

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY 

No. 42845-8-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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SHELCON CONSTRUCTION GROUP, LLC,

Respondent,

v.

SCOTT M. HAYMOND and JANE DOE  
HAYMOND; A-3 VENTURE LLC; A-4  
VENTURE; A-1111 VENTURE LLC; 14224  
PIONEER LIVING TRUST and ANCHOR  
MUTUAL SAVINGS BANK,

Appellants.

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**BRIEF OF RESPONDENT**  
**SHELCON CONSTRUCTION GROUP, LLC**

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## I. INTRODUCTION

Anchor Bank's appeal concerns the priority of Shelcon's construction lien and Anchor Bank's deed of trust on a 17-acre parcel of land in Puyallup referred to by the parties as "the Farm".

The three issues that Anchor Bank raises on appeal all relate to lien priority. The first issue is whether the recording of a lien release prevents a lien claimant from later recording a second lien that includes unpaid work that was included in the first lien. The second issue is whether Shelcon is equitably estopped from asserting a second lien for work that was part of its first lien. The third issue concerns Shelcon's first day of work at the Farm for purposes of lien priority.

All three issues would be rendered *entirely moot* if Anchor Bank had obtained a subordination agreement from Shelcon.

Anchor Bank unreasonably relied upon Shelcon's lien release and Haymond's fabricated story of how the lien arose from Shelcon's work on a different project and how another bank supposedly fully paid off Shelcon's lien. Anchor Bank could and should have contacted Shelcon to verify the status of payment and work remaining to be completed.

Although Anchor Bank attempts to portray Shelcon as blameworthy, it is undisputed that: (1) Shelcon and Anchor Bank never communicated with each other; (2) Shelcon stated no false information in

any document or communication to anyone; and (3) false information was conveyed to Anchor Bank, but it came from Haymond—not Shelcon.

Haymond and A-1111 Venture LLC appeal the trial court’s award of interest against them at 18%. They argue that the rate should be 12%.

## **II. ASSIGNMENTS OF ERROR**

Shelcon addresses Anchor Bank’s assignments of error in Section B in the Argument section below. Shelcon addresses Haymond’s assignments of error in Section H in the Argument section below.

## **III. ARGUMENT**

### **A. STANDARD OF REVIEW**

Where a party challenges a trial court's findings of fact and conclusions of law, this Court limits its review to determining whether substantial evidence supports the findings and whether those findings, in turn, support its legal conclusions. *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn.App. 335, 341, 308 P.3d 791 (2013). Substantial evidence is defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Id.* at 341-42. This is a deferential standard, which views reasonable inferences in the light most favorable to the prevailing party. *Id.* at 342.

**B. THE TRIAL COURT’S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE**

Unchallenged findings of fact are verities on appeal. *Id.* at 346; RAP 10.3(g). A party challenging a finding of fact bears the burden of showing that the finding is not supported by the record. *Panorama Vill. Homeowners Ass’n v. Golden Rule Roofing, Inc.*, 102 Wn.App. 422, 425, 10 P.3d 417 (2000). Failure to support a challenged finding or conclusion with appropriate argument and citations to the record waives the assignment. RAP 10.3(a)(5)-(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Kate Dixon (“Dixon”), a loan officer for Anchor Bank, was the only witness who testified at trial on behalf of Anchor Bank. The vast majority of the Findings of Fact challenged by Anchor Bank concern events and matters to which Dixon did not testify, but rather were based upon the testimony of Shelcon’s owner Dallas Shane Martin (“Martin”). Martin’s testimony was not contradicted by any testimony or evidence offered by Anchor Bank. Although Haymond was listed by Anchor Bank as a witness and was subpoenaed and appeared at trial to testify (RP 7:20 22, CP 608-10)<sup>1</sup>; Anchor Bank did not ask Haymond to testify at trial and

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<sup>1</sup> References to the trial record from here until page 47 are to Judge Hogan’s Findings and Conclusions and to the report of proceedings in the trial before Judge Hogan, which occurred in February 2013.

he did not testify at (the second) trial.<sup>2</sup> (CP 606, RP 287:4-9).

**Finding 6.** Anchor Bank challenges part of Finding 6. Although Martin did not testify specifically that Shelcon's bid was accepted prior to Shelcon commencing work, this was an inference that the trial court reasonably drew from the evidence.

Anchor Bank does not cite any evidence that Haymond did not accept Shelcon's bid before Shelcon commenced work at the Farm.

The trial court's inference is reasonable because Martin testified that he thoroughly reviewed the bid and the plans with Haymond. Martin testified that "on this project and other projects we took the time to explain it. You know, everything, and go through the plans and issues with him . . . and I did it on every project." (RP 114:21-24). Martin testified: "I explained the plans, what they say, what they mean. We went through the bid." (RP 198:16).

The trial court's inference is also reasonable because Haymond had six months to review the bid (and reject it if he didn't approve it) before Shelcon commenced work on July 5, 2006. (FOFs 6, 9-13). The bid in question is dated January 17, 2006. (Ex 8). At the time that Shelcon commenced work in July 2006, its January 2006 bid was the only

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<sup>2</sup> Haymond testified at the first trial before Judge Fleming in September 2011, but did not testify at the second trial before Judge Hogan in February 2013.

document in existence concerning Shelcon's price and scope of work.

There is no evidence that Haymond rejected the bid.

The trial court's inference is also reasonable because: (1)

Haymond never disputed that he owed the amount of Shelcon's first invoice (Ex 19) (it was in fact paid in full (Ex 32)); (2) Haymond never disputed that he owed the amount of *any* of Shelcon's invoices (RP 173:20); (3) Haymond never disputed that he owed the amount of Shelcon's first lien (RP 114:6); and (4) Haymond never disputed the quality of the work performed by Shelcon (RP 114:10-12). Significantly, Haymond was not called by Anchor Bank to testify.

**Findings 9, 10 and 13.** Anchor Bank assigns error to Findings 9, 10 and 13 "to the extent that [they] may be construed as a finding that Shelcon conducted a survey and definitively determined legal boundary lines of the Subject Property." (App. Brief 4-5).

Martin testified that he did not survey the Farm. (RP 95:8-11). Martin testified that he marked the boundaries of the Farm with fluorescent pink ribbons in a visible manner so that the operator of the clearing and grubbing machine would know the boundaries within which to clear and grub. (RP 94-97). Martin determined the location of the property lines by "measur[ing] off the plans". (RP 95:2).

**Finding 14.** Anchor Bank challenges Finding 14 in its entirety.

Martin testified why it was necessary for him to mark the boundaries:

“[T]he reason for that is I don’t want to get on somebody else’s property and be sued. So I flag everything”. (RP 95:13, 269:8). Martin testified that he had knowledge of another builder on other projects who “was getting sued constantly because the guy clearing it was going on other people’s property . . . and so it was just a practice that I learned years before.” (RP 95-96).

**Finding 17.** It is unclear what part of Finding 17 to which Anchor Bank assigns error since Anchor Bank does not support its challenge with any argument or citation to the record. Exhibit 8 is Shelcon’s bid in the amount of \$732,941.92, dated January 17, 2006. Exhibit 9 is Shelcon’s bid in the amount of \$717,193.12, dated August 15, 2006. Martin testified about the circumstances giving rise to the second bid and his agreements with Haymond regarding the changes in scope of work and the price. (RP 84-86). Martin testified that the \$717,193.12 figure became the new contract price and that Haymond never contested this. (RP 320:7-10). Anchor Bank does not dispute that \$717,193.12 became the new contract price since Anchor Bank does not challenge any of the amounts in Finding 70, which states that “Shelcon is owed a principal amount of \$262,828.26”. Finding 70 contains a mathematical computation showing

how the number \$262,828.26 was computed, including “contract amount” for “\$717,193.12”, which is the amount of Shelcon’s second bid.

**Finding 18.** Anchor Bank assigns error to Finding 18 “to the extent it may be construed as a finding that Haymond and Shelcon entered any change order agreements”. (App. Brief 5). There were no *written* change orders. There were many *verbal* change orders. (RP 82, 84-88, 103-06, 116-17, 145-47, 160-61, 171, 197-98, 228, 257-58, 277-78, 300-01, 318-23). Martin testified that: “Instead of calling them change orders, we called them extra work.” (RP 198:7-8). Martin testified that that the requests for extra work were made verbally. (RP 198:10). Martin testified: “Every time there was a change in the bid, I went down and we went through it.” (RP 198:19). Exhibit 70, which is a document generated by Shelcon entitled “Statement” dated May 1, 2009 (after Shelcon had ceased work at the Farm) contains a list of the changes and the amounts charged for the changes under the category of “Extra Work Added to Contract Amount.” (RP 104). The principal amount of \$262,828.26 owed to Shelcon as stated in Finding 70 (to which Anchor does not dispute) was computed in part from verbal change orders for “Extra work”. (FOF 70).

**Finding 28.** Haymond promised Shelcon that if Shelcon would release its lien, Haymond would pay Shelcon from the proceeds of the

new loan. (FOF 26; RP 120:14-17). Shelcon relied on this promise. (FOF 28; Ex 64; RP 118:6, RP 120:14-17). Martin testified how on his very first project with Haymond (Pacific Village), Haymond was in arrears for \$125,000 for almost a year, but then “paid me like he said he would”. (RP 120:19-22). Martin testified about another project (Beaver Meadows) and how Haymond was in arrears, refinanced and “[a]s soon as [the loan] closed, he caught me up”. (RP 121:9-22).

**Finding 33.** It is reasonable to infer that the purpose of Haymond’s request to increase the loan amount by \$300,000 was to get money to pay off Shelcon’s first lien (\$303,291). Haymond was “out of money”. (RP 112:6). It is highly unlikely that Haymond believed that any part of Anchor Bank’s \$3.9 million loan was earmarked to pay Shelcon’s lien since he deceived Anchor Bank into believing that Shelcon’s lien pertained to the Beaver Meadows project and that the lien had been fully paid by the Beaver Meadows lender. (FOF 32, 48, see pgs. 15-16, *infra*).

Haymond’s email described in Finding 33 was sent on July 1, 2008. (Ex 49). In the email, Haymond did not give a specific reason why he needed the extra \$300,000, but just that the budget was “close and tight” and the numbers were “close”. (Ex 49). In effect, Haymond was asking for a \$300,000 cushion. Shelcon released its lien for \$303,291 on July 16 (Ex 52), which Dixon received on July 17. (Ex 54). On July 22,

Haymond sent another email to Dixon repeating his request for \$300,000. (Ex 55). This time, the money was needed not just for a cushion, but for a specific need and if the loan were not increased, Haymond would have to pay the \$300,000 out of his own pocket. Haymond's email to Dixon on July 22 stated: "If you can't give me the 300 then I will have to come (up) with it in the end." (Ex 55).

In summary, given the facts that Haymond: (1) was out of money, (2) was promising Shelcon that he would pay the lien from the loan proceeds, (3) was asking for a loan increase that was very close (1% difference) to the amount of Shelcon's lien, (4) was representing to Anchor Bank that if the loan amount were not increased by \$300,000, then Haymond would have to pay this unspecified debt out of his own pocket, and (5) was deceiving Anchor Bank into believing that Shelcon's lien had been paid off by a third party, it is reasonable to infer that the purpose of Haymond's request was to get money to pay Shelcon's lien.

**Finding 39.** Anchor Bank assigns error to Finding 39 "with regard to representations made to Anchor Bank through the submitted invoices." (App. Brief 5). The \$79,200 figure referenced in Finding 39 pertains to the three Shelcon invoices totaling \$79,200 (Exs 24-26) described with particularity in Finding 34. Anchor Bank does not assign error to Finding 34. The three invoices in question are for discrete

portions of work. Each invoice states that the work in that invoice is “100% complete”. None of the invoices purport to state the total amount owed to Shelcon for all of Shelcon’s work at the Farm. Finding 39 is a negative finding. It is a finding that something did *not* occur. Anchor Bank did not cite evidence in the record that something *did* occur. The only document that Anchor Bank received stating the total amount owed to Shelcon was Shelcon’s lien in the amount of \$303,291.29.

**Finding 46.** Anchor Bank challenges Finding 46 in its entirety. (App. Brief 6). Similar to Finding 39, Finding 46 is a negative finding. Anchor Bank does not cite any evidence in the record that the events described in Finding 46 did occur.

**Finding 56.** Finding 56 was based in part on Martin’s testimony that: “Yes. That’s how our company and every company when there is a past due amount, we always credit to the oldest invoice and credit forward.” (RP 162:13-14).

**Finding 57.** Finding 57 references Martin’s letter to Haymond dated September 8, 2008 (Ex 64). Martin testified that he wrote this letter to Haymond and explained why he did it. (RP 159:5-11).

**Finding 60.** Exhibit 63 is the written memorialization in the amount of \$681,800 referenced in Finding 60. Martin testified that he prepared the written memorialization and discussed it with Haymond and

how the \$681,801 figure stated in the written memorialization was computed. “So [Haymond] and I kind of we went through the contract, the 717. I removed the items from the 717, and this is the bid . . . minus the credits.” (RP 160:15-17). Martin testified that he and Haymond discussed the changes that had been made to the scope of work and price as stated in the written memorialization. (*Id.*) “[Haymond] was brought up pretty much to speed. The original contract amount where we are at with the credits and the change orders.” (RP 161:1-3). Paragraph C “Change Orders” located on page 5 in the General Conditions of the written memorialization provides that Shelcon shall be compensated for change orders at “total cost . . . plus a charge equaling fifteen percent (15%) of the total cost . . .”. (Ex 63). Martin testified that, consistent with the memorialization, change orders were thereafter billed and paid at cost plus 15% to which Haymond never objected. (RP 171:17-21). Shelcon’s invoices support Martin’s testimony. Shelcon’s invoice dated September 30, 2008 contains two items of change order work with price description “cost + 15%”. (Ex 27). Page three of Shelcon’s invoice dated October 31, 2008 contains multiple references to items of change order work with price description “cost + 15%”. (Ex 28).

**Finding 61.** The written memorialization (Ex 63) was a written accounting of credits and debits that previously were executed by

performance or agreement between Shelcon and Haymond. The written memorialization did not add to or subtract from any scope or cost of work to Shelcon's bid (Ex 9). The written memorialization provided an updated accounting on the credits and debits to Shelcon's bid (Ex 9). (RP 159-162, 171-173, 197-198, 205-220).

**Finding 67.** The change orders were identified and billed to Haymond on Shelcon's final invoice dated May 1, 2009 (Ex 70) and totaled \$211,352.90 in that invoice. (RP 107:7). Martin testified that Haymond agreed to the change orders for additional work totaling \$211,352.90. (RP 301:15-21). Martin testified that Exhibit 70 understated the dollar amount of the change orders by \$17,676.84, which is one of the two items listed in Shelcon's invoice (Ex 23) dated June 13, 2007. (RP 318-323). This was an invoicing mistake by Shelcon. (FOF 18). Thus, the sum of the change orders actually totaled \$229,029.74. There is no evidence that Haymond ever contested Shelcon's charges for the change orders. Anchor Bank does not challenge any of the amounts in Finding 70, which states that "Shelcon is owed a principal amount of \$262,828.26". Finding 70 contains a computation showing how the number \$262,828.26 was computed, including "extra work" for \$211,352.90 and "extra work" for \$17,676.84. \$229,029.74 is the sum of these two numbers.

In summary, all of the trial court's Findings of Fact to which Anchor assigns error are supported by substantial evidence.

### **C. MISTAKEN ASSUMPTIONS OF ANCHOR BANK**

#### **1. Mistaken Assumption of Fact by Anchor Bank: Shelcon's Work Was Finished Prior To The Loan Closing**

Anchor Bank mistakenly assumed that Shelcon's work was finished prior to the closing of the loan. (RP 359:21, 399, Ex 56 at p. 3). In fact, Shelcon's work was substantially incomplete. (FOF 38). Anchor Bank's mistaken assumption was based in part on three Shelcon invoices (Exs 24-26) totaling \$79,000 for three items of work that Haymond submitted to Anchor Bank. (RP 358-59; FOF 50). Each invoice states that the work described in the invoice is "100% complete". The invoices were prepared in this manner at the request of Haymond. (RP 137:3-6; 274:21). None of the three invoices indicates whether there is work to be completed by Shelcon. Dixon testified:

Q. . . . Shelcon had done all the work, except for those three items?

A. That's what my understanding was.

(RP 399:6-8).

Q. . . . where did you get that understanding?

A. The invoices were a hundred percent complete, so I – from the invoices.

(RP 399:19-22).

Q. So did you think that Shelcon would be doing work beyond the work identified in those three invoices?

A. I didn't think –I didn't have an opinion . . . I didn't think that they would be involved.

(RP 400:10-14). Anchor Bank's mistaken assumption was also based in part on the absence of any representation that Shelcon's work was not complete. (RP 359:17-21).

Anchor Bank's mistaken assumption was also based in part on estimates from other contractors that Anchor Bank received concerning the future construction of buildings on the Farm to be performed after Shelcon's site work was completed. Dixon testified:

Q. . . . Where did you get the understanding that this is all that they needed to do to finish up all of their work on the job, Shelcon?

A. Because I was getting, there was estimates coming in and none of them referenced Shelcon's work.

(RP 400:17-23).

Contrary to Anchor Bank's mistaken assumption that Shelcon had completed its work, there was still much work to be performed by Shelcon (FOF 38, RP 145:16-146:19) and Shelcon worked continuously at the Farm until February 2009. (FOF 62, Ex 17 pgs. 3-4).

**2. Mistaken Assumptions of Fact by Anchor Bank:  
Shelcon's First Lien Arose from Shelcon's Work at  
Beaver Meadows, Was Inadvertantly Recorded On**

**the Wrong Property And Was Fully Paid By The  
Beaver Meadows Lender**

Anchor Bank mistakenly assumed that Shelcon's first lien of \$303,291.29 was fully paid. Dixon testified: "My assumption is that they were paid in full." (RP 380:15). Haymond told Anchor Bank that Shelcon's lien arose from Shelcon's work at Beaver Meadows, that Shelcon inadvertently recorded its lien on the Farm, that the lien should have been recorded on Beaver Meadows and that the Beaver Meadows lender paid the lien off in full. Haymond's email (Ex 55) to Anchor Bank states: "the lein [sic] with Shelcon construction has been paid and was for Beaver Meadows." (FOF 32). Anchor Bank believed these lies. (FOF 48). Dixon testified:

Well, I did not think that the lien release belonged to the – it came up on title because of the recording of the legal address. But I didn't, based on his information, I did not think that it was related to the Farm. I thought that it was – I believed Scott. I believed him, and so . . .

(RP 389:15-20). Dixon also testified:

Q. . . . [w]here do you think that Scott (Haymond) got \$303,000?

A. . . . I really don't know too much about the processes with the other bank, so that was a totally different project with a totally different funding source. It would be reasonable for me to assume that [the lien] was paid off through their normal lines of construction.

(RP 386:7-16).

Q. . . . My question is, where do you think that Scott (Haymond) came up with \$303,000 to pay my client on Beaver Meadows?

A. I think that he had his own source of funding through Washington First, or whatever bank he had.

(RP 386:23 – 387:2).

Haymond falsely told Anchor Bank that Shelcon never intended to record a lien and that the lien company (Lien Research Corp.) recorded the lien without Shelcon requesting it to do so. Haymond's email to Anchor Bank stated: "[Shelcon's lien] appeared on title because it was the 88<sup>th</sup> day and lein (sic) research recorded the lein (sic) because they weren't instructed to do otherwise." (Ex 55). Anchor Bank believed this lie.

Dixon testified:

But I just thought that they didn't tell Lien Research that they had been paid, so as a matter of process, they recorded. Shelcon did not inform Lien Research that they had been paid, so as part of the process they automatically record it.

(RP 381:19-23).

In fact, the only payment that Shelcon received concerning the Farm project after recording its first lien on June 20, 2008 and prior to Anchor Bank recording its deed of trust on August 22, 2008 was a check for \$17,000 dated July 11, 2008. (Ex 17; Ex 36; FOF 28). After that, the next payment that Shelcon received concerning the Farm project was a

check dated September 1, 2008 in the amount of \$8,200. (Ex 30; Ex 37; FOF 59).

### **3. Mistaken Assumption of Law by Anchor Bank**

Anchor Bank mistakenly assumed that a lender refinancing a loan in the middle of a construction project does not need a subordination agreement to secure the priority of its deed of trust. To the contrary, the law is that “[a]bsent a true subordination agreement, the priority of mechanics’ and materialmen’s liens against real property is not compromised by waiver and release agreements” *A.A.R. Testing Laboratory, Inc. v. New Hope Baptist Church*, 112 Wn.App. 442, 444, 50 P.3d 650 (2002). Anchor Bank was unaware that this is the law. Anchor Bank was not in the practice of using subordination agreements when it refinanced construction loans. Dixon testified that she had never used a subordination agreement with a lien claimant before. (RP 416:13-14).

Anchor Bank’s mistaken assumption of law was also based on its reliance on First American Title Company, the title company who insured the loan, who had made the same mistaken assumption of law. (FOF 47). Anchor Bank received assurances from First American Title Company that title to the Farm was clear after Shelcon released its lien. (FOF 47; RP 349-50, 352, 423). Dixon testified that: “The title company is the one

that makes the decision as far as whether that's acceptable or not for clearing title". (RP 388:17).

Anchor's mistaken assumption of law was also based in part on Anchor Bank's experience from past previous construction projects in which Anchor Bank had believed (mistakenly) that it was securing priority of its deed of trust by obtaining lien releases. (RP 360-61).

#### **D. LIEN PRIORITY RULES IN THE ABSENCE OF A SUBORDINATION AGREEMENT**

A mechanic's lien takes priority over a lender's deed of trust if the lien claimant commenced work at the subject property prior to the recording of the lender's deed of trust. RCW 60.04.061. "Mechanics' liens are a statutory exception to the general rule of first in time, first in right priority between creditors." *Scott's Excavating, supra*, 176 Wn.App. at 345 (citing *A.A.R. Testing, supra*, 112 Wn.App. at 50). "Thus, such liens create an "off-the-record" interest that may be senior to interests actually recorded before the lien's recording but after commencement of work on the project." *Id.*, 176 Wn.App. at 345.

The priority of a mechanic's lien is determined by the lien claimant's first day of work, notwithstanding that the lien claimant may have executed lien waivers and releases prior to recording its lien. In *A.A.R. Testing*, the court stated:

The priority of a mechanics' or a materialmen's lien against real property is established at the time of the commencement of labor or services or on the first delivery of materials or equipment to the property. Absent a true subordination agreement, the priority of mechanics' and materialmen's liens against real property is not compromised by waiver and release agreements executed in exchange for payment through a certain date.

*Id.*, 112 Wn.App. at 444.

In *A.A.R. Testing*, the prime contractor (Heritage) executed lien waivers and releases to the property owner concerning work performed by Heritage through June 30, 1998. *Id.*, 112 Wn.App. at 447. Heritage continued working after June 30, 1998 and later recorded a lien for \$696,479.00. *Id.* The main issue was whether the priority of Heritage's lien dated all the way back to Heritage's first day of work (February 20, 1997) or only to a day after the effective date of the June 30, 1998 lien waiver and release. Heritage argued that its lien dated all the way back to its first day of work. The court stated:

We agree with Heritage. A reading of the release indicates that Heritage only released lien rights for any "labor, services, materials or equipment supplied by the undersigned [Heritage] through June 30, 1998." Payment for work done after June 30, 1998 was still secured by the statutory lien and the priority of that claim relates back to the date work began. A waiver and release of a lien claim for work done through a certain date does not extinguish the lien or change the date of commencement under the statute. The interpretation of the waiver and release agreements asserted by the construction lenders renders the underlying mechanics' and materialmen's lien rights meaningless and allows a shifting of priority dates without

the existence of a corresponding subordination agreement.

The ruling below elevates the waiver and release documents to subordination agreements. The releases cannot be read as subordination agreements. If the construction lenders intended the mechanics' and materialmen's lien rights possessed by Heritage to be legally subordinate to their mortgage deeds, then a subordination agreement was required.

*A.A.R. Testing*, 112 Wn.App. at 449-50 (footnotes omitted).

*A.A.R. Testing* stands for the proposition that unless a lien claimant signs a subordination agreement in favor of a construction lender,<sup>3</sup> the priority of a lien dates back to the lien claimant's first day of work at the subject property, notwithstanding that the lien claimant may have waived and/or released its lien rights for a portion of the work prior to recording the lien upon which the lien claimant files its foreclosure action.

**E. RECORDING A LIEN RELEASE DOES NOT WAIVE THE RIGHT TO RECORD A SECOND LIEN FOR UNPAID WORK THAT WAS INCLUDED IN THE FIRST LIEN**

**1. Washington's Lien Statutes**

The amount of Shelcon's second lien included some unpaid work that was part of Shelcon's first lien. (FOF 66). Washington's lien

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<sup>3</sup> See also, *Scott's Excavating, supra*, 176 Wn.App. at 346 FN 5 (The lender "failed to adequately protect itself by obtaining a subordination agreement" from the lien claimant)

statutes are silent on whether recording a lien release precludes the recording of a subsequent lien for work included in the first lien. RCW 60.04.021 “Lien authorized” provides in part:

... [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 . . .

RCW 60.04.091 “Recording – Time – Contents of lien” provides in part:

Every person claiming a lien under RCW 60.04.021 shall file for recording, in the county where the subject property is located, a notice of claim of lien not later than ninety days after the person has ceased to furnish labor, professional services, materials, or equipment . . .

Anchor Bank would have the Court engraft a limitation on Shelcon’s right to record a second lien. Anchor Bank would have the Court interpret RCW 60.04.021 and .091 as if these statutes were to also state: “but the foregoing does not apply if a lien claimant previously released a lien pertaining to the same labor and materials”. If this had been the intention of the Legislature, such language could have been added to the statute. Shelcon requests the Court to enforce the lien statutes as written and not create an exception that does not exist.

**2. West v. Jarvi Holding: A Second Lien May Be Recorded Even Though The First Lien Was Released And Even Though The Lien Claimant Did Not Perform Any Work After The Lien Release**

Under Washington law, a second lien may be recorded even

though the lien claimant recorded a lien release concerning the first lien and even though the lien claimant did not furnish any additional labor or materials after recording the lien release. In *West v. Jarvi*, 44 Wn.2d 241, 266 P.2d 1040 (1954), the court approved a second lien despite the fact that the lien claimant had previously recorded a lien, received full payment for the first lien, and recorded a lien release pertaining to the first lien. Further, the second lien was approved despite the fact that the lien claimant did not furnish any labor or materials after recording its first lien. *Id.* at 250-51. A second lien was recorded after releasing the first lien because the lien claimant realized that it had made an error calculating the amount of the first lien, (i.e. the amount of the first lien should have been higher), and recorded a second lien for the amount omitted from the first lien. *Id.* at 249. The court stated that there is “no question as to the right to file a second lien, as the *right to continue to file liens* during the ninety-day period following the date of the last delivery seems to be generally recognized.” *Id.* at 250 (emphasis added).

**3. *Geo Exchange* Holding: The Amount Of A Second Lien May Include Unpaid Work That Was Included In An Expired Lien**

In *Geo Exchange Systems, LLC v. Cam*, 115 Wn.App. 625, 65 P.3d 11 (2003), this Court held that a lien claimant who records a lien, fails to

file suit to foreclose it within eight months<sup>4</sup>, but resumes work, and then subsequently records a second lien, may include in the amount of the second lien not only the recently performed work but also all of the unpaid work that had been part of the expired lien. *Id.* at 633-34.

In *Geo Exchange*, the lien claimant recorded a lien for \$998,500 in December 1997. *Id.* at 627. The lien expired because the lien claimant did not file a lawsuit to foreclose within eight months after recording the lien. *Id.* The lien claimant resumed work. In December 2000, the lien claimant recorded a second lien in the amount of \$1,527,163, which included the unpaid \$998,500 from the first expired lien. *Id.* at 627-28. The trial court (incorrectly) ruled that the second lien was excessive because it included work claimed in the first lien that had expired. The trial court reduced the amount of the second lien (\$1,527,163.54) by the amount of the first lien (\$998,500), so that the amount of the second lien was reduced to \$528,663.54. *Id.* at 628. The lien claimant appealed. Reversing the trial court, this Court held:

[W]e hold that the statutory eight-month period for foreclosing on a filed lien claim under RCW 60.04.141 does not conclusively limit a claimant's underlying lien rights. Rather, a lien claimant may file successive liens so long as the claimant is still working or providing materials

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<sup>4</sup> A lien expires eight months after it is recorded unless a lawsuit is filed to foreclose the lien within that time. RCW 60.04.141.

under the contract; successive liens may include amounts previously claimed, but not yet paid, under expired liens. Thus, a lien claimant may revive amounts owed for work under the contract previously included in an expired lien by filing another lien claim no later than 90 days after the claimant completes the work on the project.

*Id.* at 633.

The difference between *Geo Exchange* and Shelcon/Anchor is that *Geo Exchange* involved a lien *expired* by operation of law, whereas Shelcon/Anchor involves a lien *released* by the lien claimant. However, the principles and law remain the same. The encumbrance (that a lien imposes on real property) being lost by operation of law through expiration or by voluntary release by the lien claimant does not affect the lien claimant's underlying right to record successive liens for continuing work performed at the request of the property owner and a second lien may include unpaid work that had been part of the first lien.

This Court should apply the plain language of RCW 60.04.021 and 60.04.091, just as it was done in *Geo Exchange*, where this Court distinguished between a lien and the underlying right to lien, stating:

Under the *plain language of RCW 60.04.021 and RCW 60.04.091*, as long as the claimant is still working on the contracted private project, a claimant may file a lien. A specific *lien claim* expires within the eight-month period under RCW 60.04.141, but the *underlying right to claim* a lien does not expire until 90 days after work ceases.”

*Geo Exchange*, 115 Wn.App. at 632-33 (emphasis added).

The lien laws should be construed liberally to protect the lien rights of Shelcon. The lien laws “are to be liberally construed to provide security for all parties intended to be protected by their provisions.” RCW 60.04.900; *Williams v. Athletic Field, Inc.*, 172 Wn.2d 683, 697, 261 P.3d 109 (2011) (“The claimants are therefore parties ‘intended to be protected’ by the statute, RCW 60.04.900, and we will liberally construe the statute to protect them.”); *Scott’s Excavating, supra*, 176 Wn.App. at 345 (“But if a court determines that a party’s mechanics’ or materialmen’s lien attaches and is covered by chapter 60.04 RCW, then the court liberally construes the statute to provide security for all parties intended to be protected by its provisions.”)

Shelcon performed lienable work and its lien attached to the Farm. Therefore, Shelcon is a party to be protected by the lien statutes. Protecting Shelcon means permitting Shelcon to include in its second lien not only work that it performed after the lien release, but also work that was included in its first lien that was never paid.

#### **4. California Authority: Distinction Between Releasing A Lien And Releasing A Right To Lien And Emphasis On The Terms Of The Lien Release**

Washington case law has addressed the issue of whether a second lien can include unpaid work that had been part of a previous lien that

expired, but no Washington case has addressed whether a second lien can include unpaid work that had been part of a previous lien that was voluntarily released by the lien claimant. This is an issue of first impression in Washington. In the absence of clear precedent, courts may look to other jurisdictions for persuasive decisional law. *Petcu v. State*, 121 Wn.App. 36, 66, 86 P.3d 1234 (2004).

Anchor Bank argues that the case law from California, *infra*, is distinguishable because lien rights in California “are a constitutional right afforded by the California State Constitution” (App. Brief 28), in contrast to Washington lien laws.<sup>5</sup> However, Anchor Bank offers no reason why this distinction is significant. Neither States’ lien statutes preclude a lien claimant from recording a lien for work included in a previously released lien, both States have decisional law mandating liberal construction of the lien laws in favor of the lien claimant, and the California cases discussed below are squarely on point and their reasoning is sound.

In *Koudmani v. Ogle Enterprises, Inc.*, 47 Cal.App.4th 1650, 55

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<sup>5</sup> “The mechanics’ lien law [in California] is mandated by the California Constitution.” *Shady Tree Farms v. Omni Financial*, 206 Cal.App.4th 131, 135, 141 Cal.Rptr.3d 412 (2012). This has led California courts to interpret its lien laws liberally for the protection of lien claimants. “Due to this unique constitutional command, ‘the courts have uniformly classified the mechanics’ lien laws as remedial legislation, to be liberally construed for the protection of laborers and materialmen.’” *Id.* (quoting *Connolly Development, Inc. v. Superior Court*, 17 Cal.3d 803, 826-27, 132 Cal.Rptr. 477 (1976)). Although the Washington Constitution does not mandate the lien laws, Washington courts also construe the lien statutes liberally for the protection of lien claimants. *Williams v. Athletic Field, Inc.*, 172 Wn.2d 683, 696-97, 261 P.3d 109 (2011).

Cal.Rptr.2d 330 (1996), a roofing contractor recorded a lien for \$4,241.06 on August 5, 1993. *Id.* at 1653. The contractor recorded a second lien for \$3,159.13 on November 16, 1993, which was “the sum then due for the same materials which were the subject of the first claim of lien.” *Id.* The property owner requested that the lien be released because it had expired. The contractor released the first lien. *Id.* at 1653-54. The contractor later filed a lawsuit to foreclose the second lien. *Id.* at 1654.

The first issue addressed in *Koudmani* was the same issue that this Court addressed in *Geo Exchange*, which was whether the amount of a second lien can include unpaid work that had been part of an expired lien. *Koudmani* reached the same conclusion as this Court did in *Geo Exchange*, holding that the amount of a second lien can include unpaid work that had been part of an expired first lien. *Id.* at 1655-58.

The *Koudmani* court then addressed the effect of the voluntary release of the first lien and whether the amount of the second lien could include unpaid work that was part of the released lien. The lien release stated that the lien was “satisfied or otherwise released and discharged”. *Koudmani*, 47 Cal.App.4th at 1654. The court held that if a lien release unequivocally states that the lien has been satisfied, then the lien claimant releases the right to later record a subsequent lien for the labor and materials pertaining to the first lien. There, since the word “or” was used

in the lien release, it was ambiguous whether the lien had been satisfied or whether it had been merely discharged or released. The court stated:

A release which states a claim of lien is fully satisfied necessarily extinguishes the inchoate right to a lien upon which the claim of lien is based because the underlying obligation has been paid according to the express terms of the release. On the other hand, a release which indicates a specific claim of lien may *not* be “satisfied” (i.e., paid) but rather may be “*otherwise* released or discharged” does not extinguish the inchoate right to record subsequent liens based on the same work or material as the released claim of lien. Such a release frees the property only of the particular claim or claims of lien the release expressly identifies. To hold a release of an unsatisfied claim bars the right to later record a timely claim of lien for the same work or materials would frustrate the essential purpose of the mechanic's lien statutes, which is to protect contractors, laborers and material suppliers from nonpayment.

*Id.* at 1659.

*Koudmani* distinguished an earlier case, *Santa Clara Land Title Co. v. Nowack & Associates, Inc.*, 226 Cal.App.3d 1558, 277 Cal.Rptr. 497 (1991), where the court ruled against the lien claimant. *Santa Clara* involved a similar situation in that the lien claimant recorded a lien, released it, and then recorded a second lien. The key differences were that in *Santa Clara*, the lien claimant was fully paid at the time it released its first lien and the lien release unequivocally represented that the lien had been satisfied.<sup>6</sup> The lien release stated the lien “is hereby fully satisfied,

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<sup>6</sup> The issue in *Santa Clara* was not whether a second lien can include unpaid work that was included in a previously released lien. The first lien was paid in full. The issue was

released, and discharged.” *Id.* at 1562. In distinguishing *Santa Clara*, the *Koudmani* court stated:

*Santa Clara* is distinguishable. Here, the underlying amount owing to Ford was never paid, and Ford’s release, unlike [the lien claimant’s] release in *Santa Clara*, did not conclusively and unequivocally represent the claim was “fully satisfied.”

*Koudmani*, 47 Cal.App.4th at 1659.

In *Solit v. Tokai Bank, Ltd. New York Branch*, 68 Cal.App.4th 1435, 81 Cal.Rptr.2d 243 (1999), a contractor recorded a lien and then released it at the request of the property owner because the lien had expired. *Id.* at 1438. The contractor “received no compensation for causing the . . . lien to be released, nor did the release indicate that the obligation on which the lien was based had ever been satisfied.” *Id.* at 1438. The lien release stated: “The claim of lien recorded by ... is hereby released and discharged.” *Id.* at 1438. The contractor recorded a second lien two months after releasing its first lien. *Id.* at 1437. At the time that the second lien was recorded, the property was encumbered by a construction loan from Tokai Bank. *Id.* at 1437.

Just like in *Koudmani*, the second lien “was based on the same underlying claim for payment (although in a lesser amount) as to which he

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whether the priority of a second lien should date back to when the lien claimant first commenced work or to a later date after the release of the first lien.

had previously filed a lien”. *Id.* at 1437. Tokai Bank argued that the second lien was barred by the release of the first lien. *Id.* at 1439.

The *Solit* court held that the contractor’s voluntary release of its first lien did not affect the contractor’s right to record a second lien and did not limit the *amount* of the second lien even though the second lien included unpaid work that had been part of the first lien. The holding was based on the fact that the contractor’s lien release did not unequivocally indicate that the lien had been satisfied. The court stated:

Under *Koudmani* it is only when a release states that the claim of lien has been *fully satisfied* that the claimant's inchoate right to a lien, upon which any claim of lien is based, is extinguished, because then the underlying obligation has been paid according to the express terms of the release. Thus, so long as the inchoate lien right has not been extinguished, the claimant may record subsequent liens based on the same work or material as the released claim of lien, and any release which does not unequivocally indicate that the underlying obligation has been satisfied frees the property *only* of the particular claim of lien that the release expressly identifies.

*Id.* at 1444 (citations omitted).

The *Solit* court stated that California lien statutes are “to be liberally construed for the protection of laborers and materialmen” and that “doubts concerning the meaning of the mechanics' lien statutes are resolved in favor of the claimant.” *Id.* at 1442.

*Solit* and *Koudmani* squarely address the first issue in this case. Their reasoning is sound and is consistent with the Washington courts’

past construction and application of the lien statutes. Notably, Anchor Bank has not cited any case (from Washington or any other State) in which the recording of a lien release precluded a lien claimant from recording a second lien that that included unpaid work that had been part of its first lien. Anchor Bank's reliance on Shelcon's lien release is not relevant to this issue. Anchor Bank's reliance is, however, relevant to the second issue on appeal (equitable estoppel), discussed below.

#### **5. Application Of The Law To Shelcon's Lien Release**

Shelcon's lien release states that: "The undersigned lien claimant hereby releases the lien on the property [described as follows . . .]". (Ex 52). Shelcon's lien release does not indicate that the lien was satisfied, much less unequivocally indicate so.

Shelcon released its *lien*—not its *right to lien*. Shelcon could have released its *right to lien* by including language in its lien release stating that the lien had been satisfied or by signing a document waiving its right to record a future lien.

#### **6. Analogy To A Voluntary Dismissal Of A Lawsuit**

The distinction between releasing a lien and waiving one's right to record a second lien can be viewed by analogy to the distinction that the law makes between dismissing a lawsuit and waiving one's right to file a second lawsuit. Voluntary dismissal of a lawsuit does not prevent a

plaintiff from later refile a second lawsuit concerning the same subject matter unless the dismissal states “with prejudice”<sup>7</sup> or if the plaintiff and defendant enter into an agreement in which the plaintiff waives or releases the right to file a second lawsuit. A plaintiff has an underlying right to file a lawsuit. Voluntary dismissal, in and of itself, does not affect that right.

Likewise, a lien release does not result in a waiver of the right to record a second lien for unpaid work that had been part of the first lien. Recording a lien release and dismissing a lawsuit both involve an undoing of something that was done, putting the releasing/dismissing party back in their original—but not worse—position.

#### **7. Shelcon Did Not Intend To Waive Its Right To Record A Second Lien**

Anchor Bank argues that the lien release should be “construed as intended – to extinguish Shelcon’s lien rights.” (App. Brief 34).

Although Shelcon intended to release its lien, Shelcon did not intend to waive or release its underlying *right to lien*. Out of an abundance of caution, Martin consulted with two attorneys to discuss whether or not recording the lien release would affect Shelcon’s right to record a second lien for work performed before the lien release. Based on

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<sup>7</sup> A voluntary dismissal is presumed to be without prejudice, “[u]nless otherwise stated in the order of dismissal”. CR 41(a)(4).

the legal advice Martin received, Shelcon recorded the lien release. (RP 122-123, 129:7, 273:9; 287:23-288:5, 295:14).

Anchor Bank is in effect asking the Court to infer or presume that Shelcon intended to waive its underlying right to lien. This is improper because “[a] lien right is a valuable right and its waiver is not to be presumed, and any waiver of a lien right must be established by evidence that is ‘clear, certain and unequivocal.’” Boise Cascade Corporation v. Distinctive Homes, Inc., 67 Wn.2d 289, 290, 407 P.2d 452 (1965).

Waiver is the intentional relinquishment of a known right. It is necessary that the person against whom waiver is claimed have intended to relinquish the right, advantage, or benefit and his action must be inconsistent with any other intent than to waive it.

Wagner v. Wagner, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980).

#### **8. Anchor Bank’s “No Legal Consequence” Argument**

Anchor Bank argues that the trial court gave the lien release “no legal consequence” (App. Brief 2) and argues that Shelon’s lien release should be “given legal consequence”. (App. Brief 36).

Anchor Bank is asking for more than what the law affords a recorded lien release. A recorded lien release is not as significant as what Anchor Bank makes it out to be. Property owners and lenders can never be assured that a lien claimant will not record a second lien after releasing the first lien, unless the lien claimant waives its underlying lien rights in

conjunction with or as part of the recorded lien release. For example, in the *West v. Jarvi* case, discussed *supra*, the lien claimant discovered a math error after it had recorded its lien release and then recorded a second lien. Since the lien claimant had not waived its right to record a second lien, the second lien was allowed. Property owners and lenders *can* rest assured that when a lien claimant has been paid, the lien claimant must release its lien and its lien rights but only as to that part of the lien amount for which payment has been made. RCW 60.04.071 provides:

Upon payment and acceptance of the amount due to the lien claimant and upon demand of the owner or the person making payment, the lien claimant shall immediately prepare and execute a release of all lien rights **for which payment has been made**, and deliver the release to the person making payment. (emphasis added)

In short, a recorded lien release has legal effect to the extent that payment has been made. If payment has not been made, its legal effect (without anything more, such as a waiver of lien rights) is equivalent to the legal effect of a plaintiff's voluntary nonsuit: an undoing of what was done, putting the parties back in their original positions.

## F. EQUITABLE ESTOPPEL DOES NOT APPLY

### 1. Standard of Review

Equitable estoppel is a question for the trier of fact “[u]nless only one reasonable inference can be drawn from the evidence.” *Colonial*

*Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 737, 853 P.2d 913 (1993).

“Courts disfavor equitable estoppel”. *Nickell v. Southview Homeowners Ass’n*, 167 Wn.App. 42, 54, 271 P.3d 973 (2012). The party asserting equitable estoppel must “prove every element with clear, cogent and convincing evidence”. *Id.*

## **2. Elements of Equitable Estoppel**

The elements of equitable estoppel are:

- (1) an admission, statement, or act inconsistent with a claim afterward asserted;
- (2) action by another in reasonable reliance on that act, statement, or admission; and
- (3) injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission.

*Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 831, 881 P.2d 986 (1994).

## **3. Equitable Estoppel Applied Against Lien Claimants in Washington**

Anchor Bank asserts that: “Washington courts have long held that a lien holder may be estopped by his conduct from asserting his lien rights.” (App. Brief 40). The three cases cited by Anchor Bank all have one important fact in common: the lien claimant, just prior to recording its lien, affirmed or acknowledged in writing to the property owner that the

lien claimant had received payment “in full”.<sup>8</sup> The holdings in *Ostrander*, *Stewart Lumber* and *Nelson* are consistent with the doctrine of equitable estoppel, which “rests on the principle that a person ‘shall not be permitted to deny what he has once solemnly acknowledged.’” *Nickell, supra*, 167 Wn.App. at 42 ((quoting *Arnold v. Melani*, 75 Wn.2d 143, 147, 449 P.2d 800 (1968)).

There is no published or unpublished decision from a Washington court in over 80 years where the doctrine of equitable estoppel affected a mechanic’s lien.

#### **4. First Element of Equitable Estoppel Not Met**

Anchor Bank cannot meet the first element of equitable estoppel because Shelcon made no “admission, statement, or act inconsistent with a claim afterward asserted”. Shelcon’s “claim afterward asserted” was its second lien for \$309,369.58 recorded on May 1, 2009. (Ex 68).

Shelcon’s submission of its three invoices totaling \$79,200 to Haymond in July 2008 was not an admission, statement, or act inconsistent with its second lien. Those three invoices are part—but not

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<sup>8</sup> *Ostrander v. Okerlund* 165 Wash. 18, 19, 4 P.2d 828 (1931) (“Thereupon Sample issued and delivered to each of his employees his check for the amount due each of them, and each of the employees and lien claimants here signed and receipted the pay roll of Sample for **payment in full** of the amount owing to them and accepted their checks.”) (emphasis added); *Stewart Lumber Co. v. Unique Home Builders*, 160 Wash. 273, 274, 294 P. 988 (1931) (“appellant . . . gave to Unique Home Builders, Inc., a receipt for \$850, stating that the money received was ‘**balance due in full**’”) (emphasis added); *Nelson & Castrup v. Culver*, 94 Wash. 548, 549, 162 P. 978 (1917) (“appellant . . . delivered to him a check for the balance due, and received a receipt acknowledging **payment in full.**”) (emphasis added).

all—of what Shelcon was owed for its work at the Farm. Each is an invoice for a discrete item of work. None purports to be a summary or comprehensive account statement or give any indication of the total amount owed to Shelcon.

Shelcon’s lien release was not an admission, statement, or act inconsistent with its second lien. The lien release states: “The undersigned lien claimant hereby releases the lien on the property [described as follows . . . ]”. (Ex 52). The lien release does not state that Shelcon has been paid or that the lien has been satisfied.

Shelcon’s letter to Haymond dated September 9, 2008 (Ex 64) is not relevant since Anchor Bank did not rely upon the letter in making its loan. Anchor’s deed of trust was recorded in August 2008.

In short, Anchor cannot show with clear, cogent and convincing evidence that Shelcon made an admission, statement, or act that is inconsistent with a claim afterward asserted by Shelcon.

### **5. Second Element of Equitable Estoppel Not Met**

The second element of equitable estoppel is “action by another in reasonable reliance on that act, statement, or admission”.

*Berschauer/Phillips, supra*, 124 Wn.2d at 831. There are many reasons why Anchor Bank’s reliance was not reasonable.

Anchor Bank relied on Shelcon's lien release in its decision to proceed with the loan. (FOF 47). That reliance was not reasonable because Anchor Bank had "accepted Scott Haymond's representations that Shelcon's lien dated June 20, 2008 and Shelcon's lien release dated July 16, 2008 related to the Beaver Meadows project." (FOF 48). A lien pertaining to Beaver Meadows and fully paid by the Beaver Meadows lender should not have had any relevance to the issue of whether Shelcon was owed any money for its work at the Farm, and if so, how much.

Anchor Bank's reliance was not reasonable because Anchor Bank could have very easily contacted Shelcon to find out whether Shelcon was owed any money for its work at the Farm, and if so, how much. "Reliance is justified only when the party claiming estoppel did not know the true facts ***and had no means to discover them.***" *Concerned Land Owners*, 64 Wn.App. 768, 778, 827 P.2d 1017 (1992) (quoting *Marashi v. Lannen*, 55 Wn.App. 820, 824-25, 780 P.2d 1341 (1989)) (emphasis added). Anchor Bank knew Shelcon's phone number and address, as this information was listed on Shelcon's lien. (FOF 43). Anchor Bank even had Shelcon's email address.<sup>9</sup> Anchor Bank could have easily contacted Shelcon to verify the status of payment and the status of Shelcon's work.

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<sup>9</sup> Shelcon recorded the lien release on July 16, 2008. (Ex 52). The next day, Shelcon sent an email to Haymond with the lien release as an attachment. (Ex 54). Haymond then forwarded Shelcon's email with the attached lien release to Anchor Bank. (Ex 54). The email that Anchor Bank received contained Shelcon's email address. (Ex 54).

Anchor Bank should have been alerted by Haymond's repeated requests to increase the loan amount by \$300,000 and should have questioned Haymond why the money was needed, especially since Haymond's second request on July 22, 2008 was not just for a cushion (as he did in his request on July 1, 2008 (Ex 49), but stated that if the loan amount was not increased by \$300,000, then Haymond would "have to come up with it in the end". (Ex 55). Dixon could not recall whether she questioned Haymond about this. (RP 385:20).

Anchor Bank's reliance was not reasonable given that there was established Washington case law (*A.A.R. Testing, supra*) holding that a waiver or release agreement does not alter a lien claimant's priority over a lender's deed of trust recorded after the lien claimant commenced work. "The doctrine of equitable estoppel . . . is inapplicable where the representations relied upon are questions of law rather than questions of fact." *Concerned Land Owners v. King County, supra*, 64 Wn.App. at 778. Anchor Bank made a mistaken legal conclusion that Shelcon's release would ensure the priority of its deed of trust.

Hypothetically, even if Haymond or Anchor Bank had paid \$303,291 to Shelcon for all of its work at the Farm through the date of the loan closing in exchange for the lien release, Shelcon's second lien (recorded the next year) would still have priority over Anchor Bank's deed

of trust for Shelcon's subsequent work because no subordination agreement was executed.

In the three cases cited by Anchor Bank for the proposition that a lien holder may be estopped by their conduct from asserting their lien rights (App. Brief 40), the party asserting estoppel had no means to discover the true facts. (See FN 6, *supra*). In each case, the lien claimant, just prior to recording the lien, affirmed or acknowledged in writing that payment had been received "in full". The potential lien claimants either affirmed or would have affirmed that they had been paid in full if they had been contacted. *Id.*

Anchor Bank's inaction (vis-à-vis Shelcon) starkly contrasts with the action taken by the property owner in *Nelson & Castrup v. Culver*, 94 Wash. 548, 162 P. 978 (1917), cited by Anchor Bank on page 40 of its Brief, where the court applied equitable estoppel against a lien claimant. In *Nelson*, the potential lien claimant gave a receipt acknowledging payment in full to the general contractor in return for a check (which later bounced). *Id.* at 549. The general contractor forwarded said receipt (acknowledging payment in full) to the property owner. The property owner then contacted the potential lien claimant to confirm that the potential lien claimant had received payment in full, before issuing final payment to the general contractor. *Id.*

Unlike the lien claimant in *Nelson*, Shelcon never affirmed that its lien had been paid. Unlike the property owner in *Nelson*, Anchor Bank never contacted Shelcon to inquire whether the lien had been paid.

Anchor Bank argues that since it was misled by the lien release, “it is immaterial if investigation would reveal the truth.” (App. Brief 43, FN 16). Anchor Bank cites three Washington cases in its footnote 16 in support of its argument that it had no duty to investigate. Each of these cases is distinguishable because each involves a claim of fraudulent misrepresentation and those cases hold that the duty to investigate the truth or falsity of a statement can be relieved only if the statement relied upon is false. Unlike those cases, Shelcon did not make a false statement.<sup>10</sup> False statements came from Haymond—not Shelcon.

Shelcon had no duty to tell Anchor Bank that its work was not finished or that its lien had not been paid. While it is possible for silence to trigger the doctrine of equitable estoppel (*Peckham v. Milroy*, 104 Wn.App. 887, 892-93, 17 P.3d 1256 (2001)), the duty to disclose applies only in limited situations. In *Favors v. Matzke*, the court stated:

In Washington, the court will find a duty to disclose where the court can conclude there is a quasi-fiduciary relationship, where a special relationship of trust and confidence has been developed between the parties, where one party is relying upon the superior specialized

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<sup>10</sup> Anchor Bank has never asserted or argued that Shelcon committed fraud, nor was fraud asserted by Anchor Bank as an affirmative defense. (CP 86-87).

knowledge and experience of the other, where a seller has knowledge of a material fact not easily discoverable by the buyer, and where there exists a statutory duty to disclose.

53 Wn.App. 789, 796, 770 P.2d 686 (1989) (citations omitted).

Here, there was no relationship, much less a “special” or “fiduciary” one, between Shelcon and Anchor Bank. They never once communicated with each other. (FOF 42). Martin did not know what Haymond was communicating to Anchor Bank. (FOF 49, RP 133:9, 134:14, 148:18). In fact, although Martin knew that Haymond was communicating with a new lender for a possible refinance, Martin did not even know the identity of the lender. (RP 90:20, 130:22, 132:22, 172:17).

Anchor Bank argues that: “[c]ourts in other jurisdictions have repeatedly held that a lien claimant’s execution of a lien release or waiver, when executed to induce action by the owner or a third party may serve to estop the claimant from enforcing the lien against the party prejudiced.” (App. Brief 40). The six out-of-state cases cited by Anchor Bank for this proposition are distinguishable for a number of reasons. First and foremost, none involve any discussion of the elements of equitable estoppel under established Washington law. The second element of equitable estoppel under Washington law requires a showing that the reliance was reasonable or justified. None of the out-of-state cases cited by Anchor Bank address this element. Under Washington law, reliance is

never justified if the complaining party had the means to discover the true facts (*Concerned Land Owners, supra*, 64 Wn.App. at 778) or if the reliance was based on a mistake of law. *Id.* Furthermore, none of the cited cases reference any standard similar to the strict standard with which Washington courts apply the doctrine of equitable estoppel. Washington courts “disfavor” equitable estoppel and the party asserting it must prove each element with “clear, cogent and convincing evidence”. *Nickell, supra*, 167 Wn.App. at 54.

The six out-of-state cases cited by Anchor Bank (App. Brief 40) are also distinguishable because in each case the lien claimant either: (1) executed a lien waiver explicitly waiving their underlying lien rights, (2) affirmed or confirmed to the property owner or lender that they had been fully paid, or (3) received security on other property as part of a settlement agreement in exchange for releasing the lien. In one case cited by Anchor Bank, *Mountain Stone Co. v. H.W. Hammond Co.*, 39 Colo.App. 58, 564 P.2d 958 (1977), the lien claimant signed a document stating in part: “I hereby acknowledge receipt of payment in full for any and all materials, supplies, labor . . .” *Id.* at 959. The court stated:

The doctrine (of estoppel) has been applied in other jurisdictions as a bar to the assertion of mechanics' lien rights in cases where the lien claimant orally advises a landowner that he had been paid in full.

*Id.* at 960 (citing Annot., 155 A.L.R. 350). This statement from *Mountain Stone* is consistent with the Washington cases cited by Anchor Bank (App. Brief 40) where equitable estoppel applied against a lien claimant.

### **G. SHELCON'S LIEN PRIORITY DATE**

On the morning of July 5, 2006, Martin marked the boundaries of the Farm with fluorescent pink ribbon in a visible manner so that the operator of the clearing and grubbing machine would know where to clear and grub. (FOF 9-10, RP 94-97). Martin determined the location of the property lines by “measure[ing] off the plans”. (RP 95:2). In the afternoon that same day, Anchor Bank recorded its deed of trust on the Farm. (FOF 15). On July 10 and July 11, 2006, Shelcon employee Ryan Harrison cleared and grubbed the Farm. (FOF 16, Ex 14-16). On July 12, 2006, Martin attended a meeting with a Pierce County building official.<sup>11</sup>

Anchor Bank argues that no “improvement” to the Farm occurred on July 5<sup>th</sup>, 2006. The term “improvement” is defined as:

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<sup>11</sup> Anchor Bank points out that Martin’s boundary marking occurred prior to a meeting that was referred to as a “pre-construction meeting” on July 12, 2006, attended by Martin and Roger Jernegan, a Pierce County building inspector. (App. Brief 46, Ex 115 pg. 7 of 8). Martin testified that pre-construction meetings with the County usually occur prior to construction work starting (RP 302:4-6), but this case was an exception. Martin testified that prior to the meeting, Mr. Jernegan “asked us what we were going to get started with and he was okay with doing erosion control, and the clearing before he had time to get to the preconstruction meeting.” (RP 303:10-25).

(5) "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) (emphasis added).

Shelcon's boundary marking constitutes an "improvement" under *either* category (a) or category (c) of RCW 60.04.011(5).

**1. Shelcon's Boundary Marking Was An "Improvement" Under RCW 60.04.011(5)(a)**

The term "clearing" is in the definition of "improvement".

Although marking boundaries is not in RCW 60.04.011(5)(a), Shelcon's boundary marking was incidental to Shelcon's clearing activity and should be treated as part of it because it was a necessary step of work in preparation for the clearing and preceded it by only five days.

Anchor cites *Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn.App. 654, 246 P.3d 835 (2011) for the proposition that minor preparatory activities do not amount to an "improvement". That is not what *Colorado Structures* stands for. There, the prime contractor dug a test pit on August 7, 2007 to determine the depth of the groundwater before bidding on the project. *Id.* at 657-58. This digging occurred three months before the contract was signed (November 15, 2007), and six

months before construction work started (February 28, 2008). *Id.* The issue was whether the digging of the test pit to determine the depth of the groundwater constituted an improvement, such that the priority of the contractor's lien would date back to August 7, 2007.

*Colorado Structures* held that the digging of the test pit was not an improvement. It was significant to the court that the digging occurred six months before construction work started. The court suggested that if preparatory work is performed in preparation for construction work that immediately follows the preparatory work, then the preparatory work would qualify as an improvement.

[W]e agree with the trial court that the hole drilling did not constitute an improvement to the property. The testing had utility for future construction, but was not done for that **immediate purpose.**

*Id.* at 663 (emphasis added).

Here, in contrast, Martin's boundary marking was done for the purpose of immediate clearing and was in fact followed by clearing five days later. Shelcon's bid (Ex 8), which served as the parties' contract, was prepared six months prior to Shelcon's clearing activity. "Clear and Grub" is the first line item on the bid. (Ex 8). In short, Shelcon's boundary marking qualifies as an improvement because it was incidental and necessary to and immediately preceded Shelcon's clearing activity.

## 2. Shelcon's Boundary Marking Was An "Improvement" Under RCW 60.04.011(5)(c)

Shelcon's boundary marking was an improvement because the words "marking the boundaries" is part of the definition of "professional services" in RCW 60.04.011(13). There are three categories within the definition of "improvement" in RCW 60.04.011(5), one of which is "professional services".

Anchor Bank cites *McAndrews Group, Ltd., Inc. v. Ehmke*, 121 Wn.App. 759, 90 P.3d 1123 (2004) for the proposition that the placement of survey stakes and other markers does not constitute an improvement. (App. Brief 49). This is an incorrect reading of *McAndrews*. In fact, just the opposite is true. There, the court held that a lien claimant's preliminary surveying work *was* an improvement because the word "surveying" is included within the definition of professional services.

The real issue in *McAndrews* was not whether the work in question was an improvement (as is the issue in Shelcon/Anchor) since it clearly was an improvement under category (c), but rather whether the lien claimant was required to record a notice of furnishing professional services. There are three separate categories in the definition of "improvement" in RCW 60.04.011(5). *McAndrews* held that the placement of survey markers constituted an improvement under category (c), but not under categories (a) or (b). Whether there was an

improvement under (a) or (b) mattered in *McAndrews* because it affected whether or not the lien claimant was required to record a notice of furnishing professional services.<sup>12</sup>

#### **H. 18% INTEREST AGAINST HAYMOND AND A-III VENTURE LLC**

Haymond and A-1111 Venture LLC argue on appeal that the interest rate in Shelcon’s award against them should be 12%—not 18%.

References to the record from here to the conclusion of this Brief are to Judge Fleming’s Findings and Conclusions and to the report of proceedings in the trial in September 2011 before Judge Fleming.

##### **1. No Signature Required by RCW 19.52.010**

Haymond argues that the 12% interest rate in RCW 19.52.010 should apply because Haymond did not sign a document agreeing to a higher interest rate. RCW 19.52.010 provides for interest at 12% “where no different rate is agreed to in writing between the parties”. RCW 19.52.010 does not require the writing to be signed, nor has any case interpreting it so held.

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<sup>12</sup> RCW 60.04.031(5) provides that a potential lien claimant who performs professional services under subsection (c) of RCW 60.04.011(5) where no improvement under subsection (a) (construction) or subsection (b) (landscaping) has yet occurred, is vulnerable to a lender’s deed of trust if the potential lien claimant does not record a notice of furnishing professional services. A notice of furnishing professional services is not required to be recorded if the professional services are “visible from an inspection of the real property”. RCW 60.04.031(5).

Here, the 18% rate is enforceable because Haymond agreed to the written memorialization dated September 8, 2008 (Ex 33), which provided in part for interest at 18%. (FOFs 26 and 29). Finding 29, which is unchallenged, states in part that “Haymond accepted the additional terms and conditions stated” in the written memorialization dated September 8, 2008.

Judge Fleming’s determination that the terms in said document (Ex 33) were accepted by Haymond was based in part on Martin’s testimony that he gave the document to Haymond (RP 136:12-13), discussed it with Haymond (RP 136:14-15) and Haymond never objected to the terms. (RP 186:3-6).

Further support is that subsequent to September 8, 2008, Haymond made multiple payments to Shelcon on invoices reflecting the 15% markup on change orders, which was a new term between the parties, as was the 18% interest term in the written memorialization. Paragraph C “Change Orders” located on page 5 in the General Conditions of Exhibit 33 states that henceforward Shelcon would charge Haymond 15% mark-up on all change orders. Previously, Shelcon had not charged any markup to Haymond for change orders. (Ex 20). After September 8, 2008, Shelcon charged a markup of 15% on change orders. Shelcon’s invoice dated September 30, 2008 contains two items of change order

work with price description “cost + 15%”. (Ex 36). Page three of Shelcon’s invoice dated October 31, 2008 contains multiple references to items of change order work with price description “cost + 15%”. (Ex 39). These change orders were all marked up 15% per the additional terms and conditions of the 09/08/2008 agreement. Haymond made nine payments to Shelcon subsequent to the 09/08/2008 agreement (Exs. 26, 35, 37, 38, 40, 41, 43-45) as summarized in Exhibits 54 and 61.

## **2. No Usury**

Haymond argues that the 18% interest rate constitutes usury.<sup>13</sup> Usury has a number of elements that a defendant must establish, one of which is that there is a loan. *Jansen v. Nu-West, Inc.*, 102 Wn.App. 432, 439, 6 P.3d 98 (2000). There was no loan in this case. (RP 238:15-18). Second, a defendant may not plead the defense of usury to a transaction that was primarily for commercial, investment, or business purposes. RCW 19.52.080. Haymond had a “business purpose of preparing the subject property for construction of a commercial building”. (FOF 10).

In the trial with Anchor Bank in 2013, Judge Hogan awarded Shelcon interest at the rate of 12%. This was not because Judge Hogan determined that the 18% interest rate was usurious, but because Anchor

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<sup>13</sup> Haymond did not plead usury as an affirmative defense. (Ex 34). Usury is an affirmative defense and must be plead. *Singleton v. Frost*, 108 Wash.2d 723, 726, 742 P.2d 1224 (1987).

Bank—unlike Haymond—never agreed to 18% interest. A lien claimant is entitled to its contractually agreed rate of interest against the party with whom it contracted, but not against third parties such as a lender or a surety. See *Keller Supply Co., Inc. v. Lydig Constr. Co., Inc.*, 57 Wn.App. 594, 600, 789 P.2d 788 (1990) (holding that provision for interest at 1.8% per month in claimant’s contract with general contractor applied as between claimant and general contractor but not as between claimant and general contractor’s surety, limiting claimant’s award of prejudgment interest against the surety to “prejudgment interest rate at the statutory rate from the date it filed its claim of lien.”)

### **3. The Trial Court Correctly Computed Interest**

Haymond argues that interest should have been computed commencing as of the date of the filing of Shelcon’s lien (May 1, 2009), which is how Judge Hogan computed Shelcon’s interest award against Anchor Bank. As between Shelcon and Haymond, interest was properly computed by the trial court as of when payments became due per the contract and invoicing. Under Washington law, interest begins to accrue in a lien foreclosure action when payment becomes due if the lien so states or if the complaint so states. Otherwise, interest begins to accrue when the lien is recorded. In *CKP, Inc. v. GRS Const. Co.*, 63 Wash.App. 601, 618, 821 P.2d 63 (1991), the court stated:

The cases cited by Park South suggesting that interest should be allowed only from the date of filing the notice of lien are not applicable, since that principle applies where no claim is made for interest in the lien notice as having accrued prior to the date of the notice, and where the complaint prays for interest from the date of the lien only. Here, CKP claimed interest from September 10, 1985, in its subsequently filed lien notice and in its complaint. (citations omitted)

*See also Pacific Erectors, Inc. v. Gall Landau Young Const. Co, Inc.*, 62 Wash.App. 158, 171-72, 813 P.2d 1243 (1991) (holding that the trial court correctly computed prejudgment interest on a lien claim commencing from an earlier date based on the parties' contract rather than the (later) date when the mechanic's lien was recorded).

These principles are consistent with RCW 60.04.021, which provides that a lien claimant is entitled to "have a lien upon the improvement for the contract price". "[C]ontract price" is defined as "the amount agreed upon by the contracting parties". RCW 60.04.011(2).

Here, Shelcon's lien requests interest. In addition, paragraph 9.1 of Shelcon's First Amended Complaint prays for "interest at the rate provided by the contract . . . from the date said sums were due". (CP 7).

#### **4. No Abandonment Of Claim For 18% Interest**

Haymond argues that Shelcon abandoned its claim for 18% interest during trial when Martin testified: "From what I understand now, legally, you can only get 12 percent." (RP 173:24-25).

Shelcon never abandoned its claim for 18% interest. Martin made that statement only because moments earlier Haymond's counsel had represented to Martin that it was illegal. Haymond's counsel asked Martin accusingly: "you were aware . . . weren't you, of the 18% being illegal and protested by Mr. Haymond?" to which Martin replied: "I didn't know the 18% was illegal." (RP 173:1-4). Haymond cites no authority that a party may abandon a claim via witness testimony, much less in the context of cross-examination and a representation from counsel that pursuing the claim would be illegal.

#### **IV. REQUEST FOR ATTORNEYS' FEES AND EXPENSES**

Pursuant to RAP 18.1, RCW 60.04.181(3) and the attorney fee clause in the agreement between Shelcon and Haymond<sup>14</sup>, Shelcon requests an award of attorneys' fees and expenses if it prevails on appeal.

#### **V. CONCLUSION**

The trial court's decisions were correct and should be affirmed.

LINVILLE LAW FIRM, PLLC



Lawrence B. Linville, WSBA #6401

David E. Linville, WSBA #31017

Attorneys for Respondent

2/6/14  
Date

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<sup>14</sup> Exhibit 33 in the trial before Judge Fleming and Exhibit 63 in the trial before Judge Hogan.

AFFIDAVIT OF SERVICE

COURT OF APPEALS  
2014 FEB -7 PM 1:50  
STATE OF WASHINGTON

Kristen Wayman declares as follows:

1. I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-referenced action, and competent to be a witness therein.

2. On the date set forth below, I caused to be served the following pleadings:

- (1) BRIEF OF RESPONDENT SHELCON CONSTRUCTION GROUP LLC; and
- (2) RESPONDENT'S MOTION TO FILE AN OVER-LENGTH BRIEF
- (3) SHELCON CONSTRUCTION GROUP LLC'S SECOND SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS

to:

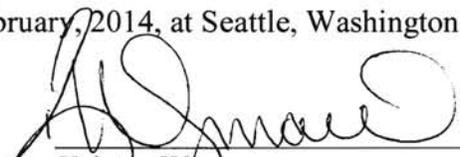
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 VIA US MAIL

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

Dated this 6<sup>th</sup> day of February, 2014, at Seattle, Washington.

  
\_\_\_\_\_  
Kristen Wayman