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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TERRY L. WILLIAMS and JANIS E.)	
WILLIAMS, husband and wife,)	No. 33607-3-II
)	
Respondent,)	BRIEF OF
vs.)	APPELLANT
)	
ATHLETIC FIELD, INC., a)	
Washington corporation,)	
)	
Appellant.)	
_____)	

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ORIGINAL

Brief of Appellant -1

PM 11-21-05

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ASSIGNMENTS OF ERROR

1. The trial court erred in entering the Order on Defendant's Motion for Revision of Court Commissioner's Order of June 27, 2005 and Awarding Fees & Costs & Judgment on July 15, 2005.

2. The trial court erred in entering Revised Findings of Fact & Conclusions of Law 2 that the notice of lien was signed in violation of RCW 60.04.091.

3. The trial court erred in entering Revised Findings of Fact & Conclusions of Law 3 and 4 that plaintiffs met their initial burden of proof that the lien was frivolous and that defendant did not meet its burden of proving a prima facie case that the lien was valid.

4. The trial court erred in entering Revised Findings of Fact & Conclusions of Law 5 that the lien is invalid, frivolous and made without reasonable cause.

5. The trial court erred in finding that AFI's lien was excessive.

6. The trial court erred in considering declarations filed by Mr. and Mrs. Williams on the morning of the hearing on their order to show cause and in failing to consider declarations filed by Athletic Fields, Inc in support of its motion for revision.

7. The trial court erred in awarding attorney's fees and costs to Mr. and Mrs. Williams and in not awarding attorney's fees and costs to Athletic Fields, Inc. under RCW 60.04.081.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Was the mechanics lien filed by Athletic Fields, Inc invalid because it was signed by an authorized agent of the corporation rather than an officer of the corporation or an attorney?

B. Was Athletic Fields, Inc.'s Mechanics lien frivolous and without reasonable cause?

C. Was Athletic Fields Inc.'s mechanics lien clearly excessive?

D. Should the court have rejected declarations filed on the morning of the hearing on the motion to remove the lien? Should the court have allowed responsive declarations filed with a motion for revision?

E. Was it error to award costs and attorney's fees to Mr. and Mrs. Williams rather than to Athletic Fields, Inc. under the frivolous lien statute?

STATEMENT OF THE CASE

Statement of Facts.

The plaintiffs in the action below are Terry and Janis E. Williams (Williams). Williams owned property in Sumner, Washington on which they wished to install a metal warehouse building. Williams' contracted with Athletic Fields, Inc. (AFI) to perform site preparation. CP 14, 15, 52.

The amount of site work required for the project was substantial. A cost breakdown prepared by Norman Hubbard arrived at a cost of \$419,925.00. Exhibit 1 to Declaration of Terry Williams. CP 14. AFI started work under the contract. It was paid either \$150,500.00 (Mr. Starren, CP 54) or \$155,000.00 (Mr. Williams, CP 15) before the contract

was terminated. All of the above facts are basically agreed to by the parties.

Beyond this point, substantial factual disputes arise. Craig Starren, President of AFI declared that AFI was hired to perform the site preparation for Williams, that Mr. Hubbard was a full-time employee of AFI and that Mr. Hubbard did not perform any of the work as an individual or through his company, PowerCo.” CP 52, 53. Mr. Williams declared that PowerCo. and Mr. Hubbard was the general contractor on the job and that AFI was hired to do some or all of the work. CP 14, 15.

Mr. Starren declared that AFI performed approximately 90% of the work (not including all of the work involving pour concrete), that virtually all of the site preparation had been completed, that structural steel and forms were in place for the slab on which the building was to be set and that half of the slab had been poured. He declared that AFI could have completed the small amount of remaining work within a short period of time if the contract had not been cancelled. CP 53. Mr. Williams declared that much of the work had not been completed and AFI was not proceeding at an acceptable pace. CP 17, 18. After the parties could not agree on payment or on a contract for the completion of the work, the

contract was cancelled and AFI filed the lien which is the subject of this action. Exhibit 5 to Hubbard Declaration, CP 2.

Procedural History

Defendant filed its action on June 15, 2005 and served the pleadings on AFI the following day. CP 59. The order to show cause was originally scheduled for June 23, 2005, CP 47, and continued for hearing on June 27, 2005.

While filing the Motion for Order to Show Cause re Removal of Frivolous Lien, Williams filed supporting declarations from Norman Hubbard and Terry Williams and a Memorandum of Law. The declarations, CP 2 and 14, alleged that AFI's lien was frivolous because AFI had already been overpaid for the allegedly limited amount of work that it had performed. On June 22, 2005, AFI submitted a memorandum and the Declaration of Craig Starren in Opposition to Motion to Remove Lien. CP 52, 56. Mr. Starren's declaration contested all of the contentions advanced by Mr. Williams and Mr. Hubbard in support of Williams's motion.

On the date of the hearing, June 27, 2005, Williams submitted a Supplemental Memorandum and seven additional declarations to support

their contention that the lien was frivolous. The last minute declarations were considered, over objection, by the Court Commissioner in entering the order of June 27, 2005 releasing AFI's lien. See list of items considered by the court on lines 46 and 47 of the Order, CP 135.

AFI filed a Motion for Revision of Commissioner's Ruling on July 7, 2005. CP 140. At the same time, AFI filed seven supporting declarations which responded to the last minute declarations filed on the date of the first hearing. CP 149-365. All of the AFI declarations were stricken by Judge Steiner. CP 410.

ARGUMENT

1. Standard of review.

The summary procedure provided for by RCW 60.04.081 was held to be analogous to a trial by affidavit in GEO Exchange Systems v. CAM, 115 Wn. App. 625, 65 P.3d 11, (2003). Both legal and factual determinations were subject to review on appeal. A trial court decision which is based solely on affidavits is reviewed de novo. In re Estate of Stockman, 59 Wn. App. 711, 800 P.2d, 1141 (1990).

2. AFI's lien is not invalid because it was signed by an agent for the Corporation.

AFI's claim of lien was filed on December 6, 2004. It is attached as Exhibit 5 to the Declaration of Norman Hubbard. CP 2.

The lien was filed by Lien Data USA, Inc. as agent for AFI. It was properly signed and attested to under oath by an employee of Lien Data USA, Rebecca Southern.

Williams contended, and the trial court agreed, that the lien was invalid because it was signed by an agent for the corporation. See revised Findings of Fact and Conclusions of Law 2 holding that the Lien violated RCW 60.04.091 because it was not signed by the claimant (or an officer of the claimant corporation) or by an attorney for the claimant. CP 408.

The requirements for a Notice of Lien are set forth in RCW 60.04.091, which states:

“...The notice of claim of lien:...

(2) Shall be signed by the claimant or some person authorized to act on his or her behalf who shall affirmatively state they have read the notice of claim of lien and believe the notice of claim of lien to be true and correct under penalty of perjury, and shall be acknowledged pursuant to chapter 64.08 RCW...A claim of lien substantially in the following form shall be sufficient:” (emphasis added) RCW 60.04.091(2).

The statute does not state that only the claimant or an attorney can sign a claim of lien, it expressly authorizes signature by an authorized person.

Williams manufacture an argument from language found in the attestation clause of the sample claim of lien form set forth in the statute which states:

“....., being sworn, says: 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.”

The sample form is introduced by the following language, “A Claim of Lien substantially in the following form shall be sufficient:” (emphasis added) RCW 60.04.091(2). The proposed form is not mandatory, only adequate. The language in the attestation clause only describes some of the persons who could sign the lien, a claimant, an attorney, or the agent of an employee benefit plan. It does not attempt to list all of those who could sign a claim of lien, or who may even be the only persons competent to sign a lien, such as officers of corporations, receivers of insolvent claimants, guardians of incompetent claimants and

attorneys in fact for absent claimants. It does not purport to set forth an exhaustive list or to exclude agents of corporate claimants.

The interpretation urged by Williams would put the form in direct conflict with the wording of the statute which says a lien can be signed by some person authorized to act on the claimant's behalf. If the statute and the form were in actual conflict, the statute would have to govern as the form only recommends language to be used and it is specifically non-exclusive. The statute does not say that the form is required.

Nothing invalidating the signature of an agent for a lien claimant will be found in the case law. In Strandell v. Moran, 49 Wash. 533, 95 Pac. 1106 (1908), the unnamed respondent was doing business through an agent under the name of "A. Strandell, agent." After respondent sold timber to a road contractor, a Notice of Lien was filed sign by "Andrew Strandell. By D.T. Winne, her attorney." This notice was deemed adequate to allow respondent to collect on a bond given to the State of Washington. The notice was adequate even though:

"(T)he statute provides that the notice required to be given the board with whom the bond is filed 'shall be signed by the person or corporation making the claim or giving the notice,' and it is urged in support of the second branch of the objection that the notice at bar is neither signed by the present claimant nor by anyone on her behalf, but is signed by a stranger to the record." Id at 535.

Unlike the case at bar, the statute then in force did not even contain language allowing the claim to be signed by an authorized person. Further, the claim in Strandell did not even identify the claimant or give notice that Mr. Strandell was acting on another's behalf. The Court reasoned that the primary purpose of the statute was notice and stated that any form that gave notice that a materialman had not been paid and did not mislead either the City or the bondsman to their injury was sufficient to comply with the statute. Williams have not been damaged by the form of the notice sent to them and they seek to assert this technical defense to avoid reaching the merits of the lien.

In Fircrest Supply, Inc. vs. Plummer, 30 Wn.App. 384, 634 P.2d 891 (1981) the lien claim of the corporate plaintiff was signed by "David Perkins, 'Registered Agent of Fircrest Supply, Inc' ". The signature was approved under a predecessor to RCW 60.04.091 which stated that the lien claim "shall be signed by the claimant, or by some person in his behalf, and be verified by the oath of the claimant, or some person in his behalf, to the effect that the affiant believes the claim to be just;..." id at 389. The Court of Appeals rejected the argument that the signature as registered agent failed to show Perkins' authority to act for Fircrest.

Williams had to rely on cases which held lien claims invalid for lack of appropriate signature or verification. Although the cases contained language setting forth the need to follow statutory requirements, none of them dealt with the ability of an agent to file a lien. In the case of Bar there is no question but that the lien was signed and verified using all required statutory language and formalities. The only issue raised is whether someone other than a claimant or an attorney can file a notice of lien.

3. AFI's lien is not frivolous.

This action was brought under RCW 60.04.081 which allows the owners of real property relief from liens that are “frivolous and made without reasonable cause.” (emphasis added) RCW 60.04.081. This statute allows for release of a frivolous lien following a summary proceeding similar to a trial by affidavit. W.R.P. Lake Union v. Exterior, 85, Wn.App. 744, 934 P.2d. 722 (1997).

Presumably because of the significant loss which could be suffered following such summary proceeding, the category of liens that can be declared frivolous has been severally limited.

“To be frivolous, a lien must be improperly filed beyond legitimate dispute. Even if a lien is ultimately found to be invalid, it is frivolous ‘only if it presents no debatable issues and is so devoid of merit that it has no possibility of succeeding.’ Every frivolous lien is invalid, but not every invalid lien is frivolous. Pacific Industries, Inc., v. Singh, 120 Wn. App.1, 5, 86 P.3d 778 (2003)

The few appellate cases that have addressed the frivolous lien statute demonstrate how difficult it is to have a lien declared to be frivolous. In W.R.P Lake Union v. Exterior, Supra, the owner/developer claimed that a lien was frivolous because it was filed by a corporate successor rather than the sole proprietorship it originally contracted with, and because the corporate successor failed to give any kind of notice of its intent to claim a lien. The Court of Appeals did not even reach the merits of either of these issues. Rather, the court looked to whether the lien was frivolous and determined that it would not be frivolous even if the owner prevailed on his theories. It held that a lien could only be frivolous if it was clear and beyond legitimate dispute that it had been improperly filed. A lien raising debatable issues of fact and law was not subject to release. The summary procedure of the frivolous lien statute was not applicable and the matter was remanded for trial.

In Pacific Industries v. Singh, Supra, Singh worked as a property developer for Pacific Industries. Singh filed a lien for his services which was based on one-half of the profit from a residential development.

Pacific Industries filed an action to release the lien under RCW 60.04.081. The action was stayed while an accountant who had been stipulated to by the parties determined there were no profits on the project. Singh released his lien and the trial court conducted a hearing on the parties' mutual requests for attorney's fees under the frivolous lien statute. The trial court awarded attorney's fees to Singh and the Court of Appeals affirmed. Pacific Industries contended that the lien was frivolous because Singh's services were not "labor" and not lienable. Although the Court of Appeals agreed with Pacific Industries' argument, it affirmed the trial court and awarded further attorney's fees to Singh on appeal. Although Singh's lien was invalid, it had presented a debatable issue of law and therefore it was not frivolous.

In Intermountain Elec. v. G-A-T Bros., 115 Wn. App. 384, 62 P.3d 548 (2003) an electrical contractor filed a lien 94 days after the last labor was performed. In an action filed under RCW 60.04.081, the trial court ruled that the lien was invalid and frivolous because it had not been filed within 90 days as required by law. Citing prior law on the strict enforcement of the 90 day filing requirement, the Court of Appeals agreed that the lien was facially invalid. The Court of Appeals held that, although the lien was invalid, it was not frivolous because the claimant had

arguments for extension of the time period or a change in existing law. The case also involved a second lien which was filed after the trial court denied all the arguments for an extension of the time for filing and declared the first lien to be invalid. The Court of Appeals agreed that the second lien was frivolous. The second lien is the only lien that the appellate courts of Washington have found met the stringent requirements for summary relief under the frivolous claim statute.

AFI's lien is not frivolous under the strict standards set forth in the case law. No procedural errors are alleged other than execution by an agent which is discussed elsewhere in this brief. The lien was timely filed shortly after work was stopped. The legal description of the property has not been challenged. The plaintiffs were properly named as owners of the property and the lien was verified under oath.

The very declarations filed by Williams in support of their action establish that the lien was not frivolous. The Declaration of Terry L. Williams states: he and his wife own the property where the construction project was located, CP 14; AFI was hired to do work on the site based on costs, profit, and sales tax, CP 14, 15; AFI had the option of doing some or all of the work, CP 15; the value of the work, before sales tax, was \$419,925.00, CP 15 and exhibit 1; AFI started work on the project in May

of 2004, CP 16 and worked through late November of 2004, CP 18; and Mr. Williams ordered AFI off of the job when it asked for a written contract, CP 18. The Declaration of Norman Hubbard, also filed in support of the action, added that CFI received two payments on the job, on July 21, 2004 and October 14, 2004, CP 7 and exhibit 4. These admitted facts make it clear that AFI supplied labor, materials and equipment for the improvement of real property, at the instance of the owner, or the owner's agent. Nothing else is required to qualify AFI to file a lien.
RCW 60.04.021

In seeking to prove that the lien was frivolous, Mr. Williams and Mr. Hubbard raised the following contentions:

1. AFI did not complete all of the work it could have done under the cost breakdown, CP 15;
2. AFI was overpaid for the work it did perform, CP 15;
3. AFI did not pay for all materials delivered to the job site, CP 15;
4. CFI did not perform in a timely manner, CP 16.

Even if they had not been contested, none of the issues raised by Mr. Williams and Mr. Hubbard would show that the lien is frivolous.

Arguments about the amount of work done, its timelines and value, and the alleged non-payment of an undisclosed number of suppliers do not eliminate the fact that AFI performed services which were accepted and used by the Williams and was entitled to file a lien to secure any amounts owing.

The contentions were contested. The Declaration of the President of AFI disputed all of the relevant assertions by Mr. Williams and Mr. Hubbard. Craig Starren declared that Norm Hubbard was a full-time employee of AFI, CP 52; that AFI performed approximately 90% of the work which was valued at \$419,925.00 in exhibit 1, except for the pourse concrete (which was assigned an \$88,000.00 value on exhibit 1), CP 53. That AFI performed extra work including bringing in a significant amount of fill, CP 53; That Williams refused to pay for the work which had been performed or to enter into a written contract, CP 54; That the work was performed at a reasonable pace, CP 54; and that all payments that were made were for work that had already been performed and supplies that had already been delivered, CP 55.

Following receipt of Mr. Starren's declaration, Williams filed a Supplemental Declaration of Mr. Williams, CP 74; two supplemental declarations for Norm Hubbard, CP 87, and a number of declarations from

workmen on the site, CP 107, 117, 121 attempting to refute AFI's contentions concerning the amount of work it had done and the amount of equipment that was on the job site. These are all matters that go to the value of the work performed, not the right to file a lien to secure payment.

The burden of proving that a lien claim is frivolous rests at all time on the party asserting the proposition. Even if the court accepts that Williams made a prima facie showing to this effect by contesting the amount of work performed, shifting the burden to AFI, this burden would have shifted back when AFI submitted evidence that it had performed 90% of the work and received less than one-half of the agreed value of the work. The ultimate burden remains on the party challenging the lien. W.R.P Lake Union v. Exterior, Supra.

Where, as in the case at bar, it is not clear that the lien is frivolous and without reasonable cause, the frivolous claim statute's summary process should not be used as a substitute for a trial on the merits. Pacific Industries Inc. v. Singh, Supra at 10. "When legitimate disputes arise regarding whether the lien has been properly filed, trial courts should not rule that the lien is per se frivolous or filed without just cause. W.R.P. Lake Union v. Exterior, Supra at 753. Rather than trying to resolve a dispute over lien filing procedures, the Court of Appeals looked at the

nature of the dispute and held that even if the lien claimant ultimately lost, the lien would not be rendered frivolous and it could not be released in a summary procedure.

4. AFI's lien is not clearly excessive.

Although the trial court was never asked to enter a specific finding that AFI's lien was excessive, this was the only argument advanced for finding it to be frivolous other than its signature by an agent. Williams devoted substantial argument to the contention that AFI's lien was excessive, that AFI had not performed much of the work it based its claim on and even that it had been overpaid.

Under RCW 60.04.081, the courts may grant relief if a claim of lien is found to be clearly excessive. However, the relief which would be granted would not be releasing the lien, but reducing it. RCW 60.04.081(4).

A claimant's lien will not be invalidated for claiming an excessive amount unless the claim is made with an intent to defraud or in bad faith. CHG Int'l v. Platt Electric, 23 Wn.App. 425, 597 P.2d 412 (1979). (The lien claimant's \$77,000.00 lien was not invalidated even though the court found that \$25,510.26 of the claim was lienable.) In Pacific Industries Inc.

vs. Singh, supra, the claim was also made that Mr. Singh's lien should be dismissed as clearly excessive. Mr. Singh filed a lien for \$250,000.00 representing what he believed would be half of the net profits from the development of a residential project. Even though it was established there was no net profit and Mr. Singh was not entitled to any compensation for his services, the Court held the lien was not invalid as excessive and awarded Singh his attorney's fees for defending an action brought under RCW 60.04.081. The Court of Appeals relied upon evidence of a legitimate dispute suggesting the amount was difficult to determine and the lack of any evidence of bad faith or an intent to defraud. The court emphasized the burden was on the party objecting the lien to establish that the lien was clearly excessive and claimed in bad faith or with intent to defraud. In the case of bar, the amount owing is clearly in dispute and no evidence has been submitted of bad faith or intent to defraud.

AFI's lien of \$276,825.00 is for a large amount of money. However, even when combined with payment received of \$150,500.00, the total of \$426,325.00 is still less than Mr. Hubbard's estimate of \$419,925.00, plus sales tax which brings the amount to \$456,878.00. The amount itself does not make the lien excessive and the actual amount owing should be left for trial.

5. The trial court should not have accepted the late declarations filed by Williams and compounded this error by striking responsive declarations filed by AFI.

Williams initially supported their motion with declarations from one of the plaintiffs, Terry Williams and from Norman Hubbard. The Williams witnesses agreed that AFI had performed work on the project. They contended that the work was not worth the amount claimed in AFI's lien, that AFI had performed less than one-third of the total work and "AFI should have been paid the sum of only about \$120,000.00(?) for the actual work performed,..." (emphasis added, question mark in original) CP 4. Mr. Hubbard also claimed that AFI did not pay for all of the materials delivered to the job site and that it used his equipment. Mr. Williams agreed with Mr. Hubbard's contentions. He also stated AFI represented it could do the work in about four months (based on conversations with Mr. Hubbard). CP 16.

AFI submitted the declaration of its President, Craig Starren. This declaration disputed put all of the significant allegations in support of the motion to release the lien. Mr. Starren declared that AFI performed approximately 90% of the work described in the cost breakdown of \$419,925.00 which both sides have used to describe the scope of the work. CP 53. He stated virtually all of the site preparation work had been

completed, that the prep work was done for the concrete slab on which the building was to be set and one-half of the slab had been poured. CP 53. He declared that AFI was prepared to complete the contract within a short period of time when it was cancelled. CP 53. He declared that AFI had completed extra work filling in low spots on the site which had not been identified prior to starting work. CP 53. He declared that AFI never agreed to perform the work in four months and that the work proceeded at a reasonable pace. CP 54.

The Williams' order to show cause was originally scheduled for hearing at 9:30am on June 23, 2005. It was continued for hearing until 9:30am on June 27, 2005. At or immediately before the hearing, Williams submitted seven new declarations. As indicated on page one of the Order of June 27, 2005, the pro tem court commissioner hearing the matter considered all of these reply pleadings. CP 135.

A. The reply declarations should not have been considered as they were duplicative and were irrelevant to whether the lien was frivolous.

The reply declarations did not add new information and they did not assist the court in determining whether the liens were frivolous.

The Supplemental Declaration of Terry Williams does not establish that the lien was frivolous. He disputed that fill was required, CP 76, but then complained that AFI imported a significant amount of “dirty” fill, CP 77. Declarations from workmen described work that had been performed before the contract was cancelled as well as work done afterwards. The declarations gave the court no way of quantifying the value of the work that had been performed or that which remained to be performed. Even if such had been an appropriate function for the trial court, it could not have determined whether Mr. Starren’s 90% estimate of work completed or Mr. Hubbard’s 30% estimate was more accurate or if the truth was to be found somewhere in between.

Pictures were submitted of the site as it was when the contract was terminated in the winter of 2004 and as it was the following summer after the building had been completed. Pictures of selected areas without explanation, cross-examination or the ability to submit pictures showing other areas where the extent of work completed was more obvious, would be of little assistance to the court in determining the extent of work which had been done.

A declaration was also submitted by Williams’ banker. Not surprisingly, the filing of the lien had resulted in freezing portions of the

construction loan to assure payment of the lien. In the only matter of any relevance to the controversy, the banker describes the loan as being for construction of an 11,200 square foot commercial building and estimated that the entire project was 50% complete at year end. As installation of the building had not even begun, it would appear obvious that the site preparation work was much more than 50% complete. This independent estimate undermines Williams' contention that less than one third of the site preparation work had been completed.

The 11 page Supplemental Declaration of Norman Hubbard, beginning at CP 87, shows the extent to which the trial court was drawn away from the legitimate objective of determining whether the lien was frivolous and invited into a dispute over the value of the services rendered by AFI. As Mr. Hubbard admitted, he "cut and pasted" paragraphs from Mr. Starren's declaration and responded to them. He disputed whether he was a full-time employee of AFI, he blamed AFI for his inability to reactive his contractor's registration, he denied Mr. Starren's allegation that the equipment on the job was AFI's and not Mr. Hubbard's. He denied the extent of the work done by AFI, denied that AFI did the layout of the work, and restated arguments about the removal of blocks from the job site. The effort to involve the court in resolving disputed facts was

demonstrated when Mr. Hubbard attempted to support his original contentions by repeating them, stating: “See my original Declaration at pages 7-8 section 15. for the truth with regards to MY communications with ‘AFI’s lien company’ while I was working with and for AFI.” (emphasis original) CP 96.

Restating its earlier contentions relating to performance, even with limited support from additional witnesses, does not amount to proof that the lien was frivolous. Williams attempted to litigate the value of the claim by affidavit. This is not the purpose of the frivolous lien statute. The ability to make factual determinations in a hearing to determine whether a lien is frivolous “does not turn this summary proceeding into a substitute for a trial on the merits when the facts do not clearly indicate the lien is frivolous and without reasonable cause or is excessive.” W.R.P. Lake Union vs. Exterior, 85 Wn.App. 744, 753, 934 P.2d 722 (1997).

B. Allowing the Supplemental Declarations from the Williams and striking the responsive declarations from AFI denied due process to AFI.

If AFI’s argument in the proceeding subsection is accepted, this argument is unnecessary because the supplemental declarations did not assist in determining that the lien was frivolous and their consideration was harmless. If this court believes that the supplemental declarations

tended to establish that the lien was frivolous, they should not have been considered as they were only submitted immediately prior to the hearing. This did not allow AFI an adequate opportunity to respond to them and did not allow any opportunity to obtain declarations and documentary evidence in response. Basic procedural due process requires notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding. The notice must be received in adequate time to prevent surprise, helplessness, and disadvantage. In re Martin, 3 Wn. App. 405, 476 P.2d 134 (1970). Allowing the Williams' last minute declarations to be heard over the objections of counsel deprived AFI of any opportunity to respond to this newly presented evidence. The error was compounded when the trial court, at the hearing on revision, entered an order striking the responsive declarations that AFI was able to submit when given time to do so. CP 410.

6. Attorney's Fees.

Williams were awarded attorney's fees and costs under RCW 60.04.081(4). If the Court of Appeals agrees that AFI's lien is not frivolous, the award of attorney's fees to Williams should be reversed and AFI should be awarded attorney's fees and costs both at trial and in the

Court of Appeals. W.R.P. Lake Union v. Exterior, 85 Wn. App. 744, 934 P.2d 722 (1997)

CONCLUSION

Williams misused the frivolous lien statute. They did not establish any grounds for declaring the lien to be frivolous. They disagreed with the amount of the lien and attempted to use the frivolous lien statute in order to avoid a trial on the merits. This is not a proper use of the statute and should not be allowed. Even liens which on final analysis had no value and were filed by persons who were not entitled to claim liens were not found to be subject to release as being frivolous. In this case, there is substantial dispute as to the value of the work performed by AFI. It had the right to file a lien to secure payment and the right to a trial to determine the amount due.

This case should be remanded with instructions to reinstate AFI's lien and allow AFI to bring an action to foreclose its lien.

RESPECTFULLY submitted this 21st day of November, 2005.



KIRK R. WINES, WSBA No. 4183
Attorney for Appellant

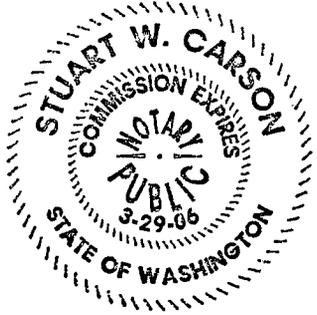
Addressed to the following party:

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DATED this 21st day of November, 2005.

Christina R. Forte
Affiant

SIGNED AND SWORN to before me on 11/21/05
by CHRISTINA R. FORTE
STUART W. CARSON



[Signature]
Print Name: STUART W. CARSON
Notary Public Residing at Sammamish, WA
My appointment expires: 3/29/06