

66762-9

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NO. 66762-9-1

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

LAWLESS CONSTRUCTION CORPORATION,
a Washington corporation,

Appellant,

v.

TUYEN DINH NGUYEN and MAI TUYET VAN, residents of King
County, Washington,

Respondents.

**BRIEF OF APPELLANT
(CORRECTED)**

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INTRODUCTION

While Mark Lawless was testifying under oath, Tuyen Nguyen and Mai Van (“Nguyens”) attempted to bind Lawless to a contract to repair their home. Lawless agreed to price and performance, but on his contract. The Nguyens later followed up, stating that they had “accepted” Lawless’s “offer.” Ex 4. They repeatedly threatened to sue Lawless if he did not perform. But the Nguyens reneged, changing the repairs and hiring someone else.

Lawless filed a \$3,500 lien – the cost for his time to negotiate the contract and to prepare to perform. One judge denied the Nguyens’ motion to release the lien, rejecting their argument that the lien was frivolous. Two different judges denied the Nguyens’ summary judgment motions, also rejecting their frivolous-lien argument and finding fact questions pertaining to the lien and to the parties’ agreement.

But the trial court directed a verdict for the Nguyens, found that Lawless’s lien was frivolous, and awarded the Nguyens \$87,405.60 in fees and costs – over nine times the amount in dispute. This Court should reverse these unwarranted and unjust decisions.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying Lawless's motions for summary judgment on equitable estoppel and promissory estoppel.
2. The trial court erred in directing a verdict for the Nguyens, where the Nguyens are estopped from denying the existence of the basic agreement. RP 339.
3. The trial court erred in finding that:
 - a. There was no meeting of the minds on the essential terms of the contract. CP 1024, FF 8.
 - b. That there were defects in the lien claim. CP 1025-26, FF 11, 12, 13, & 14.
 - c. That the lien claim was excessive. CP 1026, FF 15.
 - d. That Lawless did not satisfy the promissory-estoppel elements. CP 1026, FF 16.
 - e. That the Nguyens are entitled to \$82,740 in fees and \$4,665.60 in costs. CP 1026, FF 18.
4. There court erred in entering findings 9 and 10, to the extent that they suggest that Lawless did not provide professional services. CP 1024-25, FF 9, 10.
5. The trial court erred in entering judgment for the Nguyens. CP 1030-32.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the trial court erroneously direct a verdict for the Nguyens, where the Nguyens (a) elicited under oath Lawless' agreement to enter a contract to make repairs to the Nguyens' home; and (b) affirmed that they had accepted Lawless's offer; and (c) repeatedly threatened to sue Lawless if he did not enter the contract and make the repairs, such that the Nguyens should be estopped from denying the existence of a contract?

2. Did the trial court erroneously find that Lawless's lien was frivolous, where (a) Lawless timely filed his lien and provided professional services, improving the Nguyens' property; and (b) three different judges found that the lien was not frivolous and/or raised questions of material fact?

3. Must this Court reverse the fee award under ***Mahler***, where the single finding on the fee award does not apply the lodestar methodology or otherwise address the award's reasonableness?

4. Is a nearly \$87,000 fee award grossly excessive, where (a) the amount on controversy was \$9,500; (b) the award includes duplicative efforts and services never performed; and (3)

about 40% of the award is for fees incurred by an attorney who was disqualified under RPC 3.7?

STATEMENT OF THE CASE

Lawless Construction Corporation,¹ appeals from, among other things, the trial court's erroneous directed verdict. As such, the facts are stated in the light most favorable to Lawless. ***Baldwin v. Sisters of Providence in Wash., Inc.***, 112 Wn.2d 127, 132-33, 769 P.2d 298 (1989).

A. Lawless testified against the Nguyens in a legal malpractice case.

This matter arises out of Tuyen Dinh Nguyen and Mai Tuyet Van's (the Nguyens') two prior lawsuits: one against the construction company that built their house, and one against the attorney who represented them when they sued their builder. RP 21-23, 38-47; Ex 1. Lawless testified against the Nguyens in their legal malpractice case. Ex 1. He explained in detail how he would fix the construction defects in the Nguyens' home, and opined that it would cost \$26,200. Ex 1 at 17-23.

¹ Mark Lawless is the Vice-President of Lawless Construction Corp. RP 34. This brief uses "Lawless" to refer to both Mark Lawless and Lawless Construction Corp.

B. While under oath during the Nguyens' cross-examination, Lawless and the Nguyens agreed that Lawless would repair their floor and front door for \$26,200.

On cross-examination, the Nguyens' attorney, C. Nelson Berry III, exacted Lawless's agreement that he would repair the Nguyens' home for \$26,200. Ex 1 at 29. On re-cross, Berry handed Lawless a handwritten contract with three terms: (1) price; (2) performance; and (3) fees – Lawless would pay the Nguyens' attorney fees if they sued him:

I agree to repair the marble floor and the front door of the Nguyen home, particularly described in my trial testimony in King County Cause No. 07-2-04479-5 SEA, for \$22,500, plus \$3,700, plus Washington State sales tax. If Tuyen Nguyen and Mai Van are compelled to sue me to enforce this contract, I agree to pay their reasonable attorney fees and costs for doing so. Work to be commenced within 30 days of my signing this agreement.

Ex 1 at 45-46. Lawless reasonably responded "Under my contract, yes; not that one." *Id.* at 46.

Lawless subsequently agreed to sign the Nguyens' proposed contract and incorporate his other terms later, but the Nguyens declined – they wanted a binding contract. *Id.* When reminded that Lawless was under oath, Berry asked if Lawless would agree to the "material terms" they had discussed – Lawless again agreed, but under his contract. *Id.*

This back-and-forth continued as the Nguyens tested to “see if [Lawless was] for real.” *Id.* When the court finally ended these theatrics, Lawless reiterated: “I will commit to what I discussed here today using my contract terms.” *Id.* at 47.

C. The Nguyens repeatedly threatened to sue Lawless if he failed to perform, and Lawless confirmed that he would complete the job.

In early October 2008, about two weeks after the trial, Berry asked Lawless for the contract. RP 50; Exs 1, 2 & 3. Lawless and Berry exchanged letters regarding the contract terms (Exs 2-9) and Berry confirmed that the Nguyens “accepted” Lawless’s “offer” to repair their home for the price he testified to at trial. Ex 4. Berry also confirmed that the Nguyens agreed to several additional terms Lawless had proposed. Exs 6 & 8.

Shortly after the Nguyens asked Lawless for the contract, they began threatening to “pursue their legal remedies” against Lawless if he did not provide a contract. Ex 4. They repeated their threats to sue at least two more times. Exs 6 & 8. Lawless worked carefully to draft a contract that would offer him some protection against the Nguyens, whom he plainly and accurately perceived to be litigious. Exs 3, 5 & 7.

On November 7, Lawless told the Nguyens that the parties had “agreed to the final terms” and that his attorney would draft the contract as soon as he received the trial transcript. Ex 9. Lawless also sent the Nguyens a form notice that the failure to pay could result in a lien on their property. Exs 9 & 10. The Nguyens gave Lawless the trial transcript and their floor-tile selection. Ex 11.

On December 17, 2008, Lawless sent the Nguyens two complete contracts for their review and signature. Ex 12. A few days later, Lawless again confirmed – at the Nguyens’ request – that he would perform the work scheduled to start on February 15, 2009. Exs 12, 15 & 17.

D. Lawless prepared plans and scheduled a subcontractor before the Nguyens reneged on their agreement.

After the parties had “agreed to the final terms,” Lawless prepared a written plan for fixing the Nguyens’ floor and door, and specifications for the materials. RP 67; Exs 9 & 23. He calculated the wood-post sizes, consulted textbooks, and quantified the rebar needed to ensure that the soil would properly absorb the added weight. RP 67-68. These calculations ensured that he would install the correct number of footings at the proper height. RP 68.

Lawless did not hear from the Nguyens after confirming that he would perform. Exs 15, 17, 18. The Nguyens had changed their minds, electing to switch to hardwood floors. RP 84-85, 181, 183. They hired someone else. Ex 16.

When Lawless learned that the Nguyens had hired someone else, he had already scheduled a crew to complete the Nguyen job. Ex 18. Between preparing plans and specs, working with a subcontractor, and negotiating the contract, his work amounted to \$3,500. RP 81. Lawless anticipated a \$6,000 profit. RP 91-92.

E. Procedural History

1. Lawless recorded a lien on the Nguyens' property – three judges ruled that it was not frivolous and that there were disputed fact issues.

Lawless recorded a \$3,500 lien on the Nguyens' property. Ex 19. The Nguyens immediately moved to release the lien under RCW 60.04.081. CP 319-20. Judge Dean Lum denied the motion, rejecting their argument that the lien was frivolous. CP 320.²

Lawless sued for breach of contract and to foreclose the lien. CP 1-7. The parties cross-moved for summary judgment – the

² Below, the Nguyens argued that Judge Lum did not expressly find that the lien was not frivolous. CP 733 n.1. While true, this is irrelevant. Judge Lum could not have denied the Nguyens' motion to release the lien without concluding that the lien was not frivolous.

Nguyens argued that there was no contract, that Lawless did not render professional services, and that the lien was frivolous. CP 20-26. Judge Mary Roberts denied both motions, finding fact disputes regarding whether a contract existed, the terms of that contract, and whether Lawless provided professional services. CP 336-39.

After Lawless amended its complaint to add a promissory estoppel claim, the parties again cross-moved for summary judgment. CP 365-410, 469-87. The Nguyens repeated the arguments from their first summary judgment motion, adding that they made no binding promise to Lawless. CP 469-87. Like the judges before him, Judge Brian Gain denied both motions, finding disputed facts. CP 752.

2. The court disqualified the Nguyens' attorney, a material witness.

On May 25, 2010, Lawless disclosed Berry – the Nguyens' attorney – as a potential witness. Supp. CP ____, Sub #72 at 2.³ Berry continued to represent the Nguyens, forcing Lawless to move to disqualify him. CP 912-23; Supp. CP ____, Sub #72 at 2-3. Two weeks before trial, the court granted this motion, despite the

³ Along with this brief, Lawless files a supplemental designation of Clerk's Papers.

Nguyens' opposition. Supp. CP ____, Sub #74, 76. The Nguyens hired Guy Beckett, now Berry's partner, to represent them at trial. CP 926.

3. The trial court granted a motion for directed verdict, dismissing Lawless's claims.

The trial court granted the Nguyens' motion for a directed verdict at the close of Lawless's case. RP 339; CP 1022-29. The court entered the Nguyens' proposed findings of fact and conclusions of law, finding that there was no contract, that the parties did not make a binding promise, and that Lawless's lien was frivolous. CP 1022-29. The court dismissed Lawless's claims. CP 1028.

4. The trial court entered one summary finding to support a fee award to the Nguyens that is over nine times the amount in dispute.

The Nguyens sought \$82,830 in attorney fee and \$5,117.98 in costs. CP 903, 944, 992, 1003. Most of the fees were for Berry's work, though he never charged the Nguyens. RP 218. The parties argued extensively about the fees. CP 892-942, 954-65, 976-1005.

The fee request included fees incurred on duplicative and wasteful work and on unsuccessful claims, including:

- ◆ Berry's work after Lawless identified him as a witness. CP 912-23; Supp. CP ---, Sub #72 at 2.
- ◆ Berry's work after Lawless moved to disqualify him. Supp. CP ____, Sub #72 at 5-6.
- ◆ Beckett's work to "get up to speed" after Berry was disqualified. CP 926.
- ◆ Double bills for Berry's work. CP 911.
- ◆ Berry's preparation for and attendance of a deposition where he had already been disqualified. CP 917, 927.
- ◆ Beckett's time for the same deposition. CP 927; 961.
- ◆ Berry's work on the unsuccessful motion to release the lien. CP 907-08.
- ◆ Berry's work on both sets of unsuccessful summary judgment motions. CP 912-13.
- ◆ Berry's work on an unsuccessful opposition to a request for inspection. CP 913-14.
- ◆ Berry's work on his unsuccessful opposition to the motion to disqualify him. CP 915.

The court entered a single cursory finding that the Nguyens' requested attorney fees and costs were reasonable:

Applying the principles set forth in RPC 1.7, the attorney fees incurred by the Defendants in the amount of \$82,740 and costs and expenses in the amount of \$4,665.60 are reasonable and were necessarily incurred.

CP 1026, FF 18.⁴ The court reduced the Nguyens' requested attorney fees by only \$90. CP 903, 992, 1003, 1026, 1032. The total award – \$87,405.60 – is over nine times the amount in dispute.

⁴ It is unclear why the finding references RPC 1.7, which addresses conflicts.

ARGUMENTS

A. **The trial court erroneously granted the Nguyens' motion for directed verdict.**

"A trial court has no discretion in ruling on a motion for a directed verdict." *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 335, 779 P.2d 249 (1989). The court must "accept as true the nonmoving party's evidence" and must draw all inferences from the evidence in the nonmoving party's favor. *Saunders*, 113 Wn.2d at 335. The trial court must deny the motion if any competent evidence or reasonable inference might allow the trier to sustain the verdict. 113 Wn.2d at 335. This Court reviews an order directing the verdict *de novo*, taking the facts in the light most favorable to the nonmoving party. *Id.*; *Ramey v. Knorr*, 130 Wn. App. 672, 676, 124 P.3d 314 (2005).

1. **The Nguyens are estopped from denying the existence of the contract, where they coerced Lawless's agreement to enter the contract, confirmed the agreement, and repeatedly threatened to sue Lawless if he did not perform.**

Lawless should have been able to rely on the Nguyens' promise to pay him to repair their home, where they exacted Lawless' agreement to price and performance while he was under oath. If that were not enough, Lawless should have been able to rely on the Nguyens' confirmation that they has "accepted" Lawless'

“offer.” Ex 4. And if that were not enough, the Nguyens repeatedly threatened to sue Lawless if he did not perform. This is more than enough to allow a trier to find that the Nguyens should have been estopped from denying the parties’ agreement. This Court should reverse the directed verdict.

Lawless raised both equitable and promissory estoppel, arguing that the Nguyens could not deny the very contract they had exacted from him under oath. CP 365-71. Equitable estoppel is based on the rationale that a party should be held to the representations he makes (and to the positions he takes) if there would otherwise be inequitable consequences to another who has justifiably relied on the representation or position. ***Cornerstone Equipment Leasing, Inc. v. MacLeod***, 159 Wn. App. 899, 907, 247 P.3d 790 (2011). Equitable estoppel requires: “(1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement or act; (3) injury to such other party resulting from permitting the first party to contradict or repudiate such admission, statement, or act.” ***Uznay v. Bevis***, 139 Wn. App. 359, 370, 161 P.3d 1040 (2007). A party asserting equitable estoppel

must prove the elements by clear, cogent, and convincing evidence. **Cornerstone**, 159 Wn. App. at 907.

Promissory estoppel is based on the rationale that where consideration is lacking, reliance on another's promise will create an enforceable promise to prevent injustice. **Kim v. Dean**, 133 Wn. App. 338, 345, 135 P.3d 978 (2006). Promissory estoppel requires, "(1) [A] promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise." **Corey v. Pierce Cnty**, 154 Wn. App. 752, 768, 225 P.3d 367, *rev. denied*, 170 Wn.2d 1016 (2010); **Uznay**, 139 Wn. App. at 369-70. Unlike equitable estoppel, promissory estoppel need not be proven by clear, cogent, and convincing evidence, but must be proven by a preponderance of the evidence. **Corey**, 154 Wn. App. at 769-70; **Kim**, 133 Wn. App. at 348 n.1.

Under both theories, Lawless must prove that he detrimentally relied on the Nguyens' representations. **Uznay**, 139 Wn. App. at 370. He plainly did so.

When Lawless testified against the Nguyens, they attempted to enter a contract with him while he was on the witness stand. Ex 1 at 29, 45-47. They repeatedly stated that they wanted to bind Lawless to the price he testified to. *Id.* While under oath, Lawless agreed to the “material terms” – price and performance – using his contract. *Id.*

Any doubt Lawless may have had as to whether the Nguyens’ courtroom theatrics were serious was removed when they followed up two weeks after the trial, asking Lawless for the contract. RP 50, Exs 1, 2 & 3. The Nguyen’s unequivocally represented that that they had “accepted” Lawless’s “offer” to repair their home for the agreed amount. Ex 4.

The Nguyens then repeatedly threatened to sue Lawless if he did not perform. Exs 4, 6 & 8. Lawless had every reason to believe that these threats were real – he knew first hand that the Nguyens had already sued their builder and their lawyer.

Taking all facts and reasonable inferences in Lawless’s favor, the directed verdict is plainly erroneous. The Nguyens promised to pay Lawless to repair their home, and Lawless plainly changed his position, preparing a contract, plans and specifications, and taking other steps to perform. *Uznay*, 139 Wn.

App. at 370. Lawless's reliance was reasonable and the Nguyens should have expected it – they exacted his promise under oath, later confirming that they had “accepted” his “offer.” *Id.*; Ex 1 at 45-47; Exs 2-4. They repeatedly threatened to sue Lawless if he did not perform. Exs 4, 6 & 8.

The trial court ignores the Nguyens' promise to pay Lawless, their representation that they had accepted his offer, and their threats to sue, finding that the Nguyens “had no reason to expect” that Lawless would begin professional services, *i.e.*, drafting plans and specifications. CP 1026, FF 16. But the Nguyens made very clear that they wanted Lawless to start work no more than 30 days after the contract was signed. Ex 1 at 45-46. Lawless reasonably began preparing to perform since time was of the essence.

Justice demands that the Nguyens are estopped from denying the parties' agreement. *Uznay*, 139 Wn. App. at 370. But at a minimum, the directed verdict was clearly erroneous.

2. **Lawless raised material questions about the lien's validity, where he provided professional services improving the Nguyens' property and timely filed his lien.**

Since the Nguyens are estopped from denying the basic agreement, Lawless is entitled to the value of his work in equity.

Whether the lien is valid, or whether Lawless performed professional services, is irrelevant. Nonetheless, the trial court erroneously directed a verdict on these issues as well.

The findings assume that Lawless performed professional services, which include preparing plans and specifications, or performing any other architectural or engineering services to improve real property. CP 1024-25, FF 9 & 10; 1027, CL 6; RCW 60.04.011(13). Lawless and his expert provided uncontested evidence that Lawless performed professional services (RP 67-69, 102-03, 240-44):

- ◆ In anticipation of working on the Nguyens' home, Lawless developed plans, lumber specifications, materials specifications, and concrete-and-form-work specifications;
- ◆ To develop the plans and specifications, Lawless did sizing and slenderness calculations (for the wood he would use), consulting trade books;
- ◆ Lawless determined the size, length, and quantity of the materials he would need to purchase;
- ◆ Lawless researched the design;
- ◆ Lawless hired a subcontractor;
- ◆ Lawless contacted suppliers;

Lawless performed at least one of these items – hiring the subcontractor – less than 90 days before filing the lien on March 13, 2009. RP 102-03. Conferring with a subcontractor is a

professional service. RP 243-44.⁵ But the trial court concluded that Lawless filed his lien more than 90 days after preparing specifications, ignoring the other professional services he provided. Compare CP 1027-28, CL 6 with RP 102-03. Taking all facts and inferences in Lawless's favor, this conclusion simply cannot stand.

The trial court also incorrectly concluded that Lawless's lien was invalid because he did not improve the Nguyens' property. CP 1027, CL 5 (citing *DBM Consulting Engineers, Inc. v. U.S. Fid. & Guar. Co.*, 142 Wn. App. 35, 41, 170 P.3d 592 (2007)). But the professional services Lawless rendered are the improvement. RCW 60.04.011(5).

Under RCW 60.04.021, a party rendering professional services is entitled to a lien on the "improvement":

Except as provided in RCW 60.04.031, any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.

⁵ Lawless also reasonably believed that preparing the contract was a professional service. RP 102-03, 243-44. He forwarded the contract to Berry on December 19, less than 90 days before he filed lien on RP 82-83, 101-02. Lawless incorrectly stated, however, that this was the last day he provided professional services. RP 82-83. He consulted a subcontractor in mid-January, just two months before filing the lien. RP 102-03, 244.

Improvements include professional services rendered preparing for the intended construction, repair, and remodeling activities:

“Improvement” means: (a) Constructing, altering, repairing, remodeling, demolishing, clearing, grading, or filling in, of, to, or upon any real property or street or road in front of or adjoining the same; (b) planting of trees, vines, shrubs, plants, hedges, or lawns, or providing other landscaping materials on any real property; and (c) providing professional services upon real property or **in preparation for** or in conjunction with the intended activities in (a) or (b) of this subsection.

RCW 60.04.011(5) (emphasis added). In other words, the professional services rendered in preparation for construction and the like are the improvement. *Id.*

The court’s reliance on **DBM** is misplaced, as Lawless plainly argued. CP 311-12, 498 n.5. In **DBM**, this Court held that a bondholder was not required to pay the lien bond, where the lienholder prevailed in the underlying breach of contract claim, but failed to obtain a judgment on the lien. **DBM**, 142 Wn. App. at 39-40. The opinion correctly states that professional services must result in an improvement to support a lien, and provides that not all professional services give rise to a lien. 142 Wn. App. at 41. Since the parties did not litigate “the lienability of DBM’s services,” this Court held that it would have to speculate to determine whether the breach-of-contract judgment would support a lien under RCW

60.04.121. *Id.* **DBM's** correct interpretation of RCW 60.04.121 has no bearing on whether Lawless's professional services were an improvement giving rise to a lien.

In sum, Lawless raised competent evidence that could support a verdict in his favor on estoppel and/or on his lien claim. This Court should reverse the directed verdict.

B. Lawless's lien claim was not frivolous for the reasons discussed above, and in light of the three prior rulings that the lien claim was not frivolous.

As discussed above, Lawless at least raised evidence that would allow the trier to enforce his lien. As such, the lien cannot be frivolous. This is particularly so where three different judges rejected the Nguyens' claims that the lien was frivolous. This Court should reverse the trial court's incorrect finding.

A "lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts." ***Skimming v. Boxer***, 119 Wn. App. 748, 756, 82 P.3d 707 (2004). A suit must be "frivolous in its entirety." ***Skimming***, 119 Wn. App. at 756. If any claim is not frivolous, then the action is not frivolous. 119 Wn. App. at 756. A suit is not frivolous, simply because it is not meritorious. ***W.R.P. Lake Union Ltd. P'ship v. Exterior Services, Inc.***, 85 Wn. App. 744, 752, 934 P.2d 722 (1997).

In *W.R.P.*, this Court has held that a lien is frivolous under RCW 60.04.081 (providing a summary proceeding for motions to release a frivolous lien), only when it is “beyond legitimate dispute” that the lien was improperly filed:

[RCW 60.04.181] does not define frivolous. We have, however, defined frivolous in other contexts. In particular, we have held that an appeal is frivolous when it presents no debatable issues and is so devoid of merit that no possibility of reversal exists. A case is not necessarily frivolous because a party ultimately loses on a factual or legal ground. Likewise, for a lien to be frivolous, the decision that the lien was improperly filed must be clear and beyond legitimate dispute.

W.R.P., 85 Wn. App. at 752 (footnotes omitted). This definition is not materially different than the RCW 4.84.185 standard, or as this Court noted, the standard routinely applied to claims that an appeal is frivolous. Compare *Skimming*, 119 Wn. App. at 756 with *W.R.P.*, 85 Wn. App. at 752.

The trial court denied the Nguyens’ request for fees under RCW 4.84.185, rejecting the Nguyens’ argument that Lawless’s estoppel claims were frivolous. Compare CP 1028, CL 6⁶ with CP 900. The trial court nonetheless concluded that Lawless’s lien claim was frivolous, where (1) there was no enforceable contract;

⁶ The trial court erroneously numbered Conclusion of Law 10 as Conclusion of Law 6. As such, there are two Conclusions of Law numbered 6. This citation is to the second one, located at CP 1028.

(2) the professional services Lawless provided did not result in an improvement; (3) Lawless recorded his lien more than 90 days after providing professional services; and (4) the lien includes incorrect information as to when professional services began and ended. CP 1027-28, CL 3-9. It is irrelevant whether one discrete issue was frivolous, and unnecessary for the court to have engaged in this inquiry. *Skimming*, 119 Wn. App. at 756.

For the same reasons that the trial court erroneously directed a verdict on the lien claim, the court plainly erred as to its Conclusions 1 through 3:

- ◆ The Nguyens should be equitably estopped from denying the agreement. *Supra*, Argument § A 1. But even if the Nguyens are not estopped, the absence of an agreement does not make the lien frivolous, where the estoppel claims, even if unsuccessful, were not frivolous. *Compare* CP 1028, CL 6 *with* CP 900.
- ◆ Lawless provided professional services improving the Nguyens' property. *Supra*, Argument § A 2.
- ◆ Lawless filed his lien not more than 90 days after the last day on which he provided professional services. *Id.*

Even if this Court holds that the lien is invalid on one of these grounds, it could not hold that Lawless failed to raise a debatable issue. *W.R.P.*, 85 Wn. App. at 752; *supra*, Argument § A 2.

The court's fourth basis – that the lien includes the wrong dates from starting at stopping professional services – cannot alone

support the court's conclusion that the lien is frivolous. CP 1028, CL 7. Lawless used the dates for negotiating the contract, as he believed that his efforts to draft a contract were professional services. RP 82-83; CP 55. This did not harm the Nguyens – Lawless performed professional services after the stop-date in the lien. *Supra*, Argument § A 2. Even if Lawless was incorrect, there is no indication, and no finding or conclusion, that his belief was in bad faith or so unreasonable as to render the lien frivolous. CP 1028, CL 7. This single inaccuracy cannot mean that the lien had no chance of success. **W.R.P.**, 85 Wn. App. at 752.

The lien claim cannot be frivolous for the additional reason that the trial court denied the Nguyens' motion to release the lien and twice denied summary judgment. CP 319-20, 336-39, 750-53. Under RCW 60.04.081, the court will release a lien if it determines that the lien is frivolous and made without reasonable cause or is clearly excessive." **W.R.P.**, 85 Wn. App. at 749. The court will resolve fact questions to determine whether a lien is frivolous or excessive, so the statutory procedure is unlike a summary judgment proceeding and more akin to a trial by affidavit. 85 Wn. App. at 750. Judge Dean Lum denied the Nguyens' motion to

release the lien, rejecting their claim that it was frivolous or excessive. *Id.*; CP 319-20.

Judge Mary Roberts subsequently denied the Nguyens' motion for summary judgment that the lien was frivolous and excessive, finding material issues of fact as to whether a contract existed and whether Lawless provided professional services. CP 336-39. Judge Brian Gain subsequently denied the Nguyens' second motion for summary judgment that the lien was frivolous and excessive, finding the same disputed facts as Judge Roberts. CP 485, 750-53.

After directing a verdict for the Nguyens, Judge James Cayce, the fourth judge to address the Nguyens' claims, concluded that the lien "was and is frivolous." CP 1028, CL 9. But in light of the three prior rulings, it cannot possibly be said that the lien "present[ed] no debatable issues." *W.R.P.*, 85 Wn. App. at 752. The Nguyens should not be rewarded for judge shopping.

In sum, Lawless provided competent evidence that his lien was valid, surviving the Nguyens' RCW 60.04.081 motion and two rounds of summary judgment. Even if ultimately invalid, his lien was not frivolous.

C. The fee award is grossly excessive and lacks the required findings.

For all the reasons discussed above, this Court should reverse the directed verdict. If the Court does so, then it must also reverse the fee award. But if the court affirms the underlying issues, then it should reverse and remand with instructions to revise the fee award, where (1) the trial court entered only one finding that summarily awards fees without any lodestar analysis; (2) the award includes fees for a massive duplication of effort as well as for many unsuccessful claims; and (3) the award is grossly excessive in light of the amount in dispute.

In *Mahler v. Szucs*, the Supreme Court conclusively ruled that trial courts must be active in determining fee awards, must rigorously apply the lodestar methodology, and must enter findings of fact sufficient to allow appellate review. 135 Wn.2d 398, 433-35, 957 P.2d 632 (1998). The decision resulted in large part from a lengthy history of trial courts treating fee awards “as a litigation afterthought”:

In the past, we have expressed more than modest concern regarding the need of litigants and courts to rigorously adhere to the lodestar methodology. . . . Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought.

Mahler, 135 Wn.2d at 434 (emphasis in original). Despite the **Mahler** Court's clear admonitions, history repeats itself here.

The party seeking fees must prove that his fee request is reasonable. 135 Wn.2d at 434. He must do more than submit of a fee request, as our “[c]ourts should not simply accept unquestioningly fee affidavits from counsel.” *Id.* at 434-35.

Mahler directs the trial courts to use the lodestar methodology, under which a court must first determine whether the hours requested reasonable. 135 Wn.2d at 434. This “[n]ecessarily . . . requires the court to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims.” *Id.* The court must also determine whether the hourly rate billed is reasonable. *Id.* Using the lodestar methodology serves two purposes: (1) it provides the trial court with a “clear and simple formula” for determining a fee award; and (2) it gives the appellate court a clear record for review. *Id.* at 433. **Mahler** unequivocally holds that “findings of fact and conclusions of law are required to establish” an adequate record for appellate review. *Id.* at 435.

The lodestar is just the “starting point.” **Absher Const. Co. v. Kent Sch. Dist. No. 415**, 79 Wn. App. 841, 847, 917 P.2d 1086

(1995). While not dispositive, the court must consider whether the fee is excessive in light of the amount in dispute. ***Absher***, 79 Wn. App. at 847. The court's inquiry naturally turns on the unique circumstances of each individual case. ***Absher***, 79 Wn. App. at 847.

This matter involved a fee request from two different defense attorneys, Berry and Beckett, filing multiple fee affidavits. CP 892-903; 904-23, 924-28, 938-42, 991-93, 1000-04. Both parties made extensive arguments. CP 954-63, 964-65, 976-90, 1006-18. Yet the trial court entered a single finding (CP 1026, FF 18):

Applying the principles set forth in RPC 1.7, the attorney fees incurred by the Defendants in the amount of \$82,740 and costs and expenses in the amount of \$4,665.60 are reasonable and were necessarily incurred.

The court awarded the Nguyens \$82,740 in fees, just \$90 less than their total fee request. *Compare* CP 905, 928, 992, 1003, *with* CP 1026, FF 18; CP 1031. The court also awarded the Nguyens \$4,665.60 in costs. CP 1026, FF 18; CP 1031.

The trial court should have been extremely cautious to examine the fee request for duplicated effort, where Berry was disqualified from representing the Nguyens under RPC 3.7 (prohibiting a lawyer from being an advocate at trial in which he is

“likely to be a necessary witness”). Berry should have known from the outset that he was “likely to be a necessary witness.” RPC 3.7. He orchestrated the courtroom theatrics giving rise to the parties’ agreement. He (not the Nguyens) communicated with Lawless regarding the efforts to negotiate a contract. Supp. CP ____, Sub #72 at 2.

And Berry plainly had to know that he would be a witness after Lawless served him with a witness disclosure identifying him as a witness on May 25, 2010. *Id.* Yet Berry still billed \$29,640 after receiving the disclosure. CP 912-23. Berry billed almost half of this \$29,640 – \$14,250 – after Lawless moved to disqualify Berry on November 8, 2010, just three days after the parties’ mediation failed. CP 915-23; Supp. CP ____, Sub #72 at 5-6. Beckett began working on the case in December 2010. CP 926.

Since Berry was well aware that he would be a witness, he either should have withdrawn immediately, or sought the court’s leave to represent the Nguyens at trial. But he did not voluntarily withdraw, forcing Lawless to bring a motion seeking his disqualification. Supp. CP ____, Sub #72. The court granted this motion, despite Berry’s opposition. Supp. CP ____, Sub #74, 76.

There is also a massive duplication of effort and/or waste of time, where Beckett undoubtedly spent considerable time Berry would not have had to spend to “get up to speed.” CP 926. For example, Beckett’s block-bills include 28 hours – \$11,220 – for things like conferring with Berry, and reviewing pleadings, depositions and exhibits. CP 926-27. Much of this could have been avoided if Berry had withdrawn earlier. But the trial court did nothing to reduce the fee request to account for the duplicative and wasted effort. **Mahler**, 135 Wn.2d at 434; **Absher**, 79 Wn. App. at 847.

There are more problems too. On December 13, 2010, Berry billed \$1,020 for preparing and attending Herring’s deposition, even though he had already been disqualified and did not take the deposition. CP 917, 961. Beckett took the deposition and billed for it too. CP 927, 961. Herring’s deposition was not used at trial and was never offered into evidence. CP 961. Berry agreed that the trial court should reduce the fee award “if” his work was duplicative. CP 1001. It is plainly duplicative for two attorneys to bill for taking the same irrelevant deposition – there is no “if.” But the trial court did not reduce the fee request to account for this

obvious duplication. *Compare* CP 905, 928, 992, 1003 *with* CP 1026, FF 18; CP 1031.

Berry double billed for the same work on November 30, 2009. CP 911. He admitted as much and asked the court to reduce the fee request. CP 1000. This appears to be the only reduction the court made – \$90 – though it is impossible to tell as the court does not explain its fee award. *Compare* CP 905, 928, 992, 1003, *with* CP 1026, FF 18; CP 1031. In fact, it is impossible to tell whether the court was even aware that it awarded less than the entire fee request. CP 1026, FF 18.

And the trial court also awarded \$20,280 for work the Nguyens did not prevail on:

- ◆ From March 25, 2009 through May 27, 2009, Berry billed \$4,080 on the Nguyens' unsuccessful efforts to have the lien deemed frivolous and released under RCW 60.04.181. CP 907-08.
- ◆ From September 2, 2009 through December 3, 2009, Berry billed \$7,200 for an unsuccessful summary judgment motion and an unsuccessful motion for reconsideration. CP 909-11.
- ◆ On July 26, 2010 through August 26, 2010, Berry billed \$6,450 for a second unsuccessful summary judgment motion. CP 912-13.
- ◆ On September 20, 2010, Berry billed \$1,890 for an unsuccessful opposition to a request for inspection. CP 913.
- ◆ On November 12, 2010, Berry billed \$660 for his response to the motion to disqualify him, which the Nguyens lost. CP 915.

The trial court should reduce a fee award for unsuccessful “theories or claims.” **Mahler**, 125 Wn.2d at 434. There can be little doubt that the Nguyens’ unsuccessful RCW 60.04.081 motion to release the lien – a separate cause of action in which the Nguyens were the plaintiffs, filed under a separate cause number – is an unsuccessful “claim.” CP 319-20. The trial court should have excluded this \$4,080. **Mahler**, 125 Wn.2d at 434.

The unsuccessful oppositions to the motion for an inspection and the motion to disqualify are also “theories or claims.” *Id.* Again, however, the trial court apparently did not even consider reducing the fee award by these amounts.

Although the summary judgment motions are not independent theories or claims, the court has discretion to reduce a fee award for time spent on unsuccessful motions if the time spent was a “wasted effort” or is otherwise “unproductive.” **Chuong Van Pham v. Seattle City Light**, 159 Wn.2d 527, 151 P.3d 976 (2007). The **Chuong** Court affirmed a trial court order reducing a fee request for an unsuccessful cross-motion for summary judgment in the federal district court, an unsuccessful motion on the merits in the appellate court, an unsuccessful request for a multiplier, and – among other things – time spent working on appeals and

settlement discussions. 159 Wn.2d at 539. These things were unproductive and were not sufficiently related to the successful claim. *Id.* at 539-40.

If the trial court had given proper consideration to the fee request and to Lawless's detailed opposition, it might too have found that spending \$13,650 pursuing two summary judgment motions – despite having already lost the motion to release the lien – was unproductive, wasteful, and overly litigious. These motions raise the same issues and were denied for the same reasons. CP 15-27, 336-39, 469-87, 750-53.

And if the trial court had really considered the fee request, it might too have concluded that the fees were simply too high – over nine times the amount in dispute. ***Mahler*** 135 Wn.2d at 433. This is particularly the case given the duplicated and wasted effort resulting from Berry's failure to timely withdraw, and the significant amount spent on unsuccessful and repetitive motions. But there is no indication whatsoever that the trial court exercised its discretion. Rather, this fee award is the epitome of a "litigation afterthought." ***Mahler***, 135 Wn.2d at 434.

In short, ***Mahler*** requires findings sufficient to support the fee award. Where fees are contested at every level – the hourly

rates, the hours billed, the total fees incurred – it cannot be sufficient for the trial court to enter a single finding summarily concluding that reasonable fees should be awarded. This Court should reverse and remand with instructions to significantly reduce the fee award.

CONCLUSION

This matter arose out of the Nguyens' courtroom theatrics. They exacted Lawless's agreement under oath, confirmed that they had accepted his offer, and repeatedly threatened to sue him if he did not perform. Justice requires that the Nguyens could not then deny the parties' agreement because they changed their plans and hired someone else. The trial court's findings on the lien and fees are as unpersuasive as its decision to direct a verdict. This Court should affirm.

RESPECTFULLY SUBMITTED this 10th day of August 2011.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANT** postage prepaid, via U.S. mail on the 10th day of August 2011, to the following counsel of record at the following addresses:

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