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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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36482-4-II

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

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NORTHWEST CASCADE, INC., a Washington corporation,

Appellant,

v.

TITANIC INVESTMENTS, INC., a Washington corporation; NORMAN LEHMAN, an individual, and LOUISE LEHMAN, an individual, and their marital community; and RANGLES SAND & GRAVEL, a Washington corporation; BUILTWELL STRUCTURES, INC., a Washington corporation; CITY BANK, a Washington state chartered banking institution; and EVERGREEN TITLE COMPANY, INC., a Washington corporation,

Respondents.

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**BRIEF OF INTERVENING PARTY WELLS FARGO BANK, N.A.**

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March 12, 2010

**ORIGINAL**

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## I. INTRODUCTION

Respondent/ intervening party Wells Fargo Bank, N.A. (“Wells Fargo”) responds to Appellant Northwest Cascade, Inc.’s (“NWC”) appeal from a trial court judgment solely as to the issue of NWC’s invalid lien rights. Wells Fargo was authorized to intervene into this appeal on January 22, 2010. Wells Fargo intervened in order to protect the deed of trust granted to Wells Fargo by homeowners Timothy B. and Susan M. Peterson. Like the Petersens, Wells Fargo risks foreclosure, along with eight other lot and lienholders, if this Court overturns the trial court judgment concerning the validity of NWC’ mechanic lien.

The trial court’s judgment was based on various findings of fact supported by substantial evidence contained in the record. Specifically, the trial court properly found that, under the circumstances and the evidence presented, NWC sent an employee to the project site in the middle of the summer to revive lien rights that had otherwise lapsed. Based on this finding, the court logically concluded that NWC’s lien was invalid.

Finally, the court did not abuse its discretion with denying NWC's motion for reconsideration, and the court properly offset the parties' attorneys' fees regarding the lien issue.

## **II. ISSUES PRESENTED**

- A.** Did the trial court properly dismiss NWC's lien when it concluded that NWC's lien rights were invalid based on the finding that the July 2002 work was for the purpose of reviving lien rights?
- B.** Did the trial court abuse its discretion when it denied NWC's motion for reconsideration regarding the validity of the lien?
- C.** Did the trial court properly offset the parties' attorneys' fees on the lien issue?
- D.** Should Wells Fargo recover its attorneys' fees and costs on this appeal when NWC failed to improve its position on its trial de novo?

## **III. STATEMENT OF THE CASE**

### **A. FACTUAL BACKGROUND.**

On August 14, 2001 NWC entered into a contract with Lehman for the construction and performance of work on the Gellar Addition—a nine

lot subdivision in Pierce County (the “project”). CP 387 (Findings 4, 5).<sup>1</sup> NWC began work on or about November 5, 2001 and worked through January 2002. CP 387 (Finding 5, 14). NWC’s halted performance on January 2, 2002. CP 388 (Finding 14). As required by Pierce County regulations of Temporary Erosion and Sedimentation Control (“TESC”), NWC continued to file the required TESC reports with the county; however, NWC did not submit separate invoices to Lehman for work performed (if any) on the property in relation to those monthly reports. CP 387 (Findings 15).

On July 2, 2002—about seven (7) months after NWC stopped work in January 2002—NWC sent one of its employees to the project site in the middle of the summer to perform erosion control in the form of “mudding” around a catch basin. CP 389 (Finding 16). This work in July 2002 was not required and was performed without notice to Defendants, Lehman/Titanic. *Id.* NWC did not submit a separate invoice to Defendant Lehman (or otherwise bill) for the July catch basin work. *Id.*

As of July 2002, Lehman was behind on payments to NWC, which contributed to the general state of uncertainty regarding the project as found by the trial court. CP 389 (Finding 17).

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<sup>1</sup> Attached as Appendix A is a copy of the lower court’s *Findings of Fact and Conclusions of Law*, May 30, 2007.

NWC filed a mechanic's and materialman's lien on September 27, 2002. According to the trial court, lien rights had lapsed because "the last day NWC performed work was in January 2002," and the court found that the July 2002 catch basin work "was done to revive expired lien rights." CP 388-89 (Findings 21 & 22).

**B. TRIAL COURT PROCEDURE.**

NWC filed this action on April 29, 2003 for Breach of Contract and Foreclosure of Lien. On or about May 25, 2004, NWC filed an amended complaint to name additional parties that had subsequently obtained an interest in the lien property that was developed into nine lots.<sup>2</sup> CP 33-39, 388 (Finding 7).

After holding a bench trial from May 22 to May 24, 2006, the Honorable Judge Henry Haas issued an Opinion Letter that summarized the court's findings of fact and conclusions of law. CP 143-45; 386. The court concluded (*inter alia*) that the lien claim should be dismissed and released from the property. CP 144-45, 393-95; CP 389 (Finding 16) ("[t]he Court concludes that the work performed by NWC on July 2, 2002 was done to revive expired lien rights.").

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<sup>2</sup> The Complaint was amended because the development was subsequently platted—creating nine lots. Those lots are now affected by this lawsuit and appeal.

NWC moved for reconsideration, requesting the court to reverse its holding that the lien had lapsed and was invalid. CP 146-156. The trial court thereafter denied the motion—issuing an opinion letter and a transcribed oral ruling.<sup>3</sup> CP 169-182. NWC moved for an award of attorneys’ fees pursuant to the contract. CP 183-268. Both parties submitted proposed findings and conclusions. CP 302-367. After a hearing on April 11, 2007, the trial court entered findings of fact and conclusions of law, including an award of attorneys’ fees to NWC for the breach of contract issue, but the court offset an award of fees for the lien issue because the parties both prevailed on their lien issues. CP 387, 394-95.

### **C. APPEAL PROCEDURE**

NWC subsequently appealed and Lehman cross appealed. Respondents filed for bankruptcy shortly after. NWC moved to stay and appeal. This Court stayed the appeal on September 7, 2007.

On or about July 1, 2009, NWC notified this Court that it had obtained relief from the automatic stay in the bankruptcy court and that NWC intended to proceed with the appeal. Upon notice by NWC that it

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<sup>3</sup> Attached as Appendix C is a copy of the *Order on Motion for Reconsideration* and attached transcribed opinion, dated September 8, 2006 (CP 169-182).

obtained relief from stay, this Court lifted the stay and issued a new schedule on July 6, 2009.

On August 21, 2009, Herbert Gelman, counsel for Lehman, for the Respondents in this appeal—filed a Notice of Intent to Withdraw. On or about November 30, 2009, NWC sent notice by regular and certified mail to interested parties that the appeal had restarted, which included various property owners and lien holders that could be affected by this appeal. *See* Appellant’s Brief at pgs.12-13.

Respondent Wells Fargo intervened in this appeal on January 14, 2010 by filing a notice of appearance and motion for substitution or intervention. An Order for Substitution or Intervention of Interested Party Wells Fargo Bank, N.A. was entered January 22, 2010.

#### **IV. ARGUMENT**

##### **A. THE TRIAL COURT CORRECTLY FOUND THAT NWC’S LIEN HAD LAPSED AND WAS THEREFORE INVALID.**

The trial court, considering the substantial evidence in the record and the totality of the circumstances, correctly concluded that NWC’s lien was invalid based on the finding that NWC performed work in July 2002 for the purpose of reviving lapsed lien rights.

This appeal calls for review of the trial court's findings of fact and conclusions of law entered following a bench trial. Error has been assigned to factual findings made by the court, as well as conclusions of law. Thus, the standard of review of a trial court's findings of fact and conclusions of law is a two-step process. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). The court must first determine whether the findings are supported by substantial evidence in the record. *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 108, 86 P.3d 1175 (2004) (stating that “‘substantial evidence’ exists when there is a sufficient quantum of proof to support the trial court's findings of fact.”) (citations omitted).

If the findings are supported by substantial evidence, the court must next decide whether the findings support the conclusions of law. *Landmark*, 138 Wn.2d at 573. This court reviews the trial court's conclusions of law on a de novo standard of review. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). The appellate court must determine de novo whether the trial court “derived proper conclusions of law” from its findings of fact. *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002).

Regarding challenges for lack of evidence, this Court views the evidence in the record in the light most favorable to the nonmoving party

to determine whether, as a matter of law, there is no substantial evidence or reasonable inferences to sustain the verdict for the nonmoving party. *Hizey v. Carpenter*, 119 Wash.2d 251, 271-72, 830 P.2d 646 (1992).

Given these standards of review, the trial court's findings of fact (primarily that NWC's lien rights lapsed because the work performed by NWC on July 2, 2002 was for the purpose to revive expired lien rights) are reviewed under the substantial evidence test. The trial court's legal conclusion that must be reviewed de novo is primarily the conclusion that the lien was invalid as it was filed more than 90 days after NWC last performed work. Therefore, the evidence in the record in this case should be viewed in the light most favorable to Wells Fargo.

**1. THE COURT CORRECTLY FOUND THAT THE JULY 2002 WORK PERFORMED BY NWC WAS FOR THE PURPOSE OF REVIVING EXPIRED LIEN RIGHTS.**

The Court correctly found by substantial evidence that NWC intended to revive lapsed lien rights in July 2002 when it sent an employee to the project site to do four hours of mudding around a catch basin—almost seven months after NWC ceased work on the property in January 2002. CP 389 (Findings 16, 21, 22).

Washington statute provides that “[e]very 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....” RCW 60.04.091. The 90-day limitation period is strictly construed. *See Intermountain Elec, Inc, v. G-A-T Bros. Constr., Inc.*, 115 Wn. App. 384, 391, 62 P.3d 548 (2003) (lien filed 94 days after work ceased was invalid on its face); *Lumberman's of Wash., Inc. v. Barnhardt*, 89 Wn. App. 283, 286, 949 P.2d 382 (1997) (invalidating claim of materialmen's lien filed outside 90-day statutory time period for claim of lien).

It is well established that the work that is the basis for a statutory lien cannot be performed for the purpose of prolonging the time for filing the lien, or to revive lien rights that have lapsed. *Intermountain Elec., Inc. v. G-A-T Bros. Const., Inc.*, 115 Wn. App. 384, 393, 62 P.3d 548 (2003); *Kirk v. Rohan*, 29 Wn.2d 432, 187 P.2d 607 (1948). This exception is necessary in order to protect innocent contractors, lenders, and homeowners who rely upon the strict statutory process in order to make purchase and lending decisions related to real property. Without such assurances, especially involving the super priority lien nature of a mechanic lien, the stability of land title would be undermined.

In the case at hand, after reviewing the evidence and observing the witnesses' testimony, the trial court issued an opinion letter on June 15, 2006, holding the following:

Although the contract required NWC to maintain environmental control and inspection of the project, it is difficult to conclude that the July 2, 2002 site visit and work were performed to complete the original contract rather than to revive the lien rights which has lapsed. At that time Mr. Lehman [Defendant/Contractor] had not paid the balance of the second invoice, was not communicating with NWC and there was a reasonable basis for the uncertainty concerning the status of the project. Although the court concludes that the lien should be dismissed and released from the property, the court does not conclude that the lien filing was frivolous under RCW 60.04.081(4).

CP 144-45, 393-95. As stated in this court opinion letter, the trial court found it difficult to conclude that NWC was not trying to revive the lien rights, especially when it considered the facts presented at trial that Lehman was late on payments, that he was not communicating with NWC, that there was a general uncertainty concerning the status of the project, that the evidence shows that the July work was untimely, and that NWC had ceased substantive work in January 2002. *See* CP 388-390 (Findings 15, 16, 17, 21, and 22).

The trial court subsequently found the following facts regarding NWC's purported lien:

16. NWC performed catch basin maintenance on the Project on July 2, 2002. On July 2, 2002 NWC sent one of its employees to the site to perform some "mudding" around catch basins.

Pursuant to the original Contract NWC was required to maintain erosion control and provide inspection work required by the Contract. The work performed on July 2, 2002 was not required to be [sic] done at the time it was performed. It was performed without notice to the Defendant, Lehman/Titanic, more than four months after NWC ceased doing work on the Project. The only reason NWC sent a man out to do some work on July 2, 2002 was to revive NWC's lien rights. Catch basin maintenance work was within the original scope of NWC's work under the Contract. Plaintiff's Trial Exhibit No. 27. NWC did not submit a separate invoice for that work to Lehman or otherwise bill for it. No reporting was required under Pierce County regulations for this work. The July 2002 work was not performed under a separate contract between NWC and Lehman or Titanic.

17. As of July 2002, Lehman was behind in payments and the Court finds that there was a general state of "uncertainty" regarding the Project.
19. NWC filed a mechanic's and materialmen's lien under RCW Chap. 60.04 on September 27, 2002, within 90 days of the July 2, 2002 work, but more than 90 days after the last TESC work reported to the County, and more than 90 days after the work performed in January 2002.
21. NWC's lien rights lapsed before July 2, 2002 as the last day NWC performed work was in January 2002.
22. The Court concludes that the work performed by NWC on July 2, 2002 was done to revive expired lien rights.

Based on these findings, the trial court made the following

conclusions of law:

17. NWC's lien was invalid as it was filed more than 90 days after last performing work.
18. NWC's lien claim is dismissed with prejudice.

Appellant contends that the facts of the case refute any notion that the July 2002 catch basin work was done with the “intention of either renewing or extending lien rights” and that the work was done “because NWC had a contractual and regulatory obligation to do it....” Appellant’s Brief at pg 16, ¶ 2. Throughout the trial and this appeal, Appellant places too much emphasis on the fact that the July 2002 catch basin work was within the scope of the contract, and therefore, provides a basis for valid lien rights. A subcontractor performing work in an attempt to extend or revive lien rights will of course perform work that is within the scope of the contract in order to give the appearance that it was not for the purpose of reviving lien rights. The primary issue that the trial court resolved was whether such contractual work was for the *purpose* of reviving lien rights, which was a question of fact for the trial court based on the evidence in the record.

Moreover, Appellant also places too much emphasis on the fact that the July 2002 work was required by county regulation. Merely because NWC is required to maintain TESC measures does not automatically mean that the July 2002 work was *not* for the purpose to revive lien rights. Adhering to the TESC measures is ancillary (and possibly a scapegoat) to the ultimate determination of whether the July 2002 work was for the purpose of reviving lien rights. It is reasonably

logical to conclude that a subcontractor, attempting to revive lien rights, may perform work that has an *affect* on aspects of the contract or county requirements, but that does not necessarily mean that the work was not for the purpose to revive lien rights, especially when substantial evidence shows otherwise. At any rate, the trial court was not persuaded by NWC's argument in this respect when considering the evidence and unusual circumstances surrounding the July 2002 work.

The trial court also relied on evidence in the form of expert testimony by Mr. John Sprague<sup>4</sup> regarding NWC's July 2002 work on the catch basin. Sprague testified that it was "odd that they [NWC] went out and mudded those pipes. Nothing had happened on the job for a long time and why...the need to all of the sudden show up and mud those pipes? There was really no rhyme or reason for it."<sup>5</sup> VRP 353, ll. 3-8. Upon being asked his opinion of why that work was done in July after so many months, Sprague testified that it was his opinion that it was done just to

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<sup>4</sup> John J. Sprague had worked in the industry since 1994 and was a supervisor and estimator for J.J. Sprague, Inc., which was the company that completed the unfinished work on project during the Fall of 2002 and into 2003. *See generally*, VRP 323-25.

<sup>5</sup> Although Sprague was not at the site at the time of the July 2002 work, in his May 23, 2006 deposition Sprague testified that the mudding was not necessary because any erosion damage would have occurred within 60 days of installation of the catch basin. *See* Deposition of John Sprague, pg. 124, ll. 14-25. He said it was "ridiculous" and "silly" to mud that catch basin when so many other things still needed to be done. *Id.* at pg. 138, ll. 6-17.

“enforce a lien right” and that he has seen that done before. VRP 354, ll. 4-8. He further testified that “a lot of work had to be done” other than going out and mudding a catch basin in the middle of the summer, and that he could “hardly believe that anybody was concerned about the mudding of those pipes when the job was in the state it was in.” VRP 354, ll. 12-15.

Sprague’s testimony supports the finding that, mudding a catch basin, in the middle of the summer, after seven months of inactivity, and without any invoice or notice to the Defendant, coupled with the general uncertainty of the project, that it can be reasonably inferred that NWC was merely attempting to renew its lien rights that had lapsed a few months prior to the July 2002 work. Sprague recognized and testified to this fact, the trial court found this fact, and this Court should uphold this finding of fact as it is supported by additional evidence in the record.

The Washington Supreme Court decision in *Petro Paint Mfg. Co. v. Taylor*, 147 Wash. 158, 265 P. 155 (1928) provides an analogous set of facts and holdings to the case at hand. In *Petro Paint* the Supreme Court affirmed the trial court’s decision that the lien claimant delivered goods solely for the purpose of extending the time for filing its lien claims against the property. *Id.* at 157. The lien claimant argued that, where a contractor does further work which is necessary for the performance of the

contract, at the request of the contractor, for the purpose of fully completing the contract and not merely for the purpose of fixing a later date, the lien period should commence to run from the doing of such work. *Id.* at 164. The Supreme Court rejected the lien claimant’s argument and stated that the “*evidence and logical deductions from the evidence* in this case show that the small items of materials furnished by appellant on July 6, although at the request of the owner were...made for the purpose of fixing a later [lien] date.” *Id.* at 163 (emphasis added). Here, the “evidence and logical deductions from the evidence” support the trial court’s finding that NWC was attempting to revive lien rights by sending an employee to perform untimely erosion work in the middle of the summer—work that was not even at the request of the owner.<sup>6</sup>

Appellant seems to discuss the trial evidence in a vacuum and out of context, whereas the trial court considered the evidence in light of the surrounding circumstances at the time NWC performed the July 2002 work. Appellant contends that the July 2002 work had to be done at some point, and that questioning why the work was done in July 2002 is “not evidence,” is “irrelevant,” and is “not the applicable standard.”

Appellant’s Brief at pg 17, ¶ 2; 18, ¶¶ 1, 2. The underlying issue,

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<sup>6</sup> As distinguished from *Petro Paint* where the owner actually requested the work to complete the contract, but the Supreme Court still affirmed the trial court’s finding that the lien claimant was attempting to extend lien rights based upon the evidence at trial.

however, was whether NWC sent an employee to the site in July for the *purpose* of reviving lapsed lien rights. It is appropriate to rely on evidence, deductions from that evidence, and common sense when questioning and determining the purpose of NWC's conduct of randomly sending an employee to the site to perform untimely work. Inquiring into the question of the purpose for NWC performing the July 2002 work was not "irrelevant" contrary to Appellant's claim. Furthermore, such inquiry does, in fact, relate to the question under lien law: whether the claimant performed work for the purpose of reviving lien rights.

Appellant also contends that NWC was not required to give notice of the July work and that lack of notice "proves nothing,"<sup>7</sup> but the trial court found this lack of notice somewhat compelling under the unusual set of circumstances when it held that:

The work performed on July 2, 2002 was not required to be done at the time it was performed. It was performed without notice to the Defendant...more that four months after NWC ceased doing work on the project. The only reason NWC sent a man out to do some work...was to revive NWC's lien rights.

CP 389 (Finding 16). Even though notice of the July 2002 work was not required under the contract, the court placed bearing on the fact that NWC did not notify Defendant of the work because work ceased on the project almost seven months prior. This fact further added to the cumulative

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<sup>7</sup> Appellant's Brief at pgs. 20-21.

evidence to support the trial court's finding that NWC's attempted to revive lien rights by performing the random erosion work in July. This fact, and the fact that NWC failed to submit a separate invoice for the July 2002 work, are indeed relevant to the trial court's ultimate conclusion that NWC's lien was invalid.

As an illustration, NWC's attempt to revive lien rights would be similar to a situation where a landscaping subcontractor randomly sends an employee to its job site in the middle of the summer to prepare the shrubbery and trees for the upcoming winter, and then fail to send an invoice to the contractor for that work (seven months after ceasing work; with uncertain project status; without notice; and where the contractor was behind on payments). Such landscaping work could be ongoing, it would likely be within the scope of the contract, it may be in accordance with industry custom, and it would need to be done before the winter. The begging question in this example is the same question the trial court resolved in this case: Why then did the subcontractor perform that particular work at that particular time? The answer was apparent: to revive lien rights.

After hearing all the evidence presented at a two-day trial and after hearing much testimony, the trial court ultimately found the purpose NWC sent a man to the site in July 2002 was to "revive NWC's lien rights" and

that “NWC’s lien rights lapsed before July 2, 2002 as the last day NWC performed work was in January 2002.” CP 389 (Finding 16). Based on those and other related lien findings,<sup>8</sup> the court logically concluded that NWC’s asserted lien right was invalid as it was filed more than 90 days after last performing work. CP 394 (Conclusion 17).

Appellant’s argument that “there is no evidence, much less substantial evidence,” to support a finding that the July 2002 work was done for the purpose of reviving NWC’s lien rights is unfounded and lacks support in the record. Appellant’s Brief at pg 16, ¶ 3. The above referenced evidence at trial and the facts show that, not only was there some evidence, but there was substantial evidence that the trial court relied upon in determining NWC’s purpose of performing the work seven months after ceasing work on the project.

The question of whether NWC intended to revive lien rights depends upon the credibility of the witnesses, the experts, and the court’s reasoning considering the presentation of evidence. The trial court, in this instance, is in a better position to determine those questions. This was best stated in a controlling appellate opinion in *Kirk v. Rohan*, 29 Wn.2d 432, 187 P.2d 607 (1948) regarding expired lien rights. The court in *Kirk* stated that:

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<sup>8</sup> See CP 389 (Findings 16, 17, 21, and 22); CP 394 (Conclusions 17 and 18).

The trial court personally saw the witnesses, heard them testify, observed their conduct, and demeanor while testifying, and weighed their interest and motives and the probabilities of the truthfulness of their testimony. We are not able to say that the findings of the trial court...are clearly not supported by the weight of the evidence, and, therefore, such findings will not be disputed on appeal.

*Id.* at 437-38 (citing *Bradley v. Donovan-Pattison Realty Co.*, 84 Wash. 654, 147 P. 421 (1915)). The trial court's findings in this case should also not be disputed or argued on appeal when the court personally observed the witnesses and weighed the evidence impartially.

When viewing the record in the light most favorable to Wells Fargo, the judgment invalidating NWC's lien should be affirmed because the trial court's findings were based on substantial evidence and reasonable inferences to support the conclusion that NWC's lien is invalid.

**B. THE TRIAL COURT WAS WITHIN ITS BROAD DISCRETION IN DENYING NWC'S MOTION FOR RECONSIDERATION.**

This Court reviews a denial of a motion for reconsideration for a manifest abuse of discretion. *Kleyer v. Harborview Med. Ctr. of Univ. of Wash.*, 76 Wn. App. 542, 545, 887 P.2d 468 (1995). A trial court abuses its discretion when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The litigant moving for reconsideration must "identify the specific reasons in fact and law as to each ground on which the motion is

based.” CR 59(b). This motion, however, does not provide litigants with a “second bite at the apple.” The motion may be granted if, among other reasons, the litigant produces newly discovered material evidence, or if material evidence was available but not produced before the motion was granted, that the litigant made diligent though unsuccessful attempts to obtain it. CR 59(a). A motion for reconsideration may be granted if there is no evidence or reasonable inference from the evidence to justify the decision, or that it is contrary to law. CR 59(a)(7).

In its motion for reconsideration regarding the invalidity of the lien, NWC did not introduce newly discovered evidence or material evidence that was not presented before the motion was filed.<sup>9</sup> NWC argued that there was either no evidence or reasonable inference from the evidence to justify the trial court’s decision regarding the validity of the lien. Appendix C, CP 175, ll. 13-14. NWC merely made some of the same arguments it made in this appeal, including an argument that the only evidence supporting the invalidity of the lien was Mr. Sprague’s speculative, lay opinion testimony. CP 146-156. As discussed above, it is apparent that the trial court relied upon more than Sprague’s expert

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<sup>9</sup> See Appendix C, *Order on Motion for Reconsideration and Attached Opinion* (CP 175-177).

testimony, even though his testimony is relevant and compelling considering the circumstances of this case. *See generally* CP 175-177.

In denying NWC's motion for reconsideration, the court stated that it had adequate time to review the case and did a considerable amount of review prior to the oral arguments on the motion. CP 175, ll. 9-12. In a transcribed court opinion, the court stated that the "only question on the lien issue is why did NWC send somebody out there in July of 2002 to do some work, and the particular work that was done under the circumstances that were existing at that time...." CP 176, ll. 1-7. The court recognized that it was undisputed in the evidence that the work stopped in the end of January, that the Defendant had not paid his bill, that the job had been shut down, and that there was no communication between the parties about resuming the job. CP 176, ll. 8-14.

The court emphasized the importance of the fact that the work done in July 2002 was distinguishable from the prior environmental inspection work performed by NWC. CP 176, ll. 15-23 The court continued by adding the fact that there was no bill issued for that work—from a company that maintains great records—and that it "just seemed, frankly, odd, that a worker goes out there in July of '02 to do something that isn't tracked, that isn't billed in the normal course." CP 177, ll. 1-3. The court finally stated that "there is every inference in all of that to

conclude that these lien rights [had lapsed], and there was a whole general state of uncertainty and that the reason this guy went out there was basically to do some kind of work in order to revive that lien.” CP 177, ll. 4-15.

The reason for this verbatim reiteration of the court’s opinion denying the motion is to illustrate the exact facts that the court relied upon in making a reasonable inference based on the evidence presented. It is apparent that the court did not abuse its broad discretion in denying the motion when the denial was based on evidence and testimony presented at trial.

**C. PUBLIC POLICY SUPPORTS THE TRIAL COURT’S FINDING.**

As a matter of public policy, the trial court’s ruling that NWC’s lien is invalid is in accordance with the public policy related to notice of a potentially conflicting property interests. There is no record of NWC filing a lis pendens on the property, and the nine homeowners and various lenders that obtained an interest in the property after construction were not put on notice that their interests could be inferior to that of NWC’s interest upon conclusion of this litigation.

The purpose of a lis pendens is to “give notice of pending litigation affecting title to real property, and to give notice that anyone who

subsequently deals with the affected property will be bound by the outcome of the action to the same extent as if he or she were a party to the action.” *United Savings and Loan Bank v. Pallis*, 107 Wn. App. 398, 405, 27 P3d 629 (Div.1, 2001). In filing this action, NWC initiated an action which would clearly affect title to the nine lots on the property. At the end of the trial proceeding and at the end of this matter, it is possible that NWC could foreclose on a substantial lien on the properties. That is something that anyone interested in the property should have known about.

NWC’s failure to file a lis pendens prejudices various parties that may not have entered into contracts relating to the property had they been put on notice by a duly recorded lis pendens showing that NWC may have a senior interest in the property. The trial court’s conclusion that NWC’s lien is invalid should be affirmed for the reasons above and for public policy concerns.

**D. THE TRIAL COURT PROPERLY OFFSET ATTORNEYS’ FEES REGARDING THE LIEN ISSUE.**

The court properly concluded, based upon the findings of fact, that “because both parties prevailed on lien issues raised, the fees on that issue offset each other and no fees will be awarded to either party on the lien issues under RCW Chap. 64.04.” CP 394 (Conclusion 20). The trial

court's decision to offset the attorney's fees and cost should be upheld because, as the court said, both parties prevailed on their lien claims—the fees effectively cancel each other out as the court properly concluded.

Regardless of the validity of the lien, it should be noted that the original lien was a small amount compared to the over \$124,000 in actual fees that NWC unreasonably requested at the conclusion of the trial.

**E. THE COURT SHOULD AWARD THE RESPONDENT ATTORNEYS' FEES.**

Wells Fargo requests attorneys' fees on appeal pursuant to RAP 18.1 and MAR 7.3, which mandates a fee award where a party fails to improve its position on a trial de novo. MAR 7.3 also permits the prevailing party to recover the reasonable attorneys' fees and costs expended in defending an appeal. *Stevens v. Gordon*, 118 Wn. App. 43, 74 P.3d 653 (2003). In light of NWC's unsuccessful attempt to move for reconsideration regarding the validity of the lien at trial and because NWC failed to improve its position on the trial de novo, Respondent is entitled to an award of attorneys' fees and costs defending this appeal.

**V. CONCLUSION**

The trial court relied on substantial evidence in finding the fact that NWC sent an employee to perform work in July 2002 for the purpose of

reviving lien rights, and it correctly concluded that NWC's lien rights had lapsed based on that finding. The trial court was within its broad discretion denying NWC's motion for reconsideration as evidenced by the court's opinion reiterating the substantial evidence it based its conclusions upon. Furthermore, the trial court properly offset attorneys' fees regarding the lien issue and Respondent is entitled to its attorneys' fees and costs defending this appeal because NWC has not improved its position regarding the validity of the lien on its trial de novo.

## VI. APPENDICES

- Appendix A** Findings of Fact and Conclusions of Law, May 30, 2007 (CP 386-397)
- Appendix B** Trial Testimony of John Sprague (Excerpts VRP 323-328, 351-355)
- Appendix C** Order on Motion for Reconsideration and Attached Opinion (CP 169-182)

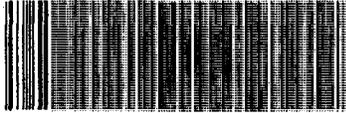
Dated this 12 day of March, 2010.

Respectfully submitted



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Matthew Barker, WSBA No. 41674  
*Attorneys for Wells Fargo Bank, N.A.*  
Routh Crabtree Olsen, P.S.  
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# Appendix A



03-2-07073-0 27585643 FNFL 05-30-07

HON. HENRY HAAS *Pro Tempore*

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A.M. MAY 30 2007 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

NORTHWEST CASCADE, INC., a Washington corporation,

No. 03-2-07073-0

Plaintiff,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

v.

TITANIC INVESTMENTS, INC., a Washington corporation; NORMAN LEHMAN, an individual, and LOUISE LEHMAN, an individual, and their marital community; and RANGLES SAND & GRAVEL, a Washington corporation; BUILTWELL STRUCTURES, INC., a Washington corporation; CITY BANK, a Washington state chartered banking institution; and EVERGREEN TITLE COMPANY, INC., a Washington corporation,

Defendants.

The Court conducted a bench trial in this case from May 22 through May 24, 2006. In addition, the Court heard argument on Plaintiff's Motion for Reconsideration on August 9, 2006 and issued an order denying same on September 5, 2006. On December 28, 2006 the Court heard

FINDINGS OF FACT AND CONCLUSIONS OF LAW- Page 1

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ORIGINAL  
CP 386

1 argument on the parties' respective requests for attorneys' fees, and initial argument on the parties  
 2 respective [Proposed] Findings of Fact and Conclusions of Law. On April 11, 2007 the Court  
 3 heard further argument on the parties respective [Proposed] Findings of Fact and Conclusions of  
 4 Law. After reviewing all of the admitted evidence and hearing the argument of counsel, the court  
 5 hereby enters the following:

6 **FINDINGS OF FACT**

7 1. Northwest Cascade, Inc. ("NWC") is a Washington corporation, licensed to do  
 8 business in Washington as a general contractor. NWC was experienced at constructing plat  
 9 improvements.

10 2. Titanic Investments Inc. ("Titanic") is a Washington corporation wholly owned by Mr.  
 11 Norman Lehman and his wife, Louise Lehman.

12 3. Mr. Lehman was experienced in plat/subdivision development.

13 4. The Geller Addition was a nine (9) lot subdivision being developed by Mr. Lehman in  
 14 unincorporated Pierce County, Washington (the subdivision is hereinafter referred to as the  
 "Project").

15 5. On August 14, 2001 Mr. Lehman and Northwest Cascade, Inc. ("NWC") entered into  
 16 a contract for construction of certain infrastructure improvements for a 9 lot subdivision referred to as  
 17 the Geller Addition (hereinafter the "Contract"). Titanic was not a party to the Contract, nor was it  
 18 identified in the Contract in any way. Mr. Lehman did not disclose to NWC that he was acting as an  
 19 agent for Titanic for purposes of the Contract either before or when he signed the Contract. Mr.  
 20 Lehman entered into the Contract individually and on behalf of his marital community and not as a  
 disclosed agent for Titanic.

21 6. Randles Sand and Gravel filed a lien on the Project. That lien was dismissed from this  
 22 litigation with prejudice on August 7, 2003. That lien did not arise from work performed by NWC.  
 23

1 7. NWC filed an amended complaint on May 27, 2004 naming additional parties that had  
2 acquired lots in the Project (including Builtwell Homes, Inc.), insured title, and/or loaned funds to the  
3 buyer of lots for construction purposes.

4 8. The Contract called for NWC to perform certain work as called for in the Contract, the  
5 plans and specifications noted on the plans. Compliance with Pierce County regulations relating to  
6 the TESC measures was part of the NWC's scope of work under the Contract.

7 9. The Contract expressly excluded certain items, as expressly set forth in Attachment A  
8 to the Contract.

9 10. The Contract provided for interest on unpaid amounts due NWC and attorneys fees for  
10 the prevailing party in any dispute.

11 11. The parties both read the Contract and were aware of all Contract provisions.

12 12. NWC commenced work on or about November 5, 2001, and continued performance of  
13 the site work, storm water work, road work, and retaining wall work under the Contract through  
14 January 2002.

15 13. The parties were aware of and understood that completing the water line work was a  
16 condition precedent to completing other elements of the Project that were part of NWC's scope of  
17 work.

18 14. As of January 2, 2002, NWC could not proceed further with substantial productive  
19 work and complete the storm water, grading and paving work because the water line work had not  
20 been awarded either to NWC or to another contractor by Mr. Lehman.

21 15. From November 2001 through April 2002, NWC filed reports with the County  
22 relating to Temporary Erosion and Sedimentation Control ("TESC") activities. The reports were filed  
23 on November 28, 2001, December 27, 2001, January 28, 2002, February 11, 2002, March 13, 2002,  
and April 15, 2002. Plaintiff's Trial Exhibits Nos. 24 & 28-34. No reporting to Pierce County was  
required under Pierce County regulations for the months of May through September. NWC did not

1 submit separate invoices to Lehman for the TESC work performed on November 28, 2001, December  
2 27, 2001, January 28, 2002, February 11, 2002, March 13, 2002, and April 15, 2002.

3 16. NWC performed catch basin maintenance on the Project on July 2, 2002. On July 2,  
4 2002 NWC sent one of its employees to the site to perform some "mudding" around catch basins.  
5 Pursuant to the original Contract NWC was required to maintain erosion control and provide  
6 inspection work required by the Contract. The work performed on July 2, 2002 was not required to  
7 done at the time it was performed. It was performed without notice to the Defendant,  
8 Lehman/Titanic, more than four months after NWC ceased doing work on the Project. The only  
9 reason NWC sent a man out to do some work on July 2, 2002 was to revive NWC's lien rights.  
10 Catch basin maintenance work was within the original scope of NWC's work under the Contract.  
11 Plaintiff's Trial Exhibit No. 27. NWC did not submit a separate invoice for that work to Lehman or  
12 otherwise bill for it. No reporting was required under Pierce County regulations for this work. The  
13 July 2002 work was not performed under a separate contract between NWC and Lehman or Titanic.

14 17. As of July 2002, Lehman was behind in payments and the Court finds that there was a  
15 general state of "uncertainty" regarding the Project.

16 18. As of October 2002, the correspondence between NWC and Mr. Lehman demonstrates  
17 that NWC still expected to return to the Project site, complete its scope of work, and possibly perform  
18 the water line work.

19 19. NWC filed a mechanic's and materialman's lien under RCW Chap. 60.04 on  
20 September 27, 2002, within 90 days of the July 2, 2002 work, but more than 90 days after the last  
21 TESC work reported to the County, and more than 90 days after the work performed in January 2002.

22 20. NWC commenced its lien foreclosure action on April 29, 2003, within 8 months of  
23 filing its lien.

21 21. NWC's lien rights lapsed before July 2, 2002 as the last day NWC performed work  
22 was in January 2002.

1           22.    The Court concludes that the work performed by NWC on July 2, 2002 was done to  
2 revive expired lien rights.

3           23.    NWC substantially performed all work that it billed Mr. Lehman for.

4           24.    NWC submitted its second progress payment on January 31, 2002.

5           25.    NWC was not paid all of its second progress payment. NWC was underpaid by  
6 \$18,222.11.

7           26.    There was no reasonable basis for withholding the \$18,222.11, which was due and  
8 owing at that time.

9           27.    NWC was not paid for all work performed.

10          28.    NWC is due \$18,222.11, plus interest at the Contract rate of 1% per month from  
11 March 1, 2002 to the date judgment is entered.

12          29.    Mr. Lehman excluded the water line work from the Contract.

13          30.    The plans provided to NWC by Mr. Lehman contemplated a logical and sequential  
14 work schedule that NWC substantially followed.

15          31.    Mr. Lehman had no complaints concerning any delays in NWC's performance during  
16 the course of the work, but raised issues of concern in a letter dated December 13, 2002.

17          32.    Mr. Lehman was aware and understood that completing the water line work was a  
18 condition precedent to completing other elements of the Project that were part of NWC's scope of  
19 work.

20          33.    NWC submitted a proposal to perform the water line work on September 14, 2001  
21 based on the plans for that work then in existence, which had been prepared for Mr. Lehman. This  
22 proposal was never accepted by Mr. Lehman.

23          34.    Titanic entered into a "Water System Extension Agreement" on December 18, 2001.

          35.    Mr. Lehman never awarded the water line work to NWC or to any other contractor  
until October 2002, when he awarded the water line work to J.J. Sprague, Inc., without disclosure to  
NWC.

FINDINGS OF FACT AND CONCLUSIONS OF LAW- Page 5

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Appendix A

CP 390

1 36. The water line work was performed by J.J. Sprague, Inc. in late October 2002 for  
2 \$21,464.28, which was approximately \$2,000 more than NWC had proposed to do the same work for.

3 37. J.J. Sprague, Inc. was the last entity to perform work in the roadway areas after  
4 January 2002 and before April 2003.

5 38. Even if Mr. Lehman's lender refused to disburse sufficient funds, that was not  
6 disclosed to NWC by Lehman.

7 39. Lehman had no plausible excuse for not awarding the water line work to NWC in time  
8 for it to complete its work on the Project.

9 40. As of January 2002, NWC might have been able to perform some minor aspects of the  
10 work, but could not complete the Project until the water line work was performed. NWC was  
11 therefore justified in stopping work and preparing the Project site for a winter shut down.

12 41. In January 2002, NWC left the cut areas in the roadway high and the fill areas low.  
13 This was confirmed by the testimony of Mr. Sprague.

14 42. Without disclosure to NWC, Lehman entered into a separate contract with J.J.  
15 Sprague, Inc. in April 2003 to perform the remaining scope of work on the NWC Contract that could  
16 not be completed due to Lehman's failure to timely award or perform the water line work.

17 43. Rainfall levels between November 2002 and April 2003 were reflected on Exhibit 114.

18 44. NWC was prepared to complete its scope of work, and do the water line work per its  
19 September 14, 2001 proposal, and Mr. Lehman was solely responsible for both the delay in the work  
20 and the inability of NWC to complete its scope of work.

21 45. NWC completed its work within a reasonable period of time taking into account all of  
22 the circumstances.

23 46. Lehman breached the Contract by failing to pay NWC for work performed and by  
preventing NWC from completing the performance of the work within the scope of its contract.

47. NWC did not breach the Contract with respect to the timely performance of its work.

1 48. NWC lost \$8,051.84 in lost profits on the work Lehman prevented it from performing  
2 when it awarded the balance of NWC's scope of work to J.J. Sprague, Inc.

3 49. NWC should have been able to complete this water line work no later than October  
4 26, 2002 when J. J. Sprague completed it, and thus is entitled to interest from that date forward.

5 50. NWC placed some unspecified amount of wet and unsuitable material on the fill area  
6 of the roadway in December 2001 when NWC was preparing the foundation for the retaining wall.

7 51. J.J. Sprague, Inc. imported 1,153 tons or approximately 800 cubic yards of "Sub-base  
8 material" for fill in April 2003. The cost of all imported material charged by J.J. Sprague, Inc. to Mr.  
9 Lehman was \$16,147.46. A portion of the imported material was necessary to replace the unsuitable  
10 soil placed by NWC on the roadway.

11 52. NWC failed to establish to the Court's satisfaction that the additional import material  
12 used by J.J. Sprague was solely attributable to the timing of the work and weather.

13 53. NWC had no knowledge of the claim of unsuitable soils, and NWC was not asked to  
14 remove and replace the unsuitable soils.

15 54. The Court finds that NWC placed an unspecified amount of unsuitable soils in the  
16 roadway area.

17 55. Mr. Lehman did not wholly meet his burden of proof to establish the necessity for the  
18 quantity of import materials in his counterclaim.

19 56. The Court finds that that NWC is liable for a portion for the costs for importing "Sub-  
20 base material" in April 2003 and that \$10,000 is a reasonable estimate of the sum appropriate to  
21 compensate Mr. Lehman for having to import "Sub-base material" for the Project.

22 57. The Court finds that \$10,000 is reasonable sum to compensate Mr. Lehman for having  
23 to import soil to replace unsuitable material placed by NWC.

24 58. Mr. Lehman was aware of the NWC lien when he sold the property to Builtwell  
25 Homes, Inc., but the lien had no effect on the sale of property.

1 59. Mr. Lehman did not present any evidence of any damages resulting from the lien of  
 2 NWC.  
 3 60. Mr. Lehman and Titanic failed to establish all of the elements of the claim for slander  
 4 of title, in particular they failed to prove any damages. Moreover, any delays in the sale of the Project  
 5 were due solely to Mr. Lehman's conduct.

**CONCLUSIONS OF LAW**

Based on the above findings of fact, the Court hereby holds as follows:

- 7 1. This Court has jurisdiction over the parties. Venue in Pierce County is proper.
- 8 2. Mr. Lehman entered into the Contract individually and on behalf of his marital  
 9 community, and not as a disclosed agent of Titanic. As such, Mr. Lehman and his marital community  
 10 are liable for any amounts due NWC under the Contract.
- 11 3. Titanic was the owner of the real property that was the location of the Project.  
 12 Lehman was the agent of the owner Titanic.
- 13 4. Titanic and Lehman were responsible for providing all necessary design documents to  
 14 NWC and warranted the adequacy of the design.
- 15 5. Lehman's failure to timely award or perform the water line work to NWC or another  
 16 contractor and its hiring of J.J. Sprague, Inc. to perform the balance of NWC's work under the  
 17 Contract, prevented NWC from completing its work under the Contract.
- 18 6. There is no evidence to support the conclusion that nonpayment or failure to award the  
 19 water line work in a timely fashion was due to actions of NWC or any third-party lender.
- 20 7. NWC is due \$18,222.11 for work performed and unpaid, plus interest at the Contract  
 21 rate of 1% per month from March 1, 2002 to the date judgment is entered.
- 22 8. NWC is due \$8,051.84 in lost profits on the work Lehman prevented it from  
 23 performing when it awarded the balance of NWC's scope of work to J.J. Sprague, Inc., plus interest  
 at the rate of 1% per month from October 26, 2002 to the date judgment is entered.

- 1           9.     NWC is entitled to judgment against Lehman in the amount of \$18,222.11 and
- 2     \$8,051.84, plus prejudgment interest on those amounts as calculated on Exhibit A.
- 3           10.    NWC is entitled to an award of reasonable attorneys fees pursuant to the Contract
- 4     because it prevailed on both contract claims. Reasonable fees for this work are \$25,000.00.
- 5           11.    Mr. Lehman and Titanic had the burden of proving that NWC breached its Contract
- 6     and that such a breach caused it damage.
- 7           12.    Mr. Lehman's counterclaim for delay damages in the form of increased interest
- 8     expense is denied.
- 9           13.    Mr. Lehman's and Titanic's counterclaim for delay damages is dismissed with
- 10    prejudice.
- 11          14.    Mr. Lehman's and Titanic's counterclaim for slander of title is dismissed with
- 12    prejudice.
- 13          15.    NWC failed to establish to the Court's satisfaction that the additional import material
- 14    was solely attributable to the timing of the work and weather.
- 15          16.    Lehman is awarded an offset in the amount of \$10,000.00 against the judgment owed
- 16    NWC. Lehman is not entitled to prejudgment interest on this amount.
- 17          17.    NWC's lien was invalid as it was filed more than 90 days after last performing work.
- 18          18.    NWC's lien claim is dismissed with prejudice.
- 19          19.    NWC's lien claim was neither frivolous, clearly excessive nor made in bad faith under
- 20    RCW 60.04.081(4). Accordingly, the defendants are not entitled to an award of attorneys fees under
- 21    RCW 60.04.081(4).
- 22          20.    Because both parties prevailed on lien issues raised, the fees on that issue offset each
- 23    other and no fees will be awarded to either party on the lien issues under RCW Chap. 64.04.
- 21.    With respect to Lehman's counterclaims, Lehman was awarded an off-set for part of
- the counterclaim and thus partly prevailed. However, because NWC prevailed in defending against

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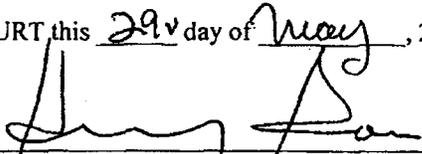
the counterclaims when viewed in their entirety, NWC is the substantially prevailing party on Lehman's counterclaims. Reasonable fees for defending the counterclaim are \$10,000.00.

22. NWC is awarded attorneys' fees in the total amount of \$35,000, and 1/2 of its out of pocket costs, or \$3,477.70.

23. Lehman is awarded 1/2 of his costs in the amount of \$612.00.

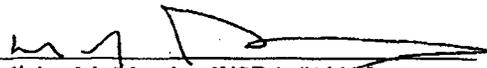
IT IS HEREBY ORDERED that Plaintiff shall prepare a judgment for entry under the civil rules consistent with these Findings of Fact and Conclusions of Law.

READ AND ENTERED IN OPEN COURT this 29<sup>th</sup> day of May, 2007.

  
HONORABLE HENRY HAAS, Pro Tempore

Approved as to form:

GROFF MURPHY TRACHTENBERG  
& EVERARD PLLC

  
Michael J. Murphy, WSBA #11132  
Attorney for Plaintiff Northwest Cascade Inc.

  
GELMAN & ASSOCIATES  
Herbert Gelman, #1811  
Attorney for Defendants Norman Lehman and Louise Lehman,  
Titanic Investments, Inc., Builtwell Structures, Inc., Evergreen  
Title Company, and City Bank

FILED  
IN COUNTY CLERK'S OFFICE  
A.M. MAY 30 2007 P.M.  
PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY  DEPUTY

# Exhibit "A"

Appendix A

CP 396

**EXHIBIT A TO FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Amount Due NWC for Work Performed		\$18,222.11
2. Interest from 3/1/02 to 4/11/07 at 1% per month (or \$5.99/day for 1868 days)		\$11,189.32
	<b>Subtotal</b>	<u>\$29,411.43</u>
3. Amount Due NWC for Lost Profits		\$8,051.84
4. Interest on \$8,051.84 from 10/26/02 to 4/11/07 at 1% per month (or \$2.65/day for 1629 days )		\$4,316.85
	<b>Subtotal</b>	<u>\$12,368.69</u>
5. Less offset awarded to Lehman		<u>(\$10,000.00)</u>
	<b>Total Due NWC (w/o fees &amp; costs)</b>	<b>\$31,780.12</b>

# Appendix B

1 THE COURT: Is this Mr. Sprague? Is that  
2 what you said?

3 MR. GELMAN: Yes.

4 THE COURT: Okay.

5 MR. GELMAN: Mr. Sprague, if you can come  
6 over here.

7 THE COURT: Come on up here, please,  
8 Mr. Sprague.

9 JOHN SPRAGUE, witness herein, having been  
10 previously sworn under oath,  
11 was examined and testified  
12 as follows:

13 THE COURT: Please have a seat, and try to  
14 speak towards that mic.

15 THE WITNESS: Okay.

16 THE COURT: And state your name and  
17 address, please.

18 THE WITNESS: My name is John Sprague. My  
19 address is 3310 West Mesquite Street,  
20 M-E-S-Q-U-I-T-E; and that's in Phoenix, Arizona,  
21 85086.

22 DIRECT EXAMINATION

23 BY MR. GELMAN:

24 Q. What's your occupation, Mr. Sprague?

25 A. I install water and sewer and storm drain piping

1 for a living.

2 Q. And what's your experience in the construction  
3 business?

4 A. I've worked my whole life, you know, installing  
5 underground utilities and building subdivisions.

6 Q. When did you start doing that?

7 A. Well, my father owned a company when I was born;  
8 so I worked in it my whole life until I got out of  
9 high school. I started full-time immediately and  
10 have worked in this industry ever since.

11 Q. And what kinds of work did you do in the industry?

12 A. We did public and private work. We did -- the  
13 public jobs consisted of working for the City and  
14 the County, building roads, installing wet  
15 utilities, water, sewer, storm drain; and, of  
16 course, the private work was, typically,  
17 subdivision work similar to what we did for  
18 Mr. Lehman there.

19 Q. And what kind of participation did you have in  
20 actual contract negotiations?

21 A. I did -- for our company, I did, you know, all of  
22 the contract negotiations. I did the majority of  
23 the estimating for our company and the majority of  
24 all the project management too.

25 Q. And when did you first start estimating jobs in

- 1 the construction business?
- 2 A. Approximately, 1994.
- 3 Q. And did you, at any point, supervise anyone else
- 4 in that aspect of construction?
- 5 A. Yes.
- 6 Q. Who?
- 7 A. I supervised a couple of different employees
- 8 that -- that worked for J.J. Sprague in Washington
- 9 here; and -- and I, also, supervised, you know, a
- 10 couple of the family members. I have an older --
- 11 an older brother and even an older brother-in-law
- 12 that were interested in doing it; and the -- the
- 13 older brother, at one point, worked full-time,
- 14 estimating for us, also; and I would oversee
- 15 everything that he did.
- 16 Q. What was the name of the company that you worked
- 17 for here in Tacoma?
- 18 A. J.J. Sprague, Incorporated.
- 19 Q. And who owned that?
- 20 A. My father.
- 21 Q. What's the status of that company today?
- 22 A. It's inactive.
- 23 Q. Is anybody operating that in Tacoma anymore?
- 24 A. No.
- 25 Q. Where are you working now?

- 1 A. I have a company in Arizona called J.J. Sprague of  
2 Arizona.
- 3 Q. And when did you go down there and do that?
- 4 A. At the end of '03.
- 5 Q. And tell us a little bit about the size of the  
6 jobs you did, both in price and in geographical  
7 size.
- 8 A. We did -- we did contracts, you know, anywhere  
9 from around 100,000 to 5 million.
- 10 Q. How many of those did you do?
- 11 MR. MURPHY: How many of those what?  
12 Object to the form.
- 13 MR. GELMAN: Those kinds of jobs at that  
14 price.
- 15 MR. MURPHY: Which price?
- 16 MR. GELMAN: A million dollars.
- 17 MR. MURPHY: Okay.
- 18 Q. (By Mr. Gelman) Did you say five million?
- 19 A. We did up to five million, yeah.
- 20 Q. How many of those large projects did you do?
- 21 A. Oh, the -- just on average, the size was,  
22 probably -- a lot of the public works, you know,  
23 were between 600,000 and, I guess, a million and a  
24 half. I'm just trying to reminisce on things  
25 and -- and a lot of the private contracts were

1           between, oh -- between 100,000, not too many of  
2           them that small, typically, around a quarter  
3           million up to around 800,000 on the private jobs.

4   Q.   And you did estimating on these?

5   A.   Mm-hmm.  Yes.

6   Q.   What actual additional work, other than  
7           estimating, did you do on the projects?

8   A.   I did -- I worked in every aspect of the business.  
9           I -- I would go out in the field and -- and work  
10          on projects, and I would, also, estimate.  I was  
11          the hands-on guy.  I didn't -- I wouldn't work in  
12          the office all week.  I would spend a couple days  
13          in the field and a couple days in the office.

14  Q.   Did you do any physical work on the job site  
15          itself?

16  A.   Yes.

17  Q.   What?

18  A.   On this particular job site?

19  Q.   No, just in general, your background.

20  A.   Oh, I would lay pipe, run equipment.

21  Q.   What kind of equipment?

22  A.   Excavators, loaders, dozers.

23  Q.   How long have you been doing that?

24  A.   Since the day I got out of high school.

25  Q.   Okay.  Did you have occasion to do some work for

1 Titanic Investments on the Geller Addition?

2 A. Yes.

3 Q. When was that?

4 A. It was in October, I believe. October of '02, I  
5 believe, is when we installed the water line out  
6 there. It may have been September. I can't  
7 remember, exactly, the date.

8 Q. Let me show you what's been marked as Plaintiff's  
9 Exhibit No. 41. Do you recall that?

10 A. Yes.

11 Q. And what, exactly, did you go out to do on that  
12 project?

13 A. First off, we -- we went out and installed the  
14 water line and then after which we ended up  
15 finishing the entire project, the paving, the  
16 grading, and everything.

17 Q. And you started that in October?

18 A. I believe so. I believe that the -- the -- this  
19 contract that you handed me is dated April 1st,  
20 but this is for the completion of that job which  
21 was the paving. The -- the first thing that we  
22 went out there and constructed was the water main;  
23 and I believe that that was prior to October,  
24 right in that area.

25 Q. When you went out on a site, did you do a physical

1           was some items that maybe -- like I said, the  
2           swale -- that maybe it might have been reasonable  
3           to hold off on some of that; but that's it.  
4           That's all I wanted to say.

5   Q.    When you came on the site, was there any evidence  
6           as to why the road subgrade had not been done?

7   A.    No.

8                   MR. MURPHY:   Could I have the last question  
9           and answer read back to me?

10                           (The last question and answer  
11                           were read by the reporter.)

12   Q.    (By Mr. Gelman) You --

13   A.    As a matter of fact, it should have been done  
14           completely before the water was put in.

15   Q.    The subgrade should have been done before the  
16           water line.   Why?

17   A.    Because in the -- on some of the areas where it  
18           was real low, I believe there's less cover on the  
19           water line when your equipment is running and just  
20           more exposure for damage from the equipment when  
21           you're building the -- the road subgrade.

22   Q.    You read the daily progress reports --

23   A.    Yes.

24   Q.    -- did you not?

25   A.    Yes.

1 Q. You noticed that on July 2, 2002, somebody went  
2 out to mud the catch basin?

3 A. Yes.

4 Q. Do you recall that?

5 A. Yes.

6 Q. Did you see the --

7 (Pause.)

8 THE COURT: Are you looking for Exhibit 27?

9 MR. GELMAN: No.

10 Q. (By Mr. Gelman) I'm showing you Exhibit Nos. 28  
11 through 34 which are erosion control reports on  
12 this project. Are you familiar with the erosion  
13 control reports?

14 A. Yeah. It's been awhile since I've looked at them,  
15 but I have a vague remembrance of them.

16 Q. On July 2, 2002, do you have an opinion, based  
17 upon a reasonable degree of expertise as a  
18 contractor in Pierce County, Washington, as to  
19 whether it was necessary, at that time, to go out  
20 and mud the catch basins on this project?

21 MR. MURPHY: Objection, Your Honor; lack of  
22 foundation.

23 THE COURT: I'll deny the objection.

24 Q. (By Mr. Gelman) Do you have an opinion?

25 A. Yeah. I -- I have an opinion. I think I'm

1           answering this right. I have an opinion about it.

2   Q.    Okay. What is that?

3   A.    Well, I -- I think that it was, kind of, odd that

4           they went out and mudded those pipes. Nothing had

5           happened on the job for a long time and why -- why

6           the need to all of a sudden show up and mud those

7           pipes? There was really no rhyme or reason for

8           it.

9   Q.    Well, was there any purpose for it, at that time,

10           in the middle of the summer?

11  A.    Well, you know, I -- I -- I have an idea why it --

12           why it was done but --

13  Q.    What's your opinion as to why it was done?

14  A.    Well, I'm just -- just guessing from my experience

15           and --

16                   MR. MURPHY: Object to the form of the

17                   question -- object to this line of questioning.

18                   He's guessing, Your Honor. That's not --

19                   MR. GELMAN: Based upon your experience,

20                   what do you believe?

21                   MR. MURPHY: Experience doesn't qualify

22                   guessing.

23                   THE COURT: Well, the question is whether

24                   or not the witness has an opinion as to why that

25                   work was done.

1 MR. GELMAN: Yeah.

2 THE COURT: Go ahead.

3 Q. (By Mr. Gelman) Do you have an opinion?

4 A. My opinion is that -- that it was done just to  
5 reinforce some kind of lien right, something to  
6 that -- to that degree.

7 Q. Have you ever seen that done before?

8 A. Yeah. I've seen that done before.

9 Q. Would it have been for any purpose that dealt with  
10 continuing work on this project?

11 A. No. I don't believe so.

12 Q. What other work had to be done on that project  
13 other than going out and mudding a catch basin in  
14 the middle of the summer?

15 A. Well, a lot -- a lot of work had to be done.

16 Q. In terms of importance of the work that remained  
17 to be done -- you said the bioswale, the pond, the  
18 infiltration system -- where would that have  
19 ranked in importance?

20 A. It would have been down the line a little ways.  
21 That's for sure.

22 Q. As compared to the other --

23 A. Exactly. I -- I hardly believe that anybody was  
24 concerned about the mudding of those pipes when  
25 the job was in the state that it was in.

1 Q. When you were there, did you see any problems with  
2 any of the catch basins?

3 A. No. They were just there.

4 Q. Do you have a reasonable degree of -- do you have  
5 an opinion as to whether or not Northwest Cascade  
6 prematurely ceased doing work on this job?

7 A. Yeah. I have an opinion about that.

8 Q. What is it?

9 A. I -- I believe that they could have continued  
10 working on the job. I believe that they -- that  
11 there was, definitely, things that could have been  
12 done if they were interested in seeing the project  
13 completed.

14 Q. What was the cost for the importation of soil on  
15 page three of your bid?

16 A. The only -- the only importation that is on page  
17 three is for the -- is for the road section, the  
18 gravel that is located --

19 Q. How much was that?

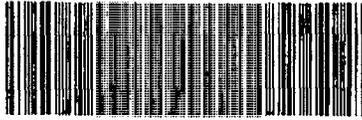
20 A. Just for the road section, it was around \$13,000.

21 Q. How much was your bid for the completion of the  
22 bioswale?

23 A. 3,200, plus, maybe, some of the hydroseeding items  
24 would be incorporated into that.

25 Q. What about the pond?

# Appendix C



03-2-07073-0 20112923 OR 09-11-06

HON. BEVERLY J. GRANT

FILED  
IN COUNTY CLERK'S OFFICE

A.M. SEP 08 2006 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

NORTHWEST CASCADE, INC., a Washington corporation,

Plaintiff,

v.

TITANIC INVESTMENTS, INC., a Washington corporation; NORMAN LEHMAN, an individual, and LOUISE LEHMAN, an individual, and their marital community; and RANGLES SAND & GRAVEL, a Washington corporation; BUILTWELL STRUCTURES, INC., a Washington corporation; CITY BANK, a Washington state chartered banking institution; and EVERGREEN TITLE COMPANY, INC., a Washington corporation,

Defendants.

No. 03-2-07073-0

ORDER ON MOTION FOR RECONSIDERATION

THIS MATTER, having come before the above-entitled Court on the motion of the Plaintiff, Northwest Cascade, Inc., for reconsideration of the letter ruling of the Court dated June 18, 2006, the Plaintiff appearing by and through its attorney, Michael J. Murphy, the Defendants

ORDER ON MOTION FOR RECONSIDERATION - Page 1

GROFF MURPHY  
TRACHTENBERG &  
EVERARD PLLC  
300 EAST PINE  
SEATTLE, WASHINGTON 98122  
(206) 628-9500  
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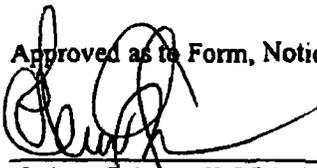
1 appearing by and through their attorney, Herbert Gelman, the Court having reviewed the records  
2 and files herein, having heard oral argument and deeming itself fully advised in the premises, now,  
3 therefore, the Court orders as follows:

4 1. Plaintiff's Motion for Reconsideration is hereby denied. The basis for that  
5 denial is set forth in detail in the Court's oral ruling, a transcript of which is attached hereto as  
6 Exhibit A and incorporated herein.

7 DATED this 5 day of September 2006.

8  
9  
10   
11 HENRY HAAS JUDGE PRO TEM

12 Presented by:  
13 GROFF MURPHY TRACHTENBERG  
& EVERARD PLLC  
14   
15 Michael J. Murphy, WSBA #11132  
16 Attorneys for Plaintiff Northwest Cascade, Inc.

17 Approved as to Form, Notice of Presentation Waived:  
18   
19  
20 Herbert Gelman, WSBA #1811  
21 Attorney for Defendant Titanic Investments, Inc.

22  
23

**EXHIBIT A**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

NORTHWEST CASCADE, )  
INC., )  
Plaintiff, )  
vs. )  
TITANIC INVESTMENTS, )  
et al., )  
Defendants. )

No. 03-2-07073-0

**COPY**

VERBATIM REPORT OF PROCEEDINGS  
AUGUST 9, 2006  
COVER SHEET



APPEARANCES

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For the Plaintiff:

MR. MICHAEL J. MURPHY  
Attorney at Law

For the Defendant:

MR. HERBERT GELMAN  
Attorney at Law

1 AUGUST 9, 2006

2 \* \* \* \* \*

3  
4 JUDGE HAAS: Thank you very much. Do you  
5 want to take a moment? I mean, we're not going to take  
6 a recess, but would you just like to relax for a minute?

7 THE COURT REPORTER: I'm fine, your Honor.

8 MR. HAAS: Okay. Thank you for the Briefs  
9 and the oral argument. And the Court has had adequate  
10 time to review this matter and I did do a considerable  
11 amount of review prior to the argument today, and I am  
12 prepared to rule on this motion.

13 I think we need to start with the basis of  
14 the motion. There's no argument that this motion is  
15 brought under CR 59, Section 7, and the motion is based  
16 on the proposition that there either was no evidence or  
17 reasonable inference from the evidence to justify my  
18 decision on the two issues which are the counterclaim  
19 and the validity of the lien. And I think it's critical  
20 to observe at the outset that the rule requires either  
21 no evidence or no basis for any inference from the  
22 evidence. The case law is also clear that this decision  
23 is entirely discretionary with the Trial Court and that  
24 the Trial Judge has latitude in making this decision.

25 So, first I'd like to address the lien

1 issue. I think, in a nutshell, the only question on the  
2 lien issue is why did Northwest Cascade send somebody  
3 out there in July of 2002 to do some work, and the  
4 particular work that was done under the circumstances  
5 that were existing at that time vis-a-vis  
6 Northwest Cascade and Mr. Lehman and the status of their  
7 contract.

8 The evidence is undisputed that the work  
9 stopped at the end of January. It's also undisputed  
10 that Mr. Lehman hadn't paid his bill. As I recall, he  
11 shorted the second invoice by \$25,000, and the job had  
12 been shut down. There was no communication between  
13 Northwest Cascade and Mr. Lehman at or about that time  
14 in mid 2002 about resuming this job, either way.

15 And I think what was particularly important  
16 in the Court's mind is that although the prior  
17 environmental inspection work that had been done which  
18 was, as I understood it, and I believe the testimony  
19 supports that, by regulation it was required and you  
20 have to file reports and it imposed a duty on the  
21 contractor to do that, that that work is distinguishable  
22 from this work that was done in July of 2002. You add  
23 to that the proposition that there was no bill issued  
24 for that work. It's obvious that Northwest Cascade is a  
25 very efficient company. It maintains great records.

1 And to the Court it just seemed, frankly, odd, that a  
2 worker goes out there in July of '02 to do something  
3 that isn't tracked, that isn't billed in normal course.

4 So, it is the Court's conclusion it was, and  
5 that's the basis of my decision, is that there is every  
6 inference in all of that to conclude that these lien  
7 rights or the period for the filing of the lien had  
8 lapsed, and there was a whole general state of  
9 uncertainty and that the reason this guy went out there  
10 was basically to do some kind of work in order to revive  
11 that lien. And so, the Court's going to deny the motion  
12 with regard to that issue. And if I hadn't already in  
13 my written decision, I think I've provided you more than  
14 ample factual basis with which to prepare Findings and  
15 Conclusions.

16 Now, the second issue of the counterclaim  
17 is, it is Court's judgment, a more difficult issue, both  
18 factually and legally. And I believe that we have to  
19 start with the question of whether or not that  
20 counterclaim could be established under any  
21 circumstances, no matter what anybody else has to say,  
22 in the absence of acceptable scientific evidence as to a  
23 person qualified and as to the testimony conforming to  
24 the standards for expert testimony. The Court will  
25 acknowledge for the record, and I don't know whether

1 this case is going on appeal or not, but that did not  
2 happen in this case.

3           In my written decision that was filed the  
4 Court specifically wrote that, "although there was a  
5 lack of independent scientific evidence or environmental  
6 testing regarding the quality of the soil and the  
7 on-site soil movement by Northwest Cascade." So, the  
8 Court recognized that that wasn't here. And, obviously,  
9 in a perfect world and in a perfect trial it would have  
10 been a lot simpler for the Court to have decided this  
11 issue if there were a qualified person who had come in  
12 and who had done the testing, the photographic and all  
13 of the things that you would expect if you had a  
14 scientific analysis as well as of the soil movement.  
15 But we didn't have that in this case. So, I guess we'll  
16 just have to decide whether you believe there is an  
17 issue here for appeal, because if the counterclaim  
18 either stands or falls on that proposition, then I will  
19 acknowledge that we didn't have that in this case. But  
20 it's the Court's opinion that it doesn't have to be  
21 supported by that level or degree of qualified and  
22 acceptable scientific evidence.

23           I guess my analogy, I don't know if it's  
24 appropriate, but what occurs to me is you have a simple  
25 automobile intersection collision at a controlled light,

1 and both drivers say they had the green light and it's  
2 impossible for both of them to have the green light.  
3 Well, I think we all know that it would be good for  
4 trial purposes if the parties each hired an expert in  
5 the Traffic Control System and the timing and all of  
6 that, but there's no requirement that they have to do  
7 that.

8           So, in this case what the Court did and what  
9 the Court is doing now is this: I had to take the  
10 cumulative evidence and weigh the value of it with  
11 regard to the soils issue. And I did consider  
12 Mr. Sprague's testimony. I will acknowledge that the  
13 terminology "dirty dirt" is probably scientifically  
14 meaningless, but I believe that there was sufficient  
15 evidence to conclude that there was some element of  
16 necessity for bringing in the import that related back  
17 to what Northwest Cascade did or didn't do.

18           Now, obviously the Court was not satisfied  
19 that 100 percent of that necessity related back to what  
20 Northwest Cascade did or didn't do, and it's a  
21 legitimate question to say "Well, where did you come up  
22 with the \$10,000?" Okay. And the answer is that I  
23 believe that that would be a reasonable sum to  
24 compensate Mr. Lehman for the necessity for bringing in  
25 the import soil. I will acknowledge that there is a

1 degree of lack of certainty. I certainly was not  
2 satisfied that he was entitled to recover all that he  
3 claimed. I know that Mr. Gelman tried to demonstrate  
4 mathematically how that happened, and when Mr. Berkley  
5 just referenced it on the board and the numbers, I think  
6 at the time I was trying to follow that but I don't  
7 think I was satisfied that you could mathematically  
8 establish it in that fashion.

9 So, I'm going to confirm my ruling and I  
10 think I've told you what the basis of it is. I'm going  
11 to deny the motion.

12 MR. GELMAN: Thank you, your Honor.

13 JUDGE HAAS: Now, with regard to, again, I'm  
14 assuming you're moving forward to enter Findings and  
15 Conclusions. Procedurally, if by some chance you can  
16 agree on a set, I'm not thinking that you can, if you  
17 could you could present it to me without the necessity  
18 of another hearing. But if you can't, then you'll have  
19 to again go through the process of contacting the  
20 pro tem coordinator and schedule it. Now, my next  
21 regular time scheduled is the week of, I don't know what  
22 the exact date is, August 21 or so. I don't know what  
23 the Monday is, but I have a trial set.

24 MR. GELMAN: I'm gone from the 17th to the  
25 23rd.

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JUDGE HAAS: I'm sorry?

MR. GELMAN: I'll be you out of town from  
the 17th to the 23rd.

JUDGE HAAS: I'll leave it to you to figure  
out how it all works out. Thank you.

\*\*oOo\*\*

## 1 REPORTER'S CERTIFICATE

2

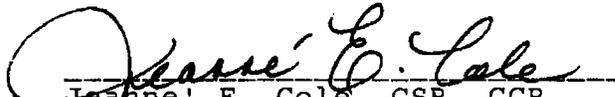
3 I, Jeanne' E. Cole, Official Pro Tem Court Reporter for  
4 the Pierce County Superior Court, do hereby certify that  
5 the foregoing transcript entitled "Verbatim Report of  
6 Proceedings," was taken by me stenographically and  
7 reduced to the foregoing typewritten transcript at my  
8 direction and control, and that the same is true and  
9 correct as transcribed.

10 DATED at Auburn, Washington, this 17th day of August,  
11 2006.

12

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14

  
15 Jeanne' E. Cole, CSR, CCR  
16 WA CCR No. 02161  
17 CA CSR No. 08970

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FILED  
COURT OF APPEALS  
DIVISION II

10 MAR 15 PM 12:58

STATE OF WASHINGTON

BY  DEPUTY

**COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON**

NORTHWEST CASCADE,  
INC., a Washington corporation,

Appellant,

v.

TITANIC INVESTMENTS, INC., a  
Washington corporation; NORMAN  
LEHMAN, an individual, and  
LOUISE LEHMAN, an individual,  
and their marital community; and  
RANGLES SAND & GRAVEL, a  
Washington corporation;  
BUILTWELL STRUCTURES, INC.,  
a Washington corporation; CITY  
BANK, a Washington state chartered  
banking institution; and  
EVERGREEN TITLE COMPANY,  
INC., a Washington corporation,

Respondents.

No. 36482-4-II

**DECLARATION OF  
MAILING**

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

ORIGINAL

2. That on March 12, 2010, I caused a copy of the BRIEF OF INTERVENING PARTY WELLS FARGO BANK, N.A. and DECLARATION OF MAILING to be served to the following in the manner noted below:

Washington State Court of Appeals Division II Attn: Debbie 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile: (253) 593-2806
Groff Murphy, PLLC Attn: Michael J. Murphy 300 East Pine Street Seattle, WA 98122	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile: (206) 628-9506
Builtwell Structures, Inc. Attn: Cheryl Sedlickas 25415 99 <sup>th</sup> Ave. Ct. E. Graham, VA 98338	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile:
Titanic Investments Inc. Attn: Louise Lehman 802 19 <sup>th</sup> Ave. SE Puyallup, WA 98372	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile:

3. I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 12<sup>th</sup> day of March, 2010.

**ROUTH CRABTREE OLSEN, P.S.**

By: Jamie Estrada  
Jamie Estrada, Paralegal