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NO. 66561-8

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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MIKELLE ENTERPRISES, INC., a Washington corporation

Plaintiff/Appellant,

vs.

RICHARD T. MIEHE, a single man; JAMES R. HENSON, JR, a  
single man; and ADMINISTRATOR, UNITED STATES SMALL  
BUSINESS ADMINISTRATION, an agency of the government of  
the United State of America,

Defendants/Respondents.

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BRIEF OF DEFENDANTS/RESPONDENTS MIEHE AND HENSON

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DENO MILLIKAN LAW FIRM, PLLC  
By: Joel P. Nichols, WSBA #23353  
Attorney for Defendants/Respondents  
Miehe and Henson  
3411 Colby Avenue  
Everett WA 98201  
425-259-2222

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## I. INTRODUCTION

Defendants/Respondents Mieke and Henson (“Respondents”) agree with Plaintiff/Appellant (“Appellant”) that *Williams v. Athletic Field*, 155 Wash.App. 434, 228 P.3d 1297 (Div. II 2010) controls the outcome of Plaintiff’s appeal herein. However, Respondents respectfully disagree that Appellant’s contractor’s claim of lien is enforceable even if the Washington Supreme Court upholds the Division II Court of Appeals decision in *Williams, supra*.

## II. RESPONSE TO ASSIGNMENT OF ERROR

The trial court correctly dismissed Appellant’s claim of lien under *Williams, supra*.

### RESPONSE TO ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A corporate construction lien is not properly acknowledged pursuant to chapter 64.08 RCW because it does not contain two of the three “substantial and essential” statutory elements of a corporate acknowledgment, namely: 1) that the signature represents the free and voluntary act of the corporation, and 2) and that the signor is authorized to execute the document on behalf of the corporation. Issue: Does the absence of these elements invalidate the lien? Short Answer: Yes.

### III. RESPONSE TO STATEMENT OF CASE

Appellant is a corporation. *CP at 118*. On or about February 5, 2008, Plaintiff recorded a construction lien against Defendant Richard Mieke and Defendant James Henson's residence. *CP 124-125*.

On November 29, 2010, Respondents filed a Motion for Judgment on the Pleadings to dismiss Appellant's lien for failure to comply with the statutory corporate acknowledgment requirements. *CP 91-95*. On December 21, 2010, the Snohomish County Superior Court, Honorable Larry McKeeman, granted Respondents' motion. *CP 8-10*.

### IV. RESPONSE TO ARGUMENT

#### A. **Appellant's Construction Lien is Invalid for Failure to Substantially Comply with the Requirements of RCW 60.04.091(2).**

A construction lien is invalid if it does not substantially comply with the notice and recording requirements listed in RCW 60.04.091, including the requirement that the lien claim "be acknowledged pursuant to chapter 64.08 RCW." *Williams, supra*,

155 Wash.App. at 442. Courts strictly construe lien statutes because they are in derogation of common law. *Id.* at 441. The validity of a statutory lien is dependent on satisfaction of all statutory lien claim requirements. *Id.*

Chapter 64.08 RCW sets forth two forms of acknowledgment, one for individuals and one for corporations. *Id.* at 442. The corporate version is defective unless it contains three “substantial and essential” elements: 1) that the person signing the document is an officer of the corporation, 2) that the signature represents the free and voluntary act of the corporation, 3) and that the signor is authorized to execute the document on behalf of the corporation. *Bank of Commerce of Anacortes v. Kelpine Prods. Co.*, 167 Wash. 592, 595 (1932); *Ben Holt Indus., Inc. v. Milne*, 36 Wn.App. 468, 471-73 (1984) (recognizing that four element test has been reduced to three elements); *Williams*, 155 Wn.App. at 444. Moreover, a corporate acknowledgment is insufficient where the first element is present but the latter two are not. *Ben Holt, supra*, 36 Wn.App. at 472 (“The absence of elements 2 and 3 above invalidated the acknowledgment and the instrument”).

The *Williams* court held a construction lien invalid for failure to comply with the attestation requirements of RCW 60.04.091(2).



cannot be cured by affidavit under the parol evidence rule.

*Williams, supra*, 155 Wash.App. at 444. Therefore, the attestation clause in the present case, like the attestation clause in *Williams*, does not substantially comply with the requirements of RCW 60.04.091(2).

**B. The Factual Differences of the *Williams* Decision are Not Dispositive.**

Any factual differences between the case at bar and *Williams* do not go to the dispositive rationale of the *Williams* decision and its predecessor decision, *Ben Holt, supra*. The *Ben Holt* and *Williams* corporate acknowledgments were ineffective because the corporations in question failed to use the corporate acknowledgment form. *Ben Holt, supra*, 36 Wash.App. at 471-73; *Williams, supra*, 155 Wash.App. 444-45. In the present case, Appellant's acknowledgment was ineffective for the same reason. Appellant used the acknowledgment for individuals rather than the acknowledgment for corporations. Appellant presents no facts that impact this analysis.

**C. The *Williams* Case Was Properly Decided.**

Contrary to Appellant's assertion in its brief, the *Williams* court did not err by confusing an "acknowledgment" with a

“certification.” The two terms are often used interchangeably. See BLACK’S LAW DICTIONARY (9th ed. 2009) (defining the verb “acknowledge” as meaning “to certify as genuine”).

More importantly, the *Williams* Court did not err even if it did confuse the two terms. Regardless of which term is used, a corporate acknowledgment/certification is ineffective if it does not substantially comply with the requirements of RCW 64.08.070. As the Washington Supreme Court held, a corporate acknowledgment/certification is not in substantial compliance with that standard if it fails to contain the essential elements listed in *Williams*. *Bank of Commerce of Anacortes v. Kelpine Prods. Co.*, 167 Wash. 592, 595 (1932); *Ben Holt, supra*, 36 Wash.App. at 471-73; *Williams, supra*, 155 Wash.App. at 444-45. Further, courts strictly construe lien statutes because they are in derogation of common law. *Williams*, 155 Wash.App. at 441, citing *Dean v. McFarland*, 81 Wash.2d 215, 219-20, 500 P.2d 1244 (1972). The *Williams* court correctly recited the rule stated in *Dean*, 81 Wash.2d at 220, that “A lien claimant must clearly demonstrate satisfaction of all the statutory lien claim requirements.” *Williams*, 155 Wash.App. at 441.

Appellant’s acknowledgment did not satisfy all statutory lien claim requirements, and its attempt to distinguish the meanings of

"certification" and "acknowledgment" is a distinction without a difference.

## V. CONCLUSION

For the reasons stated herein, Respondents respectfully request that the trial court Order Dismissing Appellant's lien foreclosure claim be affirmed.

RESPECTFULLY SUBMITTED this 6 day of July, 2011.

DENO MILLIKAN LAW FIRM, PLLC

  
JOEL P. NICHOLS, WSBA #23353  
Attorney for Defendants/Respondents  
Miehe and Henson