

2006

Iron Head Construction, Inc. v. Alan K. Gurney, Vicki W. Gurney : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

IRON HEAD CONSTRUCTION, INC.,

Plaintiff/Appellee,

VS.

ALAN K. GURNEY and
VICKI W. GURNEY,

Defendants/Appellants.

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BRIEF OF APPELLEE

CIVIL NO. 20060841-CA

BRIEF OF APPELLEE

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IN THE UTAH COURT OF APPEALS

IRON HEAD CONSTRUCTION, INC.,)	BRIEF OF APPELLEE
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Plaintiff/Appellee,)	
)	
vs.)	
)	
ALAN K. GURNEY and)	CIVIL NO. 20060841-CA
VICKI W. GURNEY,)	
)	
Defendants/Appellants.)	

STATEMENT OF JURISDICTION

This court has jurisdiction over this appeal as a case transferred from the Utah Supreme Court pursuant to Section 78-2a-3(2)(j) Utah Code Ann.

STATEMENT OF ISSUE AND STANDARD OF REVIEW

ISSUE: Did the trial court correctly award plaintiff/appellee prejudgment interest on the amount the parties agreed was due and owing from defendant/appellant?

STANDARD OF REVIEW: The decision to allow or deny an award of prejudgment interest is a question of law which is reviewed for correctness. *Smith v. Fairfax Realty, Inc.*, 82 P.3d 1064, 1068 (Utah 2003). However, in determining whether to allow or deny prejudgment interest, the trial court is required to make factual determinations as to whether the injury and consequent damages are complete and ascertainable as of a particular time. The trial court is also required to make a factual determination as to whether the amount of such damages is capable of being calculated in

accordance with rules of evidence and known standards of value. Such factual determinations are reviewed to determine whether there is substantial evidence to support the trial court's decision. The trial court's determinations will not be set aside unless clearly erroneous. *Davies v. Olson*, 746 P.2d 264, 267, 70 (Utah App. 1987).

DETERMINATIVE LAW

The prejudgment interest rate is established by Section 15-1-1 Utah Code Ann. which states:

- (1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.
- (2) Unless the parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.
- (3) Nothing in this section may be construed in any way to affect any penalty or interest charge that by law applies to delinquent or other taxes or to any contract or obligations made before May 14, 1981.

STATEMENT OF THE CASE

Nature Of The Case

This appeal arises from a lawsuit filed by plaintiff/appellee Iron Head Construction, Inc., (hereinafter "Iron Head") against defendants/appellants Alan K. Gurney and Vicki W. Gurney (hereinafter "the Gurneys") to recover money arising out of a contract in which Iron Head constructed additions to and remodeled the Gurneys' home. The Complaint alleged four causes of action: breach of contract, *quantum meruit*, unjust enrichment, and for foreclosure of a mechanic's lien.

Course of Proceedings and Disposition

A trial was commenced in this action on November 10, 2003. After the third day of trial the parties entered into a settlement agreement that resolved the case in part. The parties stipulated that the principal amount owing from the Gurneys to Iron Head was \$43,500.00. The parties, however, could not reach agreement as to whether Iron Head was entitled to recover prejudgment interest and whether the mechanic's lien filed by Iron Head was valid. The parties orally presented their agreement to the court

The terms of the agreement were: (1) the trial would be concluded; (2) The Gurneys would pay Iron head \$43,500.00; (3) the issue of entitlement to prejudgment interest would be submitted to the court for decision through the submission of post trial briefs that would be simultaneously filed on December 5, 2003; and (4) at the party's option the issue of the validity of the mechanic's lien could be submitted to the trial court by motion. The trial court accepted and adopted the parties' stipulation and settlement agreement.

On December 5, 2003, Iron Head filed its Brief In Support Of Claim For Prejudgment Interest (R.323-336). On the same date, the Gurneys submitted their Post-Trial Memorandum Re: Prejudgment Interest (R.353-361) and the Affidavit of Patrick J. Kilbourne, CPA, CMA (R. 337-352) . On December 16, 2003, the trial court entered its Order on Motion for Prejudgment Interest awarding Iron Head prejudgment interest in the amount of \$12,835.48. (R. 387-389).

A subsequent Order was entered by the court on April 13, 2004, stating that if the prejudgment interest awarded by the court was paid on or before April 14, 2004, the Gurneys would be entitled to a final judgment releasing and discharging all claims; but if they did not, Iron Head would be entitled to final judgment ordering payment of the prejudgment interest awarded. The Order also ruled that Iron Head could present the issue of the validity of the mechanic's lien to the court by motion and affidavit. (R. 390-393) Judgment was issued by the court on August 11, 2006, which is the judgment the Gurneys' appeal from. (R. 440-442)

Statement Of Facts

1. In January, 2000, Richard Curtis, representing Iron Head, met with the Gurneys on approximately three occasions to discuss constructing additions to the Gurney's home. (R. 324)
2. The parties orally agreed that Iron Head would perform the construction. A Master Material List was created that described and stated the costs of material and labor that was to go into the additions. The costs were stated at \$168,558.00. (R. 324)
3. Construction began in early February, 2000. (R. 324)
4. After construction commenced, the Gurneys informed Iron Head that their lender required a written agreement with Iron Head in order to process their construction loan. (R. 324)
5. Iron Head obtained a form "Contractor Agreement" from Sevier Office Supply store and the parties signed the agreement which was dated February 15, 2000. The parties agreed the materials, labor and costs reflected in the Master Material List previously prepared constituted the work to be performed under the Contractor Agreement. (R. 324)

6. After construction commenced The Gurneys made numerous changes in the scope of the work. In addition to adding the new additions to their home the Gurneys decided to do a total remodel of both floors of their existing home together with making numerous other upgrades, additions and modifications. (R. 324)

7. Richard Curtis met with Alan Gurney on at least one occasion to discuss the scope of the additional work. Richard Curtis informed Alan Gurney that there would be additional costs for the changes and Alan Gurney responded that the Gurneys would pay Iron Head for the additional work and would be fair. (R. 323-24)

8. Representatives of Iron Head and other subcontractors had numerous conversations with the Gurneys; particularly Mrs. Gurney. In those conversations the Gurneys were informed that the changes and additions to the scope of the work would cost additional money. The Gurneys responded that it was their house and they wanted it to be constructed the way that they wanted it. The Gurneys responded that the additional expense was not a problem. The Gurneys acknowledged that they would pay for the additional changes. (R. 325)

9. The parties did not execute written change orders for any of the changes. (R. 325)

10. In early December, 2000, Richard Curtis met with Alan Gurney in the Gurneys' home to discuss final payment of the amount due for the construction. Richard Curtis prepared a final invoice and took it to the meeting. At the meeting Alan Gurney refused to look at the final invoice and told Richard Curtis that because Alan Gurney did not know anything about construction, he was going to hire a lawyer and he would pay Iron Head whatever the lawyer told him to pay. In that meeting Alan Gurney acknowledged an obligation to pay for the extra work but disputed the amount. (R. 325)

11. On December 12, 2000, Iron Head filed a mechanic's lien on the property in the office of the Sevier County Recorder. (R. 325)

12. Because Iron Head incurred costs to construct the Gurneys' home in excess of the amount the Gurneys paid Iron Head, Iron Head was required to borrow \$61,800.00 from Zions Bank to pay the subcontractors Iron Head hired to perform work on the job and to pay the costs of material. (R. 325)

13. As of November 12, 2003, (the second day of trial) Iron Head had incurred interest charges on the loan in the amount of \$13,048.32. (R. 326)

14. On or about January 5, 2001, Iron Head filed the Complaint in this action. The Complaint alleges four claims for relief. The first claim is for breach of contract. The second claim is for *quantum meruit*. The third claim is for unjust enrichment and the fourth claim is for foreclosure of the mechanic's lien. (R. 326)

15. On the third day of trial the parties partially settled Iron Head's claim with the agreement that the Gurneys would pay Iron Head \$43,500.00. The settlement agreement did not resolve the issues of entitlement to prejudgment interest and the validity of the mechanics lien. (R. 326)

SUMMARY OF ARGUMENT

This court lacks jurisdiction to hear this appeal because the judgment appealed from is not a final order. The settlement stipulation reserved for determination by the court the issue of prejudgment interest and the issue of validity of the mechanic's lien. There are pending motions before the trial court regarding the validity of the mechanic's lien. Until the trial court rules on those motions, the judgment appealed from is not a

final order.

Prejudgment interest is properly awarded under Utah law when the injury and consequent damages are complete; the damages are ascertainable as of a particular time; and the damages can be measured by fixed rules of evidence and known standards of value. The trial court correctly ruled that Iron Head's damages were complete and ascertained as of the date of a December 2000 meeting. Iron Head's damages were proven at trial with invoices for the costs of materials and labor supplied, invoices and contracts for the costs of payments made to subcontractors, and time cards and documents showing employee time and expenses. The damages were capable of calculation based on rules of evidence and known standards of value.

The Gurneys have failed to marshal the evidence in support of the trial court's findings that form the basis of the trial court's decision.

The court's award of prejudgment interest is also proper as an award of consequential damages for Iron Head's unjust enrichment claim. The interest it seeks is merely compensation for actual interest Iron Head paid on a loan it was required to incur to pay for the material and labor incorporated into the Gurneys' home. The trial court's decision is supported by the court's factual determination and by Utah law.

ARGUMENT

I. THE JUDGMENT APPEALED FROM IS NOT A FINAL ORDER

Under Rule 3(a) Utah Rules of Appellate Procedure appeals may be taken "from

all final orders and judgments, except as otherwise provided by law.” In *Anderson v. Wilshire Investments, L.L.C.*, 123 P.3d 393, 395 (Utah 2005) the Utah Supreme Court stated “As a general rule, an appellate court lacks jurisdiction over an appeal that is not taken from a final order or judgment.” If further action is required by the trial court, there is not a final order. See *Id.* at 396; and *All Weather Insulation, Inc. v. Amiron Development Corp.*, 702 P.2d 1176, 1177-78 (Utah 1985).

On December 12, 2000 Iron Head recorded a Notice of Mechanic’s lien perfecting its lien for improvements made to the Gurneys’ residence. Iron Head’s Fourth Claim for Relief seeks foreclosure of that lien. The Gurneys asserted at trial that the lien was invalid. The parties’ settlement stipulation reserved for determination by the trial court not only the issue of entitlement to prejudgment interest but also the issue of the validity of the mechanic’s lien. The court’s Order filed April 14, 2004, specifically provided that Iron Head may, by motion and affidavit, present the issue of the validity of the lien to the court for a determination as to whether the lien is security for the judgment.

On June 26, 2006, the Gurneys sought a ruling on the issue by filing a Motion to Compel Release of Lien and Cancellation of Notice of Lis Pendens. (R. 399-400) On July 20, 2006, Iron Head filed a stipulation in which the parties agreed Iron Head would have additional time to respond to the Gurneys’ Motion. (R. 420-421) Despite the stipulation being on file, the trial court the following day issued a ruling granting the

motion. The court's ruling noted that no response had been filed by Iron Head.¹ (R. 422-423) In response Iron Head, on July 27, 2006, filed a Motion to Set Aside the trial court's ruling dated July 21, 2006, and a Motion For Order Declaring Validity of Mechanic's Lien. (R. 429-430) Iron Head filed a memorandum supporting the motions and also filed a Request for Hearing dated the same date. (R. 431-432) On August 3, 2006, the Gurneys filed a Memorandum in Opposition to Plaintiff's Motion for Order Declaring Validity of Mechanic's Lien and a Request for Hearing. (R. 433-439)

The court's Judgment that is the subject of this appeal was filed August 11, 2006. (R. 440-442) The court's Judgment does not address the Motion to Set Aside Ruling Dated July 21, 2006 nor the Motion for Order Declaring Validity of Mechanic's Lien filed by Iron Head July 27, 2006. Both motions have been fully briefed by the parties. Because the trial court has yet to rule on those two outstanding motions the August 11, 2006, Judgment is not a final appealable order.

In addition, on May 3, 2007, (more than thirty days following the date the Gurneys filed their Appellant's Brief in this action) the Gurneys served Iron Head's counsel with a new motion, i.e., Defendant's Motion to Impose Penalties for Wrongful Lien together with a memorandum of points and authorities in support of the motion. A copy of the motion is attached hereto as Addendum 1. In the motion, the Gurneys acknowledge the pendency of Iron Head's Motion for Determination of Validity of the Lien. The

¹The court failed to consider the Stipulation on file giving Iron Head additional time to oppose the motion.

Gurney's new motion states: "Concomitantly with a determination of the validity of the mechanic's lien comes the possibility of the invalidity of that lien." The Gurney's new motion seeks a determination that the lien is wrongful and requests the court to impose penalties on Iron Head. Until the issues of the validity of the mechanic's lien are resolved by the trial court, this court lacks jurisdiction to hear this appeal.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT PREJUDGMENT INTEREST SHOULD BE AWARDED IN THIS CASE

In *Smith v. Fairfax Realty, Inc.*, 82 P.3d 1064 (Utah 2003) the Utah Supreme Court reaffirmed its test laid out in *Fell v. Union Pacific Railway Co.*, 88 P.1003 (Utah 1907) for determining whether prejudgment interest is awarded in a particular case. The Court stated:

The true test to be applied as to whether interest should be allowed before judgment in a given case or not is, therefore, not whether the damages are unliquidated or otherwise, but whether the injury and consequent damages are complete and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their best judgment in assessing the amount to be awarded for past as well as for future injury, or for elements that cannot be measured by any fixed standards of value. 82 P.3d at 1069, quoting *Fell, supra.*, 88 P. at 1007.

The test requires a trial court to determine the following: (1) whether the injury and consequent damages are complete; (2) whether the injury and damages are ascertained as of a particular time; and (3) whether the damages can be measured by rules of evidence and known standards of value. These elements are likewise stated in *Bennett*

v. Huish, 570 Utah Adv. Rep. 16, 21 (Utah App. 2007) wherein this court stated:

“Prejudgment interest is properly awarded when the damage is complete, the loss can be measured by facts and figures, and the amount of loss is fixed as of a particular time.”

The damages suffered by Iron Head satisfy those requirements.

A. Iron Head’s Losses Were Complete And Ascertained As Of A Particular Time

The trial court in its Order on Motion for Prejudgment Interest made specific findings that the injury and consequent damages were complete and the injury and damages were ascertained as of an early December 2000 meeting between Richard Curtis of Iron Head and defendant Alan Gurney. The court stated:

The passage of time is measured from a particular event. Both sides offered testimony in this case that there was a meeting between Richard Curtis and Alan Gurney that occurred in the Gurney home in early December of 2000. This is a meeting where Richard testified that he had an invoice or a printed statement or bill with him, offered to show it to Alan, but Alan refused to look at it. It is clear from the evidence that no work was done on that project after that date. December 31, 2000 is a appropriate date to use to calculate the passage of time. (R. 388)

The trial court’s determination was correct. Iron Head’s damages are the losses it sustained by providing materials and labor to improve the Gurney’s house for which it was not paid. Because Iron Head did no further work on the Gurney’s home after the December 2000 meeting Iron Head did not incur additional damages; other than interest for the loss of use of its money. Iron Head’s damages were thus complete on that date.

Likewise Iron Head’s damages were ascertained as of that time. Alan Gurney communicated the Gurney’s decision not to pay the invoice at that meeting. Indeed, as

the trial court found, Alan Gurney refused to even look at Iron Head's invoice. Iron Head's damages were ascertained as of that meeting because Iron Head learned at that meeting it was not getting paid; and thus had been damaged.

This case is similar to *Davies v. Olson*, 746 P.2d 264 (Utah App. 1987) in which this court concluded that the plaintiff's damages were fixed for purposes of awarding prejudgment interest from the time the defendant acknowledged an obligation to pay the plaintiff for his services in constructing duplexes. This Court stated:

The trial court found July 7, 1981, the date defendant Lund signed the settlement statement, as the due date, as that was the date the benefit was conferred. *It was also on this date that defendants acknowledged an obligation to pay plaintiffs for their services in constructing the duplexes.* We find that this determination is supported by substantial evidence and therefore will not disturb it on appeal. *Based on this factual determination, we find the appropriate rate of interest is 10 percent.* (Emphasis added). *Id.* at 270.

The trial court correctly concluded Iron Head's damages were complete and were ascertained as of the date of the December meeting.²

**B. The Amount Of Iron Head's Damages Are Calculable
In Accordance With Fixed Rules Of Evidence And Known Standards Of Value**

Iron Head's damages are also calculable and can be measured by facts and figures. At trial Iron Head introduced into evidence invoices for all the materials that were supplied to the job. Iron Head also introduced into evidence written contracts and

²The Gurneys argue the court randomly selected the date December 31, 2000, because the meeting actually occurred in early December. The Gurneys should not complain. By selecting the last day of the month the trial court gave the Gurneys the benefit of any doubt.

invoices for all the work performed by its subcontractors. Iron Head also introduced into evidence time cards and other employment records showing the hours worked and the rates of pay and the amount of employee expenses it incurred for its employees who performed labor on the Gurneys' home.

The test under Utah law is whether the damages are "calculable" (*Price-Orem Investment Co. v. Rollins, Brown and Gunnell, Inc.* 784 P.2d 475, 483 (Utah App. 1989)) or "can be measured by facts and figures" (*Bjork v. April Industries, Inc.*, 560 P.2d 315, 317 (Utah 1977)). The test is not whether the damages are in fact liquidated and calculated prior to trial. See also *Fell, supra.* at 1006. In *Bennett, supra.* at 21 this court stated the rule as follows:

The fact that the parties dispute or reduce the amount of damages does not in and of itself mean that damages are incomplete or cannot be calculated within a mathematical certainty.

Iron Head suffered the following damages: (1) the cost of the materials it purchased and incorporated into the Gurneys' home; (2) the amount it paid its subcontractors to pay for labor and materials the subcontractors incorporated into the Gurneys' home; (3) the money it paid to its employees in wages, taxes and employment expenses for the time they performed labor on the Gurneys' home; (4) the profits³ Iron Head should have earned by making improvements to the Gurneys' home; and (5) the

³Under the settlement reached by the parties, Iron Head essentially waived its claim for lost profits. The \$43,500 the parties agreed the Gurneys would pay was the amount the parties agreed were the costs of the materials and labor paid by Iron Head plus the amounts Iron Head paid to its subcontractors.

interest it lost on these expenses. Each element of these damages can be calculated based on fixed rules of evidence and known standards of value.

Indeed the only type of damages for which prejudgment interest is not available are those that are incomplete or are left up to the best judgment of the trier of fact and for which the trier of fact is not required to follow standards of value and rules of evidence.

This court identified those types of cases as follows:

The nature of losses that cannot be calculated with mathematical accuracy are those in which damage amounts are to be determined by the broad discretion of the trier of fact, such as in cases of personal injury, wrongful death, defamation of character, and false imprisonment. *Bennett, supra*, 570 Utah Adv. Rep. at 21.

Iron Head's damages were complete and ascertained as of a specific date. They were also capable of being calculated with mathematical accuracy based on known standards of value and fixed rules of evidence.⁴ The applicable prejudgment interest rate is ten percent per annum based on Section 15-1-1 Utah Code Ann. Prejudgment interest at the rate of ten percent per annum was properly awarded by the trial court.

III. THE TRIAL COURT'S FACTUAL FINDINGS MUST BE AFFIRMED

Iron Head acknowledges that the question of whether prejudgment interest should be awarded in a particular case is a question of law to be decided by the trial court.

Smith, supra. 82 P.3d at 1068. However the trial court cannot reach that decision without

⁴The Gurneys argue interest is inappropriate because no damages were actually awarded by the trial court due to the parties' settlement. However, the standard is not whether damages were awarded but whether damages are complete, ascertained and calculable. Damages suffered by a party are damages to that party regardless of whether they have been awarded.

first making certain factual determinations. The fact questions to be determined by the trial court vary depending upon the facts of each case. This court has previously acknowledged that the decision whether to award to prejudgment interest is dependent, in part, upon factual determinations made by the trial court. As quoted earlier in this brief, the trial court in *Davies v. Olson*, 746 P.2d 264 (Utah App. 1987) made a factual finding that a settlement statement was the due date that a benefit was confirmed and an obligation acknowledged. That factual finding was the basis for the court's determination that damages were complete and were ascertained as to a particular time. This court acknowledged that those findings were factual and appropriate and formed the basis for the award of prejudgment interest. *Id.* at 270.

Similarly in *Carlson Distributing Company v. Salt Lake Brewing Co., L.C.*, 95 P.3d 1171 (Utah App. 2004) this court recognized that the determination by the trial court of whether to award prejudgment interest involved both findings of fact and conclusions of law. The trial court's decision was based upon a factual finding that a deposit of funds with the court had been made and a conclusion of law that a waiver or rights existed based upon a failure to object. This court stated: "We see no error in the trial court's factual or legal determinations in this regard." 95 P.3d at 1179-80.

As a basis for their appeal, the Gurneys assert that Iron Head's loss was not fixed as of a particular time and that the court randomly chose the date from which interest was to run. The Gurneys thus challenge the trial court's determination as to whether Iron

Head's injury and consequent damages were complete and whether the injury and damages were ascertained as of a particular time.

The Gurneys also challenge the award of prejudgment interest asserting that the amount of damages were never liquidated. For their argument the Gurneys rely upon several factual assertions set forth in an Affidavit of Patrick J. Kilbourne which was prepared following the trial. The affidavit is based upon Mr. Kilbourne's apparent review of various documents. The affidavit even purports to state what Kilbourne's understanding is of what Mr. Curtis testified to at trial. The Gurneys rely upon this affidavit even though Mr. Kilbourne was not present at trial, did not testify and his affidavit was never entered into evidence.⁵

The critical point for purposes of this appeal, however, is that the Gurneys have failed to marshal the evidence in support of the trial court's decision. When reviewing a mixed question of fact and law this court is required to give the trial court some level of deference. *Wayment v. Howard*, 2006 Utah Lexis 152, page 9. A party appealing a trial court's findings must "marshal all of the facts used to support the trial court's findings and then show that these facts cannot possibly support the conclusion reached by the trial court, even when viewed in the light most favorable to the appellee." *Id.* The Gurneys may not simply cite to the evidence which supports their position and hope to prevail. *Id.*

⁵The Kilbourne Affidavit, of course, cannot be relied upon by this court because it was not part of the evidence at trial. It is also inadmissible based on lack of foundation and because it contains hearsay.

In this case, the Gurneys have not even attempted to marshal the evidence in support of the trial court's decision.⁶ The Gurneys have only cited to the evidence of their choice.

Moreover, the issue is not whether the damages were actually liquidated to a mathematical certainty. The issue is whether the damages can be calculated. There was sufficient evidence produced at trial to adequately demonstrate that Iron Head's damages were calculable to a mathematical accuracy. The Gurneys have not marshaled the evidence in support of that determination; nor have they marshaled the evidence supporting the trial court's finding that Iron Head's damages were complete and ascertained as of the December 2000 meeting. The trial court's decision should be upheld.

IV. AWARDING INTEREST ON A SETTLEMENT AMOUNT DOES NOT VIOLATE PUBLIC POLICY

The Gurneys argue that awarding prejudgment interest on the amount the parties agreed was the principal amount owed is contrary to public policy. Notably the Gurneys have cited no Utah law to support this assertion. Indeed in *Bennett, supra*, at 21 this court stated: "The fact that the parties dispute or *reduce* the amount of damages does not in and of itself mean that damages are incomplete or cannot be calculated with mathematical certainty." (Emphasis added).

There is no basis for concluding that settlements will be less likely if prejudgment

⁶Indeed the Gurneys did not have a transcript of the trial prepared. They filed with the trial court a certificate that a transcript was not required. (R. 448 and 449)

interest is awarded. Although a defendant may be less likely to settle a case if the likelihood of paying interest exists; a plaintiff would be more likely not to settle if there were no likelihood of being awarded interest. There may be a public interest in encouraging settlements, but there is no public interest in encouraging smaller settlements. In addition defendants will be motivated to delay resolution of cases as long as possible if they believe interest will not accrue. In this case the agreement to submit the issue to the trial court was an integral part of the settlement agreement itself. There is simply no legal or logical basis to conclude that requiring the Gurneys to pay prejudgment interest on the money they agreed was owed to Iron Head is contrary to public policy.

V. PREJUDGMENT INTEREST MAY BE PROPERLY AWARDED
ON A *QUANTUM MERUIT* CLAIM.

Iron Head's Complaint alleged claims for relief based on breach of contract, *quantum meruit*, unjust enrichment, and for foreclosure of the mechanic's lien. The Gurneys argue on appeal that prejudgment interest is not properly awarded in a claim for *quantum meruit*. The Gurneys argument fails for several reasons.

First, there was ample evidence presented to the trial court to award prejudgment interest based on Iron Head's claim for breach of contract. Under Utah law an appellate court may affirm a trial court's decision on any proper ground. *Bailey-Allen Company, Inc. v. Kurzet*, 876 P.2d 421, 424 (Utah App. 1994). The Gurneys have not marshaled the evidence to demonstrate there was no evidence to support Iron Head's breach of contract

claim.

Second, prejudgment interest is properly awarded on *quantum meruit* claims. This court in *Davies v. Olson, supra*. 746 P.2d at 270 awarded prejudgment interest in a case very similar to this one. This court ruled that damages were proper based on a *quantum meruit* theory and that prejudgment interest should be awarded.

Iron Head acknowledges that this court and the Utah Supreme Court have not awarded prejudgment interest in every *quantum meruit* case. The courts have analyzed the cases on a case by case basis to determine if the appropriate requirements for an award of prejudgment interest have been satisfied. The cases cited by the Gurneys are all distinguishable from the instant case.

In *Bailey-Allen, supra.*, this court disallowed prejudgment interest in that particular case based on the facts. The court stated, “We conclude that any damages in this case cannot be fixed at a particular time and with accuracy.” *Id.* at 427. This court, however, did not make a blanket ruling that prejudgment interest is never allowed in *quantum meruit* cases.

Similarly, in *Dejavue, Inc. v. US Energy Corp.*, 993 P.2d 222 (Utah App. 1999) this court held that prejudgment interest was inappropriate in that case because the general verdict form did not identify the specific claims on which the damages award was based. The *quantum meruit* claim was submitted to the jury together with claims for relief for forcible entry, unlawful detainer, and conversion; claims for which the court

stated an award of interest would be “highly problematic.” *Id.* at 228. Again, the court’s ruling was limited to the facts of that particular case. This court did not hold that prejudgment interest is never awardable in *quantum meruit* cases. Likewise, the case of *Bellon v. Malnar*, 808 P.2d 1089 (Utah 1991) dealt with the equitable claim of restitution and is distinguishable from this case.

Whether to award prejudgment interest in a particular case is dependent upon whether the damages are complete and ascertained as of a particular date and whether the damages are capable of being calculated based upon known standards of value and fixed rules of evidence.

There was substantial evidence to support the trial court’s decision to award prejudgment interest in this case.

VI. THE AWARD OF PREJUDGMENT INTEREST WAS ALSO PROPER IN THIS CASE AS AN AWARD OF CONSEQUENTIAL DAMAGES.

The testimony at trial established that as of the second day of trial Iron Head had incurred interest expenses in the amount of \$13,048.32 on a loan obtained by Iron Head to pay its suppliers and subcontractors.⁷ The interest paid by Iron Head was thus an actual loss it suffered. In *Canyon Country Store v. Bracey*, 781 P.2d 414, 423 (Utah 1989) the Utah Supreme Court stated, “The purpose of a prejudgment interest award is to compensate a plaintiff for actual loss or to prevent a defendant’s unjust enrichment.” One

⁷The Gurneys greatly benefitted from Iron Head’s loan. If Iron Head had not obtained the loan and paid the subcontractors and suppliers they no doubt would have filed liens on the Gurneys’ home.

of Iron Head's claims for relief was for unjust enrichment.

There was substantial evidence presented at trial to support Iron Head's claim for prejudgment interest based on its claim for unjust enrichment. The interest award constitutes consequential damages to compensate Iron Head for the losses it suffered by paying interest on a loan it obtained to pay its subcontractors and suppliers.

CONCLUSION

This court does not have jurisdiction over this appeal because there are three pending outstanding motions in the trial court awaiting the trial court's ruling. Iron Head's damages were complete and were ascertainable as of the date found by the trial court. Iron Head's damages were for its costs incurred in improving the Gurneys' house. The damages were calculable with mathematical certainty based upon known standards of value and rules of evidence. Iron Head's losses were actual losses for which Iron Head was required to obtain a loan and pay interest. The interest paid on those losses are thus consequential damages.

The trial court's decision awarding Iron Head prejudgment interest on its losses was appropriate under alternate theories of Utah law. The Gurneys have not marshaled the evidence to show the trial court's ruling was erroneous. The trial court's decision should be affirmed.

DATED this 7th day of May, 2007.

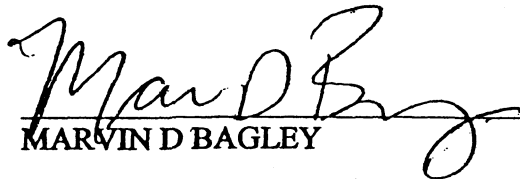

MARVIN D BAGLEY
ATTORNEY FOR APPELLEE

CERTIFICATE OF SERVICE

On the 8th day of May, 2007, I caused to be mailed by US Mail, first class postage thereon prepaid two true and correct copies of the foregoing BRIEF OF APPELLEE to each of the following:

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**SIXTH JUDICIAL DISTRICT COURT
SEVIER COUNTY, STATE OF UTAH**

IRON HEAD CONSTRUCTION, INC.,

Plaintiff,

v.

ALAN K. GURNEY and VICKI W.
GURNEY,

Defendants.

**DEFENDANTS' MOTION TO
IMPOSE PENALTIES FOR
WRONGFUL LIEN**

Civil No. 010600008

Judge David L. Mower

Defendants Alan K. Gurney and Vicki W. Gurney ("Gurneys") hereby submit their Motion to Impose Penalties for Wrongful Lien and Request for Hearing.

Plaintiff Iron Head Construction, Inc. ("Iron Head") has sought this Court's determination of the validity of the lien Iron Head filed on the Gurneys' residence. See Motion for Order Declaring Validity of Mechanic's Lien dated July 28, 2006.

Concomitant with a determination of the validity of a mechanic's lien comes the

possibility of the invalidity of that lien. Utah law recognizes that when a mechanic's lien is filed improperly and not in accordance with Utah's statutes for establishing such a lien it is wrongful. When a wrongful lien is recorded against a residence, such as in this case, that lien claimant is responsible and liable to the residence owner for the improper lien. This motion requests that the court find that the Iron Head lien on the Gurneys' residence is wrongful and that Iron Head is liable for penalties and damages for its wrongful lien.

Iron Head's lien is wrongful because it fails to comply with the statutory requirements of Utah law for establishing a mechanic's lien. Iron Head's lien does not merely violate one statutory requirement. Iron Head's lien violates three statutory requirements:

- (1) the lien was filed late (not within 90 days of last work performed, violative of § 38-1-7 Utah Code Ann.);
- (2) the lien failed to contain the steps that the Gurneys must take that would "require" Iron Head to remove the lien (violative of § 38-1-7 Utah Code Ann.); and
- (3) the lien was excessive as it was for more money than the Iron Head was allegedly owed (violative of § 38-1-25 Utah Code Ann.)

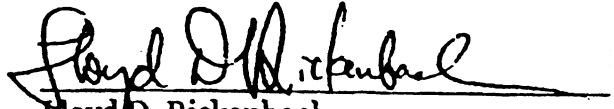
Because the lien violated these three statutory requirements the lien is wrongful. Utah law recognizes that when a wrongful lien is filed, that lien filer is liable for such. See e.g., §§ 38-9-4 and 38-1-25 Utah Code Ann. These penalties include actual damages, treble actual damages, attorney's fees and costs, determined fines, and even criminal liability in the form of a class B misdemeanor (§ 38-1-25).

Upon this Court's determination that the Iron Head's lien is wrongful, the Gurneys respectfully request that this Court address the penalties expressly provided by statute for the filing of a wrongful lien.

Along with this motion, Defendants simultaneously submit a memorandum in support. This memorandum in support more fully discusses the points and authorities of law and the relevant background of this case along with thorough analysis.

Accordingly, Defendants request that this Court grant this motion and impose penalties on the Plaintiff Iron Head for the filing and placement of a wrongful lien on the Gurneys for the last six years.

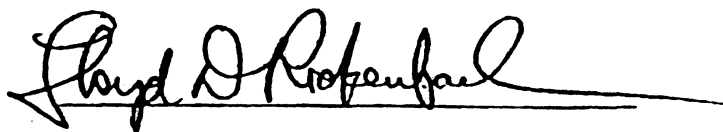
RESPECTFULLY SUBMITTED this the 3 day of May, 2007


Lloyd D. Rickenbach
Attorney for Defendants

CERTIFICATE OF SERVICE

I certify that on the 3 day of May, 2007, I caused a true and correct copy of the foregoing to be sent via U.S. First Class Mail, postage pre-paid, AND fax [(435) 896-9089] to the following:

Marvin D. Bagley, Esq.
669 North Main
Richfield, UT 84701

A handwritten signature in black ink, reading "Lloyd D. Rosenbaum", written over a horizontal line.