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## I. INTRODUCTION

Wiseman Utilities constructed water system improvements in the right-of-way in front of and adjoining the Respondents' houses and connected those improvements to the Respondents' waterlines and water meters, which required that Wiseman perform some work on the individual lots. Wiseman performed the work under a contract with Paradise Service Associates, a nonprofit that owns and operates a water system for the subdivision in the liened property is located. All owners of property in that subdivision are members of Paradise Service Associates. The Articles of Incorporation and Bylaws of Paradise Service Associates expressly authorize Paradise to construct, improve and maintain a water system, to connect that water system to its members' houses, and to hire contractors to perform that work. The Articles of Incorporation also provide that members of Paradise Water System can be personally liable by virtue of the membership interest.

Wiseman performed his work under a single lump sum contract with Paradise Service Associates, but Paradise Service Associates has refused to pay the full amount due for the work. Wiseman's work cannot be readily apportioned among the properties in the subdivision. Therefore, it is proper to record a blanket lien, or blanketing liens, to secure payment for the work. Wiseman did so.

The Respondents objected, filing a special action under RCW 60.04.081 to have the liens declared invalid and removed, asserting three bases for that removal: 1. Paradise was not a common law or construction agent of the Respondents and therefore the Respondents are not subject to liens for work performed under contract with Paradise and the liens were therefore “frivolous”; 2. Even if Respondents were subject to lien, their lien liability should be limited to their proportional share of the contract balance and, because the liens were for the full balance due, they were “clearly excessive”; and 3. Wiseman failed to provide preclaim supplier’s notices.

The Trial Court properly rejected the third argument, as Wiseman is a contractor not a supplier. The Court accepted the first argument, although in doing so it expressly ruled that the lien was not frivolous. (Therefore, the lien is not subject to dismissal under RCW 60.04.081 on the agency basis.) The Trial Court was originally silent on the issue of whether the liens were clearly excessive, but, on reconsideration, the Trial Court ruled that the liens were “excessive” (but not “clearly excessive”) because they were not apportioned among the properties, and the Trial Court thereafter signed an Order holding that the liens were “clearly excessive” and invalidating them under RCW 60.04.081.

## II. ASSIGNMENTS OF ERROR

### *Assignments of Error*

1. The Trial Court first erred in determining that Paradise Service Associates was not a construction agent of the Respondents, and next erred when it made that determination as a Finding of Fact rather than as a Conclusion of Law, and further erred when it used that erroneous Finding as a basis to dismiss the liens, despite the Trial Court's express determination, notwithstanding the Finding, that the liens were not frivolous.

2. The Trial Court erred in determining that Wiseman Utilities' lien was "clearly excessive".

### *Issues Pertaining to Assignments of Error*

1. Did the Trial Court Err in determining that Paradise Service Associates was not a construction agent of the Respondents when: (a) it hired Wiseman Utilities to construct water system improvements on and in front of the Respondents' land; (b) Paradise Service Associates' Articles of Incorporation and Bylaws authorize Paradise Service Associates to both construct such improvements on and in front of its members' land, and to hire contractors to perform the work; and (c) all Respondents are members of Paradise Service Associates? Yes.

2. Did the Trial Court err in determining that Wiseman Utilities' lien was "clearly excessive" when: (a) the lien was for the contract balance only; (b) RCW 60.04 authorizes liens for the contract balance; (c) Wiseman's claim was not segregable among the various properties improved; and (d) even if the lien were segregable, the statutory remedy for failure to apportion a segregable lien is a loss of priority, not dismissal or denial of the lien claim? Yes.

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

Wiseman Utilities is a utility contract that typically constructs water system projects for municipal and other entities that own and operate water systems and sewer systems. It also works on private water systems, PUDs, and power/fiber cabling, as such projects involve work underground on public right-of-way. (CP 309).

In this case, Wiseman Utilities was hired to build a replacement of a community water system at Paradise Estates. That system is owned by Paradise Service Associates, a nonprofit corporation created and owned by the lot owners at Paradise Estates specifically to improve and provide water service to the lots. The Respondents in this case are all members of Paradise Service Associates. In fact, the Respondents are officers and directors of Paradise Service Associates. (CP 309-310.)

The old system was an asbestos concrete water main. It had many leaks and was in poor shape. The result was poor water service to the lots in Paradise Estates. Wiseman was hired to construct a new replacement system, using materials provided to us by Paradise Service Associates. Wiseman performed this work, installing a completely new system in the rights-of-way throughout Paradise estates and then connecting that system to the water meters and waterlines on the individual lots in Paradise Estate. Most of this work occurred in the right-of-way in front of the lots, but some work occurred on individual lots. Work occurred on and in front of every lot owned by a respondent in this case. Paradise Services now has a new and fully-functional water system, and all lot owners in Paradise Estates, including all Respondents, now have running water. (CP 310; RP 4/19/2010, p. 14, ll. 18-20 (although transcript contains the words “water heaters” when it should say “water meters”); p 15, ll. 2-24).

Wiseman’s total bill was \$463,783.44. Of this amount, \$55,123.00 was for changed work performed under agreed change orders (approved by Paradise Services) and \$414,391.93 was for base contract work. Paradise Services has paid \$378,066.58, leaving an unpaid balance of \$85,749.66. Paradise Services Associates has refused to pay this amount. Paradise acknowledged that it owed \$68,440.08, but disputed \$15,876.00

plus tax. Despite that, Paradise has refused to pay any of the remaining bill, including the amount it admitted it owed. (CP 310-311.)

To secure payment, Wiseman Utilities recorded liens against some benefitted properties (those owned by the persons directing the work and controlling the decision on payment, but not owned by other, “innocent” owners of lots in Paradise Estates). Thereafter, the owners of the liened lots filed an action to remove the liens pursuant to RCW 60.04.081, which allows liens to be removed if frivolous or clearly excessive. (CP 311.)

Pursuant to the Statute, a show cause motion was set. On that motion, the Trial Court did not rule that the liens were clearly excessive and expressly ruled that the liens were not frivolous but nonetheless granted the relief of ordering that they be removed. (RP 4/19/2010 p. 30, l. 3 to p. 32, l. 24.) Seeking to remedy this defect, the Respondents moved for reconsideration, seeking an express ruling that the liens were clearly excessive. (CP 108-124.) In its ruling on reconsideration, the Court ruled that the liens were “excessive”, but did not rule that (was silent on whether) the liens were “clearly excessive”. (RP 6/15/2010.) Despite that, the Court entered an order which included a conclusion that the liens were “clearly excessive.” (CP 7-12.) Wiseman Utilities has appealed from that order.

#### IV. SUMMARY OF THE ARGUMENT

Washington statutes provide construction liens for those who work on or provide materials for both private and public construction projects... In 1991, Washington's comprehensive mechanics' and materialmen's lien statute was repealed and replaced with a revised and recodified law... Decisions under the prior statute are not discussed in this subchapter. They should be relied on only after a careful comparison of the statute under which the court was deciding and the language of the equivalent, if any, in the 1991 revisions... Liberal construction to provide security for parties intended to be protected is prescribed for all provisions of the new statute except those relating to informational materials on construction lien laws, RCWA 60.04.250 and RCW 60.04.255 ... and the provisions relating to formalities like effective date and application.

27 WA. Prac., Creditor's Rights – Debtor's Relief SS 4.51 Construction

Liens: Background.

RCW 60.04.900 states that the provisions of RCW 60.04 “are to be liberally construed to provide security for all parties intended to be protected by their provisions.” This means that when it is determined that a party is intended to be protected by the RCW 60.04, the statute will be liberally applied to preserve those rights. Kinnebrew v. CM Trucking & Const., Inc., 102 Wn. App. 226 at 231, 6 P.3d 1235 (2000).

The lien law also expressly defines its protected class:

Any person “furnishing labor, professional services, materials, or equipment” for the improvement of real property at the instance of the owner or the owner's common law agent or construction agent may claim a lien on the improvement for the contract price of the labor, services, materials, or equipment furnished. A

“construction agent” is the person having charge of the improvement to real property, including but not limited to a registered or licensed contractor or subcontractor, an architect, or an engineer and is deemed to be the agent of the owner only for the limited purpose of establishing a construction lien.

27 WA. Prac., Creditor's Rights – Debtor's Relief SS 4.52 Construction

Liens: Who May Claim.

Thus, there are three critical issues here, the determination of which drive the outcome both of this case and of the underlying lawsuit for lien foreclosure: 1. Did Wiseman construct an improvement to the Plaintiffs' properties of the kind that sustains lien rights; 2. Was this construction authorized by an agent (in this case a "construction agent" rather than a "common law agent") of the owners of the properties subject to lien; and 3. Were the amounts of the liens clearly excessive? The answer to the first two questions is "yes", and the first question is not even disputed. Therefore Wiseman Utilities' liens are valid and enforceable. The Trial Court decision should be reversed.

## V. ARGUMENT

### A. Standard of Review

Statutory construction issues are reviewed de novo. LRS Elec. Controls, Inc. v. Hamre Construction, 153 Wn.2d 731 at 738, 107 P.3d 721 (2005). Courts of Appeals give effect to the plain meaning of a

statute as an expression of legislative intent. State v. Thompson, 151 Wn. 2d. 793 at 801, 92 P.3d 228 (2004). Interpretation of the lien statute and rights under the lien statute, including the entire show-cause proceeding and all determinations made in such a proceeding, are statutory issues that are reviewed de novo. Williams v. Athletic Field, Inc., 155 Wn. App. 434 at 440, 228 P.3d 1297 (2010).

**B. Conclusions of Law Mischaracterized as Findings of Fact**

Because “[a] conclusion of law is a conclusion of law wherever it appears,” any conclusion of law erroneously denominated a finding of fact will be subject to de novo review. Kane v. Klos, 50 Wn.2d 778 at 788, 314 P.2d 672 (1957); see also Local Union 1296, Int’l Assn of Firefighters v. Kennewick, 86 Wn.2d 156 at 161-62, 542 P.2d 1252 (1975.) The interpretation to be given written instruments is a matter of law for the court, and not a question of fact. In re Larsson’s Estate, 71 Wn.2d 349 at 354, 428 P.2d 558 (1967).

In this case, the Trial Court purported to find, as a finding of fact, that “Paradise Service Associates, Inc. is not the construction agent, as defined in RCW 60.04.021, for its homeowner members relative to the contract with Wiseman Utilities, Inc. to replace the water distribution system owned by Paradise Service Associates, Inc.” (CP 10, ll. 15-16.) However, this is a mischaracterized conclusion of law.

Whether an alleged principal engaged in certain conduct or not are matters of fact, but the legal consequences of that conduct are conclusions of law. Thus, determinations of agency are categorically conclusions of law. The Trial Court erred in purporting to “find” a lack of agency as a matter of fact.

This error is compounded here. In this case, whether a person is a construction agent involves the interpretation of a statute (question of law, not fact). Further, Paradise Service Associates’ authority arises from written instruments (its Articles of Incorporation, Bylaws, and contract with Wiseman Utilities), the interpretation and application of which are questions of law, not fact. As a matter of law, Paradise Service Associates is authorized to hire contractors to conduct work on and in front of its member’s properties. Thus, as a matter of law, not a matter of fact, Paradise Service Associates is the construction agent of its members. The Court erred in ruling otherwise and in characterizing that ruling as a finding of fact rather than a conclusion of law.

**C. Wiseman's Work was a Liable Improvement to the Respondents' Various Parcels**

“Improvement” means: (a) Constructing, altering, repairing, remodeling, demolishing, clearing, grading, or filling in, of, to, or upon any real property *or street or road in front of or adjoining the same*; (b) planting of trees, vines, shrubs, plants, hedges, or lawns, or providing other landscaping materials on any real property; and (c)

providing professional services upon real property or in preparation for or in conjunction with the intended activities in (a) or (b) of this subsection.

RCW 60.04.011(5).

In this case, Wiseman Utilities installed water piping upon street right-of-way in front of and adjoining the Plaintiffs' properties for the purpose of improving Plaintiffs' properties by providing better water service to those properties. Wiseman also constructed connections to the piping system, which required entry onto, and work on the Respondents' various parcels themselves. (Although, the actual work on the individual lots was a very small part of the overall project, the project involved improvement both in front of and on all of the lots which Wiseman liened.) This work squarely falls within the definition of "Improvement" under the lien statute, satisfying the "Improvement" prerequisite to lien rights.

This distinguishes Wiseman's liens from the lien dismissed in the case, TPST Soil Recyclers of Washington, Inc. v. W.F. Anderson Const., Inc., 91 Wn. App. 297, 957 P.2d 265 (1998), relied on by the Trial Court. The TPST lien failed because its work (removing soil from property) did not fit any category in the statutory definition of "Improvement." Unlike TPST, Wiseman physically constructed something new on the land (a system of pipes), and that make all the difference.

**D. Paradise Was a Construction Agent of the Plaintiffs, so the Wiseman Liens are Authorized**

Wiseman does not contend that Paradise was a Common Law agent of the Respondents. Rather, Wiseman contends that Paradise is a construction agent of the Respondents. The lien statute defines and creates a statutory agent for construction and lien-right purposes, and such construction agents are frequently not Common Law agents. The Trial Court's fundamental mistake was to analyze the agency argument only through the standards of Common Law agency. The Trial Court's ruling is an analysis of Common Law agency, but does not even discuss the applicable statutory language creating or defining "Construction Agent." Because Wiseman did not contend that Paradise was a Common Law agent, the Court's ruling was based on a red-herring argument offered up by the Respondents. This Court should not be similarly misled.

The key to agency, including construction agency, is the determination of whether or not the Respondents authorized Wiseman's work. They could have done so in their individual capacities by clearly directing Paradise to undertake the work and hiring Wiseman to do it. In such case, Paradise would have been a Common Law agent of the Respondents. Wiseman does not contend that this happened.

However, RCW 60.04 finds authorization sufficient to sustain lien rights even in lessor circumstances. The test is whether Paradise hired Wiseman to do the work on and in front of the Respondents' properties and whether, in doing so, Paradise had the authority to enter such a contract and to allow Wiseman to enter the rights of way and the Respondents' properties to do the work. In other words, if Wiseman were not a trespasser in performing this project, then Wiseman has lien rights.

Further, if Wiseman's work was so authorized, then Wiseman has lien rights to the full extent of the Plaintiffs' ownership interests in their properties.

The lot, tract, or parcel of land which is improved is subject to a lien to the extent of the interest of the owner at whose instance, directly or through a common law *or construction agent* the labor, professional services, equipment, or materials were furnished, as the court deems appropriate for satisfaction of the lien. If, for any reason, the title or interest in the land upon which the improvement is situated cannot be subjected to the lien, the court in order to satisfy the lien may order the sale and removal of the improvement from the land which is subject to the lien.

RCW 60.04.051 (emphasis added).

It is undisputed that Wiseman's contract was with Paradise Service Associates, which is a separate entity from the Respondents themselves. However, while this separation of entities means that Wiseman cannot sue the Respondents for breach of contract, as Wiseman lacks privity of

contract with them, that separation does not act as a bar to Wiseman's lien claims.

Lien claimants frequently have proper claims against owners with whom they lack privity of contract, and frequently have contract claims against entities with whom they do not have contract claims. This happens whenever a subcontractor has lien rights. The subcontractor has lien rights against the owner of the land on which the subcontractor worked, but the subcontractor does not have privity of contract with that owner and, therefore, does not have contract claims against the owner. In such case, the subcontractor has a breach of contract claim against the general contractor, but unless the general contractor also owns the land improved, lacks a lien claim against the general contractor.

The Trial Court wrongfully accepted the Respondents' contract defenses as lien defenses. Respondents argued that Paradise was not authorized to bind them to contracts with Wiseman. Fair enough, but Wiseman is not asserting contract rights against the Respondents. Wiseman is asserting lien rights. Liens aren't subject to such defenses.

The touchstone analysis is not whether Plaintiffs have direct obligations, through contract, to Wiseman. Rather, the touchstone analysis is whether the Plaintiffs authorized Wiseman's work in a manner that provides a basis for lien rights under RCW 60.04. This authorization

need not be direct. Authorization through *a construction agent* is sufficient. Further, a construction agent need not be a common law agent (capable of binding the principal to contracts).

The question, then, is whether Paradise Service Associations was the Plaintiffs' construction agent. It was.

"Construction Agent" is a specifically defined term in RCW 60.04.011.

"Construction agent" means any registered or licensed contractor, registered or licensed subcontractor, architect, engineer, *or other person having charge of any improvement to real property*, who shall be deemed the agent of the owner for the limited purpose of establishing the lien created by this chapter.

RCW 60.04.011(1) (emphasis added).

In this case, Respondents (or, perhaps, their predecessors) created Paradise Service Associates for the express purpose of having charge of water system improvements to their real property, including pipes in the right-of-way fronting their properties and connections that run onto their properties themselves. This is the primary and exclusive purpose of Paradise Service Associates. Paradise's Articles of Incorporation, esp. paragraphs 3, 4, 5, 6, 9, and 15 of Article V, specifically authorize Paradise to undertake maintenance and construction work in front of and on the Respondents' properties. (CP 44-47.) Additionally, the Articles of Incorporation, at paragraph 21, authorize Paradise Service Associates to

enter into contracts with contractors, such as Wiseman, to carry out these purposes. (CP 48.)

Respondents asserted, and the Trial Court accepted, that the Articles of Incorporation provide that "Members of this corporation shall have only such financial liability herein as is imposed by their membership in this corporation." Respondents asserted, and the Trial Court accepted, that this insulated Respondents from lien claims. This is error. Paradise Service Associates is a construction agent of the Respondents because it was created for the purpose of having charge over water system improvements, did have charge over those improvements, and hired Wiseman Utilities to construct those improvements both on and in front of the Respondents' properties. These activities were all activities to which the Respondents' property and property frontage was subjected by virtue of Respondents' membership in Paradise Service Associates (Paradise Service Associates could not create a pipe system unless it is on and in front of the land owned by its members). Therefore, Respondents' lien liability is in incident of their membership in Paradise Service Associates, and they cannot rely on the limitations of liability in the Articles of Incorporation to escape that liability.

Finally, the Bylaws, at Section IX, paragraph E, provide further for the Plaintiffs' lien liability, making payment of dues an act of

acquiescence in and authorization of the actions of Paradise Service Associates. (CP 67.)

In opposition to this analysis, Respondents relied on the case Hewson v. Reintree Corporation, 101 Wn.2d 819, 685 P.2d 1062 (1984) (a case that predates the substantial revision to the lien act and which, therefore, must be read with care). However, the facts of Hewson make it readily distinguishable from this case.

In Hewson, a developer (Reintree) platted a subdivision. As a condition of the subdivision, Reintree had to promise King County that it would build sidewalks to certain specifications and dedicate those sidewalks to King County. After plat approval, Reintree began to sell lots. The purchase and sale agreements for these lots did not mention the sidewalks, require that the sidewalks be built, or otherwise authorize Reintree to engage in construction services or hire contractors on behalf of the purchasers. After selling these lots, Reintree entered a contract with Hewson Construction to construct the sidewalks. After Hewson had constructed the sidewalks and after they had been dedicated to the County, Reintree became insolvent and defaulted on its contractual obligations to Hewson. Hewson recorded liens against the previously-sold lots and sued to foreclose.

Hewson argued that a series of cases involving liens against the landlord's interest for tenant improvements and against a purchaser's interest for work required by the purchase and sale agreement, but contracted-for by the sellers, provided a valid basis for its liens against the individually-owned lots sold by Reintree prior to hiring Hewson. (Nelson v. Bailey, 54 Wn.2d 161, 338 P.2d 757 (1959); Newell v. Vervaek, 189 Wash. 144, 63 P.2d 488 (1937)). However, the trial and appellate court disagreed because there was no action by the owners of the lots requiring or authorizing construction of the sidewalks and because that obligation *pre-dated* the lot Owner's interest in the property. In distinguishing these cases, the Court of Appeals critically ruled:

The lease and executory contract cases are inapposite. In those cases, *an obligation was created in the first instance by the owner, who granted authority to the lessee or vendee to act as an agent*. In contrast, the owners of the lots in the Reintree subdivision did not create Reintree's obligation to install sidewalks. Rather, Reintree had a preexisting duty to install the sidewalks as a condition of plat approval. By purchasing the property, the owners did not assume control over Reintree for purposes of sidewalk installation...

Hewson at 824.

Here, unlike in Hewson, Paradise Service Associates was created by the Plaintiffs and their predecessors for the expressed purpose of having charge of the improvement constructed by Wiseman Utilities. Therefore, unlike Hewson and like the lease/vendee cases distinguished in

Hewson, Paradise Service's obligation to build, improve and maintain the water system constructed by Wiseman Utilities *was created in the first instance by the Owners (including the Plaintiffs), who granted authority to Paradise Services to act as an agent*. Finally, unlike Hewson, the Plaintiffs in this case did have and did maintain control over Paradise Service Associates for purposes of construction of the water system.

Further, the Hewson case involved an assertion and analysis of lien rights authorized by *common law agency* not by *construction agency*, and it has been widely cited as a seminal case setting forth the standards for common law agency. However, common law agency is both more powerful and more restricted than construction agency. Common law agency involves a principal giving an agent broad powers to bind the principal to contractual obligations; construction agency is a creature of statute, binding the principal to lien liability, but not contracts. Under the statute, if one entity has been authorized by an owner to have charge of a construction project, then that entity is the construction agent of the owner, and the owner's property is subject to lien rights, even though the owner may not be directly liable on the contract.

**E. The Wiseman Liens are Not Clearly Excessive**

1. *Wiseman's Lien is for the Contract Amount, No More.*

The lien statute allows lien claimants to record liens against any lot improved. RCW 60.04.051. (Improvement includes work in the right-of-way in front of the lot, as Wiseman's work was here. RCW 60.04.011(5).) The amount of the lien is the amount due to the lien claimant on the lien claimant's breach of contract for nonpayment claim, which always accompanies a lien claim.

Wiseman's lien is for the exact amount the lien statute allows – the unpaid contract claim. All the existing authority involving liens that were invalidated as "clearly excessive" involve liens claimed for amounts much larger than the proper contract claim amount (see Knibb v. Mortensen, 89 Wash. 595, 154 P. 1109 (1916), where lien was for twice the amount due on the contract) or includes claims for charges that are not the kind of charges RCW 60.04 secures (see Westinghouse Electric Supply Co. v. Hawthorne, 21 Wn.2d 74, 150 P.2d 55 (1944) (claim for materials not incorporated into the work) and Pacific Industries, Inc. v. Singh, 120 Wn. App. 1, 86 P.3d 778 (2004)(claim for lost investment in development that failed to produce a profit.)) Wiseman's lien is not excessive, let alone clearly excessive, when measured against Wiseman's contract claim. Further, Wiseman's lien is for labor, a clearly permissible basis for a lien

claim. Therefore, Wiseman's lien is not excessive in any ordinary or obvious sense.

A lien is "clearly excessive" if and only if it is for an amount that cannot be legitimately asserted under the lien statute. Liens may be for the contract price, as defined by the lien statute (the agreed contract price plus the reasonable and customary price for any extra work, if the price for extra work is in dispute). RCW 60.04.11(2). A lien for an arguably properly calculated contract price is not clearly excessive even if, in conjunction with other liens or claims, the contractor is over-secured.

Each lien is considered on its own in this regard. If the lien amount is based on the contract price, the lien is properly priced (regardless of whether or not there are other liens). If the lien amount clearly exceeds the highest possible contract claim, then it is clearly excessive (even if it is the lien claimant's only security).

In the Trial Court, the Respondents made (and the Court accepted) an erroneous two-pronged argument. The Court ruled that Wiseman was somehow obligated to record and foreclose multiple liens against all lots that Wiseman could claim liens against. Second, the Court ruled that each such lien should be for a pro-rated amount of the total lien claim amount, evenly distributed among all such properties. In arguing for these rulings, Respondents cited no authority. There is no such authority.

2. *Liens May Not be **Foreclosed** Piecemeal, but a Contractor has Discretion to Choose its Security from Among the Available Security, and is Not Obligated to be Over-Secured or to take as Security Poor Collateral or Collateral Owned by Individuals the Contractor Deems Faultless.*

To support the argument that Wiseman had an obligation to record a lien against all lots in Paradise if it were to record a lien against any of them, Respondents cited to Associated Sand & Gravel Co., Inc. v. Di Pietro, 8 Wn. App. 938 at 942, 509 P.2d 1020 (1973). In Di Pietro, Associated Sand & Gravel recorded a blanket lien against 62 lots improved by Associated, but then sought to enforce that lien piecemeal by foreclosing on only 26 of the liened lots, rather than on all 62. The Di Pietro Court ruled that "a single mechanics lien against more than one lot or parcel cannot be enforced against less than the entire property liened" without allocation and segregation where appropriate. That is, the Di Pietro Court ruled that Associated chose to claim security, through a single instrument, against 62 lots. Having done so, Associated could not enforce that lien against some of the lots disproportionately. Rather, Associated had to treat all secured property under the lien equitably, not imposing special burdens or granting special benefits to any particular secured property.

The Di Pietro Court did not rule that Associated could not have recorded its lien against 26 of the 62 lots and then foreclosed equally on those 26 lots. Thus, Di Pietro is not on par with this situation. Di Pietro stands for the proposition that a lien claimant must live with the security it has chosen; it does not stand for the proposition that a contractor has no choice with regard to the security it claims through a lien. The lien statute specifies when property is subject to a lien (when it is improved by a contractor under instructions from the lot owner or an agent of the lot owner). The lien statute does not require that a contractor claim a lien on any particular lienable property, and contractors frequently forgo all or some of their lien rights.

In this case, Wiseman had good reasons for choosing to lien the lots chosen and not the others. (CP 21-23.) First, Wiseman was fully secured through its limited lien and did not need to incur the expense of recording claims to other properties. Second, Wiseman did not want to burden owners of lots who had no personal involvement in the decision not to pay Wiseman for its work. Third, recognizing that there was no case indicating that a service company acts as the construction agent for the owners of the lots served, Wiseman wanted to make the strongest possible agency argument by liening only the property of the very

individuals who were involved in the decision to hire Wiseman, who directed Wiseman to perform work, and then not pay for the work.

If sustained, the Trial Court's decision would cause contractors to bear unnecessary costs and be under-secured when working, as here, on projects involving services (such as roads, water, sewer) to multiple lots. As seen above, such liens cannot apply to the property on which most of the work is done (as the work is generally public right-of-way). Such liens do apply to the lots served by the improvements, but if piecemealed among them, especially with a requirement that every possible property be liened, the result will be extremely expensive, unnecessarily risky, and will present a real possibility that if the contractor is not over-secured, it is undersecured. This outcome would contradict the primary, remedial purpose of the lien statute, which is to provide a mechanism for tradesmen to be paid for their labor and construction costs.

Lien claims are not without cost. Leaving aside the litigation expense, each lien is a document of real estate title. They have preparation, recording, and delivery costs. The lien statute, which is to be construed to benefit lien claimants, does not require that lien claimants incur substantial costs filing additional liens beyond those the contractor, in its own judgment, deems necessary to secure its claim.

Further, if the Law requires (as this Trial Court did) that lien claimants file all possible liens and limit the amount claimed in each lien to a pro-rated share of the total claim, then lien claimants with claims against multiple lots would always risk being substantially under-secured. Such a claimant would face the possibility of having its full and proper claim attacked and reduced in detail. If any one of the liens recorded in such case failed due to a procedural error or form mistake, the lien claimant would not be secured to the extent allowed by the lien statute, even if its other liens were completely proper. If any of the liened properties were fully encumbered by a prior mortgage, then the lien claimant would not be fully secured. If any of the liened properties were contaminated with hazardous waste or had some other feature impairing its value, then the lien claimant would not be fully secured. This would expose lien claimants to the very risk of loss that the lien statute is intended to prevent.

3. *The Wiseman Lien is Neutral as to Ultimate Allocation*

Respondents cited Associated Sand & Gravel Co., Inc. v. Di Pietro, 8 Wn. App. 938, 509 P.2d 1020 (1973) for the proposition that Wiseman's lien is clearly excessive, and therefore invalid, because Wiseman did not allocate and distribute his contract claim amount among the liened properties. However, a close reading of Di Pietro shows that

the Di Pietro Court ruled exactly the opposite. In Di Pietro, two contractors recorded blanket liens against multiple lots in a subdivision. Those liens were valid and were not determined to be clearly excessive. Rather, determining that the lien amount should be distributed among the lien properties equitably, the Court, in its judgment (affirmed on appeal) distributed those amounts. Further, in Di Pietro, Associated did not challenge the Court's decision to distribute the claim. Rather, Associated sought to distribute the lien amount differently than the Trial Court had, distributing it among some but not all of the lien properties. The Court of Appeals upheld the Trial Court's distribution. In distributing the lien amount among the properties, rather than applying the full amount to each property, and then enforcing the liens, the Trial Court ruled that failure to distribute the lien amount in the original lien document did not invalidate the lien even if distribution was proper. In affirming, the Court of Appeals upheld this determination. Therefore, Di Pietro supports the validity, not the invalidity, of blanket recording selected? liens, such as Wiseman's.

4. *Wiseman has a Good Faith Settlement Position that Its Lien is Not Segregable*

Although the lienor has the right to file a separate claim as to each piece of property if the lienor prefers to do so, as a general rule it is not necessary to file separate claims, but one claim covering all the property and including all the work done or materials furnished is sufficient, where

improvements are made under one general contract on several contiguous lots.

57 C.J.S. Mechanics Liens § 120 (2010) - **Filing one or more claims or statements by same claimant – Two or more buildings or improvements – On separate lots or parcels.**

The authorities sustaining a single lien against separate buildings or improvements *generally do not require that the lien be apportioned* to the different buildings, although some statutes require that the lien claimant make such apportionment or designate the items or amounts relating to each separate building in his or her claim or lien statement. Generally, a blanket construction lien against an entire property consisting of several parcels cannot be enforced in toto against less than all of such parcels, since it would be inequitable to burden some lesser portion of liened premises with charges for labor and materials which were not actually furnished to such particular parcel; a corollary to this general rule is that *where the total labor and material costs for which a lien is claimed can reasonably be allocated to individual parcels*, the amount of the lien can be apportioned to such individual parcels on the basis of such allocation and the liens may be enforced to such extent against individual parcels. A statute may expressly permit the court to apportion the amount of a single lien between or among the several separate buildings involved. Also, courts sometimes apply equitable principles in ruling that under the particular circumstances the single lien would be apportioned or distributed between or among the separate buildings in a particular way. Such apportionment has been made in recognition of the interests of third persons subsequently acquired in one or more of the buildings.

53 Am.Jur.2d Mechanics Liens § 262 (2010) - **Single or separate liens where there are separate buildings or improvements -- Apportionment of single lien.** (Emphasis added.)

Statutes permit the filing of separate mechanic's lien claims on each of several buildings, structures, or other improvements for which labor and materials were provided under a single contract, in proportion to the value of the labor and materials furnished for the particular structure or improvement. *Statutes also permit a single lien claim, a "blanket lien," against all such buildings, structures, or other improvements together with the ground upon which they are situated, if the cost or value of the labor or materials cannot be readily and definitely apportioned.*

53 Am.Jur.2d; Mechanics Liens § 196 (201) - **Separate buildings, structures, or other improvements.** (Emphasis added.)

The general rule cited above is consistent with Washington law, including cases in which apportionment was required.

*Where one contract is made for the construction of, or for work upon, several different buildings located on as many different lots or tracts of land, for a lump sum, one lien may be filed for the total sum and foreclosed as against all of the lots and the improvements thereon; but where, as here, the contract is that various buildings will be constructed on various lots or work done on various buildings, at a designated and fixed price per building, then each lot should be liable only for the value or contract price of the improvement on it. While there was but one contract here, it was severable as to each lot and the improvements on it, and each lot should be made to bear only the contract cost of the improvement on it. In so holding we have not overlooked section 1137, Rem. Code, which provides for the filing of one claim on more than one lot. But that section has reference to work done on more than one lot under one contract which does not segregate the value of the work on each lot.*

Hoagland v. Magarrell, 115 Wash. 259 at 262, 197 P. 20 (1921)

(Emphasis added).

Under these rules, Wiseman filed a blanket lien and sought to have that lien enforced without conceding that apportionment was necessary, either in the original lien or in the ultimate enforcement of the lien. Wiseman's work was a single improvement under a lump sum contract which cannot be reasonably allocated among parcels.

Wiseman's work improved the parcels liened (along with other parcels in the subdivision), but there is no way to tell the extent to which the work improved any particular parcel. Such a determination would involve factors outside the scope of Wiseman's contact, including: (1) the extent to which any given parcel uses water piped through the system Wiseman built; (2) the extent to which the new system improved water pressure and water quality on any given parcel; and (3) the extent to which Wiseman's redirection of water connection pipes on any given lot improves the utility of the lot by making new space available for landscaping and other improvements. None of this information is known or reasonably ascertainable. Therefore, Wiseman reasonably concluded that, because its work cannot be "reasonably allocated to individual parcels", unallocated blanket liens were proper.

5. *Even if the Lien had to be Allocated when Recorded, Remedy is Loss of Priority, Not Invalidity.*

Even if Wiseman's lien were of the kind that had to be allocated and distributed among the liened properties, and even if this distribution could not occur at the conclusion of trial (as was the case with the liens in Di Pietro), Wiseman's lien is not invalid or clearly excessive.

Where a single claim may be filed covering separate buildings or improvements and where a claimant is required to apportion such claim as to the separate improvements or designate the amount or items which relate to each, a failure to make such apportionment or designation may be held to invalidate the claim. *Sometimes the effect of failure to make a required apportionment is to subordinate the claim to other liens, and some statutes expressly so provide.*

53 Am.Jur.2d; Mechanics Liens § 239 (2010) (emphasis added) - **Effect of failure to apportion single claim as to separate buildings or improvements.**

Washington does not invalidate segregable liens for failure to segregate and distribute lien claim amounts among the liened properties. Rather, under Washington law, such an improperly unsegregated lien loses *priority not validity*. This is a matter of both common law (see Seattle Lumber co. v. Sweeney, 33 Wash. 691 at 696, 74 P. 1001) (1904) and statute (RCW 60.04.131).

6. *There is No Bad Faith in Recording a Lien to Secure Payment and Enhance Settlement Prospects.*

In a proceeding to enforce a mechanic's lien, the burden is on the party alleging fraud to establish it.

Generally, the burden is on the party alleging fraud to establish it, such as where the owner alleges that the claimant in bad faith has included in his or her statement items which are nonlienable or where he or she asserts a willful intention on the part of the claimant to claim for an item known not to have been furnished or for an amount known to be in excess of what is justly due.

C.J.S. Mechanics Liens § 453 (2010) - **Fraud and bad faith.**

Here there are no allegations (and no evidence) that Wiseman included nonlienable items in the lien, or that Wiseman's lien seeks payment for work not done, or that Wiseman's lien is for an amount Wiseman knows exceeds the amount justly due (the contract price). In fact, the evidence is that Wiseman's lien is for the contract price due for work done.

The only basis on which Respondents claimed bad faith is a statement allegedly made by Wiseman's counsel in a telephone settlement negotiations in which Wiseman's counsel allegedly said that the liens were filed for "leverage." Wiseman's counsel does not recall saying that. Rather, Wiseman's counsel recalls saying that the liens were recorded for "security". (CP 21-23.) However, even if the statement were made, it was made to communicate a risk position for settlement purposes. That is a proper statement, and liens pose risks, and discussion of those risks are key parts of settlement discussions involving lien claims. The lien statute exists to give contractors security in improved property, and to expose the

owners of improved property to the risk of foreclosure. There is nothing wrong with recording a lien for this intended purpose or for communicating that risk in settlement discussions.

However, even if the statement somehow reflected some improper purpose in recording the lien, the statement is not admissible and should not be considered by the Court. ER 408 prohibits abuse of settlement negotiations by a party, as is happening here. The statement should be disregarded under ER 408, and there is otherwise no evidence, and even no allegation, of any bad faith or improper purpose in Wiseman's assertion of his lien rights.

## **VI. CONCLUSION**

Wiseman Utilities constructed a water system in a road right-of-way in front of and adjoining the Respondents lots. This project also required that Wiseman work on Respondents' lots themselves (connecting the instreet piping to the lateral lines and water meters on those lots). Wiseman performed this work under contract with Paradise Service Associates, which, by its governing documents, was authorized to undertake the work and to hire contractors to perform it.

Under RCW 60.04.011, this work constitutes an improvement to Respondents' properties and provides lien rights against Respondents' properties as long as the work was authorized by the Respondents or their

common law or construction agent. A construction agent is a person an owner places in a position of having charge of the work. The Respondents created Paradise Service Associates for the express purpose of having charge of the work necessary to improve the water system serving their properties. Thus, Paradise Service Associates was the construction agent of the Respondents. Although Paradise Service Associates cannot bind the Respondents to contractual liability, it can and did expose Respondents' properties to lien liability, and Wiseman Utilities' lien properly attached to Respondents' properties.

The lien statute is a remedial statute. It exists for the benefit of unpaid contractors, such as Wiseman, and it expressly states that it is to be liberally construed to provide lien relief to such persons. RCW 60.04.900. It also expressly provides lien rights when improvements are constructed by a lien claimant, working with proper authorization, "upon any real property or *street or road in front of or adjoining the same.*" RCW 60.04.011(5); RCW 60.04.051. Defendant Wiseman, as a utility contractor, constructed a water system upon public right-of-way in front of the Respondents' houses and connected to those houses, providing the labor necessary to construct this system. The purpose of the new water system was to serve the Respondents' houses through Paradise Service Associates, a nonprofit owned by and composed of the Respondents

(along with other owners of houses served by the water system) for the prior and expressed purpose of constructing such improvements for the benefit of the Respondents. Paradise Service Associates was therefore the *construction agent* of the Respondents as that term is used in RCW 60.04. Therefore, Wiseman's liens were authorized.

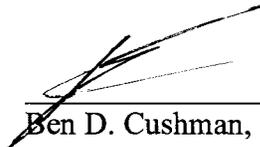
Finally, Wiseman's liens were not clearly excessive. Wiseman performed his work under a single lump sum contract, and that work cannot be readily apportioned among the properties in the subdivision. Therefore, it is proper to record a blanket lien to secure payment for the work. Further, Wiseman's blanket liens would not prevent apportionment by the Trial Court if the Trial Court ultimately ruled that the amount was due and collectible through the lien process, but had to be apportioned (as happened in the Di Pietro case). Therefore, dismissal was not an appropriate remedy. The statutory remedy is subordination, not dismissal. Therefore, even if apportionment were required and could not be done by the Court as part of judgment, in Washington the penalty for unapportioned liens is loss of priority to third parties, not a determination that the lien is clearly excessive and therefore invalid.

The Trial Court erred both in ruling that the work was not authorized and therefore not a proper basis for liens and in ruling that the

lien amounts were clearly excessive. This Court should reverse and remand.

SUBMITTED this 26<sup>th</sup> day of October, 2010.

CUSHMAN LAW OFFICES, P.S.



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Attorney for Appellant

CERTIFICATE OF SERVICE

I declare under penalty of perjury according to the laws of the State of Washington, that on the date signed below, I caused the foregoing document to be filed with this Court, and emailed and mailed to opposing counsel as indicated below:

DATED this 27 day of October, 2010.

*Doreen Milward*

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