

1966

Leon Frehner, and Minnie C. Frehner, dba  
Mountain Gardens, and Leon C. Frehner v.  
Margaret Morton, D. A. Skeen, Bertha K. Skeen and  
Prudential Federal Savings & Loan Association, A  
Corporation : Appellant's Reply Brief To  
Respondents' Cross Appeal

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# IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

LEON FREHNER, and MINNIE  
C. FREHNER d/b/a MOUN-  
TAIN GARDENS, and LEON C.  
FREHNER,

*Plaintiffs and Respondents,*

vs.

MARGARET MORTON, D. A.  
SKEEN, BERTHA K. SKEEN  
and PRUDENTIAL FEDERAL  
SAVINGS & LOAN ASSOCIA-  
TION, A Corporation,

*Defendants and Appellants.*

SEP - 1966

Clerk Supreme Court Utah

No.  
10525

## APPELLANT'S REPLY BRIEF TO RESPONDENTS' CROSS APPEAL

Appeal from the Judgment of the  
Third Judicial District Court for Summit County  
Honorable Joseph G. Jeppson, Judge

BENJAMIN SPENCE

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TAIN GARDENS, and LEON C.  
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TION, A Corporation,

*Defendants and Appellants.*

No.  
10525

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## APPELLANT'S REPLY BRIEF TO RESPONDENTS' CROSS APPEAL

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### STATEMENT OF FACTS WITH RELATION TO RULING OF THE LOWER COURT ON APPELLANTS' MOTION FOR NEW TRIAL.

Respondents' cross appeal in this action upon the question of the lower court, reducing the attorney's fee from \$750.00 to \$500.00 and contends the court erred in reducing the attorney's fee awarded by the jury.

Upon the entry of the judgment on the verdict in this matter by the court, the Appellants filed a motion with the court to have verdict and judgment set aside and to have judgment entered in accordance with defendants' motion for directed verdict and motion for new trial (R. 71).

Upon the hearing of this motion the court informed the Attorney for Respondent that unless he consented to a reduction of the Attorney's fee from \$750.00, as found by the jury, which the Appellants contend was improperly submitted to the jury, the court would grant Appellants' motion for a new trial, and in accordance therewith the attorney for Respondents consented to the reduction, rather than have a new trial granted. From the order of the court, (R-87) Respondents' cross appeal, and in response to Respondents' Cross Appeal, Appellants submit the following:

## **ARGUMENT**

### **POINT I.**

**THE COURT DID NOT ERR IN REDUCING THE ATTORNEY'S FEE AWARDED BY THE JURY. THE COURT DID, HOWEVER, IN SUBMITTING TO THE JURY INSTRUCTION 9-D AND PROPOSITION NO. 3 IN ITS SPECIAL VERDICT.**

As quoted in Respondents' brief, we quote again in support of Appellants' contention:

Title 38-1-18 UCA 1953:

“In action brought to enforce any lien under this chapter the successful parties shall be entitled to recover a reasonable attorney’s fee, *to be fixed by the court*, which shall be taxed as costs in this action.” (Emphasis supplied).

In the first place it is the contention of Appellants that the court should never have submitted the question of attorney’s fees to the jury in view of the language of the foregoing quoted Section 38-1-18 UCA 1953. If the court allowed any attorney’s fee at all, it should have been fixed by the court and not the jury. After the verdict of the jury, we are inclined to believe the court realized this and pursuant thereto did fix the attorney’s fee, in granting the Appellants’ motion for a new trial unless Respondents’ attorney did reduce the fee fixed by the jury in the sum of \$750.00 to that of \$500.00 (R-87).

We agree with Respondents’ attorney as contended for in his brief in paragraph two at page 25, that “what was a reasonable fee in 1950 may not be reasonable in 1966 due to the reduced buying power of the dollar.”

Under Section 52-1-18 UCA 1943 the statute provided that the successful party shall be entitled to recover a reasonable attorney’s fee to be fixed by the court, not to exceed \$25. Upon the amendment of this statute wherein the legislature provided for a reasonable attorney’s fee without fixing the amount we are inclined to believe that they did not intend to have the court

fix an attorney's fee out of proportion to the value of the dollar due to inflationary prices in 1966. Inflation has not reduced the value of the dollar to the extent which Respondents' attorney would contend for in proportion to the sum of \$25.00, as provided by Section 52-1-18, UCA 1943, to that of \$500.00 now fixed by the court. If the contention of Respondents' attorney is correct that the Appellate Court has a right to fix attorney's fees in such cases, which Appellants contend is not correct, it is the contention of the Appellants that this fee of \$500.00 should be reduced accordingly.

## POINT II

**IT IS THE PREROGATIVE OF THE TRIAL COURT TO FIX A REASONABLE ATTORNEY'S FEE, IF ONE IS ALLOWED AND NOT THE SUPREME COURT.**

The most recent case on this point is *Brimwood Homes, Inc. vs. Knudsen Builders Supply Co.*, 14 Utah 2nd 419, 385 P2d 982, 1963, wherein the Utah Court stated at page 984:

“The defendant being the successful party is entitled to a reasonable attorney's fee to be assessed by the lower court.”

More in point are the Washington cases of *Elmore v. Graystone of Centralia, Inc.*, 387 P2nd 75, (Wash. 1963), and *Gannon v. Emtman*, 405 P. 2nd 254, (Wash. 1965).



In the Elmore case at page 76 the court makes the following conclusion:

“The judgment is affirmed, but the cause is remanded to the trial court to consider defendant’s motion for an award of Attorney’s fees on appeal.”

In the Gannon case at page 257 the court cites the Elmore decision for the following proposition:

“Respondent will be awarded his costs on appeal, and the cause will be remanded to the trial court to consider respondent’s motion for an award of attorney’s fees on appeal.”

It is the contention of Appellants that these cases support the proposition that it is improper for the Supreme Court to make an award of Attorney’s fees without remanding the case to the trial court for its consideration.

### POINT III

THE COURT ERRED IN DIRECTING THE JURY THAT A VALID LIEN EXISTED AGAINST THE PROPERTY OF DEFENDANTS, D. A. SKEEN AND BERTHA K. SKEEN, AND ALSO ERRED IN DIRECTING A VERDICT AGAINST D. A. SKEEN AND BERTHA K. SKEEN.

Plaintiffs’ attorney is not entitled to attorney’s fee for his services in this case, since it is not properly

an action brought to enforce a lien as contemplated by the Utah Code pertaining to mechanic's liens.

As set forth in Appellants' Point 1 and Point 2 in its main brief, this action is not properly within the Mechanic's lien statute and therefore attorney's fees cannot be awarded. Without reiterating the arguments set forth in said Points 1 and 2, we respectfully refer thereto in support of this proposition.

Attorney's fees were fixed by the trial court in accordance with Section 38-1-18 UCA 1953, if such an attorney's fee were allowable, and the lower court did not err in exercising its discretion in reducing the amount improperly set by the jury.

Section 38-1-18 UCA 1953, gives the trial court exclusive power to set fees, if the case is properly an action to enforce lien rights.

Plaintiffs' attorney has not cited a single case under Utah law where an increase in attorney's fee is cited as being proper. That is because the Utah court has always considered the question within the discretion of the trial court in a proper case.

## CONCLUSION

As contended for by Appellants, the court erred in directing a verdict against the defendants D. A. Skeen and Bertha K. Skeen, that the property in question, and under the facts, was property subject to a lien, and if said property was not subject to a lien

in favor of the Respondents, then there was no attorney's fees to be allowed, which, of course, is self evident.

If the court so holds that the property in question was subject to a lien in favor of Respondents, then it was the prerogative of the lower court to fix such a reasonable attorney's fee, and not the Supreme Court on appeal, as outlined in the cases cited in this reply brief of the Appellants.

Respectfully submitted,

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