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Supreme Court No. 84555-7
Court of Appeals No. 33607-3-II

SUPREME COURT OF THE STATE OF WASHINGTON

TERRY L. WILLIAMS and JANIS E. WILLIAMS, husband and wife,

Plaintiff/Respondent,

v.

ATHLETIC FIELD, INC., a Washington corporation,

Defendant/Petitioner.

**BRIEF OF AMICUS AGC OF WASHINGTON IN SUPPORT
OF PETITION FOR REVIEW**

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I. IDENTITY OF AMICUS AGC OF WASHINGTON

The AGC has existed since 1922 and is the State's largest, oldest and most prominent construction industry trade association. The three chapters of the AGC of Washington serve more than 1,000 general contractors, subcontractors, construction suppliers and industry professionals. AGC members perform both private and public sector construction and are involved in all types of construction in the state, including office, retail, industrial, highway, healthcare, utility, educational and civic projects.

According to the 2009 results of an annual study performed by the University of Washington, more than 261,000 workers were employed by contractors, construction services and materials suppliers in the State of Washington in 2008. This represents 10.8% of the State's private sector workforce. The total payroll for construction industry jobs exceeds \$13.3 billion, which represents 11.9% of the total state non-government payroll.

In 2008, in-state business activity in the construction industry was nearly \$35.2 billion, 18.2% of all in-State sales. Construction industry businesses paid a total of \$1.8 billion to the State in sales and B&O taxes. This figure represents 25.4% of all State sales tax payments, 11.3% of all B&O taxes and 21.3% of all payments combined. These figures do not

include local construction taxes, which represent an additional amount exceeding \$500 million.

II. ARGUMENT

In the substantial experience of this Amicus and its members, most mechanics' lien claimants who assert a lien claim pursuant to RCW 60.04.091 utilize the form contained in that statute to assert their claim of lien (the Safe Harbor form). Indeed, the AGC believes that there are presently hundreds of pending, recorded liens – representing untold millions of dollars in work – that utilize the Safe Harbor form. AGC's members seek to preserve their statutory right to certainty and payment security as provided in the lien statute and the Safe Harbor form.

A. **The Safe Harbor Form in RCW 60.04.091 Provides a Straightforward and Reliable Form to Record Mechanics' Liens.**

Amicus respectfully requests the Court to accept review of this case because the Division II opinion contradicts the plain language of RCW 60.04.091 and presents significant uncertainty and potentially disastrous consequences for mechanics' lien claimants who rely upon the statute's Safe Harbor form. It has long been the law in Washington that the mechanics' lien statute is to be “liberally construed” to effect the purpose of providing payment security for claimants. *See, e.g. Turner v. Furleigh* 124 Wash. 45, 47, 213 P. 454, 455 (1923). If the Court of

Appeals opinion is allowed to stand, mechanics' lien claimants will be unable to rely upon the Safe Harbor form, a result that is contrary to the intent of the Legislature to provide a simple and reliable manner in which to file mechanics' liens, and a result that is contrary to this Court's stated intent to liberally construe the lien statutes in favor of providing security to lien claimants.

The gist of Division II's holding is that the "Subscribed and sworn" language specifically approved by the legislature in the RCW 60.04.091 Safe Harbor form is fatally insufficient because it does not meet the more stringent requirements for certifications of acknowledgment in Chapter 64.08. This Chapter's more stringent requirements also apply to corporate representatives (RCW 64.08.070) and to individuals (RCW 64.08.060). By Division II's reasoning, *any* claim of lien using the Safe Harbor form specifically authorized in RCW 60.04.091 is subject to attack.

Indeed, motions based on the *Williams* opinion have already been filed in various superior courts challenging the validity of liens using verbatim the Safe Harbor language in RCW 60.04.091, including liens signed by lien claimants, by officers of lien claimants, and by attorneys for lien claimants.

Further, at least one trial court in Division I has already rejected Division II's reasoning, and the matter has been appealed. *Aero*

Construction Company Inc. v. Ledcor Construction Inc., et. al, No. 09-2-16775-3 SEA. A split is developing between Divisions regarding the issue in *Williams*.

The Opinion below creates not merely a "trap for the unwary," but creates a trap for anyone that relies upon the Safe Harbor form. The AGC estimates that there are literally hundreds of liens currently pending that were filed using the statutory Safe Harbor language and which are now subject to attack under Division II's ruling in *Williams*. Amicus asks the Court to accept review in order to resolve conflicting court rulings and restore predictability to the statutory lien process.

B. The Court of Appeals opinion rests on a fundamental mistake regarding the difference between an instrument's acknowledgment and a notary's certificate.

Amicus also urges the Court to accept review in order to correct three fundamental errors in the Division II opinion. First, Division II misconstrues the difference between an instrument's *acknowledgment* and a notary's *certificate of acknowledgment*. Second, Division II takes a passage in the lien statute requiring claims of lien to be *acknowledged* and misconstrues that phrase to impose requirements over the wording of the notary's *certificate*. And third, the notary certification language declared by Division II as being a required 'acknowledgment' directly contradicts what the legislature provided in the mechanics lien statute as being a

sufficient notary certification. These three errors in the *Williams* opinion combine to throw into doubt every claim of lien using the Safe Harbor form that is part of the mechanics lien statute, and which the statute says "shall be sufficient" to state a mechanics lien.

At the core of Division II's reasoning is the provision in the mechanics' lien statute, RCW 60.04.091, that a claim of lien "shall be acknowledged pursuant to chapter 64.08 RCW." 155 Wn. App. at 442. In the very next sentence of the opinion, Division II mistakes the notary *certificate* of an acknowledgment set forth in RCW 64.08.080 for an actual "acknowledgment." Repeatedly throughout its opinion Division II conflate notarial certificates with acknowledgments. *See, e.g.*, 155 Wn. App. at 442-44 ¶¶21, 22 ("The acknowledgment stated only, 'SUBSCRIBED AND SWORN to . . . '"), & 25.

But an *acknowledgment* is separate and distinct from a *certificate*. An acknowledgment is merely the affirmation signed by the person who is executing an instrument. Because Division II misconstrued the difference between an acknowledgment and a certification, it assumed that RCW

64.08 contains mandatory language for an acknowledgement. RCW 64.08 contains no such language.¹

RCW 64.08 regulates who may *take* an acknowledgment and how that person may *certify* the acknowledgment. RCW 64.08 says nothing about what an acknowledgment is required to recite. In contrast, the mechanic's lien statute says precisely what recital will be deemed a "sufficient" acknowledgment in a claim of lien:

I am the claimant (or attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan) above named; I have read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct and that the claim of lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.

RCW 60.04.091. The language for that acknowledgment is entirely consistent with Chapter 64.08. Division II held to the contrary because it misunderstood the difference between an acknowledgment and a certification:

¹ Chapter 64.08 does not include a definition of 'acknowledgment' but rather references the requirements of Chapter 42.44, which *does* include such a definition:

"Acknowledgment" means a statement by a person that the person has executed an instrument as the person's free and voluntary act for the uses and purposes stated therein and, if the instrument is executed in a representative capacity, a statement that the person signed the document with proper authority and executed it as the act of the person or entity represented and identified therein.

RCW 42.44.010(4). A certificate, by contrast, is the written certification signed by the notary who takes the principal's (or a representative's) acknowledgment. *See, e.g.*, RCW 64.08.020, -050, -060, -070 and 42.44.010(2) & -090.

The *acknowledgment* stated only, "SUBSCRIBED AND SWORN to before me this 1st day of December, 2004," followed by the signature, name, and title of the notary public and the date on which her commission expires. At best, this *acknowledgment* only satisfies the short form requirements for witnessing a signature set forth in RCW 42.44.100(4). It does not satisfy the more complex requirements of corporate *acknowledgment*.

155 Wn. App. at 443-44 (emphasis added).

Where the mechanics' lien statute and Chapter 64.08 *do* vary from one another is the respective language each contains for a *certificate* of acknowledgment. Chapter 64.08 sets forth certificate language for both corporate and individual acknowledgments, and references very similar certificate language set forth in Chapter 42.44. See RCW 64.08.060 & -070 and RCW 42.44.100. By contrast, the notary certification language specifically declared by the legislature to be "sufficient" is much shorter than both the corporate and individual certificate forms in Chapters 42.44 and 64.08. The certificate language approved as sufficient for a claim of lien is instead nearly identical to a typical short-form verification certificate: "Subscribed and sworn to before me this ___ day of ____." RCW 60.04.091; *cf.* RCW 42.44.100(3).

By expressly providing "sufficient" language for a claim of lien in the Safe Harbor form, the legislature specified that the certification language contained therein "shall be sufficient" in lieu of the more rigorous *certification* provisions of RCW 64.08. Thus, by interpreting the

mechanics lien provision that a claim of lien “shall be acknowledged pursuant to chapter 64.08 RCW” as though the law instead required that the claim’s acknowledgment “shall be *certified* pursuant to chapter 64.08 RCW,” Division II created a statutory conflict where none exists, and essentially invalidated the Safe Harbor form that is relied upon by the vast majority of mechanics’ lien claimants.

C. Even if the mechanics’ lien statute conflicts with Chapter 64.08 (which it does not), Division II erred by ignoring the more recent and specific enactment embodied in the mechanics lien statute and imposing the older and more generic provisions of Chapter 64.08.

Even if acknowledgment requirements in Chapter 64.08 (as referenced in the mechanics lien statute) conflicted with the short-form certification language specifically approved as “sufficient” in the mechanics lien statute itself, the mechanics lien provision approving the short-form certification would control because it is the more recent and more specific enactment. “To resolve apparent conflicts between statutes, courts generally give preference to the more specific and more recently enacted statute.” *Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691, 697 (2000). Division II erred by making no attempt to harmonize the provisions of the mechanics lien statute with Chapter 64.08, and by instead concluding that a claimant using *verbatim* the Safe Harbor lien claim form fails as a matter of law to state a valid claim of lien.

D. Division II ignored the contrary holding of *Fircrest Supply v. Plummer*.

In addition, Division II's opinion overlooks and conflicts with Division I's holding in *Fircrest Supply, Inc. v. Plummer*, 30 Wn. App. 384, 634 P.2d 891 (1981), where the court rejected challenges to a mechanics lien claim on grounds similar to those in the present case. Aside from an issue over the adequacy of a lien's legal description, the claim of lien in *Fircrest* had three alleged infirmities: (1) The acknowledgment text gave the name of the representative signing for the claimant without expounding on that person's representative capacity; (2) the notary rather than the representative signed the acknowledgment; and (3) the notary did not sign the notary certification.

Division I swept all three objections aside as little more than scrivener irregularities. Regarding the lack of explanation in the acknowledgment of the representative's capacity to sign on behalf of the corporate lienholder, the court held that mere identification of the individual as the "agent" of the lien claimant was sufficient:

The [mechanics lien] statute requires only that the claim be "signed by the claimant, or by some person in his behalf". RCW 60.04.060. Nothing in the record suggests that *Fircrest* did not comply fully with this requirement.

30 Wn. App. at 391. The certificate form in *Fircrest* was the same "Subscribed and sworn to before me" short form language as in the

present case, but in *Fircrest* had inadvertently been signed by the notary instead of the claimant's representative. The court held that the purpose of the verification was to establish that the claim was being signed under oath, and that notwithstanding the inadvertent signature errors that purpose had been accomplished and the statute's requirements had therefore been substantially complied with. 30 Wn. App. at 390-91.

III. CONCLUSION

Division II's Opinion will cause enormous harm to the construction industry, as well as every lien claimant using the Safe Harbor lien form approved by the legislature in RCW 60.04.091. The AGC estimates that there are hundreds of pending liens and lien foreclosure actions which used the statutory form and are now at risk because of the Opinion. The legislature never intended such a result, its statutory language does not compel such a result, and routine statutory construction would have avoided such a result. Amicus respectfully requests the Court to grant the Petition for Review.

DATED this 2 day of July, 2010.

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CERTIFICATE OF SERVICE

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I hereby certify that I caused to be served on July 2, 2010, true and correct
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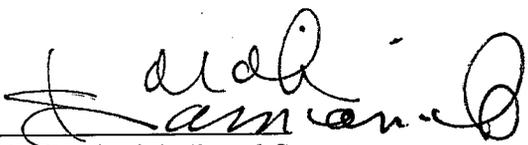
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