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NO. 62969-7-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SEA CON, LLC, a Washington limited liability company
and NATIONAL UNION FIRE INSURANCE COMPANY,
Appellants.

v.

NORTH COAST ELECTRIC COMPANY, a Washington Corporation,
Respondents.

BRIEF OF APPELLANTS

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

Assignment of Error No. 1: The Trial Court erred when it held that it had jurisdiction to allow North Coast to foreclose on its lien. Findings of Fact and Conclusions of Law (“FF”) para. 21

Assignment of Error No. 2: The Trial Court erred to the extent that it held that North Coast had only sought foreclosure on, properly provided notice for, and claimed only against the leasehold interest in the real property in question. FF para. 2

Assignment of Error No. 3: The Trial Court erred when it found that Plaintiff had previously been awarded a final judgment against the bond. FF para. 2

Assignment of Error No. 4: The Trial Court erred when it found that Plaintiff’s right to assert a lien was established in earlier proceedings and the jurisdictional basis for the lien could not be raised. FF para. 21

Assignment of Error No. 5: The Trial Court erred when it found and concluded that Plaintiff had served a pre-lien notice on the owner or reputed owner of the real property sought to be foreclosed, and otherwise complied with the statutory requirements necessary to file and foreclose on its lien. FF para. 2

Assignment of Error No. 6: The Trial Court erred when it refused to enforce the lien release that North Coast executed on items supplied to AES. FF para. 26

Assignment of Error No. 7: The Trial Court erred when it found or concluded that North Coast was entitled to reformation of the lien release based on unilateral mistake when it found no inequitable conduct by SEA CON prior to the execution of the lien release by Plaintiff. FF para. 23

Assignment of Error No. 8: The Trial Court erred to the extent that it found or concluded that there was clear and convincing evidence of inequitable conduct by SEA CON leading to the execution of the release. No specific finding of fact; FF para. 23(d)

Assignment of Error No. 9: The Trial Court erred when it found that the Plaintiff was entitled to reformation of the lien release based on mutual mistake when it did not find identical intent as to the intended effective date of the lien release and did not find that the lien release was contrary to that unfound intent. FF para. 23

Assignment of Error No. 10: The Trial Court erred to the extent that it held there was clear and convincing evidence of any agreement or intent by SEA CON to limit the lien release to May 24, 2002. No specific finding of fact; FF para. 23(d)

Assignment of Error No. 11: The Trial Court erred when it found that the Plaintiff was entitled to reformation of the lien release based on mutual mistake when Plaintiff had actual or constructive knowledge of the lien release date, the date of the invoices and the amount claimed by Plaintiff and assumed the risk of any mistake. FF para. 24

Assignment of Error No. 12: The Trial Court erred when it found that Plaintiff's negligence in execution of the lien release is not a defense to a claim for reformation based on mutual mistake. FF para. 25

Assignment of Error No. 13: The Trial Court erred when it found that Plaintiff's negligence in executing the release was excused by any conduct by SEA CON. FF para. 26

Assignment of Error No. 14: The Trial Court erred when it found that Plaintiff did not waive its claim or accept and ratify the terms of the lien release by depositing SEA CON's check that was exchanged for the lien release with knowledge of the alleged mistake. FF para. 27

Assignment of Error No. 15: The Trial Court erred when it held that SEA CON was personally liable for judgment in addition to the bond posted to release the property under RCW 60.04.161. Judgments, FF para.

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Assignment of Error No. 16: The Trial Court erred when it found that the Plaintiff had proven that it had sold at least \$200,649.89 worth of materials for the Project after May 24, 2002. FF para. 16

Assignment of Error No. 17: The Trial Court erred when it found that the Plaintiff was entitled to \$172,638.66 in damages, as the Plaintiff failed to introduce any evidence of the value of the property actually delivered after the reformed lien release date. FF para. 31

Assignment of Error No. 18: The Trial Court erred when it found that the Plaintiff was entitled to recover attorney's fees and costs because it failed to introduce evidence of compliance with RCW 60.04.091(f)(2), and erred when it failed to award damages to SEA CON and National Union. FF para. 30

B. Issues Pertaining to Assignments of Error

Issue No. 1: Does a Superior Court have jurisdiction to hear a lien foreclosure case when the Plaintiff failed to comply with the notice requirements of RCW 60.04? Assignment 1, 2, and 5

Issue No. 2: May a Court award relief when jurisdiction is lacking, when prior proceedings resulted in offsetting judgments, one of which was overturned on appeal? Assignment 3, 4

Issue No. 3: May a party foreclose a lien against a leasehold interest in real property when the lien recorded and the complaint for

foreclosure filed by that party both indicate foreclosure of the entire fee interest in the real property, the Notice of Right to Claim Lien was never served on the owner of the fee interest and a lien release bond was recorded as a result of the foreclosure on the entire fee interest in the property? Assignment 1, 2, 5

Issue No. 4: Is a lien release executed by a supplier valid when it releases all liens based on labor, services and equipment and the lien claimant pled its applicability in the complaint? Assignment 6

Issue No. 5: Is a party entitled to reformation of a lien release when the parties agreed to exchange a check for a specific amount for the lien release, but made no agreement as to the date of the release and subsequently did exchange the check for a lien release drafted by the party that wrote the check? Assignment 7, 8, 9, 10, 11, 12

Issue No. 6: Is a party entitled to reformation of a lien release on the basis of unilateral mistake when the party seeking reformation assumed the risk of a mistake? Assignment 7, 13, 14

Issue No. 7: Is a party entitled to reformation of a lien release on the basis of mutual mistake when the Court did not find any inequitable conduct prior to the execution of the lien release? Assignment 8, 9

Issue No. 8: Does a party waive its claim for reformation of a lien release, when, with knowledge that it disputes the effective date of the

release, it negotiates the check that was exchanged in consideration of the execution of the lien release? Assignment 15

Issue No. 9: Is a general contractor who posts a lien release bond joint and severally liable for judgment of foreclosure against the bond when the general contractor has no direct contractual relationship with the lien claimant? Assignment 16

Issue No. 10: Is a party entitled to a judgment for lien foreclosure when that party did not present any evidence to establish the value of the materials provided to the project after the reformed lien release date? Assignment 17, 18

Issue No. 11: Is a lien claimant entitled to recover its attorney's fees and costs when it has failed to comply with RCW 60.04.091(f)(2)? Assignment 19

II. STATEMENT OF THE CASE

This is an appeal from a construction lien foreclosure case. Respondent/Plaintiff North Coast Electric Company ("North Coast") is a large supplier of electrical equipment with offices at various locations in Oregon and Washington. Appellant/Defendant SEA CON, LLC ("SEA CON") is a local contractor that builds commercial, industrial and warehouse projects. National Union is the surety that posted the lien

release bond. This case concerns the construction of tenant improvement at a warehouse for Plexus Corporation in Bothell (“the Project”) in 2002.

A. Facts Related to Executed Release of Lien.

This was a fast-track project, meaning that construction started before the design was finalized. RP 457:20 – 458:10. As part of that contract SEA CON subcontracted with Arizona Electric Service, Inc. (“AES”) to perform the electrical work for a lump sum of \$922,357. Ex. 8. AES, under an existing credit agreement dated September 26, 2000, purchased electrical supplies from North Coast for the Project. Ex 1, CP 12 - 14.

AES’ June pay request sought payment for more than 90% of its work on the Project, with \$103,500 owing. RP 519:25, Ex. 30 and 31. This was the last major payment to AES, since basically only the retainage that covered punch list items remained outstanding on AES’ fixed price contract. Near the end of July, Plexus paid SEA CON’s June progress draw. RP 520:2.

SEA CON’s Project Manager, Brian Yandell, learned that AES was behind on its payments for materials purchased from North Coast. RP 365:19 – 23. Yandell and SEA CON had no direct relationship with North Coast. Ex. 8. Yandell was scrambling to finish the Plexus project, and was dealing with a number of subcontractor and owner issues. RP 461:5 –

6, 464:6 – 25, 526:5 – 7. He did not have a lot of time to devote to the financial relationship between AES and Plexus. He only needed to get a payoff number from North Coast and lien releases. RP 386:15 – 20.

On July 25, 2002 Yandell contacted North Coast's credit manager, Gary Hoy by telephone and asked what AES owed North Coast. RP 381:22, 385:4 – 12. Specifically, he asked, "What do you need to bring [AES] current?" RP 398:7 – 10. Hoy gave Yandell a figure of "roughly \$101,000" and said he'd fax an accounting of AES' payables. RP 387:5 – 9, 445:16 – 446:2. Hoy told Yandell that Yandell could take the check and release to either North Coast's Seattle or Bellevue offices, and provided Yandell with a contact name for each location, "Julie" in Seattle and "Paul" in Bellevue. RP 521:8 – 24.

Yandell received Hoy's fax showing a payoff number \$101,417.31. RP 387:10 – 14, 522:17 – 523:6, Ex 34, CP 33 – 35. He briefly looked at the fax before authorizing the check and preparing a release, but he did not review the document in any detail. RP 392:15 – 21, 523:10. Yandell used a form SEA CON lien release that it used for subcontractor's and supplier's complete releases of all claims. RP 393:6, Ex 35, CP 31. He inserted the date of June 30, 2002, which was the date of the last AES pay request and consistent with his conversation with Mr. Hoy. RP 396:12 – 18, 397:6 – 9. Yandell prepared an identical release,

with the same date and payment amount, for AES to sign to release its rights for the work it had performed. RP 424:19 – 425:4, Ex 36.

On July 26, 2002, Yandell picked up a check from the accounting department with the fax from Mr. Hoy attached. Ex. 56, CP 32 – 35. Yandell met with Hoefler, who reviewed the check and signed the release on behalf of AES. RP 523:22 – 524:1, 524:10, 524:17.

Yandell was running low on time so he went to North Coast's Bellevue location rather than drive into Seattle. RP 402:21 – 403:2, 524:18 – 525:6. He asked for "Paul" who was not in at the time. Yandell returned a short time later and Branch supervisor Paul Telkamp met him. RP 525:7 – 10. Telkamp took the check, the North Coast invoice list and the release and copied them. RP 245:20 – 25. He signed the release, brought it back to Yandell and Yandell left. RP 243:24 – 244:5, CP 31.

Telkamp was aware that AES was substantially behind on what it owed North Coast. RP 248:3 – 20. Telkamp had previously signed lien releases on behalf of North Coast and was aware that he was releasing North Coast's rights in exchange for payment. RP 259:12 – 260:2. At no time, however, did Telkamp look at the date through which the release was effective or check it against the North Coast accounting computers. RP 253:8 – 14, 260:3 – 261:3. Telkamp was aware from his previous

experience that it is common for lien releases to contain dates. RP 259:25 – 260:2.

Telkamp faxed the check, release and other documents to Julie Aippersbach in North Coast's accounting department to report delivery of the check. RP 245:22 – 25. Aippersbach immediately called Telkamp and told him that the release date was wrong. RP 246:1 – 9. He had not cashed the check at that time. RP 254:25 – 255:6, 274:13 – 18. Telkamp, therefore, had the SEA CON check in hand when he learned that North Coast alleged that the release date was a mistake.

Rather than attempt to return the check and renegotiate the release in good faith, North Coast deposited the check and kept the funds given in exchange for the release. RP 274:9 – 19. North Coast then demanded that SEA CON accept a new release and return release that North Coast had already executed. RP 412:20 – 413:6. At no time did North Coast offer to return the funds to SEA CON.

B. Facts Related to Lien Foreclosure.

North Coast contracted with LienData USA to provide the pre lien notice for this project. LienData USA's records purport to show that the pre lien notice was mailed to Plexus Corporation, SI North Creek II, LLC and Seattle Construction Services. Ex. 14, RP 85:16 – 21. There is no assertion or evidence in the record that the pre lien notice was mailed to

any other person, including those other persons named on the claim of lien, M. Bruce Anderson, Inc., The Northwestern Mutual Life Insurance Company, MBA Bothell Building, LLC and Bothell Building Joint Ventures fka Precor Building Associates. Specifically, M. Bruce Anderson, Inc., the record owner of the real property, was never provided the pre lien notice.

North Coast recorded a lien on the underlying real property on or about September 4, 2002. Ex. 53, CP 364 – 365. The lien specifically stated that it pertained to the real property granted to M. Bruce Anderson, Inc. It listed “M. Bruce Anderson, Inc., Plexus Services Corp, The Northwestern Mutual Life Ins. Company, MBA Bothell Building, Inc., and Bothell Building Joint Venture fka Bothell Building Associates,” as the owners or reputed owners.

In December 2002, North Coast sued to foreclose on the underlying real property. CP 1 – 35. It named as defendants all of the owners listed above, as well as “Plexus NPI Plus Corp.” and other parties. The complaint stated that it had provided a copy of the lien to the “owners,” which included M. Bruce Anderson, Inc., and Bothell Building, LLC. CP 4 at ¶ 1.11. North Coast claimed that its own interest was superior to that of the defendants, which would have included the owners of the underlying real property. CP 4 at ¶ 1.13.

North Coast's prayer for relief included a request for judgment that declared that its lien is **"superior to any interest, lien, or claim of Plaintiff [sic] and Defendants in or to the Real Property,"** and that **"the Real Property [be] sold by the sheriff of King County in the manner prescribed by law."** CP 8. At no point in its complaint did North Coast state that it was only proceeding against the improvements of the Plexus project, or that it was limiting its lien to that interest.

On or about March 3, 2003, SEA CON recorded a Release of Lien bond No. 23-66-44 in the amount of \$316,211.12, in which SEA CON was the principal and National Union Fire Insurance Co. of Pittsburgh, PA was the surety. Ex. 66, CP 378 – 379. Thereafter, on or about March 20, 2003, North Coast filed an Amended Complaint in this matter, substituting the Lien Release Bond covering the entire real property that North Coast had sued to foreclose. CP 36 – 57. It continued to seek foreclosure of the fee interest in the entire parcel of real estate.

SEA CON and National Union moved for, and were granted, summary judgment to enforce the lien release that North Coast has provided and dismissing North Coast's claims to the extent of the materials released. CP 87 – 89, 90 – 92. As part of the summary judgment award, SEA CON was granted an award of attorney's fees and costs against North Coast. The amount of the fee award nearly

corresponded to the amount due North Coast for materials furnished after June 30, 2002, which were not covered by the lien release. The parties then agreed on a judgment against SEA CON for these items to offset the attorney's fee award to allow SEA CON to pay North Coast directly and bypass Arizona Electric. CP 93 – 98.

North Coast appealed the summary judgment. The Court of Appeals reversed the summary judgment and remanded the matter for trial on all issues. *North Coast v. Ariz. Elec. Serv., Inc.*, 2006 Wash. App. LEXIS 463 (2006)(Unpublished). The trial occurred in January 2008. The Court issued findings of fact and conclusions of law in October 2008 and judgment in January 2009. CP 1025 – 1033 and CP 1048 – 1050. SEA CON now appeals the findings of fact and conclusions of law and the judgment. CP 1051 – 1079.

III. SUMMARY OF THE ARGUMENT

The trial court erred in finding in North Coast's favor. North Coast's remedy was against AES, the party with whom it had a contract and to whom it shipped large amounts of equipment without requiring payment. North Coast was less than diligent in monitoring its relationship with AES and allowed its customer to run up a large balance due. North

Coast seeks a judicial bailout for its own failure to monitor its accounts receivable.

North Coast exhibited a similar cavalier attitude toward its compliance with the notice and suit requirements of the lien statute, RCW 60.04. It liened the entire property in question, naming the fee owner on the claim of lien. Then, when it appeared that it could not comply with the requirements for foreclosing on the entire parcel, it changed on the eve of trial to claim it was foreclosing only on the leasehold interest. North Coast failed to comply with the notice and foreclosure requirements, so its lien is void and therefore unenforceable. Again, North Coast seeks a bailout for its own failure to comply with the lien statutes on which it relies.

North Coast's management continued this recklessness by signing a lien release without first checking its own easily available records to determine whether the release was correct. It relied below on the mistake doctrine, but North Coast knew exactly what the release said at the time it cashed the SEA CON check and ratified the release. North Coast made a knowing decision to accept the benefit of the release with the expectation that the court system would reform the agreement to its liking.

North Coast further failed to present evidence of the equipment shipped to the site to prove its case, and therefore the record below fails to

establish the validity of the amount of the lien and the judgment awarded. This pattern of cavalier behavior and complete disregard for the statutes and rules tip any equities against it, as the law should not be a tool to those who refuse to take reasonable action to protect themselves.

The Court mistakenly found SEA CON personally liable when North Coast's only proper remedy was against the bond posted under RCW 60.04.161. That statute provides clearly that only the bond is to be liable for the applicable lien claim.

Therefore, based on the arguments below, SEA CON and National Union request that this Court reverse the Trial Court's judgments, dismiss this case and award SEA CON and National Union their attorney's fees and costs.

IV. ARGUMENT

A. The Court Lacked Jurisdiction to Decide the Lien Foreclosure Because North Coast Failed to Notify the Owner of The Entire Fee Interest but Sued to Foreclose that Entire Interest.

North Coast failed to comply with the requirements of RCW 60.04 by failing to identify and pursue the proper real estate and its owners throughout this action. Its lien therefore cannot be enforced.

The interpretation and construction of a statute such as RCW 60.04 is a question of law reviewed *de novo*. *Lumberman's, Inc. v. Barnhardt*,

89 Wn. App. 283, 286 (1997) citing *W.R.P. Lake Union Ltd. Partnership v. Exterior Servs., Inc.*, 85 Wn. App. 744, 749, 934 P.2d 722 (1997); *State v. Parada*, 75 Wn. App. 224, 229, 877 P.2d 231 (1994). In conducting such a review, an appellate court must construe a statute according to its plain language, and statutory construction is unnecessary and improper when the wording of a statute is unambiguous. *Id.*

North Coast in this case seeks to “have its cake and eat it too.” It failed to notify the record owner of the underlying real property, only giving notice to the lessor. It then sued to foreclose against the underlying owner’s entire interests, forcing SEA CON to post a bond to protect that underlying interest. North Coast then claimed for the first time at trial that it was foreclosing only on the leasehold interest. By claiming it was foreclosing on the more valuable entire parcel, it set in motion a chain of events that caused SEA CON to post a bond for the lien amount, a course that would not have been necessary if North Coast had so restricted its lien from the beginning.

1. The trial court lacked jurisdiction because north coast failed to provide proper notice to the record owner of the property per RCW 60.04.031.

If North Coast did not provide the statutorily required notice, its lien is void and the Court lacks the subject matter jurisdiction to enforce it. *E.g., Schumacher Painting v First Union Mgmt.*, 69 Wn. App 693, 700,

850 P.2d 1351 (1993). Anytime the lack of subject matter jurisdiction becomes apparent, the Court must dismiss the claim. This is particularly true when the case involves a statutorily created proceeding related to real property interests. *See, e.g., Lumberman's*, 89 Wn. App. 283 (failure to include verification statement invalidates lien).

Because the lien statutes are in derogation of the common law, strict compliance with all statutory provisions is required to determine whether a lien attaches. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308, 312 (2009) *citing Dean v. McFarland*, 81 Wn.2d 215, 219-20, 500 P.2d 1244, 74 A.L.R.3d 378 (1972) *citing Westinghouse Elec. Supply Co. v. Hawthorne*, 21 Wn.2d 74, 77, 150 P.2d 55 (1944); *W.R.P. Lake Union*, 85 Wn. App. at 749; *Schumacher Painting*, 69 Wn. App. at 698-99. “One claiming the benefits of the lien must show he has strictly complied with the provisions of the law that created it.” *Lumberman's*, 89 Wn. App. at 286 *citing Schumacher Painting*, 69 Wn. App. at 699; *Pacific Erectors, Inc. v. Gall Landau Young Constr. Co.*, 62 Wn. App. 158, 168, 813 P.2d 1243 (1991), review denied, 118 Wn.2d 1015, 827 P.2d 1011 (1992); *see Westinghouse Elec*, 21 Wn.2d at 77; *see also Northlake Concrete Prods. v. Wylie*, 34 Wn. App. 810, 663 P.2d 138 (1983).

The Court can also look for guidance to another statutorily created proceeding designed to adjudicate real property interests – the landlord-tenant unlawful detainer proceeding. *E.g., Truly v. Heuft*, 138 Wn. App. 913, 918, 158 P.3d 1276 (2007) (unlawful detainer action void because landlord failed to include notice of tenant’s right to answer by fax or mail). *See also, e.g., Cmty. Invs. v. Safeway Stores, Inc.*, 36 Wn. App. 34, 37-38, 671 P.2d 289 (1983) (Where notice to cure complied with statute but failed to comply with contractual notice provisions, court lacked subject matter jurisdiction to consider unlawful detainer action). In a statutory special proceeding, statutory notice requirements are to be strict and compliance, in full, is required. *E.g., Dorsey v. Brunswick*, 69 Wn.2d 511, 418 P.2d 732 (1966)(cited in *Lumberman’s*)(mortgage was void and could not be foreclosed because it did not comply with statute).

RCW 60.04.031 establishes the pre-lien notice requirements for enforcing a lien. This statute requires a notice to the owner of the real property of the right to claim a lien. The statute provides, in pertinent part, as follows:

(1) Except as otherwise provided in this section, **every person furnishing professional services, materials, or equipment for the improvement of real property shall give the owner or reputed owner notice in writing of the right to claim a lien.** If the prime contractor is in compliance with the requirements of RCW 19.27.095, 60.04.230, and 60.04.261, this notice shall also be given to

the prime contractor as described in this subsection unless the potential lien claimant has contracted directly with the prime contractor. The notice may be given at any time but only protects the right to claim a lien for professional services, materials, or equipment supplied after the date which is sixty days before:

(a) Mailing the notice by certified or registered mail to the owner or reputed owner; or

(b) Delivering or serving the notice personally upon the owner or reputed owner and obtaining evidence of delivery in the form of a receipt or other acknowledgement signed by the owner or reputed owner or an affidavit of service.

....

(6) A lien authorized by this chapter shall not be enforced unless the lien claimant has complied with the applicable provisions of this section. (Emphasis added).

This notice, commonly called a “Pre-Lien Notice,” provides lien rights for materials supplied within 60 days of the notice and thereafter for a commercial project. RCW 60.03.031. Washington courts held that a notice to a lessee as the owner or reputed owner was insufficient to establish a lien against the owner of the real property. *Globe Elec. Co. v. Union Leasehold Co.*, 166 Wash. 45, 6 P.2d 394 (1931).

North Coast failed to serve a statutorily required “Notice to Owner” on the owner of the real property it later attempted to foreclose, Bothell Building Joint Venture, fka Precor Building Associates. There is no dispute, therefore, that North Coast failed to give the required notice to

the record owner of the underlying real property. It did not, and could not claim against, the underlying real property.

North Coast, however, then recorded a lien against the entire real property, and named as owners M. Bruce Anderson, Inc., The Northwestern Mutual Life Insurance Company, MBA Bothell Building, LLC and MBA Bothell Building Join Ventures fka Precor Building Associates. Ex. 53. It stated that the lien burdened the entire real property and listed the entire legal description of the underlying fee interest. *Id.* North Coast, therefore, had recorded a lien against property for which it had sent no pre-lien notice, and failed to send a copy to the record owner of the real property it had liened.

Later that year, North Coast filed its complaint that sought foreclosure of the fee interest in the underlying real property owned. SEA CON posted the lien release bond to protect the fee interest in the real property from foreclosure. It was forced into this action by the risk of foreclosure of the entire underlying parcel. The leasehold improvements were obviously worth much less than the full underlying parcel, and the need to address the matter become significantly more urgent when the overall property owner was named in a lawsuit.

If this Court allows a party to play a lien foreclosure “shell game,” it can expand or contract the scope of the lien for tactical purposes. North

Coast essentially burdened a property with a lien that it could not enforce. With the trial court's approval, it simply transferred the lien to a sub-interest, despite the clear language in its lien and lien foreclosure action. There is no certainty for property owners and contractors if lien claimants can pick and choose, and more importantly change, which property they want to foreclose solely at their own discretion without any concern for the rights of the property owners. This is true with industrial properties, warehouses, and multi-tenant retail spaces. The Legislature accorded lien rights, but requires that lien claimants provide clear and consistent notice of what property interest they claim. North Coast's failure to do so deprived the trial court of jurisdiction to decide the claim.

2. Amendment of the claim of lien was improper.

The Courts of this State have held that a claim of lien may not be amended to make it valid when the lien was not valid at the conclusion of the statutory period in RCW 60.04.091, 90 days after the claimant has ceased to furnish labor, professional services, materials, or equipment. *Lumberman's*, 89 Wn. App. at 291 (Claimant may not amend lien to remedy invalid verification); *McMullen & Co. v. Croft*, 96 Wash. 275, 164 P. 930 (1917) (Claimant may not amend a lien on property registered under the Torrens system to remedy filing lien outside the statutory period); *Flag Constr. v. Olympic Blvd. Partners*, 109 Wn. App. 286

(2001). RCW 60.04.031(6) specifically states that “[a] lien authorized by this chapter shall not be enforced unless the lien claimant has complied with the applicable provisions of this section. The applicable provisions referenced, include the requirement to serve the owner with a notice of the claimant’s right to claim a lien against the property. Therefore, since a lien is invalid if the required notice is not provided to the owner of the property, such a lien may not be amended after the expiration of the 90 period to correct the invalidity.

The Court found that North Coast “complied with all the statutory requirement necessary to file and foreclosure a construction lien against Plexus’s leasehold interest and/or the improvements under RCW Chapter 60.04.” The claim of lien, however, states that they are seeking foreclosure of the fee interest in the real property. The only reasonable conclusion from this conflict is that the Court allowed North Coast to amend its claim of lien from a lien on the fee interest to a lien on the leasehold, but failed to say so.

Such an amendment would be improper under Washington law. As shown above, North Coast failed to serve the notice of right to claim lien on the owner of the real property, as required by RCW 60.04.031. Therefore, the lien is invalid. It was clear error for the Court to allow North Coast to amend its lien to remedy that invalidity.

Even if, however, the Court did not err in allowing the amendment as a matter of law, then the Court abused its discretion in allowing the amendment. Under RCW 60.04.091(2), the Court may order the amended of a claim of lien as it would the amendment of a pleading. CR 15 governs the amendment of a pleading. It provides that leave to amendment will be freely given when justice so requires and that amendment may be allowed after trial to conform to the evidence elicited if such amendment does not prejudice the objecting party.

First, and foremost, North Coast never requested amendment of the claim of lien or its pleadings. In fact, in its January 11, 2009 Objection and Sur Reply to Defendant's Second Motion for Summary Judgment (CP 447 – 451), North Coast specifically rejected that it was seeking, or required, any such amendment. It would be improper and highly prejudicial for a Court to implicitly grant amendment only in its finding and conclusions when such amendment has never been requested, briefed or argued and had, in fact been specifically rejected.

Second, such amendment was highly prejudicial to SEA CON. Brain Yandell testified that SEA CON supplied the lien release bond because the owner of the real property considered the lien to be a violation of its lease with the owner of the leasehold interest, Plexus. CP 427 – 431. Therefore, even though SEA CON was in possession of a lien release, it

provided a lien release bond. He further testified that if the lien had been restricted to Plexus's interest in the property, then SEA CON would not have provided the bond. *Id.*

To allow North Coast to claim a lien against the entire fee title to the real property, induce SEA CON to defend and post a bond against that posture and then award victory, foreclosure of the bond and judgment against SEA CON based only on foreclosure of the leasehold interest is the definition of prejudice and the antithesis of what justice so required.

3. Prior judgment has no legal effect on jurisdiction.

RAP 2.5 allows this Court to review any decision of the Trial Court in this matter, even if not raised in the first appeal. Therefore, as the prior judgment is on review to this Court in this appeal, it is no defense to the lack of jurisdiction. As the prior judgment was also void for lack of jurisdiction, this issue always is properly before the Court.

Further, a prior judgment that cannot bind a person not a party to that judgment. The prior judgment only names SEA CON and not against National Union.¹ Therefore, regardless of the preclusive effect of the prior judgment, National Union is not and cannot be precluded from putting forth any and all valid defenses to the claims against the bond.

¹ SEA CON had withheld funds from AES that approximated the net amount of the judgment. No judgment was entered against National Union.

Additionally, the defect in North Coast's claim is that it failed to properly perfect its lien. Therefore, the lien is void and the Court lacked jurisdiction to proceed on any foreclosure of the lien. *See Schumacher Painting*, 69 Wn. App. at 700. The lack of jurisdiction is in no way impacted by the prior judgment, as it is also void for lack of jurisdiction. The lack of jurisdiction predates the complaint and all proceedings in this matter are void.

B. The Court Erred In Ordering Reformation Of The Lien Release.

The trial court did not accord sufficient weight to the principle that sophisticated commercial contracting parties who sign agreements should be bound by those agreements in the absence of fraud, misrepresentation or duress. The implications are significant if a general contractor cannot rely upon a release signed by a material supplier when the material supplier has simply chosen not to review its own records before signing the release. North Coast asks this Court to bail it out from its own lack of concern for its lien rights. In the process, it seeks to undermine the reliability of lien releases that are essential to the conduct of owners, general contractors and subcontractors in working through payment issues on construction projects.

1. This Court's scrutiny of the trial court's decision is higher because north coast was required to meet the "clear, cogent and convincing evidence," standard.

Appellate review of a trial court's findings of fact is generally limited to determining whether substantial evidence supports the findings. *In re Marriage of Schweitzer*, 132 Wn.2d 318, 329-330 (1997); see *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). However, substantial evidence supporting a trial court decision must be "highly probable" where the standard of proof in the trial court is clear, cogent, and convincing evidence. *Schweitzer*, 132 at 329 citing *In re Detention of LaBelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986), and *Douglas Northwest, Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 678, 828 P.2d 565 (1992). "Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of evidence, but only upon a certainty of the error." *Schweitzer*, 132 Wn. at 329 quoting *Slater v. Murphy*, 55 Wn.2d 892, 898, 339 P.2d 457 (1959) (emphasis in original) (quoting 3 JOHN NORTON POMEROY, EQUITY § 859a (5th ed. 1941).

The Court's decision here is suspect for a number of reasons, including the fact that the findings and conclusions are internally inconsistent. The Court found for North Coast "for either or both of the doctrines of mutual mistake or unilateral mistake." FF 23. As noted

below, however, doctrines are mutually exclusive. Mutual mistake requires that the parties had an **identical** intent, but the executed agreement does not reflect that intent. Unilateral mistake requires that only the party seeking reformation was mistaken. In fact, inequitable conduct by the defendant is required. There is no possible set of facts by which a defendant could have an intent identical to the plaintiff and then engage in some misleading or inequitable conduct. In this case, SEA CON prepared lien releases for both North Coast and AES with the same release date. AES signed the release, and so did North Coast. SEA CON's clear intent, as established in the releases, was a release for the date stated in the agreement. As such, there was neither a unilateral mistake nor a mutual mistake.

2. No unilateral mistake occurred because the parties did not reach an agreement on the release date, and because Sea Con did not engage in inequitable conduct that induced North Coast to sign the release.

If one party has no independent knowledge and accepts another's analysis and opinion, the mistake is unilateral. *Finch v. Carlton*, 84 Wn.2d 140, 524 P.2d 898 (1974); *Seattle-First National Bank v. Earl*, 17 Wn. App. 830, 836-37, 565 P.2d 1215 (1977). A party to a contract is entitled to reformation of the contract for unilateral mistake only when the other party has engaged in fraud or inequitable conduct. *Washington Mutual v.*

Hedreen, 125 Wn.2d 521, 886 P.2d 1121 (1994); *Gammel v. Diethelm*, 59 Wn.2d 504, 507, 368 P.2d 718 (1962); *Kelley v. Von Herberg*, 184 Wash. 165, 174, 50 P.2d 23 (1935); *Kaufmann v. Woodard*, 24 Wn.2d 264, 270, 163 P.2d 606 (1945). North Coast, therefore, was required to show either that SEA CON committed fraud, or that there was some legally established inequitable conduct. To prevail, North Coast must show by clear, cogent and convincing evidence (1) there was a valid prior agreement between it and SEA CON; and (2) North Coast was induced by SEA CON's fraud or inequitable conduct to mistakenly enter into a written agreement that does not reflect the prior agreement. *Gammel*, 59 Wn.2d at 508.

The Court in *Herdeen* addressed these requirements and found for the Plaintiff to reform a Master Lease, when the parties had previously entered into a commitment letter that detailed some of the terms of the Master Lease. The Defendant then drafted the Master Lease, but used terms different than those contained in the commitment letter. The Court found that because of the prior agreement in the commitment letter, the Defendant had a special relationship with the Plaintiff, such that he was required to disclose any discrepancy between the commitment letter and the Master Lease and that the Defendant engaged in inequitable conduct when he failed to do so.

Unlike in *Hedreen*, there was no prior agreement between SEA CON and North Coast as to the effective date of the release. There was no prior written agreement at all between the parties. There was one telephone conversation, the terms of which did not establish an agreement as to the release date by clear, cogent and convincing evidence. As such, there was no, and could not be any, discrepancy between any prior agreement and the release North Coast signed. Additionally, there is no basis for any special relationship between the parties requiring any disclosure and none was found by the Trial Court.² Finally, SEA CON had no knowledge that it failed to disclose to North Coast regarding the release. Therefore, under *Herdeen*, there is no basis for reformation of the lien release.

a. There was no prior agreement.

Washington law requires that the party seeking reformation establish that the parties had a prior agreement to revert to if reformation is proven. *Id.* At a minimum, the party seeking reformation must prove that the other party knew the terms proposed by the first party and the meaning thereof and leads that party reasonably to believe that he too assents to those terms. *Id.* Obviously, as with all the elements for

² North Coast did not argue and the trial court did not find that there was any special relationship with SEA CON, so that factor is not at issue.

reformation, this antecedent oral agreement must be proved by clear cogent and convincing evidence.

The Court found that Yandell was not aware that Hoy was stating the amount due through May 24, 2002 and assumed that the effective date was to be June 30, 2002. The Court found that Mr. Yandell's conclusion was "incorrect," but found no fraud or misrepresentation in his doing so. FF 23a.

The reasonableness of Yandell's conclusion that the release applied through the end of June is supported by the following undisputed facts: (1) the payment was for AES's June pay request, i.e., through the end of June, as was customary on the Project; (2) the transaction took place in July, and Yandell called North Coast for a payoff number, and was given the number inserted into the release; (3) Yandell prepared an identical release for AES's owner to sign, and before taking the lien to North Coast, AES's owner signed the release of its lien rights through June; (4) Yandell gave the release, with North Coast's own supporting documentation to a branch manager who knew of the AES account and the branch manager signed the release.

The trial court in its desire to find for North Coast regardless of the evidentiary standard, considered the antecedent agreement to be that North Coast would not sign a release for items for which it was not paid. The

record, however, fails to disclose that this was anything more than the unstated subjective intent of North Coast. In fact, Yandell asked only for a “payoff number.” There is no evidence the parties discussed whether North Coast was willing to release more or less than it had supplied. The Court essentially re-wrote the agreement for a release through a specific date with an antecedent based on a general principle with no reference to the specific date used by the Court.

Without an antecedent agreement that the release should be through May 24, 2002, there can be no basis for the Court to re-form the lien release to that date. In short, North Coast has not established, by clear and convincing evidence, that SEA CON knew that the lien release date of June 30, 2002, was contrary to some prior agreement between the parties for a May 24 date.

b. SEA CON did not act inequitably.

A party acts inequitably if it knowingly conceals a material fact from the other party and has a duty to disclose that knowledge to the other party. *Oliver v. Flow Intern. Corp.*, 137 Wn.App. 655, 664, 155 P.3d 140 (2006) citing *Hedreen*, 125 Wn.2d at 526. The inequitable conduct must induce the other party to enter into a written agreement that is, unbeknownst to them, materially different from a prior oral agreement between the parties. *See Gammel*, 59 Wn.2d at 508.

The Court did not find any inequitable conduct by SEA CON prior to the execution of the lien release by Telkamp. FF 23. The Court, specifically, did not find that SEA CON knowingly concealed any material fact from North Coast. To the contrary, Yandell gave Telkamp North Coast's own account summary with the release and check. Additionally, the Court did not find that SEA CON had any duty to disclose any information to North Coast.

The only inequitable conduct that the Court did find occurred after Telkamp signed the lien release. The Court found the Yandell's conduct in "not correcting the error once he was informed of it" was inequitable. FF 23. This is the only conduct by SEA CON or its employees that the Court found inequitable.

Washington unilateral mistake cases have never found post-agreement conduct to support a finding of reformation. Obviously, the inequitable conduct must induce the unsuspecting party mistakenly to proceed. In the absence of inequitable conduct prior to Telkamp's execution of the release, there is no basis in law for North Coast's reformation claim based on unilateral mistake.

The trial court found that negligence was not a bar to claim for unilateral mistake. FF 24. This is true but does not end the analysis of whether there was inequitable conduct proved by clear cogent and

convincing evidence. Telkamp had his own company's records and computer system, and had no conduct by Yandell that limited his ability to look at them. Negligence is not a bar as a matter of law to a claim for unilateral mistake, but a commercial party's unwillingness – indeed recklessness – in failing to take steps to ensure that a release is correct before executing it must be considered in determining whether there was inequitable conduct that proximately led to the release being signed.

Further, as noted below, North Coast knew before it negotiated the check that the release had the wrong date. Any claim of inequitable conduct by Yandell must be balanced against North Coast's own acceptance of the benefits of the release with complete knowledge of the alleged mistake.

3. No mutual mistake occurred because the parties had no identical intent and North Coast assumed the risk of mistake.

To reform a contract based on mutual mistake, one must prove, by clear and convincing evidence, the following elements: (1) both parties had an identical intention as to the terms in a proposed written document, (2) the terms in the written document which was executed is materially contrary to that identical intention, and (3) the reformation of the written document to express that identical intention will not unfairly affect innocent third parties. *Leonard v. Washington Employers, Inc.*, 77 Wn.2d

271, 279, 461 P.2d 538 (1969); *see Nationwide Mutual Fire Insurance Company v. Watson*, 120 Wn.2d 178, 187, 840 P.2d 851 (1992); *see also Beaver v. Estate of Harris*, 67 Wn.2d 621, 409 P.2d 143 (1965).

a. The parties never had identical intent on effective date of the lien release.

To prevail on its claim for mutual mistake, North Coast must show that the parties had an identical intention regarding the date of the lien release. As discussed in the Unilateral Mistake section above, there was no agreement on the terms of the release. North Coast must also show that the identical intention is contrary to the terms of the written lien release.

As the Court found, Yandell assumed that the parties were discussing the invoices through June, 30, 2002 and that this was the proper effective date for the release. Yandell subsequently wrote that date into the release based on that intention. The Court did not find any identical intention and did not find that that the terms of written release are not contrary to SEA CON's intention. Therefore, based on the facts found by the Court, reformation is not available based on mutual mistake.

b. North Coast assumed the risk of a mistake.

A party may be barred from obtaining reformation for mutual mistake if they had actual or constructive knowledge of the true facts at the time of the contract. *Denaxas v. Sandstone Court of Bellevue*,

L.L.C., 148 Wn.2d 654, 670, 63 P.3d 125 (2003). If a person exercising reasonable care could have known a fact, he or she is deemed to have had knowledge of that fact. *Id.*, citing *Noyes v. Parsons*, 104 Wn. 594, 599-600, 177 P. 651 (1919). *Black's Law Dictionary* 876 (7th ed.1999) (defining constructive knowledge).

The Washington Supreme Court has well established the rule that “a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents.” *National Bank v. Equity Investors*, 81 Wn. 2d 886, 912, 506 P.2d 20 (1973); *Skagit State Bank v. Rasmussen*, 109 Wn. 2d 377, 381, 745 P. 2d 37 (1987). A party assumes the risk of a mistake if, at the time of contracting, the party is cognizant of its limited knowledge regarding the subject matter of the mistake but treats that knowledge as sufficient. *Denny's v. Sec. Union Title Ins. Co.*, 71 Wn.App. 194, 212, 859 P.2d 619 (1993); *Nationwide Mutual*, 120 Wn.2d at 189.

This rule is especially appropriate where reformation of a release is sought. *Nationwide Mutual*, is instructive. In that case, an injured plaintiff settled with a carrier for \$24,000 and signed a release. *Id at 182-183*. The plaintiff then claimed that the release was not effective because he had thought that the release had included the cost of his medical specials in addition to the settlement amount. Our Supreme Court rejected

the Watson's arguments and enforced the release. It stated, in pertinent part, as follows:

Respondent Watson correctly acknowledges that this court has generally upheld the validity of releases. In *Beaver v. Estate of Harris*,³⁹ this court upheld a release which the plaintiff attempted to void under the theory of mutual mistake. Plaintiff signed a general release and later claimed the parties had not contemplated the true extent of his injuries. The court concluded that plaintiff had made a unilateral mistake and upheld the release. In *Metropolitan Life Ins. Co. v. Ritz*,⁴⁰ defendants executed and acknowledged before their attorney, as notary, a full release of all claims. **Defendants later claimed that the release was for wage loss and general damages only and that it made no mention of, and was not intended to include, claims for medical expenses. This court concluded that regardless of the intent of the parties, an unconditional general release of "all claims" included all claims as a matter of law.** [Emphasis added; footnotes omitted]

Id. at 187.

In *Schweitzer*, the Court also refused to apply the doctrine of mutual mistake because Mr. Schweitzer had failed to read the pertinent underlying document. 132 Wn.2d 318. Instead, the Court found Mr. Schweitzer's failure did not entitle him to relief. The Court stated in pertinent part, as follows:

A court can rescind a contract where both parties are mistaken about a basic assumption underlying the agreement. *Chemical Bank v. WPPSS*, 102 Wn.2d 874, 899, 691 P.2d 524 (1984); RESTATEMENT (SECOND) OF CONTRACTS SS 152 (1981). A mistake as to expression is a mistake as to a basic assumption of a contract. RESTATEMENT (SECOND) OF CONTRACTS

SS 155 cmt. a (1981); see also *Bergstrom v. Olson*, 39 Wn.2d 536, 542, 236 P.2d 1052 (1951) (mutual mistake found where the intention of the parties was identical at the time of agreement, but the written contract failed to express that intention). **However, the party asserting mutual mistake must prove by "clear, cogent, and convincing evidence" that both parties were mistaken. *Bergstrom*, 39 Wn.2d at 543.**

...

... Mr. Schweitzer's legal argument is theoretically correct. **However, the record does not demonstrate that both parties intended the agreement to operate only at death. If there was any mistake at all, it belonged to Mr. Schweitzer in not reading the community property agreement before signing it. The existence of a unilateral mistake will not void a contract under the theory of mutual mistake. *Beaver v. Estate of Harris*, 67 Wn.2d 621, 628, 409 P.2d 143 (1965). Furthermore, "a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents." *National Bank v. Equity Investors*, 81 Wn.2d 886, 912, 506 P.2d 20 (1973); *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 381, 745 P.2d 37 (1987). [Emphasis added]**

Id., 132 Wn.2d at 328-329

North Coast had actual knowledge of the true amounts due and the dates of the invoices at issue and therefore assumed the risk of mistake. When Telkamp signed the lien release, he did so as an authorized agent of North Coast. He was aware that this was a lien release that released North Coast's ability to recover via a lien. He determined not to read it. He was aware, however, that it stated that it was effective as of June 30, 2002. He

was aware that he did not know the balance due through June 30, 2002. He had every opportunity to confirm the balance due, to review the list of invoices attached to the check or to simply refuse to sign. Rather he chose to treat his limited information as sufficient and thereby assumed the risk of mistake. Therefore, the Court should have found that he had constructive knowledge and that there was no mutual mistake.

North Coast had complete and easily accessible knowledge of the amount due them throughout this sequence of events. They were also the only party that knew the date that internal accounting system assigned to late or current payments. North Coast, through both Hoy and Telkamp, had every opportunity to clarify both the amount and the date to Yandell and chose not to do so.

C. The Court Erred In Finding That Negligence Was Not A Defense.

As shown above, assumption of the risk of mistake is a defense to reformation based on mutual mistake. Therefore, the Court was in error to find that there was no such defense. The Court was also in error in finding that SEA CON's conduct excused North Coast's failure to exercise reasonable care. This finding is not supported by substantial evidence. There is no evidence that SEA CON discouraged Telkamp from verifying

the amounts or dates or engaged in any conduct that could be construed as leading to or otherwise excusing the failure to exercise due care.

1. North Coast waived any claim for reformation

Waiver is the intentional relinquishment of a known right. *Wagner v. Wagner*, 95 Wn.2d 94, 101 (1980) It is necessary that the person against whom waiver is claimed have intended to relinquish the right, advantage, or benefit and his action must be inconsistent with any other intent than to waive it. *Id.*; *Spokane County v. Specialty Auto & Truck Painting, Inc.*, 153 Wn.2d 238, 248 (2004) Further, to constitute a waiver, other than by express agreement, there must be unequivocal acts or conduct evincing an intent to waive. *Wagner*, 95 Wn.2d at 101 *citing Birkeland v. Corbett*, 51 Wn.2d 554, 565, 320 P.2d 635 (1958).

North Coast waived its claims for reformation when it negotiated SEA CON's check with full and clear knowledge that it disputed the validity of the lien release. North Coast was in fact aware that it disputed the lien release before negotiating the check. Telkamp called Aippersbach as soon as Yandell left his office, with the check still in his hand, to report the exchange and was told that North Coast disputed the date. Despite this knowledge, however, North Coast negotiated SEA CON's check that was given in consideration for the lien release. North Coast did not return the check and demand return of the lien release. It at

no point offered to refund the funds in exchange for a rescission of the lien release. Negotiating the check is inconsistent with any intent other than to accept the deal release as written. Therefore, the Court erred in finding that North Coast did not waive its claims

C. THE JUDGMENT IS NOT SUPPORTED BY APPLICABLE LAW OR COMPETENT EVIDENCE.

1. The Court erred in finding that Sea Con is liable for the lien claim in addition to the bond posted under RCW 60.04.161.

In an action to foreclose a mechanic's lien, a personal judgment may be rendered only against a party that is personally liable for the debt for which the lien is claimed. RCW 60.04.181(2). The right to a personal judgment generally is dependent on a contractual relation being shown between the plaintiff and the defendant against whom the judgment is sought. *Douglas Northwest*, 64 Wn. App. at 689 citing 53 Am. Jur. 2d Mechanics' Liens § 417 (1970). Thus, for a claimant to gain a personal judgment against a property owner in an action to foreclose a lien, some type of contractual relationship between the parties must be established. *Id.*, citing 53 Am. Jur. 2d, supra. Although personal judgment was proper against AES, who promised to pay for work or materials, it is improper as against SEA CON who has made no such promise. *Id.*, at 609 citing 53 Am. Jur. 2d, supra. *See also, e.g., Bershauer Phillips Construction, Inc. v.*

Seattle Sch. Dist. No. 1, 124 Wash.2d 816, 827 - 828, 881 P.2d 986 (1994)
(no recovery for contractual damages from third parties).

In this case, a lien release bond was recorded pursuant to RCW 60.04.161. That statute provides, in pertinent part, that such a bond then “steps into the shoes” of the real property, and becomes the lien claimant’s sole remedy instead of the property. *Id.* The statute states, in pertinent part, as follows:

The effect of recording of the bond shall be to release the real property described in the notice of claim of lien from the lien and any action brought to recover the amount claimed. Unless otherwise prohibited by law, if no action is commenced to recover on a lien within the time specified in RCW 60.04.141, **the surety shall be discharged from liability under the bond.** If an action is timely commenced, then on payment of any judgment entered in the account or un payment of the full amount of the bond to the holder of the judgment, whichever is less, **the surety shall be discharged from liability under the bond.** [Emphasis added]

RCW 60.04.161. The statute nowhere provides that the obligor on the bond assumes any liability for the lien claim, or that judgment may be entered against the obligor under any circumstances. Obviously, if the obligor, by posting the bond, assumed any personal liability to anyone but the surety, the Legislature would have stated that the discharge would apply to such obligor as well as the surety. The statute is clear that the surety is the only party with exposure to a lien claim, and the only one with liability for a claim against the bond.

In this matter, there is no contractual basis for any liability against SEA CON. No contract exists between North Coast and SEA CON. There is not even an allegation of a contractual relationship between the parties. Therefore, there can be no personal liability to SEA CON. The Court erred when it found that SEA CON was liable, jointly and severally with National Union, for the judgment in this matter.

2. North Coast Did Not Present Competent Evidence That It Delivered \$172,638.66 In Materials And Equipment To The Project After The Effective Date Of The Reformed Lien.

North Coast, as the Plaintiff and lien claimant, bears the burden of proving what materials and equipment delivered to the project after May 24, 2002, the value of those materials and equipment and that they were incorporated into the Project. *E.g., Standard Lumber Company v. Fields*, 29 Wn.2d 327, 344, 187 P.2d 283 (1947); *Mannington Carpets v. Hazelrigg*, 94 Wn. App. 899, 973 P.2d 1103 (1999). No evidence was present from which the Court can make any finding as to the delivery date of any of the materials and equipment.

Specifically, a North Coast witness gave uncontroverted testimony that there was no way to determine the actual date of shipment or delivery from the face of the invoices presented by North Coast to prove the amount due for any materials not delivered directly by North Coast. RP 320:1 – 321:3. The witness further testified that the “delivery date” on the

invoices, for outside deliveries, and pick tickets, not North Coast deliveries, was the date the information was entered into the North Coast computer system and not necessarily the date of delivery.

Without known when items were delivered, it is impossible for the Court to determine the value delivered after a particular date. Therefore, the judgment amount of \$172,638.66 is not and cannot be supported by substantial evidence and should be reversed.

D. THE LIEN RELEASE IS EFFECTIVE AS TO EVERYTHING NORTH COAST PROVIDED FOR THE PROJECT.

The lien release is effective and should be enforced to bar North Coast's claim. The lien release states that North Coast waives and released all liens for labor, services and equipment provided to the project though June 30, 2002. The Court has held that this does not release any of North Coast's claims for payment. This finding is simply wrong.

It is clear that what North Coast provided is covered within the terms of the release term, equipment. Equipment is not defined in the agreement. When a term is not defined, the Court should look at the common everyday meaning. Dictionary.com lists the first definition of "equipment" as follows: "anything kept, furnished, or provided for a specific purpose. *Dictionary.com Unabridged* (v. 1.1) (attached). Thesaurus.com defines "equipment" as "supplies." It lists as one of the

synonyms “material.” *Roget’s New Millennium Thesaurus* (attached). Thus “equipment” is a broad enough term to include whatever North Coast provided.

Further, On December 16, 2002, the attorneys for North Coast filed its foreclosure complaint. The complaint stated, in pertinent part, as follows:

As a result of a mutual mistake of the parties or a unilateral mistake by Plaintiff caused by Sea Con, LLC’s misrepresentation, **the Release recites that it releases all rights with respect to materials supplied through June 30, 2002. . . .** [Emphasis added]

Complaint at ¶2.3. p.5. *See also, e.g.*, Amended Complaint at ¶ 2.3, p.5.

Finally, Telkamp testified the North Coast provided what it considered to be materials and equipment. RP 218:8 – 11. Therefore, even under North Coast argument, some portion of the claim was released. There is no evidence in the record to differentiate these items. The fact that North Coast did not even attempt to make such a showing shows this argument to be grasping at straws.

It is clear that the release covered everything North Coast provided to the project. It also defies logic that a Plaintiff may prove allegations of its own complaint false at trial to the detriment of the Defendants.

E. ATTORNEY’S FEES

1. SEA CON and National Union Are Entitled to Fees.

RCW 60.04.181 provides that the Court may award the prevailing party attorney's fees and other expenses as costs, including fees and costs on appeal. SEA CON and National Union are entitled to an award of attorney's fees and costs as prevailing party on appeal upon reversal of the Court's judgment. SEA CON and National Union are further request that the Court direct the Trial Court to enter an award of attorney's fees and costs in their favor for all costs and fees incurred in this matter upon dismissal of North Coast's complaint.

2. North Coast Is Not Entitled To An Award Of Attorney's Fees Because It Failed To Comply With RCW 60.04.091.

RCW 60.04.091(f)(2) states, in pertinent part, as follows:

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** [Emphasis added]

North Coast failed to present any evidence at trial that it supplied the notice of claim of lien to the record owner, M. Bruce Anderson, Inc., within 14 days of recording. In fact, North Coast also failed to establish that its lien was, in fact, recorded, the date of such recording or that it was recorded within 90 days of the last supply of materials.

At a minimum, there is insufficient evidence to support a finding that North Coast complied with RCW 60.04.091(f)(2) and properly served the claim of lien within 14 days of recording. As the statute states, North Coast therefore forfeited any right to recover attorney's fees and costs in this action. Therefore, the Court award of attorney's fees should be reversed.

Further, if the trial court's judgment is reversed, North Coast will no longer be the prevailing party and therefore not entitled to fees in first instance.

V. CONCLUSION

For the above reasons, the judgment of the trial court should be reversed and costs and fees awarded to Appellants, and the case remanded for dismissal and determination of an award of costs and fees in favor of Appellants.

DATED this 21 day of September, 2009.

By: 
Mark A. Clausen, WSBA #15693
Clausen Law Firm, PLLC
701 Fifth Avenue, Suite 7230
Seattle, Washington 98104
(206) 223-0335
mclausen@clausenlawfirm.com
Attorneys for Appellants

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am employed by: Clausen Law Firm, PLLC.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served in the manner noted BRIEF OF APPELLANTS on the following persons:

Wm Randolph Turnbow
DCIPA Inc.
800 Willamette St Ste 600
Eugene Or 97401
 Via Hand Delivery
 Via Fax:
 Via Mail
And email

Nancy Kae Cary
Hershner Hunter
180 East 11th Avenue
PO Box 1475
Eugene Or 97440
 Via Hand Delivery
 Via Fax:
 Via Mail
And email

DATED this 9th day of September, 7/2009



Lisa Vulin

VI. APPENDIX

- 1. Findings of Facts and Conclusions of Law**
- 2. Judgment, January 9, 2009**
- 3. Judgment, December 7, 2004**

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KING COUNTY
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SEATTLE, WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

NORTH COAST ELECTRIC COMPANY, a
Washington corporation;

Plaintiff,

v.

ARIZONA ELECTRIC SERVICE, INC., a
Washington corporation; LYDIA A.
HOEFER; F. STEVEN HOEFER; NORTHSTAR
BANK, N.A., a national bank; SEATTLE
CONSTRUCTION SERVICES, INC., a
Washington corporation; SEA CON, LLC, a
Washington limited liability company; and
NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA, a foreign
corporation;

Defendants.

Case No. 02-2-35693-1SEA

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The court, after considering the evidence and arguments submitted by the parties,
issues its findings and conclusions as follows.

Findings of Fact.

1. Defendant Sea Con, LLC, fka Seattle Construction Services, Inc., ("Sea Con") is
a contractor. In 2001, it entered into a contract with Plexus Corporation to remodel and

1 construct tenant improvements for a manufacturing facility leased by Plexus Corporation.
2 Sea Con entered into a subcontract with Defendant Arizona Electric Service, Inc. ("Arizona
3 Electric") to perform most of the electrical work for that project. Plaintiff ("North Coast") is
4 a supplier of electrical materials. Arizona Electric purchased more than \$400,000 worth of
5 materials for the Plexus project from North Coast.

6 2. Both the prior judgment entered in this action and the evidence have
7 established that North Coast served both Plexus Corporation and Sea Con with a notice of
8 its right to assert a lien as required by RCW 60.04.031 and otherwise complied with all of
9 the statutory requirements necessary for it to file and foreclose a construction lien against
10 Plexus's leasehold interest and/or the improvements under RCW Chapter 60.04.

11 3. In July of 2002, Sea Con's project manager, Brian Yandell, learned that
12 Arizona Electric was experiencing problems and was behind in its payments to North
13 Coast. On July 25, 2002, Mr. Yandell called North Coast's credit manager, Gary Hoy, and
14 discussed the status of Arizona Electric's account. Mr. Hoy looked on his computer and told
15 Mr. Yandell that the total amount due for purchases Arizona Electric had made for the
16 Plexus project was more than \$300,000. At that time, Sea Con had recently received or
17 expected to receive a monthly payment from Plexus Corporation for the month of June and
18 was prepared to pay Arizona Electric less than one half of the amount due to North Coast
19 for its June draw. Because that amount was insufficient to pay North Coast in full, Mr.
20 Yandell asked Mr. Hoy how much it would take to bring Arizona Electric's account current.
21 Mr. Hoy told Mr. Yandell that a payment of \$101,417.31 would bring Arizona Electric's
22 account "current." Under North Coast's general practices and its agreement with Arizona
23 Electric, payment was not due for purchases until the 25th day of the month following the
24 month in which a purchase was made. Charges for purchases for which payments were not
25 yet due were "current." After that date, charges were "overdue" and would accrue interest.
26 Accordingly, at that time, Arizona Electric's account was "overdue" for purchases made on

1 or before May 24, 2002, and was "current" for purchases made on or after May 25, 2002.
2 Upon payment of the "overdue" amount, Arizona Electric would owe only "current" charges
3 and its account would be "current." Mr. Yandell did not inquire about those practices and
4 Mr. Hoy did not explain them. The parties' testimony conflicts as to whether they
5 specifically discussed the May 24, 2002, date in that conversation.

6 4. During the July 25, 2002, telephone conversation, Mr. Yandell and Mr. Hoy
7 entered into an agreement pursuant to which North Coast would give an appropriate
8 release if and when Sea Con paid North Coast the \$101,417.31 necessary to bring Arizona
9 Electric's account "current." The parties did not discuss the form of that release. Mr.
10 Yandell testified that he did not intend or expect that North Coast would release its claims
11 for payment except to the extent it was being paid.

12 5. There is no evidence indicating that North Coast was so desirous of
13 immediate payment that it would compromise its claims or otherwise release any claims
14 other than in return for full payment.

15 6. Mr. Yandell agreed to bring the check and a form of release to Mr. Hoy's office
16 in Seattle the following day, a Friday. Because Mr. Hoy was scheduled to be out of the office
17 that day, Mr. Hoy told Mr. Yandell that he would make arrangements for his assistant in the
18 Seattle office to handle the exchange of the check for an appropriate release.

19 7. Mr. Hoy then talked with his assistant, Ms. Aipperspach. He told her that Mr.
20 Yandell would be coming into the Seattle office to pay the overdue amount owed by
21 Arizona Electric. Mr. Hoy explained that Mr. Yandell would be bringing in a check in the
22 amount of \$101,417.31 to pay for Arizona Electric's purchases through May 24, 2002. Mr.
23 Hoy instructed Ms. Aipperspach to carefully review the form of release Mr. Yandell brought
24 in to make sure that the release did not cover any purchases after May 24, 2002. This
25 instruction was based in part on the fact that Mr. Yandell had declined to allow North Coast
26 to draft the release. She agreed to do so.

1 8. Mr. Hoy then sent Mr. Yandell a confirming fax that specifically identified (by
2 invoice number, amount, and date) the sales that made up the \$101,417.31 balance they
3 had discussed on the telephone. That list showed that the agreed upon amount covered
4 purchases only through May 24, 2002.

5 9. Mr. Yandell testified that he received and at least briefly reviewed Mr. Hoy's
6 confirming fax and list of invoices through May 24, 2002. He then had Sea Con prepare a
7 check in the amount of \$101,417.31. That check had "see attached" printed on the check
8 stub and had attached to it a copy of the list of invoices through May 24, 2002, that Mr. Hoy
9 had sent to Mr. Yandell.

10 10. Mr. Yandell also prepared a form of release on his computer. The general
11 form he chose purported to release only the right to assert a lien for claims for "labor,
12 services, equipment," a list that did not include materials. That form also contained a place
13 to insert an effective date. Mr. Yandell chose to insert an effective date of June 30, 2002,
14 even though he did not recall discussing a specific date with Mr. Hoy. He has testified he
15 merely *assumed* that June 30, 2002, was an appropriate date.

16 11. Because he ran short of time and wanted to eat lunch, Mr. Yandell drove to
17 North Coast's store in Bellevue, rather than to the credit office in Seattle. He asked to
18 whom he could talk to exchange a check for a release. The person at the counter suggested
19 that he talk with Mr. Telkamp. Mr. Yandell presented the check and release to Mr. Telkamp,
20 explaining in effect that Mr. Hoy had agreed to exchange the \$101,417.31 check for the
21 release he had prepared. Mr. Yandell did not tell Mr. Telkamp that (1) Mr. Hoy had sent
22 him a fax showing that the check was intended only to cover purchases through May 24,
23 2002, (2) he had drafted the release to be effective as of June 30, 2002, (3) he had not
24 discussed that date with Mr. Hoy, and (4) Mr. Hoy had not seen the proposed release. In
25 reliance on Mr. Yandell's representations, Mr. Telkamp signed the release and accepted the
26

1 check. Mr. Yandell testified that, under the circumstances, it was reasonable for Mr.
2 Telkamp to trust him.

3 12. That Mr. Yandell initiated the transaction at the Bellevue store rather than the
4 Seattle office was contrary to the agreement between Mr. Yandell and Mr. Hoy. Immediately
5 after signing the release, Mr. Telkamp faxed a copy of the release to Mr. Hoy's office. Ms.
6 Aipperspach reviewed the release, immediately noticed that it had an incorrect effective date,
7 and called the Bellevue store to see if Mr. Yandell was still there. She learned that he had left
8 the store shortly before that call. Ms. Aipperspach then called Mr. Yandell. She explained to
9 him that the date he put on the release was incorrect. Mr. Yandell did not deny that fact.
10 However, he declined to correct the date, stating that no one was available in his office to make a
11 decision on what to do that day. When asked by Ms. Aipperspach why he had not come to the
12 Seattle office as he had agreed to do, Mr. Yandell explained that he had simply run short of time
13 and had not wanted to drive all the way to Seattle.

14 13. Mr. Yandell's testimony did not satisfactorily explain why he did not correct the
15 mistake, and the court finds by clear, cogent, and convincing evidence that this conduct was
16 inequitable.

17 14. When Mr. Hoy returned to work the following Monday, Ms. Aipperspach
18 reported to him what had happened. Mr. Hoy attempted to contact Mr. Yandell by leaving
19 one or two voicemail messages and sending a fax explaining that the date in the release was
20 incorrect. Sea Con chose not to respond in any substantive way, and did not deny that a
21 mistake had been made.

22 15. Sea Con did not detrimentally rely on the effective date Mr. Yandell put in its
23 release prior to, or even after, being informed of the mistake.

24 16. After May 24, 2002, North Coast sold a total of \$200,649.89 worth of
25 materials to Arizona Electric for the Plexus project (calculated at the agreed price and
26

1 reasonable value of those materials). Arizona Electric failed to pay for any of those
2 materials.

3 17. North Coast brought this action seeking to (a) reform the release and (b)
4 enforce a materialman's lien pursuant to RCW Chapter 60.04 to collect the amount due.
5 Sea Con as principal and Defendant National Union Fire Insurance Company of Pittsburgh,
6 PA as surety (together "Defendants") provided a lien release bond in the amount of
7 \$316,211.12 pursuant to RCW 60.04.161. Thereafter, Plexus Corporation and some other
8 Defendants were dismissed because the claims against them were moot.

9 18. In earlier proceedings, the court awarded Sea Con summary judgment on
10 North Coast's claim to reform the release and held that it barred North Coast's claims for
11 materials purchased before July 1, 2002. The court did, however, award North Coast a final
12 judgment foreclosing its lien against the bond in the principal amount of \$28,011.38 for
13 purchases made on or after July 1, 2002, and a judgment against Arizona Electric and its
14 two principals in the approximate amount of \$270,000. (12/7/04 Judgment.)

15 19. Neither Defendants nor Arizona Electric appealed the judgments against
16 them. However, North Coast appealed the award of summary judgment to Defendants on
17 its reformation claim. The Court of Appeals reversed that judgment and remanded all
18 issues relating to that release for trial.

19 20. The trial court tried all of the remanded issues, considered all of the
20 admissible evidence presented by the parties, and considered extensive briefs and
21 arguments submitted by the parties.

22
23 **II. Conclusions of Law.**

24 21. North Coast's right to assert a lien was established in the earlier proceedings
25 and cannot now be challenged. In addition, the court alternatively concludes that North
26

1 Coast complied with the procedural requirements necessary to assert a lien under RCW
2 Chapter 60.04.

3 22. The court's conclusions of law herein are supported by findings on clear,
4 cogent, and convincing evidence.

5 23. Defendants' defense fails because North Coast is entitled to reformation of
6 the release to make it cover only the purchases for which North Coast received payment
7 (those through May 24, 2002) for either or both of the doctrines of mutual mistake or
8 unilateral mistake. More specifically, North Coast is entitled to reformation because:

9 a. Both parties agreed that North Coast would provide a release only for,
10 and to the extent of, the purchases being paid for with the \$101,417.31 check. Mr. Yandell
11 incorrectly inserted an effective date of June 30, 2002 (rather than May 24, 2002) in the
12 release he prepared, and North Coast mistakenly signed that release without recognizing
13 the error in the date.

14 b. Mr. Telkamp mistakenly signed the release believing that it correctly
15 reflected Mr. Yandell's agreement with Mr. Hoy, and he was induced to do so by Mr.
16 Yandell's (1) presenting the release to Mr. Telkamp (rather than Ms. Aipperspach, who had
17 been briefed on the agreement and was prepared to carefully review the release), (2) his
18 tacit representation to Mr. Telkamp that the form of release had been agreed to or
19 approved, and (3) his failure to disclose to Mr. Telkamp that Mr. Yandell had made the
20 release effective as of an assumed date that neither party had discussed and that was
21 inconsistent with Mr. Hoy's confirming fax.

22 c. The court finds no evidence that Mr. Yandell believed, or had any
23 reason to believe, that North Coast was so anxious to receive immediate payment that it
24 would release claims for which it had not received payment.

25 d. The court finds that Mr. Yandell's conduct in not correcting the error
26 once he was informed of it was inequitable.

1 24. The court rejects Defendant's argument that Mr. Telkamp was negligent in
2 signing the release without comparing it to North Coast's accounting records and
3 discovering Mr. Yandell's mistake because:

4 25. That argument is irrelevant because negligence in signing an agreement is
5 not a defense to a claim of reformation.

6 26. Mr. Telkamp's failure to spot the error in Sea Con's release is excused by (1)
7 Mr. Yandell's misrepresentations, (2) the fact that the release, by its terms, did not release
8 any of North Coast's claims for payment, and (3) the fact that Sea Con attached Mr. Hoy's
9 list of invoices being paid to the check as a remittance advice.

10 27. The court rejects Defendants' argument that Mr. Telkamp's depositing the
11 check constituted a waiver, since there is no evidence that North Coast knowingly and
12 intentionally waived a known right through that action. Moreover, the release form
13 prepared by Mr. Yandell, by its own terms, would have had the effect of rendering
14 acceptance of the check an acknowledgment of payment. The court also concludes that
15 depositing the check did not constitute agreement to the altered terms of the release.

16 28. The court rejects Defendants' estoppel defense for the following reasons:

17 a. Estoppel is not a defense to a reformation claim as a matter of law.

18 b. Sea Con did not rely to its detriment on the date Mr. Yandell inserted
19 in the release before being informed of that error;

20 c. Even if Sea Con had relied on that error, that would not have been
21 reasonable because Mr. Yandell knew he had not discussed that date with North Coast, did
22 not inquire about the correct date, and should have recognized that it was inconsistent
23 with Mr. Hoy's confirming fax; and

24 d. In the alternative, Sea Con's failure to take the necessary precautions
25 to make sure Arizona Electric paid North Coast and the inequitable conduct described
26

1 above, together with the public policy of protecting suppliers evidenced by RCW Chapter
2 60.04, require the court to hold that the equities favor North Coast.

3 29. None of the other defenses Defendant pled have any merit or were seriously
4 pursued at trial.

5 30. North Coast is entitled to recover its reasonable attorneys' fees incurred in
6 this dispute, including the earlier appeal, pursuant to RCW 60.04.181(3).

7 31. North Coast is entitled to an additional judgment against Defendants, up to
8 the full amount of the lien release bond, as follows:

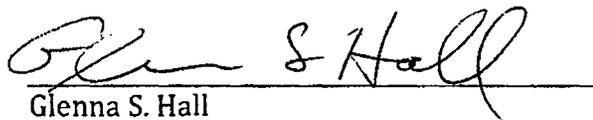
9 a. In the principal amount of \$172,638.66; plus

10 b. Interest at the rate of 12 percent per annum on the principal amount
11 in the amount of \$12,760.71 until the date of judgment plus additional interest on the
12 principal amount from December 31, 2002; plus

13 c. North Coast's costs, disbursements, and reasonable attorneys' fees
14 incurred in this proceeding; plus

15 d. Post-judgment interest as provided by law.

16
17 DATED: Sept 30, 2008.

18
19 
20 _____
21 Glenna S. Hall
22 Judge Pro Tempore
23
24
25
26

COPY

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BY JUDITH C. BOUTER
CLERK

THE HONORABLE JULIE SPECTOR
Final Judgment (Proposed)
Date of Hearing: December 7, 2004
Without Oral Argument

JUDGE'S COPY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

NORTH COAST ELECTRIC COMPANY, a
Washington corporation;

Plaintiff,

v.

ARIZONA ELECTRIC SERVICE, INC., a
Washington corporation; LYDIA A.
HOEFER; F. STEVEN HOEFER;
NORTHSTAR BANK, N.A., a national bank;
SEATTLE CONSTRUCTION SERVICES,
INC., a Washington corporation; SEA CON,
LLC, a Washington limited liability company;
and NATIONAL UNION FIRE
INSURANCE COMPANY OF
PITTSBURGH, PA, a foreign corporation;;

Defendant.

Case No. 02-2-35693-1SEA

FINAL JUDGMENT (Proposed)

JUDGMENT SUMMARY

Judgment summary pursuant to RCW 4.64.030:

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ORIGINAL

HERSHNER, HUNTER LLP
ATTORNEYS
PO Box 1475, Eugene, Oregon 97440
541-686-8811
fax 541-344-2025

COPY

Money Judgment No. 1

1. Judgment Creditor: North Coast Electric Company
2. Judgment Debtors: Arizona Electric Service, Inc.; Lydia A. Hoefler; and F. Steven Hoefler
3. Principal judgment amount: \$200,650.04
4. Accrued interest: \$10,157.37
5. Accruing interest at the rate of 18% per annum on the principal amount from August 26, 2002 until entry of judgment.
6. Sales tax: N/A
7. Attorney's fees: \$57,073.87
8. Costs and disbursements: Included in above
9. Judgment shall bear interest at 18% per annum from the date of entry.
10. Attorney for Judgment Creditor: Wm. Randolph Turnbow
Hershner Hunter, LLP

Money Judgment No. 2

1. Judgment Creditor: North Coast Electric Company
2. Judgment Debtor: Seattle Construction Service, Inc. and Sea Con, L.L.C.
3. Principal judgment amount: \$28,011.38
4. Accrued interest: \$671.75
5. Accruing interest at the rate of 12% per annum on the principal amount from December 31, 2001 until entry of judgment.
6. Sales tax: N/A
7. Attorney's fees: None
8. Costs and disbursements: None

9. Judgment shall bear interest at 12% per annum from the date of entry.
10. Attorney for Judgment Creditor: Wm. Randolph Turnbow
Hershner Hunter, LLP

Money Judgment No. 3

1. Judgment Creditor: Seattle Construction Services, Inc. & Sea Con,
L.L.C.
2. Judgment Debtor: North Coast Electric Company
3. Principal judgment amount: 0
4. Accrued interest: N/A
5. Accruing interest at the rate of 12% per annum on the principal amount
from N/A until N/A.
6. Sales tax: N/A
7. Attorney's fees: \$21,674.00
8. Costs and disbursements: \$2,794.90
9. Judgment shall bear interest at 12% per annum from the date of entry of
judgment.
10. Attorney for Judgment Creditor: Mark A. Clausen
Clausen Law Firm, PLLC

Money Judgment No. 4

1. Judgment Creditor: North Coast Electric Company
2. Judgment Debtor: North Star Bank, N.C.
3. Principal judgment amount: \$4,000.00
4. Accrued interest: N/A
5. Accruing interest at the rate of 18% per annum on the principal amount
from N/A until N/A.
6. Sales tax: N/A
7. Attorney's fees: N/A

8. Costs and disbursements: N/A
9. Judgment shall bear interest at the rate of 12% per annum from the date of entry of judgment.
10. Attorney for Judgment Creditor: Wm. Randolph Turnbow
Hershner Hunter, LLP

RECITALS

A. Plaintiff filed this action asserting, among other claims, (1) a claim to foreclose a materialman's lien on certain real property and (2) breach of contract claims against several Defendants. Defendants Seattle Construction Services, Inc. and Sea Con, LLC (together "Sea Con") obtained a bond from Defendant National Union Fire Insurance Company of Pittsburg, PA to obtain a release of Plaintiff's lien from the real property pursuant to RCW 60.04.121.

B. On or about July 14, 2003, the court granted Sea Con's motion for partial summary judgment on a portion of Plaintiff's lien claim, finding that a release was effective to bar the assertion of the lien for materials sold after June 30, 2002. To protect Plaintiff's ability to appeal that ruling, the court declined to reduce or exonerate the bond. (Order of July 14, 2003.)

C. On or about November 14, 2003, Plaintiff obtained an award of summary judgment against Defendants Arizona Electric Service, Inc.; Lydia A. Hoefler; and F. Steven Hoefler.

D. On or about October 20, 2003, Sea Con moved for an award of attorney's fees incurred in obtaining a reduction of Plaintiff's lien claim. The court granted that motion and awarded Sea Con attorney's fees, costs and disbursements in the total amount of \$24,468.90 on or about March 3, 2004.

E. The Court heard oral argument on several motions on November 8, 2004; ruling that (a) Plaintiff is not entitled to recover any attorney's fees; (b) Sea Con is not entitled to a supplemental award of attorney's fees, costs or disbursements; (c) the rate of prejudgment interest applicable to Plaintiff's Lien foreclosure claim is the statutory rate of 12% per annum;

and (d) the bond shall not be exonerated in full until this matter, including any appeals that may be filed, is fully resolved.

ORDER AND JUDGMENTS

It is hereby ORDERED AND ADJUDGED as follows.

1. The identified parties are awarded money judgments as are summarized above. The judgment entered in favor of Sea Con shall be offset against the judgment entered in favor of Plaintiff and against Sea Con to determine the net amount due from Sea Con to Plaintiff.
2. Upon payment of the net amount owing from Sea Con to Plaintiff, the bond shall be released and exonerated to the extent of the payment made, but shall be otherwise remain in full force and effect until final resolution of Plaintiff's lien claims.
3. Payment of any net amount owing from Sea Con to Plaintiff and payment of Money Judgment No. 4 above shall constitute partial payment of Money Judgment No. 1 above.
4. All claims, cross-claims, or third-party claims not resolved by the award of the money judgments summarized above are dismissed, with prejudice, and without an award of costs, disbursements or attorney's fees to any party.

DATED this 6 day of December 2004,


SUPERIOR COURT JUDGE

Plaintiff moves for entry of this judgment, as modified by the court's ruling on the remaining issues, without prejudice to or waiver of either party's rights to appeal all or any

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portion of this judgment.

DATED this 1st day of December, 2004.

HERSHNER HUNTER, LLP

/s/ Wm. Randolph Turnbow

By

Wm. Randolph Turnbow, WSB No. 19650
Trial Attorney: Wm. Randolph Turnbow
Of Attorneys for Plaintiff North Coast Electric
Company

STATE OF WASHINGTON } ss.
County of King

I, BARBARA MINER, Clerk of the Superior Court of the State of Washington, for the County of King, do hereby certify that I have compared the foregoing copy with the original instrument as the same appears on file and of record in my office, and that the same is a true and perfect transcript of said original and of the whole thereof. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Superior Court at my office at Seattle this _____ day of DEC 26 2007 20 _____

BARBARA MINER, Superior Court Clerk
By [Signature]
Deputy Clerk

RECEIVED

Judge Glenna Hall

2009 JAN -9 PM 3: 21

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

NORTH COAST ELECTRIC COMPANY, a
Washington corporation,

NO. 02-2-35693-1 SEA

Plaintiff,

JUDGMENT

v.

~~[proposed]~~

ARIZONA ELECTRIC SERVICE, INC. et al.

Defendant.

JUDGMENT SUMMARY

- 1. Judgment Creditor: North Coast Electric Company
- 2. Judgment Debtors: Seattle Construction Services, inc.; Sea Con, LLC;
National Union Fire Insurance Company of Pittsburgh,
PA
- 3. Principal Judgment Amount: \$172,638.66; plus
- 4. Taxable Costs: To be determined; plus
- 5. Attorney's Fees: To be determined; plus
- 6. Accrued Interest: \$12,760.71; plus
- 7. Accruing interest at the rate of 12% per annum on the principal amount from 12/31/02, until entry of judgment.

JUDGMENT - 1

CLAUSEN LAW FIRM PLLC
MARK A. CLAUSEN WSBA 15693
701 FIFTH AVENUE • SUITE 7230
SEATTLE, WASHINGTON 98104
(206) 223-0335 • FAX (206) 223-0337
E-Mail: mclausen@clausenlawfirm.com

1 8. Judgment shall bear interest at 12% per annum until paid.

2
3 9. Attorney for Judgment Creditor: Nancy Cary

4 10. Notwithstanding the above, the total principal amount, plus the award of costs, pre-judgment
5 interest, disbursements, post-judgment interest and attorney's fees in both judgments entered or to be
6 entered in favor of North Coast in this action shall not exceed the full \$316,211.12 (three hundred
7 sixteen thousand two hundred eleven dollars and eleven cents) amount of the lien release bond adjusted
8 downward for all payments made under the earlier judgment.

9 **IT IS HEREBY ADJUDGED** that:

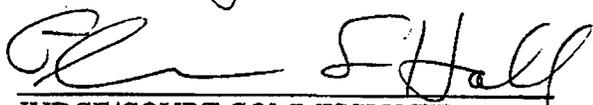
10 Plaintiff shall have judgment against Defendants Seattle Construction Services, Inc.; Sea Con, LLC and
11 National Union Fire Insurance Company of Pittsburgh, PA, jointly and severally, in the sum of the
12 following:

- 13 a. The principal amount of \$172,638.66, plus accrued interest in the amount of \$12,760.71,
14 plus accruing interest at the rate of 12% per annum on the principal amount from
15 December 31, 2002, until the date of judgment; plus
16
17 b. Plaintiff's reasonable attorney's fees in an amount to be determined; plus
18
19 c. Plaintiff's costs and disbursements in an amount to be determined; plus
20
21 d. Interest on the amounts in subparagraph a. through c., above, at the rate of 12% per
22 annum from the date of entry of judgment, until paid; plus
23
24 e. Notwithstanding the above, the total principal amount, plus the award of costs, pre-
25 judgment interest, disbursements, post-judgment interest and attorney's fees in both
judgments entered or to be entered in favor of North Coast in this action shall not exceed
the full \$316,211.12 (three hundred sixteen thousand two hundred eleven dollars and

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eleven cents) amount of the lien release bond adjusted downward for all payments made under the earlier judgment.

DONE IN OPEN COURT this 6th day of January, 2009.


JUDGE/COURT COMMISSIONER
Pro Tempore

Presented by:
CLAUSEN LAW FIRM PLLC


Mark A. Clausen, WSBA #15693
Attorneys for Sea Con LLC