”; with the Appellants insisting on the use of the latter title. It was apparent that the title was of importance to emphasize his erudition and accomplishments. This does not appear to be the same posturing on appeal. Additionally, during the appellate mediation program, the Appellants were represented by their attorney daughter who acted as their representative to make their arguments with reference to specific caselaw.

ARGUMENT

I. APPELLANTS’ BRIEF SHOULD BE DISMISSED BECAUSE IT FAILS TO COMPLY WITH THE FORM AND MARSHALING REQUIREMENTS.

Even though Appellants are pro se appellants, they must comply with the Utah Rules of Appellate Procedure. (Allen v. Friel, 2008 UT 56, ¶4 (the pro se appellant failed to follow the appellate rules, failed to identify flaws in the district court’s order to be reversed, did not provide portions of the record central to appeal, and failed to show that there was not a reasonable basis in the record to support the district court’s holdings)). The Brief of the Appellants fails to identify flaws in the district court ruling, does not provide citations to the record, fails to provide supporting legal authority, and fails to demonstrate that there was not a reasonable basis for the findings and conclusions of the Trial Court.

The Brief of the Appellants fails to comply with Rule 24 of the Utah Rules of Appellate Procedure. (Utah R. App. P. 24). Appellants fail to provide standards of review with supporting authority, citations to the record, constitutional provisions, statutes, and rules whose interpretation is determinative on appeal, a table of authorities, and supporting legal authority which supports the conclusions of the Appellants that the award of attorneys fees was “against public policy” and “inequitable”.

The Appellants have not taken issue with the findings of the Trial Court and have failed to provide a transcript of the hearing held on Appellee’s Objection to Form and Content of Proposed Order and Judgment submitted by the Appellants. Therefore, it should be assumed, as a matter of law, that the trial court's decision to award less than the amount of attorney’s fees requested by Appellants was not erroneous. (See, Jolivet v. Cook, 784 P.2d 1148, 1150 (Utah 1989), cert, denied, 493 U.S. 1033, 110 S.Ct. 751, 107 L.Ed.2d 767 (1990) (court assumes regularity of proceedings below where appellant fails to provide adequate record on appeal) (citing State v. Miller, 718 P.2d 403, 405 (Utah 1986); State v. Robbins, 709 P.2d 771, 773 (Utah 1985); State v. Jones, 657 P.2d 1263, 1267 (Utah 1982)). See also, State v. Steggell, 660 P.2d 252, 253 (Utah 1983) (court assumes correctness of judgment below if counsel on appeal fails to cite to record); State v. Tucker, 657 P.2d 755, 756 (Utah 1982) (court assumes correctness of findings when defendant's brief contained nothing more than defendant's version of facts found by trial court). These failures in the briefing and marshaling requirements is sufficient to base a

decision to decline to reach issues on appeal. (State v. Garza, 820 P.2d 937, 939 (Utah App. 1991); Trees v. Lewis, 738 P.2d 612, 612-13 (Utah 1987)).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT AWARDED LESS THAN THE FULL AMOUNT OF ATTORNEYS TO APPELLANTS WHEN APPELLANTS FAILED TO PREVAIL ON THREE OF THEIR FOUR CAUSES OF ACTION.

The trial court's award of attorney's fees was well within its discretion to award less than the attorney's fees requested by the Appellants. In fact, the Appellants in their brief acknowledge that the trial court holds the "discretion" to award attorney's fees. (Appellants' Brief at 4). Under Utah law, there is not any precise formula which defines "reasonable" as it applies to attorney's fees. The inquiry and determination of what constitutes a reasonable award of attorney's fees depends upon a number of factors which include the amount in controversy, the extent of services rendered and other factors which the trial court is in an advantaged position to judge. (Wallace v. Build, 402 P.2d 699, 701 (1965); see also, Record at 130).

The Utah Supreme Court has made it clear that the party requesting attorney's fees is required to categorize the time and fees expended for the successful claim for which there may be an entitlement to reasonable attorney fees and the claims for which there is no entitlement to attorneys fees. (See, Moore v. Smith, 2007 UT App 101, ¶50 and Foote v. Clark, 962 P.2d 52, 54 (Utah 1998)).

The Trial Court concluded that under UCA §38-1-18 a "reasonable" attorney's fee should be awarded to the Appellants. (Record at 129). The Trial Court relied, in part, on

the premise that a “successful party includes one who successfully enforces or defends against a lien action.” (Id., citing to Kurth v. Wiarda, 1999 UT App 335 ¶9). Trial courts are afforded the discretion to take into account “the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved.” (Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1983); see also, Record at 130).

In this present case, the Appellee pursued what it believed to be a rightful collection of an unpaid account owed by the Appellants. It was the refusal of the Appellants to pay any portion of this billing related to the subject countertops that resulted in the filing of the mechanic’s lien and pursuit of collection. Appellee pursued in good faith what it believed to be the amount due and owing; \$2,182 from the Appellants. Appellants in this case did prevail on their breach of contract claim and Appellee was not permitted to foreclose its mechanic’s lien. The Trial Court specifically concluded that there was not any abuse of lien or wrongful lien recorded by the Appellee.

The Appellants claimed to have expended more than one hundred five hours (105) hours in handling the fight over the \$2,182 claim. Considering the criteria prescribed by the Utah Supreme Court, this expenditure of attorneys fees is excessive. The individual time entries reflect in inordinate amount of time expended. For example, at the tail-end of the road of litigation, there is a claim that approximately twenty (20) hours, \$3800.00 in attorneys fees, were spent in

preparation for the 6-hour bench trial. Then after all of the twenty (20) hours of preparation for trial and the six (6) hours in trial, it took an additional eight point eight hours (8.8) hours, \$1,672 in attorneys fees, to prepare the proposed findings of facts; compared with the two point one (2.1) hours, \$409.50 of fees expended by Appellee for the preparation of its proposed findings of fact. However, by the time that a case is prepared for trial, as part of the trial preparation trial notes are made, the proposed findings that follow are merely a cleaning up and the editing of those trial notes. This certainly did not necessarily require near nine (9) hours to complete. (Record at 87, 100).

The Appellants' Brief cites to only one legal authority; namely, Trayner v. Cushing, 688 P.2d 856 (Utah 1984). The Trial Court in the present case reviewed Trayner and noted in its decision to reduce the attorney's fees requested that Trayner stands for the expansion of the list of factors that a trial court should consider in fashioning an award of attorney's fees. (Record at 130). Trayner identifies factors such as "the relationship of the fee to the amount recovered, the novelty and difficulty of the issues involved, the overall result achieved and the necessity of initiating a lawsuit to vindicate rights under the contract." (Trayner at 858; Record at 130). Moreover, the Trayner court states that a party is "entitled only to those fees attributable to the successful vindication of contractual rights within the terms of their agreement." (Id.)

In the instant case, the Trial Court considered the factors espoused by the applicable caselaw in exercising its discretion to fashion an attorney's fees award which was reasonable under the circumstances and related to the claims on which Appellants actually prevailed; and not related to those claims on which Appellants failed. (Record 129-133). The Trial Court did not believe that there was any particular novelty or unusual difficulty involved in the present case. (Id

at 131). The Trial Court expressed that it has “serious reservations about the great disparity in the relationship of the fee [requested] to the amount recovered [by the Appellants]... and about the allocation of fees among those causes of action for which an attorney’s fee is recoverable and those for which it is not.” (Id).

The Trial Court correctly agreed with the Appellee that Utah law requires that the trial courts should allocate the prevailing party’s attorney’s fees among those claims for which it is entitled to an award of attorney’s fees and those for which it is not. (Record at 85 and 131; see also, Ellsworth Paulsen Constr. Co v. 51-SPR, LLC, 2006 UT App 353, ¶46, 144 P.3d 261; Stonecreek Landscaping, LLC v. Bell, 2008 UT App 144 (unpublished)(noting the trial court could have chosen not to award any fees when a party fails to separate its fees between matters on which it was successful and unsuccessful). In the present case, the Trial Court found that the Appellants failed to “differentiate between work done on the compensable mechanic’s lien claim and the non-compensable abusive lien and contract-related claims.” (Record at 131). The Trial Court held that it was neither reasonable nor equitable to require the Appellee to absorb much of the cost associated with certain portions of the litigation. (Record at 132).

III. APPELLANTS’ BRIEF FAILS TO SUPPORT THE ALLEGATIONS THAT THE TRIAL COURT’S RULING IS AGAINST PUBLIC POLICY AND/OR INEQUITABLE.

Appellants provide mere opinions without any supporting legal authority.

Appellants argue that the failure to award them all of their attorney’s fees, despite the fact that they failed to prevail on all of their causes of action, because it “denies litigants their right to trial.” (Appellants’ Brief at 3). However, that statement is entirely unsupported

with legal authority. There is not any evidence or legal authority to support the proposition that the Appellants have been “punished” or denied “their right to trial”. There is not any evidence to support the argument that the Appellants have been denied any due process, access to the courts or have been “punished”.

Appellants also argue that the present case “encourages reckless lien practices.” (Appellants’ Brief at 4). However, there is nothing cited by Appellants to support this argument. It is noteworthy that Appellants failed to prevail on their abuse of lien cause of action. (Record at 131). The Trial Court specifically found that the lien was not abusive under UCA §38-1-25 and that the Appellee did not cause the lien to be filed with the intent to cloud title, to exact more than it believed was due, or to get any unjustified advantage or benefit. (Record at 80, ¶21).

Appellants then argue that the award of attorney’s fees in the present case was “inequitable.” (Appellants’ Brief at 4). It is understandable and anticipated that most, if not all, litigants who do not prevail on all of their causes of action are likely to feel that the judgment of the trial court was inequitable. However, there is nothing in the present case on appeal to support the claim of an inequitable remedy. Appellants argue that they had “no choice but litigate”. (Id at 5). However, this is not accurate. This case was over the small amount of \$2,182. (Record at 15). The Appellee’s project file indicated that the countertops which had been ordered by Appellants, had been installed. (Record at 74, ¶61). The Trial Court found that the Appellee had offered to resolve the disputed amount with a payment of \$900; however, Appellants responded by demanding the account be reduced to zero dollars and threatened to litigate. (Record at 72,

¶¶42-43, 61). It was the Appellants who elected to take formal depositions and spend 105 hours of attorney time. (Record 87, 97-101).

Appellants litigated the case under the premise that they were going to ultimately prevail on their abuse of lien cause of action and thereby stood to gain the entire amount of attorney's fees, costs and statutory damages. Nevertheless, it was the Appellee who successfully defended against the abuse of lien cause of action. (Record at 131).

CONCLUSION

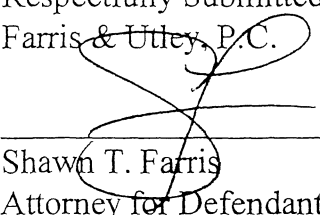
The Appellants did not prevail at trial on their abuse of lien claims. The Appellants were awarded attorney's fees on their prevailing defense against the foreclosure of the lien. The Trial Court considered the important and relevant factors in fashioning the attorney's fees award and acted well within its discretion in adjudicating the award of attorney's fees based upon the specific circumstances of the present case. Appellee is a bit troubled by the formula applied by the Trial Court in fashioning the attorney's fee award; namely, awarding one-fourth of the fees based upon the fact that Appellants prevailed on one of their four causes of action. Nevertheless, it does not appear that the Trial Court abused its discretion in its application of the factors to be considered under Utah law with respect to the award of attorney's fees.

The arguments of the Appellants are based upon mere opinion of Dr. Bircoll that the Trial Court acted inequitably, that the Appellants were denied access to the courts, and that the judgment was against public policy. The Appellants' positions on appeal lack legal authority and persuasive argument.

For the foregoing reasons, the Appellee respectfully requests that the Appellants' brief be dismissed or in the alternative, that the Order on Objection to Judgment and Amended Judgment entered by the Trial Court be affirmed.

Dated this 3rd day of September, 2009.

Respectfully Submitted,
Farris & Utley, P.C.

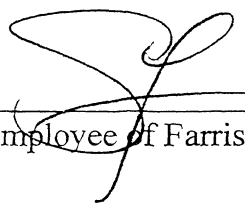


Shawn T. Farris
Attorney for Defendant/Appellee

CERTIFICATE OF MAILING

IT IS HEREBY CERTIFIED that on the 3rd day of September, 2009, a true and correct copy of the foregoing BRIEF OF APPELLEE was duly served by depositing in the U.S. mail, postage prepaid, first-class mail and addressed as follows:

Melvyn Bircoll & Janine Bircoll
2700 Casiano Road
Los Angeles, CA 90077



An Employee of Farris & Utley, PC

Tab 1

FILED
Date Sept 29, 2008
FIFTH DISTRICT COURT
WASHINGTON COUNTY
By _____

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

MELVYN BIRCOLL and JANINE
BIRCOLL, individuals,

Plaintiffs,

vs.

SOUTHWEST MARBLE & GRANITE,
INC, a Utah corporation, et al.,

Defendants.

ORDER ON OBJECTION TO JUDGMENT
AND AMENDED JUDGMENT

Case No. 050501733

Judge Eric A. Ludlow

Defendant Southwest Marble & Granite, Inc. has propounded an objection to the form and the content of the order and judgment previously entered. On August 14, 2008, the Court held a hearing on the objection, at which plaintiffs were represented by Michael F. Leavitt and defendant was represented by Shawn T. Farris. Having considered the objection, the memoranda, the arguments of counsel, and the affidavit in support of the attorney's fee, the Court finds the fee award should be reduced for the reasons set forth below.

Under Utah Code Ann. § 38-1-18, "in any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a *reasonable* attorneys' [sic] fee, to be fixed by the court, which shall be taxed as costs in the action." (Emphasis added). Naturally, the right to an attorney's fee applies as much to one who demonstrates a lien's invalidity as to one who shows its validity: "A successful party includes one who successfully enforces or defends against a lien action." *Kurth v Wiarda*, 1999 UT App 335, P9 (Utah Ct App 1999), citing

Reeves v. Steinfeldt, 915 P.2d 1073, 1079 (Utah Ct. App. 1996) and *Palombi v. D & C Builders*, 22 Utah 2d 297, 300-01, 452 P.2d 325, 327-28 (1969).

No precise formula defines a “reasonable” attorney’s fee; the inquiry is somewhat flexible and is generally fact-specific. “What is reasonable depends upon a number of factors, the amount in controversy, the extent of services rendered and other factors which the trial court is in an advantaged position to judge.” *Wallace v. Build, Inc.*, 16 Utah 2d 401, 405, 402 P.2d 699, 701 (1965). In *Cabrera v. Cottrell*, 694 P.2d 622, 625 (Utah 1983), the Utah Supreme Court stated that a calculation of attorney’s fees should take into account “the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved.” In *Trayner v. Cushing*, 688 P.2d 856 (Utah 1984), the Court expanded the list of factors to some extent, including “the relationship of the fee to the amount recovered, the novelty and difficulty of the issues involved, the overall result achieved and the necessity of initiating a lawsuit to vindicate the [plaintiff’s] rights,” *Id.* at 858 (citing *Turtle Management, Inc. v. Haggis Management, Inc.*, 645 P.2d 667, 671 (Utah 1982)). Finally, in *Dixie State Bank v. Bracken*, 764 P.2d 985, 989 (Utah 1988), the Court also noted that certain elements drawn from the Code of Professional Conduct, now the Rules of Professional Responsibility, may inform the calculus. Of the professional responsibility factors the *Bracken* court mentioned, this Court finds the second listed, the question of “[h]ow much of the work performed was reasonably necessary to adequately prosecute the matter,” *id.*, to be especially pertinent.

The Court does not believe that there is any serious dispute that the hourly rate plaintiffs’

counsel has charged is reasonable in this locality. Additionally, Mr. Leavitt is an experienced attorney and has asserted his clients' rights ably and diligently. The Court does not, however, believe there was any particular novelty or unusual difficulty involved in this case, and it has some serious reservations about the great disparity in "the relationship of the fee to the amount recovered," *Trayner*, 688 P.2d at 858, and about the allocation of fees among those causes of action for which an attorney's fee is recoverable and those for which it is not.

The complaint listed four causes of action, including the two lien claims for which attorney's fees were statutorily recoverable. Ultimately, the Court determined that plaintiffs did not prove an abusive lien and only awarded attorney fees on the mechanic's lien claim. "It is clear that Utah law requires the prevailing party, and ultimately the court, to allocate the prevailing party's attorney fees among those claims for which it is entitled to an award of attorney fees and those for which it is not." *Ellsworth Paulsen Constr. Co. v. 51-SPR, LLC*, 2006 UT App 353, ¶ 46, 144 P.3d 261. See also *Stonecreek Landscaping, LLC v. Bell*, 2008 UT App 144 (unpublished), in which the Court of Appeals noted a party's "failure to separate its fees between matters on which it was successful and unsuccessful," *id.* at *8, and stated, "[i]n the absence of that detailed information, the trial court could have chosen not to award fees at all," *id.*

Here, the affidavit and breakdown of fees provided by counsel does not differentiate between the work done on the compensable mechanic's lien claim and the non-compensable abusive lien and contract-related claims. The Court has examined counsel's billing statement and finds a relative absence of helpful subject-matter labels. Consequently, the Court is unable to determine with precision which fees belong to which claim. In such cases, the appellate courts

have found that an award of a portion of a party's "actual attorney fees [] corresponding to the relative overall extent of its success, [is] reasonable." *Id.*

The Court dislikes second-guessing the strategic decisions of counsel and understands that plaintiffs could (and do) see the abusive lien issue differently than the Court. It also notes that there is some overlap among recoverable and non-recoverable claims. It is, however, neither reasonable nor equitable to require Southwest to absorb so much of the cost associated with certain portions of the litigation. The Court must also take note of the fact that a considerable amount of time and energy was spent on an issue— the “Juperana Bordeaux” question— that was ultimately decided against plaintiffs. Given this fact, plus the disparity in the fees claimed and the principal recovery, the failure of the affidavit to specify the time spent on the successful mechanic’s lien matter, and the fact that plaintiffs have shown an entitlement to attorney’s fees for just one of the four causes of action listed in the complaint, the Court will reduce the fees to one-fourth of what plaintiffs have requested. The Court finds that 26.35 hours is a fair and reasonable amount of time to have spent on the mechanic’s lien claim and an award for that time adequately vindicates plaintiff’s rights under the statute.

JUDGMENT

In light of these findings, it is hereby ORDERED, ADJUDGED, AND DECREED that Plaintiffs have judgment against Defendant Southwest Marble & Granite, Inc. as follows:

\$1,565.00	Principal
369.00	Accrued costs to date of judgment
4,310.88	Attorney’s fees to date of judgment
\$ 6244.88	TOTAL JUDGMENT

This judgment includes interest at the judgment rate of 5 42% per annum from the date of
this judgment until paid, plus any after-accruing costs.

IT IS FURTHER ORDERED that this judgment shall be augmented in the amount of
reasonable costs and attorney's fees expended in collecting said judgment by execution or
otherwise as shall be established by affidavit.

DATED this 26th day of September, 2008.

A handwritten signature in black ink, appearing to read "Eric A. Ludlow", written over a horizontal line.

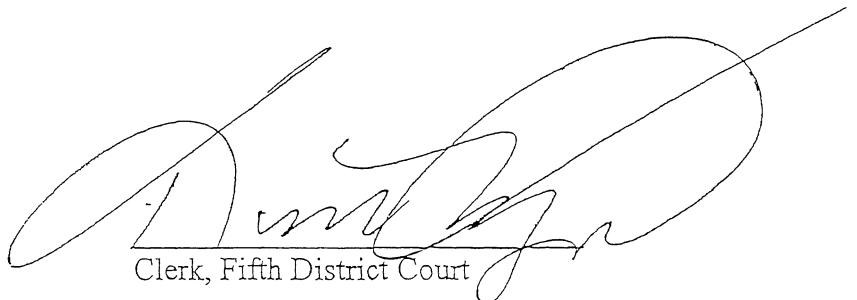
Judge Eric A. Ludlow
Fifth District Court

CERTIFICATE OF MAILING/DELIVERY

I hereby certify that on this 11 day of Dec, 2008, I provided a true and correct copy of the foregoing **ORDER ON OBJECTION TO JUDGMENT AND AMENDED JUDGMENT** to each of the parties/attorneys named below by placing a copy in such attorney's file in the Clerk's Office at the Fifth District Courthouse in St. George, Utah and/or by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

Michael F. Leavitt
Durham Jones & Pinegar, P.C.
192 East 200 North, Third Floor
St. George, Utah 84770

Shawn Farris
Farris & Utley, P.C.
2107 West Sunset Blvd., 2nd Floor
P.O. Box 2408
St. George, Utah 84770



Clerk, Fifth District Court

Tab 2

2008-7-12:02

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

MELVYN and JANINE BIRCOLL,
individuals,

Plaintiff/Counterclaim Defendants,

vs.

SOUTHWEST MARBLE & GRANITE, INC.,
a Utah corporation; and JOHN DOES I-X;

Defendant/Counterclaimant.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Civil No. 050501733

Judge Eric A. Ludlow

The above-captioned parties appeared before this Court on the 23rd day of January, 2008 for a trial in this matter. Plaintiffs, Melvyn and Janine Bircoll, were represented by Michael F. Leavitt of the law firm Durham Jones & Pinegar, P C. Defendant, Southwest Marble & Granite, Inc., was represented by Shawn Farris of the law firm of Farris & Utley, P.C. The Court heard the testimony of witnesses and viewed the evidence in this matter. Based thereon, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Court makes the following findings of fact:

1. Plaintiffs are the owners of real property located at 110 Gifford Park, Springdale, Utah ("Property").

2. Defendant is a Utah corporation with its principal place of business located in Washington County, State of Utah.

3. Beginning in 2004, Plaintiffs began the process of constructing a custom home on the Property.

4. Upon recommendation of their builder, Steven Roth, Plaintiff approached Defendant for the purchase of countertops in the new home.

5. Plaintiff also approached Defendant's sister operation, Southwest Tile, for the purchase of tiles for the new home.

6. In or about December 2004 or January 2005, Plaintiff first approached Defendant concerning the purchase of granite countertops for both the kitchen and the master bathroom in the home.

7. Defendant was represented by a person named Mark Burnett who represented that he specialized in selling granite countertops.

8. Plaintiffs informed Defendant that the home they were building was a custom-built home and that they had specific designs for the home because of its location near Zion National Park.

9. Defendant showed Plaintiffs a number of different samples of types of granite and verbally provided Plaintiffs with prices per square foot for three or four different types.

10. Defendant did not provide any prices in writing to Plaintiffs.

11. Defendant showed Plaintiffs a sample of a specific type of granite that Defendant indicated was called "Juperana Bordeaux."

12. This sample was well more than 1 ½ inches thick.

13. Plaintiffs were extremely fond of this granite because the coloring, including the veining and crystallization, matched the surrounding landscape and fit in well with the design of the home. Defendant explained that there would be variations this granite, as there is in any natural stone.

14. Plaintiffs selected this granite for both the kitchen and the master bathroom.

15. Plaintiffs had considered going with the thicker granite, but because of costs ultimately selected a thickness of 1 ¼ inches.

16. Defendant reiterated to Plaintiffs that the granite they had selected would not be as thick as the sample, but would only be 1 ¼ inches thick.

17. When Plaintiffs selected this granite, they specified to Defendant that they wanted the granite to be the same in both the kitchen and bathroom, specifically, that both countertops would be of the same color of granite as the sample they had been shown, and the same thickness, to wit: 1 ¼ inches thick.

18. The only difference between the kitchen and bathroom countertops was that the kitchen was to have a chipped or “rustic” edge and the bathroom was to have a ¼ inch beveled edge.

19. Defendant verbally confirmed these specifications to Plaintiffs.

20. Defendant verbally informed Plaintiffs of the cost for installation of this granite in their home, which total costs were \$4,685.00 for the kitchen countertop and \$2,182.00 for the bathroom countertops.

21. Plaintiffs requested written cost estimates from Defendant.

22. Defendant never provided them.

23. Plaintiffs requested that Defendant provide them with a written contract, memorializing the cost of the countertops and other terms of the agreement between the parties.

24. Defendant never provided any written contract or agreement or a writing evidencing the terms of their agreement.

25. Between March 2005 and end of May 2005, Defendant installed countertops in Plaintiffs' home.

26. Plaintiffs were not home at the time the countertops were installed, but were out of the area.

27. On the day before the countertops were installed, Defendant had a telephone conversation with Plaintiffs in which Defendant stated that the kitchen countertops looked good "with that beveled edge."

28. Plaintiffs corrected Defendant, informing it that the edge in the kitchen was to have a chipped or "rustic" look.

29. Defendant acknowledged that a mistake had been made and informed Plaintiffs that the countertop could still be chipped.

30. Plaintiffs first arrived back home, viewing the installed countertops for the first time, at the end of May 2005 or beginning of June 2005.

31. Plaintiffs first viewed the kitchen, where they noticed a number of problems, including: (1) the countertop was now shorter because Defendant had to chip the edge, reducing the edge by approximately ½ inch to 1 inch; (2) cabinets had been damaged in the installation; and (3) there were missing grease traps that should have been installed.

32. In spite of these problems, Plaintiffs were generally satisfied with the appearance of the kitchen countertop, particularly with its color.

33 The coloring of the kitchen countertop was similar to the sample Defendant had shown them, was 1 ¼ inches thick, and had a chipped edge

34. Plaintiffs then viewed the bathroom countertops.

35. Immediately, Plaintiffs noted that the bathroom countertops were not what they had ordered.

36. First, the color of the bathroom countertop was different from that in the kitchen, containing more brown coloring than burgundy and salmon and containing no crystallization in the stone, as had the color in the kitchen.

37. Second, the countertops in the bathroom were only ¾ inch thick.

38. Third, the countertops had a flat, polished edge.

39. Plaintiffs immediately called Defendant to report the problem.

40. Mark Burnett, on behalf of Defendant, came to Plaintiffs' home within a week of the telephone call to look at the countertops.

41. Upon arrival, Defendant acknowledged that the countertops were not as Plaintiffs had requested, stating that the countertop appeared to be a "Juperana Brown."

42 Defendant asked Plaintiffs if they would be willing to pay just \$900.00 for the bathroom countertops.

43. Plaintiffs indicated that they were not interested in paying \$900 for these countertops, expressing to Defendant that, because of the wrong color, thickness and edge, the appearance of the countertops actually detracted from the room.

44. Defendant then expressed concern over the cost of replacing the countertops, noting that the plumbing had already been installed and that the sinks and tile backsplash might be damaged in the removal process.

45. At that point, Defendant suggested that the Plaintiffs take the bathroom countertops free of charge, stating that the cost to replace would be far more expensive.

46. Defendant stated that he would need to clear it with “the owner,” but assured Plaintiffs that it should be “no problem.”

47. Though they were not interested in keeping the countertops in the bathroom, Plaintiffs expressed a willingness to accept this compromise, being in the process of moving into their new home.

48. Plaintiffs even told Defendant that, when they chose to replace the countertops, they would use Defendant and pay full price for the new countertops.

49. At that time, Plaintiffs provided Defendant with their credit card number to pay for the kitchen countertops and assumed all was resolved.

50. Approximately a week later, Plaintiffs spoke with Mark Burnett, who informed them that the owner had cleared the arrangement they had made. In fact, Mr. Burnett did not communicate with Mr. Eggertz concerning his discussion with the Bircolls and their claims that the countertops were wrong.

51. At some time after this discussion with Mr. Burnett, his employment with Defendant was terminated based upon his poor performance and not meeting customers’ expectations.

52. Toward the end of June 2005, Plaintiffs received a bill from Defendant showing that Plaintiffs still owed Defendant \$4,685.00 for the kitchen countertop and \$2,182.00 for the bathroom countertops.

53. Plaintiffs called Defendant and spoke with a person named “Margaret” who identified herself as the head of accounting.

54 Plaintiffs informed Margaret what had transpired between Plaintiffs and Mr. Burnett and specifically told her about the arrangement that Mr. Burnett had made with them.

55 Plaintiffs gave Margaret their credit card number again for the kitchen countertop.

56 Margaret informed Plaintiffs that she would take care of it.

57 Margaret did not inform Plaintiffs that Mr. Burnett's employment with Defendant had been terminated. In fact, Plaintiffs did not learn of this fact until after a Notice of Mechanics' Lien was recorded against their property in late July 2005.

58 Later, Plaintiffs received another bill from Defendant for the bathroom countertop.

59 Plaintiffs again called Defendant and spoke with Margaret, who, again, informed them that it would be taken care of.

60 Mr. Bircoll left a telephone message for Mr. Eggertz that the countertops were of no value to them and that the Bircolls intended to initiate a lawsuit against Southwest Marble for these countertops.

61 Given the telephone message and letter from Mr. Bircoll, along with the threat of litigation and demands that the invoice be written down to zero, Mr. Eggertz had the impression that Plaintiffs did not have any willingness to discuss this matter and that they were unwilling for any result except a total reduction of the billing. However, from the project file, it appeared that the countertops installed were according to the specifications of color, edge and thickness.

62 On or about July 27, 2005, Defendant caused a Notice of Mechanics' Lien to be filed against the Property, claiming that Plaintiffs owed Defendant \$2,182.00 for improvements to the Property.

63 Defendant never mailed a copy of the Notice of Mechanics' Lien to Plaintiffs via certified mail, or personally delivered a copy to Plaintiffs.

64. Loren Valdez, general manager of Defendant, called Plaintiffs and verbally informed them that Defendant had placed a mechanics' lien on Plaintiffs' home for their failure to pay the amount requested for the bathroom countertops.

65. Plaintiffs informed Mr. Valdez of the problem with the bathroom countertops and the arrangement that they had made with Mr. Burnett.

66. Mr. Valdez expressed sympathy for Plaintiffs' position, but stated that there was nothing he could do and that the owner, Jeff Eggertz, was the only party who could make the final decision with respect to their situation.

67. Plaintiffs requested that Mr. Valdez relay Plaintiffs' position to Mr. Eggertz and that Mr. Eggertz either call him or come to the house to look at the countertops and discuss the matter.

68. Plaintiffs had three or four additional conversations with Mr. Valdez with similar discussions.

69. In spite of Plaintiffs' requests, Mr. Eggertz never attempted to speak directly with Plaintiffs concerning this matter until well after the litigation had commenced.

70. On the last conversation Plaintiffs had with Mr. Valdez, Mr. Valdez confirmed that he had spoken with Mr. Eggertz and relayed all of Plaintiffs' concerns.

71. Mr. Valdez informed Plaintiffs that Mr. Eggertz had told Mr. Valdez that Plaintiffs would either hear from Mr. Eggertz or hear from his attorney.

72. The costs of Plaintiffs to remove and replace the countertops are as follows:

- a. Difference between the cost of a new countertop (\$2,372.00) and the amount \$190.00

Plaintiffs should have paid for the
countertop installed by Defendant
(\$2,182 00),

b Two (2) new sinks	\$600 00
c Replacement of tile backsplash	\$250 00
d Five (5) hours for plumbing hook up and travel to Springdale by plumber	\$325 00
e Repaint around tile backsplash	\$200
TOTAL	\$1,565 00

73 Experts for both Plaintiffs and Defendant acknowledged that the countertops in the bathroom were $\frac{3}{4}$ inch and had a flat, polished edge

74 Experts for both Plaintiffs and Defendant acknowledged that the countertops in both the kitchen and bathroom could be classified as Juperana Bordeaux

75 Expert for Plaintiff explained, however, that because the two countertops are of a differing thickness, the color variation exceeds the normal “natural” variation because the two countertops of differing thickness would, normally, not be cut from the same slab or material

76 According to Plaintiffs’ expert, had the countertops been of the same thickness, it is likely that they would have had a more similar color because they likely would have been cut from the same slab or material

77 Defendant’s expert did not refute this testimony

78 As early as June 2005, Defendant was aware that Plaintiffs had a concern over the installation of the countertops

79 Despite their dissatisfaction with the bathroom countertops, Plaintiffs have used and retained them in their home

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Court makes the following conclusions of law

1 Plaintiffs and Defendant entered into an agreement whereby Plaintiff agreed to pay \$2,182 00 for countertops to be placed in the Plaintiffs' bathroom at their new home on the Property

2 As part of that agreement, Defendant agreed to install countertops in the bathroom that were 1 ¼ inches thick with a beveled edge

3 Defendant agreed that the countertop would be of a color designated as "Juperana Bordeaux "

4 Defendant agreed that, with the exception of the edging, the bathroom countertops would be the same as those installed in the kitchen, including color and thickness

5 Adequate consideration for this exchange of promises occurred

6 Defendant failed to perform pursuant to the terms of this agreement because it installed countertops in the bathroom that were ¾ inch thick with a flat, polished edge

7 Defendant failed to perform because, had the kitchen countertop and the bathroom countertop both been 1 ¼ inches thick, the color of each would have been more similar and not had the extreme variation that Plaintiffs found between the kitchen and the bathroom

8 Plaintiffs gave Defendant multiple opportunities to cure this failure

9 Defendant did not cure this failure after these opportunities were provided

10 As a result of Defendant's failure to install the correct countertops in the bathroom and failure to cure, Defendant breached the agreement and Plaintiffs were excused from paying Defendant the amount it claimed it was owed to wit \$2,182.00

11 Defendant caused a Notice of Mechanics' Lien to be filed against the Property

12 With respect to mechanics' liens, Utah Code Ann. §38-1-3 states

Contractors, subcontractors, and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, shall have a lien upon the property upon or concerning which they have rendered service, performed labor, or furnished or rented materials or equipment for the value of the service rendered, labor performed, or materials or equipment furnished or rented by each respectively, *whether at the instance of the owner or of any other person acting by his authority as agent, contractor or otherwise* except as the lien is barred under Section 38-11-107 of the Residence Lien Restriction and Lien Recovery Fund Act. This lien shall attach only to such interest as the owner may have in the property

(Emphasis added)

13 In the instant case, the work performed by Defendant, with respect to the bathroom countertops, was not entirely "at the instance of the owner or any other person acting by his authority as agent, contractor, or otherwise" because the work Defendant performed was not the work that Plaintiffs requested

14 Furthermore, because Defendant installed the incorrect countertops, the value of Defendant's services to Plaintiffs is not \$2,182.00 as stated in the mechanics' lien, but Plaintiffs will actually have to incur additional costs if they desire to replace the incorrect countertops.

15 As a result, Defendant was not entitled to record a mechanics' lien against the Property.

16 Utah Code Ann. §38-1-18 states:

Except as provided in Section 38-11-107 and in Subsection (2), in any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action.

17 Defendant is not the prevailing party in this matter with respect to its mechanics' lien claim because Defendant was not entitled to record the lien as it did. "A successful party includes one who successfully enforces or defends against a lien action." *Kurth v. Wiarda*, 1999 UT App 335, ¶ 9 (Utah Ct. App. 1999).

18 Defendant is also not entitled to attorneys' fees because it failed to deliver, or mail by certified mail, a copy of the mechanics' lien to Plaintiffs within 30 days of the date of filing the notice of lien, as is required under Utah Code §38-1-7(3).

19 Plaintiffs are the prevailing party in this matter because Plaintiffs successfully showed the Court that they do not owe Defendant \$2,182.00 for the bathroom countertops and that Defendant was not entitled to a mechanics' lien against the Property.

20 As a result, Plaintiffs are entitled to an award of attorneys' fees in an amount to be determined by affidavit or motion subsequent to these Findings of Fact and Conclusions of Law and an order reflecting the same.

21 However, while the Court finds the lien to be invalid it does not find it to have been abusive under § 38-1-25 Defendant did not cause the lien to be filed with the “intent to cloud the title,” *id* at (1)(a), to exact more than it believed was due, *id* at (b), or to get any “unjustified advantage or benefit,” *id* at (c)

22 As the Court of Appeals observed in *Ellsworth Paulsen Constr Co v 51-SPR, L L C*, 2006 UT App 353, n 14, the purpose of the abusive lien statute is “to discourage outrageous lien claims,” and ‘abuse of the lien process by creating a strong disincentive for a would-be litigant to wrongly inflict a mechanic’s lien on a property owner whose property was not actually enhanced,’ without chilling a legitimate lien claimant’s right to file a mechanic’s lien for any amount that may be due ” (Citations omitted) What constitutes an “enhancement” to property may be, to a certain extent, in the eye of the beholder In this case, the Court understands that Plaintiffs found the alleged “Juperana Bordeaux” bathroom countertops to be a disappointment and, overall, a detriment However, it cannot find bad faith or an improper purpose in Defendant’s disagreement in valuation and its desire to be paid for services and materials actually provided.

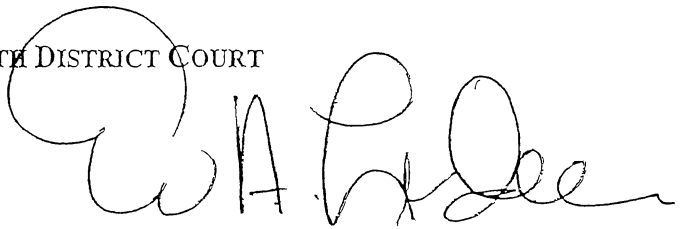
23 Noting that the statute has potential criminal penalties and therefore specific state-of-mind requirements, the *Ellsworth Paulsen* court also pointed out, “lien claimants need to be wary of using the mechanic’s lien process to intentionally, knowingly, or recklessly seek more than they are due, or to push some other abusive advantage But where a lien proves to have been overstated for some other reason that does not violate the abusive lien statute, claimants need not fear the criminal liability or civil penalties the statute imposes ” *Id* Here, in retrospect, it is clear Defendant should have communicated better with its customers and its own employees It should probably have addressed Plaintiff’s concerns more effectively and

tactfully It also should have complied with the requirements of the mechanics' lien statute more carefully These lapses however, fall short of establishing an abusive lien Therefore, Plaintiffs' claim for abuse of the lien right fails

24 Counsel for plaintiff shall submit an order for judgment consistent with the foregoing findings and conclusions

DATED THIS 7th day of April, 2008

FIFTH DISTRICT COURT

A handwritten signature in black ink, appearing to read "Eric A. Ludlow", written over a horizontal line.

Judge Eric A. Ludlow
District Court Judge

CERTIFICATE OF MAILING/DELIVERY

I hereby certify that on this 10 day of Apr, 2008, I provided a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to each of the parties/attorneys named below by placing a copy in such attorney's file in the Clerk's Office at the Fifth District Courthouse in St George, Utah and/or by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

Michael F Leavitt
Durham Jones & Pinegar, P.C.
192 East 200 North, Third Floor
St. George, Utah 84770

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Clerk, Fifth District Court

Tab 3

ORIGINAL
FILED

APR 22 2008

FIFTH DISTRICT COURT
WASHINGTON COUNTY

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2107 W. Sunset Blvd, Second Floor
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Attorneys for Southwest Marble & Granite, Inc

IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

MELVYN BIRCOLL and JANINE BIRCOLL,
individuals,

Plaintiffs,

vs.

SOUTHWEST MARBLE & GRANITE, INC, a
Utah corporation, and JOHN DOES I-X,

Defendants.

OBJECTION TO FORM AND CONTENT
OF PROPOSED ORDER AND
JUDGMENT

(Hearing Requested)

Case No. 050501733

Judge Eric A. Ludlow

SOUTHWEST MARBLE & GRANITE, INC, a
Utah corporation,

Counter-Claimant,

vs.

MELVYN BIRCOLL and JANINE BIRCOLL,

Counter-Defendants,

Counter-Claimant Southwest Marble & Granite, Inc, by and through its counsel of record,
hereby files an Objection to the Form and Content of the Order and Judgment proposed by the
Plaintiffs/Counter-Defendants.

REQUEST FOR HEARING

A hearing is hereby requested in this matter. The length of the hearing is estimated to be

about 1 hour.

STATEMENT OF FACTS

1. On the 23rd of January, 2008, this matter came before this Court for bench trial on Plaintiff's Complaint and Defendant's Counter-Claim.
2. The money judgment awarded in the favor of the Plaintiffs was \$1,565.00.
3. On or about the 15th of April, 2008, Plaintiffs submitted a request for attorney's fees and costs in the amount of \$17,243.50.
4. Plaintiffs do not separate out and categorize the fees and costs allegedly expended for the successful claim for which they may be entitled to *reasonable* attorney's fees and unsuccessful claims for which there would not be an entitlement to attorney's fees as is required by the Utah Supreme Court.
5. The amount of attorney's fees claimed by the Plaintiffs are more than 1100% of the actual damages awarded.

ARGUMENT

I. Categorization of Attorneys Fees.

The Utah Supreme Court has made it clear that the party requesting attorney's fees is required to categorize the time and fees expended for the successful claim for which there may be an entitlement to reasonable attorney fees and the claims for which there is no entitlement to attorneys fees. (See, Moore v. Smith, 2007 UT App 101, ¶50 and Foote v. Clark, 962 P.2d 52, 54 (Utah 1998)).

This Court determined that the Defendant had installed the incorrect countertops and

therefore the value of Defendant's services to Plaintiffs is not \$2,182.00 as stated in the mechanic's lien. This Court determined that the costs of replacement would be \$1,565.00 and awarded the same in the form of a money judgment against the Defendant. Additionally, this Court found that because Defendant had installed the incorrect countertops in the master-bathroom the Defendant was not entitled to record a mechanic's lien against the Property. This Court then cites to UCA §38-11-107 which permits the recovery of "a reasonable attorney fee, to be fixed by the court, which shall be taxed as costs in the action.

Subsection 107 specifically limits the attorneys fee to the prevailing party in defending against a mechanic's lien. However, the Plaintiffs in this case sought other claims and causes of action to which they did not prevail at trial. Utah law requires that Plaintiffs separate and categorize their attorneys fees and costs, which they have not done. In the case of *Moore v Smith*, 2007 UT App 101, the prevailing party sought \$123,639 in attorneys fees. The district court found that the prevailing party was seeking attorneys fees for which they were not entitled. The trial court requested that the prevailing party resubmit a categorization of attorneys fees claimed. However, the prevailing party made only minor modifications.

II The Attorneys Fees Claimed by Plaintiffs are Excessive

The calculation of attorney fees is to be limited to reasonable attorneys fees (UCA §38-11-107). The attorneys fees claimed should be carefully evaluated to make certain that the ultimate amount awarded is consistent with the unique factors of this case and that these fees adhere to the guidelines and criteria prescribed by Utah law.

In the *Moore* case, the Appellate Court noted that the requested attorneys fees were "more than four times the monetary award given the Plaintiff" and substantially more than the

\$83 000 00 total purchase price for the subject home [which was the subject matter of the litigation] ' However in the present case, the claim for attorneys fees is even more excessive. The attorneys fees sought by the Plaintiffs are 1100% more than the actual monetary award for them as the Plaintiffs.

III The Attorneys Fees Claimed by Plaintiffs are Excessive when Compared

The Plaintiffs and the Defendant were both facing similar fronts. The Plaintiffs had filed a complaint which alleged four separate causes of action. The Defendant defended against these causes of action. Likewise, Plaintiffs defended against the counter-claim filed by the Defendant.

The Plaintiffs did not prevail on their Abuse of Lien. This Court specifically found that the Defendant had not acted with the required malice and malicious intent. The Defendant was merely asserting a claim for what it believed was due under the contract since the project file was consistent with the actual countertops installed in Plaintiffs' Home. And ultimately, this Court determined that there was not any thing to this case other than a breach of contract cause of action.

The actual attorneys fees in costs incurred by the Defendant Southwest Marble through trial is equal to approximately one-third (1/3) of the total attorneys fees claimed by the Plaintiffs. This was a case where there was a belief that the case would prevail on an abuse of lien theory and therefore provide for an award of attorneys fees in favor of the Plaintiff.

When approaching litigation, it is important for both the parties and their respective counsel to incur only those fees which would be reasonably incurred and necessary to promote the reasonable positions of the parties. The expenditure of 1100% more in fees than value of the of the actual dispute is unreasonable and therefore any award of attorneys fees should be

significantly reduced (E.g. Moore v. Smith cited above the trial court reduced the amount of fees claimed by the prevailing party from \$123,639 to \$40,000)

The Plaintiffs claim to have expended more than one hundred five hours (105) hours in handling the fight over the \$2,182.00 claim. Considering the criteria prescribed by the Utah Supreme Court, this expenditure of attorneys fees is excessive. The individual time entries reflect an inordinate amount of time expended. For example, at the tail-end of the road of litigation, there is a claim that approximately 20 hours, \$3,800.00 in attorneys fees, were spent in preparation for the 6-hour bench trial. Then after all of the 20 hours of preparation for trial and the 6 hours in trial, it took an additional 8.8 hours, \$1,672 in attorneys fees, to prepare the proposed findings of facts. Compared with the 2.1 hours, \$409.50 of fees, expended by Southwest Marble for the preparation of its proposed findings of fact. However, by the time that a case is prepared for trial, as part of the trial preparation trial notes are made, the proposed findings that follow are merely a cleaning up and edit of those trial notes. This certainly did not necessarily require near 9 hours to edit trial notes.

Moreover, there should not be any recovery for time spent by any paralegals, as these are not attorney's fees, nor should there be any costs which are not taxable under Utah law, such as copying expenses. It is noteworthy that this Court directed in its Conclusions of Law that there was to be an award of attorneys fees, however, the Plaintiffs seek not only attorneys fees but also costs, some of which are not taxable costs.

IV Equity and Other Factors

The Court in its findings of fact found that Defendant should have communicated better with its customers and employees. However, the same two-way street existed for the Plaintiffs

and how they reacted to this situation. Without re-arguing the case, it is noteworthy that Plaintiffs threatened Defendant with a multi-million dollar litigation. This threat certainly was not made as an effort to seek an amicable resolution. Moreover, after enlisting the assistance of legal counsel, instead of trying to work out an agreement, litigation was initiated seeking primarily the abuse of lien cause of action. Quickly, Plaintiffs' attorneys fees amounted to an amount early on in the litigation which nearly exceed the actual total attorneys fees expended by the Plaintiff through trial. This escalation of attorneys fees by Plaintiffs was the primary reason, and perhaps the sole reason, the case was unable to be settled without a trial.

Additionally, Plaintiffs consistently maintained prior to litigation and throughout litigation, that the countertop installed in the master bathroom was not, and could not be categorized as, Juperiana Bordeaux. It was clearly explained that this stone was "Juperana Bordeaux" but was not from the exact same slab as the kitchen countertop. Based upon this continuously disputed issue by the Plaintiffs that this was not "Juperana Bordeaux", Plaintiff incurred significant expense in bringing an out-of-state expert to examine the actual counter-tops and provide an expert opinion which stated that the countertops were all "Juperana Bordeaux". However, even after the expert had rendered this opinion, Plaintiffs remained steadfast in their original contention that this was not that type of stone.

Plaintiff was then required to expend more money to bring this expert back on the date of trial to provide the testimony that the stone was, in fact, Juperana Bordeaux. It was to the dismay and surprise of Southwest Marble and its counsel, when, on the day of trial, it was learned and disclosed for the very first time that the Plaintiffs agreed that the stone was, in fact, Juperana Bordeaux. This was a frustrating surprise to have this fact revealed after the start of trial. The

expenditures for an expert witness were unnecessary and a complete detriment to Southwest Marble.

The calculation of reasonable attorneys fees is in the sound discretion of this trial court. What is reasonable depends on a number of factors, the amount in controversy, the extent of services rendered and other factors which the trial court is in an advantaged position to judge. (Dixie State Bank v. Bracken, 764 P.2d 985 (1988) quoting Wallace v. Build, Inc, 402 P.2d 699 (1965)). The Utah Supreme Court enlarged the list of potential factors to include, but not limited to, the relationship of the attorneys fees to the amount recovered, the novelty and difficulty of the issues involved, the overall result achieved. (Trayner v. Cushing, 688 P.2d 856 (Utah 1984)). Moreover, the Utah Supreme Court has also added “the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved. (Cabrera v. Cottrell, 694 P.2d 622 (Utah 1983)).

Under principles of reasonableness and equity, the unique circumstances of this case, and consistent with the criteria prescribed by the Utah Supreme Court, the award of attorneys fees should be significantly reduced. Defendant has been significantly impacted by this case already. Defendant is out the costs of the countertops and labor for installation, \$2,182.00, loss of profits, its own attorneys fees and costs, and a money judgment for \$1,565 in favor of the Plaintiffs. Moreover, the Plaintiffs retain the value and use of these countertops at the cost and expense of Southwest Marble. To saddle the Southwest Marble with five-figures of attorneys fees would not be appropriate, inequitable and is inordinately disproportionate to the actual amount in

controversy, nearly \$30,000.00 in economic damages against Southwest Marble for a contractual dispute over \$2,182.

Admittedly hindsight provides some insight and direction as to how this situation may have been handled differently by both parties. However, a hit of nearly \$30,000.00 is not reasonable under these circumstances. There was not any malice, intentional conduct or other circumstances which were egregious. Therefore, it is respectfully requested that this court review this post-trial matter.

Dated this 22nd day of April, 2008

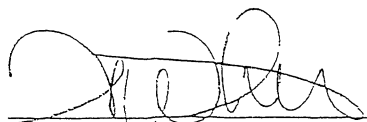


Shawn T. Farris
Attorney for Southwest Marble & Granite, Inc.

CERTIFICATE OF SERVICE

On this 22nd day of April, 2008, a true and correct copy of the foregoing was duly served upon the Plaintiffs/Counter-Defendants by depositing a copy of the same in the US Mails, postage pre-paid, first-class mail, and addressed as follows:

Michael F. Leavitt
Durham, Jones & Pinegar
192 East 200 North, Third Floor
St. George, UT 84770



Employee of Farris & Utley, PC