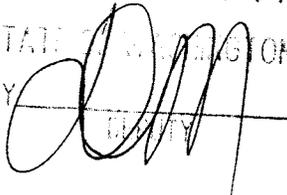


FILED
COURT OF APPEALS
10 MAY 19 PM 12:14
STATE OF WASHINGTON
BY 

36482-4-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NORTHWEST CASCADE, INC., a Washington corporation,

Appellant,

v.

TITANIC INVESTMENTS, INC., a Washington corporation;
NORMAN LEHMAN, an individual, and LOUISE LEHMAN, an
individual and their marital community; and RANGLES SAND &
GRAVEL, a Washington corporation; BUILTWELL STRUCTURES,
INC., a Washington corporation; CITY BANK, a Washington state
chartered banking institution; and EVERGREEN TITLE COMPANY,
INC., a Washington corporation

Respondents.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Northwest Cascade, Inc. (“NWC”) submits the following reply to the *Brief of Intervening Party Wells Fargo Bank N.A.* (hereafter “*Wells Fargo Br.*”). Pursuant to this Court’s order dated January 22, 2010, Wells Fargo has been permitted to substitute into this case as a real respondent in interest with respect to the lien issue.

On the central issue of whether the July 2002 work was performed to revive NWC’s lien, Wells Fargo argues that the trial court’s finding is supported by “substantial evidence” and the “totality of the circumstances.” *Wells Fargo Br.* at 6. But this argument does not withstand scrutiny. After a careful review of the record and the trial court’s findings, it is clear that the trial court’s decision was entirely based on (i) an erroneous finding that the work performed by NWC in July 2002 “was not required to done at the time it was performed,” (ii) four irrelevant findings, and (iii) inadmissible speculation by Lehman’s expert.

Wells Fargo also makes erroneous legal arguments regarding the trial court’s award of attorney’s fees, and provides an irrelevant discussion of the trial court’s denial of NWC’s motion for reconsideration. For the reasons set forth in NWC’s opening brief, the trial court’s decision must be reversed and remanded.

II. REPLY ARGUMENT

Wells Fargo begins its argument with an extensive discussion of the standard of review. *Wells Fargo Br.* at 6-8. This discussion is generally consistent with the discussion of the substantial evidence standard in NWC's brief. *App. Br.* at 16. The cases cited by Wells Fargo address only the black letter standard of review, and do not shed any light on whether the findings of fact challenged by NWC are supported by substantial evidence.¹

A. The trial court erroneously found that the work performed by NWC on July 2, 2002, was solely for the purpose of reviving NWC's lien rights.

The applicable legal standard is clear and not disputed: NWC's lien was valid unless the work done on July 2, 2002 was performed solely for the purpose of reviving NWC's rights. *Intermountain Elec., Inc. v. G-A-T Bros. Const., Inc.*, 115 Wn. App. 384, 393, 62 P.3d 548 (2003); *Kirk v. Rohan*, 29 Wn.2d 432, 436, 187 P.2d 607, 609 (1948). Wells Fargo agrees. *Wells Fargo Br.* at 9.²

¹ See *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999); *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 108, 86 P.3d 1175 (2004); *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002); *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002); *Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992).

² Wells Fargo also notes that the lien statute has been strictly construed because the statute is in derogation of the common law. *Wells Fargo Br.* at 9. But Wells Fargo never explains how this rule of statutory construction matters in this case. The relevant issue is whether the trial court erroneously found that the work performed by NWC on July 2,

The only competent evidence in the record establishes that the July 2002 work was *not* performed solely to maintain NWC's lien. *App. Br.* at 16. Compliance with Pierce County regulations for Temporary Erosion and Sedimentation Control ("TESC") measures was within the scope of the original contract, which had not been terminated, and NWC continued to perform its ongoing obligation to maintain the TESC measures even when no other work was being done on the site. CP 388-89 (Findings 8, 15-16). Wells Fargo concedes this. *Wells Fargo Br.* at 12. Furthermore, NWC believed it would return to the project and finish the work, and NWC had no notice that Lehman would hire another contractor. *App. Br.* at 15-16; CP 389-90 (Findings 16-18, 35).

As set forth in the following subsections, the trial court's contrary finding is not supported by any competent, relevant evidence. Instead, the trial court relied on (i) an erroneous finding that the July 2002 TESC work "was not required to be done at the time it was performed," (ii) four irrelevant findings, and (iii) inadmissible speculation by Lehman's expert.³

2002, was solely for the purpose of reviving NWC's lien rights. Furthermore, a 1991 amendment to the lien statute provides that the statute must be "liberally construed to provide security for all parties intended to be protected by their provisions." RCW 60.04.900; see *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 882, 155 P.3d 952 (2007).

³ Wells Fargo also relies on a portion of the trial court's *Opinion Letter*, CP 143-45, which was issued almost a year before the trial court entered its formal findings of fact and conclusions of law. *Wells Fargo Br.* at 10. The *Opinion Letter* adds nothing to the

- 1. It is undisputed that NWC was required to maintain the TESC measures, that NWC's July 2002 work had to be performed at some point, and that the work was *not* performed for the purpose of reviving NWC's lien.**

The trial court's central finding — that the July 2, 2002 work was only done to revive the lien — was based on a further erroneous finding that the work “was not required to [be] done at the time it was performed.” CP 389 (Finding 16, fourth sentence). It is undisputed that NWC was required, by both the contract and County regulations, to maintain the TESC measures. Furthermore, the only evidence in the record establishes that the TESC work at issue was valid erosion control work and had to be done at some point in the summer or early fall because the project would be going through another fall and winter. VRP 60, ll. 18-25; 61, ll. 1-7; 107, ll. 19-25; 108, ll. 1-3; 121, ll. 5-10; 127, ll. 7-14. Even Lehman's expert, Sprague, acknowledged that the work needed to be done eventually. VRP 354, ll. 16-21. Sprague also acknowledged that TESC measures require ongoing maintenance, that maintenance work sometimes has to be repeated, and that TESC measures must be checked after storms or rain. VRP 377, ll. 12-21.⁴

analysis of the lien issue, and it has no binding effect because it was not incorporated into the findings of fact. *State v. Wilks*, 70 Wn.2d 626, 424 P.2d 663 (1967).

⁴ Wells Fargo also cites to parts of Mr. Sprague's deposition in which Sprague speculated, contrary to the trial court's finding, that the July 2002 TESC work did not need to be done at all. *Wells Fargo Br.* at 13. n.5. Wells Fargo concedes that Sprague had no personal knowledge of the condition of the site at that time, and thus his

Given the undisputed facts that (i) the work done in July was required by both the contract and county regulations, and (ii) the work had to be done at some point, the trial court's finding that the TESC work "was not required to [be] done at the time it was performed," CP 389 (Finding 16, fourth sentence) is unsupported and erroneous as a matter of law. There is no case or statute that allows a court to speculate about why work was done on a particular day where the undisputed facts establish that the work was required by the contract and had to be done at some point.

Wells Fargo responds by mischaracterizing the trial court's finding. Wells Fargo asserts that the July 2002 TESC work "was not required," *Wells Fargo Br.* at 3, which misleadingly suggests that the court found that the work did not need to be done at all. Wells Fargo also asserts that the work was "untimely," *Wells Fargo Br.* at 10, 15, erroneously implying that the work should have been done earlier. In fact, the word "untimely" never appears in the court's findings. CP 386-97.

deposition testimony is inadmissible speculation. *See* subsection (3) (below). Furthermore, the parts of the deposition cited by Wells Fargo were not discussed in the trial so the trial court would not have actually read or relied on those parts of the deposition. In any event, it is doubtful whether Wells Fargo may rely on deposition testimony that not presented to or considered by the trial court in order to support that trial court's finding of fact. *Cf. In re Cygnus Telecommunications Tech., LLC Patent Litigation*, 536 F.3d 1343 (Fed. Cir. 2008) (finding that party could not create an issue of material fact by relying on portions of deposition testimony that were not cited to the trial court).

Wells Fargo also resorts to obfuscation, pointing out that “[NWC] contends that the July 2002 work had to be done at some point,” but Wells Fargo never actually denies that NWC’s point is correct and undisputed. *Wells Fargo Br.* at 15. Wells Fargo admits that the work was *required* by County regulations, but suggests that NWC “places too much emphasis” on those facts. *Wells Fargo Br.* at 12. But Wells Fargo admits, *sub silentio*, that the July 2002 work had to be performed at some point. *Wells Fargo Br.* at 17. Indeed, Lehman’s expert, Sprague, testified that the work could have been done later. VRP 354. As NWC has pointed out, doing the TESC work later would have extended the lien later.

Wells Fargo also mischaracterizes NWC’s argument, asserting, “Merely because NWC is required to maintain TESC measures does not automatically mean that the July 2002 work was not for the purpose to revive lien rights.” *Wells Fargo Br.* at 12. The fact that the July 2002 work was not for the purpose of reviving the lien is established by *testimony* in the record. VRP 60-61, 107-08. Wells Fargo does not cite any contrary evidence, other than inadmissible speculation by Sprague,⁵ because there is no contrary evidence. The undisputed fact that NWC was obligated to maintain the TESC measures merely establishes that there is no basis for the trial court’s erroneous finding that “was not required to

⁵ See subsection A(3) below.

[be] done at the time it was performed.” CP 389 (Finding 16, fourth sentence). There is no logical connection between a finding that work could have been done later and an alleged purpose to extend a lien. If work were performed later then the lien would extend further. Because the fourth sentence of Finding 16 is erroneous, it cannot support the trial court’s central finding that the TESC was performed for the purpose of reviving the lien.

An argument about exactly which day that work could or should have been done is not evidence that supports the required finding that the work was done solely to extend lien rights. If that were all that a party had to argue, then every lien would be vulnerable because an owner could always assert that the work performed on last day could or should have been performed on a different day, thus voiding the contractor’s lien rights. This interpretation of the law would eviscerate the lien statute, and defeat the underlying public policy that the statute is intended to “provide security for all parties intended to be protected by their provisions.” RCW 60.04.900; *see Hazelwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 882, 155 P.3d 952 (2007).

Allowing a party to question why work was done on a particular day is incompatible with the independence of a contractor. “[A]n independent contractor is one who engages to perform a certain service for

another, according to his own manner and method, free from control and direction of his employer in all matters connected with the performance of the service, except as to the result of the work.” *See Leech v. Sultan Ry & Timber Co.*, 161 Wash. 426, 428, 297 P.3d 203 (1931). The contract obligated NWC to maintain the TESC measures; it did not give Lehman the right to decide when that work was done. CP 389 (Finding 16); Ex. 1.

Wells Fargo ignores the trial court’s findings that Lehman delayed the project and prevented NWC from completing its substantive work. CP 388, 391 (Findings 13-14, 39-40). Lehman created the situation after January 2002 where NWC remained responsible for the TESC measures but had no other substantive work to do. Allowing Lehman to question the timing of NWC’s work effectively rewarded Lehman for conduct that the trial court found was a breach of Lehman’s contract with NWC. CP 392 (Finding 46).

Wells Fargo argues that the underlying issue “was whether NWC sent an employee to the site in July for the purpose of reviving lapsed lien rights.” *Wells Fargo Br.* at 16. First, the applicable test is whether the July 2002 TESC work was done *solely* to revive lien rights. *Intermountain Elec., Inc.*, 115 Wn. App. at 393. Second, NWC does not argue that this issue is “irrelevant.” *Id.* The issue is certainly relevant, but there is no actual evidence to support the trial court’s finding that the

“only reason” the work was done was to revive lien rights. CP 389 (Finding 16, sixth sentence). Wells Fargo never points to any particular evidence, other than speculation by Sprague, because there simply isn’t any other evidence.

The landscaping analogy suggested by Wells Fargo on page 17 of its brief demonstrates that Wells Fargo is grasping at straws, relying on speculation, and ignoring the evidence. If (i) the landscaping work was required by the contract and had to be done before the winter, and (ii) the contractor testified that the work was done pursuant to the contract and for that purpose, then the trial court could *not* make a contrary finding that the work was done to revive lien rights unless there were some contrary evidence to support such finding. In the present case there is no such evidence. In both this case and the landscaping analogy, the trial court’s finding is based on nothing more than speculation about the contractor’s motives. As explained in subsection (3), such speculation is inadmissible.

Finally, Wells Fargo attempts to trivialize the TESC regulations and NWC’s contractual obligation to comply with those measures, arguing that NWC “places too much emphasis” on those regulatory and contractual requirements. Wells Fargo suggests that the TESC measures were an “ancillary,” a “scapegoat,” and/or “random.” *Wells Fargo Br.* at

12, 16. These arguments prove only that Wells Fargo is profoundly ignorant of modern construction practices and regulations.

The Pierce County Code (PCC) includes detailed regulations for the control of erosion and sedimentation during property development. *See* Title 17A PCC. These regulations incorporate the *Pierce County Stormwater Management and Site Development Manual*, *see* PCC 17A.10.040, which clearly explains that the purpose of these regulations is to “avoid immediate and long-term environmental loss and degradation potentially caused by poorly managed construction sites.”⁶ These county measures are required by state law, *see* Chapter 173 WAC; PCC 17A.10.010, which is mandated by the Federal Clean Water Act. 40 C.F.R. § 123; RCW 90.48.260; *Puget Soundkeeper Alliance v. State*, 102 Wn. App. 783, 787, 9 P.3d 892 (2000).⁷ Failure to comply with those regulations may subject a developer to stop work orders, revocation of permits, civil and criminal penalties, and cost recovery actions. PCC 17A.10.130. Consistent with these regulations, the project included

⁶ *Pierce County Stormwater Management and Site Development Manual, Volume II - Construction Stormwater Pollution Prevention* (August 2008) at 1-2 (available online at <http://www.piercecountywa.org/pc/services/home/environ/water/cip/swmmanual.htm>)

⁷ The EPA delegated the authority and responsibility to regulate water pollution under the Federal Clean Water Act to the Washington State Department of Ecology under the State Water Pollution Control Act, Chapter 90.48 RCW. 40 C.F.R. § 123; RCW 90.48.260; *Puget Soundkeeper Alliance v. State*, 102 Wn. App. 783, 787, 9 P.3d 892 (2000). The state delegated this authority and responsibility to the Washington counties. *See* Chapter 173 WAC; PCC 17A.10.010.

detailed TESC plans with numerous specific requirements and provisions for ongoing inspection of TESC measures. Ex. 46. Indeed, the first five (5) items in the construction sequence for the project relate to compliance with TESC measures. *Id.* Compliance with the TESC measures was part of NWC's contract for the project, as the trial court found. Ex 1; CPP 388 (Finding 8, 15). Pursuant to its obligations, NWC continuously maintained the TESC measures and filed the required reports until the new contractor was hired in October 2002. CP 388-90 (Findings 15, 35). The trial court's decision cannot be upheld on the basis of Wells Fargo's unqualified and self-serving assertions that compliance with TESC measures does not really matter in the Puget Sound basin in the 21st century.

Petro Paint Mfg. Co. v. Taylor, 147 Wash. 158, 265 P.2d 155 (1928), relied on by Wells Fargo, is easily distinguished. In *Petro Paint* there was abundant evidence to support the trial court's finding that the appellant's last delivery of cement was not made in good faith but was solely for the purpose of extending the lien. 147 Wash. at 162. The builder, who no longer owned the property and could not pay the appellant, colluded with the appellant by ordering two sacks of cement for each of four unfinished houses. The cement was not actually delivered to the work sites but was "thrown in a shed" at the request of the builder who

did not complete the work. The small amount of cement was not sufficient to actually construct the unfinished sidewalks and driveways. Furthermore, the contract did not provide for the construction of the sidewalks and driveways. 147 Wash. at 160-162. Not surprisingly, the Supreme Court held that the “evidence and logical deductions from the evidence” showed that the delivery of cement was merely for the purpose of extending the appellant’s lien. 147 Wash. at 164.

Petro Paint is not even remotely analogous to this case. Unlike the builder in *Petro Paint*, Lehman still owned the property and had not terminated the contract with NWC. Unlike the delivery of a few sacks of cement in *Petro Paint*, the work performed by NWC clearly was within the scope of NWC’s original contract, and had been performed continuously pursuant to the contract. The appellant in *Petro Paint* knew that the amount of cement was not sufficient to perform the work. 147 Wash. at 164. While the delivery of cement to the insolvent builder in *Petro Paint* was clearly a scam, the trial court in this case specifically found that as late as October 2002, NWC still expected to return and complete its work. CP 389 (Finding 18).

Wells Fargo erroneously asserts that the owner in *Petro Paint* “actually requested the work to complete the contract.” *Wells Fargo Br.* at 15 n.6. In fact, the cement was ordered by the builder who no longer

owned three of the four houses, and the evidence indicated that the builder was a party to the fraud. 147 Wash. at 164-65. There are no similar facts in this case. Furthermore, the suggestion that Lehman needed to “request” the TESC work by NWC is specious. There is no requirement that work be “requested” by the owner where the work is part of the contract. NWC has repeatedly explained that the TESC work was part of the base contract for which no separate notice was required and no separate invoices were issued. App. Br. at 21-22. *See* subsection (2) (below).

Cases cited in *Petro Paint* confirm that liens will be upheld despite a temporary interruption of work where the contractor did not terminate or abandon the work and the work resumed in good faith. *Bradley v. Donovan-Pattison Realty Co.*, 84 Wash. 654, 657-58, 147 P. 421 (1915); *Rieflin v. Grafton*, 63 Wash. 387, 389, 115 P.851 (1911); *Owen v. Curtis*, 133 Wash. 360, 361-62, 233 P. 643 (1925). The undisputed facts show that NWC did not abandon its work or terminate the contract but continued to perform its duty to maintain the TESC measures until terminated by Lehman. Consequently, NWC is entitled to have its lien enforced.

2. The trial court made four irrelevant findings.

The trial court’s central finding — that the July 2, 2002 work was only done to revive the lien — was also based on several irrelevant

findings. In defense of these irrelevant, and therefore erroneous, findings, Wells Fargo argues that NWC has addressed the trial evidence “in a vacuum and out of context.” *Wells Fargo Br.* at 15. On the contrary, Wells Fargo ignores the objective facts that the project was delayed by Lehman, that NWC was justified in stopping the substantive work, that NWC continued to perform its obligations to maintain the TESC measures, and that as late as October 2002, NWC still expected to return and complete its work. CP 388-91 (Findings 13-14, 18, 32, 40, 44).⁸

Scrutiny of the trial court’s irrelevant findings establishes that the central finding regarding the purpose of the July 2002 TESC work is wholly unsupported. NWC addresses each of the irrelevant findings in detail as required by RAP 10.3(g).

First, the trial court found that “[The work] was performed without notice to [Lehman] more than four months after NWC ceased doing work on the Project.” CP 389 (Finding 16, fifth sentence). NWC has explained that this finding is irrelevant because nothing in the contract required

⁸ Wells Fargo misleadingly asserts that “NWC had ceased substantive work in January 2002.” *Wells Fargo Br.* at 10. As the trial court found, NWC was forced to stop substantive work on the project because Lehman had not awarded the water line work to NWC or another contractor. This was breach of Lehman’s obligations to NWC. CP 388-90 (Findings 13-14, 32, 39-44). But NWC continued to perform its obligations under the contract. Wells Fargo cannot use Lehman’s breaches of contract as a basis for denying NWC’s lien rights.

NWC to provide notice each time it performed work under the contract. Ex. 1; *App. Br.* at 21.

Conceding that the contract did not require any notice, Wells Fargo argues that the trial court found this lack of notice “somewhat compelling” because, according to Wells Fargo, “work ceased on the project almost seven months prior.” *Wells Fargo Br.* at 16. The assertion that “work ceased” in January 2002 is inaccurate and misleading. The evidence shows, and the trial court found, that the substantive work was stopped because Lehman had not awarded the water line work, but NWC continued to perform its obligations to maintain the TESC measures. Furthermore, the trial court specifically found that as late as October 2002, NWC still expected to return and complete its work. CP 389 (Finding 18). Therefore, the fact that NWC did not give notice that it was continuing to perform under the contract, where no notice was required, proves absolutely nothing.

Second, the trial court found that “NWC did not submit a separate invoice for that work to Lehman or otherwise bill for it.” CP 389 (Finding 16, eighth sentence). NWC’s brief explained, with citations to the undisputed evidence, that there were no separate invoices for the erosion control work because that work was part of the base contract. Consequently, the trial court’s finding (Finding 16, eighth sentence) that

NWC did not submit a separate invoice for the July 2002 TESC work is completely irrelevant. *App. Br.* at 21-22. Wells Fargo repeatedly points out that there was no separate invoice for the TESC work. *Wells Fargo Br.* at 3, 11, 14, 17, 21. But Wells Fargo never explains how this fact is *relevant* to the validity of NWC's lien.

Wells Fargo asserts that the trial court emphasized the fact "that the work done in July 2002 was distinguishable from the prior environmental inspection work performed by NWC." *Wells Fargo Br.* at 21. But the trial court never identified any *relevant* distinction. Instead, the trial court relied on irrelevant observations that there was no separate invoice (see above), and that there was no report to the County for the July work even though it is undisputed that reports were not required in the Summer months. CP 176. It is clear that the trial court was drawing improper, unsupported inferences from the irrelevant and fully explained absence of a separate invoice for TESC work.

Third, the trial court found that "As of July 2002, Lehman was behind in payments and the Court finds that there was a general state of 'uncertainty' regarding the Project." CP 389 (Finding 17). NWC has explained that uncertainty did not affect NWC's rights or obligations under the contract, that NWC remained responsible for TESC measures, and that as late as October 2002 NWC expected to resume work. *App. Br.*

at 22; CP 388-89 (Findings 8, 18). The trial court’s finding that there was “uncertainty” about the project is vague and proves nothing. Wells Fargo repeatedly points out that the trial court made this irrelevant finding, *Wells Fargo Br.* at 3, 10, 11, 14, 22, but never explains how this finding is relevant.

Fourth, the trial court found that “NWC filed [its lien] ... more than 90 days after the last TESC work reported to the County...” CP 389 (Finding 19). As NWC has explained, this finding is irrelevant because the trial court’s own findings clearly state that no reporting was required by Pierce County regulations between May and September. CP 388 (Finding 15). Apart from reciting the trial court’s finding, *Wells Fargo Br.* at 11, Wells Fargo has not addressed this irrelevant finding at all.

The trial court’s reliance on these irrelevant findings confirms that there is no evidence to support the trial court’s central finding that the July 2002 TESC work was performed only for the purpose of extending NWC’s lien. As explained in the next subsection, the trial court’s finding was entirely based on inadmissible speculation.

3. The trial court relied on inadmissible speculation by Sprague.

Like the trial court, Wells Fargo relies on speculation by Sprague, who testified that it was “odd” that NWC performed the TESC work in

July 2002.⁹ *Wells Fargo Br.* at 13-14. Wells Fargo acknowledges that Sprague had no personal knowledge of the condition of the project site in July 2002, *Wells Fargo Br.* at 13 n.5, but Wells Fargo ignores Sprague’s admission that he was “*just guessing*” as to NWC’s motives. VRP 353; *App. Br.* at 23, 24. Guessing is not evidence to support a finding of fact.

Even where a witness does not admit guessing, speculation is not admissible to prove an essential fact, such as NWC’s purpose in performing the July 2002 TESC work. *State v. Farr-Lenzini*, 93 Wn. App. 453, 462-463, 970 P.2d 313 (1999). Wells Fargo concedes this point, *sub silentio*, by ignoring *Farr-Lenzini* and the entire issue of whether Sprague’s testimony was inadmissible speculation.¹⁰

Instead, Wells Fargo argues that the trial court was in a better position to judge the credibility of witnesses. *Wells Fargo Br.* at 18-19. But this argument is a red herring. NWC has not challenged Sprague’s credibility or the weight that should have been given to his testimony. Whether the trial court found Sprague to be credible or not while

⁹ In the passage quoted by Wells Fargo, Sprague also commented that “[n]othing had happened on the job for a long time” Sprague’s comment is completely off point. Whether or not any substantive construction work had occurred after January 2002 is irrelevant to NWC’s obligation to maintain the TESC measures. As Sprague acknowledged, TESC measures require ongoing maintenance. VRP 377, ll. 12-21; see section A(1).

¹⁰ The only reference to this issue in Wells Fargo’s brief is on page 20 where Wells Fargo notes that NWC raised the issue again in its motion for reconsideration.

speculating does not change the fact that his testimony was speculative. *Kirk*, 29 Wn.2d 432, cited by Wells Fargo, does not address the question of speculative testimony.¹¹

It is clear that Sprague's testimony was speculative and inadmissible, and that the trial court impermissibly relied on such testimony in finding that the July 2002 TESC work was only done to revive NWC's lien. CP 389 (Finding 16, sixth sentence). That finding is not supported by evidence and must be reversed.

4. Public policy does *not* support the trial court's decision.

Although the trial court did not rely on considerations of public policy, Wells Fargo argues that public policy supports the trial court's decision. These new arguments are not only a clear violation of RAP 2.5(a), but both factually and legally frivolous as well.

Wells Fargo asserts, without any citation to the record, that the current homeowners and their lenders were not given notice that their interests could be inferior to NWC's lien. *Wells Fargo Br.* at 22. This assertion is patently false, and clearly was made for the improper purpose

¹¹ Wells Fargo's assertion that Sprague testified as an expert witness is also irrelevant. *Wells Fargo Br.* at 13, n. 4. Even experts cannot provide speculative testimony. *Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 102-103, 882 P.2d 703, 731 (1994). NWC also argues that Sprague's testimony about the allegedly "unsuitable" soil was improper, *App. Br.* at 31-38, but that issue relates to Lehman's counterclaims. Wells Fargo has *not* been granted permission to address the Lehman's counterclaims. See Order dated January 22, 2010.

of suggesting that homeowners (rather than their lenders or title insurers) will have to pay NWC's lien.

NWC's lien was properly recorded in Pierce County in September of 2002. **Appendix C** (Ex. 62); CP 389 (Finding 19). Such recording provides constructive notice as a matter of law to all parties, including Wells Fargo, that acquired an interest in the project after that date. *John Morgan Const. Co., Inc. v. McDowell*, 62 Wn. App. 79, 82-83, 813 P.2d 138 (1991). Indeed, that is the purpose of recording a lien in the first place. Furthermore, it is common practice in lending and purchasing property to obtain a title report, which would have disclosed NWC's lien. NWC used the title records to identify those parties, including Wells Fargo, that might have an interest in this case for purposes of RAP 3.2(a). *See Motion for Extension of Time* (11/2/09); *Letter to Clerk, Counsel & Interested Parties* (11/30/09). Wells Fargo admits that its interest in this case stems from two deeds of trust, executed in 2007 and 2009, so it clearly had constructive notice of NWC's lien. *Motion for Substitution or Intervention of Interested Party Wells Fargo Bank N.A.* (1/14/10).

Wells Fargo erroneously asserts that NWC was required to record a *lis pendens* in order to provide notice to affected parties. *Wells Fargo Br.* at 22-23. Like a properly recorded lien, a *lis pendens* is another method of providing constructive notice of a prior claim to real property.

See RCW 4.28.320. *United Savings & Loan Bank v. Pallis*, 107 Wn. App. 398, 405, 27 P.3d 629 (2001), cited by Wells Fargo, notes that a *lis pendens* also provides constructive notice. But that case does **not** hold that a *lis pendens* is required, and it does not address liens under Chapter 60.04 RCW. On the contrary, *John Morgan Const. Co., Inc.*, 62 Wn. App. at 84, explicitly rejects the argument that *lis pendens* is required in addition to a recorded lien. Wells Fargo's assertion that other parties were prejudiced by the lack of *lis pendens* is frivolous given the recorded lien.

Contrary to Wells Fargo's arguments, public policy clearly favors enforcing NWC's lien. As NWC has explained, it is against public policy to deny contractors' liens for performing TESC work that is necessary to protect the environment and is required by federal, state, and local laws. Contractors responsible for TESC measures should be encouraged to maintain such measures even where the fate of a project is uncertain. See *App. Br.* at 25-26. Wells Fargo has ignored these policy concerns in favor of frivolous arguments about an alleged lack of notice (above).

In sum, there is no competent, admissible evidence to support the trial court's finding that the July 2, 2002 work was only done to revive the lien. CP 389 (Finding 16, sixth sentence). The uncontroverted evidence and other relevant findings demonstrate that the TESC work was contractually and legally required, and in fact had to be done.

Accordingly, the sixth sentence of Finding 16, and the erroneous, unsupported, and irrelevant findings on which it is based, must be reversed.¹² Trial court's dismissal of NWC's lien claim must be reversed.

B. The trial court erroneously found that NWC placed an “unspecified amount of unsuitable soils” in the roadway area of the project, and that this somehow caused Lehman to import fill material at an additional expense.

Wells Fargo has not briefed this issue. For the reasons stated in the *Brief of Appellant* at 26-43, Findings 50-52 and 54-57 are not supported by substantial evidence and must be reversed. The trial court's award of a \$10,000 offset on Lehman's counterclaim was erroneous and must be reversed. Lehman's counterclaims should have been dismissed in their entirety.

C. In the alternative, the trial court erred in awarding any damages for Lehman's counterclaim in light of the undisputed fact that NWC was given no notice of or opportunity to cure the allegedly unsuitable soil in the roadway.

Wells Fargo has not briefed this issue. For the reasons stated in the *Brief of Appellant* at 43-44, the trial court erred as a matter of law in awarding any damages on Lehman's counterclaim because NWC had no knowledge of the allegedly unsuitable soil and was given no opportunity to cure the condition it allegedly created.

¹² Finding 22 (CP 390) is erroneous and must be reversed for the same reasons as Finding 16. *See App. Br.* at 17 n.7.

D. The trial court's award of attorney's fees was erroneous.

Wells Fargo asserts that the trial court “properly offset attorney’s fees regarding the lien issue,” and makes an irrelevant comment that the original lien was small in comparison to the fees requested by NWC for the entire case. *Wells Fargo Br.* at 23-24. But Wells Fargo has not actually addressed the attorney’s fees issues in any meaningful way.

First, if this Court agrees with NWC that the trial court’s dismissal of the lien claim was erroneous (see section A), then the trial court’s decision to “offset” the attorney’s fees on the lien claim (CP 394) was also erroneous. *See App. Br.* at 47. Wells Fargo does not argue otherwise.

Second, RCW 60.04.081(4) requires an award of attorney’s fees to the lien claimant (NWC) unless the trial court determines that the lien is frivolous and made without reasonable cause, or clearly excessive. This provision requires an award of fees to the lien claimant even if the lien is held to be invalid. *Intermountain Elec., Inc.*, 115 Wn. App. 384. The trial court ruled that NWC’s lien was not frivolous, CP 394 (Conclusion 19), and that ruling is unchallenged on appeal. Therefore, NWC is still entitled to an award of fees on the lien claims under RCW 60.04.081(4) and *Intermountain, supra*. Either way, the trial court’s award of fees was erroneous and must be remanded.

In addition, the trial court's ruling on fees must be reversed if this Court agrees that Lehman's counterclaims should have been dismissed. *App. Br.* at 47. Wells Fargo does not argue otherwise.

E. The trial court's denial of NWC's motion for reconsideration is irrelevant.

Wells Fargo devotes several pages of its brief to an argument that the trial court was within its discretion in denying NWC's motion for reconsideration. *Wells Fargo Br.* at 19-22. NWC assigned error to that ruling out of an abundance of caution, solely for the purpose of complying with RAP 10.3(a)(4). *App. Br.* at 2. But the findings of fact and conclusions of law at issue in this appeal were entered *after* the trial court's ruling on reconsideration. CP 386-87. Consequently the trial court's earlier ruling on reconsideration is irrelevant.¹³ Wells Fargo's substantive arguments about the validity of NWC's lien are addressed in section A.

F. Wells Fargo is not entitled to an award of attorney's fees.

Wells Fargo requests an award of attorney's fees on appeal pursuant to MAR 7.3. *Wells Fargo Br.* at 24. This request must be denied

¹³ The cases cited by Wells Fargo address only the standard of review for ruling on a motion for reconsideration. See *Kleyer v. Harborview Medical Center*, 76 Wn. App. 542, 545, 887 P.2d 468 (1995), and *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971). Those cases are irrelevant to whether the trial court's findings of fact and conclusions of law are unsupported and/or erroneous.

because there was no mandatory arbitration or “trial de novo” in this case. MAR 7.3 has no application whatsoever. Unlike the present case, *Stevens v. Gordon*, 118 Wn. App. 43, 74 P.3d 653 (2003), involved a trial de novo after mandatory arbitration. Nor does *Stevens* support Wells Fargo’s bizarre assumption that MAR 7.3 applies where a trial court denies a motion for reconsideration. Reconsideration under CR 59 and trial de novo under MAR 7.1 are *not* the same thing. Wells Fargo’s request for attorney’s fees is frivolous and must be denied.

G. NWC is entitled to an award of attorney’s fees on appeal.

NWC is entitled to attorney’s fees on appeal if it prevails (or substantially prevails) in this appeal. *App. Br.* at 49. Wells Fargo does not argue otherwise.

III. CONCLUSION

For all these reasons, the Court should reverse the erroneous decision of the trial court. The case should be remanded to the trial court to (i) enter judgment for NWC on its lien claim, (ii) vacate the offset of \$10,000 awarded to Lehman on the counterclaim, and (iii) re-determine the amount of attorney’s fees to be awarded to NWC.

IV. APPENDICES

Appendix C Exhibit 62

Dated this 17th day of May, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'M. Murphy', written over a horizontal line.

Michael J. Murphy, WSBA #11132
William J. Crittenden, WSBA #22033
Attorneys for Appellant
GROFF MURPHY, PLLC
300 East Pine Street
Seattle, WA 98122
(206) 628-9500

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on May 17, 2010, true and correct copies of the foregoing document to the parties of record listed below, via the method indicated:

Norman and Louise Lehman
802 19th Avenue SE
Puyallup, WA 98372

- Hand Delivery Via Messenger Service
- First Class Mail
- Federal Express
- Facsimile
- Electronic Mail

Titanic Investment, Inc.
802 19th Avenue SE
Puyallup, WA 98372

- Hand Delivery Via Messenger Service
- First Class Mail
- Federal Express
- Facsimile
- Electronic Mail

Builtwell Structures, Inc.
Attn: Cheryl Sedlickas
25415 – 99th Avenue Ct. E.
Graham, WA 98338

- Hand Delivery Via Messenger Service
- First Class Mail
- Federal Express
- Facsimile
- Electronic Mail

Brian S. Sommer
Routh Crabtree Olson, P.S.
3535 Factoria Blvd. SE,
Suite 200
Bellevue, WA 98006

- Hand Delivery Via Messenger Service
- First Class Mail
- Federal Express
- Facsimile
- Electronic Mail

FILED
COURT OF APPEALS
10 MAY 19 PM 12:14
STATE OF WASHINGTON

DATED this 17th day of May, 2010.

Beth A Russo
Beth A. Russo, Legal Assistant
Groff Murphy, PLLC

200209270432 2 pg
9-27-2002 11:55am \$20.00
PIERCE COUNTY, WASHINGTON

Mark
R. Lehman

AFTER RECORDING RETURN TO:

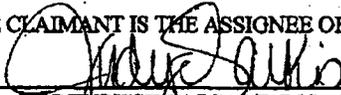
LIEN RESEARCH CORP.
P. O. BOX 449
EVERETT, WA 98206

CLAIM OF LIEN

NORTHWEST CASCADE, INC.
Claimant
VS
NORM LEHMAN
(Name of person indebted to claimant)

NOTICE IS HEREBY GIVEN that the person below claims a lien pursuant to chapter 60.04 RCW. In support of this lien the following information is submitted:

1. NAME OF LIEN CLAIMANT: NORTHWEST CASCADE, INC.
TELEPHONE NUMBER: (253) 848-2371
ADDRESS: P.O. BOX 73399, PUYALLUP, WA. 98373
2. DATE ON WHICH THE CLAIMANT BEGAN TO PERFORM LABOR, PROVIDE PROFESSIONAL SERVICES, SUPPLY MATERIAL OR EQUIPMENT OR THE DATE ON WHICH EMPLOYEE BENEFIT CONTRIBUTIONS BECAME DUE: NOVEMBER 5, 2001
3. NAME OF PERSON INDEBTED TO THE CLAIMANT: NORM LEHMAN, 2422 INTER AVE, PUYALLUP, WA. 98372
4. DESCRIPTION OF THE PROPERTY AGAINST WHICH A LIEN IS CLAIMED:
ADDRESS: GELLER ADDITION, 20610 66TH AVE E, PUYALLUP, WA.
LEGAL DESCRIPTION: TRACT 35, FRUITLAND GARDEN TRACTS, ACCORDING TO THE PLAT RECORDED IN VOLUME 10 OF PLATS, PAGE 45, RECORDS OF PIERCE COUNTY, WASHINGTON.
PIERCE COUNTY ASSESSOR'S TAX PARCEL NO. 401500-025-0
5. NAME OF OWNER OR REPUTED OWNER (if not known state "unknown"):
TITANIC INVESTMENTS, 2422 INTER AVE, PUYALLUP, WA. 98372
6. THE LAST DATE ON WHICH LABOR WAS PERFORMED; PROFESSIONAL SERVICES WERE FURNISHED; CONTRIBUTIONS TO AN EMPLOYEE BENEFIT PLAN WERE DUE OR MATERIAL, OR EQUIPMENT WAS FURNISHED: JULY 2, 2002
7. PRINCIPAL AMOUNT FOR WHICH THE LIEN IS CLAIMED: \$18,222.11, PLUS \$190.00 LIEN FEES, (TOTAL \$18,412.11), PLUS INTEREST.
8. IF THE CLAIMANT IS THE ASSIGNEE OF THIS CLAIM SO STATE HERE: N/A.

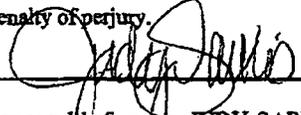


For, NORTHWEST CASCADE, INC., Claimant
P.O. BOX 73399
PUYALLUP, WA. 98373
(253) 848-2371
(Phone Number, Address, City/State of Claimant)

Plaintiff's Exhibit 62

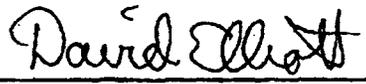
STATE OF WASHINGTON)
) ss
COUNTY OF SNOHOMISH)

JUDY SARKIS, being sworn, says: I am the agent of the claimant (or attorney of the claimant, or administrator, representative, or agent for the trustee of an employee benefit plan) above named. I have read the foregoing claim, know the contents thereof, and believe the same to be true and correct and that the claim of lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.

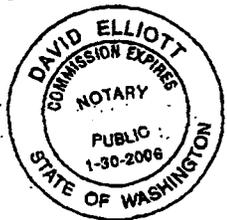


On this day personally appeared before me, JUDY SARKIS, to me known to be the individual, described above, and who further, under oath, stated that he/she had read the claim set forth above, and based upon information provided knew the contents thereof, and believed the same to be true and correct, and that the claim was made with reasonable cause and was not frivolous, and further acknowledged to me that he/she signed the same as his/her free and voluntary act and deed for the uses and purposes therein mentioned.

Subscribed and sworn to before me this 27 day of September, 2002



PRINTED NAME: DAVID ELLIOTT
NOTARY PUBLIC
in and for the State of Washington.
Residing in: EVERETT
My commission expires: 1/30/06



Order #091854, dated: 9/26/02