

No. 65959-6-I

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**COURT OF APPEALS, DIVISION I  
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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**BRIEF OF RESPONDENT**

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COURT OF APPEALS  
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## I. NATURE OF CASE

This appeal concerns the priority of liens against a parcel of real property that was owned by Normandy Park Investors, LLC (“NPI”). Pursuant to a Reciprocal Easement Agreement and Declaration of Covenants, Conditions and Restrictions (the “REA”), Respondent Antinori Development, LLC’s (“Antinori”) improved the parcel of real property owned by NPI (the “NPI Property”). Antinori, who owns an adjacent parcel (the “Antinori Property”), constructed a common driveway (the “Common Driveway”) and certain utilities for the benefit of both the Antinori and NPI Properties. Pursuant to the terms of the REA, NPI was required to pay Antinori fifty percent (50%) of the costs Antinori incurred in constructing the Common Driveway. When NPI failed to pay, Antinori filed a Claim of Lien (the “Lien”) against the NPI Property for the amount it was owed under the contract.

Appellant Columbia State Bank (“Columbia”) was NPI’s primary lender and held a Promissory Note and Deed of Trust executed by NPI and secured by the NPI Property. Both Antinori and Columbia sued NPI as a result of its defaults under the REA and the Promissory Note.

After cross-motions for summary judgment, the trial court properly determined that: (1) Antinori’s Lien was valid upon the NPI Property, (2) Antinori’s Lien has priority over Columbia’s Deed of Trust pursuant to

RCW 60.04.061, and (3) that Antinori is entitled to foreclose its Lien against the NPI Property and against all other liens and interests, including Columbia's Deed of Trust.

Columbia now seeks, among other things, a determination that the trial court erred when it determined that Antinori's Lien has priority over Columbia's Deed of Trust on the parcel. The trial court's ruling is consistent with the plain language of Chapter 60.04 RCW and controlling Washington case law. Thus, Columbia's appeal must fail.

## **II. RESTATEMENT OF ISSUES PRESENTED**

1. Is Antinori's Lien valid where it was recorded within eleven days of the completion of construction and Antinori filed a foreclosure action with eight months of recording the Lien?

2. Does Antinori's Lien have priority over Columbia's Deed of Trust where Antinori began construction of the Common Driveway prior to the date upon which Columbia recorded its Deed of Trust?

3. Does Antinori's Lien comply with the requirements of RCW 64.04.091?

4. Is Antinori's Lien perfected against Columbia where Antinori filed a counterclaim for foreclosure of its Lien within ninety days of being joined in Columbia's lawsuit against NPI?

5. Is Antinori entitled to an award of attorney's fees and costs pursuant to RCW 60.04.181 and RAP 18.1?

### III. STATEMENT OF THE CASE

**A. NPI fails to pay Antinori for costs incurred in the construction of a shared driveway, storm water system, and other utilities pursuant to the parties' agreement.**

Antinori owns real property immediately adjacent to the NPI Property. CP 1402. Together, these neighboring parcels comprise the Normandy Park Towne Center, which is located near the intersection of 1st Avenue South and SW 200th Street in Normandy Park, Washington. Id. Antinori acquired the Antinori Property from Normandy Park Towne Center, LLC ("NPTC"). CP 1405.

On or about March 31, 2005, prior to Antinori's acquisition of its parcel, NPTC and NPI entered into the REA. CP 1402; 1409-1424. NPTC and NPI recorded the REA with the King County Auditor on April 19, 2005 under Recording Number 20050419001552. Id. The REA established, among other things, a perpetual, non-exclusive easement for the benefit of both NPTC and NPI, to establish the Common Driveway. The Common Driveway was intended to provide ingress and egress to and from both the Antinori Property and the NPI Property from 1st Avenue South. Id.

Pursuant to Section 4.1.2 and Exhibit G of the REA, NPTC and NPI agreed to equally share the cost of design and construction of the Common Driveway, including unanticipated costs and cost overruns. CP 1424. Exhibit G of the REA further provides that the party that undertakes the construction of the Common Driveway may request reimbursement for half of the cost of the completed work on the Common Driveway. Id.

As successor-in-interest to NPTC, Antinori undertook construction of the Common Driveway in October 2006. CP 1403, 1447. Per the oral agreement between Antinori and NPI, the construction of the Common Driveway, as contemplated in the REA, included construction of an onsite storm drain, a shared water main, a storm water vault, roadway paving and electrical, telephone, and television utilities. CP 1403. Antinori's subcontractor Pivetta Brothers Construction, Inc. ("Pivetta") commenced labor and delivery of equipment on October 11, 2006, when they performed mass excavation and mobilization of equipment to construct the Common Driveway and stormwater system. CP 1442-1489. Pivetta continued to work on stormwater system and water main work through the end of October 2006. Id. The work performed by Pivetta was for the benefit of both the NPI Property and the Antinori Property. CP 1403. Antinori, through its subcontractor Superior Asphalt Maintenance, Inc.

(“Superior Asphalt”), completed construction of the Common Driveway and associated utilities on January 5, 2009. CP 1491-1496.

Throughout the construction of the Common Driveway, Antinori sought and received approval from NPI and its agents for the work undertaken and costs of construction of the Common Driveway. CP 1403. Antinori provided NPI with work orders, invoices and documentation for work performed and costs associated with the construction of the Common Driveway and associated storm drain and utilities. CP 1402-1445. NPI’s portion of the costs for construction of the Common Driveway is \$164,923.44. Id. Despite multiple demands from Antinori, NPI failed to pay Antinori for its portion of the cost of construction of the Common Driveway. CP 1403.

**B. Antinori records a claim of lien and files a lawsuit against NPI.**

As a result of NPI’s failure to pay Antinori for the costs it incurred in constructing the Common Driveway, Antinori recorded its Lien on January 16, 2009. CP 1403; 1444-1445. Antinori recorded the Lien, in the amount of \$164,923.44, with the King County Auditor under Recording Number 20090116000388. CP 1444. The Lien included all amounts that Antinori paid to its subcontractors for the construction of the Common Driveway and associated utilities, which occurred between October 2006 and January 16, 2009. CP 1403.

On February 3, 2009 Antinori filed its Complaint (the “Original Complaint”), naming Normandy Park Investors, LLC, as a Defendant, under King County Cause No. 09-2-06345-1 KNT (the “Antinori Lawsuit”). CP 1236. Antinori filed its First Amended Complaint on July 13, 2009. CP 1914; 1919-1925. In its First Amended Complaint, Antinori brought causes of action against NPI for breach of contract, unjust enrichment, and promissory estoppel. CP 1919-1925. Based on the Lien, Antinori also sought an order of foreclosure allowing it to foreclose the Lien against the NPI Property. Id.

**C. Columbia State Bank files a separate lawsuit against NPI.**

On February 3, 2009, the same day that Antinori filed its Original Complaint, Columbia State Bank (“Columbia”) filed a separate lawsuit against NPI under King County Cause No. 09-2-06371-1 SEA (the “Columbia Lawsuit”). CP 3-38. The Columbia Lawsuit arose out of NPI’s alleged breach of a Commercial Construction Loan Agreement (the “Loan”) between NPI and Columbia dated October 16, 2006. CP 10-21. The Loan and associated Promissory Note were secured by a Deed of Trust on the NPI Property. CP 826-845. Columbia recorded its Deed of Trust with the King County Auditor on November 1, 2006 under Recording Number 20061101001227. CP 2625. Antinori was not named as a Defendant in Columbia’s original Complaint.

On December 4, 2009, Columbia filed its First Amended Complaint, naming Antinori, Superior Asphalt Maintenance, Inc. and Elite Electric, Inc. as Defendants. In its First Amended Complaint, Columbia sought an order declaring its Deed of Trust on the NPI Property to be superior to all other liens, including Antinori's Lien.<sup>1</sup> CP 797-798. On February 19, 2010, per the stipulation of the parties, the Antinori Lawsuit was consolidated with the Columbia Lawsuit.

Antinori filed its Answer, Counterclaims and Cross-Claims on May 18, 2010. Antinori's Answer alleged actions for breach of contract and unjust enrichment against NPI and a cause of action requesting foreclosure of its lien against the NPI Property, including a counterclaim against Columbia and cross-claims against Superior Asphalt and Elite Electric, Inc.

**D. Antinori and Columbia file cross motions for summary judgment, and Antinori prevails on priority of liens.**

On May 28, 2010, Antinori and Columbia both filed motions for summary judgment. CP 1234-1246; 1628-1639. Both parties sought, among other things, to establish the validity and superior priority of their respective claims against the NPI Property over all other claimants. Id.

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<sup>1</sup> Columbia did not attempt to serve Antinori with its First Amended Complaint. Subsequently, Columbia filed its Second Amended Complaint on February 2, 2010 and counsel for Antinori stipulated to service of process on Antinori's behalf on February 18, 2010. CP 1915; 1932.

The court entered an Order Granting, In Part, Defendant Antinori Development, LLC's Motion for Summary Judgment on July 9, 2010. CP 2352-2354. The trial court determined, among other things, that: (1) Antinori's Lien was a valid lien upon the NPI Property, (2) Antinori's Lien has priority over all other "interests, claims and encumbrances in and upon the NPI Property," including Columbia's Deed of Trust, and (3) Antinori was entitled to foreclose its Lien against the NPI Property and all other inferior liens. CP 2353.<sup>2</sup> The court entered Findings of Fact and Conclusions of Law on August 20, 2010, which confirmed the priority of Antinori's Lien over Columbia's Deed of Trust. CP 2622-2630.

Columbia filed its Notice of Appeal on September 3, 2010. CP 2631.

#### IV. ARGUMENT

##### A. Standard of Review.

Columbia accurately presents the appropriate standards of review. Regarding the standard for review of the trial court's attorney fee award, "[a]n abuse of discretion exists only where no reasonable person would take the position adopted by the trial court." Singleton v. Frost, 108 Wn.2d 723, 730, 742 P.2d 1224 (1987).

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<sup>2</sup> The trial court also entered its Order Denying Plaintiff's Motion for Summary Judgment Re: Antinori Development, LLC on July 9, 2010. CP 2311-2315.

**B. Antinori's Lien is valid upon the NPI Property.**

Columbia asserts that Antinori cannot assert a mechanics' lien against NPI because the REA does not create a specific right to assert a mechanics' lien. See Appellant's Brief at 12. Columbia's argument and misplaced reliance on language in the REA completely ignores Antinori's right to file its Lien pursuant to Chapter 60.04 RCW, Washington's mechanics' lien statute.

**1. Antinori may assert its Lien pursuant to Chapter 60.04 RCW.**

Washington courts applying the mechanics' lien statute have stated that the primary objective in statutory interpretation "is to ascertain and give effect to the intent of the legislature." Van Wolvelaere v. Weathervane Window Company, 143 Wn. App. 400, 405, 177 P.3d 750 (2008) (citations omitted). When interpreting the mechanics' lien statute, courts look to the plain language of the statute:

If the plain language is subject to only one interpretation, our inquiry ends because plain language does not require construction. Absent ambiguity or a statutory definition, we give the words in a statute their common and ordinary meaning. [Citations omitted.]

Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 498, 210 P.3d 308 (2009). If a lien attaches under the mechanics' lien statute, RCW 60.04.900 requires liberal construction of the statute to protect the lien claimant:

RCW 19.27.095, 60.04.230, and 60.04.011 through 60.04.226 and 60.04.261 are to be liberally construed to provide security for all parties intended to be protected by their provisions.

See also Estate of Haselwood, 166 Wn.2d at 498.

RCW 60.04.021 describes the parties who may have a valid lien against real property. Specifically, the statute states that, “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 of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.” RCW 60.04.021. The purpose of the mechanics’ lien statute is to prevent detriment to those providing labor and material to improve the property of others. Haselwood v. Bremerton Ice Arena, 137 Wn. App. 872, 888, 155 P.3d 952 (2007).

In this case, Antinori, acting as a general contractor, made improvements to both the Antinori Property and the NPI Property through its construction of the Common Driveway and associated utilities. CP 1403-1445. As demonstrated by the REA, the Common Driveway is situated on both the Antinori Property and NPI Property. CP 1403, 1409-1424. Pursuant to the REA and the agreement between Antinori and NPI, Antinori improved the NPI Property by constructing the Common

Driveway, the onsite storm drain, a shared water main, a storm water vault, roadway paving and electrical, telephone, and television utilities. CP 1403-1445.

Antinori, acting as a general contractor, improved the NPI Property when it constructed the Common Driveway and associated utilities. Id. NPI, as a result of its obligations under the REA, was required to pay Antinori for the costs it incurred in the construction. Despite demand from Antinori, NPI failed to pay Antinori for the cost of construction. Thus, as a party who provided professional services for the improvement of NPI's real property, RCW 60.04.021 grants Antinori the right to file its Lien against the NPI Property.

**2. Antinori recorded its Lien within 90 days of the last work performed on the Common Driveway and associated utilities.**

RCW 60.04.141 requires a lien claimant to record a claim of lien within 90 days of work performed on or materials furnished on the subject property. Antinori, in its role as a general contractor and acting through its subcontractors, completed construction of the Common Driveway on January 5, 2009. CP 1491-1496. Antinori recorded its Lien on January 16, 2009, only eleven days after its subcontractor, Superior Asphalt, completed the construction. CP 1403; 1491-1496.

**3. Antinori's Lien is superior to Columbia's Deed of Trust because Antinori commenced work on the Common Driveway before the Deed of Trust was recorded.**

RCW 60.04.061 states that a claim of lien is prior to any lien, mortgage, deed of trust or other encumbrance that attached after or was unrecorded at the commencement of work by the lien claimant:

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.

RCW 60.04.061.

Antinori's subcontractor, Pivetta, commenced labor and delivery of equipment on October 11, 2006, when it began excavation and mobilization of equipment to construct the Common Driveway and related storm water system. CP 1442-1489. In fact, Pivetta continued to work on the storm water system and water main work through the end of October 2006. Id. On October 31, Pivetta made the following field note referring to the NPI Property: "installed and backfilled last of the 8" ductile, having elevation problems on the stubs we are supposed to be providing for the Shuster [NPI] project, we installed our pipe per our plan." CP 1461.

Columbia recorded its Deed of Trust on the NPI Property on November 1, 2006, several weeks after Antinori's subcontractors commenced construction of the Common Driveway. CP 2625.

Consequently, per the plain language of RCW 60.04.061, Antinori's Lien has priority over Columbia's subsequently recorded Deed of Trust because its subcontractor, Pivetta, commenced excavation and utility work on October 11, 2006. CP 1442-1489.

In order to defeat the clear evidence that Antinori and its subcontractor commenced work on the Common Driveway before its Deed of Trust was recorded, Columbia asserts that Antinori's Lien is invalid because the work done by Pivetta was not "contemplated" by the REA. See Appellant's Brief at 17-21. As explained, Antinori and NPI orally agreed to include the excavation and utilities as part of the construction of the Common Driveway. The Common Driveway was completed on January 5, 2009. CP 1491-1496. This fact is undisputed.

Further, construction of the Common Driveway was undertaken pursuant to one contract – the REA. Antinori, as the general contractor, commenced work on the Common Driveway and associated utilities when it engaged Pivetta to begin excavation on the Antinori and NPI Properties. Antinori paid Pivetta and its other subcontractors for work performed and sought reimbursement for the construction costs it incurred pursuant to the terms of the REA. When NPI refused to pay, Antinori, as the party with whom NPI contracted to construct the Common Driveway, exercised its

statutory right to file its Lien for the costs it incurred in improving the NPI Property.

In order to defeat the superior position of Antinori's Lien, Columbia cites Anderson v. Taylor, 55 Wn.2d 215 (1959), in support of the proposition that Antinori's Lien is invalid because it was not recorded within 90 days of the completion of the initial excavation work performed by its subcontractor, Pivetta. See Appellant's Brief at 20. However, Anderson is clearly distinguishable from the facts in this case and Columbia's reliance upon it is misplaced.

In Anderson, a tile subcontractor ("Tile Sub") entered a contract with a general contractor (the "GC") to provide tile work for a residential construction project. Anderson, 55 Wn.2d at 215. The homeowner made progress payments to the GC, but the GC did not pay the Tile Sub for its tiling work. Id. The Tile Sub ceased work and the GC went out of business during the construction. Id. at 216. The GC repudiated all of its contracts, including its contract with the Tile Sub. Id. The Tile Sub then contracted directly with the homeowner to complete the tile work on the residence. Id. When construction was complete, the Tile Sub filed a lien against the residence which included amounts owed under its original contract with the GC. Work under its original contract with the GC has ceased more than ninety days prior to the filing of the lien. Id. at 217.

The court held that the Tile Sub's lien was not timely filed. Id. The court explained that "after a contract is completed and closed, the time for filing ...a claim of lien cannot be extended or the right revived by furnishing material or performing labor *upon a new contract...*" Id. (emphasis added). In other words, because the Tile Sub performed work under two distinct contracts with two distinct parties, it could not revive amounts owed over a completed and expired contract simply by performing additional work on the same construction project.

Anderson and its rule regarding work performed under distinct contracts does not apply here because there is only one operative contract in this case – the REA. That contract is between Antinori and NPI and that contract alone provides the basis for the Lien. Antinori contracted with NPI to construct the Common Driveway and associated utilities through the REA. Antinori used subcontractors to perform that work and paid them for their services. Per the REA, Antinori sought payment for the cost of construction from NPI because the construction improved the NPI Property. When NPI refused to pay Antinori, it exercised its statutory right to place its Lien on the NPI Property.

The Lien, per the plain language of RCW 60.04.061 is valid as of the first day that Antinori, acting as the general contractor, arranged for work to commence on the Common Driveway. Work commenced on

October 11, 2006, three weeks before Columbia recorded its Deed of Trust. CP 1446-1489. Thus, the Lien has priority over the Deed of Trust.

**C. Antinori's Lien complies with RCW 64.04.091.**

Columbia advances an overly technical argument that Antinori's Lien is invalid under RCW 64.04.091 because it does not name NPI as both the person indebted to Antinori and the owner of the lien property, even though NPI is expressly identified on the Lien. See Appellant's Brief at 15. Columbia's argument, however, clearly overstates the requirements of established law regarding the required contents of a claim of lien.

RCW 60.04.091 states that a claim of lien shall state certain information "in substance and effect." RCW 60.04.091(1). Based on that language, Washington courts have continually stated that, in order to be valid, a lien need only "*substantially comply*" with the requirements of RCW 60.04.091. Williams v. Athletic Field, Inc., 155 Wn. App. 434, 442 (2010) (citing Lumberman's of Wash., Inc. v. Barnhardt, 89 Wn.App. 283, 289 (1997))(emphasis added). Further, courts have routinely found lien claims to be legally valid where they did not strictly comply with the requirements of the lien statute. See Fircrest Supply, Inc. v. Plummer, 30 Wn. App. 384 (1981) (lien claim is valid where (1) claim of lien contained no legal description of lien property, (2) claimant signed only the claim

form, and (3) only claimant's registered agent signed the required verification); Wolk v. Bonthius, 13 Wn.2d 217 (1942) (lien valid where it identifies all property owners and not only the liened undivided interest); Patrick v. Bonthius, 13 Wn.2d 210 (1942) (filing claim of lien against all tenants not fatal even though only one tenant in common was liable).

Here, Antinori has substantially complied with the requirements of RCW 60.04.091. As required by the statute, Antinori has, "in substance and effect" named both the owner of the property and the party against whom the claim is asserted, namely NPI. CP 1444-1445. As NPI, the owner and indebted party, are one and the same, Antinori has substantially complied with the requirements of the statute. Accordingly, Columbia's overly technical reading of the statute is insufficient to invalidate Antinori's claim of lien.

**D. Antinori's foreclosure action is valid against Columbia.**

Columbia argues that Antinori's Lien was not perfected as to Columbia because it did not serve the bank with its lien foreclosure action within 90 days of its filing. See Appellant's Brief at 21. As a result, Columbia argues that the lien should be void as to the bank. Id. at 22. Columbia's argument fails because it seeks to require of Antinori, and all lien claimants, a burden which Chapter 60.04 RCW does not impose.

**1. Antinori followed the mechanic's lien statute in pursuing its Lien.**

RCW 60.04.141 requires a lien claimant to record a claim of lien within 90 days of work performed on or materials furnished on the subject property. To perfect the lien, a lien claimant must file a lawsuit within eight (8) calendar months of recording the claim of lien. RCW 60.04.141. In addition to filing a lawsuit within the statutorily required period, the plaintiff must also serve the owner of the lien property within ninety (90) days of filing the lawsuit. Specifically, the statute states:

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 . .

Id. (emphasis added). This statute was enacted in 1991 and was significantly modified from its predecessor. MB Construction Co. v. O'Brien Commerce Center Assoc., 63 Wn. App. 151, 155 n.1 (1991). As Division One of the Court of Appeals explained, the 1991 amendments to the mechanics' lien statute changed the previous version to only require service upon the owner of the lien property. The court stated,

Effective April 1, 1992, this section will be repealed and replaced with a substantially different section. Laws of 1991, ch. 281, sec. 14, p. 1440. The new section deletes the

term “necessary parties” and requires service only upon “the owner of the subject property....”

Id. (emphasis added).

The primary objective for Washington courts applying the mechanics’ lien statute “is to ascertain and give effect to the intent of the legislature.” Van Wolvelaere v. Weathervane Window Company, 143 Wn. App. 400, 405, 177 P.3d 750 (2008) (citations omitted). When interpreting the mechanics’ lien statute, courts look to the plain language of the statute:

If the plain language is subject to only one interpretation, our inquiry ends because plain language does not require construction. Absent ambiguity or a statutory definition, we give the words in a statute their common and ordinary meaning.

Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 498, 210 P.3d 308 (2009) (emphasis added). Washington courts have recognized that the plain language of RCW 60.04.141 only requires service on the owner of the lien property within 90 days of a properly filed complaint for foreclosure. Van Wolvelaere, 143 Wn. App. at 406 (according to the plain and unambiguous language of the statute, a lien expires unless the lien claimant files a lawsuit to foreclose on the lien within eight months of recording a claim of lien and serves the property owners within 90 days of filing the lawsuit) (emphasis added). Finally, once a lien attaches under the mechanics’ lien statute, RCW 60.04.900 requires liberal construction of the

statute to protect the lien claimant. See also Estate of Haselwood, 166 Wn.2d at 498.

Antinori has met all of the statutory requirements of the plain language of RCW 60.04.141. First, the lien itself was recorded within 90 days of completion of the Common Driveway. CP 1444-1445. The Common Driveway was completed on January 5, 2009 and Antinori recorded its Lien with the King County Recorder's Office on January 16, 2009. CP 1491; 1444-1445. Second, Antinori filed its First Amended Complaint asserting a cause of action for foreclosure of its lien on July 13, 2009, slightly less than six months after it recorded its Lien. CP 1914; 1918-1925. NPI, the owner of the property subject to Antinori's Lien was served with the First Amended Complaint on the next day, June 14, 2009. CP 1914-1915; 1930. Accordingly, Antinori timely filed its lien foreclosure action within eight months of recording its claim of lien, and served the same upon the property owner within 90 days, in compliance with the plain language of the current mechanics' lien statute.

2. **Even if Antinori is required to serve Columbia with its lien foreclosure action, it did so within 90 days of being joined in the Columbia Lawsuit, thereby perfecting its Lien against Columbia.**

As explained above, Antinori is not required to serve Columbia with its lien foreclosure action because Columbia does not own the NPI

Property. Assuming for the sake of argument that Antinori was required to serve Columbia, its failure to do so was cured when Antinori filed its counterclaim for foreclosure in response to being joined in the Columbia Lawsuit. Pacific Erectors, Inc. v. Gall Landau Young Construction Co., Inc., 62 Wn. App. 158, 164, 813 P.2d 1243 (1991).

In Pacific Erectors, Division One of the Washington Court of Appeals addressed the previous version of RCW 60.04.100. Id. In that case, a general contractor (“Hedreen”) arranged for two separate subcontractors to provide concrete and drywall work on a construction project. Id. at 161. Performance disputes arose between Hedreen and its subcontractors during the project. Id. Both subcontractors entered into arbitration with Hedreen. Id.

During the arbitration, the concrete subcontractor (“GLY”) was sued by two of its second tier subcontractors who worked on the project at its direction and another unrelated contractor brought a separate action against Hedreen. Both plaintiffs alleged causes of action for foreclosure of mechanics’ liens. Id. The lawsuits were consolidated into one action by the trial court. Id. After the two lawsuits were consolidated, GLY filed an answer, counterclaim, and cross-claim against Hedreen in the consolidated case in which it asserted a cause of action against Hedreen

for foreclosure of its mechanics lien. Id. at 162. However, GLY failed to serve Hedreen with its counterclaim. Id.

On appeal, the court held that GLY's lien against Hedreen had expired because it had failed to serve Hedreen with its counterclaim for foreclosure of its lien within 90 days of being joined in the action. Id. at 167. In so holding, the court explained that GLY's lien would have been valid against Hedreen had it served Hedreen within 90 days of being joined in the action. Id. at 166. Specifically, the court explained that, "a lienor joined in an action may amend his pleadings to assert a mechanics' lien under RCW 60.04.100 only if the claim is asserted on all necessary parties within 90 days from the date of his joinder in the action." Id. (emphasis added).

The court addressed a similar situation in Van Wolvelaere. In that case, the court held that a subcontractor who intervened in an existing lawsuit could not seek foreclosure of its mechanics' lien because it asserted that its claim in intervention against the owner of the property was untimely for failure to commence the action within 8 months and serve the owner of the lien property within 90 days. Van Wolvelaere, 143 Wn. App. at 404. In so holding, the court addressed the rule of Pacific Erectors, which allows a joined party to assert its mechanics' lien against a party in the action in which it has been joined, provided that it do so within 90 days of being

joined in the case. The subcontractor relied on Pacific Erectors to assert that it need only serve all necessary parties within 90 days of intervening in the lawsuit. Id. at 408.

In rejecting the subcontractor's argument, the court noted that Pacific Erectors addressed a previous version of RCW 60.04.141 which required service upon all necessary parties within 90 days of commencement of the lawsuit. Id. at 409 (emphasis added). The court explained that the current version of RCW 60.04.141 required a lien claimant to serve only the owner and not all necessary parties within 90 days of serving a lawsuit. Id. Because the subcontractor had not served the owner of the property, its claim of lien was invalid. Id. Taken together, Pacific Erectors and Van Wolvelaere stand for the proposition that in order to assert a claim for foreclosure of a mechanics' lien, a lien claimant must: (1) file a lawsuit within 8 months of recording its lien, (2) serve the lawsuit on the owner of the lien property within 90 days of filing a lawsuit, and (3) when joined in another action to foreclose a lien, may assert its lien against a third party provided that it does so within 90 days of being joined in the action.

Here, as explained above, Antinori complied with the plain language of RCW 60.04.141, by filing its lawsuit to foreclose its lien and serving NPI, the owner of the lien property within 90 days of filing the

foreclosure cause of action. Further, as allowed by Pacific Erectors and Van Wolvelaere, Antinori perfected its lien against Columbia by serving its counterclaim for foreclosure of its lien against Columbia within 90 days of being joined in Columbia's foreclosure lawsuit. Antinori was joined in Columbia's suit when, at the request of Columbia's counsel, Antinori's attorney accepted service of Columbia's Second Amended Complaint on February 17, 2010. CP 1915; 1932. Antinori served its counterclaim for foreclosure of its lien on Columbia on May 18, 2010, 89 days after being served with Columbia's lawsuit. CP 1089. Accordingly, even if Antinori was required to serve Columbia within 90 days of filing its lien foreclosure action, Antinori cured its failure to do so. Thus, its cause of action for foreclosure of its Lien is valid against Columbia.

**E. Antinori is entitled to an award of fees and costs on appeal.**

RCW 60.04.181 provides that a prevailing party who established its lien priority under the materialmen's lien statute is entitled to an award of attorney's fees and costs. The trial court awarded Antinori its attorney's fees and costs when it prevailed and established the superior priority of its Lien. Should the court uphold the priority of Antinori's Lien, Antinori requests that this Court award Antinori its attorney's fees and costs incurred on review pursuant to RAP 18.1.

## V. CONCLUSION

The trial court properly determined that Antinori's Lien against the NPI Property is valid and has superior rank to all other interest and encumbrances against the NPI Property. That decision is consistent with the plain language of Washington's materialmen's lien statute and established case law. Antinori respectfully requests that this Court affirm the superior court's orders.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of April, 2011.

CAIRNCROSS & HEMPELMANN



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**Proof of Service**

I, Jana C. Schiewe, certify under penalty of perjury of the laws of the State of Washington that on April 14, 2011, I caused a true and correct copy of the document to which this is attached to be delivered via email (with permission of Appellant's counsel) to the following individual(s):

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DATED this 14<sup>th</sup> day of April, 2011, at Seattle, Washington.



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