

2016

**Jordan Construction, Inc Third-Party Plaintiff and Appellant, v.  
Federal National Mortgage Association, Third-Party Defendant  
and Appellee**

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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JORDAN CONSTRUCTION, INC  
*Third-Party Plaintiff and Appellant,*

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,  
*Third-Party Defendant and Appellee*

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BRIEF OF APPELLEE FEDERAL NATIONAL MORTGAGE ASSOCIATION

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On appeal from the Fourth Judicial District Court, Utah County, Honorable  
Christine S. Johnson, District Court No. 080104364

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## INTRODUCTION

This case is not as messy as it may seem. It is actually rather straightforward.

Scott Bell built a home using Jordan Construction as the general contractor. Bell did not pay Jordan Construction in full, and so it recorded a mechanic's lien and brought a foreclosure action against Bell. Jordan Construction could have, but did not, name the trust deed holder (FNMA's predecessor-in-interest) in the foreclosure action.

Jordan Construction got summary judgment against Bell and was granted a writ of attachment against the property. A sheriff's sale was set. But FNMA, having purchased the trustee's deed at a foreclosure sale after Bell defaulted on his mortgage, objected to the sheriff's sale because (1) Bell no longer had any interest in the property; and (2) the priority of Jordan Construction's mechanic's lien versus FNMA's trustee's deed had never been determined. The district court halted the sheriff's sale. Jordan Construction then filed a third-party complaint against FNMA, seeking to foreclose on the mechanic's lien against FNMA's trustee's deed.

In short, this case is a simple priority dispute—Jordan Construction's mechanic's lien versus FNMA's trustee's deed—with a few appendages growing out of that dispute.

FNMA prevailed below on essentially all the issues that were disputed. First, the district court correctly concluded that the second amendment to the mechanic's lien—which nearly doubled the amount of the lien—was invalid under the mechanic's lien statute because it was filed more than 180 days after the certificate of occupancy was issued. This conclusion was based, in part, on Jordan Construction's admission that a certificate of occupancy was issued in October 2008. Jordan Construction did not attempt to withdraw that admission until long after discovery was closed. The district court did not abuse its discretion by denying that request, especially because the admission was consistent with undisputed facts.

Second, the district court correctly concluded that the 2008 mechanic's lien chapter, which is applicable to this case, did not provide for prejudgment interest on mechanic's liens. This Court recently held the same thing. See 2 Ton Plumbing, L.L.C. v. Thorgaard, 2015 UT 29.

Third, the district court correctly concluded that FNMA was not bound by the interlocutory findings and conclusions entered against Bell earlier in the case. Jordan Construction argues on appeal that both a *lis pendens* and *res judicata* precluded FNMA from challenging the validity or priority of the mechanic's lien and an award of prejudgment interest, because it had already obtained rulings on those issues against Bell before FNMA became a party. But neither *res judicata*

nor the *lis pendens* supports that argument. One prerequisite for being bound by *res judicata* or a *lis pendens* is a final judgment. True, by the time FNMA entered this case Jordan Construction had already obtained certain *interlocutory* rulings against Bell, but the district court later altered those rulings before issuing its *final* judgment in favor of FNMA. *Res judicata* and the *lis pendens* don't have any legal relevance to interlocutory rulings that are later superseded by the final judgment. Further, *res judicata* requires that FNMA be in privity with Bell, and it was not. As discussed below, the relevant doctrine is "law of the case," which fully authorized the district court to reconsider and revise its prior rulings once FNMA became a party and established the validity of its positions.

Jordan Construction could and should have prevented all of this by simply naming the holder of the trust deed as a party to its foreclosure action when it was filed. In fact, that is the only way that interest could have been foreclosed.

Because FNMA did have the right to contest the validity and priority of Jordan Construction's mechanic's lien versus its trustee's deed, this is, once again, a simple dispute with three main issues: (1) the timeliness of the second amendment to the mechanic's lien, (2) whether prejudgment interest is available on a mechanic's lien foreclosure claim, and (3) attorney's fees for the prevailing party. As demonstrated in this brief, FNMA prevails on all these issues. The decision below should be affirmed.

## STATEMENT OF JURISDICTION

Jurisdiction exists under Utah Code § 78A-4-103(2).

## ISSUES PRESENTED

**Issue 1:** Whether the district court erred by quashing the writ of execution and halting the sheriff's sale so that FNMA could challenge the validity and priority of the mechanic's lien.

**Standard of Review:** A trial court's decision to reconsider a prior ruling is reviewed for abuse of discretion. IHC Health Servs., Inc. v. D & K Mgmt., Inc., 2008 UT 73, ¶ 27. Likewise, "[a] trial court's determination of whether a party should be joined to an action will not be disturbed absent an abuse of discretion." Cent. Utah Water Conservancy Dist. v. Upper East Union Irrigation Co., 2013 UT 67, ¶ 57.

**Issue 2:** Whether FNMA is bound by the findings and conclusions entered against Scott Bell because of the *lis pendens* or the doctrine of *res judicata*.

**Standard of Review:** "The ultimate determination of whether *res judicata* bars an action is a question of law, which we review for correctness." Press Pub., Ltd. v. Matol Botanical Int'l, Ltd., 2001 UT 106, ¶ 19 (internal quotation marks, brackets, and ellipses omitted).

**Issue 3:** Whether Jordan Construction should have been allowed to withdraw its admission that a certificate of occupancy was issued in October 2008.

**Standard of Review:** A district court's decision to deny a motion to withdraw is reviewed only for abuse of discretion. Langeland v. Monarch Motors, Inc., 952 P.2d 1058, 1061 (Utah 1998).

**Issue 4:** Whether prejudgment interest is awarded under a mechanic's lien.

**Standard of Review:** "'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(quoted Cornia v. Wilcox, 898 P.2d 1379, 1387 (Utah 1995)).

**Issue 5:** Whether the district court abused its discretion by awarding attorney's fees to FNMA as the prevailing party.

**Standard of Review:** "We ... review the trial court's determination as to who was the prevailing party under an abuse of discretion standard." R.T. Nielson Co. v. Cook, 2002 UT 11, ¶ 25.

## DETERMINATIVE PROVISIONS

The determinative provisions are properly set forth in the Appellant's Brief.

## STATEMENT OF THE CASE

**Nature of the Case:** This is a mechanic's lien foreclosure action. Third-party plaintiff, Jordan Construction, was the general contractor on a home built for Scott Bell. (R.431, 434.) When the home went over budget and Bell failed to pay, Jordan Construction recorded a mechanic's lien and sued Bell. (R.1071.) Jordan Construction obtained summary judgment against Bell. (R.500-03.) Jordan Construction then filed a third-party complaint against Federal National Mortgage Association, which had earlier purchased the trustee's deed in a nonjudicial foreclosure. Jordan Construction alleged that FNMA was bound by the summary judgment against Bell and, alternatively, that its mechanic's lien was valid and had priority over FNMA's trustee's deed. (R.1048-54.)

**Course of Proceedings and Rulings Below:** The course of proceedings and the district court's rulings on substantive issues constitute the bulk of the relevant "facts" on appeal and thus are included within the following "statement of facts."

## STATEMENT OF FACTS

In 2006, Scott Bell, an employee of Jordan Construction, hired Jordan Construction as general contractor to build him a new home. (R.439.) Jordan Construction would be responsible to pay the subcontractors. (R.439.) Visible work began on the home no later than October 16, 2006. (R.1557.)



On January 31, 2008, Bell obtained long-term financing and executed a promissory note secured by a trust deed in favor of The Mortgage Co-op. (R.909-921.) The trust deed was recorded on February 5, 2008. (R.546.)

Bell moved into the home before it was done, so on March 18, 2008, Provo City recorded a “Certificate of Non-compliance,” which stated that the property “has been occupied without an approved final [inspection] and a Certificate of Occupancy ....” (R.3388.) After the work was completed, a final inspection was done on October 16, 2008. (R.3209) On October 21, 2008, Provo City recorded a Notice of Certificate of Compliance which stated: “As of October 21, 2008 the project passed the Final Inspection. A Certificate of Occupancy has been issued.” (R.3388.)

Bell failed to pay Jordan Construction and some subcontractors what he owed. (R.3945.) In late October or early November 2008, Jordan Construction fired Bell.<sup>1</sup> (R.3945.) On November 24, 2008, Scott Bell and his brother, Todd, who was also employed by Jordan Construction, sued Jordan Construction and its owner, Wayne Lewis, in the Fourth District Court alleging conversion,

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<sup>1</sup> Jordan Construction gives a lengthy recitation of facts related to Bell’s dishonesty, including his embezzlement from Jordan Construction, and the time it took to uncover Bell’s dishonesty. For purposes of this appeal, FNMA does not dispute these facts, and they do provide some context and background. But they are not material to the outcome of this appeal.

embezzlement, breach of contract, slander, trespass, and intentional interference with business relations. (R.1-15.)

On December 5, 2008, Jordan Construction recorded a mechanic's lien against Bell's home for \$126,957.00. (R.1071.) The lien was amended on December 15, 2008 to correct a minor error. (R.49-50) On December 16, 2008, Jordan Construction filed counterclaims in the Fourth District Court against Scott Bell for breach of contract, unjust enrichment, promissory estoppel, conversion, and foreclosure of the mechanic's lien. (R.23-45.) At the same time, Jordan Construction recorded a Notice of Lis Pendens. (R.53-54.) Although there was a trust deed recorded against the property at the time, the trust deed holder was not named as a party to the foreclosure action. (R.23-45.)

Various subcontractors also recorded mechanic's liens. (R.2895.) Jordan Construction paid those subcontractors and their liens were released. (R.2895.) Other subcontractors did not record liens but did submit invoices to Jordan Construction for unpaid work. (R.2895-96.) Jordan Construction paid off all the subcontractors and then, on July 27, 2009, amended its lien to add the amounts it had paid to the subcontractors, increasing the amount from \$126,957.00 to \$232,976.81. (R.2895-98.)

On January 7, 2010, Jordan Construction moved for partial summary judgment against Bell. (R.406-428.) Bell did not file an opposition. (R.500.)

Jordan Construction's statement of facts was "deemed admitted by operation of Rule 7" (R.864), and on February 5, 2010, the court granted partial summary judgment on Jordan Construction's claims for conversion and breach of contract (R.500-03). The order was silent, however, on the mechanic's lien foreclosure claim.

On February 16, 2010, Bell filed for bankruptcy. (R.511.) The bankruptcy court later lifted the stay, and on June 24, 2010, the Fourth District Court entered findings and conclusions in support of the partial summary judgment. (R.510-12; 529-38.) The findings and conclusions still said nothing about the mechanic's lien.

And the trust deed holder still was not a party. On August 5, 2010, Jordan Construction filed a Motion for Leave to File Third-Party Complaint against Mortgage Electronic Registration Systems, Inc. ("MERS"), which had acquired the trust deed. (R.540-41.) MERS "is a necessary and indispensable party," Jordan Construction explained, "because it has an interest in the property." (R.541.) Joining MERS was necessary "in order to determine priority regarding liens which are attached to the property." (R.541.) The proposed third-party complaint sought a declaration that Jordan Construction's mechanic's lien had priority over MERS's trust deed. (R.544-48.) The court granted the motion, and

Jordan Construction filed the third-party complaint, but never served it. (R.575-76.) Thus, the trust deed still was not made subject to the foreclosure.

Meanwhile, Bell defaulted on the promissory note secured by the trust deed and on October 1, 2010, a nonjudicial foreclosure occurred, at which FNMA purchased the trustee's deed for \$442,431.96. (R.923-29.)

On January 21, 2011, Jordan Construction filed an Application for a Writ of Execution, requesting permission for the sheriff to seize and sell Bell's home in satisfaction of Jordan Construction's partial summary judgment against Bell. (R.729-35.) The application does not mention the mechanic's lien but instead appears to be an attempt to collect on the "judgment" against Bell on the conversion and contract claims.<sup>2</sup> A notice was sent to FNMA (R.999-1013), but it did not object, and on April 14, 2011, the district court issued the writ (R.747-48). The writ also makes no mention of the mechanic's lien.

In any case, Jordan Construction did not execute that writ. Instead, on June 14, 2011, it filed a motion asking the court to supplement the findings and conclusions. (R.759-60.) On July 1, 2011, the district court granted the motion, explaining that although Jordan Construction had requested summary judgment

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<sup>2</sup> On December 20, 2010, the Fourth District Court granted a motion setting aside a previous partial summary judgment that had been entered in Jordan Construction's favor against Todd Bell. (R.727-28.) Thus, there will still claims pending between Jordan Construction and Todd Bell also.

on its mechanic's lien foreclosure claim, "the ultimate Findings of Fact and Conclusions of Law and Order did not include judgment ... with respect to the mechanic's lien claim, an oversight which this Court ought to have observed." (R.865.) The court said that Jordan Construction "did, in fact, prevail" against Bell on the mechanic's lien claim. (R.865.) The court also awarded \$65,801 in attorney's fees to Jordan Construction against Bell. (R.865-71; 888-91.)

On August 3, 2011, the court modified the findings and conclusions to state that Jordan Construction "is entitled to a Decree of Foreclosure and Writ of Execution directing the Sheriff to sell the property against which the mechanic's lien was recorded ...." (R.891.) The order also stated that Jordan Construction is entitled to "prejudgment and post-judgment interest along with attorney fees and costs," bringing the total judgment against Bell to \$336,568.66. (R.891.) Finally, the court directed Jordan Construction to prepare a "new and revised Writ of Execution and Decree of Foreclosure ... directing the Sheriff of Utah County to conduct a foreclosure sale selling the property against which the mechanic's lien was recorded." (R.891.)

Jordan Construction did not prepare a new writ, however. Yet, at Jordan Construction's request, on August 22, 2011, the Utah County Sheriff posted notice of a proposed foreclosure sale on September 14, 2011 of "[a]ll right, title,

claim and interest of the above named plaintiff [i.e., Scott Bell] and his successor in interest” in the property. (R.953.)

Having recently acquired the trustee’s deed, on September 6, 2011, FNMA filed a Motion to Quash Writ of Execution and Notice of Sale. (R.893-906.) On September 12, 2011, the court issued an order quashing the writ and granting Jordan Construction’s request to file a third-party complaint against FNMA. (R.1046-47.)

On September 21, 2011, Jordan Construction filed a third-party complaint against FNMA pleading a single claim seeking a declaration that it could foreclose against FNMA’s trustee deed because FNMA was bound by the findings and conclusions entered against Scott Bell earlier in the case. (R.1048-54.) FNMA moved to dismiss the claim because the district court had already concluded when it quashed the writ that FNMA was not bound by the findings and conclusions entered against Bell. (R.1093-1106.) Jordan Construction argued there was privity between Bell and FNMA. (1108-25.) The court rejected that argument and granted FNMA’s motion to dismiss with leave to amend. (R.1173.)

Jordan Construction’s Amended Third Party Complaint, filed on February 23, 2012, alleged (word-for-word) the same declaratory-judgment claim the court had just dismissed (R.1180), but also included a second claim requesting

foreclosure on the mechanic's lien against FNMA's interest in the property (R.1180-81). The mechanic's lien claim sought to recover through foreclosure not only the amount of the lien, but the full \$336,568.66 Jordan Construction had been awarded against Bell, including interest and attorney's fees. (R.1178.)

FNMA moved to dismiss the Amended Third Party Complaint. (R.1255-56.) The court again dismissed the declaratory-judgment claim, but rejected FNMA's argument that the lien-foreclosure claim was barred by the statute of limitations. (R.1309-22.)

FNMA answered the Amended Third Party Complaint on August 24, 2012. (R.1324-28.) A month later, before any discovery, Jordan Construction moved for summary judgment. (R.1330-31; 1498-1500.) The court granted FNMA's Rule 56(f) motion and Jordan Construction withdrew its motion for summary judgment. (R.2277; 2307-08; 2316-18.)

On March 7, 2014, after fact discovery ended, FNMA filed a series of motions for partial summary judgment. First was a Motion for Partial Summary Judgment Ruling that FNMA is Not Liable for Attorneys' Fees Judgment Against Scott Bell, arguing that the award of costs and fees against Bell was his personal debt and not money that Jordan Construction could recover through foreclosure on the mechanic's lien. (R.2455-62.) Second was a Motion for Partial Summary Judgment that FNMA is Not Bound by the Judgment or Findings Entered

Against Scott Bell, again taking on Jordan Construction's *res judicata* argument. (R.2475-79.)

Third was a Motion for Partial Summary Judgment Ruling that Jordan Construction's Second Amended Mechanic's Lien is Invalid, arguing that Jordan Construction's second amendment to the mechanic's lien was untimely. (R.2489-91.) And fourth was a Motion for Partial Summary Judgment Ruling that Jordan Construction is Not Entitled to Interest, arguing that the plain language of the applicable mechanic's lien statute "does not permit a mechanic's lien claimant to recover interest on the value of its lien." (R.2551.) On April 15, 2014, Jordan Construction filed its own motion for summary judgment, arguing that its mechanic's lien had priority over FNMA's interest, and (once again) that FNMA was bound by the findings and conclusions entered against Bell. (R.2861-72.)

The court issued its ruling on July 1, 2014. (R.3206-26.) The court granted FNMA's motion regarding the attorney's fees awarded against Bell. These fees were caused "by Bell, before FNMA was joined as a party," the court explained, and were therefore allocated to Bell to pay. (R.3220.) The court also granted FNMA's motion regarding prejudgment interest on its mechanic's lien claim because the 2008 statute did not provide for prejudgment interest. (R.3221.)

On the issue of *res judicata*, the court granted FNMA's motion and denied Jordan Construction's because there was no privity. "[H]aving acquired the



trustee's lien," the court explained, "FNMA has an interest in and an ability to litigate the priority of the mechanic's lien which Bell did not. Thus, Bell did not represent the same legal right which FNMA now seeks to assert." (R.3223.)

That left two issues. First, the court denied FNMA's motion regarding the timeliness of the second amendment to the mechanic's lien. In its opposition, Jordan Construction had argued that the second amendment was valid under two theories: substantial compliance and relation back. (R.2688-90.) At oral argument, however, Jordan Construction made a new argument: that the second amendment was timely because a certificate of occupancy was not issued until June 2, 2011. (R.3219.) The court said the argument was "improperly raised during oral argument" but nevertheless temporarily denied FNMA's motion regarding the timeliness of the second amendment to the lien. (R.3219-20.)

Finally, the court rejected Jordan Construction's motion for summary judgment regarding the priority date of the mechanic's lien. The court held that there were disputed issues of material fact about whether Jordan Construction had abandoned the project for a time, which would prevent the lien from relating back to the commencement of the work. (R.3224-25.)

On February 13, 2015, Jordan Construction filed another motion for summary judgment, arguing as it had at the previous oral argument that the timeliness of the second amendment to the mechanic's lien should be determined

from the issuance of the June 2011 certificate of occupancy. (R.3246.) In opposition, FNMA pointed to Jordan Construction's admission that the certificate of occupancy was issued in October 2008:

**REQUEST NO. 2:** Admit that Scott Bell began occupying the Property in October 2007.

**RESPONSE:** 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.2541.) Jordan Construction had never moved to amend or withdraw this admission. (R.3327.) FNMA also pointed to the undisputed evidence that a certificate of occupancy was, in fact, issued in October 2008. On October 21, 2008, Provo City recorded a Notice of Certificate of Compliance which stated: "As of October 21, 2008 the project passed the Final Inspection. A Certificate of Occupancy has been issued." (R.3388.)

On April 3, 2015, FNMA filed its own motion for partial summary judgment, arguing that Jordan Construction's admission, along with the recorded notice that a certificate of occupancy was issued in October 2008, conclusively established that fact and required summary judgment in FNMA's favor on the timeliness of the second amendment to the lien. (R.3399-3406.) Three days later, Jordan Construction moved to withdraw its admission, and

asked the court for time to conduct additional discovery regarding the certificate of occupancy. (R.3474-75; R.3545-46.) On May 7, 2015, the court denied Jordan Construction's motion to withdraw its admission because the "documentary evidence, together with deposition testimony and interrogatories all consistently demonstrate that the certificate of occupancy was, in fact, issued in 2008." (R.3809.) The court also concluded that withdrawal of the admission would prejudice FNMA. (R.3810.) And the court also denied Jordan Construction's rule 56(f) request to reopen discovery. (R.3813-19.) "Defendant has had literally years to investigate the missing certificate of occupancy, but has inexplicably waited until now to seek additional discovery." (R.3817.)

On June 10, 2015, the court granted FNMA's motion for summary judgment on the timeliness of the second amendment to the lien. (R.3939-54.) The court explained that the amendment was made more than 180 days after the 2008 certificate of occupancy was issued and rejected Jordan Construction's arguments: "substantial compliance," and that the amendment should relate back to the initial lien filing. (R.3950-54.)

The only remaining issue was the validity and priority of the original amount of the mechanic's lien, \$126,956.92. On July 23, 2015, FNMA submitted an offer of judgment in the amount of \$130,000. (R.4137-38.) Jordan Construction did not accept the offer. Rather than incur the continued costs of

litigation, FNMA stipulated that the court could “enter an award in favor of Jordan Construction” for the original amount of the lien--\$126,956.92. (R.4141-42.) But the stipulation specified that this was not “admission by [FNMA<sup>3</sup>] that Jordan Construction” was the “successful party.” (R.4141-42.)

FNMA had already requested its costs and attorney’s fees. (R.4008-30.) FNMA argued that most of the case had been about the second amendment to the lien and, having prevailed on that issue, and on almost every motion that had been filed, it was the prevailing party. (R.4008-30.) At a hearing on the issue of FNMA’s fees, Jordan Construction said it intended to request its fees. The court expressed its surprise “because the court does not know what work Jordan Construction is suggesting was done in order to prevail on the first mechanics lien.” (R.4302-03.) Nevertheless, the court said it would “look at the attorney fees issue all at once.” (R.4302.) Thus, the court gave “leave to Jordan Construction to argue whether it’s the prevailing party on the stipulation” and ordered it to submit a fee affidavit within 14 days. (R.4303.)

Jordan Construction did not submit its affidavit within 14 days. (R.4308.) FNMA agreed to give Jordan Construction extra time, but Jordan Construction still did not file the affidavit. (R.4308.) Thus, on November 20, 2015, nearly three

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<sup>3</sup> At this point, Bank of American Fork had been substituted in for FNMA. For ease in reference, we will continue to refer to FNMA as the defendant.

weeks after FNMA's affidavit was originally due, FNMA filed a request to submit. (R.4307-08.)

On November 23, 2015, Jordan Construction submitted the now untimely affidavit along with a motion for its fees. (R.4313-21.) Jordan Construction argued that because of the stipulation it had prevailed on its mechanic's lien foreclosure claim, had achieved 54% or what it originally asked for, and was entitled to \$204,576 in fees. (R.4320.) The district court held that FNMA was the prevailing party, however, because Jordan Construction actually only got about one-third of what it requested in its complaint against FNMA, and did not prevail on any motion to achieve that "pyrrhic" victory, whereas FNMA had been successful on a number of motions that had whittled away Jordan Construction's claim. Thus, the district court awarded FNMA fees and costs in the amount of \$166,397.65. (R.4363-64.)

On May 4, 2016, the court entered final judgment, with a net award in FNMA's favor for \$39,437.73, resulting from an award of fees and costs in favor of FNMA in the amount of \$166,397.65, offset by the stipulated award in Jordan Construction's favor of \$126,956.92. (R.4498.) Jordan Construction filed a timely notice of appeal on June 1, 2016. (R.4500-01.)

## SUMMARY OF ARGUMENTS

Jordan Construction raises four primary issues on appeal. None merits reversal:

**1. Should FNMA have been allowed to challenge the mechanic's lien?** Jordan Construction says no for three reasons: One, FNMA failed to object to the first writ of execution. But FNMA was not yet a party to the case, and in any case, Jordan Construction did not execute that writ. Instead, it went back to the district court to seek amendment of the findings and conclusions and was told to issue a new writ. At that point, FNMA did object and then became a party. A district court has discretion to set aside a sheriff's sale *after* it has occurred, so it plainly has discretion to halt one before it happens.

Two, Jordan Construction argues that because it recorded a *lis pendens*, FNMA purchased the trustee's deed subject to the *outcome* of the litigation against Bell. But the litigation against Bell was not over when FNMA became a party. The third-party complaint filed against FNMA was a continuation of that action. And because it was a continuation of the same action, under rule 54(b) the district court had the right to revise and even reverse any of its previous rulings. And doing so was especially appropriate here where Bell had not responded to Jordan Construction's motion for summary judgment and thus disputed facts were deemed admitted. Also, the *lis pendens* could only have

affected *Bell's* interest in the property. It could not have affected FNMA's trustee's deed, which was recorded before the *lis pendens* was filed and was not at issue in the case until FNMA was made a party.

Three, Jordan Construction argues there was privity between FNMA and Bell so *res judicata* bars FNMA's attempts to challenge the findings and conclusions entered against Bell. But *res judicata* requires a final judgment in a previous case. FNMA was brought into this case as a third-party defendant before final judgment was entered. And, in any case, Bell and FNMA were never in privity, a key requirement of *res judicata*. FNMA purchased the trustee's deed, which Bell never held.

**2. Did the district court abuse its discretion by refusing to allow Jordan Construction to withdraw its admission that a certificate of occupancy was issued in October 2008?** As noted, the district court concluded that the second amendment to Jordan Construction's mechanic's lien, which nearly doubled its amount, was untimely. That conclusion was based, in part, on an admission by Jordan Construction that a certificate of occupancy was issued in October 2008. The district court denied Jordan Construction's motion to withdraw that admission. Two conditions must be met before a district court has discretion to allow withdrawal of an admission. The movant must show that the admission was contrary to the facts and that withdrawal would not prejudice the

other party. The district court concluded that neither condition was met. Undisputed evidence confirms that a certificate of occupancy was, in fact, issued in 2008. And FNMA would have been prejudiced by allowing withdrawal because discovery was over, memories had faded, and evidence had been lost. But even if these conditions are met, a district court still has discretion to deny withdrawal. The district court did not abuse that discretion here. Jordan Construction had more than two years to withdraw its admission, conduct discovery, and challenge the timing of the certificate of occupancy, but inexplicably failed to do so. Discovery was long over and trial was approaching when Jordan Construction finally moved to withdraw the admission and reopen discovery. Under these circumstances, the district court did not abuse its discretion.

**3. Was prejudgment interest allowed under the 2008 version of the mechanic's lien chapter?** In a recent case, this Court held that mechanic's lien claimants can only recover what the statute expressly allows, which does not include interest. See 2 Ton Plumbing, L.L.C. v. Thorgaard, 2015 UT 29. Moreover, in 2012, the Legislature amended the law to allow for interest on a mechanic's lien, thus confirming that it was not previously available. (This case is subject to the 2008 mechanic's lien statutes.) The district court correctly concluded that prejudgment interest is not awarded on a mechanic's lien.



**4. Did the district court abuse its discretion by awarding attorney's fees to FNMA as the "successful party"?** In the end, Jordan Construction got only about one-third of what it sought (\$126,956.92 of \$336,568.66), and did not prevail on any motion to get even that. Rather, FNMA simply stipulated rather than go to trial. The district court expressed "surprise" that Jordan Construction would even seek its fees. The district court's decision to award fees to FNMA and not Jordan Construction was not an abuse of discretion.

### **ARGUMENT**

**I. FNMA did not waive its right to object to the writ of execution. The district court had discretion to consider FNMA's objection.**

Jordan Construction first argues that the trial court erred in quashing the Writ of Execution issued on February 16, 2011, because FNMA waived its right to object by not responding to the notice it received. Aplt. Br. at 21-24.

**A. Jordan Construction did not execute the first writ. FNMA *did* object to Jordan Construction's notice of foreclosure.**

Clarity about what actually happened is required. First, Jordan Construction cites cases setting forth the standard for "setting aside" a sheriff's sale. See, e.g., Meguerditchian v. Smith, 2012 UT App 176, ¶ 9. Here, the court stopped a sheriff's sale before it happened.

Second, the district court did not quash the writ issued on February 16, 2011 – the one that FNMA did not object to. Jordan Construction never executed that writ. And that writ had nothing to do with the mechanic’s lien.

Here’s what happened. On January 21, 2011, Jordan Construction filed an Application for a Writ of Execution, which sought permission to execute on Bell’s interest in the property to satisfy the award of damages Jordan Construction had obtained against Bell. (R.729-35.) That award of damages, as set forth in the district court’s findings and conclusions, said nothing about the mechanic’s lien. At that point, judgment had been entered against Bell only on the conversion and breach-of-contract claims. Thus, the first writ was not a decree of foreclosure on the mechanic’s lien.

Further, Jordan Construction *did not execute that writ*. Instead, on June 14, 2011, Jordan Construction filed a motion asking the court to supplement its findings and conclusions to include foreclosure on the mechanic’s lien. (R.759-60.) The court granted that motion and ordered Jordan Construction to prepare a “new and revised Writ of Execution and Decree of Foreclosure.” (R.888-91.)

Jordan Construction did not prepare a new writ or a decree of foreclosure, as directed. Nevertheless, at Jordan Construction’s request, on August 22, 2011, the Utah County Sheriff posted notice of a proposed foreclosure sale to take place

on September 14, 2011 of “[a]ll right, title, claim and interest of the above named plaintiff [i.e., Scott Bell] and his successor in interest” in the property. (R.953.) This time, on September 6, 2011, having just acquired the trustee’s deed, FNMA did object and filed a motion to stop the sale. (R.893-95.)

In short, FNMA did not object to the first noticed sale, but that sale did not occur and had nothing to do with the mechanic’s lien at the center of this appeal. FNMA did object to the foreclosure sale. Thus, FNMA did not somehow “waive” its right to object.

**B. The district court had discretion to quash the writ, cancel the foreclosure sale, and consider FNMA’s arguments.**

In any case, even if FNMA’s objection was somehow untimely, the district court still did not err in stopping the sheriff’s sale. A district court has discretion to set aside a sheriff’s sale even *after it has occurred* (see Meguerditchian, 2012 UT App 176), so it surely has discretion to stop a sheriff’s sale from happening in the first place. Jordan Construction asserts: “The trial court’s order [quashing the writ] should be reversed. In this instance, the trial court does not have discretion, and is bound when the parties fail to follow procedural rules.” Aplt. Br. at 24. Noticeably absent is any support for this assertion. Jordan Construction cites no statute, rule, or case law that deprives the district court of discretion to quash a writ of execution or consider an untimely objection.

And to the contrary, there is authority for a court to quash a writ. Rule 54(b) says “*any* order or other decision, however designated ... may be changed at any time before the entry of a judgment adjudicating all the claims and the rights and liabilities of all the parties.” Utah R. Civ. P. 54(b).

**C. The writ should not have been issued in the first place because the trust deed holder was an indispensable party and no final judgment had been entered.**

And Jordan Construction itself had given the district court a reason to quash the writ and stop the foreclosure. On August 5, 2010, Jordan Construction moved for permission to file a third-party complaint against FNMA’s predecessor in interest, MERS, because MERS was a “necessary and indispensable party” and joinder was “necessary in order to determine priority regarding liens which are attached to the property.” (R.540-41.) For whatever reason, Jordan Construction never served that complaint on MERS. But Jordan Construction was right then and wrong now: MERS (now FNMA) was an indispensable party. Its interest could not be foreclosed in its absence.

Additionally, the writ was issued under Rule 64E, but a writ is available under that provision only for “property in the possession or under the control of the defendant following entry of a final judgment or order ....” Utah R. Civ. P. 64E. In this case, the property was no longer “in the possession or under the control” of Bell, and no final judgment had been entered.

The course taken by the district court was perfectly reasonable. Jordan Construction prevailed against Bell and wanted to foreclose against *his* interest in the property. The district court authorized that foreclosure but then learned, when FNMA objected, that Bell no longer had an interest in the property and that FNMA held a trustee's deed on the property. FNMA asked for the opportunity to contest the validity and priority of Jordan Construction's lien over FNMA's trustee's deed, and the court wisely gave FNMA its day in court.

And that is another key point. By quashing the writ and cancelling the sale, the district court did not deprive Jordan Construction of anything. It simply delayed foreclosure on the mechanic's lien so that Jordan Construction could attempt to establish the validity and priority of its lien against the trustee's deed held by FNMA, which otherwise would not have been affected by the foreclosure. See Dunlap v. Stichting Mayflower Mountain Fonds, 2003 UT App 283, ¶ 13 ("When the holder of a recorded interest is not joined in an action to foreclose, the foreclosure does nothing to affect its interest in the property."). If Jordan Construction had prevailed, or if it prevails on this appeal, it could still foreclose on its mechanic's lien. In any case, the district court did not commit reversible error when it quashed the writ and halted the foreclosure sale.

**II. FNMA is not bound by the interlocutory rulings entered against Scott Bell in the first part of the case.**

In the first part of this case, Jordan Construction prevailed on an unopposed motion for partial summary judgment against Scott Bell. In the amended findings and conclusions, the court said Jordan Construction could foreclose on the mechanic's lien and that it was entitled to prejudgment interest on the lien amount. Jordan Construction argues that FNMA should be bound by those findings and conclusions and that it was error for the district court to even consider FNMA's arguments on those issues. Aplt. Br. at 24-33. There are two parts of this argument. First, Jordan Construction argues that FNMA is bound because of the *lis pendens* recorded on December 15, 2008, before FNMA acquired its interest, but after the trust deed was recorded. Second, Jordan Construction argues that *res judicata* prohibits FNMA from relitigating the issues litigated by Bell.

**A. Jordan Construction's third-party complaint against FNMA was a continuation of its action against Bell, not a separate action. The district court was free to reconsider and revise orders and rulings made earlier in the action.**

To have binding effect, a *lis pendens* and *res judicata* both require a final judgment in previous litigation. That predicate is missing in this case.

Let's start with the *lis pendens* issue. "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. Dewsnap, 921 P.2d 1381, 1392 (Utah 2006) (emphasis added); see also Bagnall v. Suburbia Land Co., 579 P.2d 914, 916 (Utah 1978) ("One who acquires an interest in land that is the subject of the pending litigation ... is charged with notice of the claimed contrary right of others, and he is bound by the judgment rendered in the litigation.").

Jordan Construction argues: "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." Aplt. Br. at 27 (emphasis added). But no final judgment had been rendered so there was nothing to be bound by.<sup>4</sup> If someone had purchased the property from Bell after final judgment had been entered, then, of course, the purchaser would have been bound by the judgment. But if someone had

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<sup>4</sup> There was no final judgment for at least a couple of reasons. First, Jordan Construction had obtained partial summary judgment against Scott Bell, but Todd Bell was still a party and the claims against him had not been resolved at this point. Second, Jordan Construction had obtained partial summary judgment against Scott Bell, but that judgment had not been certified under Rule 54(b). Thus, the district court had not entered "final judgment."

purchased the property from Bell *while the litigation was pending*, they could have stepped into Bell's shoes in the litigation and pressed any arguments Bell could have made. They still would have been bound by the *eventual* judgment; but they would not have been bound by interlocutory rulings at the time they entered the case unless such rulings later became part of the final judgment. FNMA was brought into Jordan Construction's litigation against Bell as a third-party defendant before final judgment had been entered. And of course FNMA was bound by the eventual judgment that was entered—and is happy to be bound by that judgment. It is Jordan Construction that is appealing that judgment, after all. In short, the *lis pendens* is simply irrelevant.

*Res judicata* is inapplicable for a related reason. It applies only when an issue has “been decided in a final judgment on the merits in the previous action.” Jones, Waldo, & Holbrook, 923 P.2d at 1370. Here, there was no “final judgment” in a “previous action.” See DFI Props. LLC v. GR 2 Enters. LLC, 2010 UT 61, ¶ 17 (defining a final judgment as one that disposes of the case as to all the parties and as to the subject matter of the litigation). The document Jordan Construction points to as the “judgment” against Bell is the amended findings and conclusions. (See Aplt. Br. at 25 citing R.888.) Findings and conclusions are not a final judgment. See Utah R. Civ. P. 58A (“Every judgment and amended judgment must be set out in a separate document ordinarily titled ‘judgment’ —



or, as appropriate ‘Decree.’”). To be sure, Jordan Construction won partial summary judgment against Bell, but until such a “judgment” is incorporated into a final judgment, it remains interlocutory and subject to reconsideration.

In short, there is no “previous action” here, merely a continuation of the same action resulting in a single final judgment. Jordan Construction unwittingly acknowledges this, arguing that *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.*” Aplt. Br. at 32 (emphasis added). “Res judicata and its companion, collateral estoppel, do not operate within a single case. They are used to describe the binding effect of a decision in a *prior case* on a *second case.*” In re Discipline of Rasmussen, 2013 UT 14, ¶ 17 (internal citation and quotation marks omitted, emphasis in original). Because the decisions Jordan Construction is appealing were made in the same case, *res judicata* is inapplicable.

The applicable doctrine is the “law of the case.” “*Res judicata* applies as between multiple cases while the law of the case doctrine applies to successive proceedings within one case.” State v. Waterfield, 2014 UT App 67, ¶ 39 n.12. The distinction between the two is critical. See also IHC Health Servs., Inc. v. D&K Mgmt., Inc., 2008 UT 73, ¶ 26 n. 20 (“Because the elements and effects of *res judicata* and law of the case may differ, they should be viewed as distinct

doctrines.”). *Res judicata* bars relitigation of claims and issues resolved in a final judgment. Law of the case allows reconsideration of issues and claims at any time before final judgment.

While a case remains pending before the district court prior to any appeal, the parties are bound by the court’s prior decision, but the court remains free to reconsider that decision. It may do so sua sponte or at the suggestion of one of the parties.... As long as the case has not been appealed and remanded, reconsideration of an issue before a final judgment is within the sound discretion of the district court.

Id., ¶ 27. Indeed, Rule 54(b) expressly authorizes this. See Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 44 (Utah App. 1988) (“Rule 54(b) of the Utah Rules of Civil Procedure does allow for the possibility of a judge changing his or her mind in cases involving multiple parties or multiple claims.”).

In sum, a *lis pendens* binds those who acquire the defendant’s interest in the property to the *outcome* of the litigation – *i.e.*, the final judgment—but not to interlocutory rulings that may later be changed. And *res judicata* binds privies to a final judgment in a prior case. The prerequisite of both issues is a final judgment in an earlier case. That requirement is absent here.

**B. Even if the findings and conclusions entered against Scott Bell were treated as a final judgment, only Bell’s interest, not FNMA’s, is bound by that judgment.**

Assuming, for the sake of argument, that the “first part of this case” resulted in a final judgment against Scott Bell, that judgment could not determine FNMA’s separate interest in the property. First, the *lis pendens* affected only Bell’s interest, not FNMA’s interest. Second, because FNMA had a separate interest, there was no privity between FNMA and Bell.

**1. The *lis pendens* could not affect FNMA’s independent interest in the property.**

A *lis pendens* affects the property interest that is “the subject of pending litigation.” Bagnall, 579 P.2d at 916. The trust deed was recorded against the property before Jordan Construction sued Bell. But for whatever reason, Jordan Construction chose to name only Bell and not pursue foreclosure against the trust deed as well. Thus, only Bell’s interest was at stake.

If FNMA had purchased Bell’s interest in the property, which was subject to the trust deed, then that interest would have remained subject to the *lis pendens* and FNMA would have been bound by any final judgment. But FNMA did not purchase Bell’s interest in the property. It did not receive a deed from Bell. It purchased the trustee’s deed as the successful purchaser at the trust deed foreclosure sale. And a trustee’s deed maintains the same priority position the recorded trust deed had. Utah Code § 57-1-28(3) provides:

The trustee's deed shall operate to convey to the purchaser, without right of redemption, the *trustee's title* and all right, title, interest, and claim of the trustor and the trustor's successors in interest subsequent to the execution of the trust deed....

(emphasis added).<sup>5</sup> Bell never held the "trustee's title" that FNMA purchased. As the district court recognized, "having acquired the trustee's lien, FNMA has an interest in and an ability to litigate the priority of the mechanics' lien which Bell did not. Thus, Bell did not represent the same legal right which FNMA now seeks to assert." (R.3223.)

Because Jordan Construction did not name the holder of the trust deed in its foreclosure action, the interest FNMA acquired was not at stake in Jordan Construction's litigation against Bell, so the *lis pendens* has no impact on it. Again, Jordan Construction recognized this when it moved to add FNMA's predecessor-in-interest, MERS, as a third-party defendant "in order to determine priority regarding" its separate interest. (R.541.)

In short, there are two reasons why the *lis pendens* does not bind FNMA to the district court's interlocutory rulings against Bell: First, Bell's interest had not

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<sup>5</sup> A trust deed is "a deed conveying title to real property to a trustee as security until the grantor repays a loan." Black's Law Dictionary at 339 (7th ed. abridged). The successful purchaser at a foreclosure sale on a trust deed receives the "trustee's deed," i.e., the "trustee's title" to the property. Utah Code § 57-1-28(3).

been finally adjudicated when FNMA became a party. Second, FNMA had its own interest in the property that was not at stake until FNMA became a party.

**2. *Res judicata* does not bind FNMA to the findings and conclusions entered against Bell because there was no privity between FNMA and Bell.**

FNMA's separate interest in the property is another reason why *res judicata* does not bind FNMA to the interlocutory rulings entered against Bell. Both branches of *res judicata* require privity. See Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne, 2012 UT 66, ¶ 13 (claim preclusion); Jones, Waldo, Holbrook & McDonough v. Dawson, 923 P.2d 1366, 1370 (Utah 1996) (issue preclusion). Jordan Construction argues that "Bell had the same interest in the Property that FNMA has now." Apl't. Br. at 30. But that's not true. Bell never held the trustee's deed. FNMA did not acquire its interest from Bell. Thus, as the district court explained, "Bell did not represent the same legal right which FNMA now seeks to assert. There is no privity." (R.3223.)

In a mechanic's lien foreclosure action, in order to claim priority over the trust deed and foreclose that interest, the holder of the trust deed must be named as a party. "In other words, when seeking to foreclose a lien on property encumbered by a deed of trust, it is necessary to name the trustee who holds legal title to the property." ParkWest Homes, LLC v. Barnson, 302 P.3d 18, 25 (Idaho 2013). See also Dunlap, 2003 UT App 283, ¶ 13 ("When the holder of a

recorded interest is not joined in an action to foreclose, the foreclosure does nothing to affect its interest in the property.”); Mickelson v. Anderson, 19 P.2d 1033 (Utah 1932) (without title holder as a party foreclosure would be “ineffectual to convey any title ... because the only person who had any title to the property was ... not made a party to the suit”).

In short, there are at least two reasons why *res judicata* does not bind FNMA to the interlocutory rulings entered against Bell in the first part of this case. First, there was no final judgment. Thus, even if there was privity between FNMA and Bell, when FNMA stepped into Bell’s shoes, the court was free to revisit any of its prior orders and rulings. Second, FNMA in fact did not step into Bell’s shoes but had its own separate interest in the property that could not have been affected by the interlocutory rulings against Bell.

### **III. Jordan Construction is not entitled to collect prejudgment interest through foreclosure of its mechanic’s lien.**

In 2012, the “Mechanic’s Liens” chapter of the Utah Code was renumbered, amended, and partially repealed. The amended statutory scheme is found at Utah Code §§ 38-1a-101 to 38-1a-804 (2014). “Because the 200[8] version of the code was in effect ‘at the time of the event regulated by the law in question,’” that version is applicable to this case. 2 Ton Plumbing, L.L.C. v. Thorgaard, 2015 UT 29, ¶ 11 n.1 quoting State v. Folsom, 2015 UT 14, ¶ 10.

The mechanic's lien statute allows the lien claimant to recover "the value of the services rendered, labor performed, or materials or equipment furnished or rented ...." Utah Code § 38-1-3 (2008). This Court recently held that recovery through foreclosure is limited to these listed items. In 2 Ton Plumbing, 2015 UT 29, the plaintiff, 2 Ton, recorded a notice of lien representing only the value of services, labor, and materials. Id., ¶ 3. Later, 2 Ton "recorded an amended notice of mechanics' lien" for \$20,983.42 "'consisting of principal of \$7,147.41, plus lien fees of \$110, plus interest and late fees of \$2,480.30, plus pro rata costs of \$942.44, plus pro rata attorney fees of \$10,323.27 ....'" Id., ¶ 9. The property owners stipulated that the lien was valid for the original \$7,147.41, but argued that the rest of the amended claim was invalid. This Court agreed.

The Court explained that "[a]ny reference to 'attorney fees' is noticeably absent from section 38-1-3's statutory language, which sets forth 'what may be attached in a lien claim,'" and is also absent "from section 38-1-7, which states the information that 'shall' be contained in the notice of lien." Id. at ¶ 34. The same is true of interest. This absence "was purposeful." Id. Had the legislature intended for these items "to be included in the value of a mechanics' lien, it could have said so ...."<sup>6</sup> Id.

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<sup>6</sup> The Court explained that attorney fees could be recovered, but not from the property: "Section 38-1-18 provides that if a lien claimant elects to enforce the

Things changed in 2012 when the Legislature amended the law to expressly allow prejudgment interest on a mechanic's lien claim. See Utah Code § 38-1a-309 (added by Chapter 330, 2012 General Session, § 7 eff. May 8, 2012). As the district court said: "[S]ince 2012, Section 15-1-1 has acted to apply the same statutory interest rate to mechanics' liens as applies to contracts. That the Legislature saw fit to amend the mechanics' lien statutes to allow for recovery of interest strongly suggests that interest was not awardable previously." (R.3221.)

Before this amendment, as this Court held, a mechanics' lien was "limited to 'the value of the services rendered, labor performed, or materials or equipment furnished or rented.'" 2 Ton Plumbing, 2015 UT 29 ¶ 39. And as the Court pointed out, this is consistent with case law in other jurisdictions. In Artsmith Devel. Group, Inc. v. Updegraff, 868 A.2d 495 (Pa. Super. 2005), the court affirmed the trial court's conclusion that interest was "not properly the subject of a mechanic's lien claim." Id. at 496. The statute, the court said, "expressly limits the lien to amounts owed for labor and materials only." Id. In Nat'l Lumber Co. v. United Cas. & Sur. Ins. Co., Inc., 802 N.E.2d 82, 87 (Mass.

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mechanics' lien, 'the successful part shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action.' This provision clarifies that an award of attorney fees is a conditional award that depends upon the outcome of the action to enforce the lien. Pursuant to section 38-1-18, a 'successful party' must be ascertained before a lien claimant is entitled to attorney fees." Id. ¶ 35 (footnote omitted).



2004), the court likewise applied the plain language of Massachusetts' mechanic's lien statutes to deny interest.

The plain wording of G.L. c. 254 limits a mechanic's lien created pursuant to § 4 to the amount due for labor and materials.... Nowhere in the detailed statutory framework is there a reference to interest or attorney's fees. Contractual interest and attorney's fees are not "labor and material," nor can they be part of the "amount due" at the time the statement of claim is filed because they have not yet been determined.

Id. at 86.

Jordan Construction argues that the trial court's ruling "simply ignores the statutory pre-judgment interest rate set forth in Utah Code Ann. § 15-1-1" which "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." Aplt. Br. at 34. But Utah Code 15-1-1(2) "does nothing more than define what the rate of interest should be in those instances where interest accrues as a matter of law but no specific rate has been agreed to; it does not create a right to interest where none otherwise exists." Vali Convalescent & Care Inst. v. Div. of Health Care Fin., 797 P.2d 438, 445 (Utah 1990). Only if a party "is entitled to interest on some valid basis" does § 15-1-1 "establish[ ] the rate of interest to which it is entitled." Id.

Jordan Construction argues that the trial court's ruling "ignored the fact that Utah courts have awarded pre-judgment interest at the statutory rate on mechanic's lien cases in the past" and cites Lignell v. Berg, 593 P.2d 800 (Utah 1979), in support. But Lignell was not a mechanic's lien case. It was a breach-of-contract case and the court awarded interest on the contract claim. "In contract cases, certainly, interest on amounts found to be due in judicial proceedings is recovery to which the creditor is entitled as a matter of law." Id. at 809.

And that is a critical distinction. Jordan Construction is entitled to prejudgment interest on the money Bell owes. But that prejudgment interest must be collected from Bell, not from the property to which the mechanic's lien is attached. See Artsmith Devel. Group, Inc., 868 A.2d at 496-97 ("Items other than labor and materials are more properly sought in an action for breach of the construction contract, if that contract authorizes recovery of interest and attorneys' fees."). The confusion comes from Jordan Construction's erroneous belief that a "mechanic's lien claim is one that necessarily arises from contract and the payment of past due money ... and fits squarely within ... Utah Code Ann. 15-1-1." Aplt. Br. at 35. The right to recover from a mechanic's lien is statutory, not contractual. Foreclosure on a mechanic's lien is an *in rem* action against the property, not an *in personam* action to enforce a contractual right. As one court has said, "[a] lien is asserted against property, not against a person."

Kehoe Component Sales, Inc. v. Best Lighting Pods, Inc., 796 F.3d 576, 593 (6th Cir. 2015). “The contractual relationship between the property owner and the holder of the lien is not relevant to whether the lien may be enforced because ‘the entitlement to enforce a ... lien arises as a matter of law and not from a written instrument or verbal contract.’” Id. (quoting Guernsey Bank v. Milano Sports Ents., LLC, 894 N.E.2d 715, 732 (Ohio App. 2008); see also Nat’l Lumber Co., 802 N.E.2d at 88 (“National Lumber claims that it is entitled to statutory interest pursuant to G.L. c. 231 §§ 6C and 6H. Neither of these provisions is applicable in [a mechanic’s lien foreclosure] case because the nature of the plaintiff’s action is in rem, to enforce a lien.”)).

Similarly, in Guernsey Bank, 894 N.E.2d 715, the court explained that in a mechanic’s lien action the “right to recovery [is] not based upon a written instrument or verbal contract” but “ar[ises] from the mechanic’s lien statute and [goes] against the property only.” Id. This is plain, for example, when a subcontractor recovers on a mechanic’s lien. Prejudgment interest would not be available “because there [is] no privity of contract between the subcontractor and the owner of the property ....” Id. Foreclosure on a mechanic’s lien is a proceeding “*in rem not in personam*.” Id. That is, it is not a contract action to enforce personal rights between parties to a contract, but an action against the

property to recover a debt owed by some third party who may not be a party to a contract.

[W]henever a holder of a mechanic's lien enforces its lien in court, it recovers against the property based upon a statutorily granted right. Although some holders may also have contractual actions against the property owner, foreclosure on a mechanic's lien does not implicate any contractual right to recovery. As the entitlement to enforce a mechanic's lien arises as a matter of law and not from a written instrument or verbal contract, holders of mechanic's liens cannot receive prejudgment interest ....

Id. at 732.

In sum, as this Court made clear in 2 Ton Plumbing, the amount of the lien is limited to "the value of the services rendered, labor performed, or materials or equipment furnished or rented ...." Utah Code § 38-1-3 (2009).

#### **IV. The second amendment to the mechanic's lien was untimely.**

The parties agree that the timeliness of the second amendment to the mechanic's lien is determined by the date a certificate of occupancy was issued. See Utah Code § 38-1-7(1)(a)(ii) (2008). If a certificate of occupancy was issued in October 2008, as Jordan Construction once admitted, then the second amendment was untimely and thus of no validity.

**A. Refusing to allow Jordan Construction to withdraw its admission that the certificate of occupancy was issued in October 2008 was not an abuse of discretion.**

The primary question on appeal is not, however, when a certificate of occupancy was issued—at least not directly. Jordan Construction *admitted* it was issued in October 2008. (R.2541.) The question on appeal is whether the trial court abused its discretion by refusing to allow Jordan Construction to withdraw that admission.

On February 1, 2013, in response to a request for admission, Jordan Construction admitted that a Certificate of Occupancy was issued in October 2008. (R.2541). “Any matter admitted under [Rule 36] is conclusively established unless the court on motion permits withdrawal or amendment of the admission.” Utah R. Civ. P. 36(b). Rule 36(c) states that “[t]he Court *may* permit withdrawal or amendment if [1] the presentation of the merits of the action will be promoted and [2] withdrawal or amendment will not prejudice the requesting party.” Both conditions must be met before an admission can be withdrawn. “The trial court has discretion to deny a motion to amend, but its discretion to grant such a motion comes into play only after the preliminary requirements are satisfied.” Langeland v. Monarch Motors, Inc., 952 P.2d 1058, 1062 (Utah 1998). In this case, the district court correctly concluded that *neither* condition was met and, in any case, did not abuse its discretion by denying the motion.

1. **Allowing Jordan Construction to withdraw the admission would not have served presentation of the merits because the admission was consistent with the undisputed facts.**

To withdraw an admission, a party must “(1) show that the matters deemed admitted against it are relevant to the merits of the underlying cause of action, and (2) introduce some evidence by affidavit or otherwise of specific facts indicating that the matters deemed admitted against it are in fact untrue.” *Id.* at 1062. The issue is relevant. That’s never been disputed. “[T]he burden of showing the truth or falsity of admissions should not ... fall on the party that obtained the admissions but rather on the party seeking to amend or withdraw them.” *Id.* The district court denied the motion to withdraw because the “documentary evidence, together with deposition testimony and interrogatories all consistently demonstrate that the certificate of occupancy was, in fact, issued in 2008,” *i.e.*, the admission was true. (R.3809.)

The evidence is undisputed that Bell moved into the home before it was finished and on March 18, 2008, Provo City recorded against the property a “Certificate of Non-compliance,” which stated that the property “has been occupied without an approved final [inspection] and a Certificate of Occupancy issued from the Provo City Building Department.” (R.3388.) Provo City Code § 14.01.090 provides: “It shall be unlawful to use or occupy ... any building or

premises until a Certificate of Occupancy ... shall have been issued for the premises ... by Provo City.” But the home was finished, a final inspection was done, and on October 21, 2008, the City recorded a “Certificate of Compliance,” which stated: “As of October 21, 2008, the project passed the Final Inspection. A *Certificate of Occupancy has been issued*. Therefore the Certificate of Non Compliance is no longer valid.” (R.3388.) In other words, it was now legal for Bell to live there because a certificate of occupancy had been issued.

Jordan Construction’s owner, Wesley Lewis, confirmed as a 30(b)(6) witness that the final inspection where the home was “passed off” occurred in October 2008 and that no work was done after that. (R.2535-36.) “There were a few miscellaneous things that I got fixed, and I called for a final inspection, for the city to come out and do a final final, because they had hounded me at this point to get this permit cleared up and in compliance.” (R.2536.) He explained that this work was done, that the home passed final inspection, and that he saw a document from the city saying it was in compliance.

Q. And at some point the city – I’ve seen a document from the city where they eventually say, in compliance, and it essentially appears to be closed out.

A. In October, yeah.

(R.3458.) As the district court pointed out, Utah law provides that a recorded notice that a certificate of occupancy had been issued creates a presumption that

it actually has been issued. “A recorded document creates the ... presumption[ ]” that the “recitals and other statements of fact in a document including without limitation recitals concerning mergers or name changes of organizations, are true.” Utah Code § 57-4a-4(1)(j). “Thus, there is a statutory presumption,” the district court explained, “that the Property passed final inspection, and a certificate of occupancy was thereafter issued in October of 2008.” (R.3949-50.) “This presumption,” the court said, “is further supported by deposition testimony, affidavit testimony, and discovery responses, all of which point to the existence of an October 2008 certificate of occupancy.” (R.3950.)

Further, the Provo City Code required that the certificate of occupancy be issued in October 2008, when the home passed final inspection. “A Certificate of Occupancy ... is required to be issued by the Planning Commission of Provo City at the time a building is completed and final inspection granted by the Building Inspection Division.” Provo City Code § 14.01.090(2). There is no explanation for why a certificate of occupancy would not have been issued in October 2008. Thus, the district court concluded, “Jordan has failed to demonstrate that the admitted fact is untrue.” (R.3949-50.)



**2. Allowing Jordan Construction to withdraw the admission would have prejudiced FNMA.**

“[F]ailure [by the moving party] to satisfy the first requirement of rule 36(b) relieves [the nonmoving party] of the burden of showing [prejudice].” Langeland, 952 P.2d at 1061. Thus, there’s no reason to consider prejudice. In any case, the district court also correctly found that FNMA would be prejudiced by withdrawal of the admission. The test “is whether the party is now any less able to obtain the evidence required to prove the matter which was admitted than he would have been at the time the admission was made.” Id. at 1063 (quotation marks omitted).

Jordan Construction admitted, not only in its formal admission, but from the very beginning of this case, that the second amendment to the mechanic’s lien occurred after the statutory time period for amending the lien had expired. The original Third Party Complaint filed against FNMA admitted that it paid off subcontractors and then amended its lien “[a]fter the six month period in which other subcontractors could assert a lien on the Property had expired ....” (R.1051.) And in four separate summary judgment memoranda, Jordan Construction repeatedly acknowledged that the amendment was untimely. (R.2585; 2588; 2683; 2686; 2854-55; 2858.)

Rather than contend that the second amendment was timely, Jordan Construction made three other arguments: (1) FNMA should be bound by the findings against Bell – who had never raised the timeliness issue, (R.2690-98); (2) the amendment should relate back to the original lien under Rule 15 (R.2689-90); and (3) the untimeliness should be overlooked under the doctrine of substantial compliance (R.2688-89). But Jordan Construction did not move to withdraw its admission or otherwise argue that the second amendment was timely.

On April 15, 2014, Jordan Construction even attached the June 2011 certificate of occupancy as an exhibit to its motion for summary judgment. In fact, it is attached twice. (R.2949; 2955.) Yet, Jordan Construction still continued to admit that the second amendment was untimely. One of the undisputed facts in support of this motion stated: “On or about July 27, 2009, *after the six month period* in which other subcontractors could assert mechanic’s liens on the Property had expired ... Jordan Construction ... recorded a Second Amended Notice of Mechanic’s Lien.” (R.2858.) FNMA’s opposition admitted that this fact was undisputed. (R.3122.)

In short, from the time Jordan Construction filed its Third Party Complaint against FNMA in September 2011, through June 2014, it was an undisputed fact that the second amendment was filed after the allowed statutory period had

expired. Hence, there was no discovery into this issue. No Provo City officials were deposed. No one even mentioned the June 2011 certificate of occupancy.

That changed at an oral argument on various motions for summary judgment on June 23, 2014, when Jordan Construction brought the June 2011 certificate of occupancy to the court's attention and argued for the first time that the second amendment was timely because it was recorded within 180 days of this certificate. (R.3204; 3219-20.) But even then Jordan Construction did not move to withdraw or amend its admission. That was not done until April 6, 2015—26 months after making the admission, more than a year after fact discovery closed, and six-and-a-half years after the case was originally filed. (R.3474-75.) Trial was scheduled for August (R.3814) and Jordan Construction was now seeking to withdraw its admission and reopen discovery (R.3813-19).

The district court concluded that allowing withdrawal of the admission at this late stage, after years of failing to raise the issue, would prejudice FNMA. "If the date of the certificate of occupancy were now declared to be an open question," the court explained, "FNMA would be left attempting to depose witnesses in order to confirm" that a certificate of occupancy was in fact issued in 2008. (R.3810.) Given the seven years that had passed, "it seems unlikely that any witness would be equipped" to say what had happened to the 2008 certificate. (R.3810.) No discovery was conducted because the fact had been

admitted. “To retract that admission now would clearly cause prejudice to FNMA.” (R.3810.)

There is no conceivable reason why a certificate of occupancy would have been issued in 2011 (unless it was a replacement for a lost certificate) and not in 2008. But the passage of time would clearly complicate FNMA’s efforts to prove that. No Provo City official is going to remember what happened to a certificate of occupancy in 2008. Prejudice can be presumed merely from the passage of time. See Young v. W. Piling & Sheeting, 680 P.2d 394, 395 (Utah 1984) (“The prejudice and disadvantage to the defendant is readily apparent. Some witnesses may no longer be available; recollections may be dimmed. Valuable evidence may have long been discarded or destroyed.”); Kuhn v. Mount, 44 P. 1036, 1038 (Utah 1896) (imposing a time bar where “the transaction has faded from memory, or the evidence has been lost”).

Moreover, prejudice exists where a motion to withdraw is made after fact discovery is closed and a previously uncontested fact is being challenged. See also See Conlon v. United States, 474 F.3d 616, 624 (9th Cir. 2007) (nonmoving party was prejudiced where motion to withdraw admission was not filed until two-and-a-half months after fact discovery was closed); Pedroza v. Lomas Auto Mall, Inc., 258 F.R.D. 453 (D.N.M. 2009) (prejudiced where understanding

throughout the case was consistent with admissions and the request to withdraw was post-discovery and on the eve of trial).

In short, before the district court could even exercise its discretion to allow Jordan Construction to withdraw its admission, the burden was on Jordan Construction to show that the admission was untrue. Jordan Construction did not meet that burden. The district court also correctly concluded that withdrawal would prejudice FNMA. The “preliminary determination as to whether the rule 36(b) conditions have been met ‘is subject to a somewhat more exacting standard of review’” than mere abuse of discretion. Barnes v. Clarkson, 2008 UT App 44, ¶ 12 quoting Langeland, 952 P.2d at 1060-61. The district court’s decision survives even this “somewhat more exacting” abuse-of-discretion review.

**3. The district court did not abuse its discretion in refusing to allow Jordan Construction to withdraw its admission.**

As noted, a trial court has discretion to grant a motion to withdraw only if the preliminary 36(b) requirements are satisfied, but it has discretion to deny withdrawal regardless of those requirements. Langeland, 952 P.2d at 1060-61. “Decisions placed within the discretion of the trial court can be reversed only upon a finding of abuse of discretion, i.e., if there is no reasonable basis for the decision.” Id. at 1061. In this case, there was plainly a reasonable basis.

First, it is undisputed that work on the home was completed in October 2008, a final inspection was done, the Notice of Noncompliance was revoked, and a document was recorded stating: “A Certificate of Occupancy has been issued.” (R.3388.) Jordan Construction’s admission was consistent with these undisputed facts.

Further, this case was litigated for nearly three years (including 26 months after the admission) without Jordan Construction ever contending that the second amendment to the lien was timely. And Jordan Construction had plenty of opportunities. The June 2011 certificate of occupancy was obtained by FNMA on July 2, 2013, and quickly provided to Jordan Construction. Jordan Construction submitted it to the district court as an exhibit in April 2014, but still did not move to withdraw its earlier admission.

Additionally, by the time Jordan Construction finally did move to withdraw the admission, discovery was long over and trial was approaching. The district court was not willing to reopen discovery. (R.3816.) “Based upon this procedural history, the Court concludes that Jordan’s attempt to delay consideration of summary judgment and re-open discovery to investigate an issue which all parties have been aware of since 2013 is not timely.” (R.3816.) The court added that Defendant “has had literally years to investigate” the issue “but has inexplicably waited until now to seek additional discovery.” (R.3817.)

Finally, this case was already more than six years old when this issue was raised. As this Court said in Langeland, “[l]itigation must come to an end sometime,” and the rules of civil procedure are intended help that happen. Id. at 1064. Thus, a court does not have to “come to the rescue of a party” that admits a fact and then waits too long to withdraw that admission. Id.

For these reasons, the district court did not abuse its discretion by denying Jordan Construction’s motion to withdraw its admission.<sup>7</sup>

**B. Equitable tolling does not save the untimeliness of the second amendment to the mechanic’s lien.**

Jordan Construction next attempts to save the untimely second amendment to its mechanic’s lien through the doctrine of equitable tolling.

**1. Jordan Construction did not raise this argument below.**

In the district court, Jordan Construction raised three arguments to try to overcome the untimeliness of the second amendment to the lien: (1) res judicata,

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<sup>7</sup> Jordan Construction argues that it should have been allowed to withdraw or amend its admission because the admission at issue was not directly responsive to the request it was responding to. Aplt. Br. at 46. The district court correctly rejected this argument because “nowhere in Rule 36 does it suggest that an answer must be an unqualified ‘yes’ or no,” rather, the rule “clearly allows parties to admit in part, deny in part, and provide details.” (R.3811.) Jordan’s response was “permissible under Rule 36, and there is no basis to strike the language now, simply because Jordan regrets including it.” (R.3811.) Plus, this argument ignores the numerous other admissions throughout the case that the second amendment was untimely.

(2) substantial compliance, and (3) relation back. The equitable tolling argument was not raised. Because Jordan Construction “never raised this argument below,” it has “waived [its] right to urge its consideration on appeal.” State v. Martin, 2002 UT 34, ¶ 28 n.4.

**2. Equitable tolling does not apply to mechanic’s lien statutory deadlines.**

Even if the argument was not waived, equitable tolling does not apply to amending a mechanic’s lien. “A lien created solely by statute depends on the terms of the statute.” 2 Ton Plumbing, 2015 UT 29, ¶ 21. Thus, “compliance with the statute is required before a party is entitled to the benefits created by the statute.” AAA Fencing Co. v. Raintree Devel. & Energy Co., 714 P.2d 289, 291 (Utah 1986). In AAA Fencing, the lien claimant brought its foreclosure action after the statutory period for doing so had expired, but argued that the defendant had waived that defense by not pleading it. Id. at 290-91. The court rejected the argument and held that lien claimants lose their lien if they fail to file the foreclosure action within the required time. The court “distinguish[ed] mechanics’ lien statutory periods from procedural statutes of limitations,” which would be subject to waiver and tolling. Id. at 291. “[T]he statutory period is not merely a statute of limitations but a condition of liability itself ....” Id. (internal quotation marks omitted).



The time for filing and amending a lien is set by express statutory command. See Utah Code § 38-1-7(1)(a)(i)(A). Thus, “notices of liens may not be amended in any substantial manner after the time has expired for the filing of the same.” Roberts Inv. Co. v. Gibbons & Reed Concrete Prod. Co., 449 P.2d 116, 118 (Utah 1969). “Unless authorized by statute, a mechanic’s lien claim or statement may not be amended after the expiration of the time for filing.” 56 C.J.S. Mechanics’ Liens § 193; see also 53 Am. Jur. 2d Mechanics’ Liens § 231 (“In the absence of a statute providing for an amendment, a mechanic’s lien claim or notice required to be made and filed cannot be materially amended, and it must be complete and legally sufficient when filed and it cannot even be reformed in equity.”).

Further, there is no basis for equitable tolling. Jordan Construction was not deceived. It timely filed a lien for the amount it was owed. The untimely amendment was for amounts owed to subcontractors. Some had timely filed liens. Jordan Construction paid those subcontractors, released their liens, and added the amount to its own lien. Others chose not to file a lien for whatever reason. But there is no evidence they were deceived. And nothing in the mechanic’s lien statutes allows a contractor to untimely amend its lien after paying off a subcontractor.

In short, the equitable tolling argument was waived, does not apply to mechanic's liens in any case, and would not be applicable in this case even if it did apply to mechanic's liens.

**C. The "relation back" rule does not apply to mechanic's liens.**

Finally, Jordan Construction argues that the untimely amendment should relate back under rule 15(c) to the original notice of lien. Aplt. Br. at 42-43. Rule 15(c) says that a "claim or defense asserted in [an] amended pleading ... relates back to the date of the original pleading" if it "arose out of the conduct, transaction, or occurrence set forth ... in the original pleading." Utah R. Civ. P. 15(c). An amendment to a mechanic's lien is not a new "claim or defense" in an "amended pleading" and there is no "original pleading" for it to relate back to. See Utah R. Civ. P. 7.

And the mechanic's lien statute does not provide for relation back of an amended notice of lien. Utah courts "will not infer substantive terms into the text [of a statute] that are not already there." Associated Gen. Contractors v. Bd. of Oil, Gas & Mining, 2001 UT 112, ¶30 (quotations and citation omitted). Further, "relation back" would conflict with the strict deadlines set forth in the carefully crafted mechanic's lien statutes.

\* \* \* \* \*

For all these reasons, the second amendment to Jordan Construction's mechanic's lien was untimely and the district court properly granted summary judgment in FNMA's favor on this issue.

**V. The district court's conclusion that FNMA was the "prevailing party" and award of attorney fees was not an abuse of discretion.**

The mechanic's lien chapter requires fees to be awarded to the prevailing party. "[I]n any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court." Utah Code § 38-1-18(1).

**A. The district court considered the context and correctly concluded that FNMA was the successful party.**

"[T]rial courts should, as permitted by statute and other applicable law, use their common sense in deciding whether a party was 'successful' in bringing or defending against a mechanic's lien enforcement action." A.K.&R. Whipple Plumbing & Heating v. Aspen Constr., 2004 UT 47, ¶ 26. This approach "requires not only consideration of the significance of the net judgment in the case, but also looking at the amounts actually sought and then balancing them proportionally with what was recovered." Id. A court is free to use its common sense given each case's "unique circumstances." Id. "This approach ensures that only parties that are *genuinely* 'successful' according to the trial court's common

sense logic will be able to extract their attorney fees from their opponents.” L. Pochynok Co., Inc. v. Smedsrud, 2005 UT 39, ¶ 20.

The district court has significant discretion because the issue “depends, to a large measure, on the context of each case .... We therefore review the trial court’s determination as to who was the prevailing party under an abuse of discretion standard.” R.T. Nielson Co. v. Cook, 2002 UT 11, ¶ 25.

Jordan Construction asserts it was the prevailing party because “the parties stipulated to judgment in favor of Jordan Construction and an award of damages in the amount of \$126,956.92” which was “54% of the \$232,976.81 listed on the face of the Second Amended Lien.” *Aplt. Br. at 49.* The district court called Jordan Construction’s partial “victory” a “pyrrhic one.” (R.4485.) It’s true that on the face of the lien after its second amendment, the amount requested was \$232,976.81, but “Jordan brought FNMA into this litigation with a claim of \$336,568.66,” which was the amount awarded against Scott Bell, and Jordan Construction also requested interest on this amount. (R.4485.) “Through its litigation strategy,” the district court explained, “FNMA has forced Jordan to retreat into its present position and resolve this case with a settlement of \$126,956.92.” (R.4485.) Moreover, what Jordan Construction got in the end was less than the \$130,000 offer of judgment that Jordan rejected. (R.4137-38.) “After this degree of success, requiring FNMA to pay attorney fees as the losing

party lacks the common sense the flexible and reasoned approach is intended to apply.” (R.4485.)

Moreover, as the district court pointed out, Jordan Construction did not try to enforce the original amount of its lien until the very end of the case. (R.4482-83.) And even then, Jordan did not prevail on any motion or win any argument. A party is not entitled to recover fees incurred on issues resolved in the other party’s favor. Mountain States Broad Co. v. Neale, 783 P.2d 551, 566 n.10 (Utah App. 1989). See also Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988). The district court expressed surprise when Jordan requested attorney fees “because the court does not know what work Jordan Construction is suggesting was done in order to prevail” on that portion of its lien. (R.4302-03.)

FNMA, in contrast, prevailed on almost every motion and successfully reduced the amount Jordan Construction was seeking from \$336,568.66 to \$126,956.92 before stipulating to that amount. And the stipulation was not a concession that Jordan Construction would win anyway. The district court had found that there were disputed issues of material fact about whether Jordan Construction had abandoned construction for a time, which would have prevented their lien from relating back to the commencement of the work. (R.3224-25.) But given the amount at stake, the expense of trial, and FNMA’s

anticipation that it would recover its fees, it simply chose not to press the argument.

The district court properly focused “on which party had attained a ‘comparative victory,’ considering what total victory would have meant for each party and what a true draw would look like.” J. Pochynok Co., 2005 UT 39, ¶ 11. It’s conclusion that FNMA was the successful party was not an abuse of discretion.

**B. Jordan Construction failed to timely submit an affidavit in support of its request for fees.**

The district court correctly rejected Jordan Construction’s request for fees not only because FNMA was the overall successful party, but because Jordan Construction failed to submit a timely affidavit, even after being given an extension.

## **CONCLUSION**

This Court should hold that the holder of a trust deed is an indispensable party to any mechanic’s lien foreclosure action that seeks to remove the encumbrance posed by the trust deed. “In other words, when seeking to foreclose a [mechanic’s] lien on property encumbered by a deed of trust, it is necessary to name the trustee who holds legal title to the property.” ParkWest Homes, LLC, 302 P.3d at 25. Had Jordan Construction named FNMA’s

predecessor-in-interest as a party from the outset, Jordan Construction would have been in a position to assert the priority of its lien over the trust deed, and the trust deed holder would have been in a position to protect its interests. Instead, Jordan Construction obtained summary judgment against Bell, and then tried (and is still trying) to use that summary judgment to bind the separate trust deed interest. That is plainly not permissible. Thus, the district court did not err by refusing to bind FNMA to the interlocutory rulings issued against Bell and by requiring Jordan Construction to make FNMA a party in order to claim priority over FNMA's trustee's deed.

Nor did the district court abuse its discretion by refusing to allow Jordan Construction to withdraw its admission. Discovery was long over, trial was approaching, and the admission was consistent with the undisputed facts.

The district court also correctly concluded that prejudgment interest is not available on a mechanic's lien. That holding was confirmed by this Court in the 2 Ton case.

Finally, the district court's decision to award attorney's fees to FNMA was also well within its discretion. FNMA prevailed on almost every motion and successfully whittled away at Jordan Construction's mechanic's lien claim until it was worth only about one third of what it first sought.

FNMA asks this Court to affirm the judgment of the Fourth District Court and award FNMA its fees for this appeal.

DATED this 11th day of November, 2016.

KIRTON McCONKIE P.C.

By: /s/ Justin W Starr

*Attorneys for Federal National Mortgage  
Association – Appellee*



## CERTIFICATE OF COMPLIANCE

Counsel for Appellee Federal National Mortgage Association certifies that this brief contains 13584 words, including headings and footnotes, but excluding the table of contents and table of authorities, is in Book Antiqua 13-point font, and is otherwise in compliance with all applicable rules.

DATED this 11th day of November, 2016.

KIRTON McCONKIE P.C.

/s/ Justin W Starr

*Attorneys for Appellee Federal National  
Mortgage Association*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 11th day of November, 2016, the foregoing **BRIEF OF APPELLEE FEDERAL NATIONAL MORTGAGE ASSOCIATION** was served on the following by the method indicated below:

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