

1995

David Winters v. Allison Abizaid and Joanne Schulman, individually, and Joanne Shulman : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Winters v. Schulman*, No. 950908521 (Utah Court of Appeals, 1995).

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IN THE UTAH COURT OF APPEALS, STATE OF UTAH

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DAVID WINTERS, :

Plaintiff/Appellant, : BRIEF OF THE APPELLANT

vs. : :

ALLISON ABIZAID AND JOANNE : :

SCHULMAN, individually : :

Defendants, : Case No. 95-090-8521 PI

JOANNE SCHULMAN, : Appeal No. 20-000-114CA

Appellee/Cross-Appellant. : Priority No. 15

0000000

BRIEF OF THE APPELLANT

On Appeal from a Judgment of the
Third Judicial District Court for
Salt Lake County, State of Utah
Honorable William Thorne, District Judge

ORAL ARGUMENT REQUESTED

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FILED
Utah Court of Appeals

AUG 24 2000

Paulette Stagg
Clerk of the Court

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II. STATEMENT OF THE COURT'S JURISDICTION

Jurisdiction over this appeal is based upon UCA §78-2-2 which grants the Supreme Court appellate jurisdiction over appeals from judgments of any court of record over which the Court of Appeals does not have original appellate jurisdiction. This appeal was transferred to the Court of Appeals by direction of the Supreme Court. Notice of this transfer was given to the parties by an order dated the 24th day of April, 2000.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND THE STANDARD OF REVIEW

A. The Issues Presented on Appeal:

1. Whether the Trial Court properly computed the Plaintiff's damages and whether the damages were trebled as required by UCA §38-9-1 and 3?
2. Whether the Plaintiff's money damages are limited to statutory damages in the sum of \$1,000.00?
3. The failure to award prejudgment interest on the damage claim.
4. Whether the award of attorney's fees under the written Findings of Fact as entered by the court should not have been less than \$27,576.00?
5. Whether the Trial Court properly applied the law when considering the nature of the legal services and the amount of time spent in the case to date?
6. Whether the Trial Court, as a matter of law, improperly reduced by two-thirds ($\frac{2}{3}$) the amount of attorney's fees to be recovered in the case?
7. Whether the Trial Court entered sufficient Findings of Fact in order to reduce the award of attorney's fees from the amount claimed by the Plaintiff?

B. The Standard of Review on Appeal:

1. The court reviews issues of law under the correction of error standard.
2. The court reviews the ultimate application of law to any proven set of facts

under the correction of error standard.

3. The court reviews disputed evidence and the resulting Findings of Fact under the clearly erroneous standard.
4. In reviewing an award of attorney fees, the reviewing court will presume that the discretion of the trial is properly exercised unless the record clearly indicates the contrary. Beverly Goddard v. Grant A. Hickman 685 P.2d 530 (Utah 1984); Thomas J. Donnahue v. Intermountain Health Care 748 P.2d 1067 (Utah 1988).
5. A Trial Court will be deemed to have abused its discretion where it awards less than the amount of attorney fees requested when there is adequate and uncontroverted evidence in the record to support the nature and the amount of fees claimed, unless the Trial Court specifically offers an appropriate explanation for the reduction in the fee. Regional Sales Agency, Inc. v. Roland W. Reichert 784 P.2d 1210 (Utah App. 1989); Stephen Martindale v. Tom Adams 777 P.2d 514 (Utah App. 1989); Dixie State Bank v. Kirk Bracken 764 P.2d 985 (Utah 1988).

IV. DETERMINATIVE PROVISIONS

Statutory Provisions:

1. UCA §15-1-1, **Interest Rates - Contracted Rate - Legal Rate.**

(1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is subject of their contract.

(2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum. (Emphasis added.)

(3) Nothing in this section may be construed in any way affect any penalty or interest charge that by law applies to delinquent or other taxes or to any contract or obligations made before May 14, 1981.

2. **UCA §38-9-1, Liability of Person Filing Wrongful Lien.**

A person who claims an interest in, or a lien or encumbrance against, real property, who causes or has caused a document asserting that claim to be recorded or filed in the office of the county recorder, who knows or has reason to know that the document is forged, groundless, or contains a material misstatement of false claim, is liable to the owner or title-holder for \$1,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees, and costs as provided in this chapter, if he willfully refuses to release or correct such document of record within 20 days from the date of written request from the owner or beneficial title-holder of the real property. This chapter is not intended to be applicable to mechanics' or materialmen's liens. (Emphasis added).

3. **UCA §38-9-3, Liability of Person Refusing to Correct Document Containing Wrongful Lien - Penalty - Misdemeanor.**

A person described in Section 38-9-1, who willfully refuses to release or correct the document of record within 20 days from the date of written request from the owner or beneficial title-holder of the real property:

(1) is liable to the owner or beneficial title-holder of the real property for the sum of not less than \$1,000, or for treble the actual damages caused by the recording or filing, whichever is greater, and for reasonable attorney fees and costs of the action; and [Balance of the statute outlined]. (Emphasis added).

4. **UCA §38-9-4, Action may be Brought in District Court - Costs and Attorneys Fees.**

The owner or beneficial title-holder of the real property may bring an action under this chapter in the district court of the county in which the real property is located for such relief as is required to immediately clear title to the real property or may join that action with an action for damages as described in this chapter, after giving the notice required in Section 38-9-1. In either case, the owner or beneficial title-holder may recover reasonable attorney fees and costs of the action if he prevails. (Emphasis added).

V. STATEMENT OF THE CASE

A. The Nature of the Case.

This is a second appeal of a dispute involving the filing of a naked "Lis Pendens". The present appeal involves the proper computation of the amount of damages and the reduction by two-thirds ($\frac{2}{3}$) from the amount of attorney's fees otherwise found by the court to be reasonable. The Trial Court failed to award any prejudgment interest to the Plaintiff on the statutory cause of action.

In the prior appeal, the Court of Appeals ruled that the Lis Pendens filed by the Defendant was both invalid and groundless as a matter of law. David Winters v. Joanne Schulman 1999 Utah Ct. App. 119, 977 P.2d 1218 (Utah App.). A review by the Utah Supreme Court of the ruling of the Court of Appeals was sought by the Defendant, but was denied. The case was then remanded to the Trial Court for an evidentiary hearing on the issue of damages, statutory damages, and the amount of recoverable attorney's fees.

B. The Course of the Proceedings and Disposition Below.

The trial on the issues of damages, statutory damages, and recoverable attorney's fees was conducted before Judge William Thorne on December 13th, 1999. The District Court concluded that the Plaintiff suffered no money damages whatsoever. (Findings of Fact ¶17; Record p. 562; Addendum No. 3, p. 9). The Court ultimately determined that \$1,000.00 in statutory damages was all that could be recovered by the Plaintiff. (Trial Transcript p. 116; Findings of Fact ¶10; Record pp. 560 to 564; Addendum No. 3, pp. 9 and 10).

The District Court found that a reasonable attorney's fees in the case was \$27,576.00,

but then proceeded to reduce the fee award by two-thirds ($\frac{2}{3}$). (Trial Transcript pp. 115 to 121; Finding of Fact ¶20A; Record p. 563; Addendum No. 3, p. 10).

The District Court did award \$2,090.00 in litigation costs relating to the removal of the Lis Pendens in the California Superior Court proceedings. (Trial Transcript p. 116; Plaintiff's Trial Exhibit No. 6; Addendum No. 13, pp. 69 to 78). The District Court did not treat these out-of-pocket costs as "damages" under the statute and as a result, they were not trebled and no prejudgment interest was assessed on these amounts.

C. Statement of the Core Facts.

For purpose of the present appeal, the following core facts were proven at trial or is part of the trial record before the Third District Court:

1. Pursuant to the remand of the Court of Appals, the District Court conducted an evidentiary trial on December 13, 1999, on the issue of the damages, statutory damages, interest, and the claim for statutory attorney's fees.

2. In May of 1995, Mr. Schulman, as a duly licensed California attorney, filed a naked Lis Pendens on the Plaintiff's home located in Salt Lake County, State of Utah. (Findings of Fact ¶5; Record p. 561; Addendum No. 3, p. 8; Plaintiff's Trial Exhibit No. 2; Record pp. 14 to 15; Addendum No. 9, pp. 62 to 64).

3. The recorded Lis Pendens was never voluntarily released. The Lis Pendens was eventually ordered to be released pursuant to an Order of the California Superior Court as part of the post-divorce proceedings which were being conducted (but not concluded) on April 19, 1996. This domestic law proceeding involved a monetary dispute that had arisen

between the divorced parties as to the amount of liabilities that may have been owed under the 1989 California Decree of Divorce. (Findings of Fact ¶7; Record p. 561; Addendum No. 3, p. 8).

4. David Winters, as a Plaintiff, filed this statutory action against the Defendant in the Third District Court in Salt Lake County in December of 1995. The Complaint asserted claims of negligence, abuse of legal process, and a quiet title action which included the wrongful lien claim set forth in UCA §38-9-1. (Findings of Fact ¶8; Record p. 561; Addendum No. 3, p. 8, and No. 14, p. 13).

5. David Winters made a claim for \$1,000.00 in statutory damages as part of his original Complaint in the Third District Court. (Findings of Fact ¶10; Record p. 562; Addendum No. 3, p. 9, No. 14, p. 13).

6. The Plaintiff, David Winters, eventually filed a Motion under Rules 12, 54, 55, and 56 to establish the Defendant's statutory liability under the statutory cause of action. In response, the Defendant moved for Summary Judgment with respect to its asserted defenses and sought the dismissal of the entire Complaint. (Trial Transcript pp. 56 to 57; Record pp. 51 to 54, 316 to 318; Addendum No. 5, pp. 30 to 33).

7. The Plaintiff agreed to dismiss all of his other causes of actions, if the Third District Court granted the relief authorized to be entered pursuant to the wrongful lien claim contained in UCA §38-9-1. (Trial Transcript p. 57).

8. David Winters had already incurred \$3,500.00 in attorney's fees up to the point in time in which the California Superior Court ordered the Lis Pendens to be released.

(Findings of Fact ¶9; Record p. 562; Addendum No. 3, p. 9).

9. The Third District Court ultimately concluded that reasonable attorney's fees necessarily incurred to recover the \$1,000.00 in statutory damages was limited to \$2,000.00 which represents a substantial reduction in the actual fee claim. The District Court justified the reduced fee amount in part due to the complexity of the case caused by the other two (2) cause of actions. (Trial Transcript p. 116; Findings of Fact ¶¶11 and 20A; Record p. 562; Addendum No. 3, pp. 9 and 10).

10. The District Court further determined that reasonable attorney's fees, as a result of the original appeal of the dismissal of the wrongful lien claim, was limited to \$2,500.00. (Trial Transcript p. 116; Findings of Fact ¶12; Record p. 562; Addendum No. 3, p. 9).

11. The District Court found that the facts and the legal theories of the claims contained in the Plaintiff's Complaint overlapped, but were not intertwined. (Trial Transcript pp. 116 to 117; Findings of Fact ¶13; Record p. 562; Addendum No. 3, p. 9).

12. The District Court found that David Winters paid and incurred certain legal fees which were charged by his California divorce lawyer, Jonathan Gordon, and which related to the release of the Lis Pendens. (Trial Transcript pp. 4 to 5; Finding of Fact ¶14; Record p. 562; Addendum No. 3, p. 9; Plaintiff's Trial Exhibit No. 5; Addendum No. 12, p. 68).

13. The Plaintiff sought and was awarded the sum of \$1,650.00 for the legal fees actually paid to Mr. Gordon. (Trial Transcript pp. 7 and 116; Findings of Fact ¶14; Record p. 562; Addendum No. 3, p. 9).

14. The District Court found that David Winters had paid and incurred a total of \$2,090.82 in reasonable attorney's fees and costs in connection with the California Superior Court proceeding. These legal fees and costs were directly related to the release of the Lis Pendens. (Trial Transcript pp. 116 to 117; Findings of Fact ¶14; Record p. 562; Addendum No. 3, p. 9; Plaintiff's Trial Exhibits Nos. 5 and 6; Addendum Nos. 12, p. 68, and 13, pp. 69 to 78). [However, these out-of-pocket costs were not treated as "damages" by the Trial Court.]

15. The District Court further found that the Plaintiff had incurred additional out-of-pocket costs in connection with the California Superior Court proceedings, as it relates to the Lis Pendens, in the sum of \$150.00. (Trial Transcript p. 117).

16. The District Court did not find that the Plaintiff had proven any emotional distress damages and accordingly awarded no monetary damages relating to this part of the damage claim. (Trial Transcript p. 117; Findings of Fact ¶18; Record p. 562; Addendum No. 3, p. 9).

17. The District Court ultimately concluded that David Winters is entitled to no more than \$1,000.00 in statutory damages pursuant to UCA §38-9-1. (Conclusions of Law ¶1; Record p. 563; Addendum No. 3, p. 10).

18. The Plaintiff suffered economic damages in the form of lost interest on his money in the sum of \$2,015.67. (Trial Transcript pp. 7 to 8; Plaintiff's Trial Exhibit No. 7; Addendum No. 14, pp. 79 to 85).

19. The District Court specifically found that the hourly rate charged by the

Plaintiff was reasonable. (Trial Transcript p. 118).

20. The District Court ultimately found that a reasonable attorney's fees was in the sum of \$27,576.00, but the total fee claim was subject to reduction for various "complicating" matters including the assertion of other cause of actions. (Finding of Fact ¶20A; Record p. 563; Addendum No. 3, p. 10).

21. The District Court concluded that the attorney negligence claim complicated the action and prevented a resolution of the case short of Summary Judgment and appeal. (Trial Transcript pp. 116 to 117; Findings of Fact ¶20D; Record p. 563; Addendum No. 3, p. 10). [There was no evidence presented by the Defendant at the time of the trial relating to this claim of "complicated" trial issues.]

22. The District Court concluded that the legal fees could be divided categorically according to the different cause of actions. (Trial Transcript pp. 118 to 119; Findings of Fact ¶¶13 and 20D; Record pp. 562 and 563; Addendum No. 3, pp. 9 and 10; Record pp. 467 to 479; Addendum No. 6, pp. 34 to 36; Supplemental Attorney Fee Affidavit; Plaintiff's Trial Exhibit No. 12, Addendum No. 7, pp. 47 to 58).

23. A current detailed attorney's fee affidavit was submitted by the Plaintiff's attorney of record and it was accepted by the parties and the court for what it contained. (Trial Transcript p. 49; Plaintiff's Trial Exhibit No. 12; Addendum No. 7, p. 47).

24. David Winter's total attorney's fees relating to the Utah case that were incurred up through December 10, 1999, was in the sum of \$35,840.25. (Trial Transcript pp. 49 to 50).

25. David winter's incurred an additional ten (10) hours of time thereafter and including the actual trial. (Trial Transcript p. 50).

26. The amount of the Utah attorney's fees that relate to the cause of actions for which recovery of professional fees cannot be obtained was eliminated from the total fee claim at the time of the trial. (Trial Transcript pp. 50 to 51; Plaintiff's Trial Exhibit No. 8; Addendum No. 15, p. 86).

27. The total amount of attorney's fees claimed which relate in whole or in part to the Lis Pendens' litigation (and taking into account the excluded charges) was in the sum of \$32,419.00 up through December 10, 1999. (Trial Transcript p. 51).

28. The Plaintiff's claim, under UCA §38-9-1 and 4, includes two (2) basic elements which are: (i) the release of the Lis Pendens; and (ii) a separate claim for damages or statutory damages. (Trial Transcript p. 52).

29. Once the Lis Pendens was released, the Plaintiff continued to pursue his claim for money damages or statutory damages. (Trial Transcript p. 52).

30. The litigation was only reluctantly undertaken and only after several months was allowed to elapse before the Motion to impose statutory liability was filed in order to see if a claim to the title or the physical possession of the home was made in the California Superior Court proceedings. (Trial Transcript pp. 53 to 55, 65; Record pp. 467 to 479; Addendum No. 6, pp. 34 to 46; Supplemental Affidavit; Plaintiff's Trial Exhibit No. 12; Addendum No. 7, pp. 47 to 58). [This Motion to impose liability was filed under Rules 12, 45, 55, and 56 of the Utah Rules of Civil Procedure.]

31. No offer of a money judgment in any amount was ever tendered by the Defendant in this case. (Trial Transcript p. 58).

32. The Motion for Partial Summary Judgment under Rules 12, 54, 55, and 56 was filed by the Plaintiff in order to establish liability and to fix statutory liability in the sum of \$1,000.00 at the very least. (Trial Transcript p. 62; Record pp. 51 to 54; Addendum No. 5, pp. 30 to 33). [See prayer for relief at Record pp. 53 to 54.]

33. The bulk of the cause of the action related primarily to obtaining a release of the Lis Pendens and related damages or statutory damages. (Trial Transcript pp. 74 to 75, and 78 to 79).

34. The statutory cause of action was the principle case which was asserted and all of the other legal claims would be waived, if the Lis Pendens was released and the statutory damage compensation was tendered. (Trial Transcript pp. 57, 78 to 79).

35. All work specifically relating to the abuse of process and negligence claims were eliminated from the attorney's fee claim. (Trial Transcript pp. 50 to 51, 80 to 82; Plaintiff's Exhibit No. 8; Addendum No. 15, p. 86).

36. The Plaintiff would have been required to proceed with the statutory cause of action whether or not the California Superior Court ordered the Lis Pendens released. (Trial Transcript pp. 65, 82 to 83).

37. The Plaintiff's Motion filed under Rules 12, 54, 55, and 56 in the Third District Court went beyond the initial limited relief granted by the California Superior Court. (Trial Transcript pp. 52 and 86; Record pp. 51 to 54; Addendum No. 5, p. 30 to 33).

VI. SUMMARY OF THE ARGUMENT

1. The Plaintiff has proven out-of-pocket damages of not less than \$4,797.64 which must, by law, be trebled pursuant to the provisions of UCA §38-9-3. The Plaintiff's proven damages consists of:

- A. California Lis Pendens litigation costs in the sum of \$2,090.82. (Trial Transcript p. 117).
- B. California travel and telephone costs prior to April 12, 1996, in the sum of \$395.07. (Plaintiff's Trial Exhibit No. 10; Addendum No. 16, pp. 87 to 100). (This is 50% of the total listed expenses).
- C. California travel and telephone costs after April 12, 1996, in the sum of \$298.08. (Plaintiff's Trial Exhibit No. 11; Addendum No. 17, pp. 101 to 105). (This is 50% of the total listed expenses).
- D. Lost interest on expended funds in the sum of \$2,013.67. (Plaintiff's Trial Exhibit No. 7; Addendum No. 14, pp. 79 to 85).

2. The District Court failed to award prejudgment interest on the proven damages.

3. The District Court failed to award an adequate judgment for proven attorney's fees. The amount that should have been awarded is \$32,419.00.

4. The District Court, as a matter of law, improperly reduced the proven amount of the attorney's fee claim by two-thirds ($\frac{2}{3}$) representing the supposed legal costs relating to the two (2) other cause of actions. Proper factual and legal reasons for the reduction is not stated in the record and the actual reason given by the District Court is not supported by the evidence and is contrary to the governing case law.

5. The District Court committed error, as a matter of law, when it failed to award the full amount of attorney's fees demanded, because there was no competent evidence to

counter the testimony and the evidence as to reasonableness of the actual work performed on a daily basis, the necessity of the same, and the professional rate charged for each service.

6. The cost of the legal representation associated with pursuing any related legal theories (and which are based upon the same core set of facts) are recoverable by the prevailing party as a matter of law.

VII. ARGUMENT

The Uncontroverted Testimony of Competent and Knowledgeable Witnesses must be Accepted as True Absent Specific Findings or Evidence to the Contrary.

It is a generally accepted rule of law that when a witness testifies (or provides evidence) as to any fact and the testimony of the witness is not discredited by other competent evidence, and where the testimony itself is not improbable, then the testimony of the witness is to be accepted as true by the court or the fact finder. This rule of law is particularly important in a case where the testimony of the witness is fully corroborated by the other evidence as it was in this case. 30 Am.Jur.2d Evidence §1083; 81 Am.Jur.2d Witnesses §660; West v. Sinclair 90 F.Supp. 307 (DC WD Mo. 1950); Wichita Terminal Elevator v. Commissioner 47-2 USTC ¶9253, 162 F.2d 513 (CA-10 1947). The Court in the West v. Sinclair case stated the rule of law as follows:

"It is the duty of the Court and the jury in every case to view the testimony upon the theory that the witnesses are telling the truth."

The major issues before this court on appeal are the correct legal conclusions to be drawn from the undisputed core facts. In this case, the court need only apply the law to a known set of facts. First National Bank v. Commissioner 91-1 USTC ¶150,005, 921 F.2d

1081 (CA-10 1990); John R. Pollei v. Commissioner 89-1 USTC ¶9389, 877 F.2d 838 (CA-10 1989). There are only a few truly disputed facts in this case.

The Trial Court Committed Error When it
Failed to Award and Treble the Proven
Damages of the Plaintiff.

The District Court found that the Plaintiff suffered no damages. (Findings of Fact ¶17; Record p. 562; Addendum No. 3, p. 9). Notwithstanding this written finding, the Trial Court awarded compensation to the Plaintiff as damages in the case. (Trial Transcript p. 117). It is clear in the record that the District Court attempted to justify its ultimate ruling regarding damages and attorney’s fees under two (2) alternative computational methods. (Trial Transcript pp. 115 to 121).

The District Court failed to award the Plaintiff the full amount of his proven damages and to treble them as required by law. As a matter of law, certain damages (or out-of-pocket costs) will necessarily exist when a person files a “naked” Lis Pendens from a foreign jurisdiction. The Plaintiff’s proven damages were as follows:

NO.	ITEM OR DESCRIPTION	TOTAL AMOUNT CLAIMED	TRIAL EXHIBIT NUMBER	ADDENDUM NUMBER	DISTRICT COURT RULING
1	The Plaintiff’s Billing Charge of J. Gordon, Esq. (Legal fees paid to the California lawyer as it relates to the removal of the Lis Pendens.) (Trial Transcript pp. 116 and 117).	\$1,650.00	Plaintiff’s Trial Exhibit No. 5	No. 12	Allowed by the Trial Court

NO.	ITEM OR DESCRIPTION	TOTAL AMOUNT CLAIMED	TRIAL EXHIBIT NUMBER	ADDENDUM NUMBER	DISTRICT COURT RULING
2	The Plaintiff's Out-of-Pocket Costs for attending the Lis Pendens litigation in California. (Trial Transcript pp. 116 and 117).	\$440.82	Plaintiff's Trial Exhibit No. 6	No. 13	Allowed by the Trial Court
3	The Plaintiff's lost interest on cash payments made to the attorney (i.e. the accrual of the interest). (Trial Transcript pp. 7 and 8).	\$2,013.67	Plaintiff's Trial Exhibit No. 7	No. 14	Not allowed
4	The Plaintiff's Out-of-Pocket Travel and Telephone Costs incurred prior to April 12, 1996 (one-half (½) of \$790.15). (Trial Transcript pp. 8 and 9).	\$395.07	Plaintiff's Trial Exhibit No. 10	No. 16	Not allowed
5	The Plaintiff's Out-of-Pocket Travel and Telephone Costs incurred between April 13, 1996 to June 2, 1996 (one-half (½) of 596.16) . (Trial Transcript pp. 9 and 10).	\$298.08	Plaintiff's Trial Exhibit No. 11	No. 17	Not allowed
	TOTAL	\$4,797.64			

NOTE: The Lis Pendens was not released until late May, 1996, though it was ordered to be released in mid April, 1996.

The amount of the Plaintiff's proven damages are to be trebled. UCA §38-9-3. If, after trebling, the proven damages exceed \$1,000.00, then the actual damages is the correct damage claim to be awarded by the Trial Court. If the trebled damages are less than \$1,000.00, then the Plaintiff is entitled to recover the statutory sum of \$1,000.00 in lieu of

his actual damages. UCA §38-9-1 and 3. As a matter of law, the Trial Court failed to follow this damage procedure and such is omitted from the written Findings of Fact. (See also Trial Transcript pp. 115 to 120).

The Defendant knew that her actions would result in separate trial proceedings being instituted in two (2) different states. (Trial Transcript p. 56). This fact was not rebutted by other evidence or testimony. The Plaintiff claimed at trial that his out-of-pocket costs for the California Superior Court litigation should be apportioned between the two (2) different state court actions. (Trial Transcript pp. 7 to 10). Part of the litigations costs in the California Superior Court are attributable to the release of the Lis Pendens. The District Court acknowledged this fact by awarding compensation to the Plaintiff for activities relating to the Lis Pendens in the California Superior Court. (Trial Transcript pp. 116 and 117). These out-of-pocket costs relating to the California Superior Court proceedings totaled at least \$446.82 excluding any amount for California attorney's fees. (Plaintiff's Trial Exhibits Nos. 6, 10, and 11; Addendum Nos. 13, 16, and 17). This amount includes the \$150.00 actually awarded by the District Court for a portion of these types of costs. (Trial Transcript pp. 116 and 117). These actual damages or out-of-pocket costs should have been trebled. UCA §38-9-3. This would result in an award of \$14,392.92 after being trebled. Even if damages are limited to just \$446.82, this amount when trebled is \$1,340.46.

With respect to actual damages, the above table of damages were factually proven. There was no specific evidence presented to contradict the amount of the claim or the reasonableness of the allocation of the costs as between the two (2) separate proceedings.

The only real contest is the application of law to these facts. As a matter of law, these types of out-of-pocket costs are recoverable in a case such as this. With the exception of \$150.00 and \$2,090.82, the Trial Court failed to award the proven damages. (Trial Transcript pp. 115 to 119). The Trial Court thereafter failed to apply the statute correctly by trebling the actual damages. The Trial Court's ultimate conclusion that no damages were suffered is erroneous and contrary to the clear weight of the evidence.

The proving of a fact in a given case initially rests with the fact finder. However, where the facts are not materially contested, then they are deemed "proven" or established in a case. The existence of a proven fact in a case will not be changed on an appeal absent an abuse of discretion. However, the application of statutory law, against a backdrop of proven facts is a matter of law and is properly reviewed on a de novo basis. The application of statutory law to a proven set of facts is the ultimate legal conclusion to be drawn by the Trial Court.

The Plaintiff is Entitled to an Award
of Prejudgment Interest at the Statutory Rate.

The right to collect interest under the laws of the state of Utah is governed in part by state statute and in part by the common law. The controlling Utah statute is UCA §15-1-1 et. seq. The text of this important statute reads as follows:

(1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is subject of their contract. (Emphasis added).

(2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

(3) Nothing in this section may be construed in any way affect any penalty or interest charge that by law applies to delinquent or other taxes or to any contract or obligations made before May 14, 1981."

Based on this statute the obligated party must pay prejudgment interest on the proven damages. Once a judgment has been entered, the rate of interest on the judgment, in the absence of an agreement to the contrary, is set at a variable rate.

The Utah Supreme Court has set down specific guidelines in allowing prejudgment interest on a claim for money damages or the detention of money. These guidelines or common law rules are as follows:

"Where the damage is complete and the amount of loss fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time and not from the date of the judgment. On the other hand, where damages are incomplete or cannot be calculated with mathematical accuracy, such as in case of personal injury, wrongful death, defamation of character, false imprisonment, etc., the amount of the damage must be ascertained and assessed by the trier of the fact at the trial, and in such cases prejudgment interest is not allowed."

Harold O. Bjork v. April Industries, Inc. 560 P.2d 315 (Utah 1977), cert. denied 431 US 930; Uinta Pipeline Corp. v. White Superior Co. 546 P.2d 885 (Utah 1976) (citing Fell v. Union Pac. Ry. Co. 32 Utah 101, 88 P. 1003 (Utah 1907)); Canyon Country Store v. Norton E. Bracey 781 P.2d 414 (Utah 1989).

For damages to be calculable with mathematical certainty, they must be ascertained in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than being guided by their best judgment in assessing the amount to be allowed for past, as well as for future injury. Price-Orem Inv. Co. v. Rollins, Brown & Gunnel 784 P.2d 475 (Utah App. 1989). In the present case, these

amounts are both fixed and certain.

The Utah Supreme Court ruled nearly 100 years ago that Trial Court must award prejudgment interest in cases where the loss is fixed as of a particular time and the amount of the loss can be calculated with mathematical accuracy. Neil Jorgensen v. John Clay & Company 660 P.2d 229 (Utah 1983); Gary T. Anderson v. State Farm Fire & Casualty Company 583 P.2d 101 (Utah 1978); Wheatley v. Oregon Short 49 Ut. 105, 162 P. 86 (Utah 1916); Gillespie v. Blood 81 Ut. 306, 17 P.2d 822 (Utah 1932); Railroad v. Board 35 Ut. 13, 99 P. 263 (Utah 1909).

The Utah Supreme Court has, in the 1800 landmark case of Wasatch Mining Co. v. Crescent Mining Co. 7 Utah 8, 24 P. 586 (1890), affirmed 151 US 317, 14 S.Ct. 348, 38 L.Ed. 177 (1894), stated the rule of law as to prejudgment interest as follows:

"In Utah, interest is allowed on debts overdue, even in absence of statute or contract providing therefore".

This would be set at the minimum rate of 10% per annum under present statutory law.

The Utah Supreme Court has stated that interest is a proper measure of damages in cases involving the detention of (or the failure to pay) money. J. B. Walker v. Rocky Mountain Recreation Corporation 22 Utah.2d 274, 508 P.2d 538 (Utah 1973). In the J. B. Walker case, the Court stated that in the absence of a liquidated damage clause, a proper measure of damage for the detention of money is the recovery of interest. J. B. Walker v. Rocky Mountain Recreation Corporation 22 Utah.2d 274, 508 P.2d 538 (Utah 1973).

This rule of law has also been followed in other jurisdictions. In Porter E. Wilkinson v. Eugene M. Smith 639 P.2d 768 (Wash. App. 1982), the Washington Court of Appeals held

that the proper rate of interest of the difference between the statutory rate and the rate required to be paid by the Plaintiff. In the Wilkinson case, the Plaintiff was able to recover, as part of his consequential damages, the interest he had paid on money he had borrowed to acquire the real property. Porter E. Wilkinson v. Eugene M. Smith 639 P.2d 768 (Wash. App. 1982). In United California Bank v. Prudential Insurance Company 681 P.2d 390 (Ariz. App. 1983), the Arizona Court of Appeals held, among other things, that the "traditional measure of damages for breach of contract to loan money is additional interest required for a replacement loan".

The Trial Court should have allowed interest on the proven damages at the statutory rate of 10%. The cause of action, at least as to the \$1,000.00 statutory minimum amount, accrued after the twenty (20) day period expired. Interest should run from the point in time the damage was incurred.

The Party Making a Claim for Attorney's Fees
has the Burden of Proof to Establish the Right
to the Award and the Amount of the Award.

The party requesting an award of attorney's fees has the burden of presenting evidence sufficient to support the amount of the award and the legal right to such an award.

Robert Kurth v. Daniel R. Wiarda 1999 Utah Ct. App. 153, 981 P.2d 417 (Utah App.); David L. Salmon v. Davis County 916 P.2d 890 (Utah 1996).

In this case, the prior ruling of the Utah Court of Appeals establishes the Plaintiff's statutory right to the award. The remand to the District Court was to determine only two (2) items: (i) the amount of any monetary damage recoverable under the statute, and (ii) the

amount of recoverable attorney's fees.

The Reasonableness of the Attorney's Fees Can Be
Proven and Justified in a Number of Recognized Ways.

The Trial Court is only required to award a reasonable amount of attorney's fees in a case. The reasonableness of the fees can be shown or proven in a number of recognized ways. There is no single method that must be followed in order to establish the amount and reasonableness of the attorney's fees incurred. The following methods have been approved by the courts in prior cases:

1. The submission of an attorney's fee affidavit outlining the legal services, the amount of time spent on each task, and fees actually charged. Dejavue Inc. v. US Energy Corp. 1999 Utah Ct. App. 355, 993 P.2d 222 (Utah App.). This was done in this case twice. (Trial Transcript pp. 49 to 58; Record pp. 467 to 479; Addendum No. 6, p. 34 to 46; Supplemental Affidavit, Plaintiffs' Trial Exhibit No. 12; Addendum No. 7, pp. 47 to 58).
2. The submission of detailed client monthly billings records outlining the fees and costs actually charged on a daily basis in the case. Dejavue Inc. v. US Energy Corp. 1999 Utah Ct. App. 355, 993 P.2d 222 (Utah App.). This was done in this case. (Plaintiff's Trial Exhibit No. 9).
3. Expert testimony of a local attorney substantiating the reasonableness of the fees in the case. Dejavue Inc. v. US Energy Corp. 1999 Utah Ct. App. 355, 993 P.2d 222 (Utah App.); Associated Industrial Developments, Inc. v. J. Paul Jewkes 701 P.2d 486 (Utah 1984). This was done in this case through the testimony of W. Kevin Jackson, Esq. (Trial Transcript pp. 49 to 58).
4. An evidentiary hearing in which actual testimony is taken by the Trial Court. David Winters v. Joanne Schulman 1999 Utah Ct. App. 119, 977 P.2d 1218 (Utah App.); Associated Industrial Developments, Inc. v. J. Paul Jewkes 701 P.2d 486 (Utah 1984). This was done in this case. (Trial Transcript pp. 49 to 86).
5. Any evidence which bears on the nature and the amount of time spent in representing the client is admissible. This was done in this case. (Plaintiff's Trial Exhibits Nos. 3, 4, 5, 8, and 9; Addendum Nos. 10, 11, 12, and 15).

6. A combination of any of the above methods.

The party against whom the evidence is offered must do more than contend against it. The defending party has, at the very least, the duty to go forward with some meaningful evidence to show that all or a specific portion of the fees are in fact unreasonable. A mere generalized claim that the fees were “unnecessary”, “excessive”, or “inappropriate” must be supported by identifiable evidence. The Defendant did not challenge, and in fact conceded, the nature of the legal work that was rendered in this case and the amount of time spent on any given task on a given day. (Trial Transcript p. 49, line 18).

In the present case, the Plaintiff “backed out” of the gross fee claim all time charges that were not related in some material way to the statutory cause of action. (Trial Transcript pp. 50 to 52; Plaintiff’s Trial Exhibit No. 8; Addendum No. 15, p. 86). This excluded sum of money totaled \$3,421.25. This should have been a relatively small figure because the other two (2) common law claims were not subject to any meaningful discovery, were not part of the Plaintiff’s original motion to impose statutory liability, and did not result in a trial on the merits.

In this case, there is no expert testimony offered by the Defendant which tends to show that: (i) the hourly rate claimed, (ii) the charges actually incurred, (iii) the hours spent, or (iv) the work specifically performed was either excessive, unnecessary, or represented the “churning” of the file. (Trial Transcript p. 49). The Defendant’s testimony as to the amount her attorney’s fees or legal costs does not shed much light on the Plaintiff’s actual legal costs in this case. (Trial Transcript p. 98). For example, the Plaintiff, having the burden of proof,

would be expected to exceed the Defendant's actual time charges. The Defendant testified that her total legal fees to date were at least \$14,290.00. (Trial Transcript p. 98).

All of the Defendant's allegations that the fees were not legally necessary because a similar claim was also being made in the California Superior Court case fails to recognize that the removal of the Lis Pendens is only a portion of the present case. (Trial Transcript pp. 52, 56, 58, and 62). The eventual removal of the Lis Pendens (either by voluntary action or by reason of a judicial order) did not and could not terminate the statutory cause of action. There was additional relief that was specifically authorized by the statute and which was being sought by the Plaintiff in the Complaint and at the time of the trial. (Trial Transcript pp. 62 to 65; Findings of Fact ¶¶10, 11, and 12; Record p. 562; Addendum No. 3, p. 9).

Since the additional statutory relief (i.e. damages and at least some amount of attorney's fees) was never tendered by the Defendant, the case had to move forward on these two (2) issues. (Trial Transcript pp. 57, 58, 62 to 63, 65, and 86). This meant that more legal fees would be incurred by the Plaintiff. (Trial Transcript pp. 78 to 79, 82 to 85).

The Defendant, at the time of the trial, claimed that the legal fees were unnecessary and unreasonable for the following legal reasons:

1. The Lis Pendens was released as a result of the exclusive efforts of Jonathan Gordon (i.e. David Winters' California lawyer). (Trial Transcript p. 108).
2. The only legal fees necessarily relating to the removal of the Lis Pendens was in the sum of \$1,650.00. (Trial Transcript pp. 111 to 113). [This represents the legal fees paid to the California lawyer for the Superior Court proceedings.]

These defenses are deficient for a number of reasons. The statute clearly authorizes

the Plaintiff to recover attorney's fees if they are incurred in seeking actual or statutory damages. The Defendant raises the above listed legal defenses to the right to claim attorney's fee even though the only concession concerning the amount of the Plaintiff's recoverable damages was made during closing argument. (Trial Transcript p. 108). The legal cost in seeking damages are by statute recoverable by the Plaintiff. The Plaintiff made out a prima facia case for attorney's fees of not less than \$32,419.00. (Trial Transcript p. 51). The gross amount found to be reasonable by the District Court was \$27,576.00. (Findings of Fact ¶20A; Record p. 563; Addendum No. 3, p. 10).

The Recovery of Attorney Fees
Requires Satisfaction of Certain
Work Product Conditions and the Entry
of Specific Findings of Fact.

In Utah, the award of reasonable attorney fees to a party may only be granted if it is specifically authorized by state or federal statute or by the terms of a valid contract provision. Kip Quinn v. Fenton Quinn 830 P.2d 282 (Utah App. 1992); Canyon Country Store v. Norton E. Bracey 781 P.2d 414 (Utah 1989); Turtle Management, Inc. v. Haggis Management, Inc. 645 P.2d 217 (Utah App. 1990); Lynda Baldwin v. Max D. Burton 850 P.2d 1188 (Utah 1993); Harriet W. Blake v. Earnest E. Blake 17 Ut.2d 369, 412 P.2d 454 (Utah 1966).

Regardless of whether the basis for an award of attorney fees is contractual or statutory, the courts have long held that only a reasonable fee may be recovered by the prevailing party. Kip Quinn v. Fenton Quinn 830 P.2d 282 (Utah App. 1992); Canyon Country Store v. Norton E. Bracey 781 P.2d 414 (Utah 1989); Jensen v. Lichtenstein 45 Ut.

320, 145 P. 1036 (Utah 1914).

The determination of what constitutes a reasonable attorney fee is largely a matter within the Trial Court's sound discretion. Kip Quinn v. Fenton Quinn 830 P.2d 282 (Utah App. 1992); Ronald P. Jenkins v. Ronald L. Bailey 676 P.2d 391 (Utah 1984); H. LeRoy Cobabe v. B. Glen Crawford 780 P.2d 834 (Utah App. 1989). It has been declared that this discretion is not open-ended. In order to foster consistent and equitable fee awards by Trial Courts, the Utah Supreme Court, in the lead case of Dixie State Bank, outlined some "practical guidelines" for analyzing the reasonableness of attorney fees by adopting a five (5) point review procedure. Dixie State Bank v. Kirk Bracken 764 P.2d 985 (Utah 1988).

Under the Dixie State Bank ruling, a Trial Court should engage in a multi-step process which involves the following basic steps:

First, it must begin the fee analysis by determining exactly what legal work the requesting the attorney actually performed, both in terms of the nature of the legal work performed and the time spent in it's performance. [These facts were conceded by the Defendant. (Trial Transcript p. 49).]

Second, the court must then consider how much of that work was reasonably necessary to adequately or properly conclude the matter for which the legal representation was sought. [No specific Findings of Fact were entered regarding this process.]

Third, The requesting attorney's billing rate should be compared with those customarily charged in the locality for similar legal services to insure the reasonableness of the fee claim. [This was conceded by the Defendant. (Trial Transcript p. 49) and also approved by the court (Trial Transcript p. 118).]

Fourth, the trial court can then establish a preliminary fee by multiplying the number of necessary hours of legal work actually performed by the appropriate hourly rate. [This was done via. Findings of Fact ¶20A.]

The final step in the process involves the consideration of the various

factors set forth in the Utah Code of Professional Responsibility DR-2-106 which is now set forth in Rule 1.5 of the Utah Rules of Professional Conduct.

Under the Rules of Professional Conduct and specifically Rule 1.5 of the Code, the following elements or factors are to be considered by the Court when making a fee determination:

1. The novelty and the complexity of the case and the legal issues involved;
2. The likelihood that the representation will preclude the lawyer from accepting other employment;
3. The actual experience, the expertise, and the reputation of the lawyer;
4. The amount of money involved and the results if any obtained;
5. The time limitation imposed by the client or the circumstances of the case;
6. The actual length and the specific nature of the attorney/client relationship; and
7. Whether the requested attorney's fee is either fixed or contingent.

See generally, John J. Cabrera v. Ralphine Cottrell 694 P.2d 622 (Utah 1985) (condemning a fee determination made without the proper consideration of the Rules of Professional Conduct); Govert Copier Painting v. Craig Van Leeuwen 801 P.2d 163 (Utah App. 1990).

These seven (7) factors were addressed in both of the Plaintiff's attorney's fee affidavits filed in this case. (Record pp. 467 to 479; Addendum No. 6, p. 38, ¶23; Supplemental Affidavit; Plaintiff's Trial Exhibit No.12; Addendum No. 7, p. 38, ¶23).

The Trial Court failed to use or even reference these guidelines in its Findings of Fact. (Record pp. 560 to 565; Addendum No. 3, pp. 7 to 12). This is clear error of law. The Findings of Fact entered by the court (and prepared by the Defendant) acknowledges

reasonable attorney's fees of \$27,576.00. The Court then proceeds to divide them up between the three (3) cause of actions contained in the Complaint without making specific subsidiary Findings of Fact sufficient to support the reduction in the fee claim or to divide the claim on account of the cause of actions set forth in the Complaint. (Findings of Fact ¶¶20A, 20B, and 20C; Record p. 563; Addendum No. 3, p. 10).

When attorney fees are factually disputed, then the Trial Court is obligated to make specific Findings of Fact supporting the reasonableness of the fee award. Graco Fishing v. Ironwood Exploration 766 P.2d 1074 (Utah 1988); Wendell E. Taylor v. The Estate of Grant Taylor 770 P.2d 163 (Utah App. 1989); Kip Quinn v. Fenton Quinn 830 P.2d 282 (Utah App. 1992). Failure to make proper Findings of Fact is a reversible error unless the facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor of the judgment entered. Russell Acton v. J.B. Deliran 737 P.2d 996 (Utah 1987). The Findings of Fact must be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the Trial Court's decision was reached. Kim Woodward v. Richard C. Fazzio 823 P.2d 474 (Utah App. 1991); Kip Quinn v. Fenton Quinn 830 P.2d 282 (Utah App. 1992).

An attorney fee award will be reversed when the basis for reducing the amount sought in an unchallenged fee request was not adequately explained in the court's Findings of Fact or the trial record. Stephen Martindale v. Tom Adams 777 P.2d 514 (Utah App. 1989).

More importantly, unless the record clearly and uncontrovertably supports the Trial Court's decision, the absence of adequate Findings of Fact precludes appellate review of the evidentiary basis for the Trial Court's decision and requires a remand for more detailed

findings by the Trial Court which address the factors that are necessary for an award. Kim Woodward v. Richard C. Fazzio 823 P.2d 474 (Utah App. 1991); State of Utah v. Robert D. Lovegren 798 P.2d 767 (Utah App. 1990). Where a case has been remanded to the Trial Court for more detailed Findings of Fact, the Utah Supreme Court has ruled that a remand is not to be "merely an exercise in bolstering and support the conclusions already reached". John F. Allred v. Gaydi S. Allred 797 P.2d 1108 (Utah 1990). The Trial Court must identify the various factors and the factual basis for the award and make the appropriate computations, evaluations, and any required factual or legal determinations.

The Trial Court's Findings of Fact are insufficient to support the reduced judgment entered in this case. The Trial Court initially concluded that reasonable fees were proven by the Plaintiff in the sum of \$27,576.00. (Findings of Fact ¶20A; Record p. 567; Addendum No. 3, p. 10). However, the final ruling is legally deficient because it fails to identify specific and proper reasons for reducing the proven claim by two-thirds ($\frac{2}{3}$). The Trial Court reduced the award despite the fact that all legal costs relating solely to the other two (2) cause of actions were backed out of the claim. (Trial Transcript pp. 50 to 51; Plaintiff's Trial Exhibit No. 8; Addendum No. 15, p.86). A mere division of fees by category or by cause of action in the Complaint is not the proper procedure for awarding legal fees as a matter of law. (Trial Transcript p. 118). A categorical reduction in otherwise proven attorney's fees by cause of action is erroneous as a matter of law.

An Award of Attorney's Fees is Based
Upon Various Factors which the Trial
Court Must Consider and Rule Upon.

The Trial Court must thoughtfully evaluate the claim for attorney's fees and the evidence provided in support thereof. The Trial Court must also take into account the concessions made at trial. (Trial Transcript p. 49). The Trial Court can come to the conclusion that a lesser amount is a reasonable under the facts and circumstances of a given case. Dixie State Bank v. Kirk Bracken 764 P.2d 985 (Utah 1988). However, in making that determination, the Trial Court must consider the following important and well recognized factors:

1. The actual difficulty of the litigation and the nature of the case.
2. The efficiency of the attorney and his staff in presenting the case.
3. The reasonableness of the specific hours that were spent on the case.
4. The fees customarily charged in the area and the locality in which the legal services were rendered.
5. The dollar amount involved in the case and the results obtained.
6. The expertise and the actual experience of the various attorneys involved in the case.
7. The necessity of bringing the suit in order to vindicate the rights of the litigants.
8. The responsibility the case imposed upon the attorney.
9. The actual fee agreement between the attorney and the his client.
10. Any other important facts bearing on the nature and the extent of the legal representation that is required under the facts and circumstances of the case.

These foregoing factors have been reviewed and accepted by several reviewing courts. John J. Cabrera v. Ralphine Cottrell 694 P.2d 622 (Utah 1985); Herbert O. Traynor v. Robert Cushing 688 P.2d 856 (Utah 1984); Keith C. Wallace v. Build, Inc. 402 P.2d 699 (Utah 1965); Dejavue Inc. v. US Energy Corp. 1999 Utah Ct. App. 355, 993 P.2d 222 (Utah App.); Associated Industrial Developments, Inc. v. J. Paul Jewkes 701 P.2d 486 (Utah 1984); Jensen v. Lichtenstein 45 Ut. 320, 145 P. 1036 (Utah 1914).

Where the amount of the award is contested by significant evidence, the Trial Court must make detailed Findings of Fact in order to support the award of attorney fees. Regional Sales Agency, Inc. v. Roland W. Reichert 784 P.2d 1210 (Utah App. 1989); Lynda Baldwin v. Max D. Burton 850 P.2d 1188 (Utah 1993).

As a general rule, the testimony of the attorney who performed the work is the prime source of evidence to substantiate the claim and his testimony must be received and considered by the court. Associated Industrial Developments, Inc. v. J. Paul Jewkes 701 P.2d 486 (Utah 1984).

At the time of the trial, the Defendant failed to introduce any competing factual evidence relating to the important factors cited above. The Defendant's defenses to the attorney's fee claim are as follows: (i) the fees are not recoverable as a matter of law, (Trial Transcript p. 7); (ii) the fees were the result of the "churning" of the file, (Trial Transcript p. 109); (iii) since no actual damages were proven then fees cannot be recovered as a matter of law, (Trial Transcript p. 108); (iv) some of the issues (i.e. the Lis Pendens filing) were already being considered by the California Superior Court as part of the domestic law dispute

and therefore the statutory proceedings in the State of Utah were either meaningless and legally unnecessary, (Trial Transcript pp. 108 to 109); (v) the Plaintiff's motion to impose statutory liability was not needed or was procedurally improper, (Trial Transcript p. 109); and (vi) the Plaintiff was simply chasing an insurance policy. This last allegation is made even though there is no prior reference in the record of such a claim being made on any professional liability policy. (Trial Transcript pp. 109 to 110).

Each of the cited factors will be addressed in this brief and was made part of the Plaintiff's fee claim at the time of the trial.

The Actual Difficulty of the Litigation and the Nature
of the Entire Case is a Factor in Setting a Fee Claim.

The present case represents a statutory cause of action. It was the principle claim being made by the Plaintiff. (Trial Transcript pp. 57, 74 to 75, 78 to 79; Record pp. 1 to 17; Addendum No. 4, pp. 13 to 29; Record pp. 472 to 473; Addendum No. 6, pp. 39 to 40, ¶¶30 and 31; Supplemental Affidavit; Plaintiff's Trial Exhibit No. 12; Addendum No. 7, pp. 6 to 7).

The present case was made more difficult and time consuming in part by the initial ruling made by the District Court in not imposing statutory liability and then dismissing the entire case. This meant that an appeal was essential or the prior ruling of the District Court would stand. There are other items that have made the case more difficult than originally contemplated. They are as follows:

1. Failure to quickly release the Lis Pendens prior to the suit being filed. This delay lasted over a period of many months despite the repeated written requests for prompt action to remove the filing.

2. The failure to offer the statutory minimum penalty amount of \$1,000.00.
3. The claim that the present proceeding was not legally necessary because the Lis Pendens matters was also before the Superior Court in California as part of the domestic law proceedings. [This mootness issue was raised in the prior appeal and was resolved in favor of the Plaintiff. David Winters v. Joanne Schulman 1999 Utah Ct. App. 119, 977 P.2d 1218, ¶11 (Utah App.).]
4. The continued claim that no attorney's fees are recoverable as a matter of law and fact. This claim is still being made by the Defendant despite the prior ruling of the Court of Appeals.
5. The claim that the California Superior Court had already decided the major issues in this case.
6. The raising of collateral attack issues in the docketing statement which had already been ruled upon by the Court of Appeals.

When the Lis Pendens was not timely removed, a statutory cause of action ripened. Whether the California Superior Court granted (or denied) any or all of the relief that was also being sought by the Plaintiff in the Utah suit would not change this fact. (Trial Transcript pp. 65, 82 to 83, 86). This is the exact holding of the Court of Appeals in the prior appeal. David Winters v. Joanne Schulman 1999 Utah Ct. App. 119, 977 P.2d 1218, ¶11 (Utah App.).

The Efficiency of the Attorney
and His Staff in Presenting the Case.

The Plaintiff's Utah attorney had only two (2) basic goals. The first goal was to get the recorded Lis Pendens released. The second goal was to assert the claim for damages either actual or statutory. (Trial Transcript pp. 52 to 55, 65; Record pp. 51 to 54). The Plaintiff's attorney has been required to pursue an appeal and ultimately prevailed on the

initial claim that statutory liability existed. (Record p. 563, Addendum No. 3, p. 10). The Plaintiff's original Motion for Partial Summary Judgment under Rules 12, 54, 55, and 56 of the Rules of Civil Procedure was directed at this issue. (Trial Transcript pp. 56 to 57; Record pp. 51 to 54; Addendum No. 5, pp. 30 to 33). The Plaintiff would not have pursued the other claims and was willing to discard them, if the statutory relief was conceded in the case. (Trial Transcript pp. 56 to 57, 78 to 79). It is clear that the Plaintiff's objective was to achieve his two (2) goals as quickly as possible and at the least cost to all concerned.

There is no evidence in the trial record to support the claim of "churning". (Trial Transcript p. 109). The vast majority of the legal work that was done was rendered by W. Kevin Jackson. (Plaintiff's Trial Exhibit No. 9; Record pp. 467 to 479; Addendum No. 6, pp. 34 to 46; Supplemental Affidavit; Plaintiff's Trial Exhibit No. 12; Addendum No. 7, pp. 47 to 58). Despite a lengthy cross-examination, there was no proof of file "churning" as asserted by the Defendant. (Trial Transcript pp. 58 to 86). The Plaintiff's actions in seeking the release of the naked Lis Pendens in both courts is not the "churning" of the file.

The generalized defense of unreasonableness is not supported by specific evidence in the record or any written Findings of Fact. (Record pp. 560 to 563; Addendum No. 3, pp. 7 to 12). There is no proof that the attorney did not efficiently handle the case or that specific work on a specific day was not necessary or was performed incorrectly.

The Reasonableness of the Specific Hours Spent
in the Prosecution or the Defense of the Case.

There is no evidence in the record that indicates that the actual time that was spent on any specific matters was unreasonable. (Trial Transcript p. 49). The attorney was cross-

examined extensively over the legal work that was rendered in this case. (Trial Transcript pp. 58 to 86). The only error detected on the monthly billing statements was a very modest time charged that was a proper charge to another client. However, this data entry error was a nine (9) minutes, (.15) time charge. This erroneous time charge has already been backed out of the fee claim as part of Plaintiff's Trial Exhibit No. 8. (Trial Transcript p. 83; Addendum No. 15, pp. 79 to 85).

The Fees Customarily Charged in the Area
in Which the Legal Service is Rendered.

The Affidavit of W. Kevin Jackson details out the factors that were used in arriving at the hourly rate to be charged in this case. (Plaintiff's Trial Exhibit No. 9; Record pp. 467 to 479). The Defendant conceded that there is no dispute as to the content of the Affidavit. (Trial Transcript p. 49, lines 4 to 19). The Affidavit is not contested by other specific evidence that the rates charged and specific legal services rendered by both the attorney and his staff are not similar to those charged or those performed in Salt Lake County in cases such as this. The Court found the hourly rates to be reasonable. (Trial Transcript p. 118).

The fact that the other party (on an overall basis) has incurred legal fees of \$14,290.00 is not meaningful evidence that the claimant's fees are in fact unreasonable. (Trial Transcript p. 98). If there were some specific details that were placed into evidence relating to the Defendant's legal fees and costs, then those fees may have some significance when they are compared in gross terms. However, the mere comparison of overall or gross fees is not really meaningful evidence in cases such as this.

In Contested Proceedings, the Dollar Amount
of the Principle Claim is Not a Significant Factor
in Fixing an Award of Attorney's Fees.

The District Court reduced the fee claim in light of the fact that it was awarding only \$1,000.00 in statutory damages. (Trial Transcript pp. 116 to 119). This is erroneous as a matter of law. This also fails to take into account the remedial nature of the statute.

The courts have generally held that the amount of money in dispute is a factor for the court to consider, but such is only a marginal factor in many types of cases. Dixie State Bank v. Kirk Bracken 764 P.2d 985 (Utah 1988); First General Service v. Zandra Perkins 918 P.2d 480 (Utah App. 1996) (the amount of attorney's fees claimed was \$52,522.53 and the principle amount of the claim was only \$10,658.47).

In the First General Services case, the Court of Appeals noted that the Trial Court placed too much importance on the principle amount of the claim as a reason for reducing the amount of the attorney's fee award. The Trial Court's ruling was then reversed by the Court of Appeals. In reversing the ruling, the Court of Appeals acknowledged that it "... takes about the same amount of time to collect a note in the amount of \$1,000 as it takes to collection a note for \$100,000". First General Service v. Zandra Perkins 918 P.2d 480 (Utah App. 1996); Dixie State Bank v. Kirk Bracken 764 P.2d 985 (Utah 1988).

The dollar value of this case is a marginal factor in setting the amount of attorney's fees. The present case arose out of a remedial statute which should be liberally applied. The party who has been wronged should be made whole. The statute provides a simple way to avoid all liability and all legal fees if prompt corrective actions are taken. Since the

Defendant chose to litigate damage amounts that she knew were incurred and liable for, then she cannot thereafter be heard to complain over the additional fees that are incurred. (Trial Transcript p. 108, p. 112, line 5).

The Lis Pendens was a “naked” filing only. There was no ongoing dispute over a claim to the legal title to the Utah home or a claim to the physical possession of the home. David Winters v. Joanne Schulman 1999 Utah Ct. App. 119, 977 P.2d 1218 (Utah App.). The Plaintiff waited several months for the Lis Pendens to be removed voluntarily before even filing the suit. (Trial Transcript pp. 53 to 57). The Lis Pendens was released nine (9) months after the first written request was made.

The Utah suit became the vehicle that eventually vindicated the Plaintiff’s right to have the fee title to the home unencumbered. (Trial Transcript p. 61). The Trust Deed given to the Defendant Abizaid only acknowledged the existence of a monetary lien claim. The Trust Deed does not call into question his ownership of the asset. The Court of Appeals has already ruled that the “replacement” deed does not alter or compromise the statutory cause of action. David Winters v. Joanne Schulman 1999 Utah Ct. App. 119, 977 P.2d 1218, ¶11 (Utah App.)

In this case, there was no evidence submitted that the specific work rendered on a given day was either unwarranted or took too long to accomplish. There is no evidence that the work was “sloppy” or was repeated again and again by staff personnel in order to run-up costs. To the contrary, the entire proceeding and each stage of the case was reluctantly pursued and only after an ample amount of time was given to the Defendant to correct the

matter. (Trial Transcript pp. 53 to 55, and 65).

The District Court found that the amount necessary to recover the statutory damage amount of \$1,000.00 was limited to \$2,000.00. (Trial Transcript p. 116). The court gives no specific and appropriate reason in its findings to support this ultimate conclusion to award only limited fees. (Trial Transcript p. 115 to 119).

The District Court found that the amount of fees necessary for the release of the Lis Pendens was \$3,500.00. (Trial Transcript p. 116). No where in its Findings of Fact does it show how the attorney's fees, incurred in the first appeal, were not necessarily incurred, were not justified, or were excessive in any way. (Trial Transcript p. 116). In fact, the appeal was absolutely necessary in order to obtain a ruling on the issue of statutory liability. The Defendant conceded at trial the nature and the amount of the work that was provided in this case. (Trial Transcript p. 49). In light of this concession, the award of only limited fees pursuant to a remedial statute was erroneous as a matter of law.

The Necessity of the Suit to Vindicate Legal Rights
is a Factor in Setting a Fee Claim.

The present civil action was necessary in order to vindicate the Plaintiff's legal rights to the quiet enjoyment of his real property and to clear record title to the home. (Trial Transcript pp. 57 to 58). When the Lis Pendens was originally filed, there was no underlying action pending to support it. At a later date, in the State of California, a post-divorce domestic action was instituted, but it represented a monetary claim only and it did not make a specific claim to the title or the physical possession of the Salt Lake County home. (Trial Transcript pp. 53 to 55). These historical facts are acknowledged in the prior ruling of the

Court of Appeals. David Winters v. Joanne Schulman 1999 Utah Ct. App. 119, 977 P.2d 1218 (Utah App.).

The Plaintiff's Motion to impose statutory liability (i.e. Partial Summary Judgment) was filed, but denied by the District Court. (Record pp. 51 to 54, 392 to 394; Addendum No. 5, pp. 30 to 33). An appeal was pursued by the Plaintiff and liability eventually determined. The entire suit was necessary in order to clear title to the home and to recover damages and statutory damages at the very least. The ultimate rulings of the California Superior Court would not and could not alter the statutory cause of action after the twenty (20) day period had run. David Winters v. Joanne Schulman 1999 Utah Ct. App. 119, 977 P.2d 1218 (Utah App.).

The Plaintiff did not file this suit in the Third District Court on the 21st day after legal notice of the potential accrual of the claim was given to the Defendant. (Trial Transcript p. 54; Record pp. 1 to 17; Addendum No. 4, pp. 13 to 29). In fact, several months went by before the suit was filed. Even after the suit was filed, it was hoped that the Defendant would concede liability and bring the case to an early conclusion. (Trial Transcript pp. 54 to 55). This never happened. The prosecution of the suit to a conclusion became inevitable even though it was conceded by the Defendant that: (i) statutory damages was recoverable (Trial Transcript p. 108, line 5); and (ii) attorney's fees of at least \$1,650.00 was recoverable (Trial Transcript p. 112).

The Responsibility of the Case which Imposed
Upon the Lawyer is a Factor in Setting a Fee Claim.

The present case has lasted for nearly five (5) years. There is no dispute that this has

been a significantly contested case. This has meant that the attorney has had to decline other cases and other matters postponed. (Attorney's Fee Affidavit ¶26; Record p. 472; Addendum No. 6, p. 36; Supplemental Affidavit; Plaintiff's Trial Exhibit No. 12, ¶16; Addendum No. 7, p. 52).

The case has been appealed twice. The case has been handled primarily by W. Kevin Jackson. (Trial Transcript pp. 49 to 50). The entire responsibility for the case has been left with W. Kevin Jackson and those under his direct supervision.

There has been no "churning" of the file or duplicated legal costs. No evidence exists in the record to support a claim of "churning" of the file in order to run up costs. The court made no such Findings of Fact either orally or in writing. (Trial Transcript pp. 116 to 119).

The Fee Agreement of the Client and the Attorney
is a Factor in Setting a Fee Claim.

The present case was prosecuted after a signed fee agreement was entered into. (Trial Transcript pp. 6 and 7; Attorney's Fee Affidavit ¶16; Record p. 470; Addendum No. 6, p. 37; Supplemental Affidavit ¶; Plaintiff's Trial Exhibit No. 12; Addendum No. 7, p. 15). The fee agreement sets forth the cost for the representation. The fees sought to be recovered are based on this agreement and reflects the actual amounts billed to the client on a monthly basis. (Trial Transcript pp. 7, 8, and 49; Attorney's Fee Affidavit ¶¶16 and 22; Record pp. 470 and 471; Addendum No. 6, pp. 37 to 38; Supplemental Affidavit ¶¶16 to 22; Plaintiff's Trial Exhibit No. 12; Addendum No. 7, pp. 50 to 51).

Attorney's Fees Can Be Recovered for the Suit
or Defense of a Claim Even if There are Multiple
Claims Some of Which do not Allow the Recovery
of Attorney's Fees.

The District Court limited fees to a very modest sum for several reasons. (Trial Transcript pp. 116 to 119). First, the statutory damage claim was “complicated” because of the assertion of the other common law claims. No specific or adequate findings were made on how this actually impacted the statutory cause of action in a significant way as far as attorney’s fees are concerned. However, this conclusion of the court indirectly recognizes that the three (3) cause of actions were based upon the same core set of facts. Second, the cost of the first appeal was limited to \$2,500.00. (Trial Transcript p. 116). Here again, no specific subsidiary facts were shown that support this ultimate legal conclusion. The Defendant did not put on any evidence that can be construed to prove the fees incurred as a result of the appeal were unwarranted or unnecessary. (Trial Transcript p. 49). There is no evidence in the record that shows how the Trial Court arrived at this specific dollar figure.

The District Court specifically declared that the attorney’s fees claim is properly computed by reference to “cause of actions plead”. (Trial Transcript pp. 116 to 119). Since there were three (3) cause of actions, the Trial Court simply concluded that the fee award must be reduced by two-thirds ($\frac{2}{3}$). (Trial Transcript pp. 116 to 119). This was a specific “discount” of the fees by reference to the cause of action plead. (Findings of Fact ¶21; Record p. 563; Addendum No. 3, p. 10). The District Court, rather than enter specific Findings of Fact based upon the found evidence, simply chose to divide the fees between the cause of action. This is erroneous as a matter of law.

Reasonable attorney's fees should be awarded to a successful party even though multiple claims are asserted, provided the claims arise out of the same core set of facts or involve related legal theories. Dejavue Inc. v. US Energy Corp. 1999 Utah Ct. App. 355, 993 P.2d 222 (Utah App.). In order for this rule of law to apply, the claimant must have prevailed over some portion of the case. Dejavue Inc. v. US Energy Corp. 1999 Utah Ct. App. 355, 993 P.2d 222 (Utah App.); First General Service v. Zandra Perkins 918 P.2d 480 (Utah App. 1996) (holding that the claims were of necessity intertwined, because they arose out of the same core facts). This same rule of law has also been applied in the federal courts. Stewart v. Donges 979 F.2d 179 (CA-10 1992); Durant v. Independent School District 990 F.2d 560 (CA-10 1993).

The fact that a party does not succeed in every aspect of the case does not mean the right to attorney's fees has been lost or should be minimized by the Trial Court. Dejavue Inc. v. US Energy Corp. 1999 Utah Ct. App. 355, 993 P.2d 222 (Utah App.); Leon Sprouse v. Arjen W. Jager 806 P.2d 219 (Utah App. 1991); Robert Kurth v. Daniel R. Wiarda 1999 Utah Ct. App. 153, 981 P.2d 417 (Utah App.).

Where the claims and defenses are intertwined and arise out of the same core set of facts, then all fees relating to this aspect of the case are recoverable by the prevailing party. Leon Sprouse v. Arjen W. Jager 806 P.2d 219 (Utah App. 1991); Dejavue Inc. v. US Energy Corp. 1999 Utah Ct. App. 355, 993 P.2d 222 (Utah App.); Boyd J. Brown v. David K. Richards (II) 1999 Utah Ct. App. 109, 978 P.2d 470 (Utah App.); Robert Kurth v. Daniel R. Wiarda 1999 Utah Ct. App. 153, 981 P.2d 417 (Utah App.) (awarding legal fees and noting

the facts relating to the various claims were closely related). The District Court recognized that the claims “overlap”. (Trial Transcript pp. 116 to 117). The claims that were asserted, as a matter of law, relate to the very same wrongful conduct or activities. (Trial Transcript pp. 50 to 52; Record p. 473; Addendum No. 6, pp. 34 to 46; Supplemental Affidavit; Plaintiff’s Trial Exhibit No. 12; Addendum No. 7, pp. 47 to 58).

As a general rule, the attorney in seeking his or her claimed fees, must make an allocation between compensable and noncompensable claims. Cottonwood Mall Co. v. Wesley F. Sine 830 P.2d 266 (Utah 1992); Boyd J. Brown v. David K. Richards (II) 1999 Utah Ct. App. 109, 978 P.2d 470 (Utah App.) (court noting the attorney had eliminated all fees that were not compensable or recoverable).

In making the required allocation between recoverable and nonrecoverable fees, where proof of specific acts or events in the case cover both compensable and noncompensable claims, then the courts have allowed the full recovery. The reason for this is that required proof necessarily overlap and relate to each other. Boyd J. Brown v. David K. Richards (II) 1999 Utah Ct. App. 109, 978 P.2d 470 (Utah App.); First General Service v. Zandra Perkins 918 P.2d 480 (Utah App. 1996) (noting that the claims and the asserted defenses are established by the same core facts). This allocation between compensable and noncompensable amounts occurred in the present case. (Trial Transcript pp. 49 to 52; Plaintiff’s Trial Exhibit No. 8; Addendum No. 15, p. 86).

In this case, the only matter significantly advanced by the Plaintiff was the statutory cause of action. (Trial Transcript pp. 50 to 55). The Plaintiff never did seek any type of

ruling in the District Court on the nonstatutory cause of actions. (Trial Transcript p. 57; Record pp. 51 to 54; Addendum No. 5, pp. 30 to 33). The Plaintiff's initial Motion to the Trial Court was only to establish liability under the statutory cause of action. (Trial Transcript p. 57; Record pp. 51 to 54; Addendum No. 5, pp. 30 to 33). The statutory claim, if granted, would have provided adequate relief to the Plaintiff in this case. This is why the Plaintiff offered to dismiss the remaining common law claims if the statutory relief was granted by the Trial Court. (Trial Transcript p. 57; Record p. 473, ¶35; Addendum No. 6, p. 40, ¶35; Supplemental Affidavit; Plaintiff's Trial Exhibit No. 12; Addendum No. 7, p. 53, ¶34). The District Court did not grant such relief and dismissed the entire complaint. This meant an appeal would not only be necessary, but absolutely required in order to vindicate the Plaintiff's rights regarding the filing of the "naked" Lis Pendens and recover damages.

The other two (2) cause of actions were taken on appeal, but were not reversed. However, even a cursory reading of the Complaint indicates that they arise out of the same core facts and present related legal theories based upon the filing of a naked Lis Pendens. Whether or not the acts complained of support related legal theories, is an issue of law. First General Service v. Zandra Perkins 918 P.2d 480 (Utah App. 1996). The District Court's ruling on this issue is erroneous as a matter of law.

Since the Defendant never offered or tendered any amount of damages under the remedial statute (even the minimum statutory amount of \$1,000.00), the Plaintiff had no alternative, but to proceed forward and try to recover them through legal proceedings. (Trial Transcript pp. 62 to 63). The Defendant could have reduced this potential claim (via. an

offer of a money judgment) pursuant to Rule 68 of the Utah Rules of Civil Procedure. However, this offer was never tendered by the Plaintiff even though the Defendant knew, and even conceded, that certain damages were recoverable in the present case. (Trial Transcript pp. 57 to 58, and 108, line 5). The litigation and the appeals, became legally and factually necessary in order to vindicate legal rights and to recover the statutory minimum amount of damages at the very least. (Trial Transcript pp. 62 to 65).

A Party Can Recover Attorney's Fee
in Asserting the Claim for Attorney's Fees
or for the Successful Defense to a Claim to
Reduce or Eliminate the Claim for Attorney's Fees.

Where there is a contract provision for an award of attorney's fees, these types of provisions have been liberally construed to allow a party who successfully defended against such claims or who has prevailed on asserting such a claim to recover the necessary attorney's fee relating to the same. Dejavue Inc. v. US Energy Corp. 1999 Utah Ct. App. 355, 993 P.2d 222 (Utah App.); Occidental/Nebraska Federal Savings Bank v. Daniel S. Mehr 791 P.2d 217 (Utah App. 1990); ProMax Development v. Rick F. Raile 386 Utah Adv.Rep. 27 (Utah 1999) (awarding fees on appeal in defending a prior award of attorney's fees). This same rule of law should apply and does apply in this case even though this case arises out of a statutory cause of action. The claim for attorney's fees reimbursement arises out of a remedial statute. It should be liberally applied in this case. The Defendant knew there were damages of at least the statutory minimum of \$1,000.00. Rather than concede this small amount, a trial was demanded. (Trial Transcript p. 108).

Where a party must defend or overcome various matters in order to recover on their

claim on which an award of attorney's fees is based, then those costs and additional attorney's fees can also be recovered as part of the claim for attorney's fees. First General Service v. Zandra Perkins 918 P.2d 480 (Utah App. 1996) (dealing with a successful defense to claim that would have defeated the lien claim on which the award of attorney's fees was based). This important rule of law was pointed out to the Trial Court and was a central part of the Plaintiff's claim at the time of the trial on damages and attorney's fees. (Trial Transcript p. 51).

In this case, the Plaintiff has had to overcome a number of barriers in order to vindicate his rights and assert (at the very least) his statutory damage claim. (Trial Transcript pp. 64 to 65, 108, and 112). These barriers have included at least the following:

1. The initial dismissal of the Complaint by the Trial Court.
2. The appeal of the denial of Plaintiff's Motion for Partial Summary Judgment imposing liability in order to establish the Defendant's statutory liability.
3. The claim asserted in the District Trial Court that no attorney's fees can be recovered in the present case because it was the California Superior Court that eventually ordered a release of the Lis Pendens. (Trial Transcript p. 7).
4. The claim that the cause of actions are factually independent of each other even though the claims arise out of the same core set of facts.
5. The preservation of the fee claim at the trial and again by reason of the asserted cross-appeal asserting a collateral attack as to statutory liability.

The Plaintiff's evidence proves that all of the fees that were charged are recoverable except for the sum of \$3,421.25. (Trial Transcript p. 51; Plaintiff Trial Exhibit No. 8; Addendum No. 18, p. 86). The Trial Court should have awarded fees of \$32,149.00 or at least the amount initially found to be reasonable in the sum of \$27,576.00. (Findings of Fact

¶20A; Record p. 563; Addendum No. 3, p. 10).

The Award of Attorney Fees can Include
the Fees Incurred on a Successful Appeal.

The general rule is that where a party is entitled to recover a reasonable attorney fees, then the recovery should also include any appeal fees and costs absent a contractual or statutory denial of the same. H. LeRoy Cobabe v. B. Glen Crawford 780 P.2d 834 (Utah App. 1989); Ronald P. Jenkins v. Ronald L. Bailey 676 P.2d 391 (Utah 1984); G.G.A., Inc. v. Toula K. Leventis 773 P.2d 841 (Utah App. 1989); Boyd J. Brown v. David K. Richards 840 P.2d 143 (Utah App. 1992); Boyd J. Brown v. David K. Richards (II) 1999 Utah Ct. App. 109, 978 P.2d 470 (Utah App.) (awarding fees on appeal in prior action); Robert Kurth v. Daniel R. Wiarda 1999 Utah Ct. App. 153, 981 P.2d 417 (Utah App.).

The Plaintiff is entitled to recover the cost of legal representation incurred in the first appeal. Such was necessary in order to establish the statutory claim and obtain a reversal of the Trial Court's initial dismissal of the Complaint.

The District Court award of only \$2,500.00 for the prosecution of the appeal is not supported by any subsidiary facts sufficient to justify a substantial reduction from the original amount claimed. More importantly, the Defendant never offered specific evidence to limit those fees to this small figure. To the contrary, the Defendant conceded that the nature of the work rendered and the amount of time spent on the case. (Trial Transcript p. 49). The court specifically found the hourly rate to be reasonable. (Trial Transcript p. 118).

Where the Amount of Fees are Uncontested by
Specific Evidence, then the Full Amount
Claimed Should be Awarded Absent Specific
Findings Supporting and Justifying the Reduction
in the Total Amount Claimed.

Where the fee claim is supported by admissible and competent evidence and where is not materially contested by an opposing party by specific evidence, then the Trial Court must make specific findings in order to justify reducing the amount of the attorney's fee claim. First General Service v. Zandra Perkins 918 P.2d 480 (Utah App. 1996); Govert Copier Painting v. Craig Van Leeuwen 801 P.2d 163 (Utah App. 1990) (noting that the Trial Court must make specific Findings of Fact in order to reduce the total fee claim); Boyd J. Brown v. David K. Richards (II) 1999 Utah Ct. App. 109, 978 P.2d 470 (Utah App.).

The specific reasons for the reduction in fees must in fact exist, they must be articulated by the Trial Court, and more importantly, they must be appropriate under the facts and the circumstances of the case. If specific facts are not present to justify the reduction in the amount of the fees, then the Trial Court has abused its discretion in the matter. Boyd J. Brown v. David K. Richards (II) 1999 Utah Ct. App. 109, 978 P.2d 470 (Utah App.). The only reasoning given by the court for the reduction in the fee claim is in its oral Findings of Fact. (Trial Transcript pp. 116 to 119). As a matter of law, these stated reasons are insufficient in this case.

The present case represents a statutory cause of action for failure to timely release an improperly filed document that clouds a person's title to his real property. The Defendant claims that all attorney's fees should be denied because the Lis Pendens was removed by an

Order of the California Superior Court. (Trial Transcript p. 7). This mootness issue was raised and resolved against the Defendant in the prior appeal. David Winters v. Joanne Schulman 1999 Utah Ct. App. 119, 977 P.2d 1218, ¶11 (Utah App.).

The eventual clearing of the title (however obtained) is only part of the relief the Plaintiff is entitled to. (Trial Transcript pp. 64 to 65). It is an important part of his case. However, it is also clear that the California Superior Court could not and did not adjudicate the statutory cause of action in any way or address the Plaintiff's attorney's fees relating to the statutory claim. The Defendant conceded that certain damage items and legal fees were recoverable, but failed to offer the same and chose to have the claims litigated. (Trial Transcript pp. 108 and 112). In truth, it was the Defendant who chose to run-up the legal costs in this case.

An Award of Fees can Include
Paralegal Fees and Legal Assistant.

A Trial Court can include in an attorney's fee award the fees charged for paralegals and legal assistants. The Utah supreme Court has authorized such fees to be recoverable. Lynda Baldwin v. Max D. Burton 850 P.2d 1188 (Utah 1993); See also Continental Townhouses v. Roy R. Brockbank 733 P.2d 1120 (Ariz. App. 1986).

The Utah Supreme Court has noted that the use of such professional are beneficial to society by reducing costs, promotes lawyer efficiency and has at the very least become a wide spread industry practice. Lynda Baldwin v. Max D. Burton 850 P.2d 1188 (Utah 1993).

The same rule of law and public policy considerations would apply as to law clerks and other para-professionals who assist the attorney in the case. There was no competing

evidence that the work done in this case by the paralegal or legal assistant was unnecessary or useless. (Trial Transcript p. 49). Therefore, the full amount should have been allowed by the District Court for these types of services.

Standard on Appeal for Reviewing
an Award of Attorney Fees.

In reviewing an award of attorney fees, the Appeals Court will presume that the discretion of the Trial Court is properly exercised unless the record clearly indicates the contrary. Beverly Goddard v. Grant A. Hickman 685 P.2d 530 (Utah 1984); Thomas J. Donnahue v. Intermountain Health Care 748 P.2d 1067 (Utah 1988).

Generally, a Trial Court will be deemed to have abused its discretion where it awards less than the amount of attorney fees requested when there is an adequate and uncontroverted evidence in the record to support the actual fees claimed, unless the Trial Court specifically offers an explanation for the reduction in the fee while addressing and considering the important factors used in setting fee claims. Regional Sales Agency, Inc. v. Roland W. Reichert 784 P.2d 1210 (Utah App. 1989); Stephen Martindale v. Tom Adams 777 P.2d 514 (Utah App. 1989); Dixie State Bank v. Kirk Bracken 764 P.2d 985 (Utah 1988).

VIII. CONCLUSION

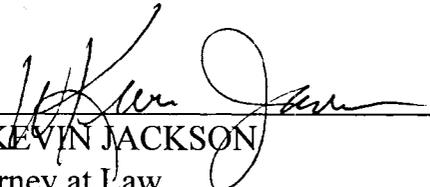
The Trial Court's judgment relating to damages, statutory prejudgment interest, and recoverable attorney's fees is erroneous. The court misapplied the law to the established facts of the case. The court failed to treble proven damages. The court failed to compute the amount of attorney's fees in accordance with the law and then improperly reduced the claim by two-thirds ($\frac{2}{3}$). The District Court should have awarded the full amount of the legal fees

claimed, but not less than the amount found to be reasonable in the sum of \$27,576.00.

This party requests oral argument of the appeal.

Respectfully submitted.

DATED this 25th day of August, 2000.



W. KEVIN JACKSON
Attorney at Law

CERTIFICATE OF MAILING

I hereby certify that I delivered in person (or caused to be delivered) a true and correct copy of the foregoing document to the following:

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by delivery to the law offices at the parties as shown above, dated the 25th day of August, 2000.

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