

1995

David Winters v. Allison Abizaid and Joanne Schulman, individually, and Joanne Schulman : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Ellen Maycock; David C. Wright; Kruse, Landa and Maycock; Attorneys for Defendant/Appellee. W. Kevin Jackson; Jensen, Duffin, Carman, Dibb and Jackson; Attorney for Plaintiff/Appellant .

Recommended Citation

Reply Brief, *Winters v. Schulman*, No. 950908521 (Utah Court of Appeals, 1995).
https://digitalcommons.law.byu.edu/byu_ca1/7073

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH STATE COURT OF APPEALS

	0000000	
DAVID WINTERS,	:	
	:	
Plaintiff/Appellant,	:	REPLY BRIEF OF THE APPELLANT
vs.	:	
	:	
ALLISON ABIZAID AND JOANNE SCHULMAN, individually	:	
	:	Case No. 95-090-8521 PI
Defendants,	:	
	:	Appeal No. 20-000114CA
JOANNE SCHULMAN,	:	
	:	Priority No. 15
Appellee.	:	
	0000000	

REPLY 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

W. KEVIN JACKSON (1640)
JENSEN, DUFFIN, CARMAN, DIBB
& JACKSON
Attorney for Plaintiff/Appellant
311 South State Street, Suite 380
Salt Lake City, UT 84111-2379

Ellen Maycock
David C. Wright
KRUSE, LANDA & MAYCOCK, L.L.C.
Attorneys for Defendant/Appellee Joanne Schulman
Eight Floor, Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101-2034

FILED
Utah Court of Appeals
NOV 27 2000
Paulette Stagg
Clerk of the Court

IN THE UTAH STATE COURT OF APPEALS

0000000
DAVID WINTERS, :
 :
 :
 Plaintiff/Appellant, : REPLY BRIEF OF THE APPELLANT
 :
 vs. :
 :
 :
 ALLISON ABIZAID AND JOANNE :
 SCHULMAN, individually :
 :
 : Case No. 95-090-8521 PI
 Defendants, :
 :
 : Appeal No. 20-000114CA
 JOANNE SCHULMAN, :
 :
 : Priority No. 15
 Appellee. :
 0000000

REPLY 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

W. KEVIN JACKSON (1640)
JENSEN, DUFFIN, CARMAN, DIBB
& JACKSON
Attorney for Plaintiff/Appellant
311 South State Street, Suite 380
Salt Lake City, UT 84111-2379

Ellen Maycock
David C. Wright
KRUSE, LANDA & MAYCOCK, L.L.C.
Attorneys for Defendant/Appellee Joanne Schulman
Eight Floor, Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101-2034

LIST OF ALL PARTIES

Plaintiff and Appellant:

David Winters

Attorney:

W. Kevin Jackson, Esq.
311 South State Street, Suite 380
Salt Lake City, Utah 84111-2379
(801) 531-6600

Defendant and Appellee:

Joanne Schulman

Ellen Maycock, Esq.
David Wright, Esq.
50 West 300 South, Suite 800
Salt Lake City, Utah 84101
(801) 531-7090

Defendant Only:

Allison Abizaid
(This party did not participate in
this appeal or the prior appeal.)

David Berry, Esq.
5296 So. Commerce Drive, Suite 100
Salt Lake City, Utah 84107
(801) 262-5300

TABLE OF CONTENTS

I. TABLE OF LEGAL AUTHORITIES v

 A. Table of Cases Cited v

 B. Table of State Statutes Cited v

 C. Table of Federal Statutes Cited v

 D. Table of Other Legal Authorities Cited vi

II. SUMMARY OF THE ARGUMENT 1

III. ARGUMENT 2

 A. The Trial Court Failed to Award Proper and Proven Damages
 and to Treble Them 2

 B. The Wrongful Lien Statute in Substance Creates Two (2) Causes
 of Actions When it is Violated 6

 C. The Amount of Attorney’s Fees Incurred after the California
 Superior Court’s Ruling Concerning the Lis Pendens are
 Recoverable as a Matter of Law 8

 D. The Utah Real Property was Not Community Property and Was
 Never Pursued as Such in the Divorce Court by the Defendant 12

 E. The Evidence as to Damages Was Adequately Marshaled 13

 F. There Has Been No Double Recovery of any Damages or
 Attorney Fees by the Plaintiff 15

 G. The Trial Court Has Not Allowed or an Unreasonably High Fee
 Award 19

 H. Courts in Equity Can Decline to Award Attorney Fees Only in
 Exceptional Cases 23

IV. CONCLUSION 24

V. ADDENDUM; PROVIDED WITH OPENING BRIEF

I. TABLE OF LEGAL AUTHORITIES

A. TABLE OF CASES CITED:

Boyd J. Brown v. David K. Richards (II) 1999 Ut.Ct.App. 109, 978 P.2d 470 . . . 23

James Busch v. James Doyle 141 BR 432 (BC DC Utah 1992) 4, 19, 23

Cable Marine v. M/V Trust Me 632 F.2d 1344 (CA-5 1980) 24

John J. Cabrera v. Ralphine Cottrell 694 P.2d 622 (Utah 1983) 23

Dejavue, Inc. V. US Energy Corp. 1999 Ut.Ct.App. 355, 993 P.2d 222 23

First General Services v. Zandra Perkins 918 P.2d 480 (Utah App. 1996) 22

Don K. Fullmer v. Ethel W. Blood 546 P.2d 606 (Utah 1976) 24

Robert Kurth v. Daniel R. Wiarda 1999 Ut.Ct.App. 153, 981 P.2d 417 23

Sinks v. Chevron Oil 507 F.2d 216 (CA-5 1975) 23

Leon Sprouse v. Arjen W. Jager 806 P.2d 219 (Utah App. 1991) 23

USA v. Mountain States 588 F.2d 259 (CA-9 1978) 24

D. Winters v. J. Schulman 1999 Ut.Ct.App. 119, 977 P.2d 1218 . . 1, 5, 7, 9, 11, 13

B. TABLE OF STATE STATUTES CITED:

UCA §38-9-1 1, 2, 8, 11

UCA §38-9-3 1, 2, 8, 11

UCA §38-9-4 6, 7, 8, 11, 22

C. TABLE OF FEDERAL STATUTES CITED:

26 USC §6331(b) 5

D. TABLE OF OTHER LEGAL AUTHORITIES CITED:

Black's Law Dictionary, 4th Edition 5

II. SUMMARY OF REPLY ARGUMENT

1. The District Court clearly failed to treble the total amount of the proven damages as required by the remedial statute. UCA §38-9-1 and 3.
2. The District Court's Findings of Facts regarding the computation of the amount of attorney's fees are inadequate as a matter of law and fail to articulate appropriate reasons to reduce the amount of the fee claim by two-thirds ($\frac{2}{3}$) or why the amount of fees should be divided by the number of cause of actions in order to arrive at the proper fee award.
3. The District Court's Findings of Fact do not identify (in the manner required by law) how the court actually arrived at the sums awarded in the case (i.e. the statutory damage claim and its related legal costs of \$2,000.00 and the cost of the prior appeal in the sum of \$2,500.000). (Findings of Fact ¶¶11 and 12; Addendum No. 3, p. 9; Record p. 562).
4. The District Court did find that reasonable attorney's fees was \$27,576.00. (Finding of Fact ¶20A; Addendum No. 3, p. 10; Record p. 563). This amount should have been awarded by the District Court unless the fee claim can be properly reduced in a manner authorized by law and for specific cause shown based upon the evidence.
5. The District Court's conclusion that the claims in the Plaintiff's Complaint overlapped, but were not intertwined, is erroneous as a matter of law. The core operative facts on which all the claims are based are undisputed and arise out the recording of a naked Lis Pendens. David Winters v. Joanne Schulman 1999 Ut.Ct.App. 119, ¶¶1 to 7, 977 P.2d 1218. The Findings of Fact do not articulate why they are not intertwined, but yet overlap.

6. Because of the concession made during the course of the trial not to dispute the nature of the legal work performed and the amount of time spent performing a given task, the Appellee's defense to the recovery of attorney's fees are limited to matters of law only. (Trial Transcript p. 49, lines 1 to 19; and p. 81, line 18).

7. The Appellee's failure to contest, in her Brief, the specific factors on which attorney's fees are to be awarded amounts to a further concession that the Affidavit and testimony of Plaintiff's counsel satisfied the factors.

8. The Appellant is entitled to recover his actual and necessary attorney's fees in pursuing the statutory damage claim as a matter of law. (Trial Transcript p. 108, line 5).

III. ARGUMENT

A. The Trial Court Failed to Award Proper and Proven Damages and to Treble Them.

The Appellee's position before the District Court and now on appeal is that no evidence ever existed on which to award any damages. (Appellee Brief at top of p. 9; Trial Transcript p. 108). If this is true, then damages cannot be trebled. In the event that there are no actual damages of any type, then the remedial statute does set the amount of recoverable damages at \$1,000.00. UCA §38-9-1 and 3. Not all wrongful filings will cause significant economic damages, but reimbursement for out-of-pocket costs (i.e. damages) is nonetheless required in order to make the claimant whole. This claim of no proven damages is clearly erroneous. The court awarded damages in its written Findings of Fact in ¶14 (in the sum of

\$2,090), and in ¶15 (in the sum of \$150.00). (Addendum No. 3, at p. 9; Record pp. 560 to 567). The evidence regarding the nature and the amount of the damages is set forth on pages 14 to 17 of the Appellant's Opening Brief and in Trial Exhibits Nos. 5, 6, 7, 10, and 11. (See Addendum Nos. 12, 13, 14, 16, and 17). The evidence regarding economic damages was not materially contested. (Trial Transcript pp. 4 to 10 [direct examination], and 40 to 46 [cross examination]). These Exhibits were all admitted. (Trial Transcript pp. 2 to 3; Addendum No. 8, pp. 59 to 61; Record pp. 557 to 559). The total amount of proven out-of-pocket damages was in the sum of \$4,797.64 and should have been trebled.

The Appellee's brief, in substance, is a challenge to whether the proven monetary damages can be recovered in a wrongful lien case as a matter of law. (Appellee's Brief at pp. 7, 9 to 11). The Appellee, in her brief, wants this Court to significantly narrow the types of damages that can be recovered. The District Court also adopted this narrow view.

The Appellee correctly notes that damages are proven when there is an act, causation and an identified sum that flows from the event. Each specific claim for damage sought by the Plaintiff has an identified event, is related to the statutory cause of action in a significant way and the dollar amount is known and was verified. (Trial Transcript pp. 4 to 10; Exhibit Nos. 5, 6, 7, 10, and 11; Addendum Nos. 12, 13, 14, 16 and 17). The District Court ruling that there was no damages is clear error. The Findings of Fact are clearly inconsistent and do not support this ultimate legal conclusion. (See Findings of Fact ¶¶14 and 15; Record pp. 560 to 567). Damages were in fact proven and awarded in this case. The costs claimed are

those that are directly related to “clearing” the title to the home. They are as follows:

NO.	DESCRIPTION	AMOUNT	TRIAL EXHIBIT	ADDENDUM NO.
1	J. Gordon, Esq. - Legal Fees	\$1,650.00	No. 6	13
2	Out-of-Pocket Costs for Lis Pendens	\$440.82	No. 6	13
3	Interest on Expended Funds	\$2,013.67	No. 7	14
4	One-half (½) of the Travel Costs prior to 04-12-1996	\$395.07	No. 10	16
5	One-half (½) of the Trial Costs between 04-13-1996 and 06-02-1996	\$298.08	No. 11	17
	TOTAL	\$4,797.64		

NOTE: Items 1 & 2 represent damages of \$2,090.82 that are referenced in the court’s Findings of Fact, ¶14; Addendum No. 3, p. 9).

It is true that no sale of the home was lost and the interest rate on the home loan was not impaired. However, this does not mean that Mr. Winters did not suffer any damages as a result of the recording of the naked Lis Pendens. For example, the cost of obtaining the title report was \$300.00. (Trial Exhibit No. 6, Addendum No. 13, p. 75). This damage amount was awarded to the Plaintiff even though the court also declares that no damages of any kind existed. (See Finding of Fact ¶17; Addendum No.3, pg.9; Record pg. 562).

Ms. Schulman’s decision to enforce the Decree of Divorce represents a very common domestic law dispute. However, the election to use illegal settlement leverage by recording a naked Notice of Lis Pendens complicated the case for all of the parties. James Busch v. James Doyle 141 BR 432 (BC DC Utah 1992). This act increased the number of legal issues in the case and thus the total cost. It was a calculated decision to use “distrain” in order to

compel the payment of a disputed and unsecured debt. Black's Law Dictionary, 4th Edition, defines "distrain" as the detention of property, whether lawful or unlawful, for settlement purpose. The use of distraint is an extraordinary remedy. The Internal Revenue Service is authorized by federal statute to use "distrain" (i.e. the seizure of property without the use of legal process). 26 USC §6331(b). No statute or rule of law extends this kind of power to general unsecured creditors. The recording of a naked Lis Pendens in order to compel concessions far exceeds zealous representation. This is the type of wrongful conduct that the statute intends to prevent. It is fundamentally unfair and it necessarily changes the legal issues and thus, the settlement bargaining power of the parties. The dispute is now overshadowed by much more menacing matters.

The Appellee attempts to justify the extraordinary action taken by claiming the home was "community property". (Brief pp. 12 to 13). However, no such claim was ever made in the California Superior Court. David Winters v. Joanne Schulman 1999 Ut.Ct.App. 119, ¶¶20 to 22, 977 P.2d 1218. The home was acquired after the divorce was final and had been previously deeded to Mr. Winters. If, under these facts, Ms. Abizaid had a bona fide community property claim, then Ms. Schulman could have made such a claim to the proper court using proper legal process. However, no such claim was made. David Winters v. Joanne Schulman 1999 Ut.Ct.App. 119, ¶22, 977 P.2d 1218. This argument is advanced only after the fact in order to justify the improper conduct and then boldly declares that the legal fees were actually "unnecessary". This single act greatly increased the cost of the dispute.

A remedial statute is to be broadly construed to effectuate its purposes. One of these purposes is to allow the injured party to recover all out-of-pocket costs incurred in getting the Lis Pendens released. These are actual damages. This includes the legal right to seek payment of the minimum statutory amount in the absence of any actual damages. The Court should have awarded and trebled all out-of-pocket costs. This was clear error not to do so.

The Plaintiff, Mr. Winters, was very reluctant to undertake the Utah litigation. (Trial Transcript pp. 53 to 55). Every opportunity to either prevent the litigation or to stop the litigation at the earliest opportunity was rebuffed or simply ignored by Ms. Schulman. (Trial Transcript pp. 53 to 57, 78 to 79, and 93, lines 1 to 18).

B. The Wrongful Lien Statute in Substance Creates Two (2) Causes of Actions When it is Violated.

The Appellee, in her brief, fails to know that the provisions of UCA §§38-9-3 and 4 create two (2) separate causes of actions. They are directed at two (2) special problems which are created when title clouding documents are recorded on real property. Perhaps, more correctly, the statutory claim has two (2) separate remedy provisions that are directed at two (2) critical matters. The first portion of the statute is directed at clearing the legal title. There is no doubt that this is the most important provision of the law. The second part of the statute deals with the distinct claim for economic damages that may be suffered. The statute further provides that if there are only modest damages suffered, then the claimant may nonetheless recover the statutory sum of \$1,000.00. The legal claims can be brought

separately or they can be joined together into a single case. UCA §38-9-4. In either event, the claimant is entitled to recover his or her attorney's fee. UCA §38-9-4 (last sentence).

The Appellee suggests, in her brief, that award of attorney's fees is available only to persons "...who must litigate to clear total". (Appellee's Brief at p. 10). This was established as part of the prior appeal. David Winters v. Joanne Schulman 1999 Ut.Ct.App. 119, ¶¶27 and 30, 977 P.2d 1218. In fact, Mr. Winters was actually compelled to "litigate" the wrongful Lis Pendens filing in two (2) separate jurisdictions. David Winters v. Joanne Schulman 1999 Ut.Ct.App. 119, ¶¶4 and 6, 977 P.2d 1218. This caused unique out-of-pocket damages to be suffered though the total amount of the costs were not staggering. A suit was reluctantly (but necessarily) filed in Utah. The remedial statute clearly provides that the statutory suit must be filed in the county where the property is located. UCA §38-9-4. However, out of patience, it was filed several months after the twenty (20) day period had expired. David Winters v. Joanne Schulman 1999 Ut.Ct.App. 119, ¶4, 977 P.2d 1218.

The Utah suit became necessary because the California proceeding was filed as a generic family law collection case. David Winters v. Joanne Schulman 1999 Ut.Ct.App. 119, ¶22, 977 P.2d 1218. Once an order was authorized to be entered directing that the Lis Pendens be released, then the Plaintiff immediately filed for partial summary judgment as to statutory liability and the entry of an Order imposing the penalty amount. (Addendum Nos. 4 and 5, pp. 13 to 33; Record pp. 1 to 17, and 51 to 54). David Winters v. Joanne Schulman 1999 Ut.Ct.App. 119, ¶7, 977 P.2d 1218. This was done promptly in the hopes of concluding

the case at the earliest opportunity. (Trial Transcript pp. 53 to 55, and 78 to 79).

Mr. Winters never received an unconditional offer to release the Lis Pendens. (Trial Transcript pp. 47, 55, 92 to 94). The recorded Lis Pendens was never voluntarily released. (Trial Transcript p. 93, lines 1 to 18). All of the actions taken by the Plaintiff in having the Lis Pendens removed and seeking the statutory relief have been contested.

C. The Amount of Attorney's Fees Incurred after the California Superior Court's Ruling Concerning the Lis Pendens are Recoverable as a Matter of Law.

The Appellee, in her brief, makes the claim that all legal fees incurred after the California Superior Court ordered that the Lis Pendens be released cannot be recovered by Mr. Winters. (Appellee's Brief p. 15). The Appellee, nonetheless, concedes that the legal fees that were incurred in pursuing the statutory damage claim are, in fact, recoverable. (Appellee's Brief p. 14). The Appellee further argues that since the District Court found that there was no actual damages, there can be no recovery of any attorney fees. (Appellee's Brief p. 14). These companion legal arguments are contrary to the clear language of the statute. See UCA §§38-9-1, 3, and 4 (last sentence). The Plaintiff is entitled to recover his actual attorney's fees: (i) in seeking the release of the Lis Pendens, and (ii) in seeking a claim for any damages including, at the very least, the \$1,000.00 in statutory damages. The release of the Lis Pendens (however accomplished) does not mean that the cause of action for damages was lost or that the claim for attorney's fees should be terminated from this point in time. The remedial statute contains no such limiting language. To graft onto the statute,

by judicial interpretation or practice, this limiting provision would effectively destroy the efficacy of the remedial law. The public policy of the statute is intended to make the injured party reasonably whole even if actual damages are quite modest. The release of the Lis Pendens (nearly a year after it was filed) only changed the focus of the case. (Trial Transcript p. 52, lines 1 to 6; p. 55, lines 9 to 23; and p. 57 lines 1 to 18; pp. 78 to 79).

At the time the suit was filed, and at the time the Motion for Partial Summary Judgment was filed, the Lis Pendens was still of record. (Addendum No. 4 and 5, pg. 13 to 33; Record pg. 1-17 and 51 to 54). In fact, it remained of record for at least another six (6) weeks after the hearing in the California Superior Court. There was no prompt and compliant response to the judicial order. There was no assurance given that the release would be made immediately. (Trial Transcript p. 55, lines 14 to 23). In fact, the Lis pendens was not released until the day before the settlement was achieved. The recording of the Lis Pendens achieved its intended goal which was to compel a favorable settlement of the family law dispute. Once it achieved its intended purpose, then and only then, was it released. David Winters v. Joanne Schulman 1999 Ut.Ct.App. 119, ¶6, 977 P.2d 1218.

The Appellee claims that the District Court found that the amount of fees incurred after the California's ruling in April of 1996 were unreasonable. (Appellee's Brief p. 14). There are no Finding of Fact which supports this conclusion of the law or explains why the actual legal costs after this point in time were in fact or by law unreasonable. To the extent this statement is a declaration of the law, it is clear error and contrary to the statute which

expressly authorizes attorney's fees to be recovered in pursuing the damage claim.

There was no specific Finding of Fact made concerning the supposed inefficiency of counsel in pursuing the matter in the state of Utah, there was no actual evidence of any "churning" of the Utah file, nor is there any specific evidence that the time charges that were claimed were erroneous, excessive, or even unnecessary. The Appellee did not dispute, and in fact conceded, the nature and the extent of the legal services rendered in this case. (Trial Transcript p. 49, lines 4 to 19). In fact, the fees were necessary because the Lis Pendens was illegally undertaken in order to obtain a settlement of an unsecured and disputed debt and until this improper objective was significantly achieved the document remained of record. It remained until May 30, 1996 despite the prior order of the Superior Court. Furthermore, it is disingenuous to force a Plaintiff to incur the cost of preparing and presenting a trial and then acknowledge (after the trial is concluded) that the Plaintiff was entitled to statutory damages and then claim that the fees that were thus incurred are now totally unreasonable. The Plaintiff knew early on that if they conceded liability on the statutory claim, then the rest of the case would be waived. (Trial Transcript pp. 53 to 55, and 78 to 79).

The Appellee declares that the attorney's fees should be significantly limited because there were no actual damages proven in the case. (Appellee's Brief p. 14; Trial Transcript p. 108, lines 4 to 5). The remedial statute does not limit the statutory right to recover attorney's fees to only those cases in which significant economic damages have been proven. The statute extends the legal right to include the necessary costs of pursuing the statutory

damage amount at the very least. (UCA §§39-9-1, 3, and 4). In any event, the Appellee, on page 14 of her Brief, concedes that these fees are recoverable. This court should so declare.

The Appellee also claims that Mr. Winter's attorney of record in the Utah Case did nothing to get this Lis Pendens released. (Trial Transcript p. 108, lines 7 to 15). At the very least, Utah counsel asked that the Lis Pendens be released voluntarily. (Trial Transcript p. 93). The Appellee further mischaracterizes the actions of the Plaintiff once the California Superior Court ordered the home released. It is undisputed that the Appellant was asking both courts to act. David Winters v. Joanne Schulman 1999 Ut.Ct.App. 119, ¶¶5 and 22, 977 P.2d 1218. Here again, the release of the Lis Pendens is only a portion of the relief that was sought in the Complaint and in the Motion for Partial Summary Judgment. (Trial Transcript p. 52, lines 1 to 15; and p. 57, lines 1 to 18; pp. 78 to 79; Addendum No. 4 and 5, pp. 13 to 33; Record p. 1 to 17 and 51 to 54). Once the release was obtained, the Plaintiff had every reason to proceed to at least establish liability under the remedial statute. The release of the Lis Pendens was necessary before liability could ultimately be established. It was ultimately determined to be an invalid recording and groundless as a matter of law. David Winters v. Joanne Schulman 1999 Ut.Ct.App. 119, ¶30, 977 P.2d 1218. While both state courts could order the Lis Pendens to be released, only the Third District Court could hear the statutory action. UCA §38-9-4 (requiring the suit to be filed in the county in which the property is located). In any event, the Utah case would have moved forward whether or not the California Superior Court ordered the Lis Pendens released. (Trial Transcript pp. 82 to 83).

D. The Utah Real Property was Not Community Property and Was Never Pursued as Such in the Divorce Court by the Defendant.

The Defendant, Ms. Schulman, was the attorney who filed Ms. Abizaid's enforcement proceedings in the California Superior Court. She had personal and specific knowledge of what was being asserted and why it was being asserted. She personally prepared the pleadings that were filed seeking to enforce the Decree of Divorce. The decision to prepare and then to record a naked Notice of Lis Pendens and to use it as a means to compel the payment or settlement of an unsecured disputed debt was hers. She was informed in advance (and on several occasions) that the filing was inappropriate, but she choose to allow the document to remain of record. (Trial Transcript p. 93). At the time the two (2) written requests were made, she had full legal authority to release the Lis Pendens because she was the attorney of record in California from October through December 29th, 1995. (Trial Transcript p. 97). The Plaintiff patiently waited for several months for a favorable response to the demand letters. When the California family law matter was served upon Mr. Winters, the issue of the release of the Lis Pendens had to be raised by Mr. Winters in order to clear title to the home. Ms. Schulman's own pleadings filed with the California Superior Court declares that it was a debt collection action. (Record pp. 145, 302 to 306, and 314 to 315).

The Appellee argues that the Utah property was "community property" and as a result no actual damages can be recovered by the Plaintiff. (Appellee's Brief at p.12). This assertion ignores the history of the case, the remedial statute, and the actual conduct of Ms.

Schulman. Ms. Abizaid (i.e. the Plaintiff's former spouse whom Ms. Schulman was representing) never sought any such right, title or beneficial interest to the real property. Her acknowledged claim was for money. David Winters v. Joanne Schulman 1999 Ut.Ct.App. 119, ¶22, 977 P.2d 1218. The Appellee's Brief incorrectly declares that the property was owned by both spouses. (Brief at p. 12). This was not true when the naked Lis Pendens was filed. David Winters v. Joanne Schulman 1999 Ut.Ct.App. 119, ¶2, 977 P.2d 1218. The Utah home was previously deeded to Mr. Winters several years earlier. Mrs. Abizaid never challenged the validity of the Quit Claim Deed in any court proceedings. (Trial Transcript p. 54, lines 13 to 22). This argument regarding "community property" is a "back-door" attempt to reopen the prior appeal or the additional issues raised in the Appellee's cross appeal that have been stricken. This legal argument (without a factual basis) is advanced as justification for the Defendant's actions. However, the law of the case doctrine declares that such conduct violated the remedial statute. David Winters v. Joanne Schulman 1999 Ut.Ct.App. 119, ¶30, 977 P.2d 1218.

E. The Evidence as to Damages Was Adequately Marshaled.

The admitted evidence and evidentiary testimony regarding the amount and the type of damages that was suffered by Mr. Winters is set forth on the Appellant's Opening Brief, at pp. 14 and 15. The Appellee's defense regarding the amount and types of damages is based upon a claim that they are not legally recoverable at all and not that they are factually disputed. (Trial Transcript pp. 40 to 46 [i.e. the cross examination of D. Winters as to the

claimed damages], and p. 108, lines 7 to 15 [closing argument]).

The case was remanded to the trial court to determine just two (2) matters. First, the existence of any damages, and in default thereof, the award of \$1,000.00 in statutory damages. Second, computing the amount of recoverable attorney's fees. The remand was not limited to only those fees that were incurred in getting the real property released.

The Appellee's claims that there was no evidence of any damage. (Appellee's Brief p. 9; Trial Transcript p. 108). The Plaintiff's damages were classified into five (5) different types. The evidence regarding the Plaintiff's out-of-pocket damages is set forth on pp. 14 to 17 of the Opening Brief of the Appellant. As a matter of law, these types of damages can be incurred (and were in fact incurred) in this case. Because this Lis Pendens arose out of a case filed in a foreign jurisdiction, it necessarily meant that two (2) courts could be required to address this wrongful filing. (Trial Transcript p. 56, lines 9 to 19). Both courts eventually agreed that the Lis Pendens was improper. The real issue being advanced by the Appellee, in her Brief, is whether these types of damages that were incurred are recoverable at all and within the meaning of the statute. The Appellee would have the Court of Appeals significantly limit the nature and the amount of the damage that can be recovered under the remedial statute.

At the very least, the District Court orally found and, in fact, eventually awarded economic damages to the Plaintiff in the sum of \$2,090.00 (i.e. \$1,650.00 in attorney's fees and out-of-pockets costs and expenses of \$440.82). (Trial Transcript pp. 4 to 7, and 116-117;

Trial Exhibit No. 6; Addendum No. 13). The Findings of Fact, in ¶14, identifies the recovery to include both fees and costs. (Addendum No. 3, p. 9; Record p. 562). This sum representing proven out-of-pocket costs when trebled as required by law is \$1,322.46. The District Court separately awarded the legal fees paid to J. Gordon in the sum of \$1,650.00. These legal fees were found to be recoverable. (Trial Transcript pp. 116 and 117; Findings of Fact ¶14; Addendum No. 3, p. 9; Record p. 562). The District Court also awarded other costs of \$150.00. (Trial Transcript p. 117, line 16; Findings of Fact ¶15; Addendum No. 3, p. 9; Record p. 562). This sum when trebled is \$450.00.

The total amount of proven out-of-pocket costs (not including any attorney's fees) is \$590.82 and when properly trebled, they total \$1,772.46. This exceeds the statutory minimum award of \$1,000.00. The District Court was clearly wrong when it erroneously limited the damage award to only \$1,000.00. The ruling of the District Court, at least as to these two (2) proven damage sums, must be reversed and should have been trebled.

F. There Has Been No Double Recovery
of any Damages or Attorney's Fees by the Plaintiff.

At the time of the trial, the actual billing records of the Plaintiff's attorney were provided to the court. (Trial Exhibit No. 9). Such is not normally required as a condition of obtaining an award of attorney's fees. It was done so that each task could be questioned by the Defendant. However, the actual work done and the amount of time spent on each task was not going to be disputed by the Defendant. (Trial Transcript p. 49). All legal fees that

were not related in some meaningful way to the statutory cause of action were eliminated prior to the trial. (Trial Transcript p. 51; Trial Exhibit No.8; Addendum No. 15, p. 36).

The billing records demonstrate that the vast majority of the work performed by Plaintiff's attorney relates to the statutory cause of action. For example, the only cause of action for which the Plaintiff was seeking partial summary judgment on was the statutory cause of action. (Record pp. 51 to 54; Addendum No. 5, pp. 30 to 33). There was no significant discovery undertaken with regards to the other cause of actions, no depositions were taken, and no lengthy evidentiary hearing were conducted. The Plaintiff was being patient.

The Appellee claims that the more economical way of pursuing the statutory relief was to bifurcate the case into separate legal proceedings and file them in serial order. This would not have achieved the Plaintiff's primary objective which was the immediate release of the Lis Pendens. The major goal of any injured party is the removal of the cloud on the title to his property. Until it is released, all other matters are really secondary. Even if the case was bifurcated, the Plaintiff is nonetheless still entitled to pursue attorney's fees in both situations. This suggested course of action is advanced without any proof that this procedure would have been less expensive.

It is clear that Ms. Schulman's conduct in the recording of the naked Lis Pendens could and did result in two (2) different state law proceedings being undertaken. (Trial Transcript p. 56, lines 9 to 19; and pp. 57 to 58). In fact, the statute allows the potential

Defendant twenty (20) days in which to avoid the statutory claim altogether by simply correcting the recording document. Plaintiff waited months for the corrective action to be taken before filing the suit. Even after the domestic law proceedings was filed in California, the Lis Pendens was maintained and in fact, defended by Ms. Schulman in her own pleadings. (Record pp. 302 to 306). It was not voluntarily released even after the Superior Court ordered it released. (Record p. 145). It was released the day before the settlement was obtained. It was clearly foreseen and foreseeable that the issue of the propriety of the a recorded Lis Pendens would be an appropriate subject to be addressed by both the California Superior Court and the Utah District Court. (Trial Transcript pp. 56 to 58).

The Appellee's Brief claims that it was inappropriate to file the statutory cause of action and that it was also wrongful to seek the release of the Lis Pendens in the State of Utah because the matter was "pending" in another court situated in a foreign jurisdiction. (Appellee's Brief p. 21). The statute has no such limiting provisions. The California matter was pending and had been pending for many months and could have remained pending for an extended period of time. Ms. Schulman acknowledged that the underlying dispute between the former spouses had been unresolved for over three (3) years before she filed the enforcement action. (Record pp. 302 to 306). The Appellee seems to suggest that the proper course of action was to file a Complaint seeking only damages. If, at some future date, the California Court denied the request to release the Lis Pendens, then Mr. Winters could amend his Complaint. The Appellee's claim that the Utah suit seeking the release of the Lis

Pendens was legally “unnecessary” cannot be justified either under the law or the facts of the case. Ms. Schulman represented to the California Supreme Court in her own pleadings that the claim was for money only. (Record pp. 302 to 306). Ms. Schulman received the demand letters requesting the release of the property. (Trial Transcript p. 93). Each request was ignored. Ms. Schulman chose to complicate the case and thereby increase the legal costs for Mr. Winters.

Ms. Schulman had motives for this conduct. She knew Mr. Winters was in a vulnerable position. Ms. Schulman candidly acknowledged that she knew that he wanted to sell or perhaps refinance his home. (Trial Transcript p. 93, lines 20 to 25, and p. 94).

The decision not to release the Notice of Lis Pendens until the settlement was all but achieved is contemptuous. This contempt issue is not properly before the Utah Courts. However, it is excellent evidence as to why the attorney’s fees were actually necessary in this case and in the amounts claimed and appropriately documented.

The Appellee’s Brief fails to realize and acknowledges to the court that the proceedings in California and the proceedings in Utah were fundamentally different except for the fact that there was a Lis Pendens dispute that affected both cases. The civil action in California was for a money judgment based upon the terms of the Decree of Divorce. (Record pp. 302 to 306). The family law dispute could have gone on for a considerable period of time. In fact, there were hearings scheduled, hearings postponed, and the hearings begun and then continued to another date all extending over a period of nine (9) months. In

contrast, the Utah litigation is wholly independent of the results of the California litigation and the relative merits of the claims and defenses of the parties. The Utah litigation is based upon the appropriateness of filing a naked Notice of Lis Pendens in order to obtain payment or settlement of an unsecured and disputed monetary claim. James Busch v. James Doyle 141 BR 432 (BC DC Utah 1992). Therefore, there is no duplication of any significant legal fees as claimed by the Appellee. All fees were both necessary and appropriate in this case.

At no time prior to the trial did the Appellee concede the statutory cause of action or tender the statutory damages. This case has been contested at all times. The Appellee cannot be heard to protest the amount of attorney's fees when they wait until closing argument to concede liability for the statutory damage claim. (Trial Transcript p. 108, line 5).

G. The Trial Court Has Not Allowed an Unreasonably High Fee Award.

The Appellee, in her Brief at Page 20, correctly points out that a party seeking a judgment for attorney's fees must allocate the gross amount of the fees according to the underlying claims to which they relate. This rule of law is not disputed in this case. This rule was complied with. However, this rule of law does not mean that the gross amount of fees that are claimed are simply divided by the number of causes of actions asserted in order to arrive at the proper award figure. It does not mean the District Court can ignore the various factors that are used in setting the amount of the award and the significant evidence offered on these factors. The Findings of Fact fails to identify the more important factors that were used and how they were used to compute and then reduce the amount of the award.

The Plaintiff submitted evidence and testimony regarding the nature and the amount of the fees claimed. The proper factors were identified and addressed in the testimony and the fee affidavit. The Appellee claims the evidence is merely self-serving and therefore, it can be ignored. (Appellee's Brief pp. 19 and 20). Such is not the rule of law except in the most unusual of cases. The attorney witness was not materially impeached or discredited on any critical matter. The Plaintiff's evidence included at least the following:

1. A lengthy and fact specific supplemental fee affidavit. (Trial Transcript pp. 1 to 2; Trial Exhibit No. 12).
2. The submission of detailed billing records for the legal services actually rendered in the case. (Trial Exhibit No. 9).
3. Oral testimony regarding the nature and the amount of the work performed in the case. (Trial Transcript pp. 49 to 86).
4. The elimination of any time charges not related to the statutory cause of action or the core facts of the case. (Trial Exhibit No. 8; Addendum No. 15).
5. Specific oral testimony regarding the eliminated attorney's work for which recovery is not properly allowable. (Trial Transcript pp. 80 to 82).

The billing records were carefully reviewed before the trial. They were also used in cross-examination. (Trial Transcript pp. 50 to 51, and 80 to 85). The time charges relating to the other cause of actions were eliminated. The lone billing error (i.e. a time charge imposed but for the wrong client) was detected in advance of the trial and had been eliminated from the fee request. (Trial Transcript p. 83; Trial Exhibit No. 8; Addendum No. 15, p. 86). None of the remaining time charges were shown to be erroneous or excessive. Disputing the time charges is not the same as presenting contrary or impeaching evidence.

The Appellee, on page 21 of her Brief, acknowledges that the enforcement action was filed in mid-October of 1995. The fact that there was a matter pending in the California Superior Court to enforce the Decree of Divorce does not alter, in any significant way, the statutory claim which had already ripened into a cause of action.

The Appellee, in her Brief at pages 21 and 22, again concedes that the civil suit for statutory damages was warranted, but then claims the suit to remove the cloud on the title was unwarranted and unnecessary and therefore, the fees cannot be justified. (Appellee's Brief pp. 21 and 22). The reasons stated for such a conclusion are without merit. The Plaintiff's claim ripened into a cause of action in late Summer of 1995. The Defendant could have taken corrective action and avoided the claim altogether or she could have done something to mitigate damages and attorney's fees, but she chose not to do so. (Trial Transcript p. 93). No valid reason recognized by the law was given for this tactical decision.

The Appellee claims that the use of two (2) attorneys in this case was improper and cannot be justified. (Appellee's Brief p. 22). The reason why there are two (2) lawyers involved in two (2) different jurisdiction is because of the intentional conduct of Ms. Schulman in using an improper document as a means to compel settlement or payment of an unsecured and disputed debt. (Record pp. 302 to 306). In the absence of this wrongful conduct, the matter could have been heard in the California Superior Court and limited to the relative merits of the party's claims and defenses under the Decree of Divorce. In any event, there is no evidence that Mr. Gordon (David Winters' California lawyer) was willing to

handle the Utah case or that he was admitted to the Utah Bar. The Utah action had to be filed in the Salt Lake County. UCA §38-9-4.

The Appellee criticizes the injured party for pursuing his statutory cause of action. In deed, it is the decisions and conduct of Ms. Schulman that necessitated and continued the Utah litigation. The Appellee, in her Brief, fails to identify a single legal reason why Mr. Winters is not entitled to vigorously pursue his statutory cause of action for damages.

Finally, the Appellee, in her Brief at page 23, adopts on appeal what in fact the District Court did in this case and that is to simply to divide the gross amount of attorney's fees by the number of cause of actions asserted in the Complaint. The resulting math computation supposedly becomes the proper fee amount. This method of computing fees is improper as a matter of law. This method ignores the various factors on which the award is to be based and also ignores those situations where a party must overcome various rulings, burdens, and defenses in order to prevail on the claim for which attorney's fees is authorized. First General Services v. Zandra Perkins 918 P.2d 480 (Utah App. 1996).

The Appellee criticizes the total amount of attorney's fees which were incurred in this case, but then candidly concedes on page 24 of her Brief that the Plaintiff is entitled to statutory damages plus reasonable fees and costs. Such a concession should have been made at the earliest opportunity. However, the tactical decision to continue the litigation necessarily increased the Plaintiff's actual legal costs. The Findings of Facts simply do not support the award of \$2,000.00 for the statutory cause of action and the award of \$2,500.00

for the prior appeal. (Appellee's Brief p. 24). The Finding of Facts are wholly lacking in subsidiary facts and how the lower figure was actually arrived at by the District Court using proper legal standards and criteria. There is no doubt that all of the cause of actions arose out of the same core set of facts. Leon Sprouse v. Arjen W. Jager 806 P.2d 219 (Utah App. 1991); Boyd J. Brown v. David K. Richards (II) 1999 Ut.Ct.App. 109, 978 P.2d 470.

The existence of multiple claims do not ipso facto mean that the attorney's fees are going to be reduced by the number of cause of actions asserted. Dejavue, Inc. V. US Energy Corp. 1999 Ut.Ct.App. 355, 993 P.2d 222; Robert Kurth v. Daniel R. Wiarda 1999 Ut.Ct.App. 153, 981 P.2d 417. The analysis by the District Court must be more thoughtful and must articulate how it arrived at its fee award. The District Court's Findings of Facts simply do not meet the minimum requirements of the law.

H. Courts in Equity Can Decline to Award Attorney Fees Only in Exceptional Cases.

The Appellee wants this court to reduce the award of attorney's fees to the sum of \$1,469.00. (Appellee's Brief p. 23). The general rule of law is that when authorized to be awarded, the recovery of statutory attorney's fees is a ". . . matter of legal right". John J. Cabrera v. Ralphine Cottrell 694 P.2d 622 (Utah 1983). In the case of contract provisions, the court does not generally possess the equitable discretion to deny the recovery of attorney fees. Sinks v. Chevron Oil 507 F.2d 216 (CA-5 1975).

A prevailing party can be denied an award of attorney fees or a substantially reduced fee amount only when there are exceptional circumstances and appropriate findings of fact

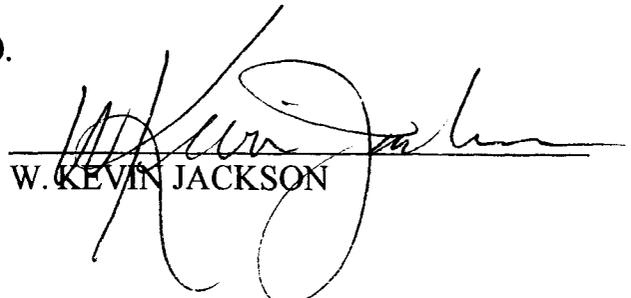
made. Don K. Fullmer v. Ethel W. Blood 546 P.2d 606 (Utah 1976) (forfeiture invoked); Cable Marine v. M/V Trust Me 632 F.2d 1344 (CA-5 1980) (refusal of generous settlement offers); USA v. Mountain States 588 F.2d 259 (CA-9 1978) (where the conduct of both parties was unwarranted). There are no exceptional circumstances present in this case.

IV. CONCLUSION

The District Court failed to treble the amount of proven damages that the court actually awarded the Plaintiff. This is an error of law. This should have been at least \$1,772.46. The District Court failed to award the California attorney's fees as an element of damage and then to treble the same. This too was an error of law.

The District Court failed to enter sufficient Findings of Fact to justify the reduction in the amount of attorney's fees. The actual method used is improper as a matter of law. The District Court failed to reference any of the required factors that are used to determine the fee amount. The Plaintiff's admitted evidence meets and addresses these factors. The District Court properly found that reasonable attorney's fees was \$27,576.00, before it improperly reduced them. It is conceded by the Plaintiff that this is less than the total amount claimed. The Court of Appeals should set the award at \$27,576.00 plus costs and fees for the present appeal.

DATED this 27th day of November, 2000.


W. KEVIN JACKSON

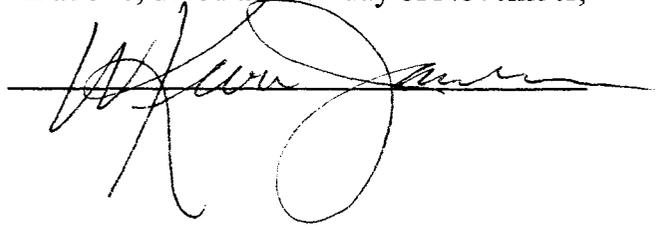
CERTIFICATE OF MAILING

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:

David C. Wright, Esq.
Ellen Maycock, Esq.
50 West 300 South, Suite 800
Salt Lake City, UT 84101

by delivery to the law offices at the parties as shown above, dated the 27th day of November, 2000.

8/WINT-RLY.BRF3

A handwritten signature in black ink, appearing to be "W. Hunter", is written over a horizontal line. The signature is stylized and cursive.