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SFR, Inc., a Colorado corporation d/b/a QED v. Atlas Electric, Inc.; Comtrol, Inc.; United States Fidelity & Guaranty Company; and Azam Soofi, an individual : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SFR, INC., a Colorado corporation d/b/a QED, Appellee and Cross-Appellant, vs. ATLAS ELECTRIC, INC.; COMTROL, INC.; UNITED STATES FIDELITY & GUARANTY COMPANY; and AZAM SOOFI, an individual, Appellants and Cross-Appellee.	Case No. 20060915-CA District Court No. 020902795 Priority No. ____

REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-APPELLEE

On Appeal from the Final Order of
the Third District Court
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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE STATUTES

FEDERAL RULES

INTRODUCTION

No documents are more fundamental to the litigation process than the damages documents which must be disclosed as part of any litigant's Initial Disclosures, pursuant to UTAH R. CIV. P. 26(a)(1). These documents must be provided to the other parties "without awaiting a discovery request." Id. With respect to damages, Initial Disclosures must contain "all discoverable documents... on which [that party's damage] calculation is based." UTAH R. CIV. P. 26(a)(1)(C). These obligations are designed to allow the parties "to evaluate the case early in the process." UTAH R. CIV. P. 26, Advisory Committee Notes. Similarly, a payment bond claimant should produce damage documents, as part of its Initial Disclosures, which will necessarily consist of an accounting of what has been paid and what is still due, including such documents as copies of all the checks received as payment for the project against which it is making a claim, and documents that show how those checks were applied.

Appellant SFR, Inc., d/b/a QED ("QED") wants this Court to hold that a bond claimant that: (1) produces no documents during Initial Disclosures; (2) represents in response to discovery requests that there are no documents that support its damage claims; (3) produces a self-selected group of damage documents on the eve of trial (including many of the checks it received for the project)[1]; and (4) continues to withhold the full set of

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[1]QED's suggestion that, "It is not clear whether or not the Remittance Documents [QED's term for the Damage Documents] were produced or made available for inspection to counsel or the parties during the discovery process," (Brief of Appellee at 5, n. 3) is flatly contradicted by the Record. Comtrol's Opening Brief affirmatively demonstrates, at Facts 9 - 22, that the documents were not produced until November 21, 2005, despite a written request from Comtrol's counsel that copies of all documents be provided. Fact 16.

damage documents (including at least three checks of unknown amounts)[2]; should not have its case dismissed because such behavior has no prejudicial effect on its adversary.

Such a holding would render Rule 26 meaningless and will result in this case standing for the proposition that parties can disregard Rule 26 with impunity, without fear of any real negative consequence. Cf., Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976) (finding dismissal an appropriate discovery sanction because "other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts."); Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees and Restaurant Employees Int'l Union, 212 F.R.D. 178, 220 (S.D.N.Y. 2003) ("unless Rule 37 is perceived as a credible deterrent rather than a 'paper tiger,' the pretrial quagmire threatens to engulf the entire litigative process."). This Court should not create such a precedent.

I. THE TRIAL COURT'S SANCTION FAILED TO ADDRESS THE HARM CAUSED BY QED.

A. Appellants Preserved this Issue for Appeal.

It is not an overstatement that the most relevant documents in a payment bond case are the documents that show what a supplier has been paid by its subcontractor. This is particularly important when the subcontractor has multiple accounts with the supplier on

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[2]QED makes the claim that Appellants have "not proved that additional documents exist." Brief of Appellee at 10. To the contrary, Appellants' Brief identified three checks which QED never produced, and allocation documents for those checks (Appellant's Brief at Fact 25). QED's brief does not contain a single fact that would rebut the existence of these documents.

separate, unrelated projects and the subcontractor has instructed the supplier how to apply the payments among the various projects. When QED, after years of contending it did not have copies of the checks and payment allocation instructions from Atlas, produced those and other damage documents on the eve of trial, Appellants moved to dismiss. Appellants contend that QED's late production of these documents had prevented Appellants from adequately developing their case via the discovery process, foreclosing "any reasonable analysis of Plaintiff's claims that it had provided materials for which it was not paid." R-642. Appellants set forth additional discovery needs that were raised by the 11th Hour Documents, including follow-up written discovery, depositions of the authors of the documents, expert damage witnesses, and review of QED's computer system. R-641-42. QED's 11th Hour production of such Damage Documents denied Appellants any meaningful opportunity of proving that QED had been paid in full and QED failed to follow Atlas' payment instructions.

After trial, when Appellants had adequate time to cross-reference and sift through the mountain of information contained in the 11th Hour documents, it became apparent from closer scrutiny of QED's belated production that at least three checks from Atlas, of unknown amounts, had never been produced. In other words, Appellants were correct in their pretrial motion to dismiss QED's complaint, which asserted that Appellants were severely prejudiced because the 11th Hour documents established that QED did not account for all of the monies it received as payment on the account relating to the Matheson Junior High Project. By producing the documents at the last minute, QED prevented Appellants from conducting the necessary discovery which would show serious questions about QED's

damage claims.

QED now contends that Appellants did not adequately preserve the issue of the failure to produce the three checks. In QED's world, litigants can, at the last minute, overwhelm their opponents with critical documents on the eve of trial, and shift the burden of rapidly digesting the documents and finding the few buried nuggets of useful information contained therein to the besieged, who are also busily engaged in trying to prepare for trial based on those documents produced legitimately during the discovery process. According to QED, if the party from whom the information was wrongfully withheld fails to find all of the evidentiary "needles in the haystack" of belated documents and articulate their existence with precision to the trial court, but only generally asserts that the case should be dismissed for discovery violations, the issue has not been preserved for appeal.

This is not the law. All that is required to preserve an issue for appeal is that the issue be "sufficiently raised to a level of consciousness before the trial court...." State v. Richins, 86 P.3d 759 (Utah Ct. App. 2004). By their Motion to Dismiss, Appellants raised the belated production to the Trial Court's consciousness, asserted that the failure to produce these documents earlier had prevented adequate preparation for trial, and set forth additional discovery needs raised by the documents. That Appellants' concerns proved prescient after additional scrutiny is further basis for reversal of the Trial Court, not a basis for a finding that Appellants did not adequately preserve the issue.

B. Discovery Sanctions Must Cure the Harm Caused by the Discovery Violation at Issue.

A discovery sanction is only adequate to the extent it cures the harm caused by the

discovery violation.[3] See, e.g., Jackson v. Microsoft Corp., 211 F.R.D. 423, 431-33 (W.D. Wash. 2002) (considering the risk of prejudice to defendant caused by discovery misconduct and concluding that "dismissal is the only viable remedy."). In cases where documents fundamental to a defendant's development of the case have been withheld, dismissal is the only adequate sanction that will remedy the harm suffered by the defendant. See, Metro. Opera, 212 F.R.D. at 230 (concluding that lesser sanction was not warranted where documents had not been produced because "it is impossible to know what [Defendant] would have found if [Plaintiff] and its counsel had complied with their discovery obligations from the commencement of the action.").

This is especially true where the documents are damage-related. See, Handwerker v. AT&T Corp., 211 F.R.D. 203, 210 (S.D.N.Y. 2002) (dismissing plaintiff's case for failure to produce documents that "impact materially on the extent of any damages [plaintiff] claims to have suffered" and concluding that "precluding [plaintiff] from introducing evidence [will not] provide an effective remedy because the misconduct at issue is [plaintiff's] self-serving withholding of information that may assist [defendant in] prepar[ing] its case.").

In such cases, there is no meaningful argument that a Defendant has not been prejudiced. Id. at 210 (concluding that prejudice occurred where plaintiff prevented defendant from obtaining damage information, and thereby "hindered [defendant] in

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[3]To the extent Appellants must identify an error of law in the trial court's ruling (See, Brief of Appellee at 13), it is this: As a matter of law, a trial court abuses its discretion when the discovery sanction it awards does not cure the harm caused by the discovery violation that is at issue, particularly a violation of such a fundamental duty.

defending itself."); Metro. Opera, 212 F.R.D. at 229 (dismissing contention that discovery violations had not prejudiced defendant where defendant "was not only denied the opportunity to prove its case, but was denied the opportunity to plan its strategy in an organized fashion as the case proceeded.").

Because of QED's non-production of the damage documents, Appellants could not prove what QED had been paid by Atlas.[4] Appellants suspected that QED had been paid in-full inasmuch as Comtrol had over-paid Atlas. Appellant's Brief at Fact 8. Having been prevented by QED from obtaining this information, Appellants lacked any means of defending against QED's claims of non-payment. QED's discovery violations deprived Appellants of the most fundamental of rights–the right to prepare a defense. Because the Trial Court failed to award a discovery sanction that even remotely addressed the harm caused by QED, it abused its discretion. The Trial Court's denial of Appellants' Motion to Dismiss must be reversed.

C. This Court Should Reject QED's Attempt to Shift Blame for the Consequences of its Discovery Violations to Appellants.

QED fails to acknowledge the severity of its wrongdoing, but instead attempts to absolve itself by pointing to certain "strategic decisions" QED claims Appellants' counsel

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[4]QED argues that it met its burden of showing that it had not been paid, even without the 11th Hour documents. See, Brief of Appellee at 18. However, it did this by refusing to produce those documents that would allow Appellants to provide any rebuttal to the simple assertion "We have not been paid." The vast majority of plaintiffs could meet their burdens if they were allowed to foreclose any meaningful defense by withholding material documents showing that they had been paid more than they admit.

made in litigating this case that somehow cleanse QED's belated production of all wrong. According to QED, Appellants should have: (1) sought a continuance (Brief of Appellee at 16); (2) filed motions to compel production of the documents (Id.); (3) sought production of documents from Atlas (Brief of Appellee at 19); and (4) focused more on trial preparation and not on the contents of the 11th Hour documents (Brief of Appellee at 20). None of these suggested reasons to ignore QED's discovery violations withstand scrutiny.

Rule 37 does not require a party seeking dismissal to also request a continuance. Appellants moved for dismissal, a remedy that would have adequately addressed the harm QED caused. To the extent QED thought continuance was more appropriate than dismissal, the burden was on QED to so argue. QED did not; instead it argued that its belated production had caused no harm whatsoever. R-2224, pg. 28. ll. 2-4. Nothing in the Rules of Civil Procedure requires parties harmed by nondisclosure of documents to present the Trial Court with a full array of sanctions to preserve the right to appeal failure to dismiss.

Nor should a party harmed by discovery violations be blamed for the failure to file a motion to compel when the opposing party has represented that the documents in question do not exist by stating in writing, signed by both QED's Credit Manager and QED's legal counsel, that all the relevant documents had been produced.[5] R-670-71, 672. The requirement of the filing of a "Motion to Compel Production of Non-Existent Documents"

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[5]QED admits that Appellants would have prevailed on a Motion to Compel (Brief of Appellee at 16), but omits the implications of this admission for an analysis of its wrongdoing.

as a prerequisite to dismissal when those same documents later appear would serve little purpose.

It is similarly wrong to suggest that Appellants' failure to obtain the documents from Atlas bars this appeal. Atlas had gone out of business and the location of its principals who had left the State of Utah (and any documents they may have had), was unknown. Moreover, the obligations Rule 26 imposes on litigants are independent of the existence of other sources of information. A party that violates Rule 26 cannot point to other sources of discovery as an excuse for its noncompliance with the rule. The suggestion that the records could have been obtained from Atlas is questionable, given that Atlas' owner, Mr. Soofi, went bankrupt early in these proceedings (R-88-89), and QED has a default judgment (R-98-100) against Atlas that it has not collected. If obtaining information from Atlas is such a simple process, why did QED not collect its judgment from Atlas?

Finally, the suggestion that Appellants' counsel should not have spent any time analyzing the belatedly-produced documents overlooks the fact that the issue of the appropriate sanction was not finally resolved until the morning of trial. Given this fact, it would have been negligent to ignore the belated production. QED successfully diverted counsel's attention at a time when Appellants most needed it, which only serves to highlight the palpable prejudice to Appellants caused by QED.

II. AS A MATTER OF LAW, QED IS NOT ENTITLED TO COMPOUNDED EIGHTEEN PERCENT INTEREST.

A. The Plain Language of the Statue Excludes Prejudgment Interest.

QED contends that the payment bond statute provides an unambiguous right to 18% prejudgment interest. Brief of Appellee at 20. However, the word "interest" appears nowhere in the statute.[6] Rather, the statute provides "a right of action" "for any unpaid amount due" one who has "furnished labor, service, or equipment" to state construction projects. UTAH CODE ANN. § 63-56-504(4)(a). Read in harmony, these phrases make clear that bond claimants are to be compensated for the value they provide to the project. Because labor, service and equipment all add value to a project, bond claimants are entitled to the "unpaid amount" for the labor, service, or equipment they provided. Interest, in contrast, does not add value to a project, and is therefore not part of the "unpaid amount" for which a bond claimant has a right of action.

At least one other jurisdiction interpreting similar language has reached the same conclusion. See, e.g., R.W. Sidley, Inc. v. U.S. Fid. & Guar. Co., 319 F.Supp.2d 554, 558-59 (W.D. Pa. 2004) (disallowing prejudgment interest despite bond that allowed claimant to recover for "such sum or sums as may be justly due him").

B. The Prejudgment Interest Award is Punitive.

QED fails to provide any meaningful argument addressing the fact that an award of 18% prejudgment interest in a noncontractual setting is punitive under the newly clarified

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[6]In contrast, the statute explicitly provides for the recovery of attorneys fees. Under the maxim of statutory construction *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of another"), a reasonable conclusion arising from the omission of any mention of prejudgment interest is that the legislature did not intend for suppliers to recover prejudgment interest, in addition to attorneys' fees. See, e.g., Field v. Boyer Co., L.C., 952 P.2d 1078 (Utah 1998) (applying maxim to interpret statute).

decision of Wilcox v. Anchor Wate, –P.3d –, 2007 UT 39 (Utah 2007). QED rightly points out that Wilcox concerns an insurance liquidation preference action, not a payment bond claim. Brief of Appellee at 25. Preference claims are in many respects, however, very similar to payment bond claims. Both typically arise only in light of insolvency; both are designed to protect parties that may be harmed by insolvency; and both often involve defendants that (like Appellants here) are completely innocent of any wrongdoing. If 10% prejudgment interest was deemed punitive by the Wilcox court when awarded against an innocent preference defendant, 2007 UT 39 at ¶ 48, there can be no principled basis for the argument that 18% prejudgment interest is anything but punitive here.

C. QED Admits that the Trial Court Awarded Compound Interest.

The rule in Utah is that "interest on a judgment should be calculated simply unless agreed to otherwise by the parties." City of Hildale v. Cooke, 28 P.3d 697, 707 (Utah 2001). However, the Trial Court awarded QED 18% postjudgment interest on the prejudgment interest portion of the judgment. QED argues that the interest award has not been "compounded *in the way that [Appellants] suggest*," impliedly admitting that it has been compounded in some other way. In order to comply with Utah's prohibition against compound interest absent agreement between the parties, the judgment cannot award postjudgment interest on the prejudgment interest portion of the judgment.

III. THE TRIAL COURT'S JOINT CHECK ESTOPPEL RULING SHOULD NOT BE DISTURBED.

In considering whether to adopt the Joint Check Rule, the Trial Court recognized that

it is "a good principle," but indicated that it was reluctant to adopt the Joint Check Rule absent guidance from a Utah appellate court. R-2224 at 45-46. This Court should provide that guidance. The Trial Court's ruling is, in effect, an adoption of the Joint Check Rule, which is itself a context-specific form of estoppel. For all the important policy reasons underlying the Joint Check Rule, this Court should both adopt the Joint Check Rule and uphold the Trial Court's estoppel ruling.

A. Facts Relevant to the Estoppel Ruling.

The $94,116.55 Joint Check

On October 5, 2001, Comtrol issued a joint check to QED and Atlas for $94,116.55. D. Ex. 13. The check consisted of $7,585.00 for July invoices and $12,787.00 for August invoices as well as $73,744.55 for September fixtures invoices, which amounts were ascertained in telephone conversations with QED. R-2222 at 569, ll. 5 - 16; D. Ex. 33. Comtrol learned later that Atlas deposited the $94,116.55 check into its own bank account without QED's endorsement. R-2222 at 576, ll. 6 - 9. On November 9, 2001, Comtrol called QED to ascertain whether QED had received any of the funds from the $94,116.55 joint check. R-2222 at 576, ll. 10 - 23; R-2222 at 577, l. 21 - 578, l. 6. Comtrol then contacted Atlas to ascertain why QED had not received the check. R-2222 at 579, l. 4 - 21. Comtrol informed Mr. Dahl at QED that Atlas' secretary had deposited the check directly into Atlas' account. R-2222 at 583, ll. 20-23.

Comtrol's Efforts to Communicate with QED re: Atlas' Account Balance

Prior to paying Atlas, Comtrol regularly called QED to ascertain the balance of QED's account with Atlas. R-2220 at 199 - 201. QED responded immediately to those inquiries. R-2220 at 201, ll. 3 - 19. QED had a "hundred percent" understanding that Comtrol was relying on QED to give adequate information regarding balances. R-2220 at 201, ll. 20 - 24.

On November 13, 2001 (R-2222 at 585, ll. 16 - 21), Brian Burk of Comtrol called QED's Branch Manager, David Dahl, to inquire about the status of QED's account with Atlas on the Matheson Project. Mr. Burk stated that the Atlas draw for that month was $85,000, and Mr. Dahl indicated that the amounts owed by Atlas to QED exceeded that amount. R-2222 at 583, l. 7 - 584, l. 18. Mr. Burk informed Mr. Dahl that because the amount due to QED exceeded the amount due to Atlas, the full amount of the Atlas draw would be paid by joint check to QED and Atlas. R-2222 at 584, l. 19 - 585, l.1. Mr. Dahl did not object to Comtrol's joint check proposal. R-2222 at 585, ll. 2 - 4.

QED Endorses the $85,383.19 Joint Check to Atlas

On November 13, 2001, Comtrol issued a joint check to Atlas and QED in the sum of $85,383.19. D. Ex. 15. Azam Soofi and Alan Hall of Atlas both came to Comtrol's office to pick up the joint check. R-2222 at 587, ll. 3 - 12. Mr. Burk indicated to Mr. Soofi and Mr. Hall that the check was written joint because he had learned from Mr. Dahl that QED was owed more than $85,000. R-2222 at 589, ll. 2 - 5. In response, Mr. Dahl and Mr. Soofi grew loud and gave Mr. Burk to understand that they did not want a joint check. R-2222 at 589.

Nonetheless, Atlas took the joint check to QED's office for endorsement. R-2220 at 203, l. Mr. Dahl endorsed the check on behalf of QED, intending to endorse it over to Atlas.

R-2220 at 202, l. 21 - 203, l. 9. Mr. Dahl's endorsement of the check occurred no later than November 14, 2001. R-2220 at 206, ll. 3 - 51. At the time QED endorsed the check, $111,305.19 in invoices were owed to QED for the Matheson Project, with dates ranging from October 2 to November 19, 2001. D. Ex. 38. In exchange for QED's endorsement, Atlas paid QED a smaller check for $51,123.76. D. Ex. 14; R-2220 at 203, ll. 10 - 12; R-2220 at 204, ll. 17 - 19. However, the date of the smaller check was never disclosed (another check QED failed to produce). Moreover, the smaller check was not deposited into QED's bank account until November 19, 2001. R-2220 at 206, l. 12 - 207, l. 8. QED never told Comtrol about the smaller check. R-2221 at 298 l. 24 - 299, l. 4. Based on earlier conversations with Mr. Dahl, Mr. Burk was shocked to learn that QED had endorsed the joint check to Atlas, instead of keeping the entire amount. R-2222 at 589, l. 20 - 590, l. 5.

Course of Dealings re: Net-30

QED accepts early payments from customers, and considers those customers who pay early to be "great customers." R-2220 at 220, ll. 11 - 16. Atlas regularly paid QED invoices on dates preceding the last day of the month after the invoice was issued.[7] In the electrical supply industry, industry standards allow an electrical contractor to pay an invoice before it becomes overdue; suppliers do not refuse such payments. R-2223 at 673, l. 2 - 674, l. 3.

B. The Trial Court Properly Applied the Principals Embodied in the Joint Check Rule.

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[7]See, e.g., P. Ex. 7 at QED 0275, 0277, 0282, 0287, and 0293, each of which is a September invoice, and each of which shows payment on October 12, 2001, well before the October 31, 2001 due date.

The Joint Check Rule has found such wide acceptance that "every state that has considered the issue has adopted [it]." Henry Products Inc. v. Tarmu, 967 P.2d 444, 446 (Nev. 1998).[8] The rule holds that because joint checks are used to protect suppliers by ensuring payment, where a supplier elects to jeopardize this protection by endorsing a joint check without retaining sufficient proceeds to satisfy the debt owed him by the subcontractor, "the material supplier should bear the risk of its own decision." Brown Wholesale Elec. Co. v. Betzak of Scottsdale, Inc., 774 P.2d 1372, 1375 (Ariz. Ct. App. 1989); Post Bros. Constr. Co. v. Yoder, 20 Cal.3d 1, 6 (Cal. 1977) ("[T]he materialman's failure to determine the owner's or contractor's intention as to the application of funds represented by the joint check precludes urging the loss caused by his imprudence should be borne by the owner or general contractor."). Although there are any number of reasons why a supplier may elect to release the funds to the subcontractor (the subcontractor may be cash poor, or the supplier may wish to maintain good relations with its customer by advancing credit), to the extent that it chooses to do so, the supplier is literally gambling with the money of the general contractor and the surety. The general contractor and the surety have no means of influencing what is essentially a purely business decision conducted at arm's length between two remote parties,

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[8]See, e.g., Brown Wholesale Elec. Co. v. Beztak of Scottsdale, Inc., 788 P.2d 73, 76 (Ariz. 1990); Post Bros. Constr. Co. v. Yoder, 20 Cal.3d 1, 3 (1977); Iowa Supply Co. v. Grooms & Co. Constr., Inc., 428 N.W.2d 662, 666 (Iowa 1988); Anchor Concrete Co. v. Victor Sav. & Loan Ass'n, 664 P.2d 396, 399 (Okla.1983); Medford School Dist. ex rel. North Coast Elec. Co. v. Peterson & Jones Commercial Constr., Inc., 708 P.2d 623, 626 (Or. 1985); City Lumber Co. v. National Surety Corp., 92 S.E.2d 128, 131 (S.C. 1956); F. & C. Eng'g Co. v. Moore, 300 S.W.2d 323, 326- 27 (Tex. Ct. App. 1957); Dauphin v. Smith,713 P.2d 116, 120 (Wash. Ct. App. 1986).

and should not suffer because the supplier's decision turns out to be the wrong choice. See, id.; City Lumber Co. v. Nat'l Sur. Corp., 92 S.E.2d 128, 131 (stating, with respect to a materialman's desire to maintain relationship with subcontractor, that "...such considerations cannot be allowed to penalize the prime contractor and its surety.").

The joint check decisions focus on the expected business sophistication of suppliers, and their corresponding knowledge of potential harm to the general contractor and surety if the funds from a joint check are misused:

> As an experienced business man, respondent's manager was bound to have known, without being specifically so advised, that he was expected to collect respondent's account from the proceeds of the [joint] check.
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> ***
>
> The surety was equitably entitled to have the check applied to the discharge of the debts for which it was bound, but this was not done because of the negligence of respondent in empowering [the subcontractor] to use the funds for any purpose which he desired. This is not a case of non-action on the part of [the materialman], but positive and affirmative action injuriously affecting the surety.

Id. These same concerns are present with respect to the joint checks issued by Comtrol and endorsed by QED. QED's experienced managers knew, and were, in fact, advised by Comtrol, that they were expected to collect Atlas' account from the proceeds of the joint check. Thus, Appellants are equitably entitled to have the joint check applied to the discharge of the debts for which they are liable.

The policies behind the Joint Check Rule are in play here. QED knew when it endorsed the $85,383.19 joint check that Atlas had improperly deposited the $94,116.55 October 5, 2001 joint check without QED's endorsement and that Atlas owed it $112,311.97

for the job. QED could have insisted on receipt of the entire $85,383.19 by withholding its endorsement. Instead, for whatever reason, it did not, and chose to gamble with Appellants' money. Pursuant to the Joint Check Rule, the risk of this reckless decision must be borne by QED, and not by the innocent Appellants. The Trial Court's ruling should not be disturbed.

C. QED Failed to Marshall all Evidence Supporting the Estoppel Ruling.

Rule 24(a)(9) of the Utah Rules of Appellate Procedure requires "[a] party challenging a fact finding [to] first marshal all record evidence that supports the challenged finding." To fulfill its duty to marshall, QED was required to,

> "temporarily remove [their] own prejudices and fully embrace the adversary's position"; [they] must play the "devil's advocate." In so doing, appellants must present the evidence in a light most favorable to the trial court and not attempt to construe the evidence in a light favorable to their case . . . . In sum, to properly marshal the evidence the challenging party must demonstrate how the court found the facts from the evidence and then explain why those findings contradict the clear weight of the evidence.

United Park City Mines v. Stichting Mayflower Mountain Fonds, et al., 2006 UT 35, 140 P.3d 1200 (2006). Instead of marshalling the facts supporting the Trial Court's estoppel ruling, QED has merely re-argued on appeal the factual case, leaving Appellants and this Court "to bear the expense and time of performing the critical task of marshalling the evidence. This is unfair, inefficient, and unacceptable." Id. at 1207, ¶26. The Utah Supreme Court has warned of the "grim consequences parties face when they fail to fulfill the marshalling requirement," and that the appellate court "can rely on that failure to affirm the lower court's findings of fact." Id. at 1207, ¶ 27. As such, "[a]n appellant may not simply cite to the evidence which supports his or her position and hope to prevail." Wayment v.

Howard, 144 P.3d 1147, 1150 (Utah 2006). In other words,

> In order to properly discharge the duty of marshaling the evidence, the challenger must present, in ***comprehensive and fastidious order, every scrap of competent evidence*** introduced at trial which supports the very findings the appellant resists. After constructing this ***magnificent array of supporting evidence***, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991).

QED failed to meet the marshalling standard in setting forth the facts which gave rise to the Trial Court's estoppel ruling. QED omitted any mention of the $94,116.55 joint check, Comtrol's shock at learning that Atlas had deposited that joint check, and Comtrol's subsequent discussions with QED at the time the $85,383.19 check was issued. This factual background was important to an understanding of just how brazen QED was in not demanding that Atlas pay it all of the $85,383.19 joint check.

QED then glosses over the evidence regarding Comtrol's efforts to communicate with QED about the account balance, mentioning only Mr. Dahl's testimony and Ms. Zobell's (Brief at 31), with no mention whatsoever of the detailed testimony of Brian Burk, as set forth above. Where QED does cite to Mr. Dahl, it omits his "hundred percent" understanding that Comtrol was relying on QED for accurate information regarding QED's account balance with Atlas. There is no mention of D. Ex. 38, which sets forth the $111,305.19 in invoices that Atlas owed to QED for the Matheson Project on November 19, 2001, the date that QED endorsed over to Atlas the joint check for $85,383.19. No mention is made of the conversation between Mr. Burk and the Atlas representatives who came to Comtrol's office

to pick up the $85,383.19 joint check. QED also omits evidence undercutting its strange arguments that "net-30" means up to net-60 terms on its account with Atlas, namely: (1) that QED accepts early payments from customers, and considers those customers who do pay early "great customers"; (2) that Atlas regularly paid QED's invoices on dates that preceded the last day of the month following the month during which QED's invoice issued; and (3) Brent Burk's testimony that in the electrical supply industry an electrical contractor can pay an invoice before it becomes overdue, and suppliers do not refuse such payments. R-2223 at 673, l. 2 - 674, l. 3.

These omissions show that QED has not marshalled in accordance with Rule 24(a)(9). QED has not presented the Court with "every scrap of competent evidence introduced at trial" supporting the joint check estoppel ruling, nor a "magnificent array of supporting evidence." QED's brief lacks any effort to "temporarily remove [its] own prejudices and fully embrace the adversary's position", or play the "devil's advocate." QED's appeal of the Trial Court's estoppel ruling must be dismissed for failure to marshall.

D. The Trial Court Properly Applied General Estoppel Principles.

Utah's estoppel caselaw is based on the principal that where one of two innocent parties must suffer, the loss should fall on the one whose acts have caused the loss. See, G. Eugene England Foundation v. Smith's Food King No. 6, 542 P.2d 753, 755 (Utah 1975); Valley Bank & Trust Co. v. Gerber, 526 P.2d 1121, 1124 (Utah 1974).

Estoppel requires three elements: (1) a party acts or fails to act in a manner that is inconsistent with a subsequent claim, (2) a second party reasonably acts or does not act

because of the first party's original act or failure to act, and (3) the second party would suffer injury if the first party were allowed to repudiate such act or failure to act. Shaw Resources Ltd., L.L.C. v. Pruitt, Gushee & Bachtell, P.C., 142 P.3d 560, 571 (Utah Ct. App. 2006).

Evidence presented at trial met all three of these elements. First, QED acted, or failed to act, when it did not object to Comtrol's proposal that the $85,383.19 be paid in the form of a joint check. Before paying the joint check, Brian Burk telephoned David Dahl to inform him that Atlas' entire payment for that month was being made joint due to Atlas' earlier deposit of a large joint check without QED's endorsement. QED thus knew: (1) that Atlas had already taken $94,116.55 of its money by depositing an earlier joint check without QED's signature; (2) that this had caused great concern on the part of Comtrol; (3) that Comtrol wanted to ensure that QED got the entire amount of the next Atlas draw, or $85,383.19; and (4) that Comtrol intended to accomplish this by paying the full draw amount in the form of a joint check. QED failed to tell Comtrol that this amount was not "due," but instead confirmed that the outstanding invoices it had issued to Altas exceeded the $85,383.19 amount. No mention was made to Comtrol of the net-30 terms or Atlas and QED's interpretation of those terms.

The second element of estoppel is met because Comtrol relied on QED's failure to object to the proposed $85,383.19 joint check and did, in fact, issue that check. Upon receipt of the check, QED did nothing to indicate to Comtrol that it was defective, too large, too small, or had not rendered the account current. Rather, it endorsed the check over to Atlas. Having maintained its silence then, QED cannot be heard to complain now.

Finally, the third element is met because Comtrol would be damaged if QED were allowed to represent that more than $85,383.19 was owed it and then simply endorse the joint check over to Atlas with no legal effect. By virtue of basic principles of estoppel and the amount owed to QED on November 13, 2001, the Trial Court correctly ruled that QED should be deemed to have received the entire $85,383.19 of the joint check and was estopped from claiming otherwise.

It is clear that Atlas owed QED far in excess of the $85,383.19 when it endorsed that check. D. Ex. 38. However, QED attempts to manipulate this calculation by arguing that certain of the unpaid invoices were not "due" on November 19, 2001. QED's distinction between invoices that are "due" and those that are "owing" is based on its interpretation of the term "Net 30," with QED contending that an invoice is not due until the last day of the month after it was issued. However, "Net 30" has a legal meaning which is not consistent with the interpretation urged by QED, namely that payment of an invoice is not due until thirty days after the date of the invoice.[9]

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[9]Avery Dennison Corp. v. Home Trust & Savings Bank, 2003 WL 22697175 at 1 (N.D.Iowa,2003) ("Terms of 'net 30 days' means that Group One was allowed 30 days from the invoice date to pay that invoice and Group One was not in default on the invoice until 30 days after the invoice date"); Watson v. Cargill, Inc., Nutrena Div., 573 S.W.2d 35, 40 (Tex. App. 1978) ("net 30 days" means payment due 30 days after delivery); In re H.L. Hansen Lumber Co. of Galesburg, Inc., 270 B.R. 273, 275 (Bkrtcy. C.D. Ill. 2001) ("The payment terms printed on the invoices are "net 30 days," meaning full payment is due within 30 days."); Valentine v. Patrick Warren Const. Co., 56 N.W.2d 860,870 (Wis.1953) (stating that contract's "terms were 'net 30 days' meaning that after thirty days the amount of the invoice was past due"); cf. Symbol Technologies, Inc. v. Sonco, Inc., (E.D.Pa April 20, 1983) (holding that the term "net thirty (30) days" is not ambiguous, and therefore refusing to take parole evidence as to its meaning).

QED argues that estoppel cannot be applied because it was "obligated" to allow Atlas to keep the $34,259.43. This argument does not comport with the reality of the relationship between QED and Atlas. Atlas regularly paid QED's invoices on dates that preceded "the last day of the month following the month during which QED's invoice issued." See, e.g., P. Ex. 7 at QED 0275, 0277, 0282, 0287, and 0293, each of which is a September invoice, and each of which shows payment by Atlas on October 12, 2001, well before the October 31, 2001 due date that QED maintains it is obligated to follow. Consequently, no reasonable argument exists that QED was "owed" an amount less than the full value of the $85,383.19 joint check on the date it was endorsed.

QED next claims that the record lacks evidence of five necessary elements of estoppel. The elements cited are not necessary elements of estoppel, and none of QED's asserted deficiencies in the record are sufficient to overturn the Trial Court's ruling. First, QED argues that there is no evidence of a misrepresentation on the part of QED. Brief at 34-35. However, estoppel does not require a misrepresentation. Rather, all that is required under Utah law is an act, or failure to act, inconsistent with a future legal position, i.e., not objecting to a proposal that Atlas' full draw be paid via joint check, and then claiming a right to endorse the joint check over to Atlas and collect only a portion of the balance owed. See, e.g., J.P. Koch, Inc. v. J.C. Penney Co., Inc., 534 P.2d 903, 905 (Utah 1975) (describing equitable estoppel as "a doctrine of equity to prevent one party from deluding or inducing another into a position where he will unjustly suffer loss" and setting forth the test as requiring conduct "by act or omission").

Next, QED argues that it has been consistent in demanding that it be paid in full for all materials furnished to the project. Brief at 35-36. This is not true–QED failed to object to Comtrol's proposal that it be paid via joint check and then inconsistently endorsed the joint check over to Atlas. This is not consistent with a demand to be paid in full.

Third, QED claims that estoppel cannot be applied because it did not intend its actions in endorsing the joint check to be a bar to recovery against the payment bond. Brief at 35, 37 (citing 28 Am. Jur. 2d Estoppel and Waiver § 46). But QED misstates the Am. Jur. section on which it relies. That section only requires, as a general matter, that a party to be estopped "should have intended, or at least expected" . . . "that his words or conduct would be relied upon by others and influence their action." There is sufficient evidence in the record to support a finding by the Trial Court that QED's assent to Comtrol's proposal that the entire Atlas draw be paid by joint check was intended to induce both payment by Comtrol and Comtrol's reliance on QED's best efforts to ensure that it retained the full amount of that check. QED's proposed standard, which holds, in effect, that a party can only be estopped if it intended to be estopped, would eliminate estoppel from our jurisprudence.

QED's fourth argument against the application of estoppel is that the Trial Court's finding that Comtrol had unreasonably relied on lien waivers executed by QED renders estoppel inappropriate. Brief at 38. However, this finding related to lien waivers executed much earlier in the Project, for different pay requests. See, D. Ex. 2; D. Ex. 3; R-2225 at 15 - 16 (ruling that reliance on lien release executed on May 4, 2001 was not reasonable). QED should not be allowed to hyperbolize a finding that Comtrol's reliance on an earlier release

(that is completely unrelated to the Trial Court's estoppel ruling) was unreasonable into a finding that *all* of Comtrol's actions were unreasonable. The Trial Court made no findings indicating that Comtrol was unreasonable in its approach to the $85,383.19 joint check. This Court should refuse QED's invitation to do so.

Finally, QED's fifth reason why estoppel should not be applied is that Comtrol did not do all it was entitled to do to "ascertain the exact amount Atlas owed QED" and was therefore negligent. Brief at 38. However, Mr. Dahl represented to Mr. Burk that Atlas owed QED in excess of $85,383.19. R-2222 at 583, l. 7 - 584, l. 18. QED suggests that Comtrol should "have asked QED to explain Atlas's payment terms." Brief at 38. There is nothing unreasonable about relying on Mr. Dahl's representation. QED is apparently suggesting that Comtrol should have cross-examined Mr. Dahl about his statement that more than $85,383.19 was owed by Atlas.

In support of its argument, QED cites Syro Steel Co. v. Hubbell Highway Signs, Inc., 424 S.E.2d 208 (N.C. Ct. App. 1993). In that case, a general contractor was not entitled to estoppel when the supplier told the general contractor it was "o.k." to pay the subcontractor, and the subcontractor subsequently failed to pay the supplier. In this case, Comtrol attempted to ensure that QED was paid by informing both Atlas and QED that the check was being made joint to ensure payment to QED. No such protections were sought by the general contractor in Syro Steel. Comtrol was not negligent, and estoppel is appropriate here.

E. The Fact that this is a Payment Bond Case does not Provide QED Special Protection Against Estoppel.

QED argues that estoppel is inappropriate because this case arises in the payment bond context, under a statute designed to "protect innocent suppliers." Brief at 39. Indeed, urges QED, upholding the Trial Court's estoppel ruling will "eviscerate the purpose of the payment bond statute." Id. at 40. Affirming the Trial Court will do nothing of the sort. While the payment bond statute should be liberally construed, that liberal construction is not without limits. See, MacEvoy and F.D. Rich Co. v. U.S. ex rel. Industrial Lumber Co., 417 U.S. , 107 (noting that while court was mindful of obligation to construe the "highly remedial" Miller Act "liberally" . . . "such a salutary policy does not justify . . . imposing wholesale liability on payment bonds"); U.S. for Use and Ben. of B & R, Inc. v. Donald Lane Const., 19 F.Supp.2d 217, 224 (D. Del. 1998) (noting that the Supreme Court has recognized the "occasional need to carve out exception[s] to the general rule of liberal construction" of the Miller Act). The only result of upholding the Trial Court's estoppel decision is that suppliers will be required to be forthright with general contractors about balances on accounts with subcontractors. The payment bond statute does not provide suppliers the right to lead general contractors astray and then benefit financially from their lack of candor. This Court should decline QED's invitation to so hold.

The caselaw cited by QED for the proposition that estoppel is inappropriate in the payment bond context is distinguishable. In CECO Corp v. Concrete Specialists, Inc., 772 P.2d 967 (Utah 1989), the Utah Supreme Court found estoppel inappropriate when a sub-

subcontractor notifies a general contractor that it will not be necessary to issue joint checks because "the sub-subcontractor will continue to look to the subcontractor for payment." Id. at 970. QED made no such representation here; rather, it was informed that Comtrol intended to ensure that it was paid by joint check. Where the general contractor in CECO did nothing to ensure that its subcontractor paid its supplier, Comtrol paid Atlas via joint check, with specific instructions to QED and Atlas that the full amount of the check was for QED. This distinction renders the holding of CECO inapposite. To hold otherwise would deprive general contractors of a well-established, simple, and expedient method for paying debts and providing protection to materialmen, the general contractor, and the public contracting authority.

IV. THE TRIAL COURT APPROPRIATELY APPLIED THE STATUTORY POST-JUDGMENT INTEREST RATE TO THE ATTORNEYS' FEES AND COSTS PORTION OF THE AMENDED JUDGMENT.

Defendants successfully argued before the Trial Court that the statutory judgment rate of 6.37% should be applied to attorneys fees and costs, because those portions of the Judgment do not relate to the principal owed on the contract between QED and Atlas. R-1869-70; R-1905. QED argues that it is entitled to 18% because UTAH CODE ANN. § 15-1-4(2)(a) provides that "... a judgment rendered on a lawful contract shall conform to the contract and shall bear the interest *agreed upon by the parties*." UTAH CODE ANN. § 15-1-4(2)(a) (emphasis added). The judgment at issue is not a contract judgment. Appellants were not in privity with QED. QED was an electrical supplier for and was in privity with only one other party in this case, Atlas, and the judgment on appeal is not against Atlas.

Appellants were not involved in the negotiation of the interest rate on QED's sales to Atlas. Thus, there is no interest "agreed upon by the parties, and UTAH CODE ANN. § 15-1-4(2)(a) does not apply. Instead, the appropriate interest rate is governed by UTAH CODE ANN. § 15-1-4(3)(a), which provides that:

> ...other civil and criminal judgments of the district court and justice court shall bear interest at the federal postjudgment rate as of January 1 of each year, plus 2%.

Despite the plain language of the postjudgment interest statute, QED argues that the payment bond statute serves to change the effect of that language and requires Comtrol and USF&G to swallow whatever interest rate QED and Atlas have agreed to. In so arguing, QED overstates the precedential value of Trench Shoring Servs., Inc. v. Saratoga Springs Dev., L.L.C., 57 P.3d 241 (Utah Ct. App. 2002) by claiming it is precedent for awarding post-judgment interest to suppliers at the contracted interest rate. Brief of Appellee at 40.

Trench Shoring should not be read to include this Court's precedential blessing of the higher rate argued for here by QED. Rather, the only mention of the appropriateness of the interest rate in that case is found in a footnote, where this Court explicitly declined to even address the interest rate issue:

> Developer additionally argues that the district court erred in awarding prejudgment and postjudgment interest at the rental agreement rate, rather than the statutory rate, as requested in Supplier's complaint and motion for summary judgment. . . . These issues were not preserved for appeal. Thus **we decline to consider whether the district court erred in awarding interest** . . . to Supplier.

57 P.3d at 244, n.2 (internal citations omitted) (emphasis added). The precedential value of

the Trench Shoring case for a determination of the appropriate postjudgment interest rate is nil. The payment bond statute should not be read to allow suppliers to foist usurious interest rates on parties with whom they are not in privity. Because there is no contract between QED and either Comtrol or USF&G, the Trial Court properly awarded QED postjudgment interest at the 6.37% rate required by UTAH CODE ANN. § 15-1-4(3)(a).

CONCLUSION

To uphold the Trial Court's failure to dismiss QED's case "would diminish the Court's authority and the adversary system and would serve as a license, encouraging similar behavior." Metro. Opera, 212 F.R.D. at 231. This Court should reverse the Trial Court's Denial of Appellants' Motion to Dismiss QED's complaint for Rule 37 discovery violations and remand the case to the Trial Court for an award of Attorneys Fees and Costs to Appellants as the prevailing parties under UTAH CODE ANN. §63-56-504(6).

Additionally, this Court should deny QED's Cross-Appeal, adopt the Joint Check Rule, and affirm the Trial Court's decision to estop QED from collecting the $34,259.43 that QED squandered when it endorsed the $85,383.19 joint check to Atlas despite Comtrol's instruction that the full amount of the check was for QED.

Respectfully submitted this 11th day of June, 2007.

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CERTIFICATE OF SERVICE

I HEREWITH CERTIFY that I am a member of and/or employed by the law firm of CALLISTER NEBEKER & McCULLOUGH, Gateway Tower East, Suite 900, 10 East South Temple, Salt Lake City, Utah 84133, and that two (2) true and correct copies of the attached **REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-APPELLEE** were caused to be served upon the following by depositing properly addressed envelopes containing the same in the U.S. Mails, postage prepaid thereon, this 11th day of June, 2007

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