IN THE UTAH COURT OF APPEALS

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Stonecreek Landscaping, LLC, a Utah limited liability company, Plaintiff, Appellee, and Cross-appellant, v. Travis Bell; Sunrise Bell; America First Credit Union, a Utah corporation; and John Does 1-10, Defendants, Appellants, and Cross-appellees.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20060568-CA F I L E D (April 24, 2008) 2008 UT App 144
Travis Bell and Sunrise Bell, Counterclaim Plaintiffs and Appellants, v. Stonecreek Landscaping, LLC, a Utah limited liability company; and Randy Waddoups, Counterclaim Defendants and Appellees.	
America First Credit Union, Crossclaim Plaintiff and Appellee, v. Travis Bell and Sunrise Bell, Crossclaim Defendants and Appellants.	

Second District, Farmington Department, 040700430
The Honorable Darwin C. Hansen

Attorneys: Shawn D. Turner, South Jordan, for Appellants and Cross-appellees
Daniel W. Anderson and Bradley L. Tilt, Salt Lake City, for Appellee and Cross-appellant Stonecreek Landscaping, LLC and Appellee Randy Waddoups
Timothy W. Blackburn and Mara A. Brown, Ogden, for Appellee America First Credit Union

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Before Judges Greenwood, McHugh, and Orme.

ORME, Judge:

Contrary to the Bells' assertion, the computations by which the trial court arrived at the amount of Stonecreek's damage award turn on factual determinations that we review for clear error. See Saleh v. Farmers Ins. Exch., 2006 UT 20, ¶ 29, 133 P.3d 428 ("[An] award of damages is a factual determination that we review for clear error."); In re Estate of Knickerbocker, 912 P.2d 969, 981 (Utah 1996) ("Because the adequacy of damages is a question of fact, we cannot overturn the trial court's findings unless they are clearly erroneous."). To establish that the trial court clearly erred in determining Stonecreek's damages, the Bells "must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence." Chen v. Stewart, 2004 UT 82, ¶ 19, 100 P.3d 1177 (citation and internal quotation marks omitted). See Utah R. App. P. 24(a)(9). "If the evidence is inadequately marshaled, [we] assume[] that all findings are adequately supported by the evidence." Chen, 2004 UT 82, ¶ 19.

The Bells failed to marshal the evidence supporting the trial court's factual determinations underlying its damage award to Stonecreek. Accordingly, we take the trial court's findings as our starting point. In its fourteenth finding of fact, the trial court found that "$7,000 worth of the work performed by Cottonwood Landscaping was to repair deficiencies with the Work and to complete the Contract." It then acknowledged that despite testimony suggesting that additional work might have been required, "such testimony was not sufficiently specific or credible, and that, on balance and recognizing that problems existed, $7,000 is the most credible amount of repair and completion Work and is the amount the Court finds was incurred and paid by the Bells for repair and completion Work."

In pursuing its cross-appeal, Stonecreek did marshal the evidence, which it contends was insufficient to support the trial court's $7000 offset against its claim. Stonecreek further contends that it should be awarded not the adjusted contract

amount but, rather, the actual value of its services--an amount greater than the contract price--minus the Bells' payments. We disagree with both contentions.

Daniel Cloward testified that he compared Stonecreek's bid and work with his own company's bid and work. He observed a number of problems and deficiencies with respect to the landscaping work Stonecreek had performed, and he estimated that $7000 of his work was attributable to remedying those problems. Stonecreek argues that Cloward had no basis on which to testify as he did because he "did not have personal knowledge of what work Stonecreek actually did, the condition of the Property when Stonecreek began its Work, or what was included in the Contract between Stonecreek and the Bells." In contrast to Martindale v. Adams, 777 P.2d 514 (Utah Ct. App. 1989), on which Stonecreek relies, there was substantial evidence here supporting the trial court's finding that there were deficiencies with Stonecreek's work, including not just Cloward's testimony but also testimony by Randy Waddoups, Dell Waddoups, and Travis Bell.

Stonecreek's further argument--in effect, that it should get more than it bargained for--is without merit. Utah Code section 38-1-3 certainly allows a contractor to "have a lien upon the property . . . for the value of the service rendered," Utah Code Ann. § 38-1-3 (2005), but we decline to accept Stonecreek's invitation to reform the parties' contract simply because it spent more time or money than it anticipated, or failed to profit as much as it had hoped. See Park Valley Corp. v. Bagley, 635 P.2d 65, 67 (Utah 1981) ("[S]ellers and buyers should be able to contract on their own terms without the indulgence of paternalism by the courts in the alleviation of one side or another from the effects of a poor bargain. They should be permitted to enter into contracts that may actually be unreasonable or which may lead to hardship on one side.").

The issue of attorney fees presents a more difficult problem. The Bells argue that because they are the prevailing party, they, not Stonecreek, are entitled to an award of attorney fees. "When reviewing attorney fee decisions that involve questions of law, we review for correctness." A.K. & R. Whipple Plumbing & Heating v. Guy, 2004 UT 47, ¶ 6, 94 P.3d 270.

"Although courts have inherent equitable power to award attorney fees when justice or equity requires, attorney fees are typically recoverable only if an applicable statute or contract so provides." Id. ¶ 7 (citations omitted). Section 38-1-18 provides that "the successful party" in a mechanic's lien action is "entitled to recover a reasonable attorney[] fee." Utah Code Ann. § 38-1-18(1) (2005). A successful party is one that "'successfully enforces or defends against a lien action.'" Whipple, 2004 UT 47, ¶ 7 (quoting Kurth v. Wiarda, 1999 UT App

335, ¶ 9, 991 P.2d 1113). Where it is not manifestly obvious which party was the "successful" or "prevailing" party,[1] courts employ the "flexible and reasoned approach" discussed in Mountain States Broadcasting Co. v. Neale, 783 P.2d 551, 556 n.7, 557 (Utah Ct. App. 1989), and clarified in Whipple, see 2004 UT 47, ¶ 26, to determine which party was the victor. Precisely because we use a "flexible and reasoned approach" to determine which party was successful for purposes of section 38-1-18, we afford some discretion to the trial court to consider "common sense factors" relative to that determination. Whipple, 2004 UT 47, ¶ 28. Under this approach, the trial court must consider, at a minimum, "the significance of the net judgment in the case [and] the amounts actually sought and . . . recovered." Id. ¶ 26 (citation and internal quotation marks omitted).

Here, the trial court determined that Stonecreek was the successful party entitled to an award of attorney fees. In making its determination, the court considered that Stonecreek filed suit for $14,587 but recovered only $4796, or approximately one-third of its claim. Contrastingly, the Bells wholly failed on their claims for abuse of lien, fraud, and personal liability, but they did prevail on their breach of contract claim, resulting in a $7000 offset against Stonecreek's damages award. We conclude that the trial court appropriately considered "the significance of the net judgment in the case [and] the amounts actually sought and . . . recovered," id., in concluding that Stonecreek was, all things considered, the successful party for purposes of awarding attorney fees.

Having affirmed the trial court's determination that Stonecreek was the successful party, we next address the parties' mutual dissatisfaction with the amount awarded. "Calculation of reasonable attorney fees is in the sound discretion of the trial court and will not be overturned in the absence of a showing of a clear abuse of discretion." Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988) (citations omitted). "It is clear that Utah law requires the prevailing party, and ultimately the court, to allocate the prevailing party's attorney fees among those claims for which it is entitled to an award of attorney fees and those for which it is not." Ellsworth Paulsen Constr. Co. v. 51-SPR, LLC, 2006 UT App 353, ¶ 46, 144 P.3d 261, aff'd, 2008 UT 28. Stonecreek's claims for breach of contract and unjust enrichment, however, are "so inextricably tied to [its] mechanic's lien claim

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1. In A.K. & R. Whipple Plumbing & Heating v. Guy, 2004 UT 47, 94 P.3d 270, the Utah Supreme Court observed "that Utah appellate courts have routinely used the terms 'successful party' and 'prevailing party' interchangeably[,] . . . even in the context of mechanic's lien cases," id. ¶ 19 (citations omitted), and concluded that the terms are synonymous, see id. ¶ 31.

as to warrant grouping these fees together." Id. ¶ 47. Thus, Stonecreek's failure to allocate its fees among its legal claims in this case does not prevent its recovery of those fees.

The same cannot be said of its failure to separate its fees between matters on which it was successful and unsuccessful. See Mountain States Broad. Co. v. Neale, 783 P.2d 551, 556 & n.10 (Utah Ct. App. 1989). Stonecreek failed to provide sufficient detail to permit that kind of allocation. In the absence of that detailed information, the trial court could have chosen not to award fees at all. Instead, it determined that one-third of Stonecreek's actual attorney fees, corresponding to the relative overall extent of its success, was reasonable. In the posture of this case, we cannot say that, given the absence of a detailed breakdown, the trial court abused its discretion in reducing Stonecreek's award commensurate with its level of comparative success.

The Bells are correct that the trial court ordered them to pay Stonecreek some costs that are not awardable as costs of the action. Costs are "generally allowable only in the amounts and in the manner provided by statute." Frampton v. Wilson, 605 P.2d 771, 773 (Utah 1980). See Utah R. Civ. P. 54(d)(1). While there are, of course, "other 'expenses' of litigation which may be ever so necessary, but are not properly taxable as costs," taxable costs are "those fees which are required to be paid to the court and to witnesses, and . . . which the statutes authorize to be included in the judgment." Frampton, 605 P.2d at 774.

The trial court appears to have correctly awarded costs to Stonecreek for the filing fee, service of process fees, recording fees, and witness fees.[2] See Utah Code Ann. § 38-1-17 (2005) (recording fees recoverable); Frampton, 605 P.2d at 773-74 (filing, service of process, and witness fees recoverable). But the other costs the court awarded, to say nothing of yet additional fees Stonecreek believes should have been awarded, are not recoverable, and the court exceeded its discretion in ordering the Bells to pay them. See Frampton, 605 P.2d at 774 (cost of certified copies not recoverable); Morgan v. Morgan, 795 P.2d 684, 687 (Utah Ct. App. 1990) (cost of appraisal report not recoverable).

The Bells finally argue that America First was not entitled to an award of its attorney fees and costs. We disagree. Given the terms of its trust deed, America First was well within its rights to appear in these proceedings and protect its security

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2. If there are computational or similar errors in these categories, as the Bells suggest, the trial court should make appropriate adjustments on remand.

interest in the Bells' property. Under the terms of the trust deed, it was entitled to an award of its reasonable attorney fees and costs, including the fees it incurred on appeal.

All the parties request attorney fees on appeal. As we discussed above, "in any action brought to enforce any lien . . . the successful party shall be entitled to recover a reasonable attorneys' fee." Utah Code Ann. § 38-1-18 (2005). "[A]n appeal from a suit brought to enforce a lien qualifies as part of 'an action' for the purposes of this section." Advanced Restoration, LLC v. Priskos, 2005 UT App 505, ¶ 36, 126 P.3d 786 (citation and additional internal quotation marks omitted) (alteration in original).

The Bells and Stonecreek raised related issues on appeal and cross-appeal, the Bells seeking to reduce and Stonecreek seeking to increase the amount awarded to Stonecreek for damages, and the Bells seeking to have attorney fees awarded in their favor and Stonecreek seeking to increase the award of fees and costs in its favor. With the exception of a nominal adjustment to the costs awarded below, we have affirmed the trial court's determinations across the board, and we therefore cannot say that either party was the successful or prevailing party on appeal. Thus, except for America First, the parties shall bear their own fees and costs incurred on appeal.

We remand for the trial court to adjust the amount of taxable costs awarded to Stonecreek and to calculate America First's attorney fees reasonably incurred on appeal; otherwise, we affirm.

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Gregory K. Orme, Judge

WE CONCUR:

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Pamela T. Greenwood,
Presiding Judge

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Carolyn B. McHugh, Judge