No. 89338-1
Court of Appeals No. 42796-6-II

SUPREME COURT OF THE STATE OF WASHINGTON

FIRST-CITIZENS BANK AND TRUST COMPANY,
a North Carolina banking association,

Third Party Defendant/Petitioner,

vs.

GIBBS & OLSON, INC.,
a Washington corporation,

Third Party Plaintiff/Respondent.

ANSWER TO WASHINGTON LAND TITLE ASSOCIATION'S AMICUS MEMORANDUM IN SUPPORT OF FIRST-CITIZENS BANK AND TRUST COMPANY'S PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner FIRST CITIZENS BANK AND TRUST COMPANY ("the Bank") has petitioned for review of a Court of Appeals decision that affirmed a judgment in favor of Respondent GIBBS & OLSON, INC. ("G&O"), foreclosing a RCW 60.04 lien. Now amicus Washington Land Title Association ("WLTA") has filed a memorandum in support of review by the Supreme Court. Further review by the Supreme Court should be denied because no substantial public interest is threatened by the Court of Appeal's well-founded and factually based opinion.

II. ISSUE PRESENTED REGARDING REVIEW

Should review be granted under RAP 13.4(b) where 1) the decision is entirely consistent with settled case law regarding contracts and the plain language of RCW 60.04, 2) the unappealed findings of fact show that the Bank had actual or constructive notice of the work being done by G&O and the Bank's potential lien exposure under the terms of the Agreement, and 3) the decision rejected other cited authority that is clearly inapposite? Answer: No.

III. STATEMENT OF THE CASE

The facts of this case are well-summarized in G&O's Answer to Petition for Review, which is incorporated by reference herein. The following summary is to respond to WLTA's characterization of the facts.

The contract between Winlock Properties, LLC ("Winlock"), and G&O, dated July 22, 2005 ("the Agreement"), required G&O to provide engineering services for the Grand Prairie Subdivision ("Project").[1] G&O was to provide preliminary design work for the entire Project including streets and alleys, the water system, storm drains, and the sewer system.[2] Additionally, the Agreement contained cost estimates for the completion of design work for the entire Project, together with a description of the further engineering services necessary to complete the entire Project.[3]

Trial testimony was clear that the Agreement was designed to be the framework for the entire Project, with additional Project work to be added by amendments.[4] Trial witnesses testified that it is common in the industry for contracts on such projects to be handled in this manner.[5] Per trial testimony, both G&O and Winlock considered the Agreement and its five amendments to all be part of one contract, and both parties performed all work as one Project under one contract, the Agreement.[6]

The trial court found that the Bank never inquired about any aspect of the Agreement, even though it could have done so.[7] Nor did the Bank

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[1] RP (Sept. 7) at 40-41; 43-46; Ex. at 9-26.
[2] Ex. at 9-11, 13-14; RP (Sept. 7) at 43-45.
[3] Ex. at 11, 26.
[4] RP (Sept. 7) at 46; *Id.* at 130-132, 134-35, 137.
[5] *Id.* at 54-55.
[6] RP (Sept. 7) at 65-66; *Id.* at 142-3.
[7] CP at 1240; RP (Sept. 8) at 62.

obtain a subordination agreement from G&O, or take reasonable steps to see that its deed of trust had priority over G&O's lien rights, despite the ability to do so.[8] The Bank did not appeal these findings of fact.[9]

Work started on the first amendment in February 2006, on oral instructions from Winlock, even though work continued under the original terms of the Agreement long after the first three amendments were formalized on April 28, 2006.[10] Winlock agreed that G&O had performed well and was entitled to be paid.[11] G&O went unpaid when the Bank eventually restructured the loan, re-budgeting monies previously allocated to engineering.[12] To date, the Bank, which ultimately foreclosed on the property, has gotten the benefit of G&O's work without paying for it.

IV. ARGUMENT FOR DENIAL OF REVIEW

A. No Public Interest Requires Review By The Supreme Court, Because The Court of Appeals Correctly Affirmed The Trial Court's Determination That G&O's RCW 60.04 Lien Had Priority.

WLTA's argument does not meet the standard for review under RAP 13.4(b)(4) because no substantial public interest is threatened by the Court of Appeals decision, where 1) the decision is entirely consistent with settled case law regarding contracts and the plain language of RCW

[8] RP (Sept. 8) at 78-79; CP at 1240.
[9] Appellant's Amended Opening Brief, pages 1-4.
[10] RP (Sept. 7) at 101; *Id.* at 99; Ex. at 27.
[11] RP (Sept. 7) at 142; RP (Sept. 8) at 66.
[12] RP (Sept. 8) at 66; RP (Sept. 7) at 144-45.

60.04, 2) the unappealed findings of fact show that the Bank had actual or constructive notice of the work being done by G&O and the Bank's potential lien exposure under the terms of the Agreement, and 3) the decision rejected other cited authority that is clearly irrelevant.

1. Based on the Unappealed Findings of Fact, the Bank Had At Least Constructive Notice of the Bank's Lien Exposure Under G&O and Winlock's Contract, Thus Giving G&O Lien Priority.

WLTA's claim that the Bank did not have notice of the work done under the amendments lacks support from the record or citations to Washington authority.[13] Therefore, the Court should not consider it. *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809 (1992).

Even if it is considered, WLTA's unsupported argument is contrary to the plain language of RCW 60.04. A professional service provider has a lien against the property worked upon for the "contract price" of those professional services. RCW 60.04.021. "Contract price" is defined by statute as "the amount agreed upon by the contracting parties," without further limitation. RCW 60.04.011(2). Contrary to WLTA's argument, Chapter 60.04 RCW does not specify when the contracting parties may or must agree on a specific dollar figure, nor do its terms restrict the parties from adjusting the contract price throughout the course of their agreement. *See id.* "The legislature therefore provided that

[13] Amicus Curiae Memorandum of WLTA in Support of Review, pages 3-5.

such liens relate back to the commencement of the services." *Zervas Grp. Architects, P.S. v. Bay View Tower LLC*, 161 Wn. App. 322, 326 (2011). Moreover, this statutory scheme must be "liberally construed" to protect those whose work improves real property, like G&O. RCW 60.04.900.

WLTA's claim that G&O and Winlock could not form and amend their contract as they did, without explicit statutory authorization, runs afoul of established Washington case law concerning contracts. "It is well-settled that parties may incorporate into a contract any provision that is not illegal or against public policy." *Car Wash Enterprises, Inc. v. Kampanos*, 74 Wn. App. 537, 543-44 (1994); *see also Redford v. Seattle,* 94 Wn.2d 198, 206–07 (1980) (upholding indemnity contract because no statute barred the subject matter of the contract). WLTA has not cited any authority that holds that contract-with-amendments arrangements like that between G&O and Winlock here are illegal or against public policy.

Furthermore, the only genuinely new authority cited by WLTA is an Illinois intermediate appellate court decision, *Lyons Sav. v. Gash Associates*. 279 Ill.App.3d 742 (1996). *Lyons* is inapposite because the statutory scheme for lien claims in Illinois is materially different than Washington's Chapter 60.04 RCW. *Compare* 770 Ill. Comp. Stat. 60/16 (2013). Moreover, the facts in *Lyons* are materially distinct. In *Lyons*, the

mortgages at issue predated all of the work by the lien claimants.[14] 279 Ill.App.3d at 744. Additionally, in *Lyons*, the lien invalidated was a "separate job," contrary to what the trial court found here, and amounted to a mere $865 out of liens totaling $78,411.55.[15] *Id.*; *Id.* at 748.

WLTA's claim that the Bank did not have notice of the work done under the amendments is also foreclosed by the trial court's factual findings. The trial court found that the Bank "had actual notice that [G&O] was providing professional engineering and surveying services benefitting the real property at issue prior to [the Bank] loaning any money to [Winlock] and prior to [the Bank] recording the Deed of Trust."[16] The Bank did not appeal this finding, which is a verity on appeal.[17] *Cowiche*, supra, 118 Wn.2d at 808.

Moreover, the Bank had at least constructive knowledge of the potential exposure under the Agreement. WLTA correctly cites *Miebach v. Colasurdo* for the proposition that "knowledge of facts sufficient to excite inquiry is constructive notice of all that the inquiry would have disclosed."[18] 102 Wn.2d 170, 175-76 (1984). The trial court found that "[p]rior to recording its Deed of Trust on January 10, 2006, [the Bank]

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[14] *Contrast* CP at 1238-39.
[15] *Contrast* CP at 1237-38 ("a single project with overlapping phases and a continuous course of work"). The Bank seeks subordination of G&O's entire lien.
[16] CP at 1238.
[17] Appellant's Amended Opening Brief, pages 1-4.
[18] Amicus Curiae Memorandum of WLTA in Support of Review, page 2.

made no attempt to determine what the terms were of [Winlock]'s contract with [G&O], or what potential exposure would be under said contract."[19] "[The Bank] could have easily done so, but chose not to do so."[20] The record shows that the Bank was not only aware of G&O's continuing work on the project, but also had constructive knowledge of the potential for the work to expand based on future amendments. WLTA cannot now argue that the Bank lacked notice of either, given the trial court's findings and the Bank's failure to appeal them. *Cowiche*, supra, 118 Wn.2d at 808.

2. Case law for common law mortgages does not apply here, under both the language of the rule and under RCW 60.04.226, which makes clear the statutory exception that applies to RCW 60.04 liens.

The Court of Appeals also correctly rejected the Bank's analogies to the optional advances rule for common law mortgages, which is re-asserted by WLTA in its amicus curiae memorandum. The optional advances rule is inapplicable on its face because, as formulated by Washington courts, the rule only applies to "an agreement to lend money." *See Nat'l Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 899 (1973). A RCW 60.04 lien claim is not an agreement to lend money, but rather an agreement to provide professional services (or labor or materials) and for the owner to pay for the same, as here. RCW 60.04.021. Moreover, it makes no sense to apply a common law mortgage analysis to

[19] CP at 1240 (emphasis added).
[20] *Id.*

RCW 60.04 liens, which are creatures of statute and have no basis in the common law. *See Estate of Haselwood v. Bremerton Ice Arena*, 166 Wn.2d 489, 498 (2009). After all, "[m]echanics' or materialmen's liens are a statutory exception to the general rule of first in time, first in right priority between creditors." *A.A.R. Testing Lab., Inc. v. New Hope Baptist Church,* 112 Wn. App. 442, 448 (2002). Such liens are exempted from the general recording requirement amongst creditors and encumbrances on real property. *Zervas*, supra, 161 Wn. App. at 326.

WLTA's mortgage analogy also must fail because their argument that lien claimants lost their priority with the enactment of RCW 60.04.226 fails to note the following phrase in RCW 60.04.226: "[e]xcept as otherwise provided in RCW 60.04.061." RCW 60.04.061 is, of course, the relation-back statute pertaining to mechanic's liens. *Zervas*, 161 Wn. App. at 326. Contrary to WLTA's suggestion, lien claimants did not lose their priority in any statutory amendments because the statute itself explicitly preserves the 60.04 priority scheme. RCW 60.04.226. A common law mortgage advance theory is therefore inapplicable to a Chapter 60.04 RCW lien because the Legislature has specified that lien claimants gain priority pursuant to statute. *Zervas*, 161 Wn. App. at 326.

WLTA's claim that lenders have no ability to protect themselves is false. As the trial court found, the Bank could have "obtained the names

of all professional service providers, contractors or others who had worked on the property and had possible lien rights under RCW 60.04 and obtained a subordination agreement from said entities."[21] "For reasons that remain a mystery, [the Bank] chose not to do this."[22] The Bank did not appeal these findings, which are verities on appeal.[23] *Cowiche*, supra, 118 Wn.2d at 808. Also, the Bank controlled loan disbursals throughout the Project, choosing who would be paid, thereby having the means to protect itself from the lien at issue.[24] RCW 60.04 was established by the Legislature to protect and to favor those who improve real property and go unpaid, like G&O. RCW 60.04.900. There is no substantial public interest in favor of changing this statutory scheme in order to aid the Bank, and thus review should be denied. RAP 13.4(b)(4).

B. Under RAP 18.1(j) and RCW 60.04.181(3), G&O Should Be Awarded its Reasonable Attorney Fees Incurred in Responding To This Petition For Review.

Pursuant to RAP 18.1(j) and RCW 60.04.181(3), G&O requests its reasonable attorney fees incurred in responding to this petition for review.

V. CONCLUSION

WLTA has not shown any substantial public interest implicated by the Court of Appeals' decision, which follows precedent and the plain

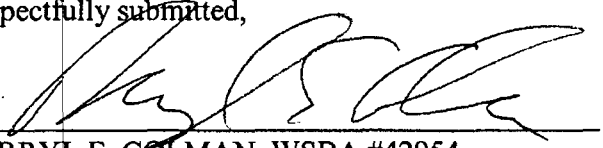
[21] CP at 1240-41.
[22] *Id.* at 1240.
[23] Appellant's Amended Opening Brief, pages 1-4.
[24] RP (Sept. 8) at 66; RP (Sept. 7) at 144-45.

language of RCW 60.04. As G&O's engineering work improved real property, RCW 60.04 must be liberally construed to protect its lien claim. In any event, the Bank had ample notice of G&O's work and the potential for such work to be expanded, but chose to do nothing to protect itself. The fact that G&O began work on the Project before the Bank obtained its deed of trust gives G&O's lien priority under RCW 60.04.

G&O performed all work to the complete satisfaction of the owner. The Bank has gotten the benefit of G&O's work without paying for it. Under the plain language of the statute and the agreement of the parties, G&O was entitled to claim a lien on the land it improved and performed the proper steps to do so. The trial court agreed, after weighing the evidence and measuring the credibility of witnesses. The Court of Appeals correctly affirmed. The Supreme Court should deny review.

DATED: December 12, 2013.

Respectfully submitted,



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CERTIFICATE

I certify that on this day I caused a copy of the foregoing ANSWER TO WASHINGTON LAND TITLE ASSOCIATION'S AMICUS MEMORANDUM IN SUPPORT OF FIRST-CITIZENS BANK AND TRUST COMPANY'S PETITION FOR REVIEW to be mailed by the mails of the United States of America, with postage thereon paid, and emailed to Appellant's attorney, addressed as follows:

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DATED this 12th day of December, 2013, at Longview, Washington.

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OFFICE RECEPTIONIST, CLERK

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Subject: RE: First-Citizens Bank & Trust Company v. Gibbs & Olson, Inc. No. 89338-1

Rec'd 12/12/2013

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Subject: First-Citizens Bank & Trust Company v. Gibbs & Olson, Inc. No. 89338-1

Dear Clerk:

Attached for filing is Respondent Gibbs and Olson, Inc.'s Answer to Washington Land Title Association's Amicus Memorandum in Support of First-Citizens Bank and Trust Company's Petition for Review in regard to the above-referenced matter.

Sincerely,
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