

74976-5

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No. 74976-5-I

**IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

WYNDEN HOLMAN and JAMIE HOLMAN,

Appellants

v.

THOMAS DUTCHER and DIANE DUTCHER,

Respondents

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Court of Appeals
Division I
State of Washington

RESPONDENT'S BRIEF

James E. Britain
WSBA # 6456
Britain / Krell PLLC
805 Dupont St. #1
Bellingham, WA 98225

Attorney for Respondent

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I. INTRODUCTION

Twelve days prior to the scheduled closing of Respondent Dutcher's¹ real estate to the Lummi Tribe of the Lummi Reservation ("The Lummi Nation"), Petitioner Wynden Holman ("Wynden") recorded a baseless claim of lien against the subject property. Wynden's eleventh-hour, bogus recording had the intended effect-- extorting \$11,550 from Dutcher to clear Wynden's "lien" and close the transaction.

Superior Court Judge Uhrig properly granted Dutcher summary judgment, ruling that Wynden's outrageous conduct subjected him to liability for slander of title, a violation Customer Protection Act ("CPA") and unjust enrichment. Because Wynden's efforts to seek reversal based upon misstating or ignoring material fact to "support" meritless hyper-technical arguments are meritless, the trial court's decision should be affirmed.

¹ At the time that this lawsuit was filed, Respondent Diane Nielson, f/k/a Dutcher, retained an interest in any award arising from the Dutcher claim by virtue of the decree dissolving the marriage between Tom and Diane. Ms. Nielson has subsequently assigned all of her right, title and interest with respect to this matter to Thomas Dutcher. CP 371-372. Accordingly, in this brief, the Respondent shall be referred to simply as "Dutcher".

II. ISSUES PRESENTED

1. Is a property owner entitled to prevail on a slander of title claim to recover funds paid to clear title and secure the release of a baseless claim of lien, as well as an award of his reasonable attorneys' fees?

2. Is it a violation of the Consumer Protection Act for a real estate broker, who is not a registered contractor, to encumber title through record false and baseless mechanic's lien claims seeking recovery for alleged real estate services?

3. Is a property owner entitled to recover payment extorted through the filing of a groundless mechanic's lien as unjust enrichment?

4. Is a Respondent entitled to an award of reasonable attorneys' fees incurred on appeal where a trial court judgment imposed liability with respect to a Respondent's claims for slander of title and violation of the Consumer Protection Act are affirmed?

III. STATEMENT OF THE CASE

The "Factual Background" portion of Wynden's brief is more akin to a story drawn from an alternate universe than a summary of the actual material facts in this case. Tellingly, Wynden's Brief never addresses nor cites the best source of material facts in this

matter, Wynden's deposition transcript. Instead, Wynden weaves his tale based on citations to inadmissible emails and hearsay conclusions.² To clarify the record, Dutcher provides the following factual summary.

A. Dutcher Loans/Title to Property

With funds that Dutcher loaned them, Darin Holman ("Darin") and Dutcher's daughter, Kristen McKenzie, f/k/a Holman ("Kristen"), purchased real estate located at 4704 Pacific Highway, Bellingham, Washington (the "Property"). Through Elite Homes, LLC ("Elite Homes"), Darin and Kristen operated a manufactured home business on the Property. From 2008 through August 2012, Dutcher loaned Darin, Kristen and/or Elite Homes approximately \$800,000 to finance the Elite business and their living expenses.³

To repay a portion of these loan obligations, Darin and Kristen executed and delivered a Warranty Deed dated June 4, 2012 transferring title to the Property to Dutcher (the "Deed").

² See, e.g., CP 316-317, an email between Collen Baldwin and Jim Bacus neither of whom are even witnesses of record in the matter; CP 309, an email from Jim Bacus; and CP 322, inadmissible speculation by Darin Holman regarding Wynden's intentions.

³ CP 187-188, 200.

Because Dutcher did not understand the importance of recording the Deed, he did not do so at the time.⁴

B. Wynden's First Lien Claim

On April 23, 2012, Wynden recorded a "Claim of Lien", asserting a mechanic's lien against the Property (the "First Lien Claim").⁵ Wynden fully understood that he was making the statements set forth in the First Lien Claim "under oath and penalty of perjury."⁶ However, that did not deter Wynden from perjuring himself by falsely representing that he had commenced performing "services" with respect to the Property on January 15, 2000 when, in reality, Wynden had no involvement with respect to the Property prior to 2008.⁷ Even though Wynden also swore, under penalty of perjury, that he was asserting his lien claim under the laws of Washington, he admitted that he knew of no legal basis for, and made no inquiry to determine any legal basis supporting, his conduct.⁸

⁴ CP 180, 222-227.

⁵ CP 201-203, 213-215.

⁶ CP 201.

⁷ CP 200.

⁸ CP 201.

Moreover, the First Lien Claim asserts an entitlement for recovery based upon the provision of “real estate services.”⁹ Although Wynden is a licensed real estate broker, he is not, and never has been, a licensed contractor.¹⁰ These “real estate services” apparently encompassed certain actions that Wynden took with respect to the Property to assist Darin and Kristen in getting the Elite Homes business up and running. As Wynden admitted, he had no contractual arrangement with Darin, Kristen or Elite Home. With respect to these “services”, Wynden kept no time records, delivered no billing and could provide no itemization or other support for the \$16,500 asserted as due on the face of the First Lien Claim.¹¹

In terms notice, Wynden only sent a copy of the First Lien Claim to Darin and not to Kristen. He did not prepare or deliver the notices as required by RCW 18.27.114 or 60.04.031.¹²

Substantially all, or all, of the actions for which Wynden vaguely claimed entitlement to payment related to conduct for the

⁹ CP 213.

¹⁰ CP 199-200.

¹¹ CP 202-203.

¹² CP 203-204, 216-221.

apparent benefit of Darin occurring during the period from 2008 through 2011, significantly more than 90 days prior to the recording date.¹³ Wynden never commenced an action to foreclose on the First Lien Claim.¹⁴

C. Sale to the Lummi Nation

After title transferred to Dutcher through the Deed, he began marketing the property. This resulted in an agreement under which the Lummi Nation agreed to purchase the Property (the “First PSA”). Unfortunately, because Darin was still listed as the owner of record, the First PSA erroneously showed Darin as the seller.¹⁵

To correct this error, Dutcher recorded the Deed on June 27, 2013, and then negotiated an amended Purchase and Sale Agreement with the Lummi Nation, under which closing was scheduled for July 31, 2013 (the “Second PSA”). During negotiations leading to execution of the Second PSA, the Lummi Nation made clear that it would not accommodate any further amendments or delays.¹⁶

¹³ CP 202.

¹⁴ CP 202, 213-215.

¹⁵ CP 188-189, 204, 228-241.

¹⁶ CP 188-189, 206, 253.

Through a “date down endorsement” to the title report dated July 19, 2013, the Dutchers learned, for the first time, that Wynden had a recorded a Second Lien Claim against the Property on July 18, 2013 (the “Second Lien Claim”). Dutcher had no idea what the basis for the Second Lien Claim was. At that point, however, he had only 12 days prior to the scheduled closing to clear the resulting encumbrance.¹⁷

D. Wynden’s Second Lien Claim

As with the First Lien Claim, Wynden asserted the Second Lien Claim through use of mechanic’s lien form. In this instance, the lien claim was purportedly based upon supplying “sign instillation/septic instillation/permits and associate fees/real estate survey” without further elaboration or documentation.¹⁸ Once again, Wynden perjured himself with respect to the Second Lien Claim by falsely stating that Darin owned the Property at the time lien recorded, even though Wynden knew Dutcher, not Darin, owned the property at the time.¹⁹

¹⁷ CP 189-190, 206-207, 270-280.

¹⁸ CP 207, 281-283.

¹⁹ CP 207-208.

Wynden further admitted that he: 1) never entered into any contract for the performance of any work with respect to the Property with Dutcher or any other Property owner; 2) had no bills or invoices relating to any such activity; 3) had no itemization or detail with respect to any such activity; 4) had completed all or substantially all such activities by 2011; 5) never arranged to deliver notice of the Second Lien Claim to Dutcher; and 6) never delivered the notices required by RCW 18.27.114 and 60.04.031.²⁰

E. Payment to Clear Title

Dutcher was particular puzzled about the basis for the Second Lien Claim, because: he had never borrowed any money from Wynden; was not indebted to Wynden in any way; and had never contracted with Wynden for the performance of any services, construction or otherwise, with respect to the Property.²¹ Although Dutcher and his agents protested the validity of the Second Lien Claim and demanding its release, Wynden refused. Rather, Wynden reduced the face value of his claim by \$5,050 to \$11,550.

²⁰ *Supra.* at nn. 8-14; CP 208-209.

²¹ *Supra.* at n 20; CP 190.

Ultimately, Dutcher had no choice but to authorize the payment to Wynden of \$11,550 at the closing. Otherwise, he would have lost that beneficial sale.²²

F. Procedural Posture

Through Dutcher's First Amended Complaint, he asserted claims based on slander of title, a violation of Consumer Protection Act and unjust enrichment.²³ Wynden filed a motion for partial summary judgement, seeking dismissal of Dutcher's slander of title and CPA claims,²⁴ and Dutcher filed a motion for summary judgment, seeking entry of judgement on all of his claims.²⁵

In connection with hearings held on February 26, 2016 and March 4, 2016, the Trial Court denied Wynden's motion for partial summary judgement and granted Dutcher's motion.²⁶ On March 18, 2016, Judge Uhrig entered an Order Granting Award of Fees and Cost to Plaintiff to Thomas Dutcher and a judgement against Wynden on all of Dutcher's claims in the principal amount \$25,000,

²² CP 190-191.

²³ CP 36-68.

²⁴ CP 75-88.

²⁵ CP 156-186.

²⁶ CP 332-334, 335-337. See Verbatim Report of Proceedings ("RP").

plus pre-judgment interest and attorney's fees.²⁷ Wynden timely filed his notice of appeal.

IV. ARGUMENT

A. The Trial Court Properly Granted Summary Judgment on Dutcher's Slander of Title Claim.

Aside from the First Lien Claim, it is hard to imagine a more deficient "claim of lien" than the Second Lien Claim. For example, by using forms designed for asserting a mechanic's lien, Wynden represented that the Second Lien Claim rested on supplying services relating to construction work performed on the Property. Yet, Wynden has never been a registered contractor. As a consequence, any claim for construction services constituted a violation of Chapter 18.27, RCW. In addition to civil penalties for such misconduct, RCW 18.27.080 prohibits anyone who is not a registered contractor from utilizing court proceedings to obtain collection for the performance of such services. Consistent with that statute, among other deficiencies, the Second Lien Claim is both facially invalid and a violation of Chapter 18.27, RCW.

Moreover, the Second Lien Claim rests on at least two untrue statements made by Wynden under oath: 1) falsely stating

²⁷ CP 332-370, 378-379.

that Darin owned the Property, when he knew that Dutcher owned the Property at the time; and 2) representing that he was legally entitled to assert the lien claim, when Wynden had no idea about the propriety of asserting a mechanic's lien under these circumstances and made no effort to verify the factual or legal legitimacy of such a lien claim.

Additional deficiencies include: 1) having no contractual basis for the claim and no factual support for the amount claimed; 2) failing to perform alleged work within the 90-day limitation period set forth in RCW 60.04.091; 3) failing to deliver the notices required by RCW 18.27.114 and 60.04.031; and 4) failing to deliver the Second Lien Claim to the Property owner, Dutcher, as required by RCW 60.040.091.

By refusing to release the Second Lien Claim prior to closing and extorting his ransom so that the closing could proceed, Wynden became subject to the Dutchers' slander of title claim. The elements of this tort are: 1) false words; 2) maliciously published; 3) with reference to some pending sale or purchase of property; 4) which go to defeat plaintiff's title; and 5) resulting in plaintiff's

pecuniary loss.²⁸ The Dutchers' claim meets all of these requirements.

Indeed, this case is squarely governed by *Rovig*, where the Washington Supreme Court applied the above elements to hold that the title impairment caused by the recording of a groundless "memorandum of agreement" was sufficient to impose slander of title liability upon perpetrators of that false recording. In addition to an award of resulting damages, *Rovig* established that those prevailing on slander of title claims are entitled to an award of attorneys' fees.²⁹

If anything, Wynden's conduct was more outrageous than the perpetrator's in *Rovig*. By filing the Second Lien Claim, Wynden clouded title to Property without any plausible legal basis. As such, the recording not only embodied "false words", but also a malicious publication.

The element of malice is met when the slanderous statement is not made in good faith or is not prompted by any reasonable belief in its veracity.³⁰

²⁸ *Rovig v. Douglas*, 123 Wn.2d 854, 859, 873 P.2d 492 (1994) ("*Rovig*"), citing *Pay 'N Save Corp v. Eads*, 53 Wn. App. 443, 448, 767 P.2d 592 (1989); *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 375, 617 P.2d 704 (1980) ("*Brown*"). See also 16A WA. PRAC., *Tort Law and Practice*, § 20:3 (3d ed.).

²⁹ 123 Wn.2d at 861-863.

³⁰ *Rovig*, 123 Wn.2d at 860-861, citing *Brown*.

The numerous Second Lien Claim deficiencies, together with Wynden's failure to investigate the existence of any legal support for his claim and perjured representations on the face of the lien claim, constituted both bad faith and a reckless disregard for the veracity or truthfulness of the lien.

In connection with the pending Property sale, the Second Lien Claim created a cloud on title which the Dutchers were forced to clear at a pecuniary loss of \$11,550. By thus establishing all of the elements necessary to prevail on their slander of title claim, Dutcher also was entitled to an award of their reasonable attorneys' fees incurred in pursuing his claim.³¹

1. Wynden Cannot Escape Liability through His "Monetary Lien" Argument.

Wynden does not take issue with, and correspondingly appears to concede, the validity of the above analysis. Rather, Wynden seeks to escape liability by raising the meritless hyper-technical argument that there is a distinction between conduct that terminates the victim's title interest, for which a slander of title claim supposedly lies, and those which are mere "monetary liens", for

³¹ *Rorvig*, 123 Wn.2d at 861-893. See also *Richau v. Rayner*, 98 Wn. App. 190, 988 P.2d 1052 (Div. 3, 1999).

which no such liability purportedly exists. Wynden further maintains that, because his false Second Lien Claim was a mere “monetary lien”, Wynden was free to extort his ransom without incurring slander of title consequences. Not surprisingly, Wynden cites no authority nor applicable policy in support of such an outlandish suggestion.

Among other deficiencies, Wynden’s reliance on *Rorvig* is misplaced. The offending memorandum of agreement in *Rorvig* did not defeat the property owners’ title nor eliminate their possessory interest... As with Wynden’s false lien claim, it improperly encumbered title with respect to a pending transaction.

Moreover, contrary to Wynden’s assertion, the fourth slander of title element articulated in *Rovig* is not, “defeats plaintiff’s title.” Rather, it is: “which **go to** defeat plaintiff’s title.”³² Aside from making no mention a distinction between so-called “monetary liens” and some other kind of liens, *Rovig* embraced what would appear to qualify as “monetary liens” by adopting the following observation from *RESTATEMENT (Second) OF TORT*, § 633, comment b (1977):

³² 123 Wn.2d at 859 [Emphasis added] .

- (1) The pecuniary loss for which a publisher of injurious falsehood is subject to liability is restricted to:
 - (a) the pecuniary loss that results directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value cause disparagement; and
 - (b) the expense of measures reasonably necessary to counteract the publication, *including litigation to remove the doubt cast upon vendibility or value of disparagement.*³³

Properly analyzed, then, *Rovig* supports the imposition of slander of title liability where, as here, the false recording casts doubt upon the vendibility of the Property.

Wynden's "argument" also ignores the practical reality that "monetary liens", such as improperly recorded (false) lis pendens, deeds of trust, judgment liens and mechanic's liens, support slander of title recovery.³⁴ Indeed, with respect to each of these liens, the property owner remains under threat that the lienor will take a possessory interest in the subject property through foreclosure – a threat that accompanied Wynden's falsely filed mechanic' lien. Moreover, each constitutes an encumbrance on

³³ 123 Wn.2d at 863 [Emphasis original].

³⁴ See, e.g., *Amresco Independent Funding, Inc. v. SPS Properties, LLC*, 129 Wn. App. 532, 119 P.3d 884 (Div. 2, 2005) [slander of title for improper lis pendens]; *Richau* [same], *Schwab v. City of Seattle*, 64 Wn. App. 742, 826 P.2d 1089 (Div. 2, 1992) [slander of title claim recognized for improper lis pendens]; *Huff v. Jennings*, 319 S.C. 142, 459 S.E. 2d 886 (1995) [slander of title for false attorneys' lien]; *Peters Well Drilling Co. v. Hanzula*, 242 N.J. Super. 16, 575 A.2d 1375 (1990) [slander of title for false mechanic's lien].

title which will inhibit the property owner from transferring title at a closing. In short, the “distinction” advanced by Wynden is not supported in applicable law and would be practically unworkable.

None of the additional cases cited by Wynden support his position. *Guimont v. Clarke*,³⁵ for example, is a “taking” case with no direct application to this matter. When properly quoted, however, the portion of the opinion cited in Wynden’s brief lends support to the view that one can slander title through an encumbrance that impinges on the marketability of title:

[T]he court must first ask whether the regulation destroys or derogates any fundamental attribute of property ownership; including the right to possess; to exclude others; or to dispose of the property.... [A]nother “fundamental attribute of property” appears to be the right to make *some* economically viable use of the property.³⁶

Similarly, *Hebb v. Stevenson*³⁷ is not a slander of title case and merely held that the title encumbrance at issue prevented a seller from delivering marketable title.³⁸

³⁵ 121 Wn.2d 586, 854 P.2d 1 (1995).

³⁶ 121 Wn.2d at 602 [emphasis original].

³⁷ 32 Wn.2d 159, 201 P.2d 156 (1948).

³⁸ See also *Clarkston Community Corp. v Asotin County Port Dist.*, 3 Wn. App. 1, 472 P.2d 558 (Div. 3, 1970) [speculative sale prospect insufficient for slander of title].

2. Wynden's Election of Remedies Argument Is Equally Untenable.

Wynden audaciously argues that, because Dutcher prudently elected to pay the ransom to clear title and close on the sale to the Lummi Nation, he is somehow foreclosed from pursuing his slander of title claim to recover the extorted sum, plus an award of attorneys' fees. Nothing in Washington case law supports such a limitation.³⁹ Because pursuing recovery after closing is likely to mitigate potential damages and expenses, sound policy also supports the course of action elected by Dutcher. In this instance, for example, had Dutcher failed to close due to Wynden's encumbrance, he would have sought predictably greater damages resulting from the loss of the sale to the Lummi Nation.⁴⁰

³⁹ The fact that reported Washington cases have arisen in the context of property owners filing suit to remove encumbrances does not foreclose claims, such as advanced by Dutcher, to recover funds extorted through assertion of a false lien. Cases from other jurisdictions support this conclusion. *See, e.g., Huff, Peters Well Drilling Co.*

⁴⁰ The notion that Dutcher should have sought to close through an escrow "holdback" is equally meritless. Purportedly, this "option" is based on an inadmissible email between Colleen Baldwin and Jim Bacus. CP 316. Even if admissible, at most, this email states that, in "rare circumstances," transactions are closed, despite an unresolved encumbrance, through use of a "holdback". As acknowledged in the email, holdbacks may only be employed when all parties to the transactions agree to them and generally require that one and one-half times the amount of the lien is held back. There is no evidence that any such agreement was ever reached, and given the Lummi Nation's position when entering into the Second PSA that it would not countenance any further amendments or delays, it is unlikely that the Lummi Nation would have agreed to

3. **Wynden’s Standard of Proof Argument Is Meritless.**

Wynden maintains, for the first time on appeal, that a “clear, cogent and convincing” standard of proof should have been employed with respect to the slander of title determination. Because Wynden did not raise this issue below,⁴¹ it should not be considered by this Court.⁴²

Wynden’s position is meritless, at any rate. Indeed, none of the numerous slander of title cases cited by Wynden makes any reference to a standard of proof other than preponderance of the evidence. Significantly, the seminal *Rovig* case does not address the issue.

Wynden’s reliance on *Centurian Properties, LLC v. Chicago Title Co., Inc.*⁴³ also is misplaced. In connection with holding that a title company does not owe a duty to third parties in recording legal

this extraordinary procedure. Aside from all of these difficulties, the “holdback” would not have provided any practical benefit. If employed, Dutcher simply would have pursued his claim against Wynden for the amount of the holdback, and Whatcom Land Title would have become a necessary party.

⁴¹ See CP 75-88, 284-296, 299-303; TP.

⁴² See, e.g. *Ainsworth v. Progressive Casualty Ins. Co.*, 180 Wn. App. 52, 80-81, 322 P.3d 6 (Div. 1, 2014); *Karlberg v. Otten*, 167 Wn. App. 522, 531-532, 280 P.3d 1123 (Div. 1, 2012)

⁴³ ____ Wn.2d ____, 375 P.3d 651 (2016).

instruments, the Washington Supreme Court made the unremarkable observation in *dicta* that the fourth element of a slander of title action is “maliciously published”. Because the trial court applied all five elements articulated in *Rovig* in reaching its decision, including “maliciously published”, no plausible argument for reversal based on an erroneous application of the slander of title elements or applicable standard of proof can be sustained.⁴⁴

Finally, as established above, Wynden exhibited outrageous disregard for applicable law and Dutcher’s rights as the Property owner to extort funds to which he had no rightful claim. Thus, even if the more demanding standard of proof were employed, summary judgment would remain appropriate.

4. The Second Lien Claim Is Not Consensual.

Wynden cannot sanitize his outrageous conduct through the pretense that the Second Lien Claim somehow constituted a consensual lien granted by his brother, Darin. Significantly, because Darin had no interest in the Property when Wynden

⁴⁴ The only other “supporting” cases cited by Wynden consist of a random collection addressing causes of action other than slander of title. *Duc Tan v. Le*, 177 Wn.2d 649, 300 P.3d 356 (2013)[defamation case involving a public figure with the corresponding First Amendment implications]; *Woody v. Stapp*, 146 Wn. App. 16, 189 P.3d 807 (Div. 3, 2008)[defamation, civil conspiracy and tortious interference case]; *Haueter v. Cowles Publishing Co.*, 61 Wn. App. 572, 811 P.2d 231 (Div. 3, 1991)[Defamation case]; *Coffel v. Clallam County*, 58 Wn. App. 517, 794 P.2d 513 (Div. 2, 1990)[“Failure to enforce” case].

asserted the Second Lien Claim, he had no authority to grant any lien encumbering the Property. Additionally, on its face, the Second Lien Claim does not constitute a deed of trust or any other form of perfected security interest. Indeed, it contains no grant from Darin to Wynden of any authority, let alone a security interest. Finally, Wynden's consensual lien argument fails for the additional reason that it is not supported by the required valid underlying obligation.⁴⁵ Through his deposition, Wynden admitted that his "claim" was not supported by any contract or other form of enforceable obligation owed by Darin, Dutcher or anyone else for that matter.

Wynden's efforts to excuse his inappropriate conduct through the pretense of a consensual lien is every bit as unjustifiable as his false Second Lien Claim. Rather than justifying Wynden's misconduct, his argument smacks of a conspiracy between Darin and Wynden to misappropriate Dutcher's assets.

Thus, summary judgment on Dutcher's slander of title claims was warranted. He was, accordingly, entitled to the corresponding

⁴⁵ Security interests fail where they are not supported by an enforceable underlying obligation. See e.g., *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012) [deed of trust foreclosure barred in the absence of supporting note or other evidence of an underlying obligation].

award of \$11,550 in damages, plus prejudgment interest and attorneys' fees.

B. The Trial Court Properly Granted Summary Judgment on Dutcher's Consumer Protection Act Claim.

As summarized in *Leingang v. Pierce County Medical*

Bureau, Inc.:

To prevail in a private action brought under the Consumer Protection Act, RCW 19.86.090, the plaintiff must establish that: (1) the defendant has engaged in an unfair or deceptive act or practice; (2) in trade or commerce; (3) that impacts the public interest; (4) the plaintiff has suffered injury in his business or property; and (5) a causal link exists between the unfair or deceptive act and the injury suffered.⁴⁶

The trial court properly concluded that Dutcher met all of these elements.

As established above, Wynden's recording of his baseless Second Lien Claim was an unfair and deceptive practice. Not only did Wynden represent that his lien claim was valid when recorded, Wynden swore under oath that he had a basis for asserting it. Yet, he made no effort to determine its validity, and it was complete baseless. To add insult to injury, the Second Lien Claim was rife with perjured statements and misrepresentations. If anything, Wynden's entire conduct associated with

⁴⁶ *Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wn.2d 133, 149, 930 P.2d 288 (1997), citing, *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986) ("*Hangman Ridge*").

asserting both of his bogus lien claims amounted to a deception compounded by a deception.

Through his brief, Wynden apparently conceded that Dutcher's claim satisfied all elements other than "in trade of commerce" and "impacts the public interest". As demonstrated below, the trial court properly ruled that Dutcher met these elements, as well.

With respect to the "in trade or commerce" element, Wynden rested both the First Lien Claim and Second Lien Claim upon the alleged provision of "real estate services." Given that he was, and is, a real estate managing broker, Wynden's unfair or deceptive conduct occurred in his trade or business.

Wynden's citation to entrepreneurial capacity CPA cases does not alter this conclusion. It is true that, with respect to professionals, such attorneys, physicians and dentists, to avoid conflating malpractice and CPA claims, courts distinguish between professional services, for which no CPA claim may lie, and business or entrepreneurial services, for which CPA may be asserted.⁴⁷ Because this is not a professional malpractice action, however, the distinction has no application in this case. Wynden's

⁴⁷ See, e.g., *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 200 P.3d 695 (2009)[dental treatment not entrepreneurial]; *Quinn v. Connelly*, 63 Wn. App. 733, 821 P.2d 1256 (Div. 1, 1992)[Attorneys' fee charge claim entrepreneurial, but not unfair or deceptive].

lien claim would be viewed as entrepreneurial, at any rate. Through both of his meritless lien claims, Wynden was improperly seeking payment for purported real estate services from Dutcher, with whom he did not even have a contractual relationship.

Dutcher also satisfied the “public interest” element. By using forms designed for the assertion of mechanic’s lien claims, Wynden implicitly represented that his claim rested on providing construction services. Given that Wynden provided neither construction materials nor professional services as an architect, engineer or surveyor,⁴⁸ contractor services afforded the only viable alternative through which Wynden could have asserted a lien under Chapter 60.04, RCW.⁴⁹

Yet, because Wynden was not a licensed contractor, his lien claim for construction services constituted a violation of Chapter 18.27, RCW. Under RCW 18.27.350 and 19.86.093, any violation of Chapter 18.27 RCW gives rise to a *per se* CPA violation, which satisfies the “public interest” requirement.⁵⁰

⁴⁸ CP 202-203, 205-206.

⁴⁹ Providing professional services without a license give rise to a *per se* CPA violation. *See, e.g., Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983).

⁵⁰ Although Chapter 60.42, RCW authorizes a lien through which a realtor can secure payment of commissions arising out of a real estate transaction, it has no application to Wynden’s conduct, because he had no plausible claim for

Even assuming, for the sake of argument, that Wynden's conduct does not constitute a *per se* violation, the "public interest" element is still satisfied. As Wynden's brief noted, "public interest" is established if an act has the capacity to deceive "a substantial portion of the public".⁵¹ In this instance, by recording his false and deceptive lien, Wynden intended to deceive the public generally into believing that he had filed a valid mechanic's lien. The effort, in fact, succeeded in deceiving at least one member of the public, Whatcom Land Title.

Wynden's conduct also falls within the "public interest" element, because it was not only capable of repetition, but Wynden had in fact repeated the recording of two equally bogus and deceptive lien claims. Such repetitive conduct forms a basis for satisfying the "public interest" element.

The trial court's entry of judgment on Dutcher's CPA claim should, accordingly, be affirmed. Consistent with RCW 19.86.090, judgment was properly entered awarding \$25,000 in special damages, plus prejudgment interest and his reasonable attorneys' fees.

commission payment attributable to the Property sale to the Lummi Nation. CP 200, 207-208.

⁵¹ See, e.g., *Hangman Ridge*, 105 Wn.2d at 790; *Anhold v. Daniels*, 94 Wn.2d 40, 614 P.2d 184 (1980).

C. The Trial Court Properly Granted Summary Judgment on Dutcher's Unjust Enrichment Claim.

By recording his baseless Second Lien Claim just prior to the closing of the Dutcher-Lummi Nation sale, Wynden extorted payment from the Dutchers to which he had no proper claim. In addition to establishing Dutcher's slander of title and CPA claims, this conduct also supports recovery based on unjust enrichment.

Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it.⁵²

The elements are:

(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment.⁵³

In this instance, Wynden received the benefit of an improper distribution of \$11,550 at closing, at Dutcher's expense, from the sales proceeds. As established above, the Second Lien Claim was devoid of any factual or legal support. Wynden had no contractual relationship with Dutcher, nor even with Darin when he

⁵² *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). This implied in law theory of recovery differs from quantum meruit or quasi-contract, through which recovery is afforded based upon an implied in fact contract.

⁵³ *Young*, 164 Wn.2d at 484-485.

owned the Property. Among other deficiencies, he kept no records of, and made no attempt to quantify, any of the so-called “work” for which he asserted a “claim”. When pressed on the basis for the \$16,660 amount claimed, Wynden admitted that: “[T]o be honest with you, I think, I – I was just guessing.”⁵⁴ Under these circumstances, it would be unjust to permit Wynden to retain the funds he extorted from Dutcher.

The fact that Dutcher paid this ransom to Wynden does not undermine his unjust enrichment claim. Indeed, unjust enrichment can provide a basis to recover payments improperly made to an enriched party. For example, it is well-settled that a party making a usurious interest payment may obtain unjust enrichment recovery notwithstanding the alternative rights granted under applicable statutes to decline payment of the usurious rate and seek statutory remedies.⁵⁵

Thus, the fact that Dutcher paid Wynden to secure release of the bogus Second Lien Claim does not undermine his claim. Given the

⁵⁴ *Supra.* nn. 8-14, 20; CP 208.

⁵⁵ *See e.g., Flannery v. Bishop*, 81 Wn.2d 696, 504 P.2d 778 (1972); *Lee v. Hillman*, 74 Wn. 408, 133 P. 583 (1913). The ransom paid by Dutcher was not a disqualifying voluntary payment under *Hawkinson v. Conniff*, 53 Wn.2d 454, 334 P.2d 540(1959), because it was made under the duress created by Wynden’s bogus lien recorded on the eve of closing, and *Hawkinson* was a quantum meruit, as opposed to unjust enrichment, case, at any rate.

absence of any basis for Wynden's claim, the trial court properly entered summary judgment on Dutcher's unjust enrichment claim awarding the \$11,550 Holman improperly received, plus prejudgment interest.

D. Consistent with RAP 18.1, Dutcher Is Entitled to an Attorney's Fee Award.

Pursuant to RAP 18.1, Dutcher is hereby moving this Court for an award of his reasonable attorneys' fees incurred in connection with this appeal. Under applicable law, Dutcher's judgment on his slander of title claim includes an award of attorneys' fees.⁵⁶ Similarly, RCW 19.86.090 grants Dutcher entitlement to his reasonable attorney's fees as part of his CPA remedy. Because these authorities encompass Dutcher's fees incurred on appeal, this Court should issue an order granting Dutcher an award of such fees in connection with affirming the judgment entered by the trial court.

V. CONCLUSION

For the going reasons, this Court should affirm the trial court's entry of summary judgement on all of Dutcher's claims. In light of Dutcher's corresponding entitlement to an award of attorney under his slander of title and CPA claims and the special damages

⁵⁶ *Rorvig*.

to which Dutcher is entitled under his CPA claim, judgment in the principal amount of \$25,000, plus pre-judgment interest and Dutcher's reasonable attorney's fees incurred at the trial court should be affirmed. In addition, consistent with Dutcher's entitlement to attorneys' fee arising out of his slander of title and CPA claims, this Court also should enter an order granting his reasonable fees incurred in connection with this appeal.

RESPECTIVELY SUBMITTED this 12th of September 2016

BRITAIN / KRELL PLLC

BY:


JAMES E. BRITAIN, WSBA # 6456
Of Attorneys for Respondent
Thomas Dutcher

**RESPONDENT'S BRIEF
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242 N.J.Super. 16
Superior Court of New Jersey,
Appellate Division.

PETERS WELL DRILLING CO., Plaintiff-Appellant,
v.
Jakob HANZULA (deceased) and Vladimir
Jovich, Defendants-Respondents.

Submitted Jan. 18, 1990.

Decided May 15, 1990.

Well-drilling company brought suit to collect money allegedly due from property owner for replacement of a well. Owners counterclaimed, alleging that in filing lawsuit, company had acted maliciously, caused unnecessary legal expenses, slandered the owners, and, by filing mechanic's notice of intention, had slandered and clouded their title. The Superior Court, Special Civil Part, Monmouth County, Cuff, J., entered judgment finding that owners had paid entire amount to company in full satisfaction of work performed, awarded owners the \$1,794 owners had deposited in escrow released, and entered a punitive award in the amount of \$1,000. Company appealed. The Superior Court, Appellate Division, King, P.J.A.D., held that: (1) owners established "special damages," and thus owners could recover for slander of title; (2) summary remedy in mechanics' lien statute does not preclude court from awarding damages for an improper refusal to discharge a mechanics' notice of intention; and (3) filing of mechanics' notice of intention was not absolutely privileged.

Affirmed.

West Headnotes (3)

[1] **Libel and Slander**
Injury from slander

Award to vendor of money placed by vendor in escrow to be held by attorney of well-drilling company which had filed mechanics' lien on vendor's property was compensatory or "special damages," for purposes of vendor's action for slander of title against company, where vendor's account with company was paid in full about

35 minutes after mechanics' notice of intention was filed, notice of intention was filed after work had been completed, claim embodied in lien had nothing to do with subject property, and escrow agreement forced defendant to litigate for disputed sum or forfeit it.

3 Cases that cite this headnote

[2] **Libel and Slander**

Actionable words or conduct relating to title Vendor of property was not precluded from recovering damages for slander of title against well-drilling company which filed mechanics' notice of intention on vendor's property by summary remedy in mechanics' lien statute, where company argued that claim was not paid, satisfied, settled or abandoned, company had brought action to recover alleged monies due, and company filed mechanics' notice of intention even though work already had been completed and then in bad faith neglected to discharge it. N.J.S.A. 2A:44-116.

1 Cases that cite this headnote

[3] **Libel and Slander**

Defenses

Well-drilling company was not entitled to absolute privilege for filing of mechanics' notice of intention on vendor's property, and thus vendor could bring slander of title action against company, where company filed mechanics' notice of intention which required vendor to escrow money to clear his title, lien was filed after work was completed, no attempt to perfect the lien was made, and no suit in reliance upon the lien was ever commenced. N.J.S.A. 2A:44-66 to 2A:44-124, 2A:44-72.

4 Cases that cite this headnote

Attorneys and Law Firms

**1376 *18 Silverman & Rozier, for plaintiff-appellant (Elizabeth S. Rozier and Robert B. Silverman, Lakewood, on the brief).

Vincent E. Halleran, Jr., for defendants-respondents (Vincent E. Halleran, Jr., Freehold, on the brief).

Before Judges KING, BAIME and KEEFE.

Opinion

The opinion of the court was delivered by

KING, P.J.A.D.

Plaintiff sued to collect money allegedly due for the replacement of a well. Plaintiff lost at trial and now appeals from the judgment dismissing its complaint and awarding compensatory and punitive damages for slander of title on the counterclaim.

Plaintiff claims that the trial judge erred in finding for defendant on the counterclaim because filing a mechanic's notice of intention is absolutely privileged in all circumstances and cannot be the predicate for a slander of title action. Plaintiff also claims that there was no proof of an essential element of the slander of title claim, special damages. We disagree on both points and affirm.

*19 1

This is the general background. On June 2, 1987 plaintiff Peters Well Drilling Co. filed a complaint in the Superior Court, Law Division, against defendants Jakob Hanzula (deceased) and Vladimir Jovich, seeking a judgment for money due and owing. Plaintiff alleged that in March 1985 it performed well-drilling services for defendants at an agreed price of \$1,604.19. Plaintiff contended that defendants paid \$400 on account, leaving a balance of \$1,204.19. It sought judgment for that amount with interest.

Defendant Vladimir Jovich, individually and as executor of the estate of co-defendant Jakob Hanzula, filed an answer and counterclaim. We will refer to Vladimir Jovich as defendant, in the singular. The answer included the defense of accord and satisfaction and asserted that defendant had complied with the terms of the agreement between the parties. Defendant alleged in his counterclaim that in March 1985 he employed plaintiff to replace a point well for an agreed price of \$385. He alleged that Hanzula paid plaintiff in cash and that plaintiff falsified the bill to alter the amount due from \$385 to \$1,385. Defendant claimed that, upon inquiring about **1377 the

falsification of the bill, he was advised by plaintiff's principal, Henry Peters, that Peters had padded it to recover monies defendant owed to a relative. Defendant alleged that in filing the lawsuit plaintiff acted maliciously, caused unnecessary legal expenses and slandered him.

Plaintiff filed a general denial to the counterclaim. In an amended answer and counterclaim defendant added a second count to his counterclaim in which he alleged that plaintiff filed a mechanic's notice of intention after the work was completed and paid for. Defendant alleged that plaintiff never served him with the mechanic's notice of intention. He also contended that plaintiff filed the notice maliciously, at a time when he knew it was ineffective, and that the filing slandered and clouded his title.

*20 The case was tried before Judge Cuff without a jury. At the conclusion of trial, the judge issued an oral decision in which she found that the work was completed on March 16, 1985 and involved the replacement of a well point with new piping only. The judge noted that several of the exhibits submitted by plaintiff into evidence had been obviously "doctored" or altered. She rejected the testimony of plaintiff's principal, Henry Peters, as incredible. She found that the contract price was \$426, not \$1,385, and that the entire payment had been made to plaintiff in full satisfaction of the work performed. She dismissed plaintiff's complaint. On the counterclaim, the judge awarded the \$1,794 held in escrow released to defendant and entered a punitive damage award in the amount of \$1,000. Plaintiff's motion for reconsideration pursuant to R. 1:7-4 was denied.

II

This is what the testimony at trial revealed. On March 12, 1985 the deceased defendant, Hanzula, contacted plaintiff's principal, Henry Peters, about a problem with the well located at a house owned by the defendants, Hanzula and Jovich. They did not live in the house. Peters testified that after inspecting the pump and tank, he quoted a price of \$300 to \$400 to fix the existing system and \$1,200 to \$1,300 for a new well, based on a flat price. Peters set forth the higher quote in writing. He later said that he knew from the first day that he would have to replace the well and that he never talked about a price of \$300.

At defendants' request, on March 22, 1985, Peters went to defendants' house and started to dig to determine where

the old well was located. Peters testified that he informed Hanzula that the well could not be repaired. Hanzula informed Peters that he would talk to Jovich and let Peters know if they decided to put in a new well. Peters testified that Hanzula refused to give him Jovich's number but that Hanzula himself spoke to *21 Jovich on the phone and then authorized Peters to put in a new well for between \$1,200 and \$1,300.

Peters began drilling a new well on Saturday, March 23. He testified that he drilled the new well 42 feet into the ground, pumped out water and connected the well. He also stated that on Monday, March 25, he and his men primed and oiled the pump. Peters calculated that he spent about seven to nine hours on the project on Friday, March 22, and eight and one-half hours on Saturday, March 23.

Peters testified that on March 23 he decided that the job would cost between \$1,200 to \$1,300. He thus prepared what was marked at trial as P-1, which purported to be an invoice for payment due. Peters claimed that the entire document was prepared on the same date, although the bottom portion was not placed on the document until after Hanzula signed it. This, he explained, was also why the writing was done with different colored pens.

Meanwhile, on March 22, 1985, Helen Peters, the wife of Henry Peters, filed a mechanic's notice of intention at the Monmouth County Courthouse in plaintiff's name against the property owned by defendants. She testified that the notice was filed because they were unable to get Jovich's **1378 telephone number from Hanzula. She also stated that she visited the site on the same day and observed a drilling rig and men working. Henry Peters testified that he gave a copy of the notice to Hanzula but not to Jovich; he understood that Hanzula would deliver it to Jovich. Peters contended that the notice was filed before all of the work was completed.

On March 27 Peters went to Hanzula's house to collect the remainder of the money he alleged was due. He testified that he was paid in "drips and drabs" and stated that he received two payments of \$50 in cash from Hanzula on March 23 and \$250 from Hanzula on March 27. On Friday, March 29, he received \$76 from Jovich for a total of \$426. Peters said that on March 23, 1985 he told Hanzula that he owed a balance of *22 \$1,240.79. According to Peters' own testimony, this balance would not have become due until Friday, March 29 when, he stated, he received his last payment of \$76. The complaint claimed that \$400, not \$426, had been paid on account.

Jovich presented a completely different description of the events. He testified that he was informed on March 12 that it would cost approximately \$300 to change the well point. About March 16, not March 22, plaintiff began work to install the new well point. Jovich remembered the day because it was the day before St. Patrick's Day. Peters came to the house with his son and a man named Gil. They did not have a drilling rig. He used water pressure to put in a new point at a depth of 28 feet. They pulled the old point out and sunk an identical point, finishing in approximately two hours. Peters then went to Hanzula and demanded payment of \$385. Apparently, Hanzula was surprised that Peters was finished so quickly and paged Jovich on his beeper. When Jovich arrived, Hanzula gave Peters \$200 and Jovich gave him \$100. Jovich also borrowed \$85 from his employee, Joseph Abadiotakis, to pay Peters, for a total payment of \$385. There was an additional balance due of \$68 or \$76 for tax and extras. Several days later Jovich paid Peters the balance. Jovich testified that he never received a bill for any alleged balance due.

Abadiotakis substantially confirmed Jovich's testimony. He remembered that the point was replaced the day before St. Patrick's Day and that Peters and his men spent about two or three hours completing the job. He stated that Peters dug a hole 28 feet deep to insert a plastic casing. This took about 20 minutes. Abadiotakis connected the point to the house and primed the pump. He also testified that he lent defendant \$80 on March 16 and that he recalled the defendants owed plaintiff a small balance of about \$30 to \$40.

Sometime after the well was repaired, Jovich contacted Peters with regard to purchasing a fitting. At that point, Peters told him that a lawyer had called him from Lakewood and *23 stated that he was filing a suit against Hanzula. Peters then asked Jovich if Hanzula owed Jovich any money, to which Jovich replied that he did not. No discussion took place with regard to any alleged amount due Peters Well Drilling.

Shortly before the property with the well was sold in 1987, Jovich was contacted by an attorney who informed him that plaintiff had placed a lien on the property. Jovich contacted Peters who told him that he had filed the lien to recover a balance due his son from Jovich. Defendant Jovich then directed his attorney to pay whatever amounts he owed to Peters' son. Jovich testified that Peters assured him that the lien did not involve the replacement of the well on the property owned by defendants.

At the time of the closing on the sale of the property, in January 1987, the matter had not been resolved and the lien had not been discharged. The sum of \$1,794.12 was placed in an escrow account and held by plaintiff's attorney until the dispute could be resolved.

Judge Cuff found that work was performed on March 16, 1985 and involved the replacement of a well point with new piping only. She based this conclusion on her **1379 observation of the witnesses and an examination of the documents which she found to be "telling." She noted that D-2 and P-3, both of which were supplied by plaintiff, purported to be the same document yet P-3 obviously had been altered. On P-3, the amount of \$1,385 appeared in a different color ink. Moreover, the numeral "one (1)" preceding the \$385 figure on the top half of the document was in a different color ink. P-2 (which is also the top portion of D-2) was also "doctored," as there were obvious cross-outs of dates in a different color ink. The Judge found that the original dates were Monday, March 18; Tuesday, March 19; Wednesday, March 20; Thursday, March 21 and Friday, March 22. These dates were crossed out to reflect March 25, 26, 27, 28 and 29. The judge found that the original dates conformed with Jovich's testimony as to when he made *24 the final payment. P-2 was also altered in that "finally paid me at three thirty-five p.m. Friday [March 22]" was in blue ink and "on account" was in black ink.

Thus, the judge concluded that the original amount quoted was \$385 plus extras, or a total due of \$426, which defendants had paid in full. Plaintiff's complaint was dismissed. On the counterclaim, the Judge found that plaintiff had filed the mechanic's notice of intention after the work had been completed. She also found that the account had been paid in full about 35 minutes after the notice was filed. The mechanic's notice of intention was filed on Friday, March 22 at approximately 3 p.m.; P-2 stated that defendant finally paid plaintiff at 3:35 p.m. on March 22. Thus, she held that failure to discharge the notice was in bad faith. As noted, she awarded defendant-counter-claimant the sum held in escrow by plaintiff's attorney and levied punitive damages of \$1,000 on the counterclaim.

III

[1] The first claim is that defendant failed to establish "special damages," an essential element of an action for

slander of title. We find that defendant did establish "special damages."

The judge found that the account was paid in full about 35 minutes after the mechanic's notice of intention was filed. She also found that the notice was filed after the work had been completed. She held that the failure to vacate the notice was in bad faith and constituted a slander on defendant's title. The judge did not make any specific findings of fact as to "special damages" but awarded the sum of \$1,794.12, which had been held by plaintiff's attorney in escrow and which represented a portion of defendant's proceeds from the sale of the subject property.

The tort of slander of title has been defined in New Jersey as "a publication of a false assertion concerning plaintiff's title, causing plaintiff special damages." *Lane v. Brown*, 199 N.J. Super. 420, *25 426, 489 A.2d 1192 (App.Div.1985). *Defendant must also have acted out of malice—either express or implied.*

In *Frega v. Northern New Jersey Mtg. Assn.*, 51 N.J.Super. 331, 143 A.2d 885 (App.Div.1958), the plaintiffs contracted to have a house built and obtained the necessary construction loan from the defendant. After obtaining a permanent mortgage from a separate institution, the plaintiffs sought to have the construction mortgage cancelled of record. The defendant refused to do so unless the plaintiffs forwarded \$150, or 2% of the construction loan amount, which had previously been paid by the plaintiffs. At the closing of the permanent mortgage, the plaintiffs paid the defendant \$150, which cancelled the construction loan agreement, and then instituted suit for breach of contract and slander of title. At trial, the plaintiffs were awarded \$250 on the contract count, designated as \$150 for cancellation of the lien and \$100 for inconvenience. Count two, in which the plaintiffs demanded punitive damages, was dismissed. On appeal, the defendant urged that since the plaintiffs were awarded compensatory damages on their contract action and since the slander of title action (count **1380 two) was dismissed, punitive damages were not recoverable. We held that the trial judge erred in dismissing the slander of title count and remanded the matter. *Id.* at 342, 143 A.2d 885. We held that the plaintiffs had spelled out, in count two, an action for slander of title or "the false assertion that complainant's land was encumbered by the mortgage to the damage of the plaintiffs." *Id.* at 337, 143 A.2d 885. We cited a series of cases in which defendants had asserted a lien or other right upon plaintiffs' properties to obtain a pecuniary benefit to which they knew they were

not entitled. This, we held, was slander of title and punitive damages could properly be awarded.

We also rejected the defendant's argument that since count two (slander of title) sought only punitive and not compensatory damages, it was properly dismissed. We noted that where a person has an alternative right to sue for a breach of contract or for a tort, the fact that the act constituted a breach of *26 contract does not preclude the award of punitive damages if the action is brought for the tort. *Id.* at 399, 143 A.2d 885, citing *Restatement of Torts*, § 908, comment (b) at 555. We held that at least \$150, the amount paid to cancel the mortgage, was properly awarded as compensatory damages and could be included within the slander of title count. Judge Gaulkin stated:

It seems to us that at least \$150 of the \$250 awarded as damages on the first count would more properly have been awarded as compensatory damages on the second count. After the trial judge had dismissed the second count, and the defendant rested without offering any evidence, the judge said: "The court will enter a directed verdict in favor of the plaintiffs and against the defendant for the sum of \$250—\$150 for the amount demanded for the cancellation of the lien which the court feels was improperly demanded, and an additional \$100 for the inconvenience and time suffered by the defendants in the removal of this lien and in securing another mortgage." [*Frega*, 51 N.J. Super. at 339, 143 A.2d 885.]

We concluded that even though the slander of title count did not seek compensatory damages, this did not prevent the court from awarding both compensatory and punitive damages. The action for slander of title was therefore improperly dismissed.

Similarly, in the case before us, Judge Cuff awarded defendant the money held in escrow, \$1,794.12. While, unlike the situation in *Frega*, defendant did not actually pay plaintiff this sum at closing, the money was held by plaintiff's attorney in his escrow account and was not available to defendant. In fact, the escrow agreement, dated January 15, 1987, specifically provided that the

[s]um of 1,674.12 plus 120.00 to be held in escrow by Carl Swanson until July 15, 1987 pending ... Sellers right to litigate the monies allegedly due to Peters Well Drilling Co. In the event no court resolution or Settlement of the dispute occurs within or before

7/15/87 escrow agent shall be free to release monies to Peters Well Drilling Co. to obtain discharge of mechanics notice of intention.

The agreement forced defendant to litigate the disputed sum or forfeit it. If defendant had simply paid plaintiff the sum at the time of closing and then litigated the matter, the sum would surely have been considered "compensatory damages," as in *Frega*.

This view is further supported by the *Restatement Torts 2d*, § 633 at 355 (1977), which defines a "pecuniary loss" in an *27 action for "disparagement," including slander of title, as follows:

(1) The pecuniary loss for which a publisher of injurious falsehood is subject to liability is restricted to

(a) the pecuniary loss that results directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value caused by disparagement, and

(b) the expense of measures reasonably necessary to counteract the publication, **1381 including litigation to remove the doubt cast upon vendibility or value by disparagement.

(2) This pecuniary loss may be established by

(a) proof of the conduct of specific persons, or

(b) proof that the loss has resulted from the conduct of a number of persons whom it is impossible to identify.

Usually the pecuniary loss is occasioned by the loss of a sale to a particular purchaser. *Restatement Torts 2d*, § 633(1) (a), comment c at 355 (1977). The "disparaging matter may prevent a sale by causing an intending purchaser to withdraw an offer already made or otherwise to terminate negotiations that were reasonably certain to result in a sale." *Id.* at 355–356. However, pursuant to § 633(1)(b) of the *Restatement 2d*, the loss can also include damages incurred in the clearing of the cloud on the title. In the case before us, although the proofs establish that the mechanic's notice of intention did not prevent the closing, this was only because Jovich agreed to enter into the escrow agreement. The agreement could not be revoked unilaterally by either party; defendant either had to litigate or reach a new agreement with plaintiff. *Sunset Beach Amusement Corp. v. Belk*, 31 N.J. 445, 451,

158 A.2d 35 (1960). Defendant incurred damages in an effort to remove the cloud on his title. We could not sensibly preclude defendant from recovering damages that he incurred in removing the lien which facilitated the sale, but provide that he could have recovered only if he lost the sale by sitting back and refusing to escrow money from the closing. Therefore, as in *Frega*, defendant has established a loss. The award of the monies held in escrow for defendant thus constituted compensatory or "special damages."

*28 Plaintiff relies heavily upon *Stiles v. Kuriloff*, 6 N.J.Misc. 271, 141 A. 314 (Cty.Ct.1928). This reliance is misplaced. *Frega* states that the result reached in *Stiles* may be erroneous but does not set forth the reason for this conclusion. *Frega*, 51 N.J.Super. at 338, 143 A.2d 885. In *Stiles*, the plaintiff alleged that a prospective purchaser of a farm had refused to take title after discovering a *lis pendens* filed by the defendant. *Id.* 6 N.J.Misc. at 271, 141 A. 314. The plaintiff sued for what seemed to be slander of title. ¹ *Ibid.* The court said that there was nothing to indicate that the contract of sale was not enforceable by reason of the defendant's filing a *lis pendens* and that even if it was enforceable, the plaintiff did not suffer damages. *Id.* at 272, 141 A. 314. In the case before us, as in *Frega*, the damages did not stem from the loss of a sale, but rather from an extorted payment into escrow of the wrongfully demanded sum.

Plaintiff, in its defense, claims that a party cannot claim "special damages" sufficient to establish a slander of title action for monies paid under duress if he has a quick, inexpensive remedy to remove the cloud on title. Plaintiff also relies upon *Frega*'s citation to *Plainfield Bldg. & Land Co. v. N.J., etc. Title Co.*, 14 N.J.Super. 384, 82 A.2d 439 (App.Div.1951), in which the plaintiff recovered judgment at the trial level for certain monies paid to the defendant as mortgage fees. We reversed and held that if a person without fraud or coercion pays a demand which is not enforceable against him, the payment is voluntary and cannot be recovered. *Id.* at 388, 82 A.2d 439.

Plaintiff's reliance upon *Plainfield* is misplaced. In *Frega*, we noted the *Plainfield* court's conclusion that even if the plaintiff there proved actual malice, it did not prove special damages. 51 N.J.Super. at 340-341, 143 A.2d 885. We distinguished *29 the situation in *Frega*, where the lending institution did not offer the slightest justification for the demand of \$150 and where the plaintiff had neither the time nor the resources to enforce his rights, from that in *Plainfield* where plaintiff had adequate **1382 funds and time to "go into Chancery

for relief" and to challenge the demand for the monies. 51 N.J.Super. at 341, 143 A.2d 885. Moreover, *Plainfield* is also distinguishable because, in that case, we found insufficient evidence to justify the inference that the defendant wrongfully threatened to refuse to cancel the mortgage there in issue. *Id.* 14 N.J.Super. at 388, 82 A.2d 439. Here, the trial judge found that plaintiff's filing of the mechanic's notice of intention after the work had been completed and its failure to discharge it, even though the account was paid in full 35 minutes after the notice was filed, was in bad faith.

Peters also admitted that he did not serve Jovich with a copy of the notice but instead relied upon his partner, Hanzula, now deceased, to deliver it to him. In fact, when Jovich finally became aware of the notice, shortly before the closing, Peters informed him that the notice concerned other monies owed to Peters' son and denied that the notice concerned work on the well on the subject property. Not only was the notice fraudulently filed, but the claim it embodied admittedly had nothing to do with the subject property. Jovich had no alternative but to place the disputed sums into an escrow account to facilitate the closing. In short, *Plainfield*, even if correct, is distinguishable.

[2] Plaintiff's final argument is that Jovich has no action for slander of title because N.J.S.I. 2A:44-116 represents a legislative decision to preclude the courts from awarding damages for an improper refusal to discharge a mechanic's notice. N.J.S.I. 2A:44-116 provides:

When a mechanic's notice of intention has been filed under section 2A:44-71 of this Title and the claim for which the notice was filed has been paid, satisfied or settled by the parties or abandoned by the party filing the notice, the party filing such notice shall file with the proper county clerk a certificate duly *30 acknowledged or proved, directing the proper county clerk to discharge the mechanic's notice of intention of record, which certificate shall contain:

- a. The date of filing the mechanic's notice of intention;
- b. The file number indorsed thereon;
- c. The name of the owner of the land named in the notice;
- d. The location of the property; and
- e. The name of the person for whom the labor was performed or materials furnished.

If the claimant shall fail or refuse to file such certificate, then upon application by any proper party in interest, the Superior Court or the County Court of the proper county, upon 5 days' written notice to the claimant, to be served upon him in the same manner as provided by section 2A:44-79 of this Title, or upon satisfactory proof that the claimant cannot be served, may, upon good cause being shown, order the mechanic's notice of intention discharged.

When a mechanic's notice of intention has been filed pursuant to section 2A:44-71 of the New Jersey Statutes, and it is alleged that the claimant improperly refuses or neglects to file such certificate, upon application in the manner aforesaid, the Superior Court or the County Court of the proper county may inquire into the facts in a summary way, and upon good cause being shown, order the mechanic's notice of intention discharged, and may require the claimant to pay the costs and reasonable attorney's fees. If at the hearing it shall appear that the claimant willfully refused to honor a written request to file such certificate after a demand therefor, served upon the claimant 15 or more days after the satisfaction of the claim and 10 or more days prior to the application to the court for an order to discharge the notice, the court may assess additional costs against the claimant and in favor of the applicant in the amount of \$50.00.

In *Heljon Management Corp. v. Di Leo*, 55 N.J.Super. 306, 150 A.2d 684 (App.Div.1959), we addressed a similar issue. The **1383 defendants filed a mechanic's lien against plaintiff's property. The plaintiff instituted suit to discharge the lien and to recover damages for slander of title. The plaintiff filed a motion for summary judgment alleging that the defendants failed to serve written notice of the lien and that therefore, pursuant to N.J.S.A. 2A:44-116, the lien should be discharged. The defendants claimed that they gave the plaintiff notice. Summary judgment was entered in favor of the plaintiff on its count to discharge the lien and the defendants appealed. On appeal, the defendants argued that the trial judge lacked jurisdiction to grant summary judgment pursuant to N.J.S.A. 2A:44-116. We held:

*31 The cited statute provides that when a mechanics' notice of intention has been filed and the claim has been paid, satisfied, settled, or abandoned, and the lien claimant fails or refuses to file a certificate directing the county clerk to discharge the notice, the court may, on application and "in a summary way," order the notice discharged. This statute has no application to the present case since,

by defendants' own admission, their claim has not been paid, satisfied, settled or abandoned. *Sharov v. Scott*, [37 N.J.Super. 224, 117 A.2d 175 (App.Div.1955)] merely holds that the summary procedure provided for by N.J.S. 2A:44-116 does not authorize the court, whose jurisdiction has been invoked to have the notice discharged, to render a summary judgment as to other aspects of the claim. [55 N.J.Super. at 313-314, 150 A.2d 684.]

In this case, as in *Heljon*, the mechanic has argued that the claim was not paid, satisfied, settled or abandoned. In fact, plaintiff filed this very complaint to recover the alleged monies due. During the trial of this claim Judge Cuff determined that plaintiff filed the mechanic's notice of intention even though the work already had been completed and then in bad faith neglected to discharge it. Plaintiff's reliance upon N.J.S.A. 2A:44-116, in support of its contention that defendant's failure to use this summary remedy precludes recovery of damages for slander of title, is unpersuasive.²

IV

[3] Plaintiff next urges that the filing of a mechanic's notice of intention is absolutely privileged and cannot form the basis for a slander of title action. We disagree, with regard to the facts of this particular case.

Plaintiff relies principally upon *Lone v. Brown*, 199 N.J.Super. at 428, 489 A.2d 1192, where we held that the filing of a *lis pendens* was absolutely privileged and could not form the predicate for a slander of title action. *Cf.*, *Westfield Dev. v. *32 Rifle Inv. Assoc.*, 786 P.2d 1112, 1114 (Colo.Sup.Ct.1990) (notice of *lis pendens* enjoys qualified privilege only). In *Lone*, we initially noted that:

Even though New Jersey recognizes slander of title as a viable cause of action, the question presented is whether defendant enjoys immunity. It is well established that statements, written or oral, made by judges, attorneys, witnesses, parties or jurors in the course of judicial proceedings, which have some relation thereto, are absolutely privileged from slander or defamation actions, even if the statements are made with malice. [*Id.*

199 N.J.Super. at 426, 489 A.2d 1192;
citations omitted.]

We held that pleadings and a notice of appeal were part of a judicial proceeding and privileged. *Id.* at 427, 489 A.2d 1192. We also held that the filing of a notice of *lis pendens* constituted a “republishing of some of the essential information contained **1384 in the complaint and notice of appeal.” *Id.* at 428, 489 A.2d 1192. We found that since the *lis pendens* related to the pending judicial proceeding, it would be “incongruous indeed to say that the complaint and notice of appeal are privileged but the notice of *lis pendens* filed in the same pending judicial proceeding, designed to give notice and preserve the status quo, would not also be privileged.” *Ibid.*

By analogy, plaintiff here urges that a mechanic's notice of intention is also privileged, although plaintiff gives no authoritative support for this contention. No New Jersey cases have ruled on whether the filing of a mechanic's notice of intention is immune from a claim for slander of title. Nor have any New Jersey cases upheld an award of damages for slander of title based upon the filing of a mechanic's lien. This is a case of first impression.³

In accordance with the provisions of the mechanic's lien law, N.J.S.A. 2A:44-66 to -124, a party must first file a notice of intention prior to performing labor or furnishing material. N.J.S.A. 2A:44-71. Within four months after the performance *33 of the last labor or the last materials furnished, a lien claim must also be filed. N.J.S.A. 2A:44-91. To enforce this lien an action in Superior Court must be commenced within the same four-month time period. N.J.S.A. 2A:44-98. Summons must issue within five days after filing the complaint and the action must be diligently prosecuted. N.J.S.A. 2A:44-99.

As suggested in *Lone v. Brown*, the filing of a civil complaint to enforce a mechanic's lien is regarded as a part of a judicial proceeding and thus its contents are absolutely privileged from slander or defamation actions, even if the statements are made with malice. The question here is whether the filing of a notice of intention alone enjoys that same status. We hold that under the facts presented in this case, the notice was not filed as a prelude to or a part of a judicial proceeding and therefore does not enjoy immunity.

As is the case with a *lis pendens*, N.J.S.A. 2A:44-72 does not require that the notice of intention be in affidavit form.

However, unlike a *lis pendens*, the filing of a notice of intention does not contain a “republishing” of the essential elements of a complaint. In fact, N.J.S.A. 2A:44-72 provides that:

The notice required by section 2A:44-71 of this title shall be signed by or on behalf of the person for whose benefit it is filed and shall contain:

- a. The name of each person who, within 10 days prior to the filing, shall have been the owner of record of the estate in the land to which the lien is to attach;
- b. A description of the land sufficient to identify it;
- c. The name of the one for whom the labor is to be performed or to whom the materials are to be furnished; and
- d. The full name and address of the one for whose benefit the notice is filed, and the name of any one whose signature, when affixed to any instrument relating to such right of lien, shall be binding on the one for whose benefit the notice is filed.

At the time the notice of intention is usually filed, the amount of the claim, if any, has not yet been determined since the work has not been completed. The purpose of the filing of the notice of intention is not, as in the case with a *lis pendens*, to give notice of a legal action affecting real estate, but rather to give notice to the owner that the property could become liable for *34 the labor provided or materials used in improving the property. *Apex Roofing Supply Co. v. Howell*, 59 N.J.Super. 462, 467, 158 A.2d 49 (App.Div.1960). Thus, if the homeowner pays his immediate contractor, he does so at the peril of finding himself with a lien against his property which can only be lifted by paying the noticed claim. *Id.* at 467-468, 158 A.2d 49.

In the case before us, plaintiff did not perfect its claim. It only filed a notice of **1385 intention,⁴ which, as the judge found, was based on a fraudulent billing for work not performed. No lien claim was ever filed nor was a complaint filed within four months after the completion of the work. In fact, the complaint in this case was not filed until June 2, 1987, more than two years later, and makes no mention at all of the mechanic's notice. In such a situation the rationale for imposing the absolute privilege accorded to judicial proceedings is absent. The notice was never perfected and never could have become a part of a suit for enforcement pursuant to N.J.S.A. 2A:44-98. If, however, plaintiff had filed

a timely notice of intention, a lien claim, and a court action to enforce it, the filing of the notice would be considered a part of a judicial proceeding and would be privileged.

We contrast the case before us with a recent Virginia case, *Donohoe Const. v. Mount Vernon Associates*, 235 Va. 531, 369 S.E.2d 857 (1988), where the court held that the filing of a memorandum of mechanic's lien is a "judicial proceeding" entitling the claimant to the defense of absolute privilege in a suit for slander of title. Initially, the court noted that "[t]he reason for the rule of absolute privilege in judicial proceedings is to encourage unrestricted speech in litigation." *Id.* 369 S.E.2d at 860. See also *35 *Frank Pisano & Associates v. Taggart*, 29 Cal.App.3d 1, 105 Cal.Rptr. 414 (Cal.Cl.App.1972) (filing of a claim of mechanic's lien in conjunction with a judicial proceeding to enforce it is absolutely privileged). The Virginia mechanic's lien statute is somewhat different from New Jersey's. In Virginia, the claimant must first file a memorandum which must contain:

... the names of the owner of the property sought to be charged, and of the claimant of the lien, the amount and consideration of his claim, and the time or times when the same is or will be due and payable, verified by the oath of the claimant.... Code § 43-4. [369 S.E.2d at 861.]

The memorandum in Virginia, unlike the initial notice in New Jersey, must contain the amount of the claim. The memorandum is also distinguishable because:

The claimant must appear and make oath before a notary public (or some other official authorized to administer an oath) that the owner is justly indebted to the claimant in the amount and for the consideration stated in the memorandum. Code § 43-5. Significantly, the taking and certifying of an acknowledgement by a notary public is a judicial act. [*Ibid.*; citations omitted.]

Thereafter, to enforce the lien the claimant must file suit within six months from the time when the memorandum was recorded or 60 days from the time the work was completed. Thus, the Virginia Supreme Court in *Donohoe* held:

Applying the broad rule enunciated in *Penick [v. Ratcliffe]*, 149 Va. [618] at 627-28, 140 S.E. [664] at 667 [1928] we conclude that the filing of the memorandum of mechanic's lien constitutes a judicial proceeding. *Accord Frank Pisano & Assoc. v. Taggart*, 29 Cal.App.3d 1, 25, 105 Cal.Rptr. 414, 430 (1972). As previously noted, it is a prerequisite to a suit to enforce. For a claimant to obtain the remedy provided by statute, he must perfect his lien and, thereafter, sue to enforce it. The two proceedings are inseparable. [*Ibid.*, emphasis in original.]

In the case before us, had plaintiff, as did the claimant in *Donohoe*, perfected its lien and sought to enforce it by suit, the contents of the notice would be absolutely privileged no matter what the merits, limited only by the principle that the "words spoken or written in [the] judicial proceeding" must be "relevant and pertinent to the matter under inquiry...." *Id.* 369 S.E.2d at 860. But this is not our case. In this **1386 case, plaintiff simply filed a fraudulent notice of intention which required defendant to escrow money to clear his title. The lien was filed *36 after the work was completed. No attempt to perfect it was made. No suit in reliance upon it was ever commenced. Under N.J.S.I. 2A:44-71 and 98, it could never have become part of a bona fide judicial proceeding to enforce. Under this narrow circumstance, the absolute privilege does not apply.

We conclude that simply filing a fraudulent mechanic's notice of intention is not absolutely privileged as part of a judicial proceeding. This fraudulent gesture did not rise to the level of a judicial proceeding.

v

The remainder of plaintiff's contentions on this appeal are clearly without merit and warrant no discussion. R. 2:11-3(e) (1)(E).

Affirmed.

Peters Well Drilling Co. v. Hanzula, 242 N.J. Super. 16 (1990)
575 A.2d 1375

All Citations

242 N.J. Super. 16, 575 A.2d 1375

Footnotes

- 1 Note, *Lone v. Brown*, 199 N.J. Super. at 428, 489 A.2d 1192, precludes a suit for slander of title based upon the wrongful filing of a *lis pendens*.
- 2 In distinguishing the facts of this case from those cases where the summary remedy provided by N.J.S.A. 2A:44-116 would apply, *i.e.*, where there is no dispute that the underlying debt has been satisfied, we do not mean to imply that the summary proceeding remedies provided by the statute are exclusive and would preclude a count for slander of title in such cases. We leave the resolution of that issue for another day when these facts are presented for decision.
- 3 In *Heljon Management Corp. v. Di Leo*, plaintiff's count for slander of title was dismissed but no reasons were expressed, 55 N.J. Super. at 309, 150 A.2d 684.
- 4 Defendant alleges that he did not receive personal service and that the facts adduced at trial show that the notice was filed after the work was completed and not before. Thus, notice violated both N.J.S.A. 2A:44-71 (service upon owner) and N.J.S.A. 2A:44-71 (notice must be filed before performing labor or furnishing material).

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319 S.C. 142
Court of Appeals of South Carolina.

William A. HUFF, Appellant,
v.
Kathleen P. JENNINGS, Respondent.

No. 2363.

|
Heard May 2, 1995.

|
Decided June 19, 1995.

|
Rehearing Denied Aug. 10, 1995.

Former husband brought action against attorney, who represented former wife in divorce action, for slander of title and filing invalid lien against marital home for wife's unpaid attorney fees. The Circuit Court, Greenville County, Frank P. McGowan, Jr., J., entered summary judgment for attorney, and husband appealed. The Court of Appeals, Howell, C.J., held that: (1) lien was invalid; (2) husband's payment to discharge lien did not render slander of title claim moot; (3) husband had standing to contest validity of lien; and (4) issues of fact precluded summary judgment on slander of title claim.

Reversed and remanded.

West Headnotes (14)

[1] **Attorney and Client**
↳ Proceedings to Perfect

Lien filed against marital home for former wife's unpaid attorney fees, incurred in divorce action, was invalid under statute providing that any attorney fee awarded by court in divorce action shall constitute lien on any property owned by person ordered to pay fee; family court did not award fees, but, rather, merely declared that each party would be responsible for his or her own fees. Code 1976, § 20-3-145.

Cases that cite this headnote

[2] **Libel and Slander**
↳ Actionable words or conduct relating to title

Landowner's payment to discharge invalid lien on his property did not render his slander of title action against lienholder moot; discharge of lien did not extinguish any claim for slander of title landowner might have had for 32 months that lien was attached to property.

2 Cases that cite this headnote

[3] **Attorney and Client**
↳ Proceedings

Former husband had standing to contest validity of lien filed against marital home for former wife's unpaid attorney fees, incurred in divorce action; at time lien was filed, property was jointly owned by husband and wife. Code 1976, § 20-3-145.

Cases that cite this headnote

[4] **Action**
↳ Persons entitled to sue

To have standing, party must have personal stake in subject matter of lawsuit and must be real party in interest.

1 Cases that cite this headnote

[5] **Parties**
↳ Who is real party in interest

"Real party in interest" is one who has real, actual, material, or substantial interest in subject matter of action, as distinguished from one who has only nominal, formal, or technical interest in, or connection with, action.

1 Cases that cite this headnote

[6] **Libel and Slander**
↳ Actionable words or conduct relating to title

South Carolina recognizes cause of action for slander of title.

2 Cases that cite this headnote

[7] **Judgment**
↳ Tort cases in general

Issues of fact, precluding summary judgment in former husband's slander of title action arising out of invalid lien filed against marital home for former wife's unpaid attorney fees, existed as to whether filing of lien was publication of false statement and whether lien was filed with malice. Code 1976, § 20-3-145.

2 Cases that cite this headnote

[8] Libel and Slander

~ Actionable words or conduct relating to title Wrongfully recording unfounded claim against property of another generally is actionable as slander of title.

3 Cases that cite this headnote

[9] Libel and Slander

~ Persons entitled to sue Former husband could bring action for slander of title arising out of lien filed against marital home for former wife's unpaid attorney fees, incurred in divorce action, notwithstanding contention that lien was filed against only wife's interest in property; property was owned by both husband and wife at time lien was recorded, lien specifically stated it was placed against property of husband and wife, and lien affected value of property as whole. Code 1976, § 20-3-145.

1 Cases that cite this headnote

[10] Libel and Slander

~ Actionable words or conduct relating to title For purposes of slander of title claim, publication is derogatory to plaintiff's title if publication disparages or diminishes quality, condition, or value of property.

4 Cases that cite this headnote

[11] Libel and Slander

~ Actionable words or conduct relating to title For purposes of slander of title claim, invalid lien filed against property was derogatory to landowner's title; lien diminished value of property in eyes of third party in that landowner

was required to discharge lien before he could complete refinancing of property.

5 Cases that cite this headnote

[12] Libel and Slander

~ Actionable words or conduct relating to title In slander of title action, malice requirement may be satisfied by showing that publication was made in reckless or wanton disregard to right of another or without legal justification.

2 Cases that cite this headnote

[13] Libel and Slander

~ Actions Special damages recoverable in slander of title action are pecuniary losses that result directly and immediately from publication, including damage to value of property and reasonably necessary expenses incurred in counteracting publication.

2 Cases that cite this headnote

[14] Libel and Slander

~ Injury from slander Money landowner paid to satisfy invalid lien was so he could close refinancing of property constituted special damages required for slander of title claim; money was expense necessary to counteract publication.

1 Cases that cite this headnote

Attorneys and Law Firms

**888 *144 O.W. Bannister, of Hill, Wyatt, Bannister & Brown; and Kenneth C. Porter, of Porter & Rosenfeld, Greenville, for appellant.

Samuel W. Outten, of Leatherwood, Walker, Todd & Mann, Greenville, for respondent.

Opinion

HOWELL, Chief Judge:

William Huff sued attorney Kathleen Jennings for slander of title for filing an allegedly invalid lien against Huff's property. Jennings admitted filing the lien and that Huff had satisfied it, but claimed several defenses to the suit. Both sides moved for summary judgment, and stipulated to certain facts. The trial court granted summary judgment for Jennings, and Huff appeals. We reverse and remand.

Huff was married to Betty Jean Huff (the Wife). They divorced in September 1990. As part of the equitable distribution, the family court awarded the Wife an interest in the marital house and lot. The Wife was represented by Jennings in the divorce and sought an award of attorney's fees from Huff. The divorce decree, however, provided:

16. Plaintiff [the Wife], with her attorney, has prevailed on the issue of custody, however, due to Plaintiff's inability to prove the divorce as she requested, I find it fair and equitable for each party to be fully and completely responsible for the prompt discharge and payment of their own attorney's fees and costs associated with this action.

Shortly after the divorce, Huff elected to purchase the Wife's interest, as provided for in the divorce decree. On October 8, 1990, Kenneth Porter, Huff's attorney in the divorce, forwarded to Jennings a deed to be executed by the Wife as part of Huff's buy-out of her interest. In a second letter to Jennings, dated October 31, 1990, Porter stated he had received no response from the first letter but that Huff told him the Wife would not sign the deed. Porter also indicated that the Wife stated Jennings no longer represented her, and Porter offered to deal directly with the Wife. Porter added, "I would *145 rather close this matter through your office as it is my understanding some additional attorney's fees are owed unto you."

On November 3, 1990, Jennings wrote Porter that the Wife refused to sign the deed. Jennings confirmed that she was still the Wife's lawyer and was still owed fees. On November 14, 1990, Jennings filed a lien for unpaid attorneys fees in the amount of \$578.36 (plus interest) against the house and lot, purportedly under S.C.Code Ann. § 20-3-145.¹ Subsequent to the filing of the lien, Huff closed the purchase of the Wife's interest. Jennings did not receive any of the funds from the

sale of the Wife's interest, nor did she receive notice of the closing.

**889 Sometime in 1993, Huff sought to refinance the outstanding debt on the house and lot. Huff's attorney found the lien of record and refused to close the refinancing until the lien and debt were cleared from public records. At that time, Jennings claimed unpaid attorney's fees and interest in the amount of \$935.79. On June 8, 1993, Huff wrote Jennings that he discovered the lien, which "was apparently placed against the property when it was still titled in both our names." Huff stated he needed to settle the matter because he needed to refinance his home. Huff paid Jennings \$935.79 on July 6, 1993, and Jennings satisfied the lien the same day.

In August 1993, Huff filed this slander of title action against Jennings. In his complaint, Huff alleged that as an attorney, Jennings knew or should have known she had no valid lien against the property, and that filing the lien created a cloud on Huff's title. Huff claimed he suffered damages in the amount of \$935.79, the amount he was compelled to pay Jennings. Because he claimed Jennings's actions were wilful and wanton, Huff also sought punitive damages.

Jennings answered and admitted she filed the lien for \$578.36, plus 18% per annum interest pursuant to her agreement with the Wife, against Huff's property. She also admitted Huff satisfied the lien on July 6, 1993, by paying \$935.79. However, Jennings maintained no action for slander of title *146 exists in South Carolina, and that Huff, therefore, failed to state a cause of action. As additional defenses, Jennings alleged she acted in good faith, even if her lien was invalid, and that she filed the lien pursuant to § 20-3-145, given the Wife owed her attorney fees and also owned an interest in Huff's house and lot. Jennings contended Huff assumed the risk when he purchased the Wife's interests in the house on November 14, 1990, subject to and with record notice of Jennings's lien. Finally, Jennings asserted that by paying the lien and voluntarily satisfying the Wife's debt, Huff acted on his own as a volunteer and could not recover against Jennings.

The trial court ruled that Jennings's lien was valid and that the Wife did not pay her fees as ordered by the family court; thus, Jennings properly filed a lien against the property of her client pursuant to § 20-3-145. The court further found that because Huff purchased the Wife's interest with notice of Jennings's lien and paid the Wife \$11,789.00 without satisfying the lien, the lien was binding on Huff. Moreover, the court held the

question of the validity of the lien was moot, because Huff satisfied the lien. The court also found Huff lacked standing to raise any issue as to the validity of Jennings's lien, and that only the Wife could challenge the lien.

As to Huff's claim of slander of title, the trial court found that such a cause of action exists in South Carolina. Relying on a West Virginia case, the court determined the elements of the cause of action to be:

- (1) the publication of
- (2) a false statement
- (3) derogatory to plaintiff's title
- (4) with malice
- (5) causing special damages
- (6) as a result of diminished value in the eyes of third parties.

See *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). However, the court found Huff's claim failed because there was no evidence that a false statement was made by Jennings, that the filing of the lien was derogatory to Huff's title, that Jennings filed the lien with malice, or that the property was diminished in value in the eyes of a third party. The trial court therefore granted Jennings's motion for summary judgment.

*147 I.

[1] Huff first argues the trial court erred in holding Jennings had a valid lien against her own client for attorney's fees under S.C.Code Ann. § 20-3-145. We agree.

Under section 20-3-145, any attorney fee awarded by the court in a divorce action shall constitute a lien on any property owned by the person ordered to pay the fee. Thus, the statute authorizes the filing of a lien where the family court actually makes an award of attorney's fees. Simply declaring that each party will be responsible for their own fees does not, as Jennings contends, equate to an "attorney fee awarded by the court" for purposes of the statute. The Wife's complaint requested that Huff pay the Wife's attorney's fees; there was no request that the Wife be ordered to pay her own fees. Under Jennings's interpretation of the order, the family court effectively awarded, without notice to the Wife, an indeterminate amount of fees when such relief was never requested. This interpretation clearly raises substantial ethical and constitutional questions. We therefore conclude that Jennings's lien filed pursuant to S.C.Code Ann. § 20-3-

145 was invalid, because she was not awarded a fee by the court.

II.

[2] Huff also argues the trial court erred in ruling his attack on the validity of the lien was moot since he already paid Jennings and she discharged the lien. We agree. The lien was attached to Huff's property from November 14, 1990 through July 6, 1993. The fact that the lien was thereafter removed does not extinguish any claim for slander of title Huff may have for the thirty-two months the lien was attached to the property. Accordingly, we hold Huff's claim was not rendered moot by his payment to Jennings to discharge her lien.

III.

[3] Huff next argues the trial court erred in concluding Huff lacked standing to contest the validity of Jennings's lien. We agree.

[4] [5] To have standing, a party must have a personal stake in the subject matter of a lawsuit, and must be a real party in interest. *148 *Bailey v. Bailey*, 312 S.C. 454, 441 S.E.2d 325 (1994). A real party in interest is "one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." *Id.* at —, 441 S.E.2d at 327. At the time Jennings filed her lien, the property was owned jointly by Huff and the Wife. Under the circumstances of this case, Huff clearly has standing to litigate whether Jennings's lien against property in which Huff had an ownership interest was valid.

IV.

[6] By way of an additional sustaining ground, Jennings contends the trial court erred in holding South Carolina recognizes a cause of action for slander of title. We find no error.

While there are South Carolina cases mentioning a slander of title cause of action, see, e.g., *Gambrell v. Schriver*, 312 S.C. 354, 440 S.E.2d 393 (Ct.App.1994), *cert. denied* (July 14, 1994); *Burgess v. Stern*, 311 S.C. 326, 428 S.E.2d 880 (1993), *cert. denied*, 510 U.S. 865, 114 S.Ct. 186, 126 L.Ed.2d 145

(1993); *Mountain Lake Colony v. McJunkin*, 308 S.C. 202, 417 S.E.2d 578 (1992), there is no reported South Carolina case directly recognizing the cause of action. However, slander of title has long been recognized as a common law cause of action. See *TXO*, 419 S.E.2d at 877-79 (thorough discussion of the action for slander of title as it developed under the common law of England). South Carolina Code Ann. § 14-1-50 (1976) provides "All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section." Since its enactment in 1712, this reception statute incorporated the body of English common law into the jurisprudence of South Carolina. See *State v. Charleston Bridge Co.*, 113 S.C. 116, 101 S.E. 657 (1919) (South Carolina courts guided by the principles of common law as settled in England); see also 6 S.C.Juris. *Common Law* §§ 3-5 (discussion of the reception statute). We therefore agree with the trial court that South Carolina law, through its incorporation of the common law of England, recognizes a cause of action for slander of title.

****891 *149 [7]** As noted by the court in *TXO*, the Restatement (Second) of Torts § 623A (1977) provides guidelines which modern courts generally follow in identifying the elements of slander of title. Section 623A provides:

One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if

(a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and

(b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.

Section 624 provides:

The rules on liability for the publication of an injurious falsehood stated in § 623A apply to the publication of a false statement disparaging another's property rights in land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary harm to the other through the conduct of

third persons in respect to the other's interests in the property.

From these sections of the Restatement, the West Virginia court determined that, to maintain a claim for slander of title, the plaintiff must establish (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff's title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties. *TXO*, 419 S.E.2d at 879; see also F.P. Hubbard & R.L. Felix, *The South Carolina Law of Torts* 309, n. 13 (1990) (discussing the Restatement rule). Here, Huff alleged facts sufficient to support a cause of action for slander of title.

[8] [9] Wrongfully recording an unfounded claim against the property of another generally is actionable as slander of title. *TXO*, 419 S.E.2d at 880; see also W.E. Shipley, Annotation, *Recording of Instrument Purporting to Affect Title as Slander of Title*, 39 A.L.R.2d 840 (1955). A jury reasonably could conclude Jennings published a false statement when she filed a lien she knew or should have known ***150** was invalid.² See, e.g., *Contract Dev. Corp. v. Beck*, 255 Ill.App.3d 660, 194 Ill.Dec. 423, 627 N.E.2d 760 (1994), *appeal denied*, 156 Ill.2d 556, 202 Ill.Dec. 920, 638 N.E.2d 1114 (1994) (recording of mechanics' liens would support slander of title action if plaintiff could establish the liens were recorded despite high degree of awareness that services performed were not lienable). Moreover, given that the family court order did not award fees to Jennings, the statement in the lien that it was filed pursuant to S.C. Code Ann. § 20-3-145 was false.

[10] [11] A publication is derogatory to the plaintiff's title if the publication disparages or diminishes the quality, condition, or value of the property. 50 Am.Jur.2d *Libel & Slander* § 551 (1995). Here, Jennings's lien clearly diminished the value of the property in the eyes of a third party, given that Huff was required to discharge the lien before he could complete the refinancing of the property.

[12] In slander of title actions, the malice requirement may be satisfied by showing the publication was made in reckless or wanton disregard to the rights of another, or without legal justification. *Id.* § 555. In the case at bar, a jury could conclude Jennings's interpretation of the family court order and section 20-3-145 was not reasonable, and that ****892** Jennings did not file the lien in good faith. A jury likewise might infer malice from the fact that Jennings filed the lien only after

learning that Huff was purchasing the Wife's interest in the property.

[13] [14] Finally, the requirement that special damages be suffered is satisfied here. Special damages recoverable in a slander of title action are the pecuniary losses that *151 result "directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value caused by disparagement, and the expense of measures reasonably necessary to counteract the publication, including litigation." 50 Am.Jur.2d *Libel & Slander* § 560; accord Restatement (Second) of Torts § 633. Huff paid Jennings the money demanded in the lien so that he could close the refinancing of the property. The money paid to satisfy the lien was an expense necessary to counteract the publication and, therefore, constitutes special damages. See *Peters Well Drilling Co. v. Hanzula*, 242 N.J.Super. 16, 575 A.2d 1375, 1379-81 (Ct.App.Div.1990) (money in amount to satisfy disputed lien that was placed in escrow pending resolution of dispute constituted special damages for slander of title claim); *Frega v. Northern New Jersey Mortgage Ass'n*, 51 N.J.Super. 331, 143 A.2d 885 (Ct.App.Div.1958) (in case where plaintiff paid defendant the \$150 demanded to cancel

construction mortgage, and then sued defendant for breach of contract and slander of title, the \$150 previously paid to defendant satisfied special damages requirement for slander of title claim).

Therefore, because Jennings's lien filed pursuant to S.C.Code Ann. § 20-3-145 was invalid, and there are facts which a jury could conclude supported a claim of slander of title, the trial court erred in granting summary judgment to Jennings.

Accordingly, for the foregoing reasons, the decision of the trial court is hereby

REVERSED and REMANDED.

GOOLSBY, J., and WILLIAM L. HOWARD, Sr., Acting Judge, concur.

All Citations

319 S.C. 142, 459 S.E.2d 886

Footnotes

- 1 Section 20-3-145 provides: "In any divorce action any attorney fee awarded by the court shall constitute a lien on any property owned by the person ordered to pay the attorney fee ..."
- 2 Jennings also contends that Huff has no claim for slander of title, because the lien was filed against only the Wife's interest in the property and thus did not encumber Huff's interest in the property. In support of this argument, Jennings relied at oral argument on the rule that a cotenant may separately encumber his interest in property, and such encumbrance binds only the cotenant's interest in the property. See *Young v. Edwards*, 33 S.C. 404, 11 S.E. 1066 (1890); 6 S.C.Juris. *Cotenancies* §§ 37-38 (1991). The property was owned by Huff and the Wife at the time the lien was recorded, and the lien specifically states it was placed against the property of William A. Huff and Betty Jean Huff. While it may be true that, had the lien been foreclosed and the property sold, the lien could have been satisfied only through the Wife's interest in the property, the lien nonetheless attached to the property as whole and affected the value of the property as a whole.

RCW 18.27.080**Registration prerequisite to suit.**

No person engaged in the business or acting in the capacity of a contractor may bring or maintain any action in any court of this state for the collection of compensation for the performance of any work or for breach of any contract for which registration is required under this chapter without alleging and proving that he or she was a duly registered contractor and held a current and valid certificate of registration at the time he or she contracted for the performance of such work or entered into such contract. For the purposes of this section, the court shall not find a contractor in substantial compliance with the registration requirements of this chapter unless: (1) The department has on file the information required by RCW 18.27.030; (2) the contractor has at all times had in force a current bond or other security as required by RCW 18.27.040; and (3) the contractor has at all times had in force current insurance as required by RCW 18.27.050. In determining under this section whether a contractor is in substantial compliance with the registration requirements of this chapter, the court shall take into consideration the length of time during which the contractor did not hold a valid certificate of registration.

[2011 c 336 § 474; 2007 c 436 § 5; 1988 c 285 § 2; 1972 ex.s. c 118 § 3; 1963 c 77 § 8.]

RCW 18.27.114

Disclosure statement required—Prerequisite to lien claim.

(1) Any contractor agreeing to perform any contracting project: (a) For the repair, alteration, or construction of four or fewer residential units or accessory structures on such residential property when the bid or contract price totals one thousand dollars or more; or (b) for the repair, alteration, or construction of a commercial building when the bid or contract price totals one thousand dollars or more but less than sixty thousand dollars, must provide the customer with the following disclosure statement in substantially the following form using lower case and upper case twelve-point and bold type where appropriate, prior to starting work on the project:

"NOTICE TO CUSTOMER

This contractor is registered with the state of Washington, registration no. . . . , and has posted with the state a bond or deposit of for the purpose of satisfying claims against the contractor for breach of contract including negligent or improper work in the conduct of the contractor's business. The expiration date of this contractor's registration is

THIS BOND OR DEPOSIT MIGHT NOT BE SUFFICIENT TO COVER A CLAIM THAT MIGHT ARISE FROM THE WORK DONE UNDER YOUR CONTRACT.

This bond or deposit is not for your exclusive use because it covers all work performed by this contractor. The bond or deposit is intended to pay valid claims up to that you and other customers, suppliers, subcontractors, or taxing authorities may have.

FOR GREATER PROTECTION YOU MAY WITHHOLD A PERCENTAGE OF YOUR CONTRACT.

You may withhold a contractually defined percentage of your construction contract as retainage for a stated period of time to provide protection to you and help insure that your project will be completed as required by your contract.

YOUR PROPERTY MAY BE LIENED.

If a supplier of materials used in your construction project or an employee or subcontractor of your contractor or subcontractors is not paid, your property may be liened to force payment and you could pay twice for the same work.

FOR ADDITIONAL PROTECTION, YOU MAY REQUEST THE CONTRACTOR TO PROVIDE YOU WITH ORIGINAL "LIEN RELEASE" DOCUMENTS FROM EACH SUPPLIER OR SUBCONTRACTOR ON YOUR PROJECT.

The contractor is required to provide you with further information about lien release documents if you request it. General information is also available from the state Department of Labor and Industries.

I have received a copy of this disclosure statement.

.....
(Signature of customer)"

(2) The contractor must retain a signed copy of the disclosure statement in his or her files for a minimum of three years, and produce a signed or electronic signature copy of the disclosure statement to the department upon request.

(3) A contractor subject to this section shall notify any consumer to whom notice is required under subsection (1) of this section if the contractor's registration has expired or is revoked or suspended by the department prior to completion or other termination of the contract with the consumer.

(4) No contractor subject to this section may bring or maintain any lien claim under chapter 60.04 RCW based on any contract to which this section applies without alleging and proving that the contractor has provided the customer with a copy of the disclosure statement as required in subsection (1) of this section.

(5) This section does not apply to contracts authorized under chapter 39.04 RCW or to contractors contracting with other contractors.

(6) Failure to comply with this section shall constitute an infraction under the provisions of this chapter.

(7) The department shall produce model disclosure statements, and public service announcements detailing the information needed to assist contractors and contractors' customers to comply under this section. As necessary, the department shall periodically update these education materials.

[2007 c 436 § 8; 2001 c 159 § 9; 1997 c 314 § 12; 1988 c 182 § 1; 1987 c 419 § 1.]

NOTES:

Voluntary compliance with notification requirements: "Nothing in RCW 18.27.114 shall be construed to prohibit

a contractor from voluntarily complying with the notification requirements of that section which take effect July 1, 1989, prior to that date." [1988 c 182 § 2.]

RCW 18.27.350

Violations—Consumer Protection Act.

The consumers of this state have a right to be protected from unfair or deceptive acts or practices when they enter into contracts with contractors. The fact that a contractor is found to have committed a misdemeanor or infraction under this chapter shall be deemed to affect the public interest and shall constitute a violation of chapter 19.86 RCW. The surety bond shall not be liable for monetary penalties or violations of chapter 19.86 RCW.

[1986 c 197 § 11.]

RCW 19.86.090**Civil action for damages—Treble damages authorized—Action by governmental entities.**

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

[2009 c 371 § 1; 2007 c 66 § 2; 1987 c 202 § 187; 1983 c 288 § 3; 1970 ex.s. c 26 § 2; 1961 c 216 § 9.]

NOTES:

Application—2009 c 371: "This act applies to all causes of action that accrue on or after July 26, 2009." [2009 c 371 § 3.]

Effective date—2007 c 66: See note following RCW 19.86.080.

Intent—1987 c 202: See note following RCW 2.04.190.

Short title—Purposes—1983 c 288: "This act may be cited as the antitrust/consumer protection improvements act. Its purposes are to strengthen public and private enforcement of the unfair business practices-consumer protection act, chapter 19.86 RCW, and to repeal the unfair practices act, chapter 19.90 RCW, in order to eliminate a statute which is unnecessary in light of the provisions and remedies of chapter 19.86 RCW. In repealing chapter 19.90 RCW, it is the intent of the legislature that chapter 19.86 RCW should continue to provide appropriate remedies for predatory pricing and other pricing practices which constitute violations of federal antitrust law." [1983 c 288 § 1.]

RCW 60.04.031

Notices—Exceptions.

(1) Except as otherwise provided in this section, every person furnishing professional services, materials, or equipment for the improvement of real property shall give the owner or reputed owner notice in writing of the right to claim a lien. If the prime contractor is in compliance with the requirements of RCW 19.27.095, 60.04.230, and 60.04.261, this notice shall also be given to the prime contractor as described in this subsection unless the potential lien claimant has contracted directly with the prime contractor. The notice may be given at any time but only protects the right to claim a lien for professional services, materials, or equipment supplied after the date which is sixty days before:

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

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

In the case of new construction of a single-family residence, the notice of a right to claim a lien may be given at any time but only protects the right to claim a lien for professional services, materials, or equipment supplied after a date which is ten days before the notice is given as described in this subsection.

(2) Notices of a right to claim a lien shall not be required of:

(a) Persons who contract directly with the owner or the owner's common law agent;

(b) Laborers whose claim of lien is based solely on performing labor; or

(c) Subcontractors who contract for the improvement of real property directly with the prime contractor, except as provided in subsection (3)(b) of this section.

(3) Persons who furnish professional services, materials, or equipment in connection with the repair, alteration, or remodel of an existing owner-occupied single-family residence or appurtenant garage:

(a) Who contract directly with the owner-occupier or their common law agent shall not be required to send a written notice of the right to claim a lien and shall have a lien for the full amount due under their contract, as provided in RCW 60.04.021; or

(b) Who do not contract directly with the owner-occupier or their common law agent shall give notice of the right to claim a lien to the owner-occupier. Liens of persons furnishing professional services, materials, or equipment who do not contract directly with the owner-occupier or their common law agent may only be satisfied from amounts not yet paid to the prime contractor by the owner at the time the notice described in this section is received, regardless of whether amounts not yet paid to the prime contractor are due. For the purposes of this subsection "received" means actual receipt of notice by personal service, or registered or certified mail, or three days after mailing by registered or certified mail, excluding Saturdays, Sundays, or legal holidays.

(4) The notice of right to claim a lien described in subsection (1) of this section, shall include but not be limited to the following information and shall substantially be in the following form, using lower-case and upper-case ten-point type where appropriate.

NOTICE TO OWNER

IMPORTANT: READ BOTH SIDES OF THIS NOTICE CAREFULLY.

PROTECT YOURSELF FROM PAYING TWICE

To: Date:

Re: (description of property: Street address or general location.)

From:

AT THE REQUEST OF: (Name of person ordering the professional services, materials, or equipment)

THIS IS NOT A LIEN: This notice is sent to you to tell you who is providing professional services, materials, or equipment for the improvement of your property and to advise you of the rights of these persons and your responsibilities. Also take note that laborers on your project may claim a lien without sending you a notice.

**OWNER/OCCUPIER OF EXISTING
RESIDENTIAL PROPERTY**

Under Washington law, those who furnish labor, professional services, materials, or equipment for the repair, remodel, or alteration of your owner-occupied principal residence and who are not paid, have a right to enforce their claim for payment against your property. This claim is known as a construction lien.

The law limits the amount that a lien claimant can claim against your property. Claims may only be made against that portion of the contract price you have not yet paid to your prime contractor as of the time this notice was given to you or three days after this notice was mailed to you. Review the back of this notice for more information and ways to avoid lien claims.

**COMMERCIAL AND/OR NEW
RESIDENTIAL PROPERTY**

We have or will be providing professional services, materials, or equipment for the improvement of your commercial or new residential project. In the event you or your contractor fail to pay us, we may file a lien against your property. A lien may be claimed for all professional services, materials, or equipment furnished after a date that is sixty days before this notice was given to you or mailed to you, unless the improvement to your property is the construction of a new single-family residence, then ten days before this notice was given to you or mailed to you.

Sender:
Address:
Telephone:

Brief description of professional services, materials, or equipment provided or to be provided:

IMPORTANT INFORMATION
ON REVERSE SIDE
IMPORTANT INFORMATION
FOR YOUR PROTECTION

This notice is sent to inform you that we have or will provide professional services, materials, or equipment for the improvement of your property. We expect to be paid by the person who ordered our services, but if we are not paid, we have the right to enforce our claim by filing a construction lien against your property.

LEARN more about the lien laws and the meaning of this notice by discussing them with your contractor, suppliers, Department of Labor and Industries, the firm sending you this notice, your lender, or your attorney.

COMMON METHODS TO AVOID CONSTRUCTION LIENS: There are several methods available to protect your property from construction liens. The following are two of the more commonly used methods.

DUAL PAYCHECKS (Joint Checks): When paying your contractor for services or materials, you may make checks payable jointly to the contractor and the firms furnishing you this notice.

LIEN RELEASES: You may require your contractor to provide lien releases signed by all the suppliers and subcontractors from whom you have received this notice. If they cannot obtain lien releases because you have not paid them, you may use the dual payee check method to protect yourself.

YOU SHOULD TAKE APPROPRIATE STEPS TO PROTECT YOUR PROPERTY FROM LIENS.

YOUR PRIME CONTRACTOR AND YOUR CONSTRUCTION LENDER ARE REQUIRED BY LAW TO GIVE YOU WRITTEN INFORMATION ABOUT LIEN CLAIMS. IF YOU HAVE NOT RECEIVED IT, ASK THEM FOR IT.

(5) Every potential lien claimant providing professional services where no improvement as defined in RCW 60.04.011(5) (a) or (b) has been commenced, and the professional services provided are not visible from an inspection of the real property may record in the real property records of the county where the property is located a notice which shall contain the professional service provider's name, address, telephone number, legal description of the property, the owner or reputed owner's name, and the general nature of the professional services provided. If such notice is not recorded, the lien claimed shall be subordinate to the interest of any subsequent mortgagee and invalid as to the interest of any subsequent purchaser if the mortgagee or purchaser acts in good faith and for a valuable consideration acquires an interest in the property prior to the commencement of an improvement as defined in RCW 60.04.011(5) (a) or (b) without notice of the professional services being provided. The notice described in this subsection shall be substantially in the following form:

NOTICE OF FURNISHING
PROFESSIONAL SERVICES

That on the (day) day of (month and year) , (name of provider) began providing professional services upon or for the improvement of real property legally described as follows:

[Legal Description
is mandatory]

The general nature of the professional services provided is

The owner or reputed owner of the real property is

.....

.....
(Signature)

.....
(Name of Claimant)

.....

(Street Address)

.....
(City, State, Zip Code)

.....
(Phone Number)

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

[1992 c 126 § 2; 1991 c 281 § 3.]

RCW 60.04.091

Recording—Time—Contents of lien.

Every person claiming a lien under RCW 60.04.021 shall file for recording, in the county where the subject property is located, a notice of claim of lien not later than ninety days after the person has ceased to furnish labor, professional services, materials, or equipment or the last date on which employee benefit contributions were due. The notice of claim of lien:

- (1) Shall state in substance and effect:
 - (a) The name, phone number, and address of the claimant;
 - (b) The first and last date on which the labor, professional services, materials, or equipment was furnished or employee benefit contributions were due;
 - (c) The name of the person indebted to the claimant;
 - (d) The street address, legal description, or other description reasonably calculated to identify, for a person familiar with the area, the location of the real property to be charged with the lien;
 - (e) The name of the owner or reputed owner of the property, if known, and, if not known, that fact shall be stated; and
 - (f) The principal amount for which the lien is claimed.

(2) Shall be signed by the claimant or some person authorized to act on his or her behalf who shall affirmatively state they have read the notice of claim of lien and believe the notice of claim of lien to be true and correct under penalty of perjury, and shall be acknowledged pursuant to chapter 64.08 RCW. If the lien has been assigned, the name of the assignee shall be stated. Where an action to foreclose the lien has been commenced such notice of claim of lien may be amended as pleadings may be by order of the court insofar as the interests of third parties are not adversely affected by such amendment. A claim of lien substantially in the following form shall be sufficient:

CLAIM OF LIEN

....., claimant, vs , name of person indebted to claimant:

Notice is hereby given that the person named below claims a lien pursuant to *chapter 64.04 RCW. In support of this lien the following information is submitted:

1. NAME OF LIEN CLAIMANT:
 TELEPHONE NUMBER:
 ADDRESS:

2. DATE ON WHICH THE CLAIMANT BEGAN TO PERFORM LABOR, PROVIDE PROFESSIONAL SERVICES, SUPPLY MATERIAL OR EQUIPMENT OR THE DATE ON WHICH EMPLOYEE BENEFIT CONTRIBUTIONS BECAME DUE:

3. NAME OF PERSON INDEBTED TO THE CLAIMANT:

4. DESCRIPTION OF THE PROPERTY AGAINST WHICH A LIEN IS CLAIMED (Street address, legal description or other information that will reasonably describe the property):

5. NAME OF THE OWNER OR REPUTED OWNER (If not known state "unknown"):

6. THE LAST DATE ON WHICH LABOR WAS PERFORMED; PROFESSIONAL SERVICES WERE FURNISHED; CONTRIBUTIONS TO AN EMPLOYEE BENEFIT PLAN WERE DUE; OR MATERIAL, OR EQUIPMENT WAS FURNISHED:

7. PRINCIPAL AMOUNT FOR WHICH THE LIEN IS CLAIMED IS:

8. IF THE CLAIMANT IS THE ASSIGNEE OF THIS CLAIM SO STATE HERE:

....., Claimant

 (Phone number, address,
 city, and
 state of claimant)

STATE OF WASHINGTON, COUNTY OF
, SS.

....., being sworn, says: I am the claimant (or attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan) above named; I have read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct and that the claim of lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.

Subscribed and sworn to before me this day of

The period provided for recording the claim of lien is a period of limitation and no action to foreclose a lien shall be maintained unless the claim of lien is filed for recording within the ninety-day period stated. The lien claimant shall give a copy of the claim of lien to the owner or reputed owner by mailing it by certified or registered mail or by personal service within fourteen days of the time the claim of lien is filed for recording. Failure to do so results in a forfeiture of any right the claimant may have to attorneys' fees and costs against the owner under RCW 60.04.181.

[1992 c 126 § 7; 1991 c 281 § 9.]

NOTES:

***Reviser's note:** The reference to chapter 64.04 RCW appears to be erroneous. Reference to chapter 60.04 RCW was apparently intended.

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

WYNDEN HOLMAN and
JAMIE HOLMAN,

Appellants

v.

THOMAS DUTCHER and
DIANE DUTCHER.

Respondents

NO. 74976-5-1

(Superior Court
No. 14-2-00491-1)

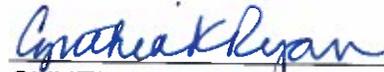
**DECLARATION OF
SERVICE**

I, Cynthia K. Ryan, under penalty of perjury under the laws of the State of Washington, hereby certify and declare that on September 12, 2016 I sent by email, a true copy of Respondent's Brief to:

Lars E. Neste
DEMCO LAW FIRM, P. S.
5224 Wilson Avenue South,
Suite 200
Seattle, WA 98118
lneste@demcolaw.com

Christina A. Cowin
DEMCO LAW FIRM, P. S.
5224 Wilson Avenue South,
Suite 200
Seattle, WA 98118
ccowin@demcolaw.com

Signed this 12th day of September, 2016


CYNTHIA K. RYAN