

2006

Joel Sill v. Bill Hart dba Hart Construction : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF UTAH

JOEL SILL,)	
)	
Plaintiff-Counterclaim Defendant/)	
Appellee)	
)	Supreme Court Case No. 20060106
vs.)	
)	
BILL HART, d/b/a HART)	
CONSTRUCTION,)	
)	
Defendant-Counterclaimant/Appellant.)	
)	

BRIEF OF APPELLANT BILL HART, dba HART CONSTRUCTION

Appeal from a Ruling of the Utah Court of Appeals

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Appellant Bill Hart, d/b/a Hart
Construction

**FILED
UTAH APPELLATE COURTS**

JUN 30 2006

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iv-vi
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND THE STANDARDS OF APPELLATE REVIEW	1
CONTROLLING STATUTES	2
STATEMENT OF THE CASE.....	3
I. Nature of the Case, Course of Proceedings, and Disposition Below	3
II. Statement of Facts	7
SUMMARY OF ARGUMENTS	8
ARGUMENT	11
I. SUBSECTION 4(a) EXPRESSLY APPLIES ONLY WHEN A LIEN CLAIMANT FILES AND SERVES A “COMPLAINT,” AND THEREFORE DOES NOT APPLY TO COUNTERCLAIMS	11
A. The Court of Appeals’ Application of Subsection 4(a) to Hart’s Counterclaim is Contrary to the Express Statutory Language and Established Rules of Statutory Construction.....	13
B. The Court of Appeals’ Inclusion of Counterclaims Within the Definition of a “Complaint” in Subsection 4(a) is Without Merit	16
C. Stretching the Statutory Term “Complaint” to Include Hart’s Counterclaim Creates Confusion and a Trap	21
II. SUBSECTION 4(a) DOES NOT REQUIRE SERVICE OF THE REFERENCED INSTRUCTIONS AND FORMS WHERE THEY ADMITTEDLY PROVIDED SILL NO RIGHT OR REMEDY AGAINST HART	23
A. There Was Nothing to Serve Upon Sill on the Face of Subsection 4(a).....	23

TABLE OF AUTHORITIES

Page

Statutes

Utah Code § 38-1-11(4)(a) (2001)	<i>passim</i>
Utah Code § 38-1-18 (2001)	16, 17
Utah Code § 38-11-102(14) (2001)	24
Utah Code § 38-11-107(1) (2001)	2, 24
Utah Code § 38-11-204(3) (2001)	3, 24
Utah Code § 42-2-10(1) (2005)	14
Utah Code § 78-2-2(3)(a)	1
Utah Code § 78-7-35 (2005)	14

Rules

Utah R. App. P. 24(g)	1
Utah R. App. P. 51(b)(4)	1
Utah R. Civ. P. 3(a)	14
Utah R. Civ. P. 7(a)	14
Utah R. Civ. P. 13(a)	14

Cases

<i>A.K. & R. Whipple Plumbing and Heating v. Guy</i> , 2004 UT 47, 94 P.3d 270	31
<i>American Rural Cellular, Inc. v. Systems Communications Corp.</i> , 939 P.2d 185 (Utah Ct. App. 1997)	17, 18

<i>Associated Gen. Contractors v. Board of Oil, Gas & Mining</i> , 2001 UT 112, 38 P.3d 291	13
<i>Butterfield Lumber, Inc. v. Peterson Mortgage. Corp.</i> , 815 P.2d 1330 (Utah Ct. App. 1991).....	29, 30
<i>Carr v. Enoch Smith Co.</i> , 781 P.2d 1292 (Utah Ct. App. 1989).....	25
<i>Cichecki v. City of Hamtramack Policy Dep't.</i> , 170 N.W.2d 58 (Mich. 1969).....	25, 26
<i>Defee v. Kaley</i> , 167 S.E.2d 758 (Ga. Ct. App. 1969)	25
<i>Evans v. State</i> , 963 P.2d 117 (Utah 1998)	29
<i>First Gen. Servs. v. Perkins</i> , 918 P.2d 480 (Utah Ct. App. 1996)	17
<i>For-Shor Co. v. Early</i> , 828 P.2d 1080 (Utah Ct. App. 1992).....	17
<i>Gillman v. Sprint Comm. Co.</i> , 2004 UT App 143, 91 P.3d 858, <i>cert. denied</i> , 98 P.3d 1177 (Utah 2004).....	13, 22
<i>Harman v. Yeager</i> , 103 Utah 208, 134 P.2d 695 (1943)	16
<i>John Wagner Assoc. v. Hercules, Inc.</i> , 797 P.2d 1123 (Utah Ct. App. 1990)	29
<i>Leger Const., Inc. v. Roberts, Inc.</i> , 550 P.2d 212 (Utah 1976).....	25
<i>Local Union No. 38, Sheet Metal Workers' Int'l v. Pelella</i> , 350 F.3d 73 (2 nd Cir. 2003)	5, 19
<i>Lund v. Brown</i> , 2000 UT 75, 11 P.3d 277	15, 16
<i>Miller v. Weaver</i> , 2003 UT 12, 66 P.3d 592	20, 23
<i>Projects Unlimited, Inc. v. Copper State Thrift & Loan Co.</i> , 798 P.2d 738, 744 (Utah 1990)	30
<i>Rushton v. Salt Lake County</i> , 1999 UT 36, 977 P.2d 1201	1
<i>Sill v. Hart</i> , 128 P.3d 1215 (Utah Ct. App. 2005).....	6, 12, 16, 21, 26
<i>Sorenson's Ranch School v. Oram</i> , 2001 UT App 354, 36 P.3d 528	15, 20

<i>State v. Hobbs</i> , 2003 UT App 27, 64 P.3d 1218	15
<i>State v. Perez</i> , 2000 UT App 65, 999 P.2d 579	29
<i>State ex rel. Road Comm’n v. Parker</i> , 13 Utah 2d 65, 368 P.2d 585 (1962).....	16
<i>Triple I Supply, Inc. v. Sunset Rail, Inc.</i> , 652 P.2d 1298 (Utah 1998).....	31

Legislative History

S.B. 254, 1 st Substitution, 2001 Gen. Leg. Sess., Senate Business, Labor and Economic Development Standing Committee Meeting held 02/16/01	27, 28
S.B. 254, 1 st Substitution, 2001 Gen. Leg. Sess., Senate Floor Debate held 02/20/01	28
H.B. 32, H.B. 62, H.B. 182, 2004 Gen. Leg. Sess., Senate Business and Labor Standing Committee Meeting held 01/30/04	28
H.B. 32, H.B. 62, H.B. 182, 2004 Gen. Leg. Sess., Senate Floor Debate held 02/04/04	28, 29

Other Authorities

Black’s Law Dictionary 258 (5 th ed. 1979).....	13
Black’s Law Dictionary 303 (8 th ed. 2004).....	13
Black’s Law Dictionary 349 (6 th ed. 1990).....	14

STATEMENT OF JURISDICTION

The Supreme Court of Utah has jurisdiction over this appeal pursuant to Section 78-2-2(3)(a) of the Utah Code.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND THE STANDARDS OF APPELLATE REVIEW

Issue No. 1: Whether the requirements of Utah Code Ann. § 38-1-11(4)(a) (hereinafter, “**Subsection 4(a)**”) apply to counterclaims. (Order of the Supreme Court of State of Utah, dated May 19, 2006, granting certiorari). This issue presents a matter of statutory interpretation, which is 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.

Issue No. 2: Whether the requirements of Subsection 4(a) apply regardless of the availability of remedies to a property owner under the Residence Lien Restriction and Lien Recovery Fund Act. (Order of the Supreme Court of State of Utah, dated May 19, 2006, granting certiorari). This issue also is one of statutory interpretation which is reviewed for correctness. *Rushton*, 1999 UT 36, ¶ 37, 977 P.2d at 1203.¹

¹ This Court granted certiorari on the original petition that was first filed by Appellant Bill Hart, d/b/a Hart Construction (“**Hart**”) as to the two above-listed issues. The Court also stated that certiorari was granted on the cross-petition that was later-filed by Appellee Joel Sill (“**Sill**”) as to the issue of whether Subsection 4(a) creates a jurisdictional bar. Pursuant to Rules 51(b)(4) and 24(g) of the Utah Rules of Appellate Procedure, Hart expressly reserves all rights to fully brief and address the merits of Sill’s arguments regarding the claimed “jurisdictional” nature of Subsection 4(a) after such arguments have first been briefed by Sill for presentation to the Court. Hart notes, however, that the Court need not even reach any analysis as to whether Subsection 4(a) is jurisdictional, since on its face Subsection 4(a) does not apply to this case to begin with, as discussed more fully in this brief.

CONTROLLING STATUTES

The following controlling statutes are applicable to this appeal:²

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

² The statutes determinative of this case that are therefore cited in this brief are those that were in place when Hart filed his answer and counterclaim in February of 2002.

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 Fund], 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 Plaintiff Joel Sill (“**Sill**”), who served a complaint upon Defendant Bill Hart, d/b/a Hart Construction (“**Hart**”) relating to the parties’ agreement for the construction by Hart of improvements to real property owned by Sill. Hart then filed with the district court and served upon Sill’s attorneys an answer that also included a counterclaim (the “**Counterclaim**”) in which Hart sought, among other things, to foreclose a mechanics’ lien securing payment from Sill for the improvements Hart made to Sill’s property.

After two and a half years of litigation and discovery, in the week just before the start of trial, Sill for the first time raised to Hart an argument that Hart’s mechanics’ lien foreclosure claim was defective because Hart had not served upon Sill a form affidavit

and motion for summary judgment, and instructions for use of those forms in exercise of certain rights available to some homeowners under Utah’s Residence Lien Restriction and Lien Recovery Fund Act (Utah Code §§ 38-11-101 *et seq.* – hereinafter, the “**LRFA**”). Sill argued that service of such LRFA instructions and forms was required of Hart by Utah Code section 38-1-11(4)(a) (identified and referred to above, and hereinafter, as “**Subsection 4(a)**”) of Utah’s mechanics’ lien statutes (Utah Code §§ 38-1-1 *et seq.*).

The case proceeded to trial. The jury returned a verdict in favor of Hart, awarding him the full principal amount of \$314,500.00 that he requested on his unjust enrichment and mechanics’ lien claims. Hart also ultimately was awarded an additional \$303,305.55 in attorney fees, costs, and prejudgment interest.

When Hart attempted to reduce the jury’s verdict to a judgment, Sill opposed that effort by arguing that attorney fees and prejudgment interest were not recoverable from him, and that Hart’s mechanics’ lien could not be foreclosed because Sill had not been served with LRFA instructions and forms when Hart served his Counterclaim on Sill’s attorneys, which Sill claimed was required by Subsection 4(a). Sill did not object to the amount of fees and interest.

After extensive briefing and oral argument by the parties, the district court issued a well-reasoned “Memorandum Decision” (the “**Decision**”) rejecting Sill’s Subsection 4(a) arguments and 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). A copy of the district court’s Decision is attached hereto as Addendum No. 1)].

Since Sill (rather than Hart) filed this action and served a “complaint,” and since what Hart served on Sill’s attorneys was instead an answer that included the Counterclaim, the district court held Subsection 4(a) did not apply to this case, that Hart was not required to serve upon Sill any of the referenced LRFA materials, and that Hart was therefore entitled to recover prejudgment interest, attorney fees and costs, and to foreclose his mechanics’ lien. (R. 1462-66 (Decision), Addendum No. 3 hereto).

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 entered by the district court. The Order, among other things, confirmed the validity and enforceability of Hart’s mechanics’ lien foreclosure Counterclaim and awarded all of the prejudgment interest, attorney fees, and costs claimed by Hart, the amount of which

Sill did not dispute. (R. 1467-71). A copy of the district court's Order is attached hereto as Addendum No. 4.

Sill appealed the district court's Decision. The Utah Court of Appeals reversed, stating that Subsection 4(a) "does not require the service specifically of a complaint," that "the statute here is triggered '[i]f a lien claimant files an action to enforce a lien,'" and that for that purpose "the term 'complaint,' as it is used in section 38-1-11(4)(a), includes counterclaims." *Sill v. Hart*, 128 P.3d 1215, 1218 & 1219, ¶¶ 9 & 13 (Utah Ct. App. 2005), *rehearing denied* (January 5, 2006). A copy of the Court of Appeals' opinion (the "**Opinion**") is attached hereto as Addendum No. 1. The appellate court therefore remanded the case for further proceedings to determine whether attorney fees and prejudgment interest were recoverable by Hart, applying Subsection 4(a) to Hart but also in light of Sill's failure to raise Subsection 4(a) as an affirmative defense in his reply to the Counterclaim. *Id.* at 1219, ¶¶ 15-17 (Court of Appeals' Opinion, Addendum No. 1 hereto). Hart timely filed with the Court of Appeals a Petition for Rehearing, which was denied without explanation. A copy of the Court of Appeals Order denying the Petition for Rehearing is attached hereto as Addendum No. 2. Hart then petitioned this Court for a writ of certiorari to review the Court of Appeals' Opinion, which was granted.

II. Statement of Facts

1. Sill owned certain real property in Summit County, Utah. (*See e.g.*, R. 1-33 (Sill's Complaint, ¶¶ 4 & 10)).

2. Sill, as the owner, entered into an agreement directly with Hart, as the original or general contractor, for Hart to construct improvements to Sill's property. (*See e.g.*, R. 1-33 (Sill's Complaint, ¶ 11)).

3. In January, 2002, Sill filed this action and a complaint against Hart claiming, among other things, a breach of the parties' construction agreement. (*See e.g.*, R. 1-33 (Sill's Complaint)).

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

5. In February, 2002, Hart filed an answer to Sill's complaint, and 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 a mechanics' lien securing payment from Sill for the improvements Hart made to Sill's property. (*See e.g.*, R. 37-58; R. 59-81).

6. At all times throughout this case, Sill has always been represented by legal counsel. (*See e.g.*, R. 1-33; district court's docket generally).

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

8. After the jury awarded Hart the full \$314,500.00 principal amount he claimed was owed by Sill, and after hearing and rejecting Sill's arguments made after the trial for application of Subsection 4(a) to this case, the district court awarded Hart, among

other things, an additional combined amount of \$303,305.55 in reasonable attorney fees, costs, and prejudgment interest. (R. 1467-71). Sill did not appeal any of the amounts awarded to Hart. Sill appealed only the district court's Decision rejecting his claim that Subsection 4(a) somehow barred recovery of attorney fees and prejudgment interest. (R. 1244-48, 1369-79, 1383-94, 1411-20, 1448-53, 1493).

SUMMARY OF ARGUMENTS

Based upon its conclusion that Subsection 4(a) of Utah's mechanics' lien statutes applied to this case, the Utah Court of Appeals reversed portions of the district court's Decision and Order awarding to Hart more than \$300,000 in attorney fees, court costs, and prejudgment interest upon Hart's successful prosecution of his Counterclaim to foreclose his mechanics' lien. The question for review by this Court is whether the Utah Court of Appeals erred in reversing the district court and in holding for the first time ever that Subsection 4(a) requires counterclaiming general contractors to serve upon homeowners who sue them instructions and forms relating to rights available to some homeowners as against only subcontractors under the LRFA, or else lose all of their rights and remedies under Utah's mechanics' lien statutes.

The Court of Appeals' Opinion is contrary to the plain language of Subsection 4(a) specifically, to the long-recognized intent, purpose and policy of Utah's mechanics' lien statutes generally, and to several canons of statutory construction. The Court of Appeals' Opinion also is contrary to the LRFA under which Sill admittedly had no rights in this case and which Sill admits did not apply to and would not have made any

difference to the outcome of this case. The Court of Appeals' Opinion essentially, as a matter of first impression, punishes Hart for not providing Sill instructions and forms that Hart, as a counterclaimant, was not required to provide on the face of Subsection 4(a), and which Sill admits he could not have used in this case in any event.

Subsection 4(a) expressly applies only if the lien claimant files an action and serves a "complaint" on the owner of residential property. In this case, it was the owner, Sill, who served a complaint upon Hart. As the defendant in the case, Hart indisputably never filed or served a complaint on Sill. Rather, Hart's mechanics' lien foreclosure was a part of Hart's Counterclaim that was served by mail upon Sill's attorneys.

Subsection 4(a)'s reference to service of LRFA instructions and forms with a "complaint," therefore, does not apply to this case. The Court of Appeals' Opinion applying Subsection 4(a) to Hart's Counterclaim changed the plain language of the statute as chosen and drafted by the Legislature. Such alterations of legislative enactments are in derogation of established rules of statutory construction, and if allowed to stand would impermissibly create traps for parties and their legal counsel who could no longer rely upon or follow the plain language of statutes. This Court should therefore reverse the Court of Appeals' Opinion, and confirm that by virtue of its express reference to service of a "complaint" Subsection 4(a) does not apply to Hart's Counterclaim in this case.

This Court should also reverse the Court of Appeals' Opinion because service of LRFA instructions and forms that are the subject of this case would have been a completely useless act that would not have made any difference whatsoever to the

outcome of this case. The LRFA instructions and forms referenced in Subsection 4(a) relate solely to rights available to certain homeowners as against only liens of subcontractors, and only after the homeowner has paid in full the original general contractor. Sill admits that Hart was his general contractor, not a subcontractor subject to the LRFA. Sill also had not paid Hart in full, as the jury found and from which Sill does not appeal. Sill therefore indisputably had no rights under the LRFA in this case. Since Subsection 4(a) expressly requires service of LRFA instructions and forms only relating to “available rights” of “the owner” under the LRFA, and since Sill admittedly and indisputably had no such rights of any kind in this case, Subsection 4(a) does not require service of the referenced LRFA instructions and forms in this case which simply do not apply and would have been of no use to Sill whatsoever.

This Court should reverse the Utah Court of Appeals’ interpretation of Subsection 4(a) 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. The Court of Appeals’ interpretation of Subsection 4(a) as an impediment to Hart’s lien foreclosure Counterclaim in this case is contrary to the language of Subsection 4(a), and to the mechanics’ lien laws generally. That interpretation grants to Sill a windfall in the form of a luxury home built by Hart without Sill having to pay for it for more than two years and without paying at all the accrued interest and the attorney fees that Hart had to expend forcing collection of the

amount due and owing to him by virtue of Sill's refusal to pay.³ This Court should not reward Sill with such a windfall to Hart's substantial detriment, including as a matter of law under the express language of Subsection 4(a) which the Court of Appeals misinterpreted. This Court should instead reverse the Court of Appeals and uphold the district court's Decision and Order declaring Subsection 4(a) inapplicable, and otherwise not any bar, to Hart's mechanics' lien foreclosure Counterclaim.

ARGUMENT

I. SUBSECTION 4(a) EXPRESSLY APPLIES ONLY WHEN A LIEN CLAIMANT FILES AND SERVES A "COMPLAINT," AND THEREFORE DOES NOT APPLY TO COUNTERCLAIMS

The Court of Appeals' application of Subsection 4(a) to Hart's Counterclaim is contrary to the plain language of that statute. On its face Subsection 4(a) expressly applies only when a lien claimant files and serves on a defendant property owner a "complaint." At the time Sill initiated this action by filing his complaint, Subsection 4(a) read as follows:

³ While this case has been pending on appeal, Sill has paid Hart the principal amount owed for Hart's work upon and improvements to the Property, which the jury awarded in precisely the amount originally claimed by Hart, and the costs that were awarded to Hart. Sill has not paid, however, the prejudgment interest and attorney fee amounts awarded by the district court and not appealed by Sill. This Court has recognized that recovery of attorney fees is vitally important to mechanics' liens. "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 someone who successfully uses a 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*, 2004 UT 47, ¶ 24, 94 P.3d 270, 276.

(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: [(Utah Code § 38-1-11(4)(a) (2001) (emphasis added)].

Subsection 4(a) expressly applies only if the lien claimant files an action and serves a “complaint” on a homeowner to foreclose a mechanics’ lien. Subsection 4(a) therefore 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, while Hart, the lien claimant, is the defendant who instead filed an answer and Counterclaim.

The Court of Appeals ruled that Subsection 4(a) applied to Hart’s answer and Counterclaim purportedly because “the statute is triggered [merely] if a lien claimant files an action to enforce a lien under the Mechanics’ Liens Act involving a residence” and “does not require the service specifically of a complaint.” *Sill v. Hart*, 128 P.3d 1215, 1218, ¶ 9 (emphasis added) (Court of Appeals’ Opinion, Addendum No. 1 hereto). That ruling is contrary to and writes-out the plain, and express reference in Subsection 4(a) specifically to a “complaint” as the only pleading with which the referenced LRFA instructions and forms are to be served. The Court of Appeals itself later acknowledged that “the statute specifically references ‘the service of the complaint,’” but reasoned that Subsection 4(a) nevertheless applied to Hart’s Counterclaim, ostensibly because “the term ‘complaint’ is frequently interpreted in Utah caselaw as including counterclaims.” *Id.* at 1219, ¶ 13 (Court of Appeals’ Opinion, Addendum No. 1 hereto). The Court of Appeals’ Opinion is an incorrect and unsupportable deviation from the language of Subsection 4(a), and well-settled rules of statutory construction and mechanics’ lien law

and policy. This Court should therefore reverse the Court of Appeals' Opinion, and adopt the Decision of the district court that Subsection 4(a) has no application to Hart's Counterclaim in this case.

A. The Court of Appeals' Application of Subsection 4(a) to Hart's Counterclaim is Contrary to the Express Statutory Language and Established Rules of Statutory Construction

It is well-settled that when interpreting a statute the courts must interpret the actual words appearing on the face of the statute itself, reading them literally and according to their plain and ordinary meaning. *E.g., Gillman v. Sprint Comm. Co.*, 2004 UT App 143, ¶ 7, 91 P.3d 858, *cert. denied*, 98 P.3d 1177 (Utah 2004). Rules of statutory construction further require courts to “assume that each term in the statute was used advisedly” and therefore require that “‘the statutory words are read literally....’” *Id.* (quotations and citations omitted). This Court has also held that when interpreting a statute courts must “not infer substantive terms into the text that are not already there,” *Associated Gen. Contractors v. Board of Oil, Gas & Mining*, 2001 UT 112, ¶ 30, 38 P.3d 291 (quotations and citations omitted).

The plain, ordinary, and literal meaning of the term “complaint” appearing in Subsection 4(a) is the first pleading, filed by a plaintiff, to initiate a lawsuit:

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. [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. [Black's Law Dictionary 258 (5th ed. 1979) (emphasis added)].

The Utah Rules of Civil Procedure are in accord, and 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).

By contrast, the plain and ordinary meaning of a counterclaim, which Hart filed, is in opposition to a “complaint.” Specifically, a counterclaim is “[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).

The Utah Rules of Civil Procedure recognize “complaints” and counterclaims as distinct and different, including defining them in completely different rules. *See e.g.*, Utah R. Civ. P. 7(a) (“*Pleadings*. There shall be a complaint and an answer....”) (emphasis added); *id.* 13(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...” (emphasis added).

The Utah Legislature also recognizes that distinction and specifically uses the term “counterclaim” when it intends a statute to apply to counterclaims. *See e.g.*, Utah Code Ann. § 42-2-10 (2005) (stating parties may not maintain “any action, suit, counterclaim, cross complaint, or proceeding” unless certain requirements are met) (emphasis added); *id.*, § 78-7-35 (separately delineating filing fees applicable to a “complaint,” and to a “counterclaim,” and other pleadings) (emphasis added).

The Utah Legislature was precise when it designated only one pleading (*i.e.*, a “complaint”) as being subject to the requirements of Subsection 4(a). The Legislature

could easily have required that the LRFA instructions and forms referred to in Subsection 4(a) be served with “the complaint or the answer containing a counterclaim.” Simpler yet, the Legislature could have used the term “pleading,” instead of “complaint.” It did not. Rather, the Legislature specifically and expressly referred exclusively to a “complaint” as the only pleading with which LRFA instructions and forms must be served.

As shown above, long-settled rules of statutory construction require that the Legislature’s exclusive reference to a “complaint” in Subsection 4(a) be treated as purposefully and advisedly adopted. Additional rules of statutory construction require that the exclusive reference in Subsection 4(a) to service of a “complaint” must be deemed to exclude application of that statute to any other pleadings, and that such exclusion must be respected and enforced by the courts. *See e.g., State v. Hobbs*, 2003 UT App 27, ¶ 21, 64 P.3d 1218 (noting rules of statutory construction that expression of one thing implies exclusion of another, and omissions in statutory language must be taken note of and given effect); *Sorenson’s Ranch School v. Oram*, 2001 UT App 354, ¶ 11, 36 P.3d 528 (same).

The Court of Appeals’ Opinion applying Subsection 4(a) to Hart’s Counterclaim violates all of the above rules of statutory construction, including the prohibition against inferring substantive terms into a statute that are not already there. It also improperly renders the word “complaint” as used in Subsection 4(a) meaningless, in violation of yet another rule of statutory construction. *See e.g., Lund v. Brown*, 2001 UT 75, ¶ 23, 11 P.3d 277 (“[A]ny interpretation which renders parts or words in a statute inoperative or

superfluous is to be avoided.”) (quotations and citations omitted). The Court of Appeals strayed from the clear language of the statute (*i.e.*, “complaint”), and inferred substantive terms (*i.e.*, counterclaim) into the statutory text that are not there. It ignored the literal words of the statute advisedly chosen by the Legislature referring exclusively to a “complaint” to be served on the owner as the only pleading that is subject to any requirements of Subsection 4(a). This Court therefore should reverse the Court of Appeals’ Opinion.

B. The Court of Appeals’ Inclusion of Counterclaims Within the Definition of a “Complaint” in Subsection 4(a) is Without Merit

There is no authority to support the Court of Appeals’ Opinion that the term “complaint,” as used in Subsection 4(a), includes counterclaims. The various cases cited by the Court of Appeals in support of its proposition that “the term ‘complaint’ is frequently interpreted in Utah case law as including counterclaims,” (*Sill v. Hart*, 128 P.3d 1215, 1219, ¶ 13 (Utah Ct. App. 2005) (Court of Appeals’ Opinion, Addendum No. 1 hereto), are off-point and do not support that court’s significant departure from the governing statutory language.

The Court of Appeals’ citations to *State ex rel. Road Comm’n v. Parker*, 13 Utah 2d 65, 368 P.2d 585 (1962) and *Harman v. Yeager*, 103 Utah 208, 134 P.2d 695, 696 (1943), *Id.* (Addendum No. 1), are unavailing. Neither of those cases have any application to this case. They spoke merely to the pleading standards required for counterclaims generally (*i.e.*, that they must state facts sufficient to support a claim for

relief, as distinguished from merely stating a defense to a plaintiff's complaint). Neither of those cases dealt with Subsection 4(a), nor involved construction of the word "complaint" or "counterclaim" as a statutory term, and particularly not under the rubric of Utah's mechanics' lien statutes.

Nor do the mechanics' lien cases cited by the Court of Appeals support its application of Subsection 4(a) to Hart's Counterclaim. The *For-Shor Co. v. Early*, 828 P.2d 1080 (Utah Ct. App. 1992) and *First Gen. Servs. v. Perkins*, 918 P.2d 480 (Utah Ct. App. 1996) cases, for example, both involved lien claimants who were plaintiffs, not counterclaimants. Moreover, Subsection 4(a) was not even enacted until 2001, long after the opinions were issued in those cases.

The only other mechanics' lien case cited by the Court of Appeals is *American Rural Cellular, Inc. v. Systems Communications Corp.*, 939 P.2d 185 (Utah Ct. App. 1997). That case dealt with the attorney fee provision of Utah's mechanics' lien statute, Utah Code Section 38-1-18. Since the court in that case held that attorney fees are recoverable for successfully prosecuting a counterclaim to enforce a mechanics' lien, the Court of Appeals cited to *American Rural* in this case as support for the proposition that "Utah courts have interpreted similar language [to Subsection 4(a)'s reference to "an action"] to include counterclaims." *Sill*, 128 P.3d at 1218, ¶ 12 (Utah Ct. App. 2005) (Court of Appeals' Opinion, Addendum No. 1 hereto). There is a striking difference, however, between the statutory language of the attorney fee provision at issue in *American Rural*, and that of Subsection 4(a) at issue in this case. The *American Rural*

case therefore actually is contrary to, and highlights the impropriety of, the Court of Appeals' Opinion applying Subsection 4(a) to Hart's Counterclaim.

The attorney fee provision that was at issue in *American Rural* 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. [Utah Code Ann. § 38-1-18 (emphasis added)].

The expansive and unqualified language of section 38-1-18 allowing recovery of fees by the successful party "in any action" brought to enforce a mechanics' lien is markedly different than the limited and qualified language of 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 *American Rural* case properly concluded that a mechanics' lien foreclosure counterclaim is within the attorney fee provision that broadly applies to "any action." That, however, simply confirms and highlights that Subsection 4(a) does not apply to counterclaims, since the word "action" is used in the attorney fee provision at issue in *American Rural* without limitation or qualification of any kind (and indeed with the expansive "any"), whereas the word "action" as it is used in Subsection 4(a) that is at issue in this case is specifically and expressly limited and qualified in that section by the term "complaint." The addition of the qualifying term "complaint" in Subsection 4(a), which was enacted long after the attorney fee provision, shows the Legislature's intent to distinguish and limit the term "action," as used in Subsection 4(a), from the expansive and unqualified "any action"

language of the fee provision. Had the Legislature intended that same expansive application for Subsection 4(a), it would have left the term “action” unqualified as it did in the attorney fee provision. Instead, however, it distinguished Subsection 4(a) by adding the limiting and qualifying reference to a “complaint” as the only pleading with which LRFA instructions and forms would be served. Since the “action” to which Subsection 4(a) applies expressly is limited to where the lien claimant files and serves a “complaint,” it does not apply to Hart’s Counterclaim.

The most closely analogous case to the case at bar of which Hart is aware is the case relied upon by the district court in its Decision: *Local Union No. 38, Sheet Metal Workers’ Int’l v. Pelella*, 350 F.3d 73 (2nd Cir. 2003). There, the court was faced with the 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 was 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)].

Similarly, the word “action” in Subsection (4)(a), that is at issue in this case, must be read in context, and it is qualified by that section’s reference to service of a “complaint.” *See also e.g., Miller v. Weaver*, 2003 UT 12, ¶ 17, 66 P.3d 592 (noting rule of statutory construction requiring court to look to “the plain language of the statute as a whole”) (emphasis added); *Sorenson’s Ranch School v. Oram*, 2001 UT App 354, ¶ 11, 36 P.3d 528 (noting if the Legislature had intended a broader application of statute, it would not have added language that qualified and limited statute’s reach). *Pelella* upholds the proposition, which governs in this case, that the express statutory language must be followed. It also confirms that a counterclaim is properly considered as something “in sharp contrast” from a “complaint.” Subsection 4(a) does not apply to this case in which Hart did not file this “action” nor serve a “complaint,” and this Court should reverse the Court of Appeals’ Opinion which misinterpreted Subsection 4(a).

C. Stretching the Statutory Term “Complaint” to Include Hart’s Counterclaim Creates Confusion and a Trap

The Court of Appeals in this case ultimately concluded that “the term ‘complaint,’ as it is used in section 38-1-11(4)(a), includes counterclaims” because “a literal reading of the term ‘complaint’ would be ‘unreasonably confus[ing]’ and render the statute ‘inoperable.’” *Sill v. Hart*, 128 P.3d 1215, 1219, ¶ 13 (Utah Ct. App. 2005) (Court of Appeals’ Opinion, Addendum No. 1 hereto). The Court of Appeals failed, however, to provide any explanation as to how a literal reading of the statutory term “complaint” (which is the required reading of statutory terms according to established rules of statutory construction discussed in Part I.A. above) would be in any way confusing or render Subsection 4(a) inoperable. To the contrary, Subsection 4(a) is clear and entirely operable with a plain language interpretation of its exclusive application to a “complaint” served on the owner. It is instead the Court of Appeals’ Opinion which creates confusion by, for the first time, straying from the express language of Subsection 4(a) and applying it to pleadings other than a “complaint.” That ruling and departure from the statutory language and rules of judicial construction leaves parties not knowing in advance of the ruling what a statute means and requires, based upon its plain facial language. It leaves parties having to guess at their peril whether the statute will be applied to other situations beyond what is described by the clear statutory language itself, and therefore unable to govern their conduct with any assurity as to whether something more will later be deemed to be required of them beyond what appears on the face of the statute. Hart in particular had no way to know, including having no prior judicial guidance, that the term

“complaint” in Subsection 4(a) would be deemed to apply to his Counterclaim in this case. *See e.g., Gillman v. Sprint Comm. Co., L.P.*, 2004 UT App 143, ¶ 7, 91 P.3d 858 (“It is the plain meaning of a statute that provides notice of its applications, and thus, unless the plain meaning is ambiguous or fails to make sense of the statute as a whole, we do not look beyond the text.”)

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 applies only when a lienholder first files an action and serves the homeowner with a “complaint,” and since neither of those occurred in this case, Subsection 4(a) does not apply to Hart’s mechanics’ lien foreclosure Counterclaim. The Court of Appeals erred in stretching the term “complaint” to include a Counterclaim like Hart’s.⁴ This Court should therefore reverse the Court of Appeals’ Opinion.

⁴ The Court of Appeals also based its Opinion that Subsection 4(a) applies to counterclaims in part on its determination that “the term ‘if,’ which triggers the statute, modifies only the language in the first clause of section 38-1-11(4)(a) and not the word ‘complaint,’ which appears in the second clause.” *Sill v. Hart*, 128 P.3d 1215, 1218, ¶ 9 (Utah Ct. App. 2005) (Court of Appeals’ Opinion, Addendum No. 1 hereto). As shown in the main text above, however, on its face Subsection 4(a) expressly applies only where a “complaint” is served, regardless of whether, grammatically, the “if” in Subsection 4(a) modifies “complaint.” Additionally, the Court of Appeals’ analysis on the scope of the effect of the word “if” in Subsection 4(a) misconstrues the language of the statute because there simply are no separate clauses within Subsection 4(a). Rather, it contains one single-clause sentence with a set of commas that merely set off the definition of a “residence” as that term is used in Subsection 4(a). There is no shift in subject, topic, or thought after the commas that set off the citation to the other statutory definition section. The material before those commas and after them therefore are not separate clauses. Accordingly, the entire introductory sentence of Subsection 4(a), including the word “complaint,” all is modified, qualified, and limited by the “if” that begins

II. SUBSECTION 4(a) DOES NOT REQUIRE SERVICE OF THE REFERENCED INSTRUCTIONS AND FORMS WHERE THEY ADMITTEDLY PROVIDED SILL NO RIGHT OR REMEDY AGAINST HART

A. There Was Nothing to Serve Upon Sill on the Face of Subsection 4(a)

Sill was not entitled to receive from Hart the instructions and forms referenced in Subsection 4(a) even apart from Hart never having filed or served the statutorily-required “complaint.” 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) expressly states that what is to be included “with the service of the complaint on the owner of the residence” is:

(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 [identified and referred to above, and hereinafter, as the “**LRFA**”]; 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 [the LRFA]. [(Utah Code § 38-1-11(4)(a) (2001) (emphasis added)].

Sill indisputably and admittedly did not have any rights under the LRFA as against Hart. There was therefore nothing required to be served upon Sill on the face of Subsection 4(a).

Subsection 4(a). Subsection 4(a) therefore applies only “if” the lien claimant “files an action” and specifically serves a “complaint on the owner” (emphasis added).

The LRFA is a statute which protects homeowners from having to pay twice for the same improvements made to their home. It does so by providing that once a homeowner has paid its general contractor in full, the homeowner and the home are then free from claims and liens of subcontractors who worked on the home. *See e.g.*, Utah Code Ann. § 38-11-102(14) (2001) (defining “original contractor” as “a person who contracts with the owner of real property”); *id.*, § 38-11-107(1) (providing homeowners relief only against parties with contracts “other than directly with the owner”); *id.* § 38-11-204(3)(b) (providing homeowners relief only after the homeowner “has paid in full the original contractor”). In such cases, the LRFA instructions and forms referenced in Subsection 4(a) provide a mechanism for the homeowner to quickly and easily, without having to incur the expense of retaining counsel,⁵ complete the forms to swear and certify to the court that he has already paid in full the original or general contractor for the improvements and therefore obtain summary judgment requiring removal of the lien of a subcontractor.

The LRFA does not apply to and has no bearing or effect whatsoever on the liens and claims of original or general contractors, and certainly not general contractors whom the homeowner has not paid in full. Sill himself correctly admits, and the Court of Appeals acknowledged, that Hart was an original, general contractor, with whom Sill contracted directly. Sill indisputably did not pay Hart in full (as evidenced most poignantly by the jury awarding Hart judgment against Sill in the full principal amount of

⁵ There is simply no need for such instructions or forms where the homeowner himself, Sill in this case, is the one who initiated the lawsuit and had already retained an attorney.

the \$314,500 claimed by Hart for the improvements made to Sill's property). Since Subsection 4(a) calls for service only of forms relating to "the owner's rights" and "available rights" under the LRFA, and since Sill indisputably and admittedly did not have any such rights as against Hart, there simply were no instructions or forms to be served upon Sill under the plain language of Subsection 4(a).

B. The Law Does Not Require Performance of a Useless Act

The Court of Appeals' Opinion improperly imposed a requirement to serve admittedly inapplicable LRFA instructions and forms that would have been of no use to Sill, and which could not have made any difference whatsoever to the outcome of this case. Even if he had received LRFA instructions and forms, Sill had no rights under the LRFA and would not have been able to make any use of them. Service of those instructions and forms would not and could not have changed one bit what Sill did in this case or what the outcome was. Service of such forms therefore would have been a completely vain and useless act, which the law does not require. *See 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); *accord e.g., Defee v. Kaley*, 167 S.E.2d 758, 759 (Ga. Ct. App. 1969) (sustaining oral motion to dismiss even though statute required motion to be in writing and served on adverse party, since the case still would properly have been dismissed if written motion had been made, noting the law does not require one "to do that which would be fruitless"); *Cichecki v. City of Hamtramack Police Dep't*, 170

N.W.2d 58, 61 (Mich. 1969) (holding parties did not have to make a demand required under statute, because making such demand would have been “futile,” and the “law does not require a party to perform a useless act”).

In footnote 3 of its Opinion the Court of Appeals stated that “the responsibility of determining whether the owner being sued has rights under the [LRFA] does not belong to the lien claimant.” *Sill v. Hart*, 128 P.3d 1215, 1218, ¶ 9 (Utah Ct. App. 2005) (Court of Appeals’ Opinion, Addendum No. 1 hereto). That claim, however, ignores the plain language of Subsection 4(a) and the admitted facts of this case. Subsection 4(a) expressly requires service (only with a “complaint” to foreclose a mechanics’ lien upon a residence) only of instructions and forms “relating to the owner’s rights” and “upon which the owner may exercise available rights” under the LRFA. Utah Code Ann. §§ 38-1-11(4)(a)(i) & (ii). Just like it is the responsibility of the lien claimant to determine whether the property at issue is a residence as defined in and subject to the LRFA, so too is it the responsibility of the lien claimant to determine whether the owner of a residence has rights under the LRFA on the facts of the situation at issue – just the same as it is the lien claimant’s responsibility to determine whether it may properly take any steps under the mechanics’ lien act.

In an appropriate case a court may later find that a subcontractor made an incorrect determination and is barred by Subsection 4(a) for failing to serve an owner with LRFA instructions and forms to which they are entitled. This case, however, is not such a case. Here, it is admitted by Sill, and otherwise indisputable, that Sill had no rights under the LRFA as against his unpaid general contractor, Hart. In light of such admitted and

indisputable facts, and further in light of the plain language appearing in Subsection 4(a) requiring service of LRFA instructions and forms only where the owner has rights under the LRFA, this Court should uphold that Subsection 4(a) does not apply to this case and does not require the meaningless act of service of LRFA instructions and forms that are inapplicable and useless to Sill as against Hart. The Court should not punish Hart, as the Court of Appeals did, for not providing something that he had no duty to provide on the face of Subsection 4(a).

C. The Court of Appeals' Opinion is At Odds with Legislative History and Intent

The legislative history of Subsection 4(a) confirms that it does not apply to this case because of Sill's acknowledged lack of rights under the LRFA. The legislative history of Subsection 4(a), both at the time it was originally adopted in 2001, and when it was later amended in 2004, confirms it is only subcontractors whose liens and other collection rights are affected by the LRFA that is referenced in Subsection 4(a). Accordingly, it is only subcontractors who the Legislature intended be required by Subsection 4(a) to provide the LRFA instructions and forms.

The Senate committee hearings and the Senate floor debates on the proposed addition of the requirement to serve LRFA 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 (discussing the proposed Subsection 4(a), explaining the LRFA referenced therein is designed to provide protection against subcontractors when a homeowner has already paid in full the general contractor for the project who then fails to pay subcontractors); S.B. 254, 1st Substitution, 2001 Gen. Leg. Sess., Senate Floor Debate held 02/20/01 (stating the LRFA 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 under Subsection 4(a) only applies to subcontractors and suppliers who are 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 (discussing the proposed amendment to Subsection 4(a) and noting “the primary focus [of the LRFA that is 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 LRFA

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).

When interpreting a statute, the “primary goal is to give effect to the Legislature’s intent in light of the purpose the statute was meant to achieve.” *State v. Perez*, 2000 UT App 65, ¶ 6, 999 P.2d 579 (quoting *Evans v. State*, 963 P.2d 117, 194 (Utah 1998) (internal quotations omitted) (citations omitted)). In order to give effect to the Legislature’s intent with respect to Subsection 4(a), a general contractor must not be held to a requirement, as the Court of Appeals imposed in this case, to serve with a counterclaim inapplicable and useless instructions and forms upon a homeowner who has sued him. This Court therefore should reverse the Court of Appeals’ Opinion which is contrary to the Legislature’s intent as shown in both the language of Subsection 4(a) and its legislative history.

III. THE COURT OF APPEALS’ OPINION DEPARTS FROM AND UNDERMINES THE LONG-RECOGNIZED PURPOSES AND CONSTRUCTIONS OF THE MECHANICS’ LIEN STATUTES

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 mechanics’ lien statutes are to be construed liberally in favor of parties who, like Hart in this case, improve real property. *Butterfield Lumber*,

Inc. v. Peterson Mortgage. Corp., 815 P.2d 1330, 1334 (Utah Ct. App. 1991). This Court also has noted and followed the “modern trend” in mechanics’ lien cases “to dispense with arbitrary rules which have no demonstrable value in a particular fact situation.” *Projects Unlimited, Inc. v. Copper State Thrift & Loan Co.*, 798 P.2d 738, 744 (Utah 1990) (upholding lien against attack where claimed deficiencies did not prejudice other party) (emphasis added).

The district court’s Decision that Subsection 4(a) is inapplicable to this case is firmly rooted in the express language of Subsection 4(a) specifically. It also is in harmony with and serves the intended purpose of the mechanics’ lien statutes generally of protecting Hart who substantially improved Sill’s property.

The Court of Appeals’ Opinion, by contrast, contorts the plain language of Subsection 4(a) and extends it to facts and circumstances to which on its face it clearly does not apply (*i.e.*, the Counterclaim of an unpaid general contractor), including despite the indisputable and admitted fact that the LRFA instructions and forms had no value whatsoever to Sill as against Hart and could not have changed the outcome of this case. All of this is, contrary to the purpose of the mechanics’ lien statutes, to the detriment of, and indeed as an impediment to recovery by, Hart whom the jury found substantially improved Sill’s Property. The result is an enormous windfall to Sill, allowing him to delay for several years payment for his luxury home built by Hart without having to pay interest in the meantime on the money owed by Sill, nor the attorney fees and costs that Hart was required to expend in order to obtain and collect a judgment against Sill for the

amount he justly owed. This Court has recognized that recovery of those amounts in addition to the principal amount owed is vitally important to the mechanics' lien system:

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 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; *see also e.g., Triple I Supply, Inc. v. Sunset Rail, Inc.*, 652 P.2d 1298 (Utah 1998) (stating general rule that unpaid mechanic is entitled to interest from when the last materials furnished)].

The courts should not award such windfalls to delinquent property owners like Sill at the expense of contractors like Hart by novel interpretations of mechanics' lien statutory provisions that apply them beyond their plain and ordinary meaning, and by requiring actions from unpaid contractors that admittedly are of no use or benefit at all to homeowners.

CONCLUSION

The Utah Court of Appeals' extension of Subsection 4(a) to the facts of this case is contrary to the plain language of the statute and established rules of statutory construction. It also punishes Hart for not providing to Sill instructions and forms that admittedly did not apply to this case and could not have changed its outcome. The Court of Appeals' Opinion improperly barred Hart from recovery of substantial attorney fees incurred to force payment of, and prejudgment interest accruing for years on, the amount justly owed by Sill. This Court should reverse the Court of Appeals' Opinion, and

uphold the Decision of the district court in this case, that Subsection 4(a) is inapplicable to this case and that Hart is entitled to the attorney fees and prejudgment interest awarded to him for his successful prosecution of his mechanics' lien.

RESPECTFULLY SUBMITTED this 30th day of June, 2006.

A handwritten signature in black ink, appearing to read "Bradley L. Tilt", written over a horizontal line.

P. Bruce Badger

Robert J. Dale

Bradley L. Tilt

Fabian & Clendenin, PC

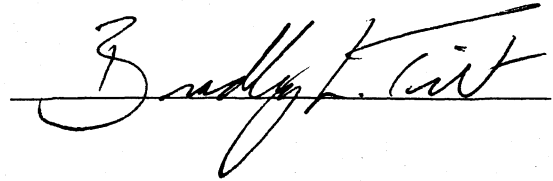
Attorneys for Defendant-Counterclaimant/Appellant

Bill Hart, d/b/a Hart Construction

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **BRIEF OF APPELLANT BILL HART, dba HART CONSTRUCTION**, and of the Addenda that follow this page, were mailed by first-class mail with postage fully prepaid this 30th day of June, 2006, to:

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

A handwritten signature in black ink, appearing to read "Bradley L. Witt", is written over a horizontal line.

Addendum No. 1

¶ 12 In holding that the defendant in *Von Murdock* was not an Indian, the 10th Circuit court asserted jurisdiction and affirmed the conviction for violating 18 U.S.C. § 1165, which prohibits hunting on land belonging to an Indian tribe without permission. *See Von Murdock*, 132 F.3d 534 (10th Cir.1997). Likewise, in *Felter*, the court found that because the defendant no longer maintained Indian status, the federal court could assert jurisdiction rather than the tribal court. *See Felter*, 752 F.2d 1505. The *Felter* court noted “that 18 U.S.C. § 1165 is not applicable to tribal members who hunted in violation of tribal regulation. Tribal jurisdiction over such minor offenses remains exclusive.” *Id.* at 1512 n. 11 (quoting *Felter*, 546 F.Supp. at 1026). It remains clear, however, that “Indian tribes lack jurisdiction to try and punish non-Indians for criminal offenses, and [thus,] 18 U.S.C. § 1165 was designed to fill the gap in enforcement powers as to non-Indians hunting or fishing on tribal or other Indians lands without tribal permission.” *Id.* The *Felter* court thus reasoned that an Indian hunting on Indian lands is under tribal jurisdiction, but a non-Indian hunting on Indian lands is under federal jurisdiction. Nothing in *Von Murdock* or *Felter* suggests that state courts can ever assert jurisdiction over hunting violations committed on Indian lands.

CONCLUSION

¶ 13 We conclude that the crimes occurred in Indian Country governed by the Ute Tribe. Because the Ute Tribe is the victim, the State does not have jurisdiction. We therefore vacate the convictions.

¶ 14 WE CONCUR: JAMES Z. DAVIS and GREGORY K. ORME, Judges.



the tribe.” Utah Code Ann. § 9-9-211 (2003). Similarly, pursuant to its jurisdiction over the land, the Ute Tribe claims a property interest in the wildlife. Section 8-1-3(1) of the Ute Law and Order Code states:

All wildlife now or hereafter within the Uintah and Ouray Reservation, not held by private ownership legally acquired, and which for pur-

2005 UT App 537

Joel SILL, Plaintiff and Appellant,

v.

Bill HART dba Hart Construction,
Defendant and Appellee.

No. 20050245-CA.

Court of Appeals of Utah.

Dec. 15, 2005.

Rehearing Denied Jan. 5, 2005.

Background: Property owner brought action against contractor alleging breach of contract and other claims, and contractor filed counterclaims seeking to foreclose a mechanics’ lien and for unjust enrichment. The Third District Court, Silver Summit Department, Deno Himonas, J., entered judgment on a jury verdict in favor of contractor, and awarded prejudgment interest, attorney fees, and court costs on the mechanics’ lien claim. Owner appealed.

Holdings: The Court of Appeals, Davis, J., held that:

- (1) contractor was required to serve owner with certain documents in connection with the lien foreclosure counterclaim, but
- (2) contractor’s failure to serve such documents did not deprive trial court of jurisdiction over counterclaim.

Reversed and remanded.

1. Appeal and Error ⇐842(8)

Questions of statutory interpretation are questions of law that are reviewed for correctness, giving no deference to the district court’s interpretation.

poses of this Code shall include all big game animals . . . are hereby declared to be the property of the Ute Indian Tribe.

Ute Law and Order Code § 8-1-3(1); cf. Utah Code Ann. § 23-13-3 (2003) (“All wildlife existing within this state, not held by ownership and legally acquired, is the property of the state.”).

2. Appeal and Error \S 842(1)

The determination of whether a trial court has subject matter jurisdiction is a question of law, which Court of Appeals reviews for correctness, according no deference to the trial court's determination.

3. Mechanics' Liens \S 265

Contractor who was sued by owner for breach of contract and on other claims, and who filed counterclaim seeking to enforce a mechanics' lien against owner's residence, was required to serve owner with a form affidavit and motion for summary judgment and instructions relating to the owner's statutory rights, pursuant to statute requiring a mechanics' lien claimant to include such documents "with the service of the complaint" if the claimant "files an action to enforce" the lien; filing of counterclaim was the filing of an action to enforce the lien, and counterclaim constituted a "complaint" within the meaning of the statute. West's U.C.A. \S 38-1-11(4)(a).

4. Pleading \S 34(1)

The character of a pleading will be determined by the court by the facts set out in the pleading.

5. Mechanics' Liens \S 265

Contractor's failure to serve property owner with a form affidavit and motion for summary judgment and instructions relating to the owner's statutory rights, as required by statute governing actions to enforce mechanics' liens against residences, did not deprive trial court of jurisdiction over contractor's counterclaim seeking to foreclose a mechanics' lien against owner's residence, which was filed in owner's action alleging breach of contract and other claims; rather, contractor's failure to comply with statute was an avoidance or affirmative defense raising matters outside the pleadings. West's U.C.A. \S 38-1-11(4)(a); Rules Civ. Proc., Rule 8(c).

Robert J. Dale, P. Bruce Badger, and Bradley L. Tilt, Fabian & Clendenin, Salt Lake City, for Appellee.

Before Judges DAVIS, GREENWOOD, and THORNE.

OPINION

DAVIS, Judge:

\P 1 Plaintiff-counterclaim defendant Joel Sill appeals from a final judgment and award of prejudgment interest, attorney fees, and court costs in favor of Defendant-counterclaimant Bill Hart. We reverse and remand.

BACKGROUND

\P 2 Sill is the owner of real property located in Summit County, Utah (the Property). Hart, a general contractor, began construction on the Property in the summer of 1999 and continued until approximately December 2001, at which time Hart left the job over a dispute with Sill regarding the completion of the project. In January 2002, Sill brought an action against Hart, alleging (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) breach of fiduciary duty, (4) negligent misrepresentation, (5) intentional misrepresentation, (6) unjust enrichment, and (7) defamation. Hart counterclaimed in February 2002, alleging breach of contract and unjust enrichment, and seeking to foreclose a mechanics' lien on the Property.

\P 3 More than two and a half years later, in October 2004, Sill for the first time raised the issue of Hart's compliance with Utah Code section 38-1-11(4)(a). See Utah Code Ann. \S 38-1-11(4)(a) (2001). The parties reserved the issue for post verdict determination, and the case went to trial one week later. The jury returned a verdict in favor of Hart in the amount of \$314,500 on Hart's unjust enrichment and mechanics' lien claims. In addition, Hart was awarded prejudgment interest, attorney fees, and court costs on his mechanics' lien claim.

\P 4 Hart thereafter sought to reduce the verdict to judgment. Sill opposed the effort insofar as it related to Hart's mechanics' lien claim. Sill argued that the trial court lacked

jurisdiction to hear Hart's mechanics' lien claim because Hart, when he served his counterclaim on Sill, did not include the instructions nor the form affidavit and motion for summary judgment required by section 38-1-11(4)(a).¹ Hart disagreed, arguing that only plaintiffs filing a "complaint"—as opposed to those filing a counterclaim—are required to comply with section 38-1-11(4)(a). The trial court agreed with Hart and entered judgment in his favor on both the unjust enrichment and the mechanics' lien claims. The court also awarded Hart prejudgment interest, attorney fees, and court costs on his mechanics' lien claim. Sill timely appealed.

ISSUES AND STANDARDS OF REVIEW

¶ 5 Under section 38-1-11(4)(a), a lien claimant filing an action to enforce a mechanics' lien on a residence must include certain documents relating to the Residence Lien Restriction and Lien Recovery Fund Act when he serves his complaint upon the owner of the residence. *See id.* Pursuant to section 38-1-11(4)(e), the lien claimant is "barred from maintaining or enforcing the lien" if he fails to provide such documents. *Id.* § 38-1-11(4)(e).

¶ 6 Hart concedes that he did not serve Sill with the documents referenced in section 38-1-11(4)(a), but argues that section 38-1-11(4)(a) does not apply to his claim because he filed a counterclaim as opposed to a "complaint" and because Sill has no rights under the Residence Lien Restriction and Lien Recovery Fund Act. Sill, on the other hand, argues not only that section 38-1-11(4)(a) is applicable, but also that the language of section 38-1-11(4)(e) makes subsection 4(a) a jurisdictional provision. Sill therefore contends that Hart's failure to comply with section 38-1-11(4)(a) deprived the trial court of jurisdiction to hear Hart's lien foreclosure action.

1. In 2004, the legislature amended the statute to require service of only the instructions and form affidavit. *See* Utah Code Ann. § 38-1-11(4)(a) (Supp.2004). However, the statute relevant to these proceedings required service of instructions and a form affidavit and motion for summary judgment. *See id.* § 38-1-11(4)(a) (2001).

[1, 2] ¶ 7 Questions of statutory interpretation are 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. "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." *Beaver County v. Qwest, Inc.*, 2001 UT 81, ¶ 8, 31 P.3d 1147.

ANALYSIS

[3] ¶ 8 Prior to addressing Sill's jurisdictional claim, we first determine whether section 38-1-11(4)(a) is even applicable in this case. The language at issue here states:

If a lien claimant files an action to enforce a lien filed under [the Mechanics' Liens Act] involving a residence, as defined in [s]ection 38-11-102,[²] 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.

Utah Code Ann. § 38-1-11(4)(a)(i)-(ii). Hart argues the statute applies only if the lien claimant "files an action" and serves a "complaint" to foreclose a mechanics' lien, and only if the owner being sued has rights under the Residence Lien Restriction and Lien Recovery Fund Act. Hart therefore contends that he was not required to serve the documents referenced in section 38-1-11(4)(a) be-

2. Under Utah Code section 38-11-102, a "residence" is defined as "an improvement to real property used or occupied, to be used or occupied as, or in conjunction with, a primary or secondary detached single-family dwelling or multifamily dwelling up to two units, including factory built housing." Utah Code Ann. § 38-11-102(20) (2001).

cause he filed a counterclaim, as opposed to an initial complaint, to foreclose a mechanics' lien and because Sill has no rights under the Residence Lien Restriction and Lien Recovery Fund Act.

¶ 9 We disagree with Hart's contention that section 38-1-11(4)(a) requires the service of a "complaint" and applies only if the owner being sued has rights under the Residence Lien Restriction and Lien Recovery Fund Act. "When faced with a question of statutory construction, we look first to the plain language of the statute," *Gillman v. Sprint Communications Co.*, 2004 UT App 143, ¶ 7, 91 P.3d 858 (quotations and citation omitted), *cert. denied*, 98 P.3d 1177 (Utah 2004), and we "will not infer substantive terms into the text that are not already there," *Associated Gen. Contractors v. Board of Oil, Gas & Mining*, 2001 UT 112, ¶ 30, 38 P.3d 291 (quotations and citation omitted). The statute here is triggered "[i]f a lien claimant files an action to enforce a lien filed under [the Mechanics' Liens Act] involving a residence, as defined in [s]ection 38-11-102." Utah Code Ann. § 38-1-11(4)(a). By the plain language of section 38-1-11(4)(a), the term "if," which triggers the statute, modifies only the language in the first clause of section 38-1-11(4)(a) and not the word "complaint," which appears in the second clause. *See id.* The application of section 38-1-11(4)(a), therefore, does not require the service specifically of a complaint, nor is the statute applicable only if the owner being sued has rights under the Residence Lien Restriction and Lien Recovery Fund Act.³ Instead, the statute is triggered if a lien claimant files an action to enforce a lien filed under the Mechanics' Liens Act involving a residence as defined by section 38-11-102. *See id.*

¶ 10 Section 38-1-11(4)(a) was clearly triggered here. Pursuant to the Mechanics' Liens Act, Hart recorded a notice of lien with Summit County in January 2002, and neither party argues that such lien does not involve a residence as defined by section 38-11-102. *See id.* § 38-11-102(20) (2001). Further-

more, Hart filed an action to enforce the lien when he filed his counterclaim in February 2002. The fact that Sill had already filed a complaint against Hart—alleging seven causes of action, all of which sounded in common law and none of which were related to the Mechanics' Liens Act—does not affect Hart's role as "a lien claimant fil[ing] an action to enforce a lien filed under [the Mechanics' Liens Act] involving a residence, as defined in [s]ection 38-11-102." *Id.* § 38-1-11(4)(a). Hart therefore was required to serve upon Sill the instructions and form affidavit and motion for summary judgment referenced in section 38-1-11(4)(a).

¶ 11 Our interpretation of section 38-1-11(4)(a) is supported by Utah caselaw. When interpreting the plain language of a statute, we "assume that each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable." *Gillman*, 2004 UT App 143 at ¶ 7, 91 P.3d 858 (quotations and citation omitted). "It is axiomatic that a statute should be given a reasonable and sensible construction, and that the legislature did not intend an absurd or unreasonable result." *State ex rel. Div. of Consumer Prot. v. GAF Corp.*, 760 P.2d 310, 313 (Utah 1988) (internal citation omitted).

¶ 12 Here, the statute at issue applies to a lien claimant filing "an action to enforce a lien filed under [the Mechanics' Liens Act]." Utah Code Ann. § 38-1-11(4)(a). Utah courts have interpreted similar language to include counterclaims. *See, e.g., American Rural Cellular, Inc. v. Systems Communication Corp.*, 939 P.2d 185, 193 (Utah Ct.App. 1997) ("[Defendant] brought a counterclaim to foreclose its mechanics' liens. This clearly qualifies as 'an[y] action brought to enforce any lien' under the mechanics' lien statute." (quoting Utah Code Ann. § 38-1-18 (Supp. 1996))); *First Gen. Servs. v. Perkins*, 918 P.2d 480, 486 (Utah Ct.App. 1996) ("[T]he successful defense of counterclaims which would otherwise defeat the principal lien claim . . . must necessarily be considered for the purpose of awarding attorney fees under [section

3. Furthermore, the responsibility of determining whether the owner being sued has rights under the Residence Lien Restriction and Lien Recov-

ery Fund Act does not belong to the lien claimant.

38-1-18 of] the mechanics' lien statute. Logically, a lien holder must defend against such claims in order to 'enforce' the lien." (quoting Utah Code Ann. § 38-1-18 (1994))).

[4] ¶ 13 Furthermore, although the statute specifically references "the service of the complaint," Utah Code Ann. § 38-1-11(4)(a), the term "complaint" is frequently interpreted in Utah caselaw as including counterclaims, see, e.g., *State ex rel. Road Comm'n v. Parker*, 13 Utah 2d 65, 368 P.2d 585, 587 (1962) ("[N]either under our rules or elsewhere, can a counterclaimant cast himself in any other role than that of a plaintiff."), *overruled in part on other grounds, Colman v. State Land Bd.*, 795 P.2d 622 (Utah 1990); *Harman v. Yeager*, 103 Utah 208, 134 P.2d 695, 696 (1943) ("A counterclaim is viewed as an original action, instituted by the defendant against the plaintiff and is tested by the same tests and rules as a complaint."). Indeed, the character of a pleading "will be determined by the court by the facts set out in the pleading." *Harman*, 134 P.2d at 696; see also *For-Shor Co. v. Early*, 828 P.2d 1080, 1084 n. 5 (Utah Ct.App.1992) (treating an action to intervene and foreclose a lien as a complaint). Because a literal reading of the term "complaint" would be "unreasonably confus[ing]" and render the statute "inoperable," *Gillman*, 2004 UT App 143 at ¶ 7, 91 P.3d 858 (quotations and citation omitted), we hold that the term "complaint," as it is used in section 38-1-11(4)(a), includes counterclaims.

[5] ¶ 14 Sill argues that section 38-1-11(4)(a) is a jurisdictional provision, and therefore, Hart's failure to comply therewith deprived the trial court of jurisdiction to hear Hart's lien foreclosure action. We recently ruled that "failure to adhere to section 38-1-11(4)(a) [does] not divest the trial court of jurisdiction." *Pearson v. Lamb*, 2005 UT App 383, ¶ 15, 121 P.3d 717.

¶ 15 Instead, Hart's failure to comply with section 38-1-11(4)(a) "constitut[es] an avoidance or affirmative defense" under rule 8(c) of the Utah Rules of Civil Procedure. Utah R. Civ. P. 8(c). Although rule 8(c) does not define or explain what constitutes an avoidance or an affirmative defense, "a rule 8(c) affirmative defense is a defense employed to

defeat the plaintiff's claim by raising matters outside or extrinsic to the plaintiff's prima facie case." *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 31, 56 P.3d 524; see also *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1374 (Utah 1996) ("A rule 8(c) affirmative defense . . . raises matter outside the plaintiff's prima facie case." (quotations and citation omitted)); *Creekview Apartments v. State Farm Ins. Co.*, 771 P.2d 693, 695 (Utah Ct.App.1989) (explaining that avoidance under rule 8(c) is "a defense independent of the allegations in the pleadings"). Here, Hart's failure to comply with the requirements of section 38-1-11(4)(a) constitutes an affirmative defense by Sill, in that it suggests that Hart's mechanics' lien claim is invalid for reasons outside and independent of the allegations in Hart's counterclaim.

¶ 16 Although it appears from the record that Sill did not raise the affirmative defense until one week prior to trial and never made a motion to amend his prior pleadings to include the affirmative defense, the trial court made no findings whatsoever regarding these matters, the effect thereof, or the effect of the parties' stipulation thereon. Further, it is unclear from the record whether Hart ever served Sill with the instructions and form affidavit and motion for summary judgment required by section 38-1-11(4)(a).

CONCLUSION

¶ 17 For the foregoing reasons, we reverse the trial court's award of prejudgment interest, attorney fees, and court costs in favor of Hart, and remand for further proceedings regarding Sill's affirmative defense in accordance with this opinion. The parties are to bear their own attorney fees and court costs on appeal.

¶ 18 WE CONCUR: PAMELA T. GREENWOOD and WILLIAM A. THORNE JR., Judges.



Addendum No. 2

FILED
APPELLATE COURTS
JAN 05 2006

IN THE UTAH COURT OF APPEALS

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Joel Sill,)
)
 Plaintiff and Appellant,)
 v.)
)
 Bill Hart dba Hart)
 Construction,)
)
 Defendant and Appellee.)

ORDER

Case No. 20050245-CA

.....

This matter is before the court upon Appellee's petition for rehearing filed December 29, 2005.

Now, therefore, IT IS HEREBY ORDERED that the petition for rehearing is denied.

Dated this 5 day of January, 2006.

FOR THE COURT:

James Z. Davis Judge

CERTIFICATE OF MAILING

I hereby certify that on January 5, 2006, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

ROBERT J. DALE
P. BRUCE BADGER
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PARK CITY UT 84068

and a true and correct copy of the foregoing ORDER was deposited in the United States mail to the trial court listed below:

THIRD DISTRICT, SILVER SUMMIT
ATTN: JOYE OVARD / DEBBIE FOUST
6300 N SILVER CREEK DR
PARK CITY UT 84098

Dated this January 5, 2006.

By Beth A. Pechota
Deputy Clerk

Case No. 20050245
THIRD DISTRICT, SILVER SUMMIT, 020500012

Addendum No. 3

**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

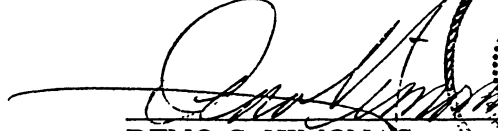
Finally, the Court rejects Sill's alternative challenge to Hart's entitlement to prejudgment interest and awards Hart the same on his mechanics' lien claim. The Court also awards Hart attorney's fees (as prayed for and established by affidavit) and costs of suit (as described by the Court at the January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

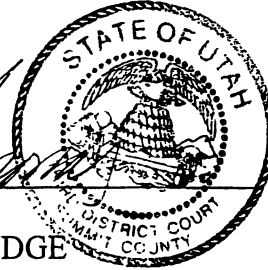
CONCLUSION

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. 4

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

Prepared by:

P. Bruce Badger, #4791
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Attorneys for Defendant/Counterclaimant/Third-Party Plaintiff Bill Hart

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

<p>JOEL SILL,</p> <p>Plaintiff/Counterclaim Defendant,</p> <p>vs.</p> <p>BILL HART, d/b/a HART CONSTRUCTION,</p> <p>Defendant/Counterclaimant,</p> <hr/> <p>BILL HART, d/b/a HART CONSTRUCTION,</p> <p>Third Party Plaintiff,</p> <p>v.</p> <p>KALLIE J. SILL, and DOES I-X,</p> <p>Third Party Defendants.</p>	<p>FINAL JUDGMENT, ORDER AND DECREE OF FORECLOSURE</p> <p>Civil No. 020500012</p> <p>Judge Deno G. Himonas</p>
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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.

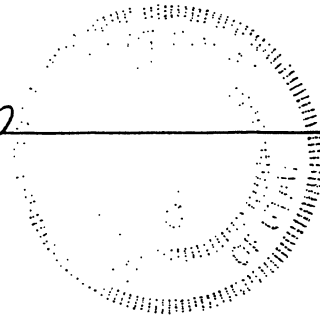
8. After the time allowed by law for redemption has expired, the Sheriff shall execute and deliver a Sheriff's Deed (the "Deed") to the purchaser at the sheriff's sale or the person entitled thereto, as provided for by the Utah Rules of Civil Procedure. The grantee named therein shall thereupon be entitled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

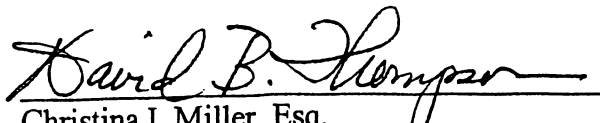
10. This judgment shall be augmented in the amount of reasonable costs and attorneys fees incurred by Defendant Bill Hart in collecting this judgment, by execution or otherwise, as shall be established by affidavit.

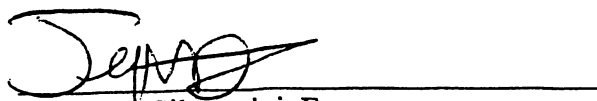
DATED this 24 day of February, 2005.


Third District Court



Approved as to form:


Christina I. Miller, Esq.
David B. Thompson, Esq.
Miller, Vance & Thompson, P.C.
Attorneys for Plaintiff Joel Sill


Jeffrey L. Silvestrini, Esq.
Cohne, Rappaport & Segal, P.C.
Attorneys for Third Party Defendant Kallie J. Sill