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STATE OF WASHINGTON, COURT OF APPEALS
DIVISION III

Brashear Electric, Inc., Appellant.

V.

Norcal Properties, LLC and Blue Bridge Properties, LLC,
Respondents, et al.

**BRIEF OF RESPONDENTS NORCAL PROPERTIES, LLC and
BLUE BRIDGE PROPERTIES, LLC**

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I. INTRODUCTION

The Washington State Supreme Court determined in the case of Wells v. Scott, 75 Wn.2d 922, 454 P.2d 378 (1969) that the providing of a mere warranty or incidental work that was not part of the initial project did not extend the time required of 90 days to file a mechanic's lien pursuant to RCW 60.04. Further, it was determined in Wells that the mechanic's lien rights were a derogation of common law and as such, its statutory terms must be strictly construed. In 1991, the legislature adopted RCW 60.04.900 which provided "RCW 19.27.095, 60.04.230, and 60.04.011 through 60.04.261 are to be liberally construed to provide security for all parties intended to be protected by their provisions." Since that time, different cases have attempted to interpret the intent and meaning of RCW 60.04.900. This issue was finally resolved in Williams v. Athletic Field, Inc., 172 Wn. 2d 683, P.3d 109 (2011).

In this case, the Appellant—subcontractor Brashear Electric, Inc. (hereinafter "Brashear")—performed certain work upon property owned by Respondents Blue Bridge Properties, LLC and Norcal Properties, LLC (hereinafter "Blue Bridge" and "Norcal," respectively). This work was completed pursuant to two separate contracts with Vandervert Construction, which served as the

general contractor for Blue Bridge and Norcal pursuant to two separate construction contracts. The only connection between Norcal and Blue Bridge is that the principals of the two LLC's are the same parties and the two LLC's own adjoining parcels of property. Although Vandervert was paid for all of the work performed on both projects, Vandervert failed to pay its subcontractors for all of the work on each project. Vandervert has since filed for receivership. Although both projects had been completed and more than 90 days had elapsed since the completion of each project, without Norcal's or Blue Bridge's knowledge or consent, Brashear asserted that they were called back to the Norcal property by Vandervert—a mere two days before Vandervert filed for receivership—to perform minor warranty work. CP 548. Norcal and Blue Bridge dispute whether this work was performed, but even if taken in the light most favorable to Brashear, as a matter of law, this work is not of the type or sufficiency to revive Brashear's right to claim a lien against either property or project. As such, the trial court was correct in granting Norcal and Blue Bridge's motions for summary judgment and denying Brashear's motions for summary judgment as against Norcal and Blue Bridge.

II. COUNTER STATEMENT OF THE CASE

Norcal and Blue Bridge shall not restate that information provided by Brashear in its Statement of the Case, but will proffer its own Counter Statement of the Case to provide clarification of several matters that Norcal and Blue Bridge believe are in dispute.

Although Apollo Construction may have contacted Brashear regarding the leak at the Norcal property, all parties agree that the leak was not due to the work of Brashear. CP 184, 211-222, 420. Therefore, any work undertaken by Brashear would also have been outside the scope of the contract. CP 535. As for the work alleged to have been done by Mr. Peal of Brashear at the Blue Bridge property, the testimony of representatives of Vandervert (Josh Miller) and Brashear (Jerry Peal) are in dispute, thereby calling in to question whether or not any work was actually performed at the Blue Bridge location on January 17, 2018, or at the very least, creating an issue of fact. CP 304, 535.

Again, Norcal and Blue Bridge will not restate the entire procedural history as Brashear has correctly recited said events, with the exception of Brashear's assertion regarding the holding of Kirk v. Rohan, 29 Wn.2d 432, 187 P.2d 607 (1947). It is Norcal and

Blue Bridge's position that Kirk does not stand for the proposition that work performed to remedy a defect extends the period to file the lien. Rather, Kirk stands for the proposition that work performed to complete the project will extend the time to file the lien. This distinction as between finishing a project and returning to perform warranty work was clarified in Wells v. Scott, which was determined in 1969, some 22 years after Kirk's determination in 1947. The Wells determination supports Norcal and Blue Bridge's position.

III. ARGUMENT

The Court should uphold the trial court's order denying Brashear's motions for summary judgment and granting Norcal and Blue Bridge's motions for summary judgment. In this case, the trial court properly followed the prior precedent established in Washington State whereby mere warranty or guarantee work is insufficient to revive the timeline to file a lien, and, additionally, that strict construction is required in determining if the work performed falls within that work that is intended to be protected by the statutory scheme of RCW 60.04.

Brashear has raised the applicability of RCW 60.04.900 which provides for liberal construction of RCW 60.04.230 and

60.04.011 through 60.04.226 and 60.04.261. Brashear further asserts that this legislative directive requires a liberal construction as to whether the work performed by Brashear on January 17, 2018 was sufficient to extent the 90 day period and thereby authorizing Brashear to file two separate claims of lien—one as to Norcal, and one as to Blue Bridge, said liens including the costs of all work performed on the project including charges that were incurred more than seven months prior and four months prior, respectively. Brashear's position is contradictory to the prior determinations related to these issues in Washington State.

Although Brashear cites to no case overturning Wells and its related cases, Brashear states that, due to the fact that Wells was determined in 1969 and RCW 60.04.900 was enacted in 1991, the inference should be that Wells and its related cases regarding the requirements to receive the benefits of RCW 60.04 are no longer applicable and that, in fact, liberal construction of the application of RCW 60.04 should be applied to determine if a party filing the lien is intended to fall under the protections of RCW 60.04. Norcal and Blue Bridge assert that this is incorrect and that Wells and its related cases are applicable and are the current law in the State of Washington.

Brashear further cites to Kirk v. Rohan, 29 Wn.2d 432, 187 P.2d 607 (1947) in support of its position that its claim of lien was timely filed. Blue Bridge and Norcal contend that Kirk is distinguishable from the facts at hand. As stated by the Court in Kirk, "It is respondents' contention that the job was not completed in November, and that it was anticipated that they would have to return at a later date to lay tile under the driveway and connect it with a downspout which extended from the back porch; that this was necessary because the driveway had not been laid." Kirk, at 433. It is further stated that "Mr. Smith testified that he was called by appellants on February 3rd to 'finish up the job.'" Id. The Court further acknowledged that:

The first bill was to the Rohans on February 8th (no statement had been sent prior to this time). On April 2nd, Rohan wrote, asking for more details, which were furnished to him. On April 12th, he again wrote, complaining that the bill was excessive. At no time during these negotiations was there any intimation that the work was completed November 19th, rather than February 4th. It was not necessary for the appellants to raise this question, because the lien claimed was not filed until May 3rd. But at least it is an indication that both parties felt that the work done February 4th was to remedy a defect under the original contract.

Kirk, at 434.

The facts in the case before this Court are distinguishable. Brashear considered this project complete. CP 304, 425. Brashear acknowledges that it had billed for all work performed. Brashear further agrees that, at best, it only performed warranty work at both the Blue Bridge and Norcal locations on January 17, 2018. Unfortunately, pursuant to Wells and its related cases, mere incidental guarantee and warranty work does not revive Brashear's right to file a lien for work completed four months and seven months prior to the time of filing. It is Blue Bridge's and Norcal's position that they do not concede that Brashear performed work on January 17, 2018, but, even if it had, that work was not in furtherance of the original contract, but rather was incidental warranty work and would not, therefore, extend the period of time under which Brashear may file a claim of lien.

The rights of a materialman to assert a lien against a property owner for work performed is a statutory creation. Pursuant to RCW 60.04.021, "any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction

agent of the owner.” To secure a lien, a licensed contractor is required to comply with certain time limitations related to the filing of the subject lien. As provided in part by RCW 60.04.091, “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 or the last date on which employee benefit contributions were due. . . . The period provided for recording the claim of lien is a period of limitation and no action to foreclose a lien shall be maintained unless the claim of lien is filed for recording within the ninety-day period stated.”

As provided in RCW 60.04, the requirements related to liens are statutory and strict compliance is required for a contractor to both file and pursue his/her/its lien rights. As provided in the depositions of Jerry Peal and Greg Ford, the work on the properties was completed by June 28, 2017 (Norcal project) and September 17, 2017 (Blue Bridge project). CP 298, 419. Brashear had invoiced the final billings for the projects (August 17, 2017 for Norcal and October 26, 2017 for Blue Bridge) and noted on its invoices that the projects were 100% complete. CP 304, 425.

Brashear had viewed the projects as complete.

After a four-month lapse (Blue Bridge project) and seven-month lapse (Norcal project), Brashear returned to the projects. CP 304, 425. The reason for this was an alleged request by a representative of Vandervert. At no time did the property owner or its representative make any such request. CP 304, 425. As noted by Vandervert's representative, this return to the projects was, at best, to be considered "warranty work." CP 304-305, 425-426. This was merely the review of an alleged concern related to an alleged leak at the Norcal project and one alleged "inoperable light fixture" related to the Blue Bridge project—even the testimony regarding the problems and work done is contradictory. CP 304-305, 425-426. "If the appellant desired the protection of the lien law in relation to the large initial job, it was incumbent upon him to file his claim within the period fixed by statute after the completion of the work. To permit the extension of the time for filing a lien, by the process of tacking on subsequent small, causal, and unrelated repairs, would create an intolerable condition not within the spirit or purpose of the lien law." Brown v. Mychel Co., 186 Wash. 97, 100-101, 56 P.2d 1020 (1936).

The issue of the applicability of RCW 60.04.900 has been

reviewed and debated for years by a variety of courts. Fortunately, the Washington State Supreme Court finally determined its applicability in Williams v. Athletic Field, Inc., 172 Wn.2d 683 P.3d 109 (2011). The answer to the question as to the applicability of RCW 60.04.900 appears to be that strict construction and liberal construction both have their place, with each to be utilized at different times in the analysis. The determination of the applicability of strict construction vs. liberal construction depends upon the issue being reviewed by the court. If the issue being addressed is whether the work performed is a type to be afforded the protections of RCW 60.04, strict construction is applied. If it is determined that the type of work performed does pass strict construction and the individual is intended to be protected by RCW 60.04, then liberal construction applies to determine such things as whether the filing was properly formatted, correct notice was provided, or if the necessary affirmations and information were included.

As stated in Williams, "We agree with Hos that the appropriate way to view the competing canons of strict and liberal construction is found in our earlier cases. The strict construction rule, at its origin, was invoked to determine whether persons or

services come within the statute's protection." Williams at 696. As provided in Williams, the determination of lien rights at its origin is based in the earlier cases and determined with strict construction. Only after it is determined—through strict construction—that an individual should be protected by the lien statute, does the liberal construction provided for in RCW 60.04.900 apply. As stated in Williams, "Here, there is no dispute in Williams or Hos that the claimants provided lienable services and claimed their liens against the appropriate property. Rather, the dispute is about whether the form of the lien is proper. 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." Williams at 697. The opposite is true in the present case before the Court. The issues in these cases are whether the work alleged to have been performed was of the type and quantity that entitles Brashear to the protections of RCW 60.04. As such, strict construction should be applied to this analysis. Now should it have been Norcal's and Blue Bridge's sole argument that Brashear's lien was invalid due to the fact that the last day of work that was alleged to have been performed was January 17, 2018, yet the Claim of Lien filed on January 30th and January 31st states that the last day work was

performed was January 24, 2018, liberal construction is appropriate and such a defense would likely fail. CP 9-16. However, that is not the case before this Court, nor the issues raised by Norcal and Blue Bridge. The liens are invalid due to the fact that strict construction is dictated by Williams and the determination in Wells and its related cases have determined that mere warranty and guarantee work does not extend the time for filing the lien. As Brashear's sole claim against Norcal and Blue Bridge is that the warranty work they allege to have been performed on January 17, 2018 revives their right to file liens against Norcal and Blue Bridge some seven months and four months, respectively, after completion of each project, Brashear, in this instance, is not a party intended to be afforded the protections of RCW 60.04. This is due to Brashear's failure to file its liens against Norcal or Blue Bridge within 90 days of completion of the projects.

RCW 60.04.900 is intended to protect contractors from minor errors such as formatting or providing incorrect affirmations. This is supported by the determination of Williams. "[I]n an industry where the vast majority of the participants who contribute work and materials are not represented by legal counsel and lack the financial resources to purchase sophisticated legal services, the

simplicity and reliability of the mechanics lien procedures established by the legislature are of paramount importance.” Williams at 697. RCW 60.04.900 was not intended to create a loophole whereby contractors and subcontractors, working in cooperation, can create a lien liability against a property owner—without that property owner’s knowledge—months, or even years after the contract is completed, by merely allowing the general contractor to call the subcontractor and request that the subcontractor return to a project to change a light bulb, or adjust a fixture, or caulk some alleged leak. Rather, RCW 60.04.900 is to provide protection to unwary contractors that properly perform work and then, within the timelines provided for in RCW 60.04, file their lien, but perhaps unintentionally err in completing the lien documentation.

The issue raised in this appeal by Brashear is whether the lien protections of RCW 60.04 should apply to extend the lien filing period from the date of minor and incidental warranty/guarantee work that Brashear performed on Norcal's and Blue Bridge's properties. We submit that Wells has not been overturned and Wells is still good case law in the State of Washington. The analysis in Wells and the determination in Williams are consistent.

In analyzing whether an individual is entitled to the protections of RCW 60.04, the Court must strictly construe the requirements, as determined in Wells and Williams. As provided in Wells, “It held that since construction of the buildings was completed on September 1, 1965, the 90-day filing period for a claim of lien commenced to run at that time; that since the claim was not filed until approximately 280 days thereafter, it was of no force an effect. We concur. The 1-year guarantee did not extend the statutory time within which the claim of lien could properly be recorded.” Wells, at 925. In Wells, the analysis was as to whether the protections of RCW 60.04 applied, similar to the cases at hand. Additionally, as provided in Brown v. Mychel Co., 186 Wash. 97, 100, 56 P.2d 1020 (1936): “The subsequent repairs and upkeep, if any should be required, were to be causal and intermittent, dependent on future circumstances and contingencies have no relation to the first job.” As such, that work did not qualify for the protections provided for in RCW 60.04. Only after a determination is made, through strict construction, that a party is entitled to the protection of RCW 60.04, would then liberal construction provided for in RCW 60.04.900 apply. This liberal construction would relate to such things as whether the lien document was properly formatted, affirmed, and

documented. In cases where the lien filing party does not strictly comply with requirements to be afforded the protection of RCW 60.04, much like the case before this Court, the denial of applicability of RCW 60.04 to the facts as presented would prevent the need for the court to ever reach the liberal construction related to the documents filed. This analysis is further supported by the determination of the trial court set forth at RP 45 – 46:

The Court: . . . Farwest Steel Corp. affirms strict construction. Trane Company versus Brown-Johnson [sic] affirms the strict construction analysis. Pinebook Homeowners again affirms strict construction. Agranoff versus Jay is inapposite for a bunch of different reasons. Johnson versus Harrigan-Peach inapposite. Prager's versus Bullitt inapposite, and as well United Pacific Insurance Company versus Lundstrom is inapposite.

So, the cases that have cited Wells versus Scott, when they have been relevant, affirm the idea of strict construction, and they do that and they're kind of clustered in 1987.

I conclude, from that and the timing of the statute and Williams –

Mr. Urich: Williams is the 2011 case.

The Court: -- Williams that there's no reason to believe that Wells versus Scott is – is overruled. That it appears to be good law.

The trial court was citing to the following cases in addition to Wells and Williams: Farwest Steel Corp. v. Mainline Metal Works, 48 Wn. App. 719, 741 P.2d 58, (1987); Trane Co. v. Brown-

Johnston, Inc., 48 Wn. App. 511, 739 P.2d 737, (1987); Pinebrook Homeowners Assn. v. Owens, 48 Wn. App. 424, 739 P.2d 110, (1987); Agranoff v. Jay, 9 Wn. App. 429, 512 P.2d 1132, (1973); Johnson v. Harrigan-Peach Land Dev. Co., 79 Wn.2d 745, 489 P.2d 923, (1971); Prager's Inc. v. Bullitt Co., 1 Wn. App. 575, 463 P.2d 217, (1969); and United Pac. Ins. Co v. Lundstrom, 77 Wn.2d 162, 459 P.2d 930 (1969).

The issue before this Court is whether the protections of RCW 60.04 were appropriate due to the minor warranty/guarantee work Brashear performed on Norcal's and Blue Bridge's separate properties on January 17, 2018. Norcal and Blue Bridge assert that the case law is clear. The first step in the analysis is to determine if the party is one intended to receive the protections of RCW 60.04 and—for that determination—strict construction is required. The question in this case is if warranty and/or guarantee work qualifies to pull all of the work completed back under the protections of RCW 60.04, even though the contracted work was completed more than 90 days from the date the lien was filed. As the question is one of whether RCW 60.04 applies, strict construction is required. To make this determination, prior case law should be reviewed. As Wells, Brown, and their related cases expressly provide, mere

incidental, warranty, and guarantee work are insufficient to extend the time period for Brashear to file its liens.

IV. ATTORNEYS' FEES & COSTS

Pursuant to RAP 18.1, Norcal and Blue Bridge request an award of attorney's fees. Pursuant to RCW 60.04.181:

The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorney's fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator may deem reasonable.

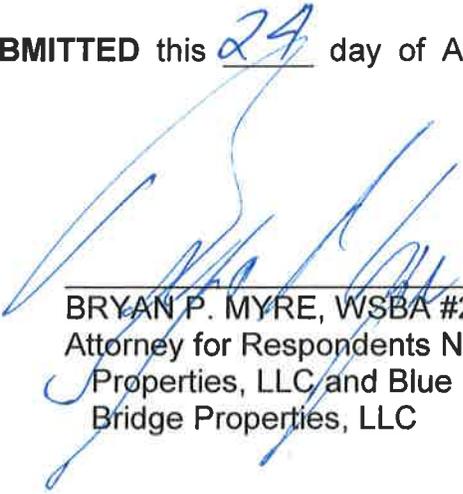
Due to the fact that this Court should uphold the ruling of the trial court and deny Brashear's appeal of both the denial of its summary judgments and granting of summary judgments for the benefit of Norcal and Blue Bridge, Norcal and Blue Bridge, as the prevailing parties, should be awarded their costs and attorneys' fees incurred on this appeal.

V. CONCLUSION

The Court should uphold the trial court's decision granting summary judgments to Norcal and Blue Bridge and further uphold the trial court's determination denying Brashear's motions for summary judgment. Brashear provided warranty/guarantee work of

a minor nature and under the precedent established with Wells,
said work is not of the type to revive Brashear's 90-day deadline to
file its lien.

RESPECTFULLY SUBMITTED this 29 day of August,
2020.



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on August 24, 2020, I caused to be served a true and correct copy of the BRIEF OF RESPONDENTS NORCAL PROPERTIES, LLC AND BLUE BRIDGE PROPERTIES, LLC to which this certificate is affixed upon the active parties set forth below via First Class Mail, postage prepaid, and the Appellate Court Portal Filing System, which will send electronic notifications of such filing for the listed active parties in this case:

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