

2006

# Joel Sill v. Bill Hart dba Hart Construction : Reply Brief

Utah Court of Appeals

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IN THE SUPREME COURT OF UTAH

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

---

**REPLY OF APPELLANT BILL HART, dba HART CONSTRUCTION  
TO APPELLEE'S RESPONSE TO APPELLANT'S OPENING BRIEF,  
AND BRIEF IN OPPOSITION TO CROSS-APPEAL**

---

Appeal from a Ruling of the Utah Court of Appeals

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Construction

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SEP 11 2006

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## **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.

## **CONTROLLING STATUTES**

**Utah Code § 38-1-11 (2001)<sup>1</sup>: [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).

...

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

## **SUMMARY OF ARGUMENTS**

Plaintiff/Appellee Joel Sill (“Sill”) asks this Court to uphold a ruling of the Utah Court of Appeals judicially rewriting Utah Code Ann. § 38-1-11(4)(a) (2001) (“**Subsection 4(a)**”) and applying it to facts outside of its express terms. Subsection 4(a)

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<sup>1</sup> The parties agree that the statutes determinative of this case are those that were in place in February of 2002.

clearly and expressly states that it applies only to mechanics' lien claimants who file an action and serve a "complaint" on the owner of residential property. Subsection 4(a) further expressly states that what is to be served in such cases are instructions and forms regarding "the owner's rights" or "available rights" which "the owner may exercise" under Utah's Residence Lien Restriction and Lien Recovery Fund Act, Utah Code Ann. §§ 38-11-101 *et seq.* (the "**LRFA**"). In this case, it is undisputed that neither of those express conditions and requirements for application of Subsection 4(a) exists. The Court of Appeals therefore erred in reversing a well-reasoned decision of the district court, and holding Subsection 4(a) required Defendant/Appellant Bill Hart d/b/a Hart Construction ("**Hart**"), the defendant in the case who never filed or served a complaint, to serve upon Sill, with Hart's answer which included a counterclaim (the "**Counterclaim**"), instructions and forms relating to the LRFA, even though Sill admittedly had no rights under the LRFA. Based upon that ruling which impermissibly deviates from the plain language of the statute as chosen and drafted by the Legislature, the Court of Appeals wrongly reversed an award to Hart of more than \$300,000.00 in prejudgment interest accrued on amounts owed by Sill, and attorney fees and costs incurred by Hart in two years of litigation to collect the amounts Sill owed.<sup>2</sup>

The Court of Appeals' ruling applying Subsection 4(a) to this case, and Sill's arguments defending it, attempt to force the square peg of this case into the round hole of Subsection 4(a). Such application is contrary to the plain language of Subsection 4(a) specifically, and to the overarching purposes of the mechanics' lien statutes generally.

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<sup>2</sup> Hart also won a jury verdict awarding him the full principle amount of \$314,500.00 that he claimed was owed by Sill. During the pendency of this appeal, Sill has paid that principal amount.

This Court should reverse the Court of Appeals, reinstate the district court's decision declaring Subsection 4(a) inapplicable to this case, and reinstate the district court's award of interest and attorney fees and costs to Hart.

In his cross-appeal Sill attacks that portion of the Court of Appeals' ruling that Subsection 4(a) is not a "jurisdictional" statute. Since Subsection 4(a) does not apply to begin with, this Court need not even reach the issue of whether it is jurisdictional. But Sill's jurisdiction arguments also fail in any event. Sill bases his jurisdiction argument on Utah Code Ann. § 38-1-11(4)(e) (2001) ("**Subsection 4(e)**"), which states that if a lien claimant fails to serve items required by Subsection 4(a), the lien claimant is "barred" from maintaining or enforcing the lien. There is, however, nothing inherently "jurisdictional" about the word "barred," and Sill fails to show any clearly expressed intention of the Legislature that Subsections 4(a) or 4(e) limit jurisdiction, as is necessary to overcome the established legal presumption of jurisdiction. Sill's analysis also fails to view Subsection 4(a) in the context of the overall mechanics' lien statutes of which it is a part. When viewed in that context, as required by the very authorities upon which Sill himself relies, even where it applies Subsection 4(a) does not impose a jurisdictional bar. This Court therefore should uphold the ruling of the Court of Appeals that Subsections 4(a) and 4(e) are not jurisdictional.

## **ARGUMENT**

### **REPLY OF APPELLANT HART TO SILL'S RESPONSE TO HART'S OPENING BRIEF**

#### **I. APPLICATION OF SUBSECTION 4(a) TO THIS CASE IS CONTRARY TO THE FACE OF THE STATUTE ITSELF AND THE RULES OF STATUTORY CONSTRUCTION**

##### **A. Subsection 4(a) Applies Specifically and Exclusively to Service of A “Complaint,” and Cannot Be Applied to Hart’s Counterclaim**

Subsection 4(a) expressly refers specifically and exclusively to a “complaint” as the only pleading with which LRFA instructions and forms are to be served. The Court of Appeals therefore erred in ruling that statute “does not require the service specifically of a complaint,” and that it applied to Hart’s Counterclaim in this case. *Sill v. Hart*, 128 P.3d 1215, 1218, ¶ 9 (emphasis added) (a copy of the Court of Appeals’ opinion in this case is attached as Addendum No. 1 to Hart’s opening brief to this Court).

The Court of Appeals’, and Sill’s, reliance on *American Rural Cellular, Inc. v. Systems Communications Corp.*, 939 P.2d 185 (Utah Ct. App. 1997) is misplaced. That case serves only to highlight that Subsection 4(a) does not apply to counterclaims. *American Rural* held that “a counterclaim to foreclose a mechanics' lien ... clearly qualifies as ‘an action brought to enforce any lien’” under the attorney fees provision of the mechanics' lien statute. *Id.* at 193 (quoting Utah Code Ann. § 38-1-18). The Court of Appeals and Sill argue in this case that Subsection 4(a) also applies to counterclaims because it too refers to “an action” to enforce a mechanics’ lien, and under *American Rural* a counterclaim qualifies as “an action.”

That, however, is only half of the analysis. As Sill himself correctly notes, “in construing a statute a court assumes that when the Legislature enacted the statute, it was aware of prior court decisions interpreting similar statutory language.” (Sill’s Brief, p. 9 (citing *Donahue v. Warner Bro. Picture Dist. Corp.*, 2 Utah 2d 256, 261, 272 P.2d 177, 180 (1954))). It therefore must be assumed as a matter of law that when the Utah Legislature enacted Subsection 4(a) in 2001 it was aware of the 1997 decision in *American Rural* interpreting “action” to include counterclaims. Accordingly, had the Legislature intended Subsection 4(a) to apply to counterclaims it would have left the term “action” broad and unqualified as it did in the attorney fee provision that was the subject of *American Rural*. The Legislature, however, did not do that. Instead, it added to the term “action” a limiting reference specifically to a “complaint.” That reference to a “complaint” limits and qualifies the term “action,” restricting application of Subsection 4(a) to only an “action” where the lien claimant files and serves a “complaint.”

Well-settled rules of statutory construction provide that courts must “assume that each term in the statute was used advisedly.” *E.g.*, *Gillman v. Sprint Comm. Co.*, 2004 UT App 143, ¶ 7, 91 P.3d 858, *cert. denied*, 98 P.3d 1177 (Utah 2004) (emphasis added). Also, in statutory text the expression of one thing implies the exclusion of another, and omissions in statutory language must be taken note of and given effect. *E.g.*, *State v. Hobbs*, 2003 UT App 27, ¶ 21, 64 P.3d 1218; *Sorenson’s Ranch School v. Oram*, 2001 UT App 354, ¶ 11, 36 P.3d 528. As applied to this case, the Legislature’s choice to add a reference in Subsection 4(a) specifically to a “complaint” must be deemed to have been

purposefully and advisedly made, intending to and in fact distinguishing the term “action” as used in Subsection 4(a) from its broader, unqualified application as used in the attorney fee provision, limiting application of Subsection 4(a) to exclude any other pleadings but a “complaint” from its reach. Such express reference to a “complaint” should be respected and enforced by the courts. By ruling as it did that Subsection 4(a) nevertheless applies to Hart’s Counterclaim, the Court of Appeals strayed from the express statutory language and violated each of those rules of statutory construction. It also impermissibly inferred a substantive term into the statute (*i.e.* counterclaim) that simply is not there, and improperly rendered meaningless Subsection 4(a)’s express and exclusive reference to a “complaint” as the only pleading to which Subsection 4(a) applies, all in violation of additional rules of statutory construction. *See e.g., Associated Gen. Contractors v. Board of Oil Gas & Mining*, 2001 UT 112, ¶ 30, 38 P.3d 291 (courts must “not infer substantive terms into [statutory] text that are not already there”); *Lund v. Brown*, 2001 UT 75, ¶ 23, 11 P.3d 277 (Utah 2000) (“[A]ny interpretation which renders parts or words in a statute inoperative or superfluous is to be avoided.”) (quotations and citations omitted).<sup>3</sup>

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<sup>3</sup> Sill’s argument that the term “complaint” in Subsection 4(a) “is used with no qualifying or limiting language” and therefore is expanded by the word “action” to include and apply to counterclaims (Sill’s Brief, p. 9), is backwards. The term “complaint” in Subsection 4(a) is the qualifying and limiting language, restricting the term “action,” which otherwise may have applied to all actions, including counterclaims, as it does in the fee provision addressed in *American Rural*.

Sill’s argument that restricting Subsection 4(a) to actions in which the lien claimant serves a “complaint” somehow ascribes to the Legislature a “hide-the-ball attitude” must be tongue-in-cheek. The Legislature can hardly be accused of hiding the ball where it clearly and expressly stated on the face of Subsection 4(a) that it applies

Not only are they contrary to the language of Subsection 4(a) and established rules of statutory construction, but Sill's arguments that "complaint" as used in Subsection 4(a) includes counterclaims are not even supported by the authorities he cites. Each of those authorities, *State ex rel. Road Comm'n v. Parker*, 13 Utah 2d 65, 368 P.2d 585 (1962), *Harman v. Yeager*, 103 Utah 208, 134 P.2d 695 (1943), *Kane v. Kane*, 558 N.Y.S.2d 627 (A.D. 1990), and Wright & Miller, *Federal Practice and Procedure*, § 1184 (3d ed. 2004), spoke merely to the pleading standards required for counterclaims generally (*i.e.*, that they must state facts sufficient to support a claim for affirmative relief, as distinguished from merely stating a defense to a plaintiff's complaint).<sup>4</sup> None of them dealt with

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only where a lien claimant files an action and serves a "complaint." It is instead the interpretation offered by Sill whereby "complaint" would actually mean and include things other than a complaint, that hides the ball.

<sup>4</sup> In footnote 4 of his Brief, Sill argues that counterclaims and complaints are interchangeable purportedly because "the courts – this Court included – frequently refer to the pleading that sets forth a counterclaim as a 'counterclaim complaint.'" (Sill's Brief, p. 13). Sill cites four cases in support of that broad claim: *Lundahl v. Quinn*, 2003 UT 11, ¶ 1, 67 P.3d 1000; *Berkeley Inv. Group, Ltd. v. Colkitt*, 259 F.3d 135, 138 (3<sup>rd</sup> Cir. 2001); *Foundation for Interior Design Educ. Res. v. Savannah College of Art & Design*, 244 F.3d 521, 531 (6<sup>th</sup> Cir. 2001); *Federal Kemper Life Assur. Co. v. Ellis*, 28 F.3d 1033, 1038 (10<sup>th</sup> Cir. 1994). Aside from the fact that four isolated references to use of the made-up term "counterclaim complaint" in courts throughout the entire country are hardly "frequent," none of Sill's four cited cases attached substantive significance to their loose use of that term. Certainly none of those cases dealt with Subsection 4(a) which is at issue in this case, nor even involved any statutory language expressly referring specifically to a "complaint" as the pleading triggering application of certain statutory requirements, as Subsection 4(a) does. This Court should not use a made up term like "counterclaim complaint," whether the use of such term is "frequent" outside of the mechanics' lien context or not, to circumvent the express language of Subsection 4(a), and its specific reference to a "complaint." To do so would render the Legislature's use of the term "complaint" in Subsection 4(a) meaningless, "inoperative or superfluous [and] is to be avoided." *Lund*, 11 P.3d at 282.

Subsection 4(a), nor involved construction of the word “complaint” or “counterclaim” as any statutory term, which is the issue in this case.

Sill argues that in drafting Subsection 4(a) the Legislature “would have chosen” the term “complaint” from the list of different pleadings with the intent that it “would cover both an original complaint and a counterclaim,” purportedly in light of what Sill claims is “the prevailing view of courts and commentators that a counterclaim is a complaint.” (Sill’s Brief, p. 14).<sup>5</sup> It is fatal to Sill’s argument that the Utah Legislature

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<sup>5</sup> Sill repeatedly refers throughout his brief to this purportedly “prevailing view.” None of the cases he cites, however, even support Sill’s position. In fact, they ultimately support Hart’s position. For example, Sill’s cited cases of *Wilson v. Baldwin*, 519 S.E.2d 251 (Ga. App. 1999), *Brink’s Inc. v. City of New York*, 533 F.Supp. 1122 (S.D.N.Y. 1982), and *Quality Clothes Shop v. Keeney*, 106 N.E. 541 (Ind. App. 1914) all equated complaints with counterclaims because the legislatures had expressly done so in the statutes there at issue. *Wilson*, 519 S.E.2d at 252 (quoting statute which prohibited bringing “a complaint seeking to obtain a change of legal custody” in various circumstances, including “as a counterclaim”); *Brink’s*, 533 F.Supp. at 1123 n.3 (quoting statute that “cause of action contained in a counterclaim or cross-claim shall be treated, as far as practicable, as if it were contained in a complaint”); *Keeney*, 106 N.E. at 542 (discussing statute under which a “counterclaim” was a pleading “which in another action would entitle the defendant to a judgment against the plaintiff”). Those statutes, and therefore those cases, stand in stark contrast to Utah’s Subsection 4(a) at issue in this case, which refers exclusively to a “complaint,” and draws no parallel at all between a complaint and a counterclaim. As shown in the main text above, rules of statutory construction require that the exclusive reference to a “complaint” in Subsection 4(a) must be deemed to have been purposefully and advisedly adopted by the Legislature, and must be respected and enforced by the courts.

Even the cases cited by Sill which held statutory uses of the word “complaint” applied to counterclaims do not help Sill’s position in this case. The history of Subsection 4(a)’s use of the term “complaint” makes that statute unique and distinguishable from the use of that term generally in other states’ statutes in Sill’s cited cases of *Uncle Henry’s, Inc. v. Plaut Consulting, Inc.*, 382 F.Supp.2d 150 (D. Med. 2005) and *Breech v. Hughes Tool Co.*, 189 A.2d 428 (Del. 1963). As shown in the main text above, it has previously been held in Utah that the term “action” standing alone in Utah’s mechanics’ lien statutes includes and applies to counterclaims. *American Rural Cellular*, 939 P.2d at 193. Addition of the term “complaint” in Subsection 4(a), therefore, was as a



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).<sup>6</sup>

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limiting term, restricting the term “action,” which otherwise, standing alone, would have applied to a counterclaim, to mean and refer instead specifically and only to a “complaint.” The Court therefore should not in this case construe the statutory term “complaint” broadly to apply to other pleadings such as counterclaims.

*Lebrecht v. Orefice*, 105 N.Y.S.2d 318 (N.Y. 1951), cited by Sill, merely held that a statute allowing re-filing of an “action” applied equally to complaints and counterclaims. Since the term “action” as used in Subsection 4(a) is specifically limited to one in which a “complaint” is filed, *Lebrecht* is inapposite. *Liberty Chevrolet, Inc. v. Rainey*, 791 N. E.2d 625 (Ill. App. 2003), also cited by Sill, also is inapposite because it dealt with construction of terms under a private contract rather than a statute, and its ruling that the term “complaint” as used in the contract broadly included counterclaims was specifically due to a public policy at work in that case favoring having disputes submitted to arbitration where a contract calls for arbitration. That public policy simply is not implicated in the case at bar. As discussed more fully in the main text below, the public policy implicated in this case is the statutory protection of parties who, like Hart, work to improve real property. That policy of course favors a construction of “complaint” to exclude and not apply to Hart’s Counterclaim.

<sup>6</sup> In footnote 6 of his Brief, Sill attempts to distinguish these two statutes “because they did not mirror the *context* in which “complaint” is used in subsection (4)(a).” (Emphasis in original). Sill misses the point that what those statutes show is that the Legislature knows how to state that a statute is to apply to a counterclaim when it intends that result, as distinguished from Subsection 4(a) in this case which specifically, expressly, and exclusively used the term “complaint.” Sill’s citation to Rule 8(a) of the Utah Rules of Civil Procedure also is fatal to his attempt to blur the distinction between a counterclaim and a complaint because Rule 8(a) on its face distinguishes between those documents, specifically using the term “counterclaim” where it intended Rule 8 to apply to a counterclaim. Sill’s argument that “[n]othing in the plain language of Rule 13(a) suggests that a counterclaim is not a complaint,” is also totally incorrect. Rule 7(a) identifies a complaint. Rule 13(a) separately identifies a counterclaim, which is a part of an answer. There is nothing in Rule 13(a), or any other

**B. There Was Nothing To Serve Upon Sill On The Face Of Subsection 4(a)**

Subsection 4(a) expressly states that what is to be included “with the service of the complaint on the owner of the residence” are:

- (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, however, did not have any rights under the LRFA in this case, as shown in Hart’s opening brief, and which Sill and the Court of Appeals acknowledge and admit. There was therefore nothing to serve upon Sill on the face of Subsection 4(a) even if Hart had filed and served a “complaint,” which he did not.

Sill focuses on the part of Subsection 4(a) referring to the service of LRFA instructions and forms by the “lien claimant,” which he argues applies broadly to general contractors and subcontractors alike. That myopic focus, however, is unwarranted and unavailing. 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). Therefore, even for the sake of argument, construing broadly who is subject to the requirements of Subsection 4(a) there still is the

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rule of civil procedure, to suggest that a counterclaim is a complaint. Instead, those pleadings are separately named and defined, and there are specific references to those separate pleadings throughout the rules.

question of what is necessary to meet those requirements. What Subsection 4(a) requires is service of forms relating to “the owner’s rights under [the LRFA],” and “available rights under [the LRFA]” which “the owner may exercise.” Since Sill indisputably and admittedly did not have any such rights in this case, there simply were no instructions or forms required to be served upon Sill under the plain language of Subsection 4(a).<sup>7</sup> Sill’s position that Subsection 4(a) does not limit the requirement to serve LRFA forms and instructions to situations where the owner is able to exercise LRFA rights is flatly contrary to the statutory language.

Sill argues that lien claimants should not be allowed to make the determination of whether an owner in a given case is eligible for relief under the LRFA. But the

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<sup>7</sup> Sill’s citations to various mechanics’ lien statutory sections do not support, and actually undermine, the Court of Appeals’ application of Subsection 4(a) to this case. To begin with, the sections Sill cites distinguishing between contractors and subcontractors (*i.e.*, Utah Code Ann. §§ 38-1-2, -14, & -17) are inapposite. Nothing in those sections changes, nor does Sill even claim that they change, the fact that Sill had no rights under the LRFA in this case.

Sill also cites to a provision of the LRFA which states “the original contractor ... shall state in the written contract with the owner what actions are necessary for the owner to be protected under” the LRFA. *Id.* § 38-11-108(1). Had the Legislature intended Subsection 4(a) to apply to an “original contractor” such as Hart, it would have said so expressly as it did in Section 38-11-108(1).

Next, Sill cites to the provisions in the mechanics’ lien statutes regarding the content required in all liens (*id.* § 38-1-7(2)(h)), and the limitations period for filing an action to enforce a mechanics’ lien (*id.* § 38-1-7(3)(c)). Each of those provisions, however, apply on their face to all liens and all lawsuits, without limitation or qualification of any kind. In sharp contrast to such provisions, the Legislature expressly limited the circumstances to which Subsection 4(a) applies and in which LRFA instructions and forms must be served to only those in which the lien claimant files the lawsuit and serves a “complaint” on the owner, and even then only if “the owner” has “available rights” under the LRFA that he “may exercise.”

Legislature itself has already made the determination that they should, stating in Subsection 4(a) that what is to be served are instructions and forms relating to “the owner’s rights” “available” and that “the owner may exercise.” As with any statutory language, it is the party itself who must make the determination in the first instance whether the language applies to their situation and requires any action by them. In an appropriate case a court may later find a lien claimant made an incorrect determination and is therefore barred by Subsection 4(a) for failing to serve an owner with LRFA instructions and forms to which they were entitled. But this 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. There were therefore no LRFA forms or instructions required to be served upon Sill under the plain language of Subsection 4(a).<sup>8</sup>

## **II. THE COURT OF APPEALS’ OPINION UNDERMINES THE INTENT AND PURPOSES OF THE MECHANICS’ LIEN STATUTES**

Sill’s Brief several times references the importance of evaluating the context in which statutory language appears, and the legislative intent and “purpose the statute was meant to achieve.” (Sill’s Brief, p. 20 (quoting *Board of Educ. of Jordan School Dist. v. Sandy City Corp.*, 2004 UT 37, ¶ 8, 94 P.3d 234)). Sill readily acknowledges that the

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<sup>8</sup> Sill’s attempt to compare Hart’s arguments in this case to those made in *Landmark Systems, Inc. v. Delmar Redevelopment Corp.*, 900 S.W.2d 258 (Mo. Ct. App. 1995) is without merit. The argument in *Landmark* was that the court should carve out an exception to the statutory requirement based on the legal sophistication of the party entitled to notice. *Id.* at 261-62. By contrast, in the case at bar the question at issue is whether Subsection 4(a) applies to this case at all to begin with. Hart is not arguing for an exception to, but rather seeks judicial enforcement of, the statutory language defining and limiting the scope and extent of the statute’s applicability on its face.

intent and purpose of Utah's mechanics' lien statutes, of which Subsection 4(a) is a part, has been long and repeatedly recognized to be, and is, to protect those like Hart who perform labor and furnish materials for the improvement of real property. He nevertheless argues to uphold the Court of Appeals' opinion which changes 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, in favor of an owner with no right or ability to use the LRFA referenced forms and instructions). This is all to the detriment of, and is an impediment to, recovery by Hart whom the jury found substantially improved Sill's property. That result is contrary to the well-settled and admitted intent of the mechanics' lien statutes. In attempting to defend that result Sill argues that compliance with provisions of the mechanics' lien statutes is required before one is entitled to their benefits and protections. That, of course, begs the question of whether Subsection 4(a) is a requirement that applies to Hart. On its face it is not, for all other reasons discussed above.

Sill's argument that the appellate court's ruling is not a windfall to him is false. That ruling opens a window for Sill to evade payment of more than \$300,000.00 in prejudgment interest and attorney fees accrued on and incurred to recover the amount which the jury found he rightfully owed to Hart (the full principal amount claimed by Hart). It is undisputed by Sill that recovery of attorney fees and interest, in addition to the principal amount owed, is a vitally important part of the mechanics' lien system. *E.g., A.K. & R. Whipple Plumbing and Heating v. Guy*, 2004 UT 47, ¶ 24, 94 P.3d 270, 276 (noting attorney fee provision strengthens protection of lien statute "by ensuring

someone who successfully uses a mechanics' lien to enforce a payment obligation ... 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.”); *Triple I Supply, Inc. v. Sunset Rail, Inc.*, 652 P.2d 1298 (Utah 1998) (stating general rule that unpaid mechanic is entitled to interest). Allowing evasion of those substantial amounts by Sill as the Court of Appeals' ruling would, is an enormous windfall in a case where service of the LRFA forms and instructions, even if they were required, admittedly could not have made any difference whatsoever to the outcome of this case.

Allowing such windfalls to delinquent property owners like Sill, at the expense of contractors like Hart, is contrary to the mechanics' lien statutes' purpose, particularly when based upon novel interpretations of isolated procedural provisions that apply them beyond their clear, plain and express language to require actions from unpaid contractors admittedly of no use or benefit at all to the owner. This Court therefore should reverse the Court of Appeals and reinstate the ruling of the district court that Subsection 4(a) simply does not apply to this case.

#### **HART'S OPPOSITION TO SILL'S CROSS-APPEAL**

Sill's Cross-Appeal attacks the portion of the Court of Appeals' ruling confirming that, even where it applies, Subsection 4(a) is not “jurisdictional” in nature. Sill's argument in this regard actually is an attack upon the Court of Appeals' ruling in the case of *Pearson v. Lamb*, 2005 UT App 383, 121 P.3d 717, which previously ruled Subsection 4(a) does not divest the court of jurisdiction over lien claims and upon which the Court of Appeals largely relied in this case. Sill's attacks upon *Pearson* and arguments that

Subsection 4(a) is jurisdictional are without merit. The *Pearson* ruling is well-reasoned and sound. Moreover, many of Sill's cited authorities actually also confirm that Subsection 4(a) indeed is not jurisdictional. This Court therefore should uphold the Court of Appeals' ruling in this case that Subsection 4(a) is not a jurisdictional bar to Hart's mechanics' lien claims in any event.

## **I. PRINCIPLES OF STATUTORY CONSTRUCTION CONFIRM THAT SUBSECTION 4(a) IS NOT JURISDICTIONAL**

Sill argues that *Pearson* overlooked the plain language of Utah Code Ann. § 38-1-11(4)(e) (2001) ("**Subsection 4(e)**") and rendered that statute meaningless in violation of rules of statutory construction in holding it was not jurisdictional.<sup>9</sup> In its entirety, Subsection 4(e) states:

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

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<sup>9</sup> Sill cites the rules of statutory construction requiring construction of statutes "according to their plain meaning ... giving meaning to all parts, and avoid rendering portions of the statute superfluous." (Sill's Brief p. 35 (quoting *LKL Assoc., Inc. v. Farley*, 2004 UT 51, ¶ 7, 94 P.3d 279)). He notes the rules of statutory construction requiring the courts to "presume the legislature used each term advisedly" and to give effect to "every word" chosen by the Legislature. (*Id.*, p. 36 (quoting *State v. Maestas*, 2002 UT 123, ¶¶ 52-53, 63 P.3d 621)). Finally, he acknowledges that the ultimate goal of statutory construction is to ascertain and give effect to the legislative intent and purpose underlying the statute. (*Id.*, pp. 35-36). The irony of Sill's citation to statutory construction rules for his jurisdiction argument is that all of those rules and aims of statutory construction highlight and confirm that Subsection 4(a) on its face simply does not apply to this case to begin with, for all of the reasons shown more fully above, rendering all of his arguments as to the purported jurisdictional nature of Subsection 4(a) irrelevant.

Sill argues that in stating a lien claim is “barred” if a lien claimant fails to comply with Subsection 4(a), Subsection 4(e) attaches a consequence to that failure to comply. The existence of that consequence, Sill argues, makes the statute jurisdictional. But Sill’s jurisdiction argument rests entirely on the flawed premise that the term “barred” in Subsection 4(e) *per se* imposes a jurisdictional consequence or bar, as opposed to a mere procedural bar or affirmative defense. That premise is unsupported by, and indeed contrary to, Utah law.

The starting point for analyzing whether a statute has jurisdictional implications is the legal presumption that “district courts retain their grant of constitutional jurisdiction in the absence of a clearly expressed statutory intention to limit jurisdiction.” *Labelle v. McKay Dee Hospital Center*, 2004 UT 15 at ¶ 8, 89 P.3d 113, 114 (emphasis added). Sill completely fails to show any clearly expressed statutory intention to limit jurisdiction in Subsections 4(a) and 4(e), nor indeed is there any. Nothing in the word “barred” is inherently jurisdictional in nature. In its plain and ordinary meaning, “barred” is defined to mean “[s]ubject to hindrance or obstruction by a bar or barrier which, if interposed, will prevent legal redress or recovery.” Black’s Law Dict. at 150 (6<sup>th</sup> ed. 1990) (emphasis added). There is absolutely nothing in that definition, nor otherwise in the language of Subsection 4(e), supporting Sill’s contention that use of the word “barred” in Subsection 4(e) was intended by the Utah Legislature to impose a jurisdictional bar to suit. To the contrary, the fact that the definition of “barred” includes only “if interposed” supports the appellate court’s rulings in *Pearson*, and in this case, that Subsection 4(e) is



not jurisdictional, but is a mere procedural bar, an affirmative defense only that is subject to being waived.

Uses of the term “barred” in other Utah law support this analysis. For example, Utah Code § 34A-3-109(2)(a), for example, states that a “claim described in Subsection (2)(b) is barred,” unless certain requirements are met by the claimant within a certain time. (Emphasis added). It has been recognized, however, that the statute is an affirmative defense, and is not jurisdictional. See *Barnard & Burk Group, Inc. v. Labor Comm’n*, 2005 UT App 401, ¶ 19, n. 7; 122 P.3d 700 (Orme, J., concurring). Many other affirmative defenses are said to “bar” enforcement of otherwise valid actions, without being jurisdictional. See e.g., *Colosmio v. Roman Catholic Bishop of Salt Lake City*, 2004 UT App 436, ¶ 23, 104 P.3d 646, 652 (holding claim was “barred” by the statute of limitations); *Nipper v. Douglas*, 2004 UT App 118, ¶ 10, 90 P.3d 649, 652 (subsequent action seeking the same relief as a prior action is “barred by res judicata) (emphasis added); *Collard v. Nagle Constr., Inc.*, 2002 UT App 306, ¶ 28, 57 P.3d 603, 610 (“Laches bars a recovery when there has been a delay by one party causing a disadvantage to the other party.”). There are many potential “bars” to suit. Labeling something as a “bar,” however, does not *per se* make the “bar” jurisdictional, as opposed to merely procedural in nature.

Sill’s argument that Subsections 4(a) and 4(e) are “jurisdictional” also ignores the well-settled principal of statutory construction, properly applied in *Pearson*, that when analyzing whether a provision is “jurisdictional,” the Court must look at the statutory

language and the intent of the overall statute as a whole. As this Court stated in

*Kennecott Copper Corp. v. Salt Lake County*, 575 P.2d 705, 706 (Utah 1978):

There is no universal rule by which directory [not-jurisdictional] provisions may, under all circumstances, be distinguished from those which are mandatory [jurisdictional]. The intention of the legislature, however, should be controlling and no formalistic rule of grammar or word form should stand in the way of the legislative intent . . . The statute should be construed according to its subject matter and the purpose for which it was enacted.

*Id.* (emphasis added); *see also Stahl v. Utah Transit Auth.*, 618 P.2d 480, 482 (Utah 1980) (“A statute is, of course, to be construed in light of its intended purposes.”); *Beaver County v. Utah State Tax Comm’n*, 919 P.2d 547, 552 (Utah 1996) (whether a statutory requirement is jurisdictional depends upon whether “it is of the essence of the thing to be done,” viewing the intent of the statute as a whole).

In *Pearson*, the court properly applied these rules of statutory interpretation when it undertook a thoughtful analysis of Subsection 4(e) within the overall context and purposes of the mechanics’ lien statutes as a whole. *Pearson* correctly concluded that Subsection 4(a) is not essential to the core purposes of those statutes (*i.e.*, to protect parties like Hart who provide labor and material to improve real property), and that service of LRFA instructions and forms under Subsection 4(a) is not “jurisdictional” because it is a “minor component” of the overall mechanics’ lien statutory scheme, is “wholly informational,” and noncompliance with it would not prejudice the other party. *Pearson*, 2005 UT App. 383 at ¶¶ 7 & 12, 121 P.3d at 719 & 721 (citing *Labelle*, 2004 UT 15 at ¶ 17, 89 P.3d at 116). A copy of the *Pearson* case is attached hereto as an addendum.

Contrary to Sill's claims, nothing in Subsections 4(a) and 4(e) is ignored or rendered obsolete or meaningless by the holdings in *Pearson*, and in this case, that they are not "jurisdictional." Those rulings leave intact the ability of a property owner to invoke those statutes as a procedural bar, as an affirmative defense, in those cases where Subsection 4(a) applies. The fact that the consequence or "bar" of Subsection 4(e) is a procedural defense, rather than a jurisdictional one, does not render it meaningless, particularly in light of the complete absence of any clearly expressed legislative intent to limit jurisdiction.

## **II. THE "TWO-PRONGED CONSEQUENCES" OF SUBSECTION 4(e) DO NOT RAISE THE "BAR" TO A JURISDICTIONAL STATUS**

Throughout the briefing and argument of this issue Sill's argument historically has always been that Subsections 4(a) and 4(e) rob the courts of jurisdiction to enforce mechanics' lien claims. In his Brief to this Court, Sill now argues for the first time that there are "two-pronged consequences" to Subsection 4(a) and 4(e). Apparently recognizing that Subsections 4(a) and 4(e) do not impose a "jurisdictional" bar to enforcing mechanics' liens, as shown above,<sup>10</sup> Sill now focuses instead on the word

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<sup>10</sup> Sill's emphasis heretofore has been on this Court's ruling in *Madsen v. Borthick*, 769 P.2d 245 (Utah 1988), and trying to equate Subsections 4(a) and 4(e) of the mechanics' lien statutes to the Utah Governmental Immunity Act ("UGIA") notice of claim provision that was held in *Madsen* to be jurisdictional. In his Brief to this Court, however, Sill has significantly downplayed his reliance upon *Madsen* and the attempted comparison of Subsections 4(a) and 4(e) to the UGIA. That obviously is because *Madsen* and the UGIA actually further confirm that Subsections 4(a) and 4(e) are not jurisdictional. As noted in *Madsen*, the UGIA notice provision was held to be jurisdictional because it expressly required certain actions be taken before a party could even file suit under it. *Madsen*, 769 P.2d at 249-50. By contrast, on its face Subsection 4(a) expressly contemplates providing LRFA information and forms after suit

“maintaining” in the language of Subsection 4(e) which says certain lien claimants “shall be barred from maintaining or enforcing the lien.” Sill now argues that imposes a second prong consequence, automatically extinguishing a mechanics’ lien upon a lien claimant’s failure to comply with Subsection 4(a). (Sill’s Brief, pp. 34-35, 38).

There simply is no authority for Sill’s automatic lien extinguishment argument. Subsection 4(e) certainly does not say the lien is automatically extinguished if LRFA instructions and forms are not served.<sup>11</sup> Regardless of whether the focus is on the word “maintaining” or on the word “enforcing,” the operative term in Subsection 4(e) still is “barred.” As shown above, there is nothing “jurisdictional” about the term “barred.” In fact, Sill himself refers to Subsection 4(a) as a mere “procedural requirement[]” and notes the lack of service under it as a mere “procedural default.” (Sill’s Brief, pp. 28, 33, and 38).<sup>12</sup>

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is already filed, “with the service of the complaint.” Unlike UGIA, compliance with Subsection 4(a) of the mechanics’ lien statutes is not a precondition to filing suit, and therefore is not jurisdictional.

<sup>11</sup> The only case cited by Sill in purported support of his automatic lien extinguishment argument is *AAA Fencing v. Raintree Dev. and Energy Co.*, 714 P.2d 289 (Utah 1989). That case, however, did not deal at all with Subsections 4(a) or 4(e). It was a statute of limitations case dealing with timely filing of a lien foreclosure lawsuit, which is fundamentally different than Subsection 4(a) which deals with procedures and defenses available after suit is filed.

<sup>12</sup> Even if Subsections 4(a) and 4(e) applied to this case at all, which they do not, failure to serve the notices referenced in those statutes would at most give rise to an affirmative defense for insufficiency of process, which was waived by Sill proceeding through more than two years of litigation and up to trial before ever mentioning it. The cases of *Fowler v. Seiter*, 838 P.2d 675 (Utah Ct. App. 1992) and *Keller v. Southwood N. Med. Pavilion*, 959 P.2d 102 (Utah 1998) are instructive. The statute at issue in those forcible entry cases required a court indorsement to be placed on the summons served with the complaint. The plaintiffs in both cases failed to obtain that court indorsement.

### III. THE *PEARSON* COURT PROPERLY CONSIDERED THE LACK OF PREJUDICE AS A RELEVANT FACTOR IN ITS JURISDICTIONAL ANALYSIS

Sill's argument that the lack of prejudice to the owner of a residence has no place in the analysis of whether Subsection 4(a) is jurisdictional is directly contrary to controlling Utah law. Lack of prejudice is a long and well-recognized factor that is to be considered in jurisdictional analyses. This Court has explained: "[a] designation is merely directory, and therefore not jurisdictional, if it is 'given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey no prejudice will occur to those whose rights are protected by the statute.'" *Beaver County v. Utah State Tax Comm'n*, 919 P.2d 547, 552 (Utah 1996) (quoting *Kennecott Copper Corp. v. Salt Lake County*, 575 P.2d 705, 706 (Utah 1978)) (emphasis added); *see also e.g., Labelle v. McKay Dee Hosp. Ctr.*, 2004 UT 15 at ¶ 17, 89 P.3d at 116 (holding statutory requirement that request for prelitigation panel review be mailed to the health care providers in medical malpractice cases is not jurisdictional, including because "it is difficult to envision how a health care provider could be prejudiced by being deprived of a copy") (emphasis added). This Court also has included lack of prejudice as a factor

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The court found that failure to comply with the statutory court indorsement requirement gave rise to an insufficiency of process defense, but that the defendants had waived that defense by not raising it until late in the litigation. *Fowler*, 838 P.2d at 677-78; *Keller*, 959 P.2d at 106. Just like the indorsement requirement under the statute at issue in *Fowler* and *Keller*, where it applies Subsection 4(a) prescribes that certain information be included with the service of process. Also just like *Fowler* and *Keller*, failure to serve such items under Subsections 4(a) and 4(e) may arguably give rise to a defense for insufficiency of process, but such defense would not automatically *per se* bar Hart's mechanics' lien claims. Any such bar must be timely raised by an owner or it is waived. Even if Subsection 4(a) applied to the facts of this case, Sill waived any defective service defense under that statute by admittedly not mentioning it until the week before trial.

properly considered in evaluating the consequence for failures to meet requirements of mechanics' lien statutes as well. *See e.g., Projects Unlimited Inc. v. Copper State Thrift & Loan Co.*, 798 P.2d 738, 744 (Utah 1990) ("Unless we find that Projects' alleged failures have compromised a purpose of the mechanics' lien statute, those failures will be viewed as technical, and in the absence of any prejudice, we will uphold the lien.") (emphasis added).

Lack of prejudice, therefore indisputably is an appropriate part of the analysis as to why Subsection 4(a) is not jurisdictional.<sup>13</sup> In this case it is indisputable that there was no prejudice to Sill. He admits that he had no rights against Hart under the LRFA. Accordingly, he could not have made any use of nor benefited in any way from the LRFA forms and instructions referenced in Subsection 4(a) even if he received them. He therefore was not prejudiced one iota by not having received them. This Court should therefore uphold that part of the Court of Appeals' ruling that, even if it applies to this case to begin with, compliance with Subsection 4(a) is not jurisdictional.

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<sup>13</sup> Even *Lyons v. Port Auth. of N.Y. & N.J.*, 643 N.Y.S. 2d 571 (N.Y. App. Div. 1996), the sole authority upon which Sill relies in arguing to the contrary, does not support him. That New York case held that consideration of prejudice was precluded only after it had been determined that the applicable statute was jurisdictional. *Id.* at 571-72 (finding first that "[c]ompliance with the condition precedent in the statute of giving sixty days notice is mandatory and jurisdictional," and only then stating the portion quoted by Sill that consideration of whether the other party was prejudiced by the failure to comply was immaterial because it was jurisdictional). That case does not hold (and even if it did it would not be binding in the face of Utah's contrary law) that lack of prejudice is irrelevant to determination of whether a statute is jurisdictional as an initial threshold matter.

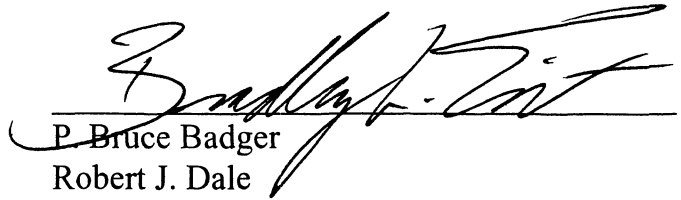
## CONCLUSION

Where the Legislature specifically said in Subsection 4(a) that it applies only if a lien claimant serves a “complaint,” the Court of Appeals held the statute “does not require the service specifically of a complaint.” Where the Legislature specifically said what is to be served under Subsection 4(a) are forms relating to “the owner’s rights” that are “available” and which “the owner may exercise” under the LRFA, the Court of Appeals held the statute requires service even where the owner indisputably has no rights under the LRFA. Each of those holdings are outside of and contrary to the plain language of Subsection 4(a) specifically, and are contrary to rules governing construction of mechanics’ lien statutes generally. They each improperly punish Hart for not providing forms that admittedly did not apply to this case and could not have changed its outcome. This Court therefore should reverse the Court of Appeals on each or either of those rulings, and reinstate the decision of the district court that Subsection 4(a) did not apply to this case or require any action by Hart.

Even if Subsection 4(a) applied to this case (which it did not), the Court of Appeals correctly determined that it is not jurisdictional. There simply is no clearly expressed statutory intention to limit jurisdiction in or by Subsections 4(a) and 4(e), as is necessary to overcome the legal presumption of jurisdiction. Nor is there any evidence otherwise that any applicable consequence or bar under those post-filing procedural sections was intended other than as an affirmative defense only. A jurisdictional bar also would be contrary to the overall intent and purpose of the mechanics’ lien statutes, affording a large windfall to the owner in a case where there admittedly was never any

prejudice to the owner. This Court therefore should uphold the ruling that Subsection 4(a) is not jurisdictional and otherwise is not any bar to Hart's mechanics' lien Counterclaim, and should allow Hart to recover attorney fees, costs, and interest for successfully prosecuting his mechanics' lien Counterclaim.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of September, 2006.

  
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 REPLY OF APPELLANT BILL HART, dba HART CONSTRUCTION TO APPELLEE'S RESPONSE TO APPELLANT'S OPENING BRIEF, AND BRIEF IN OPPOSITION TO CROSS-APPEAL, and of the Addendum that follows this page, were mailed by first-class mail with postage fully prepaid this 11<sup>th</sup> day of September, 2006, to:

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





## **Addendum**

2005 UT App 383

**Robert PEARSON dba Robert Pearson  
Construction, Plaintiff and  
Appellee,**

v.

**Suzanne J. LAMB, Defendant  
and Appellant.**

No. 20040613-CA.

Court of Appeals of Utah.

Sept. 9, 2005.

Rehearing Denied Oct. 19, 2005.

**Background:** Laborer filed complaint seeking foreclosure of a mechanics' lien. Following a bench trial, the Third District Court, Silver Summit Department, Bruce Lubeck, J., entered decision in favor of laborer, and denied homeowner's motion for a new trial. Homeowner appealed.

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

- (1) laborer's failure to serve homeowner with instructions and a form affidavit did not divest trial court of jurisdiction to hear action, and
- (2) laborer was entitled to attorney fees reasonably incurred on appeal.

Affirmed.

William A. Thorne Jr., J., concurred in result only.

#### 1. Appeal and Error ⇌842(1)

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

#### 2. Appeal and Error ⇌842(1)

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

#### 3. Mechanics' Liens ⇌265

Mechanics' Liens Act's requirements that lien claimant provide instructions and a form affidavit along with the complaint were

directory, rather than mandatory, and, thus laborer's failure to serve homeowner with instructions and a form affidavit did not divest trial court of jurisdiction to hear laborer's mechanics' lien foreclosure action, where laborer complied with Act to such an extent that homeowner did not even notice laborer's oversight for more than 18 months after complaint was filed and more than one month after homeowner stipulated that laborer had complied with all statutory procedural requirements; laborer's failure to comply did not compromise a purpose of Act, no consequences attached to laborer's failure to comply, and homeowner suffered no prejudice. West's U.C.A. § 38-1-11(4)(a).

#### 4. Statutes ⇌227

Whether a procedure prescribed by statute is jurisdictional depends on whether the procedure is mandatory or directory.

#### 5. Statutes ⇌227

While a procedure prescribed by statute is generally considered mandatory when consequences are attached to the failure to act, the purpose of the statute and the legislature's intent are of the utmost importance.

#### 6. Statutes ⇌227

There is no universal rule by which directory statutory provisions may, under all circumstances, be distinguished from those which are mandatory.

#### 7. Statutes ⇌227

A statutory designation is mandatory, and therefore jurisdictional, if it is of the essence of the thing to be done.

#### 8. Mechanics' Liens ⇌3

Mechanics' Liens Act was passed primarily to protect laborers who have added value to the property of another, but also to protect the property owner's right to convey clear title. West's U.C.A. § 38-1-1.

#### 9. Statutes ⇌227

Unlike mandatory statutory designations, a designation is merely "directory," and therefore not jurisdictional, if it is given with a view merely to the proper, orderly, and prompt conduct of the business, and by the failure to obey no prejudice will occur to

those whose rights are protected by the statute.

See publication Words and Phrases for other judicial constructions and definitions.

#### 10. Municipal Corporations ⇨741.20

Party's failure to adhere to the Utah Governmental Immunity Act's notice of claim requirement is fatal and can not be remedied. West's U.C.A. § 63-30d-402.

#### 11. Mechanics' Liens ⇨260(6), 268

Party's failure to timely file a mechanics' lien foreclosure action and *lis pendens* is fatal and cannot be remedied. West's U.C.A. § 38-1-11(1, 2).

#### 12. Mechanics' Liens ⇨260(6)

Penalty for not commencing an action to enforce a mechanics' lien within the twelve-month period provided by Mechanics' Liens Act is invalidation of the lien. West's U.C.A. § 38-1-11(1).

#### 13. Mechanics' Liens ⇨268

When a claimant fails to file a *lis pendens* within the twelve-month period provided by Mechanics' Liens Act, the mechanics' lien itself is not invalidated, but rather it is rendered void as to everyone except those named in the action to enforce the lien and those with actual knowledge of the action. West's U.C.A. § 38-1-11(1, 2).

#### 14. Mechanics' Liens ⇨5

Although courts have differing opinions about how liberally to construe provisions within their mechanics' lien statutes, the modern trend is to dispense with arbitrary rules which have no demonstrable value in a particular fact pattern.

#### 15. Mechanics' Liens ⇨310(3)

Laborer who was awarded reasonable attorney fees in mechanics' lien foreclosure action, and who prevailed on appeal, was entitled to attorney fees reasonably incurred on appeal.

#### 16. Costs ⇨252

General rule is that when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal.

David B. Thompson, Miller Vance & Thompson PC, Park City, for Appellant.

David M. Bennion and Michael P. Petrogeorge, Parsons Behle & Latimer, Salt Lake City, for Appellee.

Before Judges DAVIS, ORME, and THORNE.

OPINION (For Official Publication)

DAVIS, Judge:

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

#### BACKGROUND

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

Mr. Pearson has complied with all the statutory procedural requirements for perfecting and foreclosing on a mechanics' lien . . . ; Mrs. Lamb does not defend against Mr. Pearson's mechanics' lien claim on these statutory procedural grounds, but simply challenges his right to receive payment of the amounts claimed in the lien.

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

¶ 3 On May 26, 2004, Defendant filed a motion for reconsideration (which she now dubs a motion for a new trial), in which she argued that the trial court lacked jurisdiction to hear the foreclosure action because Plaintiff failed to comply with the requirements of section 38-1-11(4)(a) of the Mechanics' Liens

Act. The trial court, on June 16, 2004, issued a ruling and order denying Defendant's motion for a new trial, and on July 28, 2004, entered a Final Order and Judgment in favor of Plaintiff.

#### ISSUE AND STANDARD OF REVIEW

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

[1, 2] ¶ 5 The determination of whether a court has subject matter jurisdiction is a question of law, which we review for correctness, according no deference to the trial court's determination. *See Beaver County v. Qwest, Inc.*, 2001 UT 81, ¶ 8, 31 P.3d 1147. Questions of statutory interpretation are similarly questions of law that are reviewed "for correctness, giving no deference to the district court's interpretation." *Board of Educ. v. Sandy City Corp.*, 2004 UT 37, ¶ 8, 94 P.3d 234.

#### ANALYSIS

[3] ¶ 6 Under section 38-1-11(4)(a) of the Mechanics' Liens Act, lien claimants filing an action to enforce a lien must serve on the defendant-owner of a residence instructions relating to the owner's rights and a form affidavit along with the complaint. *See* Utah Code Ann. § 38-1-11(4)(a) (2001). Pursuant to section 38-1-11(4)(e), "[i]f a lien claimant fails to provide to the owner of the residence the instructions and form affidavit required by [s]ubsection 4(a), the lien claimant shall be barred from maintaining or enforcing the lien upon the residence." *Id.* § 38-1-11(4)(e). On appeal, Defendant argues that the language of section 38-1-11(4)(e) makes subsection 4(a) "mandatory," thereby making it a jurisdictional provision that cannot be waived and can be raised at any time. Defendant thus contends that Plaintiff's failure to com-

ply with requirements of section 38-1-11(4)(a) deprived the trial court of jurisdiction to hear Plaintiff's lien foreclosure action.

[4-7] ¶ 7 Whether a procedure prescribed by statute is jurisdictional depends on whether the procedure is "mandatory" or "directory." *Beaver County v. Utah State Tax Comm'n*, 919 P.2d 547, 552 (Utah 1996). And while a procedure is generally considered "mandatory" when "consequences are attached to the failure to act," *Stahl v. Utah Transit Auth.*, 618 P.2d 480, 481 (Utah 1980), the purpose of the statute and the legislature's intent are of the utmost importance:

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

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

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

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

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

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

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

*Id.*

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

[9] ¶ 11 Unlike “mandatory” designations, “a designation is merely directory, and therefore not jurisdictional, if it is ‘given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey no prejudice will occur to those whose rights are protected by the statute.’” *Beaver County v. Utah State Tax Comm’n*, 919 P.2d at 552 (quoting *Kennecott Copper Corp.*, 575 P.2d at 706) (other quotations and citations omitted); see also *Projects Unlimited*, 798 P.2d at 744–50 (upholding a lien despite its errors because such errors were technical and the defendant suffered no prejudice). Therefore, Utah courts have held that certain procedures required by statute are inconsequential to a court’s jurisdiction. For example, in *Labelle v. McKay Dee Hospital Center*, 2004 UT 15, 89 P.3d 113, the court determined that a mailing

requirement of the Medical Malpractice Act was not jurisdictional, stating that construing the statute “in a manner to impose jurisdictional consequences on a claimant’s every procedural stumble is to misapprehend the Medical Malpractice Act[.]” *Id.* at ¶ 14. While the court “[did] not ignore the fact that the requirement . . . [was] mandatory,” it stated that the mailing requirement was “a minor component of the Malpractice Act’s prelitigation scheme. It serve[d] a wholly informational role, and it is difficult to envision how [defendants] could be prejudiced by being deprived of [the mailing].” *Id.* at ¶ 17. And in *Kiesel v. District Court*, 96 Utah 156, 84 P.2d 782 (1938), the court interpreted a statute requiring a plaintiff to file an undertaking, or bond, securing costs contemporaneously with the complaint. The court held that the statute, while affording no discretion to the court, still did not create a jurisdictional prerequisite:

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

*Id.*, 84 P.2d at 784.<sup>1</sup>

¶ 12 Like the statute construed in *Kiesel*, the requirements of section 38–1–11(4)(a) are not conditions precedent to filing suit; they simply require action contemporaneous with the filing of the complaint. Furthermore, like the Medical Malpractice Act construed in *Labelle*, the Mechanics’ Liens Act creates

numerous procedural hurdles to enforcing a lien. *See* Utah Code Ann. § 38–1–7 (2001) (delineating the contents of a notice of lien, and the time frame in which it must be filed); *id.* § 38–1–11(1), (2) (delineating the time frame in which suit and a lis pendens must be filed). Section 38–1–11(4)(a) of the Mechanics’ Liens Act simply requires that certain instructions and a form affidavit be served on the defendant; these requirements are “wholly informational” and but “a minor component” of the Mechanics’ Liens Act. *Labelle*, 2004 UT 15 at ¶ 17, 89 P.3d 113. Finally, like the defendants in *Labelle*, it is difficult to envision how Defendant here was prejudiced by being deprived of the instructions and form affidavit required by section 38–1–11(4)(a). Defendant has not alleged that she was prejudiced. In fact, she even stipulated that she was not defending against the lien foreclosure on statutory procedural grounds, but simply “challenge[d] his right to receive payment of the amounts claimed in the lien.” Quite simply, the requirements of section 38–1–11(4)(a) are “directory, and therefore not jurisdictional,” as they merely concern “the proper, orderly and prompt conduct of the business” and Defendant has suffered no prejudice. *Beaver County v. Utah State Tax Comm’n*, 919 P.2d 547, 552 (Utah 1996) (quotations and citation omitted).

[10–13] ¶ 13 Defendant cites numerous cases involving the Utah Governmental Immunity Act [UGIA], stating that the UGIA’s notice requirement is comparable to the requirements of section 38–1–11(4)(a). Such an analogy is erroneous, as the UGIA’s notice requirement has nothing whatsoever to do with service and mailing but instead provides that a claim against the state is barred unless notice thereof is filed with the state within one year after the cause of action arises. *See* Utah Code Ann. § 63–30d–402 (2004); *Stahl v. Utah Transit Auth.*, 618 P.2d 480, 481

1. Other jurisdictions have held that certain “mandatory” procedures are inconsequential to a court’s jurisdiction. *See Hodusa Corp. v. Abray Constr. Co.*, 546 So.2d 1099, 1101 (Fla. Dist. Ct. App. 1989) (interpreting a statute that required a contractor to provide a residence owner an affidavit prior to bringing suit, the court stated that “[a]lthough the furnishing of the affidavit is a condition precedent to bringing an action to fore-

close a mechanic[s’] lien, failure to do so does not create a jurisdictional defect”); *Campbell v. Graham*, 144 Colo. 532, 357 P.2d 366, 368 (1960) (interpreting a statute that barred businesses that had not filed trade name affidavits from prosecuting suits, the court rejected the proposition that trade name filing is a jurisdictional prerequisite to filing a suit).

(Utah 1980). In this way, the UGIA's notice requirement is far more analogous to Utah Code section 38-1-11(1) and (2), which mandates that a mechanics' lien foreclosure action and a lis pendens must be filed within twelve months after completion of the contract or 180 days after the lien claimant last performed labor. See Utah Code Ann. § 38-1-11(1), (2). And like a party's failure to adhere to the UGIA's notice requirements, a party's failure to timely file a mechanics' lien foreclosure action and lis pendens is fatal and cannot be remedied:

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

*Projects Unlimited, Inc. v. Copper State Thrift & Loan Co.*, 798 P.2d 738, 751 n. 13, 752 (Utah 1990). Utah courts have thus ruled that failure to timely commence a mechanics' lien foreclosure action and file a lis pendens, like failure to timely notify the state of a claim against it, divests the court of jurisdiction. See, e.g., *Interlake Distribs., Inc. v. Old Mill Towne*, 954 P.2d 1295, 1297-99 (Utah Ct.App.1998) (holding that liens were void because plaintiffs failed to file a lis pendens); *Diehl Lumber Transp. Inc. v. Mickelson*, 802 P.2d 739, 742 (Utah Ct.App. 1990) ("Failure to commence a timely mechanic[s'] lien foreclosure action divests the court of jurisdiction."); *AAA Fencing Co. v. Raintree Devel. & Energy Co.*, 714 P.2d 289, 290-91 (Utah 1986) (holding that an untimely mechanics' lien action is a jurisdictional issue and "forecloses [the parties'] rights").

[14] ¶ 14 Comparison between the requirements of section 38-1-11(4)(a) and the UGIA is misplaced also because Utah courts have specifically held that the UGIA is to be "strictly construed," *Great W. Cas. Co. v. Utah Dep't of Transp.*, 2001 UT App 54, ¶ 9, 21 P.3d 240, whereas "substantial compliance with the [Mechanics' Liens Act] is all that is required," *Chase v. Dawson*, 117 Utah 295,

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

## CONCLUSION

[15, 16] ¶ 15 Since Plaintiff's failure to adhere to section 38-1-11(4)(a) did not divest the trial court of jurisdiction, we affirm the trial court's Final Order and Judgment in favor of, and its award of reasonable attorney fees and costs below to, Plaintiff. See Utah Code Ann. § 38-1-18(1) (2001) (awarding reasonable attorney fees to the "successful party" in a mechanics' lien foreclosure action). Because "[t]he general rule is that when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal," *Utah Dep't of Soc. Servs. v. Adams*, 806 P.2d 1193, 1197 (Utah Ct.App.1991), we remand the matter to the district court for calculation of attorney fees reasonably incurred on appeal.

¶ 16 Affirmed and remanded.

¶ 17 I CONCUR: GREGORY K. ORME,  
Judge.

¶ 18 I CONCUR IN THE RESULT:  
WILLIAM A. THORNE JR., Judge.

