NO. 893381

THE SUPREME COURT OF THE STATE OF WASHINGTON

FIRST-CITIZENS BANK & TRUST COMPANY,
A North Carolina banking association,

Petitioner,

v.

GIBBS & OLSON, INC.,
A Washington corporation

Respondent,

AMICUS CURIAE MEMORANDUM OF WASHINGTON LAND TITLE ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

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IDENTITY OF AMICUS CURIAE

Washington Land Title Association ("WLTA") was founded in the State of Washington in 1905. Its members primarily include title insurance underwriters, independent local title agents, and professionals in related fields. Its purposes include promoting the safe and efficient transfer of ownership and interest in real property, and providing for the collection, study and dissemination of information relating to problems with and improvements in land title evidence.

I. ARGUMENT IN SUPPORT OF GRANTING REVIEW

WLTA supports the Petition for Review filed by Petitioner First Citizens Bank & Trust Company, which seeks review of the decision of the Court of Appeals, Division II, filed on August 27, 2013, in that court's case number 42796-6-II, *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC,* 176 Wn. App. 335, 308 P.3d 791 (2013) ("Opinion"). The Petition for Review presents issues that are of substantial importance to WLTA members and to the public.

1. Chapter 60.04 RCW Does Not Permit Priority for Work Described and Initiated Under Future Contracts to Relate Back to the First Date of Work Done Under the First Contract.

Typically, liens are recorded to establish priority, pursuant to RCW 65.08.070. The legislative purpose in enacting this statute was to give greater stability to land titles, by authorizing prospective purchasers or encumbrancers to rely upon the title as disclosed by the record. *Berg v. Ting*, 125 Wn.2d 544, 553, 886 P.2d 564 (1995)(citations omitted). As the

Court of Appeals noted in its Opinion, mechanics' liens are "off record" interests that may be senior to interests actually recorded before the lien's recording, but after commencement of work by the lien claimant. These liens represent an exception to the recording requirement. *Zervas Group Architects, P.S. v. Bay View Tower LLC*, 161 Wn. App. 322, 326, 254 P.3d 895 (2011).

The reason that the recording requirements do not apply to determine priority of mechanics' liens is because the ongoing work for improvements itself puts parties on notice of a potential lien claim, if payment for that work is not made. Any lien claimant providing professional services where no improvement as defined in RCW 60.04.011(5)(a) or (b) has been commenced, and the professional services provided are *not visible* from an inspection of the real property may record a notice. However, if the lien is not recorded and continuing work for improvements is not visible, the lien claimed shall be subordinate to the interest of any subsequent mortgagee if the mortgagee acquires an interest in the property without notice of the professional services being provided. RCW 60.04.031(5). This statute provides that a lender is only subordinate to interests of which it has notice, be it actual notice if it inspected the property, or constructive notice wherein knowledge is imputed to a party. Generally speaking, knowledge of facts sufficient to excite inquiry is constructive notice of all that the inquiry would have disclosed. *Miebach v. Colasurdo*, 102 Wn.2d 170, 175-76, 685 P.2d 1074 (1984).

In this case, a developer and lien claimant entered a contract in July 2005 for the claimant to perform professional services for the sum of $112,000, to be completed in four months. *Scott's Excavating,* 308 P.3d at 795. The work was completed. The claimant was paid. *Id.* The contract contemplated that future "amendments" could be made. *Id.* It provided that any future "amendment" would have to include a scope of work, schedule, and budget for other engineering work – essentially, every requirement of an enforceable contract. *Id.*

A mortgagee's interest should only be subordinate to that which it has notice. By determining that First-Citizens' deed of trust was junior to the lien claim for work done under all of the agreements that were made after the deed of trust, the Court of Appeals' Opinion essentially expanded the idea of notice such that a party is on notice of work that had not yet begun, for which the owner had not yet bargained for, under agreements that did not yet exist. *See id.* at 798-99. A party cannot have notice of work that is both described in contracts and initiated subsequent to a mortgagee's interest. The only work that was initiated at the time of the lender's deed of trust was the work delineated and described in contract that existed at the time of the deed of trust. That was the only contract that the lender had notice of, and the lender could not have notice of agreements for work entered in the future, subsequent to its deed of trust.

There are serious consequences to the construction lending industry that result from the Court of Appeals' Opinion. The subsequent

contracts that were entered in this case, whether they be characterized as independent contracts or amendments to the original contract, did not exist at the time of the original contract, or when First-Citizens' deed of trust attached to the property. The Court of Appeals held that, nonetheless, these subsequent agreements constituted "amendments" to the lien claimant's original contract, rather than new, separate contracts, because the owner and lien claimant so agreed. Accordingly, any lien for work described and completed under the "amendments" would have priority based upon the first date of work done under the *original* contract – not the date of the actual work done as contemplated under the new agreements.

Under the holding of the Court of Appeals' decision, a lien claimant is permitted to have a first position lien, and the amount of that lien can be doubled, tripled, or more, based upon an agreement only between a lien claimant and an owner. Under such a rule, liens on the property that attached at the time an original contract was in effect can for all practical purposes be substantially impacted or even rendered worthless if the amount of the mechanics' lien is permitted to balloon substantially, or even over and above the value of the property. Parties providing construction financing would be put into the precarious position of having their security interests significantly impaired and devalued based upon future agreements to which they are not required to consent. Not only can they not predict if an existing contract is later "amended" to encompass

other, future work, they cannot predict the price for which the owner and mechanic's lien claimant may agree for such work. Further, the work could proceed for an uncertain time period. While G&O asserts that a lender can obtain a subordination agreement from lien claimants, the problem is the Court of Appeals' Opinion practically renders it impossible to determine whether a subordination agreement is required, because the smallest of projects could subsequently transform into materially different, significant work, all of which would relate back to the start date of a minor project.

A person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the "contract price." The statute does not permit or address amendments to the original contract to include work that is described in a subsequent phase. In *Lyons Savings v. Gash Associates*, 279 Ill. App. 3d 742, 665 N.E.2d 326 (1996), a party provided demolition and construction services in two phases. The lien claimant recorded its lien claim within four months of completion of the second phase, but not within four months of the completion of the first phase. Each phase resulted from separate proposals and was designated a separate job number. The court, therefore, found the lien for the first phase was not perfected. Amendment of a contract to include work defined and priced in the future can only be incorporated into a prior contract if permitted by statute. Nowhere does chapter 60.04 RCW allow such amendments, and

accordingly the additional projects agreed upon under the subsequent proposals and phases cannot relate back to the original contract that only defined the work to be done in the first phase. Just as in *Lyons Savings*, *supra*, the work done under separate phases does not have priority to the lender's deed of trust.

2. Lien for Optional, Future Work has a Priority Date of that Work.

A future advance clause included in a mortgage is security for a present loan and also for sums that the mortgagee may advance to the mortgagor in the future. 18 WILLIAM B. STOEBUCK & JOHN W. WEAVER WASHINGTON PRACTICE: METHODS OF TITLE ASSURANCE, § 14.8 at 146 (2004). It is well-settled in Washington that when advances under a contract are optional and not obligatory, the lien priority of the advances is determined *as of the time the advances are actually made* – even when the future advance clause is contained in the original mortgage or deed of trust. *Nat'l Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 899-900, 506 P.2d 20 (1973). An advance is obligatory when a lender is legally obligated to make it; whereas an advance is optional when a lender has discretion to make it or not. *Id.* The fact that a lien claimant had a "future work" clause in its original contract, but was not obligated to perform such work, is the same as a mortgagee's future advance clause, and the same consequences should be applied.

After *Equity Investors*, *supra*, the legislature soon adopted RCW 60.04.200 through RCW 60.04.220, which preserves the priority of all

future advances on construction loans, regardless of whether they are "obligatory." *See* 18 WASHINGTON PRACTICE at 14.8. However, to make up for their loss of priority, mechanics' lien claimants were at the same time granted the ability to file a "stop notice" with the lender, to place a hold on loan funds. *Id.* In the present case, however, the Court of Appeals has granted mechanics' lien claimants an unfettered ability to enter any future agreement for any price, *without any corresponding ability* for an existing lienholder to protect itself by limiting the amount of the mechanics' and materialmens' liens.

For these reasons, the priority date of a lien securing work that was undefined and not agreed upon at the time a deed of trust attached to the property, should be the date the work was started. It should not be relevant whether the owner and lien claimant agree that the lien priority should relate back to first date of work under the original contract. Existing lienholders should be included in any agreement to modify the amount of the original contract by adding additional work, and increasing the contract price. If a lien claimant requires that new work be secured by a first position lien, the lien claimant can and should request subordination agreements from existing lienholders, which are readily ascertainable, so that priority can be properly established.

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II. CONCLUSION

For the foregoing reasons, the WLTA respectfully requests that the Court grant the Petitioner's Petition for Review.

RESPECTFULLY SUBMITTED this 25 day of November, 2013.

BISHOP, MARSHALL & WEIBEL, P.S.

By _____

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Attachments: Amicus Curiae Memorandum of Washington Land Title Assoc..pdf; Certificate of Service of Amicus Curiae Memorandum of WLTA.pdf; Certificate of Service of Motion for Permission to File Amicus Curaie.pdf; Motion for Permission to File Amicus Curiae Memorandum.pdf

Good morning,

Attached please find for filing on behalf of Washington Land Title Association the following:

1. Motion for Permission to File Amicus Curiae Memorandum in Support of Petitioner's Petition for Review;
2. Certificate of Service of the Motion for Permission to File Amicus Curiae Memorandum in Support of Petitioner's Petition for Review;
3. Amicus Curiae Memorandum of Washington Land Title Association in Support of Petition for Review; and
4. Certificate of Service of the Amicus Curiae Memorandum of Washington Land Title Association in Support of Petition for Review.

Thank you.

Darla Trautman for Ann T. Marshall, WSBA No. 23533 and Katie A. Axtell, WSBA No. 35545

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