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No. 66878-1-I

COURT OF APPEALS
DIVISION 1
OF THE STATE OF WASHINGTON

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GASTON BROTHERS EXCAVATING, INC.,

Appellants,

v.

S.D. DEACON CORPORATION OF WASHINGTON

Respondents.

BRIEF OF APPELLANT

Lawrence B. Linville, WSBA # 6401
Linville Law Firm, PLLC
Attorney for Appellant
800 5th Avenue, Suite 3850
Seattle, WA 98104
(206) 515-0640

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I. INTRODUCTION

This appeal involves the review of a trial court's limitation of attorneys' fees awarded to Gaston, and the trial court's denial of interest on the interest on the Commissioner's award of appellate fees awarded to Gaston.

II. ASSIGNMENTS OF ERROR

ASSIGNMENTS OF ERROR:

Assignment of Error No. 1: Error is assigned to the trial court's restriction of attorneys' fees awarded to Gaston under RCW 60.04.081 to only those fees incurred by Gaston Brothers Excavating, Inc. ("Gaston") in opposing S.D. Deacon Corporation of Washington's ("Deacon") Petition to Show Cause in the trial court to dismiss Gaston's lien pursuant to RCW 60.04.081, but refusal to award attorneys' fees or costs is incurred by Gaston for the further trial court proceedings to reinstate Gaston's lien following remand.

Assignment of Error No. 2: Error is assigned to the trial court's failure to award Gaston its attorneys' fees pursuant to RCW 60.04.081 incurred prior to the date that Deacon filed its Petition to Show Cause (03/06/07) while awarding Deacon's attorneys fees and costs incurred prior to the date Deacon filed its Petition to Show Cause (03/06/07).

Assignment of Error No. 3: Error is assigned to the trial court's failure to award Gaston its attorney's fees incurred prior to 03/06/07 and subsequent to 04/22/07 pursuant to the Subcontract executed between Deacon and Gaston.

Assignment of Error No. 4: Error is assigned to the trial court's failure to award interest on the appellate fees and costs awarded to Gaston by the Court of Appeals from the date of the Decision and award by the Court of Appeals.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

Issues pertaining to Assignment of Error No.'s 1-3: Did the trial court err by restricting its award of attorneys' fees to Gaston to only those fees incurred during the a window period commencing upon Gaston's receipt of Deacon's Petition for Order to Show Cause (03/08/08) and terminating on Gaston's filing of its Response to Deacon's Application for Attorneys' Fees on 04/22/08.

Issue pertaining to Assignment of Error No. 4: Did the trial court err in denying Gaston interest on the Court Commissioner's award of appellate attorneys' fees to Gaston.

III. STATEMENT OF THE CASE

Gaston recorded a lien against property in north Seattle because of contractual debt owed by general contractor Deacon (CP 53). Deacon contracted with Gaston to prepare the ground for a fitness center (CP 53). After Gaston worked for several months, a contractual dispute arose regarding the prices quoted by Gaston in the Subcontract (CP 53). The parties were unable to resolve the contractual dispute and Gaston recorded a lien on the subject property (CP 55) (CP 101-102). Deacon then filed a motion pursuant to RCW 60.04.081 to dismiss Gaston's lien on the basis that said lien was frivolous and recorded without reasonable cause because Gaston had already been fully paid all contractual amounts and there was no more money owed by Deacon (CP 103-111). The trial court granted Deacon's motion, dismissed Gaston's lien and awarded Deacon attorneys' fees and costs pursuant to RCW 60.04.081 (CP 112-114). Gaston appealed (CP 257-259). The Court of Appeals reversed the trial court's decision, directed the trial court to reinstate Gaston's lien, awarded Gaston fees and costs incurred on appeal, and ordered the trial court to award fees and costs to Gaston for the earlier trial court proceedings (CP 129-140).

Upon remand, Gaston filed a Motion for (1) Order Vacating Previous Order Dismissing Lien, (2) Order Reinstating Lien, (3) Order

Tolling of Limitation Period, (4) Order Vacating Earlier Court Order Awarding Fees and Costs, (5) Order of Notice to Third Parties, (6) Order Directing Recording of Order Reinstating Lien, and (7) New Case Schedule (CP 90-168). Deacon opposed said motion and filed a response entitled Applicant's Opposition to Gaston Brothers Excavating, Inc.'s Motion for Order Vacating Previous Order Dismissing Lien, Order Reinstating Lien, Order Tolling of Limitation Period, Order Vacating Earlier Court Order Awarding Fees and Costs, Order of Notice to Third Parties, Order Directing Recording of Order Reinstating Lien and New Case Schedule **and Request for Terms** (CP 169-208). Deacon's filing in opposition contested the Court of Appeals' authority to order reinstatement of Gaston's lien (CP 174-177). Deacon asserted that the Court of Appeals lacked authority to order reinstatement of Gaston's lien because Gaston's lien had expired without commencement of a foreclosure action as required by RCW 60.04.141 (CP 172-173). Deacon vigorously argued to the trial court that the Court of Appeals lacked supporting precedent to order reinstatement of Gaston's lien, and that Gaston's legal counsel should be sanctioned with monetary penalties for attempting to get Gaston's lien reinstated (CP 177-179). Deacon aggressively opposed any action of the trial court to reinstate Gaston's lien claiming that the Court of Appeals' Mandate ordering reinstatement of Gaston's lien was invalid,

contrary to law, and could not lawfully be carried out by the trial court (CP 175). Gaston carefully prepared, and timely filed and served its reply (CP 209-214). Eventually, the trial court entered an Order Vacating Previous Order Dismissing Lien, Order Reinstating Lien, Order Tolling of Limitation Period, Order Vacating Earlier Court Order Awarding Fees and Costs, Order of Notice to Third Parties, Order Directing Recording of Order Reinstating Lien and New Case Schedule, and denied Deacon's motion for terms against Gaston and its legal counsel (CP 215-219). The Court also entered an Order Vacating (the earlier) Form of Judgment entered in favor of Deacon (CP 557-558).

Even so, Deacon persisted and reasserted its position that the Court of Appeals lacked legal authority to order reinstatement of Gaston's lien (CP 440-457). Deacon filed a Motion for Reconsideration in Part of Order Vacating Previous Order Dismissing Lien, Order Reinstating Lien, Order Tolling of Limitation Period, Order Vacating Earlier Court Order Awarding Fees and Costs, Order of Notice to Third Parties, Order Directing Recording of Order Reinstating Lien and New Case Schedule (CP 440-457). Again, Deacon argued that the Court of Appeals could not order reinstatement of Gaston's lien, and that the trial court should and must disregard the Court of Appeals decision (CP 447).

The trial court denied Deacon's Motion for Reconsideration and eventually reinstated Gaston's lien (CP 561-563). This work on remand took Gaston over three months and substantial attorneys' fees to complete due in significant part to the repeated oppositions and objections raised by Deacon upon remand when Gaston tried to get Gaston's lien reinstated by the trial court. The work was reasonable and necessary to overcome Deacon's objections to reinstatement of Gaston's lien, and to change the public records to properly reflect the reinstatement of Gaston's lien and vacation of the trial court's earlier orders.

This is what the trial court accomplished upon remand for the purpose of restoring the public records in the King County Clerk's Office and Recording Office to the *status quo ante*.

1. Vacated the trial court's earlier Order Dismissing Gaston's Lien (CP 215-219)
2. Reinstated Gaston's lien (CP 215-219)
3. Tolloed the limitation eight (8) month period (RCW 60.04.141) (CP 215-219)
4. Vacated the trial court's earlier Order awarding fees and costs to Deacon (CP 215-219)

5. Ordered notice to third parties regarding reinstatement of Gaston's lien (CP 215-219)
6. Directed Deacon to publicly record the trial court's Order Reinstating Lien (CP 215-219)
7. Vacated Deacon's earlier Form of Judgment in favor of Deacon (CP 557-558)
8. Issued a new Form of Judgment in favor of Gaston (CP 559-560)

Once the trial court reinstated Gaston's lien and entered further orders conforming the records in the King County Superior Court Clerk's Office and the King County Recording Office to the Court of Appeals' Decision and Mandate, Gaston then filed a Motion for Attorneys' Fees, Costs and Interest to recover the attorneys' fees and costs incurred by Gaston to achieve the above-referenced implementation of the Court of Appeals' Decision and Mandate and restore the records to the *status quo ante* (CP 274-439).

Gaston requested the trial court to award Gaston its fees incurred in the amount of \$30,639.00, costs in the amount of \$30.80 and interest in the amount of \$1,100.85 which accrued from the date of the Court of Appeals' award of appellate attorneys' fees and costs to Gaston, and Deacon's

payment of those fees to Gaston (allowing 10 days grace for payment) (CP 274). Gaston's motion was based on (1) RCW 60.04.081, and (2) Article 26 of the Standard Form Subcontract Agreement which was mutually executed by the parties on July 5, 2007 (CP 285-289). Both of these bases provided for recovery of attorneys' fees and costs by the prevailing party, which was Gaston (CP 281)(CP 289).

Gaston's Motion for Attorneys' Fees, Costs and Interest consisted of three parts:

(1) Gaston requested an award of attorneys' fees and costs in the amount of \$1,323.00 for fees and costs incurred by Gaston to collect from Deacon those attorneys' fees and costs which were awarded by the Court of Appeals to Gaston for the appellate proceedings (CP 367-414) (CP 375).

(2) Gaston requested an award of attorneys' fees and costs in the amount of \$8,152.00 for fees and costs incurred by Gaston in the initial trial court proceedings on Deacon's Motion to Appear and Show Cause (CP 367-414)(CP 375).

(3) Gaston requested an award of attorneys' fees and costs in the amount of \$21,164.00 incurred by Gaston following

remand to reinstate Gaston's lien and correct the public records (CP 421)(CP 415-439).

Specifically, this post mandate work consisted of the following:

1. Prepare, serve, file, present and enter an Order Vacating Previous Order Dismissing Lien (CP 90-168)(CP 215-219)
2. Prepare, serve, file, present and enter an Order Reinstating Lien (CP 90-168)(CP 215-219)
3. Prepare, serve, file, present and enter an Order Tolling of Limitation Period (CP 90-168)(CP 215-219)
4. Prepare, serve, file, present and enter an Order Vacating Earlier Court Order Awarding Fees and Costs (CP 90-168)(CP 215-219)
5. Prepare, serve, file, present and enter an Order Directing Notice to Third Parties (CP 90-168)(CP 215-219)
6. Prepare, serve, file, present and enter an Order Directing Recording of Reinstating Lien (CP 90-168)(CP 215-219)
7. Prepare, serve, file, present and enter a Declaration of Lawrence B. Linville in Support of Gaston Brothers Excavating, Inc.'s Motion for Order Vacating Previous Order Dismissing Lien, Order Reinstating Lien, Order Tolling of Limitation Period, Order Vacating Earlier Court Order Awarding Fees and Costs, Order for Notice to Third Parties, Order Directing Recording of Order

Reinstating Lien and New Case Schedule (CP 415-457)

8. Prepare, serve, file, present and enter a Memorandum in Support of Gaston Brothers Excavating, Inc.'s Motion for Order Vacating Previous Order Dismissing Lien, Order Reinstating Lien, Order Tolling of Limitation Period, Order Vacating Earlier Court Order Awarding Fees and Costs, Order for Notice to Third Parties, Order Directing Recording of Order Reinstating Lien and New Case Schedule (CP 337-366)
9. Prepare, serve, file, present and enter Gaston Brothers Excavating, Inc.'s Motion for Attorney Fees, Costs and Interest (CP 274-439)
10. Prepare, serve, file, present and enter a Declaration of Sage A. Linn in Support of Gaston Brothers Excavating, Inc.'s Motion for Attorney Fees, Costs and Interest (CP 367-414)
11. Prepare, serve, file, present and enter a Declaration of Lawrence B. Linville in Support of Gaston Brothers Excavating, Inc.'s Motion for Attorney Fees, Costs and Interest (CP 415-439)
12. Prepare, serve, file, present and enter Gaston Brothers Excavating, Inc.'s Memorandum in Support of Motion for Attorney Fees, Costs and Interest (CP 337-366)
13. Prepare, serve, file, present and enter an Order Awarding

Attorney Fees, Costs and Interest (CP 559-560)(CP 564-566)

14. Prepare, serve, file, present and enter a Motion to Vacate Form of Judgment and enter New Form of Judgment (CP 220-271)
15. Prepare, serve, file, present and enter a Declaration of Gary Gaston in Support of Motion to Vacate Form Judgment and enter New Form of Judgment (CP 272-273)
16. Prepare, serve, file, present and enter an Order Vacating Form of Judgment in favor of Deacon (CP 557-558) and,
17. Prepare, serve, file, present and enter a Form of Judgment in favor of Gaston (CP 559-560).

On February 28, 2011, the trial court entered an Order Granting In Part and Denying in Part Gaston Brothers Excavating, Inc.'s Motion for Award of Attorneys' Fees, Costs and Interest and entered following findings and award (CP 564-566):

1. Under the Mandate received from Division I of the Washington State Court of Appeals, Respondent Gaston Brothers Excavating, Inc ("Gaston") is entitled under RCW 60.04.081 for an award of its reasonable attorneys' fees and statutory costs for the period between March 6, 2008 and April 22, 2008, the time period that comprised its trial court defense of Applicant S.D. Deacon's prosecution at the trial

court of its RCW 60.04.081 Petition and Order to Show Cause (CP 565); and

2. Gaston's Motion for Award of Attorneys' Fees, Costs and Interest provides no information regarding any costs it purports to request (CP 565); and
3. Washington authority does not permit the award of interest on a previous award of attorney's fees (CP 565); and

Therefore it is ORDERED, ADJUDGED and DECREED that:

1. Gaston's Motion for Award of Attorneys' Fees is GRANTED, and it is awarded a total of \$7,608.00 in such fees, to be paid by Respondent S.D. Deacon; and
2. Gaston's Motion for Award of costs is DENIED; and
3. Gaston's Motion for Award of Interest is DENIED (CP 565)

IV. SUMMARY OF ARGUMENT

The trial court erred in restricting Gaston's award of attorneys' fees to only those fees incurred during a window period commencing upon

Gaston's receipt of Deacon's Petition for Order to Show Cause (03/08/08) and terminating on Gaston's filing of its response to Deacon's application for attorneys' fees on 04/22/08. The trial court further erred in denying Gaston interest on the Court Commissioner's award of appellate attorneys' fees to Gaston.

V. ARGUMENT

Assignment of Error No. 1: Error is assigned to the trial court's restriction of attorneys' fees awarded to Gaston under RCW 60.04.081 to only those fees incurred by Gaston Brothers Excavating, Inc. ("Gaston") in opposing S.D. Deacon Corporation of Washington's ("Deacon") Petition to Show Cause in the trial court to dismiss Gaston's lien pursuant to RCW 60.04.081, but refusal to award attorneys' fees or costs is owned by Gaston for the further trial court proceedings to reinstate Gaston's lien following remand.

Assignment of Error No. 2: Error is assigned to the trial court's failure to award Gaston its attorneys' fees pursuant to RCW 60.04.081 incurred prior to the date that Deacon filed its Petition to Show Cause (03/06/08) while awarding Deacon's attorneys fees and costs incurred prior to the date Deacon filed its Petition to Show Cause (03/06/08).

Gaston is entitled to an award of its reasonable attorneys' fees as the prevailing party under RCW 60.04.081(4) which states in pertinent part as follows:

If the Court determines that the lien is not frivolous and was made with reasonable cause, and is not clearly excessive, the Court shall issue an order so stating and awarding costs and reasonable attorneys' fees to the lien claimant to be paid by the applicant.

The trial court did not determine "that the lien is not frivolous" until the trial ultimately entered its Order Reinstating Gaston's Lien pursuant to the Court of Appeals' Decision at 150 Wn.App. 87 (2009). Up until the trial court's reinstatement of Gaston's lien on January 3, 2011, the trial court's determination was that Gaston's lien *was* frivolous because Gaston was not contractually due any further payment from Deacon. Even after remand, Deacon waged an intense contest in the trial court regarding the authority of either or both the Court of Appeals and/or the trial court to reinstate Gaston's lien. The show cause hearing did not simply end on 03/18/08 with a trial court decision that Gaston's lien was not frivolous: just the opposite. The show cause hearing ended on 03/18/08, with the trial court determining that Gaston's lien *was* frivolous (CP 112-114). The matter was then appealed to

Division I of the Court of Appeals (CP 48-50). It was only following Gaston's appeal and the Court of Appeals' remand that the trial court "determined" that Gaston's lien was *not* frivolous. The trial court did not make the "not frivolous" determination until after remand on January 3, 2011 (CP 215-219).

Moreover, the Court of Appeals awarded appellate fees and costs to Gaston pursuant to RCW 60.04.081(4) (CP 140). If RCW 60.04.081(4) limited costs to a certain window period ending on the date of the show cause hearing, the Court of Appeals would have had no authority to award its attorneys' fees and costs, since RCW 60.04.081 is silent regarding the award of attorneys' fees and costs on appeal. RCW 60.04.081(4) provides no such window period for the award of reasonable fees and costs, only stating that reasonable attorneys' fees shall be awarded, which is what the Court of Appeals awarded.

The proceedings on remand were a continuation or conclusion of the initial proceedings pursuant to RCW 60.04.081. On remand, no new pleading was filed by either party. The matter proceeded on remand to the trial court under the same caption and same cause number as the original motion to appear and show cause that was initially filed by Deacon on 03/08/08. The trial court proceeded on remand to eventually enter a series of orders to

achieve compliance with the Court of Appeals' decision and mandate. On remand, all of these orders were contested by Deacon. The trial court reviewed and entered each motion and order was submitted by Gaston in order to complete the trial court proceedings under RCW 60.04.081 and achieve compliance with the Court of Appeals' Decision and implement the Court of Appeals' Mandate. The trial court erred in denying Gaston reasonable attorneys' fees involved in the trial court proceedings after remand.

Gaston's attorneys' fees after remand were both necessary and reasonable. Each of Gaston's motions was presented to the trial court. These motions and requests for relief were decided by the trial court on January 03, 2011 over the aggressive opposition of Deacon and its counsel of record. The trial court proceeded to enter an Order Vacating Previous Order Dismissing Lien, Order Reinstating Lien, Order Tolling of Limitation Period, Order Vacating Earlier Court Order Awarding Fees and Costs, Order for Notice to Third Parties, Order Directing Recording of Order Reinstating Lien and New Case Schedule.

The trial court would *never* have entered any or each of these orders presented by Gaston unless each *one* of these orders was necessary to achieve compliance with the Court of Appeals' decision and mandate and to further achieve the *status quo ante* of the public records. The trial court's orders of January 03, 2011 were reasonable, necessary, and fully justified on the basis of

law and the specific facts of this case. That is why they were entered by the trial court over vehement objection of Deacon and its counsel. Gaston's counsel's work on remand was not pointless or wasteful. These orders were reasonable and necessary to restore the record *status quo ante* in both the King County Clerk's Office and the King County Recorder's Office. That is why they were prepared by Gaston and presented to the trial court for entry on the record. That is why the trial court approved and entered each of the orders upon remand over the objections of Deacon. Significantly, Deacon's objections to the orders presented by Gaston were based on Deacon's contention that said orders were *unnecessary* (CP 440-473)(CP 447-448).

The issue on this appeal is whether the trial court erred in limiting fees to a narrow 47-day window period from 03/06/07 (the date that Gaston was served with Deacon's Motion to Appear and Show Cause) to 04/22/07 (the date that Gaston served and filed its Motion for Reconsideration in the trial court). Firstly, Gaston respectfully submits that nothing in RCW 60.04.081 indicates a legislative intent to restrict attorneys' fees and costs awarded to a prevailing party, other than such fees and costs shall be reasonable. Certainly, nothing in RCW 60.04.081(4) indicates a legislative intent to limit a prevailing party's attorneys' fees to an unreasonably restrictive window period: in this case the 47 days between 03/06/07 and 4/22/07.

Secondly, even if such a restriction could be read into RCW 60.04.081(4), the trial court arbitrarily applied the restriction to Gaston but not to Deacon when the trial court made its initial award of attorneys' fees to Deacon. The trial court awarded Deacon its *entire* request for attorneys' fees and costs from 09/11/07 to 03/18/08 as the prevailing party pursuant to RCW 60.04.081, well outside the window period which the trial court imposed upon Gaston (CP 32-439). Deacon's fees and costs included significant attorneys' fees and costs commencing 09/11/07 (CP 432), which had no relevance to Deacon's filing of its Petition to Show Cause. The trial court awarded attorneys' fees and costs to Deacon for meetings, file reviews, conferences, etc. which occurred long before Deacon filed its Motion to Appear and Show Cause on 03/08/08 (CP 432-439), and which was also occurred long before Gaston even recorded its lien on 10/11/07 (CP 101-102). Thus, the trial court awarded Deacon its *entire* attorneys' fees and costs for not having the slightest relevance to Deacon's filing of its Show Cause Petition on 03/08/08. Yet, the trial court arbitrarily and without any explanation or acknowledgment of the disparity in treatment, limited Gaston's attorneys' fees to only the initial 47 days of trial court proceedings, awarded nothing for Gaston's work after remand, and awarded Gaston nothing for Gaston's work before Deacon filed its Petition to Appear and Show Cause. There is no congruency or consistency in the

trial court's limitation of Gaston's attorneys' fees to a narrow window period, but not similarly limiting Deacon's fees and costs to any window period; and, that is incorrectly assuming that such a restricted window period is even suggested by RCW 60.04.081(4). More to the legal point, there is no reason, and no reason was suggested by the trial court, nor findings entered by the trial court as to why one party (Deacon) was awarded full attorneys' fees and costs without regard to any window period, but why the trial court decided to impose such a window period upon Gaston.

Thirdly, it is respectfully urged that nothing in RCW 60.04.081 indicates a legislative intent to limit a trial court's authority to award attorneys' fees and costs pursuant to RCW 60.08.081 to a limited period commencing upon the date of filing of a petition for order to show appear and show cause, and the date of a trial court's determination of whether the subject lien is frivolous. The statute, RCW 60.04.081(4) simply provides for an award of "costs and reasonable attorneys' fees". Here, the trial court proceedings upon remand were significantly more protracted and complex than the initial trial court proceedings with regard to determination of Gaston's lien. Here, in this case, Gaston was required to unwind a prior and unsustainable decision of the trial court. In addition, given the fact that the title to real property was involved, Gaston prepared and presented

appropriate orders to the trial court to correct the King County Superior Court records as well as the King County Recording Office records. Gaston's efforts to reinstate its lien were vigorously opposed by Deacon. Nonetheless, the trial court entered all of the orders prepared and submitted by Gaston over the aggressive challenges and opposition presented by Deacon. Those orders were all reasonable and necessary in order to restore the *status quo ante*. The trial court would not have signed and entered these orders on the public record if the orders were not reasonable and necessary. Again, these orders consisted of the following.

1. Defend against Deacon's motion to set aside Gaston's lien on the basis of being frivolous
2. Prepare, serve, file, present and enter an Order Vacating Previous Order Dismissing Lien
3. Prepare, serve, file, present and enter an Order Reinstating Lien,
4. Prepare, serve, file, present and enter an Order Tolling of Limitation Period
5. Prepare, serve, file, present and enter an Order Vacating Earlier Court Order Awarding Fees and Costs
6. Prepare, serve, file, present and enter an Order Directing Notice to Third Parties

7. Prepare, serve, file, present and enter an Order Directing Recording of Reinstating Lien
8. Prepare, serve, file, present and enter Gaston Brothers Excavating, Inc.'s Motion for Order Vacating Previous Order Dismissing Lien, Order Reinstating Lien, Order Tolling of Limitation Period, Order Vacating Earlier Court Order Awarding Fees and Costs, Order for Notice to Third Parties, Order Directing Recording of Order Reinstating Lien and New Case Schedule
9. Prepare, serve, file, present and enter a Declaration of Lawrence B. Linville in Support of Gaston Brothers Excavating, Inc.'s Motion for Order Vacating Previous Order Dismissing Lien, Order Reinstating Lien, Order Tolling of Limitation Period, Order Vacating Earlier Court Order Awarding Fees and Costs, Order for Notice to Third Parties, Order Directing Recording of Order Reinstating Lien and New Case Schedule
10. Prepare, serve, file, present and enter a Memorandum in Support of Gaston Brothers Excavating, Inc.'s Motion for Order Vacating Previous Order Dismissing Lien, Order Reinstating Lien, Order Tolling of Limitation Period, Order Vacating Earlier Court Order Awarding Fees and Costs, Order for Notice to Third Parties,

Order Directing Recording of Order Reinstating Lien and New
Case Schedule.

Assignment of Error No. 3: Error is assigned to the trial court's failure to award Gaston its attorney's fees incurred prior to 03/06/07 and subsequent to 04/22/07 pursuant to the Subcontract executed between Deacon and Gaston.

The Subcontract Form of Agreement dated 07/05/07 prepared by Deacon and signed by both Deacon and Gaston ("Subcontract") (CP 289) states as follows with regard to the award of attorneys' fees to the prevailing party in a court action:

26.2 If *any* dispute arises between Contractor and Subcontractor pertaining in *any* manner to the construction or interpretation of this Subcontract, or to the rights or obligations of the parties hereunder, or to the breach thereof, Contractor shall have the exclusive option with regard to each such dispute either to have the dispute terminated by court or by arbitration in accordance with the Construction industry Arbitration Rules of the American Arbitration Association.

Contractor shall exercise said option by commencing a court action or by commencing an arbitration proceeding.

26.5 The prevailing party (as determined by the court or arbitrators) shall be entitled to reasonable attorney fees from the other party in an amount to be fixed by the court or arbitrator(s).”

The Subcontract plainly states that if *any* dispute arises between Deacon and Gaston pertaining in *any* manner to the construction or interpretation of the Subcontract, *or* to the *rights or obligations* of Gaston or Deacon under the terms of the Subcontract, *or* to either Gaston or Deacon’s *breach of the Subcontract*, Deacon reserved the right to commence a “*court action*,” which Deacon did by filing its Petition for Order to Show Cause pursuant to RCW 60.04.081 (CP 289). Deacon’s filing of a Petition for Order to Show Cause under RCW 60.04.081 was clearly a “court action” per the terms of the Subcontract. The Subcontract gave Deacon the right to file a court action if there was any dispute over contractual rights, responsibilities or breaches of the Subcontract. Deacon chose to file such a court action (RCW 60.04.081) and filed that court action on 03/08/08. The Subcontract

further stated that the prevailing party (as determined by the court) “**shall** be entitled to reasonable attorneys’ fees.”

Thus, Article 26.2 of the Subcontract was broadly written by Deacon and clearly encompassed the contractual dispute which arose between Deacon and Gaston. This dispute between Deacon and Gaston was entirely contractual. The trial court’s initial findings on the show cause hearing focused *exclusively* on contractual rights and responsibilities of the parties (CP 113). Deacon neither contended nor did the trial court enter any finding that there was any defect or nonconformity whatsoever in Gaston’s lien (CP 113). Deacon instead contended and the trial court found that Deacon had fully paid Gaston under the terms of the Subcontract and thus there was no further payment contractually owed by Deacon and therefore Gaston’s lien was frivolous. The trial court dismissed Gaston’s lien based solely on four specific findings of fact (CP 113), all of which referenced the balance due Gaston per the terms of the Subcontract.

1. The parties’ written subcontract for the LA Fitness Seattle North project (“the Project”), dated July, 2007 was a fully integrated agreement, in which the whole of the scope of Respondent Gaston Brothers Excavating, Inc.’s

(Gaston”) April 13, 2007 and April 16, 2007 proposals was set out.

2. The parties’ original subcontract amount for the Project was \$63,000.
3. The parties’ subcontract for the Project was adjusted by change orders, to a final value of \$54,100.
4. Petitioner has paid the whole final Project Subcontract value to Gaston.

Thus, it is clear that Deacon contended and the trial court found that Gaston had no “right” to further payment under the Subcontract, nor did Deacon have any further “obligation” to pay Gaston under the Subcontract. Thus Deacon’s challenge to Gaston’s lien was purely on contractual grounds.

The nature of the dispute was contractual. The relief sought by Deacon was dismissal of Gaston’s lien. The nature of relief sought does not define the nature of the underlying dispute. The fact that Deacon sought relief under RCW 60.04.081 does not alter the fact that Deacon filed a court action of its own choosing, nor alter the fact that the underlying dispute was entirely contractual. Thus, Gaston as the prevailing party was contractually entitled to attorneys’ fees.

Because Deacon's challenge to Gaston's lien was exclusively based on Deacon's contention regarding the respective rights and obligations of Deacon and Gaston per the terms of the Subcontract, and furthermore because Gaston ultimately prevailed and thus became the prevailing party per the terms of the Subcontract, Gaston should have been awarded its reasonable attorneys' fees pursuant the terms of the Subcontract because Deacon's payment of such fees was mandatory per the terms of the Subcontract.

Similarly, the Court of Appeals also characterized the matter as relating or pertaining to a contractual dispute between the parties. The Court of Appeals characterized this matter as "an ordinary contract dispute with factual issues that should not have been decided on affidavits" (CP 129). Thus, the trial court and the Court of Appeals each separately addressed Deacon's challenge to Gaston's lien in the singular context of a contractual dispute. Deacon's challenge to Gaston's lien was not based on any alleged defect in the lien itself; rather, Deacon's challenge to Gaston's lien was based on Gaston not being contractually entitled to any further payment.

The attorney fees provision in the Subcontract provided for the mandatory award of attorneys' fees (CP 289). Deacon's Subcontract did not use permissive language. The Subcontract called for a mandatory

award of fees. The trial court erred in excluding consideration of Gaston's contractual entitlement to reasonable attorneys' fees for (1) work performed before 03/06/07 relative to the contractual dispute (CP 375), (2) attorneys' fees incurred by Gaston between 07/08/09 and 05/13/10 to collect appellate fees and costs awarded Gaston by the Court of Appeals (CP 375), and attorneys' fees incurred by Gaston between 08/08/10 and 12/13/10 for the proceedings on remand with regard to Gaston's motions to reinstate the lien and motion for award of attorneys' fees (CP 421).

Gaston respectfully requests the Court of Appeals to hypothetically consider Gaston's appeal herein as though RCW 60.04.081 was silent on the award of attorneys' fees to the prevailing party. Gaston would have been entitled to an award of reasonable attorneys' fees pursuant to the Subcontract since both the trial court and the Court of Appeals consistently viewed and characterized the dispute as contractual and Gaston was the prevailing party at the end of the proceedings. Thus, the issue on this appeal is whether the Legislature intended that RCW 60.04.081 provide the exclusive basis for the award of attorneys' fees in a proceeding under RCW 60.04.081. No such intent appears on the face of RCW 60.04.081, nor should it be inferred by the court.

Assignment of Error No. 4: Error is assigned to the trial court's failure to award interest on the appellate fees and costs awarded to Gaston by the Court of Appeals.

Gaston requested the trial court to award Gaston interest on the Court of Appeals' award of Gaston's appellate fees / costs which Deacon refused to pay until February 9, 2009, almost 7 months following the Court of Appeals Commissioner's ruling (CP 334-336) on July 20, 2009, which ordered Deacon to pay Gaston's appellate attorneys' fees and costs in the amount of \$17,336.35.

The Court of Appeals Commissioner's ruling was entered on July 20, 2009. Deacon was ordered to pay Gaston's appellate attorney fees and costs in the amount of \$17,336.35. Deacon did not pay. Gaston's counsel requested payment from Deacon on multiple occasions (CP 371-375)(CP 385-389). Deacon did not pay. Five months following mandate, Deacon assured Gaston that the check was "put in the mail" on Christmas Eve, 2009 (CP 409-410). In fact, there was no "check in the mail". Deacon did not pay the \$17,336.35 until February 9, 2010 (CP 374).

Allowing ten days to pay the \$17,336.35 per the Commissioner's ruling entered on July 20, 2009, Deacon wrongfully and defiantly held Gaston's money (\$17,336.35) for 193 days. The sum was liquidated. The accrued interest is $(193/365 \text{ times } 0.12 \text{ times } \$17,336.35) = \$1,100.85$.

VI. REQUEST FOR FEES

Gaston requests award of fees and costs on appeal pursuant to RCW 60.04.081 and the terms of the Subcontract, specifically Article 26.

VII. CONCLUSION

Gaston incurred substantial attorneys' fees and costs outside a 47-day window period of time imposed by the trial court upon Gaston, but not Deacon. The trial court narrowly and arbitrarily limited Gaston's award of attorneys' fees and costs to those awardable under RCW 60.04.081 and those commencing upon receipt of Deacon's Petition for Order to Show Cause (03/06/08) and Gaston's Motion for Reconsideration on 04/22/08. Without explanation or findings, the trial court placed no such limitation on the trial court's award of attorneys' fees and costs to Deacon. RCW 60.04.081 does not evince any legislative intent to limit a prevailing party's attorneys' fees and costs to a certain window period or limit a prevailing party to any particular work performed. While the amount of the award is discretionary with the trial court, the award itself is mandatory under *both* RCW 60.04.081(4) and Article 26 of the Subcontract. In this case, the trial court certainly had discretion to determine the reasonableness or value of

Gaston's attorneys' fees. But the trial court did not do so in this case. Here, the trial court created an artificial window period and then, within that window period (which did not include any of the proceedings following remand), awarded Gaston only an unexplained portion of those attorney fees. Therefore the trial court abused its discretion by creating an arbitrary window period for awardable fees, especially where Deacon was awarded its full attorneys' fees without regard to any such arbitrary window period, and especially where RCW 60.04.081 does not indicate any such window period, but simply provides for the mandatory award of reasonable attorneys' fees to the prevailing party.

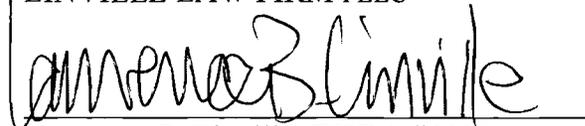
Moreover, even if there were such a legislatively intended window period, nothing in RCW 60.04.081(4) preempts Gaston from recovering its attorneys' fees and costs pursuant to the terms of Gaston's Subcontract with Deacon for work performed outside such a hypothetical window period.

The trial court's Order Granting in Part and Denying in Part Gaston Brothers Excavating, Inc.'s Motion for Award of Attorneys' Fees, Costs and Interest should be reversed and this matter should be remanded to the trial court for determination and award of Gaston's attorneys' fees and costs pursuant to either or both RCW 60.04.081(4) and Article 26.5 of the

Subcontract during the entire trial court's proceedings, both prior and subsequent to the appellate proceedings in this matter.

DATED this 5th day of July, 2011.

LINVILLE LAW FIRM PLLC

A handwritten signature in black ink, appearing to read "Lawrence B. Linville", written over a horizontal line.

Lawrence B. Linville, WSBA #6401
Attorney for Appellant, Gaston Brothers
Excavating, Inc.

CERTIFICATE OF SERVICE

I, Kristin F. Kelly, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am employed by the Linville Law Firm PLLC.

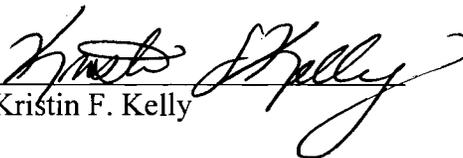
At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served in the manner noted
APPELLANT'S OPENING BRIEF on the following person:

Attorney for S.D. Deacon
J. Todd Henry
Oles Morrison Rinker & Baker LLP
701 Pike Street, Ste 1700
Seattle, WA 98101-3930

Messenger
 Facsimile: (206) 682-6234
 Mail

DATED this 5th day of July, 2011.


Kristin F. Kelly