

2008

# General Construction and Development, Inc. v. Peterson Plumbing Supply : Reply Brief

Utah Court of Appeals

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GENERAL CONSTRUCTION	)	
& DEVELOPMENT, INC., ET AL.;	)	
	)	Appellate Case No. 20080998
Plaintiffs and Appellees	)	
	)	
v.	)	
	)	
PETERSON PLUMBING SUPPLY;	)	
	)	
Defendant and Appellant	)	
	)	

**APPEAL FROM THE DECISION AND ORDER  
OF THE HONORABLE SAMUEL D. MCVEY OF THE FOURTH JUDICIAL  
DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH**

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FILED  
UTAH APPELLATE COURTS  
MAY 12 1960

**IN THE UTAH SUPREME COURT**

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**REPLY BRIEF OF THE APPELLANT  
PETERSON PLUMBING SUPPLY**

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## INTRODUCTION

In this case, the interpretation of the Wrongful Lien Act proposed by Peterson Plumbing Supply (hereinafter “Peterson”) is a limited revision of this Court’s holding in *Hutter* to account for the provisions of Utah Code § 38-9-2(3) (2008). Under Peterson’s interpretation, the holding in *Hutter*—that mechanics liens are not wrongful liens as defined in Utah Code § 38-9-1(6) because they are expressly authorized by statute—is narrowly modified to allow application of wrongful lien liability to a mechanics’ lien if the person filing the lien lacks entitlement under Utah Code § 38-1-3. Under this interpretation, a mechanics’ lien is not “expressly authorized by statute” if the person filing the lien is not “entitled to a lien under Section 38-1-3.” *See* UTAH CODE ANN. § 38-9-2(3) (2008).

In contrast, General Construction & Development, Inc., *et al.* (hereinafter “GCD”) asks the Court to modify *Hutter* to include imposition of wrongful lien liability where the lien is procedurally defective; specifically where the lien is not timely filed. Under GCD’s rule, every untimely mechanics’ lien is a wrongful lien because the lien right has lapsed. Since there is no right to have a lien, any steps taken to file and enforce a lien are without legal authority and therefore wrongful.

In proposing this rule, GCD fails to provide clear language in the statute to support its rule, identify why its rule should be limited to timing defects and not other procedural defects, or identify legislative intent for imposing such drastic liability on well-intended but ultimately unenforceable mechanics’ lien claims.

## ARGUMENT

### **I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE MECHANICS' LIEN NOTICES FILED BY PETERSON WERE NOT TIMELY.**

Peterson filed each of its liens within 90 days of the filing of the applicable Notice of Completion [R. 93-94, 320-22]. Utah Code § 38-1-7 (2007) provides that mechanics' lien claimants

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.*

UTAH CODE ANN. § 38-1-7(1)(a)(i) (2007) (emphasis added).

The district court found that Peterson's liens were untimely since they were not filed within 180 days of final completion of the original contract. GCD defends the district court's interpretation with two arguments: (1) previous versions of the statute evidence that the amendment was meant as a clarification and not a substantive change in the law; and (2) Peterson's interpretation creates an absurd, unreasonable, and inoperable result. *See* Brief of Appellees at 6-12.

#### **A. The Amendment to Utah Code § 38-1-7 (2007) Constituted a Substantive Change in the Law.**

To successfully argue an amendment is a clarification, GCD must first show that Utah Code § 38-1-7 (2007) is ambiguous. As acknowledged by this Court, "[o]nly if we find the statutory language to be ambiguous may we turn to secondary principles of



statutory construction or look to the statute’s legislative history.” State v. Ireland, 2006 UT 17, ¶ 11, 133 P.3d 396, 399 (Utah 2006).

The reasoning behind this rule of statutory construction is sound: attorneys need to be able to rely on the plain and unambiguous language of the law. If an unambiguous statute is “clarified” by every subsequent version to mean something different, it suspends our ability to predictably guide our clients. Thus,

[t]he starting point for this inquiry, as with all questions of statutory interpretation, is an examination of the plain language of the relevant statute[]. If the language is unambiguous, we confine our interpretation to the words of the [] statute[]. We seek guidance from the legislative history and relevant policy considerations only if the statutory language is ambiguous or unclear.

Harvey v. Cedar Hills City, 2010 UT 12, ¶ 15, 227 P.3d 256, 260 (Utah 2010) (internal quotation marks and footnote omitted). In arguing that Utah Code § 38-1-7 (2007) is ambiguous, GCD asserts:

A plain reading of the statute, without looking to the legislative history, reveals that the statute is ambiguous because it can conceivably be interpreted to mean: 1) that a filing of a notice of completion could extend the deadline past 180 days of completion, and 2) that a filing of a notice of completion cannot extend the deadline past 180 days.

*See* Brief of Appellees at 7 (emphasis added).

GCD’s first interpretation comports with the interpretation advanced by Peterson: if a Notice of Completion is filed, then all liens are due “within: . . . (B) 90 days after the day on which a notice of completion is filed.” *See* UTAH CODE ANN. § 38-1-7(1)(a)(i)(B) (2007). This is true even if the lien is filed more than 180 days after the deadline in

subsection (A) since subsection (A) is expressly inapplicable when a Notice of Completion is filed. *See* UTAH CODE ANN. § 38-1-7(1)(a)(i)(A) (2007).

In contrast, the second “conceivable” interpretation advanced by GCD is aptly described as “a forced reading of a clear and unambiguous statute.” *See Visitor Info. Ctr. Auth. v. Customer Serv. Div., Utah State Tax Comm’n*, 930 P.2d 1196, 1198 (Utah 1997). Moreover “conceivable” interpretations are not the standard for determining ambiguity. A statute is ambiguous only when “its terms are susceptible to more than one reasonable interpretation.” *Hutter v. Dig-It, Inc.*, 2009 UT 69, ¶ 49, 219 P.3d 918, 930 (Utah 2009) (emphasis added).

Since the second interpretation offered by GCD is forced and unreasonable, the plain language of Utah Code § 38-1-7 (2007) is not ambiguous. There is absolutely nothing in the plain language of Utah Code § 38-1-7 (2007) which states or otherwise implies the 180-day deadline is sacrosanct, or that the 90-day deadline is relative—rather than independent and alternative—to the 180-day deadline. Depending upon whether a Notice of Completion is filed, the plain language of Utah Code § 38-1-7 (2007) clearly provides that either subsection (A) or (B) is applicable.

Consequently, the Court’s analysis of Utah Code § 38-1-7 (2007) is not dependent upon the legislative history of the statute, prior versions of the statute, or a subsequent version of the statute. “Unless the statute on its face is unclear or ambiguous, we find no need to delve into the uncertain facts of legislative history.” *Visitor Info. Ctr. Auth. v. Customer Serv. Div., Utah State Tax Comm’n*, 930 P.2d 1196, 1198 (Utah 1997).

Although Peterson believes the foregoing analysis is persuasive and conclusive, a full rebuttal and an abundance of caution dictates that Peterson address the arguments presented by GCD that the statutory history of Utah Code § 38-1-7 and the Utah Senate floor debates show that the 2009 amendment to Utah Code § 38-1-7 (2007) was a clarification and not a substantive change in the law.

As an initial matter, “[l]ater versions of a statute do not necessarily reveal the intent behind an earlier version.” Id. In many cases, the “legislative change supports the proposition that the statute previously meant something different from what it now says.” See id. Accordingly, “[w]e generally presume that any amendment to a statute indicates a legislative intent to change existing legal rights and therefore is not a reliable indication of intent as to the earlier, unamended statute.” Miller v. Weaver, 2003 UT 12, ¶24, 66 P.3d 592, 599-600 (Utah 2003).

A party seeking to convince the Court that an amendment was intended by the legislature to “clarify the ambiguities in the statute rather than to change the law” must rebut the “general rule” by presenting evidence sufficient to demonstrate “a strong indication that clarification was, in fact, the legislative intent.” Hutter v. Dig-It., Inc., 2009 UT 69, ¶ 16, 219 P.3d 918, 923 (Utah 2009). GCD has failed to meet this burden.

In support of its contention that the 2009 amendment to Utah Code § 38-1-7 (2007) was a clarification and not a substantive change, GCD states that “[t]he statutory history of the Utah Mechanics’ Lien Act shows that the legislature did not intend for a Notice of Completion to allow an undeterminable amount of time to file a mechanics’

lien notice.” *See* Brief of Appellee at 7-8. GCD then sets forth the language of the 1884, 1898, 1953, 2006, 2008 and 2009 versions of Utah Code § 38-1-7 and asserts that “Peterson Plumbing’s interpretation of [Utah Code § 38-1-7 (2007)] is a drastic departure from all prior and subsequent versions inasmuch as this is the only version, according to Peterson Plumbing, that has an infinite time period to file a mechanics’ lien notice.” *See* Brief of Appellee at 8-10.

This hyperbolic assertion is misleading for the following reasons: (1) the interpretation advanced by Peterson does not result in an infinite time period to pursue a mechanics’ lien claim; (2) the liens in this case were not filed at an infinite time after the 180-day deadline; and (3) filing a Notice of Completion is a purely voluntary act.

Taking these in reverse order, the Court should note that the filing of a Notice of Completion, like those filed here, is a purely voluntary act. Under Utah Code § 38-1-33, the filing of a Notice of Completion is permissive and can only be accomplished by a select group of entities. *See* UTAH CODE ANN. § 38-1-33(1)(a) (2008). Why would a person file one at some unimaginably late date? Since the filing of a Notice of Completion is an absolute predicate to the operation of the 90-day deadline, no lien right will exist beyond the 180-day deadline when no Notice of Completion is filed.

Moreover, the liens at issue in this case were not filed at some alarmingly late date. All of Peterson’s liens were recorded within days of each other, and several of those liens were timely and have been foreclosed in another pending case. *See* Fourth District Case No. 080404372. The liens at issue in this case were filed beyond the 180-

day deadline but only by a matter of days. GCD ignores the proximity of the actual lien filings to the 180-day deadline and the fact the GCD itself opened the door for the liens at issue in this case by filing the Notices of Completion.

GCD distracts the Court from these facts with polemical expressions of infinite deadlines which will never matter because the lien deadline ruling in this case will apply only to this case. The Utah legislature amended section 38-1-7 in 2009 to read that the 180-day deadline is the absolute deadline regardless of whether a Notice of Completion is filed. Since the decision of this Court will affect only the rights of the parties in this case, we should restrict our analysis to the facts of this case and not an academically intriguing but ultimately inapplicable hypothetical.

Furthermore, the interpretation advanced by Peterson does not result in an infinite time period to pursue a mechanics' lien claim. Pursuant to subsection (A), a lien claimant must file a notice of lien within 180 days after the date of final completion of the original contract if a Notice of Completion is not filed. *See* UTAH CODE ANN. § 38-1-7(1)(a)(i)(A) (2007). If a Notice of Completion is filed, subsection (B) dictates that a lien claimant must file a lien within 90 days after the filing of the Notice of Completion. *See* UTAH CODE ANN. § 38-1-7(1)(a)(i)(B) (2007). While this may result in a lien being filed more than 180 days after final completion of the original contract, the underlying statutes of limitations for the enforcement of contractual and equitable debts will prevent a lien claim from being enforceable after the running of the applicable statute of limitations.

The right to a mechanics' lien is ancillary to a debt and merely secures the underlying obligation. The Court of Appeals acknowledged the interconnectedness of lien and monetary claims when it described breach of contract claims as "inextricably tied" to mechanics' lien claims: "a party cannot pursue [a mechanics' lien claim] without also proving the existence of a contract, a payment due under the contract, and a breach of that contract by nonpayment." Ellsworth Paulsen Const. Co. v. 51-SPR, L.L.C., 2006 UT App. 353, ¶ 47, 144 P.3d 261, 275 (Utah Ct. App. 2006).

The statute of limitations for an oral contract is four years from the nonpayment and six years with respect to the breach of a written contract. *See* UTAH CODE ANN. § 78B-2-307(3) (2010); UTAH CODE ANN. § 78B-2-309 (2010). Since the Mechanics' Lien Act provides for attorneys' fees to the successful party, *see* Utah Code § 38-1-18 (2010), it is doubtful that a lien would ever be filed beyond the applicable statute of limitations because the property owner would be entitled to costs and attorneys' fees as the successful party .

Contrary to GCD's assertion, the interpretation of Utah Code § 38-1-7 (2007) advocated by Peterson does not produce a "drastic departure from all prior and subsequent versions" since it does not result in an infinite and undeterminable time period to pursue a mechanics' lien claim. As a result, comparing Utah Code § 38-1-7 (2007) with its prior and subsequent versions and arguing that "the legislature did not intend for a Notice of Completion to allow an undeterminable amount of time to file a mechanics' lien notice" does not support GCD's contention that the 2009 amendment to

Utah Code § 38-1-7 (2007) was meant as a clarification and not a substantive change in the law.

GCD's second argument for clarification is based upon a statement made by Senator Jenkins in a senate floor debate:

On line 42, 90 days after the date of the notice completed, but no later than the, it's the 180 days that's on line 40. So it can be no later than the 180 days on line 40. So, it's just a clarification.

*See* Brief of Appellees at 12. Like the "general statement" made by Representative Morely quoted in *Hutter*, this general statement by one senator is "too slender a reed upon which to rest a general conclusion" that the 2009 amendment was intended by the legislature as a clarification of the law and not a substantive change in the law. *See Hutter v. Dig-It, Inc.*, 2009 UT 69, ¶ 16, 219 P.3d 918, 923 (Utah 2009).

In sum, GCD has failed to present evidence strongly indicating that the 2009 amendment to Utah Code § 38-1-7 (2007) was intended by the legislature as a clarification of the law and not a substantive change in the law.

While it is true that an amendment to an ambiguous statute may indicate a legislative purpose to clarify the ambiguities in the statute rather than to change the law, this is not the general rule, and this view of an amendment should be taken only where there is a strong indication that clarification was, in fact, the legislative intent.

*Hutter v. Dig-It, Inc.*, 2009 UT 69, ¶ 16, 219 P.3d 918, 923 (Utah 2009) (internal quotations and footnote omitted). Consequently, the Court should find that the district court erred in interpreting Utah Code § 38-1-7 (2007) as creating a maximum lien filing

deadline of 180 days from the date of final completion of the original contract even if the Court finds that Utah Code § 38-1-7 (2007) is ambiguous.

**B. Peterson’s Plain-Language Interpretation of Utah Code § 38-1-7 (2007) is Not Absurd, Unreasonable, or Inoperable.**

GCD’s second argument in defense of the district court’s interpretation of Utah Code § 38-1-7 (2007) is that Peterson’s plain-language interpretation of the statute “creates an absurd, unreasonable and inoperable result.” *See* Brief of Appellees at 12-15. In support of this assertion, GCD opines that “[u]nder Peterson Plumbing’s interpretation of the statute, a mechanics’ lien notice could theoretically be filed years, decades or even centuries after the completion of the final contract” since “Peterson Plumbing argues that the 2007 version does not have any determinable time frame in which a mechanics’ lien can be filed.” *See* Brief of Appellees at 13.

As already noted, this hyperbolic misrepresentation of the interpretation advocated by Peterson is not accurate: mechanics’ lien claims would still be extinguished within four to six years of final completion of the original contract by the expiration of the applicable statute of limitations on the underlying breach of contract claim. Moreover, the liens in this case were filed only days after the 180-day deadline. Upon those facts of timing, the result is not absurd, unreasonable, or inoperable.

GCD’s final argument, that Peterson’s interpretation of Utah Code § 38-1-7 (2007) is superfluous, overlooks the word “or” and the phrase “if no notice of completion is filed under section 38-1-33.” *See* Brief of Appellees at 14. Statutes should be interpreted “to



give meaning to all parts.” LKL Associates, Inc. v. Farley, 2004 UT 51, ¶ 7, 94 P.3d 279, 281 (Utah 2004).

If a Notice of Completion is filed, then subsection (B) controls and the only applicable deadline is the 90-day deadline. If a Notice of Completion is not filed, then subsection (A) controls and the only applicable deadline is the 180-day deadline. There is nothing superfluous about one deadline controlling in the event that a Notice of Completion is filed and another deadline controlling in if a Notice of Completion is not filed. Accordingly, the Court should conclude that Peterson’s plain-language interpretation of Utah Code § 38-1-7 (2007) is not absurd, unreasonable, or inoperable.

## **II. THE DISTRICT COURT ERRED IN CONCLUDING THAT PETERSON’S MECHANICS’ LIENS WERE WRONGFUL LIENS.**

The district court relied on *Foothill Park, L.C. v. Judston, Inc.*, 2008 UT App. 113, 182 P.3d 924 (Utah Ct. App. 2008), in concluding that Peterson’s mechanics’ liens were wrongful under the Wrongful Lien Act. Likewise, GCD primarily relies on *Foothill Park* to support the district court’s conclusion. However, this reliance is misplaced for the reasons set forth in the Opening Brief of the Appellant Peterson: the liens are expressly authorized by statute and they fall with the scope limitation of Utah Code § 38-9-2(3) (2008).

### **A. Peterson’s Mechanics’ Liens are Expressly Authorized by Statute.**

A lien is not a wrongful lien if it is “expressly authorized by . . . statute.” *See* UTAH CODE ANN. § 38-9-1(6) (2008). GCD presents five arguments in support of its assertion that Peterson’s mechanics’ liens were not expressly authorized by statute: (1)

the holding of the Court of Appeals in *Foothill Park*; (2) GCD's interpretation of the Court's holding in *Hutter*; (3) *Foothill Park* and *Hutter* are distinguishable; (4) wrongful liens are determined at the time a lien is recorded; and (5) the holding of the Court of Appeals in cases involving lis pendens. See Brief of Appellees at 15-19. These arguments shall be addressed in turn.

First, GCD asserts that the Court of Appeals addressed whether a mechanics' lien is "expressly authorized by . . . statute" under section 38-9-1(6) "when [the Court of Appeals] stated that 'the statute is not so broad as to exempt any filing that purports to arise under the mechanics' lien statute.'" See Brief of Appellees at 16 (quoting *Foothill Park, L.C. v. Judston, Inc.*, 2008 UT App. 113, ¶ 19, 182 P.3d 924 (Utah Ct. App. 2008)).

However, the Court of Appeals was referring to the scope limitation in section 38-9-2(3), not the wrongful lien definition in section 38-9-1(6). Indeed, the Court of Appeals did not explicitly address the definitional issue of whether a lien is "authorized by . . . statute" in rendering its decision in *Foothill Park*. *Id.* ¶¶ 18-20. Its analysis was confined solely to the scope limitation in section 38-9-2(3). *Id.* This likely explains why the Court referred to the portion of *Foothill Park* quoted by GCD as "dicta" in rendering its decision in *Hutter*. See *Hutter v. Dig-It, Inc.*, 2009 UT 69, ¶ 49, n.31, 219 P.3d 918, 929-30, n.31 (Utah 2009). As a result, GCD reliance upon *Foothill Park* with respect to the issue of whether a lien is "expressly authorized by . . . statute" under section 38-9-1(6) is misplaced.

Second, GCD argues that the Court's holding in *Hutter* "does not mean that any document created or filed purporting to be a mechanics' lien is expressly authorized by statute" and that "pursuant to *Hutter*, an untimely mechanics' lien is still a wrongful lien because there is no statutory right to file a belated mechanics' lien." *See* Brief of Appellants at 15-17. In making this argument, however, GCD ignores the Court's framing of the issue decided in *Hutter*, the legislative history quoted by the Court in *Hutter*, the Court's rejection of *Foothill Park* in *Hutter*, the Court's actual determination in *Hutter* of what it means to be "expressly authorized by . . . statute," and the distinction between the "right" to file a mechanics' lien and the statutory "nature" of a mechanics' lien.

Since *Foothill Park* did not address the issue of express authorization, the only guiding precedent is the Court's holding in *Hutter* whereby it explained "the meaning of the phrase 'expressly authorized.'" *See Hutter v. Dig-It, Inc.*, 2009 UT 69, ¶ 46, 219 P.3d 918, 929 (Utah 2009). In *Hutter*, Dig-It argued "that because the right to file a mechanics' lien is granted by statute, all mechanics' liens--even if they ultimately prove unenforceable--are expressly authorized by statute and therefore are not wrongful liens." *Id.* ¶ 46. This is the position being argued by Peterson in this case.

In contrast, the Hutters argued "that an unenforceable lien cannot be expressly authorized by statute since the statute only allows liens to be recorded that comply with the statutory terms." *Id.* ¶ 46. This was the position correctly rejected by the Court in *Hutter* and is the position being argued by GCD in this case.

After acknowledging that the phrase “expressly authorized” was ambiguous, the Court related the following legislative history, which is just as applicable and controlling in this case as it was in *Hutter*:

The Wrongful Lien Act was originally enacted by the legislature in 1985 and was last amended in 1997. Senator Matheson, a sponsor of the original bill, stated that its purpose was to impose penalties on those filing common law liens on the property of public officials in retaliation for prosecution. After making his initial statement, Senator Matheson was questioned by Senator Carling, who was concerned that the original bill’s definition of a wrongful lien was too broad for the bill’s expressed purpose. Senator Carling’s question precipitated the following exchange:

**Senator Carling:** Mr. President, . . . I thought this just went to common law liens, but apparently Senator Matheson, [you’re] enacting a whole new section and that whole new section it appears goes to all liens, not just common law liens and it would go to rental liens, lessors liens, . . . mechanic’s liens and the thing that concerns me, I . . . agree with what you’re trying to do and the problem that you have but I think that you’re going further than you intended to go because somebody might think that they have a valid lien against somebody, they’re going to file a lien and it might be determined to be invalid. One of the things that it says here, uh, they assert a lien and then you look at line 27, page 1 it says [“]or is otherwise invalid,[”] . . . that kind of covers the whole waterfront, I don’t see a problem where it says he [“]knows or has reason to know that the document is forged, groundless, contains a material misstatement or false claim,[”] but . . . where we’re putting even a little bit of negligence in here I wonder why you need [“]or otherwise invalid,[”] that seems to be a little too broad.

**Senator Matheson:** Now Mr. President, I’d have no objections to taking that out. You know the purpose of the bill and that’s to cover all of you . . . [who] might . . . find yourself in the same position if you resist what these people are attempting to do.

. . .

**Senator Moll:** . . . I believe you already know the purpose of the bill and that is to take care of . . . the problems raised by [some groups] in this state . . . where as a punitive measure if we don’t do it their way they file what we call common law liens with recorders who are hard put to know whether they

even file them or whether they have any liability. . . . [I]t addresses only liens on real property and I suggested some language to . . . Senator Matheson, . . . which says in effect, this act shall have no application to . . . [mechanic's] or materialmen's liens and I believe that that would clear it up and express the . . . intent of the body. . . .

. . .

**Senator Matheson:** Now Mr. President, I'd move under suspensions of rules [clause] it is fourteen words that we add the language which Mr. [Moll] has just said at the end of or after line 33 on page 1, "This act is not intended to be applicable to mechanic's or materialmen's liens."

Id. ¶ 50.

GCD offers no legislative history to contradict the legislative history relied upon by the Court in *Hutter* or to support GCD's position for an expanded definition and application of the term "expressly authorized by . . . statute." Nevertheless, GCD goes beyond the acknowledged intent of the statute, the legislative history, and the holding of *Hutter* by inviting the Court to expand application of the Wrongful Lien Act to all untimely liens.

This argument, and others like it inviting the Court to focus on the lien process rather than the lien claimant, is a common mistake made by those intent on punishing unsuccessful lien claimants and the same mistake made by the Court of Appeals in *Foothill Park*. The Wrongful Lien Act contained an express exemption for mechanics liens when it was originally passed in 1985. Although the express exemption was removed when Section 38-9-2(3) was added in 1997, there is nothing in the legislative history to suggest that the legislature sought to change the objective of the Wrongful Lien Act or the policy underlying the Act: the prevention of frivolous common law liens.

Rather, the amendment expressed what the legislature always intended: that the person filing a lien be of the type qualified to file the lien. Under the original version of the Wrongful Lien Act, the express exemption for mechanics' liens created the opportunity for a person to avoid wrongful lien liability by filing a common law lien denominated as a mechanics' lien. While this may have complied with the express language of the Act, it did not comport with the intent. The addition of section 38-9-2(3) allows a court to look beyond the face of the document to determine whether the person is of the class qualified to file the lien. The inquiry ends there.

Accordingly, the focus of a section 38-9-2(3) inquiry is on the "person" filing the lien, not the process. Although noncompliance with procedural requirements may result in a loss of the *right* to a mechanics' lien, i.e. a lien right may have expired based upon a failure to timely file a notice of lien, the timing of the filing of a mechanics' lien notice does not change the qualification of the person filing the lien. Consequently, the Court's appropriately broad holding in *Hutter* is controlling in this case and leads to the inescapable conclusion that untimely mechanics' liens are not wrongful liens under the Wrongful Lien Act.

Third, GCD argues that *Foothill Park* and *Hutter* are "distinguishable" since *Foothill Park* dealt with a "timeliness issue" and implies that *Hutter* is not applicable because it did not. *See* Brief of Appellees at 17. However, this observation is a distinction without a difference in light of the Court's explicit characterization of the issue decided in *Hutter* as one that had been addressed in dicta by the Court of Appeals in

*Foothill Park*, and the Court of Appeals’ erroneous application of timing to the analysis of whether a mechanics lien is wrongful.

As already noted, the issue before the Court in *Hutter* was “the meaning of the phrase ‘expressly authorized.’” Hutter v. Dig-It, Inc., 2009 UT 69, ¶ 46, 219 P.3d 918, 929 (Utah 2009). After rehearsing the competing interpretations proposed by Dig-It and the Hutters, the Court referred to *Foothill Park* in explaining that “[t]his issue is one of first impression for this court, although the Court of Appeals has addressed it in dicta.” Id. ¶ 49. The Court thereafter made it clear that the dicta to which it was referring was the Court of Appeals’ conclusion in *Foothill Park* that “the [Wrongful Lien Act] is not so broad as to exempt any filing that purports to arise under the [mechanic’s] lien statute.” Id. ¶ 49, n.31.

In concluding that “the legislature intended that the definition of ‘wrongful lien’ should encompass only common law liens” and that “the phrase ‘not expressly authorized by . . . statute’ in the Wrongful Lien Act does not include statutorily created liens that ultimately prove unenforceable,” it is clear that the Court overruled the Court of Appeals’ dicta. Id. ¶ 52. Since the issue in this case is the same issue addressed in *Hutter* and the dicta in *Foothill Park*, and the Court implicitly overruled the dicta in *Foothill Park*, any distinguishing characteristics between the facts of the two cases are irrelevant: *Hutter* is controlling.

Fourth, GCD points out that “a wrongful lien is determined at the time it is recorded or filed.” *See* Brief of Appellees at 16. While this is true, it does not change the

relevant inquiry from the person to the process. The timing of a lien does not convert the lien from a statutorily created right to a common law right. An untimely, statutory lien is still a statutorily created lien; it's just going to be unenforceable. As this Court acknowledged in *Hutter*, an unenforceable lien is not a wrongful lien. *Id.* ¶ 52.

Finally, GCD relies on two cases decided by the Court of Appeals involving lis pendens to support their assertion that a mechanics' lien that "is not timely filed [] can be a wrongful lien under the Wrongful Lien Statute." *See* Brief of Appellees at 18. However, the cases cited by GCD do not support their position for the same reason as *Foothill Park*: the Court of Appeals did not substantively address whether the mechanics' lien/lis pendens in each case were "expressly authorized by . . . statute."

With respect to the first case cited by GCD, it is a misrepresentation of the Court of Appeals' holding in *Doug Jessop Const., Inc. v. Anderton*, 2008 UT App 348, 195 P.3d 493 (Utah Ct. App. 2008), to argue that "the Court of Appeals held that a lis pendens was a wrongful lien because it preceded the filing of the counterclaim and was therefore not timely filed." *See* Brief of Appellee at 18. The Court of Appeals did not engage in any analysis of whether the lis pendens was "expressly authorized by . . . statute" and certainly did not find that it was a wrongful lien based upon the timeliness of its filing. *See Doug Jessop Const., Inc. v. Anderton*, 2008 UT App 348, 195 P.3d 493 (Utah Ct. App. 2008).

What actually happened is the "Appellants failed to preserve their claim that a lis pendens is not a lien for purposes of the wrongful lien statute as well as the issue of



whether a lis pendens can be removed pursuant to the wrongful lien statute.” Id. ¶ 19.

As a result, the Court of Appeals “deem[ed] these arguments waived and [did] not reach their merits.” Id. It was upon this basis that the Court of Appeals refused to “disturb the trial court’s judgment that the first lis pendens was a wrongful lien,” not that the Court of Appeals agreed with the trial court’s conclusion. Id.

With respect to the second case cited by GCD, the Court of Appeals’ ruling in *Eldridge v. Farnsworth*, 2007 UT App 243, 166 P.3d 639 (Utah Ct. App. 2007) suffers from the same problem as its dicta in *Foothill Park*: in both cases the Court of Appeals did not consider the ambiguity inherent in the phrase “expressly authorized by . . . statute.” Id. ¶¶ 46-50. In fact, in *Farnsworth* (like *Hutter*) the claim giving rise to the lis pendens failed. Nevertheless, the lis pendens in *Farnsworth* and the lien in *Hutter* were not found to be wrongful. Moreover, like *Foothill Park*, *Farnsworth* was decided by the Court of Appeals prior to the Court’s seminal ruling in *Hutter* regarding what it means for a lien to be “expressly authorized by . . . statute.” As a result, *Farnsworth* was also overruled by *Hutter* to the extent it conflicts with the Court’s holding in *Hutter*.

In sum, the liens filed by Peterson were mechanics’ liens, not common law liens. Even if the notice of liens were untimely, the timing of the liens does not change the nature of the liens from mechanics’ liens to common law liens. Under *Hutter*, mechanics’ liens are “expressly authorized by . . . statute” without respect to their enforceability. As a result, the Wrongful Lien Act is inapplicable even if the Court finds that Peterson’s mechanics’ liens were untimely filed and unenforceable.

**B. Peterson is “Entitled to a Lien under Section 38-1-3.”**

The Wrongful Lien Act “does not apply to a person entitled to a lien under Section 38-1-3 who files a lien pursuant to Title 38, Chapter 1, Mechanics’ Liens.” UTAH CODE ANN. § 38-9-2(3) (2008). GCD presents two awkward arguments in rebuttal to Peterson’s interpretation of this section: (1) it renders portions of the statute “superfluous and inoperative”; and (2) “innocent homeowners could face severe consequences” if an untimely filed mechanics’ lien does not subject the lien claimant to wrongful lien liability. *See* Brief of Appellant at 19-22.

GCD’s first argument, that Peterson’s interpretation of Utah Code § 38-9-2(3) renders portions of the statute superfluous and inoperative, is based on an incomplete application of Peterson’s argument. Whether a person is “entitled to a lien under Section 38-1-3” is determined solely by reference to section 38-1-3. The question of “entitlement” is the first prong in the analysis and is discussed at length on pages 20-27 of the Opening Brief of Peterson.

The second prong requiring that the lien claimant file a lien “pursuant to Title 38, Chapter 1, Mechanics’ Liens” represents a requirement that a “mechanics’ lien” be filed rather than a “common law lien” masquerading as a mechanics lien, not a requirement that a lien claimant “entitled to a lien under section 38-1-3” must also comply with the procedural, content, service, and timing provisions of the Mechanics’ Lien Act.

In contrast, GCD wants the Court to conclude the phrase “who files a lien pursuant to Title 38, Chapter 1, Mechanics’ Liens” means that the lien must be filed in full

compliance with timing provisions of Utah Code § 38-1-1, *et. seq.* This is the same argument made to support GCD's interpretation of "express authorization" and is the same argument rejected in *Hutter* because it is not supported by the plain language or legislative history of the statute.

GCD's second argument in rebuttal to Peterson's interpretation of Utah Code § 38-9-2(3) is that innocent homeowners could face severe consequences if an untimely filed mechanics' lien does not subject the lien claimant to wrongful lien liability under the Wrongful Lien Act. However, this argument is based on an unreasonable hypothetical that fails to take into consideration the other protections afforded to homeowners under other statutes. The basis for GCD's argument is as follows:

Under Peterson Plumbing's interpretation, a contractor who did work on the property at the instance of the owner could theoretically file a mechanics' lien notice at any time without any danger of it being a wrongful lien, even if the contractor filed the lien for purely malicious purposes. A contractor could wait 10 years or more and file a mechanics' lien out of spite right before a home owner was going to sell the home or refinance. The home owner would have no speedy remedy to remove the mechanics' lien from the property without the option of the Wrongful Lien Statute.

Brief of Appellees at 21.

In making yet another argument premised on a bizarre and distinct fact scenario, GCD does not propose that this wildly belated lien would be enforceable. Rather, GCD objects to the lack of ability to speedily remove the lien with the expedited procedures of the Wrongful Lien Act. Those facts are not the facts of this case, and the issue raised by GCD—the speedy removal of untimely filed mechanics' liens—is one of policy and not statutory interpretation. The Court should reject GCD's request for judicial activism.

Furthermore, it is highly unlikely that GCD's hyperbolic fact scenario would ever materialize. It has already been noted *supra* that the right to a mechanics' lien is founded upon a debt and merely secures the underlying obligation. Accordingly, mechanics' lien claims are extinguished within four to six years of final completion of the original contract by the expiration of the applicable statute of limitations on the underlying breach of contract claim. Since the Mechanics' Lien Act provides for attorneys' fees to the successful party, *see* Utah Code § 38-1-18 (2010), it is highly unlikely that a mechanics' lien notice would ever be filed where the debt cannot be enforced.

In the unlikely event that a notice of lien was filed thereafter, the property owner is not without relief. It could bring a declaratory judgment action, file a motion for summary judgment, and would be entitled to costs and attorneys' fees as the successful party if an action was filed under the Mechanics' Lien Act. *See* UTAH R. CIV. P. 54(d) (2010); UTAH CODE ANN. § 38-1-18 (2010). As acknowledged by this Court:

If Utah's mechanics' lien is a statutory creature, then section 38-1-18 is one of that creature's sharper claws. . . . it has the effect of discouraging abuse of the lien process by creating a strong disincentive for a would-be litigant to wrongfully inflict a mechanic's lien on a property owner whose property was not actually enhanced. . . . section 38-1-18 should also discourage the filing of frivolous and unsupportable mechanic's liens, because a mechanic's lien plaintiff who is not successful must pay the defendant's attorney fees.

A.K. & R. Whipple Plumbing and Heating v. Guy, 2004 UT 47, ¶ 24, 94 P.3d 270, 276-77 (Utah 2004).

In the even unlikelier event that a mechanics' lien was spitefully or maliciously filed by a contractor, the contractor would be subject to criminal charges and liable to the homeowner under the "abusive lien"<sup>1</sup> provisions of the Mechanics' Lien Act:

(1) Any person entitled to record or file a lien under Section 38-1-3 is guilty of a class B misdemeanor who intentionally causes a claim of lien against any property containing a greater demand than the sum due to be recorded or filed: (a) with the intent to cloud the title; (b) to exact from the owner or person liable by means of the excessive claim of lien more than is due; or (c) to procure any unjustified advantage or benefit.

(2) In addition to any criminal penalties under Subsection (1), a person who violates Subsection (1) is liable to the owner of the property or an original contractor or subcontractor who is affected by the lien for the greater of: (a) twice the amount by which the abusive lien exceeds the amount actually due; or (B) the actual damages incurred by the owner of the property.

UTAH CODE ANN. § 38-1-25 (2010).

In light of the foregoing, it is not practical to hypothesize that a contractor would wait 10 years or more to file a mechanics' lien out of spite or malice. If it did happen, the homeowner could file an action directly against the contractor under Utah Code § 38-1-25 (the action accrues when the lien is recorded, not when the lien claimant forecloses on the lien). As a result, applying the Wrongful Lien Act to mechanics' liens is unnecessary for the purpose of deterring unscrupulous contractors from abusing innocent homeowners.

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<sup>1</sup> In describing the lien filed by someone under subsection (1), the legislature substituted the word "abusive" for "wrongful" in 2007. However, Utah Code § 38-1-18 still refers the lien as "a wrongful lien." *See* Utah Code § 38-1-18 (2010). Accordingly, the Mechanics' Lien Act has its own definition of, and sets forth its own penalties for, the filing of a "wrongful" mechanics' lien. *See* Utah Code § 38-1-18 & 25 (2010).

In sum, whether or not a person is “entitled to a lien” is defined by Utah Code § 38-1-3. Whether or not the person “files a lien pursuant to Title 38, Chapter 1, Mechanics’ Liens” is defined by whether the lien ultimately filed is a mechanics’ lien. Whether or not the lien is enforceable is defined by the rest of the Mechanics’ Lien Act, including the timing provisions of Utah Code §§ 38-1-7 & 11. Although GCD would like to convince the Court that entitlement to a mechanics’ lien under Utah Code § 38-1-3 should include a requirement that a mechanics’ lien notice must be timely filed, such a requirement shifts the focus of Utah Code § 38-9-2(3) from the *person* filing the lien to the *process* by which the lien is filed in violation of the rules of statutory construction.

### **III. GCD’S REQUEST FOR ATTORNEYS’ FEES IS PREMATURE.**

GCD concludes the Brief of Appellees with a request for an award of costs and attorneys fees’ under the Wrongful Lien Act and the Mechanics’ Lien Act. Since this appeal is from an interlocutory order, GCD’s request is premature:

This is an interlocutory appeal; final judgment has yet to be entered. Under Utah Rule of Civil Procedure 54(d)(1), an award of costs is to be given to the “prevailing party” and is to “abide the final determination of the cause.” In interpreting this provision, we embrace the rule promulgated by the Arizona Supreme Court: “Unless provided by statute, there shall be no application for costs or attorneys’ fees made . . . in connection with a petition for review by interlocutory appeal. . . . [I]ssues of costs and attorneys’ fees, if any, shall abide the final resolution of the adjudication.” *In Re Rights to the Use of the Gila River*, 171 Ariz. 230, 830 P.2d 442, 458 (1992). We therefore instruct the district court to evaluate [the Appellee’s] request for costs and attorney fees incurred in defending against this interlocutory appeal when the case is finally resolved and it can identify the prevailing party.

Benjamin v. Amica Mut. Ins. Co., 2006 UT 37, ¶ 39, 140 P.3d 1210, 1218 (Utah 2006).

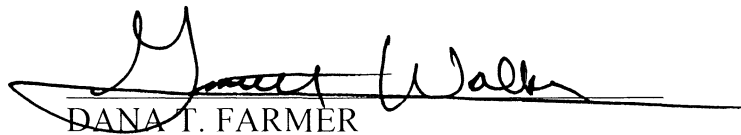
If the Court does see fit to make an award of costs and attorneys' fees, Peterson respectfully requests an award of costs and attorneys' fees from the Court pursuant to Utah Code § 38-9-7(5)(c) (2010) and Rule 54(d) of the Utah Rules of Civil Procedure since the posture of this case dictates that an award cannot be made pursuant to the Mechanics' Lien Act. To invoke the provisions of the Mechanics' Lien Act, Peterson would have had to file a complaint seeking to foreclose its mechanics' liens. *Compare* UTAH CODE ANN. § 38-1-11(2) (2010) ("A ***lien claimant shall file an action to enforce the lien filed under this chapter . . .***") with UTAH CODE ANN. § 38-1-18 (2010) ("***in any action brought to enforce any lien under this chapter*** the successful party shall be entitled to recover a reasonable attorneys' fee.").

This case did not involve an action "brought" by Peterson "to enforce" a mechanics' lien, but rather an action brought by GCD to nullify a mechanics' lien under the Wrongful Lien Act. Accordingly, the attorneys' fee provision found in the Mechanics' Lien Act is not applicable to this case.

### CONCLUSION

For the foregoing reasons, Peterson respectfully requests that the Court reverse the district court's determination that Peterson's mechanics' liens were not timely filed. In addition, Peterson respectfully requests that the Court reverse the district court's nullification of Peterson's mechanics' liens under the Wrongful Lien Act by reinstating the liens and ordering that Peterson be allowed to initiate an action to foreclose on the liens.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of May, 2010.



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### CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing **REPLY BRIEF OF THE APPELLANT PETERSON PLUMBING SUPPLY** to the following this 10 day of May, 2010:

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