

COURT OF APPEALS  
10 OCT 20 11:07  
STATE OF WASHINGTON  
BY ca  
DEPUTY

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,

---

BRIEF OF RESPONDENT

HENRY K. HAMILTON, WSBA #16301  
Fidelity National Law Group  
A Division of Fidelity National  
Title Group, Inc.  
1200 – 6<sup>th</sup> Avenue, Suite 1900  
Seattle, WA 98101  
(206) 223-4525, ext. 101  
Attorney for Respondent

**TABLE OF CONTENTS**

I. SUMMARY INTRODUCTION.....2

II. COUNTERSTATEMENT OF ISSUES.....3

III. COUNTERSTATEMENT OF THE CASE.....3

IV. AUTHORITY.....7

    A. The parties agree on the Standard of Review.....7

    B. The trial court properly dismissed Western’s lien claim because on the limited issue of Western’s admitted failure to properly notarize its lien claim, the holding in *Williams v. Athletic Field, Inc.*, 155 Wn. App. 434, 228 P.3d 1297 (2010), is directly on point and binding.....7

        1. The facts are uncontested and warrant upholding the dismissal.....7

        2. The *Williams v. Athletic Field Inc.*, opinion is directly on point and invalidates Western’s lien claim.....8

        3. Western misstates the holding in *Williams v. Athletic Field, Inc.*.....10

        4. Washington’s lien statute requires strict Compliance with all terms, which terms Cannot be equitably waived by a court....11

        5. Courts are required to enforce statutory language.....13

C.	The trial court properly dismissed Western’s lien claim because the requirements contained in Washington’s Lien Act have remained unchanged for nearly twenty years and because case law has long required strict compliance.....	13
1.	The need to have liens properly notarized has been required since at least 1992.....	13
2.	Courts have long invalidated improper liens and other documents affecting real property.....	14
3.	The previous <i>Williams</i> opinion did not address the notary issue.....	16
4.	Prospective enforcement is not proper.....	16
D.	The trial court properly found that Intervest’s Affirmative Defenses were adequate by clearly stating Western’s lien is defective.....	18
V.	CONCLUSION.....	19

**TABLE OF AUTHORITIES**

**Table of Cases**

*Ben Holt Industries v. Milne*, 36 Wn. App. 468,  
675 P.2d 1256 (1984).....14, 15

*Berger v. Sonneland*, 144 Wn.2d 91, 105, 26 P.3d 257 (2001)....13

*Cascade Sec. Bank v. Butler*, 88 Wn.2d 777,  
567 P.2d 631 (1977).....17

*Dean v. McFarland*, 81 Wn.2d 215, 219-20,  
500 P.2d 1244 (1972).....12, 15

*DKS Constr. Mgt., Inc. v. Real Estate Improvement Co. L.L.C.*,  
124 Wn. App. 532, 536, 102 P.3d 170 (2004).....15

*Northlake Concrete Prods., Inc. v. Wylie*, 34 Wn. App. 810, 813,  
663 P.2d 1380 (1983).....15

*Pacific Erectors, Inc. v. Gall Landau Young Construction  
Company*, 62 Wn. App. 158, 162, 813 P.2d 1243 (1991).....12

*Sheehan v. The Central Puget Sound Regional Transit Auth.*,  
155 Wn.2d 790, 797, 123 P.3d 88 (2005).....13

*State ex rel. Washington State Fin. Comm. v. Martin*,  
62 Wn.2d 645, 666, 384 P.2d 833 (1963).....17

*Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439,  
546 P.2d 81 (1976).....17

*Westinghouse Elec. Supply Co. v. Hawthorne*, 21 Wn.2d 74,  
77, 150 P.2d 55 (1944).....15

*Williams v. Athletic Field, Inc.*, 155 Wn. App. 434,  
228 P.3d 1297 (Wash. App. Div. 2,  
2010).....2,3,7,9,10,11,16,17,18,19

**Statutes**

RCW 42.44.100(2).....9,10

RCW 60.04.....4,7,11

RCW 60.04.011.....2

RCW 60.04.021.....8

RCW 60.04.091.....8,11,16

RCW 60.04.091(2).....2,5,8,11,13,15,18,19

RCW 64.08.....8,11

RCW 64.08.010.....8

RCW 64.08.070.....2,8,9,10,14,16

**Court Rules**

CR 12(c).....5,7

## I. SUMMARY INTRODUCTION

This appeal arises out of the Order granting Respondent Intervest Mortgage Investment Company's ("Intervest") Motion to Dismiss Appellant Western Superior Structural Mfg., Inc.'s ("Western") lien claim. The trial court entered the Order because Western failed to comply with Washington law by not having its lien properly notarized. Western admits it failed to comply with the notary requirements contained in the RCW §§ 60.04.091(2) and 64.08.070. This is uncontested.

Liens are in derogation of the common law and require strict compliance with all requirements. When a lien claimant fails to strictly comply with the clear requirements of Washington's Mechanics' Lien Act (RCW § 60.04.011, *et seq.*), then that lien claim is properly dismissed. Filing a lien acts as a pre-judgment writ of attachment so substantial compliance is not enough.

Judge Cuthbertson correctly applied established law and dismissed Western's claims related to its lien. The requirements to properly file a lien claim are not new. Washington's Mechanics' Lien Act has remained unchanged for nearly 20 years. The opinion in *Williams v. Athletic Field, Inc.*, 155 Wn. App. 434, 228 P.3d 1297 (Wash. App. Div. 2, 2010), may be recent, but the statute and the cases supporting it are not new. Western's lien claim is a corporate debt. As the court recognized, any signature

on this corporate claim must therefore be properly notarized using the corporate form. It was not. This court should uphold the trial court's entry of the Order of Dismissal of Western's lien claim.

## **II. COUNTERSTATEMENT OF ISSUES**

1. Whether Western's lien claim was properly dismissed given the holding in *Williams v. Athletic Field, Inc.*, 155 Wn. App. 434, 228 P.3d 1297 (2010), and Western's admitted failure to properly notarize its lien claim?

2. Whether Western's improperly notarized lien claim failed to comply with the clear requirements contained in Washington's Lien Act, which requirements have remained unchanged for nearly twenty years and require strict compliance?

3. Whether Intervest's Affirmative Defenses were adequate by clearly stating Western's lien was defective?

## **III. COUNTERSTATEMENT OF THE CASE**

Intervest is an innocent party who did nothing more than provide financing for the construction of a real estate project in Tacoma. (CP 4, 14 and 21) To secure its funding, Intervest recorded a Deed of Trust against the property. (CP 4, 14 and 21) Prium Homes failed to perform its obligations to Intervest and as a result Intervest commenced a receivership action and began foreclosure. (CP 34)

Primum Homes also defaulted on its obligations to several other parties including Sunset Air and Western. (CP 1-8) Sunset Air, Inc. filed the underlying lawsuit to collect unpaid amounts and to foreclose its lien against real property. (CP 1-8) In response, Western filed its answer, cross-claim for monies due and counterclaim; action for foreclosure of lien; and action against contractor's bond ("Western's Answer") (CP 9-19) Western's Answer states in pertinent part:

2.1 Defendant, Western Superior, is a Washington Corporation, doing business in Pierce County, Washington, and is a registered contractor having paid all license fees required by law and having met all statutory requirements to bring this action.

...

3.4 Western Superior filed a claim of lien, pursuant to RCW 60.04, on May 14, 2008, in the amount of \$383,181.00, under Pierce County Auditor number 200805140247. A copy of that lien is attached hereto as **Exhibit 1**.

...

3.6 Intervest-Mortgage Investment Company and WF Capital Inc. are listed as beneficiaries of Deeds of Trust and other recorded documents through which they claim an apparent interest in the subject property. All interests of these two entities are junior and inferior to that of Western Superior.

...

3.8 Defendant, Western Superior Structural MFG, Inc. is entitled to foreclose on its lien against the subject property, and all interests of Fountain Park LLC, Intervest-Mortgage Investment Company, WF Capital Inc., Sunset Air, Inc., Floorcraft Inc., CLP Resources, Inc., and Frontier Door and Cabinet LLC, for the principal sum of \$276,151.68, in addition to prejudgment interest at 12%, in addition to attorneys fees and costs.

Attached to Western's Answer is a copy of its lien claim. (CP 17-19) The lien claim attached to Western's Answer is signed by Timothy Howard as President of Western Superior Structural Mfg. Inc. (CP 17-19) Following this signature is a simple notary acknowledgment stating:

SUBSCRIBED AND SWORN to before me this  
12th day of May, 2008.

/S/ Mandy Mikelson  
NOTARY PUBLIC in and for the  
State of Washington, residing at Lake  
Tapps.  
My Commission expires: 7/10/11

(CP 19)

On October 16, 2009, Intervest filed its Answer to Western's counterclaims and cross-claims. (CP 20-25) Intervest's Answer included the following affirmative defenses:

1. Defendant Intervest's interests regarding the real property is superior to the interest claimed by Defendant Western Superior.
2. Western Superior failed to comply with the appropriate provisions of Washington's construction lien statutes, including, but not limited to failing to accurately reflect the work commencement date depicted on its lien.

On April 8, 2010, Intervest filed its Motion to Dismiss Western Superior Structural Mfg, Inc.'s Lien Claim Under Civil Rule 12(c), which Motion focused solely on Western's failure to comply with clear requirements of RCW 60.04.091(2) and have the lien notarized in compliance with RCW 64.08. (CP 26-32)

Western responded to the Motion by making the same arguments raised in this appeal. (CP 33-63) As here, Western did not dispute any material facts and did not dispute that the lien failed to comply with RCW 64.08. (CP 33-63) Western further agreed its lien failed to contain the required corporate notary block. (CP 66) Intervest's Reply in Support of its Motion to Dismiss highlighted the lack of any contested facts, the clear statutory language and the need for Western to strictly comply with the lien statute. (CP 64-72)

Judge Cuthbertson entered the Order granting Intervest's Motion to Dismiss on April 23, 2010. (CP 73-75)

Western filed a Motion for Reconsideration on April 29. (CP 76-84) Western's Motion failed to raise any new issues. Intervest's Opposition reminded the court that Western admitted its lien was corporate property and that Western also admitted that it failed to comply with Washington lien law. (CP 94) Intervest also reminded the court that there was no evidence that Western has made any attempt to collect from the real party responsible here, Prium Homes. (CP 98) There is absolutely no evidence that Prium Homes cannot pay its debt. (CP 98) Western filed its Reply on May 6. On May 7, 2010, the court properly denied the Motion for Reconsideration. (CP 106-108)

#### IV. AUTHORITY

A. The parties agree on the Standard of Review.

Intervest agrees that this court engages in de novo review of an Order granting a Motion to Dismiss under Civil Rule 12(c).

B. The trial court properly dismissed Western's lien claim because the holding in *Williams v. Athletic Field, Inc.*, 155 Wn. App. 434, 228 P.3d 1297 (2010), is directly on point and binding regarding the issue of Western's admitted failure to properly notarize its lien claim.

1. The facts are uncontested and warrant upholding the dismissal.

The pleadings show the following facts are undisputed:

1. Western is a Washington corporation.
2. Western filed a lien claim, pursuant to RCW 60.04.  
A copy of that lien was attached and incorporated in Western's pleadings.
3. The lien claim is signed by Timothy Howard, as President of Western.
4. Western's lien does not contain the required corporate notary block.
5. Intervest's second affirmative defense states the lien is invalid for failing to comply with the lien statutes

Based on these facts, the trial court properly granted the Motion to Dismiss.

2. The *Williams v. Athletic Field, Inc.*, opinion is directly on point and invalidates Western's lien claim.

Under RCW 60.04.091(2), two separate and important events must occur for a lien to be valid. First, the lien must be attested to as being not frivolous and made with reasonable cause. Second, because it involves real estate the lien must be properly notarized under chapter 64.08 RCW. For simplicity purposes, Intervest's Motion to Dismiss focused solely on the second issue – Western's acknowledged failure to have its lien properly notarized under RCW 64.08.010, *et seq.*

RCW 60.04.091(2) requires all liens be notarized consistent with RCW 64.08.

RCW 60.04.091 states in pertinent part:

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

...

(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.**

(Emphasis added).

RCW 64.08.070 sets forth the following form for a corporate acknowledgment,

On this . . . . day of . . . . . , 19 . . . . , before me personally appeared . . . . , to me known to be the (president, vice president, secretary, treasurer, or other authorized officer or agent, as the case may be) of the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

Alternatively, Western could have used the short form set forth in RCW 42.44.100(2). This short form acknowledgment for one acting in a representative capacity is:

I certify that I know or have satisfactory evidence that (name of person) is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument, on oath stated that (he/she) was authorized to execute the instrument and acknowledged it as the (type of authority, e.g., officer, trustee, etc.) of (name of party on behalf of whom instrument was executed) to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

RCW 42.44.100(2).

As in *Williams*, Western chose not to use either form. As in *Williams*, Western used a simple notary block, which simple form this court has ruled does not comply with the lien statute. As in *Williams*, the lien claim before the court fails to comply with the notary requirements of RCW 42.44.100(2) or RCW 64.08.070 because Western's lien fails to have the statutorily required corporate acknowledgement notary block. The notary

acknowledgement following Timothy Howard's signature does not meet the requirements of either RCW 64.08.070 or 42.44.100(2) because it does not include the required corporate acknowledgment. There is no dispute on this simple issue.

3. **Western misstates the holding in *Williams v. Athletic Field, Inc.***

As this court has recognized, on a corporate document, the only proper form is the corporate form. This has nothing to do with who signed the lien. It has everything to do with the fact that the lien is corporate property and the corporate form must be followed. Western confuses the issue. Mr. Howard does not own the claim, the corporation does. Mr. Howard signed the lien as an officer of the corporation, thus requiring the notary to use a corporate notary form. This was not done. It is just that simple.

Under Western's argument in this appeal, no corporate obligation would ever have to be notarized because the person signing could always claim he was solely acting in his individual capacity. This argument essentially nullifies the entire notary act and makes no sense. This court should summarily reject this argument.

Western admits its lien fails to contain the required corporate notary block. Failure to follow these requirements makes a lien not enforceable. These are not niceties, these are requirements. Simply put, Western's lien does not comply with

RCW 64.08. The statutory language is clear and must be complied with. Western's lien fails as a matter of law.

Under the clear ruling in *Williams*, Western's lien was properly dismissed because it failed to comply with the strict requirement of Washington's construction lien statute contained in RCW 60.04. Western attempts to distinguish *Williams*. However, on the simple issue before this court there is no dispute that the facts are the same in both matters. In both *Williams* and here, the corporate lien claimant failed to follow RCW 64.08.

4. **Washington's lien statute requires strict compliance with all terms, which terms can not be equitably waived by a court.**

Western claims that it substantially complied with the sample form in RCW 60.04.091. The *Williams* court rejected this same argument. To establish that a claim of lien was properly acknowledged, RCW 60.04.091(2) requires strict compliance with chapter 64.08 RCW. Where a corporate acknowledgment is required, the sample form cannot be sufficient because it only satisfies the requirements to witness an individual signature. Western's lien claim fails and must be dismissed.

A lien claimant must strictly comply with all lien perfection requirements. Western's suggestion that it substantially complied with the lien statute is irrelevant because substantial compliance is not the standard. The *Williams* ruling is

entirely consistent with the long-standing rule that courts must strictly construe lien statutes because they are in derogation of the common law. *Dean v. McFarland*, 81 Wn.2d 215, 219-20, 500 P.2d 1244 (1972). The Washington Supreme Court has ruled that a lien claimant must clearly demonstrate satisfaction of all the statutory lien claim requirements. *Dean*, 81 Wn.2d at 220.

To avoid this result, Western requests the court ignore Washington law and equitably relieve it from the strict requirements. In *Pacific Erectors, Inc. v. Gall Landau Young Construction Company*, 62 Wn. App. 158, 162, 813 P.2d 1243 (1991), the lien claimant failed to timely serve its pleadings on other defendants, in direct reliance upon a court order that purported to waive the statutory service requirements. The lien claimant asked the court to uphold its lien based upon "equitable principles," even though it had not complied with the service requirements of the statute. The court rejected this argument, reasoning that the lien claimant should not have relied upon the erroneous court order. *Id.* at 167-68. *Pacific Erectors* holds the perfection requirements of the mechanics' lien statute are mandatory and cannot be equitably waived by the court. *Id.* Consistent with *Pacific Erectors*, Western's lien was properly dismissed.

5. **Courts are required to enforce statutory language.**

Western requests this court to impermissibly read out the plain language in RCW 60.04.091(2) regarding the need to have liens properly notarized under RCW 64.08. Where the meaning of a provision is "plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Sheehan v. The Central Puget Sound Regional Transit Auth.*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005). In other words, courts may not do what Western requests: to simply ignore the plain language of RCW 60.04.091(2).

Courts should assume the Legislature means exactly what it says. *Berger v. Sonneland*, 144 Wn.2d 91, 105, 26 P.3d 257 (2001). Here, that means enforcing the clear language of RCW 60.04.091(2) where it requires that liens comply with RCW 64.08. Liens affect title to land and act as pre-judgment writs of attachment. That is why lien requirements are strictly construed and that is why they must comply with the real property acknowledgment requirements in RCW 64.08.

C. **The trial court properly dismissed Western's lien claim because the requirements contained in Washington's Lien Act have remained unchanged for nearly twenty years and because case law has long required strict compliance.**

1. **The need to have liens properly notarized has been required since at least 1992.**

This case does not involve a new statute. The statutory requirement that all liens “shall be acknowledged pursuant to chapter 64.08” is clear and unambiguous, and has remained unchanged since 1992. Western cannot claim it relied on any other statutory language. Properly notarizing lien claims is not new. The fact that Western may have gotten away with improper liens is irrelevant.

Similarly, RCW 64.08.070 has been unchanged since 1988 and was first utilized over a hundred years ago. Western’s argument that it relied on the existing statute is completely meritless.

**2. Courts have long invalidated improper liens and other documents affecting real property.**

Western can not say it relied on existing case law because courts invalidating improper documents is nothing new. For example, in *Ben Holt Industries v. Milne*, 36 Wn. App. 468, 675 P.2d 1256 (1984), the court invalidated a lease because the lessor acknowledged the lease using the individual acknowledgment form rather than the corporate acknowledgment form. 36 Wn. App. at 472-73.

As stated in *Ben Holt Industries*, for Western’s lien to be valid the lien must have a valid corporate acknowledgment containing all four elements: (1) the person signing the instrument was known to the notary to be an officer of the corporation which

executed the instrument; (2) he acknowledged the same to be the free and voluntary act of the corporation; (3) he was authorized to execute it on behalf of the corporation; and (4) the seal affixed was the corporate seal. *Ben Holt*, 36 Wn. App. at 471-72. Without these elements, both the acknowledgment and Western's lien are invalid. *Ben Holt*, 36 Wn. App. at 472. Accordingly, Western's lien claim does not comply with the requirements of RCW 60.04.091(2).

The court in *DKS Constr. Mgt., Inc. v. Real Estate Improvement Co. L.L.C.*, 124 Wn. App. 532, 536, 102 P.3d 170 (2004), repeated the rule that the lien statute is to be strictly construed (citing *Northlake Concrete Prods., Inc. v. Wylie*, 34 Wn. App. 810, 813, 663 P.2d 1380 (1983) and *Dean v. McFarland*). The *DKS Constr. Mgt., Inc.* court then reiterated that the burden of establishing the right to a mechanics' lien rests upon the person claiming it. 124 Wn. App. at 536. (citing *Westinghouse Elec. Supply Co. v. Hawthorne*, 21 Wn.2d 74, 77, 150 P.2d 55 (1944)).

The court in *DKS Constr. Mgt., Inc.* continued:

Under this framework, our courts have consistently denied relief to lien holders whose asserted mechanics' liens did not strictly come within the terms of the statute. *Wenatchee Fed. Sav. & Loan Ass'n v. Mission Ridge Estates*, 80 Wn.2d 749, 754, 498 P.2d 841 (1972); *TPST Soil Recyclers v. W.F. Anderson Constr., Inc.*, 91 Wn. App. 297, 301-02, 957 P.2d 265, 967 P.2d 1266 (1998); *Fair Price House Moving Co. v. Pacleb*, 42 Wn. App. 813, 816-17, 714 P.2d 321 (1986); *Seattle Lumber Co. v.*

*Richardson & Elmer Co.*, 66 Wash. 671, 673-74, 120 P. 517 (1912).

Simply put, in *Williams v. Athletic Field*, this court was merely following long standing Washington law in requiring lien holders to strictly comply with the terms of the lien statute, something Western failed to do. Western's argument that it relied on the existing case law is also meritless.

3. **The previous *Williams* opinion did not address the notary issue.**

Western cannot also claim it somehow relied on *Williams v. Athletic Field*, 142 Wn. App. 753, 139 P.3d 426 (2006). A close reading of that earlier opinion shows that this court did not address the issue squarely before the court in this case. The withdrawn *Williams* opinion only discussed the attestation provision and who could sign a lien. There was no discussion of the issue raised in Intervest's Motion to Dismiss – Western's admitted failure to comply with RCW 64.08.010, *et seq.* and have its lien properly notarized. Western simply could not have relied upon the previous *Williams* decision.

4. **Prospective enforcement is not proper.**

Western pleads for the court to only enforce the ruling in *Williams* prospectively. Such a request is completely unsupported. As set forth above:

- the statutes at issue, RCW 60.04.091 and RCW 64.08.070 have remained unchanged since at least 1992, at date well before Western's lien claim;
- Washington courts have consistently held that liens and other documents not properly notarized are invalid; and
- The previous *Williams* decision did not discuss the notary issue before the court so reliance was not possible.

Applying these facts to the cases Western cites shows how inappropriate they are to this case.

In *State ex rel. Washington State Fin. Comm. v. Martin*, 62 Wn.2d 645, 666, 384 P.2d 833 (1963), the court discussed prospective application where there may be a faulty rule, a constitutional misinterpretation, a statute was misconstrued or an earlier ruling was in error. None of those exist here. Again, The previous *Williams* decision did not discuss the corporate notary issue before the court so reliance was impossible.

In *Cascade Sec. Bank v. Butler*, 88 Wn.2d 777, 567 P.2d 631 (1977), the court discussed the situation where there was good faith reliance on a rule. Again, the statute has not changed since 1992.

Similarly, the test discussed in *Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439, 546 P.2d 81 (1976), for prospective application does not apply because there is no new

principle of law here. *Williams* and the cases in *Williams*, unvaryingly stand for the reapplication of the long-standing rule requiring strict compliance of a decades-old statute. The court need not go further.

Just as in *Williams*, where this court ruled the lien was invalid and unenforceable retroactively, there is no requirement for this court to apply *Williams* prospectively.

**D. The trial court properly found that Intervest's Affirmative Defenses were adequate by clearly stating Western's lien is defective.**

Western's statute of frauds argument misstates Intervest's defenses and misconstrues the nature of the underlying Motion – Western's admitted failure to comply with RCW 60.04.091(2). Western's argument about Intervest not stating a statute of frauds affirmative defense is a red herring and misstates the pleadings.

This is not a Statute of Frauds case. Rather, this is a lien claim dispute and the previous motions focused on Western's admittedly defective lien. The second affirmative defense in Intervest's Answer to Western's counterclaims and cross-claims says in pertinent part: "Western Superior failed to comply with the appropriate provisions of Washington's construction lien statutes...."

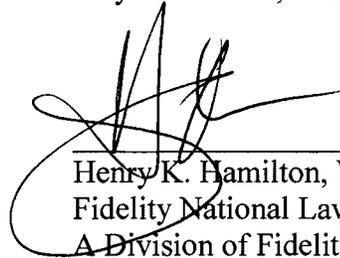
Obviously incorporated and included within this affirmative defense are all defenses to Western's failure to comply with the lien

statute. No further delineation is required. To the extent required, Intervest put Western on notice of the possibility of a motion similar to the one granted.

V. CONCLUSION

The only issue before the court is the validity of a lien claim under RCW 60.04.091(2). Western's lien claim is fatally flawed. Western admits its lien is not properly notarized. There is no dispute over this issue. As a matter of law, Western's lien is invalid under RCW 60.04.091(2) and Intervest was entitled to dismissal of Western's lien claim. Western improperly attempts to get around the strict requirements of the lien statute by raising the same arguments the *Williams* court rejected. This case is factually indistinguishable from this court's recent ruling in *Williams*.

Dated this 29th day of October, 2010.



---

Henry K. Hamilton, WSBA #16301  
Fidelity National Law Group  
A Division of Fidelity National  
Title Group, Inc.  
Attorney for respondent Intervest-  
Mortgage Investment Company

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

COURT OF APPEALS  
DIVISION II

10 OCT 29 PM 4:38

STATE OF WASHINGTON  
BY C  
DEPUTY

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

WESTERN SUPERIOR STRUCTURALS  
MFG., INC. a Washington corporation,

Appellant,

v.

INTERVEST-MORTGAGE INVESTMENT  
COMPANY,

Respondent.

No.: 40766-3-II

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing BRIEF OF RESPONDENT; and this CERTIFICATE OF SERVICE on the following individuals in the manner indicated:

1 Charles P. Mortimer  
2 LEVY · VON BECK  
3 3300 One Union Square  
4 600 University Street  
5 Seattle, WA 98101  
6 (206) 626-5444  
7 (206) 382-5527 - FAX  
8 Attorney for Floorcraft, Inc.

- U.S. Mail, proper postage affixed
- Legal Messenger
- Facsimile
- Hand Delivery
- FedEx
- E-Mail
- E-Service

6 Matthew L. Sweeney  
7 820 A Street, Suite 300  
8 Tacoma, WA 98402  
9 P.O. Box 7935  
10 Tacoma, WA 98406  
11 (253) 565-1728  
12 (206) 382-5527 - FAX  
13 Attorney for Prium Homes, Fountain Park,  
14 and Travelers Casualty

- U.S. Mail, proper postage affixed
- Legal Messenger
- Facsimile
- Hand Delivery
- FedEx
- E-Mail
- E-Service

11 Mark E. Bardwil  
12 MARK E. BARDWIL, P.S.  
13 1111 Tacoma Avenue South  
14 Tacoma, WA 98402  
15 (253) 383-7123  
16 (253) 572-1435 - FAX  
17 Attorney for Appellant Western Superior  
18 Structural's Mfg., Inc.

- U.S. Mail, proper postage affixed
- Legal Messenger
- Facsimile
- Hand Delivery
- FedEx
- E-Mail
- E-Service

15 Eugene W. Wong  
16 LASHER HOLZAPFEL SPERRY &  
17 EBBERSON  
18 601 Union Street, Suite 2600  
19 Seattle, WA 98101-4000  
20 (206) 624-1230  
21 Attorney for WF Capital, Inc.

- U.S. Mail, proper postage affixed
- Legal Messenger
- Facsimile
- Hand Delivery
- FedEx
- E-Mail
- E-Service

19 Hamilton H. Gardner  
20 HOLMQUIST & GARDINER  
21 1000 Second Avenue, Suite 1770  
22 Seattle, WA 98104  
23 (206) 438-9116  
Attorney for Frontier Door & Cabinet, LLC

- U.S. Mail, proper postage affixed
- Legal Messenger
- Facsimile
- Hand Delivery
- FedEx
- E-Mail
- E-Service

1 Daniel Finney  
2 WITHERSPOON KELLEY DAVENPORT  
3 & TOOLE, P.S.  
4 422 West Riverside Avenue, Suite 1100  
5 Spokane, WA 99201  
6 (509) 624-5265  
7 (509) 458-2728 - FAX  
8 Attorney for Intervest-Mortgage Inv. Co.

- U.S. Mail, proper postage affixed
- Legal Messenger
- Facsimile
- Hand Delivery
- FedEx
- E-Mail
- E-Service

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  

SIGNED this 29<sup>th</sup> day of October, 2010, at Seattle, Washington.

  
Cindy Rochelle, Legal Assistant