

1998

# Kurth v. Wiarda : Brief of Appellee

Utah Court of Appeals

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Robert O. Kurth, Jr.; Kurth & Associates; Attorney for Appellees.

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 981582

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

ROBERT KURTH AND LAURA KURTH,  
individually, and as TRUSTEES OF THE  
KURTH REVOCABLE TRUST,

Appellees,

vs.

DANIEL R. WIARDA, INDIVIDUALLY, AND  
D/B/A LONETREE LOG HOMES; LONETREE  
SERVICES, INC., a Utah Corporation; ALL  
UNKNOWN PERSONS WHO CLAIM ANY  
INTEREST IN THE SUBJECT MATTER OF  
THE ACTION, DOES I-X inclusive, WHOSE  
TRUE NAME(S) IS(ARE) UNKNOWN,

Appellants.

Case no. 981582-CA

Priority no. 15

**APPELLEES' BRIEF**

Appeal from the Order With Findings of Facts and Conclusions of Law by the  
Honorable Robert T. Braithwaite, in and for the Fifth Judicial District Court,  
Iron County, State of Utah, entered in this matter on or about June 17, 1998.

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**IN THE COURT OF APPEALS FOR THE STATE OF UTAH**

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ROBERT KURTH AND LAURA KURTH,  
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Appellees,

vs.

DANIEL R. WIARDA, INDIVIDUALLY, AND  
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SERVICES, INC., a Utah Corporation; ALL  
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THE ACTION, DOES I-X inclusive, WHOSE  
TRUE NAME(S) IS(ARE) UNKNOWN,

Appellants.

Case no. 981582-CA

Priority no. 15

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**APPELLEES' BRIEF**

COMES NOW Appellees, ROBERT KURTH and LAURA KURTH,  
individually, and as Trustees of the KURTH REVOCABLE TRUST  
("KURTHS"), by and through their counsel, Robert O. Kurth, Jr., of the law offices  
of KURTH & ASSOCIATES, and respectfully submit the following Appellees'  
Brief:

**I.**  
**STATEMENT OF JURISDICTION**

The Court of Appeals of the State of Utah has jurisdiction over this  
Appeal pursuant to Section 78-2-2(3)(j) and 78-2a-3(2)(j), Utah Code Ann. (1953  
Repl. Vol. 92) (95 Supp.), as the Utah Supreme Court had jurisdiction and  
transferred such to the Court of Appeals.

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**II.**  
**PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES,**  
**ORDINANCES, RULES, AND REGULATIONS**

Section 38-1-18, Utah Code Annotated (1953, as amended)

In any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall be taxed as costs in the action.

**III.**  
**STATEMENT OF THE CASE WITH PERTINENT FACTS**

Initially, on or about October 27, 1995, the Appellant, **Daniel R. Wiarda ("Wiarda")** and his company of which he was the president, **Lonetree Services, Inc.,** a Utah Corporation, dba **Lonetree Log Homes ("Lonetree"),** filed a Verified Complaint for breach of contract and to foreclose the mechanic's lien they placed on the Appellees', **ROBERT KURTH** and **LAURA KURTH,** individually, and as Trustees of the **KURTH REVOCABLE TRUST ("KURTHS"),** property. See Wiarda's Addendum No. 3c. The caption of the Verified Complaint filed in case no. 950500465 (which was later consolidated in case no. 950500549) stated as follows: Dan Wiarda and Lonetree Services, Inc., doing business as Lonetree Log Homes, Plaintiffs, vs. Robert O. Kurth and Laura L. Kurth, husband and wife, individually, and as Trustees of the **KURTH REVOCABLE TRUST AGREEMENT,** dated May 4, 1993, **DOES I** through **XX.** See Wiarda's Addendum No. 3c. A Notice of Lien by Wiarda and Lonetree against the **KURTHS** was recorded on or about October 23, 1995, and was signed by Dan Wiarda doing business as Lonetree Log Homes. See Wiarda's Addendum No. 3c. A Notice of Lis Pendens was also filed and recorded by Wiarda and Lonetree. See Wiarda's Addendum No. 3c.

The **KURTHS** filed an Answer and Counterclaim, and filed a



1 Complaint asserting various causes of action against the Defendants Daniel R.  
2 Wiarda ("Wiarda"), Carolyn Wiarda, Lonetree Services, Inc. and Lonetree Log  
3 Homes ("Lonetree"), on or about December 14, 1995. The two cases were later  
4 consolidated into this case. The First Amended Complaint was filed by the  
5 KURTHS on or about August 8, 1996.

6 Evidence at the trial of this matter was presented to the fifth judicial  
7 district court and jury, through testimony and exhibits, to substantiate the following  
8 FACTS:

9 The Appellees, KURTHS, are the owners of the real property  
10 and log home ("Home"), which is located and was constructed in Iron County, Utah,  
11 near the town of New Harmony at 2661 E. New Harmony Highway 144. That the  
12 Appellant Wiarda, and Lonetree, entered into an Agreement with the KURTHS to  
13 perform work and/or services and did so perform work and/or services in the course  
14 of the construction of the KURTHS' Home in Iron County, Utah, near the town of  
15 New Harmony. ROA 63 and 64.

16 That on or about November 3, 1994, the KURTHS entered into  
17 Contract No. LLH-94-20 and LLH-94-20B ("Contract") with Defendant Lonetree  
18 wherein they agreed to pay Lonetree the sum of \$249,250.00 for the satisfactory  
19 completion of the items set forth in the three (3) page Contract. ROA 63, 64 and 65.  
20 An estimate summary was also provided to the KURTHS at or around that time,  
21 which also stated what work/services Lonetree agreed to perform and what materials  
22 were to be used for the construction of the Home.

23 The KURTHS initially entered into the Agreement to provide  
24 work for Wiarda and Lonetree during the winter months and were told that the Home  
25 would be finished by approximately May 31, 1995 because Lonetree had other work  
26

1 beginning June 1, 1995 on the "Mountain". ROA 66, 67, 91 and 92. Pursuant to the  
2 terms of the Agreement, the KURTHS provided Lonetree with a retention/deposit  
3 in the amount of \$75,000.00; \$30,000.00 was paid by check no. 5891 on or about  
4 December 16, 1994 and the \$45,000.00 balance was paid by check no. 5933 on or  
5 about January 9, 1995. ROA 83 and 84 (Exhibit P6 and P7). The KURTHS paid the  
6 deposit to allow Lonetree to purchase the materials necessary to commence log  
7 construction, which was to begin thirty (30) days from receipt of the last deposit  
8 pursuant to the Agreement, which would have been approximately February 9, 1995.  
9 At that time, log and shell construction was to begin but was not commenced until  
10 on or about March 15, 1995. Though, Wiarda and Lonetree set the pilasters for the  
11 deck to surround the basement and began construction of the deck before that time.  
12 The construction of the pilasters and deck was done incorrectly and not per plan(s).

13           The KURTHS were billed progressively according to how much  
14 work was performed. Lonetree would then subtract 30% of that invoice (credit on  
15 deposit) and apply that portion of the initial deposit to said amount. Consequently,  
16 Lonetree was always holding more money than work that was performed. Before  
17 any work could be started, the KURTHS were informed that they needed to have  
18 engineered plans, i.e., building plans stamped by a Utah civil/structural engineer  
19 which were required before a building permit could be obtained. Therefore, the  
20 KURTHS procured the basement plans and had them stamped and engineered by a  
21 licensed Utah engineer. Wiarda and Lonetree took care of the engineering for the  
22 Home plans that were obtained from New Pioneer Log Homes, Inc. in Weippe,  
23 Idaho, by contacting Antone Thompson, P.E., who submitted an Addendum to the  
24 plans. ROA 47 and 48. Wiarda contacted Antone Thompson to stamp the plans and  
25 review the engineering. Antone Thompson then gave the engineering and addendum  
26

1 to Wiarda, who obtained a permit from Chad Nay on behalf of the KURTHS.

2 Lonetree then began constructing the KURTHS Home, where  
3 Paul Schmitt was the lead man on the Home job for Lonetree. **Some, not all,** of the  
4 problems and inadequate work completed by Lonetree that was not in accordance  
5 with the Contract, building plans, or Uniform Building Code was the log staining,  
6 the placement of ungraded, decayed, slope of grain, high moisture content, and  
7 undersized logs in the Home, the seat cuts, connection of the logs, etc. This was  
8 verified by the testimony of Chad Nay, Antone Thompson, James Smith, Bob Kurth,  
9 Kurt Sparenberg, and Larry Pendleton, to name a few.

10 The KURTHS discussed some problems with the construction  
11 of the Home on or about Monday, June 19, 1995, with Paul Schmitt, project  
12 superintendent for Lonetree. Wiarda and Lonetree never told the KURTHS the logs  
13 were not graded and no certificate of compliance had been obtained. Testimony was  
14 given by Clayton Cheney that on or about September 4, 1995, the KURTHS met  
15 with Wiarda, Lonetree and Clayton Cheney to try and resolve their differences, and  
16 at that time, the KURTHS were willing to use Lonetree to complete the job if they  
17 would repair/correct the problems. Mr. Cheney testified that offers to resolve the  
18 matter were made and that the log railing was not in compliance with the building  
19 code, that the staining job would not have been acceptable to him and that  
20 Wiarda/Lonetree asked him to lien the KURTHS' Home. The KURTHS' Home and  
21 real property had been liened on or about October 23, 1995, by Wiarda, individually,  
22 and Lonetree. ROA 1513, 1578, 1579 and 1580. Wiarda testified that he filed the  
23 lien to force the KURTHS to pay the amounts claimed due. ROA 1614. It was the  
24 only job they ever liened and Wiarda testified he knew that the KURTHS were  
25 trying to close their financing at the time and liened them nonetheless. The lien was

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1 not released until the KURTHS filed a Motion with the Court and paid a non-  
2 refundable amount for a surety bond in the approximate amount of \$14,676.00; the  
3 amount of the lien. ROA 198 and 199.

4           Testimony was presented that because of Lonetree's  
5 noncompliance, the KURTHS were forced to pay the sheet metal ironworkers in  
6 excess of approximately three thousand (\$3,000.00) dollars to repair the roof and lay  
7 the felt, along with paying another contractor (Kurt Sparenberg) in excess of  
8 \$40,000.00 to finish/re-work/repair the job. Additionally, Lonetree did not credit the  
9 KURTHS for the undersized and different material, rough-sawn fascia, insulation,  
10 etc.

11           The evidence showed that it was not until after Wiarda and  
12 Lonetree were off the Kurth Home job, it came to the KURTHS attention that the  
13 logs may not have been graded. The KURTHS called in James Smith of Timber  
14 Products Inspection, Inc., twice, who made two detailed reports of the log grading  
15 at the KURTHS' expense. ROA 322-324 and 410-415 Testimony was presented  
16 that the ungraded logs came from Logs, Inc., and Wiarda admitted he is an officer  
17 and shareholder of Logs, Inc. Logs, Inc. performed the sole milling operation(s) for  
18 the Kurth logs, pursuant to Wiarda's request/order. Additionally, testimony was  
19 presented that Logs, Inc. was using CMB Golden's grading stamps and that those  
20 stamps were not in effect at the time the logs were ordered until approximately one-  
21 half of the roof was completed. Nevertheless, Wiarda never informed the KURTHS  
22 that the logs should be graded by a licensed grader, and even refused to replace  
23 certain logs that were decayed when they were brought to his attention. Testimony  
24 was also presented that Wiarda and Lonetree knew the laws of the state of Utah, and  
25 Iron County, required graded logs. Chad Nay testified that such a requirement is set  
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1 forth in the 91 Uniform Building Code and Wiarda and Lonetree knew he required  
2 such.

3           The plans for the Home and engineering called for 12" logs, and  
4 to be engineered for a 30 pound snow load. Nevertheless, Wiarda/Lonetree never  
5 ordered them and ordered 9" logs in their place even though the contract was not  
6 amended and no credit for the reduction in size of the logs was ever given.  
7 Testimony was presented that the Contract did not call for 9" or 7" logs, but that is  
8 how Wiarda/Lonetree calculated their bid before the Contract was even written.  
9 Lonetree wrote the Contract so any ambiguities are construed against Lonetree. This  
10 is a small statement of facts as to what transpired during the course of events and  
11 trial of this matter. See the entire Trial Transcript of the Record on Appeal.

12           After an approximate two week jury trial, the jury reached a verdict  
13 on or about February 5, 1998. The Appellant Wiarda, and Lonetree filed various  
14 post-trial motions objecting to the Verdict on February 12, 1998. The motions  
15 included a Motion to Amend the Jury Verdict, Motion For Judgment  
16 Notwithstanding the Verdict, Motion For New Trial, **Objection to Plaintiffs'**  
17 **Award of Attorney's Fees**, and Motion to Set the Amount of Supersedeas Bond on  
18 Appeal. Wiarda also filed a Memorandum in Support of Various Post-Trial Motions  
19 on February 12, 1998.

20           The Appellees KURTHS filed an **Opposition to Defendants' Post-**  
21 **Trial Motions For a New Trial, For Judgment Notwithstanding the Verdict, To**  
22 **Amend the Jury Verdict, and Objection to an Award of Attorney Fees** on March  
23 6, 1998. These post-trial motions were to be heard on March 24, 1998. Judge  
24 Braithwaite of the Fifth Judicial District Court had not entered the Judgment on  
25 Verdict as he was waiting to determine the outcome of the post-trial motions.

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1           While considering the post-trial motions and the KURTHS  
2 Opposition thereto, and before entering the Judgment on Verdict, the court  
3 considered the **Memorandum of Costs and Disbursements**, which was filed by the  
4 KURTHS on or about March 6, 1998, the **Affidavit of Robert O. Kurth, Jr., in**  
5 **Support of Award of Attorney's Fees**, which was filed on or about March 6, 1998,  
6 along with the **Affidavit of Willard Bishop in support of award of attorney's fees**,  
7 which was filed on or about February 11, 1998. See Wiarda's Addendum Nos. 14a,  
8 4b and 4c.

9           On March 24, 1998, Judge Braithwaite heard argument from counsel  
10 for all parties and entered a decision denying the Post-Trial Motions. As such, Judge  
11 Braithwaite entered and **filed the Judgment on Verdict on March 24, 1998**, since  
12 the post-trial motions were determined. See Wiarda's Addendum No. 1a. The  
13 Judgment on Verdict was the "final order" disposing of the post-trial motions and  
14 entering a Judgment in the case. The Judgment on Verdict upheld the Jury Verdict  
15 in this matter for the KURTHS and against Lonetree as follows: \$545,000.00 for  
16 breach of contract, breach of the implied covenant of good faith and fair dealing,  
17 negligence, negligence per se, and breach of warranty; \$120,000.00 for fraud or  
18 misrepresentation; and \$80,000.00 for punitive damages, for a total of \$745,000.00.  
19 Further, on or about March 24, 1998, the district court also entered an Order granting  
20 the KURTHS attorney's fees and costs against Lonetree and Wiarda and merely  
21 wanted to further review the matter to determine the amount, and any such offsets  
22 to be awarded.

23           The **Judgment on Verdict** provides in paragraph 7 on page 3 that "all  
24 claims of Daniel R. Wiarda . . . pertaining to mechanic's lien . . . against Plaintiffs  
25 [KURTHS]. . . should be and they hereby are, dismissed with prejudice and upon the  
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1 merits." Further, paragraph 10 on page 4 provides:

2 That Plaintiffs [KURTHS], having  
3 prevailed in Defendants' [Wiarda's]  
4 action to enforce a mechanic's lien, are  
5 entitled to an award of reasonable  
6 attorney fees pursuant to UCA 38-1-18  
(1953, as amended), the same to be fixed  
by the Court and taxed as costs upon  
appropriate application.

7 See Wiarda's Addendum No. 1a. After the Fifth District Court for Iron County,  
8 Utah, entered a **JUDGMENT ON VERDICT** filed **March 24, 1998**, the court  
9 then entered the **MEMORANDUM DECISION** filed **April 7, 1998**, in favor of  
10 the KURTHS and against Wiarda and Lonetree as Wiarda did not prevail on his  
11 breach of contract claim and foreclosure of mechanic's lien against the KURTHS.  
12 See Wiarda's Addendum Nos. 1a and 2a.

13 The KURTHS received the **Memorandum Decision** instructing them  
14 to prepare an Order and serve such on the opposing counsel and did so, along with  
15 a letter dated April 17, 1998, which was also sent via facsimile. Counsel for Wiarda  
16 never contacted the KURTHS' counsel and simply filed an untimely Objection on  
17 or about April 21, 1998, which was not mailed until on or about April 23, 1998. In  
18 the interim, the court filed the **Findings of Fact, Conclusions of Law and Order**  
19 **on April 24, 1998**. Said Findings of Fact provided that the KURTHS could submit  
20 further costs for consideration. See Wiarda's Addendum No. 2b. The KURTHS did  
21 so and submitted a new order.

22 The court entered a final **Order with Findings of Fact and**  
23 **Conclusions of Law**, which was signed and filed on June 17, 1998, by the  
24 Honorable Robert T. Braithwaite, in and for the Fifth Judicial District Court, Iron  
25 County, State of Utah, which granted an award of attorney's fees and costs in  
26

1 favor of Appellees KURTHS against Wiarda. See Wiarda's Addendum No. 2c.  
2 Previously, the court considered motions, oppositions, etc., on or about March 24,  
3 1998, and the matter was then taken under advisement after briefing by all Parties  
4 on or about May 19, 1998. See Wiarda's Addendum No. 2c. Consequently, the  
5 district court entered judgment in favor of Appellees KURTHS and against  
6 **Wiarda**, by an **Order with Findings of Fact and Conclusions of Law**, which  
7 was signed and filed on June 17, 1998. See Wiarda's Addendum No. 2c. This  
8 Order dealt with the award of attorney's fees and costs against Wiarda, which  
9 allegedly is the subject of this Appeal according to the Brief filed by Wiarda.

10 On or about July 17, 1998, Wiarda filed his Notice of Appeal. The  
11 Kurths filed a Motion to Dismiss Appeal, along with a Memorandum of Points  
12 and Authorities in Support of Appellees/Plaintiffs Motion to Dismiss Appeal, on  
13 or about March 5, 1999, for lack of jurisdiction for failing to designate the  
14 judgment, order, or part thereof, from which the appeal was taken, in the Notice  
15 of Appeal. This Motion is renewed for the Court's consideration.

16  
17 **IV.**  
**SUMMARY OF ARGUMENT(S)**

18 This Appeal is apparently based on the decision by Judge Robert T.  
19 Braithwaite in the Fifth Judicial District Court, Iron County, State of Utah,  
20 allowing an award for attorney's fees and costs in favor of the KURTHS and  
21 against Wiarda. The KURTHS state that the appropriate findings were made by  
22 the district court and the court had the discretion to award attorney's fees and  
23 costs against both Wiarda and Lonetree for filing the mechanic's lien and not  
24 prevailing on their claim against the KURTHS in accordance with Section 38-1-  
25 18, Utah Code Annotated. Further, the KURTHS allege that attorney's fees and  
26



1 costs should be awarded them for having to defend this appeal pursuant to Section  
2 38-1-18, Utah Code Annotated.

3  
4 **V.**  
5 **ARGUMENT(S)**

6 **1. ATTORNEY'S FEES WERE PROPERLY AWARDED IN FAVOR OF**  
7 **THE KURTHS AND AGAINST DANIEL R. WIARDA, AS THE KURTHS**  
8 **PREVAILED IN THEIR DEFENSE OF THE MECHANIC'S LIEN AND**  
9 **COMPLAINT TO FORECLOSE SUCH.**

10 In Valcarce vs. Fitzgerald, 961 P.2d 305, 316 (Utah 1998), the Court  
11 held that "The standard of review on appeal of a trial court's award of attorney  
12 fees is 'patent error or clear abuse of discretion.'" See City Consumer Serv., Inc.  
13 vs. Peters, 815 P.2d 234, 240 (Utah 1991) quoting Beckstrom v. Beckstrom, 578  
14 P.2d 520, 524 (Utah 1978). The Court went on to state that the trial court's  
15 discretion in determining the amount of a reasonable attorney fee "arises from the  
16 fact that it is in a better position than an appellate court to gauge the quality and  
17 efficiency of the representation and the complexity of the litigation."

18 In Lorin Pennington vs. Allstate Insurance Co., 973 P.2d 932, 939  
19 (Utah 1998), the Utah Supreme Court affirmed an award of attorney's fees and  
20 costs to Allstate given by the trial court as the trial court considered evidence of  
21 the fees and costs, along with any and all objections of the opposing party before  
22 awarding such. That is exactly what happened in this matter. The standard  
23 enunciated in Pennington was that an award of attorney's fees and costs would be  
24 upheld "unless the trial court abused its discretion". Further, the Court held in  
25 Petty Investment Company v. Miller, 576 P.2d 883 (Utah 1978) that a plaintiff who  
26 successfully defended against the defendant's counterclaim seeking to foreclose a  
mechanic's lien was entitled to recover attorney's fees.

1           The district court determined as a matter of law that Section 38-1-18  
2 of the Utah Code Annotated provides for an award of attorney's fees to the  
3 prevailing party in a mechanic's lien action. UCA 38-1-18 provides:

4           In any action brought to enforce any lien under this  
5 chapter the successful party shall be entitled to recover  
6 a reasonable attorney's fee, to be fixed by the court,  
7 which shall be taxed as costs in the action.

8           The Court of Appeals has agreed in other cases that attorney's fees shall be awarded  
9 to a prevailing party in a mechanic's lien action pursuant to the statute. See Dixie  
10 State Bank vs. Bracken, 764 P.2d 985, 988 (Utah 1988), see also Golden Key  
11 Realty, Inc. v. Mantas, 699 P.2d 730, 734 (Utah 1985); Turtle Management, Inc.  
12 v. Haggis Management, Inc., 645 P.2d 667, 671 (Utah 1982); see Utah Code Ann.  
13 @ 78-27-56 (1987).

14           The Court of Appeals in Bailey-Allen Company, Inc. v. Kurzet, 876  
15 P.2d 421 (Utah App. 1994), held that in most cases, attorney fees are appropriately  
16 awarded only if authorized by statute or contract. Though, the Mechanics' Lien  
17 statute provides: "In any action brought to enforce any lien under this chapter the  
18 successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed  
19 by the court, which shall be taxed as costs in the action." Utah Code Ann. @ 38-1-18  
20 (1988)(emphasis added). A lien foreclosure action satisfies these requirements and  
21 attorney's fees should be awarded the prevailing party. See Rotta v. Hawk, 756 P.2d  
22 713 (Utah App. 1988). Furthermore, the Court held in Palombi v. D & C Builders,  
23 22 Utah 2d 297, 300-01, 452 P.2d 325, 327-28 (1969), that benefit of attorney fees  
24 under the statute is conferred upon the successful party, which may include the party  
25 who defended against the lien. See also Reeves v. Steinfeldt, 915 P.2d 1073 (Utah  
26 App. 1996).

          The mechanic's lien filed by Wiarda was based on an alleged breach

1 of contract and unjust enrichment for monies owed Wiarda. Wiarda filed a  
2 Complaint to foreclose the mechanic's lien based on the breach of contract. The jury  
3 determined that the KURTHS were not liable to Wiarda for breach of contract.  
4 Consequently, the KURTHS are the successful party and are entitled to attorney's  
5 fees as were awarded by the district court.

6  
7 **2. THE DISTRICT COURT PROPERLY AWARDED ATTORNEY'S**  
8 **FEES AND COSTS TO THE KURTHS FOR THEIR DEFENSE OF THE**  
9 **MECHANIC'S LIEN FILED AND PROSECUTED BY WIARDA.**

10 Appellant Wiarda argues that no mechanic's lien existed at the time  
11 of trial so that attorney's fees should not have been awarded. Though, Wiarda  
12 admits a mechanic's lien, Notice of Lis Pendens, and Verified Complaint to  
13 foreclose such was filed, and said case was consolidated with case no.  
14 950500549. Testimony was adduced at the trial that the Notice of Lien (Exhibit  
15 P37) for the amount of \$14,676.00 was signed by Dan Wiarda doing business as  
16 Lonetree Log Homes, and was filed or recorded on or about October 23, 1995.  
17 ROA 194, 195 and 1637. Wiarda admitted that he filed the mechanic's lien.  
18 ROA 1513, 1578, 1579 and 1580. Also, Wiarda testified that he filed the lien to  
19 force the KURTHS to pay the amounts he claimed were due. ROA 1614.

20 A Notice of Lis Pendens (P37) was filed on or about October 26,  
21 1995, with a legal caption listing both Dan Wiarda and Lonetree Services, Inc.  
22 ROA 196, 197, 1637 and 1638. Further, a Verified Complaint (P258) listing  
23 Wiarda as a Plaintiff was filed on or about October 26, 1995, in which Wiarda  
24 signed a Verification of Plaintiff as "I, Dan Wiarda, individually and as president  
25 of Lonetree Services, Inc. doing business as Lonetree Log Homes . . . ." ROA  
26 1632, 1633.

1 Further, Appellant Wiarda fails to recognize that the KURTHS were  
2 forced to file a **Motion to Expunge Lien, or in the Alternative, to Release the**  
3 **Mechanic's Lien and Lis Pendens and Allow the Plaintiffs to Post a Bond**  
4 **with the Court** on or about July 23, 1996. Said Motion was heard by the district  
5 court on or about the 11th day of June, 1996, and was granted. The Order  
6 granting such released the Notice of Lien (mechanic's lien) dated October 12,  
7 1995 and recorded October 23, 1995 as Entry No. 00356460 in Book 00545 at  
8 Pages 600-602 of the Official Iron County Records, and the Notice of Lis  
9 Pendens recorded December 1, 1995 as Entry No. 357919 in Book 549 at Pages  
10 258-259 of Official Iron County Records, from the County records. See  
11 Wiarda's Addendum No. 3a.

12 The release of the lien was necessary so that the KURTHS could  
13 close their financing. They suffered damages from not being able to close the  
14 loan prior. Further, the district court required the KURTHS to either post a bond  
15 or cash in lawful U.S. tender in the amount of \$14,676.00 with the clerk of the  
16 court to be held in an interest bearing account **until the case was otherwise**  
17 **resolved**, and no later than the close of the trial. See Wiarda's Addendum No.  
18 3a. A certificate of bond (Exhibit P38) in the amount of \$14,676.00 was  
19 introduced to show that a bond had to be posted to release the lien. ROA 198 and  
20 199. This bond was not released until the Jury Verdict was filed. Moreover, the  
21 KURTHS had to pay a premium for the bond, which was considered in the costs  
22 calculation. See Wiarda's Addendum No. 4c.

23 As such, the lien was only released upon a court order; not  
24 voluntarily, and the KURTHS were liable for a bond amount (and possibly more)  
25 until that was released after the conclusion of the trial when the jury ruled in their  
26

1 favor. Moreover, counsel for Wiarda never argued during jury instructions that  
2 the mechanic's lien was not an issue since it was released via posting of a bond.  
3 Wiarda testified that he understood the KURTHS filed the bond releasing the lien  
4 so that they could get their financing. ROA 1596. Wiarda also stated that the  
5 bond guaranteed payment to him if it was determined that the KURTHS owed the  
6 debt to Wiarda. ROA 1596. Consequently, the issue of the mechanic's lien and  
7 filing thereof was present until the conclusion of the trial. Hence, Wiarda's  
8 argument is patently meritless.

9  
10 **3. THE DISTRICT COURT MADE SPECIFIC FINDINGS IN**  
11 **DETERMINING THE AMOUNT OF ATTORNEY'S FEES AND COSTS TO**  
12 **AWARD, WHICH SHOULD NOT BE DISTURBED ABSENT A CLEAR**  
13 **ABUSE OF DISCRETION.**

14 The Court of Appeals has held that an award of attorney's fees by  
15 a district court where the issues were inextricably intertwined will be upheld on  
16 appeal. See Boyd J. Brown vs. David K. Richards & Company, 366 Utah Adv.  
17 Rep. 28 (Utah App. 1999), which provides:

18 We have awarded fees to a prevailing party even though  
19 some of the fees may not have been incurred on strictly  
20 compensable issues, because proof of the compensable and  
21 non-compensable claims overlapped. For example, in First  
22 General Services v. Perkins, 918 P.2d 480 (Utah Ct. App.  
23 1996), a subcontractor sought to foreclose a mechanics' lien  
24 against a homeowner, and the homeowner counterclaimed  
25 alleging negligent workmanship. See id. at 483. The  
26 subcontractor prevailed and sought recovery of its fees  
incurred in both the foreclosure of its lien and defense to the  
homeowner's counterclaim. See id. The trial court awarded  
fees on the foreclosure claim, but refused to award fees under  
the mechanics' lien statute for defense against the  
homeowner's counterclaim. See id.

On appeal, we reversed, holding that the subcontractor was  
entitled to fees both in pursuing its affirmative claims and  
defending against the counterclaim because the two were  
inextricably tied together. See id. at 486. In so holding, we

1 recognized that where the proof of a compensable claim and  
2 otherwise non-compensable claim are closely related and  
3 require proof of the same facts, a successful party is entitled  
to recover its fees incurred in proving all of the related facts.  
See id.

4 This is such a case as reflected in the Memorandum Decision where the court  
5 made particular findings that the cases and claims were inextricably intertwined.  
6 See Wiarda's Addendum No. 2a. Further, the district court made specific findings  
7 and even reduced the fees and required a hearing on some of the costs before they  
8 were awarded. As such, the attorney's fees and costs awarded were reasonable.

9 In J.V. Hatch Construction, Inc., vs. Michael Kampros, 971 P.2d 8,  
10 13 (Ct. App. 1998), the Court of Appeals held the following:

11 [T]he issue of attorney fees in a mechanics' lien suit is  
12 typically left for the trial court. See First Gen. Servs., 918  
13 P.2d at 487 (discussing mechanics' lien case and stating:  
14 "Normally, an award of attorney fees is a matter left to the  
15 trial court's sound discretion." (Citation omitted)). It follows  
that the proof necessary for an award of attorney fees in a  
mechanics' lien cause of action need not be introduced until  
after the court has made its decision and "one party has  
'prevailed.'" See Meadowbrook, 959 P.2d at 118.

16 See Dixie State Bank vs. Bracken, 764 P.2d 985, 990 (Utah 1988) (where the trial  
17 court found the \$4,847.50 fee requested by the bank's counsel to be "fair and  
18 reasonable" in the circumstances). The Court went on to hold that:

19 [I]f reasonable fees are recoverable by contract or statute and  
20 the trial court considers all pertinent factors and determines  
21 in the exercise of its sound discretion that a specific sum is  
22 a reasonable fee, it is a mistake of law to award less than that  
23 amount. Stated another way, the trial court has broad  
24 discretion in determining what constitutes a reasonable fee,  
and we will consider that determination against an  
abuse-of-discretion standard. However, once the trial court  
makes that determination in the exercise of its sound  
discretion, it commits legal error if it awards less than the  
reasonable fee to which the successful litigant is entitled.

25 Rule 4-505, Code of Judicial Administration, governs the award of  
26

1 attorney's fees and states as follows concerning the application for such:

2 (1) Affidavits in support of an award of  
3 attorneys' fees must be filed with the  
4 court and set forth specifically the legal  
5 basis for the award, the nature of the  
6 work performed by the attorney, the  
7 number of hours spent to prosecute the  
claim to judgment, or the time spent in  
pursuing the matter to the stage for which  
attorneys' fees are claimed, and affirm the  
reasonableness of the fees for comparable  
legal services.

8 See Dixie State Bank vs. Bracken, 764 P.2d 985, 990 (Utah 1988).

9 To further determine whether claimed attorney's fees are reasonable,  
10 four factors must be considered:

- 11 1. What legal work was actually performed?
- 12 2. How much of the work performed was reasonably  
13 necessary to adequately prosecute the matter?
- 14 3. Is the attorney's billing rate consistent with the rates  
15 customarily charged in the locality for similar services?  
16 and
- 17 4. Are there circumstances which require consideration of  
18 additional factors, including those listed in the Code of  
19 Professional Responsibility?

20 See Dixie State Bank vs. Bracken, 764 P.2d 985, 990 (Utah 1988) (If reasonable fees  
21 are recoverable by statute or contract, it is a mistake of law to award less than that  
22 amount). See also Saunders vs. Sharp, 818 P.2d 574, 579 (Utah App. 1991). In  
23 making such an award, it is necessary for the court to make findings of fact to  
24 support such. Saunders, 818 P.2d at 580.

25 Other factors which may be considered in determining a reasonable fee  
26 are: the difficulty of the litigation, the efficiency of the attorneys in presenting the  
case; the fee customarily charged in the locality for similar services; the amount  
involved in the case; the result attained; the expertise and experience of the attorneys

1 involved; the amount in controversy; the extent of services rendered; the novelty and  
2 difficulty of the issues involved; the overall result achieved; and the necessity of  
3 initiating the lawsuit. Dixie, 764 P.2d at 989.

4           The Affidavits of Appellees KURTHS counsel in the district court,  
5 Willard R. Bishop and Robert O. Kurth, Jr., comply with the guidelines required by  
6 Utah law and were awarded pursuant to the Memorandum Decision filed April 7,  
7 1998, and the Findings of Fact, Conclusions of Law, and Order filed April 24, 1998.  
8 See Wiarda's Addendum Nos. 2a, 4a and 4b. The district court determined what fees  
9 it believed were reasonable. Further, Wiarda was not only given an offset for the  
10 attorney's fees awarded, but was also given a further reduction of an already reduced  
11 bill. See Wiarda's Addendum No. 2a. The Appellees KURTHS believe that only  
12 one offset should have been granted and it was unfair to grant an additional offset  
13 when the KURTHS' counsel already provided the district court with a reduction of  
14 their fees, which the court accepted. If there is to be a further offset, then the amount  
15 reduced by the Court should also be reduced by a percentage of the total bill. For  
16 example, the district court ordered as follows:

17           11. Mr. Kurth's accounting states he billed Plaintiffs in the  
18 amount of \$16,743.50 for professional services up to and  
19 including March 4, 1997, twenty-seven percent of which  
20 amounts to \$4,520.61. In addition to this amount are the fees  
21 accrued on the remaining causes of action, which amount to  
\$14,261.13 (i.e., \$31,004.63, less \$16,743.50). THEREFORE,  
attorney's fees should be awarded to Plaintiff for Mr. Kurth's  
services in the amount of \$18,781.74 (i.e., \$4,520.61 plus  
\$14,261.13).

22           12. Mr. Bishop's accounting states he billed Plaintiffs in the  
23 amount of \$1,173.00 for professional services up to and  
24 including March 4, 1997, twenty-seven percent of which  
25 amounts to \$316.71. In addition to this amount are the fees  
26 accrued on the remaining causes of action, which amount to  
\$6,488.54 (i.e., \$7,661.54, less \$1,173.00). Therefore,  
attorney's fees should be awarded to Plaintiff for Mr. Bishop's  
services in the amount of \$6,805.25 (i.e., \$316.71 plus



1                                   \$6,488.54).

2                                   13. To summarize, Plaintiffs are entitled to attorney's fees,  
3                                   figured as follows:

4                                   Mr. Kurth                   \$18,781.74  
5                                   Mr. Bishop                 6,805.25  
6                                   Mr. Jackson (offset)   (2,130.00)  
7                                   Net attorney's fees: \$23,456.99

8                                   See Wiarda's Addendum Nos. 2a, 2b and 2c.

9                                   In other words, Mr. Kurth's attorney's fees were voluntarily reduced  
10                                  approximately 25%, (\$41,339.50 less 25% = \$31,004.63). The further reduction by  
11                                  the Court of \$16,743.50 was a total amount billed through a certain date that came  
12                                  *off the amount already voluntarily reduced by 25%. To be equitable, the further*  
13                                  reduction should only be 75% which is \$12,557.63. That is because the other  
14                                  amount was taken from the total attorney's fees incurred at that time; not a reduced  
15                                  amount. As such, 27% of \$12,557.63 equals \$3,390.56. Therefore, attorney's fees  
16                                  for Mr. Kurth would be **\$21,837.56** (\$31,004.63 less \$12,557.63 plus \$3,390.56).

17                                  Concerning Mr. Bishop's attorney's fees: He voluntarily reduced  
18                                  approximately 50%, (\$15,323.07 less 50% = \$7,661.54). The further reduction by  
19                                  the Court of \$1,173.00 was a total amount billed through a certain date that came off  
20                                  the amount already voluntarily reduced by 50%. To be equitable, the further  
21                                  reduction should only be 50% which is \$586.50. That is because the other amount  
22                                  was taken from the total attorney's fees incurred at that time; not a reduced amount.  
23                                  As such, 27% of \$586.50 equals \$158.36. Therefore, attorney's fees for Mr. Bishop  
24                                  would be **\$7,233.40** (\$7,661.54 less \$586.50 plus \$158.36).

25                                  Further, the Court correctly states that approximately 27% of the  
26                                  original claims for relief remained after the hearing. Nevertheless, the Court is  
                                  giving the Defendants a credit twice by further reducing the attorney's fees and then  
                                  by offsetting such with the \$2,130.00 sanction. Additionally, the Court should note

1 that the 27% of claims remaining encompassed some of the smaller claims for relief,  
2 and that the claims of relief for breach of contract, negligence, negligence per se,  
3 breach of warranty, fraud and/or misrepresentation, breach of the implied covenant  
4 of good faith and fair dealing, and punitive damages, along with the Defendants'  
5 causes of action, were the primary claims for relief and what the case revolved  
6 around. Basically, the 27% remaining were what was really being litigated and what  
7 the Defendants' always tried to unsuccessfully dismiss during the course of the  
8 prosecution of this matter.

9 Other factors which may be considered in determining a reasonable fee  
10 are: the difficulty of the litigation, the efficiency of the attorneys in presenting the  
11 case; the fee customarily charged in the locality for similar services; the amount  
12 involved in the case; the result attained; the expertise and experience of the attorneys  
13 involved; the amount in controversy; the extent of services rendered; the novelty and  
14 difficulty of the issues involved; the overall result achieved; and the necessity of  
15 initiating the lawsuit. Dixie, 764 P.2d at 989. The Affidavits of Willard R. Bishop  
16 and Robert O. Kurth, Jr., comply with the guidelines required by Utah law and  
17 should be awarded. See Wiarda's Addendum Nos. 4a and 4b.

18 The costs included in the Memorandum of Costs and Disbursements  
19 were properly taxed as costs against Wiarda pursuant to Rule 54 of the Utah Rules  
20 of Civil Procedure. The costs to be awarded are those expenses required to pursue  
21 the action such as filing fees, service of process expenses, jury and witness fees,  
22 bond premiums, deposition expenses, etc. The deposition costs claimed were all  
23 used at the trial of this matter for impeachment, cross examination, and/or to prepare  
24 for trial and were necessarily incurred to protect the KURTHS' rights. As such,  
25 those costs are allowable. See Lawson Supply Co. V. General Plumbing & Heating

1 Co., 493 P.2d 607 (Utah 1972); see also Highland Constr. Co. v. Union Pac. R.R.,  
2 683 P.2d 1042 (Utah 1984) (deposition costs are allowable where the development  
3 of a case is of such a complex nature that discovery cannot be accomplished through  
4 the less expensive methods of discovery); accord Lloyd's Unlimited v. Nature's Way  
5 Mktg. Ltd., 753 P.2d 507 (Utah Ct. App. 1988) (determining whether deposition  
6 costs are taxable is within the sound discretion of the trial court).

7 Wiarda argued at the district court that the KURTHS should not  
8 receive their attorney's fees in this matter because the judgment was already high  
9 enough. Thus far, the KURTHS have not been able to collect a penny of the Verdict  
10 and may never collect a penny as Lonetree Services Inc. dba Lonetree Log Homes  
11 filed for relief under chapter 7 of the bankruptcy code on or about September 14,  
12 1998, in case no. 98C29831.

13 **4. THERE IS ABSOLUTELY NO EVIDENCE CONTAINED IN THE**  
14 **RECORD ON APPEAL THAT THE JURY ASSUMED ITS AWARD OF**  
**DAMAGES INCLUDED ATTORNEY'S FEES.**

15 Wiarda claims that it is fair to assume the jury considered attorney's  
16 fees in determining its award in favor of the KURTHS. That is meritless. There is  
17 absolutely nothing in the record on appeal to support that assertion, and it is merely  
18 a red herring and frivolous argument, which should not even be considered by the  
19 Court. Further, the case cited by Wiarda in support of this red herring argument is  
20 completely inapposite to the case at hand. Additionally, no jury instruction  
21 concerning the award of attorney's fees was even presented for their consideration.

22 **5. THE DISTRICT COURT'S ORDER WITH FINDINGS OF FACT AND**  
23 **CONCLUSIONS OF LAW DATED JUNE 17, 1998, IS CONSISTENT WITH**  
24 **ANY PRIOR ORDERS, DECISIONS, AND THE FINDINGS DETERMINED**  
**AT THE TRIAL, HEARING AND CONSIDERATION OF THIS**  
**MATTER.**

25 The Appellant Wiarda claims that the KURTHS are not entitled to  
26

1 attorney's fees because the jury did not specifically find in their favor for a wrongful  
2 lien against Wiarda. Jury Instruction no. 52 set forth the requirements to show a  
3 wrongful lien, which are:

- 4 1. The defendants filed a claim of lien knowing it to be false or  
5 excessive;
- 6 2. That if money is owed, the property owner, the plaintiffs, have  
7 tendered the proper amount for the release thereof;
- 8 3. That the tender was rejected and the lienor defendants refused  
9 to release the lien; and
- 10 4. That the owner plaintiffs have suffered damages therefrom.

11 All these requirements must be met to determine a lien was wrongful.

12 In other words, that Wiarda filed a lien knowing it to be false or excessive, that the  
13 KURTHS tendered the lien amount, that Wiarda rejected the tender, and that the  
14 KURTHS suffered damages therefrom.

15 As such, a cause of action for a wrongful lien is not applicable as to  
16 whether or not the KURTHS prevailed upon the mechanic's lien claim because the  
17 KURTHS would only have to show that the mechanic's lien was filed, and that they  
18 did not owe the money to prevail on the mechanic's lien; which was proven at trial.  
19 Further, the wrongful lien action is not even applicable to attorney's fees and was  
20 merely an additional cause of action brought by the KURTHS in their Counterclaim  
21 against Wiarda. The jury instruction specifically explained such.

22 The wrongful lien cause of action arises from the case of Wagstaff vs.  
23 Remco, Inc., 540 P.2d 931, 934 (Utah 1975) and UCA 38-9-1 (1953, as amended),  
24 which provides for penalties against a person for filing a wrongful lien. Such  
25 penalties are \$1,000.00 or treble actual damages, and for reasonable attorney's fees  
26 and costs. Specifically, Sec. 38-9-1 of the Utah Code Annotated states "This  
chapter is not intended to be applicable to mechanic' or materialmen's liens".

1 Counsel for the KURTHS requested a jury instruction concerning  
2 attorney's fees and the court concluded that it would determine attorney's fees after  
3 the Verdict, as that was in the court's discretion to do so. It is correct that a jury  
4 instruction (#52) was for a claim of wrongful lien pursuant to UCA 38-9-1, and  
5 Wagstaff vs. Remco, Inc., 540 P.2d 931, 934 (Utah 1975). ROA 2030 ll. 12-25,  
6 and 2031. Nevertheless, as shown herein, the wrongful lien claim is wholly  
7 inapplicable to mechanic's lien(s).

8 Counsel for the KURTHS informed the court that the awarding of  
9 attorney's fees is a different instruction relating to the mechanic's lien statute, and  
10 proposed such as jury instruction #53. ROA 2032 ll. 10-25. Counsel for Wiarda  
11 then responded to the court that "attorney fees isn't really an issue in this case,  
12 Your Honor." ROA 2032 l. 25, and 2033 ll. 1-25. There was then some colloquy  
13 between counsel for both Parties and the court, and it was determined that **the**  
14 **court would determine attorney's fees on the basis of the mechanic's lien per**  
15 **a hearing before the court after the rendering of the verdict.** ROA 2033 ll.  
16 1-25. As such, the mechanic's lien/attorney's fees instruction was not given. This  
17 was completely proper as attorney's fees can be determined during or after a trial by  
18 the district court judge. See J.V. Hatch Construction, Inc., vs. Michael Kampros,  
19 971 P.2d 8, 13 (Ct. App. 1998).

20 Additionally, the jury determined that the approximate \$14,676.00, or  
21 in the alternative \$40,000.00, mechanic's lien arising from Wiarda's and Lonetree's  
22 claim for breach of contract was not valid and awarded them no damages. Jury  
23 Instruction no. 54 set forth Wiarda's claim for breach of contract against the  
24 KURTHS for the KURTHS alleged failure to pay for services rendered in the  
25 construction of their log Home. ROA 2151 and 2152. The mechanic's lien was filed  
26

1 against the KURTHS' Home based on Wiarda's alleged breach of contract by the  
2 KURTHS. Nevertheless, the jury did not award Wiarda anything. Therefore, the  
3 KURTHS' attorney's fees should be paid as the successful party in defense of the  
4 mechanic's lien, and Wiarda should be responsible for such.

5 In support thereof, the Memorandum Decision and paragraph 7 of the  
6 Court's Findings of Fact, Conclusions of Law, and Order, states:

7 7. The Defendants' [Wiarda's] objection to the award of  
8 Plaintiffs' attorney fees was based on the jury's determination  
9 that Defendants' filing of the mechanic's lien was not wrongful.  
10 In addition, Defendants claimed that, given the amount of the  
11 jury verdict, an additional award of attorney fees would be  
12 excessive.

13 8. Section 38-1-18 of the Utah Code Annotated (U.C.A.)  
14 states: "[I]n any action brought to enforce any lien under this  
15 chapter the successful party shall be entitled to recover a  
16 reasonable attorney's fee, to be fixed by the court, which shall  
17 be taxed as costs in the action." THIS COURT FINDS that, in  
18 dismissing the claim against Plaintiffs [KURTHS] pertaining  
19 to the mechanic's lien, the Plaintiffs [KURTHS] are the  
20 successful party and are therefore statutorily entitled to be  
21 awarded reasonable attorney's fees.

22 Therefore, the district court judge specifically considered these arguments before  
23 rendering his decision and he was in the best possible position to do so after  
24 presiding over the case for a couple of years, and a two week jury trial. It was/is not  
25 necessary to consider the non-issue raised by Wiarda of piercing the corporate veil,  
26 which is simply another red herring placed to confuse the issues.

**6. COSTS WERE PROPERLY AWARDED TO THE KURTHS.**

In the Memorandum Decision, along with the Findings of Fact,  
Conclusions of Law, and Order filed on April 24, 1998, the Court stated that it would  
review the appropriateness of Appellees' KURTHS expert witness fees for Antone  
Thompson and James Smith at such time as a breakdown for those fees was

1 provided. See Wiarda's Addendum Nos. 2a and 2b. The KURTHS provided the  
2 information and alleged that Mr. Smith's testimony was necessary for the prosecution  
3 and defense of this matter and his consultation in preparation for his testimony was  
4 an integral part of his testimony. Without such, Mr. Smith could not adequately  
5 testify. As such, the amount of at least \$2,045.45 was requested to be awarded  
6 against Wiarda.

7           Antone Thompson's bill for his testimony dated 2/18/98, was also  
8 provided to the district court for his consideration in awarding costs against Wiarda.  
9 Both Mr. Thompson's reports and video still shots were testified to by Wiarda's  
10 experts and were necessary in the prosecution and defense of this matter. Because  
11 of Mr. Coon's testimony, one of Wiarda's expert witnesses, it was necessary for the  
12 KURTHS to retain Mr. Thompson and expend the necessary sums for his testimony.  
13 Mr. Thompson charged the total sum of \$2,970.00 for his testimony, and the  
14 KURTHS requested that the sum of \$2,720.00 should be awarded against Wiarda.  
15 Both of these witnesses testified to the contract and compliance with such, along  
16 with other relevant items, which were all inextricably intertwined.

17           In Valcarce vs. Fitzgerald, 961 P.2d 305, 316 (Utah 1998), attorney's  
18 fees and costs were awarded when only attorney's fees were provided for by  
19 statute. The Court went on to state the following:

20           Rule 54(d) provides that costs are awarded as of course to a  
21 prevailing party and that the trial court is to assess costs  
22 based on a verified memorandum of costs, which must be  
23 filed by the successful party within five days after entry of  
24 judgment. Utah R. Civ. P. 54(d). The successful party must  
25 also serve a copy of the verified memorandum on the adverse  
26 party within the same time. The rule allows the adverse  
party seven days in which to object to the costs claimed.  
However, section 78-27-56, relied upon by the Fitzgerald  
parties in defense of the award, refers only to attorney fees,  
with no mention of "costs" recoverable under the statute.

1 In interpreting a statute, the court must look first to its plain  
2 language. See In re Worthen, 926 P.2d 853, 856 (Utah 1996).  
3 The trial court's memorandum decision states that the  
4 Fitzgerald parties moved the court, pursuant to section  
5 78-27-56, for attorney fees. The court then awarded them  
6 "costs along with fees." We do not interpret this as an  
attempt to expand section 78-27-56 beyond its terms to  
include "costs." Rather, we take it to be a reference to the  
generally understood meaning of "costs" in rule 54(d)(1) and  
to the fact that the prevailing party is to recover them as of  
course. Utah R. Civ. P. 54(d).

7 Subsequently, the KURTHS were the prevailing party against Wiarda on the  
8 mechanic's lien claim, and are therefor entitled to costs.

9  
10 **VI.**  
**CONCLUSION**

11 In light of the foregoing, it can be determined that the district court  
12 did not abuse its discretion in awarding attorney's fees and costs to the KURTHS.  
13 The KURTHS were clearly the prevailing party and were forced to undertake a  
14 complete and zealous defense to the mechanic's lien to protect their home. The  
15 mechanic's lien was filed by Wiarda, and the KURTHS prevailed on that claim.  
16 As such, the KURTHS should also be awarded attorney's fees and costs for the  
17 defense of this appeal. See Salmon vs. Davis County, 916 P.2d 890, 895 (Utah  
18 1996), which states as follows:

19 This court has interpreted attorney fee statutes broadly so as  
20 to award attorney fees on appeal where a statute initially  
21 authorizes them. . . . Richards v. Security Pacific National  
22 Bank, 849 P.2d 606,612 (Utah Ct. App. 1993), the court of  
23 appeals interpreted the provision for attorney fees under the  
24 Utah Mechanic's Liens Statute. The statute provided that in  
25 any action brought to enforce a lien, the successful party  
26 would be entitled to reasonable attorney fees. See Utah Code  
Ann. @ 38-1-18 (1988). The court of appeals concluded that  
an appeal from a suit brought to enforce a lien also qualifies  
as part of "an action" for the purposes of the statute.  
Richards, 849 P.2d at 612. See also American Federation of  
Government Employees, AFL-CIO, Local 3882 v. Federal  
Labor Relations Authority, 301 U.S. App. D.C. 293, 994  
F.2d 20 (D.C. Cir. 1993).



1 Accord J.V. Hatch Construction, Inc., vs. Michael Kampros, 971 P.2d 8, 15 (Ct.  
2 App. 1998), where the Court of Appeals held the following concerning the  
3 application for attorney's fees on appeal:

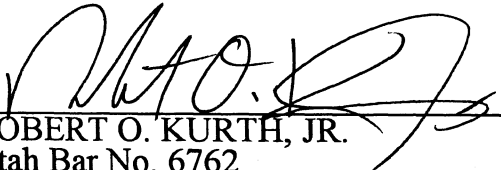
4 An appeal from a suit brought to enforce a [ mechanics' ] lien  
5 qualifies as part of 'an action' for the purposes of [section  
6 38-1-18]." Richards v. Security Pac. Nat'l Bank, 849 P.2d  
7 606, 612 (Utah App.), cert. denied, 859 P.2d 585 (Utah  
8 1993). Because Hatch is the prevailing party on appeal, it is  
9 entitled to its attorney fees incurred on appeal. See id.  
10 Kampros's request for attorney fees on appeal is denied.

11 WHEREFORE, Appellees, ROBERT KURTH and LAURA KURTH,  
12 individually, and as Trustees of THE KURTH REVOCABLE TRUST, respectfully  
13 request that the decision of the district court be upheld, and an Order entered  
14 awarding them attorney's fees, costs, and interest on the full amount. The KURTHS  
15 also respectfully request that this Court award them all of their attorney's fees and  
16 costs incurred, plus interest, in defending this appeal. Additionally, Appellees  
17 KURTHS request such other relief this Court deems appropriate..

18 DATED this 7<sup>th</sup> day of June, 1999.

19 Respectfully submitted by,

20 **KURTH & ASSOCIATES**

21   
22 ROBERT O. KURTH, JR.  
23 Utah Bar No. 6762  
24 Attorney for Appellees  
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**VII.**  
**CERTIFICATE OF SERVICE/MAILING**

I, Robert O. Kurth, Jr., state that on the 7th day of June, 1999, I served a true and correct copy of the above and foregoing **APPELLEES' BRIEF**, by placing a true and correct copy thereof in the U.S. Mail, first class, priority, postage fully prepaid thereon, and addressed to the following:

J. Bryan Jackson, Esq.  
P.O. Box 519  
Cedar City, Utah 84721-0519  
Attorney for Appellant

  
An employee of **KURTH & ASSOCIATES.**