ORIGINAL

COURT OF APPEALS
DIVISION II
11 JAN -5 PM 3:41
STATE OF WASHINGTON
BY
DEPUTY

NO. 40895-3-II

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

**(Mason County Superior
Court No. 10-2-00185-2)**

Wiseman Utilities,

Appellant (Defendant)

v.

**S. Gary and Merrisue Steinman; Mary G. and Boyd K. Smith;
Lori E. Gross; Susan Owley-Koenig and Robert P. Koenig, Jr.;
William B. Davies; William J. and Marlene N. Casmaer;
George E. and Veanne M. Young; Larry J. Pazaski;
Robert A. and Marilyn M. Miller; and Robert J. and Dorothy E. Miller**

Respondents (Plaintiffs)

APPELLANT'S REPLY BRIEF

Ben D. Cushman
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501
360/534-9183

Attorney for Appellant

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. SUMMARY ANALYSIS OF RESPONDENTS' ISSES.....4

III. ARGUMENT.....6

A. General Lien Law Principles.....6

B. Wiseman's Work Was A Lienable Improvement 8

C. Paradise Was A Construction Agent 9

D. Wiseman's Liens Are Not For An Excessive Amount.....13

1. *Liens May Not be **Foreclosed** Piecemeal, but a Contractor has Discretion to Attach any Lienable Property Security*.....15

2. *Wiseman Had Discretion Not to Lien Paradise Property* 18

3. *There is No Bad Faith in Recording a Lien to Secure Payment and Enhance Settlement*.....20

E. Fees and Remand.....22

IV. CONCLUSION.....22

TABLE OF AUTHORITIES

Table of Cases

Associated Sand & Gravel Co., Inc. v. Di Pietro, 8 Wn. App. 938, 509 P.2d 1020 (1973).....15-17

Kinnebrew v. CM Trucking & Const., Inc., 102 Wn. App. 226, 6 P.3d 1235 (2000).....6

LRS Elec. Controls, Inc. v. Hamre Construction, 153 Wn.2d 731, 107 P.3d 721 (2005).....6

Williams v. Athletic Field, Inc., 155 Wn. App. 434, 228 P.3d 1297 (2010).....6

Washington Statutes

RCW 60.04.....2, 6, 8, 11, 18, 20, 23, 24
RCW 60.04.011.....2, 10
RCW 60.04.011(1).....11
RCW 60.04.011(2).....13
RCW 60.04.011(5).....8, 23
RCW 60.04.021.....2, 7, 9
RCW 60.04.035.....7, 13
RCW 60.04.051.....23
RCW 60.04.181.....4, 7, 22
RCW 60.04.900.....6, 15, 22

Other Authorities

Corpus Juris Secundum

57 C.J.S. Mechanics Liens § 453 (2010).....20

I. INTRODUCTION

Wiseman Utilities constructed a water system in the Paradise subdivision in Mason County. The owners of the homeowners association for the Paradise subdivision incorporated a water utility, Paradise Service Associates, for the purpose of constructing, maintaining, improving and operating this water system. The owners of Paradise Service Associates are the owners of lots in the Paradise subdivision, including all Respondents.

Paradise hired Wiseman Utilities, a water utility contractor, to replace the pipe system that served the houses in the Paradise subdivision. This work required construction of pipe improvements in a road right-of-way in front of and adjoining the Respondents' lots as well as constructing connecting pipes on the Respondents' 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. It is undisputed that Paradise Service Associates had authority to undertake this work, had charge over it (by setting the scope of work in Wiseman's contract) and had authority to hire Wiseman to perform the work.

Wiseman did the work and submitted a final bill. Paradise did not pay the final bill. To secure payment, Wiseman recorded liens against the Respondents' properties.

Under RCW 60.04.011, Wiseman's work constructed improvements to Respondents' properties at the direction of person (Paradise Service Associates) with charge of the work and authority to hire Wiseman to perform it. RCW 60.04.021 provides persons constructing improvements with lien rights to secure payment provided the work was authorized by the owner of the liened property or their common law or construction agent. A construction agent is the person having charge of the work. In this case Paradise Service Associates was the construction agent for the Respondents, thus exposing their property to liens from Wiseman in the event that Paradise did not pay for the Work it hired Wiseman to do. Although Paradise Service Associates cannot bind the Respondents to contractual liability (because it is not the common law agent of Respondents), it can and did expose Respondents' properties to lien liability (as their Construction Agent under Chapter 60.04 RCW). Wiseman Utilities' liens properly attached to Respondents' properties.

Respondents filed an action, seeking an order that Wiseman's liens were frivolous and were clearly excessive. Respondents argue that the liens are clearly excessive because Wiseman did not record liens against

all properties in Paradise and did not prorate the lien claim on the face of each lien. Respondents further assert that because they did not expressly authorize Paradise to do the work in their individual capacities (although they did so as the Board Members of Paradise Service Associates), Paradise Service Associates could not expose their property to lien. That is, Respondents argue that, because Paradise Service Associates is not their common law agent, Paradise Service Associates is not their construction agent even though Paradise Service Associates fits the statutory definition of "construction agent" exactly. Finally, Respondents assert that the selection of their properties, as opposed to the other properties in the Paradise neighborhood, was improper and in bad faith, rendering Wiseman's lien frivolous (even though it applies only to improved properties, is in the proper form, was recorded in the proper manner, and secures no more than the contract balance owed to Wiseman).

The Trial Court properly ruled that Wiseman's liens were not frivolous. Initially, the Trial Court was silent on whether the liens were "clearly excessive" – ruling that they were "improper" and dismissing them. Thereafter, on reconsideration, the Court ruled that the liens were "excessive" (but not "clearly excessive") as a secondary reason for invalidating them.

Thus, the Court erred in invalidating liens despite ruling that the liens were neither "frivolous" nor "*clearly* excessive." However, more substantively, the Court erred in ruling that Paradise Service Associates was not a construction agent of the Respondents and in ruling that the lien amounts were excessive at all. This Court should reverse and remand with instructions that the Trial Court reinstate Wiseman's liens and award fees to Wiseman, when it is ripe to do so, under RCW 60.04.181.

II. SUMMARY ANALYSIS OF RESPONDENTS' ISSUES

1. Because Paradise Service Associates "owns and operates the water distribution system," "can act only through its officers and directors," and is not subject to direction by individual homeowners in their individual capacities, was Paradise Service Associates a construction agent of the Respondents when it hired Wiseman Utilities to construct water utility improvements on and in front of the Respondents' properties?

Because Paradise Service Associates had charge of work that constructed improvements on and in front of Respondents' properties, and, through its governing documents and the governing documents of the homeowner's association, had authority to construct these improvements and to hire Wiseman to perform the work, Paradise Service Associates was the construction agent of the Respondents.

2. Does it matter that Wiseman Utilities had no direct contract with any individual land owner in Paradise (including the Respondents)? No, liens are authorized in the absence of any such direct contract. For instance subcontractors, who have no direct contract with property owners, nonetheless have lien rights to secure payment for their work if the general contract fails to pay them.

3. Do lien claimants have discretion to record liens against some, but not all, of the properties that could be subject to a lien to secure nonpayment of a construction debt? There is no authority for Respondents' position that lien claimants must exhaust all security, or must attach liens based on some preference hierarchy. Further, because the lien statute is remedial, and Respondents' position would undermine the remedial purpose of the statue, this Court should reject Respondents' argument. Wiseman's counterargument, that lien claimants have and should have discretion to select optimal security, rather than being required to exhaust all security to attach liens to undesirable property instead of better-alternative lienable property, is consistent with the caselaw and statutory language and serves the remedial purpose of the statute.

III. ARGUMENT

A. General Lien Law Principles

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). 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).

Although liens are in derogation of common law, requiring strict compliance with the express requirements of the lien statute (Chapter 60.04 RRCW), the statute requires that the Court liberally interpret the statute to favor and preserve lien claims. RCW 60.04.900. RCW 60.04.900 states that the provisions of Chapter 60.04 RCW "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 RCW 60.04, the statute will be liberally applied to preserve the rights of that party. Kinnebrew v. CM Trucking & Const., Inc. 102 Wn.App. 226 at 231, 6 P.3d 1235 (2000); DeGooyer v. Northwest Trust and State Bank, 130 Wash. 652 at 653, 229 P. 835 (1924).

This also means that, contrary to the arguments advanced by Respondents, the Courts are not to erect barriers for lien claims other than those expressly imposed by the statute. The Courts are to strictly apply the statute, and are not to enhance the statutory protections available to owners of properties encumbered by liens beyond the strict limitations of the statute. The Legislature made clear that the beneficiaries of the lien act are people (like Wiseman) who do construction work without being fully paid for that work. (See, for example, statutory prohibition on prior waivers or restraints of lien rights. RCW 60.04.035.)

> Except as provided in RCW 60.04.031 [supplier notice requirement], any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.

RCW 60.04.021.

Wiseman is such a person. Therefore, Wiseman is among the class protected by the statute. Further, Wiseman complied with the statutory requirements for attachment and enforcement of mechanics liens. Therefore, Wiseman's lien was proper and should not have been invalidated by the Trial Court. This Court should reverse and remand this case for the Trial Court to reinstate the lien and award fees to Wiseman as allowed by RCW 60.04.181.

There are three principal challenges to Wiseman's lien, each addressed in more detail below. First, contrary to the facts of the case, Respondents contend that Wiseman's work was not an improvement to the liened properties. Second, contrary to the definition of "construction agent" as any person with authority to undertake the work (even if that person is not a common law agent who was expressly authorized to do so), Respondent's contend that Paradise was not a construction agent with regard to the improvement of respondents' properties. Finally, in an attempt to require substantial and novel requirements beyond those imposed in Chapter 60.04 RCW, Respondents argue that Wiseman's lien was improper because Wiseman did not follow some unwritten hierarchy of lienable properties (lien Paradise's property first) and did not lien all the properties it could have conceivably liened. Both of these arguments would impose burdens on liens beyond those imposed by the statute.

B. Wiseman's Work Was A Lienable Improvement

> "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).

This case involves a service company, Paradise Service Associates, owned by the homeowners of the Paradise subdivision (including the Respondents) for the purpose of providing water service to the lots in the Paradise subdivision. Paradise hired Wiseman to improve the water system. Wiseman's work included installation of water piping upon street right-of-way in front of and adjoining the Plaintiffs' properties and connecting lines on the various properties connecting the houseline to the main water line. This work included work both on the Respondent's properties and on the right of way in front of and adjoining those properties for the purpose of providing water system improvements to serve the Respondent's properties utility work, such as this, clearly fits the definition of "Improvement" under the lien statute.

C. Paradise Was A Construction Agent

Next, to have a lien right, a lien claimant must have constructed the improvement "at the instance of the owner, or the agent or construction agent of the owner." RCW 60.04.021.

Wiseman does not contend that Paradise was the Owner of the Respondents' properties or the Common Law agent of the Respondents. Rather, Wiseman contends that Paradise was a Construction Agent of the Respondents. The Respondents argue, both to the Trial Court below and in their Response, that because Paradise was not expressly authorized by

the Respondents (in their individual capacities) to do the work on and in front of the Respondent's properties, Paradise could not expose those properties to liens. If Respondents had so authorized Paradise, then Paradise would have been their common law agent. Thus, the argument amounts to an argument that a Construction Agent must be a Common law agent. The law is otherwise.

Construction agents are frequently not Common Law agents. If the Legislature wanted to limit lien rights to cases in which the Owner or Common Law agent of the owner expressly authorized the work or directed the work, it could have done so. The result would have been a statute authorizing liens only for work done "at the instance of the owner, or the [common law] agent of the owner." Because the Legislature included the term "construction agent" (and later defined it), the Legislature must have intended liens to be authorized in cases in which someone other than the owner or the owner's common law agent expressly authorized the work. This is just such a case as the legislature had in mind.

"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).

The question then is whether Paradise had lawful and proper charge over the improvements on and in front of Respondents' properties. If so, Paradise was the construction agent of the Respondents, entitling Wiseman to assert lien rights to the Respondents' properties.

Perhaps the easiest way to answer this question is to ask a tangential question: Was Paradise a trespasser when it entered the Respondents' properties (through Wiseman) to construct the connection pipes on them? If not, then Paradise had the authority to construct the improvements on the Respondents' properties and, through its contract with Wiseman, had charge of that work. It is not disputed that Paradise had this authority, and was not a trespasser. Therefore, it is not properly disputed that Paradise was the Construction Agent of the Respondents.

Much of the previous analysis has been to parse out different kinds of "authorization" and to determine whether Paradise (and Wiseman) had one of the kinds of "authorization" for the work that allows for property to be liened when payment is not made for the work. This might be a misleading analysis. A better analysis (one more consistent with the meaning and intent of Chapter 60.04 RCW) might be to determine

whether the person who had charge of the work (be it the owner, agent, or construction agent), had the "authority" to do that work, rather than whether that person had somehow been "authorized" to do the work. Owners have inherent authority to do the work because they own the property being improved. An owner's common law agent has the authority because the owner has expressly authorized them to undertake the work. An owner's construction agent then could have the authority because they were expressly authorized to do specific work (as when an owner hires a general contractor, which, in turn, hires subcontractors), or because the construction agent has some inherent or continuing authority (as here, where Paradise has the clear authority to do this work and to improve the Respondents' properties through the governing and formation documents of both Paradise Service Associates and the homeowner's association of the Paradise subdivision).

It is undisputed that Paradise Service Associates has the authority to construct the improvements it did. Indeed, Paradise was formed for that very purpose – construction, maintenance, and operation of water system improvements in the Paradise subdivision, including pipes in the right-of-way fronting their properties and connections that run onto the Respondents' properties themselves. Paradise's Articles of Incorporation, esp. paragraphs 3, 4, 5, 6, 9, and15 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.)

The Respondents argue that the formation documents of Paradise Service Associates prohibit Paradise from encumbering the properties of its owners and members. The Respondents then argue that this acts as a bar to statutory rights of third parties. However, Paradise cannot impose a prior restraint or waiver on Wiseman's lien rights through its governing documents or even through its contract with Wiseman. RCW 60.04.035. The Respondents may have rights of defense and indemnification from Paradise, but Wiseman has the rights provided to it by statute, including the right to lien Respondents' property for improvements made on and in front of them at the instance of the Respondents' construction agent, Paradise Service Associates.

D. Wiseman's Liens Are Not For An Excessive Amount

It is undisputed that Wiseman's liens are for the contract amount, which is the amount authorized under RCW 60.04.011(2). Thus, the liens are not "clearly excessive" as that term is generally used in the caselaw interpreting the lien statute.

The Respondents attempt to argue that by recording twelve liens, each for the contract price, Wiseman is asserting a lien claim for twelve times the proper amount. This argument misconstrues what a lien is. A lien, like a deed of trust, is a security interest securing an obligation; a lien is not an obligation itself. Just as a single note can be secured by multiple pieces of property, each of which could be encumbered by a deed of trust for the full value of the note, a single contract claim can be secured by multiple liens. Payment on the claim would pay down the obligation secured by all liens, requiring recording of amended liens reflecting this payment and reducing the amount claimed in each lien to the contract amount that remained due. If the contract obligation were paid in full, either by an owner of a single liened property, or by Paradise, or by some other person, then all liens would have to be released. Liens, like deeds of trusts, are not cumulative, but rather secure a single, calculable obligation.

In arguing that the Wiseman's liens are clearly excessive, the Respondents make two contrary arguments. First, Respondents argue that Wiseman should have liened all properties owned by owners of lots in the Paradise subdivision. In other words, the Respondents argue that even though the lien statute does not have any requirement that lien claimants exhaust all available security, Wiseman should have filed each and every lien it could have, and then should have filed each lien for a reduced (pro-

rated) amount. Second, Respondents argue that, because property owned by Paradise Service Associates was available to lien, Wiseman should have only liened that property, even if Wiseman had lien rights against other properties. That is, again despite a complete absence of any such requirement in the lien statute, Respondents argue that there is a priority among lienable properties and that lien claimants are obligated to record liens in accordance with this hierarchy of security, first attaching available property owned by parties in contract with the lien claimant before (or instead of) attaching lienable property owned by others.

Neither of these arguments have any support in the lien statute or in the caselaw applying the statutory requirements of liens. Further, both arguments would unnecessarily complicate the lien process and would place improper, nonstatutory burdens on lien claimants, in violation of RCW 60.04.900.

*1. Liens May Not be **Foreclosed** Piecemeal, but a Contractor has Discretion to Attach any Lienable Property Security.*

The Respondents' argument that Wiseman had to record all available liens and then prorate those liens is a one trick pony with an inapposite trick. Respondents cite to a single case, Associated Sand & Gravel Co., Inc. v. Di Pietro, 8 Wn. App. 938 at 942, 509 P.2d 1020 (1973), for the proposition that a lien claimant must claim lien rights

against all lienable lots. However, Di Pietro does not stand for that proposition. Di Pietro does not even address the issue of what lots a lien claimant can lien. Rather, Di Pietro stands for the proposition that liens are not enforceable piecemeal, but must be enforced uniformly against all property encumbered by the lien. That is, Di Pietro does not limit the discretion of the lien claimant in choosing its security; rather, Di Pietro holds lien claimants to their choice by requiring that they live with the security selected in their liens and foreclose all of it when foreclosing on the lien.

There is good reason for this rule. When enforcing a lien, a trial court has a document (the lien) which it can read and enforced and has jurisdiction over certain subject properties (those subject to the lien). On this basis, the Court can order that the lien be enforced in accordance with its own terms (applying to all the property) and can utilize its jurisdiction over the subject properties by releasing them piecemeal based on a pro rata payment of the lien. These rules are consistent with the lien statute.

The rule advocated by Respondents is not consistent with the lien statute. Respondents argue that a lien claimant is obligated to record a pro-rata lien against each and every property on which it can claim a lien, even if there is some good reason to select some properties and not others. In a case like this, that would require filing of hundreds of small liens,

each with its own filing fee, placing an improper cost barrier between lien claimants and their lien rights. Further, such a requirement would require exhaustive (and expensive) prefiling investigation of all potentially lienable properties to make sure that none were missed. This would also place an improper, nonstatutory barrier between lien claimants and their lien rights.

The implications for lien enforcement litigation would be even worse. Under the current rule, trial courts have a clear set of properties and documents to evaluate – the contract documents, lien, and the properties attached by the lien. On Respondents' argument, the courts will have to entertain arguments that other properties, even properties owned by nonparties, should have been liened and therefore the lien should be reduced accordingly. Further, such an analysis, unlike the rule in Di Pietro, will require that the courts look beyond the four-corners of the liens they are asked to enforce to determine whether the liens could have attached additional properties. Thus, whether evaluated from the perspective of the court's jurisdiction over liened property or the perspective of the documentary case, Respondent's position would add an additional layer of complicated detail to lien cases, greatly increasing the cost and time of such actions.

Further, the requirement would make lien cases far more cumbersome than they need to be. Currently, lien claimants have the discretion and incentive to be selective in attaching liens to minimize the number of parties in a case. Each owner of a liened property would be a party to a lien enforcement. In the current case, that would mean that there would be over one hundred defendants on a lien for a contract balance of less than $100,000. Each defendant would be entitled to their own defense and their own counsel. That would place an improper and unnecessary burden on both the lien claimant and on the court system.

Finally, there is no section of Chapter 60.04 RCW, and no case interpreting that statute, that requires lien claimants to exhaust all available security. If the Legislature intended such a requirement, it could easily have added it to the lien statute. Given that the requirement is not clearly imposed by the lien statute, that it would impose an additional and substantial burden on lien claimants, and that the lien statute is to be interpreted for the benefit of lien claimants, this Court should reject the position advocated by Respondents and taken by the Trial Court.

2. *Wiseman Had Discretion Not to Lien Paradise Property.*

Respondents next assert that Wiseman should have liened only property owned by Paradise Service Associates because such property was available to be liened. This argument assumes that there is a hierarchy of

lienable properties and that one category must be exhausted before property in a different category can be liened. There is no case or provision in the lien statute setting forth any such requirement. Rather, as argued above, lien claimants have, and should have, discretion to attach their liens in the manner that they calculate would result in the most efficient route to full lien security.

There is good reason to lien individual lots rather than a pumphouse and associated piping. There is a market for individual houses. Given the limited service area of the Paradise Service Associate's water system, Paradise Service Associates and its owner are the only market for the pumphouse and associated piping. Further, while Wiseman could have possibly liened, foreclosed on, purchased, and then shut off the water system, thus motivating payment of its bill by homeowners in the Paradise subdivision who needed water service, ordinary foreclosure of the residential properties Wiseman did lien seemed like a more seemly and moral process. Based on these factors, the individual lots, rather than the pumphouse and piping, seemed like better security. That is exactly the kind of consideration that is, and should be, left up to lien claimants, and exactly the kind of consideration that would be prohibited on Respondents' argument.

As with the argument that lien claimants must exhaust, and then prorate among, available security, there is no section of RCW 60.04, and no case interpreting that statute, that creates a priority or preference list for liens. If the Legislature intended such a requirement, it could easily have added it to the lien statute. As with exhaustion of security, prioritization of security is a requirement that is not clearly imposed by the lien statute, which would impose an additional and substantial burden on lien claimants, who are the beneficiaries of the lien statute (a remedial statute). Therefore, this Court should reject the position advocated by Respondents.

3. *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.

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

Here it is undisputed that Wiseman did not do any of the things identified as bad faith. Rather, Wiseman's claim is for the contract price of work Wiseman completed, for which Paradise has not paid. The basis on which Respondents claimed bad faith is a statement allegedly made by

Wiseman's counsel that the liens were filed for "leverage." This claim is disputed. However, even if true, selection of security that could most efficiently produce a resolution of the case is not improper. Rather, as argued above, lien claimants have, and should have, discretion to choose from among the available security and to select whatever security most efficiently results in a fully secured claim. Wiseman's selection of marketable property owned by those individuals who actually decided that Wiseman should not be paid was actually an exercise in good faith. Encumbering other properties would penalize innocent parties without increasing Wiseman's security position. Similarly, Wiseman thought it unseemly and immoral to encumber Paradise property, which only has value based on the threat that a foreclosure could interrupt water service to the lots in the Paradise subdivision. Respondents' argument, in fact, attempts to punish Wiseman for an attempt to use discretion in good faith merely because the Respondents are unhappy with the implications of their own actions.

The lien statute is a remedial statute designed to provide some assurance that people who improve real property by performing construction work will be compensated for their efforts. It exists to give contractors security in improved property and to expose the owners of

improved property to the risk of foreclosure. That is exactly what happened in this case.

E. Fees and Remand

This Court should reverse and remand this matter to the Trial Court with instructions that the Trial Court reinstate the lien and award fees to Wiseman when the lien is finally adjudicated. Unlike Paradise, which waived its claim to attorney's fees, Wiseman continues to have and assert a claim for fees under RCW 60.04.181. However, because there is a separate, parallel action proceeding in Mason County Court on Wiseman's Complaint for breach of contract and lien foreclosure (Mason County Cause No. 10-2-00217-4), and because fees can be most easily assessed at a single instance at the conclusion of all related lien cases, Wiseman is not asking this Court to exercise its power under RAP 18.1, but rather for a direction, on remand, that fees be awarded by the Trial Court at the conclusion of the litigation on Wiseman's liens.

VI. CONCLUSION

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 express 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 Chapter 60.04 RCW. Therefore, Wiseman's liens were authorized.

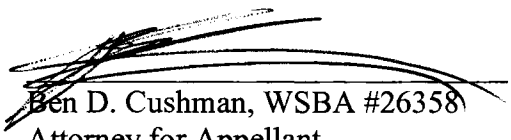
Wiseman's liens were not clearly excessive. Wiseman performed his work under a single lump sum contract, and that work cannot be readily apportioned among the properties in the subdivision. Wiseman, in a good faith exercise of discretion, secured its obligation by attaching liens to some, but not all, of the valuable residential properties in which it constructed water improvements. Wiseman did not overreach by oversecuring his obligation by recording liens against all available property, or by liening water utility property, which only has value insofar

as foreclosure could interrupt the residential water service at Paradise. Wiseman has, and should have, the discretion to choose to exercise lien rights efficiently and in a manner the owner of Wiseman Utilities believes to be moral, right and proper (as opposed to the indiscriminate catch-fall or catch-none manner advocated by Respondents).

This Court should apply Chapter 60.04 RCW as written, and as limited by its language, in a manner that advances its remedial purpose. The Trial Court did not do so in this case. Therefore, for the reasons advanced above, this Court should reverse and remand this matter to the Trial Court with instructions that the Trial Court reinstate the lien and award fees to Wiseman when the lien is finally adjudicated.

SUBMITTED this 6th day of January, 2011.

CUSHMAN LAW OFFICES, P.S.



Ben D. Cushman, WSBA #26358
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 6 day of January, 2011.

Doreen Milward, Paralegal

Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501
360/534-9183

Attorney for Plaintiffs/Respondents:

WSBA #26138
Susan McIntosh
Forsberg & Umlauf
901 Fifth Avenue, Suite 1400
Seattle, WA 98164-2050
206-689-8500
fax 206-689-8501
smcintosh@forsberg-umlauf.com