

Consolidate No. 42845-8

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

[Faint handwritten notes and a signature]

SHELCON CONSTRUCTION GROUP, LLC,

Respondent

v.

SCOTT M. HAYMOND and JANE DOE HAYMOND; A-3 VENTURE LLC; A-4
VENTURE; A-111 VENTURE LLC; 14224 PIONEER LIVING TRUST and
ANCHOR MUTUAL SAVINGS BANK,

Appellants.

APPELLANT ANCHOR MUTUAL SAVINGS BANK'S REPLY BRIEF

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I.
SHELCON'S LIEN RELEASE, WHICH WAS UNCONDITIONAL AND UNLIMITED IN SCOPE, AND WAS PURPOSELY RECORDED TO INDUCE FINANCING, BARS OR LIMITS SHELCON'S CLAIM OF PRIORITY.

A. **The Release Should Be Construed In Context And Based Upon Its Plain Language.**

The lien release Shelcon Construction Group, LLC ("Shelcon") publicly recorded to induce Anchor Mutual Savings Bank ("Anchor Bank") to fund the Haymond Farm project was neither conditional nor limited in scope. The lien release provided:

SHELCON CONSTRUCTION GROUP.
CLAIMANT

VS.

RELEASE OF LIEN
#200806200326

SCOTT RAYMOND, A-3 VENTURE LLC
DEFENDANT

THE **UNDERSIGNED LIEN CLAIMANT** hereby releases the lien on the property owned or reputedly owned by: A-III VENTURE LLC, P.O. BOX 206, PACIFIC, WA. 98047-0206/ SCOTT HAYMOND, 136 STEWART RD SE, UNIT J, PACIFIC, WA. 98407-2143 / SCOTT HAYMOND, A-3 VENTURE L.L., P.O. BOX 206, PACIFIC, WA. 98047. Property described as follows:

COMMONLY KNOWN AS: THE FARM, 14224 PIONEER WAY E, PIJYALLUP, WA.

Which lien was dated the 20TH day of JUNE, 2008, and filed on the 20TH day of JUNE, 2008, in the office of the Auditor of Pierce County, Washington, under Recording #200806200326.

SHELCON CONSTRUCTION GROUP
P.O. BOX 2016
SNOQUALMIE WA. 98065
425422-3570
CLAIMANT

(Ex. 52, attached as Appendix C to Anchor's Opening Brief.)

The trial court made the following findings of fact with regard to the context for and Shelcon's purpose in recording this release:

24. When Anchor Bank learned of Shelcon's lien, Anchor Bank informed Scott Haymond that Shelcon's lien would need to be released before Anchor Bank would lend.

25. Scott Haymond contacted Shane Martin and requested Shelcon to release its lien.

* * *

27. Shane Martin released Shelcon's lien with the purpose of enabling Scott Haymond to continue his application for refinancing through Anchor Bank and receive payment from the loan proceeds.

* * *

31. The lien release did not contain any language indicating whether Shelcon had been paid any or all of the amount of the lien that was released. Shelcon's lien release also did not contain any language specifying whether the lien release was conditional or limited. (Emphasis added.)

(CP 622-23.)

Shelcon did not cross appeal to challenge these favorable findings, now verities,¹ nor could it, since they are well-supported by the substantial evidence. Shelcon's owner, Shane Martin, testified that

- he knew the lien claim was interfering with Haymond's effort to obtain bank financing (RP 119-20, 273-74);
- he had less chance of getting paid if Haymond did not get the bank loan (RP 122, 271);
- he requested that the lien release be prepared and recorded without providing any instruction to limit or condition the release (RP 122, Ex. 53);

¹ *Scott's Excavating Vancouver, LLC, v. Wincock Properties, LLC*, 176 Wn. App. 335, 346, 308 P.3d 791 (2013).

- he expected the lien release to be sent to the bank (RP 136-37);
- there are no words in the recorded lien release that indicate any reservation or retention of rights or limits its scope (273-74);
- he knew the lien release would help Haymond get the bank loan (RP 162, 271, 273-74); and
- Shelcon would be benefited by the bank loan because it would provide a source of payment (RP 271).

The recorded lien release served Shelcon's intended purpose. Anchor Bank relied on the lien release (CP 626, Finding 47), approved and funded a loan to Haymond (CP 626-27, Findings 47, 50, RP 361-62), and Shelcon received a substantial payment from the proceeds of the first loan disbursement (CP 627-29, Findings 34, 50, 59).

Shelcon does not dispute any of the above. Instead, it argues that Shelcon's voluntary act of recording the lien release - which Shelcon did "with the purpose of enabling Scott Haymond to continue his application for refinancing through Anchor Bank and receive payment from the loan proceeds"² - does not in any way impact the amount Shelcon may claim on a subsequent lien or its priority. Relying primarily on case law addressing legal rights following actions related to expired lien claims, Shelcon asserts that recording the lien release was essentially an extraneous and meaningless act.

² CP 623, Finding 27.

Shelcon admits in its brief that “Washington’s lien statutes are silent on whether recording a lien release precludes the recording of a subsequent lien for work included in the first lien.”³ (Shelcon Brief at p. 21.) Moreover, courts have acknowledged that the priority of a lien may be changed by agreement between the lien claimant and the property owner. *A.A.R Testing Laboratory, Inc. v. New Hope Baptist Church*, 112 Wn. App. 442, 449, 50 P.3d 650 (2002). Ultimately, the legal effect of Shelcon’s release, like any other release, must be determined by construing the release according to contract principles and in light of the language used. *Barton v. State, Dept. of Transp.*, 178 Wn.2d 193, 209, 308 P.3d 597 (2013); *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 187, 840 P.2d 851 (1992). In that regard, the court’s primary task is to determine the intent of the parties. *Barton*, 178 Wn.2d at 209.

In this case, it is undisputed that the release Shelcon publicly recorded (with full knowledge that it would be sent to the bank), was general in its terms, without limitation or conditions, and prepared for the purpose of inducing Anchor Bank finance the Haymond Farm project and thereby create a source of payment for Shelcon.

³ As a result, Shelcon’s later citation to RCW 60.04.900 providing for liberal construction of the lien statute to provide security to all parties protected by its provisions has no application in this case. (See Shelcon Brief at p. 25.)

Unfortunately, prior to the trial and without the benefit of the findings highlighted above, the trial court held, as a matter of law, that a lien release does not impact or limit a second lien “unless it affirmatively says the lien was satisfied.” (9/28/12 RP at 17, CP 325.) It did so without clear legal support and with disregard to the plain language, context and purpose of the release in this case.

The trial court erred. The release should be construed as written and intended and given legal consequence consistent with that construction.

B. Shelcon Misconstrues *A.A.R. Testing*. The *A.A.R. Testing* Court Construed Specific Release Language And Its Ruling Does Not Extend To Unconditional And Unlimited Lien Releases.

Shelcon argues that a release may never operate to subordinate a mechanics lien; that, according to Shelcon, may only be accomplished through a subordination agreement. To support this argument, Shelcon presents the following partial quote from *A.A.R. Testing, supra*, and states: “[T]he law is that ‘absent a true subordination agreement, the priority of mechanics’ or materialmen’s liens against property is not compromised by waiver and release agreements.’” (Shelcon Brief at p. 17, *quoting A.A.R. Testing*, 112 Wn. App. at 444.) However, Shelcon truncated the quote from *A.A.R.*

Testing, omitting an important phrase integral to the court's decision.

The court's full sentence reads:

Absent a true subordination agreement, the priority of mechanics' or materialmen's liens against property is not compromised by waiver and release agreements executed in exchange for payment through a certain date." Additional labor, services and materials after that date remain protected by the statutory lien. (Emphasis added.)

112 Wn. App. at 444. The court in *A.A.R. Testing* did not announce a blanket rule that only subordination agreements may affect the priority of a mechanics' lien.⁴ Rather, the *A.A.R. Testing* court interpreted the language used by that lien claimant in the particular recorded waiver and release – language that expressly limited the scope of the release – and held that the waiver and release evaluated in that case did not subordinate the mechanics lien.

In *A.A.R. Testing*, the court was asked to decide the priority of competing a mechanics' lien and two deeds of trust on the same property. It was undisputed in that case that the lien claimant commenced work on February 20, 1997. 112 Wn. App. at 444. The

⁴ Shelcon also cites footnote 5 in *Scott's Excavating Vancouver, LLC, v. Wincock Properties, LLC*, 176 Wn. App. 335, 345, 308 P.3d 791 (2013), for the proposition that a release cannot affect lien priority; and only a subordination agreement may affect priority. (Shelcon Brief at p. 20, n.3.) *Scott's Excavating* does state in the footnote that that the trial court made an unchallenged finding that "Venture Bank failed to adequately protect itself by obtaining a subordination agreement." The lien claimant in that case did not, however, execute a release in any form and the question of the legal consequence of a lien release was not before the court.

lien claimant executed six different releases after payments were received that were specific to the work for which each payment was received. *Id.* at 446. Each release, on its face, only covered work up to and including a date certain, and provided, in relevant part:

IN CONSIDERATION for payment of [amount certain], the undersigned hereby unconditionally and irrevocably waives and releases any mechanic's or materialmen's lien, equitable lien, stop notice, or any right against any labor and/or material bond for labor, services, materials or equipment supplied by the undersigned through [date certain] for the project owned by New Hope Missionary Baptist Church, located at 122-124 21st Avenue, Seattle, Washington. (Emphasis added.)

A.A.R. at 446. The final release of the six releases was executed on July 29, 1998, and expressly stated it was for work completed through June 30, 1998. The banks' deeds of trust were recorded on December 4, 1997 and June 24, 1998, respectively. *Id.* at 447. The bank argued that the above waiver and release language subordinated the mechanic's lien to the bank's later recorded deed of trust.

The parties in *A.A.R. Testing* did not disagree that RCW 60.04.061 grants mechanic's liens senior status over other liens recorded before the mechanic's lien was recorded, but after commencement of work on the project. The court acknowledged, however, that "[t]he priority of a lien may be changed by agreement

between the possessor of the lien and the owner of the property.” 112 Wn. App. at 449. Thus, the court framed the question in the context of the waiver and release presented in that specific appeal:

Thus, the question posed here is whether the releases executed by Heritage altered the priority of the lien.

Id.

The lien claimant argued that the six limited releases did not extinguish its right to the lien for subsequent work and that it retained its priority position for that subsequent work. Based upon the language of the waiver and release presented, the court agreed:

A reading of the release indicates that Heritage only released lien rights for any 'labor, services, materials or equipment supplied by the undersigned [Heritage] through June 30, 1998.' Payment for work done after June 30, 1998 was still secured by the statutory lien and the priority of that claim relates back to the date work began. *A waiver and release of a lien claim for work done through a certain date does not extinguish the lien or change the date of commencement under the statute.* (Emphasis added.)

112 Wn. App. at 449.

The *A.R.R. Testing* court held no more than that the specific release presented (with its limiting language), unaccompanied by a subordination agreement, was insufficient to subordinate the mechanic's lien to the deeds of trust. The decision was based “on the

record before” the court (*id.* at 450) and did not announce a firm rule that a broad, unlimited and unconditional release as presented in this case cannot operate to subordinate a mechanic's lien priority.

The present case is distinguishable in a material regard — Shelcon's release is without express limitation. Unlike the releases in *A.A.R.*, it does not on its face limit Shelcon's release to work performed through a date certain. As shown above, it simply states, “The undersigned lien claimant hereby releases the lien on the property owned by [Scott Haymond].” Shelcon's release did not leave any work secured by its lien and, as a result, did not “preserve” Shelcon's priority. The release certainly did not reserve a right to claim the same work and charges included in the first, released lien.

Moreover, the purpose of the release was to induce Anchor Bank to fund the loan – no other purpose or reason for the release was ever presented. *A.A.R. Testing* does not direct the same outcome for the release in this case that was recorded with a different intent and for a different purpose.

C. The Cited California Cases Do Not Support Shelcon's Position.

Shelcon directs this Court to two California cases, *Solit v. Tokai Bank Limited*, 68 Cal. App.4th 1435, 81 Cal. Rptr.2d 243 (1999) and *Koudmani v. Ogle Enterprises, Inc.*, 47 Cal App.4th 1650, 55 Cal.

Rptr.2d 330 (1996), as support for its argument that Shelcon's release did not affect Shelcon's lien rights.⁵ Both cases address a constitutional and statutory framework unique to California and they do not support Shelcon's argument.

In California, a mechanics lien is a constitutionally created right; in fact "it is the only creditor's remedy stemming from constitutional command." *Solit*, 68 Cal. App.4th at 1442. The mechanism to enforce this constitutional right is separately created by California's statutory scheme. *Id.* Under California's statutory scheme, lien is not defined as a right, but as "a charge imposed in some mode other than by the transfer in trust upon specific property by which it is made security for the performance of an act." *Koudmani*, 47 Cal. App.4th at 1655 quoting CA Civil Code § 2872. The "inchoate lien right" addressed by the California courts is constitutionally created; and the statutorily defined "lien" or "claim of lien" is a separately and statutorily created enforcement mechanism that transforms the constitutional right to a tangible claim. *Id.* at 1655-56. See also, *Solit*, 68 Cal. App. 4th at

⁵ As anticipated in Anchor Bank's opening Brief, Shelcon also cites and relies upon the Washington cases *Geo Exchange Systems LLC v. Cam*, 115 Wn. App. 625, 65 P.3d 11 (2003) and *West v. Jarvi*, 44 Wn.2d 241, 266 P.2d 1040 (1954) to support its position. Anchor Bank took great care in its opening brief to distinguish those cases from this case. (See Opening Brief at pp. 36-39.) Shelcon does not address those distinctions in its response.

1446. Thus, unlike in Washington, lien rights and lien claims have separate origins.

To transform the constitutionally created lien right into a tangible lien claim, the California lien statute requires a lien claimant to record a lien and then commence action to foreclose the claim within 90 days of recording. *Solit*, 68 Cal. App.4th at 1438, CA Civil Code §§ 3115, 3116, 3144. If action to foreclose the lien claim is not commenced within 90 days of recording, the lien expires and is automatically null and void. *Id.* Though void by operation of law, an unreleased expired lien may still create a cloud on title. Thus, if an expired lien is not voluntarily released, Section 3154 of the California Civil Code authorizes the property owner, or any party with an interest in the lien property, to petition the court for a “decree to release the property from the lien” as well as attorney’s fees. Section 3154 also provides at subsection (g):

Nothing in this section shall be construed to bar any other cause of action or claim for relief by the owner of the property or an interest in the property, nor shall a decree canceling a claimant’s lien bar the lien claimant from bringing any other causes of action or claim for relief, other than an action foreclosing such lien. However, no other action or claim shall be joined with the claim for relief established by this section.

Collectively, Sections 3144 and 3154, “by their terms apply *only* to a specific lien which has become null and void through the claimant’s failure to file an action and enforce it within 90 days of the date such lien was recorded, and do *not* apply to any not-yet-filed-and-timely liens which the claimant could record based on his or her inchoate lien rights and on the fact that the underlying obligation has still not been satisfied.” *Solit*, 68 Cal. App. 4th at 1445 (italics in original).

Significantly, the lien releases addressed in both *Solit* and *Koudmani* were recorded after the claim of lien expired and under threat of suit under Section 3154. *Solit*, 68 Cal. App.4th at 1438; *Koudmani*, 47 Cal. App.4th at 1654-55. In both cases, a second lien was timely recorded by the lien claimant after the expired lien claim was released. In this special context, the California courts held that “releasing a stale mechanic’s lien or a gratuitous voluntary release recorded under threat of a section 3154 petition” does not release inchoate lien rights and does not preclude timely recording of a second lien based on the same work and materials included in the released lien. *Solit*, 68 Cal. App.4th at 1447; *Koudmani*, 47 Cal. App.4th at 1657-58. The *Solit* court explained:

The only logical conclusion to be drawn from this statutory scheme is that once a timely-recorded lien becomes null and void because the claimant did not commence an action to enforce it, such

lien can be removed as a cloud upon title either by the claimant's voluntary recordation of a release of such lien, or by court decree pursuant to section 3154. But either method only goes to the removal of a particular lien as a cloud on title, and nothing in the statutory scheme indicates that either method has any effect on whether the claimant can record a subsequent lien on the property, which if it is timely recorded pursuant to sections 3115 or 3116, can be enforced within 90 days after such recordation even though based on the same work performed or materials supplied as the prior lien. In other words, neither a voluntary release of a null and void lien, nor decree ordering release of such a lien, has an effect on the validity of any subsequently recorded lien, whose validity must be determined on such subsequently lien's own merit.

Id. at 1443-44 (emphasis added). Releases pursuant to or based on Sections 3144 and 3154 of the California Civil Code will only bar subsequent claims if the release conclusively and unequivocally states that the specific claim was satisfied. *Id.* at 1444, *citing Koudmani*, 47 Cal. App. 4th at 1658-59.⁶

Solit and *Koudmani* stand only for the proposition that, under California's unique statutory framework, voluntary release of an expired, but unpaid recorded lien claim does not release otherwise viable inchoate constitutional lien rights. In Washington, there is no

⁶ In *Koudmani*, the release recorded under threat of a section 3154 petition stated that the lien was "satisfied or otherwise released and discharged." 47 Cal. App.4th at 1653-54, 1559. The court thus noted that the language in the release itself created an ambiguity regarding the basis and grounds for the release. *Id.* at 1559.

such statutory framework to compel release of an expired recorded lien claim. To the contrary, in Washington a lien release is only required “upon payment and acceptance of the amount due to the lien claimant and upon demand of the owner or the persona making the payment.” RCW 60.04.071. Thus, under Washington’s statutory framework, recording an unconditional and unlimited release infers those reviewing the public record that the release claim was paid. In any event, neither *Solit* nor *Koudmani* provide relevant or instructive authority for this appeal.

Santa Clara Land Title Co. v. Nowack & Assoc., Inc., 226 Cal. App.3d 1558, 277 Cal. Rptr. 497 (1991), on the other hand, has greater applicability here. In *Santa Clara*, the lien claimant, Nowack, recorded a lien release even though it had not been paid, but received only a promissory note. Nowack did not record the release under threat of a section 3154 petition, but to facilitate the property owner’s (Blumenthal) efforts to secure financing from World Savings Bank:

Paul Nowack, principle of Nowack, conceded that he understood that before World Saving would fund such a loan, it would require all mechanics’ liens to be removed from the record. Nowack was experienced enough to understand that construction lenders do not want to obtain liens junior to a mechanic’s lien. Nowack executed a “Release of Lien” describing the property and providing in pertinent part: “That certain mechanic’s notice and claim of lien recorded on

December 5, 1983 ... is hereby fully satisfied, released and discharged.” Nowack claimed he executed the lien not intending to give up any mechanic’s lien rights, but only to secure payment from Blumenthal on the promissory note.

Id. at 1562.

After the release was recorded, World Savings approved a construction loan, secured by a recorded deed of trust. Funds were disbursed to the owner and Nowack received payment on the promissory note. 225 Cal. App.3d at 1562. Nowack continued to perform engineering services and, after it did not receive payment for those subsequent services, recorded another lien. *Id.* at 1563. The *Santa Clara* court held that in this context, the lien claimant released not only its claim of lien, but also its inchoate personal right of lien that attached when it commenced work. *Id.* at 1569.

The release of lien executed by Nowack states that the mechanic’s notice and claim of lien recorded December 5, 1983, is hereby “fully satisfied, released and discharged.” Nowack acknowledged that he knew World Savings would not release construction funds unless all mechanic’s liens were cleared from the property. The language of the release, while referring to the December 5, 1983 “claim of lien,” gives no hint that it was not intended to release the underlying inchoate lien right. Certainly World Savings would not have released construction funds had it believed the release insufficient to release the underlying lien upon which the claim was based. Under Civil Code section 3268, the parties may

waive or release the benefits of the mechanic's lien laws, unless otherwise prohibited by public policy.

Id. at 1566. "Nowack was able and willing to release its claim of lien in order to induce funding of the construction loan, and as a direct result, payment of the Blumenthal note." *Id.* at 1569. In this context, the court held, as a matter of law, that nothing in California's statutory scheme prevented the recorded release from extinguishing both the claim of lien and Nowack's inchoate constitutional lien rights. *Id.* The court thus affirmed the trial court's summary judgment ruling that the bank deed of trust had priority over Nowack's lien notwithstanding that Nowack commenced work before the deed of trust was recorded. *Id.*

While Shelcon's release did not contain the same express statement that its lien was satisfied, there was likewise no conditional or limiting language as was the case in *A.A.R. Testing, supra*. Like in *Santa Clara*, however, Shelcon recorded the release to induce bank financing and received payment from the loan proceeds. If this Court is inclined to look to California case law for guidance, there is far greater commonality of context between this appeal and *Santa Clara* than there is with either *Solit* or *Koudmani*. In light of that common context, the court's analysis in *Santa Clara* is more appropriately applied to this case.

D. The Trial Court's Findings Support The Conclusion That Shelcon Should Be Equitably Estopped From Asserting Lien Priority Over Anchor Bank.

Despite that its unconditional and unlimited lien release was publicly recorded to induce financing, and despite that it submitted and received payment on invoices that represented work was 100% complete, Shelcon argues that it made no representations to Anchor Bank. Shelcon argues that, even if the release and invoices are deemed representations, Anchor Bank should not have believed Shelcon's representations, but should have investigated the veracity of the representations. Anchor Bank, according to Shelcon, thus did not reasonably rely on Shelcon's representations in the recorded lien release and invoices. The trial court's factual findings, now verities, belie Shelcon's arguments. The trial court found:

24. When Anchor Bank learned of Shelcon's lien, Anchor Bank informed Scott Haymond that Shelcon's lien would need to be released before Anchor Bank would lend.

25. Scott Haymond contacted Shane Martin and requested Shelcon to release its lien.

* * *

27. Shane Martin released Shelcon's lien with the purpose of enabling Scott Haymond to continue his application for refinancing through Anchor Bank and receive payment from the loan proceeds.

* * *

31. The lien release did not contain any language indicating whether Shelcon had been paid any or all

of the amount of the lien that was released. Shelcon's lien release also did not contain any language specifying whether the lien release was conditional or limited.

34. In July 2008, at the request of Scott Haymond, Shelcon submitted to Scott Haymond three invoices totaling \$79,200. Each of the three invoices was dated July 21, 2009. Invoice number 293 in the amount of \$61,000 states: "Waterline 100% Complete". Invoice number 294 in the amount of \$8,200 states: "Retention Pond 100% Complete". Invoice number 295 in the amount of \$10,000 states: "Utility Trenching 100% Complete". The invoices were prepared for the purpose of obtaining payment from loan disbursements.

35. Shelcon and Scott Haymond understood that these three invoices totaling \$79,200 represented part, but not all, of what was owed at the time that the invoices were submitted. Scott Haymond did not disclose this understanding to Anchor Bank.

36. Scott Haymond furnished these three invoices to Anchor Bank. Anchor Bank did not receive any other Shelcon invoices.

* * *

47. Kate Dixon and Anchor Bank relied on the lien release and the title report showing that the lien had been released for the decision to proceed with the loan application.

* * *

53. The Court cannot find fault with Anchor Bank, its protocols or procedures for their August 2008 loan of \$3,900,000 to Scott Haymond. It is easy under a Monday morning quarter back analysis to see that there were signs that might have suggested or prealerted Anchor Bank prior to the loan being funded. Some of those might have included that Scott Haymond had multiple projects and multiple lenders, or that Scott Haymond was seeking \$3,900,000 from Anchor Bank, but had just paid off

the \$300,000 lien filed two months before the loan was funded and as suggested by the lien release equaling payment in full. (Emphasis added.)

(CP 623-28.) The trial court found that Anchor Bank relied on the lien release and made payments based upon the invoices purportedly for work 100% complete. Regardless of Shelcon's claim that the Bank could have discovered that Shelcon's representations were, at best, deliberately incomplete,⁷ the trial court, significantly, found no fault with Anchor Bank's protocols or procedures, making Anchor Bank's reliance reasonable.

Moreover, the substantial evidence in the record fully supports and confirms the trial court's finding that "Shane Martin released Shelcon's lien with the purpose of enabling Scott Haymond to continue

⁷ Recall that after Anchor Bank approved the loan and after Shelcon was assured payments from the proceeds of the first loan draw based on the three invoices for work 100% complete, Shelcon prepared and signed, but did not record or send to Anchor Bank a wholly different lien waiver. Unlike the publicly recorded, unlimited lien release, Shelcon's unrecorded lien waiver provided

The undersigned agrees that upon receipt by the undersigned of a check in the amount of \$70,200 and payment of that check by the bank upon which it was drawn, this conditional release shall become effective to waive and release, pro tanto, any and all claims and liens which the undersigned may have with respect to the Project for labor, services, equipment and material ("Work") furnished to the extent of such payment; provided that, this conditional release does not cover Work furnished, or retainage, to the extent not yet paid. The individual signing below warrants that he/she has authority to sign this document on behalf of the undersigned.

(Ex. 113, RP 282-85). To the extent that Shelcon actually intended to limit its release, it knew how to condition or limit a release. That chose not to do so in the publicly recorded lien that it knew Anchor Bank would see only evidences further that Shelcon did not wish to disclose to Anchor Bank any unexpressed, secret intent to preserve unpaid claims asserted in its first lien or preserve any lien priority over the bank.

his application for refinancing through Anchor Bank and receive payment from the loan proceeds.” (CP 623, Finding 26.) Martin knew that he had less chance of getting paid if Haymond did not get the bank loan. (RP 122, 271). He also knew that Shelcon’s lien was interfering with Haymonds financing effort and that the lien release would facilitate bank financing. He was fully aware that its lien release would be sent to the bank and would help Haymond get the bank loan (RP 136-37, 162, 271, 273-74.)

Shelcon does not dispute any of this. It simply argues, contrary to the trial court’s findings, that Anchor Bank should have known better than to rely on Shelcon’s actions that were designed to induce Anchor Bank to approve Haymond’s construction loan.

Like in *Santa Clara*, Shelcon’s unconditional and unlimited release was publicly recorded, with success, for the purpose of inducing financing that would be, and was in fact, a source of payment for Shelcon. Even in the cases relied upon by Shelcon, *Geo Exchange Systems, supra*, and *West, supra*, the courts acknowledge that the involvement of innocent third parties could lead the court to different conclusions than those announced in the decisions. See, the *Geo Exchange*, 115 Wn. App. at 632; *West*, 44 Wn.2d at 250. The lien release, if construed based on its language and in context, should

operate to bar Shelcon's claims as against Anchor Bank. If the lien release is nonetheless deemed insufficient on its face, then certainly, based on the trial court's own factual findings, equity should intervene to bar Shelcon's claims.

The trial court's findings do not support the trial court's conclusion regarding equitable estoppel and the conclusion is thus erroneous. See *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002). To the contrary, the findings support only a conclusion that Shelcon should be equitably estopped from asserting lien priority.

**II.
SHELCON'S PREPARATORY ACTIONS ON THE DATE THE FIRST DEED OF
TRUST WAS RECORDED DID NOT VEST SHELCON WITH A SUPERIOR
LIEN.**

Only a few hours before Washington 1st International Bank recorded its deed of trust to secure the construction financing to Haymond, Shelcon "visited" the site to inspect it and place temporary markers in anticipation of clearing work. (Exs. 61, 13; RP 94-102.) No actual clearing occurred on that day. Rather, the owner of Shelcon did little more than walk the site.

Shelcon insists that this limited activity, which occurred only hours before the deed of trust recorded, was sufficient to vest Shelcon lien priority over the deed of trust. This limited activity, however, does not qualify as an improvement to the property as defined by RCW

60.04.011(5). It cannot, therefore, qualify as lienable work as contemplated by RCW 60.04.021. It is unqualified, minor preparatory work. *Pacific Industries, Inc. v. Singh*, 120 Wn. App. 1, 86 P.3d 778 (2004).

If Shelcon's argument is accepted, lending institutions would literally be required to stand guard on the property on the day of recording to ensure that no contractor entered the site. Shelcon presents an absurd construction of Washington's lien statute that would foster disingenuous and surreptitious actions by contractors for the purpose of obtaining lien priority.

Shelcon did not commence work before the Washington 1st International deed of trust recorded. To the extent Shelcon's lien was not released, it is subordinated to the amount of the Washington 1st construction loan.

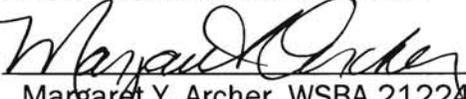
III. CONCLUSION

The trial court erred and should be reversed. This Court should hold that Shelcon's lien is subordinate to the Anchor Bank's lien. At a minimum, this Court should hold that Shelcon may not claim in its second lien any amounts included in Shelcon's first released lien.

Dated this 2nd day of April, 2014.

Respectfully submitted,

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COURT OF APPEALS, DIVISION II

OF STATE OF WASHINGTON

SHELCON CONSTRUCTION GROUP,
LLC,

Respondents,

vs.

SCOTT M. HAYMOND and JANE
DOE HAYMOND; A-3 VENTURE LLC;
A-4 VENTURE; A-111 VENTURE
LLOC; 14224 PIONEER LIVING
TRUST and ANCHOR MUTUAL
SAVINGS BANK,

Appellants.

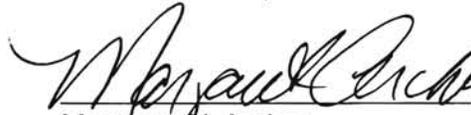
NO. Consolidated No. 42845-8

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 2nd day of April, 2014, I did
serve via U.S. Postal Service, true and correct copies of Appellant
Anchor Mutual Savings Bank's Reply Brief by addressing for delivery to
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