SUMMARY
January 16, 2025

2025COA3

No. 23CA1649, *Galiant v. Herlik* — Creditors and Debtors — Mechanics' Liens — Lien Statement — New or Amended Statements

A division of the court of appeals holds, as a matter of first impression, that a mechanic's lien claimant may amend its original lien — after the statutory deadline governing mechanic's lien amendments set forth in section 38-22-109(6), C.R.S. 2024 — to reduce the amount claimed when the claimant obtains new information after filing the original lien. The division concludes that this interpretation best aligns with the intent underlying the mechanic's lien statutes.

In resolving the remainder of the case, the division concludes that, in a lien foreclosure action to determine the lien's validity, the district court properly excluded evidence of the parties' underlying contractual obligations where a breach of contract claim had

previously been resolved through arbitration, and the proffered evidence was duplicative of an issue determined in arbitration. Next, because there was evidence in the record to support the district court's findings, the division affirms the district court's judgment concluding that the mechanic's lien was not excessive. And the district court did not violate the homeowners' right to due process by setting the trial for a half day where counsel ran out of time to present evidence largely due to his own strategic decisions and failed to make a sufficient offer of proof requesting additional time. The division remands the case so that the district court may determine the lienor's reasonable attorney fees incurred on appeal.

COLORADO COURT OF APPEALS **2025COA3**

Court of Appeals No. 23CA1649
El Paso County District Court No. 19CV30772
Honorable Marla Prudek, Judge

Galiant Homes, LLC, a Colorado limited liability company,

Plaintiff-Appellee,

v.

Edward C. Herlik and Cynthia J. Strong-Herlik,

Defendants-Appellants.

JUDGMENT AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE FOX
Johnson and Schock, JJ., concur

Announced January 16, 2025

Mulliken Weiner Berg & Jolivet P.C., Karl A. Berg, Jr., Hilary A. Roland, Colorado Springs, Colorado, for Plaintiff-Appellee

Jensen Cofer LLC, Trevor L. Cofer, Colorado Springs, Colorado, for Defendants-Appellants

¶ 1 Defendants, Edward C. Herlik and Cynthia J. Strong-Herlik (the Herliks), appeal the district court's judgment approving the foreclosure of a mechanic's lien filed by plaintiff, Galiant Homes, LLC (Galiant), a custom homebuilder. We affirm the district court's judgment and remand the case so that the district court may determine Galiant's reasonable attorney fees incurred on appeal.

I. Background

¶ 2 In early 2018, Galiant contracted with the Herliks to build them a home in Monument, Colorado. In December 2018, the Herliks terminated the contract. Galiant's last day of work on the project was November 30, 2018. In January 2019, Galiant sent the Herliks a final invoice for $74,900.21, and two months later it filed a mechanic's lien against their property for the same amount. Galiant then sued the Herliks for breach of contract and unjust enrichment, and to foreclose on the lien. In August 2019, Galiant amended its lien and the invoice, removing certain items after it learned the Herliks had paid some vendors directly.

¶ 3 In May 2021, the parties resolved the unjust enrichment and breach of contract claims in arbitration. The arbitrator determined

that the Herliks breached the contract and awarded Galiant damages, attorney fees, and costs.

¶ 4 As relevant here, the fixed-price contract provided that Galiant could not incur costs beyond the allowance amounts stated in the contract without submitting a change order and obtaining the Herliks' approval. The allowance amount for excavation costs was $18,000. Because Galiant claimed it incurred costs above the $18,000 allowance but did not submit a change order, the arbitrator considered whether Galiant had a contractual obligation to submit a change order to recover the overage. The arbitrator concluded that a change order was required but that Galiant's failure to provide one was not a breach. Instead, because the contract was for a fixed price, Galiant — not the Herliks — would have incurred these excess costs if the contract had been fully performed.

¶ 5 The arbitrator determined that Galiant's evidence "accurately reflect[ed] the amounts that remain[ed] unpaid after all adjustments [had] been considered" and concluded that Galiant proved "by a preponderance of the evidence damages in the amount of $39,714.63." The award also included a reduction in Galiant's

excess excavation costs from $11,971.89 to $8,196.21. During arbitration, Galiant realized it had miscalculated these costs and alerted the arbitrator to the error.

¶ 6 The arbitrator left issues regarding the mechanic's lien's filing, validity, enforceability, and defenses to the district court. Three days after arbitration concluded, Galiant amended its lien to reflect the amount awarded at arbitration.[1] The district court confirmed the arbitration award. The Herliks then appealed the district court's denial of their motion to vacate the arbitration award, and a division of this court affirmed the award. *Galiant Homes, LLC v. Herlik*, (Colo. App. No. 22CA0236, May 4, 2023) (not published pursuant to C.A.R. 35(e)).

¶ 7 After a series of delays, the case involving the unresolved mechanic's lien issues was set for a half-day bench trial to determine (1) whether the lien had been properly and timely filed and perfected; and (2) even if so, whether it was excessive and therefore invalid. The district court found in Galiant's favor.

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[1] The August 2019 lien amendment reduced the lien from $74,900.21 to $44,434.23. The second lien amendment further reduced the lien from $44,434.23 to $39,714.63.

¶ 8 After trial, the Herliks filed two C.R.C.P. 59 motions for a new trial, arguing that the district court improperly limited the trial to a half day, rather than a full day, and that the court misapplied the mechanic's lien law. The district court denied both motions.

¶ 9 On appeal, the Herliks argue that the district court erred by (1) excluding evidence of the lien's excessiveness; (2) finding that the original lien was not excessive; (3) finding that Galiant's lien amendments were proper and did not invalidate the original lien; and (4) limiting the trial to a half day. We disagree and affirm.

II. Discussion

A. The District Court Did not Improperly Exclude Evidence Regarding Change Orders

¶ 10 The Herliks contend that the district court erred by excluding evidence necessary to support their argument that the mechanic's lien was excessive.[2] We conclude that the court did not entirely preclude this evidence and where it did, its decision was proper

[2] In their reply brief, the Herliks contend for the first time that the court's exclusion of evidence — as distinct from the time limitations — violated their due process rights. We do not address this issue because we do not consider issues raised for the first time in a reply brief. *In re Estate of Liebe*, 2023 COA 55, ¶ 19.

because the proffered evidence related to issues determined during arbitration.

1. Standard of Review and Applicable Law

¶ 11 We review a district court's exclusion of evidence for an abuse of discretion. *Wolven v. Velez*, 2024 COA 8, ¶ 9. A district court abuses its discretion when it misapplies the law or its decision is manifestly arbitrary, unreasonable, or unfair. *See id.* (citations omitted). Evidence is relevant if it has "any tendency to make the existence of any fact *that is of consequence to the determination of the action* more probable or less probable." CRE 401 (emphasis added).

¶ 12 When an issue has been determined at arbitration, that issue cannot be litigated in subsequent proceedings. *Quist v. Specialties Supply Co.*, 12 P.3d 863, 866 (Colo. App. 2000) (holding that an arbitrator's damages findings could not be relitigated); *Barnett v. Elite Props. of Am., Inc.*, 252 P.3d 14, 22 (Colo. App. 2010) (applying issue preclusion "to issues decided in arbitration").

2. Analysis

¶ 13 As we understand the Herliks' argument, they contend that the court erroneously excluded evidence concerning the change

order that was contractually required before Galiant could exceed the $18,000 excavation cost allowance. Beyond this, the Herliks make broad arguments about improperly excluded evidence, with a general cite to more than forty pages of the record. Without citing specific portions of the record, they also argue that they attempted to introduce evidence that Galiant knew its lien was for an amount greater than the amount due and attempted to elicit testimony about materials that they paid for directly and "construction claims that [they] paid many months before termination."

¶ 14 A party's brief must identify the "precise location in the record where the issue was raised and where the court ruled." C.A.R. 28(a)(7)(A). We also will not "consider undeveloped and unsupported arguments." *Woodbridge Condo. Ass'n v. Lo Viento Blanco, LLC*, 2020 COA 34, ¶ 41 n.12, *aff'd*, 2021 CO 56. Therefore, we only consider the Herliks' arguments concerning evidence of change orders.

¶ 15 While cross-examining Galiant's owner, Steve Miller, the Herliks' attorney repeatedly attempted to ask if change orders had been submitted or were required. The first time, Galiant's counsel objected on relevance grounds. The Herliks' counsel argued that

some items in Galiant's lien "should have been [approved] through change orders" and that "whether or not there were change orders that should have been submitted . . . is an issue as to whether or not the lien itself was valid." The court sustained the objection because the issue had been determined in arbitration and because Miller's testimony did not "indicate[] that costs or the amount of the lien were reduced . . . because of . . . a change order . . . not being required."

¶ 16 Shortly thereafter, the Herliks' counsel introduced the contractual language about change orders, and Galiant's attorney raised the same objection. Again, the Herliks' counsel argued that a change order had been required but not submitted. The court sustained the objection, concluding that the arbitrator had decided the issue. The Herliks' counsel later returned to essentially the same line of questioning, followed by a relevance objection and another discussion about arbitration. The court responded:

> I will allow you to explore the costs, the amount of the lien, but not — I mean, should there have been a change order or not, that was something that the arbitrator dealt with and ruled on, and that issue is closed. So if you want to talk about amounts, I'll allow you to talk about the amounts for excavation and

> why it changed or if it changed or when it changed, how it changed, but not get into the change order, because that's been dealt with.

¶ 17 Again, the Herliks' counsel made an offer of proof, stating that the evidence went to whether the excavation costs were excessive because Galiant claimed an amount beyond $18,000 without submitting a change order. This time, after the offer of proof, the court said, "All right. I'll allow it." However, the Herliks' counsel pivoted to a question about permits, not the change order.

¶ 18 As the trial continued, a similar pattern emerged with the Herliks' counsel attempting to raise issues determined at arbitration, opposing counsel objecting, and the court sustaining the objections. The Herliks' counsel elicited further testimony about change orders from Miller and Mrs. Herlik, which either opposing counsel did not object to or the court allowed.

¶ 19 We understand the difficulty the Herliks faced in trying to prove that the lien was excessive when the arbitrator had awarded Galiant damages and determined the amounts claimed were valid. However, the court gave the Herliks ample opportunities to ask about change orders and to probe why, how, and when the excavation costs changed. The Herliks' counsel also elicited from

Miller that the contract required change orders, and he elicited from Mrs. Herlik that there was no change order for the excess excavation costs. So the court did not entirely exclude change order evidence. But even if it had, the court would not have abused its discretion by precluding evidence that was cumulative or relevant only to issues determined at arbitration. *See Quist*, 12 P.3d at 866.

¶ 20 Moreover, we cannot discern what evidence the Herliks wished to present beyond trying to show, as they did, that a change order for the excess excavation costs was contractually required but not submitted. Their offers of proof suggested that the lack of a change order would establish excessiveness, and they argue on appeal that the evidence was relevant because Galiant knew it could not charge excess excavation costs without a change order. They argue that they could not introduce this evidence, but the record indicates that they did. We therefore discern no abuse of discretion in the district court's evidentiary rulings.

B. The District Court's Finding that the Lien Was Not Excessive Was Not Clearly Erroneous

¶ 21 Next, the Herliks argue that the district court erroneously found that the original mechanic's lien was not excessive. Because we conclude that there was evidence in the record to support the court's finding, we affirm.

1. Standard of Review and Applicable Law

¶ 22 "Whether a lien is excessive is an issue of fact," which we review for clear error. *Byerly v. Bank of Colo.*, 2013 COA 35, ¶ 32. Under this standard, we reverse only "if there is no evidence in the record" to support the district court's factual findings. *Id.* We also defer to the fact finder's determinations concerning witness credibility. *See Gazette v. Bourgerie*, 2023 COA 37, ¶ 42 (*cert. granted* Feb. 26, 2024). Finally, we review the district court's interpretation of the mechanic's lien statutes de novo. *Sure-Shock Elec., Inc. v. Diamond Lofts Venture, LLC*, 2014 COA 111, ¶ 8.

¶ 23 A mechanic's lien is excessive, and the lien claimant "forfeit[s] all rights to [the] lien," if it is filed "for an amount greater than is due without a reasonable possibility that said amount claimed is due and with the knowledge that said amount claimed is greater

than that amount then due." § 38-22-128, C.R.S. 2024; *Honnen Equip. Co. v. Never Summer Backhoe Serv., Inc.*, 261 P.3d 507, 510 (Colo. App. 2011). To determine whether a lien is excessive, we consider "the information available to the lien claimant at the time of filing the lien statement." *E.B. Roberts Constr. Co. v. Concrete Contractors, Inc.*, 704 P.2d 859, 864 (Colo. 1985).

¶ 24 The lien statutes' intent is to "punish and deter those who abuse" the right to assert a lien "by knowingly and intentionally claiming excess amounts that are totally unrelated to the construction project." *Honnen*, 261 P.3d at 510. However, because the mechanic's lien statutes are also "designed to prevent the unjust enrichment of property owners," *In re Regan*, 151 P.3d 1281, 1285 (Colo. 2007), we liberally construe them "for the benefit and protection of mechanics and materialmen," *Compass Bank v. Brickman Grp., Ltd.*, 107 P.3d 955, 958 (Colo. 2005).

2. Analysis

¶ 25 The Herliks assert that the district court erred by finding that Galiant's original lien was not excessive.[3] Specifically, they contend that they proved Galiant knew the lien was excessive because (1) the lien amendments prove "Galiant never had a right to the amounts that it claimed it was owed"; (2) Galiant's failure to submit a change order proved it claimed costs beyond those due; and (3) the lien included costs Galiant had not paid. They also contend that the court applied the wrong standard to determine whether Galiant knew the lien was excessive because the court found that Galiant "reasonably believed" it was due the amounts claimed, but the statute imposes a "reasonable possibility" standard. § 38-22-128. We address each of these contentions in turn.

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[3] Despite a heading in their opening brief that reads, "The trial court erred as a matter of law in finding that . . . [the] mechanic's lien . . . was not excessive," the Herliks' reply brief characterizes as misleading Galiant's statement that the district court "found that Galiant's lien was not excessive." They argue that the district court never determined excessiveness. Because the court's order clearly considered the lien's excessiveness, and because we do not consider issues raised for the first time in a reply brief, *see Liebe*, ¶ 19, we evaluate the issue as framed in the opening brief.

¶ 26 First, there is evidence in the record that Galiant amended its lien as it learned new information of which it was unaware when it filed the original lien. *See E.B. Roberts*, 704 P.2d at 864; § 38-22-128. As to the first amendment, Miller testified that, as soon as Galiant discovered that the Herliks had directly paid for certain custom items, Galiant amended the lien and invoice to remove amounts for these items. This occurred *after* Galiant had filed the original lien, but when it filed the lien, Galiant did not know the Herliks had already paid. As the court noted, the Herliks presented no evidence of when they paid or that they notified Galiant they had done so. With respect to the second amendment, Miller testified that Galiant did not discover the mistake involving the excess excavation costs until the day before arbitration, well after it had filed the lien. The district court found this evidence credible, and we will not disturb that finding. *See Bourgerie*, ¶ 42.

¶ 27 Divisions of this court have previously concluded that, especially for custom-made materials, lien claimants need not "show the materials furnished were actually used in the structure against which the lien is sought." *Ragsdale Bros. Roofing v. United Bank of Denver, N.A.*, 744 P.2d 750, 755 (Colo. App. 1987). We

apply the same principle here. Because Galiant ordered specially manufactured, custom items that it could not reuse or return, it was liable for those costs regardless of whether the materials were used. Therefore, Galiant could reasonably include these costs in the lien even if it had not yet paid the vendors, so long as the amounts remained due (or Galiant believed they did).

¶ 28 The evidence indicates that Galiant was unaware, *at the time of filing*, that the original lien claimed more than what was due. *See E.B. Roberts*, 704 P.2d at 864. Galiant amended the lien as soon as it obtained new information. We therefore conclude that the court did not err by rejecting the Herliks' argument that the lien amendments proved the lien was excessive when filed.

¶ 29 Nor did the district court err by finding that the lack of a change order did not prove Galiant knew its lien was excessive. The court credited evidence suggesting that Galiant did not know a change order was required. This supports a conclusion that Galiant did not purposely fail to submit a change order to deceive or charge more than what was due. *See Honnen*, 261 P.3d at 510-11. And Miller testified that Galiant's failure to calculate the correct amount of the excavation costs until just before arbitration was due

to an "administrative error" that Galiant did not notice until 2021, well after it had filed the original lien.

¶ 30 Therefore, even if Galiant had submitted a change order, the lien it filed could have included an incorrect amount. The Herliks do not cite any evidence or proffer suggesting that the mere act of submitting the change order would have prevented this mistake or that Galiant knew the excavation costs it originally claimed exceeded what was due. Accordingly, we cannot say that the district court's conclusion lacks record support. *See Byerly*, ¶ 32.

¶ 31 We also disagree with the Herliks that the district court clearly erred by finding that the lien was not excessive because it included amounts for which they, not Galiant, had paid. The Herliks rely on a case in which a division of this court affirmed the district court's finding that a lien claimant knew the lien was excessive when the homeowners had paid subcontractors for costs included in the lien. *JW Constr. Co. v. Elliott*, 253 P.3d 1265, 1270-71 (Colo. App. 2011). However, in *JW*, the district court found that when the claimant filed the lien, "it was aware that the [homeowners] had paid directly to subcontractors at least some portions" of the claimed amount. *Id.* at 1269. Here, the district court made the opposite finding.

¶ 32 The mere fact that Galiant had not yet paid for some costs included in its original lien did not make the lien excessive. Section 38-22-101, C.R.S. 2024, provides that "persons furnishing labor, laborers, or materials *to be used* . . . either in whole *or in part* . . . or who have . . . bestowed labor in whole *or in part*, describing or illustrating, or superintending such structure, or work done or *to be done* . . . shall have a lien upon the property." (Emphasis added.) The repeated use of the future tense seemingly contemplates situations in which a claimant may, as Galiant did here, file a lien for costs owed but not yet paid. *See Compass Bank*, 107 P.3d at 956 (requiring liberal statutory construction in the lien claimant's favor).

¶ 33 Additionally, Miller testified that the disputed items had been specially ordered and could not be returned, Galiant could not have used them in a different project, and it was obligated to pay for any custom materials ordered. *See Ragsdale Bros. Roofing*, 744 P.2d at 755. Therefore, while Galiant had not yet paid for those materials when it filed the original lien, it remained liable for the cost of the materials until the vendors were paid.

¶ 34 Finally, we disagree with the Herliks that the district court used the wrong standard to determine whether Galiant knew its lien was excessive. First, as we read the statute, the "knowledge" and "reasonable possibility" requirements are not the same. *See* § 38-22-128. A lien claimant could file a lien without a reasonable possibility that the amount claimed was due, while simultaneously lacking knowledge that there was no reasonable possibility that the amount claimed was due. Therefore, a district court must make two distinct determinations: (1) whether there was no reasonable possibility that the claimed amount was due, and (2) whether the lien claimant knew there was no such reasonable possibility.

¶ 35 Second, while the court discussed Galiant's reasonable belief, its findings applied a knowledge standard. With respect to the first lien amendment, the court noted that the Herliks failed to offer evidence that "Galiant/Mr. Miller *knew* that the Herliks had actually paid [for certain items] . . . *before* Galiant filed the original lien." (Second emphasis added.) The court also noted the lack of evidence showing "that Galiant *knew* a written change order was required" when it filed the original lien.

¶ 36 In sum, we conclude that the record supports the district court's finding that the lien was not excessive. *See Byerly*, ¶ 32.

C. The Amendments Reducing the Amount Owed Under the Mechanic's Lien Were Valid

¶ 37 The Herliks next ask us to conclude that Galiant's amendments to its original lien, which reduced the amount owed, were untimely and invalidated the original lien. *See* § 38-22-109(5), (6), C.R.S. 2024 (statutory deadline). We decline the request.

1. Standard of Review and Applicable Law

¶ 38 As discussed, we review interpretations of the mechanic's lien statutes de novo. *Sure-Shock*, ¶ 8. When interpreting any statute, our goal is to effectuate the General Assembly's intent. *Dep't of Nat. Res. v. 5 Star Feedlot, Inc.*, 2021 CO 27, ¶ 20. In doing so, we "giv[e] the words and phrases their plain and ordinary meaning" and then consider "the entire statutory scheme," seeking "to give consistent, harmonious, and sensible effect to all its parts, while simultaneously avoiding constructions that would either render any of its words or phrases superfluous or yield illogical or absurd results." *Id.*

¶ 39 As explained, a "primary purpose of a mechanic's lien is to benefit and protect those who supply labor, materials, or services in order to enhance the value or condition of another's property." *City of Westminster v. Brannan Sand & Gravel Co.*, 940 P.2d 393, 395 (Colo. 1997). Therefore, we liberally construe the mechanic's lien statutes "for the benefit and protection of mechanics and materialmen." *Compass Bank*, 107 P.3d at 958. But the statutes are also designed "to permit a lien . . . only to the extent that the benefit has been received by the owner," *Ragsdale Bros. Roofing*, 744 P.2d at 755, and therefore prohibit excessive liens, *see Honnen*, 261 P.3d at 510.

2. Analysis

¶ 40 The Herliks contend that any amendments to a mechanic's lien, including those reducing the amount claimed, are invalid unless filed within four months of the last day "labor is performed or the last laborers or materials are furnished." § 38-22-109(5)-(6). We disagree.

¶ 41 Section 38-22-109(6) provides that "[n]ew or amended statements may be filed within the periods provided in this section for the purpose of curing any mistake or for the purpose of more

fully complying with the provisions of this article." Under section 38-22-109(5), certain lien statements must be filed within four months "after the day on which the last labor is performed or the last laborers or materials are furnished." Advocating for a rigid interpretation, the Herliks contend that Galiant could not amend its original lien, even to reduce the amount owed, after March 30, 2019, or four months after Galiant's last day of work. Galiant advocates for a less literal interpretation, arguing that preventing a lien claimant from amending its lien to *reduce* the amount owed leads to absurd results. We agree with Galiant for three reasons.

¶ 42 First, nothing in the statute suggests untimely amendments invalidate the underlying lien, and we have not found a Colorado appellate case adopting such an interpretation. Second, while our appellate courts have not considered whether lien claimants may amend a lien to *reduce* the amount claimed after the statutory deadline, we conclude that Galiant's amendments — reducing and correcting the amount owed — were permissible.

¶ 43 Galiant filed the original lien on March 15, 2019, within four months of its last date of work, November 30, 2018. The district court found that this lien was timely filed and perfected. Galiant

filed the first amendment on August 28, 2019, after Miller learned that the Herliks had directly paid for several custom items included in the lien.

¶ 44 The Herliks argue that this amendment was invalid because it was filed outside of the statutory deadline and that the amendment is "evidence of [Galiant's] knowledge that the amount originally claimed was excessive." Yet, as discussed above, the Herliks did not establish that they paid for these materials — and notified Galiant accordingly — *before* Galiant filed the original lien. Therefore, the evidence suggested that Galiant amended its lien based on *new* information. The time limits in section 38-22-109(6) apply to amendments made for the purpose of "curing any mistake" or "more fully complying with the provisions of this article." As we read it, this provision does not bar amendments that *reduce* the amount claimed and are based on previously unavailable information that the lien claimant only learns after the statutory filing deadline.

¶ 45 Third, an interpretation prohibiting such amendments would lead to an illogical result, *see 5 Star Feedlot*, ¶ 20, that could prevent lien claimants from reducing liens to account for

subsequent events or information unavailable to the lien claimant at the time of filing. The interpretation the Herliks advance is also incongruent with the statute's purpose of protecting lien claimants, *see Compass Bank*, 107 P.3d at 958, while preventing excessive liens, *see Ragsdale Bros. Roofing*, 744 P.2d at 755.[4] For example, correcting honest mistakes could reduce the amount owed and benefit the property owner, but the Herliks' interpretation could disincentivize claimants from doing so. Claimants would be further disincentivized if, as the Herliks suggest, amending liens to reduce the amount due is conclusive evidence of the underlying lien's excessiveness. Nor does the Herliks' interpretation guard against excessive liens; without a way (beyond litigation) to reduce liens once filed, claimants may not call attention to potential excesses.

¶ 46 As for the second lien amendment, Miller testified that the day before arbitration, he noticed an error in the revised invoice, overstating the amount owed for excavation costs. He raised the

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[4] To support their interpretation, the Herliks repeatedly emphasize the need for a lien's accuracy when and before it is filed. This argument overlooks the facts that a lien cannot be based on information unavailable to the claimant at the time of filing and that the statute invalidates only those liens that the lien claimant knows to be excessive.

error, and the arbitrator's award reflected the revised amount. Three days after the arbitration award, Galiant again amended its lien to reduce the amount claimed to reflect the reduced excavation cost and the arbitration award. This amendment was also beyond the four-month deadline, but it reflects nothing more than Galiant's effort to account for the arbitration award; there is no evidence that, by reducing the lien amount, Galiant sought to "deceptively claim amounts that are not due," *Honnen*, 261 P.3d at 512, or evade liability for filing an excessive lien.

¶ 47 As discussed, the statutory scheme as a whole and the time limits for amending liens were designed to protect against excessive liens, not prohibit amendments *reducing* a lien. *See id.* at 510-12. Other states have made this explicit in their statutory schemes. *See, e.g.*, 49 Pa. Stat. and Cons. Stat. § 1504 (West 2024) (prohibiting amendments to liens after the filing deadline only when the amendment *increases* the amount); Kan. Stat. Ann. § 60-1105(b) (West 2024) ("[A] lien statement may be amended . . . *except to increase* the amount claimed.") (emphasis added); Iowa Code Ann. § 572.26(2)(b), (c) (West 2024) (allowing amendments that *decrease* the lien amount but prohibiting those that increase it); Ga.

Code Ann. § 44-14-361.1(a.1) (West 2024) ("A claim of lien may be amended at any time to *reduce* the amount claimed . . . .") (emphasis added).

¶ 48 That section 38-22-109(6) is not as explicit as these statutes does not bind us to a literal interpretation that contradicts the General Assembly's intent and leads to absurd results. *See 5 Star Feedlot*, ¶ 20. While we do not adopt a blanket rule exempting all amendments reducing a lien amount from the statutory deadline in section 38-22-109(6), we conclude that the district court did not err by concluding that Galiant's amendments, which reduced the amount claimed based on new information, were not invalid as untimely.

D. The District Court Did Not Err by Limiting Trial to a Half Day

¶ 49 In a pretrial conference, the district court set trial for a half day and informed the parties at trial that they would each have an hour and a half to present their cases. The Herliks argue that limiting the trial to a half day denied them due process because it prevented them from fully developing Mrs. Herlik's testimony and from calling two bankers as witnesses. We disagree.

1. Standard of Review

¶ 50 We review a district court's decision to impose time limits at trial for an abuse of discretion. *Maloney v. Brassfield*, 251 P.3d 1097, 1102 (Colo. App. 2010). A court abuses its discretion if the limits are "inadequate for the nature of the proceeding at the outset" or "they bec[o]me inadequate because of developments during the proceeding." *Id.* (noting that we apply a "heightened standard" to these questions).

2. Applicable Law

¶ 51 Imposing time limits on a trial may violate due process. *Id.* First, "a time limit that is inadequate from the onset . . . is an abuse of discretion" that may deny due process. *Id.* Factors that affect whether a time limit is initially inadequate include the court's familiarity with the case, the number of witnesses, and the issues. *See id.* Second, to determine whether a time limit became inadequate over the course of a trial, courts consider several factors, including

- [w]hether the . . . time limits resulted in unfair surprise;
- [w]hether the court allowed the parties to make their own strategic decisions;

- [w]hether the court adequately communicated the elapsed or remaining time;

- [w]hether the time limits became impractical because of unexpected developments;

- [w]hether the court demonstrated flexibility in response to unexpected developments; and

- [w]hether the complaining party made a sufficiently detailed proffer in requesting extra time.

Id. at 1103.

3. Analysis

a. The Time Limit Was Not Inadequate at the Outset

¶ 52 Presumably contending that a half-day trial was inadequate at the outset, the Herliks cite minute orders and Galiant's notices to the court describing the trial as set for one day. However, at a March 2023 pretrial conference, the district court made clear that the trial length remained unsettled despite any prior determinations; the court explicitly raised the issue, and the parties disagreed about whether a half-day trial was adequate. The parties then discussed the remaining issues and potential witnesses. The court did not set the trial length at that time, presumably because

there were outstanding issues involving the Herliks' witnesses and exhibits.

¶ 53 Later, at a July 11, 2023, pretrial conference, the court set the trial for a half day on August 1, 2023. The Herliks' attorney did not object, and when the court asked if there was anything else, their attorney said, "No, ma'am." On these facts, we cannot say that a half-day trial was inadequate at the onset such that the court abused its discretion. *See id.* at 1102-03.

¶ 54 The court was familiar with the issues and the case. *See id.* Judge Prudek, who presided at trial, had presided over the case since April 2022. In addition to pleadings, motions, and a trial management order, the March and July 2023 pretrial conferences included discussions about the witnesses, issues, and evidence for trial. During the March conference, the court learned that the Herliks planned to call four witnesses, while Galiant intended to call one. Additionally, the anticipated issues for trial — whether the lien was properly filed and perfected and whether it was excessive

— remained consistent throughout the proceedings.[5] There is also no indication that the anticipated number of witnesses changed between the time the court set the trial length and the time of trial.

¶ 55 Therefore, when the court set the trial length and when trial started, the parties expected to call five witnesses and address three issues. As the plaintiff, Galiant had to prove that the lien was properly filed and perfected. This required evidence (1) of the lien statement's contents; (2) that Galiant served the Herliks with a notice of intent to file the lien statement; and (3) that both were timely. *See* § 38-22-109(1), (2), (3), (5); *Sure-Shock*, ¶ 8. In turn, to prove that the lien was excessive, the Herliks had to establish that (1) the lien claimed more than what was due; (2) there was no "reasonable possibility" that the amount claimed was actually due; and (3) Galiant knew that the amount claimed was greater than the amount due. *See Honnen*, 261 P.3d at 510; § 38-22-128. Given the limited issues and short witness list, we cannot say that a half-day

[5] Although Judge Prudek did not preside over the January 2022 status conference, the record is clear that the issues had not changed.

trial, or ninety minutes per side, was insufficient at the outset. *See Maloney*, 251 P.3d at 1102.

b. The Time Limit Did Not Become Inadequate During Trial

¶ 56 We also conclude that the time limit did not become inadequate at trial. *See id.* at 1102-03. First, the limit did not result in unfair surprise. *Id.* at 1103. We do not agree with the Herliks that the mere fact that trial was originally set for a full day caused unfair surprise, where the district court revised the trial length nearly three weeks before trial. We understand that different attorneys represented the Herliks at the July pretrial conference and at trial. But any miscommunication between the attorneys about the length of trial did not create an unfair surprise attributable to the court.

¶ 57 Second, the district court gave the Herliks leeway to make strategic decisions. On multiple occasions, it allowed the Herliks' counsel to pursue lines of questioning or make offers of proof, while reminding him that he had limited time. For example, the transcript reflects five full pages spent on an unfruitful discovery dispute, where counsel acknowledged: "I know the Court made a note of the marginal relevance of the" discovery dispute.

¶ 58 The Herliks seemingly contend that they had no choice but to dedicate their time to making offers of proof because they could not present their case within the time allotted. However, as discussed with respect to the excluded evidence, their counsel spent a considerable amount of time continuing to press issues related to the arbitration award for which the court repeatedly sustained relevance objections. *See Bank of Am., N.A. v. Camire*, 2017 ME 20, ¶¶ 7, 9, 10 (concluding that a two-hour time limit did not violate due process and noting that the court had to spend time "enforcing relevance objections that it had sustained").

¶ 59 As for the two bankers the Herliks contend were improperly excluded, the district court deferred to counsel's decisions about whether and when to call them. When the Herliks' counsel had thirty minutes remaining, the court said, "[Y]ou've got two witnesses in the hall that I'm concerned about." Later, the court asked the Herliks' counsel if he wanted to call the bankers, and he chose to call Mrs. Herlik instead.

¶ 60 Overall, the Herliks' counsel spent more than seventy minutes cross-examining Miller on largely irrelevant matters. He also chose to call Mrs. Herlik instead of the bankers and continuously pursued

lines of questioning to which the court repeatedly sustained objections. Finally, he chose to renew objections to the time limit, despite being on the clock and despite having raised the issue at the start of trial. We disagree that he had no choice but to make multiple offers of proof concerning the same issues. *See Madalena v. Zurich Am. Ins. Co.*, 2023 COA 32, ¶ 50 (Raising "the sum and substance of the argument" preserves it for appeal.) (citation omitted).

¶ 61 Third, the district court adequately communicated the remaining time. *Maloney*, 251 P.3d at 1103. It warned counsel at the sixty-minute mark and the seventy-minute mark. Fourth, unexpected developments did not make the limit impractical. *Id.* The Herliks argue that the limit became impractical because they were unable to call the bankers, but they had an opportunity to call the bankers and to allocate time to examine their own witnesses. Instead, their counsel spent most of the time cross-examining Miller. Fifth, although there were no unexpected developments, the court demonstrated flexibility by allowing the Herliks' counsel to exceed the time limit. *Id.*

¶ 62 Lastly, while counsel repeatedly raised objections to the trial length, he failed to provide a sufficiently detailed proffer; therefore, the court did not err by not allowing even more time. *See id.* When asked why the Herliks needed more time and what evidence they would present, counsel responded: "Well, I think additional information from Mrs. Herlik. She could testify to [sic] about the lien, about the circumstances leading up to the filing of the lien, and also the bankers talking about the . . . access to the money." He then said that Mrs. Herlik could testify about the lien's accuracy and whether it was excessive, to which the court responded that she had already done so. We cannot say that this was a sufficiently detailed proffer, particularly with respect to the bankers, where counsel did not purport to tie the "access to the money" testimony to the lien amounts.

¶ 63 On appeal, the Herliks contend that the bankers could have testified about how the Herliks paid Galiant and that the bankers "had information, documentation, and knowledge of the amount [Galiant] claimed in its lien that would have shown . . . why the claims in [the] lien were excessive." Yet they do not explain what

specifically this evidence included or *how* it would have proved the lien was excessive.

¶ 64 The most specific statement the Herliks make is that the bankers, not the Herliks, were responsible for paying debts related to the lien. However, this does not explain how the testimony could have shown that the lien was excessive. At most, it could have related to the Galiant's breach of contract claim, which the arbitrator had previously resolved. Additionally, the Herliks presented similar evidence when Mrs. Herlik testified that they did not have access to the funds provided for the project and that the bank was responsible for disbursing funds. The Herliks also suggest that the bankers issued all the funds for the construction and that "nothing more was owed." Yet this was not part of their proffer at trial. *See id.* It also contradicts the arbitration award.

¶ 65 Finally, the Herliks' counsel did not make a detailed proffer at trial regarding Mrs. Herlik's anticipated testimony, nor do the Herliks say on appeal exactly what she would have testified to if the trial had been longer. *See id.* They merely suggest that she could have better developed her testimony about whether and when

Galiant knew certain items had been paid for. In all, there was not a "sufficiently detailed proffer" asking for more time. *Id.*

¶ 66 Considering all the factors, we cannot say that the time limit was inadequate to begin with or became inadequate during the trial. *See id.* at 1102-03. The Herliks' counsel chose to spend more than two-thirds of his time cross-examining Miller, often on issues that had been decided in arbitration or that were otherwise largely irrelevant. That he ran out of time to examine the bankers and Mrs. Herlik was in large part due to his strategic decisions and unfocused examination.[6] On this record, we cannot say that a half-day trial was so inadequate as to deny the Herliks due process. *See id.*

E. Attorney Fees

¶ 67 Galiant requests its attorney fees for defending this appeal pursuant to C.A.R. 39.1. As the basis for recovery, Galiant cites language in the parties' contract entitling it "to all costs of collection, including reasonable attorney fees." In at least one case,

[6] A substantial amount of trial time could have been saved if both counsel had stipulated to some (or all) of their exhibits, rather than establishing foundations for each proffered document.

a division of this court has construed a similar provision as entitling a party to appellate attorney fees. *See Castle Rock Bank v. Team Transit, LLC*, 2012 COA 125, ¶¶ 73-74. We therefore conclude that Galiant may recover appellate attorney fees and remand to the district court to determine a reasonable amount of those fees. *See* C.A.R. 39.1.

III. Disposition

¶ 68 The district court's judgment approving the foreclosure of Galiant's mechanic's lien is affirmed, and the case is remanded to the district court to determine Galiant's reasonable attorney fees incurred on appeal.

JUDGE JOHNSON and JUDGE SCHOCK concur.