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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

No. 291049

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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NEW CARE CONSTRUCTION, LLC,  
a Washington limited liability  
company,

Respondent,

vs.

MIKE HARVEY'S PLUMBING  
SERVICES, INC., a Washington  
corporation,

Appellant.

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REPLY BRIEF OF APPELLANT

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NEW CARE CONSTRUCTION, LLC, ) No. 291049  
a Washington limited )  
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Respondent, )  
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MIKE HARVEY'S PLUMBING )  
SERVICES, INC., a Washington )  
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 )  
Appellant. )

INTRODUCTION

Whether a trial court's conclusion that a mechanics' lien was time-barred in summary proceedings pursuant to RCW 60.04.081 meant that the lien should be released as frivolous is the primary issue. A subsidiary issue is whether the trial court's letter opinion contains or constitutes findings of fact resulting in less penetrating appellate review.

Both issues should be resolved in the appellant's favor. The trial court's letter opinion neither contains nor constitutes findings of fact. Therefore, the decision below should

be reviewed de novo. Despite the respondent's failure to appreciate the absence of findings of fact and the consequences of that absence, the decision below resolved the primary issue erroneously. That a lien claim is invalid because it is untimely does not mean that the lien is "frivolous and made without reasonable cause," and should be released pursuant to RCW 60.04.081.

Here, there are reasonable grounds for concluding that the Harvey lien was timely. There are no grounds for concluding that the lien was frivolous. Well established authority articulates the distinction between an invalid lien and a frivolous lien. Neither the respondent nor the trial court followed that authority to distinguish between an invalid lien and a frivolous lien. Following that authority requires reversal of the decision below.

ARGUMENT IN REPLY

I. JUST AS NEW CARE CONFLATES  
INVALIDITY AND FRIVOLITY, IT  
IGNORES THE DISTINCTION BETWEEN  
A TRIAL COURT'S WRITTEN OPINION  
AND FINDINGS OF FACT.

New Care argues that the trial court made findings of fact. (Brief of Respondent at 4) New Care reports that Harvey asserted that the trial court "made no findings of fact or conclusions of law." (Brief of Respondent at 4) Indeed, Harvey made that very assertion. (Brief of Appellant at 5) Contrary to the New Care contention, the Harvey assertion is accurate. The trial court made no findings of fact or conclusions of law.

Apparently in an effort to avoid de novo review, New Care repeatedly states that the trial court made findings of fact. Thus:

The trial court issued a  
lengthy opinion letter outlining  
its findings on numerous facts. . . .  
(Brief of Respondent at 4)

Those findings were then incorporated into the trial court's Order and Judgment. (Brief of Respondent at 5)

In the present case the trial court made significant findings of fact. . . . (Brief of Respondent at 9)

No findings of fact were made and none was incorporated in the Order and Judgment. (CP 92-94)  
Only if one ignores the distinction between a written opinion and findings of fact is the New Care position tenable. That distinction may not be ignored. Recognition of that distinction is required by precedent.

As noted in State v. Mallory, 69 Wn. 2d 532, 533-534, 419 P. 2d 324 (1966):

Appellants, in their argument in support of their appeal, refer to the oral opinion and the memorandum opinion of the trial court. These may be considered as interpreting the findings of fact and conclusions of law, but they cannot be considered as the basis for the trial court's judgment and sentence. A trial court's oral or memorandum opinion is no more than an expression of its informal opinion at the time it is rendered. It has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment.

A memorandum opinion, as found in the instant case, simply "does not have the standing of findings of fact." Akers v. Sinclair, 37 Wn. 2d 693,701, 226 P. 2d 225 (1950).

Both Mallory and Akers, supra, rely on Justice Millard's analysis set forth in Clifford v. State, 20 Wn. 2d 527,531-532, 148 P. 2d 302 (1944):

As the memorandum opinion was not made in pursuance of statute or court rule nor was it incorporated in and made a part of the court's formal findings, it is no part of the findings of fact and judgment entered pursuant thereto, and cannot be used to impeach the findings or judgment. The trial court's memorandum opinion was merely an informal expression of the court's views and forms no part of the findings or judgment.

"While it is said to be proper for the trial court in rendering a decision to embody its reasons in either a written or oral opinion, such an opinion does not constitute either findings of fact or conclusions of law. This being so, it is not commendable practice for a court in its formal findings to refer to and incorporate a portion of a written opinion on file." Bancroft's Code Practice and Remedies, Vol 2, §1682, p. 2161.

"It is said to be commendable practice for a trial court to furnish counsel or file with the records a statement announcing the

reasons for its decision. Such a statement, however, is in no way binding; its only function is to indicate the judge's opinion as to the points involved and his views as to the law applicable. The statement of reasons constitutes no part of the decision of the court, is insufficient as a finding of fact, and should not be incorporated into the conclusions of law; it may indeed be modified or nullified by the making of findings of fact and conclusions of law, or by the entry of a judgment, inconsistent therewith, and it may not be employed to impeach the findings." Bancroft's Code Practice and Remedies, Vol. 2, § 1615, p. 2081-2082.

Moreover, prevailing parties have a duty to "procure formal written findings," or "abide the consequences of their failure to do so." Peoples Bank v. Birney's Enters., 54 Wn. App. 668,670, 775 P. 2d 466 (1989). A consequence of New Care's failure to procure findings of fact in the instant case is de novo review.

Notwithstanding New Care's failure to procure findings of fact, de novo is the applicable standard of review, where, as here, a question of law is presented. As stated in the appellant's opening brief, whether a "lien complies with RCW 60.04.091

is a question of law which we review de novo." DKS Const. Management, Inc. v. Real Estate Improvement Company, LLC, 124 Wn. App. 532,535, 102 P. 3d 170 (2004). Whether a failure to comply with 60.04.091, if proven, renders a lien frivolous is a matter of statutory interpretation. "Statutory interpretation is a question of law which we review de novo." Intermountain Electric v. G-A-T Bros., 115 Wn. App. 384,390, 62 P. 3d 548 (2003). Therefore, review should be de novo.

II. WITHOUT AUTHORITY OR ANALYSIS,  
THE RESPONDENT REITERATES THE TRIAL  
COURT'S ERROR IN CONCLUDING THAT AN  
UNTIMELY LIEN MUST BE A FRIVOLOUS  
LIEN.

New Care's conflation of invalidity and frivolity is revealed in its own argument:

Based on that detailed analysis, the court then expressly found that the lien was both untimely and frivolous. CP:80. Once it determined that the Claim of Lien was untimely, and the recent activity of MHP was self-serving

for the purposes of attempting to revive the lien, it is a reasonable position to state that the Claim of Lien, filed twenty-one months after the project was completed and nineteen months after the last payment by New Care, was frivolous. (Brief of Respondent at 9)

There is no reason to assume that the court ignorantly used the term "frivolous" in its opinion, and there is substantial evidence to support a finding that the untimely Claim of Lien was frivolous. (Brief of Respondent at 10)

Of course, no finding was made and substantial evidence is not the test. More important is the absence of any evidence or analysis properly leading to a conclusion that the Harvey lien was frivolous. Proof, without more, that the Harvey lien was invalid does not establish that the lien was frivolous. The record below establishes neither invalidity nor frivolity.

The Harvey lien was timely. As stated in Michael D. Harvey's declaration (CP 50:7--51:5)

A component of the work done by Mike Harvey's Plumbing Services, Inc. was the provision of "as built" drawings. As built drawings show how actual construction was accomplished. It is not unusual in the course

of construction for the work that is actually done to diverge from that which is shown on the original plans. To aid maintenance and future construction, as built drawings are a frequently required component of a construction contract of the sort that my firm had with New Care Construction.

In the fall of 2009, a question arose concerning the provision by my firm of as built drawings. I spoke with Les Wright the Park Manor Rehabilitation Center maintenance manager in November, 2009, concerning whether his employer had received a complete set of as built drawings. In an effort to complete my firm's work and fulfill its obligations under its subcontract with New Care, I visited the job site on November 25, 2009. There I met with Mr. Wright and examined several drawings and other documents concerning the construction project in which my firm was engaged. This effort took time and professional expertise. It was necessary to fulfill my firm's obligations. As a result of the work I performed in the course of my visit to the job site on November 25, 2009, it was determined that a complete set of as built drawings had been provided to Park Manor.

Thus, Harvey provided labor and professional services as part of its work on the property against which the lien was claimed on November 25, 2009. As the lien was recorded on January

25, 2010, fewer than ninety days had passed between the cessation of work and the recording of the lien claim. The lien was timely.

Contrary to the respondent's assertion that the project was closed out in April, 2008 (Brief of Respondent at 3), it was not. As late as September 30, 2009, New Care's president, Granville Brinkman, wrote to Harvey:

New Care Construction LLC's (NCC) file is filled with requests to Mike Harvey's Plumbing Services Inc. (MHP) to comply with the terms of the subcontract 5040-15400 dated July 13th 2007 allowing the subcontract to be closed out.

. . . .

MHP has failed to comply with the terms of the subcontract and has breached the contract with NCC and in turn with the project owner.

. . . .

The last progress payment made to MHP was in June of 2008, what is not addressed are the terms of the subcontract MHP is in breach of the subcontract MHP failed to complete the scope of work depicted in the subcontract and has failed to supply the requested close out documents.  
(CP 60)

Subcontractor's work under this Subcontract shall not be deemed complete until such time as Subcontractor has fully performed all work in accordance with the contract documents and the work has been finally approved and accepted by the Contractor and Owner. . . . (CP 61)

NCC has diligently attempted to close out this project with MHP. At present communication has been one sided as stated previously. We have approximately 10 unanswered requests to finalized [sic] the contract amount and close out this project. NCC is still waiting for final [sic] AS-Built drawings from MHP per the terms of the contract. NCC would gladly discuss the close out of this project with MHP if there are any questions. NCC has only one objective that is to close out the project per the terms of the subcontract between NCC and MHP. (CP 64)

Thus, the job was not, would not and could not be closed out because Harvey had not finished its work. This work, by New Care's own account, included provision by Harvey of as built drawings.

Furnishing as built drawings was a component of the work contracted by Harvey. Just as work performed to see that a previously installed furnace was in "proper operating condition" was

part of the installation contract, the work performed by Harvey regarding as built drawings and the circulating pump was part of its contracted work for New Care. This conclusion follows from the rationale of Friis v. Brown, 37 Wn. 2d 457,460, 224 P. 2d 330 (1950).

That Harvey performed work on a circulating pump after recording its lien is of no moment. Nothing in the mechanics' lien statute (RCW 60.04) requires a contractor to wait until all work is finished before liening a job.

New Care misinterprets a provision of the parties' contract to conclude that an express warranty expired before Harvey addressed the circulating pump problem. (Brief of Respondent at 3):

However, the express warranty included in the Subcontract Agreement is limited to one year from the date of final acceptance of the project. (CP 15 at ¶ 26)

A look at the cited contract provision shows that New Care misconceives a warranty of one year.

The contract provision cited by New Care in support of its contention that the work on the circulating pump was performed after a one-year express warranty expired states (CP 15 at ¶ 26):

Subcontractor shall guarantee its work to the same extent that Contractor is obligated to guarantee its work under the Main Contract, or as required by the law in the state where the Project is constructed but, in any event, Subcontractor shall guarantee its work against all defects in material and workmanship for a period of one (1) year from the date of final acceptance of the Project by Owner.

Clearly, that provision does nothing more than establish minimum standards for a guarantee.

Not only does New Care conjure an express warranty from a contractual provision that merely sets forth minimum standards for a guarantee, but its own communications with Harvey undercut its contention. New Care contends that the express warranty it finds in the parties' contract "is limited to one year from the date of final acceptance of the project." (Brief of Respondent at 3) Yet, New Care president Brinkman's letter of September 30, 2009, shows that Harvey's work was never finally accepted. (CP 60, 61, 64) As noted in the appellant's opening brief, the record is without evidence of a one-year warranty or expiration of a one-year warranty. Thus, New Care's argument that the Harvey lien was untimely fails for factual, legal and logical support.

Assuming for discussion purposes only that the Harvey lien was untimely, the record and decision below is bereft of grounds for concluding that the lien was "frivolous and made without reasonable cause." RCW 60.04.081. The trial court never concluded that the Harvey lien was "so devoid of merit that it has no possibility of succeeding." Intermountain Electric v. G-A-T Bros., 115 Wn. App. 384,394, 62 P. 3d 548 (2003). Nothing in the record below shows that "It is apparent beyond legitimate dispute that the lien was invalid when filed." Williams v. Athletic Field, Inc., 155 Wn. App. 434,446, 228 P. 3d 1297 (2010). All arguments for holding the lien to be timely and valid were reasonable. (CP 45-48) The lien should not have been released. The trial court should be reversed.

#### CONCLUSION

In accordance with the foregoing argument together with that set forth in the appellant's opening brief, the trial court judgment should be reversed. The mechanics' lien of the appellant should be reinstated, and this case should be

remanded to the trial court for further proceedings.  
The appellant should be awarded its attorney fees  
and expenses.

Dated this 10<sup>th</sup> day of September, 2010.

Respectfully submitted,

  
\_\_\_\_\_  
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