2008

Michael v. DIT-IT : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TIMOTHY MICHAEL & TAMRA McQUEEN HUTTER, husband & wife; Appellee v. DIG-IT, INC., a Utah Corporation; Appellant	Appellate Case No. 20080077-CA **ORAL ARGUMENT REQUESTED** **REPORTED OPINION REQUESTED**

REPLY BRIEF OF THE APPELLANT DIG-IT, INC.

APPEAL FROM THE DECISION AND ORDER OF THE SECOND JUDICIAL DISTRICT

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INTRODUCTION

In the Opposing Brief, the Hutter's propose an interpretation of the State Construction Registry which will require this Court to fashion a rule that grants all of the benefits of the State Construction Registry to property owners, without imposing any of the verification, correction, or financial burdens other users of the of the system bear. According to the Hutters, Weber County filed a Notice of Commencement for then when it transmitted their building permit information top the SCR. The Hutters also claim they had no obligation to verify the accuracy of the building permit information, despite a clear statutory mandate to the contrary, and Hutters ask this Court to conclude the sole financial burden for operation of the system should be born subcontractors and material suppliers who must file and pay for preliminary notices to protect their lien rights, because, under the Hutter's interpretation, the cities and counties have not been conscripted by the legislature to file preliminary notices for subcontractors and suppliers.

A good and reasonable interpretation of the statute and purpose of the State Construction Registry, as set forth hereafter and in Dig-It's opening memorandum, establishes that the conclusions and rules proposed by the Hutters cannot stand.

ARGUMENTS

I. THE DISTRICT COURT ERRED BY DETERMINING THAT A NOTICE OF COMMENCEMENT WAS FILED BY WEBER COUNTY.

Examining Utah Code § 38-1-31 in accordance to the rules of statutory construction manifests that local government entities are not currently authorized to file notices of commencement. More importantly for this case, such an examination also

manifests that the legislature never intended for local government entities to file notices of commencement. "When interpreting a statute . . . our primary goal is to give effect to the legislature's intent." *Progressive Casualty Insurance Co. v. Ewart*, 167 P.3d 1011, 1014 (Utah 2007).

A. The Court Should Consider the 2007 Amendment to Section 38-1-31 to Determine the Legislative Intent with Respect to the 2006 Version.

The Hutters attempt to persuade the Court that Dig-It seeks to retroactively apply an additional requirement (i.e., that only contractors and owner-builders are authorized to file a notice of commencement) from the amendments made in the 2007 version of section 38-1-31to the 2006 version. *See* Hutters Brief at 17-19. This is an incorrect characterization. Dig-It contends that consideration of the 2007 amendment to Utah Code § 38-1-31 clarifies the *original intent* for local government entities to have authority to file notices of commencement. If the legislature originally intended to only authorize original contractors and owner-builders to file notices of commencement *based* on the building permit information, then a subsequently enacted amendment to that effect is relevant. "An amendment which, in effect, construes and clarifies a prior statute will be accepted as the legislative declaration of the original act. Thus, when a statute is ambiguous, amendment of the statute may indicate a legislative purpose to clarify the ambiguities in the statute rather than to change the law." *State v. Bryant*, 965 P.2d 539, 546 (Utah Ct. App. 1998) (quotations and citations omitted) (emphasis added).

The pertinent provisions of the 2006 version of section 38-1-31 read as follows:

(1)(a)(i) For a construction project where a building permit is issued to an original contractor or owner-builder, within 15 days after issuance of the building permit, the local government entity issuing that building permit shall input the building permit application and transmit the building permit information to the database electronically by way of the Internet or computer modem or by any other means and such information shall form the basis of a notice of commencement.

***

(b) For a construction project where a building permit is not issued, within 15 days after commencement of physical construction work at the project site, the original contractor or owner-builder may file a notice of commencement with the database.

Utah Code Ann. § 38-1-31 (2006) (emphasis added).

Although Utah Code § 38-1-31(1)(a)(i) (2006) provides that local government entities are required to transmit building permit information to the State Construction Registry, the 2006 version of section 38-1-31 is ambiguous with regard to whether the building permit information is a self-executing notice of commencement or whether another party was expected to *file* a notice of commencement *based* on the building permit information submitted by the local government entity. *See* UTAH CODE ANN. § 38-1-31(1)(a)(i) (2006).

In 2007, the legislature amended Utah Code § 38-1-31(1)(a)(i) to clarify, among other things, what constitutes a notice of commencement filing. *See* HB277503, House Floor Debate Day 25 - 3:00-4:15 (Representative Morley stated that the 2007 amendment was a consensus industry meant to clarify the 2006 version). As amended, Utah Code § 38-1-31(1)(a)(i) (2007) provides:

(A) For a construction project where a building permit is issued to an original contractor or owner-builder, within 15 days after the issuance of the building permit: (I) the local government entity issuing that building permit shall input the

> building permit application and transmit the *building permit information* to the database ...; and (II) *the original contractor or owner-builder may file a notice of commencement based on the building permit issued by the local government entity.*
>
> (B) The information submitted [by the local government entity issuing the building permit] under Subsection (1)(A)(i)(A) forms the *basis of a notice of commencement.*

UTAH CODE ANN. § 38-1-31(1)(a)(i) (2007) (emphasis added).

Thus, the amended version of section 38-1-31 clarifies that building permit information is no a self-executing notice of commencement, but rather for original contractors and owner-builders *may* file a notice of commencement *based* on the building permit information. This interpretation is reinforced by the rules of statutory construction. *See* Dig-It's Brief at 14-18.

B. The Legislative History Relied Upon by the Hutters is Inconclusive.

The Hutters cite to pre-enactment legislative history which purports to prove that the legislature originally intended for local government entities to file a notice of commencement when a building permit was issued for the project. *See* Hutters Brief at 22-25. However, the legislative history relied upon by the Hutters is inconclusive in light of the fact that there are other quotes in the legislative history as set forth in the Hutter's brief where Representative Morely refers to the building permit information as "information" rather than a notice of commencement.

Thus, it is not clear from the pre-enactment legislative history whether the building permit information was intended to be a self-executing notice of commencement, or if the term "notice of commencement" was being used generically by

Representative Morely to refer to the information transmitted by the local government entity upon which a notice of commencement was to be filed by some other party. In contrast, the 2007 amendment to section 38-1-31 unquestionably evidences that the legislature did not intend for the building permit information to constitute the notice of commencement. Importantly, the 2007 amendment came after the comments made by Representative Morely that are relied upon the Hutters.

C. The Failure of State Construction Registry Personnel to Implement the State Construction Registry in Accordance with Section 38-1-31 and Rule R156-38b-506 Does Not Manifest Legislative Intent or Change the Law.

The Hutters have not disputed that the 2007 amendment to section 31-1-31 provides that original contractors and owner-builders are the only parties currently authorized to file a notice of commencement. Furthermore, it is clear from Rule R156-38B-506 (2006) that a payment has always been required in order to file a notice of commencement. *See infra* § IIB. There are no promulgated exceptions to this payment requirement.

As a result, all notices of commencement require a payment before they are considered filed, which makes sense if only contractors and owner-builders are authorized to file notices of commencement. The Hutters attempt to discount the applicability of the amendment to section 38-1-31 and Rule R156-38b-506 to this case by pointing out that the parties managing the State Construction Registry currently consider the building permit information transmitted by the local government entities to create

self-executing notices of commencement, and that they do not charge local government entities a fee when filing building permit information. *See* Hutters Brief at 25-30.

Far from manifesting the legislature's intent with respect to whether local government entities can file notices of commencement, however, the Hutters reliance on the current implementation of the State Construction Registry merely demonstrates that the State Construction Registry is not currently being implemented in accordance with section 38-1-31 and Rule R156-38b-506. There can be no doubt but that the 2007 amendment to Section 38-1-31, which provides that only original contractors and owner-builders are authorized to file a notice of commencement, has yet to be incorporated into the State Construction Registry Web sites, and that the State Construction Registry is still processing building permit information as a notice of commencement in spite of the 2007 amendment. *See* Hutters Brief at 25-30.

The fact that the State Construction Registry is not currently operating in accordance with the Code and the administrative rules governing its operation cast doubt on whether the State Construction Registry personnel or its Web sites can be relied upon to accurately reflect the legislature's original intent in 2006. Consequently, the current implementation of the State Construction Registry should not be considered authoritative for purposes of interpreting section 38-1-31.

Rather, the Court should find that the legislature intended for only original contractors and owner-builders to be authorized to make payment for a notice of commencement and *thereby file* a notice of commencement *based* upon the building

permit information transmitted by the local government entity. This was the manifest intent of the legislature in amending section 38-1-31 to clarify its provisions. The State Construction Registry's failure to implement the legislature's intent, by considering the building permit information transmitted by the local government entities to be notices of commencement, is not evidence of a different legislative intent, but rather a failure by those charged with implementing the State Construction Registry to correctly interpret its governing statutes.

II. THE HUTTERS' PROPOSED NOTICE OF COMMENCEMENT WAS NOT ENFORCEABLE UNDER § 38-1-31(5)(A).

As the Court by now is well aware, "[t]he burden is upon any person seeking to enforce a notice of commencement to verify the accuracy of information in the notice of commencement and prove that the notice of commencement is filed timely and meets all of the requirements in this section." UTAH CODE ANN. § 38-1-31(5)(a) (2006).

A. The Hutters' Interpretation of the Verification Requirement Results in an Absurd Outcome.

This Court has noted that "[o]ur duty is to implement the law as it reads unless it results in an absurd outcome." *Reedeker v. Salisbury*, 952 P.2d 577, 589 (Utah Ct. App. 1998) (quoting *Stephens v. Bonneville Travel, Inc.*, 935 P.2d 518, 522 (Utah 1997)). Section 38-1-31(5)(a) does not explicitly identify a time period within which the verification requirement must be met. However, reading section 38-1-31(5)(a) to allow for satisfaction of the verification requirement after the time for filing a preliminary notice has passed (or at the time of trial as the Hutters contend) results in an absurd

outcome. *See* Hutters Brief at 31 ("Substantial evidence was introduced at trial verifying the accuracy of the information in the notice of commencement.").

In order to file a preliminary notice, the potential lien claimant must rely on the information that constitutes the notice of commencement. *See* Dig-It Brief at 19. Since filers of preliminary notices must rely on the accuracy of information in the notice of commencement to search and find the notice of commencement, it is only reasonable that verification must occur before the deadline for filing a notice of commencement. *See* UTAH CODE ANN. § 38-1-31(5)(c) (2006)

The timing for when the verification requirement must be met is not ambiguous. Section 38-1-31(5)(c) explicitly provides: "A person filing a notice of commencement by alternate filing is responsible for verifying and changing any incorrect information in the notice of commencement before the expiration of the time period during which the notice is required to be filed." UTAH CODE ANN. § 38-1-31(5)(c) (2007). In this case, it is undisputed that the Hutters' notice of commencement was filed by an alternate filing method. *See* Hutters Brief at 34 ("The evidence established that the notice of commencement was filed by an alternate method of filing . . . .").

Despite this finding and the unequivocal language of the statute, the Hutters argue that verification should be allowed after the deadline at any time up to trial. A rule such as this nullifies the verification requirement and makes it meaningless because there will no be any incentive to verify the information within the time period necessary to benefit preliminary notice filers.

In addition, the Hutters also appeal to the "no harm, no foul" argument to persuade the Court that verification at trial was sufficient. *See* Hutters Brief at 31 ("Judge Jones' finding that the information in the notice of commencement is accurate is supported by the evidence and should be affirmed."). But this argument combines the elements of the burden of sections 38-1-31(5)(a) and (b). Section 38-1-31(b) governs whether the notice of commencement information is sufficiently accurate by providing that "a substantial inaccuracy in a notice of commencement renders the notice of commencement unenforceable." UTAH CODE ANN. § 38-1-31(5)(b) (2006).

This requirement is separate and distinct from the requirement that "[t]he burden is upon any person seeking to enforce a notice of commencement to verify the accuracy of information in the notice of commencement . . . ." UTAH CODE ANN. § 38-1-31(5)(a) (2006). Although a showing at trial that the information is accurate satisfies the requirement imposed by subsection (b), it does not constitute a showing that the information was ever verified to be accurate at a time when the verification requirement could be of any practical consequence.

B. Whether the Hutters' Proposed Notice of Commencement was Timely Depends on Whether Weber County was Authorized to File the Notice of Commencement.

Dig-It concedes that there was evidence that the notice of commencement was timely filed *if* the if building permit information is a self-executing notice of commencement. However, Utah Administrative Code R156-38b-506, the administrative rule promulgated by DOPL governing how to determine the official filing date for a

notice of commencement, evidences that DOPL originally does not contemplate building permit information is a self-executing notice of commencement. This rule provides:

> The official filing date of a particular filing shall be determined as follows:
>
> (1) in the case of an electronic filing, it shall be the date the SCR accepts a filing input by the person making the filing and makes available a payment receipt to the person making the filing.
>
> (2) in the case of an alternate filing, it shall be the date upon which the designated agent received a filing that was ultimately accepted into the SCR including content requirements and payment.

UTAH ADMIN. CODE R156-38b-506.

In addition, Utah Code § 38-1-27 provides that the State Construction Registry shall "provide hard-copy printing of electronic receipts for [a notice of commencement] filing evidencing the date and time of the [notice of commencement] filing and the content of the [notice of commencement] filing." UTAH CODE ANN. § 38-1-27(2)(g) (2006) (emphasis). The Hutters argue that "[i]t would be unreasonable to apply this rule as advocated by Dig-It and require a payment to establish the filing date when no payment was required by DOPL or the State Construction Registry." *See* Hutters Brief at 35.

But reading Utah Administrative Code R156-38b-506 as an administrative application of UTAH CODE ANN. § 38-1-27(2)(g) (2006), is reasonable because these provisions establish that a payment receipt is the appropriate evidence of a notice's content and timing; and a receipt will not be provided until payment is made. Thus

payment is a specific element of the evidentiary burden identified in UTAH CODE ANN. § 38-1-27(2)(g) (2006) and required by UTAH CODE ANN. § 38-1-31(5)(a) (2006).

Consequently, the only logical conclusion is that the legislature and DOPL *did not intend* for local government entities to file notices of commencement. Rather, "the original contractor or owner-builder may file [and pay for] a notice of commencement based on the building permit issued by the local government entity." UTAH CODE ANN. § 38-1-31(1)(a)(i)(A) (2007).

Requiring payment before the official filing date of a notice of commencement is also consistent with funding provisions of the State Construction Registry. DOPL must establish fees for those seeking to file notices in the State Construction Registry, including fees for those seeking to file notices of commencement. UTAH CODE ANN. § 38-1-27(4)(a) (2006). The purpose of the fees is to "create and maintain" the State Construction Registry database. UTAH CODE ANN. § 38-1-27(4)(b) (2006).

It is thus evident that the Utah Legislature intended for those seeking to file a notice of commencement, i.e. not the local governmental entity, to bear their share of the burden with regard to the cost associated with the creation and maintenance of the State Construction Registry database. Accordingly, requiring payment before the official filing date for a notice of commencement is determined is a reasonable way for DOPL to ensure that original contractors and owner-builders share in the cost burdens imposed by running and maintaining the State Construction Registry database.

C. The Hutters Proposed Notice of Commencement Did Not Meet All of the Requirements of Section 38-1-31.

A notice of commencement is unenforceable unless it meets all of the requirements of section 38-1-31. UTAH CODE ANN. § 38-1-31(5)(a) (2006). One of the explicit requirements of section 38-1-31 is that the name and address of the owner of the project must be included in the notice of commencement. UTAH CODE ANN. § 38-1-31(2)(a). It is undisputed that the notice of commencement relied upon by the Hutters did not list the Hutters' city, state, and zip code. As a result, the Hutters' notice of commencement is unenforceable. The Hutters attempt to avoid this result by relying on the following provision:

> (c) The content of a notice of commencement need not include all of the items listed in subsection (2)(a) if:
>
> (i) a building permit is issued for the project; and
>
> (ii) all items listed in subsection (2)(a) that are available on the building permit are included in the notice of commencement.

UTAH CODE ANN. § 38-1-31(2)(c) (2006).

Dig-It and the Hutters disagree on what was intended by the legislature's use of the term "available." Dig-It argues that the legislature, in providing that notices of commencement must include the subsection (2)(a) information available on the building permit, must have intended for building permits to be completely filled out with the exception of requested information that did not exist. On the other hand, the Hutters contend that the use of the term "available" means that the only information required to be included in the notice of commencement is the information actually entered on the building permit, regardless of whether requested and existing information is omitted from the building permit. *See* Hutters Brief at 37.

However, the Hutters' interpretation of "available", along with its proposal for self-executing notices of commencement, proposes a rule which would lead to absurd results because it could allow the party filing the building permit to intentionally or negligently omit critical information from the building permit, have that deficient information submitted to the Registry and form a notice of commencement, but be lacking in adequate detail to be searchable by preliminary notice filers. *See* Trial Exhibit 1.

It cannot be seriously argued that this was the legislature's intent in light of the fact that preliminary notice filers must rely on the notice of commencement information to file preliminary notices.

In contrast, Dig-It's interpretation of the verification requirement, the timing requirement and the term "availability" establishes a rule which reqries those who benefit from the notice of commencement, namely owners and original contractors, to equally participate in filing of notice, verification of notices, and financial contribution to the Registry. See UTAH CODE ANN. § 38-1-27(10) (2006) ("A person filing a notice of commencement, preliminary notice, or notice of completion is responsible for verifying the accuracy of information entered into the database, whether the person files electronically or by alternate or third party filing").

Further, the Hutters argue that "it does not make sense to exclude permits by requiring information that certain municipalities may not require for the issuance of a building permit," *see* Hutters Brief at 38, this argument fails to consider the fact that

since 2007, building permit content has been standardized. UTAH ADMIN. CODE R156-56-402. In addition, the Hutters concern that building permits will be excluded from the state construction registry is unfounded because the State Construction Registry would still be populated with all of the construction projects across the state based on the building permit information submitted, whether complete or incomplete.

The Hutters also argue that their notice of commencement is enforceable based on their assertion that "[t]he requirement for the Hutters to prove that the notice of commencement meets all of the requirements in the statute that is set forth in paragraph (5)(a) is modified by subparagraph (b) which states 'a substantial inaccuracy in a notice of commencement renders the notice of commencement unenforceable.'" *See* Hutters Brief at 38.

A more accurate articulation of the statute is that subsections (5)(a) and (5)(b) constitute a two-part test. First, subsection (5)(a) requires that a notice of commencement must fully comply with all of the requirements of the statute, i.e. content must be given for each required item or information, such as name, address, etc... UTAH CODE ANN. § 38-1-31(5)(a). Then, if a portion of the content is inaccurate, the notice of commencement may be validated if the inaccuracy is not "substantial" under (5)(b). On the other hand, if the information in the notice of commencement does not comply with all of the content requirements, the statutory mandate is not met, and the notice of commencement is unenforceable and there is no need to determine whether there is a substantial inaccuracy under subsection (5)(b). This is where the Hutters an the trial

court erred by applying the "substantial compliance" standard, which is allowed for a preliminary notice by UTAH CODE ANN. § 38-1-32(2)(b) (2006), as opposed the "substantial inaccuracy" standard required for a notice of commencement. UTAH CODE ANN. § 38-1-31(5)(a) (2006).

In this case, the Hutters notice of commencement completely omitted information required by the statute and fields for providing that information were available on the permit. As a result, the Hutters notice of commencement failed to meet all of the requirements of the statute. Although the Hutters argue that the notice of commencement could be located notwithstanding the Hutters' failure to meet all of the requirements of the statute, *see* Hutters' Brief at 39, that fact is irrelevant since section 38-1-31(5)(a) does not provide an exemption from the requirement for cases where the notice of commencement can still be located.

III. DIG-IT'S LIEN IS NOT A WRONGFUL LIEN UNDER THE WRONGFUL LIEN INJUNCTION ACT BECAUSE IT WAS AUTHORIZED BY THE MECHANICS' LIEN STATUTE.

To determine whether Dig-It's mechanics' lien constitutes a wrongful lien under the Wrongful Lien Injunction Act, the Court must determine whether the lien is wrongful under section 38-9-1 of the Wrongful Lien Act. *See* UTAH CODE ANN. § 38-9a-102 (2007). Section 38-9-1 of the Wrongful Lien Act defines a "wrongful lien" as "any document that purports to create a lien . . . and at the time it is recorded or filed is not: (a) expressly authorized by this chapter or another state or federal statue . . . ." UTAH CODE

ANN. § 38-9-1(6) (2007). At the center of Dig-It and the Hutters dispute is the meaning of the term "authorized."

Dig-It's interpretation of section 38-9-1(6) is that by articulating a specific exception to the definition of a wrongful lien, i.e. liens "expressly authorized" by statute, the legislature intended to limit the definition of a wrongful lien to only those liens which are not expressly regulated by specific provisions of the Code.

The Hutters, on the other hand, contend that a lien is "authorized" by statute only if it successful on the merits. *See* Hutters Brief at 41 ("Unless Dig-It complies with the mechanic's lien laws, its mechanic's lien is unauthorized."). The requirement for successful meritorious resolution was struck down by the Court in *Eldridge v. Farnsworth*, 166 P.3d 639, 654 (Utah Ct. App. 2007), and the Hutters have not provided a rationale for revisiting that rule here.

A. The Utah Legislature Intended to Exclude Both Successful and Unsuccessful Mechanics' Liens from the Section 38-9-1(6) Definition of a Wrongful Lien.

To determine what the legislature intended by its use of the term "authorized" in section 38-9-1(6), it is helpful to examine other instances in which the term "authorized" has been used in a similar context. One such instance is in the originally enacted version of section 38-9-2. It provided that "[a] document purporting to claim an interest in, or a lien or encumbrance against, real property not authorized by statute, judgment, or other specific legal authority is presumed to be groundless and invalid." UTAH CODE ANN. § 38-9-2 (1985).

By using the term "authorized by statute" there can be no doubt that the legislature intended for statutory liens such as mechanics' liens to be excluded from this initial presumption of invalidity, regardless of whether they ultimately proved successful or unsuccessful. On the other hand, the Hutters interpretation of the term "authorized" would lead to an absurd and nonsensical result when applied to this former version of section 38-9-2. It cannot be argued that the legislature could have meant that liens expressly regulated by a statute that were ultimately adjudicated to be invalid (i.e., unsuccessful liens) were to be presumed to be groundless and invalid. Such a reading would put the cart before the horse. If a lien had been found by the court to be invalid based on a lack of conformance with the statute, then the time for presumptions would have been over and there would no longer be a need to presume that the lien was invalid.

As a result, it is clear that the legislature did not intend to create a presumption of invalidity for liens filed pursuant to the code but not in conformance with the code. Rather, the legislature's use of the term "authorized" in section 38-9-2 (1985) was intended to limit the definition of a wrongful lien to only those liens which were not expressly regulated by a specific provision of the Code. Accordingly, the legislature's use of the term "authorized" in section 38-9-1(6) (2007) should also be interpreted to exclude from the definition of a wrongful lien those liens that are expressly regulated by specific provisions of the Code, regardless of whether they ultimately prove successful or unsuccessful at trial.

Although the Hutters argue that this Court already rejected the implications of Dig-It's interpretation of the term "authorized" in *Russell v. Thomas*, it appears from an examination of the *Russell* opinion that the Court did not have an opportunity to consider Dig-It's argument that both successful and unsuccessful liens are authorized if they are specifically regualted by statute. *See Russell*, 999 P.2d 1244 (Utah Ct. App. 2000). Rather, it appears as though both the plaintiff and the defendant proceeded as if the Hutters interpretation of "authorized" was a given. *Id.* In light of the legislative history of the Wrongful Lien Act and the legislature's past use of the term "authorized," this was a mistake by the defendant and the Court should have been presented with an opportunity, as it is now being presented, to consider the import of the term "authorized."

The Hutters also assert that "[m]echanic's liens have not been held to be wrongful liens under Utah's Wrongful Lien Act" because of the protection afforded mechanics' lien claimants under Utah Code Ann. § 38-9-2(3). *See* Hutter Brief at 41-42. Accordingly, the Hutters contend that section 38-9-1(6) does not protect unsuccessful mechanics' liens from being defined as a wrongful lien. *See id.*

Aside from the fact that the Hutters failed to present any authority for this assertion, the legislative history of the Wrongful Lien Act evidences intent by the legislature to exclude unsuccessful mechanics' liens from the section 38-9-1(6) definition of a wrongful lien though its use of the term "authorized." *See* Dig-It Brief at 37-39. "When interpreting a statute . . . our primary goal is to give effect to the legislature's intent." *Progressive Casualty Insurance Co. v. Ewart*, 167 P.3d 1011, 1014 (Utah 2007).

In addition, the actual text of the original version of section 38-9-1 demonstrates that the legislature intended to exclude both successful and unsuccessful mechanics' liens from the definition of a wrongful lien. It provided:

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

UTAH CODE ANN. § 38-9-1 (1985).

It is axiomatic that the legislature was not concerned with successful mechanics' lien claims when it provided that "[t]his chapter is not intended to be applicable to mechanics' or materialmen's liens." *Id.* Successful mechanics' lien claims would not have qualified as a wrongful lien even without the addition of the foregoing sentence because it would be impossible for a mechanics' lien claimant that has complied with all of the requirements of the statute governing mechanics' liens and whose lien will ultimately be found to be justified to have "know[n] or ha[d] reason to know that the document [wa]s forged, groundless, or contain[ed] a material misstatement or false claim." *See* UTAH CODE ANN. § 38-9-1 (1985). Rather, the legislature was clearly intending to remove even unsuccessful mechanics' liens from the definition of a wrongful lien.

The Hutters final argument against adopting Dig-It's interpretation of the term "authorized" is that section 38-9-2(3) would become a "meaningless waste of words" if unsuccessful mechanics' liens were excluded from the definition of a wrongful lien in section 38-9-1(6) . *See* Hutters Brief at 42. Section 38-9-2(3), the Hutters argue, would be unnecessary. However, the Hutters argument overlooks the legislature's demonstrated interest in ensuring that even unsuccessful mechanics' lien claimants would not be subjected to liability under the Wrongful Lien Act. That the legislature chose to effectuate that interest by protecting mechanics' lien filers in more than one section of the statute should not be construed to render one of the sections a meaningless waste of words.

The legislature's attempt to reinforce a provision of a statute with another provision providing for essentially the same thing is nothing new. For example, in section 38-1-31(1)(c), the legislature essentially repeats what it has already established in sections 38-1-31(1)(a) and (b) with respect to the original contractor. *See* UTAH CODE ANN. §§ 38-1-31(1)(A)-(C) (2006). Just as it would be absurd to argue that a notice of commencement could not be filed by an original contractor under § 38-1-31(1)(b) because it is also provided for in § 38-1-31(1)(c), the Hutters argument that unsuccessful mechanics' liens are not exempt from the definition of a wrongful lien in § 38-9-1(6) because they are exempt from the operation of the Wrongful Lien Act under § 38-9-2(3) is also absurd. The enactment of section 38-9-2(3) should be seen as an attempt to reinforce the import of section 38-9-1(6) with respect to mechanics' liens.

In sum, this Court has apparently never had a chance to consider Dig-It's argument that the legislature intended through its use of the term "authorized by statute" to limit the definition of a wrongful lien to only those liens which are not expressly regulated by specific provisions of the Code. In light of the legislative history of the Wrongful Lien Act (*see* Dig-It's Brief at 38-39) and the legislature's past use of the term "authorized," this Court should interpret section 38-9-1(6) as excluding all liens provided for by statute from the definition of a wrongful lien, including those that are unsuccessful.

B. Public Policy Favors Excluding Mechanics' Liens from the Definition of a Wrongful Lien.

If the Court does find that the Hutters notice of commencement was valid, then holding that unsuccessful mechanics' liens are not excluded from the section 38-9-1 definition of a wrongful lien would have the practical effect palcing the entirely of mechanics lien litigation within the procedural confines of 38-9a-101, et. seq.. This would subject alien claimaint to having it's lien nullified on a ex parte order 38-9a-202, then being compelled to litigate the lien, within 10 days 38-9a-203, and at the hearing have the burden of proof to show why its lien should not be nullified 38-9a-203(3)(b). All of this before the lien claimant has had the chance to conduct discovery, or otherwise prepare the prosecution of the lien claim. In light of this increased burden, potential mechanics' lien claimants would forego filing valid mechanics' liens due to a real concern that discovery could show that there was a valid defense to the lien that was previously questionable or unknown.

The Utah Supreme Court has noted that "[t]he purpose and intent of Utah's Mechanics' Lien Statute . . . manifestly has been to protect, at all hazards, those who perform the labor and furnish the materials which enter into the construction of a building or other improvement. *Lien statutes should be broadly construed to effectuate that purpose*." Sill, 162 P.3d at 1102-03 (internal quotations and citations omitted) (emphasis added). IN consideration of this mandate and the effects of the Hutter's interpretation, the Court should adopt Dig-It's interpretation of the term "authorized" in section 38-9-1of the Wrongful Lien Act and find that mechanics' liens, even those that ultimately prove unsuccessful, are exempt from the definition of a wrongful lien.

C. The Hutters Definition of a Wrongful Lien Fails to Harmonize the Wrongful Lien Act with the Mechanics' Lien Statute.

Referring to the Mechanics Lien Act, the Utah Supreme Court has stated that courts should "interpret its provisions in harmony with other provisions in the same statute and with other statutes under the same and related chapters." *Sill v. Hart*, 162 P.3d 1099, 1102(Utah 2007) (internal quotations and citations omitted). The Mechanics' Lien Statute provides that the "successful party shall be entitled to recover a reasonable attorneys' fee," and that "[a] person who files a wrongful lien as provided in Section 38-1-25 is not entitled to recover attorneys' fees under Subsection (1)." UTAH CODE ANN. § 38-1-18 (emphasis added).

If mechanics' liens are subject to regulation and adjudication under the Wrongful Lien Injunction Act by virtue its incorporation of the section 38-9-1(6) wrongful lien definition, then there is no need for regulation and adjudication under the Mechanics'

Lien Statute. It is also noteworthy that the Mechanics' Lien Statute has its own provisions for what it denotes as a wrongful lien. *See* Utah Code Ann. § 38-1-25. This internal provision for what constitutes an abusive lien would be rendered entirely useless if the Wrongful Lien Injunction Act's definition of a wrongful lien includes all unsuccessful mechanics' liens as the Hutters contend.

D. Even if Statutory Liens are Subject to the Wrongful Lien Act, Dig-It's Mechanics' Lien was Authorized when it was Filed.

The Hutters interpretation of section 38-1-31(6) is tempered by the fact that the controlling test is not only whether the lien was authorized by statute, but also whether the lien was authorized by statute "at the time it [was] recorded or filed." UTAH CODE ANN. § 38-9-1(6) (2006); *Eldridge v. Farnsworth*, 166 P.3d 639, 654 (Utah Ct. App. 2007). In order to determine whether a lien is authorized, the court must "evaluate its validity based on the *facts* known *at the time it was recorded*, not at a later point in time. . . ." *Id.* (emphasis added). This is a rule of general applicability which the Hutters have not refuted.

Accordingly, this Court's precedent in *Eldridge* is appropriately applied to mechanics' liens. The Hutters contend that Dig-It's lien was not authorized when it was filed because Dig-It failed to file a preliminary notice. But this conclusion is based upon facts and legal conclusions which were in dispute at the time the lien was filed. Pursuant to *Eldridge*, knowledge is not established until the proof is in, and that knowledge is not retroactively applied for purposes of defining a wrongful lien.

The Hutters try to confuse the Court's analysis by arguing that the allocation of the burden of proof "does not mean that the legal right ripens into existence only after it has been proven to be enforceable." *See* Hutters Brief at 43. The Hutters cite as an example the law of trespass and state that "a trespass is a trespass even if the claimant has not proven ownership of the property in court previously." *Id.* However, the question of whether Dig-It's lien meets the definition of a wrongful lien turns on when it was *known* that the Hutters had a legal right to have Dig-It's lien declared void, not when the Hutters legal right to have Dig-It's lien declared void sprang into existence. It is indisputable that it was factually unknown to Dig-It whether or not the Hutters' notice of commencement was enforceable when Dig-It filed its mechanics' lien because the Hutters had yet to meet their section 38-1-31(5)(a) burden of proof. *See* UTAH CODE ANN. § 38-1-31(5)(a) (2006).

The Hutters also allege that "Dig-It's concept of how the burden of proof operates to suspend the validity of the notice of commencement reads obligations into the statute that don't exist." *See* Hutters Brief at 44. This is an incorrect characterization of Dig-It's argument. The operation of the burden of proof with respect to the definition of a wrongful lien as presented by Dig-It does not equate to a suspension of the "validity of the notice of commencement," but rather an acknowledgement that the validity of the notice of commencement has not yet been established and that therefore there can be no wrongful lien liability. That there is no wrongful lien liability is the only implication of Dig-It's burden of proof argument.

Just because wrongful lien liability is inapplicable does not mean that there are no consequences for when it is determined that a valid notice of commencement has been filed and that the lien claimant has not filed a preliminary notice. There are still specific time periods within which a preliminary notice must be filed to have any effect. *See* Utah Code Ann. § 38-1-32(1) (2006). When the validity of the notice of commencement is established and a preliminary notice has not been filed, the mechanics' lien is then declared void and the lien claimant is subject to the penalties prescribed by section 38-1-18. *See* UTAH CODE ANN. § 38-1-18 (2006).

Holding that a lien was not a wrongful on the date that it was filed does not change this result or give the lien claimant more time to file a preliminary notice as the Hutters imply. It does, however, mean that the party seeking to enforce the notice of commencement must appeal to the Mechanics' Lien Statute for resolving the validity of a mechanics' instead of the procedures outlined in the Wrongful Lien Injunction Act. Fortunately, this is what the legislature intended.

CONCLUSION

For the foregoing reasons, Dig-It respectfully requests that the Court reverse the trial court's order nullifying Dig-It's mechanics' lien and that the Court over-rule the trial court's conclusion that the Hutters filed a Notice of Commencement on May 30, 2006

RESPECTFULLY SUBMITTED this 14 day of November, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed a true and correct copy of the foregoing **REPLY BRIEF OF THE APPELLANT** to the following, this 14 day of November, 2008, postage prepaid:

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