

2015

**Maa Prospector Motor Lodge, LLC, Plaintiff and Appellee, v. Ray W. Palmer, Et Al., Defendant and Appellant.**

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

**MAA PROSPECTOR MOTOR LODGE,  
LLC**, a limited liability company

Plaintiffs,

v.

**RAY W. PALMER, an individual, and  
JOHN DOES 1-10,**

Defendants.

Case No.: 20151010

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**BRIEF OF APPELLANT**

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THIS IS A DIRECT APPEAL FROM TWO JUDGMENTS ENTERED IN  
THE SEVENTH JUDICIAL COURT IN AND FOR GRAND COUNTY,  
STATE OF UTAH, THE HONORABLE, LYLE R. ANDERSON,  
PRESIDING

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## JURISDICTION

This Court has jurisdiction under UTAH CODE ANN. §78A-4-103 and UT. R. APP. P. 3 over the *Order and Judgment Granting MAA Prospector's Motion for Summary Judgment* and the *Order and Final Judgment* dated July 28, 2015 and November 5, 2015, respectively, (the “**Judgments**”) by the Honorable Lyle M. Anderson of the Seventh District Court, State of Utah, granting MAA's Motion for Summary Judgment (“**MAA MPSJ**”) and *MAA Prospector's Motion for Award of Attorney's Fees and Costs* (“**Attorney Fees Motion**”). A copy of both Judgments are attached hereto as Addendum “A” and Addendum “B” respectively.

## STATEMENT OF THE ISSUES

**ISSUE I:** *Did the trial court contravene UTAH CODE ANN. §78B-5-201 by improperly validating the Bank's recording of the Bank's Order, which resulted in incorrectly concluding that Palmer's title to the real property was extinguished and that MAA was a bona fide purchaser without sufficient recordation or inquiry notice, evidencing that MAA was not entitled to summary judgment as a matter of law?*

**STANDARD OF REVIEW:** “We review a district court's decision to grant summary judgment for correctness, with no deference to the district court's conclusions.” *State ex rel. School & Institutional Trust Land Admin. v. Mathis*, 2009 UT 85, ¶10, 223 P.3d 1119.

Claims based on equitable doctrines ‘are mixed questions of fact and law. ... “Accordingly, we defer to a trial court's factual findings unless there is clear error but review its legal conclusions for correctness.” ... A finding is clearly erroneous “only if the finding is without adequate evidentiary support or induced by an erroneous view of the law.” ... Therefore, we will not disturb a finding unless it is “against the clear weight of the evidence, or if [we] otherwise reach[ ] a definite and firm conviction that a mistake has been made.” *Id.* “However, because of the fact-intensive nature of equitable doctrines, we grant the trial court broader discretion in applying the law to the facts.”

*Cottonwood Imp. Dist. V. Qwest Corp.*, 2013 UT App 24, ¶2, 296 P.3d 754 (internal citations omitted). “It is well settled that when faced with a question of statutory interpretation, ‘our

primary goal is to evince the true intent and purpose of the [l]egislature,’ ..., and that “ ‘the best evidence of the legislatures intent is the plain language of the statute itself,’” ... *F.D.I.C. v. Taylor*, 2011 UT App 416, ¶16, 267 P.3d 949 (internal citations omitted).

**PRESERVATION:** This matter was preserved by Palmer’s *Response in Opposition to Plaintiff’s Motion for Partial Summary Judgment Against Defendant Ray William Palmer and Palmer’s Cross-Motion for Summary Judgment* (“**Opposition to PSJ**”), wherein Palmer argued the Bank maintained the duty to inform its buyers of Palmer’s appeal of his priority lienholder status; MAA was not a bona fide purchaser based on recordation notice as well as inquiry notice; and, Palmer’s Trust Deed was in senior position during the Bank’s Trustee’s Sale by effect of *First National Bank of Layton v. Palmer*, 2013 UT App 50, 352 P.3d 904 (the “**Appeal Reversal**”), later interpreted by Judge Orme’s Concurrence (defined *post*). At the June 11, 2015, hearing, Palmer’s counsel raised UTAH CODE ANN. §78B-5-201; however, the trial court found it did not apply. The trial court’s Judgment found that Palmer did not provide notice of his appeal by recordation; the Bank validly recorded the Bank’s Order; and, MAA’s inquiry notice would have been futile since Palmer only desired to pursue proceeds. *Ibid*. This issue was properly raised and determined below and is ripe for this Court’s review.

**ISSUE II:** *Did the trial court err in granting MAA summary judgment as a matter of law on a position previously denied thrice by this Court (by suggestion of mootness, in briefing and on rehearing) that since Palmer did not obtained a stay of the Bank’s Order prior to the Bank conducting its Trustee’s Sale, the sale “froze” the parties’ lienholder positions and extinguished Palmer’s Trust Deed, which it decided was “frozen” in junior position, thereby giving no respect to this Court’s Appeal Reversal that placed Palmer in senior position?*

**STANDARD OF REVIEW:** “We review a district court’s decision to grant summary judgment for correctness, with no deference to the district court’s conclusions.” *State ex rel. School & Institutional Trust Land Admin. V. Mathis*, 2009 UT 85, ¶10, 223 P.3d 1119. Claims

of issue preclusion are reviewed “for correctness, according no particular deference to the trial court.” *Zufelt v. Haste, Inc.*, 2006 UT App 326, ¶8, 142 P.3d 594. “Vertical stare decisis ... compels a court to follow strictly the decisions rendered by a higher court. ... Moreover, in accordance with horizontal stare decisis, the first decision by a court on a particular question of law governs later decisions by the same court. ... *State v. Tenorio*, 2007 UT App 92, ¶9, 156 P.3d 854 (internal quotation marks and citations omitted).

**PRESERVATION:** MAA’s argued below that Palmer had failed to obtain a stay of the Bank’s Order in the Bank’s Case, which “froze” the law at the time of the Bank’s Trustee’s Sale, rendering it valid and Palmer’s Trust Deed extinguished. Palmer argued the doctrines of issue preclusion and vertical stare decisis to support his right to foreclose the Property citing this Court’s Appeal Reversal placing him as senior lienholder, as well as Orme’s Concurrence (defined *post*), the latter of which specifically states the Appeal Reversal placed Palmer’s trust deed “in a senior position to that of the bank when the bank effected its trustee’s sale, and the sale did not affect the status of Palmer’s trust deed, which presumably remains of record as a valid lien against the property secured thereby.”

Further, this Court repeatedly denied MAA’s precise issue in the Appeal, first by denying the Bank’s suggestion of mootness seeking relief based on its Trustee’s Sale and Palmer’s lack of obtaining a stay. The Appeal Reversal then denied the Bank’s briefing of the issue, and denied rehearing. Certiorari review was also denied on this issue. Nonetheless, the Judgments concluded that without Palmer obtaining a stay, the Bank’s Trustee’s Sale forever “froze” the parties’ positions, with the Bank’s First Trust Deed as senior priority position under the Bank’s Order—an order already reversed by the Appeal Reversal.

The Judgment alternatively claims Palmer *deliberately* “disclaimed” any right to foreclose through his Appeal oral arguments wherein he said he had an option of obtaining the proceeds as redress. *Id.* However, prior to the Judgment the same trial court had already denied Palmer access to those proceeds by denying a request for the Bank to deposit the proceeds and a Rule 15 request to amend to include a claim for the proceeds, which is subject of a third appeal. *See* Appellate Case No. 20160280-SC.

Thus, the issue was properly raised and determined allowing for this Court’s review.

**ISSUE III:** *Did the trial court err in determining that MAA was entitled to the payment of its attorneys’ fees and costs when MAA’s request was untimely and where the facts did not support fees under the reciprocal attorneys’ fees statute?*

**STANDARD OF APPELLATE REVIEW:** “[C]ourts do not have discretion to misapply the law [, and thus] legal determinations concerning the proper interpretation of [a] statute which grants the [district] court discretion are reviewed for correctness.” *State v. Petersen*, 810 P.2d 421, 425 (Utah 1991).

**PRESERVATION:** This matter was preserved by Palmer’s *Response in Opposition to Motion and Memorandum in Support of Plaintiff MAA Prospector’s Motion for Award of Attorney’s Fees and Costs; and Memorandum in Support* (“**Opposition to Attorney Fees**”), arguing MAA’s request was untimely brought after Judgment entered. MAA claimed its oral reservation rendered the Judgment nonfinal; however, no procedure allows for this and it contradicts *Meadowbrook, LLC v. Flower*, 959 P.2d 115, 117 (Utah 1998). Palmer also challenged MAA’s request for attorney fees under the reciprocal attorney fees statute under the Palmer Trust Deed, to which MAA is not a contracting party. The trial court deviated from the standard application

of such statute and awarded fees to MAA. The issue was properly raised and determined, and is thus ripe for this Court's review.

### **CONTROLLING CONSTITUTIONAL AND STATUTORY PROVISIONS**

In accordance with UT. R. APP. P. 24(a)(6), the controlling constitutional provisions, statutes and rules are set out verbatim in the arguments below.

### **PROCEDURAL HISTORY AND STATEMENT OF THE CASE**

#### **A. Facts from First National Bank of Layton v. Ray Wm. Palmer, et. al., Civil No. 090700136 (the "Bank's Case").**

First National Bank of Layton (the "**Bank**") loaned JDJ Holdings, Inc. ("**JDJ**") \$1,025,000 to purchase property from Palmer in Blanding, Utah (Parcel 1 designated as the "**Property**" herein). R0194. The Bank's loan was secured by trust deed recorded December 12, 2003 (the "**Bank's First Trust Deed**"). R0214. On December 5, 2003, JDJ executed a trust deed and a promissory note regarding the Property with Palmer for \$780,000.00, recorded on December 12, 2003 (the "**Palmer Trust Deed**"). R0232; R0238. On February 11, 2004, JDJ executed a *Substitution of Trustee and Deed of Reconveyance* (the "**Bank's Second Trust Deed**" or "**Reconveyance**"), and a *Second Assignment of Rents* (the "**Second Assignment**"), recorded on March 8, 2004. R0243. The Bank entered no subrogation agreement with Palmer, aware that the Palmer Trust Deed was recorded only four months prior. R0501, R0509. JDJ defaulted on the Bank's Second Trust Deed and the Palmer Trust Deed. R0196. On June 5, 2009, Palmer asserted the Palmer Trust Deed was in senior lien priority position under the Reconveyance, Bank's Second Trust Deed, and Second Assignment absent a subrogation agreement. *Id.*

On July 23, 2009, the Bank filed its action against Palmer (District Court No. 090700136, the “**Bank’s Case**”), seeking equitable reinstatement of the Bank’s First Trust Deed, or equitable subrogation of the Palmer Trust Deed to the Second Bank’s Trust Deed. *Id.* On January 28, 2010, the Bank filed for summary judgment. R0269. On December 6, 2010, summary judgment entered (the “**Bank’s Order**”), reinstating the First Bank Trust Deed, rendering the Bank’s Reconveyance “void ab initio”; and authorizing the Bank to exercise all rights and remedies provided by its Trust Deed. R0296. On March 25, 2011, the Bank was granted dismissal of its foreclosure action against JDJ. R0197. On March 29, 2011 the Bank’s Order was recorded. *Id.*

On April 8, 2011, Palmer appealed the Bank’s Order, challenging the lien priority decision under Appellate Case No. 20110338 (the “**Appeal**”). R0197. Palmer filed a *Motion for Stay of the Order and Judgment*, but did not submit it for decision. R0530. Thus, no stay was obtained. *Id.* On June 29, 2011, the Bank issued its *Notice of Trustee’s Sale* under the Bank’s First Trust Deed, and held its Trustee’s Sale August 8, 2011 (the “**Trustee’s Sale**”).

In the Appeal, the Bank filed for suggestion of mootness arguing the Trustee’s Sale extinguished Palmer’s interests, but mootness was denied by this Court. R0510, R0542. The Bank mistakenly relied upon debtor-creditor law regarding parties under the same contract. R0510. Palmer responded that in creditor-creditor disputes, parties maintain different contracts, thus he maintained a right to the Property if he prevailed on the Appeal. R0414, R0521. The Bank briefed its mootness issue, relying on the same debtor-creditor law, the lack of a stay, and the Trustee’s Sale the Bank believed extinguished Palmer’s junior lien.



R0541. At appellate oral arguments, Palmer's counsel projected he would likely pursue the proceeds rather than foreclosure if he prevailed. R0657.

On February 28, 2013, this Court issued its Appeal Reversal holding the Bank was on inquiry notice of Palmer's Trust Deed and "negligently failed to act" by "sweep[ing] its knowledge of Palmer's seller financing under the rug and proceed[ing] in blind reliance on what proved, not surprisingly, to be an erroneous title report..." which was "the proximate cause of First National losing its first lien position." R0500. at ¶ 15. The plain language placed Palmer in senior lienholder position, reinstating the Bank's Reconveyance and voiding the Bank's First Trust Deed under which the Bank conducted the Trustee's Sale. *Id.*

On March 12, 2013, the Bank petitioned for rehearing on the mootness issue; however, rehearing was denied on September 17, 2013. R0415. On October 10, 2013, the Bank petitioned for certiorari review of the Appeal Reversal, challenging this Court's mootness determination; however, the Utah Supreme Court denied review. R0415. The Bank argued four times that Palmer's failure to obtain a stay deprived him of his rights to the Property after the Trustee's Sale; however, this Court and the Utah Supreme Court denied that challenge all four times, placing Palmer in first lienholder position. R0500; R0510; R0542.

On remand from the Appeal Reversal, Palmer sought an order directing the Bank to deposit the funds from the Trustee's Sale; however, such request was denied April 22, 2014, by the trial court (the "**Deposit Denial**"). R0495. Palmer petitioned for extraordinary relief on the Deposit Denial. R0416. On May 29, 2014, this Court denied the petition (the "**Extraordinary Relief Denial**"); however, Judge Orme concurred specially in that

determination (hereinafter “**Orme’s Concurrence**”):

The trial court appears to have ruled correctly in denying Palmer’s motion requiring the payment of funds into court. By reason of this court’s ruling, Palmer’s trust deed was in a senior position to that of the bank when the bank effected its trustee’s sale, and the sale did not affect the status of Palmer’s trust deed, which presumably remains of record as a valid lien against the property secured thereby. Absent a comprehensive settlement as wisely suggested by the trial court, Palmer appears to have the rights of any trust deed beneficiary, including the right to foreclose judicially or conduct a nonjudicial trustee’s sale. But no basis for requiring the bank to pay money into court is apparent in the record before us.

R490. Thereafter, Palmer sought UT. R. CIV. P. 15 amendment to include an action against the Bank for the proceeds as senior lienholder under the Appeal Reversal. The trial court denied amendment on grounds that it was outside the discovery cutoff time frame the court had set for amendments. This matter is the subject of a third appeal regarding the Property. *See* Appellate Case No. 20160280-SC.

#### **B. Statement of Procedural History of MAA Case**

MAA originally intended to purchase the Property from Palmer. R0889. After the Bank’s Order placed Palmer in junior position, the money was returned to Mr. Bharat Maru (“**Maru**”), the principal of MAA. *Id.* On August 9, 2011, the Bank’s Trustee Sale was held and MAA purchased the Property for \$255,000. R0330. On August 10, 2011 the Bank executed a trust deed to MAA, recorded on November 22, 2011 (the “**MAA Trust Deed**”). R0329. On July 8, 2014, after the Extraordinary Relief Denial and denial of Rule 15 amendment, Palmer recorded a *Notice of Default and Election to Sell* (the “**Palmer Foreclosure**”). R0102.

On October 22, 2014 MAA filed their *Complaint for Quiet Title and Declaratory Relief* (“**Complaint**”), seeking to quiet title to the Property and place Palmer’s equity and interest

junior to MAA. R0001-5. MAA sought declaratory relief to stop Palmer's foreclosure. R0006. On October 24, 2014, a *Temporary Restraining Order* issued restraining Palmer from foreclosing. R0111-2. On November 13, 2014, Palmer filed his *Answer and to Complaint for Quiet Title and Declaratory Relief*, stating the Palmer Trust Deed was valid and he had the right to foreclose. R0138.

On March 2, 2015 MAA filed the MAA MPSJ, arguing Palmer had not filed a *Lis Pendens* nor obtained a stay to stop the Bank's Trustee's Sale, which invalidated the Palmer Trust Deed. R0145;R0158;R0171. The MAA MPSJ argued MAA was a bona fide purchaser with no notice of Palmer's Appeal. R0175. The MAA MPSJ argued election of remedies and laches, among other things. R0177;R0182;R0184. The MAA MPSJ argued that Palmer's Trust Deed was never senior to the Bank's Trust Deed. R0186.

On April 1, 2015, Palmer filed his *Response in Opposition to Plaintiffs Motion for Partial Summary Judgment Against Defendants Ray William Palmer and Palmer's Cross-Motion for Summary Judgment* ("**Palmer OPSJ**"), arguing Palmer was the senior lienholder at the Bank's Trustee's Sale and his lien was unaffected thereby. R0402;R0421. MAA's claims were barred by issue preclusion, having been previously raised four times by the Bank and rejected, and by vertical stare decisis under the Appeal Reversal and Orme's Concurrence. R0426. Palmer argued MAA had actual notice of the Appeal through conversations between counsel herein and Maru. R0435. On May 8, 2015 MAA filed its reply to which Palmer responded on May 28, 2015. R0601;R0726.

Oral arguments were held June 11, 2015, on the MAA MPSJ, at the conclusion of which the trial court granted summary judgment to MAA. After oral ruling, MAA orally

reserved the ability to file a formal motion for attorneys' fees. However, MAA prepared the order under UT. R. CIV. P. 7(f), and on July 28, 2015 the *Order and Judgment Granting MAA Prospector's Motion for Summary Judgment* (the "**Judgment**") entered, declaring Palmer's lien no longer a valid encumbrance, denying Palmer the ability to foreclose, and quieting title to MAA. R0790;R0797. To comport with the oral proceedings, the Judgment contained reference to the oral reservation for filing a motion for attorneys' fees by MAA; however, none had been filed prior to entry of the written Judgment. *Id.* On August 7, 2015 Palmer appealed from the Judgment. R0801.

Over one (1) month after the appeal was filed, on September 10, 2015 *MAA Prospector's Motion for Award of Attorney's Fees and Costs* ("**Attorney Fees Motion**") was filed. R0807. On September 11, 2015 *MAA Prospector's Motion for Release of Lis Pendens* ("**Lis Pendens Motion**") was filed. R0854. On September 23, 2015 Palmer filed his opposition to the Attorney Fees Motion ("**Attorney's Fees Opposition.**"), arguing that MAA's motion was untimely and that the reciprocal attorney fees' statute did not apply to benefit non-contracting parties such as MAA. R0898. On September 25, 2015, Palmer filed his opposition to the Lis Pendens Motion ("**Lis Pendens Opposition**") asking that it not be released pending this appeal. R0922.

On October 29, 2015 this Court dismissed Palmer's appeal from the Judgment based upon the trial court's determination to entertain the Attorney's Fees Motion. R0964. On November 5, 2015 the *Order and Final Judgment* (with the Judgment, the "**Judgments**") was entered granting MAA attorney fees against Palmer. R0974. On December 1, 2015 Palmer filed his *Notice of Appeal* from the Judgments. R0981.

## **STATEMENT OF FACTS**

### **A. Oral Arguments June 11, 2015 on Summary Judgment**

The matter came only for consolidated oral arguments on June 11, 2015, with the 2DP case. No evidence was presented nor witnesses called.

Palmer argued that the threshold decision was what rights the Bank had at the time of the Trustee's Sale. R1083:12. While Orme's Concurrence was not precedential, it was directive and specific to this case and these parties, containing the Court's interpretation of the Appeal Reversal under these precise facts. R1083:13. The Appeal Reversal reversed the Bank's Order and everything subsequently occurring in reliance thereon void ab initio. *Id.* The Appeal Reversal placed Palmer in first position as of the Bank's recording of the Reconveyance. *Id.* Palmer did not need to obtain a stay where co-creditors were disputing priority. R1083:14.

Under the Appeal Reversal, Palmer had various remedies such as obtaining the proceeds or foreclosing. R1083:18. Palmer argued that he could not lose his Trust Deed to real property by not filing a stay. R1083:19. Palmer explained that his stay motion was not submitted because the bond was too high. R1083:20.

Palmer argued that any potential buyers relying on a recorded Judgment would check whether it was appealed. R1083:26. Palmer cited UTAH CODE ANN. §78B-5-201 in support. R1083:28, R0506. The court ruled that section 78B-5-201 did not apply because it is not a judgment lien. R1083:29, R0506. Palmer argued the Bank had a duty to inform purchasers that the Bank's Order was being appealed. R1083:30.

Palmer argued for proceeds in response to the Bank's mootness issue in the Appeal, but only as an option and to survive mootness. R1083:33. Palmer never waived his foreclosure rights under the Palmer Trust Deed, which remained valid on record. R1083:34. During the Appeal, Palmer believed the proceeds were his only remedy, until Orme's Concurrence indicated otherwise. R1083:38.

Palmer argued the Bank could have only sold its junior position at its Trustee's Sale since Palmer was senior lienholder under the Appeal Reversal, which reversed the Bank's Order and all subsequent actions relying thereon as void ab initio. R1083:40. Palmer was entitled to receive the proceeds, asking post-Appeal that the Bank deposit them; however the trial court and this Court found no law requiring the Bank to do so. Because Orme's Concurrence indicated Palmer could foreclose, Palmer pursued that remedy. R1083:41. Palmer argued that a lack of a stay or *lis pendens* did not deprive him of his senior position during the Trustee's Sale. *Id.* The Bank's Trustee's Sale could have only sold the junior position, and could not effectuate an invalidating of Palmer's Trust Deed. *Id.* Palmer specifically argued the Palmer Trust Deed was still of record notifying any buyers, who could not be bona fide purchasers buying in good faith on this basis. R1083:43.

The trial court ruled the Trustee's Sale occurred with the Bank in senior position under the Bank's Order. R1083:54-55. It ruled that the sale froze the parties' positions. *Id.* The court found Palmer was required to obtain a stay to stop the sale that sold the Bank's senior lien. *Id.* The court indicated it would have ordered a lesser amount bond if Palmer had submitted one, but Palmer chose not to stay the Bank's Order or file a bond to instead pursue a claim for the proceeds in the Bank's Case not yet resolved. R1083:56. The trial

court ruled that Palmer waived his right to foreclose absent a stay. *Id.* The trial court quieted title against Palmer. R1083:57.

The trial court stated that determining whether MAA was a bona fide purchaser would not affect its decision that the title was frozen as of the Bank's Trustee's Sale. R0885. It found that, had MAA investigated the court file regarding the appeal, they would have believed Palmer was pursuing only proceeds. *Id.*

MAA originally agreed to buy the Property from Palmer, but instead bought the Property from the Bank's Trustee's Sale. R0890. Palmer's counsel argued MAA knew about the Appeal because Maru had discussed the Appeal with him. *Id.* Palmer kept Maru advised of the Appeal, and MAA knew the decision could be adverse. R0891. The trial court stated MAA's knowledge of the Appeal affected its bona fide purchaser status, which required MAA to be unaware of the Appeal. *Id.* There was a factual question as to whether MAA was a bona fide purchaser. *Id.*

However, the trial court found that Palmer not obtaining a stay rendered him bound by it. *Id.* Subsequent events—meaning the Appeal Reversal—did not change this. *Id.* The trial court opined that orders have to be relied upon or sales cannot be held on Property based on orders. *Id.* The trial court stated MAA's "investigation into the records" would have uncovered Palmer's mootness response, indicating he was only pursuing proceeds; thus, MAA would have still purchased the property unaware it was subject to foreclosure. *Id.*



**B. ORAL ARGUMENT HEARING ON OCTOBER 19, 2015**  
**ON ATTORNEY FEES MOTION**

The matter came for oral arguments on October 19, 2015. No evidence was presented nor witnesses called.

MAA argued that the Judgment stated MAA reserved the right to seek attorney fees and costs, which were not disposed of by the Judgment, rendering it nonfinal. R1005. MAA argued that the right to attorney's fees was only waived if not "reserved" prior to written judgment entering. R1006. MAA indicated this Court had recently issued a *Sua Sponte Motion for Summary Disposition*. R1007.

MAA sought attorney fees under UTAH CODE ANN. §78B-5-826 relating to Palmer's Trust Deed that contained an attorney's fees provision for default by JDJ. R1011. MAA argued it was entitled to attorney's fees through the fee-shifting provision, although MAA was not a contracting party in the Palmer Trust Deed. R1012.

MAA cited UTAH CODE ANN. §78B-6-1304 for release of lis pendens, arguing release on motion and if probable validity of the real property claim was established by a preponderance. R1013. MAA argued Palmer's lis pendens was filed after the trial court entered summary judgment against Palmer, thus Palmer could not re-establish a claim after being ruled against. R1014. MAA argued Palmer could not prove likelihood of success on the merits because he had no remaining valid claim. R1015. MAA argued a stay/bond were required to keep Palmer's lis pendens on the Property to protect against accruing attorney fees. R1016. MAA asked the court to determine the amount of a guarantee/bond. R1046. MAA argued it was only required to "raise" the attorney fees issue before decision. R1048.

MAA believed the reciprocal attorney's fee claim applied herein, and the Palmer's Trust Deed entitled MAA to attorney's fees. R1049.

Palmer argued that UT. R. APP. P. 4 does not suspend the time for appealing through orally "reserving" attorney's fees. *Id.* This process causes confusion as to when the appeal is due: now or months later after waiting to see if a request will actually be formalized. R1018. Under UT. R. CIV. P. 7(f), the Judgment was prepared by counsel, objected to, and entered by the court rendering it final. R1020.

The trial court stated an order was not final simply because it was prepared by an attorney by a judge's instructions. *Id.* The question is whether it addresses all the issues between the parties. *Id.* If all issues did not have to be resolved, then every order on a partial summary judgment would be final. R1021.

Palmer argued that *Meadowbrook* required more than "reserving" the attorney fees issue orally. A written motion had to be filed before written judgment entered. R1022. The trial court differentiated *Meadowbrook* stating attorney fees were not mentioned in their written judgment. *Id.* Palmer argued that MAA had to file something or obtain an extended deadline, not just orally "reserve" it with no deadline. R1023.

Palmer argued that a non-contracting entity cannot obtain attorney fees based on the other party having a contract with an attorney fees provision with another entity. R1025. Palmer and JDJ were parties to Palmer's Trust Deed. MAA's deed was with the Bank. MAA was not a party to the Palmer Trust Deed. *Id.* In a reverse hypothetical, Palmer argued he could not get attorney fees against MAA under his deed with JDJ. R1026.

The trial court found that if Palmer had prevailed it would have ordered MAA to pay Palmer's attorney fees under Palmer's Trust Deed. R1027. The trial court explained that the Trust Deed indicates they may have to defend against litigation with "other parties" on the Trust Deed, which allows a person to request attorney fees from them as well. R1028.

Palmer argued that his lis pendens provides public notice that the Property title may be affected by the appeal. R1032. Palmer argued MAA cannot obtain release of the lis pendens based on the Judgments when he is appealing. *Id.* There is a likely probability of the Judgments being reversed as contradictory to the Appeal Reversal. *Id.* Orme's Concurrence interpreted the Appeal Reversal stating explicitly that Palmer was in senior position at the time of the Trustee's Sale and could foreclose. R1033.

The trial court was unwilling to allow the lis pendens to remain recorded without MAA being provided a guarantee for damages incurred while in effect. R1035. Palmer argued the lis pendens should remain effective pending the appeal and that no damage would occur since MAA was in possession and generating income from the Property. R1037. The trial court held the lis pendens invalid and ordered its release. R1044. Palmer could file a guarantee to avoid release. R1045.

The trial court ruled the Judgment was not final for appeal, MAA was entitled to attorney fees under the statutory reciprocal provision in the amount of \$43,500.00, and Palmer's lis pendens was to be released or Palmer was to file a stay/bond to avoid the release. R1051-55.

## SUMMARY OF THE ARGUMENT

Failure to include the information specifically contained in UTAH CODE ANN. §78B-5-201(4)(b) in the Bank's Order rendered the recording as without effect on Palmer's Trust Deed. *Irving Place Associates v. 628 Park Ave, LLC*, 2015 UT 91, 362 P.3d 1241. As a first impression interpretation not creating a new rule of law, this retroactively applies to the recording of the Bank's Order. The Bank's Order was deficient as missing *all* of the information contained in -201(4)(b). MAA and the trial court were on record notice of the deficiency. The recording of the Bank's Order and conducted Trustee's Sale did not nullify the Palmer Trust Deed under statute and the *Irving* interpretation. The trial court erroneously found that section -201 did not apply, finding that the Palmer Trust Deed was extinguished by the recorded Bank's Order and resulting Trustee's Sale and finding that MAA was a bona fide purchaser unaware of Palmer's interests. MAA was not entitled to judgment as a matter of law on this issue, requiring reversal.

The trial court rendered decisions in contradiction to the Appeal Reversal and Orme's Concurrence, with the oral decision and written Judgments silent as to them. This Court placed Palmer as senior lienholder on the Property in the Appeal Reversal, with Orme's Concurrence interpreting that meant Palmer was in that position during Bank's Trustee's Sale. The Judgments specifically contradict this Court, concluding the Bank was in first lienholder position at its Trustee's Sale and Palmer's junior lien was thereby extinguished. This Court's Appeal Reversal and Orme's Concurrence deserve respect and should be afforded validity through reversing the Judgments herein and entering summary judgment in favor of Palmer.

The trial court further found MAA entitled to judgment as a matter of law on Palmer having not obtained a stay of the Bank's Order, thereby authorizing the Bank's Trustee's Sale and extinguishing Palmer's Trust Deed. Palmer's issue preclusion and vertical stare decisis arguments cited four times the Bank was denied relief on this precise issue by motion, in briefing, on rehearing and seeking certiorari in the Appeal involving the same exact parties. This Court knew of the lack of stay and the Trustee's Sale and found that Palmer maintained grounds for relief. Orme's Concurrence later indicated that Palmer could foreclose his senior lien. Nonetheless, MAA's *Complaint* raises exactly the same issue among the same parties, claiming they are a new party and not "privy" to the Bank in these decisions. However, MAA's argument was flawed because their position involves the same parties—the Bank and Palmer—and exactly the same situation resolved in the Appeal. MAA's claims should have been dismissed under the doctrine of issue preclusion and vertical stare decisis, but instead the trial court granted summary judgment as a matter of law in direct contradiction to this Court's Appeal Reversal and Orme's Concurrence. Thus, the Judgments should be reversed and this Court should enter summary judgment in Palmer's favor.

MAA's attorney's fees request should have been denied as untimely. The Utah Supreme Court requires a written request for attorney fees to be submitted prior to entry of the written order. MAA orally reserved the right to seek attorneys' fees, but then drafted the order on summary judgment and submitted it for signature with no new deadline for their fees request. Their oral "reservation" without any future deadline ran contrary to the Utah Supreme Court's dictates, or they waived their rights to attorney fees. MAA easily could have filed its Attorney Fees Motion prior to the entry of the Judgment because they controlled

when it entered. Instead, the “reservation” left the time frame for filing an attorney fees request open-ended and adversely affected Palmer who filed his appeal based on the precedent ignored by the trial court. Attorney fees issues cannot be left open-ended but must be entered prior to the final order as to not affect appellate rights. MAA was untimely in its filing. Thus, the trial court erred in granting the attorney fees award.

Further, MAA mistakenly sought attorney fees below on the reciprocal attorney fees provision; however, this deviates from standard rules of contract. MAA argued a non-contracting entity can benefit from a contract attorney fees provision to which they are not a party. Appellate precedent interprets the statute’s plain language as not reaching to non-contracting parties, only contracting parties who may be faced with a unilateral fees provision. Neither Palmer nor MAA could obtain attorneys’ fees in either the actual scenario or the hypothetical alternative scenario attached to the statute; thus, MAA was not entitled to attorneys’ fees.

## **ARGUMENT**

### **I. THE TRIAL COURT IMPROPERLY INVALIDATED PALMER’S TITLE TO THE REAL PROPERTY AND DETERMINED THAT MAA WAS A BONA FIDE PURCHASER.**

#### **(A) The Bank’s Order Was Not Validly Recorded Pursuant to UTAH CODE ANN. §78b-5-201, and Could Not Affect Palmer’s Trust Deed.**

In *F.D.I.C. v. Taylor*, it states that, “[i]t is well settled that when faced with a question of statutory interpretation, our primary goal is to evince the true intent and purpose of the [l]egislature, ... and that the best evidence of the legislature’s intent is the plain language of the statute itself, ...” *Ibid*, 2011 UT App. 416, ¶16, 267 P.3d 949 (internal quotation marks and citations omitted).

Under *Crompton v. Jenson*, one who deals with real property is charged with what is shown by the county recorder records where the property is located. *Ibid.*, 78 Utah 55, 1 P.2d 242, 247 (1931). “Record notice ‘results from a record or ... is imputed by the recording statutes.’ ... purchasers of real property are charged with having record notice of the contents of recorded documents.” *Haik v. Sandy City*, 254 P.3d 171, ¶14 and fn. 13 (Utah 2011)(citation omitted).

UTAH CODE ANN. §78B-5-201 (2014)<sup>1</sup> states in pertinent part as follows:

(2) On or after July 1, 1997, a judgment entered in a district court does not create a lien upon ***or affect the title to real property*** unless the judgment is filed in the Registry of Judgments of the office of the clerk of the district court of the county in which the property is located.

(3)(a) On or after July 1, 2002, except as provided in Subsection (3)(b), a judgment entered in a district court does not create a lien upon ***or affect the title to real property*** unless the judgment or an abstract of judgment is recorded in the office of the county recorder in which the real property of the judgment debtor is located.

(b) State agencies are exempt from the recording requirement of Subsection (3)(a).

(4) In addition to the requirements of Subsections (2) and (3)(a), any judgment that is filed in the Registry of Judgments on or after September 1, 1998, or any judgment or abstract of judgment that is recorded in the office of a county recorder after July 1, 2002, ***shall include:***

(a) the information identifying the judgment debtor as required under Subsection (4)(b) on the judgment or abstract of judgment; or

(b) a copy of the separate information statement of the judgment creditor that contains:

(i) the correct name and last-known address of each judgment debtor and the address at which each judgment debtor received service of process;

(ii) the name and address of the judgment creditor;

(iii) the amount of the judgment as filed in the Registry of Judgments;

(iv) if known, the judgment debtor’s Social Security number, date of birth, and driver’s license number if a natural person; and

(v) whether or not a stay of enforcement has been ordered by the court and the date the stay expires.

(5) For the information required in Subsection (4), the judgment creditor shall:

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<sup>1</sup> See, footnote “1” *supra*.



(a) provide the information on the separate information statement if known or available to the judgment creditor from its records, its attorney's records, or the court records in the action in which the judgment was entered; or

(b) state on the separate information statement that the information is unknown or unavailable.

(6) Any judgment that requires payment of money and is entered in a district court on or after September 1, 1998, ***or any judgment or abstract of judgment recorded in the office of a county recorder after July 1, 2002,*** that does not include the debtor identifying information as required in Subsection (4) is not a lien until a separate information statement of the judgment creditor is recorded in the office of the county recorder in compliance with Subsections (4) and (5).

(Emphasis added). Under *Irving Place Associates v. 628 Park Ave, LLC*, this Court undertook an analysis of UTAH CODE ANN. §78B-5-201(4)(a). *Ibid.*, 2013 UT App 204, ¶¶19-27, 309 P.2d 260 (THORNE, J., dissenting)(“**Irving I**”), *reversed on certiorari review*, 2015 UT 91, 362 P.3d 1241(“**Irving II**”). Prior to the 2014 amendment of §78B-5-201(4)(a), the phrase “as required under Subsection (4)(b)” was not contained in subsection (4)(a). This Court determined that the requirements of (4)(a) and (4)(b) were independent since the language stated one could meet the criteria of (4)(a) **or** (4)(b). Judge Thorne dissented indicating his belief that (4)(a) encompassed the requirements of (4)(b). Certiorari review was granted on *Irving I*, and it was reversed in favor of Judge Thorne’s dissent stating that the requirements of (4)(a) encompassed all other factors of (4)(b). Since 78B-5-202(7)(a)(i) required “the information” identifying the judgment debtor as described in -201(4), then additional information listed under -201(4)(b) was necessary. *Irving II* at ¶¶ 28-29. *Irving II* did not create a new rule of law and is thus retroactively applied. *See, e.g., In re I.K.*, 2009 UT 70, ¶30, 220 P.3d 464(“...as a first impression statutory interpretation, it did not announce a new rule of law and therefore had retroactive effect.”). *Irving II* reversed on the basis that the recorded judgment lacked the requisite information under -201(4)(b).

A “bona fide purchaser” is “[o]ne who has purchased property for value without any notice of any defects in the title of the seller. One who pays valuable consideration, has no notice of outstanding rights of others, and acts in good faith.” *Black’s Law Dictionary*, Abridged Sixth Ed. at p. 121, “Bona fide: *bona fide purchaser*.” “We have held that, to take property ‘in good faith, a subsequent purchaser must take title to the property without notice of a prior, **unrecorded** interest in the property.’ Notice ... may be actual or constructive. ‘Actual notice arises from actual knowledge of an unrecorded interest or infirmity in the grantor’s title.’ And constructive notice may result from record notice or inquiry notice.” *Pioneer Builders Co. of Nevada, Inc. v. K D A Corp.*, 2012 UT 74, ¶23, 292 P.3d 672 (footnotes omitted)(emphasis added).

Record notice ‘results from a record or is imputed by the recording statutes.’ The Recording Statute provides that documents and instruments filed with the county recorder ‘impart notice to all persons of their contents.’ Thus, when documents filed with the county recorder disclose an interest in a particular property, a subsequent purchaser has record notice of the competing interest and does not take in good faith.

*Id.* at ¶24 (footnotes omitted). “We have held that ‘[w]hatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.’ Further, we have explained that a subsequent purchaser may not ‘shut his eyes or ears to avoid information’ or ‘remain willfully ignorant’ of facts that give rise to a duty to inquire.” *Id.* at ¶25 (footnotes omitted).

Palmer’s OPSJ argued it was the Bank’s duty to inform MAA of Palmer’s Appeal challenging the Bank’s Order and potentially impacting the priority of liens on the Property. Palmer argued MAA was not a bona fide purchaser based on recordation notice of Palmer’s

existing Trust Deed, and inquiry notice of the Appeal based on recordation of the Bank's Order. Palmer's lien remained valid and in first position during the Bank's Trustee's Sale by effect of the Appeal Reversal and Orme's Concurrence. Palmer's counsel specifically raised UTAH CODE ANN. §78B-5-201 governing the Bank's duty to inform MAA; however, the trial court found such statute did not apply. The Judgment then found that Palmer did not provide notice of his appeal by recordation, the Bank properly recorded the Bank's Order, and MAA's inquiry would have only uncovered that Palmer was seeking proceeds. *Ibid.*

MAA knew about the Appeal, because Maru—the principal of MAA—had been to counsel's office herein and discussed the Appeal. Palmer kept Maru advised of the Appeal. R0891. MAA was not a bona fide purchaser. However, the trial court's found this did not impact its decision that Property rights had “frozen” at the Bank's Trustee's Sale, with the Bank in first position, rendering all successors of the Bank bona fide purchasers. R0892. The trial court found that Palmer was bound by the Trustee's Sale for not obtaining a stay, and thereby MAA obtained first position. *Id.* The Judgment concluded that MAA was a bona fide purchaser.

Legislative intent behind UTAH CODE ANN. §78B-5-201 requires analysis of its plain language, particularly where this trial court believed such section to be inapplicable. *F.D.I.C.* at ¶16. Both -201(2) and (3)(a) state they govern judgments purported to either “create a lien upon *or* affect the title to real property” *Ibid.* (emphasis added). The legislative intent applies -201 to judgments “affect[ing] title to real property.” *F.D.I.C.* at ¶16. Disputes over priority of liens is akin to “creating” a lien; however the Bank's Order definitively “affected title to real property.” The Bank's Order was filed in the Registry and recorded, meeting -201(2) and

-201(3)(a); however, the recorded document failed to contain required criteria from -201(4)(a) and (b) to have recordation affect upon the Palmer Trust Deed.

Precedent required information from -201(4)(a) and (b) to be set forth in the Bank's Order. Irving II at ¶¶ 28-29. No "separate information statement" was recorded by the Bank. The recording occurred under -201(4)(a); however, the contents of -201(4)(b) were required as "the information identifying the judgment debtor" under (4)(a). Irving II at ¶¶ 28-29; *I.K.* at ¶ 30. The -201(4)(b) information was required for the Bank's order to "affect the title to real property" under the Palmer Trust Deed; however, it is deficient of nearly all the information required.

The Bank did not provide the "last known address" of Palmer nor the address at which he "received service of process" to enable buyers to locate Palmer and inquire as to the Palmer Trust Deed by which they would learn of the Appeal. UTAH CODE ANN. §78B-5-201(4)(b)(i). The Bank's Order failed to include the name and address of the Bank itself, which is important to verify with whom a transaction is entered. UTAH CODE ANN. §78B-5-201(4)(b)(ii). The Bank did not indicate the amount of the judgment, which was zero; however, this would have alerted buyers it was a contest of lien priorities. UTAH CODE ANN. §78B-5-201(4)(b)(iii). The Bank's Order did not provide personal identifying information of Palmer pertinent to potential buyers. UTAH CODE ANN. §78B-5-201(4)(b)(iv).

Importantly, the Bank's Order was required to state "whether or not a stay of enforcement has been ordered by the court and the date the stay expires." UTAH CODE ANN. §78B-5-201(4)(b)(v). Inherent in this section is the Bank's duty to alert buyers of an appeal or encumbrance notifying them that priorities were subject to change. However, the

Bank recorded the Bank's Order *prior to* expiration of the time for appealing, requiring a later updated recording by a case information statement. UTAH CODE ANN. §78B-5-201(6). Nothing else was filed prior to MAA's purchase. The Bank had a statutory duty to inform MAA and failed to do so. Absent a statement, the Bank's Order did not affect the Property until the Bank complied with subsection (4). *Id.* The Bank's Order never became a validly recorded judgment affecting the Palmer's Trust Deed.

The deficiencies of the Bank's Order under -201(4)(b) and Palmer's Trust Deed imparted actual record notice rather than imputed recordation notice. *Crompton* at 247 (1931); *Haik* at ¶14 and fn. 13, *citing Crompton* at 247. The Bank's Order could not have legally been considered by MAA or any other buyers to have invalidated the Palmer Trust Deed. The Bank's Order was deficient under UTAH CODE ANN. §78B-5-201(4) and (6) and therefore had no effect upon the title to the Property. *See, Pioneer Builders* at ¶23.

The deficient recording was enough to "excite attention" and put MAA on their guard to call for further inquiry. *Pioneer Builders* at ¶25. This inquiry would have provided them notice of Palmer's Appeal. Contrary to the Judgments, the record would not have imparted to MAA that Palmer elected only to pursue proceeds, as covered further below. They had sufficient information to lead them to this fact, so they are "deemed conversant of it." MAA could not shut their eyes or ears to avoid the information or remain willfully ignorant by deliberately choosing not to inquire. *Pioneer Builders* at ¶25.

MAA had notice and did not act in "good faith." *Black's Law Dictionary*, Abridged Sixth Ed. at p. 121, "Bona fide: *bona fide purchaser*." Palmer maintained no duty to inform MAA of the Appeal, even though he did actually do so.

Thus the Judgments must be reversed since MAA was not entitled to judgment as a matter of law against Palmer based on the purported extinguishing of the Palmer Trust Deed by the recording of the statutorily deficient Bank's Order and subsequent Trustee's Sale. Further, summary judgment should be granted in Palmer's favor and he be allowed to exercise his rights to nonjudicial foreclosure of the Property.

**(B) The Trial Court Erroneously Gave Effect to a Reversed Order.**

"A reversal of a judgment or decision of a lower court ... places the case in the position it was before the lower court rendered that judgment or decision, and vacates all proceedings and orders dependent upon the decision which was reversed." *Phebus v. Dunford*, 198 P.2d 973, 974, 114 Utah 292, 294 (Utah 1948)(citation omitted). Under *Black's Law Dictionary* the term "reverse" is defined as "[t]o overthrow, vacate, set aside, make void, annul, repeal, or revoke; as, to reverse a judgment, sentence or decree of a lower court by an appellate court ... To reverse a judgment means to overthrow it by contrary decision, make it void, undo or annul it for error." *Ibid.*, Abridged Sixth Ed. at p. 915. In *Franklin Sav. Ass'n v. Office of Thrift Supervision* it states that, "[a] judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel." *Ibid.*, 35 F.3d 1466 (10<sup>th</sup> Cir. 1994)(citations omitted).

"A sale on foreclosure by a junior lender or other lienholder does not affect senior liens..." 2 L. Distressed Real Est. §26.30 (December 2014). "[A] senior lienholder can foreclose on property and obtain a title free of a junior encumbrance, but a junior lien cannot be foreclosed unless the junior lienholder satisfies or pays the senior lien. The general rule is that a senior lienholder can foreclose on property and obtain title free of a junior

encumbrance.” 53 C.J.S. Liens §50 (March 2015). “[T]he title deriving from a foreclosure sale, whether judicial or by power of sale, will be subject to all mortgages and other interests that are senior to the mortgage being foreclosed.” Restatement (Third) of Property: Mortgages §7.1 (1997). It is “the undisputed rule that a purchaser at the foreclosure sale of a junior mortgage takes title subject to all senior encumbrances and interests”. *Id.* (citations omitted). A junior lienholder whose lien is not satisfied by foreclosure loses the security by the property and becomes an unsecured creditor of the debtor. *See, City Consumer Services, Inc. v. Peters*, 815 P.2d 234, 237 (Utah 1991).

On February 28, 2013, this Court’s Appeal Reversal reversed the Bank’s Order, finding that the Bank “negligently failed to act” by “sweep[ing] its knowledge of Palmer’s seller financing under the rug and proceed[ing] in blind reliance on what proved, not surprisingly, to be an erroneous title report...” which was “the proximate cause of First National losing its first lien position.” *Ibid.* at ¶15. Palmer was found to be in senior lienholder position on the Property. *Ibid.* at ¶16. The Bank’s Second Trust Deed was reinstated, causing the Bank’s First Trust Deed—the one under which the Bank foreclosed at the Trustee’s Sale—to be entirely voided. Rehearing and certiorari were denied. On May 29, 2014, Orme’s Concurrence providing the following assistive interpretation of the Appeal Reversal and direction to the parties:

The trial court appears to have ruled correctly in denying Palmer’s motion requiring the payment of funds into court. By reason of this court’s ruling, Palmer’s trust deed was in a senior position to that of the bank when the bank effected its trustee’s sale, and the sale did not affect the status of Palmer’s trust deed, which presumably remains of record as a valid lien against the property secured thereby. Absent a comprehensive settlement as wisely suggested by the trial court, Palmer appears to have the rights of any trust deed beneficiary, including the right to foreclose judicially or conduct a nonjudicial trustee’s



sale. But no basis for requiring the bank to pay money into court is apparent in the record before us.

*Ibid.* Palmer presented the Appeal Reversal and Orme Concurrence as part of his defense; however, the Judgments are entirely silent as to those prior decisions. The Judgments conclude ***entirely opposite*** the Appeal Reversal and Orme's Concurrence stating that "[t]he First Bank Trust Deed was in first lien priority position at the time of the sale, and the Trustee's sale had the effect of extinguishing the Palmer Trust Deed, which was then a junior interest." *Ibid.*

The Appeal Reversal placed the parties where they were before the Bank's Order entered. *Phebus* at 974. Thus, the Bank lost its senior position by its recording of the Reconveyance. The Appeal Reversal reversed the reinstatement of the Bank's First Trust Deed, under which the Bank conducted its Trustee's Sale, thus such sale was invalidated as conducted under a non-existing trust deed. The Bank's Order was made void, annulled, repealed, and revoked as in error. *Black's Law Dictionary* at p. 915. The Bank's Order had no conclusive effect, both as res judicata or collateral estoppel. *Franklin Sav. Ass'n*, Yet the trial court relied upon the Bank's Order as res judicata and collateral estoppel, giving no respect to the appeal process, finding the legal rights "frozen" forever in time at the Trustee's Sale, and finding the Appeal Reversal moot, contrary to this Court's dictates on the same facts and arguments. The trial court effectively eliminated all of Palmer's remedies under the Palmer Trust Deed.

Even if the Trustee's Sale conducted by the Bank—a junior lienholder—was still valid, it did not affect the senior Palmer Trust Deed. 2 L. Distressed Real Est. §26.30. Orme's Concurrence states clearly, "...the sale did not affect the status of Palmer's trust

deed, which presumably remains of record as a valid lien against the property secured thereby.” The Bank’s Trust Deed (a junior lien) could not be foreclosed unless the Bank satisfies or pays the senior lien (the Palmer Trust Deed). 53 C.J.S. Liens § 50. The Bank ran the risk of being the junior lienholder at its sale, with insufficient funds to pay all lienholders, and should not have foreclosed. 22 J.L. & Pol’y at 291-292. If the Trustee’s Sale was validly conducted, the proceeds are subject to Palmer’s Trust Deed. Mortgages § 7.1. However, this Court has indicated the law does not require the Bank to provide Palmer the proceeds, indicating that the sale on the Bank’s First Trust Deed was invalidated by the Appeal Reversal’s reinstatement of the Bank’s Second Trust Deed.

Orme’s Concurrence wisely suggested settlement between the Bank and Palmer; however, the Bank continues to assert entitlement to the proceeds regardless of the Appeal Reversal and Orme’s Concurrence. Thus, the only legal effect of the Trustee’s Sale, if such sale remains valid, is that the Bank sold its junior lien and MAA maintains a part of that junior lien subject to Palmer’s senior lien. Mortgages §7.1.

This Court’s Appeal Reversal and Orme’s Concurrence should be given respect. Palmer’s Trust Deed is the senior lien on the Property and was at the time of the Bank’s Trustee’s Sale, which was an invalid sale under a voided trust deed. MAA was not entitled to summary judgment as a matter of law against Palmer and the Judgments should be reversed. Palmer should be granted the ability to foreclose the Property under the Palmer Trust Deed.

**(C) The Judgments Are Internally Contradictory As to Palmer’s Rights to the Property.**

The concept of “election of remedies” was defined by our Utah Supreme Court as follows:

...technical rule of procedure and its purpose is not to prevent recourse to any remedy, but to prevent double redress for a single wrong. Said doctrine presupposes a choice between inconsistent remedies, and knowledgeable selection of one thereof, free of fraud or imposition, and a resort to the chosen remedy evincing a purpose to forego all others.

*Palmer v. Hayes*, 892 P.2d 1059, 1061-62 (Utah App. 1995)(citation omitted); *see also Cook v. Covey-Ballard Motor Co.*, 69 Utah 161, 253 P. 196, 200 (1927)(“The doctrine of an election rests upon the principle that one may not take contrary positions ... the deliberate and settled choice of one ... will preclude him thereafter from going back and electing another.”).

An internal contradiction exists in the Judgments. The trial court found both that the Palmer Trust Deed was in junior position and “extinguished” by the Trustee’s Sale, but then found that Palmer could pursue the proceeds of the Bank’s Sale in the Bank’s Case after it denied him foreclosure rights. *Id.* There will be no proceeds if Palmer was the junior lienholder at the Trustee’s Sale, and he maintains no rights if the Palmer Trust Deed was in fact “extinguished.” Clearly the court tried to balance out the Appeal Reversal with its determination, but its decision is legally unsupported.

The trial court herein also sits on the Bank’s case and has denied Palmer access to the proceeds twice through denial of Palmer’s request for the Bank to deposit the proceeds and denying Palmer’s UT. R. CIV. P. 15 motion to amend to include a claim for the proceeds from the Bank. Palmer has appealed that matter. The Judgments contradict not only this Court’s prior holdings, but are internally contradictory.

The Judgments avoid stating that Palmer “elected” the remedy of seeking the proceeds; however, the Judgments conclude Palmer “disclaimed” rights to the Property

through his Appeal oral arguments where he argued he could seek the proceeds from the Bank's Trustee's Sale. This was *before* Palmer won reversal and maintained rights. Palmer argued in favor of proceeds as an example to survive mootness, thinking at the time that it may be his only remedy if he prevailed on appeal. Palmer had not fully considered his remedies since at the time he maintained no remedy. Nonetheless, the court believed Palmer made a knowledgeable election to pursue the proceeds over foreclosure to meet the criteria for "a resort to the chosen remedy evincing a purpose to forego all others."

Palmer cannot elect a remedy not yet available to him in a manner that waived his foreclosure rights over real property interests under the Palmer Trust Deed without realizing it, and somehow meet the legal criteria of full knowledge, by simply telling this Court of review—not one of fact—that such remedy was a possibility. This determination was an erroneous one requiring reversal.

## **II. THE TRIAL COURT ERRED IN GRANTING MAA'S SUMMARY JUDGMENT AS A MATTER OF LAW WHERE MAA'S CLAIMS WERE FORECLOSED BY ISSUE PRECLUSION AND VERTICAL STARE DECISIS.**

"The doctrine of res judicata embraces two distinct branches: claim preclusion and issue preclusion." *Macris & Associates, Inc. v. Neways, Inc.*, 2000 UT 93, ¶19, 16 P.3d 1214.

Issue preclusion is defined as follows:

...when a particular issue has already been litigated, further litigation of same issue is barred. As it relates to civil actions, concept of 'issue preclusion' is in substance that any fact, question or matter in issue and directly adjudicated or necessarily involved in determination of action before court of competent jurisdiction in which judgment or decree is rendered on merits, is conclusively settled by judgment therein and cannot be relitigated in any future action between parties or privies, either in same court or court of concurrent jurisdiction, while judgment remains unreversed or unvacated by proper

authority, regardless of whether claim or cause of action, purpose or subject matter of two suits is same.”

*Black’s Law Dictionary*, Abridged Sixth Ed., p. 578. “Issue preclusion ... “*arises from a different cause of action* and prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit.” *Macris* at ¶19, *citing Schaer v. State*, 657 P.2d 1337, 1340 (Utah 1983)(emphasis in original)(additional citation omitted). The *Macris* court applied a four-part test to determine whether the doctrine of issue preclusion applies:

First, the issue challenged must be identical in the previous action and in the case at hand. Second, the issue must have been decided in a final judgment on the merits in the previous action. Third, the issue must have been competently, fully, and fairly litigated in the previous action. Fourth, the party against whom collateral estoppels is invoked in the current action must have been either a party or privy to a party in the previous action.

*Id.* at ¶37 (citations omitted). “All four elements must be present for issue preclusion to apply.” *Id.* (citation omitted).

“Privity” is defined as “mutual *or successive relationships* to the same right of property, or such an identification of interest of one person with another as to represent the same legal right. It is a derivative interest founded on, or growing out of, contract, connection, or bond of union between parties; mutuality of interest.” *Black’s Law Dictionary*, Abridged Sixth Ed., p. 833 (emphasis added). “Privity signifies that relationship between two or more persons is such that a judgment involving one of them may justly be conclusive upon other, although other was not party to lawsuit.” *Id.* *Macris* noted, however, that “[m]utuality of parties is no longer essential’ for collateral estoppel purposes.” *Ibid.* at ¶45, *citing Wilde v. Mid-Century Ins. Co.*, 635 P.2d 417, 419.

The doctrine of “stare decisis” is defined as follows:

Policy of courts to stand by precedent and not to disturb settled point. Doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same. Under doctrine a deliberate or solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy... The doctrine is not ordinarily departed from where decision is of long-standing and rights have been acquired under it, unless considerations of public policy demand it... The doctrine is limited to actual determinations in respect to litigated and necessarily decided questions, and is not applicable to dicta or obiter dicta.

*Black's Law Dictionary*, Abridged Sixth Ed., pp. 978-979. "Vertical stare decisis ... compels a court to follow strictly the decisions rendered by a higher court." *State v. Tenorio*, 2007 UT App 92, ¶9, 156 P.3d 854, citing *State v. Menzies*, 889 P.2d 393, 399 n. 3 (Utah 1994). This Court has acknowledged that it is bound by the doctrine of vertical stare decisis with regard to decisions rendered by our Utah Supreme Court. See, e.g., *State v. Newland*, 2010 UT App 380, fn. 5, 253 P.3d 71 ("...under principles of vertical stare decisis, we are prohibited from departing from the precedent established by our supreme court.").

The Bank's *Suggestion of Mootness* in the Appeal argued Palmer failed to obtain a stay of the Bank's Order and Trustee's Sale, thereby waiving his rights and mooted the Appeal. The Bank argued this Court could not reinstate the extinguished junior Palmer Trust Deed or authorize him to sell the Property if he prevailed, erroneously relying on creditor-debtor law applicable only to contracting parties. The Bank believed Palmer could not be provided relief.

Palmer argued the parties' relationship was a creditor-creditor relationship pertaining to priority of separate contracts. Palmer cited authority indicating that creditors in this

situation compete for the same outcome, such as proceeds, which is more easily transferred if he prevailed; however, Palmer's further research and further proceedings indicated he had other options.

This Court denied mootness allowing the Appeal to proceed, agreeing that Palmer maintained viable relief regardless of the Bank's Trustee's Sale. The Bank briefed the mootness issue; however, the Court's Appeal Reversal effectively denied that second request. The Bank sought rehearing on the mootness issue; however, rehearing was denied. The Bank then sought certiorari review, which was denied.

Orme's Concurrence later provided specific direction:

The trial court appears to have ruled correctly in denying Palmer's motion requiring the payment of funds into court. By reason of this court's ruling, Palmer's trust deed was in a senior position to that of the bank when the bank effected its trustee's sale, and the sale did not affect the status of Palmer's trust deed, which presumably remains of record as a valid lien against the property secured thereby. Absent a comprehensive settlement as wisely suggested by the trial court, Palmer appears to have the rights of any trust deed beneficiary, including the right to foreclose judicially or conduct a nonjudicial trustee's sale. But no basis for requiring the bank to pay money into court is apparent in the record before us.

*Ibid.* Palmer attempted to amend his pleadings in the Bank's Case to include a claim for proceeds, but was denied amendment. He has appealed this decision.

Palmer filed to foreclose, and MAA filed the Complaint claiming Palmer waived his rights by failing to obtain a stay of the Bank's Order, rendering this Court's Appeal Reversal moot based on the Trustee's Sale. This argument contradicted this Court's denial of mootness, the Appeal Reversal, and rehearing denial on that same issue. Palmer relied upon those prior determinations to defend this action against MAA; however, the trial court failed to give any respect to the Appeal Reversal or Orme's Concurrence.

Issue preclusion forecloses MAA's Complaint claims. *Macris* at ¶19; see *Swainston* at 1061. The precise issue was determined by this Court on its merits in the Appeal. MAA's claim itself involves the same parties and the same circumstance. The issue could not be properly relitigated in this action between MAA—a privy of the Bank's as a successor to its deed—and Palmer. The Appeal Reversal is precedential, with certiorari review denied.

It cannot be that the Bank is denied the issue in its own case, but MAA can prevail on the exact issue herein. The Bank's precise issue was resolved by this Court, rendering MAA its privy without the ability to re-litigate them herein. *Macris* at ¶34, citing *Schaer* at 1340; *Searle* at 690. MAA, a Bank's deed successor, is barred by issue preclusion on issues fully determined by this Court. *Id.* at ¶19, citing *Schaer* at 1340 (quoting *Searle* at 690). The Judgments gave MAA the relief that this Court denied the Bank on the same facts and arguments.

The four-part *Macris* test is met to apply issue preclusion to MAA's Complaint. The issues are identical to the Bank's in the Appeal. This Court was best suited to determine whether Palmer's appellate relief was rendered moot—not a trial court. This Court found the Appeal was not moot, while fully aware of the Bank's nonjudicial Trustee's Sale and Palmer's failure to obtain a stay. The trial court cannot render an appellate decision moot, particularly when the appellate court determined it is not.

The issues regarding Palmer's rights after not obtaining a stay prior to the Trustee's Sale were competently, fully, and fairly litigated in the Appeal. The Bank's *Suggestion of Mootness* cited incorrect authority respecting parties with competing interests under one contract. This case was one of competing contracts. Priority of liens is a distinct issue not found between debtors and creditors. Palmer's property rights were preserved by filing the



Appeal challenging the lien priority decision. The Bank's decision to sell the Property during the Appeal assumed the risk of reversal and retroactive loss of priority with a void ab initio affect. This is precisely what happened herein. The waiver and mootness issues were competently, fully, and fairly litigated in the Appeal by the proper court—this one.

Palmer maintained no duty to inform MAA of the Appeal. The Bank was contractually obligated to MAA for full disclosure. UTAH CODE ANN. §78B-5-201 also required the Bank to provide specific information in recording the Bank's Order that would properly inform MAA of Palmer's rights. The Bank refuses to settle with Palmer on proceeds from its Trustee's Sale. Palmer opted to foreclose his senior lien. However, the trial court's decisions in three cases now before this Court effectively refused to let Palmer exercise *any* remedy—by foreclosure or action for the proceeds, as though the Appeal Reversal never happened.

MAA was a privy to the Bank in the Bank's Case on these matters. *Macris* at ¶37. Any judgment affecting the rights of the Bank to the Property necessarily impacted MAA's rights to the Property as successor under their lien. *Black's Law Dictionary* at p. 833. MAA maintains the same legal rights to the Property the Bank had at the Trustee's Sale, which was either a junior lien or no interest from the Appeal Reversal invalidating the sale. *Id.* MAA's derivative interest is founded on the contract with the Bank. *Id.* Denial of the *Suggestion of Mootness* and the Appeal Reversal, affecting the Bank's interest, was conclusive upon MAA.

Issue preclusion applies herein through vertical stare decisis. Palmer argued to uphold the Appeal Reversal and proceedings, particularly as addressing these precise facts and issues. The Appeal Reversal, made after thorough argument, should have been applied when

the identical point was again raised in controversy by MAA. The trial court had no discretion to revisit the Appeal Reversal. *Tenorio* at ¶9, *citing Menzies* at 399 n. 3; *Newland* at fn. 5. Issue preclusion and vertical stare decisis applied to foreclose MAA's claims in the Complaint, and the trial court erred in denying Palmer relief thereby. *Macris* at ¶19; *see Swainston* at 1061; *Tenorio* at ¶9, *citing Menzies* at 399 n. 3; *Newland* at fn. 5.

MAA contradicted the Appeal Reversal asking that the Bank's Second Trust Deed retain senior priority. However, by recordation the Reconveyance placed that lien in junior position, which priority was fully litigated previously. The issue arose in a different cause of action (the MAA case), preventing parties (the Bank) or their privies (MAA) from relitigating issues (the parties' priorities, mootness of the Appeal) already fully litigated in the Appeal. The Bank's privies—MAA and others—assumed the Bank's loss in the Appeal Reversal and cannot relitigate it. The Appeal Reversal stands as properly placing Palmer in senior priority position and the Judgments should be reversed.

### **III. THE TRIAL COURT ERRED IN DETERMINING THAT MAA WAS ENTITLED TO THE PAYMENT OF ITS ATTORNEY'S FEES AND COSTS.**

#### **A. MAA's Motion for Attorney's Fees Was Untimely and Thus Any Request For Attorney's Fees Or Costs Are Waived.**

UT. R. CIV. P. 73(a) indicates attorney fees are authorized by contract or statute and must be supported by affidavit or testimony. *Ibid*; *see Meadowbrook, LLC v. Flower*, 959 P.2d 115, 117 (Utah 1998). The time frame for requesting fees was settled in *Meadowbrook*, requiring they be sought during the "trial phase." *Ibid.* at 117, *quoting Cabrera*, 694 P.2d 622, 624 (Utah 1985). It found "there must come a time of closure, or finality, in a case when a claim for attorney fees must be raised or waived. That time is the signed entry of final

judgment.” *Id.* at 118 (citation omitted). Our Supreme Court declined to allow requests for fees at or after the deadline for appealing, finding an attorneys’ fees decision could impact the party’s decision to appeal. *Id.* at 118-119. Instead, the Court held that, “a prevailing party that ***files a motion*** for attorney fees before signed entry of final judgment or order does not waive its claims to such fees, unless otherwise provided by statute or unless it fails to comply with the court’s order to address the issue at a specific time.” *Id.* at 119-120 (emphasis added).

Trial counsel who fail to preserve an issue, opting instead to raise the issue for the first time in a post-trial motion, simply gamble that their motion will be filed before entry of final judgment. ... While the trial court did not enter final judgment until nearly four months after the jury verdict, had it done so before counsel filed the motion for attorney fees, defendants would have waived their claim to those fees.

*Id.* at 120 (emphasis added). While UT. R. APP. P. 4(b) does not include this motion as one suspending the time for appealing, this is likely because *Meadowbrook* required that attorneys’ fees be filed ***pre-judgment***.

UT. R. CIV. P. 7(f)<sup>2</sup> governs determination with respect to the finality of orders in that “compliance with rule 7(f) dictates the timing for filing a notice of appeal.” *Butler v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints*, 2014 UT 41, ¶17, 337 P.3d 280, *citing Central Utah Water Conservancy District v. King*, 2013 UT 13, ¶ 15, 297 P.3d 619. Three events were listed as supporting finality, with the pertinent one being when “the court enters an order prepared by counsel and served on opposing counsel pursuant to rule 7(f)(2).” *Id.*

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<sup>2</sup> Rule 7 was amended in November of 2015; however, the orders challenged herein were entered prior to such amendment.

The court ordered MAA to prepare and serve a proposed order, which it did. Palmer objected to it as exceeding the scope of oral determination. On July 28, 2015, the court entered the Judgment, which contains a recitation of MAA's oral desire that "MAA has reserved the right to seek attorney fees and costs" but added "this Order and Judgment therefore does not address that issue." MAA did not file a motion for attorneys' fees prior to the signing of the Judgment, and there was no separate court directive on when one should be filed.

On August 7, 2015, Palmer appealed the Judgment. On September 3, 2015, this Court filed its *Sua Sponte Motion for Summary Disposition* on grounds the Judgment was non-final given MAA's oral reservation; however, no attorneys' fees motion had even then been filed below. A week later on September 10, 2015, MAA filed their attorney fees motion. The trial court entertained the motion, thus this Court dismissed the appeal.

MAA did not *file* the motion or affidavit required by UT. R. CIV. P. 73(a) during the "trial phase." *Meadowbrook* at 117. *Meadowbrook* required either filing of a motion or compliance with a court's order setting a specific time for filing. The Judgment provides no deadline for MAA's filing of attorneys' fees. Orally "reserving" the right to file a request at some indeterminate later date past the precedential deadline is insufficient for matters impacting Palmer's appeal rights and trial court and appellate jurisdiction. *See, e.g.*, UT. R. APP. P. 4(b)(1)(A)-(E). Allowing "reservation" with an indeterminate time frame runs contradicts *Meadowbrook* by creating no deadline.

*Meadowbrook* rejected post-judgment attorney fees motions like MAA's. *Ibid.* at 119. A delay of 30 days was also expressly rejected. *Id.* at 118-119. MAA's request was filed post-

judgment by a delay of approximately forty-four (44) days. MAA's written request was due immediately after oral pronouncement to avoid delay or, alternatively, the court was to set a time limitation for its submission to alert Palmer regarding his appeal rights. Memorialization of an oral "reservation" in an otherwise final written order without an explicit deadline listed cannot render that written order non-final. The *Meadowbrook* deadline remains unless a different one is set. There was no new deadline ordered orally or in written form, thus defaulting to the *Meadowbrook* deadline before entry of the Judgment. *Ibid.* at 119-120.

Had Palmer waited to appeal based on the Judgment's recitation of a prior oral reservation, he could have lost his right to appeal if MAA withdrew its motion or never filed. In the companion *2DP* appeal, the same "reservation" language was used and the matter came for summary disposition; however, *2DP* voluntarily withdrew its motion. Upon withdrawal, summary disposition was denied and the original order Palmer appealed from was deemed the final order.

Palmer reasonably relied upon the rules of procedure and *Meadowbrook* to determine the Judgment was final for appeal. UT. R. CIV. P. 7(f). The Judgment was the properly finalized under Rule 7(f)(2). MAA's counsel submitted a proposed order to Palmer, who objected to its entry, after which the court entered it. *Butler* at ¶ 17, *citing Central Utah Water Conservancy District* at ¶ 15. At that point the *Meadowbrook* deadline effectively passed where the trial court set no alternative deadline, and MAA waived its request. The trial court erroneously granted MAA the relief it requested and ordered that Palmer pay MAA's attorneys' fees and costs. This determination requires reversal.

**B. Alternatively, Under the Reverse Hypothetical Analysis Required to Apply §78b-5-826 To MAA's Request For Attorney Fees, Palmer Could Not Have Recovered Fees From MAA Under The Palmer Trust Deed Based on Palmer's Theory that He Held the Senior Lien on the Property; Thus, MAA Is Not Entitled To Fees Under §78b-5-826.**

UTAH CODE ANN. §78B-5-826, referred to as the “reciprocal attorney fees statute” states as follows:

A court may award costs and attorney fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees.

“The classic application of the statute involves a one-sided fee provision in a dispute between the parties to the contract.” *Hooban v. Unicity Intern. Inc.*, 2012 UT 40, ¶ 26, 285 P.3d 766 (“**Hooban II**”), *citing Bilanzich* at ¶18. “[T]he purpose of the reciprocal attorney fees statute is to eliminate “ ‘unequal exposure to the risk of contractual liability for attorney fees.’” *PC Crane Service, LLC v. McQueen Masonry, Inc.*, 2012 UT App 61, ¶ 23, 273 P.3d 396, *citing Hooban v. Unicity International, Inc.*, 2009 UT App 287, ¶ 11 n. 3 220 P.3d 485 (“**Hooban I**”), *affirmed by Hooban II* (*quoting Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, ¶¶ 76-77, 201 P.3d 966); *see Bilanzich v. Lonetti*, 2007 UT 26, ¶ 18, 160 P.3d 1041 (noting that the reciprocal attorney fees statute “was designed to create a level playing field for parties to a contractual dispute” (internal quotation marks omitted)). “[T]he statute affords to the party not benefitted by the contractual attorney fee provision the same access to attorney fees that the provision explicitly affords to the other party.” *Id.* “The statute does not create an independent right to a fee award that the contract’s attorney fee provision would not allow to either party simply because the fee provision is one-sided.” *Id.*

In Hooban II, the Supreme Court agreed with Hooban's analysis of -826 as follows:

...the statutory trigger for fee award—"when the provision of the ... contract ... allow at least one party to recover attorney fees"—does appear to refer to a party to a contract, and not just the litigation. In context, ***the statute makes an obvious reference to contracting parties and their contractual attorney fees provisions.*** After all, the "provisions of a contract" would not apply to a mere party to the litigation who is unmentioned in the contract.

*Ibid.* at ¶23 (emphasis added). Hooban argued the statute did not apply since the court found he was a stranger to the agreement; however, the Court found the evaluation was "a hypothetical alternative in which the case resolved the other way." *Id.* at ¶¶24-26. If Hooban had prevailed, his own theory was that he was a party to the contract, which would have enabled him to recover his attorney fees thereunder. *Id.* at ¶25.

[I]n that archetypal scenario, the statutory analysis of whether the contract allows "at least one party to recover" is undertaken in the hypothetical—under an alternative consideration in which the tables were turned and the opposite party prevailed. Because only that approach preserves the classic case covered by the statute, we interpret its language to contemplate the hypothetical analysis...

*Id.* at ¶27. Hooban II opined that the fee shifting of -826 could not be based on "status as a party ***who is*** entitled to attorney's fees" since that would deprive the non-entitled contracting party from obtaining fees under a unilateral provision. *Id.* at ¶28 (emphasis added). Hooban II states "[t]hus, we interpret section 826 ... [to] inquire[ ] whether the contract would allow at least one party to recover fees in the hypothetical alternative scenario in which the opposing party prevailed." *Id.* at ¶ 29.

MAA's deed originated with the Bank. The Palmer Trust Deed with JDJ obtained senior lienholder status to the Bank's deed by the Appeal Reversal. Palmer filed to foreclose. MAA sought to quiet title under their own deed seeking status as the senior lienholder on

the Property as a bona fide purchaser. MAA prevailed, then sought attorney fees under the “reciprocal attorney fees statute” in reliance upon a provision in the Palmer Trust Deed pertaining to defaulting parties.

Palmer and MAA are not “contracting parties” to any one deed as required by interpretation of UTAH CODE ANN. §78B-5-826. *PC Crane Service* at ¶ 23, *citing* Hooban I at ¶ 11 (*quoting* *Giusti* at ¶¶ 76-77); Hooban II at ¶¶ 23, 26. Section -826’s provisions classically involves a one-sided fee provision between the parties to a single contract. The “contracting parties” under the Palmer Trust Deed are only Palmer and JDJ. These two parties could **not** contract for attorney fees against a third person/entity unnamed in their deed. If Palmer filed a foreclosure action against JDJ for its default and JDJ prevailed, JDJ would be entitled to attorney fees under UTAH CODE ANN. §78B-5-826. Conversely, MAA’s action was for priorities of competing deeds, not in defense of JDJ’s default. MAA is not a party under the Palmer Trust Deed, nor averred any relationship to implicate the “reciprocal” analysis.

Hooban II stated that section -826 applies and refers to parties to one contract, **not** parties to a litigation. MAA misinterpreted the statutory language that states “when the provision of the ... contract ... allow at least one party to recover attorney fees.” MAA believed Palmer is “one party” that could recover fees under the Palmer Trust Deed, thus **any** nonparty to the contract could do so against Palmer. However, Hooban II holds the opposite that “ ‘provisions of a contract’ would not apply to a mere party to the litigation who is unmentioned in the contract.” *Ibid.* at ¶23. MAA is only a mere party to the litigation, and cannot benefit from the contractual provisions of the Palmer Trust Deed.



MAA's application of -826 can only be by hypothetical archetypal scenario since the Palmer Trust Deed is not "a one-sided fee provision in a dispute between the parties to the contract." Hooban II at ¶ 26 (emphasis added), *citing Bilanzich* at ¶18. JDJ is not part of this dispute. Proper analysis requires consideration of the case resolving in favor of Palmer. *Id.* at ¶¶24-26. Palmer's theory and defense is that he is the senior lienholder to MAA's junior (if the sale was for the junior only) or nonexistent (if the Appeal Reversal invalidated the sale altogether) lien authorized to foreclose. His theory did not make MAA a defaulting party under the Palmer Trust Deed against whom he could obtain fees. Competition of priorities cannot create contractual rights to fees. Palmer and MAA are simply *not* two parties to any one contract, nor did Palmer's defense and theory create this relationship.

MAA argued Palmer would be entitled to fees under the Palmer Trust Deed<sup>3</sup> in prevailing against MAA, but never evidenced how. Palmer cannot enforce a default provision of his own trust deed with JDJ against MAA who is but "a mere party to the litigation ... unmentioned in the contract." Hooban II at ¶23. Thus section -826 cannot apply since it cannot create contractual provisions for fees to be paid to non-contracting parties to litigation. *PC Crane Service, LLC* at ¶23. The Judgments erroneously allow parties to contract for attorney fees from an innumerable amount of unsuspecting, unnamed, and uninvolved non-contracting entities and individuals. Clearly, only parties to a contract can agree regarding their own rights and not the rights of others.

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<sup>3</sup> The provision relied upon in the Motion as contained in the Palmer Trust Deed is a default provision, applicable only if the opposing party defaulted. MAA cannot obtain fees against Palmer because JDJ defaulted. Our appellate courts have declined to provide fees under 826 on contractual provisions requiring default where there is no default occurring by either party. *See, PC Crane Service, LLC* at ¶23.

The Judgments deviated from standard rules of contract by allowing a non-contracting entity to obtain a purely contractual benefit of other contracting parties. Section -826 is a modifier of contractual attorney fees provisions, not an independent basis on which to seek them statutorily. Hooban II's language stating it "could not be based on status as a party" explains that has to be a party "who is entitled to attorney's fees." It does not reach non-contracting individuals, only parties to the contract containing the provision whether that provision is unilateral or otherwise. Neither Palmer nor MAA could obtain attorneys' fees in either the classic scenario or the hypothetical alternative scenario of -826; thus, MAA was not entitled to attorneys' fees and the Judgments require reversal.

### **CONCLUSION**

WHEREFORE, Palmer requests that this Court vacate the Motion for Summary Judgment and grant any further relief it deems necessary.

DATED this 5th day of July, 2016.

\_\_\_\_/s/\_\_\_\_\_  
Craig C. Halls  
Attorney for Ray William Palmer

### **CERTIFICATE OF COMPLIANCE WITH UT. R. APP. P. 24(f)(1)(C)**

Counsel hereby certifies the *Brief of Appellant* complies with the type-volume limitation: 13,928 words are contained herein, in compliance with UTAH R. APP. P. 24(f)(1)(A) and was determined by the word processing system used to prepare *Brief of Appellant*.

DATED this 5th day of July, 2016.

\_\_\_\_/s/\_\_\_\_\_  
Craig C. Halls  
Attorney for Ray William Palmer

**CERTIFICATE OF MAILING**

I hereby certify that I mailed a true and correct copy, postage pre-paid, of the foregoing *Brief of Appellant* with attachments, on this 5th day of July 2016, to the following:

Ronald G. Russell  
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101 South 200 East, Suite 700  
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\_\_\_\_\_/s/\_\_\_\_\_

# **Addendum “A”**

*Order and Judgment Granting MAA Prospector’s Motion for Summary Judgment*  
dated July 28, 2015

The Order of Court is stated below:

Dated: July 28, 2015  
12:53:24 PM

/s/ LYLE R ANDERSON  
District Court Judge



Ronald G. Russell (4134)  
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IN THE SEVENTH JUDICIAL DISTRICT COURT FOR SAN JUAN COUNTY

STATE OF UTAH

MAA PROSPECTOR MOTOR LODGE, LLC, a Utah Limited Liability Company,	)	<b>ORDER AND JUDGMENT GRANTING MAA PROSPECTOR'S MOTION FOR SUMMARY JUDGMENT</b>
Plaintiff,	)	
vs.	)	
RAY W. PALMER, an individual; and JOHN DOES 1-10,	)	
Defendants.	)	
		Civil No. 140700016
		Judge Lyle R. Anderson

This matter came before the Court on plaintiff MAA Prospector Motor Lodge, LLC's ("MAA") Motion for Summary Judgment Against Defendant Ray William Palmer (the "Motion"). Oral argument was held on June 11, 2015. Ronald G. Russell of Parr Brown Gee & Loveless argued on behalf of MAA. Craig Halls argued on behalf of Mr. Palmer.

Having considered the parties' briefing and oral argument in this matter and in the matter of *2DP Blanding, LLC v. Palmer*, Case No. 140700017, which was argued the same day and

which arguments were stipulated by the parties to apply to this case except for the distinctions highlighted by the parties during the oral argument, the Court hereby ORDERS, ADJUDGES, and DECREES as follows:

**UNDISPUTED MATERIAL FACTS**

The following are the most pertinent undisputed facts to the Court's conclusions of law:

1. Palmer was the owner of two parcels of property located at 591 South Main Street ("Parcel 1") and 861 South Main Street ("Parcel 2") in Blanding, Utah. The parcel at issue in this matter is Parcel 1.
2. In 2003, Palmer sold the Parcels to JDJ Holdings, Inc. ("JDJ"), and the transaction closed on or about December 23, 2003.
3. Palmer provided seller financing to JDJ that was secured by a trust deed and assignment of rents on the Parcels ("Palmer Trust Deed").
4. First National Bank of Layton ("the Bank") provided financing to JDJ, which was secured by a trust deed on the Parcels ("First Bank Trust Deed").
5. At the time of the sale of the Parcels, the parties understood that the First Bank Trust Deed was in first lien priority position on the Parcels.
6. JDJ later executed a new deed of trust in favor of the Bank that altered the principal amount owed by JDJ secured by the trust deed. This trust deed was recorded.
7. Because the Bank had recorded a second trust deed ("Second Bank Trust Deed") replacing the first, on March 2, 2004, the Bank executed a Substitution of Trustee and Deed of Reconveyance for the First Bank Trust Deed and recorded it in the

San Juan County Recorder's Office.

***The Bank Lawsuit***

8. On or about June 5, 2009, Palmer notified the Bank that he believed the Palmer Trust Deed was in first lien priority position on the Parcels due to the Deed of Reconveyance and the later recording of the Second Bank Trust Deed.
9. On or about July 23, 2009, the Bank filed an action in this Court titled *First National Bank of Layton v. Ray William Palmer, et al.*, Case No. 090700136 (7th Dist. Ct.) ("the Bank Lawsuit"), to clarify the priority of parties' trust deeds.
10. On November 8, 2010, this Court entered a ruling granting partial summary judgment to the Bank, holding that the Bank was entitled to equitable reinstatement of its first lien priority position on the Parcels.
11. On March 9, 2011, this Court entered an Order and Judgment declaring that (a) the First Bank Trust Deed was "reinstated with its original priority and position as a valid security interest" in the Parcels, (b) the Bank's Deed of Reconveyance was "void ab initio," and (c) the Bank was "authorized to exercise all rights and remedies provided by its Trust Deed with respect to the Property."
12. Neither Palmer nor the Bank ever recorded a lis pendens on the Parcels in the San Juan County Recorder's Office.
13. Although Palmer eventually appealed from the Order and Judgment, he did not record any document indicating he had filed an appeal in the San Juan County Recorder's Office.
14. Palmer did not obtain a stay of the execution of the Order and Judgment pending

his appeal.

***Foreclosure of the First Bank Trust Deed and Conveyance to Black Oil***

15. On March 29, 2011, the Bank recorded the Order and Judgment in the San Juan County Recorder's Office.
16. After the Bank issued a Notice of Default and Notice of Trustee's Sale, a Trustee's Sale was held August 8, 2011.
17. At the Trustee's Sale, MAA was the highest bidder on Parcel 1, with a bid of \$255,000.
18. On August 10, 2011, Parcel 1 was conveyed to the MAA via trustee's deed, which was recorded in the San Juan County Recorder's Office on November 22, 2011 as Entry No. 114697.
19. The parties dispute whether MAA had actual notice that Palmer had appealed from the Order and Judgment at the time it purchased Parcel 1.

***Palmer's Appeal***

20. During Palmer's appeal before the Utah Court of Appeals, the Bank argued that the appeal was moot because Palmer had failed to obtain a stay of the Order and Judgment, the Parcels had been sold at the Trustee's Sale, and the Palmer Trust Deed had been extinguished because the First Bank Trust Deed was in first lien priority position at the time of the sale.
21. Palmer responded that his appeal was not moot because "[h]e simply want[ed] to establish his right to his share of the sales proceeds" from the sale of the Parcels, and that obtaining his "rightful share of the proceeds" from the Bank "remain[ed]"



a viable issue on appeal.”

22. In briefing and at oral argument before the Utah Court of Appeals, Palmer disclaimed any right in the Parcels and repeatedly stated that, despite the sale of the Parcels, he could still seek a share of the sale proceeds retained by the Bank from its sale of the Parcels.

23. On or about February 28, 2013, the Utah Court of Appeals issued a written opinion, which (a) determined that Palmer’s appeal was not moot and (b) reversed the Order and Judgment because the Bank had not been entitled to first lien priority position of the First Bank Trust Deed under the doctrines of equitable subrogation or equitable reinstatement.

***Palmer’s Attempt to Foreclose the Palmer Trust Deed***

24. Palmer began efforts to foreclose the Palmer Trust Deed and sell Parcel 1, which led to this lawsuit.

**CONCLUSIONS OF LAW**

MAA seeks summary judgment quieting title to Parcel 1 in MAA under numerous legal and equitable bases. The Court does not reach the merits of each of these bases because it concludes that MAA is entitled to judgment as a matter of law on the following two grounds based on the foregoing undisputed material facts:

1. Utah law recognizes that an order that is not stayed remains valid and enforceable during the pendency of an appeal. *See, e.g., Cheves v. Williams*, 1999 UT 86, ¶ 47, 993 P.2d 191; *Skeen v. Pratt, Judge*, 48 P.2d 457, 458 (Utah 1935); *see also Franklin Fin. v. New Empire Dev.*, 659 P.2d 1040, 1043 (Utah 1983) (recognizing

that sale of property was “legally carried out during the pendency of the appeal” after “failure to obtain a stay of execution”). Palmer did not obtain a stay of the Order and Judgment, which had declared that (a) the First Bank Trust Deed was “reinstated with its original priority and position as a valid security interest” in the Parcels, (b) the Bank’s Deed of Reconveyance was “void ab initio,” and (c) the Bank was “authorized to exercise all rights and remedies provided by its Trust Deed with respect to the Property.” While Palmer was appealing from the Order and Judgment, the Bank foreclosed the First Bank Trust Deed, as it was authorized to do under the Order and Judgment, and Parcel 1 was sold to MAA at the Trustee’s Sale.

The sale of Parcel 1 at the Trustee’s Sale had the effect of freezing the state of the law at that time. The state of the law was that the First Bank Trust Deed was in first lien priority position pursuant to the valid and enforceable Order and Judgment. The Trustee’s Sale conferred good and valid title to the MAA. If Palmer was unhappy with the state of the law at the time of the Trustee’s Sale, he had an obligation to obtain a stay of the Order and Judgment. Utah’s requirement that an appellant obtain a stay places importance on the rule that judgments are valid and enforceable until they are overturned.

Although Palmer may have considered it cost-prohibitive to obtain a stay by posting a supersedeas bond, he had options. Palmer’s counsel suggested at oral argument that Palmer could not have afforded a bond with a value equivalent to the fair market value of the Parcels. But it is likely this Court would have instead considered the impact of a stay on the fair market value of the Parcels pending Palmer’s appeal and would have set a bond reflecting the value of

that impact. Presumably, Palmer did not follow through with seeking a stay or posting a supersedeas bond because he had another option: making a claim for the proceeds of the Bank's sale of the Parcels should he prevail on appeal. Palmer's claim to the proceeds of the Bank's sale of the Parcels is part of another proceeding and has yet to be sorted out.

Palmer's failure to obtain a Stay of the Order and Judgment resulted in the lawful sale of Parcel 1. The First Bank Trust Deed was in first lien priority position at the time of sale, and the Trustee's Sale had the effect of extinguishing the Palmer Trust Deed, which was then a junior interest. MAA therefore has good and valid title to Parcel 1, free of any interest or encumbrance asserted by Palmer and anyone claiming by, through, or under him.

2. MAA also has good and valid title to Parcel 1, free of any interest asserted by Palmer, under the bona fide purchaser doctrine. The parties dispute whether MAA had actual notice of Palmer's appeal. Even assuming, for purposes of summary judgment, that MAA had actual notice of the appeal, and had a duty to inquire into the appeal, such inquiry would not have notified MAA that Palmer continued to assert any right in Parcel 1. MAA would only have learned that Palmer had disclaimed his interest in Parcel 1 before the Utah Court of Appeals and instead sought entitlement to a share of the proceeds of the Bank's sale of the Parcels. The Court concludes based on the undisputed facts that MAA was a bona fide purchaser for value of Parcel 1 without notice of Palmer's asserted rights in Parcel 1.

### **JUDGMENT**

The Court hereby GRANTS MAA's Motion and ENTERS JUDGMENT in favor of MAA

declaring that (1) the Palmer Trust Deed is no longer a valid encumbrance on Parcel 1, (2) Palmer is permanently enjoined from foreclosing the Palmer Trust Deed, and (3) title to Parcel 1 is quieted in MAA and against Palmer's asserted interest and anyone claiming by, through, or under him. Defendants are hereby ORDERED to release the Palmer Trust Deed.

MAA has reserved the right to seek attorney fees and costs, and this Order and Judgment therefore does not address that issue.

**\*\*\*\*\*END OF ORDER\*\*\*\*\***

Pursuant to Rule 10(c) of the Utah Rules of Civil Procedure, this Order will be entered by the Court's signature at the top of the first page.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 14th day of July, 2015, a true and correct copy of the foregoing **ORDER AND JUDGMENT GRANTING MAA PROSPECTOR'S MOTION FOR SUMMARY JUDGMENT** was served via electronic mail on the following:

Craig C. Halls  
[craigchalls@yahoo.com](mailto:craigchalls@yahoo.com)  
403 S. Main St.  
Blanding, UT 84511

/s/ Jeffery A. Balls

# **Addendum “B”**

*Order and Final Judgment* dated November 5, 2015



ER ANDERSON  
ct Court Judge

/s/ LYLE R ANDERSON  
District Court Judge

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR SAN JUAN COUNTY

STATE OF UTAH

Case No. 140700016  
Honorable Lyle R. Anderson

1 of 5

Plaintiff seeks an award of costs and attorney fees under Utah Code Ann. § 78B-5-826. Defendant argues that the motion is untimely and plaintiff waived its right to seek such an award. Defendant's argument is based on the faulty premise that this court's "Order and Judgment Granting Maa Prospector's Motion for Summary Judgment" dated July 28, 2015 (the "July 28 Order") was a final judgment. The July 28 Order, however, was not a final judgment because it specifically reserved plaintiff's claim for attorney fees and costs. In Promax Development Corp. v. Raile, 2000 UT 4, the Utah Supreme Court held that "a trial court must determine the amount of attorney fees awardable to a party before the judgment becomes final for purposes of an appeal under Utah Rule of Appellate Procedure 3." Id. at ¶ 15.

Under the reciprocal attorney fee statute, Utah Code Ann. § 78B-5-826, a court may award attorney fees to either party that prevails if the provisions of a written contract allow at least one party to recover attorney fees in a civil action based upon the contract. See Hooban v. Unicity Int'l, Inc., 2012 UT 40 ¶ 12. An action is based upon a contract if "a party to the litigation assert[s] the writing's enforceability as a basis for recovery." Dillon v. Southern Management Corp. Retirement Trust, 2014 UT 14, ¶ 48.

There is no doubt that defendant is asserting the enforceability of his trust deed in this case. The trust deed provides for an award of attorney fees. Since the trust deed allows at least one party to recover attorney fees, the court may award attorney fees to the prevailing party under Utah Code Ann. § 78B-5-826. Plaintiff has submitted affidavits establishing that it has incurred \$39,778.26 in attorney fees and \$435.00 in costs. At the hearing on this motion, plaintiff's counsel made a proffer that an additional \$3,500 in attorney fees were incurred in connection with preparing for and attending the hearing on this motion. Defendant did not



dispute the reasonableness of the fees and costs claimed. The court finds such fees and costs to be reasonable and concludes that plaintiff is entitled to an award in the foregoing amounts.

2. Lis Pendens.

Plaintiff moved for the release of a lis pendens recorded by defendant after the court had issued its July 28 Order. Utah Code Ann. § 78B-6-1304 provides that a party to an action may make a motion for the release of a lis pendens. Section 1304(2)(1) states that, upon such motion, the "court shall order a notice released if . . . (b) the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim that is the subject of the notice." Utah Code Ann. § 78B-6-1304. Defendant argued that the probable validity of the real property claim is established by the Utah Court of Appeals decision in First National Bank of Layton v. Palmer, 203 UT App. 50, and by Judge Orme's opinion in that proceeding regarding a petition for an extraordinary writ. This court, however, has already ruled as a matter of law in this action that defendant's real property claim is not valid and the court believes its decision is correct. Plaintiff is, therefore, entitled to an order releasing the lis pendens.

Section 1304(4) permits a party to maintain a lis pendens upon providing a "guaranty." The court will consider setting the amount of such a guaranty, if defendant should file a timely motion to stay under Rule 62 of the Utah Rules of Civil Procedure.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Plaintiff Maa Prospector Motor Lodge, LLC is awarded judgment against defendant Ray W. Palmer in the amount of its attorney fees totaling \$43,278.26 and costs in the amount of

\$435.00.

2. The Lis Pendens dated August 18, 2015 and recorded at the San Juan County Recorder's office on August 19, 2015 as Entry No. 124630, in Book 974, at Pages 128-129 is hereby released and discharged from the property described therein, which property is located in San Juan County, Utah and is more particularly described as follows:

Section 34, Township 36 South, Range 22 East, SLM: Beginning at a point which is 3755 feet North and 2107.1 feet East of the South quarter corner of Section 34; and running thence East 270 feet, thence North 205 feet, then West 354.1 feet, (said point being on the East right-of-way line of Highway 163); thence South 19°57' West 189.80 feet along the right-of-way line; thence East 148.86 feet, thence South 26.59 feet to the point of the beginning. (Parcel No. B36220341801)

EXCEPTING therefrom all coal, gas, mines, metals, gravel and all other minerals.

3. The court having previously entered its July 28 Order addressing all other claims in this case, enters this Order and Final Judgment as the Final Judgment in this case for all purposes.

----- END OF ORDER -----

Pursuant to Rule 10(e) of the Utah Rules of Civil Procedure, this Order and Final Judgment will be entered by the court's signature at the top of the first page.

APPROVED AS TO FORM:

/s/ Ronald G. Russell, Esq.  
Ronald G. Russell, Esq. of  
PARR BROWN GEE & LOVELESS  
Attorneys for Plaintiff

/s/ Craig C. Halls, Esq.

Craig C. Halls, Esq.  
Attorney for Defendant

# **Addendum “C”**

Controlling Constitutional and Statutory Provisions

## **CONTROLLING CONSTITUTIONAL AND STATUTORY PROVISIONS**

### **A. UTAH CODE ANN. §57-3-103 states as follows:**

Each document not recorded as provided in this title is void as against any subsequent purchaser of the same real property, or any portion of it, if: (1) the subsequent purchaser purchased the property in good faith and for a valuable consideration; and (2) the subsequent purchaser's document is first duly recorded.

### **B. UTAH CONST. ART. 8, § 5 states as follows:**

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

### **C. UTAH CODE ANN. §78A-2-201 states as follows:**

Every court has authority to: (8) amend and control its process and orders to conform to law and justice; (9) devise and make new process and forms of proceedings, consistent with law, necessary to carry into effect its authority and jurisdiction; and I (10) enforce rules of the Supreme Court and Judicial Council.

### **D. UTAH CODE ANN. §78B-5-201 (2014)<sup>1</sup> states in pertinent part as follows:**

(2) On or after July 1, 1997, a judgment entered in a district court does not create a lien upon or affect the title to real property unless the judgment is filed

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<sup>1</sup> Palmer cites here and relies throughout his brief upon the 2014 version of UTAH CODE ANN. §78B-5-201 regarding the recordation of the Bank's Order occurring on March 29, 2011, in the Bank's Case, which was reversed by this Court in the Appeal Reversal. In *Irving Place Associates v. 628 Park Ave, LLC*, the Utah Supreme Court rendered a first-impression interpretation of the predecessor provision to -201(4). *Ibid.*, 2015 UT 91, 362 P.3d 1241. The *Irving* decision provided the precise premise for the 2014 amendment; thus, the current 2014 version encompasses the *Irving* interpretation. Because *Irving* was a first impression statutory interpretation that did not announce a new rule of law, it is considered to have retroactive effect and applies to the Bank's recordation in March of 2011 at issue herein. *See, In re I.K.*, 2009 UT 70, ¶30, 220 P.3d 464.

in the Registry of Judgments of the office of the clerk of the district court of the county in which the property is located.

(3)(a) On or after July 1, 2002, except as provided in Subsection (3)(b), a judgment entered in a district court does not create a lien upon or affect the title to real property unless the judgment or an abstract of judgment is recorded in the office of the county recorder in which the real property of the judgment debtor is located.

(b) State agencies are exempt from the recording requirement of Subsection (3)(a).

(4) In addition to the requirements of Subsections (2) and (3)(a), any judgment that is filed in the Registry of Judgments on or after September 1, 1998, or any judgment or abstract of judgment that is recorded in the office of a county recorder after July 1, 2002, shall include:

(a) the information identifying the judgment debtor as required under Subsection (4)(b) on the judgment or abstract of judgment; or

(b) a copy of the separate information statement of the judgment creditor that contains:

(i) the correct name and last-known address of each judgment debtor and the address at which each judgment debtor received service of process;

(ii) the name and address of the judgment creditor;

(iii) the amount of the judgment as filed in the Registry of Judgments;

(iv) if known, the judgment debtor's Social Security number, date of birth, and driver's license number if a natural person; and

(v) whether or not a stay of enforcement has been ordered by the court and the date the stay expires.

(5) For the information required in Subsection (4), the judgment creditor shall:

(a) provide the information on the separate information statement if known or available to the judgment creditor from its records, its attorney's records, or the court records in the action in which the judgment was entered; or

(b) state on the separate information statement that the information is unknown or unavailable.

(6) Any judgment that requires payment of money and is entered in a district court on or after September 1, 1998, or any judgment or abstract of judgment recorded in the office of a county recorder after July 1, 2002, that does not include the debtor identifying information as required in Subsection (4) is not a lien until a separate information statement of the judgment creditor is recorded in the office of the county recorder in compliance with Subsections (4) and (5).

...

(8) A judgment or notice of judgment wrongfully filed against real property is subject to Title 38, Chapter 9, Wrongful Lien Act.

E. UT. R.CIV. P. 56 states as follows:

A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 21 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof. (b) A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof. (c) The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (d) If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

F. UT. R. CIV. P. 7(j) states as follows:

(j)(1) Decision complete when signed; entered when recorded. However designated, the court's decision on a motion is complete when signed by the judge. The decision is entered when recorded in the docket. (j)(2) Preparing and serving a proposed order. Within 14 days of being directed by the court to prepare a proposed order confirming the court's decision, a party must serve the proposed order on the other parties for review and approval as to form. If the party directed to prepare a proposed order fails to timely serve the order, any other party may prepare a proposed order confirming the court's decision and serve the proposed order on the other parties for review and approval as to form. (j)(3) Effect of approval as to form. A party's approval as to form of a proposed order certifies that the proposed order accurately reflects the court's decision. Approval as to form does not waive objections to the substance of the order. (j)(4) Objecting to a proposed order. A party may object to the form of the proposed order by filing an objection within 7 days after the order is served. (j)(5) Filing proposed order. The party preparing a proposed order must file it: (j)(5)(A) after all other parties have approved the form of the order (The party preparing the proposed order must indicate the means by which approval was

received: in person; by telephone; by signature; by email; etc.); (j)(5)(B) after the time to object to the form of the order has expired (The party preparing the proposed order must also file a certificate of service of the proposed order.); or (j)(5)(C) within 7 days after a party has objected to the form of the order (The party preparing the proposed order may also file a response to the objection.).