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DIVISION II
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STATE OF WASHINGTON
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No. 42195-0-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

OLSON ENGINEERING, INC.,
Respondent,

v.

PL LAND COMPANY II, LLC, a Delaware Limited
Liability Company; JUNEAU INVESTMENTS, LLC,
a Washington Limited Liability Company; TAPANI UNDERGROUND,
INC., a Washington Corporation; ECOLOGICAL LAND SERVICES,
INC., a Washington Corporation,
Defendants,

and

KEYBANK NATIONAL ASSOCIATION,
A District of Columbia Corporation,
Appellant.

REPLY BRIEF OF APPELLANT

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I. THE RECORDING OF A LIEN BOND DOES NOT BAR ADJUDICATION OF A PRIORITY DISPUTE.

Arguing that the term “priority” is “noticeably absent” from RCW 60.04.161, Brief of the Respondent (“Resp’t’s Br.”) at 7, Olson Engineering ignores the fact that in lien foreclosure actions, it has long been the practice of Washington courts to adjudicate priority disputes between lien claimants and secured lenders despite the absence of any statutory authorization to do so. *See, e.g., Nelson v. Bailey*, 54 Wn.2d 161, 338 P.2d 757 (1959); *Nason v. Nw. Milling & Power Co.*, 17 Wash. 142, 49 P. 235 (1897). Given this historical backdrop, it is telling that when the legislature amended RCW 60.04.161 two decades ago to add lenders to the list of persons allowed to make use of the lien bond procedure, *see* Laws of 1992, ch. 126, § 10, the legislature did not add a prohibition against this practice. *See Thompson v. Hanson*, 142 Wn. App. 53, 60, 174 P.3d 120 (2007) (“[T]he legislature is presumed to know the existing state of the case law in those areas in which it is legislating.” (brackets in original) (*quoting Woodson v. State*, 95 Wn.2d 257, 262, 623 P.2d 683 (1980)), *aff’d*, 168 Wn.2d 738, 239 P.3d 537 (2009).

Although the legislature did not include any language expressly prohibiting the adjudication of priority disputes when it enacted and amended RCW 60.04.161, Olson Engineering argues that the statute

should be interpreted as containing such a ban because it would be “prejudicial” to the lien claimant to interpret the statute otherwise. *E.g.*, Resp’t’s Br. at 8. The claim of prejudice is based on Olson Engineering’s argument that priority disputes “require the availability of the real property to remedy the dispute,” Resp’t’s Br. at 13, because only through “redemption and reinstatement” can junior lien holders “protect their interests,” Resp’t’s Br. at 15.¹ The argument is based on a faulty premise.

In a lien foreclosure action involving a lien bond recorded by a lender holding a secured interest in the property, if the validity and correctness of the lien claimant’s lien is proved, the court may proceed to adjudicate a priority dispute between the lien claimant and the lender. If the court determines that the lender’s deed of trust has priority over the lien, the amount of the lien claimant’s judgment may be paid from the lien bond *unless* the lender makes a prima facie showing that the value of the property is insufficient to pay off the debt secured by the lender’s deed of trust.² If the lender meets this burden, the lien claimant should have the opportunity to introduce contrary evidence. The lien claimant’s judgment may then be paid from the bond unless the court concludes that the

¹ *See also* Resp’t’s Br. at 14 (“priority disputes require the real property so that a remedy can be properly fashioned to not prejudice a lien claimant”).

² Olson Engineering does not contend that receipt of lien bond proceeds inadequately protects the interests of a lien claimant.

property is not valuable enough to pay off the lender's secured debt and the junior lien. If the court makes this determination, the proper result is that the lien claimant will obtain a judgment against the party who contracted for the lien claimant's materials or services, but it may not collect on the bond. The lien claimant is not prejudiced by this outcome because it has been proved in court that the value of the property is insufficient to pay off the security interest that is senior to the lien and cover the junior lien.

Olson Engineering argues, however, that the lien claimant would be prejudiced because it would be unable to redeem the property "and then wait for market values to increase or find a buyer for the property that would pay off the lender and the lien claimant." Resp't's Br. at 12. Under either scenario, this argument makes no sense. With respect to the first argument, even if a lien claimant thought that property values eventually were going to increase, what rational lien claimant would pay more than market value to redeem a property? It surely makes more sense to invest funds by paying market or below market prices for assets expected to appreciate in value. The second argument fails because if the lien claimant could find a buyer willing to pay a price for the property that would pay off the lender *and* the lien claimant, the lien claimant would

prove to the court that the value of the property actually was sufficient to pay both debts. In that case, as stated previously, the lien claimant's judgment would be paid from the bond. In sum, the lien claimant would not be prejudiced by this procedure.

Lenders, on the other hand, are prejudiced by the interpretation urged by Olson Engineering. After acknowledging that the lien bond procedure provides significant benefits by "expediting the foreclosure, sale and disposition of ... property," Resp't's Br. at 2, Olson Engineering suggests a statutory interpretation that presents a lender with a Hobson's choice: Whenever a lien claimant commences a foreclosure action and alleges that its lien is superior to the lender's deed of trust or mortgage, the lender will have to forgo the lien bond procedure and wait for the foreclosure action to run its course in order to prove that the lien was not superior to the lender's secured interest or pay off the lien claimant even though the lien was junior in priority. This interpretation would allow lien claimants to hold up lenders by forcing them to pay more for their collateral than the market value of that collateral or watch the collateral's value decline further as the lien claimant's foreclosure action proceeds. Unless the lien was *de minimis*, the lender would have no real choice.

Consider the following hypothetical: A lender extends a property developer \$10 million to buy properties and start construction on some of those properties. Two years later, while still owing more than \$8 million on the loans, the developer runs into financial difficulties and stops making payments on the loans. The real estate market has dropped precipitously over the same two-year period. The value of the purchased properties comprising the lender's collateral has dropped to \$2.5 million and is continuing to decline. To try to stem its losses, the lender starts to take steps to collect on its security, but a construction lien claimant commences a lien foreclosure action alleging that its \$75,000 lien on the same properties is superior in priority to the lender's deeds of trust. The lender believes its deeds of trust have priority. Under Olson Engineering's interpretation of the lien bond statute, the lender either has to wait the many months it takes for the lien claimant's foreclosure action to come to trial (and watch the value of its collateral decline even further while it is waiting), or has to pay the lien claimant \$75,000 in order to be able to step in and try to deal expeditiously and prudently with the properties. If, however, RCW 60.04.161 is not interpreted to bar adjudication of priority disputes, the lender can record a lien bond, pursue efforts to stem further declines in the value of its collateral, and later prove that its deeds of trust

were superior in priority to the lien claimant's lien. Although the lien bond will be released, the lien claimant will still have the right to obtain a personal judgment against the property owner that contracted for its services. The lien claimant is not prejudiced by the absence of a foreclosure sale and an opportunity to redeem the subject properties because no one would redeem the properties for millions more than the value of those properties.³

Although Olson Engineering argues it is “without question [that] Olson [Engineering] would have been prejudiced” if the trial court had adjudicated the priority dispute between KeyBank and Olson Engineering, Resp't's Br. at 11, Olson Engineering does not dispute that the collective market value of the Meriwether properties would have had to have been more than three times the value of the properties obtained through the trustee's sale (a credit bid of \$819,436 for the majority of Meriwether Hilltop and a small portion of Meriwether Phase 2), the Section 363 bankruptcy sale (a credit bid of \$1,445,000 for Meriwether Phase 1), and

³ If the lien claimant wanted to acquire the subject properties and then “wait for market values to increase,” the lender undoubtedly would be willing to sell the properties for more than \$5.5 million over their market value (i.e., for the \$8 million still owing on the loans). Actually, it is likely the hypothetical lender would be willing to sell the properties to the lien claimant for substantially less than the amount the lien claimant would have had to pay to redeem the properties. The lien claimant suffers no prejudice.

the Quitclaim Deed in Lieu of Foreclosure (credited for the appraised value of \$365,000, for Meriwether PURD, most of Meriwether Phase 2, and the remaining portion of Meriwether Hilltop) in order for the more than \$8.35 million loan balance to have been satisfied. *See* CP 223-24. Not surprisingly, there is no contention from Olson Engineering that it would have been willing to pay more than \$5.5 million over the market value of the Meriwether properties in order to redeem those properties, “and then wait for [their] market values to increase,” had the trial court ruled in KeyBank’s favor on the priority dispute between KeyBank and Olson Engineering.⁴ Olson Engineering would not have “been prejudiced” if the priority dispute between it and KeyBank had been resolved at trial: If it had prevailed on its claim that its lien was valid, correct, and superior to KeyBank’s deeds of trust, it would have been awarded a personal judgment and a judgment entitling it to collect on the lien bond; if it had proved its lien was valid and correct but lost on its claim that its lien had priority, it still would have obtained a personal judgment and would have lost only redemption rights that were valueless.

⁴ In fact, although Olson Engineering put into the record marketing materials indicating that the Meriwether properties have been offered for sale for \$3.3 million, CP 809, 812-15, the record contains no evidence that Olson Engineering purchased or offered to purchase the properties for that price so it could then “wait for [the] market values [of those properties] to increase.”

The Virginia Supreme Court did not find any prejudice to the lien claimant when it rejected the argument that the filing of a lien bond relieves the lien claimant of the necessity of proving the priority of its lien. *See York Fed. Sav. & Loan Ass'n v. William A. Hazel, Inc.*, 256 Va. 598, 506 S.E.2d 315 (1998). Although Olson Engineering tries to distinguish the *York* decision by arguing that Virginia has a “statutory mechanism” for determining priority issues when lien bonds are filed, while the “statutory mechanics are no longer in place to handle a priority issue” when a lien bond is filed in Washington, Resp’t’s Br. at 14, in Virginia, as in Washington, the filing of a lien bond substitutes the bond for the real property and Virginia has no more of a “statutory mechanism” in place to handle priority issues than does Washington. Virginia’s lien bond statute requires that the bond be “conditioned for the payment of such judgment adjudicating the lien or liens to be valid and determining the amount for which the same would have been enforceable against the real estate as may be rendered by the court upon the hearing of the case on its merits,” Va. Code Ann. § 43-70, while Washington’s lien bond statute requires that the bond be conditioned “to guarantee payment of any judgment upon the lien in favor of the lien claimant entered in any action to recover the amount claimed in a claim of lien, or on the claim asserted in the claim of

lien,” RCW 60.04.161, but the language of § 43-70 does not create any “statutory mechanism” to handle priority issues. Instead, any dispute over relative priorities is resolved at the trial of the lien claimant’s enforcement action. *See York*, 506 S.E.2d at 316-17.⁵

It may be “perplexing” to Olson Engineering that the Virginia Supreme Court will acknowledge the potential prejudice to secured lenders and other lienors if the filing of a lien bond relieved the lien claimant from having to prove the priority of its lien, Resp’t’s Br. at 14, but the court’s rationale is not difficult to understand. If lien bond statutes were interpreted as argued by the lien claimant in *York* and Olson Engineering, “few prior lienors would be willing to bond off the real estate,” *York*, 506 S.E.2d at 317, and the utility of these statutes would be greatly diminished.

Finally, to avoid acknowledging that its statutory interpretation effectively eliminates the lien bond option for similarly situated lenders.

⁵ Olson Engineering also suggests that the decision in *York* should be disregarded because an interested party must obtain leave of court to record a bond and the “court has broad discretion to set the amount and terms so that no parties are prejudiced.” Resp’t’s Br. at 14. No such “broad discretion” is reflected in the terms of the statute. Permission to “pay into court an amount of money sufficient to discharge such lien, or liens, and the costs of the suit” or “permission to file a bond in the penalty of double the amount of such lien, or liens, and costs, ... shall be granted by the court ... unless good cause be shown against the same by some party in interest.” Va. Code Ann. § 43-70.

Olson Engineering suggests that RCW 60.04.161's "purpose" is to address "those typical situations where there is a dispute as to the amount of the lien claim," as when a general contractor disputes the amount owed to a subcontractor. Resp't's Br. at 12. Olson Engineering cites no authority supporting this alleged statutory purpose. Moreover, even if the legislature had in mind such situations when referring to disputes over the "correctness" of a lien, there is no indication the legislature intended to limit the use of the lien bond procedure to such disputes when it amended the statute to add lenders to the list of persons allowed to record lien bonds.

For all of these reasons, and the reasons stated in KeyBank's opening brief, this Court should reject Olson Engineering's interpretation of RCW 60.04.161. The trial court's judgment should be reversed.

II. OLSON ENGINEERING FAILED TO PROVE THE VALIDITY AND CORRECTNESS OF ITS LIEN

Olson Engineering did not prove, as a matter of law, that its lien was valid and correct and that it was entitled to a judgment enforcing its lien. Although KeyBank's argument that Olson Engineering's lien did not satisfy the requirements of RCW 60.04.091(2) cannot stand in light of the Washington Supreme Court's decision in *Williams v. Athletic Field, Inc.*,

172 Wn.2d 683, 261 P.3d 109 (2011),⁶ Olson Engineering has not disproved the merits of KeyBank’s remaining arguments.

A. Olson Engineering Failed to Prove as a Matter of Law That Its Blanket Lien Was Valid.

Olson Engineering’s services were not provided on three lots “constituting a single home premises,” as was the case in *Caine-Grimshaw Co. v. White*, 136 Wash. 98, 101, 238 P. 980 (1925). Nor were its services provided in connection with land comprising a single tract, as was the case in *Keane v. Thomas B. Watson Co.*, 149 Wash. 424, 427, 271 P. 73 (1928) (a 17-acre parcel constituting the watershed for a water system), and in *Standard Lumber Co. v. Fields*, 29 Wn.2d 327, 340, 187 P.2d 283 (1947) (a “single tract” comprising a 160-acre farm), or provided on multiple properties for an agreed lump sum, *see Hoagland v. Magarrell*, 115 Wash. 259, 261-62, 197 P. 20 (1921) (distinguishing such cases). Rather, Olson Engineering’s services were provided in connection with 11 parcels of property, which were allocated to four separate subdivisions (Meriwether Phase 1, Meriwether Phase 2, Meriwether Hilltop, and Meriwether PURD). CP 15-22, 296-97, 571-673. Although it allocated the charges for its services among “Meriwether Subdivision Phase 1 and 2,”

⁶ Issuing its decision after KeyBank filed its opening brief, the Washington Supreme Court reversed this Court’s ruling in *Williams v. Athletic Field, Inc.*, 155 Wn. App. 434, 228 P.3d 1297 (2010).

“Meriwether Hilltop,” and “Meriwether PURD” projects, Olson Engineering filed a single, blanket lien against all of the properties. CP 15-22.

Contrary to the suggestion of Olson Engineering, Resp’t’s Br. at 18-19, the question of whether a single lien is valid when filed against multiple lots or tracts of property is not decided solely on whether the properties are contiguous and used by the owner for a single purpose. Rather, a critical question is whether the work done on the various properties was done pursuant to a single contract or was done pursuant to a divisible contract, pursuant to separate contracts, or on an open account basis.⁷

Olson Engineering cites no Washington or non-Washington decision upholding the validity of a construction lien filed against multiple lots or tracts of property when the goods or services providing the basis for the lien (a) were provided on an open account and were allocated among different projects, or (b) were not provided pursuant to a single contract for a lump sum. In its opening brief, KeyBank cited decisions from non-Washington jurisdictions holding construction liens invalid

⁷ In *Standard Lumber Co.*, 29 Wn.2d at 335-41, a case cited by Olson Engineering, Resp’t’s Br. at 19-20, the first issue addressed on the appeal was whether the lien claimant’s work was done under one contract or two separate contracts.

when filed against multiple properties for allocable work not done pursuant to a single contract. *See, e.g., J.B. Shotwell & Son Excavating & Grading, Inc. v. Mercure Dulles, Inc.*, 29 Va. Cir. 36 (Va. Cir. Ct. 1992) (holding invalid blanket lien of subcontractor who furnished equipment and operators for grading and earth removal work on four lots of a single business park, where subcontractor’s work was billed on an open account but invoices, delivery tickets, and work orders made it possible to identify which charges were associated with which properties). The policy underlying these decisions is to give the security of a lien to those who, by their labor or materials, have enhanced the value of an improvement to real property, but not to allow a lien for such labor or materials to be placed upon property not benefitted by the labor or materials. *See Jaynes Concrete, Inc. v. Seabrook Corp.*, 29 Va. Cir. 1 (Va. Cir. Ct. 1992). This policy is consonant with Washington’s statutory scheme, which permits parties furnishing labor, professional services, and materials to have a lien upon the improvement, and potentially on the lot or tract so improved as the court “deems appropriate for satisfaction of the lien.” RCW 60.04.051; *see also* RCW 60.04.021.⁸

⁸ Olson Engineering does not attempt to explain, for example, how surveying and marking the boundaries of lots within one subdivision constitutes an “improvement” to property within an entirely separate subdivision.

Failing to explain why the same rule should not be applied here, Olson Engineering instead tries to argue in support of the trial court's reliance on Henry Gerhard's declaration that Olson Engineering "worked on the project as a whole," Resp't's Br. at 22 (quoting the trial court's statement of reliance upon paragraph 18 of the Declaration of Henry Gerhard), to decide the factual issue of whether the arrangement between Olson Engineering and PLH or Juneau was "one contract." Olson Engineering ignores, as did the trial court, the undisputed evidence establishing that Olson Engineering billed for its services on an open account and allocated the charges for its services among the different projects, instead of charging a lump sum for its services – evidence from which a reasonable inference certainly could be drawn that Olson Engineering's services were not provided pursuant to a single, indivisible contract.

Olson Engineering also points to KeyBank's post-foreclosure marketing of the Meriwether properties as evidence allegedly showing that "KeyBank always considered this one large parcel and project," Resp't's Br. at 23, without explaining (because it cannot) how this evidence has any relevance to the nature of the arrangement between Olson Engineering and PLH or Juneau. Similarly, how KeyBank viewed the Meriwether

properties before deciding to lend acquisition and development funds to Juneau, *see* Resp't's Br. at 24-25, is irrelevant because KeyBank's view had no bearing on the relationship between Olson Engineering and PLH or Juneau.

In any event, the evidence cited by Olson Engineering does not eliminate the evidence contradicting Olson Engineering's claim that there was a single, indivisible contract for its services to be provided in connection with a single, indivisible project. Olson Engineering's separately allocated billings and the admission of Henry Gerhard that the separate billings accommodated PLH's desire to associate the appropriate costs with the particular subdivision projects, CP 553-58, 299-326, 328-411, 413-43, 565-67, show that there was a genuine issue of material fact and that the trial court erred in resolving the issue on summary judgment. Even Olson Engineering's explanation that Peter Tuck "clarified" (i.e., changed) his testimony after his deposition, Resp't's Br. at 26, only reinforces the need for a trial so that KeyBank may cross examine Peter Tuck on his new version of material facts. *See Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 662, 240 P.3d 162 (2010), *rev. denied*, 171 Wn.2d 1012, 249 P.3d 1029 (2011); *see also Riley v. Andres*, 107 Wn. App. 391, 395, 27 P.3d 618 (2001) (acknowledging summary judgment is

disfavored when material facts are particularly within moving party's knowledge).

B. Olson Engineering Failed to Prove as a Matter of Law That Its Services Were Provided at the Instance of the Property Owner.

RCW 60.04.021 authorizes a person furnishing professional services for the improvement of real property to have a lien upon the improvement for the contract price of professional services "furnished at the instance of the owner, or the agent or construction agent of the owner." RCW 60.04.051 provides that the "lot, tract, or parcel of land which is improved is subject to a lien to the extent of the interest of the owner at whose instance, directly or through a common law or construction agent the... professional services ... were furnished, as the court deems appropriate for satisfaction of the lien." Completely ignoring the unambiguous statutory language permitting a construction lien to be placed on property only when professional services are furnished "at the instance of the owner" or the owner's agent,⁹ Olson Engineering argues that its lien on the Meriwether properties relates back to January 23, 2006, when it began supplying professional services "at the request of and for the benefit of Juneau ... and...PLH, as agent for Juneau," Resp't's Br. at

⁹ Notably, the statute says nothing about services furnished at the behest of (a) a vendee under an executory contract, or (b) any other potential purchaser.

6, even though it is undisputed that neither Juneau nor PLH owned the Meriwether properties at that time.¹⁰

Olson Engineering relies on *Mutual Savings & Loan Ass'n v. Johnson*, 153 Wash. 41, 279 P. 108 (1929), and *Adams v. Dose*, 87 Wash. 575, 152 P. 9 (1915), to argue that the issue of whether its lien relates back to January 23, 2006, and therefore has priority over KeyBank's deeds of trust, hinges on "whether, based on the equities, KeyBank should bear the loss." Resp't's Br. at 27-34. In so arguing, Olson Engineering ignores the fact that Washington's statutory scheme for construction liens has undergone a comprehensive amendment since 1929. *See, e.g.*, Laws of 1991, ch. 281. Under the current version of chapter 60.04 RCW, there is no basis for alleged "equities"¹¹ to override specific statutory

¹⁰ Olson Engineering admits that "[a]gency is not an issue on appeal in the case at bar," Resp't's Br. at 30, an admission that is not surprising given there was no agency agreement between either Antonson/Skaar and Juneau or PLH or the Whitakers and Juneau or PLH, and there was insufficient evidence to establish a common law agency. CP 48-49, 54-55, 59-60; *see CKP, Inc. v. GRS Constr. Co.*, 63 Wn. App. 601, 608, 821 P.2d 63 (1991) (holding that under lien statutes requiring work to be done at the request of the owner or the owner's agent, "very clear proof of strong circumstances showing an intimate relationship between the owner and the making of the improvement is required to give rise to an implied agency").

¹¹ Moreover, the "equities" in the *Mutual Savings* case stemmed from the lender's inspection of the subject property before approving the loan and mortgage and its actual knowledge of work in progress on the ground. The court held that because the lender had actual knowledge of the work, it was in the best position to prevent any loss. Today, there is a statutory mechanism for a party providing professional services to file a pre-lien notice of its work. *See* RCW (continued . . .)

requirements. Not surprisingly, Olson Engineering fails to cite any modern decision granting such relief.

If this Court rejects, as it should, Olson Engineering's interpretation of the lien bond statute as eliminating any adjudication of the relative priorities of KeyBank's deeds of trust and Olson Engineering's lien, this Court should also reject Olson Engineering's claim that its lien relates back to a date prior to the inception of Juneau's ownership of the Meriwether properties. A lien created under chapter 60.04 RCW cannot relate back to a time before the debt was lienable.

III. CONCLUSION

For all the reasons stated in KeyBank's opening brief and in this reply brief, this Court should reverse the trial court's rulings (a) barring adjudication of the priority dispute between KeyBank and Olson Engineering, and (b) granting summary judgment in Olson Engineering's favor on Olson Engineering's lien foreclosure claim. The final judgment foreclosing on the lien bond and awarding Olson Engineering a deficiency

(. . . continued)

60.04.031(5). Although that notice option was available to Olson Engineering, the company did not file any such notice and the "equities" under the circumstances are debatable, especially when the services for which Olson Engineering claims it is owed payment were not rendered until long after KeyBank's deeds of trust were recorded. *Compare* CP 875 (Olson Engineering's running balance sheet showing zero dollars owed on October 30, 2007), *with* Supp. CP 21, 156-209 (KeyBank's deeds of trust recorded June 1, 2006).

judgment against KeyBank should be reversed, and KeyBank should be awarded its reasonable attorneys' fees and costs incurred on this appeal, pursuant to RCW 60.04.181(3). The matter should be remanded to the trial court for entry of a judgment in KeyBank's favor, based upon the invalidity of Olson Engineering's lien, and for an award to KeyBank of the reasonable attorneys' fees and costs it incurred in the trial court proceedings, also pursuant to RCW 60.04.181(3).

DATED: January 10, 2012.

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A handwritten signature in black ink, appearing to read "Jill D. Bowman", is written over a horizontal line.

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