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C.E. Butters Realty and Construction Inc. dba C.E. Butters Construction v. Robert McFarland, Renae W. McFarland, Tim Bovee dba Bovee Construction Company and Merwin Holgate dba Holgate and Sons Construction Company : Brief of Appellee

Utah Court of Appeals

UTAH COURT OF APPEALS

C.E. BUTTERS REALTY AND CONSTRUCTION, INC., dba C.E. BUTTERS CONTRUCTION, Plaintiff/Appellant, v. ROBERT MCFARLAND, Trustee, RENAE W. MCFARLAND, Trustee, TIM BOVEE Defendants/Appellees/Cross-Appellants TIM BOVEE d/b/a BOVEE CONSTRUCTION COMPANY; MERWIN HOLGATE, d/b/a HOLGATE & SONS CONSTRUCTION COMPANY; ROBERT McFARLAND Trustee and RENAE W. McFARLAND, Trustee Third-party Plaintiffs.	Priority No. 15 Supreme Court Case No. 20020571-SC Second District Case No. 97-090-7206 CV

BRIEF OF APPELLEES/CROSS-APPELLANTS

Appeal from an Order of the
Second Judicial District Court, Weber County
Before the Honorable Pamela Heffernan

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

IN THE UTAH COURT OF APPEALS

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JURISDICTION

The Utah Supreme has original jurisdiction over this matter pursuant to Utah Code Ann. §78-2-2(3)(j) and Utah R. App. P. Rules 3 and 4. Pursuant to §78-2-2(4), Utah Code Annotated, the Utah Supreme Court transferred this matter to the Utah Court of Appeals.

ISSUES PRESENTED FOR REVIEW

1. Did the Appellants err when they failed to Marshal the evidence in favor of the bench verdict and then show why this evidence was not clearly erroneous.

Standard of Review: It is the Appellants' duty to marshal all the evidence in a light most favorable of the court's ruling and then show that it is so lacking in support as to make the findings clearly erroneous. Groberg v. Housing Opportunities, Inc., 68 P.3d 1015, 1018 (Utah Ct.App. 2003).

Preservation of issue on Appeal: The issue is new because of the filing of Appellants' Appeal inappropriately and therefore should be available to raise at this time.

2. Whether the court erred in ignoring the industry standard for supplying road base that will meet state specifications.

Standard of Review: This presents questions of both law and fact. This court can overturn clearly erroneous findings of fact by the trial court. See Anderson v. Brinkerhoff, 756 P.2d 95 (Utah App. Ct. 1988). This court reviews questions of law for correctness. See Jorgensen's Inc. v. Ogden City Mall Co., 26 P.3d 872 (Utah App. Ct. 2001). 'Course of dealing' or industry usage and custom is admissible evidence to construe ambiguous terms of an agreement or to supply missing terms in an otherwise valid agreement. See Hector v. United Savings and Loan Ass., 741 P.2d 542 (Utah 1987). A usage or custom may aid in interpreting the intentions of the parties to a contract, the real character of which is to be ascertained, not alone from express stipulations, but also from general implications and presumptions arising from the nature and character of the employment. See Anderson v. Daly Min. Co., 50 P. 815 (Utah 1897).

Preservation of issue on Appeal: Appellees' docketing statement at 8(d) and 8(b).

3. Whether the court erred in ignoring the fact that spec road base was not provided.

Standard of Review: This presents questions of both law and fact. This court can overturn clearly erroneous findings of fact by the trial court. See Anderson v. Brinkerhoff, 756 P.2d 95 (Utah App. Ct. 1988). This court reviews questions of law for correctness. See Jorgensen's Inc. v. Ogden City Mall Co., 26 P.3d 872 (Utah App. Ct. 2001).

Issue preserved for Appeal: Docketing statement at 8(b).

4. Whether the court erred in ignoring the industry standard for compaction.

Standard of Review: This presents questions of both law and fact. This court can overturn clearly erroneous findings of fact by the trial court. See Anderson v. Brinkerhoff, 756 P.2d 95 (Utah App. Ct. 1988). This court reviews questions of law for correctness. See Jorgensen's Inc. v. Ogden City Mall Co., 26 P.3d 872 (Utah App. Ct. 2001). 'Course of dealing' or industry usage and custom is admissible evidence to construe ambiguous terms of an agreement or to supply missing terms in an otherwise valid agreement. See Hector v. United Savings and Loan Ass., 741 P.2d 542 (Utah 1987). A usage or custom may aid in interpreting the intentions of the parties to a contract, the real character of which is to be ascertained, not alone from express stipulations, but also from general implications

and presumptions arising from the nature and character of the employment. See Anderson v. Daly Min. Co., 50 P. 815 (Utah 1897).

Preservation of issue on Appeal: Appellees' docketing statement at 8(d).

5. Whether the court abused its discretion in ruling as a matter of fact John Owens was responsible for the compaction and the Appellants were not.

Standard of Review: This presents questions of both law and fact. This court can overturn clearly erroneous findings of fact by the trial court. See Anderson v. Brinkerhoff, 756 P.2d 95 (Utah App. Ct. 1988). This court reviews questions of law for correctness. See Jorgensen's Inc. v. Ogden City Mall Co., 26 P.3d 872 (Utah App. Ct. 2001).

Issue preserved for Appeal: See Docketing Statement at 8(d).

6. Whether the court erred in not awarding the Defendants attorney fees inasmuch as the final judgment award was less than the amount of the Offer of Judgment.

Standard of Review: "The interpretation of a statute [or rule of the Court] poses a question of law which this court reviews for correctness and without deference to the lower court's conclusions." Zoll and Branch, P. C. v. Asay, 932 P.2d 592, 593 (Utah 1997).

Issue preserved for Appeal: See Docketing Statement at 8(f).

7. Whether the court erred when it found that the Defendants did not put on any evidence in regards to the Plaintiffs' slander of title and tortuous interference with contractual and prospective economic relations.

Standard of Review: This presents questions of fact. This court can overturn clearly erroneous findings of fact by the trial court. See Anderson v. Brinkerhoff, 756 P.2d 95 (Utah App.Ct. 1988).

Issue preserved for Appeal: See Docketing Statement at 8(f).

8. Whether the court erred when it allowed attorney fees to be attached to the property as part of the mechanic's lien when Robert McFarland, the property owner, was never notified of the mechanic's lien as required by Utah Code Annotated §38-1-7(4).

Standard of Review: "The interpretation of a statute [or rule of the Court] poses a question of law which this court reviews for correctness and without deference to the lower court's conclusions." Zoll and Branch, P. C. v. Asay, 932 P.2d 592, 593 (Utah 1997).

Issue preserved for Appeal: See Docketing Statement at 8(g).

STATEMENT OF THE CASE

Bovee Construction was attempting to do the excavation and paving work for Holgate and Sons Construction, who was contracted to build the building and all improvements by the property owner McFarland. Essentially the controversy is between Bovee Construction Company [hereinafter referred to as the Appellee] [1] and its subcontractor the Appellants Butters Construction Company et. al. [hereinafter referred to as the Appellants].

[1] Although technically McFarland and Holgate are named in this suit they will not be referred to as the Appellee.

Appellee contracted for the delivery and compaction of road base that meet the requirements of his plans and specifications. The Appellants delivered what is known as pit run and did not deliver the required road base. In addition to which the original estimates that the parties had talked about were far exceeded by the Appellants and when asked to verify how much material had actually been delivered to the sight a very sophisticated and confusing process ensued wherein the Appellants made attempts to convince the Appellee what had been delivered. The books and records and the accounts of what had been delivered were confusing, misleading, at times contradictory and had been tampered with making any bill from the Appellants untrustworthy.

Subsequently, since this dispute was not resolved for a substantial period of time the material that was delivered was not compacted properly, was not what it was supposed to be, and subsequently the surface area of the paving failed, causing parts of the parking lot and the curbs, gutters and through driveway to fail. The Appellee counter sued the Appellants for their failure to provide the proper material or to properly compact the material that they did provide.

STATEMENT OF THE FACTS WITH CITATIONS TO THE RECORD

Holgate and Sons Construction company was hired by Robert McFarland to construct a Subway Sandwich shop [hereinafter referred to as the project]. As a part of the project Holgate and Sons Construction sub-contracted with Appellee

for the paving around the project which included driveways, curbs and gutters, approaches, parking and the street.[2] (Tr. Vol. I at 44-45).

Appellee hired a man by the name of John Owens [hereinafter referred to as Owens] as an employee who was responsible for supervising a subcontractor to bring the surface of the parking area and the street to what is called in the business 'asphalt ready'.[3] [4] (Tr. Vol. I at 134-61, Vol. IV at 19). John Owens then went to the Appellants and hired the Appellants to bring the project up to 'asphalt ready'. (Tr. Vol I at 161-62).

Appellee then met with representatives from Appellants (Kent Butters) and spread out the plans and specifications over the hood of a truck and discussed the Appellants' responsibility. (Tr. Vol. II at 25-6, Vol. IV at 52). Appellee and Kent Butters had a discussion about the fill material. Appellee asked Kent Butters if it was good material and Butters assured him it was. Then Appellee told Kent Butters that he didn't care as long as it met standards. Bovee then delivered to Kent Butters a copy of the plans and specifications. Industry standards require spec road base in all public roadways. The Appellants failed to provide spec road base in the roadway. The parties agreed to $95.00 per 13 ton truckload.

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[2] There were other things the Appellee was contracted to do on this project but they have no relevance to the dispute herein.

[3] "Asphalt ready" is a term used to describe bringing the fill to a *compacted* level ready for the asphalt to be applied on top.

[4] This allegation is not without considerable dispute. Appellants claims that it was John Owens responsibility to bring the project to 'asphalt ready' condition. They were only responsible to deliver the materials. The Appellee contends that it was the responsibility of the Appellants to both deliver the material and to make the project asphalt ready.

Appellants work then commenced on November 6, 1996. On November 7, 1996 the Appellants scooped out roadway which Kent Butters had complained was too wet to place road base on top of. (Tr. Vol. IV at 57, Exhibit 5 at 2). On November 9, 1996, despite the Appellants claims that the project was plagued with water, they brought in a water truck and emptied two thousand gallons of water on the project. (Exhibit 9). Kent Butters time cards indicate that on the sixth, seventh, eighth and ninth, he ran the grader (Exhibit 8). The loader was on the property for two days, the 6th and 7th of November and on both days the time card of Kerry Nelson indicates that he was running the loader. The time card of Kerry Nelson indicates that the loader was there at the project on the 6th of November for two and half hours including travel time.[5] (Exhibit 5 at 1-2).

The plans showed clearly that the part of the material to be delivered was going into a street that ran adjacent to the parking area and would be used by the public.[6] (Tr. Vol. II at 147).

Not all road base is the same nor does it have the same characteristics. But to meet road base specifications it has a rather narrow band of gradation requirements which must be met in order for it to be classified as road base. (Tr. Vol. II at 166). If it is *processed* road base this means that it still falls within the gradation requirements for road base, but in addition is processed or fractured rock

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[5] This time card was also modified to match the bill. First, the time card said 3:30 to 5:30 and was changed to state 3:00 to 5:30.

[6] This is important because Appellants claims ignorance of what is required to go under asphalt in a public street. Something which is clearly a standard and which the Appellants knew or should have known.

instead of natural rock. Fractured rock in the same gradation as road base is substantially more stable than road base due to the fractured nature of the rock and its characteristics of locking together as opposed to rolling as an un-fractured rock can do. This is critical because anyone who provides road base material to a job and works as an excavator, as the Appellants do, knows that when you are working in a public street the requirements are that you use processed road base or what is known as spec road base as your road base layer under the asphalt.[7] (Tr. Vol. V at 29).

a.) Controversy over how much road base was actually brought to the job site.

First, the controversy over how much material was brought in focuses on the accounting records of the Appellants and the suspicious circumstances over when and how much material was brought in on certain days.

The accounting records of the Appellants were totally and completely non-existent, sloppy, altered, and there was evidence that the records were actually created subsequent to an inquiry by the Appellee to review them. (Tr. Vol. III at 235, Vol. IV at 209, Vol. V at 38, 41-2, Exhibits 4-11).

There was also an inconsistent record keeping method on behalf of the drivers. Some drivers would use one tic for a truck and a pup while other drivers would use two tics for a truck and a pup. Some of the same drivers who one day

[7] Appellants's own expert Alex Rush testified that every municipality for which he was familiar required spec road base under the asphalt. (Tr. Vol. IV at 203).

used one tic for a truck and a pup would on another day use two tics to indicate a truck or a pup. Becky Butters was the bookkeeper and she deciphered these tics always charging for a truck and a pup even though the tics if interpreted consistently would have shown a truck and a pup on one day and only a truck on another day. She claimed that she knew those drivers who used a tic to indicate a truck and a pup and those drivers who indicated two tics to indicate a truck and a pup. (Tr. at Vol. III at 186-205).

Additionally, there were times when Becky double billed for some material, billing Appellee for material that was actually delivered to another customer. It was also clear that Becky changed the time cards which were the foundation for the bill. (Tr. Vol. III at 220-23).

The lower court found that the Appellants' written accounting was hopelessly inaccurate and unreliable. That the drivers' records were inconsistent, showed that Appellee were charged for loads likely delivered to a different site, and the originals were altered by the Appellants accounting employee, Becky Butters, in such a way that Ms. Butters was unable to decipher what were her changes versus what were the original markings by the delivery drivers. ***None of the drivers testified at trial.*** (Tr. Vol. III at 220, 225-27, 229, 241-44; Exhibits 8-9).

First, the bill they sent claimed they delivered 204 truckloads. Inasmuch as the Appellants never produced any load tickets to the job the Appellee wanted verification of the bill. (Tr. Vol. V at 38). The Appellants, after repeated

demands, finally produced time cards of the truck drivers, which had been altered by Becky Butters and showed only 197 loads had been delivered. The time cards of the drivers before they were altered showed 182 loads. This was 182 truckloads delivered, not 13 ton truckloads. The court determined that the parties agreed to the 13 ton truckloads and therefore reduced the 182 number to 146 as the truckloads that were actually delivered. (See Addendum Court's Findings of Fact Conclusion of Law 8/3/01 at 5).

Secondly, there were three days which were in conflict with other pretty reliable evidence. First, November 16th and 17th was a weekend in which there were 61 loads Appellants claimed to have delivered. No one can remember much material and certainly not 61 loads of material being on the job site on any Monday morning in which they were on the job.

Merv Holgate [hereinafter referred to as Holgate] testified that he was frustrated that the dirt was not getting delivered and that he spoke with Owens and demanded more fill be delivered. Owens promised more fill to be delivered over the weekend of November 16th and 17th. Holgate arrived at the project site on the morning of Monday, November 18th and testified that only approximately 5 loads of dirt, at the most, appeared to have been delivered over the weekend. (Tr. Vol. III at 43-45).

Owens, who was keeping track of the material hauled in his day planner was unaware of any material which came in over the weekend. (Exhibit 506). Owens was further working on November 16th for eight hours or at least until three

thirty in the afternoon and while he was there nothing was delivered. (Tr. Vol. I at 166-67, 172; Exhibit 506). Owens also testified that on Sunday, November 17, he was there and it was rainy and snowy, he met with Appellants' employee Doug Treseder who was operating the grader and asked what could be expected for that day and was told that Doug would be working for about an hour and would be leaving, no one was going to deliver on that day. (Tr. Vol. I at 168-69). The court ruled that the twenty-six loads that had been hauled in on Saturday the 16th of November did not get delivered. (See Appellant's Brief at 14).

Further, Owens day timer shows that on Friday November 15th he was there all day and nothing was delivered on that day either. (Exhibit 506, Owen's Day Planner). The bill of the Appellants billed for eight truckloads that day. (Exhibit 211, Appellants' Bill).

Owens was contacted by truck drivers on the fifteenth to verify the loads they had delivered. Becky Butters was also confused about the loads that had been delivered and therefore went to Owens for help. On Monday, November 18th Owens could not verify any loads that Appellants claimed to have delivered and it was at this point that Owens quit keeping track of the truckloads delivered. (Tr. Vol. I at 257-58). Up until this point he kept and accurate record of the loads delivered.

According to the Appellants the project was plagued by water problems. In fact the roadway next to the Subway parking had to be excavated out and re-filled pursuant to Kent Butters' complaint that the roadway was too boggy. (Tr. Vol IV

at 81). Even with all these claimed water problems, when it was snowing and raining on the 17th of November the Appellants' claim 35 loads were delivered to the site. (Exhibit 211, Appellants' Bill).

The court found the parties agreed to 13 ton truck loads. This is not a disputed fact on appeal.

The fact of the matter is that the truckloads for which the Appellants wanted full compensation for came from a Ford Truck, with bed liner, with a capacity of 8.1 tons, two loads credited to a belly dumpster that had a load capacity of 22.3 tons, one dump truck which had a liner that prohibited a full fill which had a maximum load capacity of 8.1 tons, and pups which had a maximum capacity of 8.5 for a two axel and 10.5 for a three axel. (Tr. Vol. IV at 18; Vol. V at 116-18).[8] Furthermore, Bovee had brought into the project by October 3, 1996 and had fully compacted enough fill material to bring the project parking lot and roadway to a level which would have required only eight inches of spec road base on the road and four inches of road base in the parking area. (Tr. Vol. IV 122-23). It was further testified that none of this material was removed from the site.[9] Bovee delivered a total of 116 loads of sandy silt fill material. This material tested

[8] Appellee does not agree with the figures supplied by Appellants but uses them for argument sake only.

[9] This is important because when Appellants' experts testify about what they believe was actually delivered, neither one has accounted for the Bovee material.

at 114.2 proctor and therefore would have had much greater volume than the heavier road base.[10] (Tr. Vol. IV 122-23).

Appellants' expert Alex Rush [hereinafter referred to as Rush] took core samples and tested these samples. (Tr. Vol. II at 149). Rush ignored photographs which were taken showing clearly a difference in the different colors of strata. (Tr. Vol. II at 197-98). But Rush chose to use a roughly two inch tube that he claimed he could not tell any difference in the color of the strata and therefore concluded that all of the material in his tubes came from a single source. He then commenced to do all his testing with this theory as his basis. His final conclusions were that all of the material came from one source but he could not conclude that the one source was the Appellants.[11] (Tr. Vol. II at 157).

b.) Appellants were supposed to deliver spec road base which they never did.

Secondly, as mentioned earlier it was determined during the testing that the material that Appellants provided was not the quality that it was supposed to be. (Tr. Vol. IV at 201, 225-26). It is clear that a part of the road base material was

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[10] This is a difficult concept to understand. Basically, when you fill the back of a truck with 13 tons of material and it is the heavier road base material it has less volume and will fill less area when laid down. In contrast, the sandy silt material that was brought in by Bovee would have contained more volume and filled more area.

[11] It was clear from the testimony that there were three other sources of material that were put into this project. Material from Mouldings, materials from Parsons, and materials from Bovee. This is why when Rush ignores the pictures showing the different layers of materials and states that he simply did a visual of the tubes he reached his conclusions based upon erroneous assumptions.

going into the road and it was expected that this material would meet municipality specifications or, as mentioned previously, qualify as spec road base or processed road base. (Tr. Vol. IV 225-26). The billings that were provided by the Appellants showed that it did in fact bill $95 for road base and then charged $115 for spec road base. (Exhibit 211). At the time of the trial the Appellants tried to take the position that they never intended to supply any spec road base but only supplied road base. It was clear from the testimony that at the time Appellants were making deliveries their processor was not operational so it could not have provided the necessary spec road base.[12] (Tr. Vol. III at 139-40, Exhibit 211).

We must next turn to the controversy which effects the Appellee's claims against the Appellants. The primary concern is that the parking lot, drive through, and curb and gutter at the project started to deteriorate during the litigation process. It became clear that the road base had not been compacted properly. There is a sharp dispute over whose responsibility the compaction was. The Appellee claiming that it was the responsibility of the Appellants herein and the Appellants claiming that they never assumed any such responsibility but were only responsible for providing the material to the job site. (Tr. Vol. IV at 67-80).

The facts supporting the Appellee's contention are as follows: *First*, that from day one the Appellants sent to the project all of the heavy machinery to bring

[12] During the testimony it was clear that Appellants took the position that it was only to supply road base. When confronted with the invoices in which it had billed $115 for spec road base the only excuse they had for this was that they had finally gotten their processor up and running and then delivered spec road base.

the project to 'asphalt ready', i.e., loader, grader, compactor, and water trucks. (Exhibit 211, Appellants' Bill). *Secondly*, the first bill sent to the Appellee is dated December 29, 1996 and includes charges on the 6th of November for the loader and grader in the amount of $215.50 and $546.25 respectively, on November 7th for the loader and grader in the amount of $340.00 and $475.00 respectively, on November 8th for the loader and grader in the amount of $340.00 and $665.00 respectively, on November 9th for the grader, compacter and water truck in the amount of $570.00, $75.00 and $100.00 respectively, on November 11th grader and compacter in the amount of $570.00 and $200.00 respectively, on November 12th grader and compactor in the amount of $570.00 and $200.00 respectively, on November 13th grader in the amount of $605.00, November 14th grader and compactor in the amounts of $475.00 and $275.00 respectively, on November 15th grader in the amount of $475.00, on the phantom weekend the grader for $760.00, on November 16th grader and compactor for $522.50 and $255.00 respectively, on November 20th grader and compactor for $380.00 and $25.00 respectively, and finally November 21st grader in the amount of $332.30. (Exhibit 211, Appellants' Bill). *Third,* the Appellants billed for compaction and grader time. (Exhibit 211, Appellants' Bill). *Fourth*, they made it clear that they did not want anyone else operating their machinery.[13] (Tr. Vol. I at 129). *Fifth*,

[13] This despite the fact that the project was being threatened because the asphalt companies shut down in the winter and the asphalt needed to be laid before the winter shutdown or it would be the following summer before the job could be completed.

the location of the most severe deterioration of the curbs and gutters and the drive thru happened to be the same area that Kent Butters testified that he had put down fifteen inches of road base. *Sixth,* Kent Butters also testified that he sunk the grader up to its axel in the same corner and then told no one about the boggy problem he experienced. *Finally,* it was clear from all appearances, from the totality of the actions of the Appellants, from the billing, from the conversations, the Appellants were responsible to bring the parking lot to "asphalt ready". No one disputed this until some of the parking area started to deteriorate and then all of the Appellants disputed this as well as their good buddy Owens.[14] Owens claims that he was responsible for the compaction of the project site. In fact he was only responsible for supervising bringing the parking lot to "asphalt ready".

Holgate testified that the grader was operated by Appellants employees and he recalls it going around and around an around the building grading and compacting the corner where the majority of the asphalt and concrete failed. (Tr. Vol. III at 40-41).

Bovee testified that he was clearly under the impression that Appellants were to do the compaction because they delivered the fill. (Tr. Vol. I at 71) Bovee also testified that he told Owens he had to hire someone to place it and bring it up to 'asphalt ready'. Bovee testified that Owens proceeded to hire Appellants to do that. (Tr. Vol. IV at 218)

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[14] If you do anything read the entirety of Owens' testimony to catch an accurate picture of this dog and pony show.

Kent Butters testimony claimed that Butters construction was responsible for compacting during the taking of his deposition. (Tr. Vol. IV at 66-71). Forty one pages into his deposition testimony Butters changed his testimony to claim that he was not responsible for compaction.[15] Then at trial after the counter claim was filed he was relatively certain that Appellants were not responsible for compaction. (Tr. Vol. IV at 55).

Bovee testified that Kent Butters told him about the problem with the boggy roadway. He stated that Butters told him he would not lay down any road base until such time as the boggy material in the roadway was excavated out. (Tr. Vol. IV at 223).

Further, Butters testified that he pushed mud out and put the lifts back in to bring it level in the area where the majority of the concrete settled. (Tr. Vol. IV at 46-47) Butters did not tell anybody about the muddy hole and the need to bring in the track hoe prior to or after pushing the mud out of the hole and putting in the lifts. What Butters did testify to was that Owens was on the site and knew what was going on. Butters attempted to testify that there was concrete and debris in that corner and that was why it was settling and sinking. But when Butters was confronted with the AGRA reported Butters had to admit there was not debris or

[15] It should be noted that this deposition was taken by tape recording as the parties were walking around the site. For forty one pages he claimed to be responsible for compaction but when they rounded the corner where you could see the beginning of the deterioration he started to back away from earlier statements claiming that he was not responsible for the compaction.

concrete in that area down to 15 feet per the AGRA boring sample at (Tr. Vol. IV 46-48; Exhibit 510 at 15).

Wayne Morris, an expert in asphalt construction testified that in his opinion that it would have been the responsibility of the Appellants to compact the soil. (Tr. Vol. V at 29). He further testified that grading is part of the compacting process. (Tr. Vol. V at 30).

Bovee testified that by the time Appellants came to the site the entire site had been grubbed. (Tr. Vol. IV at 219-220) Bovee testified that he laid the plans and specifications of the project on the hood of the truck and went over the project with Kent Butters. Bovee stated that Butters told him he had a natural road base material and Bovee further stated that he did not know then the difference between good and bad road base. Bovee testified that he stated to Butters that all he cared about was that the material would meet the appropriate standards and was assured by Butters that it would. Bovee then gave a set of plans and specifications to Butters. (Tr. Vol. IV at 225-26). The plans and specifications specifically indicate the quality of the road base which should have been placed in the roadway.

Finally, to avert a possible catastrophe the Appellee made two important offers to settle the case. The first offer was made prior to any litigation commencing and that offer was for $18,000. This offer was flat out rejected. The second offer came during the course of the litigation when Appellee filed with the court an 'Offer of Judgment' for $20,000 to settle the case. (Appellants' Brief at 14). It was clear on its face and excluded a calculation of attorney's fees which

could have been left to another day. This 'Offer of Judgment' was ignored. The verdict came out less than the 'Offer of Judgment' and therefore the Appellee requested but were denied, attorney's fees for their efforts after the 'Offer of Judgment' was filed.

The lower court found in the Decision that Plaintiffs Proposed Findings of Fact and Conclusions of Law that was filed on or about May 24, 2001, made no proposed finding that Appellee's Counterclaims and Third Party Claims were asserted in bad faith. The court did not recall a demand by the Appellants during or after trial for attorneys fees claimed to have been incurred by the Appellants as it relates to the Third Party Claims or Counterclaims. The court stated that for the Appellants to wait until after the court's decision set for in August 2001, "and then wait further until March 13, 2002, to claim attorneys fees pursuant to Utah Code Ann., Section 78-27-56 for the first time on a Motion to Reconsider is improper, untimely and of ***questionable*** motive given the timing of the newly raised claims. The court also notes that in the Decision of August 2001 that the Appellants did not make a claim for fees based on bad faith. (See Addendum, Decision of June 13, 02 at 2-3).

There were also problems with the Appellants' notice to the property owner McFarland. The Appellants did not send a notice to McFarland and therefore cannot claim a lien against the subject property for the amount of the attorneys' fees and costs. (McFarland's Affidavit). The court allowed the entire claim,

including attorney's fees to be a part of the lien foreclosure against the McFarland property.

SUMMARY OF THE ARGUMENTS

Appellants first have failed to meet the heavy burden of marshaling all of the evidence, giving the reasonable inferences therefrom that support the bench verdict and *then* demonstrating that it is insufficient. Even if the Court considers the merits of the Appellants' challenge, the Court must construe the facts and all reasonable inference therefrom in the light most favorable to the verdict. So viewed, the evidence was sufficient to support the verdict about how much material was reasonably hauled to the project. Appellants' chief argument is that the testimony of their expert witnesses was bulletproof, undisputed and accurate. This is totally and patently false. Appellants' experts rendered opinions based upon erroneous suppositions unsupported by the evidence. Scott Nelson did topographical estimates taking the topographical before the project was started, *grubbing it down to a level unsupported by the evidence*[16], then calculated the as built topographical to render an opinion as to how many cubic feet of material was delivered to the site. He further *estimated the amount of material that was removed from the roadway*[17] and *estimated what the finished roadway was*[18] and

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[16] Nelson estimated that the site had been grubbed down six inches when the testimony clearly established that this lot was a parking lot before, had a stable base and was grubbed perhaps two inches.

[17] The roadway fill material had been excavated out due to the moisture prior to bringing in fill material and road base. No one can testify with any real degree of

made an estimate of what material was brought in there. Hardly a reliable bookend.

Alex Rush took several two inch cores, set up arbitrary zones for which he applied the information he gained from the two inch core drillings and then *estimated* the amount of material that was brought in. Hardly a reliable bookend there. He ignored the pictures taken by Abe Martinez, which clearly showed different strata. (Tr. Vol. II at 197; Exhbits 300-03).

Neither of these expert witnesses came even modestly close to what the unaltered employee records indicated was brought to the project. And when each load is given credit at thirteen tons, neither expert comes close to what is actually documented, even if the court ignores Becky Butters modifications and gives credit for every load they claim to have brought in.

Furthermore, the lower court erred as a matter of law when it rejected the proposition that the Appellee were entitled to attorney's fees for their efforts in defending this action from the time an 'Offer of Judgment' had been filed and which 'Offer of Judgment' was not met. And likewise erred when it didn't take into account the offer made prior to the suit. The court should have taken that offer

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certainty how much depth, width or length of material which was excavated out of the roadway. They had to *estimate* the depth, width and length of the material.
[18] When the topographical was completed Nelson also had to *estimate* based upon a roadway which was non-existent at the time of his *estimates*. The Appellee constructed roadway had actually been almost totally removed and replaced by another roadway.

and decided outright that the Appellants weren't entitled to any attorneys' fees or costs because the court had a reasonable basis for so holding.

Regarding Appellee's claims:

The Court clearly erred when it did not find the Appellants liable for their faulty workmanship in compacting the project. The lower Court relied totally upon the subjective and self serving statements made by Ernie Butters, Kent Butters, and Becky Butters. She also relied upon the rather contemptuous testimony of John Owens, who admitted under oath that he had come into the office and met with Tim Bovee and Susan Bovee and had asked them how much they would pay him for his testimony. There was likewise evidence that the Appellants had forgiven some debt he owed to them.

The lower court ignored the objective evidence of the Appellants' bill which billed almost every day they were at the site for compacting and grading; that the Appellants would not allow the Appellee employees to operate the machinery; Kent Butters own testimony that he had graded in a fifteen inch lift and admitted that it has to be compacted in eight inch lifts; Kent Butters proud proclamation that when he was at the site and in the area where most of the settling damage occurred that he sunk to his axel on the grader and told no one of the problem in that corner.

If the court didn't err in finding that the Appellants had no duty to compact this site then certainly the court erred when it allowed the Appellants a judgment

for their charges for grading and compacting. If they weren't responsible for it they certainly can't be compensated for having done it.

Finally, with regard to attorney's fees Appellee believes the court erred in several different respects. First, the court should not have given any fees to the Appellants' attorney for any of his work. Since the A.K. & R. Whipple Plumbing and Heating v. Guy, 47 P.3d 92, (Utah App. Mar 14, 2002), it is clear that the court has discretion in awarding fees and if there is a good reason not to award them the court should not do so. In this case the Appellants' books and records were totally and completely unreliable. Secondly, an offer of $18,000 was made to them prior to any litigation which should have been accepted by them.

Furthermore, if this court believes that attorney's fees should be awarded then they should terminate as of the filing of the Offer of Judgment. An act which again gives the court good reason not to award attorneys fees. And the court further erred when it did not award the Appellee's attorney with attorney's fees for all the work performed from the date of the Offer of Judgment because the common law prior to this action allowed it and the legislature has now codified the common law.

Finally, the court erred when it allowed the attorney's fees to attach as a lien against the McFarland property because the Appellants never notified McFarland as the mechanics' lien statute requires. Furthermore, simply because McFarland may get hit with attorney's fees because of his failure to bond, the

failure to bond statute has no provision for attaching those attorney's fees as a lien against the property and therefore it was err to do so.

ARGUMENT POINT I.

APPELLANTS FAILED TO MARSHAL THE EVIDENCE.

"In reviewing a factual determination, we defer to the decision of the trial court . . . ." Nu-Tren Elec. Inc., v. Deseret Fed. Sav. & Loan Ass'n Inc., 786 P.2d 1369, 1371 (Utah Ct. App. 1990). Furthermore this court has stated:

> [t]o successfully challenge a trial court's findings of fact on appeal, [a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, and thus making them clearly erroneous.
>
> Groberg v. Housing Opportunities, Inc., 68 P.3d 1015, 1018 (Utah Ct.App. 2003)(citations omitted).

This Court has further disciplined itself by giving ". . . due consideration . . to the trial court to judge the credibility of witnesses." Coalville City v. Lundgren, 930 P.2d 1206, 1209-1210 (Utah Ct. App.), cert. Denied, 939 P.2d 683 (Utah 1997).

ARGUMENT POINT II.

THE COURT'S FINDINGS WERE NOT CLEARLY ERRONEOUS AND THE COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE

EXPERTS WERE NOT THE MOST RELIABLE NOR THE MOST CREDIBLE.

There are three reasons why the court ignored the testimony of the experts. First, Appellants' records did not agree with the exaggerated opinions of the experts; second, the experts opinions were based upon questionable assumptions; and third, Abe Martinez, an expert par excellence did in fact contradict the testimony of the Appellants' experts.

a.) Appellants' own books and records did not agree with the experts testimony.

Look, instead of going through the mind numbing calculations presented by the Appellants it is very easy to capsulate the entire argument. The Appellants' own books and records indicated only 182 loads were delivered. (Appellants' Brief at 13). Appellants' bill stated Appellants delivered 204 loads. (Exhibit 211). The time cards Becky Butters altered indicated they delivered 197 loads. But the evidence the court found most reliable was the unaltered time cards which indicated 182 loads. (Exhibits 4-11) Judge Heffernan stated:

> The reason I'm not really too wild about listening to some experts come in and testify about how much dirt was on site is because the best evidence is what the tickets – what the tickets would have shown had they been accurately kept. The records themselves were the best evidence of what was in fact delivered, but they weren't very good. And they were tampered with, I don't think wrongfully, but I think they were negligently messed around with, changed and much put on them that shouldn't have been there, so it made them very unreliable. However, I don't – I didn't find it particularly helpful to have two experts come in who

> disagreed with each other as to how much was delivered, come in and tell me what the record should have shown, which was the most clear and simple explanation of how much was delivered that's why the experts to me just weren't very helpful.

(Video Transcript at 35). Judge Heffernan stated it best when she said: " . . . I just find it – to have to have experts come in and tell us – me – have the party who brought the materials in have an expert come in and tell me how much they delivered is just inherently – there's something wrong with the picture." (Video Tr. at 35-36). Judge Heffernan further stated: "[I]t raised a big red flag to me if you have to have an expert come in to tell me how much was delivered, in and of itself." (Video Tr. at 36). That is the basis to begin with. Their own records show what they delivered. Then you go to the uncontested factual finding that the parties agreed to 13 ton loads.[19] That means you have to reduce the number of loads on Appellants' bill based upon the limitations in each of their trucks. This reduces the truckloads to 158.[20] This is a ceiling for the Appellants unless you start looking at Becky Butters alterations of the time cards and then her alteration of the bill. However, it was the trial court who watched the demeanor of the witnesses and chose to believe Becky Butters alterations were not reliable and undocumented.

Additionally, this Court would have to ignore the obvious difficulty with the Appellants records which occurred when Owens testified Becky Butters came

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[19] By the way, incalculable trial hours were spent trying to establish that $95.00 per load meant a 13 ton load. Appellants tried to maintain a load was a load. Even, I suppose my granddaughter's little red Radio Flyer Wagon.

[20] Truck loads delivered times average weight per truckload divided by the agreed upon weight per truck load. (182*11.28)/13= 158.

to him to figure out what had been delivered and so did the truck drivers. (Tr. Vol. I at 147, 252-58). And lest we forget the November 16th and 17th, [hereinafter referred to as the "phantom weekend"] where no one could verify much of anything on that weekend. On Friday, November 15th, Holgate complained about the amount of material that had been delivered. Holgate was told that a large amount of material would be delivered over the weekend. Holgate testified that about halfway through the time on the project on a Monday, which Appellee believes to be Monday November 18th , there were approximately five truck loads of material at the site. (Tr. Vol. III at 44). Owens first testified that on Monday, November 18th, that at best he could tell that there had been some work done on the site but could not determine if any material had been delivered. Then , Owens changed his testimony to state that he remembered seeing windrows or dump loads of material on Monday morning. (Tr. Vol. I at 202-03).

During the phantom weekend, Owens saw no one there on Saturday; and it was rainy and snowy on Sunday, November 17th. Owens talked with Appellants' employee Doug Treseder, and Owens was informed Doug was only going to work an hour and go home because of the rain and snow.[21] (Tr. Vol. I at 169). Additionally, on Monday, the 18th, Owens attempted to verify with the Appellants if any had been delivered and when he could not satisfy himself that anything had

[21] The Appellants had contended all along that water was a significant problem on this property. According to Appellants we had all ready removed an entire roadway. It's truly puzzling then with the rain and snow how they would feel comfortable delivering the thirty five loads they claimed to have delivered on that day anyway.

been delivered he quit keeping record of any of the deliveries. (Tr. Vol. I at 257-58).[22]

More troubling is the inconsistency between Owens' day timer for Friday, the 15th of Nov., and Butters bill. Owens stated nothing came in on Friday but Butters billed for eight loads that day. (Tr. Vol. I at 146, 166-67, 172 Exhibit 506). It is quite possible that besides throwing out Saturday twenty-six loads that the court should have thrown out the eight loads Appellants claimed they delivered on Friday (Exhibit 211) and the thirty five loads they claimed to have delivered on Sunday. (Exhibit 211).

Appellants are trying to claim a proctor of as high as 147 lbs. for their material. [23] If the proctor is 147 lbs and the records of the Appellants only document, using that term loosely, 158 thirteen ton truckloads, that means they brought in 27,946[24] cubic feet of material. Where did their expert Rush come up with a minimum of 38,020 cubic feet imported by the Appellants?[25] This would have required Appellants to have brought in 214 thirteen ton truckloads or if you consider the limitations of the Appellants trucks it would have required 248 truckloads. Even if you consider the altered, and altered again bill, that's 44 truckloads more than the Appellants claimed they had brought in.

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[22] Owen's testimony here was reliable because he was cornered by the day timer he created at the time the material was being delivered.
[23] See Appellants Brief page 24 footnote 4 stating that "(147) is the proctor for course [sic] natural pit run which is what Butters' material is classified as."
[24] Tons times truckloads times 2,000 pounds per ton divided by 147 lb proctor, or (13*158*2000)/147=27,946 cubic feet.
[25] Appellants' Brief page 25.

b.) The Appellants' experts based their opinions on faulty assumptions skewing their opinions.

Appellants speak of their experts as though what they said was bulletproof. It most certainly was not. Both experts based their calculations on assumptions which were questionable at best and totally erroneous at worst.

i.) Expert Alex Rush testimony.

Alex Rush [hereinafter referred to as Rush] estimated what material was delivered by drilling several two inch holes around the parking lot and roadway, making assumptions that those holes represented the material level in areas that he basically put together on his own and came up with a calculation which, oh my gosh, coincidentally supported the amount of truckloads the Appellants claimed to have delivered. (Tr. Vol. II at 175, Appellants' Brief at 24). All their complicated calculations aside that's what Rush did!

Rush testified that typically the folks that do the fine grading put the 4 ¾ inches of crown in the roadway. He was asked if he knew who put the crown in the road. He did not know. He had done a core drilling in the crown but couldn't identify any strata of material other than one source from the bottom of the pavement to the natural ground. Parsons had done the asphalt and therefore the crown and had brought in nine dump truck loads of material. (Tr. Vol. II at 187-88; Exhibit 175). None of which showed up in Rush's core drilling according to Rush. (Tr. Vol. II at 190). Rush also found no strata in his two inch samples

where Abe Martinez, the Appellee's expert, did in his much larger scoop samples. (Tr. Vol. II at 199, 208; Vol. IV at 130, 135).

Kevin Butters directed Rush on where to do the core drillings. (Tr. Vol. II at 191). Obviously, Kevin Butters was aware where the deepest parts of the project were.

ii.) Expert Scott Nelson testimony.

Scott Nelson [hereinafter referred to as Nelson] took a topographical from before and after and came up with his estimate as to what had been delivered. Again four things are wrong with this calculation. First, he calculated substantially more material than even the Appellants had claimed was delivered[26]. Secondly, since the roadway had been completely redone he used estimates to determine how much would have been delivered there. Therefore he didn't even take a transom to that side of the property and assumed that the east side of the road was substantially the same height as the west side, and what the crown in the road was. (Tr. Vol. II at 101). Thirdly, Bovee's fill material was removed from the roadway because of its wet and muddy condition. Nelson didn't know the depth, width and length of that excavation other than to make a guess. (Tr. Vol. II 103). He took the figure of two feet because that is what Appellants estimated had been removed. And finally, Nelson based his estimates of how much property was grubbed from the site by the subjective and self serving testimony of Kent Butters who claims he

[26] Yet even here it was far short of accounting for the 139 truckloads of material that was brought in by Bovee, or the 9 truckloads that were brought in by Parsons, or the 16 tons that were brought in by Mouldings. (Tr. Vol. IV at 94).

grubbed off six inches but can't explain what happened to what he grubbed off. (Tr. Vol. IV at 48).

The result is that Appellant's attorney makes the assertions that Nelson's calculations were based on "known beginning and ending values." (See Appellant's Brief at 25. But in fact, Nelson's testimony was based on variables of the beginning and ending values. As shown in the previous paragraph the beginning values were based on the unknown amount grubbed from the site and the unknown amount of fill material excavated from the roadway. The end value is a variable because the new roadway that was put in makes any estimation of the old roadway at the site impossible. Only in the mind of the Appellant's attorney was there an actual "known beginning and end measurements."

Nelson calculated his numbers based on the property being grubbed some six inches before any fill was brought in. (Tr. Vol. II 105). Holgate testified that the project property had been used for a parking lot. He testified that it was flat, compacted and that there was no vegetation on part of the lot requiring little grubbing to prepare the lot. (Tr. Vol. II 45-46). Holgate testified that Bovee grubbed the lot and Holgate thought that only two inches was grubbed and only on part of the lot. (Tr. Vol. III at 45-48). Holgate also testified that the property was so compacted that even grass could not grow. Holgate further testified that all the grubbed material was pushed to the rear of the lot, which was very little. (Tr. Vol.

III at 45-46). If it was six inches grubbed off as Kent Butters claimed, "where's the beef?" as they say. [27]

Nelson also estimated the fill in the roadway and failed to account for the 6800 cubic feet of fill that was removed from the footprint of the building.

Another problem with the claimed bulletproof evidence of the experts is the *estimation of proctors.* The higher the procter, i.e., the more a cubic foot of material weighs, the more 13 ton truckloads it would take to achieve a comparable volume. That is why Rush estimated a proctor for the pit run material at 147 lbs. (See Appellants' Brief at 24 in footnote). If the Appellants material has that high a proctor it will take many more truckloads to achieve the same volume as a proctor of say 114.2 lbs. per cubic foot. (Which proctor was not an estimate it was actually taken by Abe Martinez of Bovee's material)[28]. (Tr. Vol. IV 122-23). Conversely, if the proctor is low, say 114.2 it takes far fewer trucks to create the same volume than a higher proctor. Or stated slightly differently, if you have 116 thirteen ton truckloads with material that weighs 114.2 lbs. per cubic foot it will have a much larger volume than 116 truckloads with a proctor of 147. 116 truckloads with a proctor of 114.2 fills an area of 26,410 cubic feet while the same number of

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[27] That 4" difference equates to 23 truckloads of material. (60 ft. width of parking area times 201 foot length time 1/3 depth (4 inches) difference in Appellants and Appellees statements times the proctor of 147 divide by 2000 lbs. divided by 13 tons equals twenty three truck loads.)

[28] Keep in mind that this proctor was taken of Bovee's material on October 3, 1996 before Butters had ever come on the job. It was not taken for the purposes of litigation and therefore totally and completely trustworthy. There are absolutely no underlying motivations for manipulation. (Tr. Vol. IV at 122-123)

truckloads with a proctor of 147 would fill an area of 20,517 cubic feet. That's a significant difference. In fact it would require 33 and 1/3 more thirteen ton truckloads of material at 147 lbs.

Ok, again, I apologize for taking this court through this mind numbing experience but it may prove somewhat beneficial. Take the given that Bovee's proctor for his fill material was 114.2. (Tr. Vol. IV 122-23). Bovee brought in 116 loads of this grade of material. (Tr. Vol. V at 75) Parsons, Mouldings and Ogden Auto Body accounted for 30 more documented loads. (Tr. Vol. V at 75) These loads could have had a proctor anywhere from 133 to 147.(Appellants brief at page 24, footnote 4) Now *assume* that Nelson is accurate in his 2010 cubic yards delivered to the site. And assume, because we do not know, that the proctor Rush claims Appellants material should be, 147 lbs. per cubic foot, then here's some analysis this Court might find interesting.

If you take Bovee's 116 loads at 114.2 lbs per cubic foot, and the loads are thirteen ton truckloads, then Bovee's 116 loads fills a volume of 26,410[29] cubic feet. Then you take the 30 additional truckloads from Parsons, Mouldings and Ogden Auto Body at a fair proctor of 135 and this fills a volume of 5,778[30] cubic feet. That means that Appellee's can account for at least 32,188[31] cubic feet of

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[29] 116 loads times 13 tons per load times 2,000 lbs. divided by a proctor of 114.2.
[30] 30 loads times 13 tons per load times 2,000 lbs. divided by a proctor of 135.
[31] This little exercise completely ignores the other 37 loads imported by Bovee from Butters' pit. (See Exhibit 211) If you include that additional 37 – 13 ton loads Bovee actually accounts for another 6,544 cubic feet. Don't you find it

material they brought to the site. Now take Nelson's estimate of 54,270 cubic feet[32] and deduct Bovee's contributions and you have only 22,082 cubic feet brought in by the Appellants. Now giving them the benefit of a doubt that their proctor of 147 is accurate this shows a maximum of 125 loads brought in by Butters.[33]

c.) Abe Martinez, the expert for the Appellee did contradict the testimony of the experts.

Abe Martinez [hereinafter Martinez] testified as the Appellee's expert. Martinez' testimony completely contradicts the Appellants' expert witnesses. Martinez tested three different areas of the site, on July 17, 1998. Martinez' test holes were a two by two by four foot deep test hole versus Rush's two inch core sample of the material. Even Rush, the Appellants' expert, admitted when he looked at Martinez' test hole samples Rush could see the different colors of strata in the material. When Rush tested his two inch core drill he could not see any strata and therefore credited Butters with all the material from underneath the asphalt to the natural ground. Further Rush verified that Martinez' tested materials were identified according to the Unified Soil Classification System. (Tr. Vol. II at 199, 208). Martinez' test holes cut a test sample that would show from the asphalt grade down to four foot. (Tr. Vol. IV at 124, 126, 128).

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interesting that Appellants spent most of the trial contesting that loads meant 13 ton loads yet without operating scales charged Bovee for 13 ton truck loads.

[32] Nelson's 2010 cubic yards times by 27 cubic feet you get 54,270 total cubic feet.

[33] 22,082 cubic feet times 147 lbs divided by 2,000 lbs. divided by 13 tons.

Martinez testified that there were distinct changes in the material. (Tr. Vol. IV at 130, 135). There were samples taken from each of the different changes in the material that was seen. Resulting with the test samples showing different strata of material.

Martinez testified that none of the material he tested met any standard required for this project. (Tr. Vol. IV at 182). Martinez stated that when someone requests road base then it must meet road base standards, either the material is spec road base or it is not. And that Farr West, where the project is located, would not allow anything less then spec road base. (Tr. Vol. IV at 178) Martinez testified that a 300 foot road should have some consistencey, however the road base that Appellants provided had absolutely no consistencey. Martinez testified that in a relatively short distance between samples one, two and three on the road base was not consistent. (Tr. Vol. IV at 181). This supports the proposition that they were mixing Bovee's material with their own.

Martinez explained that a processed base costs more because it takes more work to process the base is involved. (Tr. Vol. IV at 182). It is interesting that the "natural road base" that Appellants asserted was used Martinez has never heard of such a road base and to Martinez' knowledge there is no such type of material for road base. The only time he has heard the term is when dealing with the Appellants', Butters' pit. (Tr. Vol. IV 196).

d.) Testimony did not agree with Appellants view of what their experts were testifying to.

One incident is noteworthy that happened during the trial. Owens was testifying to lay the foundation for what the experts were to testify. Owens essentially made a note in his day timer on November 4th that the site required eight inches of road base in the roadway and four inches of road base in the parking lot area. (Tr. Vol. I at 121). Immediately after Owens made this statement at trial, which was inconsistent with the calculations of the experts, Appellants attorney asks to break for lunch. (Tr. Vol. I at 121). It was clear that Owens not only went to lunch with Appellants and their Attorney but that they discussed the case. (Tr. Vol. I at 156-57).

ARGUMENT POINT III

THE OFFER OF JUDGMENT WAS NOT VAGUE OR AMBIGUOUS AND SHOULD HAVE BEEN ACCEPTED AND WAS DONE WITH THE IDEA THAT IF THESE APPELLANTS WERE GOING TO PURSUE THEIR CLAIMS TO TRIAL THEY WOULD HAVE TO PAY THE CONSEQUENCES, I.E., PAYING APPELLEE ATTORNEY'S FEES AND COSTS.

On page 38 of the Appellants' brief opposing counsel makes a reckless accusation[34]. The idea that Appellee's Offer of Judgment was somehow intended

[34] Footnote 8 accuses Appellee's counsel as follows: "Butters' assertion that the Defendants' attorney intentionally and very carefully crafted the offer to be a 'Trojan Horse' offer is not based on speculation or paranoia. Taking into consideration the carefully worded Offer of Judgment and Defendants' post trial motion seeking attorney fees, it is evident that the Defendants were attempting to lay a trap by vaguely working the offer and reserving the attorney fees issue to the court."

to take an unfair advantage of the Appellants is absurd. If all that Chambers says is true then Chambers is the one guilty of riding in on the Trojan Horse. Chambers must have gleefully set his own trap and then went merrily on his way incurring costs, expenses and attorneys fees that he could slam the Appellee with. This is, as Appellants say, simple *estoppel in pais*.[35] And of course ... [t]he courts should not sanction any attempt to trick or allow a party to gain a tactical advantage over another party and then allow that party to claim or represent that the offer was something other than what it was..." (See Appellants' Brief at 38).

Appellee made a good faith offer which was never responded to. Not even a phone call. Nothing. It was totally ignored. The offer was made to avoid going to trial, to avoid the incurrence of additional attorneys fees, to put to rest the litigation and to give the Appellants an opportunity to prove the attorney's fees they had incurred to date for their attempts to enforce the lien. It was further Appellee's intention to collect his attorneys' fees from Appellants should Appellants continue this Russian Roulette type game they were playing.

In First Southwestern Financial Services v. Sessions, 875 P.2d 553 (Utah S.Ct. 1994) the Supreme Court stated in footnote 5:

> We realize that awarding FSFS costs and reasonable attorney fees for its motion for a new trial or to alter or amend judgment and the appeal to this court might seem unduly severe, given that the Sessions were merely

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[35] "The doctrine by which a person may be precluded by his act or conduct, or ***silence*** when it is his duty to speak, from asserting a right which he otherwise would have had." See Blacks Law Dictionary, Fifth Edition, 1979 page 495 (emphasis mine).

> defending an advantageous, albeit erroneous, conclusion of law by the district court. We note, however, that the Sessions ***could have cut off their costs and reasonable attorney fees liability by timely filing an offer of judgment under rule 68 of the Utah Rules of Civil Procedure.***

875 P.2d at 556 (Emphasis mine.)

The Appellee, in an attempt to remedy the excessive claims, and because it was abundantly clear this argument was over Joe Chambers attorney's fees and nothing more at this point, we filed an offer of judgment to take care of the lien problem. The offer of judgment followed rule 68 and stated in essence:

> Inasmuch as this case can and might accrue significant attorneys fees and costs, and inasmuch as the defendants are desirous of curbing those potential fees and costs, the Defendants are tendering the following offer, which includes costs, **but does not include attorney's fees**. ***The issue of fees can still be presented to the court for a final determination***. The offer being tendered by the Defendants is Twenty Thousand Dollars ($20,000.00). (Emphasis mine.)

Whatever motives Appellants might attempt to conjure up the plain and simple *truth* is that Appellee, not Appellants, were making every attempt possible to put this litigation behind them and resolve the lawsuit. The *truth* is that Appellee made an unambiguous offer to settle the mechanic's lien claim for $20,000 and let the court then decide the issue of Chamber's attorneys fees for his efforts to bring the litigation to a point where the offer of judgment was made. It is totally and completely irrelevant that the other causes of action remained pending. Furthermore, the party that requests attorney fees must differentiate between the

fees and time expended for (1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement for attorney fees. See generally, Kraatz v. Heritage Imports, 71 P.3d 188, 202 (Utah App.Ct. 2003); Foote v. Clark, 962 P.2d 52, 55 (Utah 1998); Prince v. Bear River Mut. Ins. Co., 56 P.3d 524, 540 (Utah 2002); and Pack v. Case, 30 P.3d 436, 444 (Utah App.Ct. 2001).

Appellants cite AAA Fencing Company v. Raintree Development and Energy Company, 714 P.2d 289 (S.Ct. 1986); Kurth v. Wiarda, 991 P.2d 1113 (Utah App. 1999); Palombi v. D&C Builders, 452 P.2d 325 (S.Ct. Utah 1969); and Reeves v. Steinfeldt, 915 P.2d 1073 (Utah App.Ct. 1996) for the proposition that had they not enforced the lien on this property they would not have been able to recover attorney's fees, stating: "[T]he court awarded attorney fees against the plaintiff (mechanics' lien claimant) who failed to obtain an order of foreclosure with respect to its lien." Appellants Brief at 36.

The Appellants original and never modified lien was for $31,043 (See Exhibit 502). Appellants are asking this court to increase the $12,257.00 awarded by the court below by a maximum $4,268.00 (See Appellants' Brief page 29 stating the range of $15,865-$16,525)[36] increasing the total judgment to $22,246.24. This would mean, even in their own calculation, that they filed an excessive lien. Furthermore, the most reliable testimony and testimony to which

[36] The high of that range is $16,525 - $12,257 = $4,268.

the experts cannot refute is the Appellants own records which, if they are to be believed[37], indicated precisely how many 13 ton truckloads were delivered to the site. Or an additional 18 loads that the Appellants weren't given credit for. (See Appellants Brief page 23)[38] This amounts to a total increase of the judgment of $1,710 or a total judgment of $19,266.24. Clearly under either scenario the Appellee have been and continue to be under the onerous burden of defending against an excessive lien. Reeves, Supra., implies, and in fact approved, attorneys fees for defending against an excessive lien [39]

CROSS APPEAL

ARGUMENT POINT I.

THE LOWER COURT ERRED IN NOT AWARDING DAMAGES FOR THE FAILURE OF THE APPELLANTS TO PROPERLY COMPACT THE MATERIAL.

Marshaling the evidence: Finding of Fact number 17 states: "Butters had no written contract with Bovee. Their obligation to the site (supported by the testimony of Ernie Butters, Kent Butters, and John Owens) is that they did not undertake to assume the responsibility to make the site 'asphalt ready'. Nor did

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[37] Phantom weekend included.

[38] "Even taking Bovee's 293 13 ton truckloads and deducting the 146 Bovee claims to have imported, this still would leave Butters entitlement to 147 . . . ." (147 – 129 awarded = 18)

[39] Their own paperwork which was introduced at the time of trial only indicated a delivery of 182 loads. (See Appellants Brief page 13) Even giving them the Radial Flyer little red wagon analogy that it didn't matter the size of the load they delivered they still got $95 per load this would increase the judgment by $5,035 which still only makes for a total judgment of $23,013.74 still an excessive lien defense.

Butters assume the obligation to compact the materials to any specified level of compaction." (See Appellants' Brief at 12) The second finding paragraph 18 states: "John Owens was the person responsible for the compaction and he testified that in the area where there is failure on the concrete that he graded and compacted the area." (See Appellants' Brief at 12).

Owens testified that he was to run the grader and bring in the lifts. (Tr. Vol. I at 164). He also testified that Appellants were not responsible for compacting. (Tr. Vol. I at 170). Kent Butters testified at trial that the Appellants did not agree to compact the project. (Tr. Vol. IV at 12,55). Kent Butters testified that he did not receive a set of the plans for the project and cannot recall the meeting with Bovee over the hood of the truck. (Tr. Vol. IV at 51). Ernie Butters testified they did not agree to compact the project. (Tr. Vol. III at 166-67).

Basically the evidence before the court consisted of the self serving statements of the Appellants and the questionable testimony of John Owens. All of which is suspicious. The evidence the court failed to consider was the objective uncontroverted books and records of the Appellants which billed for the compaction and for the water truck which they used while on the job[40]; the uncontroverted testimony of Morris stating that the practice in the trade would have been for Appellants to be responsible for compaction; the uncontroverted

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[40] Have you ever seen a dump truck worried about dust when its only dumping the material and not grading and compacting it? Why was the water truck being used by the Appellants? Because they were grading and compacting and preparing the lot for it to be 'asphalt ready'.

employee records which showed that the Appellants employees did the compaction, drove the grader, and used the water truck; and the testimony of Kent Butters, wherein he claimed you had to compact in eight inch lifts and he himself put down and graded fifteen inches at one time.[41]

Essentially the court relied upon the most untrustworthy subjective evidence available and ignored objective evidence. Objective, evidence which, by the way, was first billed to and sent by the Appellants herein on December 29, 1996 after the completion of the job. The Appellants billed for compaction and grading before it was obvious that the compaction and grading were inadequate and the project site started to settle and deteriorate.

Evidence which clearly shows that courts ruling on compaction is clearly erroneous.

a.) The court ignored the industry standards.

The lower court seemed to focus on bits and pieces of this case in a vacuum. Since two Butters testified and John Owens backed them up then obviously the Appellants never agreed to bring the project to 'asphalt ready'. (Tr. Vol. I at 135). Morris testified that the standard in the industry is that when you

[41] Ok, so if he wasn't responsible for compacting by contract isn't he responsible because he assumed the responsibility for the fifteen inches of dirt he put down that he knew had to be compacted in eight inch lifts. Additionally, it was the very area that he claimed he put down fifteen inches of material where the parking lot had its worst problems of settling. He also testified that he had sunk in this corner up to his axel and told no one about this. Is there no accountability for these actions despite his claim there was never a contract or agreement that they were responsible for compaction?

hire someone like Appellants to deliver, grade and compact and they do in fact deliver, grade and compact, it is an industry standard that they had agreed to do so. (Tr. Vol. V at 29-30) When you have some one deliver material *only* they do not deliver, grade and compact the material they simply dump it on the site. (Tr. Vol. V at 29-30).

'Course of dealing' or industry usage and custom is admissible evidence to construe ambiguous terms of an agreement or to supply missing terms in an otherwise valid agreement. See Hector v. United Savings and Loan Ass., 741 P.2d 542 (Utah 1987). A usage or custom may aid in interpreting the intentions of the parties to a contract, the real character of which is to be ascertained, not alone from express stipulations, but also from general implications and presumptions arising from the nature and character of the employment. See Anderson v. Daly Min. Co., 50 P. 815 (Utah 1897).

It was also testified that spec road base was to be supplied. This is the standard in the industry, for a municipal public roadway. (Tr. Vol. V at 29). When you're asphalting a road all of these contractors knew what was expected in that roadway. Appellants attempt to act totally ignorant of what was expected stating, gratuitously, that they were delivering natural road base, which was basically simply pit run brought directly from their pit. (Exhibit 211, Appellants' Bill). They made no attempt to bring in road base or make sure that it followed any specifications. Luckily for them when tested it qualified as road base but it didn't qualify as spec road base (*processed*). (Tr. Vol. IV at 201). Their own

expert, Rush, testified that he didn't know of a municipality that wouldn't require spec road base in the road. (Tr. Vol. IV at 203). What in all likelihood happened is that Appellants wanted the work and expected to get their crusher working quick. When it didn't work until the end of the project they delivered what they had anyway. At the end of the project it was clear that they were delivering spec road base. One has to ask themselves, if they didn't know spec road base was expected how come when the crusher was fixed they started to deliver crushed road base and only crushed road base?

b.) The court ignored the blatant contradictions in the testimony of these parties and accepted only the final testimony they offered at trial.

Owens testified that he was not going to run the grader or the compactor. (Tr. Vol. I at 162) Two pages later in the transcript Owens changes his testimony to state that he was to run the grader and bring in the lifts. (Tr. Vol. I at 164) When confronted with the Kent Butters' deposition wherein Butters admits to being responsible for compaction, Owens testified that he did not agree with this interpretation of the deposition. (Tr. Vol. I at 227 and 228) Then when Owens was confronted with additional and more specific testimony from Kent Butters' deposition and asked if his statements were inconsistent with Owens trial testimony he responded that they were. (Tr. Vol. I at 229 and 230)

Owens then testified most of the parking had been compacted by himself, Bovee, and Diego Gobaldin, but admitted that Kent Butters had done some of it. (Tr. Vol. I at 230) Immediately thereafter the Court reprimanded the Appellants

for seeming to coach the witness as he was on the stand. The Court stated: "I'm talking about what I see is happening on the other side, too, and I don't think you're (Appellee's attorney) seeing it because I am looking at them and you're not, is that I'm getting shaking of heads and nods of heads and what appears to be coaching type responses that is not appropriate for either side to do that." (Tr. Vol. I at 230 and 231)

Kent Butters deposition was taken before the claims filed for the Appellants failure to compact. He stated that Appellants were doing the compacting. Kent Butters testified during the first 41 pages of his deposition that Appellants were responsible for compaction. The deposition was taken with a tape recording as the parties were on the site. (Tr. Vol. IV at 65-66). As they came around the building and Kent noticed the first settling problem he then started to distance himself from the Appellants obligation to compact the property. (Tr. Vol IV at 65-66).

Earlier in Kent Butters' deposition he had stated it was Appellants responsibility to compact and in fact had stated that he was not responsible for compacting any trenches but was responsible for compacting the parking area. Then he stated in his deposition that he thought the problem associated with the crack in the concrete[42] was a trench under the concrete. After learning that there was no trench under the concrete at trial Butters changed his concerns to state that he had buried his front wheels in a boggy hole in this area and that the area had concrete and asphalt debris that should have been removed with his track hoe.

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[42] Which by the time of trial has disintegrated.

After claiming the debris was the problem he was then confronted with an AGRA report which showed clearly that in this area a test was conducted and down to fifteen feet there was no sign of debris. He then admitted he told no one of these concerns nor did he state those concerns in his deposition. In his deposition at the point of seeing this crack he also states that any compacting he did was at the direction of Bovee or his employees.

c.) Appellants were not held responsible for compaction even when it was clear they had compacted an area where the problem was isolated. This was clearly an erroneous finding.

It was the southwest corner of the project where all the concrete failed. There was a driveway, curb and gutter which failed. Appellants tried to blame it on other reasons but their own expert Rush stated that in his opinion the southwest corner failed due to compaction. (Tr. Vol II at 245).

Even if Appellants had no obligation to compact as they claim, they certainly must be held responsible for what happened in that southwest corner.

Kent Butters testified that there was a deep hole in the southwest corner of the project. He testified further that he scooped out the hole and put in the lifts that brought that area up to grade. He testified that a track hoe needed to be brought in to take out some five feet of material to stabilize this same area. He further testified he told no one about his concerns over this hole and the grounds' instability.

Well if Kent Butters assumed the compaction, which he obviously had to because in his own words you have to compact every eight inch lift, it is a clearly erroneous finding of fact that at least in this corner that they weren't responsible for the compaction. Despite protestations to the contrary once you assume a task and complete the task you're responsible for the task. In Interwest Const. v. Palmer, 923 P.2d 1350 (Utah 1996) the court stated, quoting the restatement of torts:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.
>
> 923 P.2d at 1355 at footnote 2.

Interwest, Supra., dealt with a case where they had a contract to construct a fiber glass tank at the owner's newly constructed wastewater. When the tank failed the owner brought suit for strict liability and negligence. The contractor tried to absolve himself from liability by stating that the tank was constructed as per the contract. The court disagreed. It is analogous to the case at bar. It doesn't matter what the contract was, once Kent Butters gratuitously, as he claims, graded and

compacted the area in question then Appellants are certainly liable for his failure to compact properly.

d.) The court erred when it found that John Owen, Bovees' employee, was responsible for the compaction.

Again, we hate to keep carping on Mr. Owens obvious bias, but Owens testimony was not trustworthy. And yet the court seemed to place incredible weight to his claim that he alone was responsible to make the project 'asphalt ready'. Clearly again when you look at the objective testimony, when you consider the bill which clearly showed the Appellants intended to be compensated for the compaction and grading, when you listen to testimony of those who lay asphalt every day as to what would be expected under the circumstances, when Appellants were given a set of plans and specifications, when Butters discussed the job over the hood of the truck with Holgate and Bovee, when Appellants' employees were running the compacter, when Appellant's company was doing all of the grading, when even John Owens testified that he wasn't allowed to run the machinery with permission, and when Kent Butters refused to lay down road base until the boggy roadway was excavated out, clearly the court made an erroneous finding that Appellants were not responsible for compacting. Why would Butters demand the roadway be excavated before he would lay down his material if he was just dumping his material on the site and not making the roadway asphalt ready? It is clearly erroneous to hold that Appellants did not agree to compact the project. What the lower court did was akin to saying that the general contractor is solely

responsible for what a subcontractor did. And the general contractor cannot go against the sub for substandard work. That's preposterous. John Owens was to overview what Appellants did. But it was Appellants, the subcontractors, who were responsible for the work they were doing. Ultimately if the subcontractors failed, the contractor would have the responsibility but with redress against the Appellants. That's what happened. Grading and compaction were the responsibility of the Appellants and that's what they failed to do properly. The court is letting them skate on the outright fabrications of John Owens. The court ignored clear contradictions from Butters and Owens depositions and relied solely upon what they said in testimony at trial. That's totally erroneous when clearly their stories changed drastically at the time of trial

ARGUMENT POINT II.

THE COURT ERRED WHEN IT FOUND THAT NO OTHER EVIDENCE WAS INTRODUCED AS TO ANY OF THE ELEMENTS OF COUNTERCLAIMANT'S/THIRD-PARTY PLAINTIFF'S AS ALLEGED IN THE OTHER CAUSES OF ACTION I.E. INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONSHIP AND SLANDER OF TITLE.

First, Appellants took an inordinate amount of time putting on their evidence. They consumed most of the trial time. Secondly, Judge Heffernan kind of tipped her hand on what her judgment was most likely to be. She believed that the counter-claim for compaction was not warranted, as she believed that Owens was responsible for compaction rather than Appellants. Judge Heffernan was

getting very impatient with what was happening at trial and we simply tried not to further anger the judge. (Tr. Vol. V at 110-113)

ARGUMENT POINT III.

THE COURT ERRED WHEN IT ALLOWED THE ATTORNEYS FEES TO BE AWARDED AGAINST THE MCFARLAND PROPERTY WHEN MCFARLAND WAS NEVER NOTIFIED OF THE MECHANIC'S LIEN AS REQUIRED BY UTAH CODE ANNOTATED §38-1-7(4).

The court awarded pre-offer attorney's fee against the Appellants herein. It is important that those fees be allocated appropriately because the award of attorney's fees should not form the basis for the lien that is being foreclosed against the property. Under Utah Code Annotated §14-2-1(7) the District Court has the power to award attorney's fees against Robert McFarland for his failure to provide a bond on this project. However, nothing in §14-2-1 et. seq. gives authority to attach said attorney's fees as a part of the lien against his property. The Mechanic's Lien Statute is the only statute that gives the Appellants the right to have those attorney's fees held against the subject property. And this is only if they can establish that they have provided notice to the property owner. Clearly this was not done. This being the case, and the Appellants' failure to send by certified mail a copy of the lien to the Bob McFarland, then Appellants fail in their efforts to have the attorney's fees attach as a lien against the property. That does not mean that this court cannot award attorney's fees against McFarland as he clearly failed to bond the project as is required by statute. But there simply is

no statutory authority to so attach a lien because the Appellants failed to notify the property owner.

This was brought up before the filing of the final judgment by way of a declaration action but the court apparently ignored it when she rendered her final decision. In the case of J.V. Hatch Construction, Inc. v. Kampros, 971 P.2d 8 (Utah App.Ct. 1998) this court dealt with this very issue.

The court stated: "[T]he mailing requirement embodied within section 38-1-7 is certainly a necessary element of proof beyond the right to or reasonableness of attorney fees . . . ." 971 P.2d at 13. However, the Court concluded, "[a] party is not a prevailing party until *after* a determination on the merits is made by either a jury or a trial court judge." 971 P.2d at 13. Therefore, ". . . it would be a waste of judicial resources to require proof of mailing the notice of lien for purposes of entitlement to attorney fees during the trial on the principal issues." 971 P.2d at 13.

Of course, this Court stated "'compliance with the [mechanics' lien] statute is required before a party is entitled to the benefits created by the statute.'" (Citations omitted) 971 P.2d at 13. And concluded: "[A]s long as the prevailing lien claimant can prove that it did indeed mail or deliver the notice of lien if that issue is disputed, then it will have complied with the mechanics' lien statute and will consequently be entitled to attorney fees." 971 P.2d at 13.

The Court concluded that the prevailing party ". . . can establish at any time during the trial phase that it mailed the notice of lien as required by . . . ." 971 P.2d

at 15. Essentially Hatch had failed to prove that the property owner had been notified by mail during the trial. Subsequent to the trial but prior to the entry of the judgment Hatch filed a notice to reopen the case to put on the evidence. The trial court would not reopen the case, denied the attorney's fees and entered a judgment thereon.[43] The Findings of Fact and Conclusions of law were entered on the April 4, 2002. This was the end of the trial phase. The affidavit of McFarland indicating he had received no such notice was prepared on July 13, 2001. All Appellants did was move to strike McFarland's affidavit but put forth no evidence to support that they notified him by mail. The Reply to the motion to strike the McFarland affidavit was prepared and signed by the Appellee on August 8, 2001.

Appellee contends that since the *trial phase* had not ended that Appellee was well within his rights to raise the issue, put on evidence that the notice requirements had not been met by the Appellants, and shift the burden to Appellants to respond. Since they did nothing more than move to strike it is obvious that they did not comply with the notice requirements of the mechanic's lien statute and no attorney's fees, for the judgment, can form the basis for the lien against the McFarland property.

ARGUMENT POINT IV.

THE COURT ERRED WHEN IT FAILED TO AWARD ATTORNEY'S FEES FOR THE WORK THAT WAS DONE AFTER THE OFFER OF

[43] "[T]he 'trial phase' ends, not with the rendering of the jury's verdict, but with the signed entry of final judgment or order, at which time trial issues become ripe for appeal . . . ." Hatch, supra., 971 P.2d at 12.

JUDGMENT WAS MADE BY THE APPELLEE HEREIN.

a.) The Utah Supreme Court has authorized attorney's fees whenever a statute or contract so provide.

Normally, pursuant to Utah Rules of Civil Procedure, Rule 68, the Appellee would only be entitled to costs after the date of the Offer of Judgment if the final outcome at trial was not more favorable than the Offer of Judgment. However, there is authority in the state of Utah that when an Offer of Judgment is rendered and there is statutory or contractual authority for the awarding of attorney's fees, then the court is authorized to make such an award upon applicatioin. See generally Nelson v. Newman, 583 P.2d 601 (Utah S.CT. 1978) wherein an Offer of judgment was filed with the court, the trial proceeded and one party did not get a judgment in excess of the Offer of Judgment. The court stated in pertinent part:

> We have previously held that the contractual liability for payment of attorney's fees extends only to the amount necessary for the enforcement of the contract (here the collection of the notes).
>
> In this case, however, the Court awarded costs, including attorneys' fees, by virtue of the provisions of Rule 68(b) [Offer of Judgment], which provides:
>
> > At any time more than ten days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. . . . An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. ***If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay***

> ***the costs incurred after the making of the offer.***
>
> Defendant filed such an offer to have judgment taken against him more than 10 days before the trial, which offer was more favorable to Plaintiff than the judgment obtained by Plaintiff, and which offer was not accepted by him. Rule 68(b), however, applies to taxable costs only. Attorney's fees are not taxable as costs, ***but may be awarded against an opposing party only if there is contractual or statutory liability therefore.*** Defendant is entitled to reasonable attorney's fees for the collection of the notes as noted ante, but he failed in his burden of proof with regard to the amount of time necessarily spent for that purpose. (Emphasis mine.)

Nelson v. Newman, 583 P.2d 601, at 604.[44]

Clearly there is statutory authority for the awarding of attorney's fees in this case.[45]

b.) The Supreme Court has also authorized the awarding of attorney's fees as costs to selected statutes that refer to costs being attached thereto.

Utah Code Annotated §38-1-18 states that "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." Clearly the statute states that attorneys' fees shall be taxed as **costs** to the action. Rule 68 of the Utah Rules of Civil Procedure

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[44] Had the Defendant put on evidence that showed what time the attorney had then spent in defending after the offer of judgment had been filed, the Defendant would have been awarded his attorney's fees.

[45] " . . . [I]n 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."

states: "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the **costs** incurred after the making of the offer."

In Meadowbrook v. Flower, 949 P.2d 115 (Utah S.Ct. 1998) the Utah Supreme Court discussed this distinction in a footnote to the case and stated:

> Some statutes provide that attorney fees shall be taxed as costs. See, e.g., Utah Code Ann. §14-2-1(5) (attorney fees in action upon bond in private contract); §14-2-2(3) (attorney fees in action upon bond in private contract); §34-27-1 (attorney fees in suits for wages); **§38-1-18 (attorney fees in suits enforcing mechanic's liens)**; §63-56-38(5) (attorney fees in suit upon payment bond in construction contract); §78-45f-313(2) (attorney fees inn actions under uniform interstate family support act). **Generally, under these statutes attorney fees may be included in a cost memorandum, which may be filed and served within five days after entry of final judgment, as prescribed by Utah Rule of Civil Procedure 54(d).** (Emphasis mine.)

Footnote 8, 959 P.2d at 120.

Additionally, since attorney fee awards under §38-1-18 are "mandatory, not discretionary" (See gen. Reeves v. Steinfeldt, 915 P.2d 1073, 1079 (Utah Ct.App. 1996)), it only follows that after an Offer of Judgment and the Appellants' failure to improve its position on the mechanic's lien through the litigation then conversely the attorney's fees must be mandatory and not discretionary in favor of the Appellee. Furthermore, the Supreme Court has previously ruled that the benefit of attorneys fees under the statute is conferred upon "the successful party," which may include the party who defended against the lien. See Palombi, supra., at page 327-328. After filing the Offer of Judgment, the Appellee were the

successful party as they successfully defended the excessive, inaccurate, and woefully questionable charges and demands by the Appellants.

Also, Appellee attempts to settle the mechanic's lien with the $20,000 should in and of itself be sufficient for the District Court judge to weigh in on what reasonable attorney's fee should be awarded, if any. Clearly the court in A.K. & R. Whipple, supra. opened the door for the District Court judge to essentially say, no one prevailed, and not awarded any attorney's fee. Or determined that after the offer had been made it simply wasn't reasonable to expend the continued sums of money for the litigation.

ARGUMENT POINT V.

APPELLANTS WERE SUPPOSED TO SUPPLY SPEC ROAD BASE FOR THE ROAD AND DID NOT. THE JUDGMENT SHOULD BE REDUCED BY THE VALUE OF THE SPEC ROAD BASE.

Owens testified clearly and undeniably that he expected processed road base under the asphalt. (Tr. Vol. I at 108). Several times he referred to it as processed road base. He didn't limit it to the roadway, as the Appellee has done here in this brief, because technically the only thing that the Appellee expected from his conversation was road base material that met specifications. And the specifications required processed road base in the roadway and just ordinary road base in the parking area.

During the deposition with Owens it was brought to his attention that the road base under the roadway wasn't processed road base and when Owens learned this he immediately backed away from his earlier testimony that it was supposed to be processed road base. (Tr. Vol. I at 182-92).

Appellee worried for the longest time that he would be required to rip up the entire roadway and replace the road base material. Since this case has taken so long the property had another development on it which required the removal of the road base and the re-constitution of the roadway. However, it seems fitting to ask this court to reduce the judgment by the difference of the value of processed and non-processed road base. Or a total of $1,960. (See Exhibit 321)

CONCLUSION

The Appellants have failed to marshal the evidence as is their duty, have failed to provide clear evidence that the findings of fact by the District Court are clearly erroneous, and have failed further to show clearly that the evidence they want this court to accept is sufficient to warrant the conclusions they want this court to make. Therefore, the appeal of the Appellants should be dismissed, them taking nothing thereby.

On the contrary, the Appellee did marshal the evidence with regard to the compaction duties of the Appellants. It clearly showed Appellants billed for compaction, operated the machinery to compact, brought Bovee to the recognition that there were certain parts of the property that were not stable, compacted fifteen inches of material knowing that it had not been compacted in eight inch lifts, sunk

the grader up to its axels in mud and said absolutely nothing to anyone, and began delivering spec road base when they got their crusher up and running. This is all objective evidence when weighed against the subjective, self serving testimony of two Butters and one very questionable Owens who admitted under oath that he had come to the Bovees and asked how much they would pay for the testimony they wanted. Therefore this court should find that the District Court made a clearly erroneous ruling based upon the facts.

Further the court ignored the requirement that spec road base be used in the road.

Further this court should award every nickel of attorneys fees for having to defend against an excessive lien and especially after the offer of judgment was entered. In any event, it was totally and completely clear that the Appellants books and records were hopelessly untrustworthy. Who pays a bill to someone who doesn't document any of the goods and services they provide? It's like Becky Butters conjured up this bill out of thin air and then had to manipulate the supporting documentation to try and equal her phony bill. Finally, no attorneys fees should attach to the subject property due to the failure of the Appellants' to notify the property owner of the lien.

The precise relief sought by the Appellee's is first, all attorney's fees for defending against this excessive lien and all the attorney's fees, costs and expenses incurred in this appeal. In the alternative, all attorney's fees and costs incurred

from the time the Offer of Judgment was made until the conclusion of this case, all attorney's fees, costs and expenses incurred with this appeal.

Secondly, an adjustment to the judgment in the amount of the value of the processed road base they should have delivered to what they actually delivered.

Thirdly, the finding against the Appellee that the compaction was not the responsibility of the Appellants was clearly erroneous. It was clearly their responsibility. The evidence of the damages was put into trial and therefore those damages should be awarded against the Appellants herein.

Forth, for all costs and expenses incurred, including a reasonable attorney's fee for the defense Appellant's appeal and the need to file the Cross Appeal.

Fifth, if this Court concludes the Appellants were not responsible for compaction then a reduction of the judgment for all costs of grading and compacting.

Sixth, to adjust the judgment for the value of the road base.

Finally, that no Attorneys fees can be awarded as a lien against the subject property because the property owner was never notified by mail as required. In the alternative to remand the case for a hearing on the issues and allow the parties to put on the evidence.

Respectfully submitted,

Oct 9, 2003

J. Paul Stockdale
Attorney for Appellees

UTAH COURT OF APPEALS

C.E. BUTTERS REALTY AND CONSTRUCTION, INC., dba C.E. BUTTERS CONTRUCTION, Plaintiff/Appellant, v. ROBERT MCFARLAND, Trustee, RENAE W. MCFARLAND, Trustee, TIM BOVEE Defendants/Appellees/Cross-Appellants TIM BOVEE d/b/a BOVEE CONSTRUCTION COMPANY; MERWIN HOLGATE, d/b/a HOLGATE & SONS CONSTRUCTION COMPANY; ROBERT McFARLAND Trustee and RENAE W. McFARLAND, Trustee Third-party Plaintiffs.	Priority No. 15 Utah Court of Appeals 20020571-SC Second District Case No. 97-090-7206 CV

CERTIFICATE OF SERVICE

I certify that I mailed on October 10, 2003 an original Appellees' /Cross Appellants' Brief and seven copies to the Utah Court of Appeals and two copies to Appellant's counsel to the following addresses:

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