

2002

J. Pochynok Company, Inc. v. Gregory Smedsrud : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Ray G. Martineau, Anthony R. Martineau, Brett D. Cragun; attorneys for appellees.

Vincent C. Rampton, Ross I. Romero; Jones, Waldo, Holbrook and McDonough; attorneys for appellees.

Recommended Citation

Brief of Appellee, *Pochynok Company v. Smedsrud*, No. 20020940 (Utah Court of Appeals, 2002).
https://digitalcommons.law.byu.edu/byu_ca2/4049

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

J. POCHYNOK COMPANY, INC., a
Corporation,

Plaintiff and Appellant

vs.

GREGORY SMEDSRUD and LOUANN
SMEDSRUD,

Defendants and Appellees.

Appeal No. 20020940 CA

Civil No. 020901328
Judge J. Dennis Frederick

BRIEF OF APPELLEES

**APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH, HONORABLE J. DENNIS
FREDERICK**

Ray G. Martineau
Anthony R. Martineau
Brett D. Cragun
3098 Highland Drive, Suite 450
Salt Lake City, Utah 84106
Telephone: (801) 486-0200
Attorneys for Plaintiffs/Appellees



Vincent C. Rampton (USB 2684)
Ross I. Romero (USB 7771)
JONES, WALDO, HOLBROOK &
MCDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200
Attorneys for Defendants/Appellees

FILED
Utah Court of Appeals

MAY 23 2003

14580.0001

Paulette Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

J. POCHYNOK COMPANY, INC., a
Corporation,

Plaintiff and Appellant

vs.

GREGORY SMEDSRUD and LOUANN
SMEDSRUD,

Defendants and Appellees.

Appeal No. 20020940 CA

Civil No. 020901328
Judge J. Dennis Frederick

BRIEF OF APPELLEES

**APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH, HONORABLE J. DENNIS
FREDERICK**

Ray G. Martineau
Anthony R. Martineau
Brett D. Cragun
3098 Highland Drive, Suite 450
Salt Lake City, Utah 84106
Telephone: (801) 486-0200
Attorneys for Plaintiffs/Appellees

Vincent C. Rampton (USB 2684)
Ross I. Romero (USB 7771)
JONES, WALDO, HOLBROOK &
MCDONOUGH
170 South Main Street, Suite 1500
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200
Attorneys for Defendants/Appellees

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF JURISDICTION	-1-
PARTIES TO THE APPEAL	-1-
STATEMENT OF ISSUES ON APPEAL	-1-
STATEMENT OF THE CASE	-2-
STATEMENT OF FACTS	-6-
PRIOR OR RELATED APPEALS	-9-
DETERMINATIVE PROVISIONS OF LAW	-9-
SUMMARY OF ARGUMENT	-10-
ARGUMENT	-13-
POINT I - THE TRIAL COURT PROPERLY AWARDED TO DEFENDANTS/APPELLEES ALL ATTORNEYS' FEES INCURRED AFTER MAY 9, 2002	-13-
A. Statutory Enactments Granting Attorneys' Fees Have Been Expressly Held Procedural and Remedial, and Applied Retroactively to Pending Litigation	-15-
B. Utah Code Ann. § 38-1-18(3) Clarifies the Prior Enactment	-18-
C. Had Plaintiff Accepted Defendants' Offer Of Judgment, They Would Have Been Bound By It	-19-
POINT II - THE LOWER COURT DID NOT ERR IN AWARDING TO DEFENDANTS AND APPELLEES THEIR COSTS AND ATTORNEYS' FEES INCURRED PRIOR TO MAY 9, 2002	-20-
A. Defendants Defeated Virtually All of Plaintiff's Mechanic's Lien Claim.	-25-
B. Defendants' Statutory Right to Attorneys' Fees After	

May 9, 2002 Results in a Net Recovery in Their Favor.	-26-
C. The Jury’s Verdict Necessarily Implied the Filing of Two Wrongful Liens by Plaintiff.	-26-
POINT III - THE TRIAL COURT DID NOT ERR IN REJECTING PLAINTIFF’S/APPELLANT’S OBJECTIONS TO DEFENDANTS’/APPELLEES’ WRIT OF GARNISHMENT TO ZIONS FIRST NATIONAL BANK	-28-
A. J. Pochynok Company presented no evidence to the trial court to support any challenge to the writ of garnishment	-28-
B. Even If the Testimony of John Pochynok’s Affidavit Had Been Presented at the Hearing, it Would Not Have Sustained Plaintiff’s Burden of Proof	-31-
CONCLUSION	-33-

TABLE OF AUTHORITIES

STATE CASES

<i>AK&R Whipple Plumbing & Heating v. Guy</i> , 47 P.3d 92 (UT App 2002)	2, 21
<i>Ault v. Holden</i> , 44 P. 3d 781 (Utah 2002)	2
<i>Beehive State Bank v. Rosquist</i> , 21 Utah 2d 439 P.2d 468 (1968)	29
<i>Calcium v. Systems Communications Corp.</i> , 939 P.2d 185 (UT App 1997)	26
<i>Collier v. Heinz</i> , 827 P.2d 982 (UT App 1992)	17
<i>Dept. of Social Service v. Higgs</i> , 656 P.2d 998 (Utah 1982)	14
<i>Johansen v. Johansen</i> , 2002 Ut. App. 75 (UT App 2002)	14
<i>McCormack v. Town of Granite</i> , 913 P.2d 282 (Okl. 1996)	16
<i>Moore v. American Coal Company</i> , 737 P.2d 989 (Utah 1987)	15
<i>Morse v. Packer</i> , 15 P.3d 1021 (Utah 2000)	2
<i>Mountain States Broadcasting Co. v. Neale</i> , 783 P.2d 551, 555 (Ut. 1989)	23
<i>Occidental/Nebraska Federal Savings Bank v. Mehr</i> , 791 P.2d 217 (Ct. App. Ut. 1990)22, 23, 24	
<i>Peterson v. Peterson</i> , 571 P.2d 1360 (Utah 1977)	29, 31
<i>Qualls v. Farmers Insurance Company, Inc.</i> , 629 P.2d 1258 (Okl. 1981)	16
<i>R.T. Nielson Company v. Cook</i> , 2002 UT 11, 2002 Utah LEXIS 16 (Utah 2002)	23, 24
<i>Rodwater v. Old Republic Surety</i> , 854 P.2d 527 (Utah 1993)	17
<i>Shupe v. Menlove</i> , 18 Utah 2d 130, 417 P.2d 246 (1966)	2, 11, 20, 25, 27
<i>State Department of Human Services v. Jacoby</i> , 975 P.2d 939 (UT App 1999)	15
<i>Toone v. Weber County</i> , 57 P. 3d 1084 (Utah 2002)	2
<i>Veloedman v. Cornell</i> , 161 Or. App. 396, 984 P.2d 906 (Or. Ct. App. 1999)	15
<i>Wilde v. Wilde</i> , 969 P.2d 438 (UT App 1998)]	14

STATE STATUTES

Utah Code Ann. § 38-1-25	27
Utah Code Ann. § 38-11-107	18
Utah Code Ann. § 57-1-32	22
Utah Code Ann. § 58-55-603	32
Utah Code Ann. § 31-1-17	9, 20
Utah Code Ann. § 38-1-1, <u>et seq</u>	7
Utah Code Ann. § 38-1-17	1, 2, 11, 27
Utah Code. Ann. § 38-1-18	1, 2, 14, 17, 18, 22
Utah Code Ann. § 38-1-18(1)	9, 20
Utah Code Ann. § 38-1-18(2)	27
Utah Code Ann. § 38-1-18(3)	1, 7, 10, 13, 14, 15, 17, 18, 19

MISCELLANEOUS

Rule 59 U.R.C.P.	6, 28, 29, 30
Rule 59(e) U.R.C.P.	5
Rule 64D(h), U.R.C.P.	10, 28
Rule 64(D)(h)(3)(i)	29
2002 Utah Lexis at 25	23, 24

Defendants and Appellees Gregory Smedsrud and LouAnn Smedsrud submit the following Appellees' Brief in the above-referenced proceeding.

STATEMENT OF JURISDICTION

Appellees agree with Appellant's statement of jurisdiction of this case.

PARTIES TO THE APPEAL

The parties to the appeal are Plaintiff and Appellant J. Pochynok Company, Inc. (hereafter "Plaintiff/Appellant" or "Pochynok"), and Defendants and Appellees Gregory Smedsrud and LouAnn Smedsrud (hereafter "Defendants/Appellees" or "Smedsruds").

STATEMENT OF ISSUES ON APPEAL

1. Whether the lower court erred in granting to Defendants/Appellees all attorneys' fees incurred after May 9, 2002, pursuant to Utah Code Ann. § 38-1-18(3), by reason of Appellant's refusal of Appellees' Offer of Judgment made on that date, in that this action was filed before enactment of that provision by the Utah Legislature.

2. Whether the lower court erred in granting to Defendants/Appellees all costs and attorneys' fees incurred in this matter before May 9, 2002, pursuant to Utah Code Ann. §§ 38-1-17 and 38-1-18.

3. Whether the lower court erred in upholding Defendants/Appellees' writ of garnishment to Zions First National Bank, in that Plaintiff/Appellant failed to offer evidence, or otherwise to establish, that the funds on deposit in its depository account were not its property.

Issue 1 is a question of law relating to the retroactivity of the statute relied on, which this Court reviews for correctness – *Toone v. Weber County*, 57 P.3d 1084 (Utah 2002).

Issue 2 concerns the trial court's apportionment of costs (including attorneys' fees) under Utah Code Ann. §§ 38-1-17 and 38-1-18. As applicable case law clothes the trial court with discretion in this analysis, its decision in this regard is reviewable under an abuse of discretion standard – *Shupe v. Menlove*, 18 Utah 2d 130, 417 P.2d 246 (1966); *AK&R Whipple Plumbing & Heating v. Guy*, 47 P.3d 92 (UT App 2002); *Ault v. Holden*, 44 P. 3d 781 (Utah 2002).

Issue 3, arising from the lower court's ruling on issues of fact following hearing, is governed by a clearly erroneous standard - see *Morse v. Packer*, 15 P.3d 1021 (Utah 2000).

STATEMENT OF THE CASE

This case concerns the construction of a residence in Summit County, State of Utah. Defendants and Appellees Gregory Smedsrud and LouAnn Smedsrud, as owners, were sued by Plaintiff/Appellant J. Pochynok Company, Inc. for breach of contract and quantum meruit. Plaintiff and Appellant J. Pochynok Company further sought to foreclose the later of two mechanic's liens asserted against the Defendants/Appellees' residence. Defendants and Appellees counterclaimed, asserting defective workmanship and incompleteness of the project.

The matter was set for jury trial commencing May 21, 2002. On May 9, 2002, counsel for Defendants and Appellees presented Plaintiff/Appellant with an offer of judgment in the amount of \$40,000 (see Addendum 1 hereto, R 408-410). Plaintiff/Appellant declined the offer, and the case proceeded to trial.

The case was tried to a jury on May 21-22, 2002. In its case in chief, Plaintiff/Appellant initially claimed \$81,269.91 in damages (having plead \$74,360.51 in its complaint – R. 1-6; 200-207); during the course of trial, though, Plaintiff/Appellant was inconsistent in the computation of its claim. Defendants/Appellees put on substantial proof concerning unearned supervisor fees, defective work which had to be redone, or which diminished the value of the home. Following deliberation, the jury returned a verdict (net of offsets) of only \$7,096.00 for Plaintiff/Appellant. See Addendum 2 hereto (R. 354-355). Plaintiff/Appellant does not appeal the jury verdict.

On May 31, 2002, Defendants and Appellees moved the court for an order taxing costs and attorneys' fees which they had incurred in the litigation. Plaintiff/Appellant J. Pochynok Company opposed the motion of Defendants and Appellees, and filed its own motion for an award of costs and fees. Both parties submitted evidence of costs and attorneys' fees in the form of affidavits by legal counsel.

By minute entry dated July 25, 2002 (R. 621-622), the trial court granted Defendant/Appellees' motion to tax costs and attorneys' fees, and denied

Plaintiff/Appellant's motion. Judgment upon the verdict was thereupon entered by the Court on August 5, 2002 as follows:

- a. Judgment was entered in favor of Plaintiff J. Pochynok Company, Inc., and against Defendants Gregory Smedsrud and LouAnn Smedsrud, jointly and severally, in the amount of \$7,076.56, together with interest thereon from and after May 22, 2002 until paid in full at the contract rate of 12% per annum.
- b. Judgment was entered in favor of Defendants Gregory and LouAnn Smedsrud, jointly and severally, and against Plaintiff J. Pochynok Company, Inc., in the following amounts:
 - i. \$1,906.94, representing Defendants' costs of suit incurred prior to May 9, 2002;
 - ii. \$48,083.10, representing Defendants' attorneys' fees incurred prior to May 9, 2002;
 - iii. \$766.50, representing Defendants' costs of suit incurred on and after May 9, 2002;
 - iv. \$33,280.00, representing Defendants' attorneys' fees incurred on and after May 9, 2002; and
 - v. Interest was awarded on the foregoing amounts from and after May 22, 2002 until paid in full, at the contract rate of 12%.

The Judgment further denied Plaintiff/Appellant's petition for foreclosure of its mechanic's lien against the residence of Defendants/Appellees, holding that Plaintiff/Appellant held no right, title or interest therein. See Addendum 3 hereto (R. 635-640)

On August 23, 2002, Plaintiff/Appellant moved the court for an order altering or amending the judgment under Rule 59 (e), Utah Rules of Civil Procedure, which was denied by order of the lower court on October 7, 2002 (R. 629-631).

On September 2, 2002, Defendants/Appellants sought and obtained issuance of a writ of garnishment to Zions First National Bank as garnishee, seeking garnishment of all funds on deposit in any depository accounts maintained by Plaintiff/Appellant. On September 12, 2002, Zions First National Bank returned an amended response to the garnishee interrogatories¹, indicating that Plaintiff/Appellant maintained funds on deposit in the amount of \$37,585.00, and froze the same pending further order of the court – see Addendum 4 (R. 700-705).

Plaintiff/Appellant requested a hearing on Defendants'/Appellees' writ of garnishment on September 23, 2002, asserting that the funds on deposit in its Zions Bank account were being held for payment of subcontractors on a separate project, and therefore exempt from garnishment. The matter was called on for hearing before the trial court on October 7, 2002 (R. 726). Plaintiff/Appellant presented no evidence to contradict the answers of Zions First National Bank to Defendants'/Appellees' garnishee

¹ In a prior response, Zions had inadvertently garnished Defendants' account.

interrogatories; accordingly, at the conclusion of argument, the court ruled that Plaintiff's objections to the writ of garnishment were not well-taken.

At the trial court's direction, Defendants and Appellees filed a proposed form of order on the writ of garnishment. On October 16, though, Plaintiff/Appellant moved for a "new trial" on the writ of garnishment under Rule 59, Utah Rules of Civil Procedure (R. 746-747). The Motion was accompanied by the Affidavit of John Pochynok, owner of Plaintiff/Appellant, asserting various facts concerning the garnished funds which had not been offered or introduced into evidence at the October 7 hearing (R. 766-769). The court denied Plaintiff/Appellant's Rule 59 motion (R. 849-851), and no appeal is taken therefrom (*see* Notice of Appeal, R. 816-817). A ruling issued October 17, 2002, overruling Plaintiff/Appellant's objections to the writ, and ordering funds released to Defendants/Appellees. See Addendum 5 hereto (R.776-779).

Plaintiff/Appellant filed its Notice of Appeal on November 4, 2002. On November 18, 2002, Plaintiff/Appellant certified to the trial court that no transcript would be required for this appeal (R. 852-853).

STATEMENT OF FACTS

Most of the salient facts relevant to this appeal arise not from the underlying dispute (resolved by a jury verdict from which no appeal is taken), but from post-trial proceedings which are fully described in the foregoing Statement of the Case. The following Statement of Facts briefly sets out additional information relevant to the argument which follows.

1. By this action, Plaintiff and Appellant J. Pochynok Company, Inc. sought an order of the Court foreclosing a mechanic's lien interest in property located at 7100 Canyon Road in Summit County, State of Utah, pursuant to Utah Code Ann. § 38-1-1, et seq. See Plaintiff's Amended Lien Foreclosure Complaint herein (R. 200-208).

2. Plaintiff's claims were based upon a Notice of Mechanic's Lien filed with the Summit County Recorder's office on October 19, 1999, in the amount of \$74,360.51, together with interest, \$100 in costs and attorneys' fees (R. 208-402).

3. Plaintiff had previously filed, and then released, a Notice of Mechanic's Lien against Defendants' property on July 26, 1999 in the amount of \$150,000, plus interest, costs and attorneys' fees (R. 405).

4. Defendants' Answer and Counterclaim asserted, *inter alia*, defective workmanship and delay damages. See Defendants' Answer to Plaintiff's Amended Lien Foreclosure Complaint and Counterclaim herein (R. 19-29; 211-218).

5. This matter was set for trial to a jury commencing May 21, 2002.

6. On May 9, 2002, Defendants submitted to Plaintiff, through its counsel, an offer of judgment in the amount of \$40,000, tendered pursuant to Utah Code Ann. § 38-1-18(3). See Addendum 1 hereto (R. 408-410).

7. Plaintiff never accepted Defendants' May 9, 2002 offer of judgment.

8. This matter was tried to a jury on May 21 and 22, 2002.

9. At trial, Plaintiff asserted a claim against Defendants in the amount of \$81,269.91 (exclusive of costs and attorneys' fees). See Plaintiff's Trial Exhibit 26 (R. 412-431).

10. During trial, Defendants presented evidence that they were entitled to significant offsets for unearned supervisor fees, work defects and delays. Defendants further produced evidence that they had never received a consistent accounting from Plaintiff despite nearly three years of negotiations and attempts, contradictory and inconsistent claims coming from Plaintiff right up to the eve of trial.

11. At the conclusion of the evidence, the jury returned a general verdict in favor of Plaintiff in the amount of only \$7,076.56. See Addendum 2 hereto (R. 354-355).

12. Prior to and through May 9, 2002, Defendants incurred \$1,906.94 in costs and \$48,083.10 in attorneys' fees. Affidavit of Ross I. Romero (R. 435-459).

13. Between May 10, 2002 and the entry of judgment, Defendants/Appellees incurred \$775.70 in costs and \$33,280.00 in attorneys' fees. Affidavit of Ross I. Romero (R. 435-459).

14. Pursuant to writ of garnishment to Zions First National Bank as garnishee, Defendants/Appellees recovered \$37,585.00 from Plaintiff/Appellant's account. (R. 700-705).

15. In its sworn answers to garnishee interrogatories, Zions expressly acknowledged that J. Pochynok was the company owner of the garnished account, and set out the amount on deposit (R. 700-705).

16. Contrary to the clear implication in paragraphs 11-17 of Appellant's Statement of Facts (Appellant's brief at pp. 8-9), *Plaintiff/Appellant presented no evidence whatsoever to the trial court at the October 7, 2002 hearing on Defendants/Appellees' writ of garnishment to Zions First National Bank*. As such, not one of the facts set out in those paragraphs was established by testimony, by documents or other physical evidence offered or received into evidence, or otherwise. Rather, they were set out in an affidavit signed by John Pochynok, and filed with the trial court on October 16, 2002 – nine days after the court had already granted Plaintiff/Appellant a hearing on its objections to the writ of garnishment, and ruled against them, and over a month after the return on the writ of garnishment was filed by the garnishee. (R. 766-769).

PRIOR OR RELATED APPEALS

There are no prior or related appeals herein.

DETERMINATIVE PROVISIONS OF LAW

1. Utah Code Ann. § 31-1-17:

Except as provided in § 38-11-107, as between the owner and the contractor, the Court shall apportion the costs according to the right of the case. . . .

2. Utah Code Ann. § 38-1-18(1):

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

3. Utah Code Ann. § 38-1-18(3):

A party against whom any action is brought to enforce a lien under this chapter may make an offer of judgment pursuant to Rule 68 of the Utah Rules of Civil Procedure. If the offer is not accepted and the judgment finally obtained by the offeree is not more favorable than the offer, the offeree shall pay the costs and attorneys' fees incurred by the offerer after the offer was made.²

4. Rule 64D(h), U.R.C.P.:

The Defendant or any other person who owns or claims an interest in the property subject to garnishment that is garnisheed may request a hearing to claim any exemption to the garnishment, or to challenge the issuance of the writ or the accuracy of the answers to interrogatories. . . . The request for a hearing shall be in the form to enable the defendant or other person to specify the grounds upon which the defendant or other person challenges the issuance of the writ or the accuracy of the answers to interrogatories. . .

SUMMARY OF ARGUMENT

The trial court properly awarded to Defendants and Appellees Smedsruks all attorneys' fees and costs incurred after May 9, 2002, the date on which they made an offer of judgment to Pochynok. Utah Code Ann. § 38-1-18(3) mandates an award of attorneys' fees in all mechanic's lien cases where the claimant does not recover more than an offer of judgment. As Pochynok's net recovery amounted to only a fraction of the \$40,000 offered it on May 9, 2002, application of the statute required an award of Defendants'/ Appellees' post-May 9 attorneys' fees.

² Rule 68, Utah Rules of Civil Procedure, permits the extension of an offer of judgment at any time more than 10 days prior to the commencement of trial.

Plaintiff's/Appellant's claim that the statute should be inapplicable, as it was enacted after this case had been filed, ignores the remedial nature of the statute. Under governing law, a substantive law may be applied only prospectively, whereas a remedial law is applied retroactively. Case law from numerous jurisdictions has established beyond contention that a legislative enactment providing an award of attorneys' fees is remedial in nature, and may operate retrospectively. Moreover, the statute simply clarifies the prior version of Utah Code. Ann. § 38-1-18 to specify a category of "successful party" under that provision as previously enacted.

Defendants and Appellees, moreover, must be deemed the "successful parties," for purposes of Utah Code. Ann. §§ 38-1-17 and 38-1-18, and the lower court's award of all costs and fees was not an abuse its discretion. Under the balancing test mandated by *Shupe v. Menlove*, 18 Utah 2d 130, 417 P.2d 246 (1966), coupled with the "flexible, reasoned approach" to determining the "successful party," as mandated in the case law handed down since that time, Smedsruks were clearly the successful parties in this case. They defeated all but a fraction of Pochynok's mechanic's lien claims through assertion of rights of setoff. Given their statutory entitlement to post-May 9 attorneys' fees, moreover, the net recovery in the case goes in favor of Defendants and Appellees, and renders them the "successful parties" under any definition.

Finally, the lower court did not err in permitting garnishment of funds on deposit in J. Pochynok Company's bank account with Zions First National Bank.

Plaintiff/Appellant J. Pochynok Company asserts that the funds were actually the

property of a third party, paid to J. Pochynok Company in connection with a separate construction project. The argument suffers two failings, however. First, Plaintiff/Appellant offered no evidence to support its contention in this regard when the matter was heard on October 7, 2002. Far from carrying the required burden of proof by “clear and convincing evidence” that the funds were not J. Pochynok Company’s property notwithstanding their deposit in its bank account with Zions, J. Pochynok Company furnished not one scrap of evidence to support its position. Second, even the evidence offered by affidavit after the hearing conclusively concluded established only that the funds on deposit in the account had been paid to J. Pochynok Company in connection with another construction project, pursuant to a contract with the owner/payer. At that point, the funds became the property of Plaintiff/Appellant, to be paid to whichever creditor it saw fit to pay (subject, however, to judicial process in the form of writs of garnishment). The fact that Plaintiff/Appellant Pochynok would have preferred to pay subcontractors on another project, at Smedsruds’ expense, does not alter its ownership of the funds, or their susceptibility to garnishment by Defendants and Appellees.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY AWARDED TO DEFENDANTS/APPELLEES ALL ATTORNEYS' FEES INCURRED AFTER MAY 9, 2002

Utah Code Ann. § 38-1-18(3) provides as follows:

A party against whom any action is brought to enforce a lien under this chapter may make an offer of judgment pursuant to Rule 68 of the Utah Rules of Civil Procedure. If the offer is not accepted and the judgment finally obtained by the offeree is not more favorable than the offer, the offeree shall pay the costs and attorneys' fees incurred by the offerer after the offer was made.³

The language of 38-1-18(3) is mandatory. By making their offer of judgment of \$40,000 on May 9, 2002, Defendants/Appellees became statutorily entitled to a recovery of all costs and attorneys' fees incurred after that date if Plaintiff/Appellant, as lienholder, failed to recover more than the amount of the offer at trial. It is undisputed that Plaintiff's/Appellant's recovery, net of offsets asserted by Defendants/Appellees, was only a fraction of the offer amount. Without more, then, Defendants and Appellees were statutorily entitled to an award of costs in the amount of \$775.70, and attorneys' fees in the amount of \$33,280.00.

Plaintiff's/Appellant's only response to this is that Section 38-1-18(3) was enacted effective April, 2001—more than a year before Defendants and Appellees made their Offer

³ Rule 68, Utah Rules of Civil Procedure, permits the extension of an offer of judgment at any time more than 10 days prior to the commencement of trial.

of Judgment in this matter, but after the case had been filed. Plaintiff argues, without authority, that Section 38-1-18(3) “plainly affects substantive or vested rights,” and therefore may not be applied to any portion of a lawsuit filed before its effective date.⁴

Defendants’ Offer of Judgment was made pursuant to Rule 68 of the Utah Rules of Civil Procedure, as was required by section 38-1-18. It was made pursuant to a procedural rule and was therefore remedial in nature. Defendants, although not required, clarified their offer by referencing section 38-1-18 to put Plaintiff on notice that they would be seeking their attorneys’ fees from the date of offer should plaintiffs fail to collect at least the amount offered. In sum, there should be no question about the nature of Defendants’ offer being procedural.

Further, whether a statute is applied retroactively depends on the nature of the enactment. The Utah Court of Appeals recently articulated the applicable standard in the case of *Wilde v. Wilde*, 35 P.3d 341 (UT App 2001), cited in Appellant’s brief:

“As a general rule, amendments which ‘affect substantive or invested rights . . . operate prospectively’ [citing *Department of Social Service v. Higgs*, 656 P.2d 998 (Utah 1982)]. However, if an amendment is procedural or remedial, then it applies to accrued, pending and future actions. *See Id.* . . . ‘A substantive law creates, defines and regulates the rights and duties of the parties which may give rise to a cause of action.’ [quoting *Wilde v. Wilde*, 969 P.2d 438 (UT App 1998)] . . . A procedural or remedial law ‘provid[es] a different mode or form of procedure for enforcing substantive rights,’ [citation

⁴ Plaintiff/Appellant cites to the cases of *Wilde v. Wilde*, 35 P.3d 341 (UT App 2001) and *Johansen v. Johansen*, 2002 Ut. App. 75 (UT App 2002), both of which concern statutory modifications of alimony rights. Alimony is clearly a vested, substantive right which may not be disturbed through retroactive legislation. For those reasons set out herein, though, an award of attorneys’ fees incurred in litigation is a procedural device, not a substantive right. *See also* discussion of the *Wilde* decision, *infra*.

omitted], or clarifies the meaning of an earlier enactment.
[citation omitted]” 35 P.3d at page 344-345.

See also State Department of Human Services v. Jacoby, 975 P.2d 939 (UT App 1999) (holding that an enactment extending the applicable statute of limitations was procedural, and applied retroactively); *Moore v. American Coal Company*, 737 P.2d 989 (Utah 1987) (holding that a post-filing legislative enactment making hearing on a workmen’s compensation claim discretionary with the administrative law judge defeated no substantive right, but was procedural and therefore retroactive).

For the reasons set out below, Utah Code Ann. § 38-1-18(3) is clearly remedial and procedural, and applicable to the Offer of Judgment made in this action 13 months after its enactment.

A. Statutory Enactments Granting Attorneys’ Fees Have Been Expressly Held Procedural and Remedial, and Applied Retroactively to Pending Litigation.

Although no Utah court has ruled directly on the question, other jurisdictions have expressly held that the statute granting a right to attorneys’ fees is procedure and remedial in nature, and therefore applicable retroactively to cases pending on its effective date.

In the case of *Veloedman v. Cornell*, 161 Or. App. 396, 984 P.2d 906 (Or. Ct. App. 1999), the court retroactively applied a statute authorizing awards of attorneys’ fees to prevailing parties in actions for injuries to crops. The court began by observing that neither the statute itself nor its legislative history, stated whether or not it was to be given retroactively application. The court then stated the following:

The pertinent maximum of construction is that, in the absence of evidence of what the legislature actually intended, we presume that it intended retroactive effect to be given to statutes that are “remedial” or “procedural,” as opposed to “substantive” in nature [citation omitted]. In this case, two factors lead us to conclude that OR.S 105.810(2) is remedial or procedural and, thus, retroactive.

First, we observe the essentially remedial nature of the statute as a whole. The Supreme Court has explained that, at least in the context of determining the retroactivity of statutes, “remedial” statutes are those “which pertain to or affect a remedy, as distinguished from those which affect or modify a substantive right or duty.”[citation omitted] OR.S 105.810 is such a statute. It provides property owners a statutory remedy for the unlawful taking of crops, a remedy that includes treble damages and, since 1995, attorneys’ fees. The attorneys’ fees provision was added to the statute without altering any underlying legal duties.

Second, we observe that OR.S 105.810(2) provides for an award of attorneys’ fees as “reimbursement of reasonable costs of litigation.” The distinction between attorneys’ fees as costs and attorneys’ fees as a consequence of substantive liability has proven critical in prior cases.”

984 P.2d at pages 908-909.

Similarly, in the case of *McCormack v. Town of Granite*, 913 P.2d 282 (Okla. 1996), the Supreme Court of Oklahoma stated that “statutes relating to the award of attorney fees to a prevailing party are procedural, and subject to retrospective operation.” (913 P.2d at page 285). *See also Qualls v. Farmers Insurance Company, Inc.*, 629 P.2d 1258 (Okla. 1981) (“The general rule that the statutes will be given prospective operation only . . . does not apply to statutes affecting procedure. . . .Taxing of attorneys’ fees as costs relates to a motive procedure.”).

Utah Code Ann. § 38-1-18(3) clearly falls within the holding of the foregoing authorities. Enacted in 2001, it modified the language of Utah Code Ann. § 38-1-18 (initially enacted well before this action was filed, which provided for attorneys' fees to be "taxed as costs in the action" to the "successful party") (see POINT II below). As enacted, subsection (3) did not enlarge, contract, modify or otherwise affect any contractual or other substantive right held by J. Pochynok Company, Inc. at the time this action began. It neither created nor revoked any substantive right giving rise to any civil cause of action.⁵

By definition, in fact, Section 38-1-18(3) has nothing to do with the substantive rights and obligations giving rise to the parties' claims in the litigation. It cannot be invoked until the case is already pending. By its express terms, however, the Offer of Judgment contemplated by the statute may, under Rule 68, be made at any time up to ten days prior to trial.

On its face, the statute is a procedural device for mitigating the impact of attorneys' fee awards on minuscule recoveries by over-reaching contractors. It is a procedural, cost-shifting device, and nothing more. Based on the clear weight of authority, it should be treated as remedial and procedural, rather than substantive, and given retroactive application to this case.

⁵ By definition, awards of attorneys' fees are not "damages" under law—see *Rodwater v. Old Republic Surety*, 854 P.2d 527 (Utah 1993); *Collier v. Heinz*, 827 P.2d 982 (UT App 1992).

B. Utah Code Ann. § 38-1-18(3) Clarifies the Prior Enactment.

Prior to April 1, 2001, Utah Code Ann. § 38-1-18 stated the following:

Except as provided in Utah Code Ann. § 38-11-107⁶, as between the owner and the contractor the court shall apportion the costs according to the right of the case, but in any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action.

By adding subsection (3) in 2001, the legislature further illuminated its intent as to who was the “successful party” under § 38-1-18 as previously enacted. Should the property owner make an Offer of Judgment for more than the contractor’s ultimate recovery of trial, the legislature clearly concluded, the property owner – not the contractor—should be deemed the “successful party” under § 38-1-18 with respect to costs and attorneys’ fees incurred after the offer was made.

In other words, subsection (3) simply defined, directed and clarified the application of § 38-1-18 in situations where an Offer of Judgment had been made—an area clearly within the court’s discretion prior to 2001, as addressed at POINT II, below. As such, the 2001 enactment should be given retroactive application to a case pending prior to its effective date, particularly when the Offer of Judgment was made well after that time.

⁶ The reference section concerned mechanic’s lien claims on residential properties by subcontractors which is not applicable in the present case.

C. Had Plaintiff Accepted Defendants' Offer Of Judgment, They Would Have Been Bound By It.

In arguing that § 38-1-18(3) should have only prospective application, J. Pochynok Company ignores a fundamental inequity. Had J. Pochynok Company *accepted* Defendants'/Appellees' May 9, 2002 Offer of Judgment in this matter, it would have been statutorily entitled to entry of judgment thereon under Rule 68, Utah Rules of Civil Procedure. Defendants would have had no means of avoiding entry of judgment thereon by claiming that § 38-1-18(3) should be afforded only prospective application. Having elected to decline the offer, Plaintiff/Appellant should not be permitted to make the same self argument in his own interests.

With regard, finally, to J. Pochynok Company's observation that the attorneys' fees which it incurred in trial should be added to the amount of the verdict in determining whether or not its recovery exceeded the amount of the offer, the response is simple: J. Pochynok Company recovered no fees, at trial or thereafter. The judgment entered in this matter cannot be massaged in any way that makes it "more favorable than the offer"; accordingly, J. Pochynok Company's argument based on what might have happened, or even what should have happened, is moot.

POINT II

THE LOWER COURT DID NOT ERR IN AWARDING TO DEFENDANTS AND APPELLEES THEIR COSTS AND ATTORNEYS' FEES INCURRED PRIOR TO MAY 9, 2002.

Actions brought (or defended) under Utah's Mechanic's Liens Statute fall within a statutory exception to the general rule that, in civil litigation matters, the parties each bear their respective costs and attorneys' fees. Utah's Mechanic's Lien Act calls for an award of costs and attorneys' fees to the "successful party" in a lien foreclosure action.

The Utah Supreme Court has expressly held that the term "successful party" for purposes of award costs and attorneys' fees, must be viewed in light of two separate statutory provisions, which have been interpreted to complement each other. Utah Code Ann. § 38-1-18(1) provides as follows:

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

Utah Code Ann. § 31-1-17, however, reads as follows:

Except as provided in § 38-11-107, as between the owner and the contractor, the Court shall apportion the costs according to the right of the case. . . .

In the early case of *Shupe v. Menlove*, 18 Utah 2d 130, 417 P.2d 246 (1966), the Utah Supreme Court was faced with a case in which (precisely as in the case before the Court in this action) a building contractor sought to foreclose a mechanic's lien claim against a

property owner pursuant to a cost-plus-ten-percent building contract. There, as here, the jury had returned a verdict in favor of the contractor, but for substantially less than the amount of the contractor's mechanic's lien claim or the amount asserted at trial. The trial Court rejected the contractor's claim that he had been the "successful party" at trial and the Utah Supreme Court affirmed. In its opinion, the Court quoted the language of § 17 and 18 of the Mechanic's Lien Statute set out above, and then stated the following:

It is plain that these two sections relating to this subject should be construed together and that when attorney fees are awardable thereunder, they are to be treated as costs, which, as expressed in 38-1-17 the Court 'shall apportion the cost according to the right of the case.'

417 P.2d at 249.

More recent cases are in accord. J. Pochynok Company cites the Court to its decision in *AK&R Whipple Plumbing & Heating v. Guy*, 47 P.3d 92 (UT App 2002) for the proposition that a "successful party" in a mechanic's lien action must be determined by a mechanical, winner-take-all, net-recovery rule. Contrary to Plaintiff's/Appellant's argument, though, the *Whipple* decision stands for the proposition that a trial court's determination of who is the "successful (or prevailing) party" is *not* a mechanical process at all (unless all claims run one way only); that, where claims in a civil action run both ways and both parties are to a degree successful, the court must adopt "a flexible and reasoned approach", taking into consideration the practical and substantive outcome of the litigation. In fact, the court's opinion, while determining that "successful party" and "prevailing party" were synonymous terms, expressly noted that:

we do not suggest that whether a claim is ultimately determined to be enforceable under the conditions of Section 38-1-18 is not a factor to be considered in determining which party or parties prevail or are successful.

(47 P.3d at 95.) The court's language here has specific application to this case, where Smedsruds offered judgment for nearly six times Plaintiff's ultimate recovery, and thus became entitled as a matter of law to all attorneys' fees incurred after May 9, 2002 (the sum total of which far eclipsed Plaintiff's jury verdict). While *Whipple* rejected the strict "net recovery" rule in cases where (as here), both parties realize on claims, Smedsruds' statutory entitlement to post-May 9 attorneys' fees clearly dictates a net balance in their favor. Certainly, under the "flexible and reasoned approach" mandated by *Whipple*, the court's decision in this case is unassailable.

The *Whipple* decision, moreover, expressly invoked and affirmed the Court of Appeals' decision in *Occidental/Nebraska Fed. Savings Bank v. Mehr*, 791 P.2d 217 (Ut. Ct. App. 1990), the holding which expressly validates the Court's ruling in this action. In *Occidental*, the plaintiff brought a trust deed deficiency action against the Defendant, seeking also an award of costs and attorneys' fees (in that case under Utah Code Ann. § 57-1-32). The trial court observed that, of its six-figure deficiency claim, the plaintiff recovered only \$7,339.44. Based thereon, the trial court determined that, even though plaintiff obtained a judgment against Defendants, they were the "prevailing parties" by reason of the nominal amount thereof, and awarded them costs and attorneys' fees. The court of appeals affirmed:

At trial, Occidental obtained a judgment of approximately \$7300. It argues that a money judgment in its favor entitles it to attorneys' fees as the prevailing party. *As stated above,*

this court has recognized the need for a flexible and reasoned approach to making determinations of who is the prevailing party.

In the case at hand, Occidental claimed a balance due of over \$600,000 resulting from the trustee's sale held in April 1986 . . . The Mehrs were successful in defending against Occidental's claim for a \$600,000 deficiency based on the April sale. The Mehrs successfully demonstrated the validity of the December sale, thus the deficiency judgment was for the stipulated amount of \$7339.44. In light of the circumstances involved and the issues contested at trial, the trial court did not err in granting the Mehrs attorneys' fees and costs as the prevailing party.

791 P. 2d at 222. In *Occidental/Nebraska Fed. Savings*, then, as in the instant case, the trial court sustained an award of attorneys' fees to a party which successfully defeated all but a token amount of the opposing party's claim. *Occidental* directly defeats the claim of Plaintiff in this action to the effect that any award of a money judgment automatically entitles the recipient to the status of "prevailing party," and to an award of attorneys' fees as a matter of law. Rather, the Court must look to the realities of the case, and adopt the Court of Appeals' "flexible and reasoned approach" to an award of attorneys' fees. Under the *Occidental/Nebraska* decision, as affirmed in *Whipple*, the Court's ruling in this action should stand.

Finally, the "flexible and reasoned approach" dictated by *Occidental* and *Whipple* was affirmed and expanded in the recent Utah Supreme Court decision of *R.T. Nielson Company v. Cook* 2002 UT 11, 2002 Utah LEXIS 16 (Utah 2002):

As the court of appeals noted in *Mountain States Broadcasting Co. v. Neale*, determining the prevailing party for purposes of awarding fees can often times be quite simple. 783 P.2d 551, 555 (Ut. 1989). Where a plaintiff sues for

money damages, and plaintiff wins, plaintiff is the prevailing party; if defendant successfully defends and avoids adverse judgment, defendant has prevailed. *Id.* *This simple analysis cannot always be employed, however...*

Which party is the prevailing party is an appropriate question for the trial court. This question depends, to a large measure, on the context of each case, and, therefore, it is appropriate to leave this determination to the sound discretion of the trial court. We therefore review the trial court's determination as to who was the prevailing party under an abuse of discretion standard. Appropriate considerations for the trial court would include, but are not limited to, (1) contractual language, (2) the number of claims, counterclaims, cross-claims, etc., brought by the parties, (3) the importance of the claims relative to each other and their significance in the context of the lawsuit considered as a whole, and (4) the dollar amounts attached to and awarded in connection with the various claims. Based on these and other relevant factors, the trial court is in a better position than we are as an appellate court to decide which party is the prevailing party. In most cases involving language similar to the contractual language before us here, there can generally be only one prevailing party. [Citations omitted.] However, the standard articulated above will permit a case-by-case evaluation by the trial court, and flexibility to handle circumstances where both, or neither, parties may be considered to have prevailed.

2002 Utah Lexis at 25.

In this action, the “right of the case” plainly dictated that Defendants and Appellees Gregory and Louann Smedsrud be deemed the “successful parties” for purposes of an award of costs and attorneys’ fees, and the trial court so found. Under the *R.T. Nielson* standard, as well as that in *Occidental* and *Whipple*, the trial court’s determination was clearly the correct outcome, and should not be disturbed.

A. Defendants Defeated Virtually All of Plaintiff's Mechanic's Lien Claim.

To begin with, while Defendants acknowledge that Plaintiff realized a nominal recovery on this mechanics lien claim, the award amounted to less than 10% of his original mechanics lien claim, and barely 8% of his asserted amount at trial. The jury, as trier of fact, was clearly persuaded that Plaintiff's claim was not only excessive, but should be all but eclipsed by Defendants' claimed offsets.

It was Plaintiff's inability, and unwillingness, to furnish a consistent accounting on the project which necessitated adjudication of this matter to begin with. Defendants tried repeatedly, both before and after completion of the project, to persuade Mr. Pochynok to sit down with them and resolve the account. Rather than do so, Plaintiff simply made repeated demands for payment, the amount of the demand changing each time (often several times in the course of only a few days). Not only were the numbers inconsistent, but none would acknowledge a single penny of offset for improper work or delays.

Any practical application of the principals set out in the decision of *Shupe v. Menlove*, dictates that, apportioning costs and attorneys' fees between owners and contract "according to the right of the case" dictates that Smedsruuds – not J. Pochynok Company – were the "successful party," and should be awarded their costs and attorneys' fees.

B. Defendants' Statutory Right to Attorneys' Fees After May 9, 2002 Results in a Net Recovery in Their Favor.

Even to the extent the jury's verdict was nominally in Plaintiff's favor, the effect of that verdict is more than offset by Defendants' right to post-May 9 attorneys' fees as

set out under Point I, above. Under such circumstances, Defendants/Appellees must be deemed the successful litigants in this matter, and their attorneys' fees before May 9, 2002 likewise awarded. Attorneys' fees under the Mechanics Lien Act are to be awarded to the party or parties which are "ultimately successful" - *see Calcium v. Systems Communications Corp.*, 939 P. 2d 185 (UT App 1997).⁷

C. The Jury's Verdict Necessarily Implied the Filing of Two Wrongful Liens by Plaintiff.

As noted above, J. Pochynok Company filed two successive liens against Defendants'/Appellees' property in connection with its claims in this matter. The first, for \$150,000, was released not long after its filing; the second, for some \$74,000, remained pending through trial.

Yet the jury's verdict – clearly applying Defendants' offset claims – was for just over \$7,000 total. The conclusion is inescapable that both notices of lien were for amounts far in excess of that which J. Pochynok Company was ultimately entitled. The conclusion was likewise inescapable that the purpose of the liens' filing was to secure payment to Plaintiff for an amount greater than that actually owing.

⁷ Appellees recognize that J. Pochynok Company attempts to make this selfsame argument in an effort to defeat their May 9 Offer of Judgment (Appellant's Brief at p. 14). The difference, though, is fundamental: Defendants and Appellees *were* awarded their costs and fees after May 9. The trial court, in other words, reviewed the issues in their correct order. It looked first to the amount of the verdict, and determined it to be not "more favorable than the offer", thus mandating an award of fees after the date of the offer. With those fees included, Defendants and Appellees clearly became the "successful parties" under the earlier statute. Plaintiff's/Appellant's approach would have this Court turn such analysis on its head, revoking fees which the trial court *did* award, granting fees which it did *not* award, and reconstructing the balance of success in disregard of determinations by both the trial judge and the jury.

Under Utah Code Ann. § 38-1-25, the filing of an excessive lien under the circumstances set out above constitutes a misdemeanor.⁸ It is self-evident that, in taxing costs (including attorneys' fees) "according to the right of the case," as mandated by Utah Code Ann. § 38-1-17 and *Shupe v. Menlove*, the Court took into account the fact that the mechanics lien which Plaintiff sought to vindicate by this action (as well as its predecessor) were shown at trial to be excessive, wrongful and illegal on their face. Under such circumstances, Defendants and Appellees were properly awarded their attorneys' fees as the "successful parties"

POINT III

THE TRIAL COURT DID NOT ERR IN REJECTING PLAINTIFF'S/APPELLANT'S OBJECTIONS TO DEFENDANTS'/APPELLEES' WRIT OF GARNISHMENT TO ZIONS FIRST NATIONAL BANK

J. Pochynok Company's most mystifying claim on appeal is that the lower court committed reversible error in permitting Defendants and Appellees to garnish, from J. Pochynok Company's own bank account at Zions First National Bank, funds admittedly on deposit there at the time the writ of garnishment was served. J. Pochynok Company claims that these funds were not really its property; that they were being held

⁸ Since this action was filed, Utah Code Ann. § 38-1-25 has been amended to permit a right of civil recovery for wrongful lien filing. In addition, Utah Code Ann. § 38-1-18(2) has been added since the filing of this action, statutorily denying to a mechanic's lien claimant the right to recover any attorneys' fees whatever in the event that its lien filing is adjudged wrongful. While these provisions were not in effect at the time Plaintiff's notices of mechanic's liens were filed in this action, they plainly codified what was already clear in the law – that the pursuit of excessive mechanic's liens is contrary to public policy.

“in trust” for subcontractors on another job. This argument, however, suffers to fatal defects, one procedural and the other substantive.

A. J. Pochynok Company presented no evidence to the trial court to support any challenge to the writ of garnishment.

As noted above, J. Pochynok Company filed a request for hearing on September 23, 2002 with respect to the writ of garnishment returned by Zions First National Bank on September 12, 2002.⁹ The procedure thus invoked is set out at Rule 64D(h), U.R.C.P., which reads in pertinent part as follows:

The Defendant or any other person who owns or claims an interest in the property subject to garnishment that is garnisheed may request a hearing to claim any exemption to the garnishment, or to challenge the issuance of the writ or the accuracy of the answers to interrogatories. . . . The request for a hearing shall be in the form to enable the defendant or other person to specify the grounds upon which the defendant or other person challenges the issuance of the writ or the accuracy of the answers to interrogatories. . . .

J. Pochynok Company’s request for hearing (R. 724-725) requests a hearing to claim an exemption to the Zions’ writ of garnishment, but states only that “the basis for the exemption is that the funds in J. Pochynok Company, Inc.’s account are owned by other persons or entities” (R. 724-725). The court accordingly scheduled a hearing for

⁹ The court’s disposition of Pochynok’s objections to the writ of garnishment, held, inter alia, that the request for hearing had been untimely filed, being more than ten days after the return on the writ of garnishment. This was due to a misstatement by Defendants/Appellee’s counsel at the hearing, given that the tenth day fell on Sunday, September 22, 2002. Given the other failings in Pochynok’s proof, and the substance of his objections, the error was harmless. Moreover, this issue was disposed of pursuant to Pochynok’s Rule 59 U.R.C.P. motion, from which no appeal is taken.

October 7, 2002. No further submittals, statements, documents or claims were forthcoming from Pochynok before the hearing

At the hearing (of which this court has no transcript, due to Pochynok's election not to rely on such transcript), J. Pochynok Company presented no evidence whatsoever in support of its request for hearing. The court accordingly determined that, based upon Zions' answers to garnishee interrogatories, the funds in the garnisheed account belonged to J. Pochynok Company, and were subject to Defendants/Appellees' judgment claim (R 776-779). The court's ruling in this regard was in full accord with the requirements of Rule 64D(h)(3)(i):

If the court determines at the hearing . . . that the assets or a portion thereof are subject to garnishment and not exempt, it shall issue an order to pay the Property Subject to Garnishment directly to plaintiff or plaintiff's attorney or as otherwise ordered by the court . . .

Only *after* the date and time of the scheduled hearing, and pursuant to a Rule 59, U.R.C.P. motion for new trial, did J. Pochynok Company attempt to offer actual evidence, in the form of the affidavit of John Pochynok, to the effect that the funds in its bank account belonged to someone else. No explanation was given as to why this evidence could not have been offered at the October 7 hearing. The trial court denied the motion for new trial, and J. Pochynok Company did not appeal therefrom.

It is incumbent upon any party challenging the ownership of funds in a depository account to establish, by clear and convincing evidence that the funds are not the property of the account owner - *Peterson v. Peterson*, 571 P.2d 1360 (1977); *Beehive State Bank v.*

Rosquist, 21 Utah 2d 17, 439 P.2d 468 (1968). In this case, far from establishing ownership of the garnisheed funds in a third party by “clear and convincing evidence”, J. Pochynok Company failed to offer *any* evidence at the hearing whatever, seeking to rely upon an affidavit filed nine days after the hearing concluded, containing testimony never before presented to the Court.¹⁰ Plaintiff having failed to carry its burden of proof, the only competent evidence before the Court on October 7, 2002 consisted of the sworn answers to garnishment interrogatories of Zions First National Bank, which acknowledged that the bank was indebted to J. Pochynok Company, Inc. in the amount of \$37,585.00, the amount maintained in Plaintiff’s checking account with Zions. With no competent evidence before it to refute Zions’ position, the Court properly found the funds subject to garnishment, and its ruling was clearly sustained by the evidence.

B. Even If the Testimony of John Pochynok’s Affidavit Had Been Presented at the Hearing, it Would Not Have Sustained Plaintiff’s Burden of Proof.

Even assuming that John Pochynok had taken the stand on October 7 and testified in accordance with his October 16, 2002 affidavit, moreover, it would not have established, by clear and convincing evidence, that the funds in Plaintiff’s bank account were not subject to the garnishment by the Smedsruks. By Mr. Pochynok’s own

¹⁰ Plaintiff’s attempt to offer an affidavit in support of its motion for a new trial, containing evidence which was not presented at trial, invokes not the “insufficient evidence” basis of Rule 59(a)(6), but the “newly discovered evidence” basis of Rule 59(a)(4). Plaintiff’s decision not to rely on this provision of the Rule, however, is understandable - the requirement is that the evidence be such as the movant “could not, with reasonable diligence, had discovered and produced at the trial”. Plaintiff makes no suggestion that the content of Mr. Pochynok’s October 16, 2002 affidavit could not have been presented to the Court at the hearing through the testimony of Mr. Pochynok himself (who was present in court).

admission, Plaintiff/Appellant received funds on deposit in its bank account as of September 13, 2002 in its capacity as general contractor on a construction project for Steve Young, the project owner (R. 766-769). As such, Plaintiff does not, and cannot, allege that Mr. Young was indebted to the subcontractors on the project; rather, Mr. Young's obligation was to J. Pochynok Company as general contractor. This is established by the invoice attached as Exhibit B to Pochynok's memorandum in support of its Motion for New Trial (incorporated by reference in paragraph 4 of Mr. Pochynok's affidavit, R. 766-769) - it is an invoice from J. Pochynok Company as general contractor to Steve Young as owner, merely itemizing payments which J. Pochynok Company – not Steve Young – must make to its subcontractors. By Mr. Pochynok's own admission, Mr. Young paid the invoice by wire transfer into the garnished account.

It is noteworthy, in this connection, that Plaintiff has nowhere produced an affidavit or other challenge from Mr. Young or any subcontractor claiming that they were the owners of the garnished funds. The reason is obvious - Mr. Young performed under his building contract with J. Pochynok Company, Inc. by paying the invoice, and transferring funds to J. Pochynok Company, Inc. as general contractor. Were the garnished funds actually the property of Mr. Young, and not Plaintiff, Mr. Young – not Plaintiff – needed to appear before the trial court objecting to the garnishment. He was conspicuous by his absence, as were any other alleged owners of the funds.

The situation in this case is easily distinguishable from that in *Peterson v. Peterson*, 571 P. 2d 1360 (Utah 1977) – it does not involve joint *de facto* owners of a

bank account, as was the case in that decision. Mr. Young paid the funds to J. Pochynok Company, as he was contractually obligated to do. The funds, once in the account, were J. Pochynok Company's alone, to do with as it pleased, but subject to competing obligations, including the judgment in favor of Defendants and Appellees.

J. Pochynok Company seeks to invoke Utah Code Ann. § 58-55-603 in support of the proposition that the funds in his bank account were not subject to garnishment by Defendants and Appellees. The statute provides nothing of the sort. It merely provides that, when a general contractor receives construction funds from an owner, it must pay subcontractors and material men in proportion to the amount of work which they have performed on the project. It does not deprive the general contractor of ownership of funds paid by the owner.

Simply put, Plaintiff/Appellant J. Pochynok Company received a progress payment on a project, but Defendants and Appellees garnished those funds before J. Pochynok Company made payments to its subcontractors. The most that Plaintiff/Appellant can make out of this situation is that it would rather have used funds from the project to pay subcontractors to the exclusion of Smedsruks. Where a Writ of Garnishment is used in aid of a valid judgment, however, the judgment debtor does not retain the option of preferring other creditors over the judgment creditor.

CONCLUSION

Simply put, Plaintiff and Appellant J. Pochynok Company, Inc. lost at trial. It lost in any meaningful and practical sense. Defendants'/Appellees' set offs and counterclaims

whittled a claim of over \$81,000.00 down to less than \$7,100.00. Moreover, J. Pochynok Company had in hand an offer of \$40,000.00 on May 9, 2002 – which, by statute, it could reject only with the express understanding that, if this verdict was not larger than that amount, it would be responsible for the attorneys' fees of Defendants and Appellees incurred after that date. Plaintiff/Appellant elected to accept this risk. The result simply cannot support a claim that Pochynok Co. was the “successful party” in this litigation.

After the trial, when Defendants and Appellees Smedsruks had the good fortune to garnish J. Pochynok Company's bank account after it had received payment from an owner, but before it had drained the account with payments to other creditors, Plaintiff/Appellant demanded a hearing on the writ of garnishment. However, it did not avail itself of the opportunity before the Court, presenting no evidence to support its claim that the money deposited by it in its own account did not belong to it. Even after the hearing was over, and the Court had ruled against it, Plaintiff/Appellant failed to establish any more than that a creditor had seized funds from his bank account before it had the opportunity to pay those funds to other creditors.

The lower Court ruled properly and prudently on all matters before it. Its rulings should be affirmed without exception.

DATED this 22 day of May, 2003.

JONES, WALDO, HOLBROOK & McDONOUGH, P.C.

By _____

Vincent C. Rampton

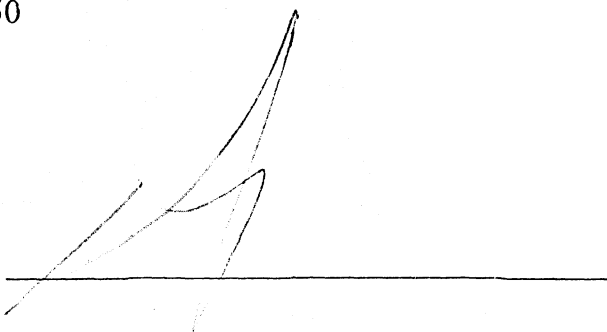
Ross I. Romero

Attorneys for Gregory and LouAnn Smedsrud

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May, 2003, I caused to be mailed by first class mail, postage prepaid, a true and correct copy of the foregoing BRIEF OF APPELLEES to the following:

Ray G. Martineau
Anthony R. Martineau
Brett D. Cragun
3098 Highland Drive, Suite 450
Salt Lake City, Utah 84106



Tab 1

VINCENT C. RAMPTON (USB #2684)
ROSS I. ROMERO (USB #7771)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Gregory and LouAnn Smedsrud
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

J. POCHYNOK COMPANY, INC., a Corporation	:	OFFER OF JUDGMENT
	:	
	:	
Plaintiff(s),	:	Civil No. 0006000014
vs.	:	
	:	Judge J. Dennis Frederick
GREGORY SMEDSRUD; LOUANN SMEDSRUD; BUTTERFIELD LUMBER, INC., a Corporation; PELLA PRODUCTS, INC., a Corporation; BLAZE WHARTON CONSTRUCTION, INC., a Corporation; DIXIE WOODWORKS, INC., a Corporation; and JEFREY KAISER, doing business as RIO GRANDE PAINTING,	:	
	:	
	:	
Defendant(s).	:	

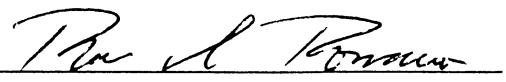
TO: PLAINTIFF AND COUNTERCLAIM DEFENDANT J. POCHYNOK COMPANY, INC. AND COUNSEL

Pursuant to Rule 68 of the Utah Rules of Civil Procedure and Utah Code Ann. §38-1-18(3), defendants and counterclaim plaintiffs, Greg and LouAnn Smedsrud, offer to allow

judgment to be taken against them in the sum of Forty Thousand Dollars and Zero Cents (\$40,000.00) in complete and final settlement of all claims by the plaintiff and counterclaim defendant against defendants and counterclaim plaintiffs, Greg and LouAnn Smedsrud. If plaintiff and counterclaim defendant do not accept this offer and fail to obtain a judgment at trial against defendants and counterclaim plaintiffs which is more favorable than this offer, defendants and counterclaim plaintiffs will seek reimbursement from the plaintiff and counterclaim defendant of all attorneys' fees and costs incurred after making this offer pursuant to Utah Code Ann. §38-1-18(3). Evidence of this offer is inadmissible except in a proceeding to determine to attorneys' fees and costs. This offer includes all claims, interest, liens, court costs and attorneys' fees whatsoever that plaintiff and counterclaim defendant has made or could against defendants and counterclaim plaintiffs. This offer is in lieu of and revokes all prior offers of settlement.

DATED this 9th day of May, 2002.

JONES, WALDO, HOLBROOK &
McDONOUGH

By: 
Vincent C. Rampton
Ross I. Romero
*Attorneys for Gregory and LouAnn
Smedsrud*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Offer of Judgment was sent via facsimile and hand delivery, to the following this 9th day of May, 2002:

Ray G. Martineau
Anthony R. Martineau
3098 Highland Drive, Suite 450
Salt Lake City, Utah 84106



Tab 2

FILED DISTRICT COURT
Third Judicial District
MAY 22 2002
By _____ SALT LAKE COUNTY
Deputy Clerk *KJ*

IN THE THIRD JUDICIAL DISTRICT COURT
SUMMIT COUNTY
STATE OF UTAH

J. POCHYNOK COMPANY, INC., a
Corporation,

Plaintiff and Counterclaim
Defendant,

vs.

GREGORY SMEDSRUD; LOUANN
SMEDSRUD; BUTTERFIELD LUMBER,
INC., a Corporation; PELLA PRODUCTS,
INC., a Corporation; BLAZE WHARTON
CONSTRUCTION, INC., a Corporation;
DIXIE WOODWORKS, INC., a Corporation;
and JEFREY KAISER, doing business as RIO
GRANDE PAINTING,

Defendants and Counterclaim
Plaintiffs.

JURY VERDICT

020901328

Civil No. ~~0006000014~~

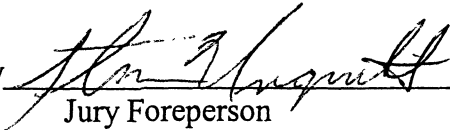
Judge J. Dennis Frederick

We, the jury, duly empaneled in the above-entitled matter, hold as follows in the above-entitled action:

1. Based on the law as it has been explained to us, we find in favor of plaintiff J. Pochynok Company, Inc., and against defendants Gregory and LouAnn Smedsrud, in the amount of \$ 7076.56

2. Based on the law as it has been explained to us, we find in favor of defendants Gregory and LouAnn Smedsrud, and against plaintiffs J. Pochynok Company, Inc., in the amount of \$ _____.

DATED this 22nd day of May, 2002.

By 
Jury Foreperson

Tab 3

IMAGED

FILED DISTRICT COURT
Third Judicial District

AUG 13 2002

SALT LAKE COUNTY
By Deputy Clerk

VINCENT C. RAMPTON (USB #2684)
ROSS I. ROMERO (USB #7771)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Gregory and LouAnn Smedsrud
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200

IN THE THIRD JUDICIAL DISTRICT COURT
SUMMIT COUNTY
STATE OF UTAH

J. POCHYNOK COMPANY, INC., a
Corporation,

Plaintiff and Counterclaim
Defendant,

vs.

GREGORY SMEDSRUD; LOUANN
SMEDSRUD; BUTTERFIELD LUMBER,
INC., a Corporation; PELLA PRODUCTS,
INC., a Corporation; BLAZE WHARTON
CONSTRUCTION, INC., a Corporation;
DIXIE WOODWORKS, INC., a Corporation;
and JEFREY KAISER, doing business as RIO
GRANDE PAINTING,

Defendants and Counterclaim
Plaintiffs.

ENTERED IN REGISTRY
OF JUDGMENTS

DATE 08/15/02

JUDGMENT UPON VERDICT AND
ORDER ON POST TRIAL MOTIONS

020901328
Civil No. ~~0006000014~~

Judge J. Dennis Frederick

This matter was tried to a jury on May 21 and 22, 2002. Prior to trial, all crossclaims between defendants Gregory and LouAnn Smedsrud and Pella Products, Inc. had been dismissed with prejudice pursuant to stipulation and prior order of this Court. In addition, all claims of



plaintiff J. Pochynok Company, Inc. against defendants Blaze Wharton Construction, Inc. and Jeffrey Kaiser were voluntarily dismissed without prejudice pursuant to Rule 41(a), Utah Rules of Civil Procedure prior to trial.

On May 22, 2002, the jury returned a verdict in favor of Plaintiff J. Pochynok Company, Inc. and against Gregory Smedsrud and LouAnn Smedsrud, in the amount of \$7,076.56. The jury returned no verdict in favor of any other party hereto.

Following trial, both parties submitted motions for award of costs and attorneys fees incurred in the action. In addition, the plaintiff submitted a motion for injunctive relief, asking that this Court enjoin defendants from asserting claims or initiating legal proceedings against Wynn G. Yelland, Paul V. Nesseth and Locus Architecture, Ltd., by reason of Mr. Yelland having agreed to appear and testify at trial herein.

The Court having reviewed the parties' post-trial motions and supporting submittals, being fully advised, and good cause appearing,

IT IS HEREBY ORDERED, adjudged and decreed as follows:

1. The motion of Defendants Gregory and LouAnn Smedsrud to tax costs and attorneys fees is granted for those reasons set out in defendants' Memorandum of Law in Support of Motion to Tax Costs and Attorneys Fees, and their Reply Memorandum in Support of Motion to Tax Costs and Attorneys Fees.
2. Plaintiff's Motion for Injunctive Relief is denied, for those reasons set out in defendants' Memorandum in Opposition to Motion for Injunctive Relief.

3. Plaintiff's Motion for Award of Attorneys Fees and Costs is denied for those reasons set out in defendants' Memorandum in Opposition to Plaintiff's Motion for Award of Attorneys Fees and Costs, defendants' Memorandum of Law in Support of Motion to Tax Costs and Attorneys Fees, and their Reply Memorandum in Support of Motion to Tax Costs and Attorneys Fees.

4. Based upon the foregoing rulings and upon the jury verdict in this matter, final judgment is hereby entered as follows:

a. Judgment is entered in favor of plaintiff J. Pochynok Company, Inc., and against defendants Gregory Smedsrud and LouAnn Smedsrud, jointly and severally, in the amount of \$7,076.56, together with interest thereon from and after May 22, 2002 until paid in full at the contract rate of 12% per annum.

b. Judgment is hereby entered in favor of defendants Gregory and LouAnn Smedsrud, jointly and severally, and against plaintiff J. Pochynok Company, Inc., in the following amounts:

i. \$1,906.94, representing defendants' costs of suit incurred prior to May 9, 2002;

ii. \$48,083.10, representing defendants' attorneys fees incurred prior to May 9, 2002;

iii. \$766.50, representing defendants' costs of suit incurred on and after May 9, 2002;

iv. \$33,280.00, representing defendants' attorneys fees incurred on and after May 9, 2002; and

v. Interest on the foregoing amounts from and after May 22, 2002 until paid in full, at the contract rate of 12%.

c. It is further ordered that the award of defendants' costs and attorneys fees as set out above may be augmented in an amount equal to all costs and attorneys fees incurred by defendants' from and after June 1, 2002 in the enforcement and/or collection of the judgment entered herein, upon further application as supported by affidavit of defendants' counsel.

5. Plaintiff's petition for an order of foreclosure of its mechanic's lien herein is denied, as its judgment against Smedsruks, as the owners, is fully offset by judgment in favor of Smedsruks herein.

6. Plaintiff is hereby ordered to release all liens and notices of liens placed by or for it upon the Smedsruks' residence located in Summit County, State of Utah, more particularly described as follows:

All of Lot 118, PINERIDGE SUBDIVISION, according to the official plat thereof filed in the office of the Recorder of Summit County, State of Utah.

(hereafter "Smedsruk Property"). Plaintiff is hereby declared to hold no right, title or interest in and to the Smedsruk Property. Plaintiff is further ordered to release any and all Notices of Lis

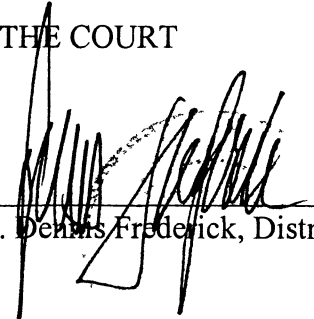
Pendens filed against the Smedsrud Property with the Summit County Recorder's office in connection with this action.

7. Defendants Butterfield Lumber, Inc., Pella Products, Inc., Blaze Wharton Construction, Inc., Dixie Woodworks, Inc., and Jeffrey Kaiser, having failed to present any proof to the court in support of any claims which they have or may have against any party hereto, or to obtain any verdict or judgment in their favor, are determined to hold no right, title or interest in and to the Smedsrud Property, whether jointly or severally, by virtue of any right of mechanic's lien asserted by or on behalf of said defendants (or any of them) against the Smedsrud Property. Said defendants are hereby ordered to release all liens and notices of mechanics' or materialman's lien placed by or for them upon the Smedsrud Property.

8. Any and all claims asserted by or against any party to this action, to the extent not otherwise addressed in this judgment and order, are hereby deemed dismissed with prejudice and on the merits.

DATED this 13th day of August, 2002.

BY THE COURT

By 
J. Dennis Frederick, District Judge

CERTIFICATE OF SERVICE

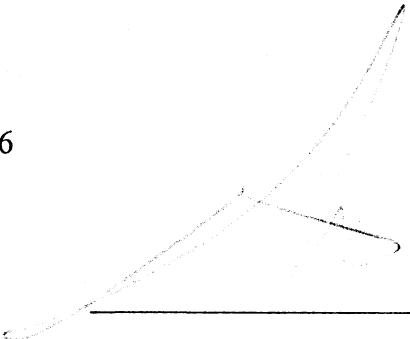
I hereby certify that on the 15th day of August, 2002, I caused to be hand-delivered a true and correct copy of the foregoing proposed form of **JUDGMENT UPON VERDICT AND ORDER ON POST TRIAL MOTIONS** to the following:

Ray G. Martineau
Anthony R. Martineau
Brett D. Cragun
3098 Highland Drive, Suite 450
Salt Lake City, Utah 84106

Scott L. Wiggins
ARNOLD & WIGGINS
American Plaza II, ste. 105
57 West 200 South
Salt Lake City, Utah 84101

Randall R. Smart
Snow, Nuffer
341 South Main Street, #303
Salt Lake City, UT 84111

Ralph R. Tate
4625 South 2300 East, Ste. 206
Salt Lake City, Utah 84117



A handwritten signature in dark ink, appearing to be 'R. Tate', is written over a horizontal line. The signature is stylized with a large, sweeping 'R' and a trailing flourish.

Tab 4

VINCENT C. RAMPTON (USB #2684)
ROSS I. ROMERO (USB #7771)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Gregory and LouAnn Smedsrud
170 South Main Street, Suite #1500
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200

02 SEP 15 PM 3:53

HS

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

CA-1582

J. POCHYNOK COMPANY, INC., a
Corporation

Plaintiff-Counterclaim defendant,

vs.

GREGORY SMEDSRUD; LOUANN
SMEDSRUD; BUTTERFIELD LUMBER,
INC., a Corporation; PELLA PRODUCTS,
INC., a Corporation; BLAZE WHARTON
CONSTRUCTION, INC., a Corporation;
DIXIE WOODWORKS, INC., a Corporation;
and JEFREY KAISER, doing business as RIO
GRANDE PAINTING,

Defendants- Counterclaim Plaintiffs .

WRIT OF GARNISHMENT

Civil No. 020901328

Judge J. Dennis Frederick

DATE 9/16 TIME 1210
BY EA
UPON LA. Smedsrud
R. S. S.
COURT CLERK DEPUTY/SERVER
501-4278

THE STATE OF UTAH TO: ZIONS FIRST NATIONAL BANK, Garnishee.

You are hereby ordered and commanded by the Court to hold, until further order of this Court, and not pay to Plaintiff any or all money and other personal property of the Plaintiff in your possession or under your control, whether now due or hereafter to become due, which are not exempt from execution, up to the amount remaining due on the judgment or order plus court approved costs in this matter, after offsets being \$ 76,959.98.

You are required to answer the attached questions called interrogatories, and file your answer with the Clerk of the Court within five business days of the date this Writ is served upon you. The address of the Clerk is: 450 South State Street, Salt Lake City, Utah 84111. You are also required to send a copy of your answers to the Defendants, Greg and LouAnn Smedsrud at the following address: Ross Romero, Jones, Waldo, Holbrook & McDonough, 170 South Main Street, Suite #1500, Salt Lake City, Utah 84101.

If you fail to answer, the judgment creditor may ask the Court to make you pay the amount you should have withheld.

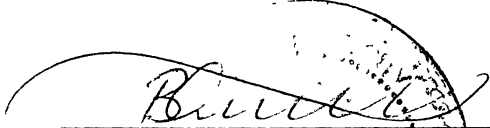
If you are indebted to or hold property or money belonging to the Plaintiff, you shall immediately mail by first class mail a copy of the Writ of Garnishment and your answer to the Interrogatories, the Notice of Garnishment and Exemptions and two (2) copies of the Request for Hearing to the Plaintiff and to anyone else who, according to your records, may have an ownership or other interest in the property or money at the last known address of the Plaintiff or such other persons shown on your records at the time of the service of this Writ. In lieu of mailings, you may hand-deliver a copy of these documents to the Plaintiff and other persons entitled to copies.

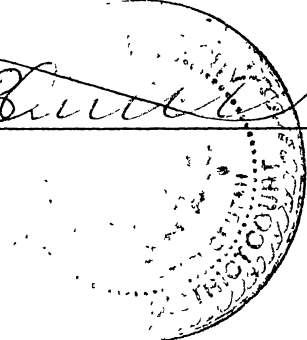
YOU MAY DELIVER to the officer serving this Writ the portion of Plaintiff's earnings or income to be held as shown by your answers. You will then be relieved from further liability in this case unless your answers are successfully disputed. You may, in the alternative, hold the money until further order of the Court.

If you do not receive an order from the Court regarding this Writ and the property you held pursuant to this Writ within sixty (60) days after filing your answers to the attached Interrogatories, this Writ shall expire and you may ignore it.

DATED this 6 day of September, 2002.

CLERK OF THE COURT


Deputy



Serve Zions First National Bank at:

Robert A. Goodman
Legal Services Department, 232-K5
One South Main Street, 5th Floor
Salt Lake City, Utah 84111

INDEBTED DEBTORS

INTERROGATORIES TO GARNISHEE

(Not for Earnings for Personal Services)

Page 1 of 3

Case No: _____

Defendants: _____

(Give your answers in the spaces provided and attach additional sheets if necessary.)

1. Are you indebted to the Defendants either in property or money?

ANSWER: _____

2. What is the nature of the indebtedness?

ANSWER: _____

3. What is the total amount of the indebtedness?

ANSWER: _____

4. Is the indebtedness now due?

ANSWER: _____

5. If not, when is it to become due?

ANSWER: _____

6. Have you in your possession, in your charge, or under your control any property or money in which Defendants have an interest other than as set forth in your answers above?

ANSWER: _____

7. If so, identify or describe such property or money and value of Defendants' interest in it.

Identification or Description

Amount or Value of Defendants' Interest

_____	_____
_____	_____
_____	_____

8. Do you know of any debts owing or which may be owing from any other person to Defendants, whether due or not. or of any property of Defendants or in which Defendants have an interest in any other person's possession or control?

ANSWER: _____

(RETURN ORIGINAL TO COURT)

INTERROGATORIES TO GARNISHEE - CONTINUED
(Not for Earnings for Personal Services)
Page 2 of 3

Case No: _____
Defendants: _____

9. If so, state the full particulars thereof.

Identification or Description of Debt Right or Item	Location	Third Party Debtor, Holder or Custodian	Amount or Value of Defendants' Interest

10. Have you retained or deducted from the property or money in which are indebted to Defendants any amount in payment, in full or in part, of a debt owed by Defendants or Plaintiff to you?

ANSWER: _____

11. If so, state the amount so retained or deducted and the person indebted for whom the amount has been retained or deducted.

ANSWER: _____

12. Describe any information provided to you by or on behalf of Defendants regarding Defendants' property, bank accounts, bank relationships, employment, and all other financial information, e.g., via financial statements, applications, etc. In lieu of a written response to this interrogatory request, you may provide copies of any such information provided to you by or on behalf of Defendants with your response to these interrogatories.

ANSWER: _____

(RETURN ORIGINAL TO COURT)

INTERROGATORIES TO GARNISHEE - CONTINUED
(Not for Earnings for Personal Services)
Page 3 of 3

Case No: _____

Defendants: _____

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

I do swear or affirm that I am the garnishee or person authorized to execute this document and make this verification on behalf of garnishee and that the answers to the foregoing interrogatories are true to the best of my information and belief.

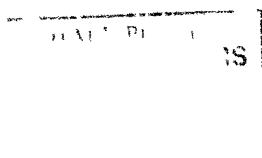
I also swear or affirm that I mailed by first class mail, or hand-delivered a copy of the Writ of Garnishment, Answers to Interrogatories, Notice of Garnishment and Exemptions and two (2) copies of a Request for Hearing, to the Defendants at _____ on the _____ day of _____, 2001.

I also swear or affirm that the following other persons were also provided a copy of the Writ of Garnishment, Answers to Interrogatories, Notice of Garnishment and Exemptions and Request for Hearing:

Person	Address	Date mailed or delivered
_____	_____	_____
_____	_____	_____
_____	_____	_____

Signature of Garnishee or Authorized
Signature on Behalf of Garnishee

SUBSCRIBED AND SWORN to before me this _____ day of _____, 2001.



NOTARY PUBLIC
My commission expires: _____

(RETURN ORIGINAL TO COURT)

Tab 5

THIRD DISTRICT COURT
Third Judicial District
OCT 17 2002
SALT LAKE COUNTY
By _____
Deputy Clerk *KS*

VINCENT C. RAMPTON (USB #2684)
ROSS I. ROMERO (USB #7771)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Gregory and LouAnn Smedsrud
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

J. POCHYNOK COMPANY, INC., a	:	
Corporation,	:	
	:	
Plaintiff and Counterclaim	:	RULING ON WRIT OF
Defendant,	:	GARNISHMENT
vs.	:	
	:	
GREGORY SMEDSRUD; LOUANN	:	
SMEDSRUD; BUTTERFIELD LUMBER,	:	
INC., a Corporation; PELLA PRODUCTS,	:	Civil No. 020901328
INC., a Corporation; BLAZE WHARTON	:	
CONSTRUCTION, INC., a Corporation;	:	Judge J. Dennis Frederick
DIXIE WOODWORKS, INC., a Corporation;	:	
and JEFREY KAISER, doing business as RIO	:	
GRANDE PAINTING,	:	
	:	
Defendants and Counterclaim	:	
Plaintiffs.	:	

Defendants Gregory Smedsrud and Louann Smedsrud having caused a Writ of
Garnishment to issue in the above-entitled proceeding, directed to Zions First National Bank as
Garnishee; said Writ having been served September 10, 2002, upon Zions First National Bank;

Zions First National Bank having served its answers to interrogatories incident to said Writ upon Defendants, and upon the Plaintiff-in-judgment Debtor, J. Pochynok Company, Inc., on September 13, 2002; and Plaintiff J. Pochynok Company, Inc. having filed a Request for Hearing pursuant to Rule 64D(h), Utah R. Civ. P., the Smedsrud Defendants' Writ of Garnishment was called on for hearing by the Court on October 7, 2002, at 9 a.m. Plaintiff J. Pochynok Company, Inc. was represented by its counsel of record, Brett D. Cragun. The Smedsrud Defendants were represented by their counsel of record, Vincent C. Rampton of Jones, Waldo, Holbrook & McDonough.

The Court having heard presentations of counsel, having reviewed all submittals of counsel, and being fully advised in the premises and good cause appearing,

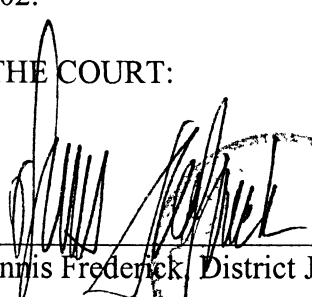
IT IS HEREBY ORDERED as follows:

1. Plaintiff J. Pochynok Company, Inc. has failed to establish by clear and convincing evidence that the Writ of Garnishment was issued improperly; that the answers to interrogatories are inaccurate; or that any assets garnished thereby are exempt from or are not subject to garnishment;
2. Plaintiff's Request for Hearing was untimely;
3. Plaintiff's objections to the Writ of Garnishment are therefore declined;
4. All assets identified in the answers to interrogatories of Garnishee Zions First National Bank are subject to garnishment and not exempt;

5. Zions First National Bank, as Garnishee, is hereby ordered to pay the Property Subject to Garnishment, as identified in its answers to interrogatories in response to the Smedsrud Defendants' Writ of Garnishment, directly to counsel for Defendants Gregory and LouAnn Smedsrud.

DATED this 14th day of October, 2002.

BY THE COURT:



J. Dennis Frederick, District Judge

APPROVED AS TO FORM:

By: _____
Brett D. Cragun
Attorneys for Plaintiff J. Pochynok Company, Inc.

CERTIFICATE OF SERVICE

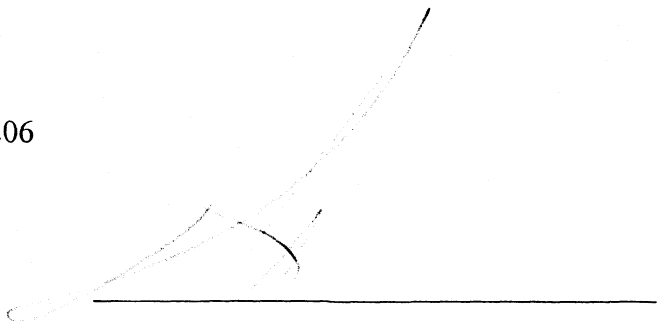
I hereby certify that on the 24th day of October, 2002, I caused to be mailed by first class mail, postage prepaid, a true and correct copy of the foregoing proposed **RULING ON WRIT OF GARNISHMENT** to the following:

Ray G. Martineau
Anthony R. Martineau
Brett D. Cragun
3098 Highland Drive, Suite 450
Salt Lake City, Utah 84106

Scott L. Wiggins
Arnold & Wiggins
American Plaza II, Suite 105
57 West 200 South
Salt Lake City, UT 84101

Randall R. Smart
Snow, Nuffer
341 South Main Street, #303
Salt Lake City, UT 84111

Ralph R. Tate
4625 South 2300 East, Suite 206
Salt Lake City, UT 84117

A handwritten signature, possibly "R. Tate", is written above a solid horizontal line.