

2006

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

IRON HEAD CONSTRUCTION, INC.,	:	Appeal of Judgment Entered
	:	August 11, 2006
Plaintiff/Appellee,	:	
	:	Sixth District Court in and for
vs.	:	Sevier County, Utah
	:	
ALAN K. GURNEY and VICKI W.	:	The Hon. Judge David L. Mower
GURNEY,	:	
	:	Appellate Case No. 20060841-CA
Defendants/Appellants.	:	

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ARGUMENT

In an apparent effort to avoid having to address the merits of the trial court's incorrect decision regarding prejudgment interest, Appellee Iron Head Construction, Inc. ("Iron Head") makes two procedural arguments. First, Iron Head argues that the judgment appealed from, which was prepared by Iron Head, was not a final order. Second, Iron Head argues that Appellants Alan K Gurney and Vicki W. Gurney (collectively, "Gurneys") failed to fulfill their marshaling burden.

Neither of these arguments has merit. The appeal was timely because it was from a final judgment resolving all of the claims between all of the parties on their merits.¹ The Gurneys have no marshaling burden because the decision to award prejudgment interest is a question of law, which Iron Head admits.

Iron Head's arguments regarding the prejudgment-interest issue actually appealed are similarly misguided. Iron Head (1) mis-cites applicable law; (2) fails to acknowledge that an award of prejudgment interest requires a determination of liability and an award of damages, whereas Iron Head compromised the case in the middle of trial, prior to any finding of liability and without recovering any damages; and (3) ignores that prejudgment interest may not be awarded on equitable claims such as unjust enrichment and *quantum meruit*.

¹ The ongoing proceedings in the trial court, mentioned by Iron Head, are in the nature of collection efforts of a judgment that was never stayed.

I. THE JUDGMENT APPEALED FROM WAS A FINAL ORDER BECAUSE IT RESOLVED ALL OF THE CLAIMS BETWEEN THE PARTIES.

Iron Head first argues that the Gurneys' appeal on the issue of prejudgment interest is from a nonfinal order because the issue of the validity of Iron Head's mechanic's lien remains unresolved. Appeals can only be taken from "final orders and judgments, except as otherwise provided by law." Utah R. App. P. 3(a). "An order is final only if it disposes of 'all the claims of all the parties.'" *Matter of Adoption of Baby K.*, 967 P.2d 947, 950 (Utah Ct. App. 1998) (emphasis in original) (citation omitted)).

In the present case, the August 11, 2006 Judgment ("Judgment") appealed from, which was prepared by Iron Head, was a final order. (A copy of the Judgment is attached in Addendum A to this Reply Brief.) On April 14, 2004 the trial court entered an Order expressly recognizing that "the parties agreed on terms to **compromise all of Iron Head's claims**, with the exception of its claim for prejudgment interest . . . [and] Iron Head's claims, having been thus resolved, are hereby dismissed with prejudice with the exception of the prejudgment interest claim." (R. 392.) (emphasis added). (A copy of the April 14, 2004 Order is attached as Addendum B to this Reply Brief.)² This necessarily included Iron Head's claim to foreclose on its mechanic's lien—the fourth cause of action in its complaint. (R. 2-3.) Regarding the finality of the prejudgment interest claim, the trial court stated:

² The April 14, 2004 Order was signed on April 13, 2004 but not entered until April 14, 2004. In the Gurneys' initial brief on appeal, this Order was referred to as the "April 13, 2004 Order," and the Gurneys attached it as Addendum B to that initial brief. Upon further review, however, the Gurneys believe that the "April 14, 2004" designation is more accurate, and so use this throughout the reply brief. Both the April 13, 2004 and April 14, 2004 designations reference the same Order.

The prejudgment interest payment, in accordance with the Court's ruling and the schedule agreed to by the parties, will be due on or before April 14, 2004. Should the Gurneys make a timely payment of the prejudgment interest amount, the Gurneys may submit a form of final Judgment pursuant to which all claims between Iron Head and the Gurneys will be completely released and discharged. **In the event the Gurneys do not pay the prejudgment interest amount on or before April 14, 2004, Iron Head may submit a form of final judgment ordering payment in the amount of \$12,835.48 on the basis of the Court's December 15, [sic] 2003 Order.** Iron Head may also, by motion and affidavit(s), present the issue of the validity of Iron Head's claimed lien to the Court for a determination as to whether the lien is security for that obligation.

(R.391-92.) (emphasis added).

In other words, as of April 14, 2004, all that remained to be resolved was determining if the Gurneys were going to pay the prejudgment interest award when due and the consequent entry of a final judgment by one of the parties. Iron Head's mechanic's lien claim was resolved, except to the extent *Iron Head* elected to present the issue "by motion and affidavit(s)" of whether the claimed lien could be security for the prejudgment-interest obligation. (R. 392.) However, Iron Head filed no such motion.

Instead, when the Gurneys did not pay the prejudgment interest by April 14, 2004, Iron Head, as directed by the trial court, prepared and submitted a final judgment, which was entered on August 11, 2006. (R. 441-42.) The entry of this Judgment, which closely tracked the above-emphasized language of the April 14, 2004 Order, completed

the final step in resolving all the claims of all the parties. The Judgment was never stayed and the Gurneys, therefore, properly appealed from this Judgment.³

Iron Head now insists, however, that the Gurney's filing of a Motion to Compel Release of Lien and Cancellation of Notice of Lis Pendens on June 26, 2006 prevented the Judgment from being final. Iron Head apparently believes that by filing this Motion, the Gurneys somehow presented, *for* Iron Head, the issue of whether Iron Head's lien could validly serve as security for the prejudgment-interest obligation. However, as indicated, under the April 14, 2004 Order, Iron Head needed to present this issue via its own motion.

By filing their Motion, the Gurneys merely sought to remove Iron Head's lien from their property, which was wrongfully left in place after it was resolved by the settlement agreement. These proceedings address collection methods, a winding-up step, unrelated to the issue on appeal of whether Iron Head was entitled to prejudgment interest in the first place. *See Matter of Estate of Morrison*, 933 P.2d 1015, 1016 (Utah Ct. App. 1997) (“[W]hether an order is deemed a ‘final order’ is not necessarily dependent in all instances upon whether all issues in a lawsuit have been adjudicated. The test to be applied is a pragmatic test.” (quoting *First of Denver Mortgage Investors v. C.N. Zundel & Assocs.*, 600 P.2d 521, 528 (Utah 1979))). In describing the pragmatic test, the *Morrison* Court stated “failure to allow an appeal” from certain orders “that resolve

³ The Gurneys note that Iron Head is wholly at fault in creating this jurisdiction issue. If the Iron Head did not intend the Judgment to be the final order on the prejudgment-interest issue, why then did Iron Head submit prepare and submit it to the trial court for entry?

issues of vital importance” and “conclude a major phase of the process” could “compel all subsequent proceedings . . . to go forward under a cloud of uncertainty.” *Id.* In *First of Denver*, following this test, the Supreme Court considered an order final even though various cross and counter claims, unrelated to the issue on appeal, were unresolved:

In the instant case no further judicial action remains to be taken with respect to the issues of priority and the sale of the property; and, but for the appeal, sale of the property and disbursement of the proceeds would occur. To require the appeal to abide the determination of pending unrelated claims would make an appeal on the issue of priorities moot. Unless an appeal may be taken at this point, substantial property interests may be destroyed since the sheriff's sale would proceed and the money would be disbursed on the basis of the priorities determined by the trial court. With the issuance of a sheriff's deed and the disbursement of monies, the legal rights and obligations of the parties are finally established. Accordingly, under a pragmatic view of the test of finality, the order appealed in this case is final.

First of Denver, 600 P.2d at 528-29.

In the present case, the prejudgment-interest issue is even more clearly final than those issues considered final in *Morrison* and *First of Denver*. All of the claims of all of the parties have been resolved, and all the steps required under the April 14, 2006 Order have been taken with Iron Head's filing of the Judgment on August 11, 2006. Because Iron Head did not file a motion establishing that its lien could validly serve as security for the prejudgment interest obligation prior to submitting the Judgment for entry by the Court, the prejudgment interest issue is final, notwithstanding the fact that the Gurneys sought release of and penalties for Iron Head's wrongfully unremoved lien. Simply put, the continued validity of Iron Head's lien in any capacity is not relevant to the issue on

appeal. Moreover, if Iron Head was not entitled to prejudgment interest, then the validity of its lien as security for that obligation is moot.

II. THE GURNEYS WERE NOT REQUIRED TO MARSHAL THE EVIDENCE IN ORDER TO APPEAL IRON HEAD'S ENTITLEMENT TO PREJUDGMENT INTEREST.

Iron Head next claims that the Gurneys' appeal is procedurally deficient because the Gurneys failed to marshal the evidence in support of the trial court's decision. However, the marshaling burden is not imposed in all instances, but is limited to situations where an appellant is challenging a finding of fact as either clearly erroneous or an abuse of discretion. *See* Utah R. App. P. 24(a)(9) ("A party challenging a **fact finding** must first marshal the record evidence" (emphasis added)); *see also, e.g., Parduhn v. Bennett*, 2005 UT 22, ¶25, 112 P.3d 495. Consequently, marshaling is not required when the appellant challenges only a trial court's pure legal conclusions. *See, e.g., Peirce v. Peirce*, 2000 UT 7, ¶17 n. 4, 994 P.2d 193 ("[T]he marshaling requirement applies only to challenges of factual findings, not to conclusions of law.").

As Iron Head acknowledges (*see* Appellee Brief, p. 14), "[a] trial court's decision to grant or deny prejudgment interest presents a question of law which [is] review[ed] for correctness." *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶16, 82 P.3d 1064. Nevertheless, Iron Head argues that the Gurneys have a marshaling burden because the determination of whether to award prejudgment interest is a mixed question of law and fact, citing *Davies v. Olson*, 746 P.2d 264 (Utah Ct. App. 1987) and *Carlson Distributing Co. v. Salt Lake Brewing Co., LLC*, 2004 UT App 227, 95 P.3d 1171. However, neither of these cases support this assertion. *Davies* does not set forth a standard of review and *Carlson*

confirms that the decision to grant or deny prejudgment interest is a question of law. *See Carlson*, 2004 UT App 227 at ¶15. Notably, Iron Head does not set forth a single authority imposing the marshaling burden in an appeal on the issue of whether a party was entitled to an award of prejudgment interest.⁴

The Gurneys assert that the trial court erred in making *any* award of prejudgment interest to Iron Head, as the award was based upon a compromise sum, arrived at through the litigants' agreement to settle all claims between them, including equitable claims, prior to and in lieu of the rendering of judgment on the underlying causes of action by the trial court. This is not a fact-sensitive issue, but a purely legal one having equal application in any case regardless of the actual facts at issue in that case. Thus, the Gurneys' challenge the trial court's legal conclusion that Iron Head was entitled to prejudgment interest in the first place.⁵

⁴ Iron Head's marshaling argument may admit more than it intends: Iron Head argues that a "trial court cannot reach that decision [to award prejudgment interest] without first making certain factual determinations." (Appellee's Br., pp. 14-15.) The trial court made no factual findings here; it merely attempted to impose an interest obligation on an amount it acknowledged was a compromise sum. (R. 392.) The trial court's Order, according to Iron Head's standard, is thus deficient. Moreover, where no factual determination was made, there can be no marshaling requirement.

⁵ Although the Gurneys argue that the trial court erred, in part, by randomly choosing December 31, 2000 as the date from which interest is to run (*see* Appellants' Brief, p. 4-5), they do not make this argument to claim that the interest awarded should be something less than \$12,835.48. Instead, the Gurneys assert that the trial court's choice of a random date shows the award was based on discretion, which is error because Utah courts require the "loss" be "fixed as of a particular time," and an absence of discretion. *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 20, 82 P.3d 1064.

However, even assuming *arguendo* that the Gurneys were required to marshal the evidence, which they were not, they have amply fulfilled their burden. Specifically, the Gurneys set forth, in Fact Paragraphs 14 through 19 of their initial brief, everything the trial court relied on in awarding prejudgment interest to Iron Head. The Gurneys further cited to the pleadings filed by Iron Head. Iron Head claims, however, that the Gurneys did not marshal the evidence because they did not cite all the evidence adduced at trial and did not order a transcript of the trial.⁶

This argument itself reveals an inherent flaw in Iron Head's position that it is entitled to prejudgment interest. The trial was never completed and, as indicated in the April 14, 2004 Order of the Court, was settled while Iron Head's first witness was still testifying, "without completing Iron Head's case and without the presentation of any evidence by the Gurneys." (R. 392-93.) Accordingly, the trial court's award of prejudgment interest could not properly be based on the incomplete evidence presented at the trial; this evidence was inconsistent as presented by Iron Head's witness and would have been further contradicted by the Gurneys if given a chance. To the extent the trial

⁶ The Gurneys cited an Affidavit of Patrick Kilbourne to describe the conflicting and inconsistent evidence submitted by Iron Head and demonstrating that it would be impossible to determine the actual amount of money owed to Iron Head (if any) without completing the trial. (*See* Appellants' Brief, pp. 12-14.) Although Iron Head now objects to the use of this affidavit (on grounds of hearsay and foundation), it did not raise any objection below and the Kilbourne Affidavit is part of the appellate record. Iron Head may not challenge the sufficiency of this affidavit for the first time on appeal. *State v. Irwin*, 924 P.2d 5, 7 (Utah Ct.App.1996) ("It is a well-established rule that a [litigant] who fails to bring an issue before the trial court is generally barred from raising it for the first time on appeal.")

court has relied on such evidence, it was not only clearly erroneous, but fundamentally unfair and incorrect as a matter of law.

III. PREJUDGMENT INTEREST WAS NOT PROPERLY AWARDED BECAUSE THE CASE WAS SETTLED AND THUS THERE WAS NO FINDING OF LIABILITY OR DAMAGES AWARDED.

Iron Head's arguments regarding the merits of the prejudgment interest award are similarly without merit. Each of Iron Head's arguments as to why the award should be affirmed suffers from a single fundamental problem. Namely, an award of prejudgment interest requires, as its basis, a finding of liability and an award of damages against the party to pay interest.⁷ Here, as the Gurneys explained in their initial brief, there was no finding of liability, no finding of loss, and no damages were awarded.⁸

Instead the case was settled by all parties on the third day of trial, after it became apparent that the trial could not be finished in the allotted time and would have to be continued months later, for the compromise sum of \$43,500. This number is not "calculable within a mathematical certainty" or the product of the precise "facts and figures" necessary for an award of prejudgment interest. *See Bennett v. Huish*, 2007 UT

⁷ See, e.g., *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 20, 82 P.3d 1064 ("The true test to be applied as to whether interest should be allowed before judgment in a given case or not is . . . **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" (emphasis added)); *Bennett v. Huish*, 2007 UT App 19, ¶ 43, 570 Utah Adv. Rep. 16 (observing "[p]rejudgment interest is properly awarded when the **damage is complete** . . . and if damages are calculable within a mathematical certainty." (emphasis added) (quoting *Orlob v. Wasatch Med. Mgmt.*, 2005 UT App 430, ¶ 35, 124 P.3d 269)).

⁸ This fact resolves Iron Head's argument that prejudgment interest is justified as an award of consequential damages. By settling the case with the Gurneys, Iron Head gave up any right to pursue an award of damages, compensatory or otherwise.

App 19, ¶ 43, 570 Utah Adv. Rep. 16. Likewise, this amount is not traceable to any amount allegedly owed or claimed to be owed by the Gurneys to Iron Head.

Nevertheless, in an attempt to save its prejudgment interest award, Iron Head claims that in settling the case it “essentially waived its claim for lost profits” and, thus, the \$43,500 settlement amount reflects its damages minus lost profits.⁹ (Appellee’s Brief, p. 13 n .3.) Notably, Iron Head does not provide a single record cite or other evidence (such as an invoice or contract) supporting this assertion. Indeed, this is because it is not accurate. In its complaint, Iron Head sought \$71,000 *plus* profit and interest. It previously filed a mechanic’s lien on the property in the inconsistent amount of \$119,051. (R. 1-8.) Its invoices yielded different totals yet, and all of these figures are at variance with Iron Head’s contract. (R. 15-16.) If this is the case, how can the \$43,500 settlement amount equal Iron Head’s damages minus lost profits?

Moreover, the statement of facts in Iron Head’s brief do not support its assertion. In Paragraph 12, Iron Head claims that it was required to borrow \$61,800 to pay its subcontractors and for the costs of materials.¹⁰ (Appellee’s Brief, p. 6.) In Paragraph 13, Iron Head claims it had incurred interest on the loan of \$13,048.32 as of the second day of trial. (*Id.*) However, the trial court did not base its award of prejudgment interest on

⁹ The statement made in footnote 3 of Iron Head’s brief on appeal to the effect that the parties agreed to settle all claims for payment of Iron Head’s actual costs is absolutely false. The number was arrived at purely as a compromise figure with no substantiation of invoices or records.

¹⁰ The Gurneys note that this and other record cites set forth in Iron Head’s Statement of Facts are not to the record evidence, but rather to Iron Head’s own characterizations of that evidence in Iron Head’s Brief in Support of Claim for Prejudgment Interest, filed with the trial court on December 5, 2003. (R. 323-36.)

the bank debt, interest allegedly paid by Iron Head, or any other specified amount or factor.

The fact of the matter is that Iron Head's attempts to reconstruct the facts and figures to justify the prejudgment-interest award simply do not work. Contrary to Iron Head's assertions, the \$43,500 settlement amount was the product only of the settling parties' discretion and was not owed, sought or liquidated prior to the date the settlement agreement was entered into. This amount was agreed upon by Iron Head and the Gurneys as a means to end the litigation, with everyone compromising. The authorities agree that it is improper to award prejudgment interest on a stipulated and thus, discretionary, sum. *See Smith*, 2003 UT 41 at ¶20 (stating prejudgment interest may not be based on discretion); *Carlson Distribution Co. v. Salt Lake Brewing Co., L.C.*, 2004 UT App 227, ¶¶ 32-34, 95 P.3d 1171 (refusing to base an award of prejudgment interest on a stipulated amount of damages, but instead requiring the interest to be based on the amount of damages actually awarded by the jury); *Pearson Construction Co. v. Intertherm Inc.*, 566 P.2d 575, 576 (Wash Ct. App. 1977) (refusing to award prejudgment interest on a stipulation because this would chill settlements).

Importantly, despite the fact that the Gurneys raised this exact issue in their initial brief, Iron Head has cited no authority even purporting to allow prejudgment interest on a settlement amount accruing from a date prior to the execution of the settlement agreement. Iron Head does, however, cite to this Court's decision in *Davies v. Olson* granting prejudgment interest from "the date defendant Lund signed the settlement statement . . . as that was the date the benefit was conferred." 746 P.2d at 270. Iron Head

takes this statement completely out of context. The “settlement statement” discussed in *Davies* was not an agreement to settle the litigation, but was rather a document prepared to assist in the closing of the real estate transaction at issue. *See id.* at 266. This real estate transaction document had nothing to do with the compromise of a dispute. Furthermore, unlike the present case, in *Davies* prejudgment interest was awarded after trial was completed, following a finding of liability and an award of damages. *Id.*

IV. PREJUDGMENT INTEREST MAY NOT BE AWARDED ON AN EQUITABLE CLAIM.

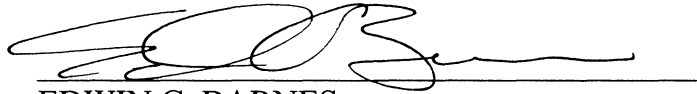
Iron Head also argues that prejudgment interest is properly awarded on *quantum meruit* and unjust enrichment claims. As the Gurneys explained in their initial brief, this is contrary to current Utah law. *See generally Bellon v. Malnar*, 808 P.2d 1089, 1097 (Utah 1991); *Shoreline Development, Inc. v. Utah County*, 835 P.2d 207, 212 (Utah Ct. App. 1992). Although Iron Head relies on the *Davies* Court’s award of prejudgment interest in a *quantum meruit* case, this decision is also contrary to later Utah law and, as explained above, specifically distinguishable by the fact that prejudgment interest was awarded following a complete trial, including a finding of liability and an award of damages. *Davies*, 746 P.2d at 266. Iron Head, here, settled all of its equitable claims along with its legal claims without distinguishing among them. This, along with the fact that there was no finding of liability or damages awarded, is fatal to Iron Head’s case. *See Dejavue, Inc. v. U.S. Energy Corp.*, 1999 UT App 355, ¶24, 993 P.2d 222 (upholding the trial court’s denial of prejudgment interest since one of the five causes of action the plaintiff submitted to the jury was an unjust enrichment claim).

CONCLUSION

For the foregoing reasons and those stated in the Gurneys' initial brief, the prejudgment interest award must be reversed.

Dated this 11th day of June 2007.

CLYDE SNOW SESSIONS & SWENSON

A handwritten signature in black ink, appearing to read 'Edwin C. Barnes', is written over a horizontal line.

EDWIN C. BARNES
AARON D. LEBENTA

LLOYD D. RICKENBACH

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the REPLY BRIEF OF APPELLANTS were mailed, postage prepaid, to the following on the 11th day of June 2007:

Marvin D. Bagley
669 North Main Street
Richfield, Utah 84701
Attorney for Appellee

A handwritten signature in black ink, appearing to read 'M. D. Bagley', is written over a horizontal line.

ADDENDUM A

2004 APR 11 PM 4:23



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IN THE SIXTH JUDICIAL DISTRICT COURT

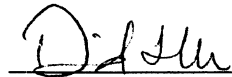
SEVIER COUNTY, STATE OF UTAH

IRON HEAD CONSTRUCTION, INC.,)	JUDGMENT
)	
Plaintiff,)	
)	
vs.)	
)	
ALAN K. GURNEY and)	CIVIL NO. 010600008
VICKI W. GURNEY,)	
)	
Defendants.)	JUDGE DAVID L. MOWER

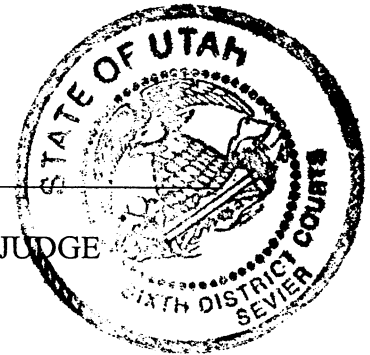
This court having issued an Order on Motion for Prejudgment Interest on December 16, 2003, ordering that plaintiff Iron Head Construction, Inc. was entitled to judgment against Alan K. Gurney and Vicki W. Gurney for prejudgment interest in the amount of \$12,835.48 calculated as of November 12, 2003, and defendants having failed to pay plaintiff that amount on or before April 14, 2004, in accordance with this court's Order dated April 13, 2004, and good cause appearing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

Judgment is hereby entered in favor of Iron Head Construction, Inc. against defendants Alan K. Gurney and Vicki W. Gurney jointly and severally in the amount of \$12,835.48 together with post judgment interest at the rate of 3.41% from November 12, 2003, until paid.

DATED this 11 day of Aug, 2006.



DAVID L. MOWER
SIXTH DISTRICT COURT JUDGE



Approved as to form:

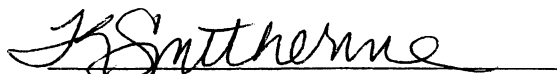
COUNSEL FOR DEFENDANTS

MAILING CERTIFICATE

On the 27th day of July, 2006, I caused to be mailed by U.S. Mail, first class postage thereon prepaid a true and correct unsigned copy of the foregoing JUDGMENT to the following:

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SECRETARY

MAILING CERTIFICATE

On the _____ day of _____, 2006, I caused to be mailed by U.S. Mail, first class postage thereon prepaid a true and correct signed copy of the foregoing JUDGMENT to the following:

Edwin C. Barnes, Esq.
CLYDE SNOW SESSIONS & SWENSON
One Utah Center
Thirteenth Floor
201 South Main Street
Salt Lake City, UT 84111-2216

Lloyd D. Rickenbach
PO Box 440008
Koosharem, UT 84744

SECRETARY

ADDENDUM B

Edwin C. Barnes (Bar No. 0217)
Walter A. Romney, Jr. (Bar No. 7975)
CLYDE SNOW SESSIONS & SWENSON
Attorneys for Defendants
201 South Main Street, 13th Floor
Salt Lake City, Utah 84111-2216
Telephone: (801) 322-2516
Facsimile: (801) 521-6280

SIXTH DISTRICT COURT

2004 APR 14 AM 9:16

CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT
IN AND FOR SEVIER COUNTY, STATE OF UTAH

IRON HEAD CONSTRUCTION, INC., :

Plaintiff, :

-vs- :

ALAN K. GURNEY and
VICKI W. GURNEY, :

Defendants. :

ORDER

Civil No. 010600008

Judge David L. Mower

Trial commenced in this case on November 10, 2003 before the Honorable David L. Mower. Plaintiff Iron Head Construction, Inc. was represented by its counsel of record, Marvin D. Bagley, and two of its representatives, Richard Curtis and Amber Curtis, were present during the proceedings. Defendants Alan K. Gurney and Vicki W. Gurney appeared in person and were represented by their counsel of record, Edwin C. Barnes.

On the third day of trial, November 13, 2003, Iron Head's first witness was still testifying and it was apparent to all that the trial could not be completed within the time

allotted. At that time, without completing Iron Head's case and without presentation of any evidence by the Gurneys, the parties agreed on terms to compromise all of Iron Head's claims, with the exception of its claim for prejudgment interest. The parties orally presented their settlement agreement to the Court. In their oral presentation, the parties agreed to submit the issue of entitlement to prejudgment interest to the Court for decision by simultaneous written arguments and submissions. The parties did so and, on or about December 16, 2003, the Court issued its Order On Motion for Prejudgment Interest, awarding \$12,835.48 to Iron Head based upon application of mathematical principles to the agreed settlement amount. *mbs and the other reasons set forth in the Memorandum Decision.*


The parties represent in filing this Order that the agreed settlement amount was timely paid. Iron Head's claims, having been thus resolved, are hereby dismissed with prejudice with the exception of the prejudgment interest claim.

The prejudgment interest payment, in accordance with the Court's ruling and the schedule agreed to by the parties, will be due on or before April 14, 2004. Should the Gurneys make timely payment of the prejudgment interest amount, the Gurneys may submit a form of final Judgment pursuant to which all claims between Iron Head and the Gurneys will be completely released and discharged. In the event the Gurneys do not pay the prejudgment interest amount on or before April 14, 2004, Iron Head may submit a form of final Judgment ordering payment in the amount of \$12,835.48 on the basis of the Court's December 15, 2003 Order. Iron Head may also, by motion and affidavit(s),

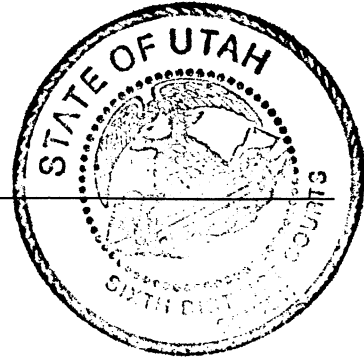
present the issue of the validity of Iron Head's claimed lien to the Court for a
determination as to whether the lien is security for that obligation.

Dated this 13 of April 2004.

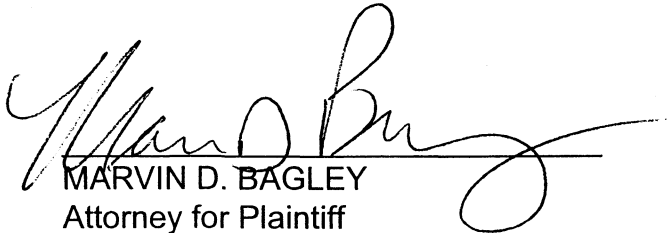
BY THE COURT:



DAVID L. MOWER
District Court Judge



APPROVED AS TO FORM:



MARVIN D. BAGLEY
Attorney for Plaintiff

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 010600008 by the method and on the date specified.

METHOD	NAME
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Mail	MARVIN D. BAGLEY ATTORNEY PLA 180 NORTH 100 EAST SUITE F RICHFIELD, UT 84701
------	--

Mail	EDWIN C BARNES ATTORNEY DEF 201 S MAIN ST 13TH FLOOR SALT LAKE CITY UT 84111-2216
------	---

Dated this 14 day of April, 2004.

Carol Frank
Deputy Court Clerk