

2008

Mark D. Bergman v. Debbie A. Burke, Dorene R. Basug, and First American Title : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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

REPLY BRIEF OF APPELLEE

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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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 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, was 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, 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.*

30. 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.**

31. 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.**

32. 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.**

33. Ms. Burke filed her Notice of Appeal on or about May 13, 2008. **Record at pages 570 - 80.**

SUMMARY OF THE ARGUMENTS

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. The items not included in Mr. Bergman's Lien are not technical defects. Mr. Bergman claimed that he substantially complied with the Utah Mechanics' Lien Statute, but he failed to provide any dates for the first and last dates of work. He did not attempt to comply with that portion of the statute. The granting of summary judgment 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 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

A. 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.

Mr. Bergman in his opening paragraph of his Reply Brief of the Plaintiff ("Brief") at page four asserts that "if the plaintiff had marshaled the evidence, such evidence would support the trial courts findings of fact. Hence, a reply argument on these points seems unnecessary." *See* first paragraph of the Argument in the Brief at page 4. Mr. Bergman failed to provide any response to the arguments or citations Ms. Burke included in her Brief of Appellee filed herein.

Further, Mr. Bergman did no address the Ms. Burke's first issue on appeal before moving on the next two issues, which he does respond to in his Brief. He failed to address the standard for summary judgments or Utah's mechanics' lien statute or standard. In his Reply Brief of the Plaintiff, he did not challenge any of the issues raised by Ms. Burke's initial brief. He summarily dismissed Ms. Burke's first issue in appeal and the arguments and case citations therein. A review of the summary judgment standard cited in Ms. Burke's brief will demonstrate that Mr. Bergman did not raise a material issue of fact as to the required information of the lien he recorded against Ms. Burke's real property. His lien was defective as it relates to the required items which must be included in a valid lien in Utah.

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.

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). Mr. Bergman did not even substantially comply with the mechanics' lien statute. In order to substantially comply, a lien claimant must at least make an attempt to include the required information. In this case, Mr. Bergman did not include a first date of work or a last date of work, but rather, did not include either of those dates at all. If no dates are included, then how can that be substantial compliance?

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. That issue could not be addressed in this case.

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 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, asserted that Ms. Burke had failed to state the purpose of the Statute's requirements, failed to state how the omissions contravened that purpose, and failed to state how she was prejudiced by the omissions. 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. Mr. Bergman's failed to raise any material issue of fact that could have explained the missing required information. He failed to demonstrate that he substantially complied with the Utah Mechanics' Lien statute.

B. 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.

Mr. Bergman asserts that the *Packer v. Cline*, 2004 UT App 311 (2004) case fact situation is not close enough to the one in this case. He claims that since the lien was determined to be invalid because the claimant did not perform any work on the property that had the lien attach to it. Mr. Bergman dismisses the precedential value of the *Packer* case because of the specific facts do not mirror exactly the facts in this case. Nevertheless, the holding in *Packer* is applicable to the case before this Court. The *Packer* Court held that Utah courts have recognized

that substantial compliance with these provisions is all that is required to acquire a mechanics' lien. *See Projects Unlimited, Inc. v. Copper State Thrift & Loan Co.*, 798 P.2d 738, 743 (Utah 1990). That Court went on to hold that Cline's lien lacks substantial compliance because it fails to address several requisite provisions under Utah Code Ann. § 38-1-7(2), the mechanics' lien statute. The *Packer* Court specifically held that:

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).**

Id. at 312 (emphasis added). Substantial compliance must at least demand that each element required by the statute be on or included within the lien. For example if a claimant fails to get the dates correct, then he may have substantially complied under that specific provision, but if the claimant does not include any dates at all, how can that be substantial compliance?

These are exactly the arguments made by Ms. Burke in her motion for summary judgment concerning Mr. Bergman's Lien in this case. In his Lien, Mr. Bergman failed to provide the first and last dates that labor or service was performed or the first and last dates equipment or material was furnished, he did not provide his telephone number, and failed to identify what steps an owner may take to require a lien claimant to remove the lien. *See* Utah Code Ann. §§ 38-1-7(2)(a)(iii), (2)(a)(v), and (2)(a)(ix). Those items were not included on or within the Lien. *See* the Lien at the **Record at page 8**. Rather than focusing on the statutory requirements for a lien and how Mr. Berman's Lien stacked up against the statute, the District Court examine very closely what Ms. Burke did or did not do in her motion. The District Court held:

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**.

The trial court issued its Memorandum Decision on January 19, 2006. **Record at pages 161 - 65** at 163 (emphasis added). Mr. Bergman's Lien has to be examined as to its validity on its face and evaluated as it was recorded and as it serves 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). It should also 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). The requirements outlined in Utah Code Ann. §§ 38-1-7(2) are not technicalities and must be included on a valid lien recorded in Utah.

C. 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.

Mr. Bergman asserts that since the district court included in its Order, of January 16, 2007, that each party "shall bear their own attorneys' fees." **Record at pages 374 - 78**. He next claims that since there was no objection or opposition to district court's Order, that Ms. Burke did not preserve this issue for consideration on appeal. The Order was prepared at the district court's specific instructions after the January 9, 2008, telephone conference, in which it delivered its decision to the parties' counsel and Mr. Isbell. **Record at page 373**. 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.** In other words, Ms. Burke objected to the district court's decision to order each party to bear their own attorneys' fees.

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.***

Id. (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 involves 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 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.

Mr. Bergman also contends that he was the prevailing party not Ms. Burke. His claim is simply that since he received an amount of money on his foreclosure action that he is the prevailing party to the whole case. 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 filed his Lien claiming that he was owed \$28,675.00. Though the escrow and a payment by Ms. Burke, that amount of money was paid into the district court. Of the \$28,675.00, Mr. Bergman was awarded only \$2,280.00 of that amount. 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 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.** 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 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 its 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 8th day of April 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 8th day of April 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

M. E. Bostwick