NO. 40766-3-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION II

WESTERN SUPERIOR STRUCTURALS, INC.,
a Washington Corporation,

Crossclaimant/Appellant,

v.

INTERVEST- MORTGAGE INVESTMENT COMPANY,

Crossclaim Defendant/Respondent,

BRIEF OF APPELLANTS

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I. ASSIGNMENT OF ERROR

A. Assignment of Error. The trial court erred by:

1. Dismissing Western Superior's lien claim, where the facts in this case were distinguishable from those in the Williams v. Athletic Field decision. See Williams v. Athletic Field Inc., 155 Wash.App. 434, (2010).

2. Applying the Williams v. Athletic Field decision prospectively to the instant case after the original Williams v. Athletic Field decision stood for almost four years holding that using the safe harbor form contained in the statute was acceptable.

3. Finding that Intervest Mortgage properly plead an affirmative defense raising the issue of statute of frauds.

B. Issues Relating to Assignment of Error.

A. What is the standard of review of an Order of dismissal pursuant to CR 12(c)?

B. Is the instant case is distinguishable from Williams v. Athletic Field?

1. Does Western Superior's lien substantially comply with statute for a lien signed by corporate representative.

2. Does Western Superior's lien substantially comply with statute for a lien signed by an individual representative.

C. Should the Williams (2010) decision be applied prospectively only in application to the instant case.

D. Did Intervest Mortgage properly plead a statute of frauds affirmative defense?

II. STATEMENT OF THE CASE

A. Procedural History.

The underlying matter in this case is a lien foreclosure action, with multiple parties. (CP 1-8). The matter was set for trial on May 6, 2010. All evidence indicated that crossclaim-defendant/Appellant Western Superior Structurals, Mfg. (hereinafter referred to as "Western Superior") possessed a first position lien claim superior to Defendant/Respondent Intervest Mortgage (hereinafter referred to as ("Intervest"). (CP 34). The Williams v. Athletic decision was issued by this court on March 23 and again on April 7, 2010, holding an **RCW 60.04.091** lien claim to be invalid because it did not contain a corporate acknowledgement where it was so required. Williams v. Athletic Field Inc., 155 Wash.App. 434, (2010).

On April 9, 2010, Intervest filed a motion for a judgment on the pleadings, alleging that Western Superior's lien was invalid, citing the newly issued Williams decision as controlling authority. (CP 26-32). The trial court granted Defendant Intervest's Motion to Dismiss Western Superior Structurals' claim of lien on April 23, 2010, following oral argument by counsel of record for Western Superior and Intervest. (CP

73-75). Thereafter, Western Superior filed a motion for reconsideration, which was denied by an order dated May 7, 2010. (CP 106-108). The trial court determined at that time, that there was no just reason for delay of hearing this appeal. (CP 107). Western Superior Structurals filed its notice of appeal on May 20, 2010. (CP 109-116).

B. Facts.

In or about May/June of 2006, Defendant Western Superior was hired by Prium Homes to provide fabricated and miscellaneous structural steel on the Chelsea Height's Condominiums, which is located on the subject property described in Western Superior's Answer and Crossclaim. (CP 9-19). Western Superior Structurals Mfg. Inc., a material supplier, is a small family owned steel fabrication company doing business in Pierce County since 1969. (CP 34).

Western Superior commenced work on or about July 1, 2006, and last performed work on or about May 8, 2008. (CP 34). Western Superior performed all services required under the contract and are owed the balance listed below, which Prium Homes does not deny. (CP 34). Defendants Prium Homes breached their contract with Western Superior by failing to pay sums when due. Western Superior

filed a claim of lien, pursuant to **RCW 60.04.091**, on May 14, 2008, in the amount of $383,181.00, under Pierce County Auditor number 200805140247. (CP 34 & 44-48). Western Superior is still owed an unpaid balance of approximately $240,053.56, as of the time of the underlying motions in this case. (CP 34).

Intervest-Mortgage Investment Company filed a receivership action in Superior Court (Pierce County Cause No. 09-2-15698-6), to take over management and ownership control of the property that is the subject of this action, after rejecting Prium Homes' requests for continued funding. (CP 34). Through discovery, it was learned that Western Superior's claim of lien was the only claim superior to Intervest Mortgage's, and it was apparent to all, based on the underlying validity and priority of the claim, that Intervest would be required to pay Western Superior's claim upon taking over the property. (CP 34).

On March 23, 2010, a little more than a month from the trial scheduled in this action, the court of appeals issued an opinion under Williams v. Athletic Field, Inc., 33607-3-II, 2010 WL 1408281 (Wash. Ct. App. Apr. 7, 2010), withdrawing, on reconsideration, its own three and one half year old old opinion upholding a lien, which Intervest contends has an effect on the lien filed by Western Superior in this cause. That

case was withdrawn and amended again on April 7, 2010. Intervest Mortgage to this date has not pled the requisite statute of frauds defense necessary to put Western Superior on notice of its claim to invalidity of its lien for an allegedly defective acknowledgement. (CP 35).

Intervest Mortgage has received the benefits of Western Superior's work. They are taking back the property from the developer (through receivership and foreclosure). (CP 34). Noone disputes the amounts owed to Western Superior. (CP 34). If the trial court's ruling is upheld, the effect will be that Intervest will have obtained the benefit of all work performed by subcontractors on the Chelsea Heights project; cleared all liens of record including Western Superior's claim in the approximate amount of $240,000.00; and taken back the property at a fraction of its value. Intervest's only basis for such an extraordinary result, would be that Western Superior used the sample form provided by statute, thus failing to use a corporate notary block. (CP 26-32).

III. ARGUMENT

A. Standard of Review

When reviewing a trial court's ruling on a question of law, based on a motion for judgment on the pleadings brought under **CR 12(c)**, the appellate court reviews the question de novo. Davenport v. Washington

Educ. Ass'n 147 Wash.App. 704, 715-716, 197 P.3d 686, 692 (Wash.App. Div. 2, 2008).

B. The instant case is distinguishable from Williams v. Athletic Field.

Intervest argues that the recent Williams v. Athletic Field, WL 1408281, (2010), issued on April 7, 2010, is dispositive of Western Superior's lien filed under this cause, because Western Superior's lien did not contain a corporate acknowledgement, as was the case in Williams. Western Superior disagrees. (CP 26-32).

First of all, Western Superior maintains that it believes by using the verbatim safe harbor form provided in RCW 60.04.091, it filed a valid lien claim under Washington law, and particularly a valid lien claim under existing Washington case law as of the date that the lien claim was filed on May 14, 2008. While this is literally a brand new decision awaiting acceptance of review by the state Supreme Court, the facts of the Williams case are significantly and absolutely distinguishable to the facts in the instant case. However, the trial court failed to recognize a distinction between the two cases.

Like Williams, the lien form attestation clause and notary block here was taken literally verbatim from **RCW 60.04.091**, which states, with respect to such form as follows:

[omitting body of form except the attestation and notary block]

"A claim of lien substantially in the following form shall be sufficient:

STATE OF WASHINGTON, COUNTY OF
....., ss.
....., being sworn, says: I am the claimant (or attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan) above named; I have read or heard the foregoing claim, read and 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.
Subscribed and sworn to before me this ... day of ....."

However, in Williams v. Athletic Field, Williams argued (successfully):

> "...that the acknowledgment signed by Rebecca Southern in her individual capacity does not substantially comply with **RCW 60.04.091** because **Lien Data** was Athletics' agent, and, as a corporation, Lien Data must acknowledge the claim of lien using the corporate form." Williams v. Athletic Field at ¶ 17 *(Emphasis added).*

In other words, the reason a corporate acknowledgement was required in Williams, was because the lien document itself clearly identified Lien Data Inc. (a corporation) as agent, and not Rebecca Southern (the signor), and thus Rebecca Southern could only sign on behalf of Lien Data Inc., which required a corporate acknowledgment.

These facts differ, significantly, where the person who signed the lien in the instant case was a corporate officer of the claimant corporation, and was an individual person and employee, with personal knowledge of the claim. Additionally, in the instant case, no one was listed as "agent".

1. Western Superior's lien form substantially complies with statutory form and is signed by a Claimant 'officer' and 'representative', not Lien company. In the instant case, the claim of lien was not signed by a corporate third party lien filing agency, nor was a corporate agent designated anywhere in the lien. Instead, the claim of lien was signed by Timothy Howard, who happens to be a corporate officer, shareholder, principal and employee, of Western Superior Structurals Mfg., Inc. (CP 44-48). Tim Howard is merely identified by name in the attestation clause as (claimant, attorney of claimant, or administrator, representative or agent of the trustees of an employee benefit plan).

RCW 60.04.091 provides, in pertinent part, as follows:

> *"The Notice claim of lien:*
> *...(2) Shall be signed by the claimant* ***or some person authorized to act on his or her behalf*** *who shall affirmatively state they have read the notice of claim of lien and believe the notice of claim of lien to be true and correct under penalty of perjury, and shall be acknowledged pursuant to chapter 64.08 RCW. If the lien has been assigned, the name of the assignee shall be stated. Where an action to foreclose the lien has been commenced such notice of claim of lien may be amended as pleadings may be by order of the court*

insofar as the interests of third parties are not adversely affected by such amendment.

Nowhere in **RCW 60.04.091** is there a requirement that a person signing a lien on behalf of a corporation sign in his or her corporate capacity, nor does the statute require that one prove on the face of the lien that such person has been given authority to sign. Timothy Howard, as designated authorized representative of the claimant, Western Superior Structurals, Mfg. Inc., is qualified, (by statute, to sign Western Superior's lien claim individually, or as a corporate officer (Claimant). **RCW 60.04.091(2)**. While on the face of the document it appears that Mr. Howard attempted to sign the lien claim in his corporate capacity, the body of the attestation clause refers to him only as "TIMOTHY HOWARD". (CP 47).

From a practical standpoint, other than lacking a corporate notary block, it is clear that the President of Western Superior Structurals Inc. signed the lien before a notary officer and there is no argument that this lien could be anything but authentic, or that Tim Howard is not who he says he is. (CP 47)[1]. The form, not only 'substantially complies' with the form provided by statute, it is identical to it. Intervest can hardly argue

[1] Mandy Skidds, the notary who notarized this document signed a declaration to submit to the court authenticating the document and Mr. Howard's signature and capacity to sign, it is unclear whether the trial court considered that declaration, or whether this court will, but it is part of the record and does demonstrate further validity of the signature, to the extent admissible. (CP 58-63). There was never a ruling on admissibility by the trial court.

prejudice of any kind. Understanding the conflict and confusion created by the Williams decision, and the conflicting notary statute however, it is necessary to distinguish this case further.

Unlike Ms. Southern in the Williams case, who is not identified in any capacity in the lien claim (or even described as an employee of Lien Data), Mr. Howard is clearly identified as someone representing Western Superior Structurals (it's President), with familiarity as to the contents of the lien. (CP 48) It is clear that Mr. Howard signed freely and voluntarily, and intended to do so in his duties as an officer of the corporation. Taking into consideration Mr. Howard's corporate signature block, he substantially complied with the statute.

2. Timothy Howard's signature substantially complies with RCW 60.04.091 as individual authorized to act on behalf of corporation. Even if this court deems Mr. Howard's signature, in the capacity of "President" of Western Superior Structurals Mfg. Inc., to require a corporate acknowledgment, it is clear by the language of the statute, that Timothy Howard can sign a claim of lien as "some person authorized to act on his or her behalf", in an individual capacity. **RCW 60.04.091(2).** No Washington court has ruled on *who* may sign the attestation clause on the claimant's behalf. Williams (2006) at 764.

Descriptive language following a signature on a contract indicate such language is generally considered to be *descriptio personae,* that is, merely descriptive of the person executing the agreement, and does not necessarily indicate a signing capacity. Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wash. 2d 692, 700, 952 P.2d 590, 594 (1998). Where the body of the document contains language binding the individual signer, additional descriptive language added to the signature does not alter the signer's personal obligation. Id. at 700, citing *Gavazza v. Plummer,* 53 Wash. 14, 15, 101 P. 370 (1909) (holding the language of the guaranty personally bound the signer despite the *descriptio personae* addition of "Treas." to his signature, and noting: "If it is desired to escape personal liability in the contract of an agent or other representative, the intention so to do must be expressed in clear and explicit language; otherwise, a personal obligation arises."). *Accord Schwab v. Getty,* 145 Wash. 66, 76-77, 258 P. 1035 (1927)[2].

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[2] However, other Washington contract cases indicate where the face of the document does not otherwise indicate the signer's capacity, a signature with additional descriptive language may create an ambiguity requiring judicial construction of the agreement to determine who is bound by its terms. *See Hansen v. Lindell,* 14 Wash.2d 643, 649-54, 129 P.2d 234 (1942). *See also Robertson v. Club Ephrata,* 48 Wash.2d 285, 295, 293 P.2d 752 (1956); *Schwab v. Getty,* 145 Wash. 66, 71-72, 258 P. 1035 (1927). In **595 *Griffin v. Union Sav. & Trust Co.,* 86 Wash. 605, 609-11, 150 P. 1128 (1915), we noted the rule applicable in such circumstances:

when words which may be either descriptive of the person, or indicative of the character in which a person contracts, are affixed to the name of a contracting party, *prima facie,* they are descriptive of the person only; but the fact that they were not *701 intended by the parties as descriptive of the person, but were understood as determining the character in which the party contracted, may be shown by extrinsic evidence; but the burden of proof rests upon the party seeking to change the *prima facie* character of the contract. *Id.* at 610, 150 P. 1128 (citation omitted).

Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wash. 2d 692, 700-701, 952 P.2d 590, 594-595 (1998)

The Williams court addressed this argument of an agent using the statutory form to sign in an individual capacity on behalf of a claimant. While the court found that the attestation was sufficient for an individual, Athletic Field's argument failed because Lien Data USA Inc. had been "clearly identified" as agent for the lien claimant, and not Ms. Southern. Therefore, a corporate acknowledgment was necessary because only Lien Data Inc. could execute the lien. Williams v. Athletic Field, Inc., 155 Wn.App 434, 444-445 228 P3d 1297 (2010).

In the instant case, however, Timothy Howard signed the lien claim as a 'person authorized to act on Western Superior Structurals' behalf', pursuant to **RCW 60.04.091(2)**, either corporately or individually. No corporate acknowledgment is required of an individual, where a corporate agent is not designated. Williams (2010) at 444-445. For example, had the legal counsel signed the lien, as an attorney for the claimant, no corporate acknowledgment would have been required. It would hardly seem logical that an attorney's signature on a lien would be of more value than that of a person familiar with the work, or require less formality.

Should the court determine that a corporate acknowledgment is necessary for Timothy Howard (as an officer of Western Superior) to sign the lien filed under this cause, the court should, rather than discarding the signature, look to the actual language of the statute and the lien attestation clause itself, and find that Timothy Howard signed the lien individually, on behalf of Western Superior, as he is authorized to do by **RCW 60.04.091(2).**

It is significant to note that Intervest clearly and plainly argued that every corporate lien claimant must have its lien signed by a corporation, using a corporate notary block. Intervest argues on page 2 of its opposition brief (to the motion for reconsideration):

> *"Western admits this debt is corporate property. As the court recognized, any signature on this corporate claim must therefore be properly notarized using the corporate form".*
>
> (CP 93).

This position is simply not the holding in the Williams decision, and certainly is not required by **RCW 60.04.091(2)**.

If the court were to adopt Intervest's interpretation of the statute, only another corporation could be an agent for a corporate lien claimant, and not an individual. For instance, an attorney who is a non-corporate

sole practitioner, would not be able to sign a lien claim. That is simply not what the statute requires, nor was it the holding in Williams.

C. Western Superior relied on existing statute and interpretive caselaw when signing the lien.

The April 7, 2010 Williams decision is a result of an almost four year reconsideration of the same Division II Court of Appeals decision upholding the lien filed by Lien Data in that case back in 2006. Western Superior Structurals' lien claim was signed in May of 2008. (CP 45-48). Western Superior has a right to rely on existing law at the time of the preparation of the lien. The ruling in the Williams decision should be applied prospectively only, so as not to cause undue hardship on a party who relied, in good faith, on prior law established by this very court, and there is legal precedent for applying new law prospectively only. State ex rel. Washington State Finance Committee v. Martin 62 Wash.2d 645, 666, 384 P.2d 833, 845 (WASH.1963). The court in that case said:

"If rights have vested under a faulty rule, or a constitution misinterpreted, or a statute misconstrued, or where, as here, subsequent events demonstrate a ruling to be in error, prospective overruling becomes a logical and integral part of stare decisis by enabling the courts to right a wrong without doing more injustice than is sought to be corrected. By means of this doctrine, courts of the most prudent and careful tradition can move boldly to right the very wrong they have been traditionally perpetuating under the old, rigidly-applied, singleminded view of the doctrine of stare decisis. The courts can act to do that which ought to be

done, free from the fear that the law itself is being undone". Id.

Courts usually determine the general or unlimited retroactive effect of our overruling decisions only when the question arises in subsequent cases Cascade Sec. Bank v. Butler 88 Wash.2d 777, 785, 567 P.2d 631, 635 (Wash. 1977). United States Supreme Court set forth the following three factors to serve as the proper test for determining retroactivity in civil suits:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . .. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard **87 its operation.' . . . Finally, we have weighed the inequity imposed by retroactive application, for '(w)here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.'"

Taskett v. KING Broadcasting Co. 86 Wash.2d 439, 448, 546 P.2d 81, 86 - 87 (1976).

With respect for the first prong, the 2010 reconsideration ordered under the Williams case established a new principal of law, to wit: A signor of a lien under **RCW 60.04.091** cannot simply rely on the safe harbor form provided in the statute, and must add a corporate acknowledgement when signed by a corporate representative on behalf of a corporate entity.

Williams (2010) at 443. In addition, the issue of who could actually sign a claim under the statute was a case of first impression. Williams (2006) at 764.

Western Superior's claim of lien was filed on May 14, 2008, and Western Superior relied on and existing statute with at the time of the signing of the lien. (CP 35). **RCW 60.04.091** provides, in pertinent part, the following, with respect to the lien claim form used by Western Superior in this case:

> *"A claim of lien substantially in the following form shall be sufficient:"*

In 2008, there were no interpretive cases annotated in the statute that indicated that there were any issues with relying on the safe harbor form provided by statute. In fact, this Court had issued an interpretive opinion in 2006 that found, with respect to that statutory form, that it was acceptable (although barely so) for a corporate agent to use the safe harbor form, even though the signor did not use a corporate notary. Williams v. Athletic Field, Inc. 142 Wash.App. 753, 763, 139 P.3d 426, 432 (Wash.App. Div. 2,2006).

With respect to the weighing of the merits of this case, Western Superior has an otherwise valid lien claim, signed by a company representative intimately familiar with the work (as opposed to a lien claim signed by a corporate agent lien filing agency). In addition, the

notary is available to validate the signature. To the extent that this Court's (2010) Williams decision with withstands a Supreme Court challenge, applying its effect prospectively only, with respect to the Western Superior facts, will do nothing to harm the future operation of the new rule.

Finally, Western Superior's (almost) quarter of a million dollar lien claim was the only remaining priority claim to the first lien mortgage, and Intervest's elimination of the same would have an unfair effect on this small business. (CP 55). The equities surely fall in favor of validating the lien, as the hardship caused by a retroactive application of this caselaw would financially unfair. (CP 55).

D. Intervest Mortgage did not properly plead affirmative defense, and thus its motion to dismiss is improper under CR 8 and CR 12(c).

Intervest brought its motion to dismiss pursuant to **CR 12(c),** as a motion for a judgment on the pleadings. (CP 26-32). **CR 12(c)** provides as follows:

> "**(c) Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided

in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

Intervest brings this defense based on a Statute of Frauds argument that there is a defective acknowledgment to Western Superior's Lien. (CP 26-32).

CR 8(c) provides the following with respect to pleading of affirmative defenses, which specifically includes a requirement to plead any statute of frauds defense:

(c) Affirmative Defenses. *In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fault of a nonparty, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata,* ***statute of frauds****, statute of limitation, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.*

Intervest relies much on the Ben Holt decision, which also addresses the issue of pleading of affirmative defenses. Ben Holt Indus., Inc. v. Milne, 36 Wash. App. 468, 473, 675 P.2d 1256, 1259 (Wash. Ct. App. 1984). In Ben Holt, Ben Holt argued that the Statute of Frauds defense was not properly pled as an affirmative defense. However, the plain language of the answer filed in that case contained specific language referring to statute of frauds, and therefore, the opposing side had been put on adequate notice of the defense . The court found that "Stating that the lease was never perfected and raising the statute of frauds was sufficient

compliance with **CR 8(c).** In that fact situation, it was because there is not an effective acknowledgment that the statute of frauds comes into play". Ben Holt at 473

In the instant case, however Intervest argues that it plead the statute of frauds defense (regarding the alleged defective acknowledgement of the lien) by pleading the following:

> *"Western Superior failed to comply with the appropriate provisions of Washington's construction lien statutes, including, but not limited to failing to accurately reflect the work commencement date depicted on its lien."* (CP 23)

Intervest attempts to argue that by pleading boilerplate language that Western Superior "failed to comply with the lien statutes", particularly by "not accurately reflecting the work commencement date depicted on the lien", satisfies adequate notice under **CR 8**. (CP 71). It is obvious to see that the only specific defense referenced in this pleading dealt with the commencement date on the lien. (CP 23). Intervest, by making such argument, attempts to convince the court that it contemplated this alleged 'statute of frauds' defense (with the acknowledgment issue) at the time it filed its pleading. (CP 71 & 98). Under the Ben Holt inquiry, this pleading would not suffice, as this (the acknowledgment issue) is clearly a statute of frauds defense, and was not plead.

What is most telling about what Intervest truly plead at the time of its original filing is that Intervest did not bring its motion to dismiss until immediately after publication of the Williams (2010) decision. (CP 32). Ben Holt is a 1984 decision, which raises the issue of statute of frauds as it pertains to a lack of a corporate acknowledgment on a lease. That case was clearly available to Intervest at the time of its original pleading, but the Williams decision was obviously not. If the statute of frauds defense which was the basis of Intervest's motion to dismiss was intentionally plead in the original affirmative defense pleading, why didn't Intervest file its motion to dismiss until two days after the Williams publication, and less than a month before trial? Intervest clearly could not have intended, let alone plead, the statute of frauds defense that it now attempts to explain, when it filed its original answer and affirmative defenses, nor could Western Superior possibly be on notice of the possibility of the same based on Intervest's pleadings. No amended answer with defenses was ever filed.

Intervest's 'corporate acknowledgment' argument is a hypertechnical, 'form over substance' position. It was brought just prior to trial in this matter, and was not previously pled. (CP 32). Intervest should be held to the same hypertechnical standard by the court in determining whether or not this defense has been properly pled or not.

IV. CONCLUSION

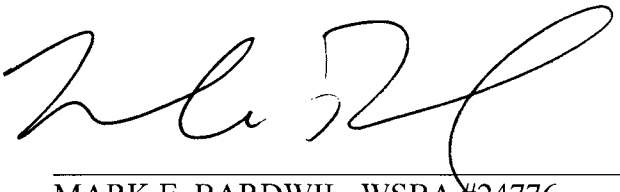
Intervest's argument that the Western Superior lien is invalid because it lacks a corporate notary block is a hypertechnical argument asking the court to put form over substance. Such a hypertechnical argument should be scrutinized with the same level of technicality.

Intervest's arguments fail because Tim Howard's signature, as corporate president, substantially complies with the statutory form, and the requisites of corporate capacity exist on the face of the document. Furthermore, no corporate notary was required for Tim Howard to sign a lien on behalf of Western Superior Structurals, as he was free to do so, by statute, as an individual familiar with the claim.

In addition, Western Superior, in 2008, relied on a statutory form and existing caselaw upholding of use of the safe harbor form contained in the statute at the time of the filing of its lien, and should not be penalized because of such a reliance.

Finally, Intervest has failed to properly plead the affirmative defense necessary to put Western Superior on notice of this defense, and therefore has waived said defense by raising it by motion on the eve of trial.

Respectfully submitted this _____ day of _____, 2010.



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COURT OF APPEALS
DIVISION II OF THE STATE OF WASHINGTON

WESTERN SUPERIOR STRUCTURALS MFG, INC. Appellant, v. INTERVEST-MORTGAGE INVESTMENT COMPANY, Respondent.	)	NO. 40766-3-II CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times; mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen (18) years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the BRIEF OF APPELLANTS on the following individuals in the manner indicated below.

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I declare under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.

DATED this 30th day of August, 2010 at Tacoma, Washington

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