

2006

Joel Sill v. Bill Hart dba Hart Construction : Brief of Respondent

Utah Supreme Court

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P. Bruce Badger, Robert J. Dale, Bradley L. Tilt; Fabian and Clendenin, P.C.; Attorneys for Petitioner. Christina I. Miller; Miller Vance and Thompson PC; Attorneys for Respondent.

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IN THE UTAH SUPREME COURT

JOEL SILL,

*

Respondent and
Cross-Petitioner,

*

*

Case No. 20060106

v.

*

BILL HART d/b/a HART
CONSTRUCTION,

*

Petitioner and
Cross-Respondent.

*

*

BRIEF OF RESPONDENT AND CROSS-PETITIONER

On Certiorari to the Utah Court of Appeals

P. BRUCE BADGER (4791)
ROBERT J. DALE (0808)
BRADLEY L. TILT (7649)
FABIAN & CLENDENIN, P.C.
215 South State, Twelfth Floor
P.O. Box 510210
Salt Lake City, Utah 84151-0210
Telephone: (801) 531-8900
Facsimile: (801) 531-1716

Attorneys for Petitioner and
Cross-Respondent

CHRISTINA I. MILLER (7940)
MILLER VANCE & THOMPSON PC
2200 North Park Avenue, Suite D200
P.O. Box 682800
Park City, Utah 84068
Telephone: (435) 649-8209
Facsimile: (435) 649-8428

Attorneys for Respondent and
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MILLER VANCE & THOMPSON PC
2200 North Park Avenue, Suite D200
P.O. Box 682800
Park City, Utah 84068
Telephone: (435) 649-8209
Facsimile: (435) 649-8428

Attorneys for Respondent and
Cross-Petitioner

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IN THE UTAH SUPREME COURT

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BILL HART d/b/a HART
CONSTRUCTION,

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BRIEF OF RESPONDENT AND CROSS-PETITIONER

STATEMENT OF JURISDICTION

This Court has jurisdiction under UTAH CODE ANN. § 78-2-2(3)(a) (2002).

**ISSUES PRESENTED FOR REVIEW BY PETITIONER
AND STANDARDS OF REVIEW**

This Court granted review on two issues presented by petitioner Bill Hart:

1. Whether the requirements of UTAH CODE ANN. § 38-1-11(4)(a) apply to counterclaims; and
2. Whether those requirements apply regardless of the remedies to a property owner under the Residence Lien Restriction and Lien Recovery Fund Act.

On certiorari, this Court “review[s] the decision of the court of appeals, not the trial court.” *Aris Vision Institute, Inc. v. Wasatch Property Management, Inc.*, 2006

UT 38, ¶ 7, ___ P.3d ___ (citing *Salt Lake County v. Metro W. Ready Mix, Inc.*, 2004 UT 23, ¶ 11, 89 P.3d 155). The court of appeals' interpretation of a statute is reviewed for correctness. *Id.* (citing *State v. Schofield*, 2002 UT 132, ¶ 6, 63 P.3d 667).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

UTAH CODE ANN. § 38-1-11(4)(a) & (e) (2001)¹:

(a) If a lien claimant files an action to enforce a lien filed under this chapter involving a residence, as defined in Section 38-11-102, the lien claimant shall include with the service of the complaint on the owner of the residence:

(i) instructions to the owner of the residence relating to the owner's rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act; and

(ii) a form affidavit and motion for summary judgment to enable the owner of the residence to specify the grounds upon which the owner may exercise available rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act.

* * *

(e) If a lien claimant fails to provide the owner of the residence the instructions and form affidavit required by Subsection 4(a), the lien claimant shall be barred from maintaining or enforcing the lien upon the residence.

¹ The version of section 38-1-11(4) set forth here was in effect in 2002 when Hart served his counterclaim complaint on Sill. In 2004, the legislature amended that section. See UTAH CODE ANN. § 38-1-11(4) (Supp. 2004). None of the amendments, however, is relevant to the issue before this Court, which must only construe the version of section 38-1-11(4) that was in place in 2002 (subsection (4) was enacted in 2001, effective April 30, 2001). Accordingly, all citations to subsection (4) in this brief are to that version.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

The court of appeals set out in its opinion the following accurate summary of the nature of this case and the proceedings in the trial court:

Sill is the owner of real property located in Summit County, Utah (the Property). Hart, a general contractor, began construction on the Property in the summer of 1999 and continued until approximately December 2001, at which time Hart left the job over a dispute with Sill regarding the completion of the project. In January 2002, Sill brought an action against Hart, alleging (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) breach of fiduciary duty, (4) negligent misrepresentation, (5) intentional misrepresentation, (6) unjust enrichment, and (7) defamation. Hart counterclaimed in February 2002, alleging breach of contract and unjust enrichment, and seeking to foreclose a mechanics' lien on the Property.

More than two and a half years later, in October 2004, Sill for the first time raised the issue of Hart's compliance with Utah Code section 38-1-11(4)(a). *See* Utah Code Ann. § 38-1-11(4)(a) (2001). The parties reserved the issue for post verdict determination, and the case went to trial one week later. The jury returned a verdict in favor of Hart in the amount of \$314,500 on Hart's unjust enrichment and mechanics' lien claims. In addition, Hart was awarded prejudgment interest, attorney fees, and court costs on his mechanics' lien claim.

Hart thereafter sought to reduce the verdict to judgment. Sill opposed the effort insofar as it related to Hart's mechanics' lien claim. Sill argued that the trial court lacked jurisdiction to hear Hart's mechanics' lien claim because Hart, when he served his counterclaim on Sill, did not include the instructions nor the form affidavit and motion for summary judgment required by section 38-1-11(4)(a). Hart disagreed, arguing that only plaintiffs filing a "complaint" – as opposed to those filing a counterclaim – are required to comply with section 38-1-11(4)(a). The trial court agreed with Hart and entered judgment in his favor on both the unjust enrichment and the mechanics' lien claims. The court also

awarded Hart prejudgment interest, attorney fees, and court costs on his mechanics' lien claim. Sill timely appealed.²

Sill v. Hart, 2005 UT App 537, ¶¶ 2-4, 128 P.3d 1215 (footnote omitted).

The Court of Appeals

The court of appeals reversed the trial court's ruling in favor of Hart on his mechanics' lien claim. Applying the well-established rules of statutory construction that a court looks to the plain language of the statute to determine its meaning and that a court does not infer substantive terms into the text that are not already there, the court of appeals held that under the proper interpretation of section 38-1-11(4)(a), Hart – a “lien claimant” – was required to serve the papers referenced in that section when he served his counterclaim on Sill. *Sill*, 2005 UT App 537, ¶¶ 8-13. The court rejected the trial court's and Hart's view that the term “complaint” as used in subsection (4)(a) referred only to the initial pleading filed by a plaintiff to commence a lawsuit and did not include a defendant's counterclaim initiating an action to enforce a lien filed under the mechanics' lien statutes. *Id.* The court noted that “although the statute specifically references ‘the service of a complaint,’ the term ‘complaint’ is frequently interpreted in Utah caselaw as including counterclaims[.]” *Id.* at ¶ 13. And, noting that “the statute at issue applies to a lien claimant filing ‘an action to enforce a lien filed under [the mechanics' lien statutes][,]’” the court observed that “Utah courts have interpreted

² Sill paid Hart the \$314,500 awarded him on the unjust enrichment claim. Sill also has paid Hart the \$5,598.92 awarded him in costs. (R. 1496, Partial Satisfaction of Judgment).

similar language to include counterclaims.” *Id.* at ¶ 12 (first brackets in original). It therefore rejected the trial court’s and Hart’s contention that because Hart had served a “counterclaim” rather than a “complaint,” the requirement to serve the papers referenced in subsection (4)(a) did not apply to him. *Id.* at ¶ 13.

The court of appeals also rejected Hart’s arguments that subsection (4)(a) did not apply to him because (1) he had not “file[d] an action” in this case (according to him, only Sill had done that) and (2) Sill ultimately had no right to relief under the Residence Lien Restriction and Lien Recovery Fund Act (LRFA).³ It concluded that subsection (4)(a) clearly applied to Hart, noting that under (4)(a)’s plain language “the statute here is triggered if a lien claimant files an action to enforce a lien filed under the Mechanics’ Liens Act involving a residence as defined by section 38-11-102” – precisely what Hart had done in filing his counterclaim against Sill. *Sill*, 2005 UT App 537 ¶¶ 9-10. As for Hart’s contention that because Sill ultimately had no right to relief under the LRFA, the court concluded that “the responsibility of determining whether the owner being sued has rights under the [LRFA] does not belong to the lien claimant.” *Id.* at ¶ 9 n.3. In short, that was not a basis for Hart to avoid the requirements of (4)(a).

Having interpreted (4)(a) to apply to Hart, the court of appeals rejected Sill’s argument that Hart’s failure to comply with (4)(a) deprived the trial court of jurisdiction to hear Hart’s lien foreclosure action. Instead, it held that “Hart’s failure to comply

³ Title 38, Chapter 11 of the Utah Code.

with [that] section * * * ‘constitut[es] an avoidance or affirmative defense’ under rule 8(c) of the Utah Rules of Civil Procedure.” *Id.* at ¶ 15.

Hart filed a petition for rehearing, which was denied. This Court then granted his petition for certiorari and Sill’s cross-petition.

B. Statement of Relevant Facts

It is undisputed that when Hart served his counterclaim complaint (setting forth the mechanic’s lien foreclosure action) on Sill in 2002, Hart did not include with the complaint the instructions and forms described in subsection (4)(a). That is the only fact relevant to the issues presented for review.

SUMMARY OF ARGUMENT

Under UTAH CODE ANN. § 38-1-11(4)(a) (2001), a provision in Utah’s mechanics’ lien statutes, a lien claimant who files “an action” against an owner of a residence to enforce a mechanics’ lien must serve on the owner certain instructions and forms with the “complaint” that initiates the foreclosure action. In light of this Court’s and the court of appeals’ case law that makes clear that a counterclaim institutes “an action,” and the common understanding that the term “complaint” includes a counterclaim, the court of appeals correctly interpreted subsection (4)(a) to apply to Bill Hart, who, as a lien claimant, filed an action by way of a counterclaim to enforce his mechanics’ lien against Joel Sill’s property.

That interpretation of the statute is in harmony with settled rules of statutory construction, namely that when construing a statute, a court (1) must read the plain

language of the statute as a whole, and interpret its provisions consistently with other statutes in the same chapter and related chapters, (2) must assume that each statutory term is used advisedly and that the intent of the legislature is revealed by the use of the term in the context and structure in which it is placed, and (3) must consider as its primary goal giving effect to the legislative intent, as evidenced by the statute's plain language and the purpose the statute was meant to achieve.

ARGUMENT

The court of appeals correctly interpreted the plain language of subsection (4)(a) to require Hart, a lien claimant, to serve with his counterclaim complaint the instructions and forms identified in that provision.

A. In construing subsection (4)(a), the court of appeals correctly concluded that the term “complaint” includes a counterclaim.

Hart argues that the court of appeals violated two rules of statutory construction by interpreting the term “complaint” as used in subsection (4)(a) to include a counterclaim: (1) a court must assume that each term was used advisedly and thus the statutory words must be read literally, and (2) a court may not infer substantive terms into the text that are not already there. The premise for that argument is that neither standing alone nor in the context of subsection (4)(a) is the term “complaint” reasonably interpreted to include a counterclaim. As shown below, that premise lacks support in precedent from both the Utah courts and courts in other jurisdictions, and in the major treatises.

1. The meaning of “an action” in subsection (4)(a)

Subsection (4)(a) provides:

If a lien claimant files an action to enforce a lien filed under [the mechanics’ lien statutes] involving a residence, as defined in Section 38-11-102, the lien claimant shall include with the service of the complaint on the owner of the residence [certain instructions and papers.]

The term “complaint” as used in that provision must be interpreted in the context in which it used. *See Ward v. Richfield City*, 716 P.2d 265, 266 (Utah 1984) (this Court assumes that “each term [in a statute] is used advisedly and that the intent of the Legislature is revealed in the use of the term in the context and structure in which it is placed”). “Complaint” refers back to “an action” filed by a lien claimant to enforce a lien. Thus, the starting point for determining the meaning of “complaint” is the meaning of the term “action.”

In *American Rural Cellular, Inc. v. Systems Communications Corp.*, 939 P.2d 185 (Utah Ct. App. 1997), a case decided four years before the legislature enacted subsection (4)(a), the court of appeals interpreted the phrase “action brought to enforce any lien under this chapter” in UTAH CODE ANN. § 38-1-18(1) (Supp. 1996) (the provision relating to the award of attorney fees and costs to the prevailing party in a mechanics’ lien action) to include a counterclaim. The court held that “a counterclaim to foreclose [a] mechanics’ lien[] * * * clearly qualifies as ‘an action brought to enforce any lien’ under the mechanics’ lien statute.” 939 P.2d at 193. The court of appeals’ holding in the instant case that the nearly identical phrase at the beginning of subsection

(4)(a) – “an action to enforce a lien filed under this chapter” – also includes a counterclaim (and thus the word “complaint,” which follows that phrase and is used with no qualifying or limiting language, naturally would include a counterclaim) is in harmony with settled rules of statutory construction. Specifically, in construing a statute, a court assumes that when the legislature enacted the statute, it was aware of prior court decisions interpreting similar statutory language. *Donahue v. Warner Bros. Picture Distributing Corp.*, 2 Utah 2d 256, 261, 272 P.2d 177, 180 (1954). In short, nothing in the plain language of subsection (4)(a) suggests that the legislature intended for the “action” referenced therein to have a more limited scope than the “action” referenced in section 38-1-18(1), which the court of appeals previously had interpreted in *American Rural Cellular* to include a counterclaim.

In an effort to avoid the court of appeals’ construction of the term “action” in *American Rural Cellular*, Hart argues that the language of section 38-1-18(1) is very different from the language in subsection (4)(a), because the word “any” is in front of the word “action” in section 38-1-18 and not in subsection (4)(a). He contends that “any action” and “an action” are so significantly different that one is compelled to conclude that “an action” in subsection (4)(a) does not include a counterclaim. As explained below, that the legislature intended such fine distinctions between the words used in section 38-1-18 and the nearly identical words used in subsection (4)(a) simply is not apparent from either *American Rural Cellular* or the plain language of subsection (4)(a).

At bottom, Hart's argument on this point is anchored in his contention that the legislature's use in subsection (4)(a) of the term "complaint," which he insists must be interpreted narrowly to refer only to an original complaint filed by a plaintiff, reflects an intent to limit the scope of the term "action" to an original action filed by a lien claimant as a plaintiff. That construction, however, is plausible only if one accepts Hart's position that the undefined term "complaint" – standing alone without any limiting language – is not reasonably interpreted as including a counterclaim and necessarily means only an original complaint filed by a plaintiff. That view is contrary to the prevailing view that a counterclaim is a complaint and that when the term "complaint" is used in a statute with no qualifying language, it naturally includes a counterclaim.

In *American Rural Cellular*, the court of appeals specifically held that "a counterclaim to foreclose [a] mechanics' lien * * * clearly qualifies as 'an action brought to enforce any lien' under the mechanics' lien statute." 939 P.2d at 193. It expressly said the words "an action" included a counterclaim, thus placing no significance on the word "any" that preceded the word "action" in section 38-1-18(1). Assuming – as one must – that the legislature was aware of *American Rural Cellular* when it drafted subsection (4)(a), its use of "an action" in the introductory clause can only be interpreted to carry the same meaning as the court of appeals gave "an action" in *American Rural Cellular* – that is, "an action" includes a counterclaim.

Had the more restrictive reading of subsection (4)(a) Hart proposes been intended, the legislature – mindful of the construction of “an action” in *American Rural Cellular* – certainly would have made explicit an intent to limit subsection (4)(a)’s reach to an original complaint filed by a lien claimant as a plaintiff. It is unreasonable to think, as Hart would have it, that the legislature used in subsection (4)(a) the words “an action” – precisely the words the court of appeals said included a counterclaim – but intended to leave to the reader of (4)(a) the task of divining a contrary legislative intent to give those words a meaning different from that determined in *American Rural Cellular*. Had the legislature intended the restriction Hart says it did, it would have made that intention clear by providing, for example: “If a lien claimant files an action, *as a plaintiff in an original complaint and not as a counterclaimant*, to enforce a lien filed under this chapter * * *.” To think otherwise is to ascribe to the legislature a hide-the-ball attitude in its enactment of subsection (4)(a) that simply is not suggested in anything Hart cites to this Court.

2. The meaning of “complaint” in subsection (4)(a)

With the foregoing statutory context in mind (*i.e.*, as used in subsection (4)(a), “an action” plainly includes a counterclaim), Hart’s proposed interpretation of the term “complaint” now can be addressed. He contends that because that term is not commonly understood to include a counterclaim, the legislature must have intended for “complaint” to limit the scope of “an action,” which precedes “complaint” in subsection (4)(a), to an original complaint filed by a lien claimant as a plaintiff, thereby

excluding a counterclaim complaint from subsection (4)(a)'s coverage. For the following reasons, that argument fails.

Hart first cites definitions of “complaint” from Black’s Law Dictionary and Rule 3(a), Utah Rules of Civil Procedure, as support for his apparent contention that an “action” can only be commenced by a plaintiff’s original complaint accompanied by service of a summons. Pet.’s Br. 13-14. He reasons, therefore, that when the legislature referenced a “complaint” in Subsection (4)(a), it must have intended to restrict the application of that provision to a plaintiff lien claimant who files an original complaint and to exclude the defendant lien claimant who files a counterclaim complaint.

The fundamental problem with that analysis is that rides on the notion that a counterclaim does not commence an “action” under Utah law. That simply is incorrect. As this Court said long ago, “[a] counterclaim is viewed as an original action, instituted by the defendant against the plaintiff and is tested by the same tests and rules as a complaint.” *Harman v. Yeager*, 103 Utah 208, 134 P.2d 695, 696 (1943). *See also State ex rel. Road Comm’n v. Parker*, 13 Utah 2d 65, 368 P.2d 585, 587 (1962) (“[N]either under our rules or elsewhere, can a counterclaimant cast himself in any other role than that of a plaintiff.”), *overruled in part on other grounds*, *Coleman v. State Lands Bd.*, 795 P.2d 622 (Utah 1990). That view is the prevailing view in this country. *See, e.g., Kane v. Kane*, 558 N.Y.S.2d 627, 629 (A.D. 1990) (“A counterclaim is in essence a complaint by a defendant against the plaintiff and

alleges a present viable cause of action upon which the defendant seeks judgment. It is not a responsive pleading merely because it is contained in a responsive paper; to wit, the answer. It is not a defense. * * * The pleader of a counterclaim is a plaintiff in his own right.” (internal quotation marks and citations omitted)); Wright & Miller, *Federal Practice and Procedure*, § 1184 at 24-25 (3d ed. 2004) (“Since a counterclaim basically is a defendant’s complaint, it is perfectly logical to oblige a plaintiff to respond to it.” (emphasis added)).⁴

Hart next cites Rules 7(a) and 13(a) of the Utah Rules of Civil Procedure and asserts that the “Utah Rules of Civil Procedure recognize ‘complaints’ and counterclaims as distinct and different, including defining them in completely different rules.” Neither of those rules, however, supports his view that “complaint” as used in Subsection (4)(a) cannot include a counterclaim.

Rule 7(a) defines “pleadings”:

Pleadings. There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party

⁴ Not surprisingly, the courts – this Court included – frequently refer to the pleading that sets forth a counterclaim as a “counterclaim complaint.” *See, e.g., Lundahl v. Quinn*, 2003 UT 11, ¶ 1, 67 P.3d 1000 (“she has filed a motion to intervene and an amended counterclaim complaint”); *Berkeley Investment Group, Ltd. v. Colkitt*, 259 F.3d 135, 138 (3rd Cir. 2001) (“Colkitt reasserted those counterclaims not dismissed with prejudice in an amended counterclaim complaint”); *Foundation for Interior Design Educ. Res. v. Savannah College of Art & Design*, 244 F.3d 521, 531 (6th Cir. 2001) (“College alleged in its counterclaim complaint * * *”); *Federal Kemper Life Assur. Co. v. Ellis*, 28 F.3d 1033, 1038 (10th Cir. 1994) (“Defendant then filed a motion for leave to file an answer and amended counterclaim complaint”).

is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served.

Hart acknowledges that a counterclaim is a “pleading.” *See* Pet.’s Br. 15 (arguing that had the legislature intended for Subsection (4)(a) to apply to a counterclaim, it “could have used the term ‘pleading’ instead of ‘complaint’”).

Assuming that when the legislature drafted subsection (4)(a) it looked to Rule 7(a) for a “pleading” that would cover both an original complaint and a counterclaim, it necessarily would have chosen “complaint” from the list of “pleadings” contained in that rule. That is so because “counterclaim” is not expressly set forth in Rule 7(a), and thus a “counterclaim” – acknowledged to be a “pleading” – must be subsumed in the term “complaint.” A counterclaim certainly is not an “answer,” a “reply to a counterclaim,” an “answer to a cross-claim,” a “third-party complaint,” or a “third-party answer” – the other “pleadings” listed in Rule 7(a), all of which the legislature naturally would have rejected as not descriptive of a counterclaim. On the other hand, selection of the term “complaint” from Rule 7(a) would be entirely consistent with the prevailing view of courts and commentators that a counterclaim is a complaint, it just is one filed by a defendant against a plaintiff. Rule 7(a) therefore does not advance Hart’s contention that the legislature, by using the term “complaint” in subsection (4)(a), must have intended a reference only to an original complaint filed by a plaintiff.⁵

⁵ The trial court also cited Rule 7(a) in support of its conclusion that the term “complaint” in subsection (4)(a) does not include a counterclaim. Memorandum Decision 3 (copy contained in Addendum No. 3 to Hart’s opening brief). The court

As for Rule 13(a), which talks about compulsory counterclaims, it is not clear why Hart believes that rule compels such a clear distinction between a counterclaim and a complaint that the legislature could not have intended that the term “complaint” in subsection (4)(a) include a counterclaim. Nothing in the plain language of Rule 13(a) suggests that a counterclaim is not a complaint. Moreover, Rule 8(a) of the Utah Rules of Civil Procedure recognizes that a complaint and a counterclaim are in substance the same pleading:

Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled.

In short, the rules Hart cites do not advance his argument.⁶

Significantly, and perhaps most telling, is that Hart does not cite a single decision where a court has construed the statutory term “complaint” not to include a counterclaim. Indeed, numerous courts faced with the question have construed the term to include a counterclaim. *See, e.g., Uncle Henry’s, Inc. v. Plaut Consulting, Inc.*, 382 F.Supp.2d 150, 154 (D. Me. 2005) (“I conclude that the only reasonable way to read the statute is to interpret the word ‘complaint’ to mean the pleading asserting the

described Rule 7(a) as “distinguishing a complaint from other pleadings”; however, it failed to observe that Rule 7(a) does not distinguish a “complaint” from a “counterclaim.”

⁶ Hart’s cites UTAH CODE ANN. § 42-2-10 (2005) and UTAH CODE ANN. § 78-7-35 (2002) as support for his argument that the legislature intended to limit the word “complaint” as used in subsection (4)(a) to an original complaint filed by lien claimant as a plaintiff and

claim in question, here Plaut Consulting's counterclaim."); *Wilson v. Baldwin*, 519 S.E.2d 251, 253 (Ga. App. 1999) (noting that the term "complaint" equates with the term "counterclaim" for purposes of the statute at issue); *Brink's Inc. v. City of New York*, 533 F.Supp. 1122, 1123 (S.D.N.Y. 1982) ("The City's argument that section 203(c) does not apply because the statute uses the term 'complaint,' whereas in the instant case Brink's is attempting to assert the recoupment against a 'counterclaim' is without merit; indeed, it borders on the frivolous."); *Breech v. Hughes Tool Co.*, 41 Del. Ch. 128, 189 A.2d 428, 429-30 (Del. 1963) (statute providing that if it appears in any "complaint" filed in chancery court that a defendant is a nonresident, court may order his appearance and may provide for seizure of his property, is not to be strictly construed to end that "complaint" exclude a counterclaim, but rather a counterclaim against a nonresident is within the purview of the statute).⁷

not as a counterclaimant. Pet.'s Br. 14. Those statutes do not help him, because they do not mirror the *context* in which "complaint" is used in subsection (4)(a).

⁷ In the court of appeals, Hart argued that *Wilson v. Baldwin* and *Brinks, Inc. v. City of New York* supported the trial court's construction of subsection (4)(a) rather than the one the court of appeals adopted. Those cases, however, do support the court of appeals' construction. In *Wilson*, the statute at issue prohibited bringing "a complaint seeking to obtain a change of legal custody" of a child "[a]s a counterclaim." *Wilson*, 519 S.E.2d at 327. That statutory prohibition illustrates the common understanding that the term "complaint" includes a counterclaim. If that were not the commonly understood meaning of "complaint," there would be no need for an express prohibition against bringing a complaint in the form of a counterclaim. The absence of similar limiting language with respect to the term "complaint" in Subsection (4)(a) indicates a legislative intent that "complaint" be given its commonly understood meaning (*i.e.*, the term includes a counterclaim). (*continued on next page*)

What Hart cannot avoid is that the term “complaint,” when used in the absence of limiting language, is commonly understood to include a counterclaim. *See, e.g., Liberty Chevrolet, Inc. v. Rainey*, 791 N.E.2d 625, 629 (Ill. App. 2003) (“[W]e agree with the trial court that, under the Agreement, a counterclaim is a ‘complaint.’”); *Lebrecht v. Orefice*, 105 N.Y.S.2d 318, 320 (N.Y. 1951) (“In the absence of language indicating a legislative intent that Section 23 * * * shall be inapplicable to counterclaims, this court is of the opinion that Section 23 applies equally to complaints and counterclaims, since for all practical purposes the counterclaim is the same as a complaint.”); *Quality Clothes Shop v. Keeney*, 106 N.E. 541, 542 (Ind. App. 1914) (“It would seem, therefore, that, by the express language of the statute, a counterclaim is a complaint, and the courts have held repeatedly that a counterclaim is similar in character to a complaint, and is, in fact, in the nature of a complaint against the plaintiff.”).

(*cont.*)

The *Brink’s* court, in construing the statutory term “complaint” in one statute to include a counterclaim, relied on the following language from another statute: “A cause of action contained in a counterclaim or a cross-claim shall be treated, as far as practicable, as if it were contained in a complaint.” *Brink’s Inc.*, 533 F.Supp. at 1123 n.3. Direct parallels to that provision exist in Utah law. As noted above, it is well-settled in this state that “[a] counterclaim is viewed as an original action, instituted by the defendant against the plaintiff and is tested by the same tests and rules as a complaint.” *Harman*, 134 P.2d at 696. Further, under Rule 8(a), Utah Rules of Civil Procedure, a counterclaim must meet precisely the same standards as a complaint. Those parallels lead one to the same conclusion that the *Brink’s* court reached: the term “complaint” includes a counterclaim.

3. The Second Circuit's decision in *Local Union No. 38, Sheet Metal Int'l v. Pelella*

Lacking any persuasive authority to support his view that the term “complaint” is not commonly understood to include a counterclaim, Hart offers *Local Union No. 38, Sheet Metal Workers Int'l v. Pelella*, 350 F.3d 73 (2nd Cir. 2003), as support for his position that the word “complaint” in subsection (4)(a) must be read as limiting the word “action” to an action commenced by an original complaint filed by a lien claimant as a plaintiff. The principal point from *Pelella* he asks this Court to consider is the two-judge majority's conclusion that the term “action,” as used in section 101(a)(4) of the federal Labor-Management Reporting and Act, does not embrace a counterclaim, because “action” is qualified by the phrase “to institute.” Hart argues by analogy that the term “action” in subsection (4)(a), because it is qualified by the subsequent phrase “service of the complaint,” likewise does not embrace a counterclaim. For the following reasons, that analogy does not work.

The *Pelella* majority's construction of “action” was based on the view that “[a] defendant does not ‘institute’ an action when he asserts a counterclaim.” 350 F.3d at 82. According to the majority, an action is only “instituted” when a plaintiff files a complaint and “[i]n sharp contrast, a defendant asserts a counterclaim in response to a plaintiff's institution of an action.” *Id.* Thus, the “sharp contrast” the majority found between a “complaint” and a “counterclaim” lay in the perception that one does not “institute an action” by filing a counterclaim. Hart asks this Court to adopt essentially

the same view and apply it in construing the terms “action” and “complaint” in subsection (4)(a). Pet.’s Br. 20 (“*Pelella*” also confirms that a counterclaim is properly considered as something in ‘sharp contrast’ from a ‘complaint.’ Subsection (4)(a) does not apply to this case in which Hart did not file this ‘action’ nor serve a ‘complaint[.]’”).

The problem with Hart’s invitation to adopt the *Pelella* majority’s reasoning in interpreting subsection (4)(a) is that the majority’s major premise – that one does not institute an action through a counterclaim – is directly contrary to Utah law. As previously noted, this Court has made clear that “[a] counterclaim is viewed as an original action, instituted by the defendant against the plaintiff and is tested by the same tests and rules as a complaint,” *Harman*, 134 P.2d at 696. Further, the court of appeals held in *American Rural Cellular* that “an action” included a counterclaim. This Court in *Harman*, like many other courts across the country, correctly equated a counterclaim with a complaint. Hart cannot escape that. Nor can it be assumed that the legislature, when it enacted subsection (4)(a), was unaware of *Harman*, which expresses the clear majority view that a counterclaim is in substance a complaint. In short, *Pelella* is inapposite; its reasoning cannot be harmonized with settled Utah law.⁸

⁸ In a well-reasoned opinion, the dissenting judge in *Pelella* concluded that “the right to ‘institute an action’ includes the right to assert a counterclaim.” 350 F.3d at 92 (Straub, J., dissenting). Thus, the dissent’s analysis is consistent with Utah law, not the majority’s.

4. Summary

Given the juxtaposition of the terms “action” and “complaint” in subsection (4)(a), this Court’s and the court of appeals’ pre-*Sill v. Hart* decisions making clear that “an action” may be instituted by a counterclaim, and the common understanding of the word “complaint” to include a counterclaim, the court of appeals correctly interpreted subsection (4)(a) to apply to counterclaims. It faithfully applied the principles that, in construing a statute, a court must look to its plain language as a whole, *Miller v. Weaver*, 2003 UT 12, ¶ 17, 66 P.3d 592, and must interpret a statutory term according to its commonly understood meaning. *Nephi City v. Hansen*, 779 P.2d 673, 675 (Utah 1989). Moreover, the court of appeals’ interpretation of (4)(a) is in harmony with the statute’s obvious purpose, which is to ensure that a homeowner is informed of his or her rights under the LRFA when a lien claimant brings an action against the homeowner to enforce a mechanics’ lien. *See Board of Educ. of Jordan School Dist. v. Sandy City Corp.*, 2004 UT 37, ¶ 8, 94 P.3d 234 (a court’s “aim in construing a statute is to give effect to the legislature’s intent in light of the purpose the statute was meant to achieve.”).

B. The plain language of subsection (4)(a) requires that all lien claimants, including general or original contractors like Hart, comply with its provisions.

Apparently as an alternative to his argument that subsection (4)(a) does not apply to counterclaims because it references service of a “complaint,” Hart contends that, in any event, (4)(a) did not require him to serve the referenced instructions and forms

because Sill had no rights under the LRFA with respect to Hart, a general or original contractor (hereafter simply “general contractor”). Hart reasons that because the LRFA gives a homeowner rights only with respect to subcontractors, the legislature could not have intended for subsection (4)(a) to apply to a general contractor like himself.⁹ As explained below, that argument fails for a variety of reasons.

1. Subsection (4)(a)’s plain language

The initial problem with Hart’s argument is that it fails to recognize that subsection (4)(a), by its terms, sets a notice requirement that applies to *all* lien claimants. As previously noted, the clear purpose of (4)(a) is to ensure that a homeowner is alerted to the rights created by the LRFA when a lien claimant brings an action to enforce a mechanics’ lien. Under the plain language of (4)(a), a “lien claimant” who “files an action to enforce a lien filed under [the mechanics’ lien statutes] involving a residence” must serve with the “complaint” (which, as previously discussed, naturally includes a counterclaim complaint) certain instructions and forms relating to the LRFA. Hart argues that notwithstanding that plain language, (4)(a) is not reasonably interpreted to obligate a general contractor like himself – as opposed to a subcontractor – to comply with its requirements, because the LRFA only applies to claims and liens of subcontractors, not to those of general contractors. The

⁹ Although Hart does not come right out and say it, his argument necessarily applies to any general contractor who brings an action to enforce a mechanics’ lien against a homeowner, whether that is by the filing of an original complaint as a plaintiff or by the filing of a counterclaim as a defendant. In other words, Hart’s argument is that

fundamental problem with that argument is that the plain language of (4)(a) must be ignored to adopt Hart's view.

Nowhere in the mechanics' lien statutes, subsection (4)(a) included, is there so much as a hint that "lien claimant" does not include a general contractor like Hart. Where the legislature intended to draw distinctions between a general (or original) contractor and a subcontractor, it used those specific terms to distinguish the two. *See, e.g.,* UTAH CODE ANN. §§ 38-1-2 (defining and distinguishing "original contractor" and "subcontractor"), -14 (separating "original contractors" and "subcontractors"), -17 (separating "contractor" and "subcontractor") (2005). Thus, on its face, subsection (4)(a)'s requirement that the "lien claimant" serve certain instructions and forms on the sued homeowner applies to anyone who has filed a lien under the mechanics' lien statutes, including a general contractor. Had the legislature intended to limit the reach of subsection (4)(a) to subcontractors, then it would have said just that – for example: "If a lien claimant *who is a subcontractor* files an action to enforce a lien * * *."

There also is no merit to Hart's additional argument that subsection (4)(a) does not apply in the situation where the homeowner ultimately is unable to exercise rights under the LRFA. Subsection (4)(a) does not limit the instructions/forms requirement to those situations where the homeowner ultimately is able to exercise rights under the LRFA. Nor does it exempt from that requirement a lien claimant who may believe the

subsection (4)(a) does not apply to a general contractor under any circumstances, because the homeowner has no rights against a general contractor under the LRFA.

owner has no such rights. Subsection (4)(a) simply sets forth a notice requirement with which the lien claimant must comply.

Hart's view that serving the required instructions and forms on Sill or other homeowners in his position would be useless is of no import. The legislature has decided otherwise, and "[i]t is not the function of this Court to evaluate the wisdom or practical necessities of legislative enactments." *Redwood Gym v. Salt Lake County Commission*, 624 P.2d 1138, 1143 (Utah 1981). Obviously, the legislature did not want the lien claimant deciding whether the homeowner in a given case is eligible for relief under the LRFA; it wanted to ensure that the sued owner would be the one making that determination, informed by the instructions and forms served in compliance with subsection (4)(a). Hart cannot escape the mandatory requirements of subsection (4)(a) simply because he thinks they are a bad idea under certain circumstances. *See LKL v. Farley*, 2004 UT 51, ¶ 8, 94 P.3d 279 (rejecting condominium owners' broad interpretation of the term "residences" as used in the LRFA as contrary to the statutory definition, and observing that although "their argument might represent good policy, * * * [i]n order for this court to accept the owners' position and affirm the trial court, we would be forced to ignore a clear statutory mandate and render the definition chosen by the legislature meaningless").

Instructive on this point is *Landmark Systems, Inc. v. Delmar Redevelopment Corp.*, 900 S.W.2d 258 (Mo. Ct. App. 1995), where the Missouri Court of Appeals correctly rejected a similar attack on a notice requirement in that state's mechanic's lien

statutes. There, the lien claimant argued that its failure to comply with the requirement should not bar its lien because the liened property owner was “a large corporation sophisticated in the areas of real estate and construction” and “had knowledge of the mechanic’s lien law.” 900 S.W.2d at 261. The court disagreed:

It is true, as [the lien claimant] suggests, the purpose of § 429.012 is to warn inexperienced property owners of the danger to them which lurks in the mechanic’s lien statute. However, this court is also aware the requirements of our statute are mandatory. The statute does not limit the necessity of this notice to those inexperienced with, or having lack of knowledge about, the mechanic’s lien laws. The statute has no exceptions and this court will not accept the invitation to create an exception in this case. Additionally, * * * allowing a lien where there was not substantial compliance with the notice provision contained in § 429.012 would add another issue to each mechanic’s lien case, namely the extent of the property owner’s knowledge of the mechanic’s lien laws. The fact such an exception was not incorporated into the statute indicates the legislature did not intend such a result.

900 S.W.2d at 261-62 (citations and internal quotation marks omitted).

That analysis applies with equal force here in determining the reach of subsection (4)(a). Whether the circumstances in any given case are such that a homeowner is or is not in a position to exercise rights under the LRFA may be an issue in many mechanics’ lien cases when litigation begins. It is precisely for that reason that the legislature could have reasonably determined that subsection (4)(a)’s requirements would apply to all lien claimants, thereby avoiding litigation on the question of whether

a lien claimant in a particular case justifiably decided not to provide the homeowner with the instructions and forms.¹⁰

In sum, subsection (4)(a) plainly applies to all lien claimants, Hart included.

The legislature did not carve out any exceptions to the instructions and forms requirement, and this Court should not create one.¹¹

¹⁰ Hart makes much out of the reference to “available rights” in subsection (4)(a)(ii), arguing that because Sill had no rights against him as a general contractor, he therefore was relieved of any obligation to comply with subsection (4)(a). As previously discussed, had the legislature intended to exempt general contractors from the requirements of (4)(a), it would have made that explicit by limiting “lien claimant” to subcontractors. Despite all of Hart’s protestations, the plain language of (4)(a) requires all lien claimants who bring an action to enforce a mechanics’ lien – general contractors and subcontractors alike – to serve the instructions and forms. That the “available rights” for a homeowner under the LRFA may only be against subcontractors is of no consequence. The legislature obviously intended for this notice provision to apply to all lien claimants. In any event, even if Hart’s tortured interpretation of (4)(a)(ii) were correct, the “available rights” language only refers to the “form affidavit and motion for summary judgment” that must be served; there is no similar language in (4)(a)(i), which requires that the “instructions” be served. Thus, even under Hart’s proposed interpretation of (4)(a)(ii), he still would not be relieved of the obligation to serve the instructions under (4)(a)(i). He, of course, failed to do that.

Additionally, Hart takes issue with the court of appeals’ statement that “the responsibility of determining whether the owner being sued has rights under the [LRFA] does not belong to the lien claimant.” *Sill*, 2005 UT App at ¶ 9 n.3 (Pet.’s Br. 26). He insists that because he is a general contractor, as opposed to a subcontractor, subsection (4)(a) must be construed not to apply to him. Again, Hart is asking this Court, as he did the court of appeals, to ignore the plain language of the statute, which obligates a “lien claimant” to do certain things, drawing no distinction between the lien claimant who is a general contractor and the lien claimant who is a subcontractor.

¹¹ The legislative history Hart cites provides him no help. It only confirms what the parties have acknowledged all along: The LRFA applies to claims and liens by subcontractors. That fact does not alter the analysis of what legislative intent the plain language of subsection (4)(a) reflects, insofar as the notice requirements in that provision are concerned.

2. The statutory scheme

The additional flaw in Hart's argument that subsection (4)(a) could not apply to general contractors due to the reference to the LRFA is that it ignores other related statutory provisions which undermine that view. A quick look at the statutory scheme the legislature has adopted for providing a homeowner notice of LRFA rights illustrates the point.

Hart's implicit argument that the legislature could not have intended to require a general contractor (as opposed to a subcontractor) to give the homeowner notice of rights under the LRFA through the service of the papers specified in subsection (4)(a) is defeated by other provisions in the mechanics' lien statutes. Two prominent provisions illustrate that the legislature intended to require a general contractor to give the homeowner notice of LRFA rights throughout the contractor-homeowner relationship.

First, a general contractor has a statutory obligation to give the homeowner notice of those rights early on in that relationship:

Beginning July 1, 1995, the original contractor or real estate developer shall state in the written contract with the owner what actions are necessary for the owner to be protected under Section 38-11-107 [(part of the LRFA)] from the maintaining of a mechanic's lien or other civil action against the owner or the owner-occupied residence to recover monies owed for qualified services.

UTAH CODE ANN. § 38-11-108(1) (2005). Second, a lien claimant – whether a general contractor or a subcontractor – is required to inform the homeowner of LRFA rights at the time the lien is filed:

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

* * *

(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)(a)(ix) (2005).

The foregoing provisions obviously are relevant to determining what the legislature intended in adopting the strict notice requirement for a lien claimant that appears in section 38-1-11(4)(a). A court must “read the plain language of the statute as a whole, *and interpret its provisions in harmony with other statutes in the same chapter and related chapters.*” *Miller v. Weaver*, 2003 UT 12, ¶ 17, 66 P.3d 592 (emphasis added). When the entire statutory scheme is considered, one is unable to conclude, as Hart contends, that the legislature intended to exclude a general contractor when it referenced “lien claimant” in subsection (4)(a).

C. The court of appeals’ construction of subsection (4)(a) does not undermine the basic purpose of the mechanics’ lien statutes.

Hart’s final attack on the court of appeals’ interpretation of subsection (4)(a) is that it undermines the intent and purpose of the mechanics’ lien statutes. Specifically, he contends that the court of appeals’ decision is contrary to “[t]he purpose of the mechanic’s lien * * * to protect those whose labor or materials have enhanced the value of property.” *A.K. & R. Whipple Plumbing and Heating v. Guy*, 2004 UT 47,

¶ 24, 94 P.3d 270. *See* Pet.’s Br. 29-31. He apparently is of the view that any homeowner-protective interpretation of a provision in the mechanics’ lien statutes cannot stand because it is contrary to that general purpose. That view, however, is at odds with the settled principle that “compliance with the [procedural provisions of the mechanics’ lien] statute[s] is required before a party is entitled to the benefits created by the statute[s].” *AAA Fencing Company v. Raintree Development and Energy Company*, 714 P.2d 289, 291 (Utah 1989).

In short, the general purpose of the mechanics’ lien statutes to protect those who have enhanced the value of property by supplying materials or labor does not permit a court or lien claimant to ignore procedural requirements in the statutory scheme that are designed to protect the homeowner as opposed to the lien claimant. Given that a “mechanics’ lien is a creature of statute,” *AAA Fencing Company*, 714 P.2d at 291, the legislature is free to enact whatever procedural prerequisites to enforcement of a lien and recovery of costs and attorney fees it believes are appropriate. Indeed, prior to the enactment of subsection (4)(a), the legislature had imposed other procedural requirements on the lien claimant, noncompliance with which results in a bar to enforcement of the lien or to the recovery of costs and attorney fees. *See, e.g.*, UTAH CODE ANN. § 38-1-11(1) (2005) (setting forth the time period for commencing an action to enforce a lien, which must be complied with or the lien is invalidated, as this Court held in *AAA Fencing Company*); UTAH CODE ANN. § 38-1-7(3)(c) (2005) (“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.").

In light of the foregoing, the court of appeals' construction of the plain language of subsection (4)(a) does not undermine the purpose of the mechanics' lien statutes simply because it is detrimental to Hart's position in this case (that is, to his effort to collect prejudgment interest and attorney fees). Contrary to Hart's contention, the result is not a windfall for Sill.

Hart first complains that the court of appeals' decision unfairly eliminates prejudgment interest owed by Sill. What Hart fails to disclose, however, is that under Utah law he could have asked the jury to include prejudgment interest in the damages awarded on his unjust enrichment claim. *See Shoreline Development, Inc. v. Utah County*, 835 P.2d 207, 212 (Utah Ct. App. 1992) ("we hold that prejudgment interest must be sought directly as damages in unjust enrichment cases"). He did not do that, electing to tie the prejudgment interest request exclusively to the mechanics' lien action. As for his additional complaint that reversal of the attorney fee award unfairly penalizes him, the penalty imposed for his procedural default (*i.e.*, failure to comply with subsection (4)(a)) is no more severe than the penalty the legislature has seen fit to impose for similar procedural defaults. For example, as previously noted, a lien claimant's "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 * * * in an action to enforce the lien." § 38-1-7(3)(c).

CONCLUSION

Based on the foregoing arguments, this Court should affirm the court of appeals' holding that subsection (4)(a) applied to Hart's counterclaim complaint, which instituted an action to enforce his mechanics' lien against Sill's property.

CROSS-PETITION

ISSUES PRESENTED FOR REVIEW BY CROSS-PETITIONER AND STANDARDS OF REVIEW

This Court granted review on one issue presented by cross-petitioner Joel Sill:

1. Whether a counterclaimant's failure to comply with UTAH CODE ANN. § 38-1-11(4)(a) creates a jurisdictional bar to adjudication of an action to enforce a lien.

On certiorari, this Court "review[s] the decision of the court of appeals, not the trial court." *Aris Vision Institute, Inc. v. Wasatch Property Management, Inc.*, 2006 UT 38, ¶ 7, ___ P.3d ___ (citing *Salt Lake County v. Metro W. Ready Mix, Inc.*, 2004 UT 23, ¶ 11, 89 P.3d 155). The court of appeals' interpretation of a statute is reviewed for correctness. *Id.* (citing *State v. Schofield*, 2002 UT 132, ¶ 6, 63 P.3d 667).

SUMMARY OF ARGUMENT

Under the plain language of subsections (4)(a) and (e), a lien claimant's failure to comply with the requirements of subsection (4)(a) upon filing an action to enforce a mechanics' lien results in a jurisdictional bar to that action. The statute is straightforward: If the lien claimant fails to comply with subsection (4)(a), the lien

claimant is barred from both maintaining and enforcing the lien. The statutory bar on maintenance of the lien results in an extinguishment of the lien at the point of the lien claimant's failure to comply with (4)(a). Based on settled case law from this Court, noncompliance with subsection (4)(a) therefore creates a jurisdictional bar to adjudication of an action to enforce a lien. The court of appeals erred in concluding otherwise.

ARGUMENT

The court of appeals erred in holding that subsection (4)(a) is not jurisdictional by misinterpreting and misapplying this Court's controlling case law.

A. Introduction

As discussed above, the court of appeals interpreted subsection (4)(a) to apply to Hart, holding that under the plain language of that provision he was required to include with service of his counterclaim on Sill certain instructions and papers related to the LRFA. Then, based on its recent decision in *Pearson v. Lamb*, 2005 UT App 383, 121 P.3d 717, the court rejected Sill's argument that under the plain language of section 38-1-11(4)(e), the result of Hart's noncompliance with subsection (4)(a) was a jurisdictional bar to Hart's mechanics' lien foreclosure action. Instead, the court viewed Hart's noncompliance with (4)(a) as an affirmative defense for Sill and remanded the matter to the trial court for further proceedings on that defense. As explained below, the court's holding in the instant case that subsection (4)(a) is not jurisdictional is contrary to the plain language of subsection (4)(e). The *Pearson*

court's analysis of the jurisdictional question, upon which that holding rests, is deficient in numerous respects.

Subsection (4)(e) says that “[i]f a lien claimant fails to provide the owner of the residence the instructions and form affidavit required by subsection 4(a), the lien claimant shall be barred from maintaining or enforcing the lien upon the residence.” Reading subsections (4)(a) and (4)(e) together, the statutory scheme is straightforward: A lien claimant who files an action to enforce a lien is required to serve the sued homeowner with certain papers and if the lien claimant fails to do that, both maintenance and enforcement of the lien are barred. That scheme has all the hallmarks of a jurisdictional bar. Nonetheless, the court of appeals, applying *Pearson*, rejected the argument that (4)(a) is jurisdictional. *Sill*, 2005 UT App 537, ¶ 14.

In *Pearson*, “[t]he only issue before the court [was] whether [the contractor’s] failure to comply with section 38-1-11(4)(a) of the Mechanics’ Liens Act divested the trial court of jurisdiction to hear [the contractor’s] mechanics’ lien foreclosure action.” *Pearson*, 2005 UT App 383, ¶ 4. The *Pearson* court held that that failure “did not divest the trial court of jurisdiction” because subsection (4)(a) is not mandatory but merely directory, and thus is not jurisdictional. *Id.* at ¶¶ 12, 15. The court characterized subsection (4)(a)’s requirements as “‘wholly informational’ and but ‘a minor component’ of the Mechanics’ Liens Act.” *Id.* at ¶ 12 (citing *Labelle v. McKay Dee Hospital Center*, 2004 UT 15, ¶ 17, 89 P.3d 113). In arriving at those conclusions, the *Pearson* court overlooked several critical points of law.

B. In interpreting subsections (4)(a) and (e), the *Pearson* court overlooked two elementary rules of statutory construction: (1) statutes are to be construed according to their plain language, and (2) statutes must be interpreted to give meaning to all parts, so as to avoid rendering part of a statute superfluous.

Well before the court of appeals decided the *Pearson* case, this Court had adopted a methodology for determining whether a statutory procedural requirement is jurisdictional. Whether such a requirement is jurisdictional depends on whether it is “mandatory” (jurisdictional) or merely “directory” (not jurisdictional). *Beaver County v. Utah State Tax Commission*, 919 P.2d 547, 552 (Utah 1996). A court is “guided in construing the language of [a] statute by the principle that generally a direction in a statute to do an act is considered ‘mandatory’ when consequences are attached to the failure to act. Conversely, when a statute requires an action to be taken without prescribing a penalty for failure to so act, the requirement is not often deemed mandatory.” *Stahl v. Utah Transit Authority*, 618 P.2d 480, 481 (Utah 1980).

Applying those principles in examining subsections (4)(a) and (e), it is plain that subsection (4)(a) is a mandatory, and thus jurisdictional, provision. Those subsections require that a lien claimant do an act (*viz.*, include with service of the lien foreclosure complaint on the homeowner certain papers concerning the LRFA) and expressly attach consequences to the failure to do the prescribed act (*viz.*, the lien claimant is barred from maintaining or enforcing the lien). In that sense, subsections (4)(a) and (e) are identical to the statutes at issue in *Madsen v. Borthick*, 769 P.2d 245 (Utah 1988) (construing the notice of claim provisions in the Utah Governmental Immunity Act),

because they all contain a condition to suit which, when not satisfied, deprives the trial court of jurisdiction. As this Court explained in *Madsen*:

Section 63-30-11 sets out the notice requirement [for filing suit against a governmental entity], and section 63-30-12 spells out the effect of failing to comply with the requirement [(“A claim against the state is barred unless notice of claim is filed with the attorney general and the agency concerned within one year after the cause of action arises.”)]. Section 63-30-11 provides that before a plaintiff may maintain an action against the State, he or she must file a notice of claim with the appropriate state entity. Section 63-30-12 provides that an action against the State is barred if the required notice is not filed. It therefore makes failure to give notice grounds for dismissal. A plain reading of those sections indicates that no suit against the State may be maintained if notice is not given. We therefore conclude that service of notice is a precondition to suit.

769 P.2d at 249 (footnotes and citations omitted).

Like the statutory notice requirement discussed in *Madsen*, the requirements of subsection (4)(a) are a condition to suit. And like the statutes in *Madsen*, subsection (4)(e) provides that a suit is “barred” if that condition is not satisfied. Thus, a lien claimant’s failure to satisfy the statutory condition to suit contained in subsection (4)(a) deprives the trial court of jurisdiction. See *Patterson v. American Fork City*, 2003 UT 7, ¶ 10, 67 P.3d 466 (“A plaintiff’s failure to comply with the [Utah Governmental Immunity Act]’s notice of claim provisions deprives the trial court of subject matter jurisdiction.”); *Madsen*, 769 P.2d at 250 (“Because the plaintiffs in *Madsen I* did not give the required notice and therefore failed to satisfy a precondition to suit, the trial court lacked jurisdiction to consider the merits of their claim.”). Moreover, given that a failure to comply with subsection (4)(a) results in a bar to *maintaining* the lien, in

MILLER VANCE
— & —
THOMPSON
A PROFESSIONAL CORPORATION

FILED
UTAH APPELLATE COURTS

JAN 30 2007

CHRISTINA INGE MILLER
DWAYNE A. VANCE
DAVID B. THOMPSON¹
NATALIE C. SEGALL²

PO BOX 682800
2200 NORTH PARK AVENUE
BUILDING D SUITE 200
PARK CITY, UTAH 84068

TELEPHONE: 435-649-8209
FACSIMILE: 435-649-8428

¹ RETIRED

² OF COUNSEL

January 30, 2007

HAND-DELIVERED

Appellate Clerk's Office
Utah Supreme Court
450 S. State
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Re: *Sill v. Hart*, Case No. 20060106

Dear Clerk:

I wish to make the following correction to the Brief of Respondent and Cross-Petitioner (red brief) in the above-referenced case, which is set for oral argument on February 1, 2007. At the top of page 35, second line, the reference to "subsection (4)(e)" should be to "subsection (4)(a)."

Enclosed are copies of this letter for inclusion with each copy of the brief that I filed. Thank you for your assistance.

Sincerely,

MILLER VANCE & THOMPSON

Christina Inge Miller

Enclosures

c: P. Bruce Badger (via fax - (801) 596-2814)
Robert J. Dale
Bradley L. Tilt

addition to the bar to enforcement of the lien, the lien is invalidated or extinguished by the failure to comply with subsection (4)(e). That is akin to the extinguishment of the lien this Court has held occurs after the statutory period for bringing an action to enforce a mechanics' lien has run, which results in a jurisdictional bar to enforcement of the lien. *See AAA Fencing Company*, 714 P.2d at 291-92.

The *Pearson* court erred in concluding otherwise, and that error made its way into the instant case. Significantly, the *Pearson* court mentioned subsection (4)(e) just once in its opinion, in the paragraph setting forth appellant Lamb's argument on appeal. The court never analyzed the plain language of (4)(e), choosing instead to decide the issue of whether subsection (4)(a) is mandatory or merely directory by "balanc[ing] a laborer's right to be paid for his labor and materials with the negative impact that liens have on an owner's credit and her ability to convey clear title." *Pearson*, 2005 UT App 383, ¶ 8. The court imported that balancing analysis from *Projects Unlimited, Inc. v. Copper State Thrift & Loan Co.*, 798 P.2d 738, 743 (Utah 1990), where this Court held that a lien claimant had substantially complied with the statutory notice of lien requirement and thus technical errors in complying with that requirement did not render the mechanics' lien notice invalid.

"Statutes are to be construed according to their plain language." *LKL Associates, Inc. v. Farley*, 2004 UT 51, ¶ 7, 94 P.3d 279. A court "interprets statutes to give meaning to all parts, and avoids rendering portions of the statute superfluous." *Id.* Indeed, the legislature's intent is derived from the plain language of a statute:

Our court has held that when interpreting statutes, our primary goal is to evince the true intent and purpose of the Legislature. The plain language of the statute provides us the road map to the statute's meaning, helping to clarify the intent and purpose behind its enactment. When reading the statutory language, our purpose is to render *all parts* of the statute relevant and meaningful, and thus, we presume the legislature used each term advisedly and according to its ordinary meaning. As a result, we avoid interpretations that will render portions of a statute superfluous or inoperative.

As is the case in construing statutes, this court's rules of practice and procedure require close attention to their exact language. It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. No clause, sentence or word shall be construed as superfluous, void or insignificant if the construction can be found which will give force to and preserve all the words of the statute.

State v. Maestas, 2002 UT 123, ¶¶ 52-53, 63 P.3d 621 (internal quotation marks, citations, brackets, and ellipses omitted) (emphasis added).

In not analyzing the plain language of subsection (4)(e), the *Pearson* court overlooked the foregoing settled rules of statutory construction. Subsection (4)(e) is an unambiguous, express mandate from the legislature: If a lien claimant fails to comply with subsection (4)(a), maintenance and enforcement of the mechanics' lien are "barred." The *Pearson* court simply ignored that language. See *LKL Associates*, 2004 UT 51, ¶ 8 ("While [the owners'] argument might represent good policy, the statutory language clearly limits the [LRFA's] protections to either the typical single-family home, or a duplex. In order for this court to accept the owners' position and affirm the trial court, we would be forced to ignore a clear statutory mandate and render the definition chosen by the legislature meaningless.").

Furthermore, in electing to apply the balancing analysis employed in *Projects Unlimited*, the *Pearson* court overlooked this Court’s conditional language in that case, which prefaced its conclusion that technical errors in complying with the notice provision of the mechanics’ lien statutes did not invalidate the notice: “[W]e have stated that ‘[a] lien once acquired by labor performed on a building with the consent of the owner should not . . . be defeated by technicalities, when no rights of others are infringed, *and no express command of the statute is disregarded.*” *Projects Unlimited*, 798 P.2d at 744 (quoting *Eccles Lumber Co. v. Martin*, 31 Utah 241, 249, 87 P. 713, 716 (1906)) (emphasis added). Unlike the notice provision at issue in *Projects Unlimited*, there is an express statutory command with respect to a lien claimant’s failure to comply with subsection (4)(a) – namely, subsection (4)(e)’s mandate that maintenance and enforcement of the lien are barred. The *Pearson* court ignored that command.

C. The *Pearson* court overlooked the two-pronged consequence of failing to comply with subsection (4)(a) in concluding that that provision is not “mandatory” because a dismissal of the mechanics’ lien action could be remedied by refiling or through Utah’s savings statute.

In support of its holding that subsection (4)(a) is neither mandatory nor jurisdictional, the *Pearson* court stated that “the procedures set forth in section 38-1-11(4)(a) are not ‘mandatory’ because no consequences attach to the failure to act.” *Pearson*, 2005 UT App 383 at ¶ 9. That, of course, is not literally true, as subsection (4)(e) sets out the direct consequence for failing to comply with subsection (4)(a). The

court reasoned, however, that because a dismissal of the contractor's mechanics' lien action could be remedied by refiling or through Utah's savings statute (UTAH CODE ANN. § 78-12-40 (2002)), there are effectively no consequences for not complying with subsection (4)(a), and thus that provision is neither mandatory nor jurisdictional.

In adopting that reasoning, however, the court overlooked the two-pronged consequence of failing to comply with subsection (4)(a). The first and foremost consequence under subsection (4)(e) is that "the lien claimant shall be barred from maintaining * * * the lien upon the residence." As previously noted, the lien is therefore extinguished at the point of the lien claimant's failure to comply with subsection (4)(a). Thus, contrary to what the *Pearson* court concluded, after the procedural default there is no lien upon which to refile an enforcement action.

D. The *Pearson* court's reliance on *Labelle v. McKay Dee Hospital Center*, 2004 UT 15, 89 P.3d 113, was misplaced.

In holding that subsection (4)(a) is not jurisdictional, the *Pearson* court relied heavily on *Labelle v. McKay Dee Hospital Center*, 2004 UT 15, 89 P.3d 113. In *Labelle*, this Court held that a mailing requirement of the Medical Malpractice Act was not jurisdictional – a requirement the Court described as "wholly informational" and "a minor component of the Malpractice Act's prelitigation scheme." *Labelle*, 2004 UT 15 at ¶ 17. The *Pearson* court likened the requirements of subsection (4)(a) to the mailing requirement of the Malpractice Act, calling those requirements "'wholly informational'

and but ‘a minor component’ of the Mechanics’ Liens Act.” *Pearson*, 2005 UT App 383 at ¶ 12.

The problem with comparing subsection (4)(a) to the statutory mailing requirement construed in *Labelle* is that the Malpractice Act does not contain a “consequence” provision like subsection (4)(e) that reveals a legislative intent to bar a malpractice action based on one’s failure to comply with the mailing requirement. Indeed, this Court made that point clear at the outset of its analysis in *Labelle*:

The language and structure of the Malpractice Act offer scant evidence of an intention to condition the exercise of the district court’s subject matter jurisdiction on compliance with the mailing requirement.

2004 UT 15 at ¶ 8. Just the opposite is true with respect to subsection (4)(a), given the plain language of subsection (4)(e). The *Pearson* court overlooked that critical distinction between *Labelle* and the case before it. Even if the *Pearson* court considered the requirements of subsection (4)(a) to be a minor component of the mechanics’ lien statutes, the legislature certainly did not think that, as evidenced by the serious consequences it decided to attach to the failure to comply with those requirements (as set forth in subsection (4)(e)).

E. The *Pearson* court mistakenly concluded that prejudice was a relevant consideration in the determination of whether subsection (4)(a) is jurisdictional.

In several parts of the *Pearson* court’s opinion, it suggested that the homeowner had to show she was prejudiced by the contractor’s failure to comply with subsection (4)(a) in order to establish that that provision is jurisdictional. *See Pearson*, 2005 UT

App 383 at ¶ 12 (“Defendant has not alleged that she was prejudiced.”) & ¶ 14 (“Furthermore, Defendant did not allege how the instructions and form affidavit required by section 38-1-11(a) [sic] would have conferred any demonstrable value here, but instead argued that such value (or lack thereof) was ‘irrelevant’ and ‘of no import.’”). That suggestion is legally incorrect, as a showing of prejudice is unnecessary if the statute is jurisdictional. *See, e.g., Lyons v. Port Authority of New York and New Jersey*, 643 N.Y.S.2d 571, 571-72 (A.D. 1996) (“The fact that the Port Authority may not have been prejudiced by the plaintiff’s failure to comply with the statute is immaterial, since the requirement is jurisdictional and must be strictly construed.”). Thus, the court mistakenly incorporated prejudice as a consideration in its analysis of whether subsection (4)(a) is jurisdictional.

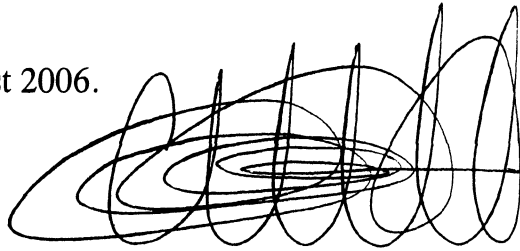
F. Summary

In sum, the court of appeals’ analysis of the jurisdictional question – as set out in *Pearson* and incorporated into this case – is fatally flawed. This Court therefore should reject that analysis and hold that subsection (4)(a) is a jurisdictional provision.

CONCLUSION

Based on the foregoing arguments, the Court should reverse the court of appeals’ holding that subsection (4)(a) does not create a jurisdictional bar to enforcement of a lien where the lien claimant fails to comply with the requirements of that provision.

Dated this 7th day of August 2006.

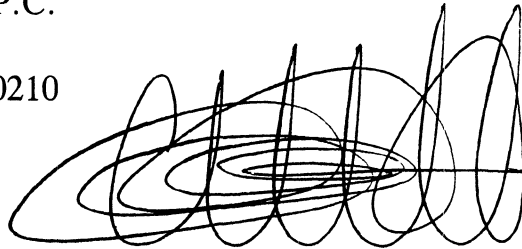
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CHRISTINA I. MILLER
MILLER VANCE & THOMPSON PC
Attorneys for Respondent and Cross-Petitioner

CERTIFICATE OF SERVICE

I certify that on August 7, 2006, I served the foregoing Brief of Respondent and Cross-Petitioner on the attorneys for Petitioner and Cross-Respondent by mailing two copies, with postage prepaid, in an envelope addressed to:

P. Bruce Badger
Robert J. Dale
Bradley L. Tilt
FABIAN & CLENDENIN, P.C.
P.O. Box 510210
Salt Lake City, Utah 84151-0210

A handwritten signature in black ink, appearing to read 'Christina I. Miller', written over a horizontal line.

CHRISTINA I. MILLER
MILLER VANCE & THOMPSON PC
Attorneys for Respondent and Cross-Petitioner