

No. 70217-3-I

COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

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BRUCE JOHNSON CONTRACTOR LLC,

Appellant,

vs.

COLUMBIA STATE BANK,

Respondent.

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STATE OF WASHINGTON  
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RESPONSE BRIEF

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**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. STATEMENT OF ISSUE..... 1

III. STATEMENT OF THE CASE..... 2

    A. Factual Background ..... 2

    B. Johnson’s Lien Claims..... 4

    C. Proceedings Below..... 5

IV. ARGUMENT ..... 7

    A. Requirements to Recover on a Lien-Release Bond. .... 8

    B. Johnson Failed to Come Forward with Evidence  
    that His Liens Were Valid..... 10

    C. Johnson’s Priority Argument Fails Under the  
    Statute, the Bond, and Fundamental Principles  
    of Relevant Law. .... 15

        1. Johnson Ignores the Language and Purpose  
        of RCW 60.04.161. .... 16

        2. Johnson Disregards the Nature of this Action,  
        which Relates Only to Property Subject to the  
        Bank’s Deeds of Trust, and the Corresponding  
        Scope of the Bond..... 18

        3. The Bond Expressly Provided for Discharge  
        by Further Order of the Court. .... 20

        4. Allowing Johnson to Recover Against the  
        Bond Would Contravene Fundamental  
        Deed-of-Trust, Lien, and Priority Principles. .... 20

    D. Johnson Is Not Entitled to Attorney Fees. .... 24

V. CONCLUSION..... 24

## TABLE OF AUTHORITIES

### Cases

<i>City of Seattle v. Fontanilla</i> , 128 Wn.2d 492, 909 P.2d 1294 (1996).....	14
<i>DBM Consulting Engineers, Inc. v. U.S. Fidelity and Guar. Co.</i> , 142 Wn. App. 35, 170 P.3d 592 (2007), <i>rev. denied</i> , 164 Wn.2d 1005 (2008).....	14
<i>Howell v. Spokane &amp; Inland Empire Blood Bank</i> , 117 Wn.2d 619, 818 P.2d 1056 (1991).....	20
<i>McAndrews Grp., Ltd. v. Ehmke</i> , 121 Wn. App. 759, 90 P.3d 1123 (2004).....	10
<i>Northlake Concrete Prods., Inc. v. Wylie</i> , 34 Wn. App. 810, 663 P.2d 1380 (1983).....	10, 12
<i>Olson Engineering, Inc. v. KeyBank, N.A.</i> , 171 Wn. App. 57, 286 P.3d 390 (2012).....	9, 10, 17, 22, 23
<i>Stonewood Design, Inc. v. Heritage Homes, Inc.</i> , 165 Wn. App. 720, 269 P.3d 297 (2011).....	9
<i>TPST Soil Recyclers of Wash., Inc. v. W.F. Anderson Constr., Inc.</i> , 91 Wn. App. 297, 957 P.2d 265, 967 P.2d 1266 (1998).....	11
<i>Truck Ins. Exchange v. Vanport Homes, Inc.</i> , 147 Wn.2d 751, 58 P.3d 276 (2002).....	10
<i>Woodstream Constr. Corp. v. Van Wolvelaere</i> , 143 Wn. App. 400, 177 P.2d 750 (2008).....	11

### Statutes

RCW 60.04.011(5).....	11, 13
RCW 60.04.021 .....	10, 13
RCW 60.04.131 .....	22

RCW 60.04.161 .....	passim
RCW 60.04.171 .....	14, 16
RCW 60.04.181 .....	24
RCW 60.04.181(1).....	24
RCW 61.24.040(4).....	21
<b>Rules</b>	
CR 56(e).....	15

## **I. INTRODUCTION**

Columbia State Bank brought this action for a declaration that its deed-of-trust interests in certain real property were superior to Johnson's lien interests. Columbia posted a bond so it could foreclose its deeds of trust free of Johnson's liens. After the court granted summary judgment declaring Columbia's deeds of trust superior to Johnson's liens, it discharged the bond. On appeal, Johnson concedes the dispositive issues below – that Columbia's deeds of trust are superior to Johnson's liens, and that Columbia retained the right to contest Johnson's liens and lien priority despite filing the bond. Johnson does not challenge the summary judgment, but argues the trial court erred in discharging the bond.

## **II. STATEMENT OF ISSUE**

Columbia posted a bond to release Johnson's liens from property subject to Columbia's deeds of trust. The trial court declared, and Johnson concedes, that Columbia's rights in the deed-of-trust property have priority over Johnson's liens. Should the court's order discharging the bond be affirmed?

### III. STATEMENT OF THE CASE

#### A. Factual Background

Columbia's predecessor in interest, Summit Bank, made a series of real estate loans totaling approximately \$4,175,799 to Victor and Linda Benson and The Benson Family Trust (collectively, "the Bensons"). CP 336. To secure the loans, which were made from 2006 through 2009, the Bensons granted Summit Bank deeds of trust in certain real property that the Bensons assembled in connection with their plan to develop an upscale residential subdivision in Skagit County. CP 336-37. The deeds of trust were duly recorded. *See* CP 340-74; CP 45-62.

The property assembled for the subdivision consisted of thirteen separate parcels, which were correctly described in the deeds of trust that secured the loans.<sup>1</sup> CP 337. In June 2009, with the Bank's consent, the Bensons obtained final plat approval for their subdivision consisting of 26 lots, which Skagit County certified as eligible for conveyance and consideration for development permits. *Id.*; *see also* CP 566. Following final plat approval, the Bensons began to sell the finished building lots, and the Bank partially released its deeds of trust in connection with the

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<sup>1</sup> The Bensons also granted the Bank a deed of trust in an adjoining parcel that is not part of the subdivision and is not relevant to this litigation.

lots that were sold. CP 337. Beginning in December 2009, the Bensons defaulted on their loans by failing to make payments when due. *Id.*

Columbia State Bank acquired certain Summit Bank assets, including the loans and deeds of trust on the Bensons' property, through the FDIC on May 20, 2011. *Id.* The Bank notified the Bensons of its election to foreclose on the loans and deeds of trust in September and October 2011 by serving the Bensons with Notice of Default and Election to Foreclose. *Id.* The Bensons attempted to prevent the foreclosure by filing suit in Skagit County Superior Court in November 2011 under Skagit Co. No. 11-2-02266-1. They asserted that when they platted the property, the Bank's deeds of trust were extinguished. CP 337. The Bensons' Complaint was dismissed under CR 12(b)(6) for failure to state a claim upon which relief can be granted. *Id.* The Bensons initially appealed, then dismissed the appeal. *Id.*

Johnson asserts he began providing services at the property in September 2010 and has continued to perform such services under a contract with the Bensons. CP 555. The services are described as "maintenance and inspection" of various storm water, drainage, and water systems, unsold lots, and common areas. CP 553.

**B. Johnson's Lien Claims**

Johnson first filed a lien claim against the unsold subdivision lots in October 2011, and amended the lien claim in January 2012 and again in March 2012. *See* CP 568-79. In February 2012, Johnson sued to foreclose his lien against the Bensons. CP 67. Columbia was initially named as a defendant in Johnson's lien foreclosure action, but Johnson's Second Amended Complaint removed Columbia from the lawsuit. CP 549. Although named as a defendant in Johnson's original Complaint and First Amended Complaint, the Bank was never served in the *Johnson v. Benson* lawsuit. CP 67. In the Second Amended Complaint, Johnson affirmatively acknowledged that the interests of persons with recorded interests in the property who were not made parties to the litigation would not be affected by the lien foreclosure. CP 557.

In answer to the Second Amended Complaint, the Bensons and their Homeowners Association admitted Johnson's factual allegations and agreed that Johnson was entitled to the relief requested. CP 580-82. On June 28, 2012, the Court entered a Judgment by Confession in Johnson's favor against the Bensons and their Homeowners Association in the amount of \$89,867.00. CP 584. The Judgment by Confession provides that the lien is foreclosed as to the Bensons and their Homeowners Association in the amount of the judgment, the date of priority is

September 21, 2010, and the lien is superior to any interest of the Bensons or their Homeowners Association. CP 588-89; *see also* CP 268-318 (providing relevant pleadings filed in Johnson's lien-foreclosure action to trial court below).

Meanwhile, the Bank continued to pursue nonjudicial foreclosure of its deeds of trust in the property. CP 338. Although the Bank's deeds of trust were recorded before Johnson allegedly commenced the work for which he claims a lien, and despite the fact that Johnson apparently acknowledged in his lien-foreclosure action that the Bank's interests were prior to his liens, the Bank's title report continued to show the Johnson lien as an exception to insurable title. *Id.*

**C. Proceedings Below**

The Bank filed this action in August 2012 to obtain a judgment declaring the Bank's deeds of trusts prior and superior to Johnson's alleged liens. CP 159-63. On August 6, 2012, pursuant to RCW 60.04.161, the Bank moved for an order authorizing the Bank to record a surety bond to release the liens Johnson claimed on the real property at issue in the lawsuit. CP 245-51. The parties agreed to entry of a Stipulated Order Approving Bond in Lieu of Claim Under RCW 60.04.161, which the trial court entered on August 23, 2012. CP 1-2.

Columbia filed the surety bond (“Bond”) on September 13, 2012.<sup>2</sup> CP 19. The Bond provided that the surety obligation would remain in force “until discharged by further order of the Court.” CP 20.

The Bank filed a motion for summary judgment on its claims on October 1, 2012. CP 38-44. Johnson opposed the motion on two grounds: first, that once the Bank filed the Bond, it was no longer entitled to challenge Johnson’s lien priority; and second, that the Bank’s deeds of trust were not co-extensive with the real property included in his liens. CP 165-66; CP 173. On October 30, 2012, the trial court entered summary judgment in Columbia’s favor (the “Judgment”). CP 220-21.<sup>3</sup> The court held that the Bank’s deeds of trust and modifications to those deeds of trust “are prior and superior” to the three claims of lien filed by Johnson. CP 221. Johnson did not appeal from the Judgment, and apparently concedes on appeal that it was correct.

After the Judgment was entered, the Bank discovered that Johnson had recorded an additional lien on the property on October 2, 2012 (the day after Columbia filed its motion for summary judgment), which Johnson did not disclose to the trial court either in his responsive

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<sup>2</sup> A copy of the Bond is attached hereto as Appendix 1.

<sup>3</sup> A copy of the Judgment is attached hereto as Appendix 2.

pleadings to the Bank's motion or at the hearing on the motion, both of which occurred after he filed the additional lien. CP 264-67. The Bank only discovered the additional lien when it obtained an updated trustee's sale guaranty for its pending foreclosure sale. CP 261.

The Bank then requested the trial court to amend the Judgment pursuant to CR 60 to provide that the Bank has priority over any and all liens on the property filed by Johnson subsequent to the liens specified in the Judgment, including the October 2, 2012 lien. CP 252-56. The Bank also moved for an order discharging the Bond because the Bank had established that its deeds of trust were entitled to priority over Johnson's liens. CP 222-25. The trial court granted both motions. CP 439-511; CP 512-32. Johnson appealed, and assigns error to the Order Releasing Bond in Lieu of Claim Under RCW 60.04.161. He claims that he is entitled to recover against the Bond because Columbia has not foreclosed on all of the property he liened.

#### **IV. ARGUMENT**

To recover on a Bond in Lieu of Claim under RCW 60.04.161, the lien claimant must show the lien's validity, correctness, and – where challenged – priority. Because Johnson failed to do so, the trial court properly discharged the Bond.

Columbia challenged the validity of Johnson's liens, as well as their priority, in its motion for summary judgment. Although the trial court did not reach this issue, this Court may affirm on any ground. Because Johnson failed to come forward with evidence that his liens were valid, the Bond was properly discharged.

The trial court granted summary judgment and Johnson now admits that the Bank's deeds of trust are prior and superior to Johnson's liens on the deed-of-trust property. Johnson's argument that he is nonetheless entitled to recover on the Bond fails to acknowledge: (1) key statutory language in RCW 60.04.161; (2) the nature of this action, which relates only to property subject to the Bank's deeds of trust, and the corresponding scope of the Bond; (3) the Bond language, which grants the trial court authority to discharge the Bond; and (4) fundamental deed-of-trust, lien, and priority principles.

**A. Requirements to Recover on a Lien-Release Bond.**

RCW 60.04.161 allows a person interested in real property upon which a mechanics' or materialmen's lien has been filed to clear title to the property by bonding around the lien. It provides, in pertinent part, as follows:

Any owner of real property subject to a recorded claim of lien under this chapter, or contractor, subcontractor, lender, or lien claimant who disputes the correctness or validity of

the claim of lien may record, either before or after the commencement of an action to enforce the lien, in the office of the county recorder or auditor in the county where the claim of lien was recorded, a bond issued by a surety company authorized to issue surety bonds in the state. ... The condition of the bond shall be to guarantee payment of any judgment upon the lien in favor of the lien claimant entered in any action to recover the amount claimed in a claim of lien, or on the claim asserted in the claim of lien. The effect of recording a 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. ...

Nothing in this section shall in any way prohibit or limit the use of other methods, devised by the affected parties to secure the obligation underlying the claim of lien and to obtain a release of real property from a claim of lien.

Under the statute, posting the bond releases the real property from both the lien and from any action brought to recover the claimed lien amount. *Stonewood Design, Inc. v. Heritage Homes, Inc.*, 165 Wn. App. 720, 723 ¶10, 269 P.3d 297 (2011). To recover against the bond, the lien claimant must establish that the lien is valid and enforceable. *Id.* at 725 ¶14.

On summary judgment below, Johnson argued that once the Bank posted the Bond, Johnson was entitled to execute against it even if the Bank's deeds of trust were entitled to priority over Johnson's liens. CP 166, 170-71. Columbia referred the trial court to *Olson Engineering, Inc. v. KeyBank, N.A.*, 171 Wn. App. 57, 286 P.3d 390 (2012), which Johnson now concedes is on point and rebuts the argument he made below. Under

*Olson*, the lien claimant may execute on the lien-release bond only if the lien has priority over the property interests of the party who posted the bond. *Id.* at 81 ¶43. Thus, posting a lien-release bond does not change the rule that in a dispute over lien priority, the lien claimant (here, Johnson) bears the burden of both establishing the lien and showing that it is superior to other encumbrances. See *McAndrews Grp., Ltd. v. Ehmke*, 121 Wn. App. 759, 763, 90 P.3d 1123 (2004); *Northlake Concrete Prods., Inc. v. Wylie*, 34 Wn. App. 810, 813, 663 P.2d 1380 (1983). Here, Johnson did neither.

**B. Johnson Failed to Come Forward with Evidence that His Liens Were Valid.**

A reviewing court “may affirm the trial court on any grounds established by the pleadings and supported by the record.” *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002). In this case, although the trial court relied on the priority of Columbia’s deeds of trust over Johnson’s liens, the record also supports the trial court’s discharge of the Bond on the ground that Johnson failed to show that his liens were valid at all.

RCW 60.04.021 provides a lien to “any person furnishing labor, professional services, materials, or equipment for the improvement of real

property.” RCW 60.04.011(5) defines the “improvement” necessary to qualify for a lien. “Improvement” means (*id.*):

- (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.

The statute strictly defines “professional services” to mean “surveying, establishing or marking the boundaries of, preparing maps, plans, or specifications for, or inspecting, testing, or otherwise performing any other architectural or engineering services for the improvement of real property.” RCW 60.04.011(5).

To prove the validity and correctness of a mechanics’ or materialmen’s lien, the claimant must prove strict compliance with all of the statutory requirements. *Woodstream Constr. Corp. v. Van Wolvelaere*, 143 Wn. App. 400, 409 ¶18, 177 P.2d 750 (2008); *TPST Soil Recyclers of Wash., Inc. v. W.F. Anderson Constr., Inc.*, 91 Wn. App. 297, 299-300, 957 P.2d 265, 967 P.2d 1266 (1998) (“Statutory liens are in derogation of common law and must be strictly construed to determine whether the lien attaches.”). The benefit of such liens will be “extended only to those who clearly come within the statute’s terms.” *TPST*, 91 Wn. App. at 300. “The

burden of establishing the right to a lien rests upon the person claiming it.”  
*Northlake Concrete Prods.*, 34 Wn. App. at 813.

Johnson described the work he performed at the property as follows: “on going site work including the maintenance and inspection of storm water systems, maintenance of and inspection of the domestic water system until final completion and transfer/acceptance by Skagit County PUD No. 1; maintenance and inspection of all unsold Lots owned by the developer; inspection and maintenance of common areas concerning storm drainage, storm damage, and general maintenance, and final completion of site features.” CP 553. He did not allege that he constructed, altered, repaired, remodeled, demolished, cleared, graded, filled in, planted, or landscaped anything. *Id.* Nor did he allege the performance of any “professional services,” which are limited by statute to surveying, architectural, and engineering services. *Id.* Johnson’s alleged “maintenance and inspection” of existing systems and features did not constitute a real property improvement, and so did not qualify for a lien.

In response to Columbia’s motion for summary judgment, Johnson made no effort to show that the “work” he provided met the statutory criteria for a valid mechanics’ or materialmen’s lien. CP 171-72. He cited no legal authority that the work he described was sufficient to create a valid lien. *Id.* Although he described the water system for which he

allegedly provided “maintenance and inspection” in great detail, he failed to describe what “work” he performed on it or why such work fell within the statutory definition. CP 169-70. The most specific description Johnson provided of the “work” he performed was that he “assisted and advised” Benson about the property. CP 176. He described work Benson hired him for, which is “not yet completed,” but did not explain what work he actually performed and billed for, or why it was lienable. CP 176-78. In fact, Johnson submitted no evidence whatsoever to substantiate the amount or nature of the work he performed. CP 175-82. Thus, even after Columbia challenged the validity of Johnson’s liens based on the description of Johnson’s work in his Second Amended Complaint against Benson, Johnson failed to provide evidence that he had constructed, altered, repaired, remodeled, demolished, cleared, graded, filled in, planted, or landscaped anything, or that he had performed “professional services” (which are limited by statute to surveying, architectural, and engineering services). *See* RCW 60.04.021; RCW 60.04.011(5).

Instead of submitting evidence to prove the validity and amount of his lien, Johnson simply relied on Benson’s approval of whatever bills Johnson sent him, Benson’s receipt Johnson’s lien claims, and the Judgment by Confession in the lien foreclosure action. CP 177. But, of course, the Judgment by Confession is not binding on the Bank, which

was not a party to Johnson's foreclosure action. RCW 60.04.171 ("The interest in the real property of any person who, prior to the commencement of the action, has a recorded interest in the property, or any part thereof, shall not be foreclosed or affected unless they are joined as a party.") Indeed, Johnson's Second Amended Complaint affirmatively acknowledged this rule. CP 547. This comports with the general rule that "one is not bound by a judgment ... in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *City of Seattle v. Fontanilla*, 128 Wn.2d 492, 502, 909 P.2d 1294 (1996).

To establish the validity and correctness of his lien in this action by the Bank, Johnson had to prove he performed work that entitled him to claim a lien, and the amount owed for that work. *See, e.g., DBM Consulting Engineers, Inc. v. U.S. Fidelity and Guar. Co.*, 142 Wn. App. 35, 40 ¶8, 170 P.3d 592 (2007), *rev. denied*, 164 Wn.2d 1005 (2008) ("Not all services that relate to property qualify for a lien, and a lien statute is strictly construed to determine whether the lien attaches"). He failed to come forward with any such evidence.

"When a motion for summary judgment is made and supported as provided [by the civil rules], an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as

otherwise provided by [CR 56], must set forth specific facts showing that there is a genuine issue for trial.” CR 56(e). “If he does not so respond, summary judgment, if appropriate, shall be entered against him.” *Id.* On summary judgment, Johnson failed to submit any evidence to support his claim that he performed work that qualified him for a lien under Washington’s lien statute or the amount owed for that work. On this ground alone, the trial court’s discharge of the lien-release bond should be affirmed.

**C. Johnson’s Priority Argument Fails Under the Statute, the Bond, and Fundamental Principles of Relevant Law.**

Johnson did not appeal from and now acknowledges that the Judgment holding Columbia’s deeds of trust superior to Johnson’s liens was correct. He argues, though, that he is nonetheless entitled to execute on the Bond because he liened property outside the scope of Columbia’s deeds of trust and the Bond became his security for that property as well as for the deed-of-trust property. He also asserts – without any authority at all – that the Trustee’s Deed issued following Columbia’s nonjudicial foreclosure on some the deed-of-trust property now delineates the totality of Columbia’s deed-of-trust interests.

These “priority” arguments fail. They disregard the language and purpose of RCW 60.04.161. They ignore the scope of this action, which

was limited to property in which Columbia held deeds of trust, and the corresponding scope of the Bond. They contravene language in the Bond. And they violate fundamental deed-of-trust, lien, and priority principles.

**1. Johnson Ignores the Language and Purpose of RCW 60.04.161.**

Johnson's statutory argument is overly simplistic. He asserts that because RCW 60.04.161 provides for a bond to guarantee payment of "any judgment ... in favor the lien claimant," and the bond releases "the real property described in the notice of claim of lien from the lien," the Bond Columbia posted must secure the Judgment by Confession entered in his action against Benson and must have released the lien on all the real property he claimed whether or not Columbia held a deed-of-trust interest for which it sought priority.

This superficial approach makes no sense in the context of a priority dispute. First, "any judgment upon the lien in favor of the lien claimant" cannot mean literally any judgment, but must refer to a judgment against the party who bonded around the lien. A contrary reading would contravene RCW 60.04.171, which provides that a foreclosure action cannot impact the interest of a person with a recorded interest in the property who is not joined as a party. It would also be inconsistent with *Olson*, which holds that the lien-release bond is available

only to satisfy a lien that is prior to the interest of the party who posted the bond. 171 Wn. App. at 81 ¶43, n. 28.

Second, the statute does not say that the bond must release the lien on **all** “the real property described in the notice of claim of lien” without regard to whether the party who files the bond asserts a competing interest in that property. On the contrary, the purpose of RCW 60.04.161 is to allow a party who claims a prior interest to enforce that interest free of the lien by substituting a bond for the property in which the prior interest is claimed. *See Olson* at 63 ¶8. There is no reason to release the lien on property outside the scope of the interest claimed by the party posting the bond.

Moreover, the statute is not the exclusive remedy for a party in Columbia’s position. RCW 60.04.161 provides:

Nothing in this section shall in any way prohibit or limit the use of other methods, devised by the affected parties to secure the obligation underlying the claim of lien and to obtain a release of real property from a claim of lien.

The statutory remedy is invoked merely by recording the bond in the county real property records. Columbia did more. It filed this action for declaratory relief, requesting entry of “judgment in its favor declaring that its deed of trust interests in the Property are prior and superior to Johnson’s lien, if any.” CP 163. Thus, even if Johnson’s superficial

reading of the statute's lien-release bond scheme were correct, it would not dictate the result in this case, where Columbia sought judicial assistance and approval to clear title to its deed-of-trust property and determine the relative priorities of the parties' interests in that property.

**2. Johnson Disregards the Nature of this Action, which Relates Only to Property Subject to the Bank's Deeds of Trust, and the Corresponding Scope of the Bond.**

The purpose of the action was to allow Columbia to foreclose its deeds of trust without concern that Johnson's liens might continue to encumber the deed-of-trust property after the foreclosure sale. CP 162. Columbia further asked the court to approve the bond – again with the specific purpose to enable Columbia to provide insurable title upon nonjudicial foreclosure of its deeds of trust. CP 249 (“the Bank seeks to bond around the lien under RCW 60.04.161, which will allow the Bank to obtain title insurance for the nonjudicial foreclosure”); CP 250 (“the Bank seeks to post a bond in this action because Johnson's claim of lien is interfering with the Bank's ability to nonjudicially foreclose the deeds of trust ... . The bond will release the property from the lien and prevent Johnson or Benson from further impeding the Bank's nonjudicial foreclosure of the property”).

Johnson stipulated to an order approving the Bond on those terms. CP 1. The Stipulated Order Approving Bond in Lieu of Claim Under

RCW 60.04.161 provides: “The Bank’s motion to approve bond in lieu of claim under RCW 60.04.161 is GRANTED.” *Id.* Thus, the Stipulated Order expressly incorporated the terms of the relief Columbia had requested.

Likewise, the Bond itself reflected the purpose to secure for Johnson his right to payment for any valid lien in the deed-of-trust property that was prior to the Bank’s. It provides: “if the Lien Claimant **shall obtain judgment** on the Claim of Lien and the Principal pays any and all amounts due by reason of **such judgment**, then the obligation of the Surety shall be void. Otherwise, the obligation remains in full force unless and until discharged by further order of the Court.” CP 20. Johnson’s Judgment by Confession against Benson had been entered months before. CP 583. Thus, by securing only a possible future judgment, the Bond expressly did not secure the Judgment by Confession. Rather, the Bond only secured whatever judgment, if any, Johnson could obtain in this action – Columbia’s declaratory judgment action – based on the relative priority of his liens in the deed-of-trust property. Once the trial court held that the Bank’s deeds of trust were prior and superior to Johnson’s liens, there was no longer a possibility that Johnson could obtain a judgment against the Bank. As a result, there was “no longer

need for such surety bond,” and the Bond was properly discharged. CP 512.

**3. The Bond Expressly Provided for Discharge by Further Order of the Court.**

One of Johnson’s articulated issues is whether the trial court had “jurisdiction” to discharge the Bond. Johnson presents no argument on this issue. When an appellant fails to support a contention by legal argument or authority, the court does not consider the contention on appeal. *E.g., Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991).

Moreover, as set forth above, RCW 60.04.161 expressly provides for alternate methods to secure obligations underlying lien claims while releasing real property from the lien. Because there is no provision in the statute that precludes discharging the Bond under the circumstances of this case, and because the Bond itself expressly provided for discharge by further order of the court, the Order Releasing Bond should be affirmed.

**4. Allowing Johnson to Recover Against the Bond Would Contravene Fundamental Deed-of-Trust, Lien, and Priority Principles.**

Most of Johnson’s argument on appeal is based on materials he submitted after the trial court had already orally granted Columbia’s motion to discharge the Bond. CP 379-416. Johnson argues that Columbia’s partial foreclosure of its deeds of trust and the resulting

Trustee's Deed establish that Columbia did not have deed-of-trust interests and Johnson therefore had priority in portions of the property that were not included in the Trustee's Deed legal description. This argument fails on multiple grounds.

First, Washington's deed of trust statute specifically provides that the "trustee may sell the property in gross or in parcels as the trustee shall deem most advantageous." RCW 61.24.040(4). Consistent with that statute, Columbia foreclosed on certain parcels of the deed-of-trust property, which did not represent all of the real estate covered by Columbia's deeds of trust. CP 422-23. The Bank continues to hold its prior interests in the remaining portions of the deed-of-trust property. *Id.* Thus, contrary to Johnson's argument, the Bank's foreclosure on a portion of its security has no bearing on the trial court's Judgment that the Bank's deeds of trust are prior and superior to Johnson's liens.<sup>4</sup>

Second, although Johnson now limits his priority argument to certain alleged "work areas," his lien claims were not so limited. He liened "Lots 2, 3, 5, 6, 8, 9, 10, 11, 12, 13, 18, 19, 20, 25, and 26" (including property in Lot 26 owned by Skagit County Public Utility

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<sup>4</sup> On appeal, Johnson erroneously argues that the Judgment "requires" foreclosure. Actually it provides that "Any nonjudicial foreclosure [of the Bank's deeds of trust] shall extinguish" Johnson's lien claims. CP 221.

District No. 1).<sup>5</sup> CP 6-7; CP 11-12; CP 16-17. The liens were not limited to the “work areas” in Lot 26, nor were the amounts due segregated by lot or area. As Johnson points out, he was not required to segregate his lien claims among (or within) those lots. *See Olson*, 171 Wn. App. at 78-79 ¶¶38-40. But that choice has consequences.

RCW 60.04.131 provides that if a claim of lien “is recorded against two or more separate pieces of property” and the claimant does not “designate in the notice of claim of lien the amount due on each piece of property,” then the lien is subordinated to other liens on the property. “The lien of such claim does not extend beyond the amount designated as against other creditors having liens upon such piece of property.” *Id.* In other words, by filing unsegregated lien claims, Johnson subjected those claims to all prior interests in any or all of the property he liened. Johnson previously acknowledged that “Lot 26 is now, and must remain, a single legal Lot that cannot be divided.” CP 168. Thus, by statute, his unsegregated lien claims are subordinate to Columbia’s deeds of trust (which Johnson now admits include at least portions of Lot 26 – *see* CP

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<sup>5</sup> The original claim also liened property owned by Donald and Erin Moe. CP 6-7.

387-88).<sup>6</sup> Moreover, Johnson admits on appeal that the trial court was correct in deferring to the Trustee to correctly describe the foreclosed property to be deeded free and clear of Johnson's liens pursuant to the Bank's nonjudicial foreclosure sales.

Finally, Johnson claims that discharging the Bond leaves him "holding an empty bag." But against the Bank, Johnson's liens were always empty. *See Olson*, 171 Wn. App. 68-73 ¶¶19-25 (recapping lien priorities as against recorded deeds of trust and limited remedies available to junior lienholders). Discharging the Bond leaves him in the same position he was in before – with a lien foreclosure judgment against Benson, enforceable against Benson personally and against whatever property Benson may own that is not subject to Columbia's deeds of trust. Indeed, at the hearing on the Bank's motion to discharge the Bond, Johnson's counsel admitted that Johnson's liens encumbered "the interest of the owner, Mr. Benson, not the Bank." CP 329. Thus, discharging the

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<sup>6</sup> In an apparent about-face, Johnson now seems to contend that his "work areas" are discrete legal tracts or parcels of real property, which may properly be the subject of separate lien foreclosure sales. If so, and if the Bank does not hold deeds of trust on any portion of those parcels or tracts, Johnson is free to execute on them because the Bank bonded around Johnson's lien claims only with regard to its deed-of-trust properties.

Bond was proper under Washington deed-of-trust, lien, and priority principles.

**D. Johnson Is Not Entitled to Attorney Fees.**

Johnson seeks attorney fees under RCW 60.04.181. But that statute applies only to cases “in which different construction liens are claimed against the same property.” RCW 60.04.181(1). RCW 60.04.181(3), which is the attorney fee clause, relates back to the cases described in subsection (1) when it allows costs and attorney fees to “the prevailing party **in the action,**” and grants such fees and costs the priority “established by subsection (1).” [Emphasis added]. RCW 60.04.181 does not, by its terms, provide for attorney fees in cases between a construction lien creditor and the holder of a deed of trust. But if the Court reads the statute differently, the Bank, as prevailing party, should be awarded attorney fees against Johnson.

**V. CONCLUSION**

To recover on a Bond in Lieu of Claim under RCW 60.04.161, the lien claimant must show the lien’s validity, correctness, and – where challenged – priority. Johnson failed to do so. Accordingly, the trial court’s Order Releasing Bond in Lieu of Claim under RCW 60.04.161 should be affirmed.

DATED this 1<sup>st</sup> day of April, 2014.

GRAHAM & DUNN PC

By 

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Attorneys for Columbia State Bank

**CERTIFICATE OF SERVICE**

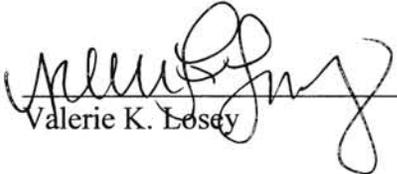
Valerie K. Losey affirms and states:

That on this day, I caused to be served a true and correct copy of Response Brief, by the method indicated below, and addressed to each of the following:

Craig Magnusson Magnusson Law Office PO Box 31263 Bellingham WA 98228 Email: <i>craigm@magnussonlawoffice.com</i>	<input checked="" type="checkbox"/>	U.S. Mail, Postage Prepaid
	<input type="checkbox"/>	Hand Delivered
	<input type="checkbox"/>	Overnight Mail
	<input type="checkbox"/>	Facsimile Transmission
	<input type="checkbox"/>	Electronic Mail

I declare under penalty of perjury under the laws of the State of Washington and the United States of America, that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 15<sup>th</sup> day of April, 2014.

  
Valerie K. Losey

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SUPERIOR COURT OF WASHINGTON  
FOR SKAGIT COUNTY

COLUMBIA STATE BANK, a Washington  
chartered bank,

Plaintiff,

vs.

BRUCE JOHNSON CONTRACTOR LLC, a  
Washington limited liability company,

Defendant.

) No. 12-2-01516-6

) SURETY BOND IN LIEU OF CLAIM  
) PURSUANT TO RCW 60.04.161

) [Bond No. 08935029 ]

**SURETY BOND IN LIEU OF CLAIM (RCW 60.04.161)**

Columbia State Bank, Plaintiff, as principal ("Principal"), and Fidelity and Deposit Company of Maryland, as surety ("Surety"), jointly and severally bind themselves, their successors, and their assigns in an amount up to the sum of One Hundred and Thirty Four Thousand Eight Hundred and One Dollars (\$134,801.00), for the payment of the Lien Claims defined below as asserted by Bruce Johnson Contractor LLC ("Lien Claimant"), on the conditions further described below.

Pursuant to RCW 60.04.161, the condition of this obligation shall be to guarantee payment of any judgment upon the claim of lien asserted by the Lien Claimant as described in the Claims of Lien attached hereto as **Exhibit A, B, and C** (collectively, "Claim of Lien"), to

SURETY BOND IN LIEU OF CLAIM  
PURSUANT TO RCW 60.04.161 -- 1

1 recover the amount claimed in the Claim of Lien or on the claim asserted in the Claim of Lien.  
2 The Claim of Lien contains a description of the real property claimed to be involved, and the  
3 amount of this Surety Bond represents an amount equal to or greater than one and one-half times  
4 the amount of the Claim of Lien, which is in excess of ten thousand dollars.

5  
6 If the Lien Claimant shall obtain judgment on the Claim of Lien and the Principal pays  
7 any and all amounts due by reason of such judgment, then the obligation of the Surety shall be  
8 void. Otherwise, the obligation remains in full force unless and until discharged by further order  
9 of the Court.

10 IN WITNESS WHEREOF, this 12th day of September, 2012.

11  
12  
13  
14 Fidelity and Deposit Company of Maryland, Surety  
15 By: Cindy Westling  
16 Cindy Westling (Attorney-in-Fact)

17  
18 Columbia State Bank, Principal  
19 By: ROBERT M B DENNER  
20 Its: SENIOR VICE PRESIDENT

**SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR SKAGIT COUNTY**

	)	
	)	
<b>COLUMBIA STATE BANK, a</b>	)	
<b>Washington chartered bank,</b>	)	<b>No. 12-2-01516-6</b>
<b>Plaintiff,</b>	)	
	)	
<b>BRUCE JOHNSON CONTRACTOR</b>	)	<b>ORDER GRANTING COLUMBIA</b>
<b>LLC, a Washington limited liability</b>	)	<b>STATE BANK'S MOTION FOR</b>
<b>company,</b>	)	<b>SUMMARY JUDGMENT</b>
<b>Defendant,</b>	)	
	)	
	)	

THIS MATTER came before the Court for hearing on Plaintiff Columbia State Bank's Motion for Summary Judgment, and the Court having heard oral argument from the parties, having reviewed the following papers submitted in support of and in response to Plaintiff Columbia State Bank's Motion for Summary Judgment and arguments:

1. Plaintiff Columbia State Bank's Motion for Summary Judgment;
2. Declaration of Robert M.B. Draper in Support of Motion for Summary Judgment, and the exhibits attached thereto;
3. Declaration of Claire Molesworth in support of Motion for Summary Judgment, and the exhibits attached thereto;
4. Defendant's Response to Motion for Summary Judgment;
5. Declaration of Bruce Johnson in Response to Motion for Summary Judgment;
6. Columbia Bank's Reply in Support of Motion for Summary Judgment; and
7. Supplemental Declaration of Claire L. Molesworth in Support of Bank's Motion for Summary Judgment, and the exhibits attached thereto.

Therefore being fully advised in the premises, the Court hereby ORDERS, ADJUDGES, AND DECREES as follows:

1. Plaintiff Columbia State Bank's Motion for Summary Judgment is GRANTED.
2. Columbia State Bank holds a security interest in certain real property owned by Victor and Linda Benson and/or the Benson Family Trust pursuant to the deeds of Trust recorded under Skagit County auditor's numbers 200704040005, 200804180194, and 200803110127, respectively, and attached hereto as **Exhibit A, Exhibit B, and Exhibit C**, respectively (collectively, "Deeds of Trust") and the Modifications of Deeds of Trust recorded under Skagit County auditor's numbers 201003050069 and 201003050070, respectively, and attached hereto as **Exhibit D and Exhibit E** ("Modifications").
3. Each and all of Columbia State Bank's Deeds of Trust and Modifications are prior and superior to defendant Bruce Johnson LLC's ("Johnson") Claim of Lien, Amended Claim of Lien, and Second Amended Claim of Lien, recorded under Skagit County Auditor's numbers 201110120012, 201201190022, and 201203070017, respectively, and attached hereto as **Exhibit F, Exhibit G, and Exhibit H**, respectively (collectively, "Claim of Lien").
4. Any and all rights of Columbia State Bank under its Deeds of Trust and Modifications (including any rights it acquires through any subsequent reformation action thereof) are prior and superior to any and all rights claimed by Johnson in its Claim of Lien.
5. Any nonjudicial foreclosure of the Deeds of Trust and Modifications conducted pursuant to RCW 61.24 *et seq.* shall extinguish any and all liens asserted by Johnson in the Claim of Lien in accordance with the terms of that statute.
6. Pursuant to CR 54(d)(2), the Plaintiff reserves the right to file motion for attorneys' fees and expenses.

COPY

  
\_\_\_\_\_  
SUSAN K. COOK  
Skagit County Superior Court Judge

DATED: October 30, 2012.