

NO. 80411-7

IN THE SUPREME COURT WASHINGTON STATE

ESTATE OF CHARLES C. HASELWOOD, and JOANNE I. HASELWOOD,
husband and wife,

Petitioners,

v.

BREMERTON ICE ARENA, INC., a Washington corporation; GREGORY
S. MEAKIN and DEBORAH A. MEAKIN, husband and wife,

Defendants,

RV ASSOCIATES, Inc., a Washington corporation,

Respondent.

MALLORY ENTERPRISES, INC., dba ABBEY CARPETS, a Washington
corporation; ROBISON MECHANICAL INC., a Washington corporation;
JPL HABATABILITY, INC., A Washington corporation; CONSOLIDATED
ELECTRICAL DISTRIBUTORS, Inc., dba STUSSER ELECTRIC
CO/EAGLE ELECTRIC, a Washington corporation; ALASKA CASCADE
FINANCIAL SERVICES, INC., ASSIGNEE FOR Sound Glass Sales, Inc.,
a Washington corporation; SULLIVAN HEATING & COOLING, INC., a
Washington corporation; STIRNCO STEEL STRUCTURES, INC., a
Washington corporation; EAGLE ELECTRIC, INC., a Washington
corporation; HANSON SIGN COMPANY, INC., a Washington corporation;
STRIPE RITE, INC., a Washington corporation,

Defendants.

SUPPLEMENTAL BRIEF OF PETITIONERS

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I. INTRODUCTION

Washington common law has never allowed a mechanic to lien the public's property. But the appellate court allowed such a lien because the improvement is a "permanent structure." *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 887, 155 P.3d 952 (2007), *rev. granted*, 163 Wn.2d 1017 (2008). This creates a very broad exception, where many if not most improvements are "permanent" under RCW 60.04.011(5).¹ The inherent permanency of many improvements is not new: it cannot warrant changing nearly 80 years of common law.

In any event, RV's Associate's lien cannot reach the real property under RCW Ch. 60.04 because the party who ordered the work – BIA – has no interest in the real property. RCW 60.04.051 ("The . . . land which is improved is subject to a lien ***to the extent of the interest of the owner*** at whose instance . . . the labor . . . or materials were furnished"; emphasis added). This Court should reverse the appellate court and affirm the trial court.

¹ Defining "improvement" as "(a) Constructing, altering, repairing, remodeling, demolishing, clearing, grading, or filling in, of, to, or upon any real property or street or road in front of or adjoining the same; (b) planting of trees, vines, shrubs, plants, hedges, or lawns, or providing other landscaping materials on any real property; and (c) providing professional services upon real property or in preparation for or in conjunction with the intended activities in (a) or (b) of this subsection."

II. SUPPLEMENTAL STATEMENT OF THE CASE

The Brief of Respondent and Petition for Review state the facts. The Haselwoods include this brief summary of the relevant property interests for the Court's convenience.

A. BIA – who ordered RV's work – does not own or have an interest in the improved real property.

On August 9, 2002, the City of Bremerton and Bremerton Ice Arena, Inc. ("BIA") entered a "Concession Agreement" granting BIA a "ground and use concession" to develop, construct, and operate an ice arena on City property. CP 263, ¶ 1.1. The City contributed the use of its real property, and BIA agreed to secure funding, oversee construction, and operate the Arena. *Id.*; CP 262, 268 ¶ 1.1. The City retained ownership of its real property, while BIA owned the improvements for the Agreement's term. CP 263, ¶ 1.1; 307. As the appellate Court noted, BIA never had any interest in the real property:

The agreement . . . establishes the extent of BIA's interest in the ice arena.

...

BIA never had and never would acquire any interest in the underlying realty. The extent of BIA's interest was an ownership interest in the ice arena itself and all its incidental improvements as personal property.

Haselwood, 137 Wn. App at 883.

B. The Haselwoods have no security interest in the City's real property.

Chuck and Joanne Haselwood loaned BIA just over \$4.5 million to construct the Arena, secured by a promissory note, deed of trust, commercial security agreement, and fixture filing. CP 97-103, 105-09, 630-34, 636-49, 651-81. The Haselwoods' loan was not secured by the City's property (CP 275, ¶ 6.2) but BIA granted the Haselwoods a first-position security interest in BIA's entire interest, including the Concession Agreement; buildings and improvements; personal property; rents and revenues; intangibles related to development and use of the property; all stock or other evidence of ownership; and all proceeds related to these items. CP 302-04.

The Agreement forbids BIA from encumbering the real property, including with mechanics' and materialmen's liens (CP 274 (¶ 5.9, "**No Liens**")):

. . . it is mutually understood and agreed that the [BIA] shall have no authority, express or implied, . . . in any manner to bind, the interest of the CITY in the Premises . . . for any claim in favor of any person dealing with [BIA], including those who may furnish materials or perform labor for any construction or repairs, and each such claim shall affect and each such lien shall attach to, if at all, only the right and interest granted to [BIA] by this Agreement.

C. The appellate court correctly held that RV's lien, if any, does not reach the improved real property.

When BIA defaulted and the Haselwoods sought judicial foreclosure, RV claimed that it had a lien on the public real property underlying the Arena. CP 4-16; 124, ¶ 2.6; 125, ¶¶ 2.7, 2.8. It claimed relation back to the commencement of labor (before the Haselwoods recorded a deed of trust) under 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.

The appellate court agreed with the trial court that RV's lien could not attach to the real property for two reasons: (1) under this Court's precedents, public property is not lienable; and (2) under RCW 60.04.051, which limits a lien "to the extent of the interest of the owner at whose instance . . . labor [was] furnished," BIA has no interest in the real property. *Haselwood*, 137 Wn. App. at 883-84. This aspect of the appellate court's decision is correct and unchallenged; this brief thus assumes that RV's lien, if any,² does not reach the improved public property underlying the Arena.

² The trial court did not decide whether RV had a lien on improvements.

III. SUPPLEMENTAL ARGUMENT

Unfortunately, what the appellate court affirmed with one hand, it promptly reversed with the other. Not less than five times, the appellate court repeated its correct holding that RV's lien could not reach the improved real property.³ But the court nonetheless held that RV's "lien is 'upon a parcel of land' within the meaning of RCW 60.04.061." *Compare* 137 Wn. App. at 876, 883-84 *with* 887. This was error.

The public owns the "parcel of land" at issue here, so RV could not lien it. Moreover, RV's lien could not reach the parcel because BIA – the owner at whose instance RV did the work – holds no interest in that property. RV simply failed to use the available statutory remedy, a stop notice to the lender. The appellate court should not have rewritten this clear and unambiguous statute based on its hunches about the Legislature's intent. Those hunches are incorrect in any event.

This Court should reverse and dismiss.

³ Stating for example, "the extent of RV Associates' possible lien is limited to the improvements designated as BIA's personal property in the agreement and it does not reach the underlying real property the City owns." 137 Wn. App. at 885.

A. The Haselwoods' deed of trust is prior to RV's lien, where the Haselwoods filed first and no exception to the "first in time, first in right" rule applies.

RCW Chapter 60.04 allows mechanics, materialmen and those providing professional services to improve real property to lien the improvements (RCW 60.04.021):

[A]ny person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement

An improvement lien can, but does not necessarily, reach "[t]he lot, tract, or parcel of land which is improved":⁴

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 60.04.051 (emphasis supplied).⁵

⁴ The appellate court rejected the Haselwoods' argument that §§ .021 & .051 create two liens, one on improvements, the other on real property. Although plain language supports this reading, we do not agree here because it is immaterial whether there are two liens or only one lien that reaches improvements and *may* reach the real property.

⁵ RCW 64.04.051 was amended in 1992 to clarify "that the interest in land referred to is that of the owner who orders the work done, as opposed to some other owner." Final Bill Report, ESB 6441, Ch. 126, Synopsis as Enacted (1992).

Generally, improvement liens fail to reach the improved real property where, as here, “the improvements are furnished at the instance of someone who owns less than the fee estate in the subject property.” *Haselwood*, 137 Wn. App. at 886. As noted above, it is undisputed that RV’s lien, if any, is on improvements only and does not reach the real property.

Assuming that RV has a valid improvement lien, priority is determined by the “first in time, first in right” rule, under which the Haselwoods’ deed of trust is prior to RV’s lien⁶ unless one of two enumerated exceptions applies:

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

RCW 60.04.226. The first exception (§ .221) allows mechanics to collect amounts past due directly from lenders via a stop notice, which will subordinate senior mortgages and deeds of trust if the lender fails to comply with the statutory requirements.⁷ In other words, RV could have protected itself by invoking § .221, but it never did.

⁶ It is undisputed that the Haselwoods filed first.

⁷ The Brief or Respondent fully discusses this exception at 18-19.

RV solely relied on the second exception (§ .061, the relation back statute), which subordinates trust deeds by relating later-filed mechanics' liens back to the date work commenced:

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

RCW 60.04.061. This section solely applies to liens “upon any lot or parcel of land,” not to liens on improvements.

Contrary to § .061's limitation to liens “upon any lot or parcel of land,” the appellate court held that § .061 applies to RV's improvement lien, even though it “does not reach the underlying real property the City owns.” *Haselwood*, 137 Wn. App. at 885. This holding simply ignores the statute's plain language.

Section .061 is unambiguous. It means exactly what it says (see *In re King*, 146 Wn.2d 658, 663, 49 P.3d 854 (2002)): only liens “upon any lot or parcel of land” relate back. RV's improvement lien does not reach the “[t]he lot, tract, or parcel of land which is improved” (§ .051) so it cannot reach “any lot or parcel of land” (§ .061).

Other longstanding statutory-construction rules compel the same conclusion. For example, “[w]here the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.” *In re Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990) (quoting *UPS v. Department of Rev.*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984)). But the appellate court ignores the distinction between “a lien upon the improvement” (§ .021) and a lien on “any lot or parcel of land” (§ .061). Interpreting § .061 to apply to liens on improvements also impermissibly engrafts a new material term into the statute. See, e.g., *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

The appellate court also erroneously refuses to treat § .061’s plain language as an “expression of legislative intent” (*Cosmopolitan Eng’g Group, Inc. v. Ondeo Degroment, Inc.*, 159 Wn.2d 292, 298, 149 P.3d 666 (2006)); and renders “surplusage” § .061’s limitation to liens “upon any lot or parcel of land.” *Condon Bros., Inc. v. Simpson Timber Co.*, 92 Wn. App. 275, 284 n.20, 966 P.2d 355 (1998) (“whenever possible, a statute must be interpreted so as to avoid surplusage and give all of its language meaning”). This error is particularly egregious where the

appellate court ignores the very language the Legislature added in 1991. *Infra*, Argument § B.

The appellate court incorrectly criticizes the Haselwoods' reading of § .061 as "overly literal," suggesting that it is "absurd" to limit relation-back priority to liens that reach the real property. 137 Wn. App. at 888. But limiting § .061 to liens that reach real property is necessary to protect senior real-property interests.

When an improvement lien fails to reach the underlying real property, it is typically because the person ordering the work holds less than a fee estate. RCW 60.04.051; *Haselwood*, 137 Wn. App. at 886 (citing *Columbia Lumber Co. v. Bothell Dairy Farm*, 174 Wash. 662, 664, 25 P.2d 1037 (1933); *Gile Inv. Co. v. Fisher*, 104 Wash. 613, 618, 177 P. 710 (1919); *Cutler v. Keller*, 88 Wash. 334, 340, 153 P. 15 (1915)). As noted above, the mechanic's lien cannot exceed the interest of the party who ordered the work, if any. RCW 60.04.051.⁸ This protects other owners from liens for work they did not order.

⁸ This limitation dates back to the original Act (1854 § 1) and has been amended to emphasize that mechanics may not lien more than the interest of the owner who ordered the work. Final Bill Report ESB 6441, Ch. 126, Synopsis as Enacted (1992).

But allowing improvement-only liens to relate back undermines this clear legislative limitation. Here, for instance, the owner who ordered the work was BIA. BIA had no interest in the lot, tract or parcel of land. And under the Concession Agreement, whatever interest BIA had in the improvements was subordinated to the Haselwoods' security interest. Yet the appellate court held that RV's limited improvements lien is somehow senior to the Haselwoods' interest. This turns the statute on its head.

The correct reading of § .051's plain language also counters the appellate court's incorrect suggestion that RV's lien would have had priority "but for" the Concession Agreement's provision that the improvements belong to BIA, not to the City. *Haselwood*, 137 Wn. App. at 887. The scope of RV's lien does not turn on who owns the improvements, but rather on who owns the real property. As noted above, under § .051 RV's lien cannot reach the real property because BIA has no interest in the real property.

In sum, § .061 does not grant RV's lien relation back because (a) the lien cannot reach the public's property, and (b) BIA has no interest in the real property, as the trial court correctly found. The appellate court's confusing holding that RV's improvement-only lien somehow satisfies § .061's "lot or parcel of land" requirement

circumvents this Court's longstanding rule that mechanics' liens cannot attach to public property. It also contradicts the statutory mandate that liens are limited to the interest of the owner ordering the work. The appellate court should not have rewritten the statutes, even if it believed that the Legislature meant something other than it said. This Court should reverse.

B. The appellate court's presumptions about the Legislature's intent are at odds with Chapter 60.04's legislative history.

As discussed above, § .061 is clear and unambiguous so the Court should "give effect to that plain meaning as an expression of legislative intent," reverse the appellate court, and affirm the trial court. *Cosmopolitan*, 159 Wn.2d at 298. Yet the Court of Appeals implies that the Legislature could not mean what it said. Since the statute is unambiguous, this Court should not resort to legislative history. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708 153 P.3d 846 (2007), *cert. denied*, 128 S. Ct. 661, 169 L. Ed. 2d 512 (2007). But even if the Court could do so, the legislative history contradicts the appellate court's surmise.

It is particularly egregious to ignore language that the Legislature recently added. The Legislature most recently amended the mechanics' lien statute (originally enacted in 1854) in

1991-92 to cure widespread problems with the law. SSB 5497 Ch. 281, Final Bill Report, Synopsis as Enacted (1991).⁹ The chair of the Senate Committee on Economic Development and Labor appointed a Task Force in 1989,

consisting of members of all facets of the construction industry . . . includ[ing] representatives of the lending community, building materials and supplier community, subcontractors, general contractors, commercial builders, home builders, surety and bonding companies, title insurance companies, citizen and homeowners groups, the Attorney General's Office, labor groups, remodeling contractors and . . . others.

SB 5497 Ch. 281, Legislative History, letter from William Charbonneau, Chairman, *Citizen Task Force Revising Construction Lien Law*. After "tedious compromise," the Task Force arrived at a bill that it thought would gain majority support (*supra*, SB 5497, Charbonneau letter) but the bill failed in the 1990 Legislative session. *Supra*, SSB 5497 Final Bill Report. The Senate asked the Task Force to continue refining the bill (*id.*) and the bill passed in 1991, with a delayed effective date of April 1992, "to allow those involved with the application of the act an additional period of time

⁹ By 1991, there were four different lien statutes. The 1991 amendments incorporated former RCW Chapters 60.20 and 60.48, providing for lien rights based on the provision of landscaping or engineering services. *Supra*, SSB 5497, Synopsis as Enacted.

to become familiar with its provisions and identify technical problems that could be corrected prior to its effective date.” ESB 6441, Ch. 126, Final Bill Report, Synopsis as Enacted (1992). In short, this major overhaul was the product of much legislative compromise.

The 1991 amendments were based on the 1893 Act,¹⁰ which had not been “substantially amended or modernized [for a] century.” *Supra*, SSB 5497, Synopsis as Enacted. By 1991, “[v]irtually all of the industry segments ha[d] reported problems with the” law (*id.*), which was in such disarray that it provided “fertile ground . . . to challenge virtually any lien filed.” *Supra*, SB 5497, Charbonneau letter.

For nearly 100 years before the 1991 amendments, the mechanics lien statute granted relation-back priority to “liens created by this act”:

The liens created by this act are preferred to any lien, mortgage or other incumbrance which may attach subsequently to the time of the commencement of the performance of labor

Laws of 1893, Ch. 24, § 4. The Legislature reworded this provision in 1943, but made no substantive change. Laws of 1943, Ch. 18, §

¹⁰ The first significant amendments to the original Act.

2. The Legislature reverted back to the 1893 language when it again amended the provision in 1959 (Laws of 1959, Ch. 279, § 4) and retained the same language in the 1975 amendments. Former RCW 60.04.050.

In the 1991 amendments, the Legislature retained “liens created by this chapter,” but added the limitation “upon any lot or parcel of land.” *Compare* former RCW 64.04.050 *with* RCW 64.04.061. The Haselwoods have found nothing in the Legislative history addressing this amendment, which plainly limits § .061-relation-back to liens on real property.

The appellate court’s unprecedented expansion of § .061 to improvement liens contradicts the purposes of the 1991 amendments. The focus of the 1991 amendments was to simplify notice requirements and make bonding and stop-notice procedures more effective:

- ◆ Chapter 64.04 simplifies notice requirements by:
 - Providing a form of notice to clarify lien rights to property owners and help owners avoid potential liens;
 - Adopting the rule that a lien claimant providing professional services that are not visible on the property must record a notice in the county real property records;
 - Omitting the pre-lien notice requirement only where the person providing labor or professional services

contracts directly with the property owner, or a subcontractor contracts directly with the prime contractor; and

- Replacing the requirement that liens must be recorded in the Torrens Register with the requirement that liens must be recorded the same as any other title instrument.
- ◆ Chapter 60.04 simplifies bond procedures to increase the ability to remove a lien encumbering real property by:
 - Reducing the required bond amount “to make this remedy more usable by owners and to more realistically reflect the protection needed for the lien claimant”,¹¹
 - Omitting a lien claimant’s right to reject the bond, requiring only that the bond satisfies statutory requirements;
 - Adding “lenders” to those who can post a bond;
 - Requiring lien claimant to immediately release the lien once it has been paid; and
 - Expediting procedures for frivolous liens.
- ◆ Chapter 60.04 makes stop-notice provisions more usable by:
 - Clarifying stop-notice procedures to cure confusion reported by lenders, contractors and lien claimants;
 - Reducing the lender’s stop notice withholding from 50% of the construction financing to the full amount indicated in the lien notice; and
 - Expediting procedures for frivolous liens.

Supra, SB 5497, Charbonneau Letter & Legislative History, *Comparison of Current Law and SSB 5497*.

¹¹ *Supra*, SSB 5497, Synopsis as Enacted.

In sum, the 1991 amendments help property owners avoid liens, simplify the stop-notice process, and make it easier and cheaper to remove liens. Contrary to these express legislative goals, the appellate court's decision allows more liens to subordinate owners' security interests based on unsupported surmises about the Legislature's intent. This Court should reverse.

C. Attorney fees

The Court should award the Haselwoods attorney fees under RCW 60.04.181:

In every case in which different construction liens are claimed against the same property

...

The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, . . . attorneys' fees and necessary expenses incurred by the attorney in the . . . supreme court

If the Court reverses the appellate court, it should award the Haselwoods fees and affirm the trial court's award of statutory fees and costs under RCW 4.84.080 and CR 78(e).¹²

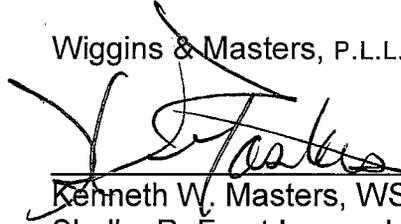
¹² The appellate court declined to award RV fees, where RV failed to comply with RAP 18.1, requesting fees for the first time in its reply.

CONCLUSION

Under § .061's plain language, RV's lien does not reach the real property underlying the Arena and is therefore junior to the Haselwoods' security interests. Any other interpretation rewrites RCW Ch. 60.04. The Court should reverse.

DATED this 2nd day of June, 2008.

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CERTIFICATE OF SERVICE BY MAIL

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