

2008

# Timothy Michael and Tamara McQueen Hutter v. DIT-IT, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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TIMOTHY MICHAEL & TAMARA	)	
McQUEEN HUTTER, husband & wife	)	Appellee Case No. 20080077-CA
Appellee	)	
	)	
v.	)	
	)	
DIT-IT, INC., a Utah Corporation;	)	
	)	
Appellant	)	

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Brief of Appellee

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IN THE UTAH COURT OF APPEALS

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Brief of Appellee

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## **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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## STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction of this matter pursuant to section 78A-4-103(2)(j) of the Utah Code.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

**I. The Trial Court Correctly Determined that a Notice of Commencement Was Filed for the Construction of the Hutter's Home When Weber County Transmitted the Building Permit Information to be Posted on the State Construction Registry as Required by Statute.**

The Hutter's response to Dig-It's first issue is at pages 17 to 30.

### **Standard of Review**

The first issue within Dig-It's first assignment of error is whether changes to section 38-1-31 made after the events in this suit occurred operate retroactively.

"Whether an amended statute operates retroactively is a question of law" which is reviewed for correctness. *J. Pochynok Co. Inc. v. Smedsrud*, 2003 UT App 375, ¶5, 80 P.3d 563 (reversed on other grounds).

The second issue of whether a notice of commencement was filed for the Hutter's home is a mixed question of law and fact. The standard of review is deference to the trial court's discretion. The degree of discretion afforded the trial court is determined based on the following factors:

- (1) The degree of variety and complexity in the facts to which the legal rule is to be applied;
- (2) the degree to which a trial court's application of the legal rule relies on 'facts' observed by the trial judge, 'such as a witnesses appearance and demeanor, relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts;' and

- (3) other ‘policy reasons that weigh for or against granting discretion to trial courts.’

*State v. Levin*, 2006 UT 50, ¶25, 144 P.3d 1096 (quoting *State v. Virgin*, 2006 UT 29, ¶28, 137 P.3d 787). On this issue the trial court should be given some discretion. The variety and complexity of facts to which the law is to be applied is limited by the terms of the statute; however, the trial court was able to observe the witness testimony regarding the operation of the State Construction Registry.

## **II. The Trial Court Correctly Found That the Notice of Commencement Filed For the Construction of the Hutter's Home Was Accurate, Timely Filed and Enforceable.**

The Hutter's response to Dig-It's second set of issues is located at pages 30 to 40.

### **Standard of Review**

There are several sub-issues within this second assignment of error. The question of whether the information in the notice of commencement is accurate is a question of fact and the standard of review is clear error. Utah R. Civ. Pro. 52. The issue of whether the law requires the information in a notice of commencement to be verified within 15 days is a legal question of statutory interpretation reviewed for correctness. *MacFarlane v. Utah State Tax Comm'n*, 2006 UT 25, ¶9, 134 P.2d 1116.

The issue of whether the notice of commencement was timely filed is a mixed question of law and fact. The standard of review is deference to the trial court's discretion. The degree of discretion afforded the trial court is determined based on the following factors:

- (1) The degree of variety and complexity in the facts to which the legal rule is to be applied;

- (2) the degree to which a trial court's application of the legal rule relies on 'facts' observed by the trial judge, 'such as a witnesses appearance and demeanor, relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts;' and
- (3) other 'policy reasons that weigh for or against granting discretion to trial courts.'

*Levin*, 2006 UT at ¶25. On this issue the trial court should be granted greater discretion because of the potential variety of facts to which this rule is to be applied and the trial judge's ability to assess the demeanor of the witnesses regarding the operation of the State Construction Registry.

The issue of the proper interpretation of section 38-1-31(2)(c)'s safe harbor provision is a legal question reviewed for correctness. *MacFarlane*, 2006 UT at ¶9. The question of whether this safe harbor provision was applied properly to the facts is a mixed question of law and fact. The standard of review is deference to the trial court's discretion, the degree of which is determined by the *Levin* factors. In this instance the Court need not afford the trial court discretion because the variety of facts to which the rule applies is limited by the terms of the statute and the witness testimony was not material to the court's determination.

Finally, the issue of whether any inaccuracies in the notice of commencement were substantial is a mixed question of law and fact. The standard of review is deference to the trial court's discretion, the degree of which is determined by the *Levin* factors. In this instance the Court should afford the trial court greater discretion because of the potential variety and complexity of facts to

which this rule is to be applied and the trial court's ability to assess the demeanor of the witnesses.

**III. The Trial Court Correctly Concluded That Dig-It's Mechanic's Lien Was a Wrongful Lien and Could Be Contested Under of the Utah Wrongful Lien Injunction Act.**

The Hutters' response to Dig-It's third issue is set forth on pages 40 to 44.

**Standard of Review**

This issue presents a question of statutory interpretation which is a question of law. The standard of review is correctness. *MacFarlane*, 2006 UT at ¶9.

**DETERMINITIVE STATUTES**

The following statutes are of central importance to this appeal:

**Utah Code Ann. § 38-1-31 (2006)**

§ 38-1-31. Building permit -- Construction -- Notice registry -- Notice of commencement of work

(1) (a) (i) 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, 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.

(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) 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.

(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) On January 1, 2007 and thereafter, 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) The content of 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) 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.

(3) If a notice of commencement for a construction project is not filed within the time set forth in Subsections 38-1-31(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 such notice for 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.

**Utah Code Ann. § 38-1-32 (2006)**

§ 38-1-32. Preliminary notice by subcontractor

- (1) (a) (i) Except for a person who has a contract with an owner or an owner-builder, a subcontractor shall file a preliminary notice with the database within the later of:
  - (A) 20 days after commencement of its own work or the commencement of furnishing labor, service, equipment, and material to a construction project; or
  - (B) 20 days after the filing of a notice of commencement.
- (ii) A preliminary notice filed within the period described in Subsection (1)(a)(i) is effective as to all labor, service, equipment, and material furnished to the construction project, including labor, service, equipment, and material provided to more than one contractor or subcontractor.
- (iii) (A) If more than one notice of commencement is filed for a project, a person may attach a preliminary notice to any of the notices of commencement filed for the project.
- (B) A preliminary notice attached to an untimely notice of commencement is valid if there is also a valid and timely notice of commencement for the project to which the preliminary notice may attach.
- (b) If a person files a preliminary notice after the period prescribed by Subsection (1)(a), the preliminary notice becomes effective five days after the day on which the preliminary notice is filed.
- (c) Failure to file a preliminary notice within the period required by Subsection (1)(a)

precludes a person from maintaining any claim for compensation earned for performance of labor or service or supply of materials or equipment furnished to the construction project before the expiration of five days after the late filing of a preliminary notice, except as against the person with whom the person contracted.

(d) (i) (A) If a person who is required to file a preliminary notice under this chapter fails to file the preliminary notice, that person may not hold a valid lien under this chapter.

(B) A county recorder need not verify that a valid preliminary notice is filed when a person files a notice to hold and claim a lien under Section 38-1-17.

(ii) The content of a preliminary notice shall include:

(A) the building permit number for the project, or the number assigned to the project by the designated agent;

(B) the name, address, and telephone number of the person furnishing the labor, service, equipment, or material;

(C) the name and address of the person who contracted with the claimant for the furnishing of the labor, service, equipment, or material;

(D) the name of the record or reputed owner of the project;

(E) the name of the original contractor under which the claimant is performing or will perform its work; and

(F) the address of the project or a description of the location of the project.

(iii) Upon request by person identified in Subsection (1)(a)(i), an original contractor shall provide the person with the building permit number for the project, or the number assigned to the project by the designated agent.

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

(A) the person filing the preliminary notice;

(B) each person that filed a notice of commencement for the project; and

(C) all interested persons who have requested such notice for the project.

(ii) A person to whom notice is required under Subsection (2)(a)(i) is responsible for:

(A) providing an e-mail address, mailing address, or telefax number to which a notice required by Subsection (2)(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.

(iii) The designated agent fulfills the notice requirement of Subsection (2)(a)(i) 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.

(b) The burden is upon the person filing the preliminary notice to prove that the person has substantially complied with the requirements of this section.

(c) Subject to Subsection (1)(d), a person required by this section to give preliminary notice is only required to give one notice for each project.

(d) If the labor, service, equipment, or material is furnished pursuant to contracts under

more than one original contract, the notice requirements must be met with respect to the labor, service, equipment, or material furnished under each original contract.

(3) (a) If a construction project owner, original contractor, subcontractor, or other interested person believes that a preliminary notice has been filed erroneously, that owner, original contractor, subcontractor, or other interested person can request from the person who filed the preliminary notice evidence establishing the validity of the preliminary notice.

(b) Within ten days after the request described in Subsection (3)(a), the person or entity that filed the preliminary notice shall provide the requesting person or entity proof that the preliminary notice is valid.

(c) If the person or entity that filed the preliminary notice does not provide proof of the validity of the preliminary notice, that person or entity shall immediately cancel the preliminary notice from the database in any manner prescribed by the division pursuant to rule.

(4) A person filing a preliminary notice by alternate filing is responsible for verifying and changing any incorrect information in the preliminary notice before the expiration of the time period during which the notice is required to be filed.

#### **Utah Code Ann. § 38-9a-102 (2007)**

##### § 38-9a-102. Definitions

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.

#### **Utah Code Ann. § 38-9-1 (2007)**

##### § 38-9-1. Definitions

As used in this chapter:

\* \* \*

(6) "Wrongful lien" means any document that purports to create a lien 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;

#### **Utah Code Ann. § 38-9-2 (2007)**

##### § 38-9-2. Scope

\* \* \*

(3) This chapter does not apply to a person entitled to a lien under Section 38-1-3 who files a lien pursuant to Title 38, Chapter 1, Mechanics' Liens.



## STATEMENT OF THE CASE

### **I. Nature of the Case.**

This appeal is between Tim and Tamara Hutter, (the “Hutters”), owners of a home recently constructed in Weber County, Utah and Dig-It, Inc., (“Dig-It”), an excavation contractor employed by the Hutters’ general contractor to perform work on the construction of the Hutters’ home. Prior to the start of construction, Weber County issued the Hutters’ general contractor a building permit on May 22, 2006. According to legislation enacted in 2004 and becoming effective in 2005, Weber County faxed the building permit for the Hutters’ home to the State Construction Registry. The State Construction Registry then posted this information on its database as a notice of commencement for the construction project. All of these steps occurred exactly as required by the legislation creating the State Construction Registry.

Once the notice of commencement for the Hutters’ home was created, all subcontractors performing work on the Hutters’ home were required to file preliminary notices. If they failed to file preliminary notices, they were not entitled to record a mechanic’s lien against the Hutters’ home. A number of subcontractors and suppliers filed preliminary notices on the Hutters’ home. Dig-It, however, did not.

For reasons that are not clear and are not relevant to this appeal, a dispute arose between Dig-It and the Hutters’ general contractor regarding payment. Dig-It claims that it was not paid for all of the work that it performed on the Hutters’ home. As part of this claim, Dig-It recorded a mechanic’s lien against the Hutters’ home despite the clear statutory bar against recording such a lien.

## **II. Course of Proceedings.**

In response to Dig-It's mechanic's lien, the Hutters sent letters to Dig-It personally and through their attorney asking Dig-It to remove its mechanic's lien and enable them to close the construction loan on their home. Dig-It refused. The Hutters then filed a petition to nullify Dig-It's mechanic's lien pursuant to Utah's Wrongful Lien Injunction Act, sections 38-9a-101--105 of the Utah Code. This legislation, also enacted in 2005, provides an inexpensive and expedited procedure to review liens.

The Hutters' petition was tried to Judge Jones in the District Court for the Second Judicial District, Weber County, Utah. The Hutters presented documentary evidence and the testimony of Weber County building officials, representatives from the Division of Occupation and Professional Licensing, and managers of the State Construction Registry to prove the veracity, timeliness and authenticity of the notice of commencement. Judge Jones entered a Memorandum Decision finding that the notice of commencement was timely filed and enforceable and nullified Dig-It's mechanic's lien. Dig-It has appealed this decision.

## **III. Statement of Facts.**

1. In the spring of 2006, the Hutters contracted with a general contractor, Jeromy's Homes, Inc., to construct a home for them on property that they owned at 3591 North Elkview Drive in Weber County, Utah. [Hearing Transcript, R142, p.44 ll. 11-21, Dig-It Appendix A; Trial Exhibit 1, Appendix Tab 2].

2. Jeromy's Homes, Inc. applied for and obtained a building permit issued by Weber County on May 22, 2006. [Trial Exhibit 1, Appendix Tab 2; R113 Memorandum

Decision ¶ 20, Appendix Tab 1; Hearing Transcript, R142, p.10 ll. 3-19, Dig-It Appendix A]

3. Following the requirements created by recently enacted legislation, Craig Brown, a Weber County building official, faxed the Hutter's' building permit along with a number of others issued that week to the State Construction Registry on May 26, 2006.

[R113 Memorandum Decision ¶ 28, Appendix Tab 1; Hearing Transcript, R142, Testimony of Craig Brown, p.10, l. 20 - p.11 l. 22; Testimony of Jeff Buist, p.13 l.24 – p.14 l.11, Dig-It Appendix A; Trial Exhibit 2.].

4. Utah Interactive, the state's designated agent that operates the State Construction Registry, posted the Hutter's' building permit information that it received from Weber County onto State Construction Registry database as a notice of commencement on May 30, 2006, eight days after the building permit was issued. [Trial Exhibit 3, Appendix Tab 3; Hearing Transcript, R142, Testimony of Jeff Buist, p.14 l.12 – p.15 l.7; Testimony of Michael Rice, p.23 l.10 - p.24 l.17; Testimony of Tom Harper, p.39 l.8 – p.42 l.11, Dig-It Appendix A].

5. This is the precise procedure that the Division of Occupation and Professional Licensing's State Construction Registry manager understood was required to create a notice of commencement. [Hearing Transcript, R142, Testimony of Tom Harper, p.39 ll. 8-20, Dig-It Appendix A].

6. Weber County never made payments for filing notices of commencement with State Construction Registry. It was never required to pay for these filings, and no receipts from the State Construction Registry were ever provided to Weber County after

it transmitted building permits to the State Construction Registry. [R113 Memorandum Decision ¶¶ 28, 29, Appendix Tab 1; Hearing Transcript R142, Testimony of Craig Brown, p.11 ll.16 – 23, Dig-It Appendix A].

7. The Division of Occupation and Professional Licensing established that no fees would be collected from municipalities filing notices of commencement. [Hearing Transcript R142, Testimony of Tom Harper, p.39 ll.18 – 21, Dig-It Appendix A].

8. The State Construction Registry does not collect payment for notice of commencement filings made by municipalities and no receipts or confirmation documents are provided to the municipalities. [Hearing Transcript R142, Testimony of Jeff Buist, p.15 l.14 – p.16 l.8; Testimony of Tom Harper, p.39 ll.18 – 21, Dig-It Appendix A].

9. The date for notices of commencement filings received from municipalities is the date created automatically by the computer programming that date stamps the information when it is posted to the State Construction Registry's database. [Hearing Transcript, R142, Testimony of Michael Rice, p.24 ll.8 – 17, Dig-It Appendix A].

10. The information contained in the notice of commencement for the Hutter's home is the same information that was included on the building permit issued by Weber County for the Hutter's home. [Trial Exhibits 1, 3, Appendix Tabs 2, 3].

11. The information in the notice of commencement and in the building permit is accurate in all respects; however, the city, state, and zip code of the Hutter's then current address were omitted from the building permit and from the notice of commencement. [R112 Memorandum Decision ¶¶ 12-18, Appendix Tab 1; Trial Exhibits

1, 3, Appendix Tabs 2, 3; Hearing Transcript, R142, Testimony of Tim Hutter, p.46 1.25 – p.48 1.13; Testimony of Pat Brennan, p.63 1.16 – p.65 1.14, Dig-It Appendix A].

12. Notices of commencement are not indexed or searchable by the owner's address in the State Construction Registry database. Notices of commencement in the State Construction Registry database are indexed by owner name, original contractor name, project name, if any, project address, and the unique project number assigned by the State Construction Registry. It is impossible to use or input the owner's address to search for or locate a notice of commencement in the State Construction Registry database. [Trial Exhibit 8, Appendix Tab 4; Hearing Transcript, R142, Testimony of Michael Rice, p.24 1.21 – p.25 1.16, Dig-It Appendix A; Utah Code Ann. § 38-1-27(c)].

13. The owner's address is not required for a subcontractor to file a preliminary notice or to record a mechanic's lien on the project. [Trial Exhibit 5; Utah Code Ann. § 38-1-32(d)(ii)(A) – (F), § 38-1-7(2)].

14. During the course of construction on the Hutters' home, five subcontractors and suppliers filed preliminary notices to preserve their lien rights on the project. [Trial Exhibit 3, Appendix Tab 3; Hearing transcript R142, Testimony of Jeff Buist, p.15 ll.8 – 13, p.19 1.23 - p.20 1.12; Testimony of Michael Rice p.26 1.14 – p.27 1.2, Dig-It Appendix A].

15. At some point near the beginning of the construction of the Hutters' home, Jeromy's Homes, Inc. contracted with Dig-It to perform excavation and grading work. Dig-It did not contract with the Hutters to perform work on the Hutters' home. [Trial

Exhibit 5; Hearing Transcript, R142, Testimony of Pat Brennan, p.59 l.12 – p.60 l.6, Dig-It Appendix A].

16. Dig-It began performing work on the Hutters' home on June 5, 2006 and completed all of its work on the Hutters' home by October 20, 2006. [R111 Memorandum Decision ¶ 1, Appendix Tab 1; Trial Exhibit 5; Hearing Transcript, R142, Testimony of Pat Brennan, p.60 ll.16 – 21, Dig-It Appendix A].

17. Dig-It claims that it was not paid by Jeromy's Homes, Inc. for all of the work that it performed on the Hutters' home. [Trial Exhibit 5; Hearing transcript R142, Testimony of Pat Brennan p.59 l.12- p.60 l.6, Dig-It Appendix A].

18. Dig-It did not file a preliminary notice for its work on the Hutters' home. [R112 Memorandum Decision ¶ 7, Appendix Tab 1; Dig-It Brief at 6, Dig-It Statement of Facts at 9, ¶10].

19. On June 6, 2007 Dig-It recorded a mechanic's lien on the Hutters' home claiming a valid lien to secure the amounts that Jeromy's Homes, Inc. allegedly failed to pay Dig-It. [R111 Memorandum Decision ¶ 2, Appendix Tab 1; Trial Exhibit 5, Hearing Transcript R142, Testimony of Pat Brennan, p.59, ll.10 – 1.15, Dig-It Appendix A].

## SUMMARY OF ARGUMENTS

### **Introduction**

In 2004 the Utah legislature passed House Bill 136. This new set of laws became effective in 2005 and substantially changed how mechanic's liens operate in this state. Foremost, this new legislation created the State Construction Registry, an internet

accessible and searchable database designed to be a repository for activities occurring on all construction projects across the state.

As part of these sweeping changes, the new law provides that “a subcontractor shall file a preliminary notice with the database . . . [and] if a person who is required to file a preliminary notice under this chapter fails to file the preliminary notice, that person may not hold a valid lien under this chapter.” Utah Code Ann. §38-1-32(1)(a)(i), (d)(i)(A) (2006) (emphasis added). At the same time, another component of this new legislation, section 38-1-31, states that “if a notice of commencement for a construction project is not filed . . . the following do not apply: (a) Section 38-1-32. . . .” *Id.* §38-1-31(3)(a) (emphasis added). Therefore, under the new mechanic’s lien regimen if a notice of commencement is filed on a construction project, subcontractors and suppliers must file preliminary notices or they are prohibited from recording mechanic’s liens. A notice of commencement was filed for the construction of the Hutters’ home. Dig-It did not file a preliminary notice but nevertheless recorded a mechanic’s lien. Dig-It argues in this appeal that it was entitled to record a mechanic’s lien on the Hutters’ home because the notice of commencement is not enforceable. The Hutters respond to each of Dig-It’s arguments as outlined below.

**I. A Notice of Commencement was Filed for the Construction of the Hutters’ Home.**

Dig-It argues that the notice of commencement was not filed properly because it was filed by Weber County, the building permit issuing municipality, and not the Hutters or their

general contractor. This argument is not correct because Dig-It relies on amendments made to the statute after events in this case occurred to read requirements into the statute that do not exist.

**II. The Notice of Commencement is Enforceable Because It is Accurate, Timely Filed and Met All of the Statute's Requirements.**

A. Dig-It first argues that the Hutters were required to verify the accuracy of the information in the notice of commencement within a specified period of time. Again, Dig-It presents policy based arguments attempting to add requirements to the statute that do not exist. In the trial before Judge Jones the information in the notice of commencement was verified as accurate.

B. Dig-It argues that the timeliness of the notice of commencement's filing was not proved at trial. There was substantial and uncontroverted evidence establishing that the notice of commencement was filed well within the 15 day statutory period. An agency rule relied upon by Dig-It does not apply to the municipalities filing notices of commencement because they are not charged a fee for these filings.

C. Dig-It argues that the omission of the city, state and zip code from the Hutters' address on the notice of commencement rendered the notice of commencement unenforceable. This argument is not correct because there is a safe harbor provision in the statute that the notice of commencement falls within. This safe harbor provision states that the notice of commencement need only include the information that is on the building permit, which it does. Also the statute provides that only a substantial inaccuracy in the information on the notice of commencement will render the notice of



commencement unenforceable. The court correctly found that this omission was not substantial.

**III. Dig-It's Lien is a Wrongful Lien as Defined by the Utah Wrongful Lien Injunction Act.**

Dig-It argues that its mechanic's lien is not wrongful because it is not covered by the definition of a wrongful lien in the Utah Wrongful Lien Injunction Act and at the time it's mechanic's lien was filed, the Hutters had yet to prove that they had an enforceable notice of commencement. Dig-It's mechanic's lien falls within the definition of a wrongful lien because its mechanic's lien is expressly prohibited by section 38-1-32. Further, the allocation of the burden to prove the enforceability of the notice of commencement does not suspend its effectiveness and allow subcontractors to record mechanic's liens in violation of law's clear mandate.

**ARGUMENTS**

**I. THE DISTRICT COURT CORRECTLY DETERMINED THAT A NOTICE OF COMMENCEMENT WAS FILED FOR THE CONSTRUCTION OF THE HUTTERS' HOME.**

The evidence introduced at trial established that Weber County transmitted the Hutters' building permit to the State Construction Registry which then posted this information to its database as a notice of commencement. Dig-It argues that a notice of commencement can only be filed by the Hutters or their general contractor. [Dig-It Brief at 15-17]. However, Dig-It attempts to add this requirement to the statute based on changes that were made to the law after the events in this suit occurred.

**A. The 2006 Version of Section 38-1-31 is Applicable to This Case, Not the 2007 Amendments.**

Section 38-1-31 specifies the manner in which notices of commencement are to be filed. It was originally passed into law in 2004 and was scheduled to take effect in May 2005. Utah Code Ann. §38-1-31(2004). During the 2005 legislative session, minor changes were made to this section including suspending the effective date of the law for residential construction to November 1, 2005. *See, Id.* §38-1-37 (2005). During the 2006 legislative session, a few additional minor changes were made to the statute, and these changes became effective on May 1, 2006. *Id.* §38-1-31 (2006). The version of the statute relied upon by Dig-It in this appeal is the product of more significant changes that were made to section 38-1-31 during the 2007 legislative session. These changes went into effect on April 30, 2007. *Id.* §38-1-31 (2007).

As established during the trial of this case, the building permit for the Hutterers' home was issued on May 22, 2006. [Statement of Fact 2]. The notice of commencement for the Hutterers' home was filed on May 30, 2006. [Statement of Facts 3, 4]. Dig-It performed all of its work on the Hutterers' home between June 5, 2006 and October 20, 2006. [Statement of Fact 16]. The last possible day that Dig-It could have filed a preliminary notice to cover any of its work performed on the Hutterers' home would have been October 14, 2006. *See, Utah Code Ann.* §38-1-32(1)(b) (preliminary notice filed beyond 20 day period effective for work performed five days after filing). Accordingly, all of the events that are material to this suit occurred prior to the 2007 legislative session and prior to any changes made to section 38-1-31 becoming effective.

The amendments made to section 38-1-31 in 2007 should not be applied to this suit retroactively. Section 68-3-3 of the Utah Code expressly provides “no part of these revised statutes are retroactive, unless expressly so declared.” *Id.* §68-3-3. The Utah Supreme Court has consistently applied this requirement: “A statute is not to be applied retroactively unless the statute expressly declares that it operates retroactively.” *Goebel v. Salt Lake City S. R.R. Co.*, 2004 UT 80, ¶39, 104 P.3d 1185. Furthermore, “[a]s a general rule, amendments to statutes are not retroactive.” *National Park and Conservation Assoc. v. Board of State Lands*, 869 P.2d 909, 912 (Utah 1993). There is no express declaration in section 38-1-31 or in the 2007 amendments that they should be applied retroactively. In certain narrow exceptions statutory amendments can be applied retroactively. *Brown & Root Indus. Serv. v. Industrial Comm. of Utah*, 947 P.2d 671, 675 (Utah 1997) (noting exception to rule against retroactive application of statutory amendments is narrow). This exception is only for procedural changes that do not enlarge, eliminate, destroy or affect substantive rights. *Id.*; *Johansen v. Johansen*, 2002 UT App. 75, ¶5; 45 P.3d 520. Dig-It argues that the 2007 amendments place an affirmative duty on homeowners and general contractors to file notices of commencement where no such duty existed before when notices of commencement were filed by the municipalities. Accordingly, the 2007 amendments to section 38-1-31 directly affect the substantive rights of the parties. They are not merely procedural amendments and should have no application to this case.

**B. The 2006 Statute Requires Municipalities to File the Notices of Commencement When Building Permits are Issued for Construction Projects.**

The pertinent provisions of section 38-1-31 provide 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). According to the statute there are two scenarios in which notices of commencement are filed. The first is for projects where a building permit is issued and the second is for projects where a building permit is not issued. For projects where building permits are issued, the statute requires the permit issuing municipality to transmit the building permit information to the State Construction Registry where that information will become the notice of commencement when it is posted to the database. There is no provision for an owner or general contractor to file a notice of commencement when a building permit is issued.<sup>1</sup> Instead, this burden is

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<sup>1</sup> Subparagraph (1)(c) provides a homeowner and a general contractor with general discretion to file a notice of commencement: “An owner of construction or an original contractor may file a notice of commencement with the designated agent within the time prescribed by Subsection (1)(a) and (b).” *Id.* (emphasis added). However, neither person is required to make such a filing.

placed on the municipalities. In fact, the Division of Occupation and Professional Licensing, (“DOPL”), the agency responsible for the operation of the State Construction Registry, *see* Utah Code Ann. §38-1-27(2)(b), expressly prohibits the municipalities from shifting the burden of filing notices of commencement to the general contractor or owner when a building permit is issued:

(2) Persons Who Must File Notices [of Commencement]. In accordance with Subsections 38-1-31(1)(a) and (b), the following are required to file a notice of commencement:

(a) For a construction project where a building permit is issued, within 15 days after the issuance of the building permit, the local government entity issuing that building permit shall input the data and transmit the building permit information to the database electronically or by alternate method and such building permit information shall form the basis of a notice of commencement. The local government entity may not transfer this responsibility to the person who is issued or is to be issued the building permit.

Utah Admin. Code, R156-38b-501. (emphasis added).

In the second scenario, where a building permit is not issued, the statute provides that the general contractor or an owner-builder may file a notice of commencement, Utah Code Ann. § 38-1-31(1)(b), and DOPL requires the general contractor to file the notice of commencement: “For a construction project where a building permit is not issued, within 15 days after commencement of physical construction work at the project cite, the original contractor shall file a notice of commencement with the SCR.” Utah Admin. Code, R156-38b-501. (emphasis added). Thus, on projects where building permits are issued, the municipalities are required to transmit the building permit information to the State Construction Registry to become a notice of commencement, and on projects where building permits are not issued, this burden falls to the general contractor.

There was no dispute in the district court that a building permit was issued for the Hutters' home. [Statement of Fact 2; Trial Exhibit 1 in Appendix at Tab 1]. Accordingly, subparagraph (1)(b) of section 38-1-31 does not apply. Instead, the municipality is required to transmit the building permit information to the State Construction Registry for the notice of commencement to be filed.

Dig-It relies on the 2007 changes to the statute to insist that there are "only two groups that are authorized to *file* a notice of commencement based on that building permit information: original contractors and owner-builders." [Dig-It Brief at 16 (emphasis in original)]. However, the version of the statute that was effective and applicable to this suit does not contain any such restriction. To the contrary, the 2006 version of the law only requires the permit issuing municipalities to file the building permit information with the State Construction Registry, and this Court should not draft the requirements advocated by Dig-It into this legislation. *Stephens v. Bonneville Travel, Inc.*, 935 P.2d 518, 522 (Utah 1997) ("Our duty is to implement the law as it reads unless it results in an absurd outcome."); *Reedeker v. Salisbury*, 952 P.2d 577, 585 (Utah Ct. App. 1998) (court has no power to rewrite statute).

**C. The Intent of the Legislature Is That the Building Permit Information Posted to the State Construction Registry Is the Notice of Commencement.**

The primary goal of interpreting and applying a statute is to give effect to the legislature's intent. *Progressive Cas. Ins. Co. v. Ewart*, 2007 UT 52, ¶16, 167 P.3d 1011. In this instance the legislature's intent is expressed by the plain meaning of the language in section 38-1-31. In situations where building permits are issued, the building

permit information is to be transferred from the permit issuing municipality to the State Construction Registry. This information forms the notice of commencement when it is posted on the State Construction Registry's database. The language of section 38-1-31 does not support Dig-It's argument that an owner or a general contractor must make a separate or duplicate filing to create a notice of commencement.

In the unlikely event that the Court finds this paragraph of section 38-1-31 ambiguous or unclear, the Hutters encourage the Court to view the evidence of the legislature's intent contained in the legislative history of this statute to aid its interpretation and application of the statute. *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶47, 164 P.3d 384 (court may look beyond statute to legislative history to ascertain intent if statute is ambiguous). In particular, House Bill 136 was presented to the House Business & Labor Committee by Representative Michael Morley, its sponsor, on February 13, 2004. Minutes of House Business and Labor Standing Committee, February 13, 2004, available at <http://www.le.state.ut.us/~2004/minutes/HBUS0213.pdf>. During the hearing on the bill Representative Stephen Clark and Representative Morley had the following exchange:

Rep. Clark: "Who files the commencement notice?"

Rep. Morley: "In the case that there is a building permit, the permitting agency will convey that information."

Rep. Clark: "That would be the cities and counties?"

Rep. Morley: "the cities and counties."

Rep. Clark: "They're willing to do this?"

Rep. Morley: “. . . yes, they are reluctantly willing to do this.”

Hearing on H.B. 136 Before House Bus. and Labor Comm., 2004 Gen. Session, February 13, 2004, Audio Tape 1, Side 2 at min. counter 2.4-3.0. Similarly, when House Bill 136 was introduced in the Senate Judiciary, Law Enforcement and Criminal Justice Committee, Representative Morley explained to the members of that committee that “upon receipt of a building permit the permitting agency would either fax or convey the information to a central repository. That would constitute a notice of commencement on the project.” Hearing on H.B. 136 Before Senate Judiciary, Law Enforcement, and Criminal Justice Comm., 2004 Gen. Session, February 25, 2004, Audio Tape at counter 571 – 586; minutes available at <http://le.utah.gov/asp/interim/Commit.asp?Year=2004&Com=SSTJLC>.

In fact, the Utah League of Cities and Towns voiced resistance to the burden of having to file the notices of commencement with the State Construction Registry. Hearing on H.B. 136 Before House Bus. and Labor Comm., 2004 Gen. Session, February 13, 2004, Audio Tape 1, Side 2 at min. counter 7.5 – 10.4. However, the bill was passed by the legislature and signed into law maintaining this requirement for the municipalities. In the following year, 2005, Representative Morley presented the House Business and Labor Committee with House Bill 105 which contained amendments to the law passed in 2004. Minutes of House Business and Labor Standing Committee, February 7, 2005, available at <http://www.le.state.ut.us/~2005/minutes/HBUS0207.pdf>. One of these amendments addressed filing notices of completion. When asked if it would be possible to require the municipalities to file notices of completion, Representative Morley



responded that he was reluctant to add such a requirement “primarily because we had already committed to the cities and towns that if they would file this notice of commencement that we wouldn’t require them to do anything other than that this year.” Hearing on H.B. 105 Before House Bus. and Labor Comm., 2005 Gen. Session, February 7, 2005, Audio Tape at min. counter 31.5 – 31.7.

Even as recently as January 26, 2007 when Representative Morley introduced House Bill 277 to the House Business and Labor Committee he explained, “now when a permit is pulled, the municipality has 15 days to convey that information to the SCR and it’s put on the website and it constitutes a commencement notice.” Hearing on H.B. 277 Before House Bus. and Labor Comm., 2007 Gen. Session, January 26, 2007 audio recording available at <http://le.utah.gov/~2007/htmdoc/hbillhtm/HB0277.htm>, audio timer 7:01 – 7:12.

Moreover, this is the exactly how the legislation has been implemented by DOPL and the State Construction Registry to create notices of commencement for building projects where a building permit has been issued. At the trial, Tom Harper, DOPL’s manager of the State Construction Registry and the individual responsible for overseeing that its operation conforms to the law that created it testified:

Q. Okay. And what type of filing do municipal filers do in the Construction Registry?

A. The only thing they could do would be the notice of commencement.

Q. And what’s your understanding of how that notice of commencement is done by municipal filers?

- A. My understanding is - - is consistent with what Mr. Rice explained. The permit information is transmitted from the agency to Utah Interactive. And the data entry team puts that in the system and it becomes a notice of commencement.

[Hearing Transcript, R142, p.39 ll.8 – 17, Dig-It Appendix A]. Similarly, Michael Rice, the project manager at Utah Interactive responsible for designing, building and maintaining the State Construction Registry, testified:

- Q. Can you explain how notices of commencement are created when the information is faxed to the SCR?

- A. - - when we receive information from faxes through the cities, it is converted through a company called Efax. And they change it to an email. That email is delivered to our - - Jeff and then he will transfer that E-mail to a company called Rocky Mountain Data. They then transcribe it and send it back to us in a text file. Jeff then receives that text file and he will (unintelligible) and use the website to pull the data into the construction registry. And at that time, the commencement is filed.

[*Id.* p.23 l.21 – p.24 l.7]. Finally, Jeff Buist, the State Construction Registry operations manager testified:

- Q. And tell me what is Exhibit 3?

- A. This is a - - basically a screenshot of the filing, the SCR Notice of Commencement for that permit, that building permit.

*Id.* at p.14 ll.19 – 22]. Accordingly, the evidence submitted at trial established that notices of commencement are filed in the State Construction Registry by posting the building permit information conveyed to the State Construction Registry by the permit issuing municipality.

Additionally, to the extent that any question remains regarding the intent and operation of this part of section 38-1-31, the Hutters request the Court to take judicial

notice of the information contained on the State Construction Registry's website. This information is "capable of accurate and ready determination" because the website can be easily accessed and the existence of the information can be verified and confirmed.

Additionally, the accuracy of the information cannot be reasonably questioned because its source is the very database whose operation creates notices of commencement and other filings. Utah R. Evid. 201; *see also, O'Toole v. Northrop Gruman Corp.*, 499 F.3d 1218, 1224-25 (10<sup>th</sup> Cir. 2007) ("It is not uncommon for courts to take judicial notice of information found on the world wide web.") (citing supporting cases); *Coleman v. Dretke*, 409 F.3d 665, 667 (5<sup>th</sup> Cir. 2005) (appellate panel taking judicial notice of agency website on petition for rehearing). Additionally, taking judicial notice of information in the appellate court for the purpose of affirming the trial court is one of the exceptions to the policy opposing matters raised for the first time in this Court. *Mel Trimble Real Estate v. Monte Vista Ranch, Inc.*, 758 P.2d 451, 456, n.4 (Utah Ct. App. 1988).

On the page titled Filing Requirements the State Construction Registry website states:

Notices of commencement will be automatically filed by the SCR upon permit data submission from each city or county permitting office for projects requiring a building permit. Permitting agencies are required to submit building permit information to the SCR within 15 days of issuing a permit. For projects in which a notice of commencement is not automatically filed, owners and original contractors may file a commencement in order to enforce the preliminary notice requirement. Examples: State projects in which permits are not issued, exempt projects, projects in which a municipality fails to transmit permit data.

State Construction Registry Website located at,

[http://www.utah.gov/cnr/filing\\_requirements.html](http://www.utah.gov/cnr/filing_requirements.html) , viewed September 9, 2008, (screen

shots of the website are included in the Appendix to this Brief at Tab 5). On the page titled Filing Timeline, it states “For the majority of projects, notices of commencement are automatically filed in the SCR based on permit data received from the issuing municipalities.” *Id.* located at <http://www.utah.gov/cnr/timeline.html> , Appendix Tab 5, viewed September 9, 2008. On the General Contractor page under the heading Filing Details and Tips it states “when a permit is issued for a new project, the issuing municipality is required to submit the permit data to the SCR within 15 days. A notice of commencement is generated when this information is received and entered into the system.” *Id.* located at [http://www.utah.gov/cnr/general\\_contractors.html](http://www.utah.gov/cnr/general_contractors.html) , Appendix Tab 5, viewed September 9, 2008.

On the State Construction Registry’s User’s Guide page under the topic Notices of Commencement – Permitted Projects, it states: “if a building permit is issued for a construction project, the issuing municipality is required to submit the permit data to the SCR system. A notice of commencement is generated when this information is received and entered into the system.” *Id.* located at <http://www.utah.gov/cnr/userguide.html> , Appendix Tab 5, viewed September 9, 2008. On the page titled City Information the website states “the role of the city/county is critical in this process – the submitted building permit information will now serve as the notice of commencement of a construction project. This is a critical legal step for subcontractors and suppliers to protect their lien rights.” *Id.* located at <http://www.utah.gov/cnr/city.html> , Appendix Tab 5, viewed September 9, 2008. Additionally, a letter from Craig Jackson, director of the Division of Occupation and Professional Licensing is posted on this page of the website

which states “**effective May 1, 2005, building permit information submitted by cities/counties** will serve as the notice of commencement of a construction project, and thus will provide a legal avenue for subcontractors and suppliers to protect their lien rights.” *Id.* located at <http://www.utah.gov/cnr/FNLLetter.pdf> , Appendix Tab 5, viewed September 9, 2009 (emphasis in original).

Accordingly, the legislation has been implemented consistent with the intent of the legislature. When a building permit is issued, the municipality transmits the building permit information to the State Construction Registry. This information is the basis of the notice of commencement which is filed when the building permit information is posted on the State Construction Registry database. This is the exact procedure that was followed in this case, and the district court correctly found that the notice of commencement for the Hutters’ home was filed in the State Construction Registry. [R112 Memorandum Decision ¶¶ 21-23, Appendix Tab 1].

Dig-It’s numerous policy based arguments advocating for additional requirements to be added to the procedure for filing a notice of commencement are better directed to the legislature, *Intermountain Smelting Corp. v. Capitano*, 610 P.2d 334, 337 (Utah 1980) (conviction to change laws should be directed to legislature). The legislature is presumed to know the operation of its law and it is in the position to make changes to it if it disagrees with how it has been implemented.

Moreover, implying Dig-It’s requirement that an owner or general contractor must file a notice of commencement in addition to the filings made by the municipalities yields an absurd result. *Reedeker*, 952 P.2d 577, 585 (court is to interpret and apply statute in

manner that avoids absurd results). The purpose of the State Construction Registry legislation is to create a database for filings on all of the construction projects in the state. In order to get these projects into the State Construction Registry the legislature crafted a mechanism whereby notices of commencement would be filed commensurate with the issuance of building permits. In this way the State Construction Registry was capable of including a wide breadth of projects. Dig-It's formulation of the filing requirements for a notice of commencement would nullify the vast majority of the notices of commencement filed by the municipalities, and such a result would render the State Construction Registry completely ineffective.

**II. THE TRIAL COURT CORRECTLY FOUND THAT THE NOTICE OF COMMENCEMENT WAS VALID AND ENFORCEABLE BECAUSE IT WAS FILED TIMELY, THE INFORMATION CONTAINED IN IT WAS ACCURATE, AND THE INFORMATION OMITTED FROM THE NOTICE OF COMMENCEMENT WAS NOT SUBSTANTIAL.**

The State Construction Registry legislation provides that:

(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.

Utah Code Ann. §38-1-31(5) (2006). The district court found that the information in the notice of commencement filed on the Hutter's home was accurate; it was filed timely; and it met all of the requirements of section 38-1-31. [R111-114 Memorandum Decision, Appendix Tab 1]. Dig-It disagrees with these findings.

**A. The Information in the Notice of Commencement was Verified to be Accurate.**

Substantial evidence was introduced at trial verifying the accuracy of the information in the notice of commencement. [Statement of Fact 11]. Both Mr. Hutter and Dig-It's owner Pat Brennan testified that the information in the notice of commencement was accurate, and no evidence was admitted to question the accuracy of the information. *Id.* Hence, Judge Jones' finding that the information in the notice of commencement is accurate is supported by the evidence and should be affirmed. [R112 Memorandum Decision, Appendix Tab 1].

Dig-It's disagreement is less with Judge Jones' findings and more with the requirement of the statute. Dig-It argues that this Court should draft into this legislation a duty to verify the information in a notice of commencement within 15 days of the issuance of a building permit. [Dig-It Brief at 20-22 ("the only way to prevent this unjust result is to interpret Utah Code Ann. section 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.")]. However, the statute contains no such requirement. Instead the statute provides that when a person seeks to enforce a notice of commencement that person has the burden to verify the accuracy of the information. Dig-It's policy arguments are more appropriately directed to the legislature where these policies can be verified and balanced. "Where legislation is clear, we must 'refuse to consider public policy arguments or otherwise attempt to assess the wisdom of the legislation. Our duty is implement the law as it reads unless it results in an

absurd outcome.” *Reedeker*, 952 P.2d at 589 (quoting *Stephens*, 935 P.2d at 522)). The statute does not require the Hutterers to verify the accuracy of the information in the notice of commencement at the time that it is filed and this Court should not write such a requirement into the law.

**B. The Notice of Commencement For the Hutterers’ Home was Filed Timely.**

As discussed above, the provisions of the State Construction Registry legislation require the permit issuing municipality to provide the building permit information to the State Construction Registry within 15 days from the issuance of the building permit. Utah Code Ann. §38-1-31(1)(a)(i) (2006). Substantial evidence was introduced at trial that the notice of commencement for the Hutterers’ home was filed on the State Construction Registry database within this 15 day time period. Trial Exhibit 1 along with the testimony of Craig Brown, the Weber County building official responsible for issuing the Hutterers’ building permit, established that the Hutterers’ building permit was issued on May 22, 2006. [Trial Exhibit 1, Appendix Tab 2; R113 Memorandum Decision ¶ 20, Appendix Tab 1; Hearing Transcript, R142, p.10 ll. 3-19, Dig-It Appendix A]. Jeff Buist, the operations manager for the State Construction Registry testified consistently with Trial Exhibit 2 that the State Construction Registry received the building permit information for the Hutterers’ building permit on Friday, May 26, 2006. Mr. Buist then testified that Trial Exhibit 3, the notice of commencement, was filed on the State Construction Registry from the building permit information on Tuesday, May 30, 2006. [Hearing Transcript, R142, Testimony of Craig Brown, p.10, l. 20 - p.11 l. 22; Testimony



of Jeff Buist, p.13 l.24 – p.14 l.11, Dig-It Appendix A; Trial Exhibit 2.]. This fact was corroborated by testimony from Michael Rice, the State Construction Registry’s manager, who explained that the date of the filing is created automatically as part of the computer process of posting the information on the State Construction Registry. [Trial Exhibit 3, Appendix Tab 3; Hearing Transcript, R142, Testimony of Jeff Buist, p.14 l.12 – p.15 l.7; Testimony of Michael Rice, p.23 l.10 - p.24 l.17; Testimony of Tom Harper, p.39 l.8 – p.42 l.11, Dig-It Appendix A]. Tom Harper, DOPL’s manager of the State Construction Registry, concurred and testified that for the Division’s purposes the date that the notice of commencement was filed was the date that the building permit information was posted on the State Construction Registry, May 30, 2006. *Id.*

Accordingly, the evidence and testimony introduced at trial established that the notice of commencement was filed 8 days after the issuance of the building permit and well within the 15 day statutory period. [R113 Memorandum Decision No. 21-23, Appendix Tab 1].

In this appeal, Dig-It argues that agency rule R156-38b-506 required the Hutters to provide a payment receipt as the sole and exclusive proof of the date that the notice of commencement was filed. [Dig-It Brief at 26]. However, Dig-It misconstrues this rule and Judge Jones was correct in finding that the notice of commencement was filed within the 15 day statutory period.

DOPL’s agency rule provides that:

The official filing date of a particular filing shall be determined as follows:

(1) In the case of 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.

Utah Admin. Code R156-38b-506. The evidence established that the notice of commencement was filed by an alternative method of filing, and Dig-It does not challenge this finding. Accordingly, the availability or existence of a payment receipt is not relevant to the filing of the notice of commencement in this case. [R113 Memorandum Decision ¶¶27-29, Appendix Tab 1].

Dig-It also argues that a payment must be made before a filing date can be determined. [Dig-It Brief at 26]. DOPL established the fees for filing notices of commencement and all other filings in the State Construction Registry. Utah Code Ann. §38-1-27(4)(a). Tom Harper testified that DOPL established that no fees would be charged to municipalities for filing notices of commencement. [Hearing Transcript R142, Testimony of Tom Harper, p.39 ll.18 – 21, Dig-It Appendix A]. This fact was corroborated by all of the witnesses that testified at the trial. Craig Brown testified that Weber County had never been charged a fee to file notices of commencement, and Jeff Buist confirmed that no payments were collected from municipalities for filing notices of commencements. [R113 Memorandum Decision ¶¶ 28, 29, Appendix Tab 1; Hearing Transcript R142, Testimony of Craig Brown, p.11 ll.16 – 23; Testimony of Jeff Buist, p.15 l.14 – p.16 l.8; Testimony of Tom Harper, p.39 ll.18 – 21, Dig-It Appendix A].

This fact is further corroborated by the State Construction Registry's website.<sup>2</sup> On the page titled Pricing for the State Construction Registry, it states "Permitting agencies are exempt from Notice of Commencement filing fees when submitting building permit data which constitutes the Notice of Commencement." State Construction Registry Website located at, <http://www.utah.gov/cnr/pricing.html> , Appendix Tab 5, viewed September 9, 2008.

Based on these facts rule R156-38b-506 confirms that the filing date for the notice of commencement is the date when the building permit information was accepted into the State Construction Registry, or May 30, 2006. It 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. Indeed, such an application would yield an absurd result invalidating the vast majority of notices of commencement filed in the State Construction Registry and rendering the State Construction Registry program ineffective.

**C. The Information Contained in the Notice of Commencement Meets the Requirements of the Law Because It Complies With the Statute's Safe Harbor Provision and Any Omitted Information Was Not Substantial.**

Dig-It argues that the notice of commencement did not meet the statute's requirements because it omitted the city, state and zip code of the Hutter's residence.

[Dig-It Brief at 28]. The State Construction Registry legislation sets forth the information that must be contained in a notice of commencement:

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<sup>2</sup> See, *supra* at 26-27 for authority for this Court to take judicial notice of the contents of the information posted on the State Construction Registry website.

(2)(a) The content of 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

\* \* \*

(iii) the project address if the project can be reasonably identified by any address;

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

\* \* \*

(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) (2006). Within paragraph (2), subparagraph (2)(c) creates a safe harbor which provides that if the information on a building permit is included on the notice of commencement then the notice of commencement satisfies the statute's requirements. Again, Dig-It does not challenge the fact that a building permit was issued for this project, [Statement of Fact 2], nor does Dig-It challenge the fact that all of the information contained on the building permit was included on the notice of commencement. [Statement of Fact 10]. Based on these facts, Judge Jones concluded that the notice of commencement contained the necessary information. [R112 Memorandum Decision ¶¶ 13-15, Appendix Tab1].

Dig-It takes issue, however, with the term "available" in the safe harbor provision arguing that the provision should be read to require that all information requested on the building permit must be contained in the notice of commencement whether the information is available on the building permit or not. [Dig-It Brief at 29]. Dig-It's

proposed reading of the safe harbor provision goes too far. “When interpreting statutory language, this court consistently look[s] first to the plain meaning of the statute. Moreover, the court assumes that the legislature used each term advisedly and gives effect to each term according to its ordinary and accepted meaning.” *Pace v. St. George City Police Dept.*, 2006 UT App 494, ¶6, 153 P.3d 789 (internal quotations and citations omitted). The ordinary and accepted meaning of “available” is “suitable or ready for use or service; at hand,” Webster’s Unabridged Dictionary, (2nd ed. 2001) (emphasis added), or “present and ready for use, at hand.” American Heritage Dictionary of the English Language (4<sup>th</sup> ed. 2000) (emphasis added). Applying this meaning to the safe harbor provision requires that the notice of commencement contain only the information that is “at hand” or “present and ready for use” on the building permit to comply with the statute. The term “available” does not mean information that is requested to be on a building permit but not available. Moreover, the building permit in this case contained the notation “n/a” (not available or not applicable) in the spaces for the owner’s city, state and zip code. [Trial Exhibit 1, Appendix Tab 2]. Hence, the building permit itself in this case states that the information requested is either not available or the request is not applicable to this building permit.

Dig-It’s parade of possible adverse consequences that it asserts in support of its proposed reading of the safe harbor provision is unreasonable and unlikely to transpire. The original contractors to whom building permits are typically issued are in contract with owners and will know the owner’s name, the project’s address and all of the information about the original contractor itself. There is even less risk of missing

essential information if the building permit is issued to an owner-builder. Hence, the information contained in a building permit will be amply sufficient to locate a notice of commencement in the database.

Furthermore, the safe harbor provision should be applied in harmony with the intent of the legislature which is to populate the State Construction Registry with all of the construction projects across the state by having the building permit information used to create notices of commencement. There are numerous building permit issuing municipalities and it does not make sense to exclude permits by requiring information that certain municipalities may not require for the issuance of a building permit. Instead, as the legislation provides, the essential information required for a building permit establishes the requirements for a notice of commencement, thereby ensuring that each permitted construction project will be in the State Construction Registry. Hence the notice of commencement for the Hutter's home falls within the safe harbor provision because it contains all of the information that was available on the building permit.

Additionally, the notice of commencement for the Hutter's home complies with the statute even without the safe harbor. The requirement for the Hutter's 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." Utah Code Ann. §38-1-31(5)(b). Thus only substantial inaccuracies render a notice of commencement unenforceable. Dig-It faults Judge Jones for evaluating whether the notice of commencement substantially complied with the statute's requirements [Dig-It

Brief at 30; R112 Memorandum Decision ¶¶ 17, 18, Appendix Tab 1]. However, this was not an error because the statute itself states that only substantial inaccuracies will invalidate a notice of commencement.

Substantial evidence was introduced at trial to prove that the inaccuracy in the Hutters' notice of commencement was not substantial, and no evidence was introduced to prove that this inaccuracy was substantial. In fact, Dig-It suffered no prejudice caused by this inaccuracy nor could it have. The city, state and zip code of the owner's address is not required to locate a notice of commencement because the database is not indexed by this information, and it is not even possible to use this information to search or locate a notice of commencement. [Trial Exhibit 8, Appendix Tab 4; Hearing Transcript, R142, Testimony of Michael Rice, p.24 l.21 – p.25 l.16, Dig-It Appendix A; Utah Code Ann. § 38-1-27(c)]. Likewise, this information is not required for a subcontractor to file a preliminary notice nor is this information required for a subcontractor to record a mechanic's lien. *See*, Utah Code Ann. §38-1-32(d)(ii)(A), §38-1-7(2). Further, five other subcontractors and suppliers located the notice of commencement and filed preliminary notices proving that the notice of commencement could be located readily notwithstanding the omitted information. [Trial Exhibit 3, Appendix Tab 3; Hearing transcript R142, Testimony of Jeff Buist, p.15 ll.8 – 13, p.19 l.23 - p.20 l.12; Testimony of Michael Rice p.26 l.14 – p.27 l.2, Dig-It Appendix A]. Accordingly, this inaccuracy is not substantial, and did not affect or impair Dig-It's rights in anyway. Judge Jones was correct in finding that the omission of the Hutters' city, state and zip code was not a

substantial inaccuracy and the notice of commencement met the requirements of the statute.

In sum, Judge Jones' findings that the information in the notice of commencement was accurate, that it was timely filed, and that the notice of commencement met the requirements of the statute are supported by the evidence and the State Construction Registry statute.

### **III. DIG-IT'S LIEN IS A "WRONGFUL LIEN" UNDER THE WRONGFUL LIEN INJUNCTION ACT.**

Dig-It asserts that its mechanic's lien is not a wrongful lien because it was "authorized" to be recorded up to the time the Hutters proved the enforceability of the notice of commencement in court. This argument is unavailing because the mechanic's lien laws expressly prohibited Dig-It's lien.

#### **A. Dig-It's Mechanic's Lien is Encompassed by the Definition of a Wrongful Lien in the Wrongful Lien Injunction Act.**

The Wrongful Lien Injunction Act defines a wrongful lien as "an instrument or document as defined in Section 38-9-1." Utah Code Ann. §38-9a-102. The definition of a wrongful lien in section 38-9-1 states "'wrongful lien' means any document that purports to create a lien 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. . . ." *Id.* §38-9-1(6). There is no question that Dig-It's mechanic's lien purports to create a lien on the Hutters' real property. In an attempt to remove its lien from the scope of this definition, Dig-It resorts to a general description of the statutes' legislative history to argue that this definition does not encompass any liens



created or regulated by statutes. Instead, Dig-It argues, this definition only encompasses “common law liens or liens that are not created by statute.” [Dig-It Brief at 37-39 (“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.”)].

Dig-It’s reading of the definition of a wrongful lien is too narrow. First, this Court rejected this argument in *Russell v. Thomas*, 2000 UT App 82, ¶15, 999 P.2d 1244. In *Russell*, the defendants recorded a notice of interest on real property pursuant to section 57-9-4 of the Utah Code. Like Dig-It, the defendants argued that the notice of interest was not a “wrongful lien” because it was authorized or created by section 57-9-4. However, the Court rejected this argument holding that the defendant’s failure to satisfy the requirements of section 57-9-4 meant that the notice of interest was not authorized by this section and was a wrongful lien. *Id.*; *Centennial Inv. Co., LLC v. Nuttall*, 2007 UT App 321, ¶¶ 15, 16, 171 P.3d 458 (confirming holding in *Russell*).

The same holds true for Dig-It’s mechanic’s lien. Unless Dig-It complies with the mechanic’s lien laws, its mechanic’s lien is unauthorized. There is, however, one important difference between Dig-It’s circumstances and those in the *Russell* case. Mechanic’s liens have not been held to be wrongful liens under Utah’s Wrongful Lien Act because section 38-9-2 of the Act expressly exempts mechanic’s liens from the scope of the wrongful lien definition. Section 38-9-2(3) expressly states “this chapter does not apply to a person entitled to a lien under Section 38-1-3 who files a lien pursuant to Title 38 Chapter 1 Mechanic’s Liens.” Utah Code Ann. §38-9-2(3) (emphasis added). Thus, while Dig-It argues that the wrongful lien act has not been applied to mechanic’s liens

because mechanic's liens are "authorized" by statute, the fact is that the Wrongful Lien Act has not been applied to mechanic's liens because liens filed by the entities set forth in section 38-1-3, contractors, subcontractors, and suppliers, pursuant to Title 38 Chapter 1, the mechanic's liens laws, are expressly exempted from the scope of the Wrongful Lien Act.

This exception was not carried over to the Wrongful Lien Injunction Act expressing the legislature's intent that mechanic's liens would be covered by the Wrongful Lien Injunction Act. Thus, the better reading of the definition of a wrongful lien in section 38-9-1 is that it encompasses mechanic's liens but mechanic's liens are specifically removed from its scope by section 38-9-2(3). Dig-It's contrary reading would render the mechanic's lien exception from the Wrongful Lien Act a meaningless waste of words. "Statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and interpretations are to be avoided which render some part of a provision nonsensical." *J. Pochynok Co. Inc. v. Smedsrud*, 2005 UT 39, ¶15, 116 P.3d 353 (quotations omitted).

Second, not only was Dig-It's mechanic's lien not authorized by the mechanic's liens laws, it was expressly prohibited: "if a person who is required to file a preliminary notice under this chapter fails to file their preliminary notice that person may not hold a valid lien under this chapter. Utah Code Ann. §38-1-32 (emphasis added). Dig-It seeks to avoid this statutory bar by arguing that the notice of commencement does not become enforceable until after the party seeking to enforce it proves in court that it has an

enforceable notice of commencement. [Dig-It Brief at 39-40]. This argument is both difficult to comprehend and reads obligations into the statute that do not exist.

The notice of commencement for the Hutter's home was either enforceable when it was filed or not. If it was enforceable, as Judge Jones found that it was, Dig-It's lien was barred because Dig-It failed to file a preliminary notice. Dig-It's argument that its lien was authorized because "the Hutter's had yet to prove pursuant to Utah Code Ann. §38-1-31(5), that their proposed notice of commencement was enforceable," [Dig-It Brief at 40], distorts the effect of the allocation of the burden of proof. These circumstances are no different than the enforcement of any other legal right, whether based in contract, property or statute. To enforce a legal right, a party has the burden to prove the existence of the right and the parties' entitlement to enforce it. Allocating the burden of proof in this way does not mean that the legal right ripens into existence only after it has been proven to be enforceable, nor does the allocation of the burden of proof provide an excuse for offending conduct occurring prior to the enforceability of a right being legally established. In other words, a trespass is a trespass even if the claimant has not proven ownership of the property in court previously.

The notice of commencement was valid and enforceable when it was filed. Its validity and enforceability was not suspended until after it was proved in court to be enforceable. Certainly, Dig-It can put the Hutter's to their burden of proof by recording its mechanic's lien. However, Dig-It must accept the consequences if the Hutter's carry this burden; namely, the lien was barred by the statute and, therefore, it was a wrongful lien as defined by the Wrongful Lien Injunction Act.

Moreover, 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. According to Dig-It's concept, subcontractors would be required to file preliminary notices only after the enforceability of a notice of commencement has been proven, presumably in a declaratory action for which it would be impossible to join all necessary parties and impossible to complete in any meaningful timeframe relevant to the course of construction. According to Dig-It, these liens would not be wrongful liens, and the only avenue for contesting these liens would be a full blown lien foreclosure action. However, the language of section 38-1-32 does not support such a requirement.

Finally, the case of *Eldridge v. Farnsworth*, 2000 UT App 243, 166 P.3d 639, relied upon by Dig-It is distinguishable. In *Eldridge*, the plaintiff recorded a lis pendens on property that was subject to a purchase contract and negotiations for a lease option contract that was subsequently sold to another purchaser. The Court of Appeals held that the lis pendens was authorized by section 78-40-2 of the Utah Code because the lis pendens complied with the requirements of the statute; namely, there was a pending action affecting title or possession to real property. *Id.* ¶49. The Court refused to look at the outcome of the case to evaluate whether the action truly affected title or possession to real property under lis pendens statute when it was filed. Unlike *Eldridge*, Dig-It's mechanics lien was prohibited by section 38-1-32 because Dig-It failed to file a preliminary notice. The notice of commencement filed for the Hutters' home was valid and enforceable at the time it was filed. Judge Jones' decision confirmed this fact. Dig-It did not file a preliminary notice and was not entitled to maintain a valid lien against the



**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the *Appellee's Response Brief* was served by U. S. Postal Service, postage prepaid, this 15th day of September, 2008, to the following:

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\_\_\_\_\_  
/s/  
Janet H. Hancock  
Legal Assistant

## APPENDIX

<u>TAB</u>	<u>DOCUMENT</u>
1	Memorandum Decision
2	Trial Exhibit 1 – Building Permit
3	Trial Exhibit 3 – Notice of Commencement
4	Trial Exhibit 8 -- State Construction Registry Search
5	State Construction Registry Website