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IN THE SUPREME COURT FOR THE STATE OF UTAH

SCOTT BELL and TODD BELL, Plaintiffs, vs. WESLEY LEWIS and JORDAN CONSTRUCTION, INC., Defendants.	District Court Case No. 080104364 Appellate Case No: 20160474-SC
AND RELATED THIRD-PARTY ACTION.	

BRIEF OF APPELLANT

Appeal from the Fourth District Court, Utah County, Judge Christine S. Johnson, from *Order Denying Third-Party Plaintiff's Motion for Attorney's Fees, and Granting Third-Party Defendants' Motion for Entry of Final Judgment and Final Judgment*

Peter C. Schofield
Adam D. Wahlquist
KIRTON & MCCONKIE
Thanksgiving Park Four
2600 West Executive Pkwy., Suite 400
Lehi, Utah 84043
(801) 426-2100

Counsel for Appellee

Jeffery J. Owens (10973)
VIAL FOTHERINGHAM LLP
515 South 400 East, Suite 200
Salt Lake City, UT 84111
(801) 355-9594
Jeffery.Owens@vf-law.com

Counsel for Appellant

TABLE OF CONTENTS

ADDENDA

TABLE OF AUTHORITIES

Cases listed alphabetically

Rules

Statutes

Other Authority

STATEMENT OF JURISDICTION

The Notice of Appeal was sent to the Utah Supreme Court pursuant to *Utah Code Ann. § 78A-3-102(3)(j)(2012 – Addendum 1).* Pursuant to Rule 42 of the *Utah Rules of Appellant Procedure,* the Utah Supreme Court has issued an order retaining the case in the Utah Supreme Court effective July 6, 2016.

ISSUES ON APPEAL AND STANDARDS OF REVIEW

ISSUE NO. 1: Whether the trial court erred in quashing the Writ of Execution issued February 16, 2011 and canceling the Utah County Sheriff's Notice of Sale No. 11-0741.

"The standard for setting aside a sheriff's sale is based on case law. '[The Court] consider[s] the trial court's interpretation of that law for correctness.'" *Meguerditchian v. Smith,* 2012 UT App 176, ¶ 9, 284 P.3d 658 (quoting *State v. Richardson,* 843 P.2d 517, 518 (Utah Ct. App. 1992). Preserved in the trial court at R. 0957-1044.

ISSUE NO. 2: Whether the trial court erred in dismissing Jordan Construction's declaratory relief claim and in granting FNMA's Motion for Partial Summary Judgment Ruling that FNMA is not Bound by the Outcome of the Litigation Between Scott Bell and Jordan Construction.

"Because the propriety of a 12(b)(6) dismissal is a question of law, we give the trial court's ruling no deference and review it under a correctness standard." *Lowe v. Sorenson Research Co., Inc.,* 779 P.2d 668, 669 (Utah 1989)(citing *Atlas Corp. v. Clovis Nat'l Bank,* 737 P.2d 225, 229 (Utah 1987)); *Kimball v. Campbell,* 699 P.2d 714, 716 (Utah 1985). Preserved in the trial court at R. 1108-1155 and 1269-1283.

ISSUE NO. 3: Whether the trial court erred in granting FNMA's Motion for Partial Summary Judgment ruling that Jordan Construction was not entitled to pre-judgment interest on its mechanic's lien claim pursuant to Utah Code Ann. § 15-1-1.

"A trial court's decision to grant or deny prejudgment interest presents a question of law which we review for correctness." *Smith v. Fairfax Realty, Inc.,* 2003 UT 41, ¶ 16, 82 P.3d 1064 (quoting *Cornia v. Wilcox,* 898 P.2d 1379, 1387 (Utah 1995)). *Iron Head Const. Inc. v. Gurney*, 2009 UT 25, ¶ 7, 207 P.3d 1231, 1232

A trial court's grant of summary judgment is reviewed for correctness, with no deference given to the court's legal conclusions. *Davis v. Sperry,* 2012 UT App 278, ¶ 10, 288 P.3d 26, 30. Preserved in the trial court at R. 2562-2566.

ISSUE NO. 4: Whether the trial court erred in granting FNMA's Motion for Partial Summary Judgment ruling that the Second Amended Notice of Mechanic's Lien was untimely.

A trial court's grant of summary judgment is reviewed for correctness, with no deference given to the court's legal conclusions. *Davis,* 2012 UT App at ¶ 10, 288 P.3d at 30. Preserved in the trial court at R. 3824-3903; 3236-3299; and 3477-3540.

ISSUE NO. 5: Whether the trial court erred in denying Jordan Construction's Motion for Leave to Amend Admission.

"We review the denial of [a motion to withdraw admission] under a 'conditional discretionary standard', first determining if certain conditions have been met and then determining if the district court abused the discretion that it is allowed once the conditions have been met." *Barnes v. Clarkson,* 2008 UT App 44, ¶ 9, 178 P.3d 930, 932 (quoting *Langeland v. Monarch Motors, Inc.,* 952 P.2d 1058, 1060–61 (Utah 1998)).

> [O]ur review of the district court's action on a rule 36(b) motion is a two-step process: In the first step, we review the trial court's determinations as to whether amendment or withdrawal would serve the presentation of the merits and whether amendment or withdrawal would result in prejudice to the nonmoving party. In the second step, we review the trial court's discretion to grant or deny the motion. Only after both rule 36(b) conditions have been met does a district court have discretion to grant or deny the motion to withdraw admissions, which decision we review for an abuse of discretion. But the court's preliminary determination as to whether the rule 36(b) conditions have been met is subject to a somewhat more exacting standard of review.

Id. at ¶ 12 (internal quotes omitted). Preserved in the trial court at 3477-3540 and 3599-3604.

ISSUE NO. 6: Whether the trial court erred in determining FNMA to be the prevailing party and erred in awarding FNMA its attorney fees and costs.

The question of which party is the prevailing party is a question for the trial court, and we therefore review the trial court's determination on this matter for abuse of discretion. *See R.T. Nielson Co. v. Cook,* 2002 UT 11, ¶ 25, 40 P.3d 1119. However, the court's interpretation of binding case law on this matter is a question of law, reviewed for correctness. *See Houghton v. Department of Health,* 2005 UT 63, ¶ 32, 125 P.3d 860. Preserved in the trial court at R. 4080-4107 and 4274-4284.

ISSUE NO. 7: Whether the trial court erred in refusing to award Jordan Construction its attorney fees and costs.

"Which party is the prevailing party ... depends, to a large measure, on the context of each case, and, therefore, it is appropriate to leave this determination to the sound discretion of the trial court. We therefore review the trial court's determination ... under

an abuse of discretion standard." *R.T. Nielson Co. v. Cook,* 2002 UT 11, ¶ 25, 40 P.3d 1119. Preserved in the trial court at 4313-4357 and 4443-4448.

DETERMINATIVE PROVISIONS

ISSUE NO. 1: Whether the trial court erred in quashing the Writ of Execution issued February 16, 2011 and canceling the Utah County Sheriff's Notice of Sale No. 11-0741.

> Rule 64. Writs in General
> …
> (e) Claim to property by third person.
>
> (e)(1) *Claimant's rights.* Any person claiming an interest in the property has the same rights and obligations as the defendant with respect to the writ and with respect to providing and objecting to security. Any claimant named by the plaintiff and served with the writ and accompanying papers shall exercise those rights and obligations within the same time allowed the defendant. Any claimant not named by the plaintiff and not served with the writ and accompanying papers may exercise those rights and obligations at any time before the property is sold or delivered to the plaintiff.
>
> (e)(2) *Join claimant as defendant.* The court may order any named claimant joined as a defendant in interpleader. The plaintiff shall serve the order on the claimant. The claimant is thereafter a defendant to the action and shall answer within 14 days, setting forth any claim or defense. The court may enter judgment for or against the claimant to the limit of the claimant's interest in the property.
>
> (e)(3) *Plaintiff's security.* If the plaintiff requests that an officer seize or sell property claimed by a person other than the defendant, the officer may request that the court require the plaintiff to file security.

Utah R. Civ. P. 64(e).

Rule 64E. Writ of Execution

…

(d) Reply to writ; request for hearing.
(d)(1) The defendant may reply to the writ and request a hearing. The reply shall be filed and served within 14 days after service of the writ and accompanying papers upon the defendant.

(d)(2) The court shall set the matter for an evidentiary hearing as soon as possible and not to exceed 14 days. If the court determines that the writ was wrongfully obtained, or that property is exempt from seizure, the court shall enter an order directing the officer to release the property. If the court determines that the writ was properly issued and the property is not exempt, the court shall enter an order directing the officer to sell or deliver the property. If the date of sale has passed, notice of the rescheduled sale shall be given. No sale may be held until the court has decided upon the issues presented at the hearing.

(d)(3) If a reply is not filed, the officer shall proceed to sell or deliver the property.

Utah R. Civ. P. 64E(d).

ISSUE NO. 2: Whether the trial court erred in dismissing Jordan Construction's declaratory relief claim and in granting FNMA's Motion for Partial Summary Judgment Ruling that FNMA is not Bound by the Outcome of the Litigation Between Scott Bell and Jordan Construction.

§ 78B-6-1303. *Lis pendens*—Notice

(1)(a) Any party to an action filed in the United States District Court for the District of Utah, the United States Bankruptcy Court for the District of Utah, or a Utah district court that affects the title to, or the right of possession of, real property may file a notice of pendency of action.

(b) A party that chooses to file a notice of pendency of action shall:

(i) first, file the notice with the court that has jurisdiction of the action; and

(ii) second, record a copy of the notice filed with the court with the county recorder in the county where the property or any portion of the property is located.

(c) A person may not file a notice of pendency of action unless a case has been filed and is pending in a United States or Utah district court.

(2) The notice shall contain:

(a) the caption of the case, with the names of the parties and the case number;

(b) the object of the action or defense; and

(c) the specific legal description of only the property affected.

(3) From the time of filing the notice, a purchaser, an encumbrancer of the property, or any other party in interest that may be affected by the action is considered to have constructive notice of pendency of action.

Utah Code Ann. § 78B-6-1303.

ISSUE NO. 3: Whether the trial court erred in granting FNMA's Motion for Partial Summary Judgment ruling that Jordan Construction was not entitled to pre-judgment interest on its mechanic's lien claim pursuant to Utah Code Ann. § 15-1-1.

Utah Code Ann. § 15-1-1. Interest rates--Contracted rate--Legal rate

(1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.

(2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

(3) Nothing in this section may be construed in any way to affect any penalty or interest charge that by law applies to delinquent or other taxes or to any contract or obligations made before May 14, 1981.

Utah Code Ann. § 15-1-1.

ISSUE NO. 4: Whether the trial court erred in ruling that the Second Amended Notice of Mechanic's Lien was untimely.

§ 38-1-7. Notice of claim -- Contents -- Recording -- Service on owner of property

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

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

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

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

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

(B) if no certificate of occupancy is required by the local government entity having jurisdiction over the

construction project, but as a result of the work performed under the original contract an inspection is required as per state-adopted building codes for the work, the date of the final inspection for the work by the local government entity having jurisdiction over the construction project; or

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

Utah Code Ann. § 38-1-7(1) (2008).

ISSUE NO. 5: Whether the trial court erred in denying Jordan Construction's Motion for Leave to Amend Admission.

(c) Effect of admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment if the presentation of the merits of the action will be promoted and withdrawal or amendment will not prejudice the requesting party. Any admission under this rule is for the purpose of the pending action only. It is not an admission for any other purpose, nor may it be used in any other action.

Utah R. Civ. P. 36(c).

ISSUE NO. 6: Whether the trial court erred in determining FNMA to be the prevailing party and erred in awarding FNMA its attorney fees and costs and in refusing to determine that Jordan Construction was the prevailing party and refused to award Jordan Construction its attorney fees and costs.

§ 38-1-18. Attorneys' fees -- Offer of judgment

(1) Except as provided in *Section 38-11-107* and in Subsection (2), in any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action.

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

Utah Code Ann. § 38-1-18 (2008).

STATEMENT OF THE CASE

This case originally arises from a dispute between Appellant Jordan Construction, Inc. and its former employee Scott Bell. Jordan Construction is a general contractor based in Provo, Utah. Scott Bell was first hired by Jordan Construction in 2005, and was assigned to manage a new division of Jordan Construction primarily dedicated to production and installation of granite countertops. In addition, Mr. Bell's assigned duties included keeping the books and managing payroll for the entire company.

While he was employed by Jordan Construction, Mr. Bell decided to build a new home in Provo, using Jordan Construction as the general contractor. Because he was a trusted employee, Mr. Bell was allowed to arrange for the subcontractors, order materials, and generally manage the construction of his home himself. Jordan Construction prepared an estimate for construction on September 8, 2006, showing a cost to build of $445,558.13. Scott Bell obtained a construction loan for $417,000 and planned to pay the excess using personal funds and/or equity from the sale of his existing home.

A building permit was issued, and construction began in November, 2006. Construction continued until October 16, 2008, though a certificate of occupancy was not issued until much later, on June 2, 2011. Unbeknownst to Jordan Construction, Mr. Bell made a number of upgrades and changes to the plans, and by the time it was finished, the total cost of the house was $767,025.17. Mr. Bell used the entire amount of the construction loan ($417,000), borrowed $50,000 from Charles Lewis[1], and contributed $67,057.81 from the sale of his existing home. In total, there was a shortfall of $232,967.81.

Around the time that construction on the home was wrapping up, Wesley Lewis, the president of Jordan Construction became aware of the significant cost overruns and began to investigate. During his investigation, Mr. Lewis also discovered that over the course of more than three years, Scott Bell had embezzled at least $184,142.06 from Jordan Construction through misuse of company credit and debit cards, directing company funds for personal use, and through other means.

Upon discovering the embezzlement, Jordan Construction immediately fired Mr. Bell. Very shortly thereafter, Mr. Bell sued Jordan Construction for wrongful termination and breach of contract[2]. At that time, Jordan Construction did not know the full extent of the cost overruns on Scott Bell's home, but knew for sure that there were cost overruns of at least $126,957.00 based upon information then readily available. On December 5,

[1] Charles Lewis is the father of Jordan Construction owner and President Wesley Lewis. This loan was never repaid.
[2] Mr. Bell's claims against Jordan Construction were resolved in the trial court and are not relevant to this appeal.

2008, Jordan Construction recorded a Notice of Mechanic's Lien[3] for $126,957.00, and on December 16, 2008 filed a counterclaim which included, among others, a lien foreclosure claim and a breach of contract claim related to the construction of Mr. Bell's home. A Notice of *Lis Pendens* was recorded in the chain of title to the home the same day.

As discovery proceeded, Jordan Construction continued to investigate the full extent of the embezzlement and the house cost overruns. Eventually, over the next several months, Jordan Construction determined that as best as it could determine, the actual amount of the cost overruns was $232,967.81. On July 27, 2009, Jordan Construction recorded a Second Amended Notice of Mechanic's Lien for that amount.

The litigation between Scott Bell and Jordan Construction proceeded to its conclusion in June, 2010, at which point Jordan Construction obtained a judgment against Mr. Bell on all of Jordan Construction's counterclaims. Scott Bell filed for bankruptcy, and Jordan Construction obtained leave from the bankruptcy court to pursue a writ of execution and foreclose its mechanic's lien.

In the meantime, Scott Bell had stopped making his mortgage payments, and the holder of the Trust Deed on the home had commenced non-judicial foreclosure proceedings of its own. Federal National Mortgage Association ("FNMA") received an assignment of the Trust Deed immediately before the sale, and purchased the house at the trust deed foreclosure sale on October 1, 2010.

[3] The Notice of Mechanic's Lien was amended shortly thereafter to correct a minor procedural error not relevant to the issues on appeal.

In January 2011, Jordan Construction applied for a writ of execution to foreclose its mechanic's lien. A copy of the application was mailed to FNMA on January 19, 2011. Along with the Application for Writ of Execution, Jordan Construction enclosed three documents: (1) Checklist for Writ of Execution for Judgment Debtor and Persons with an Interest in the Property; (2) Notice of Execution and Exemptions; and (3) a Reply and Request for Hearing form. Neither FNMA nor anyone else objected or requested a hearing, and after the appropriate amount of time had passed, the trial court issued the writ on February 16, 2011. A sale date was scheduled with the Utah County Sheriff's office shortly thereafter.

Shortly before the foreclosure sale was to be held, FNMA moved to quash the Writ of Execution and the then-scheduled Sheriff's sale on September 6, 2011. Jordan Construction opposed the motion, but the trial court nevertheless quashed the Writ of Execution and canceled the sale. Jordan Construction filed a Third-Party Complaint against FNMA, and this case in its current form commenced.

Jordan Construction's original Third-Party Complaint consisted of only one claim for declaratory relief declaring that FNMA was bound by the findings of fact and conclusions of law entered by the trial court against Scott Bell. FNMA moved to dismiss, and the trial court granted the motion, but allowed Jordan Construction to amend. Jordan Construction amended its Third-Party Complaint and included both a declaratory relief claim and a lien foreclosure claim. Again, FNMA moved to dismiss. The declaratory relief claim was dismissed, but the lien foreclosure claim was allowed to proceed.

As litigation proceeded, the trial court made several rulings from which Jordan Construction appeals, including: (1) that FNMA is not bound by the findings of fact and conclusions of law entered against Scott Bell; (2) that Jordan Construction is not entitled to prejudgment interest on its mechanic's lien claim; (3) that Jordan Construction's Notice of Mechanic's Lien was untimely and therefore not valid; (4) that Jordan Construction should not be permitted to amend a response to a request for admission when later-discovered facts clearly showed the admission was made in error; (5) that FNMA was the prevailing party and entitled to its attorney fees; and (6) that Jordan Construction was not entitled to its attorney fees. Final judgment was entered in this case on May 4, 2016.

STATEMENT OF FACTS RELEVANT TO APPEAL

1. Appellant Jordan Construction, Inc. ("Jordan Construction") is a licensed general contractor (R. 3207).

2. Wesley Lewis ("Lewis") is the founder, sole director, sole officer, and sole shareholder of Jordan Construction. (R. 3207)

3. In 2005, Jordan Construction hired Scott Bell ("Bell") as an employee. (R. 3944)

4. Mr. Bell was given the responsibility of managing the Artistic Marble & Granite division of Jordan Construction. His duties included management of payroll and finances for the entirety of Jordan Construction. (R. 3944)

5. In 2006, Mr. Bell decided to build a new home, and hired Jordan Construction as the general contractor. (R. 3945)

6. Jordan Construction prepared a proposal for the construction of Bell's home that totaled $445,558.13. (R. 3945)

7. Bell accepted the proposal, and hired Jordan Construction to perform the general contracting work. (R. 0534)

8. Mr. Lewis understood that Jordan Construction was going to be paid from the proceeds of a $417,000 construction loan that Mr. Bell had obtained, with the balance being paid from the proceeds of Mr. Bell's then-existing home, and that Jordan Construction would in turn be responsible for paying the subcontractors (R. 3945)

9. Mr. Bell was allowed to personally arrange for all of the subcontractors to work on his home and oversee much of the work, despite the fact that it was not generally within Mr. Bell's job description to do so. (R. 3945)

10. Excavation on the property began on October 13, 2006, and was completed on October 16, 2006. Thus, visible work began sometime between October 13, 2006, and October 16, 2006, but no later than October 16, 2006. (R. 3945)

11. Bell moved into the home in October, 2007. (R. 3208)

12. On or about February 5, 2008, Mr. Bell closed on his long-term financing, and executed a Deed of Trust in favor of his long-term financing lender. The Deed of Trust was recorded in the office of the Recorder of Utah County, State of Utah (R. 3945).

13. The final inspection for the home passed in October, 2008, after minor concrete flaws were repaired by Jordan Construction. (R. 3209).

14. In October or November, 2008, Mr. Lewis discovered that Scott Bell had been embezzling money from Jordan Construction and fired Mr. Bell. (R. 3945)

15. In reviewing company records, Mr. Lewis also discovered that Mr. Bell had failed to pay Jordan Construction for the entire cost of Mr. Bell's new home, though the full extent of Mr. Bell's actions were still not entirely clear to Mr. Lewis (R. 3945).

16. Mr. Bell commenced this case by filing a Complaint against Mr. Lewis and Jordan Construction alleging wrongful termination and other related claims on or about November 20, 2008. (R. 3945)

17. As of that date, Jordan Construction was still not fully aware of the extent of Mr. Bell's fraud and embezzlement scheme, but was actively investigating his activities. (R. 3945)

18. On December 5, 2008, Jordan Construction caused a mechanic's lien to be recorded against Bell's home in the amount of $126,956.92, which represented the amount easily and readily ascertainable by Jordan Construction at the time. (R. 3946) Addendum 2 – Original Notice of Lien

19. Once Mr. Lewis discovered that Mr. Bell had embezzled funds and failed to pay many of the subcontractors who worked on his new home, Mr. Lewis immediately began to investigate Mr. Bell's records (to the extent they existed), Jordan Construction's bank records, and other documentation to help determine the amount of damage Mr. Bell caused to Jordan Construction. (R. 3946)

20. Mr. Lewis discovered that Jordan Construction's bank accounts had diminished, but there was not a complete trail of monies paid into or out of those accounts relating to Mr. Bell. (R. 3946)

21. Mr. Lewis continued to investigate which subcontractors had worked on Mr. Bell's home, whether they had been paid, and how they were paid. (R. 3946)

22. Mr. Bell kept few receipts and records demonstrating how many of the subcontractors were paid, so it took several months to locate such records, review them, and eventually locate and communicate with those subcontractors to ensure they had been paid in full, by whatever means. (R. 3946)

23. Once Mr. Lewis believed that he had, to the best of his ability, located all available records, contacted all known subcontractors, and determined whether they were paid in cash or by some other means, Mr. Lewis had to perform a detailed accounting reconciliation to determine the amount of monies Jordan had lost as a result of Mr. Bell's activities. (R. 3946)

24. Jordan Construction's investigation ultimately revealed a total of $232,976.81 for costs associated with building Mr. Bell's new home which remain unpaid. (R. 3947)

25. On July 27, 2009, Jordan Construction amended its Notice of Mechanic's Lien to reflect the amount determined from its lengthy and thorough investigation. (R. 3947) (Addendum 3 – Second Amended Lien)

26. Lewis would not have encountered such difficulties and it would not have taken as long as it did to determine the amount of damage Bell caused to Jordan Construction but for Bell's embezzlement, fraudulent activities, and failure to keep accurate and complete records (R. 3213).

27. Jordan Construction timely recorded a Notice of *Lis Pendens* on or about December 15, 2008. (R. 3211) (Addendum 4 – *Lis Pendens*)

28. On June 24, 2010, the trial court entered its Findings of Fact and Conclusions of Law and Order Granting Motion for Partial Summary Judgment, which awarded damages in the amount of $232,967.81 plus prejudgment interest to Jordan Construction on Jordan Construction's breach of contract claim related to the construction of Mr. Bell's home. (R. 0529-0539)

29. Shortly after the court entered its findings of fact and conclusions of law, Scott Bell filed for bankruptcy. Jordan Construction sought and obtained leave from the bankruptcy court to foreclose on its mechanic's lien to recover the amounts of damages awarded to Jordan Construction related to the mechanic's lien, but not on the other amounts awarded to Jordan Construction on Jordan Construction's other claims.[4]

30. On September 30, 2010, the Trust Deed was transferred to FNMA, who then purchased the property the following day at a non-judicial foreclosure sale on October 1, 2010. (R. 3214) (Addendum 5 - Trustee's Deed)

31. In January 2011, Jordan Construction applied for a writ of execution to foreclose its mechanic's lien. A copy of the application was mailed to FNMA on January 19, 2011. Along with the Application for Writ of Execution, Jordan Construction enclosed three documents: (1) Checklist for Writ of Execution for Judgment Debtor and Persons with an Interest in the Property; (2) Notice of Execution and Exemptions; and (3)

[4] There is no reference to this in the record, as it took place in the bankruptcy court in Mr. Bell's bankruptcy case. This fact is provided for context and information purposes only.

a Reply and Request for Hearing form. (R. 0729-0744; R. 0999-1013) (Addendum 6 Application for Writ)

32. FNMA did not request a hearing or immediately object to the Writ of Execution, and the Writ of Execution was issued on February 16, 2011 (R. 0745-0746)

33. A certificate of occupancy for the house was issued on June 2, 2011. (R. 3538) (Addendum 7 – Certificate of Occupancy)

34. On September 6, 2011, eight days before the mechanic's lien foreclosure sale was scheduled to occur, FNMA filed its Motion to Quash Writ of Execution and Utah County Sheriff's Notice of Sale, No. 11-0741. (R. 0893-0895)

SUMMARY OF THE ARGUMENT

I. The trial court should not have quashed the Writ of Execution and canceled the Sheriff's sale because FNMA was afforded due process. Jordan Construction served FNMA with a copy of the writ of execution, along with a form for FNMA to complete and return within ten days if it objected to the writ. (R. 0729-0744; R. 0999-1013) (Addendum 6, Application for Writ). FNMA failed to timely object or request a hearing, and the writ was issued. Several months later, FNMA sought to quash the writ of execution and the sheriff's sale by arguing that it was not afforded due process. FNMA was afforded due process by being given notice of the writ of execution and an opportunity to be heard.

II. A *lis pendens* appeared in the chain of title to the property prior to the time that FNMA purchased the property at the trustee's sale. FNMA was therefore on notice that it would take the property subject to the outcome of the pending litigation between

Jordan Construction and Scott Bell affecting title to the property. FNMA is not a bona fide purchaser in this case and should be bound by the judgment Jordan Construction obtained against Scott Bell. Further the doctrine of *res judicata* precludes FNMA from re-litigating issues previously litigated between Jordan Construction and Scott Bell.

III. Jordan Construction is entitled to prejudgment interest on the amount stated on the face of its Mechanic's Lien pursuant to Utah Code Ann. § 15-1-1. A mechanic's lien claim is one that necessarily arises from contract and the payment of past due money, and fits squarely within the holdings of relevant cases (cited herein) and Utah Code Ann. § 15-1-1.

IV. The trial court erred in holding that Jordan Construction's second amended notice of mechanic's lien was untimely and invalid. First, the limitations period applicable to mechanic's liens in 2008 did not begin to run until a certificate of occupancy was issued for the property. A certificate of occupancy was not issued until June 2, 2011, nearly two years after Jordan Construction's second amended notice of mechanic's lien was recorded.

Furthermore, due to Scott Bell's fraudulent acts, Jordan Construction did not know the full amount for which it was entitled to a lien until July 2009. Thus, the discovery rule applies to toll the limitations period. Finally, the relation back doctrine should be applied to relate the second amended notice of lien back to the date of the original notice of lien, which was timely recorded.

V. The trial court erred in refusing to allow Jordan Construction to withdraw or amend its response to a request for admission that was proven to be based upon faulty

information. The request for admission requested that Jordan Construction admit that Scott Bell had begun occupying the property in October 2007. In response, Jordan Construction admitted that Mr. Bell began occupying the property in October, 2007, but that a certificate of occupancy had not been issued until October, 2008. At the time of its response, Jordan Construction was under the impression that the property had passed its final inspection in October, 2008, and that the certificate of occupancy issued at the same time. It was later revealed that the certificate of occupancy was not issued until much later in 2011. The applicable limitations period for mechanic's liens to be recorded in 2008 began to run from the time the certificate of occupancy was issued. Thus, if the certificate of occupancy had been issued in October, 2008, the second amended notice of lien was arguably untimely. This is precisely what FNMA argued. However, if the certificate of occupancy had been issued in June, 2011, then the second amended notice of lien was timely. This is what Jordan Construction argued. Jordan Construction sought to withdraw or amend its prior admission to bring its response in line with the later-discovered facts. The court refused to allow the withdrawal or amendment in error.

VI. The trial court erroneously held that FNMA was the prevailing party and awarded FNMA its attorney fees and costs. Jordan Construction should have been considered to be the prevailing party and should have been awarded its fees and costs under the flexible and reasoned approach promulgated by the Utah Supreme Court. This is especially true in light of the fact that Jordan Construction should have been entitled to interest, and to have its second amended mechanic's lien enforced.

ARGUMENT

I. THE TRIAL COURT ERRED IN QUASHING THE WRIT OF EXECUTION ISSUED FEBRUARY 16, 2011, AND CANCELING THE UTAH COUNTY SHERIFF'S NOTICE OF SALE NO. 11-0741.

The trial court erred in quashing the Writ of Execution issued February 16, 2011, and in canceling the Utah County Sheriff's Notice of Sale No. 11-0741 and should be reversed. "The standard for setting aside a sheriff's sale is based on case law. '[The Court] consider[s] the trial court's interpretation of that law for correctness.'" *Meguerditchian v. Smith*, 2012 UT App 176, ¶ 9, 284 P.3d 658 (quoting *State v. Richardson*, 843 P.2d 517, 518 (Utah Ct. App. 1992).

A. FNMA Waived its Right to Object to the Writ of Execution.

After Jordan Construction obtained its judgment against Scott Bell which directed that Jordan Construction's mechanic's lien be foreclosed via sheriff's sale (R. 0529) , Jordan Construction applied for a writ of execution that specifically directed the Utah County Sheriff to sell the property against which the mechanic's lien had been filed. (R. 0729).

Writs of execution are governed by Rules 64 and 64E of the Utah Rules of Civil Procedure. Rule 64(e)(1) applies to all types of writs, including writs of execution, and explicitly imposes the same rights and obligations upon third parties who claim an interest in the property as a defendant to the underlying action.

> (e)(1) *Claimant's rights*. Any person claiming an interest in the property has the same rights and obligations as the defendant with respect to the writ and with respect to providing and objecting to security. Any claimant named by the plaintiff and served with the writ and accompanying

> papers shall exercise those rights and obligations within the same time allowed the defendant.
>
> U.R.C.P. 64(e)(1).

Rule 64E of the Utah Rules of Civil Procedure specifically governs writs of execution. It clearly contemplates a situation such as this where there is a third party that claims an interest in the property to be executed upon, and provides for notice and an opportunity to be heard. FNMA failed to take advantage of its opportunity to be heard.

Jordan Construction filed its Application for Writ of Execution on January 21, 2011, (R. 0729), and in so doing complied with Rules 64 and 64E in every way. The Application itself (R. 0729) listed every person and entity that had ever claimed an interest in the Property, including FNMA. (R. 0732). A copy of the Application was mailed to FNMA on January 19, 2011, as is shown by the Certificate of Service attached thereto. (R. 0734). Along with the Application for Writ of Execution, Jordan Construction enclosed three documents: (1) Checklist for Writ of Execution for Judgment Debtor and Persons with an Interest in the Property; (2) Notice of Execution and Exemptions; and (3) a Reply and Request for Hearing form. (R. 0999-1013). All of these documents are forms produced by and approved by the Board of District Court Judges in 2009, which with minor amendments, are still in use today. Because FNMA failed to return the Reply and Request for Hearing form, it waived its right to object.

B. FNMA Was Afforded Due Process.

The very purpose of the notice and service procedures governing writs of execution and the forms that are sent to an interested party is to afford due process to

those who may have an interest in the property to be executed upon. The checklist form clearly directs the recipient to carefully read the Notice of Execution and Exemptions form, and to reply and request a hearing. (R. 1007). The Notice of Execution and Exemptions form clearly states that "If you believe that . . . the Writ of Execution was issued improperly. . . **then do the following immediately**. You have a deadline of 10 business days from the date that you were served with the writ and accompanying papers." (R. 1008). It then directs the recipient to complete and return the attached Reply and Request for Hearing form. (R. 1008).

Despite having been served with the Application for Writ of Execution, the Checklist for Writ of Execution for Judgment Debtor and Persons with an Interest in the Property, the Notice of Execution and Exemptions, and a Reply and Request for Hearing form, FNMA failed to comply with Rule 64E and request a hearing within 10 days. Rule 64E(d)(3) provides that "if a reply is not filed, the officer shall proceed to sell or deliver the property." There were no replies or requests for hearing filed within 10 days, and the trial court issued the Writ of Execution on February 16, 2011 (R. 0745). This is adequate due process.

It was not until September 6, 2011, more than six months later, that FNMA filed its Motion to Quash Writ of Execution and Utah County Sheriff's Notice of Sale, No 11-0741(R. 0893). The trial court heard oral arguments on September 12, 2011, and entered its *Order Quashing and Cancelling Writ of Execution and Utah County Sheriff's Notice of Sale*, No. 11-0741 (R. 0946).

It was error for the trial court to quash the Writ of Execution and cancel the Sheriff's sale where FNMA did not follow proper procedural requirements in responding and requesting a hearing. The trial court's order should be reversed. In this instance, the trial court does not have discretion, and is bound when the parties fail to follow procedural rules. FNMA had been served with notice of the writ of execution, and sat on its rights for more than six months, notwithstanding its obligation to file a reply and request for hearing within ten days of being served with the writ of execution documents. The trial court should be reversed, and Jordan Construction should be permitted to proceed with its mechanic's lien foreclosure sale and recover the amount awarded in the judgment it obtained against Scott Bell. (R. 0888).

II. FNMA IS BOUND BY THE JUDGMENT OBTAINED BY JORDAN CONSTRUCTION AGAINST SCOTT BELL.

This case was litigated in two principal parts. The first part of the case centered on a dispute between Scott Bell and Jordan Construction. Reduced to simplified terms, Scott Bell claimed that he was improperly terminated from his employment at Jordan Construction (R. 0001), and Jordan Construction claimed that Scott Bell had embezzled more than $180,000 and failed to pay Jordan Construction $232,967.81 of the cost of constructing Scott Bell's personal home. (R. 0023) At the outset of the litigation, on December 15, 2008, Jordan Construction recorded a Notice of *Lis Pendens* in the chain of title of the home indicating that litigation affecting title to the property was currently pending in Fourth District Court. (R. 2741).

At the conclusion of the first part of the case, Jordan Construction obtained a judgment against Scott Bell on August 3, 2011 (R. 0888). The judgment awarded damages for the embezzlement, but it also awarded $336,568.66 in damages on Jordan Construction's mechanic's lien claim related to Scott Bell's failure to pay for construction of Scott Bell's personal home. *Id*. It further provided that Jordan Construction could enforce its mechanic's lien through a foreclosure sale of Scott Bell's home. *Id*. However, in the interim, Scott Bell stopped making his mortgage payments, and the holder of the Trust Deed and note commenced a non-judicial foreclosure. (R. 2660). FNMA ultimately purchased the home at the trustee's sale on October 1, 2011. (R. 2667).

Much of this case has centered on whether FNMA is bound by the judgment Jordan Construction obtained against Scott Bell. On March 7, 2014, FNMA moved for partial summary judgment seeking a ruling that FNMA was not bound by the judgment or findings obtained by Jordan Construction against Scott Bell (R. 2482). The trial court granted FNMA's motion (R. 3226) in error and for the following reasons should be reversed.

A. The *Lis Pendens*

It has never been disputed in this case that a *lis pendens* was recorded in the chain of title to the Scott Bell home on December 15, 2008 (R. 2741), and that this same *lis pendens* appeared in the chain of title to the home throughout this case, including at the time FNMA purchased the home at the trustee's sale. Nevertheless, FNMA has

continually argued that it is not bound by the judgment Jordan Construction obtained against Scott Bell in spite of the *lis pendens*. *See, e.g.*, R. 2575.

This Court has held that the purchaser of real property that is subject to a *lis pendens* acquires the property subject to the outcome of the litigation. "The recording of a *lis pendens* provides constructive notice to all persons that the rights and interests in the property at issue are controverted. One who purchases property subject to a *lis pendens* acquires only the grantor's interest therein, as determined by the outcome of the litigation." *Timm v. Dewsnup*, 921 P.2d 1381, 1392 (Utah 2006) (citing *Hidden Meadows Dev. Co. v. Mills*, 590 P.2d 1244 (Utah 1979). As explained by the Court in *Timm*, the only exception is a bona fide purchaser who took without notice of the pending litigation. The very purpose of a *lis pendens* is to prevent a subsequent purchaser from taking without notice. If a *lis pendens* appears in the chain of title, a purchaser cannot be a bona fide purchaser without notice. "The recording of the notice of *lis pendens* is deemed to give notice, not only of the fact the action relating to the property it describes is pending, but what that action entails and the disposition thereof." *Harvey v. Sanders*, 534 P.2d 905 (Utah, 1975).

Further, "[t]he recording of a *lis pendens* serves as a warning to all persons that any rights or interests they may acquire . . . are subject to the judgment or decree. **One who acquires an interest in land that is the subject of the pending litigation . . . is charged with notice of the claimed contrary rights of others, and he is bound by the judgment rendered in the litigation."** *Bagnall v. Suburbia Land Co.*, 579 P.2d 914 (Utah 1978).

Because a *lis pendens* appeared in the chain of title to the property at the time FNMA purchased it, FNMA is charged with notice of the pending litigation, and is bound by the judgment rendered in the litigation. *Id.* Any other result is contrary to the very purpose of a *lis pendens*. The trial court failed to properly recognize that FNMA is bound by the judgment against Scott Bell, at least as it applies to the property in question. (R. 3206). This Court should reverse the trial court and declare that FNMA is in fact bound by the judgment Jordan Construction obtained against Scott Bell and direct the lower court to enforce the judgment against FNMA.

B. *Res judicata* prevents re-litigation

FNMA should not have been permitted to re-litigate the lien amount and the issue of priority, as those issues had already been decided in the litigation between Scott Bell and Jordan Construction. (R. 0529; 0888). "The doctrine of *res judicata* embraces two distinct branches: claims preclusion and issue preclusion." *Mack v. Utah State Dept. of Commerce,* 2009 UT 47, ¶ 29, 221 P.3d 194 (citation omitted). "Issue preclusion, which is also known as collateral estoppels, prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit" *Oman v. Davis School Dist,* 194 P.3d 956, 965 (Utah 2008). Issue preclusion applies only when the following four elements are met:

> (i) the party against whom issue preclusion is asserted must have been a party to or in privity with a party to the prior adjudication; (ii) the issue decided in the prior adjudication must be identical to the one presented in the instant action; (iii) the issue in the first action must have been completely, fully, and fairly litigated; and (iv) the first suit must have resulted in a final judgment on the merits.

Collins v. Sandy City Bd. of Adjustment, 2002 UT 77, ¶ 12, 52 P.3d 1267 (internal quotation marks omitted).

"[C]laim preclusion corresponds to causes of action[;] issue preclusion corresponds to the facts and issues underlying the causes of action." *Mack*, 2009 UT 47, ¶ 29. (citation omitted) (alterations in original). "Claim preclusion is premised on the principle that a controversy should be adjudicated only once." *Id.* (citations omitted). "To promote this principle, claim preclusion bars a party from bringing in a subsequent lawsuit a related claim that has already been fully litigated." *Allen v. Moyer*, 2011 UT 44, ¶ 6, 259 P.3d 1049 (citation omitted).

In order to preclude a claim from being re-litigated, the party attempting to preclude the claim must demonstrate that the claim involves the same parties or privities, that the claim was presented in the first action or could and should have been brought in the first action, and that the first action resulted in a final judgment on the merits:

> First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Mack, 2009 UT 47 at ¶ 29 (citations omitted). "By barring claims that satisfy this three-part test, claim preclusion advances three important purposes." *Allen*, 2011 UT 44 at ¶ 7. Those three important purposes are finality of the claim, judicial economy, and preservation of the integrity of the judicial system:

> First, it ensures finality and "protect[s] litigants from harassment by vexatious litigation." Second, it promot[es]

> judicial economy by preventing previously litigated [claims] from being relitigated. Finally, claim preclusion "preserv[es] the integrity of the judicial system by preventing inconsistent judicial outcomes."

Id. (citations omitted) (alterations in original).

This Court has explained that "ensuring that parties will have to litigate a controversy only once" will "promote finality and protect litigants." *Id.* at ¶ 10. Judicial economy is promoted when parties "assert all of their related claims in one proceeding." *Id.* at ¶ 11 (citation omitted). "Resolving a dispute in one action protects judicial resources from being burdened by the need to address identical claims in multiple forums." *Id.* (citation omitted). "In this respect, the judicial interest in avoiding the burden of repetitious litigation is allied with a party's interest in finality and preventing vexatious lawsuits." *Id.* at n.17. "In addition, resolving a dispute in one action ensures that judicial resources are expended on binding determinations." *Id.* at ¶ 11. Finally, the application of claim preclusion "will preserve the integrity of the judicial system by preventing inconsistent judgments[,] . . . [which] may occur when multiple courts examine the same evidence to make the same factual determinations." *Id.* at ¶ 12. The danger is that the two courts (or even the same court) might reach opposite conclusions with respect to the claims presented. *See id.* If that were to occur, the public confidence in the judicial system would be undermined. *See id.*

1. Scott Bell and FNMA are in Privity With Each Other, and FNMA is the Successor in Interest to Scott Bell.

The first requirement for both issue preclusion and claim preclusion is that both cases involve the same parties or their privities. *See Mack*, 2009 UT 47 at ¶ 29 (citations

omitted). This Court "has defined the word 'privity' as a 'mutual or successive relationship to the same right or property." *Tanner v. Bacon,* 136 P.2d 957, 960 (Utah 1943). "As applied to judgments or decrees of courts, the word means one whose interest has been legally represented at the time." *Id.* (citation omitted).

Several courts have explained that "'[p]rivity' as used when applying the doctrine of *res judicata* in the circumstances in issue here means mutual or *successive relationship to precisely the same right of property;* as testator and executor, ancestor and heir, assignor and assignee, *grantor and grantee*, and lessor and lessee." *Sawyer Nurseries v. Galardi,* 181 Cal. App. 3d 663, 672 (Cal. Ct. App. 1986) (citing *United States v. Stull,* 105 F.Supp. 568, 571 (D.C. Conn. 1952); *Estate of Hanson,* 126 Cal. App. 2d 71, 271 P.2d 563 (Cal. Ct. App. 1954); *Bernhard v. Bank of America Nat. Trust & Sav. Ass'n,* 19 Cal. 2d 807, 122 P. 892 (Cal. 1942)) (emphases added). "Webster's Third New International Dictionary . . . defines 'privity' as follows: '4 b: mutual or successive relationship to the same rights of property: the relationship between privities whereby they succeed to the same legal right or duty derived from a common source.'" *Id.* at n.6.

Here, Mr. Bell had the same interest in the Property that FNMA has now. That is, Mr. Bell originally held title to the Property in fee simple and through a series of transactions, FNMA acquired the Property in fee simple. FNMA's interest is identical to that which Mr. Bell once held. FNMA holds a "successive relationship to precisely the same right of property . . . as grantor and grantee . . . ." *See Galardi,* 181 Cal. App. 3d at 672 (citations omitted). Therefore, the first requirement for *res judicata* is satisfied in this case.

2. All Claims Regarding the Mechanic's Lien were Presented or Could and Should Have Been Raised During the Litigation Between Scott Bell and Jordan Construction, Were Fully and Fairly Litigated, and Resulted in a Final Judgment on the Merits.

All claims relating to the mechanic's lien were raised or could and should have been raised during the litigation between Scott Bell and Jordan Construction. This Court has made clear that "[c]laims or causes of action are the same as those brought or that could have been brought in the first action if they *arise from the same operative facts*, or in other words from the *same transaction*." *Mack,* 2009 UT 47 at ¶ 30 (citation omitted) (emphases added). It went on to explain that "[r]ather than resting on the specific legal theory invoked, *res judicata* generally is thought to turn on the essential similarity of the underlying events giving rise to the various legal claims." *Id.* (citations omitted). "A claim or cause of action is 'the aggregate of operative facts which give rise to a right enforceable in the courts.'" *Id.* (citation omitted). Therefore, "*if a party raises claims based on the same operative facts or the same transaction, it may be precluded if the other elements of claim preclusion are met*." *Id.* (emphasis added).

Here, issues related to the validity and amount of Jordan Construction's mechanic's lien were set forth and conclusively determined by the trial court in the first part of the case against Scott Bell. (R. 0529). The trial Court specifically ruled that "Jordan Construction is the prevailing party in the above-captioned matter, including on its mechanic's lien foreclosure claim" and found that Jordan Construction was entitled to attorneys' fees, interest, costs, and a *Writ of Execution* and *Decree of Foreclosure* to sell the Property. (*R. 0888*). Therefore, the validity, amount, and all other issues related to the

mechanic's lien were presented in the first action between Mr. Bell and Jordan Construction. Any challenges to the validity, amount, or other matters related to the mechanic's lien could and should have been raised at that time as they arise from the same operative facts and transactions at issue. Therefore, *res judicata* should be applied to preclude those issues and prevent re-litigation of those claims.

3. The First Portion of This Case Resulted in a Final Judgment on the Merits.

Utah courts have made clear that summary judgment, for *res judicata* purposes, satisfies the final judgment on the merits requirement. *See e.g. Am. Estate Mgmt. Corp. v. Int'l & Dev. Corp.,* 1999 UT App. 232, ¶ 16, 986 P.2d 765 ("Summary judgment on the Separation Agreement claims constituted a judgment on the merits which became final upon entry of the Final Order.");

Res judicata prevents re-litigation of the issues and claims even if, in hindsight, the trial court comes to some conclusions that differed from those reached in the first part of the case. *See Collins v. Sandy City Bd. of Adjustment*, 2000 UT App. 371, ¶ 26, 16 P.3d 1251 (citations omitted) (citing *Gail v. Western Convenience Stores*, 434 N.W.2d 862, 863 (Iowa 1989) (stating "the *res judicata* consequences of a final, unappealed judgment on the merits are not altered by the fact that the judgment may have been wrong or rested on legal principles later overruled in another case"); *Cleveland v. Ohio Dep't of Mental Health*, 84 Ohio App. 3d 769, 618 N.E.2d 244, 247-48 (Ohio Ct. App. 1992) (holding that failure to appeal judgment bars collateral attack even if judgment is based on erroneous view of law)); *see also Hanley v. Four Corners Vacation Properties*, 480

F.2d 536, 538 (10th Cir. 1973) ("It is equally well settled that where the issue of due process has been litigated and final judgment entered, the determination of that issue, right or wrong, is *res judicata*.")).

This Court has made clear that a final order, "*unless reversed on appeal, is res judicata and binding*." *Collins*, 2000 UT App 371 at ¶ 27 (*citing Piacitelli v. Southern Utah State College,* 636 P.2d 1063, 1065 (Utah 1981) (citations omitted)) (emphasis added). If the complaining party does not appeal the order, it is binding on all parties. *See id.* at ¶ 28 (citation omitted).

In this case, the trial court decided all issues relating to the property between Jordan Construction and Scott Bell in Jordan Construction's favor in all respects, including on its mechanic's lien foreclosure claim. (R. 0529). The trial court subsequently entered a final modified Order regarding those issues on August 3, 2011, conclusively determining all issues contained therein. (R. 0888). Mr. Bell, FNMA's predecessor in interest, did not appeal that Order or otherwise take any action with respect thereto. Therefore, *res judicata* should have been applied to prevent re-litigation of the issues. Therefore, the trial court should be reversed, and the judgment Jordan Construction obtained against Scott Bell should be enforced as entered.

III. JORDAN CONSTRUCTION IS ENTITLED TO PREJUDGMENT INTEREST AT THE STATUTORY RATE.

On March 7, 2014, FNMA filed a motion for partial summary judgment arguing that Jordan Construction should not be entitled to pre-judgment interest on its mechanics' lien claim because the mechanic's lien statute in effect when the mechanics' lien was

recorded did not expressly provide for pre-judgment interest. (R. 2559). The trial court granted FNMA's motion in error (R. 3206), and should be reversed.

The trial court's ruling that Jordan Construction is not entitled to pre-judgment interest simply ignores the statutory pre-judgment interest rate set forth in Utah Code Ann. § 15-1-1. It provides for a default statutory prejudgment interest rate of 10% per annum for claims arising from the forbearance of any money, goods, or chose in action. *Id*.

The Court's ruling also ignored the fact that Utah courts have awarded pre-judgment interest at the statutory rate on mechanic's lien cases in the past. *See*, *e.g.*, *Lignell v. Berg*, 593 P.2d 800 (Utah 1979). "[T]he interest issue is injected by law into every action for the payment of past due money." *Id*. at 809. In addition, prejudgment interest is appropriate "when the loss has been fixed as of a definite time and the amount of the loss can be calculated with mathematical accuracy in accordance with well-established rules of damages." *Iron Head Constr., Inc. v. Gurney*, 2009 UT 25, ¶ 11, 207 P.3d 1231 (internal citation omitted). In *Iron Head*, the Gurneys hired Iron Head Construction to expand and remodel part of their home. The parties signed a contract that indicated Iron Head would be paid $168,558 for the work. Once construction began, the Gurneys made several changes to the scope of the project. *Id*. at ¶ 2. At the completion of the project, Iron Head attempted to collect an additional $82,463.33 above and beyond the contract price. The Gurneys refused to pay, and litigation ensued. *Id*. at ¶ 3. During trial, the parties settled for $43,500, with the parties reserving the issue of prejudgment interest. *Id*. at ¶ 4. The trial court awarded interest, but the Utah Supreme Court reversed

because (1) the $43,500 was not damages, as it was a settlement absent an admission of liability for damages; (2) the settlement amount could not be calculated to a mathematical certainty. *Id*.

The *Iron Head* case is distinguishable from this case. In this case, the lien amount claimed by Jordan Construction to be subject to interest was not a settlement amount. It was the full amount on the face of the lien. Second, the lien amount was calculated to a mathematical certainty – again, the amount listed on the face of the lien.

A mechanic's lien claim is one that necessarily arises from contract and the payment of past due money, and fits squarely within the holding of *Lignell* and Utah Code Ann. 15-1-1. Prejudgment interest at the statutory rate should have been awarded by the trial court.

In 2012, the Utah Legislature codified the ruling in *Lignell*, and specifically applied the Section 15-1-1 interest rate to all mechanic's lien claims. Utah Code Ann. § 38-1a-309. Therefore, Jordan Construction is entitled to recover pre-judgment interest at the rate of 10% per annum from the time the money was first due until judgment is awarded. The trial court's ruling should be reversed and this Court should remand for a determination of the amount of interest to which Jordan Construction is entitled.

IV. THE TRIAL COURT ERRED IN RULING THAT JORDAN CONSTRUCTION'S SECOND AMENDED MECHANIC'S LIEN WAS UNTIMELY.

The trial court erred in holding that Jordan Construction's Second Amended Notice of Mechanic's Lien was untimely and therefore invalid. It is clear that the original

notice of lien and its subsequent amendments were timely recorded under the provisions of the 2008 version of Utah's mechanic's lien statutes.

A. The Certificate of Occupancy Controls the Limitations Period.

At the time of the recording of Jordan Construction's mechanic's lien and the filing of this action, Utah Code Ann. § 38-1-7(1)(a)(I)[5] provided as follows:

> [A] person claiming benefits [of a mechanic's lien] shall file for record with the county recorder of the county in which the property, or some part of the property, is situated, a written notice to hold and claim a lien no later than:
>
> (A) 180 days after the day on which occurs final completion of the original contract if no notice of completion is filed under Section 38-1-33; or
>
> (B) 90 days after the day on which a notice of completion is filed under Section 38-1-33 but not later than the time frame established in Subsection (1)(a)(i)(A).

Utah Code Ann. § 38-1-7(1)(a)(I) (2008). It was undisputed that Jordan Construction completed its work on or about October 16, 2008. (R. 3209). However, under the terms of the statute as it read in 2008, that date is irrelevant and immaterial.

The term "final completion of the original contract" is defined in the Notice of Claim Statute, and given a particular meaning:

> For purposes of this Subsection (1), final completion of the original contract . . . means:

[5] The trial court analyzed this statute in its Ruling on FNMA's Motion for Partial Summary Judgment dealing with the timeliness of Jordan Construction's Second Amended Mechanic's Lien (R. 3206). The trial court denied FNMA's motion at that time, but later granted a renewed motion on the same issue (R. 3839).

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

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

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

(D) If as a result of termination of the original contract prior to the completion of the work defined by the original contract, the compliance agency does not issue a certificate of occupancy or final inspection, the late date on which substantial work was performed under the original contract.

Utah Code Ann. § 38-1-7(1)(a)(ii) (2008).

Provo City issued its Certificate of Occupancy on June 2, 2011. (R. 3538). Therefore, under the clear terms of the statute, the last date on which Jordan Construction's mechanic's lien could have been filed was 180 days following June 2, 2011, well after Jordan Construction filed its Second Amended Mechanic's Lien.

FNMA (and the trial court) relied upon a mistaken admission made by Jordan Construction that stated that a certificate of occupancy had been issued in 2008

(discussed at length at Section V herein). The Certificate of Occupancy is attached hereto at Addendum 7. There is no evidence more credible than the actual certificate of occupancy itself. It would be a miscarriage of justice and common sense to conclude that even though we have the actual certificate of occupancy, we are going to assume that the certificate was issued three years earlier because one of the parties erroneously so admitted. At the time that admission was made, Jordan Construction did not have definitive knowledge on the issue. However, at that time, that was Jordan Construction's understanding, and Jordan Construction assumed the certificate had been issued. It turns out that the certificate of occupancy was not actually issued until 2011. The trial court ignored the best evidence, namely the actual certificate of occupancy, and ruled that a certificate of occupancy was issued in 2008 based upon an admission that Jordan Construction was not really qualified to make. The trial court's ruling in this respect should be reversed, and the Court should look to the actual certificate of occupancy to determine when the relevant limitations period began to run.

B. The Limitations Period Should Have Been Tolled.

1. Equitable Tolling (the Discovery Rule) Generally.

Even if the Second Amended Notice of Mechanic's Lien was brought outside the applicable limitations period, it should be revived by the Equitable Discovery Rule. The Utah Supreme Court has acknowledged two situations in which a statute of limitations may be tolled "until the discovery of facts forming the basis for the cause of action." *Hill v. Allred*, 2001 UT 16 ¶15, 28 P.3d 1271. In *Warren v. Provo City*, 838 P.2d 1125 (Utah

1992), the Supreme Court specifically recognized the following situations in which a statute of limitations should be tolled:

> (1) in situations where the discovery rule is mandated by statute; (2) in situations where a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct; and (3) in situations where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action.

Warren, 838 P.2d at 1129. The first enumerated exception is known as the internal discovery rule or statutory discovery rule, and is not applicable in this case. *Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 21, 24, 108 P.3d 741. *See also, In re Hoopiiaina Trust*, 2006 UT 53, 144 P.3d 1129; *Hampton v. Professional Title Services*, 2010 UT App 294, ¶20, 242 P.3d 796 (Roth, J., concurring).

Although there are three enumerated exceptions discussed in the *Warren* case, Utah courts have clarified that the latter two are actually two separate prongs of the "equitable discovery rule" which, if applied, tolls the statute of limitations.

> We have limited the circumstances in which an equitable discovery rule may operate to toll an otherwise fixed statute of limitations period to the following two situations: (1) where a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct, and (2) where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action.

Russell Packard Dev., Inc., 2005 UT 14 at ¶25 (internal quotations omitted).

2. Equitable Discovery Rule Applies in This Case.

The Utah Supreme Court first recognized that absent a statutory tolling provision, a limitations period could nevertheless be equitably tolled on estoppel grounds in *Rice v. Granite School Dist*., 456 P.2d 159 (Utah 1969). In *Rice*, the plaintiff sued for injuries sustained when she, while attending a high school football game, fell from bleachers allegedly negligently maintained by the defendant school district. The trial court dismissed the claim on the grounds that the plaintiff had brought her cause of action outside the then-applicable one-year limitations period. *Id*. at 160.

The plaintiff argued that the court should toll the limitations period because an insurance adjuster for the defendant school district had contacted the plaintiff and told her that the insurance company would compensate her for her injuries as soon as the damages could be ascertained. Based upon the insurance adjuster's assurances, the plaintiff delayed in filing suit until after the limitations period had run. *Id*.

The Utah Supreme Court tolled the limitations period on an estoppel theory, reasoning that "[o]ne cannot justly or equitably lull an adversary into a false sense of security thereby subjecting his claim to the bar of limitations, and then be heard to plead that very delay as a defense to the action when brought." *Id*. at 163. It held that "[a]cts or conduct which wrongfully induce a party to believe an amicable adjustment of his claim will be made may create an estoppel against pleading the Statute of Limitations." *Id*. *See also, Hampton v. Professional Title Services*, 2010 UT App 294, 242 P.3d 796 (Roth, J. concurring) (equitable tolling has its genesis in estoppel).

In *Russell Packard Development, Inc.*, the Utah Supreme Court addressed the equitable discovery rule at length. It clarified the circumstances in which a plaintiff could invoke the concealment version of the equitable discovery rule to toll the statute of limitations.

> [A] plaintiff may successfully toll a statute of limitations by showing that, given the defendant's concealment of the plaintiff's cause of action, the plaintiff neither discovered nor reasonably should have discovered the facts underlying the cause of action before the limitations period expired. Once a plaintiff makes this showing, the concealment version of the discovery rule will operate to toll the relevant statute of limitations, and the limitations period will not commence until the date the plaintiff possessed actual or constructive knowledge of the facts forming the basis of his or her cause of action.

Id. at ¶ 29. Thus, a statute of limitation will be equitably tolled under the so-called discovery rule where the defendant concealed the facts underlying the plaintiff's claim until the plaintiff has actual or constructive knowledge of all of the facts necessary to his or her cause of action.

In this case, the facts underlying Jordan Construction lien claim were concealed by Scott Bell. (R. 3946-47; R. 3213). Jordan Construction acted reasonably in attempting to discover the extent of Scott Bell's fraud and concealment. The Utah Supreme Court has held that "the reasonableness of a plaintiff's conduct [is evaluated] in light of the defendant's fraudulent or misleading conduct." *Id*. at ¶ 26. See also, *In re Hoopiiaina Trust*, 2006 UT 53, ¶ 36, 144 P.3d 1129 (in-depth discussion of concealment prong of equitable discovery rule).

In this case, it was only after an extensive and exhaustive investigation was Jordan Construction aware of the full extent of Scott Bell's fraud. (R. 3946-47; R. 3213). This is the very definition of concealment, fitting squarely within the definitions set forth by Utah courts. Thus, the concealment prong of the discovery rule operates to equitably toll the relevant limitations period. The trial court should be reversed on this point.

C. The Relation Back Doctrine Should be Applied.

Even if the trial court was correct in refusing to consider the actual certificate of occupancy and rely only on Jordan Construction's admission, and the equitable discovery rule did not apply, the trial court should have applied the relation back doctrine to allow the amended lien to be enforced. Although an amended notice of lien is not exactly the same as an amended pleading in litigation, the rationale in favor of applying the doctrine is essentially the same and should be applied in this case.

"Utah's relation back doctrine developed out of the common law under which a party could correct a clerical error without bringing a new action where the real parties were involved unofficially all along." *Gary Porter Const. v. Fox Const., Inc.*, 2004 UT App 354, ¶ 32, 1010 P.3d 371. Rule 15(c) of the Utah Rules of Civil Procedure also addresses relation back of amendments. "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Utah R. Civ. P. 15(c).

In this case, FNMA had actual notice of the amended notice of mechanic's lien because the amended notice of mechanic's lien appeared in the chain of title long before

FNMA ever acquired the trust deed or the property itself. (R. 3947) (Addendum 3 – Second Amended Lien). FNMA cannot reasonably argue that it did not have notice of Jordan Construction's claim. There is no compelling reason that the amendment should not be permitted in this case given the circumstances of this case. Additionally, the second amended notice of mechanic's lien arose from the same transaction and set of facts as the original notice of lien. In arguing that the second amended notice of lien was untimely, FNMA simply took advantage of Scott Bell's fraud and concealment.

The same rationale should be used in this case. The Second Amended Mechanic's Lien clearly related back to the original mechanic's lien on its face. Given the circumstances of this case, it would be equitable to apply the relation back doctrine and enforce the Second Amended Mechanic's Lien. The trial court's ruling should be reversed.

V. JORDAN CONSTRUCTION SHOULD HAVE BEEN PERMITTED TO WITHDRAW ITS ADMISSION WHEN IT WAS CLEARLY CONTRADICTED BY EVIDENCE.

Rule 36(c) of the Utah Rules of Civil Procedure provides that "The Court may permit withdrawal or amendment if the presentation of the merits of the action will be promoted and withdrawal or amendment will not prejudice the requesting party." This is in effect a two part inquiry. First, the Court should determine whether amendment or withdrawal would serve the presentation of the merits. Second, the Court should determine whether allowing an amendment or withdrawal would prejudice the party propounding the request for admission. *See Barnes v. Clarkson*, 2008 UT App. 44 at ¶12 (*citing Langeland v. Monarch Motors, Inc*., 952 P.2d 1058, 1060-611 (Utah 1998).

In this case, the issue of whether a certificate of occupancy was issued is important. FNMA argued (and the trial court ruled) that Jordan Construction's Second Amended Notice of Mechanic's Lien was untimely recorded on July 27, 2009, because it was recorded more than 180 days after the last day Jordan Construction provided the last of its services on the home. (R. 3389; R. 3703) In response, Jordan Construction argued that it was timely because pursuant to the 2008 version of Utah's Mechanic's Lien Statute, the time for recording a mechanic's lien does not begin to run until after a certificate of occupancy is issued. *See* Utah Code Ann. § 38-1-7(1)(a)(I) (2008)[6]. Thus, it follows that if a certificate of occupancy was not issued until June 2, 2011, Jordan Construction's 2009 mechanic's lien would be timely.

The trial court ignored the certificate of occupancy because of Jordan Construction's response to a request for admission propounded by FNMA. (R. 3708). The request for admission read, "Admit that Scott Bell began occupying the Property in October, 2007." (See R. 3505). Jordan Construction responded as follows: "Admit that Scott Bell occupied the property pursuant to a temporary occupancy permit beginning in October 2007. However, construction on his home was not yet finished, no final inspection had been completed and no permanent occupancy permit had been issued until October 2008." (R. 3505).

The trial court erred, and Jordan Construction should have been permitted to amend its response to Request for Admission No. 2 as it would serve the presentation of

[6] The statute cited herein has since changed. It is important to look to the 2008 version of the statute, which applies in this case.

the merits of this case because the later-discovered certificate of occupancy proves that Jordan Construction's statement that Scott Bell occupied the property pursuant to a temporary occupancy permit is actually false. Furthermore, Jordan Construction's statement that a temporary certificate of occupancy had been issued was not actually responsive to the request, which simply requested an admission that Scott Bell began occupying the property in October 2007. Allowing an amendment to an unqualified admission would have more accurately and fully responded to the request and more fully complied with Rule 36 of the Utah Rules of Civil Procedure. Finally, amending the response to an unqualified admission would not prejudice FNMA.

A. Presentation of the Merits Would be Served by Allowing an Amendment Because Newly Discovered Evidence Proves that Jordan Construction's Statement Regarding a Certificate of Occupancy is Factually Incorrect.

After a careful review of documents produced by Provo City in response to a subpoena issued by FNMA, and interviews with Provo City personnel, it became clear that no certificate of occupancy of the property of any kind was issued until June 2, 2011. (R. 3538).

At the time of Jordan Construction's responses to FNMA's requests for admissions, Jordan Construction believed that a certificate of occupancy had been issued, but later learned that this was not the case. Because under the 2008 mechanic's lien statute, the issue of whether Provo City had issued a certificate of occupancy is determinative of whether Jordan Construction's Second Amended Mechanic's Lien was

timely filed, allowing Jordan Construction to amend its response to an unqualified admission would serve the presentation of the merits of this case.

B. Jordan Construction's Response That a Certificate of Occupancy Had Been Issued in 2008 Was Not Directly Responsive to the Request and Should Have Been Ignored

FNMA's Request for Admission No. 2 reads "Admit that Scott Bell began occupying the Property in October 2007." (R. 3505). Jordan Construction's response goes beyond what was actually being requested. "Admit that Scott Bell occupied the property pursuant to a temporary occupancy permit beginning in October 2007. However, construction on his home was not yet finished, no final inspection had been completed and no permanent occupancy permit had been issued until October 2008." (R. 3505). Jordan Construction's response should have simply been an unqualified admission, as the remainder of the response is not really relevant to the matter requested, and was based on an incorrect assumption. It is clear that Jordan Construction is admitting that Scott Bell occupied the property in October 2007, which is all that is requested, and is all that should have been said in the response. The qualifying language does not really qualify the admission at all.

Though Rule 36 of the Utah Rules of Civil Procedure allows a responding party to admit part of the request and deny part of the request, it does not provide for additional explanation or qualified admissions. Thus, the extraneous portion of the response was not provided for by the rules, and should have been a simple, unqualified admission. Jordan Construction should be permitted to amend its response to make it an unqualified admission without further explanation, as that is what the FNMA's request sought.

C. An Amendment to An Unqualified Admission Would Not Have Prejudiced FNMA.

FNMA argued in response to Jordan Construction's *Motion for Leave to Amend Its Admission* that because Provo City recorded a Certificate of Notice of Compliance dated October 21, 2008 (R. 3806), there is conclusive proof that a certificate of occupancy had been issued, and that Jordan Construction's prior admission that a certificate of occupancy had been issued is on all fours with the evidence. (R. 3538). That is simply not true. In fact, the Certificate of Notice of Compliance highlights exactly why Jordan Construction was mistaken in the first place. (R. 3806). The Certificate of Notice of Compliance is not a Certificate of Occupancy. Simply because it contains the statement that "A certificate of occupancy has been issued" does not make it so. In fact, closer look at Provo City's file reveals that there is no record of any Certificate of Occupancy ever having been issued prior to June 2, 2011. The simplest explanation is that the Certificate of Notice of Compliance was mistaken and that no Certificate of Occupancy had in fact been issued. Otherwise, why would a separate permanent Certificate of Occupancy have been issued in 2011? Jordan Construction was then mistaken in believing that a Certificate of Occupancy had been issued in 2008, when in fact it had not been issued.

In any event, it is a stretch to argue that the Certificate of Notice of Compliance is dispositive of the issue of the timeliness of the Second Amended Lien, because it is not clear from the Certificate of Notice of Compliance that the Certificate of Occupancy to which it refers was a permanent Certificate of Occupancy. At best, it would have been a temporary Certificate of Occupancy, as the permanent Certificate of Occupancy was in

fact issued in 2011. The 2008 version of the mechanic's lien statute makes it clear that work is not completed until a ***permanent*** Certificate of Occupancy is issued. A temporary Certificate of Occupancy does not trigger the statute.

> For purposes of this Subsection (1), final completion of the original contract . . . means:
>
> (E) If as a result of work performed under the original contract a ***permanent*** certificate of occupancy is required for the work, the date of issuance of a permanent certificate of occupancy by the local government entity having jurisdiction over the construction project;

Utah Code Ann. § 38-1-7(1)(a)(ii) (2008) (emphasis added). Clearly, the best evidence we have is the actual permanent Certificate of Occupancy issued in June of 2011, rather than a vague statement contained within a Certificate of Notice of Compliance that is unsupported by the evidence.

The trial court abused its discretion in refusing to allow Jordan Construction to amend its prior admission in light of the newly discovered evidence that proved that the admission was inaccurate, and the trial court should be reversed.

VI. JORDAN CONSTRUCTION IS THE PREVAILING PARTY AND SHOULD HAVE BEEN AWARDED ITS ATTORNEY FEES AND COSTS.

The trial court erred in refusing to award attorney fees to Jordan Construction and awarding attorney fees instead to FNMA. "Attorney fees are awardable only if provided for by statute or contract. . ." *Mountain States Broad. Co. v. Neale*, 783 P.2d 551, 555 (Utah App. 1989). In this case, attorney fees should be awarded pursuant to statute.

Under Utah Code § 31-1-18(1) (2008), the prevailing party in this case is entitled to an award of attorney fees and costs.

Sometimes, however, the identity of the prevailing party is not immediately obvious. "[d]etermining the prevailing party is often an imprecise process. Utah courts have developed a 'flexible and reasoned approach' for determining which party has emerged the "comparative winner." *Olsen v. Lund*, 2010 UT App 353, ¶ 7 (quoting *Mountain States*, 783 P.2d at 557-58). A flexible and reasoned approach applied in this case reveals Jordan Construction as the "comparative winner." *Id*.

In this case, the parties stipulated to judgment in favor of Jordan Construction and an award of damages in the amount of $126,956.92. This is 54% of the $232,976.81 listed on the face of the Second Amended Lien. Jordan Construction did not bring separate claims for foreclosure of the Original Lien and the Second Amended Lien. It was only one claim. Furthermore, the Original Lien and the Second Amended Lien were not separate liens. They were a single lien for the same work on the same property. The Amended Lien was never intended to be a separate mechanic's lien. Instead, it was merely aimed at more correctly listing the amount owed by Scott Bell to Jordan Construction after Jordan Construction had enough time to fully investigate. There is one lien and one lien foreclosure claim.

Jordan Construction is the prevailing party in this case because it prevailed on its mechanic's lien foreclosure claim. FNMA stipulated to entry of judgment in favor of Jordan Construction on that claim, the very claim for which Utah Code Ann. § 31-1-18(1) (2008) awards fees to the prevailing party. Because Jordan Construction was awarded

judgment on that claim, it was the prevailing party as to that claim. Furthermore, even if FNMA was successful as to a portion of the damages sought, Jordan Construction was the overall prevailing party as it recovered the full amount of the Original Lien, and more than half of the principal amount of the Second Amended Lien. The trial court therefore should have awarded reasonable attorney fees and costs to Jordan Construction.

In addition, because Jordan Construction should have been permitted to pursue the full amount of its Second Amended Notice of Mechanic's Lien, and should have been entitled to interest, it becomes even more clear that Jordan Construction was the prevailing party and should have been awarded its attorney fees and costs pursuant to Utah Code § 31-1-18(1) (2008). Thus, the trial court erred and should be reversed.

CONCLUSION

For the foregoing reasons, the trial court's judgment should be reversed.

DATED this 7th day of September, 2016.

_____

Jeffery J. Owens
Attorney for Jordan Construction, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September, 2016, and pursuant to Rule 26(b) of the Utah Rules of Appellate Procedure, two copies of the foregoing *Appellant Brief* was served to the following via e-filing

Peter C. Schofield
Adam D. Wahlquist
KIRTON MCCONKIE
Thanksgiving Park Four
2600 West Executive Pkwy, Suite 400
Lehi, UT 84043

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Jeffery J. Owens