

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 40766-3-II

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

WESTERN SUPERIOR STRUCTURALS, INC.,
a Washington Corporation,
Crossclaimant/Appellant,

v.

INTERVEST- MORTGAGE INVESTMENT COMPANY,
Crossclaim Defendant/Respondent,

REPLY BRIEF OF APPELLANT

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I. REPLY TO 'COUNTERSTATEMENT OF THE CASE'

While most of the facts relevant of this appeal are not disputed, a few of the characterizations of this case by Respondent should be addressed.

First of all, Western Superior has not “admitted that it did not comply with Washington law”, and Respondent merely cites its own trial court brief for the support of this contention. Western Superior does not concede that its lien is defective. These statements are misstatements of Western Superior’s position throughout this matter, and would contradict the entire purpose of this appeal.

Second, Intervest characterizes itself as an “innocent party” in this matter, implying that Western Superior is somehow not. Intervest conducted discovery only to find that Western Superior performed work and that there was absolutely no dispute over either its work, or the monies it was owed for such work. (CP 34). It has obtained a default judgment against Prium Homes, the developer, who is apparently a defunct corporation. In light of the foreclosure and receivership, it is apparent that the lien foreclosure action. is the only way Western Superior will ever be paid. Intervest’s assertion that Western Superior has not attempted to be paid by Prium Homes lacks merit, in addition to lacking relevance.

Intervest, on the other hand is in the process of foreclosing on the subject property, which is also in a receivership. (CP 34). Assuming that Intervest can strip all of the liens for literally millions of dollars worth of improvements to the subject property, it should stand to gain millions, at the expense of junior lienholders, in addition to Western Superior, a superior lien claimant who's lien stood to be the only encumbrance paid on this property other than Intervest's. Intervest is hardly an "innocent party".

Western Superior is the true "innocent party", should there be such a thing in a case like this, not Intervest.

II. ARGUMENT

A. Respondent misconstrues statutory *Williams* holding in context of statutory interpretation of RCW 60.04.091.

1. Respondent's interpretation of RCW 60.04.091, that it requires every corporate lien to be signed by a corporate representative using a corporate notary certificate and acknowledgment is simply a rewrite of the statute.

RCW60.04.091(2) does not require a corporate acknowledgment whenever there is a corporate lien claimant just because it references RCW 64.08. RCW 60.04.091(2), provides:

...(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. (Emphasis added).

Intervest attempts to blur the reference of RCW 64.08 into requiring compliance with RCW 64.08.070. That is simply not the case. RCW 64.08 is a general reference to the acknowledgment statute, which includes several different notary certificates, including those for individuals. Nowhere in RCW 60.04.091 is a party directed to comply with RCW 64.08.070 (the corporate acknowledgment subchapter) specifically, because a corporate acknowledgement is not always going to be required. The court must look at each and every situation, on a case by case basis, and determine what requirements are necessary in order to perfect a lien claim. Intervest argues that every corporate lien claimant must have its lien signed by a corporation, using a corporate notary block. This position is simply not the holding in the *Williams* decision, and certainly is not required by RCW 60.04.091(2).

If the court were to adopt Intervest's interpretation of the statute, Athletic Field would not have been permitted to appoint an agent to sign a lien at all, because only a corporate representative of Athletic Field (as a corporate claimant) could sign on its behalf. Alternatively, using a looser interpretation of Intervest's analysis, only *another corporation* could be an

agent for a corporate lien claimant. Under this interpretation, accordingly, an attorney who is a sole practitioner would not be able to sign a lien claim on behalf of his corporate client. That is simply not what the statute's plain language requires, nor was it the holding in *Williams*.

The problem in *Williams* was not that an individual signed on behalf of Athletic Field, a corporate lien claimant. The problem was that *in the lien itself*, Lien Data Inc., a corporation, was listed as the agent, and Rebecca Southern, who is a completely unidentified individual, was not. Because of that, a corporate acknowledgment was required. Although RCW 60.04.091 does not require that you specifically disclose and identify the agent in the body of the lien, Lien Data Inc. was listed above the attestation clause in the lien as follows:

“Lien Data USA, Inc.
AGENT FOR CLAIMANT
P.O. Box 1120
Bothell, WA 98041-1120” See *Williams v. Athletic Field at 438*.

Because a corporate entity was clearly the person or entity designated as agent to sign the lien, a corporate acknowledgment was required. This makes the facts of the instant case distinguishable from *Williams* in a significant way.

There is no requirement otherwise contained in RCW 60.04.091 that a corporation's lien use a corporate notary certificate or

acknowledgment, as Respondent argues. In addition, it should be noted that the *Williams* decision found the notary form used in that case to be acceptable for an individual, when upon close inspection of RCW 64.08, the form contained in RCW 60.04.091 is more streamlined and simplified than would have been required under the notary statute, even for an individual. Again, the main problem with the *Williams* lien was not the notary block, but was the notary block in light of a designated third party corporate entity.

2. Western's lien complies with the requirements of the safe harbor form provided in the statute.

The legislature enacted *RCW 60.04.091* in 1991, creating the 'safe harbor' form which is the subject of this appeal. While the legislature has modified that statute since, the form has remained the same. The preamble to the form, which obviously is part of the statutory language itself (just like the language which reverences *RCW 60.08*), reads as follows:

"A claim of lien substantially in the following form shall be sufficient."

RCW 60.04.091

Western Superior's lien claim form is clearly 'substantially in the same form as the statutory safe harbor form, if not verbatim to it. As

Respondent would argue, the court cannot simply ‘ignore the plain language of the statute’.

RCW 64.04.091, is a much more recent statute than *RCW 64.08*, and is much more specific on the subject of requirements of a valid lien than its elder counterpart. Given such a divergence, Courts should give more weight to newer and more specific statutes. *State v. J.P.*, 149 Wn.2d 444, 453-454, 69 P.3d 318 (2003).

Western Superior Structural’s (not an unknown and undesignated individual on behalf of a corporate agent) used the safe harbor form provided by statute, and should not be punished for doing so.

3. Courts cannot ignore clear legislative declaration.

Respondent argues repeatedly that *RCW 60.04.091* must be strictly construed and that any technical deficiency in a lien form is fatal to the lien. While Western does not concede a deficiency in its lien form, this characterization of the law is actually directly contrary to legislative intent of the lien statutes themselves. *RCW 60.04.900* provides as follows:

RCW 19.27.095, 60.04.230, and 60.04.011 through 60.04.226 and 60.04.261 are to be liberally construed to provide security for all parties intended to be protected by their provisions.

Respondent cites *Dean v. McFarland*, 81 Wn.2d 215, 219-20, 500 P.2d 1244 (1972), to support its contention that there must be a strict construction of lien statutes. However, that decision was qualified in later

authority, in which the Supreme Court has expressed that while the statutes should be strictly construed, if a party's lien is covered by the statute the statute is to be liberally construed. *Estate of Haselwood v. Bremerton Ice Arena, Inc.* 166 Wash.2d 489, 498, 210 P.3d 308, 312 (Wash.,2009). The *Haselwood* decision held:

“Mechanic's and materialmen's liens are creatures of statute, in derogation of common law, and therefore must be strictly construed to determine whether a lien attaches. Dean v. McFarland, 81 Wash.2d 215, 219-20, 500 P.2d 1244 (1972). But if it is determined a party's lien is covered by chapter 60.04 RCW, the statute is to be liberally construed to provide security for all parties intended to be protected by its provisions. RCW 60.04.900; see Lumberman's of Wash., Inc. v. Barnhardt, 89 Wash.App. 283, 286, 949 P.2d 382 (1997)”.

While the lien statute should be strictly construed, Western Superior is clearly a lien claimant protected by the statute, who used the safe harbor form provided by statute that was attested to by a person with personal knowledge of the validity of the lien. Western Superior should be protected as intended by RCW 60.04.900, even if the court were to determine that its lien form had a technical deficiency in its notary certificate.

B. The trial court's decision was based solely on the *Williams*' decision, not any preexisting caselaw as suggested by the Respondent.

1. If Respondent relied on pre-*Williams* caselaw, why did it not bring its motion to dismiss until literally weeks after the *Williams* decision was issued?

Respondent contends that Intervest did not rely on new caselaw or interpretation of a statute and that its position has been supported since 1992. This is a convenient position now that the case is in the court of appeals, but quite simply, it's a rewriting of history. Intervest filed its answer to Western Superior's Counterclaims and crossclaims to foreclose its lien on October 16, 2009. Yet, Intervest did not file its motion to dismiss until April 8, 2010, less than a month before trial was set in this matter, citing specifically the recently published *Williams* decision as the primary basis for its motion. (CP 26-32).

Furthermore, the court specifically found in its oral and written order dismissing the matter that the *Williams* decision was dispositive of the issue of the lien's validity, not any other legal authority. (CP 107). The court also noted, in finding 'no just reason for delay' of the appeal, that there were factual differences between the instant case and *Williams* case. (CP 107).

Intervest clearly relies solely on the weight of the *Williams* decision, which was the entire basis for the late motion to dismiss. Intervest's fate should sink or swim based on its likeness (or not) to *Williams*, as well as *Williams*' underlying validity.

2. Previous caselaw actually rejects hyper-technical arguments such as that advanced by Respondent in the context of liens, it does not support such defenses, as advanced by Respondent.

The Court of Appeals Division I rejected very similar arguments to the ones at bar, as far back as 1981. In *Fircrest Supply, Inc. v. Plummer* 30 Wash.App. 384, 390-391, 634 P.2d 891, 894 - 895 (Wash.App., 1981), the court specifically rejected an arguments that the lien was invalid even though there were problems with: (1) the legal description in the lien; (2) the acknowledgment, which gave the name of the person signing, without explaining his representative capacity; (3) the acknowledgment, which was signed by the notary, rather than the representative and (4) the notary certification, which was not signed by the notary.

The court in *Fircrest* found that the requirements of the statute had been substantially complied with, saying:

*“What constitutes a sufficient verification of the notice or claim has been several times decided. Thus, the signature *391 of a claimant, appended to his statement, and the certificate of the clerk of the court that he made oath to the accompanying affidavit, is a substantial compliance with a statute which demands that the “statement shall be verified by oath,” although the claimant fail to sign the affidavit, as the statute only required that the statement shall be verified by oath.... A law requiring the lien statement to be verified by oath of the claimant does not require him to sign it.”*

Fircrest Supply, Inc. v. Plummer at 390-391

Such affidavits should be liberally construed in the absence of fraud or other suspicious circumstances. *Dorsey v. Brunswick Corporation*, 69 Wash.2d at 513, 418 A.2d 732; *First Nat'l Bank v. Oppenheimer*, 123 Wash. 290, 212 P. 164 (1923).

This court should follow the less hyper-technical approach to analysis of the lien in the instant case, given the facts in this case, as well as preexisting caselaw on point.

3. The Ben Holt decision is easily distinguishable to the case at bar.

The court in *Ben Holt* determined that both the acknowledgement and the underlying instrument were invalid. *Ben Holt Indus., Inc. v. Milne*, 36 Wash.App. at 472-73, 675 P.2d 1256. Here there is no question as to Mr. Howard's authority to sign (he personally performed and billed for the work and was the president of the company), or the validation of the lien. The lien is properly attested. The only question was the notary form.

In addition, in *Ben Holt*, the instrument in question was a lease, with no statutory interpretation directives. The underlying instrument in the case at bar, is a lien. In the lien context there is a strong statutory directive to liberally construe the document. RCW 60.04.900. This directive clearly applies to RCW 60.04.091. *See, e.g., Northlake Concrete Prods., Inc. v. Wylie*, 34 Wash.App. 810, 818, 663 P.2d 1380 (1983)

(explaining the Legislature's intent that “ ‘the lien laws shall be liberally construed with the view to effecting their object’ “ meant that “ ‘when it has been determined that persons come within the operation of the act it will be liberally applied to them.’ “ (quoting *De Gooyer v. Nw. Trust & State Bank*, 130 Wash. 652, 653, 228 P. 835 (1924), *aff'd*, 132 Wash. 699, 232 P. 695 (1925))).

The facts in the instant case are clearly distinguishable from *Ben Holt*.

4. Prospective Application is proper.

Respondent attempts to argue that there should not be a prospective application of the *Williams* decision because this was not a “new rule” or authority, and because the corporate notary was not discussed in the 2006 *Williams* decision.

Again, as referenced above, if the *Williams* decision was not new authority, then why didn't Respondent move to dismiss Appellant's lien the many months prior to publication of the *Williams* decision, instead waiting until less than a month before trial, citing the ‘not yet published’ *Williams* case as its primary authority?

Furthermore, the *Williams* decision even referenced the issue before it being a case of first impression. What's more, if it were such a long established rule in Washington that liens such as this required a

corporate notary certificate, why was it not so obvious to the initial *Williams* court in 2006?

Respondent is clearly stretching to construe the 2010 *Williams* decision as following “long established legal authority”, in a veil attempt to avoid what would be a fair (prospective) application of a new rule, in light of the *Williams*’ court validation of use of the lien safe harbor form in 2006.

Furthermore, with the Supreme Court accepting review of the *Williams* decision, which is apparently to be heard in the spring of 2011, should this court decide not to distinguish, or apply *Williams* prospectively only, it should defer its decision until final review of that matter has been made by the Supreme Court.

C. Respondent could not have possibly known of its Statute of Frauds affirmative defense until after the *Williams* decision was issued, which is clear evidence that it was not pled.

As has been noted earlier, Respondent did not move to dismiss Western Superior’s lien claim until just within a month prior to trial, and specifically cited the just issued *Williams* decision as the authority for its late position. Respondent did not move to amend its pleadings prior to its motion to add this statute of frauds defense that it asserted so late in the game. Now Respondent tries to go back to the original pleadings and find

a “catchall” defense that it can say it contemplated at the time of filing of its answer. Respondent now argues that a vague reference to the lien statute with only a specific reference to the date of commencement of the work, is sufficient to plead its statute of frauds defense. This is a transparent attempt to rewrite history and conflicts with the holding in *Ben Holt*.

The fact of the matter is that until the *Williams* decision was issued, Respondent did not have such a defense to assert, and the very decision on which Respondent places so much emphasis (*Ben Holt*), clearly indicates that where not raised as a statute of frauds defense, in addition to raising the issue of the instrument not being perfected (in *Ben Holt* the lease and in the instant case the lien statute requirement), one has not properly plead the defense. *Ben Holt at 473*.

Intervest’s affirmative defense of statute of frauds was not pled, making its motion to dismiss, and subsequent order granting it, improper.

III. CONCLUSION

As stated in its opening brief, Intervest’s argument that the Western Superior lien is invalid because it lacks a corporate notary block is a hypertechnical argument asking the court to put form over substance. Such a hypertechnical argument should be scrutinized with the same level of technicality.

Intervest's arguments fail because Tim Howard's individual signature and attestation, as corporate president and individual person familiar with the lien claim, substantially complies with the statutory safe harbor form.

In addition, Intervest has failed to properly plead the affirmative defense raised by motion on the eve of trial.

Furthermore, Western Superior, in 2008, relied on existing caselaw upholding of use of the safe harbor form contained in the statute at the time of the filing of its lien, and should not be penalized because of such a reliance. The court should apply any weight the *Williams* decision may have on the instant case prospectively only.

In the alternative, should the court decide not to distinguish this matter from the facts of the *Williams* decision, or not apply *Williams* prospectively only; it should defer decision until the Supreme Court has ruled on the *Williams* appeal, in the interest of justice and judicial economy.

Respectfully submitted this 29th day of November, 2010.



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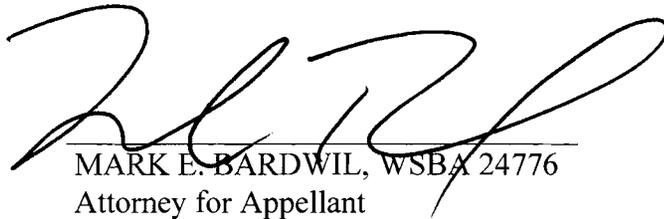
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13 I declare under penalty of perjury under the laws of the State of Washington the
14 foregoing is true and correct.

15 DATED this 29th day of November, 2010 at Tacoma, Washington

17 
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