

2006

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

Utah Court of Appeals

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**J. POCHYNOK COMPANY, INC., a
Corporation,**

VS.

Defendants/Appellees.

:
:
:
:
:
: Case No. 20060308-CA
: Case No. 20060308-SC

: PRIORITY 15

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IN THE UTAH COURT OF APPEALS

J. POCHYNOK COMPANY, INC., a	:	
Corporation,	:	
	:	
Plaintiff/Appellant,	:	Case No. 20060308-CA
vs.	:	Case No. 20060308-SC
	:	
GREGORY SMEDSRUD and LOUANN	:	PRIORITY 15
SMEDSRUD,	:	
	:	
Defendants/Appellees.	:	
	:	

BRIEF OF APPELLEES

Appeal From a Final Civil Judgment of the
Third Judicial District Court of Salt Lake County
Judge J. Dennis Frederick, Case No. 020901328

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TABLE OF CONTENTS

STATEMENT OF JURISDICTION	6
PARTIES TO THE APPEAL	6
STATEMENT OF ISSUE ON APPEAL	6
STATEMENT OF THE CASE	8
FINDINGS OF FACT	13
CONCLUSIONS OF LAW	15
STATEMENT OF FACTS	16
PRIOR OR RELATED APPEALS	19
DETERMINATIVE PROVISIONS OF LAW	19
SUMMARY OF ARGUMENT	20
ARGUMENT	21
POINT I: THE TRIAL COURT PROPERLY DETERMINED THE SMEDSRUDS WERE THE SUCCESSFUL PARTY IN THIS CASE.	21
A. Attorneys' Fees Incurred After May 9, 2002.	22
B. Attorneys' Fees Incurred Prior to May 9, 2002.	23
POINT II: THE TRIAL COURT PROPERLY REFUSED TO SET ASIDE THE GARNISHMENT OF POCHYNOK'S ACCOUNT AND REINSTATE POCHYNOK'S MECHANICS LIEN.	30
CONCLUSION	34

TABLE OF AUTHORITIES

STATE CASES

<i>AK&R Whipple Plumbing & Heating v. Guy</i> , 47 P.3d 92 (UT App 2002)	2, 20, 21, 22, 23, 24
<i>Ault v. Holden</i> , 44 P. 3d 781 (Utah 2002)	2
<i>Baca v. Hoover, Backs & Shearer</i> , 823 S.W.2d 734 (Tex. App. - Houston [14th Dist.] 1992, writ denied)	28
<i>Bailey–Allen Company, Inc. v. Kurzet</i> , 945 P.2d 180 (Utah App. 1997)	29
<i>J. Pochynok Company, Inc. v. Gregory Smedsrud and Louann Smedsrud</i> , 2003 UT App 80	3
<i>J. Pochynok Company, Inc. v. Gregory Smedsrud and Louann Smedsrud</i> , 2005 UT 39, 116 P.3d 353	3
<i>Mountain States Broadcasting Co. v. Neale</i> , 783 P.2d 551 (Ut. 1989)	22
<i>Occidental/Nebraska Fed. Savings Bank v. Mehr</i> , 791 P.2d 217 (Ut. Ct. App. 1990)	21, 22, 23
<i>R.T. Nielson Company v. Cook</i> 2002 UT 11	22, 23
<i>Shipman v. Evans</i> , 2004 UT 44	18
<i>Shupe v. Menlove</i> , 18 Utah 2d 130, 417 P.2d 246 (1966)	2, 16, 19, 20, 25, 26
<i>State v. Rivera</i> , 954 P. 2d 225 (Utah 1997)	27

STATE STATUTES

Utah Code Ann. § 31-1-17	15, 19
Utah Code Ann. § 38-1-1	13
Utah Code Ann. § 38-11-107	15, 19
Utah Code Ann. § 38-1-17	2, 26
Utah Code Ann. § 38-1-18	2, 16, 19
Utah Code Ann. § 38-1-18(1)	12, 13, 15, 19
Utah Code Ann. § 38-1-18(2)	25
Utah Code Ann. § 38-1-18(3)	12, 13, 16, 18
Utah Code Ann. § 38-1-25	25
Utah Code Ann. § 57-1-32	21

OTHER

Rule 24, Utah Rule App. P.	12
Rule 41(a), U.R.Civ.P.	9
Rule 68, U.R.Civ.P.	18

Defendants and Appellees Gregory Smedsrud and LouAnn Smedsrud submit the following Appellees' Brief in the above-referenced proceeding.

STATEMENT OF JURISDICTION

Appellees agree with Appellant's statement of jurisdiction of this case.

PARTIES TO THE APPEAL

The parties to the appeal are Plaintiff and Appellant J. Pochynok Company, Inc. (hereafter "Pochynok"), and Defendants and Appellees Gregory Smedsrud and LouAnn Smedsrud (hereafter "Smedsruuds").

STATEMENT OF ISSUE ON APPEAL

1. Whether the trial court properly followed the Supreme Court's mandate on remand by making factual determinations necessary to determine that Smedsruuds were the "successful parties" in this case for the purposes of awarding attorneys fees based upon the jury verdict rendered in this matter.

This issue concerns the trial court's apportionment of costs (including attorneys' fees) under Utah Code Ann. §§ 38-1-17 and 38-1-18. As applicable case law clothes the trial court with discretion in this analysis, its decision in this regard is reviewable under an abuse of discretion standard – *Shupe v. Menlove*, 18 Utah 2d 130, 417 P.2d 246 (1966); *AK&R Whipple Plumbing & Heating v. Guy*, 47 P.3d 92 (UT App 2002); *Ault v. Holden*, 44 P. 3d 781 (Utah 2002).

2. Whether the trial court properly denied Pochynok's Motion to Set Aside Garnishment, for Restitution, and to Reinstate Mechanic's Lien; alternatively, whether the trial court's entry of findings and conclusions rendered that Motion moot.

Smedsrud challenges that this issue was properly preserved incident to this appeal. The general question of the propriety of the trial court's garnishment proceeding was previously appealed to this court (Appeal No. 20020940), and affirmed by this Court's prior decision therein (*J. Pochynok Company, Inc. V. Gregory Smedsrud and Louann Smedsrud*, 2003 UT App 80; P.3d 563, Addendum at No. 1). The issue was not accepted for review by the Supreme Court on certiorari – see Supreme Court decision in *J. Pochynok Company, Inc. V. Gregory Smedsrud and Louann Smedsrud*, 2005 UT 39, 116 P.3d 353, Addendum at No. 2. Neither was any review of the garnishment order made part of the order on remand – Addendum at No. 2. Accordingly, it was not properly before the trial court on remand, and is not properly before this court on appeal.

To the extent properly appealable, the trial court's ruling on this issue (assuming that such ruling may be implied from the findings and conclusions entered – see Argument at Point II, below) was not based on “a misunderstanding or misapplication of the law”, but followed from the carrying out of the Supreme Court's mandate to enter findings and conclusions bearing on whether Smedsruds remained the “successful party”

at trial. Again, given the court's underlying discretion in determining the "successful party" in this action, the trial court's ruling should be viewed for abuse of discretion

STATEMENT OF THE CASE

This case concerns the construction of a residence in Summit County, State of Utah. Smedsruks, as owners, were sued by Pochynok for breach of contract and *quantum meruit*. Pochynok further sought to foreclose the later of two mechanic's liens asserted against the Smedsruks' residence. Smedsruks counterclaimed, asserting defective workmanship and failure to complete the project.

The matter was set for jury trial commencing May 21, 2002. On May 9, 2002, counsel for Smedsruks presented Pochynok with an offer of judgment in the amount of \$40,000 (see Addendum at No. 3 hereto, R 408-410). Pochynok declined the offer, and the case proceeded to trial on the claim as pleaded, *Smedsruk having paid no portion thereof, to Pochynok or its subcontractors, in the interim.*

The case was tried to a jury on May 21-22, 2002. In its case in chief, Pochynok initially claimed \$81,269.91 in damages (having plead \$74,360.51 in its Complaint – R. 1-6; 200-207); during the course of trial, though, Plaintiff/Appellant was inconsistent in the computation of its claim. Defendants, by contrast, presented evidence that they were entitled to significant offsets for unearned supervisor fees, work defects and delays. Defendants 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. See Defendants' Exhibits D-29 and D-46. 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. (R. 390-434).

Following deliberation, the jury returned a verdict (net of offsets) of only \$7,096.00 for Pochynok. See Addendum at No. 4 (R. 354-355). Pochynok did not appeal the jury verdict, nor did it order a transcript of the trial for inclusion in the record herein.

On May 31, 2002, Defendants and Appellees moved the court for an order taxing costs and attorneys' fees which they had incurred in the litigation. Plaintiff/Appellant J. Pochynok Company opposed the motion of Defendants and Appellees, and filed its own motion for an award of costs and fees. Both parties submitted evidence of costs and attorneys' fees in the form of affidavits by legal counsel.

By minute entry dated July 25, 2002 (R. 621-622), the trial court granted Defendant/Appellees' motion to tax costs and attorneys' fees, and denied Plaintiff/Appellant's motion. Judgment upon the verdict was thereupon entered by the Court on August 5, 2002 as follows:

a. Judgment was entered in favor of Plaintiff J. Pochynok Company, Inc., and against Defendants Gregory Smedsrud and LouAnn Smedsrud, jointly and severally, in the amount of \$7,076.56, together with interest thereon from and after May 22, 2002 until paid in full at the contract rate of 12% per annum.

b. Judgment was entered in favor of Defendants Gregory and LouAnn Smedsrud, jointly and severally, and against Plaintiff J. Pochynok Company, Inc., in the following amounts:

- i. \$1,906.94, representing Defendants' costs of suit incurred prior to May 9, 2002;
- ii. \$48,083.10, representing Defendants' attorneys' fees incurred prior to May 9, 2002;
- iii. \$766.50, representing Defendants' costs of suit incurred on and after May 9, 2002;
- iv. \$33,280.00, representing Defendants' attorneys' fees incurred on and after May 9, 2002; and
- v. Interest was awarded on the foregoing amounts from and after May 22, 2002 until paid in full, at the contract rate of 12%.

The Judgment further denied Plaintiff/Appellant's petition for foreclosure of its mechanic's lien against the residence of Defendants/Appellees, holding that Plaintiff/Appellant held no right, title or interest therein. See Addendum at No. 5 (R. 635-640).

On August 23, 2002, Pochynok moved the court for an order altering or amending the judgment under Rule 59 (e), Utah Rules of Civil Procedure, which was denied by order of the lower court on October 7, 2002 (R. 629-631). Pochynok filed its Notice of Appeal on November 4, 2002. By Order dated December 20, 2002 (R. 854-855), this matter was referred to the Court of Appeals for decision. Following briefing and argument, the Court of Appeals issued its decision on November 6, 2003 (Addendum at No. 1).

Pochynok petitioned the Utah Supreme Court for certiorari on January 5, 2004. By order dated March 18, 2004, the Supreme Court granted certiorari on the sole issue of whether Smedsruks had properly been deemed the "successful parties" at trial for purposes of the award of costs and attorney's fees (Addendum at No. 2). On June 1, 2004, Pochynok submitted its brief on Certiorari. On June 30th, the Smedsruks submitted their Brief on Certiorari. On August 2, 2004, Pochynok submitted its Reply Brief.

On June 24, 2005, the Supreme Court issued an opinion upholding the Court of Appeals' use of the flexible and reason approach in its review of the trial courts

determination of the “successful party.” The Supreme Court recognized that the trial court should have made findings regarding the amounts sought and awarded by each party. In addition, the Court indicated that a determination of the successful party under §38-1-18 should have occurred before the calculation required under subsection (3) and that any attorneys’ fee award under subsection (1) should then be included in the subsection (3) calculation of whether any offer of judgment was greater than the judgment finally obtained at trial. Finally, the Court remanded to the Court of Appeals with instruction to remand to the trial court for a factual determination of awards and offsets, followed by a ruling of who was the successful party under Utah Code Ann. § 38-1-18(1), and whether an award of attorneys’ fees under § 38-1-18(3) was proper.

Addendum at No. 2.

On November 15, 2005, Pochynok moved the trial court for an order setting aside the writ of garnishment previously entered, ordering restitution of garnished funds, and reinstating its mechanic’s lien (R. 904-912). The trial court, by order dated February 6, 2006, took Pochynok’s motion under advisement and, consistent with the Supreme Court’s directive, requested Pochynok and the Smedsrud to each prepare and submit proposed Findings of Fact and Conclusions of Law. Both parties submitted proposed findings and conclusions.

On March 3, 2006, the Court signed the Findings of Fact and Conclusions of Law submitted by Defendant/Appellees Smedsrud, as follows:

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 Smedsruks' residence at a time when significant draw requests had recently been paid.

12. Smedsruks 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. Smedsruks also presented evidence that they were entitled to significant offsets for unearned supervisor fees, work defects and delays. Specifically, Smedsruks 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. Smedsruks 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 Smedsruks placed at \$11,535.96.

14. Smedsruks 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; Smedsruks, 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 Smedsruks' claimed offsets.

4. The trial court found Smedsruks' 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 Smedsruks, trial by jury might have been averted.

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

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

8. Accordingly, the court concludes that Smedsruks 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 Smedsruks, and its prior denial of costs and attorneys fees to Plaintiff.

10. In light of the foregoing, the court likewise reaffirms its award of Smedsruks’ costs and attorneys fees incurred after May 9, 2002, pursuant to Utah Code Ann. § 38-1-18(3), given that Smedsruks’ 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 Smedsruks as may hereafter be established by affidavit. . .

Findings of Fact and Conclusions of Law, R. 984-992, Addendum at No. 6¹.

STATEMENT OF FACTS

Smedsruks defer to the trial court’s Findings of Fact and Conclusions of Law, set out at pp. 8-10, above. As stated therein, and in compliance with Rule 24, Utah R. App. P., Smedsruks reiterate those facts as follows:

1. By this action, Plaintiff and Appellant J. Pochynok Company, Inc. sought an order of the Court foreclosing a mechanic’s lien interest in property located at 7100

¹The record does not contain a separate ruling on Pochynok’s Motion to Set Aside Garnishment, etc., which the Court took under advisement pending submission of proposed findings and conclusions.

Canyon Road in Summit County, State of Utah, pursuant to Utah Code Ann. § 38-1-1, *et seq.* See Plaintiff's Amended Lien Foreclosure Complaint herein (R. 200-208).

2. Pochynok'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 (R. 208-402).

3. Pochynok 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 (R. 405).

4. Defendants' Answer and Counterclaim asserted, *inter alia*, defective workmanship and delay damages. See Defendants' Answer to Pochynok's Amended Lien Foreclosure Complaint and Counterclaim herein (R. 19-29; 211-218).

5. This matter was set for trial to a jury commencing May 21, 2002.

6. On May 9, 2002, Defendants submitted to Pochynok, through its counsel, an offer of judgment in the amount of \$40,000, tendered pursuant to Utah Code Ann. § 38-1-18(3). See Addendum 1 hereto (R. 408-410).

7. Contrary to Pochynok's groundless, unsupported and false declaration (see Appellants' Brief at pages 3 and 5), Smedsrud paid no subcontractors after May 9, 2002.

8. At trial, Pochynok asserted a claim against Defendants in the amount of \$81,269.91 (exclusive of costs and attorneys' fees). See Pochynok's Trial Exhibit 26 (R. 412-431).

9. During trial, Defendants presented evidence that they were entitled to significant offsets for unearned supervisor fees, work defects and delays. Defendants further produced evidence that they had never received a consistent accounting from Pochynok despite nearly three years of negotiations and attempts, contradictory and inconsistent claims coming from Pochynok right up to the eve of trial. R. 390-434.

10. At the conclusion of the evidence, the jury returned a general verdict in favor of Pochynok in the amount of only \$7,076.56. See Addendum 2 hereto (R. 354-355).

11. Prior to and through May 9, 2002, Defendants incurred \$1,906.94 in costs and \$48,083.10 in attorneys' fees. Affidavit of Ross I. Romero (R. 435-459).

12. Between May 10, 2002 and the entry of judgment, Defendants/Appellees incurred \$775.70 in costs and \$33,280.00 in attorneys' fees. Affidavit of Ross I. Romero (R. 435-459).

PRIOR OR RELATED APPEALS

Pochynok filed its Notice of Appeal on November 4, 2002. By Order dated December 20, 2002, this Court transferred the matter to the Utah Court of Appeals for disposition (Appeal Number 20020940-CA). Oral argument was presented to the Court of Appeals on October 16, 2003. The Court of Appeal's opinion issued November 6, 2003, affirming the trial court's rulings in all respects (Addendum 4 hereto). Pochynok petitioned for Writ of Certiorari on January 5, 2004, granted by Order of this Court dated March 18, 2004. On June 24, 2005 the Supreme Court issued its Opinion remanding the case to the trial court to enter more specific findings of facts and conclusions of law as to the awards and offsets as well as who was the successful party.

DETERMINATIVE PROVISIONS OF LAW

1. Utah Code Ann. § 31-1-17:

Except as provided in § 38-11-107, as between the owner and the contractor, the Court shall apportion the costs according to the right of the case. . . .

2. Utah Code Ann. § 38-1-18(1):

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

3. Utah Code Ann. § 38-1-18(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 offerer after the offer was made.

SUMMARY OF ARGUMENT

The trial court in adopting the Smedsruds' proposed Findings of Facts and Conclusion of Law found they were the "successful parties," for purposes of Utah Code Ann. § 38-1-18.

The balancing test mandated by *Shupe v. Menlove*, 18 Utah 2d 130, 417 P.2d 246 (1966), coupled with the "flexible, reasoned approach" to determining the "successful party," as mandated in the case law handed down since that time, dictate that Smedsruds were clearly the successful parties in this case. They defeated all but a fraction of Pochynok's mechanic's lien claims through assertion of rights of setoff. Moreover, given their statutory entitlement to post-May 9 attorneys' fees, the net recovery in the case goes in favor of Defendants and Appellees, and renders them the "successful parties" under any definition.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DETERMINED THE SMEDSRUDS WERE THE SUCCESSFUL PARTY IN THIS CASE.

The Utah Supreme Court's ruling on certiorari herein expressly adopted the "flexible and reasoned approach" to determining the "successful party" in a mechanics' lien action. It acknowledged, moreover, that the trial court could well conclude, upon proper factual findings, that Smedsruuds had been the "successful parties" at trial herein:

"Though [the] insufficiency [of information in the trial court record concerning the trial court's inference and conclusions] requires that we direct the court of appeals to remand this case to the trial court for a determination of awards and offsets, it does not necessarily follow, as Pochynok contends, that Pochynok is the successful party. Our difficulty is with the trial court's process, not necessarily the outcome. After a determination of the awards and offsets likely considered and made by the jury, it is entirely possible that the trial court might once again conclude that the Smedsruuds are the successful party.

Addendum at No. 2, p. 6.

On remand, the trial court accepted the assignment to enter findings and conclusions concerning "the awards and offsets likely considered and made by the jury", and concluded – again – that under the "flexible, reasoned approach" articulated by the Supreme Court in its order of remand, Smedsruuds were the "successful parties".

Addendum at No. 6. While much of what follows is repetitive of prior briefing in this

case, it established once again the propriety of the trial court's compliance with the Supreme Court's mandate herein.

A. Attorneys' Fees Incurred After May 9, 2002.

Utah Code Ann. § 38-1-18(3) provides as follows:

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 offerer after the offer was made.²

The language of 38-1-18(3) is mandatory.³ By making their offer of judgment of \$40,000 on May 9, 2002, Defendants/Appellees became statutorily entitled to a recovery of all costs and attorneys' fees incurred after that date if Plaintiff/Appellant, as lienholder, failed to recover more than the amount of the offer at trial. It is undisputed that Plaintiff's/Appellant's recovery, net of offsets asserted by Defendants/Appellees, was only a fraction of the offer amount. Without more, then, Defendants and Appellees were statutorily entitled to an award of costs in the amount of \$775.70, and attorneys' fees in the amount of \$33,280.00.

² Rule 68, Utah Rules of Civil Procedure, permits the extension of an offer of judgment at any time more than 10 days prior to the commencement of trial.

³ That an award of attorneys' fees is a matter of right where provided by statute or contract, *see Shipman v. Evans*, 2004 UT 44.

B. Attorneys' Fees Incurred Prior to May 9, 2002.

On remand, the trial court acted well within its discretion in determining, under a totality of circumstances, that Smedsruks were the "successful parties" at the trial of this matter, and awarding costs and fees under Utah Code Ann. § 38-1-18.

The Utah Supreme Court has held that the term "successful party" for purposes of award costs and attorneys' fees, must be viewed in light of two separate statutory provisions, which have been interpreted to complement each other. Utah Code Ann. § 38-1-18(1) provides as follows:

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

Utah Code Ann. § 31-1-17, however, reads as follows:

Except as provided in § 38-11-107, as between the owner and the contractor, the Court shall apportion the costs according to the right of the case. . . .

In the case of *Shupe v. Menlove*, 18 Utah 2d 130, 417 P.2d 246 (1966), the Utah Supreme Court was faced with a case in which (precisely as in the case before the Court in this action) a building contractor sought to foreclose a mechanic's lien claim against a property owner pursuant to a cost-plus-ten-percent building contract. There, as here, the jury had returned a verdict in favor of the contractor, but for substantially less than the

amount of the contractor's mechanic's lien claim or the amount asserted at trial. The trial court rejected the contractor's claim that he had been the "successful party" at trial. This Court affirmed. In its opinion, the Court quoted the language of § 17 and 18 of the Mechanic's Lien Statute set out above, and then stated the following:

It is plain that these two sections relating to this subject should be construed together and that when attorney fees are awardable thereunder, they are to be treated as costs, which, as expressed in 38-1-17 the Court 'shall apportion the cost according to the right of the case.'

417 P.2d at 249.

More recent cases are in accord. Pochynok has cited *AK&R Whipple Plumbing & Heating v. Guy*, 47 P.3d 92 (UT App 2002), for the proposition that a "successful party" in a mechanic's lien action must be determined by a mechanical, winner-take-all, net-recovery rule. Contrary to this argument, though, the *Whipple* decision stands for the proposition that a trial court's determination of who is the "successful (or prevailing) party" is *not* a mechanical process at all (unless all claims run one way only); that, where claims in a civil action run both ways and both parties are to a degree successful, the court must adopt "a flexible and reasoned approach," taking into consideration the practical and substantive outcome of the litigation. In fact, the court's opinion, while determining that "successful party" and "prevailing party" were synonymous terms, expressly noted that:

we do not suggest that whether a claim is ultimately determined to be enforceable under the conditions of Section 38-1-18 is not a factor to be considered in determining which party or parties prevail or are successful.

(47 P.3d at 95.)

The *Whipple* decision, moreover, expressly invoked and affirmed the Court of Appeals' decision in *Occidental/Nebraska Fed. Savings Bank v. Mehr*, 791 P.2d 217 (Ut. Ct. App. 1990), the holding which expressly validates the Court's ruling in this action. In *Occidental*, the plaintiff brought a trust deed deficiency action against the Defendant, seeking also an award of costs and attorneys' fees (in that case under Utah Code Ann. § 57-1-32). The trial court observed that, of its six-figure deficiency claim, the plaintiff recovered only \$7,339.44. Based thereon, the trial court determined that, even though plaintiff obtained a judgment against Defendants, they were the "prevailing parties" by reason of the nominal amount thereof, and awarded them costs and attorneys' fees. The court of appeals affirmed:

At trial, Occidental obtained a judgment of approximately \$7300. It argues that a money judgment in its favor entitles it to attorneys' fees as the prevailing party. *As stated above, this court has recognized the need for a flexible and reasoned approach to making determinations of who is the prevailing party.*

In the case at hand, Occidental claimed a balance due of over \$600,000 resulting from the trustee's sale held in April 1986. . . . The Mehrs were successful in defending against Occidental's claim for a \$600,000 deficiency based on the April sale. The Mehrs successfully demonstrated the validity

of the December sale, thus the deficiency judgment was for the stipulated amount of \$7339.44. In light of the circumstances involved and the issues contested at trial, the trial court did not err in granting the Mehrs attorneys' fees and costs as the prevailing party.

791 P. 2d at 222. In *Occidental/Nebraska Fed. Savings*, then, as in the instant case, the trial court sustained an award of attorneys' fees to a party which successfully defeated all but a token amount of the opposing party's claim. *Occidental* directly defeats the claim of Plaintiff in this action to the effect that any award of a money judgment automatically entitles the recipient to the status of "prevailing party," and to an award of attorneys' fees as a matter of law. Rather, the Court must look to the realities of the case, and adopt the Court of Appeals' "flexible and reasoned approach" to an award of attorneys' fees. Under the *Occidental/Nebraska* decision, as affirmed in *Whipple*, the Court's ruling in this action should stand.

Finally, the "flexible and reasoned approach" dictated by *Occidental* and *Whipple* was affirmed and expanded in the recent Utah Supreme Court decision of *R.T. Nielson Company v. Cook* 2002 UT 11, 2002 Utah LEXIS 16 (Utah 2002):

As the court of appeals noted in *Mountain States Broadcasting Co. v. Neale*, determining the prevailing party for purposes of awarding fees can often times be quite simple. 783 P.2d 551, 555 (Ut. 1989). Where a plaintiff sues for money damages, and plaintiff wins, plaintiff is the prevailing party; if defendant successfully defends and avoids adverse judgment, defendant has prevailed. *Id.* *This simple analysis cannot always be employed, however. . . .*

Which party is the prevailing party is an appropriate question for the trial court. This question depends, to a large measure, on the context of each case, and, therefore, it is appropriate to leave this determination to the sound discretion of the trial court. We therefore review the trial court's determination as to who was the prevailing party under an abuse of discretion standard. Appropriate considerations for the trial court would include, but are not limited to, (1) contractual language, (2) the number of claims, counterclaims, cross-claims, etc., brought by the parties, (3) the importance of the claims relative to each other and their significance in the context of the lawsuit considered as a whole, and (4) the dollar amounts attached to and awarded in connection with the various claims. Based on these and other relevant factors, the trial court is in a better position than we are as an appellate court to decide which party is the prevailing party. In most cases involving language similar to the contractual language before us here, there can generally be only one prevailing party. [Citations omitted.] However, the standard articulated above will permit a case-by-case evaluation by the trial court, and flexibility to handle circumstances where both, or neither, parties may be considered to have prevailed.

2002 Utah Lexis at 25.

In this action, the “right of the case” plainly dictated that Defendants and Appellees Gregory and Louann Smedsrud be deemed the “successful parties” for purposes of an award of costs and attorneys’ fees, and the trial court so found. Under the *R.T. Nielson* standard, as well as that in *Occidental* and *Whipple*, the trial court’s determination was clearly the correct outcome, and should not be disturbed.

Pochynok’s recovery on its ever-changing mechanic’s lien claim amounted to less than 10% of its pleaded claim amount, and barely 8% of its asserted amount at trial. The

jury, as trier of fact, must be presumed persuaded that Pochynok's claim was not only excessive, but should be all but eclipsed by Smedsruds' claimed offsets.

It was Pochynok's inability, and unwillingness, to furnish a consistent accounting on the project which necessitated adjudication of this matter to begin with. Smedsruds tried repeatedly, both before and after completion of the project, to persuade Mr. Pochynok to sit down with them and resolve the account. Rather than do so, Pochynok simply made repeated demands for payment, the amount of the demand changing each time (often several times in the course of only a few days). Not only were the numbers inconsistent, but none would acknowledge a single penny of offset for improper work or delays.

The language of *Whipple*, mandating a "flexible, reasoned approach" to determining the "successful party" in attorneys' fee awards has specific application to this case, where Smedsruds offered judgment for nearly six times Plaintiff's ultimate recovery, and thus became entitled as a matter of law to all attorneys' fees incurred after May 9, 2002 (the sum total of which far eclipsed Plaintiff's jury verdict). While *Whipple* rejected the strict "net recovery" rule in cases where (as here), both parties realize on claims, Smedsruds' statutory entitlement to post-May 9 attorneys' fees clearly dictates a net balance in their favor. Certainly, under the "flexible and reasoned approach" mandated by *Whipple*, the court's decision in this case is unassailable.

Any practical application of the principles set out in the decision of *Shupe v. Menlove*, dictates that, apportioning costs and attorneys' fees between owners and contract "according to the right of the case" dictates that Smedsruks – not J. Pochynok Company – were the "successful party," and should be awarded their costs and attorneys' fees.

As noted above, moreover, J. Pochynok Company filed two successive liens against Smedsruks'/Appellees' property in connection with its claims in this matter. The first, for \$150,000, was released not long after its filing; the second, for some \$74,000, remained pending through trial. Yet the jury's verdict – clearly applying Smedsruks' offset claims – was for just over \$7,000 total. Both notices of lien were for amounts far in excess of that which J. Pochynok Company was ultimately entitled. The purpose of the liens' filing was to secure payment to Pochynok for an amount greater than that actually owing.

Under Utah Code Ann. § 38-1-25, the filing of an excessive lien under the circumstances set out above constitutes a misdemeanor.⁴ It is self-evident that, in taxing

⁴ Since this action was filed, Utah Code Ann. § 38-1-25 has been amended to permit a right of civil recovery for wrongful lien filing. In addition, Utah Code Ann. § 38-1-18(2) has been added since the filing of this action, statutorily denying to a mechanic's lien claimant the right to recover any attorneys' fees whatever in the event that its lien filing is adjudged wrongful. While these provisions were not in effect at the time Pochynok's notices of mechanic's liens were filed in this action, they plainly

costs (including attorneys' fees) "according to the right of the case," as mandated by Utah Code Ann. § 38-1-17 and *Shupe v. Menlove*, the Court could take into account the fact that the mechanics lien which Pochynok sought to vindicate by this action (as well as its predecessor) were shown at trial to be excessive, wrongful and illegal on their face. Under such circumstances, Smedsruks and Appellees were properly awarded their attorneys' fees as the "successful parties."

POINT II

THE TRIAL COURT PROPERLY REFUSED TO SET ASIDE THE GARNISHMENT OF POCHYNOK'S ACCOUNT AND REINSTATE POCHYNOK'S MECHANICS LIEN.

This matter was remanded to the trial court for one purpose only: to enter findings and conclusions assessing "the awards and offsets likely considered and made by the jury" at trial, in order to revisit the question of whether Smedsruks were the "successful parties" at trial (Addendum at No. 2, p. 6). Pochynok's prior challenge to the post-judgment garnishment of its bank account was unsuccessful before this Court, and was not accepted for review under the Supreme Court's writ of certiorari (*Id.* At p. 1). As such, it was not properly before the trial court at all, and not reviewable here. The Utah Supreme Court's ruling remanded for a factual determination of awards and offsets,

codified what was already clear in the law – that the pursuit of excessive mechanic's liens is contrary to public policy.

followed by a ruling on who is the successful party and (if appropriate) a determination of attorney fees. In reaching its conclusion, the Supreme Court upheld the trial Court's use of the "flexible and reasoned approach" for determining the successful party. The Supreme Court did not instruct the trial court to order the attorneys fees and costs to be returned, rather, it sought only clarification from the trial court for its order. Indeed, as addressed at length in the Supreme Court's opinion, it expressly *rejected* Pochynok's claim that it was the "successful party," deferring this question to the trial court upon more explicit findings of fact.

There is some question, moreover, whether any final ruling exists in the record on Pochynok's motion from which an appeal can be taken. The motion was taken under advisement by the trial court's minute entry ruling of February 6, 2006 (R. 950), and never thereafter addressed on the record of the trial court. The claim, strictly speaking, may be unappealable.

As a practical matter, however, the motion on garnishment issues has been rendered moot, for purposes of this appeal, by the trial court's findings and conclusions (Addendum at No. 6). An issue on appeal is "moot" whenever the requested relief cannot affect the rights of the litigants – *State v. Rivera*, 954 P. 2d 225 (Utah 1997). At the time the motion was made, the trial court had already determined that Smedsruks were the "successful parties", entitled to recovery of costs and fees. The trial court's reaffirmation

of that finding upon remand mooted any interim claim of impropriety of the garnishment proceeding. Given the trial court's proper carrying out of the Supreme Court's mandate (with the same result), Pochynok cannot claim injury by reason of the garnishment – Smedsruks remain entitled to the garnished funds.

Neither did Pochynok's demand for restitution of garnished funds have merit at the time it was raised before the trial court. Pochynok cites the case of *Baca v. Hoover, Backs & Shearer*, 823 S.W.2d 734 (Tex. App. - Houston [14th Dist.] 1992, writ denied) to support its proposition that garnished funds should be returned to Pochynok. The *Baca* decision, however, presents a very different factual scenario. Therein, a judgment underlying a garnishee judgment was *dismissed* – not remanded for further proceedings. Given this situation, the Texas Court of Appeals properly ruled that the garnishment was inappropriate:

A garnishment is not an original suit, but ancillary to the main one, and for that reason takes its jurisdiction from the main suit. [citations omitted] Thus, when the trial court loses jurisdiction in the main suit by reason of an appeal, it likewise loses jurisdiction in the ancillary garnishment proceeding. [citation omitted] *If the judgment in the main suit is affirmed, the trial court regains jurisdiction over the garnishment action. . . 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.*

823 SW.2d at 738 (emphasis added). Smedsruks certainly acknowledge that, given the Supreme Court's ruling, the trial Court regained jurisdiction of both the underlying cause

of action and the garnishment action. The underlying judgment, however, was not reversed and vacated by the remand; rather, the trial Court was charged with the taking of further proceedings in the form of factual findings sufficient to sustain its conclusion that, in fact, Smedsruks were the “successful party,” and entitled to their costs and fees by law. Pending that determination, the ancillary garnishment proceeding (of which the trial Court likewise regained jurisdiction) was held in abeyance.

Pochynok’s request that the trial Court reinstate its mechanic’s lien was and remains a mystery. Nowhere in the Supreme Court’s opinion was such relief mandated, or even implied. Indeed, it seems to contemplate the outcome of the mandated factual findings in Pochynok’s favor before findings have even been made, an approach which the Supreme Court’s decision expressly forbade. In fact, Pochynok took no appeal from this Court’s order releasing its claim of mechanic’s lien. Decisions of the trial court from which no appeal was taken are preserved and remain in full force and effect, unaffected by any portions of the trial court’s decision reversed or remanded pursuant to appeal. *See, Bailey–Allen Company, Inc. v. Kurzet*, 945 P.2d 180 (Utah App. 1997) (“any portion of a judgment not appealed from continues in effect, regardless of the reversal of other parts of the judgment”—945 P.2d at 194).

CONCLUSION

Pochynok's essential argument is simple: He asserted a claim of nearly \$100,000, yet walked away from trial with a recovery (net of Smedsruks' asserted offsets) of less than \$8,000. Nevertheless, Pochynok claims, he was the "successful party" simply because Smedsruks did not succeed in extinguishing his claim altogether.

Case precedent from both this Court and the Court of Appeals has long since debunked such a mechanical approach to determining who is the "successful party" in multi-claim construction litigation. The Utah Legislature has required that costs (including fees) be apportioned "according to the right of the case." Case law has repeatedly mandated a "flexible, reasoned approach."

The nature of the claims and counterclaims asserted by the parties, the accounting information which was included in the record, and the jury's resulting verdict, paint a fair picture: Pochynok severely abused a contractor's legal lien rights in this case, and was not successful in vindicating its conduct. This position was supported in the Court entering the Findings of Facts and Conclusion of law submitted by the Smedsruks.

Add to the foregoing the fact of Smedsruks' May 9, 2002 offer of judgment, in an amount more than five times Pochynok's ultimate verdict, and the trial court's discretionary award of attorneys' fees to Smedsruks becomes even more compelling.

Based on the foregoing, it is submitted that the Court correctly found the Smedsruds were the successful party and that the garnishment was proper as well as the denial of Pochynok's mechanic's lien.

DATED this 23rd day of July, 2006.

JONES WALDO HOLBROOK & McDONOUGH PC

By 

Vincent C. Rampton

Ross I. Romero

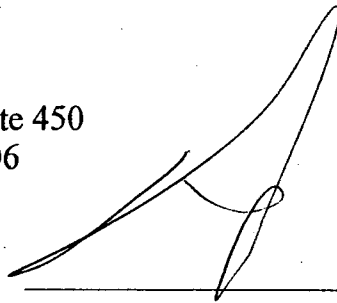
Attorneys for Gregory and LouAnn Smedsrud

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of July, 2006, I caused to be mailed by first class mail, postage prepaid, a true and correct copy of the foregoing APPELLEES'

BRIEF to the following:

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

A handwritten signature in black ink, appearing to be 'Ray G. Martineau', is written over a horizontal line.

Tab 1

ADDENDUM 1

► Court of Appeals of Utah.
J. POCHYNOK COMPANY, INC., a corporation,
Plaintiff and Appellant,

v.

Gregory SMEDSRUD; Louann Smedsrud;
Butterfield Lumber, Inc., a corporation;
Pella Products, Inc., a corporation; et al.,
Defendants and Appellees.
No. 20020940-CA.

Nov. 6, 2003.

Contractor brought action against homeowners, seeking to foreclose a mechanics' lien and to recover for breach of contract, and homeowners counterclaimed for breach of contract. The District Court, Salt Lake Department, J. Dennis Frederick, J., entered judgment for contractor, but awarded costs and attorney fees to homeowners. Contractor appealed. The Court of Appeals, Billings, Associate Presiding Judge, held that: (1) homeowners were "successful party" and, thus, entitled to award of attorney fees and costs, and (2) funds in contractor's business account were subject to garnishment.

Affirmed.

West Headnotes

[1] Mechanics' Liens ⚡309

257k309 Most Cited Cases

Appellate court reviews a trial court's determination as to who was the prevailing party, for purposes of determining entitlement to attorney fees, in action to enforce a mechanics' lien, under an abuse of discretion standard. U.C.A.1953, 38-1-18(1).

[2] Appeal and Error ⚡842(1)

30k842(1) Most Cited Cases

Whether an amended statute operates retroactively is a question of law, which appellate court reviews for correctness without deference to the trial court.

[3] Appeal and Error ⚡1008.1(5)

30k1008.1(5) Most Cited Cases

Appellate review of factual findings is highly deferential, requiring reversal only if a finding is clearly erroneous.

[4] Mechanics' Liens ⚡310(1)

257k310(1) Most Cited Cases

Homeowners were "successful party" in contractor's action to enforce a mechanics' lien, and thus homeowners were entitled to award of attorney fees and costs, even though contractor obtained judgment for \$7,076.56, where contractor did not accept homeowners' offer to settle for \$40,000, contractor recovered only ten percent of amount initially sought, and it was reasonable to conclude that jury found in favor of homeowners on their counterclaims and offset those damages from contractor's initial claim. U.C.A.1953, 38-1-18(1).

[5] Appeal and Error ⚡1024.1

30k1024.1 Most Cited Cases

Because prevailing party status depends, to a large measure, on the context of each case, the trial court is in a better position than an appellate court is to decide which party is the prevailing party for purposes of determining entitlement to attorney fees.

[6] Garnishment ⚡56

189k56 Most Cited Cases

Funds in contractor's business account were subject to garnishment, even though contractor intended to use such funds to pay subcontractors; use of funds was solely in discretion of contractor.

[7] Banks and Banking ⚡154(6)

52k154(6) Most Cited Cases

[7] Banks and Banking ⚡227(1)

52k227(1) Most Cited Cases

There is a rebuttable presumption that the funds in a bank account belong to the account owner.

*564 Brett D. Cragun, Ray G. Martineau, and

80 P.3d 563, 486 Utah Adv. Rep. 27, 2003 UT App 375

(Cite as: 80 P.3d 563, 2003 UT App 375)

Anthony R. Martineau, Salt Lake City, for Appellant.

Vincent C. Rampton and Ross I. Romero, Jones Waldo Holbrook & McDonough, Salt Lake City, for Appellees.

Before JACKSON, P.J., BILLINGS, Associate P.J. and GREENWOOD, J.

OPINION

BILLINGS, Associate Presiding Judge:

****1** Pochynok Company, Inc. (Pochynok) appeals the trial court's posttrial order awarding costs and attorney fees to Gregory and Louann Smedsrud (the Smedsruds) and upholding garnishment of Pochynok's account at Zions First National Bank over its objections. We affirm.

BACKGROUND

****2** In August 1998, Pochynok and the Smedsruds entered into a construction contract wherein Pochynok agreed to build a residence for the Smedsruds in Summit County and in return the Smedsruds agreed to pay Pochynok for his services as a general contractor. On January 13, 2000, Pochynok filed a complaint against the Smedsruds alleging breach of contract arising from the Smedsruds' failure to pay \$81,269.91 for services rendered. Pursuant to the Utah mechanics' liens statute, [FN1] Pochynok sought to foreclose a mechanics' lien on the Smedsruds' Summit County property to recover the unpaid amounts. The Smedsruds counterclaimed for breach of the same construction contract alleging defective workmanship, delay damages, and failure to supervise. On May 9, 2002, pursuant to rule 68 of the Utah Rules of Civil Procedure and Utah Code Annotated section 38-1-18(3) (2001), [FN2] the ***565** Smedsruds submitted an offer of judgment in the amount of \$40,000, which Pochynok did not accept. A jury trial ensued in late-May 2002. At the conclusion of trial, the jury rendered a verdict awarding \$7,076.56 to Pochynok. [FN3]

FN1. See Utah Code Ann. §§ 38-1-1 to 29 (2001 & Supp.2003).

FN2. In 2001, the Utah Legislature amended Utah's mechanics' liens statute to include a provision governing offers of judgment in mechanics' lien disputes. See Utah Code Ann. § 38-1-18(3) (2001). The amendment became effective on April 30, 2001, after Pochynok filed its complaint, but before the Smedsruds filed their May 9, 2002 offer of judgment. See *id.* (Amendment Notes).

FN3. The verdict form does not indicate what damages, if any, were awarded to the Smedsruds to offset Pochynok's claimed damages of \$81,269.91.

****3** Thereafter, both Pochynok and the Smedsruds filed posttrial motions claiming to be the "successful party" for purposes of the mechanics' liens statute, and requesting costs and attorney fees. In addition, the Smedsruds asserted that under section 38-1-18(3), they were entitled to costs and attorney fees incurred after May 9, 2002, because Pochynok did not accept the Smedsruds' offer of judgment, which was more favorable than the subsequent jury award for Pochynok.

****4** The trial court determined the Smedsruds were the successful party under the mechanics' liens statute, and accordingly granted the Smedsruds' motion to tax costs and attorney fees to Pochynok. Concurrently, the trial court ordered Pochynok to pay the Smedsruds \$49,990.04 in costs and attorney fees incurred prior to May 9, 2002, and \$34,046.50 in costs and attorney fees incurred after May 9, 2002, for a total award of \$84,036.54.

ISSUES AND STANDARDS OF REVIEW

[1][2] ****5** First, Pochynok claims the trial court erred in determining the Smedsruds were the "successful party" under the amended mechanics' liens statute. Utah Code Ann. § 38-1-18(1) (2001). "We ... review the trial court's determination as to who was the prevailing party under an abuse of discretion standard." *R.T. Nielson Co. v. Cook*,

80 P.3d 563, 486 Utah Adv. Rep. 27, 2003 UT App 375

(Cite as: 80 P.3d 563, 2003 UT App 375)

2002 UT 11, ¶ 25, 40 P.3d 1119. Pochynok also asserts the trial court erred in giving retroactive effect to subsection 3 of Utah's mechanics' liens statute. See Utah Code Ann. § 38-1-18(3). "Whether a[n amended] statute operates retroactively is a question of law, which we review for correctness without deference to the [trial] court." *State Dep't of Human Servs. v. Jacoby*, 1999 UT App 52, ¶ 7, 975 P.2d 939 (quoting *Evans & Sutherland Computer Corp. v. State Tax Comm'n*, 953 P.2d 435, 437 (Utah 1997)).

[3] **6 Finally, Pochynok claims the trial court erred in finding Pochynok's business account funds were not exempt from garnishment. See Utah R. Civ. P. 64D(h)(iii). "Appellate review [of factual findings] is highly deferential, requiring reversal only if a finding is clearly erroneous." *Drake v. State Indus. Comm'n*, 939 P.2d 177, 181 (Utah 1997).

ANALYSIS

I. "Successful Party" Under Section 38-1-18(1) of the Mechanics' Liens Statute

**7 As the sole beneficiary of the jury verdict of \$7,076.56, Pochynok claims to be the successful party under Utah Code Annotated section 38-1-18(1) (2001). Hence, Pochynok argues the trial court erred in awarding costs and attorney fees to the Smedsruks. Subsection 1 of the mechanics' liens statute provides that "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." Utah Code Ann. § 38-1-18(1).

**8 Utah courts describe a "successful party" under the mechanics' liens statute as the "party in whose favor a judgment is rendered ... the 'prevailing party.'" *A.K. & R. Whipple Plumbing & Heating v. Guy*, 2002 UT App 73, ¶ 11, 47 P.3d 92 (*Whipple II*) (quoting Black's Law Dictionary 1145 (7th ed.1999)), cert. granted, 2002 Utah LEXIS 187, 59 P.3d 603. However, the successful or prevailing party "may [be] the party who defended against the lien." *Bailey-Allen Co., Inc. v. Kurzet*,

876 P.2d 421, 428 (Utah Ct.App.1994) (citing *566 *Palombi v. D & C Builders*, 22 Utah 2d 297, 452 P.2d 325, 327-28 (1969)); see also *Whipple II*, 2002 UT App 73 at ¶ 9, 47 P.3d 92 ("A successful party includes, but is not limited to, one who successfully enforces or defends against a lien action.").

**9 Utah appellate courts "have addressed [various] methodologies for determining which party or parties ... occupy prevailing party status" under the circumstances of a particular case. *Whipple II*, 2002 UT App 73 at ¶ 12, 47 P.3d 92. Citing to *Whipple II*, Pochynok contends that the trial court should have employed a "net recovery" or "net judgment" analysis to determine the successful party in this case. Pochynok misconstrues our reasoning in *Whipple II* and ignores our holding in that case. The facts underlying *Whipple II* are detailed in *A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 1999 UT App 87, 977 P.2d 518 (*Whipple I*). The case involved a plaintiff subcontractor who obtained a trial judgment for \$3,943.00 and an order allowing foreclosure on three mechanics' liens against the defendant general contractor. See *id.* at ¶ 1, 977 P.2d 518. Determining the plaintiff was the successful party under the mechanics' liens statute, the trial court awarded the plaintiff \$7,500.00 in attorney fees. See *id.* at ¶ 9, 977 P.2d 518.

**10 On appeal however, we vacated a portion of the trial court's order because the plaintiff was not properly licensed to perform some of the work for which it obtained judgment. See *id.* at ¶¶ 12, 21, 977 P.2d 518. In light of our disposition of the judgment, we also remanded the attorney fees issue "for a redetermination of the prevailing party and a proper allocation of attorney fees to that party." *Id.* at ¶ 40, 977 P.2d 518.

**11 On remand, the trial court denied the plaintiff's claim for foreclosure on the mechanics' lien relating to the work the plaintiff was not licensed to complete. See *Whipple II*, 2002 UT App 73 at ¶ 5, 47 P.3d 92. Based on the plaintiff's resulting net recovery, the trial court determined

80 P.3d 563, 486 Utah Adv. Rep. 27, 2003 UT App 375

(Cite as: 80 P.3d 563, 2003 UT App 375)

that the "outcome was essentially a 'draw' " and concluded neither party prevailed for purposes of awarding attorney fees under the mechanics' liens statute. *Id.*

****12** On appeal for the second time, the defendant argued that because the trial court's calculations on remand resulted in a \$527.00 net recovery for the defendant, the trial court should have awarded the defendant attorney fees as the successful party under the mechanics' liens statute. *See id.* at ¶¶ 5-6, 47 P.3d 92. Like Pochynok, the defendant argued the trial court's successful party determination should have been wholly based on a net recovery analysis. *See id.* at ¶ 10, 47 P.3d 92. This court was not persuaded. Noting that "[t]he facts and circumstances surrounding a determination of prevailing party status vary widely," we declared "the 'net recovery rule' is [merely] a starting point and need not be applied strictly" to every prevailing party determination. *Id.* at ¶¶ 18, 20, 47 P.3d 92. We directed Utah courts to employ " 'a flexible and reasoned approach to deciding in particular cases who actually is the prevailing party.' " *Id.* at ¶ 15, 47 P.3d 92 (quoting *Occidental/Nebraska Fed. Sav. Bank v. Mehr*, 791 P.2d 217, 221 (Utah Ct.App.1990)). Furthermore, "[a] key part of the flexible approach" involves using "common sense" to "look[] at the amounts actually sought and then balanc[e] them proportionally with what was recovered." *Id.* at ¶ 19, 791 P.2d 217. On this reasoning we affirmed the trial court's determination that neither party was the successful party under the mechanics' liens statute. *See id.* at ¶ 21, 791 P.2d 217.

****13** Two other Utah cases, neither decided under the mechanics' liens statute, are instructive. In *Mountain States Broadcasting Company v. Neale*, 783 P.2d 551 (Utah Ct.App.1989), we applied the net judgment rule to determine that a party who obtained an \$85,000 net recovery--about 60% of the amount sought--was the successful party for purposes of a contractual fee shifting provision. *See id.* at 556, 558. However, we cautioned that when making a successful party determination, a trial court should only apply the net judgment rule

when doing so "does not distort the relative success of the parties at trial." *Id.* at 558. We further cautioned that "nothing in our opinion should be taken to suggest that the net judgment rule can be mechanically applied in all cases." ***567** *Id.* at 557. In some cases, we held, the net judgment rule is merely "a good starting point" in a much more "flexible and reasoned approach to deciding in particular cases who actually is the prevailing party," *id.* (quotations omitted), such as "where the ultimate award of money damages does not adequately represent the actual success of the parties under the peculiar posture of the case." *Id.* at 556 n. 7 (citing *Owen Jones & Sons, Inc. v. C.R. Lewis Co.*, 497 P.2d 312, 313-14 (Alaska 1972)).

****14** In *Occidental/Nebraska Federal Savings Bank*, this court made a prevailing party determination in a case arising under Utah's real estate conveyances statute. *See id.* at 221-22 (citing Utah Code Ann. §§ 57-1-24, -32 (1974)). These statutes (1) empower a trust deed trustee to sell trust property if the trustor breaches a secured obligation and (2) award costs and attorney fees to the prevailing party in any action to recover the balance due upon the obligation for which the trust deed was given as security. *See id.* at 219, 221. In *Occidental/Nebraska Federal Savings Bank*, the plaintiff brought an action to recover a remaining balance of over \$600,000. *See id.* at 222. The trial court awarded costs and attorney fees to the defendant as the prevailing party because the plaintiff recovered only about \$7,300 of the \$600,000 amount at trial. *See id.* On appeal, the plaintiff, like Pochynok, argued the trial court should have applied the net recovery rule and declared the plaintiff the prevailing party by virtue of the jury award in the plaintiff's favor. *See id.* at 222. Rejecting this argument, this court applied the " 'flexible and reasoned approach' " as outlined in the *Mountain States Broadcasting Company* case. *See Occidental/Nebraska Federal Savings Bank*, 791 P.2d at 221 (quoting *Mountain States Broadcasting Co.*, 783 P.2d at 556 n. 7). As such, we affirmed the trial court's determination that the defendant was the successful party where the defendant prevailed on the only contested issue at trial--the deficiency amount. *See id.* at 222.

80 P.3d 563, 486 Utah Adv. Rep. 27, 2003 UT App 375

(Cite as: 80 P.3d 563, 2003 UT App 375)

[4][5] ****15** We, like the trial judge in this case, are persuaded that an application of the net judgment rule in the case before us, "distort[s] the relative success of the parties at trial," *Mountain States Broadcasting Co.*, 783 P.2d at 558, and is therefore inappropriate. Instead, like the *Whipple II* court, we apply a flexible and reasoned approach. See *Whipple II*, 2002 UT App 73, ¶¶ 19, 21, 47 P.3d 92. Furthermore, because prevailing party status "depends, to a large measure, on the context of each case, ... the trial court is in a better position than we are as an appellate court to decide which party is the prevailing party." *R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶ 25, 40 P.3d 1119.

****16** Pochynok initially sought to recover over \$80,000 from the Smedsruks. At trial, a jury determined that Pochynok's claim was only worth \$7,076.56. Thereupon, the trial court properly recognized that Pochynok's action, against which the Smedsruks had no choice but to defend, only produced a net recovery of approximately 10% of the amount Pochynok initially sought.

****17** Here, the jury's verdict form does not provide precise calculations of offsets the jury may have made for the Smedsruks' counterclaims for faulty workmanship, delay damages, and improper supervision. However, from the verdict, the trial court could have reasonably 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 Smedsruks on their counterclaims and offset these damages in the amount of \$74,193.35 from Pochynok's initial claim.

****18** Furthermore, the mechanics' liens statute was amended in 2001 to specify the prevailing party where a proper offer of settlement is made. See Utah Code Ann. § 39-1-18(3) (2001) (Amendment Notes). An examination of the effects of subsection 3 is relevant to determining who is a successful party under section 38-1-18(1). The legislative history of subsection 3 indicates as much. Under the title, "Penalty for Wrongful Mechanics Lien," Senate Bill 167 proposed amendments to three

sections of the Utah Code: sections 38-1- 18, -25; and section 58-55-501, in an effort to curb wrongful, outrageous, and fraudulent lien claims. See S.B. 167, 2001 Leg., 53d Sess. (Utah 2001). ***568** A note, proposing the amendment adding subsection 3 and speaking to the bill's intent, is instructive.

In my view, the primary inequity in the mechanic's [sic] lien law as it currently operates is that a party can assert a claim for much more than he or she is legitimately owed forcing a defendant to litigate the claim, and yet still be entitled to attorney[] fees as the "prevailing party" even if the lien claimant only recovers a fraction of what was originally claimed.

****19** While the note envisions a simple definition of successful party, it is clear the intent of the amendment is to discourage outrageous lien claims and to encourage the settlement of lawsuits which are of minor financial value. Thus, we think the trial court's consideration of the refused offer of judgment in this case was appropriate in its successful party determination.

****20** Given the potential for a distorted determination of the relative success of the parties by application of the net judgment rule to the facts of this case, we conclude the trial court wisely applied a more flexible and reasoned approach to its successful party determination. Thus, we conclude the trial court did not abuse its discretion in finding the Smedsruks were the successful party under the mechanics' liens statute and affirm the trial court's award of \$84,036.54 in attorney fees and costs. [FN4]

FN4. Although we need not reach the issue, we would hold that Utah Code Annotated section 38-1-18(3) (2001), which was enacted after Pochynok filed its complaint in this matter, is procedural and thus applies in this case. Therefore, the Smedsruks alternatively could recover attorney fees from the date of their offer of judgment under subsection 3. Subsection 3 provides:

A party against whom any action is

80 P.3d 563, 486 Utah Adv. Rep. 27, 2003 UT App 375

(Cite as: 80 P.3d 563, 2003 UT App 375)

brought to enforce a [mechanics'] lien ... may make an offer of judgment pursuant to [r]ule 68 of the Utah Rules of Civil Procedure [and i]f 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 attorney[] fees incurred by the offeror after the offer was made.

Id. § 38-1-18(3).

To determine whether an amendment is substantive or procedural, we must examine whether or not the amendment "establishes a primary right and duty which was not in existence at the time [the claim] arose." *Johansen v. Johansen*, 2002 UT App 75, ¶ 5, 45 P.3d 520 (alteration in original) (quotations and citations omitted).

Under the prior version of the statute, trial courts were already vested with discretion to award costs and attorney fees to one party or the other (i.e., the successful party) depending on the outcome of the dispute. *See* Utah Code Ann. § 38-1-18 (1997). Thus the amendment merely "provid[es] a different mode or form of procedure" for courts to employ in enforcing previously existing substantive rights and duties. *Pilcher v. Department of Soc. Servs.*, 663 P.2d 450, 455 (Utah 1983)

(deeming a child support enforcement statute procedural and giving it retroactive effect even though it was enacted ten years after the support order); *see* Utah Code Ann. § 38-1-18(3) (2001). Authority from other jurisdictions supports a conclusion that attorney fee awards are procedural and can be applied retroactively. *See McCormack v. Town of Granite*, 913 P.2d 282, 285 (Okla.1996); *Vloedman v. Cornell*, 161 Or.App. 396, 984 P.2d 906, 909 (1999).

II. Garnishment

[6][7] **21 Pochynok also argues the trial court erred in finding the funds in Pochynok's company business bank account were not exempt from

garnishment by the Smedsruuds where Pochynok claimed the funds did not belong to Pochynok. [FN5] In Utah, there is a rebuttable presumption that the funds in a bank account belong to the account owner. *See Peterson v. Peterson*, 571 P.2d 1360, 1362 (Utah 1977). Hence, to avoid garnishment, a garnishee account owner must show by clear and convincing evidence that the funds belong to someone else. *See id.* The record reflects that Pochynok requested a hearing to claim an exemption to garnishment pursuant to Utah Rule of Civil Procedure 64(D)(h). However, the record also reveals that prior to and during the hearing, Pochynok failed to present any evidence to the trial court in support of its claim of exemption. With no competent evidence to counter the Smedsruuds' position, the trial court did not clearly err in finding the funds were subject to garnishment. [FN6]

FN5. Pochynok utterly failed to marshal the evidence in challenging the trial court's factual findings. *See West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct.App.1991). For efficiency, we reach the merits of the claim notwithstanding.

FN6. Pochynok argues that the parties put on proof by proffer. However, even given the proffers made, we conclude the trial court did not err. Pochynok's argument that the funds in the account were not subject to garnishment because those monies were intended to be used to pay subcontractors on other projects is without merit. The funds, once in Pochynok's account, were owned by Pochynok. Thus, the decision to pay subcontractors with those funds, or to use the money elsewhere, was solely in the discretion of Pochynok. Under these facts no constructive trust arises. *See Parks v. Zions First Nat'l Bank*, 673 P.2d 590, 599 (Utah 1983) ("Constructive trusts include all those instances in which a trust is raised ... for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a

80 P.3d 563, 486 Utah Adv. Rep. 27, 2003 UT App 375

(Cite as: 80 P.3d 563, 2003 UT App 375)

relation, and in most cases contrary to the intention of the one holding the legal title").

***569 CONCLUSION**

****22** We conclude that the trial court did not err in determining the Smedsruks were the successful party under the mechanics' liens statute and awarding the Smedsruks attorney fees and costs. We also conclude the court did not err in determining the funds in Pochynok's company bank account were subject to garnishment by the Smedsruks. We affirm the trial court's award of costs and attorney fees to the Smedsruks and the garnishment of Pochynok's company account.

****23 WE CONCUR:** NORMAN H. JACKSON, Presiding Judge, PAMELA T. GREENWOOD, Judge.

80 P.3d 563, 486 Utah Adv. Rep. 27, 2003 UT App 375

END OF DOCUMENT

Tab 2

ADDENDUM 2

H

Supreme Court of Utah.
J. POCHYNOK COMPANY, INC., A
Corporation, Plaintiff and Petitioner,

v.

Gregory **SMEDSRUD** and LouAnn **Smedsrud**,
Defendants and Respondents.
No. 20040005.

June 24, 2005.

Background: General contractor brought action against homeowners, seeking to foreclose mechanics' lien and to recover for breach of contract, and homeowners counterclaimed for breach of contract. Following a jury trial, the Third District Court, Salt Lake Department, J. Dennis Frederick, J., entered judgment for general contractor, but awarded costs and attorney fees to homeowners. General contractor appealed. The Court of Appeals, 80 P.3d 563, affirmed. Contractor sought certiorari review, which was granted.

Holdings: The Supreme Court, Durham, C.J., held that:

- (1) flexible-and-reasoned approach, not net-judgment rule, applied when determining which party was "successful party" for purposes of awarding attorney fees;
 - (2) remand was warranted for purpose of determining whether general contractor or homeowners were entitled to award of attorney fees; and
 - (3) as a matter of first impression, determination of the "successful party" under statute requiring court to award attorney fees to successful party should occur before calculation concerning offer of judgment.
- Decision of Court of Appeals reversed and remanded.

West Headnotes

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[1] Certiorari ⚡64(1)

73k64(1) Most Cited Cases

On certiorari, Supreme Court review the decision of the Court of Appeals, not the decision of the trial court.

[2] Appeal and Error ⚡842(1)

30k842(1) Most Cited Cases

When reviewing attorney fee decisions that involve questions of law, Supreme Court reviews for correctness.

[3] Appeal and Error ⚡842(1)

30k842(1) Most Cited Cases

Supreme Court reviews interpretation of statutes for correctness.

[4] Mechanics' Liens ⚡310(1)

257k310(1) Most Cited Cases

Flexible-and-reasoned approach, not net-judgment rule, applied when determining which party was the "successful party" for purposes of awarding attorney fees in action to foreclose general contractor's mechanic's lien, although verdict form used by jury gave no indication of whether, or by how much, jury offset homeowners' breach-of-contract claim against general contractor's claim. West's U.C.A. § 38-1-18(1).

[5] Appeal and Error ⚡1177(9)

30k1177(9) Most Cited Cases

Remand to trial court was warranted for purpose of determining whether general contractor or homeowners were entitled to award of attorney fees as successful party in action to foreclose mechanic's lien; application of flexible-and-reasoned approach to determine which party prevailed required more information about jury award for general contractor's claim and homeowners' breach-of-contract claim than was available in record. West's U.C.A. § 38-1-18(1).

[6] Mechanics' Liens ⚡310(1)

116 P.3d 353, 528 Utah Adv. Rep. 34, 2005 UT 39

(Cite as: 116 P.3d 353, 2005 UT 39)

257k310(1) Most Cited Cases

Determination of "successful party" under statute requiring court to award attorney fees to successful party in action to foreclose mechanic's lien should occur before calculation required under statute allowing defendant in mechanic's lien foreclosure action to be awarded attorney fees if judgment finally obtained by plaintiff is not more favorable than defendant's offer of judgment; any attorney fees awarded under statute governing award of attorney fees to successful parties should then be included in calculation of whether offer of judgment was greater than judgment finally obtained at trial. West's U.C.A. § 38-1-18(1, 3).

[7] Statutes ↪188

361k188 Most Cited Cases

Supreme Court looks first to the plain language of a statute to determine its meaning.

[8] Statutes ↪190

361k190 Most Cited Cases

Only when there is ambiguity does Supreme Court look further than plain language of statute.

[9] Statutes ↪206

361k206 Most Cited Cases

Statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and interpretations are to be avoided which render some part of a provision nonsensical or absurd.

*354 Ray G. Martineau, Anthony R. Martineau, Brett D. Cragun, Salt Lake City, for plaintiff.

Vincent C. Rampton, Ross I. Romero, Salt Lake City, for defendants.

On Certiorari to the Utah Court of Appeals

DURHAM, Chief Justice:

**1 This case concerns a mechanic's lien and suit for breach of contract brought by petitioner J. Pochynok Company (Pochynok) against respondents Gregory and LouAnn Smedsrud (the Smedsruks), who counterclaimed for breach of contract. We granted certiorari to consider (1) whether the court of appeals erred in upholding the

trial court's determination that the Smedsruks were the "successful party" under Utah Code section 38-1-18(1) when the jury returned only a general verdict that did not indicate which party prevailed on which claims, and (2) whether Pochynok's potential award of attorney fees as the successful party should be taken into account under Utah Code section 38-1-18(3) when calculating whether the Smedsruks' offer of judgment was greater than the final judgment ultimately obtained by Pochynok. The trial court awarded the Smedsruks attorney fees under section 38-1-18(1) as the successful party and under section 38-1-18(3) because their offer of judgment was greater than the judgment finally obtained by Pochynok. The court of appeals affirmed. We reverse and remand.

BACKGROUND

**2 The Smedsruks hired Pochynok in August 1998 as the general contractor in charge of building their home in Summit County, Utah. In the fall of 1999, the Smedsruks fell behind in payments to Pochynok. In response, Pochynok filed a mechanic's lien for approximately \$74,000 plus interest and attorney fees. Pochynok then brought suit against the Smedsruks to foreclose on the lien and for breach of contract. The Smedsruks counterclaimed, alleging that Pochynok had breached the contract through defective workmanship and delay in completing construction.

**3 Twelve days before trial, the Smedsruks made an offer of judgment to Pochynok in the amount of \$40,000 "in complete and final settlement of all claims," including "court costs and attorneys' fees." Pochynok rejected this offer, and the case proceeded to jury trial. At trial, Pochynok asserted a *355 claim for \$81,269.91, not including costs and attorney fees. The Smedsruks, in turn, claimed an unspecified amount of offsets and damages for unearned supervisor fees and work defects and delays. At the conclusion of trial, the jury awarded Pochynok a verdict of \$7076.56. The verdict form used by the jury gave no indication of whether, or by how much, the jury offset the Smedsruks' claims against Pochynok's claim. [FN1]

FN1. The verdict form given to the jury

116 P.3d 353, 528 Utah Adv. Rep. 34, 2005 UT 39

(Cite as: 116 P.3d 353, 2005 UT 39)

allowed it to designate, on one line, the amount awarded Pochynok against the Smedsruks and, on the second line, the amount awarded to the Smedsruks against Pochynok. The jury wrote \$7076.56 on the first line and left the second line blank.

****4** The Smedsruks filed a posttrial motion to recover costs and attorney fees in the amount of \$84,036. In support of this motion, they argued that under the provisions of Utah Code section 38-1-18(3), they were entitled to recover attorney fees and costs incurred after the offer was made because their offer of judgment was greater than the judgment finally obtained by Pochynok. In addition, they argued that they were the "successful party" under Utah Code section 38-1-18(1) and were therefore entitled to all costs and attorney fees. Pochynok filed its own motion for an award of costs and attorney fees in the amount of \$39,761, also arguing that it was the successful party under section 38-1-18(1).

****5** Despite the jury's award of \$7076.56 to Pochynok, the trial court ruled that the Smedsruks were the "successful party" for purposes of Utah Code section 38-1-18(1), denying Pochynok's motion and awarding the Smedsruks costs and attorney fees in the amount of \$84,036.54. Other than general references to arguments made by the Smedsruks, the trial court's order contained no findings of fact or conclusions of law to explain its decision. In addition, the court made an explicit award to the Smedsruks for attorney fees incurred after the date of the offer of judgment, but it did not provide a detailed explanation of how section 31-1-18(3) operated in this case. Pochynok appealed.

****6** The court of appeals upheld the trial court's award of costs and fees. *J. Pochynok Co. v. Smedsruks*, 2003 UT App 375, ¶ 1, 80 P.3d 563. In doing so, it applied the "flexible and reasoned approach," later approved by this court in *A.K. & R. Whipple Plumbing & Heating v. Aspen Construction*, 2004 UT 47, ¶¶ 25-26, 94 P.3d 270, to conclude that the trial court properly determined the Smedsruks to be the successful

party. *Pochynok*, 2003 UT App 375 at ¶ 15, 80 P.3d 563. The court of appeals noted that the jury's verdict did "not provide precise calculations of offsets the jury may have made for the Smedsruks' counterclaims" but that the trial court "could have reasonably inferred" that the jury awarded the Smedsruks \$74,193.35 in offsets and could have concluded that the Smedsruks were the successful party on that basis. *Id.* at ¶ 17. The court of appeals did not reach a specific conclusion on how to apply section 38-1-18(3)'s offer of judgment rule, but approved the trial court's presumed consideration of the rejected offer of judgment in its successful party determination. *Id.* at ¶ 20.

****7** On certiorari, Pochynok argues (1) that despite our recent decision in *Whipple*, the trial court and court of appeals should have employed the net judgment rule instead of the flexible and reasoned approach to determine the successful party; (2) that regardless of the rule used, neither the trial court nor the court of appeals could have properly determined that the Smedsruks were the successful party in this action because the jury verdict did not provide sufficient information to reach such a conclusion, making Pochynok, as the only party to receive an award, the successful party; and (3) that if Pochynok is determined to be the successful party and awarded costs and attorney fees pursuant to section 38-1-18(1), this post trial award should be considered part of "the judgment finally obtained" under section 38-1-18(3), preventing the Smedsruks from receiving postoffer costs and attorney fees pursuant to that section. [FN2]

FN2. We do not address the additional argument raised by Pochynok regarding whether delay damages can be used to offset a mechanic's lien. Pochynok cited no authority for this proposition, nor is it adequately briefed, and we therefore decline to address it. *See State v. Thomas*, 961 P.2d 299, 304 (Utah 1998).

***356 STANDARD OF REVIEW**

[1][2][3] ****8** "On certiorari, we review the decision of the court of appeals, not the decision of

116 P.3d 353, 528 Utah Adv. Rep. 34, 2005 UT 39

(Cite as: 116 P.3d 353, 2005 UT 39)

the trial court." *Hebertson v. Willowcreek Plaza*, 923 P.2d 1389, 1392 (Utah 1996) (internal quotation omitted). "When reviewing attorney fee decisions that involve questions of law, we review for correctness." *A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 2004 UT 47, ¶ 6, 94 P.3d 270. We use the same standard when construing statutes. *Id.*

ANALYSIS

I. INTERPRETATION OF SECTION 38-1-18

A. Subsection (1): Successful Party Determination

[4] **9 Utah law expressly requires a court to award attorney fees to the successful party in any mechanic's lien action. Utah Code Ann. § 38-1-18(1) (2001); *A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 2004 UT 47, ¶ 7, 94 P.3d 270. Section 38-1-18(1) provides that "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." Utah Code Ann. § 38-1-18(1). We most recently construed this statute in *Whipple*, 2004 UT 47, 94 P.3d 270. *Whipple*, much like the case now before us, involved a mechanics' lien foreclosure action and a counterclaim for damages. *Id.* at ¶ 2. Plaintiff Whipple filed a lien for \$30,641, with defendant Aspen claiming an offset of \$25,000 for Whipple's allegedly negligent work. *Id.* at ¶ 3. The trial court awarded Aspen \$7000 in offsets and, "[a]fter calculating the consequences of the parties' respective wins and losses on their competing claims, ... awarded a net judgment to Aspen in the amount of \$527." *Id.* Employing the "flexible and reasoned approach" first outlined in *Mountain States Broadcasting Co. v. Neale*, 783 P.2d 551, 556-57 (Utah Ct.App.1989) (mem. decision on pet. for reh'g), the trial court found that, where one party received such a small net recovery, the case was essentially a "draw," so neither party could be considered "successful" for purposes of section 38-1-18(1). *Whipple*, 2004 UT 47 at ¶ 4, 94 P.3d 270. We upheld both the trial court's use of the flexible and reasoned approach and its specific finding that there was no successful party. *Id.* at ¶ 31-32.

**10 Here, Pochynok seeks to distinguish *Whipple*

from the present case and urges us to hold that the net judgment rule and not the flexible and reasoned approach should apply in cases with general rather than specific jury verdicts. Under the net judgment rule, the party that receives the bigger judgment is the successful party. Since Pochynok received a net judgment of approximately \$7000, it would be the successful party under this rule. Certainly it is more difficult--although not impossible--to apply the flexible and reasoned approach where, as here, the jury verdict does not specify who won what. However, it does not follow that the net judgment rule automatically applies in such a case. As we stated in *Whipple*, "rigid application of the net judgment rule can result in unreasonable awards of attorney fees," *id.* at ¶ 26, which "would deprive trial courts of their power to apply their discretion and common sense to this issue," *id.* at ¶ 25. As in *Whipple*, we decline to require such a rule here.

[5] **11 At the same time, it 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. In *Mountain States*, the court of appeals first considered which party received a net judgment and then discussed two additional factors relevant to its determination of which party was successful. 783 P.2d at 558. First, it focused on which party had attained a "comparative victory," considering what total victory would have meant for each party and what a true draw would look like. *Id.* Second, it looked at which party obtained a greater percentage of the amount originally claimed. *Id.* Such an analysis in this case is impossible without more specific monetary figures.

**12 Similarly, we stated in *Whipple* that "[the flexible and reasoned] approach requires ... looking at the amounts actually *357 sought and then balancing them proportionally with what was recovered." 2004 UT 47 at ¶ 26, 94 P.3d 270 (internal quotation and citation omitted). In the present case, 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. Nor did the court explain its

116 P.3d 353, 528 Utah Adv. Rep. 34, 2005 UT 39

(Cite as: 116 P.3d 353, 2005 UT 39)

reasoning in concluding that the Smedsruuds were the successful party. The case before us is thus in contrast to *Whipple*, where we stated:

Although lacking in detail, the trial court's explanation of its rationale is adequate because it demonstrates that the court correctly considered common sense factors in addition to the net judgment. It is apparent from the trial court's reasoning that it believed Aspen's net recovery of only two percent (2%) of its claimed damages was insufficient to make it the "successful party."

Id. at ¶ 28. In upholding the trial court's determination of the successful party, the court of appeals inappropriately relied on conjecture, surmising that, despite the nonspecific jury award, "the trial court could have reasonably inferred ... offsets" and "could have reasonably concluded that the jury in fact found in favor of the Smedsruuds on their counterclaims and offset these damages." *J. Pochynok Co. v. Smedsruud*, 2003 UT App 375, ¶ 17, 80 P.3d 563. There is nothing in the record to indicate that the trial court actually made such inferences and conclusions.

****13** Though this 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, it does not necessarily follow, as Pochynok contends, that Pochynok is the successful party. Our difficulty is with the trial court's process, not necessarily the outcome. After a determination of the awards and offsets likely considered and made by the jury, it is entirely possible that the trial court might once again conclude that the Smedsruuds are the successful party.

B. Subsection (3): Offer of Judgment

[6] ****14** We now consider Pochynok's claims in regard to subsection (3) of the mechanic's lien attorney fees statute. Utah Code section 38-1-18(3) provides:

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.

Utah Code Ann. § 38-1-18(3) (2001). Pochynok argues that if it is held to be the successful party under Utah Code section 38-1-18(1), the resulting award of attorney fees against the Smedsruuds should be included as part of the "final judgment obtained" pursuant to Utah Code section 38-1-18(3). In other words, Pochynok suggests that the determination of which party is successful under section 38-1-18(1) must be made before a court may determine under section 38-1-18(3) whether the judgment finally obtained is greater than the offer of judgment. The Smedsruuds claim the opposite, arguing that an award of attorney fees under subsection (3) should be included in a determination of which party was successful for purposes of subsection (1). Subsection (3) was added to section 38-1-18 in 2001. Its operation in conjunction with subsection (1) is a matter of first impression in this court.

[7][8][9] ****15** We look first to the plain language of a statute to determine its meaning. *Stephens v. Bonneville Travel*, 935 P.2d 518, 520 (Utah 1997). Only when there is ambiguity do we look further. *Id.* In addition, "statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and ... interpretations are to be avoided which render some part of a provision nonsensical or absurd." *Millett v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980).

****16** In construing section 38-1-18(3), the court of appeals held that "the trial court's consideration of the refused offer of judgment in this case was appropriate in its successful party determination." *Pochynok*, 2003 UT App 375 at ¶ 19, 80 P.3d 563. Bypassing a consideration of the statute's plain ***358** language, the court of appeals looked to the legislative history of subsection (3), noting that it was added to the statute in 2001 "in an effort to curb wrongful, outrageous, and fraudulent lien claims." *Id.* at ¶ 18 (citing ch. 257, 2001 Utah Laws 1202). As a result of this clear legislative policy, the court of appeals concluded that any award of attorney fees under subsection (3) should be considered in the determination of which party is successful under subsection one. *Id.* at ¶ 19. In

116 P.3d 353, 528 Utah Adv. Rep. 34, 2005 UT 39

(Cite as: 116 P.3d 353, 2005 UT 39)

further support of this conclusion, the court quoted a legislative note, stating:

[T]he primary inequity in the mechanic's lien law as it currently operates is that a party can assert a claim for much more than he or she is legitimately owed forcing a defendant to litigate the claim, and yet still be entitled to attorney[] fees as the "prevailing party" even if the lien claimant only recovers a fraction of what was originally claimed.

Id. at ¶ 18.

****17** While this statement may accurately reflect the policy behind section 38-1-18 in general and subsection (3) in particular, we do not agree with the analysis of the court of appeals to the extent that it overlooks important realities regarding offers of judgment. We thus hold that the "judgment finally obtained" language in Utah Code section 38-1-18(3) includes an award of attorney fees to the successful party under section 38-1-18(1). In other words, if the offer of judgment explicitly includes attorney fees, [FN3] and turns out to be greater than the offeree's jury verdict plus any attorney fees awarded to the offeree as the successful party under section 38-1-18(1), then subsection (3) requires the offeree to pay the offeror's costs and attorney fees incurred after the offer was made.

FN3. Although it has no bearing on the outcome of this case, we note that, under the current version of rule 68 of the Utah Rules of Civil Procedure, which governs offers of judgment under section 38-1-18(3), we would reach the same result unless the offer explicitly excluded attorney fees. The rule was amended in 2004 to specifically require that, "[u]nless otherwise specified, an offer made under this rule ... is an offer to resolve all claims between the parties to the date of the offer, including costs, interest and, if attorney fees are permitted by law or contract, attorney fees." Utah R. Civ. P. 68(a).

****18** The plain language and structure of the statute support this interpretation of subsection (3). Subsection (3) was added to the end of the

already-existing section 38-1-18, suggesting it is an addition to, and not a starting point for, the required analysis under the statute. It also requires comparison of the offer of judgment to the "judgment *finally* obtained." Utah Code Ann. § 38-1-18(3) (emphasis added). This formulation implies a finality that cannot be reconciled with a judgment that has yet to include the ultimate "successful party" determination under subsection (1).

****19** We recognize, however, that the plain language of subsection (3) does not entirely eliminate ambiguity regarding the correct order of operation of subsections (1) and (3). We therefore also consider legislative history and policy. *See Stephens*, 935 P.2d at 520. We conclude that including successful party attorney fees awarded under subsection (1) in the subsection (3) calculation does not interfere with the policy goals behind section 38-1-18. The preamble to the legislature's 2001 amendment indicates that the purpose of subsection (3) is to "provide[] for costs and attorneys' fees in cases where an offer of judgment is unreasonably rejected." Ch. 257, 2001 Utah Laws 1202. As the court of appeals pointed out, the legislature's goal in adding subsection (3) was to discourage unreasonable rejections of offers of judgment. *See supra* ¶ 16. Interpreting the "judgment finally obtained" under subsection (3) to include an award of attorney fees under subsection (1) does nothing to contravene that policy as long as the offer of judgment also included attorney fees. An offeree who rejects an offer of judgment that includes attorney fees and then receives a judgment, also including attorney fees, that is greater than the offer of judgment clearly has not acted unreasonably.

****20** We are cognizant of the concern expressed in the legislative note attached to the 2001 amendment to section 38-1-18, which the court of appeals cited in support of its contrary interpretation of the statute's operation. However, that concern is largely resolved ***359** through the use of the flexible and reasoned approach which, we concluded above, was proper to determine the successful party under subsection (1). Under this

116 P.3d 353, 528 Utah Adv. Rep. 34, 2005 UT 39

(Cite as: 116 P.3d 353, 2005 UT 39)

approach, a party that makes an outrageous claim and then receives only a fraction of what it demanded will not likely be deemed the successful party. This approach also prevents a party judged "successful" from being required to pay attorney fees under subsection (3). Although this can create something of a winner-takes-all situation when it comes to attorney fees, this tendency is effectively balanced by the use of the flexible and reasoned approach in determining successful party status so that no party can expect to be the successful party simply because it receives a dollar more than the other party. In fact, the flexible and reasoned approach was first adopted in order to avoid situations such as those mentioned in the legislative note, in which the difference of a sum as negligible as one dollar could entitle one party to an award of attorney fees. *Mountain States*, 783 P.2d at 557. This approach "ensures that only parties that are genuinely 'successful' according to the trial court's common sense logic will be able to extract their attorney fees from their opponents." *Whipple*, 2004 UT 47 at ¶ 25, 94 P.3d 270.

****21** Finally, we construe statutes to ensure that there will be no absurd results, particularly in the interplay of subsections of a single statute. See *Millett*, 609 P.2d at 936. Interpreting subsection (3) to operate before subsection one would allow a party to manipulate section 38-1-18 so as to achieve an unfair award of attorney fees. Though there is no such allegation here, the present case illustrates this potential problem. The *Smedsruuds*' \$40,000 offer of judgment was made on the eve of trial, by which time each party had incurred substantial legal fees. The offer of \$40,000 explicitly included attorney fees, but represented less than half the amount Pochynok was claiming as damages at trial. If we were to hold that the "judgment finally obtained" does not include award of attorney fees under subsection (1), a party defending against a lien could make an offer of judgment, including attorney fees, that is well below what is fair for both the lien and the attorney fees but that is higher than what the other party could hope to win at trial exclusive of attorney fees. An interpretation of section 38-1-18(3) that does not account for an award of attorney fees to the successful party under

section 38-1-18(1) would too easily allow an offeror to benefit by making an unfair offer.

CONCLUSION

****22** We uphold the court of appeals' use of the flexible and reasoned approach in its review of the trial court's determination of the "successful party" for purposes of section 38-1-18(1). However, we conclude that the trial court could not have made this determination without specific information regarding the total amount the jury awarded to Pochynok and the total amount in offsets it awarded to the *Smedsruuds*. *Mountain States* and *Whipple* clearly contemplate a balancing of awards and offsets as part of the flexible and reasoned approach. The jury did not provide this information in its verdict form. In order to apply the flexible and reasoned approach in this case, therefore, the trial court should have made findings regarding the amounts sought and won by each party. It should then have conducted a common sense inquiry and balancing in regard to who was the successful party. The trial court failed to do so here.

****23** In addition, we reverse the court of appeals' construction of the interplay between subsections (1) and (3) of section 38-1-18. We hold that the determination of the "successful party" under subsection (1) should occur before the calculation required under subsection (3) and that any attorney fees awarded under subsection (1) should then be included in the subsection (3) calculation of whether any offer of judgment was greater than the judgment finally obtained at trial.

****24** We remand this case to the court of appeals with instructions 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 ***360** attorney fees under Utah Code section 38-1-18(3) is proper.

****25** Associate Chief Justice WILKINS, Justice DURRANT, Justice PARRISH, and Justice NEHRING concur in Chief Justice DURHAM's opinion.

116 P.3d 353

Page 8

116 P.3d 353, 528 Utah Adv. Rep. 34, 2005 UT 39

(Cite as: 116 P.3d 353, 2005 UT 39)

116 P.3d 353, 528 Utah Adv. Rep. 34, 2005 UT 39

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Westlaw Attached Printing Summary Report for BROWN,CYNTHIA 4620710

Your Search:	TI(POCHYNOK & SMEDSRUD)
Date/Time of Request:	Friday, July 21, 2006 14:56:00 Central
Client Identifier:	999980085 CLB
Database:	ALLCASES
Citation Text:	80 P.3d 563
Lines:	400
Documents:	1
Images:	0

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Tab 3

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ADDENDUM 3

VINCENT C. RAMPTON (USB #2684)
ROSS I. ROMERO (USB #7771)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Gregory and LouAnn Smedsrud
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

J. POCHYNOK COMPANY, INC., a
Corporation

Plaintiff(s),

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,

Defendant(s).

: **OFFER OF JUDGMENT**

:
:
:
: Civil No. 0006000014

:
:
: Judge J. Dennis Frederick

**TO: PLAINTIFF AND COUNTERCLAIM DEFENDANT J. POCHYNOK COMPANY,
INC. AND COUNSEL**


Pursuant to Rule 68 of the Utah Rules of Civil Procedure and Utah Code Ann. §38-1-

18(3), defendants and counterclaim plaintiffs, Greg and LouAnn Smedsrud, offer to allow

judgment to be taken against them in the sum of Forty Thousand Dollars and Zero Cents (\$40,000.00) in complete and final settlement of all claims by the plaintiff and counterclaim defendant against defendants and counterclaim plaintiffs, Greg and LouAnn Smedsrud. If plaintiff and counterclaim defendant do not accept this offer and fail to obtain a judgment at trial against defendants and counterclaim plaintiffs which is more favorable than this offer, defendants and counterclaim plaintiffs will seek reimbursement from the plaintiff and counterclaim defendant of all attorneys' fees and costs incurred after making this offer pursuant to Utah Code Ann. §38-1-18(3). Evidence of this offer is inadmissible except in a proceeding to determine to attorneys' fees and costs. This offer includes all claims, interest, liens, court costs and attorneys' fees whatsoever that plaintiff and counterclaim defendant has made or could against defendants and counterclaim plaintiffs. This offer is in lieu of and revokes all prior offers of settlement.

DATED this 4th day of May, 2002.

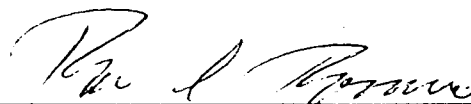
JONES, WALDO, HOLBROOK &
McDONOUGH

By: 
Vincent C. Rampton
Ross I. Romero
*Attorneys for Gregory and LouAnn
Smedsrud*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Offer of Judgment was sent via facsimile and hand delivery, to the following this 9th day of May, 2002:

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



Tab 4

ADDENDUM 4

FILED DISTRICT COURT
Third Judicial District

MAY 22 2002

By _____
SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SUMMIT COUNTY
STATE OF UTAH

J. POCHYNOK COMPANY, INC., a
Corporation,

Plaintiff and Counterclaim
Defendant,

vs.

GREGORY SMEDSRUD; LOUANN
SMEDSRUD; BUTTERFIELD LUMBER,
INC., a Corporation; PELLA PRODUCTS,
INC., a Corporation; BLAZE WHARTON
CONSTRUCTION, INC., a Corporation;
DIXIE WOODWORKS, INC., a Corporation;
and JEFREY KAISER, doing business as RIO
GRANDE PAINTING,

Defendants and Counterclaim
Plaintiffs.

JURY VERDICT

020901328

Civil No. 0006000014

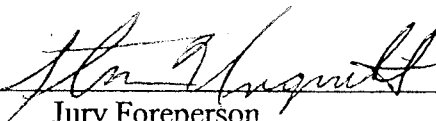
Judge J. Dennis Frederick

We, the jury, duly empaneled in the above-entitled matter, hold as follows in the above-entitled action:

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 \$ 7076.56

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 \$ _____.

DATED this 22nd day of May, 2002.

By 
Jury Foreperson

Tab 5

ADDENDUM 5

IMAGED

FILED DISTRICT COURT
Third Judicial District

AUG 13 2002

SALT LAKE COUNTY

By
Deputy Clerk

VINCENT C. RAMPTON (USB #2684)
ROSS I. ROMERO (USB #7771)
JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Gregory and LouAnn Smedsrud
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200

IN THE THIRD JUDICIAL DISTRICT COURT
SUMMIT COUNTY
STATE OF UTAH

J. POCHYNOK COMPANY, INC., a
Corporation,

Plaintiff and Counterclaim
Defendant,

vs.

GREGORY SMEDSRUD; LOUANN
SMEDSRUD; BUTTERFIELD LUMBER,
INC., a Corporation; PELLA PRODUCTS,
INC., a Corporation; BLAZE WHARTON
CONSTRUCTION, INC., a Corporation;
DIXIE WOODWORKS, INC., a Corporation;
and JEFREY KAISER, doing business as RIO
GRANDE PAINTING,

Defendants and Counterclaim
Plaintiffs.

ENTERED IN REGISTRY
OF JUDGMENTS

DATE 08/15/02

JUDGMENT UPON VERDICT AND
ORDER ON POST TRIAL MOTIONS

020901328

Civil No. ~~0006000014~~

Judge J. Dennis Frederick

This matter was tried to a jury on May 21 and 22, 2002. Prior to trial, all crossclaims between defendants Gregory and LouAnn Smedsrud and Pella Products, Inc. had been dismissed with prejudice pursuant to stipulation and prior order of this Court. In addition, all claims of



plaintiff J. Pochynok Company, Inc. against defendants Blaze Wharton Construction, Inc. and Jeffrey Kaiser were voluntarily dismissed without prejudice pursuant to Rule 41(a), Utah Rules of Civil Procedure prior to trial.

On May 22, 2002, the jury returned a verdict in favor of Plaintiff J. Pochynok Company, Inc. and against Gregory Smedsrud and LouAnn Smedsrud, in the amount of \$7,076.56. The jury returned no verdict in favor of any other party hereto.

Following trial, both parties submitted motions for award of costs and attorneys fees incurred in the action. In addition, the plaintiff submitted a motion for injunctive relief, asking that this Court enjoin defendants from asserting claims or initiating legal proceedings against Wynn G. Yelland, Paul V. Nesseth and Locus Architecture, Ltd., by reason of Mr. Yelland having agreed to appear and testify at trial herein.

The Court having reviewed the parties' post-trial motions and supporting submittals, being fully advised, and good cause appearing,

IT IS HEREBY ORDERED, adjudged and decreed as follows:

1. The motion of Defendants Gregory and LouAnn Smedsrud to tax costs and attorneys fees is granted for those reasons set out in defendants' Memorandum of Law in Support of Motion to Tax Costs and Attorneys Fees, and their Reply Memorandum in Support of Motion to Tax Costs and Attorneys Fees.
2. Plaintiff's Motion for Injunctive Relief is denied, for those reasons set out in defendants' Memorandum in Opposition to Motion for Injunctive Relief.

3. Plaintiff's Motion for Award of Attorneys Fees and Costs is denied for those reasons set out in defendants' Memorandum in Opposition to Plaintiff's Motion for Award of Attorneys Fees and Costs, defendants' Memorandum of Law in Support of Motion to Tax Costs and Attorneys Fees, and their Reply Memorandum in Support of Motion to Tax Costs and Attorneys Fees.

4. Based upon the foregoing rulings and upon the jury verdict in this matter, final judgment is hereby entered as follows:

a. Judgment is entered in favor of plaintiff J. Pochynok Company, Inc., and against defendants Gregory Smedsrud and LouAnn Smedsrud, jointly and severally, in the amount of \$7,076.56, together with interest thereon from and after May 22, 2002 until paid in full at the contract rate of 12% per annum.

b. Judgment is hereby entered in favor of defendants Gregory and LouAnn Smedsrud, jointly and severally, and against plaintiff J. Pochynok Company, Inc., in the following amounts:

i. \$1,906.94, representing defendants' costs of suit incurred prior to May 9, 2002;

ii. \$48,083.10, representing defendants' attorneys fees incurred prior to May 9, 2002;

iii. \$766.50, representing defendants' costs of suit incurred on and after May 9, 2002;

iv. \$33,280.00, representing defendants' attorneys fees incurred on and after May 9, 2002; and

v. Interest on the foregoing amounts from and after May 22, 2002 until paid in full, at the contract rate of 12%.

c. It is further ordered that the award of defendants' costs and attorneys fees as set out above may be augmented in an amount equal to all costs and attorneys fees incurred by defendants' from and after June 1, 2002 in the enforcement and/or collection of the judgment entered herein, upon further application as supported by affidavit of defendants' counsel.

5. Plaintiff's petition for an order of foreclosure of its mechanic's lien herein is denied, as its judgment against Smedsruds, as the owners, is fully offset by judgment in favor of Smedsruds herein.

6. Plaintiff is hereby ordered to release all liens and notices of liens placed by or for it upon the Smedsruds' residence located in Summit County, State of Utah, more particularly described as follows:

All of Lot 118, PINERIDGE SUBDIVISION, according to the official plat thereof filed in the office of the Recorder of Summit County, State of Utah.

(hereafter "Smedsrud Property"). Plaintiff is hereby declared to hold no right, title or interest in and to the Smedsrud Property. Plaintiff is further ordered to release any and all Notices of Lis

Pendens filed against the Smedsrud Property with the Summit County Recorder's office in connection with this action.

7. Defendants Butterfield Lumber, Inc., Pella Products, Inc., Blaze Wharton Construction, Inc., Dixie Woodworks, Inc., and Jeffrey Kaiser, having failed to present any proof to the court in support of any claims which they have or may have against any party hereto, or to obtain any verdict or judgment in their favor, are determined to hold no right, title or interest in and to the Smedsrud Property, whether jointly or severally, by virtue of any right of mechanic's lien asserted by or on behalf of said defendants (or any of them) against the Smedsrud Property. Said defendants are hereby ordered to release all liens and notices of mechanics' or materialman's lien placed by or for them upon the Smedsrud Property.

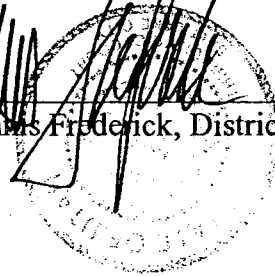
8. Any and all claims asserted by or against any party to this action, to the extent not otherwise addressed in this judgment and order, are hereby deemed dismissed with prejudice and on the merits.

DATED this 13th day of August, 2002.

BY THE COURT

By

J. Dennis Frederick, District Judge



CERTIFICATE OF SERVICE

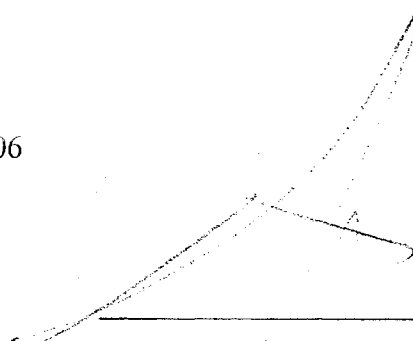
I hereby certify that on the 1st day of August, 2002, I caused to be hand-delivered a true and correct copy of the foregoing proposed form of **JUDGMENT UPON VERDICT AND ORDER ON POST TRIAL MOTIONS** to the following:

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

Scott L. Wiggins
ARNOLD & WIGGINS
American Plaza II, ste. 105
57 West 200 South
Salt Lake City, Utah 84101

Randall R. Smart
Snow, Nuffer
341 South Main Street, #303
Salt Lake City, UT 84111

Ralph R. Tate
4625 South 2300 East, Ste. 206
Salt Lake City, Utah 84117

A handwritten signature, possibly reading "R. Tate", is written over a horizontal line.

Tab 6

ADDENDUM 6

FILED DISTRICT COURT
Third Judicial District

MAR 8 3 2006

SALT LAKE COUNTY

By

[Signature]
Deputy Clerk

Vincent C. Rampton (USB #2684)
Ross I. Romero (USB #7771)
JONES WALDO HOLBROOK & McDONOUGH PC
Attorneys for Gregory and LouAnn Smedsrud
170 South Main Street, Suite #1500
Post Office Box 45444
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200

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**

→ ORDER

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 ("Smedsruuds") 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 ("Smedsruks") to foreclose a mechanic's lien asserted for work allegedly performed to the Smedsruks' 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 Smedsruks for breach of contract and quantum meruit.
6. The Smedsruks 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; Smedsruks, 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 Smedsruks' claimed offsets.

4. The trial court found Smedsruks' 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 Smedsruks, trial by jury might have been averted.

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

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

8. Accordingly, the court concludes that Smedsruks 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 Smedsruks, and its prior denial of costs and attorneys fees to Plaintiff.

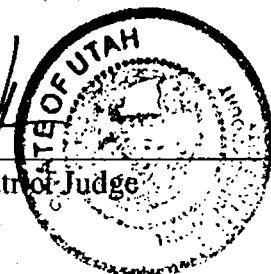
10. In light of the foregoing, the court likewise reaffirms its award of Smedsruks' costs and attorneys fees incurred after May 9, 2002, pursuant to Utah Code Ann. § 38-1-18(3), given that Smedsruks' May 9, 2002 Offer of Judgment was greater than Plaintiff's actual recovery at trial, with or without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

DATED this 22nd 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
Brett D. Cragun
3098 Highland Drive, Suite 450
Salt Lake City, Utah 84106

