

2008

# Timothy Michael & Tamra McQueen Hutter, husband & wife v DIG-IT : Brief of Appellant

Utah Court of Appeals

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Jeffrey D. Stevens; Par Waddoups Brown Gee & Loveless Attorneys for Appellee.

Dana T. Farmer; Smith Knowles; Attorneys for Appellant.

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IN THE UTAH COURT OF APPEALS

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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**

**OPENING BRIEF OF THE APPELLANT  
DIG-IT, INC.**

**APPEAL FROM THE DECISION AND ORDER  
OF THE SECOND JUDICIAL DISTRICT**

---

Jeffrey D. Stevens  
Parr Waddoups Brown Gee & Loveless  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111  
*Attorneys for Appellee*

Dana T. Farmer  
Smith Knowles, P.C.  
4723 Harrison Blvd., Suite 200  
Ogden, UT 84403  
*Attorneys for Appellant*

IN THE UTAH COURT OF APPEALS

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

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Jeffrey D. Stevens  
Parr Waddoups Brown Gee & Loveless  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111  
*Attorneys for Appellee*

---

Dana T. Farmer  
Smith Knowles, P.C.  
4723 Harrison Blvd., Suite 200  
Ogden, UT 84403  
*Attorneys for Appellant*

## **PARTIES TO THE PROCEEDINGS**

Pursuant to Rule 24(a)(1) of the Utah Rules of Appellate Procedure, the following is a complete list of all parties to the proceedings below that are involved in this Appeal:

Timothy Michael Hutter, Petitioner below, Appellee

Tamra McQueen Hutter, Petitioner below, Appellee

Dig-It, Inc., Respondents below, Appellant

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None

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None

## **JURISDICTIONAL STATEMENT**

The Court of Appeals has jurisdiction to review this matter resulting in this appeal pursuant to UTAH CODE ANN. § 78A-4-103(2)(j) (2008). These issues were addressed in the trial court.

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

#### **I. THE TRIAL COURT ERRED IN CONCLUDING THAT THE HUTTERS FILED A NOTICE OF COMMENCEMENT ON MAY 30, 2006.**

##### **Standard of Review**

The question of whether the Hutters filed a Notice of Commencement is a mixed question of law and fact. To determine the standard of review for a mixed question of law and fact, appellate courts “apply a test that considers (1) the complexity of the facts; (2) the degree to which the lower court relied on observable facts that cannot be adequately reflected in the record, such as witness demeanor and appearance; and (3) any policy reasons favoring or disfavoring the exercise of discretion.” Mandell v. Auditing Div. of Utah State Tax Com’n, 186 P.3d 335, 339 (Utah 2008).

##### **Preservation for Appeal**

This issue was preserved for appeal by being addressed in Dig-It’s Memorandum in Opposition to the Hutters’ Petition for Nullification of Wrongful Lien [R. 27-28], and in oral argument following the Evidentiary Hearing on October 30, 2007 [Transcript, Ex. A, pp. 96-99].

**II. THE TRIAL COURT ERRED IN CONCLUDING THAT THE HUTTERS SATISFIED THE BURDEN OF PROOF FOR ESTABLISHING THE FILING OF A VALID NOTICE OF COMMENCEMENT.**

**Standard of Review**

“In a bench trial, the determination of whether a plaintiff has proven his or her case by a preponderance of the evidence is a legal determination reviewed for correctness.” Handy v. U.S. Bank, Nat. Ass’n, 177 P.3d 80, 84 (Utah Ct. App. 2008).

**Preservation for Appeal**

This issued was preserved for appeal by being address in Dig-It’s Memorandum in Opposition to the Hutters’ Petition for Nullification of Wrongful Lien [R. 22-29], and in oral argument following the Evidentiary Hearing on October 30, 2007 [Transcript, Ex. A, pp. 89-101].

**III. THE TRIAL COURT ERRED IN CONCLUDING THAT DIG-IT’S MECHANICS’ LIEN WAS A WRONGFUL LIEN UNDER SECTION 38-9A-102.**

**Standard of Review**

The determination of whether a document is a Wrongful Lien under Utah Code Ann. § 38-9a-102 is a question of law which the Court of Appeals will review for correctness, affording the trial court no deference. Eldridge v. Farnsworth, 166 P.3d 639, 646 (Utah Ct. App. 2007).

**Preservation for Appeal**

This issued was preserved for appeal by being address in Dig-Its Memorandum in Opposition to the Hutters’ Petition of Nullification of Wrongful Lien [R. 29-33], and in

oral argument following the Evidentiary Hearing on October 30, 2007 [Transcript, Ex. A, pp. 101-107].

## **STATUTES DETERMINATIVE ON APPEAL**

### **I. UTAH CODE ANN. § 38-1-31 (2007).**

- (1)(a)(i)(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 electronically by way of the Internet or computer modem or by any other means; 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 under Subsection (1)(a)(i)(A) forms the basis of a notice of commencement.
- (ii) The person to whom a building permit, filed under Subsection (1)(a)(i), is issued is responsible for the accuracy of the information in the building permit.
  - (iii) For the purposes of classifying a record under Title 63, Chapter 2, Government Records Access and Management Act, building permit information transmitted from a local governmental entity to the database shall be classified in the database by the division notwithstanding the local governmental entity's classification of the building permit information.
- (b) 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 whether or not a building permit is issued or a notice of commencement is filed under Subsection (1)(a).
- (c) An owner of construction or an original contractor may file a notice of commencement with the designated agent within the time prescribed by Subsections (1)(a) and (b).
- (d)(i) If duplicate notices of commencement are filed, they shall be combined into one notice for each project and any notices filed relate back to the date of the earliest-filed notice of commencement for the project.
- (ii) A duplicate notice of commencement that is untimely filed relates back under Subsection (1)(d)(i) if the earlier filed notice of commencement is timely filed.
  - (iii) Duplicate notices of commencement shall be automatically linked by the designated agent.
- (e) The designated agent shall assign each construction project a unique project number that:
- (i) identifies each construction project; and
  - (ii) can be associated with all notices of commencement, preliminary notices, and notices

of completion.

(f) A notice of commencement is effective only as to any labor, service, equipment, and material furnished to the construction project that is furnished subsequent to the filing of the notice of commencement.

(2)(a) A notice of commencement shall include the following:

(i) the name and address of the owner of the project;

(ii) the name and address of the:

(A) original contractor; and

(B) surety providing any payment bond for the project, or if none exists, a statement that a payment bond was not required for the work being performed; and

(iii)(A) the project address if the project can be reasonably identified by an address; or

(B) the name and general description of the location of the project if the project cannot be reasonably identified by an address.

(b) A notice of commencement may include:

(i) a general description of the project; or

(ii) the lot or parcel number, and any subdivision, development, or other project name, of the real property upon which the project is to be constructed if the project is subject to mechanics' liens.

(c) 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.

(3) If a notice of commencement for a construction project is not filed within the time set forth in (1)(a) and (b), the following do not apply:

(a) Section 38-1-32; and

(b) Section 38-1-33.

(4)(a) Unless a person indicates to the division or designated agent that the person does not wish to receive a notice under this section, electronic notice of the filing of a notice of commencement or alternate notice as prescribed in Subsection (1), shall be provided to:

(i) all persons who have filed notices of commencement for the project; and

(ii) all interested persons who have requested notices concerning the project.

(b)(i) A person to whom notice is required under Subsection (4)(a) is responsible for:

(A) providing an e-mail address, mailing address, or telefax number to which a notice required by Subsection (4)(a) is to be sent; and

(B) the accuracy of any e-mail address, mailing address, or telefax number to which notice is to be sent.

(ii) The designated agent fulfills the notice requirement of Subsection (4)(a) when it sends the notice to the e-mail address, mailing address, or telefax number provided to the

designated agent whether or not the notice is actually received.

(5)(a) The 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.

(b) A substantial inaccuracy in a notice of commencement renders the notice of commencement unenforceable.

(c) 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.

(6) At the time a building permit is obtained, each original contractor shall conspicuously post at the project site a copy of the building permit obtained for the project.

## **II. UTAH CODE ANN. § 38-9a-102 (2005).**

As used in this chapter, “wrongful lien” refers to a lien made in violation of Section 76-6-503.5, and includes an instrument or document as defined in Section 38-9-1.

### **STATEMENT OF THE CASE**

#### **I. NATURE OF THE CASE.**

This case presents two questions of first impression to Utah Appellate Courts: 1) whether the mere presence of building permit information in the State Construction Registry constitutes a notice of commencement despite the evidentiary burden set forth in UTAH CODE ANN. § 38-1-31(5)(a); and 2) whether the lack of a preliminary notice converts a mechanics’ lien into a wrongful lien as defined in UTAH CODE ANN. § 38-9a-102.

In this case, certain building permit information was faxed to the State Construction Registry by Weber County in May, 2006. That information was displayed in the State Construction Registry and made available for searching and the filing of preliminary notices by potential lien claimants. The building permit information did not

include the city, state, or zip code of the owner, and the owners did not search and make any corrections to the permit information until March, 2007.

Dig-It did not search the State Construction Registry or file a preliminary notice. When a dispute arose between the owner and the builder, and the builder failed to pay Dig-It, Dig-It filed a mechanics' lien to secure its collection rights and commenced foreclosure of that lien. As a defense to Dig-It's lien, the Hutters claimed that despite their indifference to the State Construction Registry requirements for timely and accurately filing notices of commencement, the building permit information submitted to the State Construction Registry by Weber County was a valid and enforceable notice of commencement which placed an affirmative obligation on Dig-It to preserve its lien rights by filing a timely and accurate preliminary notice. According to the Hutters, Dig-It's failure to file a preliminary notice voided its right to file a mechanics' lien, so the Hutters were entitled to have the lien enjoined under Utah's Wrongful Lien Injunction Statute, UTAH CODE ANN. § 38-9a-101, *et. seq.*

## **II. COURSE OF PROCEEDINGS.**

1. The proceeding was commenced on August 1, 2007, when Petitioners filed their Petition for Nullification of Dig-It's Mechanics Lien [R. 1-5].
2. Prior to the filing of the Petition, Dig-It filed an action to commence the foreclosure of its lien in the matter entitled Dig-It, Inc. v. Tim and Tami Hutter, *et.al.*, Case No. 070904567, Utah State Second District Court, Weber County, Ogden Department, State of Utah.

3. On September 10, 2007, Dig-It, Inc. filed its Memorandum in Opposition to Hutters' Petition for Wrongful Lien [R. 22-34].
4. On October 30, 2007, an Evidentiary Hearing was held before Honorable Ernie W. Jones, Utah State Second District Court, Weber County, Ogden Department [R. 109-10].
5. On November 13, 2007, the trial court entered its Memorandum Decision granting the Petition for Nullification of Dig-It's Mechanics Lien [R. 111-15].
6. On December 24, 2007, the Court entered its Final Order [R. 122-24].
7. On January 15, 2008, Dig-It, Inc. filed its Notice of Appeal [R. 125-27].

### **III. DISPOSITION IN THE COURT BELOW.**

On December 24, 2007, the trial court entered its Final Order concluding the mechanics' lien filed by Dig-It was a Wrongful Lien and nullifying the lien pursuant to the Wrongful Lien Injunction Statute, UTAH CODE ANN. § 38-9a-101, *et. seq.* Based upon a stipulation of the parties, the separate foreclosure action, Case No. 070904567 has been stayed pending the resolution of this matter.

#### **STATEMENT OF FACTS**

1. Appellant, Dig-It, Inc., (hereinafter "Dig-It"), is an excavation contractor who performed work on property owned by Appelles [R. 111, ¶ 1].
2. Appellees, Timothy Michael and Tamra McQueen Hutter, (collectively hereinafter "Hutters"), are the owners of certain real property located in Weber County, State of Utah, and more particularly described as follows [R. 9]:

ALL OF LOT 53, ELKHORN SUBDIVISION PHASE 3, WEBER COUNTY,  
UTAH.



3. On or about May 22, 2006, a building permit was issued to Jeromy's Homes for construction of the Hutter's residence. [Transcript, Ex. A, p. 10, l. 19; R. 112, ¶15]. A copy of the permit is attached as Ex. B.
4. Thereafter, on May 26, 2006, the Weber County Building Department faxed a copy of the building permit to Utah Interactive, and the information in that permit was converted to a data file and then uploaded into the Utah State Construction Registry. [Transcript, Ex. A, p. 13, l. 5 to p. 15, l. 7; R. 112, ¶15].
5. From May 30, 2006 to March 2007, neither Jeromy's Homes nor the Hutter's took any action to review the building permit information submitted to the State Construction Registry by Weber County. [Transcript, Ex. A, p. 52, l. 2 to p. 53, l. 25].
6. In March 2007, the Hutter's fired Jeromy's Homes and took over the construction of their home as a general contractor. [Transcript, Ex. A, pp. 44-45, 50].
7. In March 2007, after the Hutter's fired Jeromy's Homes, the Hutter's logged into the State Construction Registry and submitted information, including an email address, and paid \$7.00 for the filing of a notice of commencement. [Transcript, Ex. A, pp. 50-56].
8. After concluding its work on the property, Dig-It was not paid by Jeromy's Homes for the work completed. [Transcript, Ex. A, pp. 60-62].
9. As a result of non-payment, Dig-It filed a lien against the property in the office of the Weber County Recorder on June 6, 2007, as Entry 2269167. [R. 111, ¶ 2; R. 1]. A copy of the lien is attached as Ex. C.

10. Dig-It never filed a preliminary notice in the State Construction Registry. [R. 112, ¶¶ 6&7].

### SUMMARY OF THE ARGUMENTS

#### **I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE HUTTERS FILED A NOTICE OF COMMENCEMENT ON MAY 30, 2006.**

In nullifying Dig-It's mechanics' lien, the trial court concluded that the Hutters filed a notice of commencement on May 30, 2006, and that Dig-It was therefore precluded from holding a valid lien due to Dig-It's failure to file a preliminary notice. However, no evidence was presented that a notice of commencement was filed by the Hutters on May 30, 2006, or by anyone else with authority to file a notice of commencement in their behalf.

Furthermore, a preliminary notice is not necessary to hold a valid lien when a notice of commencement has not been filed. *See* UTAH CODE ANN. § 38-1-31(3) (2007). Accordingly, the trial court erred in nullifying Dig-It's mechanics' lien because the Hutters failed to prove that a notice of commencement was filed on May 30, 2006.

#### **II. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE HUTTERS MET THEIR BURDEN TO PROVE THAT THEY WERE ENTITLED TO ENFORCE THE PROPOSED NOTICE OF COMMENCEMENT.**

The Utah Legislature has provided 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 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) (2007). In this

case, the Hutters failed to provide any evidence that they timely verified the accuracy of the information contained in the proposed notice of commencement or that the proposed notice of commencement was timely filed and met all of the requirements of UTAH CODE ANN. § 38-1-31.

To the contrary, the evidence demonstrates that the Hutters did not meet any of the burdens imposed by UTAH CODE ANN. § 38-1-31(5)(a). Consequently, the trial court erred in nullifying Dig-It's mechanics' lien because a preliminary notice did not need to be filed in light of the Hutters' failure to meet their burden to prove that they could enforce the proposed notice of commencement.

### **III. THE MECHANICS' LIEN FILED BY DIG-IT PURSUANT TO UTAH'S MECHANICS' LIEN ACT WAS NOT A WRONGFUL LIEN.**

Under the Wrongful Lien Injunction Statute, a "wrongful lien" is defined as "a lien made in violation of Section 76-6-503.5, and includes an instrument or document as defined in Section 38-9-1. UTAH CODE ANN. § 38-9a-102 (2005). Dig-It's mechanics' lien was not made in violation of UTAH CODE ANN. § 76-6-503.5 and does not fall within the definition of a wrongful lien under UTAH CODE ANN. § 38-9-1. Thus, the trial court erred by applying Utah's Wrongful Lien Injunction Statute to nullify Dig-It's mechanics' lien.

## ARGUMENTS

### **I. THE DISTRICT COURT ERRED IN FINDING THAT THE HUTTERS FILED A NOTICE OF COMMENCEMENT ON MAY 30, 2006.**

The filing date of a notice of commencement is a mixed question of law and fact. To determine the standard of review for a mixed question of law and fact, appellate courts “apply a test that considers (1) the complexity of the facts; (2) the degree to which the lower court relied on observable facts that cannot be adequately reflected in the record, such as witness demeanor and appearance; and (3) any policy reasons favoring or disfavoring the exercise of discretion.” Mandell v. Auditing Div. of Utah State Tax Com’n, 186 P.3d 335, 339 (Utah 2008).

As the following review will show, this is not a factually complex matter, nor is there a dispute over the veracity of testimony from witnesses. Instead, the questions of when and who filed the notice of commencement mix various factual information, i.e. the dates information was filed in the State Construction Registry and the source of that information; with questions of law, namely the legal conclusion of when the notice of commencement was filed and who filed, as required by UTAH CODE ANN. § 38-1-31(1).

The trial court should be granted discretion, as the fact-finder, concerning the sufficiency of the evidence to determine who filed what information on which date, but the conclusion as to the date that the notice of commencement was filed is a question of law to be reviewed for correctness. Questions about the legal adequacy of findings of fact and the conclusions of the trial court present questions of law which are to be

reviewed for correctness. Kendall Insurance, Inc. v. R&R Group, Inc., --- P.3d ---, 2008 WL 2446052 (Utah Ct. App 2008).

**A. The Evidence was Insufficient to Support a Finding that the Hutter's Filed a Notice of Commencement on May 30, 2006.**

A preliminary notice is not necessary to hold a valid lien unless a notice of commencement is filed. UTAH CODE ANN. § 38-1-31(3) (2007). Conversely, when a valid notice of commencement has been filed, a potential lien claimant must file a preliminary notice in order to preserve the right to hold a valid lien. UTAH CODE ANN. § 38-1-32(1)(d)(i)(A) (2007). In nullifying Dig-It's mechanics' lien, the trial court found that the Hutters filed a notice of commencement on May 30, 2006 [R. 113, ¶ 21], and that Dig-It was therefore precluded from holding a valid lien due to Dig-It's failure to file a preliminary notice [R. 113, ¶¶ 35-36].

To successfully challenge such findings, "an appellant must first marshal all the evidence supporting the finding[s] and then demonstrate that the evidence is legally insufficient to support the findings even in viewing it in the light most favorable to the court below. Burton Lumber & Hardware Co. v. Graham, 186 P.3d 1012, ¶12 (Utah Ct. App. 2008). In fulfillment of that burden, Dig-It presents the following exhaustive list of evidence from which the Court could conclude a person filed the notice of commencement asserted in this matter:

1. Craig Brown, Weber County Building Inspection testified:
  - a. Weber County issued a building permit for the Hutter's residence on May 22, 2006. [Transcript, Ex. A, p. 10, ll.14-19].
  - b. Weber County faxes its building permits to the State Construction Registry about once a week. [Transcript, Ex. A, p. 11, ll. 4-15]

- c. Weber County has never paid to transmit building permit information and has never received a receipt for transmitting permit information. [Transcript, Ex. A, p. 11, ll. 16-22].
2. Jeff Buist, Utah Interactive, SCR System Maintenance Technician:
  - a. The State Construction Registry received building permit information from Weber County by fax on May 26, 2006, and the building permit information was filed into the SCR on May 30, 2006 [Transcript, Ex. A, pp. 13, l. 19 to p. 15, l. 7.].
  - b. Utah Interactive does not charge municipalities for filing building permit information and had no receipt showing payment for the alleged notice of commencement in this action. [Transcript, Ex. A, p. 15, l. 8 to p. 16, l. 8].
  - c. The only information in the State Construction Registry relating to the Weber County building permit came from Weber County. [Transcript, Ex. A, p. 19, ll. 8-17].
  - d. The building permit information was confirmed on March 17, 2007. [Transcript, Ex. A, pp. 20-21].
3. Michael Rice, Utah Interactive, SCR Project Manager
  - a. The building permit information from Weber County was filed in the SCR on May 30, 2006. [Transcript, Ex. A, p. 23, l. 13 to p. 24, l. 14].
4. Tom Harper, SCR Manager, Division of Occupational & Professional Licensing, Utah State Department of Commerce.
  - a. For the Division's purposes, the SCR filing date for the Weber County building permit information was May 30, 2006. [Transcript, Ex. A, p. 42, ll. 6-11].
5. Tim Hutter, Owner
  - a. Prior to March, 2007, he was aware of the State Construction Registry, but did not feel he had a need to look at it. [Transcript, Ex. A, p. 50, ll. 8-10].
  - b. He attempted to make a change to the building permit information for his home in March 2007. [Transcript, Ex. A, p. 52, l. 19 to p. 53, l. 25].
  - c. He paid the SCR filing fee for the building permit information in March 2007. [Transcript, Ex. A, p. 54, l. 1 to p. 56, l. 56].

From this review of facts, it is clear that information for the Hutter residence was entered by various people at two different times. In May 2006, Weber County issued a building permit, faxed the permit to the State Construction Registry; and on May 30,

2006, the building permit information was filed in the State Construction Registry by Utah Interactive and its agents. In March 2007, the owner, Tim Hutter, logged in to the State Construction Registry for the first time, edited the building permit information and paid the filing fee.

For the reasons set forth in detail below, it was error for the Court to find that the filing of building permit information in the State Construction Registry by Weber County and Utah Interactive on May 30, 2006, was the date of filing by the Hutters, as opposed to March 2007 when they verified and paid for the filing.

**B. The Trial Court Erred in Concluding that the Building Permit Information from Weber County was a Notice of Commencement Filed by the Hutters.**

The trial court's conclusion was based solely on the fact that Weber County submitted the building permit information to the State Construction Registry by alternate filing. [R. 113, ¶ 28]. There is no evidence showing that the Hutters, their builder, or any other person acting on their behalf filed any information in the State Construction Registry until March 2007. [Transcript, Ex. A, pp. 50-53]. Nevertheless, the trial court concluded that the "Hutters" filed a notice of commencement on May 30, 2006. [R. 113, ¶ 21]. For the trial court's conclusion to be correct, the Court will have to conclude that the building permit information Weber County faxed to the State Construction Registry was effectively the Hutters' filing of a notice of commencement. [Transcript, Ex. A, pp. 14-15]. To determine whether the trial court erred in concluding that the building permit information created a notice of commencement, we must look to UTAH CODE ANN. § 38-1-31, which governs notices of commencement.

Under UTAH CODE ANN. § 38-1-31(1)(a)(i) the building permit information submitted by Weber County constituted only the *basis of a notice of commencement*.

This section 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 electronically by way of the Internet or computer modem or by any other means; 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).

With specific regard to the Mechanics Lien Statute, the Utah Supreme Court has stated, “[u]nder our rules of statutory construction, we look first to the statute’s plain language to determine its meaning. We read the plain language of a statute as a whole and 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). In addition, “[w]e assume that each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable.” Id. at 1103.

From the plain language of the statute, two important rules for evaluating notices of commencement appear: (1) the building permit information submitted by Weber County only formed the *basis* of a notice of commencement; and (2) Weber County is not



one of the only two groups that are authorized to *file* a notice of commencement based on that building permit information: original contractors and owner-builders.<sup>1</sup>

Furthermore, a piecemeal reading of the statute is contrary to established rules for statutory construction: “[w]e read the plain language of the statute as a whole and interpret its provisions in harmony with other provisions of the same statute and other statutes under the same and related chapters. We do so because a statute is passed as a whole and not in parts or sections and is animated by one general purpose or intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.” *Id.* at 1102 (internal quotations and citations omitted).

With these rules of construction in mind, it is evident that construing UTAH CODE ANN. § 38-1-31(1)(a)(i) as enabling the local government entity to file a notice of commencement without any action on the part of the original contractor, owner-builder, or the owner would render as mere surplusage the statute’s provision that “the original contractor or owner-builder may file 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). If building permit information is a self-executing notice of commencement, then

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<sup>1</sup> Utah Code § 38-1-31(1)(c) also provides that “[a]n owner of construction or an original contractor may file a notice of commencement . . . .” Again, however, neither Weber County nor the State Construction Registry itself qualifies as the owner of the Hutters construction or the Hutters original contractor.

there is no need to allow owners and contractors to file a notice of commencement “based” upon the building permit information.<sup>2</sup>

In addition, the trial court’s conclusion is inconsistent with UTAH ADMIN R.156-38B-506 (2006). Rule R156-38b-506 provides that where an alternate filing method is used [R. 113, ¶ 28],

The official filing date of a particular [notice of commencement] filing shall be determined as follows: ... (2) In the case of an alternate method 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.

Before the trial court, Dig-It vigorously argued that a notice of commencement was not filed by the Hutters until March 2007, which is when Mr. Hutter testified he finally logged in to the State Construction Registry, edited, and paid for the notice of commencement. [Transcript, Ex. A, pp. 92-99]. Yet, the trial court concluded that payment is only required for electronically filed notices of commencement, and since the Hutters use an alternate method, no payment was required. [R. 113, ¶ 28].

The trial court’s ruling does not expound on its conclusion or provide a rationale basis for ignoring the applicable half of Rule R156-38b-506. Thus, this Court should conclude that the trial court erred in finding that the Hutters filed a notice of

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<sup>2</sup> Utah Code § 38-1-31(1)(d) acknowledges that duplicate notices of commencement could be filed, but this acknowledgement is necessary due to the fact that there are three separate entities that are authorized to file a notice of commencement on a single project: the original contractor, the owner-builder, and the owner of the construction project. Thus, provisions for duplicate notices of commencement should not be construed to imply that Weber County and the State Construction Registry itself have authority to file a notice of commencement.

commencement on May 30, 2006, because the Hutterers have presented no evidence that they themselves or their contractor filed a notice of commencement on that date, and Weber County was not authorized to file a notice of commencement for them. Accordingly, the trial court also erred in nullifying Dig-It's mechanics' lien on the basis that Dig-It did not file a preliminary notice because a preliminary notice was not necessary to hold a valid lien unless a valid and enforceable notice of commencement had been timely filed. UTAH CODE ANN. § 38-1-31(3) (2007).

**II. THE DISTRICT COURT ERRED IN FINDING THAT THE HUTTERS MET THEIR BURDEN TO PROVE THAT THEY WERE ENTITLED TO ENFORCE THE PROPOSED NOTICE OF COMMENCEMENT.**

The Utah Legislature has provided 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 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) (2007). In its Memorandum Decision, the Court does not specifically discuss the Hutterers compliance with the verification requirement other than to say that the Hutterers met their burden of proof for a notice of commencement. [R. 114, ¶ 39].

In this case, the Hutterers evidence was insufficient to conclude that they timely verified the accuracy of the information contained in the proposed notice of commencement or that the proposed notice of commencement was timely filed and met all of the requirements of UTAH CODE ANN. § 38-1-31.

To the contrary, the evidence establishes that the Hutters did not meet any of the burdens imposed by UTAH CODE ANN. § 38-1-31(5)(a). Consequently, the trial court erred in nullifying Dig-It's mechanics' lien because the Hutters failed to put themselves in a position to enforce the proposed notice of commencement.

**A. The Hutters Failed to Timely Verify the Accuracy of the Information in the Proposed Notice of Commencement.**

A notice of commencement defense to a lien claim only arises when a lien claimant has filed a lien without having first filed a preliminary notice. The only way for a potential lien claimant to file a preliminary notice is to first find the notice of commencement to which the preliminary notice must attach in the State Construction Registry database. [Transcript, Ex. A, p. 32, l. 19 to p. 33, l. 2]. In order to find a particular notice of commencement, a potential lien claimant must input information contained in the notice of commencement into the search engine used by the State Construction Registry. [Transcript, Ex. A, p. 25, l. 17 to p. 26, l. 13]. If a notice of commencement cannot be found, then a preliminary notice cannot be filed. [Transcript, Ex. A, p. 32, l. 19 to p. 33, l. 2].

Accordingly, the difficulty in filing a preliminary notice is compounded when the information in the notice of commencement is inaccurate. For example, if a notice of commencement is incorrectly filed under the name of "Huter" and a potential lien claimant searches under the correct name of "Hutter", the search engine will not retrieve the notice of commencement and the potential lien claimant, through no fault of its own,

will not be able to protect its lien rights by filing a preliminary notice. [Transcript, Ex. A, p. 25, l. 20 to p. 26, l. 13; and p. 29, l. 13 to p. 33, l. 2].

To protect against the nullification of liens by notices of commencement with inaccurate information, the Utah Legislature placed a significant burden on owners and general contractors to make sure the notice of commencement information is complete and accurate. Under UTAH CODE ANN. § 38-1-31(5)(a), “[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) (2007).

In light of the Utah Supreme Court’s observation that “[t]he purpose and intent of Utah’s Mechanics’ Lien Act . . . 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,” Sill, 162 P.3d at 1102-03 (internal quotations and citations omitted), it makes sense that the Legislature requires the party seeking to enforce a notice of commencement to affirmatively verify the accuracy of information in the notice of commencement in order to earn the privilege of using the notice of commencement as a sword to destroy a mechanics’ lien claim.

However, the burden to verify articulated by the Utah Legislature in UTAH CODE ANN. § 38-1-31(5)(a) is meaningless unless: (1) verification occurs within the deadline for filing a notice of commencement; and (2) a notice of commencement is unenforceable if the party seeking enforcement fails to prove that it verified the accuracy of the information.

First, in order for the burden of verification to have any significance, verification must occur within the fifteen (15) day deadline for filing a notice of commencement. Since preliminary notices preserving lien rights must be attached to a notice of commencement within twenty (20) days of the lien claimant's first date of work under UTAH CODE ANN. § 38-1-32(1)(a)(i), and the difficulty in filing a preliminary notice is compounded when the information in the notice of commencement is inaccurate, allowing for verification and correction of the notice of commencement after the notice of commencement filing deadline would prejudice the ability of a lien claimant to protect its lien rights.

In addition, allowing verification and correction of the notice of commencement after the deadline would run afoul of the Utah Supreme Court's declaration that "[l]ien statutes should be broadly construed" to protect potential mechanics' lien claimants. Sill, 162 P.3d at 1102-03 (internal quotations and citations omitted).

Furthermore, allowing verification and correction of the notice of commencement after the filing deadline could enable those seeking to enforce a notice of commencement to use UTAH CODE ANN. § 38-1-31(5)(a) as a tool to deny potential lien claimants the opportunity to protect their lien rights. This could be accomplished simply by initially inputting incorrect information into the notice of commencement and then verifying the accuracy of the information contained in the notice of commencement after those seeking to file a preliminary notice had checked to see if a notice of commencement had been

filed. In this way, those seeking to enforce the notice of commencement could prevent the filing of any preliminary notices.

The only way to prevent this unjust result is to interpret UTAH CODE ANN. § 38-1-31(5)(a) as imposing the obligation to verify the accuracy of the information contained in the notice of commencement prior to the deadline by which a notice of commencement must be filed. Such an interpretation would ensure that potential lien claimants could not be denied the opportunity to protect their lien rights due to mistakes (whether intentional or unintentional) made by the party obligated to file the notice of commencement.

Moreover, if a notice of commencement is enforceable without verification, the “burden” imposed by UTAH CODE ANN. § 38-1-31(5)(a) is not a burden at all, but rather an empty mandate. Under its plain language, Section 38-1-31(5)(a) has meaning only if a notice of commencement is enforceable by those who actually verify the accuracy of its information.

These policy considerations and others must have been considered by the Legislature when it clarified the verification element in section 38-1-31(5)(c), which provides that, in the case of notices of commencement which are alternately filed, as Weber County’s information was in this case, verification must occur within fifteen (15) days after the permit is issued.

Applying the foregoing analysis, the Hutters have not provided any evidence that they verified the accuracy of the information contained in the notice of commencement

prior to June 6, 2006, which was the deadline by which a notice of commencement could be filed.<sup>3</sup>

In fact, the earliest that the Hutters even contend that they verified the accuracy of the information contained in the notice of commencement is March 2007, which is well past the June 25, 2006 date by which Dig-It was authorized to file a preliminary notice.<sup>4</sup> As a result, the Hutters failed to meet their burden of proof with regard to verification, and Dig-It was not required to file a preliminary notice in order to hold a valid mechanics' lien.

**B. The Hutters Failed to Prove that the Proposed Notice Of Commencement was Timely Filed.**

In order to limit lien rights to only those lien claimants that filed a preliminary notice, UTAH CODE ANN. § 38-1-31(3)(a) (2007), the Hutters were required to file a notice of commencement within fifteen (15) days after the issuance of their building permit, UTAH CODE ANN. § 38-1-31(1)(A)(i)(A) (2007). In addition, the Hutters bear the

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<sup>3</sup> If a building permit has been issued, a notice of commencement must be filed within fifteen (15) days after the issuance of the building permit. *See* UTAH CODE ANN. § 38-1-31(1)(a)(i). In his case, a building permit was issued on May 22, 2006. [Transcript, Ex. A, p. 10, l. 19].

<sup>4</sup> A preliminary notice must be filed by a subcontractor within twenty (20) days after the commencement of its own work on a construction project. *See* UTAH CODE ANN. § 38-1-31(1)(a)(i) (2007). Thus, a preliminary notice would have had to have been filed by June 25, 2006 because Dig-It began work on the construction project on June 5, 2006. [R. 007].



burden to “prove that the notice of commencement [was] filed timely . . . .” UTAH CODE ANN. § 38-1-31(5)(a) (2007).

Although the Hutter’s building permit was issued on May 22, 2006, [Transcript, Ex. A, p. 10, l. 19], and therefore the Hutter’s had until June 6, 2006 to file a notice of commencement, the following questions still arise: (1) how is the official filing date of a notice of commencement established for purposes of determining whether a notice of commencement was filed timely; and (2) how can the person seeking to enforce a notice of commencement prove that the notice of commencement was filed timely.

Pursuant to the Utah Legislature’s mandate to “make rules and develop procedures” to “oversee and enforce” the statutory provisions governing notices of commencement, UTAH CODE ANN. § 38-1-30(3)(a) (2006), the Division of Occupational and Professional Licensing has promulgated UTAH ADMIN R. 156-38b-506 (2006). Rule R156-38b-506 is an administrative rule that not only clarifies the official filing date for notices of commencement, but also provides proof of timely filing for those seeking to enforce notices of commencement:

The official filing date of a particular [notice of commencement] 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 method 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.

As set forth by this Court, “[a]dministrative rules adopted pursuant to a statutory grant of authority have the full force and effect of law. Thus, like a legislative

amendment that clarifies ambiguous terms in a statute, such administrative rules may be used to interpret ambiguous statutory provisions.” V-1 Oil Co. v. Department of Environmental Quality, Division of Environmental Response and Remediation, 904 P.2d 214, 218-19 (Utah Ct. App. 1995) (internal citation omitted).

Using Rule R156-38b-506 to clarify how to determine whether a particular notice of commencement has been filed timely is also consistent with this Court’s analysis in King v. Industrial Commission of Utah:

First, we determine whether the legislature explicitly granted discretion to the agency to interpret or apply statutory language at issue. . . . [A] statute directing the agency to interpret or apply specific statutory language should be interpreted as an explicit grant of discretion. If we find such a grant, we review . . . for abuse of discretion. That is, we afford the agency some deference and assess whether its action is within the bounds of reasonableness.

Second, if we do not find an explicit grant of discretion, we examine the language of the statute and the statutory framework for an implicit grant of discretion. If the statutory language is broad and expansive or subject to numerous interpretations we will assume the legislature has chosen to defer to the policy making expertise of the agency and we will find an implicit grant of discretion and review the action . . . for abuse of discretion.

King v. Industrial Commission of Utah, 850 P.2d 1281, 1291 (Utah Ct. App. 1993).

The Utah Legislature has mandated that the Division of Occupational and Professional Licensing “*shall* make rules and develop procedures” to “oversee and enforce” the statutory provisions governing notices of commencement. UTAH CODE ANN. § 38-1-30(3)(a) (2006) (emphasis added). Thus, Rule R156-38b-506 clarifies how to determine whether a notice of commencement has been filed timely. It provides that when a notice is alternately filed, a payment must be received before the official filing date of a notice of commencement can be determined. Once a notice is filed, the

payment receipt contemplated by Rule R156-38b-506 provides the evidence with which those seeking to enforce a notice of commencement can meet their burden of proof with regard to whether the notice of commencement was filed timely. This method of proving the filing date is consistent with the Utah Legislature's directive that State Construction Registry "provide hard-copy printing of electronic receipts for an individual filing evidencing the date and time of the individual filing and the content of the individual filing." UTAH CODE ANN. § 38-1-27(2)(g) (2006).

In light of the fact that "[t]he [Division of Occupational and Professional Licensing] and the designated agent need not determine the timeliness of any notice before filing the notice in the database" under UTAH CODE ANN. § 38-1-27(7), it makes sense that the Division of Occupational and Professional Licensing would articulate a rule to determine whether a notice filed in the State Construction Registry database purporting to be a notice of commencement was filed timely.

Finally, requiring payment before the official filing date of a notice of commencement can be established is consistent with funding provisions of the State Construction Registry. The Division of Occupational and Professional Licensing must establish fees for those seeking to file notices in the State Construction Registry database, 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). Furthermore, "[t]he fees allowed under Subsection (4)(a) may vary by method of filing if one form of

filing is more costly to process than another form of filing.” UTAH CODE ANN. § 38-1-27(4)(c) (2006).

Thus, it is plain to see that the Utah Legislature intended for those seeking to file a notice of commencement 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 the Division of Occupational and Professional Licensing to ensure that those filing notices of commencement share in the cost burdens imposed by running and maintaining the State Construction Registry database.

Applying the foregoing analysis, although the Hutterers have failed to provide a payment receipt to evidence the official filing date of their proposed notice of commencement, the Hutterers contend that they made payment for their notice of commencement in March of 2007. However, the deadline by which they could file an enforceable notice of commencement was June 6, 2006. Accordingly, the Hutterers failed to timely file a notice of commencement and Dig-It was not required to file a preliminary notice in order to hold a valid lien. UTAH CODE ANN. § 38-1-31(3)(a) (2007).

**C. The Hutterers Failed to Prove that the Proposed Notice of Commencement Met All of the Requirements of Utah Code § 38-1-31.**

The Utah Legislature has provided that “[t]he burden is upon any person seeking to enforce a notice of commencement to . . . prove that the notice of commencement . . . meets all of the requirements in this section.” UTAH CODE ANN. § 38-1-31(5)(a) (2007).

One of the mandatory requirements of UTAH CODE ANN. § 38-1-31 is that “[a] notice of commencement *shall* include . . . the name and *address* of the owner of the project . . . .” UTAH CODE ANN. § 38-1-31(2)(a) (2007) (emphasis added).

However, the proposed notice of commencement did not include the city, state, and zip code of the owner of the project. [R 112, ¶ 13]. Thus, the notice failed to meet all of the requirements of UTAH CODE ANN. § 38-1-31 and should have been deemed unenforceable by the trial court.

Instead, the trial court erroneously relied on UTAH CODE ANN. § 38-1-31(2)(c) for the proposition that a notice of commencement does not need to include the address of the owner of the project when a building permit has been issued for the project and the party that filed the building permit neglected to include the address of the owner of the project on the building permit.

Specifically, UTAH CODE ANN. § 38-1-31(2)(c) provides that “[a] notice of commencement need not include all of the items listed in Subsection (2)(a) [such as the name and address of the owner of the project] 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) (2007) (emphasis added).

In this case, the Hutters were issued a building permit, but the person that filled out the building permit neglected to include the Hutters’ city, state, and zip code in the space provided on the building permit. [R 014]. Spaces for the Hutters’ city, state, and

zip code were available on the building permit, but that information was never given to Weber County, so Weber County never sent it to the State Construction Registry.

Although the trial court apparently interpreted the phrase “available on the building permit” to mean the information actually entered on the building permit (i.e., only the information listed in Subsection (2)(a) actually entered on the building permit needs to be included in the notice of commencement), such an interpretation would lead to incongruous results.

For example, the building permit includes a space for both the name and address of the owner of the project. Under the trial court’s interpretation of “available on the building permit,” if the building permit, as executed, failed to include both the name and address of the owner of the project, a notice of commencement would not have to include the name and address of the owner of the project. Remembering that preliminary notice filers must search and find a notice of commencement before they can file a preliminary notice, it would be considerably more difficult for a potential lien claimant to be sure that a notice of commencement lacking the name and address of the owner of the project was the correct notice of commencement to which a preliminary notice should be attached, especially if the building permit was inaccessible to the potential lien claimant.<sup>5</sup>

A more thorough interpretation of the phrase “available on the building permit” is that there is a space provided for the information on the building permit (i.e., all of the

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<sup>5</sup> It should be noted that the Hutters failed to provide any evidence that a building permit was posted at the project cite as required by Utah Code Ann. § 38-1-31(6) (2007).

information listed in Subsection (2)(a) that can be input into the building permit needs to be included in the notice of commencement). Under this interpretation, the only items listed in Subsection 2(a) that would not need to be included in the notice of commencement are those items for which there is no space on the building permit to input that information.

Applied to this case, the Hutter's should not be relieved of the obligation to include the complete name and address of the owner of the project on the notice of commencement solely because the filer of the building permit failed its UTAH CODE ANN. § 38-1-31(1)(a)(ii) obligation to include the Hutter's complete address in the space provided on the building permit.

To further justify its conclusion that the proposed notice of commencement was enforceable in spite of the fact that the notice of commencement failed to meet all of the requirements of UTAH CODE ANN. § 38-1-31 due to its failure to include the city, state, and zip code of the owner of the project, the trial court erroneously relied on the doctrine of substantial compliance.

Applying the doctrine of substantial compliance to the evaluation of a notice of commencement is inappropriate because the Utah Legislature has expressly provided that “[s]ubstantial compliance with the requirements of this chapter is sufficient to *hold and claim a lien*,” UTAH CODE ANN. § 38-1-7(2)(b) (2007) (emphasis added), or a *preliminary notice*, UTAH CODE ANN. § 38-1-32(2)(b) (2007), but not a notice of commencement under UTAH CODE ANN. § 38-1-31 (2007). This purposeful omission is a

significant factor in interpreting this section. When confronted with such an omission, the Supreme Court advises:

In interpreting the meaning of a statute or ordinance, we begin first by looking to the plain language of the ordinance. When examining the plain language, we must assume that each term included in the ordinance was used *advisedly*. Additionally, statutory construction presumes that the expression of one should be interpreted as the exclusion of another. Thus, we should give effect to any omission in the ordinance language by presuming that the omission is *purposeful*.

Carrier v. Salt Lake County, 104 P.3d 1208, 1216 (Utah 2004) (emphasis added).

Accordingly, if the Utah Legislature intended for a notice of commencement that substantially complied with the requirements of UTAH CODE ANN. § 38-1-31 to be enforceable, then the Legislature would have drafted UTAH CODE ANN. § 38-1-31(5)(a) to read: “[t]he burden is upon any person seeking to enforce a notice of commencement to . . . prove that the notice of commencement . . . substantially complies with the requirements in this section.” Instead, the Utah Legislature has provided that “[t]he burden is upon any person seeking to enforce a notice of commencement to . . . prove that the notice of commencement . . . meets all of the requirements in this section.” UTAH CODE ANN. § 38-1-31(5)(a) (2007) (emphasis added).

Thus, by mandating in UTAH CODE ANN. § 38-1-31(2)(a) that the address of the owner of the project “shall” be included in the notice of commencement, and that a party seeking to enforce a notice of commencement bears the “burden” to prove that the notice of commencement meets “all” of the requirements of UTAH CODE ANN. § 38-1-31, it must be presumed that the Utah Legislature “advisedly” and “purposefully” foreclosed the application of a substantial compliance standard to notices of commencement,



especially in light of the fact that the Legislature explicitly provided for the application of the substantial compliance standard to preliminary notices and lien claims.

Furthermore, in light of the fact that that notices of commencement are a narrow exception to the broad, remedial purposes of the Mechanics' Lien Statute, applying a substantial compliance standard to notices of commencement runs contrary to the Utah Supreme Court's declaration that "[l]ien statutes should be broadly construed 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]." Sill, 162 P.3d at 1102-03 (internal quotation omitted).

Public policy also weighs against adopting a substantial compliance standard with regard to notices of commencement. The plain language of UTAH CODE ANN. § 38-1-31(5)(a) articulates a clear, objective standard (i.e., *all* of the requirements of UTAH CODE ANN. § 38-1-31 must be met, including the provision that a notice of commencement *shall* include the name and address of the owner of the property) for determining whether a notice of commencement is enforceable.

Such an objective, bright-line rule not only complies with the plain language of the statute, but is also well within the capacity of those seeking to file a notice of commencement. With regard to required information, the notices of commencement need only include: (1) the name and address of the original contractor; (2) the name and address of the owner; and (3) the address or description of the project. *See* UTAH CODE ANN. § 38-1-31(2)(a) (2007). If owners and original contractors do not have that

information readily available, they have greater problems than compliance with the rules for filing notices of commencement.

On the other hand, by adopting a substantial compliance standard, the hard and fast rules defining whether a notice of commencement is enforceable would give way to the differing opinions of different judges about what constitutes substantial compliance. This subjective standard would promote litigation by creating an exception to the requirement for notices of commencement to include “all” required information.

Thus, a simple, objective, bright-line test for determining whether a notice of commencement complied with all of the requirements of the statute would be traded for a subjective test based on whether the particular judge felt that the content of a particular notice of commencement was close enough. Not only would such a subjective standard invite litigation, but it would also unnecessarily burden those seeking to file a mechanics’ lien because of uncertainty as to whether an enforceable notice of commencement had been filed.

Finally, it should be noted that a notice of commencement is not unenforceable due to minor inaccuracies in the provided information. Only a substantial inaccuracy in the provided information will make a notice of commencement unenforceable. UTAH CODE ANN. § 38-1-31(5)(b) (2007). Thus, after the burden to include in a notice of commencement all of the information required by UTAH CODE ANN. § 38-1-31(2)(a) is met, the information itself is subject to a substantial inaccuracy standard.

Consequently, the trial court erroneously relied on the doctrine of substantial compliance to find that the proposed notice of commencement was enforceable in spite of the fact that the notice of commencement did not meet all of the requirements of UTAH CODE ANN. § 38-1-31 due to its failure to include the city, state, and zip code of the owner of the project. As a result, the trial court erred in nullifying Dig-It's mechanics' lien because the Hutters' proposed notice of commencement should have been deemed unenforceable.

### **III. THE MECHANICS' LIEN FILED BY DIG-IT PURSUANT TO UTAH'S MECHANICS' LIEN ACT WAS NOT A WRONGFUL LIEN.**

In addition to the errors in interpreting and applying the provisions regarding notices of commencement and preliminary notices, the trial court also erred in implicitly concluding that Dig-It's lien was a wrongful lien. [R. 114]. The Wrongful Lien Injunction Statute provides that “[a]ny person who believes that he or she is the victim of a wrongful lien may file a verified written petition for a civil wrongful lien injunction against the person filing, making, or uttering the lien . . . .” UTAH CODE ANN. § 38-9a-201(1)(a) (2008).

A “wrongful lien” is defined under the Wrongful Lien Injunction Statute as “a lien made in violation of Section 76-6-503.5, and includes an instrument or document as defined in Section 38-9-1.” UTAH CODE ANN. § 38-9a-102 (2005). However, the mechanics' lien filed by Dig-It was not made in violation of UTAH CODE ANN. § 76-6-503.5 and does not meet the definition of a wrongful lien under UTAH CODE ANN. § 38-9-

1. Consequently, the Wrongful Lien Injunction Statute should not have been applied by the trial court to nullify Dig-It's mechanics' lien.

**A. Dig-It's Mechanics' Lien was Not Made in Violation of Utah Code § 76-6-503.5.**

There are only two ways by which a person can be in violation of UTAH CODE ANN. § 76-6-503.5:

A person is guilty of the crime of wrongful lien if that person knowingly, makes, utters, records, or files a lien: (a) having no objectively reasonable basis to *believe* he has a present and lawful property interest in the property or a claim on the assets; or (b) if the person files the lien in violation of a civil wrongful lien injunction pursuant to Title 38, Chapter 9a, Wrongful Lien Injections.

UTAH CODE ANN. § 76-6-503.5(2) (2005) (emphasis added). Going in reverse order, subsection (b) is inapplicable because there was not a civil wrongful lien injunction in place when Dig-It filed its mechanics' lien. As to subsection (a), Dig-It had an objectively reasonable basis to believe that it had a present and lawful interest in the property when it filed its mechanics' lien.

The basis upon which Dig-It believed that it had a present and lawful interest in the property includes the following facts: (1) Dig-It had not been compensated for the labor and materials that it supplied for use in construction on the property; (2) Dig-It *believed* that it was entitled to a mechanics' lien under Utah Code Ann. § 38-1-3; and (3) Dig-It *believed* that it was not required to file a preliminary notice in order to hold a valid

lien because, as set forth *infra*, Dig-It believed that the Hutters had not filed a valid and enforceable notice of commencement with the State Construction Registry.<sup>6</sup>

The objective reasonableness of Dig-It's belief is underscored by the trial court's Memorandum Decision finding that Dig-It filed its mechanics' lien action in "good faith" and that "[t]he statutes which apply to a mechanics' lien are complex and subject to different interpretation." [R. 113, ¶¶ 32-33]. Accordingly, Dig-It's mechanics' lien was not in violation of Utah Code Ann. § 76-6-503.5 and therefore could not be considered a wrongful lien under the Wrongful Lien Injunction Statute pursuant to its incorporation of Utah Code Ann. § 76-6-503.5.

**B. Dig-It's Mechanics' Lien Was Not a Wrongful Lien under Utah Code § 38-9-1.**

Since Dig-It's mechanics' lien does not qualify as a wrongful lien under UTAH CODE ANN. § 76-6-503.5, it may only be a wrongful lien if it falls within the definition set forth in UTAH CODE ANN. § 38-9-1, which defines a wrongful lien as

any document that purports to create a lien, notice of interest, or encumbrance on an owner's interest in certain real property and at the time it is recorded or filed is not: (a) expressly authorized by this chapter or another state or federal statute . . . ."

Thus, a lien that was expressly authorized by a state statute at the time it was recorded or filed is not a wrongful lien. In this case, the lien filed by Dig-It was expressly authorized

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<sup>6</sup> If a valid and enforceable notice of commencement has not been filed, then a preliminary notice does not need to be filed in order to hold a valid lien. *See* UTAH CODE ANN. § 38-1-31(3) (2007).

by Utah's Mechanics' Lien Statute at the time it was filed. UTAH CODE ANN. § 38-1-1, *et seq.*

Those who attempt to define mechanics' liens as wrongful for lack of authorization under UTAH CODE ANN. § 38-9-1 often resort to the misguided argument that a mechanics' lien is not "expressly authorized" if a defense against the lien can be presented to defeat the lien claim. For example, the Hutters' argued before the trial court that Dig-It's mechanics' lien was not "authorized" because the Hutters filed a notice of commencement and Dig-It failed to file a preliminary notice.

Taking the Hutters argument to its logical conclusion, however, exposes its weakness. If the term "authorization" is analyzed within the context of meritorious resolution, then there are only two classes of liens: successful liens and wrongful liens. But if "authorization" is analyzed within the context of statutorily created legal rights, then wrongful liens are only those which are not rooted in a particular provision of the Code.

A more thorough interpretation of UTAH CODE ANN. § 38-9-1 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. This conclusion is bolstered by the legislative history of the Wrongful Lien Statute.

When the language of a statute is plain, other interpretive tools are not needed. However, if the language of the statute is ambiguous, the court may look beyond the statute to the legislative history and public policy to ascertain the statute's intent. When viewed holistically, a statute is

ambiguous if duplicative, yet plausible meanings are not eliminated from possibility.

Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints, 164 P.3d 384, 396 ¶47 (Utah 2007).

In 1985, Senator Matheson of the Utah Senate brought the wrongful lien bill in response to liens that were being filed by members of certain fundamentalist groups in southern Utah against local city and county officials that were attempting to enforce Utah law against the fundamentalist groups. *See* Senate Floor Debates, 1985 General Session, February 21, 1985, Afternoon Session, Disc #96, Side 1, [07] 4:00-5:36. Senator Matheson stated that approximately \$12 million dollars in liens had been filed against these public officials, and that these liens were commonly referred to as “common law liens” that were without any basis or support in the law. Id.

Senator Carling raised his concern that the language of the bill as proposed would also apply to statutory liens such as mechanics’ liens. Id. He further indicated that this bill should not apply to those liens. Id. The original language of the bill defined a wrongful lien as a lien that was without basis in the law, or that was “otherwise invalid.” Id. The senators agreed that this language was too broad inasmuch as it could be read to include mechanics’ liens and other statutory liens. Id. In order to protect statutory liens, such as mechanics’ liens, Senator Matheson agreed that the phrase “or is otherwise invalid” should be stricken from the proposed bill. Id. Furthermore, Senator Moll indicated that the purpose of the bill was to keep fringe groups from filing common law liens and that the bill should have no application whatsoever to mechanics’ liens. *See*

Senate Floor Debates, Utah State Legislature, 1985 General Session, February 21, 1985, Afternoon Session, [10] 4:05 - 4:39 / [1] 01-64.

Thus, it is clear from the legislative history of UTAH CODE ANN. § 38-9-1 that the definition of a “wrongful lien” is not intended to encompass statutorily regulated liens because such liens are “authorized” in that they are regulated by a specific code section, and the consequences for failing to succeed on such lien claims is managed within the code sections which govern these liens. With these considerations in mind, it is apparent that Dig-It’s mechanics’ lien was authorized at the time it was filed by Utah’s Mechanics’ Lien Statute. *See* UTAH CODE ANN. § 38-1-1, *et seq.*

Moreover, on June 6, 2007, the date Dig-It recorded its mechanics’ lien, the Hutters had yet to prove that their notice of commencement was enforceable. Under UTAH CODE ANN. § 38-1-31(5)(a), “[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) (2007).

While it is true that building permit information had been submitted to the State Construction Registry, and that Dig-It could have submitted a preliminary notice, the lack of a preliminary notice did not deprive Dig-It of the opportunity to file its lien in order to determine whether the Hutters could meet their burden to prove that they verified the accuracy of the information in the notice of commencement and that the notice of commencement was filed timely and met all of the requirements of UTAH CODE ANN. §



38-1-31(5)(a). Rather, Dig-It's decision not to file a preliminary notice merely provided the Hutters with a defense to Dig-It's lien claim in the event that the Hutters could meet the burden of proof set forth in UTAH CODE ANN. § 38-1-31(5)(a).

Accordingly, at the time that Dig-It filed its mechanics' lien, it was not under any statutory obligation to file a preliminary notice because the Hutters had yet to prove, pursuant to Utah Code Ann. § 38-1-31(5), that their proposed notice of commencement was enforceable. Consequently, Dig-It's mechanics' lien was subject to a defense, but nevertheless authorized as of its date of filing and therefore not a wrongful lien under UTAH CODE ANN. § 38-9-1 or under the Wrongful Lien Injunction Statute pursuant to its incorporation of UTAH CODE ANN. § 38-9-1.

This application of the provisions of Utah Code Ann. § 38-9-1 is consistent with this Court's recent holding in Eldridge v. Farnsworth, 166 P.3d 639 (Utah Ct. App. 2007). In Eldridge, this Court was asked to determine whether a lis pendens filed by the Plaintiffs as part of a lawsuit seeking to enforce a Real Estate Purchase Contract was a wrongful lien. Id. at 653. The Court ultimately determined that the Plaintiffs did not have a valid contract for the purchase of the property. Id. at 650. Accordingly, the Defendants argued that the lis pendens filed by the Plaintiffs was a "wrongful lien" because the "claims in the complaint [were] later determined to be without merit." Id. at 654. However, this Court looked to the express language of Utah Code Ann. § 38-9-1 and concluded that whether the underlying claim is meritoriously resolved in favor of the claimant is irrelevant to whether the claimant filed a wrongful lien:

Section 38-9-1 requires a court to determine whether a lien is wrongful by evaluating it at the time it is recorded or filed. Therefore, when evaluating the [petitioners'] *lis pendens*, the trial court was required to evaluate its validity based on the facts known at the time it was recorded, not at a later point in time after evaluating the merits.

Id. at 654.

Similarly, the trial court in this case was under an obligation to evaluate whether Dig-It's lien was wrongful at the time it was filed. At the time that Dig-It's mechanics lien was filed, the Hutters' had yet to meet their burden to assert and "prove" the defense that their "notice of commencement [was] filed timely and [met] all of the requirements in [UTAH CODE ANN. § 38-1-31]." UTAH CODE ANN. § 38-1-31(5) (2007).

Consequently, Dig-It's filing of a preliminary notice was not a prerequisite for Dig-It's lien to be "authorized" by the Mechanics' Lien Statute. UTAH CODE ANN. § 38-1-31(3) (2007).

Since Dig-It's lien could only be "wrongful" if it was not authorized by statute at the time it was filed, the trial court's conclusion regarding the wrongfulness of Dig-It's lien implicitly presumes that the notice of commencement was valid when Dig-It filed its mechanics' lien. This presumption effectively shifts the Hutters' Section § 38-1-31(5)(a) burden of proving that their notice of commencement was enforceable to Dig-It, because Dig-It would have to assume the building permit information was a valid notice of commencement, subject to invalidation by Dig-It.

This shift of the Hutters' Section 38-1-31(5)(a) burden to Dig-It would not only be inconsistent with the plain language of UTAH CODE ANN. § 38-1-31(5)(a), but would also

be inconsistent with the established doctrines for construing the Mechanics' Lien Act. As set forth by the Utah Supreme Court, "[t]he purpose and intent of Utah's Mechanics' Lien Act . . . 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).

Accordingly, Dig-It was authorized by statute to file its mechanics' lien at the time it was recorded because a determination of whether Dig-It needed to file a preliminary notice had not yet been made (and indeed could not have been made in light of UTAH CODE ANN. § 38-1-31(5)(a)). Consequently, Dig-It's mechanics' lien was authorized by statute and cannot be considered a wrongful lien under UTAH CODE ANN. § 38-9-1 or under the Wrongful Lien Injunction Statute pursuant to its incorporation of UTAH CODE ANN. § 38-9-1.

### 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 \_\_\_\_ day of July, 2008.

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DANA T. FARMER  
*Attorney for Appellant*

**CERTIFICATE OF SERVICE**

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

Jeffrey D. Stevens  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111

Kenneth D. Burton  
5319 Adams Ave. Parkway, Ste. D  
South Ogden, UT 84405

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Heidi Gonzalez  
*Legal Assistant*