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Division III  
State of Washington  
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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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BRASHEAR ELECTRIC, INC.,

Appellant,

v.

NORCAL PROPERTIES, LLC, a Washington limited liability company,  
COLUMBIA STATE BANK, a Washington chartered bank, BLUE  
BRIDGE PROPERTIES, LLC, a Washington limited liability company,  
WHEATLAND BANK, a Washington chartered bank, NELSON  
ROOFING ENTERPRISES, INC., an Oregon corporation d/b/a PALMER  
ROOFING COMPANY,

Respondents.

No. 373797

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APPELLANT'S REPLY BRIEF

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In construing statutes which reenact, with certain changes, or repeal other statutes, or which contain revisions or codification of earlier laws, resort to repealed and superseded statutes may be had, and is of great importance, in ascertaining the intention of the legislature, for, where a material change is made in the wording of a statute, a change in legislative purpose must be presumed.

*Graffell v. Honeysuckle*, 30 Wn.2d 390, 399, 191 P.2d 858, 863–64 (1948) (internal citations omitted). In this matter, the parties largely (although not entirely,) agree that *Williams v. Athletic Field, Inc.* and the subsequent case law provides the controlling framework in this matter. The parties disagree about where this framework leads.

If the statutory language is unambiguous, then the rule of strict or liberal construction does not apply and *Wells* is superseded by statute. *Williams v. Athletic Field, Inc.*, 172 Wn.2d 683, 693, 261 P.3d 109, 115 (2011). If the language is ambiguous, then the inquiry is whether Brashear is a party “intended to be protected by” the statute’s provisions. *Id.* at 697 (quoting RCW 60.04.900). If Brashear is a party intended to be protected by the statute, then the rule is liberal construction and *Wells* is superseded by statute. The only situation where *Wells* remains good law is if RCW 60.04.091 is ambiguous and Brashear is not a party whose security is intended to be protected by the provisions of Chapter 60.04. Because RCW 60.04.091 is not ambiguous the Court should reverse. In the alternative,

even if RCW 60.04.091 is ambiguous, Brashear is a party intended to be protected by the statute and is thus entitled to liberal construction.

**1. Stare Decisis Does Not Apply Because This Case Involves Interpretation Of Statutory Law Which Has Been Amended And The Statutory Provisions Supersede Common Law.**

In the Respondent’s Brief, the Respondents argue that because *Wells* has not been overturned, *Wells* remains good case law. *Respondent’s Brief*, pg. 13. Were this a case of constitutional law, or interpretation of common law, stare decisis could apply. “Statutory cases have a fixed base from which we always start[;] they are unlike common-law cases wherein the later cases supersede the earlier ones to the extent of any differences between them.” *Windust v. Dep’t of Labor & Indus.*, 52 Wn.2d 33, 36, 323 P.2d 241, 244 (1958) (quoting *Petersen v. Dep’t of Labor & Indus.*, 40 Wn.2d 635, 636, 245 P.2d 1161, 1162 (1952)). “The application of the doctrine of stare decisis to the interpretation of a statute will, more often than not, lead to the eventual repeal or amendment of the statute, just as it did in this case.” *Windust*, 52 Wn. 2d at 37 (emphasis added). “[W]here a material change is made in the wording of a statute, a change in legislative purpose must be presumed.” *Graffell*, 30 Wn.2d at 399 (citing *In re Phillips’ Estate*, 193 Wash. 194, 74 P.2d 1015 (1938)).

The legislature also “has the power to supersede, abrogate, or modify the common law.” *Potter v. Washington State Patrol*, 165 Wn.2d 67, 76, 196 P.3d 691, 695 (2008) (citing *State v. Estill*, 50 Wn.2d 331, 334–35, 311 P.2d 667 (1957)). “In determining whether a statute supersedes, abrogates, or modifies the common law, we will look to the language of the statute, whether that language contains an express statement of exclusivity, and other expressions of legislative intent.” *King Cty. v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 628, 398 P.3d 1093, 1098 (2017) (citing *Potter*, 165 Wn.2d at 80). Legislative intent to repeal the common law may also be found where “the provisions of a ... statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force.” *Potter*, 165 Wn.2d at 80 (citing *State ex rel. Madden v. Pub. Util. Dist. No. 1*, 83 Wn.2d 219, 222, 517 P.2d 585 (1973)).

As applied to the case at hand, there is no question that the common law rule of strict construction as it stood in 1969 has been abrogated by statute. RCW 60.04.900 now provides that the statutes are to be “liberally construed to provide security for all parties intended to be protected by their provisions.” The opinion in *Wells* explicitly relied on the common law rule that the “statutory terms must be strictly construed” in affirming that the lien was untimely filed. *Wells v. Scott*, 75 Wn.2d 922, 925, 454 P.2d 378,

381 (1969). Because this rule of interpretation has been changed, the Court must determine whether the application of the rule in *Wells* is consistent with the *Williams* framework, or whether the application in *Wells* has been superseded by the change in statute. Regardless of outcome, this analysis does not rely on whether or not *Wells* has been “overturned.” Stare decisis does not apply.

**2. There Is No Genuine Issue Of Material Fact Whether Brashear Electric Provided The Warranty Labor At Issue.**

In addition to arguing that the lien was untimely under *Wells*, Respondents suggest that there is a question of fact regarding whether the work was actually performed. The Respondents assert there is a question of fact regarding the Blue Bridge property because the “testimony of representatives of Vandervert (Josh Miller) and Brashear (Jerry Peal) are in dispute.” *Respondent’s Brief*, pg. 3. However, both Mr. Miller and Mr. Peal assert that the work was directed by Vandervert and performed by Brashear. *CP 158; CP 168*. A party does not create a genuine issue of fact by merely impeaching the witnesses offered in support of the motion for summary judgment; the non-moving party must actually bring forth evidence to create a dispute of fact. *See Laguna v. Washington State Dep’t of Transp.*, 146 Wn. App. 260, 266, n. 12, 192 P.3d 374, 377 (2008) (*citing Young v. Key Pharms. Inc.*, 112 Wn.2d 216, 225 n. 1, 770 P.2d 182 (1989)).

Respondents also suggest that the because the subcontractors disagreed about who was at fault for the defective work on the Norcal project, Brashear's labor was not "work" under its contract. *Respondent's Brief, pg. 3*. It is not clear that this is even relevant as Brashear's time for filing the lien runs from the last furnishing of "labor, professional services, materials, or equipment" to the property. RCW 60.04.091. The right to a lien arises when the labor is "furnished at the instance of the owner, or the agent or construction agent of the owner." RCW 60.04.021. There is no dispute that this labor was furnished at the instance of the owner as directed by Vandervert and as authorized in the prime contracts. *CP 69; CP 92; see also CP 168*. To the extent that Respondents suggest that Vandervert should have called a different subcontractor to remedy the defective work, that would appear to be a complaint which should be levied to Vandervert.

Further, to the extent the Court believes this dispute is relevant to the validity of the lien, the subcontract between Brashear and Vandervert dispels any such issue:

3. Subcontractor acknowledges the Subcontract Work may or may not be entirely contained in specification sections or plan sheets in the Main contract where such work is customarily found. Subcontractor shall perform any work reasonably inferred from the description of the Subcontract Work that may be located outside of its customary location in the Main Contract.

CP 523. This Subcontract work includes “[a]ll work necessary or incidental to complete the following work for the Project in strict accordance with and reasonable [sic] inferable from the Main Contract...” CP 535. Because there is no genuine issue of fact whether the labor was performed on the projects, the Court should reverse the trial court’s decision.

**3. Respondents Attempt To Categorize *Kirk v. Rohan* As An Incomplete Project Are Unsupported By The Court’s Opinion.**

Respondents in this action attempt to distinguish *Kirk v. Rohan* as a case involving an incomplete project, as opposed to a project where the time for filing a lien was extended based on labor to remedy defects. *Respondent’s Brief*, pgs. 4; 6-7. As the court in *Kirk* repeatedly stated, “if the work is done or materials furnished at the request of the owner to complete the original contract, or to remedy some defect in the work done, then the time for filing the lien would run from the last furnishing of labor and material...” *Kirk v. Rohan*, 29 Wn.2d 432, 436, 187 P.2d 607, 609 (1947) (emphasis added). In fact, the Court in *Kirk* did not appear to be interested in what type of work was performed. The court summarized the inquiry as follows:

In short, if the work done or material furnished at the request of the owner, is in furtherance of the original contract, then the time for filing the lien is extended.

*Id.* at 437. This summary of the relevant inquiry is unsurprising as it tracks the very language of statute authorizing the creation of the lien. Laws of 1905, ch. 116 § 1 (“Every person performing labor upon...any other structure... has a lien upon the same for the labor performed or material furnished by each, respectively, whether performed or furnished at the instance of the owner of the property...”); *see also* RCW 60.04.021. The holdings of *Kirk* and *Wells* are in direct conflict, but as discussed *supra*, this conflict is resolved as a matter of statutory interpretation based on the subsequent enactment of RCW 60.04.900. As a result, the Court should conclude that the lien was timely filed and reverse the decision of the trial court.

## CONCLUSION

“[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 labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.” RCW 60.04.021. In this case, Brashear furnished labor upon Respondents’ properties as directed by the owner’s agent and as required under Brashear’s subcontract. The Respondents contracted for a warranty period on the construction for Respondents’ own benefit. Respondents seek the benefit of the warranty but wish to disclaim

the liability that arises from labor furnished therefrom. RCW 60.04.900 requires the Court to liberally construe the mechanic's lien statutes for the benefit of the persons intended to be protected the statutory provisions. Brashear is a person intended to be protected by these provisions. As a result, the Court should reverse.

DATED this 23<sup>rd</sup> day of September, 2020.

A handwritten signature in blue ink, appearing to read "Bret Uhrich", is enclosed in a thin black rectangular border.

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BRET UHRICH, WSBA #45595

**WALKER HEYE MEEHAN & EISINGER PLLC**

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