NO. 48058-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FRANCISCO GUILLEN, ROBERTO GUILLEN, HECTOR FIERRO, MARTIN GUILLEN, and JOSE TIMOTEO,

Appellants

v.

BENJAMIN PEARSON, VULCAN MOUNTAIN CONSTRUCTION, ABSI BUILDERS, INC., GRAVELLY LAKE TOWNHOMES, LLC, CBIC, and RLI INSURANCE,
Defendants

and

MILESTONE AT WYNNSTONE LLC, MILESTONE AT WYNNSTONE 2 LLC, and RED CANOE CREDIT UNION,

Respondents.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. REPLY ARGUMENTS

A. Laborers Who Frame Buildings Are "Persons and Services" Intended to be Protected by the Lien Statutes; The Court Should Liberally Construe The Lien Statutes to Resolve All the Other Issues in This Case.

Respondent Milestone at Wynnstone, LLC ("Milestone") misreads *Williams v. Athletic Field, Inc.*, 172 Wn.2d 683, 694–98, 261 P.3d 109 (2011), in arguing that the rule of strict construction applies to the disputed issues in this case. *See* Responsive Brief ("Resp. Br." at 2–5). The parties apparently agree that *Williams* held that the rule of strict construction applies to determine whether "persons or services come within the statute's protection." *Williams*, 172 Wn.2d at 696 (emphasis added); *see* Resp. Br. at 4 (quoting holding).[1] The court limited strict construction to these issues because "[e]xpanding the rule of strict construction beyond this inquiry effectively nullifies RCW 60.04.900." *Williams*, 172 Wn.2d at 696; *accord* RCW 60.04.900 (statutory mandate to "liberally construe" the statute "to provide security for all parties intended to be protected by their provisions.").

Milestone then misapplies the *Williams* holding, arguing:

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[1] Milestone discusses a pre-*Williams* case—*Dean v. McFarland Wrecking Co.*, 81 Wn.2d 215, 500 P.2d 1244 (1972)—which strictly construed the lien statute and held that a service, hauling away debris from a building demolished by another, was not a "service" intended to be within the lien statues. *See* Resp. Br. at 2-3. *Dean* is consistent with *Williams*. However, it is *Williams*—not *Dean*—that provides the rule for distinguishing between liberal and strict construction issues.

> In the instant case the issue before the Court is whether Plaintiffs, who are not licensed contractors, who were employees of a subcontractor and who were not hired by either the statutory agent or the owner or the actual agent, had lien rights. The court is to strictly construe the lien statute against finding lien rights.

Resp. Br. 5. Milestone's approach smushes together several issues—issues that go beyond *Williams*'s "persons or services" issue. The issues identified by the above quote from Milestone's brief can be described as follows:

1. Whether laborers (a covered class of persons) must also be licensed contractors? **Liberal construction.**

2. Whether laborers (a covered class of persons) must be hired by a general contractor rather than a subcontractor? **Liberal construction.**

3. Whether a licensed subcontractor is a construction agent of the owner? **Liberal construction.**

Page 5 of Milestone's brief thus identifies 3 issues, none of which involve the issues of "persons or services" the lien statutes were designed to extend to and none of which are subject to strict construction.

Milestone's statement of issues identifies two issues—one warranting a liberal construction and the other warranting a strict construction. Resp. Br. at 2. Milestone defines its first issue as

> Is every subcontractor on every construction job the agent of the owner of the property for purpose of being able to enter into contracts with third parties that can create lien rights on the owner's [sic] under RCW 60.04?

Id. This issue turns on the proper interpretation and application of the "construction agent" definition and is not an issue of "persons or services" who can lien. The answer is therefore entitled a liberal construction. *See Williams*, 172 Wn.2d at 696. The second issue described by Milestone is

> Do employees of a corporation providing labor on a construction job have claims in their individual capacity against the property owner in addition to the claims of the corporation providing the labor?

Resp. Br. at 2. This issue is actually correctly framed as whether laborers have the right to lien under chapter 60.04 RCW (as contrasted with liens by their employers)? This issue is in fact over "persons" within the scope of chapter 60.04 RCW, and, therefore, as to this issue, a strict construction is proper. The Laborers argue that "laborers" are within the class of protected persons, relying on RCW 60.04.021 ("any person furnishing labor"), RCW 60.04.011(7) (defining labor), and RCW 60.04.181(1)(a) (first lien priority to liens "for the performance of labor" with fourth priority for subcontractor claims for labor and materials and fifth priority for prime contractor liens). *See also* App. Op. Br. at 7–9.

Milestone also tries to restrict *Williams* to its facts—an issue of notarization format—whereas the Court's holding states a general rule of broad application. *See* Resp. Br. at 4. If the specific issue before the court does not involve whether the lien claimants were of a class of "persons or

services" within the scope of chapter 60.04 RCW, then liberal rules of construction apply. *See Williams*, 172 Wn.2d at 696–97. Any ambiguities in the statute should be construed "to provide security for all parties intended to be protected by their provisions." RCW 64.04.900.

B. Licensed Subcontractors Are "Construction Agents" Under the Lien Statute, Especially Where They Have Control Over the Work That is Part of Their Subcontract.

Henifin Construction v. Keystone Construction, 136 Wn. App. 268, 145 P.3d 402 (2006), does not stand for the proposition that "construction agents" must have control over the entire project.[2] *Henifin* involved a general contractor acting as a "constructing agent" for purposes of a lien claim. It did not involve, as the case before us, a licensed subcontractor. By its nature, a general contractor will have charge over a project, as the court described. The "in charge of the construction" project was relevant in *Henifin* only to respond to the landowner's defense based on *McCombs Construction v. Barnes*, 32 Wn. App. 70, 645 P.2d 1131 (1982). *Henifin*, 136 Wn. App. at 274–75.

McCombs involved a son, who without permission or direction from his parents, authorized improvements on the family home. 32 Wn. App. at

[2] Milestone incorrectly attributes a quote from *McCombs Construction v. Barnes*, 32 Wn. App. 70, 645 P.2d 1131 (1982), to *Henifin*. Resp. Br. at 8 (the "*Henifin* quote" which starts with, "A statutory agent . . .). As discussed *infra*, *McCombs* involved work performed at the request of an interloping relative—not a licensed subcontractor.

72. The court explored whether the son satisfied any of the categories of construction agents under RCW 60.04.010, including licensed contractors or subcontractors, architects, etc. The court said, "[t]he only conceivable category applying to [the son] would be 'person having charge, of the construction.'" *Id.* at 75. The court limited its analysis to the "having charge" category because the son did not arguably meet any of the other categories of construction agents. However, "the son was not the statutory agent because he had put himself in charge of the project and was not in charge of it for the benefit of his parents," *i.e.,* "the parents had not given their son the authority to make improvements to their property." *Henifin*, 136 Wn.App. at 275. There is no *McCombs* issue here. The laborers' employer was a licensed subcontractor who hired the laborers to perform its obligations under the framing subcontract.[3] *See* CP 158–62, 174–76, & 320.

Milestone relies on MARJORIE DICK ROMBAUER, 27 WASH. PRAC., CREDITORS' REMEDIES – DEBTORS' RELIEF § 4.52 (2015) as authority that only a person in charge of the entire project can be a construction agent.

[3] The landowner in *Henifin* tried to avoid lien charges for change orders agreed to by its general contractor without pre-approval from the landowner as required in the contract between the landowner and general contractor. The landowner unsuccessfully argued that it was like the parents in *McCombs*, the victim of a party that acted without authority. In this context, *McCombs* was distinguished, because the *Henifin* general contractor was held to be a statutory construction agent, regardless of whether the pertinent change-order approval was given in breach of the general contractor's contract with the landowner.

Resp. Br. 9. The treatise provides more of a checklist, than a discussion of underlying lien law cases or policy. Milestone's quote is at best ambiguous. A clearer enunciation of the issue appears in the next section of the treatise, which includes a sample "NOTICE TO CUSTOMER" form for licensed contractors to provide to customers. The form states,

> YOUR PROPERTY MAY BE LIENED. **If** a supplier of materials used in your construction project or **an employee** or subcontractor **of your contractor or subcontractors is not paid, your property may be liened to force payment**.

Id. at § 4.53 (emphasis added). The NOTICE TO CUSTOMER language mirrors that of a sample Notice to Customer forms created by the Washington Department of Labor & Industries ("L&I").

> **If** a supplier of materials used in your construction project or **an employee** or subcontractor **of your contractor or subcontractors is not paid, your property may be liened to payment and you could pay twice for the same work**.

WASHINGTON DEPARTMENT OF LABOR & INDUSTRIES, DISCLOSURE STATEMENT: NOTICE TO CUSTOMERS, PUB. NO. F625-030-000 (2015) (emphasis added), *available at* http://www.lni.wa.gov/Forms/pdf/F625-030-000.pdf. This form is more than just agency literature. It is a form mandated by statute. RCW 60.04.250 (requiring L&I to prepare forms providing information about construction liens). In sum, Rombauer and other sources support the Laborers' position that laborers employed by

subcontractors can lien real property on which they worked. *See also* App. Br. at 14–16 (providing additional secondary authority).

Milestone spends a considerable amount of time responding to arguments the Laborers do not raise. The Laborers do not argue that they had contractual privity with Milestone or that ABSI was a common-law agent of Milestone. *See* Resp. Br. at 5–6. The Laborers do not argue that they have the right to assert a contract claim directly against Milestone under Restatement of Agency § 707 (2006) or other authority. *See* Resp. Br. 13–14. The Laborers' claims are limited to chapter 60.04 RCW mechanics' lien claims.

C. Allowing Laborer Liens Will Not Impede Construction.

Milestone argues that if every laborer on a site was entitled a lien, large construction projects would come to a halt. Resp. Br. at 10. Milestone further suggests that it is "inconceivable" that the legislature intended each employee of a subcontractor to have to sign a lien release. *Id.* at 11. Milestone should address this contention to the Legislature, since the statute provides lien rights to laborers. *See* App. Br. at 8–9. Second, the argument is without any support in the record. Third, the argument is incorrect.

Laborer and material liens are filed only because contractors or subcontractors fail to meet their obligations to material suppliers and laborers. The safest way to avoid lien claims is to hire reputable,

responsible contractors and subcontractors. Apart from hiring reliable contractors and subcontractors, landowners have other methods to protect property from lien claims. Indeed, Milestone's contract with ABSI gave Milestone the contractual right to use a variety of measures to avoid exposure to liens—not just lien waivers. Milestone had the right to bargain for a "Performance Bond and a Labor and Material Payment Bond satisfactory to the Builder." CP 157 (¶ 7). It also had the right to withhold pay until waivers or evidence of "full payment is furnished from all subcontractors, materialmen, laborers or others who might be entitled to a lien on the premises . . . ." CP 157 (¶ 6). Milestone also had the contractual right to pay laborers and materialmen directly. *Id.*

Moreover, Milestone could have insulated itself if it had hired a general contractor for the project and entrusted the general contractor with hiring subcontractors. If a problem arose, Milestone would have had a direct or implied contractual right to require the general contractor to keep the property lien free. Instead, Milestone acted as its own general contractor, hired an irresponsible subcontractor, and took none of the steps available to it protect itself from laborer liens. More seasoned owners and general contractors would have likely had the business sense and skill to avoid laborer liens. Meanwhile, the Legislature chose in chapter 60.04 RCW, and its predecessors, to gives laborers the right to look to the real

property they improve when their licensed subcontractor or contractor employer fails to pay them for their labor when improving real property.

Large construction projects are even less likely to be negatively affected by applying chapter 60.04 RCW to laborers, as intended by the Legislature. Owners have express and implied contractual protection against liens on the property. Large projects are run by established construction companies. The owners typically have the right to stop payments on a project when liens are pending. The pressure flows downstream from general contractors to subcontractors to 2nd tier subcontractors, etc. The debtor subcontractor is then required to either pay or bond around the lien. The project does not halt.

In contrast, the lien statute allows construction to flourish. A company selling lumber, windows, nails, pipes, or saplings does not need to rely solely on the credit-worthiness of every subcontractor or general contractor who enters its shop. They only need to go to L&I's website to determine whether they are dealing with licensed contractor. The same protection is extended to laborers and material suppliers. Large and small construction projects in Washington benefit because there is a free flow of materials and labor to those projects. The lien claim is limited to the project itself.

II. CONCLUSION

For the reasons discussed above and in their Opening Brief, the Laborers request that this Court reverse the summary judgment decisions of the Superior Court and remand for further proceedings.

RESPECTFULLY SUBMITTED this 24th day of February, 2016.

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Throughout 2015 and 2016, the parties have been serving each other through email.

This brief is being served via email and US Mail postage prepaid this 24th day of February, 2016.

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