

2005

Joel Sill v. Bill Hart, d/b/a Hart Construction : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOEL SILL,)	
)	
Plaintiff-Counterclaim)	
Defendant/Appellant,)	
)	Appellate Case No. 20050245-CA
vs.)	
)	Argument Priority No. 15
BILL HART, d/b/a HART)	
CONSTRUCTION,)	
)	
Defendant-Counterclaimant/Appellee.)	Oral Argument Requested
)	
)	
)	

BRIEF OF APPELLEE BILL HART, d/b/a HART CONSTRUCTION

Appeal from a Final Judgment Entered by the Third Judicial District Court
In And For Summitt County, State of Utah
Honorable Bruce C. Lubeck and Honorable Deno G. Himonas, Presiding

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SEP 22 2005

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September 22, 2005

Utah Court of Appeals
450 South State Street
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Salt Lake City, UT 84114-0230

Re: Joel Sill v. Bill Hart, d/b/a Hart Construction
Appellate Case No. 20050245-CA

Court:

Under cover of this letter, Appellee Bill Hart, d/b/a Hart Construction, provides to the Court a copy of the following case authority that is supplemental to those authorities cited in the Brief of Appellee that is on file herein: Robert Pearson, d/b/a Robert Pearson Construction v. Suzanne J. Lamb, 2005 UT App 383. This supplemental citation is provided now because it is a ruling of this Court made after briefing in this case was completed.

The Pearson case pertains to two of the issues raised in the parties' briefs in this above-referenced pending appeal. First, the argument of Appellant (e.g., Brief of Appellant, pp. 6-21) that Utah Code § 38-1-11(4)(a) (2001), the statute at issue both in this case and in the Pearson case, is "mandatory" and therefore a "jurisdictional" bar to certain mechanics' lien claims. Pearson, 2005 UT App. 383 ¶¶7-12 (holding it is not "mandatory" or "jurisdictional"). Second, the argument of Appellee (Brief of Appellee, pp. 30-32) that the district court's ruling that the statute does not apply to this case in any event should be upheld as being in accord with the underlying purpose of the mechanics' lien statutes to protect those who provide labor and materials that add value to the property of another. Pearson, 2005 UT App. 383 ¶¶8 & 11 (noting and upholding that policy).

Sincerely,

FABIAN & CLENDENIN

Bradley L. Tilt

BLT/jd

Enclosure

cc: David B. Thompson, Attorney for Appellant, w/encl.

This opinion is subject to revision before
publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

----ooOoo----

Robert Pearson dba Robert)	OPINION
Pearson Construction,)	(For Official Publication)
)	
Plaintiff and Appellee,)	Case No. 20040613-CA
)	
v.)	F I L E D
)	(September 9, 2005)
Suzanne J. Lamb,)	
)	2005 UT App 383
Defendant and Appellant.)	

Third District, Silver Summit Department, 020500636
The Honorable Bruce Lubeck

Attorneys: David B. Thompson, Park City, for Appellant
David M. Bennion and Michael P. Petrogeorge, Salt
Lake City, for Appellee

Before Judges Davis, Orme, and Thorne.

DAVIS, Judge:

¶1 Suzanne J. Lamb (Defendant) appeals the trial court's denial of her motion for a new trial, in which she argued that the failure of Robert Pearson (Plaintiff) to comply with Utah Code section 38-1-11(4)(a) divested the trial court of jurisdiction. See Utah Code Ann. § 38-1-11(4)(a) (2001). We affirm.

BACKGROUND

¶2 In October 2002, Plaintiff filed a complaint seeking foreclosure of a mechanics' lien. Defendant filed her answer in December 2002 and an amended answer and counterclaim in February 2003; neither pleading contained allegations that Plaintiff failed to comply with the requirements of the Mechanics' Liens Act. On April 12, 2004, the parties filed stipulations of fact with the district court, stipulating that

Mr. Pearson has complied with all the
statutory procedural requirements for
perfecting and foreclosing on a mechanics'

lien . . . ; Mrs. Lamb does not defend against Mr. Pearson's mechanics' lien claim on these statutory procedural grounds, but simply challenges his right to receive payment of the amounts claimed in the lien.

A bench trial was held thereafter, and the district court entered a memorandum decision in favor of Plaintiff on April 20, 2004.

¶3 On May 26, 2004, Defendant filed a motion for reconsideration (which she now dubs a motion for a new trial), in which she argued that the trial court lacked jurisdiction to hear the foreclosure action because Plaintiff failed to comply with the requirements of section 38-1-11(4)(a) of the Mechanics' Liens Act. The trial court, on June 16, 2004, issued a ruling and order denying Defendant's motion for a new trial, and on July 28, 2004, entered a Final Order and Judgment in favor of Plaintiff.

ISSUE AND STANDARD OF REVIEW

¶4 The only issue before this court is whether Plaintiff's failure to comply with section 38-1-11(4)(a) of the Mechanics' Liens Act divested the trial court of jurisdiction to hear Plaintiff's mechanics' lien foreclosure action. If Plaintiff's failure to comply with section 38-1-11(4)(a) did not divest the trial court of jurisdiction, it is undisputed that Defendant waived that issue, not only by failing to assert it prior to trial but also by stipulation.

¶5 The determination of whether a court has subject matter jurisdiction is a question of law, which we review for correctness, according no deference to the trial court's determination. See Beaver County v. Qwest, Inc., 2001 UT 81, ¶8, 31 P.3d 1147. Questions of statutory interpretation are similarly questions of law that are reviewed "for correctness, giving no deference to the district court's interpretation." Board of Educ. v. Sandy City Corp., 2004 UT 37, ¶8, 94 P.3d 234.

ANALYSIS

¶6 Under section 38-1-11(4)(a) of the Mechanics' Liens Act, lien claimants filing an action to enforce a lien must serve on the defendant-owner of a residence instructions relating to the owner's rights and a form affidavit along with the complaint. See Utah Code Ann. § 38-1-11(4)(a) (2001). Pursuant to section 38-1-11(4)(e), "[i]f a lien claimant fails to provide to the owner of the residence the instructions and form affidavit required by [s]ubsection 4(a), the lien claimant shall be barred

from maintaining or enforcing the lien upon the residence." Id. § 38-1-11(4)(e). On appeal, Defendant argues that the language of section 38-1-11(4)(e) makes subsection 4(a) "mandatory," thereby making it a jurisdictional provision that cannot be waived and can be raised at any time. Defendant thus contends that Plaintiff's failure to comply with requirements of section 38-1-11(4)(a) deprived the trial court of jurisdiction to hear Plaintiff's lien foreclosure action.

¶7 Whether a procedure prescribed by statute is jurisdictional depends on whether the procedure is "mandatory" or "directory." Beaver County v. Utah State Tax Comm'n, 919 P.2d 547, 552 (Utah 1996). And while a procedure is generally considered "mandatory" when "consequences are attached to the failure to act," Stahl v. Utah Transit Auth., 618 P.2d 480, 481 (Utah 1980), the purpose of the statute and the legislature's intent are of the utmost importance:

There is no universal rule by which directory provisions may, under all circumstances, be distinguished from those which are mandatory. The intention of the legislature, however, should be controlling and no formalistic rule of grammar or word form should stand in the way of carrying out the legislative intent The statute should be construed according to its subject matter and the purpose for which it was enacted.

Kennecott Copper Corp. v. Salt Lake County, 575 P.2d 705, 706 (Utah 1978) (alterations in original) (quotations and citation omitted); see also Stahl, 618 P.2d at 482 ("A statute is, of course, to be construed in light of its intended purposes."). Therefore, "[a] designation is mandatory, and therefore jurisdictional, if it is 'of the essence of the thing to be done.'" Beaver County v. Utah State Tax Comm'n, 919 P.2d at 552 (quoting Kennecott Copper Corp., 575 P.2d at 706) (other quotations and citations omitted); see also Projects Unlimited, Inc. v. Copper State Thrift & Loan Co., 798 P.2d 738, 744 (Utah 1990) ("We must determine whether the rigorous interpretations urged by [defendants] are necessary to protect the interests of the parties in the instant situation. Unless we find that [Plaintiff's] alleged failures have compromised a purpose of the mechanic[s'] lien statute, those failures will be viewed as technical").

¶8 The Mechanics' Liens Act was passed primarily to protect laborers who have added value to the property of another, but also to protect the property owner's right to convey clear title:

[T]he purpose of the mechanic[s'] lien act is remedial in nature and seeks to provide protection to laborers and materialmen who have added directly to the value of the property of another by their materials or labor. On the other hand, we recognize that liens create an encumbrance on property that deprives the owner of his ability to convey clear title and impairs his credit State legislatures and courts attempt to balance these competing interests through their mechanic[s'] lien statutes and judicial interpretations thereof.

Projects Unlimited, 798 P.2d at 743 (quotations and citations omitted); see also Mickelsen v. Craigco, Inc., 767 P.2d 561, 563 (Utah 1989) ("[T]he mechanic[s'] lien law was enacted for the benefit of those who perform the labor and supply the materials . . ."). We must therefore balance a laborer's right to be paid for his labor and materials with the negative impact that liens have on an owner's credit and her ability to convey clear title. Plaintiff's failure to serve Defendant with instructions and a form affidavit is irrelevant to the lien's negative impact, whereas invalidating Plaintiff's right to be paid for his labor simply because he made a procedural error clearly contravenes the intended purpose of the Mechanics' Liens Act. Quite simply, the requirements of section 38-1-11(4)(a) have nothing to do with "the essence of the thing to be done," Beaver County v. Utah State Tax Comm'n, 919 P.2d at 552 (quotations and citations omitted), and Plaintiff's failure to comply therewith did not compromise a purpose of the Act.

¶9 Furthermore, the procedures set forth in section 38-1-11(4)(a) are not "mandatory" because no consequences attach to the failure to act. See Stahl, 618 P.2d at 481. The omission could have been remedied at any time during the course of the proceedings, or, had the trial court dismissed Plaintiff's mechanics' lien foreclosure action for failure to adhere to section 38-1-11(4)(a), the dismissal could have been easily addressed by either refiling or, depending on the timing, through Utah's savings statute. See Utah Code Ann. § 78-12-40 (2002). Under Utah's savings statute,

[i]f any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, . . . [the plaintiff]

may commence a new action within one year after the reversal or failure.

Id.

¶10 Although Plaintiff may have failed to serve Defendant with the instructions and form affidavit required by section 38-1-11(4)(a), there is no question that he commenced his action within due time. "A civil action is commenced (1) by filing a complaint with the court, or (2) by service of a summons together with a copy of the complaint." Utah R. Civ. P. 3(a). And section 38-1-11(1) gives lien claimants twelve months after completion of the contract, or 180 days after the lien claimant last performed labor, to file suit. See Utah Code Ann. § 38-1-11(1). Here, Plaintiff performed labor at the residence throughout the spring of 2002 and filed his complaint seeking foreclosure in October 2002. Because Plaintiff's action was timely commenced and a dismissal for failure to adhere to section 38-1-11(4)(a) would have been a dismissal "otherwise than upon the merits," id. § 78-12-40, Plaintiff could have remedied his failure simply by commencing a new action within one year after the dismissal.

¶11 Unlike "mandatory" designations, "a designation is merely directory, and therefore not jurisdictional, if it is 'given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey no prejudice will occur to those whose rights are protected by the statute.'" Beaver County v. Utah State Tax Comm'n, 919 P.2d at 552 (quoting Kennecott Copper Corp., 575 P.2d at 706) (other quotations and citations omitted); see also Projects Unlimited, 798 P.2d at 744-50 (upholding a lien despite its errors because such errors were technical and the defendant suffered no prejudice). Therefore, Utah courts have held that certain procedures required by statute are inconsequential to a court's jurisdiction. For example, in Labelle v. McKay Dee Hospital Center, 2004 UT 15, 89 P.3d 113, the court determined that a mailing requirement of the Medical Malpractice Act was not jurisdictional, stating that construing the statute "in a manner to impose jurisdictional consequences on a claimant's every procedural stumble is to misapprehend the Medical Malpractice Act[]." Id. at ¶14. While the court "[did] not ignore the fact that the requirement . . . [was] mandatory," it stated that the mailing requirement was "a minor component of the Malpractice Act's prelitigation scheme. It serve[d] a wholly informational role, and it is difficult to envision how [defendants] could be prejudiced by being deprived of [the mailing]." Id. at ¶17. And in Kiesel v. District Court, 96 Utah 156, 84 P.2d 782 (1938), the court interpreted a statute requiring a plaintiff to file an undertaking, or bond, securing costs contemporaneously with the complaint. The court held that

the statute, while affording no discretion to the court, still did not create a jurisdictional prerequisite:

The language of [the statute], while positive and mandatory, when considered altogether makes the requirement only that the undertaking be filed contemporaneously with the complaint. This certainly is no stronger than the language of [other] statutes which require the bond to be filed before commencing action. But we think the legislature intended to make the requirement so positive and unequivocal as to require the court to dismiss the suit if the bond was not filed at least contemporaneously with the complaint if [a] motion to dismiss was timely made. Otherwise, the court could continue to take jurisdiction.

Id. at 784.¹

¶12 Like the statute construed in Kiesel, the requirements of section 38-1-11(4)(a) are not conditions precedent to filing suit; they simply require action contemporaneous with the filing of the complaint. Furthermore, like the Medical Malpractice Act construed in Labelle, the Mechanics' Liens Act creates numerous procedural hurdles to enforcing a lien. See Utah Code Ann. § 38-1-7 (2001) (delineating the contents of a notice of lien, and the time frame in which it must be filed); id. § 38-1-11(1), (2) (delineating the time frame in which suit and a lis pendens must be filed). Section 38-1-11(4)(a) of the Mechanics' Liens Act simply requires that certain instructions and a form affidavit be served on the defendant; these requirements are "wholly informational" and but "a minor component" of the Mechanics' Liens Act. Labelle, 2004 UT 15 at ¶17. Finally, like the

¹Other jurisdictions have held that certain "mandatory" procedures are inconsequential to a court's jurisdiction. See Hodusa Corp. v. Abray Constr. Co., 546 So. 2d 1099, 1101 (Fla. Dist. Ct. App. 1989) (interpreting a statute that required a contractor to provide a residence owner an affidavit prior to bringing suit, the court stated that "[a]lthough the furnishing of the affidavit is a condition precedent to bringing an action to foreclose a mechanic[s'] lien, failure to do so does not create a jurisdictional defect"); Campbell v. Graham, 357 P.2d 366, 368 (Colo. 1960) (interpreting a statute that barred businesses that had not filed trade name affidavits from prosecuting suits, the court rejected the proposition that trade name filing is a jurisdictional prerequisite to filing a suit).

defendants in Labelle, it is difficult to envision how Defendant here was prejudiced by being deprived of the instructions and form affidavit required by section 38-1-11(4) (a). Defendant has not alleged that she was prejudiced. In fact, she even stipulated that she was not defending against the lien foreclosure on statutory procedural grounds, but simply "challenge[d] his right to receive payment of the amounts claimed in the lien." Quite simply, the requirements of section 38-1-11(4)(a) are "directory, and therefore not jurisdictional," as they merely concern "the proper, orderly and prompt conduct of the business" and Defendant has suffered no prejudice. Beaver County v. Utah State Tax Comm'n, 919 P.2d 547, 552 (Utah 1996) (quotations and citation omitted).

¶13 Defendant cites numerous cases involving the Utah Governmental Immunity Act [UGIA], stating that the UGIA's notice requirement is comparable to the requirements of section 38-1-11(4)(a). Such an analogy is erroneous, as the UGIA's notice requirement has nothing whatsoever to do with service and mailing but instead provides that a claim against the state is barred unless notice thereof is filed with the state within one year after the cause of action arises. See Utah Code Ann. § 63-30d-402 (2004); Stahl v. Utah Transit Auth., 618 P.2d 480, 481 (Utah 1980). In this way, the UGIA's notice requirement is far more analogous to Utah Code section 38-1-11(1) and (2), which mandates that a mechanics' lien foreclosure action and a lis pendens must be filed within twelve months after completion of the contract or 180 days after the lien claimant last performed labor. See Utah Code Ann. § 38-1-11(1), (2). And like a party's failure to adhere to the UGIA's notice requirements, a party's failure to timely file a mechanics' lien foreclosure action and lis pendens is fatal and cannot be remedied:

The penalty for not commencing an action to enforce a mechanic[s'] lien within the twelve-month period provided in section 38-1-11 is invalidation of the lien When a claimant fails to file the lis pendens within the twelve-month period, the lien itself is not invalidated, but rather it is rendered void as to everyone except those named in the action and those with actual knowledge of the action.

Projects Unlimited, Inc. v. Copper State Thrift & Loan Co., 798 P.2d 738, 751 n.13, 752 (Utah 1990). Utah courts have thus ruled that failure to timely commence a mechanics' lien foreclosure action and file a lis pendens, like failure to timely notify the state of a claim against it, divests the court of jurisdiction. See, e.g., Interlake Distribs., Inc. v. Old Mill Towne, 954 P.2d

1295, 1297-99 (Utah Ct. App. 1998) (holding that liens were void because plaintiffs failed to file a lis pendens); Diehl Lumber Transp. Inc. v. Mickelson, 802 P.2d 739, 742 (Utah Ct. App. 1990) ("Failure to commence a timely mechanic[s'] lien foreclosure action divests the court of jurisdiction."); AAA Fencing Co. v. Raintree Devel. & Energy Co., 714 P.2d 289, 290-91 (Utah 1986) (holding that an untimely mechanics' lien action is a jurisdictional issue and "forecloses [the parties'] rights").

¶14 Comparison between the requirements of section 38-1-11(4)(a) and the UGIA is misplaced also because Utah courts have specifically held that the UGIA is to be "strictly construed," Great W. Cas. Co. v. Utah Dep't of Transp., 2001 UT App 54, ¶9, 21 P.3d 240, whereas "substantial compliance with the [Mechanics' Liens Act] is all that is required," Chase v. Dawson, 117 Utah 295, 215 P.2d 390, 390 (1950) (relating to the legal sufficiency of the notice of lien); see also Projects Unlimited, 798 P.2d at 743 ("Utah courts have recognized that substantial compliance with [the Mechanics' Liens Act's] provisions is all that is required."). "Although courts have differing opinions about how liberally to construe provisions within their mechanic[s'] lien statutes, the modern trend is to dispense with arbitrary rules which have no demonstrable value in a particular fact pattern." Projects Unlimited, 798 P.2d at 744 (quotations and citation omitted). Here, Plaintiff substantially complied with the Act, to such an extent that Defendant did not even notice Plaintiff's oversight until May 2004, more than eighteen months after the complaint was filed and more than one month after Defendant stipulated that Plaintiff had "complied with all the statutory procedural requirements for perfecting and foreclosing on a mechanics' lien." Furthermore, Defendant did not allege how the instructions and form affidavit required by section 38-1-11(a) would have conferred any demonstrable value here, but instead argued that such value (or lack thereof) was "irrelevant" and "of no import." Therefore, Plaintiff's failure to adhere to section 38-1-11(4)(a) did not divest the trial court of jurisdiction.

CONCLUSION

¶15 Since Plaintiff's failure to adhere to section 38-1-11(4)(a) did not divest the trial court of jurisdiction, we affirm the trial court's Final Order and Judgment in favor of, and its award of reasonable attorney fees and costs below to, Plaintiff. See Utah Code Ann. § 38-1-18(1) (2001) (awarding reasonable attorney fees to the "successful party" in a mechanics' lien foreclosure action). Because "[t]he general rule is that when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal," Utah Dep't of Soc. Servs. v. Adams, 806 P.2d 1193, 1197 (Utah Ct. App.

1991), we remand the matter to the district court for calculation of attorney fees reasonably incurred on appeal.

¶16 Affirmed and remanded.

James Z. Davis, Judge

¶17 I CONCUR:

Gregory K. Orme, Judge

¶18 I CONCUR IN THE RESULT:

William A. Thorne Jr., Judge

IN THE UTAH COURT OF APPEALS

JOEL SILL,)	
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Defendant/Appellant,)	
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Construction

PARTIES TO PROCEEDINGS BELOW

Pursuant to Rules 24(a)(1) and 24(b) of the Utah Rules of Appellate Procedure, the following is a complete list of all parties to the trial court proceedings that are the subject of this appeal, and their respective party designations in those proceedings:

1. Joel Sill, Plaintiff and Counterclaim Defendant
2. Bill Hart, d/b/a Hart Construction, Defendant, Counterclaimant, and Third Party Plaintiff
3. Kallie J. Sill, Third Party Defendant

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ADDENDUM No. 1: The trial court’s February 4, 2005, Memorandum Decision

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal transferred from the Utah Supreme Court pursuant to Utah Code § 78-2a-3(2)(j) (2004).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW AND STANDARD OF APPELLATE REVIEW

Whether the trial court correctly interpreted Utah Code § 38-1-11(4)(a) (2001) as not requiring Appellee Bill Hart, d/b/a Hart Construction (“**Hart**”), an original or general contractor, to serve various referenced instructions and forms upon Joel Sill (“**Sill**”) when Hart served Sill’s attorney with a mechanics’ lien foreclosure counterclaim in a lawsuit filed by Sill.

The issue raised on appeal presents a question of statutory interpretation. The trial court’s interpretation of a statute presents a question of law that is reviewed for correctness. *See e.g., Rushton v. Salt Lake County*, 1999 UT 36, ¶ 17, 977 P.2d 1201, 1203 (Utah 1999).

DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES AND RULES

The following determinative statutes are applicable to this appeal:¹

Utah Code § 38-1-11(4)(a) (2001): [Mechanics' Liens] Enforcement --Time for --Lis pendens --Action for debt not affected --Instructions and form affidavit and motion.

(4)(a) If a lien claimant files an action to enforce a lien filed under this chapter involving a residence, as defined in Section 38-11-102, the lien claimant shall include with the service of the complaint on the owner of the residence:

(i) instructions to the owner of the residence relating to the owner's rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act; and

(ii) a form affidavit and motion for summary judgment to enable the owner of the residence to specify the grounds upon which the owner may exercise available rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act. (Emphasis added).

Utah Code § 38-11-107 (2001): [Residence Lien Restriction and Lien Recovery Fund Act] Restrictions upon maintaining a lien against residence or owner's interest in the residence.

(1) A person qualified to file a lien upon an owner-occupied residence and the real property associated with that residence under the provisions of Title 38, Chapter 1, Mechanics' Liens, who provides qualified services under an agreement effective on or after January 1, 1995, other than directly with the owner, shall be barred after January 1, 1995, from maintaining a lien upon that residence and real property or recovering a judgment in any

¹ The parties are in agreement that the statutes determinative of this appeal are those that were in place when Hart filed his counterclaim that is the subject of this appeal in February of 2002. *See e.g.*, Brief of Appellant, 2 n.1. Unless otherwise specifically noted, therefore, all citations to and quotations of statutory provisions that appear in this brief are to the versions that were in effect in February of 2002 (*i.e.*, those appearing in the 2001 version of the Utah Code).

civil action against the owner or the owner-occupied residence to recover monies owed for qualified services provided by that person if: (Emphasis added).

Utah Code § 38-11-204 (2001): [Residence Lien Restriction and Lien Recovery Fund Act] Claims against the fund --Requirement to make a claim -- Qualifications to receive compensation.

(3) To recover from the [Residential Lien Restriction and Lien Recovery F]und, regardless of whether the residence is occupied by the owner, a subsequent owner, or the owner or subsequent owner's tenant or lessee, a qualified beneficiary shall establish that:

. . .

(b) the owner has paid in full the original contractor, licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, real estate developer, or factory built housing retailer under Subsection (3)(a) with whom the owner has a written contract in accordance with the written contract and any amendments to the contract, and: (Emphasis added).

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings and Disposition Below

This action was filed by Sill, who filed a complaint claiming, among other things, that Hart, an original general contractor with whom Sill had directly contracted, had breached the parties' agreement for the construction of improvements to certain real property owned by Sill (the "**Property**"). (R. 1-33). After being served with Sill's complaint, Hart filed an answer that also included a counterclaim (the "**Counterclaim**"). (R. 34-36; R. 37-58; R. 59-81). In his Counterclaim Hart sought, among other things, to

foreclose a mechanics' lien Hart had recorded on the title to the Property in order to secure payment from Sill for the improvements Hart had made to the Property. (R. 53-55, 57; R. 76-78, 80).

Two and a half years later, in the week just before the start of the trial, Sill for the first time raised to Hart an argument that Hart's mechanics' lien foreclosure claim was allegedly defective because Hart had not served upon Sill (i) instructions relating to rights available under Utah's Residence Lien Restriction and Lien Recovery Fund Act (Utah Code § 38-11-101 *et seq.* – hereinafter, the “**Lien Recovery Fund Act**”), and (ii) a form affidavit and motion for summary judgment for Sill to file with the court below to exercise rights under the Lien Recovery Fund Act. Sill argued that service of such instructions and forms was required of Hart under Section 38-1-11(4)(a) of Utah's mechanics' lien statutes (“**Subsection (4)(a)**”). Sill further argued that the trial court lacked jurisdiction to rule upon Hart's mechanics' lien Counterclaim since he had not served such items upon Sill with the Counterclaim, allegedly based upon Section 38-1-11(4)(e) of the mechanics' lien statutes, which stated that “[i]f the lien claimant fails to provide the owner of the residence the instructions and form affidavit required by Subsection (4)(a), the lien claimant shall be barred from maintaining or enforcing the lien upon the residence.” The parties reserved for post-verdict determination the issue of whether Hart was required to comply with Subsection (4)(a). (R. 1050-52).

After trial, the jury returned a verdict in favor of Hart, awarding him a principal amount of \$314,500.00 on his unjust enrichment and mechanics' lien claims, plus interest and attorney fees and costs. (R. 1188-93).

Hart then attempted to reduce the jury's verdict to a judgment. Sill opposed that effort only insofar as it included entry of judgment for prejudgment interest, and attorney fees and certain costs, and a foreclosure of the mechanics' lien. Sill argued that Hart was entitled to those items only on his mechanic's lien claim, but that Hart's mechanic's lien claim was barred because Hart had not served upon Sill with Hart's mechanics' lien foreclosure Counterclaim various instructions and forms referenced in Subsection (4)(a) of the mechanics' lien statutes regarding rights available to certain homeowners under the Lien Recovery Fund Act. (R. 1244-48, 1369-79, 1383-94, 1411-20, 1448-53).

After extensive briefing by the parties, Sill's Subsection (4)(a) arguments came on for hearing before the Third Judicial District Court, Summit County, State of Utah, the Honorable Judge Deno G. Himonas presiding. After the hearing, on February 4, 2005, the trial court issued a "Memorandum Decision" (the "**Decision**") declaring:

The plain language of Subsection (4) compels the conclusion that the Utah Legislature limited the obligation of a lien claimant to serve a homeowner with the materials referenced in Subsection (4)(a) to those instances in which the lien claimant was initiating an action through service of a complaint and not a counterclaim. First, while "[t]he word 'action' without more is arguably broad enough to encompass any type of judicial proceeding, including counterclaims" (*Local Union No. 38, Sheet Metal Workers' Int'l v. Pelella*, 350 F.3d 73, 81 (2nd Cir. 2003) (citations omitted)), read in the context of Subsection (4), it is qualified by the reference to "service of the complaint." Second, this reference to a complaint is to a pleading that is filed at the commencement of a lawsuit and that is commonly understood to be distinct from a counterclaim. *See e.g., Local Union No. 38, Sheet Metal Workers' Int'l v. Pelella*, 350 F.3d at 82; *see also* Utah Rules of Civil Procedure 3 ("A civil action is commenced (1) by filing of a complaint . . . , or (2) by service of a summons together with a copy of the complaint") & 7(a) (distinguishing a complaint from other pleadings). Third, had the Legislature intended Sill's construction, it could have easily provided for it (*e.g.*, by substituting the words "initial

pleading” for “complaint” in Subsection (4)(a)). [R. 1464 (Decision, p. 3 (footnotes omitted) (emphasis added))].

Since Sill (rather than Hart) filed this action and served a “complaint,” and since what Hart filed was an Answer that included the Counterclaim in this case that was initially filed by Sill, the trial court held Hart was not required to serve upon Sill any of the materials referenced in Subsection (4)(a), that Hart’s lien foreclosure Counterclaim therefore was valid, and that Hart was therefore entitled to recover prejudgment interest, attorney fees, and costs. (R. 1462-66 (Decision)).

Consistent with the Decision, a “Final Judgment, Order and Decree of Foreclosure” (the “**Order**”) was signed, approved as to form by legal counsel for Sill, and was then submitted to and was entered by the trial court on February 24, 2005. The Order, among other things, confirmed the validity and enforceability of Hart’s mechanics’ lien foreclosure Counterclaim and declared the Property foreclosed pursuant to Hart’s Counterclaim in order to pay the amounts declared to be due and owing to Hart from Sill. (R. 1467-71).

It is the Decision and Order which are the subject of Sill’s appeal. Copies of the Decision and Order are attached hereto as Addenda Nos. 1 and 2, respectively.

II. Statement of Facts

1. At all times relevant to this case, Sill was the owner of certain real property located in Summit County, Utah, which is the subject of this case (identified and referred

to above, and hereinafter, as the “**Property**”). (*See e.g.*, R. 1-33 (Sill’s Complaint, ¶¶ 4, 10.)

2. Sill, as the owner, contracted directly with Hart, as the original or general contractor, for certain improvements to be made to the Property. (*See e.g.*, R. 1-33 (Plaintiff’s Complaint, ¶ 11); p. 3 of the Brief of Appellant (“**Sill’s Brief**”)).

3. In January, 2002, Sill filed this action and a complaint against Hart claiming, among other things, a breach of the parties’ agreement for the improvements to the Property. (*See e.g.*, R. 1-33; Sill’s Brief, p. 3).

4. Sill thereafter served his complaint on Hart. (*See e.g.*, R. 34-36).

5. At all times throughout this action, including when Sill first filed this action, Sill has been represented by legal counsel. (*See e.g.*, R. 1-33; trial court’s docket generally).

6. In February, 2002, after the filing of this action by Sill, and after the filing and service of a complaint by Sill against and on Hart, Hart filed an answer to Sill’s complaint, which answer included a counterclaim, and later an amended counterclaim (identified and referred to above, and hereinafter, collectively, as the “**Counterclaim**”) in which Hart sought, among other things, to foreclose upon a mechanics’ lien Hart had recorded on the title to the Property to secure payment from Sill for Hart’s improvements made to the Property. (*See e.g.*, R. 37-58; R. 59-81; Sill’s Brief, p. 3).

7. Hart served his Counterclaim by mail upon Sill’s attorneys of record in this case. (*See e.g.*, R. 58; R. 81).

SUMMARY OF ARGUMENTS

The trial court correctly interpreted Subsection (4)(a) as being inapplicable to Hart on the facts of this case, and this Court should uphold the trial court's Decision and Order. Subsection (4)(a), on its face, specifically and expressly applies only "if" the lien claimant "files an action" and serves a "complaint" on a homeowner to foreclose a mechanics' lien. In this case it was Sill who filed the action and served a complaint upon Hart. As the defendant in the case, Hart obviously never filed or served any complaint on Sill. Rather, Hart's mechanics' lien foreclosure is instead a part of Hart's Counterclaim. On its face, therefore, Subsection (4)(a)'s requirement of service of certain instructions and forms with a "complaint" when a lien claimant "files an action" expressly does not apply to this case. Sill's arguments for application of Subsection (4)(a) to the facts of this case depend upon and require linguistic contortions by this Court of the clear and plain language of the statute as chosen and drafted by the Legislature. Such distortions are inappropriate and in derogation of established rules of statutory construction.

Additionally, the contorted reading of Subsection (4)(a) that Sill asks the Court to adopt would be of absolutely no benefit to him in any event. The instructions and forms referenced in Subsection (4)(a) of Utah's mechanics' lien statutes, and that Sill argues should have been served on him, relate solely to rights available to certain homeowners in certain circumstances under the Lien Recovery Fund Act. In this case, however, Sill admittedly and indisputably has no rights at all under the Lien Recovery Fund Act. To begin with, the Lien Recovery Fund Act only protects homeowners from liens of subcontractors – not original general contractors – and Sill admits that Hart was not a

subcontractor, but rather the general contractor with whom he had contracted directly. Moreover, the Lien Recovery Fund Act protects homeowners (from liens and claims of subcontractors only) only after the homeowner has paid the general contractor in full, which Sill did not do. Sill therefore fails the requirements of the Lien Recovery Fund Act and has no rights under it. Since Subsection (4)(a) relates only to service of instructions and forms relating to the homeowner's rights under the Lien Recovery Fund Act, and since Sill has no such rights of any kind in this case, Subsection (4)(a) does not require service of the referenced instructions and forms in this case which simply do not apply and would be of no value or benefit to Sill whatsoever.

This Court also should uphold the trial court's interpretation of Subsection (4)(a) because it is in harmony with, and should reject Sill's desired interpretation which is contrary to, the long-recognized legislative purpose of the mechanics' lien statutes to protect those such as Hart who perform work upon and provide improvements to real property. Sill's argument for application of Subsection (4)(a) as an impediment to Hart's lien claims in this case is contrary to the very language of Subsection (4)(a) itself, and to the mechanics' lien laws generally, all in an attempt to gain a windfall for himself in the form of a luxury home built by Hart without fully paying for it and the attorney fees and costs that Hart has had to expend attempting to collect the amounts due and owing to him by virtue of Sill's refusal to pay.² This Court should not reward Sill with such a windfall

² Recovery of attorney's fees is vitally important to the mechanic's lien scheme. "The purpose of the mechanic's lien is to protect those whose labor or materials have enhanced the value of property. [The attorney fee provision of the mechanic's lien statutes] strengthens that protection by ensuring that someone who successfully uses a

to Hart's substantial detriment, and indeed cannot as a matter of law under the express language as well as the legislative history of the statutes. This Court should instead uphold the trial court's Decision and Order declaring Subsection (4)(a) inapplicable, and otherwise not any bar, to Hart's mechanics' lien foreclosure Counterclaim herein.

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT SUBSECTION (4)(a) HAS NO APPLICATION TO THIS CASE.

A. The Plain Language of Subsection (4)(a) On Its Face Does Not Apply to Hart's Counterclaim Filed In This Case

This Court should affirm the trial court's well-reasoned Memorandum Decision ruling that Hart was not subject to any requirement to serve any instructions or forms under Subsection (4)(a) because the plain language of Subsection (4)(a) simply does not apply to the admitted facts of this case.

At the time Sill initiated this action by filing his complaint, Subsection (4)(a) read as follows:

(4) (a) If a lien claimant files an action to enforce a lien filed under this chapter involving a residence ... the lien claimant shall include with the service of the complaint on the owner of the residence:

(i) instructions to the owner of the residence relating to the owner's rights under [the] Lien Recovery Fund Act; and

mechanic's lien to enforce a payment obligation for such enhancement will not ultimately bear the legal costs of that enforcement action. It also functions as a penalty for one who wrongly fails to pay for enhancement to his property.” *A.K. & R. Whipple Plumbing and Heating v. Guy, supra*, 2004 UT 47, ¶ 24, 94 P.3d 270, 276.

- (ii) a form affidavit and motion for summary judgment to enable the owner of the residence to specify the grounds upon which the owner may exercise available rights under [the] Lien Recovery Fund Act. [Utah Code Ann. § 38-1-11 (2001) (emphasis added)].

On its face, Subsection (4)(a) specifically, clearly, and expressly applies only “if” the lien claimant “files an action” and serves a “complaint” on a homeowner to foreclose a mechanics’ lien. On its face, therefore, Subsection (4)(a) simply does not apply to this case in which it is Sill, the homeowner, who is the plaintiff that filed the action and served a complaint. As the defendant, Hart obviously never served a complaint on Sill. Rather, Hart’s pleading was an answer that included a compulsory counterclaim to foreclose his mechanic’s lien. *See* Utah R. Civ. P. 7(a)³; Utah R. Civ. P. 13(a).⁴

It is well-settled that when interpreting a statute the court must interpret the actual words appearing on the face of the statute itself, according to their plain and ordinary meaning, and that the court may “look beyond the plain language only if [it] find[s] some ambiguity.” *State v. Burgess–Beynon*, 2004 UT App 312, 99 P. 3d 383. When faced with questions of statutory construction, courts must presume “that each term in the

³ Utah R. Civ. P. 7(a) states:

(a) *Pleadings*. There shall be complaint and an answer; a reply to a counterclaim; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. **No other pleading shall be allowed**, except that the court may order a reply to an answer or a third-party answer. (emphasis added)

⁴ Utah R. Civ. P. 13(a) states in relevant part:

(a) *Compulsory counterclaims*. **A pleading shall state as a counterclaim** any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. (emphasis added)

statute was used advisedly.” *Gillman v. Sprint Comm. Co., L.P.*, 91 P.3d 858, 860 (Utah Ct. App. 2004). Also, “any interpretation which renders parts or words in a statute inoperative or superfluous is to be avoided.” *Lund v. Brown*, 11 P.3d 277, 282 (Utah 2000).

The Utah Legislature was very precise when it designated only one of the six pleadings allowed under Utah R. Civ. P. 7(a) (*i.e.*, a complaint) as being subject to the requirements of Subsection (4)(a). The Legislature could easily have required that the instructions and summary judgment forms referred to in Subdivision 4(a) be served with “the complaint or the answer containing a counterclaim,” or simpler yet, the Legislature could have used the term “pleading” or “initial pleading,” instead of “complaint.” It did not. Rather, it specifically and expressly referred exclusively to a “complaint” as the pleading with which certain summary judgment instructions and forms must be served.⁵ The trial court rightly concluded, therefore, that the Legislature meant what it said in Subsection (4)(a) and used the term “complaint” purposefully and advisedly in limiting the types of “an action” in which a lien claimant is required to serve the referenced summary judgment instructions and forms upon a homeowner.

⁵ The existence of Utah Code Sec. 78-7-35 confirms unequivocally that the Legislature knows there are various different types of pleadings that may be filed in a lawsuit. That statute separately delineates the filing fees that apply to a “complaint,” and to a “counterclaim,” “crossclaim,” “complaint in intervention,” and “third party complaint.” This confirms that the Legislature’s exclusive reference to the filing of a “complaint” in Subsection (4)(a) was purposeful, and must be respected and enforced by the Court. *See e.g., State v. Hobbs*, 64 P.3d 1218, 1222 (Utah Ct. App. 2003) (in statutory construction the expression of one thing implies the exclusion of another, and omissions in statutory language must be taken note of and given effect); *Sorenson’s Ranch School v. Oram*, 36 P.3d 528, 531 (Utah Ct. App. 2001) (same).

Any interpretation of Subsection (4)(a) that would broaden its application beyond cases in which the lienholder itself first files the action and serves a “complaint” on the homeowner renders the Legislature’s careful wording inoperative and meaningless. Since Subsection (4)(a) on its face expressly applies only when a lienholder first files an action and serves the homeowner with a “complaint,” and since neither of these things occurred in this case, Subsection (4)(a) does not apply to Hart’s mechanic’s lien foreclosure Counterclaim. This Court should therefore uphold the trial court’s ruling.

i. None of Sill’s arguments make Hart’s Counterclaim into a “complaint” that would be subject to Subsection (4)(a)

In trying to make the square peg of this case fit into the round hole of Subsection (4)(a), Sill tries several ways to make Hart’s Counterclaim appear to be a “complaint.” In addition to being contrary to the plain language of Subsection (4)(a) itself and all of the rules of statutory construction noted above, each of Sill’s arguments also fails for the reasons discussed below.

a. There is no such thing as a “counterclaim complaint”

Sill first tries to satisfy Subsection (4)(a) by repeatedly referring to Hart’s Counterclaim as a “counterclaim complaint.” Use of the term “counterclaim complaint” was a tactic that Sill attempted without avail in his memoranda filed with the trial court. There is no such thing, however, as a “counterclaim complaint.” Rule 7(a) of the Rules of Civil Procedure (both state and federal) define the various types of pleadings that exist

in civil matters. There is no mention of any such thing as a “counterclaim complaint” in those rules, which conclude by stating “[n]o other pleading shall be allowed.” *See* Utah R. Civ. P. 7(a); Fed. R. Civ. P. 7(a).

Sill cites four cases in support of his claim that the term “counterclaim complaint” nevertheless is “routine”: *Berkeley Investment Group, Ltd. v. Colkitt*, 259 F.3d 135, 138 (3rd Cir. 2001); *Foundation for Interior Design Educ. Res. v. Savannah College of Art & Design*, 244 F.3d 521, 531 (6th Cir. 2001); *Federal Kemper Life Assur. Co. v. Ellis*, 28 F.3d 1033, 1038 (10th Cir. 1994); *Lundahl v. Quinn*, 2003 UT 11, ¶ 1, 67 P.3d 1000.

Aside from the fact that four isolated references to the use of such term in courts throughout the entire country is hardly “routine,” none of Sill’s four cited cases is of any avail to him in any event because there was no substantive significance attached by those courts to their occasional loose use of the term “counterclaim complaint.” Certainly none of those cases dealt with Subsection (4)(a) which is at issue in this case, nor even involved any statutory language expressly referring specifically and only to a “complaint” as a document triggering application of certain statutory requirements, as Subsection (4)(a) does.

This Court should not use a made up term like “counterclaim complaint,” whether use of such a term is “routine” outside of the mechanics’ lien context or not, to circumvent the express language of Subsection (4)(a), and its direct and specific reference to a “complaint” as the exclusive pleading with which various other forms must in certain cases be served on a homeowner. To do so would render the Legislature’s use of the term “complaint” in

Subsection (4)(a) meaningless, “inoperative or superfluous [and] is to be avoided.” *See e.g., Lund v. Brown*, 11 P.3d 277, 282 (Utah 2000).

b. The *American Rural* interpretation of “action” under 38-1-18 does not apply to the fundamentally different language of Subsection (4)(a)

Sill also argues that bringing a counterclaim is the same thing as filing an action and serving a complaint for purposes of Subsection (4)(a). Sill purportedly bases that argument upon the statement in *American Rural Cellular, Inc. v. Systems Comm. Corp.*, 939 P.2d 185 (Utah Ct. App. 1997), that “a counterclaim to foreclose [a] mechanics’ lien ... clearly qualifies as ‘an action brought to enforce any lien’ under the mechanics’ lien statute.” (Sill’s Brief, p. 15 (citing *American Rural*, 939 P.2d at 193). From that Sill argues the Legislature must have intended to adopt the *American Rural* interpretation of “action” as including a counterclaim when it used the word “action” in Subsection (4)(a) that was enacted four years after the *American Rural* decision. (Sill’s Brief, p. 15). However, Sill’s argument is fatally flawed because of, and indeed is contradicted by, the striking difference in the statutory provision at issue in *American Rural* and what the Legislature later said in Subsection (4)(a).

The statute at issue in *American Rural* was Utah Code Section 38-1-18, regarding awards of attorney fees. At the time of the *American Rural* decision, that provision stated, in its entirety:

In any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys’ fee, to be fixed by the court, which shall be taxed as a cost in the action. (Emphasis added).

The expansive language of section 38-1-18 allowing fees to the prevailing party “in any action brought” is markedly different than the conditional and restrictive Subsection (4)(a), which states that certain forms and instructions are to be served only “if” the lien claimant “files an action” and serves a “complaint” on the homeowner. The fact that in Subsection (4)(a) the Legislature chose to have that provision apply only in certain limited circumstances “if” certain facts are present is a major distinction from section 38-1-18 which the Legislature stated applies in “any” action.⁶ Most importantly, however, is Subsection (4)(a)’s statement of what must be present for it to apply – specifically, the lien claimant must be the one who “files an action” and serves a “complaint.” “Filing” an “action” is different than “bringing” a counterclaim, as shown unequivocally by the Legislature’s use in Subsection (4)(a) of the term “complaint.” The addition of that qualifying term shows the Legislature’s intent to distinguish and limit the term “action” as used in Subsection (4)(a) from the expansive definition that applies under 38-1-18 as interpreted for that section by the *American Rural* decision. Had the Legislature intended that same expansive definition to apply under Subsection (4)(a), it would have left the term “action” unconditioned and unqualified as it did in 38-1-18; it

⁶ Sill argues that the *American Rural* Court placed no significance on the word “any” in the language of section 38-1-18. He focuses on the fact that the *American Rural* Court said that a counterclaim “clearly qualifies as ‘an action brought to enforce any lien’ under the mechanics’ lien statute.” (Sill’s Brief, p. 19 (quoting *American Rural*, 939 P.2d at 193 (emphasis added by Sill)). Sill’s argument is an attempted distinction without a difference, since the Court’s ruling in *American Rural* was interpreting the language of 38-1-18, which at the time, as it does now, referred to “any action.”

would not have added to Subsection (4)(a) the conditional term “if” and the limiting and qualifying reference to a “complaint.”

Sill argues that “it is simply not reasonable to conclude...that the word ‘complaint’ serves to restrict the term ‘action,’ such that ‘action’ does not include a counterclaim.” (Sill’s Brief, p. 19). In making that argument Sill relies upon *Wilson v. Baldwin*, 519 S.E.2d 251 (Ga. App. 1999) and *Brink’s Inc. v. City of New York*, 533 F.Supp. 1122 (S.D.N.Y. 1982) to suggest that other courts find a “complaint” and a “counterclaim” to be effectively the same thing. Sill’s reliance on these two cases, however, is misplaced. To begin with, neither of those cases dealt with the type of mechanic’s lien statute at issue in the case at bar where there is a clear and express reference to service of a “complaint” as the triggering event for something. In fact, both of those cases actually support the trial court’s ruling in the case at bar that the Utah Legislature’s exclusive reference to a “complaint” in Subsection (4)(a) does not apply to or include counterclaims. That is because the statutes at issue in the *Wilson* and the *Brink’s* cases both expressly equated the term complaint with the term counterclaim. *Wilson*, 519 S.E.2d at 252 (quoting the statute there at issue as prohibiting bringing “a complaint seeking to obtain a change of legal custody” in two situations, one of which included “as a counterclaim or in any other manner in response to a petition for a writ of habeas corpus seeking to enforce a child custody order”); *Brink’s*, 533 F.Supp. at 1123 n.3 (quoting the dispositive statute in that case as stating that “[a] cause of action contained in a counterclaim or a cross-claim shall be treated, as far as practicable, as if it were contained in a complaint”). Those statutes, and therefore those cases, stand in stark

contrast to Utah’s Subsection (4)(a) at issue in this case, which refers exclusively to a “complaint,” and draws no parallel at all between a complaint and a counterclaim. The exclusive reference to a “complaint” in Subsection (4)(a) qualifies and gives meaning to the term “action,” as the trial court correctly reasoned, and must be respected and enforced. *See e.g., Lund v. Brown*, 11 P.3d 277, 282 (Utah 2000) (“[A]ny interpretation which renders parts or words in a statute inoperative or superfluous is to be avoided.”); *Gillman v. Sprint Comm. Co., L.P.*, 91 P.3d 858, 860 (Utah Ct. App. 2004) (courts must presume “that each term in the statute was used advisedly”); *State v. Hobbs*, 64 P.3d 1218, 1222 (Utah Ct. App. 2003) (in statutory construction the expression of one thing implies the exclusion of another, and omissions in statutory language must be taken note of and given effect); *Sorenson’s Ranch School v. Oram*, 36 P.3d 528, 531 (Utah Ct. App. 2001) (same).

c. Sill’s own authorities confirm that a “complaint” is different from a counterclaim

Sill argues that the “commonly accepted meaning” of the terms “action” and “complaint” appearing in Subsection (4)(a) includes counterclaims. That argument, however, is contrary to his own cited authorities and his recognition of the governing rules of statutory construction that courts must presume “each [statutory] term is used advisedly,” and that “each term in a statute should be interpreted according to its usual and commonly accepted meaning.” (Sill’s Brief, p. 16 (citations omitted)). For example, Sill himself correctly points out that the “commonly accepted meaning of ‘complaint’” is:

- “The initial pleading that starts a civil action and states the basis for the court’s jurisdiction, the basis for the plaintiff’s claim, and the

demand for relief.” (Sill’s Brief, pp. 16-17 (quoting Black’s Law Dictionary 303 (8th ed. 2004) (emphasis added))).

- “The original or initial pleading by which an action is commenced under codes or Rules of Civil Procedure.” (Sill’s Brief, p. 17 (quoting Black’s Law Dictionary 258 (5th ed. 1979) (emphasis added))).

The Utah Rules of Civil Procedure provide that “[a] civil action is commenced (1) by filing a complaint with the court, or (2) by service of a summons together with a copy of the complaint in accordance with rule 4.” Utah R. Civ. P. 3(a). The Court must presume that the Legislature acted purposefully and advisedly in choosing to use the phrase “service of a complaint” on the homeowner in Subsection (4)(a), meaning (according even to Sill’s own above-quoted definitions) service of the initial pleading by a plaintiff that starts a civil action, as distinguished from a counterclaim which is defined as the diametric opposite of a “complaint,” specifically, “[a] claim presented by a defendant in opposition to or deduction from the claim of the plaintiff.” Black’s Law Dictionary 349 (6th ed. 1990).

Sill cites three purported authorities in support of his argument that counterclaims should be treated as a “complaint” for purposes of Subsection (4)(a): *Harman v. Yeager*, 103 Utah 208, 134 P.2d 695, 696 (1943); *Kane v. Kane*, 558 N.Y.S.2d 627, 629 (A.D. 1990); Wright & Miller, *Federal Practice and Procedure*, § 1184 at 24-25 (3d ed. 2004). None of those authorities, however, have any application to this case. They all were speaking merely to the pleading standards required for counterclaims (*i.e.*, that they must state sufficient facts to support a claim for relief, as distinguished from merely stating a defense to a plaintiff’s complaint). None of them dealt with Subsection (4)(a), nor with

any other similar statute specifying requirements applicable to a particular pleading. On that point, the most closely analogous case to the case at bar of which Hart is aware is the case relied upon by the trial court in its Decision: *Local Union No. 38, Sheet Metal Workers' Int'l v. Pelella*, 350 F.3d 73 (2nd Cir. 2003). In that case, the Second Circuit Court of Appeals was faced with a question of whether a counterclaim that was financed by an employer was barred by a statute stating that “[n]o labor organization shall limit the right of any member thereof to institute an action in any court ... provided further, That [sic] no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action” *Pelella*, 350 F.3d at 80 (emphasis added). The *Pelella* court correctly held that it did not, explaining:

The word “action,” without more, is arguably broad enough to encompass any type of judicial proceeding, including counterclaims.

We need not decide, however, whether the word “action,” standing alone, embraces *Pelella*’s counterclaim for the purposes of section 101(a)(4)’s second proviso. “[T]he meaning of statutory language, plain or not depends on context.” In the statutory context of section 101(a)(4), the word “action is qualified by the phrase “to institute.”

A party institutes an action when he commences a judicial proceeding. A party commences a judicial proceeding when he takes the first step that invokes the judicial process.

An action is therefore instituted when a plaintiff files a complaint as that constitutes the first step invoking the judicial process. In sharp contrast, a defendant asserts a counterclaim in response to a plaintiff’s institution of an action. A counterclaim, by definition, is a “claim for relief asserted against an opposing party after an original claim has been made.” Counterclaims are therefore “generally asserted in the answer” to a previously filed complaint.

In other words, a defendant does not “institute” an action when he asserts a counterclaim. Rather, a plaintiff must commence the action by filing a complaint that names a defendant. This affords the defendant the ability to file a responsive pleading, namely the answer, in which he can include a claim for relief against the opposing party. [*Pelella*, 350 F.3d at 81-82 (citations deleted) (emphasis added)].

Pelella therefore confirms that the word “action” in Subsection (4)(a), that is at issue in this case, must be read in context, and that it is indeed qualified by that section’s use of the word “complaint.” It also confirms that a “complaint” is properly considered as something “in sharp contrast” from a counterclaim. *Pelella* confirms, therefore, that Subsection (4)(a) simply does not apply to this case in which Hart did not file this “action” nor serve a “complaint.”

Sill argues that the statement in *Harman v. Yeager*, 103 Utah 208, 134 P.2d 695, 696 (1943), that a counterclaim is “an original action, instituted by the defendant against the plaintiff,” (Sill’s Brief, p. 18), governs this case rather than *Pelella*, and that Hart’s Counterclaim was therefore the filing of an “action” by Hart and is within the scope of Subsection (4)(a). To the contrary, however, *Pelella* actually is more instructive to this case than is *Yeager*. To begin with, *Yeager* merely held that a counterclaim must state facts that show a basis for relief under general pleading standards. It did not deal with any statutory language like that at issue in Subsection (4)(a) in this case, and it was decided prior to the 1951 adoption of the Utah Rules of Civil Procedure which distinguish between the various pleadings as discussed more fully above. By contrast, the recent *Pelella* decision dealt specifically with a statute, like Subsection (4)(a) that is at issue in this case, which attached certain requirements and limitations only if a certain pleading was employed. *Pelella* therefore is right on point to this case, and it upholds the proposition, which governs in this case, that the statutory language must be followed.

Under the express language of Subsection (4)(a), even accepting as true for the sake of argument Sill's proposition that filing a counterclaim constitutes the filing of an "action," that still is only half of the analysis. Subsection (4)(a) does not apply merely when any "action" is filed by a lien claimant. It expressly applies only "if" the lien claimant files an "action" and serves a "complaint." By Sill's own definitions, a "complaint" is the initial pleading filed by a plaintiff to commence a civil action. But even if Hart's Counterclaim constituted the filing of an "action," it still is not a "complaint," and Hart still never served any "complaint" upon Sill. Hart therefore still is not subject to Subsection (4)(a).

B. Even If There Were Any Merit To Any Of Sill's Arguments, At Most They Would Merely Create Ambiguity As To The Meaning Of Subsection (4)(a), But Related Statutes and Legislative History Confirm The Trial Court's Interpretation That It Does Not Apply To This Case

i. The Lien Recovery Fund Act that is referred to in Subsection (4)(a) of the mechanics' lien statute confirms that Subsection (4)(a) does not apply to this case

It is well-established that when interpreting a statute the Court should look to "the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters." *Miller v. Weaver*, 2003 UT 12 ¶ 17, 66 P.3d 592 (emphasis added). It is highly significant to this case that Subsection (4)(a) only requires service of instructions and forms relating to the homeowner's "rights under [the] Lien Recovery Fund Act." Utah Code Ann. § 38-1-11(4)(a)(i) & (ii) (2001). By his own admissions, Sill has no such rights. There is,

therefore, no requirement to serve him the instructions and forms referenced in Subsection (4)(a).

The Lien Recovery Fund Act protects a homeowner from having to pay twice for the same improvements made to his home. It does so by stating that once a homeowner has paid his general contractor in full, the homeowner and his home are then free from claims and liens of subcontractors who worked on the project. *See* Utah Code Ann. § 38-11-107(1) (2001) (providing for relief only against parties with contracts “other than directly with the owner”); *id.* 38-11-204(3)(b) (providing for relief only after the homeowner “has paid in full the original contractor”); *id.* 38-11-102(14) (defining “original contractor” as “a person who contracts with the owner of real property”).

The Lien Recovery Fund Act has no bearing on the liens and claims of general contractors, and certainly not on the liens and claims of original or general contractors whom the homeowner has not paid in full. Since Sill himself admits that Hart was an original, general contractor, with whom he contracted directly, and since Sill did not pay Hart in full, Sill simply does not have any rights for relief under the Lien Recovery Fund Act in this case. Since Sill had no rights under the Lien Recovery Fund Act, Subsection (4)(a), on its face, did not require Hart to serve Sill with any instructions or summary judgment forms. Utah Code § 38-1-11(4)(a)(i) and (ii) (2001) (referencing serving instructions and forms “relating to the owner’s rights” and “available rights” of the owner under the Lien Recovery Fund Act). *See also e.g., Carr v. Enoch Smith Co.*, 781 P.2d 1292, 1295 (Utah Ct. App. 1989) (stating the law does not require one to do a vain or useless thing); *Leger Const., Inc. v. Roberts, Inc.*, 550 P.2d 212, 214 (Utah 1976)

(same). Subsection (4)(a)'s purpose for requiring the subcontractor to accompany the service of his lien foreclosure complaint on the homeowner with instructions and summary judgment forms is to allow the homeowner to quickly and easily, without necessarily having to incur the expense of retaining counsel, claim the benefit of the Lien Recovery Fund Act (*i.e.*, removal of a subcontractor's lien) by simply completing the forms to swear and certify to the court that he has already paid in full the general contractor for the improvements. Sill could not have made any use of such instructions and forms even if they were served on him, and in any event already had an attorney and had initiated litigation. The forms therefore would have been useless and would not serve any purpose.

Sill argues that it was improper for the trial court to consider as a part of its analysis the admitted fact that Sill has no rights and was not eligible for any relief under the Lien Recovery Fund Act. Sill claims that taking that into consideration somehow “simply reflects the court’s disagreement with a legislative policy decision ... to require a lien claimant to give the Subsection (4)(a) notice to a homeowner who is sued by the lien claimant to enforce a mechanic’s [*sic*] lien, whether or not the owner ultimately is eligible for relief under the [Lien Recovery Fund] Act” and that such policy disagreement “has no place in the process of statutory interpretation.” (Sill’s Brief, p. 20). To the contrary, however, the trial court’s having taken into its consideration the fact that Sill was not entitled to any relief under the Lien Recovery Fund Act actually was a recognition and upholding of the express statutory language and the underlying legislative policy determination. In Subsection (4)(a) the Legislature determined that

homeowners (in the limited circumstances where Subsection (4)(a) otherwise applies due to the filing of a “complaint” by a lien claimant) be notified of their existing, “available” rights under the Lien Recovery Fund Act. Since Sill admittedly had no rights under the Lien Recovery Fund Act, there was nothing of which to notify him, and so no requirement to give any notice of anything, under Subsection (4)(a).

Sill’s citation to *Gottling v. P.R. Inc.*, 2002 UT 95, 61 P.3d 989 for the proposition that the trial court’s ruling was a mere case of judicial disagreement with a legislative policy determination actually is contrary to Sill’s position. Since the language of Subsection (4)(a) on its face simply does not require it, it is really Sill’s argument in this case that the Legislature should require all lien claimants to serve Lien Recovery Fund Act instructions and forms on all homeowners in all cases. As quoted by Sill, however, *Gottling* held that “[w]hat the legislature ‘should’ do is not the question. Rather it is what the legislature has done.” *Gottling*, 2002 UT 95 ¶ 23. On the face of Subsection (4)(a), it is clear that what the Legislature has done is to require service of certain Lien Recovery Fund Act instructions and forms only in certain limited cases, “if” the lien claimant is the one who “files an action” and serves a “complaint,” and even then only to give notice of any available rights under the Lien Recovery Fund Act, of which Sill admits he had none in this case. Sill also argues that it should not be the lien claimant deciding whether the homeowner in a given case is eligible for relief under the Lien Recovery Fund Act, but rather the homeowner itself making that determination, “informed by the instructions and forms served in compliance with Subsection (4)(a).” (Sill’s Brief, pp. 20-21). That argument, however, is tongue-in-cheek, since it is the courts who actually determine who

is eligible for relief under the Lien Recovery Fund Act, guided by the facts of each individual case. The indisputable, and indeed admitted, facts of this case are that Sill is not eligible for any relief under the Lien Recovery Fund Act.

ii. The legislative history of Subsection (4)(a) further confirms that Hart was not subject to it

The legislative history of Subsection (4)(a) confirms that it is only subcontractors whose liens and other collection rights are affected by the Lien Recovery Fund Act that is referenced in Subsection (4)(a), and therefore that it is only subcontractors who are required to provide the referenced Lien Recovery Fund Act instructions and forms. The Senate committee hearings and the Senate floor debates on the proposed addition of the requirement to serve those instructions and forms when Subsection (4)(a) was first adopted in 2001 both confirm that the requirement does not apply to cases like this one in which a general contractor is seeking payment in the first instance from the homeowner for services provided by the general contractor. *See e.g.*, S.B. 254, 1st Substitution, 2001 Gen. Leg. Sess., Senate Business, Labor and Economic Development Standing Committee Meeting held 02/16/01 (stating the Lien Recovery Fund Act is designed to provide protection when a homeowner pays the general contractor who then fails to pay subcontractors); S.B. 254, 1st Substitution, 2001 Gen. Leg. Sess., Senate Floor Debate held 02/20/01 (stating the Lien Recovery Fund Act is aimed at “the situation of the innocent homeowner who pays [his general contractor] for the house, and then ... has to

pay for his house a second time” to remove a lien of a subcontractor whom the general contractor failed to pay).

Likewise, when Subsection (4)(a) was amended in 2004 (to require service of only the instructions and form affidavit, deleting the requirement to serve a form summary judgment motion – *see* Utah Code Ann. § 38-1-11(4) (2004)), the Senate committee hearings and floor debates both again reiterated that the requirement to serve any of those forms only applies to subcontractors and suppliers not in direct privity of contract with the homeowner, and not to general contractors. *See e.g.*, H.B. 32, H.B. 62, H.B. 182, 2004 Gen. Leg. Sess., Senate Business and Labor Standing Committee Meeting held 01/30/04 (noting the primary focus [of the Lien Recovery Fund Act referenced in Subsection (4)(a)] was designed to protect homeowners who deal with the general contractor, and pay the general contractor in full, from having liens filed against their property [by subcontractors] so that they would have to pay twice.”); H.B. 32, H.B. 62, H.B. 182, 2004 Gen. Leg. Sess., Senate Floor Debate held 02/04/04 (noting the Lien Recovery Fund Act was designed “to take care of the suppliers that couldn’t get the money from the [general] contractor” whom the homeowner had paid in full).

In order to give effect to the Legislature’s intent, a general contractor must not be held to a requirement to serve inapplicable and useless instructions and forms upon a homeowner as a part of foreclosing his mechanics’ lien, particularly where the express language of the statute does not require such service. *See State v. Perez*, 999 P.2d 579, 580 (Utah Ct. App. 2000) (quoting *Evans v. State*, 963 P.2d 177, 194 (Utah 1998) (““When we interpret statutes, our primary goal is to give effect to the Legislature’s intent

in light of the purpose the statute was meant to achieve.”). The legislative history confirm what is clear on the face of the statute, that Subsection (4)(a) does not apply to the facts of this case involving a counterclaim filed by an unpaid general contractor.

II. THE OTHER STATUTORY PROVISIONS CITED BY SILL REGARDING REQUIRED TERMS IN CONTRACTS AND LIENS DO NOT SHOW THAT SERVICE OF ADDITIONAL FORMS WAS REQUIRED BY HART IN THE LAWSUIT UNDER SUBSECTION (4)(a)

Sill attempts to derive some significance for his claims in this case from the existence of statutory provisions regarding language that a contractor must include in its contract with a homeowner and regarding what information must be included in a mechanics’ lien notice that is filed with the county recorder.

First, Sill points to a portion of the Lien Recovery Fund Act, which states:

Beginning July 1, 1995, the original contractor or real estate developer shall state in the written contract with the owner what actions are necessary for the owner to be protected under Section 38-11-107 [the Lien Recovery Fund Act] from the maintaining of a mechanic’s lien or other civil action against the owner or the owner-occupied residence to recover monies owed for qualified services. [Utah Code Ann. § 38-11-108(1) (2001)].

Next, Sill points to a portion of the mechanics’ lien statute stating:

(2) The notice [of mechanics’ lien that is recorded with the county recorder’s office] shall contain a statement setting forth: . . . (h) if the lien is on an owner-occupied residence . . . a statement describing what steps an owner, as defined in Section 38-11-102, may take to require a lien claimant to remove the lien in accordance with Section 38-11-107. [*Id.* § 38-1-7 (2001)].

From these provisions Sill argues that it would be “odd, and ultimately unreasonable” (Sill’s Brief, p. 13), for the court to conclude that information and notices

regarding Lien Recovery Fund Act rights would have to be provided by all contractors (general contractors and subcontractors alike) at the contract and lien stages, but would have to be provided at the litigation stage only if the lien claimant initiates the lawsuit and is a subcontractor. However, that is not odd or unreasonable at all in light of the language used in each respective statutory provision. Section 38-11-108(1), cited by Sill, specifically and expressly requires the “original contractor” to state in the written contract information regarding the Lien Recovery Fund Act. Section 38-1-7(2), also cited by Sill, expressly and unqualifiedly states that any notice of mechanics’ lien “shall contain a statement setting forth” information regarding how the homeowner can remove a lien under the provisions of the Lien Recovery Fund Act. Had the Legislature intended Subsection (4)(a) to apply to an “original contractor” such as Hart, it would have said so expressly as it did in Section 38-11-108(i). And had the Legislature intended Subsection (4)(a) to apply in any lawsuit, it also would have said so as it did in Section 38-1-7(2) with respect to contents that must appear in all liens without qualification. The Legislature, however, did not do those things in Subsection (4)(a). Rather, in sharp contrast to such provisions, the plain language of Subsection (4)(a) shows the Legislature made the determination to, and expressly did, limit the circumstances in which Lien Recovery Fund Act instructions and forms must be provided in a litigation context. Specifically, the Legislature expressly required such items be served only “if” a lien claimant “files an action” and serves a “complaint.” Those distinctions between other provisions cited by Sill and Subsection (4)(a) must be upheld and enforced by this Court.

As the trial court correctly recognized, (Decision, p. 4 n.5, Addendum No. 1 hereto), there is very good reason as to why the Legislature chose to limit the circumstances in which Lien Recovery Fund Act instructions and forms must be given in litigation settings. Those instructions and forms are intended to aid the homeowner to quickly remove a subcontractor's lien from his home, without the necessity of the homeowner hiring an attorney and incurring legal fees and costs, when the homeowner has already paid in full the general contractor for the improvements to his home. In such cases, the instructions and forms allow the homeowner to very simply, and without the requirement of incurring the costs of hiring an attorney, defeat the alleged lien of a subcontractor, so the homeowner does not end up paying the subcontractor as well as the general contractor, thus being forced to pay twice for the same improvements. There is of course no need whatsoever for such instructions or forms where the homeowner himself, as in this case, is the one who initiated the lawsuit against a general contractor rather than a subcontractor, and has already retained an attorney for that purpose and admittedly has no rights to obtain any relief pursuant to the referenced instructions and forms.

III. THE TRIAL COURT'S INTERPRETATION OF SUBSECTION (4)(a) IS CONSISTENT WITH THE OVERARCHING PURPOSE OF THE MECHANICS' LIEN STATUTES AND SHOULD BE UPHELD

Sill begins his argument with the proposition that the provisions of Subsection (4)(a) are mandatory, and therefore are "jurisdictional." He argues that any failure by Hart to comply with Subsection (4)(a) would operate as a bar to enforcement of

Hart's mechanics' lien and deprive the trial court of jurisdiction over Hart's mechanics' lien Counterclaim. Sill's labeling of the issue as "jurisdictional" does not change the analyses set forth above. Subsection (4)(a) simply does not apply to this case on its face. Moreover, it is well-settled in Utah that in determining whether a statutory condition is "mandatory" (and therefore is jurisdictional) the "statute should be construed according to its subject matter and the purpose for which it was enacted...." *Kennecott Copper Corp. v. Salt Lake County*, 575 P.2d 705, 706 (Utah 1978); *State v. Helm*, 563 P.2d 794, 797 (Utah 1977) (explaining that in determining whether a statute's requirements are jurisdictional the "statute" should be viewed in harmony with the general rule of statutory construction: That it should be interpreted and applied in light of its purpose.").

It has been long and repeatedly recognized that the intent and purpose of Utah's mechanics' lien statutes, of which Subsection (4)(a) is a part, "manifestly has been to protect, at all hazards, those who perform the labor and furnish the materials which enter into the construction of a building or other improvement." *John Wagner Assoc. v. Hercules, Inc.*, 797 P.2d 1123, 1125 (Utah Ct. App. 1990). Utah courts further have held that "to effect that purpose, the law is to be construed broadly." *Butterfield Lumber, Inc. v. Peterson Mortgage. Corp.*, 815 P.2d 1330, 1334 (Utah Ct. App. 1991) (emphasis added). The trial court's interpretation that Subsection (4)(a) is inapplicable to this case, is in conformity with the express language of Subsection (4)(a) itself, as well as its legislative history, and serves the intended end and purpose of the mechanics' lien statutes to protect those, such as Hart, who perform labor and furnish materials for the improvement of real property.

Although Sill concedes that protection of those who improve real property is indeed the “clear” purpose of Utah’s mechanics’ lien statutes, (Sill’s Brief, p. 12), he argues that the intended purpose of Subsection (4)(a) is to protect homeowners from improper mechanics’ liens by requiring that lien claimants inform owners of rights under the Lien Recovery Fund Act. As shown above, however, to the extent that may arguably be a purpose of Subsection (4)(a), it clearly and expressly applies in limited circumstances only which simply are not present in this case.

Sill’s arguments for application of Subsection (4)(a) to bar Hart’s mechanics’ lien Counterclaim because Hart did not serve with his Counterclaim various instructions and forms regarding a summary judgment procedure that Sill admits was completely inapplicable to this case and of absolutely no use or value to him is contrary to the express language of Subsection (4)(a) itself, its legislative history, and the intent and purpose of the mechanics’ lien statutes in general. This Court should therefore reject Sill’s arguments and uphold the trial court’s well-reasoned Memorandum Decision (Addendum No. 1 hereto) ruling that Subsection (4)(a) does not apply to this case.

CONCLUSION

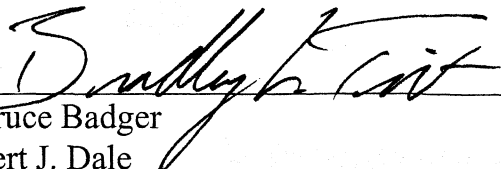
The trial court correctly interpreted Subsection (4)(a) as being inapplicable to Hart on the facts of this case. Subsection (4)(a) specifically and expressly applies only “if” the lien claimant “files an action” and serves a “complaint” on a homeowner to foreclose a mechanics’ lien. As the defendant in the case that was filed by Sill, Hart obviously and indisputably did not file this action nor did he ever serve any complaint upon Sill. Sill’s

arguments for treating Hart's Counterclaim as a "complaint" for purposes of Subsection (4)(a) are unsupportable even under his own cited authorities, and contrary to well-recognized and admittedly dispositive rules of statutory construction. Subsection (4)(a) also does not apply to this case since it references service only of forms relating to rights under the Lien Recovery Fund Act, of which Sill admits he had none as against Hart, so there was nothing required to be served on Sill in any event.

Any interpretation of Subsection (4)(a) to apply to counterclaims of unpaid general contractors such as Hart would be inappropriately contorting the language appearing on the face of Subsection (4)(a) itself, its legislative history, and the related Lien Recovery Fund Act. Such interpretation urged by Sill also is contrary to the underlying purpose of Utah's mechanics' lien statutes to protect those, such as Hart, who provide labor and materials for the improvement of real property, and would result in a substantial and inappropriate windfall to Sill.

For each of the foregoing reasons, this Court should uphold the trial court's Decision and Order declaring Subsection (4)(a) inapplicable to this case. Hart respectfully requests that the Court hear oral argument in this case.

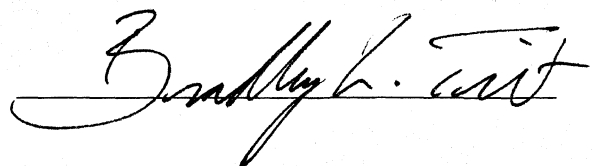
RESPECTFULLY SUBMITTED this 29th day of July, 2005.


P. Bruce Badger
Robert J. Dale
Bradley L. Tilt
Fabian & Clendenin, PC
Attorneys for Defendant/Counterclaimant/
Appellee Bill Hart, d/b/a Hart Construction

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **BRIEF OF APPELLEE BILL HART, d/b/a HART CONSTRUCTION**, and of the Addenda that follow this page, were mailed by first-class mail with postage fully prepaid this 29th day of July, 2005, to:

David B. Thompson
Miller, Vance & Thompson, P.C.
2200 North Park Avenue, Suite D200
P.O. Box 682800
Park City, Utah 84068



ADDENDUM NO. 1

**In the Third Judicial District Court
Summit County, State of Utah**

JOEL SILL,

Plaintiff,

vs.

**BILL HART, d/b/a HART
CONSTRUCTION,**

**Defendant and Third-Party
Plaintiff,**

vs.

KALLIE J. SILL and DOES I-X,

Third-Party Defendants.

MEMORANDUM DECISION

Case No. 020500012

Hon. Deno G. Himonas

From October 13-22, 2004, Defendant and Counterclaimant, Bill Hart d/b/a Bill Hart Construction ("Hart"), and Plaintiff and Counterclaim Defendant, Joel Sill ("Sill"), tried this matter to a jury. At the conclusion of the trial, the jury returned a verdict in Hart's favor of \$314,500.00 on his unjust enrichment and mechanics' lien claims.

Hart now seeks to reduce the verdict to a judgment. To this end, Hart has filed a Motion for Entry of Judgment Upon a Verdict and for Decree of Foreclosure, Award of Prejudgment Interest, Attorney's Fees and Costs (the "Motion"). Sill opposes the Motion on the grounds that (1) "Hart's lien action is barred" because "Hart failed to comply with Utah Code Ann. § 38-1-11(4)(a) (2001) when he served his counterclaim complaint on Sill;"¹ (2) Hart is not entitled to prejudgment interest and attorney's fees on his unjust enrichment claim; and (3) "Hart is entitled to only a portion of the costs he claims." Response to Motion, pp. 3 & 8. For the reasons set forth below, the Court is of the view that Hart's lien claim is valid and that he is entitled to prejudgment interest and attorney's fees as a result. The Court is also of the view that Hart is entitled to a large part of his costs.

¹By stipulation the parties reserved for "post-verdict determination . . . [a]ny issues concerning Hart's compliance with the statutory requirements for maintaining and enforcing a mechanic's lien." Response to Motion for Entry of Judgment Upon Verdict and for Decree of Foreclosure, Award of Prejudgment Interest, Attorney's Fees and Costs ("Response to Motion"), p. 2 (citation and internal quotations omitted).

ANALYSIS

Sill concedes that Hart is entitled to a judgment of \$314,500.00 “for his unjust enrichment claim.” Response to Motion, p. 2. He contests, however, Hart’s entitlement to a judgment on his mechanics’ lien claim. The nub of Sill’s argument is that when Hart filed his counterclaim, he failed to comply with the notice requirements set forth in Section 11(4) of Utah’s mechanics’ lien statute (Title 38, Chapter 1), which provides in pertinent part as follows:

(4)(a) If a lien claimant files an action to enforce a lien filed under this chapter involving a residence, as defined in Section 38-11-102, the lien claimant shall include with the service of the complaint on the owner of the residence: (i) instructions to the owner of the residence relating to the owner’s rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act; and (ii) a form affidavit and motion for summary judgment to enable the owner of the residence to specify the grounds upon which the owner may exercise available rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act.

(b) The lien claimant may file a notice to submit for decision on the motion for summary judgment. The motion may be ruled upon after the service of the summons and complaint upon the nonpaying party, as defined in Section 38-11-102, and the time for the nonpaying party to respond, . . . , has elapsed.

* * *

(e) If a lien claimant fails to provide to the owner of the residence the instructions and form affidavit required by Subsection (4)(a), the lien claimant shall be barred from maintaining or enforcing the lien upon the residence.

Utah Code Ann. § 38-1-11(4) (2001)(emphasis added).² Specifically, Sill argues that Hart never served him with the instructions and “form affidavit and motion for summary judgment” identified in Subsection (4)(a) when he filed his counterclaim. He further argues that this failure dooms Hart’s request for prejudgment interest and attorney’s fees because Hart is only entitled to the same if he prevails on his lien claim.

Hart readily admits that he did not serve the papers referenced above on Sill. He also readily admits that he is not entitled to recover either prejudgment interest or attorney’s fees on his unjust enrichment claim. *See, e.g.*, Motion, pp. 8 & 10-13. But he vigorously disputes the notion that Subsection (4) applies to this dispute.

²The parties are in agreement that the mechanics’ lien statute in place when Hart filed his counterclaim (February 2002) governs this dispute. *See, e.g.*, Response to Motion, p. 3 n.1.

Both parties acknowledge that Subsection (4) is essentially dispositive of this issue and, therefore, contend that the Subsection's plain and unambiguous language requires the Court to rule in their favor. According to Sill, Hart's filing of his counterclaim constituted "fil[ing] an action to enforce a lien" and triggered the notice obligations set forth in Subsection (4). Not so, according to Hart; Subsection (4) applies, he asserts, only if a lien claimant "files an action" and serves a "complaint" (versus a counterclaim) on a homeowner. Hart is correct.

"[W]hen interpreting a statute," a court "looks first to the statute's plain language to determine" legislative intent. *Miller v. Weaver*, 2003 UT 12, ¶ 17, 66 P.3d 592 (citation omitted). In doing so, it must "read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related statutes." *Id.* (citations omitted). And where the statute is clear, the court must not "assess the wisdom of the legislation," but must "implement the law as it reads unless it results in an absurd outcome." *Reedeker v. Salisbury*, 952 P.2d 577, 586 (Utah App. 1998) (citations and internal quotations omitted).

The plain language of Subsection (4) compels the conclusion that the Utah Legislature limited the obligation of a lien claimant to serve a homeowner with the materials referenced in Subsection (4)(a) to those instances in which the lien claimant was initiating an action through service of a complaint and not a counterclaim. First, while "[t]he word 'action' without more is arguably broad enough to encompass any type of judicial proceeding, including counterclaims" (*Local Union No. 38, Sheet Metal Workers' Int'l v. Pelella*, 350 F.3d 73, 81 (2nd Cir. 2003) (citations omitted)), read in the context of Subsection (4), it is qualified by the reference to "service of the complaint."³ Second, this reference to a complaint is to a pleading that is filed at the commencement of a lawsuit and that is commonly understood to be distinct from a counterclaim. *See, e.g., Local Union No. 38, Sheet Metal Workers' Int'l v. Pelella*, 350 F.3d at 82; *see also* Utah Rules of Civil Procedure 3 ("A civil action is commenced (1) by filing of a complaint . . . , or (2) by service of a summons together with a copy of the complaint") & 7(a) (distinguishing a complaint from other pleadings). Third, had the Legislature intended Sill's construction, it could have easily provided for it (*e.g.*, by substituting the words "initial pleading" for "complaint" in Subsection (4)(a)).⁴

³Sill argues that the Utah Court of Appeals disposed of this issue in his favor in *American Rural Cellular, Inc. v. Systems Communications Corp.*, 939 P.2d 185 (Utah App. 1997), when it held that the word "action" in Section 38-1-18 of the mechanics' lien statute included a counterclaim. *Id.*, p. 193. Sill's reading ignores that there are no words or phrases in Section 18 that restrict the word "action" in any way. Indeed, the current statute references "any action." Utah Code Ann. § 38-1-18(1). Sill also ignores that the *American Rural Cellular* decision is in harmony with the purpose of the mechanics' lien statute, while his suggested interpretation is not. *Infra*, pp. 4-5; *American Rural Cell.*, 939 P.2d at 193.

⁴Sill counters that the reference to a "summons and complaint" in Subsection (4)(b) is proof that the Legislature intended the reference to a "complaint" in Subsection (4)(a) be broadly construed. Sill's conclusion just does not follow. Under Utah Rule of Civil Procedure 56, a party may not move for summary judgment until "the expiration of 20 days from commencement of the action." Subsection 4(b) simply makes clear that the motion for summary judgment identified in Subsection (4)(a) is not subject to the same restraint.

The Second Circuit Court of Appeals' decision in *Local Union No. 38, Sheet Metal Workers' Int'l v. Pelella*, 350 F.3d 73, is instructive. There, the Second Circuit was confronted with the question of whether the Labor-Management Reporting and Disclosure Act ("LMRDA") barred an employee's counterclaim because it was financed by an "interested employer." Under Section 101(a)(4) of the LMRDA, an employee could not "institute an action" that was financed by an "interested employer." Therefore, the union argued, Pelella could not maintain his employer-backed counterclaim. The Second Circuit, relying heavily on a decision of the Seventh Circuit Court of Appeals, disagreed. In doing so it noted that:

[A] defendant does not "institute" an action when he asserts a counterclaim. Rather, a plaintiff must commence the action by filing a complaint that names a defendant. This affords the defendant the ability to file a responsive pleading, namely the answer, . . . , in which he can include a claim for relief against the opposing party.

Local Union No. 38, Sheet Metal Workers' Int'l, 350 F.3d at 82. The Second Circuit further noted that this "narrow construction" better comported with legislative purpose, and that the "concerns" that Section 101(a)(4) "seeks to address" were lessened because, "[b]y taking the member to court, the union itself introduces the outside actor into what once had been an internal grievance and opens the door to some measure of interference." *Id.*, pp. 84-85.⁵

Sill counters that in *Harman v. Yeagar Et Ux.*, 134 P.2d 695, 696 (Utah 1943), the Utah Supreme Court wrote that "[a] counterclaim is viewed as an original action . . . tested by the same tests and rules as a complaint." He further counters that Black's Law Dictionary defines "complaint" to include a counterclaim.⁶ While these arguments are not without some persuasive value, they do not carry the day. Moreover, accepting these arguments would only create an ambiguity—an ambiguity that must be resolved in favor of Hart's construction.

To the extent that a statute is ambiguous, it is appropriate for a court to look beyond its language and to its legislative history⁷ and purpose. See *Stahl v. Utah Transit Authority*, 618 P.2d 480, 482 (Utah 1980) (citation omitted); *State v. Burgess-Benyon*, 2004 UT App 312, ¶ 7, 99 P.3d 383 (citation omitted). With respect to the statute at hand, it is well established that its general purpose is "to provide protection to those who enhance the value of a property by supplying labor or materials." *AAA Fencing Company v. Raintree Development and Energy Company*, 714 P.2d 289,

⁵In a similar fashion, the concerns that Subsection (4) guards against are lessened when the homeowner has demonstrated a certain familiarity with the legal process by instituting suit against a lien claimant.

⁶This is a secondary definition. The primary definition, at least according to Black's Law Dictionary, is "[t]he original or initial pleading by which an action is commenced."

⁷Because neither party addressed the legislative history of Subsection (4), the Court assumes that it is either nonexistent or unhelpful.

291 (Utah 1986); *see also Butterfield Lumbar, Inc. v. Peterson Mortgage Assoc.*, 815 P.2d 1330, 1334 (Utah 1991).⁸ That purpose is served by construing Subsection (4) narrowly and consistent with its plain language, as Hart urges.⁹


Finally, the Court rejects Sill's alternative challenge to Hart's entitlement to prejudgment interest and awards Hart the same on his mechanics' lien claim. The Court also awards Hart attorney's fees (as prayed for and established by affidavit) and costs of suit (as described by the Court at the January 31, 2005 hearing).

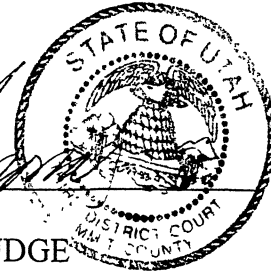
CONCLUSION

For the foregoing reasons, the Court grants the Motion in part and denies it in part. Counsel for Hart is to prepare, circulate, and submit a Judgment consistent with this Memorandum Decision.

Dated this 4th day of February, 2005, in Summit County, State of Utah.

BY THE COURT:


DENO G. HIMONAS
DISTRICT COURT JUDGE



⁸It is important to note that "[a] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent." *Miller*, 2003 UT at ¶ 17 (emphasis added) (citations and internal quotations omitted).

⁹Sill admits that he was not eligible for relief under the Residence Lien Restriction and Lien Recovery Fund Act. Nevertheless, he urges the Court to adopt an interpretation that would restrict Hart's ability to recover for an otherwise valid lien based on Hart's failure to provide notice of an irrelevant statutory provision. While this point is certainly not dispositive, it does help emphasize that Sill's construction is contrary to the lien law's overarching purpose.

Case No: 020500012
Date: Feb 04, 2005

CERTIFICATE OF NOTIFICATION

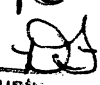
I certify that a copy of the attached document was sent to the following people for case 020500012 by the method and on the date specified.

METHOD	NAME
Mail	P. BRUCE BADGER ATTORNEY DEF 215 S STATE ST 12TH FLR POB 510210 SALT LAKE CITY, UT 84151-0210
Mail	CHRISTINA I MILLER ATTORNEY PLA 2200 N PARK AVE STE D200 POB 682800 PARK CITY UT 84068
Mail	DAVID B THOMPSON ATTORNEY PLA 1712 SE 35TH PLACE PORTLAND OR 97214

Dated this 4th day of February, 2005.


Deputy Court Clerk

ADDENDUM NO. 2

FILED
FEB 24 2005 13:58
By  Court
Deputy Clerk, Summit County

Prepared by:

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Attorneys for Defendant/Counterclaimant/Third-Party Plaintiff Bill Hart

**IN THE THIRD DISTRICT COURT
SUMMIT COUNTY, STATE OF UTAH**

JOEL SILL,

Plaintiff/Counterclaim Defendant,

vs.

BILL HART, d/b/a HART CONSTRUCTION,

Defendant/Counterclaimant,

BILL HART, d/b/a HART CONSTRUCTION,

Third Party Plaintiff,

v.

KALLIE J. SILL, and DOES I-X,

Third Party Defendants.

**FINAL JUDGMENT, ORDER AND
DECREE OF FORECLOSURE**

Civil No. 020500012

Judge Deno G. Himonas

The Jury having rendered its verdict in this action on October 22, 2004, and the court having fully considered Defendant, Counterclaimant and Third Party Plaintiff Bill Hart's Motion for Entry of Judgment Upon a Verdict and For Decree of Foreclosure, Award of Prejudgment Interest, Attorneys Fees and Costs, three supporting joint affidavits in support of motion for award of attorneys fees, Amended Verified Memorandum of Costs, and the related motion papers, and having fully considered Plaintiff's opposing memoranda, and having heard oral argument from Plaintiff's and Defendant's respective counsel on January 31, 2005, and being otherwise fully advised in the premises, now enters judgment consistent with the court's Memorandum Decision entered February 4, 2005.

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

1. Bill Hart is awarded judgment in his favor and against Joel Sill, whose address is 28 White Pine Canyon Road, Park City, Utah 84060, in the amount of \$314,500, plus prejudgment interest of \$98,480.88, plus costs of \$5,598.92, plus reasonable attorneys fees in the amount of \$199,225.75, pursuant to Utah Code Ann. § 38-1-18, which are taxed as costs in this matter, for a total judgment of \$617,805.55.
2. This judgment shall bear interest from entry hereof at the post-judgment rate specified in Utah Code Ann. § 15-1-4(3).
3. The Notice of Lien dated January 30, 2002, recorded on January 31, 2002, as Entry 00609900, in Book 1432, Page 511-512, of the official records of the Summit County Recorder, is a valid and enforceable lien against the property located in Summit County, State of

Utah, described as follows (the "Property"), and Defendant Bill Hart is entitled to a foreclosure of his lien on the Property:

All of Homestead No. 15, The Colony At White Pine Canyon, Phase 1 Amended Final Subdivision, according to the official plat thereof on file and of record in the office of the Summit County Recorder.

Also together with and subject to all rights, benefits, encumbrances and obligations set forth in the grant of easements recorded September 28, 1998 as Entry No. 518627 in Book 1186 at Page 128 of the official records.

Parcel # CWPC - 15 - AM

4. The Property is hereby foreclosed pursuant to Defendant's lien, and the Property, or such amounts as may be sufficient to pay the amounts due under this judgment and decree, together with accruing costs and interest, be sold at public auction by the Sheriff of Summit County, State of Utah, in the manner prescribed by Utah law for the sale of real property as in the case of foreclosure of mortgages. Plaintiff Joel Sill, and Third Party Defendants, including Kallie J. Sill, and each of them, and all persons and entities claiming by, through or under them or any of them, have no further estate, right, title, lien, or other interest of any kind in, on, or to the Property, except a right of redemption as the case may be as provided by law. Provided, however, that the Property be foreclosed and sold subject to any unnamed, non-party person or entity that holds any mortgage or interest that is prior to the interests of Defendant. Any party to this action may bid for the Property at the sale.

5. That all persons claiming under Plaintiff Joel Sill or Third Party Defendant Kallie Sill, whose interests do not appear of record in the Summit County Recorder's Office as of

Defendant's filing of the lis pendens of this action, are barred and foreclosed of all right, title, interest and equity of redemption in the Property.

6. The Sheriff, upon sale of the Property, shall distribute the proceeds from the sale as follows:

- a. to pay the Sheriff's cost of sale, disbursements and commissions;
- b. to pay to Bill Hart or his attorneys the accrued and accruing costs and attorneys fees of this action, together with the remaining amounts owing Bill Hart for the total judgment as set forth in paragraph 1 above;
- c. any surplus after payment of the amount set forth above be accounted for and paid over by the Sheriff to the Clerk of Court pending further order by this Court.

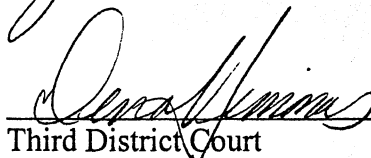
7. The person or entity purchasing the Property at the sheriff's sale thereof shall receive a Certificate of Sale from the sheriff and shall, subject to the rights of redemption, be entitled to immediate possession of the Property and the right to receive and collect all rents therefrom.

8. After the time allowed by law for redemption has expired, the Sheriff shall execute and deliver a Sheriff's Deed (the "Deed") to the purchaser at the sheriff's sale or the person entitled thereto, as provided for by the Utah Rules of Civil Procedure. The grantee named therein shall thereupon be entitled to and have possession of the Property.

9. Defendant Bill Hart is hereby awarded a deficiency judgment against Plaintiff Joel Sill for any and all deficiencies remaining due after applying the net proceeds derived from the foreclosure sale of the Property to the judgment as herein provided.

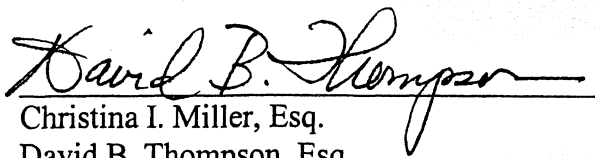
10. This judgment shall be augmented in the amount of reasonable costs and attorneys fees incurred by Defendant Bill Hart in collecting this judgment, by execution or otherwise, as shall be established by affidavit.

DATED this 24 day of February, 2005.

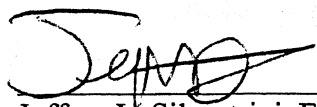


Third District Court

Approved as to form:



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