2015

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

Utah Court of Appeals

IN THE UTAH SUPREME COURT

MAA PROSPECTOR MOTOR LODGE, LLC, Plaintiff and Appellee, v. RAY W. PALMER, et al., Defendant and Appellant.	**BRIEF OF APPELLEE MAA PROSPECTOR MOTOR LODGE, LLC** Appellate Case No. 20151010-SC

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT, SAN JUAN COUNTY, STATE OF UTAH HONORABLE LYLE R. ANDERSON, DISTRICT COURT JUDGE

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Oral Argument Requested

LIST OF PARTIES

Appellee and Plaintiff:

MAA Prospector Motor Lodge, LLC

Appellant and Defendant:

Ray W. Palmer

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STATEMENT OF JURISDICTION

The Utah Supreme Court has appellate jurisdiction over this matter pursuant to Utah Code Ann. § 78A-3-102(3)(j) (2016).

ISSUES PRESENTED FOR REVIEW

1. The district court properly granted summary judgment in favor of MAA because the Palmer Trust Deed was extinguished by the foreclosure of the First Bank Trust Deed where Palmer failed to obtain a stay of the Bank Order and allowed the foreclosure sale to occur at the time a judicial order declared the Palmer Trust Deed to be junior to the First Bank Trust Deed.

   A district court's grant of summary judgment is reviewed for correctness. *See Harvey v. Cedar Hills City*, 2010 UT 12, ¶ 10, 227 P.3d 256. This Court may affirm a grant of summary judgment on any grounds apparent in the record. *See Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158. This issue was raised below. [R. 171-174.]

2. The district court did not contravene Utah Code Ann. § 78B-5-201 by properly granting summary judgment in favor of MAA because MAA was a bona-fide purchaser for value.

   A district court's grant of summary judgment is reviewed for correctness. *Harvey*, 2010 UT 12, ¶ 10 (citation omitted). This Court may affirm a grant of summary judgment on any grounds apparent in the record. *Bailey*, 2002 UT 58, ¶ 10. Palmer did not preserve the issue of whether Utah Code Ann. § 78B-5-201 requires a judgment quieting title to contain the debtor identifying information set forth in Utah Code Ann. § 78B-5-201(b)(4). The issue of whether MAA was a bona fide purchaser for value was raised below. [R. 175-177.]

3. The Court of Appeals can affirm the district court's ruling on the alternative grounds of laches, judicial estoppel, equitable estoppel, quasi estoppel, election of remedies, and Section 7.3(a) of the Restatement (Third) of Property: Mortgages.

This Court may affirm a grant of summary judgment on any grounds apparent in the record. *See Bailey*, 2002 UT 58, ¶ 10. These alternative grounds for affirming the grant of summary judgment were raised below. [R. 177-188.]

4. The district court correctly awarded attorney fees to MAA under section 78B-5-826 where MAA's motion for attorney fees was made prior to entry of final judgment and Palmer would have been entitled to attorney fees had he prevailed under a reverse hypothetical analysis.

A district court's interpretation of a statute is reviewed for correctness. *See Insight Assets v. Farias*, 2013 UT 47, ¶ 8, 321 P.3d 10210. This issue was raised below. [R.807-851.]

DETERMINATIVE STATUTES

The following provisions are determinative of the above-captioned appeal:

Utah Code Ann. § 78B-5-201 (2008). A copy of section 78B-5-201 is included in the Addendum hereto at Tab "A."

Utah Code Ann. § 57-1-28 (2011). A copy of section 57-1-28 is included in the Addendum hereto at Tab "B."

Utah Code Ann. § 78B-5-826 (2011). A copy of section 78B-5-826 is included in the Addendum hereto at Tab "C."

STATEMENT OF THE CASE

This is an appeal arising from a grant of summary judgment on a quiet title claim brought by Appellee MAA Prospector Motor Lodge, LLC ("MAA") concerning real property located in San Juan County ("Parcel 1"). MAA is the current owner of Parcel 1 and has owned Parcel 1 since 2011. Appellant Ray W. Palmer ("Palmer") asserts he has

an interest in Parcel 1 under a trust deed ("Palmer Trust Deed") that was executed in 2003.

Palmer's Original Ownership and Sale of Parcel 1

Palmer was once the owner of Parcel 1, which is located on Main Street in Blanding, Utah. Parcel 1 is now owned by MAA. [R. 164, 168.] In 2003, Palmer sold Parcel 1 to JDJ Holdings, Inc. ("JDJ"). To finance the purchase, JDJ obtained a loan from First National Bank of Layton ("FNB") and received additional financing from Palmer. These loans were secured by separate trust deeds, which were recorded on December 12, 2003. Palmer and FNB intended and understood that FNB's trust deed ("First Bank Trust Deed") was in first lien priority position over the Palmer Trust Deed at that time. [R. 164-165; *First Nat'l Bank of Layton v. Palmer* (*Palmer I*), 2013 UT App 50, ¶ 3, 362 P.3d 904.]

A few months after closing, JDJ executed a second trust deed in favor of FNB ("Second Bank Trust Deed") to cure a technical issue with the First Bank Trust Deed. [*Palmer I*, 2013 UT App 50, ¶ 4.] FNB recorded the Second Bank Trust Deed and reconveyed the First Bank Trust Deed—but FNB failed to obtain a subordination agreement from Palmer. [R. 165-166; *Palmer I*, 2013 UT App 50, ¶ 4.]

In 2009—more than five years after FNB recorded the Second Bank Trust Deed—Palmer notified FNB he believed the Palmer Trust Deed was in first lien priority position as a result of the reconveyance of the First Bank Trust Deed. [R. 166.]

The Bank Case

FNB sued Palmer, asserting a claim for quiet title and judicial foreclosure ("Bank Case"). After summary judgment briefing, the district court entered an order ("Bank Order") granting summary judgment to FNB. [R. 274-277.] Under an equitable theory, the district court reinstated the First Bank Trust Deed. The Bank Order declared the First Bank Trust Deed had "its original priority and position as a valid security interest" encumbering the Parcels and FNB was "authorized . . . to exercise all rights and remedies provided by its Trust Deed with respect to the Property." [*Id.*] The Bank Order also declared the reconveyance of the First Bank Trust Deed was "void ab initio." [R. 274-277, 405.] Palmer appealed, but he did not obtain a stay of the Bank Order. [R. 406.]

FNB's Foreclosure and Trustee's Sale

Because JDJ had defaulted on FNB's loan, FNB exercised the right of foreclosure under the reinstated First Bank Trust Deed. FNB recorded the Bank Order in the San Juan County Recorder's Office. It then recorded a Substitution of Trustee and a Notice of Default and Election to Sell, both of which were mailed to Palmer. Each of these recordings referenced the reinstatement of the First Bank Trust Deed to its original lien position under the Bank Order. Rather than seeking to enjoin the trustee's sale, Palmer attended it. [R. 406-407.]

The trustee's sale occurred on August 8, 2011. MAA was the highest bidder on Parcel 1, making a bid of $255,000. A trustee's deed conveying Parcel 1 to MAA was then recorded. It stated that Parcel 1 "was the subject of litigation" and that "[p]ursuant to that litigation the Court issued an Order and Judgment . . . reinstating the [Bank's] Trust

Deed with its original priority and position as a valid security interest." [R. 168, 329-331.]

Palmer's Appeal of the Bank Order

In Palmer's direct appeal from the Bank Order ("*Palmer I*"), FNB suggested the appeal was moot because the Parcels had been sold. To avoid a determination of mootness, Palmer represented his appeal was not moot because "[h]e simply want[ed] to establish his right to his share of the sales proceeds" held by FNB and obtaining his "rightful share of the proceeds" from FNB "remain[ed] a viable issue." He further stated his relief was "monetary in nature given the Bank's option to foreclose the property and convert the property at issue to funds during [the appellate] proceedings." [R. 355-358.]

Palmer's pursuit of the proceeds of sale also took the forefront at oral argument in *Palmer I,* as reflected in the following transcript portions:

> MR. HALLS [Palmer's counsel]: Your Honor, with [respect to] the mootness issue . . . . We were in the same position as the bank. We were claiming the same money. . . . . And [FNB] sold the property. The money is in a pot. We're asking for that same money[.]
>
> JUDGE VOROS: There's still a point in remanding this thing to fight on; right?
>
> …
>
> MR. HALLS: Yes. . . . [I]f you're talking about we think that we have to get the property back? **The property's been sold. I think that -- that mootness argument would -- probably should prevail.**
>
> …
>
> We were going to foreclose the interest ... that [FNB] foreclosed. . . . We know exactly how much money [FNB] got for it. The money is still sitting there.
>
> JUDGE VOROS: They liquidated your damages for you.
>
> MR. HALLS: They liquid[ated] - yes.

[R. 659 (emphasis added).]

Judge Orme also recognized Palmer's "proceeds" argument:

> JUDGE ORME [to FNB's counsel]: . . . As I understand [FNB's] mootness argument is, "Never mind all of that. This dispute is over and done. The defense has passed along and - and the case is now moot." In response to that [Palmer] says, "No, not necessarily, because even if the properties have been sold . . . our lien can follow -- those proceeds."
>
> It's a -- it's an argument in specific response to the mootness suggestion.
>
> And I think it might be right. Even if -- if the property note is no longer there, if the priority is, as [Palmer] says it is, wouldn't those - wouldn't this mean follow the proceeds that now represent what used to be real property?

[R. 658-659.]

On February 28, 2013, the Utah Court of Appeals issued an opinion holding Palmer's appeal was not moot because "the rights of the parties [could] be adjusted as appropriate." *Palmer I*, 2013 UT App 50, ¶ 7 n. 2. The Utah Court of Appeals also reversed the Bank Order, concluding that the district court had erred in reinstating the First Bank Trust Deed under the doctrines of equitable reinstatement and equitable subrogation. *Id.* ¶¶ 9-16. The Utah Court of Appeals remanded for "further proceedings consistent with [its] opinion." *Id.* ¶ 16.

Remanded Proceedings in the Bank Case

On remand, Palmer did not seek to foreclose under the Palmer Trust Deed. Instead, Palmer filed a Motion to Deposit, which requested an order requiring FNB to deposit proceeds from the sale of the Parcels with the district court. The district court denied the motion, noting that Palmer's position was devoid of authority and that Palmer's argument was essentially, "I won the appeal, so I get the money." The district

court observed that Palmer had not actually pleaded a claim for the sale proceeds or sought to amend his counterclaim against FNB to seek that relief. [R. 495-498.]

Palmer's Request for Extraordinary Relief

After the denial of his Motion to Deposit, and instead of seeking leave to amend his counterclaim to assert a claim to the sale proceeds, Palmer sought extraordinary relief under Rule 65B(d)(2) of the Utah Rules of Civil Procedure. In a written order dated May 29, 2014 ("*Palmer II*"), the Utah Court of Appeals denied Palmer's request for relief. [R. 674-676.]

In a special concurrence, Judge Orme stated, by reason of *Palmer I*, the Palmer Trust Deed had remained "in a senior position to that of the bank when the bank effected its trustee's sale." According to Judge Orme, "[T]he 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." [R. 675.]

Palmer's Failure to Timely Plead a Right to the Sale Proceeds

After *Palmer II*, Palmer sought to amend his counterclaim against FNB to include a claim to the sale proceeds on June 12, 2014—nearly a month beyond the court-ordered deadline to do so. The district court denied his motion, concluding Palmer had engaged in undue delay. [R. 180.]

Palmer's Attempt to Foreclose the Palmer Trust Deed

On July 8, 2014, Palmer recorded a Notice of Default and Election to Sell under the Palmer Trust Deed. This document did not reference *Palmer I*, *Palmer II*, or any continued litigation over Parcel 1. This was the first recorded notice of default under the

Palmer Trust Deed, even though JDJ had been in default on Palmer's note in excess of 10 years. [R. 410-411.]

The MAA Lawsuit

MAA sued Palmer to prevent him from foreclosing the Palmer Trust Deed and selling Parcel 1. [R. 1-8.] The parties filed cross-motions for summary judgment, with MAA presenting eight bases for summary judgment. [R. 158-190, 396-460.] The district court adopted two of those bases and entered an Order and Judgment quieting title in Parcel 1 to MAA. [R. 790-799.] First, the district court held the Bank's foreclosure extinguished the Palmer Trust Deed, which was junior at the time of sale. The Bank Order elevated the FNB Trust Deed to first lien priority position on Parcel 1. Because the Bank Order was enforceable during Palmer's appeal, and because Palmer did not stay its enforcement, the Bank's foreclosure extinguished Palmer's junior interest under the Palmer Trust Deed. [R. 794-796.]

Second, the district court concluded that MAA was a bona fide purchaser for value. The district court assumed that even if MAA had actual notice of Palmer's appeal or a duty to inquire into the appeal, MAA would have discovered Palmer disclaimed an interest in Parcel 1 and sought only an entitlement to the proceeds of the Bank's sale. Therefore, MAA was a bona fide purchaser without notice that Palmer continued to assert a right in Parcel 1. [R. 796.]

The Order and Judgment did not rule on MAA's entitlement to attorney fees and expressly recognized that MAA preserved the right to seek attorney fees. [R. 797.] MAA subsequently filed a motion for attorney fees, which the district court granted, awarding

attorney fees in favor of MAA under section 78B-5-826. [R. 963, 974-978.] On November 5, 2015, the Order and Final Judgment was entered by the district court. [R. 974-978.]

SUMMARY OF ARGUMENTS

Argument I: The district court correctly concluded the Palmer Trust Deed was extinguished by the foreclosure of the First Bank Trust Deed because Palmer failed to obtain a stay of the Bank Order. Judgments are valid and enforceable during an appeal unless a party obtains a stay. Palmer failed to obtain a stay of the Bank Order during the pendency of his appeal. Thus, MAA acquired the valid title FNB held at the time it purchased Parcel 1.

Palmer does not challenge the merits of the district court's ruling. Instead, Palmer asserts MAA cannot raise the argument under the doctrine of issue preclusion and stare decisis. However, none of the elements of issue preclusion or stare decisis are present in this case. The issue of the Palmer Trust Deed being extinguished by the foreclosure of the First Bank Trust Deed is not identical to the issue previously decided, the issue was not fully and fairly litigated to a final judgment, and MAA was not a party to the prior litigation or in privity with FNB.

Argument II: The district court correctly found MAA was a bona fide purchaser for value who purchased Parcel 1 free and clear of any interest Palmer had in Parcel 1. Palmer asserts the district court erred in finding that MAA was a bona fide purchaser because the Bank Order did not include debtor identifying information Palmer asserts was required under Utah Code Ann. § 78B-5-201. Palmer's argument should be rejected

because Palmer failed to preserve this argument by raising it before the district court below.

Even if Palmer had raised the issue, his argument is contrary to the language of the statute. Section 78B-5-201, by its plain language, governs the creation of judgment liens; it does not apply to court orders quieting title to real property or determining the priority of competing trust deeds.

Finally, MAA is a bona fide purchaser for value because it purchased Parcel 1 for value and without notice that Palmer continued to claim an interest in Parcel 1. For purposes of summary judgment, the district court assumed MAA had actual knowledge of Palmer's appeal. With this knowledge, MAA would have been on notice that Palmer disclaimed any interest in Parcel 1 and instead asserted he was entitled to the proceeds from FNB's sale. Therefore, MAA had no knowledge, actual or constructive, that Palmer continued to assert an interest in Parcel 1. Additionally, the district court's conclusion is correct because the mere knowledge of an appeal should not preclude a party from being a bona fide purchaser for value.

Argument III: The district court's grant of summary judgment can also be affirmed on six additional bases the district court did not reach. The ruling in favor of MAA can be affirmed based upon laches, judicial estoppel, equitable estoppel, quasi estoppel, election of remedies, and section 7.3(a) of the Restatement (Third) of Property: Mortgages.

Argument IV: The district court properly awarded MAA its attorney fees under Utah Code Ann. § 78B-5-826. MAA's motion for attorney fees was timely because it was

brought prior to entry of a final appealable judgment. Each of the statutory requirements for awarding attorney fees under section 78B-5-826 are met in this case. First, the litigation is based upon a writing—the Palmer Trust Deed—which Palmer sought to foreclose against Parcel 1 owned by MAA. Second, the Palmer Trust Deed allowed at least one party—Palmer—to recover his attorney fees and costs. If Palmer had prevailed, he would have been able to recover his attorney fees through the foreclosure. Therefore, MAA is entitled to attorney fees under the reciprocal fees statute.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DETERMINED THE PALMER TRUST DEED WAS EXTINGUISHED BY THE FORECLOSURE OF THE FIRST BANK TRUST DEED WHERE PALMER FAILED TO OBTAIN A STAY OF THE BANK ORDER.

A. Palmer's Trust Deed was Extinguished by the Foreclosure of the First Bank Trust Deed.

The district court correctly concluded the Palmer Trust Deed was extinguished by the foreclosure of the First Bank Trust Deed because Palmer failed to obtain a stay of the Bank Order and allowed the foreclosure to proceed at a time when the First Bank Trust Deed was a senior trust deed vis-à-vis the Palmer Trust Deed.

Under Utah law, unless a party obtains a stay, a judgment is valid and enforceable. *See Cheves v. Williams*, 1999 UT 86, ¶ 46, 993 P.2d 191 (stating that in the absence of a stay "the judgment is immediately enforceable"). Additionally, a party who fails to obtain a stay faces the risk that his rights will be affected, because the judgment is fully enforceable pending appeal if no stay has been secured. *See Skeen v. Pratt*, 48 P.2d 457, 458 (Utah 1935) ("In case of an appeal without supersedeas or stay, the judgment or order

appealed from is enforceable as though no appeal had been taken."); *see also Kellch v. Westland Minerals Corp.*, 484 P.2d 726 (Utah 1971) (holding that, because defendant did not stay judgment that granted plaintiffs stock, which plaintiffs then sold and transferred pending appeal, the "court [was] without power to grant any relief"). Specifically, if a party fails to obtain a stay of the judgment, property can be legally sold to another. *See Franklin Fin. v. New Empire Dev. Co.*, 659 P.2d 1040, 1043 (Utah 1983) (holding that appeal would be moot if "the sale were legally carried out during the pendency of the appeal"); *see also Richards v. Baum*, 914 P.2d 719, 722 (Utah 1996) ("Because of their failure to obtain a stay pending this appeal, the property was lawfully sold to another.").

A similar factual situation to the present case was considered by the Washington Court of Appeals in *Spahi v. Hughes-Northwest, Inc.*, 27 P.3d 1233 (Wash. Ct. App. 2001). There, the district court quieted title to property in the United States. Spahi appealed the decision to the Ninth Circuit, but Spahi failed to file a supersedeas bond or obtain a stay of the judgment. During the pendency of the appeal, the United States sold the property at a forfeiture sale, and Hughes-Northwest purchased the property. After the property had been sold, the Ninth Circuit found that the district court erred in quieting title in the United States and reversed the quiet title judgment. Spahi then brought a claim against Hughes-Northwest contending Hughes-Northwest did not obtain an interest in the property, because its predecessor, the United States, was ultimately determined not to have title to the property. The Washington Court of Appeals held that "[u]nder Washington law, a trial court judgment is presumed valid, and unless the judgment is superseded, a

judgment creditor has specific authority to execute on that judgment. Thus, Hughes acquired the valid title the United States held at the time of the execution sale." *Id.* at 1235 (citations omitted).

As set forth above, in Utah, like in Washington, a district court judgment is immediately valid and enforceable unless a stay is obtained or a supersedeas bond is posted. *Cheves*, 1999 UT 86, ¶ 46 (in the absence of a stay "the judgment is immediately enforceable"). At the time FNB foreclosed the First Bank Trust Deed, FNB held a senior trust deed in Parcel 1 and conveyed the title it held as if no appeal had been taken. Under section 57-1-28, the foreclosure of the First Bank Trust Deed extinguished any interest under the Palmer Trust Deed. *See* Utah Code Ann. § 57-1-28 (providing that a trustee's sale conveys to the purchaser "the trustee's title and all right, title, interest, and claim of the trustor and the trustor's successors in interest and of all persons claiming by, through, or under them, in and to the property sold"); *see gen. City Consumer Services, Inc. v. Peters*, 815 P.2d 234, 236 (Utah 1991) (stating that junior encumbrance is "sold out" and thus junior lienholder becomes unsecured as a result of foreclosure of senior lien); *Randall v. Valley Title*, 681 P.2d 219 (Utah 1984) (stating that junior lienholder's interest was extinguished by sale of senior lien); *see also* Restatement (Third) of Prop.: Mortgages § 7.1 (1997) ("A valid foreclosure of a mortgage terminates all interests in the foreclosed real estate that are junior to the mortgage being foreclosed and whose holders are properly joined or notified under applicable law."). Thus, MAA acquired the valid title FNB held at the time it purchased Parcel 1, free from any interest Palmer had in Parcel 1 under the Palmer Trust Deed.

The subsequent reversal by this Court of the Bank Order does not change this result, as Parcel 1 had already been sold to MAA at a time when the law determined the First Bank Trust Deed was senior to the Palmer Trust Deed. "Any other result would nullify the requirement that the appellant obtain a stay pending appeal." *Richards*, 914 P.2d at 721.

Nor does Judge Orme's concurrence in *Palmer II*, change this result. In *Palmer II*, the Court of Appeals denied Palmer's request to require the Bank to deposit the funds from the Bank's foreclosure sale. [R. 486-487.] Judge Orme concurred specially and opined:

> 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.

[R. 486-487.] Judge Orme's concurrence, however, is dicta and is not the opinion of the Court of Appeals. Therefore, Judge Orme's concurrence should not be given "great deference" as Palmer argues. Additionally, Judge Orme did not have the benefit of knowing the Bank had foreclosed its trust deed and Parcel 1 had been sold. Under Utah law, as set forth above, once Parcel 1 was legally sold to MAA, any interest Palmer had in Parcel 1 was extinguished.

B. MAA's Arguments are not Barred by Issue Preclusion or Stare Decisis.

In his appellate brief, rather than contest the merits of the district court's ruling that the Palmer Trust Deed was foreclosed by the sale of the First Bank Trust Deed where Palmer failed to obtain a stay of the Bank Order, Palmer instead argues that MAA is

precluded from raising the issue under the doctrines of issue preclusion and stare decisis. Palmer asserts the Utah Court of Appeals, in the Bank Case, already determined Palmer's Trust Deed was not extinguished by the foreclosure of the First Bank Trust Deed. Palmer's assertion is incorrect.

In order for issue preclusion to apply, Palmer must show each of four separate elements:

> 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 estoppel is invoked in the current action must have been either a party or privy to a party in the previous action.

Macris & Assocs., Inc. v. Neways, Inc., 2000 UT 93, ¶ 37, 16 P.3d 1214 (citing *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1370 (Utah 1996)). If any of these four elements are not satisfied, then Palmer's issue preclusion argument fails as a matter of law. *Baxter v. Utah Dept. of Transp.*, 705 P.2d 1167, 1168 (Utah 1985).

First, Palmer cannot show the issue decided by the district court in this action, that the trustee's sale of the First Bank Trust Deed extinguished the Palmer Trust Deed, is identical to an issue previously decided in the Bank Case. FNB argued that Palmer's appeal in the Bank Case was moot because the foreclosure of the First Bank Trust Deed had occurred. Mootness is a jurisdictional issue independent of the merits of the case. *See Murray City v. Maese*, 2011 UT App 73, ¶ 2, 251 P.3d 843 (stating that "a court will normally refrain from adjudicated [a moot case] on the merits."). In response, Palmer argued his appeal was not moot because he could assert an interest in the proceeds, not

the property. [R. 658-659.] Because the issue of whether the Palmer Trust Deed was extinguished by the foreclosure of the First Bank Trust Deed is not identical to the issue of whether the appellate court lacked jurisdiction because Palmer's claim was moot, issue preclusion and stare decisis do not apply as a matter of law.

Second, even if the issues were the same, which they are not, the issue of whether the foreclosure of the First Bank Trust Deed extinguished the Palmer Trust Deed was not fully and fairly litigated in the Bank Case to a final judgment. Palmer presented no evidence that a final judgment has been entered determining the Palmer Trust Deed was not extinguished. Any full and fair consideration of the issue was short-circuited by Palmer himself. Palmer, in order to avoid a finding that his appeal was moot, disclaimed any interest in enforcing the Palmer Trust Deed against the property. [Appellate Brief at 13 (stating that Palmer argued for the proceeds "for the purpose of surviving mootness".] Palmer asserted that he was seeking to enforce his interest against the proceeds obtained by FNB in its foreclosure sale. Palmer went so far as to concede that if he was seeking a return of the property, his appeal would be moot.

> JUDGE VOROS: There's still a point in remanding this thing to fight on; right?
>
> …
>
> MR. HALLS: Yes. . . . [I]f you're talking about we think that we have to get the property back? **The property's been sold. I think that -- that mootness argument would -- probably should prevail.**
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> …
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> We were going to foreclose the interest ... that [FNB] foreclosed. . . . We know exactly how much money [FNB] got for it. The money is still sitting there.
>
> JUDGE VOROS: They liquidated your damages for you.
>
> MR. HALLS: They liquid[ated] - yes.

[R. 659 (emphasis added).] Because Palmer did not argue the Palmer Trust Deed remained an encumbrance on Parcel 1, issue preclusion and stare decisis cannot apply when the issue was not fairly and fully litigated to a final judgment.

Finally, issue preclusion is inapplicable because MAA was not a party to the Bank Case, nor is MAA in privity with FNB. "The legal definition of a person in privity with another, is a person so identified in interest with another that he represents the same legal right." *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1230 (10th Cir. 2005) (quoting *Searle Bros. v. Searle*, 588 P.2d 689, 691 (Utah 1978)). "A person is not in privity with another simply because of the showing of 'identical rights' at issue in the earlier litigation, 'some interest in the outcome of the case,' or even 'employ[ment of] the same attorney;' rather, the person 'must have had some control over the [earlier] litigation.'" *Id.* (quoting *Baxter v. Utah Dep't of Transp.*, 705 P.2d 1167, 1169 (Utah 1985)). MAA did not have control over the Bank Case. Therefore, MAA was not in privity with FNB for issue preclusion to apply.

Because Palmer cannot show any of the four elements, issue preclusion and stare decisis do not preclude the district court's ruling, and it should be affirmed for the reasons set forth above.

II. THE DISTRICT COURT DID NOT CONTRAVENE UTAH CODE ANN. § 78B-5-201 WHEN IT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF MAA BECAUSE MAA IS A BONA FIDE PURCHASER FOR VALUE THAT TOOK FREE OF ANY INTEREST PALMER HAD IN PARCEL 1.

Palmer asserts that the district court ruled contrary to Utah Code Ann. § 78B-5-201 when the district court found MAA was a bona fide purchaser for value who

purchased Parcel 1 free and clear of any interest Palmer may have had in Parcel 1. According to Palmer, the Bank Order could not affect title to Parcel 1 because the Bank Order did not include the debtor identify information that Palmer asserts is required under section 78B-5-201(b)(4). Palmer's argument, however, fails for several reasons. First, Palmer failed to preserve this issue for appeal as Palmer did not raise the purported necessity for debtor identifying information to be included in the Bank Order before the district court. Second, even if Palmer properly preserved the issue for appeal, which he did not, Palmer's argument is contrary to Utah law and is not supported by the plain language of section 78B-5-201. Section 78B-5-201 governs the creation of judgment liens from money judgments, not the recording of orders quieting title or determining the priority of competing trust deeds. Third, although Palmer spends a large amount of his brief erroneously arguing about section 78B-5-201, Palmer fails to challenge the actual holding of the district court. Palmer argues that section 78B-5-201 establishes that MAA had actual and constructive notice of Palmer's appeal. For purposes of summary judgment, the district court assumed MAA had actual and constructive notice of Palmer's appeal. The district court, however, found that MAA was a bona fide purchaser because MAA had no actual or constructive notice that Palmer continued to assert an interest in Parcel 1. Therefore, MAA took Parcel 1 free from any interest Palmer may have had in Parcel 1.

A. Palmer Failed to Preserve the Issue for Appeal.

The Court should decline to consider Palmer's argument under section 78B-5-201 because Palmer failed to preserve the issue for appeal. "To properly preserve an issue for

appellate review, the issue must be raised in the district court." *Donjuan v. McDermott*, 2011 UT 72, ¶ 20, 266 P.3d 839. In addition, "the issue must be specifically raised, in a timely manner, and must be supported by evidence and relevant legal authority." *Id.* These requirements are necessary "to put the district court on notice of an issue and provide it with an opportunity to rule on it." *Id.*

Palmer did not argue to the district court that the Bank Order needed to contain information identifying the "judgment debtor" and did not provide the district court with an opportunity to rule on this issue. Although Palmer referenced section 78B-5-201 below, Palmer's argument to the district court was drastically different than his argument in his appellate brief.

Before the district court, Palmer mentioned section 78B-5-201 in his summary judgment briefing on just two occasions. [R. 435, 438.] In the first instance, Palmer stated:

> Utah Code Ann. § 78B-5-201(1) states that the "Registry of Judgments: is the index where a judgment is filed. Subsection (3)(a) states that, as it pertains to this matter,
>
> > "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."

[R. 435.] Later in his memorandum, Palmer argued regarding the judgment index that "[t]his index appears to be only with regard to the creation of judgment liens, rather than a listing of the valid contractual liens against a property. *See,* Utah Code Ann. § 78B-5-201, *et seq.*" [R. 438.] At no point in his summary judgment memoranda, did Palmer

suggest there was any problem with the recording of the Bank Order, let alone that the Bank Order was deficient because it needed to include specific debtor identifying information. Indeed, Palmer explicitly recognized that section 78B-5-201 deals with the creation of judgment liens, and not with orders regarding existing trust deeds against the property. [R. 438.]

During oral argument on the summary judgment motions, Palmer mentioned section 78B-5-201 on two occasions. [R. 1107, 1110.] Palmer argued section 78B-5-201(1) required an abstract be filed in the registry of judgments. [*Id.*] However, when pressed by the district court, Palmer promptly backed away from that argument:

> The Court: Are you saying that if it doesn't find its way into the registry of judgments this statute means it doesn't vest title?
> Mr. Halls: Well--
> The Court: Surely you don't mean that?
> Mr. Halls: No, I don't.

[R. 1111.] During briefing and oral argument, Palmer did not raise the argument that the Bank Order could not affect title to Parcel 1 because it lacked the debtor identifying information under section 78B-5-201. Because Palmer failed to raise this issue before the district court, Palmer's argument regarding section 78B-5-201(4) is not preserved and cannot be considered on appeal. *Donjuan*, 2011 UT 72, ¶ 20.

B. Palmer's Reading of Section 78B-5-201 is not Supported by the Statute.

Even if Palmer adequately preserved this issue for appeal, Palmer's argument fails on the merits. Palmer asserts the Bank Order was required to contain the debtor identifying information identified in Utah Code Ann. § 78B-5-201(4) in order for it to "bec[o]me a validly recorded lien." The recording of the Bank Order, however, was not

to create a lien in Parcel 1; indeed, FNB already had a valid recorded lien against Parcel 1 through the First Bank Trust Deed. Rather the Bank Order was recorded to put parties on record notice of the Bank Order and the judicial determination that the First Bank Trust Deed was senior to the Palmer Trust Deed. Section 78B-5-201 *et seq.*, governs the creation of judgment liens, not the recording of court orders that establish the priority of trust deeds or quiet title to real property.

When interpreting a statute, the "primary goal is to evince the true intent of purpose of the legislature." *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863 (quoting *Salt Lake County v. Holliday Water Co.*, 2010 UT 45, ¶ 27, 234 P.3d 1105). Legislative intent is determined by the plain language of the statute. *Id.* "The plain language of a statute is to be read as a whole, and its provisions interpreted in harmony with other provisions in the same statute and 'with other statutes under the same and related chapters.'" *Lyon v. Burton*, 2000 UT 19, ¶ 17, 5 P.3d 616 (quoting *Roberts v. Erickson*, 851 P.2d 643, 644 (Utah 1993)).

When read as a whole, the plain language of section 78B-5-201 *et seq.* is clear that these sections govern the creation of judgment liens against judgment debtors, and not orders and judgments that quiet title to real property or determine the priority of interests in real property. Throughout, the statutes use the terms "judgment debtor" and "judgment creditor." Such provisions are applicable only to monetary judgments and the creation of judgment liens, not to orders that quiet title to property. The statute also requires that the judgment creditor list the amount of judgment. As Palmer necessarily concedes, there is no judgment amount in this case.

This plain language reading of the statute is further supported when read in harmony with other sections. For example, section 78B-5-202 states that a judgment shall continue for a period of eight years. Palmer's interpretation of the statute would necessitate that a court order quieting title to property be rerecorded every eight years to remain valid and effective as to the title to real property. Under Palmer's reading, if an order quieting title was not rerecorded, after eight years it would no longer be effective as to the title to real property or put parties on record notice of the judgment. Such a reading is contrary to Utah law. Section 57-3-102 provides documents "shall, from the time of recording with the appropriate county recorder, impart notice to all persons of their contents." Utah Code Ann. § 57-3-102. Interpreting section 78B-5-201 to apply only to judgment liens, and not to court orders quieting title, is consistent with Utah law and harmonizes sections 57-3-102 and 78B-5-202.

Finally, Palmer's assertion that the recording of the Bank Order was insufficient and could not affect title to real property because it did not contain the debtor identifying information set forth in section 78B-5-201(4) is also contrary to the plain language of the statute. "[W]hen interpreting a statute, we assume, absent a contrary indication, that the legislature used each term advisedly according to its ordinary and usually accepted meaning." *Hutter v. Dig-It, Inc.*, 2009 UT 69, ¶ 32, 219 P.3d 918. "[T]he expression of one [term] should be interpreted as the exclusion of another" and all omissions in statutory language are presumed to be purposeful. *Marion Energy, Inc.*, 2011 UT 50, ¶ 14.

The statute provides the failure to provide the debtor identifying information prevents judgments from becoming judgment liens against the property. Utah Code Ann. § 78B-5-201(6)(a) provides a recorded judgment that does not include the debtor identifying information set forth in subsection (4) "is not a lien until a separate information statement of the judgment creditor is recorded in the office of a county recorder in compliance with Subsections (4) and (5)." No similar language prevents a court order from affecting title to real property. If the legislature intended the debtor identifying information to be necessary to affect title to real property, it could have so stated, like it did with the creation of a judgment lien. The legislature's decision not to include such language in this section must be presumed to be advised and intentional. *See, e.g., Marion Energy, Inc.*, 2011 UT 50, ¶ 14 ("We therefore seek to give effect to omissions in statutory language by presuming all omissions to be purposeful."). Thus, Palmer's reading of the statute fails.

C. MAA is a Bona Fide Purchaser for Value.

The district court properly concluded that MAA was a bona fide purchaser for value. "A bona fide purchaser for value is one who pays valuable consideration for a conveyance, acts in good faith, and takes without notice of an adverse claim or others' outstanding rights to the seller's title." *Baldwin v. Burton*, 850 P.2d 1188, 1197 (Utah 1993). Such a purchaser acquires the property free of any unknown interests, claims or equities as a "bona fide purchaser for value." *See* 77 AM. JUR. 2D Vendor and Purchaser § 368 (2010); *Haik v. Sandy City*, 2011 UT 26, ¶ 13, 254 P.3d 171 ("a subsequent

purchaser for value prevails over a previous purchaser if the subsequent purchaser (1) takes title in good faith and (2) records before the previous purchaser.").

In this case, it is undisputed that MAA paid valuable consideration for Parcel 1. [R. 407.] Thus, the only inquiry before the district court was whether MAA acted in good faith in purchasing Parcel 1 "without notice of an adverse claim or others' outstanding rights to the seller's title." *Baldwin*, 850 P.2d at 1197.

Palmer asserts his appeal destroys MAA's status as a bona fide purchaser. However, even if MAA had notice of the Palmer appeal, MAA can only be on notice of what Palmer ultimately argued on appeal. That is, Palmer "simply want[ed] to establish his right to his share of the sale proceeds" from FNB. [R. 355-358.] Thus, knowledge of the appeal would not have ultimately revealed any continued claim by Palmer that he had a valid and continuing encumbrance on Parcel 1. To the contrary, if MAA had actual knowledge of the appeal, MAA would have learned that Palmer's requested remedy was "monetary in nature given the Bank's option to foreclose the property and convert the property at issues to funds." [R. 355-358.] Thus, the district court correctly concluded that MAA, even assuming knowledge of the appeal, was not on notice that Palmer still claimed an interest in Parcel 1.

Even if Palmer's arguments had merit, Palmer's arguments fail to challenge the district court's ruling. Palmer incorrectly asserts that "[t]he deficiencies of the Bank's Order under -201(4)(b) and Palmer's Trust Deed imparted actual record notice rather than imputed recordation notice." Palmer argues that these deficiencies were sufficient to "excite attention" and put MAA on inquiry notice of Palmer's appeal. However, for

purposes of summary judgment, the district court assumed that MAA had actual notice of Palmer's appeal and that it had a duty to inquire into the appeal. [R. 796.] Thus, Palmer's argument regarding imputed record notice misses the mark.

Additionally, the district court's conclusion that MAA is a bona fide purchaser is correct because knowledge that a district court's order is being appealed does not impact a subsequent purchaser's status as a bona fide purchaser for value. In *Spahi*, the Washington Court of Appeals recognized that "[k]knowledge that the judgment is being appealed does not deprive the third party protection as a purchaser in good faith . . . ." 27 P.3d at 1234. The court explained that because the appealing party did not win at the district court, "he could not claim to have a present interest in the property when he filed his appeal. Notice of the pending appeal was notice only of the fact that Spahi was attempting to reacquire an interest in the property." *Id.* at 1236. The *Spahi* conclusion is supported by the Restatement which states that "[a] person is not prevented from being a bona fide purchaser by the fact that he has knowledge that an appeal is pending or even that he has knowledge of the grounds for appeal, except where he knows that the judgment was obtained by fraud." Restatement (First) of Restitution § 74 (1937); Restatement (Third) of Restitution and Unjust Enrichment § 17 DD (2000) (stating that if a bona fide purchaser at an execution sale is also a "stranger to the record," the subsequent reversal or avoidance of the underlying judgment does not affect the purchaser's rights, notwithstanding actual or constructive notice to the purchaser that an appeal of the underlying judgment is pending or that the underlying judgment remains subject to attack, by appeal or otherwise."). The *Spahi* court recognized that to hold

otherwise would result in every notice of appeal acting as an automatic supersedeas. 27 P.3d at 1237.

Although some Utah cases have stated that knowledge of an appeal would defeat a bona fide purchaser for value defense, *see Timm v. Dewsnup*, 921 P.2d 1381, 1393 (Utah 1996), this Court should adopt the Restatement position and that set forth by the *Spahi* court. The Restatement position is consistent with the need to file a supersedeas bond and Utah law allowing judgments to be enforced pending appeal unless a supersedeas bond is posted or stay is obtained. *See Skeen*, 48 P.2d 457, 458 (Utah 1935) ("In case of an appeal without supersedeas or stay, the judgment or order appealed from is enforceable as though no appeal had been taken."); *Kellch*, 484 P.2d 726 (holding that, because defendant did not stay judgment that granted plaintiffs stock, which plaintiffs then sold and transferred pending appeal, the "court [was] without power to grant any relief"). Additionally, a holding that actual knowledge of an appeal prevents someone from being a bona fide purchaser inhibits the party from fully enforcing its judgment and obtaining the relief it has been awarded. *See Malo v. Anderson*, 454 P.2d 828 (Wash. 1969) (if appellant's knowledge of pending appeal prevented her doing anything with the property except at her own risk, the appeal itself would act as a supersedeas; no prevailing party would expend any money on property awarded in an unsuperseded judgment for fear of losing the investment). Therefore, the district court's conclusion can also be affirmed on this basis.

III. ALTERNATIVE GROUNDS EXIST TO AFFIRM THE DISTRICT COURT'S RULING.

Although the district court decided the case based upon its conclusion that the Palmer Trust Deed was extinguished by the foreclosure of the First Bank Trust Deed and MAA is a bona fide purchaser for value, the district court's decision can also be affirmed on several alternative grounds. MAA presented six additional bases to the district court upon which summary judgment could have been granted in favor of MAA: laches, judicial estoppel, equitable estoppel, quasi estoppel, election of remedies, and section 7.3(a) of the Restatement (Third) of Property: Mortgages. The district court did not reach those bases because it had already ruled in favor of MAA. This Court can affirm the district court's decision on "any legal ground or theory apparent on the record." *Bailey*, 2002 UT 58, ¶ 10.

A. The Doctrine of Laches Bars Palmer from Foreclosing the Palmer Trust Deed.

"[M]ortgage foreclosure actions are equitable in nature and [are] subject to the equitable defense of laches, irrespective of whether the statute of limitations period has run." *Insight Assets v. Farias*, 2013 UT 47, ¶17, 321 P.3d 1021. Laches bars foreclosure of a trust deed if (1) the party seeking foreclosure was not diligent in exercising trust deed rights, and (2) an injury results from the party's lack of diligence. *See id.* ¶19.

In *Insight Assets*, the Utah Supreme Court concluded laches barred Insight Assets from foreclosing a trust deed. *Id.* ¶¶ 18, 22. As to the first element—lack of diligence—the court observed Insight Assets had been assigned rights in a trust deed from "Sellers," who had taken "no action to clarify or assert their rights to the property"

even though the underlying obligation had been in default for five years. *Id.* ¶20. The Sellers also sat by while a bank with a potentially senior lien foreclosed its interest, thereby risking "forfeiting their security interest entirely." *Id.* The court concluded this "inaction" displayed a "lack of diligence" sufficient to support laches. *Id.*

As to the second element—injury—the Utah Supreme Court noted that the property Insight Assets wanted to foreclose upon had been "conveyed . . . to another buyer, who conveyed the property to yet another buyer, who ultimately conveyed the property to Homero Farias." *Id.* ¶4. When Farias purchased the property, "it was reasonable for him to infer from Seller's inaction that their security interest had been extinguished by . . . the foreclosure." *Id.* ¶21. Farias also had "negotiated the price of his home without considering" the debt secured by Insight Assets' trust deed. *Id.* This was sufficient to show injury.

The result from *Insight Assets* should apply here. First, Palmer's conduct shows a lack of diligence. Like the Sellers' five-year delay in Insight Assets, Palmer waited until 2009 to assert that his trust deed was in senior position, even though JDJ had been in default for more than five years. And it was not until 2014—ten years after JDJ began defaulting—that Palmer first recorded a notice of default under his trust deed.

Palmer also failed to take rudimentary steps to protect the interest he now asserts in Parcel 1. He failed to secure a stay of the Bank Order; he failed to record a lis pendens during or after his appeal; he attended FNB's foreclosure sale without attempting to enjoin it; and he did not attempt to foreclose the Palmer Trust Deed until nearly a year and a half after his successful appeal in *Palmer I*. Additionally, Palmer only seeks to

foreclose on Parcel 1 because he slumbered on amending his complaint against FNB to seek the proceeds from FNB's foreclosure. Like the Sellers in *Insight Assets*, who sat by while a potential senior lien was foreclosed, Palmer's inaction displays a lack of diligence.

Second, Palmer's foreclosure of the Palmer Trust Deed would injure MAA. Had Palmer diligently protected his rights in Parcel 1 during the Bank Case by securing a stay of the Bank Order or continually asserting an interest in Parcel 1, MAA would not have been able to purchase Parcel 1. Certainly had Palmer continued to assert an interest in Parcel 1, assuming that MAA had actual notice of the appeal, it would have known that Palmer continued to assert an interest in Parcel 1 and would have acted in accordance with that risk. Like in *Insight Assets*, it was reasonable for MAA to assume, based on Palmer's inaction, Palmer's interest in Parcel 1 had been extinguished and Palmer no longer asserted an interest in Parcel 1. Palmer's lack of diligence over the course of nearly 10 years has directly injured MAA, and Palmer should not be permitted to benefit from its lack of diligence to the detriment of MAA.

B. Three Theories of Estoppel Preclude Palmer from Foreclosing Under the Palmer Trust Deed.

1. Palmer is judicially estopped from foreclosing under the Palmer Trust Deed.

"Under judicial estoppel, a person may not, to the prejudice of another person, deny any position taken in a prior judicial proceeding between the same persons or their privies involving the same subject matter, if such prior position was successfully maintained." *Cafe Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 2009 UT 27, ¶42, 207 P.3d

1235 (internal quotation marks omitted). "The purpose behind judicial estoppel is to discourage machinations by the parties that subvert the integrity of the judicial system." *3D Const. & Dev., L.L.C. v. Old Standard Life Ins. Co.*, 2005 UT App 307, ¶11, 117 P.3d 1082.

In *Palmer I*, Palmer represented FNB's foreclosure did not moot his appeal because he could pursue the proceeds of FNB's sale of the property. Palmer "simply want[ed] to establish his right to his share of the sales proceeds," as shown in the following argument from his opposition to FNB's Suggestion of Mootness:

> Palmer's rightful share of the proceeds of sale of the property remains a viable issue on appeal. Whether or not Palmer was rightfully in first position has important implications for the money generated from the [sale] of the property, and represents 'relief [that] could be granted even though the sale is already completed and the time for redemption has elapsed,' Franklin, supra. . . . Since the controversy continues to viably exist regarding rights to the proceeds of the sale of the property, and relief remains available, this case is 'not moot because [Palmer is] not trying to prevent the foreclosure but [is] merely trying to establish [his] right to a share of the sales proceeds.' Franklin, supra.

[R. 539.]

Palmer is judicially estopped from now asserting rights in Parcel 1. First, that position contradicts the position he took in *Palmer I,* that he only sought the proceeds of sale. Second, Palmer successfully maintained his "proceeds" position in *Palmer I*. The Utah Court of Appeals agreed that his appeal was not moot after Palmer cited *Franklin Financial* and contended that he merely wanted the proceeds of FNB's sale. *See Stevensen v. Goodson*, 924 P.2d 339, 353 (Utah 1996) (explaining "the rule followed in Utah [for judicial estoppel] requires that the party seeking judicial relief must have

prevailed upon its statement in the earlier proceeding"). Had Palmer argued he continued to have rights in the property, his appeal would have been moot under *Franklin Financial*. Finally, Palmer's current assertion that he can foreclose his trust deed is prejudicial to the owner of Parcel 1—MAA.

All of the requirements of judicial estoppel are met. The doctrine should be applied here to uphold the principle that parties should be prevented "from playing fast and loose with the court or blowing hot and cold during the course of litigation." *3D Const.*, 2005 UT App 307, ¶11 (internal quotation marks omitted).

2. Palmer is equitably estopped from foreclosing under the Palmer Trust Deed.

Equitable estoppel requires proof of three elements:

> [1] a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; . . . [2] reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act or failure to act; and . . . [3] injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

Youngblood v. Auto-Owners Ins. Co., 2007 UT 28, ¶14, 158 P.3d 1088 (internal quotation marks omitted). All three elements are satisfied here.

First, Palmer's statements to the Utah Court of Appeals in *Palmer I* are inconsistent with his current assertion that he has a valid security interest in Parcel 1, as opposed to a right to seek the trustee's sale proceeds. Also, Palmer failed to act by not securing a stay of the Bank Order and by failing to record any document notifying successive purchasers that he continued to assert an interest in Parcel 1.

Second, assuming MAA knew of the appeal, MAA took reasonable action on the basis of Palmer's continued disclaimer of interest before this Court: it purchased Parcel 1 at the trustee's sale. *See Insight Assets*, 2013 UT 47, ¶21 (noting that, because appellant waited to foreclose, subsequent purchaser was harmed in purchasing property in reliance upon inaction of purported interest holder).

Finally, MAA would be injured if Palmer were allowed to foreclose the Palmer Trust Deed. Allowing him to do so would wrest away Parcel 1 from MAA, which paid valuable consideration. Had Palmer simply secured a stay of the Bank Order, this entire case could have been avoided. Accordingly, this Court may affirm the district court's summary judgment ruling on the basis of equitable estoppel.

3. Quasi-estoppel bars Palmer from foreclosing under the Palmer Trust Deed.

> The doctrine of quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position [it has] previously taken. The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit.

In re RBFS, 2012 UT App 132, ¶ 31, 278 P.3d 143 (quoting *Bott v. J.F. Shea Co.*, 299 F.3d 508, 512 (5th Cir. 2002)). Quasi-estoppel does not require proof of reliance by the party asserting it. *See Smith v. DenRoss Contracting, U.S., Inc.*, 737 S.E.2d 392, 399 (N.C. App. 2012).

This doctrine of quasi-estoppel bars Palmer from foreclosing under the Palmer Trust Deed. Palmer overcame FNB's mootness argument in *Palmer I* by stating that he only sought FNB's sale proceeds. His current position that he can foreclose the Palmer

Trust Deed is inconsistent with his prior position. It would be unconscionable to allow Palmer to obtain a decision in *Palmer I* by claiming that he sought only FNB's sales proceeds, only now to assert a remedy that would have mooted his appeal in *Palmer I*—the right to foreclose. The doctrine of quasi-estoppel bars Palmer from having it both ways.

C. Palmer Knowingly Elected a Remedy Inconsistent with Foreclosure under the Palmer Trust Deed.

The election of remedies doctrine

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

Royal Res., Inc. v. Gibralter Fin. Corp., 603 P.2d 793, 796 (Utah 1979). "Where the remedies afforded are inconsistent, it is the election of one that bars the other," irrespective of whether the remedy selected has been satisfied. *Taylor v. Epley*, 2002 UT App 199, 2002 WL 1228064, at *1.

Palmer seeks double redress through the Bank Case and his effort to foreclose the Palmer Trust Deed. In the Bank Case, Palmer knowingly asserted a right to FNB's sale proceeds under the theory that the Palmer Trust Deed was in the first lien position held by FNB and that, because FNB foreclosed that position, Palmer is entitled to FNB's proceeds. That argument presumes that FNB's foreclosure extinguished Palmer's interest.

In this case, Palmer asserts a right to foreclose the Palmer Trust Deed as if it is in first lien priority position, and to sell the Parcels and obtain the proceeds from that sale. This argument presumes a valid, continuing encumbrance on Parcel 1.

These remedies are inconsistent. Under one theory, the Palmer Trust Deed is no longer an encumbrance on the Parcels, and under the other it continues to be a valid encumbrance. The Utah Court of Appeals has rejected a similar attempt to claim inconsistent remedies based on the validity and invalidity of a trust deed. *See Taylor*, 2002 UT App 199, at *1 (holding that one action based on validity of trust deed as "an actual encumbrance on the property" was inconsistent with another claiming that trust deed was invalid).

Consequently, Palmer's foreclosure of the Palmer Trust Deed is barred under the election of remedies doctrine. By repeatedly representing in *Palmer I* that FNB's sale proceeds were his remedy—and then filing a Motion to Deposit to obtain those proceeds—Palmer knowingly and unequivocally evinced a purpose to forego the inconsistent remedy of foreclosing on Parcel 1.

D. Palmer Cannot Foreclose the Palmer Trust Deed because it was Never in a First Lien Priority Position, as Shown in Section 7.3(a) of the Restatement (Third) of Property: Mortgages.

In seeking to foreclose the Palmer Trust Deed, Palmer assumes that his lien is, and has been, in first lien priority position and that *Palmer I* held as much. Palmer is incorrect. *Palmer I* held that FNB was not entitled to equitable reinstatement of the First Bank Trust Deed because FNB had been negligent. *Palmer I*, 2013 UT App 50, ¶¶ 12-16. It did not hold as a matter of law that the Palmer Trust Deed was in first lien priority

position. To the contrary, this Court left open the possibility that the Palmer Trust Deed was always in junior position due to section 7.3(a) of the Restatement (Third) of Property: Mortgages. *See id.* ¶12 n.3. It did not reach that issue because neither party had raised it. *Id.*

Section 7.3(a) states:

> If a senior mortgage is released of record and, as part of the same transaction, is replaced with a new mortgage, the latter mortgage retains the same priority as its predecessor, except (1) to the extent that any change in the terms of the mortgage or the obligation it secures is materially prejudicial to the holder of a junior interest in the real estate, or (2) to the extent that one who is protected by the recording act acquires an interest in the real estate at the time that the senior mortgage is not of record.

Restatement (Third) of Prop.: Mortgages § 7.3 (1997). Although Utah courts have not yet adopted section 7.3(a), they have adopted section 7.3(b), which contains similar language regarding lien priority when a senior mortgage is modified (as opposed to released). *See Nature's Sunshine Prods., Inc. v. Watson*, 2007 UT App 383, ¶18, 174 P.3d 647. Palmer never disputed the applicability of section 7.3(a) in the district court. This Court should therefore adopt and apply section 7.3(a) here.

Applying section 7.3(a) to the undisputed facts establishes that the Palmer Trust Deed was never in first lien priority position. The Second Bank Trust Deed replaced the reconveyed First Bank Trust Deed as part of the same transaction. The Second Bank Trust Deed thus retained the priority of its predecessor unless any of section 7.3(a)'s exceptions apply; they do not. There was no term of the Second Bank Trust Deed that materially prejudiced Palmer; to the contrary, it benefited Palmer because it reduced the debt secured by $50,000. Cf. Restatement (Third) of Property: Mortgages § 7.3(a), cmt. b

(noting that "an increase in the principal amount will prejudice the holders of junior interests"). Moreover, the First Bank Trust Deed was of record when Palmer recorded the Palmer Trust Deed, and Palmer understood and intended for the First Bank Trust Deed to be in first lien priority position.

Section 7.3(a) ensures that an error in releasing a senior trust deed will not result in a windfall to junior lien holders. It does so while protecting junior lien holders from any resulting prejudice. Applying section 7.3(a) is this case prevents a windfall to Palmer. Palmer never intended for the Palmer Trust Deed to be in first lien priority position, and was only benefited by FNB's reduction of the secured debt in the Second Bank Trust Deed.

Accordingly, this Court should hold that Palmer is not entitled to foreclose the Palmer Trust Deed in senior position and FNB's foreclosure extinguished the Palmer Trust Deed under section 7.3(a).

IV. THE DISTRICT COURT PROPERLY AWARDED ATTORNEY FEES IN FAVOR OF MAA.

A. MAA's Motion for Attorney Fees was Timely, as it was Brought Prior to Entry of a Final Judgment.

Palmer asserts MAA waived its right to request attorney fees because it did not move the district court for an award of attorney fees until after a "final judgment" had been entered. In so arguing, however, Palmer ignores that the Order and Judgment entered by the district court on July 28, 2015, was not a final judgment under rule 54(b) of the Utah Rules of Civil Procedure.

In *Meadowbrook, LLC v. Flower*, 959 P.2d 115 (Utah 1998), this Court set forth a "clear rule" as to "whether a prevailing party waives its right to attorney fees if it fails to present evidence of attorney fees or move the court during trial to allow evidence of such fees to be presented after trial." *Id.* at 117. This Court held a motion for attorney fees must be made prior to the signed entry of final judgment. *Id.*

Palmer assumes that for an order to be a final, it need only comply with Rule 7(f) of the Utah Rules of Civil Procedure. However, the very case cited by Palmer to support this contention, *Butler v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 2014 UT 41, 337 P.3d 280, demonstrates Palmer's analysis is incomplete. In *Butler*, this Court noted that Rule 7 sets forth the procedural requirements for obtaining a final judgment, but the substantive requirements for obtaining a final judgment are set forth under Rule 54(b) of the Utah Rules of Civil Procedure, and the two rules work in concert to make a judgment final. 2014 UT 41, ¶ 30. "According to the final judgment rule, a judgment or order is final and thus appealable if it 'dispose[s] of the case as to all the parties, and finally dispose[s] of the subject-matter of the litigation on the merits of the case.'" *Butler*, 2014 UT 41, ¶ 24 n. 6. Where a judgment or order does not dispose of all claims or resolve the issues as to all parties the judgment is not final, even if the procedural steps of rule 7 are met.

In this case, the Order and Judgment did not dispose of all claims between MAA and Palmer. In its Complaint, MAA sought, *inter alia*, to quiet title to Parcel 1, declaratory relief that Palmer had no interest in Parcel 1, and an award of attorney fees. MAA filed a ***partial*** motion for summary judgment against Palmer. MAA's motion was a

partial motion because it did not seek to resolve MAA's claim for attorney fees as a prevailing party determination had not been made. Thus, the granting of MAA's partial summary judgment motion did not resolve all claims. Indeed, the Order and Judgment explicitly recognized claims still remained for resolution. The Order and Judgment states: "MAA has reserved the right to seek attorney fees and costs, and this Order and Judgment therefore does not address that issue." [R. 797.] This Court has also held that "a trial court must determine the amount of attorney fees awardable to a party before the judgment becomes final for the purposes of an appeal under Utah Rule of Appellate Procedure 3." *Promax Development Corp. v Raile*, 2000 UT 4, ¶ 15, 998 P.2d 254. Because MAA's claim for attorney fees was not resolved as part of the Order and Judgment, the Order and Judgment was not a final judgment. The Utah Court of Appeals recognized the Order and Judgment was not final and summarily dismissed Palmer's appeal of the Order and Judgment sua sponte. [R. 993-995.]

Palmer asserts that MAA's reservation of the right to file a motion for attorney fees is insufficient. Palmer's argument, however, is contrary to this Court's holding in *Meadowbrook*. This Court stated:

> We further emphasize that prudent trial counsel should always preserve the issue of attorney fees, as well as any other issues not disposed of during trial, before resting their case, thereby allowing the court to address the issue at the court's and the parties' convenience. 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.

Meadowbrook, 959 P.2d at 120. MAA did precisely what this Court recognized was prudent. MAA specifically preserved its claim for attorney fees, and the district court

recognized the issue was preserved. By preserving the issue, MAA could "address the issue at the court's and the parties' convenience," which MAA did by filing its motion for attorney fees. *Id.* Because the Order and Judgment was not a final judgment, MAA's motion was timely and MAA did not waive its claim to attorney fees.

B. MAA is Entitled to its Attorney Fees Under Utah Code Ann. § 78B-5-826 and Applicable Case Law.

The district court correctly awarded attorney fees to MAA under section 78B-5-826, Utah's reciprocal attorney fees statute. This section provides

> 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.

Utah Code § 78B-5-826 ("Section 826"). "This provision consists of a conditional if/then statement: (a) If the provisions of a written contract allow at least one party to recover attorney fees in a civil action based upon the contract, (b) then a court may award attorney fees to either party that prevails." *Hooban v. Unicity Int'l, Inc.* (*Hooban II*), 2012 UT 40, ¶ 12, 285 P.3d 766.

Palmer argues that MAA is not entitled to an award of attorney fees under Section 826 because MAA was not a "contracting party" to the Palmer Trust Deed. Palmer accuses MAA of misinterpreting Section 826 because "*Hooban* stated that section -826 applies and refers to parties to one contract, ***not*** parties to a litigation." To support his argument, Palmer cites to paragraph 23 of the *Hooban II* decision. Palmer, however, fails to realize that paragraph 23 does not constitute the holding of this Court; rather,

paragraph 23 is merely the recitation by the Court of Hooban's argument, which the Court ultimately rejected. *Id.* at ¶¶ 21-31.

Hooban II addressed whether Unicity International, Inc. was entitled to attorney fees under a distributorship agreement to which Hooban was found not to be a party. *Id.* at ¶¶ 3-11. Hooban argued, like Palmer does here, that Section 826 should "be limited to actions between litigants that are both signatories to the contract at issue," and that Unicity was not entitled to fees from him because he was not a party to the agreement. *Id.* at ¶ 21. Hooban further argued "the statutory trigger for a fee award—'when the provisions of the ... contract ... allow at least one party to recover attorney fees'—[] appear[s] to refer to a party to a contract, and not just the litigation." *Id.* at ¶ 23. This Court rejected Hooban's argument and adopted Unicity's position that Section 826 requires courts to consider "a hypothetical alternative in which the case was resolved the other way." *Id.* at ¶¶ 22, 25-26. Had Hooban prevailed and been declared a party to the agreement, he could have sought fees under the contract's bilateral fees provision. *Id.* at ¶ 31. Because Hooban would have been entitled to fees had the litigation turned out differently, Unicity also was entitled to fees. *Id.* Thus, under this Court's holding in *Hooban II*, it does not matter whether the prevailing litigant is a party to the writing at issue, so long as one litigant is a party to the writing and could have sought attorney fees if that litigant had prevailed. *See id.* at ¶ 31.

Palmer's misreading of *Hooban II* is further evidenced by this Court's holdings in *Dillon v. Southern Management Corp. Retirement Trust*, 2014 UT 14, 326 P.3d 656 and *Insight Assets, Inc. v. Farias*, 2013 UT 47, 321 P.3d 1021. In both cases, this Court found

that a property owner was entitled to fees under Section 826 for successfully preventing the opposing party from foreclosing under a trust deed that allegedly encumbered the owners' properties even though the property owner was not a party to the trust deed.

In *Dillon*, the Dillons prevailed in a dispute with defendant Southern Management Corporation Retirement Trust ("SMCRT"). The Dillons had sued SMCRT to prevent its foreclosure under a trust deed that allegedly encumbered the Dillons' property in Park City. 2014 UT 14, ¶¶ 1, 12. The district court ultimately granted summary judgment in favor of the Dillons, holding, in part, that SMCRT's interest in the trust deed was void as against the Dillons. *Id.* at ¶ 16. Under Section 826, the district court awarded fees and costs to the Dillons totaling $1,120,395.69. *Id.* at ¶ 19.

On appeal, SMCRT contended that Section 826 did not apply because the Dillons' argument had focused on Utah's Recording Act, and thus the litigation "was based on the statute, not the trust deed." *Id.* at ¶ 47. This Court rejected this argument and upheld the award of attorney fees to the Dillons because SMCRT had asserted in the litigation that its trust deed was enforceable, and thus the litigation had been "based upon" a contract:

> We recently clarified what it means for an action to be "based upon" a contract for the purposes of Utah Code section 78B-5-826. "[A]n action is 'based upon' a contract under the statute if a party to the litigation assert[s] the writing's enforceability as a basis for recovery." There is no doubt that SMCRT is asserting the enforceability of the trust deed in this case. Nor is there any dispute that the trust deed allows for its holder to be reimbursed for attorney fees incurred in any litigation "which may arise in respect" to the trust deed. . . . [H]ad SMCRT been the prevailing party in this action, it would have been entitled to attorney fees under the trust deed. Accordingly, the district court did not abuse its discretion in awarding the Dillons attorney fees under Utah Code section 78B-5-826, as prevailing parties in this litigation.

Id. at ¶ 48 (quoting *Insight Assets*, 2013 UT 47, ¶ 24).

This Court's decision in *Insight Assets* provides further justification to award fees and costs to MAA. In *Insight Assets*, Joseph and Denise Phalen sold property to William and Roberta Boeck. The Phalens and First Franklin Financial Corp. provided financing and recorded trust deeds to secure their loans. First Franklin's trust deed was later assigned to Wells Fargo, and the Phalens' trust deed was assigned to Insight Assets. *Id.* at ¶¶ 2-3, 5.

When the Boecks defaulted on their obligations, Wells Fargo foreclosed under its trust deed. The property was conveyed to Wells Fargo at the trustee's sale, and later to multiple buyers, ending with defendant Homero Farias. Approximately four years after the foreclosure by Wells Fargo, Insight Assets attempted to foreclose under the Phalens' trust deed, claiming its trust deed had priority over the Wells Fargo trust deed and was a valid encumbrance on Farias's property. *Id.* at ¶¶ 4-5.

In a lawsuit between Insight Assets and Farias, the district court entered summary judgment in favor of Farias on the ground that he was a bona fide purchaser of the property. As the prevailing party, Farias sought attorney fees from Insight Assets under the Sellers' trust deed, but the district court denied Farias's request. *Id.* at ¶ 6.

On appeal, this Court reversed the district court's denial of Farias's request for fees. *Id.* at ¶ 26. The determination that Farias was entitled to fees rested on a provision in the Sellers' trust deed—a provision identical to paragraph 16 of the Palmer Trust Deed—that would have entitled Insight Assets to fees had it prevailed:

> Upon the occurrence of any default hereunder, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Trust Deed in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceeding all costs and expenses incident thereto, including a reasonable attorney's fee in such amount as shall be fixed by the court.

Id. at ¶ 25.

In light of this provision, this Court reasoned that Farias was entitled to attorney fees under Section 826, even though he was not a party to the trust deed:

> We [have] determined . . . that Mr. Farias is the prevailing party in this action. If Insight Assets' suit had been successful, it would have resulted in foreclosure on the original mortgage from the seller financing, and Insight Assets, as beneficiary, would have been entitled to reasonable attorney fees under the parties' contract. *Thus, the statutory trigger for fee shifting is met: the contract allows at least one party, Insight Assets, to recover attorney fees, and consequently the court may award attorney fees to the party that prevails in the action. Therefore, section 826 affords a basis for an award of attorney fees to Mr. Farias as the prevailing party.* We reverse the district court's denial of attorney fees to Mr. Farias and remand this matter for a determination of the amount of fees owed to Mr. Farias.

Id. (emphasis added).

Like in *Dillon* and *Insight Assets*, both statutory requirements under Section 826 are present in this lawsuit. First, the litigation was based upon a writing: the Palmer Trust Deed, which Palmer asserted was valid and enforceable against Parcel 1. Second, the Palmer Trust Deed allowed Palmer to obtain an award of attorney fees. The Palmer Trust Deed provided that Palmer would be entitled to "all costs and expenses incident" to his foreclosure "including a reasonable attorney's fee in such amounts as shall be fixed by the court. [R. 824.] Indeed, the Palmer Trust Deed contains the exact provision at issue in *Insight Assets*, which entitled Farias to attorney fees. 2013 UT 47, ¶ 25.

Palmer concedes that, had he prevailed, he could have sought fees and costs incident to this action from JDJ Holdings ("JDJ"), which defaulted on the note secured by his trust deed. [Appellate Brief at 43.] Had Palmer prevailed on his claim that the Palmer trust deed was enforceable, Palmer would have been able to foreclose on its trust deed and would have been entitled to reasonable attorney fees under the Palmer Trust Deed. MAA, as the owner of Parcel 1, would have been required to pay the amounts owed under the Palmer Trust Deed, including the attorney fees, to avoid losing Parcel 1. The statutory trigger for reciprocal attorney fees is met: a contract that would have allowed Palmer to recover attorney fees had he prevailed. As this Court found in *Insight Assets*, "[i]f [Palmer] had been successful, it would have resulted in foreclosure on the original mortgage [], and [Palmer], as beneficiary, would have been entitled to reasonable attorney fees under the parties' contract." Thus, the district court correctly determined MAA was entitled to its attorney fees under Section 826.

CONCLUSION

For all of the foregoing reasons, MAA respectfully requests that this Court affirm the district court's grant of MAA's motion for summary judgment, the district court's denial of Palmer's cross-motion for summary judgment, and the district court's award of attorney fees and costs in favor of MAA. Additionally, MAA requests that the Court award it its attorney fees incurred on appeal pursuant to Section 826.

DATED this 31st day of March, 2017.

PARR BROWN GEE & LOVELESS, P.C.

By: _____
Ronald G. Russell
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CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 12,877 words, excluding the parts of the brief exempted by UTAH R. APP. P. 24(f)(1)(B).

This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Time New Roman font size 13.

Jeffery A. Balls

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of March, 2017, I caused two true and correct copies of the foregoing **BRIEF OF APPELLEE MAA PROSPECTOR MOTOR LODGE, LLC** to be served via U.S. Mail, first-class postage prepaid, on the following:

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