

2004

John F. Stout, DBA Pioneer Roofing v. Creekside East Condominium Homeowners Association : Brief of Appellee

Utah Court of Appeals

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



Part of the [Law Commons](#)

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

Gregory P. Hawkins; Rick L. Sorensen; Hawkins and Sorensen; Attorneys for Appellee.

Loren M. Lambert; Arrow Legal Solutions Group, PC; Attorney for Appellant.

Recommended Citation

Brief of Appellee, *Stout v. Creekside East Condominium HOA*, No. 20040641 (Utah Court of Appeals, 2004).

https://digitalcommons.law.byu.edu/byu_ca2/5146

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
K F U

50

A10

IN THE UTAH COURT OF APPEALS

DOCKET NO. 2004 0641

JOHN F. STOUT. doing business as
PIONEER ROOFING,

Plaintiff and Appellee.

v.

CREEKSIDE EAST
CONDOMINIUM HOMEOWNERS
ASSOCIATION,

Defendant and Appellant.

BRIEF OF THE APPELLEE

Case Number 20040641

On Appeal from Jury Verdict and Award of Attorney's Fees Entered in the Third District
Judicial Court, Honorable Timothy R. Hanson, District Judge and
Honorable Denise P. Lindberg, District Judge
Trial Court Civil No. 030917317

Loren M. Lambert
Arrow Legal Solutions Group, PC
266 East 7200 South
Midvale, UT 84047
Attorney for Appellant

Gregory P. Hawkins, # 4485
Rick Sorensen # 7631
HAWKINS & SORENSEN, LC
The Atrium Bldg, Suite 101
5250 Commerce Drive
Murray, UT 84107
Attorneys for Appellee

Appellee's request oral argument

FILED
UTAH APPELLATE COURT
FEB 22 2005

IN THE UTAH COURT OF APPEALS

JOHN F. STOUT, doing business as
PIONEER ROOFING,

Plaintiff and Appellee,

v.

CREEKSIDE EAST
CONDOMINIUM HOMEOWNERS
ASSOCIATION,

Defendant and Appellant.

BRIEF OF THE APPELLEE

Case Number 20040641

On Appeal from Jury Verdict and Award of Attorney's Fees Entered in the Third District
Judicial Court, Honorable Timothy R. Hanson, District Judge and
Honorable Denise P. Lindberg, District Judge
Trial Court Civil No. 030917317

Loren M. Lambert
Arrow Legal Solutions Group, PC
266 East 7200 South
Midvale, UT 84047
Attorney for Appellant

Gregory P. Hawkins, # 4485
Rick Sorensen # 7631
HAWKINS & SORENSEN, LC
The Atrium Bldg, Suite 101
5250 Commerce Drive
Murray, UT 84107
Attorneys for Appellee

Appellee's request oral argument

TABLE OF CONTENTS

Table of Contents	ii
Table of Authorities	iii
Statement of the Issues Presented For Review.....	iv
Determinative Constitutional Provisions, Statutes, Ordinances, Rules, and Regulations...	2
Statement of the Case	2
Statement of Facts	3
Summary of Argument	7
Argument.....	9
I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED CREEKSIDE’S MOTION TO COMPEL BECAUSE THE TRIAL COURT DETERMINED THAT CREEKSIDE’S DISCOVERY REQUESTS WERE VAGUE, AMBIGUOUS, AND OVERBROAD	9
II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED CREEKSIDE’S REQUEST TO EXTEND DISCOVERY DEADLINES BECAUSE CREEKSIDE HAD UNDULY DELAYED THIS MATTER	18
III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT AWARDED PIONEER ROOFING, AS THE PREVAILING PARTY, ITS ATTORNEY FEES	22
IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DETERMINED THAT PIONEER ROOFING’S ATTORNEY FEES WERE REASONABLE AND NOT EXCESSIVE	24
V. THIS COURT SHOULD REMAND TO THE TRIAL COURT FOR A DETERMINATION OF THE AMOUNT OF ATTORNEY FEES PIONEER ROOFING SHOULD BE AWARDED ON APPEAL	30
Conclusion.....	31
Oral Argument Statement.....	31
Proof of Service.....	33
Addendum.....	33

TABLE OF AUTHORITIES

Cases

<i>Askew v. Hardman</i> , 918 P.2d 469 (Utah 1996).....	iv, 18
<i>Darrington v. Wade</i> , 812 P.2d 452 (Utah Ct. App. 1991)	21
<i>Eggett v. Wasatch Energy Corp.</i> , 2004 UT 28, 94 P.3d 193.....	26
<i>First General Services v. Perkins</i> , 918 P.2d 480 (Utah Ct. App. 1996)	26
<i>Green v. Louder</i> , 2001 UT 62, 29 P.3d 638.....	iv, 18
<i>Pack v. Case</i> , 2001 UT App 232, 30 P.3d 436.....	<i>passim</i>
<i>R.T. Nielson Co. v. Cook</i> , 2002 UT 11, 40 P.3d 1119.....	2, 22, 23, 30
<i>Roundy v. Staley</i> , 1999 UT App 229, 984 P.2d 404.....	iv, 9
<i>SLW/Utah, MacKay v. Hardy</i> , 973 P.2d 941 (Utah 1998).....	9, 17
<i>State ex rel Rd. Comm'n v. Petty</i> , 17 Utah 2d 382, 412 P.2d 914 (1966).....	16, 17
<i>State v. Bishop</i> , 753 P.2d 439 (Utah 1988)	9
<i>State v. Lanier</i> , 778 P.2d 9 (Utah 1989).....	12
<i>State v. Wareham</i> , 772 P.2d 960 (Utah 1989).....	9
<i>Tucker Realty, Inc. v. Nunley</i> , 396 P.2d 410, 16 Utah 2d 97 (1964).....	21
<i>Utah Dep't of Transp. v. Osguthorpe</i> , 892 P.2d 4 (Utah 1995)	21
<i>Valcarce v. Fitzgerald</i> , 961 P.2d 305 (Utah 1998).....	2, 24
<i>Williamson v. Opsahl</i> , 92 Ill. App.3d 1087, 48 Ill.Dec. 510, 416 N.E.2d 783 (1981).....	9
<i>Young v. Young</i> , 1999 UT 38, 979 P.2d 338.....	26

Rules

Utah R. Civ. P. 26	15, 18
Utah R. Civ. Pro. 11	26, 27

Utah R. Civ. Pro. 8.....	27
Utah R. Evid. 404.....	12
Utah R. Evid. 608.....	14
Utah R. Evid. 609.....	14
Utah R. Jud. Admin. 4-501	21

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Issue 1: Whether trial court has discretion to deny motion to compel discovery where trial court determined discovery requests are vague, ambiguous, and overbroad.

Standard of review: Trial court’s denial of the motion to compel is reviewed under an abuse of discretion standard. *See Pack v. Case*, 2001 UT App 232, ¶16, 30 P.3d 436 (citing *Roundy v. Staley*, 1999 UT App 229, ¶5, 984 P.2d 404.)

Issue 2: Whether Trial Court has discretion to deny request to extend discovery deadlines where party had unduly delayed the matter.

Standard of Review: “Because trial courts have broad discretion in matters of discovery, this issue is reviewed for abuse of discretion. Consequently, ‘an appellate court will not find abuse of discretion absent an erroneous conclusion of law or where there is no evidentiary basis for the trial court’s ruling.’” *Green v. Louder*, 2001 UT 62, ¶39, 29 P.3d 638 (quoting *Askew v. Hardman*, 918 P.2d 469, 472 (Utah 1996).

Issue 3: Whether Trial Court abused its discretion by determining prevailing party.

Standard of review: This Court reviews “the trial court’s determination as to who was the prevailing party under an abuse of discretion standard.” *R.T. Nielson Co. v. Cook*,

2002 UT 11, ¶25, 40 P.3d 1119.

Issue 4: Whether Trial Court abused its discretion when it determined attorney fees were reasonable and not excessive.

Standard of Review: This Court reviews the reasonableness of an attorney's fee under an abuse of discretion standard. *See Valcarce v. Fitzgerald*, 961 P.2d 305, 317 (Utah 1998).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, RULES, AND REGULATIONS**

There are no determinative constitutional provisions, statutes, ordinances, or rules.

STATEMENT OF THE CASE

In this Case, Plaintiff John F. Stout doing business as Pioneer Roofing (hereinafter "Pioneer Roofing") contracted with Defendant Creekside East Homeowners Association (hereinafter "Creekside") to install a roof on Creekside's condominiums. After Pioneer Roofing completed the roofing project, Creekside refused to pay Pioneer Roofing. As a consequence, Pioneer Roofing filed suit against Creekside alleging breach of contract and unjust enrichment. Creekside counterclaimed against Pioneer Roofing by alleging breach of contract and negligent employment. Creekside did not complete its discovery in a timely manner. The Trial Court therefore denied Creekside's Request to Extend Discovery Deadlines because Creekside had unduly delayed the matter.

At trial, the Jury awarded Pioneer Roofing the principal amount of \$31,865.00 and offset the principal amount by awarding Creekside \$4,200.00. Judgment was entered thereafter and Pioneer Roofing, pursuant to the contract, was awarded its attorney fees as the

prevailing party. Creekside has appealed the Trial Court's discovery rulings and its attorney fee award.

STATEMENT OF FACTS

1. On or about February 10, 2000, Pioneer Roofing contracted with Creekside to install a roof on Creekside's condominiums. [R. 7]

2. After the roofing project was completed, Pioneer Roofing invoiced Creekside for the amount due and owing in the amount of \$30,906.00, which included changes to the contract. [R. 8]

3. On or about April 19, 2002, Pioneer Roofing filed suit alleging breach of contract and unjust enrichment. [R. 1-4]

4. On or about April 30, 2002, Creekside answered the complaint and counterclaimed against Pioneer Roofing alleging breach of contract and negligent employment. [R. 14-17]

5. On or about May 24, 2002, the parties held an Attorneys' Planning Meeting in which Creekside's attorney stated he knew just how long it takes to complete discovery and would not agree to the 240 day discovery cutoff as set forth by rule and demanded a discovery cutoff date of January 30, 2003, which is 275 days after Creekside filed its answer. Pioneer Roofing's counsel agreed to the January 30, 2003, cutoff date as demanded by Creekside's attorney. [R. 30; R 318-22]

6. On or about July 9, 2002, Pioneer Roofing served discovery requests on Creekside. [R. 33-34]

7. On August 19, 2002, Creekside filed a Motion to Recuse Judge Lindberg. [R. 37-57]

8. In September, 2002, Pioneer Roofing made an offer to Creekside to settle the matter. Creekside did not respond to the offer settlement until December 27, 2002. [R. 320]

9. On December 6, 2002, Pioneer Roofing submitted a Notice to Submit for the Motion to Recuse Judge Lindberg. [R. 74-76]

10. On or about January 10, 2003, the Trial Court, through its associate presiding judge, denied Creekside's motion to recuse Judge Lindberg by determining that Creekside's motion to recuse was untimely, not within the scope of the rules, and unsupported by any analysis or authority. [R. 79-81]

11. On or about January 24, 2003, Pioneer Roofing served responses to Creekside's discovery requests. [R. 84]

12. On February 5, 2003, Creekside filed a motion to compel discovery requests. [R. 108-09]

13. On February 20, 2003, Pioneer Roofing filed a motion to strike Creekside's motion to compel discovery and filed a motion for protective order. [R. 110-44]

14. On or about March 31, 2003, the Trial Court denied Creekside's motion to compel and granted Pioneer Roofing's motion for protective order by determining Creekside's discovery requests were vague, ambiguous, and overbroad. [R. 160-65]

15. On or about April 25, 2003, Creekside filed a Request to Extend Discovery Deadlines. [R. 166-67]

16. On May 5, 2003, Pioneer Roofing filed a certificate of readiness for trial. [R. 223-24]

17. On May 7, 2003, Creekside filed a second motion to recuse Judge Lindberg. [R. 227-288]

18. On or about May 7, 2003, Creekside filed another Request to Extend Discovery Deadlines. [R. 290-91]

19. On July 7, 2003, Judge Lindberg recused herself by determining as follows:

the Court has been concerned with the delays that Plaintiff has already experienced as a result of Defendant's motion to recuse. It is unfair to Plaintiff to have the resolution of his case held hostage until these collateral matters are addressed. After weighing this Court's duty to retain a case, versus its duty to expedite resolution of matters before it and to preserve the integrity and independence of the judiciary, the Court concludes that the better course is to recuse itself from this case and allow Plaintiff's case to proceed to resolution in another court.

[R. 305]

20. On August 28, 2003, the Trial Court, shortly after the case had been transferred to the Honorable Timothy Hanson, held a telephone conference and ordered Pioneer Roofing to file a response to Creekside's requests to extend discovery deadlines. [R. 315-17]

21. On September 11, 2003, Pioneer Roofing filed an opposition to Creekside's request to extend discovery deadlines. [R. 318-22]

22. On or about October 6, 2003, the Trial Court denied Creekside's request to extend discovery deadlines by determining as follows:

The defendant seeks to extend the January 30, 200[3], discovery deadline on the basis that discovery 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 the 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 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.

[R. 325-26]

23. On December 9, 10, and 11, a Jury Trial was held in this matter and the Jury returned a general verdict in favor of Pioneer Roofing in the amount of \$31,865.00 and returned a general verdict in favor of Creekside in the amount of \$4,200.00. [R. 610-11]

24. On January 12, 2004, Pioneer Roofing filed an Affidavit of Attorney Fees. [R. 615-25]

25. On February 2, 2004, Creekside filed a response to affidavit of attorney fees. [R. 644-55]

26. On April 5, 2004, the Trial Court determined that "the attorney fees and costs sought by the plaintiff are reasonable and therefore declines to reduce the amounts sought by almost 50% amount suggested by the defendant." [R. 722-25]

27. On April 23, 2004, Creekside filed a motion for a new trial, or in the alternative, for additur or remmitur. [R. 727-28]

28. On May 4, 2004, Pioneer Roofing filed an opposition to the motion for new trial, or in the alternative, for additur or remmitur. [R. 757-68]

29. On June 6, 2004, the Trial Court entered Judgment in favor of Pioneer Roofing and against Creekside. [R. 777-79]

30. On July 14, 2004, the Trial Court entered an Order Regarding Motion for New Trial, Additur, and Remmitur by determining as follows:

There is no legal basis upon which the Court may consider granting a new trial or an additur or a remittitur. The Court declines to consider the affidavits submitted by Defendant because the affidavits are hearsay and if otherwise admissible, the thought process of the jury, absent a showing of resort to chance or bribery, is an improper intrusion upon the jury deliberation process. This Court therefore denies Defendant's Motion.

[R. 784-86]

31. On July 19, 2004, Creekside filed its notice of appeal. [R. 787-88]

SUMMARY OF ARGUMENT

The Trial Court did not abuse its discretion when it denied Creekside's motion to compel because the trial court determined that Creekside's discovery requests were vague, ambiguous, and overbroad. Creekside failed to limit its discovery requests by time and place. Creekside also sought information regarding "concerns," "problems," and "disputes," but failed to define what it meant by those terms or how those issues related to the roofing project at issue in this matter. Trial court's are granted broad discretion with regard to motions to compel because trial courts are in a better position than appellate courts to make the determination to deny or grant a motion to compel.

This Court should determine that the Trial Court did not abuse its discretion when it denied Creekside's request to extend discovery deadlines. Trial courts have broad discretion

in matters of discovery, and therefore an appellate court will not find abuse of discretion absent an erroneous conclusion of law or where there is no evidentiary basis for the trial court's ruling. In this matter the Trial Court had ample evidence before it to support its determination that Creekside had unduly delayed this matter. Creekside refused to complete discovery in the 240 days required by the rules of civil procedure. Creekside also failed to conduct its discovery in a timely manner. When its time had run, it filed two motions to extend the discovery deadlines, but failed to submit either of the motions to the Trial Court for decision. Creekside also filed two motions to recuse Judge Lindberg, which also unduly delayed the matter. As a result, the Trial Court did not abuse its discretion when it denied Creekside's motions to extend discovery.

Pioneer Roofing sued Creekside for \$25,906.00, plus a 10% penalty, and interest, and the Jury awarded Creekside \$31,865.00. Creekside brought a counterclaim for breach of contract and negligent employment. The jury entered a verdict for Creekside in the amount of \$4,200.00. Pioneer Roofing was the prevailing party in this matter and was duly awarded its attorney fees, pursuant to the contract, as the prevailing party. This Court reviews a trial court's determination as to who is the prevailing party under an abuse of discretion standard. In this matter, the Trial Court did not abuse its discretion when it determined that Pioneer Roofing was the prevailing party because Creekside only obtained a nominal amount on its counterclaims.

The Trial Court did not abuse its discretion when it determined that Pioneer Roofing's attorney fees were reasonable and not excessive. This Court reviews a trial court's

determination of the amount of a reasonable attorney fee through an abuse of discretion standard because the trial court is in a better position than an appellate court to gauge the quality and efficiency of the representation and the complexity of the litigation. The Trial Court reviewed the Affidavit of Costs and Attorney Fees, which included a detailed description of Pioneer Roofing's attorney fees and determined that the attorney fees were reasonable and not excessive. Creekside failed to marshal the evidence in support of the Trial Court's findings. This Court should therefore not disturb the Trial Court's findings.

The Trial Court determined that Pioneer Roofing is the prevailing party in this matter and, pursuant to the contract between the parties, awarded attorney fees to Pioneer Roofing. Pioneer Roofing is the prevailing party on appeal. This Court should therefore remand this matter to the Trial Court to determine the appropriate amount of attorney fees incurred by Pioneer Roofing on appeal.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED CREEKSIDE'S MOTION TO COMPEL BECAUSE THE TRIAL COURT DETERMINED THAT CREEKSIDE'S DISCOVERY REQUESTS WERE VAGUE, AMBIGUOUS, AND OVERBROAD

Creekside argues that the Trial Court abused its discretion when it denied Creekside's motion to compel. Creekside's appellate brief provides this Court with exhaustive commentary and opinion, but has provided scant citation to the record and relatively little legal analysis or legal authority to support its claim that the Trial Court abused its discretion when it denied Creekside's motion to compel. This Court should

therefore decline to address Creekside's argument. See *SLW/Utah, MacKay v. Hardy*, 973 P.2d 941, 948 (Utah 1998) (“[W]e will not address issues not adequately briefed.”); *State v. Wareham*, 772 P.2d 960, 966 (Utah 1989) (declining to address issue where “brief wholly lacks legal analysis and authority to support . . . argument”); *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988) (“[A] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.” (quoting *Williamson v. Opsahl*, 92 Ill. App.3d 1087, 48 Ill.Dec. 510, 416 N.E.2d 783, 784 (1981))).

If this Court does address Creekside's argument, this Court reviews “the trial court's denial of the motion to compel under an abuse of discretion standard.” *Pack v. Case*, 2001 UT App 232, ¶16 30 P.3d 436 (citing *Roundy v. Staley*, 1999 UT App 229, ¶5, 984 P.2d 404.)

In *Pack*, the defendant

assert[ed] that the trial court abused its discretion when it refused to compel Pack to respond to interrogatories asking for (1) the names of the two dry wall workers and repair people with knowledge about alleged repairs and defects; (2) the names of all the people who worked on the house; and (3) the blueprints for the house.

Id. at ¶29. In *Pack*, this Court determined as follows:

We cannot conclude that the trial court abused its discretion when it denied Case's motion to compel. First, the record indicates that the repairs of both the interior and the roof were conducted by Pack, his son, and an employee of Pack. Prior to trial, Case was able to depose both Pack and his son and thereby ascertain the names of any workers who may have helped with the repairs. However, Case filed his motion to compel before he deposed Pack and Pack's son. On the facts

of this case, regardless of whether the trial court exceeded its discretion by denying the motion to compel brought at such an early stage of discovery, Case could have renewed his motion to compel if he was unable to obtain the desired information through other discovery.

Second, it was well within the trial court's discretion to deny Case's motion to compel Pack to provide the names of all the persons who participated in the construction of Pack's house. Such a request is overly broad and unduly burdensome because many workers participated in the construction of the house. Moreover, the majority of the workers involved in the construction of the house would not have set foot upon the roof of the house and would not have had any knowledge of the work conducted upon the roof. Therefore, these employees could not provide information relevant to the present case. Further, there is nothing in the record indicating Case had anything other than unlimited access to the roof or that the defects were there to be seen.

Finally, the trial court did not abuse its discretion when it refused to compel Pack to produce the blueprints for the house because Case could have obtained the blueprints from Salt Lake City. Indeed, Case eventually did obtain the blueprints from Salt Lake City. Thus, the trial court did not abuse its discretion when it denied Case's motion to compel.

Id. at ¶¶30-32. The Trial Court in this matter did not abuse its discretion when it denied Creekside's motion to compel because Creekside's discovery requests, as determined by the Trial Court, were "vague, ambiguous, and overbroad." [R. 162]

For example, Creekside's Interrogatory 2 seeks the following information:

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.

[R. 99] Pioneer Roofing has been in business for over twenty years. Interrogatory 2 does not limit its interrogatory by time and thus Pioneer Roofing would have to provide the requested information accumulated over a twenty year period. The interrogatory is vague and ambiguous because it does not define “concern,” “disputes,” or “problems.” If one of Pioneer Roofing’s customers called Pioneer Roofing and said he was “concerned” about the weather because it might rain while Pioneer Roofing worked on his roof, Pioneer Roofing would have to disclose that information to Creekside. Obviously that hypothetical “concern” is not relevant to the issues of this case, but Pioneer Roofing would have to provide all such irrelevant information to Creekside to respond to Interrogatory 2.

Furthermore, the information sought in Interrogatory 2 does not seek, as asserted by Creekside, information regarding “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Utah R. Evid. Rule 404(b). Interrogatory 2 only seeks information regarding character and witness credibility. Creekside relies on *State v. Lanier*, 778 P.2d 9 (Utah 1989) to support its claim that “witness’s credibility is always a relevant issue of inquiry in discovery.” Brief of the Appellant, p. 13. *Lanier*, however, does not even mention discovery. “The sole issue [in *Lanier*] is whether it is harmless error to permit the admission of evidence of defendant’s previous convictions for burglary and robbery pursuant to rule 609, Utah Rules of Evidence.” *Lanier*, 778 P.2d at 9. Rule 609 of the Utah Rules of Evidence refers to impeachment by evidence of conviction of crime, and thus Rule 609 has nothing to do

with the issues in this case. Creekside's reliance on *Lanier* is therefore misplaced. The Trial Court therefore correctly determined interrogatory 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)." [R. 162]

In Interrogatory 3, Creekside seeks the following information:

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.

[R. 100] Similar to Interrogatory 2, Interrogatory 3 is vague, ambiguous, and overbroad because it is not limited in time or place. It also requests information regarding Pioneer Roofing's agents, yet Creekside does not define agent. An agent of Pioneer Roofing would likely include an employee, which, to respond to the interrogatory, Pioneer Roofing would have to provide information about its employees accumulated over a twenty plus year period. Creekside seeks information that is also unduly burdensome, and oppressive, as well as vague, and overbroad. Thus, the Trial Court correctly determined "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." [R. 162]

In Interrogatories 4 and 5, Creekside seeks irrelevant and/or inadmissible information. Defendant's Interrogatory 4 seeks the following information: "Has Plaintiff

or its agents ever been convicted of any felony or misdemeanor involving dishonesty?”

[R. 100] Interrogatory 5 seeks specific information if Interrogatory 4 is answered in the affirmative. [R. 100] The information sought by Creekside is not limited to “agents” that worked on the condominium roof at issue in this matter, but seeks information regarding any and all agents of Pioneer Roofing over a twenty year period. Creekside does not define agent and does not limit the discovery to whether the felony or misdemeanor involves a dishonest act while the agent was in the employ of Pioneer Roofing.

Furthermore, Pioneer Roofing’s honesty is not at issue. Rule 26(b)(1) of the Utah Rules of Civil Procedure provides that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the *pending* action.” (Emphasis added.) Thus, Creekside is not entitled to discovery regarding Pioneer Roofing’s honesty unless Pioneer Roofing’s honesty is at issue in this pending matter. Rule 608 of the Utah Rules of Evidence provides that “evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.” Creekside has not attacked Pioneer Roofing’s character for truthfulness. Creekside’s causes of action are for breach of contract and negligent employment, not, for example, fraud or misrepresentation. Thus, interrogatories 4 and 5 are overbroad, vague, ambiguous, unduly burdensome, and outside the scope of discovery. The Trial Court determined that “the 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.” [R. 163]

In Interrogatory 6, Creekside seeks the following discovery: “Do you claim that Defendant or its agents made any representations that were incorrect?” [R. 100]

Creekside seeks a yes or no answer to Interrogatory 6, but the interrogatory is vague, ambiguous, and overbroad and cannot simply be answered with a yes or no. Creekside does not define agent, does not limit the scope of the interrogatory to time and place, and does not define what it means by “any representations.” Pioneer Roofing has brought no cause of action against Creekside regarding its honesty, but Creekside seems to be seeking information from Pioneer Roofing regarding Creekside’s honesty.

Interrogatory 7 seeks discovery if Interrogatory 6 is answered in the affirmative:

If your answer to the preceding interrogatory was “yes,” please provide the following information for each and every representation that you claim to be incorrect:

- a. Describe the representation that was made;
- b. State the name of the individual making the representation and the date the representation occurred.
- c. Identify all witnesses to the alleged representation;
- d. Explain why you believe the representation is inaccurate;
- e. Fully describe how you have been damaged, if at all, by the alleged misrepresentation;
- f. Identify each and every document, letter, memorandum, recording, or other item evidencing the alleged representation and provide the name, address and telephone number of each person possessing the item.

[R. 86] Pioneer Roofing is suing Creekside for breach of contract and unjust enrichment, but Creekside somehow believes that Pioneer Roofing has alleged misrepresentation.

Misrepresentation is not at issue in the pending matter. *See* Utah R. Civ. P. 26(b)

(“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.”). Furthermore, Creekside seeks discovery that is overbroad, ambiguous, and unduly burdensome because it has provided no definition, scope, or time period.

Creekside states that Interrogatories 6 and 7 seek to “determine whether or not plaintiff’s claims [sic] that the defendant ever made any misrepresentations to it that affected plaintiff’s ability to properly accomplish the work it had been contracted to perform.” [R. 90] Pioneer Roofing has not made a claim for misrepresentation against Creekside. Thus, the Trial Court did not abuse its discretion when it determined that “[t]hese 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.” [R. 163]

With regard to Requests for Production of Documents, Creekside’s Request No. 6 seeks the following discovery documents:

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.

[R. 105] The Trial Court determined that “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.” [R. 163]

Request No. 12 seeks the following discovery:

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.

[R. 106] The Trial Court determined that “[t]his request appears to be substantively related to Interrogatory No. 2. As the Court has already concluded with respect to the prior request, 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.” [R. 163] The Trial Court, therefore, did not abuse its discretion when it determined the requests are vague.

In *State ex rel Rd. Comm’n v. Petty*, 17 Utah 2d 382, 412 P.2d 914 (1966), the Utah Supreme Court determined as follows:

The use of discovery should not be extended to permit ferreting unduly into detail, nor to have the effect of cross-examining the opposing party or his witnesses. Nor should it be distorted into a “fishing expedition” in the hope that something may be uncovered. It should be confined within the proper limits of enabling the parties to find out essential facts for its legitimate objective hereinabove stated.

Id. at 386. Creekside’s interrogatories and requests run far afield of the essential facts of the pending action. In essence, Creekside discovery requests amount to a fishing expedition in hopes of turning up something relevant. The typical fishing expedition consists of a fisherman casting a line into water in hopes of catching a fish. Creekside, however, instead of casting a single line, admits that it wants to cast a net in its fishing expedition. *See* Brief of the Appellant, p. 18 (“The Defendant’s discovery net was thrown to do just that, entrap or ‘encompass’ evidence that may be relevant.”) In this case, the Trial Court did not abuse its

discretion when it denied Creekside's motion to compel because the Trial Court determined Creekside's discovery requests were vague, ambiguous, and overbroad. This Court should therefore determine that the Trial Court did not abuse its discretion when it denied Creekside's motion to compel.

**II. THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION WHEN IT DENIED CREEKSIDE'S
REQUEST TO EXTEND DISCOVERY
DEADLINES BECAUSE CREEKSIDE HAD
UNDULY DELAYED THIS MATTER**

Creekside asserts that the Trial Court abused its discretion when it denied its request to extend discovery. This Court should decline to address Creekside's argument because Creekside has failed to support its claim with legal analysis or authority. *See SLW/Utah*, 973 P.2d at 948 (“[W]e will not address issues not adequately briefed.”).

In the event this Court does address Creekside's argument, this Court should determine that the Trial Court did not abuse its discretion when it denied Creekside's request to extend discovery deadlines. “Because trial courts have broad discretion in matters of discovery, this issue is reviewed for abuse of discretion. Consequently, ‘an appellate court will not find abuse of discretion absent an erroneous conclusion of law or where there is no evidentiary basis for the trial court's ruling.’” *Green v. Louder*, 2001 UT 62, ¶39, 29 P.3d 638 (quoting *Askew v. Hardman*, 918 P.2d 469, 472 (Utah 1996)).

In this case, the Trial Court determined that Creekside had unduly delayed the case and had “not articulated an adequate basis for to delay it further.” [R. 326] There is

ample evidence in this case to support the Trial Court's ruling. Rule 26 of the Utah Rules of Civil Procedure provides that “fact discovery shall be completed within 240 days after the first answer is filed.” Utah R. Civ. P. 26(d). Creekside, however, refused to agree to the 240 days set forth in Rule 26(d). [R. 319] On or about May 24, 2002, Pioneer Roofing’s attorney and Creekside’s attorney held an attorneys’ planning meeting as required by Rule 26 of the Utah Rules of Civil Procedure. *See* Utah R. Civ. Pro. 26(f). At the attorneys’ planning meeting, Creekside’s counsel refused to allow discovery to proceed as set forth in Rule 26(d), which provides that fact discovery will be completed within 240 days after the first answer is filed. [R. 319] Creekside’s attorney stated he knew just how long it takes to complete discovery and would only agree to a discovery cutoff date of January 30, 2002, which is 275 days after Creekside filed its answer. [R. 319] Pioneer Roofing’s counsel agreed to the January 30, 2002, cutoff date as requested by Creekside’s attorney. [R. 30] As a consequence, Creekside already had obtained a stipulated extension to the discovery deadlines when it requested another extension. Creekside claims it needed more time to conduct discovery because the parties attempted to settle this matter between September and December, 2002. Pioneer Roofing did make an offer to settle the matter to which Creekside did not respond to until December 27, 2002. [R. 320] Settlement was not a matter of negotiating back and forth as typically occurs in litigation. Pioneer Roofing made the offer to settle and Creekside simply refused to respond to the settlement offer until December 27, 2002. [R. 320] In other words, Creekside is solely responsible for its undue delay in responding to the settlement

offer. During the settlement period, Creekside failed to conduct any discovery.¹

Creekside also unduly delayed the matter by filing two motions to recuse Judge Lindberg. Creekside filed the first motion to recuse on August 9, 2002, four months after the filing of the Complaint. [R. 37-57] Pioneer Roofing timely filed a Motion to Strike Defendant's Motion Requesting Judge Lindberg to Recuse Herself. [R. 69-71] Creekside, however, failed to oppose the Motion to Strike. Furthermore, Creekside failed to file a notice to submit for its recusal motion. Pioneer Roofing filed the notice to submit in December, 2002. [R. 74-76] The Trial Court, through its associate presiding judge, denied Creekside's motion to recuse by determining that Creekside's motion to recuse was untimely, not within the scope of the rules, and unsupported by any analysis or authority. [R 79-81]

In spite of the motion being denied, Creekside filed a second motion to recuse Judge Lindberg. [R. 227-288] Creekside claims it was victorious in its efforts to have Judge Lindberg recuse herself. Judge Lindberg, however, explained that she recused herself because

the Court has been concerned with the delays that Plaintiff has already experienced as a result of Defendant's motion to recuse. It is unfair to Plaintiff to have the resolution of his case held hostage until these collateral matters are addressed. After weighing this Court's duty to retain a case, versus its duty to expedite resolution of matters before it and to preserve the integrity and independence of the judiciary, the Court

¹ Creekside opines that Pioneer Roofing waited four months to respond to Creekside's discovery. *See* Brief of the Appellant, p. 24. Creekside, however, admits that it was Creekside that caused the four month delay, not Pioneer Roofing, because Creekside stated "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 200[2], when settlement did not occur, he requested that Plaintiff respond to its discovery." *See* Brief of the Appellant, p. 25

concludes that the better course is to recuse itself from this case and allow Plaintiff's case to proceed to resolution in another court.

[R. 305] Thus, the Trial Court recused itself because it recognized that Creekside had unduly delayed this matter and would likely continue to do so unless she recused herself.

Although fact discovery was cutoff on January 30, 2003, Pioneer Roofing did not file the certificate of readiness for trial until May 5, 2003; an additional 89 days after the discovery cutoff. [R. 223-24] In the interim, on April 25, 2003, Creekside filed a Request for Extension of Discovery Deadlines. [R. 166-67] On May 7, 2003, Creekside filed another Request for Extension of Discovery Deadlines. [R. 290-91] Creekside, however, never filed a notice to submit, as required by the rules of civil procedure, for either of its Requests for Extension of Discovery Deadlines. Utah R. Jud. Admin. 4-501(D) (2002) ("If neither party files a notice, the motion will not be submitted for decision."). As a result, the Trial Court did not rule on the unsubmitted motions. Furthermore, the Trial Court in its ruling regarding the protective order suggested that Creekside could redraft its discovery requests so that they would not be vague and overbroad. [R. 160-65] Creekside, however, never redrafted the discovery requests.

On August 28, 2003, the newly appointed Trial Court, sua sponte, gave Pioneer Roofing ten days to respond to the requests to extend discovery. [R. 315] On October 6, 2003, the Trial Court determined as follows:

The defendant seeks to extend the January 30, 200[3], discovery deadline on the basis that discovery 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 the 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 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.

[R. 325-26] "Because trial courts must deal first hand with the parties and the discovery process, they are given broad discretion regarding the imposition of discovery sanctions." *Darrington v. Wade*, 812 P.2d 452, 457 (Utah Ct. App. 1991). The Utah Supreme Court has "long held that we will not interfere unless 'abuse of that discretion [is] clearly shown.'" *Utah Dep't of Transp. v. Osguthorpe*, 892 P.2d 4, 8, (Utah 1995) (quoting *Katz v. Pierce*, 732 P.2d 92, 93 (Utah 1986)); see also *Tucker Realty, Inc. v. Nunley*, 396 P.2d 410, 412, 16 Utah 2d 97, 100 (1964) ("Unless it is shown that [the trial court's] action is without support in the record, or is a plain abuse of discretion, it should not be disturbed."). In this case, the record clearly supports the Trial Court's determination to not extend the discovery deadlines. This Court should therefore determine that the Trial Court did not abuse its discretion when it denied Creekside's request to extend discovery because Creekside had unduly delayed this matter.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT AWARDED PIONEER ROOFING, AS THE PREVAILING PARTY, ITS ATTORNEY FEES

Creekside argues that it was the prevailing party in this matter. Pioneer Roofing, however, sued Creekside for \$25,906.00, plus a 10% penalty, and interest, [R. 1-10], and

the Jury awarded Creekside \$31,865.00. [R. 610] Pioneer Roofing therefore prevailed in this matter. This Court reviews “the trial court’s determination as to who was the prevailing party under an abuse of discretion standard.” *R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶25, 40 P.3d 1119.

In this case, the Trial Court did not abuse its discretion when it awarded Creekside attorney’s fees as the prevailing party. The Trial Court determined as follows:

Plaintiff’s counsel, Rick L. Sorens[e]n, 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 plaintiff, can be considered the prevailing party.

[R. 723-24] (emphasis added). Creekside relies on *R.T. Nielson Co.* to support its theory that it is the prevailing party. *R.T. Nielson Co.*, however, supports the Trial Court’s determination that Pioneer Roofing is the prevailing party. In *R.T. Nielson Co.*, the Utah Supreme Court determined as follows:

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.

R.T. Nielson Co., 2002 UT 11, at ¶25. “[T]he trial court is in a better position than we are as an appellate court to decide which party is the prevailing party. In most cases involving language similar to the contractual language before us here, there can generally be only one prevailing party.” *Id.* The supreme court also articulated a standard to “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.” *Id.* In this case, the Trial Court determined that “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.” [R. 723] Creekside’s claim that it prevailed in this matter is therefore without merit. This Court should therefore determine that the Trial Court did not abuse its discretion by determining that Pioneer Roofing is the prevailing party.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DETERMINED THAT PIONEER ROOFING’S ATTORNEY FEES WERE REASONABLE AND NOT EXCESSIVE

Creekside also argues that the Trial Court abused its discretion when it determined that Pioneer Roofing’s attorney fees were reasonable and not excessive. The Utah Supreme Court has determined as follows:

While the award of attorney fees must be supported by evidence in the record, the trial court has discretion in

determining the question of a fee's "reasonableness," as this issue must be decided against a variety of factual backgrounds. A trial court's discretion in determining the amount of a reasonable attorney fee "arises from the fact that it is in a better position than an appellate court to gauge the quality and efficiency of the representation and the complexity of the litigation." Thus, as noted above, in the absence of an abuse of discretion, this court will not disturb the trial court's findings.

Valcarce v. Fitzgerald, 961 P.2d 305, 317 (Utah 1998) (citations omitted).

The Trial Court determined as follows:

[T]he Court considers the defendant's argument that even if the plaintiff is entitled to recover its attorney 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 attorneys with similar practices and years of experience. Overall, the Court concludes that the attorney's fees and costs sought by the plaintiff are reasonable and therefore declines to reduce the amounts sought by the almost 50% amount suggested by the defendant.

[R. 724-25] Thus, the Trial Court clearly provided in the record grounds for awarding

Pioneer Roofing the attorney fees.

Creekside asserts that it “prevailed on its claims for Breach of Contract, Negligent Employment, Waste, Nuisance, Invasion of Privacy, Trespass and Conversion . . . [and therefore] 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.” Brief of the Appellant, p. 29 (emphasis omitted). Creekside fails to cite anywhere in the record where it shows that Creekside was the prevailing party on its counterclaims. The Jury submitted a General Verdict to the Trial Court finding “in favor of the defendant and against the plaintiff and assess the defendant’s damages at \$4,200.00.” [R. 611] The Jury did not state whether it awarded the damages for any of the torts claimed by Creekside, nor did the Jury state whether it awarded the damages as an offset for damages pursuant to the contract. Consequently, there is no evidence in the record that Creekside prevailed on any of its claims.

Furthermore, this Court has determined that where claims and counterclaims are sufficiently tied to the enforcement of the contract, attorney fees should be awarded to the prevailing party. *See First General Services v. Perkins*, 918 P.2d 480, 486-87 (Utah Ct. App. 1996). In this case, the breach of contract claims were sufficiently tied to award the prevailing party status to Pioneer Roofing.

To prevail on a claim that the Trial Court abused its discretion when awarding attorney fees, Creekside “must ‘marshal the evidence in support of the [trial court’s]

findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous.'" *Eggett v. Wasatch Energy Corp.*, 2004 UT 28, ¶38, 94 P.3d 193 (quoting *Young v. Young*, 1999 UT 38, P 15, 979 P.2d 338). Creekside failed to marshal any evidence in support of the Trial Court's findings. Creekside merely opines as to reasons why it disagrees with the Court's findings and even fails to cite to the record when setting forth its opinions.

For example, Creekside opined that the time billed by Pioneer Roofing's counsel for drafting the Complaint and Reply to Counterclaim was excessive. [R. 648] This case is complicated by the fact that a homeowners association is involved and Pioneer Roofing needed to determine if the individual homeowner's would be liable. Creekside's Counterclaim asserted many causes of action, each which needed to be researched before filing a response. Rule 11 of the Utah Rules of Civil Procedure requires the following:

By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or later advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support.

Utah R. Civ. Pro. 11(b). Before filing the Complaint and Reply to Counterclaim, Pioneer

Roofing researched the law relevant to those causes of action. Rule 8 of the Utah Rules of Civil Procedure requires a party to assert all affirmative defenses when filing a responsive pleading. Clearly the time to research those issues is before filing the pleading. Pioneer Roofing presented that argument to the Trial Court before the Trial Court made its attorney fee award. [R. 715-16]

Creekside also claims that Pioneer Roofing should not be able to bill for time spent on defending Creekside's motions to recuse Judge Lindberg. Creekside even goes so far as to claim that Pioneer Roofing "unsuccessfully" challenged Creekside's motion to recuse. The Trial Court, through its associate presiding judge, determined that Creekside had failed on every aspect of its motion to recuse. [R. 79-81] It is clear that Creekside did not even review the rules of civil procedure before filing its motion. Had Creekside actually read the rules, it should have determined that it was too late to file a motion for recusal and neither party would have incurred attorney fees over that issue. Creekside, however, filed the motion and clearly Pioneer Roofing had to respond. Notwithstanding, Creekside filed another motion to recuse. Instead of expending attorney fees to fight the second motion, Pioneer Roofing requested a status conference from the Trial Court to determine if Pioneer Roofing should respond to Creekside's untimely motions. [R. 297-98] Consequently, Pioneer Roofing saved the parties from expending more on attorney fees.

Creekside opines that this matter has been adversarial, but the blame for this matter being adversarial rests on Creekside. To cite one example, the parties had briefed Pioneer

Roofing's Motion to Strike and for Protective Order. Instead of waiting for the Court to rule on the motions, Creekside's counsel telephoned Pioneer Roofings counsel and began shouting so loud that Pioneer Roofing's counsel had to hold telephone receiver one foot from his ear. [R. 152-57] Pioneer Roofing's attorney terminated the conversation because of Creekside's counsel's unprofessional behavior. [R. 155] Creekside later complained that Pioneer Roofing's attorney would not respond to his inquiry and simply terminated the conversation. [R. 145-48]

Creekside asserts that "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," because "Plaintiff finally conceded at trial that he had damaged Defendant's air cooling units." Brief of the Appellant, p. 36. Creekside fails to cite to the record to show when Pioneer Roofing made any such concession. Even if Creekside was able to substantiate such a claim, Creekside failed to show how such a concession damaged it.

Creekside also complains that the Trial Court failed to consider how invoices provided at trial increased the costs of litigation. Brief of the Appellant, p. 36. Pioneer Roofing did not have the invoices because Pioneer Roofing does not keep invoices after the product is delivered to a job site. [R. 714] At trial, plaintiff John Stout testified that he had purchased the products from a supplier and after Mr. Stout testified Mr. Sorensen asked Mr. Stout if the supplier might still have the invoices. [R. 714] After trial that day Mr. Stout called the supplier and had the invoices faxed to him. [R. 714] Creekside was

given the copies the next day. [R. 714] Obviously Creekside could have obtained the invoices through discovery by subpoenaing the invoices directly from the supplier but failed to do so. *See Pack*, 2001 UT App at ¶32 (“[T]he trial court did not abuse its discretion when it refused to compel Pack to produce the blueprints for the house because Case could have obtained the blueprints from Salt Lake City.”) Furthermore, the invoices were for the products that Pioneer Roofing actually installed on the project. [R. 714] In other words, there was no surprise and Creekside never sought to enter them into the record nor did Creekside object at trial to the timeliness of the production. As a consequence, the Trial Court did not abuse its discretion when it did not discount Pioneer Roofing’s attorney fees relating to the “concession” and invoices. This Court should therefore determine that the Trial Court did not abuse its discretion when it determined that Pioneer Roofing’s attorney fees were reasonable and not excessive.

V. THIS COURT SHOULD REMAND TO THE TRIAL COURT FOR A DETERMINATION OF THE AMOUNT OF ATTORNEY FEES PIONEER ROOFING SHOULD BE AWARDED ON APPEAL

The Trial Court did not abuse its discretion with regard to any claim brought by Creekside on appeal. As a result, this Court should determine that Pioneer Roofing is the prevailing party on appeal and is therefore entitled to an award of its attorney fees on appeal. *See R.T. Nielson Co.*, 2002 UT 11, ¶27 (“As the prevailing party, RTNC is entitled to recover attorney fees incurred on appeal based on the parties’ agreement.”) This Court should therefore remand to the Trial Court to determine the appropriate amount of attorney fees incurred by Pioneer Roofing on appeal.

CONCLUSION

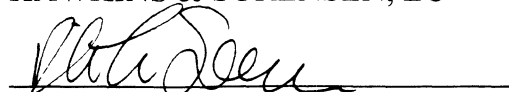
This Court should affirm the Trial Court's rulings because the Trial Court did not abuse its discretion when ruling on the appeal issues. The Trial Court did not abuse its discretion when it denied Creekside's motion to compel because the Trial Court determined that Creekside's discovery requests were vague, ambiguous, and overbroad. The Trial Court did not abuse its discretion when it determined that Creekside had unduly delayed this matter and therefore denied Creekside's request to extend discovery deadlines. The Trial Court did not abuse its discretion when it determined that Pioneer Roofing was the prevailing party because the Jury awarded Pioneer Roofing the contract amount and Creekside was awarded a nominal amount on its counterclaims. The Trial Court did not abuse its discretion when it determined that Pioneer Roofing's attorney fees were reasonable and not excessive. Creekside failed to marshal the evidence in favor of the Trial Court with regard to the attorney fee findings. Finally, because Pioneer Roofing is the prevailing party, this matter should be remanded to the Trial Court for a determination of attorney fees in favor of Pioneer Roofing for this appeal. Thus, this Court should affirm the Trial Court in all aspects of this appeal and remand for attorney fee determination.

ORAL ARGUMENT STATEMENT

Oral argument is requested.

DATED this 22ND day of February, 2004.

HAWKINS & SORENSEN, LC



Rick Sorensen

Attorneys for Appellee John F. Stout doing
business as Pioneer Roofing.

PROOF OF SERVICE

This is to certify that copies of the foregoing **APPELLEES' BRIEF** was sent by the method shown the 22nd of February, 2005 to the following:

<u>No. of Copies</u>	<u>Address</u>	<u>Method</u>
Original and 7copies	Utah Court of Appeals Office of the Clerk	Hand-Delivery
2	Loren M. Lambert Arrow Legal Solutions Group, PC 266 East 7200 South Midvale, UT 84047 Attorney for Appellant	First Class Mail



A handwritten signature in cursive script, appearing to read "M. L. Seem", is written over a horizontal line.

ADDENDUM

Refer to addenda attached to Brief of the Appellant