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Supreme Court No. 84555-7  
(consolidated with 84764-9)  
Court of Appeals No. 33607-3-II

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**SUPREME COURT OF THE STATE OF WASHINGTON**

TERRY L. WILLIAMS and JANIS E. WILLIAMS, husband and wife,

Plaintiff/Respondent,

v.

ATHLETIC FIELD, INC., a Washington corporation,

Defendant/Petitioner.

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HOS BROS. CONSTRUCTION, INC.,

Appellant,

v.

C19-1 SHOTWELL, LLC *et al.*,

Respondent.

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**BRIEF OF AMICUS AGC OF WASHINGTON**

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**TABLE OF CONTENTS**

|   | <u>Page</u> |
|---|-------------|
| TABLE OF AUTHORITIES .....  | ii          |
| I. IDENTITY AND INTEREST OF AMICUS .....  | 1           |
| II. ARGUMENT .....  | 3           |
| A. The Safe Harbor Form in RCW 60.04.091 serves an important public purpose by providing a straightforward, reliable and uniform method of mechanic’s recording liens .....                     | 3           |
| B. Mechanics lien claimants have an express statutory right to have the Provisions of RCW 60.04.091 liberally construed to effect the purpose of payment security.....                          | 4           |
| C. The Court of Appeals opinion rests on a fundamental mistake regarding the difference between an instrument’s acknowledgment and a notary’s certificate .....                                 | 6           |
| D. The Williams Court erred by ignoring the more recent and specific enactment embodied in the mechanics lien statute and imposing the older and more generic provisions of Chapter 64.08 ..... | 10          |
| E. Division II ignored the contrary holding of Division I in <i>Fircrest Supply v. Plummer</i> .....  | 11          |
| III. CONCLUSION.....  | 12          |

## TABLE OF AUTHORITIES

|   | <u>Page</u> |
|---|-------------|
| <b>Cases</b>  |             |
| <i>Berry v. The Department of Labor and Industries</i> ,<br>45 Wash.Ap. 833, 844-855, 729 P.2d 64 (Wash.App., 1986) ..... | 5           |
| <i>Dean v. McFarland</i><br>81 Wn.2d 215, 219-220 (1972).....   | 4, 5, 6     |
| <i>Estate of Haselwood v Bremerton Ice Arena, Inc</i> ,<br>166 Wash.2d 489, 498, 210 P.3d 308, 312 (2009).....            | 5, 6        |
| <i>Fircrest Supply, Inc. v. Plummer</i> ,<br>30 Wn. App. 384, 634 P.2d 891 (1981).....                                    | 11, 12      |
| <i>Lumberman's of Wash., Inc v Barnhard</i> ,<br>89 Wash.App. 283, 286, 949 P.2d 382 (1997).....                          | 5, 11, 12   |
| <i>Roe v. Ludtke Trucking, Inc.</i> ,<br>46 Wash.App. 816, 819, 732 P.2d 1021 (1987).....                                 | 5           |
| <i>Tunstall v. Bergeson</i> ,<br>141 Wn.2d 201, 5 P.3d 691 (2000) .....   | 10          |
| <i>Turner v. Furleigh</i> ,<br>124 Wash. 45, 213 P. 454 (1923) .....  | 3           |
| <b>Statutes</b>   |             |
| RCW 42.44 .....   | 8,9         |
| RCW 42.44.010 .....   | 9           |
| RCW 42.44.100 .....   | 9           |
| RCW 42.44.090 .....   | 9           |
| RCW 60.04.091 .....   | passim      |
| RCW 60.04.900 .....   | 5, 6-8      |
| RCW 64.08 .....   | passim      |

**TABLE OF AUTHORITIES**

|                     | <u>Page</u> |
|---------------------|-------------|
| RCW 64.08.080 ..... | 7           |
| RCW 64.08.060 ..... | 9,12        |
| RCW 64.08.070 ..... | 9           |

## I. IDENTITY AND INTEREST OF AMICUS

The Associated General Contractors of Washington (hereafter "AGC") has existed since 1922 and is the State's largest, oldest and most prominent construction industry trade association. The three chapters of the AGC serve more than 1,000 general contractors, subcontractors, construction suppliers and industry professionals. AGC members perform both private and public sector construction and are involved in all types of construction in the state, including office, retail, industrial, highway, healthcare, utility, educational and civic projects. Construction is a significant sector of the state's economy, and provides significant jobs to Washington citizens.

For the vast majority of private construction projects, the only security available to those who provide labor, perform work, or furnish materials and equipment to the project is provided by the right to file a mechanics lien as set forth RCW 60.04 et. seq. As such, Amicus (and the lien claimants that it represents as members) have a substantial interest in having Washington Courts logically and fairly interpret the mechanics lien statutes so as to protect lien claimants and their statutory right to payment security.

In 1991, the legislature revised the mechanics lien statutes to simplify their provisions. It was in that spirit that the legislature included a 'Safe Harbor' form

that the legislature directed “*shall be sufficient*” to establish a valid construction lien. *See* RCW 60.04.091.

In the substantial experience of this Amicus and its members, the vast majority of mechanics’ lien claimants in Washington utilize Safe Harbor form to assert their claim of lien. Indeed, the AGC believes that there are presently hundreds of pending, recorded liens – representing untold millions of dollars in work – that utilize the Safe Harbor form. AGC’s members seek to preserve their statutory right to certainty and payment security as provided in the lien statute and the Safe Harbor form.

Moreover, in an industry where the vast majority of participants who contribute work and materials are not represented by legal counsel and lack the financial resources to purchase sophisticated legal services, the simplicity and reliability of the mechanics lien procedures established by the legislature are of paramount importance.

The erroneous decision in *Williams* imperils every claim of lien that relies upon the Safe Harbor form, as illustrated by the trial court decision in the consolidated *Hos Bros.* matter. Therefore, for the reasons set forth herein, in addition to the reasons set forth in the briefing of Athletic Field, Inc. and Hos Bros., the *Williams* decision should be reversed.

## II. ARGUMENT

**A. The Safe Harbor Form in RCW 60.04.091 serves an important public purpose by providing a straightforward, reliable and uniform method of recording mechanics liens.**

Amicus respectfully requests the Court to reverse the *Williams* decision because Division II's opinion contradicts the plain language of RCW 60.04.091 and presents significant uncertainty and potentially disastrous consequences for mechanics' lien claimants who rely upon the statute's Safe Harbor form. It has long been the law in Washington that the mechanics' lien statute is to be "liberally construed" to effect the purpose of providing payment security for claimants. *See, e.g. Turner v. Furleigh* 124 Wash. 45, 47, 213 P. 454, 455 (1923). If the Court of Appeals opinion is allowed to stand, mechanics' lien claimants will be unable to rely upon the Safe Harbor form, a result that is contrary to the intent of the Legislature to provide a simple and reliable manner in which to file mechanics' liens, and a result that is contrary to this Court's stated intent to liberally construe the lien statutes in favor of providing security to lien claimants.

The gist of Division II's holding is that the "Subscribed and sworn" language specifically approved by the legislature in the RCW 60.04.091 Safe Harbor form is fatally insufficient because it does not meet the more stringent requirements for certifications of acknowledgment in Chapter 64.08. By Division II's reasoning, *any* claim of lien using the Safe Harbor form specifically authorized in RCW 60.04.091 is subject to attack.

Indeed, motions based on the *Williams* opinion have already been filed in various superior courts challenging the validity of liens using verbatim the Safe Harbor language in RCW 60.04.091, including liens signed by lien claimants, by officers of lien claimants, and by attorneys for lien claimants.

The Opinion below creates not merely a "trap for the unwary," but creates a trap for anyone that relies upon the Safe Harbor form. The AGC estimates that there are hundreds of liens currently pending that were filed using the statutory Safe Harbor language and which are now subject to attack if the *Williams* decision is affirmed.

**B. Mechanics lien claimants have an express statutory right to have the provisions of RCW 60.04.091 liberally construed to effect the purpose of payment security.**

At the heart of the erroneous decision in *Williams* is a misapplication of the "strict construction" standard to determine whether a mechanics lien claim has attached to the property at issue. In particular, the *Williams* Court stated as follows:

We strictly construe lien statutes because they are in derogation of the common law. A lien claimant must clearly demonstrate satisfaction of all of the statutory lien claim requirements.

*Williams*, 155 Wn.2d at 441, citing *Dean v. McFarland*, 81 Wn.2d 215, 219-220 (1972). This is a misstatement of *Dean*, and a misstatement of Washington law.

The *Dean* Court did not hold that all lien statutes are strictly construed. Rather, the *Dean* Court held that lien statutes will be strictly construed to determine *whether a lien has attached*, which is a separate and distinct question from *whether the form of lien is sufficient*. The distinction between attachment and sufficiency of form was repeated by this Court as recently as in 2009:

Mechanic's and materialmen's liens are creatures of statute, in derogation of common law, and therefore must be strictly construed to determine whether a lien attaches. *Dean v. McFarland*, 81 Wash.2d 215, 219-20, 500 P.2d 1244 (1972). But if it is determined a party's lien is covered by chapter 60.04 RCW, the statute is to be liberally construed to provide security for all parties intended to be protected by its provisions. RCW 60.04.900; see *Lumberman's of Wash., Inc. v. Barnhardt*, 89 Wash.App. 283, 286, 949 P.2d 382 (1997).

*Estate of Haselwood v. Bremerton Ice Arena, Inc.* 166 Wash.2d 489, 498, 210 P.3d 308, 312 (2009)

Thus, according to this Courts' opinion in *Estate of Haselwood*, once it is demonstrated that a lien can attach, the question of lien validity is liberally construed in favor of providing payment security. RCW 60.04.900.<sup>1</sup>

The issue in *Estate of Haselwood* was whether a mechanics lien can attach to improvements on real property, but not the real property itself. *Estate of*

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<sup>1</sup> The application of strict construction to determine whether a person is within the scope of protection afforded by a statutory scheme followed by liberal construction for those who are is applied to other statutory schemes in Washington law. *E.g., Berry v. Department of Labor and Industries* 45 Wn.App. 883, 884-885 (1986) (workmen's compensation benefits) statutes. *Roe v. Ludtke Trucking, Inc.*, 46 Wash.App. 816, 819, 732 P.2d 1021 (1987) (Liberal construction of wrongful death statutes is applied after the proper beneficiaries have been determined).

*Haselwood*, 166 Wash.2d at 492 (“We must determine whether a mechanic's lien can attach to improvements on property but not the real property itself..”).

Unlike *Estate of Haselwood*, there is no dispute in either of the consolidated cases that a mechanics lien can attach to the respective properties at issue. And unlike *Dean v. McFarland*, there is no dispute that the type of work performed by the appellants (Athletic Field and Hos Brothers, respectively) was the type of work for which a mechanics lien may be claimed.

At issue in this consolidated appeal is whether the claimants complied with the acknowledgement requirement of RCW 60.04.091(2) by using the Safe Harbor form contained in the statute. As a result, neither of the consolidated cases in this appeal presents a question of lien "attachment," and the rule of strict construction simply does not apply. Rather, the legislature's directive of "liberal construction" contained in RCW 60.04.900 must be applied to guide the questions at issue in this appeal, so that the express legislative purpose of payment security for lien claimants is given effect.

**C. The Court of Appeals made a rests on a fundamental mistake regarding the difference between an instrument's acknowledgment and a notary's certificate.**

There are several other fundamental errors in the *Williams* opinion that frustrate the purpose of payment security served by the mechanics lien statute. First, Division II misconstrues the difference between an instrument's *acknowledgment* and a notary's *certificate of acknowledgment*. Second, Division

II takes a passage in the lien statute requiring claims of lien to be *acknowledged* and misconstrues that phrase to impose requirements over the wording of the notary's *certificate*. And third, the notary certification language declared by Division II as being a required 'acknowledgment' directly contradicts what the legislature provided in the mechanics lien statute as being a sufficient notary certification. These three errors in the *Williams* opinion combine to throw into doubt every claim of lien using the Safe Harbor form that is part of the mechanics lien statute, and which the statute says "shall be sufficient" to state a mechanics lien.

At the core of Division II's reasoning is the provision in the mechanics' lien statute, RCW 60.04.091, that a claim of lien "shall be acknowledged pursuant to chapter 64.08 RCW." 155 Wn. App. at 442. In the very next sentence of the opinion, Division II mistakes the notary *certificate* of an acknowledgment set forth in RCW 64.08.080 for an actual "acknowledgment." Repeatedly throughout its opinion Division II conflate notarial certificates with acknowledgments. *See, e.g.*, 155 Wn. App. at 442-44 ¶¶21, 22 ("The acknowledgment stated only, 'SUBSCRIBED AND SWORN to . . . '"), & 25.

But an *acknowledgment* is separate and distinct from a *certificate*. An acknowledgment is merely the affirmation signed by the person who is executing an instrument. Because Division II misconstrued the difference between an acknowledgment and a certification, it assumed that RCW

64.08 contains mandatory language for an acknowledgement. RCW 64.08 contains no such language.<sup>2</sup>

RCW 64.08 regulates who may *take* an acknowledgment and how that person may *certify* the acknowledgment. RCW 64.08 says nothing about what an acknowledgment is required to recite. In contrast, the mechanic's lien statute says precisely what recital will be deemed a "sufficient" acknowledgment in a claim of lien:

I am the claimant (or attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan) above named; I have read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct and that the claim of lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.

RCW 60.04.091. The language for that acknowledgment is entirely consistent with Chapter 64.08. Division II held to the contrary because it misunderstood the difference between an acknowledgment and a certification:

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<sup>2</sup> Chapter 64.08 does not include a definition of 'acknowledgment' but rather references the requirements of Chapter 42.44, which *does* include such a definition:

"Acknowledgment" means a statement by a person that the person has executed an instrument as the person's free and voluntary act for the uses and purposes stated therein and, if the instrument is executed in a representative capacity, a statement that the person signed the document with proper authority and executed it as the act of the person or entity represented and identified therein.

RCW 42.44.010(4). A certificate, by contrast, is the written certification signed by the notary who takes the principal's (or a representative's) acknowledgment. *See, e.g.*, RCW 64.08.020, -050, -060, -070 and 42.44.010(2) & -090.

The *acknowledgment* stated only, "SUBSCRIBED AND SWORN to before me this 1st day of December, 2004," followed by the signature, name, and title of the notary public and the date on which her commission expires. At best, this *acknowledgment* only satisfies the short form requirements for witnessing a signature set forth in RCW 42.44.100(4). It does not satisfy the more complex requirements of corporate *acknowledgment*.

155 Wn. App. at 443-44 (emphasis added).

Where the mechanics' lien statute and Chapter 64.08 *do* vary from one another is the respective language each contains for a *certificate* of acknowledgment. Chapter 64.08 sets forth certificate language for both corporate and individual acknowledgments, and references very similar certificate language set forth in Chapter 42.44. *See* RCW 64.08.060 & - 070 and RCW 42.44.100. By contrast, the notary certification language specifically declared by the legislature to be "sufficient" is much shorter than both the corporate and individual certificate forms in Chapters 42.44 and 64.08. The certificate language approved as sufficient for a claim of lien is instead nearly identical to a typical short-form verification certificate: "Subscribed and sworn to before me this \_\_ day of \_\_\_\_." RCW 60.04.091; *cf.* RCW 42.44.100(3).

By expressly providing "sufficient" language for a claim of lien in the Safe Harbor form, the legislature specified that the certification language contained therein "shall be sufficient" in lieu of the more rigorous *certification* provisions of RCW 64.08. Thus, by interpreting the

mechanics lien provision that a claim of lien “shall be acknowledged pursuant to chapter 64.08 RCW” as though the law instead required that the claim’s acknowledgment “shall be *certified* pursuant to chapter 64.08 RCW,” Division II created a statutory conflict where none exists, and essentially invalidated the Safe Harbor form that is relied upon by the vast majority of mechanics’ lien claimants.

**D. The *Williams* Court erred by ignoring the more recent and specific enactment embodied in the mechanics lien statute and imposing the older and more generic provisions of Chapter 64.08.**

Even if acknowledgment requirements in Chapter 64.08 (as referenced in the mechanics lien statute) conflicted with the short-form certification language specifically approved as “sufficient” in the mechanics lien statute itself, the mechanics lien provision approving the short-form certification would control because it is the more recent and more specific enactment. “To resolve apparent conflicts between statutes, courts generally give preference to the more specific and more recently enacted statute.” *Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691, 697 (2000). Division II erred by making no attempt to harmonize the provisions of the mechanics lien statute with Chapter 64.08, and by instead concluding that a claimant using *verbatim* the Safe Harbor lien claim form fails as a matter of law to state a valid claim of lien.

**E. Division II ignored the contrary holding of *Fircrest Supply v. Plummer*.**

In addition, Division II's opinion overlooks and conflicts with Division I's holding in *Fircrest Supply, Inc. v. Plummer*, 30 Wn. App. 384, 634 P.2d 891 (1981), where the court rejected challenges to a mechanics lien claim on grounds similar to those in the present case. Aside from an issue over the adequacy of a lien's legal description, the claim of lien in *Fircrest* had three alleged infirmities: (1) The acknowledgment text gave the name of the representative signing for the claimant without expounding on that person's representative capacity; (2) the notary rather than the representative signed the acknowledgment; and (3) the notary did not sign the notary certification.

Division I swept all three objections aside as little more than scrivener irregularities. Regarding the lack of explanation in the acknowledgment of the representative's capacity to sign on behalf of the corporate lienholder, the court held that mere identification of the individual as the "agent" of the lien claimant was sufficient:

The [mechanics lien] statute requires only that the claim be "signed by the claimant, or by some person in his behalf". RCW 60.04.060. Nothing in the record suggests that *Fircrest* did not comply fully with this requirement.

30 Wn. App. at 391. The certificate form in *Fircrest* was the same "Subscribed and sworn to before me" short form language as in the

present case, but in *Fircrest* had inadvertently been signed by the notary instead of the claimant's representative. The court held that the purpose of the verification was to establish that the claim was being signed under oath, and that notwithstanding the inadvertent signature errors that purpose had been accomplished and the statute's requirements had therefore been substantially complied with. 30 Wn. App. at 390-91.

### III. CONCLUSION

If affirmed, Division II's Opinion in *Williams* will cause enormous harm to the construction industry and every lien claimant using the Safe Harbor lien form approved by the legislature in RCW 60.04.091. The AGC estimates that there are hundreds of pending liens and lien foreclosure actions which used the statutory form and are now at risk because of the *Williams* decision. The legislature never intended such a result, its statutory language does not compel such a result, and routine statutory construction would have avoided such a result.

Amicus respectfully requests the Court to reverse the *Williams* decision, and hold that a lien claimant who utilizes the Safe Harbor sufficiently states a valid claim of lien under Washington law, including the requirement in 60.04.091(2) that said claim be acknowledged pursuant to chapter 64.08 RCW.

DATED this 9th day of May, 2011.

GROFF MURPHY, PLLC

/s/ Michael P. Grace

Michael P. Grace WSBA # 26091

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on May 9, 2011, true and correct copies of the foregoing document to the counsel of record listed below, via the method indicated:

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