Court of Appeals No. 393607

SUPREME COURT
OF THE STATE OF WASHINGTON

PARK SOUTH, LLC,

Plaintiff/Appellant,

v.

DENALI CONSTRUCTION, LLC; TAYLOR MOUNTAIN, LLC; and RICHARD LUDWIGSEN,

Defendants/Respondents.

RESPONDENTS' PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

I. INTRODUCTION

The Division III Court of Appeals' Opinion ushers in a new and harmful precedent that, if allowed to stand, will upend Washington State's construction industry and rewrite the fundamental principles of contract law. The Opinion issued by the Court of Appeals, reversing the Trial Court at nearly every turn, establishes that a general contractor can now unilaterally waive any right or claim its subcontractor may have against a property owner. The Opinion defies both law and logic.

Next, once again reversing the Trial Court, the Court of Appeals' Opinion obscures what "substantial justification" means as it applies to a lis pendens filed under RCW 4.28.328. The Court of Appeals' Opinion asserts that an entity cannot establish "substantial justification" for filing a lis pendens despite numerous court orders supporting the filing, despite all Parties agreeing that the contract establishing the basis for the lis pendens was valid and enforceable and despite the fact that the subject contract was the sole focus of nearly the entire litigation.

Finally, the Court of Appeals – once again reversing the Trial Court's findings – failed to follow to plain language of RCW 4.28.328 when it awarded damages related to a lis pendens filed in conjunction with a lien foreclosure action, which is expressly excluded by RCW 4.28.328.

Based on the foregoing, Review by the Washington State Supreme Court is not only warranted, but necessary.

II. IDENTITY OF PETITIONERS

The Petitioners are Denali Construction, LLC ("Denali") and Taylor Mountain, LLC, [1] ("Taylor") (collectively "Petitioners"), the Respondents in the Court of Appeals under Cause No. 393607 and the Defendants/Counterclaim Plaintiffs in the Superior Court for Spokane County, Cause No. 20-2-02125-32.

[1] Appellant Park South failed to establish any claims against Mr. Richard Ludwigsen individually at the time of trial and no claims against him individually were raised on appeal.

III. CITATION TO THE COURT OF APPEALS' DECISION

Petitioners seek review of the Division III Court of Appeals' Unpublished Opinion filed on January 25, 2024. (Appendix A). Petitioners moved for reconsideration pursuant to RAP 12.4, which the Court of Appeals denied by Order filed March 19, 2024. (Appendix B).

IV. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals' Opinion disregards the fundamental principal of contract and construction law by reversing the Trial Court and finding that Denali was not entitled to damages stemming from work performed on Park South's land because Taylor unilaterally waived Denali's lien rights and unjust enrichment claim against Park South.

2. Whether the Court of Appeals incorrectly reversed the Trial Court and found that Taylor did not have "substantial justification" to record a lis pendens against Park South's property, despite the lis pendens stemming from a Right of First

Purchaser clause contained in the Parties' Agreement which formed the basis for this entire action and which the Parties and Trial Court categorically deemed valid and enforceable throughout litigation.

3. Whether the Court of Appeals' Opinion conflicts with the plain language of RCW 4.28.328 which, as the Trial Court found, explicitly carves out liability for damages when a lis pendens is filed in conjunction with a mechanic's lien foreclosure action under RCW 60.04 as Denali did.

4. Whether the Court of Appeals incorrectly reversed the Trial Court and found that Denali failed to file a valid and enforceable lien within 90 days after the last day performing work on the subject property.

5. Whether the case should be remanded to establish Park South's damages, when Park South failed to establish damages at the time of trial.

V. STATEMENT OF THE CASE

A. Relevant Facts Established at Trial.

1. Taylor and Park South Entered into a Land Development Agreement.

Taylor and Park South – not Denali – entered into a land development agreement called the Joint Venture Agreement on November 15, 2018 (the "JV"). (Clerks Papers ("CP") 782-788). Park South agreed to pay Taylor $1,000,000.00 in return for Taylor developing a single parcel of Park South's land ("Phase 6"). (CP 782). The development of Phase 6 was based on drawings and specifications from 2014 (the "2014 Specifications"). (CP 788); (Report of Proceedings ("ROP"), 160:2-7). Under the JV, once Taylor completed development of Phase 6, Taylor and Park South would sell the developed single family lots and split the profits. (CP 783); (ROP, 158:2-8).

2. The JV Contained a Right of First Purchaser Clause.

The JV contained a "Right of First Purchaser" clause granting Taylor property interest in Phase 6, as well as six

subjoining parcels of Park South's land (the "Undeveloped Land"). (CP 785). The Right of First Purchaser established that Park South could not sell the Undeveloped Land to a third party without first offering Taylor the right to purchase the property based on the same terms. *Id*.; (ROP, 159:21-160:1).

3. Spokane County Implemented Unforeseen Change of Conditions Which Drastically Increased the Cost to Develop Phase 6.

One month after executing the JV, Spokane County implemented a "Change of Conditions" essentially replacing the 2014 Specifications used as the basis for the cost to develop Phase 6. The Change of Conditions drastically increases costs to develop the land by hundreds of thousands of dollars. (ROP, 163:20 – 165:2).

4. Park South Failed to Pay for the Work Performed and Park South Breached the Joint Venture.

Taylor proceeded to comply with the Joint Venture and it developed (with Denali as its subcontractor) the land in accordance with the Change of Conditions, despite incurring

costs far beyond the agreed upon $1,000,000.00. (ROP 169:17-172:17). However, Park South refused to pay for work performed. *Id*. Park South only paid $707,987.50 despite Petitioners providing well over $1,400,000.00 of improvements to Park South's land. (CP 1503, at ¶ 24); (ROP, 79:23-80:10). The last payment made by Park South was on June 24, 2019. (ROP, 80:6-8).

Based on its failure to pay under the terms of the JV, the Trial Court found that Park South, not Taylor, breached the JV. (CP 1511, ¶¶ 6-7). The Trial Court's finding that Park South breached the JV was not raised on appeal.

5. Taylor and Park South Entered into a Purchase and Sale Agreement on September 6, 2019.

Taylor and Park South entered into a Purchase and Sale Agreement on September 6, 2019 (the "2019 PSA") whereby Taylor agreed to purchase the entire seven parcels of Undeveloped Land owned by Park South. (CP 122-131).

6. The 2019 PSA Extinguished All of Park South and Taylor's Claims and Obligations – Denali was not a Party to the 2019 PSA.

Pursuant to the 2019 PSA entered into by Taylor and Park South, Taylor and Park South agreed to the following language:

> *All previous agreements and contractual obligations between the parties, including those expressed by and contained in the Joint Venture & Construction Improvement Agreement between Park South, LLC, Taylor Mountain LLC and Denali Construction, LLC are superseded and supplemented by this agreement upon the execution of this agreement contract.* ***Denali Construction LLC is to provide a separate written signed statement acknowledging its agreement.***

(CP 129, ¶ 9).

Based on the foregoing language, Park South and Taylor waived any and all claims and obligations related to the Joint Venture. *Id*.; (CP 1512, ¶¶ 8-9). However, Denali's claims for unjust enrichment and lien foreclosure against Park South remained actionable as Denali was not a party to the 2019 PSA and never provided a written statement waiving any of its claims

or lien rights. (CP 129); (ROP, 81:15-20); (ROP), 140:25-141:22).

The entirety of work performed and invoiced on Phase 6 occurred prior to September 6, 2019. (ROP, 280:1-9). Furthermore, all drilling and blasting had been completed by July of 2019. *Id*. The final invoice for work performed by Denali was sent in July 2019 for $497,176.53. (CP 358).

If any work was performed after September 6, 2019 (the extent of which was never established at trial), that work was performed by Denali, but was not included in the amount awarded by the Trial Court.

7. Park South Breached the 2019 PSA, but Still Retained the $25,000.00 in Earnest Money.

Park South failed to disclose material water access issues on the property. (CP 1504-1505, at ¶ 39); (ROP 81:21-82:16). Based on the material breach of the 2019 PSA, Taylor did not purchase the land, yet Park South retained the $25,000.00 in earnest money. (CP 1505, at ¶ 40); (ROP, 132:5-16).

8. January 8, 2020 was Denali's Final Day on the Project – Denali Filed its Lien Within 90 Days of January 8, 2020.

On January 8, 2020, Denali performed stabilization and winterization of Phase 6 at the request of Park South. (CP 1505, at ¶ 41); (ROP, 182:10-21). On April 7, 2020, Denali recorded its lien against Phase 6 – within 90 days of its last day working on the project. (CP 160-162). The form and substance of Denali's lien complied with RCW 60.04. (CP 1508, at ¶¶ 1-10).

9. Park South's Complaint was Based Expressly on Breach of the JV.

On August 5, 2020, Park South filed its Complaint against Taylor Mountain based on breach of the JV – despite expressly waiving such claims when it signed the 2019 PSA. (CP 3-7). By simply filing the Complaint based on the obligations which had been previously waived, Park South was in breach of the terms of the 2019 PSA. *Id*. Park South's own Complaint specifically alleges that "**Park South has no express contract with Denali**" which supports Denali's Unjust Enrichment claim. *Id*. at ¶ 27.

10. Denali and Taylor Filed Counterclaims on October 26, 2020.

On October 26, 2020, Denali and Taylor filed separate Answers and Counterclaims. (CP 14-32). Denali's counterclaims included a lien foreclosure and unjust enrichment, while Taylor's counterclaims included breach of contract and quantum meruit, also based on the JV. *Id*. Because Park South filed claims in breach of the 2019 PSA, **Taylor and Park South believed the JV was still the controlling document.**

11. Denali and Taylor Prevailed at Trial.

After a two-day bench trial, the Trial Court found:

1. Park South was in breach of the Joint Venture Agreement. (**This issue was not raised on appeal by Park South**);

2. Park South owed Denali **$432,929.26** for unpaid work performed;

3. Denali filed a valid and enforceable lien;

4. The lis pendens filed by both Denali and Taylor were substantially justified;

5. Park South did no prevail on its breach of contract claim (**This issue was not raised on appeal by Park South**);

6. Park South did not prevail on its unjust enrichment claim (**This issue was not raised on appeal by Park South**).

7. Park South did not prevail on any claim against Richard Ludwigsen individually including claims of alter ego, failure to adhere to corporate formalities, or undercapitalization. (**This issue was not raised on appeal by Park South**).

8. Denali was entitled to an award of fees and costs under the lien statute; and

9. Park South owed Taylor $25,000.00 plus prejudgment interest for the earnest money withheld after the 2019 PSA failed to close.

(CP 1500-1514).

Thereafter, Park South was unsuccessful on its Motion for Reconsideration. (CP 2060-62).

B. Procedural History Establishing Justification for the Lis Pendens.

1. The Complaint, the Motions filed by Park South and the Trial Court's own rulings throughout litigation provided Taylor "substantial justification," in law and in fact, for filing the lis pendens.

Taylor filed its lis pendens against all seven parcels of land based on the Right of First Purchase clause contained in the JV. (CP 214-217).

While the Court of Appeals found that that 2019 PSA extinguished the obligations under the JV, Taylor was substantially justified in filing the lis pendens based on the actions of both the Court and Park South throughout litigation, specifically:

1. Park South's Complaint for breach of contract expressly states "*[a] valid contract, the [Joint Venture Agreement], exists between park South and Taylor Mountain*." (CP 5). Park South made no

reference to the 2019 PSA in its complaint. (CP 1-7).

2. Taylor filed its counterclaims also based on the valid JV. (CP 26-32).

3. On March 5, 2021, Park South filed a Motion for Summary Judgment to affirmatively enforce the JV. (CP 174-181). It was only after the summary judgment to enforce the JV was filed that Taylor filed its lis pendens on May 4, 2021. (CP 2014-2017).

4. ***On September 9, 2021, the Trial Court entered an Order establishing that the JV was valid and enforceable.*** (CP 566-568).

> In its written findings granting the Motion, the Trial Court explained that "***<u>It is undisputed that the parties had a valid contract . . .</u>***" (Respondents' Index to Appendix: Motion for Reconsideration, pg.

3, filed with the Court of Appeals on February 13, 2024).

5. On July 30, 2021, Park South filed its initial Trial Brief asserting under the Breach of Contract Section, "*there is no dispute that a valid and enforceable Joint Venture & Construction Agreement ("Agreement") exists between Park South, LLC ("Park South") and Taylor Mountain, LLC."* (CP 470).

6. On September 3, 2021, Park South filed another Summary Judgment, once again asserting that the JV was valid and enforceable, and requested that Taylor's lis pendens be cancelled. (CP 519-525).

7. On June 16, 2022, the Trial Court denied Park South's Motion to Cancel the Lis Pendens. (CP 1083-1084).

8. On June 24, 2022, Park South again moved for summary judgment once again requesting the Trial

Court cancel the lis pendens on its property. (CP 1085-1092).

9. On July 8, 2022, the Trial Court again denied Park South's request to cancel the lis pendens. (CP 1116).

10. On September 21, 2022, after a two day bench trial, the Court affirmed that the lis pendens were substantially justified by both Denali and Taylor. (CP 1510-1511).

11. On November 10, 2022, after considering a Motion for Reconsideration, the Trial Court denied Park South's Motion for Reconsideration, once again affirming justification for the lis pendens. (CP 2060-2063).

12. On January 9, 2024, the Trial Court, while this matter was on appeal, entered an order denying Park South's request to cancel the lis pendens.

13. As recently as March 19, 2024, the Court of Appeals denied park South's Motion to Cancel the Lis Pendens.

VI. ARGUMENT

Review of the Court of Appeals' Opinion is necessary under RAP 13.4. The Opinion conflicts with prior decisions from both the Court of Appeals and the Supreme Court of Washington, and it cuts against basic principles of contract law. Further, it involves an issue of substantial public interest, specifically, what constitutes "substantial justification" as it relates to filing a lis pendens? Finally, the Court of Appeals' Opinion disregards the plain language of RCW 4.28.328. There exists a substantial public interest in assuring that our court's opinions and rulings appropriately apply legal statutes.

A. Denali's Lien Rights and Claim of Unjust Enrichment Against Park South Cannot be Waived by a Contract to Which Denali was not a Party.

Denali was a prevailing party at trial. As such, the Court of Appeals should have viewed the evidence and all reasonable

inferences in the light most favorable to Denali – it did not. *Columbia State Bank v. Invicta Law Grp. PLLC*, 199 Wn. App. 306, 319 (2017). Furthermore it is a foundational pillar of contract law that "[o]ne who is not a party to a contract can neither enforce its provisions nor be bound by them." *Trane Co. v. Brown-Johnson, Inc.*, 48 Wn. App. 511, 520 (1987).

At the conclusion of trial, the Trial Court correctly exercised it discretion and it found that Denali was not a party to the 2019 PSA. (CP 1504, at ¶ 35). Yet, despite the Trial Court's findings the Court of Appeals found the following:

> Given the terms of the 2019 PSA . . . **Taylor Mountain disclaimed any claims against Park South on its own behalf and on behalf of Denali.**

(Appendix A, pg. 13).

In contrast to the Court of Appeals' Opinion, the testimony provided at trial categorically supports the Trial Court's finding that Denali was not a party to the 2019 PSA. Notably, the following testimony was offered at the time of trial:

Atty. Adolphson: [the] 2019 purchase sales agreement, was Denali Construction ever part of that contract?

Mr. Ludwigsen: No, it was not.

Atty.. Adolphson: And did Denali ever provide a separate written signed statement agreeing to the terms of the 2019 PSA?

Mr. Ludwigsen: No, it did not.

(ROP, 81:15-20).

Atty. Adolphson: And the last sentence in that paragraph says, "Denali Construction LLC is to provide a separate written signed statement in support of this acknowledgement." Do you see that?

Mr. Kofmehl (Park South's sole member): Yes.

Atty. Adolphson: And did we establish Denali never sent you a signed written statement to that affect, correct?

Mr. Kofmehl: No, it was Taylor Mountain. Denali was separate, so he included them.

Atty. Adolphson: Right, but Denali did not provide a separate written statement, correct?

Mr. Kofmehl: Well, he didn't provide a lot of things that he was going to provide . . .
. . .

> Atty. Adolphson: I just want to make sure because I don't know if you answered it quite. But Denali Construction never provided a written statement –
>
> Mr. Kofmehl: Not that I am familiar with.

(ROP, 140:25-141:22).

The testimony establishes that the Parties agree that Denali was not a party to the 2019 PSA Park South and Taylor.

Further, the affects of the Court of Appeals ruling have the ability to turn all future subcontractor's rights on their head. For instance, any time a property owner hires a general contractor on construction project, the owner and the general contractor can contract around the subcontractors and preclude any of them from asserting a lien claim or unjust enrichment claim against the owner. Such a precedent must be avoided. The Court of Appeals determination that Denali waived its unjust enrichment claim based on a contract to which it was not a party should be reversed.

B. Washington Case Law Establishes Conclusively that a Subcontractor has the Right to Bring a Claim of Unjust Enrichment Against a Property Owner.

The Court of Appeals also found that a subcontractor cannot maintain a claim against a property owner because property owners maintain no "direct obligation" to subcontractors. App. A, at pg. 14. However, both law and common sense dictate that a party must make restitution when he has been unjustly enriched at the expense of another. *Chemical Bank v. WPPSS*, 102 Wn. 2d 874, 909 (1984).

Three elements must be established in order to sustain a claim based on unjust enrichment. *Young v. Young*, 164 Wn.2d 477, 484 (2008). The defendant must (1) receive a benefit (2) at the plaintiff's expense, and (3) the circumstances must be such that it would be unjust for the defendant to retain the benefit without payment. *Id*. at 484-85. Stated another way, one who receives a benefit must pay for if the circumstances of its receipt or retention make it unjust for him to keep the benefit without paying. *Chandler v. Washington Toll Bridge Auth.*, 17 Wn. 2d

591 (1943).

In the case of *Irwin Concrete, Inc. v. Sun Coast Properties, Inc.*, 33 Wn. App. 190, 193-95 (1982) the court held that recovery under the theory of unjust enrichment is proper when a subcontractor benefits the landowner without pay. *Id*., at 193-95.

Here, the Trial Court found that Park South failed to pay Denali in the amount of **$432,929.26** for work performed. (CP 1510). Park South did not contest that amount on appeal. Because unchallenged findings are verities on appeal and because Denali had a right to maintain its unjust enrichment claim against Park South, the Court of Appeals should be reversed and the Trial Court's award of $432,292.26 should be upheld. *In re Estate of Jones*, 152 Wn. 2d 1, 8 (2004).

C. The Trial Court Correctly Found That Taylor had Substantial Justification to File Its Lis Pendens.

Filing a lis pendens is substantially justified where the claimant has a "*reasonable, good faith basis in fact or law for believing they have an interest in the property*." *S. Kitsap Family*

Worship Ctr. v. Weir, 135 Wn. App. 900, 912 (2006). Here, the Trial Court exercised its discretion and ruled that Taylor had substantial justification to file the lis pendens based on the JV. (CP 1510). The Trial Court's finding is supported throughout the record. Specifically, both the Complaint and the Counterclaims assert that the JV was a valid contract and controlled Park South and Taylor's relationship. (CP 3-32). The pleadings filed in this case created a good faith belief in fact that the Right of First Purchaser contained in the JV established that Taylor maintained a property interest in Park South's land. *Id*.

Next, during litigation the Trial Court entered an order, based on Park South's own motion, establishing the JV was valid and enforceable, – which created a good faith basis in law, that the Right of First Purchase clause contained therein was enforceable. (CP 566-568). Both the Trial Court and the Court of Appeals refused to cancel the lis pendens despite numerous motions from Park South, once again creating a good faith basis

in law to allow the lis pendens to encumber the land. (CP 1083-1084); (CP 1116); (CP 1510-1511).

Finally, Park South filed numerous motions based on the enforceability of the JV and even conceded that it was enforceable in its initial trial brief. (CP 174-181); (CP 519-525); (CP 470).

Taylor and Park South treated the JV as valid and enforceable throughout litigation, and the Trial Court reenforced the JV's validity through numerous rulings. The Court of Appeals should be reversed accordingly and Taylor should be found to have "substantial justification" for filing and maintaining the lis pendens in accordance with the Trial Court's Findings of Fact and Conclusions of Law.

D. Washington Case Law Expressly Provides that a Lis Pendens is Permitted in a Lien Foreclosure Action – Denali had Substantial Justification to Record its Lis Pendens.

The lis pendens recorded by Denali only applied to Phase 6 – the single parcel of land it was developing. As noted on the first page of the lis pendens recorded in Spokane County:

> The object of said action is for breach of the of the joint venture agreement concerning property owned by Plaintiff **and to foreclose on a mechanic's lien on Plaintiff's property** . . . The legal description of the property subject to the joint venture agreement and **of which the lien is a subset**, is describe as . . .

(CP 1067).

Under Washington law, a mechanic's lien claimant is permitted to file a lis pendens in accordance with the lien, although it is not necessary.

> Generally, "*[t]he filing or recording of [a lis pendens] is not necessary in the foreclosure of a mechanic's lien unless expressly required by statute*." RCW 60.04 imposes no such requirement. *Cf.* **The filing of a lis pendens is permissive and has no effect on the substantive rights of the parties.**

John Morgan Constr. Co., Inc. v. McDowell, 62 Wn. App. 79, 84 (1991) (internal quotations omitted). The filing of a lis pendens in conjunction with a lien is proper under Washington law. *Id*. Based on Denali's lien foreclosure action, Denali had substantial justification to record its lis pendens – the Court of Appeals misinterpreted the law when it found that Denali's lis pendens was not justified and this Court should reverse the Opinion accordingly.

E. Denali is Exempt from any Damages Awarded Under RCW 4.28.328; The Court of Appeals Failed to Correctly Apply the Plain Language of RCW 4.28.328.

The Court of Appeals awarded damages to Park South under RCW 4.28.328(3) based on the assertion that Taylor and Denali did not have substantial justification for recording the lis pendens. However, Denali is not a party subject to damages under RCW 4.28.328, as RCW 4.28.328 does not apply to lis pendens recorded "***in connection with an action filed under . . . Title 60***" (i.e. a lien foreclosure action). RCW 4.28.328(1)(a). As

stated on the face of the recorded lis pendens, Denali recorded its lis pendens in connection with its mechanic's lien foreclosure action under RCW 60.04. (CP 1060). The language of RCW 4.28.328(1)(a) is clear:

> For the purpose of this section, "lis pendens" means a lis pendens filed under RCW 4.28.320 or 4.28.325 or other instrument having the effect of clouding the title to real property, however named . . . **but does not include a lis pendens filed in connection with an action under Title 6, 60, other than chapter 60.70 RCW, or 61 RCW.**RCW 4.28.328(1)(a).

The Trial Court addressed this issue in its Findings of Fact and Conclusions of law Section E:

> **A lien claimant, similar to Denali in this case, is not within the class of people that can be held liable under RCW 4.28.328 for damages related to the recording of a lis pendens.**

(CP 1510) (emphasis added).

The language of the lis pendens is clear. Denali was only encumbering the parcel of land subject to its mechanic's lien, recorded in Spokane County. (CP 1067).

Because Denali's lis pendens only applied to its

mechanic's lien foreclosure under RCW 60.04, Denali is not liable for any damages stemming from the lis pendens under RCW 4.28.328(3). The Court of Appeals failure to properly apply the plain language of a statute should not be allowed to stand and this Court should reverse the Court of Appeals' opinion accordingly.

F. Denali's Lien was Valid and in Compliance with RCW 60.04.091.

The Trial Court found that Denali performed work on Park South's land on January 8, 2020 and filed a valid lien thereafter. (CP 1505). On appeal, the Court will view the evidence and all reasonable inferences in the light most favorable to the prevailing party. *Columbia State Bank v. Invicta Law Grp. PLLC,* 199 Wn. App. 306, 319 (2017). On appeal, the Court does not review the trial court's credibility determinations. *Id*.

Washington law is well settled that a property owner to which a claim of lien is asserted cannot allege that "*additional work done at his request to complete the contract was not a*

continuation of the previous work, and done under the same contract." *Rieflin v. Grafton*, 63 Wash. 387, 389 (1911) (emphasis added).

Here, Park South requested that Denali continue working to complete Phase 6. (ROP, 174:6-23). Testimony and text messages proffered a the time of trial establish that Denali worked on the project, **at the request of Park South**, as late as January 8, 2021. (ROP, 182:10-21) (CP 973-935); (D-137). Denali complied with RCW 60.04.091's 90 day window by recording its lien on April 7, 2021, contrary to the Court of Appeals' Opinion. The Court of Appeals' Opinion invalidating Denali's lien should be reversed.

G. The Court of Appeals Should Not have Remanded This Matter for Further Proceeding on Damages Related to the Lis Pendens.

At trial, Park South failed to produce evidence establishing any damages resulting from the lis pendens. As the Trial Court noted, "Park South is not entitled to any damages related to the lis pendens – to the extent any exist." (CP 1511). The record is

void of any testimony establishing the value of Park South's land or profits that *could have* been realized had a lis pendens not been filed.

Despite the record being void of any semblance of actual damages suffered by Park South, the Court of Appeals has remanded this proceeding to "calculate Park South's actual damages related to the lis pendens." (Appendix A, pg. 19-20). Awarding Park South a second bite of the apple is not appropriate given the failure to establish damages at the first trial. This case should not be remanded.

VII. ATTORNEY FEES AND EXPENSES: RAP 18.1

Pursuant to RAP 18.1, Petitioners hereby move this Court for an award of attorney fees and costs incurred on appeal and petitioning the Supreme Court as well as fees and costs under RCW 60.04.181 as awarded by the Trial Court.

VIII. CONCLUSION

Taylor and Denali submit that Review should be accepted. This case presents an important opportunity for this Court

because the Court of Appeals' Opinion does not exist in a vacuum, but instead sets the precedent that a general contractor can unilaterally relieve a property owner from any liability on behalf of its subcontractors.

Further, review will allow the Court to establish what constitutes "substantial justification" with respect to a lis pendens. And, by applying the plain language of RCW 4.28.328, the Court will establish that a lien claimant is not subject to damages stemming from a lis pendens.

Next, review is appropriate as the Court of Appeals took unjustified liberties by reversing the Trial Court's discretionary findings with respect the timing of Denali's lien and the justification for filing both Parties' lis pendens.

Finally, this case should not be remanded for further proceedings on damages when Park South failed to present any evidence of damages at the time of trial. Review of the Court of Appeals Opinion is appropriate.

IX. CERTIFICATE OF COMPLIANCE

As required by RAP 18.17, the undersigned certifies that the number of words contained in this document, exclusive of words contained in any appendices, title sheet, table of contents, table of authorities, this certificate of compliance, certificate of service, and signature block with date below, have been calculated using the word count calculation of the word processing software used to prepare the answer, as follows: 4,829.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of April 2024, I caused to be served a true and correct copy of the foregoing document to the below individuals as follows:

☐ HAND DELIVERY	William C. Schroeder
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Appendix A

FILED
JANUARY 25, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

PARK SOUTH LLC, a Washington limited liability company, Appellant, v. DENALI CONSTRUCTION LLC, a Washington limited liability company; TAYLOR MOUNTAIN LLC, a Washington limited liability company; and RICHARD LUDWIGSEN, an individual, Respondents.	)	No. 39360-7-III UNPUBLISHED OPINION

PENNELL, J. — Park South LLC appeals from a judgment issued in favor of Denali Construction LLC and Taylor Mountain LLC on three claims related to a property development dispute: return of earnest money, unjust enrichment, and enforcement of a construction lien. We agree with Park South that it is entitled to reversal on all three claims. We further agree Denali and Taylor Mountain improperly recorded a lis pendens against Park South's property without substantial justification. This matter is reversed and remanded for further proceedings.

FACTS

This case concerns three Washington limited liability companies: Park South LLC, whose sole member is Patrick Kofmehl; Taylor Mountain LLC, whose two members are Richard Ludwigsen and Josh Nicholson; and Denali Construction LLC, whose sole member is Richard Ludwigsen.

In March 2018, Park South and Taylor Mountain entered into a real estate purchase and sale agreement (the 2018 PSA) whereby Park South agreed to sell six parcels of land to Taylor Mountain. The 2018 PSA required a $25,000 earnest money deposit, which was subsequently tendered by Taylor Mountain. The PSA then failed to close and Park South retained the earnest money.[1]

In November 2018, Park South and Taylor Mountain entered into a joint venture and construction improvement agreement to develop one of the aforementioned six parcels into buildable residential lots. Park South and Taylor Mountain were the only parties to the agreement. Per the joint venture agreement, Park South agreed to pay Taylor Mountain "up to but not more than" $1 million. Clerk's Papers (CP) at 67; *see also id.* at 65. Payments were to be made via monthly invoices documenting "completed" work.

[1] The parties dispute who was at fault for the failure of the 2018 PSA to close and, as a result, whether Park South should have returned the earnest money at that time. This disagreement is not pertinent to our disposition of this appeal.

Id. at 68. The agreement assigned assumption of risk to Taylor Mountain and specified a completion date of July 31, 2019.

Park South and Taylor Mountain agreed to evenly split the profits from the sale of finished lots. The joint venture agreement also gave Taylor Mountain a right of first refusal: Park South agreed "not to sell" the parcel being developed or any of the other five parcels to a third party without first offering Taylor Mountain the chance to purchase the land under the same terms. *Id*. at 70. Taylor Mountain agreed to "hold . . . Park South harmless against any claims made by [Taylor Mountain's] contractors," and agreed to indemnify Park South against any third-party claims. *Id*. at 69.

Shortly after execution of the joint venture agreement, Taylor Mountain entered into a subcontract with Denali, by which Taylor Mountain agreed to pay Denali $1 million "[t]o furnish and perform all work" on the project. *Id*. at 780. The Taylor Mountain–Denali subcontract incorporated the joint venture agreement and its attached specifications. Both Taylor Mountain and Denali engaged additional subcontractors on the project.

On December 13, 2018, a Spokane County hearing examiner approved "an application" filed by Taylor Mountain's engineering subcontractor "for a Change of Conditions" to modify a plat of land including the parcel that was the subject of the joint

venture agreement. *Id.* at 850. The application sought to remove a road, realign four lots, and extend a road. The County's hearing examiner approved the application "subject to *revised* conditions." *Id*.

According to Mr. Ludwigsen, co-owner of Taylor Mountain and sole owner of Denali, the County's revised conditions "significantly changed" the scope of the joint venture project. 1 Rep. of Proc. (RP) (Aug. 23, 2022) at 160. He claimed the conditions were not foreseeable and significantly increased the costs of the project. Nevertheless, Mr. Ludwigsen did not notify Park South about the changes required by the county or the associated increase in the costs of the project until August of the following year.

In the meantime, Taylor Mountain submitted monthly invoices to Park South as contemplated by the joint venture agreement. Although the invoices were generated by Denali, Taylor Mountain requested checks be made payable to Taylor Mountain. Pursuant to those invoices, the parties agree Park South paid Taylor Mountain approximately $707,987.50 for work billed from January through June 2019. Therefore, $292,012.50 remained billable on the $1 million contract.

On June 24, 2019, Mr. Ludwigsen e-mailed Mr. Kofmehl acknowledging that only $292,012.50 remained billable under the joint venture agreement. But in addition to that sum, Mr. Ludwigsen asked Mr. Kofmehl to immediately "cut[ ] us [a] check for

[$]311,600[.00],” which would enable Taylor Mountain “to finish this plat and consummate the sale to [a third party].” CP at 92, 790.

Two days later, Mr. Kofmehl responded and explained Park South was “unable to undertake any variations” and would not agree to pay more than the contract price. *Id*. at 94.

On July 20, 2019, Taylor Mountain sent three invoices to Park South. Like the previous invoices, the invoices bore a Denali Construction watermark. One of the invoices was for $66,500.00, another was for $12,572.14, and the third invoice was for $497,176.53. Unlike the first two itemized invoices, this last invoice provided no description of any work performed; instead, it consisted of a single line item, for $497,176.53, and a description reading “Change of Conditions Imposed by Spokane County. Refer to *Work Estimate* Attached hereto for detailed breakdown.” *Id*. at 358 (emphasis added). Mr. Ludwigsen eventually acknowledged the vast majority of this last invoice was for work that had yet to be performed at the time he demanded immediate payment. On July 25, Mr. Ludwigsen informed Park South’s attorney in an e-mail that he would “stop work” on the project if these immediate payments were not made. *Id*. at 794.

On August 7, 2019, Mr. Ludwigsen again wrote to Park South’s attorney, stating the terms of the joint venture agreement were insufficient to allow for project completion.

The letter claimed Taylor Mountain and Denali had absorbed out-of-pocket expenses due to the revised conditions imposed by Spokane County. Mr. Ludwigsen claimed Park South owed Taylor Mountain $79,072.14 on "unpaid invoices." *Id*. at 101, 1023. Mr. Ludwigsen also reiterated his desire for an advance payment of $497,176.53. Mr. Ludwigsen's letter also raised a concern about Park South's retention of the earnest money from the failed 2018 PSA. Mr. Ludwigsen closed his letter by demanding a response from Park South and payment of moneys within two days.

Park South did not accede to Taylor Mountain's demands. Instead, on September 6, 2019, Park South and Taylor Mountain entered into a vacant land purchase and sale agreement (the 2019 PSA) for seven parcels of land, including the parcel already under development.[2] Mr. Ludwigsen executed the agreement on behalf of Taylor Mountain. The 2019 PSA terminated the joint venture agreement, disclaimed the accusations in Mr. Ludwigsen's August 7 letter, and explicitly stated Taylor Mountain would not incur additional expenses on the project. The 2019 PSA again required Taylor Mountain to tender $25,000 in earnest money, but the parties agreed the $25,000 from the failed 2018 PSA would roll over and satisfy this obligation. *See* 1 RP (Aug. 23, 2022) at 28, 56.

[2] On August 10, almost four weeks prior to execution of the 2019 PSA, Patrick Kofmehl sent an e-mail to Mr. Ludwigsen's business partner, Josh Nicholson, stating he would like to see the project completed.

The 2019 PSA provided Taylor Mountain

> has had full and ample opportunity to thoroughly review, inspect, and evaluate the Property and any improvements, and is completely satisfied with the status and condition of the Property and fully acknowledges that [Taylor Mountain] is purchasing the property, expressly, on an "as-is" basis.
> . . . .
> . . . [Taylor Mountain] expressly waives its right to receive any disclosure statements . . . .

CP at 129, 805, 1973; Ex. P-14. The 2019 PSA specifically "advised" Taylor Mountain "to investigate whether there is a sufficient water supply to meet [Taylor Mountain's] needs." CP at 126, 1968; Ex. P-14.

According to the terms of the 2019 PSA, Denali was to provide a separate signed statement acknowledging its agreement to the 2019 PSA's terms. This never happened. The 2019 PSA listed a closing date of October 10, 2019. Park South later agreed to extend the closing date to November 30. While the 2019 PSA was pending, two subcontractors recorded liens against Park South's property, alleging unpaid invoices by Denali.

The 2019 PSA failed to close as scheduled on November 30. Taylor Mountain sought another extension of the closing date, but Park South declined. Park South subsequently satisfied each lien filed by Denali's subcontractors. Meanwhile, Denali

recorded a lien against Park South's property on April 7, 2020, claiming it was owed $770,995.

In August 2020, Park South initiated an action in Spokane County Superior Court for breach of contract, indemnification/contribution, and unjust enrichment against Taylor Mountain, Denali, and Richard Ludwigsen. In addition to damages, Park South sought attorney fees and costs. The defendants separately answered the complaint and asserted affirmative defenses; and both Taylor Mountain and Denali brought counterclaims against Park South. Taylor Mountain asserted Park South had wrongfully retained its $25,000 in earnest money, and made its own claims of breach of contract and unjust enrichment. Denali asserted unjust enrichment and sought to foreclose on its lien. Taylor Mountain and Denali jointly recorded a lis pendens against six of Park South's parcels.

The case proceeded to a two-day bench trial in August 2022. At trial, Richard Ludwigsen expounded on the claims made by Taylor Mountain and Denali. Mr. Ludwigsen asserted the 2019 PSA fell through because there was an issue with water availability for most of the property, which made financing difficult. He also testified Denali worked on the property after the termination of the joint venture agreement, including as recently as January 8, 2020. However, he agreed Park South had never been

sent any invoices for such work, and agreed the project was not completed when Denali ultimately left the jobsite.

The trial court issued a ruling against Park South and in favor of Taylor Mountain and Denali. With respect to Taylor Mountain, the court ordered Taylor Mountain was entitled to a return of its $25,000.00 in earnest money, plus interest. The court did not decide whether there had been a breach of the 2019 PSA. Instead, it reasoned "Park South had no right to retain" the earnest money because the evidence did not establish a breach by Taylor Mountain. CP at 1508. The court found Denali had added $432,929.26 in value to Park South's property without compensation and therefore was entitled to relief on its unjust enrichment counterclaim. The court also ruled Denali had properly recorded an enforceable lien against Park South's property. Finally, the court determined both Denali and Taylor Mountain properly recorded their lis pendens. According to the court, Denali's lis pendens was justified by its lien. Taylor Mountain's lis pendens was justified by its purported interest in the property pursuant to the right of first purchaser clause contained in the joint venture agreement. *See id*. at 1510.

The court also ordered Park South to pay Denali $167,389.06 in attorney fees and costs. Park South moved for reconsideration, which the trial court denied. The trial court

later awarded additional postjudgment attorney fees and ordered a writ of garnishment against Park South.

Park South timely appealed the trial court's rulings in favor of Taylor Mountain and Denali. Park South has not appealed the trial court's denial of its own claims against Taylor Mountain, Denali, and Richard Ludwigsen.

ANALYSIS

Earnest money

Park South first challenges the trial court's ruling that Taylor Mountain was entitled to return of the $25,000 in earnest money under the 2019 PSA. This is a question of contract interpretation. Because this dispute does not turn on the credibility of extrinsic evidence, our review is de novo. *Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 594, 305 P.3d 230 (2013).

Earnest money is the consideration a buyer provides in return for a seller's promise to convey their property. *Id*. at 597. To get back an earnest money deposit, a buyer must "show that [they] did not receive what [they] paid for, that is, the *promise* to sell [them] the land." *Id*. at 598. To satisfy this burden, the buyer must show the seller "'was not ready, willing, and able'" to convey the property. *Id*. at 596 & n.3 (quoting BLACK'S LAW

DICTIONARY 1418 (9th ed. 2009)). As the buyer, Taylor Mountain had the burden here.[3] The record on review fails to show this burden was met.

The only purported repudiation Taylor Mountain has pointed to, in the trial court or on appeal, is Park South's failure to disclose a water accessibility issue that Taylor Mountain claims rendered five-sixths of the property undevelopable. But this was plainly not a repudiation of the 2019 PSA. In the 2019 PSA, Taylor Mountain "fully acknowledge[d]" it was "expressly" agreeing to purchase the property "on an 'as-is' basis." CP at 805. Taylor Mountain disclaimed a right to receive "any" disclosure statements. *Id*. Taylor Mountain agreed that it "had full and ample opportunity to thoroughly review, inspect, and evaluate the Property and any improvements" and that it was "completely satisfied with the status and condition of the Property." *Id*.

There is no basis in the record to disregard the 2019 PSA's "as-is" clause. *See Sloan v. Thompson*, 128 Wn. App. 776, 790, 115 P.3d 1009 (2005) (noting Washington courts "routinely enforce" such clauses); *see also Mattingly v. Palmer Ridge Homes, LLC*, 157 Wn. App. 376, 396, 238 P.3d 505 (2010). The clause was bargained for by two

[3] The trial court reasoned Taylor Mountain was entitled to a return of its earnest money because there was no evidence Taylor Mountain had breached the PSA. This reasoning is not consistent with the governing legal standard, which properly assigns the burden of establishing any breach by Park South to Taylor Mountain.

sophisticated parties and was set forth with particularity in the agreement. *See Warner v. Design & Build Homes, Inc.*, 128 Wn. App. 34, 40-41, 114 P.3d 664 (2005). Nor did Taylor Mountain produce any evidence of fraudulent concealment of the purported defect. *See Sloan*, 128 Wn. App. at 791.

The undisputed evidence is that Taylor Mountain received exactly what its $25,000 earnest money paid for: a promise from Park South to sell the property as-is. *See Kofmehl*, 177 Wn.2d at 597-98. Because Taylor Mountain failed to prove any actual repudiation of the contract by Park South, it failed to carry its burden and the trial court erred by awarding Taylor Mountain a return of its earnest money. *See id*. at 596-97; *see also Frickel v. Sunnyside Enters., Inc.*, 106 Wn.2d 714, 721, 725 P.2d 422 (1986).

The trial court's judgment in favor of Taylor Mountain on the issue of earnest money must therefore be reversed.

Unjust enrichment

Unjust enrichment is an "equitable remedy." *Puget Sound Sec. Patrol, Inc. v. Bates*, 197 Wn. App. 461, 475, 389 P.3d 709 (2017); *see Young v. Young*, 164 Wn.2d 477, 486, 191 P.3d 1258 (2008). "'[T]he question of whether equitable relief is appropriate is a question of law,' *Niemann v. Vaughn Community. Church*, 154 Wn.2d 365, 374, 113 P.3d 463 (2005), and like all issues of law our review is de novo." *Bank*

of Am., NA v. Prestance Corp., 160 Wn.2d 560, 564, 160 P.3d 17 (2007) (alteration in original).

"'Three elements must be established in order to sustain a claim based on unjust enrichment.'" *Young*, 164 Wn.2d at 484 (quoting *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 159-60, 810 P.2d 12 (1991)). The defendant must (1) receive a benefit (2) at the plaintiff's expense, and (3) the circumstances must be such that it would be unjust for the defendant to retain the benefit without payment. *Id*. at 484-85.

Given the terms of the 2019 PSA, Denali has not shown it would be unjust for Park South to retain any benefit conferred by Denali without payment. As of the date of that agreement, Taylor Mountain disclaimed any claims against Park South on its own behalf and on behalf of Denali. And the agreement immediately terminated the joint venture agreement and required Taylor Mountain not to incur any additional expenses on the project going forward. Although Denali technically did not sign the agreement or an accompanying acknowledgment, Denali cannot justly be deemed unaware of the agreement's terms. *See Seattle Mortg. Co., Inc. v. Unknown Heirs of Gray*, 133 Wn. App. 479, 498, 136 P.3d 776 (2006) (noting liability for unjust enrichment "attaches only when the circumstances of the benefit would make it unjust to keep it"). The 2019 PSA was signed by Denali's sole owner, Richard Ludwigsen.

There is no evidence that after execution of the 2019 PSA, Park South either encouraged Denali to work on the project or silently acquiesced in such work. *Cf. Irwin Concrete, Inc. v. Sun Coast Props., Inc.*, 33 Wn. App. 190, 194, 653 P.2d 1331 (1982) (holding liability for unjust enrichment attached where landowner "knew about and silently acquiesced in the work").[4] Thus, contrary to the trial court's ruling, equity does not compel Park South to further compensate Denali for any work on the project.

Denali insists equity is on its side because Park South never told it to stop work. But Denali and Park South did not have a contractual relationship. Park South's contract was with Taylor Mountain and Denali was one of Taylor Mountain's subcontractors. Ordinarily, a property owner who retains a general contractor assumes no "direct obligation" to the general contractor's subcontractors. *Del Guzzi Constr. Co., Inc. v. Global Nw. Ltd., Inc.*, 105 Wn.2d 878, 886-87, 719 P.2d 120 (1986). If anyone had a duty to tell Denali to stop working on the jobsite once the joint venture agreement was

[4] Denali points to an August 10, 2019, e-mail exchange between Patrick Kofmehl and Josh Nicholson, Richard Ludwigsen's business partner at Taylor Mountain, where Mr. Kofmehl commented he "would like to see this project completed." Ex. D-266. Mr. Kofmehl's e-mail does not indicate Park South encouraged Denali to keep working on the project. For one thing, the e-mail was not directed at Denali. But more importantly, the e-mail predated the 2019 PSA, whereby Taylor Mountain agreed to stop work, by at least several weeks.

terminated, it was Taylor Mountain. To the extent Denali was unaware it needed to stop work on the project,[5] its claim is against Taylor Mountain, not Park South.

The trial court's judgment in favor of Denali on the issue of unjust enrichment must therefore be reversed.

Validity of Denali's lien

Park South next challenges enforcement of the lien filed by Denali on April 7, 2020. "A lien is an encumbrance on property to secure payment of a debt." *S.D. Deacon Corp. of Wash. v. Gaston Bros. Excavating, Inc.*, 150 Wn. App. 87, 89, 206 P.3d 689 (2009). In a suit for enforcement of a lien, the claimant bears the burden of proving all of the lien prerequisites were met. *See id*. at 91; *W.R.P. Lake Union Ltd. P'ship v. Exterior Servs., Inc.*, 85 Wn. App. 744, 752, 934 P.2d 722 (1997). In a case involving a lien, this court reviews the trial court's factual findings for substantial evidence and legal conclusions de novo. *See Intermountain Elec., Inc. v. G-A-T Bros. Constr., Inc.*, 115 Wn. App. 384, 390-91, 62 P.3d 548 (2003).

Construction liens are authorized by RCW 60.04.021. To assert a lien under this statute, a claimant must record a notice of lien not later than 90 days after the claimant

[5] This claim would strain credulity given Denali's sole member signed the 2019 PSA.

has ceased to furnish materials or services at the owner's behest. RCW 60.04.091; *see Woodley v. Style Corp.*, 7 Wn. App. 2d 543, 552-53 & n.12, 453 P.3d 739 (2019) (recognizing authorization of labor or provision of materials by the owner or owner's agent is required to toll the 90-day filing limit); *Intermountain Elec.*, 115 Wn. App. at 393 (same).

The facts at trial failed to show Denali timely recorded its lien claim. The joint venture agreement between Taylor Mountain and Park South terminated on September 6, 2019. Given its sole member signed the agreement terminating the joint venture, Denali certainly knew about this change in events even though it never signed a separate acknowledgment. There is no evidence Park South said or did anything to encourage Denali to work on the project after September 6, 2019. Yet Denali did not record its claim of lien until April 7, 2020. This fell far outside the 90-day filing window. The lien was therefore invalid. *See Woodley*, 7 Wn. App. 2d at 553.

The trial court's order allowing Denali to foreclose on its lien is therefore reversed. This disposition also requires reversal of Denali's attorney fee and cost award.

Lis pendens

Under RCW 4.28.320, a party to a court action affecting title to real property may record a lis pendens with the county auditor. A "lis pendens" is "[a] notice, recorded in

the chain of title to real property . . . to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome." BLACK'S LAW DICTIONARY 1117 (11th ed. 2019). A lis pendens has no impact on the parties' substantive rights, but because it clouds title, a lis pendens can interfere with a property owner's efforts to sell land or otherwise transfer ownership. *See 134th St. Lofts, LLC v. iCap Nw. Opportunity Fund, LLC*, 15 Wn. App. 2d 549, 557-58, 479 P.3d 367 (2020); *John Morgan Constr. Co. v. McDowell*, 62 Wn. App. 79, 84, 813 P.2d 138 (1991).

Given the potential harm to a property owner, the legislature has provided that "a party who files a wrongful lis pendens may be liable in damages for doing so." *Samra v. Singh*, 15 Wn. App. 2d 823, 839, 479 P.3d 713 (2020) (citing RCW 4.28.328). Relevant here, a party who records a lis pendens will be "liable to an aggrieved party who prevails in defense of the action in which the lis pendens was filed" if there was no "substantial justification for filing the lis pendens." RCW 4.28.328(3); *see also Samra*, 15 Wn. App. 2d at 839.

Park South has shown it is entitled to cancellation of the lis pendens and for actual damages under RCW 4.38.438(3) because neither Taylor Mountain nor Denali had a substantial justification for recording the lis pendens. In this context, a substantial

justification means a "reasonable, good faith basis in fact or law for believing they have an [ownership] interest in the property." *S. Kitsap Family Worship Ctr. v. Weir*, 135 Wn. App. 900, 912, 146 P.3d 935 (2006). Here, Taylor Mountain's purported interest in the property was its right of first refusal under the joint venture agreement and Denali's purported interest was its lien. But as set forth above, the joint venture agreement—including the right of first refusal—was extinguished by the 2019 PSA. And as previously explained, Denali's lien was filed far outside the 90-day statutory limitation period. Given these fundamental defects, neither Taylor Mountain nor Denali had a substantial legal basis for recording the lis pendens.

Park South is entitled to cancellation of the lis pendens and for damages under RCW 4.28.328(3). We remand for the calculation of actual damages. On remand, the trial court also has discretionary authority under the statute to award attorney fees and costs.

ATTORNEY FEES AND COSTS

Park South argues Taylor Mountain should be ordered to pay its attorney fees incurred on appeal and at trial pursuant to the fee-shifting provision in the 2019 PSA. *See* CP at 1967 ("[I]f Buyer or Seller institutes suit against the other concerning this Agreement the prevailing party is entitled to reasonable attorney[ ] fees and expenses."). We agree in part. Park South has prevailed on appeal. Thus, it is entitled to attorney fees

and expenses from Taylor Mountain related to appeal. *See First-Citizens Bank & Trust Co. v. Reikow*, 177 Wn. App. 787, 800, 313 P.3d 1208 (2013) ("When a contract provides for a fee award in the trial court, the party prevailing before [this court] may seek reasonable costs and attorney fees incurred on appeal."). But Park South did not prevail on its own substantive claims at trial, and that aspect of the trial court's judgment has not been appealed. Accordingly, Park South is not entitled to an award of fees and costs incurred at trial.

While Park South is not entitled to attorney fees and costs related to trial under the fee-shifting provision of the 2019 PSA, we reiterate that because we are remanding this matter for a determination of actual damages under RCW 4.28.328(3), the trial court will have discretion to award attorney fees related to the improperly recorded lis pendens.

CONCLUSION

The judgments against Park South on the issues of the earnest money deposit, unjust enrichment, and Denali's lien claim are reversed. We also vacate the trial court's award of attorney fees to Denali and reverse the trial court's judgment that Taylor Mountain and Denali properly recorded their lis pendens. This matter is remanded with instructions to cancel the lis pendens, calculate Park South's actual damages related to

the lis pendens, and assess whether Park South is entitled to discretionary attorney fees in connection with cancellation of the lis pendens.

As the prevailing party on appeal, Park South is entitled to an award of costs against Taylor Mountain and Denali under RAP 14.2, subject to its compliance with RAP 14.4. Park South is also entitled to an award of appellate attorney fees against Taylor Mountain pursuant to the terms of the parties' 2019 PSA, subject to its compliance with RAP 18.1(d).

Given our disposition of this appeal, no action is necessary on Park South's motion objecting to supersedeas decision of trial court.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Fearing, C.J.

Staab, J.

Appendix B

FILED
MARCH 19, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

PARK SOUTH LLC, a Washington limited liability company, Appellant, v. DENALI CONSTRUCTION LLC, a Washington limited liability company; TAYLOR MOUNTAIN LLC, a Washington limited liability company; and RICHARD LUDWIGSEN, an individual, Respondents.	)	No. 39360-7-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered respondents Denali Construction LLC, Taylor Mountain LLC, and Richard Ludwigsen's motion for reconsideration of this court's January 25, 2024, opinion; the answer of appellant Park South LLC; and the record and file herein.

IT IS ORDERED that the respondents' motion for reconsideration is denied.

PANEL: Judges Pennell, Fearing, and Staab

FOR THE COURT:

George Fearing

GEORGE B. FEARING
Chief Judge

Appendix C

PDF

RCW 4.28.328

Lis pendens—Liability of claimants—Damages, costs, attorneys' fees.

(1) For purposes of this section:

(a) "Lis pendens" means a lis pendens filed under RCW 4.28.320 or 4.28.325 or other instrument having the effect of clouding the title to real property, however named, including consensual commercial lien, common law lien, commercial contractual lien, or demand for performance of public office lien, but does not include a lis pendens filed in connection with an action under Title 6, 60, other than chapter 60.70 RCW, or 61 RCW;

(b) "Claimant" means a person who files a lis pendens, but does not include the United States, any agency thereof, or the state of Washington, any agency, political subdivision, or municipal corporation thereof; and

(c) "Aggrieved party" means (i) a person against whom the claimant asserted the cause of action in which the lis pendens was filed, but does not include parties fictitiously named in the pleading; or (ii) a person having an interest or a right to acquire an interest in the real property against which the lis pendens was filed, provided that the claimant had actual or constructive knowledge of such interest or right when the lis pendens was filed.

(2) A claimant in an action not affecting the title to real property against which the lis pendens was filed is liable to an aggrieved party who prevails on a motion to cancel the lis pendens, for actual damages caused by filing the lis pendens, and for reasonable attorneys' fees incurred in canceling the lis pendens.

(3) Unless the claimant establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved party who prevails in defense of the action in which the lis pendens was filed for actual damages caused by filing the lis pendens, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.

[1994 c 155 § 1.]

PDF **RCW 60.04.091**

Recording—Time—Contents of lien.

Every person claiming a lien under RCW **60.04.021** shall file for recording, in the county where the subject property is located, a notice of claim of lien not later than ninety days after the person has ceased to furnish labor, professional services, materials, or equipment or the last date on which employee benefit contributions were due. The notice of claim of lien:

(1) Shall state in substance and effect:

(a) The name, phone number, and address of the claimant;

(b) The first and last date on which the labor, professional services, materials, or equipment was furnished or employee benefit contributions were due;

(c) The name of the person indebted to the claimant;

(d) The street address, legal description, or other description reasonably calculated to identify, for a person familiar with the area, the location of the real property to be charged with the lien;

(e) The name of the owner or reputed owner of the property, if known, and, if not known, that fact shall be stated; and

(f) The principal amount for which the lien is claimed.

(2) Shall be signed by the claimant or some person authorized to act on his or her behalf who shall affirmatively state they have read the notice of claim of lien and believe the notice of claim of lien to be true and correct under penalty of perjury, and shall be acknowledged pursuant to chapter **64.08** RCW. If the lien has been assigned, the name of the assignee shall be stated. Where an action to foreclose the lien has been commenced such notice of claim of lien may be amended as pleadings may be by order of the court insofar as the interests of third parties are not adversely affected by such amendment. A claim of lien substantially in the following form shall be sufficient:

CLAIM OF LIEN

. . . . . ., claimant, vs . . . . . ., name of person indebted to claimant:

Notice is hereby given that the person named below claims a lien pursuant to *chapter **64.04** RCW. In support of this lien the following information is submitted:

1. NAME OF LIEN CLAIMANT: . . . .
TELEPHONE NUMBER: . . . .
ADDRESS: . . . .

2. DATE ON WHICH THE CLAIMANT BEGAN TO PERFORM LABOR, PROVIDE PROFESSIONAL SERVICES, SUPPLY MATERIAL OR EQUIPMENT OR THE DATE ON WHICH EMPLOYEE BENEFIT CONTRIBUTIONS BECAME DUE: . . . .

3. NAME OF PERSON INDEBTED TO THE CLAIMANT:
. . . .

4. DESCRIPTION OF THE PROPERTY AGAINST WHICH A LIEN IS CLAIMED (Street address, legal description or other information that will reasonably describe the property): . . . .
. . . .
. . . .
. . . .

5. NAME OF THE OWNER OR REPUTED OWNER (If not known state "unknown"): . . . .

6. THE LAST DATE ON WHICH LABOR WAS PERFORMED; PROFESSIONAL SERVICES WERE FURNISHED; CONTRIBUTIONS TO AN EMPLOYEE BENEFIT PLAN

WERE DUE; OR MATERIAL, OR EQUIPMENT WAS FURNISHED: . . . .

. . . .

7. PRINCIPAL AMOUNT FOR WHICH THE LIEN IS CLAIMED IS: . . . .

8. IF THE CLAIMANT IS THE ASSIGNEE OF THIS CLAIM SO STATE HERE: . . . .

. . . .

. . . ., Claimant

. . . .

. . . .

(Phone number, address, city,
and
state of claimant)

STATE OF WASHINGTON, COUNTY OF

. . . . . ., ss.

. . . . . ., being sworn, says: I am the claimant (or attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan) above named; I have read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct and that the claim of lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.

. . . . . .

Subscribed and sworn to before me this . . . . day of . . . . . .

. . . . . .

The period provided for recording the claim of lien is a period of limitation and no action to foreclose a lien shall be maintained unless the claim of lien is filed for recording within the ninety-day period stated. The lien claimant shall give a copy of the claim of lien to the owner or reputed owner by mailing it by certified or registered mail or by personal service within fourteen days of the time the claim of lien is filed for recording. Failure to do so results in a forfeiture of any right the claimant may have to attorneys' fees and costs against the owner under RCW **60.04.181**.

[**1992 c 126 § 7**; **1991 c 281 § 9**.]

NOTES:

***Reviser's note:** The reference to chapter **64.04** RCW appears to be erroneous. Reference to chapter **60.04** RCW was apparently intended.

WILLIAMS, KASTNER & GIBBS

April 17, 2024 - 3:30 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Park South, LLC v. Denali Construction, LLC, et al (393607)

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