

64432-7

64432-7

ORIGINAL

W

No. 64432-7-1

2010 APR 29 PM 4:00  
COURT OF APPEALS  
STATE OF WASHINGTON  
FILED  
W

---

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

---

CHRISTOPHER GRAY and JULIE LASSONDE-GRAY,  
Plaintiffs/Appellants

v.

BOURGETTE CONSTRUCTION, LLC,  
Defendant/Respondent

---

BRIEF OF APPELLANTS IN REPLY

---

Tarl R. Oliason, WSBA No. 11923  
Dainen N. Penta, WSBA No. 33597

McKisson Sargent & Oliason P.S.  
1900 West Nickerson Street, Suite 209  
Seattle, WA 98119  
(206) 285-4130

Attorneys for Plaintiffs/Appellants

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	RESPONDENT FAILED TO ALLEGE AND PROVE THAT IT COMPLIED WITH THE STATUTORY PREREQUISITES TO FILING A LIEN OR THAT A LEGITIMATE DISPUTE EXISTED AS TO THE AVAILABILITY OF AN EXEMPTION.....	2
	A. James and Westcott Development were neither the Grays' "construction agent" nor the Grays' common law agent.....	3
	B. The "labor only" exemption to the notice requirement is inapplicable because both labor and materials were provided.....	5
III.	THE MERITS OF BOURGETTE'S UNDERLYING QUASI-CONTRACTUAL CLAIM WERE NOT AT ISSUE AT THE SHOW CAUSE HEARING.....	5
IV.	CONCLUSION.....	6

## TABLE OF AUTHORITIES

### Cases

<i>Pacific Industries v. Singh</i> 120 Wn.App. 1, 86 P.3d 778 (2003).....	2
<i>Deacon Corp. v. Gaston Bros. Excavating</i> 150 Wn.App. 87, 206 P.3d 689 (2009).....	6

### Rules

RCW 60.04.011(1).....	4
RCW 60.04.031.....	1
RCW 60.04.031(2)(b).....	5
RCW 60.04.031(3)(a).....	4
RCW 60.04.031(6).....	1

### Treatises

Rest. 3 <sup>rd</sup> Agency § 8.09.....	4
------------------------------------------	---

## I. INTRODUCTION

*“A lien authorized by this chapter shall not be enforced unless the lien claimant has complied with the applicable provisions of this section.”* RCW 60.04.031(6) (emphasis added). The Washington Legislature provided a simple and inexpensive way contractors can protect their lien rights, set forth in RCW 60.04.031. However, a contractor who is not otherwise exempt may not assert a claim of lien without first having complied with a simple threshold requirement: that notice is given to the property owner.

Here, Bourgette Construction (“Bourgette”) could have easily protected itself from a potential lien dispute by issuing the statutorily-prescribed notices, with little expense and little or no inconvenience. However, it failed to provide any credible evidence that it provided the Grays with the “Notice to Owner” required by RCW 60.04.031 or that there was a legitimate dispute as to whether it was exempt from doing so. In the absence of showing either, Bourgette knew or should have known that failure to do so could render its lien frivolous as a matter of law, preventing it from filing or enforcing a lien.

While it is perhaps a harsh result that the statute operates as a complete and strict bar to enforcing its lien, Bourgette's burden was not high – the cost of a few sheets of paper and perhaps a phone call – certainly outstripped by the costs of litigating this case. “A lien statute must be strictly construed to determine whether the lien attaches, and its benefits will be extended only to those who clearly come within the statute's terms.” *Pacific Industries v. Singh*, 120 Wn.App. 1 at 6, 86 P.3d 778 (Ct. App. 2003). Here, Bourgette's failure to comply with the notice requirement meant that when it did file its lien that the filing was frivolous and its lien unenforceable, and therefore the trial court erred in ordering that the lien be removed and in awarding fees to Bourgette.

**II. RESPONDENT FAILED TO ALLEGE AND PROVE THAT IT COMPLIED WITH THE STATUTORY PREREQUISITES TO FILING A LIEN OR THAT A LEGITIMATE DISPUTE EXISTED AS TO THE AVAILABILITY OF AN EXEMPTION**

Bourgette argues that the show cause hearing was limited in nature and that its provision of labor and services precludes a finding of frivolity. The Grays agree that a legitimate dispute about the merits of a lien preclude its release at a summary hearing. However, here there was no legitimate dispute because Bourgette failed to show that it

complied with the notice requirements or that it was exempt therefrom, and the court should not have released its lien.

Bourgette's brief discusses the improvements to the Grays property, the city permits it obtained, the invoices it submitted to James, and its damages resulting from James' failure to pay Bourgette. Respondent's Brief at 2-3. However, none of these factual issues are relevant to the threshold requirements to claim a lien, including provision of notice to the owner.

The Grays do not dispute that Bourgette provided labor and services in some amount, that Bourgette was the appropriate party to the action, or that Bourgette's lien complied with the statutory form and was served on the Grays. However, Bourgette failed to allege and demonstrate that it complied with the statutory notice requirements or that it was exempt. Therefore, Bourgette was not entitled to lien the Grays' property. It knew or should have known its lien was frivolous, and the trial court should have ordered the lien released.

**A. James and Westcott Development were neither the Grays' "construction agent" nor the Grays' common law agent.**

The definition of a "construction agent" was amended in 2007 and now includes only registered or licensed

contractors. RCW 60.04.011(1). James and Westcott Development (“James”) are not registered or licensed contractors. Therefore, James could never be a “construction agent” within the ambit of the statute, which would exempt Bourgette from the notice requirements.

Neither does a general contractor somehow become a common law agent for the homeowners once a dispute arises. An agent “has a duty to take action only within the scope of the agent’s actual authority.” Rest. 3<sup>rd</sup> Agency § 8.09. Here, James was hired for a specific purpose – to remodel the Grays’ home. James is more properly viewed as a special agent, authorized only to conduct a single transaction or specified series of transactions over a limited period of time, not to act as the Grays’ general agent. Even if for purposes of this appeal one assumes that the Grays were aware of Bourgette’s work on their property, such knowledge is irrelevant to whether James was the Grays’ general agent at common law. In any event, because James is not a statutory “construction agent”, this limits James’ authority rather than broadens it, as Bourgette argues. Thus, Bourgette was not exempt under RCW 60.04.031(3)(a) from the lien notice requirement.

**B. The “labor only” exemption to the notice requirement is inapplicable because both labor and materials were provided.**

There is no dispute that Bourgette did work on the Gray property. The dispute as to whether the Grays were aware Bourgette was working on the property or not is irrelevant to the issue of whether an exemption was available. The documentation provided by Bourgette indicates that both labor and materials were provided. Therefore, there is no legitimate dispute that the statutory exemption at RCW 60.04.031(2)(b) is inapplicable which exempts a contractor who provides “solely labor.”

**III. THE MERITS OF BOURGETTE’S UNDERLYING QUASI-CONTRACTUAL CLAIM WERE NOT AT ISSUE AT THE SHOW CAUSE HEARING**

Bourgette argues, in sum, that its lien claim is enforceable because (1) it “properly recorded” its claim of lien, and (2) it performed work on the Gray’s property. Respondent’s Brief, at 3. While the recordation is a relevant consideration to the analysis of whether Bourgette’s lien was proper, the performance of work is not, if the lienor has not complied with the lien statute’s threshold requirements. A trial court may resolve issues such as “whether the lien was signed by a proper party, whether it was properly served,

and whether its contents comply with the statutory requirements.” *Deacon Corp. v. Gaston Bros. Excavating*, 150 Wn.App. 87 at 95, 206 P.3d 689 (Ct. App. 2009).

Here, Bourgette simply failed to comply with the notice requirements, and there is no legitimate dispute that no exemption applied. Therefore, while Bourgette’s quasi-contractual claim to be paid for services and labor supplied may not be frivolous, the lien filing was frivolous as Bourgette knew or should have known that its lien rights would not attach if the notice requirements applied. Therefore, the trial court erred in ordering the lien’s release.

#### **IV. CONCLUSION**

At the summary proceeding, the trial court should not have ordered that the Bourgette’s lien be released. While there is some legitimate dispute about the amounts at issue and possibly the extent of the work performed, there is no material dispute that Bourgette Construction never provided Mr. and Mrs. Gray with the notices of lien it was required to by law. Nor is there any legitimate dispute that Geoffrey James and Westcott Development was not a “construction agent” of the Grays, because that term as statutorily defined is limited only to a registered or licensed contractor, which James and Westcott were not. Bourgette’s argument that

James and Westcott had a greater scope of agency authority than what was accorded under the Grays' engagement of James and Westcott is an ineffective attempt to "bootstrap" Bourgette into an exemption which simply does not apply.

For the reasons stated above, the Grays request that this Court REVERSE the Superior Court's October 13, 2009 order releasing Bourgette's lien and awarding attorney fees to Bourgette Construction. The Grays further request that this Court find that the trial court erred in not finding the Grays to be the prevailing party, and remand this case for a determination of the appropriate fees and costs in connection with the show cause hearing. The Grays further request that this Court find that the Grays are the prevailing party for purposes of this appeal, and award reasonable fees and costs incurred in connection with this appeal.

DATED this 29<sup>th</sup> day of April, 2010.

McKisson Sargent & Oliason P.S.

By 

Tom R. Oliason, WSBA #11923  
Dainen N. Penta, WSBA #33597  
1900 West Nickerson Street, Suite 209  
Seattle, WA 98119  
(206) 285-4130

Attorneys for Appellants

I HEREBY CERTIFY that on this 29<sup>th</sup> day of April, 2010, I caused to be served a true and correct copy of the following document(s):

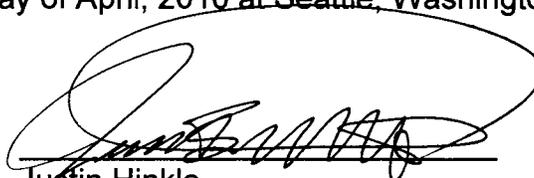
1. Brief of Appellants in Reply; and
2. Certificate of Service

to the individual(s) named below in the specific manner(s) indicated:

Bridget Bourgette Shaw  
Shaw Law Group PLLC  
787 Maynard Ave. S., Suite B  
Seattle, WA 98104

<input checked="" type="checkbox"/>	Legal Messenger
<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Certified Mail
<input type="checkbox"/>	Hand Delivered
<input type="checkbox"/>	Overnight Mail

DATED this 29th day of April, 2010 at Seattle, Washington.



Justin Hinkle