

NO.65959-6-I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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COLUMBIA STATE BANK, a Washington State banking corporation,

Appellant,

v.

ANTINORI DEVELOPMENT, LLC, a Washington limited liability  
company,

Respondent.

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APPELLANT'S REPLY BRIEF

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EISENHOWER & CARLSON, PLLC  
By: Donald L. Anderson, WSBA # 8373  
Jennifer A. Wing, WSBA # 27655  
Attorneys for Appellant  
Columbia State Bank

**EISENHOWER & CARLSON, PLLC**  
1200 Wells Fargo Plaza  
1201 Pacific Avenue  
Tacoma, Washington 98402  
Telephone: (253) 572-4500

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**I. RESPONSE TO RESPONDENTS' STATEMENT OF THE CASE**

The parties' respective recitations of the material facts are essentially identical. Of significance in Antinori's Brief of Respondent is its admission that the basis for its lien claim is Antinori's and NPI's Reciprocal Easement Agreement ("REA") ("[pursuant to a Reciprocal Easement Agreement . . . Antinori improved the parcel of property owned by NPI", Brief of Respondent, at p. 1; "construction of the Common driveway was undertaken pursuant to one contract – the REA", Brief of Respondent, at p. 13; "[t]hat contract [REA] is between Antinori and NPI and that contract alone provides the basis for the lien", Brief of Respondent, at p. 15).

The REA reflects the parties' contract establishing a perpetual, reciprocal non-exclusive easement for the benefit of Antinori and NPI to establish a common driveway ("Driveway") to provide ingress and egress to and from their respective parcels. *See* Brief of Respondent, at pp. 1, 3, 4. It is undisputed (and Antinori readily concedes) that the REA itself does not provide either party the authority to file or foreclose a lien pursuant to the REA.

As explained below, these facts are significant because Antinori's

acknowledgement undermines its argument that it has a valid lien claim under Washington's Mechanics' and Materialmen's lien statute.

## II. ARGUMENT

A. The Trial Court Erred in Entering the Order Granting, in Part, Defendant Antinori's Motion for Summary Judgment and Decree and Judgment of Foreclosure for Antinori Development, LLC

- i. *Antinori's Lien Claim is not Valid under the Mechanics' and Materialmen's Lien Statute because its Claim is Purely Contractual.*

Antinori's Response acknowledges that its lien claim is based upon Antinori's and NPI's REA. Antinori's Notice of Claim or Lien states that "THE LIEN IS ASSESSED pursuant to the REA. A recording of the REA under King County Auditors Number 2005419001552 constitutes record notice and perfection of the lien." CP 1444-1445. There is no provision in the REA authorizing the right to pursue a lien foreclosure action against NPI pursuant to RCW 60.04. The REA merely provides for a cost reimbursement allocation between Antinori and NPI and contains no language contemplating a lien in the event of non-payment. Antinori's claim against NPI arises purely from its contract and the obligations and responsibilities set forth therein.

Accordingly, Antinori's right to reimbursement is purely contractual and its lien foreclosure action brought pursuant to the

Mechanics' and Materialmen's lien statute is invalid. The trial court committed error in entering its Order Granting, in Part, Defendant Antinori's Motion for Summary Judgment and Decree and Judgment of Foreclosure for Antinori Development, LLC.

While Antinori argues in its Respondent's Brief that the Mechanics' and Materialmen's lien statute is to be liberally construed, Antinori fails to fully appreciate that such liens are creatures of statute and thus, they are in derogation of the common law and must be strictly construed to first determine whether a lien attaches. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308 (2009), citing *Dean v. McFarland*, 81 Wn.2d 215, 219-20, 500 P.2d 1244 (1972). Thus, courts strictly construe the provisions of the statute when initially determining whether a lien attaches in a particular circumstance.

The Mechanics' and Materialmen's lien statute's purpose, in relevant part, is to "prevent detriment to laborers and material suppliers who expend their resources on others' property." *Estate of Haselwood, supra* (recognizing protection of equipment supplier who provides equipment to project pursuant to contract with owner and construction manager's directive to commence work); Rombauer, *27 Washington Practice*, Creditors' Remedies-Debtors' Relief §4.52, 347-48 (2d ed).

The circumstances of this case are significantly different than a “typical” lien where a material supplier provides materials or a laborer expends time and engery, and is entitled to file and establish a lien to avoid non payment. As more fully explained in the Bank’s Opening Brief, Antinori, as owner of the adjacent and benefitted property (under the REA), is not a contemplated beneficiary of the statute and does not and should not receive the benefit of the statutory exception establishing lien priority. The REA establishes and creates for Antinori's benefit a perpetual, non-exclusive easement for ingress and egress. Antinori, as beneficiary of the REA undertook to improve its own property by constructing a driveway on its own easement, which allowed ingress and egress for vehicular traffic to Antinori's property.

The statute was not intended to benefit Antinori by conferring upon it the right to file a lien claim where it was improving its own property. Accordingly, Antinori does not receive the protection of the Mechanics’ and Materialmen’s lien statute, or the statutory section placing its lien claim prior to the Bank's recorded Deed of Trust.

- ii. *The Bank’s Lien Claim Has a Priority Interest where Antinori does Not have a Valid Lien Claim under the Mechanics’ and Materialmen’s Lien Statute.*

RCW 60.04.226 is entitled "Financial encumbrances – Priorities"

and provides, in relevant part:

Except as otherwise provided in RCW 60.04.061 or 60.04.221, *any mortgage or deed of trust shall be prior to all liens, mortgages, deeds of trust, and other encumbrances which have not been recorded prior to the recording of the mortgage or deed of trust* regardless of when the same are disbursed or whether the disbursements are obligatory.

Emphasis added.

It is undisputed that the Bank recorded its Deed of Trust on November 1, 2006, reflecting an interest as mortgagee in the Real Property. Antinori filed its Claim of Lien on January 15, 2009.

Accordingly, the Bank's Deed of Trust is prior to Antinori's lien given the Bank's priority recording. Moreover, the exceptions to RCW 60.04.226 do not apply to Antinori.

RCW 60.04.061 provides:

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

However, RCW 60.04.021 sets forth those persons who may have a valid lien against real property as follows:

. . . 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 for the labor, professional services, materials, or equipment furnished at the insistence of the owner, or

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agent or construction agent of the owner.

RCW 60.04.021 (emphasis added).

Where the Mechanics' and Materialmen's lien statute does not apply to Antinori (as described above and in Appellant's Opening brief), Antinori does not gain the benefits conferred by the statute including the benefit of the statutory exception establishing lien priority. Thus, Antinori's lien does not have priority over the Bank's lien claim.

- iii. *Even If Antinori's Lien Claim is Valid, its Admission that the Work forming the basis of the Claim Arises from a Written Contract (REA) and Oral Contract, (a) eliminates the Pivetta work from its claim; and (b) invalidates its claim by its failure to timely file such claim.*

Even if Antinori has a valid lien claim, its lien claim is limited to work performed by Superior Asphalt and not work performed by Pivetta Brothers. Quite simply, the REA, which forms the basis for the lien claim, contemplates the type of work performed by Superior Asphalt only. The work performed by Pivetta for subsurface improvements was the subject of an oral contract, upon which the lien claim is not based. It is significant that Antinori repeatedly asserts that the REA alone formed the basis of its lien claim.

The REA provides for the construction and shared costs of a common driveway. Paragraph 4.1 of the REA, entitled "Roadway Surface

Improvements," plainly and unambiguously, states:

The owner of the Investors Parcel shall bear and pay when due all costs of ***constructing, installing, maintaining, repairing, altering and replacing the paving, roadway, driving lanes, striping and other surface improvements*** on the Investors Parcel, shall keep all of such improvements in good condition and repair at all times.

CP 1412.

The REA makes exceptionally clear the parties' intent as to the types of improvements for which NPI was required to pay. These terms are more specifically discussed in the Appellant's Opening Brief and demonstrate that the REA does neither contemplate nor encompasses the subsurface work including mass excavation, storm drain or water main work performed by Pivetta totaling \$125,695. CP 1412.

Antinori admits that the subsurface work performed on the properties was not part of the written REA, but instead was subject to an oral agreement between NPI and Antinori. *See* Brief of Respondent at p. 13 ("Antinori and NPI orally agreed to include the excavation and utilities as part of the Common Driveway").

Where Antinori claims that its entire lien claim arises from the REA, it cannot successfully argue that the Pivetta work can be included in that lien claim because that work arose from an oral agreement completely separate and apart from the REA. It follows that the Pivetta work

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comprising 76% of Antinori's claim is not properly the subject of its lien claim.

Antinori argues that *Anderson v. Taylor*, 55 Wn.2d 215, 347 P.2d 576 (1959), does not apply because Antinori's lien claim did not involve two contracts, but only one contract, namely the REA. However, this assertion is inconsistent with Antinori's admission that the Common Driveway work was the result of two contracts, namely the REA work and additional subsurface work (performed by Pivetta) which was the result of an oral contract between NPI and Antinori. Antinori's attempt to shift the cost of the Pivetta work into the REA when the Pivetta work was the subject of a separate, oral agreement must fail. The Pivetta work cannot be included in Antinori's lien claim.

Further, where there are separate and distinct contracts, a lien claimant cannot extend the time for filing a lien claim based upon work performed or materials furnished on a separate contract. *Boise Cascade Corp. v. Pence*, 64 Wn.2d 798, 394 P.2d 359 (1964) citing *Anderson v. Taylor*, 55 Wn.2d 215, 347 P.2d 576 (1959). As explained in Appellant's Opening Brief, Antinori failed to timely file its lien claim as required by RCW 60.04.091. The trial court's determination as to the validity and amount of Antinori's lien claim is erroneous. If Antinori has a valid lien,

the lien amount should reflect the amounts paid to Superior for its "Roadway Surface Improvements" only.

iv. *The Bank is Entitled to an Award of Attorney's Fees.*

The Bank has already requested attorney's fees and renews that request and asks that Antinori's request be denied. As the prevailing party, the Bank is entitled to an award of its attorney's fees and costs for establishing its priority lien interest above Antinori under the "rank of lien" provision in RCW 60.04.181.

### III. CONCLUSION

The Bank respectfully requests that this Court reverse the trial court's Order Granting, in Part, Defendant Antinori's Motion for Summary Judgment and Decree and Judgment of Foreclosure for Antinori Development, LLC.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of May, 2011.

EISENHOWER & CARLSON, PLLC

By:   
Donald L. Anderson, WSBA #8373  
Jennifer A. Wing, WSBA #27655

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of January, 2011, I served Respondent with a copy of the foregoing APPELLANT'S REPLY BRIEF by sending a true and correct copy of the foregoing document via ABC Legal Messengers to the following counsel for Respondent:

Mr. Sandip Soli  
Cairncross & Hempelmann P.S.  
524 Second Avenue, Suite 500  
Seattle, WA 98104-2323

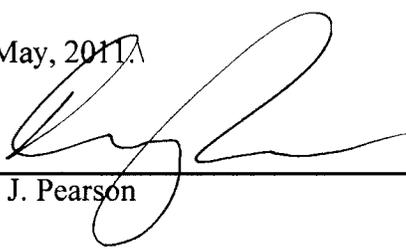
I also delivered a courtesy copy of the foregoing document via ABC Legal Messengers to be hand-delivered to the following:

Mr. Andrew A. Guy  
Stoel Rives LLP  
600 University Street, Suite 3600  
Seattle, WA 98101-3197

Finally, I arranged for the original and one copy of the foregoing document to be filed with the Court of Appeals, Division I, via ABC Legal Messengers at the following address:

Washington State Court of Appeals, Division I  
One Union Square  
600 University Street  
Seattle, WA 98101-1176

DATED this 13 day of May, 2011.

  
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Cameron J. Pearson

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