

NO.65959-6-I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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COLUMBIA STATE BANK, a Washington State banking corporation,

Appellant,

v.

ANTINORI DEVELOPMENT, LLC, a Washington limited liability  
company,

Respondent.

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APPELLANT'S OPENING BRIEF

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## **I. ASSIGNMENT OF ERROR**

### A. Assignment of Error

The Trial Court Erred in Entering its Order Granting, in Part, Defendant Antinori Development, LLC's Motion for Summary Judgment as well as the Judgment and Decree of Foreclosure for Antinori Development, LLC.

### B. Issues Pertaining to Assignment of Error

- i. Whether the trial court erred in finding Antinori's lien claim valid and superior to the Bank's lien claim when its claim arises from the Reciprocal Easement Agreement and its right to reimbursement is purely contractual.
- ii. Whether the trial court erred in finding Antinori's lien claim valid and superior to the Bank's lien claim where Antinori is not a proper lien claimant under Chapter 60.04 RCW.
- iii. Whether the trial court erred in finding Antinori's lien claim valid and superior to the Bank's lien claim even though its Claim of Lien Notice Fails to Comply with Chapter 60.04 RCW's Strict Requirements.
- iv. Assuming Antinori's lien claim is valid and superior to the Bank's lien claim, whether the trial court erred in not limiting the lien claim to the value of the work performed by Superior Asphalt because the Pivetta Brothers' work was not contemplated in the Reciprocal Easement Agreement and the lien claim as to Pivetta Brothers' was not Timely Filed.
- v. Whether the trial court erred in finding Antinori's lien claim valid and superior to the Bank's lien claim where Antinori failed to name and serve the Bank with its lien foreclosure action.

- vi. Whether the Bank is entitled to an award of attorney's fees and costs pursuant to RCW 60.04.181 and RAP 18.1.

## II. STATEMENT OF THE CASE

### A. The Parties.

**Columbia State Bank (“the Bank”)**. The Bank is a Washington state banking corporation that loaned money to Normandy Park Investors, LLC (“NPI”) for the development of a shopping center in Normandy Park, Washington (“Real Property”). NPI executed a Promissory Note for the loan, which was secured by a Deed of Trust in the Real Property. Diversified Property Investors, LLC (“DPI”), a related entity, guaranteed all of NPI's obligations arising from the loan and other actions in connection with the loan.

After NPI and DPI's default of its obligations under loan documents, the Bank sought foreclosure and other relief. The Bank also sought an order establishing its first place priority interest in the Real Property as to all other lien claimants including Antinori Development, LLC.

**NPI and DPI.** NPI borrowed money from the Bank for the construction of the shopping center. DPI was the guarantor of NPI's obligations.

**Antinori Development, LLC (“Antinori”)**. Antinori owned real

property adjacent to the Real Property that was the subject of the Bank's lawsuit against NPI and DPI. Antinori filed its own lawsuit against NPI arising from, in part, NPI's alleged breach of the parties' Reciprocal Easement Agreement relating to construction of a driveway servicing both NPI's and Antinori's properties. Antinori also filed a lien claim against NPI and sought an order establishing its first place priority interest in the Real Property as to all other lien claimants. Antinori never named the Bank in its lien foreclosure action.

**B. Procedural History.**

This appeal arises from the Bank's foreclosure action involving Real Property owned by NPI, against which Antinori improperly filed a claim of lien. The trial court erred in determining that Antinori's lien claim is valid and holds a superior priority interest to the lien of the Bank's Deed of Trust from NPI.

On February 3, 2009, the Bank filed its Complaint against NPI and DPI alleging various causes of action arising from NPI's and DPI's defaults of the Bank's loan to NPI for the construction of a shopping mall located in Normandy, Washington. CP 3-38.

On December 4, 2009, the Bank filed an Amended Complaint adding Antinori as a defendant. Antinori claimed a lien against the Real Property that was the subject of the Bank's foreclosure action against NPI

and DPI. CP 748-851.<sup>1</sup> In addition to relief sought against NPI and DPI, the Bank sought an order declaring all lien claimants' interests, including Antinori's, inferior and subordinate to the Bank's interest. CP 797-798.

Shortly thereafter, on February 2, 2010, the Bank filed its Second Amended Complaint adding another lien claimant as a defendant. CP 1012-1028.<sup>2</sup>

Antinori filed its Answer, Counterclaims and Cross-Claims on May 18, 2010. CP 1079-1110. Antinori's Counterclaims sought, in relevant part, foreclosure of its lien as to the Real Property as well as a determination that Antinori's lien was valid and had priority over the Bank's lien and all other liens. *Id.*

As more fully described below, Antinori filed its First Amended Complaint against NPI in its separate King County Superior Court action on July 13, 2009, seeking an order of foreclosure upon NPI's Real Property arising from its construction lien recorded on January 16, 2009. However, Antinori neither named the Bank in nor served the Bank with its lawsuit. Subsequently, on February 19, 2010, that suit was consolidated with the Bank's foreclosure action against NPI and DPI before the

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<sup>1</sup> The Bank's Amended Complaint also named lien claimant, Superior Asphalt Maintenance, Inc. ("Superior") as a defendant. CP 784. On July 22, 2010, the trial court entered a Stipulated Lien Release and Dismissal of Superior from the lawsuit. CP 2383-2392.

<sup>2</sup> The Bank's Second Amended Complaint named lien claimant Elite Electric, Inc. ("Elite"). On July 13, 2010, the trial court entered a Stipulated Lien Release and Dismissal of Elite from the lawsuit. CP 2378-2380.

Honorable King County Superior Court Judge Gregory P. Canova. CP 1043-1047.

On May 20, 2010, just two month prior to trial, Antinori filed a Motion to Amend Complaint seeking leave from the trial court to add the Bank as a defendant and to assert its lien claim against the Bank. CP 1147-1160. On June 7, 2010, the trial court denied Antinori's Motion to Amend Complaint precluding Antinori from naming the Bank in its lien foreclosure action. CP 1839-1840. Thus, the Bank was never made a party to Antinori's lien foreclosure action.

On May 28, 2010, both the Bank and Antinori filed motions for summary judgment seeking the court's determination, as a matter of law, as to the parties' lien claims. CP 1234-1246; 1628-1639. Both the Bank and Antinori sought to establish the validity and priority of their lien claims. *Id.*

On July 9, 2010, the trial court entered its Order Granting, in Part, Defendant Antinori Development, LLC's Motion for Summary Judgment. CP 2352-2354. The Order established, in relevant part:

- NPI was liable to Antinori in the principal amount of \$134,817.69 (plus pre-judgment interest and attorney's fees);
- Antinori's Claim of Lien recorded in King County on January 16, 2009, is a valid lien as against NPI upon the subject real property currently owned by NPI . . . in the amount of \$134,817.69;

- Antinori's lien has rank and priority over all interests, claims and encumbrances in and upon the NPI Property (including that of the Bank); and
- Antinori is entitled to foreclose its lien against the NPI Property and against any and all other liens of inferior rank or priority who claim an interest in the NPI Property.

CP 2353.

On July 19, 2010, the trial court conducted a bench trial. On August 20, 2010, the trial court entered a Judgment and Decree of Foreclosure for Plaintiff Columbia Bank with regard to its claims as to NPI and DPI. CP. 2640-2643.

That same day, the trial court also entered a Judgment and Decree of Foreclosure for Antinori Development, LLC. CP 2635-2639. The trial court entered Findings of Facts and Conclusions of Law (CP 2644-2652), including the following:

Finding of Fact No. 4: Defendant Antinori Development, LLC (Antinori) . . . Antinori filed a Notice of Claim of Lien with the King County Auditor's Office under Recording No. 20090116000388 on January 16, 2009, which lien encumbered the Real Property described below in Paragraph 7. CP 2645.

Conclusion of Law No. 2: The Deed of Trust constitutes a valid lien on Real Property superior in right and time to the interest of all parties to this action except that claim of Antinori, which claim is superior in right and time to all other parties to this action, as reflected in both the Order

entered July 9, 2010 Granting in Part Defendant Antinori's Motion for Summary Judgment and the Judgment and Decree of Foreclosure for Antinori Development, LLC, dated August 20, 2010. CP 2650.

The Bank timely filed this Notice of Appeal on September 3, 2010. CP 2631.

C. **Factual History.**

i. *The Bank's Lawsuit v. NPI and DPI*

On October 16, 2006, the Bank and NPI executed a Commercial Construction Loan Agreement ("Loan Agreement"). The Loan Agreement governs the terms and conditions of a construction loan ("Loan") made by the Bank to NPI for the construction of the Normandy Park shopping mall. CP 10-21. On that same date, NPI executed a promissory note ("Note") payable to the Bank in the amount of \$12,350,154.00. CP 23-28. NPI secured repayment of the Loan and Note by executing a Deed of Trust ("Deed of Trust") relative to the Real Property. CP 826-845.

The Bank recorded the Deed of Trust with the King County Auditor on **November 1, 2006** under Auditor's Recording no. 20061101001227. CP 2625. The trial court determined that the Bank's lien claim is valid. CP 2628. The Findings of Fact and Conclusions of Law establishing such have not been appealed.

ii. *Antinori's Lawsuit v. NPI*

After recording its Notice of Claim of Lien on January 16, 2009, Antinori filed suit against NPI in King County Superior Court under

Cause No. 09-2-06345-1 KNT on July 13, 2009. That case was consolidated with the Bank's case against NPI and DPI on February 19, 2010. CP 1043-1047.

Antinori owned real property immediately adjacent to the Real Property that was the subject of the Bank's foreclosure action against NPI. *Id.* Antinori's lien foreclosure action against NPI arose from a Reciprocal Easement Agreement ("REA"), to which Antinori (allegedly as successor in interest to Normandy Park Towne Center, LLC) and NPI are parties as well as the CC&R's recorded against the Real Property and Antinori's property. CP 1118-1125. The REA was recorded in King County on April 19, 2005. CP 1409. The Bank is not a party to the REA. *Id.*

The REA establishes a perpetual, reciprocal non-exclusive easement for the benefit of Antinori and NPI to establish a common driveway ("Driveway") to provide ingress and egress to and from both parcels. CP 1409-1424. Antinori alleged that the REA provides that the cost of constructing the Driveway is to be shared equally by Antinori and NPI. CP 1084-1085. Antinori also claimed that the REA provides, in relevant part, the party undertaking construction of the Driveway may request reimbursement from the other party. CP 1084-1085.

Paragraph 4.1 of the REA is entitled "Roadway Surface Improvements" and states:

The owner of the Investors Parcel shall bear and pay when due all costs of ***constructing, installing, maintaining, repairing, altering and replacing the paving, roadway, driving lanes, striping and other surface improvements*** on the Investors Parcel, shall keep all of such improvements in good condition and repair at all times.

CP 1095.

Antinori contracted with two, unrelated subcontractors to perform the construction work. CP 1401-1403. The first contractor, Pivetta Brothers Construction ("Pivetta"), commenced its work on October 11, 2006. CP 1401-1403. Pivetta performed mass excavation and stormwater on NPI's property. CP 1403, 1426-1442. The Pivetta Job Detail Report reflects that Pivetta completed their work on March 15, 2007 and, nearly one year later, was recalled to the job site for a one day period on March 5, 2008. CP 1447, 1459, 1427-1428, 1449.

Although Pivetta's work did not involve the construction of the driveway as contemplated in the REA, Antinori included the \$125,695 cost of Pivetta's work in its \$164,923.44 "driveway" lien claim. CP 1110, 1426-1428.

Superior Asphalt ("Superior"), the second contractor working on NPI's property for the common driveway, performed work associated with the surface common road construction. CP 1490-1496. Superior completed its work on NPI's property on January 5, 2009. CP 1491, 1493.

It is undisputed that the REA does not provide either party the authority to file or foreclose a lien pursuant to the REA. CP 1409-1424. Despite such, however, Antinori filed its claim of lien against NPI on January 15, 2009 under King County Auditor's Recording no. 20090116000388. Antinori's Notice of Claim of Lien provides:

NOTICE IS HEREBY GIVEN that the entity named below ***claims a lien, pursuant to the Reciprocal Easement Agreement*** and Declaration of Covenants, Conditions, and Restrictions ("REA")

5. ***THE LIEN IS ASSESSED pursuant to the REA.*** A recording of the REA under King County Auditors Number 2005419001552 constitutes record notice and perfection of the lien.

CP 1444-1445.

Antinori's First Amended Complaint against NPI alleged causes of action for breach of contract, unjust enrichment, promissory estoppel and foreclosure of lien. Antinori alleged in its lien foreclosure action that it provided labor, professional services, and supply material or equipment for the construction and improvement of the Driveway. Antinori's Notice of Claim of Lien and First Amended Complaint describe the real property that is the subject of Antinori's lien claim. CP 1444-1445. This is the same Real Property against which the Bank sought foreclosure. Antinori

cited to Chapter 60.04 RCW, the Mechanic's and Materialmen's Lien Statute, as the basis of its lien claim. CP 1118, 1123-1124.

As described above, the trial court granted Antinori's Motion for Summary Judgment and determined that Antinori's lien claim was valid and held a priority interest over all other lien claims, including the Bank's lien claim.

### III. ARGUMENT

#### A. Standard of Review

The appellate court reviews cross motions for summary judgment de novo. *State ex rel. Public Disclosure Commission v. 119 Vote No! Comm.*, 135 Wn.2d 618, 637, 957 P.2d 691 (1998). Further, the interpretation and application of a statute or a contract to a particular set of facts is a question of law. *Abbs v. Georgie Boy Mfg., Inc.*, 60 Wn. App. 157, 160, 803 P.2d 14 (1991); *The Language Connection, LLC v. Employment Sec. Dept. of State of Washington*, 149 Wn.App. 575, 205 P.3d 924 (2009). Questions of law are reviewed de novo. *Niemann v. Vaughn Community Church*, 154 Wn. 2d 365, 375, 113 P.3d 463 (2005).

In this case, the trial court considered competing cross-motions for summary judgments and interpreted Chapter 60.04 RCW, the Mechanics' and Materialmen's lien statute. Thus, this Court's review is de novo.

B. Antinori's Lien Claim Against NPI is Invalid Because its Claim is Purely Contractual.

Antinori's Notice of Claim of Lien plainly and unambiguously provides that the basis of Antinori's lien claim is the REA between Antinori and NPI. This assertion appears in the introductory section of the Notice of Claim or Lien as well as paragraph 5 of the Notice of Claim of Lien. Paragraph 5 provides that "THE LIEN IS ASSESSED pursuant to the REA. A recording of the REA under King County Auditors Number 2005419001552 constitutes record notice and perfection of the lien." CP 1444-1445. However, nothing in the REA provides a right to pursue a lien foreclosure action pursuant to RCW 60.04 against NPI. The REA merely provides for a cost reimbursement allocation between Antinori and NPI and contains no language contemplating a lien in the event of non-payment. Antinori's claim against NPI arises purely from its contract and the obligations and responsibilities set forth therein.

Accordingly, Antinori's right to reimbursement is purely contractual and its lien foreclosure action brought pursuant to the Mechanics' and Materialmen's lien statute is invalid. The trial court committed error in entering its Order Granting, in Part, Defendant Antinori's Motion for Summary Judgment and Decree and Judgment of Foreclosure for Antinori Development, LLC.

C. Antinori's Lien Claim is Invalid Because Antinori is Not a Proper Lien Claimant as Contemplated by Chapter 60.04 RCW

Antinori's claim of lien also fails because it is not a party to whom the lien claim statute was intended to apply.

RCW 60.04.226 is entitled "Financial encumbrances – Priorities" and provides, in relevant part:

*Except as otherwise provided in RCW 60.04.061 or 60.04.221, any mortgage or deed of trust shall be prior to all liens, mortgages, deeds of trust, and other encumbrances which have not been recorded prior to the recording of the mortgage or deed of trust regardless of when the same are disbursed or whether the disbursements are obligatory.*

Emphasis added.

It is undisputed that the Bank recorded its Deed of Trust on November 1, 2006, reflecting an interest as mortgagee in the Real Property. Antinori filed its Claim of Lien on January 15, 2009. Accordingly, the Bank's Deed of Trust is prior to Antinori's lien given the Bank's priority recording. Moreover, the exceptions to RCW 60.04.226 do not apply to Antinori.

RCW 60.04.061 provides:

The claim of lien created by this chapter upon any lot or parcel of land shall be prior to any lien, mortgage, deed of trust, or other encumbrance which attached to the land after or was unrecorded at the time of commencement of labor or professional services or first delivery of materials or equipment by the lien claimant.

However, RCW 60.04.021 sets forth those persons who may have a valid lien against real property as follows:

. . . any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price for the labor, professional services, materials, or equipment furnished at the insistence of the owner, or agent or construction agent of the owner.

RCW 60.04.021 (emphasis added).

Mechanic's and materialmen's liens are creatures of statute and thus, they are in derogation of the common law and must be strictly construed to determine whether a lien attaches. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308 (2009), citing *Dean v. McFarland*, 81 Wn.2d 215, 219-20, 500 P.2d 1244 (1972).

The statute's purpose, in relevant part, is to "prevent detriment to laborers and material suppliers who expend their resources on others' property." *Estate of Haselwood, supra* (recognizing protection of equipment supplier who provides equipment to project pursuant to contract with owner and construction manager's directive to commence work); Rombauer, 27 *Washington Practice*, Creditors' Remedies-Debtors' Relief §4.52, 347-48 (2d ed).

Antinori, as owner of the adjacent and benefitted property (under the REA), is not a contemplated beneficiary of the statute and does not and

should not receive the benefit of the statutory exception establishing lien priority. Specifically, the REA establishes and creates for Antinori's benefit a perpetual, non-exclusive easement for ingress and egress. Antinori, as beneficiary of the REA undertook to improve its own property by constructing a driveway on its own easement, which allowed ingress and egress for vehicular traffic to Antinori's property.

Under these unique circumstances, Antinori does not receive the protection of this statute, or the statutory section placing its lien claim prior to the Bank's recorded Deed of Trust.<sup>3</sup> The Bank's Deed of Trust was filed prior in time to Antinori's Claim of Lien and thus holds a priority position over Antinori's lien claim. Since the lien claim statute does not apply to Antinori, the trial court's Order Granting, in Part, Defendant Antinori's Motion for Summary Judgment and the trial court's entry of the Decree and Judgment of Foreclosure for Antinori Development, LLC are erroneous.

D. Antinori's Lien Claim is Invalid Because its Claim of Lien Notice Fails to Comply with RCW 60.04's Strict Requirements.

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<sup>3</sup> Further, Antinori is not a lender providing interim or construction financing as contemplated by the section exception, set forth in RCW 60.04.221.

*Assuming arguendo*, that Antinori is an intended beneficiary of the lien claim statute and its protections, Antinori's lien claim is invalid because it fails to comply with the plain and unambiguous provisions of the statute. First, Antinori's Notice of Claim of Lien twice states the identity of the owner of the Real Property, NPI, but fails to state or name the person or entity indebted to Antinori. Further, its Notice of Claim of Lien specifically alleges that the basis for its lien claim arises from the REA and the CC&R's, but fails to cite to the Mechanics' and Materialmen's lien statute, Chapter 60.04 RCW.

To assert a valid lien claim, a lien claimant must clearly demonstrate satisfaction of all of the statutory lien requirements, including compliance with the provisions of RCW 60.04.091. *Williams v. Athletic Field, Inc.*, 155 Wn.App. 434, 228 P.3d 1297 (2010), *rev. granted*, 169 Wn.2d 1021, 238 P.3d 504 (2010).

RCW 60.04.091 requires that every person claiming a lien under RCW 60.04.021, shall file for recording a notice of claim of lien. Further the statute sets forth requirements relating to notice of the claim of lien.

RCW 60.04.091 provides, in relevant part:

The notice of claim of lien:

(1) **Shall state** in substance and effect:

...

(c) The name of the person indebted to the claimant.

RCW 60.04.091 (emphasis added).

It is well established that when interpreting the mechanics' lien statute, courts look to the plain and unambiguous language of the statute. *Estate of Haselwood*, *supra*. The language "shall" denotes a mandatory term and requires strict compliance.

Antinori's Notice of Claim of Lien completely omits the required identification of the person indebted to the claimant. Instead, Antinori's Notice of Claim of Lien twice identifies the property owner, once in paragraph 4 ("The property is owned by: Normandy Park Investors, LLC") and once on the first page in handwriting ("The property is owned by: Normandy Park Investors, LLC."). CP 1109-10.

Where this is the case, Antinori fails to comply with the strict requirements of the lien foreclosure statute and thus, it is invalid. Accordingly, the trial court's determination as to Antinori's lien validity and priority are erroneous and must be reversed.

- E. Antinori's Lien Claim, Even if Valid, Is Limited to the work performed by Superior Asphalt Because the Lien Claim Associated with the Pivetta Brothers work was not contemplated in the REA and even if contemplated, the lien claim was not Timely Filed.

The REA provides for the construction and shared costs of a common driveway. Paragraph 4.1 of the REA, entitled "Roadway Surface Improvements," states:

The owner of the Investors Parcel shall bear and pay when due all costs of ***constructing, installing, maintaining, repairing, altering and replacing the paving, roadway, driving lanes, striping and other surface improvements*** on the Investors Parcel, shall keep all of such improvements in good condition and repair at all times.

CP 1412.

The REA's unambiguous language makes exceptionally clear the parties' intent as to the types of improvements for which the Investor Parcel (NPI) was required to pay. First, the term "Surface" contained in the title of Paragraph 4.1 contemplates above ground improvements including preparing for paving, paving a roadway, painting the roadway and other ground level or above ground improvements. The term "surface" is not defined in the REA. Where this is the case, courts often look to common dictionary definitions to interpret contracts. *Black v. National Merit Ins. Co.*, 154 Wn.App. 674, 226 P.3d 175 (2010). The term "surface" is commonly defined as "the top layer of something, especially of land." *Black's Law Dictionary*, 1171 (6<sup>th</sup> ed.). The term "surface" is also commonly defined as "the exterior or upper boundary of

an object or body”. Merriam-Webster On-Line Dictionary (2010)  
([www.merriam-webster.com/dictionary/surface](http://www.merriam-webster.com/dictionary/surface)).

Further, the specific listing of the types of work associated with roadway surface improvements describe basic above ground, or close to above ground improvements aimed at constructing or placing a roadway on a property. Quite simply, the REA does not contemplate the mass excavation and construction of an onsite storm drain, shared water main and storm water vault as performed by Pivetta CP 1412. This work, totaling \$125,695, or 76% of Antinori’s lien claim, is outside the scope of the REA and is not properly the subject of its lien claim.

*Assuming arguendo*, the Pivetta work was somehow contemplated by the REA, the lien claim for the work performed and/or material supplied by Pivetta was not timely recorded and does not constitute valid lien claim.

RCW 60.04.091 provides, in relevant part:

Every person claiming a lien under RCW 60.04.021 shall file for recording . . . a notice of claim of lien not later than ninety days after the person has ceased to furnish labor, professional services, materials, or equipment . . .

. . .

The period provided for recording the claim of lien is a period of limitation and no action to foreclose a lien shall be maintained unless a claim of lien is filed for recording within the ninety-day period.

RCW 60.04.091(1)(c), (2).

Where there are separate and distinct contracts, a lien claimant cannot extend the time for filing a lien claim based upon work performed or materials furnished on a separate contract. *Boise Cascade Corp. v. Pence*, 64 Wn.2d 798, 394 P.2d 359 (1964) citing *Anderson v. Taylor*, 55 Wn.2d 215, 347 P.2d 576 (1959). The *Anderson* court, quoting 36 Am.Jur. 97 *Mechanics' Liens* § 140 stated: ". . . after a contract is completed and closed, the time for filing a statement or claim of lien cannot be extended or the right received by furnishing material or performing labor, upon a new contract, and tacking the same to the original contract." *Anderson*, 55 Wn.2d at 217.

With respect to the contracts that are the subject of Antinori's lien claim, the Pivetta work performed pursuant to the parties' agreement was for mass excavation and related stormwater work, which work allegedly began on October 11, 2006 and was completed at least by March 5, 2008. Pursuant to RCW 60.04.091 as well as *Anderson, supra*, and *Boise Cascade, supra*, in order to assert a valid lien claim, Antinori was required to file any lien claim associated with the Pivetta work no later than 90 days after completion of its work, or June 5, 2008. Antinori filed its claim of lien against NPI on January 15, 2009. Antinori cannot extend its time for filing a claim of lien by "tacking" on Superior's time of performance based upon its separate contract with Antinori.

The trial court's determination as to the validity and amount of Antinori's lien claim is erroneous. If Antinori has a valid lien, the lien amount should reflect the amounts paid to Superior for its "Roadway Surface Improvements" only.

- F. The Bank is Not a Valid Party to Antinori's Lien Foreclosure Action and thus, Antinori's Lien is Void as to the Bank.

While Antinori filed its Notice of Claim of Lien on January 15, 2009 and filed its lawsuit against NPI, on July 13, 2009, within 8 months of recording its claim, Antinori did not name the Bank in or serve the Bank with its lien foreclosure action.

RCW 60.04.141 provides, in relevant part:

No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim of lien has been recorded *unless* an action is filed by the lien claimant within that time in the superior court in the county where the subject property is located to enforce the lien, and *service is made upon the owner of the subject property within ninety days of the date of filing the action . . .* This is a period of limitation.

Emphasis added.<sup>4</sup>

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<sup>4</sup> The Legislature amended the lien statute in 1991 to remove the term "necessary parties" and to require service upon only owners of the subject property. See *MB Construction Co. v. O'Brien Commerce Center Assoc.*, 63 Wn.App. 151, 155 n.1, 816 P.2d 1274 (1991).

While the statute sets forth that the lien claimant need only serve the owner (as opposed to parties such as mortgagees of properties to which lien claims are made), it is nonsensical that a lien claimant may foreclose upon such property without any notice whatsoever to such mortgagee. *See Shurtliff v. Dept. of Retirement Systems*, 103 Wn. App. 815, 825, 15 P.3d 164 (2000) (recognizing courts should not construe statute, rule or contract term where such a construction would lead to unreasonable or absurd consequence).

Where this is the case, Antinori's lien claim should be void as to the Bank and the Bank's lien should have a priority interest over Antinori's lien claim.

G. The Bank is Entitled to an Award of Attorneys' Fees and Costs for Establishing its Priority interest in the Real Property and for Defending Antinori's Lien Claim.

As the prevailing party, the Bank is entitled to an award of its attorney's fees and costs for establishing its priority lien interest above Antinori under the "rank of lien" provision in RCW 60.04.181.

RCW 60.04.181 provides for an award of attorneys' fees and costs to the prevailing party in a lien foreclosure action brought under the mechanics' lien statute where that party establishes its priority ranking.

RCW 60.04.181 provides, in relevant part:

(1) In every case in which different construction liens are claimed against the same property, the court shall declare the rank of such lien or class of liens, which liens shall be in the following order:

...

(2) The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the monies paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, and supreme court.

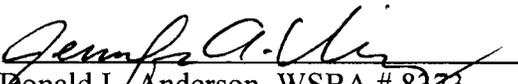
In *Emerald City Elec. & Lighting, Inc. v. Jensen Elec., Inc.*, 68 Wn.App. 734, 846 P.2d 559 (1993), the court applied the provisions of RCW 60.04.181 and awarded attorneys' fees to a construction lender who prevailed on the issue of priority of its deed of trust over subcontractor mechanics' liens. In this case, if this Court reverses the trial court, the Bank respectfully requests an order awarding its attorney's fees and costs in establishing its priority lien position in the Real Property.

## V. CONCLUSION

Given the foregoing, the Bank respectfully requests that this Court reverse the trial court's Order Granting, in Part, Defendant Antinori's Motion for Summary Judgment and Decree and Judgment of Foreclosure for Antinori Development, LLC.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of January, 2011.

EISENHOWER & CARLSON, PLLC

By:   
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Columbia State Bank

DECLARATION OF SERVICE

I hereby certify that on the 27th day of January, 2011, I served Respondent with a copy of the foregoing APPELLANT'S OPENING BRIEF by sending a true and correct copy of the foregoing document via ABC Legal Messengers to the following counsel for Respondent:

Mr. Sandip Soli  
Cairncross & Hempelmann P.S.  
524 Second Avenue, Suite 500  
Seattle, WA 98104-2323

I also delivered a courtesy copy of the foregoing document via ABC Legal Messengers to be hand-delivered to the following:

Mr. Andrew A. Guy  
Stoel Rives LLP  
600 University Street, Suite 3600  
Seattle, WA 98101-3197

Finally, I arranged for the original and one copy of the foregoing document to be filed with the Court of Appeals, Division I, via ABC Legal Messengers at the following address:

Washington State Court of Appeals, Division I  
One Union Square  
600 University Street  
Seattle, WA 98101-1176

DATED this 27th day of January, 2011.

  
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Bryan D. Johnson