

66762-9

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NO. 66762-9-1

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

LAWLESS CONSTRUCTION CORPORATION,
a Washington corporation,

Appellant,

v.

TUYEN DINH NGUYEN and MAI TUYET VAN, residents of King
County, Washington,

Respondents.

REPLY BRIEF

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INTRODUCTION

The Nguyens are estopped from denying the parties' agreement. They agree that while cross-examining Lawless during their legal malpractice case, they exacted Lawless's agreement to repair their home at the price he testified to. BR 1-2. They agree that they sent Lawless a letter stating that they had "accepted [his] offer" made under oath. BR 3. They agree that Lawless "reaffirmed his promise" after the malpractice trial and that they "threatened to sue Lawless if [he] did not perform." BR 3-4.

Lawless raised debatable issues about the lien, where he provided professional services preparing to perform the work the Nguyens demanded. One judge denied the Nguyens' motion to release Lawless's lien, rejecting the Nguyens argument that it was frivolous. Two different judges denied the Nguyens' summary judgment motions, also rejecting their frivolous-lien argument and finding fact questions as to the lien and to the parties' agreement.

But the trial court directed a verdict for the Nguyens, found that Lawless's lien was frivolous, and awarded the Nguyens \$87,405.60 in fees and costs – over nine times the amount in dispute. This Court should reverse these unwarranted and unjust decisions.

REPLY STATEMENT OF THE CASE

Having agreed to price and performance while Lawless was under oath, the Nguyens followed up, stating that they had “accepted [Lawless’s] offer.” Ex 4. But the Nguyens terminated the parties’ agreement, changing their repair plans to put in hardwood floors. RP 84-85, 181, 183. They hired someone else without telling Lawless. Ex 16. The Nguyens do not support their assertion that they canceled the parties’ agreement because they were unhappy with the negotiations. BR 5.

Nor do the Nguyens support their claim that there is “[n]o evidence” to support the amount of the lien claim. BR 5. Lawless estimated the lien amount based on the time his attorney spent drafting the contract and the time Lawless spent communicating with the Nguyen’s counsel and preparing to perform. RP 103-04. Lawless’s testimony is evidence.

The remainder of the Nguyen’s Statement of the Case is an argument that Lawless failed to properly challenge findings of fact such that they are verities on appeal, and failed to properly challenge conclusions of law such that they are the law of the case.

BR 7-15.¹ The Nguyens repeat these claims *ad nauseam*, often failing to make any other response. BR 19, 20, 21, 30-31.

Lawless assigned error to findings 8 through 16 and 18. BA

2. Contrary to the Nguyens' claim (BR 12), Lawless discusses these findings at length (*compare* BR 7-12 *with* the following):

- ◆ Finding 8 – that there was no meeting of the minds on essential terms. CP 1024. Lawless argued that the parties agreed on essential terms – price and performance – and that the Nguyens repeatedly affirmed the agreement, “accept[ing] his offer.” BA 12-16.
- ◆ Findings 9 and 10 – that Lawless “contends” that he provided professional services, drawing up plans and specifications, but that the plans were incomplete and were not given to the Nguyens until the lawsuit. CP 1024-25. Lawless challenged findings 9 and 10 only to the extent they suggest that Lawless did not provide professional services. BA 2. Lawless correctly argued that he provided professional services, drawing up plans and specifications, researching materials, and contacting a subcontractor, among other things. BA 16-20.²
- ◆ Findings 11, 12, 13, 14, 15 – that the lien claim was inaccurate as to the dates Lawless started and stopped providing professional services (FF 11 & 12), that Lawless did not provide time records to support the work he provided giving rise to the lien (FF 13 & 14), and that the lien amount

¹ The Nguyens also argue that the findings are verities under RAP 10.4(c), providing that parties should append findings or include them in the brief. The Nguyens provide no authority supporting this argument, nor is Lawless aware of any. Lawless attaches the findings to this Reply.

² Finding 10 also contains an incorrect legal conclusion that the plans and specifications “did not result in any improvements to [the Nguyens] home.” CP 1025. As discussed in the opening brief, professional services rendered “in preparation for” construction, repairs, or remodeling, are themselves an improvement under RCW 60.04.011(5). BA 18-19; *infra*, Argument § B.

was excessive. CP 1025-26. Lawless addressed these alleged lien defects at BA 16-20, 22-23.

- ◆ Finding 16 – that Lawless did not prove the promissory-estoppel elements. CP 1026. Lawless argued that the Nguyens were estopped from denying the existence of the parties' agreement, where they exacted Lawless's agreement to price and performance under oath, stated that they had "accepted" Lawless's "offer," and repeatedly threatened to sue Lawless if he did not perform. BA 12-16.
- ◆ Finding 18 – that a nearly \$90,000 fee award to the Nguyens was reasonable. CP 1026. Lawless argued at length that the fee award was excessive for many reasons and that the trial court's single summary finding utterly failed to satisfy **Mahler**. BA 25-33 (citing and discussing **Mahler v. Szucs**, 135 Wn.2d 398, 433-35, 957 P.2d 632, 966 P.2d 305 (1998)).

The Nguyens also argue that the conclusions of law are the law of the case, where Lawless did not assign error to them. BR 15. The RAPs do not require assignments of error to conclusions of law. RAP 10.3(g), 10.4(c). And the cases the Nguyens rely on provide that "unchallenged" conclusions of law become the law of the case, not that conclusions of law to which no error is assigned become the law of the case. BR 15 n.11 (e.g., **Energy Nw. v. Hartje**, 148 Wn. App. 454, 459, 199 P.3d 1043 (2009)). Lawless plainly challenged the trial court's incorrect legal conclusions (*compare* BR 13-15 *with* the following):

- ◆ Conclusions 3 and 4 – that the parties did not have a meeting of the minds, such that Lawless was not entitled to assert a lien. CP 1027. Lawless argued that the Nguyens agreed to material terms – price and performance – and

were estopped from denying the existence the agreement, where they confirmed that they had “accepted” Lawless’s “offer,” and repeatedly threatened to sue Lawless if he did not perform. BA 12-16.

- ◆ Conclusion 5 – that even if Lawless provided professional services, he did not improve real property under ***DBM Consulting Engineers, Inc. v. U.S. Fid. & Guar. Co.***, so could not assert a lien. CP 1027 (citing 142 Wn. App. 35, 41, 170 P.3d 592 (2007)). Lawless addressed this conclusion of law at BA 18-20, arguing that the trial court incorrectly relied on ***DBM***, which sheds no light on whether Lawless provided professional services. Lawless also argued that conclusion 5 is inconsistent with the plain language of RCW 60.04.011, providing that professional services rendered in preparation for construction, remodeling, or repairs, are an improvement. BA 18-19.
- ◆ Conclusion 6 – that the contract negotiations were not professional services, but even if they were, the negotiations were completed more than 90 days before Lawless recorded the lien, making the lien untimely. CP 1027-28. Lawless addressed conclusion 6 at BA 17-18, arguing that Lawless performed at least one professional service less than 90 days before recording the lien.
- ◆ Conclusion 7 – that Lawless’s claim for lien foreclosure should be dismissed because Lawless did not strictly comply with the lien-claim statute. CP 1028. Lawless addressed this conclusion at BA 22-23, arguing that a good faith mistake as to the date he began and finished providing professional services could not support the court’s conclusion that his lien is frivolous.
- ◆ Conclusion 8 – that the Nguyens never made a legally binding promise, such that Lawless’s estoppel claim should be dismissed. CP 1028. Again, Lawless argued that the Nguyens should be estopped from denying the parties’ agreement, where they exacted the agreement under oath, repeatedly confirmed the agreement, and threatened to sue Lawless if he did not perform. BA 12-16.
- ◆ Conclusion 9 – that Lawless’s lien claim was frivolous. CP 1028. Lawless argued that his lien claim was not frivolous,

particularly in light of the three *in limine* rulings, that there were fact questions as to whether the parties had formed a contract and whether Lawless has provided professional services. BA 20-24.

- ◆ Conclusion 10 – that the Nguyens were entitled to nearly \$90,000 in attorney fees. CP 2028.³ Lawless argued that the trial court erroneously awarded the Nguyens’ attorney fees, impermissibly treating the fee award as a “litigation afterthought.” BA 25-33 (citing *Mahler*, 135 Wn.2d at 434).

ARGUMENTS

A. The trial court erroneously granted the Nguyens’ motion for directed verdict.

The Nguyens repeatedly referred to their “half-time” motion as a motion for “directed verdict.” *Compare* RP 267, 294; CP 871-79 *with* BR 16. Nonetheless, in a bench trial, where the court dismisses the case when the plaintiff rests, and acts as a fact-finder, this Court reviews whether substantial evidence supports the findings, and whether the findings support the conclusions. *In re Dependency of Schermer*, 161 Wn.2d 927, 939-40, 169 P.3d 452 (2007).

³ The trial court erroneously numbered conclusion 10 as conclusion 6. As such, there are two conclusions numbered 6. This citation is to the second one, located at CP 1028.

1. **The Nguyens are estopped from denying the existence of the parties' agreement, where they coerced Lawless's agreement to material terms, affirmed the agreement, and repeatedly threatened to sue Lawless if he did not perform.**

Lawless should have been able to rely on the Nguyens' promise to pay him to repair their home, where they exacted Lawless' agreement to "material terms" – price and performance – while he was under oath, repeatedly stating that they wanted to bind Lawless to the price he testified to. Ex 1 at 29, 45-47. Proving that their courtroom theatrics were serious, the Nguyens asked Lawless for the contract two weeks later. RP 50, Exs 1, 2 & 3. They plainly stated that that they had "accepted" Lawless's "offer" to repair their home for the agreed amount. Ex 4. They repeatedly threatened to sue Lawless if he did not perform. Exs 4, 6 & 8.

This is more than enough to support Lawless's estoppel claims. BA 12-16; *Uznay v. Bevis*, 139 Wn. App. 359, 370, 161 P.3d 1040 (2007). The Nguyens mistakenly suggest that Lawless raised only promissory estoppel. BR 17. Lawless repeatedly argued both promissory and equitable estoppel. CP 365, 382-83, 763-64, 774-75, 1020-21.

The Nguyens' primary response is technical – that Lawless did not sufficiently challenge findings 8 and 16. BR 18-21. They

also argue that Lawless did not assign error to findings 5 and 6, and conclusions 3 and 8.⁴ *Id.* Findings 8 and 16 and conclusion 8 pertain to the trial court's incorrect determination that Lawless could not justifiably rely on the Nguyens' promises. CP 1024, 1026-28. As discussed above, Lawless addressed this estoppel issue at length. *Supra*, Reply Statement of the Case; BA 12-16.

Lawless argued that the parties' reached a meeting of the minds on "material terms" – price and performance – where the Nguyens exacted an agreement as to price and performance while Lawless was under oath and repeatedly affirmed the agreement. BA 15. He argued that in entering finding 16, the trial court ignored "the Nguyens' promise to pay Lawless, their representation that they had accepted his offer, and their threats to sue." BA 16. He argued that he was entitled to rely on the Nguyens' promises – and on their threats. *Supra*, Reply Statement of the Case; BA 12-16. The Nguyens provide no other response than their incorrect and overly technical claims. BR 17-21.

Lawless did not challenge findings 5 and 6 and conclusion 3 because the parties did not enter a final written contract. After months of negotiations, Lawless sent the Nguyens the final contract

⁴ Again, it is irrelevant that Lawless did not assign error to conclusions of law.

awaiting their signatures. Exs. 12, 15, 17. Unbeknownst to Lawless, the Nguyens had elected to switch their repair plans and to hire someone else. RP 84-85, 181, 183; Exs 15-18.

This does not, however, change the fact that parties plainly agreed to “material terms” – price and performance. Nor does it change the fact that the Nguyens repeatedly affirmed the agreement and repeatedly threatened to sue Lawless if he did not perform. The point is not that the parties had a written agreement, but that the Nguyens are estopped from denying the existence of the parties’ agreement. BA 12-16.

2. Lawless raised debatable issues about the lien where he provided professional services improving the Nguyens’ property and timely filed his lien.

Since the Nguyens are estopped from denying the basic agreement – price and performance – Lawless is entitled to the value of his work in equity. BA 16. The Nguyens misunderstand this point, arguing that “[s]ince . . . the Nguyens are not estopped to deny the existence of a contract . . . there is no basis for Lawless’ contention that it is somehow ‘entitled to the value of his work in equity.’” BR 22. But the Nguyens remove the premise of Lawless’s argument – that the Nguyens are estopped. *Compare* BA 16 *with* BR 22. If the Nguyens are estopped, then Lawless’s recovery

would be in equity, not under the lien-claim statute, such that alleged lien defects would be irrelevant.

Nonetheless, Lawless performed professional services supporting his lien claim, including research and development, preparing design plans and specifications, and working with suppliers and subcontractors. BA 17-18; RP 67-69, 102-03, 240-44. Lawless performed at least one of these items – hiring the subcontractor – less than 90 days before filing the lien on March 13, 2009. RP 102-03, 243-44.

Assuming *arguendo* that Lawless provided professional services, the trial court nonetheless concluded that Lawless's lien was invalid because he did not improve the Nguyens' property. CP 1027, CL 5 (citing **DBM**, 142 Wn. App. at 41).⁵ But under the plain language of RCW 60.04.011(5) defining "improvement," professional services rendered preparing for repairs, remodeling, or other construction activities are an improvement. The Nguyens have no answer to this plain meaning of the statute. *Compare* BA 16-20 *with* BR 22-27.

⁵ The Nguyens take issue with Lawless's statement that findings 9 and 10 and conclusion 6 assume *arguendo* that Lawless provided professional services. BR 22-23. But the Nguyens seemingly agree, stating that the findings and conclusion "indicate why, even if the 'plans and specifications' Lawless claims he prepared might be considered 'professional services,' under RCW 60.04.011(13), they would be insufficient to support its Claim of Lien." BR 23.

This reading is consistent with **DBM**, in which this Court correctly noted that professional services must be an improvement to support a lien and that not all professional services support a lien. 142 Wn. App. at 41; BA 19-20; CP 311-12, 498 n.5. But the Court did not address whether the professional services at issue supported a lien claim, holding that reaching such a decision would require speculation. *Id.* **DBM**'s correct interpretation of RCW 60.04.121 has no bearing on whether Lawless's professional services provided "in preparation for" "repairing" the Nguyens' home were an improvement. RCW 60.04.121. The Nguyens continue to rely on **DBM**, never addressing Lawless's argument that it is inapposite. BR 23-24, 26.

The other cases the Nguyens rely on are also inapposite. The Nguyens argue that "[m]inor preparatory activities" are not an improvement. BR 22-26. They provide no discussion, simply making bare assertions followed by a string-cite. BR 21. The cases are easily distinguished, or apply inapplicable sections of RCW 60.04.011(5) governing the provision of labor – not professional services:

McAndrews Group, Ltd., Inc. v. Ehmke addressed lien priority under RCW 60.04.031(5), which applies to a "potential lien

claimant providing professional services where no improvement as defined in RCW 60.04.011(5) (a) or (b) has been commenced.” 121 Wn. App. 759, 764, 90 P.3d 1123 (2004). The court held that the professional services at issue – staking the property boundary – was not an improvement as defined by RCW 60.04.011(5)(a) or (b) “Improvement” means:

(a) [c]onstructing, altering, repairing, remodeling, demolishing, clearing, grading, or filling in, of, to, or upon any real property or street or road in front of or adjoining the same; (b) planting of trees, vines, shrubs, plants, hedges, or lawns, or providing other landscaping materials on any real property . . .

McAndrews, 121 Wn. App. at 764.

McAndrews is inapposite for at least two reasons. Lawless’s professional services are not defined by RCW 60.04.011(5)(a) or (b), but by RCW 60.04.011(5)(c): “Improvement means . . . providing professional services upon real property or in preparation for” repairs, remodels, or other construction. BA 18-20. And Lawless contracted directly with the Nguyens or their common law agent, so his lien claim is governed by RCW 60.04.021, not by RCW 60.04.031. RCW 60.04.031(3)(a).

TPST Soil Recyclers of Wash., Inc. v. W.F. Anderson Const., Inc., was a case of first impression, addressing whether

removing contaminated soils improves real property. 91 Wn. App. 297, 299-300, 957 P.2d 265, 967 P.2d 1266 (1998). TPST was “hired to haul away and dispose of contaminated soil.” *TPST*, 91 Wn. App. at 301. This Court held that *TPST* was “not involved in an overall plan to improve the property,” such that it could not assert a lien under a strict construction of RCW 60.04.011(5)(a). 91 Wn. App. at 302. Lawless was plainly involved in the plan to improve – *i.e.*, remodel – the Nguyens’ property.

Colorado Structures, Inc. v. Blue Mountain Plaza, LLC involved a contractor, CSI, who discovered that potentially shallow ground-water levels could seriously impact its proposals, so hired a subcontractor to dig test-pits to ascertain the groundwater levels. 159 Wn. App. 654, 658, 246 P.3d 835 (2011). The issue on appeal was whether digging the test-pits constituted an improvement as defined by RCW 60.04.011(5).⁶ 159 Wn. App. at 662. The Court of Appeals Division Three held that the test-pits were not “preparatory work for improving the property” (*id.* at 663):

The test holes dug here did not amount to preparatory work for improving the property. The holes provided intelligence about the water level, which undoubtedly shaped the

⁶ The opinion assumed *arguendo* that digging the test-pits was a professional service. *Id.* at 662.

subsequent plans and bids. However, that information was not itself an improvement upon the realty . . .

Id. Here, however, Lawless drew up plans and specifications preparing to repair the Nguyen's property. RP 67-69.

Pac. Indus., Inc. v. Singh examined whether certain preparatory tasks such as contract negotiations constituted "labor" under RCW 60.04.021, defining labor as the exertion of mind or body at the worksite. 120 Wn. App. 1, 6, 8, 86 P.3d 778 (2003). Contrary to the Nguyens' claim, ***Singh*** does not address whether preparing contracts and working with subcontractors are professional services giving rise to a lien claim. Compare ***Singh***, 120 Wn. App. at 6-8 with BR 26.

Blue Diamond Group, Inc. v. KB Seattle 1, Inc. held that offsite "construction management services" do not constitute "labor" under RCW 60.04.021. 163 Wn. App. 449, 454-55, ___ P.3d ___ (2011). This Court also held that the offsite construction management services were not professional services under RCW 60.04.011(13). 633 Wn. App. at 455. Holding that there were no professional services performed, this Court did not address the issue here – whether professional services constituted an improvement under RCW 60.04.011(5)(c).

Finally, the Nguyens argue that the design plans and specifications are not an improvement, where Lawless did not provide them to the Nguyens. BR 26-27.⁷ The Nguyens do not offer any authority to support this proposition, which misunderstands the statute. *Id.* Their reading contradicts the meaning of “Improvement” . . . providing professional services . . . in preparation for” repairs, remodels or other construction on real property, even if actual construction has not commenced, and the property is left physically unaltered. RCW 60.04.011(5) & (13), and .021.

In short, the trial court incorrectly directed the verdict. This Court should reverse.

B. Lawless’s lien claim was not frivolous for the reasons discussed above, particularly in light of the three prior rulings that the lien claim was not frivolous.

A lien is frivolous only if it is “improperly filed ‘beyond legitimate dispute.’” *Williams v. Athletic Filed, Inc.*, ___ Wn.2d ___, ¶32, ___ P.3d ___ (2011) (citing *Intermountain Elec., Inc. v. G-A-T Bros. Constr., Inc.*, 115 Wn. App. 384, 394, 62 P.3d 548 (2003) (quoting *W.R.P. Lake Union Ltd. P’ship v. Exterior*

⁷ The Nguyens also absurdly suggest that Lawless would have a lien on his design plans and specifications, not on the Nguyen’s home. BR 27. They do not support this assertion, which contradicts the statute’s plain language.

Services, Inc., 85 Wn. App. 744, 752, 934 P.2d 722 (1997)). “A frivolous lien ‘presents no debatable issues and is so devoid of merit that it has no possibility of succeeding.’” **Williams**, ___ Wn.2d at ¶ 32 (quoting **G-A-T Bros.**, 115 Wn. App. at 394). Lawless’s lien claim was not frivolous where Lawless raised debatable issues as to whether he provided professional services within 90 days of filing the lien, and where three courts found fact questions surrounding the lien’s validity. BA 22-24.

The Nguyens first argue that without a contract, Lawless could not have a valid lien. BR 28-29.⁸ But the Nguyens do not articulate how the court’s ultimate conclusion that there was no contract renders Lawless’s lien frivolous *per se*. *Id.* It does not – even assuming *arguendo* that the parties did not have a contract sufficient to satisfy RCW 60.04.021, a lien claim can certainly be invalid without being frivolous. **Singh**, 120 Wn. App. at 6.

⁸ The Nguyens argue, in a footnote, that “estoppel does not give rise to lien rights” in place of a contract. BR 29 n.32. But Lawless does not argue that estopping the Nguyens from denying the existence of the parties’ agreement allowed him to lien the Nguyens’ home. BA 16-17. He argues that estoppel allows him to recover independent of the lien statute. *Id.*; CP 763-65, 858. Estoppel is relevant to the frivolous-lien issue only because a lawsuit is frivolous only if it is frivolous in whole, not in part. BA 20 (citing **Skimming v. Boxer**, 119 Wn. App. 748, 756, 82 P.3d 707 (2004)). As such, having rejected the Nguyens’ arguments that Lawless’s estoppel claim was frivolous, the trial court need not have addressed whether the lien was frivolous. BA 21-22.

The Nguyens' assertion that "the absence of a contract" makes Lawless's lien frivolous is at odds with the three court orders rejecting the Nguyen's frivolous-lien arguments, two of which found fact questions on the existence of a contract. *Compare* BA 23-24 *with* BR 28-29. Judge Dean Lum denied the Nguyens' motion to release the lien, rejecting their claim that it was frivolous or excessive. CP 319-20. The Nguyens argue that Judge Lum did not "resolve factual issues" (BR 31), but Judge Lum necessarily rejected the Nguyen's frivolous-lien claim in denying their motion. BA 23-24; RCW 60.04.081(4).

Judges Mary Roberts and Brian Gain each denied separate motions for summary judgment that the lien was frivolous and excessive, finding material issues of fact as to whether a contract existed and whether Lawless provided professional services. CP 336-39, 750-53. The Nguyens gloss over this point, arguing only that Judges Roberts and Gain did not make findings "one way or the other" on the Nguyen's frivolous lien-claim arguments. BR 32. The point, however, is that these judges found fact questions – debatable issues – about whether the parties had a contract and whether Lawless provided professional services. BA 23-24. These

findings plainly contradict the Nguyens' assertion that the absence of a contract renders the lien frivolous.

Lawless had every right and reason to continue pursuing his claims under these rulings that his lien was not frivolous and that fact questions warranted a trial on his lien claim. *Id.* Yet the trial court punished Lawless for relying on these prior rulings and rewarded the Nguyens for judge shopping.

Colorado Structures does not support the Nguyens argument on this point. BR 28-29. **Colorado Structures** held that the term "contract price" in RCW 60.04.021 requires a contract to support a lien claim. 159 Wn. App. at 663-64. But **Colorado Structures** is inapposite – that lien-claimant had done nothing more than research to prepare a bid. *Id.* at 664. Here, the parties had agreed to a "contract price." **Colorado Structures** does not address whether an agreement on material terms, including contract price, is sufficient to satisfy RCW 60.04.021.

The Nguyens next contend that Lawless's lien is frivolous because he did not render professional services "at [their] instance." BR 29-30 (emphasis omitted). It is irrelevant that the Nguyens never expressly directed Lawless to "render professional services" in so many words. *Id.* They exacted an agreement from

Lawless while he testified against them. They confirmed the agreement, threatening to sue Lawless if he did not perform. They told him to draft a contract. They told him they wanted him to start work immediately. Providing professional services was necessary to preparing for the work the Nguyens demanded.

Finally, Lawless argued that the lien was not defective or excessive, or at least that he had raised debatable issues on these points, such that the lien was not frivolous. BA 16-20, 22-23. The Nguyen's only response is that Lawless did not adequately address findings 13 through 15, regarding the amount of the lien. BR 30-31. Lawless already addressed this meritless and overly technical assertion. *Supra*, Reply Statement of the Case. Lawless testified that the professional services rendered in preparation for the Nguyen's repair job were valued at \$3,500, the lien amount. RP 103-04. There was no contrary evidence. The simple fact that Lawless did not have records to support the "minutiae," does not render the lien excessive or frivolous. *Id.*

In sum, Lawless raised debatable issues regarding the lien claim. Even if ultimately invalid, his lien was not frivolous.

C. The fee award is grossly excessive and lacks the required findings.

In this \$3,500 lawsuit, the trial court awarded the Nguyens nearly \$90,000 in costs and fees, cutting just \$90 from their total fee request. *Compare* CP 905, 928, 992, 1003, *with* CP 1026, FF 18; CP 1031. This Court should reverse the directed verdict and the fee award. If, however, the Court affirms the directed verdict, then it should reverse and remand with instructions to revise the fee award, which cannot be sustained under ***Mahler***.

The Nguyens misunderstand ***Mahler***, Lawless' arguments on this issue, or both. BR 34. Lawless does not claim that the trial court should have calculated fees using some method other than the lodestar. *Compare* BA 26-27 *with* BR 34. His point is that ***Mahler*** requires the trial court to "rigorously" apply the lodestar and to actively assess fee awards. ***Mahler***, 135 Wn.2d at 434. The court cannot just accept fee affidavits. 135 Wn.2d at 434-35.

And Lawless also did not argue that "the trial court is required to enter more than one finding." BR 34. The number of findings the court enters is irrelevant. The point is that rubber-stamping boilerplate – "the attorney fees awarded are reasonable

and were necessarily incurred” – is insufficient. *Id.*; CP 1026, FF 18.

The Nguyens do not deny (and seem to concede) that there was indeed a “massive duplication of effort” here. BA 27-30; BR 38-39. They claim that Lawless is responsible for this duplication, where he did not really need to have Berry disqualified or waited too long to do so. BR 36-38.

But the Nguyens knew or should have known that Berry would be disqualified under RPC 3.7 (prohibiting a lawyer from being an advocate at trial in which he is “likely to be a necessary witness”). Berry orchestrated the courtroom theatrics giving rise to the parties’ agreement. Lawless communicated with Berry – not with the Nguyens – about the parties’ agreement.

The Nguyens’ complaint that Lawless waited too long to move to disqualify Berry is equally unpersuasive. BR 37. Lawless moved to have Berry disqualified just three days after the parties’ unsuccessful mediation. CP 915, 1081-82.

Ignoring the obvious reality that Berry would likely be disqualified dramatically increased attorney fees. BA 27-30. Berry billed \$29,640 after receiving Lawless’s witness disclosure identifying him as a witness, almost half of which – \$14,250 – Berry

billed after Lawless moved to disqualify him. CP 912-23, 1081-82, 1109. Berry wasted time and Beckett duplicated Berry's efforts, block-billing 28 hours – \$11,220 – for things like conferring with Berry, and reviewing pleadings, depositions and exhibits. CP 926-27. The trial court did nothing to account for this duplication and waste. **Mahler**, 135 Wn.2d at 434.

And it is irrelevant that RPC 3.7 did not require Berry to stop representing the Nguyens before trial. BR 36. The issue is not whether Berry *had* to step down – it is that he should have stepped down or sought the court's leave to continue representing the Nguyens – or at least that Lawless is not responsible to pay for his failure to do so.⁹

The Nguyens agree that the trial court has discretion to reduce a fee award for “wasted” or “unproductive” time spent on unsuccessful motions. BR 39; BA 30-32 (citing **Chuong Van Pham v. Seattle City Light**, 159 Wn.2d 527, 151 P.3d 976 (2007)). They claim that since their unsuccessful motions were “reasonably related to the successful claims,” the trial court did not abuse its discretion. BR 39-40. But the Nguyens' argument misses the point, which is that there is no indication that the trial court even

⁹ Again, Berry did not bill the Nguyens. RP 218.

considered cutting wasted and unproductive time. BA 31-32. If it had, the court very well may have found, for example, that after the Nguyens spent \$4,080 on the unsuccessful motion to release the lien, it was wasteful, unproductive, and overly litigious to spend another \$13,650 on two unsuccessful summary judgment motions raising the same issues. CP 15-27, 336-39, 469-87, 750-53.

Finally, the Nguyens misunderstand or misstate Lawless' argument that the fee award is excessive in light of the amount in dispute. BR 41-43. Lawless readily acknowledged that the amount in dispute is not dispositive, but that the court must consider the amount in dispute in determining whether the fee is excessive. BA 27 (citing ***Absher Constr. Co. v. Kent Sch. Dist. No. 415***, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995)). Comparisons to inapposite cases are unhelpful to this fact-specific inquiry. *Compare Absher*, 79 Wn. App. at 847 *with* BR 41-42.

In sum, this Court should reverse the directed verdict and the fee award. At a minimum, the Court should reverse and remand with instructions to significantly reduce the fee award.

CONCLUSION

For the reasons stated above, this Court should reverse.

RESPECTFULLY SUBMITTED this 1st day of November,
2011.

MASTERS LAW GROUP, P.L.L.C.



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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 1st day of November 2011, to the following counsel of record at the following addresses:

Co-counsel for Appellant

James W. Talbot
Law Offices of James W. Talbot
210 Summit Avenue East
Seattle, WA 98102

Counsel for Respondents

C. Nelson Berry III
Berry & Beckett
1708 Bellevue Ave
Seattle, WA 98122


Shelby R. Frost Lemmel, WSBA 33099
Attorney for Appellant

Original

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

LAWLESS CONSTRUCTION
CORPORATION, a Washington
Corporation,

Plaintiff,

vs.

TUYEN DINH NGUYEN and MAI
TUYET VAN, residents of King
County, Washington,

Defendants.

NO. 09-2-22937-6 KNT

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

THIS MATTER having come on duly and regularly for trial; and the Court having reviewed the evidence duly admitted at trial, including the testimony of witnesses in the Plaintiff's case in chief: Mark Lawless, Todd Christianson, Nelson Berry; and James B. Phillips; and when the Plaintiff rested, the Defendants moved for dismissal of Plaintiff's case pursuant to CR 41(b)(3); and the Court having considered the evidence, and all reasonable inferences to be drawn from such evidence in the light most favorable to the Plaintiff; and having heard the argument of counsel; and being otherwise fully advised in the premises; now makes the following

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Page 1 of 8

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FINDINGS OF FACT

1
2 1. The Plaintiff, Lawless Construction Corporation, is a Washington corporation,
3 duly organized and licensed under the laws of the State of Washington, and with its principal
4 place of business in King County, Washington. Mark Lawless is the Vice-President of
5 Lawless Corporation. At all times material hereto, Lawless Construction Corporation acted
6 solely through Mark Lawless. However, when Mark Lawless testified at the underlying legal
7 malpractice trial, he was acting through his other related corporation, CSMI. Mark Lawless
8 has a 50% interest in CSMI and is not the primary shareholder.

9 2. The Defendants, Tuyen Dinh Nguyen and Mai Tuyet Van are husband and
10 wife, forming a marital community under the laws of the State of Washington, who at all time
11 relevant hereto have resided in King County, Washington.

12 3. Nelson Berry represented Tuyen Nguyen and Mai Van in a legal malpractice
13 trial against their former attorneys who had represented them in a construction defect case.
14 On September 25, 2008, the defendant attorneys' expert, Mark Lawless, of Lawless
15 Construction Corporation, testified during trial that he could repair the marble floor in the
16 Nguyen and Van home for \$22,500, and their front door for \$3,700, for a total of \$26,200,
17 plus Washington State Sales tax.

18 4. Exhibit 1 contains the transcript of the proceedings in the legal malpractice trial.
19 After this testimony, Mr. Berry tried to get Mr. Lawless to sign a written agreement to do this
20 work at that price, including a provision that he would commence this work within 30 days of
21 signing the agreement and a provision that in the event that Nguyen and Van were
22 compelled to sue to enforce that agreement, Lawless Construction Corporation would pay
23 their attorney fees and costs. Mr. Lawless refused to sign that agreement, but promised to

1 sign an agreement containing these terms under "his contract".

2 5. Several months of negotiations followed, and finally, Mr. Lawless sent Nguyen
3 and Van his proposed contract on December 19, 2008. Mr. Lawless' proposed contract
4 omitted terms which Mark Lawless had agreed to include in the contract during his trial
5 testimony, including the attorney fee provision in the event Nguyen and Van had to sue
6 Lawless to enforce the contract, and the start date to be commenced within thirty (30) days of
7 signing.

8 6. In addition, Lawless' proposed contract contained numerous terms which had
9 never even been discussed, much less agreed to, between these parties.

10 7. Nguyen and Van decided to discontinue the negotiations with Lawless and to
11 get the work done by another contractor.

12 8. At no time was there a meeting of the minds between, Lawless Construction
13 Corporation on the one hand, and Nguyen and Van on the other hand, on the essential terms
14 necessary to form a contract. At no time did LCC or Nguyen and Van sign LCC's proposed
15 contract found at Exhibit 13.

16 9. Lawless Construction Corporation filed a Claim of Lien against the Defendants'
17 home on March 13, 2009. Mark Lawless admits that LCC never furnished labor, materials, or
18 equipment for the improvement of the property. Instead, LCC contends that it provided
19 professional services rendered in anticipation of performing improvements to the Defendants'
20 real property.

21 10. Mark Lawless testified that he drew up plans and specifications for part of the
22 remodeling work proposed to be done at the Defendants' home. Exhibit 23. These "plans and
23 specifications" were incomplete in that they did not include dimensions for the proposed

1 remodeling and other essential information. In addition, the "plans and specifications" were
2 never provided to the Defendants until after the commencement of this legal action and did
3 not result in any improvements to their home.

4 11. The Claim of Lien, Exhibit 19, filed by Lawless Construction Corporation
5 contains many inaccuracies. In its Claim of Lien, Lawless asserted that it "began to perform
6 labor, provide professional services, supply material or equipment or the date which
7 employee benefit contributions became due" on September 26, 2008. Yet, the only
8 significance of this date is that it is the day after Lawless claims that the colloquy between
9 counsel and Mark Lawless at trial created a contract, notwithstanding the fact that contract
10 negotiations continued for several months thereafter, and no contract was ever formed. In
11 fact, Lawless Construction Corporation did nothing with respect to the proposed remodeling
12 project at the Defendants' home from September 25, 2008 to October 10, 2008, when Mr.
13 Lawless spoke by telephone with Nelson Berry about the prospective remodel job.

14 12. Lawless Construction Corporation also asserted in the Claim of Lien that the
15 "last date on which labor was performed, professional services were furnished; contributions
16 to an employee benefit plan were due or material, or equipment was furnished" was
17 December 19, 2008. Yet, according to Lawless' Answer to Interrogatory No. 9, the "last work
18 performed by Lawless Construction for the benefit of the Nguyen/Van property...on
19 December 17, 2008, as alleged in Paragraph 2.11 of its complaint was "Finalization of the
20 formal written contract." Mark Lawless also testified that the professional services he had
21 performed (Exhibit 23) were completed by November 30, 2008, more than 90 days before
22 Lawless Construction Corporation filed its Claim of Lien on March 13, 2009.

23 13. In the Claim of Lien, Lawless Construction Corporation also asserted that the

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

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CP 1025

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1 principal amount for which its lien is claimed was "\$3,500, plus applicable lien fees &/or
2 attorney's fees, &/or interest". At trial, Mr. Lawless testified that of that \$3,500, \$506 was for
3 Lawless' attorney to review the proposed contract with the Defendants, and as for the
4 remainder of the \$2,994, that amount was "an estimate" of the value of the professional
5 services Lawless Construction Corporation claimed to have performed.

6 14. No time records was produced to support what time Lawless Construction
7 Corporation may have spent doing what services or what costs it incurred.

8 15. The amount claimed in the Plaintiff's Claim of Lien is excessive.

9 16. By requesting that the Plaintiff provide the Defendants with its contract,
10 including the terms to which Mark Lawless had agreed at trial, the Defendants did not make a
11 legally binding promise. The Defendants had no reason to expect their request to cause the
12 Plaintiff to change its position by performing "professional services". The Plaintiff did not
13 change its position justifiably relying upon any purported promise by performing "professional
14 services", in such a manner that injustice can be avoided only by enforcement of the alleged
15 promise.

16 17. In its First Amended Complaint, the Plaintiff sought an award of damages in an
17 amount of less than \$10,000.

18 18. Applying the principals set forth in RPC 1.7, the attorney fees incurred by the
19 Defendants in the amount of \$ 82,740 and costs and expenses in the amount of
20 ~~\$5,117.98~~ ^{\$4,665.60} are reasonable and were necessarily incurred.

21 **FROM THE FOREGOING FINDINGS OF FACT, THE COURT**
22 **MAKES THE FOLLOWING CONCLUSIONS OF LAW:**

23 1. This Court has jurisdiction over the parties and the subject matter of this
action.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

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CP 1026

1 2. Statutes creating liens are in derogation of the common law. As such they
2 must be strictly construed. The Defendants never requested the Plaintiff to render any
3 services, professional or otherwise, on their home.

4 3. Plaintiff and Defendants never formed a contract during the course of their
5 negotiations, and no contract was ever created. Agreements to agree are *not*
6 enforceable. A judgment should be entered dismissing the Plaintiff's claim for breach of
7 contract.

8 4. In the absence of an enforceable contract or a legally binding promise to
9 do work on the Defendants' property, Lawless Construction Corporation was not entitled
10 to assert a Claim of Lien, and Lawless' claim for lien foreclosure should be dismissed.

11 5. "RCW 60.04.021 requires that professional services must result in an
12 improvement to the property in order to give rise to a lien." *DBM Consulting Engineers,*
13 *Inc. v. U.S. Fidelity and Guar. Co.*, 142 Wn. App. 35, 41 (2007), *review denied*, 164
14 Wn.2d 1005 (2007). Even if Lawless Construction Corporation performed professional
15 services related to Defendants' home, those services did not result in an improvement
16 to their property. Thus, Lawless Construction Corporation's Claim of Lien is invalid, and
17 Lawless' claim for lien foreclosure should be dismissed.

18 6. The contract negotiations carried on between Lawless Construction
19 Corporation and the Defendants were not "professional services" as defined in RCW
20 60.04.011(13). Even if the plans and specifications Mr. Lawless says he prepared may be
21 considered "professional services" under RCW 60.04.011(13), Lawless Construction
22 Corporation's Claim of Lien was recorded more than ninety (90) days after the last day Mr.
23 Lawless testified he prepared the plans and specifications. In order for a lien for professional

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

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CP 1027

1 services to be valid, it must be recorded within ninety days of the date the claimant ceased
2 furnishing such services. RCW 60.04.091. Because Lawless' lien was not recorded within
3 that ninety day period, it is invalid, and Lawless' claim for lien foreclosure should be
4 dismissed..

5 7. One claiming the benefits of a lien under RCW 60.04 must show he has strictly
6 complied with the provisions of the law that created it. *Lumberman's of Washington, Inc. v.*
7 *Barnhardt*, 89 Wn. App. 283, 286 (1997). RCW 60.04.091(1)(b) requires every lien claimant
8 to include in his Claim of Lien "The first and last date on which the ... professional services ...
9 [were] furnished[.]" Because Lawless' Claim of Lien contains incorrect information, it is
10 invalid, and Lawless' claim for lien foreclosure should be dismissed.

11 8. Nor did the Defendants ever make a legally binding promise to the Plaintiff
12 upon which Lawless Construction Corporation was entitled to rely. Plaintiff's claim for
13 promissory estoppel should be dismissed.

14 9. In the absence of an enforceable contract or a legally binding promise to do work on
15 the Defendants' property, Lawless was not entitled to assert a Claim of Lien. For the reasons
16 stated in Conclusion of Law No.'s 3 through 8, Plaintiff's Claim of Lien was and is frivolous.
17 Judgment should be entered dismissing and releasing Lawless' Claim of Lien.

18 20 C 6. The Defendants are entitled to an award of their reasonable attorney fees and
19 ~~\$78,040~~ ^{\$82,740} expenses in the amount of ~~\$78,040~~, pursuant to RCW 60.04.181(3), RCW 4.84.250, RCW
20 4.84.330, and *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn. App. 188,
21 197, 692 P.2d 867 (1984), and their statutory costs in the amount of \$4,665.60.

22 **LET JUDGMENT BE ENTERED IN CONFORMANCE WITH**
23 **THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

Done in Open Court this 4th day of Feb., 2011.

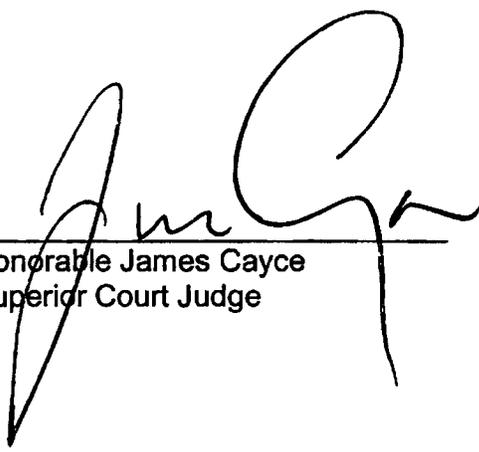
**FINDINGS OF FACT AND
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CP 1028

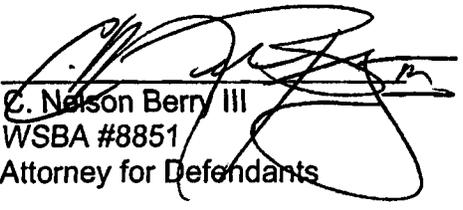
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Honorable James Cayce
Superior Court Judge

Presented By:

BERRY & BECKETT, PLLP



C. Nelson Berry III
WSBA #8851
Attorney for Defendants