2006

J. Pochynok Company, Inc., a Corporation v. Gregory Smedsrud and Louann Smedrud: Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

J. POCHYNOK COMPANY, INC., a Corporation, Plaintiff/Appellant, vs. GREGORY SMEDSRUD and LOUANN SMEDSRUD, Defendants/Appellees.	Case No. 20060308-CA

BRIEF OF APPELLANT

APPEAL FROM A FINAL CIVIL JUDGMENT OF THE THIRD DISTRICT COURT OF SALT LAKE COUNTY JUDGE J. DENNIS FREDERICK, CASE NO. 020901328

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ORAL ARGUMENT AND PUBLISHED DECISION IS REQUESTED

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DESIGNATION OF PARTIES

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

STATEMENT SHOWING JURISDICTION

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

STATEMENT OF ISSUES PRESENTED FOR REVIEW

(Including standards of appellate review and supporting authority.)

ISSUE ON APPEAL: WHETHER THE TRIAL COURT HAD ENOUGH INFORMATION TO PROPERLY DETERMINE THE "SUCCESSFUL PARTY" IN THIS CASE FOR PURPOSES OF AWARDING ATTORNEY FEES BASED UPON THE JURY VERDICT THAT WAS RENDERED IN THIS MATTER?

Applicable Standard of Appellate Review: When a trial court's rulings are based upon a misunderstanding or misapplication of the law, where a correct one would have produced a different result, the party adversely affected is entitled to have the error rectified in a proper adjudication under a correct principal of law. *Reed v. Avery*, 616 P.2d 1374 (Utah 1980); *Farris v. Jennings*, 595 P.2d 857 (Utah 1979) and *Cummings v. Nielson*, 42 Utah 157, 129 Pac. 519 (1912). Whether and the extent to which attorney fees are recoverable in an action is a question of law which is reviewed for correctness. *Selvage v. J.J. Johnson & Assocs.*, 910 P.2d 1252 (Ut. Ct. App. 1996).

Preservation of Issue: The above stated issue was preserved for appeal by the following: Defendants' Motion To Tax Costs And Attorney Fees (R. 387-389);

Memorandum Of Law In Support Of Defendants' Motion To Tax Costs And Attorneys' Fees (R. 435-459); Plaintiff's Motion For Award Of Attorney's Fees And Costs (R. 469-470); Plaintiff's Memorandum In Support Of Plaintiff's Motion For Award Of Attorney's Fees And Costs And In Opposition To Defendant's Motion To Tax Costs And Attorney's Fees (R. 572-592); Reply Memorandum In Support Of Defendants' Motion To Tax Costs And Attorneys Fees (R. 544-554); Memorandum In Opposition To Plaintiff's Motion For Award Of Attorneys' Fees And Costs (R. 567-571); Plaintiff's Reply Memorandum In Support Of Plaintiff's Motion For Award Of Attorney's Fees And Costs (R. 598-609); Minute Entry Ruling (R. 621-622); Judgment Upon Verdict And Order On Post Trial Motions (R. 635-640); Plaintiff's Rule 59(e) Motion To Amend Judgment (R. 650-651); Memorandum In Support Of Plaintiff's Rule 59(e) Motion To Amend Judgment (R. 652-666); Memorandum In Opposition To Plaintiff's Rule 59(e) Motion To Amend Judgment (R. 667-686); Reply Memorandum In Support Of Plaintiff's Rule 59(e) Motion To Amend Judgment (R. 706-718); Minute Entry Ruling (R. 726-727); Order Denying Motion To Amend Judgment (R. 729-731); Appellant's briefing in the Utah Court Of Appeals (Case No. 20020940-CA); Appellant's briefing in the Utah Supreme Court (Case No. 20040005-SC); Remittitur From Utah Supreme Court (R. 892-903); Remittitur – Order On Remand (R. 904-905); Pochynok's Request For New Jury Trial And Submission Of Form Of Special Verdict To Jury (R. 954-973); Pochynok's Submission Of Proposed Findings Of Fact And Conclusions Of Law (R. 974-975); and Smedsruds' Findings Of fact And Conclusions Of Law Re: Costs And Attorneys Fees (R. 984-992).

ISSUE ON APPEAL: WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO SET ASIDE THE GARNISHMENT OF POCHYNOK'S ACCOUNT AND FAILED TO RESINSTATE POCHYNOK'S MECHANIC'S LIEN?

Applicable Standard of Appellate Review: When a trial court's rulings are based upon a misunderstanding or misapplication of the law, where a correct one would have produced a different result, the party adversely affected is entitled to have the error rectified in a proper adjudication under a correct principal of law. *Reed v. Avery*, 616 P.2d 1374 (Utah 1980); *Farris v. Jennings*, 595 P.2d 857 (Utah 1979) and *Cummings v. Nielson*, 42 Utah 157, 129 Pac. 519 (1912).

Preservation of Issue: The above-stated issue was preserved for appeal by the following: Pochynok's Motion To Set Aside Garnishment, For Restitution, And To Reinstate Mechanic's Lien (R. 908-912); Memorandum In Support Of Pochynok's Motion To Set Aside Garnishment, For Restitution, And To Reinstate Mechanic's Lien (R. 908-912); Memorandum In Opposition To Pochynok's Motion To Set Aside Garnishment For Restitution And To Reinstate Mechanic's Lien (R. 913-936); Reply Memorandum In support Of Pochynok's Motion To Set Aside Garnishment, for Restitution, And To Reinstate Mechanic's Lien; Minute Entry Ruling (R. 944-945); Minute Entry (R. 946-949); and Minutes Law And Motion (R. 950).

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

Utah Code Annotated § 38-1-18. Attorneys' fees -- Offer of judgment.
(1) Except as provided in Section 38-11-107 and in Subsection (2), in any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action.

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

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

STATEMENT OF THE CASE

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

Pochynok, a general contractor, brought suit against the Smedsruds seeking to recover damages for breach of a construction contract and to foreclose its mechanic's lien. The Smedsruds asserted a counterclaim also seeking damages for breach of the construction contract. At trial, the jury found in favor of Pochynok awarding $7,076.56. There was no award entered on the jury verdict form in favor of the Smedsruds.

Pochynok and the Smedsruds each filed post trial motions asserting that they were the successful party at trial and sought costs and attorneys fees pursuant to Utah Code Ann. § 31-1-18. The Smedsruds argued that they were entitled to their attorney fees because they were the "successful party" in the litigation in accordance with § 38-1-18(1). Contrary to the Smedsruds position, Pochynok argued that as the only party to be awarded by the jury, Pochynok was in fact the "successful party" in the litigation, and therefore entitled to its attorney fees under § 31-1-18(1). The trial court ruled that the Smedsruds were the prevailing party and therefore entitled to recover all of their costs and attorney fees. The Smedsruds subsequently garnished $37,585.00 from Pochynok Company's bank account. Despite Pochynok's objections, the trial court upheld the garnishment.

This case was then appealed to the Utah Court of Appeals in 2002. *Pochynok v. Smedsrud*, 80 P.3d 563, 486 Utah Adv. Rep 27, 2003 UT App 375 (Ut. Ct. App. 2003). On appeal, Pochynok argued that it was entitled to costs and fees incurred in the action because it was the only party that received an award from the jury. Pochynok also contested the appropriateness of the garnishment. The Smedsruds argued that the trial court should have evaluated the successful party determination using a "flexible and reasoned" approach and further contended that the garnishment was appropriate. The Court of Appeals affirmed the trial court's rulings in all respects.

Pochynok thereafter petitioned to the Utah Supreme Court for a Writ Of Certiorari. The Utah Supreme Court granted the petition and heard the case. *Pochynok v. Smedsrud*, 116 P.3d 353, 528 Utah Adv. Rep 34, 2005 UT 39 (Utah 2004). The Utah Supreme Court expressed approval for the use of the "flexible and reasoned" approach, but reversed the Court of Appeals decision and directed the appellate court "to remand to the trial court for a factual determination of awards and offsets, followed by a ruling on who is the successful party under Utah Code section 38-1-18(1) and whether an award of attorneys fees under Utah Code section 38-1-18(3) is proper." Upon remand the attorney fees award was vacated pending the trial court's determination.

After remand and the setting aside of the attorney fees award, Pochynok sought to have the money that had been formerly garnished from its account returned. Pochynok further requested that the trial court reinstate its mechanic's lien. These issues were briefed and submitted to the trial court. Following oral argument the trial court declined to reinstate the mechanic's lien and took the garnishment issue under advisement. The

trial then directed the parties to submit proposed findings and conclusions in relation to the attorney fees issue.

Pochynok thereafter filed a motion for new trial along with its proposed findings and conclusions. Both the motion for new trial and proposed findings and conclusions averred that a new trial was warranted because the trial court did not have the information necessary from the jury to utilize the Utah Supreme Court mandated flexible and reasoned approach.

The Smedsruds filed their proposed findings and conclusions a few days later. On the same day the Smedsruds proposed finding and conclusions were filed, the trial court issued a minute entry which adopted the Smedsruds' proposal as the findings and conclusions of the trial court. The Smedsruds proposed findings and conclusions determined that the Smedsruds were the successful party in the litigation and were therefore entitled to *all* of their costs and fees. Pochynok appealed from the trial court's signed minute entry.

STATEMENT OF FACTS

1. In this action, Pochynok brought a breach of construction contract claim against the Smedsruds and sought to foreclose a mechanic's lien on real property owned by the Smedsruds. (R. 1-8) The Smedruds counterclaimed asserting they were entitled to substantial damages for breach of the same construction contract, which damages included unearned supervisor fees, workmanship defects and delay damages. (R. 19-29; 211-218)

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

3. At the conclusion of the evidence, the jury returned a verdict in favor of Pochynok Company in the amount of $7,076.56. (R. 354-355) The "general" jury verdict form read as follows:

> 1. Based on the law as it has been explained to us, we find in favor of plaintiff J. Pochynok Company, Inc., and against defendants Gregory and LouAnn Smedsrud, in the amount of $7,076.56.
> 2. Based on the law as it has been explained to us, we find in favor of defendants Gregory and LouAnn Smedsrud, and against plaintiffs J. Pochynok Company, Inc., in the amount of $_____.

4. Pochynok and the Smedsruds each filed post-trial motions requesting attorneys fees on the basis that each respective party was the "successful party" in the lien foreclosure action pursuant to § 38-1-18(1).

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

6. Judgment was entered in favor of the Smedsruds on August 13, 2002. (R. 635-640)

7. On September 12, 2002, funds in a Pochynok Company bank account were garnished by the Smedsruds in the amount of $37,585.00, and the garnishment was upheld by the trial court over Pochynok's objection. (R. 703-705, 728 and 849-851)

8. Pochynok Company sought appellate review of the trial court's determination that the Smedsruds were the successful party in the litigation. (R. 816-817)

9. In affirming the trial court's successful party determination, the Utah Court of Appeals stated as follows:

> Here, the jury's verdict form does not provide precise calculations of offsets the jury may have made for the Smedsruds' counterclaims for faulty workmanship, delay damages, and improper supervision. However, from the verdict, the trial court *could have* reasonable *inferred* such offsets by simply subtracting the jury's verdict of $7,076.56 from the $81,269.91 that Pochynok sought to recover in the lien enforcement action. The trial court could have reasonably concluded that the jury in fact found in favor of the Smedsruds on their counterclaims and offset these damages in the amount of $74,193.35 from Pochynok's initial claim. (emphasis added)

10. After receiving the Court of Appeals' decision, Pochynok filed a Petition For Writ Of Certiorari with the Utah Supreme Court.

11. The Utah Supreme Court reversed and remanded the Court of Appeals decision and directed the appellate court "to remand to the trial court for a factual determination of awards and offsets, followed by a ruling on who is the successful party under Utah Code section 38-1-18(1) and whether an award of attorneys fees under Utah Code section 38-1-18(3) is proper."

12. Based upon the Utah Supreme Court's decision, the attorney fees award in this case was vacated until the trial court made a determination of awards and offsets.

13. After the case returned to the trial court, Pochynok filed a motion to have the garnished money returned and for reinstatement of it's mechanic's lien. (R. 906-940)

14. The trial court denied reinstatement of the mechanic's lien, and took the garnishment issue under advisement. The trial court also directed that the parties file proposed findings and conclusions in relation to the successful party/attorney fees issue. (R. 946-950)

15. Pochynok then filed a request for a new trial, along with its proposed findings and conclusions. (R. 951-977)

16. A short time thereafter, the Smedsruds filed their proposed findings and conclusions. On the same day as their filing, the trial court entered the proposed findings and conclusions as the trial court's findings and conclusions.

17. Pochynok thereafter appealed the signed minute entry order in which the trial court adopted the Smedruds' proposed findings and conclusions as it own.

SUMMARY OF ARGUMENT

The trial court in this case did not have enough information from the jury to determine the successful party at trial for purposes of awarding costs and attorney fees. The trial court engaged in impermissible speculation in order to reach its findings and conclusions. As such, a new trial should be granted so a proper award of costs and attorney fees can be determined.

The trial court erred when it failed to return the proceeds which had been garnished from Pochynok's account, and further erred when if failed to reinstate Pochynok's mechanic's lien. After the Utah Supreme Court vacated the attorney fees award in this case, there was no valid legal basis for the Smedsruds to retain the garnished money.

ARGUMENT

ISSUE 1

WHETHER THE TRIAL COURT HAD ENOUGH INFORMATION TO PROPERLY DETERMINE THE "SUCCESSFUL PARTY" IN THIS CASE FOR PURPOSES OF

AWARDING ATTORNEY FEES BASED UPON THE JURY VERDICT THAT WAS RENDERED IN THIS MATTER?

The trial court in this matter did not have enough information from the jury to utilize the flexible and reasoned approach mandated by the Utah Supreme Court. The jury verdict form completed by the jury only provided for an award in favor of Pochynok and not for any award in favor of Smedsrud. The jury's May 22, 2002 Jury Verdict stated as follows:

> 1. Based on the law as it has been explained to us, we find in favor of plaintiff J. Pochynok Company, Inc., and against defendants Gregory and LouAnn Smedsrud, in the amount of $7,076.56.
> 2. Based on the law as it has been explained to us, we find in favor of defendants Gregory and LouAnn Smedsrud, and against plaintiffs J. Pochynok Company, Inc., in the amount of $_____.

The jury thus found Pochynok entitled to recover $7,076.56 from the Smedsruds. No amount was inserted in the blank providing for any award in favor of the Smedsruds.

Following trial, Pochynok and the Smedsruds each claimed attorney fees under Section 38-1-18 of Utah mechanic's lien law. Subsection (1) of Section 38-1-18 provides "the successful party" shall be entitled to recover reasonable attorney fees. Notwithstanding that the jury awarded $7,076.56 to Pochynok, and made no express award to the Smedsruds, the trial court ruled the Smedsruds the successful party for purposes of awarding attorney fees and did in fact award the Smedsruds' costs and attorneys fees against Pochynok in the amount of $84,036.54.

On appeal, the Utah Court of Appeals found the trial court properly determined the Smedsruds were the successful party, and noted the jury's verdict did not show whatever offsets the jury might have applied as to the Smedsruds' counterclaims. The appellate

court then stated the trial court *could have inferred* that the jury awarded the Smedsruds $74,193.35 in offsets and on that basis may have concluded the Smedsruds were the successful party.

The June 24, 2005 decision of the Utah Supreme Court reversed the decision of the Court of Appeals. The Supreme Court's decision notes that Pochynok filed a mechanic's lien for approximately $74,000.00 and that Pochynok had asserted a claim at trial for $81,269.91 not including costs or attorneys fees. The Supreme Court further noted that the Smedsruds claimed an unspecified amount of offsets and damages, claiming unearned supervisor fees, work defects and delays.

The Supreme Court's decision stated that the jury awarded Pochynok a verdict of $7,076.56 giving no indication of whether or by how much the jury may have offset the claims made by the Smedsruds against any larger Pochynok entitlement which might have entered into the jury's deliberations.

The Supreme Court held that the trial court should have first determined who was the "successful party" under subsection (1) of Section 38-1-18. The Supreme Court decision cites *A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 94 P.3d 270 (Utah 2004), a mechanic's lien case in which counterclaims were made although one party received a small recovery. *Whipple* held the trial court properly determined there was no "successful party", only essentially a draw and was justified in not awarding attorney fees. The Supreme Court stated that the *Whipple* decision means that rigid application of the net judgment rule could result in unreasonable awards of attorneys fees and deprive a trial court of power to apply discretion and common sense and said that the

"flexible and reasoned approach" outlined in *Whipple* and in *Mountain States Broadcasting Co. v. Neale*, 783 P.2d 551 (Utah Ct.App. 1989) "requires more information about the jury award for the parties' particular claims than is available in this case."

The Supreme Court further said that "because the jury's verdict did not indicate specific awards and offsets, the trial court did not have the information necessary to undertake such a balancing" (of amounts sought vs. what was recovered) and in its final conclusion said that "we conclude that the trial court could not have made this (successful party) determination without specific information regarding the total amount the jury awarded to Pochynok and the total amount in offsets it awarded to the Smedsruds."

The aforementioned statement presumes, without support from the record, that the jury made entitlement findings for both sides and then offset them to arrive at a net award in favor of Pochynok although the Supreme Court said the jury "did not provide this information in its verdict form."

The Supreme Court's decision states that the trial court should have made findings regarding "the amount sought and won by each party". However, the trial court was not in a position to do that for the very reasons stated several times in the Supreme Court opinion. The jury properly conducted its deliberations outside the presence of the trial court leaving no earmarked trail as to how it came to the award made to Pochynok.

The jury may have determined that Pochynok proved only part of Pochynok's claims. The jury may have determined the Smedsruds did not prove any of the Smedsruds' counterclaims. The jury may have determined the Smedsruds proved part,

but not all of their counterclaims and offset them against amounts it determined were owed Pochynok.

The jury's single entry on the jury verdict form leaves the parties, their counsel, the trial court, the Court of Appeals and the Supreme Court to speculate and guess as to whether and to what extent the jury may or may not have determined the Smedsruds were entitled to offsets against a larger amount the jury determined was earned by Pochynok or whether and the extent to which the jury decided the evidence was insufficient to support certain claims.

A "flexible and reasoned" approach to the fee entitlement issue cannot arise from speculation/supposition concerning the jury's verdict. The Supreme Court's opinion specifically rejects the "reasoned" suppositions made by the Court of Appeals concerning suppositions previously made by the trial court, emphasizing that it cannot be determined from the jury's verdict by what means the jury arrived at its result. The opinion of the Supreme Court did not and could not help the trial court speculate as to how the jury may or may not have proceeded in arriving at its award to Pochynok. There has been no waiver of the right to jury trial as to foundational factual issues in favor of speculative court findings of fact and conclusions of law made on a cold record three years after the trial as to the meaning of a simple jury verdict.

While the opinion of the Supreme Court does not specifically direct a retrial, it also does not and could not properly purport to deny the party's right to a jury trial on factual issues the opinion states are dispositive of the attorney fee entitlement issue.

The Supreme Court's opinion repeatedly emphasizes the fact that the trial court could not make a determination of entitlement to attorney fees without *additional information*. The Supreme Court's opinion repeatedly states such information is simply not available from the jury verdict. There is simply no source from which such information can be derived other than from pure speculation. The trial court, therefore, could not properly determine entitlement to attorney fees on the basis of its speculation concerning the means by which a jury may have arrived at the verdict in favor of Pochynok.

If the jury had inserted a total entitlement figure in the Pochynok award and a total entitlement figure in the blank provided for a Smedsrud award, would there be a starting point for application of the "flexible and reasoned" and "balancing (claims and recoveries) proportionally approach" directed by the Supreme Court?

No. Such figures would not alone suffice because as the Supreme Court's opinion points out "the jury verdict does not specify who won what". Further, as stated by the Supreme Court opinion:

> It "*gave no indication of whether, or by how much*, the jury offset the Smedsrud claim against Pochynok's claim". "[I]t is clear that the nature of the flexible and reasoned approach outlined in *Mountain States and Whipple* requires more information about the jury award *for the parties' particular claims than is available in this case*". "*Such an analysis in this case is impossible without more specific monetary figures*". "[B]ecause the jury's verdict did not indicate *specific awards and offsets* the trial court did not have the information necessary to undertake such a balancing". "[T]his insufficiency of information requires that we direct the court of appeals to remand this case to the trial court for a determination of awards and offsets..." (emphasis added)

The final paragraph of the June 24, 2005 opinion of the Utah Supreme Court directs the Court of Appeals "to remand to the trial court for a factual determination of awards and offsets, followed by a ruling on who is the successful party under Utah Code section 38-1-18(1) and whether an award of attorneys fees under Utah Code section 38-1-18(3) is proper."

To obtain the necessary information which the existing jury's verdict does not supply, a new jury trial must be granted. A properly drafted special verdict form with appropriate specific interrogatories must be submitted to the jury. Only in that way will a factual basis exist for determining an award of attorney fees.

While counsel for the appellant could find little Utah case law which evaluates facts similar to the case at hand, other jurisdictions have examined these issues. In *Kansas City Power & Light Companyv. Bibb & Assoiciates, Inc.*, __ S.W.3d __, 2006 WL 1222691 (Mo.App. W.D.) the Missouri Court of Appeals stated:

> In construing a verdict, the court determines if it can find a reasonable clear intent expressed therein. *Thorne v. Thorne*, 350 S.W.2d 754, 757 (Mo.1961), *overruled on other grounds by Douglass Safire*, 712 S.W.2d 373 (Mo. banc 1986); *Robinson v. Riverside Concrete, Inc.*, 544 S.W.2d 865, 871 (Mo.App.1976). The verdict is construed liberally when attempting to ascertain the jury's intent. *Id.*; *Lewis v. State*, 152 S.W.3d 325, 328 (Mo.App. W.D.2004) (quoting *Morse v. Johnson*, 594 S.W.2d 610, 616 (Mo. banc 1980)). To serve as the basis for the judgment, the jury's verdict must be clear, intelligible, consistent, and certain. *Robinson*, 544 S.W.2d at 871. It should be responsible to all of the material issues. *Thorne*, 350 S.W.2d at 757. The verdict should impart a definite meaning free from ambiguity and should show just what the jury intended. *Robinson*, 544 S.W.2d at 871. "[T]he verdict must be clear and unambiguous so that a judgment may be written upon it without resorting to inference or construction." *Lewis*, 152 S.W.3d at 328 (quoting *Morse*, 594 S.W.2d at 616). The parties are entitled to the unconditional judgment of the jury, rather than the court's interpretation of its findings. *Robinson*, 544

> S.W.2d at 871-872 (quoting *Boone v. Richardson*, 388 S.W.2d 68, 76 (Mo.App.1965), *overruled on other grounds by Douglass v. Safire*, 712 S.W.2d 373 (Mo. banc 1986)). A court may not speculate as to what the jury meant; and a verdict that requires speculation to determine its meaning cannon stand and cannot support a judgment entered thereon. *Id.* at 872; *Trimble v. Pracna*, 51 S.W.3d 481, 594 (Mo.App. S.D.2001).

In this case, the parties, the trial court and the appellate courts can only infer or speculate how the jury reached its verdict. Thus, it is impossible from the jury verdict form to determine on what claims, if any, the Smedsruds were successful. (As Pochynok did in fact receive an award from the jury, it is undisputable it was successful on part of its claims, however, the trial court did not take Pochynok's success at trial into account in any manner in purportedly balancing the parties' relative successes at trial.)

Moreover, it is open to question whether and the extent to which the Smedsruds were successful in regard to their unearned supervisory, work defect, and delay claims. For example, it is possible the jury could have found Pochynok completed work and enhanced the value of the Smedsruds' property in the amount of $50,000.00, thereby entitling an award of that amount in Pochynok's favor. Additionally, the jury could have also found that the Smedsuds incurred "delay" damages in the amount of $42,923.44, thereby entitling the Smedruds to an award against Pochynok in that amount. The jury could have netted these figures (rather than entering both figures on the jury verdict form), and found in favor of Pochynok in the amount of $7,076.56.

The problem is, even if the record in this case contained the amounts sought by both parties on their respective claims, it is impossible to know on what claims, and in what amounts, the jury felt the parties were successful. In the above example, the jury

could have concluded that Pochynok completed the work in a proper manner and was entitled to be paid. The jury could have also concluded that purported delays in completing the work caused the Smedsruds' damage. Both parties would therefore be entitled to recovery against the other.

This potential scenario (which based upon the lack of information from the jury is as viable as any other scenario) raises an additional important issue. It is doubtful that "delay damages" should in any way impact or "offset" the amount successfully asserted in a mechanic's lien claim in any event. In *Whipple,* the Supreme Court stated:

> We emphasize, however, that a court should look only to the parties' claims and counterclaims relating directly to the specific mechanic's lien at issue. Stated another way, when assessing which party is the "successful party" under the mechanic's lien statute, a court should confine itself to consideration of only those claims relating directly to both the particular property on which the mechanic's lien action is asserted *and the particular work on which the mechanic's lien action is based.* (emphasis added)
>
> *Id.* at 275.

From a common sense perspective, the lien claims are separate and distinct from the delay damage claims, and provide different remedies. Logically, delay damages have no direct relation to a mechanic's lien. Pursuant to Utah law, an appropriate mechanic's lien is solely based on the value of the service rendered, labor performed, or materials or equipment furnished or rented. Hence, if a contractor paints a room and thereby increases the value of property by $1,000.00, the owner of that property has received $1,000.00 in value, notwithstanding the fact that the room may not have been painted within the timeframe expected by the parties. The property owner may have been damaged by a delay and entitled to recover an appropriate amount for the delay, but the

delay in and of itself does not change the fact that the property owner did receive an enhancement in value to his property of $1,000.00, which would be the correct mechanic's lien amount.

Applying this reasoning to this case, even if the Smedsruds had paid Pochynok in full for work completed on the project, the Smedsruds would have still been entitled to sue Pochynok for any purported delay damages that were incurred in connection with the project. If the Smedsruds were successful in the suit, however, it is unlikely (barring a contractual provision) that the Smedsruds would receive their costs and fees as part of their recovery. Notably, costs and fees are what is presently at issue in this matter.

In other words, the Smedsruds could be "successful" on a work delay claim regardless of whether a mechanic's lien claim existed or not. The point being, if Pochynok Company established its lien claim for a certain amount, the fact that delay damages are established by the Smedsruds should not negate the fact that Pochynok did in fact establish the viability of its lien claim and its entitlement to statutory attorney fees for establishing its claim. As such, it would be inappropriate for a court to simply net the figures of a successful lien claim and a successful delay claim (two separate and distinct claims), and then determine that a party was or was not successful for purposes of an attorney fees award pursuant to the mechanic's lien statute based upon that net figure.

The trial court has also overlooked the fact that Pochynok was successful at trial (as it received an award), but has not taken this into account in awarding costs and fees. In effect, the trial court has granted the Smedsruds a clean win, granting *all* of their costs and fees in spite the successes Pochynok did have at trial.

This difficulty in this case is obvious. There is no way to know how the jury reached its conclusions. The parties and the courts can offer theories and rank speculation on the matter, but there is no way to *know*. Without information from the jury, the Supreme Court's mandated flexible and reasoned approach cannot properly be applied in this case. The balancing cannot occur and there cannot be an appropriate determination of awards and offsets. As such, for justice to occur, there must be a new trial in this case. Pochynok should also be awarded its costs and attorney fees in prosecuting this appeal pursuant to § 38-1-18.

ISSUE 2

WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO SET ASIDE THE GARNISHMENT OF POCHYNOK'S ACCOUNT AND FAILED TO RESINSTATE POCHYNOK'S MECHANIC'S LIEN?

The trial court erred when it failed to return the garnished funds to Pochynok and reinstate it mechanic's lien following the Supreme Court's decision. The Utah Supreme Court's decision caused the initial award of attorney's fees herein to be set aside. As such, any and all amounts the Smedsruds obtained from the garnishment proceeding founded on the trial court's award of attorney fees to the Smedsruds should have been returned to Pochynok. This is so because after the attorney fee award was vacated, there was no judgment amount which supported the Smedsruds retention of the garnished funds. Additionally, Pochynok's mechanic's lien on the Smedsruds' property should have been reinstated.

While there do not appear to be any Utah decisions that relate directly to the issues surrounding the return of garnished funds, other jurisdictions have evaluated similar

situations. For example, in *Baca v. Hoover, Bax, & Shearer*, 823 S.W.2d 734 (Tex. App.-Houston [14th Dist.] 1992, writ denied), the court indicated that the validity of a judgment in a garnishment action rests upon the finality of the underlying debt. The court continued, "If the judgment in the main suit is reversed, the garnishment proceedings become a nullity and the writs issued thereunder are *functus officio*, or of no further force or authority." The Texas court then determined that because the summary judgment had been reversed in that case, the garnishment proceeding became a nullity. The Texas court concluded that the garnishees were entitled to restitution of the funds that had been garnished from them.

Similar to the situation in *Baca*, in this case, the Utah Supreme Court has set aside the award of attorney's fees, which entitled the Smedsruds to garnish funds from Pochynok's account. As such, there was no legal basis for the Smedsruds to retain the funds that were garnished until the time the trial court had entered its ruling. Consequently, those funds should have been returned to Pochynok.

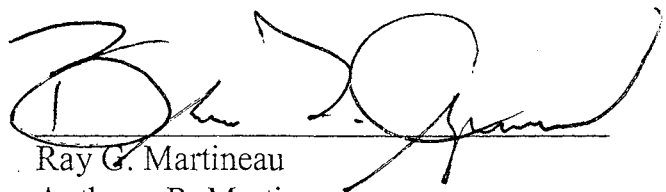
Additionally, the only net award remaining after the Supreme Court' and prior to the trial court's revised ruling was in Pochynok's favor. As such, Pochynok's mechanic's lien against the Smedsruds' property should have been reinstated as well.

CONCLUSION

Based upon the foregoing, Pochynok respectfully requests that this Court reverse the ruling of the trial court that the Smedsruds were the successful party herein on the basis that the trial court did not have enough information to make a proper determination of awards and offsets. Moreover, Pochynok respectfully requests that this Court

determine the trial court's failure to reinstate Pochynok's mechanic's lien and return Pochynok's garnished funds was in error. Finally, Pochynok requests an award of its costs and fees associated with this appeal.

RESPECTFULLY SUBMITTED this 12 day of June, 2006.



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

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Brief Of Appellant was served upon the following individuals by mailing two copies thereof, postage prepaid, to said individuals at the following address this 12 day of June, 2006.

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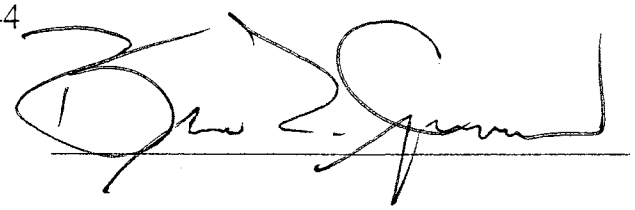

ADDENDUM

VINCENT C. RAMPTON (USB #2684)
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Attorneys for Gregory and LouAnn Smedsrud

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

J. POCHYNOK COMPANY, INC., a Corporation, Plaintiff and Counterclaim Defendant, vs. GREGORY SMEDSRUD; LOUANN SMEDSRUD; BUTTERFIELD LUMBER, INC., a Corporation; PELLA PRODUCTS, INC., a Corporation; BLAZE WHARTON CONSTRUCTION, INC., a Corporation; DIXIE WOODWORKS, INC., a Corporation; and JEFREY KAISER, doing business as RIO GRANDE PAINTING, Defendants and Counterclaim Plaintiffs.	**SMEDSRUDS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW RE COSTS AND ATTORNEYS FEES** Civil No. 020901328 Judge J. Dennis Frederick

Defendants Gregory Smedsrud and Louann Smedsrud by counsel and pursuant to this Court's order of February 6, 2006, submits the following proposed findings of fact and conclusions of law re costs and attorneys fees in the above-entitled action.

DATED this 27th day of February, 2006.

JONES, WALDO, HOLBROOK & McDONOUGH

By _____
Vincent C. Rampton
Ross I. Romero
Attorneys for Defendants and Counterclaim Plaintiffs Gregory Smedsrud and LouAnn Smedsrud

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing SMEDSRUDS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW RE COSTS AND ATTORNEYS FEES was mailed via first class mail, postage prepaid, to the following this 27th day of February, 2006:

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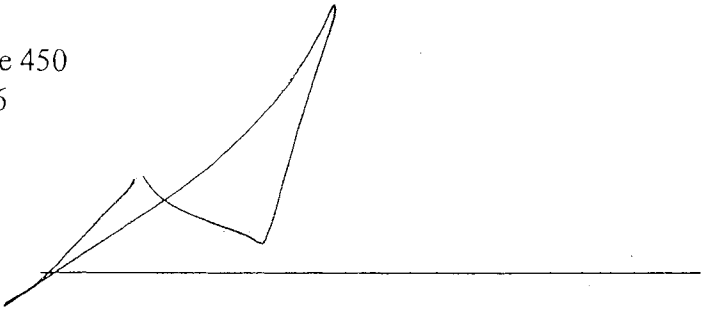

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

J. POCHYNOK COMPANY, INC., a corporation, Plaintiff, vs. GREGORY SMEDSRUD; LOUANN SMEDSRUD; BUTTERFIELD LUMBER, INC.; PELLA PRODUCTS, INC., a corporation; BLAZE WHARTON CONSTRUCTION, INC., a corporation; DIXIE WOODWORKS, INC., a corporation; and JEFREY KAISER, dba RIO GRANDE PAINTING, Defendants.	:	**FINDINGS OF FACTS AND CONCLUSIONS OF LAW RE COSTS AND ATTORNEYS FEES** Civil No. 020901328 Judge J. Dennis Frederick

Pursuant to directive of the Utah Supreme Court by Opinion dated June 24, 2005, the Court enters the following Findings of Fact and Conclusions of Law with respect to its award of costs and attorneys fees to Defendants Gregory Smedsrud and LouAnn Smedsrud ("Smedsruds") in the above-entitled matter:

FINDINGS OF FACT

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

2. J. Pochynok Company Inc. ("Plaintiff") had filed a complaint against Gregory Smedsrud and Lou Ann Smedsrud ("Smedsruds") to foreclose a mechanic's lien asserted for work allegedly performed to the Smedsruds' residence located at 7100 Canyon Road in Summit County, State of Utah.

3. Plaintiff's claims were based upon a Notice of Mechanic's Lien filed with the Summit County Recorder's office on October 19, 1999, in the amount of $74,360.51, together with interest, $100 in costs and attorneys' fees. See Exhibit 1 hereto.

4. Plaintiff had previously filed, and then released, a Notice of Mechanic's Lien against Defendants' property on July 26, 1999 in the amount of $150,000, plus interest, costs and attorneys' fees. See Exhibit 2.

5. Plaintiff also brought claims against the Smedsruds for breach of contract and quantum meruit.

6. The Smedsruds counterclaimed, asserting defective workmanship and failure to complete the project.

7. Pella Products, Inc. had asserted a crossclaim against Smedsrud; this, however, had been dismissed with prejudice pursuant to stipulation and prior order of this Court.

8. In addition, all claims of Plaintiff J. Pochynok Company, Inc. against Defendants Blaze Wharton Construction, Inc. and Jeffrey Kaiser were voluntarily dismissed without prejudice pursuant to Rule 41(a), Utah Rules of Civil Procedure prior to trial.

9. At trial, Plaintiff asserted a claim against Defendants in the amount of $81,269.91 (exclusive of costs and attorneys' fees).

10. Plaintiff offered inconsistent calculations, however, for money allegedly owed in the computation of its claim. Specifically, documentary evidence was introduced at trial showing inconsistent demands by Plaintiff for payment.

11. In addition, evidence was introduced that Plaintiff had filed the July 26, 1999 notice of mechanics' lien against Smedsruds' residence at a time when significant draw requests had recently been paid.

12. Smedsruds presented evidence challenging Plaintiff's accounting work, and establishing that Plaintiff's claim at trial, and its second notice of mechanics' lien, were excessive.

13. Smedsruds also presented evidence that they were entitled to significant offsets for unearned supervisor fees, work defects and delays. Specifically, Smedsruds presented evidence that

a. Paint work had been double charged, resulting in overcharge of $23,087.07;

b. Plaintiff's contractor fee on the paint work overcharged was likewise unwarranted, resulting in an overcharge of $2,308.71;

c. Smedsruds had been subjected to unwarranted delay costs of $3,118.75; and

d. Plaintiff's lien had been overstated, permitting offset in an amount equal to twice the overcharge amount, which Smedsruds placed at $11,535.96.

14. Smedsruds further produced evidence that they had never received a consistent accounting from Plaintiff despite nearly three years of negotiations and attempts, contradictory and inconsistent claims coming from Plaintiff right up to the eve of trial. Had Plaintiff been willing to

discuss a consistent claim in light of Defendants' demands and offsets, the case would not have gone to trial; absent a cogent accounting, though, Defendants had no choice but to submit the matter for a jury to decide

15. At the conclusion of the evidence, the jury returned a general verdict in favor of Plaintiff in the amount of only $7,076.56.

CONCLUSIONS OF LAW

1. With respect to an award of costs and attorneys fees to the "successful party" in this action, pursuant to Utah Code Ann. § 38-1-18(1), this Court is charged with applying a "flexible and reasoned approach" to the parties' relative successes in establishing their claims at trial – *AK&R Whipple Plumbing & Heating v. Aspen Construction,* 2004 Utah 47, ¶¶ 25-26, 94 P.3d 270.

2. At trial, Plaintiff asserted claims exceeding $81,000; Smedsruds, however (1) challenged the propriety of Plaintiff's accounting and claim, and (2) asserted an offset claim of $40,050.49, together with accrued judgment interest.

3. As such, Plaintiff recovered on only a small fraction of its original claim, which was reduced by a factor even greater than the dollar amount of Smedsruds' claimed offsets.

4. The trial court found Smedsruds' challenge to Plaintiff's claim, coupled with their asserted offsets, more persuasive than Plaintiff's offered evidence in support of its claim.

5. The trial court was further persuaded that, had Plaintiff offered an accurate accounting to Smedsruds, trial by jury might have been averted.

6. Under these circumstances, the court concludes that Smedsruds obtained a comparative victory, considering what total victory would have meant for each of the parties.

7. The court further concludes that Smedsruds obtained a full percentage of their claimed offsets.

8. Accordingly, the court concludes that Smedsruds were the "successful party" at trial, for purposes of Utah Code Ann. § 38-1-18(1).

9. In light of the foregoing, the court affirms its prior award of costs and attorneys fees to Smedsruds, and its prior denial of costs and attorneys fees to Plaintiff.

10. In light of the foregoing, the court likewise reaffirms its award of Smedsruds' costs and attorneys fees incurred after May 9, 2002, pursuant to Utah Code Ann. § 38-1-18(3), given that Smedsruds' May 9, 2002 Offer of Judgment was greater than Plaintiff's actual recovery at trial, with or without an award of costs and attorneys fees under Utah Code Ann. § 38-1-18(1).

11. The court therefore reaffirms its judgment upon verdict and order on post-trial motions entered August 15, 2002, as that order and judgment may hereafter be supplemented in the amount of any post-judgment costs and attorneys fees incurred by Smedsruds as may hereafter be established by affidavit.

DATED this _____ day of March, 2006.

BY THE COURT:

_____

J. Dennis Frederick, District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of February, 2006, I caused a true and correct copy of the foregoing proposed **FINDINGS OF FACT AND CONCLUSIONS OF LAW**, to be mailed, postage prepaid, to the following:

Ray G. Martineau
Anthony R. Martineau
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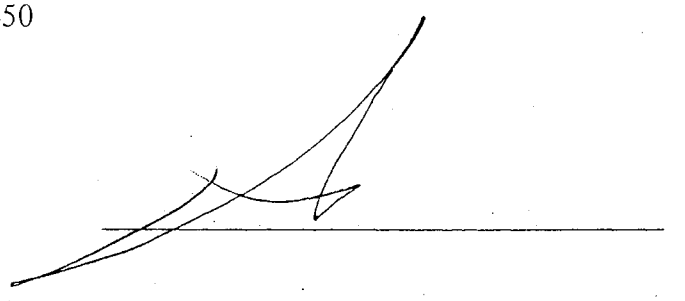

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

J. POCHYNOK COMPANY, INC., a Corporation, Plaintiff/Counterclaim Defendant, vs. GREGORY SMEDSRUD; LOUANN SMEDSRUD; BUTTERFIELD LUMBER, INC., a Corporation; PELLA PRODUCTS, INC., a Corporation; BLAZE WHARTON CONSTRUCTION, INC., a Corporation; DIXIE WOODWORKS, INC., a Corporation; and JEFREY KAISER, doing business as RIO GRANDE PAINTING, Defendants/Counterclaim Plaintiffs.	MINUTE ENTRY Case No. 020901328 Hon. J. DENNIS FREDERICK March 3, 2006

The above-entitled matter comes before the Court pursuant to the Proposed Findings of Fact and Conclusions of Law Re: Costs and Attorneys Fees, submitted by the parties in accordance with this Court's February 6, 2006 Minute Entry and in response to the Utah Supreme Court's concern regarding the need to enter additional findings to support this Court's prior award of attorney fees.

The Court having reviewed the respective submissions finds those submitted by Defendants Gregory and Louann Smedsrud accurately reflect the persuasive and credible evidence adduced at trial. Accordingly, the Court will enter the same as the Findings of Fact and Conclusions of Law Re: Costs and Attorneys Fees.

DATED this 3rd day of March, 2006.

J. DENNIS FREDERICK
DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 020901328 by the method and on the date specified.

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Dated this 3 day of March, 20 06.

Deputy Court Clerk