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# The Recovery of Attorney Fees in Utah: A Procedural Primer<sup>1</sup> for Practitioners – Part I

By James E. Magleby

## I. INTRODUCTION

In 1984, the University of Utah Law Review published a symposium<sup>2</sup> which summarized the state of Utah law<sup>3</sup> on the recovery of attorney fees<sup>4</sup> which contained a brief discussion of the procedural aspects of the process.<sup>5</sup> Although Utah law on the subject has developed substantially since 1984, the procedural aspects of the recovery of attorney fees are often overlooked by courts and practitioners alike.<sup>6</sup> Accordingly, this article attempts to reduce the confusion by providing an overview of the procedural aspects of pleading and recovering attorney fees in Utah and surviving appellate challenge to the award.<sup>7</sup>

## II. PROCEDURAL REQUIREMENTS

### a. Pleading

Although it may appear obvious, practitioners have, on occasion, failed to request an award of attorney fees in the pleadings. Such an omission can have dire consequences, as a party who fails to raise the issue of attorney fees until late in the proceedings may be precluded from recovering fees at all. This position was first taken in *Leger Construction, Inc. v. Roberts, Inc.*,<sup>8</sup> where the court declined to award attorney fees because the statute under which fees were sought was not pled in the original pleadings.<sup>9</sup> The court noted that, at least with regard to a request for attorney fees under statutory authority, "one entitled [to attorney fees under a statute], in fairness, should make his claim known in his pleadings."<sup>10</sup> Although this statement was couched as mere observation,<sup>11</sup> the rule in practice is that attorney fees which are not requested in the pleadings will not be awarded.<sup>12</sup>

However, if the issue of attorney fees is raised before the trial court and the other party placed on notice, Utah courts appear willing to interpret the rules of procedure liberally to allow a fee award. In *Palombi v.*



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*D.C. Builders,*<sup>13</sup> the Utah Supreme Court upheld an award of attorney fees under the

mechanics lien statute, although the issue had not been raised in the original complaint.<sup>14</sup> In doing so, the Supreme Court ruled:

The fact that there was no specific pleading in that regard does not preclude such an award. It is indeed important that *the issue be raised and that the parties have full opportunity to meet it.* But when that is done, our rules indicate that there shall be liberality of procedure to reach the result which justice requires. Rule 1(a), [Utah Rules of Civil Procedure], provides that they shall be "liberally construed" to secure a "just . . . determination of every action and Rule 54(c)(1) provides ". . . every final judgment shall grant the relief to which the party . . . is entitled, even if the party has not demanded such relief in his pleadings."<sup>15</sup>

Other rules have been construed in similar manner to reach similar results. Rule 8(e) of the Utah Rules of Civil Procedure contains the "notice pleading" rule which provides that "no technical forms of pleadings or motions are required."<sup>16</sup> This rule has been applied to allow recovery of attorney fees where the opposing party was "clearly on notice" that fees were sought, albeit by imperfect pleading.<sup>17</sup> Trial courts have discretion to take evidence on attorney fees at trial under Utah Rule of Civil Procedure 15(b),<sup>18</sup> even if the parties did not raise the issue in the pleadings.<sup>19</sup> Nor do the pleadings limit the amount of fees recoverable,<sup>20</sup> unless they are awarded pursuant to a default judgment.<sup>21</sup>

From these cases, it appears that where a party has failed to request attorney fees in the initial pleadings, as long as "*the issue be raised and . . . the parties have full opportunity to meet it,*"<sup>22</sup> particularly where the opposing party is "clearly on notice,"<sup>23</sup> Utah courts will probably allow recovery of attorney fees despite a failure to con-

form to a specific pleading format. Therefore, a practitioner who has inadvertently failed to plead attorney fees, or is not entitled to do so until the case has progressed,<sup>24</sup> should (1) take steps to bring the issue before the court and (2) place opposing counsel on notice that fees are an issue.

In pleading attorney fees, practitioners must decide the grounds upon which attorney fees will be sought, whether they be statutory, contractual or equitable.<sup>25</sup> Next, the practitioner must decide the appropriate method for pleading the grounds upon which attorney fees are sought. The practice in Utah varies, with some preferring to request attorney fees in the prayer for relief, rather than as separate claim.<sup>26</sup> Intuitively, this may make sense as attorney fees are usually awarded after the conclusion of the lawsuit,<sup>27</sup> in temporal proximity to an award of damages. Another approach is to plead attorney fees as a separate claim.<sup>28</sup> This method seems particularly appropriate where the request is based upon a statute or other rule which requires the party requesting fees to produce proof on discrete issues.<sup>29</sup>

#### **b. Burden of Proof**

Once recovery of attorney fees is allowed,<sup>30</sup> "[a] party requesting an award of attorney fees has the burden of presenting evidence sufficient to support the award."<sup>31</sup> A party which does not provide such evidence, even if indisputably entitled to recover attorney fees, may not recover at all,<sup>32</sup> even if there is no disputed issue of material fact.<sup>33</sup>

Various types of evidence may be sufficient to meet this burden. Generally, "[s]ufficient evidence should include the hours spent on the case, the hourly rate charged for those hours, and the usual and customary rates for such work."<sup>34</sup> This evidence should probably be submitted by affidavit,<sup>35</sup> although testimony<sup>36</sup> by counsel for the party requesting attorney fees is allowed.<sup>37</sup> Practitioner should beware reliance solely upon their own opinion, however, as "[e]ven [if the] evidence is undisputed, the trial judge [is] not necessarily compelled to accept such self-interested testimony whole cloth and make . . . an award."<sup>38</sup>

The simplest way for a practitioner to meet the initial evidentiary burden is to file an affidavit in compliance with Rule 4-505 of the Utah Code of Judicial Administration. Rule 4-505, designed "[t]o establish

uniform criteria and a uniform format for affidavits in support of attorney[] fees,"<sup>39</sup> provides:

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

(2) The affidavit must also separately state hours by persons other than attorneys, for time spent, work completed and hourly rate billed.<sup>40</sup>

Although Rule 4-505 does not require the inclusion of an hourly rate for each attorney working on the case,<sup>41</sup> such information should probably also be included as "an hourly rate would likely be helpful to the court."<sup>42</sup>

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*“. . . the party requesting attorney fees is often entitled to fees incurred in pursuing only some portions of the lawsuit . . . .”*

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Once the initial burden of production is met, opposing counsel has the opportunity to investigate the evidence supporting the claimed fees. Although the procedure is meant to be informal, practitioners opposing an attorney fee award may challenge the evidence, and the trial court is obligated to act "so that procedural fairness will be accorded one who opposes a requested award."<sup>43</sup> The Supreme Court has summarized its position regarding the nature of this process:

Although we do not intend to turn fee award determination into satellite litigation with full scale discovery, thereby increasing the overall cost of litigation, an adversary-type mechanism through which an opponent to a fee request can examine the accuracy of factual assertions underlying the request must be available. Usually, it will be sufficient if the opponent is provided access to supporting documents such as attorney time records. If

necessary, however, a party should have an opportunity to contest the accuracy of the documents by either counter-affidavit or cross-examination of the opposing attorney before the court. Full-blown discovery should rarely be necessary.<sup>44</sup>

Accordingly, practitioners should take advantage of the procedural protections, and investigate any request for attorney fees. In particular, inquiry should be conducted to insure that the requested fees have been properly allocated,<sup>45</sup> and meet the evidentiary<sup>46</sup> and reasonableness<sup>47</sup> requirements discussed in this article. Failure to investigate, and dispute, at least some of the evidence presented in support of the request for attorney fees creates the risk of summary adjudication in favor of the party requesting the fees.<sup>48</sup> However, if a party has failed to provide the court with sufficient evidence, or failed to properly allocate between the recoverable and non-recoverable fees may result in a denial of the fee award altogether.<sup>49</sup>

#### **c. Allocation of fees**

Practitioners should also be aware of the rule<sup>50</sup> that "[a] party is . . . entitled only to those fees resulting from its principle cause of action for which there is a contractual (or statutory) obligation for attorney[] fees."<sup>51</sup> In other words, the party requesting attorney fees is often entitled to fees incurred in pursuing only some portions of the lawsuit, as authorized by statute, contract, or equity. For example, attorney fees awarded under the terms of a contract may not allow recovery of all the fees generated in the lawsuit.<sup>52</sup> Similarly, attorney fees awarded under a statute will not allow an award of fees incurred in pursuit of common law, or other statutory claims.<sup>53</sup>

In the event a party is entitled to only some of the legal fees incurred, the practitioner requesting attorney fees has the burden of allocating fees between the various claims. The Utah Supreme Court has summarized:

One who seeks an award of attorney fees must set out the time and fees expended for (1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees.<sup>54</sup>

A party who fails to allocate attorney fees between those which are recoverable, and those which are not, may forfeit the award entirely,<sup>55</sup> at the trial court's discretion.<sup>56</sup>

<sup>1</sup>A primer is defined as "a small introductory book on a subject." Webster's Ninth New Collegiate Dictionary 934 (1986). This definition reflects that this article is not meant to be the complete word on its subject, but rather a review of the procedures for recovering attorney fees in Utah.

<sup>2</sup>See generally 1984 Utah Law Review 533-669 (1984).

<sup>3</sup>See Kelli L. Sager, *Attorney's Fees in Utah*, 1984 Utah L. Rev. 553-571 (1984).

<sup>4</sup>The terminology for this phrase varies and has included "attorneys' fees," "attorney's fees," "attorney fee" and "attorney fees." Because the Utah courts seem to have settled upon the nomenclature "attorney fees," this is the phrase used in this article. See, e.g. *Salmon v. Davis County*, 916 P.2d 890 (1996).

<sup>5</sup>*Supra* Note 4 at 563-65.

<sup>6</sup>Despite the focus of the 1984 symposium, the issue of attorney fees is often ignored or given only cursory treatment by both practitioners and the courts. As the Utah Supreme Court has noted, "[i]n many instances, where the question arises at all, the attorney fee issue is treated as incidental by the appellant, who focuses on more substantial issues, and has accordingly tended to receive the same kind of cursory treatment by us." *Dixie State Bank v. Braken*, 764 P.2d 985, 989 n.6 (Utah 1988). This problem is compounded by the often confusing, or even contradictory, statements in Utah case law. See, e.g., notes 96 through 98 and accompanying text.

<sup>7</sup>Traditionally, Utah appellate courts have "generally reviewed a trial judge's decision on the issue of attorney fees for abuse of discretion." *Salmon*, *supra* note 4 at 892. However, in *State v. Pena*, 869 P.2d 932 (Utah 1994), the Utah Supreme Court clarified that in some cases the appropriate standard of review would be a mixed question of law and fact, and therefore require a somewhat different standard of review. *Id.* at 935-39. Since then, the appropriate standard of review for an award of attorney fees has been subject to some debate. Justice Durham now takes the position that "[i]n light of . . . [Pena] . . . the reasonableness of an award of attorney fees ordinarily presents a question of law, with some measure of discretion given to the trial court in applying the reasonableness standard to a given set of facts." *Id.* at 893 (Durham, J., lead opinion). However, Justice Durham may be alone in this approach. *Id.* at 897-98 (disputing that *Pena* calls for a change in the standard of review for an award of attorney fees) (Russon, J., joined by Justice Howe, dissenting); *id.* at 900 (Zimmerman, C.J., concurring "in Justice Russon's articulation of the proper standard of review for a trial court's award of attorney fees . . ."); *id.* at 900 (Stewart J., making no comment on Justice Durham's argument).

<sup>8</sup>550 P.2d 212 (Utah 1976).

<sup>9</sup>*Id.* at 215. Attorney fees were also not requested until after judgment was entered, and the request came one day before the time for filing a motion to amend expired. *Id.* It is unclear from the decision how much weight, if any, the court gave to this consideration.

<sup>10</sup>*Id.*

<sup>11</sup>The court noted that "[a]lbeit we say in fairness [a request for attorney fees in the pleadings] should be done we need not and do not decide that point." *Id.*

<sup>12</sup>See, e.g. *Christensen v. Farmers Insurance Exchange*, 669 P.2d 1236, 1239 (Utah 1983) (denying a request for attorney fees because, in part, "a review of the pleadings on file does not reflect any claim for attorney fees."); cf. *Projects Unlimited v. Copper State Thrift*, 798 P.2d 738, 753 n.18 (Utah 1990) (declining to award attorney fees to bank which was statutorily entitled to fees where bank "did not request attorney fees as part of its motion for summary judgment."); *Cabrera v. Cottrell*, 694 P.2d 622, 625 (Utah 1985) (declining to award attorney fees on appeal where prevailing party "has not sought them").

<sup>13</sup>452 P.2d 325 (Utah 1969).

<sup>14</sup>However, attorney fees could not have been raised in the original complaint, as the mechanics lien statute was not raised until the defendant contractor raised the statute by filing a counterclaim. *Id.* at 327. It is unclear from the decision how much weight, if any, the court gave to this consideration.

<sup>15</sup>*Id.* at 328 (footnote omitted) (partial emphasis added).

<sup>16</sup>Utah R. Civ. P. 8(e). Other rules call for similar results, although they have not yet been used by Utah courts to allow an award of attorney fees. See, e.g. Utah R. Civ. P. 8(f) ("All pleadings shall be so construed as to do substantial justice."); Utah R. Civ. P. 15(a) ("[A] party may amend his pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given.") (emphasis added); *Id.* ("A party may amend his pleading once as a matter of course before a responsive pleading is served, 'or, if no responsive pleading is allowed, 'within 20 days after it is served.');" Utah R. Civ. P. 15(d) (allowing filing of supplemental pleadings, noting "[p]ermission [to file a supplemental pleading] may be granted even though the original pleading is defective in its statement of a claim for relief or defense") (emphasis added).

<sup>17</sup>*Sears v. Riemersma*, 655 P.2d 1105, 1110 (Utah 1982) (allowing party who requested attorney fees in counterclaim, but not in answer, to recover fees incurred in defending lawsuit because the other parties "were clearly on notice that [attorney fees] be awarded in connection with the dismissal of [the] complaint").

<sup>18</sup>Rule 15(b) states, in relevant part:

If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense on the merits.

Utah R. Civ. P. 15. Because it is unlikely that an award of attorney fees would prejudice an objecting party on the merits, a practitioner should almost always be able to argue that the issue of attorney fees may be raised as late as trial. However, the decision is within the trial court's discretion, see *infra* note 8, and care should therefore be taken not to rely upon this approach unless absolutely necessary.

<sup>19</sup>*Redevelopment Agency v. Daskalas*, 785 P.2d 1112, 1125 (Utah 1989) (holding that "the trial court was within its discretion in concluding that the pleadings could be amended to include attorney fees, even though not initially raised in the pleadings").

<sup>20</sup>*Pope v. Pope*, 589 P.2d 752, 753 (Utah 1978) ("[U]nder [Rule 54(c)(1)], an award of attorney[] fees in excess of that requested in the pleadings, is allowable where the proof shows the party to be entitled to it."); *Ferguson v. Ferguson*, 564 P.2d 1380, 1383 (Utah 1977) (same); see also Utah R. Civ. P. 54(c)(1) ("[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. . .").

<sup>21</sup>*Pope*, 589 P.2d at 753; *Ferguson*, 564 P.2d at 1383; see also Utah R. Civ. P. 54(c)(1) ("Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled. . .") (emphasis added).

<sup>22</sup>*Palmobi*, *supra* note 13 at 328.

<sup>23</sup>*Sears*, *supra* note 17 at 1110.

<sup>24</sup>Such as in *Palmobi*, *supra* note 13 at 328, where plaintiff was not allowed to seek recovery under the mechanics lien statute, but was allowed to recover fees as a prevailing party once defendant raised a counterclaim under the statute.

<sup>25</sup>"It has long been established that "[t]he general rule in Utah, and the traditional American Rule, subject to certain exceptions, is that attorney fees cannot be recovered by a prevailing party unless a statute or contract authorizes such an award." *Stewart v. Utah Public Service Com'n*, 885 P.2d 759, 782 (Utah 1994). However, recent decisions by the Utah courts may indicate an increased willingness to consider equitable grounds for awarding attorney fees. See *id.* at 782 (recognizing inherent power of courts to award fees where party acts in bad faith, vexatiously, wantonly, or for oppressive reasons); *id.* at 783 (recognizing power of court to award fees under common fund theory); *id.* (recognizing power of court to award fees under private attorney general theory); see also *Jensen v. Bowcut*, 892 P.2d 1053, 1059 (Utah App. 1995) (affirming an award of attorney fees "based on principles of equity and justice as they relate to the specific circumstances of this case."); *Saunders v. Sharp*, 840 P.2d 796, 09 (Utah App. 1992) (noting that "courts may, in some situations, award attorney fees on an equitable basis").

<sup>26</sup>This conclusion is based upon the author's own observations and those of a number of practitioners in Salt Lake City, Utah.

<sup>27</sup>There are exceptions, such as an award of attorney fees for failure to comply with discovery requests, or Rule 11 sanctions. See Utah R. Civ. P. 37 ("If the motion [to compel compliance

with a discovery request] is granted, the court shall . . . require the party or deponent whose conduct necessitated the motion . . . to pay . . . the reasonable expenses incurred . . . including attorney fees . . ."); Utah R. Civ. P. 11 ("If a [court paper] is signed in violation of this rule, the court . . . shall impose . . . an appropriate sanction, which may include an order to pay . . . a reasonable attorney fee").

<sup>28</sup>This conclusion is based upon the author's own observations and those of a number of practitioners in Salt Lake City, Utah.

<sup>29</sup>See, e.g., Utah Code Ann. §78-27-56 (1992) (awarding attorney fees to a prevailing party where action was without merit or brought in bad faith); see also *Hermes Assocs. v. Park's Sportsman*, 813 P.2d 1221, 1225 (Utah App. 1991) (requiring proof of three discrete elements before attorney fees may be awarded under §78-27-56).

<sup>30</sup>After pleading attorney fees, the parties must obviously litigate the right to attorney fees. This step is beyond the scope of this article.

<sup>31</sup>*Salmon*, *supra* note 4 at 893. This has been the explicit rule in Utah since at least 1945. See *Mason v. Mason*, 160 P.2d 730, 733 (1945).

<sup>32</sup>See, e.g. *Dixie*, *supra* note 6 at 988; see also *Regional Sales Agency, Inc. v. Reichart*, 784 P.2d 1210, 1126 (Utah App. constitutes an abuse of discretion and must be overruled."); *Bangerter v. Poulton*, 663 P.2d 100, 103 (Utah 1983) ("[T]he award of the trial court of attorney's fees and certain costs is not supported by any evidence in the record and is reversed. . .").

<sup>33</sup>Even if there were no disputed issue of material fact, the summary judgment would not award an attorneys fee without a stipulation as to the amount, an unrebuted affidavit, or evidence given as to the value thereof." *Freed Finance Company v. Stoker Motor Company*, 537 P.2d 1039, 1040 (Utah 1975). Therefore, even if the opposing party does not dispute the fee award, practitioners should take care to submit either a stipulation, an affidavit, or other evidence regarding the value of the requested attorney fees. In the event evidence is undisputed, a party may be entitled to recover attorney fees by summary disposition. See *infra* note 88 and accompanying text.

<sup>34</sup>*Salmon*, *supra* note 4 at 893; see also *Cottonwood Mall Co. v. Sine*, 830 P.2d 266, 268 (Utah 1992).

<sup>35</sup>Aside from the obvious advantages of submitting a fee request in writing, rather than by oral testimony, a written fee request reduces the chance that counsel requesting attorney fees will be subject to cross examination. However, a party may be entitled to cross examine regardless of the method chosen to submit the evidence. As the Utah Supreme Court has noted, "[i]f necessary . . . a party should have an opportunity to contest the accuracy of the documents by either counter-affidavit or cross-examination of the opposing attorney before the court." *Cottonwood Mall*, *supra* note 34 at 269.

<sup>36</sup>*Associated Indus. Developments v. Jewkes*, 701 P.2d 486, 489 (Utah 1985) (finding "trial court abrogated its responsibility to undertake a full inquiry" of evidence in support of attorney fees by refusing to receive testimony by attorney for party requesting fee); *Stubbs v. Hemmert*, 567 P.2d 168, 170 (Utah 1977) (finding trial court's award of attorney fees was reasonable based, in part, upon testimony of plaintiff's attorney); see also *Associated Indus. Developments*, 701 P.2d at 488. ("Logically, the attorney claiming the fee ought to be a valuable and relevant source of information concerning the composition of that fee."); but see *Paul Mueller Co. v. Cache Valley Dairy Assoc.*, 657 P.2d 1279, 1287-88 (Utah 1982) (noting that where "detailed billing records" were submitted by stipulation, trial court abused its discretion in relying only upon statement of counsel at post-trial hearing).

<sup>37</sup>A practitioner should not, however, object on the grounds that counsel cannot act as both a witness and an attorney in a case. First, such an argument is incorrect. See Utah Rule of Professional Conduct 3.7(a)(2) (allowing attorney to testify where "[t]he testimony relates to the nature and value of legal services rendered in the case."); see also *Associated Indus. Developments*, *supra* note 36 at 489 n.1 (allowing attorney to testify regarding attorney fees under previous version of Rules of Professional Conduct). Second, if the trial court erroneously sustains the objection, the appellate court may find that "counsel cannot successfully object at trial to [opposing] counsel's testimony about his fee and then complain on appeal that plaintiff has failed to prove the reasonableness of the fee." *Id.* at 489 (declining to reverse award of attorney fees for insufficient evidence where attorney for party requesting fees was not allowed to testify because opposing counsel objected on grounds that "attorneys are not permitted to testify in cases in which they represent" a party).

<sup>38</sup>*Beckstrom v. Beckstrom*, 578 P.2d 520, 523-24 (Utah 1978); see also *Regional*, supra, note 32 at 1215 ("[A] trial court is not compelled to accept the self-serving testimony of a party requesting attorney fees even if there is no opposing testimony."); Paul Mueller Co., supra note 36 at 1287-88 (noting "it is not good practice to make an award [of an attorney fee] predicated only upon [the] opinion [of a party's attorney].") (quoting 59 C.J.S. Mortgages §8 12e(2), at 1554.); but see *infra* note 88 and accompanying text (discussing propriety of summary judgment motion for attorney fees where no disputed issue of material fact).

<sup>39</sup>Utah Code Jud. Admin. R4-505.

<sup>40</sup>*Id.*

<sup>41</sup>In *LMV Leasing, Inc. v. Conlin*, 805 P.2d 189 (Utah App. 1991), the Utah Court of Appeals noted the hourly rate for each attorney is not required, and that "[s]o long as the legal basis of the award, the nature of the work performed by the attorneys, the number of hours spent to prosecute the claim, and some affirmation that the fees charged are reasonable in light of comparable legal services are included in the affidavit submitted by the party requesting the fees, there is no failure to comply with Rule 4-505(1). *Id.* at 198. Inconsistent statements have also been made in this area. Although perhaps distinguishable because the court was not discussing Rule 4-505, the Utah Supreme Court has apparently contradicted the statement in *LMV Leasing*, by noting that "[s]ufficient evidence should include the hours spent on the case, the hourly rate charged for those hours, and the usual and customary rates for such work." Salmon, supra note 4 at 893 (emphasis added).

<sup>42</sup>*Id.*

<sup>43</sup>*Cottonwood Mall*, supra note 34 at 269.

<sup>44</sup>*Cottonwood Mall*, supra note 34 at 268-69

<sup>45</sup>See *infra* notes 34 through 38 and accompanying text.

<sup>46</sup>See subsection c.

<sup>47</sup>See subsection b.

<sup>48</sup>See *infra* note 88 and accompanying text. "Specifically, where attorney fees are awarded to a prevailing party on summary judgment, the undisputed, material facts must establish, as a matter of law, that (1) the party is entitled to the award and (2) the amount awarded is reasonable." *Taylor v. Estate of Taylor*, 770 P.2d 163, 169 (Utah App. 1989).

<sup>49</sup>See *infra* notes 32 through 33 and accompanying text, and subsection c in general.

<sup>50</sup>The allocation issue is treated as separate rule by the courts, independent of the reasonableness analysis discussed in section d. See, *infra* notes 48 through 51; but see *Mountain States Broadcasting v. Neale*, 776 P.2d 643, 649 n.10 (Utah App. 1989) (noting that "a reasonable fee" will only compensate party for those fees expended upon issues where the party prevailed).

<sup>51</sup>*Utah Farm Production Credit Association v. Cox*, 627 P.2d 62, 66 (1981).

<sup>52</sup>See, e.g., *Paul Mueller Co.*, supra note 36 at 1288 (allowing only those fees incurred in defense of the main causes of action, but not those incurred in pursuit of counterclaim); *Stubbs*, supra note 36 at 170 & n.11 (refusing to award any attorney fees incurred in trial where contractual liability for fees was limited to collection of debt and these claims were settled before trial); *Sears*, supra note 17 at 1110 (upholding trial court's reduction in fees where trial court found "a goodly portion of the time" would have been directed to activities other than simply defending against . . . the claim."); *Trayner v. Cushing*, 688 P.2d 856, 858 (Utah 1984) ("[A] party is entitled only to those fees attributable to the successful vindication of contractual rights within the terms of the agreement").

<sup>53</sup>See, e.g., *Graco Fishing v. Ironwood Exploration*, 766 P.2d 1074, 1079-80 (Utah 1988) (remanding for allocation of attorney fees between those incurred in pursuit of successful claims under one statute, and unsuccessful claims pursued under other statute).

<sup>54</sup>*Cottonwood Mall*, supra note 34 at 269-70.

<sup>55</sup>*Utah Farm Production Credit Ass'n* supra note 51 at 66. (finding no abuse of discretion in trial courts refusal to award any attorney fees where party requesting fees failed to distinguish between time "spent prosecuting its complaint and the portion spent in defending the counterclaim"); *Selva v. J.J. Johnson & Assoc.*, 910 P.2d 1252, 1266 n.16 (Utah App. 1996) (noting that "it may be proper to deny a request for attorney fees if the requesting party fails to allocate in accord with the directive of *Cottonwood Mall*").

<sup>56</sup>"[S]uch a decision is within the trial court's discretion, rather than being a strict legal requirement." *Selva*, supra note 55 at 1266 n.15 (citing *Schafir v. Harrigan*, 879 P.2d 1384, 1394 (Utah App. 1994)).

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