

1993

James Constructors, Inc. v. Salt Lake City  
Corporation : Salt Lake City Corporation v. James  
Constructors Inc., et al. : Industrial Indemnity  
Company v. Hood Corporation, et al. : Reply Brief

Utah Court of Appeals

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Robert M. Anderson; Bruce Wycoff; William H. Pruitt; Anderson and Watkins; Attorneys for Appellant.

Scott Daniels; Snow, Christensen and Martineau; Attorneys for Appellee.

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UTAH COURT OF APPEALS  
BRIEF

UTAH  
D.  
K.T.G.  
F.

IN THE UTAH COURT OF APPEALS

930452 CA

JAMES CONSTRUCTORS, INC.,

Plaintiff,

vs.

SALT LAKE CITY CORPORATION,

Defendant.

SECRET NO. \_\_\_\_\_

Case No. 930452-CA

SALT LAKE CITY CORPORATION,

Plaintiff,

vs.

JAMES CONSTRUCTORS, INC.,  
et al.,

Defendants.

INDUSTRIAL INDEMNITY COMPANY,

Cross-Claimant and  
Third Party Plaintiff,  
and Appellee,

vs.

HOOD CORPORATION, et al.,

Cross- and Third-Party  
Defendants and  
Appellant.

Priority 15

APPELLANT'S REPLY BRIEF

**FILED**  
Utah Court of Appeals

MAR 16 1994

*Mary T. Nunn*  
Mary T. Nunn  
Clerk

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Appeal from the Third Judicial District Court of  
Salt Lake County, State of Utah  
Honorable David S. Young, District Judge, Presiding

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Robert M. Anderson (0108)  
Bruce Wycoff (4448)  
William H. Pruitt (5863)  
ANDERSON & WATKINS  
900 Kearns Building  
136 South Main Street  
Salt Lake City, Utah 84101

**Attorneys for Appellant**

Scott Daniels  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, 11th Floor  
Salt Lake City, Utah 84111

**Attorneys for Appellee**

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IN THE UTAH COURT OF APPEALS

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SALT LAKE CITY CORPORATION,

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ANDERSON & WATKINS  
900 Kearns Building  
136 South Main Street  
Salt Lake City, Utah 84101

**Attorneys for Appellant**

Scott Daniels  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, 11th Floor  
Salt Lake City, Utah 84111

**Attorneys for Appellee**

## TABLE OF CONTENTS

I.	DETERMINATIVE CONSTITUTIONAL PROVISION . . . . .	1
II.	ARGUMENT . . . . .	1
	A. This Court is Fully Empowered to Adjudicate Hood's Appeal . . . . .	1
	1. Industrial's Suggested Rule is Unconstitutional . . . . .	2
	2. The Parties Never Contemplated that the Stipulation Would Divest Hood of its Constitutional Right of Appeal . . . . .	3
	B. The Trial Court Improperly Afforded Industrial's Attorney Fee Request a Presumption of Reasonableness . . . . .	4
	C. The Trial Court Failed to Make Findings of Fact on All Elements Required Under Existing Law . . . . .	6
	D. The Trial Court Abused its Discretion in Finding that Industrial Acted Reasonably in Maintaining A Separate Defense (Finding of Fact No. 14) . . . . .	8
	E. The Trial Court's Award of Attorneys' Fees for Duplicative and Redundant Legal Services Was Improper As a Matter of Law . . . . .	13
	F. The Trial Court's Award of Prejudgment Interest was Improper . . . . .	15
	G. Industrial is Not Entitled to Attorneys' Fees On Appeal . . . . .	21
III.	CONCLUSION . . . . .	25

# TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page No.</u>
<u>ALI v. Jefferson Insurance Co.</u> , 5 Ohio App.3d 105, 449 N.E.2d 495 (App. 1982) . . . . .	19
<u>Amazi v. Atlantic Richfield Co.</u> , 249 Mont. 355, 816 P.2d 431 (1991) . . . . .	21, 23-24
<u>Bar 70 Enter., Inc. v. Tosco Corp.</u> , 703 P.2d 1297 (Colo. 1985)(En Banc.) . . . . .	2
<u>Cabrera v. Cottrell</u> , 694 P.2d 622 (Utah 1985) . . . . .	7
<u>Central Towers Apartments, Inc. v. Martin</u> , 61 Tenn. App. 244, 453 S.W.2d 789 (App. 1969) . . . . .	7-9
<u>First of Denver Mortg. Investors v. C.N. Zundel and Assoc.</u> , 600 P.2d 521 (Utah 1979) . . . . .	2
<u>Govert Copier Painting v. Van Leeuwen</u> , 801 P.2d 163 (Utah App. 1990) . . . . .	8
<u>INA Ins. Co. of N. America v. Valley Forge Ins. Co.</u> , 150 Ariz. 248, 722 P.2d 975 (App. 1986) . . . . .	24
<u>Jackson v. Hollowell</u> , 685 F.2d 961 (5th Cir. 1982) . . . . .	4, 6
<u>Jones v. Strom Construction Co.</u> , 84 Wash.2d 518, 527 P.2d 1115 (1974) . . . . .	21-22
<u>Matter of Estate of Quinn</u> , 830 P.2d 282 (Utah App. 1992) . . . . .	8
<u>Mooney v. GR and Assoc.</u> , 746 P.2d 1174 (Utah App. 1987) . . . . .	2
<u>Morrison-Knudsen Co., Inc. v. The Makahuena Corp.</u> , 66 Haw. 663, 675 P.2d 760 (1983) . . . . .	20-21
<u>Perkins v. Standard Oil Co. of California</u> , 487 F.2d 672 (9th Cir. 1973) . . . . .	19
<u>Perkins v. Thompson</u> , 551 So.2d 204 (Miss. 1989) . . . . .	7
<u>Peter Fabrics, Inc. v. S.S. "Hermes"</u> , 765 F.2d 305 (2nd Cir. 1985) . . . . .	22-23
<u>Ranger Const. Co. v. Prince William Co. School Bd.</u> , 605 F.2d 1298, 1304-05 (4th Cir.) . . . . .	22

<u>Ringwood v. Foreign Auto Works, Inc.,</u> 786 P.2d 1350, 1361 (Utah App.), <u>cert. denied</u> , 795 P.2d 1138 (Utah 1990) . . . . .	4, 15-16
<u>Sentry Ins. Co. v. Davison Fuel &amp; Dock Co.,</u> 60 Ohio App.2d 248, 396 N.E.2d 1071 (App. 1978) . . . . .	14
<u>Signal Oil &amp; Gas Co. v. The Barge W-701,</u> 654 F.2d 1164 (5th Cir. 1981) <u>cert. denied</u> , 455 U.S. 944 (1982) . . . . .	22
<u>Simko v. C &amp; C Marine Maint. Co.,</u> 594 F.2d 960 (3rd Cir.) <u>cert. denied</u> , 444 U.S. 833 (1979) . . . . .	22
<u>Tri-M Erectors, Inc. v. Drake,</u> 27 Wash.App.2d 529, 618 P.2d 1341 (App. 1980) . . . . .	17-19
<u>United States v. Hardage,</u> 985 F.2d 1427 (10th Cir. 1993) . . . . .	16-17
<u>Wilson-Jump Company v. McCarthy-Hundreiser and Assoc.,</u> <u>Inc.,</u> 85 Ill.App.3d 179, 405 N.E. 2d 1322 40 Ill. Dec. 230 (App. 1980) . . . . .	4
<u>Worthington &amp; Kimball v. C &amp; A Dev. Co.,</u> 777 P.2d 475 (Utah 1989) . . . . .	20-21

#### **Constitutional Provision**

Utah Constitution, Art. VIII, § 5 . . . . .	1-2
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I.

DETERMINATIVE CONSTITUTIONAL PROVISION

**Jurisdiction of district court and other courts--Right of appeal.** The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

Utah Constitution, Article VIII, § 5.

II.

ARGUMENT

**A. This Court is Fully Empowered to Adjudicate Hood's Appeal.**

Appellee, Industrial Indemnity Company ("Industrial") argues at pages 15-18 of its Brief that Appellant Hood Corporation ("Hood") "has no business before this Court." Industrial's major premise, made without any citation to authority, is that Judge Young functioned as nothing more than an arbitrator. Its minor premise, also made without any citation to authority, is that in his capacity as an "arbitrator," Judge Young's decision is subject to the same deferential review accorded arbitral awards. Industrial's premises are flawed, and this Court should reject Industrial's argument for the following reasons:

1. Industrial's Suggested Rule is Unconstitutional.

Article VIII, § 5 of the Utah Constitution provides, in pertinent part: "Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause." (Emphasis added). Judge David S. Young is a judge, not an arbitrator. In that capacity, Judge Young entered a judgment in this case. The Constitution unambiguously and explicitly gives Hood "an appeal of right" from that judgment.

Even if the Stipulation purported to waive the parties' constitutional right to appeal, which it does not do, the Stipulation does not free this Court from its constitutional duty to review Judge Young's judgment because stipulations between litigants do not bind courts "when points of law requiring judicial determination are involved." First of Denver Mortg. Investors v. C.N. Zundel and Assoc., 600 P.2d 521, 527 (Utah 1979); Mooney v. GR and Assoc., 746 P.2d 1174, 1178 n.3 (Utah App. 1987). The one case other than Zundel relied on by this Court in Mooney explains why this Court is obligated to consider the merits of Hood's appeal irrespective of the parties' Stipulation:

A stipulation cannot be used to bind a court in the determination of questions of law or mixed questions of law and fact. On the contrary, it always remains the independent responsibility of the court to decide the law applicable to a particular case and the legal sufficiency of the evidence in regard to a contested claim.

Bar 70 Enter., Inc. v. Tosco Corp., 703 P.2d 1297, 1306 (Colo. 1985) (En Banc.) (cited in Mooney, 746 P.2d at p. 1178 n.3).

2. The Parties Never Contemplated that the Stipulation Would Divest Hood of its Constitutional Right of Appeal.

On January 11, 1993 Industrial filed its memorandum responding to Hood's motion for a hearing on Industrial's attorneys' fees. (R. 3438-43). In its memorandum, Industrial wrote:

Given the protracted history of this case and the litigious stance Hood has unabashedly adopted throughout, it is almost certain that Hood will appeal almost any judgment or award. If the court believes, in its discretion, that a hearing on the reasonableness of Industrial Indemnity's fees will minimize the prospect of further proceedings and thus reduce the accrual of additional costs and fees to any significant degree, Industrial Indemnity has no objection to such a hearing.

(R. 3439) (emphasis added).

On May 26, 1993, while this appeal was still pending before the Utah Supreme Court, Industrial filed its Motion for Summary Disposition Affirming Judgment and Award of Attorneys Fees. In that motion, Industrial again said nothing about Hood's purported inability to appeal. Instead, at pages 9-10, Industrial wrote:

Stripped of the unfounded and unjustifiable overstatements of the Docketing Statement, and of issues that are not raised by or even relevant to this case, Hood's Docketing Statement reveals no specific challenge to any of these factual findings, other than the ultimate conclusion or reasonableness. Against the highly-deferential "abuse of discretion" standard applicable to findings of fact (Sprouse v. Jager, 806 P.2d 219, 226 (Utah App. 1991)), there is no significant issue on the unchallenged facts justifying more than summary appellate review of the trial court's exercise of its fact-finding powers in resolving the issue of reasonableness as anticipated by the governing Stipulation.

\* \* \*

In fact, the law and standards suggested by Hood as applicable were properly applied in the Court's analysis and support the judgment entered.

There being no substantial or legal basis for Hoods' [sic] appeal, this is an appropriate case for summary dismissal.

Industrial never suggested to the trial court or to the Supreme Court that Hood had no right of appeal. Industrial raised this claim for the first time in its brief to this Court. Industrial's argument is a last-minute and untimely rationalization without any legal or factual basis.

**B. The Trial Court Improperly Afforded Industrial's Attorneys' Fee Request a Presumption of Reasonableness.**

Hood established in its initial brief that attorneys' fees incurred by Industrial are not entitled to a presumption of reasonableness. See Appellant's Brief, pages 8-10. Industrial must prove the attorneys' fees claimed are reasonable. See Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350, 1361 (Utah App.), cert. denied, 795 P.2d 1138 (Utah 1990); Wilson-Jump Company v. McCarthy-Hundreiser and Assoc., Inc., 85 Ill.App.3d 179, 192, 405 N.E.2d 1322, 1325, 40 Ill. Dec. 230 (App. 1980); Jackson v. Hollowell, 685 F.2d 961, 966 (5th Cir 1982). Industrial reluctantly acknowledges this burden in its Brief;<sup>1</sup> however, at the

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<sup>1</sup>Industrial states: "[i]n the end, however, Industrial did not press that theory [presumption of reasonableness] or argue that entitlement during the evidentiary hearing. In fact, Industrial's counsel specifically acknowledged Industrial's burden at the hearing, stating, 'I suppose we [Industrial] have to prove our fees are both reasonable and necessary.' [R. 3770]." Appellee's Brief at page 19.

same time, it urges this Court to adopt a presumption of reasonableness standard based on dated authority (Fidelity and Guaranty Co. v. Hittle, 96 N.W. 782 (Iowa 1903)) that has not been followed for several decades. See Appellee's Brief, pages 20-22.

Industrial's erroneous argument for a presumption of reasonableness is based in its pleadings requesting attorneys' fees and costs. (R. 3166, 3397-98, 3441). According to its argument, Hood had the burden of proof to establish the unreasonableness of Industrial's attorneys' fees.

Despite its argument, Industrial claims the trial court afforded it no presumption of reasonableness, and that Hood's argument to the contrary is "based solely on an unwarranted twist on a comment by Judge Young, quoted out of context . . . ." See Appellee's Brief, page 19. Industrial suggests Judge Young's statement -- "[s]o if it [attorneys' fees] begins out as all being reasonable then the prong that I think that Mr. Anderson is claiming the right to prevail on is that it, in fact, wasn't necessary" -- merely reflects his understanding of the testimony of Hood's expert. See Appellee's Brief, pages 19-20, (R.3782). Industrial's claim is not supported by the record. A close review of the record reveals Judge Young's basic misunderstanding of Industrial's burden in establishing the reasonableness of its attorneys' fees.

Counsel for Industrial stated at the hearing: "With respect to the presumption of reasonableness issue, I only think the law in this area is very much in dispute." (R. 3781). Counsel

then proceeded to cite authority in support of a presumption of reasonableness stating " . . . it's not a question of looking back with hindsight and saying what would have been the best thing to do looking back. They're [Hood] not entitled to come here like Monday morning quarterbacks and say, well, you know, this wasn't really necessary." (R. 3781-82). These statements suggest a presumption of reasonableness, and contradict Industrial's begrudging acknowledgement of its burden of proof at the evidentiary hearing.

At the same hearing, Hood's expert, Craig Mariger Esq., testified that Industrial's attorneys' fees were reasonable during certain periods of the litigation and were unreasonable during other periods based on the factual circumstances of each period. (R. 3753-3757). Mr. Mariger did not testify that all attorneys' fees incurred by Industrial begin as being reasonable. Indeed, Hood has argued from the beginning that Industrial must establish both the reasonableness and necessity of its attorneys' fees.

The trial court's statement that all attorneys' fees "begin" as reasonable reflects a misunderstanding of Mr. Mariger's testimony and authority cited by Hood on this issue. The trial court erred, as a matter of law, by affording a presumption of reasonableness to the attorneys' fees incurred by Industrial.

**C. The Trial Court Failed To Make Findings of Fact on All Elements Required Under Existing Law.**

Industrial is required to prove the reasonableness of its attorneys' fee request to prevent financial abuse of its indemnitor, Hood, under the indemnity agreement. See Jackson v. Hollowell, 685 F.2d 961, 966 (5th Cir. 1982). In recognition of

the ever-present possibility of unnecessary, duplicative and redundant representation, courts have developed a specific test to determine if attorneys' fees incurred by an indemnitee satisfy the reasonableness and necessary standards. See Perkins v. Thompson, 551 So.2d 204, 209 (Miss. 1989); Central Towers Apartments, Inc. v. Martin, 61 Tenn. App. 244, 267, 453 S.W.2d 789, 799 (App. 1969). Industrial claims at pages 21-22 of its Brief that the trial court's award of attorneys' fees survives the test set forth in Central Towers. This claim is, however, not supported because of the trial court's failure to make findings on several key factors.

Hood established in its initial brief that the trial court entered no findings of fact on the following key factors of the Central Towers analysis: nos. 8 (the competency of Hood and James' attorneys); 10 (whether there was a conflict of interest between Industrial and Hood); 11 (the attitude and cooperativeness of Industrial); and 12 (the diligence of the attorneys for Industrial). Furthermore, the trial court failed to consider (1) the efficiency of Industrial's attorneys and (2) the results obtained by Industrial's attorneys as required under existing Utah law to determine the reasonableness of a request for attorneys' fees. See Appellant's Brief, pages 12-17; Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1985).

Industrial does not address the trial court's failure to make findings of fact on these key factors. Because the findings are deficient under (1) Utah law; and (2) the standard set forth in Central Towers, this Court should reverse the award of attorneys'

fees to Industrial. See Govert Copier Painting v. Van Leeuwen, 801 P.2d 163, 174 (Utah App. 1990)(attorneys' fee award reversed because the trial court's findings did not demonstrate consideration of "the factors established by appellate courts as relevant to a reduction in fees.")(emphasis added). See also, Matter of Estate of Quinn, 830 P.2d 282, 286 (Utah App. 1992)("the absence of adequate findings of fact precludes appellate review of the evidentiary basis underlying the trial court's decision and requires remand for more detailed findings by the trial court.")

**D. The Trial Court Abused its Discretion in Finding that Industrial Acted Reasonably in Maintaining a Separate Defense (Finding of Fact No. 14).**

Industrial argues that the evidence marshalled by Hood is sufficient under an abuse of discretion standard to support the trial court's findings that (1) Industrial's reasonably retained separate counsel; and (2) all of its attorneys' fees were reasonable. See Appellee's Brief, pages 22-24. Hood has always acknowledged Industrial reasonably incurred certain attorneys' fees. On appeal, Hood argues only that the evidence relied upon by the trial court and presented by Industrial in its Brief fails to support (1) Industrial's maintenance of a separate defense throughout the litigation; and (2) the trial court's award of all attorneys' fees claimed by Industrial. The trial court itself admitted its award was "somewhat arbitrary." (R. 3800, Add. 74).

In its initial brief, Hood identified certain factors in the Central Towers decision critical to determining whether sufficient evidence exists to support an award of attorneys' fees



to a surety pursuant to an indemnity agreement.<sup>2</sup> See Appellant's Brief, pages 19-24; Central Towers, 453 S.W.2d at p. 800. These factors led to the reversal of an award of attorneys' fees for a surety in Central Towers. They are present in this case, but are ignored by the trial court and Industrial in its Brief. Instead, Industrial relies on five arguments to justify the trial court's finding of fact no. 14.

Industrial first argues that James' insolvency had a potential, detrimental impact on Industrial that justifies the trial court's finding. See Appellee's Brief, pages 24-25. Industrial's argument is not valid because (1) Hood, as Industrial's guarantor, was financially able to indemnify Industrial throughout the litigation; and (2) by executing the Stipulation, Industrial consciously and willingly accepted Hood's guarantee as Industrial's sole security. See Appellant's Brief, Ex. D-15, Add. 75, Add. 24-25. Industrial cannot argue in good faith that a separate defense was necessary based on its subjective feelings of insecurity after the date of the Stipulation.

Industrial's second argument is that the defense provided by James was "never fully co-extensive with Industrial's independent defenses". See Appellee's Brief, pages 25-27. Industrial's argument is incorrect. Industrial filed its pleading

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<sup>2</sup>These factors are: (1) the absence of risk to the surety as a practical matter; (2) the solvency of the indemnitor (Hood); (3) the competency of the indemnitor's attorneys who were engaged to represent the surety's interest; (4) the active defense of the suit by the indemnitor's attorneys; and (5) the lack of conflict of interest between the indemnitor and the surety.

asserting its independent defenses on September 27, 1987, which defenses were dismissed by the trial court on May 17, 1988 (R. 968-70). After the dismissal, Industrial's defense was completely co-extensive with the defense of James.<sup>3</sup> Consequently, Industrial's claim of independent defenses does not support or justify its retention of separate counsel throughout the litigation or the trial court's award of post-Stipulation attorneys' fees.

Third, Industrial argues that Hood's inactivity and apparent lack of interest in the litigation support the trial court's finding of fact no. 14. See Appellee's Brief, pages 27-28. Whether Hood demonstrated adequate interest in the litigation is immaterial. Instead, the key is whether Industrial's exposure to risk justified its maintenance of a separate defense. Industrial was never exposed to any risk in the litigation. Hood, as Industrial's guarantor, maintained at least a \$20 million net worth throughout the litigation, which was made known to Industrial and was sufficient to satisfy any judgment on Industrial's \$1.128 million bond. See Appellant's Brief, pages 19-20, Ex. D-15, Add. 75.

Even if Hood's level of interest is properly at issue, Hood, James and its liability insurers expended approximately \$626,000 in attorneys' fees and expert fees in defense of the

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<sup>3</sup>On February 5, 1991 Industrial did ask the trial court to permit Industrial to raise an "overpayment defense" allegedly not available to James. (R. 1093-1107). The trial court denied that request on March 20, 1991 (R. 1458-59).

litigation. (R. 3294). The amount expended by Hood is hardly the act of an inactive or disinterested party.

In its fourth argument, Industrial states that Hood's refusal to post collateral supports the trial court's finding of fact no. 14. See Appellee's Brief, pages 28-29. Industrial did not request collateral from Hood until August 1987. (R. 3599-3602). Following months of negotiations, Hood and Industrial executed the Stipulation in April, 1988. (R. 902-09, Appellant's Brief Add. 20-27). The Stipulation unequivocally states that Industrial agreed to look only to Hood's net worth for security and relieved Hood of any obligation to post collateral. These undisputed facts establish only an eight-month window during which Industrial can plead insecurity, and even that claim is rendered void by the subsequent Stipulation with no separate security.

Despite these facts, the trial court determined Industrial acted reasonably in maintaining a separate defense and awarded Industrial all of its attorneys' fees. In its oral ruling, the trial court relied exclusively on Industrial's perceived insecurity as the sole basis for finding Industrial's attorneys' fees reasonable. See Hood's initial brief at pp. 22-24. The trial court abused its discretion since the posting of collateral was a non-issue for all but eight months of the litigation.

In its fifth and final argument, Industrial states that its separate defense and attorneys' fees were reasonable because Hood did not demand Industrial re-tender its defense until late in the litigation. See Appellee's Brief, pages 29-31. This argument

is misleading. Reed Brown, counsel for James, requested Industrial re-tender its defense on August 25, 1987. (R. 3188). Industrial refused to do so and instead demanded that Hood post collateral. In response to Industrial's demand, Hood and Industrial executed the Stipulation, which resolved the collateral issue. Industrial nevertheless stubbornly continued its separate defense. (R. 906-07, 3666, Appellant's Brief Add. 24-25, 50); Appellee's Brief, pages 8-9. Industrial incurred approximately \$71,500.00 in attorneys' fees between Mr. Brown's August 25, 1987 request for re-tender, and August 2, 1991, the date Industrial re-tendered its defense to Hood. (Ex. P-1). Industrial's incurrence of these fees was unreasonable especially in light of (1) Mr. Brown's request for re-tender, and (2) the execution of the Stipulation.

At page 13 of its brief, Industrial asserts:

with the exception of the period between James' rejection of Industrial's tender and the Stipulation reached with Hood, Industrial's counsel was involved only in monitoring the case, responding to discovery requests from plaintiff, participating in settlement discussion or filing motions and otherwise rendering assistance or expertise requested by James or Hood relating to Industrial's independent surety defenses and in support of general defense strategy.

Industrial's assertion is incorrect. Prior to June 25, 1987, (the date James rejected Industrial's tender), Industrial incurred attorneys' fees for attendance at depositions, trial preparation and other matters not mentioned by Industrial in the above synopsis. See Ex. P-1. The attorneys' fees Industrial incurred during this period totalled approximately \$21,825.87, the majority

of which were incurred through excessive and unreasonable fees for "monitoring the case".

After the Stipulation, Industrial continued to incur additional attorneys' fees of approximately \$88,000 (Ex. P-1). Yet, its own billing records belie Industrial's characterization of those fees. Even after the Stipulation, Industrial continued to attend depositions and perform other work not indicated above.

Industrial's arguments do not support the trial court's finding that Industrial acted reasonably in maintaining a separate defense throughout the Litigation. Hood has never contended Industrial should receive none of its attorneys' fees. The trial court abused its discretion in failing to exercise any discretion in evaluating Industrial's request. For these reasons, the trial court's entry of finding of fact no. 14 was an abuse of discretion and must be reversed.<sup>4</sup>

**E. The Trial Court's Award of Attorneys' Fees for Duplicative and Redundant Legal Services Was Improper as a Matter of Law**

Industrial argues that the trial court made no finding of fact or conclusion or law that Industrial incurred duplicative or unnecessary legal services. See Appellee's Brief, page 35. Because Hood claims the trial court committed an error of law in awarding Industrial fees for duplicative work, See Appellant's

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<sup>4</sup>Industrial does not directly confront Hood's arguments concerning the trial court's abuse of discretion in its Finding No. 25. Rather than repeating that argument here, Hood directs the Court's attention to pages 25-30 of its initial brief.

Brief, pages 30-36, the presence of absence of findings or conclusions is legally irrelevant.<sup>5</sup>

Hood identified various occurrences of duplicative or redundant representation by Industrial's counsel for which the trial court approved the recovery of attorneys' fees. See id. Industrial does not challenge or distinguish the legal authorities cited by Hood establishing the inability of an indemnitee to recover attorneys' fees for duplicative or redundant legal services. As a matter of law, Industrial's recovery of attorneys' fees must be limited to those reasonably and necessarily incurred and not for duplicative or redundant representation.

Of particular concern are the 11 depositions attended by counsel for James and by Industrial's separate counsel. The undisputed authority cited by Hood establishes that a surety cannot recover attorneys' fees incurred for attending depositions if such fees pay for duplicative services simultaneously being rendered by the principal's counsel. See Sentry Ins. Co. v. Davison Fuel & Dock Co., 60 Ohio App.2d 248, 396 N.E.2d 1071, 1074 (App. 1978). In addition, 5 of the 11 depositions occurred after the April 4, 1988 stipulation date Industrial identifies at page 8 of its Appellee's Brief. (R. 3366-81). Under the Stipulation, Industrial relied solely on Hood's financial strength as its guarantor in the litigation. (R. 906-07, Appellant's Brief Add. 24-25). Industrial

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<sup>5</sup>This is not an issue of fact as suggested by Industrial; rather, it is an issue of law reviewed under a correction of error standard.

had no risk and, therefore, no reasonable basis for attending those depositions.

Industrial cannot recover attorneys' fees expended for its counsel's unproductive attendance at depositions relating to Hood's and James' defenses or for other duplicative or redundant legal services.<sup>6</sup>

**F. The Trial Court's Award of Prejudgment Interest was Improper.**

Hood established in its initial brief that the abuse of discretion standard used to review an award of reasonable attorneys' fees is incompatible with an award of prejudgment interest. Industrial does not in any way address or challenge this incompatibility. Instead, Industrial argues that indemnity agreements are in some way different, making them an exception to controlling legal principles. To the contrary, indemnity agreements are not exceptions to the legal rules set forth in Hood's initial brief.

In Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350, 1360-61 (Utah App.), cert. denied, 795 P.2d 1138 (Utah 1990), two

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<sup>6</sup>At page 34 of its Brief, Industrial confuses Mr. Mariger's testimony concerning the reasonableness of attorneys' fees incurred as a result of a request for assistance. Judge Young asked Mr. Mariger if counsel for James requested Industrial's assistance, are Industrial's attorneys' fees incurred in response to such a request reasonable? Mr. Mariger responded that he "would have a hard time saying it was unreasonable . . ." Mr. Mariger further said, however, he could not believe Mr. Brown requested Industrial's assistance at the very time he requested Industrial to re-tender its defense. (R.3776-7). Mr. Mariger testified that Industrial's refusal to re-tender and subsequent negotiations to reduce Industrial's involvement through the Stipulation evidence Mr. Brown's attempt to remove Industrial from the defense of the Litigation. Id.

defendants appealed the trial court's denial of attorneys' fees pursuant to an indemnity agreement. That agreement provided indemnity "'from any and all claims and loss . . . including attorneys' fees . . . arising from claims' made by" the plaintiff. Id. at 1360. The indemnitees argued evidence of reasonableness was unnecessary because the fee request was made pursuant to an indemnity agreement. The trial court, however, denied the fee request because there was no evidence to support it.

In affirming the trial court, the Court of Appeals held: "We see no basis for distinguishing a request for attorney fees under an indemnity provision from a request under an attorney fee provision." Id. at 1361 (emphasis added). In addition, authorities cited by Hood in its initial brief specifically deny prejudgment interest on attorneys' fees arising in an indemnity context.

In United States v. Hardage, 985 F.2d 1427 (10th Cir. 1993), the trial court found a hazardous waste transporter/indemnitor liable for attorneys' fees incurred by a hazardous waste generator/indemnitee pursuant to various indemnification provisions. See Id. at pp. 1432-36. The trial court awarded the hazardous waste generator/indemnitee all requested attorneys' fees. The appellate court reversed and remanded that award for a determination of the reasonableness of those attorneys' fees. See Id. at 1436-37.

The trial court also awarded--as did the trial court in this action--prejudgment interest on all attorneys fees from the time of



each payment. It did so pursuant to Oklahoma law functionally identical to the rule in Utah.<sup>7</sup> The United States Court of Appeals for the Tenth Circuit reversed the trial court's prejudgment interest award, holding:

An award of attorneys' fees is not a sum certain where the reasonableness of those fees is still to be determined by the trial court. . . . Because we hold that the district court must determine the reasonableness of the legal expenses underlying the [attorneys' fees] assessments, the district court's award of prejudgment interest is reversed.

Id. at p. 1438.

In Tri-M Erectors, Inc. v. Drake, 27 Wash.App.2d 529, 618 P.2d 1341 (App. 1980) the employee of a construction subcontractor was injured. The employee sued the general contractor for damages and the general contractor tendered the defense to the subcontractor/employer pursuant to an indemnity agreement. The subcontractor/employer refused to defend the lawsuit as required by its indemnity agreement, and the general contractor/indemnatee was required to hire its own attorneys at an expense of \$76,797.90 as set by the jury. See id. at p. 1345. The general contractor/indemnatee was successful in its defense of the employee's action. See id. at p. 1342.

After the employee's suit was concluded, the subcontractor sued the contractor to recover money the subcontractor contended it

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<sup>7</sup>Okla.Stat. Ann. tit. 23 § 6 (West 1987) provides: "any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, . . ." Id. at p. 1438.

spent to replace and repair towers damaged in the employee's accident. See id. The contractor counterclaimed to recover, pursuant to the indemnification agreement, expenses it incurred in its defense of the employee's suit. The trial court dismissed the subcontractor's complaint, and granted the contractor's indemnity claim against the subcontractor. See id.

However, the trial court denied prejudgment interest on the award of attorneys' fees pursuant to the indemnity agreement. See id. at p. 1345. In affirming the trial court's denial of prejudgment interest, the Washington Court of Appeals held:

Prejudgment interest may be awarded

(1) when an amount claimed is liquidated, or (2) when the amount claimed is unliquidated and this amount is determinable by computation with reference to a fixed standard contained in the contract.

A claim is unliquidated if the principal must be arrived at by a determination of reasonableness.

The question of reasonableness of the attorneys' fees expended by Drake was determined by the jury. Until that was resolved by the jury, the claim was unliquidated. . . . therefore prejudgment interest on attorneys' fees was properly denied by the trial court.

Id. at p. 1346 (citations omitted).

Accordingly, Industrial is wrong in its unsupported assertion that prejudgment interest on attorneys' fees is somehow treated differently in an indemnity context.

Similarly, Industrial is wrong in its argument, at page 39 of its brief, that its attorneys' fee payments were liquidated.

Numerous authorities establish that the amount of reasonable attorneys' fees is unliquidated until the trier of fact makes a determination of reasonableness. See, e.g., Tri-M, 618 P.2d at p. 1346; ALI v. Jefferson Insurance Co., 5 Ohio App.3d 105, 449 N.E.2d 495, 499 (App. 1982); Perkins v. Standard Oil Co. of California, 487 F.2d 672, 675 (9th Cir. 1973).

Furthermore, Industrial is once again wrong when it asserts, at page 39 of its brief, that the trial court employed "no guesswork or estimation in the total of the fees incurred. . ." As Hood set forth at page 29 of its initial brief, the trial court exhibited guesswork in the extreme in its award of Industrial's reasonable attorneys fees: "I either take [\$]51,000.00 or I take [\$]122,000.00 if I buy the argument that they [Industrial] aren't entitled to any interest and I minus from that \$5,000.00 plus or minus for the errors in it, or I take \$171,000.00. Now every one of them strikes me as being somewhat arbitrary. Any one of the three." (R. 3800)(emphasis added). Whether viewed from a purely legal standpoint, or from the trial court's own perception that any particular award of attorneys' fees in this case would be "somewhat arbitrary," Industrial's attorneys' fees were not liquidated.

Finally, at page 40 of its brief, Industrial invites the Court to picture a parade of horrors whereby any indemnitor could avoid interest merely by challenging the "reasonableness" of attorneys' fees. Industrial drafted the Stipulation, which provided Hood would be liable only for Industrial's "reasonable" attorneys' fees. If sureties/indemnitees such as Industrial want to avoid a

challenge to the reasonability of the attorneys' fees they elect to incur, they may include a provision in indemnity agreements providing that an indemnitor will pay all of the surety's attorneys' fees incurred, without regard to reasonableness. Sureties similarly could insert a provision whereby the indemnitor specifically agrees that all attorneys' fees incurred by a surety are conclusively established as a liability of the indemnitor. Sureties may insert a provision requiring indemnitors to pay some fixed amount, liquidated in advance. Under any of these provisions, Utah law would authorize an award of prejudgment interest. Industrial did not, however, utilize a provision liquidating the attorneys' fees it chose to incur.

Industrial relies on only two cases in fashioning its argument regarding prejudgment interest. Those cases have no application to this appeal. Both Worthington & Kimball v. C & A Dev. Co., 777 P.2d 475 (Utah 1989) and Morrison-Knudsen Co., Inc. v. The Makahuena Corp., 66 Haw. 663, 675 P.2d 760 (1983) have nothing to do with either attorneys' fees or prejudgment interest. Both of these cases involved arbitrations, and the unique set of rules applicable in the arbitration context. As noted by the Worthington Court, American Arbitration Association Rule 43 provides that "[t]he arbitrator may grant any remedy or relief which is just and equitable and within the terms of the agreement of the parties." Worthington, 777 P.2d at p. 478. The Worthington Court held only that this rule, along with language in the contract between the parties providing that "unpaid sums due thereunder shall bear

interest at the rate paid on the construction loan or at the legal rate, whichever is greater," justified the arbitrator's award of 15% interest for reimbursement of out-of-pocket interest payments. Similarly, Makahuena involved a challenge only to the amount of post-judgment interest. Neither of these cases has any relevance to this appeal.

**G. Industrial is Not Entitled to Attorneys' Fees on Appeal**

In its separate February 17, 1994 Motion and Memorandum for Award of Attorneys Fees on Appeal and Remand to Trial Court to Assess Amount, Industrial asks this Court to award Industrial its attorneys' fees incurred on appeal. Numerous authorities establish that this Court should deny Industrial its attorneys' fees on appeal, even if it should prevail.

The Washington Supreme Court stated the rule that defeats Industrial's request:

We have not heretofore had occasion to consider whether attorneys' fees attributable solely to litigation of the indemnity issue itself are recoverable. The general, and virtually unanimous rule appears to limit the allowance of such fees to the defense of the claim indemnified against and not to extend such allowance for services rendered in establishing the right to indemnification. 41 Am.Jur.2d Indemnity § 36 (Supp.1974); 42 C.J.S. Indemnity § 13d (1944). We hold, therefore, that, in the absence of express contractual terms to the contrary, an indemnitee may not recover legal fees incurred in establishing his right to indemnification.

Jones v. Strom Construction Co., 84 Wash.2d 518, 527 P.2d 1115, 1119 (1974) (emphasis added). See also, Amazi v. Atlantic Richfield Co., 249 Mont. 355, 816 P.2d 431, 434-35 (1991) (the majority rule

is that a party is not entitled to its fees and costs incurred in establishing its right to indemnity); Signal Oil & Gas Co. v. The Barge W-701, 654 F.2d 1164, 1178 (5th Cir. 1981) cert. denied, 455 U.S. 944 (1982) (joining with the Eighth, Ninth and Tenth Circuits of the United States Court of Appeals in holding that, under a general indemnity agreement, an indemnitee enjoys no right to recover its legal fees incurred in establishing its right to indemnification); Ranger Const. Co. v. Prince William Cnty. School Bd., 605 F.2d 1298, 1304-05 (4th Cir. 1979); Simko v. C & C Marine Maint. Co., 594 F.2d 960, 968-69 (3rd Cir.), cert. denied, 444 U.S. 833 (1989) (both to the same effect).

Yet another United States Circuit Court of Appeals, the Second, has explained the reason for this rule:

Indemnity obligations, whether imposed by contract or by law, require the indemnitor to hold the indemnitee harmless from costs in connection with a particular class of claims. Legal fees and expenses incurred in defending an indemnified claim are one such cost and thus fall squarely within the obligation to indemnify. . . . Such reasoning does not apply to fees and expenses incurred in establishing the existence of an obligation to indemnify, since such expenses are not by their nature a part of the claim indemnified against. Rather, they are costs incurred in suing for a breach of contract, to wit, the failure to indemnify. As such, fees and expenses incurred in establishing the indemnity obligation fall within the ordinary rule requiring a party to bear his own expenses of litigation, see Berger, Court Awarded Attorneys' Fees: What is "Reasonable"?, 126 U.Pa.L.Rev. 281, 281 (1977). Cf. 5 Corbin, Contracts § 1037 (1964) (attorneys' fees and expenses may be covered if they constitute damages from the breach of a contract but not if they are incurred in proving the breach.)

Of course, when, as here, the obligation to indemnify arises out of a contract, the rule that an indemnitee cannot recover the costs of establishing the right to indemnification does not apply if "the agreement explicitly states otherwise." However, while the indemnity clause of Massport's contract with Italian Line, quoted above, contains the phrase, "including but not limited to cost of suit and attorneys' fees," these words are more naturally construed as referring to legal expenses incurred in defending against the primary claim. Merely including the words "attorneys' fees" among the expenses indemnified against in the main action cannot reasonably be viewed as causing a shifting of fees in an action to establish the obligation to indemnify.

Peter Fabrics, Inc. v. S.S. "Hermes", 765 F.2d 306, 316 (2nd Cir. 1985).

In Amazi v. Atlantic Richfield Co., an indemnitee sought indemnity totalling \$70,250.75. Of this sum, \$50,449.51 was expended in defending the case. The remaining \$19,801.24 was spent in trying to secure indemnity. The trial court awarded the amounts incurred in defending the case, and disallowed all sums the indemnitee incurred in securing indemnity.

The indemnitee claimed its entitlement to attorneys' fees incurred in attempting to secure indemnity arose from the following indemnity provision:

If indemnity is required by any of the terms of this Agreement, the responsible party shall defend the other and pay all settlements, judgments, costs, including reasonable attorneys fees, and other related expenses similar or dissimilar to the foregoing.

Id. at p. 435.

On appeal the indemnitee argued that such "related expenses" include attorneys' fees incurred in establishing its contractual right to indemnification. In doing so, the indemnitee cited the rule that contracts for indemnification are to be liberally construed in favor of the party intended to be indemnified. See id.

In rejecting the defendant's arguments, and affirming the trial court, the Montana Supreme Court held:

While contracts of indemnity are to be liberally construed in favor of the indemnitee, the provision here is not in and of itself such a contract. Rather it is a contract term allowing for recovery of certain attorneys' fees. Under the majority rule just adopted, such a term must be express in order for an indemnitee to recover legal fees incurred in establishing its right to indemnification. We conclude that the provision here is not sufficiently express, and affirm the District Court's adoption of the majority rule regarding such fees.

Id (emphasis provided by the Amazi court).

In addressing the issue in the context of appeals, the Arizona Court of Appeals indicated why Industrial's request cannot succeed:

[Indemnitee] has asked for its attorney's fees on appeal because the matter arises from contract. Under general indemnity principles, [indemnitee] would have no right to fees: the right of indemnity includes a right to attorney's fees incurred in defending the underlying claim, but does not include the right to fees incurred in establishing the right of indemnity.

INA Ins. Co. of N. America v. Valley Forge Ins. Co., 150 Ariz. 248, 722 P.2d 975, 983 (App. 1986). Similarly, Industrial cannot



prevail on its request for attorneys' fees on appeal because it can point to no sufficiently express contractual provision permitting it to recover attorneys' fees incurred in establishing its right to indemnification.

**III.**

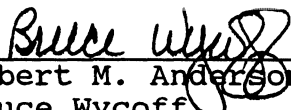
**CONCLUSION**

For the foregoing reasons, this Court should **reverse** the trial court's judgment, and **disallow** Industrial's requested attorneys' fees on appeal.

DATED this 16<sup>th</sup> day of March, 1994.

Respectfully submitted,

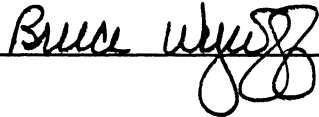
ANDERSON & WATKINS

  
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Robert M. Anderson  
Bruce Wycoff  
William H. Pruitt  
**Attorneys for Appellants**

**CERTIFICATE OF SERVICE**

On this 16<sup>th</sup> day of March, 1994, I hereby caused to be hand-delivered two true and correct copies of the foregoing **APPELLANT'S REPLY BRIEF** to the following:

Scott Daniels, Esq.  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, Suite 1100  
Salt Lake City, Utah 84111

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