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DIVISION II

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STATE OF WASHINGTON

BY C. Krattli  
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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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FIRST-CITIZENS BANK & TRUST COMPANY,  
a North Carolina banking association,

Third-Party Defendant / Appellant,

v.

GIBBS & OLSON, INC.,  
a Washington corporation,

Third-Party Plaintiff / Respondent.

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## **APPELLANT'S REPLY BRIEF**

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## II. ARGUMENT

### A. **LIBERAL CONSTRUCTION UNDER RCW 60.04.900 AND WILLIAMS STILL DOES NOT PERMIT THE UNWARRANTED EXPANSION OF CHAPTER 60.04 RCW LIENS BEYOND THE STATUTORY SCHEME AND EXISTING CASE LAW**

Respondent cites to the recent case of *Williams v. Athletic Field, Inc.*<sup>1</sup> as the post-trial justification for its expansion of the lien provided by Chapter 60.04 RCW.<sup>2</sup> However, a liberal construction of the statute does not permit the Respondent to disregard the express language of the statute and sixty years of interpretive case law, as discussed below. When liberally construing a statute, the courts cannot read into the statute matters which are not there.<sup>3</sup> Liberal construction does not provide license to rewrite the statute or unreasonably extend its terms.

It is also important to remember that the burden of establishing a right to a lien under Chapter 60.04 RCW rests upon the person claiming it.<sup>4</sup> *Williams* did not alter that obligation.

### B. **THE TRIAL COURT ERRED BY HOLDING THAT THE JULY 2005 CONTRACT AND 2006 CONTRACTS CONSTITUTE A SINGLE CONTRACT FOR THE PURPOSES OF A CLAIM OF LIEN UNDER CHAPTER 60.04 RCW**

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<sup>1</sup> 172 Wash.2d 683, 261 P.3d 109 (2011).

<sup>2</sup> Respondent's Brief, 9-10.

<sup>3</sup> See *Klossner v. San Juan County*, 93 Wash. 2d 42, 47, 605 P.2d 330, 332 (1980).

<sup>4</sup> *Westinghouse Elec. Supply Co. v. Hawthorne*, 21 Wn.2d 74, 77, 150 P.2d 55, 56 (1944); *DKS Const. Mgmt., Inc. v. Real Estate Improvement Co., L.L.C.*, 124 Wn. App. 532, 537, 102 P.3d 170, 172 (2004).

Appellant agrees with Respondent that this matter is fundamentally about a simple issue regarding the phrase “contract price”, as it is used in RCW 60.04.021.<sup>5</sup> That statute provides certain parties a lien upon improved real property for “the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner...”<sup>6</sup> As defined under RCW 60.04.011(2), the phrase “contract price” is limited to “the amount agreed upon by the contracting parties, or if no amount is agreed upon, then the customary and reasonable charge therefor.”

Appellant argues that either (1) they were done *in furtherance* of the July 2005 Contract, and thus relate back to the July 2005 Contract for priority purposes, or (2) the 2006 Contracts and the July 2005 Contract form a single enforceable contract for the purposes of RCW 60.04.021.<sup>7</sup> Both of these arguments fail as, (1) the 2006 Contracts were not necessary for the completion of the July 2005 Contract, and (2) Respondent was not obligated to perform the 2006 Contracts as of the recording of Venture Bank’s Deed of Trust in Januray 2006.

**1. The 2006 Contracts were not done “in furtherance” of the July 2005 Contract as the work specified in the 2006 Contracts was not necessary to complete work under the July 2005 Contract.**

Respondent’s primary argument is that the subsequent 2006 Contracts relate back to the original July 2005 Contract in that they were

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<sup>5</sup> Respondent’s Brief, 11.

<sup>6</sup> RCW 60.04.021 (emphasis added).

<sup>7</sup> Respondent’s Brief, 14-15.

done *in furtherance* of the July 2005 Contract.<sup>8</sup> This argument disregards both the actual content of the contracts and the testimony provided at trial. The work performed under the 2006 Contracts was not necessary for the completion of the work required under the July 2005 Contract, and therefore it was not in furtherance of the July 2005 Contract. As such, the 2006 Contracts cannot relate back to the July 2005 Contract for purposes of priority under RCW 60.04.061. Additionally, Respondents reliance on the *A.A.R. Testing Laboratory, Inc. v. New Hope Baptist Church*<sup>9</sup> is misplaced, as the *A.A.R.* decision does not address the relation back of contract modifications in any fashion.

- a. **Subsequent agreements cannot relate back to an earlier contract for the purposes of lien priority under Chapter 60.04 RCW unless those agreements are “in furtherance” of the original contract, which requires that the additional work is necessary to either (i) complete the original contract, or (ii) remedy a defect in the already completed work.**

Subsequent agreements cannot be used to artificially prolong or extend a lien under Chapter 60.04 RCW.<sup>10</sup>

The law is well-settled in this state that work done, or materials furnished under a new and independent contract, entered into after the original contract is completed, cannot be tacked onto the original contract to extend the time for filing a lien under the original contract, for labor performed and materials furnished.<sup>11</sup>

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<sup>8</sup> Respondent’s Brief, 21.

<sup>9</sup> 112 Wn.App. 442, 50 P.3d 650 (2002).

<sup>10</sup> *Kirk v. Rohan*, 29 Wn.2d 432, 436, 187 P.2d 607, 609 (1947); *see also Friis v. Brown*, 37 Wn.2d 457, 460, 224 P.2d 330, 331-32 (1950); *Hopkins v. Smith*, 45 Wn.2d 548, 552, 276 P.2d 732, 734 (1954).

<sup>11</sup> *Kirk v. Rohan*, 29 Wash. 2d at 436.

The only exception is where a subsequent agreement and the associated work were done in furtherance of the original contract.<sup>12</sup> Stated differently,

If work is done or materials are furnished to complete the original contract, or remedy some defect in the work done or materials furnished under the original contract then such work or the furnishing of additional materials extends the time for filing a lien.<sup>13</sup>

Respondent does not appear to seriously argue that the 2006 Contracts were done to remedy a defect in the work done or material furnished.<sup>14</sup> Instead, Respondent argues that the work was done in furtherance of the July 2005 Contract.

The applicable case law indicates that “in furtherance” requires that the additional work is necessary to complete the original contract. For example, the contractor in *Friis* returned to the property to ensure that an installed furnace was in proper operating condition, which the court determined was an obligation due under the original contract.<sup>15</sup> Similarly,

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<sup>12</sup> *Friis v. Brown*, 37 Wn.2d at 460.

<sup>13</sup> *Hopkins v. Smith*, 45 Wn.2d at 552 (emphasis added).

<sup>14</sup> Respondent does make passing reference to the fact that the final amendment was requested in order to repair damage to survey stakes, but presumably the Respondent is not suggesting that the repair of damage caused by a third party nearly two years later is the equivalent of work done to “remedy a defect.” Respondent’s Brief, 24 and 30. If so, Respondent fails to provide any reference to such a warranty in the contracts, nor does Respondent provide any statutes or case law requiring such work. To the contrary, the Respondent admits that it entered into a new agreement (Amendment No. 4), to include additional payments, rather than relying on any previous warranties or contract requirements. *Id.*

<sup>15</sup> *Friis v. Brown*, 37 Wn.2d at 460.

the court in *Kirk* held that the addition of a drain and downspout was necessary to remedy flooding occurring after the contractor built a garage for the property owner.<sup>16</sup> The court in *Kirk* held that work “to complete the original contract” was done in furtherance of the original contract.<sup>17</sup>

In contrast, the court in *Hopkins* found the contractor’s repair of two stair treads at a property the contractor renovated three months earlier was not done in furtherance of the original project, nor was it to remedy a defect therein.<sup>18</sup> The court instead held that it was instead “a new and independent agreement not connected with [the contractor’s] previous work.”<sup>19</sup>

**b. The July 2005 Contract’s short reference to an overarching plan does not constitute a binding agreement rendering the 2006 Contracts necessary to complete the July 2005 Contract.**

In support of its position, Respondent argues that the original contract was for a 200 lot subdivision, and summarily states that the 2006 Contracts, which increased the total contract price by \$249,100.00 (or 222%),<sup>20</sup> did not include substantial changes to the expected scope of the project.<sup>21</sup> That theory ignores the actual contents and structure of the July 2005 Contract and the 2006 Contracts, along with the testimony provided by representatives of both G&O and Winlock.

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<sup>16</sup> *Kirk v. Rohan*, 29 Wn.2d at 434.

<sup>17</sup> *Id.* at 432.

<sup>18</sup> *Hopkins v. Smith*, 45 Wn.2d at 552.

<sup>19</sup> *Id.*

<sup>20</sup> Appellant’s Brief, 12.

<sup>21</sup> Respondent’s Brief, 24-25.

Although the July 2005 Contract does include a single page summary of an overall plan for the Winlock Development, the next eight pages include the actual scope of work required, to include the only specific deliverables as of July 2005 (and prior to the recording of Venture Bank's Deed of Trust in January 2006).<sup>22</sup> That long scope of work is followed by an express provision (the "Future Amendments" provision), intentionally included by the Respondent,<sup>23</sup> excluding any obligation to accept future amendments to the July 2005 Contract:

Following completion of the Final Design Phase Services, and after receipt of written authorization from the Winlock Properties, LLC, Gibbs & Olson shall prepare an amendment to this Agreement for completion of the Construction phase and operational phase services. Upon approval of the amendment, Gibbs & Olson shall proceed with the work on this project.

....

Following completion of the Final Design Phase Services, and upon the OWNER's satisfaction with the ENGINEER's performance during design, and after the OWNER has approved the final bidding documents, the OWNER reserves the right to request the ENGINEER to prepare an amendment to this contract for future services. The amendment will include engineering work necessary to carry the project through construction of the facilities and closeout of the project.

In the amendment, the ENGINEER shall include a scope of work, schedule and budget for the remaining engineering work. This amendment shall be negotiated in good faith between the OWNER and ENGINEER and signed by the OWNER and ENGINEER before the ENGINEER is authorized to proceed with the work. If the OWNER and ENGINEER cannot reach agreement on the terms of

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<sup>22</sup> Supp. CP, 9-25. The first half of p. 9 and the first four lines of p. 10 describe the overall goal. However, the next eight pages describe the actual scope of work included in the July 2005 Contract.

<sup>23</sup> Respondent drafted all of the contracts at issue herein. Supp. CP, 8-9. VRP (Sept. 7, 2011) at 92:19-93:3.

*the contract, include scope of work, schedule and budget, then the OWNER and ENGINEER each reserve the right to terminate negotiations without consequence.*<sup>24</sup>

The consequence of the above language is that the Respondent was not contractually bound, as of July 2005 (and prior to Venture Bank recording its Deed of Trust), to perform any work beyond the scope of work included in the July 2005 Contract. Both the Respondent and Winlock acknowledge that, based on the above provision, neither party was obligated to enter into the 2006 Contracts.<sup>25</sup>

The 2006 Contracts contain specific and independently complete budgets, scopes of work, and schedules, all of which are separate and distinct from the budget, scope of work, and schedule contained in the July 2005 Contract. They increased the total budget by \$249,100.00, an increase of approximately 222%. The 2006 Contracts do not simply clarify the July 2005 Contract terms, they instead contain entirely new performance requirements related to entirely different services, such as staking, construction management, and design of subsequent phases of the development project. They are in no way a mere extension or completion of the performance required by the original July 2005 Contract.

As such, the 2006 Contracts were not necessary to complete the July 2005 Contract. Work based on the July 2005 Contract was completed around June 2006.<sup>26</sup> Respondent was paid in full for all work related to

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<sup>24</sup> Supp. CP, 16-17 (emphasis added).

<sup>25</sup> Richard Riley of G&O, VRP (Sept. 7, 2011) at 83:15-85:17; Tom Ossinger of Winlock, VRP (Sept. 7, 2011) at 152:15-153:16.

<sup>26</sup> VRP (Sept. 7, 2011) at 99:8-15.

the July 2005 Contract.<sup>27</sup> Both parties testified that the work performed under the 2006 Contracts was not necessary to complete the scope of work required under the July 2005 Contract.<sup>28</sup> As such, the only available evidence before the court indicates that the 2006 Contracts were separate and distinct from the July 2005 Contract. There is no substantial evidence to the contrary.

**c. Respondent's reliance on *A.A.R. Testing Lab., Inc. v. New Hope Baptist Church* is misplaced, as that case does not address the relation back of liens under Chapter 60.04 RCW.**

Respondent relies heavily on the case of *A.A.R.*<sup>29</sup> for the proposition that modifications to a contract, even where they increase the price by \$700,000, can relate back to the detriment of intervening lien holders. *A.A.R.* stands for nothing of the sort, and does not address the relation back of amendments whatsoever.

The contractor in *A.A.R.* entered into a contract with the property owner for construction of a new sanctuary and church building after the original church buildings were destroyed by a fire.<sup>30</sup> There was no indication that the project was broken down into separate phases or scopes of work; it was a single project for the competition of a pair of intertwined buildings. All additional costs incurred by the contractor were based on

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<sup>27</sup> VRP (Sept. 7, 2011) at 117:21-118:5.

<sup>28</sup> Richard Riley of G&O, VRP (Sept. 7, 2011) at 105:10-107:1 (Amendments 1-3) and 108:19-110:22 (Amendments 4-5); Tom Ossinger of Winlock, VRP (Sept. 7, 2011) at 157:6-158:10.

<sup>29</sup> 112 Wn. App. at 444.

<sup>30</sup> *Id.*

“various disagreements, change orders, and required changes ordered by the county increased the price of the project.”<sup>31</sup> All of the changes were apparently directly related to completion of the original scope of work presented in the original contract.

Importantly, though, the amendments in *A.A.R.* appear to have been entered into *before* the intervening liens attached. The parties in *A.A.R.* entered into the original contract in April 1997.<sup>32</sup> The next two paragraphs of the opinion’s statement of the facts states:

*Various disagreements, change orders, and required changes ordered by the county increased the price of the project.* Due to disagreements, New Hope refused to pay what Heritage claimed was due and at some point Heritage stopped work on the project. *However, the parties settled this dispute and entered into a settlement agreement as of December 11, 1997.... Heritage understood that one of the main reasons for the disagreement was that the church was under financed on the project.* Therefore, Heritage agreed to cooperate with the church in its attempt to obtain and finalize financing for the project.<sup>33</sup>

The property owner subsequently entered into financing agreements, resulting in Deeds of Trust recorded on December 4, 1997 and June 24, 1998. Aside from the above quote, there is no temporal analysis in *A.A.R.* of when the amendments to the contract occurred. The timeline described even suggests that that the “disagreements, change orders, and required changes ordered by the county” occurred prior to the two deeds of trust.<sup>34</sup>

Based on the available facts and holding, it is not even clear if

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<sup>31</sup> *Id.* at 445. It is interesting to note that the court in *A.A.R.* did not analyze the dates the changes occurred in relation to the associated loans at issue.

<sup>32</sup> *Id.* at 444.

<sup>33</sup> *Id.* at 445.

<sup>34</sup> *Id.* (the disputes were settled on or about December 11, 1997).

amendments were made after the financiers recorded their deeds of trust. As such, *A.A.R.* does not provide any authority regarding the impact of amendments on intervening lien holders.

The entire focus of *A.A.R.*'s discussion section instead focuses on the impact of lien waivers as executed by the contractor. "[T]he question posed here is whether the releases executed by [the contractor] altered the priority of its lien."<sup>35</sup> Nowhere in *A.A.R.* does the court reference the key cases on relation back of subsequent work: *Flint*, *Kirk*, *Friis*, or *Hopkins*.<sup>36</sup> The phrase "in furtherance" is never even used. *A.A.R.* simply does not stand for what Respondent claims it stands for. *A.A.R.* is strictly an analysis of executed waivers unique to that case. The modifications are irrelevant to the court's holding, and insufficiently described to offer any meaning in this matter.

Based on the above, there is no evidence to suggest that the 2006 Contracts were done *in furtherance* of the July 2005 Contract.

**2. The enforceability of the 2006 Contracts as between G&O and Winlock does not control for purposes of priority under Chapter 60.04 RCW.**

Respondent next focuses on the general rules of contract to argue that the July 2005 Contract and the 2006 Contracts form a single enforceable contract.<sup>37</sup> This analysis misses the real issue. The question

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<sup>35</sup> *Id.*

<sup>36</sup> *Flint v. Bronson*, 197 Wn. 686, 86 P.2d 218 (1939); *Kirk v. Rohan*, 29 Wn.2d 432; *Friis v. Brown*, 37 Wn2d. 457; *Hopkins v. Smith*, 45 Wn.2d 548.

<sup>37</sup> Respondent's Brief, 15-21

is not whether the agreements are enforceable as between G&O and Winlock (that is not in dispute), but rather *when* the contracts became enforceable between the parties.

The priority of a lien under Chapter 60.04 RCW is determined based on when the services commenced.

The claim of lien created by [Chapter 60.04 RCW] upon any lot or parcel of land shall be prior to any lien ... which attached to the land after or was unrecorded at the time of commencement of ... professional services ... by the lien claimant.<sup>38</sup>

Furthermore, the lien itself is tied to the existence of a contract done at the request of the property owner.

[A]ny 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 ... professional services ... *furnished at the instance of the owner*....<sup>39</sup>

By necessity then, there must be both a contract and some performance before lien priority will commence.

In this case, the earliest of the 2006 Contracts were proposed no earlier than April 2006.<sup>40</sup> Even the most favorable testimony for the Respondent pins the commencement of work under the 2006 Contracts at no earlier than February 2006, which was subsequent to Venture Bank's Deed of Trust.<sup>41</sup> As such, under RCW 60.04.061 the 2006 Contracts cannot receive priority over Venture Bank's prior recorded Deed of Trust

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<sup>38</sup> RCW 60.04.061.

<sup>39</sup> RCW 60.04.021.

<sup>40</sup> Supp. CP, 27.

<sup>41</sup> VRP (Sept. 7, 2012), 101:7-11 (Amendment No. 1), 10:23-25 (Amendment No. 2), and 104:9-13 (Amendment No. 3).

based solely on their execution and performance in February or April 2006.

**3. As stated in *KeyStone*, the agreement to agree language in the “Future Amendments” provision of the July 2005 Contract does not create a binding obligation on the part of Respondent or Winlock to enter into the 2006 Contracts.**

Respondent’s Brief entirely misses the point<sup>42</sup> of Appellant’s discussion of the “Future Amendments” provision of the July 2005 Contract in relation to *Keystone Land and Development v. Xerox Corp.*<sup>43</sup> Once again, Appellant is not arguing that the 2006 Contracts were unenforceable in general, but rather that the “Future Amendments” provisions of the July 2005 Contract did not require Respondent and Winlock to enter into those subsequent agreements as of the date of that contract. If, prior to the recording of Venture Bank’s Deed of Trust, Respondent was not obligated to perform the 2006 Contracts, then those contracts were not part of the “contract price” established through the July 2005 Contract and its subsequent performance.

In *Keystone*, the Supreme Court of Washington stated that agreements to agree (or agreements to negotiate)<sup>44</sup> do not bind the parties

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<sup>42</sup> Respondent’s Brief, 30-35.

<sup>43</sup> 152 Wn.2d 171, 94 P.3d 945 (2004).

<sup>44</sup> Respondent cites to *Badgett v. Security State Bank*, 116 Wn.2d 563 (1991) for the proposition that agreements to negotiate are enforceable. Respondent’s Brief, 32. However, Respondent fails to reference the portion of *Keystone* holding that, while such agreements may be enforceable, they only require negotiation rather than an ultimate agreement on the substantive deal. *Keystone*, 152 Wn2d at 176.

to enter into a subsequent substantive agreement.<sup>45</sup> As discussed above, the “Future Amendments” provision of the July 2005 Contract requires Respondent, at most, to provide a proposal for an amendment to the July 2005 Contract.<sup>46</sup> Neither Respondent nor Winlock were required to actually proceed with the amendment. Either party could refuse to proceed, without consequence, for any reason or no reason.<sup>47</sup>

The key question in this litigation is what were Winlock and the Respondent bound to perform as of the recording of the Deed of Trust. Tellingly, both Respondent and Winlock admit that they were not bound, beyond mere negotiations, to perform any future amendments to the July 2005 Contract.<sup>48</sup> As such, the 2006 Contract cannot be included in the “contract price” contemplated by the parties in the July 2005 Contract.

In response to this argument, Respondent points to *Henifin Const., LLC v. Keystone Const.*<sup>49</sup> As with *A.A.R.*, Respondent’s summary of *Henifin* and its importance is inaccurate.<sup>50</sup> Respondent cites to *Henifin* for the theory that change orders are included in the “contract price”. However, *Henifin* barely supports that proposition, and it is entirely unrelated to the *Keystone* analysis above.

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<sup>45</sup> *Id.* at 175-177.

<sup>46</sup> Supp. CP, 16-17.

<sup>47</sup> *Id.* at 17.

<sup>48</sup> Richard Riley of G&O, VRP (Sept. 7, 2011) at 112:7-24; Tom Ossinger of Winlock, VRP (Sept. 7, 2011) at 148:17-149:3 and 152:3-4.

<sup>49</sup> 136 Wash.App. 268, 145 P.3d 402 (2006).

<sup>50</sup> Respondent’s Brief, 30-32. It is also unclear how *Henifin* relates to the *Keystone* discussion of the “Future Amendments” provisions.

In *Henifin*, the subcontractor incurred additional costs due to weather delays. Several change orders resulted in the contract price increasing from \$141,720 to \$195,423 (an increase of only 38%).<sup>51</sup> The primary dispute was whether the property owner was bound by the acts of its agent in approving the change order.<sup>52</sup> There is absolute no analysis of the relationship between those change orders to the original commencement of work, nor is there any discussion of its effect on intervening lienholders. The ruling is instead focused on binding the property owner to the acts of its agent.<sup>53</sup> As it focuses on agency issues, *Henifin* adds nothing to this discussion.

**4. Treatment of optional mortgage advances under Washington's common law should be considered when analyzing contract amendments made to the detriment of intervening lien holders under Chapter 60.04 RCW.**

Respondent incorrectly and summarily dismisses Appellant's argument that amendments to liens under Chapter 60.04 RCW should be treated similarly to optional mortgage advances under Washington's common law.<sup>54</sup> Mortgage case law states that optional mortgage advances made with actual knowledge of intervening encumbrances on mortgaged property are made subject to the intervening mortgage.<sup>55</sup> A mortgage advance is optional where the timing of the advance and the amount of

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<sup>51</sup> *Henifin*, 136 Wn.App. at 272-73.

<sup>52</sup> *Id.* at 273.

<sup>53</sup> *Id.* at 276.

<sup>54</sup> Respondent's Brief, 33-35.

<sup>55</sup> *Elmendorf-Anthony Co. v. Dunn*, 10 Wn.2d 29, 35-36, 116 P.2d 253, 255-56 (1941).

money to be advanced are largely discretionary by the lender.<sup>56</sup> Under the common law, optional advances only attach to the real property when the advances are actually made.<sup>57</sup>

Respondent's 2006 Contracts operated in a similar fashion to optional mortgage advances, as they were extensions of an earlier contract with an associated lien on real property. Respondent, with knowledge of Venture Bank's intervening Deed of Trust, voluntarily chose to enter into the 2006 Contracts with Winlock. If the 2006 Contracts, as amendments to an earlier contract, are functionally equivalent to an optional mortgage advance, their priority should attach as of the date each amendment was agreed to by the parties.

Although the harsh result of the common law rule for mortgages was eased by erasing the distinction between optional and mandatory advances, that statutory exception is limited to mortgages and deeds of trust.<sup>58</sup> No equivalent exception exists for Chapter 60.04 RCW liens, and thus the common law analysis remains applicable.

Respondent cites to RCW 60.04.226 in response to this argument, and asserts that the express exclusion of RCW 60.04.061 from RCW

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<sup>56</sup> *Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 898-900, 506 P.2d 20, 29-30 (1973).

<sup>57</sup> *Id.* at 900.

<sup>58</sup> RCW 60.04.226 was enacted in reaction to *Equity Investors* and states “[a]ny mortgage or deed of trust shall be prior to all liens, mortgages, deeds of trust, and other encumbrances which have not been recorded prior to the recording of the mortgage or deed of trust to the extent of all sums secured by the mortgage or deed of trust *regardless of when the same are disbursed or whether the disbursements are obligatory.*”

60.04.226 exempts Chapter 60.04 liens from any potential treatment based on the common law analysis of optional mortgage advances.<sup>59</sup>

Respondent fails to properly read or understand the context of RCW 60.04.226. The sole purpose of RCW 60.04.226 was to overrule the holding issued in *Nat'l Bank of Wash. v. Equity Investors* that same year.<sup>60</sup> The portions of the statute exempting RCW 60.04.061 merely preserve the potential priority of liens under that statute from the absolute priority language granted to mortgages and deeds of trust under RCW 60.04.226 over subsequently recorded liens. As liens under RCW 60.04.061 receive priority prior to recording, their exclusion from RCW 60.04.226 was necessarily required.

However, RCW 60.04.226 does not in any way comment on or alter the application of the common law analysis to liens under Chapter 60.04 RCW. As the statute provides an exception from the common law rule applied in *Equity Investors* for mortgages and deeds of trust, it is unclear how the exclusion of RCW 60.04.061 has any relevance to the application of the common law to liens under Chapter 60.04 RCW.

There is no reason to believe that Chapter 60.04 RCW liens should be treated differently from common law mortgages with respect to optional future performance. When the legislature enacted RCW 60.04.226 to modify the *Equity Investors* analysis, it limited the statute's

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<sup>59</sup> Respondent's Brief, 34.

<sup>60</sup> 18 Wash. Prac., Real Estate § 18.25 (2d. ed.) (“In 1973, as a result of the [*Equity Investors* case], the legislature adopted [RCW 60.04.226]”).

protection to mortgages and deeds of trust. There is no additional statutory authority granting optional contractual performance under Chapter 60.04 RCW priority over intervening encumbrances, such as Venture Bank's Deed of Trust. Respondent's Claim of Lien should be treated like a common law mortgage, and therefore the optional nature of the 2006 Contracts should result in the lien being subordinate to Venture Bank's Deed of Trust.

**C. THE TRIAL COURT ERRED BY DENYING FIRST-CITIZENS' AFFIRMATIVE DEFENSE BASED ON RESPONDENT'S FAILURE TO MITIGATE**

**1. Assurances of payment were insufficient to excuse Respondent's failure to mitigate its losses for fifteen months after Winlock stopped making payments.**

Respondent argues that it was excused from taking action to mitigate its damages after Winlock stopped making payments because Winlock made promises that it would be paid. In general, a victim of a breach of contract is required to use means that are reasonable to avoid or minimize his damages.<sup>61</sup> The duty to mitigate is suspended when a party receives assurances that performance will be forthcoming.<sup>62</sup> However, that suspension only lasts so long as there are grounds upon which the injured party can reasonably expect performance.<sup>63</sup>

In the *Jet Boats* case, a purchaser ordered a new boat from Jet

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<sup>61</sup> *Jet Boats, Inc. v. Puget Sound Nat. Bank*, 44 Wn.App. 32, 35, 721 P.2d 18 (1986).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

Boats on February 17, 1978, with an original delivery date of May 10, 1978. On June 30, 1978, only two months later, the purchaser took the boat out for a trial run, and found numerous problems.<sup>64</sup> The boat was completed one month later. Despite repeated claims that the boat would be fixed and delivered, the court held that by June 30, 1978 the purchaser no longer had reasonable grounds to believe that Jet Boats would perform. As such, the purchaser had a duty to mitigate from that date forward.

In this case the Respondent argues that repeated *weekly* claims of payment for over fifteen months, without progress or explanation, are sufficient to suspend its duty to mitigate its damages.<sup>65</sup> Respondent cites no case law to support such an argument. Nor is there any evidence available on the record to explain Respondent's reliance on Winlock's weekly inability to make any payments.

**2. As mitigation in this case required Respondent to stop working, Venture Bank and Respondent did not have an equal opportunity to mitigate damages.**

Rather than explaining its delay in mitigating its damages, Respondent instead attempts to shift blame to Venture Bank.<sup>66</sup> Relying on *Walker v. Transamerica Title Insurance Co., Inc.*,<sup>67</sup> Respondent asserts that Venture Bank had an equal opportunity to mitigate the damages

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<sup>64</sup> *Id.*

<sup>65</sup> Respondent's Brief, 38; VRP (Sept. 7, 2011) at 67:6-9 ("And he continued to keep in contact with me every few weeks to just kind of tell me, Dick, hand with us, we're working on alternative funding. We're going to be able to get that.").

<sup>66</sup> Respondent's Brief, 38-40.

<sup>67</sup> 65 Wn.App. 399, 828 P.2d 621 (1992).

incurred, and failed to do so when it did not request a subordination agreement from Respondent in January 2006. As the wrong at issue was Winlock's breach of the 2006 Contracts in October 2006,<sup>68</sup> Venture Bank's actions nine months earlier are irrelevant. It is also important to remember that the conduct of the Respondent at issue is its voluntary decision to continue working, and running up the bill to the tune of an additional \$126,025.04 in damages, for fifteen months after Winlock's breach. Venture Bank did not have an equally reasonable means of mitigating the damages after the breach occurred in October 2006, which is a requirement of the equal opportunity doctrine cited by the Respondent.

In *Walker*, the court summarized the equal opportunity doctrine:

Where both the plaintiff and the defendant have equal opportunity to reduce the damages by the same act or expenditure, and it is equally reasonable to expect the defendant to minimize damages, the defendant will not be heard to say that the plaintiff should have minimized ...<sup>69</sup>

The court ultimately held that the parties in *Walker* had an equal opportunity to avoid the consequences of the foreclosure sale by bidding at the foreclosure sale or paying off the subject loan prior to the foreclosure sale. Either party could have mitigated the damages (preserving the subject real property) by taking the same action.<sup>70</sup>

In this case the failure to mitigate involves Respondent's voluntary decision to continue working for fifteen months after Winlock breached

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<sup>68</sup> Supp. CP, 125.

<sup>69</sup> *Id.* at 406, quoting D. Dobbs, Remedies § 3.7 at 186 (1973).

<sup>70</sup> *Id.* at 407-08.

the 2006 Contracts. To mitigate its damages, Respondent merely had to stop working. There was no equivalent action possible by Venture Bank. As such, the doctrine of equal opportunity does not apply.

**3. Once reasonable grounds to expect performance ended, Respondent cannot mitigate its damages by continuing to increase their damages.**

Respondent fails to respond in any meaningful way to the Appellant's argument that continuing to work for fifteen months is not an acceptable means of mitigating damages. The doctrine of mitigation of damages states that a party is not entitled to recover for any harm it could have avoided by the use of reasonable effort or expenditure.<sup>71</sup> The trial court in this case held that Respondent attempted to mitigate its damages by continuing to work for fifteen months, and running up additional bills of \$126,025.04, after it stopped receiving payments Winlock. This holding was erroneous as (i) it is not supported by sufficient evidence because Respondent presented no evidence that the July 2005 Contract was originally structured such that Respondent would only be paid upon the sale of lots, and (ii) erroneous as a matter of law because increasing the balance due by continuing to work after a default cannot constitute mitigation of damages. Respondent's Brief does not address either of those two issues, and its damage award should be reduced accordingly.

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<sup>71</sup> *Walker v. Transamerica Title Ins. Co., Inc.*, 65 Wn.App. at 405-06.

**D. THE TRIAL COURT ERRED BY DENYING FIRST-CITIZENS REQUEST FOR AN OFFSET BASED ON G&O'S FAILURE TO ASSERT OR ENFORCE ITS CLAIM OF LIEN AGAINST SIX LOTS IN THE WINLOCK DEVELOPMENT.**

Respondent's final two arguments attempt to address (i) Respondent's release of its Claim of Lien against Grand Prairie Plaza, LLC for less than the three lots' pro-rata share of the lien balance, and (ii) Respondent's conscious decision not to lien three lots owned by Rockmann Development, LLC that were potentially subject to the lien. Respondent released or never asserted a claim of lien against six Phase I lots owned by Grand Prairie Plaza, LLC and Rockmann Development, LLC, entities related to Winlock through its owner, Allen Olson. All of these lots were part of Phase I of the development, which received a disproportionate share of the professional services provided by Respondent. The trial court wrongfully denied Appellant's request for an offset based on Respondent's voluntarily and unexplained decision not to pursue those lots.

Respondent asserts that liberal construction of Chapter 60.04 RCW permits it to selectively assert its Claim of Lien for favored defendants.<sup>72</sup> Although no case law exists analyzing the selective enforcement of a claim of lien, that is more likely an indication of the rarity of the practice. Respondent offers no justification for their favorable treatment of Allen

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<sup>72</sup> Respondent's Brief, 41.

Olson's other entities. As RCW 60.04.131 indicates a preference for attributing amounts of liens to the actual properties improved, Appellant should be awarded an offset against the judgment in the amount of \$19,217.27, plus an appropriate reduction in pre-judgment interest.

According to Respondent's own records, the fees incurred by it for Phase I constitute 42.61% of all fees incurred by Respondent in the Winlock Subdivision.<sup>73</sup> The six lots released by Respondent constitute 34.98% of the buildable area within Phase I.<sup>74</sup> In exchange for the six lots waived or released, G&O received payment of only \$4,000. Based on the above calculations, the reasonable share of G&O's fees attributable to these lots is approximately \$23,217.27.<sup>75</sup>

G&O's election to waive and release six lots without receiving appropriate compensation appears to favor one creditor over another without justification. It also leaves First-Citizens without a remedy to pursue the other property owners for its disproportionate share of the judgment. The trial court's justification for its holding is not supported by substantial evidence or consistent with the applicable law. As such, Appellant respectfully requests that this Court reverse that ruling and grant

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<sup>73</sup> Supp. CP, 125 (\$173,743.76 in Phase I fees divided by total fees of \$407,713.45).

<sup>74</sup> Supp. CP, 254. Tract A is a commercial lot, and Tract B is an unbuildable stormwater retention pond. Supp. CP 253. As such, Phase I lots include 166,449 square feet of buildable space. The lots waived or released by G&O total 58,223 square feet of buildable space.

<sup>75</sup> Based on 42.61% of fees associated with Phase I x 34.98% of the buildable area of Phase I applied against the remaining balance due of \$155,755.59.

First-Citizens an offset against the judgment of \$19,217.27, plus an appropriate reduction in pre-judgment interest.

**E. IF RESPONDENT PREVAILS, IT SHOULD NOT BE PERMITTED TO RECEIVE A MULTIPLIER AS A BOND IS IN PLACE TO SECURE REPAYMENT.**

If Respondent prevails on this appeal, it should not be awarded a multiplier. Pursuant to a stipulation between the parties, Appellant has filed a supersedes bond of \$634,309.00 in the trial court. The total judgment in this case was \$382,135.53. Respondent's counsel is adequately assured payment, to include additional reasonable attorney's fees and interest, should it prevail upon appeal. A multiplier is only appropriate to compensate for the "high risk nature of a case."<sup>76</sup> As payment is now assured under the supersedes bond, there is no justification for the award of a risk based multiplier.

**V. CONCLUSION**

Based on the foregoing, Appellant respectfully asks this Court to reverse the decision of the trial court by determining that the 2006 Contracts were separate and distinct from the fully paid and unconnected 2005 Contracts for the purposes of Respondent's Claim of Lien. As such, the Claim of Lien was foreclosed by Venture Bank's foreclosure of its prior and superior Deed of Trust.

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<sup>76</sup> *Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wn.2d 527, 542, 151 P.3d 976, 983 (2007).

Should this Court disagree, Appellant alternatively requests that this Court (i) reverse the trial court on Respondent's failure to mitigate damages, and (ii) grant Respondent an offset against the judgment based on the waived and released lots.

Appellant further requests an award of its reasonable attorney fees on appeal pursuant to RCW 60.04.181(3).

RESPECTFULLY SUBMITTED this 31st day of July, 2012.

EISENHOWER & CARLSON, PLLC

By:   
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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 2012, I caused all parties hereto to be served with the foregoing *Appellant's Reply Brief* and this *Certificate of Service* by directing delivery as follows:

By U.S. first-class mail, postage prepaid, and by e-mail, on July 31, 2012, to Attorney for Respondent:

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

DATED this 31st day of July, 2012, at Tacoma, Washington.

  
Gayle Herrmann