

2002

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

J. POCHYNOK COMPANY, INC., a
Corporation,

Plaintiff/Appellant,

vs.

GREGORY SMEDSRUD and LOUANN
SMEDSRUD,

Defendants/Appellees.

Case No. 20020940-CA

BRIEF OF APPELLANT

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ORAL ARGUMENT AND PUBLISHED DECISION IS REQUESTED

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DESIGNATION OF PARTIES

Pursuant to Rule 24(d), Utah Rules Of Appellate Procedure, appellant J. Pochynok Co., will be referred to herein as “Pochynok Company” and the appellees Gregory and LouAnn Smedsrud will be referred to herein as the “Smedsruks”.

STATEMENT SHOWING JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW (Including standards of appellate review and supporting authority.)

ISSUE ON APPEAL: WHETHER POCHYNOK COMPANY, AS THE ONLY PARTY AWARDED RELIEF BY THE JURY AT THE TRIAL OF THIS MATTER, IS THE “SUCCESSFUL PARTY” UNDER UTAH CODE ANN. § 31-1-18 AND IS THEREFORE ENTITLED TO RECOVER ITS ATTORNEY FEES AND COSTS?

Applicable Standard of Appellate Review: The interpretation of a statute is a question of law, which is reviewed for correctness. *Provo City v. Cannon*, 1999 UT App 344, ¶ 5, 994 P.2d 206 (quoting *State v. Lowder*, 889 P.2d 412, 413 (Utah 1994)). Whether and the extent to which attorney fees are recoverable in an action is a question of law which is reviewed for correctness. *Selva v. J.J. Johnson & Assocs.*, 910 P.2d 1252 (Ut. Ct. App. 1996). When a trial court’s rulings are based upon a misunderstanding or misapplication of the law, where a correct one would have produced a different result, the party adversely affected is entitled to have the error rectified in a proper adjudication under a correct principal of law. *Reed v. Avery*, 616 P.2d 1374 (Utah

1980); *Farris v. Jennings*, 595 P.2d 857 (Utah 1979) and *Cummings v. Nielson*, 42 Utah 157, 129 Pac. 519 (1912).

Preservation of Issue: The above stated issue was preserved for appeal by the following: Defendants' Motion To Tax Costs And Attorney Fees (R. 387-389); Memorandum Of Law In Support Of Defendants' Motion To Tax Costs And Attorneys' Fees (R. 435-459); Plaintiff's Motion For Award Of Attorney's Fees And Costs (R. 469-470); Plaintiff's Memorandum In Support Of Plaintiff's Motion For Award Of Attorney's Fees And Costs And In Opposition To Defendant's Motion To Tax Costs And Attorney's Fees (R. 572-592); Reply Memorandum In Support Of Defendants' Motion To Tax Costs And Attorneys Fees (R. 544-554); Memorandum In Opposition To Plaintiff's Motion For Award Of Attorneys' Fees And Costs (R. 567-571); Plaintiff's Reply Memorandum In Support Of Plaintiff's Motion For Award Of Attorney's Fees And Costs (R. 598-609); Minute Entry Ruling (R. 621-622); Judgment Upon Verdict And Order On Post Trial Motions (R. 635-640); Plaintiff's Rule 59(e) Motion To Amend Judgment (R. 650-651); Memorandum In Support Of Plaintiff's Rule 59(e) Motion To Amend Judgment (R. 652-666); Memorandum In Opposition To Plaintiff's Rule 59(e) Motion To Amend Judgment (R. 667-686); Reply Memorandum In Support Of Plaintiff's Rule 59(e) Motion To Amend Judgment (R. 706-718); Minute Entry Ruling (R. 726-727); and Order Denying Motion To Amend Judgment (R. 729-731).

ISSUE ON APPEAL: WHETHER THE RECENT VERSION OF UTAH CODE ANN. § 31-1-18, WHICH WAS MODIFIED BY ADDING THE "OFFER OF JUDGMENT" LANGUAGE DURING THE COURSE OF THIS LITIGATION, IS APPLICABLE TO THIS MATTER?

Applicable Standard of Appellate Review: An appellate court will review the lower court's findings of fact under the clearly erroneous standard and its conclusions of law under a correctness standard. See *Drake v. Industrial Comm'n*, 939 P.2d 177, 181 (Utah 1997).

Preservation of Issue: The above stated issue was preserved for appeal by the following: Plaintiff's Motion For Award Of Attorney's Fees And Costs (R. 469-470); Plaintiff's Memorandum In Support Of Plaintiff's Motion For Award Of Attorney's Fees And Costs And In Opposition To Defendant's Motion To Tax Costs And Attorney's Fees (R. 572-592); Reply Memorandum In Support Of Defendants' Motion To Tax Costs And Attorneys Fees (R. 544-554); Plaintiff's Reply Memorandum In Support Of Plaintiff's Motion For Award Of Attorney's Fees And Costs (R. 598-609); Minute Entry Ruling (R. 621-622); and Judgment Upon Verdict And Order On Post Trial Motions (R. 635-640).

ISSUE ON APPEAL: WHETHER CONSTRUCTION FUNDS WHICH ARE DEPOSITED BY A PROJECT OWNER INTO A GENERAL CONTRACTOR'S BANK ACCOUNT, WHICH ACCOUNT WAS CREATED SPECIFICALLY FOR THE PROJECT OWNER'S PROJECT, AND WHICH FUNDS WERE SPECIFICALLY DESIGNATED BY THE PROJECT OWNER TO BE PAID TO SPECIFIC SUBCONTRACTORS WHO HAVE COMPLETED WORK ON THE PROJECT, ARE FUNDS OWNED BY THE GENERAL CONTRACTOR AND THEREFORE SUBJECT TO GARNISHMENT BY THE GENERAL CONTRACTOR'S JUDGMENT CREDITORS?

Applicable Standard of Appellate Review: An appellate court will review the lower court's findings of fact under the clearly erroneous standard and its Conclusions of law under a correctness standard. See *Drake v. Industrial Comm'n*, 939 P.2d 177, 181 (Utah 1997). With respect to mixed questions of law and fact, the appellate court will

review the underlying facts under the deferential clear error standard; however, the legal effect of those facts is within the province of the appellate court, and no deference need be given a lower court's resolution of such questions of law. *Id.*

Preservation of Issue: The above stated issue was preserved for appeal by the following: Request For Hearing (R. 724-725); Minutes – Objection To Garnishment (R. 728); Combined Rule 59 Motion For New Trial And Notice Of Objection To Order (R. 746-747); Memorandum In Support Of Combined Rule 59 Motion For New Trial And Notice Of Objection To Order (R. 749-765); Affidavit Of John Pochynok (766-769); Ruling On Writ Of Garnishment (776-779); Memorandum Of Law In Opposition To Combined Rule 59 Motion For New Trial And Notice Of Objection To Order (793-800); Reply Memorandum In Support Of Combined Rule 59 Motion For New Trial And Notice Of Objection To Order (R. 805-809); Affidavit Of Brett D. Cragun (R. 810-812); Minute Entry Ruling (R. 818-819); and Order On Motion For New Trial And Objection To Form Of Order (R. 849-851).

STATUTES WHICH ARE OF DETERMINATIVE AND OF CENTRAL IMPORTANCE ON THE APPEAL

Utah Code Annotated § 38-1-18. Attorneys' fees -- Offer of judgment.

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

(2) A person who files a wrongful lien as provided in Section 38-1-25 is not entitled to recover attorneys' fees under Subsection (1).

(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 offeror after the offer was made.

STATEMENT OF THE CASE

Nature of the Case, Course Of Proceedings, And Disposition Below

Pochynok Company, a general contractor, brought suit against the Smedsruds seeking to recover damages for breach of a construction contract and to foreclose its mechanics lien. The Smedsruds asserted a counterclaim also seeking damages for breach of the construction contract. Prior to the jury trial, the Smedsruds made an offer of judgment to Pochynok Company in the amount of \$40,000.00. The offer of judgment was not accepted and the matter proceeded to trial. At trial, the jury found in favor of Pochynok Company awarding \$7,076.56. The jury awarded nothing on the Smedsruds' claims.

Pochynok Company and the Smedsruds each filed post trial motions asserting that they were the successful party at trial and sought costs and attorneys fees pursuant to Utah Code Ann. § 31-1-18. The Smedsruds argued that they were entitled to their attorney fees because they were the "successful party" in the litigation in accordance with § 38-1-18(1). Moreover, the Smedsruds asserted that they were entitled to their attorney fees and costs under § 38-1-18(3) because the amount of the jury award was lower than the Smedsruds' offer of judgment.

Pochynok Company responded to the Smedsruds' claims by contending that the "offer of judgment" language, which was added to the statute during the course of this litigation, was not applicable to this case because the change to the statute was a substantive rather than procedural change. Pochynok Company further argued that the "offer of judgment" provision of the statute was of no consequence even if it was

retroactively applied to this case, because as the only party to be awarded by the jury, Pochynok Company was in fact the “successful party” in the litigation, and therefore entitled to its attorneys fees under § 31-1-18(1). The jury award when combined with Pochynok Company’s attorney fees that Pochynok Company was entitled to under the statute, exceeded the offer of judgment made by the Smedsruks. Consequently, attorneys’ fees would not be available to the Smedsruks under subsection (3).

The trial court ruled that the present version of § 31-1-18 was applicable to the case, that the Smedsruks were the successful parties at trial, and therefore the Smedsruks were entitled to their costs and attorneys fees. A Rule 59 motion to amend the judgment was subsequently filed by Pochynok Company. The motion was denied by the trial court.

The Smedsruks subsequently sought to garnish funds in Pochynok Company’s bank account. Pochynok Company opposed the garnishment on the basis that the funds in Pochynok Company’s account were owned by Pochynok Company’s then current project owner, which project owner had deposited the funds into the account with the direction that subcontractors who had completed work on the project be paid with those funds. In fact, the checking account had been established by Pochynok Company specifically for this project owner’s development. Moreover, the funds were disbursed into Pochynok Company’s account with specific direction by the project owner to pay designated subcontractors, and Pochynok Company had in fact issued checks to pay those subcontractors before the Writ Of Garnishment was served on Pochynok Company’s bank. Notwithstanding the fact that the funds could be directly traced to the project owner, and despite the fact that those funds had been designated by the project owner to

pay subcontractors, and had not been commingled with any other funds, the trial court found that the garnishment was proper. Pochynok Company filed a Rule 59 motion for new trial on the garnishment issue. The trial court denied this motion.

STATEMENT OF FACTS

1. In this action, Pochynok Company brought a breach of construction contract claim against the Smedsruks and sought to foreclose a mechanic's lien on real property owned by the Smedsruks. (R. 1-8)

2. On May 9, 2002, pursuant to § 38-1-18(3), the Smedsruks submitted an offer of judgment to Pochynok Company in the amount of \$40,000.00. (R. 408)

3. The "offer of judgment" language was added to § 38-1-18(3) during the course of this litigation. (See footnote to Section 38-1-18, Utah Code Annotated (1953))

4. The Smedsruks' offer of judgment was not accepted by Pochynok Company. (R. 391 at ¶5)

5. The matter was presented to a jury on May 21 and 22, 2002. (R. 249-250)

6. At the conclusion of the evidence, the jury returned a verdict in favor of Pochynok Company in the amount of \$7,076.56. (R. 354-355)

7. Pochynok Company and The Smedsruks both filed post-trial motions requesting attorneys fees on the basis that each respective party was the "successful party" in the lien foreclosure action pursuant to § 38-1-18(1). Pochynok Company and the Smedsruks also contested whether the newly enacted subsection (3) to § 38-1-18 was retroactively applicable to this case. (R. 387-389, 435-459, 469-470, 544-554, 567-592, 598-609, 650-686, and 706-718)

8. Notwithstanding the fact that jury returned a verdict in favor of Pochynok Company and against the Smedsruds, the trial court ruled in favor of the Smedsruds, finding that the Smedsruds were the successful party and therefore entitled to recover their costs and fees. (R. 621-622 and 726-727)

9. Judgment was entered in favor of the Smedsruds on August 13, 2002. Pochynok Company's Motion To Amend Judgment was denied on October 7, 2002. (R. 635-640 and 729-731)

10. On September 12, 2002, funds in a Pochynok Company bank account were garnished by the Smedsruds in the amount of \$37,585.00. (R. 703-705)

11. Prior to the garnishment being filed, on September 6, 2002, the owner of Pochynok Company's then current construction project wired \$35,253.49 into Pochynok Company's account. This account was established to be used solely with this owner's project. (R. 762, 766-769)

12. Before the September 6, 2002 wire was received, the balance in Pochynok Company's account was approximately \$3,307.66. After the wire was received, Pochynok Company's account balance was approximately \$38,461.18. (R. 766-769)

13. On September 6, 2002, the project owner sent Pochynok Company a wire confirmation. This confirmation set forth the total amount of money that was wired into the account, and designated which subcontractors were to be paid with the construction funds. (R. 760, 766-769)

14. Between September 7, 2002 and September 12, 2002, no deposits were made into Pochynok Company's account. (R. 768)

15. On September 10, 2002, Pochynok Company disbursed checks payable to two subcontractors in amounts totaling \$29,500.00. These checks bounced because the money in Pochynok Company's account was garnished. (R. 766-769)

16. The construction funds which were garnished were not owned by Pochynok Company, and were provided by the project owner to be used to pay for work that had been completed on the owner's project. (R. 766-769)

17. Because of the garnishment, the owner's funds which were intended to be used to pay the subcontractors were diverted to the the Smedsruks, and were therefore not available for payment as directed by the project owner. (R. 766-769)

18. The trial court denied Pochynok Company's objection to the garnishment, and subsequent request for new trial on the garnishment issue. (R. 728 and 849-851)

SUMMARY OF ARGUMENT

The trial court erred when it determined Pochynok Company was not the successful party in the litigation. Pursuant to Utah Code Ann. § 31-1-18(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 recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action." The Utah decision of *A.K. & R. Whipple Plumbing and Heating v. Guy*, 47 P.3d 92 (Utah Ct. App. 2002) explains that determining the prevailing party for purposes of awarding fees and costs is quite simple. Plaintiff sues defendant for money damages; if plaintiff is awarded a judgment, plaintiff has prevailed, and if defendant successfully defends and avoids an adverse judgment, defendant has prevailed. In this matter, Pochynok Company sued

defendant for money damages and Pochynok Company was awarded judgment. The Smedsruks recovered nothing on their claims for breach of contract. Accordingly, Pochynok Company is the successful party and is entitled to recover its attorneys fees pursuant to § 31-1-18(1).

Subsection (3) of § 31-1-18 is not applicable in this matter. Subsection (3) of § 31-1-18 was added to the statute during the course of this litigation. Under Utah law, substantive changes in legislation only operate prospectively. *See* discussion in *Wilde v. Wilde*, 35 P.3d 341 (Utah Ct. App. 2001) and *Johansen v. Johansen*, 2002 Ut. App. 75 (Ut. Ct. App. 2002). As such, the “offer of judgment” language contained in subsection (3) should not be applicable to this case.

The trial court erred when it allowed the garnishment of the funds in Pochynok Company’s bank account. The construction funds which were garnished in this matter were not owned by Pochynok Company. According to the decision in *Peterson v. Peterson*, 571 P.2d 1360 (Utah 1977), the fact that funds are held in a bank account titled in another person’s name, does not necessarily mean that the owner of the bank account owns the funds inside of that account. As Pochynok Company did not own the funds in the bank account, the trial court erred when it ruled the construction funds were subject to garnishment.

ARGUMENT

ISSUE 1

WHETHER POCHYNOK COMPANY, AS THE ONLY PARTY AWARDED RELIEF BY THE JURY AT THE TRIAL OF THIS MATTER, IS THE “SUCCESSFUL

PARTY” UNDER UTAH CODE ANN. § 31-1-18 AND IS THEREFORE ENTITLED
TO RECOVER ITS ATTORNEY FEES AND COSTS?

The trial court erred when it determined the Smedsruks were the successful party in this litigation. At trial, Pochynok Company was the only party that received a recovery from the jury. The jury awarded the Smedsruks nothing on their claims. Under Utah statutory law, the successful party in litigation involving a mechanic’s lien is entitled to recover attorneys’ fees. 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 recover a reasonable attorneys’ fee, to be fixed by the court, which shall be taxed as costs in the action.

The Utah Court Of Appeals decision in *Whipple*, provides guidance on the scope and meaning of the term “successful party” in § 38-1-18. *Whipple* at 94. In *Whipple*, the court stated that the terms “successful party” and “prevailing party” are synonymous. *Whipple* at 96. Black’s Law Dictionary defines the term “prevailing party” as: “A party in whose favor a judgment is rendered, regardless of the damages awarded.” Black’s Law Dictionary 1145 (7th ed. 1999). When defining a “successful party,” Black’s Dictionary refers to the definition of prevailing party. *Id.* Under Utah decisions, a successful party includes, but is not limited to, one who successfully enforces or defends against a lien action. *Reeves v. Steinfelt*, 915 P.2d 1073, 1079 (Utah Ct. App. 1996); *Palombi v. D & C Builders*, 452 P.2d 325, 327-328 (1969).

Under the Utah Court of Appeals decision in *J.V. Hatch Constr., Inc. v. Kampros*, 971 P.2d 8, 15 (Utah Ct. App. 1998), a lien claimant’s prima facie evidence establishing

its right to attorneys' fees is met by showing that it is the prevailing party in the mechanics' lien cause of action.

The *Whipple* court quoted from the *Mountain States*¹ decision, which stated that typically, determining the prevailing party for purposes of awarding fees and costs is quite simple. *Whipple* at 95. The court explained, "Plaintiff sues defendant for money damages; if plaintiff is awarded a judgment, plaintiff has prevailed, and if defendant successfully defends and avoids an adverse judgment, defendant has prevailed." *Id.* This is the analysis which should be employed in the "typical" type case that was before the trial court. Because Pochynok Company was awarded \$7,076.56 by the jury, and defendant was awarded nothing, Pochynok Company, by definition, was the prevailing or successful party. As the successful party, Pochynok Company is entitled to recover its attorneys' fees. The trial court erred in determining that the Smedsruds was the successful party in this matter.

ISSUE 2

WHETHER THE RECENT VERSION OF UTAH CODE ANN. § 31-1-18, WHICH WAS MODIFIED BY ADDING THE "OFFER OF JUDGMENT" LANGUAGE DURING THE COURSE OF THIS LITIGATION, IS APPLICABLE TO THIS MATTER?

Subsection (3) of Section 38-1-18 does not apply to this case. The trial court ruled that the Smedsruds were entitled to attorney's fees under subsection (3) of Section 38-1-18 of Utah's Mechanic's Lien Law, a subparagraph added in 2001, effective April 30, 2001.

¹ *Mountain States Broad. Co. v. Neale*, 783 P.2d 551, 555-556 (Utah Ct. App. 1989)

When subparagraph (3) was added and became effective, this matter was then pending, the complaint having long been filed respecting work performed by Pochynok Company for the Smedsruks, for which Pochynok Company filed a Notice of Claim of Lien on October 19, 1999 about a year and a half before the statute was amended.

Subparagraph (3) of § 38-1-18 plainly affects substantive or vested rights in that it creates, defines and regulates rights and duties which may give rise to a cause of action by creating a method by which a contracting party defending against a mechanic's lien may recover post offer costs and fees against the mechanic's lien claimant if "the judgment finally obtained by the offeree is not more favorable" than "an offer of judgment" made by the defending party. While a procedural step is involved—that of making an offer of judgment, the statute plainly affects substantive rights. It plainly establishes a primary right not in existence at the time Pochynok Company's claim arose. *Such substantive legislation operates only prospectively.* See discussion in *Wilde v. Wilde*, 35 P.3d 341 (Utah Ct. App. 2001) and *Johansen v. Johansen*, 2002 Ut. App. 75 (Ut. Ct. App. 2002).²

² *Wilde v. Wilde* cites an earlier appeal in the same case, *Wilde v. Wilde*, 969 P.2d 438 (Ut. Ct. App. 1998) and *Department of Soc. Servs v. Higgs*, 656 P.2d 998 (Utah 1982). The first *Wilde* opinion held that a statutory amendment which conditioned modification of alimony on a showing of "extenuating circumstances" regulated the right to receive alimony and changed the law substantively and was not simply a different mode or form of procedure for enforcing existing rights, did not merely clarify the meaning of an earlier enactment. Because that change was substantive, it was held not to apply except prospectively. Adding subparagraph (3) to Section 38-1-18, was plainly a substantive change which operates only prospectively and does not change the rights of the parties as they existed when the work was done, the lien was filed and then suit was filed to foreclose the lien.

Even if the amendment was valid and did apply to this earlier filed case, the Smedsruuds would not be entitled to attorney's fees by reason of the Smedsruuds unaccepted offer of a \$40,000.00 judgment because the judgment to which Pochynok Company is entitled exceeds that offer in any event.

The verdict of the jury was \$7,076.56. The reasonable attorney's fee award to which plaintiff is entitled as the successful party under Section 38-1-18(1), and which is fully supported by the affidavit of Pochynok Company's counsel was over \$35,000.00. The total judgment that should be entered is therefore in excess of \$40,000.00 plus Plaintiff's costs, e.g., "more favorable" than the offer.

ISSUE 3

WHETHER CONSTRUCTION FUNDS WHICH ARE DEPOSITED BY PROJECT OWNER INTO A GENERAL CONTRACTOR'S BANK ACCOUNT, WHICH ACCOUNT WAS CREATED SPECIFICALLY FOR THE PROJECT OWNER'S PROJECT, AND WHICH FUNDS WERE SPECIFICALLY DESIGNATED BY THE PROJECT OWNER TO BE PAID TO SPECIFIC SUBCONTRACTORS WHO HAVE COMPLETED WORK ON THE PROJECT, ARE FUNDS OWNED BY THE GENERAL CONTRACTOR WHICH ARE SUBJECT TO GARNISHMENT BY THE GENERAL CONTRACTOR'S JUDGMENT CREDITORS?

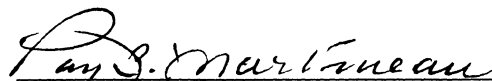
The trial court erred when it ruled that the funds in Pochynok Company's account were subject to garnishment by the Smedsruuds. The funds that were deposited into plaintiff's account were owned by the project owner, and were to be used to pay for work which was completed on the owner's project. Pochynok Company had a duty under Utah Statute §57-55-603(1) to pay the money deposited by the project owner to the designated subcontractors.

The money deposited into Pochynok Company's account was not a gift to Pochynok Company, nor was it payment for services that Pochynok Company had provided on the project. There was no transfer of ownership of the funds, and Pochynok Company never had an ownership interest in those funds. Prior to the wire into Pochynok Company's account, the account balance was less than \$3,500.00. No deposits were made into Pochynok Company's account between that date of the September 6, 2002 wire and the date of the garnishment. Immediately after the garnishment, Pochynok Company's account had a negative balance. It is therefore clear that the money in Pochynok Company's account was placed there by the project owner. In fact, the account was created and used only for this particular owner's project. As is established by the Utah Supreme Court decision in *Peterson v. Peterson*, 571 P.2d 1360 (Utah 1977), the fact that funds are held in bank account titled in another person's name, does not necessarily mean that the owner of the bank account owns the funds inside of that account. Here the project owner obviously owned the money in the account that he designated be paid to the designated subcontractors. The trial court erred when it allowed the Smedsruks to garnish another party's money.

CONCLUSION

Based upon the foregoing, Pochynok Company respectfully requests that this Court reverse the ruling of the trial court that the Smedsruks were the successful party herein, reverse the trial court's ruling that §38-1-18(3) should be retroactively applied in this matter, and reverse the trial court's ruling that garnishment herein was proper.

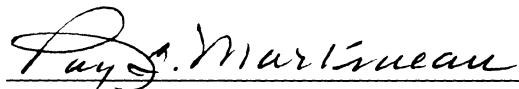
RESPECTFULLY SUBMITTED this 5' day of April, 2003.


Ray G. Martineau
Anthony R. Martineau
Brett D. Cragun
Attorneys For Plaintiff/Appellant

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Brief Of Appellant was served upon the following individuals by mailing a copy thereof, postage prepaid, to said individuals at the following address this 21 day of April, 2003.

GREGORY SMEDSRUD
LOUANN SMEDSRUD
7100 Canyon Drive
Park City, UT 84098-4658



ADDENDUM

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

| | | |
|----------------------------|---|---------------------------|
| J. POCHYNOK COMPANY, INC., | : | MINUTE ENTRY RULING |
| Plaintiff(s), | : | CASE NO. 020901328 MI |
| vs. | : | Judge J. Dennis Frederick |
| GREGORY SMEDSRUD, et al, | : | Date: July 25, 2002 |
| Defendant(s), | : | |

After review of the pleadings and upon receipt of the Notice to Submit filed July 19, 2002 and Notice to Submit filed July 19, 2002, the Court rules as follows:

1. Defendants' Motion to Tax Costs and Attorneys Fees, etc. is granted for the reasons specified in the supporting memoranda.
2. Plaintiff's Motion for Injunctive Relief, etc. and its Motion for Award of Attorney's Fees, etc. are denied for the reasons specified in the opposing memoranda.
3. Counsel for the prevailing parties to prepare the appropriate orders.

Case No. 020901328 MI

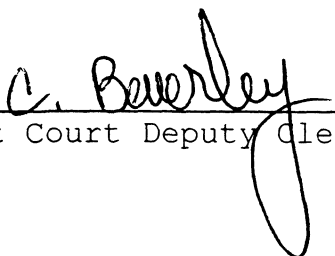
CERTIFICATE OF MAILING

I certify that on the 25th day of July, 2002, I sent by first class mail, a true and correct copy of the attached document to the following:

Vincent C. Rampton
Ross I. Romero
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, UT 84145-0444

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

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



District Court Deputy Clerk

IMAGED

FILED DISTRICT COURT
Third Judicial District

AUG 13 2002

By _____ SALT LAKE COUNTY

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 "Smedsruks Property"). Plaintiff is hereby declared to hold no right, title or interest in and to the Smedsruks 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

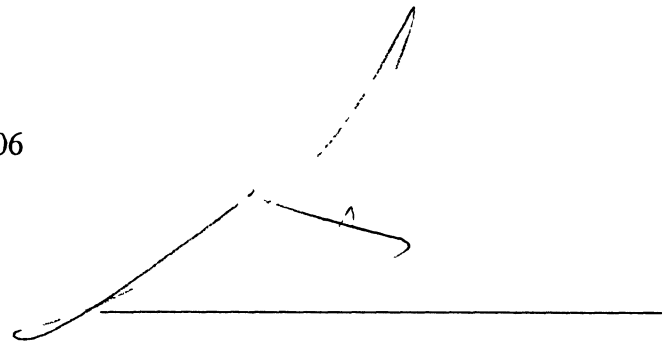
I hereby certify that on the 15th day of August, 2002, I caused to be hand-delivered a true and correct copy of the foregoing proposed form of **JUDGMENT UPON VERDICT AND ORDER ON POST TRIAL MOTIONS** to the following:

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 black ink, consisting of a series of loops and a long horizontal stroke at the end, positioned to the right of the list of names.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

| | | |
|----------------------------|---|---------------------------|
| J. POCHYNOK COMPANY, INC., | : | MINUTE ENTRY RULING |
| Plaintiff(s), | : | CASE NO. 020901328 MI |
| vs. | : | Judge J. Dennis Frederick |
| GREGORY SMEDSRUD, et al, | : | Date: September 19, 2002 |
| Defendant(s), | : | |

After review of the pleadings and upon receipt of the Notice to Submit filed September 18, 2002, the Court rules as follows:

1. Plaintiff's Motion to Amend Judgment is in reality an effort to have this Court reconsider its previous decisions incident to the judgment of August 13, 2002 which this Court declines to do.

Case No. 020901328 MI

CERTIFICATE OF MAILING

I certify that on the 19th day of September, 2002, I sent by first class mail, a true and correct copy of the attached document to the following:

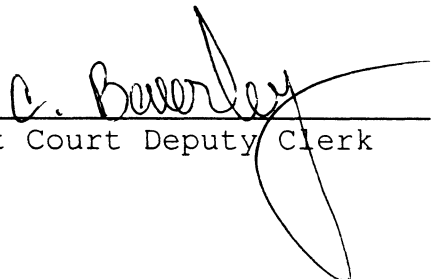
Vincent C. Rampton
Ross I. Romero
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, UT 84145-0444

Ralph R. Tate, Jr.
4685 Highland Drive
Suite 202
Salt Lake City, UT 84117

Randall R. Smart
341 South Main Street
Suite 303
Salt Lake City, UT 84111

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

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



District Court Deputy Clerk

FILED DISTRICT COURT
Third Judicial District

OCT - 7 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 DISTRICT COURT OF SALT LAKE 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.

**ORDER DENYING MOTION TO
AMEND JUDGMENT**

Civil No. 020901328

Judge J. Dennis Frederick

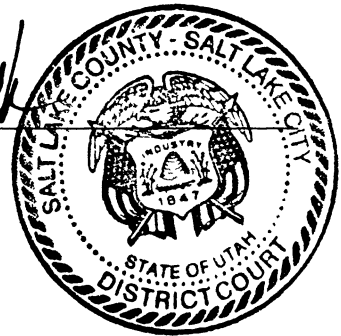
Plaintiff's Motion to Amend Judgment in the above-entitled matter having been
submitted pursuant to Rule 4-501, Utah Rules of Judicial Administration, the Court having
reviewed the parties' submittals, and good cause appearing,

IT IS HEREBY ORDERED that the Motion of Plaintiff J. Pochynok Company, Inc. to amend judgment in the above-entitled matter be and hereby is denied.

DATED this 17th day of Sept ~~September~~, 2002.

BY THE COURT:

Judge



CERTIFICATE OF SERVICE

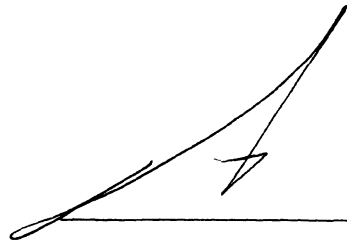
I hereby certify that on the 27th day of September, 2002, I caused to be mailed by first class mail, postage prepaid, a true and correct copy of the foregoing form of Order Denying Motion to Amend Judgment, to the following:

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



3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

| | | |
|-------------------------|---|---------------------------|
| J POCHYNOK COMPANY, | : | MINUTES |
| Plaintiff, | : | OBJECTION TO GARNISHMENT |
| | : | |
| | : | |
| vs. | : | Case No: 020901328 MI |
| | : | |
| GREGORY SMEDSRUD Et al, | : | Judge: J DENNIS FREDERICK |
| Defendant. | : | Date: October 7, 2002 |

Clerk: cindyb

PRESENT

Plaintiff(s): MR. POCHYNOK
Defendant(s): GREGORY SMEDSRUD
Plaintiff's Attorney(s): BRETT D. CRAGUN
Defendant's Attorney(s): VINCENT C RAMPTON
DAVID MCGRATH

Video

Tape Number: 1 Tape Count: 9:13-9:24

HEARING

Plaintiff's Objection to Garnishment is argued to the Court and denied for the reasons stated on the record. Attorney Rampton to prepare the appropriate order.

FILED DISTRICT COURT
Third Judicial District
OCT 17 2002
SALT LAKE COUNTY
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 DISTRICT COURT OF SALT LAKE 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.

**RULING ON WRIT OF
GARNISHMENT**

Civil No. 020901328

Judge J. Dennis Frederick

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;

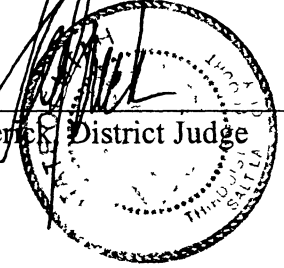
5. Zions First National Bank, as Garnishee, is hereby ordered to pay the Property Subject to Garnishment, as identified in its answers to interrogatories in response to the Smedsrud Defendants' Writ of Garnishment, directly to counsel for Defendants Gregory and LouAnn Smedsrud.

DATED this 17th 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

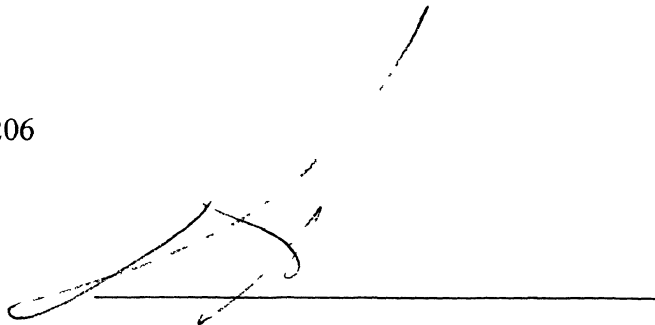
I hereby certify that on the 24th day of October, 2002, I caused to be mailed by first class mail, postage prepaid, a true and correct copy of the foregoing proposed **RULING ON WRIT OF GARNISHMENT** to the following:

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 in black ink, appearing to read 'R. Tate', is written over a horizontal line. The signature is stylized with a large, sweeping initial 'R'.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

| | | |
|----------------------------|---|---------------------------|
| J. POCHYNOK COMPANY, INC., | : | MINUTE ENTRY RULING |
| Plaintiff(s), | : | CASE NO. 020901328 MI |
| vs. | : | Judge J. Dennis Frederick |
| GREGORY SMEDSRUD, et al, | : | Date: November 5, 2002 |
| Defendant(s), | : | |

After review of the pleadings and upon receipt of the Notice to Submit filed November 4, 2002, the Court rules as follows:

1. Plaintiff's Combined Rule 59 Motion, etc. is denied for the reasons specified in the opposing memorandum.
2. Counsel for defendants Smedsrud to prepare the order.

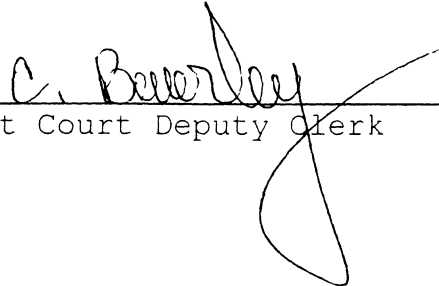
Case No. 020901328 MI

CERTIFICATE OF MAILING

I certify that on the 5th day of November, 2002, I sent by first class mail, a true and correct copy of the attached document to the following:

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

Vincent C. Rampton
Ross I. Romero
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, UT 84145-0444



District Court 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

FILED
Third District Court
NOV 15 2002
SALT LAKE CITY
Deputy Clerk

IN THE THIRD DISTRICT COURT OF SALT LAKE 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.

**ORDER ON MOTION FOR NEW
TRIAL AND OBJECTION TO FORM
OF ORDER**

Civil No. 020901328

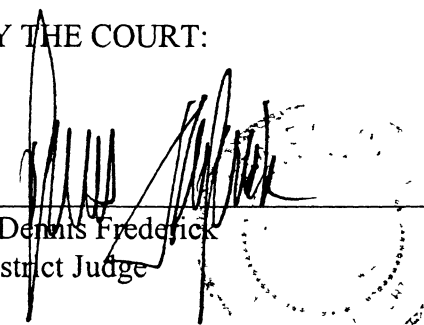
Judge J. Dennis Frederick

Plaintiff J. Pochynok Company, Inc.'s Combined Rule 59 Motion for New Trial and
Notice of Objection to Order having been submitted for decision pursuant to Rule 4-501, Utah
Rules of Judicial Administration; the Court having reviewed the submittals of the parties, and
good cause appearing,

IT IS HEREBY ORDERED that Plaintiff's Combined Rule 59 Motion for New Trial and Notice of Objection to Order, both in connection with this Court's hearing of Plaintiff's objection to Defendants' Writ of Garnishment herein, is denied.

DATED this 18th day of November, 2002.

BY THE COURT:



J. Dennis Frederick
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of November, 2002, I caused to be mailed by first class mail, postage prepaid, a true and correct copy of the foregoing form of **ORDER ON MOTION FOR NEW TRIAL AND OBJECTION TO FORM OF ORDER** 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

