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Division I  
State of Washington

NO. 73464-4-I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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TERENCE RAYMOND JOHNSON,

Appellant,

v.

C & R ELECTRIC, INC., a Washington corporation,

Respondent.

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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. ARGUMENT ..... 3

    A.    SUMMARY JUDGMENT SHOULD BE REVERSED BECAUSE  
          MATERIAL ISSUES OF FACT EXIST WHETHER JOHNSON ENTERED  
          INTO A CONTRACT WITH C&R. .... 3

    B.    SUMMARY JUDGMENT SHOULD BE REVERSED REGARDING THE  
          AMOUNT OWING FOR THE COPPER WIRE REPAIR. .... 9

    C.    RELIEF ON A THEORY OF QUANTUM MERUIT SHOULD BE  
          DENIED. .... 10

    D.    THE TRIAL COURT’S AWARD OF ATTORNEY’S FEES SHOULD BE  
          REVERSED. .... 11

    E.    C&R IS NOT ENTITLED TO AN AWARD OF ATTORNEY’S FEES ON  
          APPEAL. .... 19

III. CONCLUSION ..... 19

TABLE OF AUTHORITIES

**Cases**

*Berger v. Alan Realty Co.*,  
273 Wis. 427, 78 N.W.2d 747 (1956).....6

*CKP, Inc. v. GRS Const. Co.*,  
63 Wn. App. 601, 821 P.2d 63, 71 (1991)..... 18

*Crown Plaza Corp. v. Synapse Software Systems, Inc.*,  
87 Wn. App. 495, 962 P.2d 824 (1997)..... 7, 8

*Curtis Const. Co., Inc. v. Am. Steel Span, Inc.*,  
707 N.W.2d 68 (N.D. 2005) .....6

*In re Guardianship of Decker*,  
188 Wn.App 429 (2015) ..... 17

*Lumberman's of Washington, Inc. v. Barnhardt*,  
89 Wn. App 283, 949 P.2d 382 (1997)..... 18

*Schmidt v. Cornerstone Investments*,  
115 Wn.2d 148, 795 P.2d 1143 (1990)..... 13, 15

*Schumacher Painting Co. v. First Union Mgmt., Inc.*,  
69 Wn.App. 693, 850 P.2d 1361 (1993)..... 13, 14

*Structurals Nw., Ltd. v. Fifth & Park Place, Inc.*,  
33 Wn.App. 710, 658 P.2d 679 (1983)..... 13, 15

**Statutes**

RCW 4.84.250 ..... 16

RCW 60.04.181(3) ..... 18, 19

## I. INTRODUCTION

This is an appeal by Terence R. Johnson (“Johnson”) of an order by the trial court granting summary judgment against Johnson, in favor of the plaintiff in the underlying lawsuit, C&R Electric, Inc. (“C&R”). Johnson appeals the trial court’s judgment on C&R’s claim for breach of contract in the principal amount of \$7,506.30, the trial court’s granting of a lien in favor of C&R against Johnson’s commercial property in the amount of \$3,626.01, and (3) the trial court’s award to C&R of all of its attorney’s fees and costs in the amount of \$21,883.84. Johnson appeals the Summary Judgment Order because material issues of fact exist (1) whether C&R performed its work pursuant to a contract with Johnson, as the owner, and (2) whether the invoice on which the court allowed the claim of lien included work unrelated to work on the building. Johnson appeals the fee award because the trial court awarded \$21,883.84 in attorney’s fees and costs without C&R having submitted to the court any invoices for the costs, expenses and legal fees awarded, without engaging in the required lodestar analysis on which an award of fees is conditioned, and without segregating the fees allocable to legal services related to the work subject to the lien statute from all of the other legal work performed not involving the claim the court found to be lienable and for which there was no basis for an award of legal fees.

In its responding brief, C&R argues (repeatedly) that Johnson failed to present the court with facts denying the existence of a contract with the owner because Johnson failed to engage in the equivalent of a “point counterpoint” of every detail alleged by Mr. Gartin in his declaration in support of the motion for summary judgment. While Johnson did not engage C&R on all of its background evidence, Johnson did submit sufficient factual testimony in his declaration to create an issue of material fact whether C&R entered into a contract with Johnson as the owner.

With respect to the award and allocation of all of the attorney’s fees to the lien claim, even though the vast majority of those fees involved claims and proceedings not involving the lienable work, C&R argues that the two projects (installation of the paint booth and repair of the copper wire vandalism) share common facts and therefore the attorney’s fees incurred in prosecuting the paint booth claim should be considered fees incurred in prosecuting the copper wire lien claim. They do not. The lienable work indisputably was separate and distinct from the paint booth work, and it therefore was reversible error to award C&R 100% of its attorney’s fees for all claims and proceedings based upon the lien statute, and by including 100% of the fees as part of the claim of lien.

## II. ARGUMENT

### A. **Summary Judgment Should Be Reversed Because Material Issues of Fact Exist Whether Johnson Entered Into a Contract With C&R.**

C&R argues that “Marc Gartin’s Declaration describes in detail the formation of the parties’ oral agreement at their first meeting in April of 2013 and the terms of that agreement,” and that all material terms were agreed to at that meeting.<sup>1</sup> C&R then proceeds to argue that Johnson did not refute and present “specific facts” in response to the detailed declaration of Mr. Gartin, that Johnson did not specifically mention the meeting, and that Johnson simply made a conclusory statement that he made no contract with C&R. To the contrary, in his declarations, Johnson directly disputes C&R’s allegation that a contract was discussed and terms were agreed upon.

C&R claims that Johnson’s testimony that “There was no agreement verbal or written, between C&R and either TRJ or T&C,”<sup>2</sup> is insufficient, by itself, to create an issue of fact, because it is conclusory. To the contrary, it directly contradicts Mr. Gartin’s similarly cryptic

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<sup>1</sup> Brief of Respondent, page 16.

<sup>2</sup> Brief of Respondent, page 18. “TRJ” refers to TRJ Development, Inc., a corporation wholly owned by Johnson that previously owned the real property, and “T&C” is Johnson’s tenant who had just leased the property for the purpose of operating an auto body business at the property.

statement that the parties entered into a “time and materials” contract.<sup>3</sup> Moreover, as C&R acknowledges on the next page of its brief, Johnson further expounded on his testimony that he made no agreement with C&R, verbal or written, when Johnson went on to state that “there had never been any discussion of price, hourly rates, value of work, or other terms of agreement.”<sup>4</sup>

Notably, while Mr. Gartin’s Declaration spans six pages, virtually all of the content of that declaration addresses his version of the background leading up to the meeting at which they allegedly discussed and entered into a contract, and then his position on performance and payment. However, the totality of the testimony in Mr. Gartin’s declaration relating to the alleged formation of an oral contract is his statement that he told Johnson it “would have to be done on a ‘time and materials’ basis,” [CP 126] and that “Terry Johnson agreed to my terms while he sat in my office,” i.e. that Johnson had agreed to a time and materials contract. [CP 127] The balance of the statements contained in paragraph 5 of Mr. Gartin’s Declaration [CP 127-127] consist of a

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<sup>3</sup> As discussed in this section, the statements in Johnson’s Declaration are evidentiary and sufficient to defeat summary judgment as they give rise to an issue of material fact. However, if this court were to conclude that Johnson’s testimony is conclusory, then Mr. Gartin’s cryptic statements are equally conclusory, and provide no evidentiary basis to prove the existence of an oral contract, with the result that summary judgment would have to be reversed.

statement that he allegedly told Johnson that “the work would not be cheap” (which is not an agreement, or a term of an agreement),<sup>5</sup> and Mr. Gartin’s explanation to the court of the meaning of a time and materials contract (he does not state that he discussed that with or expressed that to Johnson at the meeting).

Recognizing that Johnson’s statement that there never had been any discussion of price, hourly rates, value of work, or other terms of agreement directly contradicts Mr. Gartin’s statement that Johnson agreed to a time and materials arrangement, C&R makes the remarkable assertion that this statement by Johnson actually is consistent with Mr. Gartin’s declaration because Mr. Gartin did not state in his declaration that he discussed rates or pricing with Johnson – as if an agreement to pay for time and materials is not a pricing term! Of course, an agreement that work will be paid for on a time and materials basis is a pricing term – it establishes the pricing formula for how the work is to be valued and invoiced. *Curtis Const. Co., Inc. v. Am. Steel Span, Inc.*, 707 N.W.2d 68,

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<sup>4</sup> Brief of Respondent, page 18.

<sup>5</sup> This statement is also further contradicted by C&R’s own statement in the permit application submitted by C&R, which estimates the value of the work to be \$1,000. [CP 182] This application was prepared and submitted within days of the April meeting described by Mr. Gartin in his declaration. [CP 177, paragraph 6] The \$1,000 cost estimate also is directly contradictory to C&R’s contention that it told Johnson the job would be “difficult, cumbersome and expensive.” Brief of Respondent, page 10.

73 (N.D. 2005) (court “concluded that pricing term of the . . . contract was on a time-and-materials basis.”); *Berger v. Alan Realty Co.*, 273 Wis. 427, 431, 78 N.W.2d 747, 749 (1956) (defendants’ making partial payments “of the plaintiff’s [invoices] shows that it was mutually understood the contract provided for time and materials at specific prices.”).

In addition, Johnson further explained in his opening brief that C&R mailed the invoices to T&C’s place of business, at the property, and not to the owner’s address listed on the electrical permit, further showing that C&R understood its work was being done for and on the account of T&C, as tenant, and not on the account of Johnson, as the owner.<sup>6</sup> That fact gives rise to an inference that C&R’s oral contract was with T&C as the tenant, and not Johnson as the owner. C&R does not deny this in its responsive brief.

Finally, as Johnson noted in his opening Brief of Appellant, it is well-established in Washington that disputes over the existence of oral agreements are not appropriately decided on summary judgment.<sup>7</sup> In its response, C&R attempts to downplay that well established rule by arguing that the cases cited by Johnson “simply support the general principle that

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<sup>6</sup> Brief of Appellant, page 16.

<sup>7</sup> Brief of Appellant, pages 13-14.

only a genuine issue of material fact can defeat summary judgment.”<sup>8</sup> Of course that is the rule governing summary judgments, but the question here is the showing required to establish the existence of a genuine dispute of fact in the context of an oral contract.

The rule in Washington that “disputes over the existence of oral agreements are not appropriately decided on summary judgment,” *Crown Plaza Corp. v. Synapse Software Systems, Inc.*, 87 Wn. App. 495, 500, 962 P.2d 824 (1997), is the rule because, as is the case here, “disputes about oral agreements depend a great deal on the credibility of the witnesses.” *Id.* at 501. Indeed, the court in *Crown Plaza* found summary judgment inappropriate under circumstances substantially similar to those present in this case. In *Crown Plaza*, the defendant testified that he and the plaintiff entered into an oral lease termination agreement. The defendant testified that he and the plaintiff agreed the defendant would pay rent for two months, forfeit the deposit, and vacate the premises. In response, the plaintiff denied “that he entered into a termination agreement and rhetorically question[ed] whether a reasonable business person would agree to terminate a lease worth over \$60,000 in exchange for \$8,000.”

The plaintiff moved for summary judgment, arguing that the defendant presented mere allegations or assertions to support the

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<sup>8</sup> Brief of Respondent, page 15.

formation of an oral contract. The trial court granted the plaintiff's motion. The Court of Appeals reversed, noting the plaintiff confused a bare assertion (e.g., "there was an oral contract") "with making a statement that, if believed by a factfinder, would support the legal contention." The Court held that the defendant "stated that he and [the plaintiff] entered into an agreement and [the plaintiff] denies it. Only a factfinder can determine which of these statements is more credible, considering all the evidence." *Id.* at 500-01.

Here, Johnson stated in his declaration that the parties never discussed price, hourly rates, the value of C&R's work, or any other terms of an alleged agreement. Johnson further stated that C&R never sent any bills for its work to Johnson or TRJ, but instead sent its bills to T&C Premier Auto Sales. As in *Crown Plaza*, these statements, "if believed by a factfinder, would support the legal contention" that "there was no agreement, verbal or written, between C&R and either TRJ or T&C." Indeed, similar to the evidence presented in *Crown Plaza*, Mr. Gartin stated that C&R entered into an agreement with Johnson, and Johnson denies it. "Only a factfinder can determine which of these statements is more credible, considering all of the evidence." *Id.* at 501. *Crown Plaza* is dispositive. The Order Granting Summary Judgment should be reversed

because material issues of fact exist as to whether the parties entered into an agreement.

**B. Summary Judgment Should Be Reversed Regarding the Amount Owing for the Copper Wire Repair.**

The trial court also committed error in determining, as a matter of law, that all of the work invoiced under the third invoice, in the amount of \$3,626.01, related to the repair of the stolen copper wire. Johnson disputed that, and the invoice, on its face, demonstrates that most of the work described in that invoice relates to the paint booths, not the repair of the stolen copper wire. [CP 187] In its responsive brief, C&R argues that Johnson's declaration is insufficient to create an issue of fact on the failure to segregate the work listed in the invoice because he did not critique the invoice, item by item.<sup>9</sup> He did not need to do so for there to be an issue of fact, because the invoice itself specifically lists work which on its face does not involve reinstalling and pulling wire (e.g., the work for which Johnson is being billed as part of that invoice includes replacing, drilling and tapping new lugs; pulling ground wire to the compressor; and wiring an intake fan). On summary judgment, the evidence, and the inferences to be drawn therefrom, must be weighed in the light most favorable to the non-moving party. Here, those inferences required that summary

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<sup>9</sup> Brief of Respondent, page 20.

judgment be denied as to the value of the lienable work listed on this invoice.

Because material issues of fact exist as to whether Johnson or T&C was the contracting party, and regarding the amount allocable to the copper wire repair, relief by way of summary judgment was improper, and the Order Granting Summary Judgment should be reversed and remanded for trial.

**C. Relief on a Theory of Quantum Meruit Should be Denied.**

C&R alleges that “[I]n addition to breach of contract, C&R’s Motion for Summary Judgment sought relief under the doctrine of quantum meruit.”<sup>10</sup> It did not. The statement of issues in C&R’s motion for summary judgment makes no request for relief on a quantum meruit theory. [CP 170] In its statement of the issues to be considered by the court on its motion for summary judgment, C&R sought relief solely for breach of contract, and then requested that it be awarded a lien against Johnson’s property based upon its claim for breach of contract. [CP 170 – 172]

Further, C&R has no basis for a claim on summary judgment based upon quantum meruit against Johnson because Johnson denies the work was being performed on his account. And, no award can be made against

the property based upon a quantum meruit theory, as the work pertaining to the paint booth is not lienable work because it did not involve an improvement to the real property.

**D. The Trial Court's Award of Attorney's Fees Should Be Reversed.**

The sole legal basis for the trial court's award of attorney's fees was the attorney's fee provision in the lien statute. Indeed, that is the only basis on which C&R sought an award of attorney's fees in its motion for summary judgment. [CP 172] Further, the law in Washington is well established that if only a portion of a party's claims are based upon a statute, contract or recognized ground in equity that support an attorney's fee award, only the attorney's fees identifiable to those claims may be awarded. The attorney's fees incurred in prosecuting claims for which no basis exists for a fee award must be identified and segregated, and may not be included in an attorney's fee award.<sup>11</sup> Then, in cases in which a legal basis exists to award attorney's fees to the prevailing party, Washington courts calculate and award reasonable attorney fees based on the lodestar

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<sup>10</sup> Brief of Respondent, page 21.

<sup>11</sup> Brief of Appellant, pages 17-18.

method, and findings of fact and conclusions of law are required to establish such a record.<sup>12</sup>

As Johnson explained in his opening brief, the award of attorney's fees must be reversed for two reasons. First, the trial court awarded C&R all of the attorney's fees and costs it claims it incurred, and awarded lien status to all of those fees, even though virtually all of those fees did not involve the prosecution of the copper wire repair claim. Instead of segregating the fees between those involving the work on the copper wire repair (work performed under an agreement separate from the alleged contract for the paint booth work), the court awarded C&R all of the fees it allegedly incurred for work unrelated to the lienable copper wire repair, including (1) attorney's fees incurred by C&R in prosecuting its claims against the defaulted defendants, TRJ Development, Inc. and Tyko Johnson, (2) attorney's fees incurred in the Johnson Chapter 13 bankruptcy case, and (3) attorney's fees incurred in prosecuting the breach of contract claims relating to the work performed regarding the installation of the paint booths, for which no legal basis exists for an award of attorney's fees under the lien statute because it did not involve an improvement to the real estate.

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<sup>12</sup> Brief of Appellant, page 18.

Second, the trial court performed no lodestar analysis, and entered no findings of fact or conclusions of law in support of the award of attorney's fees and costs. As previously noted, the trial court could perform no lodestar analysis because no "adequate record" was made and presented given the total absence of any billing records. No substantial evidence was even presented to the trial court, and, as such, no substantial evidence supports the fee award made by the trial court.<sup>13</sup> Because the trial court engaged in no lodestar analysis, and made no findings of fact, the fee award must be reversed.

In an effort to salvage the fee award in its favor, C&R argues that a trial court has "broad discretion" in fixing fees, citing *Schmidt v. Cornerstone Investments*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990), and that a discretionary decision fixing the amount of fees to be awarded will only be disturbed on appeal based upon a showing of abuse of discretion, citing *Structurals Nw., Ltd. v. Fifth & Park Place, Inc.*, 33 Wn.App. 710, 718, 658 P.2d 679, 683 (1983). C&R then cites *Schumacher Painting Co. v. First Union Mgmt., Inc.*, 69 Wn.App. 693, 702, 850 P.2d 1361 (1993) for the proposition that if claims are related, a party entitled to fees on one

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<sup>13</sup> Brief of Appellant, pages 19-20.

claim may recover fees incurred in connection with claims on which the party was not successful.<sup>14</sup>

None of these cases justify an award of all of C&R's attorney's fees by reason of the lien statute, or the inclusion of all of those fees within the lien award. The only basis asserted by C&R for an award of attorney's fees is the lien statute [CP 172], and the only portion of the attorney's fees that are entitled to be included in the amount of the lien award are those fees related to the lienable work. While C&R now argues on appeal that the work on the two projects all was "related,"<sup>15</sup> it plainly and unequivocally told the trial court the exact opposite in its motion for summary judgment! Indeed, in its summary judgment motion, C&R represented to the trial court that the work on the electrical repair "was not related to the paint booth project," and that it was requested long after the original paint booth work was requested, at a time when C&R was on site performing the paint booth work, as a result of a theft. [CP 178, lines 1-6] C&R is bound by that admission.

C&R argues that "The complaint did not distinguish between the two projects in its claim for lien foreclosure," and that the Claim of Lien

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<sup>14</sup> *Schumacher* involved a single claim, with separate legal issues related to that single claim. Here, we have two separate and distinct claims.

<sup>15</sup> Brief of Respondent, pages 24 and 29.

covered the amount invoiced for both projects.<sup>16</sup> Neither of these is legally relevant to determine whether the work relates to the same contract, as the controlling issue is whether the wire repair work involved work separate from the paint booth, and whether the work performed under two alleged separate agreements was lienable work. The paint booth work, by C&R's own admission, was separate, and the judgment for the paint booth work was not awarded lien status by the trial court.

Indeed, even as C&R tries to characterize the "two projects" as sharing common facts, because they "were performed on the same Property," and "both were billed on a time and materials basis," it then proceeds to contradict itself, and C&R admits, as it must, that "**the work performed for the two projects differed.**"<sup>17</sup> Indeed, the copper wire repair work had nothing whatsoever to do with the paint booth work, and came about as a result of vandalism which occurred while the paint booth work was in progress.

Neither the *Schmidt* decision nor the *Structurals Nw.* decision cited by C&R are contrary to or overrule the Washington case law requiring segregation of fees as between claims for which a fee award is eligible and those that are not so eligible. Both cases simply support the proposition

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<sup>16</sup> *Id.*

<sup>17</sup> Brief of Respondent, page 24.

that, in circumstances where a prevailing party is entitled to be awarded fees as to one or more claims, a trial court has broad discretion in fixing the amount of the fees, applying the lodestar factors. Neither decision gives a trial court discretion to award attorney's fees on claims for which attorney's fees are not eligible to be awarded.

Realizing that the claims for the paint booth work and the copper wire repair work are separate, and that the paint booth repair work fees are not awardable under the lien statute, C&R now claims, for the first time on appeal, that it also is entitled to be awarded its attorney's fees under RCW 4.84.250 (claims under \$10,000). That is a new argument on appeal, and should be disregarded. However, and regardless, that statute does not confer lien status on a fee award made under that statute – at most, if applicable, it provides a basis to award fees against individual defendants. It does not provide a basis to assess those fees as a lien against real property.

With respect to the absence of any lodestar analysis by the trial court, and the trial court's failure to enter findings of fact and conclusions of law in support of the award of attorney's fees and costs, C&R concedes, as it must, that it did not provide the trial court with the required hours, rates, and narrative necessary to allow the trial court to perform a lodestar

analysis.<sup>18</sup> However, C&R argues that the lodestar analysis is not required in all cases, and cites *In re Guardianship of Decker*, 188 Wn.App 429, 447 (2015), a decision by Division II of the Washington Court of Appeals. The *Decker* case provides no support for the proposition that the trial court was not required to perform a lodestar analysis in this case, and to the contrary, affirms the proposition that a lodestar analysis is the required analysis when fees may be awarded based upon a prevailing party statute. The *Decker* case involved a guardianship proceeding, and stands for the proposition a trial court is not required to conduct a lodestar analysis when determining compensation under the guardianship statute because the primary considerations for fee awards in guardianship cases are equitable, and that “[T]his is not a typical situation wherein lodestar analysis is required, such as where a trial court awards attorney fees **to the prevailing party.**”<sup>19</sup> Of course, this is not a guardianship case. Rather, it is a case in which the basis for the award of fees is the lien statute which gives a trial court discretion to award attorney fees to **the prevailing party** – the cases in which the court in *Decker* recognized that the lodestar

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<sup>18</sup> Brief of Respondent, page 27.

<sup>19</sup> *Id.* at 447.

analysis is required.<sup>20</sup> The decision in *CKP, Inc. v. GRS Const. Co.*, 63 Wn. App. 601, 615, 821 P.2d 63, 71 (1991), cited by C&R, is not to the contrary.

C&R further argues that “[T]here is at least one case where the Court of Appeals has ruled that a trial court did not abuse its discretion in awarding \$5,500 in attorney fees under the mechanic’s lien statute when the attorney simply submitted a declaration stating that the client incurred \$5,526 in attorney fees,” citing *Lumberman’s of Washington, Inc. v. Barnhardt*, 89 Wn. App 283, 292, 949 P.2d 382 (1997). The court in *Lumberman’s* made no such ruling. Nowhere in that opinion does the court state that fee statements, with hours, rates and a description of the services are not required, nor does it state that a detailed fee statement was not included as part of the attorney’s declaration in support of the fee award, or that the fee award was not based upon a lodestar analysis, and it certainly contains no ruling by the court that an unsupported declaration by counsel complies with the proof requirements for an award of attorney’s fees.

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<sup>20</sup> Under RCW 60.04.181(3), “The court may allow **the prevailing party in the action**, whether plaintiff or defendant, as part of the costs of the action, the moneys 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, supreme court, or arbitration, as the court or arbitrator deems reasonable. Such costs shall have the priority of the class of lien to which they are related, as established by subsection (1) of this section.”

**E. C&R Is Not Entitled to An Award of Attorney's Fees On Appeal.**

C&R seeks an award of attorney's fees on appeal based upon the prevailing party attorney's fee provision in the mechanic's lien statute, RCW 60.04.181(3). C&R's request must be denied. As discussed in both the Brief of Appellant and in this Reply Brief of Appellant, the only claim at issue in this case to which the lien statute applies is the limited work performed in replacing the stolen copper wire. With the exception of Johnson's challenge on this appeal to the amount awarded on summary judgment for the copper wire repair, a relatively minor issue in terms of the amount of briefing presented to this court, the issues on appeal do not involve the lienable work. The remaining issues on appeal address the propriety of the grant of summary judgment on the alleged contract for work on the paint booth installation, not work for which a claim of lien exists, and the absence of a basis in the record to award attorney's fees, and to include that fee award as part of the lien award. C&R is not entitled to an award of attorney's fees on appeal based upon the lien statute.

**III. CONCLUSION**

The trial court should have denied C&R's motion for summary judgment because material issues of fact exist as to whether the work relating to the paint booth was performed under an oral contract with

Johnson, and regarding the amount owing for work pertaining to the copper wire repair. The award of attorney's fees should be reversed because the required evidentiary basis for such an award is absent and no substantial evidence supports it, because the trial court did not apply the required lodestar analysis, because the trial court entered no findings of fact and conclusions of law in support of the award of costs and attorney's fees, and because the trial court failed to segregate the attorney's fees awarded between the services that were the subject of the lien award and all of the other work for which no legal basis exists for an award of attorney's fees.

RESPECTFULLY SUBMITTED this 30 day of September, 2016.

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## CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

On the date given below, I caused to be served by legal messenger a copy of this document on the following attorney as follows:

Stephan D. Wakefield  
Hecker & Feilberg PS  
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Seattle, WA 98119-4103

DATED this 30<sup>th</sup> day of September 2016, at Seattle,  
Washington.

  
\_\_\_\_\_  
Kevin R. Smith