

1989

John Garrett v. Kenneth A. Rushton : Petition for Rehearing

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

J. Keith Henderson; Attorney for Appellant.

Mark O. Morris, Brent D. Wride; Ray, Quinney and Nebeker; Attorneys for Appellees.

Recommended Citation

Legal Brief, *Garrett v. Rushton*, No. 890494.00 (Utah Supreme Court, 1989).
https://digitalcommons.law.byu.edu/byu_sc1/2763

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
45.9
DOCKET NO.

UTAH SUPREME COURT

BRIEF

890494

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN GARRETT, dba GARRETT
DRYWALL,

Plaintiff-
Appellant,

v.

KENNETH A. RUSHTON, TRUSTEE,
FIRST AMERICAN SAVINGS BANK,
F.S.B., GREENSBORO, NORTH
CAROLINA, AND FDIC AS RECEIVER
FOR AMERICAN FEDERAL SAVINGS
AND LOAN ASSOCIATION, ANDERSON,
INDIANA, TRUSTEES,

Defendants-
Appellees.

Case No. 890494

Classification Priority 12

APPELLEES' PETITION FOR REHEARING

PROCEEDING ON A QUESTION CERTIFIED TO THE UTAH SUPREME COURT
BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,
THE HONORABLE BRUCE S. JENKINS

MARK O. MORRIS (A4636)
BRENT D. WRIDE (A5163) of
RAY, QUINNEY & NEBEKER
79 South Main Street
P. O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Attorneys for Defendants-Appellees

J. KEITH HENDERSON (A1459)
8 East Broadway, Suite 735
Judge Building
Salt Lake City, Utah 84111

Attorney for Plaintiff-Appellant

FILED

NOV 9 1990

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN GARRETT, dba GARRETT
DRYWALL,

Plaintiff-
Appellant,

v.

KENNETH A. RUSHTON, TRUSTEE,
FIRST AMERICAN SAVINGS BANK,
F.S.B., GREENSBORO, NORTH
CAROLINA, AND FDIC AS RECEIVER
FOR AMERICAN FEDERAL SAVINGS
AND LOAN ASSOCIATION, ANDERSON,
INDIANA, TRUSTEES,

Defendants-
Appellees.

:

:

:

:

:

:

:

:

:

Case No. 890494

Classification Priority 12

APPELLEES' PETITION FOR REHEARING

PROCEEDING ON A QUESTION CERTIFIED TO THE UTAH SUPREME COURT
BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,
THE HONORABLE BRUCE S. JENKINS

MARK O. MORRIS (A4636)
BRENT D. WRIDE (A5163) of
RAY, QUINNEY & NEBEKER
79 South Main Street
P. O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Attorneys for Defendants-Appellees

J. KEITH HENDERSON (A1459)
8 East Broadway, Suite 735
Judge Building
Salt Lake City, Utah 84111

Attorney for Plaintiff-Appellant

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THIS COURT'S COMPLETE RELIANCE ON THE <u>PROJECTS UNLIMITED</u> DECISION TO ANSWER THE QUESTION CERTIFIED BY THE U.S. DISTRICT COURT PREJUDICES APPELLEES AND FOLLOWS RATIONALE WHICH OUGHT TO BE RECONSIDERED.....	3
II. THIS COURT OVERLOOKED OR MISAPPREHENDED IMPORTANT LEGISLATIVE AMENDMENTS WHICH AROSE AFTER BRIEFING IN <u>PROJECTS</u> <u>UNLIMITED</u> WAS COMPLETED.....	5
A. The Utah Legislature's Intent In 1984 And Presently Is That Mechanics Liens Be Acknowledged In Accordance With Utah Code Ann. S46-1-1 et seq.....	5
1. The <u>Projects Unlimited</u> case did not take into account the legislature's expression that pre-April 29, 1985 liens contain a conforming jurat.....	6
B. The Legislature's Recent Enactment of The Notaries Public Reform Act Did Not Relax The "PlaceOf Residence" Requirement, But Rather Magnified The Requirement By Compelling More Specificity.....	7
C. The 1989 Amendment To The Mechanics Lien Statute And The 1988 Enactment Of The Notaries Public Reform Act Make Clear The Legislature's Intent Regarding Jurats And What Must Be Contained In Them.....	9

III. THIS COURT'S EXPANSIVE APPLICATION OF THE DOCTRINE OF SUBSTANTIAL COMPLIANCE IN THIS CASE AND IN <u>PROJECTS UNLIMITED</u> CREATES INCONSISTENCIES WITH PRIOR DECISIONS.....	10
A. <u>Projects Unlimited</u> Renders <u>Mickelsen</u> And <u>Baker</u> Meaningless.....	10
B. The Doctrine Of Substantial Compliance Should Not Be Used To Excuse The Complete Absence Of A Statutorily Required Element.....	12
IV. DOCTRINES OF STATUTORY CONSTRUCTION FAVOR REHEARING.....	14
CONCLUSION	15
CERTIFICATE OF COUNSEL	16
CERTIFICATE OF SERVICE	16
ADDENDUM A	
ADDENDUM B	

TABLE OF AUTHORITIES

CASES

<u>Baker v. Schwendiman,</u> 714 P.2d 675 (Utah 1986)	11, 12, 13
<u>Consolidated Elec. Distribs., Inc. v.</u> <u>Jepson Elec. Contracting, Inc.,</u> 536 P.2d 80, (Or. 1975)	9
<u>First Security Mortgage Co. v. Hansen,</u> 631 P.2d 919 (Utah 1981)	12, 13
<u>Graff v. Boise Cascade Corp.,</u> 660 P.2d 721 (Utah 1983)	12, 13
<u>Mickelsen v. Craigco, Inc.,</u> 767 P.2d 561 (Utah 1989)	5, 10, 11, 12, 13, 15
<u>P.I.E. Employees Fed. Credit Union v. Bass,</u> 759 P.2d 1144, (Utah 1988)	14
<u>Projects Unlimited, Inc. v. Copper State</u> <u>Thrift & Loan Co.,</u> 142 Utah Adv. Rep. 7 (Utah 1990)	1, 2, 3, 4, 5, 6, 9, 10, 11, 13, 14, 15

STATUTES AND REGULATIONS

Utah Code Ann. § 46-1-1 (1953)	2, 5, 6
Utah Code Ann. § 46-1-1 to 46-1-10 (1953)	7, 8
Utah Code Ann. §§ 46-1-1 to 46-1-17 (1988)	8
Utah Code Ann. § 46-1-13(3)(a)(iii) (1988)	8

Utah Code Ann. § 46-1-1 (Supp. 1990)	6
Utah Code Ann. § 46-1-13(3)(a)(iv) (Supp. 1990)	8
Utah Code Ann. § 38-1-7 (Supp. 1983)	5
Utah Code Ann. § 38-1-7(2) (Supp. 1990).....	6, 7
Utah Code Ann. § 57-3-1 (1989)	6, 7

INTRODUCTION

Appellees respectfully submit this Petition for Rehearing pursuant to Rule 35 of the Utah Rules of Appellate Procedure because Appellees believe that when this Court filed its October 26, 1990 Opinion (hereafter "Opinion") (attached hereto as Addendum "A") in this case, this Court either overlooked or misapprehended certain points of controlling case law and unequivocal expressions of legislative intent contained in recent statutory amendments. This Court should grant the Petition for Rehearing in this particular case because the Opinion is based exclusively upon this Court's recent decision of Projects Unlimited, Inc. v. Copper State Thrift & Loan Co., 142 Utah Adv. Rep. 7 (Utah 1990), which was filed on September 6, 1990, the same day this Court heard oral argument in this case. (Copy of Projects Unlimited attached hereto as Addendum "B"). Because this Court's Projects Unlimited decision did not exist until after the parties had already briefed and argued this matter, neither party had an opportunity to analyze and address the application of the Projects Unlimited rationale to this case.

Appellees recognize that on October 17, 1990 this Court denied the September 20, 1990 Petition for Rehearing filed in the Projects Unlimited case. However, a review of that Petition reveals that no legal arguments were directed towards the merits

of the jurat issues raised therein, particularly the requirements of §46-1-1, et seq. Utah Code Ann. and the applicability of the doctrine of substantial compliance. Appellees genuinely believe that the issues raised herein have not been fully considered by this Court in the Projects Unlimited case or in this case. For the reasons set forth below, this Court should afford Appellees an opportunity to argue the merits or lack of merits in applying the Projects Unlimited rationale here.

SUMMARY OF ARGUMENT

This Court should rehear argument in this case because this Court's exclusive reliance upon the Projects Unlimited decision effectively deprived Appellees of their opportunity to analyze the rationale of the Projects Unlimited decision to address that case in its briefs and argument. In addition, there are a number of legal and policy arguments not raised in the Projects Unlimited case which this Court should further consider before it determines to excuse some express statutory requirements while requiring strict compliance with others. The Projects Unlimited decision, and therefore the decision in this case, is flawed because statutory expressions of intent, through amendments to the Mechanics Lien Act and through the enactment of the Notaries Public Reform Act, make clear that lien notices must contain a jurat which completely conforms to the statutorily required elements.

Although this Court did not express any intent to do so in either this or in the Projects Unlimited case, the holding of these cases effectively overrules a line of important Utah decisions. The historical application of the doctrine of substantial compliance has been to cure an inadequate or incomplete attempt at meeting a statutory requirement. This Court's expansive application of the doctrine of substantial compliance in this case and in Projects Unlimited is a departure from this Court's historical practice, and now constitutes a rule of law permitting the complete absence of a required statutory element to be ignored.

Appellees do not believe that this Court intended to overrule prior case law, ignore legislative intent, or create a new rule of law. This Court should grant this Petition for Rehearing to have the benefit of having these concerns addressed and to be fully advised of all ramifications of following and supporting the Projects Unlimited decision.

ARGUMENT

- I. THIS COURT'S COMPLETE RELIANCE ON THE PROJECTS UNLIMITED DECISION TO ANSWER THE QUESTION CERTIFIED BY THE U.S. DISTRICT COURT PREJUDICES APPELLEES AND FOLLOWS RATIONALE WHICH OUGHT TO BE RECONSIDERED.

On September 6, 1990 this Court heard oral argument in this case on the question of whether, in 1984, the absence of the notary's place of residence from a jurat is fatal to the validity

of the mechanic's lien upon which the jurat appears. Unbeknownst to Appellees and on that same date, this Court handed down its decision in Projects Unlimited, which effectively answered the federal court's certified question. Not surprisingly, on October 26, 1990, this Court filed its decision in this case stating its ruling in three sentences that the Projects Unlimited decision was controlling.

The unfortunate coincidence of the Projects Unlimited decision's being announced at the same time Appellees were presenting their oral argument to this Court has effectively deprived Appellees of their ability to brief and argue the controlling, precedential law to this Court. Upon a closer analysis of the Projects Unlimited decision and the underlying parties' briefs filed therein, Appellees believe that there are significant legal issues not raised in that case which should have been considered. Further, Appellees believe that there are practical consequences to this Court's decisions here and in Projects Unlimited which this Court did not address, nor intend. For the following reasons this Court should grant Appellee's petition for rehearing and allow Appellees an opportunity to highlight for this Court the difficulties of Projects Unlimited and its likely progeny.

II. THIS COURT OVERLOOKED OR MISAPPREHENDED IMPORTANT LEGISLATIVE AMENDMENTS WHICH AROSE AFTER BRIEFING IN PROJECTS UNLIMITED WAS COMPLETED.

In Projects Unlimited, this Court recognized that mechanics liens are "purely statutory, and lien claimants may only acquire a lien by complying with the statutory provisions authorizing them." 142 Utah Adv. Rep. at 9 (citation omitted). Yet this Court ruled that the complete omission of the statutorily required element of the notary's place of residence will have no effect on the validity of the lien by operation of the doctrine of substantial compliance. This particular application of the doctrine of substantial compliance departs from established case law.

- A. The Utah Legislature's Intent In 1984 And Presently Is That Mechanics Liens Be Acknowledged In Accordance With Utah Code Ann. §46-1-1 et seq.

A recent amendment to the mechanics lien law makes clear that in 1984, the legislature desired all mechanic's liens to contain a jurat in conformance with §46-1-1, et seq. The mechanics lien at issue here was recorded on June 4, 1984. The applicable mechanics lien statute at that time, Utah Code Ann. §38-1-7 (Supp. 1983), stated that every notice of lien "must be verified by the oath of [the lien claimant] or of some other person." This Court held last year that a valid verification requires, among other things, a "proper jurat." Mickelsen v. Craigco, Inc., 767 P.2d 561, 564 (Utah 1989).

As this Court noted in Projects Unlimited, 142 Utah Adv. Rep. at 9 n.4, the Utah Legislature amended the mechanics lien statute in 1985 in an apparent attempt to simplify lien notices by removing the requirement of verification, and therefore of the jurat. However, the legislature apparently recognized the need for a proper jurat because, as this Court further noted in Projects Unlimited, the statute was amended again in 1989, reinstating the requirement that a notice of lien contain a jurat.

In 1989, the legislature amended the mechanic's lien statute to specifically provide a particular jurat form. The current statute requires "an acknowledgment or certificate as required under Chapter 3, Title 57." Utah Code Ann. §38-1-7(2)(e) (Supp. 1990).

Id. at 9, n.8 (emphasis added). The "particular jurat form" referenced in §57-3-1 Utah Code Ann. (1989) is the form contained in §46-1-1, et seq. Utah Code Ann. (Supp. 1990). That statute has consistently required the notary to affix his residence or location with the jurat.

1. The Projects Unlimited case did not take into account the legislature's expression that pre-April 29, 1985 liens contain a conforming jurat.

This Court quoted at length from the new, amended section 38-1-7(2) Utah Code Ann. (Supp. 1990) in footnote 2 to the Projects Unlimited decision with one notable and critical exception -- this Court made no mention of the fact that the legislature expressed its intent that all liens prior to April 29, 1985 and after April 24, 1989 be acknowledged with the particular jurat form contained in §46-1-1, et seq. Utah Code Ann.

The actual language appearing in the statute and apparently not considered by this Court is as follows:

This notice shall contain a statement setting forth the following information:

(e) the signature of the lien claimant or his authorized agent and an acknowledgement or certificate as required under Chapter 3, Title 57. No acknowledgment or certificate is required for any notice filed after April 29, 1985, and before April 24, 1989.

§38-1-7(2)(e) Utah Code Ann. (Supp. 1990). The necessary implication of this subsection is that the legislature intended all liens recorded prior to the 1985 amendment to be acknowledged under §57-3-1 Utah Code Ann. (1990). That statute now reads, in part:

(2) Notarial acts affecting real property in this state shall also be performed in conformance with Chapter 1, Title 46.

(Emphasis added.) The legislative intent of §57-3-1 is clear. To be recorded, a document must be acknowledged, and any notarial act must be in conformance with the Notary Public Act, which expressly required, at least in 1984, the "place of residence" of the notary.

B. The Legislature's Recent Enactment of the Notaries Public Reform Act Did Not Relax The "Place Of Residence" Requirement, But Rather Magnified The Requirement By Compelling More Specificity.

The 1988 enactment of the Notaries Public Reform Act heightened the place of residence requirements for jurats. In 1984, §46-1-8 Utah Code Ann. (1953) stated as follows:

To all acknowledgments, oaths, affirmations and instruments of every kind taken and certified by a notary

public he shall affix to his signature his official title and his place of residence and the date on which his commission expires.

In 1988, the Utah legislature repealed former §46-1-1 to 46-1-10 Utah Code Ann. (1953), and enacted the Notaries Public Reform Act, codified as §46-1-1 to §46-1-17 Utah Code Ann. (1988). This repeal and amendment gave the legislature an opportunity to reconsider the technical requirements of jurats and relax those requirements if it desired to do so. However, rather than relax the requirements of a jurat the legislature chose to require more specificity. Section 46-1-13 Utah Code Ann. now requires all notaries to obtain a notarial seal which "shall" include "the address of the notary's business or residence."

§46-1-13(3)(a)(iii) Utah Code Ann. (1988). Further amendments were made to the Notaries Public Reform Act effective July 1, 1990, which amendments perpetuated the "address" requirements of §46-1-13(3)(a)(iii) Utah Code Ann. (Supp. 1990) and added more requirements for the notarial seal. See, e.g. §46-1-13(3)(a)(iv) Utah Code Ann. (Supp. 1990).

Changing the notary statutes to require the notary's "address" necessarily implies two important concepts. First, the legislature looked at and considered the address requirements of the previous statutes and determined to retain that requirement. Second, and equally important, the legislature chose not to

perpetuate the general "place of residence" requirement and elected to enhance the requirement by calling for the more specific "address" of the notary.

- C. The 1989 Amendment To The Mechanics Lien Statute And The 1988 Enactment Of The Notaries Public Reform Act Make Clear The Legislature's Intent Regarding Jurats And What Must Be Contained In Them.

This Court's decision in Projects Unlimited overlooked or misapprehended the expressions of legislative intent described above. These significant changes were not and could not be called to this Court's attention by the parties in the Projects Unlimited case. And because this Court felt itself bound by Projects Unlimited, Appellees suggest that the Court overlooked or misapprehended important arguments in favor of requiring compliance with the jurat requirements.

In Projects Unlimited, this Court cited to a 1975 Oregon Supreme Court decision for the proposition that the modern trend is to "dispense with arbitrary rules which have no demonstrable value in a particular fact situation." 142 Utah Adv. Rep. at 9 (quoting Consolidated Elec. Distribs., Inc. v. Jepson Elec. Contracting, Inc., 537 P.2d 80, 83 (Or. 1975)). This Court then went on to state that Utah has "followed this trend both in the legislature and in the courts", pointing to the 1985 amendment to the mechanics lien law which removed the verification requirement. Id.

The difficulty with the above proposition that the legislature is relaxing lien content requirements is that it ignores the more recent expressions of the legislature reinstating the jurat requirements for liens and mandating more specificity for jurat content. The recent amendments identified above expressly rebut the proposition implied in Projects Unlimited that a lien's jurat is a "cumbersome" requirement needing only substantial compliance. While lien "content" requirements may be undergoing a gradual legislative simplification process, the jurat requirements for mechanic's liens have become more, not less exacting in recent years.

III. THIS COURT'S EXPANSIVE APPLICATION OF THE DOCTRINE OF SUBSTANTIAL COMPLIANCE IN THIS CASE AND IN PROJECTS UNLIMITED CREATES INCONSISTENCIES WITH PRIOR DECISIONS.

This Court's application of the doctrine of substantial compliance expands upon and effectively unsettles the rules applicable to mechanic's liens.

A. Projects Unlimited Renders Mickelsen And Baker Meaningless.

This Court recently settled the question of what constitutes a valid verification in Mickelsen v. Craigco, Inc., 767 P.2d 561 (Utah 1989).

We adopt as our rule that for a valid verification,

(1) there must be a correct written oath or affirmation, and (2) it must be signed by the affiant in the presence of a notary or other person authorized to take oaths, and (3) the latter must affix a proper jurat.

Id. at 564 (emphasis added). In an earlier decision, expressly reaffirmed by the Mickelsen court, this Court stated that "A notary public who signs a jurat must comply with all of the requirements of U.C.A., 1953, §46-1-1, et seq." Baker v. Schwendiman, 714 P.2d 675, 677 (Utah 1986) (emphasis added).

This Court has consistently held that what constitutes a "proper jurat" is a statutory matter, and Utah statutory law in effect at the time of the notice of lien in the instant case provided that a notary must affix "his place of residence" to all instruments certified. Yet this Court departed from its well settled policy and stated in Projects Unlimited that "substantial compliance would certainly be sufficient to satisfy [the jurat] requirement." 142 Utah Adv. Rep. at 10.

The rules of law expressed in Mickelsen and Baker are irreconcilable with the result in Projects Unlimited. In Projects Unlimited, the jurat contained only two of the four requirements in effect then. Only the signature and official title appeared, while the place of residence and date of commission expiration were absent. Projects Unlimited's application of the doctrine of substantial compliance to excuse the complete absence of 50% of the statutorily required elements of a jurat renders the proper jurat requirements of Mickelsen and Baker meaningless. It also renders meaningless the express statutory imperative regarding the contents of jurats. To reaffirm Projects Unlimited by following

it in this case calls into question the validity of Mickelsen and certainly overrules the expression of law in Baker. This cannot have been the intent of this Court.

B. The Doctrine Of Substantial Compliance Should Not Be Used To Excuse The Complete Absence Of A Statutorily Required Element.

Other applications of the doctrine of substantial compliance by this Court demonstrate that while substantial compliance may be applied to cure an attempt at meeting a statutory requirement, the doctrine cannot be used to fill a void. Before considering prior applications, this Court should have in mind that the Mickelsen decision expressly reaffirmed the holdings of First Security Mortgage Co. v. Hansen, 631 P.2d 919 (Utah 1981), Graff v. Boise Cascade Corp., 660 P.2d 721 (Utah 1983) and Baker v. Schwendiman, 714 P.2d 675 (Utah 1986). 767 P.2d at 564.

In the First Security case, the lien holder made the claim that the corporate acknowledgement contained in the lien substantially complied with the verification requirements. The lienholder also claimed that to invalidate the lien on the basis of an incorrect verification would be a "mere hypertechnicality." 631 P.2d at 921. Responding to this claim, this Court held:

Our statute leaves no room for doubt as to the requirement of a verified notice of claim, and this Court in Eccles Lumber Co. v. Martin, 31 Utah 241, 87 P. 713 (1906), stated that since a mechanic's lien is statutory and not contractual, a lien cannot be acquired unless the claimant complies with the statutory provisions.

in view of this holding, defendant's argument that it was nevertheless in substantial compliance with the lien statute is unavailing.

Id. at 922. Under First Security, the complete failure to comply with statutory provisions prevents the creation of a lien, and this complete absence of a verification cannot be cured by application of the doctrine of substantial compliance.

Perhaps the case most on point is Graff v. Boise Cascade Corp., 660 P.2d 721 (Utah 1983). In that case, the verification form was present, and only one of its elements was absent. Specifically, "the verification was complete except for the fact that the lien claimant's signature appear[ed] on the wrong line." 660 P.2d at 722. This Court rejected the application of the doctrine of substantial compliance in the absence of an essential element to the verification. Id. at 723. In Graff, the absence of one statutory element was fatal to the lien. This contrasts to the Projects Unlimited holding that the absence of two statutorily required elements was not fatal to the lien.

The Projects Unlimited decision calls into question the continuing validity and applicability of Mickelsen, Baker, First Security and Graff. Appellees respectfully submit that this Court has misapprehended the substantial compliance doctrine in Projects Unlimited and in this case. In both cases there was no compliance--substantial or otherwise--with the requirement that the notary provide "his place of residence."

Appellees respectfully submit that before overruling or seriously undermining this important line of Utah Supreme Court cases, the Court should grant the Petition for Rehearing, so that the soundness of the Projects Unlimited decision and its application in the present instance may be more thoroughly examined and tested.

IV. DOCTRINES OF STATUTORY CONSTRUCTION FAVOR REHEARING.

In a recent decision, this Court set forth the rule of law regarding unambiguous expressions of legislative intent.

When the language of a particular provision of a statute is ambiguous, the Court may attempt, following principles of statutory construction, to ascertain the intention of the Legislature; but where there is no ambiguity the plain language of the statute must be taken as the expression of the Legislature's intent.

P.I.E. Employees Federal Credit Union v. Bass, 759 P.2d 1144, 1151 (Utah 1988). There is nothing ambiguous about the legislature's desire that liens contain jurats, and that the jurats contain some description of the notary's address. Regardless of this Court's or anyone else's questions regarding the wisdom or policy reasons for such requirements, this Court has consistently honored legislative intent by recognizing that the cure for any harshness resulting from, or antiquity inherent in such requirements is a matter for the legislature.

[W]e cannot eliminate those antiquated and apparently unnecessary statutory formalities and bring consistency and clarity to this area by judicial fiat.

. . . .

[A] complete remedy for the problems created by these statutes would be the legislature's enactment of a law repealing technical swearing requirements in all statutes and substituting the simple requirement that the documents or statements in question be signed or made under penalty of perjury.

It would be most unfortunate if our action today served only to postpone a truly effective and thoroughgoing legislative remedy.

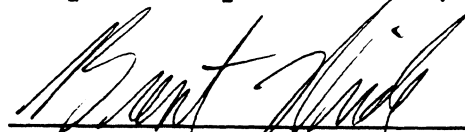
Mickelsen, 767 P.2d at 565-6 (Zimmerman, J. concurring). Contrary to this Court's historical reticence to amend law by judicial fiat, this Court's decision in Projects Unlimited and consequently in this case overlooked and/or misapprehended the clear expressions of legislative intent in recent amendments, and implicitly overruled the clear, unambiguous rulings in other jurat and mechanic's lien cases

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court grant their Petition for Rehearing.

DATED this 14th day of November, 1990.

Respectfully Submitted,



Mark O. Morris
Brent D. Wride

Attorneys for Defendant-Appellees

CERTIFICATE OF COUNSEL

I certify that the foregoing PETITION FOR REHEARING is
filed in good faith and not for the purpose of delay.

DATED this 9th day of November, 1990.

Respectfully Submitted,



Mark O. Morris
Brent D. Wride

Attorneys for Defendant-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 1990,
four copies of the foregoing APPELLEE'S PETITION OF REHEARING were
mailed, postage prepaid, to the following:

J. Keith Henderson
8 East Broadway, Suite 735
Judge Building
Salt Lake City, Utah 84111
Attorney for Plaintiff-Appellant



ADDENDUM A

OCT 29 1990

& NEBEKER

*This opinion is subject to revision before
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

DOCKET
CONTROL

-----oo0oo-----

John Garrett, dba Garrett
Drywall,
Plaintiff and Appellant,

No. 890494
F I L E D
October 26, 1990

v.

Kenneth Rushton, Trustee,
First American Savings Bank,
F.S.B., North Carolina, FSLIC as
receiver, American Federal Savings
and Loan Association, Anderson,
Indiana, Trustee,
Defendants and Appellees.

Geoffrey J. Butler, Clerk

Attorneys: J. Keith Henderson, Salt Lake City, for Garrett
Mark O. Morris, Brent D. Wride, Salt Lake City,
for First American & FSLIC,
Kenneth A. Rushton, Salt Lake City, for himself

On Certification from the United States District Court
for the District of Utah, The Honorable Bruce S. Jenkins

STEWART, Justice:

This case is here on a question of law certified by
the United States District Court for the District of Utah. The
question certified is: "[I]s a notice of lien placed of
record lacking the place of residence of a notary, but
otherwise complete . . . , void under Utah law?"

John Garrett, dba Garrett Drywall, filed a notice of
lien to secure payment of money due for drywall work performed
during the construction of the Brianhead Hotel in Brianhead,
Iron County, Utah. The entities that constructed the Brianhead
Hotel and the Brianhead Hotel Corporation filed bankruptcy
petitions in the United States Bankruptcy Court for the
District of Utah, Central Division. Pursuant to bankruptcy
court approval, the Brianhead Hotel was sold subject to liens
against the property on the date of sale. The appellees, the
beneficial interest holders of a trust deed secured by the

proceeds of the sale, challenged the validity of Garrett's lien on the ground that the notary failed to include his place of residence under his name on the jurat, as required by Utah Code Ann. § 46-1-8 (1981) (currently § 46-1-13 (Supp. 1990)). All other statutory requirements for a valid jurat were met.

The bankruptcy court held that a proper jurat must show "the county of residence of the notary public" and that the absence of that "essential element of a . . . jurat is not substantial compliance" under Utah law. On that basis, the bankruptcy court held that Garrett did not have a valid lien. That ruling was appealed to the United States District Court, and Chief Judge Jenkins certified the issue of the correctness of that ruling to this Court for resolution.

The precise question posed by the district court was recently addressed in Projects Unlimited, Inc. v. Copper State Thrift & Loan Co., 142 Utah Adv. Rep. 7 (Utah 1990). This Court held that the failure of a notary to affix the notary's place of residence to the jurat did not invalidate a mechanic's lien under either the mechanic's lien statute or the notary public statute. Accordingly, we hold that there was substantial compliance with Utah Code Ann. § 46-1-8 (1981) and that Garrett's lien is not invalid because of the absence of the notary's place of residence from the jurat.

WE CONCUR:

Gordon R. Hall, Chief Justice

Richard C. Howe, Associate
Chief Justice

Christine M. Durham, Justice

Michael D. Zimmerman, Justice

ADDENDUM B

Cite as
142 Utah Adv. Rep. 7

IN THE SUPREME COURT
OF THE STATE OF UTAH

PROJECTS UNLIMITED, INC., a Utah
corporation,

Plaintiff and Appellant,

v.

COPPER STATE THRIFT & LOAN CO.,
Valley Bank
& Trust Co., Cottonwood Thrift & Loan Co.,
Western Savings & Loan Co., Bradshaw
Development Co., et al.,
Defendants and Appellees.

No. 860340

FILED: September 6, 1990

Third District, Salt Lake County
The Honorable Judith M. Billings

ATTORNEYS:

Ellen Maycock, Robert F. Babcock, Darrel J.
Bostwick, Salt Lake City, for appellant

Jon C. Heaton, James Boevers, Salt Lake
City, for Copper State Thrift & Loan Co.,
Valley Bank & Trust Co., Cottonwood
Thrift & Loan Co., and Western Savings &
Loan Co.

Jeffrey M. Jones, Salt Lake City, for Copper
State

Dennis V. Haslam, Kathy A. F. Davis,
Salt Lake City, for Cottonwood Thrift

Steven D. Crawley, Salt Lake City, for
Bradshaw Development Co.

Richard K. Nebeker, Salt Lake City, for
Metler

Matthew F. Hilton, Draper, for
Stringfellow and Highland Orchards

Allen Sims, Gary E. Doctorman, Salt Lake
City, for Hugo F. Diederick

Richard A. Rappaport, Salt Lake City, for
Carolyn L. Nielsen

Julian D. Jensen, Salt Lake City, for Brent
Ivie Electric, Inc.

Bruce A. Maak, Salt Lake City, for Deseret
Pacific Mortgage and Scott A. Kafesjian

This opinion is subject to revision before
publication in the Pacific Reporter.

ORME, Court of Appeals Judge:

Projects Unlimited, Inc., appeals from a summary judgment invalidating its mechanic's lien against the interests of Copper State Thrift & Loan Company, Valley Bank & Trust Company, and Cottonwood Thrift & Loan Company, Inc. We affirm the summary judgment as to Cottonwood Thrift, but reverse as to Copper State and Valley Bank.

I. FACTS

Bradshaw Development Company, Inc. ("Bradshaw"), owned a parcel of land, the Highland Orchards property, which it planned to develop into the Highland Orchards Condominium project. The property was divided into two parcels with the objective of constructing condominiums in two phases--phase I and phase II. Phase I, when completed, would consist of eighteen condominium units. Bradshaw engaged Projects Unlimited, Inc. ("Projects"), to construct some of the phase I units. In September 1982, Bradshaw and Projects entered into a contract for the construction of two units--FF-6-A1 and FF-6-B1, hereinafter referred to as units 1 and 2. Those parties entered into a second contract in April 1983 concerning the construction of six additional units--FF-5-A1, FF-5-B1, FF-11-A1, FF-11-A2, FF-11-B1, and FF-11-B2, hereinafter referred to as units 3 through 8, respectively. The contracts allocated prices on a per-unit basis.

Copper State Thrift & Loan Company financed construction of the eight units. The Copper State loan to Bradshaw was secured by two trust deeds. The first deed was recorded in December 1982 and covered units 1 and 2. The second deed was recorded in June 1983 and covered units 3 through 8.

Relying on the terms of its loan agreement with Bradshaw, Copper State refused to advance additional funds to Bradshaw in June 1983. Sometime thereafter, Bradshaw stopped making payments to Projects. On October 7, 1983, Projects ceased construction with a substantial balance still owing to Projects. Bradshaw did not record its condominium declaration until August 1983.

During construction, units 1, 2, and 3 were sold. The sales of units 1 and 2 were financed by Valley Bank & Trust Company, which recorded trust deeds on those units in May 1983. Copper State subordinated its December 1982 trust deed to the May 1983 trust deeds of Valley Bank. The sale of unit 3 was financed by Western Savings & Loan Company, which is not a party to this appeal. After construction was halted, units 4 and 5 were sold. The sales of these units were financed by Cottonwood Thrift & Loan Company and secured by trust deeds recorded in December 1983.

In November 1983, Projects recorded a notice of mechanic's lien against the Highland Orchards property. The notice described Bradshaw as the owner of the subject property. The lien notice described the property by a metes and bounds description including all of the phase I and phase II property.¹ The notice did not describe the eight constructed units, by employing their descriptions as used in the condominium declaration or otherwise, nor did it allocate unpaid amounts attributable to each unit. The notice did not distinguish

between work performed under the September 1982 and April 1983 contracts. The notice of lien cited the construction starting date as October 10, 1982, and the ending date as October 7, 1983. Although the notice of lien contained the signature and seal of a notary and the date of notarization, it did not give the notary's address or commission expiration date.

Bradshaw and Projects negotiated to release from the lien units 4 and 5, financed by Cottonwood Thrift. The lien release specifically stated that units 4 and 5 were released from the scope of the lien in exchange for the payment of \$90,000. Thereafter, Projects filed an amended notice of lien. The amended notice was essentially identical to the initial notice except that \$85,000 was added to the "credits and offsets" figure and subtracted from the "balance owing" figure. The same metes and bounds description was used to describe the property. The amended notice did not exempt units 4 and 5 from the property description, but attached to it were a map of the entire condominium project and a copy of the partial release.

Projects commenced an action to foreclose the lien and recorded a *lis pendens* in March 1984. The complaint alleged that Bradshaw had breached its contracts with Projects. The complaint also called for a determination of priorities among the various claimants. Valley Bank was not named as a defendant in the complaint but had actual knowledge of the action at least by August 1984, when it reviewed a title report showing Projects' *lis pendens* and initiated relevant correspondence with Projects. On May 24, 1985, almost twenty months after it ceased construction, Projects filed an amended complaint which joined Valley Bank and others as defendants. Bradshaw failed to answer either complaint, and a default judgment was entered against it in December 1985.

Copper State, Cottonwood Thrift, Valley Bank, and Western Savings ("the Banks") moved for summary judgment on the remaining claims. They collectively argued that Projects' lien was invalid under the mechanic's lien statute and under the Condominium Ownership Act. Essentially, their arguments under the mechanic's lien statute were that (1) the *jurat* lacked the notary's address and the date her commission expired, (2) the notice describes more property than was actually subject to the lien, (3) the notice describes property which Bradshaw initially did not own, and (4) the lien did not distinguish between work performed under the September 1982 and April 1983 contracts. The Banks also argued that the Condominium Ownership Act required Projects to file a separate lien on each condominium unit as described in the condominium declaration.

Valley Bank also argued that Projects had

failed to join it as a defendant within the statutorily prescribed time and was therefore barred from later amending its complaint to add that bank as a defendant. Moreover, Cottonwood Thrift argued that it was not a proper party to the suit because Projects had released the units it financed from the scope of the lien. Projects filed a cross-motion for partial summary judgment on its claim against Copper State, its construction lender.

The trial court granted the Banks' summary judgment motions and denied Projects' motion. The court concluded that (1) Projects had unequivocally released from the lien's coverage the units financed by Cottonwood Thrift, (2) Projects failed to join Valley Bank as a party within the required time, and (3) the lien was invalid due to improper notarization "and on grounds otherwise set forth in the moving defendants' memoranda on file."

On appeal, Projects challenges each of the trial court's conclusions. Primarily, it argues that Utah does not require a lien notarization to contain the notary's address and/or commission expiration date.

The Banks assert the same arguments on appeal that they asserted in the trial court. In particular, they argue that we should affirm the trial court's decision on the notarization issue. Moreover, the Banks assert that, even assuming we were to agree with Projects on the notarization issue, we can and should affirm the summary judgment due to other failures in the lien notice. And indeed, "we may affirm trial court decisions on any proper ground(s), despite the trial court's having assigned another reason for its ruling." *Buehner Block Co. v. UWC Assocs.*, 752 P.2d 892, 895 (Utah 1988); see also *State v. One 1979 Pontiac Trans Am*, 771 P.2d 682, 684 (Utah Ct. App. 1989). The Banks also cross-appeal, seeking an award of attorney fees in the district court and on appeal.

II. STANDARD OF REVIEW

"Summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Transamerica Cash Reserve, Inc. v. Dixie Power & Water, Inc.*, 789 P.2d 24, 25 (Utah 1990); see Utah R. Civ. P. 56(c). In our determination of whether the trial court properly granted summary judgment, we must review the facts in the light most favorable to the losing party. *E.g.*, *Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist*, 773 P.2d 1382, 1385 (Utah 1989). Moreover, we review the trial court's legal conclusions for correctness and give no particular deference to that court's view of the law. *Id.*

III. MECHANIC'S LIENS GENERALLY

We begin our analysis by recognizing that "[t]he purpose of the mechanic's lien act is remedial in nature and seeks to provide prot-

ection to laborers and materialmen who have added directly to the value of the property of another by their materials or labor." *Calder Bros. Co. v. Anderson*, 652 P.2d 922, 924 (Utah 1982). On the other hand, we recognize that liens create "an encumbrance on property that deprives the owner of his ability to convey clear title and impairs his credit," *First Sec. Mfg. Co. v. Hansen*, 631 P.2d 919, 922 (Utah 1981), a fact the importance of which is magnified by the pre-recording priority accorded a valid mechanic's lien. See Utah Code Ann. §38-1-5 (1988). State legislatures and courts attempt to balance these competing interests through their mechanic's lien statutes and judicial interpretations thereof.

Mechanic's liens are purely statutory, and lien claimants may only acquire a lien by complying with the statutory provisions authorizing them. *Utah Sav. & Loan Assoc. v. Mecham*, 12 Utah 2d 335, 338, 366 P.2d 598, 600 (1961). However, Utah courts have recognized that substantial compliance with these provisions is all that is required.² *Chase v. Dawson*, 117 Utah 295, 296, 215 P.2d 390, 390 (1950); see also *Graff v. Boise Cascade Corp.*, 660 P.2d 721, 722 (Utah 1983). Moreover, we 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." *Eccles Lumber Co. v. Martin*, 31 Utah 241, 249, 87 P. 713, 716 (1906) (quoting 20 Am. & Eng. Encyclopedia of Law 276); see also *Mickelsen v. Craigco, Inc.*, 767 P.2d 561, 563 (Utah 1989). Courts from other states also subscribe to this view. See, e.g., *H.A.M.S. Co. v. Electrical Contractors of Alaska, Inc.*, 563 P.2d 258, 263 (Alaska 1977); *Horseshoe Estates v. 2M Co.*, 713 P.2d 776, 781 (Wyo. 1986).

Although courts have differing opinions about how liberally to construe provisions within their mechanic's lien statutes, "the modern trend is to dispense with arbitrary rules which have no demonstrable value in a particular fact situation."³ *Consolidated Elec. Distribs., Inc. v. Jepson Elec. Contracting, Inc.*, 272 Or. 376, 380, 537 P.2d 80, 83 (1975). Utah has followed this trend both in the legislature and in the courts. A legislative example of this trend is the 1985 amendment to section 38-1-7 of the mechanic's lien statute. The 1985 amendment greatly simplified the mechanic's lien notice, dispensing with several of the more cumbersome lien notice requirements.⁴ One judicial example of this trend is *Mickelsen*, in which this court clarified the lien verification process and dispensed with the notion that the claimant's verification required any formal ritual. 767 P.2d at 563.

With these general principles in mind, we turn to the particular arguments in this case.

We must determine whether the rigorous interpretations urged by the Banks are necessary to protect the interests of the parties in the instant situation. Unless we find that Projects' alleged failures have compromised a purpose of the mechanic's lien statute, those failures will be viewed as technical, and in the absence of any prejudice, we will uphold the lien.⁵

IV. INVALIDITY OF THE LIEN UNDER SECTIONS 38-1-7 AND -8

Sections 38-1-7 and 38-1-8 of Utah's mechanic's lien statute identify the statutory elements of a lien notice. At the time the dispute arose, section 38-1-7 provided that every notice of lien recorded with the county recorder must contain

a notice of intention to hold and claim a lien, and a statement of his demand after deducting all just credits and offsets, with the name of the reputed owner if known or if not known, the name of the record owner, and also the name of the person by whom he was employed or to whom he furnished the material, with a statement of the terms, time given and conditions of his contract, specifying the time when the first and last labor was performed, or the first and last material was furnished, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person.

Utah Code Ann. §38-1-7 (Supp. 1983).⁶ Section 38-1-8 provided:

Liens against two or more buildings or other improvements owned by the same person may be included in one claim; but in such case the person filing the claim must designate the amount claimed to be due to him on each of such buildings or other improvements.

Utah Code Ann. §38-1-8 (1988).

A. Failure of the Jurat

At the time the dispute arose, Utah Code Ann. §38-1-7 (Supp. 1983) provided that every notice of lien "must be verified by the oath of [the lien claimant] or of some other person." The district court found that a proper verification under section 38-1-7 required compliance with Utah Code Ann. §46-1-8 (1953), which provided: "To all acknowledgments, oaths, affirmations and instruments of every kind taken and certified by a notary public he shall affix to his signature his official title and his place of residence and the date on which his commission expires." The court then concluded that the

notary's failure to include her address and commission expiration date in the jurat invalidated the verification, which made the lien void. We disagree.

Initially, we note that verification is an essential part of a lien notice and "not a hypertechnicality that we can discount." *First Sec. Mtg. Co. v. Hansen*, 631 P.2d 919, 922 (Utah 1981).⁷ Verification by the lien claimant was thought necessary so that "[f]rivolous, unfounded, and inflated claims can thereby be minimized, and the prejudgment property rights of the [property owners] receive their due protection." *Id.* Verification accomplishes this purpose by creating "the possibility of perjury prosecution for verifying a false lien claim." *H.A.M.S. Co. v. Electrical Contractors of Alaska, Inc.*, 563 P.2d 258, 264 (Alaska 1977) (lien must be signed by claimant; corporate acknowledgment insufficient).

Although the 1983 mechanic's lien statute requires verification, Utah Code Ann. §38-1-7 (Supp. 1983), it does not state any particular procedure for verification. Those procedures have developed judicially in cases like *First Security Mortgage*. One of the most recent and instructive cases defining these procedures is *Mickelsen v. Craigco, Inc.*, 767 P.2d 561 (Utah 1989), decided after the trial court made its ruling in this case. In *Mickelsen*, we listed the essential elements for a proper verification: "(1) [T]here must be a correct written oath or affirmation, and (2) it must be signed by the affiant in the presence of a notary or other person authorized to take oaths, and (3) the latter must affix a proper jurat." *Id.* at 564. The Banks do not contest that an oath was made or that it was signed before a notary. They simply argue that the notary failed to affix a "proper jurat" because she omitted her address and the expiration date of her commission.

The Banks would have us adopt a position requiring strict compliance with the notary public statute in order to satisfy the verification requirement of the mechanic's lien statute as expounded in *Mickelsen*. We decline to adopt this position. A jurat is "merely evidence of the fact that the oath was properly taken before the duly authorized officer." 50 C.J.S. *Jurat* 705 (1947); see also *Stern v. Board of Elections*, 14 Ohio St. 2d 175, 181, 237 N.E.2d 313, 317 (1968); *Craig v. State*, 232 Ind. 293, 295, 112 N.E.2d 296, 297 (1953) (purpose is to evidence that oath was made before authorized officer). In view of this principle, because the jurat in this case clearly evidenced that the oath was given before a notary, it should be considered adequate. And even assuming that the legislature intended the inclusion of a jurat which conformed with the notary statute,⁸ substantial compliance would certainly be sufficient to satisfy that requirement. *E.g.*, *Chase v. Dawson*, 117 Utah 295, 296, 215 P.2d 390, 390 (1950).

In this case, the jurat contained the notary's signature, the date, and her official seal. These items were sufficient to evidence the fact that the document had been verified. Moreover, anyone who questioned the validity of the notarization could certainly confirm its authenticity with the simplest inquiry. Thus, we find that the lien's notarization substantially complied with the mechanic's lien and notary statutes. See, e.g., *Georgia Lumber Co. v. Harrison Constr. Co.*, 103 W. Va. 1, 5, 136 S.E. 399, 401 (1927) (notice sufficient though notary failed to affix official seal in contravention of statute); *Stern*, 237 N.E.2d at 317-19 (failure of notary to affix signature to jurat did not invalidate affidavit).

The purpose of the verification requirement is to assure that lien claimants file legitimate claims. *First Sec. Mtg.*, 631 P.2d at 922; see also *H.A.M.S.*, 563 P.2d at 264. In *First Security Mortgage* and *H.A.M.S.*, liens were held invalid because the lien notices did not contain the signature of the claimants but simply the signature of a notary attesting to the oath of the claimants. Unlike those cases, the president of Projects signed an oath that the contents of the lien notice were true and the notary attested to this fact. We see no policy reason why the notary's technical failure to include her address and commission expiration date increased, in any way, the likelihood that Projects would file a frivolous claim, especially since her failure presumably occurred after the verification was signed by the president.

For the above reasons, we find that the lien notice substantially complied with the "proper jurat" requirement established in *Mickelsen*.⁹

B. Other Grounds

Though we disagree with the trial court's legal conclusion on the notarization issue, we may still affirm the summary judgment based upon one of the other failures in the lien notice. The Banks argue that the lien notice is invalid because the metes and bounds description in the notice (1) covers more than one condominium unit without specifically referencing each, (2) describes more property than is actually subject to the lien, and (3) describes property which was not initially owned by Bradshaw and because the notice fails to distinguish between work completed under the two separate contracts.

These other grounds essentially challenge the descriptive contents of the lien notice. The purpose for descriptive terms in a lien notice is to adequately inform interested parties of the existence and scope of the lien. See *Park City Meat Co. v. Comstock Silver Mining Co.*, 36 Utah 145, 155, 103 P. 254, 260 (1906); *Eccles Lumber Co. v. Martin*, 31 Utah 241, 249, 87 P. 713, 717 (1906); see also *Parsons v. Keeney*, 98 Conn. 745, 749, 120 A. 505, 507 (1923); *Beall Pipe & Tank Corp. v. Tumac Inter-*

tain, Inc., 108 Idaho 487, 490, 700 P.2d 109, 112 (Ct. App. 1985); *Consolidated Elec. Distribs., Inc. v. Jepson Elec. Contracting, Inc.*, 272 Or. 376, 382, 537 P.2d 80, 82 (1975). Thus, courts look to see whether interested parties have been informed of the existence of the lien and whether the lien has misled or prejudiced those parties. See *Eccles*, 87 P. at 717; see also *Beall*, 700 P.2d at 112; *Horseshoe Estates v. 2M Co.*, 713 P.2d 776, 781 (Wyo. 1986). When lien notices have sufficiently informed interested persons that a lien exists on identifiable property and the complaining party has not been misled by the notice, the purpose of the provisions has not been thwarted and courts are inclined to find substantial compliance. See, e.g., *Horseshoe*, 713 P.2d at 781.

As we analyze each of the Banks' challenges to the lien description, our main purpose is to determine whether the notice adequately informed the Banks of the existence of the lien and whether the Banks were prejudiced, as a matter of law, by the descriptive terms. "Absent any such claim of prejudice or being misled in any manner by the description[s] which [appear] in the lien statement, we [will] hold that it was sufficient." *Id.*¹⁰

1. Inclusion Of More Than One Unit Without Designating Each

Section 38-1-7 provides, with our emphasis, that every notice of lien must contain "a description of the property to be charged with the lien, sufficient for identification." Utah Code Ann. §38-1-7 (Supp. 1983). Section 38-1-8 provides in pertinent part: "Liens against two or more buildings ... owned by the same person or persons may be included in one claim; but in such case the person filing the claim must designate therein the amount claimed to be due to him on each of such buildings." Utah Code Ann. §38-1-8 (1988). The Banks argue that these two sections require Projects to allocate its contract claims among all the relevant condominium units.

We begin our analysis with the first of three cases dealing with section 38-1-8 and its predecessor. In *Eccles Lumber Co. v. Martin*, 31 Utah 241, 87 P. 713 (1906), the owner of property on which a mechanic's lien had been filed argued that a lien notice was invalid because it failed to separately state amounts due on different structures. This court construed the predecessor statute to section 38-1-8, which contains language identical to that in section 38-1-8, and definitively stated that a blanket lien was not invalid for failing to allocate the amounts due. *Eccles*, 87 P. at 717. The lien claimant's failure did "not affect nor concern the owner of the property." *Id.* He was "fairly informed of the amount claimed against his property." *Id.* Rather, allocation was necessary "to protect the interests of the

lien claimants between and among themselves." *Id.*

The next case in which we discussed the issue was *United States Building & Loan Association v. Midvale Home Finance Corp.*, 86 Utah 506, 44 P.2d 1090 (1935). In *Midvale Home*, a corporation promoted the construction and sale of homes in a subdivision. When the corporation defaulted on its construction loan, the loan company brought suit to foreclose its mortgage on the subdivision property. We were called upon to determine the priorities among the mortgage, several mechanic's liens, and the interests of the individual home purchasers. The home purchasers argued that they had priority over the lien claimants because the lien claimants did not allocate amounts due on the various houses constructed in the subdivision. The purchasers attempted to distinguish *Eccles* on the basis that *Eccles* involved only the original owner. We rejected this argument, concluding that the mechanic's liens "attached before any of the claims of the unit holders." *Id.* at 519, 44 P.2d at 1096.

The final case in which we dealt with this subject was *Utah Savings & Loan Association v. Mecham*, 12 Utah 2d 335, 366 P.2d 598 (1961). In *Mecham*, a claimant filed a lien covering numerous subdivision lots. Some of the lots were owned by the Mechams, and some, by another individual. The lien failed to allocate the amounts due on each lot. Mecham argued that the lien was invalid. We affirmed the general rules in *Eccles* and *Midvale Home* but concluded that the lien claimant could only aggregate claims if the various lots and structures described in the lien were owned by the same person.

As in *Midvale Home*, the Banks in this case acquired their interests in the property subsequent to the time the mechanic's lien attached. Unlike the situation in the *Mecham* case, Bradshaw was apparently the only owner of the affected property when the lien attached, i.e., when construction started. Finally, the Banks do not argue that the lien misled them as to the claimed lien, nor have they demonstrated any prejudice from the aggregation of the claims in this case. Thus, we hold that the lien notice was not invalid, at least as against the Banks, simply because Projects failed to segregate the contract amounts attributable to individual condominium units.

2. Describing More Property Than Was Subject To Lien

The Banks argue that even if Projects was not required to segregate the claims attributable to each condominium unit, the lien was invalid for describing more property than was properly subject to the lien. However, the general rule is that the inclusion of

more land than that to which the lien may properly attach does not

vitate the lien upon so much of the land as is encompassed within the description and to which a lien may properly attach, at least if the description is not fraudulent or grossly misleading and innocent third parties are not affected.

Annotation, *Sufficiency of notice, claim, or statement of Mechanic's lien with respect to description or location of real property*, 52 A.L.R.2d 12, 83 (1957); see also *Adams Tree Serv., Inc. v. Transamerica Title Ins. Co.*, 20 Ariz. App. 214, 511 P.2d 658, 663 (1973) (valid portion of lien can be severed from invalid portion); *Beall Pipe & Tank Corp. v. Tumac Intermountain, Inc.*, 108 Idaho 487, 700 P.2d 109, 112 (Ct. App. 1985) ("the land properly subject to the lien is for the court to determine"); *Park City Meat Co. v. Comstock Silver Mining Co.*, 36 Utah 145, 103 P. 254, 259 (1909) ("court may limit the amount [of land] to what may be necessary"); *Horseshoe Estates v. 2M Co.*, 713 P.2d at 781 (lien which contained "no adequate description of the property" upheld where no claim of prejudice or being misled); *Engle v. First Nat'l Bank*, 590 P.2d 826, 832 (Wyo. 1979) (validating lien which described entire ranch rather than small parcel upon which house was constructed since no showing of prejudice by bank).

We are persuaded that no purpose of the mechanic's lien statute would be served by totally invalidating a lien which overdescribes the property upon which the lien can properly attach. There is no evidence in the record to suggest that the description was fraudulent. Moreover, the Banks do not argue that they were misled or prejudiced by the description. Therefore, we cannot say, as a matter of law, that the overly broad description results in the lien's invalidity as to the Banks.¹¹

3. Describing Property Not Initially Owned By Bradshaw

The Banks argue that the description may have included property not even owned by Bradshaw at the time the work was commenced on the project. They argue, citing *Mecham*, that this fact alone invalidates the lien. We do not think *Mecham* stands for this proposition. In *Mecham*, we invalidated the lien because "the materials, for which claim was made, were not furnished upon buildings owned by the same person or persons." 12 Utah 2d at 339, 366 P.2d at 601 (emphasis added). Here, the Banks do not argue that any of the materials or labor went into the construction of buildings not initially owned by Bradshaw but simply that some of the land included in the notice was not owned by Bradshaw at the outset of construction.

We fail to see much of a distinction for this case between a lien which includes too much property owned by the same owner and too much property part of which is owned by

another person. In either event, the court can determine what part of the property is actually subject to the lien. *Beall Pipe & Tank Corp. v. Tumac Intermountain, Inc.*, 108 Idaho at 498, 700 P.2d at 112. Whether the other person would have an action for slander of title is a separate matter. See *supra* note 11. Again, the Banks do not complain that they were actually misled or prejudiced by the notice. Thus, under these facts, the overly expansive property description did not compromise any purpose of the statute and does not invalidate the lien as to the Banks.

4. Inclusion Of Separate Contracts In One Lien

The Banks also argue that the lien must fail because the construction work on the property was performed under two separate contracts. Although the Banks advance this argument, they fail to cite much authority to support their position or to give any policy reasons for adopting such a rule. Utah courts have not addressed this question before, and there is a split of authority among other jurisdictions which have considered it.

Some courts have held that when work is performed under separate contracts, the work may not be aggregated into a single lien claim. Rather, a separate notice must be recorded for each contract. See, e.g., *F.A. Drew Glass Co. v. Eagle Mill*, 1 Kan. App. 614, 42 P. 387, 390 (1895); *Schively v. Radell*, 227 Pa. 434, 441, 76 A. 209, 211 (1910). Other jurisdictions, however, have allowed lien claimants to file a single notice even though the work was performed under more than one contract. See, e.g., *Fixture & Plumbing Co.*, 131 Ala. 256, 31 So. 26, 28 (1901); *Alabama State Fair & Agricultural Ass'n v. Alabama Gas Booth v. Pendola*, 88 Cal. 36, 25 P. 1101, 1101 (1891); *Parsons v. Keeney*, 98 Conn. 745, 749, 120 A. 505, 507 (1923); *Saint Joseph's College v. Morrison, Inc.*, 158 Ind. App. 272, 302 N.E.2d 865, 874-76 (1973); *Consolidated Elec. Distrib., Inc. v. Jenson Elec. Contracting, Inc.*, 272 Or. 376, 537 P.2d 80 (1975); *Fischer v. Meiroff*, 192 Wis. 482, 484, 213 N.W. 283, 285 (1927).

After reviewing the various cases, we find more persuasive the cases which have allowed the aggregation of claims arising under more than one contract. In *Consolidated Electric*, one of the comparatively more recent cases, the Oregon Supreme Court allowed a lien claimant to file a single lien notice covering two contracts with separate owners. Although the court stated that it did not favor the practice, it noted that each owner was sufficiently notified of the lien against its property and no "prejudice [had] been suffered by the defendants in any material respect." 272 Or. at 383, 537 P.2d at 83. The holding of *Consolidated Electric* significantly departed from earlier Oregon case law. See, e.g., *Dimitre Elec. Co.*

v. *Paget*, 175 Or. 72, 151 P.2d 630 (1944). In changing its position, the Oregon court recognized that "the modern trend [in mechanic's lien law] is to dispense with arbitrary rules which have no demonstrable value in a particular fact situation." *Consolidated Elec. Dist., Inc.*, 272 Or. at 380, 537 P.2d at 82.

The reasoning in *Consolidated Electric* makes sense, and we adopt that position in this case. Again, the Banks do not argue that the notice failed to adequately notify them of the existence of the lien or in any way prejudiced them. Thus, we hold that the inclusion of claims arising under two separate contracts in a single lien notice did not invalidate Projects' lien.

5. Summary

The Banks do not seriously claim that any of the alleged description failures misled or prejudiced them. The lien notices, while not a model of clarity and precision, appear to have adequately accomplished the purposes of the statute as concerns the Banks. Thus, we hold that Projects' lien notice substantially complied with sections 38-1-7 and 38-1-8 of the mechanic's lien statute. Accordingly, the lien is valid, at least as between the parties to this appeal.

V. INVALIDITY OF THE LIEN UNDER SECTION 57-8-19

The Banks also argue that the lien notice was invalid under the Condominium Ownership Act, which provides in pertinent part, with our emphasis:

Subsequent to recording the declaration as provided in this act, and while the property remains subject to this act, no lien shall thereafter arise or be effective against the property. During such period liens or encumbrances shall arise or be created only against each unit

Utah Code Ann. §57-8-19 (1953). The Banks argue that Projects' lien arose and was effective only after recordation of the condominium declaration. Thus, they argue, Projects was required to file a notice of lien for each specific condominium unit.

Utah appellate courts have not had an opportunity to interpret section 57-8-19 in this context. However, both the Montana and Wisconsin Supreme Courts have interpreted statutes nearly identical to Utah's in contexts similar to this case. See *Hostetter v. Inland Dev. Corp.*, 172 Mont. 167, 561 P.2d 1323 (1977); *Stevens Constr. Corp. v. Draper Hall, Inc.*, 73 Wis. 2d 104, 242 N.W.2d 893 (1976).

The facts in *Hostetter*, *Stevens*, and the instant case are essentially the same. In each case, the developer contracted for the construction of condominium units and construction work began. Thereafter, the developers filed condominium declarations. Some time later,

the contractors filed mechanic's liens which described the entire property on which the condominium complex was constructed and failed to allocate separate amounts to the different units. In each case, the defendants argued that a blanket lien over the entire project was inappropriate once the condominium declaration had been filed.

The courts in both *Hostetter* and *Stevens* held that the blanket lien was sufficient. *Hostetter*, 172 Mont. at 173, 561 P.2d at 1326-27; *Stevens*, 73 Wis. 2d at 114, 242 N.W.2d at 898. Both courts noted that the key factor was the point when the liens arose and became effective against the property; both courts held that this occurred at the commencement of construction. *Hostetter*, 172 Mont. at 172-73, 561 P.2d at 1326; *Stevens*, 73 Wis. 2d at 114, 242 N.W.2d at 898. The filing of the lien notice merely preserved and perfected the lien. *Stevens*, 73 Wis. 2d at 114, 242 N.W.2d at 898. The only effect that the condominium declaration had was to make the blanket lien proportionately effective against each unit constructed under the subject contract along with its corresponding undivided interest in the common area. *Hostetter*, 172 Mont. at 174, 561 P.2d at 1327; *Stevens*, 73 Wis. 2d at 114, 242 N.W.2d at 898.

The Banks attempt to distinguish *Hostetter* and *Stevens*. They note that, unlike this case, the work in those cases was done under a single contract. They argue that this fact alone should produce a different result, but they do not state the reasons for their conclusion. We have concluded that a lien notice may include work performed under separate contracts and fail to see why the result should be different when the work is performed on a condominium project.¹²

We find the reasoning in *Hostetter* and *Stevens* sound and adopt their rationale. Section 57-8-19 does not affect the validity of the lien in this case. The lien arose and became effective when Projects commenced work on the project. As previously noted, the lien notice was sufficient to perfect that lien, making the lien valid at least as to the units properly subject to the lien and as between the parties to this appeal. The only effect of section 57-8-19 and the intermediate filing of the declaration was to make the lien proportionately effective against each unit constructed under the subject contracts and each such unit's corresponding undivided interest in the common area. Having concluded that the lien notice is not facially invalid as to the Banks, we turn now to the separate arguments presented by Valley Bank and Cottonwood Thrift.

VI. VALLEY BANK DISMISSAL

The trial court granted summary judgment to Valley Bank on the basis of Utah Code Ann. §38-1-11 (1988). That statute prov-

ides in pertinent part:

Actions to enforce [mechanic's] liens must be begun within twelve months after the completion of the original contract, or the suspension of work thereunder for a period of thirty days. Within the twelve months herein mentioned the lien claimant shall file for record with the county recorder of each county in which the lien is recorded a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action

Id.

Projects commenced this action and recorded its *lis pendens* five months after it ceased construction, well within the statutory twelve-month period. It did not, however, add Valley Bank as a defendant until it filed its amended complaint, nearly twenty months after construction ceased. Valley Bank argued, and the trial court agreed, that section 38-1-11 is a statute of limitation¹³ which required Projects to name Valley Bank as a defendant within the twelve-month period, on pain of its action against Valley Bank being forever barred. We read section 38-1-11 differently.

Section 38-1-11 has two requirements which serve two different purposes. First, the statute requires the lien claimant to commence his action within twelve months of the completion of the project or suspension of work. See *supra* note 13. Valley Bank argues that the lien claimant is also required by this provision to join all persons having an interest in the property within the twelve-month period. However, the statute does not expressly require the lien claimant to do so and, on the contrary as hereafter explained, obviously contemplates the joinder of defendants not initially named after the expiration of the twelve-month period.

The second "requirement" of section 38-1-11 is that the lien claimant file a *lis pendens* within the twelve-month period. However, the limited effect of a failure to comply with this requirement is expressly set forth in the statute. When a claimant fails to file the *lis pendens* within the twelve-month period, the lien itself is not invalidated, but rather it is rendered void as to everyone except those named in the action and those with actual knowledge of the action. By contrast, it follows logically, timely recordation of the *lis pendens* imparts constructive notice to all persons concerned with the property of the action to enforce the lien, see Utah Code Ann.

§78-40-2(1989), regardless of whether they were named as parties or had actual knowledge of the action.

Valley Bank's contrary interpretation would render portions of the statute meaningless or nonsensical. See *Millert v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980) ("[S]tatutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and that interpretations are to be avoided which render some part of a provision nonsensical or absurd."). For one thing, it would be pointless to provide that a lien would be valid as against persons with actual knowledge of the action to enforce the lien who had not been named as parties in the action as filed within the twelve-month period unless it were fully anticipated that such parties could be brought into the action, by amendment, beyond the twelve-month period. It would make no sense to consider the lien to be valid as against such persons unless it could be enforced against them by joining them in the action as previously commenced. Moreover, failure to join a defendant in the complaint as filed within the twelve-month period cannot be conclusively fatal to the claimant's ability to enforce the lien as against the defendant or it would be meaningless for the statute to refer to the continued effectiveness of the lien, even absent timely recordation of a *lis pendens*, as against nonparties, like Valley Bank in this case, who have actual knowledge of the action.

We conclude that section 38-1-11 should be read as a whole to require a lien claimant to commence a mechanic's lien action and record a corresponding *lis pendens* within the twelve-month period. Commencing the action preserves the lien. Recording the *lis pendens* imparts constructive notice of the lien enforcement action to everyone interested in the lien property. Only when the claimant fails to timely record the *lis pendens* can an interested person argue that it is not subject to the lien, and then only if such person was not named as a party and did not have actual knowledge of the action.

In this case, Projects commenced the action and filed the *lis pendens* within the required twelve-month period. Valley Bank was therefore subject to the lien¹⁴ and could properly be joined by an appropriate amendment to the complaint as was done in this case. The trial court accordingly erred when it dismissed Valley Bank from the action.¹⁵

VII. AMBIGUITY OF "PARTIAL" LIEN RELEASE

The trial court granted Cottonwood Thrift & Loan Company's summary judgment motion on two grounds: First, the court concluded that, "based on undisputed facts," Cottonwood Thrift had reasonably relied upon the recorded lien release. Second, the court concluded that the effect of the release was

clear on its face. Projects argues on appeal that the release was ambiguous. It also argues that reasonable reliance is a concept necessarily too fact-sensitive for disposition by summary judgment.

Whether a contract is ambiguous is a question of law. *E.g.*, *Morris v. Mountain States Tel. & Tel. Co.*, 658 P.2d 1199, 1200 (Utah 1983). Moreover, the trial court must determine "whether a contract is ambiguous ... before it takes any evidence in clarification." *Id.* It follows, therefore, that if the contract is clear on its face, the trial court need not—and in fact should not—consider evidence of a contrary meaning.

The release in this case stated in pertinent part that Projects "in consideration of [\$90,000] ... does hereby release, satisfy and discharge that certain claim of lien ... against the following described real property." The release then described units 4 and 5. This language is susceptible of no other interpretation but that the two units were completely released from the scope of the lien.¹⁶ The trial court properly construed the release as a matter of law and properly declined to consider evidence of another intent. Consequently, we affirm the trial court's decision to dismiss Cottonwood Thrift from the action.¹⁷

VIII. CONCLUSION

The trial court's order and judgment of dismissal are affirmed only as they relate to Cottonwood Thrift.¹⁸ As to Copper State and Valley Bank, we reverse and remand for trial or other appropriate proceedings consistent with this decision.

WE CONCUR:

Gordon R. Hall, Chief Justice
Richard C. Howe, Associate Chief Justice
I. Daniel Stewart, Justice
Michael D. Zimmerman, Justice

Durham, Justice, having disqualified herself, does not participate herein; Gregory K. Orme, Court of Appeals Judge, sat.

1. Accordingly, the metes and bounds description was not confined to the property on which the eight units constructed by Projects were located. However, it appears from the record that the only new structures on any part of the Highland Orchards property were the units constructed by Projects.

2. The Banks do not argue that Projects completely failed to comply with any of the particular requirements of Utah Code Ann. §38-1-7 (1983). Rather, they argue that Projects' efforts did not substantially comply with the statutes.

3. This trend is not confined to this area of the law but can be seen in others as well. See, *e.g.*, *Tech-Fluid Servs., Inc. v. Gavilan Operating, Inc.*, 787 P.2d 1328 (Utah Ct. App. 1990). In *Tech-Fluid*, the Utah Court of Appeals took a similar position in the area of redemption. The court concluded that where the provisions in the redemption statute are "procedural in nature and do not affect any subst-

antive rights of the purchaser ... [substantial] compliance is all that is necessary." *Id.* at 1334.

4. The current version of section 38-1-7 provides in pertinent part:

(2) This notice shall contain a statement setting forth the following information:

(a) the name of the reputed owner if known or, if not known, the name of the record owner;
(b) the name of the person by whom he was employed or to whom he furnished the equipment or material;
(c) the time when the first and last labor or service was performed or the first and last equipment or material was furnished;
(d) a description of the property, sufficient for identification; and
(e) the signature of the lien claimant or his authorized agent and an acknowledgment or certificate

Utah Code Ann. §38-1-7 (Supp. 1990). Requirements under the 1984 version of this provision which are no longer part of the statute include actual verification of the statements in the lien notice, "a statement of [the claimant's] demand after deducting all just credits and offsets ... [, and] a statement of the terms, time given and conditions of his contract" Utah Code Ann. §38-1-7 (Supp. 1983).

5. It is important to emphasize the scope of this opinion. Our focus is of course upon the particular parties and particular facts in this case, but it is further narrowed by the "as a matter of law" standard implicit in reviewing summary judgments. It may well be that the same lien notices would have worked significant prejudice on other parties not before us, such as owners of, or lenders secured by, the phase II parcel to which Projects had no valid claim. Thus it is entirely possible that we would invalidate this same notice as it applied to another party who could demonstrate prejudice. *Cf. Horsehoe Estates v. 2M Co.*, 713 P.2d 776, 781 (Wyo. 1986) (holding lien sufficient as against party who failed to demonstrate prejudice or that it was misled). It is even conceivable that the Banks, or some of them, could demonstrate actual prejudice in the context of a trial. At this juncture, however, we only consider the Banks' contention that the liens are so flawed as to simply be void, regardless of any actual prejudice.

6. Section 38-1-7 has been amended since 1983. See *supra* note 4.

7. In *First Security Mortgage*, a lien notice was held invalid because the lien claimant failed to sign the oath. The notice was insufficient even though the notary had signed the certificate. See also *Worthington & Kimball Constr. Co. v. C & A Dev. Co.*, 777 P.2d 475 (Utah 1989).

8. In 1989, the legislature amended the mechanic's lien statute to specifically provide a particular jurat form. The current statute requires "an acknowledgment or certificate as required under Chapter 3, Title 57." Utah Code Ann. §38-1-7(2)(e) (Supp. 1990).

9. We recognize that this conclusion is inconsistent with *In re Williamson*, 43 Bankr. 813 (D. Utah

1984), on which the trial court heavily relied. In *Williamson*, the bankruptcy court found that each element listed in section 46-1-8 was an essential part of a notary's certificate even when made on a mechanic's lien. *Id.* at 823. Utah law was admittedly unclear on this point when *Williamson* was decided. Nonetheless, we disagree with the analysis in *Williamson* and hold to the contrary.

10. It is not enough for the Banks to show that other persons might have been prejudiced by the lien notice. In order to prevail, the Banks must show that they were somehow misled or prejudiced. See *supra* note 5.

11. At the risk of unnecessary repetition, we reiterate that in holding that the description does not invalidate the lien as to the Banks, we do not mean to suggest that the result would be the same for others. The lien, for example, is ineffective as to the phase II property, in which the Banks claim no interest, and inclusion of that property in the lien notices would subject Projects to appropriate relief in a slander of title action. See *supra* note 5.

12. In *Hostetter*, the Montana court specifically noted that the blanket lien was effective against the entire condominium project because "the work was performed under one contract, and not a series of separate contracts for each unit." *Hostetter v. Inland Dev. Corp.*, 172 Mont. 167, 170, 561 P.2d 1323, 1325 (1977). Apparently, Montana courts have adopted the position that a single lien may not encompass work performed under multiple contracts. See *Caird Eng'g Works v. Seven-up Gold Mining Co.*, 111 Mont. 471, 487-89, 111 P.2d 267, 276 (1941). We have declined to adopt that position and thus disavow that aspect of the *Hostetter* decision.

13. Although both parties have characterized section 38-1-11 as a statute of limitation, we do not view it strictly as such. Rather, it contains one of the requirements with which the claimant must comply "before [that] party is entitled to the benefits created by the [mechanic's lien] statute." *AAA Fencing Co. v. Raintree Dev. & Energy Co.*, 714 P.2d 289, 291 (Utah 1986). The penalty for not commencing an action to enforce a mechanic's lien within the twelve-month period provided in section 38-1-11 is invalidation of the lien rather than preclusion of the claim as with a traditional statute of limitation. See, e.g., Utah Code Ann. §78-12-23 (Supp. 1986). The commencement requirement of section 38-1-11 serves as a substantive restriction on the lien action and, unlike a true statute of limitation, is not waived if not pleaded. *AAA*, 714 P.2d at 291.

14. It is worth noting that even if Projects had not recorded its *lis pendens* timely, Valley Bank would still be subject to the lien because it had actual knowledge of Projects' action by no later than August 1984, when it reviewed a title report disclosing the action and commenced a dialogue with Projects concerning the matter.

15. Although Valley Bank directs our attention to California and Illinois decisions holding that a lien claimant may in no event add defendants after expiration of the deadline for filing a mechanic's lien action, we are not persuaded by those decisions. As previously noted, unlike California and Illinois statutes, section 38-1-11 is not a true statute of limitation. See *supra* note 13. Moreover, our statute is significantly different from the statutes in California and Illinois because it does not merely impose a deadline for commencement of the action, but goes on to delineate persons who will be subject to the

lien even though not joined in the action within the twelve-month period. Our attention is drawn to no decision construing similar language in any other mechanic's

16. Projects argues that the release was ambiguous because the word "Partial" was added to the "Release of Lien" heading. However, in the context of this case, the release clearly was "partial" because it only released two of the eight units otherwise covered by the lien notice. We do not believe that the addition created any ambiguity in the instrument.

In the determination of the real character of a contract, courts will always look to its purpose rather than to the name given it by the parties, and where a conflict exists between a name attempted to be applied to a particular contract and the language of the contract itself, the name will be rejected as inapplicable.

17 Am. Jur. 2d *Contracts* §269 (1964) (footnote omitted).

17. Because we agree that the release was clear and was not ambiguous, we need not address Projects' reasonable reliance arguments.

18. The Banks request on appeal that we award attorney fees based upon Utah Code Ann. §38-1-18 (1988), which provides: "In any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action." In view of our holding, except as concerns Cottonwood Thrift, determination of any party's "success" is clearly premature. In the case of Cottonwood Thrift, we note that it, along with the other banks, did not request attorney fees as part of its motion for summary judgment. We will not entertain issues raised for the first time on appeal. *Zions First Nat'l Bank v. National Am. Title Ins. Co.*, 749 P.2d 651, 657 (Utah 1988). Therefore, we decline to consider Cottonwood Thrift's request for fees even though it has successfully defeated Projects' claims against it.

Cite as

142 Utah Adv. Rep. 16

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, in the interest of R.R.,
Plaintiff and Appellee,

v.

C.R. and R.R.,
Defendants and Appellants.

State of Utah, in the interest of R.D.H.,
Plaintiff and Appellee,

v.

K.G.,
Defendant and Appellant.

No. 890053-CA

No. 890173-CA