

2008

# Mark D. Bergman v. Debbie A. Burke, Dorene R. Basug, First American Title : Brief of Appellee

Utah Court of Appeals

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

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**MARK D. BERGMAN,**

Appellant/Cross-Appellee,

vs.

**DEBBIE A. BURKE, DORENE R.  
BASUG, and FIRST AMERICAN TITLE,**

Appellee/Cross Appellant.

**Civil No. 20080323-CA**

**Priority No. 15**

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**BRIEF OF APPELLEE**

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Appeal from a Judgment entered in the Second Judicial District Court,  
Weber County, State of Utah Honorable Judge Parley R. Baldwin Presiding

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UTAH APPELLATE COURTS

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### **STATEMENT OF JURISDICTION**

Pursuant to Utah Code Ann. §§ 78-2-2(3) and 78-2a-3 (1953, as amended) this civil appeal is within the jurisdiction of the Utah Supreme Court and Mr. Bergman's appeal (20080323-CA) was transferred to the Utah Court of Appeals pursuant to Utah Code Ann. §§ 78A-3-102 and 78A-4-103, on May 2, 2008, and Ms. Burke's appeal (20080438-CA) was transferred to the Utah Court of Appeals pursuant to Utah Code Ann. §§ 78A-3-102 and 78A-4-103, on May 20, 2008. On or about October 3, 2008, the Court of Appeals issued an Order consolidating case numbers 20080323-CA and 20080438-CA and designated as Court of Appeals case number 20080323-CA.

### **PARTIES**

1. **Debbie A. Burke** ("Ms. Burke") was, at all times relevant, a resident of Ogden, Weber County and/or Duchesne, Duchesne County, Utah.
2. **Mark D. Bergman** ("Mr. Bergman") was, at all times relevant, a resident of Ogden, Weber County, Utah.
3. **Dorene R. Basug**, and **First American Title** have been dismissed from this case.

### **DEBBIE A. BURKE'S STATEMENT OF ISSUES ON APPEAL**

1. Whether the trial court erred in determining that summary judgment was not appropriate under the facts of this case, which required Ms. Burke to continue defending the case on Mr. Bergman's invalid lien, rather than having the case dismissed because of Mr. Bergman's failure to comply with the statutory requirements for recording and perfecting a Utah mechanics' lien.

**DETERMINATIVE LAW:** Utah Rules of Civil Procedures 56(c); *Burns v.*

*Cannondale Bicycle Co.*, 876 P.2d 415 (Utah Ct. App. 1994); *Dairyland Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 882 P.2d 1143 (Utah 1994); *Fericks v. Lucy Ann Soffe Trust*, 100 P.3d 1200 (Utah 2004); *Holmes v. American States Ins. Co.*, 1 P.3d 552 (Utah Ct. App. 2000); *Kessler v. Mortenson*, 16 P.3d 1225, 1226 (Utah 2000); *Lopez v. Union Pac. R.R.*, 932 P.2d 601 (Utah Ct. App. 1997); *Malibu Investment Co. v. Sparks*, 996 P.2d 1043 (2000); *Massey v. Griffiths*, 152 P.3d 312 (Utah Ct. App. 2007); *McKell Excavating, Inc. v. Wells Fargo Bank, N.A.*, 100 P.3d 1159 (Utah 2004); *McNair v. Farris*, 944 P.2d 392 (Utah Ct. App. 1997); *Poteet v. White*, 147 P.3d 439 (Utah 2006); *Price Development Co., L.P. v. Orem City*, 995 P.2d 1237 (Utah 2000); *Surety Underwriters v. E & C Trucking, Inc.*, 10 P.3d 338, 340 (Utah 2000); Utah Code Ann. § 38-1-1 et. seq.

**STANDARD OF REVIEW:** A trial court's grant of summary judgment is reviewed under a correctness standard, granting no deference to the trial court's legal conclusions. *Coet v. Labrum*, 2008 UT App 69 (March 6, 2008); *Green River Canal Co. v. Thayn*, 2003 UT 50, ¶ 16, 84 P.3d 1134. The review of the facts and all reasonable inferences drawn there from must be done in light most favorable to the nonmoving party. *Coet v. Labrum*, 2008 UT App 69 (March 6, 2008); *Surety Underwriters v. E & C Trucking, Inc.*, 10 P.3d 338 (Utah 2000).

2. Whether the trial court erred in determining that the Mr. Bergman substantially complied with the requirements for filing a notice of lien pursuant to the Utah Mechanics' Lien statute.

**DETERMINATIVE LAW:** Utah Code Ann. § 38-1-7; *Eccles Lumber Co. v. Martin*, 31 Utah 241, 249, 87 P. 713, 716 (1906); *First Gen. Servs. v. Perkins*, 918 P.2d 480, 486 (Utah

Ct.App. 1996); *First Sec. Mtg. Co. v. Hansen*, 631 P.2d 919, 922 (Utah 1981); *For-Shor Co. v. Early*, 828 P.2d 1080, (Utah Ct. App. 1992); *Graff v. Boise Cascade Corp.*, 660 P.2d 721 (Utah 1983); *John Holmes Const. v. R.A. McKell*, 101 P.3d 833, 836 (Utah Ct. App. 2004); *Packer v. Cline*, 2004 Ut. App. 311 (September 10, 2004); *Projects Unlimited v. Copper State Thrift*, 798 P.2d 738, 744 (Utah 1990); *Salt Lake City Corp. v. James Constructors, Inc.*, 761 P.2d 42 (Utah Ct. App. 1988); *State v. Casey*, 44 P.3d 756 (Utah 2002); *Utah Sav & Loan Assoc. v. Mecham*, 366 P.2d 598 (Utah 1961); *Young v. Salt Lake City Sch. Dist.*, 52 P.3d 1230 (Utah 2002).

**STANDARD OF REVIEW:** The appellate court's review of a trial court's statutory interpretations is for correctness. *Foothill Park, LC, v. Judston, Inc.*, 2008 UT App 113 (April 3, 2008); *John Wagner Assocs. v. Hercules, Inc.*, 797 P.2d 1123, 1126 (Utah Ct. App. 1990).

3. Whether the trial court erred in denying the Appellant's motion for attorneys' fees in a single cause of action foreclosing a mechanics' lien, when Ms. Burke is the prevailing party.

**DETERMINATIVE LAW:** Utah Code Ann. § 38-1-18; Utah Rules of Civil Procedures 54(d)(1); *A.K. & R. Whipple Plumbing and Heating v. Aspen Construction*, 977 P.2d 518, 526 (Utah Ct. App. 1999); *Cabera v. Cottrell*, 694 P.2d 622, 625 (Utah 1983); *Dixie State Bank v. Bracken*, 764 P.2d 985 (Utah 1988); *First General Services, Inc. v. Perkins*, 918 P.2d 480, 487 (Utah Ct. App. 1996); *Govert Copier Painting v. Van Leeuwen*, 801 P.2d 163 (Utah Ct. App. 1990); *Meadowbrook, LLC v. Flower*, 959 P.2d 115, 117 (Utah 1998); *Quinn v. Quinn, Jr.*, 820 P.2d 282 (Utah Ct. App. 1992); *Richards v. Security Pacific National Bank*, 849 P.2d 606 (Utah Ct. App. 1993); *Turtle Management, Inc. v. Haggis Management, Inc.*, 645 P.2d 667, 671 (Utah 1982).

**STANDARD OF REVIEW:** The amount of attorneys' fees to be awarded is a matter left to the Court's sound discretion. *First General Services v. Perkins*, 918 P.2d 480, 485 (Utah Ct. App. 1996); *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988). An abuse of the trial court's discretion may be found where the court's determination of reasonableness is unsupported by evidence in the record as explained in the court's findings of fact. *Id.*, *Quinn v. Quinn, Jr.*, 820 P.2d 282 (Utah Ct. App. 1992).

## STATEMENT OF THE CASE

Ms. Burke owned real property located in Weber County, Utah, described as: Lot 496, RON-CLARE VILLAGE NO. 5, Ogden City, Weber County, Utah (the “Property”). **Record at pages 4, 24, 74, and 81.** In order to sell the Property, Ms. Burke and her husband, Vince Isbell (“Mr. Isbell”), listed the Property with Laura Streble (“Ms. Streble”), who is Mr. Bergman’s wife, through Val R. Iverson Realty (“VRIR”) on a Multi State Listing. Prior to selling the Property, Ms. Burke and Mr. Isbell agreed to let Mr. Bergman perform some clean-up and repairs on the Property. At no time during Ms. Burke and Mr. Isbell’s conversations with Mr. Bergman about the clean-up and repairs on the Property did either Ms. Burke and/or Mr. Isbell offer Mr. Bergman a full time job working on the Property. Ms. Burke and Mr. Isbell’s discussions did not include an offer of employment for a specific number of hours, a specific amount of money per hour, or that they would pay any amount of Mr. Bergman’s taxes.

On or about October 27, 2003, Mr. Bergman filed a lien on the Property in the amount of \$28,675.00 (“Lien”). Attached as Exhibit “A” to the Complaint. **Record at page 8.** On or about April 1, 2004, Mr. Bergman filed his complaint with the district court in Weber County, Utah (“Complaint”). **Record at pages 1 - 11.** Mr. Bergman also recorded a Lis Pendens on or about April 6, 2004. **Record at pages 12 - 13.** The Complaint is entitled “Complaint to Foreclose Mechanics’s Lien.” **Record at pages 1 - 11.** Mr. Bergman asserted a single cause of action in his Complaint claiming he was entitled to foreclose his mechanics’ lien under Utah’s mechanics’ lien statute. *Id.* Ms. Burke was served with a summons and the Complaint on or about June 18, 2004. **Record at page 22.** Ms. Burke filed her Answer and Counterclaim on or about August 12, 2004. **Record at pages 23 - 28.** Mr. Bergman filed his Answer to the

Counterclaim on or about August 25, 2004. **Record at pages 30 - 31.**

On or about January 23, 2004, Dorene R. Basug, purchased the Property from Ms. Burke, prior to the Complaint being filed **Record at pages 38 - 55.** First American Title, the title company for the sale, were dismissed from the case after depositing \$28,675.00 with the district court, based on a stipulation of the parties on or about October 21, 2004. **Record at pages 56 - 57.**

Mr. Bergman did not prosecute his case from October 2004, August of 2005. **See the Record.** Ms. Burke filed her Motion for Summary Judgment and supporting documents on or about August 4, 2005. **Record at pages 73 - 108.** Ms. Burke was asking the district court to determine that the Lien was invalid due to deficiencies in the Lien itself. **Record at page 8.** Mr. Bergman filed his Memorandum in Opposition to Defendant Debbie Burke's Motion for Summary Judgment and supporting documentation on or about August 22, 2005. **Record at pages 109 - 22.** Ms. Burke filed the Defendant Debbie A. Burke's Reply Memorandum in Support of Defendant Debbie A. Burke's Motion for summary Judgment. **Record at pages 123 - 35.** The court held a hearing on Ms. Burke's Motion for Summary Judgment on December 15, 2005. **Record at page 141.** Counsel for Ms. Burke sent a letter to the district court and opposing counsel concerning the Court of Appeals' decisions in *Pearson v. Lamb*, 2005 UT. App. 383) September 9, 2005, and *Sill v. Hart*, 2005 UT. App. 537 (December 15, 2005), a copy of the *Sill* decision and a copy of Utah Code Ann. § 38-11-102 were attached to the letter. **Record at pages 142 - 52.** Counsel for Mr. Bergman filed a letter dated December 20, 2005, discussing the *Pearson* and *Sill* cases. He also discussed Utah Code Ann. § 38-1-11(4)(a), Utah Code Ann. § 38-1-7(2)(h), and Utah Code Ann. § 38-11-102(16) and provided copies of those

code sections. **Record at pages 153 - 55.** Counsel for Mr. Bergman also filed a letter dated December 5, 2005, but was filed in the Record on January 12, 2006, including a copy of the *Pearson* case. **Record at pages 156 - 60.** On or about January 19, 2006, the court denied Ms. Burke's Motion for Summary Judgement. **Record at pages 161 - 65.** The order denying the Motion for Summary Judgement was filed on or about February 24, 2006. **Record at pages 166 - 69.** Once again, Mr. Bergman failed to prosecute his case, and the district court filed a Notice of Intent to Dismiss on or about December 7, 2006. **Record at pages 170 - 71.** Mr. Bergman filed his Statement of Plaintiff in Response to the Court's Notice of Intent to Dismiss and Request for Permission to hold Rule 26, Scheduling Conference of the Parties' on December 21, 2006. **Record at pages 172 - 75.**

At the telephonic conference held by the district court on February 28, 2007, in addition to scheduling the trial and dates associated there with, a discovery cut-off date, which was set for July 7, 2007. **Record at pages 179 - 83.** On or about June 13, 2007, Ms. Burke sent Debbie A. Burke's First Set of Interrogatories and Document Requests and Debbie A. Burke's First Set of Requests for Admission to Plaintiff to Mr. Bergman. **Record at pages and 184 - 85, 188 - 89.** Mr. Bergman failed to send any discovery of any type to Ms. Burke at any time during the case. Mr. Bergman filed his Certificate of Service of the Plaintiff's Answers to Defendant Debbie A. Burke's First Set of Interrogatories and Responses to Request for Production of Documents on July 31, 2007. **Record at page 190.** Mr. Bergman also filed his Certificate of Service of the Plaintiff's Responses to Defendant Debbie A. Burke's First Set of Requests for Admissions. **Record at page 191.** After trying to work out some discovery issues between the attorneys, Ms. Burke filed a Motion to Compel, and supporting documents, more complete answers and/or



response to the discovery, on October 1, 2007. **Record at pages 192 - 93 and 197 - 272.**

The district court conducted a two day bench trial on or about November 13, and 14, 2007. **Record at pages 312 - 14.** Due to time constraints, the district court requested the attorneys submit written closing arguments. On or about November 21, 2007, Mr. Bergman filed the Plaintiff's Closing Argument. **Record at pages 317 - 25.** Ms. Burke filed the Defendant Debbie A. Burke's Memorandum in Support of Motion to Dismiss on November 23, 2007. **Record at pages 326 - 51.** On or about November 23, 2007, Ms. Burke filed the Defendant Debbie A. Burke's Closing argument. **Record at pages 352 - 70.** Through a telephonic conference, the district court issued its Ruling on the trial. **Record at page 373.** The district court issued its Judgment on January 16, 2008. **Record at pages 374 - 78.** Counsel for Mr. Bergman signed off and approved the Judgment as to form and content. **Record at page 377.**

On or about January 24, 2008, Mr. Bergman filed the Plaintiff's Notice of Release of Counsel and Representing Pro Se. **Record at pages 379 - 80.** On the same day, Mr. Bergman filed a Motion to Alter or Amend a Judgment with the supporting documents. **Record at pages 381 - 86.** The district court issued it memorandum decision granting Plaintiff's motion to allow Michael F. Olmstead to withdraw as counsel and denied the Plaintiff's Motion to Alter or Amend the Judgment, on or about March 4, 2008. **Record at pages 408 - 09.**

Ms. Burke filed Burke's Motion for Attorneys' Fees and Costs and Affidavit of Attorneys' Fees and supporting documents on March 6, 2008, pursuant to Utah Code Ann. § 38-1-18(1). **Record at pages 410 - 60.** On or about March 13, 2008, Mr. Bergman filed his Motion Requesting Court to Classify and Seal Court Documents and his Memorandum in Opposition of Defendant's Motion for Attorney Fees and supporting documents. **Record at pages 471 - 89.**

On or about April 3, 2008, Mr. Bergman filed his Motion Presenting New Conclusive Evidence Relating to the Defendant Committing Fraud upon the Court and his Affidavit in Support of Motion Presenting New Conclusive Evidence and supporting documents. **Record at pages 514 - 31.**

On or about April 7, 2008, Mr. Bergman filed his Notice of Appeal and his Affidavit of Impecuniosity. **Record at pages 532 - 33.** The district court issued its Memorandum Decision denying Ms. Burke's Motion for Attorneys' Fees and Costs and Mr. Bergman's Motion Requesting the Court to Classify and Seal Court Documents on or about April 8, 2008. **Record at pages 539 - 40.** On or about April 25, 2006, Ms. Burke filed Burke's Objection to the Motion Presenting New Conclusive Evidence Relating to the Defendant Committing Fraud Upon the Court. **Record at pages 555 - 62.**

On or about May 12, 2008, the district court issued its decisions on Mr. Bergman's Order on Plaintiff's Notice of Release of Counsel and Representing Pro Se and Motion to Alter or Amend a Judgment and Order on Plaintiff's Motion Requesting the Court to Clarify and Seal Court Documents and Burke's Motion for Attorney's Fees and Costs. **Record at pages 564 - 69.** Ms. Burke filed her Notice of Appeal on or about May 13, 2008. **Record at pages 570 - 80.**

Mr. Bergman filed a Motion to Remove Stay on Judgment on or about August 1, 2008. **Record at pages 592 - 96.** On or about August 7, 2008, the district court issued its Ruling Denying Plaintiff's Rule 60 (b) Motion. **Record at pages 597 - 99.** Mr. Bergman filed his Notice of Appeal and his Affidavit of Impecuniously on or about September 2, 2008. **Record at pages 600 - 11.**

### **DEBBIE A. BURKE'S STATEMENT OF THE FACTS**

The following facts, taken from the lower court's record, are pertinent to the issues raised on appeal:

1. Ms. Burke owned real property located in Weber County, Utah, described as: Lot 496, RON-CLARE VILLAGE NO. 5, Ogden City, Weber County, Utah (the "Property")..

**Record at pages 4, 24, 74, and 81.**

2. In order to sell the Property, Ms. Burke and her husband, Mr. Isbell, listed the Property with Laura Streble ("Ms. Streble"), who is Mr. Bergman's wife, through Val R. Iverson Realty ("VRIR") on a Multi State Listing. **Record at pages 74 and 81.**

3. Prior to trying to sell the Property, Ms. Burke and Mr. Isbell agreed to let Mr. Bergman perform some clean-up and repairs on the Property. *Id.*

4. Mr. Bergman had been employed in the construction industry, but was out of work during May and June, 2003. *Id.*

5. At no time during Ms. Burke and Mr. Isbell's conversations with Mr. Bergman about the clean-up and repairs on the Property did either Ms. Burke and/or Mr. Isbell offer Mr. Bergman a full time job working on the Property. *Id.*

6. Ms. Burke and Mr. Isbell's discussions did not include an offer of employment for a specific number of hours, a specific amount of money per hour, or that we would pay any amount of Mr. Bergman's taxes. **Record at pages 74 and 81 - 82.**

7. The clean-up and repairs of the Property were performed during May and June, 2003. **Record at pages 75 and 82.**

8. Mr. Bergman had been paid in full for all work authorized to be performed on the Property. *Id.*

9. During that conversation, I asked Mr. Bergman for an itemized list of his hours and the materials he was claiming as part of his demand, which he has never produced. **Record at pages 75.**

10. On or about October 27, 2003, Mr. Bergman filed a lien on the Property in the amount of \$28,675.00. **Record at page 8.**

11. On or about April 1, 2004, Mr. Bergman filed his single cause Complaint with the District Court in Weber County. **Record at pages 1 - 11**

12. A bench trial in this matter was held on or about November 13 and 14, 2007. **Record at pages 312 - 13.**

13. On or about January 9, 2008, the district court, through a telephone conference, issued its decision to the parties counsel and Mr. Isbell, who was with counsel or Ms. Burke. **Record at page 373.**

14. The district court issued its Judgment on or about January 16, 2008. **Record at pages 374 - 78.**

15. Mr. Bergman's counsel signed off on the Judgment, when he approved it as to "Form and Content." **Record at page 377.**

16. The parties did not reach a meeting of the minds. **Record at pages 374 - 78.**

17. The parties did not have a written contract. *Id.*

18. The Court found that Mr. Isbell was the most credible witness during the trial. *Id.*

19. Mr. Isbell is a licensed contractor and was at Ms. Burke's home almost on a weekly basis to review the work performed by Mr. Bergman. *Id.*

20. Mr. Isbell provided the adequate supervision over Mr. Bergman for the work

performed by Mr. Bergman. *Id.*

21. Mr. Isbell estimated the cost for the work to be performed to improve the value of Ms. Burke's home was between \$5,000.00 and \$8,000.00. *Id.*

22. The court found that the total value of the labor and materials provided to Ms. Burke, by Mr. Bergman, was \$7,500.00. *Id.*

23. Ms. Burke paid Mr. Bergman almost on a weekly basis for the work and materials he provided to Ms. Burke's home. *Id.*

24. The total payments from Ms. Burke to Mr. Bergman, prior to the conclusion of the work performed, equals \$5,220.00. *Id.*

25. The balance owing to Mr. Bergman was \$7,500.00 (the total for the work and materials provided by Mr. Bergman) minus \$5,220.00 (the amount already paid by Ms. Burke) equals \$2,280.00. *Id.*

26. Mr. Bergman received \$2,280.00 of the \$28,675.00 that was deposited with the court. *Id.*

27. Ms. Burke received the balance of the \$28,675.00 deposited with the court, or \$26,395.00. *Id.*

28. The evidence of the payments to Mr. Bergman consisted of trial exhibits and direct testimony from Mr. Isbell, Ms. Burke, and Mr. Bergman's brother, Josh Bergman. **Record at page 313.** Mr. Bergman did not request a transcript of the trial to help him marshal the evidence in support of his positions and therefore, the record does not contain specific testimony of Mr. Isbell, Ms. Burke, and Mr. Bergman's brother, Josh Bergman.

29. The cash payments, including the two checks, which Mr. Bergman brought to the

court's attention after the trial, were identified in the trial exhibits and discussed in direct and cross examination of Mr. Isbell, Ms. Burke, and Mr. Bergman's brother, Josh Bergman. *Id.*

## STATUTE AND RULES THAT ARE DETERMINATIVE

Utah Code Ann. § 38-1-7 (1953)(as amended) provides:

### **Notice of claim -- Contents -- Recording -- Service on owner of property.**

(1) (a) (i) Except as modified in Section 38-1-27, a person claiming benefits under this chapter shall file for record with the county recorder of the county in which the property, or some part of the property, is situated, a written notice to hold and claim a lien within:

(A) 180 days after the day on which occurs final completion of the original contract if no notice of completion is filed under Section 38-1-33; or

(B) 90 days after the day on which a notice of completion is filed under Section 38-1-33.

(ii) For purposes of this Subsection (1), final completion of the original contract, and for purposes of Section 38-1-33, final completion of the project, means:

(A) if as a result of work performed under the original contract a permanent certificate of occupancy is required for the work, the date of issuance of a permanent certificate of occupancy by the local government entity having jurisdiction over the construction project;

(B) if no certificate of occupancy is required by the local government entity having jurisdiction over the construction project, but as a result of the work performed under the original contract an inspection is required as per state-adopted building codes for the work, the date of the final inspection for the work by the local government entity having jurisdiction over the construction project; or

(C) if with regard to work performed under the original contract no certificate of occupancy and no final inspection are required as per state-adopted building codes by the local government entity having jurisdiction over the construction project, the date on which there remains no substantial work to be completed to finish the work on the original contract.

(b) Notwithstanding Section 38-1-2, where a subcontractor performs substantial work after the applicable dates established by Subsections (1)(a)(ii)(A) and (B), that subcontractor's subcontract shall be considered an original contract for the sole purpose of determining:

(i) the subcontractor's time frame to file a notice of intent to hold and claim a lien under this Subsection (1); and

(ii) the original contractor's time frame to file a notice of intent to hold and claim a lien under this Subsection (1) for that subcontractor's work.

(c) For purposes of this chapter, the term "substantial work" does not include:

(i) repair work; or

(ii) warranty work.

(d) Notwithstanding Subsection (1)(a)(ii), final completion of the original contract does not occur if work remains to be completed for which the owner is holding payment to ensure completion of that work.

(2) (a) The notice required by Subsection (1) shall contain a statement setting forth:

(i) the name of the reputed owner if known or, if not known, the name of the record owner;

(ii) the name of the person:

(A) by whom the lien claimant was employed; or

- (B) to whom the lien claimant furnished the equipment or material;
  - (iii) the time when:
    - (A) the first and last labor or service was performed; or
    - (B) the first and last equipment or material was furnished;
  - (iv) a description of the property, sufficient for identification;
  - (v) the name, current address, and current phone number of the lien claimant;
  - (vi) the amount of the lien claim;
  - (vii) the signature of the lien claimant or the lien claimant's authorized agent;
  - (viii) an acknowledgment or certificate as required under Title 57, Chapter 3, Recording of Documents; and
  - (ix) if the lien is on an owner-occupied residence, as defined in Section 38-11-102, a statement describing what steps an owner, as defined in Section 38-11-102, may take to require a lien claimant to remove the lien in accordance with Section 38-11-107.
- (b) Substantial compliance with the requirements of this chapter is sufficient to hold and claim a lien.
- (3) (a) Within 30 days after filing the notice of lien, the lien claimant shall deliver or mail by certified mail a copy of the notice of lien to:
- (i) the reputed owner of the real property; or
  - (ii) the record owner of the real property.
- (b) If the record owner's current address is not readily available to the lien claimant, the copy of the claim may be mailed to the last-known address of the record owner, using the names and addresses appearing on the last completed real property assessment rolls of the county where the affected property is located.
- (c) Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorneys' fees against the reputed owner or record owner in an action to enforce the lien.
- (4) The Division of Occupational and Professional Licensing shall make rules governing the form of the statement required under Subsection (2)(a)(ix).

Utah Code Ann. § 38-1-18 (1953)(as amended) states:

**Attorneys' fees -- Offer of judgment.**

- (1) Except as provided in Section 38-11-107 and in Subsection (2), in any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action.
- (2) A person who files a wrongful lien as provided in Section 38-1-25 is not entitled to recover attorneys' fees under Subsection (1).
- (3) A party against whom any action is brought to enforce a lien under this chapter may make an offer of judgment pursuant to Rule 68 of the Utah Rules of Civil Procedure. If the offer is not accepted and the judgment finally obtained by the offeree is not more favorable than the offer, the offeree shall pay the costs and attorneys' fees incurred by the offeror after the offer was made.



## Utah Rules of Appellate Procedure - Rule 24.

### **Briefs.**

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references.

(a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(a)(10) A short conclusion stating the precise relief sought.

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) Brief of the appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) Length of briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs. No brief shall exceed 50 pages, and no party's briefs shall in combination exceed 75 pages.

(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal.

(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal.

(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-Appellant.

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee.

(h) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages requested, and the good cause for granting the motion. A motion filed at least seven days before the date the brief is due or seeking five or fewer additional pages need not be accompanied by a copy of the brief. A motion filed less than seven days before the date the brief is due and seeking more than 5 additional pages shall be accompanied by a copy of the draft brief for in camera inspection. If the motion is granted, any responding party is entitled to an equal number of additional pages without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall state the reasons for the supplemental citations. The body of the letter must not exceed 350 words. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

## **SUMMARY OF THE ARGUMENTS**

Mr. Bergman's asserts in his appellate brief that the district court's finding of fact are not supported by the evidence adduced at trial. He claims that the trial court failed to provide adequate support for the findings of fact and conclusions of law in this matter. Further, he alleges that Ms. Burke failed to provide written evidence of some of the payments to him for work performed on her real property. Finally, Mr. Bergman wants the appellate court to revisit his claims for compensation from Ms. Burke by arguing that her husband, Mr. Isbell, was her agent.

Mr. Bergman did not have a transcript of the trial prepared. He filed a document stating that no transcript was necessary. He does not cite to the Records at all in his brief. He leaves this Court to its own devices to determine where, if any at all, the errors he claims the trial court made are located in the Record. He argues that he is exempt from marshaling the evidence in support of his claims. Mr. Bergman postulates the district court's errors in it drafting it findings of fact are so plain and pervasive that they are "legally insufficient" and relieves him from the burden of meeting he clearly erroneous standard.

The issues raised by Mr. Bergman in his brief are so inadequately briefed and the overall analysis of these issues is so lacking as to shift the burden of research and argument to the this Court. Without citations to the Record, lack of a transcript, little if any citations to appropriate legal authority, and a failure to marshal the evidence makes responding to Mr. Bergman's appellate brief a challenge at best. Mr. Bergman was not happy with the outcome of the trial. He fired his attorney and decided to plead his case before the district court and now before this Court. Mr. Bergman asks this Court to determine that the trial court failed to support its findings

of fact without providing any support for his conclusions. The Court should deny Mr. Bergman's appeal for a lack of following the appropriate Appellate Rules and his failure to properly, as set forth in the Utah case law, marshal the evidence.

Ms. Burke submitted a motion for summary judgment to the district court concerning the validity of Mr. Bergman's Lien. His Lien was defective on its face because he failed to include specific required elements on his Lien. Those elements include his telephone number, the first date of work performed on Ms. Burke's real property, and the last date of work was performed. As a result of Mr. Bergman's failure to comply with the Utah Statute governing mechanics' liens, the district court should have granted Ms. Burke's summary judgment motion. This would have concluded the case at that time and would not have necessitated her continued defense to Mr. Bergman's foreclosure action.

Whether Ms. Burke was successful with her defense against Mr. Bergman's foreclosure action at the summary judgment level or at the trial level, she is entitled to an award of costs, which includes a reasonable attorneys' fee. Ms. Burke was the prevailing party at trial.

Ms. Burke successfully defended against the Mr. Bergman's mechanics' lien foreclosure action. Mr. Bergman was awarded only \$2,280.00 out of the \$28,675.00 he claimed he was owed. In other words, he was only awarded approximately 8% of his claim. On the other hand, Ms. Burke received \$26,395.00 of the \$28,675.00 or 92% of the amount claimed by Mr. Bergman.

Ms. Burke should have been awarded a reasonable attorneys' fees at the trial court level and should be entitled to an award of attorneys' fees on appeal. Ms. Burke requests that this Court grant her appeals and remand this matter to the district court for a determination of the

reasonable attorneys' fees and costs. She also asked this Court to grant her fees and costs on appeal pursuant to the Appellate Rule.

## ARGUMENT

Mr. Bergman did not order a transcript of the trial. He has chosen to make his agreements without providing this Court with the trial testimony of any of the witnesses. Mr. Bergman did not make one citation to the record at all in his brief. He failed to marshal any evidence in support of his claims that the district court abused its discretion. Rather, Mr. Bergman presents his argument that he did not need to marshal any evidence in support of his claims, because the district court's findings are "legally insufficient." *See Campbell v. Campbell*, 896 P.2d 635, 638 (Utah Ct. App. 1995). Mr. Bergman continues to ignore the Record.

### **A. Standard for a Reviewing a District Court's Findings of Fact.**

"Findings of fact, whether based on **oral or documentary evidence**, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah Rules Civil Procedures 52(a) (emphasis added). A party challenging a fact finding must first marshal all record evidence that supports the challenged finding *United Park City Mines v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, P 24, 140 P.3d 1200; *see also* Utah R. App. P. 24(a)(9). We dismiss arguments that do not meet these requirements. *See State v. Sloan*, 2003 UT App 170, P 13, 72 P.3d 138 (citing *Smith v. Smith*, 1999 UT App 370, P 8, 995 P.2d 14). The assertions that factual findings of a court are not supported by the evidence are evaluated under the clearly erroneous standard. *See 438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, P68, 99 P.3d 801 (noting that clearly erroneous findings are "against the clear weight of the evidence"). "A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite

and firm conviction that a mistake has been committed.” *State v. Walker*, 743 P.2d 191, 193 (Utah 1987) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)). 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.” *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 899 (Utah 1989); *see also* Utah Rules of Appellate Procedures 24(a)(9).

To successfully challenge that ultimate finding, an appellant should marshal all of the remaining evidence supporting it and then demonstrated why that evidence “is legally insufficient to support [it] even when viewing it in a light most favorable to the court below.” *Chen v. Stewart*, 2004 UT 82, P76, 100 P.3d 1177 (internal quotations omitted).

To appropriately marshal evidence, parties must “provide a precisely focused summary of all the evidence supporting the findings they challenge.” *Id.* at P77. “This summary must correlate all particular items of evidence with the challenged findings and then convince us that the trial court erred in the assessment of that evidence to its findings.” *Id.* Indeed, parties challenging factual findings must “fully embrace the adversary's position” and play “devil's advocate.” *Harding v. Bell*, 2002 UT 108, P19, 57 P.3d 1093 (internal quotations omitted). The process of marshaling evidence is fundamentally different from that of presenting the evidence at trial. The challenging party must temporarily remove its own prejudices and fully embrace the adversary's position; he or she must play the devil's advocate. In so doing, appellants must present the evidence in a light most favorable to the trial court and not attempt to construe the evidence in a light favorable to their case. Appellants cannot merely present carefully selected



facts and excerpts from the record in support of their position. Nor can they simply restate or review evidence that points to an alternate finding or a finding contrary to the trial court's finding of fact. *Chen v. Stewart*, 2004 UT 82, P 78, 100 P.3d 1177 (citations and internal quotation marks omitted).

The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. Particularly, “[b]riefs must contain reasoned analysis based upon relevant legal authority. An issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court.” *State v. Sloan*, 2003 UT App 170, P 13, 72 P.3d 138 (citing *Smith v. Smith*, 1999 UT App 370, P 8, 995 P.2d 14).

**B. Did the Trial Court abuse its discretion when it concluded:**

- a. “The Court that there was no meeting of the minds on the essential elements of any agreement between the parties.”
- b. “The parties did not form an oral contract for the work for Ms. Burke’s home.

Mr. Bergman brought a single cause of action in his Complaint. *See* “Statement of the Case at page 11 of Mr. Bergman’s Brief dated November 5, 2008. That single cause of action was to “foreclosure of a mechanics’ lien recorded upon the Defendant’s real property.” *Id.* Mr. Bergman did not include a cause of action for breach of any type of contract in his Complaint. Mr. Bergman was suing in order to be fully compensated for the value of the work he performed on Ms. Burke’s real property. Simply put, he was seeking money. He was not trying to establish a right to get paid through a contract, but through Utah’s Mechanics’ Lien Statute.

The district court listened to the testimony from all of the witnesses and reviewed all of the trial exhibits from both parties. Both parties submitted written closing arguments for the court's review. The trial was conducted in mid November 2007, and the court announced its decision in mid January 2008. The Judgment specifically stated that the court:

Having reviewed and considered the parties' witnesses, the evidence presented at the trial, considered the written closing arguments of the parties, reviewing the file and good cause appearing, the Court enters its following Findings of Fact, Conclusions of Law, and Judgment. **Record at page 374.** Clearly, the district court reviewed all of the evidence, oral and/or documentary, and considered all of the legal arguments of counsel prior to issuing its Ruling. The Judgment is only a reflection of the court's pronounced ruling. Mr. Bergman was not privy to the conference call when the court issued its ruling. The district court findings of facts are "legally sufficient" for review on a single cause of action trial.

The marshaling rule requires appellant, Mr. Bergman to "marshal all the evidence in favor of the facts as found by the trial court and then demonstrate that even viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact." *Save Our Schools v. Board of Educ.*, 2005 UT 55, P 10, 122 P.3d 611 (quoting *Chen v. Stewart*, 2004 UT 82, P 76, 100 P.3d 1177). Because Mr. Bergman has failed to marshal the evidence, the appellate court should "assume the evidence supports the trial court's findings." *See Chen*, 2004 UT 82, P 80, 100 P.3d 1177.

Mr. Bergman offers no meaningful analysis and only cursory legal citation in his brief. Rather than meeting the marshaling rule's high burden, Mr. Bergman attempts to simply present previously found to be insufficient. *Chen*, 2004 UT 82 at P78. It does not matter that Mr.

Bergman's claim is that no evidence supports the findings he challenges. *See Wilson Supply, Inc.*, 2002 UT 94 at P22. Even assuming the truth of those claims, the fact remains that Mr. Bergman's challenge is ultimately to the district court's findings and he marshals none of the facts he alleges evidence support his claims. Mr. Bergman completely fails to fulfill the "rigorous and strict" marshaling requirement, *see Chen v. Stewart*, 2004 UT 82, P 79. For those findings that Mr. Bergman *does* directly challenge, he essentially reargues the evidence and asserts that the findings are incorrect because the evidence supporting them is "self-serving" and "controverted." But such recharacterizations of the evidence are ineffectual on appeal because it is the trial court's role to assess credibility and to assign weight to conflicting evidence. *See 438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, P 75, 99 P.3d 801 ("When reviewing a district court's findings of fact on appeal, we do not undertake an independent assessment of the evidence presented during the course of trial and reach our own separate findings with respect to that evidence. Rather, we endeavor only to evaluate whether the court's findings are so lacking in support that they are against the clear weight of the evidence."). Thus, because Mr. Bergman makes no real attempt to properly marshal the evidence, this Court should accept all the trial court's findings. *See Chen*, 2004 UT 82, P 80. Further, the Court should refuse to address any of Bergman's legal arguments that are entirely dependent on a version of the facts that is contrary to the trial court's findings.

Mr. Bergman's arguments consist of assertions that the action on the part of Ms. Burke, her counsel, and the district court was improper. Such an argument does not comply with appellate briefing rules. *See Utah R. App. P. 24(a)(9)* (requiring an appellant's argument to "contain the contentions and reasons of the appellant with respect to the issues presented"); *West Jordan City v. Goodman*, 2006 UT 27, P 29, 135 P.3d 874 ("The appellate court is not a

depository in which the appealing party may dump the burden of argument and research. An adequately briefed argument must provide meaningful legal analysis. A brief must go beyond providing conclusory statements and fully identify, analyze, and cite its legal arguments. This analysis requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority." (footnotes and internal quotation marks omitted)). This Court has warned that such noncompliance may have serious consequences because we have the discretion to strike the noncompliant arguments and "assess attorney fees against the offending lawyer." Utah Rules of Appellate Procedures 24(k).

Thus, this Court should decline to address the merits of Mr. Bergman's arguments under these circumstances. *See State v. Shepherd*, 1999 UT App 305, P 27, 989 P.2d 503 (declining to consider the merits of issues briefed where defendant's brief failed to cite relevant legal authority or provide any meaningful analysis), *see also State v. Bobo*, 803 P.2d 1268, 1272 (Utah Ct. App. 1990) (explaining proper method for presenting state constitutional claims); *State v. Johnson*, 771 P.2d 326, 328 (Utah Ct. App. 1989) (rejecting nominal allusions to state constitutional guarantees). The district court did not abuse its discretion in formulating and issuing its findings of facts. This court should deny Mr. Bergman's appeal.

**C. Did the Trial Court abuse its discretion when it allowed the Defendant to offer as proof of payment to the Plaintiff, alleged cash payments totaling \$2,700.00 without corroborating evidence that suggested such payments were actually made?**

In his brief, Mr. Bergman provided a copy of Ms. Burke's Exhibit D14, which was received by the district court on November 13, 2007. Mr. Bergman's Brief dated November 5, 2008, at page 27. During the trial, Ms. Burke, Mr. Isbell, and Josh Bergman all testified to one

or more of the entries on that list of payment from Ms. Burke to Mr. Bergman. Each of the entries on Exhibit D14 were discussed at the trial. Mr. Bergman's counsel did cross examine Ms. Burke's witnesses in relation to their testimony concerning the payments to Mr. Bergman. D14 clearly identifies the cash payments to Mr. Bergman. Specifically, Ms. Burke and her witnesses testified to the cash payments to Mr. Bergman. There was adequate testimony at trial to explain and prove the existence of the payments to Mr. Bergman for the district court to find and draft its Findings of Fact. The trial court accepted the testimony and trial exhibits offered by Ms. Burke in making its Ruling.

Mr. Bergman makes unsupported claims and statements. He claims that since Ms. Burke did not provide documentary exhibits, i.e. a cancelled check, for the cash payments she is not entitled to the benefit of those payments. Ms. Burke provided oral testimony to support those payments instead. He asserts that the district court should not accept that testimony as proof of those payments. Since the matter was tried to the district court as a bench trial, the trial district court was and is the trier of fact. Mr. Bergman has failed to demonstrate that the trial courts finding are "clearly erroneous." Mr. Bergman did not marshal the evidence to support the allegations in his brief.

The records and exhibits provided by Mr. Bergman at trial do not meet the standard he would now like to impose on Ms. Burke. That is, that the only way the trial court could accept and find that cash payments were made is with some sort of documentary evidence and the oral testimony of three witnesses would be inadequate. Nevertheless, Mr. Bergman failed to provide the same level documentation for his own claims. His hourly claim for working 1,200 hours was an estimate, not contemporaneous records for the claimed work. However, he now seeks to have

this Court rule that he is entitled to more compensation for his work by not allowing Ms. Burke to claim her cash payments to Mr. Bergman. The trial court heard all of the oral evidence presented by all of the witnesses, including Mr. Bergman and Ms. Burke's witnesses. Simply put, the district court did not believe the testimony of Mr. Bergman and his witnesses.

Without citations to the Record and/or a trial transcript, it is impossible for Mr. Bergman to marshal the evidence necessary to meet the clearly erroneous standard required by Mr. Bergman's appeal. In order to challenge a court's factual findings an appellant must marshal the evidence on appeal. In *Groberg v. Housing Opportunities, Inc.*, 2003 UT App 67, the Court of Appeals held that:

"In reviewing a factual determination, we defer to the decision of the trial court . . . ." *Nu-Trend Elec. Inc., v. Deseret Fed. Sav. & Loan Ass'n Inc.*, 786 P.2d 1369, 1371 (Utah Ct. App. 1990). Furthermore, [t]o successfully challenge a trial court's findings of fact on appeal, [a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, and thus making them clearly erroneous. *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998) (quotations and citations omitted).

*Id.* at ¶ 16. Mr. Bergman has not met his burden to show that the district court's findings are so lacking in support as to be against the clear weight of the evidence, and thus making them clearly erroneous.

Further, Mr. Bergman failed to provide this Court with any citations to the Record. He did not provide the Court with a transcript of the trial testimony he claims failed to prove the existence of the cash payments. Once again Mr. Bergman failed to marshal the evidence to support his claims that the cash payments were not made. Mr. Bergman made no real attempt to properly marshal the evidence, thus this Court should accept all the district trial court's factual findings. Therefore, this Court should deny Mr. Bergman's appeal.

**D. Did the Trial Court abuse its discretion when it did not state nor explain the evidentiary foundation to support its factual findings? The findings stated by the Trial Court clearly do not support the Trial Court’s conclusion of law, but rather are in conflict with each other, unclear and are argumentative in nature.**

Once again, Mr. Bergman has failed to marshal any evidence to give any credence to his arguments. The marshaling rule requires appellant, Mr. Bergman to ““marshal all the evidence in favor of the facts as found by the trial court and then demonstrate that even viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact.”” *Save Our Schools v. Board of Educ.*, 2005 UT 55, P 10, 122 P.3d 611 (quoting *Chen v. Stewart*, 2004 UT 82, P 76, 100 P.3d 1177).

Despite the plain language of the Judgment, Mr. Bergman claims that the district court failed to support its findings of fact. The Judgment specifically states:

the trial, considered the written closing arguments of the parties, reviewing the file and good cause appearing, the Court enters its following Findings of Fact, Conclusions of Law, and Judgment.

....

2. After a review of all of the evidence, the Court finds that there was no meeting of the minds between the parties.

**Record at pages 374 - 75.** In other words, the district court reviewed virtually the whole file and all of the trial testimony and exhibits. The court could not have been more thorough. It is plain that the district court reviewed all of the evidence, oral and/or documentary, and consider all of the legal arguments of counsel prior to issuing its Ruling. The Judgment is just a reflection of the district court’s announced Ruling. Mr. Bergman was not privy to the conference call when the district court issued its Ruling, which may explain his confusion about what the court did.

Mr. Bergman has even failed to point out the “conflict” between the Findings of Fact and/or the Conclusions of Law issued by the trial court. Further, he has not demonstrated how

the Judgment issued by the district court is “unclear” and/or “argumentative in nature.” Mr. Bergman provides no citation to the Record or to a transcript to support his bare allegations in his brief. He claims that it is so clear that the Findings of Fact are so lacking that without explanation, this Court should find that they are insufficient and cannot be adequately reviewed. Therefore, clearly against the weight of the evidence Mr. Bergman fails to provide this Court with enough information to support his argument, through the Record or the actual testimony of witnesses at trial or exhibits received by the district court at trial. The district court’s Findings of Fact are “legally sufficient” for review on a single cause of action trial.

**E. Was the Trial Court’s award of damages proper given the lack of explicit factual findings regarding such award?**

In order to challenge the district court’s factual findings, Mr. Bergman is required to marshal the evidence. Without any analysis at all, Mr. Bergman asserts that the court’s findings are “simple cursory statements, which speak more about the parties rather than what is the law and how it governs the actions of the parties.” Mr. Bergman does not cite to the Record at all in his brief. Mr. Bergman failed to provide this Court with a transcript of the proceedings he now challenges. He provides this Court with no way to analyze his argument or evaluate his claims. Mr. Bergman asserts that the district court failed to use enough specific detail in order for him to follow the district court’s evaluation of the evidence.

Mr. Bergman’s Complaint asserted a single cause of action, foreclosure of a mechanics’ lien; he did not include a cause of action for breach of contract. He claimed that he had worked 1,200 hours and wanted to be paid at \$20.00 per hour. He kept no hourly records. He did not provide any written periodical billing for the time and materials he claimed to provide to Ms.



Burke. At trial, Mr. Bergman did not produce any time cards or other information containing contemporaneous records of this work on Ms. Burke's property as exhibits. Despite Mr. Bergman's clear lack of documentary evidence of his claims, he now seeks to hold Ms. Burke to a different standard.

At the district court's telephone conference where it announced its Ruling, the court specifically identified Mr. Isbell as the most creditable witness at trial. **Record at page 375.** Simply put, the district court believed the evidence presented by Mr. Isbell. At trial, Mr. Isbell testified that the value of the work thus performed on the property by Mr. Bergman was between \$5,000.00 and \$8,000.00. Based on that testimony, the trial court found that the reasonable value of the work performed by Mr. Bergman on Ms. Burke's property was \$7,500.00. This Court should deny Mr. Bergman's appeal, for his failure to meet his burden on appeal.

**F. Did Trial Court disregard the evidence that the Defendant's Agent had authorization to approve or disapprove / increase or decrease the scope of repair and renovation work that the Plaintiff was performing on the Defendant's property? As the party charged by the Defendant with authorizing work on the real property at issue, the Defendant is liable to the Plaintiff for work performed on such property at the Defendant's Agent's request.**

Mr. Bergman has once again fallen short in providing this Court with any direction and evidence to support his claims. He did not cite to the Record or provide a transcript in order for a meaningful review of his claims. He has failed to marshal any evidence to allow this Court to even evaluate his assertions. His brief is wholly inadequate on appeal. His request for relief, if any, under this section of his brief should be denied.

In light of the award by the district court of \$7,500.00 to Mr. Bergman for the work he performed on Ms. Burke's property, the trial court accepted Mr. Isbell as Ms. Burke's agent. The

trial court accepted the fact that Mr. Isbell was giving directions to Mr. Bergman and paying him on an almost weekly basis during the performance of his work on Ms. Burke's property. In fact, the trial court held in its Judgment that:

5. Mr. Isbell is a licensed contractor and was at Ms. Burke's home almost on a weekly basis to review the work performed by the Plaintiff.
6. Mr. Isbell provided the adequate supervision over the Plaintiff for the work performed by the Plaintiff.
7. Mr. Isbell estimated the cost for the work to be performed on Ms. Burke's home was between \$5,000.00 and \$8,000.00.
8. The court finds that the total value of the labor and materials provided to Ms. Burke, for which she is liable was \$7,500.00.
9. Ms. Burke paid the Plaintiff almost on a weekly basis for the work and materials he provided to Ms. Burke's home.
10. The total payments from Ms. Burke to the Plaintiff equal \$5,220.00.

**Record at page 375.** The trial court's finding clearly set forth its findings of fact that Mr. Isbell was acting on behalf of Ms. Burke. Mr. Isbell acted as her agent as it related to the real property, which was the subject matter of this litigation. The district court made its award to Mr. Bergman based on Mr. Isbell's involvement in this matter. Mr. Isbell was the one providing "adequate supervision" to Mr. Bergman. Mr. Isbell was the one that paid Mr. Bergman "almost on a weekly basis" for his efforts on the real property. Ms. Burke was given credit for the payments Mr. Isbell made to Mr. Bergman, whether by check or in cash. Mr. Isbell testified as to his roll in having Mr. Bergman work on Ms. Burke's real property. That is why the trial court specifically outlined its findings, set forth above, in its Judgment.

The district court clearly determined that Mr. Isbell was Ms. Burke's agent and made its Findings of Fact reflect that fact. Without citations to the Record and a trial transcript, or any legal authority cited by Mr. Bergman to support this claim in his brief, this Court should deny his appeal.

**G. Whether the trial court erred in determining that summary judgment was not appropriate under the facts of this case, which required the Ms. Burke to continue defending the case on the Mr. Bergman's invalid lien, rather than having the case dismissed because of the Mr. Bergman's failure to comply with the statutory requirements for recording and perfecting a Utah mechanic' lien.**

**I. Standard for Granting Summary Judgment.**

Rule 56 of the Utah Rules of Civil Procedure provides that summary judgment shall be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Utah Rules of Civil Procedures 56. The Utah Supreme Court explained this to mean that summary judgment is proper when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Surety Underwriters v. E & C Trucking, Inc.*, 10 P.3d 338, 340 (Utah 2000); *Kessler v. Mortenson*, 16 P.3d 1225, 1226 (Utah 2000); *Malibu Investment Co. v. Sparks*, 996 P.2d 1043, 1047 (2000) (citations omitted); *Price Development Co., L.P. v. Orem City*, 995 P.2d 1237, 1242 (Utah 2000); *see also* Utah Rules of Civil Procedures 56(e). A moving party is entitled to a judgment as a matter of law where the nonmoving party fails to or cannot make a sufficient showing on an essential element of the nonmoving party's case with respect to the burden of proof. *See Holmes v. American States Ins. Co.*, 1 P.3d 552, 555 (Utah Ct. App. 2000); *see also Burns v. Cannondale Bicycle Co.*, 876 P.2d 415, 420 (Utah Ct. App. 1994). All reasonable inferences drawn from the facts are taken in the light most favorable to the nonmoving party. *See McNair v. Farris*, 944 P.2d 392, 393 (Utah Ct. App. 1997) (quoting *Lopez v. Union Pac. R.R.*, 932 P.2d 601, 602 (Utah Ct. App. 1997)).

## II. Mechanics' Lien Standard

In *Sill v. Hart*, P.3d 1099 (Utah 2005) the Utah Supreme Court provide these guidelines for statutory construction of the Utah's Mechanics' Lien Act:

"Under our rules of statutory construction, we look first to the statute's plain language to determine its meaning." *Sindt v. Ret. Bd.*, 2007 UT 16, P 8, 157 P.3d 797 (internal quotation marks omitted). We read "[t]he 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." *State v. Schofield*, 2002 UT 132, P 8, 63 P.3d 667 (internal quotation marks omitted). We do so because "[a] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." *State v. Maestas*, 2002 UT 123, P 54, 63 P.3d 621 (quoting Norman J. Singer, 2A Sutherland *Statutory Construction* § 96:05 (4th ed. 1984)).

*Id.* at 1104.

Utah Code Ann. § 38-1-7, in effect at the time of filing of the October 27, 2003 lien, provided in pertinent part as follows:

- (2) The notice required by Subsection (1) **shall contain** a statement setting forth:
  - (a) the name of the reputed owner if known or, if not known, the name of the record owner;
  - (b) the name of the person by whom the lien claimant was employed or to whom the lien claimant furnished the equipment or material;
  - (c) **the time when the first and last labor or service was performed or the first and last equipment or material was furnished;**
  - (d) a description of the property, sufficient for identification;
  - (e) the name, current address, and **current phone number of the lien claimant;**
  - (f) the signature of the lien claimant or the lien claimant's authorized agent;
  - (g) an acknowledgment or certificate as required under Title 57, Chapter 3, Recording of Documents; and
  - (h) **if the lien is on an owner-occupied residence, as defined in Section 38-11-102, a statement describing what steps an owner,**

**as defined in Section 38-11-102, may take to require a lien claimant to remove the lien in accordance with Section 38-11-107.**

Utah Code Ann. § 38-1-7(2) (2003)(emphasis added). The descriptive terms in the lien notice serve to inform interested parties of the existence and scope of the lien. *See, For-Shor Co. v. Early*, 828 P.2d 1080, (Utah Ct.App. 1992).

The Utah Court of Appeals has stated that, “[t]he purpose of the mechanics’ lien act [, which] is to protect laborers and materialmen who have increased the value of the property of another by their materials or labor.” *For-Shor*, 828 P.2d at 1082. It has been further held that, “the general policy of Utah courts is to construe the statutes broadly to protect those who add value to another’s property.” *First Gen. Servs. v. Perkins*, 918 P.2d 480, 486 (Utah Ct.App. 1996). These sweeping benefits provided by the courts and the statute are not haphazardly applied, for they “are available only to those who comply with its requirements.” *For-Shor*, 828 P.2d at 1082. More specifically it has been stated that, “Mechanics’ liens are purely statutory, and lien claimants may only acquire a lien by complying with the statutory provisions authorizing them.” *Utah Sav & Loan Assoc. v. Mecham*, 366 P.2d 598, 600 (Utah 1961).

It should be noted that the Utah Supreme Court has stated that a lien will not be invalidated for mistakes or omissions that are seen as technicalities. *See, Graff v. Boise Cascade Corp.*, 660 P.2d 721 (Utah 1983). However, the provisions authorizing a lien are specifically identified as, “mandatory condition precedent to the very creation and existence of a lien.” *Id.* at 722. The Utah

legislature amended section 38-1-7 in 1985, ridding it of what was considered “cumbersome lien notice requirements.” *Projects Unlimited v. Copper State Thrift*, 798 P.2d 738, 744 (Utah 1990). Had the legislature felt that the dates of work, or the phone number of the lien claimant were technicalities, it is likely they would have been removed with other of the cumbersome requirements. Instead both were left and are still specifically stated as requirements to the lien notice. Utah Code Ann. § 38-1-7(2)(c)(e). This provides the conclusion they are to be found as essential to the lien notice and not a hyper technicality to be discounted. *First Sec. Mtg. Co. v. Hansen*, 631 P.2d 919, 922 (Utah 1981). Accordingly the statute also requires that:

A person claiming benefits under this chapter shall file for record with the county recorder of the county in which the property, or some part of the property, is situated, a written notice to hold and claim a lien within 90 days from the date:

(a) the person last performed labor or service or last furnished equipment or material on a project or improvement for a residence as defined in Section 38-11-102; or

(b) of final completion of an original contract not involving a residence as defined in Section 38-11-102.

Utah Code Ann. § 38-1-7(1)(a)(b) (2003). A mechanics’ lien must be properly filed within the 90 days set forth in the statute. An issue in this case is whether the lien was filed within the 90 day period.

### **III. Mr. Bergman’s Compliance with Utah’s Mechanics’ Lien Statute.**

In the this case, Mr. Bergman’s Lien is invalid on it’s face. **Record at page 8.** The Lien filed by Mr. Bergman on October 27, 2003 is missing several of the specific requirements listed in section 38-1-7(2). *See, Record at page 8.* The missing elements are, “the time when the first

and last labor or service was performed or the first and last equipment or material was furnished,” and a “current phone number of the lien claimant.” Utah Code Ann. § 38-1-7(2)(c)(e) (2003). The notice also lacks a statement required to notify an owner of residential property, as defined in 38-11-102, of the steps necessary to remove the lien under section 38-11-107. *Id.* at § 38-1-7(2)(h).

It is clear from the face of the Lien filed by Mr. Bergman that he has failed to fully comply with the requirements set forth in the statute. Omitted from the Lien statement are elements that are clearly and definitely listed in the statute. When a court is required to review statutory language during summary judgment, it first looks to the plain meaning of the statute. *Young v. Salt Lake City Sch. Dist.*, 52 P.3d 1230 (Utah 2002) (citing *State v. Casey*, 44 P.3d 756 (Utah 2002)). In this case the statute is very clear and specific as to what is required to be set forth in the written notice for a mechanics’ lien. *See, John Holmes Const. v. R.A. McKell*, 101 P.3d 833, 836 (Utah Ct. App. 2004). The absence of the statutorily required elements make the Lien invalid on its face and entitled Ms. Burke to summary judgment.

The argument that these omissions are just technical errors is inappropriate in the current case. The information omitted from Mr. Bergman’s Lien may at first glance appear to be technicalities. The descriptive terms in a lien notice serve to inform interested parties of the existence and scope of the lien. *See, For-Shor Co. v. Early*, 828 P.2d 1080, (Utah Ct.App. 1992). Another issue here is whether Mr. Bergman’s lien has been filed within 90 days from the date of his “last performed labor or service.” Utah Code Ann. § 38-1-7(1)(a). Without the first and last dates of work specified in the Lien, it is virtually impossible for an interested party, of the existence and scope of the lien, to tell if it meets the statutory requirement of being filed within

the 90 day time frame.

At no point did Mr. Bergman correct any of the defects omitted from his Lien. The omission in the Lien prejudiced Ms. Burke as a matter of law. Therefore, Mr. Bergman's Lien is invalid and Ms. Burke's motion for summary judgment should have been granted as a matter of law. *Projects*, 798 P.2d at 747.

After all of the briefing was completed, the district court held a hearing on or about December 15, 2005. **Record at page 141.** The trial court issued its Memorandum Decision on January 19, 2006. **Record at pages 161 - 65.** In that Memorandum Decision the district court, after a discussion of the standard for motions for summary judgment, states:

The Court concludes that the Defendant [Ms. Burke] has failed to establish that she is entitled to judgment as a matter of law based on the omissions, from the lien, of the Plaintiff's [Mr. Bergman] telephone number and the dates when the Plaintiff performed the labor. In order to show that a lien is invalid based on omissions, the Defendant must show that any of the omissions compromised a purpose of the Statute or that she was prejudiced due to any of the omissions. *Projects Unlimited Inc.*, 798 P.2d at 744. The Defendant has failed to state the purpose of the Statute's requirements which mandate the inclusion of the omitted information. The Defendant has also failed to state how the omissions contravened that purpose. Additionally, the Defendant failed to state how she was prejudiced by the omissions. Because the Defendant has failed to establish that the lien was invalid due to these omissions, the Court will not grant the Defendant's motion for summary judgment based on the Plaintiff's failure to include this information in the lien.

*Id.* at 163. Despite the trial court's Memorandum Decision, Mr. Bergman's lien lacks several requisite provisions within the mechanics' lien statute for a valid mechanics' lien in Utah.

**H. Whether the trial court erred in determining that the Mr. Bergman substantially complied with the requirements for filing a notice of lien pursuant to the Utah Mechanics' Lien statute.**

In *Packer v. Cline*, 2004 UT App 311, the Court of Appeals held:



While "Utah courts have recognized that substantial compliance with these provisions is all that is required" to acquire a mechanics' lien, *Projects Unlimited, Inc. v. Copper State Thrift & Loan Co.*, 798 P.2d 738, 743 (Utah 1990), Cline's lien lacks substantial compliance because it fails to address several requisite provisions within the mechanics' lien statute. *See* Utah Code Ann. § 38-1-7(2). **In particular, Cline's lien fails to set forth "the time when the first and last labor or service was performed or the first and last equipment or material was furnished," *id.* § 38-1-7(2)(c), and "what steps an owner . . . may take to require a lien claimant to remove the lien." *Id.* § 38-1-7(2)(h).** Furthermore, because Cline did not establish that he provided any work or provided any materials or equipment used on the mural, he is not entitled to file a mechanics' lien under Utah Code section 38-1-3. *See* Utah Code Ann. § 38-1-3 (2002). Therefore, we hold that the trial court properly determined that Cline's lien was not a mechanics' lien.

*Id.* at 312 (emphasis added). In this case, Mr. Bergman lacks substantial compliance because his Lien fails to satisfy several requisite provisions within the Utah Mechanics' Lien Act. The Lien does not contain the first and last dates of work for Mr. Bergman or his telephone number.

**Record at page 8.** The Trial Court should have granted Ms. Burke's Motion for Summary Judgment, due to the failure of Mr. Bergman's Lien to comply with the Utah Mechanics' Lien Act.

**I. Whether the trial court erred in denying the Appellant's motion for attorneys' fees in a single cause of action foreclosing a mechanics' lien, when the Ms. Burke is the prevailing party.**

It is the well-established general rule in Utah, "a party is entitled to attorney fees only if authorized by statute or by contract." *Meadowbrook, LLC v. Flower*, 959 P.2d 115, 117 (Utah 1998); *Dixie State Bank v. Bracken*, 764 P.2d 985 (Utah 1988); *Turtle Management, Inc. v. Haggis Management, Inc.*, 645 P.2d 667, 671 (Utah 1982). In this case, Mr. Bergman filed a Complaint with a single cause of action. Mr. Bergman was seeking to foreclose on his mechanics' lien, which was filed by him on real property owned by Ms. Burke.

In Utah an award of attorneys' fees and costs to the successful party in a mechanics' lien foreclosure action is mandatory. The mechanics' lien statute "provides for attorney fees to a party that must undertake court action to recover on the lien." *Richards v. Security Pacific National Bank*, 849 P.2d 606 (Utah Ct. App. 1993).

Specifically, Utah Code Ann. § 38-1-18 states:

[I]n any action brought to enforce any lien under this chapter, ***the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action.***

(Emphasis added). Prima facie evidence establishing a party's right to attorneys' fees is met by "showing that it is the prevailing party in the mechanics' lien cause of action." *J.V. Hatch Construction, Inc., v. Kampros*, 971 P.2d 8, 15 (Utah Ct. App. 1998). Without question, Ms. Burke is the prevailing party in this action and therefore, is entitled to an award of attorneys' fees.

Mechanics' lien foreclosure cases involve a three-step determination: (1) whether the claimant did work for which a lien is allowed and has not been paid; (2) whether a mechanics' lien complies with the requirements of the statute; and (3) the reasonable value of the work performed for which the claimant has not been paid. Where a claimant fails to meet its burden of proof on those issues and is not successful in foreclosing the lien, it is liable to pay to the defendant its reasonable attorneys' fees and costs. *Id.*

The district court has determined, through its Judgment that the claimant, Mr. Bergman, did work for which a lien is allowed and has not been paid. Therefore, meets the first determination. The district court in the summary judgment hearing, determined that the Plaintiff's lien substantially complied with the Mechanics' Lien Statute and therefore, was valid.

Determination two is then met. The trial court, through the Judgment, held that Mr. Bergman was entitled to more money than he had been paid and awarded the Mr. Bergman and additional \$2,280.00 for the work he performed on Ms. Burke's real property. Consequently, Mr. Bergman was successful in receiving more money for the work he did on the property. He has met all three determinations. However, he cannot be determined to be the successful party under the facts of this case. Ms. Burke was successful in defending against the Plaintiff's mechanics' lien claim. Mr. Bergman was awarded \$2,280.00 out of the \$28,675.00 he claimed he was owed. In other words, he was awarded almost 8% of his claim. On the other hand, Ms Burke received \$26, 395.00 of the \$28,675.00 or 92% of the amount claimed by Mr. Bergman.

Utah Code Ann. § 38-1-17 provides that "[a]s between the owner and contractor the court shall apportion the costs (including attorneys' fees) according to the right of the case." *First General Services, Inc. v. Perkins*, 918 P.2d 480, 487 (Utah Ct. App. 1996). Under the statute, the successful defense against a mechanics' lien shall entitle the defendant to an award of costs including attorneys' fees. Ms. Burke was and is the prevailing party in the litigation begun by Mr. Bergman's filing of his mechanics' lien Complaint. It is Ms. Burke's right under the circumstances of this case to recover her costs, including a reasonable attorneys' fee and pursuant to the statute as the successful party on Mr. Bergman's mechanics' lien claim.

The trial court denied Ms. Burke's Motion for attorneys' fees and costs pursuant to its Memorandum Decision dated April 8, 2008. The Memorandum Decision stated; "Defendant's Motion for Attorney fees and costs is denied." The Order on Plaintiff's Motion Requesting the Court to Clarify and Seal Court Documents and Burke's Motion for Attorneys' Fees and Costs dated May 12, 2008, provided; "Burke's Motion for Attorneys' Fees and Costs is denied." No

other explanation was give for the denial by the trial court.

Mr. Burke was and is the prevailing party in the lien foreclosure action initiated by Mr. Bergman. This Court should remand this matter to the district court for and evaluation and determination of reasonable attorneys' fees and costs to Ms. Burke as the prevailing party.

Because Ms. Burke should have been awarded attorney fees and costs below and because she should be the prevailing party on appeal, she is asking for her costs and reasonable attorney fees on appeal. *See Valcarce v. Fitzgerald*, 961 P.2d 305, 319 (Utah 1998) ("When a party who received attorney fees below [\*6] prevails on appeal, the party is also entitled to fees reasonably incurred on appeal." (quotations and citations omitted)).

### **CONCLUSION**

In view of the facts and arguments set forth herein, Ms. Burke hereby request that this Court dismiss Mr. Bergman's appeal in it entirety for failing to marshal all of the evidence challenging the trial court's Findings of Fact and Conclusions of Law. Ms. Burke further requests that this Court grant her appeals and remand this matter to the district court for a determination of the reasonable attorneys' fees and costs. She also asked this Court to grant her fees and costs on appeal pursuant to the Appellate Rule and grant all other relief this Court deems just and appropriate.

Respectfully Submitted this 9<sup>th</sup> day of January 2009.

**M.E. BOSTWICK'S LAW OFFICES, P.C.**

A handwritten signature in black ink, appearing to read "M.E. Bostwick", written over a horizontal line.

Michael E. Bostwick  
Attorneys for Debbie A. Burke

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on the 9<sup>th</sup> day of January 2009, I caused two (2) true and correct copy of the foregoing Brief of Appellant to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Utah Rules of Appellate Procedure and the Utah Rules of Civil Procedure, to the following persons:

Mark D. Bergman  
545 East 1100 North  
Ogden, Utah 84404

U.S. Mail	<u>X</u>
Facsimile	<u>    </u>
Hand delivered	<u>    </u>
Overnight Mail	<u>    </u>

*Pro Se*



# Addendum Exhibits

# Exhibit A

Recording requested by and returned to:

Mr. Mark D. Bergman  
545 East 1100 North  
Ogden, Utah 84404

Friday, October 24, 2003

**NOTICE TO HOLD AND CLAIM OF LIEN - INDIVIDUAL**

(Utah Code Ann. 38-1-7)

I, Mark D. Bergman, being the undersigned claimant hereby timely claim the right to record and claim a lien against the real property described below and for the following reasons:

1. That within the last 90 days I performed authorized services and or furnished materials for the improvements of the real property located at 850 East 1050 North Ogden, Utah and described as:  
Serial Number: 11-069-0003  
All of lot 496, Ron-Clare Village No. 5, Ogden City, Weber County, State of Utah
2. That a statement of the claimant's demand, after deducting all just credits and offsets, equal the adjusted sum of \$28,675.00
3. That the name of the owner, or reputed owner of the property is:  
Burke, Debbie A.  
850 East 1050 North  
Ogden, Utah 84404
4. A general statement of the kind of work done or materials furnished by claimant, or both are:
  - a. That after the renters of such real property moved out, the home and property were left with major damage and badly soiled from animals.
  - b. That I was to be paid a wage for all labor provided.
  - c. That I would be reimbursed for all expenses relating to the materials that I provided relating to the same.
  - d. That a sustainable amount of the needed repairs are completed and the parties are satisfied.
  - e. That the name of the person by whom claimant was employed or to whom claimant furnished the materials for is:  
Burke, Debbie A. and Isbel, Vince  
P.O. Box 503  
Duchesne, Utah 84021
5. That the Lienor served this notice to the Owner by Certified Mail on this: 27 day of October, 2003

Mark D. Bergman

Lienor

State of: Utah

County: Weber

On, Oct 27, 2003 / Mark D. Bergman

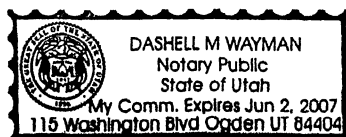
before me, appeared Mark D. Bergman personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity and that by his signature on the instrument he executed the instrument.

Witness my hand and official seal,

Signature

Notary Public

E# 1986572 PG1 OF1  
DOUG CROFTS, WEBER COUNTY RECORDER  
27-OCT-03 2:37 PM FEE \$10.00 DEP CV  
REC FOR: MARK D. BERGMAN





# Exhibit B

SECOND DISTRICT COURT  
IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY  
OGDEN DEPARTMENT, STATE OF UTAH

MARK D. BERGMAN,  Plaintiff,  vs.  DEBBIE A. BURKE, DORENE R. BASUG, and FIRST AMERICAN TITLE,  Defendants.	MEMORANDUM DECISION  Civil No. 040902444 LM Judge Parley R. Baldwin
--	---

JAN 19 2006

In this action to foreclose a mechanic's lien, the Defendant, Debbie Burke, moves for summary judgment arguing that the Plaintiff, Mark Bergman, cannot establish the validity of the mechanic's lien he placed on her property, because information, required to be included in the lien, was not given--specifically, a statement describing the procedure to remove a lien, the Plaintiff's phone number, and the starting and ending dates when service was performed were not included in the lien. The Court denies the motion.

Summary judgment is appropriate when the *moving party has demonstrated* that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In re Discipline of Sonnenreich, 86 P.3d 712, 724-725 (Utah 2004) (emphasis added). In this case, there is no dispute of fact, because the Plaintiff admits that he omitted the information from the lien as the Defendant described. The sole issue posed by this motion for summary judgment is whether the Defendant has demonstrated that she is entitled to judgment as a matter

Memorandum Decision (denied motion)



VD18827005  
040902444 FIRST AMERICAN TITLE

of law, because the omissions invalidated the lien.

To show that the omissions on a lien render it invalid, the Defendant must show that the Plaintiff failed to substantially comply with each of the requirements in the mechanic's lien statute (Statute). Projects Unlimited, Inc. v. Copper State Thrift & Loan Co., 798 P.2d 738, 743 (Utah 1990). To establish that a lien did not substantially comply with the Statute, a party must demonstrate the following elements. First, there was an mistake, See, Projects Unlimited, Inc., 798 P.2d at 748, or omission, See, Chase v. Dawson, 215 P.2d 390, 390 (Utah 1950). Second, the Statute required the information which was omitted or incorrectly identified. See, Id. Third, the moving party must show that either the omission or mistake compromised a purpose of the Statute, or the moving party must show that it was prejudiced by the omission or mistake. Projects Unlimited, Inc., 798 P.2d at 744.

The Court concludes that the Defendant has failed to demonstrate that the lien should be invalidated for the Plaintiff's failure to include a statement explaining the procedure by which an owner may have a lien removed, because the Defendant failed to establish that she was entitled to the statement. This statement is necessary only if the residence upon which the lien will be placed qualifies as an 'owner occupied residence.' Utah Code Ann. § 38-1-7(2)(a)(xi) (2003). An owner occupied residence is defined as a "residence that is, or after completion of the construction on the residence will be, occupied by the owner or the owner's tenant or lessee as a

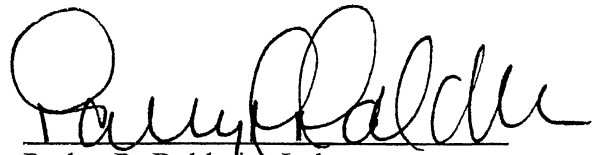
primary or secondary residence within 180 days from the date of the completion of the construction on the residence." Utah Code Ann. § 38-11-102 (2003). The Defendant did not state whether anyone was living at the residence during construction, and she did not state whether she or her tenant planned to occupy the residence within 180 days from the date of the completion of construction. Because the Defendant failed to demonstrate that she was entitled to this statement, the Court will not grant the Defendant's motion for summary judgment based on this omission.

The Court concludes that the Defendant has failed to establish that she is entitled to judgment as a matter of law based on the omissions, from the lien, of the Plaintiff's telephone number and the dates when the Plaintiff performed the labor. In order to show that a lien is invalid based on omissions, the Defendant must show that any of the omissions compromised a purpose of the Statute or that she was prejudiced due any of the omissions. Projects Unlimited, Inc., 798 P.2d at 744. The Defendant has failed to state the purpose of the Statute's requirements which mandate the inclusion of the omitted information. The Defendant has also failed to state how the omissions contravened that purpose. Additionally, the Defendant failed to state how she was prejudiced by the omissions. Because the Defendant has failed to establish that the lien was invalid due to these omissions, the Court will not grant the Defendant's motion for summary judgment based on the Plaintiff's failure to include this information in the lien.

Because the Defendant has failed to establish that the lien did not substantially comply with the Statute's requirements, the Court denies the Defendant's motion for summary judgment.

Mr. Olmstead shall prepare an order for the Court's signature.

Dated this 18<sup>th</sup> day of January, 2006.



Parley R. Baldwin, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 23<sup>rd</sup> day of January, 2006, I sent a true and correct copy  
of the foregoing ruling to counsel as follows:

Michael E. Bostwick  
Counsel for the Defendant  
Bostwick & Price, P.C.  
139 E. South Temple Street, Suite 320  
Salt Lake City, UT 84111

Michael F. Olmstead  
Counsel for the Plaintiff  
2650 Washington Blvd, Suite 102  
Ogden, UT 84401

  
Deputy Court Clerk

# Exhibit C

3-2-2006 10:10:23 1725

SECOND DISTRICT COURT  
2006 FEB 24 AM 11:18

MICHAEL F. OLMSTEAD [2455]  
Attorney for Plaintiff  
2650 Washington Boulevard, Suite 102  
Ogden, Utah 84401  
Telephone (801) 625-0960  
Facsimile (801) 621-0035

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IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY  
OGDEN DEPARTMENT, STATE OF UTAH

---

FEB 24 2006

MARK D. BERGMAN,

Plaintiff,

vs.

DEBBIE A. BURKE, DORENE R. BASUG,  
and FIRST AMERICAN TITLE,

Defendants.

)  
) **ORDER ON MOTION**  
) **FOR SUMMARY JUDGMENT**  
)  
)  
)  
)  
)  
)  
)  
)

Civil No. 040902444

*Judge* PARLEY R. BALDWIN

---

This matter having come on for Oral Argument on Defendant, DEBBIE A. BURKE's, Motion for Summary Judgment; and the Plaintiff appearing in person and with his counsel of record, MICHAEL F. OLMSTEAD, Esquire; and Defendant, DEBBIE A. BURKE, not being present in person but represented by her counsel of record, MICHAEL E. BOSTWICK, Esquire; and each of the parties having argued their respective positions with regard to the propriety of the Motion; and the Court having taken the matter under advisement; and, thereafter, each of the parties, through counsel, having submitted supplemental materials concerning recent case law; and the Court, otherwise, being fully advised and having issued its Memorandum Decision on said Motion; now, therefore, the Court makes and enters the following Findings, Conclusions and Order:

ORDER ON MOTION FOR SUMMARY JUDGMENT



040902444 VD18884410  
FIRST AMERICAN TITLE



**FINDINGS  
AND CONCLUSIONS**

1. Summary Judgment is appropriate when the moving party has demonstrated there is no issue as to any material fact, and the moving party is entitled to Judgment as a matter of law.

2. In this case, there is no dispute of fact, because the Plaintiff, MARK D. BERGMAN, admits he filed and recorded a Notice of Mechanic's Lien that failed to include his phone number and the starting and ending dates when he claims his services were performed.

3. In addition, his Notice of Mechanic's Lien did not include the statement referenced in Utah Code Annotated, §38-1-7(2)(a)(xi) (2003), with regard to procedures, by which an owner of an "owner occupied residence" may have a lien removed.

4. In order to prevail, Defendant, DEBBIE A. BURKE, must show that Plaintiff failed to substantially comply with the requirements of the mechanic's lien statute.

5. To establish that Plaintiff's lien notice did not substantially comply with the statute, Plaintiff must demonstrate the following elements: (a) There was a mistake/omission; (b) the statute requires the information incorrectly identified or omitted; and (c) the mistake/omission compromised the purpose of the statute, or that the owner was prejudiced by the mistake/omission.

6. The Court finds that Defendant, DEBBIE A. BURKE, failed to demonstrate that the lien notice, as filed, should be invalidated because of Plaintiff's failure to include the procedures by which an owner might have a lien removed.

7. The Court finds that Defendant, DEBBIE A. BURKE, was not entitled to this

06:11:33 10:18:33 1738

81 4 0 0

Order on Motion for Summary Judgment  
Civil No. 040902444

---

information in the lien notice, because Defendant, DEBBIE A. BURKE, has failed to establish that the property was an “owner occupied residence”, as that term is defined under Utah Code Annotated, §38-11-102 (2003).

8. The Court further finds and concludes that Defendant, DEBBIE A. BURKE, has failed to show that Plaintiff’s omissions regarding his telephone number and the first and last dates of labor performed compromised the purpose of the statute, or that she was prejudiced due to any such omission. [Projects Unlimited Inc., 798 P.2d at 744.]

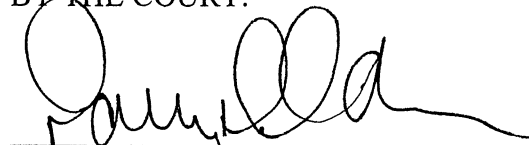
9. The Court finds that Defendant, DEBBIE A. BURKE, has failed to state the purpose of the statute’s requirements which mandate the inclusion of the omitted information, and she has failed to state how the omissions in this case contravene the purpose of the statute. Finally, she has failed to state how she was personally prejudiced by the omissions.

### ORDER

From the foregoing Findings and Conclusions, the Court now orders that Defendant’s Motion for Summary Judgment be denied.

DATED and signed this 21 day of February, 2006.

BY THE COURT:



PARLEY R. BALDWIN, District Court Judge

Entered: \_\_\_\_\_

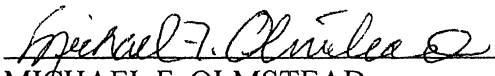
Order on Motion for Summary Judgment  
Civil No 040902444

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**NOTICE TO DEFENDANT,  
DEBBIE A. BURKE'S, ATTORNEY**

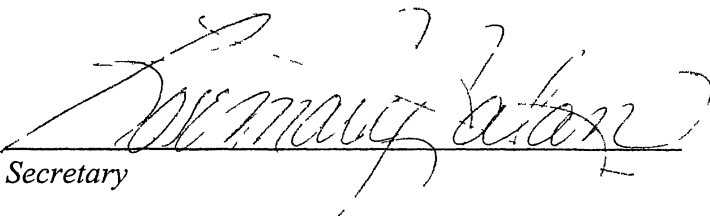
YOU WILL PLEASE TAKE NOTICE that the undersigned party will submit the foregoing *Order on Motion for Summary Judgment* to the Court upon the expiration of five (5) days from the date of this notice, plus three (3) days for mailing, unless a written objection is filed prior to that time, pursuant to Rule 7(f), Utah Rules of Civil Procedure. Kindly govern yourself accordingly.

DATED and signed this 2<sup>nd</sup> day of February, 2006.

  
MICHAEL F. OLMSTEAD  
Attorney for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing *Order on Motion for Summary Judgment* to MICHAEL E. BOSTWICK, Attorney for Defendant, DEBBIE A. BURKE, One Thirty Nine East South Temple Street, Suite 320, Salt Lake City, Utah, 84111, this 2ND day of February, 2006.

  
Secretary

# Exhibit D

SECOND DISTRICT COURT - OGDEN  
WEBER COUNTY, STATE OF UTAH

---

MARK D BERGMAN,	:	MINUTES
Plaintiff,	:	BENCH TRIAL
	:	
	:	
vs.	:	Case No: 040902444 LM
	:	
FIRST AMERICAN TITLE Et al,	:	Judge: PARLEY R BALDWIN
Defendant.	:	Date: November 13, 2007

---

Clerk: debbieg

PRESENT

Plaintiff(s): MARK D BERGMAN  
Defendant(s): DEBBIE A BURKE  
Plaintiff's Attorney(s): MICHAEL F OLMSTEAD  
Defendant's Attorney(s): MICHAEL E BOSTWICK  
Video  
Tape Number: 3D111307 Tape Count: 9:09-4:55

---

TRIAL

This is time set for bench trial. Plaintiff, Mark Bergman, is present and is represented by Michael Olmstead. Defendant, Debbie Burke, is present and is represented by Michael Bostwick.

Trial is held with testimony taken. Opening statements are given by both counsel. Court denies the Motion in Limine. Plaintiff's witness 1, Mark Bergman, is sworn and testifies, 9:35.

Defense reserves cross as to the first plaintiff's witness to allow for testimony of some other witnesses. Plaintiff's witness 2, Reynoldo Santos, is sworn and testifies, 2:06. Plaintiff's witness 3, Michell Battisti, is sworn and testifies, 2:20.

Cross examination of plaintiff's witness 1, 2:25. Plaintiff's witness 4, Josh Bergman, is sworn and testifies, 3:32. Cross examination of witness 1 is resumed. Trial to continue on 11/14/07 @ 9:00 a.m.

Exhibits P1, P2, P3, P4, P5, P6, P8, and D10 are offered and received.

Total time: 5 hours 35 minutes.

SECOND DISTRICT COURT - OGDEN  
WEBER COUNTY, STATE OF UTAH

---

MARK D BERGMAN, : MINUTES  
Plaintiff, : BENCH TRIAL  
 :  
vs. : Case No: 040902444 LM  
 :  
FIRST AMERICAN TITLE Et al, : Judge: PARLEY R BALDWIN  
Defendant. : Date: November 14, 2007

---

Clerk: debbieg

PRESENT

Plaintiff(s): MARK D BERGMAN  
Defendant(s): DEBBIE A BURKE  
Plaintiff's Attorney(s): MICHAEL F OLMSTEAD  
Defendant's Attorney(s): MICHAEL E BOSTWICK  
Video  
Tape Number: 3D111407 Tape Count: 9:15-4:50

---

TRIAL

This is time set for the second day of a bench trial. Plaintiff, Mark Bergman, is present and is represented by Michael Olmstead. Defendant, Debbie Burke, is present and represented by Michael Bostwick.

Mark Bergman retakes the stand on cross examination. Plaintiff's witness 5, Darren Strebel, is sworn and testifies, 10:0. Plaintiff's witness 6, Daniel Bergman, is sworn and testifies, 10:33.

Plaintiff's witness 7, Laura Strebel, is sworn and testifies, 10:45. Plaintiff rests, 11:25. Mr. Bostwick makes a motion to dismiss. Court reserves the motion. Defendant's witness 1, Debbie Burke, is sworn and testifies, 11:30.

Defendant's witness 2, Vince Isbell, is sworn and testifies, 3:00. Defense rests. Rebuttal plaintiff's witness, Mark Bergman, testifies, 4:42. Exhibits D9, D11, D12, D13, D14, D15, D16, and D17 are offered and received.

Closing arguments shall be submitted in writing by both counsel by

Case No: 040902444

Date: Nov 14, 2007

---

11/21/07. Counsel may respond to the closings by 11/28/07. Clerk will then set a decision on the record.

Total time: 5 hours 13 minutes.

SECOND DISTRICT COURT - OGDEN  
WEBER COUNTY, STATE OF UTAH

---

MARK D BERGMAN, : MINUTES  
Plaintiff, : BENCH TRIAL  
 :  
 :  
 :  
vs. : Case No: 040902444 LM  
 :  
FIRST AMERICAN TITLE Et al, : Judge: PARLEY R BALDWIN  
Defendant. : Date: November 14, 2007

---

Clerk: debbieg

PRESENT

Plaintiff(s): MARK D BERGMAN  
Defendant(s): DEBBIE A BURKE  
Plaintiff's Attorney(s): MICHAEL F OLMSTEAD  
Defendant's Attorney(s): MICHAEL E BOSTWICK  
Video  
Tape Number: 3D111407 Tape Count: 9:15-4:50

---

TRIAL

This is time set for the second day of a bench trial. Plaintiff, Mark Bergman, is present and is represented by Michael Olmstead. Defendant, Debbie Burke, is present and represented by Michael Bostwick.

Mark Bergman retakes the stand on cross examination. Plaintiff's witness 5, Darren Strebel, is sworn and testifies, 10:0. Plaintiff's witness 6, Daniel Bergman, is sworn and testifies, 10:33.

Plaintiff's witness 7, Laura Strebel, is sworn and testifies, 10:45. Plaintiff rests, 11:25. Mr. Bostwick makes a motion to dismiss. Court reserves the motion. Defendant's witness 1, Debbie Burke, is sworn and testifies, 11:30.

Defendant's witness 2, Vince Isbell, is sworn and testifies, 3:00. Defense rests. Rebuttal plaintiff's witness, Mark Bergman, testifies, 4:42. Exhibits D9, D11, D12, D13, D14, D15, D16, and D17 are offered and received.

Closing arguments shall be submitted in writing by both counsel by



Case No: 040902444  
Date: Nov 14, 2007

---

11/21/07. Counsel may respond to the closings by 11/28/07. Clerk will then set a decision on the record.  
Total time: 5 hours 13 minutes.

# Exhibit E

SECOND DISTRICT COURT

2007 NOV 23 PM 3: 21

Michael E. Bostwick (7037)  
**M.E. BOSTWICK'S LAW OFFICES, P.C.**  
 6955 UNION PARK CENTER, SUITE 570  
 MIDVALE, UTAH 84047  
 TELEPHONE: 801-352-9330  
 FACSIMILE: 801-352-9339

DEFENDANT DEBBIE A BURKE'S CLOSING ARGUMENT



VD19943910

pages:

040902444 FIRST AMERICAN TITLE

*Attorneys for Debbie A. Burke*

**IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY  
 OGDEN DEPARTMENT - STATE OF UTAH**

**MARK D. BERGMAN,**

Plaintiff,

vs.

**DEBBIE A. BURKE, DORENE R. BASUG,  
 and FIRST AMERICAN TITLE,**

Defendants.

**DEFENDANT DEBBIE A. BURKE'S  
 CLOSING ARGUMENT**

11/23/07

Case No. 040902444

Judge: Parley R. Baldwin

The above-entitled matter came before the Honorable Judge Parley R. Baldwin for a bench trial on November 13 and 14, 2007. Defendant, Debbie A. Burke ("Ms. Burke") was represented by her attorney of record Michael E. Bostwick, of the firm of M.E. BOSTWICK'S LAW OFFICES, P.C., and Plaintiff Mark D. Bergman ("Plaintiff") was represented by his attorney of record Michael F. Olmstead.

Defendant, Ms. Burke, by and through her attorney of record, Michael E. Bostwick, hereby submit the following closing argument. The trial was based on the Plaintiff's Complaint to Foreclose Mechanic's Lien ("Complaint") filed on or about April 1, 2004. The Plaintiff asserted two claims against Ms. Burke in his Complaint. See the Complaint in the Court's file.

Within the Complaint the Plaintiff asserted several allegations, which required him to prove certain facts. The allegations in the Plaintiff's Complaint and a response as to what was present as evidence at trial are as follows:

1. Plaintiff is a residence of Weber County, Utah, and the real property that is the subject matter of this litigation is located in Weber County, Utah.

**Response:** Plaintiff offered evidence as to location of the property owned by Ms. Burke during all the relevant times.

2. Plaintiff claims, for purposes of this litigation, that the real property in question was not an "owner-occupied residence," as that term is defined under Utah Code Annotated, § 38-11-102(13).

**Response:** Plaintiff offered no evidence that would support this allegation. To the contrary, evidence was adduced at trial that the home was sold, January 2004, within 180 days after the Plaintiff claimed to have completed, on or about October 4, 2003, the contract on the subject property. See the Closing documents admitted as Exhibit number D15 and Complaint filed herein at paragraph 10. Plaintiff cites Utah Code Annotated, § 38-11-102(13) as the definition for an "owner-occupied residence" in this matter. However, in 2003 the Utah Code Ann. § 38-11-102(16) was the definition for "owner-occupied residence": and states as follows:

38-11-102 Definitions.

....

(16) "Owner-occupied residence" means a residence that is, or after completion of the construction on the residence will be, occupied by the owner or the owner's tenant or lessee as a primary or secondary residence within 180 days from the date of the completion of the construction on the residence.

*Id.* Ms. Burke proved that her home in Ogden qualified under the Residence Lien Restriction and Lien Recovery Fund Act codified at Utah Code Ann. § 38-11-102(16). Plaintiff failed to prove this allegation in his Complaint.

Since the Plaintiff failed to prove this allegation of his Complaint, his Notice of Lien was required to provide a notice to Ms. Burke pursuant to Utah Code Ann. § 38-1-7(2)(a)(ix), which provides in the pertinent parts:

(2) (a) The notice required by Subsection (1) **shall contain a statement setting forth:**  
 (ix) if the lien is on an owner-occupied residence, as defined in Section 38-11-102, **a statement describing what steps an owner**, as defined in Section 38-11-102, **may take to require a lien claimant to remove the lien in accordance with Section 38-11-107.**

*Id.* (Emphasis added). No evidence was provided at the trial that this provision of the requirements under Utah Code Ann. § 38-1-7(2)(a)(ix) was met by the Plaintiff. The Plaintiff failed and/or refused to comply with the specific requirements to file a notice of lien with the County Recorder's Office. Further, the Plaintiff produced no evidence that he met this requirement of the statute he seeks to enforce.

3. Plaintiff also claims for purposes of this litigation, that he was not subject to the licensing requirements of Utah Code Annotated, § 58-55-604, in that the work performed herein and the relationship between the parties falls within the "common law" exceptions to the referenced statutory bar.

**Response:** Plaintiff offered no evidence that he held any licenses during all of the relevant times he was performing construction service to Ms. Burke. When asked direct questions concerning his licensing, the Plaintiff acknowledged through his testimony that he held no

construction licenses during the whole time he claimed to have performed work for Ms. Burke on her home in Ogden. Further, the Plaintiff's witnesses also acknowledged through their testimony that they also held no construction licenses during their work either. Utah Code Ann. § 58-55-604 provides:

Proof of licensure to maintain or commence action.

No contractor may act as agent or commence or maintain any action in any court of the state for collection of compensation for performing any act for which a license is required by this chapter without alleging and proving that he was a properly licensed contractor when the contract sued upon was entered into, and when the alleged cause of action arose.

*Id.* In addition to the Plaintiff providing not evidence of his licenses, there was also no evidence offered or accepted at trial that the Plaintiff was not required to comply with Utah Code Ann. § 58-55-604. The Plaintiff also failed to provide any evidence that he was allowed to perform \$28,675.00 alleged work under one of the exceptions listed in Utah Code Ann. § 58-55-305. To the contrary, there was evidence adduced that the Plaintiff personally and through others, performed work on the plumbing and electrical systems without a license, and work on the gas piping, and water softener without the correct licenses. *See* Utah Code Ann. § 58-55-305(1)(h)(i) and (ii), (1)(k), (1)(l), (1)(m), (1)(n), (1)(o), and (1)(p). The Plaintiff's evidence provided and adduced at trial failed to prove this allegation in his Complaint.

4. Defendant, DEBBIE A. BURKE ("Burke"), is a resident of Duchesne, Uintah County, Utah, and at all times pertinent, was the owner in fee simple of the real property hereinafter described in paragraph 16.

**Response:** Plaintiff offered no evidence that Ms. Burke was a resident of Uintah County, Utah.

5. Defendant, DORENE R. BASUG ("Basug"), has, or claims to have, an interest in this matter by virtue of that certain Warranty Deed recorded in the Office of the Weber County Recorder, on or about March 4, 2004.

**Response:** The matter against Dorene R. Basug was resolved prior to trial.

6. Defendant, FIRST AMERICAN TITLE ("First American"), has, or claims to have, an interest in this matter by virtue of a Deed of Trust recorded in the Office of the Weber County Recorder, on or about March 4, 2004.

**Response:** The matter against First American was resolved prior to trial.

7. On or about May 10, 2003, Defendant Burke entered into a contract with Plaintiff for Plaintiff to provide labor and materials for the repair of the subject property (then recently vacated by tenants) for the purpose of placing the home on the market for sale. The agreement between the parties was to compensate Plaintiff for his labor at the rate of \$20.00 per hour, plus actual costs for materials furnished by Plaintiff.

**Response:** Plaintiff offered evidence of one contract, established on or about May 10, 2003. The evidence of the terms of the contract were disputed. Plaintiff did provide evidence that the Ms. Burke's home was placed on the market for sale on or about April 27, 2003. Mr. Burke and her witnesses testified that she was to provide all materials and there would be compensation for the Plaintiff's work.

Despite the Plaintiff's claim of a contract for \$20.00 per hour agreement, he did not keep any records of the number of hours he worked each day or even the days he claims to have worked for Ms. Burke. At no time did the Plaintiff provide to Ms. Burke any type of daily log

with the number of hours he claims to have worked each day on Ms. Burke's home. In his responses to discovery he claims that the list does not exist and/or would be impossible for him to create. This statement was supported by the Plaintiff's failure to offer such a list as evidence at trial. The witnesses that the plaintiff called to support the large number of hours he spent at Ms. Burke's Ogden home, Ray Santos, Michael Battisti, and Jerry Stranger, each testified that they saw the Plaintiff's vehicle at Ms. Burke's home, but most of the time did not see the Plaintiff performing any work. The Plaintiff's wife, Laura Strebel, testified that she went to Ms. Burke's home many times to locate her husband, but she could not testify to what work he performed on the home and/or how many hours he worked on the home. The Plaintiff's other witnesses included his wife's brother, Darren Strebel, and the Plaintiff's brother Daniel Bergman testified that they worked with the Plaintiff at different times during the claimed contract period. Other than the dirt that was placed in the back yard and under the new deck, neither witness provided any specific information about the days or number of hours per day that they or the Plaintiff worked on the property.

The testimony was undisputed that Vince Isbell ("Mr. Isbell"), Ms. Burke's husband, provided approximately \$1,700.00 in materials before or just after work began on the Project. Both parties testified that the Plaintiff went to Duchesne, Utah, to pickup materials from Mr. Isbell for not only work on the subject property, but for a deck on Ms. Burke's Slaterville home and a deck for Val R. Iverson, the Plaintiff's wife's broker. Further, Mr. Isbell testified that he brought materials for the property when he went to Ogden, Utah, on an approximately every other week basis.



8. Thereafter, Plaintiff duly and substantially performed the agreed-upon labor and furnished the agreed-upon materials, and the same was performed and/or furnished towards, and actually used in, the improvement of said real property between the dates of May 10, 2003, and October 4, 2003, and the reasonably value thereof for which Defendant Burke agreed to pay was the sum of \$28,675.00.

**Response:** Plaintiff claims to have worked approximately 1,200 hour on Ms. Burke's home. He claims to have an hourly plus materials contract with Ms. Burke. However, the Plaintiff did not keep any record of the days he worked on the project or the number hours he work each day or week on the project. Plaintiff did not offer any exhibit that outlined the number of hours he worked on the project, which would have helped the Court determine what if anything the Plaintiff was entitled to receive. The Plaintiff did testify that he would, in August and/or September 2003, some times work 30 to 40 hours straight in order to get the project completed. This was after he claimed to be owed \$13,000.00 and was not getting paid. However, receiving \$500.00 convinced him to work herculing efforts to get the project finished despite being told to stop working on the home.

The plaintiff also testified that he worked side jobs to make money in order to purchase materials for Ms. Burke's home. This would have meant that he did not spend all of his time at the Burke home. However, when questioned on cross examination, the Plaintiff stated that he did not remember any other side jobs other than working for a restaurant and he exchanged some of his labor for meals for himself and his wife. The Plaintiff could not remember any other side jobs to earn money to purchase materials for Ms. Burke.

There was specific testimony from Ms. Burke and Mr. Isbell that many of the Plaintiff's claimed 110 project he performed were in fact never discussed with either of them. Ms. Burke and Mr. Isbell testified that several times the Plaintiff was told to stop working on the home, because Ms. Burke did not have the money to hire or pay him. Further, for example, during cross examination the Plaintiff could not explain why he purchased 11 cooler pads when the swamp cooler at Ms. Burke's home only took four pads and two cooler pumps when only one was required.<sup>1</sup> He did not remember where he used those extra pads, except that he believed that he put pads on Ms. Burke's Slaterville home also, which would have taken him time away from her Ogden's home work. The Plaintiff bought light bulbs almost every time he went to the store for the claims parts.<sup>2</sup> He also bought tools and more exterior lights fixtures than he claims to have replaced.<sup>3</sup> A small refund was not included in the Plaintiff's calculations either.<sup>4</sup> The Plaintiff

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<sup>1</sup>Receipts dated May 26, 2003 - 7 pads; July 26, 2003 - 3 pads; July 28, 2003 - 1 pad. Receipts dated June 2, 2003 - one pump; July 15, 2003 - one pump.

<sup>2</sup>Receipts dated May 24, 2003 - 2 packages; June 4, 2003 - 1 package; July 15, 2003 - 1 package; July 26, 2003 - 1 package; July 28, 2003 - 1 package; September 4, 2003 - 4 packages; September 12, 2003 - 1 package; September 14, 2003 - 2 packages; and September 16, 2003 - 1 package.

<sup>3</sup> Receipts dated September 1, 2003 - tools; September 17, 2003 - tools; and September 18, 2003 - tools. Receipts dated September 4, 2003 - 2 fixtures; September 5, 2003 - 3 fixtures; and September 12, 2003 - 1 fixture.

<sup>4</sup>Dated September 7, 2003 \$5.95 not credited on list.

included illegible receipts to support the amount he claimed for materials.<sup>5</sup> Plaintiff failed to provide adequate proof of his claims in his Complaint.

9. That on, and after October 4, 2003, and pursuant to their agreement, Plaintiff became entitled to receive from Defendant Burke the amount of \$28,675.00, and no part of the same has been paid, notwithstanding that the Plaintiff duly demanded payment thereof, and the sum of \$28,675.00 is actually due Plaintiff from Defendant Burke.

**Response:** See Response to paragraph 8 of the Plaintiff's Complaint. Plaintiff testified that he was owed \$24,000.00 for an estimated 1,200 hour for his labor from May 10, 2003 through October 4, 2003. However, he provided no evidence as to the days he actually worked at Ms. Burke's home to allow the Court, the trier of fact, to evaluate or even assess the Plaintiff's claim. He did not provide any contemporaneous records as evidence of the number of hours he claimed to have worked on Ms. Burke's home. The Plaintiff's testimony changed as his testified on direct and then on cross examinations. For example, he testified that he worked side job to get money for materials for Ms. Burke's home. He later could not remember what those jobs were or how much time he spent on those jobs. When pressed, he did testify that he did side jobs at a restaurant, but that he used some of those hours in trade for meal with his wife at the restaurant. He worked for Val Iverson installing a deck and was paid for his labor in August 2003. *See* Exhibit D10. Plaintiff testified all of the telephone call were made form his home telephone. He had to travel from Ms. Burke's home to his home in order to make those calls. Many time the

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<sup>5</sup>June 14, 2003; June 19, 2003; June 19, 2003; June 24, 2003; July 13, 2003; September 2, 2003; September 16, 2003.

Plaintiff made successive calls which spanned an hour or two. Josh Bergman ("Josh") testify that during the claimed contract period, he would go to visit his brother, the Plaintiff, and find him at his house not Ms. Burke's home. At times when Josh would find the Plaintiff at Ms. Burke's home he was doing meth and was high. In either of these situations, the Plaintiff was not working on Ms. Burke's home.

The Plaintiff testify that he presented a bill to Ms. Burke on or about August 3, 2003, and told her that if he did not get paid he would leave the job. The total bill, as he testified, represented \$4,700.00 for the Slaterville home and \$8,300.00 for materials and labor for Ms. Burke's Ogden home. The alleged work on the Slaterville home, would have taken time from Ms. Burke's Ogden home. Additionally, the Plaintiff produced no evidence of the days or hours he worked on the Slaterville home. If the Plaintiff had kept records, those records may have demonstrated how little work he performed. On cross examination, the Plaintiff admitted that it was an estimated \$1,124.00 in materials used on Ms. Burke's Ogden home through July 31, 2003. This left only \$7,176.00 for labor for the Ogden home. This means that from May 10, 2003, through August 3, 2003, the Plaintiff worked 359 hours during 84 days of the contract. The Plaintiff later testified that these figures were estimates and/or settlement numbers and did not represent the actual number of hours he worked on either project. It should be noted that he did not testify that these figure were also estimates until pressed on cross examination. If the number of hours worked is extrapolated from the Plaintiff's estimate of 1,200 for the total number of hours worked form Ms. Burke, then from August 4, 2003 through October 4, 2003, or 61 days, the Plaintiff claims to have worked 841 hours Some of those hours the Plaintiff worked

for 30 to 40 hour straight. The Plaintiff claims to have accelerated his work when he had not been paid and was told not to continue several times by Mr. Isbell.

The cancelled check copies, Exhibit number D13, and the summary of payments, Exhibit D11, and the testimony of Mr. Isbell provides the Court with the evidence of payments from Ms. Burke to the Plaintiff for work on her Ogden home. These payments equal \$5,220.00. The Plaintiff failed and/or refused to give Ms. Burke credit against the amounts he claimed were owed for work on Ms. Burke's home. The Plaintiff testify that he was paid \$500.00 on August 3, 2003, but that payment was given to his wife. This check was confirmed by Ms. Burke's records, but she was not even given credit by the Plaintiff for that payment.

The Plaintiff prepared Exhibit D2, which is entitled Mark's Professional Services, which does not include any hours he claimed to have worked on Ms. Burke's Ogden home. The Plaintiff conceded that any amount for receipts dated after October 4, 2003, could not be included in his claim or lien. There were receipts on October 6, 7, 10, 15, 15, 25, 28, 2003. The one on October 28, 2003 was after the Plaintiff filed his claimed lien. These receipts total \$965.96 should be subtracted from his claimed total, which leaves a balance on that exhibit of \$4,290.26. Ms. Burke does not concede that the Plaintiff is entitled to any of this amount, but rather, demonstrates the unreliability of the Plaintiff's evidence.

The Plaintiff started out his case in chief with his telephone records, Exhibit P 1. This was used to show his communications with Ms. Burke and/or Mr. Isbell. It should be noted that the Plaintiff testified that the telephone records were for his home telephone and not a cellular telephone. That all telephone calls on Exhibit P 1 were made from his home telephone. In order

for the Plaintiff to call Ms. Burke or Mr. Isbell to discuss Ms. Burke's home, he had to walk or drive to his home, which was several block away. Many of the telephone calls were made in bunches only a minute or several minutes apart. The Plaintiff testified that he stayed at his home while making the calls that were made within a short time of each other. Several of the longer calls were made between his wife and Ms. Burke and not him to discuss issues with Ms. Burke's home. Many of the cluster call were made on June 2, 3, 12, 13, 15, 19, 24, 26, 2003, July 10, 19, 21, 26, 28, 2003, August 4, 18, 11, 20, 2003, and September 18, 2003.

10. No action or proceeding has been brought at law, or otherwise for the recovery of said sum or any part thereof.

**Response:** Plaintiff presented no evidence at trial concerning this paragraph in his Complaint.

11. That on October 27, 2003, and within 90 days of completion of the Plaintiff's said agreement, as aforesaid, Plaintiff recorded a Written Notice to Hold and Claim a Lien in the office of the Recorder of Weber County, Utah, in which the said real property against which is a lien is asserted, is situated on and against said real property for the amount of labor and materials as aforesaid, to-wit: \$28,675.00.

**Response:** Plaintiff presented no evidence at trial concerning this paragraph in his Complaint.

12. Said Notice of Lien was duly verified and substantially complied in all respects, with the requirements of the statute, and such case made and provided, and, on October 27, 2003, said Notice of Lien was duly entered and recorded by said Recorder of the County of Weber, State of Utah,

**Response:** Plaintiff presented no evidence at trial concerning this paragraph in his Complaint.

13. That said lien has not been canceled or, otherwise, discharged.

**Response:** Plaintiff presented no evidence at trial concerning this paragraph in his Complaint.

14. That no action has been brought by this Plaintiff for the foreclosure of said lien, nor has Plaintiff been made a party to any action brought before the foreclosure of any other lien or mortgage against said property, or any part thereof.

**Response:** Plaintiff presented no evidence at trial concerning this paragraph in his Complaint.

15. Pursuant to § 38-1-18 Utah Code Annotated, Plaintiff is entitled to, and should be awarded, reasonable attorneys' fees.

**Response:** Plaintiff presented no evidence at trial concerning this paragraph in his Complaint.

16. A copy of the said Notice of Lien is annexed hereto and made a part hereof, marked Exhibit "A".

**Response:** Plaintiff presented no evidence at trial concerning this paragraph in his Complaint.

17. That the said real proeprty is described as follows:

All of Lot 496, RON-CLARE VILLAGE NO. 5, Ogden City, Weber

County, Utah. [Land Serial No. 11-06-0003]

**Response:** Plaintiff presented no evidence at trial concerning this paragraph in his Complaint.

18. That attached hereto as Exhibit "B" and as required by Utah Code Annotated 38-1-11, is a form "Answer, Affidavit and Motion for Summary Judgment", together with instructions for Defendant Burke's use.

**Response:** Plaintiff presented no evidence at trial concerning this paragraph in his Complaint.

However, on the one hand, Plaintiff claims that Ms. Burke's home does not qualify as a "owner-occupied residence," as that term is defined under Utah Code Annotated, § 38-11-102(13), *see*

paragraph 2 of Plaintiff's Complaint, but felt it was necessary to attach to his Complaint a form as required by Utah Code Annotated 38-1-11, which is titled "Answer, Affidavit and Motion for Summary Judgment" and instructions for Ms. Burke's use. If the home did not qualify, then why was it necessary to include the Lien Recovery form for Ms. Burke? A simple explanation is that the Plaintiff filed his Notice of Lien without counsel and his Complaint was filed with the help of counsel.

The Plaintiff failed to plead any cause of action for quantum meruit or any other alternative pleading to the foreclosure of a mechanics' lien. However, in his prayer for relief at paragraph 7, pages 5 and 6, the Plaintiff asserts:

7. That, in the case it is determined and adjudged that Plaintiff does not have a valid and subsisting lien upon said property, Plaintiff has a personal judgment against Defendant Burke for the sum of \$28,675.00, with interest from October 4, 2003, together with costs and disbursement of this action and reasonable attorneys' fees, as fixed by the Court.

**Response:** Plaintiff presented no evidence at trial concerning this paragraph in his Complaint. This paragraph was not drafted in the Complaint as a cause of action, but rather the Plaintiff's demand for judgment. The Plaintiff has not properly plead the elements of quantum meruit and therefore, should not be allowed to rely on this sentence to support his claim of an alternate theory of pleading. Further, the Plaintiff has also failed to provide the Court with any evidence to support his non-claim of quantum meruit.

The Plaintiff has not supported the claims in his Complaint with any evidence at trial. He failed to establish his Notice of Lien. He failed to present the Notice of Lien to Court as an exhibit or evidence



in any way. He did not provide any evidence that his absent lien complied with the requirements of Utah Code Ann. § 38-1-7. The Plaintiff did provide direct evidence that neither he nor individuals he claims to have hired to help with the work were properly licensed to perform the work on Ms. Burke's home. None of them had a contractor's license, a plumber's license, or and electrician's license. The Plaintiff did not provide any evidence as to any exception to the licensing requirement under Utah Code Ann. §§ 58-55-305 and 604. He also failed to provide this Court with any evidence that would support his claim that he is exempt from the licensing requirement based on any of the four common law exceptions in the State of Utah. This case should be dismissed pursuant to Ms. Burke's Motion to Dismiss under Rule 41(b) of the Utah Rules of Civil Procedures.

Plaintiff failed to provide the Court with any reliable evidence as to the value of the work he alleged to perform on Ms. Burke's Ogden home. First his claimed 1,200 hours worked was not supported by any contemporaneous records showing days and/or hours worked on Ms. Burke's home. The Plaintiff claims that he was hired pursuant to an oral contract for \$20.00 per hour, plus the materials he purchased for the job. However, the Plaintiff, contrary to that alleged agreement did not keep track of the days he worked nor the hours he spent fulfilling his alleged contract. Even when he was not getting paid and alleges to have made a claim for payment to Ms. Burke on or about August 1-3, 2003, he did not keep any records of the hours he worked. He claims to have threatened to leave the project if he did not get paid. Upon receiving a \$500.00, which he did not give Ms. Burke credit for on his accounting, the Plaintiff worked even harder on Ms. Burke's home. He claims to have worked the bulk of the 1,200 house in approximately 64 days. The Plaintiff was so dedicated to Ms. Burke that when told to stop

working on her home, he continued anyway and spent more money and hours on her home.

Nevertheless, he did not keep track of his hours even then.

Plaintiff provided little evidence concerning the alleged materials he used on Ms. Burke's home. On his list, there were receipts that spanned beyond the dates the Plaintiff claimed to have worked. He conceded that those amounts were not appropriate to include in his lien claim. This reduced his materials claim by \$965.93. He also conceded that the receipts that were illegible should not be included in his lien claim, this amount was approximately \$424.92. He claimed to have receipts for which he failed and/or refused to produce to Ms. Burke through the discovery process and did not offer them as an exhibit at trial. These lost receipts total a little over \$192.00. These specific items add up to almost \$1,600.00. This total does not include any amount credited for refunds, extra materials purchased by the Plaintiff and charged to Ms. Burke, as outlined herein, or for tools the Plaintiff purchased. There was not evidence presented concerning the cost of the "trades" the Plaintiff alleges to have made. For example, the dirt brought to Ms. Burke's home was from Mr. Strebel's property. He did not testify to the value of the dirt or what it did or the amount it increased Ms. Burke's home. Mr. Isbell brought much of the materials used in the home to the project himself or had the Plaintiff come to Duchesne, and Salt Lake City, Utah to pick it up. The list and accounting of the materials the Plaintiff claimed to have used on Ms. Burke's home has the same status as the number of hours worked on her home. Ms. Burke has demonstrated the unreality of the receipts and account submitted by the Plaintiff. It is suspect at best. The information on the number of hours and the dollar amount of materials claimed to have been expended and/or used is unreliable at best.

Ms. Burke and Mr. Isbell each testified that the Plaintiff did not preform any work at their Slaterville, Utah home. Plaintiff's claimed amount for the Slaterville home was not supported by any evidence and should not be considered in this matter.

Ms. Burke produced evidence concerning the total value of the work performed by the Plaintiff and the payments she made to the Plaintiff as well. Ms. Isbell testified that the total value for the work performed by the Plaintiff \$7,500.00. This amount excluded all of the materials Mr. Isbell purchased and provided to the Plaintiff for the work done on Ms. Burke's home. Both Ms. Burke and Mr. Isbell testified to the amount of money that was paid to the Plaintiff during the course of the work. Checks, transfers, and/or cash were given to the Plaintiff on an approximate weekly basis. *See* Exhibits D10, D13, D14, and D15. The total amount that Ms. Burke paid to the Plaintiff was \$5,200.00. The maximum amount that Ms. Burke could be responsible for is the difference between \$7,500.00 and the payments of \$5,200.00, or \$2,300.00.

Exhibit D17 is the letter drafted by Ms. Isbell on behalf of Ms. Burke concerning the issues raised by the Plaintiff's lien. The document was drafted contemporaneously with the events since it was written on or about November 17, 2003. The Plaintiff failed and/or refused to provide any support for his alleged work during and since he filed the lien. Even at the trial he failed to provide such evidence. The dollar estimate for the work requested in the letter, was approximately \$8,000.00, was very close to the amount that Mr. Isbell estimates, \$7,500.00, for work completed.


Ms. Burke sold the home, which was the subject matter of this litigation, for \$99,000.00. When all of the selling costs and fees and the mortgages were paid, she was left with only \$17,288.31 in equity for the house. As Ms. Burke put it, she did not have enough money to remodel the house, but was trying

to fix the problems and get the home sold to protect what equity she had in the home. To evidence the amount of money she received, see Exhibit D16, which is the Promissory Note signed by Ms. Burke in order to make up the difference between the equity she realized out of the sale of her home and the amount of the lien that was placed on her home by the Plaintiff. The Promissory Note is made in the amount of \$11,386.69. Ms. Burke has been paying on this Note since March 4, 2004. Had Ms. Burke wanted to just get out of the home, she could have negotiated with Darren Streble. He testified that he thought she may want to just get out of the house and he could make a profit on the house. Ms. Burke did not accept this very low offer nor did she negotiate with him at that low number. She believed that if the home was fix and not remodeled, this would protect her equity in the home.

The Plaintiff has failed to prove his case in chief. The Court should grant Ms. Burke's Rule 41(b) motion. However, in light of Ms. Burke's evidence, there can be no question that the Plaintiff did not provide enough evidence to prevail on his single claim from relief, that is, foreclosure of his mechanic's lien.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of November 2007.

**M.E. BOSTWICK'S LAW OFFICES, P.C.**

A handwritten signature in black ink, appearing to read "M. E. Bostwick", written over a horizontal line.

Michael E. Bostwick

*Attorneys for Debbie A. Burke*

### CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 21<sup>st</sup> day of November 2007, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Utah Rules of Civil Procedure, to the following persons:

Michael F. Olmstead  
2650 Washington Boulevard, Suite 102  
Ogden, Utah 84401  
*Attorney for Plaintiff Mark D. Bergman*

U.S. Mail	<u>X</u>
Facsimile	_____
Hand delivered	_____
Overnight Mail	_____

*M. E. Bostwick*

# Exhibit F

SECOND DISTRICT COURT - OGDEN  
WEBER COUNTY, STATE OF UTAH

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MARK D BERGMAN,	.	41MINUTES
Plaintiff,	:	RULING
	:	
	:	
vs.	:	Case No: 040902444 LM
	:	
FIRST AMERICAN TITLE Et al,	:	Judge: PARLEY R BALDWIN
Defendant.	:	Date: January 9, 2008

---

Clerk: debbieg

PRESENT

Plaintiff's Attorney(s): MICHAEL F OLMSTEAD

Defendant's Attorney(s): MICHAEL E BOSTWICK

Other Parties: VINCE ISBELL

Video

Tape Number: 3D010908 Tape Count: 2:03-2:11

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HEARING

This is time set for ruling of the court. Michael Olmstead is present representing the plaintiff. Defendant's husband, Vince Isbell, is present. Michael Bostwick is present representing the defendants.

The Court rules in favor of the plaintiff in the amount of \$7,500. The amount previously paid by the defendant in the amount of \$5,220 shall be deducted from \$7,500 leaving a balance of \$2,280.

The Court awards to the plaintiff that amount. A check in the amount of \$2,280 shall be written to Mark Bergman and mailed to his counsel, Michael Olmstead.

The balance of the funds shall be returned to the defendant, Debbie Burke. A check will be made out in the amount of \$26,395 to the defendant, Debbie Burke and mailed to her counsel, Michael Bostwick.

Parties shall bear the cost of their own attorney fees.

Mr. Bostwick shall prepare the appropriate Order for the court's signature.

# Exhibit G



SECOND DISTRICT COURT

2008 JAN 16 AM 9:33

Michael E. Bostwick (7037)  
**M.E. BOSTWICK'S LAW OFFICES, P.C.**  
6776 SOUTH 1300 EAST  
SALT LAKE CITY, UTAH 84121  
TELEPHONE: 801-352-9330  
FACSIMILE: 801-352-9339

*Attorneys for Debbie A. Burke*

JAN 16 2008

JUDGMENT @J



JD24080833

pages:

040902444 FIRST AMERICAN TITLE

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

OGDEN DEPARTMENT - STATE OF UTAH

**MARK D. BERGMAN,**

Plaintiff,

vs.

**DEBBIE A. BURKE, DORENE R. BASUG,  
and FIRST AMERICAN TITLE,**

Defendants.

**JUDGMENT**

Case No. 040902444

Judge: Parley R. Baldwin

The above-entitled matter came before the Honorable Judge Parley R. Baldwin for a jury trial on November 13, and 14, 2007. Defendant Debbie A. Burke ("Ms. Burke") was represented by her attorney of record Michael E. Bostwick of M.E. BOSTWICK'S LAW OFFICES, P.C., and Plaintiff Mark D. Bergman ("Plaintiff"), was represented by his attorney of record Michael F. Olmstead. Having reviewed and considered the parties' witnesses, the evidence presented at the trial, considered the written closing arguments of the parties, reviewing the file and good cause appearing, the Court enters its following Findings of Fact, Conclusions of Law, and Judgment.

**FINDINGS OF FACT**

1. The Court finds the Plaintiff's testimony was not credible.
2. After a review of all of the evidence, the Court finds that there was no meeting of the minds between the parties.
3. The parties did not have a written contract.
4. The Court finds that the most credible testimony during the trial was provided by Vince Isbell ("Mr. Isbell").
5. Mr. Isbell is a licensed contractor and was at Ms. Burke's home almost on a weekly basis to review the work performed by the Plaintiff.
6. Mr. Isbell provided the adequate supervision over the Plaintiff for the work performed by the Plaintiff.
7. Mr. Isbell estimated the cost for the work to be performed on Ms. Burke's home was between \$5,000.00 and \$8,000.00.
8. The court finds that the total value of the labor and materials provided to Ms. Burke, for which she is liable was \$7,500.00.
9. Ms. Burke paid the Plaintiff almost on a weekly basis for the work and materials he provided to Ms. Burke's home.
10. The total payments from Ms. Burke to the Plaintiff equals \$5,220.00.
11. The balance still owing to the Plaintiff is \$7,500.00 (the total for the work and materials provided by the Plaintiff) minus \$5,220.00 (the amount already paid by Ms. Burke) equals \$2,280.00.

12. The Plaintiff is entitled to receive \$2,280.00 from the \$28,675.00 that was deposited with the court.

13. Ms. Burke is entitled to receive the balance of the \$28,675.00 deposited with the court, or \$26,395.00.

### **CONCLUSIONS OF LAW**

14. The court concludes that there was no meeting of the minds on the essential elements of any agreement between the parties.

15. The parties did not form an oral contract for work for Ms. Burke's home.

16. Based on Mr. Isbell's supervision, the Plaintiff did not need to be licenced for the work he performed on Ms. Burke's home pursuant to the provisions of the Utah Code.

17. Pursuant to the mechanic's lien the Plaintiff recorded with the Weber County Recorder's Office and the Complaint to foreclosure that mechanic's lien the Plaintiff file with the court, he is entitled to recover \$2,280.00 for the work he provided to Ms. Burke, for which he was not compensated during the time the work was performed on Ms. Burke's home.

### **JUDGMENT**

THEREFORE, the Court enters its Order and Judgment as follows:

1. Pursuant to the mechanic's lien the Plaintiff recorded with the Weber County Recorder's Office and the Complaint to foreclosure that mechanic's lien the Plaintiff file with the court, the Plaintiff is entitled to recover \$2,280.00 for the work and materials he provided to Ms. Burke.

2. Ms. Burke is entitled to receive \$26,395.00, which is the balance of the \$28,675.00 held by the court.

3. In summary, the court awards the \$28,675.00 in the amounts as follows:

ITEMS	AMOUNTS
The Total Amount held by the Court	\$28,675.00
The Amount to be paid to MARK D. BERGMAN	\$2,280.00
The Amount to be paid to DEBBIE A. BURKE	\$26,395.00
<b>COURT'S BALANCE</b>	<b>\$0.00</b>

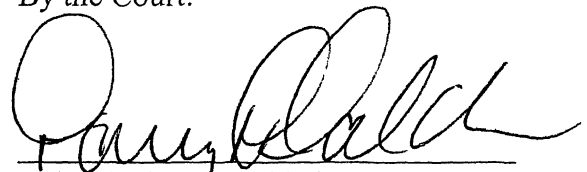
4. The funds shall be mailed to the parties respective counsel. Mark D. Bergman is represented by Michael F. Olmstead, and Debbie A. Burke is represented by Michael E. Bostwick.

5. Each parties shall bear their own attorneys' fees and costs.

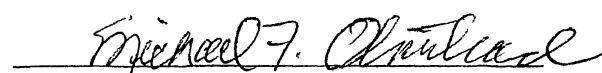
6. This order shall be a final judgment pursuant to Rule 54 of the Utah Rules of Civil Procedure.

Dated this 11 day of January 2008.

By the Court:

  
Judge Parley R. Baldwin

Approved as to Form and Content:

  
Michael F. Olmstead, Attorney at Law  
Attorney for Plaintiff Mark D. Bergman

**NOTICE TO PLAINTIFF'S ATTORNEY****TO: Michael F. Olmstead, Attorney for Plaintiff:**

You will please take notice that the undersigned, attorney for Plaintiff, will submit the above and foregoing JUDGMENT to the Honorable Judge Parley R. Baldwin for his signature, upon the expiration of five (5) days from the date of this notice, together with three (3) for mailing, if mailed, unless a written objection is filed prior to that time, pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure.

DATED this 11<sup>th</sup> day of January 2008.**M.E. BOSTWICK'S LAW OFFICES, P.C.**


Michael E. Bostwick

*Attorneys for Debbie A. Burke***CERTIFICATE OF SERVICE**

I, the undersigned, certify that on the 11<sup>th</sup> day of January 2008, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Utah Rules of Civil Procedure, to the following persons:

Michael F. Olmstead  
2650 Washington Boulevard, Suite 102  
Ogden, Utah 84401

*Attorney for Plaintiff Mark D. Bergman*

U.S. Mail	_____
Facsimile	_____
Hand delivered	<u>  X  </u>
Overnight Mail	_____



# Exhibit H

---

**IN THE SECOND JUDICIAL DISTRICT COURT, STATE OF UTAH  
WEBER COUNTY, OGDEN DEPARTMENT**

---

MARK D. BERGMAN,

Plaintiff (s),

vs.

DEBBIE A. BURKE, DORENE R.  
BASUG, and FIRST AMERICAN TITLE,

Defendant (s).

MEMORANDUM DECISION

Civil No. 040902444

Honorable Parley R. Baldwin

APR - 8 2008

**FILED**

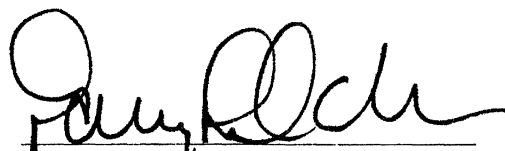
APR - 8 2008

SECOND  
DISTRICT COURT

Defendant's Motion for Attorney fees and costs is denied. Plaintiff's Motion Requesting the Court to Classify and Seal Court Documents is denied.

Counsel for the defendants shall prepare an appropriate Order for the court's signature.

Dated this 7 day of April, 2008.

  
 Parley R. Baldwin, Judge

Memorandum Decision



VD24235263 pages:  
040902444 FIRST AMERICAN TITLE

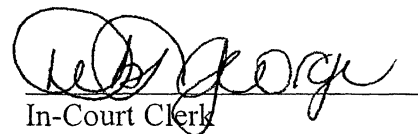
Decision  
Case No 040902444  
Page Two

CERTIFICATE OF MAILING

I hereby certify that on the 8<sup>th</sup> day of April, 2008, I mailed a true and correct copy of the foregoing memorandum decision to counsel as follows:

Mark. D. Bergman  
Plaintiff  
545 East 1100 North  
Ogden, Utah 84404

Michael E. Bostwick, Esq.  
Attorney for Defendant  
6776 South 1300 East  
Salt Lake City, Utah 84121

  
In-Court Clerk



# Exhibit I

Order on Plaintiff's Motion Requesting the Court to Cl

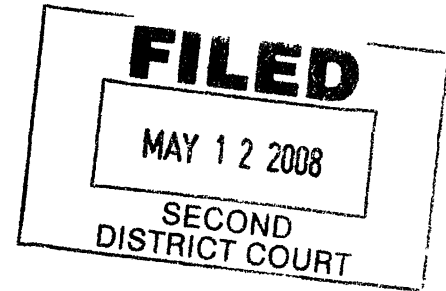


VD24298685

pages: 3

040902444 FIRST AMERICAN TITLE

Michael E. Bostwick (7037)  
M.E. BOSTWICK'S LAW OFFICES, P.C.  
6776 SOUTH 1300 EAST  
SALT LAKE CITY, UTAH 84121  
TELEPHONE: 801-676-8777  
FACSIMILE: 801-352-9339



*Attorneys for Debbie A. Burke*

**MAY 12 2008**

**IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY**

**OGDEN DEPARTMENT - STATE OF UTAH**

**MARK D. BERGMAN,**

Plaintiff,

vs.

**DEBBIE A. BURKE, DORENE R. BASUG,  
and FIRST AMERICAN TITLE,**

Defendants.

**ORDER ON PLAINTIFF'S MOTION  
REQUESTING THE COURT TO CLARIFY  
AND SEAL COURT DOCUMENTS and  
BURKE'S MOTION FOR  
ATTORNEYS' FEES AND COSTS**

Case No. 040902444

Judge: Parley R. Baldwin

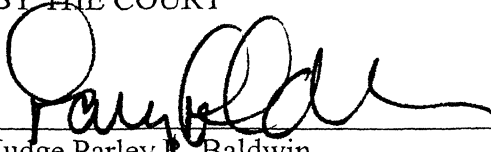
Plaintiff's ("Plaintiff") Motion Requesting Court to Classify and Seal Court Documents and Burke's Motion for Attorneys' Fees and Costs came before the Court without hearing. Having reviewed and considered the parties' written submissions and reviewed the file, and for good cause showing, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. The Plaintiff's Motion Requesting Court to Classify and Seal Court Documents is denied.
2. Burke's Motion for Attorneys' Fees and Costs is denied.

DATED this 12 day of ~~April~~<sup>May</sup> 2008.

BY THE COURT

  
\_\_\_\_\_  
Judge Parley R. Baldwin  
Second District Court

APPROVE AS TO FORM AND CONTENT:

\_\_\_\_\_  
Mark D. Bergman

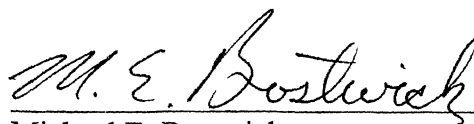
**NOTICE TO PLAINTIFF**

**TO: Mark D. Bergman, Plaintiff:**

You will please take notice that the undersigned, attorney for Defendant Ms. Burke, will submit the above and foregoing Order to the Honorable Parley R. Baldwin for his signature, upon the expiration of five (5) days from the date of this notice, together with three (3) for mailing, if mailed, unless a written objection is filed prior to that time, pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure.

DATED this 15<sup>th</sup> day of April 2008.

**M.E. BOSTWICK'S LAW OFFICES, P.C.**

  
\_\_\_\_\_  
Michael E. Bostwick  
Attorneys for Debbie A. Burke

### CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 15<sup>th</sup> day of April 2008, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Utah Rules of Civil Procedure, to the following persons:

Mark D. Bergman  
545 East 1100 North  
Ogden, Utah 84404

U.S. Mail	<u>X</u>
Facsimile	_____
Hand delivered	_____
Overnight Mail	_____

*Plaintiff Mark D. Bergman, Pro Se*

M. E. Bortwick