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NO. 84764-9

SUPREME COURT
OF THE STATE OF WASHINGTON

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HOS BROS. CONSTRUCTION, INC.,

Appellant,

v.

C19-1 SHOTWELL, LLC; SEQUOYAH ELECTRIC, LLC, a Washington limited liability company; SS LANDSCAPING SERVICES, INC., a Washington corporation; PACLAND-BELLEVUE, INC., a Washington corporation; BANKFIRST, a South Dakota state bank; CENTURION FINANCIAL GROUP, LLC, a Washington limited liability company; WF CAPITAL, INC., a Washington limited liability company; BINGO INVESTMENTS, LLC, a Washington limited liability company; and RICHARD BURRELL, an individual,

Respondents.

APPELLANT'S REPLY BRIEF

Todd C. Hayes, WSBA No. 26361
Attorneys for Appellant
HARPER | HAYES PLLC
600 University Street, Suite 2420
Seattle, Washington 98101
Telephone: 206.340.8010
Facsimile: 206.260.2852

FILED AS
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I. INTRODUCTION

RCW 60.04.091(2) says a claim of lien on the safe harbor form *shall* be sufficient. Hos's lien was *identical* to that form. The trial court therefore erred in invalidating it.

Nothing in BF-Thar's opposition brief proves otherwise. BF-Thar claims that Hos had to attach what BF-Thar calls a "corporate form of acknowledgment" to its lien. But nothing in the statute or this Court's case law supports that. An "*acknowledgement*" is distinct from a "*certificate* of acknowledgement." See RCW 42.44.010(4) (defining "acknowledgement"); RCW 64.08.050 (describing evidence of a "certificate of acknowledgement"). Thus, the phrase "*acknowledged* pursuant to chapter 64.08 RCW . . ." does not say that a claim of lien must contain certain *certificate* of acknowledgement language. Even if it did, the language on the sample form would satisfy chapter 64.08 RCW because, according to Kley v. Geiger, 4 Wash. 484, 487, 30 P. 727 (1892), a certificate need not contain language identical to that in chapter 64.08 RCW to constitute a valid certificate. Moreover, even if RCW 60.04.091 did address *certificate* of acknowledgement language, Hos would not have had to use the "certificate of acknowledgement for a corporation" in RCW 64.08.070 because RCW 60.04.091 itself allows someone other than a corporate lien claimant to sign the lien. Finally, even if Hos's lien had

been defective, the trial court erred in not allowing Hos to amend the lien because (a) it substantially complied with RCW 60.04.091; (b) BF-Thar had notice of the proposed amendments, and (c) the merits of the proposed amendment were irrelevant anyway.

For each of these reasons, Hos respectfully requests that this Court reverse the trial court's June 24, 2010 order.

II. ARGUMENT

A. **THE COURT SHOULD LIBERALLY CONSTRUE RCW 60.04.091 TO PROTECT HOS**

RCW 60.04.900 expressly states that "RCW . . . 60.04.011 through 60.04.226 and 60.04.261 are to be liberally construed to provide security for all parties intended to be protected by their provisions." Notwithstanding this mandate, BF-Thar claims that "RCW 60.04.900 only provides for a liberal construction once a lien is deemed to have attached," and that "whether a valid lien was created in the first place . . . is subject to the rule of strict construction."¹

But the statute does not say that—and such a reading makes no sense. RCW 60.04.900 lists specific sections of chapter 60.04 RCW that "are to be liberally construed"—not "may be liberally construed." Among those is RCW 60.04.091 (which is all about how a claimant creates a valid

¹ *BF-Thar's Opp.*, at 9.

lien). Thus, the Legislature has expressly stated that the very statute at issue in this case must be liberally construed.

Moreover, applying a “liberal construction” to RCW 60.04.091 only *after* a valid lien is deemed to attach would make no sense. At that point—when by definition the claimant has a valid lien—nothing in RCW 60.04.091 would matter to the claimant. If the lien is already valid, whether a court liberally or strictly construes its requisite elements would never matter; the claimant would no longer need the benefit of any doubt.

Consistent with that, this Court has limited the “strict construction” rule to deciding whether a claimant falls within the class of persons that the lien statutes protect. The “strict construction” rule originates in Tsutakawa v. Kumamoto, 53 Wash. 231, 101 P. 869 (1909). The issue in that case was not whether the claimant recorded a proper lien, but whether the claimant had provided lienable materials—as opposed to things “used by [workers] merely for the purpose of facilitating their work.” Tsutakawa, 53 Wash. at 236. It was in the course of holding the appellant’s “camp supplies” *were not lienable* that the Court said lien statutes are in derogation of the common law (and thus to be strictly construed):

The object of these statutes is to secure a lien to the laborer and materialman for that which goes into the finished structure. . . .

....

Liens of this character are in derogation of the common law. Depending solely on the statutes, courts have persistently refused to extend their operation for the benefit of those who furnish supplies, means, or money to carry on a work, unless they come clearly within the terms of the statute. In the case of Allen v. Elwert, [44 P. 823 (Or. 1896)], the supreme court refused to allow a lien for certain tools and appliances belonging to the workmen and used by them merely for the purpose of facilitating their work.²

Cases following Tsutakawa draw this same distinction. In DeGooyer v. Northwest Trust & State Bank, 130 Wash. 652, 228 P. 835 (1924), for example, this Court applied the "strict construction" rule in deciding whether the claimants had provided the type of labor that entitled them to protection under the relevant lien statute—not whether they had recorded a valid form of lien:

Statutes creating liens are in derogation of the common law and are to receive a strict construction. Tsutakawa v. Kumamoto, 53 Wash. 231, 101 Pac. 869, 102 P. 766. Their operation will not be extended for the benefit of those who do not clearly come within the terms of the act. It is true that § 1209, Rem. Comp. Stat. [P. C. § 9665b], provides that the lien laws shall be liberally construed with the view to effecting their object. This means that when it has been determined that persons come within the operation of the act it will be liberally applied to them.³

² Tsutakawa, 53 Wash. at 236.

³ DeGooyer, 130 Wash. at 653. The precise question was whether the claimants provided labor to improve "crops," as opposed to fruit.

Court of Appeals decisions that have properly explored the “strict construction” rule—as opposed to blindly applying it to all the lien statutes—have also drawn this distinction. In Northlake Concrete Prods. v. Wylie, 34 Wn. App. 810, 818, 663 P.2d 1380 (1983), for example, the Court of Appeals cited the strict construction rule in holding that the installer of a side sewer had provided the type of services that gave rise to a lien:

The mandate of the Legislature in enacting the original lien statutes was that “the lien laws shall be liberally construed with the view to effecting their object.” De Gooyer v. Northwest Trust & State Bank, 130 Wash. 652, 653, 228 P. 835 (1924). Taken with the strict construction mandated by case law, the phrase has been interpreted to mean that “when it has been determined that persons come within the operation of the act it will be liberally applied to them.” De Gooyer, at 653.

Northlake, as a subcontractor performing necessary work on a house in attaching a plumbing connection, *falls within the class of those protected by the statute.*⁴

This limited application of the rule is also consistent with RCW 60.04.900’s plain language. That section says the lien statutes are to be “liberally construed to provide security *for all parties intended to be protected by their provisions.*”⁵ The “parties intended to be protected by their provisions” are persons “furnishing labor, professional services,

⁴ Northlake Concrete, 34 Wn. App. at 818 (citations omitted) (emphasis added).

⁵ RCW 60.04.900 (emphasis added).

materials, or equipment for the improvement of real property.”⁶ In other words, once a court decides (using the “strict construction” rule) whether the claimant provided lienable material or services, then the court *from that point on* must construe the lien statutes liberally. Thus, because it is undisputed that Hos provided lienable site work that improved the real property at issue here, this Court should construe RCW 60.04.091 liberally.

B. RCW 60.04.091 DOES NOT SAY THAT A CLAIM OF LIEN NEEDS A CERTIFICATE OF ACKNOWLEDGEMENT

BF-Thar’s first *substantive* argument is that Hos’s lien was never acknowledged at all. This is true, BF-Thar claims, because the language above the notary’s signature says “Subscribed and sworn to before me this ___ day of __,” as opposed to quoting RCW 64.08.070. *See BF-Thar’s Opp.*, at 15. According to BF-Thar, Hos should have therefore attached to its claim of lien—*i.e.*, the document with the language that the Legislature has said “*shall* be sufficient” to create a valid claim of lien—a separate document containing what BF-Thar calls an “acknowledgement.” *See, e.g., BF-Thar’s Opp.*, at 18 (“[Hos] was required to use the corporate

⁶ RCW 60.04.021 (“Except as provided in RCW 60.04.031, any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.”).

form *of acknowledgement* set forth in RCW 64.08.070.”) (emphasis added).

The first problem with this argument is that the language BF-Thar calls an “acknowledgement” is in fact not an “acknowledgement” at all:

“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 of acknowledgement,” by contrast, is the language that the notary signs, attesting that he or she knows the acknowledging party is who he says he is, etc. See RCW 64.08.060 (“A certificate of acknowledgement for an individual”) (emphasis added).⁷ “Acknowledgement” is what the person executing the document says, not what the notary attests to.

BF-Thar’s entire brief is premised on conflating these two terms. BF-Thar erroneously claims that “acknowledged pursuant to chapter 64.08 RCW” in RCW 60.04.091 means the claim of lien must include the certificate of acknowledgement language set forth in chapter 64.08 RCW. In other words, BF-Thar is reading the phrase, “The notice of claim of lien

⁷ The “short-form” statute calls the language a “notarial certificate”: “The following short forms of notarial certificates are sufficient for the purposes indicated” RCW 42.44.100.

. . . [s]hall be acknowledged pursuant to chapter 64.08 RCW” as if it said, “The notice of claim of lien . . . shall be *appended with the certificate of acknowledgement language in chapter RCW 64.08.*”

But RCW 60.04.091 of course does not say that. And if the Legislature wanted a lien claimant to have to include certain certificate of acknowledgement language in its lien form, then the Legislature would have said that. This Court “assume[s] the legislature means exactly what it says, and interpret[s] the wording of statutes according to those terms.” In re Forfeiture of One 1970 Chevrolet Chevelle, 166 Wn.2d 834, 842, 215 P.3d 166 (2009). The phrase “acknowledged pursuant to . . .” does not mean “include a certificate of acknowledgement”—of any kind.

Moreover, nothing in this record indicates that Mr. Caunt did not acknowledge Hos’s claim of lien. Regardless of what the notary did or did not attest to, nothing in this record demonstrates that Mr. Caunt did not “execute[] [the] instrument as [his] free and voluntary act for the uses and purposes stated therein.” RCW 42.44.010(4). To the contrary, the language above Mr. Caunt’s signature says he read the claim after being sworn, that he knows its contents, and that he believes it is true, correct, and not frivolous—all “under penalty of perjury.” If a certificate of acknowledgement is valid even though it lacks the requisite “freely and

voluntarily” language, Kley, 4 Wash. at 487, then the acknowledgement itself must also be.

Conflating “acknowledgement” with “certificate” is also problematic because it would render the safe harbor form entirely superfluous. If, as BF-Thar reasons, “acknowledged pursuant to chapter 64.08 RCW” means use the “certificate of acknowledgement language in chapter 64.08 RCW,” then no lien on the sample form would be sufficient—no matter who signed it. As Williams acknowledged, the notarial certificate on the safe harbor form does not match the language in RCW 64.08.070. But as Hos explained in its Opening Brief, the safe harbor form does not match the “individual” notarial certificate either.⁸ Thus, by reading “acknowledged pursuant to . . .” as if it said “certificated pursuant to . . . ,” BF-Thar has rendered the safe harbor form entirely superfluous—regardless of what kind of juristic entity executed the lien. That is of course a violation of Washington’s statutory construction rules: “Statutes should not be interpreted so as to render any portion meaningless, superfluous or questionable.” Addleman v. Board of Prison Terms & Paroles, 107 Wn.2d 503, 509, 730 P.2d 1327 (1986).

⁸ Compare RCW 60.04.091(2) (“Subscribed and sworn to before me this _ day of _.”) with RCW 64.08.060 (certifying that signatory attested to signing document “for the uses and purposes therein mentioned”) and RCW 42.44.100(1) (same).

The Legislature wrote “acknowledged pursuant to chapter 64.08 RCW,” not “appended with a certificate of acknowledgement in chapter 64.08 RCW.” BF-Thar’s arguments fail because it has conflated the two terms, and nothing in this record demonstrates that Mr. Caunt did not acknowledge Hos’s claim of lien.

C. A CORPORATE CERTIFICATE WAS NOT REQUIRED BECAUSE RCW 60.04.091 ITSELF ALLOWS SOMEONE OTHER THAN THE LIEN CLAIMANT TO SIGN

In section B.2. of its brief, BF-Thar goes on for pages about the requisite “elements” of a certificate of acknowledgement for a corporation (again confusing a “certificate” with an “acknowledgement”).⁹ But this entire argument is irrelevant because RCW 60.04.091 does not address certificates of acknowledgement, much less “corporate” ones. This is true not only because RCW 60.04.091 does not say “certificates,” but also because the statute says any claimant can use the safe harbor—*i.e.*, the statute does not say, “A claim of lien substantially in the following form shall be sufficient—*as long as the lien claimant is not a corporation.*” Moreover, RCW 60.04.091 expressly says that someone other than the lien claimant can execute the claim of lien. Thus, when Mr. Caunt signed Hos’s claim of lien, he was doing so as “a person authorized” to do that under the lien statute itself.

⁹ See *BF-Thar's Opp.*, at 18-26.

BF-Thar's argument might make more sense (but still be wrong) if RCW 60.04.091 said, "The notice of claim of lien . . . [s]hall be signed by the claimant." In that case, "Hos Bros., Inc." would at least arguably have to acknowledge the lien. The person signing would then be doing so solely in his or her capacity as an agent of the corporation, not as "a person" authorized by the lien statute to sign in his or her own capacity. But RCW 60.04.091—unlike statutes regarding deeds and mortgages—does not require that the claimant itself execute the instrument.

This makes sense when one considers how lien claimants use the sample form. "[A] lien claimant will frequently fill out the claim form himself." Fircrest Supply, Inc. v. Plummer, 30 Wn. App. 384, 388, 634 P.2d 891 (1981). Contractors, laborers, and other lien claimants are often unsophisticated in legal technicalities. The sample form exists so that any claimant can simply fill it out and record it. *Cf. Fircrest*, 30 Wn. App. at 388 ("It does not appear that the legislature intended to burden the construction industry with the obligation to research title before each claim of lien.").

By allowing "some person authorized to act on behalf of" a corporate lien claimant to sign its sample form, the Legislature further simplified the lien-filing process. Just like the lien claimant need not be an expert on "research[ing] title," the lien claimant need not be an expert

on the distinction between “corporate” and “individual” certificates of acknowledgement. By providing a sample form, the Legislature intended that any claimant—regardless of its juristic personality—could use it.

BF-Thar’s reliance on Ben Holt Indus. v. Milne,¹⁰ Yukon Investments,¹¹ and Kelpine Products,¹² continues to ignore this distinction. Unlike here, the statutes in those cases did not expressly say that a third party could execute the instruments on behalf of the party to be bound. In Ben Holt, for example, the lease had to be executed by the lessor, not by “some person authorized to act on [its] behalf.”¹³ Thus, the Ben Holt court *assumed* that when “the corporation” executed the lease, it had to use a certificate of acknowledgement for a corporation (because the executing party was a corporation, not a human being).

This is precisely the distinction that the Court of Appeals recognized in Fircrest:

Finally, Blumhardt claims that Perkins improperly signed the lien claim as Fircrest’s “Registered Agent.” He argues

¹⁰ Ben Holt Indus. v. Milne, 36 Wn. App. 468, 675 P.2d 1256 (1984).

¹¹ Yukon Inv. Co. v. Crescent Meat Co., 140 Wash. 136, 248 P. 377 (1926).

¹² Bank of Commerce of Anacortes v. Kelpine Products Co., 167 Wash. 592, 10 P.2d 238 (1932).

¹³ See Ben Holt, 36 Wn. App. at 470 (referring to “lease [that] was defectively acknowledged”); see also Stevenson v. Parker, 25 Wn. App. 639, 642 n.3, 608 P.2d 1263 (1980) (explaining lease must be acknowledged because of RCW 64.04.010 and .020); RCW 64.04.020 (“Every deed shall be in writing, signed by the party bound thereby, and acknowledged *by the party* before some person authorized by this act to take acknowledgments of deeds.”) (emphasis added).

that this fails to show Perkins' authority to act for Fircrest. We disagree. The 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.¹⁴

By claiming that Hos had to use a certificate of acknowledgement for a corporation, BF-Thar not only ignores the "shall be sufficient" clause in RCW 60.04.091, it erroneously infers that Hos—as opposed to Mr. Caunt—had to execute the lien. BF-Thar's interpretation impermissibly reads the phrase "or some person authorized to act on his or her behalf" out of RCW 60.04.091. *See Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010) (explaining courts "interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous").¹⁵

D. ONLY HOS'S READING PROPERLY RECONCILES THE DIFFERENT CLAUSES IN RCW 60.04.091

BF-Thar next claims that Hos is asking this Court to strike the phrase "acknowledged pursuant to chapter 64.08 RCW," so only

¹⁴ *Fircrest*, 30 Wn. App. at 391. BF-Thar claims *Fircrest* is distinguishable because the statute then in effect did not say "acknowledged pursuant to chapter 64.08 RCW." But that misses the point of the quoted language. The court was saying that because of the phrase "or by some person in his behalf," someone other than the claimant itself could do the act that this phrase modified.

¹⁵ BF-Thar argues that the word "President" after Mr. Caunt's signature "is merely descriptive" and "neither turns the signature into a corporate act nor sets forth the authority of the signor." *BF-Thar's Opp.*, at 20 n.6. But Hos did not need to "turn the signature into a corporate act" because RCW 60.04.091 does not require the corporation to sign—the statute expressly allows someone other than the corporation to sign.

BF-Thar's interpretation of RCW 60.04.091 gives effect to both relevant clauses in the statute. See *BF-Thar's Opp.*, at 27-31. Analogizing to Washington's deed statutes, BF-Thar claims this Court should reconcile the phrase "acknowledged pursuant to . . ." with the phrase "[a] claim of lien substantially in the following form shall be sufficient" by requiring every claimant to attach to its lien a separate document with the certificate of acknowledgement language from chapter 64.08 RCW (which BF-Thar again erroneously calls "an acknowledgement"). See *BF-Thar's Opp.*, at 31.

But Hos is not in fact asking this Court to strike any language. Rather, as Hos explained in its Opening Brief, the Court can reconcile and give effect to all of RCW 60.04.091 by holding—as it did in Kley—that a certificate of acknowledgement is sufficient even if does not duplicate the certificate statute's sample language:

Sec. 1437 . . . provides that the certificate of acknowledgment substantially in the form there given shall be sufficient, which form contains a recital that the execution of the instrument was the free and voluntary act of the party executing the same. It does not provide that this form of acknowledgment shall be exclusive, and we are satisfied the acknowledgment which was taken wherein the defendants acknowledged that they signed and executed the mortgage, without any further statement that they voluntarily did the same, was sufficient.¹⁶

¹⁶ Kley, 4 Wash. at 487 (emphasis added). Although BF-Thar admits that Kley says a certificate need not match the sample language, it claims that Hos's certificate had to

In other words, the reference in chapter 64.08 RCW as to what certification language *is* sufficient does not define what certification language is *not* sufficient. Thus, even if this Court accepted BF-Thar's claim that "acknowledged pursuant to . . ." governs what certificate language a lien must contain, "acknowledged pursuant to chapter 64.08 RCW" would still not mean "acknowledged with a certificate *containing the exact language of chapter 64.08 RCW.*"

This Court has similarly held that a defect in a *certificate* does not render the *acknowledgment* invalid if the document as a whole discloses the missing information. In Barouh v. Israel, 46 Wn.2d 327, 281 P.2d 238 (1955), the notary left the date of acknowledgment blank on the certificate of acknowledgement. The date was a requisite element. Nevertheless, the Court explained that it could look at the instrument as a whole to ascertain the missing information:

The date of the acknowledgment is blank, but this is not a material defect. Where there is an omission of the date in a certificate of acknowledgment, the court is entitled to look at the whole instrument, and if the date can thus be ascertained, the informality of the certificate may be regarded as obviated.¹⁷

contain certain "elements" of a certificate of acknowledgement *for a corporation*. But that argument assumes RCW 60.04.091 (a) requires a particular certificate of acknowledgement (which the statute does not say); and (b) that a corporation was signing the lien (which it was not).

¹⁷ Barouh v. Israel, 46 Wn.2d 327, 281 P.2d 238 (1955).

Here, the document as a whole demonstrates that Mr. Caunt signed the lien freely and voluntarily, and that he is the President of the claimant. Thus, even if “acknowledged pursuant to . . .” meant “certificated pursuant to . . .,” and even if the lien was supposed to include a certificate of acknowledgement for a corporation, as opposed to an individual, those alleged defects would not—according to Kley and Barouh—affect the enforceability of Hos’s lien. Thus, a claim of lien on the safe harbor form is “acknowledged pursuant to chapter 64.08 RCW.” *This* interpretation gives effect to all of the language in RCW 60.04.091.

BF-Thar’s “separate document” argument is also flawed because it wholly ignores the fact that RCW 60.04.091 is newer and more specific. The Legislature enacted RCW 60.04.091 in 1991.¹⁸ Chapter 64.08 RCW and RCW 42.44.100 are from 1988.¹⁹ Chapter 64.08 RCW and RCW 42.44.100 deal with certificates of acknowledgement generally. But RCW 60.04.091(2) addresses what a certificate in a mechanic’s lien should say. Thus, because the Legislature enacted that more specific language more recently, the certificate language in the safe harbor form

¹⁸ See Laws of 1991, Ch. 281 § 9.

¹⁹ See Laws of 1988, Ch. 69 §§ 2-4.

should prevail: “Generally, provisions of a specific more recent statute prevail in a conflict with a more general predecessor.”²⁰

Finally, BF-Thar’s “separate document” argument is just plain illogical. BF-Thar argues that “acknowledgment is an additional requirement necessary to create a valid lien, just as the other requirements contained in subsections (1)(a)-(f) of the statute are additional elements that must also be contained in the lien (*and are not contained in the sample form*).” *BF-Thar’s Opp.*, at 29 (emphasis added). But every element listed in subsections (1)(a)-(f) *is* in the safe harbor form.²¹ RCW 60.04.091(1)(a) says the lien must include the “name, phone number, and address of the claimant.” The first section of the sample form says: “NAME OF LIEN CLAIMANT,” “TELEPHONE NUMBER,” and “ADDRESS.” RCW 60.04.091(1)(b) says the claim of lien must include “[t]he first and last date on which the labor . . . was furnished.” Section two of the sample form says, “DATE ON WHICH THE CLAIMANT BEGAN TO PERFORM LABOR” RCW 60.04.091(1)(c) says the lien must include “[t]he name of the person indebted to the claimant.” Section three of the sample form says, “NAME OF PERSON INDEBTED TO CLAIMANT.”

²⁰ *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 37, 785 P.2d 44 (1990).

²¹ Obviously the lien claimant has to *fill out* the sample form.

BF-Thar cannot seriously contend this is just coincidence. The fact that the required elements identically match the safe harbor form further confirms what the phrase “shall be sufficient” already says—the Legislature assumed that if a lien claimant simply filled out the safe harbor form that it was providing, then the form would satisfy the lien elements that the Legislature had just identified.

What the elements sections do *not* contain is equally significant. Nowhere in the language preceding the safe harbor form does RCW 60.04.091 say a claim of lien must be sworn or certified by a notary. Thus, the “Subscribed and sworn to before me” language in the safe harbor form is unnecessary unless the Legislature intended that it also serve as a certificate of acknowledgment. Put another way, if a claimant had to attach to the safe harbor form a separate certificate of acknowledgment as BF-Thar claims, then the sample form’s “Subscribed and sworn to before me” and notary signature would be superfluous.

BF-Thar’s citation to Clements v. Snider, 409 F.2d 549, 550 (9th Cir. 1969), is equally misplaced. Citing that *California* law case,²² BF-Thar claims that when a statute provides a sample form “and additionally indicates that the form must be acknowledged,” then the

²² Clements was decided under California law. See Clements, 409 F.2d at 550.

“acknowledgement must be attached to, and follow, the sample form.”²³

But Clements says nothing of the sort. Rather, Clements says that if the *acknowledgment* itself is proper, then a defective *certificate* does not invalidate the instrument:

[A]ppellant argues that if the certificate was incorrect, the acknowledgement was invalid and appellees were unsecured creditors. Appellees’ theory is that if the acknowledgment was proper and only the certificate was defective, the instrument is valid. We find the reasoning of appellees to be the better position²⁴

Moreover, Washington law specifically allows a certificate of acknowledgment to be written upon the instrument being acknowledged—*i.e.*, Washington’s Legislature has expressly said that a certificate need *not* be a separate document attached to the lien. *See* RCW 64.08.050 (“The officer, or person, taking an acknowledgment . . . shall certify the same by a certificate written upon *or* annexed to the instrument acknowledged and signed by him or her”) (emphasis added). Thus, nothing in Clements—or any other case—supports BF-Thar’s claim that Hos had to attach a separate certificate of acknowledgement to its lien.

Nor do the deed statutes imply that. In the deed statutes, the sample form appears first, then the statute says, “Every deed in substance

²³ *BF-Thar’s Opp.*, at 31 (again confusing “acknowledgement” with the *certificate* of acknowledgement).

²⁴ Clements, 409 F.2d at 550.

in the above form, *when otherwise duly executed*, shall” RCW 64.04.030 (emphasis added). Thus, the statute identifies the sample form, then informs the reader that additional requirements apply.

RCW 60.04.091, by contrast, lists the elements of the claim of lien first, then provides a safe harbor form that the statute says “shall be sufficient”—period. The only logical way to read these statements in the order they appear is that the sample form satisfies all the requirements listed in the statute—including the requirement that the lien be acknowledged. RCW 60.04.091, unlike the deed statutes, does not say the sample form is sufficient only “when otherwise duly executed.”²⁵

E. THE TRIAL COURT SHOULD HAVE ALLOWED HOS TO AMEND ITS LIEN

Even if Hos’s lien had been deficient, the trial court should have allowed Hos to amend it. *See* RCW 60.04.091(2), a “notice of claim of lien may be amended as pleadings may be . . . insofar as the interests of third parties are not adversely affected by such amendment.” In response to this argument, BF-Thar claims that “[c]onsistent with the rule of strict

²⁵ The cases that BF-Thar relies upon are distinguishable for similar reasons. Anderson v. Frye and Bruhn, 69 Wash. 89, 124 P. 499 (1912), simply states that a lease for more than one year must be in writing and acknowledged because the deed statute says that. Saunders v. Callaway, 42 Wn. App. 29, 35-36, 708 P.2d 652 (1985), just recites the requirements of RCW 64.04.010 and .020. And as Hos explained in its opening brief, Ben Holt is distinguishable because the statute at issue there did not allow the document to be executed by the party “or some person authorized to act on his or her behalf.”

construction,” a lien claimant cannot “simply ‘amend’ an invalid lien by belatedly adding an acknowledgement clause.” *BF-Thar’s Opp.*, at 33, 34.

This argument begs the question; it assumes both that the “rule of strict construction” applies here and that Hos’s lien was “invalid” because the notorial certificate did not match RCW 64.08.070. But as explained above, the “strict construction” rule applies only in deciding whether the claimant provided the type of labor or equipment that gives rise to a lien. And as Hos explained in its Opening Brief, *this* Court has held that a lien that substantially complies with the lien statutes is *not* invalid—even if it omits a statutorily-required element. *See, e.g., Davidson v. National Can Co.*, 150 Wash. 370, 376, 273 P. 185 (1928).²⁶ Thus, notwithstanding what the *Court of Appeals* said in dictum in *Lumberman’s of Washington v. Barnhardt*, 89 Wn. App. 283, 949 P.2d 382 (1997), *this* Court has held that a substantially compliant (and timely²⁷) lien is amendable.

²⁶ BF-Thar claims that *Davidson* is distinguishable on grounds the lien in that case was not really defective (because the statute requiring a seal had changed) and because *Davidson* pre-dates the “strict construction” rule. But whether the *Davidson* Court was right or wrong, it said the lien *was* defective—and yet it was enforceable notwithstanding that defect because it substantially complied with the statutes: “[T]he only defect is the failure to impress his official seal before recording . . .”. *Davidson*, 150 Wash. at 376. And as *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 P. 869 (1909), demonstrates, *Davidson* did not in fact pre-date the “derogation of the common law”/“strict construction” rule.

²⁷ In *McMullen & Co. v. Croft*, 96 Wash. 275, 164 P. 930 (1917), this Court said exactly what Hos said in its Opening Brief—if the claimant does not file its original lien *on time*, then there is nothing to amend. Thus, the *McMullen* reference to “void notice of lien” that BF-Thar quotes refers to an *untimely* claim of lien. *Intermountain Elec. v. G-A-T Bros.*, 115 Wn. App. 384, 62 P.3d 548 (2003), is similarly

BF-Thar further claims that “substantial compliance” is not the correct standard because Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 210 P.3d 308 (2009), says lien statutes are “strictly construed.” But Davidson says otherwise, and Estate of Haselwood was not a case about amending liens.

BF-Thar’s “futility” arguments simply parrot irrelevant facts and ignore the key legal issue. Hos personnel did *at one time* say the work that gave rise to Hos’s lien commenced in 2006. But they corrected that testimony (based on the fact that some of Hos’s equipment had remained on site since 2005) *before BF-Thar recorded its deed of trust.*²⁸ Thus, BF-Thar does not dispute that it took its interest in the property with notice that Hos claimed its lien related back to 2005. It follows that under CKP, Inc. v. GRS Constr. Co., 63 Wn. App. 601, 610, 821 P.2d 63 (1991), changing the lien to reflect that 2005 date could never prejudice BF-Thar, and amendment therefore should have been allowed.

As for BF-Thar’s “tacking” argument, BF-Thar simply misconstrues the issue. Hos’s lien relates back to 2005 because that was the date that Hos first placed its equipment on the job site—equipment it

distinguishable. As in McMullen, the claimant there had failed to record its initial claim of lien within the 90-day limitation period, so there was nothing to amend. See Intermountain, 115 Wn. App. at 394-95.

²⁸ See CP 202-215; CP 86.

used to improve the property *under what BF-Thar calls the "second" contract*.²⁹ Thus, Hos is not seeking to "tack" two contracts together; Hos is simply seeking to have its lien for unpaid work on "the second contract" correctly reflect the date that RCW 60.04.061 says the lien relates back to. Moreover, the *merits* of Hos's proposed amendment were irrelevant anyway³⁰—a point that BF-Thar has not attempted to refute.

III. CONCLUSION

RCW 60.04.091(2) says a claim of lien on the safe harbor form *shall* be sufficient. Hos's lien was *identical* to that form, and the trial court therefore erred by invalidating it.

Nothing in BF-Thar's opposition brief says otherwise. The phrase "acknowledged pursuant to chapter 64.08 RCW . . ." does not mean that a lien must contain certain *certificate* of acknowledgement language because a certificate and an acknowledgement are two distinct things. Even if it did, the language on the sample form satisfies chapter 64.08 RCW under Kley—which is an interpretation that gives effect to all the

²⁹ See RCW 60.04.061 ("The claim of lien . . . 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.") (emphasis added).

³⁰ See RCW 60.04.091(2) ("[A] notice of claim of lien may be amended as pleadings may be . . ."); Netbula, LLC v. Distinct Corp., 212 F.R.D. 534, 539 (N.D. Ca. 2003) ("Ordinarily, courts will defer consideration of challenges to the merits of a proposed amended pleading until after leave to amend is granted and the amended pleading is filed.").

language in RCW 60.04.091. Moreover, a “certificate of acknowledgement for a corporation” would not have been required anyway because RCW 60.04.091 itself allows someone other than a corporate lien claimant to sign the lien. Finally, even if Hos’s lien had been defective, the trial court erred in not allowing Hos to amend the lien because it substantially complied with RCW 60.04.091, because BF-Thar had notice of the proposed amendments, and because the merits of the proposed amendment should have been irrelevant anyway. For each of these reasons, Hos respectfully requests that this Court reverse the trial court’s June 24, 2010 order.

DATED this 19th day of January, 2011.

HARPER | HAYES PLLC

By: 
Todd C. Hayes, WSBA No. 26361
Attorneys for Appellant