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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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

v.

ATHLETIC FIELD, INC.,
Appellant.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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ISSUES PRESENTED FOR REVIEW

1. Where RCW 60.04.091(2) gives only three options as entities or individuals who qualify as “*some person authorized to act on (the claimant’s) behalf*”, and where the person that signed Petitioner, Athletic Field, Inc.’s (AFI’s) lien is none of these options, is the attestation clause defective?

2. Where AFI’s mechanics’ and materialmen’s lien is not signed by any of the three recognized entities allowed by the statute (see the attestation in the Sample Form in RCW 60.04.091), is it invalid on its face and frivolous?

3. Where the Washington State Legislature, in crafting the state’s mechanics’ and materialmen’s lien statute (RCW 60.04.091), specifically included a requirement that the lien be acknowledged pursuant to 64.08 RCW, and where Petitioner’s lien was not acknowledged pursuant to 64.08 RCW, did the Court of Appeals properly hold Petitioner’s lien to be invalid?

4. Where Petitioner let the statute of limitations lapse on both its underlying lien claim and any potential breach of contract claim, is the Petition for Review to the Supreme Court moot?

5. Should the Respondents, the Williams, be awarded their attorneys’ fees for prevailing against Petitioner, AFI?

STATEMENT OF THE CASE

Statement of Facts.

This case arose from an oral construction contract between the Williams and AFI. CP 18. The parties agree that AFI began working on the Williams' property on May 14, 2004 and its last day of work on the property was November 30, 2004. CP 12-13.

The parties agree that AFI appointed LienData, USA, Inc. ("LienData") as an agent for purposes of filing the lien against the Williams' property.¹ The parties agree a lien was filed, on behalf of AFI, against the Williams' property. CP 12-13. The parties agree that, despite RCW 60.04.091's requirement that the lien be acknowledged pursuant to 64.08 RCW, AFI's lien was not acknowledged accordingly.²

AFI does not dispute that Rebecca Southern signed the lien in her individual capacity. *Id.* There is absolutely no evidence in the record of whom Southern is, or that she is connected as an employee or otherwise to LienData. There is no dispute that Southern is not the claimant, the claimant's attorney, or the administrator, representative, or agent of the trustees of an employee benefit plan. CP 57.

Procedural History.

On December 6, 2004, AFI filed a frivolous lien against the

¹ See Brief of Appellant, page 10.

² See Appellant's Petition for Review, page 8-9.

Williams' property. CP 12-13. On June 15, 2005, Williams brought a Motion to Show Cause Re: Removal of Frivolous Lien. CP 1. Williams argued that AFI's lien failed to comply with the lien statutes, specifically RCW 60.04.091. CP 36-46.

AFI responded, acknowledging that Southern signed the lien as an individual, and asserted that she was LienData's employee. CP 57. AFI did not submit evidence regarding who Southern was or if she had any affiliation with LienData. It did not submit evidence that Southern was an authorized agent of LienData or otherwise affiliated with AFI.

On June 27, 2005, Pro Tem Commissioner John Cain released the lien. CP 135-137. AFI brought a Motion for Revision arguing that: (1) though Southern signed the lien in her individual capacity, the lien was properly signed and acknowledged; (2) that Williams did not meet their initial burden that the lien was frivolous; (3) that AFI met its burden of proof to establish a prima facie case that the lien was valid, not frivolous, and based on reasonable cause; and (4) that the Williams' attorneys' fee award was erroneous. CP 140-148. On July 15, 2005, Superior Court Judge D. Gary Steiner, denied AFI's Motion for Revision and awarded Williams' their attorneys' fees. CP 406-409.

On July 28, 2005, AFI filed its Notice of Appeal. CP 414. In addition to other issues not relevant to its Petition for Review, AFI

assigned error to the same issues it raised in its Motion for Revision. See Brief of Appellant, pages 4-5.

The parties briefed the issue and, during oral argument, the undersigned counsel for the Williams cited the case of *Ben Holt Industries, Inc. v. Milne*, 36 Wash.App. 468, 470-473, 675 P.2d 1256 (Div. 1, 1984) to support the Williams' argument that AFI's lien did not substantially conform to RCW 60.04.091, specifically, AFI's lien had not been properly acknowledged.

On August 1, 2006, the Court of Appeals Division 2 found that AFI appointed LienData to sign the lien on its behalf.³

The Court of Appeals found that AFI's lien was not frivolous since "[w]hether RCW 60.04.091 permits any authorized agent to sign the attestation clause, rather than only the claimant or the claimant's attorney, is an issue of first impression subject to legitimate dispute." *Id.*

On August 21, 2006, Williams filed a Motion for Reconsideration, arguing that Southern's signature on the lien was invalid since she had not been properly identified as having any relationship or authority from AFI's corporate agent, LienData and since her signature was not notarized the with proper corporate acknowledgment.

On April 7, 2010, the Court of Appeals, Division 2 reconsidered its

³ See e.g., *Williams v. Athletic Field, Inc.*, 142 Wash.App. 753, 763, 139 P.3d 426 (Div. 2, 2006).

decision, holding that the attestation clause Southern signed did not meet either RCW 64.08.070 or RCW 42.44.100(2)'s requirements.⁴ Attachment A, Slip Op. at page 7. It held that the attestation clause, on its face, failed to substantially comply with either statute because it did not indicate that Southern signed in a representative capacity on behalf of LienData and the attestation clause failed to identify her as an officer or employee of LienData. *Id.* at page 8-9. The Court stated that the corporate acknowledgment elements, as set forth in *Ben Holt* were not satisfied by the attestation clause on the lien claim.⁵

The Court held that, while the lien was invalid, it was not frivolous “[b]ecause the issue of who may attest to a claim of lien is a debatable legal issue, the question of the form of acknowledgment for a corporate agent attesting to the lien is likewise subject to legitimate legal debate. *Id.* at 10.

ARGUMENT

I. Under RCW 60.04.091, only three entities or individuals can sign a mechanics and materialman’s lien.

A. RCW 60.04.091 is unambiguous.

If a statute is unambiguous, courts are required to apply the statute

⁴ AFI asserted that when the legislature enacted RCW 42.44.100 in 1985, then the acknowledgment requirements in RCW 64.08 *et seq.* were no longer applicable.

⁵ 36 Wash.App. at 471-72

as written and assume the legislature means exactly what it says.⁶ An unambiguous statute is not subject to judicial construction and courts have declined to insert words where the language, taken as a whole, is clear and unambiguous.⁷ When the language is clear, courts cannot construe a statute contrary to its plain language.⁸

In a statute's language is unambiguous, a reviewing court is to rely solely on the statutory language.⁹ A reviewing court may not delete language from an unambiguous statute.¹⁰

Neither party contends that RCW 60.04.091 is ambiguous. The parties agree that the court must apply the statute exactly as it is written. The court must assume that the legislature meant exactly what it wrote in the statute. The court cannot insert or delete words, or construe RCW 60.04.091 contrary to its plain meaning.

B. The Court must give effect to the statutory scheme as a whole.

A well-settled principle of statutory construction is that each word

⁶ See e.g. *Plouffe v. Rock*, 135 Wash.App. 628, 633, 147 P.3d 596 (Div. 1, 2006) (citing *State v. Radan*, 143 Wash.2d 323, 330, 21 P.3d 255 (2001)).

⁷ *Plouffe*, 135 Wash.App. at 633 (citing *Tenino Aerie v. Grand Aerie*, 148 Wash.2d 224, 239, 59 P.3d 655 (2002)).

⁸ *Plouffe*, 135 Wash.App. at 633 (citing *City of Kirkland v. Ellis*, 82 Wash.App. 819, 826, 920 P.2d 1996)).

⁹ See e.g., *State v. Roggenkamp*, 153 Wash.2d 614, 621, 106 P.3d 196 (2005) (citing *State v. Avery*, 103 Wash.App. 527, 532, 13 P.3d 226 (2000)).

¹⁰ *Id.* at 624.

of a statute is to be accorded meaning.¹¹ The drafters of legislation are presumed to have used no superfluous words and the court must accord meaning to every word in a statute.¹²

A statutory construction principle consistent with this view is that of *noscitur a sociis*, which provides that a single word in a statute should not be read in isolation, and that the ‘meaning of words may be indicated or controlled by those which they are associated.’¹³

AFI assigned error to the trial court’s finding “[t]hat the lien filed and recorded for... [AFI] by LienData...was not signed, under penalty of perjury, by the Claimant (or an officer of the Claimant corporation) or by an attorney for the Claimant, in violation of RCW 60.04.091.¹⁴ AFI acknowledges that the statute’s language requires the signing person or entity to be the claimant, the claimant’s attorney, or administrator, representative, or agent of the trustees of an employee benefit plan.¹⁵

AFI also takes issue with the Court enforcing RCW 60.04.091’s requirement “that a claim of lien ‘shall be acknowledged pursuant to chapter 64.08.’”¹⁶

¹¹ *Id.* citing *State ex rel. Schillberg v. Barnett*, 79 Wash.2d 578,584, 488 P.2d 255 (1971).

¹² *Roggenkamp*, 153 Wash.2d at 624 (citing *In re Recall of Pearsall-Stipek*, 141 Wash.2d 756, 767, 10 P.3d 1034 (2000) (quoting *Greenwood v. Dep’t of Motor Vehicles*, 13 Wash.App. 624, 628, 536 P.2d 644 (1975))).

¹³ *Roggenkamp*, 153 Wash.2d at 622.

¹⁴ See Appellant’s Opening Brief, page 11.

¹⁵ *Id.*

¹⁶ See Petition for Review, page 9.

AFI asks the Court to focus on the language found in RCW 60.04.091(2) that the lien “[s]hall be signed by the claimant or some person authorized to act on his or her behalf,” and on the language stated “[a] claim of lien substantially in the following form shall be sufficient...”

Well established case law holds that the Court must give meaning to all the words in the statute. In order to apply the case law to the statute, the Court must read that the notice of the claim of lien “[s]hall be signed by the claimant or some person authorized to act on his or her behalf” with the language in the sample lien: “I am the claimant (or attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan).” At the same time, the Court must give effect to the language requiring the lien be acknowledged pursuant to RCW 64.08 and that the “claim of lien substantially in the following form shall be sufficient.”

By finding that the only persons or entities authorized to act on the claimant’s behalf are those found in the suggested attestation clause, the trial court gave effect to all the statute’s sections. This interpretation of RCW 60.04.091 is consistent with the language declaring the lien sufficient as long as it is substantially in the form of the sample lien. The trial court and Court of Appeals gave effect to all sections of the statute when finding that the lien acknowledgment must comply with RCW

64.08.070. While the form of the lien does not have to match the sample lien exactly, the lien must contain the substance required by RCW 60.04.091.

The only way for the Court to read all the statutory provisions together is to (1) limit the “person authorized to act on [the claimant’s] behalf” to those persons specifically identified later in the statute in the attestation clause found in the sample form; (2) require that the lien be acknowledged pursuant to RCW 64.08; and (3) find a lien in substantially the form provided in RCW 60.04.091 to be sufficient. To give effect to all of the language in RCW 60.04.091, the Court cannot ignore the substance of the RCW 60.04.091. Only the claimant OR “person(s) authorized to act on [the claimant’s] behalf” (the claimant’s attorney, or administrator, representative, or agent of the trustees of an employee benefit plan) can sign a claim of lien and the lien must be acknowledged pursuant to RCW 64.08.

AFI’s approach requires the Court to read certain sections of RCW 60.04.091 in isolation of other parts. AFI wants the Court to use the sample form exclusive of the statutory requirement of the lien claim being acknowledged pursuant to chapter 64.08 RCW. AFI’s position violates the principle of *noscitur a sociis*. The sample form is associated with RCW 60.04.091 in its entirety and cannot be interpreted separately and

without consideration of the rest of the statute.

C. It is undisputed that Southern is not the claimant, the claimant's attorney, or administrator, representative, or agent of the trustees of an employee benefit plan.

AFI never contended that Southern was the claimant, the claimant's attorney, or administrator, representative, or agent of the trustees of an employee benefit plan. The Williams established that the Court cannot simply ignore that statutory language. Applying the statutory language to AFI's lien shows that the lien is defective.

II. AFI's lien frivolous since it is invalid on its face and it cannot be reasonably argued to be a valid lien.

A. Southern is not one of the three persons allowed to sign AFI's lien claim.

A lien is frivolous when it is improperly filed beyond legitimate dispute.¹⁷

The Court can read RCW 60.04.091 in only one way in order to give effect to all of the words in the statute, consistent with well established case law. The Court must interpret RCW 60.04.091 to mean that only one of three (3) persons can sign a claim of lien: (1) the claimant, (2) the claimant's attorney, or (3) the administrator, representative, or agent of the trustees of an employee benefit plan. Nos. (2) & (3) are, by a full reading of the statute, the only "person(s) authorized to act on [the

¹⁷ See e.g., *W.R.P. Lake Union Ltd. Partnership v. Exterior Services, Inc.*, 85 Wash.App. 774, 752, 934 P.2d 722 (Div. 1, 1997).

claimant's] behalf".

It is undisputed that Southern is not any of the three persons allowed to sign AFI's lien. AFI cannot reasonably argue that Southern could properly sign the lien under RCW 60.04.091. It is beyond legitimate dispute that none of the persons which RCW 60.04.091 designates as "authorized" signed the lien. Therefore, it is beyond legitimate dispute that this lien is invalid. Under the well established rules of statutory construction and AFI's concession that Southern is not the claimant, the claimant's attorney, nor the administrator, representative, or agent of the trustees of an employee benefit plan, this lien is invalid on its face and frivolous.

B. AFI did not present a prima facie case as to why the lien was not frivolous.

Once Williams provided the reason why AFI's lien was frivolous to the trial court, the burden shifted to AFI to present a prima facie case as to why the lien was not frivolous.¹⁸

In their *Memorandum of Law in Support of Motion for Removal of RCW 60.04 Lien and for Award of Attorneys Fees*, which accompanied their *Motion for Order to Show Cause...*, Williams argued that the lien was invalid on its face and frivolous because none of the persons

¹⁸ *W.R.P. Lake Union Ltd. Partnership*, 85 Wash.App. at 752.

permitted by statute had signed the lien. CP 40-45. In doing so, the burden shifted to AFI to present a prima facie case as to why the lien was not frivolous.

In AFI's response, it failed to present any evidence as to who Southern was and what relationship, if any, she had to or with AFI and/or to or with LienData. CP 52-58.

Southern is not a person that anybody involved in this litigation knows (nor was any evidence presented by AFI below) who she is or in what capacity she signed AFI's claim of lien. There is no relationship between her and LienData disclosed in any form or fashion in the acknowledgment, the attestation/verification, or elsewhere in the document. The acknowledgment or the attestation/verification on the claim of lien neither meets even the minimal requirements of identifying a true "agent" nor does it come even close to RCW 64.08's requirements for the acknowledgment for an officer representing a corporation's interest and representing a claimant.

III. The Washington legislature, in crafting the state's mechanics & materialmen's lien statute, RCW 60.04.091, specifically included a requirement that the lien be acknowledged pursuant to 64.08 RCW, making any mechanics' & materialmen's lien not acknowledged per 64.08 RCW invalid.

A. AFI has provided no legal authority for its position.

AFI provides no legal authority for its argument that certain

language in RCW 60.04.091 “trumps” or invalidates other language in RCW 60.04.091. Where no authorities are cited, the Court may assume that counsel, after diligent search, has found none.¹⁹

Williams provided well established case law that the Court must give effect to the plain language in the statute, without adding or deleting words, and must give effect to every word in the statute, assuming that the legislature does not include superfluous language.²⁰ The Court must give effect to RCW 60.04.091’s requirement that the claim of lien be acknowledged pursuant to 64.08 RCW. The Court properly applied RCW 60.04.091 as it was written.

B. The legislature specifically considered 64.08 RCW before including it as a requirement to a claim of lien.

The Court presumes that the legislature does not include superfluous language in a statute.²¹

As AFI pointed out, 64.08 RCW had been in effect for many decades when the Washington legislature specifically included it in RCW 60.04.091. The Court must assume that the legislature did not include any superfluous language and give the language in a statute its plain meaning.

The Court must assume that the legislature intended to include the command language in RCW 60.04.091 requiring claims of lien to be

¹⁹ See e.g., *DeHeer v. Post Intelligencer*, 60 Wash.2d 122, 126, 372 P.2d 193 (1962).

²⁰ *Roggenkamp*, 153 Wash.2d at 621, 624.

²¹ See e.g., *State v. Stately*, 152 Wash.App. 604, 605, 216 P.3d 1102 (Div. 2, 2009).

acknowledged pursuant to chapter 64.08 RCW.

AFI has not produced any authority to support its argument that this Court should ignore the statutory requirement that a lien be acknowledged pursuant to chapter 64.08 RCW.

C. RCW 60.04.900 does not require the Court to ignore the statutory requirements of RCW 60.04.091.

The Court derives the plain meaning of a statute from the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.²²

The Court must construe RCW 60.04.900²³ to be consistent with RCW 60.04.091. It cannot ignore RCW 60.04.091's statutory requirements, as AFI asserts.

The only legal authority AFI asserts to support its position is *Fircrest Supply, Inc. v. Plummer*, 30 Wash.App. 384, 634 P.2d 891 (1981), decided ten (10) years before the Washington legislature enacted RCW 60.04.091. *Fircrest Supply, Inc.* is not instructive in the present case. In *Fircrest Supply, Inc.*, the contractor included the street address, but not the legal description of the property on the lien. *Id.* at 386. The property owner argued that the lien was deficient without the legal

²² *Stately*, 152 Wash.App. at 606.

²³ RCW 60.04.900 reads in its entirety: “RCW 19.27.095, 60.04.230, and 60.04.011 through 60.04.226 and 60.04.261 are to be liberally construed to provide security for all parties intended to be protected by their provisions.”

description as “there would be no way for third parties such as bona fide purchasers to discover the existence of the lien...” *Id.* at 388. The Court of Appeals disagreed and cited the Supreme Court’s decision in *Whittier v. Stetson & Post Mill Co.*, 6 Wash. 190, 33 P. 393 (1893)²⁴, stating that “[i]t does not appear that the legislature intended to burden the construction industry with the obligation to research title [of the property] before each claim of lien.” *Id.* The *Fircrest Supply, Inc.* holding does not stand for the proposition that “unsophisticated” contractors can disregard the statutory requirements of the lien statute, as AFI asserts.

While AFI goes on to argue that courts have abandoned the rule of strict construction, Washington courts continue to use the strict construction standard in construing the mechanics and materialmen’s statute (lien statute), including *Van Wolvelaere v. Weathervane Window Co.*, 143 Wash.App. at 409 (wherein Division 1 held in 2008 that the lien statute must be strictly construed).

D. The Court of Appeal decision applied the statute as it was written.

AFI erroneously asserts that the Court judicially mandated that claims of lien to be acknowledged pursuant to chapter 64.08 RCW, when

²⁴ In *Whittier*, the Supreme Court held “The grantor-grantee indexing system employed by county auditors in this state is designed to give constructive notice, so long as the description given is sufficient to identify the property with reasonable certainty to the exclusion of other parcels.”

in fact, the Court merely applied RCW 60.04.091 exactly as it was written. Any effect on present and future lien claims that AFI is asserting is a result of the statute's plain language, not a result of the Court's decision.

The Court's decision is consistent with the well established law governing statutory construction, strictly construing the lien statute, and the law governing corporate acknowledgments. AFI has not produced any case law or legal authority for its position that the Court should have ignored the statute's requirement that a lien claim be acknowledged pursuant to chapter 64.08 RCW.²⁵

E. The sample form alone does not fulfill RCW 60.04.091's requirements that a claim of lien be acknowledged pursuant to chapter 64.08 RCW.

1. An acknowledgment pursuant to chapter 64.08 RCW is a statutory requirement.

Statutes must be interpreted and construed so that all language used is given, with no portion rendered meaningless and superfluous.²⁶

RCW 60.04.091(2) does not require only that a lien be declared to be true under penalty of perjury and be acknowledged, it requires that the lien be acknowledged *pursuant to chapter RCW 64.08 RCW*. The Court

²⁵ AFI argues that the subject lien uses the sample form "verbatim". However, the sample form requires that the lien claimant, the lien claimant's attorney, or administrator, representative, or agent of the trustees of an employee benefit plan sign the lien. AFI admitted that its lien was not signed by any of these three people/entities. As such, AFI's lien does not comply with even the sample form.

²⁶ *Roggenkamp*, 153 Wash.2d at 624.

cannot simply disregard this requirement because AFI claims, without any legal authority, that the lien accomplishes RCW 60.04.091's unwritten objectives. The statute specifically requires an acknowledgment pursuant to chapter 64.08 RCW - without such an acknowledgment, the statutory requirements are not met.

2. AFI failed to meet the statutory requirements when filings its lien, making it frivolous.

Notwithstanding AFI's argument that the statutory form under RCW 60.04.091 (if signed by the proper person) could satisfy the statutory requirements for both verification/attestation AND acknowledgment, the lien filed for AFI is still invalid on its face, and should, therefore, be found to be frivolous.

Even if the Court accepts AFI's argument and allows lien claimants to use the sample form verbatim, the person or entity signing the lien claim must declare, under the penalty of perjury that she is the claimant, attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan. The sample form (and the statute) allows only these three persons (or entities) to sign a lien claim.

There is NO evidence in the lien of who "Rebecca Southern" is, and what relationship (if any) she has to either the "Claimant"- AFI, or the

"Agent for the Claimant" - Lien Data. AFI does not dispute that Ms. Southern is none of the persons/entities permitted to sign the lien claim in the sample form.

AFI cannot "correct" the defective acknowledgment. Under well settled and long standing Washington case law, all later offered evidence (parol evidence) is inadmissible to resuscitate this lien, invalid on its face.²⁷

IV. AFI's lien claim and any potential breach of contract claim are moot.

A. The statute of limitations on foreclosure of AFI's lien claim has expired.

RCW 60.04.141²⁸ is a statute of limitations.²⁹ A lien on the property is binding for no longer than eight (8) months after the lien was recorded unless the lien claimant files a lawsuit to enforce the lien within eight (8) months.³⁰ To collect on a lien, a claimant must commence a

²⁷ See *Ben Holt Industries, Inc.*, 36 Wash.App. at 472.

²⁸ RCW 60.04.141 reads in relevant part: "No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim of lien has been recorded unless an action is filed by the lien claimant within that time in the superior court in the county where the subject property is located to enforce the lien, and service is made upon the owner of the subject property within ninety days of the date of filing the action; or, if credit is given and the terms thereof are stated in the claim of lien, then eight calendar months after the expiration of such credit... This is a period of limitation, which shall be tolled by the filing of any petition seeking protection under Title Eleven, United States Code by an owner of any property subject to the lien established by this chapter."

²⁹ See e.g., *Van Wolvelaere v. Weathervane Window Co.*, 143 Wash.App. 400, 405, 177 P.3d 750 (Div. 1, 2008); See also *Geo Exchange Systems, LLC v. Cam*, 115 Wash.App. 625, 629, 65 P.3d 11 (2003).

³⁰ *Van Wolvelaere*, 143 Wash.App. at 405.

legal action in superior court within eight (8) calendar months after recording a lien claim; thus if an action is not filed within eight (8) months, the right to recover on this record lien expires.³¹

The lien statute must be strictly construed and equitable considerations cannot ameliorate its effects.³² One claiming the benefits of the lien must show that he complied strictly with the provisions of the law that created it. *Id.*

AFI recorded its lien on December 6, 2004.³³ Pursuant to RCW 60.04.091, AFI had until August 6, 2005 to file an action in superior court and seek to foreclose on its lien. The statute of limitations on AFI's lien claim expired on August 6, 2005. AFI failed to file any complaint in any court to foreclose its claim of lien. AFI no longer has the right to pursue an action on its lien claim.

Washington courts do not make equitable considerations when construing the lien statute. In order for AFI to claim the benefits of its lien, it must show that it strictly complied with the statute. Considering the statute of limitations ran on its claim nearly five (5) years ago, AFI cannot show strict compliance with the statute.

B. The statute of limitations on any potential breach of contract claim has expired.

³¹ *Geo Exchange Systems, LLC*, 115 Wash.App. At 629.

³² *Van Wolvelaere*, 143 Wash.App. at 409.

³³ See Claim of Lien as attached to AFI's Petition for Review.

RCW 4.16.080(3) reads in relevant part: “[t]he following actions shall be commenced within three years: (3) ... an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument.”

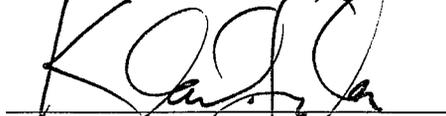
The parties to this action had an oral contract. CP 18. AFI had three (3) years after the alleged breach of contract to bring an action against the Williams. The lien claim indicates that AFI stopped working on the Williams’ property on November 30, 2004. AFI claims that the alleged breach of contract happened around that time. CP 54. AFI had until November 30, 2007 to bring a breach of contract claim. The statute of limitations expired on AFI’s potential breach of contract claim two and a half (2.5) years ago.

V. CONCLUSION

The Court should accept review to reinstate the trial court’s decision that the AFI lien was invalid on its face and thus, frivolous. The Court should deny AFI’s petition for review, as its claims are moot.

RESPECTFULLY SUBMITTED THIS 7th day of JUNE, 2010.

SNYDER LAW FIRM, LLC


KLAUS O. SNYDER, WSB# 16195
Of Attorneys for Respondents

SNYDER LAW FIRM, LLC


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of Attorneys for Respondents

APPENDIX

ATTACHMENT A

FILED
COURT OF APPEALS
DIVISION II

NOV 7 AM 9:53

STATE OF WASHINGTON

BY lp
DEPUTY

No. 33607-37H

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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

Respondents,

v.

ATHLETIC FIELD, INC., a Washington
corporation,

Appellant.

PUBLISHED OPINION

HOUGHTON, J. — Athletic Field, Inc., appeals a trial court order releasing its mechanics' lien as frivolous and awarding attorney fees and costs to the property owners, Terry and Janis Williams. The trial court found the lien invalid because a lien filing service employee signed the notice of lien's attestation clause. Athletic argues that the trial court erred in construing the statute as requiring that either the claimant or the claimant's attorney sign the attestation clause. We affirm in part and reverse in part and remand.

FACTS

The Williamses are the owners and developers of a parcel of land in Sumner. Their development project required site preparation work estimated to cost \$419,925, followed by construction of a commercial warehouse. In spring 2004, they orally contracted with Athletic Field, Inc., to complete either some portion or all of the site preparation work (the parties dispute the scope of the agreement). They later made three payments to Athletic totaling approximately \$155,000 for work completed. But they were dissatisfied with the pace of Athletic's performance. In October 2004, Athletic's owner, Craig Starren, asked the Williamses to sign a written contract. Instead, the Williamses ordered Athletic to discontinue work and vacate the site.

The Williamses moved for an order to show cause why relief should not be granted under RCW 60.04.081, the frivolous lien statute.¹ They claimed that the lien was invalid because neither Athletic nor its attorney signed the attestation clause. They further noted the absence of a written contract and stated that they had paid Athletic for all the work it performed and, in fact, had overpaid Athletic.

In support of their show cause motion, the Williamses filed declarations by Terry Williams and Norman Hubbard, an Athletic employee who acted as the site project manager. Hubbard stated that he was a general contractor on the project, that he brought Athletic in to perform only a portion of the work, that his own company performed a substantial portion of the work, and that the Williamses paid Athletic all amounts due.

In opposing the motion, Athletic contested the Williamses' interpretation of the statute, arguing that, according to RCW 60.04.081, any authorized agent may sign the attestation clause. Athletic argued that the lien's validity could not be resolved in the context of a show cause proceeding because it involved disputed factual issues about the amount of work performed and monies due that required a trial on the merits.

In support of its opposition, Athletic filed Starren's declaration stating that his oral agreement with the Williamses was for performing the entire site preparation work and that Athletic had completed 90 percent of the work. Starren also stated that Hubbard was his full-time employee, not a general contractor, and that any work he performed is attributable to Athletic because Athletic provided all the labor, services, and equipment. He also stated that he performed additional work at the Williamses' request worth \$50,000.

¹ RCW 60.04.081 was amended in 2006 and for purposes of this opinion, there were no substantive changes.

In reply, the Williamses submitted additional declarations by Hubbard and Terry Williams rebutting Athletic's allegations. Williams stated that the additional work allegedly worth \$50,000 was a fill project costing far less and that he actually did Athletic a favor by permitting it to use the site as a dumping ground for the "dirty dirt"² it accumulated at other projects. Hubbard again asserted that his own company performed most of the work.

After hearing argument on the motion, a pro tempore superior court commissioner entered an order releasing the lien and awarding attorney fees and costs to the Williamses for an amount to be determined at a motion for revision hearing held by a superior court judge. The order states that the lien did not comply with RCW 60.04.091 because it "was not signed, under penalty of perjury, by the Claimant (or an officer of the Claimant corporation) or by an attorney for the Claimant." Clerk's Papers at 136. The order further states that the Williamses met their initial burden to show that the lien was frivolous and without reasonable cause and that Athletic failed to present a prima facie case to the contrary, but the commissioner provided no explanation for this determination.³

In its motion for revision by the superior court, Athletic filed several declarations rebutting the Williamses' assertions made in reply to the motion. The trial court granted the Williamses' motion to strike Athletic's additional pleadings and denied Athletic's motion to revise the commissioner's ruling. The trial court entered an order awarding the Williamses approximately \$10,000 in attorney fees and costs. Athletic appeals.

² Williams explained that "dirty dirt" needs to be screened for use other than as fill. Clerk's Papers at 77.

³ Our record does not contain a transcript of the show cause hearing.

ANALYSIS

RCW 60.04.091

We first address whether the notice of claim of lien recorded here complied with the statutory requirements. Athletic contends that the trial court erred when it ruled that RCW 60.04.091 requires either the claimant or the claimant's attorney sign the attestation clause and that no other authorized agent may do so.

We review statutory construction issues de novo. *LRS Elec. Controls, Inc. v. Hamre Constr., Inc.*, 153 Wn.2d 731, 738, 107 P.3d 721 (2005). We give effect to the plain meaning of a statute as an expression of legislative intent. *State v. Thompson*, 151 Wn.2d 793, 801, 92 P.3d 228 (2004).

We strictly construe lien statutes because they are in derogation of the common law. *Dean v. McFarland*, 81 Wn.2d 215, 219-20, 500 P.2d 1244 (1972). A lien claimant must clearly demonstrate satisfaction of all the statutory lien claim requirements. *Dean*, 81 Wn.2d at 220.

Under RCW 60.04.091, a lien claimant must file a notice of claim of lien within 90 days after the claimant ceased to supply services or materials to a subject property. Subsection (1) sets forth the required content of the lien claim. Subsection (2) provides that the lien claim must be notarized and "[s]hall be signed by *the claimant or some person authorized to act on his or her behalf* who shall affirmatively state they [sic] have read the notice of claim of lien and believe the notice of claim of lien to be true and correct under penalty of perjury A claim of lien *substantially in the following form* shall be sufficient." RCW 60.04.091 (emphasis added).

A sample attestation clause follows, stating in part:

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

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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(2) (emphasis added).

Athletic argues that the attestation clause for a lien claim may be signed by any authorized agent of the claimant, not just the claimant or the claimant's attorney. The Williamses respond that the acknowledgment signed by Rebecca Southern in her individual capacity does not substantially comply with RCW 60.04.091 because LienData was Athletic's agent and, as a corporation, LienData must acknowledge the claim of lien using the corporate form.

The Williamses cite *Ben Holt Industries, Inc. v. Milne* to support their argument that the acknowledgment was defective. 36 Wn. App. 468, 675 P.2d 1256 (1984). Athletic counters that the separate corporate acknowledgment set forth in RCW 64.08.070 is no longer required and that the required form is set forth in RCW 42.44.100. According to Athletic, the acknowledgment signed by Rebecca Southern fulfills the requirements of RCW 42.44.100. The Williamses' argument persuades us.

A lien claim is invalid if it does not substantially comply with RCW 60.04.091. See *Lumberman's of Wash., Inc. v. Barnhardt*, 89 Wn. App. 283, 289, 949 P.2d 382 (1997). In 1991, the legislature amended the statute to require that a claimant attest to the lien's validity under penalty of perjury. *Lumberman's*, 89 Wn. App. at 287-88. In the absence of evidence that the claimant (or someone authorized to act on the claimant's behalf) attested to its validity, a lien claim does not substantially comply with RCW 60.04.091. See *Flag Constr. Co. v. Olympic Boulevard Partners*, 109 Wn. App. 286, 290, 34 P.3d 1250 (2001).

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RCW 60.04.091(2) requires that the notice of claim of lien "shall be acknowledged pursuant to chapter 64.08 RCW." Chapter 64.08 RCW provides two forms of acknowledgment, one for individuals and one for corporations. RCW 64.08.070 sets forth the following form for a corporate acknowledgment:

On this day of, 19, before me personally appeared, to me known to be the (president, vice president, secretary, treasurer, or other authorized officer or agent, as the case may be) of the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

RCW 64.08.070 also provides that after December 31, 1985, a certificate of acknowledgment for a corporation is valid if it substantially complies with the short form set forth in RCW 42.44.100(2). This short form acknowledgment for one acting in a representative capacity is:

I certify that I know or have satisfactory evidence that (name of person) is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument, on oath stated that (he/she) was authorized to execute the instrument and acknowledged it as the (type of authority, e.g., officer, trustee, etc.) of (name of party on behalf of whom instrument was executed) to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

RCW 42.44.100(2).

The attestation clause signed by Rebecca Southern does not meet the requirements of either RCW 64.08.070 or 42.44.100(2). The attestation clause in the claim of lien stated only,

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.

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/S/ Rebecca Southern

SUBSCRIBED AND SWORN to before me this 1st day of December, 2004.

/S/ Judi M. Elsbree
NOTARY PUBLIC in and for the
State of Washington, residing at Bothell.
My Commission expires: 08/18/07

This attestation clause fails to substantially comply with the forms provided in RCW 64.08.070 and RCW 42.44.100 because it does not indicate that Southern signed in a representative capacity on behalf of LienData. 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.

In *Ben Holt*, the Court of Appeals invalidated a lease because the lessor acknowledged the lease using the individual acknowledgment form rather than the corporate acknowledgment form. 36 Wn. App. at 472-73. Citing the Supreme Court's decisions in *Yukon Inv. Co. v. Crescent Meat Co.*, 140 Wash. 136, 248 P. 377 (1926) and *Bank of Commerce of Anacortes v. Kelpine Prods. Corp. of Am.*, 167 Wash. 592, 10 P.2d 238 (1932), the court held that four elements are required for a valid corporate acknowledgment: (1) the person signing the instrument was known to the notary to be an officer of the corporation which executed the instrument; (2) he acknowledged the same to be the free and voluntary act of the corporation; (3) he was authorized to execute it on behalf of the corporation; and (4) the seal affixed was the corporate seal. *Ben Holt*, 36 Wn. App. at 471-72. Absent a writing affixed to the instrument

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setting forth these elements, both the acknowledgment and the underlying instrument were held to be invalid. *Ben Holt*, 36 Wn. App. at 472.

Here, the elements of corporate acknowledgment are not satisfied by the attestation clause signed by Rebecca Southern. The form fails to identify her as an officer or employee of LienData, fails to characterize the subscription as the free and voluntary act of LienData, and fails to set forth Southern's authority to act on behalf of LienData. These shortcomings cannot be cured by affidavit because parol evidence is not admissible to cure a defective acknowledgment. *Ben Holt*, 36 Wn. App. at 472. Accordingly, on its face the attestation clause does not substantially comply with the requirements of RCW 60.04.091(2).

Athletic further argues that RCW 60.04.091(2) provides that a lien substantially in the form of the sample shall be sufficient and, because its lien was substantially similar to the example and identified Rebecca Southern as an agent for Athletic, the acknowledgment was sufficient. For purposes of attesting to the validity of the lien, it is sufficient, if only barely so, that Rebecca Southern signed in an individual capacity when LienData USA, Inc., was clearly identified as the agent for the lien claimant. But to establish that the claim of lien was properly acknowledged, RCW 60.04.091(2) requires compliance with chapter 64.08 RCW. Where corporate acknowledgment is required, the sample form cannot be sufficient because it only satisfies the requirements to witness an individual signature. Athletic's argument fails. The lien was invalid for failure to comply with the statutory attestation requirement.

Frivolous Lien

The Williamses also argue that the lien was frivolous because Athletic did not comply with the statutory lien notice requirements and because they do not owe Athletic any money. Athletic responds that it met its burden of stating a prima facie case showing its entitlement to

the amount claimed and that the Williamses failed to meet their burden of proving the invalidity of Athletic's claim beyond legitimate dispute. While we agree with the Williamses that they proved the invalidity of the lien itself, we agree with Athletic that they did not prove that filing the lien was frivolous or that Athletic may not be allowed to prove the disputed amount owed.

Lack of compliance with RCW 60.04.091 renders a lien claim invalid but not necessarily frivolous. *W.R.P. Lake Union Ltd. P'ship v. Exterior Servs., Inc.*, 85 Wn. App. 744, 752, 934 P.2d 722 (1997) (lien not frivolous where its compliance with statutory notice requirement is fairly debatable). Although all frivolous liens are invalid, not all invalid liens are frivolous. *Intermountain Elec., Inc. v. G-A-T Bros. Constr., Inc.*, 115 Wn. App. 384, 394, 62 P.3d 548 (2003) (first lien invalid but not frivolous where claimant legitimately disputed the calculation of the limitations period); *cf. Intermountain*, 115 Wn. App. at 394-95 (second lien invalid and frivolous where court previously ruled that the limitations period had expired). A lien claim is not necessarily frivolous because a party loses on a factual or legal ground. *W.R.P.*, 85 Wn. App. at 752. Release of a lien as frivolous is appropriate only when it is apparent beyond legitimate dispute that the lien was invalid when filed. *Intermountain*, 115 Wn. App. at 394.

Where, as here, the notice requirements are subject to legitimate dispute, it is incorrect to release the lien as "frivolous." *W.R.P.*, 85 Wn. App. at 752. Because the issue of who may attest to a claim of lien is a debatable legal issue, the question of the form of acknowledgment for a corporate agent attesting to the lien is likewise subject to legitimate legal debate. In the absence of controlling authority on the validity of the lien, a lien is not frivolous. *See Pac. Indus., Inc. v. Singh*, 120 Wn. App. 1, 10, 86 P.3d 778 (2003) (lien invalid but not frivolous where the lienability of the claimant's services raised an issue of first impression). Because the construction of RCW 60.04.091 presented a debatable issue of law, the trial court correctly

determined that the lien was invalid but erred in concluding that the lien claim was frivolous and without reasonable cause for failure to comply with the statute.

A proceeding to determine the validity or frivolity of a lien claim is not a substitute for a trial on the merits of the underlying claim. *See Andries v. Covey*, 128 Wn. App. 546, 550, 113 P.3d 483 (2005). Here, the Williamses submitted affidavits by Terry Williams and Hubbard stating that the Williamses orally agreed to pay Athletic for whatever portion of the site preparation work Athletic completed. The affidavits further state that Athletic completed a small fraction of the work and that the Williamses overpaid it for the work performed. In support, the Williamses pointed out the absence of a written contract and submitted a copy of the unsigned contract for the entire site preparation project.

In response, Athletic submitted an affidavit by its owner, Starren, stating that the Williamses orally agreed to pay him for the entire site preparation work and that Athletic had, in fact, completed 90 percent of the project plus additional work the Williamses requested. Athletic stated that Hubbard was its full-time employee and that any work he performed is attributable to Athletic. In reply, the Williamses reasserted their allegations, disputing Athletic's version of the facts.

Athletic established debatable issues of law and fact concerning its entitlement to recover for work it performed. It is undisputed that the Williamses entered an oral contract with Athletic to provide labor, services, materials, and/or equipment for the improvement of their property. It is also undisputed that Athletic performed work at the site between May 2004 and mid-November 2004.

The remaining dispute involves the scope of the oral agreement, the amount of work Athletic actually performed, and whether the Williamses paid it all amounts due. This dispute

raises debatable issues of fact that cannot be resolved in a summary proceeding under the frivolous lien statute. The Williamses rely on the absence of a written contract for proof of their version of the facts. But their refusal to sign the contract does not disprove Athletic's contention that they orally agreed to have Athletic complete the entire project.

Athletic met its burden of presenting a prima facie case that its lien filing was not frivolous. And the Williamses failed to prove that it was frivolous. Thus, the trial court erred when it released the lien as frivolous and without reasonable cause but it did not err in finding the lien invalid for failure of proper attestation.⁴

Attorney Fees

Athletic argues that the trial court erred in awarding attorney fees to the Williamses. It asks us to award it attorney fees for the summary proceeding below and on appeal.

The frivolous lien statute mandates an award of attorney fees to the prevailing party. The trial court granted attorney fees to the Williamses under RCW 60.04.081(4).⁵ Because the trial court erred in finding the lien filing frivolous, it improperly awarded the Williamses their attorney fees. The Williamses prevail on appeal regarding the lien's invalidity and Athletic prevails on the issue of whether it was frivolous. Thus, neither party substantially prevailed and we do not award fees to either party.

⁴ Athletic further argues that the trial court erred when it considered declarations the Williamses submitted in their reply pleading and refused to consider its own reply declarations. Because the resolution of this case turns on other issues, we do not address Athletic's additional argument.

⁵ RCW 60.04.081(4) provides in part, "If, following a hearing on the matter, the court determines that the lien is frivolous and made without reasonable cause, or clearly excessive, the court shall issue an order releasing the lien if frivolous and made without reasonable cause, or reducing the lien if clearly excessive, and awarding costs and reasonable attorneys' fees to the applicant to be paid by the lien claimant."

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The trial court erred in awarding attorney fees when releasing the invalid lien, and we reverse and remand for reassessment of fees and costs and further proceedings on Athletic's claim because both parties admit that there was an oral agreement that Athletic perform work for the Williamses and merely dispute whether the Williamses owe Athletic additional sums. *See Intermountain*, 115 Wn. App. at 396,

Affirmed in part and reversed in part and remanded.

Houghton, J.
Houghton, J.

We concur:

Bridgewater, J.
Bridgewater, J.

Penoyar, A.C.J.
Penoyar, A.C.J.

ATTACHMENT B

RCW 60.04.091. Recording--Time--Contents of lien

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 notice of claim of lien:

- (1) Shall state in substance and effect:
 - (a) The name, phone number, and address of the claimant;
 - (b) The first and last date on which the labor, professional services, materials, or equipment was furnished or employee benefit contributions were due;
 - (c) The name of the person indebted to the claimant;
 - (d) The street address, legal description, or other description reasonably calculated to identify, for a person familiar with the area, the location of the real property to be charged with the lien;
 - (e) The name of the owner or reputed owner of the property, if known, and, if not known, that fact shall be stated; and
 - (f) The principal amount for which the lien is claimed.

(2) Shall be signed by the claimant or some person authorized to act on his or her behalf who shall affirmatively state they have read the notice of claim of lien and believe the notice of claim of lien to be true and correct under penalty of perjury, and shall be acknowledged pursuant to chapter 64.08 RCW. If the lien has been assigned, the name of the assignee shall be stated. Where an action to foreclose the lien has been commenced such notice of claim of lien may be amended as pleadings may be by order of the court insofar as the interests of third parties are not adversely affected by such amendment. A claim of lien substantially in the following form shall be sufficient:

CLAIM OF LIEN

....., claimant, vs, name of person indebted to claimant:

Notice is hereby given that the person named below claims a lien pursuant to *chapter 64.04 RCW. In support of this lien the following information is submitted:

1. NAME OF LIEN CLAIMANT:

.....

TELEPHONE NUMBER:

.....

ADDRESS:

.....

2. DATE ON WHICH THE CLAIMANT BEGAN TO PERFORM LABOR, PROVIDE PROFESSIONAL SERVICES, SUPPLY MATERIAL OR EQUIPMENT OR THE DATE ON WHICH EMPLOYEE BENEFIT CONTRIBUTIONS BECAME DUE:

.....

3. NAME OF PERSON INDEBTED TO THE CLAIMANT:

.....

4. DESCRIPTION OF THE PROPERTY AGAINST WHICH A LIEN IS CLAIMED (Street address, legal description or other information that will reasonably describe the property):

.....

.....

5. NAME OF THE OWNER OR REPUTED OWNER (If not known state "unknown"):

.....

6. THE LAST DATE ON WHICH LABOR WAS PERFORMED; PROFESSIONAL SERVICES WERE FURNISHED; CONTRIBUTIONS TO AN EMPLOYEE BENEFIT PLAN WERE DUE; OR MATERIAL, OR EQUIPMENT WAS FURNISHED:

.....

7. PRINCIPAL AMOUNT FOR WHICH THE LIEN IS CLAIMED IS:

.....

8. IF THE CLAIMANT IS THE ASSIGNEE OF THIS CLAIM SO STATE HERE:

.....

.....

....., Claimant

.....

.....

(Phone number, address, city, and state of claimant)

STATE OF WASHINGTON, COUNTY OF

....., ss.

....., being sworn, says: 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.

.....

.....

Subscribed and sworn to before me this ... day of

.....

.....

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. The lien claimant shall give a copy of the claim of lien to the owner or reputed owner by mailing it by certified or registered mail or by personal service within fourteen days of the time the claim of lien is filed for recording. Failure to do so results in a forfeiture of any right the claimant may have to attorneys' fees and costs against the owner under RCW 60.04.181.

CREDIT(S) [1992 c 126 § 7; 1991 c 281 § 9.]

ATTACHMENT C

ATTACHMENT D

RCW 42.44.100. Short forms of certificate

The following short forms of notarial certificates are sufficient for the purposes indicated, if completed with the information required by this section:

(1) For an acknowledgment in an individual capacity:

State of Washington

County of

I certify that I know or have satisfactory evidence that (name of person) is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument and acknowledged it to be (his/her) free and voluntary act for the uses and purposes mentioned in the instrument.

Dated:

.....
(Signature)

(Seal or stamp)

.....
Title
My appointment expires

(2) For an acknowledgment in a representative capacity:

State of Washington

County of

I certify that I know or have satisfactory evidence that (name of person) is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument, on oath stated that (he/she) was authorized to execute the instrument and acknowledged it as the

(type of authority, e.g., officer, trustee, etc.) of (name of party on behalf of whom instrument was executed) to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated:

.....
(Signature)

(Seal or stamp)

.....
Title
My appointment expires