

NO. 42796-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FIRST-CITIZENS BANK & TRUST COMPANY,
a North Carolina banking association,

Third-Party Defendant / Appellant,

v.

GIBBS & OLSON, INC.,
a Washington corporation,

Third-Party Plaintiff / Respondent.

APPELLANT'S AMENDED OPENING BRIEF

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I. INTRODUCTION

This appeal concerns whether the trial court erred by holding that (i) contracts entered into by the Respondent and the property owner in 2006 related back to an earlier contract between the parties in July 2005, (ii) Respondent was not unreasonable in mitigating its damages by continuing to provide professional services for fifteen months after payments ceased, and (iii) Appellant was not entitled to an offset based on lots waived or released by the Respondent.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by entering Finding of Fact No. 3,¹ to the extent that it concluded that the July 22, 2005 contract was one contract with five separate amendments rather than a series of independent contracts for the purposes of Chapter 60.04 RCW.

2. The trial court erred by entering Finding of Fact No. 4,² to the extent that it concluded that the July 22, 2005 contract was one contract with five separate amendments rather than a series of independent contracts for the purposes of Chapter 60.04 RCW.

¹ Clerk's Papers (CP) at 1237. Finding of Fact No. 3 interprets the meaning of the contracts at issue herein, and thus should be reviewed as a Conclusion of Law.

² *Id.* at 1237-38. Finding of Fact No. 4 interprets the meaning of the contracts at issue herein, and thus should be reviewed as a Conclusion of Law.

3. The trial court erred by entering Finding of Fact No. 5,³ to the extent that it concluded that the July 22, 2005 contract was one contract with five separate amendments rather than a series of independent contracts for the purposes of Chapter 60.04 RCW.

4. The trial court erred by entering Finding of Fact No. 5,⁴ to the extent that it concluded that the amendments increasing to the contract price over time and the contract language allowing the parties to walk away from the contract under certain circumstances was really an intent to limit the consequences of a breach, not an indication that any of the five amendments were separate contracts for the purposes of Chapter 60.04 RCW.

5. The trial court erred by entering Finding of Fact No. 6,⁵ to the extent that it concluded that Gibbs & Olson, Inc. (“G&O”) provided professional engineering and surveying services to the subject property on or about June or July 2005 and continued providing such services, in a continuous course of employment, up through February 2008, all pursuant to the terms of the July 22, 2005 Contract.

6. The trial court abused its discretion by entering Finding of Fact No. 22,⁶ to the extent that the court found that G&O could have

³ *Id.* at 1238. Finding of Fact No. 5 interprets the meaning of the contracts at issue herein, and thus should be reviewed as a Conclusion of Law.

⁴ *Id.* at 1238. Finding of Fact No. 5 interprets the meaning of the contracts at issue herein, and thus should be reviewed as a Conclusion of Law.

⁵ *Id.* at 1238. Finding of Fact No. 6 interprets the meaning of the contracts at issue herein, and thus should be reviewed as a Conclusion of Law.

⁶ *Id.* at 1241-42.

stopped work at some point, but that would have been harming itself because it would have likely shut down the project, which project was planned such that work would continue and that revenue would come in from the sale of the lots and as long as they kept doing the work, G&O kept making the properties sellable.

7. The trial court erred by entering Finding of Fact No. 22,⁷ to the extent that the court held that G&O was mitigating its damages by continuing to work after it stopped being paid.

8. The trial court abused its discretion by entering Finding of Fact No. 23,⁸ to the extent that the court found that G&O's agreement to release its lien as to three lots for \$4,000 was reasonable.

9. The trial court abused its discretion by entering Finding of Fact No. 24,⁹ to the extent that the court found that G&O's conscious decision not to lien three lots was reasonable.

10. The trial court abused its discretion by entering Finding of Fact No. 25,¹⁰ to the extent that the court found that there was a failure of proof on all of First-Citizens Bank & Trust Company's ("**First-Citizens**") affirmative defenses and claims of setoff.

⁷ *Id.* at 1241-42. Finding of Fact No. 22 interprets the meaning of the contracts at issue herein, and thus should be reviewed as a Conclusion of Law.

⁸ *Id.* at 1242.

⁹ *Id.*

¹⁰ *Id.*

11. The trial court erred by entering Conclusion of Law No. 1,¹¹ by determining that G&O's RCW 60.04 lien claim has priority over First-Citizens' claims against the real property at issue.

12. The trial court erred by entering Conclusion of Law No. 2,¹² by determining that G&O may foreclose its lien against the real property owned by First-Citizens'.

13. The trial court erred by entering Conclusion of Law No. 3,¹³ by determining that G&O's lien under RCW 60.04 is a valid first lien against the real property owned by First-Citizens' entitling G&O to have the real property sold by the Sheriff of Lewis County, Washington.

14. The trial court erred by entering Conclusion of Law No. 4,¹⁴ by determining that Judgment should be entered in favor of G&O and against all Defendants in accordance with the court's other Findings of Fact and Conclusions of Law.

III. ISSUE STATEMENTS

1. The trial court committed reversible error when it held that the July 22, 2005 contract was one contract with five separate amendments for the purposes of the Respondent's Claim of Lien under Chapter 60.04 RCW. (Assignments of error 1-5, 11-14)

2. The trial court committed reversible error when it held that there was no showing of a failure to mitigate damages by the Respondent

¹¹ *Id.*

¹² *Id.* at 1242-43.

¹³ *Id.* at 1243.

¹⁴ *Id.*

where the Respondent continued to work for fifteen (15) months after it ceased being paid. (Assignments of error 6-7, 10.)

3. The trial court committed reversible error when it denied a setoff based on the Respondent's release of its Claim of Lien against real property owned by Grand Prairie Plaza for less than the pro-rata share of the Claim of Lien. (Assignments of error 8, 10.)

4. The trial court committed reversible error when it denied a setoff based on the Respondent's failure to assert its Claim of Lien against real property owned by Rockmann Development, LLC, which was similarly benefited by the subject contract. (Assignments of error 9-10.)

IV. STATEMENT OF THE CASE

A. FACTUAL HISTORY.

1. Winlock Subdivision: Loan and Foreclosure

Winlock Properties, LLC ("**Winlock**") was involved in the development of a 200 lot subdivision on approximately 49 acres of real property located in Winlock, Washington ("**Winlock Subdivision**").¹⁵ At various times during the development of the Winlock Subdivision, Gibbs & Olson, Inc. ("**G&O**") provided professional services for Winlock.¹⁶

On December 21, 2005 Winlock executed a Deed of Trust granting Venture Bank a security interest in the subject real property as security for the development loan issued to Winlock by Venture Bank.¹⁷ The Deed of

¹⁵ Verbatim Report of Proceedings (VRP) (Sept. 7, 2011) at 38:3-18.

¹⁶ Supplemental Clerk's Papers (Supp. CP) at 1-39.

¹⁷ *Id.* at 221-229.

Trust was then recorded with the Lewis County Auditor on January 10, 2006 under Recording Number 3241712.¹⁸ The amount initially secured by the Deed of Trust was \$3,765,000.00¹⁹, but it was ultimately increased to \$4,365,000.00.²⁰

When Winlock eventually defaulted on the development loan, Venture Bank foreclosed its Deed of Trust through a Trustee's Sale held on August 21, 2009.²¹ Venture Bank was the successful bidder at the Trustee's Sale, with a winning bid of \$3,600,000, representing a portion of the amount outstanding under the secured obligation.²² The Trustee's Deed was recorded with the Lewis County Auditor on August 31, 2009 under Recording Number 3332892.²³ The Trustee's Deed included the entire Winlock Subdivision, except for Lots 1, 2, 3, 7, 18, and Tract A, which were owned by other entities related to Winlock.²⁴ The trustee's sale complied with all requirements of Chapter 61.24 RCW, and all interested parties were provided notice.²⁵

Venture Bank's interest in the subject real property was then assigned to First-Citizens Bank & Trust Company ("**First-Citizens**"),

¹⁸ *Id.*

¹⁹ *Id.* at 227.

²⁰ *Id.* at 238, ¶ 2.

²¹ *Id.* at 238-241.

²² *Id.*

²³ *Id.*

²⁴ *Id.* Lots 1, 2, and 3 were owned by Rockmann Development, LLC. Lots 7, 17, and Tract A were owned by Grand Prairie Plaza, LLC. Both Rockmann Development, LLC and Grand Prairie Plaza, LLC are owned by Allen Olson, the owner of Winlock.

²⁵ Supp. CP at 239, ¶ 7 and 9.

Appellant herein, as reflected by a Receiver's Deed dated April 16, 2010, which was recorded with the Lewis County Auditor on May 13, 2010 under Recording No. 3344939.²⁶

2. G&O's Contracts with Winlock: PRE-Venture Bank Deed of Trust

In approximately February of 2005 G&O drafted a written contract for Winlock regarding engineering services to be provided by G&O for the Winlock Subdivision ("**Feb. 2005 Contract**").²⁷ Specifically, the Feb. 2005 Contract provides for site pre-design analysis.²⁸ The Feb. 2005 Contract, as drafted by G&O, includes an estimated budget of \$5,800.00, with an upper budget limit of \$6,300.00.²⁹ It further specifies that the work was to be completed within approximately ten working days of the final notice to proceed.³⁰ Winlock accepted and authorized the Feb. 2005 Contract on or about February 15, 2005.³¹

In approximately July of 2005, G&O drafted³² a written contract for Winlock regarding engineering services to be provided by G&O for the Winlock Subdivision ("**July 2005 Contract**").³³ Specifically, the July 2005 Contract provided for services during the "preliminary design phase"

²⁶ *Id.* at 268.

²⁷ *Id.* at 1-7.

²⁸ *Id.* at 2.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 3.

³² VRP (Sept. 7, 2011) at 92:19-93:3.

³³ *Id.* at 8-26.

and “final design phase.”³⁴ Winlock accepted and authorized the Feb. 2005 Contract on August 8, 2005.³⁵

The July 2005 Contract, as drafted by G&O, includes an upper budget limit of \$112,000.00, which was not to be exceeded without the approval of Winlock.³⁶ The July 2005 Contract further states that the requested work was to be completed within approximately four months.³⁷

Although the July 2005 Contract references possible future amendments, neither Winlock nor G&O, prior to the Deed of Trust, were obligated to perform any additional amendments under the express language of the July 2005 Contract, which states:

Following completion of the Final Design Phase Services, and after receipt of written authorization from the Winlock Properties, LLC, Gibbs & Olson shall prepare an amendment to this Agreement for completion of the Construction phase and operational phase services. Upon approval of the amendment, Gibbs & Olson shall proceed with the work on this project.

....

Following completion of the Final Design Phase Services, and upon the OWNER's satisfaction with the ENGINEER's performance during design, and after the OWNER has approved the final bidding documents, the OWNER reserves the right to request the ENGINEER to prepare an amendment to this contract for future services. The amendment will include engineering work necessary to carry the project through construction of the facilities and closeout of the project.

In the amendment, the ENGINEER shall include a scope of work, schedule and budget for the remaining engineering work. This amendment shall be negotiated in good faith between the

³⁴ *Id.* at 10-11. VRP (Sept. 7, 2011) at 86:10-92:15.

³⁵ Supp. CP at 12.

³⁶ *Id.* at 11.

³⁷ *Id.*

OWNER and ENGINEER and signed by the OWNER and ENGINEER before the ENGINEER is authorized to proceed with the work. If the OWNER and ENGINEER cannot reach agreement on the terms of the contract, include scope of work, schedule and budget, then the OWNER and ENGINEER each reserve the right to terminate negotiations without consequence.³⁸

Both the President of G&O and the President of Winlock testified that, prior to the recording of Venture Bank's Deed of Trust, neither G&O nor Winlock were obligated to perform any services or make any payments beyond the scope of work and budget contained in the July 2005 Contract.³⁹ Moreover, both testified that either could have elected not to proceed with any subsequent phases, without any liability to the other party.⁴⁰ For example, Winlock could have proceeded with a different contractor for any reason or no reason whatsoever.

Work based on the July 2006 contract was completed around June 2006.⁴¹ G&O was paid in full for all work related to the July 2006 contract.⁴²

The January 2005 Contract and the July 2005 Contract are collectively referred to herein as the "**2005 Contracts**".

³⁸ Supp. CP at 16-17 (emphasis added).

³⁹ Richard Riley of G&O, VRP (Sept. 7, 2011) at 112:7-24; Tom Ossinger of Winlock, VRP (Sept. 7, 2011) at 148:17-149:3 and 152:3-4.

⁴⁰ Richard Riley of G&O, VRP (Sept. 7, 2011) at 83:15-85:17; Tom Ossinger of Winlock, VRP (Sept. 7, 2011) at 152:15-153:16.

⁴¹ VRP (Sept. 7, 2011) at 99:8-15.

⁴² VRP (Sept. 7, 2011) at 117:21-118:5.

3. G&O's Contracts with Winlock: POST-Venture Bank Deed of Trust

In approximately April 2006, more than three months after Venture Bank recorded its Deed of Trust, G&O drafted three written contracts, labeled Amendments 1, 2, and 3, for Winlock regarding engineering services to be provided by G&O for the Winlock Subdivision (“**April 2006 Contracts**”).⁴³

The April 2006 Contracts purport to be amendments of the July 2005 Contract. Specifically, Amendment 1 provides for Phase II design engineering,⁴⁴ Amendment 2 provides for construction staking services,⁴⁵ and Amendment 3 provides for construction observation services regarding Phase I of the Winlock Development.⁴⁶

The April 2006 Contracts increased the budget contained in the July 2005 Contract by \$170,100.00, an increase of approximately 152%. Amendment 1 is budgeted for \$87,000.00,⁴⁷ Amendment 2 is budgeted for \$22,000.00,⁴⁸ and Amendment 3 is budgeted for \$61,100.00.⁴⁹

The April 2006 Contracts each include separate and distinct budgets, scopes of work, and two of the three include schedules. Amendment 1 states “We anticipate our responsibility will commence

⁴³ Supp. CP at 27-35.

⁴⁴ Supp. CP at 28.

⁴⁵ *Id.* at 31.

⁴⁶ *Id.* at 32.

⁴⁷ *Id.* at 29.

⁴⁸ *Id.* at 31.

⁴⁹ *Id.* at 33.

approximately 71% over the original budget. Amendment 4 is budgeted for \$33,500.00,⁵⁵ and Amendment 5 is budgeted for \$45,500.00.⁵⁶

Amendment 4 does not contain a specific schedule, but Amendment 4 states “We anticipate our responsibility will commence approximately August 28, 2006 and be completed no later than December, 2006.”⁵⁷

The April 2006 Contracts and the Sept. 2006 Contracts are collectively referred to herein as the “**2006 Contracts**”.

In total, the 2006 Contracts increased the budget of the July 2005 Contract by a total of \$249,100.00, an increase of approximately 222%.

Both the President of G&O and Winlock testified that none of the work specified in the 2006 Contracts was not necessary for completion of the scope of work contained in the July 2005 Contract.⁵⁸

4. G&O’s Contract Payment History

Over the course of the project Winlock paid G&O a total of \$247,057.30 under the above referenced contracts.⁵⁹ Between April 11, 2005 and January 21, 2008 G&O issued twenty-one invoices to Winlock under the subject contracts, totaling \$407,712.89.⁶⁰

⁵⁵ *Id.* at 36.

⁵⁶ *Id.* at 38.

⁵⁷ *Id.*

⁵⁸ Richard Riley of G&O, VRP (Sept. 7, 2011) at 105:10-107:1, 108:19-110:4, 110:19-22; Tom Ossinger of Winlock, VRP (Sept. 7, 2011) at 157:6-158:10.

⁵⁹ Supp. CP at 125.

⁶⁰ *Id.*

Winlock issued payments to G&O for the first nine consecutive invoices issued by G&O, paying G&O in full for work performed between February 26, 2005 and June 25, 2006.⁶¹ Winlock also issued an additional payment in full for the eleventh invoice issued by G&O.⁶²

Winlock defaulted on payments for work performed by G&O on or after June 26, 2006, which was five months after Venture Bank recorded its Deed of Trust.⁶³

5. G&O's Claim of Lien

On March 7, 2008, Norman C. Dick, attorney for G&O, recorded a Claim of Lien with the Lewis County Auditor under Recording Number 3301040.⁶⁴ The Claim of Lien was signed by Norman C. Dick, and the notary block indicates it was signed on March 6, 2008, more than two years after Venture Bank's Deed of Trust was recorded.⁶⁵

The Claim of Lien states that work commenced on or about February 26, 2005, and continued until February 4, 2008, a period encompassing both the 2005 Contracts and the 2006 Contracts.⁶⁶

The Claim of Lien included all of the Winlock Subdivision, with the exception of Lot Nos. 1, 2, and 3, which were owned by Rockmann Development, LLC, an entity related to Winlock's principals.⁶⁷ Work on

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 230-233.

⁶⁵ *Id.* at 232.

⁶⁶ *Id.* at 231.

⁶⁷ *Id.* at 233.

Lots 1, 2, and 3 was complete with Phase I, and the Lots have homes on them.⁶⁸ G&O received no compensation for the omission, and the omission was a voluntary choice by G&O.⁶⁹

Prior to trial, G&O released its Claim of Lien as to Lots 7, 18, and Tract A of the Winlock Subdivision, which were owned by Grand Prairie Plaza, LLC, another entity related to Winlock.⁷⁰ G&O agreed to the release in exchange for payment of \$4,000.00 by Grand Prairie Plaza, LLC, and Grand Prairie Plaza, LLC was subsequently dismissed from this action.⁷¹

B. PROCEDURAL HISTORY.

Trial in this matter was held on September 7 and 8, 2011, and the court ruled in favor of G&O on all issues. Following the trial, the court issued findings of fact and conclusions of law.⁷² With respect to whether the July 2005 Contract and the 2006 Contracts constituted a single contract or several separate and distinct contracts, the court found that

The [July 2005 Contract] for Professional Services was one contract with five subsequent amendments rather than a series of independent contracts. Said amendments were clearly designated as amendments. It was clearly the intent of the parties that said amendments be amendments to the original [July 2005 Contract] and that was how the parties to the contract performed over the life of the contract. All of the work which was done by [G&O] was done by [G&O] from approximately June 2005 through February 2008, was done in furtherance of the original [July 2005

⁶⁸ VPR (Sept. 7, 2011) at 121:17-20.

⁶⁹ *Id.* at 123:2-5.

⁷⁰ *Id.* at 123:9-19.

⁷¹ *Id.*; CP at 1034-37.

⁷² CP at 1234-43.

Contract], which contract created a single project with overlapping phases and a continuing course of work by [G&O] from the original [July 2005 Contract] work through the breach of contract by [Winlock].⁷³

With respect to Appellant's affirmative defense based on G&O's failure to mitigate damages, the court found that G&O was not required to issue a notice under RCW 60.04.221, and

[G&O] could have stopped work at some point, but that would have been harming themselves because it would have likely shut down the project, which project was planned such that work would continue and that revenue would come in from the sale of the lots and as long as they kept doing the work, [G&O] kept making the properties more sellable. So, actually, [G&O] was indeed trying to mitigate its damages in some sense by taking the most reasonable approach to eventually getting paid by continuing to work on the project as they did.⁷⁴

Finally, as to Appellant's request for an offset based on G&O's (i) voluntary decision not to lien property owned by Rockmann Development, LLC, and (ii) G&O's release of its Claim of Lien with Grand Prairie Plaza for less than the balance due, the court held that no offset was due, as "the settlement was reasonable under the circumstances" and "no authority has been cited by [Appellant] requiring that a lien be asserted against 100% of the property on which services were provided under RCW 60.04."⁷⁵

Based on these findings, the only offset allowed was the actual \$4,000.00 settlement payment.

⁷³ CP at 1237.

⁷⁴ *Id.* at 1241-42.

⁷⁵ *Id.* at 1242.

IV. ARGUMENT

A. STANDARD OF REVIEW

This case involves assignments of error regarding both findings of fact and the associated conclusions of law. Findings of fact are determinations that a phenomenon has happened or will be happening independent of or anterior to any assertion as to its legal effect.⁷⁶ Appellate review of findings of fact is limited to determining whether a trial court's findings are supported by substantial evidence.⁷⁷ “‘Substantial evidence’ exists when there is a sufficient quantum of proof to support the trial court's findings of fact.”⁷⁸

However, the conclusions of law applied to the facts are reviewed de novo.⁷⁹ Conclusions of law labeled as findings of fact will be treated as conclusions of law when challenged on appeal.⁸⁰ Finally, interpretation of a contract is generally a question of law, and is reviewed de novo, when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence.⁸¹

⁷⁶ *Robel v. Roundup Corp.*, 148 Wn.2d 35, 59 (2002).

⁷⁷ *Am. Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477, 481 (1990).

⁷⁸ *Organization to Preserve Agr. Lands v. Adams Cnty.*, 128 Wn.2d 869, 882, 913 P.2d 793(1996).

⁷⁹ 148 Wn.2d at 59.

⁸⁰ *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

⁸¹ *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674 (1996).

B. THE TRIAL COURT ERRED BY HOLDING THAT THE JULY 2005 CONTRACT AND 2006 CONTRACTS CONSTITUTE A SINGLE CONTRACT FOR THE PURPOSES OF A CLAIM OF LIEN UNDER CHAPTER 60.04 RCW

The trial court's conclusions of law found in Findings of Fact Nos. 3-6 and Conclusions of Law Nos. 1-4 are erroneous in that they combine separate and independent contractual agreements for the purposes of relating back to an earlier commencement date under Chapter 60.04 RCW. G&O's Claim of Lien relies on a stated commencement date of February 26, 2005 (or potentially July 2005 based on the July 2005 Contract) to assert priority over Venture Bank's Deed of Trust. G&O claimed that the 2006 Contracts are merely extensions of the July 2005 Contract, and thus relate back for the purposes of Chapter 60.04 RCW. The documents, as drafted and intended by G&O, do not support this conclusion.

1. Requirements for Mechanics' and Materialmen's Liens under Chapter 60.04 RCW.

RCW 60.04.021 grants any person furnishing professional services for the improvement of real property a lien upon the improvement for the *contract price* of the professional services furnished. Claims of lien established under Chapter 60.04 RCW are prior to any deed of trust which attached to the land after or was unrecorded at the time of commencement of professional services by the lien claimant.⁸²

⁸² RCW 60.04.061.

The burden of establishing a right to a lien under Chapter 60.04 RCW rests upon the person claiming it.⁸³ Liens under Chapter 60.04 RCW are a statutory creation, and in derogation of common law. As such, they are strictly construed when analyzing whether a lien has attached,⁸⁴ and the party claiming the lien must “come clearly within its terms.”⁸⁵

The amount of the lien is expressly limited to the “contract price” of the services furnished,⁸⁶ and the term “contract price” is defined by statute as “the amount agreed upon by the contracting parties, or if no amount is agreed upon, then the customary and reasonable charge therefore.”⁸⁷

2. The 2005 Contracts and 2006 Contracts are independent of each other, and the commencement dates cannot be arbitrarily combined for the purposes of a lien under Chapter 60.04 RCW.

There is simply no authority whatsoever in Chapter 60.04 RCW or the associated case law suggesting that unnecessary, subsequently executed contracts can relate back to an earlier contract for the purposes of establishing lien priority. To the contrary, case law indicates that subsequent agreements do not merge with earlier contracts, and instead

⁸³ *Westinghouse Elec. Supply Co. v. Hawthorne*, 21 Wn.2d 74, 77 (1944); *DKS Const. Mgmt., Inc. v. Real Estate Improvement Co., L.L.C.*, 124 Wn. App. 532, 537 (2004).

⁸⁴ *Lumberman's of Wash., Inc. v. Barnhardt*, 89 Wn. App. 283, 286 (1997); *Dean v. McFarland*, 81 Wn.2d 215, 219-20 (1972).

⁸⁵ *Dean*, 81 Wn.2d at 220; *DKS Const. Management, Inc.*, 124 Wn. App at 536.

⁸⁶ RCW 60.04.021.

⁸⁷ RCW 60.04.011(2).

provide an independent basis for a claim of lien, with distinct commencement and completion dates for the purposes of lien priority and filing requirements.

If work is done or materials are furnished to complete the *original contract*, or remedy some defect in the work done or materials furnished under the original contract then such work or the furnishing of additional materials extends the time for filing a lien. *If, however, the work is done or materials are furnished under a new and independent agreement, made after the original contract or continuing employment is ended, then such work or the furnishing of additional materials does not set the time running so as to preserve a lien for the earlier work.*⁸⁸

Lien claimants are not permitted to use subsequent agreements to prolong the time for filing a lien or renewing a lien which had been lost by a lapse of time.⁸⁹ Subsequently performed work must be in furtherance of the *original contract* in order to continue the period of performance under the original contract for the purposes of Chapter 60.04 RCW.⁹⁰

There is no dispute that the 2006 Contracts incorporate the basic conditions of performance contained in the July 2005 Contract. Incorporating base contract terms in a series of contracts is a common practice, as it simplifies the subsequent contracts and associated negotiations.⁹¹ However, the mere inclusion of prior general terms does not mean that the subsequent contracts relate back for the purposes of Chapter 60.04 RCW. Each contract, and its associated commencement and completion dates, remains distinct and independent.

⁸⁸ *Hopkins v. Smith*, 45 Wn.2d 548, 552 (1954) (emphasis added).

⁸⁹ *Fris v. Brown*, 37 Wn.2d 457, 460 (1950).

⁹⁰ *Id.*

⁹¹ VRP (Sept. 7, 2011) at 80:18-81:8.

In this case the 2006 Contracts contain specific and independently complete budgets, scopes of work, and schedules, all of which are separate and distinct from the budget, scope of work, and schedule contained in the July 2005 Contract. They increased the total budget by \$249,100.00, an increase of approximately 222%. The 2006 Contracts do not simply clarify the July 2005 Contract terms, they instead contain entirely new performance requirements related to different services, such as staking, construction management, and design of subsequent phases of the development project. They are in no way a mere extension or completion of the performance required by the original July 2005 Contract. Testimony from both G&O and Winlock stated that the work performed under the 2006 Contracts was not necessary to complete the work required by the 2005 Contracts.⁹²

To allow such drastic “amendments” of a contract to relate back to the commencement date of the original contract for the purposes of a Chapter 60.04 RCW lien is an improper and unwarranted expansion of the statute. RCW 60.04.021 limits the amount of the lien to the “contract price” of the services rendered. “Contract Price” means the amount agreed upon by the contracting parties. G&O’s analysis and the trial court’s ruling turns that specific amount into a constantly increasing amorphous figure, dependant on the whims of the contracting parties, to the detriment of intervening mortgage interests or purchasers. The trial

⁹² Richard Riley of G&O, VRP (Sept. 7, 2011) at 83:15-85:17; Tom Ossinger of Winlock, VRP (Sept. 7, 2011) at 152:15-153:16.

court's conclusions that the 2006 Contracts were merely an extension of the July 2005 Contract are erroneous, and should be reversed.

3. The Future Amendment Provisions of the July 2005 Contract are merely agreements to agree, and are unenforceable.

G&O has argued that the "Future Amendments" provisions of the July 2005 Contract create a binding agreement to enter into Amendments 1-5, allowing the July 2006 Contracts to relate back to July 2005 for the purposes of lien priority under Chapter 60.04 RCW. This is contrary to the plain language of the "Future Amendments" provisions, which were selected and drafted by G&O, as they only constitute an unenforceable agreement to agree. In Washington, an "agreement to agree", which is an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete, is an unenforceable agreement.⁹³

⁹³ *Keystone Land Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 175-76 (2004); see also Restatement (Second) of Contracts § 24 (1981). The *Keystone* decision also references an "agreement to negotiate", which it describes as an "exchange of promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time." *Id.* at 176. However, under an "agreement to negotiate" no breach occurs if the parties fail to reach an agreement as to the substantive deal. *Id.* Breach only occurs if a party fails to conform to the specific course of conduct agreed upon. *Id.* Although it appears that no court in Washington has ruled on the enforceability of an "agreement to negotiate", that issue is irrelevant for the purposes of this action. *Id.* at 176 and 180. The July 2005 Contract is arguably an "agreement to negotiate," but the issue in this case is the substantive deal the parties agreed to discuss: the future amendments to the July 2005 Contract. An "agreement to negotiate" remains an unenforceable "agreement to agree" with respect to those proposed amendments.

G&O, which drafted the July 2005 Contract agreement, clearly intended that either party could refuse, without consequence, to perform any amendments to the July 2005 Contract. As such, those portions of the July 2005 Contract are merely unenforceable “agreements to agree”, and cannot contribute to the “contract price” for the purposes of Chapter 60.04 RCW as of the recording date of Venture Bank’s Deed of Trust. They merely provide a framework for additional negotiations. If either party refused to accept those proposed amendments, they could do so “without consequence.”⁹⁴ This was for the mutual benefit of the parties.⁹⁵

As work under the April 2006 Contracts did not commence until after Venture Bank’s Deed of Trust was recorded,⁹⁶ G&O’s Claim of Lien depends on the assertion that those amendments relate back to the commencement of work under the July 2005 Contract in order to obtain priority over the Deed of Trust under RCW 60.04.061.⁹⁷ G&O claims that

⁹⁴ Supp. CP at 16-17 (“If the OWNER and ENGINEER cannot reach agreement on the terms of the contract, include scope of work, schedule and budget, then the OWNER and ENGINEER each reserve the right to terminate negotiations *without consequence*.” (emphasis added)).

⁹⁵ See VRP (Sept. 7, 2011) at 156:6-18 (intent of phased work is to limit liability to contractors).

⁹⁶ Venture Bank’s Deed of Trust was recorded on January 10, 2011, but work commenced under the April 2006 Contracts no earlier than February 2006. VRP (Sept. 7, 2011) at 99:22-105:19.

⁹⁷ “The claim of lien created by this chapter upon any lot or parcel of land shall be prior to any lien, mortgage, deed of trust, or other encumbrance which attached to the land after or was *unrecorded at the time of commencement of labor or professional services* or first delivery of materials or equipment by the lien claimant.” RCW 60.04.061 (emphasis added).

the 2006 Contracts are merely extensions of the July 2005 Contract, and thus relate back for the purposes of Chapter 60.04 RCW.

The key question in this litigation is what were Winlock and G&O bound to perform as of the recording of the Deed of Trust. Tellingly, both G&O and Winlock admit that they were not bound, beyond mere negotiations, to perform any future amendments to the July 2005 Contract.⁹⁸ Despite that limited liability, G&O is arguing that it should receive the benefit (in terms of lien priority) as though it was bound to perform those amendments. This is simply inequitable, and should not be permitted.

As discussed above, the Future Amendment Provisions, and the associated 2006 Contracts, were unenforceable under Washington law as of the recording date of Venture Bank's Deed of Trust. As such, the 2006 Contracts should be treated as separate and distinct from the July 2005 Contract for the purposes of Chapter 60.04 RCW. The trial court's determination that these contractual limitations were merely an "intent to limit the consequences of a breach, [and] not an indication that any of the five amendments were separate contracts" is contrary to the applicable law, and entirely unsupported by the available evidence.⁹⁹ The trial court effectively ruled that an unenforceable agreement constitutes a contract for

⁹⁸ Richard Riley of G&O, VRP (Sept. 7, 2011) at 112:7-24; Tom Ossinger of Winlock, VRP (Sept. 7, 2011) at 148:17-149:3 and 152:3-4.

⁹⁹ CP at 1238, ¶ 5.

the purposes of Chapter 60.04 RCW. This is an erroneous legal conclusion, and should be reversed.

4. The 2006 Contracts were not done “in furtherance” of the July 2005 Contract as the work specified in the July 2006 Contracts was not necessary to complete work under the July 2005 Contract.

Regardless of the contract construction arguments discussed above, courts also consider whether additional work was performed “in furtherance” of an earlier contract to determine if the additional work relates back to the earlier contract for the purposes of Chapter 60.04 RCW.¹⁰⁰ In this case the work specified in the 2006 Contracts was not done in furtherance of the July 2005 Contract, as the additional work was separate and distinct from the work required by the July 2005 Contract.

The applicable case law indicates that “in furtherance” requires that the additional work is necessary to complete the original contract. For example, the contractor in *Fris* returned to the property to ensure that an installed furnace was in proper operating condition, which the court determined was an obligation due under the original contract.¹⁰¹ As such, the later work extended the date for the contractor to file a lien claim.¹⁰²

In *A.A.R. Testing Lab., Inc. v. New Hope Baptist Church*,¹⁰³ a case heavily relied upon by G&O, the court mentioned that the additional expenses incurred were related to completion of the original project. The

¹⁰⁰ *Fris v. Brown*, 37 Wn.2d 457, 460 (1950).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ 112 Wn. App. 442, 444 (2002).

contractor in *A.A.R.* entered into a contract with the property owner for construction of a new sanctuary and church building after the original church buildings were destroyed by a fire.¹⁰⁴ There was no indication that the project was broken down into separate phases or scopes of work; it was a single project for the competition of a pair of intertwined buildings. All additional costs incurred by the contractor were based on “various disagreements, change orders, and required changes ordered by the county increased the price of the project.”¹⁰⁵ All of the changes were apparently directly related to completion of the original scope of work presented in the original contract.

In this instant case, both parties acknowledge that the work performed under the 2006 Contracts was not necessary to complete the scope of work required under the July 2005 Contract.¹⁰⁶ They also agreed that neither party was obligated to enter into the 2006 Contracts.¹⁰⁷ If the work required by the 2005 Contracts could be completed in its entirety regardless of whether the 2006 Contracts were ever performed, then the 2006 Contracts were not done “in furtherance” of the original contract.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 445. It is interesting to note that the court in *A.A.R.* did not analyze the dates the changes occurred in relation to the associated loans at issue.

¹⁰⁶ Richard Riley of G&O, VRP (Sept. 7, 2011) at 105:10-107:1 (Amendments 1-3) and 108:19-110:22 (Amendments 4-5); Tom Ossinger of Winlock, VRP (Sept. 7, 2011) at 157:6-158:10.

¹⁰⁷ Richard Riley of G&O, VRP (Sept. 7, 2011) at 83:15-85:17; Tom Ossinger of Winlock, VRP (Sept. 7, 2011) at 152:15-153:16.

The evidence does not support the trial court's conclusions that the 2006 Contracts were done in furtherance of the original contract.¹⁰⁸ Both parties acknowledged that the work was separate and distinct. The trial court's conclusions that the work resulting from the 2006 Contracts was in furtherance of the July 2006 Contract are erroneous, and should be reversed.

5. G&O's Claim of Lien should not receive greater priority than similarly drafted mortgages under Washington's common law.

The trial court's application of the "contract price" under RCW 60.04.021, which liberally merges contract amendments into earlier agreements, grants liens under Chapter 60.04 RCW better treatment than mortgages under the common law with respect to optional future performance. Mortgage case law states that optional mortgage advances made with actual knowledge of intervening encumbrances on mortgaged property are made subject to the intervening mortgage.¹⁰⁹ A mortgage advance is optional where the timing of the advance and the amount of money to be advanced are largely discretionary by the lender.¹¹⁰ Optional advances only attach to the real property when the advances are actually made.¹¹¹ Although the harsh result of the common law rule for mortgages was eased by erasing the distinction between optional and mandatory advances, that statutory exception is limited to mortgages and deeds of

¹⁰⁸ CP at 1237, ¶ 3.

¹⁰⁹ *Elmendorf-Anthony Co. v. Dunn*, 10 Wn.2d 29 (1941).

¹¹⁰ *Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 898-900 (1973).

¹¹¹ *Id.* at 900.

trust.¹¹² No equivalent exception exists for Chapter 60.04 RCW liens, and thus the common law analysis remains applicable.

Pursuant to the July 2005 Contract, Winlock was under no contractual obligation to agree to additional performance by G&O.¹¹³ Additional performance was conditioned on (i) a request by Winlock for additional amendments, and (ii) the acceptance by Winlock of those additional amendments.¹¹⁴ That contractual provision was no more binding than the future advances clauses at issue in *Equity Investors*.¹¹⁵ G&O was on notice of Venture Bank's Deed of Trust, which was recorded before the 2006 Contracts, and therefore G&O's Claim of Lien based on

¹¹² RCW 60.04.226 was enacted in reaction to *Equity Investors* and states “[a]ny mortgage or deed of trust shall be prior to all liens, mortgages, deeds of trust, and other encumbrances which have not been recorded prior to the recording of the mortgage or deed of trust to the extent of all sums secured by the mortgage or deed of trust *regardless of when the same are disbursed or whether the disbursements are obligatory.*”

¹¹³ Supp. CP at 16-17.

¹¹⁴ *Id.*

¹¹⁵

[t]he lending bank's duty to make the advances was dependent to such a degree upon so many conditions, the occurrence of which lay within [the lending bank's] judgment, that it had the option throughout the construction either to pay the materialmen, mechanics and subcontractors from the loan funds or to retain the loan funds within its control, or to deliver the loan funds over to the borrower. The advances being thus optional, they became subject to intervening liens accruing with the lender's knowledge and acquiescence.

81 Wn.2d at 901.

those subsequent contracts should be subject to the recorded Deed of Trust.

There is no reason to believe that Chapter 60.04 RCW liens should be treated differently from common law mortgages with respect to optional future performance. When the legislature enacted RCW 60.04.226 to modify the *Equity Investors* analysis, it limited the statute's protection to mortgages and deeds of trust. There is no additional statutory authority granting optional contractual performance priority over intervening encumbrances, such as Venture Bank's Deed of Trust. G&O's Claim of Lien should be treated like a common law mortgage, and therefore the optional nature of the 2006 Contracts should result in the lien being subordinate to Venture Bank's Deed of Trust. The trial court did not specifically address this issue, but implicitly denied First-Citizens' argument through its ultimate conclusion. Based on analogy to mortgage law, G&O's increase of the contract price and the resulting lien, done with knowledge of Venture Bank's intervening security interest, should not be permitted to take priority over Venture Bank's Deed of Trust. The trial court's holding was erroneous, and should be reversed.

6. Venture Bank effectively foreclosed G&O's Claim of Lien.

Should this court determine that the 2006 Contracts were independent contracts from the 2005 Contracts, then G&O could not have commenced work under the 2006 Contracts any earlier than February 2006, the agreed start date under the April 2006 Contracts. Venture Bank's Deed of Trust was recorded on January 10, 2006, and thus is prior

and superior to any lien based on the 2006 Contracts pursuant to RCW 60.04.061.

G&O was sent all notices required by RCW 61.24.040 regarding the foreclosure of Venture Bank's Deed of Trust. As such, G&O's Claim of Lien was effectively foreclosed by the Trustee's Sale and the associated Trustee's Deed. G&O no longer has any interest in the Property.

C. **THE TRIAL COURT ERRED BY DENYING FIRST-CITIZENS' AFFIRMATIVE DEFENSE OF FAILURE TO MITIGATE DAMAGES WHERE G&O CONTINUED WORKING FOR 15 MONTHS AFTER WINLOCK STOPPED PAYMENTS.**

The trial court's Findings of Fact Nos. 6-7 and 10, and the conclusions of law contained therein, are (i) not supported by sufficient evidence because G&O presented no evidence that the July 2005 Contract was originally structured such that G&O would only be paid upon the sale of lots, and (ii) erroneous because increasing the balance due by continuing to work after a default cannot constitute mitigation of damages as a matter of law. The doctrine of mitigation of damages provides that, where one person has breached a contract, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages.¹¹⁶ The person wronged cannot recover for any item of damage which could thus have been avoided.¹¹⁷ Failure to

¹¹⁶ *Young v. Whidbey Island Bd. of Realtors*, 96 Wn.2d 729, 732 (1982); *Westmark Dev. Corp. v. City of Burien*, 140 Wn. App. 540, 564 (2007).

¹¹⁷ 96 Wn.2d at 732.

mitigate damages is an affirmative defense, and the burden of proof lies with the party asserting the defense.¹¹⁸

First-Citizens argued at trial that G&O acted unreasonably when it (i) elected to continue working for fifteen (15) months after G&O stopped receiving payments from Winlock, and (ii) by failing to notify Venture Bank of the default as authorized by RCW 60.04.221.¹¹⁹

G&O started working for Winlock on approximately February 26, 2005, and continued working for Winlock until approximately January 21, 2008.¹²⁰ All invoices issued by Winlock for work performed through May 25, 2006 were paid in full.¹²¹ On September 7, 2006 G&O issued an invoice for \$29,730.55 that was never paid.¹²² On September 11, 2006, G&O issued another invoice for \$15,527.80, which was paid by Winlock on October 12, 2006.¹²³

The October 12, 2006 payment was essentially the last voluntary payment received by G&O from Winlock.¹²⁴ Prior to the final payment on October 12, 2006, the longest G&O waited for an invoice to be paid was

¹¹⁸ *Bernsen v. Big Bend Elec. Co-op., Inc.*, 68 Wn. App. 427, 435 (1993)

¹¹⁹ VRP (Sept. 7, 2011) at 126-127.

¹²⁰ SCP at 125-26, 166; VRP (Sept. 7, 2011) at 78:9-15 (describing Exhibit 13).

¹²¹ Supp. CP at 125, 133 (billing numbers 1-9 were paid in full).

¹²² Supp. CP at 125, 134.

¹²³ Supp. CP at 125, 137.

¹²⁴ Supp. CP at 125; VRP (Sept. 7, 2012) at 118:13-16.

approximately four months.¹²⁵ Most invoices were paid within one to two months. There was no doubt that payments stopped completely.¹²⁶

Despite the fact that payments ceased completely and Winlock was out of money, G&O continued working. The first point that G&O considered stopping work was in January 2008, fifteen months later.¹²⁷ During this period G&O generated additional bills for approximately \$126,025.04, excluding interest.¹²⁸ The only action taken by G&O to press Winlock for payment occurred thirteen months later in November 2007, when G&O insisted on payment in advance for work. At that point G&O required Winlock to pay its expected fees, which were only \$4,900.00, in advance.¹²⁹

At trial, G&O provided no reasonable justification for why it continued to run up bills for \$126,025.04 after it stopped being paid. G&O claimed that Winlock promised it was working on alternate financing, but it never materialized.¹³⁰ G&O also argued that it kept

¹²⁵ Supp. CP at 125 (see billing numbers 5 and 7).

¹²⁶ VRP (Sept. 7, 2012) at 118:13-16 (“Q: And so it wasn’t a situation where they were trickling in payments over time. For all intents and purposes it stopped cold after October 12th, 2006? A: That’s correct”).

¹²⁷ VRP (Sept. 7, 2012) at 118:17-21; Supp. CP at 125 (balance due of \$155,755.59 minus billing number 10 of \$29,730.55).

¹²⁸ VRP (Sept. 7, 2012) at 119:1-6.

¹²⁹ Supp. CP at 125 (billing number 21); VRP (Sept. 7, 2012) at 70:20-71:1.

¹³⁰ VRP (Sept. 7, 2012) at 66:20-67:13; VRP (Sept. 7, 2012) at 119:10-22 (“A: ... As I mentioned earlier, [Allen Olson] would call every few weeks to let me know that he was looking for alternative funding, you know, hang on with me, Dick, I owe you the money, we’ll get you paid

working under the promise that they would be paid as each lot sold.¹³¹ However, at no point during the three years of work on the Winlock Development did a single lot sell.¹³² G&O was simply granting a favor to Winlock.¹³³ This was a conscious decision by G&O to assume a risk of non-payment.

Through this action, though, G&O asked to place the burden of that choice on First-Citizens. G&O asserts that its Claim of Lien is for the entire balance incurred of \$155,755.59. Despite First-Citizens' argument that G&O acted unreasonable during these fifteen months of nonpayment, the trial court disagreed, and held that:

GIBBS & OLSON could have stopped work at some point, but that would have been harming themselves because it would have likely shut down the project, which project was planned such that work would continue and that revenue would come in from the sale of the lots and as long as they kept doing work, GIBBS & OLSON kept making the properties more sellable. So, actually, GIBBS & OLSON was indeed trying to mitigate its damages in some sense by taking the most reasonable approach to eventually getting paid by continuing to work on the project as they did.¹³⁴

This ruling is not supported by sufficient evidence.

somehow. Q: You elected to grant him that favor and continue working?

A: I did.”)

¹³¹ VRP (Sept. 7, 2011) at 67:20-68:1-3.

¹³² VRP (Sept. 7, 2011) at 144:15-19.

¹³³ VRP (Sept. 7, 2011) at 119:10-22 (“A: ... As I mentioned earlier, [Allen Olson] would call every few weeks to let me know that he was looking for alternative funding, you know, hang on with me, Dick, I owe you the money, we’ll get you paid somehow. Q: You elected to grant him that favor and continue working? A: I did.”)

¹³⁴ CP at 1241-42.

First, there was no evidence presented that this deal was originally structured such that G&O would be paid from the lot sales. To the contrary, Winlock obtained a loan of \$3,765,000.00, which was for the total cost of the project.¹³⁵ The loan was eventually increased to \$4,365,000.00.¹³⁶ The only reference to such an arrangement was a brief comment by Richard Riley, the president of G&O, regarding promises made by Winlock after they ceased making payments.¹³⁷

Second, continuing to work was not G&O's only option. As evidenced by this case, G&O could have stopped work and asserted its lien under Chapter 60.04 RCW. G&O also failed to invoke its rights under RCW 60.04.211.¹³⁸ Under that statute, a contractor who fails to receive payment may notify the lender offering construction financing of the balance due. Upon receipt, the lender must withhold from subsequent draws the amount claimed as due.¹³⁹ By failing to notify Venture Bank, G&O missed yet another opportunity to resolve the issue. Instead G&O continued to run up its fees. At some point over those fifteen months G&O's failure to pursue other remedies became unreasonable.

Most troubling about the trial court's ruling, though, is that the court appeared to use Venture Bank's unrelated conduct as justification for excusing G&O's unreasonable response to Winlock's default. The court

¹³⁵ Supp. CP at 227; VRP (Sept. 8, 2011) at 13:1-14, 17:22-25

¹³⁶ See Supp. CP at 238, ¶ 2.

¹³⁷ VRP (Sept. 7, 2011) at 67:14-68:3.

¹³⁸ VRP (Sept. 7, 2011) at 115:16-116:2.

¹³⁹ RCW 60.04.221(5).

offered the following additional justification for denying First-Citizens' affirmative defense:

In any event, had Venture Bank requested a subordination agreement,¹⁴⁰ which they chose not to do, Venture Bank would have resolved the whole matter before a problem developed.¹⁴¹

G&O's counsel argued that Venture Bank should have obtained a subordination agreement from G&O prior to executing its Deed of Trust in order to avoid the Claim of Lien. Whether Venture Bank should have obtained a subordination agreement bears no relationship to G&O's actions post-default. The affirmative defense of failure to mitigate is based on the injured party's response to the breach of contract. It appears that the trial court used its dissatisfaction with Venture Bank's loan practices¹⁴² to excuse G&O from any liability for its unreasonable post-default response. This was inappropriate and erroneous.

There was not substantial evidence to support the trial court's findings on mitigation by G&O. No reasonable excuse was provided for G&O's election to keep working for fifteen months post-default or its failure to pursue other available remedies, to include an earlier claim of

¹⁴⁰ Counsel for G&O argued that Venture Bank should have obtained agreements from all contractors involved in the Winlock Development subordinating their potential liens to the bank's Deed of Trust. VRP (Sept. 8, 2011) at 131:25-132:8.

¹⁴¹ CP at 1242.

¹⁴² VRP (Sept. 8, 2011) at 48:6-49:7 (Chris Heck testified that Venture Bank relied on its title insurance policy and a written letter from Winlock stating that all contractors were paid in full and no additional work was performed in the previous 90 days – Supp. CP 225).

lien. G&O's response was unreasonable, and its damage award should be reduced accordingly.

D. THE TRIAL COURT ERRED BY DENYING FIRST-CITIZENS REQUEST FOR AN OFFSET BASED ON G&O'S FAILURE TO ASSERT OR ENFORCE ITS CLAIM OF LIEN AGAINST SIX LOTS IN THE WINLOCK DEVELOPMENT.

The trial court's Findings of Fact No. 8-10 are not supported by substantial evidence in that there was no evidence presented to justify or explain G&O's (i) release of its Claim of Lien against Grand Prairie Plaza, LLC for less than the lots' pro-rata share of the lien balance, and (ii) conscious decision not to lien three lots owned by Rockmann Development, LLC that were potential subject to the lien. G&O released or never asserted a claim of lien against six Phase I lots owned by Grand Prairie Plaza, LLC and Rockmann Development, LLC, entities related to Winlock and owned by Allen Olson. All of these lots were part of Phase I of the development, which received a disproportionate share of the professional services provided by G&O. The trial court denied First-Citizens' request for an offset based on G&O's failure to include these lots in its lien foreclosure.

G&O's Claim of Lien did not include Lots 1, 2, or 3 of Phase I.¹⁴³ Although those lots were part of the Winlock Development, and subject to a potential lien claim, G&O received no compensation for their exclusion. G&O consciously decided to exclude those three lots without any payment

¹⁴³ Supp. CP at 230-33; VRP (Sept. 7, 2011) at 121:11-122:8.

or agreement with their owner.¹⁴⁴ Interestingly, those properties were the only lots containing houses, and they remain unsold and owned by Rockmann Development, LLC.¹⁴⁵

After this action was filed, G&O reached settlement with Grand Prairie Plaza, LLC,¹⁴⁶ another entity owned by Allen Olson.¹⁴⁷ Grand Prairie Plaza, LLC owns Lots 7, 17, and Tract A, which are part of Phase I. These lots were released in exchange for a single payment of \$4,000. No explanation was provided by G&O as to why it elected to settle with Grand Prairie Plaza, LLC for only \$4,000.

Phase I was responsible for a disproportionate share of the professional services rendered by G&O. According to G&O's records, the fees incurred by G&O for Phase I constitute 42.61% of all fees incurred by G&O in the Winlock Subdivision.¹⁴⁸ The six lots released by G&O constitute 34.98% of the buildable area within Phase I.¹⁴⁹

In exchange for the six lots waived or released, G&O received payment of only \$4,000. Based on the above calculations, the reasonable share of G&O's fees attributable to these lots is approximately

¹⁴⁴ VRP (Sept. 7, 2011) at 122:2-8.

¹⁴⁵ VRP (Sept. 7, 2011) at 121:23-122:6, 123:6-8.

¹⁴⁶ VRP (Sept. 7, 2011) at 123:9-22.

¹⁴⁷ CP at 1034-37.

¹⁴⁸ Supp. CP at 125 (\$173,743.76 in Phase I fees divided by total fees of \$407,713.45).

¹⁴⁹ Supp. CP at 254. Tract A is a commercial lot, and Tract B is an unbuildable stormwater retention pond. Supp. CP 253. As such, Phase I lots include 166,449 square feet of buildable space. The lots waived or released by G&O total 58,223 square feet of buildable space.

\$23,217.27.¹⁵⁰ First-Citizens requested an offset equal to the amount G&O should have received in exchange for waiving or releasing the six lots: \$19,217.27,¹⁵¹ plus an appropriate reduction in pre-judgment interest.

The trial court denied this request without offering any significant justification. With respect to the settlement lots, the court simply stated that the \$4,000 payment was “reasonable under the circumstances”, but did not explain what circumstances contributed to the court’s findings.¹⁵² The court’s ruling was particularly curious as G&O never offered a justification whatsoever for the \$4,000 settlement amount.

As to the waived lots, the court pointed to the lack of any authority requiring that a lien be asserted against 100% of the property on which services were provided under RCW 60.04.¹⁵³ This rationale appears to ignore the mitigation of damages defense asserted by First-Citizens. It also assumes that each separate and distinct property subject to a claim of lien is joint and severally liable for the entire balance due on the contract forming the basis for the claim of lien. This is contrary to RCW 60.04.131, which requires a party asserting a claim of lien against two or more separate pieces of property to designate in the notice of claim of lien the amount due on each piece of property. As G&O failed to attribute a cost to each parcel claimed, a credit should be granted against the

¹⁵⁰ Based on 42.61% of fees associated with Phase I x 34.98% of the buildable area of Phase I x the remaining balance due of \$155,755.59.

¹⁵¹ \$23,217.27 minus the \$4,000 settlement payment.

¹⁵² CP at 1242.

¹⁵³ *Id.*

judgment herein for the reasonable costs attributable to the lots waived or released.

G&O's election to waive and release six lots without receiving appropriate compensation appears to favor one creditor over another without justification. It also leaves First-Citizens without a remedy to pursue the other property owners for its disproportionate share of the judgment. The trial court's justification for its holding is not supported by substantial evidence or consistent with the applicable law. As such, First-Citizens respectfully requests that this Court reverse that ruling and grant First-Citizens an offset against the judgment of \$19,217.27, plus an appropriate reduction in pre-judgment interest.

E. FIRST-CITIZENS IS ENTITLED TO ATTORNEY FEES ON APPEAL.

If First-Citizens prevails, it is entitled to attorney fees and costs pursuant to RAP 18.1 and RCW 60.04.181(3). G&O intervened in this action, and named First-Citizens as a third party defendant, to establish the priority of its lien as against First-Citizens and other defendants. If this Court rules in favor of First-Citizens, the Court may award First-Citizens its reasonable attorney's fees and costs pursuant to RCW 60.04.181(3). As the prevailing party at the trial court level, G&O was awarded its attorney's fees and costs pursuant to RCW 60.04.181(3).¹⁵⁴ Should this Court reverse the trial court's decision in favor of First-Citizens, First-

¹⁵⁴ CP at 1255, ¶3.

Citizens is entitled to an award of its reasonable attorney's fees and costs pursuant to RCW 60.04.181.¹⁵⁵

V. CONCLUSION

Based on the forgoing argument and authority, the trial court committed reversible error. First-Citizens respectfully requests that this Court reverse the decision of the trial court by determining that the 2006 Contracts were separate and distinct from the fully paid and unconnected 2005 Contracts for the purposes of G&O's Claim of Lien. As such, the Claim of Lien was foreclosed by Venture Bank's foreclosure of its prior and superior Deed of Trust.

Should this Court disagree with this interpretation of the contracts, First-Citizens requests that this Court (i) reverse the trial court on G&O's failure to mitigate damages, (ii) grant First-Citizens an offset against the judgment based on the waived and released lots.

First-Citizens further requests an award of its reasonable attorney fees on appeal pursuant to RCW 60.04.181(3).

RESPECTFULLY SUBMITTED this 16th day of April, 2012.

EISENHOWER & CARLSON, PLLC

By: 

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Attorneys for Appellant
First Citizens Bank & Trust Company

¹⁵⁵ RCW 60.04.081(4).

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of April, 2012, I caused all parties hereto to be served with the foregoing *Appellant's Amended Opening Brief* and this *Certificate of Service* by directing delivery as follows:

By U.S. first-class mail, postage prepaid, and by e-mail, on March 16, 2012, to Attorney for Respondent:

Mr. Norman C. Dick
Walstead Mertsching, PS
Civic Center Building, 3rd Floor
1700 Hudson Street
P.O. Box 1549
Longview, WA 98632
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I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16th day of April, 2012, at Tacoma, Washington.


Gayle Herrmann

APPENDIX

RCW 60.04.011

(2) "Contract price" means the amount agreed upon by the contracting parties, or if no amount is agreed upon, then the customary and reasonable charge therefor.

RCW 60.04.021

Except as provided in RCW 60.04.031, any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.

RCW 60.04.011

(2) "Contract price" means the amount agreed upon by the contracting parties, or if no amount is agreed upon, then the customary and reasonable charge therefor.

RCW 60.04.061

The claim of lien created by this chapter upon any lot or parcel of land shall be prior to any lien, mortgage, deed of trust, or other encumbrance which attached to the land after or was unrecorded at the time of commencement of labor or professional services or first delivery of materials or equipment by the lien claimant.

RCW 60.04.131

In every case in which the notice of claim of lien is recorded against two or more separate pieces of property owned by the same person or owned by two or more persons jointly or otherwise, who contracted for the labor, professional services, material, or equipment for which the notice of claim of lien is recorded, the person recording the notice of claim of lien shall designate in the notice of claim of lien the amount due on each piece of property, otherwise the lien is subordinated to other liens that may be established under this chapter. The lien of such claim does not extend beyond the amount designated as against other creditors having liens upon any of such pieces of property.

RCW 60.04.221

(5) After the receipt of the notice, the lender shall withhold from the next and subsequent draws the amount claimed to be due as stated in the notice. Alternatively, the lender may obtain from the prime contractor or borrower a payment bond for the benefit of the potential lien claimant in an amount sufficient to cover the amount stated in the potential lien claimant's notice. The lender shall be obligated to withhold amounts only to the extent that sufficient interim or construction financing funds remain undisbursed as of the date the lender receives the notice.

RCW 60.04.226

Except as otherwise provided in RCW 60.04.061 or 60.04.221, any mortgage or deed of trust shall be prior to all liens, mortgages, deeds of trust, and other encumbrances which have not been recorded prior to the recording of the mortgage or deed of trust to the extent of all sums secured by the mortgage or deed of trust regardless of when the same are disbursed or whether the disbursements are obligatory.