IN THE UTAH COURT OF APPEALS

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Mark D. Bergman, Plaintiff, Appellant, and Cross-appellee, v. Debbie A. Burke, Dorene R. Basug, and First American Title, Defendant, Appellee, and Cross-appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080323-CA F I L E D (June 4, 2009) 2009 UT App 146

Second District, Ogden Department, 040902444
The Honorable Parley R. Baldwin

Attorneys: Mark D. Bergman, Ogden, Appellant Pro Se
Michael E. Bostwick, Salt Lake City, for Appellee

Before Judges Greenwood, Thorne, and Orme.

PER CURIAM:

Mark D. Bergman and Debbie A. Burke each appeal from the January 16, 2008 judgment and the district court's order denying Burke's motion for attorney fees. We affirm.

Bergman first asserts several issues relating to the sufficiency of the evidence and the admission of certain evidence. However, Bergman has failed to provide this court with an adequate record to support his allegations. "As an appellate court, our 'power of review is strictly limited to the record presented on appeal.' . . . 'Parties claiming error below and seeking appellate review have the duty and responsibility to support their allegations with an adequate record.'" Gorostieta v. Parkinson, 2000 UT 99, ¶ 16, 17 P.3d 1110 (citations omitted); see also Call v. City of W. Jordan, 788 P.2d 1049, 1052 (Utah Ct. App. 1990) (stating that "the appellant has the burden of providing the reviewing court with an adequate record on appeal to prove his allegations"). Accordingly, if an appellant seeks review of rulings, findings, and conclusions made during the course of trial, or as a result of a trial, the appellant must

include a transcript of the proceeding in the record on appeal. In the absence of the transcript on appeal, this court presumes the regularity of the proceedings below. See State v. Jones, 657 P.2d 1263, 1267 (Utah 1982). Because Bergman did not provide us with a copy of the trial transcript, we must presume the regularity of that proceeding. Therefore, Bergman waived the issues he raises on appeal pertaining to the sufficiency of evidence and the presentation of evidence at trial.

Bergman also asserts that the district court's findings were insufficient in that they lacked sufficient detail to support the district court's conclusions. However, Bergman never raised an objection to the adequacy or detail of the district court's findings. While Bergman did file a motion to amend the findings and judgment, this motion was not premised on the adequacy of the findings but, instead, focused on the ineffectiveness of Bergman's prior counsel and the presentation of evidence which Bergman believed contradicted the district court's findings. Accordingly, because Bergman failed to sufficiently raise the issue in the district court in such a way as to give the district court the opportunity to rule on the issue, the issue was waived. See 438 Main St. v. Easy Heat, Inc., 2004 UT 72, ¶ 56, 99 P.3d 801 (concluding that an appellant waived his challenge to the sufficiency of the district court's findings of fact because he failed to raise the issue with the district court).

In her cross-appeal, Burke first argues that the district court erred in denying her motion for summary judgment. This court has recently stated that after a trial on the merits has occurred, "only the legal issues decided by the denial of summary judgment that prevented a party from dealing with the issue at trial will be considered [on appeal]." Normandeau v. Hanson Equip., Inc., 2007 UT App 382, ¶ 13, 174 P.3d 1. Here, the district court's order denying Burke's motion for summary judgment demonstrates that the court based its decision primarily on Burke's failure to set forth undisputed facts that would demonstrate that Burke was entitled to summary judgment. Specifically, the district court stated that Burke had failed to set forth any evidence in her summary judgment motion demonstrating that the property at issue was an "owner occupied residence," thereby potentially obviating the obligation to include information in the notice of claim describing what steps an owner may take to remove a lien. See Utah Code Ann. § 38-1-7(2)(a)(ix) (2005) (requiring inclusion of information concerning the steps to remove a mechanic's lien only when the controversy involves an owner occupied residence). Further, the district court concluded that Burke had failed to set forth any undisputed facts that demonstrated, based upon the particular facts of this case, that the absence of the information compromised the purpose

of the mechanics' lien statute or that she was prejudiced by the information missing from the notice of claim. See Projects Unlimited v. Copper State Thrift & Loan Co., 798 P.2d 738, 744 (Utah 1990) (stating that unless a party can show that failures to comply with the statute compromised a purpose of that statute, "those failures will be viewed as technical, and in the absence of any prejudice, we will uphold the lien"). Accordingly, because the district court's ruling did not foreclose Burke's opportunity to present evidence at trial and fully litigate the issues raised in the summary judgment motion, we will not consider the issue on appeal.[1]

Burke next asserts that the district court erred in denying her motion for attorney fees. Specifically, Burke claims that because Bergman recovered only a small portion of his mechanics' lien claim, Burke should be considered the prevailing party, thereby entitling her to attorney fees. See Utah Code Ann. § 38-1-18(1). However, Burke, like Bergman, failed to provide this court with an adequate record on which to review her claim.

The district court denied Burke's motion for attorney fees in a brief memorandum decision. In so doing, the district court made no findings to support its conclusion. Burke never objected to the lack of findings or otherwise requested more specific findings. Further, Burke, like Bergman, failed to make the trial transcript part of the record. This is important because the Utah Supreme Court has previously noted that there is a "need for a flexible and reasoned approach to deciding in particular cases who actually is the 'prevailing party.'" R.T. Nielson Co. v. Cook, 2002 UT 11, ¶ 24, 40 P.3d 1119. This flexible and reasoned approach allows the district court to consider various factors. See id. Accordingly, the ultimate determination of who is the prevailing party "depends, to a large measure, on the context of each case, and, therefore, it is appropriate to leave this determination to the sound discretion of the trial court." Id. ¶ 24. Because the district court did not specify its reasons for making its determination and because the trial transcript is not available to provide this court with the factual background that led to the district court's conclusion, the record is

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1. Burke has not set forth any information in her brief that indicates that she was foreclosed from raising these issues at trial. More importantly, because Burke did not include a transcript of the trial in the record, we have no way of knowing whether Burke was allowed to present evidence on these issues at trial. Accordingly, due to that failure we must presume the regularity and correctness of the proceeding. See State v. Jones, 657 P.2d 1263, 1267 (Utah 1982).

insufficient to review Burke's argument.[2] Therefore, because Burke failed to provide this court with an adequate record to review her claim, we must presume the regularity of the proceedings below. See State v. Jones, 657 P.2d 1263, 1267 (Utah 1982).

Affirmed.

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Pamela T. Greenwood,
Presiding Judge

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William A. Thorne Jr.,
Associate Presiding Judge

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Gregory K. Orme, Judge

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2. Because Burke did not object to the district court's lack of findings, she waived any challenge to the sufficiency of those findings. See 438 Main St. v. Easy Heat, Inc., 2004 UT 72, ¶ 56, 99 P.3d 801. Further, Burke does not argue that the district court committed plain error. See State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993) (concluding that plain error standard of review applies to issues not preserved for appeal). As such, we do not consider whether the district court should have set forth additional findings to support its conclusion.