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COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

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

Third Party Defendant/Appellant,

vs.

GIBBS & OLSON, INC.,
a Washington corporation,

Third Party Plaintiff/Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Appellant FIRST CITIZEN'S BANK AND TRUST COMPANY ("First-Citizens") appeals a Lewis County Superior Court judgment in favor of Respondent GIBBS & OLSON, INC. ("G&O"), foreclosing a mechanic's lien against property previously owned by Winlock Properties, LLC ("Winlock") for the contract price of work done, attorney fees and costs. First-Citizens gained an interest in the land when it acquired Venture Bank (hereinafter referred to collectively with First-Citizens as "the Bank"), which had a deed of trust on the same property. The issues on appeal are whether the trial court correctly determined that: 1) G&O's RCW 60.04 lien claim had priority over the Bank's deed of trust; 2) G&O had reasonably mitigated its damages; 3) the grant of an offset to the Bank in the exact amount of a settlement reached between G&O and Grand Prairie Plaza, LLC, was reasonable; and 4) no further offset was necessary based on the fact that G&O did not lien 100% of the property worked upon.

II. STATEMENT OF THE CASE

Winlock owned 50 acres of pastureland in Lewis County which it wanted to develop into a 200 lot residential subdivision.¹ Winlock and G&O entered into a contract, dated July 22, 2005, for G&O to provide engineering

¹ RP (Sept. 7) at 38-41, 44-46.

services for the 200 lot Grand Prairie Subdivision (“Project”).² The contract required G&O to provide preliminary design work for the entire 50 acre Project including: all streets and alleys, the entire water system, all storm drains, and the entire sewer system.³ The contract also required G&O to help obtain the required government approvals for the entire Project and provide final design work and other engineering work on portions of the Project.⁴ Additionally, the July 22, 2005 contract contained estimates for the cost of completion of design work for the entire Project (which was planned as one continuous project, broken into five phases) together with a description of the further engineering services necessary to complete the entire Project.⁵

Trial testimony made it clear that the July 22, 2005 contract was designed to be the framework for the entire Project, with additional Project work to be added by amendments.⁶ Trial witnesses testified that it was common in the industry for contracts on such projects to be handled in this manner.⁷ In accord with this industry custom, the July 22, 2005 contract provided that “Gibbs & Olson shall prepare an amendment to the Agreement for the completion of the construction phase and the operational phase

² *Id.* at 40-41; 43-46; Ex. at 9-26.

³ Ex. at 9-11, 13-14; RP (Sept. 7) at 43-45.

⁴ RP (Sept. 7) at 52.

⁵ Ex. at 11, 26.

⁶ RP (Sept. 7) at 46; *Id.* at 130-132, 134-35, 137.

⁷ *Id.* at 54-55.

services.”⁸ In fact, the Project did move forward in one continuous fashion pursuant to the July 22, 2005 contract, as amended.⁹

From August 2005 and continuing throughout 2005, Winlock provided G&O’s engineering work regarding the entire project to the Bank as part of Winlock’s application for a \$3.7 million loan to complete the Project.¹⁰ This made it clear to the Bank that G&O was the Project engineer and had already begun work on the Project.¹¹

On January 10, 2006, the Bank recorded a deed of trust against the entire 50 acre parcel, securing the Bank’s \$3.7 million Project loan to Winlock.¹² The Bank never inquired about any aspect of the July 22, 2005 contract.¹³ Nor did the Bank obtain a subordination agreement from G&O, or take any other steps to see that its deed of trust had priority over G&O’s lien rights under RCW 60.04, which steps would have been consistent with the standard in the industry for lenders seeking priority.¹⁴ When the Bank recorded its deed of trust on January 10, 2006, G&O was still doing work on the Project under the July 22, 2005 contract.¹⁵ As the project moved forward

⁸ Ex. at 11.

⁹ RP (Sept. 7) at 65-66.

¹⁰ CP at 1239.

¹¹ *Id.* at 1238-39.

¹² *Id.* at 1241.

¹³ RP (Sept. 8) at 62.

¹⁴ *Id.* at 78-79.

¹⁵ RP (Sept. 7) at 98; CP at 1241.

the Bank continued to pay G&O's bills out of Winlock's loan for many months per Winlock's request.¹⁶

From June 2005 through February 2008, G&O continued to provide engineering services under the terms of the July 22, 2005 contract, including five amendments to the contract.¹⁷ The five written amendments were entered into between April 28, 2006 and September 2006.¹⁸ Work started on the first amendment, per oral instructions from Winlock in February 2006, even though work continued under the terms of the original July 22, 2005 contract without regard to the amendments, through at least June 2006, long after the first three amendments were entered into on April 28, 2006.¹⁹ The amendments were all in furtherance of the Project and were for work generally described in the July 22, 2005 contract, but more specifically described in the amendments, together with an agreed price for the work.²⁰ The first sentence of each of the five amendments stated, "This Amendment revising the Scope of Work, Schedule, and Budget for Engineering Services is hereby attached to and made a part of the Agreement for Engineering Services dated July 22, 2005, between Winlock Properties, LLC and Gibbs

¹⁶ CP at 1239-40.

¹⁷ *Id.* at 1236, 41; RP (Sept. 7) at 62-66, 70-72, 75-76, 142-43.

¹⁸ RP (Sept. 7) at 55, 62-65, 142-43.

¹⁹ *Id.* at 101; *Id.* at 99; Ex. at 27.

²⁰ RP (Sept. 7) at 62-66, 142-43; Ex. at 27-39.

and Olson, Inc.”²¹ Per trial testimony both G&O and Winlock considered the July 22, 2005 contract and its five amendments to all be part of one contract and both parties performed all of the work as one Project under one contract, the July 22, 2005 contract.²²

Winlock agreed that G&O had performed well and was entitled to be paid.²³ But Winlock stopped paying when the Bank restructured the loan, rebudgeting monies previously allocated to engineering to another budget category.²⁴ G&O continued working for a time based on Winlock’s assurances of payment.²⁵ Finally, on March 7, 2008, G&O recorded a mechanics’ lien with the Lewis County Auditor pursuant to RCW 60.04.²⁶

In March 2008, an RCW 60.04 lien foreclosure action was filed by another Project contractor, SCOTT’S EXCAVATING VANCOUVER, LLC.²⁷ G&O intervened and filed cross claims against Winlock and the Bank for lien foreclosure.²⁸ While G&O’s cross claims were pending, the Bank foreclosed its deed of trust with Winlock.²⁹

²¹ Ex. at 28, 31-32, 36-37.

²² RP (Sept. 7) at 65-66; *Id.* at 142-3.

²³ *Id.* at 142; RP (Sept. 8) at 66.

²⁴ RP (Sept. 8) at 66; RP (Sept. 7) at 144-45.

²⁵ RP (Sept. 7) at 67, 119, 145.

²⁶ RP (Sept. 7) at 73, 75; Ex. at 230-33.

²⁷ CP at 1-10.

²⁸ *Id.* at 66-73.

²⁹ *Id.* at 1241; Ex. at 238-41, 245-47.

The Bank took an aggressive stance defending against G&O's lien claim.³⁰ As the trial court judge stated following trial,

“It appears to me that the bank's strategy was to make this litigation so expensive that Gibbs & Olson would be forced to settle or just give up as its own legal fees were too high to continue.”³¹

Even though the Bank had based its loan on G&O's engineering work and had been writing checks for many months to G&O out of Winlock's loan funds, the Bank denied nearly every allegation in G&O's cross claim, including the existence of G&O and that G&O had a contract with Winlock.³² The two main issues for trial were: 1) the Bank's claim, now abandoned on appeal, that it did not even know that G&O was involved with the Project until after it had loaned \$3.7 million secured by 50 acres of pasture land; and 2) the Bank's claim, unsupported by any evidence, that the July 22, 2005 contract as amended pursuant to five written amendments was not one contract but was instead six completely separate contracts.

After trial on September 7 and 8, 2011, the court ruled for G&O on all issues.³³ The trial court held in part as set forth below.

³⁰ RP (Oct. 11) at 15.

³¹ *Id.* at 27.

³² CP at 80.

³³ RP (Sept. 8) at 134.

3. The July 22, 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 22, 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 GIBBS & OLSON from approximately June 2005 through February 2008, was done in furtherance of the original July 22, 2005 Contract, which contract created a single project with overlapping phases and a continuing course of work by GIBBS & OLSON from the original July 22, 2005 Contract work through the breach of contract by WINLOCK PROPERTIES.

4. The attempt by FIRST-CITIZEN'S to pick the amendments apart and to make them appear to be separate contracts is not what occurred here...

15. The standard in the industry for protecting a deed of trust such as Venture Bank had in this instance with WINLOCK PROPERTIES from liens pursuant to RCW 60.04, was for the lender to have requested a subordination agreement from professional service providers... For reasons that remain a mystery, Venture Bank chose not to do this. ...

III. ARGUMENT

A. General Principles On Review

“An appellate court reviews a trial court’s findings of fact for substantial evidence in support of the findings.” *Merriman v. Cokeley*, 168

Wn.2d 627, 631 (2010). “Appellate review of a conclusion of law, based upon findings of fact, is limited to determining whether a trial court’s findings are supported by substantial evidence, and if so, whether those findings support the conclusion of law.” *Am. Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222 (1990). The appellate court’s “examination of the record goes no further than to determine whether there is substantial evidence to sustain the trial court’s findings.” *Brown v. Superior Underwriters*, 30 Wn. App. 303, 306 (1980). “Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.” *Id.*

“There is a presumption in favor of the trial court’s findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence.” *First Am. Title Ins. Co. v. Liberty Capital Starpoint Equity for Fund, LLC*, 161 Wn. App. 474, 497 (2011). “We defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses.” *Id.* “We review all reasonable inferences in the light most favorable to the prevailing party.” *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 104 (2011).

Appellate review of a purely legal issue is de novo. *In re Marriage of Wright*, 147 Wn.2d 184, 189 (2002). However, an appellate court “will uphold a conclusion of law if the trial court’s findings of fact supports it.” *Burrill v. Burrill*, 113 Wn. App. 863, 870 (2002).

B. Application And Proper Construction Of RCW 60.04

The materialmen’s lien statute provides that “ ‘RCW . . . 60.04.011 through 60.04.226 . . . are to be liberally construed to provide security for all parties intended to be protected by their provisions.’” *Williams v. Athletic Field, Inc.*, 172 Wn.2d 683, 694-95 (2011) (quoting RCW 60.04.900). In contrast, the Bank has “relied on the oft-stated principle that mechanics’ liens are strictly construed because they are in derogation of the common law.” *Athletic Field*, 172 Wn.2d at 695; *see* Appellant’s Brief, p. 18 (citing *Lumberman’s of Wash., Inc. v. Barnhardt*, 89 Wn. App. 283, 286 (1997)). However, the Washington Supreme Court in *Athletic Field* recently determined that

the appropriate way to view the competing canons of strict and liberal construction is found in our early cases. The strict construction rule, at its origin, was invoked to determine whether persons or services came within the statute's protection. Expanding the rule of strict construction beyond this inquiry effectively nullifies RCW 60.04.900.

172 Wn.2d at 696. “To the extent *Lumberman’s* or other cases suggest that the statute’s mandate of liberal construction has been supplanted by a common law rule of strict construction, we disapprove them.” *Id.* at 697.

Engineering and surveying services are expressly included in the statutory definition of professional services. RCW 60.04.011(13). G&O is an engineering and surveying firm and provided those services to Winlock for the development of a bare piece of ground into a 200-lot residential subdivision; i.e., for the improvement of real property.³⁴ It is undisputed that G&O ceased providing services in February 2008 and filed a Claim of Lien on March 7, 2008, well within the statutory 90-day period.³⁵ RCW 60.04.091; *John Morgan Const. Co., Inc. v. McDowell*, 62 Wn. App. 79, 83 (1991). G&O filed its cross-claims on July 18, 2008, well within eight months of recording its claim of lien.³⁶ RCW 60.04.141. The property owner, Winlock, and the Bank were served with the lawsuit at the time of filing.³⁷ G&O is thus a party “intended to be protected” by RCW 60.04, and the statute should be liberally construed to protect its lien claim.³⁸ *Athletic Field*, 172 Wn.2d at 697.

³⁴ RP (Sept. 7) at 36, 40-42.

³⁵ *Id.* at 70-73; Ex. at 230-33.

³⁶ CP at 66-78; Ex. at 230-33.

³⁷ Ex. at 234-37; CP at 72; *Id.* at 1241; RP (Sept. 7) at 15.

³⁸ RP (Sept. 8) at 136.

C. The Trial Court's Finding That G&O's RCW 60.04 Lien Had Priority Over The Deed Of Trust Should Be Affirmed

G&O maintains that this case is fundamentally very simple. A professional service provider has a lien against the property worked upon for the "contract price" of those professional services. RCW 60.04.021. "Contract price" is defined by statute as "the amount agreed upon by the contracting parties." RCW 60.04.011(2). Such liens are "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." RCW 60.04.061.

The trial court found that G&O provided professional services at the instance of the property owner, Winlock, who has always agreed that the work was done well and that the amount claimed by G&O is the amount Winlock properly owed.³⁹ G&O began working on the Project in 2005 and worked until February 2008.⁴⁰ The Bank's deed of trust was recorded on January 10, 2006, after G&O's work commenced on the Project.⁴¹ All of the above were either not appealed or are supported by substantial evidence and thus are verities on appeal.⁴² *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42

³⁹ *Id.* at 66; RP (Sept. 7) at 142.

⁴⁰ CP at 1237-38; RP (Sept. 7) at 58; *Id.* at 69-73, 75-76. .

⁴¹ CP at 1241.

⁴² Compare Appellant's Brief, 1-4.

(2002); *Miller v. City of Tacoma*, 138 Wn.2d 318, 323 (1999). Based on these findings of fact, the trial court's ruling that G&O's lien was prior under RCW 60.04.061 should be affirmed. See *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 867-71 (2011), as amended (July 11, 2011), rev. den., 172 Wn.2d 1025 (2011); see also *A.A.R. Testing Lab., Inc. v. New Hope Baptist Church*, 112 Wn. App. 442, 448-49 (2002).

However, on appeal, as at trial, the Bank attempts to "pick apart" the contracts, trying to contradict the intent of the parties and the legislative intent of RCW 60.04, relying on inapplicable case law and at times on argumentation alone, without citation to authority.⁴³ Thus, a more in-depth discussion of RCW 60.04, the related case law, and basic contractual principles is necessary to meet the Bank's arguments here.

"Mechanics' or materialmen's liens are a statutory exception to the general rule of first in time, first in right priority between creditors." *A.A.R. Testing Lab.*, 112 Wn. App. at 448. Such liens "may be senior to interests actually recorded prior to the recording of the mechanics' or materialmen's lien but after commencement of work on the project." *Id.* "During the period of time between commencement of work and actual recording of the claim of lien, a mechanics' or materialmen's lien has an 'off-record' priority." *Id.*

⁴³ See RP (Sept. 8) at 135.

at 448-49. “When a claimant follows the requirements of RCW Chapter 60.04, including the timely recording of a claim of lien, and then commences an enforcement action within 8 months of the claim of lien, the lien binds the property from the time labor was first performed.” *John Morgan*, 62 Wn. App. at 83.

Since “a properly perfected lien relates back to the commencement of labor,” the central question in Chapter 60.04 RCW cases is often whether work was done on the contract within 90 days of the recording of the claim of lien. *Id.* at 85. When the work done is within the express terms of the parties’ original agreement, the result is simple--the RCW 60.04 lien has priority over all other encumbrances relating back to the first day services, labor or materials were furnished. *Id.* at 83-85. The parties to the July 22, 2005 Agreement all believed, and the trial court found, that the original contract and its amendments formed a single contract relating to one overall project.⁴⁴ Given all the evidence at trial of this effect and the trial court’s finding that there was one Project and one contract, there should be no question that G&O’s lien claim has priority here under RCW 60.04.

Also, it is common in Chapter 60.04 RCW cases for the lien claimant to have done work outside the express terms of the original contract, where

⁴⁴ RP (Sept. 7) at 63-66; *Id.* at 136-43.

the lien would be timely if the 90-day time period ran from the date of the later work, but not if timed from the last day of work under the original express terms of the agreement. See *Flint v. Bronson*, 197 Wn. 686, 690-91 (1939); see also *Kirk v. Rohan*, 29 Wn.2d 432, 436-37 (1947). For such situations, Washington courts have developed the rule that:

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.

Hopkins v. Smith, 45 Wn.2d 548, 552 (1954). “In short, if the work done or material furnished at the request of the owner, is in furtherance of the original contract, then the time for filing the lien is extended.” *Kirk*, 29 Wn.2d at 437.

If Amendments 1-5 were amendments to the July 22, 2005 agreement and thus were part of that contract, as the amendments themselves provide, as the contracting parties understood, and as the trial court found, then G&O’s February 2008 work clearly would relate back to the commencement of labor, giving its lien claim priority over all subsequent encumbrances.⁴⁵

⁴⁵ CP at 1237-38.

John Morgan, 62 Wn. App. at 83-85. If the amendments somehow were not amendments to the July 22, 2005 contract, then the question is whether substantial evidence supports the trial court's finding that G&O did work at the owner's instance in furtherance of the July 22, 2005 contract within 90 days of the filing of G&O's lien claim.⁴⁶ *Kirk*, 29 Wn.2d at 437. In that case G&O's claims would also have priority over the Bank's claims. *Id.*

1. Pursuant to Normal Contract Principles, the Contract as Amended Between Winlock and G&O was a Single Enforceable Agreement.

“The meaning of contract provisions is a mixed question of law and fact because we ascertain the intent of the contracting parties “ ‘by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.’” *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 431, n. 9 (2008) (quoting *Berg v. Hudesman*, 115 Wn.2d 657, 667 (1990)). “As a general rule, [courts] consider the parties’ intentions questions of fact.” *Wm. Dickson Co. v. Pierce County*, 128 Wn. App. 488, 493 (2005). Thus, “[i]nterpretation of a contract is generally a determination of fact; ‘it is the process that ascertains the

⁴⁶ *Id.* at 1238, 1241.

meaning of a term by examining objective manifestations of the parties' intent.” *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 33 (2005), *rev. den.*, 156 Wn.2d 1030 (2006) (quoting *Denny’s Restaurants, Inc. v. Security Union Title Ins. Co.*, 71 Wn. App. 194, 201 (1993)). “Construction is a question of law; it is the process that determines the legal consequences that follow from a contract term.” *Denny’s Restaurants*, 71 Wn. App. at 201. “In order to interpret the original meaning of a contract term, extrinsic evidence is admissible, even if the term appears unambiguous.” *Id.*

The provisions of the July 22, 2005 agreement, the language contained in each of the five amendments, and the conduct of the parties all confirm that both G&O and Winlock intended the amendments to modify and become part of the original July 2005 agreement. Here, the trial court found that the contracting parties, G&O and Winlock, intended for the amendments to be part of one single overall contract for work.⁴⁷ Viewing the agreement “as a whole and from the intent of the parties and not what the bank would like it to be,” the trial court held the agreement between Winlock and G&O was “one contract with several amendments.”⁴⁸ “The original July 22, 2005 Contract specifically provided for amendments to it, and every one of the

⁴⁷ CP at 1237.

⁴⁸ RP (Sept. 8) at 135.

amendments specifically stated that it was an amendment to the original contract.”⁴⁹ The “parties to the contract performed over the life of the contract” reflecting the reality that it “was one contract with five subsequent amendments rather than a series of independent contracts” creating “a single project with overlapping phases and a continuing course of work.”⁵⁰

The Bank offers no authority that amendments, so designated and performed as modifications to a single, original contract, are in fact separate contracts.⁵¹ The Bank is the *only* entity to refer to the contractual relationship between G&O and Winlock as “2005 Contracts” and “2006 Contracts,” as opposed to one agreement with five amendments thereto.⁵² The Bank is not one of the contracting parties. The Bank presented no evidence at trial as to the contracting parties’ intent.⁵³ As the trial court found, the “attempt by FIRST-CITIZEN’S to pick the amendments apart and to make them appear to be separate contracts is not what occurred here.”⁵⁴

“Clear and unambiguous contracts are enforced as written.” *Grey v. Leach*, 158 Wn. App. 837, 850 (2010). Each one of the five amendments

⁴⁹ CP at 1237; Ex. at 9-39; RP (Sept. 7) at 64; *Id.* at 142-43.

⁵⁰ CP at 1237; RP (Sept. 7) at 65; *Id.* at 143.

⁵¹ Appellant’s Brief, pg. 19-21.

⁵² RP (Sept. 7) at 63-66; *Id.* at 137; *Id.* at 143.

⁵³ RP (Sept. 8) at 114.

⁵⁴ CP at 1237.

specifically states in its first paragraph that the amendment “is hereby attached to and made a part of the Agreement for Engineering Services dated July 22, 2005.”⁵⁵ The July 22, 2005 contract includes a “Future Amendments” section instructing G&O to prepare an amendment to the agreement “for completion of the construction phase and operational phase services.”⁵⁶ Exhibit A to that July 22, 2005 contract provides for amendments to define “Preparation of final design and construction documents for the remaining four phases” as well as “engineering work necessary to carry the project through construction of the facilities and closeout of the project.”⁵⁷

“The practical application of the contract, when acted on by both parties, frequently provides an excellent means of understanding the manner in which the parties intended the ambiguous language or contract to be interpreted or construed.” *Prager’s, Inc. v. Bullitt Co.*, 1 Wn. App. 575, 582 (1969). “If the parties have given the contract a reasonable interpretation or construction, its meaning should be adopted.” *Id.*

The plain language of the agreement and its amendments is supported by the testimony of the contracting parties. G&O’s principal, Richard Riley,

⁵⁵ Ex. at 27-39 (emphasis added); *see also* CP at 1237.

⁵⁶ Ex. at 11.

⁵⁷ *Id.* at 14.

testified that the language providing that each amendment “is hereby attached to and made a part of the agreement for engineering services dated July 22, 2005” was included because the Project “was always considered as a single contract and that as we did work, additional work on the next portion of the project, the 200-lot project, we’d prepare an amendment and make it a part of the contract.”⁵⁸ The same language was used in all five of the amendments, “indicating that all five of them were amendments and part of that July 22nd, 2005 contract.”⁵⁹ Winlock’s Project Manager, Tom Ossinger, testified that the July 22, 2005 contract and its five amendments “was treated as one contract, both conceptually and on an accounting basis.”⁶⁰ He explained that the parties “intended that it would be an ongoing continuous project.”⁶¹ “So ultimately there would be a contract and numerous amendments to it to take those phases one phase at a time.”⁶²

In fact, testimony showed that it is a “typical practice in the industry to have an initial base contract for the entire project followed by subsequent amendments.”⁶³ From Winlock’s observation, G&O treated the agreement “as a continuation of the original contract by these amendments, not as

⁵⁸ RP (Sept. 7) at 63-64.

⁵⁹ *Id.* at 64.

⁶⁰ *Id.* at 143.

⁶¹ *Id.* at 132.

⁶² *Id.* at 137.

⁶³ *Id.* at 81.

individual contracts.”⁶⁴ G&O made the same observation about Winlock’s performance of the contract.⁶⁵ Therefore, given the testimony of the parties, their performance, and the express provisions of the original agreement and of the five amendments thereto, there is no question that the intent of the parties was to make their agreement the single July 22, 2005 contract, as amended.⁶⁶ *Prager’s*, 1 Wn. App. at 582.

The trial court erred in giving effect to the parties’ intent only if the contracting parties could not have agreed to the amendments as a matter of law. *Car Wash Enterprises, Inc. v. Kampanos*, 74 Wn. App. 537, 543-44 (1994) (“It is well-settled that parties may incorporate into a contract any provision that is not illegal or against public policy.”) “In the absence of express statutory language evidencing a legislative intent to prohibit” modification of professional services agreements subject to Chapter 60.04 RCW, the single amended contract between G&O and Winlock is neither illegal nor contrary to public policy. *Id.* at 543-44 (no legislative intent to prohibit allocation of risk of MTCA liability); *see also Redford v. Seattle*, 94 Wn.2d 198, 206-207 (1980) (no intent to prohibit “the making of indemnity agreements which exclude the indemnitee’s own negligence”). The trial

⁶⁴ *Id.* at 143.

⁶⁵ *Id.* at 46, 66.

⁶⁶ CP at 1237-38.

court gave effect to the manifested intentions of the contracting parties, and should be affirmed.⁶⁷ *Prager's*, 1 Wn. App. at 582.

2. Construing the Agreement Between WINLOCK and G&O Under RCW 60.04 and Related Case Law, Work was Done in Furtherance of the Original Contract Within 90 Days of the Filing of G&O's Claim of Lien.

Work, even if not within the express terms of the parties' original agreement, that is done 1) at the owner's instance and 2) in furtherance of the original contract, extends the time for filing a lien claim. *Kirk*, 29 Wn.2d at 437; *Bradley v. Donovan-Pattison Realty Co.*, 84 Wn. 654 (1915); *Friis v. Brown*, 37 Wn.2d 457, 460 (1950); *Flint*, 197 Wn. at 690-91; *Intermountain Elec., Inc. v. G-A-T Bros. Const., Inc.*, 115 Wn. App. 384, 392-93 (2003); *Diversified*, supra, 161 Wn. App. 859. Courts have not allowed relation back of lien claims for extra work only when 1) the work was not done at the owner's request, or 2) the work was done "under a new and independent agreement, made after the original contract or continuing employment is ended," or 3) the work was solely "for the purpose of extending the time for the filing of the lien." *Intermountain*, 115 Wn. App. at 393; *Hopkins*, 45 Wn.2d at 552; *Kirk*, 29 Wn.2d at 435-36.

⁶⁷ CP at 1237-38

- a) *All of G&O's work was done at the request of the owner, Winlock, or its agents.*

Modifications of the original contract, so long as they are for work done at the instance of the owner's or owner's agent, can be enforced through the lien statutes. RCW 60.04.021; *see Henifin Const., L.L.C. v. Keystone Const.*, 136 Wn. App. 268, 275 (2006); *see also A.A.R. Testing*, 112 Wn. App. at 448-49 (allowing relation back of priority on an increase in the original contract from \$1.5 million to over \$2.9 million). The trial court found that all of G&O's work on the project was done at the instance of the property owner, Winlock.⁶⁸ It was the owner that requested that G&O go beyond the specific work provided for in the July 22, 2005 contract.⁶⁹ In general, Winlock would request work, G&O would do it, and the parties would catch up the paperwork later.⁷⁰ In every instance, G&O was "doing exactly what both parties agreed to do."⁷¹ Thus, the trial court's finding that all the work that G&O did on the project was done at the instance of the owner or the owner's agent is supported by substantial evidence. RCW 60.04.051; *see Henifin*, 136 Wn. App. at 275; *see also Diversified*, 161 Wn. App. at 870.

⁶⁸ *Id.* at 1238.

⁶⁹ RP (Sept. 7) at 56.

⁷⁰ *Id.* at 62-63.

⁷¹ *Id.* at 113.

- b) *Work was done in furtherance of the original contract within 90 days of filing the lien claim.*

For a notice of claim of lien to be timely filed, work must have been done in furtherance of the original agreement of the parties within 90 days of the filing. *Kirk*, 29 Wn.2d at 437; *Diversified*, 161 Wn. App. at 867 (citing RCW 60.04.091). Here, the trial court found that work was done in furtherance of the original agreement of the parties within the 90-day time frame.⁷² The Bank did not assign error to this finding and thus it is a verity on appeal.⁷³ *See Robel*, supra, 148 Wn.2d at 42. In any event, the trial court's determination that certain work done within 90 days of recording the claim of lien was "part of the job" under the parties' contract is a finding of fact that will be upheld if supported by substantial evidence. *Diversified*, 161 Wn. App. at 868-69 (evidence supported finding that contractor's return to clear slash was "part of the job," extending time for filing of claim of lien).

Here, substantial evidence supports the trial court's finding that G&O's work was done in furtherance of the original contract within 90 days of filing the lien claim on March 8, 2008.⁷⁴ For example, on January 25, 2008 G&O performed services regarding drawings for all phases of the

⁷² CP at 1241: "Said lien was recorded within 90 days of GIBBS & OLSON last providing work on the property"; *see id.* at 1237-38.

⁷³ Appellant's Brief, pg. 1-4.

⁷⁴ CP at 1237-38, 1241.

Project, including drawings for phase 1, which were drawings required by the original July 22, 2005 contract prior to the subsequent amendments.⁷⁵ Also on January 17, 2008, G&O was working with phase 1 plats, work also a part of the July 22, 2005 contract.⁷⁶ As an additional example, in the fall of 2007, a utility company on the project tore out some of G&O's survey stakes marking the corners of the lots.⁷⁷ These stakes must be in place before lots can be sold.⁷⁸ The work to reset the stakes was done in December of 2007 and January of 2008, within 90 days of March 8, 2008.⁷⁹ Resetting the stakes was a required service under Amendment 4.⁸⁰

Routine clean-up work, even without the owner's explicit request, was found to be "part of the job" for purposes of extending the time for filing a lien in *Diversified*, 161 Wn. App. at 870. In *Friis v. Brown*, where the contract was to install a furnace, the contractor's return to the property to make adjustments and light the furnace three months after installation was completed, was held to be in furtherance of the original contract. 37 Wn.2d at 460. Here, there was no substantial change in the plan--to turn a bare piece

⁷⁵ Ex. at 14 and 71; RP (Sept. 7) at 73.

⁷⁶ RP (Sept. 7) at 72; Ex. at 14 and 114.

⁷⁷ RP (Sept. 7) at 69.

⁷⁸ *Id.* at 69-70.

⁷⁹ *Id.* at 70-73; Ex. at 122.

⁸⁰ RP (Sept. 7) at 75-76; Ex. at 36.

of ground into a 200-lot subdivision.⁸¹ G&O worked toward the completion of this overall project entirely consistent with the provisions of the original July 2005 Agreement up until the moment it walked off the project in February 2008.⁸² Substantial evidence supports the trial court's finding that G&O's work on the Project with Winlock was entirely in furtherance of this agreement.⁸³ *Kirk*, 29 Wn.2d at 437; *Friis*, 37 Wn.2d at 460; *Diversified*, 161 Wn. App. at 867 (citing RCW 60.04.091).

c) *The Amendments to the July 22, 2005 agreement were not new and independent contracts, but rather modified and became part of the parties' original contract and were in furtherance of it.*

Amendments 1-5 to the original July 2005 agreement were not “new and independent contracts” “made after the original contract or continuing employment ended.” *See Hopkins*, 45 Wn.2d at 552. G&O's work on the Project continued from February 2005 to February 2008.⁸⁴ According to Richard Riley, the Project “was always considered as a single contract and that as we did work, additional work on the next portion of the project, the 200-lot project, we'd prepare an amendment and make it a part of the

⁸¹ RP (Sept. 7) at 46; *Id.* at 132-33, 138.

⁸² *Id.* at 62-65, 69-72, 76, 113, 118-19; CP at 1241.

⁸³ CP at 1237-38.

⁸⁴ RP (Sept. 7) at 58; *Id.* at 62-66; 69-73, 75-76.

contract.”⁸⁵ Therefore, work that was described in the amendments was necessary to complete the 200-lot subdivision as described in the original contract document.⁸⁶ Furthermore, the parties “wanted to set a contract that set a framework for the entire project.”⁸⁷ Thus, “the entire subdivision had to be laid out and designed as part of this contract” of July 22, 2005.⁸⁸

Cases where new and independent agreements were found are distinguishable from G&O’s work done at Winlock’s request. *See Kirk*, 29 Wn.2d at 435-37. For example, unlike the second agreement in *Hopkins*, the amendments and the oral agreements reached between G&O and Winlock were clearly and intimately connected to G&O’s previous work and the original July 2005 agreement.⁸⁹ *See Hopkins*, 45 Wn.2d at 552. In *Hopkins* the owner denied requesting the work to be done. *Id.* That the extra work was perhaps not even requested by the owner was specifically at issue in that case, and the holding should be read in that light. *Id.*

In contrast, there is no dispute here that all the work done was at Winlock’s request, and in fact, the owner’s agent, Tom Ossinger, confirmed that all the work done was requested by the owner.⁹⁰ The last work done here

⁸⁵ *Id.* at 63-64.

⁸⁶ RP (Sept. 7) at 64.

⁸⁷ *Id.* at 131.

⁸⁸ *Id.* at 46.

⁸⁹ *Id.*; *Id.* at 64-65; *Id.* at 137; *Id.* at 142-43.

⁹⁰ RP (Sept. 7) at 142; *Id.* at 155-56.

was more like that in *Kirk*, where, at the owner's request, the builders returned to add a downspout and lay tile for a garage they had already completed following flooding caused by heavy rain. 29 Wn.2d at 433-35. As in *Friis*, this later work in *Kirk* did not constitute a "new and independent contract," but rather was in furtherance of the original contract. *Id.* at 436-37; *Friis*, 37 Wn.2d at 460. Here, the amendments and additional oral orders by Winlock were a continuation or extension of the earlier work, and expressly incorporated and built upon the original July 2005 agreement.⁹¹ Moreover, the amended agreement and all other work requests formed part of one project under one overall contract, as is typical in the industry for such work.⁹² Therefore, as the trial court found, the work done in early 2008 was in furtherance of the overall agreement of the parties and at the owner's request, and thus making the March 7, 2008 claim of lien filed by G&O timely.⁹³ *Kirk*, 29 Wn.2d at 437.

A.A.R. Testing is an illustrative example of the application of these principles on similar facts. In *A.A.R. Testing*, the construction company, contracting directly with the owner, agreed to rebuild the owner's church buildings. 112 Wn. App. at 444. The contract price of \$1.5 million was

⁹¹ *Id.* at 61-64; *Id.* at 140, 42-43.

⁹² RP (Sept. 7) at 53-55; *Id.* at 81.

⁹³ CP at 1238, 1241.

changed by “disagreements, change orders, and required changes by the county.” *Id.* at 445. Afterward, the owner obtained two construction loans which were expressly conditioned on the release of all of the contractor’s lien claim rights. *Id.* at 446. These releases were signed by the contractor on six different occasions, but the lender never obtained a subordination agreement. *Id.* Ultimately, the contractor was paid \$2.2 million by the owner, but nearly \$700,000 remained unpaid. *Id.* at 447. Work was done after the final lien waiver and release, disagreements arose, and a claim to foreclose on a materialmen’s lien was eventually filed. *Id.*

The Court of Appeals reversed the trial court’s grant of summary judgment for the construction lenders, holding that even though the contractor had released its right for payment for work done prior to the date of the final lien release, payment for work done after that date “was still secured by the statutory lien and the priority of that claim relates back to the date work began.” *Id.* at 449 (emphasis added). The court admonished that if “the construction lenders intended the mechanics’ and materialmen’s liens possessed by [the contractor] to be legally subordinate to their mortgage deeds, then a subordination agreement was required.” *Id.* at 450. In doing so, the court held valid modifications of the contract between the parties even

though the contract price nearly doubled. *Id.* at 444-45, 47, and 49-50.

As in *A.A.R. Testing*, the contracting parties here substantially increased the original contract price.⁹⁴ The owner here also obtained construction financing in the middle of work, but the lender did not execute a subordination agreement.⁹⁵ Unlike the contractor in *A.A.R. Testing*, G&O did not execute any waiver or release of its lien claim rights. *See id.* at 446. Under *A.A.R. Testing*, the trial court properly found that G&O's lien related back to the commencement of labor in 2005 even though later amendments modified the original July 22, 2005 agreement. *Id.* at 449-50.

The Bank's suggestion that work must be "necessary" for completion of the original contract for such work to extend the time for filing a lien must fail.⁹⁶ Again, the rule is that "if the work done or material furnished at the request of the owner, is in furtherance of the original contract, then the time for filing the lien is extended." *Kirk*, 29 Wn.2d at 437.

Much more importantly, the Bank's argument fails even under its own proposed "rule." The trial court properly found that amendments 1-5 effectively modified the July 22, 2005 agreement between the parties.⁹⁷

⁹⁴ RP (Sept. 7) at 61-62; *Id.* at 134-35, 39.

⁹⁵ *Id.* at 158-61; RP (Sept. 8) at 47-48.

⁹⁶ Appellant's Brief, pg. 24.

⁹⁷ CP at 1238.

Richard Riley testified that the work done in late 2007 and early 2008 was “necessary” under Amendment 4.⁹⁸ Thus, even under the Bank’s proposed interpretation of “in furtherance of,” the work G&O did within 90 days of March 7, 2008 extended the time for filing a lien because the parties modified their agreement so that said work was “necessary” under their contract, as amended. *See Kirk*, 29 Wn.2d at 437.

3. The Bank’s Citations to Unrelated Case Law are Inapposite, and Do Not Support Reversal.

a) *Amendments 1-5 are not unenforceable “agreements to agree.”*

The Bank misses the point with its briefing on “agreements to agree.” At trial, G&O was not trying to enforce an “agreement to agree” against Winlock, but rather the *actual agreements* it reached with Winlock and actually performed under, pursuant to all of the amendments. Those amendments effectively modified the original contract, and the contracting parties’ performance confirms this.⁹⁹ Under Chapter 60.04 RCW, priority dates back to the beginning of performance on the contract. *See, eg., A.A.R. Testing*, 112 Wn. App. at 448-49. Modifications of the contract price through change orders were enforced in *Henifin*, *supra*. 136 Wn. App. at 275.

⁹⁸ RP (Sept. 7) at 64; *see also id.* at 144.

⁹⁹ Ex. at 27-39; CP at 1238; RP (Sept. 7) at 143.

In *Henifin*, the general contractor agreed to several change orders that increased the original contract price by \$53,703.23 in order to “see the job was done timely and smoothly.” *Id.* at 272. The property owner did not approve these change orders, which eventually went unpaid. *Id.* The subcontractor then sued to establish a claim of lien against the owner’s property for the unpaid amount resulting from the general contractor’s breach. *Id.* The trial court denied the subcontractor’s claim of lien, reasoning, much as the Bank does here, that since the agreements and the additional obligation entered into by the general contractor were “outside and beyond the terms of their basic contract, there should be no lien that is enforceable against the owner of the property.” *Id.* at 273.

The Court of Appeals reversed, holding that the contract price, as modified and increased through change orders issued by the general contractor, was the statutory “amount agreed upon by the contracting parties.” *Id.* at 275-76 (citing RCW 60.04.011(2) [emphasis added]). Thus, the subcontractor’s lien for an unpaid amount resulting from subsequent modifications of the contract price was enforceable against the owner’s property. *Id.* Considering *Henifin*, the agreed contract modifications to the July 22, 2005 agreement should not prevent G&O’s lien claim from relating

back to the commencement of work under the original contract. *Id.*; *see also A.A.R. Testing*, 112 Wn. App. at 448-49.

The Bank's argument that the amendments to the July 22, 2005 agreement are unenforceable "agreements to agree" is also simply wrong. The only case that the Bank cites in favor of this principle is *Keystone Land and Development v. Xerox Corp.*, 152 Wn.2d 171 (2004), which is not on point. Lien law, RCW 60.04, and the issue of the priorities in a lien situation were never touched upon in that case. *Id.* *Keystone* holds only that mere discussions between the parties about future negotiations are not a binding, enforceable agreement between the parties. *Id.* at 178-80. Furthermore, the court's own previous holding in *Badgett v. Security State Bank*, 116 Wn.2d 563 (1991) "supports a conclusion that, under Washington contract law, a specific course of conduct agreed upon for future negotiations is enforceable when it is contained in an existing substantive contract." *Keystone*, 116 Wn.2d at 177 (emphasis added). Hence, even though *Keystone* has nothing specifically to do with lien law, it supports the opposite conclusion that the Bank cites it for, i.e., concluding that where there is a binding contract, such as the July 22, 2005 contract, said contract may be binding regarding future negotiations. *Id.*

- b) *The Bank's attempt to analogize to case law for common law mortgages omits a key provision of RCW 60.04.226, which makes clear the statutory exception that applies to RCW 60.04 liens.*

The Bank complains that 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 with respect to optional future performance.”¹⁰⁰ What this objection ignores is that exceptional treatment in favor of lien claimants is exactly what RCW 60.04 is intended to provide. *See* RCW 60.04.900; *see also McAndrews Ground, Ltd., Inc. v Ehmke*, 121 Wn. App. 759, 762 (2004) (RCW 60.04.021 and RCW60.04.061 give “priority to a professional service lien even if the lien is recorded after a deed of trust”).

The Bank ignores this statutory principle of liberal construction in favor of lien claimants, and argues that the common law of mortgages with regard to optional advances should apply to G&O’s RCW 60.04 lien claim.¹⁰¹ While noting that legislation was enacted in reaction to case law pertaining to optional mortgages, the Bank claims that “the common law analysis remains applicable” because “[n]o equivalent exception exists for

¹⁰⁰ Appellant’s Brief, pg. 26.

¹⁰¹ *Id.*

Chapter 60.04 RCW liens.”¹⁰² It is unclear how common law mortgage analysis could ever apply to RCW 60.04 liens, which are creatures of statute and have no basis in the common law. *Estate of Haselwood v. Bremerton Ice Arena*, 166 Wn.2d 489, 498 (2009).

Regardless, the Bank’s argument must fail because it rests on a false statement of the law. RCW 60.04.226, cited and quoted (in part) in favor of the Bank’s suggestion that “the common law analysis remains applicable,” also includes the following phrase which the Bank inexplicably omitted when quoting the statute: “[e]xcept as otherwise provided in RCW 60.04.061 or 60.04.221.”¹⁰³ RCW 60.04.226.¹⁰⁴ RCW 60.04.061 is, of course, the relation-back statute pertaining to materialmen’s liens. *Zervas Group Architects, P.S. v. Bay View Tower*, 161 Wn. App. 322, 326 (2011) (citing RCW 60.04.061). If a common law mortgage advance theory could have ever applied to a Chapter 60.04 RCW lien, such a theory is clearly inapplicable now given the plain language of the statute. RCW 60.04.226; RCW 60.04.061. The statutory law of RCW 60.04 applies instead, and, as

¹⁰² *Id.* at 26-27 and n. 112 (citing RCW 60.04.226).

¹⁰³ RCW 60.04.226 provides, in full: “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.”

¹⁰⁴ Compare Appellant’s Brief, p. 27, n. 112.

set out above, the trial court's judgment of foreclosure, pursuant to RCW 60.04 and the applicable case law, should be affirmed.¹⁰⁵ See *Diversified*, supra, 161 Wn. App. at 870-71; see also *Zervas*, 161 Wn. App. at 328-29.

D. The Trial Court's Finding that the Bank Did Not Meet Its Burden to Prove Any Failure by G&O to Mitigate Damages Should be Affirmed.

1. G&O Acted Reasonably To Mitigate Its Damages

"The doctrine of avoidable consequences, or mitigation of damages, prevents an injured party from recovering damages that could have been avoided through reasonable efforts." *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 840 (2004). But, it is well established that

[a] wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a reasonable man is required of him. If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.

Id. (quoting *Hogland v. Klein*, 49 Wn.2d 216, 221 (1956)). Here, the Bank invited G&O's claim by re-allocating the Winlock loan disbursements so that monies originally intended for G&O were thereafter disbursed only to the contractor, Scott's Excavating.¹⁰⁶ Since the Bank's action caused G&O to go entirely unpaid, the Bank should not be heard to complain about G&O's

¹⁰⁵ CP at 1242-43.

¹⁰⁶ RP (Sept. 7) at 144.

methods of mitigating its damages. *Labriola*, 152 Wn.2d at 840. Also, the “party asserting an unreasonable failure to mitigate bears the burden of proof.” *Cox v. Keg Restaurants U.S., Inc.*, 86 Wn. App. 239, 244 (1997).

A trial court’s finding on whether a party failed to mitigate its damages is reviewed for support by substantial evidence. *Bernsen v. Big Bend Elec. Co-op., Inc.*, 68 Wn. App. 427, 435 (1993). In *Bernsen*, cited by the Bank, the “testimony established that a decision was made which, at the time it was made, appeared both reasonable and timely” with regard to the plaintiff’s efforts to mitigate his damages. *Id.* Therefore, the Court of Appeals found that the trial court’s determination that the plaintiff had failed to mitigate its damages was not supported by substantial evidence. *Bernsen*, 68 Wn. App. at 435.

Here, the trial court’s findings that 1) G&O did mitigate its damages, and 2) that the Bank had in any event failed to meet its burden to show any failure to mitigate by G&O, are supported by substantial evidence. G&O continued working at Winlock’s request until February 2008 because it had a good working relationship with Winlock, which was giving G&O assurances that payment would be made, whether by alternate funding or as lots sold, if work was completed.¹⁰⁷ Once Winlock told G&O that funding

¹⁰⁷ RP (Sept. 7) at 67-73, 75-76; Ex. at 108-124.

had dried up permanently, G&O walked off the project.¹⁰⁸ Under these facts, there was no unreasonable conduct by G&O.¹⁰⁹ As in *Bernsen*, the “testimony established that a decision was made which, at the time it was made, appeared both reasonable and timely,” and thus the trial court’s finding that G&O acted reasonably to mitigate its damages should be upheld.¹¹⁰ See *Bernsen*, 68 Wn. App. at 435.

2. G&O Owed No Duty to Mitigate Its Damages

a) *Winlock’s Assurances of Payment*

In breach of contract claims, “one is ordinarily required to make reasonable efforts to avoid the consequence” resulting from the other’s breach. *Lopeman v. Gee*, 40 Wn.2d 586, 590 (1952). “However, if, after an injury is begun, there are repeated assurances from the wrongdoer that the condition complained of will be remedied, there is no duty upon the part of the injured party to take steps to minimize the loss so long as there are grounds to expect that he will perform.” *Id.*; see also, *Sears, Roebuck & Co. v. Grant*, 49 Wn.2d 123, 126 (1956) (upholding findings that “such assurances were given, that the respondent had a right to rely on them, and that they justified his failure to mitigate damages in the ways suggested.”).

¹⁰⁸ RP (Sept. 7) at 118-19.

¹⁰⁹ CP at 1241-42; RP (Sept. 7) at 66-68; *Id.* at 145.

¹¹⁰ CP at 1241-42.

In *Lopeman*, for instance, the plaintiffs complained about the defendant's breach (there, faulty storage of the plaintiffs' onions) and on each occasion were assured that the "condition complained of would be remedied." *Lopeman*, 40 Wn.2d at 591. The Supreme Court found that the plaintiffs were entitled to rely on the assurances of the defendant's agents. *Id.*

Like the plaintiffs in *Lopeman*, G&O complained to Winlock when it stopped receiving payment.¹¹¹ Allen Olson, president of Winlock, repeatedly assured Richard Riley that G&O would be paid.¹¹² These assurances took place every few weeks, as Mr. Olson informed Mr. Riley that he was working on alternate funding.¹¹³ Furthermore, Mr. Olson assured Mr. Riley that if G&O continued to work to make the properties more saleable, then as the lots sold, G&O would be paid from the proceeds.¹¹⁴ As in *Lopeman*, G&O, "under the circumstances of this case, [was] entitled to rely upon these assurances" of Allen Olson. 40 Wn.2d at 591.

b) The Bank's Equal Opportunity To Mitigate

Also, "a plaintiff has no 'duty' to mitigate when the defendant has equal opportunity to do so." *Walker v. Transamerica Title Ins. Co., Inc.*, 65

¹¹¹ RP (Sept. 7) at 66-67, 70.

¹¹² *Id.* at 67-68; *Id.* at 145.

¹¹³ *Id.*

¹¹⁴ *Id.* at 67-68.

Wn. App. 399, 405-6 (1992). “Like the doctrine of mitigation in general, this principle of equal opportunity applies in both tort and contract cases.” *Id.*

Here, the Bank had an equal or greater opportunity than G&O to mitigate any potential damages. As found by the trial court, “Venture Bank failed to take reasonable steps to protect its Deed of Trust recorded on January 10, 2006 from any lien rights pursuant to RCW 60.04.”¹¹⁵ In fact, “Venture Bank made no attempt to determine what the terms were of WINLOCK’s contract with GIBBS & OLSON, or what potential exposure would be under said contract.”¹¹⁶ As the trial court found, the

standard in the industry for protecting a deed of trust such as Venture Bank had in this instance with WINLOCK from liens pursuant to RCW 60.04, was for the lender to have requested a subordination agreement from professional service providers or other contractors already involved on the project, or requested some such as an indemnification agreement, though subordination agreements are generally preferred.¹¹⁷

“For reasons that remain a mystery, Venture Bank chose not to do this.”¹¹⁸

The trial court weighed the testimony of Roxie Stroup of Lewis County Title for G&O and Chris Heck of Venture Bank for the Bank with regard to the reasonableness of the Bank’s attempts to protect its own interest in the

¹¹⁵ CP at 1240.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

land.¹¹⁹ In finding the Bank's actions unreasonable, the Court ruled that

“The claims to the contrary by Christopher Heck, testifying for Venture Bank, are unconvincing and his entire testimony was so vague and inconsistent as to be anything but incredible in the true sense of that word, meaning not credible.”¹²⁰

The Bank did not assign error to any of these findings; thus, they are verities on appeal. *Robel*, supra, 148 Wn.2d at 42.

As in *A.A.R. Testing*, if “the construction lenders intended the mechanics’ and materialmen’s lien rights” asserted by G&O “to be legally subordinate to their mortgage deeds, then a subordination agreement was required.”¹²¹ 112 Wn. App. at 450. Since the Bank had an equal or greater opportunity to mitigate or avoid its damages through the customary subordination agreement, G&O did not owe a duty to mitigate its damages. The trial court’s finding that the Bank did not meet its burden to prove any failure by G&O to mitigate damages should be affirmed on this additional ground.¹²² *See Walker*, 65 Wn. App. at 405-6.

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¹¹⁹ RP (Sept. 8) at 137-39; *Id.* at 76-89; *Id.* at 10-62.

¹²⁰ CP at 1240.

¹²¹ *Id.* at 1240-41.

¹²² *Id.* at 1241-42.

E. The Trial Court’s Grant of a Set-Off in the Amount of \$4,000 Should be Affirmed.

G&O reached a settlement of its claims against Grand Prairie Plaza, LLC (“Grand Prairie”) for \$4,000, and proposed a corresponding offset to the judgment against the Bank of \$4,000. The trial court reviewed the settlement and G&O’s proposal and found both “reasonable under the circumstances.”¹²³ The Bank argues that the trial court “abused its discretion” in so finding and in denying a larger setoff.¹²⁴

No authority is cited by the Bank for its contention that G&O’s lien should have been reduced pro-rata based on the portion of the lien attributable to the lots pertaining to the settlement.¹²⁵ Nor has Respondent’s research uncovered any such authority. Likewise, there is nothing in Chapter 60.04 RCW that provides for pro-rata reductions of liens. Moreover, the provisions of Chapter 60.04 RCW “are to be liberally construed to provide security for all parties intended to be protected by their provisions.” RCW 60.04.900. The court should not read a requirement into a remedial statute that is detrimental to claimants who have a valid lien for professional services, such as G&O. *See Athletic Field*, supra, 172 Wn.2d at 696-7.

¹²³ *Id.* at 1242.

¹²⁴ Appellant’s Brief, pg. 3, 5.

¹²⁵ *Id.* at 35.

Absent a statute specifically providing for it, a setoff is an equitable remedy to ensure that a plaintiff does not recover from two defendants for the same damage. *See Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 702 (2000)). This theory of setoff is based on the fundamental “principle of damages, both tort and contract, that there shall be no double recovery for the same injury.” *Id.* “Generally the party claiming an offset has the burden of proving this claim.” *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 160 Wn. App. 728, 735 (2011). An appellate court reviews the grant or denial of an offset for abuse of discretion. *Eagle Point Condo*, 102 Wn. App. at 701. “A court abuses its discretion if its decision is not based on tenable grounds or tenable reasons.” *Id.*

Here, there is no danger of double recovery by G&O. *See id.* at 703. G&O was paid \$4,000 by Grand Prairie in return for the release of G&O’s claims against Grand Prairie.¹²⁶ The entire amount of that settlement was credited to the Bank and G&O’s judgment was reduced accordingly.¹²⁷ Moreover, Lots 7, 18, and Tract A (the portion of the property at issue owned by settling party Grand Prairie) were originally covered by the Bank’s deed of trust, but were released by the Bank when Lots 7, 18, and Tract A were

¹²⁶ CP at 1242.

¹²⁷ RP (Sept. 8) at 134, 142.

reconveyed to Winlock on November 15, 2007 and May 17, 2007, respectively.¹²⁸ Since the Bank had this property under its control and yet released it through reconveyance, the Bank should not be heard to complain now that G&O did not receive more compensation for this property. *See Walker*, 65 Wn. App. at 405-6. If the record can be said to lack specificity, the “appellant cannot benefit from this vague state of the record because it had the burden of proving the setoff it had alleged.” *Alway v. Carson Lumber Co.*, 57 Wn.2d 900, 902 (1960). The trial court did not abuse its discretion in finding the settlement and \$4,000 offset “reasonable under the circumstances.”¹²⁹ *See also Eagle Point Condo*, 102 Wn. App. at 702-3.

F. The Trial Court’s Decision to Not Award a Further Set-Off Based on the Particular Land G&O Asserted Its Lien Against Should be Affirmed.

The trial court found that the legal description in G&O’s claim of lien “did not include Lots 1, 2 and 3 from the Grand Prairie Subdivision, which three lots were owned by a third party at the time G&O’s lien claim was recorded on March 7, 2008.”¹³⁰ The Bank argues on appeal that it is entitled to a set-off based on G&O’s decision not to lien the aforementioned lots.¹³¹

¹²⁸ Ex. at 245; *Id.* at 247.

¹²⁹ CP at 1242.

¹³⁰ *Id.* at 1237.

¹³¹ Appellant’s Brief, p. 37.

As the trial court found and the Bank concedes, there is “a lack of any authority requiring that a lien be asserted against 100% of the property on which services were provided under RCW 60.04.”¹³² If a “contention is not supported by authority, it need not be considered on appeal.” *Seventh Elect Church in Israel v. Rogers*, 34 Wn. App. 105, 120-21 (1983), *rev. den.*, 99 Wn.2d 1019 (1983). As noted above, there is nothing in Chapter 60.04 RCW that provides for pro-rata reductions of liens. Since the provisions of Chapter 60.04 RCW are to be liberally construed, the Court should reject the Bank’s suggested requirement protect lien claimants such as G&O. RCW 60.04.900; *see also Athletic Field*, 172 Wn.2d at 696-7.

The Bank cites RCW 60.04.131 for the result it desires.¹³³ However, that statute only requires that, if a lien claim is asserted against separate pieces of property, the amount due on each should be designated. RCW 60.04.131.¹³⁴ It does not require that the notice of claim of lien be actually recorded against two or more separate pieces of property. Here, the Project was one overall piece of property.¹³⁵ Moreover, the penalty under

¹³² *Id.*; *see also* CP at 1242: “No authority has been cited by FIRST-CITIZEN’s requiring that a lien be asserted against 100% of the property on which services were provided under RCW 60.04.”

¹³³ Appellant’s Brief, p. 37.

¹³⁴ RCW 60.04.131 begins with “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.”

¹³⁵ RP (Sept. 7) at 38.

RCW 60.04.131 for failing to designate the amount due on each piece of property is only that “the lien is subordinated to other liens that may be established under this chapter” (i.e., RCW 60.04). *Id.* Interpreting an earlier but substantially identical version of the present statute, the Washington Supreme Court came to the same conclusion, determining that “[t]he penalty for not designating the amount due on each piece of property is the postponement of the general lien to other liens which do designate the amount due upon a specific property.” *Seattle Lumber Co. v. Sweeney*, 33 Wn. 691, 696 (1904).¹³⁶ (emphasis added). “The effect is not to invalidate the lien notice or the lien.” *Id.*

Thus, there is no authority that G&O’s decision not to lien a third party’s property should result in a pro rata reduction of its lien.¹³⁷ As noted above, the Bank bore the burden of proving its right to any set-off. *Madrona Park*, 160 Wn. App. at 735. The trial court found that there was a failure of proof on the Bank’s claims of setoff.¹³⁸ The trial court further found that it was reasonable “for GIBBS & OLSON to choose not to lien a third party under the circumstances and possibly risking a slander of title claim.”¹³⁹

¹³⁶ Interpreting 2 Bal. Code § 5907 (set out in full in Appendix).

¹³⁷ CP at 1242.

¹³⁸ *Id.*

¹³⁹ *Id.*

Finally, Lots 1, 2, and 3, were originally covered by the Bank's deed of trust, but were released by the Bank when Lots 1, 2, and 3 were reconveyed to Winlock on December 31, 2008.¹⁴⁰ Since the Bank had the property under its control and yet released it through reconveyance, the Bank should not be heard to complain now that G&O did not lien this property. *See Walker*, 65 Wn. App. at 405-6. There is substantial evidence supporting the trial court's determination that the Bank did not prove any right to a setoff, and thus its decision should be affirmed. *See Eagle Point Condo*, 102 Wn. App. at 702-3.

G. Under RAP 18.1 and RCW 60.04.181(3), G&O Should be Awarded Its Reasonable Attorney Fees Incurred on Appeal.

Pursuant to RAP 18.1 and RCW 60.04.181(3), G&O requests an award of its reasonable attorney fees and costs incurred in defending this appeal. RCW 60.04.181 provides for an award of the prevailing party's reasonable costs and attorney fees, both at trial and on appeal. RCW 60.04.181(3). The trial court determined that G&O was entitled to an award of attorney fees and costs pursuant to said statute as the prevailing party at trial.¹⁴¹ If the Court agrees with G&O and affirms the trial court, G&O is again the prevailing party. "The decision as to whether to award attorney fees is discretionary with the court." *CKP, Inc. v. GRS Const. Co.*,

¹⁴⁰ Ex. at 246.

¹⁴¹ CP at 1243; *Id.* at 1254-55.

63 Wn. App. 601, 621 (1991), *rev. den.*, 120 Wn.2d 1010 (1992).

In general, a lien claimant that prevails on appeal is often awarded attorney fees in RCW 60.04 cases. *See Standard Lumber Co. v. Fields*, 29 Wn.2d 327, 354 (1947); *CKP*, 63 Wn. App. at 621-23; *Henifin*, *supra*, 136 Wn. App. at 276, *Diversified*, *supra*, 161 Wn. App. at 890-91, *Zervas*, *supra*, 161 Wn. App. at 329. The Court should likewise exercise its discretion to award attorney fees pursuant to RCW 60.04.181(3). Throughout this proceeding, the Bank has communicated its intent to take fees against G&O in the event that the Bank prevailed, and has recognized in its Appellant's Brief that such an award to the prevailing party is appropriate.¹⁴²

“[A] 50 percent premium to reflect the contingent nature of success” has been upheld by the state Supreme Court in certain cases where work was done on a contingent fee basis.” *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 601 (1983); *see also Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 335 (1993). Pursuant to a fee agreement signed August 31, 2011, G&O's counsel worked on an hourly basis until March 30, 2009, and on a contingent fee basis from March 30, 2009 onward.¹⁴³ Under that agreement, if no money was received by

¹⁴² Appellant's Brief, p. 38-39.

¹⁴³ CP at 1188-89.

settlement or judgment, G&O's counsel would "receive no fee for their time and service following March 20, 2009."¹⁴⁴ *See also Bowers*, 100 Wn.2d at 598. Given the risk of zero compensation following March 30, 2009 had G&O not prevailed at trial, the trial court determined that a 25% premium for counsel's services from March 30, 2009, through trial was appropriate.¹⁴⁵ *See id.* at 601, and *Fisons*, 122 Wn.2d at 335.

G&O requests that this Court apply the same 25% modifier to any award of attorney's fees to G&O on appeal. The Bank has not assigned any error to the trial court's grant of attorney's fees, including the modifier.¹⁴⁶

While it appears that no reported Washington decision touches on this issue, there is nothing in the lodestar case law that suggests that a contingency modifier which is appropriate at trial is inappropriate on appeal. *See Bowers*, 100 Wn.2d at 601, and *Fisons*, 122 Wn.2d at 335. The Florida Court of Appeals, confronted with the same issue, held that where "there was no change in representation and both the trial and appellate work were governed by a contingency arrangement, there is no reason to treat the appellate hours differently from the trial hours" in applying a lodestar contingency modifier. *Stack v. Lewis*, 641 So. 2d 969, 970 (Fla. Dist. Ct. App. 1994). As in *Stack*,

¹⁴⁴ *Id.* at 1189.

¹⁴⁵ RP (Oct. 11) at 28.

¹⁴⁶ Appellant's Brief, 1-4.

G&O's trial counsel are also counsel on appeal, and the appellate work remains governed by the contingency agreement.¹⁴⁷ Thus, a 25% modifier is also appropriate for any fees awarded to G&O on appeal. *Id.*

IV. CONCLUSION

G&O was clearly entitled to foreclose its lien as a prior and superior interest over the Bank's deed of trust. As a provider of professional engineering services for the improvement of real property that has complied with the requirements of RCW 60.04, G&O is entitled to the liberal construction of the statute to protect its lien claim. The fact that G&O began work on the Project before the Bank obtained its deed of trust gives G&O's lien priority under RCW 60.04.

The equities of the case militate toward the same result as the lien statute and corresponding case law. G&O performed all work to the complete satisfaction of the owner, Winlock, which agrees that it owes, and has been found to owe, G&O the entire amount sought in the lien claim. The Bank seeks to interpret the parties' agreement for them in a manner not consistent with the clear and express language of the parties' contractual writings, that they had one overall agreement. Further, it is fair to subordinate the Bank's deed of trust to G&O's lien when the Bank should

¹⁴⁷ CP at 1189.

have requested a subordination agreement from G&O, as is common practice within the industry, but failed to do so.

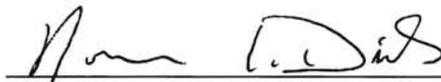
Under the plain language of the statute and the agreement of the parties, G&O was entitled to claim a lien on the land it improved and performed the proper steps to do so. The trial court agreed, after weighing the evidence and measuring the credibility of witnesses. This Court should now affirm the trial court's grant of foreclosure and allow G&O to obtain the payment it earned several years ago.

DATED: June 15, 2012.

Respectfully submitted:



DARRYL E. COLMAN, WSBA #42954
Of Attorneys for Intervening
Defendant/Third-Party Plaintiff GIBBS &
OLSON, INC.



NORMAN C. DICK, WSBA #13914
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Defendant/Third-Party Plaintiff GIBBS &
OLSON, INC.

APPENDIX

STATUTES CITED

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 60.04.011(13): “ ‘Professional services’ means surveying, establishing or marking the boundaries of, preparing maps, plans, or specifications for, or inspecting, testing, or otherwise performing any other architectural or engineering services for the improvement of real property.”

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 60.04.051: “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 labor, professional services, equipment, or materials were furnished, as the court deems appropriate for satisfaction of the lien. If, for any reason, the title or interest in the land upon which the improvement is situated cannot be subjected to the lien, the court in order to satisfy the lien may order the sale and removal of the improvement from the land which is subject to the lien.”

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 60.04.091 (in pertinent part): “Every person claiming a lien under RCW 60.04.021 shall file for recording, in the county where the subject property is located, a notice of claim of lien not later than ninety days after the person has ceased to furnish labor, professional services, materials, or equipment or the last date on which employee benefit contributions were due. ***”

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 60.04.141: “No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim of lien has been recorded unless an action is filed by the lien claimant within that time in the superior court in the county where the subject property

is located to enforce the lien, and service is made upon the owner of the subject property within ninety days of the date of filing the action; or, if credit is given and the terms thereof are stated in the claim of lien, then eight calendar months after the expiration of such credit; and in case the action is not prosecuted to judgment within two years after the commencement thereof, the court, in its discretion, may dismiss the action for want of prosecution, and the dismissal of the action or a judgment rendered thereon that no lien exists shall constitute a cancellation of the lien. This is a period of limitation, which shall be tolled by the filing of any petition seeking protection under Title Eleven, United States Code by an owner of any property subject to the lien established by this chapter.”

RCW 60.04.181(3): “The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable.”

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.”

RCW 60.04.900: “RCW 19.27.095, 60.04.230, and 60.04.011 through 60.04.226 and 60.04.261 are to be liberally construed to provide security for all parties intended to be protected by their provisions.”

2 Bal. Code § 5907: “In every case in which one claim is filed against two or more separate pieces of property owned by the same person, or owned by two or more persons who jointly contracted for labor or material, for which the lien is claimed, the person filing such claim must designate in the claim the amount due him on each piece of property, otherwise the lien of such claim is postponed to other liens. The lien of such claim does not extend beyond the amount designated as against other creditors having liens upon either of such pieces of property.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

SEE ATTACHED COPY (OMITTING EXHIBITS THERETO)

(Also found at Clerk’s Papers, pages 1234-1243).

SUPERIOR COURT
LEWIS COUNTY, WASH
REC'D & FILED

2011 OCT 11 AM 10:17

KATHY BRACK, CLERK

BY MS
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR LEWIS COUNTY

SCOTT'S EXCAVATING VANCOUVER,
LLC, a Washington corporation,

Plaintiff,

v.

WINLOCK PROPERTIES, LLC, fka
WINLOCK INDUSTRIAL PARK, LLC;
ROCKMANN DEVELOPMENT GROUP,
LLC; FIRST-CITIZEN'S BANK & TRUST
COMPANY,

Defendants.

GIBBS & OLSON, INC.,

Intervening Defendant.

GIBBS & OLSON, INC.,

Third-Party Plaintiff,

v.

GRAND PRAIRIE PLAZA, LLC,

Third-Party Defendant.

No. 08 2 00298 3

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

151A

Walstead Mertsching PS
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Longview, Washington 98632-7934
(360) 823-5220

1 This matter was tried to the Court, without a jury, on September 7 and 8, 2011. The
2 Honorable Nelson Hunt presided at the trial. The claim presented at trial for adjudication was as
3 follows:

4 Intervening Defendant, GIBBS & OLSON, INC.'s claim against Defendant
5 FIRST-CITIZEN'S BANK & TRUST COMPANY for foreclosure of a lien for professional
6 services pursuant to RCW 60.04.

7 Intervening Defendant, GIBBS & OLSON, INC. (hereafter referred to as GIBBS & OLSON)
8 appeared personally at trial through its President, Richard Riley, and through its attorney of record,
9 NORMAN C. DICK. Defendant FIRST-CITIZEN'S BANK & TRUST COMPANY (hereafter
10 referred to as FIRST-CITIZEN'S) appeared at trial through its attorney, DARREN R. KRATTLI and
11 through Christopher Heck, an officer of FIRST-CITIZEN'S.

12 The witnesses who were called and testified at the trial are identified in the Witness List
13 attached as Exhibit A.

14 The exhibits, which were offered, admitted into evidence and considered by the Court, are
15 set out in the list attached as Exhibit B.

16 Based on the evidence presented at trial, the Court makes the following Findings of Fact:

17 **I. FINDINGS OF FACT**

18 A. Defendant WINLOCK PROPERTIES LLC's Breach of Contract

19 1. This Court previously ruled on Intervening Defendant, GIBBS & OLSON's Motion
20 for Summary Judgment and on June 3, 2011, entered an order entitled Order Granting Gibbs &
21 Olson, Inc.'s Motion for Summary Judgment in Part, Denying Said Motion in Part and Denying
22 First-Citizen's Bank's Motion for Summary Judgment, wherein the Court found that the undisputed
23 factual record established that:

24 a. WINLOCK PROPERTIES, LLC (hereafter referred to as WINLOCK PROPERTIES)
25 entered into a contract with GIBBS & OLSON for GIBBS & OLSON to provide
26 engineering services for the development of the real property which is the subject of

1 the above-entitled legal action, which property is legally described on GIBBS &
2 OLSON's lien claim attached as Exhibit 1 to the Declaration of Richard Riley, filed
3 herein in support of GIBBS & OLSON, INC.'s Motion for Summary Judgment.

- 4 b. WINLOCK PROPERTIES breached said contract with GIBBS & OLSON by failing
5 to pay \$155,755.59 principal, plus interest on the principal balance at the contractual
6 rate of 12% per annum in the accrued amount of \$71,279.18 through October 25,
7 2010, plus interest accruing after that date in the amount of \$51.20 per day through
8 the date of this order in the total additional amount of \$7,475.20, and subsequent
9 interest at the rate of 12% per annum.

10 2. The Court further held in said Order that GIBBS & OLSON is entitled to judgment
11 as a matter of law as set forth above and judgment was thereby entered in said Order in favor of
12 GIBBS & OLSON, establishing Defendant WINLOCK PROPERTIES' breach of contract in the
13 principal amount of \$155,755.59, plus prejudgment interest in the amount of \$78,754.38 (through
14 June 3, 2011), plus post summary judgment interest after the date of June 3, 2011 at the rate of 12%
15 per annum.

16 3. The evidence presented at trial was to the same effect as that established in the
17 summary judgment proceeding as set forth above and it was further established at trial that the
18 July 22, 2005 Contract between WINLOCK PROPERTIES and GIBBS & OLSON also provided
19 for surveying services.

20 B. GIBBS & OLSON's Establishment of Lien Claim.

21 1. On or about July 22, 2005, GIBBS & OLSON and WINLOCK PROPERTIES entered
22 into a contract whereby GIBBS & OLSON would provide professional engineering and surveying
23 services for WINLOCK PROPERTIES. These professional services were for the benefit of
24 approximately 50 acres of real property owned by WINLOCK PROPERTIES, for development of
25 said 50-acre parcel of bare ground into an approximately 200 lot subdivision called Grand Prairie
26 Subdivision.

1 2. The said 50-acre parcel owned by WINLOCK PROPERTIES was described on the
2 claim of lien attached as Exhibit 1 to the Counterclaim, Crossclaims and Third-Party Complaint of
3 Intervening Defendant, GIBBS & OLSON, filed herein on July 18, 2008, except that said legal
4 description did not include Lots 1, 2 and 3 from the Grand Prairie Subdivision, which three lots were
5 owned by a third party at the time GIBBS & OLSON's lien claim was recorded on March 7, 2008.

6 3. The July 22, 2005 Contract for Professional Services was one contract with five
7 subsequent amendments rather than a series of independent contracts. Said amendments were clearly
8 designated as amendments. It was clearly the intent of the parties that said amendments be
9 amendments to the original July 22, 2005 Contract and that was how the parties to the contract
10 performed over the life of the contract. All of the work which was done by GIBBS & OLSON from
11 approximately June 2005 through February 2008, was done in furtherance of the original July 22,
12 2005 Contract, which contract created a single project with overlapping phases and a continuing
13 course of work by GIBBS & OLSON from the original July 22, 2005 Contract work through the
14 breach of contract by WINLOCK PROPERTIES.

15 4. The attempt by FIRST-CITIZEN'S to pick the amendments apart and to make them
16 appear to be separate contracts is not what occurred here. The original July 22, 2005 Contract
17 specifically provided for amendments to it, and every one of the five amendments specifically
18 stated that it was an amendment to the original contract, stating as follows: "This Amendment
19 revising the Scope of Work Schedule, and Budget for Engineering Services is hereby attached to and
20 made a part of the Agreement for Engineering Services dated July 22, 2005, between Winlock
21 Properties, LLC and Gibbs & Olson, Inc." Moreover, the testimony of the personnel for both
22 GIBBS & OLSON and WINLOCK PROPERTIES, who drafted and implemented the July 22, 2005
23 Contract and amendments, was to the effect that, and the Court also so finds that, all parties
24 specifically intended all five of the amendments to be an actual part of the July 22, 2005 Contract,
25 and that both WINLOCK PROPERTIES and GIBBS & OLSON performed pursuant to the July 22,

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1 2005 Contract and all five of its amendments at all times in a way that confirmed and was consistent
2 with all five amendments being a part of the original July 22, 2005 Contract.

3 5. The Court has made the findings outlined in paragraphs B.3. and B.4. above, viewing
4 the evidence as a whole, considering all of the language in the July 22, 2005 Contract and each of
5 the five amendments, together with the testimony regarding the clear intent of the parties that the
6 original contract and amendments were all to be part of the original contract and the testimony of
7 the witnesses that throughout all parties' performance under the contract, the original July 22, 2005
8 Contract together with the five amendments was at all times considered in the course of performance
9 as one contract and were in fact actually performed by both parties as one contract. The fact that the
10 amendments increased the price of the contract over time and the contract language allowing the
11 parties to walk away from the contract under certain circumstances was really an intent to limit the
12 consequences of a breach, not an indication that any of the five amendments were separate contracts.

13 6. GIBBS & OLSON began providing professional engineering and surveying services
14 to the subject property on or about June or July 2005 and continued providing such services, in a
15 continuous course of employment, up through February 2008, all pursuant to the terms of the
16 July 22, 2005 Contract. These services were throughout this time at the request of WINLOCK
17 PROPERTIES.

18 7. FIRST-CITIZEN'S predecessor in interest, Venture Bank, had actual notice that
19 GIBBS & OLSON was providing professional engineering and surveying services benefitting the
20 real property at issue prior to Venture Bank loaning any money to WINLOCK PROPERTIES and
21 prior to Venture Bank recording the Deed of Trust on January 10, 2006 against the real property at
22 issue.

23 8. Venture Bank had actual notice, for example, on September 2, 2005, when
24 Christopher Heck, Venture Bank's principal loan officer evaluating WINLOCK PROPERTIES' loan
25 application, sent his supervisor at Venture Bank, Dennis Shade, a facsimile transmittal regarding
26 GIBBS & OLSON's estimates of the probable cost to construct the 200 lots at issue. Venture Bank

1 also had notice that GIBBS & OLSON had begun providing professional engineering and surveying
2 services to WINLOCK PROPERTIES on the Grand Prairie Subdivision project prior to making a
3 loan to WINLOCK PROPERTIES and prior to recording the January 10, 2006 Deed of Trust, given
4 that Allen Olson, acting for WINLOCK PROPERTIES, submitted a preliminary loan request listing
5 GIBBS & OLSON as follows: "Engineering Firm: Gibbs & Olson, Inc. Engineers-Planners-
6 Surveyors." Furthermore, prior to Venture Bank making the loan to WINLOCK PROPERTIES and
7 prior to the January 10, 2006 Deed of Trust recording, Allen Olson of WINLOCK PROPERTIES
8 told Venture Bank's loan officer, Christopher Heck, that GIBBS & OLSON had started providing
9 engineering services on the project and specifically provided Venture Bank with copies of a number
10 of documents, including diagrams, plat maps and other information from GIBBS & OLSON
11 regarding the Grand Prairie Subdivision, which documents showed that GIBBS & OLSON was
12 working on the project and identified GIBBS & OLSON as the entity that had prepared said
13 documents.

14 9. Likewise, Venture Bank had constructive notice that GIBBS & OLSON was
15 providing services to the project, including survey markings on the property in question which would
16 have been clearly visible during the property inspection Christopher Heck made of the property at
17 issue prior to the January 10, 2006 Deed of Trust recording by Venture Bank.

18 10. Also, the circumstances of the project were such that prior to January 10, 2006,
19 Venture Bank had to have known that an engineering firm was involved with obtaining preliminary
20 plat approval and in fact, prior to January 10, 2006, Venture Bank had actual documents showing
21 that the engineering firm involved with obtaining preliminary plat approval for the Grand Prairie
22 Subdivision was GIBBS & OLSON.

23 11. The fact that within approximately three weeks of January 10, 2006, Venture Bank
24 approved GIBBS & OLSON's submittal of its billing number six without any question or
25 investigation, is a clear indication that Venture Bank knew at the time it made its January 10, 2006

26 ///

1 loan that GIBBS & OLSON was the engineering firm actually providing services on the project in
2 question.

3 12. All of that provided Venture Bank with adequate notice that GIBBS & OLSON was
4 out there providing professional services on the subject real property prior to Venture Bank recording
5 its Deed of Trust on January 10, 2006.

6 13. Prior to recording its Deed of Trust on January 10, 2006, Venture Bank made no
7 attempt to determine what the terms were of WINLOCK PROPERTIES' contract with GIBBS &
8 OLSON, or what potential exposure would be under said contract. Venture Bank could have easily
9 done so, but chose not to do so.

10 14. Testimony at trial was to the effect that as of January 10, 2006, Venture Bank had
11 assets of approximately One Billion Dollars and had 23 branches. Given the size of the loan
12 involved here between Venture Bank and WINLOCK PROPERTIES, which loan was approximately
13 \$3.7 million, and given the sophistication of this lender, a reasonable course of action for Venture
14 Bank would have been to request a copy of the contract between WINLOCK PROPERTIES and
15 GIBBS & OLSON to make an inspection of it. Venture Bank chose not to do so.

16 15. The standard in the industry for protecting a deed of trust such as Venture Bank had
17 in this instance with WINLOCK PROPERTIES from liens pursuant to RCW 60.04, was for the
18 lender to have requested a subordination agreement from professional service providers or other
19 contractors already involved on the project, or requested something such as an indemnification
20 agreement, though subordination agreements are generally preferred. For reasons that remain a
21 mystery, Venture Bank chose not to do this. The claims to the contrary by Christopher Heck,
22 testifying for Venture Bank, are unconvincing and his entire testimony was so vague and inconsistent
23 as to be anything but incredible in the true sense of that word, meaning not credible.

24 16. Venture Bank failed to take reasonable steps to protect its Deed of Trust recorded on
25 January 10, 2006 from any lien rights pursuant to RCW 60.04. If the bank was worried about such
26 potential liens, it should have obtained the names of all professional service providers, contractors

1 or others who had worked on the property and had possible lien rights under RCW 60.04 and
2 obtained a subordination agreement from said entities. Venture Bank made no attempt to do so.

3 17. GIBBS & OLSON recorded its lien claim, above referenced, with the Lewis County
4 Auditor in a form which complied with RCW 60.04, which recording was done on March 7, 2008.
5 A copy of said notice was provided by GIBBS & OLSON to the property owner, WINLOCK
6 PROPERTIES, in a timely manner pursuant to RCW 60.04. Said lien was recorded within 90 days
7 of GIBBS & OLSON last providing work on the property and GIBBS & OLSON filed its suit to
8 foreclose said lien on or about July 18, 2008, which date was within eight months of recording said
9 lien.

10 18. WINLOCK PROPERTIES owned the fee interest in the entire approximately 50-acre
11 parcel at issue in 2005 when GIBBS & OLSON began its work under the July 22, 2005 Contract.

12 19. On January 10, 2006, Venture Bank recorded its Deed of Trust including the entire
13 approximately 50-acre parcel at issue in this case.

14 20. On August 31, 2009, a Trustee's Deed was recorded whereby Venture Bank became
15 the record owner of the approximately 50-acre parcel above described and previously owned by
16 WINLOCK PROPERTIES, excepting therefrom, Lots 1, 2, 3, 7, 18 and Tract A of Grand Prairie
17 Phase I as shown in Trial Exhibit 25 at p. 264 and following.

18 21. Said same real property was then transferred to FIRST-CITIZEN'S under a Receiver's
19 Deed as shown by Trial Exhibit 25 at p. 268 and following.

20 22. Regarding FIRST-CITIZEN'S claim that GIBBS & OLSON has failed to mitigate its
21 damages, there has been no showing of this. There is no requirement that GIBBS & OLSON record
22 a lien notice other than the lien notice it actually recorded in this case. Moreover, early on in the
23 project, there was no need to do it as GIBBS & OLSON was being paid regularly. GIBBS &
24 OLSON could have stopped work at some point, but that would have been harming themselves
25 because it would have likely shut down the project, which project was planned such that work would
26 continue and that revenue would come in from the sale of the lots and as long as they kept doing the

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1 work, GIBBS & OLSON kept making the properties more sellable. So, actually, GIBBS & OLSON
2 was indeed trying to mitigate its damages in some sense by taking the most reasonable approach to
3 eventually getting paid by continuing to work on the project as they did. In any event, had Venture
4 Bank requested a subordination agreement, which they chose not to do, Venture Bank would have
5 resolved the whole matter before a problem developed. There is a failure of proof on any claim of
6 failure to mitigate.

7 23. GIBBS & OLSON's settlement with GRAND PRAIRIE PLAZA, LLC, regarding Lot
8 Nos. 7, 18 and Tract A only, for \$4,000 and release of the lien against GRAND PRAIRIE PLAZA's
9 Lot Nos. 7, 18 and Tract A was reasonable under the circumstances and GIBBS & OLSON's
10 proposal to credit \$2,667.67 of said settlement against the \$155,755.59 in principal owed under the
11 lien and the balance for attorney fees and costs is reasonable under the circumstances as well.

12 - 24. GIBBS & OLSON failed to lien Lots 1, 2 and 3 of Grand Prairie Phase I, which lots
13 were owned by ROCKMANN DEVELOPMENT, LLC., as of February 5, 2008. It was reasonable
14 for GIBBS & OLSON to choose not to lien a third party under the circumstances and possibly risking
15 a slander of title claim. No authority has been cited by FIRST-CITIZEN'S requiring that a lien be
16 asserted against 100% of the property on which services were provided under RCW 60.04.

17 25. There is a failure of proof on all of FIRST CITIZEN'S affirmative defenses and
18 claims of setoff.

19 II. CONCLUSIONS OF LAW

20 1. GIBBS & OLSON having begun its work on the project in June of 2005, and with
21 Venture Bank having notice of GIBBS & OLSON's work on the project prior to Venture Bank
22 recording its Deed of Trust, GIBBS & OLSON's RCW 60.04 lien claim has priority over
23 CITIZEN'S BANK's claims against the real property at issue.

24 2. GIBBS & OLSON has established its claims under RCW 60.04 for foreclosure of its
25 lien for professional services against all of the above-described subject property owned by
26 FIRST-CITIZEN'S, the legal description of which is contained in the Receiver's Deed under Trial

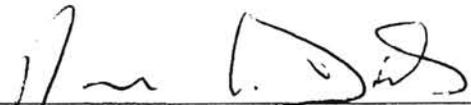
1 Exhibit 25 at p. 274, a true copy of which legal description is attached hereto as Exhibit C.
2 Judgment accordingly should be granted herein in favor of GIBBS & OLSON as to all parties to this
3 action on GIBBS & OLSON's lien foreclosure action for a decree foreclosing its lien in the principal
4 amount of \$155,755.59 (less the \$2,667.67 from settlement), plus prejudgment interest in the amount
5 of \$85,313.95 through October 11, 2011, and accruing at 12% per annum after that date, plus
6 statutory costs and reasonable attorney fees, litigation expenses, recording fees and title report fees
7 as shall be shown by declaration filed herein.

8 3. That the said lien is a valid first lien against all of the real property described on Trial
9 Exhibit 25 at p. 274 (Exhibit C hereto), that all the parties to this action and anyone claiming by or
10 through or under them should be forever foreclosed of all right, title and interest in said property or
11 any part thereof, and that the property be sold by the Sheriff of Lewis County, Washington, in the
12 manner provided by law to satisfy the aforesaid sums and that GIBBS & OLSON be permitted to
13 purchase at the sale by bidding in a portion of its judgment as it deems fit.

14 4. Judgment should be entered herein in favor of GIBBS & OLSON and against all
15 Defendants in accordance with these Findings of Fact and Conclusions of Law.

16 Dated: OCTOBER 11, 2011.

17 
18 _____
HONORABLE NELSON HUNT

19
20 Presented by:
21 
22 _____
NORMAN C. DICK, WSBA #13914
23 Of Attorneys for Intervening Defendant
GIBBS & OLSON, INC.

Approved as to form and notice of
presentation waived:
24 
25 _____
WARREN R. KRATTLI, WSBA #39128
26 Of Attorneys for Defendant
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CERTIFICATE

I certify that on this day I caused a copy of Respondent's Brief and Certificate of Service to be mailed, postage prepaid and emailed, to Appellant's attorney, addressed as follows:

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DATED this 15 day of June 2012, at Longview, Washington.



DARRYL E. COLMAN