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Charles C. Rehn, an Individual; And That Certain Real Property Located at 4118 Saddleback Road, Park City, Utah Plaintiffs/ Appellants/Crossappellees, v. Steves. Christensen, an Individual; Steves. Christensen, p.c., a Utah Professional Corporation; Henroid, Nielsen, & Christensen, a Utah General Partnership; Christensen, Corbett & Pankratz, PLLC, a Utah Professional Limited Liability Company; Hirschi Christensen,pLLC,a Utah Professional Limited Liability Company; And All Unknown Persons Who Claim Any Interest in the Subject Matter of the Action. Defendants/ Appellees/ Crossappellants.

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CHARLES C. REHN, an individual; and
that certain real property located at **4118
SADDLEBACK ROAD, PARK CITY,
UTAH**,

Plaintiffs/Appellants/Cross-
Appellees,

vs.

STEVE S. CHRISTENSEN, an
individual; **STEVE S. CHRISTENSEN,
P.C.**, a Utah professional corporation;
**HENRIOD, NIELSEN, &
CHRISTENSEN**, a Utah general
partnership; **CHRISTENSEN,
CORBETT & PANKRATZ, PLLC**, a
Utah professional limited liability company;
HIRSCHI CHRISTENSEN, PLLC, a
Utah professional limited liability company;
and **ALL UNKNOWN PERSONS WHO
CLAIM ANY INTEREST IN THE
SUBJECT MATTER OF THE
ACTION**,

Defendants/Appellees/Cross-
Appellants.

REPLY BRIEF OF CROSS-APPELLANT

Appellate Case No. 20150119-CA

District Court Case No. 130500115

Oral Argument Requested

Appeal from Final Judgment, Rulings, and Orders of the Third Judicial District Court of
Utah, Summit County, Utah, the Honorable Ryan M. Harris, Presiding

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Utah professional limited liability company;
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INTRODUCTION

Cross-Appellants (Appellees), including Steve S. Christensen (Christensen), by and through counsel, hereby submit this brief supporting their arguments in their initial brief (Appellee Brief) and replying to the arguments presented by Cross-Appellee Charles C. Rehn (Rehn) in his Reply Brief of Appellant and Brief of Cross-Appellee (Rehn Brief). Appellees argue that the slander of title judgment entered against them below was improper because 1) Appellees held a valid lien against the property in question (the Property), 2) Rehn failed to present evidence of malice, or 3) the jury awarded damages that were per se ineligible for award in slander of title actions.

ARGUMENT

I. REHN HAS FAILED TO ESTABLISH THAT APPELLEES' KNEW THEIR CLAIM THAT A LIEN EXISTED WAS FALSE.

Utah allows establishment of malice by implication, but even where malice is implied, the plaintiff *must* demonstrate “the defendant had actual knowledge that the *statements at issue* were false.” *Dillon v. S. Mgmt. Corp. Retirement Trust*, 2014 UT 14, ¶ 35, 326 P.3d 656 (emphasis added). In this case, the relevant statement made by Appellees in their lien against Rehn’s property is that they held a lien against Rehn’s property. Rehn points to no evidence that Appellees knew they had no lien whatsoever against Rehn. There was no such evidence presented at trial.

Rehn’s “evidence” that purportedly establishes Christensen knew Appellees’ claim to a lien was false is problematic in two respects. Rehn Brief, p. 37.

First, the evidence Rehn invokes relates to Christensen’s statements about whether he would release the lien after the lien was filed. What Christensen represented about his intent

to maintain the lien does not establish that Christensen had actual knowledge that Appellees held no right to lien Rehn's property. Christensen established that he believed he had not only a consensual lien but also a statutory lien. The lien was recorded and properly identified Rehn's property. Christensen specifically called Rehn's attention to the lien in a letter to Rehn. This was done in the context of a discussion of the options for payment of the outstanding fees. The recorded lien and Christensen's letter provided sufficient notice of the lien's existence. Even if Christensen's informal written notice dissembled about the purpose or nature of the lien, such actions do not establish that Christensen knew Appellees held no right to a lien. For over a decade, Rehn failed to pay off his attorneys fees. Further, for a decade after written notice of the lien, Rehn did not challenge the lien or ask that it be removed.

Second, Rehn's conclusory arguments that Christensen knew Appellees had no lien are not supported by evidence and are unwarranted under the cited record materials. For example, Rehn argues Christensen falsified the lien notice "to make it appear like an amendment to an earlier recorded attorney's line [sic] that never existed[.]" Rehn Brief, p. 37. Admittedly, Rehn established that there were errors in the lien notice, but the mistakes are scrivener's errors that do not affect the right to a lien. There is no admission whatsoever that Christensen knew that he had no right to a lien. To the contrary, Christensen testified that Rehn agreed in a written, signed engagement letter to a lien on his residence as security for Rehn's payment of attorney fees on appeal. Rehn's argument that Christensen made a "decision to withhold notice of the Lien from Rehn" is not in evidence. Christensen's letter to Rehn gave explicit notice of the lien. Even if the letter was "dissembling about the

purpose of the Lien” there is no evidence or admission that Christensen had actual knowledge that he had no right to a lien on Rehn’s property.

Rehn criticizes Appellees’ reliance on *Dillon v. S. Mgmt., Corp. Retirement Trust*, 2014 UT 14, 326 P.3d 656, and *First Sec. Bank v. Banberry Crossing*, 780 P.2d 1253 (Utah 1989). See Rehn Brief, p. 38. Contrary to Rehn’s implication, the fact that *Dillon* “merely restate[s] prior opinions” makes it no less valuable or authoritative—particularly because it is a recent decision of the Utah Supreme Court. Regardless of what *Dillon* and *Banberry Crossing* state about implying malice (as opposed to demonstrating actual malice), there remains the fact that in proving either implied or actual malice in a slander of title action, the plaintiff *must* demonstrate “the defendant had actual knowledge that the *statements at issue* were false.” *Dillon v. S. Mgmt. Corp. Retirement Trust*, 2014 UT 14, ¶ 35. Rehn has not produced evidence that at any time prior to summary judgment below that Appellees had actual knowledge that they held no right to a lien whatsoever against Rehn. Rehn has thus not produced evidence sufficient to support a verdict or finding of malice. Therefore, the decision below should be reversed in its entirety.

II. NOTWITHSTANDING REHN’S ARGUMENTS, THE SUMMARY JUDGMENT AGAINST APPELLEES WAS IMPROPER.

Appellees held both an attorney’s lien and a consensual lien. Despite errors in the notice of lien filed with the county recorder, the right to liens existed independent of any notice thereof. Their priority in relation to more properly recorded liens may have been questionable because notice of an attorney’s lien is tied to priority. See Utah Code § 38-2-7(9). However, the lien’s existence is another matter because an attorney’s lien is not created or kept alive by notice. See generally *id.*

A. Appellees held an attorney's lien.

“An attorney shall have a lien for the balance of compensation due from a client on any money or property owned by the client that is the subject of or connected with work performed for the client” Utah Code § 38-2-7(2).

1. *Obtaining ownership of property after representation ends does not shield it from an attorney's lien if it was the subject of or connected with the representation.*

Nowhere does the statute limit attorney's liens to property owned by the client at the time of the representation or specifically mentioned in a court document. It limits attorney's liens to property that was the subject of or connected with the representation and that is owned by the client. Holding otherwise would limit attorneys from possessing liens on properties owned by the client that the client would not have obtained but for the attorney's representation.

In this case, Rehn, at a certain point of time, both owned the property and owed Appellees for past representation connected to the property. By operation of law, Appellees held an attorney's lien on the property, and Appellees recorded an admittedly imperfect notice thereof.

2. *The Property was the marital property and was connected to Christensen's representation of Rehn.*

As described in more detail *infra*, Rehn testified that “we moved into that when I was still married . . . like '94 or something like that.” R3945:38. Rehn's assertions on appeal to the contrary are thus debunked and the Lindell Affidavit stands discredited by a more authoritative source—Rehn himself. Christensen claimed to have advised Rehn regarding the Property in the specific context of the divorce. In the summary judgment context, assertions

advanced by the non-moving party (Appellees) are entitled to be viewed in a more favorable light.

Admittedly, Appellees did not emphasize the marital home connection below. But, Appellees did argue that the Property was connected to the divorce representation and did note that Rehn had leased the Property during the marriage in addition to asserting that Rehn had sought advice regarding his purchase of the property in connection with the divorce representation. R702. The requirement for issue preservation is just that—it requires that issues be preserved. *State v. Winfield*, 2006 UT 4, ¶ 14, 128 P.3d 1171. There is no requirement that citations, specific arguments, and emphases be preserved. *See id.* Were it so, parties on appeal would be limited to copying and pasting the texts of their arguments into their appellate briefs.

In this case, Appellees argued that the Property was connected to Christensen’s representation of Rehn, highlighting the advice Christensen gave Rehn regarding the property mid-divorce and mentioning that Rehn leased the property during the marriage. R702.

3. *Contrary to Rehn’s argument, Bay Harbor Farm, LC v. Sumsion is instructive. Rehn’s proposed alternate, CFD Payson, LLC v. Christensen is inapposite.*

Appellees invoked *Sumsion* in the Appellee Brief to emphasize that there need only be a connection between the representation and the property to justify an attorney’s lien under the attorney lien statute. The district court employed an extremely narrow view, requiring the Property to be the actual subject of representation. R1957. In *Sumsion*, this Court explained “the statute includes the phrase ‘connected with’ in addition to the phrase ‘the subject of,’

indicating that the statute was meant to cover more than those cases where the land is the actual subject of the lawsuit.” *Bay Harbor Farm, L.C. v. Sumsion*, 2014 UT App 133, ¶ 15, 329 P.3d 46. Hence, an attorney may hold a lien on property that was never the subject of the representation, addressed or court documents, or mentioned at hearings. *Sumsion* also states that it would be plausible to hold that the land on which a worker’s compensation incident occurred is connected to representation in the subsequent worker’s compensation matter.

In this case, not only did Rehn consult Christensen regarding potential ownership of the Property, it was property that was rented by the parties during the marriage and at which marital and family activities occurred. The property was integral to the divorce representation since Rehn’s alimony was determined in part based on what he could afford after his personal expenses. Those expenses included the marital home payments, upkeep and utilities. In addition, the location of the home in relation to the children’s school and the stability it provided would also have been litigated in relation to Rehn’s claim for joint custody. The consultation and status of the Property as marital home creates both an instance where it was the subject of some portion of the representation and connected to the rest.

Rehn attempts to bar Appellees’ citation to *Sumsion* by invoking what might be best described as an ill-defined and heretofore unheard of doctrine of citation preservation. *Sumsion*, decided June 12, 2014, was not available to Appellees when they argued at the summary judgment hearing six months prior on January 9, 2014. *See Sumsion*, 2014 UT App 133; R1956. Notwithstanding, Appellees are entitled to invoke *Sumsion* to argue that the district court’s January 2014 decision was incorrect so long as they argued against the

decision in the first place. Indeed, pursuant to Utah R. App. P. 24(j), Appellees are entitled to notify this Court of controlling authorities not cited to at trial, in appeal briefing, or even oral argument.

Rehn further argues that Appellees' reliance on *Sumsion* is misplaced. Rehn Brief, p. 28. Admittedly, because *Sumsion* is addressing the Wrongful Lien Act, it is not strictly on point. But, the portions on which Appellees rely address the meaning of Utah's attorney lien statute. *Sumsion*, 2014 UT App 133, ¶ 15. *Sumsion's* comments on Utah Code § 38-2-7 are thus instructive and relevant.

Rehn directs this Court's attention away from *Sumsion* and toward *CFD Payson, LLC v. Christensen*, 2015 UT App 251, 361 P.3d 145. *CFD Payson* is inapposite.¹ It does not purport to interpret the attorney lien statute, establish what type of connection is sufficient to create an attorney's lien, or speak to whether a client subjected to an attorney's lien must own the property during the actual representation (as opposed to owning later). It merely concludes that the fact the property in question was owned by a holding LLC means Kim Dahl did not own the property, despite being awarded an interest in the liquidation of the property investment. *CFD Payson*, 2015 UT App 251, ¶ 11. In Rehn's case, it is undisputed that he owned the property when Appellees recorded the lien notice and at times when he had failed to pay his bill for Christensen's representation of him in the divorce.

¹ *CFD Payson* does not provide controlling legal authority. Further it would be inappropriate for Rehn to rely on the facts of *CFD Payson* for as a factual basis in support of Rehn's arguments. This Court issued its opinion in *CFD Payson* on October 8, 2015, long after the district court had made its final and dispositive judgments/orders in this case. See Court of Appeals Published Decisions By Date – 2015, available at <https://www.utcourts.gov/opinions/appopin/index-2015.asp>.

4. *An attorney's lien exists independent of the mistakes in the document giving notice of the lien.*

Regardless of whether attorneys give notice of their liens, they hold their liens beginning with the time of their engagement by the client. Utah Code § 38-2-7(2)-(3). Whether attorneys give notice of their liens or attempt to enforce them is a separate matter. *See generally* Utah Code § 38-2-7 (setting forth conditions for existence and commencement of attorney's lien in subsections separate from provisions regarding notice and enforcement, and not making notice mandatory). Rehn states a lien claimant cannot acquire a lien without complying with the statutory provisions. Rehn Brief, p. 30. This is true, but as explained *supra*, hiring the attorney creates the attorney's lien, not the attorney giving notice of the lien.

Rehn cites *First Sec. Mtg. Co. v. Hansen*, 631 P.2d 919 (Utah 1981) for the proposition that without sufficient verification on the lien notice, no lien is created. Rehn then argues that Appellees' lien notice lacked proper verification and that the underlying attorney's lien was thus invalidated. However, *Hansen* was addressing Utah Code § 38-1-7, a long superseded version of the mechanic's lien statute. Indeed, § 38-1-7 is now § 38-1a-502.² Both now and in 1981, when *Hansen* was decided, a person wishing to claim a mechanic's lien (or construction lien, as they are now called) was *required* to file notice. *See* Utah Code § 38-1a-502; *Hansen*, 631 P.2d at 920. If the notice for a construction lien is defective, it appears that the lien cannot exist because without notice, there can be no lien. But, in this case, Appellees' lien was an attorney's lien, which exists regardless of whether notice is filed with

² H.B. 131, 2012 General Session (Utah), *available at* <http://le.utah.gov/~2012/bills/static/HB0131.html>.

the county recorder. Thus, Rehn's arguments that "lien verification" and other notice requirements are essential is incorrect.

5. *Concluding that an attorney's lien exists regardless of errors in the notice thereof does not render the notice portions of the attorney's lien statute meaningless.*

Despite Rehn's arguments, there is no provision of the attorney's lien statute that renders an attorney's lien void or otherwise prescribes a penalty for failure to follow the notice requirements. Rehn seems to be arguing that if an attorney's lien is not invalidated for failure to follow the notice requirements, the notice requirements are superfluous. However, there is a built-in penalty for failure to observe the attorney lien statute's notice requirements. Depending on the defects in notice, the consequence for an improper notice is a loss of priority—not invalidation of the lien—because priority is tied to the lien notice being filed with the county recorder. *See* Utah Code § 38-2-7(9).³ Thus, the notice requirements are not superfluous, and this Court need not imagine and enforce penalties that are not explicitly prescribed. However, whether the lien notice requirements were met, Appellees were entitled to a lien. Assertion of the lien did not slander title.

It is arguable whether Utah Code § 38-12-103 applies to the attorney's lien statute, but it is at least instructive to note that in prescribing a penalty for failure to give notice of a lien, § 38-12-103(3) expressly provides that failure to give notice *does not* "invalidate any lien."

Rehn refuses to admit that § 38-12-103 is either controlling or instructive when analyzing the attorney's lien statute. He argues that § 38-12-103 and the attorney's lien statute (§ 38-2-7) are only in the same title and not in the same chapter of the Utah Code. In

³ Regardless of whether a lien notice is proper, it is enforceable against those who have "actual or constructive knowledge of the attorney's lien." Utah Code § 38-2-7(8).

this case, that argument is a poor one. Title 38 of the Utah Code has fifteen chapters, many of which embrace a particular type of lien or serve as the umbrella for multiple lien types. Chapter 12 especially addresses “Notice of Lien Filing.” Therein, § 102(3) lists chapters of title 38 to which it does not apply. The implication is that chapter 12 applies especially to some of its fellow chapters and is at least relevant to others, even if they are only in the same title of the Utah Code.

B. Appellees held a consensual lien.

Appellees admitted there was no written agreement between SSC (one of multiple Appellees) and Rehn. They did not admit that there was no agreement between Rehn and the firm Henriod, Nielsen & Christensen. R18, R324. The allegation they were answering asserted only that there was no agreement between Rehn and SSC. *Id.* Moreover, Appellees asserted the existence of a consensual lien in their counterclaim. R328.

Rehn argues that Appellees must present case law to establish that admissions in an answer apply only to the allegations in the complaint. Rehn is wrong. It should be him, not Appellees, who must produce authority to demonstrate the veracity of the extraordinary theory that contents of an answer are binding judicial admissions beyond what the complaint asserted. The rule governing pleadings revolves around admitting “the statements in the claim” and various degrees of denial. Utah R. Civ. P. 8(b). Nowhere does the rule talk about a defendant being able to admit to more than has been alleged in the complaint. Nor has Rehn cited any authority justifying a result. Pleadings are to “be construed to do substantial justice.” U.R.C.P. 8(f). Allowing a plaintiff and trial court to seize upon a partial admission to an allegation as being a judicial admission to facts extending far beyond the complaint’s

allegations is not substantially just—particularly when a counterclaim in the same document affirmatively asserts the existence of a consensual lien.

Also, as previously argued herein, Rehn mischaracterizes Appellees' decision to withdraw the motion to amend the pleadings as a confirmation of the so-called judicial admission that Appellees held no contractual lien. But, in withdrawing the motion, Appellees stated that they had "located a signed agreement between HNC and Rehn authorizing the lien" and that it was not an agreement between "SSC and Rehn, as was the subject of the allegation in the Verified Complaint." R1950. Thus, Appellees were proceeding under the same theory they now press on appeal—the judicial admission was in regard to signed agreements between Rehn and one defendant/appellee. The admission did not reach all defendants/appellees.

In the Rehn Brief at page 35, Rehn states as follows: "In the Engagement Letter, Christensen stated that his right to an attorney's lien was 'as permitted by the laws of the State of Utah.' R. 1134." This statement is not a fair representation of the excerpt Rehn is quoting. In reality, the language of the "Engagement Letter" does not even refer to an "attorney's lien." It refers to "a lien." The letter states "[HNC] shall be entitled to a lien for services rendered ... as permitted [sic] the laws of the State of Utah ..." R1134.⁴ The Engagement Letter was stating that HNC had a lien, so long as it was legal in Utah.

⁴ The *sic* is placed to note that the word *by* is missing in the original.

C. Rehn's argument that there is no harmful error in the district court's summary judgment ruling is incorrect.

Rehn attempts to portray the jury's verdict on the malice element of slander of title and the lien notice errors as independent vindication of any error in the district court's summary judgment ruling. Rehn's argument is untenable.

At the beginning of the trial, the district court specifically instructed the jury that the Court had already ruled that there were no liens. R3944:115-16. Thus, any finding whatsoever the jury made was tainted by the district court's summary judgment ruling. Had the district court not entered summary judgment on the first two elements of slander of title, Appellees would have been able to show evidence of the existence of a lien. Further, the conclusion the court imposed on the jury that there was no lien tainted the inquiry of whether there was a right to a lien. As to the establishment of error in the lien, it has been argued here on appeal that those errors did not invalidate the lien and do not establish slander of title.

The district court's summary judgment ruling was erroneous. Undoubtedly, an erroneous summary judgment ruling such as the one in this case constitutes harmful error. If the decision on summary judgment is reversed, this case should be remanded for further proceedings.

III. NO AMOUNT OF EVIDENCE (OR LACK OF OPPOSING EVIDENCE) CAN JUSTIFY THE AWARD OF DAMAGES THAT ARE PER SE INELIGIBLE FOR AWARD.

In their initial brief, Appellees invoked case law and analysis to argue that some of the damages awarded Rehn for attorney fees were per se unreasonable and unnecessary and thus ineligible for award in a slander of title action, not the least of which were fees incurred to

pursue the slander of title tort action (in violation of the American Rule) and fees that were otherwise unallocated. *See generally* Appellee Brief, pp. 35-43.

Rehn, in an apparent attempt to sway this Court through prejudice, references *Dahl v. Dahl*, 2015 UT 23, ¶¶ 175-211,⁵ another case Christensen handled. *Dahl* is unrelated to this case, particularly because it was not raised or argued below.⁶ The fact that the Utah Supreme Court chastised Christensen for unreasonable fees has no bearing whatsoever on whether the jury's damages award in Rehn's favor was legal or appropriate. If Rehn's intent by this reference is to distract, confuse, and prejudice this Court, he has violated the rule against placing "irrelevant, immaterial, or scandalous matters" in appellate briefs. Utah R. App. P. 24(k).

Rehn argues that he presented evidence on the issue of damages, but points to nothing that counters Appellees' argument that some damages the jury awarded were per se ineligible for award in a slander of title case because the fees were for unrelated or unsuccessful endeavors. Indeed, Rehn does not respond to Christensen's argument that some of the fees the jury awarded him as damages were ineligible, as a matter of law, to remedy a disparagement of title.

⁵ Rehn Brief, p. 39.

⁶ *Dahl* is not being cited as controlling authority, but rather as a factual basis in support of Rehn's arguments. Facts related to *Dahl* have not been developed on the record. Nor could *Dahl* have been developed on the record or had any effect on the judgment below. The *Dahl* opinion was issued on January 30, 2015, subsequent to entry of final judgment and denial of Rehn's motion for attorney fees. *See* Supreme Court Opinions By Date – 2015, *available at* <https://www.utcourts.gov/opinions/supopin/index-2015.asp>. Appellate courts are to render opinions based on a review of what was before the trial court. "Appellate jurisdiction is the jurisdiction to review the decision or judgment of an inferior tribunal, upon the record made in that tribunal, and to affirm, reverse or modify such decision; judgment, or decree." *State v. Johnson*, 114 P.2d 1034, 1037 (Utah 1941).

The district court should have granted Appellees' motion for JNOV or a new trial to correct the award of ineligible damages.

IV. DESPITE REHN'S ASSERTIONS TO THE CONTRARY, APPELLEES HAVE PHRASED ISSUES APPROPRIATELY AND INVOKED CORRECT STANDARDS OF REVIEW.

Appellees' Issue 1:

Appellees' phrasing of Issue 1, as contained in the Appellee Brief is appropriate.

Appellees have contended that the district court erred by concluding that Rehn had made a showing sufficient to satisfy the first two elements of slander of title (publication of a false statement slandering title)⁷ on summary judgment. Regardless of errors contained in the notice of lien, there existed an attorney's lien (because of the connection between the divorce litigation and the property in question) and a consensual lien.

Appellees' phrasing of the issue is the most appropriate because it focuses on whether either an attorney's lien or consensual lien existed and fairly includes the relevant sub-issues. Rehn's phrasing fails to encompass even his own contentions on this issue.

Rehn admits that Appellees have asserted a connection between Appellees' lien and the Property, referring to it as the "sole possible connection." Rehn Brief, p. 1. Appellees have contended that the consultation addressing Rehn's intent to purchase the property, augmented by the overall circumstances (including the Property being the marital home, including the costs of maintaining the home in determining Rehn's ability to pay alimony and the stability of the home location for joint custody), was a connection sufficient to create a right to an attorney's lien. The existence of a valid attorney's lien would undermine Rehn's

⁷ *Dillon v. S. Mgmt. Corp. Retirement Trust*, 2014 UT 14, ¶ 36, 326 P.3d 656.

position and the district court's decision. Even if Christensen was wrong about whether the consultation about the purchase of the property and litigation over the effect of the home on alimony and custody determinations, there was no evidence that Christensen did not believe the home related to the litigation.

Further, Appellees deny that they judicially admitted that no consensual lien existed. In the complaint, Rehn asserted no consensual lien existed because there was no signed agreement between Rehn and SSC, one of multiple defendants. R18. Appellees admitted that there was no signed agreement between Rehn and SSC and denied all else, including the assertion that no consensual lien existed. R324. Rehn wishes to interpret that admission as reaching beyond the scope of the allegation in the complaint and applying to all defendants/appellees, and not just SSC. Appellees assert that doing so is contrary to the plain meaning of the admission. Christensen can only admit the exact language of the request. Further, admission of no written contract between SSC and Rehn does not logically require the admission that there was not a contract between Rehn and Henriod, Nielsen & Christensen, as the firm and SSC were different legal entities. Rehn's construction is also contradicted by Appellees' assertion of the existence of a consensual lien in the counterclaim submitted in the same document as the referenced answer. R328.

Standard of Review: Appellees' statement of the standard of review is correct—and complete. Contrary to Rehn's assertion, Appellees did not ignore the "material fact" portion of the standard of review for summary judgment. See Appellee Brief, p. 1.

Appellees' Issue 2:

Appellees' phrasing of Issue 2 is appropriate, and the issue is preserved.

Appellees have argued that there was no evidence of malice, and that absent malice, the slander of title judgment cannot stand. Rehn has demonstrated errors on Christensen's part and vehemently argued that those errors prove a nefarious motive. But, not all errors count as malice in slander of title actions.

A slander of title plaintiff must demonstrate "the defendant had actual knowledge that the *statements at issue* were false." *Dillon v. S. Mgmt. Corp. Retirement Trust*, 2014 UT 14, ¶ 35, 326 P.3d 656 (emphasis added). Any mistake will not qualify as a false statement sufficient to establish malice. Rather, Appellants must establish that Appellees had actual knowledge that the assertion of a lien was false at the time they recorded the lien against Rehn's property. Proving any other statement or fact is false would not create slander of title. Rehn has been focusing on *any* statement in the notice of lien that happened to be false. Under Rehn's proposed phrasing of the issue, proof that Appellees made a false but unquestionably irrelevant statement in the lien notice would result in a determination of malice, even if the lien existed and was enforceable. If Christensen did not have actual knowledge that Appellees were not entitled to a lien at the time it was asserted, he could not have had malice. An erroneous labeling of the lien as "amended" or other typographical errors do not make the lien more or less valid. Thus, whether Appellees knew their liens were unenforceable is essential to establishing malice.

As to preservation and invited error, it is clear from the record that Appellees' counsel was arguing the malice issue, saying that Rehn had failed to demonstrate that Appellees knew their claim to a lien was false, or unenforceable. R3945:123-24. Rehn responded. *Id.* Appellees' failure to provide reply or rebuttal does not represent invited error.

Appellees moved for a directed verdict. *Id.* Appellees provided argument therefor, and the district court ruled thereon. *Id.*

Standard of Review: Yet again, Rehn falsely accuses Appellees of misstating the standard of review. Rehn's excerpt from *State v. Hawkins* is merely describing the same standard of review that Appellees had already invoked in their statement of the issues. The excerpt on which Rehn relies is not a standard of review in and of itself. Reference to the portion of the *Hawkins* paragraph that Rehn failed to quote makes this readily apparent. Compare Appellee Brief, p. 2 (setting forth standard of review for Issue 2) with *State v. Hawkins*, 2016 UT App 9, ¶ 32.

Appellees' Issue 3:

Appellees' phrasing of Issue 3 is appropriate and encompasses the specific facet of damage awards in slander of title cases that Appellees have put at issue in their cross-appeal.

In proposing an alternate phrasing of Appellees' third issue, Rehn fails to account for Appellees' argument being that some of the attorney fees the jury awarded as damages to Rehn are *per se* ineligible to be awarded as damages in a slander of title action. Indeed, Rehn provides no counterargument on the issue of whether some of the attorney fees the jury awarded him were *per se* ineligible.

Instead, Rehn focuses on the fact that Appellees relied on cross-examination instead of presenting their own witness in regard to reasonableness of attorney fees. But, no amount of testimony or evidence can justify the award of attorney fees that are *per se* ineligible for award as damages in a slander of title judgment. That some fees are ineligible to be awarded as damages, despite testimony to the contrary, accords with the American Rule, followed in

Utah, that each party in a tort case is responsible for their own fees. *See Neff v. Neff*, 2011 UT 6, ¶ 77, 247 P.3d 380; *accord Colquhoun v. Webber*, 684 A.2d 405, 413 (Me. 1996) (explicitly holding that attorney fees to pursue slander of title are not reasonably necessary to remedy a disparagement of title and that awarding them would violate the American Rule).

Admittedly, the American Rule can be confusing in the context of slander of title. Attorney fees are often the damages in slander of title if incurred to remove the disparagement of title. But, *Neff* and *Colquhoun* explain that those attorney fees, as damages, are not the same as the attorney fees incurred to pursue the slander of title action itself.

Standard of Review: For the third time, Rehn has falsely accused Appellees of misstating a standard of review. The quotations Rehn emphasizes do not refute the standard of review invoked by Appellees. Rather, they reinforce the standard of review and provide commentary thereon. *See ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.*, 2013 UT 24, ¶¶ 18, 21-22; Appellee Brief, p. 3.

V. REHN'S BRIEF MISCHARACTERIZES FACTS. IT ALSO MISCHARACTERIZES APPELLEES' PRESENTATION OF THE FACTS.

A. The Property was, indeed, the marital home, and Rehn consulted Christensen in regard thereto.

In their initial brief, Appellees contended that the Property was the marital home and that this fact strengthened Appellees' claims that the Property was connected to Christensen's representation of Rehn in the divorce and divorce appeal. Appellee Brief, pp. 21-22.

In his brief, Rehn shot back, asserting that Appellees' statement was "extremely misrepresentative" and referencing the marital home assertion as a "glaring example." Rehn

Brief, p. 7. In the Rehn Brief, Rehn explains that he did not begin living at the Property until July 1997, six weeks before the divorce trial, and to support this assertion, referenced an affidavit signed by Bruce Lindell. *Id.*

However, Rehn's testimony at the trial below flatly contradicts the assertions in his appeal brief and further calls into doubt the veracity Lindell's affidavit. At trial, Rehn took the witness stand, and, in response to a question asking when he moved into the Property, stated as follows:

Boy, we moved into that when I was still married, so this—the property on Saddleback that—I think we moved in there like '94 or something like that. I can't remember offhand.

R3945:38.

Rehn's attempts to discredit Christensen's claim that he and Rehn discussed the potential purchase of the Property during Christensen's representation of Rehn in the divorce should also be disregarded. Rehn highlights that Christensen admitted at trial to not remembering the date or time the conversation took place. However, it should be noted that the conversation and the trial at which the conversation was discussed would have taken place approximately twenty years apart. In the absence of a written record detailing the content of what would have been one of many conversations over a long period of time between Rehn and Christensen, it should be understandable that Christensen would not recall the date and time of the conversation after that long passage of time.

B. Appellees held a contractual lien.

As alleged in the pleadings and argued in the Appellee Brief, Appellees held a contractual lien. The district's court's decision to construe Appellees' answer as a judicial

admission that no contractual lien existed was inappropriate when the specific statement that was admitted was much narrower than the district court interpreted it. The absence of a written agreement between Rehn and SSC was appropriately admitted. However, Appellees were not asked to deny a written agreement between Rehn and Henriod, Nielsen & Christensen, yet the district court imposed such an admission on Appellees.

Rehn mischaracterizes Appellees' decision to withdraw the motion to amend the pleadings as a confirmation of the so-called judicial admission that Appellees held no contractual lien. In withdrawing the motion, Appellees stated that they had "located a signed agreement between HNC and Rehn authorizing the lien" and that it was not an agreement between "SSC and Rehn, as was the subject of the allegation in the Verified Complaint." R1950. Thus, Appellees were proceeding under the same theory they now press on appeal—the judicial admission was in regard to signed agreements between Rehn and one defendant/appellee, but not the others. The district court and Rehn improperly interpreted the admission as reaching all defendants/appellees.

C. The difference between Appellees' version of the facts and Rehn's version of the facts is caused by differing perspectives and interpretations.

With the more notable exception of Rehn claiming in his appeal brief that he did not move into the Property until 1997 despite testifying below that he began living there in 1994, the differing views on the facts can be largely attributed to perspective and interpretation. Some of those perspectives and interpretations relate to the procedural posture of how facts are to be considered or their actual implication in context of the case. For example, Appellees drafted their factual statement keeping in mind that in making summary judgment decisions, courts are to view facts and reasonable inferences "in the light most favorable to

the nonmoving party.” *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (quoting another source). Where the standard of review was less favorable to Appellees, Appellees marshalled evidence and did so in close proximity to the point in the Appellee Brief where those arguments were presented. *See* Appellee Brief, pp. 29, 40.

It should be noted that Rehn’s version of the facts is littered with factual statements anchored to assumptions that are not grounded in objective evidence or findings of fact. These statements that Rehn has strewn about are assumptions and interpretations based not on actual findings of fact, but on Rehn’s naked allegations and theories. For example, Rehn states that if Christensen had cited the correct statute in the lien notice “it would have belied his attempt to make the Lien appear to relate back in time.” Rehn Brief, p. 10. Or—“The only explanation for these falsifications was to make SSC’s lien rights facially appear to relate back to 1995.”⁸ *Id.* at p. 11. Another: “[Christensen] belatedly tried to cover himself when he learned that Rehn would likely discover the Lien.” *Id.* at p. 12. None of these facts establish that Appellees knew at the time of recording that they had no right to a lien.

In reality, the actual findings the district court made are few in number. In the summary judgment order, there are only seven. R1957. The jury verdict addressed no more than three questions. R3617. There were also some findings in the district court’s order denying Rehn’s motion for attorney fees. R3721-24.

⁸ Appellees have, in fact, provided an explanation. It is alleged that Christensen used a template to draft the notice. Appellee Brief, p. 9. Since the statute had changed only a few months prior to Christensen using the template, the explanation is reasonable. *See id.*

CONCLUSION

Appellees' phrasing of the issues, as presented in their initial brief is appropriate. The standards of review invoked are correct. Further, in light of Rehn's own testimony at the trial below, Rehn's argument on appeal that the Property was not the marital home stands debunked.

The mere fact that a property was bought after a representation does not necessarily shield it from an attorney's lien, particularly if it was the subject of or connected to the representation as was the case, here. Mistakes in notices of lien do not invalidate a lien that exists regardless of whether notice is filed with the county recorder.

Moreover, Rehn failed to meet the requirement of making a showing that Appellees actually knew they held no lien or establishing that all of the damages awarded him were even eligible to be awarded in a slander of title action.

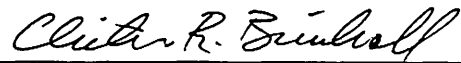
WHEREFORE, Appellees request that this Court reverse the district court's slander of title judgment and order that this case be dismissed with prejudice. Alternatively, if the Court concludes that dismissing the slander of title judgment is inappropriate, Appellees' request that this case be remanded to recalculate Rehn's damages or for other appropriate reason consistent with Appellees' arguments on appeal.

REQUEST FOR ORAL ARGUMENT

Appellees respectfully request oral argument.

Respectfully submitted this 11th day of May, 2016.

CHRISTENSEN LAW



Clinton R. Brimhall

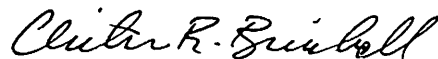
Jeremy R. Miller

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CERTIFICATE OF COMPLIANCE WITH RULE 24(G)(5)(D)

I hereby certify that this brief complies with the requirements of Rule 24(g)(5)(D) of the Utah Rules of Appellate Procedure. This is a Reply Brief of Cross-Appellant that must contain 7,000 words or less. I have used the word processor to count the number of words in this brief, excluding words in the table of contents, table of authorities, and the addendum. The total number of words in this brief is 6,435.

CHRISTENSEN LAW



Clinton R. Brimhall

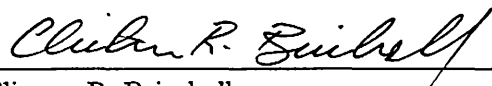
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **REPLY BRIEF OF CROSS-APPELLANT** to be sent via first class U.S. Mail, postage prepaid, on the 11th day of May, 2016, to:

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