

1999

Lee O. Barney v. Jon D. Siddoway and Standard Tile, Inc. : Brief of Appellee

Utah Court of Appeals

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Larry A. Kirkham; Attorney for Appellee.

Evan A. Schmutz; Hill, Johnson, and Schmutz; Attorney for Appellants.

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IN THE UTAH COURT OF APPEALS

LEE O. BARNEY)	
)	
Plaintiff, Appellee, & Cross Appellant,)	
)	
)	Appellate Court No. 990579-CA
vs.)	
)	
JON D. SIDDOWAY and STANDARD)	
TILE, INC., a Utah Corporation,)	Priority No. 15
)	
Defendants, Appellants,)	
& Cross Appellees.)	

BRIEF OF APPELLEE LEE O. BARNEY

APPEAL FROM A JUDGMENT IN THE THIRD DISTRICT COURT
ON JUNE 7, 1999
THE HONORABLE DAVID S. YOUNG PRESIDING

Larry A. Kirkham [1832]
3040 W. Jonquil Drive
Taylorsville, Utah 84118
Telephone: 964-0693

Attorney for Plaintiff, Appellee
& Cross Appellant
Lee O. Barney

Evan A. Schmutz
HILL, JOHNSON & SCHMUTZ, L.C.
3319 North University Ave.
Jamestown Square, Suite 200
Provo, Utah 84604
Telephone: (801) 375-6600

Attorney for Defendants, Appellants
& Cross Appellees
Jon D. Siddoway & Standard Tile, Inc.

MAR 08 2000

ORAL ARGUMENT REQUESTED
Julia D'Alesandro
Clerk of the Court

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Telephone: 964-0693

Attorney for Plaintiff, Appellee
& Cross Appellant
Lee O. Barney

Evan A. Schmutz
HILL, JOHNSON & SCHMUTZ, L.C.
3319 North University Ave.
Jamestown Square, Suite 200
Provo, Utah 84604
Telephone: (801) 375-6600

Attorney for Defendants, Appellants
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Jon D. Siddoway & Standard Tile, Inc.

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TABLE OF CONTENTS

STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES & STANDARD OF REVIEW BY APPELLANT ...	1
STATEMENT OF ISSUES AND STANDARD OF REVIEW ON CROSS-APPEAL	1
STATEMENT OF DETERMINATIVE STATUTES AND PROVISIONS	2
STATEMENT OF THE CASE	4
STATEMENT OF THE FACTS	6
SUMMARY OF ARGUMENT	13
ARGUMENT IN RESPONSE TO APPEAL	14
I. THE TRIAL COURT CORRECTLY FOUND THAT BARNEY WAS A 25 PERCENT SHAREHOLDER OR OWNER OF STI.	15
II. KRISTI BARNEY HAD THE REQUISITE KNOWLEDGE, TRAINING, AND UNDERSTANDING TO OFFER EVIDENCE ON ACCOUNTING MATTERS	17
III. THE COURT PROPERLY ALLOWED INTRODUCTION OF THE SUMMARIES SPECIFICALLY EXHIBITS 14 THROUGH 20 .	18
IV. THE COURT DID NOT INTERFERE WITH SIDDOWAY'S EXAMINATION WHICH CONSTITUTED CUMULATIVE ERROR	27
ARGUMENT ON CROSS-APPEAL	30
I. THE TRIAL COURT ERRED IN FAILING TO GRANT PREJUDGMENT INTEREST ON THE DAMAGES AWARDED TO BARNEY	30
II. BASED ON THE COURT'S FINDING OF AN AGREEMENT	

BETWEEN BARNEY AND SIDDOWAY AND THE TERMS OF THAT AGREEMENT, BARNEY SHOULD HAVE BEEN AWARDED ADDITIONAL DAMAGES EQUAL TO THE EXCESS BASE SALARY TAKEN BY SIDDOWAY AS WELL AS OTHER DAMAGES	33
CONCLUSION	35
CERTIFICATE OF SERVICE	37
ADDENDUM	38
1. EXHIBIT A	39
Trial Exhibit 17 "Actual Base Salary Summary Not Including Bonuses"	
2. EXHIBIT B	42
Trial Exhibit 24 "Record of Lee Barney Stock"	
3. EXHIBIT C	44
Trial Exhibit 25 "STI Net Equity of the Corporation"	
4. EXHIBIT D	45
Trial Exhibit 27 "STI Loan Receivable from Jon D. Siddoway"	

TABLE OF AUTHORITIES

Cases Cited

<u>Bjork v. April Industries, Inc.</u> , 560 P.2d 315 at 316 (Utah 1977)	31
<u>Brown v. Richards</u> , 840 P.2d 143 (Utah Ct. App. 1992)	32
<u>Crookston v. Fire Ins. Exchange</u> , 860 P.2d 937 (Utah 1993)	28
<u>Hurley v. Board of Review</u> , 767 P.2d 524 (Utah 1988)	1, 31
<u>Lysenko v. Sawaya</u> , 973 P.2d 445 (Utah Ct. App. 1999)	34
<u>Morton v. Continental Baking Co.</u> , 938 P.2d 271 (Utah 1997)	2, 28, 34
<u>Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc.</u> , 784 P.2d 475 (Utah Ct. App. 1989)	32

<u>Randle v. Allen</u> , 862 P.2d 1329 (Utah 1993)	17
<u>Shurtleff v. Jay Tuft and Co.</u> , 622 P.2d 1168 (Utah 1980)	26
<u>State Dept. of Social Services v. Ruscetta</u> , 742 P.2d 114 (Utah Ct. App. 1978)	25
<u>State v. Locke</u> , 688 P.2d 464 (Utah 1984)	17
<u>State v. Pena</u> , 869 P.2d 932 (Utah 1994)	34
<u>Super Tire Market Inc. V. Rollins</u> , 417 P.2d 132 (Utah 1966)	25
<u>State v. Rameriz</u> , 817 P.2d 774 (Utah 1980).	15
<u>Trolley Square and Assoc. v. Nielson</u> , 886 P.2d 61 (Utah Ct. App. 1994)	26
<u>Uinta Pipeline Corp. v. White Superior Co.</u> , 546 P.2d 885 (Utah 1976)	32
<u>Valcarce v. Fitzgerald</u> , 961 P.2d 305 (Utah 1998)	15
<u>Vasels v. LoGuidice</u> , 740 P.2d 1375 (Utah Ct. App. 1987)	31
<u>Vali Convalescent and Care Inst. v. Div. of Health Care Financing</u> , 797 P.2d 438, (Utah Ct. App. 1990)	31
<u>Young v. Young</u> , 979 P.2d 338 (Utah 1999)	15

Statutes Cited

Utah Code Ann. §15-1-1	1, 4, 32
Utah Code Ann. §78-2-2(3)(k)(1953)	1, 4
Utah Code Ann. §78-2-2(4)	1, 4
Utah Code Ann. §78-2a-2(j)	1, 4
Utah Rule of Civil Procedure 54	2, 33, 35
Utah Rule of Civil Procedure 61	2

Utah Rule of Evidence 102	2
Utah Rule of Evidence 103	2
Utah Rule of Evidence 104	3
Utah Rule of Evidence 702	18
Utah Rule of Evidence 1006	4, 23, 25

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction over this matter pursuant to U.C.A., §78-2-2(3)(k) (1953) as amended. Pursuant to U.C.A.. §78-2-2(4), the Supreme Court transferred this matter to the Utah Court of Appeals. The Utah Court of Appeals has jurisdiction over this matter, upon transfer by the Supreme Court, pursuant to U.C.A. §78-2a-2(j).

STATEMENT OF ISSUES & STANDARD OF REVIEW BY APPELLANT

The Appellee and Cross Appellant, hereafter Lee Barney, accepts Appellant, Jon D. Siddoway and STI's, hereafter referred to as "Siddoway," statement of the issues, but disagrees with the characterization of the issues and Siddoway's statement of the proper standard for review. These points will be addressed in the argument below.

STATEMENT OF ISSUES AND STANDARD OF REVIEW ON CROSS APPEAL

1. Whether the trial court erred in denying and refusing to award pre-judgment interest to appellee on damages granted to Barney and consistent with U.C.A. §15-1-1. The determination to award pre-judgment interest is a question of law and is reviewed under the "correctness standard." Hurley v. Board of review, 767 P.2d 524 (Utah 1988).

2. Whether the trial court erred in failing to grant Barney additional damages, particularly as it related to underpayment of wages and excess benefits taken by Siddoway. The Court found the parties had an agreement, but in failing to award

damages based on the undisputed evidence the Court abused its discretion. Morton v. Continental Baking Co., 938 P.2d 271 (Utah 1994).

STATEMENT OF DETERMINATIVE STATUTES AND PROVISIONS

1. Utah Rules of Civil Procedure, Rule 61. Harmless error.

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

2. Utah Rules of Civil Procedure, Rule 54 (c)(1). Judgments; costs.

“Demand for judgment. Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.”

3. Utah Rules of Evidence, Rule 102. Purpose and construction.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

4. Utah Rules of Evidence, Rule 103. Rulings on evidence.

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground

of objection, if the specific ground was not apparent from the context; or

(2) *Offer of proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) *Record of offer and ruling*. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) *Hearing of jury*. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) *Plain error*. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

5. Utah Rules of Evidence, Rule 104. Preliminary questions.

(a) *Questions of admissibility generally*. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of Subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy conditioned on fact*. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) *Hearing of jury*. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) *Testimony by accused*. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) *Weight and credibility*. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

(Amended effective October 1, 1992.)

6. Utah Rules of Evidence, Rule 1006. Summaries.

The contents of voluminous writings, recordings, or photographs which

cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

7. Utah Code Annotated §15-1-1. Interest rates-Contracted rate-Legal rate.

(1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.

(2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

(3) Nothing in this section may be construed in any way to affect any penalty or interest charge that by law applies to delinquent or other taxes or to any contract or obligations made before May 14, 1981.

8. Utah Code Annotated §78-2-2(3)(k) (1953).

9. Utah Code Annotated §78-2-2(4).

10. Utah Code Annotated §78-2a-2(j).

STATEMENT OF THE CASE

Barney brought an action against Siddoway seeking an accounting from Siddoway for both the corporation Standard Tile, Inc., hereafter "STI" and the partnership S&B Storage. In all respects, the corporation was run more like a partnership than a corporation. There were no books and records kept by the corporation, no minutes of meetings, and Siddoway was in control of the corporation, its assets, and made all of the decisions without consulting Barney. Barney was invited to work with Siddoway and become a "partner" in STI., receiving the same benefits as

Siddoway was receiving from the corporation with the exception that any bonuses at year end would be divided with 75 percent going to Siddoway and 25 percent going to Barney. The relevant facts are set forth below.

Siddoway formed STI in 1986. Siddoway later approached Barney and requested Barney go into business with him. Both Siddoway and Barney had been in the tile business for a substantial period of time. In 1989, when Siddoway approached Barney, Barney had a going business with employees and contracts. Barney was to receive a salary and benefits equal to that of Siddoway and bonuses from STI would be divided with 75 percent going to Siddoway and 25 percent going to Barney. The parties also agreed that they would be partners in all future business endeavors, on a 75/25 split as set forth above.

At the end of the first year, Siddoway told Barney that he would have to purchase the 25 percent stock in STI, and that the cost would be approximately book value or \$25,000.00; \$1,000.00 per percentage point of stock in STI. Even though this had not been part of the original agreement, Barney reluctantly agreed. Siddoway represented to Barney that the book value of STI was \$100,000.00. In fact, the book value was actually \$22,000.00.

In 1991, the parties formed an additional business relationship, i.e. a partnership which purchased real property and storage units, S&B Storage.

In February of 1996, Siddoway fired Barney and locked him out of STI and S&B Storage.

On July 17, 1996, Barney filed a complaint in Third District Court seeking to recover damages alleging money was owed by Siddoway to Barney as a result of the parties business relationships. The complaint also sought an accounting from Siddoway for both the corporation and the partnership. The case was tried in a three day bench trial commencing February 17th and continuing through February 19, 1999. The Court entered its Findings of Fact, Conclusions of Law, as well as its Order and Judgment on June 7, 1999. The parties resolved and settled the S&B Storage matters after trial and Siddoway paid Barney. Siddoway filed his appeal, alleging error regarding certain rulings by the Court as it related to STI and Barney's interest therein. Barney cross-appealed.

STATEMENT OF FACTS

1. Standard Tile Inc. a Utah corporation, was organized in 1986, by Siddoway. Siddoway owned 100 percent of the stock of that corporation (Record No. 735; Transcript p. 28).
2. Sometime prior to March of 1989, Siddoway approached Barney for the purpose of becoming a shareholder or "partner" in STI, and also becoming a partner with Siddoway in all future business endeavors. The parties reached a verbal agreement sometime prior to March 31, 1989, regarding Barney's participation with Siddoway in STI (Record Nos. 735 & 736; Transcript pp. 30, 31, 32, 64, and 200).
3. The terms of the agreement reached by the parties in 1989, which was to

become effective April 1, 1989, was as follows:

a. Barney would become an employee of STI, just as Siddoway was an employee of STI;

b. Barney would have the right and or opportunity to purchase up to 25 percent of the stock in STI from bonuses; and

c. Barney and Siddoway agreed that both parties would receive the same monthly salary commencing April 1, 1989, and continuing thereafter.

d. The parties agreed that each would receive and use the benefit of a company vehicle beginning April 1, 1989, and thereafter.

e. The parties agreed that any profits from the corporation or operation of the business would be split or divided on the basis of Siddoway receiving 75 percent of the profits and Barney receiving 25 percent of the profits commencing April 1, 1989, and thereafter (Finding No. 6(e)).

4. At the end of 1989, Siddoway represented to Barney that the value of the corporation was \$100,000.00 and Barney would therefore be required to pay into the corporation \$25,000.00 in order to purchase 25 percent of the stock in STI (Record No. 736; Transcript pp. 200-201).

5. Based on the representation of Siddoway, Barney reluctantly agreed to pay up to \$25,000.00 for 25 percent interest in STI or \$1,000.00 per percentage point of stock in STI (Record No. 736; Transcript p. 201).

6. At all times relevant hereto, Siddoway controlled all the financial aspects

including the checking account. At no time did Barney have the right to sign any checks on the corporation checking account or to withdraw funds from any corporate account or charge on any corporate account (Record No. 735; Transcript pp. 114, 137, and 138).

7. The corporate books and records including shares of stock, stock register, minutes of meetings, etc. were lost by the company accountant, Tuber Okuda, in either 1993 or 1994 (Record No. 735; Transcript pp. 100 and 101). Siddoway offered no explanation as to why the corporate books and records were not kept at the office of STI.

8. Following the loss of the corporate records, no minutes were kept of any meetings thereafter. No notices of meetings or waiver of notice for any meeting was prepared after the original books and records were lost (Record No. 735; Transcript p. 101).

9. No corporate resolutions were ever passed after the records were lost (Record No. 735; Transcript p. 101).

10. Siddoway was in charge of establishing and declaring bonuses. No bonus was declared in 1989 (Record No. 735 & 737; Transcript pp. 41, 310, 311, & 377).

11. As bonuses were declared, Barney's bonuses first went to pay off his account under accounting code 136, loans to shareholders. Taxes were taken out and the net bonus was applied to purchase of stock (See Exhibit 24 & 27).

12. In 1991, there was a bonus, but the money from the bonus was put into S&B Storage (Defendant's Exhibit 24; Record No. 735 & 736; Transcript pp. 50, 209).

13. In 1992 and 1993, Barney's bonus went to pay his 136 account with STI (Record No. 737; Transcript pp. 419, 420, & 544-560).

14. Barney paid \$14,500.00 out of his bonuses toward purchase of stock at the following times and in the following amounts:

<u>Date of purchase</u>	<u>Amount</u>
November 30, 1990	\$1,500.00
December 31, 1990	\$7,000.00
December 31, 1994	\$6,000.00
Total	\$14,500.00

15. In 1995, Barney was allocated a net bonus of \$5,370.00 that was never paid and should have been applied toward the stock purchase bringing his total stock purchase amount to \$19,870.00 or a total of 19.87 percent of the stock at the very least. The remaining balance owing for the stock purchase by Barney would have been no more than \$5,130.00 (Finding Nos. 16 & 17).

16. Siddoway took benefits and paid personal obligations from corporate funds in which Barney was entitled to share. Siddoway also received salary in excess of that which Barney was entitled to receive. Barney's share of the excess benefits taken by Siddoway far exceeds the \$5,130.00 and therefore Barney has paid well in excess for his 25 percent interest in the corporation STI and therefore owned 25 percent of the shares therein (Finding Nos. 18 & 19).

17. Some of the examples of Siddoway's excess benefits, and admitted by

Siddoway are as follows:

- a. Siddoway had a disability insurance policy paid for by the company. Barney did not (Record No. 735; Transcript p. 139).
- b. STI also paid all of Siddoway's medical bills for him and his family, but did not pay Barney's medical bills (Record No. 735 & 736; Transcript pp. 141, 142, & 215; See also Exhibit 14).
- c. At one point Barney was not even covered by STI under the companies insurance plan and received no benefit relative to that (Record No. 735; Transcript p. 143).
- d. STI also paid automobile insurance on Siddoway's wife's car (Record No. 735; Transcript p. 144; Exhibit 14).
- e. Standard Tile, Inc. paid \$2,000.00 in 1990, to Dart, Adamson & Kasting to represent Siddoway in a dispute which he had with his first wife (Record No. 735; Transcript p. 147).
- f. The corporation purchased Jazz tickets and Siddoway received the use of more than ½ of the Jazz tickets (Record No. 735; Transcript pp. 148, 149, & 150).
- g. Siddoway received and took a bobcat tractor and trailer which was not accounted for in any exhibit list (Record No. 735; Transcript p. 152).
- h. Siddoway purchased a spa and jacuzzi for his home claiming it was a medical expense. STI paid for the jacuzzi. (See Exhibit 14).

18. The corporation was effectively dissolved as of the end of February 1996, when the parties no longer worked together and when Barney's employment was terminated by Siddoway. Barney and Siddoway were the only shareholders of STI. At the time the parties terminated the business relationship, the corporation owned certain assets, most of which were taken by Siddoway (Finding No. 20).

19. The accounts receivable, as of termination, were collected and used to pay debts and obligations of STI (Finding No. 23).

20. STI owned certain interests in real property as of the date the parties terminated, and the assets and values were as follows:

- a. Lot 202 Hearthstone Estates, net equity \$63,545.76;
- b. Lot 202 Hearthstone Estates deposits \$7,800.00;
- c. Lot 211 Hearthstone Estates purchase price \$38,548.50;
- d. Lot 223 Hearthstone Estates, deposit \$500.00 (Finding No. 24; Record No. 735; Transcript pp. 17-131; Exhibits 5, 6, & 7).

21. The total value of real property held by STI and Siddoway as of the date the parties terminated was \$110,549.26. Siddoway took these lots and homes, completed homes on all of the lots and took all of the profit individually (Finding No. 24; Record No. 735; Transcript p.145-160).

22. The Court awarded Barney a judgment against Siddoway for 25 percent of the value of the real property interests as of the time the parties separated in the judgment amount of \$27,598.57 (Finding No. 25).

23. The Court found that the total value of the equipment, the vehicles, and the furnishings as \$44,666.67. Siddoway had taken or received \$33,500.00 in value of the equipment and Barney had taken or received \$10,438.00 in value of the equipment, consistent with exhibits 15 and 29 offered in evidence. Barney was therefore entitled to a judgment against Siddoway for \$729.68 representing the excess of the equipment taken by Siddoway up and above that which was received by Barney. Siddoway took the bobcat and trailer and Barney was not awarded any damages related to the bobcat.

24. STI had also purchased a Lincoln Continental automobile which was used exclusively by Siddoway and Siddoway's wife. The payments on the automobile, for the period of two years from 1994 through 1996, totaled \$12,402.20 (Exhibits 5, 7, 15, & 29; Finding No. 28).

25. Barney and Siddoway were to receive equal benefits from the company and because this was an additional benefit received by Siddoway and Siddoway's wife, Barney was entitled to 50 percent of the value of the payments made or judgment in the amount of \$6,201.10 (Record No. 735; Transcript pp. 144, and 145; Finding No. 31).

26. In February of 1996, Siddoway owed to Standard Tile Inc. the sum of \$13,415.65 which were additional funds taken by Siddoway. The Court awarded Barney judgment of 50 percent of that amount against Siddoway in the amount of \$6,707.82 (Finding No. 32).

27. Barney no longer worked for STI after the end of February 1996. STI and the partnership S&B Storage had substantial assets in February of 1996, and Siddoway

took control of all of the assets.

SUMMARY OF ARGUMENT

A. SUMMARY OF RESPONSE TO APPEAL.

The trial court properly determined that Barney was entitled to 25 percent ownership in STI. The evidence is clear from Siddoway and Mr. Okuda, the company accountant, that Barney owned 16.2 percent of the stock, and at trial Siddoway took the position that Barney only owned 14.5 percent. Barney was allocated a bonus 1995, which could and should have been applied to the purchase of stock consistent with the parties prior practice giving Barney almost 20 percent of the stock. Barney testified that there was no requirement to purchase stock as part of the parties original agreement, but was approached almost a year later by Siddoway with the requirement that he pay for the stock.

The payment for the stock was based on Siddoway's representation of \$100,000.00 value of the business, when in fact the business in 1989 was worth no more than \$22,000.00. Barney was therefore a 25 percent shareholder based on monies paid in and the parties agreement. The Court determined that Siddoway had taken excess benefits from the corporation which more than exceeded any amount Barney would otherwise have to pay for the stock. Kristi Barney was in fact prepared and qualified to submit the summary to the court regarding the excess benefits taken by Siddoway. Her qualifications, knowledge, and expertise go to the weight to be given to her testimony by the trier of fact, not to its admissibility. It should be noted that this is

an action for an accounting and Siddoway failed to come forward with any evidence. The summaries were also proper, consistent with Rule 1006 of the Utah Rules of Evidence and based on documents and information in the control and prepared solely by Siddoway and Siddoway's accountant.

Siddoway's counsel was not prevented or interfered with in his examination. Siddoway's counsel had many very long discussions with and arguments with the Court about objections. These discussions, nonetheless, did not interfere with Siddoway's presentation of the evidence, and the Court did not preclude Siddoway from putting on his evidence.

B. SUMMARY OF ARGUMENT ON CROSS-APPEAL.

Barney is entitled to prejudgment interest as a matter of law, calculated at the rate of 10 percent per annum on the damages awarded by the Court consistent with the provisions of U.C.A. §15-1-1.

Barney is entitled to an additional judgment representing excess wages taken by Siddoway in violation of the agreement. Barney was also entitled to additional damages relative to all of the excess benefits taken by Siddoway, but to the extent the Court had utilized that to achieve Barney's 25 percent interest in STI, Barney simply requests that he be awarded the difference in wages as clearly established by Plaintiff's Exhibit 17.

ARGUMENT IN RESPONSE TO APPEAL.

I. THE TRIAL COURT CORRECTLY FOUND THAT BARNEY WAS A 25 PERCENT STOCK HOLDER OR OWNER OF STI.

The trial court determined, after hearing the evidence, that Barney had more than paid for 25 percent of the stock or interest in STI (Finding of Fact No. 15, 16, 17, 18, & 19). Siddoway attempts to characterize its appeal as an “error in law” to be reviewed under a correctness standard, citing State v. Rameriz, 817 P.2d 774 (Utah 1980).

The Court’s determination that Barney owned 25 percent of STI however, is a factual determination and must be properly reviewed under the “clearly erroneous standard.” Siddoway’s arguments, on pages 20 and 21 of the Appellant’s Brief, makes reference to the specific Findings of Fact the Court made (A copy of the Findings of Fact is attached as part of the Addendum to Siddoway’s Brief). By referring to the Findings, Siddoway must agree that the “clearly erroneous standard” is applicable here.

Because this is an issue of fact which Siddoway disputes, Siddoway has the burden on appeal of marshalling the evidence. See Young v. Young, 979 P.2d 338 (Utah 1999), and Valcarce v. Fitzgerald, 961 P.2d 305 (Utah 1998). Siddoway has failed to marshal the evidence in support of the trial court’s decision. The evidence presented which supports the Court’s decision included the agreement of the parties that Barney would become a 25 percent interest holder or “partner” of Siddoway and STI (Record No. 736 & 737; Transcript pp. 201 and 459). Siddoway testified that the \$25,000.00 for 25 percent of Standard Tile was based on the companies book value of

\$100,000.00 as of 1989 (Record No. 735; Transcript pp. 99-100). Barney testified that the original agreement did not involve paying for the stock, but this was something that was brought up after the fact (Record No. 735; Transcript pp. 101-102).

Siddoway said the purchase price for the stock i.e. \$25,000.00, was based on the book value and that he contacted the accountant to "ask him about what it was worth" (Record No. 735; Transcript p. 100). Mr. Okuda, the company accountant, testified that the book value of the entire company in 1989 was \$22,000.00 not \$100,000.00. (Record No. 737; Transcript pp. 476, 477, & 538). Mr. Okuda went on to testify that in 1990, the companies book value had only increased to approximately \$39,000.00.

Siddoway attempts to argue in his brief that Barney only purchased 14.5 percent of the stock. Siddoway testified, however, that the accountant had calculated Barney's ownership interest in the stock for which \$14,500.00 had been paid, as an ownership of 16.2 percent (Record No. 735; Transcript p. 104-105). Mr. Okuda testified to the same thing and in fact Siddoway introduced an exhibit through Mr. Okuda (Exhibit 25, attached as part of the addendum), which shows stock ownership at 16.2 percent for the \$14,500.00 paid (Record No. 737; Transcript pp. 424-425).

Barney was also to have received a net bonus as of December 31, 1995, in the amount of \$5,370.00 (Record No. 737; Transcript pp. 420-422; Exhibit 24 & 25).

Barney was never paid this money, but based on the way the parties had always treated bonuses, that \$5,370.00 should have been applied to the purchase of stock, and the Court so found (Finding No. 16). Mr. Okuda also admitted that Defendant's Exhibit 25

had been prepared at or near the time of trial (Record No. 737; Transcript p. 415).

Based on Okuda's accounting, Barney should have acquired approximately 22.6 percent of the stock. Siddoway also received benefits far in excess of the purchase price of the stock.

Barney had no discretion in deciding which bonuses would go toward purchase stock and which bonuses would be utilized to fund the purchase of the S&B Storage partnership property.

Barney received no bonus in 1989, and Siddoway received additional income and bonuses in 1989, contrary to the agreement of the parties (Exhibit 17; Record No. 735 & 736; Transcript pp. 41 & 311). The Court properly and equitably found that Barney was a 25 percent interest owner in STI.

II. KRISTI BARNEY HAS THE REQUISITE KNOWLEDGE, TRAINING, AND UNDERSTANDING TO OFFER EVIDENCE ON ACCOUNTING MATTERS.

The matter of qualification of an expert witness lies in the discretion of the Court. State v. Locke, 688 P.2d 464 (Utah 1984).

Formal training or education is not a prerequisite to giving expert opinion: a witness may qualify as an expert by virtue of experience or training. Randle v. Allen, 862 P.2d 1329 (Utah 1993).

Mrs. Barney testified that she had obtained an associates degree in accounting and had also worked in the accounting area for a number of years (Record No. 736; Transcript pp. 291-293). Mrs. Barney also indicated that she was familiar with tax

returns, financial documents, general ledgers, etc. and in fact had prepared such documents in the course of her employment (Record No. 736; Transcript pp. 291 & 292). Mrs. Barney's testimony was based on summaries which she prepared after examining voluminous business records of STI.

Consistent with Rule 702 of the Utah Rules of Evidence, Mrs. Barney testified regarding a fact in issue, i.e. did Jon Siddoway take excess benefits and salary from STI. in violation of his agreement with Lee Barney. Mrs. Barney had the requisite knowledge and skill to examine the business records of STI and formulate the summaries introduced including Exhibits 14, 15, and 17. Siddoway, in his brief, uses the term "forensic or investigative auditor." Siddoway however, offers no case or statute requiring a "forensic or investigative auditor" be used in a case like this or what those terms even mean and or the qualifications necessary to be considered a "forensic or investigative auditor."

Mrs. Barney's experience or lack of experience in the accounting area goes to the weight of her testimony, but certainly not to her qualifications.

The Court properly concluded that Mrs. Barney's experience was sufficient to allow her to examine the books and records and provide the summaries which were introduced as evidence. Siddoway failed to put on any rebuttal evidence to Exhibit 14 and Exhibit 17.

III. THE COURT PROPERLY ALLOWED INTRODUCTION OF THE SUMMARIES SPECIFICALLY EXHIBITS 14 THROUGH 20.

It should be noted that Barney brought this action against Siddoway seeking an accounting for both the partnership and the corporation, inasmuch as Siddoway was in total control of both. Barney also brought the action for breach of fiduciary duty.

Barney put on sufficient evidence to establish a prima facie case. The burden then shifted to Siddoway to account and show he dealt fairly with Barney.

It is clear the parties had an agreement and that Siddoway breached that agreement. Exhibit 14, regarding the excess benefits taken by Siddoway, is perhaps the best example of the breach of the agreement. Barney and Siddoway both testified as to what their agreement was and the Court chose to believe Barney over Siddoway. In preparing the exhibits, none of the companies books and records for 1989 were available, not even the general ledger. For 1990, only the general ledger was available. Siddoway's arguments under point III, beginning on page 27 of his brief, is really addressed to Exhibit 14, which is captioned "Summary of Excess Benefits Taken by Siddoway From Standard Tile." The checks and invoices for 1991 were also not available, but for the years 1992 forward, copies of all of the checks, check vouchers, and invoices, if any were attached to the checks, were provided. In cross-examining Mrs. Barney, Siddoway's counsel only asked questions about Exhibit 14 regarding the 1990 and 1991 information.

The Court did not award Barney specific damages as it relates to Exhibit 14 except to give Barney some small credit sufficient to bring him up to the 25 percent

ownership of stock.

Specific examples of Siddoway taking excess benefits, as demonstrated on Exhibit 14 as well as other exhibits and testimony in the record, clearly shows an excess of benefits sufficient to meet the stock issue.

Some of the most obvious examples include:

1. Check no. 2787, on January 4, 1990, to Dart, Adamson & Casting, in the amount of \$2,000.00, represents a payment taken from the STI account to pay Siddoway's attorneys representing him in a custody battle with his first wife. Siddoway admitted this (Record No. 735; Transcript p. 147).
2. Purchase of Jazz season tickets, as set forth on Exhibit 14, are another example, and the Court concluded, based on Siddoway's testimony and the testimony of Mr. and Mrs. Barney, that Siddoway received excess benefits with respect to using the Jazz tickets and or selling them and taking the money (Record No. 735; Transcript pp. 148-149).
3. Siddoway also purchased a disability policy to provide him income if for some reason he should become disabled. Mr. Barney did not have a similar benefit (Record No. 735; Transcript pp. 139-140).

The Court concluded that the payments on the Lincoln Continental automobile utilized by Dawn Siddoway, Siddoway's second wife, was an improper benefit to Siddoway. Exhibit 14 demonstrates that insurance and repairs were also made on a Chevrolet Corsica which belonged to Dawn Siddoway prior to the purchase of the

Lincoln Continental. Insurance and repairs on the Continental were also paid for by STI.

STI should not have been paying for insurance and repairs on a Chevrolet Corseca. Most of these entries have invoices attached, but these charges were never passed through to Siddoway requiring him to reimburse the company (Record No. 735; Transcript pp. 144-147). In 1992, Jon Siddoway and Dawn Siddoway were building a new home and a substantial number of charges paid for by STI showed delivery made to the Siddoway home. Indeed, much discussion was had about a garage door and key pad installed in the Siddoway home. When the Court asked Mr. Okuda, the company accountant, if this was a proper charge (Record No. 737; Transcript p. 446). Mr. Okuda stated that this would not be a proper business expense.

Siddoway paid all of his personal medical expenses for his entire family through STI. Again Barney did not receive a similar benefit (Record No. 735; Transcript pp. 140-141). Standard Tile paid all of the charges on the Visa Gold card held by Dawn Siddoway and as set forth in Exhibit 14, many of these expenses on that credit card related to the purchase of gasoline in Hanksville, Utah, Bullfrog Marina, and were for the Siddoway's personal vacations to Lake Powell.

In 1994, at the bottom of page 9 of Exhibit 14, Siddoway purchased a Jacuzzi or "spa" for his personal residence and classified the same as medical expenses under the specific account code 637 for STI. Because of the parties agreement, Barney was entitled to an equal share of the benefits provided to Siddoway. Exhibit 14 asks for 25

percent of \$247,000.00. The proper figure should have been 50 percent of \$247,000.00. The Court perhaps gave Barney only \$5,100.00 worth of credit which was applied toward the purchase of stock in arriving at the 25 percent stock figure. It would seem therefore that even if it was error to admit the summary, it was clearly harmless error within the meaning of Rule 61 of the Utah Rules of Civil Procedure and Siddoway in his own testimony admits taking the benefits listed above.

Siddoway, by and through his accountant Mr. Okuda, offered into evidence Defendant's Exhibit 27, which is a summary of accounts 135 and 136 in the general ledger of STI. Account 135 is the loan receivable from Jon Siddoway and account 136 is the loan receivable from Lee Barney. (Record No. 737; Transcript pp. 426-432). This document perhaps was offered to rebut Exhibit 14. The entries on Exhibit 14, however, are separate, apart from, and distinct from all of the entries on Exhibit 27. The entries on Exhibit 14 show benefits taken by Siddoway which were not passed through and shown as a debt from Siddoway to the corporation (See Exhibits 5 & 7).

Mrs. Barney, with her experience in accounting, preparing financial statements, preparing tax returns, etc. clearly has a working knowledge of what is or should be considered a proper business expense and what is a personal expense.

The company accountant, Mr. Okuda, also agreed that personal expenses should not be paid for through the corporation (Record No. 737; Transcript p. 433). Again it should be noted, however, that Siddoway was in complete control of the financial matters of the corporation. Lee Barney did not have the authority to sign checks for the

corporation and had no input on deciding what bills could or should be paid. When asked, Siddoway denied that he was the party that assigned specific accounting codes to specific expenses (Record No. 735; Transcript pp. 137-139).

When Mr. Okuda, the company accountant, was asked, he testified that Siddoway was the one who assigned the account codes to the business expenses and that he (Mr. Okuda) never examined any of the checks or invoices to determine the propriety of business expenses (Record No. 737; Transcript pp. 403 & 405).

With respect to Siddoway's arguments that Exhibit 14 and the other summaries do not satisfy Rule 1006 of the Utah Rules of Evidence, Siddoway is simply mistaken.

Rule 1006 provides:

"The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court."

Nothing in Rule 1006 requires that a summary of business records summarize everything in the business records. To do so would involve more than the financial statements, balance sheets, and general ledger of the company. All of the business records were in the possession of Siddoway and Siddoway is the individual who prepared the checks, attached invoices to the checks, and supplied the accounting codes on the checks themselves. Mr. Okuda, as the companies accountant, prepared the financial statements and general ledger for the company based on information provided

by Siddoway.

The duplicates of the company records, which Mrs. Barney utilized, were available in court. Siddoway brought to court the original documents and those were available for examination and copying.

Siddoway also attempts to argue that the summaries are improper because they do not contain a summary of the benefits received by Mr. Barney. Defendant's Exhibit 27, however, specifically those entries under account 136, demonstrate the checks Barney received and which he had to reimburse the company for out of his bonuses. Barney received no other benefits than those listed in Exhibit 27 under account 136. Siddoway's account 135, should look very similar to Barney's account 136. Exhibit 14, however, demonstrates all of the additional benefits received by Siddoway which were not included in his account 135. The attorney fees for his custody battle, Jazz tickets, gas, insurance, and repairs for the automobile driven by Dawn Siddoway are not included in account 135 or Exhibit 27. Siddoway's disability insurance is not included in Exhibit 27. The spa or jacuzzi installed at the Siddoway home is not included in account 135 or on Exhibit 27, nor are deliveries of building materials to the Siddoway home included on Defendant's Exhibit 27 (A copy of Exhibit 27 is attached as part of the Addendum).

Clearly given the check numbers, account codes, etc. Mr. Siddoway himself could have been personally examined either by the Plaintiff or by his own counsel

regarding each one of the transactions listed thereon. A copy of the check and the invoice for each check could have been introduced as evidence, but that would defeat the entire purpose of Rule 1006 of the Rules of Evidence.

The trial court has a certain degree of discretion in controlling the method and manner in which evidence can come in and be presented. The trial court, as a trier of fact in a bench trial, has somewhat more latitude in this regard. See Rules 102, 103, 104 of the Utah Rules of Evidence. See also Super Tire Market Inc. v. Rollins, 417 P.2d 132 (Utah 1966) and State Dept. of Social Services v. Ruscetta, 742 P.2d 114 (Utah Ct. App. 1978).

Siddoway's argument with respect to Exhibit 15, the value of the equipment, was clarified because both Mr. Barney and Mr. Siddoway testified regarding the exhibits and the equipment owned by the company. Any admission of Exhibit 15 to the extent it relied on Mrs. Expertise, therefore would be harmless error.

Plaintiff's Exhibit 16 is a summary of closing documents for real property owned by STI. The Court chose not to rely on Exhibit 16 to award damages. The Court did, however, rely on other documents, primarily the testimony and financial statements of STI to award damages as it related to the property (See Exhibits 5 & 7). Admission of Exhibit 16 therefore is at best harmless error as well. Siddoway does not dispute the evidence or information contained in Plaintiff's Exhibit 17, the summary of excess wages taken by Siddoway in breach of the agreement between he and Mr. Barney.

Siddoway attempts to attack Exhibit 19 on the basis that it summarizes payments made on the Lincoln Continental automobile which was used for the Siddoways personally. The same information is contained in Exhibit 5, the annual statement from STI for the period ending December 31, 1995, and Exhibit 7, the financial statement for the period ending December 31, 1994. There was also considerable other testimony relative to the Lincoln Continental automobile, who used the automobile, and what Mrs. Siddoway's relationship to the company was (Record No. 735 & 737; Transcript pp. 144-146, 561 & 562).

Therefore even if Exhibit 19 was improper, it was also harmless error because there was additional evidence to support the Court's ruling. The Court did not have to rely on Exhibit 19 to make an award of judgment of \$6,201.10 relative to the Lincoln Continental automobile.

Siddoway also argues that the summaries violate the hearsay rule. Siddoway relies on Shurtleff v. Jay Tuft and Co., 622 P.2d 1168 (Utah 1980) and the case of Trolley Square and Assoc. v. Nielson, 886 P.2d 61 (Utah At. App. 1994). In Shurtleff a summary had been prepared by the employee of the lessee of a backhoe, itemizing problems with the backhoe. In Shurtleff, the lessor of the backhoe brought an action to recover the costs of repairs to the backhoe made during the term of the lease. The Shurtleff case dealt with the Utah Rules of Evidence prior to their amendment. The summary was also prepared based on statements from the defendant in the case, the lessee of the backhoe. In this case, Mrs. Barney is summarizing information obtained

from the documents prepared by Siddoway and kept in the ordinary course of business of Siddoway and STI. There is no hearsay violation here.

Once again, Siddoway has not demonstrated that the admission or exclusion of the summaries affected the outcome of the case. Siddoway has not marshaled the evidence to demonstrate whether or not there is other sufficient evidence to support the Court's ruling on the award of damages. Barney submits that there is additional evidence even if the exhibits were excluded. Since Siddoway has failed to properly marshal the evidence, Siddoway's claim for relief should be denied and the Court should affirm the Trial Court's ruling with respect to the exhibits and the admission of these exhibits into evidence.

IV. THE COURT DID NOT INTERFERE WITH SIDDOWAY'S EXAMINATION WHICH CONSTITUTED CUMULATIVE ERROR.

Siddoway claims that one of the errors the Court committed was refusing to grant a pretrial motion attempting to limit the evidence.

The parties were before the Court on December 2, 1998, in a pretrial conference (See record pages 82 & 83). The parties were ordered to exchange witness and exhibit lists and the exhibits by January 29, 1999. The parties agreed to an extension to February 8, 1999. Following that pretrial conference on December 2, 1998, Siddoway scheduled the deposition of Lee Barney and Kristi Barney. At the time of the deposition, the summaries being prepared by Kristi Barney were not yet prepared, but were delivered consistent with the order of the Court and the Stipulation of the parties

on February 8, 1999. By contrast, Siddoway's exhibit list and exhibits were not submitted until the day of trial, February 17, 1999. Some of the summaries prepared by Mr. Okuda, Defendant's Exhibit 24 and Exhibit 27, were not produced until Mr. Okuda testified on the third day of trial. The standard of review on appeal is "abuse of discretion," and as the Court stated in Crookston v. Fire Ins. Exchange, 860 P.2d 937 (Utah 1993), the appellate court will not reverse the trial court's ruling unless it is so unreasonable that it can be classified as arbitrary and capricious or a clear abuse of discretion. 860 P.2d 937 at 938.

In this case there is no abuse of discretion in denying Siddoway's motion. Clearly the records being summarized are and always have been in the possession of Siddoway and Siddoway prepared them. There is no surprise because Siddoway has an intimate knowledge of the books and records or should have an intimate knowledge of the books and records.

On direct examination of Mr. Okuda, Siddoway's attorney attempted to have Mr. Okuda comment on Exhibit 14, indicating that he (Mr. Okuda) had a chance to go through and examine the exhibit prior to trial.

The Court did not need to delay the trial or exclude evidence. This in part was an action for an accounting, equitable in nature. The Trial Court therefore had a great deal of latitude in determining the most efficient manner in which to conduct the Court's business. See Morton v. Continental Baking Co., Supra.

Siddoway next attempts to argue that his cross-examination of Mrs. Barney was

limited. Siddoway cites transcript pages 347 and 348. Upon review, however, it shows that Siddoway's counsel was cross-examining Mrs. Barney and apologized in advance because he indicated that it would be a very laborious process (Record No. 736; Transcript p. 348). The Court and Siddoway's counsel then discussed the matter for four pages (Record No. 736; Transcript pp. 348-352). The Court then allowed the questioning to continue. At no time did the Court limit the cross-examination.

The cross-examination then continued for eight additional pages (Record No. 736; Transcript pp. 352-360). The Court and Siddoway's counsel then discussed the matter again for five pages (Record No. 736; Transcript pp. 360-365), but at no time did the Court tell Siddoway's counsel he could not continue cross-examining the witness. The Court was merely trying to suggest to Siddoway's counsel a more efficient way of presenting the evidence the Court needed to hear to decide the case. Clearly there was no abuse of discretion in this regard.

Siddoway next complains that the Court did not allow him to rebut the testimony of Mrs. Barney and cites the transcript pages 446 and 447. This was direct examination of the company accountant, Mr. Okuda. Barney's counsel objected and asked to voir dire the witness as it related to Exhibit 14. On voir dire, Mr. Okuda testified that he had not looked at the checks or the invoices contained on Exhibit 14 and therefore was not in a position to say whether those charges were proper business expenses or in fact personal expenses because he had not seen the backup documentation. Barney's counsel objected on the basis that Mr. Okuda had not examined the underlying documents and

therefore could not testify as to the propriety of the expenses since he had no knowledge of the underlying documents. The objection was sustained (Record No. 737; Transcript p. 447).

The Court and Siddoway's counsel then discussed the matter up to the point of recess (Record No. 737; Transcript pp. 453-480). The Court asked Mr. Okuda several questions during the course of this discussion. Mr. Siddoway also jumped in "uninvited." At no time, however, did the Court limit or preclude Siddoway from presenting evidence he chose. Siddoway's counsel simply wanted to continue to argue the foundational objection which had been sustained and was unable to convince the Court to reverse its ruling on the foundational objection.

In his brief, on page 38, Siddoway cites to the transcript on pages 460 and 461 indicating some ruling or direction by the Court. Exhibit 14 was not discussed at the transcript pages 460 and 461, and therefore the reference in the brief is inaccurate and again demonstrates no abuse of discretion on the part of the Court.

Siddoway's argument regarding cumulative error is without merit, not supported by the record, and Siddoway has not demonstrated an abuse of discretion on the part of the Court.

ARGUMENT ON CROSS-APPEAL.

I. THE TRIAL COURT ERRED IN FAILING TO GRANT PREJUDGMENT INTEREST ON THE DAMAGES AWARDED TO BARNEY.

The law in Utah is clear that prejudgment interest should be awarded on damages

where the damage is complete, the loss is fixed at a particular time and that loss can be measured by facts and figures. Bjork v. April Industries, Inc., 560 P.2d 315 at 316 (Utah 1977). In Vasels v. LoGuidice, 740 P.2d 1375 (Utah Ct. App. 1987) The Court stated:

“Prejudgment interest represents an amount awarded *as damages* due to the opposing party’s delay in tendering the amount owing under an obligation. L & A Drywall, Inc. V. Whitmore Constr. Co., 608 P.2d 626,629 (Utah 1980). In Bjork, as in numerous other cases declaring a party’s entitlement to prejudgment interest as a matter of law, the interest accrued as damages arising out of a valid contract determined to have been breached by the other party.” (Citations omitted).

In Vali Convalescent and Care Institutions v. Division of Health Care Financing, 797 P.2d 438, (Utah Ct. App. 1990) the Court stated that the entitlement to interest is a question of law. Consequently, the Appellate Court need not accord any deference to the decision below but review them for legal correctness. Hurley v. Board of Review, *Supra*.

At the close of trial, and after the court had announced its decision, Barney’s counsel requested clarification on the issue of prejudgment interest.

The Court responded indicating that he declined to award prejudgment interest (Record No. 737; Transcript pp. 637- 638). In this case the Court determined that the parties had severed their business relationship, both in a partnership and a closely held corporation, in February of 1996, and therefore prejudgment interest should accrue on the damages determined by the Court from March 1, 1996, up to and including June 7, 1999, the date of the judgment. The damages as found by the Court, as it relates to

Siddoway and STI, are \$41,036.17. (Finding of Fact No. 34; See also Findings of Fact Nos. 24, 25, 26, 27, 28, 29, 31, and 32). The trial court simply erred as a matter of law in not awarding Barney prejudgment interest on the damages.

U.C.A. §15-1-1 provides the appropriate interest rate i.e. 10 percent.

All of the damages were fixed by virtue of the evidence presented and fixed as the date the parties terminated their relationship. The damages were based on a contractual relationship between the parties and on the fiduciary duty the corporation and its managing shareholder owed to a minority shareholder, as well as the fiduciary duty one partner and shareholder owes to another. The damages were complete when Siddoway took control of all of the assets and failed to pay Barney a reasonable sum for the assets Siddoway took. Barney therefore is entitled to interest because it took almost three years to get the case to trial, and almost 6 months before the judgment was entered. See Uinta Pipeline Corp. V. White Superior Co., 546 P.2d 885 (Utah 1976). See also Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc., 784 P.2d 475 (Utah App. 1989) and Brown v. Richards, 840 P.2d 143 (Utah App. 1992).

Barney is entitled to interest at the rate of 10 percent per annum from March 1, 1996, to June 7, 1999, on the judgment amount of \$41,036.17. That interest figure, as of the date of judgment, is \$13,423.89. That amount should be added to the entire judgment and post judgment interest should accrue on that figure as well.

As set forth below, Barney claims additional damages and prejudgment interest should also accrue on the additional damages if any.

II. BASED ON THE COURT'S FINDING OF AN AGREEMENT BETWEEN BARNEY AND SIDDOWAY AND THE TERMS OF THAT AGREEMENT, BARNEY SHOULD HAVE BEEN AWARDED ADDITIONAL DAMAGES EQUAL TO THE EXCESS BASE SALARY TAKEN BY SIDDOWAY.

Rule 54 (c)(1) of the Utah Rules of Civil Procedure provides:

"Demand for judgment. Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves."

In this case the Court found that the parties reached an agreement. One of the terms of which provided that each party would receive the same monthly base salary commencing April 1, 1989, and continuing thereafter. This Finding of Fact is not challenged by the Appellant, Siddoway, nor is it challenged by Barney and in fact is consistent with Barney's position, understanding, and the testimony relative to the agreement reached by the parties in 1989. Barney introduced evidence, primarily Plaintiff's Exhibit 17, a copy of which is attached hereto in the addendum and by this reference made a part hereof, demonstrating that despite the parties agreement, Siddoway had drawn excess salary. This summary exhibit (Exhibit 17) also demonstrates that it is based solely on a monthly salary and excludes the bonuses from the calculation. The amount set forth on Plaintiff's Exhibit 17 simply demonstrates the amount of base monthly salary drawn by

Siddoway in excess of the amount paid to Barney. Barney only asked for 25 percent of the excess amount, but in reality, Barney was entitled to an equal amount of salary as a damage figure to reimburse him for the excess amounts taken by Siddoway. Barney is entitled to an additional award of \$42,025.00 which includes an amount equal to the excess salary taken by Siddoway together with interest at the rate of 10 percent per annum as calculated on the exhibit, up to February 25, 1999. There would, of course, be some additional prejudgment interest between February 25, 1999, and June 7, 1999, the date the Court entered its order.

The Court abused its discretion in not awarding the damages for the excess salary. See State v. Pena, 869 P.2d 932 (Utah 1994), Morton v. Continental Baking Co., supra, and Lysenko v. Sawaya, 973 P.2d 445 (Utah Ct. Apps. 1999).

Exhibit 17 was received by the Court (Record No. 736; Transcript p.310-311).

Siddoway's counsel tried to confuse Mrs. Barney relative to her calculations as set forth on Plaintiff's Exhibit 17, with regard to salary vs. bonuses. (Record No. 736; Transcript pp. 377-386) It should be noted that through the exchange between Siddoway's counsel and the Court, Mr. Schmutz indicated that he would bring in additional evidence by and through Mr. Okuda to clear things up.

No such evidence was presented by Mr. Okuda or through Siddoway to

rebut the evidence offered in Plaintiff's Exhibit 17. Siddoway's counsel implies without evidence that perhaps the difference between Siddoway's 1989 income is based on a "bonus" he received in 1989.

There were no books and records for 1989, with the exception of the personal tax return of Siddoway. The W-2's for Siddoway and Barney were attached to the tax returns utilized in preparing the summary. Siddoway testified that he was probably taking at least \$200.00 to \$300.00 more a month than Barney (Record No. 735; Transcript pp. 32-41). Pursuant to Rule 54 of the Utah Rules of Civil Procedure, the Court should have awarded Barney damages at least for the excess wages. The court probably should have also awarded additional damages as it related to Exhibit 14, but Barney is not appealing that particular issue or requesting an award of additional damages except for the wage claim set forth herein.

CONCLUSION

Siddoway's appeal should be dismissed. Siddoway failed to marshal the evidence in support of his claims on appeal and had he done so, the evidence would support the Court's ruling in any event.

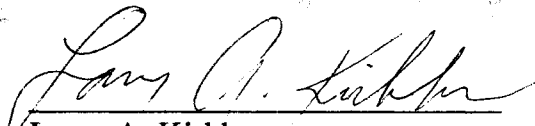
Even if the summaries Siddoway claims were improper or inappropriate and were received without justification, there was still sufficient evidence in the record to support the Court's findings and rulings. Siddoway has not demonstrated that the Court abused its discretion in anyway, and therefore

Siddoway's appeal should be denied in all respects and costs should be awarded to Barney.

With respect to Barney's claim, Barney should have been awarded prejudgment interest on the amount of the judgment awarded by the Court consistent with the law. Barney is entitled to prejudgment interest in the amount of \$13,423.89, which includes interest from March 1, 1996, to June 7, 1999. That amount should be made part of the original judgment and post judgment interest should accrue on that amount as well.

Finally, Barney requests that he be awarded additional damages for the excess wages taken by Siddoway in violation of the agreement that the parties were to receive an equal salary commencing April 1, 1989. Barney is entitled to an award of \$42,025.00, as set forth in Exhibit 17, with additional interest at the rate of 10 percent per annum after February 25, 1999, until June 7, 1999. Barney should be awarded his costs on appeal.

RESPECTFULLY Submitted this 7th day of March 2000.


Larry A. Kirkham
Attorney for Appellee and
Cross-Appellant

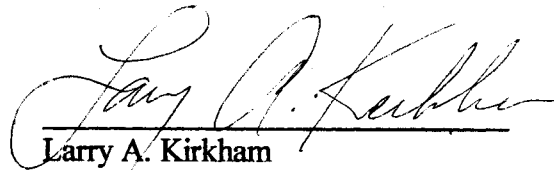
CERTIFICATE OF SERVICE

This certifies that I caused a true and correct copy of the within and foregoing
Brief of Appellee Lee O. Barney, to be delivered to:

Evan A. Schmutz
HILL, JOHNSON & SCHMUTZ L.C.
3319 North University Avenue, Suite 200
Provo, Utah 84604

by depositing the same in the United States first-class mail, postage prepaid, on the

8 day of March, 2000.


Larry A. Kirkham

ADDENDUM

1. EXHIBIT A

Trial Exhibit 17 “Actual Base Salary Summary Not Including Bonuses”

2. EXHIBIT B

Trial Exhibit 24 “Record of Lee Barney Stock”

3. EXHIBIT C

Trial Exhibit 25 “STI Net Equity of the Corporation”

4. Exhibit D

Trial Exhibit 27 “STI Loan Receivable from Jon D. Siddoway”

EXHIBIT A

Trial Exhibit 17 “Actual Base Salary Summary Not Including Bonuses”

Actual Base Salary Summary Not Including Bonuses

YEAR	BARNEY	SIDDOWAY	EXCESS SIDDOWAY
1989	\$17,307.00 ¹	\$36,925.00	\$13,849.00
1990	\$23,076.00 ²	\$26,700.00	\$3,624.00
1991	\$28,800.00 ³	\$30,000.00	\$1,200.00
1992	\$28,800.00	\$30,000.00	\$1,200.00
1993	\$29,259.62	\$30,200.00	\$940.38
1994	\$32,200.00	\$32,400.00	\$200.00
1995	\$32,400.00	\$32,400.00	\$0.00
1996	\$5,400.00 ⁴	\$36,500.00	<u>\$4,100.00</u>
Total Siddoway Excess Salary:			\$25,113.38

1989	Interest at 10% (12-31-89 to 02-25-99)	\$11,279.00
1990	Interest at 10% (12-31-90 to 02-25-99)	\$2,585.00
1991	Interest at 10% (12-31-91 to 02-25-99)	\$862.00
1992	Interest at 10% (12-31-92 to 02-25-99)	\$741.00
1993	Interest at 10% (12-31-93 to 02-25-99)	\$489.00
1994	Interest at 10% (12-31-94 to 02-25-99)	\$76.00
1996	Interest at 10% (12-31-96 to 02-25-99)	<u>\$880.00</u>
Total Interest		\$16,912.00

Total Excess and Interest **\$42,025.00** ✓

Lee Barney Share (25% x \$42,025.00) **\$10,506.00** ✓

The information utilized to prepare this summary was taken from the Standard Tile financial statements, Standard Tile corporate tax returns, W-2's, and personal tax returns of Lee Barney and Jon Siddoway. Interest is calculated at 10 percent on the basis of U.C.A. §15-1-1.

¹ Barney's salary for nine (9) months of 1989, was \$1,923.00 per month. Siddoway's salary should have been \$1,923.00 per month for the same period of time and for the first two (2) months of 1989. The excess amount was calculated by taking Siddoway's gross salary for the nine (9) months and subtracting Barney's salary for nine (9) months and then subtracting an additional two (2) month salary at \$1,923.00 for each of the two (2) months. Siddoway still took an excess of \$13,849.00 as direct salary and bonuses. The salary for both parties is to be equal an additional profit or bonuses were to be 75 percent for Siddoway and 25 percent for Barney. In other words, a \$10,000.00 profit or bonus would be divided \$7,500.00 to Siddoway and \$2,500.00 to Barney.

² The base salary for both parties should have been \$1,923.00 per month for each of the twelve (12) months of 1990. Siddoway apparently took \$2,225.00 per month or roughly \$300.00 more per month as base salary than did Barney. Attached hereto as part of this summary is a Standard Tile W-2 income summary.

³ In 1991, Lee Barney understood that the parties were going to be receiving \$2,400.00 per month as a base salary and Mr. Barney began receiving that. He received that amount through 1992, and most of 1993. Near the end of the 1993, the base salary was increased to \$2,500.00 per month. In 1994, the base salary was to be \$2,700.00 per month but Lee Barney's first check was only \$2,500.00 with the remaining months being \$2,700.00 per month.

⁴ In February of 1996, Jon Siddoway fired Lee Barney. Lee Barney was only paid \$2,700.00 per month for the months of January and February. Jon Siddoway should have been paid \$32,400.00 for 1996, assuming the corporation was operating. Jon Siddoway claims in his deposition that the corporation stopped operating as of June 30, 1996, and Siddoway Enterprises was incorporated and began operating the first part of July, 1996. The excess taken by Siddoway for 1996, would probably be more correct at \$20,300.00.

Standard Tile W-2 Income Summary

YEAR	BARNEY	SIDDOWAY
1989	\$17,307.00 ¹	\$36,925.00 ²
1990	\$39,103.00	\$73,500.00
1991	\$43,623.05	\$74,025.00
1992	\$32,004.06	\$38,025.00
1993	\$35,901.15	\$48,800.00
1994	\$42,800.00	\$62,900.00
1995	\$40,500.00	\$55,500.00
1996	\$5,400.00	\$36,500.00

¹ This figure was taken from the W-2 received by Lee Barney from Standard Tile, Inc. in 1989, covering a period of nine (9) months.

² This figure was taken from the personal tax return form 22441 of Jon Siddoway. Neither Standard Tile, Jon Siddoway, and/or Tubber Okuda, the accountant for Standard Tile and Mr. Siddoway, could produce the 1989, W-2's for Jon Siddoway or any of the financial documents for 1989.

Base Salary for Siddoway and Barney

YEAR	Per Month	Per Year
1989	\$1,923.00 (9 months)	\$17,307.00
1990	\$1,923.00	\$23,076.00
1991	\$2,400.00	\$28,800.00
1992	\$2,400.00	\$28,800.00
1993	\$2,400.00 ¹	\$29,259.62
1994	\$2,700.00 ²	\$32,200.00
1995	\$2,700.00	\$32,400.00
1996	\$2,700.00	\$32,400.00

This summary was prepared from information taken from the statements of assets, liabilities and equity for Standard Tile, Inc. for the years 1989, through 1990. The 1989, records were unavailable and personal tax returns, W-2's, and the corporate tax returns for Standard Tile have also been used. The 1989, salary of \$1,923.00 was taken from Lee Barney's W-2.

¹ In November of 1993, Lee Barney received salary of \$2,500.00 per month. Jon Siddoway had previously been taking \$2,500.00 per month and in November increased to \$2,600.00 per month. In December, Siddoway's salary remained at \$2,600.00 per month and Lee Barney was given a check for \$2,759.62 as salary for December. Barney received a \$6,000.00 bonus i.e. 25 percent, and Siddoway received an \$18,000.00 bonus i.e. 75 percent.

² Lee Barney's first monthly salary check was \$2,500.00 in January of 1994. Jon Siddoway received \$2,600.00 per month in January. Thereafter, Lee Barney and Jon Siddoway both received \$2,700.00 per month as base salary.

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EXHIBIT B

Trial Exhibit 24 “Record of Lee Barney Stock”

Acct of Lee Barney Stock

Nov. 30, 1990 thru March 31, 1996

	1	2	3	4	5
2)					
3-90 Lee Barney - Bonus				10000.00	
less: Fed & State Taxes Withheld				- 2865.00	
Balance				7135.00	
less: Payment for Stock		- 467.00			824 1/2
less: Excess of Par Value		6533.00			
Total Paid for Stock				- 7000.00 (2)	
3-90 Clerk 3389 - Net check gain				135.00	
3)					
3-94 Lee Barney - Bonus				10000.00	
less: Fed & State Taxes Withheld				- 3938.55	
Balance				6061.42	
less: Payment for Stock		- 400.00			620 7/8
less: Excess of Par Value		- 5600.00			
Total Paid for Stock				6000.00 (3)	
3-94 Net check paid to L. Barney				61.42	
CK # 5677					
4)					
3-90 Lee Barney Bonus				5000.00	
less: Fed & State Taxes Withheld				- 1432.50	
Balance				3567.50	
less: Payment for Stock		- 100.00			476 7/8
less: Excess of Par Value		- 1400.00			
Total Paid for Stock				- 1500.00 (1)	
Balance				2067.50	
less: Deduction from Net Res				- 1500.00	
Net check				567.50	
5)					
3-95 Lee Barney Bonus				7500.00	
less: Fed & State Taxes Withheld				- 5737.5	
Balance				6926.25	
#136 less: Note Rec from L. Barney				- 1556.21	
Balance Due to Lee Barney				5370.04 (4)	
Note Payable to Barney					
					162 7/8
Total for Stock purchases				14500	

EXHIBIT C

Trial Exhibit 25 “STI Net Equity of the Corporation”



National® Brand

45-605 Eye-Ease®

45-305 2-Pack

Made in USA

Standard Life Inc

Net Equity of the Corporation

Sept 30, 1999 * to Dec. 31, 1995 *

January 1, 1990

Initials Date

Prepared By

Approved By

	1	2	3	4	5
		Jan 1 1990	Net Additions	March 31 1996	
Stockholders' Equity					
Capital Stock		50.00	9.67	59.67	
Retained Earnings		17558	35196	52754	
Excess of BV Value on Stock		0	13533	13533	
Total Equity		22558	49696	72254	
See O Barney became a stockholder on:					
		Share	%		
Nov 30, 1990		100	1.76		
Dec. 31, 1990		467	8.24		
Dec 31, 1994		400	6.20		
Total shares		967	16.20		
Note: financial statements were prepared on a quarterly basis, therefore the nearest financial statement was used for these computations.					

Exhibit D

Trial Exhibit 27 “STI Loan Receivable from Jon D. Siddoway”

loan Receivable from Jon S Siddoway

	1	2	3	4	5
	Acct. # 135	Entry or check no.	Debit or charges Dr.	Credit or Payments (Cr.)	Loan Rec - JS # 135
1	12-31-89	Balance forward			.00
2					
3	8-13-90	Wt Goss Cr Un # 3141	10000.00		10000.00
4	12-31-90	Cr. Note Rec-JS		10000.00	0.00
5					
6	1-22-92	South Jordan City - JS 3983	5673.08		5673.08
7	9-30-92	Draw from Zion's Sav-JS 60	995.46		6668.54
8	9-30-92	Transfer from #290 acct-JS JE		184.17	6484.37
9	10-07-92	S & B Storage 4485	3348.00		9832.37
10	12-31-92	Jon S - Natl Bk of Wash left			
11		in Standard Bk	PR	5836.09	3996.28
12					
13	3-30-93	Scuba Vacation - JS 4494	2295.49		6291.77
14	3-09-93	Colonial Natl Bk - JS 4704	217.75		6509.52
15	5-10-93	- - - JS 4796	2824.00		9333.52
16	5-20-93	Design Exch JS 4809	470.00		9803.52
17	5-31-93	AJ Dean & Son JS 4819	1069.94		10873.46
18	8-13-93	Colonial Natl Bk JS 4936	439.47		11312.93
19	9-15-93	- - - JS 4987	365.71		11678.64
20	11-27-93	Wholesale Satellite JS 5086	2157.00		13835.64
21	12-23-93	Colonial Natl Bk JS 5129	203.12		14038.76
22	12-31-93	Credit from #18000 Bonus - JS JE		14038.76	-0-
23					
24	3-31-94	Colonial Natl Bk 5256	2534.58		2534.58
25	4-06-94	Jon Siddoway 5264	2500.00		5034.58
26	4-12-94	Colonial Bank 5285	162.19		5196.77
27	6-05-94	- - - 5368	466.80		5663.57
28	6-15-94	Zions Bank - loan 5391	25000.00		30663.57
29	8-14-94	Colonial Bank 5478	2100.5		30873.62
30	9-21-94	Burgard 5512	1012.57		31886.19
31	9-30-94	Note paid Zions Bank #240 JE		25000.00	6886.19
32		(#25,000 was deposited 7/31/94)			
33	11-10-94	Colonial BANK 5601	6592		6952.11
34	12-31-94	Credit from #32,000 Bonus			
35		left in Standard Bk PR		6952.11	-0-
36					
37	12-31-95	Note Rec from Jon S.			
38		for Standard Bk			
39	12-31-95	Credit from #22,000 Bonus			20850.00



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45-305 2-Pack
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Standard Title Inc

Page 141

born receivable from Lee O Barney

Prepared By	Initials	Date
Approved By		

1		2		3		4		5	
Acct #		Entry		Draws or		Credits or		born	
		check		charges		Payments		Rec. - L.B	
		No.		DR		<CR>		# 136	
1	12-31-89	Balance forward						2000.00	
2									
3	9-29-90	Lee Barney		# 3234	1500.00			3500.00	
4	11-30-90	C. Note Rec-LB		JE		1500.00		2000.00	
5									
6	07-05-91	First card Visa							
7	✓	Barney personal chgs		36.55	259.16			2259.16	
8									
9	10-06-92	Swanson		4480	1064.62			3323.78	
10	10-07-92	S & B Storage		4485	1115.50			4439.28	
11	12-31-92	Lee B. Net payroll left				1926.85		2512.43	
12	✓	in Standard Title		PR					
13									
14	04-19-93	Robert Merrill Stidley		4755	1145.00			3657.43	
15	04-28-93	Mod gutter - LB		4765	449.25			4106.68	
16	12-31-93	Credit from Bob's Bonus		JE		4106.68		- 0 -	
17									
18	4-13-94	Lee Barney		5281	635.00			635.00	
19	4-13-94	Lee Barney		5284	5559.1			1190.91	
20	7-27-94	Comfort Systems		5433	553.00			1743.91	
21	8-11-94	First card		6460	106.75			1850.66	
22	10-14-94	AM elect co		5552	467.02			2517.68	
23	12-31-94	credit from \$10,000 Bonus							
24	✓	left in Standard Title		PR		2517.68		- 0 -	
25	12-31-94	Note Rec for stock		JE	6000.00			6000.00	
26	12-31-94	Payment for stock from							
27		\$10,000 Bonus		JE		6000.00		- 0 -	
28									
29	4-01-95	Personal purchase		CE	1232.50			1232.50	
30	4-20-95	First card		5863	58.95			1291.45	
31	5-27-95	First card VISA		5914	69.20			1360.65	
32	8-08-95	First card		6042	44.32			1404.97	
33	8-23-95	✓		6073	53.46			1458.43	
34	9-30-95	Personal purchase		JE	97.78			1556.21	
35	12-31-95	Credit from \$7500 Bonus		JE		1556.21		- 0 -	
36									
37									
38									



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Standard Sili, Inc

page 1 of 1

Loans Payable to Stockholder - Lee O. Barney

Prepared By	Initials	Date
Approved By		

	1	2	3	4	5
	Acct # 285	Entry in check No.	Payments or Draws on loan DR	Credits or Loans to Corp <CR>	Balance loan payable to Lee Barney <CR>
1	12-31-89				-0-
2					
3	12-31-93	credit from Bmw 6000 left			
4	-	in standard Sili	DR	114842	114842
5					
6	2-08-95	first car	5733	2022	112820
7	4-01-95	personal purchases	CR	112820	-0-
8					
9					
10	12-31-95	Balance due on 7500 Bmw		537004	537004
11					
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hours payable to stockholder - Jim Siddoway

Initials Date
Prepared By
Approved By

	1	2	3	4	5
	Acct # 290	Entry or check No.	payments or draws on loan DR	credits on loan to corp <CR>	bal. loan payable to Jim Siddoway <CR>
1	12-31-89 Balance forward				0.00
2	1-30-90 loan deposit to std TOL	CR		4500.00	4500.00
3	1-01-90 JS - correct check	2782		3380	4533.80
4	6-21-90 Dawn Siddoway	3082	2000 -250	1750.00	2783.80
5	9-30-90 JS - out of Town subsistence				
6	✓ paid by Siddoway personally	DE		2611.64	5395.44
7	12-31-90 } Jim Siddoway - payroll ck				
8	✓ left in the corporation	3391		5500.00	10995.44
9	12-31-90 Zion mc - personal chg	AP	18913		10706.31
10	12-31-90 offset - Note Rec - JS 135			10000.00	706.31
11					
12	1-4-91 loan deposit to std TOL by Jim	CR		22000.00	22706.31
13	1-01-91 reverse Zion mc	REV		18913	22895.44
14	1-31-91 chg Jim for Zion mc pymt	3435	18913		22706.31
15	3-04-91 Dawn Siddoway - Regy loan	0001	22000.00		706.31
16	3-07-91 first capital wk	3484	32050		38581
17	7-05-91 Discover card - JS personal	3649	20164		18417
18					
19	9-30-92 transfer & credit loan Rec - JS	DE	18417		-0-
20					
21	12-31-93 credit from 10000 bonus				
22	left in standard TOL JS	DE		233834	233834
23					
24	7-28-94 Dawn Siddoway traded in her				
25	personal car on '93 Lincoln	DE		6000.00	293834
26	11-14-94 AFCA set up Acct	5603	2500		291334
27					
28	1-31-95 Deposit - loan from Jim S	CR		18500.00	2141334
29	3-26-95 Colonial Bank	5812	8998		2132339
30	4-01-95 personal purchases	CE	88963		2043376
31	4-07-95 IRS - JS 94 Tax	5827	740300		1303076
32	4-07-95 Wt St Tax - JS 94 Tax	5829	1799.00		1123176
33	4-17-95 S Jordan City - Bay Permit	5835	150.00		1108176
34	4-20-95 Colonial BANK	5866	10757		1097419
35	5-06-95 Metro West Ready Mix	5885	10370		987049
36	6-14-95 Colonial Bank	5945	36981		950068
37	4-20-95 Costco	5832	36389		913679
38	7-06-95 Intermtn Aquatics	5923	34876		878803
39	7-31-95 Beacon mtl	6029	51		-



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Standard Lids Inc.

Page 2 of 2

loan payable to stockholder - Jon Sidloway

Prepared By	Initials	Date
Approved By		

	1	2	3	4	5
	Acct # 290	Entry or check No.	Payments or Draws on loan OR	Credits or loans to corp <CR>	Balance loan payable to Jon Sidloway <CR>
1	9-30-95 Balance Forward				8245.51
2	12-18-95 Colonial Bank	* 5763	542.95		7702.56
3	12-31-95 offset for loan rec.-95 (#135)	DE	117.15		7585.41
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