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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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SFR, INC., a Colorado corporation d/b/a QED, Plaintiff/Appellee and Cross-Appellant, vs. ATLAS ELECTRIC, INC., a Utah corporation; COMTROL, INC., a Utah corporation; and UNITED STATES FIDELITY & GUARANTY COMPANY, a Maryland corporation; and AZAAM SOOFI, an individual, Defendants/Appellants and Cross-Appellees.	Case No. 20060915-CA District Court Case No. 020902795 Judge Joseph C. Fratto, Jr. Priority No. _____

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REPLY BRIEF OF CROSS-APPELLANT

Appeal from the Third District Court
Salt Lake County
The Honorable Joseph C. Fratto, Jr.

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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subcontractor and his materialman are joint payees, and no agreement exists with the owner or general contractor as to allocation of proceeds, the materialman by endorsing the check will be deemed to have received the money due him." Post Bros. Constr. Co. v. Yoder, 569 P.2d 133, 135 (Cal. 1977). It does not, however, impose an absolute bar on a materialman's recovery for any and all joint check proceeds that the materialman does not retain. As pointed out by the Oregon Court of Appeals, the "crucial question" regarding the joint check rule's applicability is "what is 'the money due him' which the materialman is deemed to have received." See Medford Sch. Dist. No. 549C ex rel. N. Coast Elec. Co. v. Peterson & Jones Commercial Constr., Inc., 708 P.2d 623, 625 (Or. Ct. App. 1985) (emphasis added). The "money due" the materialman "refers, not to all money which may ultimately be due, but only to the money due as of the date the check covers." See id.; see also Iowa Supply Co. v. Grooms & Co. Constr., 428 N.W.2d 662, 666 (Iowa 1988) ("This rule only bars claims against the maker of the check for the money due from a subcontractor up to the date of the check and up to the amount of the check." (emphasis added)). It is for that reason that "the question of whether a joint check constitutes payment of the amount owed by the subcontractor to the lower-tier subcontractor is a question of fact based upon the intention of the parties." See AAA Cabinets & Millwork, Inc. v. Accredited Sur. & Cas. Co., 130 P.3d 887, 892 (Wash. Ct. App. 2006).

Here, although Atlas had received materials for the Matheson Junior High School Project (the "Project") whose invoiced value equaled or exceeded the full amount of the November 13, 2001, joint check, the $34,259.43 portion that QED allowed Atlas to retain was not yet due. The terms of Atlas's account with QED required Atlas to pay for the

product it received on or before the last day of the month following the month in which it received the product. (See PA-6,[2] QED 0001–0059; PA-4, QED 0060–0061; R. 2221:316–317, 446–47.) The trial court expressly found that "[u]nder the terms of QED's agreement with Atlas, as of November 19, 2001, Atlas was only past due for the invoices issued through September 30, 2001, which totaled $51,123.76 [the amount of the November 13, 2001, joint check retained by QED]." (R. 2134 ¶ 53.) USF&G has not challenged this finding. Thus, although Atlas's account balance for the Project equaled or exceeded the full amount of the November 13, 2001, joint check, $34,259.43 of that check was simply not "money due" or past due. (R. 2220:211.) Simply put, on November 13, 2001, QED could not have recovered the $34,259.43 in a collection action against Atlas and was not legally entitled to demand that portion of the November 13, 2001, joint check proceeds. The joint check rule is therefore inapplicable to this case, and no basis exists in fact or law for this Court to adopt it.

3. If Adopted, the Joint Check Rule Should Not Be Given Retroactive Application.

To the extent that the Court is inclined to consider arguments with regard to the joint check rule, and to the extent the Court is inclined to adopt the joint check rule as the law of Utah, that rule should not be applied retroactively to this case. Although judicial decisions generally have retroactive effect, retroactive application "is not invariable," Van Dyke v. Chappell, 818 P.2d 1023, 1025 (Utah 1991), and "the extent of [a] decision's application is left to the discretion of the court." In re Loyal Order of Moose,

[2] The trial court's exhibits were denoted by a designation of "PA" for "Plaintiff" and "DA" for "Defendant" along with an exhibit number. For consistency purposes, the trial exhibits are referred to herein as they were at trial, i.e., "PA-1" for Plaintiff's Trial Exhibit 1.

#259 v. County Bd. Of Equalizations, 657 P.2d 257, 264 (Utah 1982). Indeed, retroactive application of a judicial decision "depends solely upon an appraisal of the relevant judicial policies to be advanced." See Kennecott Corp. v. State Tax Comm'n, 862 P.2d 1348, 1352 (Utah 1993) (emphasis added) (internal quotation marks omitted). A court may decline to allow a new decision to apply retroactively where "there has been justifiable reliance on the prior state of the law or [where] the retroactive operation of the new law may otherwise create an undue burden." Van Dyke, 818 P.2d at 1025.

The Utah Supreme Court has expressly declined to give retroactive effect to decisions with certain import. For instance, in Timpanogos Planning & Water Management Agency v. Central Utah Water Conservancy District, the Utah Supreme Court held that because certain water districts had "in good faith relied upon [the existing state of the law] in conducting their business for several decades," it "would work an injustice to cast a cloud upon the legality of their operations during those many years." 690 P.2d 562, 572 (Utah 1984). Moreover, in Loyal Order of Moose, #259, the Supreme Court noted that "if the rule [in question] were to be given retroactive effect, the assessment of back taxes on properties affected by this rule might well result in an unreasonable burden upon all those organizations and governmental bodies associated with it." 657 P.2d at 265. In other words, the Utah Supreme Court has been decidedly reluctant to give its decisions retroactive effect where the parties would sustain undue burden and injustice. Indeed, one of the very purposes of the law is to provide a steady standard to which individuals and entities may conform so as to avoid liability and loss. See Black's Law Dictionary 884–85 (6th ed. 1990) (defining "law" as "[t]he regime that orders human activities and relations").

Here, a retroactive imposition of the joint check rule would unduly burden QED and every other materials supplier that relies on the absence of the joint check rule's bright line rule of automatic forfeiture. Materialmen supply materials to subcontractors every day, and "[t]he use of joint checks in this type of situation is well established in the construction industry." Iowa Supply Co., 428 N.W.2d at 666. To impose the joint check rule in this case would result in an unjust, undue burden on QED and every other materials supplier who has relied status of the law in Utah regarding joint checks.

Moreover, the joint check rule is in direct conflict with the general law of waiver in Utah. The Utah Supreme Court has stated that "there is only one legal standard required to establish waiver under Utah law. . . . 'To constitute waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it.'" Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n, 857 P.2d 935, 942 (Utah 1993) (emphasis added) (quoting Phoenix, Inc. v. Heath, 61 P.2d 308, 311–12 (Utah 1936)). In this case—and presumably in other cases as well—QED allowed Atlas to temporarily retain $34,259.43 of the November 13, 2001, joint check proceeds based only on its belief that no bright-line estoppel rule existed in Utah that would penalize it for doing so. If QED had known that its mere allowance of Atlas to retain the $34,259.43 portion of that check would categorically forfeit its rights in that amount, QED could have made other arrangements with Atlas. But, relying on the absence of an automatic forfeiture rule, QED honored its agreement with Atlas and allowed Atlas to wait to pay the $34,259.43 amount until those invoices actually came due. Retroactive application of the joint check rule would therefore unfairly penalize QED. And, given the established

use of joint checks under these circumstances in Utah, QED is not the only materials supplier that would suffer from retroactive adoption of the joint check rule.

B. The Trial Court's Application of Equitable Estoppel Principles Was an Abuse of Discretion.

1. QED Has Properly Marshaled the Evidence in Support of the Findings of Fact It Challenges.

Contrary to USF&G's argument, QED properly marshaled the evidence in support of the findings of fact it challenges. Despite the strictness of the marshaling requirement, the Utah Rules of Appellate Procedure require that an appellant challenging a finding of fact "first marshal [only] all record evidence that supports the challenged finding." Utah R. App. P. 24(a)(9) (emphasis added). The Utah Supreme Court's interpretations of Rule 24(a)(9) emphasize that an appellant must marshal only evidence in support of the specific finding it challenges. See, e.g., State v. Worwood, 2007 UT 47, ¶ 12 ("[P]arties challenging the facts under a clear error standard have a judicially imposed obligation to marshal the evidence in support of the challenged finding." (emphasis added)); United Park City Mines Co. v. Stichting Mayflower Mountain Fonds, 2006 UT 35, ¶ 26, 140 P.3d 1200 (noting that an appellant "must demonstrate how the court found the facts from the evidence and then explain why those findings contradict the clear weight of the evidence" (emphasis added) (quoting Chen v. Stewart, 2004 UT 82, ¶ 78, 100 P.3d 1177)).

QED challenges only certain, narrow aspects of two findings of fact. Those findings of fact are as follows, set forth precisely as QED set them forth in its opening brief:

- In exchange for Atlas'[s] payment of $51,123.76 on or about November 19, 2001, which satisfied all amounts owed to QED for the materials and supplies QED furnished for the Project through September 30, 2001, QED allowed Atlas to retain the balance of $34,259.43 provided by the November 13, 2001 joint check. (R. 2134 ¶ 52 (emphasis added).)

- Notwithstanding QED's belief that Atlas did not yet owe the remaining $34,259.43 of the November 13, 2001 joint check, and that QED, therefore, could not retain that money, in fact, the total of the [u]npaid [i]nvoices [(PA-6, QED 0001–0059) (the "Unpaid Invoices")] on Atlas'[s] account for the Project (even after applying the $51,123.76 payment) equaled at least the remaining balance of the November 13, 2001 joint check—$34,259.43. (R. 2134 ¶ 54 (emphasis added).)

QED purposefully emphasized certain words in its recitation of the trial court's findings in order to define the narrow parameters of its two challenges to those findings. Specifically, QED challenges only the trial court's findings that: (1) QED, at its option, "allowed" Atlas to retain the balance of the joint check proceeds, which implies that QED had the choice to do so; and (2) that QED believed that Atlas did not yet "owe" the remaining portion of the November 13, 2001, joint check to QED. Thus, QED was only required to marshal evidence supporting the trial court's conclusions that QED possessed other options but "allowed" Atlas to retain the balance of the joint check, and that QED believed that Atlas did not yet owe it the remainder of the November 13, 2001, joint check.

To satisfy Rule 24(a)(9)'s marshaling requirement, QED noted the subsidiary findings upon which the trial court based the above-referenced findings. (R. 2132 ¶ 41–62.) QED then listed, in detail and complete with citations to the record, all of the evidence presented by either QED or USF&G at trial that supported the trial court's findings. (See Br. of Appellee & Cross-Appellant at 30–31.) QED then demonstrated

that this evidence was insufficient to support the trial court's findings. QED therefore scrupulously complied with Rule 24(a)(9)'s marshaling requirement. See Utah R. App. P. 24(a)(9); Chen, 2004 UT 82, ¶ 76.

Completely ignoring the narrowness of QED's two factual findings, USF&G faults QED's marshaling on the ground that it omits a number of purportedly important bits of evidence presented at trial. Given the narrowness of those two challenges, QED simply was not required to marshal the vast spectrum of evidence USF&G proposes, namely, evidence surrounding another, unrelated joint check; USF&G's efforts to ascertain its account balance by communicating with QED; invoices outstanding on the date of the November 13, 2001, joint check; and Atlas's payment practices. None of that evidence has anything to do with QED's narrow challenges to the trial court's findings regarding its intent in permitting Atlas to retain the balance of the joint check or whether QED believed that Atlas "owed" QED anything.[3] Thus, QED was not required to marshal that evidence.

Of course, all evidence presented at a trial is interconnected in some way or another. But that does not mean that an appellee may defeat an appellant's challenge to a finding of fact simply by pointing to any shred of evidence presented at trial and arguing that the appellant failed to marshal it. If that were so, the findings of fact in a case of any degree of complexity—like this one—would be virtually unassailable, regardless of how

[3] Of course, the upshot of QED's challenges to the trial court's factual findings is that QED was not legally entitled to proceeds of the November 13, 2001, joint check that were not yet due. Moreover, QED believed that it could not retain the remaining $34,259.43 portion of the November 13, 2001, joint check because the remaining unpaid invoices on Altas's account for the Project were not yet due, not that Atlas did not owe QED that amount. QED has never maintained that Atlas was not obligated to eventually pay the invoices that were outstanding but not yet due as of November 13, 2001.

unsupported they are. An appellant could only satisfy the marshaling requirement by marshaling all evidence presented at trial. Such a rule would fly in the face of fundamental appellate rules such as page limits. See Utah R. App. P. 24(f) (imposing page limits on briefs); id. 24(h) (noting that motions for leave to file an overlength brief are "disfavored"). That is not the kind of marshaling the Utah courts require.

The Utah Supreme Court recently recognized that the marshaling rule is not as hypertechnical as USF&G characterizes it. In Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints, the Court recognized that the marshaling requirement is but a "tool pursuant to which the appellate courts impose on the parties an obligation to assist them in conducting a whole record review." 2007 UT 42, ¶ 19, 578 Utah Adv. Rep. 20. The Court took pains to emphasize that even if an appellant fails entirely to marshal, the appellate court "retains discretion to consider independently the whole record and determine if the decision below has adequate factual support." Id. ¶ 20. Although QED fully complied with the marshaling requirement, the Supreme Court's message is clear: the marshaling requirement is not intended to be a mechanism for disposing of legitimate challenges to factual findings through overreaching extensions of technicalities like those advanced by USF&G.

In sum, QED complied with the requirements of Rule 24(a)(9) and marshaled all the requisite evidence in support of the narrow factual findings it challenges.

2. The Findings of Fact Upon Which the Trial Court Relied Are Clearly Erroneous.

The trial court committed clear error finding that QED "allowed" Atlas to retain $34,259.43 of the $85,383.19 joint check in the "belief" that Atlas did not "owe" that

amount to QED at the time the $85,383.19 joint check was negotiated. Evidence presented at trial does not support the trial court's finding that Atlas was due or past due on its account terms with QED for materials furnished to the Project in an amount greater than the $51,123.76 at the time the $85,383.19 joint check was issued, and that QED intended to waive payment for the remaining $34,259.43 that it allowed Atlas to retain.

First, with respect to the trial court's finding that QED did not believe that Atlas owed QED the $34,259.43, the evidence establishes only that QED had invoiced Atlas for product supplied by QED for the Project and that Atlas was obligated to pay those invoices in accordance with the terms of its contract with QED. (R. 2220:219–20.) Furthermore, trial testimony demonstrates that the term "net-30," as used on the Unpaid Invoices, was clearly understood by Atlas and QED to provide up to sixty days after the issuance of the invoice for Atlas to make its payments. (R. 2221:446–47; 2222:557.) Thus, when QED invoiced Atlas, that invoice was not past due, and payment was not required for up to 60 days, depending on when the invoice was issued. Furthermore, each unpaid invoice contained a payment reminder at the bottom left corner that confirmed the actual due date of the invoice. (R. 2220:212, 217; 2221:446–47.) There is simply no evidence whatsoever that QED had any right to demand payment for amounts owed, but not yet due, under the terms of Atlas's account. The trial court's apparent reliance on evidence that the entirety of the November 13, 2001, joint check was due or past due, where there is no such evidence, is against "clear weight of the evidence" and therefore "clearly erroneous." See Department of Human Servs. ex rel. Parker v. Irizarry, 945 P.2d 676, 678 (Utah 1997).

Second, with respect to the trial court's finding that QED chose to allow Atlas to keep the $34,259.43, as if QED had a choice, the only evidence presented at trial by either party demonstrates that QED was obligated to allow Atlas to retain the portion of the $85,383.19 joint check if Atlas demanded such. (R. 2221:446–47; 2222:557, 595.) As set forth above, QED could not legally force Atlas to allow QED to retain the $34,259.43 portion of the joint check. Given that Atlas's remaining unpaid invoices were not yet due or past due, QED had no legal right to demand the full amount of the joint check proceeds. The trial court's finding to the contrary is against the "clear weight of the evidence" and "clearly erroneous." Irizarry, 945 P.2d at 678. Because the trial court's equitable estoppel ruling hinges on two clearly erroneous findings of fact, it must be reversed. Cf. Menzies v. Galetka, 2006 UT 81, ¶ 55, 150 P.3d 480 (noting, in the context of Rule 60(b) motions that "[i]f a district court's ruling . . . is based on clearly erroneous factual findings . . . the district court has likely abused its discretion").

3. Equitable Estoppel Is Inappropriate in this Case Because USF&G Failed to Meet Its Evidentiary Burden for Proving Equitable Estoppel.

Quite apart from its reliance on clearly erroneous findings of fact, the trial court abused its discretion because USF&G failed to meet its burden to present evidence at trial sufficient to establish estoppel. Cf. Bolitho v. East, 143 P. 584, 588 (Utah 1914) (reversing a trial court's equitable estoppel ruling in part because "the evidence was not competent to establish an estoppel"). Specifically, equitable estoppel should not have been applied in this case because USF&G presented no evidence that: (a) QED did not act in a manner inconsistent with its payment bond claim; (b) QED's endorsement of the $85,383.19 joint check was enough to constitute waiver of QED's bond claim; (c)

Comtrol's reliance on QED's endorsement of the $85,383.19 joint check was reasonable; (d) Comtrol properly ascertained the amount QED was due when it issued the $85,383.19 joint check; and (e) QED's course of dealing with Atlas uniquely defined "net-30."

a) QED has not acted in a manner inconsistent with its payment bond claim.

USF&G failed to present any evidence at trial demonstrating that QED has been inconsistent in asserting its payment bond claim. It presented no evidence demonstrating that QED agreed to bear the risk of non-payment and waive its bond claim by allowing Atlas to retain $34,259.43 of the November 13, 2001 joint check proceeds. Moreover, it presented no evidence demonstrating that QED intended to waive its right to payment of the invoices—which could have been covered by the $34,259.43—by not demanding payment for those invoices until they were actually due. QED, on the other hand, presented evidence at trial demonstrating that it adhered to all the statutory requirements in asserting its bond claim. (R. 2220:17; PA-1.)

b) The simple act of endorsing the $85,383.19 joint check is insufficient to bar QED's payment bond claim.

Even if QED represented to USF&G that the $85,383.19 joint check was equal to an amount owed by Atlas, USF&G presented no evidence establishing that QED intended its endorsement of that check to be a waiver of its right against the payment bond posted for the Project (the "Bond") in the event of non-payment by Atlas. See 28 Am. Jur. 2d Estoppel & Waiver § 46 (2006) (requiring intent before applying equitable estoppel as a defense to a claim). In fact, QED did not knowingly or otherwise waive its right to payment from the Bond of the invoices that would have been paid in part or in full by the portion of the $85,383.19 joint check QED allowed Atlas to keep.

In Brimwood Homes, Inc. v. Knudsen Builders Supply Co., 385 P.2d 982 (Utah 1963), the Utah Supreme Court held that where a construction materials supplier received payments for "more than it was legally entitled to at that time," a promise to waive its rights to future claims or liens "would be without consideration." Id. at 984. Therefore, even an attempt by QED to waive its rights against the Bond for the full amount of the $85,383.19 would be without consideration and unenforceable. USF&G presented no evidence that QED represented that it would waive any claim against the Bond if Atlas failed to pay for the materials QED supplied to the Project. See CECO Corp. v. Concrete Specialists, Inc., 772 P.2d 967, 970 (Utah 1989) (concluding that estoppel was inappropriate because the supplier never expressly waived its rights against the Bond). Nor did it present any evidence demonstrating that QED intended to waive its bond claim by the simple act of endorsing a joint check. See Clark-Fontana Paint Co. v. Glassman Constr. Co., 397 F.2d 8 (4th Cir. 1968) (rejecting argument that by signing joint checks with conspicuous waiver language that a supplier had waived its lien rights).

Moreover, contrary to USF&G's argument, USF&G presented no evidence establishing that QED knew anything about the $94,116.55 joint check until Comtrol called and asked QED whether it had received that joint check. (R. 2220:223.) Similarly, it presented no evidence that even implies that QED knew that Comtrol was "greatly concerned" by Atlas's retention of the $94,116.55 joint check or that Comtrol made it clear to QED that it was going to issue the $85,383.19 joint check and that the entire check was intended for QED.

Moreover, the record affirmatively establishes that Comtrol could have done more to ascertain the actual amounts due QED at the time it issued the $85,383.19 joint check.

(R. 2222:637–41.) The consequences of its failure to do so should not be borne by QED. QED simply responded to Comtrol's generalized, blanket inquiry into the outstanding balance owed by Atlas. USF&G offered no evidence that QED attempted to lead Comtrol astray or represented intent to look to Atlas directly for payment.

The fact that QED retained only that portion of the $85,383.19 joint check that Atlas was contractually obligated to pay does not constitute waiver under the circumstances of this case. See Soter's, Inc., 857 P.2d at 942 (setting forth the "only . . . legal standard required to establish waiver under Utah law"). On the contrary, the only finding supported by the record is that QED did not waive its right to assert a claim against the Bond for the full value of the materials furnished to the Project.

c) Comtrol's reliance on QED's endorsement of the $85,383.19 joint check was unreasonable.

Although the lien waivers may have related to different payments for the Project, the trial court's conclusion that Comtrol's reliance on those lien waivers was unreasonable demonstrates the implausibility of relying on a simple act of endorsing a joint check as a waiver of a portion QED's bond claim. The record does not support the application of equitable estoppel because if USF&G's reliance on QED's lien waivers was unreasonable (R. 2135 ¶ 58; R. 2225:16), USF&G certainly was not entitled to rely on a response by QED to Comtrol's general inquiry regarding Atlas's account balance. Moreover, in presenting its ruling, the trial court stated that in light of the "sophisticated operation and the [joint] checks" used in this case, USF&G's reliance on the joint checks was not reasonable. (R. 2225:15–16, attached to QED's opening brief as Addendum A.) Accordingly, it was an abuse of discretion for the trial court to conclude that by virtue of

allowing Atlas to temporarily retain the $34,259.43—which was payable but not yet due—QED should be estopped from recovering that amount.

d) Comtrol is responsible for its own negligence in failing to ascertain the amount actually owed to QED.

The very purpose of payment bond statutes is to shift the risk of non-payment away from suppliers (like QED) to general contractors and their sureties (like USF&G). See Krupp Steel Prods., Inc. v. Aetna Ins. Co., 831 F.2d 978 (11th Cir. 1987); see also Geneva Pipe Co. v. Maughan, 714 P.2d 648, 650–51 (Utah 1986) ("The risk of loss . . . is one of the hazards which a surety, for a fixed consideration assumes by its contract." (quoting Salt Lake City v. O'Connor, 249 P. 810, 814 (Utah 1926))). The trial court's erroneous findings of fact effectively shift that risk of non-payment back to QED, forcing QED to bear the loss resulting from Comtrol and USF&G's own failure to ascertain the amounts due QED.

The record affirmatively establishes that Comtrol failed to accurately determine the amount actually due QED when Comtrol issued the $85,383.19 joint check. The record further affirmatively establishes that Comtrol could have ascertained the exact amount due QED, but did not. (R. 2222:637–41.) See Syro Steel Co. v. Hubbell Highway Signs, Inc., 424 S.E.2d 208, 210 (N.C. Ct. App. 1993) (noting that one of the elements of equitable estoppel is that the asserting party lack knowledge "and the means to acquire knowledge as to the real facts in question" (emphasis added)). Accordingly, Comtrol and its surety, USF&G, are responsible for their failure to ascertain or understand the terms of Atlas's account with QED, and the trial court abused its discretion when it made QED "responsible for monitoring its purchaser, rather than

making [Comtrol] responsible for monitoring its subcontractor." See Krupp Steel Prods., 831 F.2d at 983 n.3; see also Geneva Pipe, 714 P.2d at 651 (discussing the "ample facilities" sureties have for protecting themselves as opposed to a supplier's general inability to monitor relationships with customers).

e) QED's course of dealing with Atlas uniquely defined "net-30".

The uncontroverted terms of Atlas's account with QED specifically defined Atlas's payment obligation to require Atlas to pay invoices on the last day of the month following the month during which QED's invoice was issued. (R. 2132 ¶ 41; PA-4.) The payment terms between QED and Atlas involved numerous occasions for performance by both. (Id.) Both Atlas and QED had knowledge of the nature of the performance, the opportunity to object to the arrangement, and an implicit understanding that the construction of the agreement and course of performance were reasonable. (R. 2132 ¶ 42.) All these factors are relevant to the meaning of the agreement between Atlas and QED and undisputedly point to the conclusion that the agreement required that payment be made on the last date of the month following the month in which the materials were furnished. (R. 2220:132–133; 2221:267–282.) The evidence submitted at trial regarding this critical term is compelling and virtually uncontested.

4. Utah's Payment Bond Statute Provides Special Protection to QED.

In its reply brief, USF&G concedes that payment bond statutes are to be liberally construed, but it argues that this liberal construction is "not without limits." (See Reply Br. of Appellants & Br. of Cross-Appellees at 24.) However, USF&G does not say what those limitations are, nor could it: the only "limitation" on the liberal construction

afforded to payment bond statutes is the language of those statutes. See J.W. Bateson Co. v. United States, 434 U.S. 586, 594 (1978) (noting that the rule of liberal construction "does not justify ignoring plain words of limitation" (internal quotation marks omitted)); United States ex rel. B. & R., Inc. v. Donald Lane Constr., 19 F. Supp. 2d 217, 223–24 (D. Del. 1998) (noting consensus that notice provisions are an exception to the rule of liberal construction because "the remedial purposes of the Miller Act will not justify ignoring clear limitations imposed by the statute" (emphasis added)). That limitation does not provide Comtrol or USF&G the protection they seek. Utah's payment bond statute unambiguously allows QED to recover against the Bond "for any unpaid amount due" it. See Utah Code Ann. § 63-56-504(4) (emphasis added). The liberal construction for which QED advocates is totally consistent with the language of the bond statute, and the "limitations" USF&G places upon that construction are illusory.

No other reason exists to depart from the liberal construction normally afforded to payment bond statutes. Despite USF&G's contention, the trial court's estoppel decision will have little bearing on the veracity of communications between suppliers and general contractors. However, it will profoundly restrict the ability of suppliers to assert claims against payment bonds. Indeed, at the very least, the trial court's reduction of QED's claim significantly weakens the very purpose of the payment bond statute, namely, to ensure payment to those supplying labor and materials to public projects. See Am. Sur. Co. of N.Y. v. Hinds, 260 F.2d 366, 368 (10th Cir. 1958) (noting that the purpose of the Miller Act is to "shift the ultimate risk of nonpayment from workmen and suppliers to the surety"); see also W. Coatings v. Gibbons & Reed Co., 788 P.2d 503, 505 (Utah 1990) (noting the many similarities between the Miller Act and Utah's payment bond statute).

At trial, USF&G offered no evidence that QED was anything but forthright in responding to Comtrol's inquiries regarding Atlas's account balance. More importantly, in spite of USF&G's efforts to represent otherwise, USF&G offered no evidence—and the trial court did not make any findings that would support such a contention—that QED attempted to lead Comtrol astray and then attempted to "benefit financially from [its] lack of candor." (See Reply Br. of Appellants & Br. of Cross-Appellees at 24.)

5. Appellate Courts in Utah and Across the Country Have Rejected the Application of Equitable Estoppel as a Defense to Payment Bond Claims In Situations Similar to This Case.

Finally, the cases cited by QED in its opening brief are just a representative sampling of the cases throughout the United States—and in particular, Utah—where appellate courts have rejected the application of equitable estoppel as a defense to payment bond claims in situations similar to this case. The status of the law of equitable estoppel in Utah was made clear in CECO Corp. v. Concrete Specialists, Inc., where the Utah Supreme Court reversed a trial court's application of equitable estoppel as a defense to a payment bond claim. 772 P.2d at 970–71. Despite USF&G's argument to the contrary, CECO is not distinguishable. The fact that the supplier in CECO contacted the general contractor to advise it that the supplier had not been paid for work on a project is of no consequence and does not distinguish CECO. Instead, it actually highlights the inappropriateness of applying equitable estoppel in this case. If equitable estoppel was not an appropriate defense in CECO—where the sub-subcontractor made representations that it would continue to look to its customer for payment—it is certainly not appropriate here, where QED simply responded to Comtrol's general inquiry regarding the amount owed on Atlas's account and honored the terms of its agreement with Atlas. (R.

2220:213–14; 2222:589.) In CECO, the supplier represented to the general contractor that it would "continue to look to the subcontractor for payment," but no such representation was made in this case.

Furthermore, QED never communicated an intention to waive its right to assert a claim against the Bond, and there is no evidence on the record that Comtrol gave "specific instructions to QED and Atlas that the full amount of the check was for QED." (Reply Br. of Appellants & Br. of Cross-Appellees at 25.) This reality is perhaps best illustrated by USF&G's recitation of "facts" that it believes surround the issuance of the $85,383.19 joint check. (See id. at 12–13.) USF&G goes to great lengths to recite all the "facts" surrounding the issuance of the $85,383.19 joint check, but it conspicuously omits any record citation to support its contention that Comtrol gave "specific instructions to QED and Atlas that the full amount of the check was for QED." (Id. at 25.)

Here, just as in CECO, the general contractor issued joint checks in an effort to ensure payment to the supplier. This Court should therefore follow the Utah Supreme Court's lead in CECO and adhere to the important public policy underlying the payment bond statute. To do otherwise would produce a "ludicrous result," namely, one that "make[s] it rather easy for general contractors to avoid their statutory obligation to provide assurances that their subcontractors will pay their bills." CECO, 772 P.2d at 970. That kind of unfairness should not be countenanced with an equitable estoppel ruling. Additionally, USF&G's theory, if adopted, provides an avenue for general contractors to shift the risk of non-payment from themselves to suppliers. Such a result is contrary to Utah's payment bond statute, waiver doctrine, and general principles of equity and

fairness. See Krupp Steel Prods., 831 F.2d at 983 n.3; see also Geneva Pipe, 714 P.2d at 651.

In this case, QED furnished materials to a public project for which it has not been paid. And, as in CECO, QED attempted to work with its customer (Atlas) to procure payment for its materials furnished to the Project. The only distinction between this case and CECO is that QED did not contact Comtrol, that QED always looked to Atlas for payment rather than to Comtrol, and that QED responded to Comtrol's general inquiry regarding the status of Atlas's account. When Atlas failed to pay QED in full, QED asserted a statutorily authorized claim against the Bond, which was posted to guarantee payment for all those furnishing labor and materials to the Project. Accordingly, the trial court abused its discretion by estopping QED from recovering the full amount of its payment bond claim. This Court should remand to the trial court with instructions that the trial court amend QED's judgment and award QED an additional $34,259.43, plus pre- and post-judgment interest.

II. THIS COURT SHOULD REMAND THE TRIAL COURT'S CALCULATION OF ATTORNEYS' FEES WITH INSTRUCTIONS TO AWARD QED ALL OF ITS FEES.

USF&G does not appear to dispute that if this Court concludes that the trial court abused its discretion by estopping QED from claiming the additional $34,259.43 that Atlas withheld from the November 13, 2001, joint check, the Court should remand the trial court's calculation of attorneys' fees with instructions to award QED all of its attorneys' fees. Indeed, it could not dispute that outcome. As noted in QED's initial brief, Utah courts employ a "flexible and reasoned approach" to determine which party in litigation is the prevailing party and therefore entitled to attorneys' fees. See Mountain

States Broad. Co. v. Neale, 776 P.2d 643, 649 n.7 (Utah Ct. App. 1989). Employing that "flexible and reasoned approach," the trial court concluded that QED was the prevailing party, and USF&G does not dispute that conclusion. But the trial court must also employ some flexibility and reason when calculating the amount of attorneys' fees to which a prevailing party is entitled. Specifically, the court must consider certain "established touchstones" when calculating the amount of fees. See Dixie State Bank v. Bracken, 764 P.2d 985, 989–90 (Utah 1988).

Here, the trial court initially awarded QED the full amount of its attorneys' fees, but it later reduced that award by 25%. (R. 1570–75, 2138 ¶ 18.) The trial court based that reduction on its application of equitable estoppel principles to the November 13, 2001 joint check, which is explained above. The court reasoned that because QED's recovered only a percentage of the recovery it sought (albeit a large percentage), the amount of attorneys' fees it may recover should be proportionally reduced. (See id.) As explained above, however, the trial court's application of equitable estoppel principles to the November 13, 2001 joint check was an abuse of discretion: QED should have been allowed to recover the full amount of the November 13, 2001 joint check from the Bond. Thus, if this Court reverses the trial court's equitable estoppel ruling and allows QED to recover the full amount of the November 13, 2001 joint check, this Court should employ a "flexible and reasoned approach" and award QED the remaining 25% of its attorneys' fees. Indeed, any other result would constitute legal error. See Dixie State Bank, 764 P.2d at 991 (noting that once a trial court determines the amount of attorneys' fees to which a prevailing party is entitled, "it commits legal error if it awards less than the reasonable fee to which the successful litigant is entitled"). Indeed, this Court should

award QED all of its fees in any event: the trial court found that all of QED's attorneys' fees were reasonable (R. 2139 ¶ 20), and it therefore abused its discretion in failing to award QED all of those reasonable fees. See id. This Court should remand the trial court's calculation of attorneys' fees and instruct it to award QED all of the fees and costs that the trial court previously determined were reasonable.

III. QED IS ENTITLED TO 18% INTEREST ON ITS ATTORNEYS' FEES AND COSTS.

Although USF&G acknowledges that this action is an action against the Bond, its position regarding the interest rate governing QED's award of fees and costs reflects its failure to fully appreciate the significance of the nature of this action. The payment bond statute provides that "[a] person shall have a right of action on a payment bond under this section for any unpaid amount due him." Utah Code Ann. § 63-56-504(4) (emphasis added). Thus, the absence of a contract between USF&G and QED is of no consequence in determining the interest rate applicable to QED's fees and costs award. The contract between QED and Atlas defines the applicable rate, and USF&G's obligation under the payment bond statute requires it to compensate QED for whatever Atlas failed to pay pursuant to Atlas's contract with QED. Indeed, pursuant to the Bond, USF&G agreed to compensate QED for any sums that Atlas wrongfully failed to pay QED. (PA-1.) USF&G cannot now escape its obligation under the Bond by arguing that it never agreed to the terms of the agreement between QED and Atlas.

Here, the contract between QED and Atlas allows QED, in litigation, to recover its costs of collection as well as its attorneys' fees. (PA-4.) It also provides for an 18% interest rate on all sums due and owing to QED. (Id.) Thus, if QED were to sue Atlas

and prevail, it would be allowed to recover 18% interest on the entire amount recovered, including fees and costs. Thus, USF&G must, pursuant to the bond statute and the Bond itself, compensate QED for "any unpaid amount due." See Utah Code Ann. § 63-56-504(4). In other words, by virtue of its obligation as a surety, USF&G must pay 18% interest on QED's award of attorneys' fees and costs.

It is true, as USF&G points out, that pursuant to section 15-1-4 "a judgment rendered on a lawful contract shall . . . bear the interest agreed upon by the parties." Utah Code Ann. § 15-1-4(2)(a) (emphasis added). It is also true that this is not an action on a contract, but against the Bond, and that section 15-1-4(2)(a) does not directly govern this issue. However, the tangential import of section 15-1-4(2)(a) does not mean that the interest rate applicable to QED's award of fees and costs cannot be defined by any contract. Section 15-1-4(2)(a) pertains only to judgments arising from contracts between parties to litigation; it has nothing to do with judgments against sureties arising from payment bonds. Seeking nevertheless to make some hay from 15-1-4(2)(a), USF&G argues that because section 15-1-4(2)(a) does not govern the interest rate applicable to QED's fees and costs award, the default rate applies. That argument ignores the other statutory provisions that govern the applicable interest rate, and it is tantamount to arguing that section 15-1-4 simultaneously governs and does not govern the interest rate applicable to QED's fees and costs award.[4]

[4] QED's reference, in its opening brief, to section 15-1-4(2)(a) as the "relevant" statute was correct: it indeed governs the interest rate on judgments arising from actions on contracts, and had QED obtained a judgment against Atlas, QED's judgment would have borne an interest rate of 18%. The amount of any judgment that QED could have obtained against Atlas is precisely the amount that QED should recover against USF&G.

In any event, Utah Code section 15-1-4(3)(a), on which USF&G hangs its hat, does not govern this issue either. By its plain terms, that provision only applies "[e]xcept as otherwise provided by law." Utah Code Ann. § 15-1-4(3)(a). Here, law otherwise provides: the payment bond statute unambiguously allows QED to recover from USF&G "for any unpaid amount due." Utah Code Ann. § 63-56-504(4). The amount due QED is the amount specified in its contract with Atlas: attorneys' fees and costs at an 18% interest rate. That is what USF&G, as the surety, owes QED.

In fine, despite USF&G's recognition of the nature of this action, it ignores the significance of that nature. The trial court erred by applying a 6.37% interest rate to QED's award of fees and costs. This Court should remand to the trial court with instructions that the trial court apply the 18% post-judgment interest rate, which is consistent with QED's contract with Atlas, to the award of fees and costs.

IV. QED SHOULD BE AWARDED ITS ATTORNEYS' FEES AND COSTS ON APPEAL.

QED requested an award of attorneys' fees and costs on appeal in its opening brief. (See Br. of Appellee & Cross-Appellant at 50.) USF&G does not appear to dispute this, nor could it. As the prevailing party to the action below, in addition to those attorneys' fees and costs already awarded, QED is also entitled to all attorneys' fees and costs incurred on appeal, assuming that it prevails on appeal. See Utah Code Ann. § 63-56-38(6) (renumbered 63-56-504(6)) ("In any suit upon a payment bond, the court shall award reasonable attorneys' fees to the prevailing party. . . ." (emphasis added)).

USF&G has erroneously assumed that QED's statement that section 15-1-4(2)(a) was the "relevant" statute means that it governs this Court's resolution of this precise issue.

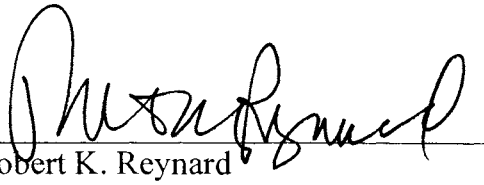
Accordingly, QED's judgment against USF&G should be augmented to include all attorneys' fees and costs incurred on appeal.

CONCLUSION

This Court should affirm QED's Amended Judgment against USF&G in the amount of $307,412.74, but it should reverse the trial court's application of equitable estoppel. Specifically, this Court should conclude that: (1) the trial court abused its discretion by applying equitable estoppel principles to this case, (2) erred by reducing QED's attorneys' fees award, and (3) erred by not awarding QED 18% interest on the full amount of QED's Judgment against USF&G. Accordingly, the Court should award QED an additional $34,259.43, along with all its attorneys' fees in prosecuting this matter, including attorneys' fees and costs incurred on appeal, pursuant to Utah Code Ann. § 63-56-504(6), and pre-judgment and post-judgment interest at the rate of 18% per annum.

RESPECTFULLY SUBMITTED this 18th day of July, 2007.

BENNETT TUELLER JOHNSON & DEERE



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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July 2007, I caused to be served, via hand delivery, two (2) true and correct copies of the foregoing **REPLY BRIEF OF CROSS-APPELLANT** upon the following:

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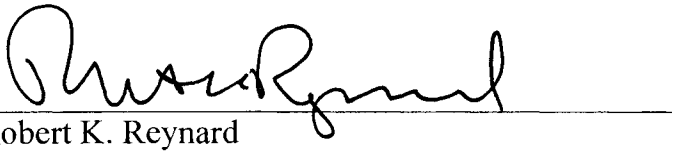

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