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 PETITION FOR REVIEW

WALSTEAD MERTSCHING PS
DARRYL E. COLMAN WSBA #42954
NORMAN C. DICK WSBA #13914
Attorneys for Respondent
GIBBS & OLSON, INC

WALSTEAD MERTSCHING PS
Civic Center Building, Third Floor
1700 Hudson Street
Post Office Box 1549
Longview, WA 98632
Telephone: (360) 423-5220
Fax: (360) 423-1478

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I. INTRODUCTION

Petitioner FIRST CITIZENS BANK AND TRUST COMPANY ("the Bank") petitions for review of a Court of Appeals decision affirming a Lewis County Superior Court judgment in favor of Respondent GIBBS & OLSON, INC. ("G&O"), foreclosing a mechanic's lien pursuant to RCW 60.04 for the contract price of work done for the property owner, Winlock Properties, LLC ("Winlock"). The Court of Appeals affirmed on all issues in a well-founded opinion that is entirely consistent with the clear language of RCW 60.04 and well-established case law. If the Bank prevails here, G&O will not be paid for the professional services it provided and the Bank will get the benefit of G&O's work for nothing. Further review by the Supreme Court should be denied.

II. ISSUES PRESENTED REGARDING REVIEW

1. Should review be granted under RAP 13.4(b)(1), where the Court of Appeals' decision is entirely consistent with established precedent regarding contracts and RCW 60.04, declined to apply inapposite law, and rejected the Bank's unsupported legal theories? Answer: No.

2. Should review be granted under RAP 13.4(b)(4) where the Bank cites no authority that supports its position and where the judgment affirmed by the Court of Appeals actually furthers the public interest as the Legislature set forth in RCW 60.04.900? Answer: No.

III. STATEMENT OF THE CASE

Winlock owned 50 acres of pastureland in Lewis County which it wanted to develop into a 200 lot residential subdivision. Winlock and G&O entered into a contract, dated July 22, 2005 ("the Agreement"), for G&O to provide engineering services for the 200 lot Grand Prairie Subdivision ("Project").[1] The contract required G&O to provide preliminary design work for the entire 50 acre Project including all streets and alleys, the entire water system, all storm drains, and the entire sewer system.[2] Additionally, the Agreement contained estimates for the cost of completion of design work for the entire Project (planned as one continuous 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] Accordingly, the Agreement anticipated that G&O would "prepare an amendment to the Agreement for the completion of the construction phase

[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.

and the operational phase services."[6] In fact, the Project did move forward in one continuous fashion pursuant to the Agreement, as amended.[7]

From August 2005 and continuing throughout 2005, Winlock provided G&O's engineering work regarding the entire Project to Venture Bank (FIRST-CITIZENS' predecessor in interest, hereinafter collectively "the Bank") as part of Winlock's application for a $3.7 million loan to complete the Project.[8] This made it clear to the Bank that G&O was the Project engineer and had already begun work on the Project.[9]

On January 10, 2006, the Bank recorded a deed of trust against the entire 50 acre parcel, securing the Bank's $3.7 million Project loan to Winlock. The Bank never inquired about any aspect of the Agreement.[10] Nor did the Bank obtain a subordination agreement from G&O, or take any other steps to see that its deed of trust had priority over G&O's lien rights under RCW 60.04.[11] When the Bank recorded its deed of trust on January 10, 2006, G&O was still doing work on the Project under the Agreement.[12] As the project moved forward, the Bank continued to pay G&O's bills out of Winlock's loan per Winlock's request.[13]

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[6] Ex. at 11.
[7] RP (Sept. 7) at 65-66.
[8] CP at 1239.
[9] *Id.* at 1238-39.
[10] RP (Sept. 8) at 62.
[11] *Id.* at 78-79.
[12] RP (Sept. 7) at 98; CP at 1241.
[13] CP at 1239-40.

From July 2005 through February 2008, G&O continued to provide engineering services under the Agreement, including five amendments to the contract.[14] The five amendments were formalized between April 28, 2006, and September 2006.[15] Work started on the first amendment in February 2006, on oral instructions from Winlock, even though work continued through at least June 2006 under the pre-amendment terms of the original Agreement, and long after the first three amendments were formalized on April 28, 2006.[16]

The amendments were all in furtherance of the Project and were for work generally described in the Agreement, but more specifically described in the amendments, together with an agreed price for the work.[17] The first sentence of each of the five amendments stated, "This Amendment revising the Scope of Work, Schedule, and Budget for Engineering Services is hereby attached to and made a part of the Agreement for Engineering Services dated July 22, 2005, between Winlock Properties, LLC and Gibbs and Olson, Inc."[18] Per trial testimony both G&O and Winlock considered the Agreement and its five

[14] *Id.* at 1236, 41; RP (Sept. 7) at 62-66, 70-72, 75-76, 142-43.
[15] RP (Sept. 7) at 55, 62-65, 142-43.
[16] *Id.* at 101; *Id.* at 99; Ex. at 27.
[17] RP (Sept. 7) at 62-66, 142-43; Ex. at 27-39.
[18] Ex. at 28, 31-32, 36-37.

amendments to all be part of one contract, and both parties performed all work as one Project under one contract, the Agreement.[19]

Winlock agreed that G&O had performed well and was entitled to be paid.[20] G&O went unpaid when the Bank eventually restructured the loan, re-budgeting monies previously allocated to engineering.[21] On March 7, 2008, G&O recorded a mechanics' lien with the Lewis County Auditor pursuant to RCW 60.04.[22] Later, G&O intervened and filed cross claims against Winlock and the Bank for lien foreclosure in an RCW 60.04 action that was filed by another Project contractor.[23] While G&O's cross claims were pending, the Bank foreclosed its deed of trust.[24]

The Bank aggressively defended G&O's lien claim.[25] The trial court judge noted "that the bank's strategy was to make this litigation so expensive that Gibbs & Olson would be forced to settle or just give up as its own legal fees were too high to continue."[26] After trial, the court ruled for G&O on all issues.[27] On appeal, the Court of Appeals affirmed on all issues. The Bank, with the same arguments that were rejected at trial and on appeal, now petitions the Supreme Court for review.

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[19] RP (Sept. 7) at 65-66; *Id.* at 142-3.
[20] *Id.* at 142; RP (Sept. 8) at 66.
[21] RP (Sept. 8) at 66; RP (Sept. 7) at 144-45.
[22] RP (Sept. 7) at 73, 75; Ex. at 230-33.
[23] CP at 1-10; *Id.* at 66-73.
[24] *Id.* at 1241; Ex. at 238-41, 245-47
[25] RP (Oct. 11) at 15.
[26] *Id.* at 27.
[27] RP (Sept. 8) at 134.

IV. ARGUMENT FOR DENIAL OF REVIEW

A. The Court of Appeals Correctly Affirmed The Trial Court's Determination That G&O's RCW 60.04 Lien Had Priority.

The Bank has not met the standard for review under RAP 13.4(b)(1) because 1) the Court of Appeals decision is entirely consistent with settled case law regarding contractual formation and RCW 60.04, 2) no conflict exists with established precedent because the "in-furtherance-of" test does not apply to the contract and facts here, which meet that test anyway, and 3) the Bank's other cited authority is clearly inapposite. The Bank also offers no analysis how the Court of Appeals decision, following settled law, implicates a substantial public interest. RAP 13.4(b)(4).

1. Applying Ordinary Contract Principles and the Plain Language of Chapter 60.04 RCW, the Court of Appeals Correctly Affirmed the Trial Court's Determination that G&O and Winlock Had One Enforceable Contract, Entitling G&O to Have its Lien Foreclosed.

This case is fundamentally very simple. 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 as "the amount agreed upon by the contracting parties." RCW 60.04.011(2). Such liens are prior to any "encumbrance which attached to the land after or was unrecorded at the time of commencement of labor or professional services." RCW 60.04.061.

G&O is an engineering and surveying firm and provided those services to Winlock for the improvement of real property: the 50-acre Project.[28] *See* RCW 60.04.011(13). It is undisputed that G&O timely filed its Claim of Lien and commenced suit thereon.[29] G&O is thus a party "intended to be protected" by RCW 60.04, and the statute should be liberally construed to protect its lien claim.[30] *Williams v. Athletic Field, Inc.*, 172 Wn.2d 683, 697 (2011) (quoting RCW 60.04.900).

The trial court found that G&O worked at the instance of the property owner, Winlock, who has always agreed that the work was done well and that the amount claimed by G&O is the amount Winlock properly owed.[31] G&O began working on the Project in 2005 and worked until February 2008.[32] The Bank's deed of trust was recorded on January 10, 2006, after G&O's work commenced on the Project.[33] All of the above were either not appealed or are supported by substantial evidence and thus are verities on appeal.[34] *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 819 (1992). The Court of Appeals correctly affirmed the trial court's foreclosure of G&O's lien.

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[28] RP (Sept. 7) at 36, 40-42.
[29] *Id.* at 70-73; CP at 66-78; Ex. at 230-33.
[30] RP (Sept. 8) at 136.
[31] *Id.* at 66; RP (Sept. 7) at 142.
[32] CP at 1237-38; RP (Sept. 7) at 58; *Id.* at 69-73, 75-76.
[33] CP at 1241.
[34] Compare Appellant's Amended Opening Brief, 1-4.

However, on appeal, as at trial, the Bank attempts to "pick apart" the contract, trying to contradict the intent of the parties despite the fact that the Bank did not present any evidence of the parties' contractual intent at trial. Thus, a more in-depth discussion of basic contractual principles is necessary to meet the Bank's arguments here.

"In construing a written contract, the basic principles require that (1) the intent of the parties controls; (2) the court ascertains the intent from reading the contract as a whole; and (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous." *Dice v. City of Montesano*, 131 Wn. App. 675, 683-84 (2006), *rev. den.*, 158 Wn.2d 1017 (2006) (citation omitted). "Furthermore, we give words and provisions in a contract their ordinary meaning." *Davis v. State, Dept. of Transp.*, 138 Wn. App. 811, 818 (2007) (citation omitted).

The trial court concluded that the intent of the contracting parties governed the nature of their agreement, so that the five amendments actually became part of the Agreement.[35] *See Dice*, supra, 131 Wn. App. at 683-84. The evidence and finding at trial was that G&O and Winlock mutually intended for the Agreement and its amendments to form a single contract relating to one overall project.[36] The trial court also concluded that the express language in each amendment that said amendment "is

[35] CP at 1237-38.
[36] *Id.*; RP (Sept. 7) at 63-66; *Id.* at 136-43.

hereby attached to and made a part of" the Agreement meant that the parties' agreement was one contract.[37] Furthermore, the parties performed as though one overall agreement governed their contractual relationship.[38]

Under this framework, G&O did work at Winlock's request.[39] G&O began this work under the Agreement prior to the recording of the Bank's deed of trust in January 2006.[40] Since the Agreement was one contract, pursuant to its unambiguous language and to the mutual intention of Winlock and G&O, G&O's lien related back to the commencement of services thereon, giving it lien priority over the Bank's deed of trust.[41]

The Bank relies on argument alone to pick apart the contract here, despite the clear intent of the parties and the plain language of the Agreement and amendments to it. The Bank offers no authority that amendments, so designated and performed as modifications to a single, original contract, are in fact separate contracts. The Bank is the *only* entity to refer to the contractual relationship between G&O and Winlock as "2005 Contracts" and "2006 Contracts," as opposed to one agreement with five amendments thereto.[42] The Bank presented no evidence at trial

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[37] CP at 1237; *see* Ex. 28, 31-32, 36-37.
[38] CP at 1237-38; RP (Sept. 7) at 63-66; *Id.* at 136-43.
[39] CP at 1238-39; RP (Sept. 7) at 73, 75-76; Ex. at 230-33.
[40] CP at 1235-38, 1241; RP (Sept. 7) at 62-66, 70-72, 75-76, 142-43.
[41] CP at 1237-38, 1242.
[42] RP (Sept. 7) at 63-66; *Id.* at 137; *Id.* at 143.

as to the contracting parties' intent.[43] Instead, as the trial court found, the "attempt by FIRST-CITIZEN'S to pick the amendments apart and to make them appear to be separate contracts is not what occurred here."[44]

The Bank complains that the Court of Appeal's decision makes the "contract price" "dependant on the whims of the contracting parties."[45] Since the "contract price" is "the amount agreed upon by the contracting parties," the intent of the contracting parties is exactly what the statute empowers. RCW 60.04.021; RCW 60.04.011(2). Contrary to the Bank's argument about "the key question in this litigation," 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.[46] *See id.* Even the Bank admits that the agreement between G&O and Winlock is enforceable between the parties.[47] This admission should end the analysis.

The trial court erred in giving effect to the parties' intent only if the contracting parties could not have agreed to the amendments as a matter of law. *Car Wash Enterprises, Inc. v. Kampanos*, 74 Wn. App. 537, 543-44 (1994) ("parties may incorporate into a contract any provision

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[43] RP (Sept. 8) at 114.
[44] CP at 1237.
[45] Petition for Review, page 13.
[46] *Id.* at 15.
[47] Appellant's Reply Brief, page 11 ("not in dispute" that "the agreements are enforceable as between G&O and Winlock.")

that is not illegal or against public policy.") The Bank has not cited any authority holding that contract-with-amendments arrangements like that between G&O and Winlock here are illegal or against public policy.

Here, the trial court found that the contracting parties, G&O and Winlock, intended for the amendments to be part of one single overall contract for work.[48] Viewing the agreement "as a whole and from the intent of the parties and not what the bank would like it to be," the trial court held the agreement was "one contract with several amendments."[49] "The original July 22, 2005 Contract specifically provided for amendments to it, and every one of the amendments specifically stated that it was an amendment to the original contract."[50] The "parties to the contract performed over the life of the contract" as it "was one contract with five subsequent amendments rather than a series of independent contracts" creating "a single project with overlapping phases and a continuing course of work."[51] Thus, G&O's last work on the Project clearly relates back to the commencement of labor on the Project, giving its lien claim first priority, a trial court determination that the Court of Appeals correctly affirmed.[52] RCW 60.04.021; RCW 60.04.061.

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[48] CP at 1237; RP (Sept. 7) at 63-66; *Id.* at 136-43.
[49] RP (Sept. 8) at 135.
[50] CP at 1237; Ex. at 9-39; RP (Sept. 7) at 64; *Id.* at 142-43.
[51] CP at 1237; RP (Sept. 7) at 65; *Id.* at 143.
[52] CP at 1237-38.

2. The Court of Appeals Correctly Affirmed The Trial Court, Because The "In-Furtherance-Of" Test Does Not Apply To Single, Enforceable Agreements Like The Contract Here, But Also Because G&O's Contractual Arrangement With Winlock Meets This Test Anyway.

The Bank argues that the Court of Appeals erred in applying (or failing to apply) the "in-furtherance-of" test to the contract between G&O and Winlock. *See Kirk v. Rohan*, 29 Wn.2d 432 (1947); *Hopkins v. Smith*, 45 Wn.2d 548 (1954); *Friis v. Brown*, 37 Wn.2d 457 (1950). However, that test is not applied where all the work done was within the express terms of the parties' agreement, as the trial court and the Court of Appeals determined here. *See* RCW 60.04.021; *see also, e.g., Zervas Group Architects, P.S. v. Bay View Tower*, 161 Wn. App. 322, 324 (2011). Here, all the work done was pursuant to the Agreement between G&O and Winlock.[53] *See Kirk*, 29 Wn.2d at 437.

Even if the "in-furtherance-of" test applied, work done at the owner's request does not extend the time for filing a lien only when the agreement for it is 1) new, 2) independent, and 3) after the original contract completed. *Hopkins*, 45 Wn.2d at 552; *Kirk*, 29 Wn.2d at 435-36. It is undisputed that all of G&O's work on the project was done at the instance of the property owner, Winlock.

[53] Ex. at 14, 36, 71, 114, and 122; RP (Sept. 7) at 69-73 and 75-76; CP at 1238, and 1241.

a) *The Amendments did not need to be "necessary" to be enforceable under RCW 60.04, but testimony showed that work under the Amendments was necessary anyway.*

A later contract need not be "necessary" to satisfy the "in furtherance of" test. None of the Bank's cited cases use the term "necessary" in their formulation of the rule. *Kirk*, 29 Wn.2d at 436-37; *Hopkins*, 45 Wn.2d at 552; *Friis*, 37 Wn.2d at 460. Furthermore, two of the three cases cited found that the later work in those cases, even though done months after work had stopped, was closely enough related to the original work that it still extended the time for filing the lien claim. *Kirk*, 29 Wn.2d at 437; *Friis*, 37 Wn.2d at 460. *Hopkins*, without analysis, reversed foreclosure in a case where, again, the original work had been completed and the later, unrelated, work was done months later. 45 Wn.2d at 552. In that case, unlike the present case, the property owner disputed that the work was done at the owner's request, and the holding in *Hopkins* should be considered in that light. *Id.*

Even more importantly, the Bank's argument fails even under its own proposed "rule." The trial court properly found that amendments 1-5 effectively modified the Agreement between the parties.[54] Trial testimony was that the work done in late 2007 and early 2008 was "necessary" under

[54] CP at 1238; RP (Sept. 7) at 62-66, 70-72, 75-76, 142-43.

Amendment 4.[55] Thus, even under the Bank's proposed interpretation of "in furtherance of," the work G&O did was "necessary" under the agreement, as amended. *See Kirk*, 29 Wn.2d at 437.

b) *The Amendments to the Agreement were not "new and independent contracts."*

Amendments 1-5 to the original Agreement were not "new and independent contracts." *Kirk*, 29 Wn.2d at 437; *Friis*, 37 Wn.2d at 460. The amendments between G&O and Winlock were clearly and intimately connected to G&O's previous work and the original Agreement.[56] Here, the testimony was that the amendments were a continuation or extension of the earlier work.[57] The Amendments, which were "attached to and made a part of" the Agreement by their clear terms, thus expressly incorporated and built upon the original July 2005 agreement. Moreover, the amended Agreement and all other work requests formed part of one project under one overall contract, as is typical in the industry for such work.[58] These were not "new and independent contracts" under the meaning of the rule. *Friis*, 37 Wn.2d at 460.

c) *The Amendments to the Agreement were not entered into after the work on the "original contract" was done.*

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[55] RP (Sept. 7) at 64; *see also id.* at 144.
[56] *Id.*; *Id.* at 64-65; *Id.* at 137; *Id.* at 142-43.
[57] *Id.* at 61-64; *Id.* at 140, 42-43.
[58] RP (Sept. 7) at 53-55; *Id.* at 81.

The amendments also were not "entered into after the original contract is completed." *See Kirk*, 29 Wn.2d at 436. Work started on the first amendment, per oral instructions from Winlock, in February 2006, even though work continued under the terms of the Agreement, excluding amendments, through at least June 2006, long after the first three amendments were formalized on April 28, 2006.[59] Here, substantial evidence supports the trial court's finding that G&O's work was done in furtherance of the original contract.[60]

3. The Court of Appeals Correctly Refused to Apply the Bank's Citations to Inapposite Case Law, Which Does Not Support Review.

a) Amendments 1-5 are not unenforceable "agreements to agree," and the Bank's cited case is inapposite.

Supreme Court case law regarding unenforceable "agreements to agree" is inapplicable, and the Court of Appeals correctly did not apply it here. The only case that the Bank cites in its favor is *Keystone Land and Development v. Xerox Corp.*, 152 Wn.2d 171 (2004), which is not on point. Lien law, RCW 60.04, and the issue of the priorities in a lien situation were never touched upon in that case. *Id. Keystone* holds only that mere discussions between parties about future negotiations do not create a binding, enforceable agreement. *Id.* at 178-80. *Keystone* does not apply to enforceable amendments to an enforceable agreement.

[59] *Id.* at 101; *Id.* at 99; Ex. at 27.
[60] CP at 1237-38, 1241; RP (Sept. 7) at 101; *Id.* at 99; Ex. at 27.

G&O is not trying to enforce any "agreement to agree," but rather the *actual agreement* it reached with Winlock, as amended. Once the amendments were agreed to, they were binding and enforceable, as the Bank admits.[61] The amendments effectively modified the original contract, and the contracting parties' performance confirms this.[62]

b) 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 common law mortgage theories, a rule which is inapplicable here. As formulated by Washington courts, the optional advances rule applies to "promised loan moneys ... under an agreement to lend money," and does not by its terms encompass a statutory lien claim for services rendered. *See Nat'l Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 899 (1973). Moreover, it makes no sense to apply a common law mortgage analysis to 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

[61] *See* Appellant's Reply Brief, page 11, quoted in note 49, supra.
[62] Ex. at 27-39; CP at 1238; RP (Sept. 7) at 143.

time, first in right priority between creditors." *A.A.R. Testing Lab., Inc. v. New Hope Baptist Church,* 112 Wn. App. 442, 448 (2002).

The Bank's mortgage analogy also must fail because it inexplicably omits the following phrase "[e]xcept as otherwise provided in RCW 60.04.061." RCW 60.04.226.[63] RCW 60.04.061 is, of course, the relation-back statute pertaining to mechanic's liens. *Zervas*, supra, 161 Wn. App. at 326 (citing RCW 60.04.061). A common law mortgage advance theory is inapplicable to a Chapter 60.04 RCW lien given the plain language of the statute. RCW 60.04.226; RCW 60.04.061.

B. The Court of Appeals Correctly Affirmed the Trial Court's Grant of a Set-Off in the Amount of $4,000 and Decision to Not Award the Bank a Further Set-Off Merely Because G&O Did Not Lien 100% of the Property Upon Which Work Was Done.

Here, the Bank has not shown a substantial public interest requiring review by the Supreme Court, RAP 13.4(b)(4), because to grant or deny a set-off is a matter within the trial court's discretion. *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 701 (2000). The exercise of a trial court's discretion must be "based on tenable grounds or tenable reasons." *Id.* The purpose of a set-off is to ensure "that there shall be no double recovery for the same injury." *Id.* at 702. Here, G&O agreed to release its lien claim against Grand Prairie Plaza, LLC, for

[63] *Compare* Petition for Review, p. 16, n. 77.

$4,000.[64] The amount of G&O's judgment against the Bank following trial was reduced by $4,000, ensuring that there would be no double recovery by G&O.[65] Given the purpose of set-offs to prevent double recovery, the trial court's grant of an offset to the Bank in the exact amount of the settlement was based on tenable reasons and correctly affirmed here. *Eagle Point*, 102 Wn. App. at 702.

As for the three lots not liened, they were owned by a third party, Rockmann Development, LLC, at the time G&O brought its lien claim.[66] The trial court found that it "was reasonable for GIBBS & OLSON to choose not to lien a third party under the circumstances and possibly risk a slander of title claim."[67] Moreover, "the party claiming an offset has the burden of proving this claim." *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 160 Wn. App. 728, 735 (2011). There was a failure of proof on the Bank's claims of setoff.[68]

The only public interest here is the statute granting lien claimants liberal construction. RCW 60.04.900. Furthermore, the Bank's cited authority does not require "a lien be asserted against 100% of the property

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[64] CP at 1242.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*

on which services were provided under RCW 60.04."[69] RCW 60.04.131 only applies if a lien claim is asserted against separate pieces of property. RCW 60.04.131. Here, the Project was one overall piece of property.[70] Moreover, failing to comply with RCW 60.04.131 only results in the lien being subordinated to other RCW 60.04 liens that do comply. *Id.* Therefore, the trial court's decision to deny a further offset to the Bank was correctly affirmed. *Eagle Point Condo*, 102 Wn. App. at 702-3. The Court should not consider the Bank's unsupported arguments. *See* RAP 10.3(a)(6); *see also Cowiche*, supra, 118 Wn.2d at 809.

C. 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.

G&O prevailed in the Court of Appeals, as at trial, and was awarded its reasonable attorney's fees and costs. Pursuant to RAP 18.1(j) and RCW 60.04.181(3), G&O requests an award of its reasonable attorney fees and costs incurred in responding to the Bank's petition for review.

V. CONCLUSION

The Bank has not shown that the Court of Appeals decision conflicts with precedent, nor has the Bank shown any substantial public interest implicated by a trial court's discretionary ruling on whether to grant an offset. G&O was clearly entitled to foreclose its lien as a prior

[69] CP at 1242.
[70] RP (Sept. 7) at 38.

and superior interest over the Bank's deed of trust. As a provider of professional engineering services for the improvement of real property, G&O is entitled to the liberal construction of the statute to protect its lien claim. 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, Winlock, which agrees that it owes G&O the entire amount sought in the lien claim. 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 trial court's grant of foreclosure. The Supreme Court should deny review, and finally allow G&O to obtain the payment it earned several years ago.

DATED: October 24, 2013.

Respectfully submitted,

NORMAN C. DICK, WSBA #13914
Of Attorneys for Respondent

DARRYL E. COLMAN, WSBA #42954
Of Attorneys for Respondent

CERTIFICATE

I certify that on this day I caused a copy of the foregoing ANSWER TO 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:

Darren Robert Krattli
Eisenhower and Carlson PLLC
1201 Pacific Avenue, Suite 1200
Tacoma, WA 98402-4395
Fax No.: (253) 272-5732
dkrattli@eisenhowerlaw.com

DATED this 24th day of October, 2013, at Longview, Washington.

JOYCE A. DONALDSON

APPENDIX

STATUTES CITED

RCW 60.04.011 (in pertinent part):

"(2) 'Contract price' means the amount agreed upon by the contracting parties, or if no amount is agreed upon, then the customary and reasonable charge therefor."

"(13) 'Professional services' means surveying, establishing or marking the boundaries of, preparing maps, plans, or specifications for, or inspecting, testing, or otherwise performing any other architectural or engineering services for the improvement of real property."

RCW 60.04.021: "Except as provided in RCW 60.04.031, any 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 of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner."

RCW 60.04.061: "The claim of lien created by this chapter upon any lot or parcel of land shall be prior to any lien, mortgage, deed of trust, or other encumbrance which attached to the land after or was unrecorded at the time of commencement of labor or professional services or first delivery of materials or equipment by the lien claimant."

RCW 60.04.131: "In every case in which the notice of claim of lien is recorded against two or more separate pieces of property owned by the same person or owned by two or more persons jointly or otherwise, who contracted for the labor, professional services, material, or equipment for which the notice of claim of lien is recorded, the person recording the notice of claim of lien shall designate in the notice of claim of lien the amount due on each piece of property, otherwise the lien is subordinated to other liens that may be established under this chapter. The lien of such claim does not extend beyond the amount designated as against other creditors having liens upon any of such pieces of property."

RCW 60.04.181 (in pertinent part):

"(3) The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable."

RCW 60.04.226: "Except as otherwise provided in RCW 60.04.061 or 60.04.221, any mortgage or deed of trust shall be prior to all liens, mortgages, deeds of trust, and other encumbrances which have not been recorded prior to the recording of the mortgage or deed of trust to the extent of all sums secured by the mortgage or deed of trust regardless of when the same are disbursed or whether the disbursements are obligatory."

RCW 60.04.900: "RCW 19.27.095, 60.04.230, and 60.04.011 through 60.04.226 and 60.04.261 are to be liberally construed to provide security for all parties intended to be protected by their provisions."

SEE ATTACHED COPY (OMITTING EXHIBITS THERETO) FOR:

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Also found at Clerk's Papers, pages 1234-1243).

SUPERIOR COURT OF WASHINGTON FOR LEWIS COUNTY

151 A

SCOTT'S EXCAVATING VANCOUVER, LLC, a Washington corporation,

Plaintiff,

v.

WINLOCK PROPERTIES, LLC, fka WINLOCK INDUSTRIAL PARK, LLC; ROCKMANN DEVELOPMENT GROUP, LLC; FIRST-CITIZEN'S BANK & TRUST COMPANY,

Defendants.

GIBBS & OLSON, INC.,

Intervening Defendant.

GIBBS & OLSON, INC.,

Third-Party Plaintiff,

v.

GRAND PRAIRIE PLAZA, LLC,

Third-Party Defendant.

No. 08 2 00298 3

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Walstead Mertsching PS
Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, Washington 98632-7934
(360) 423-5220

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This matter was tried to the Court, without a jury, on September 7 and 8, 2011. The Honorable Nelson Hunt presided at the trial. The claim presented at trial for adjudication was as follows:

> Intervening Defendant, GIBBS & OLSON, INC.'s claim against Defendant FIRST-CITIZEN'S BANK & TRUST COMPANY for foreclosure of a lien for professional services pursuant to RCW 60.04.

Intervening Defendant, GIBBS & OLSON, INC. (hereafter referred to as GIBBS & OLSON) appeared personally at trial through its President, Richard Riley, and through its attorney of record, NORMAN C. DICK. Defendant FIRST-CITIZEN'S BANK & TRUST COMPANY (hereafter referred to as FIRST-CITIZEN'S) appeared at trial through its attorney, DARREN R. KRATTLI and through Christopher Heck, an officer of FIRST-CITIZEN'S.

The witnesses who were called and testified at the trial are identified in the Witness List attached as Exhibit A.

The exhibits, which were offered, admitted into evidence and considered by the Court, are set out in the list attached as Exhibit B.

Based on the evidence presented at trial, the Court makes the following Findings of Fact:

I. FINDINGS OF FACT

A. Defendant WINLOCK PROPERTIES LLC's Breach of Contract.

1. This Court previously ruled on Intervening Defendant, GIBBS & OLSON's Motion for Summary Judgment and on June 3, 2011, entered an order entitled Order Granting Gibbs & Olson, Inc.'s Motion for Summary Judgment in Part, Denying Said Motion in Part and Denying First-Citizen's Bank's Motion for Summary Judgment, wherein the Court found that the undisputed factual record established that:

a. WINLOCK PROPERTIES, LLC (hereafter referred to as WINLOCK PROPERTIES) entered into a contract with GIBBS & OLSON for GIBBS & OLSON to provide engineering services for the development of the real property which is the subject of

Walstead Mertsching PS
Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, Washington 98632-7934
(360) 423-5220

the above-entitled legal action, which property is legally described on GIBBS & OLSON's lien claim attached as Exhibit 1 to the Declaration of Richard Riley, filed herein in support of GIBBS & OLSON, INC.'s Motion for Summary Judgment.

b. WINLOCK PROPERTIES breached said contract with GIBBS & OLSON by failing to pay $155,755.59 principal, plus interest on the principal balance at the contractual rate of 12% per annum in the accrued amount of $71,279.18 through October 25, 2010, plus interest accruing after that date in the amount of $51.20 per day through the date of this order in the total additional amount of $7,475.20, and subsequent interest at the rate of 12% per annum.

2. The Court further held in said Order that GIBBS & OLSON is entitled to judgment as a matter of law as set forth above and judgment was thereby entered in said Order in favor of GIBBS & OLSON, establishing Defendant WINLOCK PROPERTIES' breach of contract in the principal amount of $155,755.59, plus prejudgment interest in the amount of $78,754.38 (through June 3, 2011), plus post summary judgment interest after the date of June 3, 2011 at the rate of 12% per annum.

3. The evidence presented at trial was to the same effect as that established in the summary judgment proceeding as set forth above and it was further established at trial that the July 22, 2005 Contract between WINLOCK PROPERTIES and GIBBS & OLSON also provided for surveying services.

B. GIBBS & OLSON's Establishment of Lien Claim.

1. On or about July 22, 2005, GIBBS & OLSON and WINLOCK PROPERTIES entered into a contract whereby GIBBS & OLSON would provide professional engineering and surveying services for WINLOCK PROPERTIES. These professional services were for the benefit of approximately 50 acres of real property owned by WINLOCK PROPERTIES, for development of said 50-acre parcel of bare ground into an approximately 200 lot subdivision called Grand Prairie Subdivision.

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2. The said 50-acre parcel owned by WINLOCK PROPERTIES was described on the claim of lien attached as Exhibit 1 to the Counterclaim, Crossclaims and Third-Party Complaint of Intervening Defendant, GIBBS & OLSON, filed herein on July 18, 2008, except that said legal description did not include Lots 1, 2 and 3 from the Grand Prairie Subdivision, which three lots were owned by a third party at the time GIBBS & OLSON's lien claim was recorded on March 7, 2008.

3. The July 22, 2005 Contract for Professional Services was one contract with five subsequent amendments rather than a series of independent contracts. Said amendments were clearly designated as amendments. It was clearly the intent of the parties that said amendments be amendments to the original July 22, 2005 Contract and that was how the parties to the contract performed over the life of the contract. All of the work which was done by GIBBS & OLSON from approximately June 2005 through February 2008, was done in furtherance of the original July 22, 2005 Contract, which contract created a single project with overlapping phases and a continuing course of work by GIBBS & OLSON from the original July 22, 2005 Contract work through the breach of contract by WINLOCK PROPERTIES.

4. The attempt by FIRST-CITIZEN'S to pick the amendments apart and to make them appear to be separate contracts is not what occurred here. The original July 22, 2005 Contract specifically provided for amendments to it, and every one of the five amendments specifically stated that it was an amendment to the original contract, stating as follows: "This Amendment revising the Scope of Work Schedule, and Budget for Engineering Services is hereby attached to and made a part of the Agreement for Engineering Services dated July 22, 2005, between Winlock Properties, LLC and Gibbs & Olson, Inc." Moreover, the testimony of the personnel for both GIBBS & OLSON and WINLOCK PROPERTIES, who drafted and implemented the July 22, 2005 Contract and amendments, was to the effect that, and the Court also so finds that, all parties specifically intended all five of the amendments to be an actual part of the July 22, 2005 Contract, and that both WINLOCK PROPERTIES and GIBBS & OLSON performed pursuant to the July 22,

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2005 Contract and all five of its amendments at all times in a way that confirmed and was consistent with all five amendments being a part of the original July 22, 2005 Contract.

5. The Court has made the findings outlined in paragraphs B.3. and B.4. above, viewing the evidence as a whole, considering all of the language in the July 22, 2005 Contract and each of the five amendments, together with the testimony regarding the clear intent of the parties that the original contract and amendments were all to be part of the original contract and the testimony of the witnesses that throughout all parties' performance under the contract, the original July 22, 2005 Contract together with the five amendments was at all times considered in the course of performance as one contract and were in fact actually performed by both parties as one contract. The fact that the amendments increased the price of the contract over time and the contract language allowing the parties to walk away from the contract under certain circumstances was really an intent to limit the consequences of a breach, not an indication that any of the five amendments were separate contracts.

6. GIBBS & OLSON began providing professional engineering and surveying services to the subject property on or about June or July 2005 and continued providing such services, in a continuous course of employment, up through February 2008, all pursuant to the terms of the July 22, 2005 Contract. These services were throughout this time at the request of WINLOCK PROPERTIES.

7. FIRST-CITIZEN'S predecessor in interest, Venture Bank, had actual notice that GIBBS & OLSON was providing professional engineering and surveying services benefitting the real property at issue prior to Venture Bank loaning any money to WINLOCK PROPERTIES and prior to Venture Bank recording the Deed of Trust on January 10, 2006 against the real property at issue.

8. Venture Bank had actual notice, for example, on September 2, 2005, when Christopher Heck, Venture Bank's principal loan officer evaluating WINLOCK PROPERTIES' loan application, sent his supervisor at Venture Bank, Dennis Shade, a facsimile transmittal regarding GIBBS & OLSON's estimates of the probable cost to construct the 200 lots at issue. Venture Bank

Walstead Mertsching PS
Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, Washington 98632-7934
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also had notice that GIBBS & OLSON had begun providing professional engineering and surveying services to WINLOCK PROPERTIES on the Grand Prairie Subdivision project prior to making a loan to WINLOCK PROPERTIES and prior to recording the January 10, 2006 Deed of Trust, given that Allen Olson, acting for WINLOCK PROPERTIES, submitted a preliminary loan request listing GIBBS & OLSON as follows: "Engineering Firm: Gibbs & Olson, Inc. Engineers-Planners-Surveyors." Furthermore, prior to Venture Bank making the loan to WINLOCK PROPERTIES and prior to the January 10, 2006 Deed of Trust recording, Allen Olson of WINLOCK PROPERTIES told Venture Bank's loan officer, Christopher Heck, that GIBBS & OLSON had started providing engineering services on the project and specifically provided Venture Bank with copies of a number of documents, including diagrams, plat maps and other information from GIBBS & OLSON regarding the Grand Prairie Subdivision, which documents showed that GIBBS & OLSON was working on the project and identified GIBBS & OLSON as the entity that had prepared said documents.

9. Likewise, Venture Bank had constructive notice that GIBBS & OLSON was providing services to the project, including survey markings on the property in question which would have been clearly visible during the property inspection Christopher Heck made of the property at issue prior to the January 10, 2006 Deed of Trust recording by Venture Bank.

10. Also, the circumstances of the project were such that prior to January 10, 2006, Venture Bank had to have known that an engineering firm was involved with obtaining preliminary plat approval and in fact, prior to January 10, 2006, Venture Bank had actual documents showing that the engineering firm involved with obtaining preliminary plat approval for the Grand Prairie Subdivision was GIBBS & OLSON.

11. The fact that within approximately three weeks of January 10, 2006, Venture Bank approved GIBBS & OLSON's submittal of its billing number six without any question or investigation, is a clear indication that Venture Bank knew at the time it made its January 10, 2006

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Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, Washington 98632-7934
(360) 423-5220

loan that GIBBS & OLSON was the engineering firm actually providing services on the project in question.

12. All of that provided Venture Bank with adequate notice that GIBBS & OLSON was out there providing professional services on the subject real property prior to Venture Bank recording its Deed of Trust on January 10, 2006.

13. Prior to recording its Deed of Trust on January 10, 2006, Venture Bank made no attempt to determine what the terms were of WINLOCK PROPERTIES' contract with GIBBS & OLSON, or what potential exposure would be under said contract. Venture Bank could have easily done so, but chose not to do so.

14. Testimony at trial was to the effect that as of January 10, 2006, Venture Bank had assets of approximately One Billion Dollars and had 23 branches. Given the size of the loan involved here between Venture Bank and WINLOCK PROPERTIES, which loan was approximately $3.7 million, and given the sophistication of this lender, a reasonable course of action for Venture Bank would have been to request a copy of the contract between WINLOCK PROPERTIES and GIBBS & OLSON to make an inspection of it. Venture Bank chose not to do so.

15. The standard in the industry for protecting a deed of trust such as Venture Bank had in this instance with WINLOCK PROPERTIES from liens pursuant to RCW 60.04, was for the lender to have requested a subordination agreement from professional service providers or other contractors already involved on the project, or requested something such as an indemnification agreement, though subordination agreements are generally preferred. For reasons that remain a mystery, Venture Bank chose not to do this. The claims to the contrary by Christopher Heck, testifying for Venture Bank, are unconvincing and his entire testimony was so vague and inconsistent as to be anything but incredible in the true sense of that word, meaning not credible.

16. Venture Bank failed to take reasonable steps to protect its Deed of Trust recorded on January 10, 2006 from any lien rights pursuant to RCW 60.04. If the bank was worried about such potential liens, it should have obtained the names of all professional service providers, contractors

Walstead Mertsching PS
Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, Washington 98632-7934
(360) 423-5220

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. Venture Bank made no attempt to do so.

17. GIBBS & OLSON recorded its lien claim, above referenced, with the Lewis County Auditor in a form which complied with RCW 60.04, which recording was done on March 7, 2008. A copy of said notice was provided by GIBBS & OLSON to the property owner, WINLOCK PROPERTIES, in a timely manner pursuant to RCW 60.04. Said lien was recorded within 90 days of GIBBS & OLSON last providing work on the property and GIBBS & OLSON filed its suit to foreclose said lien on or about July 18, 2008, which date was within eight months of recording said lien.

18. WINLOCK PROPERTIES owned the fee interest in the entire approximately 50-acre parcel at issue in 2005 when GIBBS & OLSON began its work under the July 22, 2005 Contract.

19. On January 10, 2006, Venture Bank recorded its Deed of Trust including the entire approximately 50-acre parcel at issue in this case.

20. On August 31, 2009, a Trustee's Deed was recorded whereby Venture Bank became the record owner of the approximately 50-acre parcel above described and previously owned by WINLOCK PROPERTIES, excepting therefrom, Lots 1, 2, 3, 7, 18 and Tract A of Grand Prairie Phase I as shown in Trial Exhibit 25 at p. 264 and following.

21. Said same real property was then transferred to FIRST-CITIZEN'S under a Receiver's Deed as shown by Trial Exhibit 25 at p. 268 and following.

22. Regarding FIRST-CITIZEN'S claim that GIBBS & OLSON has failed to mitigate its damages, there has been no showing of this. There is no requirement that GIBBS & OLSON record a lien notice other than the lien notice it actually recorded in this case. Moreover, early on in the project, there was no need to do it as GIBBS & OLSON was being paid regularly. GIBBS & OLSON could have stopped work at some point, but that would have been harming themselves because it would have likely shut down the project, which project was planned such that work would continue and that revenue would come in from the sale of the lots and as long as they kept doing the

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Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, Washington 98632-7934
(360) 423-5220

work, GIBBS & OLSON kept making the properties more sellable. So, actually, GIBBS & OLSON was indeed trying to mitigate its damages in some sense by taking the most reasonable approach to eventually getting paid by continuing to work on the project as they did. In any event, had Venture Bank requested a subordination agreement, which they chose not to do, Venture Bank would have resolved the whole matter before a problem developed. There is a failure of proof on any claim of failure to mitigate.

23. GIBBS & OLSON's settlement with GRAND PRAIRIE PLAZA, LLC, regarding Lot Nos. 7, 18 and Tract A only, for $4,000 and release of the lien against GRAND PRAIRIE PLAZA's Lot Nos. 7, 18 and Tract A was reasonable under the circumstances and GIBBS & OLSON's proposal to credit $2,667.67 of said settlement against the $155,755.59 in principal owed under the lien and the balance for attorney fees and costs is reasonable under the circumstances as well.

24. GIBBS & OLSON failed to lien Lots 1, 2 and 3 of Grand Prairie Phase I, which lots were owned by ROCKMANN DEVELOPMENT, LLC., as of February 5, 2008. It was reasonable for GIBBS & OLSON to choose not to lien a third party under the circumstances and possibly risking a slander of title claim. No authority has been cited by FIRST-CITIZEN'S requiring that a lien be asserted against 100% of the property on which services were provided under RCW 60.04.

25. There is a failure of proof on all of FIRST CITIZEN'S affirmative defenses and claims of setoff.

II. CONCLUSIONS OF LAW

1. GIBBS & OLSON having begun its work on the project in June of 2005, and with Venture Bank having notice of GIBBS & OLSON's work on the project prior to Venture Bank recording its Deed of Trust, GIBBS & OLSON's RCW 60.04 lien claim has priority over CITIZEN'S BANK's claims against the real property at issue.

2. GIBBS & OLSON has established its claims under RCW 60.04 for foreclosure of its lien for professional services against all of the above-described subject property owned by FIRST-CITIZEN'S, the legal description of which is contained in the Receiver's Deed under Trial

Walstead Mertsching PS
Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, Washington 98632-7934
(360) 423-5220

Exhibit 25 at p. 274, a true copy of which legal description is attached hereto as Exhibit C. Judgment accordingly should be granted herein in favor of GIBBS & OLSON as to all parties to this action on GIBBS & OLSON's lien foreclosure action for a decree foreclosing its lien in the principal amount of $155,755.59 (less the $2,667.67 from settlement), plus prejudgment interest in the amount of $85,313.95 through October 11, 2011, and accruing at 12% per annum after that date, plus statutory costs and reasonable attorney fees, litigation expenses, recording fees and title report fees as shall be shown by declaration filed herein.

3. That the said lien is a valid first lien against all of the real property described on Trial Exhibit 25 at p. 274 (Exhibit C hereto), that all the parties to this action and anyone claiming by or through or under them should be forever foreclosed of all right, title and interest in said property or any part thereof, and that the property be sold by the Sheriff of Lewis County, Washington, in the manner provided by law to satisfy the aforesaid sums and that GIBBS & OLSON be permitted to purchase at the sale by bidding in a portion of its judgment as it deems fit.

4. Judgment should be entered herein in favor of GIBBS & OLSON and against all Defendants in accordance with these Findings of Fact and Conclusions of Law.

Dated: OCTOBER 11, 2011.

HONORABLE NELSON HUNT

Presented by:

NORMAN C. DICK, WSBA #13914
Of Attorneys for Intervening Defendant
GIBBS & OLSON, INC.

Approved as to form and notice of presentation waived:

DARREN R. KRATTLI, WSBA #39128
Of Attorneys for Defendant
FIRST-CITIZEN'S BANK & TRUST COMPANY

Walstead Mertsching PS
Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, Washington 98632-7934
(360) 423-5220

OFFICE RECEPTIONIST, CLERK

To: Joyce A. Donaldson
Cc: dkrattli@eisenhowerlaw.com; Tracy, Angela D.; Norm C. Dick; Darryl E. Colman
Subject: RE: First Citizens Bank and Trust Co. v. Gibbs & Olson, Inc., Case No. 89338-1

Rec'd 10-25-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Joyce A. Donaldson [mailto:joyce@walstead.com]
Sent: Thursday, October 24, 2013 5:00 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: dkrattli@eisenhowerlaw.com; Tracy, Angela D.; Norm C. Dick; Darryl E. Colman
Subject: First Citizens Bank and Trust Co. v. Gibbs & Olson, Inc., Case No. 89338-1

Dear Clerk:

Attached for filing is Respondent's Answer to Petition for Review in regard to the above-referenced matter.

Sincerely,
Joyce A. Donaldson
Legal Assistant to Norman C. Dick, WSBA #13914
dick@walstead.com
and
Darryl E. Colman, WSBA #42954
colman@walstead.com

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Joyce A. Donaldson
Legal Assistant
WALSTEAD MERTSCHING
--ATTORNEYS AT LAW--
Civic Center Building, Third Floor
1700 Hudson Street
PO Box 1549
Longview, WA 98632-7934
A Professional Service Corporation
mail to: joyce@walstead.com
(360) 423-5220 / (360) 423-1478 (fax)
www.walstead.com