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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. : 33607-3-II

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ATHLETIC FIELD, INC., a Washington corporation

Petitioner

vs.

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

Respondents

PETITION FOR REVIEW TO SUPREME COURT

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ORIGINAL

TABLE OF CONTENTS

	Page
I. IDENTITY OF PETITIONER	1
II CITATION TO COURT OF APPEALS DECISION	1
III. ISSUES PRESENTED FOR REVIEW	
1.	1
2.	2
3.	2
4.	2
IV. STATEMENT OF THE CASE	2
1. Statement of Facts	2
2. Procedural History	3
V. ARGUMENT	5
1. The Court of Appeals held that Petitioner's lien was invalid because the certification, despite being precisely as set forth in the 'safe harbor' form in the lien statute, did not meet the more rigorous provisions for a notarized certification set forth in RCW 64.08	5
2. The Court of Appeals holding calls into question the validity of literally every present and future mechanics lien using the certification language approved by the legislature for a recorded Claim of Lien.....	13
3. The legislature's form adequately fulfills the requirements for acknowledging and attesting to the validity of the claim of lien.	15
4. AFI should be awarded its attorney's fees.	18
VI. CONCLUSION	18
VII. APPENDIX	
1. Court of Appeals Decision	
2. Claim of Lien	

TABLE OF CASES, STATUTES AND OTHER AUTHORITY

Table of Cases

Dean v. McFarland,
81 Wn.2d 215, 219-20, 500 P.2d 1244 (1972) 13

Firecrest Supply, Inc. v. Plummer,
30 Wn. App. 384, 388, 634 P.2d 891 (1981) 13

Haselwood v. Bremerton Ice Arena, Inc.,
166 Wn.2d 489, 498, 210 P.3d 308 (2009) 13

Lumberman's of Wash., Inc. v. Barnhardt,
89 Wn. App. 283, 286, 949 P.2d 382 (1997) 13

State v. J.P.,
149 Wn.2d 444, 453-54, 69 P.3d 318 (2003) 11

Williams v. Athletic Field, Inc.,
142 Wn. App. 753, 139 P. 3d 426 (2006) 4

Williams v. Athletic Field, Inc.,
___ Wn. App. ___, ___ P. 3d ___ (2010) 1

Statutes and Other Authority

RCW 9A.72.085 16

RCW 42.44.080 16

RCW 42.44.080(1) 17

RCW 42.44.080(3) 16

RCW 42.44.080(8) 17

RCW 42.44.100 9

RCW 42.44.100(1) 10

RCW 42.44.100 (3) 17

RCW 42.44.100(4) 9

RCW 60.04.021 5

RCW 60.04.091 1, 2, 5, 7, 8, 9, 11, 13, 14

RCW 60.04.091(2) 16

RCW 60.04.900 12, 13

RCW 64.04 5, 6, 8, 12

RCW 64.08	2, 5, 9, 10, 11, 14
RCW 64.08.050	15
RCW 64.08.060	10, 14
RCW 64.08.070	9, 14
RCW 64.04.091	11
RAP 13.4(b)(4)	2, 14

Identity of Petitioner

Petitioner is Athletic Fields, Inc., a Washington corporation. Petitioner was defendant in the trial court, and appellant in the Court of Appeals.

Citation to Court of Appeals Decision

The decision below was issued and published by Division 2 on April 7, 2010. The citation is *Williams v. Athletic Field, Inc.*, __ Wn. App. __, __ P.3d __ (2010) (2010 Wash. App. LEXIS 708) (copy attached in Appendix).

Issues Presented for Review

1. Where the Washington legislature in crafting the State's mechanics lien statute (RCW 60.04.091) included a 'safe harbor' form for lien claims and declared that a lien claim in substantially that form "shall be sufficient" to establish a lien, and where Petitioner recorded its claim of lien using *exactly* the language in the statute's safe harbor form, did the Court of Appeals err by holding that the legislature's approved language was legally inadequate to establish a valid lien?

2. Where the Court of Appeals held that Petitioner's lien form was fatally defective because it adopted the notary certification language approved in RCW 60.04.091's safe harbor form, and where the Court of

Appeals held Petitioner's lien should have met more rigorous certification language approved by earlier legislation for notary certifications (RCW 64.08), and where the Court of Appeals' reasoning would invalidate every current and future mechanics lien using the safe harbor form approved in RCW 60.04.091, does the Court of Appeals' published decision involve an issue of substantial public interest meriting consideration by the Supreme Court pursuant to RAP 13.4(b)(4)?

3. Where the legislature enacts a form which it determines satisfies the requirements of a statute, should the courts determine that use of the statutory form does not meet these requirements?

4. Should AFI be awarded its attorney's fees for prevailing against the Williams' claim that its lien was frivolous?

STATEMENT OF THE CASE

Statement of Facts.

Respondents Williams owned property in Sumner, Washington on which they wished to install a metal warehouse building. Williams' contracted with Athletic Fields, Inc. (AFI) to perform site preparation. CP 14, 15, 52.

The amount of site work required for the project was substantial. The estimated cost was \$419,925.00. Exhibit 1 to

Declaration of Terry Williams. CP 14. AFI started the site preparation. It was paid either \$150,500.00 (Mr. Starren, CP 54) or \$155,000.00 (Mr. Williams, CP 15) before the contract was terminated. These facts were basically agreed to by the parties.

Beyond this point, substantial factual disputes arise. Both parties filed declarations in the lower court action which was decided at a hearing on an order to show cause. Craig Starren, President of AFI, declared that AFI performed almost all of the site work CP 52, 53. Mr. Williams declared that much of the work had not been completed and AFI was not proceeding at an acceptable pace. CP 17, 18. After the parties could not agree on payment or on a contract for the completion of the work, the contract was cancelled and AFI filed the Notice of Lien which is the subject of this action. Exhibit 5 to Hubbard Declaration, CP 2. (copy in appendix)

Procedural History

Before any action was filed on the lien, Williams filed an action to dismiss it as a frivolous lien. Williams filed the action on June 15, 2005 and served the pleadings on AFI the following day.

CP 59. The pleadings included an Order to Show Cause why the lien should not be removed as frivolous. Both parties filed numerous declarations relating to the merits of the lien. The Order to Show Cause was returnable to a Court Commissioner who held the lien was invalid. On a Motion for Revision of Commissioner's Ruling, Judge Steiner affirmed the ruling, holding the lien was invalid because it was not signed by the claimant or an attorney for the claimant. CP 406 at 408.

AFI appealed. The Court of Appeals issued its first ruling on August 1, 2006. *Williams v. Athletic Field, Inc.*, 142 Wn. App. 753, 139 P. 3d 426 (2006). In this ruling, it held that the trial court had erred in holding that an agent could not sign and attest to the lien and in resolving issues of fact about AFI's right to recover for work performed.

Williams filed a motion for reconsideration. For the first time, they questioned whether the acknowledgment of the lien was improper. After 3 and one half years, the Court of Appeals issued a new decision on March 24, 2010. This decision held that the lien was invalid, due to an improper acknowledgment, but was not frivolous, and awarded attorney's fees at trial and on appeal to AFI

because it prevailed under the frivolous lien statute. On April 7, 2010, the Court of Appeals issued its third decision, still holding the lien was invalid due to an improper acknowledgment and was not frivolous but ruling that neither party was entitled to attorney's fees on appeal since both parties had prevailed in part.

Argument

1. The Court of Appeals held that Petitioner's lien was invalid because the certification, despite being precisely as set forth in the 'safe harbor' form in the lien statute, did not meet the more rigorous provisions for a notarized certification set forth in RCW 64.08.

Washington's mechanics lien regimen is RCW Chapter 60.04. It provides in relevant part:

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

RCW 60.04.091. The statute then lists elements to be included in the recorded claim of lien: The name and contact information for the claimant, the dates for first and last labor performed, the identity of the person indebted to the claimant, etc. The statute then sets forth a safe harbor form for lien claimants to use, which will be deemed sufficient to establish a lien. The statute reads:

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 60.04 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
.....

RCW 60.04.091. The legislature enacted this statute, including its safe harbor form, in 1991. The legislature made modifications to the statutory text the following year, but left the safe harbor form intact. Both the statutory text and the safe harbor form have remained the same ever since.

Notably, the legislature crafted the safe harbor form to have generic use whether the lien claimant was an individual, an unincorporated entity, or a corporation. The legislature crafted the form to be suitable whether signed directly by the claimant or by the claimant's attorney or other representative. And the sole language required in the safe harbor form for the notary's certification of the acknowledgment is the streamlined language: "Subscribed and sworn to before me this day of....."

requirements for a claim of lien. The court reasoned that because RCW 60.04.091 states in part that a claim of lien "shall be acknowledged pursuant to chapter 64.08 RCW," the notary's certification of the acknowledgment must conform to the suggested language for notary certifications set out in RCW 64.08.070 (or else the language in a related statute, RCW 42.44.100). Division 2 said:

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.

At least superficially, the Court of Appeals appeared to imply that the more rigorous notary certification language it now declares must be used for a claim of lien (under the auspices of being required by RCW 64.08.070) is unique to certification of an acknowledgment by a corporate representative. But the provisions of RCW 64.08 undercut any such distinction.

It is true, as Division 2 recited, that RCW 64.08.070 provides suggested text for certification of a corporate acknowledgment that is

more rigorous than the "Subscribed and sworn to before me" language in the lien statute's safe harbor form. But the suggested notary certification language for an *individual* acknowledgment recited in RCW 64.08 is likewise more rigorous than the "Subscribed and sworn to before me" language in the lien statute's safe harbor form:

A certificate of acknowledgment for an individual, substantially in the following form or, after December 31, 1985, substantially in the form set forth in RCW 42.44.100(1), shall be sufficient for the purposes of this chapter and for any acknowledgment required to be taken in accordance with this chapter:

State of

ss.

County of

On this day personally appeared before me (here insert the name of grantor or grantors) to me known to be the individual, or individuals described in and who executed the within and foregoing instrument, and acknowledged that he (she or they) signed the same as his (her or their) free and voluntary act and deed, for the uses and purposes therein mentioned. Given under my hand and official seal this day of, 20.... (Signature of officer and official seal)

RCW 64.08.060; *see* RCW 42.44.100(1) (approved notary certification language is likewise more rigorous than the "Subscribed and sworn to before me" language in the mechanics lien statute's safe harbor form).

By holding that a lien claimant's claim of lien form must meet the more rigorous certification language posited by RCW 64.08, and that the certification language expressly approved in the safe harbor form that is

part of the mechanics lien statute is legally inadequate, the Court of Appeals read out of existence the legislature's declaration that a lien claimant adopting the safe harbor form would be deemed to have a sufficient statement of lien. That was error.

The 1991 enactment of RCW 64.04.091 came many decades after enactment of RCW 64.08. Had the legislature intended the more rigorous certification language contemplated by RCW 64.08 to be a claim of lien requirement superseding the streamlined language set out for the safe harbor form, the legislature would have included the more rigorous language as part of the form, and would not have declared that a form using the streamlined "Subscribed and sworn to before me" language would be sufficient.

Division 2, however, did not recognize that RCW 64.04.091 is a much more recent enactment than RCW 64.08, nor did the court attempt any analysis to harmonize their respective provisions. *See, e.g., State v. J.P.*, 149 Wn.2d 444, 453-54, 69 P.3d 318 (2003) (In construing statutes, more recent and specific statute on a subject receives priority over terms of older, more general enactment.). The appellate court simply held that a lien form adopting verbatim the safe harbor language enacted as part of the mechanic's lien statute was legally inadequate to establish a mechanic's

lien in light of an earlier, more general statute regarding acknowledgment forms.

The appellate court's disregard of Petitioner's verbatim use of the safe harbor form in the mechanic's lien statute was particularly inappropriate in light of the legislature's promise in the mechanic's lien regimen that its statutory terms will be construed liberally for the benefit of those intended to be beneficiaries:

[RCW] 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.

RCW 60.04.900. Contractors, material suppliers and similarly situated parties seeking to protect their payment rights with a mechanic's lien are frequently unsophisticated in legal technicalities. "First, a lien claimant will frequently fill out the claim form himself. It does not appear that the legislature intended to burden the construction industry with the obligation to research title before each claim of lien." *Fircrest Supply, Inc. v. Plummer*, 30 Wn. App. 384, 388, 634 P.2d 891 (1981). This Court has observed that it will closely examine compliance with the requirements of the mechanics lien statute in conjunction with granting liberal construction of that enactment:

Mechanic's and materialmen's liens are creatures of statute, in derogation of common law, and therefore must be strictly construed to determine whether a lien attaches.

Dean v. McFarland, 81 Wn.2d 215, 219-20, 500 P.2d 1244 (1972). But if it is determined a party's lien is covered by chapter 60.04 RCW, the statute is to be liberally construed to provide security for all parties intended to be protected by its provisions. RCW 60.04.900; *see Lumberman's of Wash., Inc. v. Barnhardt*, 89 Wn. App. 283, 286, 949 P.2d 382 (1997).

Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 498, 210 P.3d 308 (2009).

Division 2 relied upon the rule of strict construction adopted by the Supreme Court in 1972, citing *Dean v. McFarland*, 81 Wn.2d 215, 219-20, 500 P.2d 1244 (1972). It did not even discuss the provision which the legislature included when it rewrote the mechanic's lien chapter in 1991 stating that the provisions at issue should be liberally construed to give security to those entitled to lien protection. RCW 60.04.900. Where, as here, a contractor uses *verbatim* the safe harbor language that the legislature said in the mechanics lien statute "shall be sufficient" to establish a lien, the rule of liberal construction made it error for the appellate court to hold the lien insufficient.

2. The Court of Appeals holding calls into question the validity of literally every present and future mechanics lien using the certification language approved by the legislature for a recorded Claim of Lien.

By sweeping aside the legislature's declaration that the safe harbor form in RCW 60.04.091 "shall be sufficient" for a mechanics lien,

including its "Subscribed and sworn to before me" language, and by requiring that the certification language must instead meet the suggested provisions for certification under RCW 64.08, the Court of Appeals' holding calls into question literally every lien filed in this State that adopts the safe harbor form in RCW 60.04.091. The "Subscribed and sworn to before me" language in that safe harbor form no more satisfies the suggested certification language for an individual acknowledgment (RCW 64.08.060) than it does for a corporate acknowledgment (RCW 64.08.070). So whether the claimant is an individual or a corporation, or has the Claim of Lien acknowledged by an attorney or other representative, use of the "Subscribed and sworn to before me" language approved in the mechanics lien safe harbor form would – under Division 2's reasoning – render that claim of lien invalid.

Contractors, labors and other intended beneficiaries of Washington's mechanics lien regimen routinely use and rely on the safe harbor form set out as part of the mechanics lien statute. Where the Court of Appeals publishes an opinion that threatens the validity of every such claim of lien (including the claim of lien of anyone in the future using the safe harbor form), that decision "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4).

3. The legislature's form adequately fulfills the requirements for acknowledging and attesting to the validity of the claim of lien.

RCW 60.04.091(2) requires that a claim of lien be both (1), declared to be true under penalty of perjury and (2), acknowledged; it goes on to set forth a form that purports to do both. Although the form is less than perfect, it does accomplish both objectives and its use satisfies the statutory requirements.

Acknowledgments have long been required for recorded instruments that affect the title to real property. At least one purpose of this requirement is obvious, to allow person interested in the title to rely upon recorded documents. This purpose is satisfied when the notary is required to establish, either from personal knowledge or from satisfactory evidence, that the person before him is the person who signed the document. RCW 64.08.050.

Attestations or verifications serve a different purpose. Requiring an attester to declare the truth of his statements under oath or penalty of perjury should eliminate false claims.

The form adopted by the legislature actually accomplishes both of these purposes and more. For verification, the statute only requires that the person signing the claim of lien,

“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.”

RCW 60.04.091(2).

The statutory form requires a more comprehensive verification:

“I have read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct and the claim of lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.”

RCW 60.040.091(2).

The statutory form also requires that the signer sign the claim of lien under oath before a notary public. RCW 60.040.091(2). Since signing under penalty of perjury is equivalent to signing under oath, RCW 9A.72.085, it may appear that this requirement is a mere redundancy. However, the requirement to sign the lien under oath before a notary public also satisfies the identification purpose of an acknowledgment. The standards for notarial acts are set forth in RCW 42.44.080. For statements under oath the statute states:

“In taking a verification upon oath or affirmation, a notary public must determine, either from personal knowledge or from satisfactory evidence, that the person appearing before the notary public and making the verification is the person whose true signature is on the statement verified.”

RCW 42.44.080(3).

For acknowledgments the statute states:

“In taking an acknowledgment, a notary public must determine and certify, either from personal knowledge or from satisfactory evidence, that the person appearing before the notary public and making the acknowledgement is the person whose true signature is on the document.”

RCW 42.44.080(1).

The only difference between the requirements is that the notary for a verification is not required to certify that he has properly confirmed the identity of the person who signed. The notary for an acknowledgement must so certify. The identification requirement is identical and persons interested in the title can assume that the person signing is the person identified in the instrument. The proper means of identification of the signing individual are identical for both acts. RCW 42.44.080(8).

The form used for verification in AFI's lien and in the safe harbor form was adopted from the short form for verification set forth in RCW 42.44.100(3).

The claim of lien form enacted by the legislature may not be artful but that is no reason for the courts to deny the protections provided under the lien statutes to any entity that uses it. The same section of the statute which provided the requirements for the claim of lien declared that the form adopted by the statute would satisfy these requirements. AFI used the form developed by the legislature and should be allowed to proceed to proof of the merits of its claim.

4 AFI should be awarded its attorney's fees.

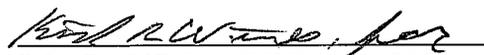
AFI's claim of lien was not frivolous. It has been prevented from proceeding to a trial on the merits for over five years by Williams' attempt to prove that it was. Williams sued under RCW 60.04.081. Under that statute, if the court determines that the lien is not frivolous, the lien claimant is entitled to its costs and attorney's fees.

Conclusion

The Supreme Court is respectfully requested to accept review and to reverse the holding of the Court of Appeals that the use of the safe harbor form by AFI caused its lien to be invalid.

Respectfully submitted this 7th day of May, 2010


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Appendix

Court of Appeals

Decision

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

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).

No. 33607-3-II

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.

No. 33607-3-II

/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

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

No. 33607-3-II

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."

No. 33607-3-II

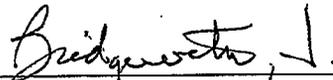
The trial court erred in awarding attorney fees when releasing the invalid lien, and we reverse and remand for reassessment of fees and costs and further proceedings on Athletic's claim because both parties admit that there was an oral agreement that Athletic perform work for the Williamses and merely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

Affirmed in part and reversed in part and remanded.

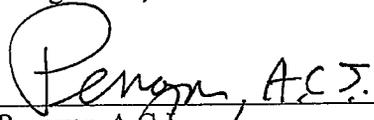


Houghton, J.

We concur:



Bridgewater, J.



Penoyar, A.C.J.

Claim of Lien



PLEASE RECORD AND RE 200412061129 2 PGS
LienData USA, Inc. Agents Fr 12-06-2004 03:52pm \$20.00
P.O. Box 1120 PIERCE COUNTY, WASHINGTON
Bothell, WA 98041-1120

CLAIM OF LIEN

ATHLETIC FIELDS INC.,
CLAIMANT,
VS.
TERRY WILLIAMS,
Person or Persons
Indebted to Claimant,

NOTICE IS HEREBY GIVEN that
the person named below claims a lien. In
support of this lien the following information
is submitted:

- Owner: Terry & Jan Williams
1. NAME OF LIEN CLAIMANT: Athletic Fields Inc.
ADDRESS: 21620 SE May Valley Road
Issaquah, WA 98027
TELEPHONE NUMBER: (425) 917-0758
 2. DATE ON WHICH THE CLAIMANT BEGAN TO PERFORM LABOR,
PROVIDE PROFESSIONAL SERVICES, SUPPLY MATERIAL OR
EQUIPMENT: May 14, 2004
 3. NAME OF PERSON INDEBTED TO CLAIMANT:
Terry Williams
18108 45th Street E.
Sumner, WA 98390-3725
 4. DESCRIPTION OF THE PROPERTY AGAINST WHICH A LIEN IS
CLAIMED: SECTION 11 TOWNSHIP 20 RANGE 04 QUARTER 12
HILLMANS C D PACIFIC CITY DIV #4: HILLMANS C D PACIFIC
CITY DIV # 4 NE OF NE 11-20-04E L 6 B67 EXC THAT POR DEEDED
TO ST OF WA FOR SR 167 APPROX 44,200 SQ FT OUT OF 103-2 SEG
C0866JU 9/23/91BO

Commonly Known As: Parcel #4495401034
1723 West Valley Highway
Sumner, Pierce County, Washington

EXHIBIT #5

- 5. NAME OF THE OWNER OR REPUTED OWNER:
Terry & Jan Williams
18108 45th Street E.
Sumner, WA 98390-3725

- 6. THE LAST DATE ON WHICH LABOR WAS PERFORMED;
 PROFESSIONAL SERVICES WERE FURNISHED; OR MATERIAL, OR
 EQUIPMENT WAS FURNISHED: **November 30, 2004**

- 7. PRINCIPAL AMOUNT FOR WHICH THE LIEN
 IS CLAIMED IS: **\$276,825.00** PLUS INTEREST
 PLUS LIEN FEES

- 8. IF THE CLAIMANT IS THE ASSIGNEE OF THIS CLAIM SO STATE
 HERE: **Not Applicable**

DATED this 1st day of December, 2004.

LienData USA, Inc.
 AGENT FOR CLAIMANT
 P.O. Box 1120
 Bothell, WA 98041-1120

Athletic Fields Inc.
 CLAIMANT
 21620 SE May Valley
 Issaquah, WA 98027

STATE OF WASHINGTON)
) ss.
 COUNTY OF KING)

Rebecca Southern, 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.

Rebecca Southern
 Rebecca Southern

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

Judi M. Elsbree
 Judi M. Elsbree

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



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By sending the documents via ABC Messenger service, with conformed copies requested, to:

Klaus Otto Snyder
Snyder Law Firm LLC
920 Alder Ave., Ste. 201
Sumner, WA 98390-1401
(253) 863-2889

Dated this 11th day of May, 2010.

Treacy Coates
Treacy Coates

SUBSCRIBED AND SWORN to before me this 11th day of May, 2010

MACHELE M. BRODIE
STATE OF WASHINGTON
NOTARY — — PUBLIC
MY COMMISSION EXPIRES 06-10-10

Machele M Brodie
Machele Brodie

NOTARY PUBLIC in and for the State of
Washington, residing at Sammamish
My Commission expires: 6-10-10

DECLARATION OF
SERVICE - 2

O'Brien Barton Wieck & Joe, P.L.L.P.
O'Brien Professional Building
175 NE Gilman Blvd., Suite 100
Issaquah, WA 98027
(425) 391-7427; Fax (425) 391-7489