

2004

John F. Stout et. al. v. Creekside East Condominium Homeowners Association : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOHN F. STOUT et. al.,

BRIEF OF THE APPELLANT

Plaintiff and Appellee,

vs..

Case No. 20040641 **CURT OF APPEALS
BRIEF**

CREEKSIDE EAST CONDOMINIUM
HOMEOWNERS ASSOCIATION,

**UTAH
DOCUMENT
K F U**

Defendant and Appellant.

DOCKET NO. 20040641

**AN APPEAL FROM A JURY VERDICT AND AN AWARD OF ATTORNEY'S
FEES ENTERED BY THE TRIAL COURT
JUDGE DENISE P. LINDBERG AND JUDGE TIMOTHY R. HANSON**

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UTAH APPELLATE COURTS
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PARTIES TO THE PROCEEDINGS BELOW

The caption of the case on appeal contains the names of all parties to the proceedings in the district court.

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STATEMENT OF JURISDICTION

Defendant appeals several discovery rulings and a ruling on attorney's fees in this case resulting from a final jury verdict. This Court has jurisdiction under URAP Rule 4.

STATEMENT OF THE ISSUES & STANDARD OF REVIEW

FIRST ISSUE ON APPEAL

Issue. Did the Trial Court abuse its discretion by denying Defendant's Motion To Compel Discovery and Motions to Extend Discovery?

Standard of Review. The Court of Appeals should review this issue under an abuse of discretion standard of review.

Citation to Record of Issue Preservation. Trial Record (TR) 85-107, 166-167, 290-291.

SECOND ISSUE ON APPEAL

Issue. Did the Trial Court abuse its discretion by awarding attorney's fees to the Plaintiff as the prevailing party in the lawsuit; and if not, were the fees properly charged and allocated?

Standard of Review. The Court of Appeals should review this issue under an abuse of discretion standard of review.

Citation to Record of Issue Preservation. TR 644-711.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

There are no such citations of central importance to the appeal.

STATEMENT OF THE CASE

This case arises from a construction and roofing contract. The Plaintiff contracted to provide a roof to the Defendant. Defendant alleged that the Plaintiff constructed the roof improperly and also during construction committed various civil torts. During the course of the litigation Defendant sought to recuse the Trial Judge. The Defendant's counsel had several cases with the Judge Lindberg and believed that she could not impartially rule upon any matters in which he was the counsel. He therefore sought her recusal prior to advancing the litigation. He was eventually successful in doing so.

However, prior to her recusal, she denied Defendant's Motion to Compel and invited Defendant to redraft discovery after the discovery deadline had passed. Plaintiff therefor refused to engage in further discovery. These procedural actions, along with settlement negotiations and Plaintiff's untimely production of discovery, caused considerable delay and Defendant was unable to prepare for trial and sought to extend discovery. The request was denied and the matter went to trial. The jury returned a verdict of \$4200 for Defendant and approximately \$31,000 for Plaintiff. Thereafter, without requiring the allocation of fees, and without scrutinizing double billed fees, and eliminating fees for unnecessary legal work, the Trial Court granted Plaintiff all attorney's fees requested.

SUMMARY OF PROCEEDINGS BELOW

The matter commenced on April 19, 2002 when Plaintiff filed and served its

complaint. Defendant answered the complaint and filed a counterclaim. Soon thereafter the parties engaged in settlement discussions, discovery, and Defendant sought to recuse the Trial Judge. The Trial Judge recused herself in July of 2003 and a new Trial Judge was assigned. The matter went to trial on December 11, 2003 and resulted in a mixed jury verdict for both parties. Attorney's fees were then awarded Plaintiff and this appeal ensued.

SUMMARY OF FACTS

1. On April 19, 2002, Plaintiff commenced this action alleging Breach of Contract and Unjust Enrichment. He alleged that Defendant had agreed to pay "for materials and services," owed "\$25,906, plus, as provided in the Contract, a 10% surcharge," and 18% interest. The dispute arose out of a roofing project that Plaintiff contracted to complete. Trial Record (TR) 1-4.

2. Defendant/appellant counterclaimed alleging Material Breach of Contract, Negligent Employment, Waste, Nuisance, Invasion of Privacy, Trespass and Conversion. Defendant alleged that Plaintiff and its agents failed to perform their work in a competent manner, caused damage, interfered with its parking area, failed to properly hire, train and supervise its employees who caused waste, damage and privacy violations. TR 14-17.

3. During the course of this litigation through the day of trial, the Plaintiff disputed all causes of action asserted by Defendant including the assertion that he had caused damage to Defendant's air-conditioning units. The sole exception was that at trial,

Plaintiff conceded it had damaged Defendant's air conditioning units. TR 18-20.

4. On August 26, 2002, Defendant sent a discovery request to Plaintiff. TR 72-73. In this discovery request, in addition to other information, Defendant requested the following:

INTERROGATORY NO. 2: Provide the last known names and numbers of any business entities, governmental agencies, persons who have ever had any complaints, concerns, lawsuits, disputes, problems, issues regarding any of the supplies, workmanship, or services provided by Plaintiff or its agents to any persons or businesses or other legal entities.

INTERROGATORY NO. 3: Provide the party names, the name of the court and docket numbers of lawsuits or administrative actions filed against Plaintiff or its agents because of any of its business practices or because of its services, materials or workmanship.

INTERROGATORY NO. 4: Has Plaintiff or its agents ever been convicted of any felony or misdemeanor involving dishonesty?

INTERROGATORY NO. 5: If your answer to the preceding interrogatory is "yes," please provide the following:

- a. The charge,
- b. The court;
- c. The docket number of the case.

....

REQUEST NO. 5: Please produce a copy of each and every document stating the amount that Plaintiff charged Defendant for the work performed, including but not limited to bills, invoices, and other similar documents.

REQUEST NO. 6: Please produce a copy of each of the personnel files, wage statements, contracts of all persons that were either employees or independent contractors of Plaintiff and who supplied services or materials to Defendant.

....

REQUEST NO. 12: Please produce a copy of each and every document, recording, photograph, or other item evidencing any complaints, concerns, lawsuits, disputes, problems, issues regarding any of the supplies, workmanship, or services provided by Plaintiff or its agents to any persons or businesses or other legal entities. TR 86-87

....

5. Except for Request (for Documents) 5, Plaintiff's response, **sent four and a half months late** (TR 84), to all of these discovery requests above was:

Plaintiff objects to this [interrogatory or request] as being vague, ambiguous, over broad, unduly burdensome, oppressive, and beyond the scope of discovery permitted by Rule because it requests information that is not relevant to the subject matter of the pending litigation and is not reasonably calculated to lead to the discovery of admissible evidence at trial. TR 99-107.

6. Pursuant to the Trial Court's Scheduling Order, the discovery deadline was January 30, 2003 (TR 30). No additional discovery, except on expert witnesses could go forward without an extension of the discovery deadline.

7. On February 3, 2003, Defendant filed a Motion to Compel discovery. TR 85-91.

8. The Trial Judge, on March 31, 2003 denied Defendant's Motion to Compel stating:

12. The Court agrees with Plaintiff that [Interrogatory No.2], as presently structured, is vague and overbroad. It is possible, however, that Defendant may be able to narrow and define this discovery request by using time limits and language that limits the information requested to that reasonably calculated to lead to admissible evidence under Utah Rules of Evidence 404(b).

....

14. The Court again agrees with Plaintiff that [Interrogatory No.3] is vague and overbroad. Arguably, this particular request could be narrowed by providing reasonable time limits to the request and limiting the request to causes of action that relate to the claims Defendant has made against Plaintiff.

....

16. In support of its [Interrogatory No. 4 and 5] Defendant argues that information regarding a witness' honesty is always relevant for establishing credibility. Nevertheless, this discovery request is not limited to those who may be called as

witnesses, but appears to apply to any employee of Plaintiff. See Utah R. Evid. 609. Upon identification of those persons who are likely to appear as witnesses at trial, Defendant might be able to provide a narrower construction of this discovery request.

....

19. In Request No.6, Defendant asks Plaintiff to "produce a copy of each of the personnel files, wage statements, contracts of all persons that were either employees or independent contractors of Plaintiff and who supplied services or materials to Defendant." Defendant asserts, without support, that this information is necessary for it to maintain its counterclaims. While some of these documents arguably may be relevant, as it is currently drafted, the request is over broad.

....

21. [Request No.12], appears to be substantively related to Interrogatory No.2. As the Court has already concluded with respect to the prior request, *see supra* ¶¶10-12, this request is also vague. Plaintiff has no way of knowing every person or entity that has ever had a "concern" or "problem" against it. Additionally, the scope of this discovery request appears to encompass situations not related to Defendant's claims for negligent employment or material breach of contract. (Exhibit A and TR 162-163).

9. Due to Plaintiff's delay in submitting discovery, settlement discussions and the trial Court's ruling on the Motion to Compel, on April 24, 2003 Defendant requested an extension of the Discovery cut off deadlines that had passed. TR 166-167.

10. On May 1, 2003, Plaintiff filed a Certificate of Readiness for Trial. TR 223.

11. Again, due to Plaintiff's delay in submitting discovery, settlement discussions the trial Court's ruling on the Motion to Compel, the recusal Motions to recuse the Trial Judge, and because of an intent to submit a modified discovery request pursuant to the Trial Judge's denial of its Motion to Compel, on May 7, 2003, Defendant renewed its request for an extension of the Discovery cut off deadlines that had passed, requested oral argument thereon, and submitted to Plaintiff the discovery questions it sought to have the Plaintiff respond to. TR 290-291.

12. On April 14, 2003, Plaintiff refused to respond to discovery or submit to a deposition because the discovery cut off deadline had passed. TR 447 ¶ 7, 543 ¶ 5.

13. On May 15, 2003, Defendant objected to the certificate of readiness for trial and requested oral argument. TR 295.

14. On May 29, 2003, Defendant notified the court by affidavit that all but one address given by Plaintiff in his discovery responses regarding potential witnesses were incorrect or no longer valid. TR 299-300.

15. On July 3, 2003, Judge Denise Lindberg recused herself from the case. TR 306

16. On August 6, 2003, the case was assigned to Judge Timothy R. Hanson. TR 308.

17. On August 28, 2003, the Trial Judge, by telephone conference, without requiring a written motion, granted Plaintiff the right to make an untimely response to Defendant's requests for an extension of discovery and set another telephone conference to address and decide the matter on October 7, 2003. TR 315, 447 ¶ 8, 543 ¶ 6.

18. However, on October 6, 2003, one day prior to the scheduled telephone conference for oral argument, the Trial Judge issued an order denying Defendant's request stating:

. . . The court notes that the Defendant requests a hearing on this Request for Extension. However, since the Request . . . is not a dispositive motion and since the parties' written submissions adequately represent their respective legal positions, the Court declines to schedule this matter for hearing. Therefore, . . . the Court rules as stated herein.

The Defendant seeks to extend the January 30, 2002 (sic-2003), discovery deadline on the basis that discovery in this matter has been delayed by settlement

negotiations, the filing of recusal requests and the filing of Motion to Compel. Of these, only the pendency of a motion to compel could have potentially hindered discovery from progressing. However, while the Motion to Compel was decided on March 31, 2003, the Defendant (for unknown reasons) has taken no further steps to complete its discovery in the months following. Furthermore, as the Plaintiff accurately describes in his opposition, this case has already been unduly delayed and the Defendant had not articulated an adequate basis to delay it further. Accordingly, having considered the Defendant's Request, the Court denies the same. Exhibit B--TR 325-326, 347-348.

19. Although they were requested in discovery, Plaintiff conceded during the trial that he had failed to provide, in response to discovery, any invoices pertinent to the project. TR 753 ¶ 4.

20. On December 11, 2003, Defendant's causes of action for Material Breach of Contract, Negligent Employment, Waste, Nuisance, Invasion of Privacy, Trespass and Conversion were submitted to the Jury. TR 573.

21. The Jury returned a General Verdict in favor of Defendant for \$4,200 and returned another General Verdict for Plaintiff for \$31,865. TR 610-611.

22. As a result of this verdict Plaintiff by affidavit requested an award of attorney's fees and costs in the amount of \$20,329. TR 615-625

23. Defendant submitted a counter affidavit for attorney's fees, contesting Plaintiff's affidavit of attorney's fees as excessive, and asserting that Defendant was the prevailing party. Defendant further argued that, besides not properly allocating fees between claims, requested fees were: (1) double billed, (2) billed for consultation among attorneys, (3) billed for time spent unsuccessfully defending against Defendant's counterclaims, (4) and billed for matters that Plaintiff did not pursue, withdrew or was unsuccessful in pursuing. TR 644-659, 667-670.

24. Among others, Defendant specifically challenged the following entries on Plaintiff's bill for attorney's fees. TR 661-665.

A. Double billing and attorney consultations between attorneys Sorensen (RLS), Greg Hawkins (GPH) and Lonn Litchfield (LL) are found at entry numbers: 3-9, 14, 18, 27, and 33.

B. Breach of Contract and Unjust Enrichment are not complex. To research and draft the complaint, Plaintiff's attorneys billed a total of 7.2 hours at entries 4-7. This time is excessive.

C. To research and draft an answer and reply to Defendant's counterclaim, Plaintiff's attorneys billed a total of 8.6 hours at entries 8-12. This time is excessive.

D. Plaintiff unsuccessfully challenged Defendant's motion to recuse Judge Lindberg, Plaintiff's attorneys billed at total of 12.8 hours at entries 25-29. Plaintiff's attorneys billed for time for a Motion to Dismiss that was never filed by Plaintiff and prepared documentation for settlement of the case. No such documents were ever agreed upon by the parties. These are at entries 8, 35.

E. Plaintiff's attorneys billed for time in its unsuccessful challenge to strike Defendant's Motion to Compel Discovery at entries 43-44, 48. Plaintiff's Motion to Strike was frivolous. Plaintiff's attorney asserted that Defendant had not consulted with him prior to filing its Motion to Compel. Plaintiff's attorney's own billing entries demonstrate that such correspondence in fact occurred. After presenting proof thereof, Judge Lindberg found this claim to be unfounded and

denied the Motion to Strike.

F. In this matter Defendant's attorney's staff contacted Judge Lindberg's clerk to determine whether or not a proper jury demand and fee had been paid. They were informed that it had not. Therefore Mr. Lambert filed a Rule 39 (b) request for a jury. Rather than simply inform Mr. Lambert of its jury request and payment, the opposing attorney prepared an objection to the request and billed for this objection at entry 51. This was completely unnecessary.

G. Plaintiff's attorneys double billed for time spent drafting a Rule 11 letter to Mr. Lambert threatening him with sanctions that were never imposed at entries 53-54.

H. Plaintiff's attorneys billed for time for preparing, on the eve of trial, several motions, including a Motion to Strike and Motion for Order to Preclude New Evidence at entries 61, 64-65. These Motions were frivolous and were withdrawn by Plaintiff after Defendant had spent considerable time responding to them and filing counter motions demonstrating their lack of foundation.

25. The Trial Judge, without engaging in any factual or legal analysis, ruled upon Defendant's objection to attorney's fees stating, among other conclusory findings, that:

... Under the case law recited in the Defendant's brief, it is undoubtable that the Plaintiff prevailed on the significant issues in this litigation and that the Defendant's success (both in terms of monetary recovery and legal issues presented) was nominal.

....

... Having reviewed these specific entries, the Court concludes that the Defendant's objections are without merit and that a reduction in the fees is unwarranted. In fact, a number of the Defendant's objections are based on the

invalid argument that simply because a particular motion or legal endeavor pursued by the Plaintiff was eventually unsuccessful, there should be no recovery for the time attributable thereto. However, it is the overall outcome that is determinative of prevailing party status and attorney fee recovery and not the success of each individual motion or legal effort. TR 772-773.

26. The facts supporting the Trial Judge granting of attorney's fees are that Plaintiff was awarded all of his requested contractual damages plus interest and a 10% penalty minus the \$4,200 awarded the Defendant.

SUMMARY OF ARGUMENT

The Trial Court abused its discretion by failing to compel Plaintiff to answer discovery requests that were reasonably calculated to lead to evidence about Plaintiff and his potential witnesses' credibility, motive, opportunity, intent, preparation, plan, knowledge, competency, work customs, and job performance. The requested discovery was reasonably calculated to lead to the whereabouts of Plaintiff's employees that worked on Defendant's roof on behalf of Plaintiff.

The Trial Judge denied Defendant's Motion to Compel on March 31, 2003 after the discovery cut off deadline had passed, but invited Defendant to redraft its requests to conform to its ruling. The Plaintiff however, refused to engage in further discovery because of the lapse of the discovery deadline. Defendant then moved to extend discovery. A Trial Judge abused his discretion when he denied the request stating that the Defendant had no excuse for not having completed discovery after March 31, 2003.

Rushed into trial, the Defendant was awarded a \$4,200 general jury verdict which offset the Plaintiff's general jury verdict of \$31,000. Plaintiff's contract allowed an award of attorney's fees if he had to pursue collection efforts. The Trial Judge awarded

Plaintiff his attorney's fees but failed to make any analysis of his decision except that the monetary award to Defendant was nominal. Defendant asserts that the Trial Judge did not analyze the contractual language, the number of claims, counterclaims, cross-claims, etc., brought by the parties, the importance of the claims relative to each other and their significance in the context of the lawsuit. Had he done so and juxtaposed these factors against the factor he gave the most importance to—that being the dollar amounts awarded to the parties—he may have realized that the Defendant should have been deemed the prevailing party.

Alternatively, no fees and costs should have been awarded to either side, or Plaintiff attorneys' fees should have been substantially reduced. Plaintiff did not allocate fees between claims for which there was no entitlement to attorney fees and for claims for which there may be an entitlement to attorney fees for time expended on each. Moreover, the fees billed were a result of inefficiency and an excessive, unreasonable number of hours spent on the case and for redundant and unnecessary work. This is evidenced by many frivolous, withdrawn, unsuccessful, non-meritorious motions filed by Plaintiff. Plaintiff's attorney also requested payment for expenses that were duplicated due to several attorneys being involved in the same matter.

Lastly, Plaintiff's attorney increased the expense of the litigation by delaying for trial Plaintiff's concession that he had damaged Defendant's air cooling units. Plaintiff made an untimely disclosure of a few invoices at trial for materials allegedly integrated into the roof when they had been requested in discovery. These actions were in bad faith and in violation with the Civil Rules of Procedure.

ARGUMENT

I. DID THE TRIAL JUDGE ERR IN DENYING DEFENDANT’S MOTION TO EXTEND DISCOVERY AND MOTION TO COMPEL?

Discovery is allowed so long as the requested discovery, “appears reasonably calculated to lead to the discovery of admissible evidence.” URCP Rule 26(b)(1). The key is not that something may ultimately be inadmissible or that the discovery net that is cast is “unduly broad” because it may capture inadmissible or irrelevant information. Also, there is no per se rule that requires a litigant to so narrowly craft its requests that only relevant, admissible evidence is produced. Nor must the litigant allow the opposing/responding party to decide and dictate what is or is not relevant before it responds to discovery.

Moreover, it is axiomatic that a potential witness’ credibility is always a relevant issue of inquiry in discovery. *State v. Lanier*, 778 P.2d 9 (Utah 1989). It is also true that while character evidence is generally inadmissible, prior bad acts “may, however, be admissible” to show, “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” URE Rule 404(b). In other words evidence offered under URE Rule 404(b) “is admissible if it is relevant for a non-character purpose and meets the requirements of Rules 402 and 403.”

In this case Defendant had alleged that Plaintiff had failed to perform under its contract with Defendant and that he had negligently hired, trained and supervised his employees. Defendant more specifically alleged that the Plaintiff and his employees provided shoddy workmanship, substandard materials and caused both negligent and

intentional damage to the Creekside premises and its property. Defendant further alleged that Plaintiff's employees exposed themselves to Creekside habitants, urinated in full view of Creekside residents, and soiled the premises. These actions resulted in waste, destruction of property, nuisance and an invasion of privacy. The jury in fact awarded Defendant \$4,200 for these causes of action.

Given these allegations, all discovery requests were proper that were reasonably calculated to net information or locate witnesses that could demonstrate that Plaintiff knew and in fact had negligently hired, trained and supervised his employees, had provided shoddy, incompetent workmanship, substandard materials, had caused both negligent and intentional damage to the Creekside premises and its property, or had violated the Defendant's privacy. Furthermore, all discovery requests were proper that were reasonably calculated to net information that impeached Plaintiff, its employees and potential witnesses' credibility.

Defendant's Interrogatories #2 and #3 and Request (for Documents) #12 sought information that was reasonably calculated to locate other persons or entities that had had similar complaints or legal actions as those of Defendant against any Plaintiff regarding its supplies, workmanship, or services. In its Motion to Compel, Defendant indicated that it had heard rumors that other customers of Plaintiff had encountered the same problems it alleged against the Plaintiff: i.e., poor workmanship, hiring unskilled workers, using substandard materials and not complying with his contractual obligations. This comment was made not as evidentiary proof thereof, but to explain why it had propounded these discovery requests and to show what it hoped to discover.

Apparently, the Trial Judge believed that before evidence can be requested in discovery a litigant must first prove the evidence exists. (See Judge's note at TR 126, "based on what"). This is not the law.

As argued in its Motion to Compel, Plaintiff through his pleadings and at trial represented himself as an honest, skilled, highly-qualified professional roofer who used good workmanship, skilled workers, and appropriate materials. The information sought may have revealed that Plaintiff or his employees had, on prior occasions, engaged in tortious acts. Such reports or information may have been admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," and to show that Defendant knew or should have known his employees were unskilled and committing torts on the premises of customers and that his roofs were being installed in a faulty manner with substandard materials, or to attack his credibility and that of his witnesses. If Plaintiff in fact knew or should have known that his employees had engaged in such acts prior to working on Defendant's roof, it would have proven that he should have fired them or trained and supervised them better and since he did not, he was liable for their actions—even for their intentional torts.

At trial, both Plaintiff and an expert witness testified about the workmanship and actions of his employees in installing the roof. If Defendant had discovered information that demonstrated him and his employees were not competent, honest or skillful, this information could have been used to rebut any of Plaintiff's assertions and to attack his credibility and his witnesses' credibility. Not only was such evidence directly relevant to the issue of negligence, URE Rule 406 specifically allows evidence of a habit or routine

practice to establish Plaintiff acted in conformity with the habit or routine practice.

In denying its Motion to Compel on this request, the Trial Judge stated:

. . . [Interrogatory No.2], as presently structured, is vague and overbroad. It is possible, however, that Defendant may be able to narrow and define this discovery request by using time limits and language that limits the information requested to that reasonably calculated to lead to admissible evidence under Utah Rules of Evidence 404(b).

. . . [Request No.12], appears to be substantively related to Interrogatory No.2. . . . this request is also vague. Plaintiff has no way of knowing every person or entity that has ever had a "concern" or "problem" against it. Additionally, the scope of this discovery request appears to encompass situations not related to Defendant's claims for negligent employment or material breach of contract.

Contrarily, especially in this case's circumstances, obtaining discovery should not become a guessing game about what a Trial Court judge, or opposing party, would deem as proper limiting language as to time and subject so that the request is not unduly burdensome and would only lead to relevant information. Moreover, the discovery deadline had past on January 30, 2003 (TR 30) and Plaintiff therefor refused to permit additional discovery. TR 325-326, 347-348; 447 ¶ 7, 543 ¶ 5. Consequently, Defendant could not redraft and resubmit its discovery requests without the Trial Court's permission which was refused. Even despite this, Interrogatories #2 and #3 and Request (for Documents) #12 were limited by time and subject because they sought only information **known by** Plaintiff and its agents about prior problems with workmanship and materials.

If a Trial Court judge will not extend discovery in such situations to allow a litigant to redraft its requests, then at least the Trial Court should provide the limiting language it deems appropriate. This procedure is contemplated by the rules but is rarely used. URCP Rule 26 (c) states:

“Upon motion by a party . . . from whom discovery is sought . . . the court . . . may make any order which justice requires . . . including: . . . (c)(2) that the discovery may be had only on specified terms and conditions, . . . (c)(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; . . .”

Furthermore, even if discovery had been extended, without the Trial Court’s guidance the parties may have engaged in another round of discovery requests, late answers and then Motions to Compel. In short, a litigant should not be left to guess what a particular Trial Judge would deem as acceptable, especially when the discovery deadlines have passed and the court is unwilling to extend the deadlines.

The Trial Judge also ruled that the discovery requests were overbroad because, “Plaintiff has no way of knowing every person or entity that has ever had a ‘concern’ or ‘problem’ against it.” Of course, the Plaintiff could not divulge “concerns” or “problems” he was unaware of, but could and should have divulged those he was aware of in his answers. It is axiomatic that a litigant can only respond to discovery with information **it knows or is within its possession and control**.

In fact, “Each interrogatory **shall** be answered separately and fully, in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for the objection **and shall answer to the extent the interrogatory is not objectionable**. URCP Rule 33 (b)(1).

Further justifying her decision, the Trial Judge stated that: “the scope of this discovery request appears to encompass situations not related to Defendant’s claims for negligent employment or material breach of contract.” Contrarily, the test is not whether the discovery net may entrap or “encompass” information that is not relevant to a party’s

claims or defenses, but whether it is reasonably calculated to entrap or “encompass” evidence **that may be relevant**. The Defendant’s discovery net was thrown to do just that, entrap or “encompass” evidence that may be relevant. Until these requests were answered, it was impossible to address whether or not the information that would have been obtained was relevant and admissible to parties’ defenses and causes of action.

Defendant’s Interrogatories #4 and #5 requested whether Plaintiff or its agents had ever been convicted of any felony or misdemeanor involving dishonesty and sought the details thereon. This information was directly relevant to whether or not Plaintiff negligently hired or retained any employee and to his and his employees’ credibility. URE Rules 608 & 609 allow a witness’ truthfulness to be attacked by any conviction for a crime, that is punishable by imprisonment in excess of one year, or that involves dishonesty or false statements. URE Rule (609)(a)(b).

In denying Defendant’s request for this information, the Trial Judge stated:

. . . [T]his discovery request is not limited to those who may be called as witnesses, but appears to apply to any employee of Plaintiff. See Utah R. Evid. 609. Upon identification of those persons who are likely to appear as witnesses at trial, Defendant might be able to provide a narrower construction of this discovery request.

The Trial Judge’s ruling is impracticable for several reasons. First, at the onset of litigation and discovery, it was not known by Defendant whom the Plaintiff would call as witnesses, nor even who the Defendant may have called as a result of its discovery investigation. As is the norm, the scheduling order in this case required Plaintiff to identify his witnesses after discovery had closed within 14 days prior to trial. (TR 30, 31). Since Defendant could not engage in discovery after discovery had closed, it could

not limit its discovery request to only “witnesses.” However, as URCP Rule 26 requires, it could draft its request in a manner reasonably calculated to lead to relevant evidence. It did so by limiting its request to “Plaintiff or its agents.”

Second, practically speaking it would have been very simple for the Plaintiff to have indicated if he, his business as an entity or his employees had ever been convicted of a felony or a crime of dishonesty. Hence the limitation to just the Plaintiff and his employees was sufficiently detailed and restricted as to not be unduly vague, overbroad or burdensome. Then, in the event any were called as a witness (as Plaintiff was), the information would have already been obtained and verified.

Third, this information was relevant to Defendant’s claim of negligent employment regardless of whether or not the Plaintiff or his employees were “witnesses.” If Plaintiff knew, for instance that an employee had been convicted of a felony for lewdness, the jury may have concluded that he should have supervised or terminated the employee before he exposed himself to Defendant’s unit owners.

Fourth, had discovery been extended to allow Defendant to locate and interview or depose Plaintiff’s employees, knowing that these employees had a criminal conviction would have allowed defendant to evaluate the employee’s credibility which is relevant to Defendant in calling such a person as a witness.

Defendant’s Request (for Documents) #6 asked Plaintiff to produce copies of the “personnel files, **wage statements, contracts** of all persons that were either employees or independent contractors of Plaintiff **and who** supplied services or materials to Defendant.” Such evidence would have allowed Defendant to explore many factual

issues directly relevant to the case.

First, personnel records contain contact location information on the particular employee, often including alternative addresses of friends, family and prior employers so that if the employee had moved they could be located through these other sources. Such information also allows a litigant to verify if the opposing party has been honest and thorough in providing last known addresses and phone numbers. In this case, although Plaintiff provided the last known addresses and phone numbers of his employees, Defendant was only able to locate one of them and could not verify the thoroughness nor truthfulness of Plaintiff's information which appeared to be highly suspect.

Second, personnel files, wage statements and contracts could have established when and how long each employee or agent actually spent working on the Defendant's roofing project to rebut or validate allegations of adequate staffing and actual work performed or to rebut the witnesses' testimony about their presence or lack of presence on the job site. This information may have also reflected upon the credibility of any witnesses. For instance if any employee witness, including the Plaintiff, claimed to have had knowledge that work on a certain day was done properly, yet his time card or other records indicated he wasn't there, this would be relevant. Also, any wages paid were relevant to Plaintiff's Unjust Enrichment Claim to show Plaintiff's damages or lack thereof.

Third, personnel records may have had information about the employees skill levels, qualifications, and other background information such as the Plaintiff's business practices, habits and routines and whether or not any employee was fired, disciplined, or

suspended for poor workmanship or committing torts on the job site. This information was relevant to Defendant's allegation of negligent employment. Moreover, all of Plaintiff's employees or independent contractors who supplied services or materials to Defendant were potential witnesses and all information involving their backgrounds may have been relevant. Such information is routinely requested and should have been provided in discovery. *In re Hawaii Corp.*, 88 FRD 518, 525 (D. Haw 1998).

Fourth, contracts and wage statements from those who supplied materials to the project would have allowed Defendant to verify the quality and quantity of the supplies actually integrated into the roofing project. Such information was reasonably calculated to lead to relevant evidence about whether the proper materials were integrated into the roof and what where the costs and quality of the roofing material. This information was directly relevant to the Plaintiff's claim of Unjust Enrichment and to Defendant's causes of action for breach of contract. For instance, had Plaintiff been unable to produce proper invoices for the materials integrated into the roofing project this would have supported Defendant's claim for breach of contract.

In denying its Motion to Compel on this request, the Trial Judge stated:

. . . Defendant asserts, without support, that this information is necessary for it to maintain its counterclaims. While some of these documents arguably may be relevant, as it is currently drafted, the request is over broad.

Contrarily, this request was limited to all persons that were either employees or independent contractors of Plaintiff **and who supplied services or materials to Defendant**. Hence, it was limited to only those persons working on or supplying materials integrated into Defendant's roof. This language limited the request to the

period that the contract was performed. Moreover, if “some of these documents arguably may be relevant,” why wasn’t the Plaintiff simply ordered to provide any such documents with whatever restrictions the Trial Court may have imposed to cure the requests “overbroadness?” This request was therefore not overbroad.

Plaintiff may claim that since, pursuant to request for documents #5, he provided some invoices during trial alleged to pertain to Defendant’s roof that this negates this Defendant’s arguments hereon. However, at trial there was no way for Defendant to verify that the invoices actually pertained to materials integrated into Defendant’s roof. The invoices that were provided could have been purchases made for other roofing projects. Had Defendant been permitted to complete discovery, it could have explored whether or not the invoices pertained to other roofing projects. Consequently, it was error for the Trial Court’s to refuse to compel discovery.

Defendant further contends that the Trial Court’s abused its discretion by refusing to extend discovery. In this case after the initial position pleadings and scheduling order were provided to the court, on July 9, 2002 Plaintiff sent his discovery request to Defendant. TR 84. On August 19, 2002, Defendant then filed an informal request that the Trial Judge recuse herself. TR 58-68. On August 6, 2002, Defendant timely provided an extensive response to Plaintiff’s discovery request. TR 377-421, 494-501.

On Aug. 28, 2002 Defendant provided to Plaintiff its discovery request. TR 72-73. On Dec. 16, 2002 Defendant’s request to recuse Judge Lindberg was sent for a decision and an Order thereon was signed Jan. 1, 2003. TR 77-78, 79-81. Then on Jan. 24, 2003, four and a half months late, Plaintiff responded to Defendant’s discovery request. TR 84.

On Feb. 5, 2003 Defendant filed its Motion to Compel. TR 85-107.

On March, 31, 2003, after the discovery cut off deadline the Trial Court ruled upon the Motion to Compel. TR 160-165. Plaintiff thereafter refused to engage in more discovery. TR 447 ¶ 7, 543 ¶ 5. On May 7, 2003 due to Judge Lindberg's continued conduct, the Defendant again sought to formally recuse Judge Lindberg. On April 25, 2003 and then on May 2, 2003, Defendant moved to extend the discovery deadlines. TR 166-167, 290-291. On July 3, 2003, Judge Lindberg recused herself from the case.

The case was then assigned to Judge Hansen who, in a telephone conference allowed Plaintiff's to file an untimely response to Defendant's Motions for an Extension of Discovery and set another telephone conference to address the Motions. One day prior to the second telephone conference, in a written Minute Entry, the Trial Judge denied the Motions stating:

... The court notes that the Defendant requests a hearing on this request for Extension. However, since the Request ... is not dispositive motion and since the parties' written submissions adequately represent their respective legal positions, ... the Court rules as stated herein. ...

The Defendant seeks to extend the January 30, 2002, (sic-2003) discovery deadline on the basis that discovery in this matter has been delayed by settlement negotiations, the filing of recusal requests and the filing of Motion to Compel. Of these, only the pendency of a motion to compel could have potentially hindered discovery from progressing. However, while the Motion to Compel was decided on March 31, 2003, the Defendant (for unknown reasons) has taken no further steps to complete its discovery in the months following. Furthermore, as the Plaintiff accurately describes in his opposition, this case has already been unduly delayed and the Defendant had not articulated an adequate basis to delay it further. Accordingly, having considered the Defendant's Request, the Court denies the same. TR 325-326, 347-348.

The Trial Court's denial is an abuse of discretion because it rewarded the Plaintiff's failure to timely respond to discovery, ignored the obvious bar against

Defendant to engage in further discovery, and it penalized the Defendant for having sought and been successful in recusing a fellow District Court Judge and for engaging in settlement discussions.

First Plaintiff and not Defendant, waited more than four months to respond to discovery. In its opposition, Plaintiff argued that Defendant was unduly dilatory. However, even a cursory review of the case history set forth above, demonstrates a consistent effort to advance the case.

Second, Defendant could not engage in further discovery in the months following the ruling on the Motion to Compel because the discovery deadline had passed and Plaintiff refused to engage in further discovery. Also, in her ruling on the Motion to Compel, the Trial Judge invited Defendant to redraft its requests. Based thereon, what was Defendant to do to “[take] further steps to complete its discovery in the months following [March 31, 2003],” hold a gun to Plaintiff’s head? No, the only thing it could do is what it did, file its Motions to Extend in April and then again in May 2003. Therefore how can Judge Hanson state that there were some “unknown reasons” why Defendant could complete discovery. He himself stated in his ruling that on “January 30, 2002 (sic-2003)” the “discovery deadline” had expired.

Third, Defendant’s successful efforts to recuse Judge Lindberg had indeed delayed the case. Anecdotally, Defendant’s counsel has been warned that even legitimate concerns raised against a sitting judge could prejudice him with others Judges. Nevertheless, with all due respect, Defendant’s counsel believed that Judge Lindberg could and would not act impartially and he sought her recusal because he did not want her

making further decision. Now it appears that Plaintiff and Judge Hansen would opine that causing this delay in this case to recuse a fellow Judge should in fact be sanctioned as “undue delay.”

Lastly, the Plaintiff and the Trial Judge would penalize as “undue delay” by Defendant the two months spent in settlement negotiations even though overlapping the same time Plaintiff delayed his discovery responses by more than four months. Plaintiff will further argue that Defendant did nothing during settlement negotiations. This is a curious argument. Plaintiff’s counsel billed for preparing settlement documents in November 2003. (TR 622). Nevertheless, it is reasonable that both parties would not want to expend more attorney’s fees while there was a possibility of a settlement. Hence, while Defendant’s counsel waited to hear back from the Defendant condominium association on the settlement negotiations, Defendant’s counsel tried to resolve the discovery dispute (TR 699) and in December 2003, when settlement did not occur, he requested that Plaintiff respond to its discovery. TR 695.

Of further note, although the Trial Judge correctly noted that the administrative rules do not require oral argument on discovery matters, after allowing Plaintiff the right to file an untimely response to Defendant’s Motions to Extend, he set a telephone conference to orally address the Motions. Despite this, one day before the telephone conference, he made his ruling. Perhaps had he allowed the promised argument, defense counsel could have reminded him that the discovery deadline had passed and thereafter Plaintiff would not allow further discovery. TR 543-544. Therefore it was not “for unknown reasons” Defendant had “taken no further steps to complete its discovery in the

months following,” the Trial Court’s ruling on March 31, 2003; the case had not been “unduly delayed;” and the right to complete discovery is “an adequate basis to delay” a case. Accordingly, the Trial Court abused its discretion in failing to compel discovery and then in failing to allow Defendant to complete discovery.

Since there has been this error, it is Plaintiff’s burden to prove that it was harmless.

In, *Askew v. Hardman*, 884 P.2d 1258 (Ut. Ct. App. 1994) [overturned on certiorari on other grounds], the Court of Appeals stated:

However, the usual harmless-error analysis is inapposite where the Trial Court has erroneously denied a discovery request. In such situations, this court is required to presume prejudice unless it is shown that the denial was harmless. Prejudice is presumed because to require the requesting party to show that the error was harmful would place the requesting party in the untenable position of having to demonstrate that the contents of inaccessible information would have affected the outcome of the case. Because the requesting party does not have the information, he or she will never be able to demonstrate that the Trial Court's erroneous denial of a discovery request was anything but harmless. The burden of demonstrating that the erroneous denial of a discovery request was not prejudicial must therefore rest with the party resisting discovery. (*Citations omitted*)

II. DID THE TRIAL JUDGE ERR IN GRANTING PLAINTIFF ITS ATTORNEY’S FEES?

Plaintiff’s contract with Defendant contained a provision stating, “If collection is made by lawsuit or otherwise, customer agrees to pay interest accrued until paid, customer also agrees to pay all collection costs, including attorney’s fees.” Pursuant to UCA § 78-27–5, this contractual provision is made reciprocal. Consequently, since both parties prevailed in this action, the Trial Court had to determine which party prevailed and then to award it reasonable attorney’s fees. Defendant asserts that the Trial Court abused its discretion in its analysis and award of attorney’s fees to the Plaintiff as the prevailing party.

Defendant further asserts, even if attorney's fees were properly awarded to the Plaintiff as the prevailing party, the fees awarded were excessive. Defendant pursued and prevailed on all of its tort claims. These claims do not allow an award of attorney's fees. Moreover, Plaintiff's request for fees did not allocate attorney's fees expended in defending against these claims.

A. Prevailing Party

In this matter, the Plaintiff pursued two causes of action, the first for Breach Contract, and the second for Unjust Enrichment. The Plaintiff sought a judgment for \$25,906 plus a 10% penalty and an 18% interest charge. The Defendant counterclaimed for Material Breach of Contract, Negligent Employment, Waste, Nuisance, Invasion of Privacy, Trespass and Conversion. As a result of a general verdict form, the jury rendered a judgment in Defendant's favor on its causes of action for \$4,200 and for the Plaintiff for more than \$31,000. So who prevailed?

The prevailing party is not determined solely by size of the monetary award but by many other factors. In *David C. v. Leavitt*, 900 F. Supp. 1547 (Ut. Fed. Dist. Ct. 1995), the Utah Federal District Court, cited as persuasive authority, stated:

Plaintiffs typically are considered prevailing parties for attorney's fees purposes "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley*, 461 U.S. at 433. The "touchstone" to, and precondition of, prevailing party status is the "material alteration of the legal relationship of the parties."

In this case, it is Defendant that obtained the material alteration in the legal relationship of the parties. This is so because, in essence, the jury determined that Plaintiff Mr. Stout was not due all the money he requested under his contract when he

provided his invoice to Defendant because, as concluded by the jury, Defendant was entitled to an offset against Plaintiff's invoice of \$4,200.

In, *R.T. Nielson Co. v. Cook*, 2002 UT 11 (Utah 2002), the Utah Supreme Court in determining who was the prevailing party stated:

. . .[D]etermining the prevailing party for purposes of awarding fees can oftentimes be quite simple. 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. This simple analysis cannot always be employed, however. . . . [There is] . . . difficulty in determining which party prevails in complicated cases involving multiple claims and parties, mentioned that **in some circumstances both parties may be considered to have prevailed**, and [there is therefore] the "need for a flexible and reasoned approach to deciding in particular cases who actually is the 'prevailing party.'" 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. . . . 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.

(1) Contractual Language.

Plaintiff can request attorney's fees for his Breach of Contract Claim and not for his Unjust Enrichment claim. Plaintiff's contract stated that, "If collection is made by lawsuit or otherwise, customer agrees to pay interest accrued . . . [and] all collection costs, including attorney's fees." At the time Plaintiff presented his invoice for payment, Defendant disputed the amount because of the causes of action asserted in this lawsuit.

The Jury agreed with Defendant and granted it a \$4,200 offset against the invoice. The contract only allows an attorney's fee award to Plaintiff for expenses in collections not for an initial dispute over the contract invoice that is shown to be incorrect by the Defendant. The attorney fee provision was only operable after this case's judgment was rendered.

(2) The Number of Claims, Counterclaims, Cross-claims, Etc., Brought by the Parties.

Although Plaintiff was awarded \$31,000 under the contract, Defendant prevailed on its claims for Breach of Contract, Negligent Employment, Waste, Nuisance, Invasion of Privacy, Trespass and Conversion. It can only be argued the Defendant failed to prevail on its claim for Material Breach of Contract. However, the causes of action for Negligent Employment, Waste, Nuisance, Invasion of Privacy, Trespass and Conversion **do not allow a party an award for attorney's fees in defending them or prosecuting them and no attorney's fees should be awarded to Plaintiff for its unsuccessful defense of these claims.**

(3) The Importance of the Claims Relative to Each Other and Their Significance in the Context of the Lawsuit Considered as a Whole.

Prosecuting and defending breach of contract claims are not complex—in this case Plaintiff merely had to introduce the contract, state that the work had been preformed and indicate what he was still owed thereunder. Defendant's torts and breach of contract claims were much more complicated. Moreover, Plaintiff admitted at trial that his misfeasance had damaged the Defendant's air-conditioning units. These units did not have a market value. This created a difficult evidentiary burden for the Defendant. Defendant also had a difficult evidentiary burden proving the general damages associated

with Mr. Stout's tortious behavior. Hence, the damages awarded should not be the controlling factor to determine the prevailing party. What should be the measure of success it that Defendant advanced important and significant issues that perhaps by their moral superiority are a better measure of success? Moreover, the social importance of the Defendant's counterclaims, when they are considered "relative to each other and their significance in the context of the lawsuit considered as a whole," would indicate that Defendant was the prevailing party in this action.

(4) The Dollar Amounts Attached to and Awarded in Connection with the Various Claims.

Plaintiff did receive a larger award than Defendant and therefore this factor alone is in his favor. In determining who was the prevailing party, the Trial Judge stated:

. . . Under the case law recited in the Defendant's brief, it is undoubtable that the Plaintiff prevailed on the significant issues in this litigation and that the Defendant's success (. . . in terms of monetary recovery and legal issues presented) was nominal. . . TR 772.

While it is true that "in terms of monetary recovery," Plaintiff appears to prevail, it is not true that "Defendant's success (both in terms of . . . **legal issues presented**) was nominal." What causes of action or "legal issues presented" did the Defendant not prevail on? The Trial Court cannot say and in fact engaged in no analysis to indicate Defendant failed to prevail on all of them or to demonstrate that any other factors other than the monetary were applied in making its decision. Hence, a more sound decision would be that it is Defendant who altered the legal position of the parties in this lawsuit and is therefore the prevailing party. In the alternative, no fees and costs should be awarded either side, or the amount requested by the Plaintiff for attorneys' fees should be

reduced substantially.

In *Govert Copier Painting v. Van Leeuwen*, 801 P.2d 163 (Utah 1990) the Supreme Court stated:

"An award of attorney fees must be based on evidence in the record which supports the award. **However, a Trial Court is not compelled to accept the self-serving testimony of a party requesting attorney fees even if there is no opposing testimony.**" A court, when determining what is a reasonable fee, may reduce the amount requested, after considering factors such as: the difficulty of the litigation, the **efficiency** of the attorneys in presenting the case, the **reasonableness of the number of hours spent** on the case, . . . the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved. (Citations omitted)

Also, as persuasive authority, *Jane L. v. Bangerter*, 828 F. Supp. 1544 (Utah 1993), the Utah Federal District court stated:

Before submitting a fee application to the court, the prevailing party must "**make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary**, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission."

. . .
Another category of time in which reductions are appropriate is unnecessary duplicative time. . . "If the same task is performed by more than one lawyer, multiple compensation should be denied." The problem of duplication of hours is frequently encountered in cases of multiple representation because too many attorneys (all billing their time) are present at meetings, hearings, and depositions: **"The more lawyers representing a side of the litigation, the greater the likelihood will be for duplication of services."** . . . **"It is often important to analyze and exclude duplication of time spent on aspects of a case where several lawyers, paraprofessionals and/or clerks are working simultaneously."** (Citations omitted)

In *Prince v. Bear River Mutual Insurance Co.*, 56 P.3d 524 (Utah 2002), the Utah Supreme Court stated:

[T]he Trial Court had broad discretion in deciding what constitutes reasonable attorney fees, and we will not reverse that determination absent an abuse of discretion.

. . . .

First, in exercising its discretion in awarding attorney fees, a Trial Court considers all the evidence and arguments presented regarding the award and in its discretion determines a reasonable fee. . . [A]ccepting one party's argument over the other is not an abuse of discretion in the absence of substantial proof that the Trial Court abused its discretion. . . [A] Trial Court is not required to adopt the prevailing party's assertion of what constitutes a reasonable attorney fee.

Second, . . . the Trial Court can award Prince [in this case a party] attorney fees only for those issues on which he was the prevailing party. Indeed, we have explained that a party seeking fees must allocate its fee request according to its underlying claims. Indeed, the party must categorize the time and fees expended for "(1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees."

. . . In addition, "while a Trial Court may, in its discretion, deny fees altogether for failure to allocate, it may not award wholesale all attorney fees requested if they have not been allocated as to separate claims and/or parties." In the instant case, Prince [in this case, Pioneer] was not the prevailing party with respect to whether the statute required that Bear River pay only necessary claims [was not the prevailing party with respect to Defendant's counterclaims]. . . (Citations omitted.)

Based upon these principles, Plaintiff's request for attorney's fees should be reduced for the following reasons. First, since Defendant proved its counterclaims, and since Plaintiff expended considerable time unsuccessfully preparing for and defending against the Defendant's claims, his requested fees should have been allocated and should not have been awarded by the Trial Court.

Second, his requested attorney's fees, as set forth in the statement of facts, included entries for frivolous, withdrawn, and unsuccessful-non-meritorious motions, and payment for expenses that were duplicated because of several attorneys being involved in the same matter. Also, Plaintiff's attorneys took an unnecessarily adversarial position in this case which increased costs.

In determining whether all Plaintiff's attorney's fees billed should be taxed to

Defendant, the Trial Judge stated:

. . . Having reviewed these specific entries, the Court concludes that the Defendant's objections are without merit and that a reduction in the fees is unwarranted. In fact, a number of the Defendant's objections are based on the invalid argument that simply because a particular motion or legal endeavor pursued by the Plaintiff was eventually unsuccessful, there should be no recovery for the time attributable thereto. However, it is the overall outcome that is determinative of prevailing party status and attorney fee recovery and not the success of each individual motion or legal effort. TR 772-773.

The ruling oversimplifies Defendant's arguments and the law thereon. Plaintiff had a duty, "Before submitting a fee application to the court . . . **make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary**, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Jane L., supra*. In this case, a private lawyer would not have billed for excessive, frivolous and unwarranted and unduly adversarial actions. Moreover, a trial court "may reduce the amount requested, after considering factors such as: . . . the **efficiency** of the attorneys in presenting the case, the **reasonableness of the number of hours spent**." Defendant asserts that Plaintiff's bills for Motions that were not filed, were frivolous and were unsuccessful should not be taxed because they were "unnecessary," demonstrated **inefficiency**, and the number of hours spent on them were not reasonable.

Plaintiff unnecessarily double billed: "**If the same task is performed by more than one lawyer, multiple compensation should be denied**." *Jane L., supra*. Double billing and attorney consultation between attorneys were found in Plaintiff's bill in entries 3-9, 14, 18, 27, and 33. Plaintiff's attorneys double billed for time spent drafting a Rule 11 letter, at entries 53-54, to Defendant's counsel threatening him with sanctions. No

such sanctions were ever imposed and the allegations were frivolous.

Plaintiff unnecessarily overcharged: Breach of Contract and Unjust Enrichment are not complex. To research and draft the complaint, Plaintiff's attorneys billed a total of 7.2 hours at entries 4-7. To research and draft an answer and reply to Defendant's counterclaim, Plaintiff's attorneys billed a total of 8.6 hours at entries 8-12. This time is excessive.

Plaintiff excessively and unnecessarily billed for frivolous time on issues not even pursued or allowed by the rules of civil procedure: The rules do not require a responsive motion to a Motion to Recuse. Nevertheless, Plaintiff unsuccessfully challenged Defendant's motion to recuse Judge Lindberg—billing at total of 12.8 hours at entries 25-29—and admitting that it filed its response simply because he felt that as an adversary, he had to oppose Defendant's Motion to Recuse. TR 669 ¶ 7. Plaintiff's attorneys billed time for a Motion to Dismiss **that was never filed by Plaintiff** and prepared documentation for settlement of the case. No such documents were ever discussed nor agreed upon by the parties. These are at entries 8, 35. Plaintiff's attorneys billed for time in its unsuccessful and frivolous challenge to strike Defendant's Motion to Compel Discovery at entries 43-44, 48. This is so because Plaintiff's attorney asserted that Defendant had not consulted with him prior to filing its Motion to Compel. Plaintiff's attorney's own billing entries demonstrate that such correspondence in fact occurred. After presenting proof thereof, Judge Lindberg found this claim to be unfounded, without merit and denied the Motion to Strike.

Plaintiff's attorney billed for time unnecessary spent: Judge Lindberg's clerk

represented to Defendant that a jury fee had not been paid. Therefore Defendant filed a Rule 39 (b) request for a jury. Rather than simply inform Defendant that it had made payment, Plaintiff's counsel prepared and billed for an objection to the request at entry 51.

Plaintiff's attorneys billed for time for preparing, on the eve of trial, several motions, including a Motion to Strike and Motion for Order to Preclude New Evidence at entries 61, 64-65. These Motions were frivolous and were withdrawn by Plaintiff after Defendant had spent considerable time responding to them and filing counter motions demonstrating their complete lack of foundation.

All of these billings should have been scrutinized by the Trial Court. The Trial Court's ruling thereon demonstrates that he in fact **"accept[ed] the self-serving testimony of a party requesting attorney fees . . ."** in his award. No effort was made to consider "the difficulty of the litigation, the efficiency of the attorneys in presenting the case, [and] the reasonableness of the number of hours spent on the case . . ."

Moreover, since the Defendant pursued and prevailed on its tort claims for which no attorney's fees could be awarded, "the Trial Court [could award Plaintiff] attorney fees only for those issues on which he was the prevailing party. Indeed, [Plaintiff in] seeking fees **[should have allocated its fee]** . . . [for] the time and fees expended for (1) successful claims for which there may be an entitlement to attorney fees [and], . . . (3) claims for which there is no entitlement to attorney fees." Since Plaintiff did not, the Trial Court should have either denied "fees altogether for failure to allocate," or at least not awarded "wholesale all attorney fees requested [because] they [had] not been

allocated.”

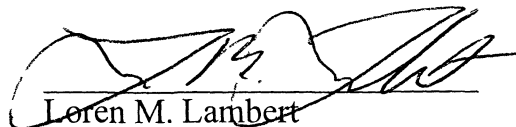
Lastly, the Trial Court should have taken into consideration the “inefficient” and improper actions by Plaintiff that increased the fees and the uncertainty of the litigation. As stated above, Plaintiff finally conceded at trial that he had damaged Defendant’s air cooling units. Also, Plaintiff provided a few invoices at trial for materials allegedly integrated into the roof. They should have been provided a year sooner with his discovery responses. These actions were in bad faith and in violation with the Civil Rules of Procedure. Timely admissions and responses to discovery would have averted the need of both parties to address these issues during the litigation thus avoided unnecessary expenses, or even hastening a settlement of that issue.

CONCLUSION

In conclusion, it is respectfully requested that the Trial Court be found to have abused its discretion in not compelling discovery, not extending the discovery deadlines and then in awarding all attorney’s fees billed by Plaintiff as the prevailing party.

Dated: Dec. 27, 2004.

Arrow Legal Solutions

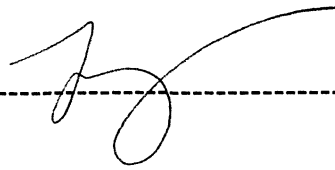

Loren M. Lambert
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that I mailed two true and correct copies of the foregoing document on

December 27, 2004, postage prepaid to:

Gregory P. Hawkins/Rick L. Sorensen
Attorney for Defendant/Appellee
45 West 10000 South, Suite 309
Sandy, UT 84070
Telephone: 521-4441

A handwritten signature in black ink, appearing to be "G. P. Hawkins" or "R. L. Sorensen", is written over a horizontal dashed line.

ADDENDUM

- | | |
|------------------|--|
| EXHIBIT A | Minute Entry on Motion to Compel, Motion to Strike and Motion for Protective Order |
| EXHIBIT B | Minute Entry |
| EXHIBIT C | Minute Entry and Order |
| EXHIBIT D | Judgement |

EXHIBIT A

Signed

3-31-03

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
SANDY DEPARTMENT

JOHN F. STOUT d.b.a. PIONEER
ROOFING CO.,

Plaintiff,

vs.

CREEKSIDE EAST CONDOMINIUM
HOMEOWNERS ASSOCIATION,

Defendant.

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:

MINUTE ENTRY ON MOTION TO
COMPEL, MOTION TO STRIKE
AND MOTION FOR PROTECTIVE
ORDER

Judge Denise P. Lindberg
Case no. 020404177

¶1 Three motions are before the Court: (1) Defendant's Motion to Compel and Request for Attorney's Fees, filed February 5, 2003; (2) Plaintiff's Motion to Strike Defendant's Motion to Compel and Request for Attorney's Fees, filed February 20, 2003; and (3) Plaintiff's Motion for Protective Order. Based upon the Court's review of the parties' memoranda and the law, the Court DENIES Defendant's Motion to Compel, DENIES Plaintiff's Motion to Strike, but GRANTS Plaintiff's Motion for Protective Order.

PROCEDURAL HISTORY

¶2 These motions arise out of Plaintiff's action for breach of contract and unjust enrichment, originally filed April 19, 2002. In its Complaint Plaintiff alleged that it contracted with Defendant to provide roofing services and materials to be used in improving Defendant's property, and that Defendant failed to pay for these services.

¶3 Defendant filed its Answer and Counterclaim on May 9, 2002. First, Defendant alleged that Plaintiff materially breached the contract by failing to perform the work competently and by causing damage to Defendant's premises. Second, Defendant claims that "Plaintiff failed to properly hire, train, supervise and discipline its employees." Plaintiff replied to Defendant's Counterclaim on May 15, 2002.

¶4 Following an attorneys' planning meeting, Defendant submitted to Plaintiff its First Set of Interrogatories and Request for Production of Documents in August 2002. On September 13,

2002, Plaintiff sent a letter to Defendant setting forth objections to the discovery requests. These objections were also set forth in Plaintiff's responses to Defendant's discovery requests. Although the parties explored settlement options between September and December 2002, the parties could not come to agreement.

¶5 Thereafter, on February 5, 2003 Defendant filed this Motion to Compel and for Attorneys Fees. Plaintiff responded by moving to Strike Defendant's motion on the ground that Defendant had not included a Rule 37(2)(A) certification that it had made a prior good faith attempt to secure the requested disclosures from Plaintiff. Simultaneously, Plaintiff filed a Motion for Protective Order, arguing that the Defendant's discovery requests are vague, overbroad, or unduly burdensome. Defendant filed a "Verified Reply" and requested oral argument on February 28, 2003.

ANALYSIS

¶6 The Rules of Judicial Administration provide,

In cases where the granting of a motion would dispose of the action or any claim in the action on the merits with prejudice, either party *at the time of filing the principal memorandum in support of or in opposition to a motion* may file a written request for a hearing.

Rule 4-501(3)(B) (emphasis added).

¶7 Defendant did not comply with the clear requirements of Rule 4-501. Defendant did not include a request for oral argument in its Motion to Compel, "the principal memorandum in support of" its motion. Rather, Defendant waited until filing its Reply to request oral argument. Moreover, the rules presume that motions will be addressed without hearing unless, as noted above, the parties timely file their request for oral argument *and* the pending motion is one which could be dispositive of one or more of the claims on the merits with prejudice. Utah R. Jud. Admin. 4-501(3)(B). Neither of those prerequisites has been met in this case. Thus, the Court DENIES Defendant's request and makes its determinations on the pending motions based solely on the documents submitted by the parties.

Plaintiff's Motion to Strike

¶8 In its Motion to Strike Plaintiff argues that Defendant failed to include certification required Rule 37(2)(A) of the Utah Rules of Civil Procedure. While it is true that Defendant failed to include such a certification in its original motion, Defendant has since cured this problem by providing the certification in its Reply. Because this is the sole ground raised by Plaintiff in support of its motion, this motion has been rendered moot by subsequent action by Defendant. Therefore, the Court DENIES Plaintiff's motion.

Defendant's Motion to Compel *

¶9 Defendant argues that its discovery requests are appropriate because they may lead to admissible evidence regarding the credibility, skill, and knowledge of Plaintiff's employees, which Defendant alleges is at issue in this case. Defendant has alleged that Plaintiff "provided shoddy workmanship, substandard materials and actually caused damage to the Creekside premises and its equipment," as well as that Plaintiff's employees "exposed themselves to Creekside habitants, urinated in full view of Creekside residents, and soiled the premises." For the reasons given below, the Court DENIES each of Defendant's discovery requests because they are vague, ambiguous, and overbroad.

¶10 In Interrogatory No. 2, Defendant asks Plaintiff to

[p]rovide the last know names and numbers of any business entities, governmental agencies, persons who have ever had any complaints, concerns, lawsuits, disputes, problems, issues regarding any of the supplies, workmanship, or services provided by Plaintiff or its agent to any persons or businesses or other legal matters.

¶11 Plaintiff objects to this interrogatory, claiming it is

... vague, ambiguous, over broad [sic], unduly burdensome, oppressive, and beyond the scope of discovery permitted by Rule because it requests information that is not relevant to the subject matter of the pending litigation and is not reasonably calculated to lead to the discovery of admissible evidence at trial.

¶12 The Court agrees with Plaintiff that this interrogatory, as presently structured, is vague and overbroad. It is possible, however, that Defendant may be able to narrow and define this discovery request by using time limits and language that limits the information requested to that reasonably calculated to lead to admissible evidence under Utah Rules of Evidence 404(b).

¶13 In Interrogatory No. 3, Defendant requests

... the party names, the name of the court and docket numbers of lawsuits or administrative actions filed against Plaintiff or its agents because of any of its business practice or because of its services, materials or workmanship.

¶14 The Court again agrees with Plaintiff that this interrogatory is vague and overbroad. Arguably, this particular request could be narrowed by providing reasonable time limits to the request and limiting the request to causes of action that relate to the claims Defendant has made against Plaintiff.

¶15 Defendant's Interrogatories Nos. 4 and 5 relate to the same issues. In Interrogatory No. 4,

Defendant seeks the following information: “Has Plaintiff or its agents ever been convicted of any felony or misdemeanor involving dishonesty?” Interrogatory No. 5 seeks specific information in the event that Interrogatory No. 4 is answered in the affirmative.

¶16 In support of its request, Defendant argues that information regarding a witness’s honesty is always relevant for establishing credibility. Nevertheless, this discovery request is not limited to those who may be called as witnesses, but appears to apply to any employee of Plaintiff. *See* Utah R. Evid. 609. Upon identification of those persons who are likely to appear as witnesses at trial, Defendant might be able to provide a narrower construction of this discovery request.

¶17 Interrogatories Nos. 6 and 7 are also related. Interrogatory No. 6 asks, “Do you claim that Defendant or its agents made any representations that were incorrect?” If Plaintiff answers this interrogatory in the affirmative, Interrogatory No. 7 requests specific information regarding any such misrepresentations. These discovery requests are also vague, overbroad, and ambiguous. Plaintiff has no way of knowing what “any representations” are. Furthermore, particular representations or misrepresentations do not appear to be an issue in this case.

¶18 The Court next turns to Defendant’s requests for documents. Defendant asserts that Plaintiff failed to fulfill Requests Nos. 6, 7, and 12. Plaintiff has made a general objection to these requests, alleging that they “are over broad [sic], vague, ambiguous, unduly burdensome, and the information is protected by the attorney-client and work-produce privileges.”

¶19 In Request No. 6, Defendant asks Plaintiff to “produce a copy of each of the personnel files, wage statements, contracts of all persons that were either employees or independent contractors of Plaintiff and who supplied services or materials to Defendant.” Defendant asserts, without support, that this information is necessary for it to maintain its counterclaims. While some of these documents arguably may be relevant, as it is currently drafted, the request is overbroad.

¶20 Defendant’s Request No. 12 asks Plaintiff to

. . . produce a copy of each and every document, recording, photograph, or other item evidencing any complaints, concerns, lawsuits, disputes, problems, issues regarding any of the supplies, workmanship, or services provided by Plaintiff or its agents to any persons or businesses or other legal entities.

¶21 This request appears to be substantively related to Interrogatory No. 2. As the Court has already concluded with respect to the prior request, *see supra* ¶¶ 10–12, this request is also vague. Plaintiff has no way of knowing every person or entity that has ever had a “concern” or “problem” against it. Additionally, the scope of this discovery request appears to encompass situations not related to Defendant’s claims for negligent employment or material breach of contract.

Plaintiff's Motion for Protective Order

¶22 For the same reasons that the Court has DENIED Defendant's Motions to Compel, the Court GRANTS Plaintiff's Motion for Protective Order.

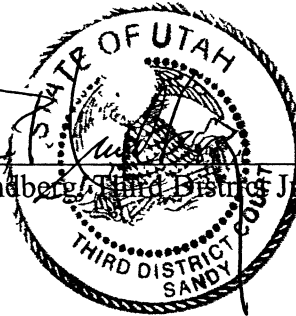
ORDER

¶23 The Court DENIES Plaintiff's Motion to Strike, DENIES Defendant's Motion to Compel, and GRANTS Defendant's Motion for Protective Order. Because Defendant has not prevailed in its motion, the Court also DENIES its request for attorney's fees.

So Ordered this 31st day of March, 2003 By the Court

DC
9/3/01


Denise P. Lindberg, Third District Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 020404177 by the method and on the date specified.

METHOD NAME

Mail	GREGORY P HAWKINS ATTORNEY PLA 136 S MAIN ST 6TH FL SUITE 150 SALT LAKE CITY, UT 84101
Mail	LOREN M LAMBERT ATTORNEY DEF ARROW LEGAL SOLUTIONS 266 EAST 7200 SOUTH MIDVALE UT 84047
Mail	RICK L SORENSEN ATTORNEY PLA 45 W 10000 S #309 SANDY UT 84070

Dated this 31st day of March, 2003.

Deputy Court Clerk

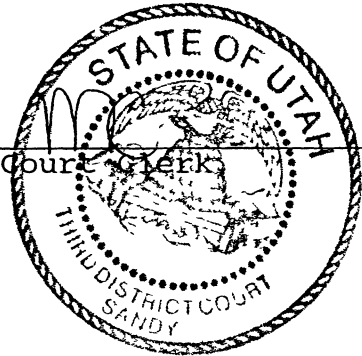


EXHIBIT B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOHN F. STOUT, doing business
as PIONEER ROOFING CO.,

Plaintiff,

vs.

CREEKSIDE EAST CONDOMINIUM
HOMEOWNERS ASSOCIATION,

Defendant.

MINUTE ENTRY

CASE NO. 030917317

FILED DISTRICT COURT
Third Judicial District

OCT - 6 2003

By

Evelyn Thompson
SALT LAKE COUNTY

Deputy Clerk

The Court has before it a request for decision filed by the defendant seeking a ruling on its Request for Extension of Discovery. The Court notes that the defendant requests a hearing on this Request for Extension. However, since the Request for Extension is not a dispositive motion and since the parties' written submissions adequately represent their respective legal positions, the Court declines to schedule this matter for hearing. Therefore, having reviewed the defendants' Request and the plaintiff's opposition thereto, the Court rules as stated herein.

The defendant seeks to extend the January 30, 2002, discovery deadline on the basis that discovery in this matter has been delayed by settlement negotiations, the filing of recusal requests and the filing of a Motion to Compel. Of these, only the pendency of a motion to compel could have potentially hindered discovery

from progressing. However, while the Motion to Compel was decided on March 31, 2003, the defendant (for unknown reasons) has taken no further steps to complete its discovery in the months following. Furthermore, as the plaintiff accurately describes in his opposition, this case has already been unduly delayed and the defendant has not articulated an adequate basis to delay it further. Accordingly, having considered the defendant's Request, the Court denies the same.

This Minute Entry decision will stand as the Order of the Court, denying the defendant's Request for Extension.

Dated this 6 day of October, 2003


TIMOTHY B. HANSON
DISTRICT COURT JUDGE



STOUT V. CREEKSIDE
EAST CONDO ASSOC.

PAGE 3

MINUTE ENTRY

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 6 day of October, 2003:

Gregory P. Hawkins
Rick L. Sorensen
Attorneys for Plaintiff
45 West 10000 South, Suite 307
Sandy, Utah 84070

Loren M. Lambert
Attorney for Defendant
266 East 7200 South
Midvale, Utah 84047

Evelyn Thompson

EXHIBIT C

IMAGED

FILED DISTRICT COURT
Third Judicial District

APR - 5 2004

By [Signature] SALT LAKE COUNTY
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOHN F. STOUT, doing business as PIONEER ROOFING CO.,	:	MINUTE ENTRY AND ORDER
Plaintiff,	:	CASE NO. 030917317
vs.	:	
CREEKSIDE EAST CONDOMINIUM HOMEOWNERS ASSOCIATION,	:	ENTERED IN REGISTRY OF JUDGMENTS
Defendant.	:	DATE <u>04/14/04</u>

The Court has before it a Notice to Submit for decision filed by the plaintiff seeking a ruling on its counsel's Affidavit of Attorney's Fees, filed on January 12, 2004. The defendant filed a Request for Extension of Time to Respond to this Affidavit on January 22, 2004, which the plaintiff opposed. Then, without leave of Court, the defendant filed an untimely Response to the plaintiff's Affidavit of Attorney's Fees and a Counter Request for Attorney's Fees. These were accompanied by defense counsel's Affidavit. Despite the untimeliness of the defendant's Response and Counter Request, the Court determines that in the interest of justice, both should be considered. However, the Court declines the defendant's request for oral argument. The issue of attorney's fees is not dispositive and, since both sides' written submissions adequately set forth their respective legal positions, oral

Minute Entry and Order @J



argument is neither necessary nor helpful. Therefore, having reviewed the Affidavit of Attorney's Fees filed by plaintiff's counsel, the defendant's Response and Counter Request, the Affidavit of defense counsel and the plaintiff's Reply thereto, the Court rules as stated herein.

Plaintiff's counsel, Rick L. Sorenson, has submitted his Affidavit detailing the attorney's fees and costs that the plaintiff incurred, totaling \$20,329.00. In its Response, the defendant raises a number of alternative arguments for reducing these fees, eliminating them altogether or for awarding the defendant its attorney's fees and costs. With respect to the latter two arguments, the defendant essentially contends that the jury's verdict was "factually and legally invalid" and that it should be considered the prevailing party.

The Court has considered the defendant's theory that it is the prevailing party and finds it unpersuasive. Under the case law recited in the defendant's brief, it is undoubtable that the plaintiff prevailed on the significant issues in this litigation and that the defendant's success (both in terms of monetary recovery and legal issues presented) was nominal. Further, unless and until it is proven that the jury's verdict was improper, this argument cannot provide a valid basis for reassigning prevailing party status. Therefore, the Court remains unconvinced that the

defendant, rather than the plaintiff, can be considered the prevailing party.

Next, the Court considers the defendant's argument that even if the plaintiff is entitled to recover its attorney's fees, the amount sought is unreasonable and excessive. Specifically, the defendant assails a number of entries in counsel's Affidavit as being duplicitous, unnecessary and excessive in terms of time and effort. Having reviewed these specific entries, the Court concludes that the defendant's objections are without merit and that a reduction in the fees is unwarranted. In fact, a number of the defendant's objections are based on the invalid argument that simply because a particular motion or legal endeavor pursued by the plaintiff was eventually unsuccessful, there should be no recovery for the time attributable thereto. However, it is the overall outcome that is determinative of prevailing party status and attorney fee recovery and not the success of each individual motion or legal effort. Further, the Court is unpersuaded that Mr. Sorensen's hourly fees should be reduced because of his minimal involvement with jury trials involving construction law. Mr. Sorensen's hourly fees are reasonable given his apparent expertise in construction law and the comparable fees charged by attorney's with similar practices and years of experience. Overall, the Court concludes that the attorney's fees and costs sought by the

STOUT V. CREEKSIDE
EAST CONDO ASSOC.

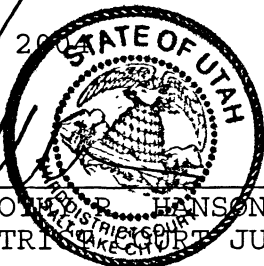
PAGE 4

MINUTE ENTRY

plaintiff are reasonable and therefore declines to reduce the amounts sought by the almost 50% amount suggested by the defendant.

This Minute Entry decision will stand as the Order of the Court, awarding the plaintiff attorney's fees in the amount of \$20,100 and costs in the amount of \$229.00.

Dated this 9 day of April, 2000


TIMOTHY D. HANSON
DISTRICT COURT JUDGE

STOUT V. CREEKSIDE
EAST CONDO ASSOC.

PAGE 5

MINUTE ENTRY

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry and Order, to the following, this 5 day of April, 2004:

Gregory P. Hawkins
Rick L. Sorensen
Attorneys for Plaintiff
45 West 10000 South, Suite 309
Sandy, Utah 84070

Loren M. Lambert
Attorney for Defendant
266 East 7200 South
Midvale, Utah 84047

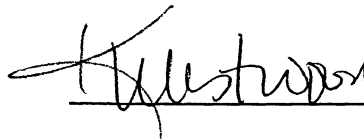


EXHIBIT D

Gregory P. Hawkins #4485
Rick L. Sorensen #7631
HAWKINS & SORESEN
Centennial Plaza, Suite 309
45 West 10000 South
Sandy, Utah 84070
Telephone: (801) 233-0031
Facsimile: (801) 233-0032
Attorneys for Plaintiff

FILED DISTRICT COURT
Third Judicial District

JUN - 7 2004

By *Evelyn Thompson*
SALT LAKE COUNTY

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 06/10/04

**IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH**

JOHN F. STOUT doing business as
PIONEER ROOFING CO.

Plaintiff,

v.

CREEKSIDE EAST CONDOMINIUM
HOMEOWNERS ASSOCIATION,

Defendant.

JUDGMENT

Civil No. 030917317 DC

Judge Timothy R. Hanson

This matter came on for trial before the Court and a Jury, the Honorable Timothy R. Hanson, District Court Judge, presiding on December 9, 2003, and continued through December 10, 2003, and December 11, 2003. Rick L. Sorensen of Hawkins & Sorensen, LC appeared for and on behalf of Plaintiff John F. Stout doing business as Pioneer Roofing Co. (hereinafter "Pioneer Roofing"). Loren M. Lambert of Arrow Legal Solutions, LLC appeared for and on behalf of Defendant Creekside East Condominium Homeowners Association (hereinafter "Creekside"). The issues were duly tried and the Jury having duly rendered its verdict,

Judgment @J



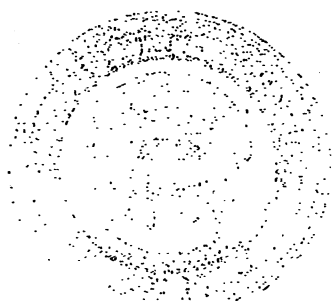
IT IS ORDERED, ADJUDGED AND DECREED

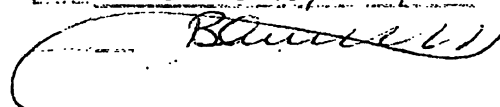
that Plaintiff Pioneer Roofing recover from Defendant Creekside \$27,665.00, plus interest thereon at the rate of 18%, as provided in the contract and pursuant to section 15-1-4(2) of the Utah Code, from December 12, 2003, and continuing thereafter until paid and, as the prevailing party, Pioneer Roofing is awarded attorney's fees in the amount of \$20,100.00 and costs in the amount of \$229.00 to be paid by Defendant Creekside for a total judgment in the amount of \$47,994.00. ~~This Judgment may be augmented in the amount of reasonable costs and attorney's fees pursuant to Rule 73 of the Utah Rules of Civil Procedure.~~ ^{TWO}

DATED this 7 day of June, 2004.

BY THE COURT:


The Honorable Timothy L. Hanson
Third District Court Judge


CERTIFY THAT THIS IS A TRUE COPY OF AN
ORIGINAL FILED IN THE OFFICE OF THE
CLERK OF THE DISTRICT COURT, SALT LAKE COUNTY, UTAH
ON JUNE 16, 2004.

FILED June 16, 2004


INFORMATION STATEMENT

1. **Name and Last-Known Address of Judgment Debtor(s):**
 - a. Creekside East Condominium Homeowners Association, 5319 S. 560 E. No. A,
Murray, Utah 84107
2. **Address at Which Judgment Debtor(s) Received Service of Process:**
 - a. 5319 S. 560 E. No. A, Murray, Utah 84107
3. **Name and Address of Judgment Creditor:**
 - a. John F. Stout, Pioneer Roofing, 7041 South 2700 East, Salt Lake City, Utah 84121
4. **Amount of Judgment Entered in Registry of Judgments:** \$47,994.00
5. **Debtor's Social Security Number:** N/A
6. **Debtor's Date of Birth:** N/A
7. **Debtor's Driver's License Number:** N/A
8. **Status:** No stay of enforcement has been ordered by the Court.