

No. 689622

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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KULEANA L.L.C., a Washington limited liability company; and  
HAROLD E. JOHNSON, a single person,

*Plaintiffs-Appellants,*

vs.

DIVERSIFIED WOOD RECYCLING, INC.,  
a Washington business corporation,

*Defendant-Respondent.*

FILED  
APR 11 2013  
COURT OF APPEALS  
DIVISION I  
EPHRATA, WA

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BRIEF OF APPELLANTS

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**TABLE OF AUTHORITIES**

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## INTRODUCTION

This case involves a dispute about the priority of competing interests in certain real estate. In *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 251 P.3d 293, *rev. denied*, 172 Wn.2d 1025 (2011) (hereafter *Diversified I*), this Court held that a mechanics' lien on the property was validly foreclosed by Diversified Wood Recycling, Inc. (Diversified), even though Diversified did not join the owners of the property, Harold E. Johnson (Sr.) and Kuleana, L.L.C. (Kuleana), as parties in the lien foreclosure action. In the related case of *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 891, 251 P.3d 908, *rev. denied*, 172 Wn. 2d 1025 (2011) (hereafter *Diversified II*), the Court affirmed denial of Harold Johnson Sr.'s and Kuleana's post-judgment motion to intervene in *Diversified I*.

In both cases, the Court recognized that the interest of a person who is not joined as a party in a lien foreclosure action "shall not be foreclosed or affected[.]" RCW 60.04.171 (brackets added). Specifically, in *Diversified I* the Court quoted RCW 60.04.171 two separate times for this proposition, 161 Wn. App. at 888 & 889, and concluded: "[t]hus if the owner or anyone else with a recorded interest in the property is not made a party, the consequence is that his or her interest will not be foreclosed or affected[.]" *id.* at 889.

Likewise, in *Diversified II*, the Court stated: “[w]e hold that the nonjoinder of an owner does not make a foreclosure judgment void; it simply means that the owner’s interest is unaffected.” 161 Wn. App. at 894. The Court further stated that: “[t]he consequence [of nonjoinder] is that the interest of a person not joined may not be foreclosed or otherwise affected.” *Id.* at 903 (citing RCW 60.04.171; brackets added). There is no indication in either case that the interests of Harold Johnson Sr. or Kuleana were affected by the lien foreclosure action.

Following the decisions in *Diversified I* and *II*, Harold Johnson Sr. and Kuleana filed the present action, seeking declaratory judgment that “[t]heir interests in the property are not foreclosed or otherwise affected by the lien foreclosure action because they were not joined as parties[,] and to quiet title in themselves. CP 7-8 (brackets added). *Diversified* moved to dismiss their complaint on grounds of res judicata and collateral estoppel. CP 60-61. The superior court granted *Diversified*’s motion, and Harold Johnson Sr. and Kuleana appeal. RP 34-36; CP 394-96; CP 397-402.

## **ASSIGNMENT OF ERROR**

The superior court erred in dismissing Harold Johnson Sr.'s and Kuleana's complaint. CP 394-96.

### **ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Whether Harold Johnson Sr.'s and Kuleana's interests in the subject property are affected by the lien foreclosure action to which they were not joined as parties?
2. Whether Harold Johnson Sr.'s interest in the subject property, to the extent it is not encompassed within the legal description of Diversified's lien, is affected by the lien foreclosure action?
3. Whether a lien foreclosure action precludes a subsequent declaratory judgment action regarding the effect and priority of the lien under the doctrines of res judicata or collateral estoppel?

## STATEMENT OF THE CASE

### A. The interests of the parties in the subject property.

The interests of the parties in the subject property are reflected on three documents:

1. On March 23, 2006, Harold Johnson Sr. obtained title to certain property located in Spokane County, Washington, by statutory warranty deed from one Michael R. McGarvey. CP 215. See Appendix A.<sup>1</sup>
2. On January 5, 2007, Harold Johnson Sr. conveyed a portion of the property to Kuleana by statutory warranty deed. CP 218-20. See Appendix B.
3. On March 2, 2007, Diversified filed a notice of claim of a mechanics' lien pursuant to Ch. 60.04 RCW against the property owned by Harold Johnson Sr. and Kuleana. CP 222-25. See Appendix C.

The legal description of the Diversified lien, CP 222-25, is the same as the legal description on the McGarvey-to-Johnson deed, CP 215, with two exceptions. First, the Diversified lien covers portions of Crescent Road (in the northwest corner of the property) and Highway 2 (along the eastern boundary of the property), that are not included in the McGarvey-

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<sup>1</sup> Because the color coding of the surveyor's map, CP 227, does not appear on black and white copies, the relevant parcels are shaded on Appendices A-E of this brief.

to-Johnson deed. CP 212-13. In this sense, the lien encompasses *more* property than the deed. CP 212-13. Compare Appendix A with Appendix C. The additional property encompassed by the lien is reflected on Appendix E.

Second, the Diversified lien excludes portions of the property on the northern boundary of the McGarvey-to-Johnson deed. In this sense, the claim of lien encompasses *less* property than the deed. CP 212-13. Compare Appendix A with Appendix C. The property omitted from the lien is reflected on Appendix D.

The property described in the Johnson-to-Kuleana deed, CP 218-20, is wholly contained within the property described in both the original McGarvey-to-Johnson deed, CP 215, and the Diversified lien, CP 222-25. Compare Appendices A and C with Appendix B.

**B. The lien foreclosure action.**

On May 16, 2007, Diversified filed a lien foreclosure action in Spokane County Superior Court, Cause No. 07-2-02149-8. Diversified did not allege any claims other than lien foreclosure. CP 254-57.

The summons and complaint identified the parties to the lien foreclosure action as “Diversified Wood Recycling, Inc., a Washington corporation, Plaintiff, vs. Harold Johnson, also known as Hal Johnson and Jane Doe Johnson, husband and wife.” CP 252, 254-55. Harold Johnson

Sr. is not known as “Hal” nor is he married. However, his son is known as “Hal” and is married.<sup>2</sup> Neither the summons nor the complaint in the lien foreclosure action identified Kuleana as a party. CP 252, 254-55.

The summons and complaint in the lien foreclosure action were served on the son of Harold Johnson Sr., at the son’s personal residence in Washington. CP 387 (internal 6:2-3); CP 274 (internal ¶ 6, indicating Harold Johnson Sr. lives in California); CP 306 (affidavit of service). The superior court specifically found that Diversified never served Harold Johnson Sr. in the foreclosure action. CP 241 (internal 6:3-4). The superior court omitted any finding that Diversified served Kuleana in the foreclosure action. CP 236-43. In fact, Diversified never served Kuleana nor Harold Johnson Sr. CP 260 (internal ¶ 8); CP 274 (internal ¶ 5).

The son of Harold Johnson Sr. defended the lien foreclosure action on the basis that he did not own the property subject to the lien, but that his father owned it. CP 240 (internal 5:10-13). The superior court did not find that the son owned the property subject to the lien. CP 236-43. In fact, the son did not own any of the property subject to the lien. CP 260 (internal ¶¶ 3 & 6); CP 273-74 (internal ¶¶ 2 & 4).

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<sup>2</sup> See CP 236 (internal 1:18-19, indicating the defendant Harold Johnson is also known as “Hal”); CP 274 (internal ¶ 5, indicating Harold Johnson Sr. is single); CP 290 (internal ¶ 2); CP 295 (internal ¶ 2).

Believing that the son had deceived Diversified based on the similarity of his name and his father's name, the superior court foreclosed the lien against the property owned by Harold Johnson Sr. and Kuleana on grounds that the son was acting as "an agent and subcontractor of his father." CP 240 (internal 5:10-13). The Court affirmed the lien foreclosure judgment on direct appeal. *Diversified I. supra.*

Neither Kuleana nor Harold Johnson Sr. were ever represented by counsel in the underlying lien foreclosure action. CP 289-91, 294-97. After judgment was entered in the lien foreclosure action, Harold Johnson Sr. and Kuleana sought to intervene, but Diversified successfully resisted intervention in the superior court and on direct appeal. *Diversified II. supra.*

In affirming the denial of intervention by Harold Johnson Sr. and Kuleana, the Court of Appeals specifically declined to decide whether Harold Johnson Sr. or Kuleana were owners of the property subject to Diversified's lien. Specifically, the Court stated: "[w]e do not decide whether they [i.e, Harold Johnson Sr. and Kuleana] were owners." *Diversified II*, at 894 (brackets added). The Court further stated: "[w]e are not required to determine in this appeal whether they actually were owners and consequently we make no such determination." *Id.* at 904 (brackets added).

Nonetheless, the Court of Appeals specifically recognized that, under RCW 60.04.171, the interest of an owner who is not joined in a lien foreclosure action cannot be foreclosed or otherwise affected, and that foreclosure under these circumstances is limited solely to junior interests in the property. *Diversified II*, at 894 & 903 (quoted above).

**C. Procedural history.**

Following the decisions in *Diversified I* and *II*, Harold Johnson Sr. and Kuleana filed the present action, seeking declaratory judgment that “[t]heir interests in the property are not foreclosed or otherwise affected by the lien foreclosure action because they were not joined as parties[,] and to quiet title in themselves. CP 7-8 (brackets added). *Diversified* moved to dismiss their complaint on grounds of res judicata and collateral estoppel. CP 60-61. The superior court granted the motion to dismiss. RP 34-36; CP 394-96. From this decision, Harold Johnson Sr. and Kuleana now appeal. CP 397-402.

**SUMMARY OF ARGUMENT**

In accordance with RCW 60.04.171 and the Court’s holdings in both *Diversified I* and *II*, the interests of Harold Johnson Sr. and Kuleana are not affected by the lien foreclosure judgment because they were not joined as parties in the lien foreclosure action. Moreover, the portion of the subject property owned by Harold Johnson Sr., and not covered by the

legal description in Diversified's lien, cannot be affected by the lien in any event.

The doctrines of collateral estoppel and res judicata are inapplicable here because Harold Johnson Sr. and Kuleana do not seek to avoid the effect of *Diversified I* or *II*, nor do they seek to relitigate the validity of Diversified's lien or their right to intervene. Instead, they seek to apply the holdings in *Diversified I* and *II* to quiet title in their property.

### ARGUMENT

- A. Under RCW 60.04.171 and this Court's holdings in *Diversified I* and *II*, the interests of Harold Johnson Sr. and Kuleana are not affected by the lien foreclosure action because Diversified successfully resisted their intervention rather than joining them as parties.**

RCW 60.04.171 provides in pertinent part:

The lien provided by this chapter, for which claims of lien have been recorded, may be foreclosed and enforced by a civil action in the court having jurisdiction in the manner prescribed for the judicial foreclosure of a mortgage. The court shall have the power to order the sale of the property. In any action brought to foreclose a lien, the owner shall be joined as a party. *The interest in the real property of any person who, prior to the commencement of the action, has a recorded interest in the property, or any part thereof, shall not be foreclosed or affected unless they are joined as a party.*

(Emphasis added.)<sup>3</sup>

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<sup>3</sup> The full text of the current version of RCW 60.04.171 is reproduced as Appendix F to this Brief.

In accordance with this statutory provision, the Court held, in

*Diversified II:*

Appellants allege RCW 60.04.171 provides a basis for vacation on grounds of lack of subject matter jurisdiction. Under RCW 60.04.171, a recorded claim of lien may be foreclosed and enforced by a civil action “in the manner prescribed for the judicial foreclosure of a mortgage.” This section also states that “the owner shall be joined as a party.” RCW 60.04.171. Appellants erroneously infer that a foreclosure action in which the owner has not been joined as a party must be dismissed as void. We addressed the same argument in Junior's appeal. *The consequence of nonjoinder of the owner or any other person who has a prior recorded interest in the property is not lack of jurisdiction. Nonjoinder of the owner does not mean the lien expires or that the court lacks statutory authority to proceed. The consequence is that the interest of a person not joined may not be foreclosed or otherwise affected. RCW 60.04.171.*

161 Wn. App. at 903 (emphasis added). The Court cross-referenced a similar passage in the related case:

In any lien foreclosure action, the owner “shall be joined” as a party. In view of the use of the passive voice, we do not share Junior's view that the statute imposes upon the plaintiff a mandatory obligation to “join” the owner or else suffer dismissal. Rather, we read RCW 60.04.171 as giving direction to a trial court when faced with an assembly of persons having interests in the same property, some of them attempting to foreclose on liens and others attempting to stave off foreclosure. The “owner” is the only entity whose joinder the court must permit in any lien foreclosure action. The rest of the statute gives the court some latitude in deciding whether and when to allow joinder of other persons who claim a lien against or an interest in the same property. *Obviously it is in the plaintiff's interest to see that the owner is joined because of the risk of coming up empty-*

*handed*. But if the legislature had intended to make *joinder* of the owner essential to the action in the same way that *service* upon the owner is essential, the requirement would have been placed in RCW 60.04.141.

Nothing in the plain language of RCW 60.04.171 indicates that a lien will expire unless the owner is joined as a party. The statute states, “The interest in the real property of any person who, prior to the commencement of the action, has a recorded interest in the property, or any part thereof, shall not be foreclosed or affected unless they are joined as a party.” *Thus, if the owner or anyone else with a recorded interest in the property is not made a party, the consequence is that his or her interest will not be foreclosed or affected. See 27 Marjorie Dick Rombauer, Washington Practice: Creditors' Remedies–Debtors' Relief § 4.71 at 369*

*Diversified I*, 161 Wn. App. at 889 (emphasis added; formatting in original); *see also Diversified II*, at 903 n.17 (citing this passage from *Diversified I*).

The holdings in *Diversified I* and *II* regarding the effect of lien foreclosure proceedings (or lack thereof) on nonparties follow from the Court’s rationales. The first rationale is based on the quasi-in rem nature of lien foreclosure actions. Given that lien foreclosure proceedings are quasi-in rem, “they determine the interests of *certain defendants* in a thing in contrast to a proceeding in rem, which determines the interests of *all persons* in the thing.” *Diversified II*, at 902 (quotation omitted; emphasis added). The quasi-in rem nature of lien foreclosure proceedings is essential to the Court’s holding that joinder of all owners was not

necessary in order for a lien foreclosure. *See id.* The Court reasoned that it was not necessary to join all owners precisely because only the interests of those who were joined would be affected. *See id.*

The second rationale is based on an analogy to judicial foreclosure of a mortgage. The Court recognized that liens under Ch. 60.04 RCW may be foreclosed “in the manner prescribed for the judicial foreclosure of a mortgage.” *Diversified I*, at 903 (quoting RCW 60.04.171). Judicial foreclosure of a mortgage does not reach senior interests in the property; it only reaches interests junior to that of the foreclosing party. *See Diversified I*, at 903-04 (citing *Valentine v. Portland Timber & Land Holding Co.*, 15 Wn.App. 124, 128, 547 P.2d 912, *rev. denied*, 87 Wn.2d 1015 (1976); 27 Marjorie Dick Rombauer, *Washington Practice: Creditors’ Remedies-Debtors’ Relief* § 3.2 at 138 n.7; and 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate Transactions* § 19.2, at 375 n.7). Reference to the Court’s citations confirms the fact that judicial foreclosure of a mortgage is limited in effect to junior interests in the property and does not reach senior interests. *See Valentine*, 15 Wn. App. at 128 (involving junior interest in timber and mineral rights obtained and recorded after mortgage was granted); 27 Rombauer, *supra* § 3.2 & n.7 (stating “the foreclosure will eliminate all junior interests”; citing *Valentine* for the proposition that “[a] mortgage

foreclosure cannot affect a prior lien”; and further stating “[f]or this reason, it is not necessary to make the senior encumbrancers parties to the litigation”); 18 Stoebuck, *supra* § 19.2 & n.7 (using same language as 27 Rombauer, *supra* § 3.2). Just as a judicial foreclosure of a mortgage does not affect senior interests, foreclosure of a mechanics’ lien does not affect the prior recorded interests of nonparties. *See* RCW 60.04.171.

Applying the plain language of RCW 60.04.171 and the Court’s holdings in *Diversified I* and *II*, Harold Johnson Sr.’s and Kuleana’s prior recorded interests in the subject property cannot be affected by the lien foreclosure action because they were not joined as parties. This result is entirely consistent with, and even mandated by, the lien foreclosure statute and the rationales underlying the statute and the Court’s holdings.<sup>4</sup>

**B. Collateral estoppel and res judicata are inapplicable because Harold Johnson Sr. and Kuleana seek to enforce, rather than avoid, the holdings in *Diversified I* and *II*.**

Res judicata and collateral estoppel are only applicable when a party seeks to relitigate a prior court decision. *See generally*, 14A Karl B. Tegland, Wash. Prac., Civil Procedure § 35:21 (2d ed.) They do not preclude a party from enforcing a prior decision. Because Harold Johnson

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<sup>4</sup> Of course, to the extent that the legal description in *Diversified*’s lien does not cover portions of the property owned by Harold Johnson Sr., those portions of the property cannot be affected either.

Sr. and Kuleana seek to enforce the Court's decisions in *Diversified I* and *II*, these doctrines are inapplicable.

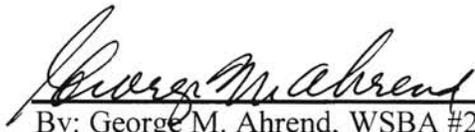
### CONCLUSION

Based on the foregoing, Harold Johnson Sr. and Kuleana respectfully ask the Court for the following relief:

1. Reverse the superior court's dismissal of their complaint and vacate the order of dismissal; and
2. Enter declaratory judgment that their interests in the property are not foreclosed or otherwise affected by the lien foreclosure action and quiet their title in the subject property.

Submitted this 19th day of September, 2012.

AHREND ALBRECHT PLLC

  
By: George M. Ahrend, WSBA #25160  
Attorneys for Plaintiffs-Appellants

**CERTIFICATE OF SERVICE**

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On September 19, 2012, I served the document to which this is annexed as follows:

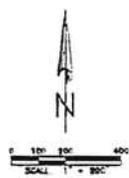
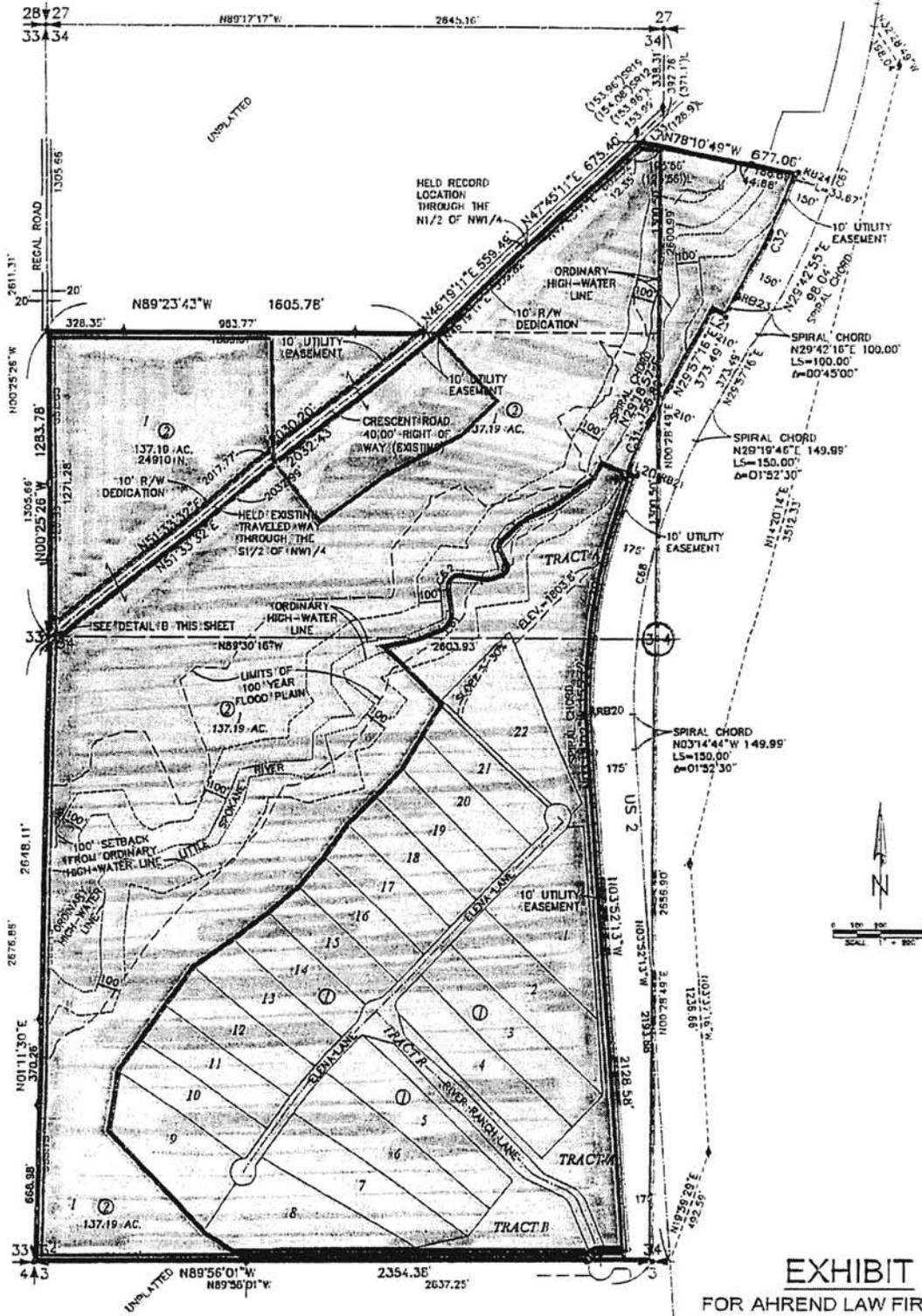
Maris Baltins  
Law Offices of Maris Baltins, PS  
7 S. Howard St., Ste. 220  
Spokane, WA 99201-3816  
Email: [mbaltins@baltinslaw.com](mailto:mbaltins@baltinslaw.com)

Signed at Ephrata, Washington on September 19, 2012.

  
\_\_\_\_\_  
Shari M. Canet, Paralegal

# APPENDIX

Appendix A: McGarvey to Johnson Sr. Deed (CP 227, shading added)



**EXHIBIT**  
FOR AHREND LAW FIRM PLLC

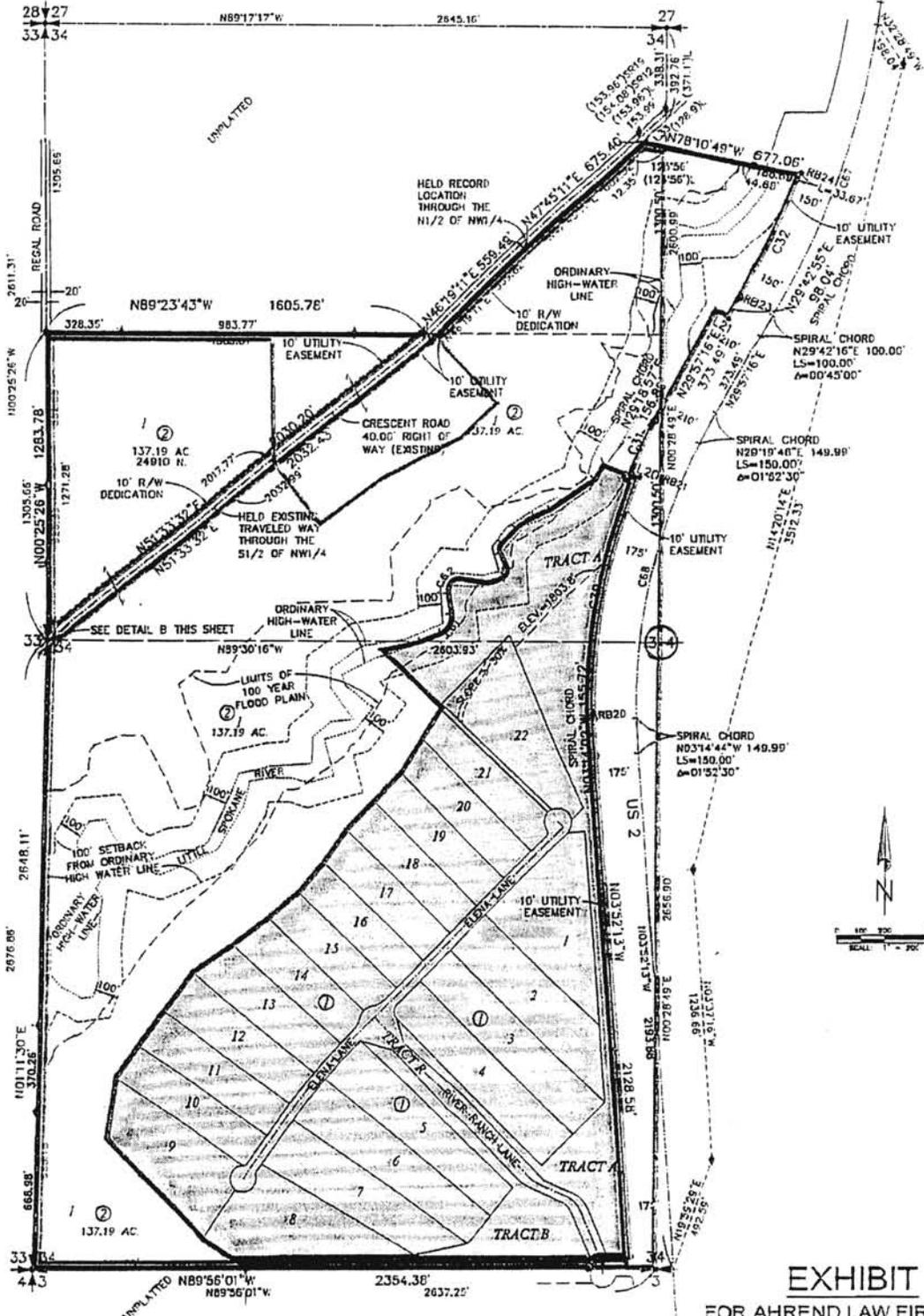
- LEGEND**
- = DEED 5361829 MCGARVEY to JOHNSON  
NOTE: STATUTORY WARRANTY DEED 5361829 HAS AN INCORRECT ABBREVIATED LEGAL DESCRIPTION REFERRING TO THE SE1/4 OF SECTION 34. NONE OF THIS PROPERTY IS IN THE SE1/4 OF SECTION 34.
  - = DEED 5493141 JOHNSON to KULEANA, LLC
  - = LEIN 5504627 DIVERSIFIED vs JOHNSON



8-16-11



Appendix B: Johnson Sr. to Kuleana Deed (CP 227, shading added)



**EXHIBIT**  
FOR AHREND LAW FIRM PLLC

- LEGEND**
- = DEED 5361829 McGARVEY to JOHNSON  
NOTE: STATUTORY WARRANTY DEED 5361829 HAS AN INCORRECT ABBREVIATED LEGAL DESCRIPTION REFERRING TO THE SE1/4 OF SECTION 34. NONE OF THIS PROPERTY IS IN THE SE1/4 OF SECTION 34.
  - = DEED 5493141 JOHNSON to KULEANA, LLC
  - = LEIN 5504627 DIVERSIFIED vs JOHNSON



8-16-11



Appendix C: Diversified Lien (CP 227, shading added)

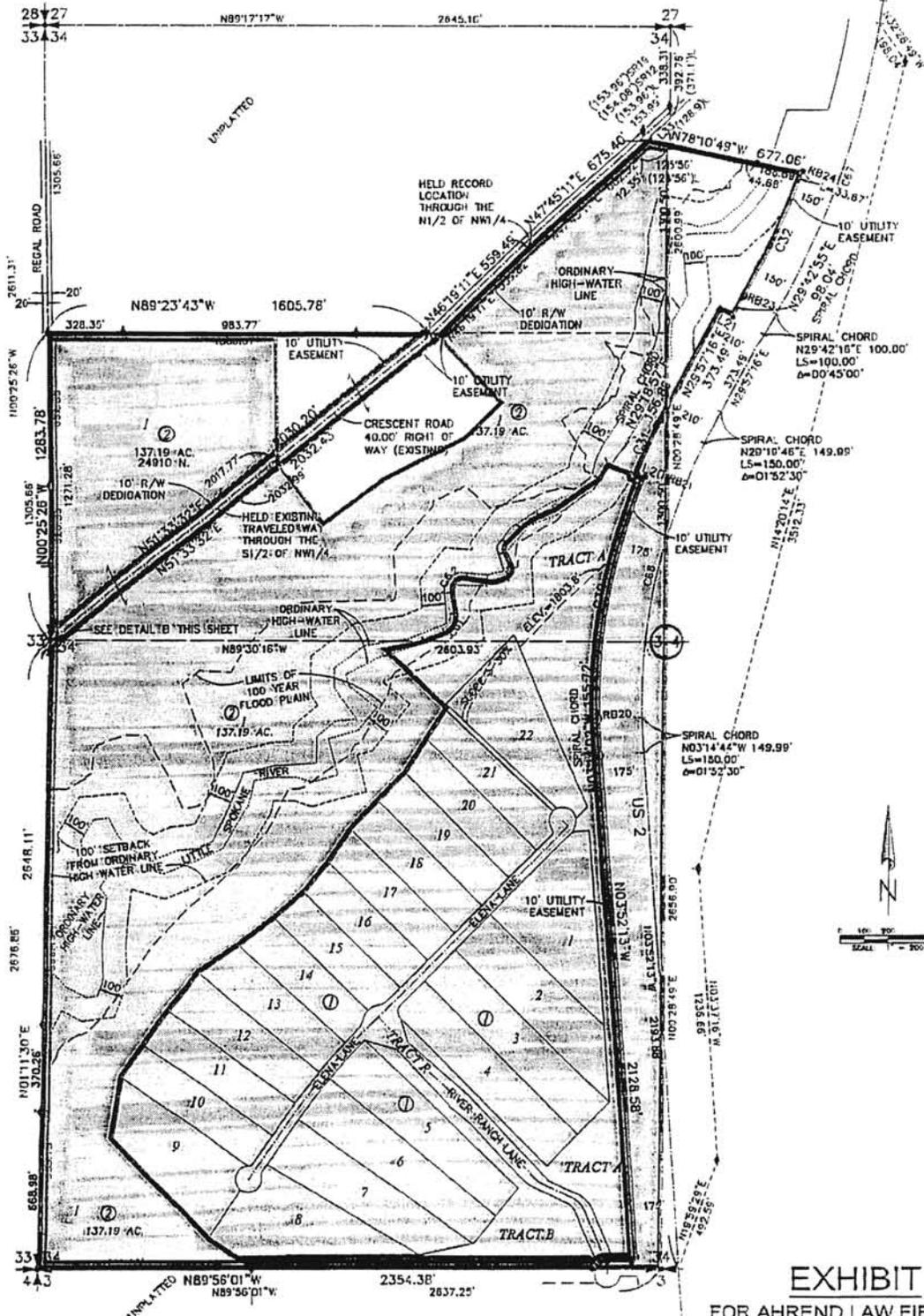


EXHIBIT  
FOR AHREND LAW FIRM PLLC

- LEGEND**
- = DEED 5361829 McGARVEY to JOHNSON  
NOTE: STATUTORY WARRANTY DEED 5361829 HAS AN INCORRECT ABBREVIATED LEGAL DESCRIPTION REFERRING TO THE SE1/4 OF SECTION 34. NONE OF THIS PROPERTY IS IN THE SE1/4 OF SECTION 34.
  - = DEED 5493141 JOHNSON to KULEANA, LLC
  - = LEIN 5504627 DIVERSIFIED vs JOHNSON



8-16-11



Appendix D: Johnson Sr. property omitted from Diversified Lien  
(CP 227, shading added)

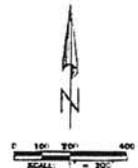
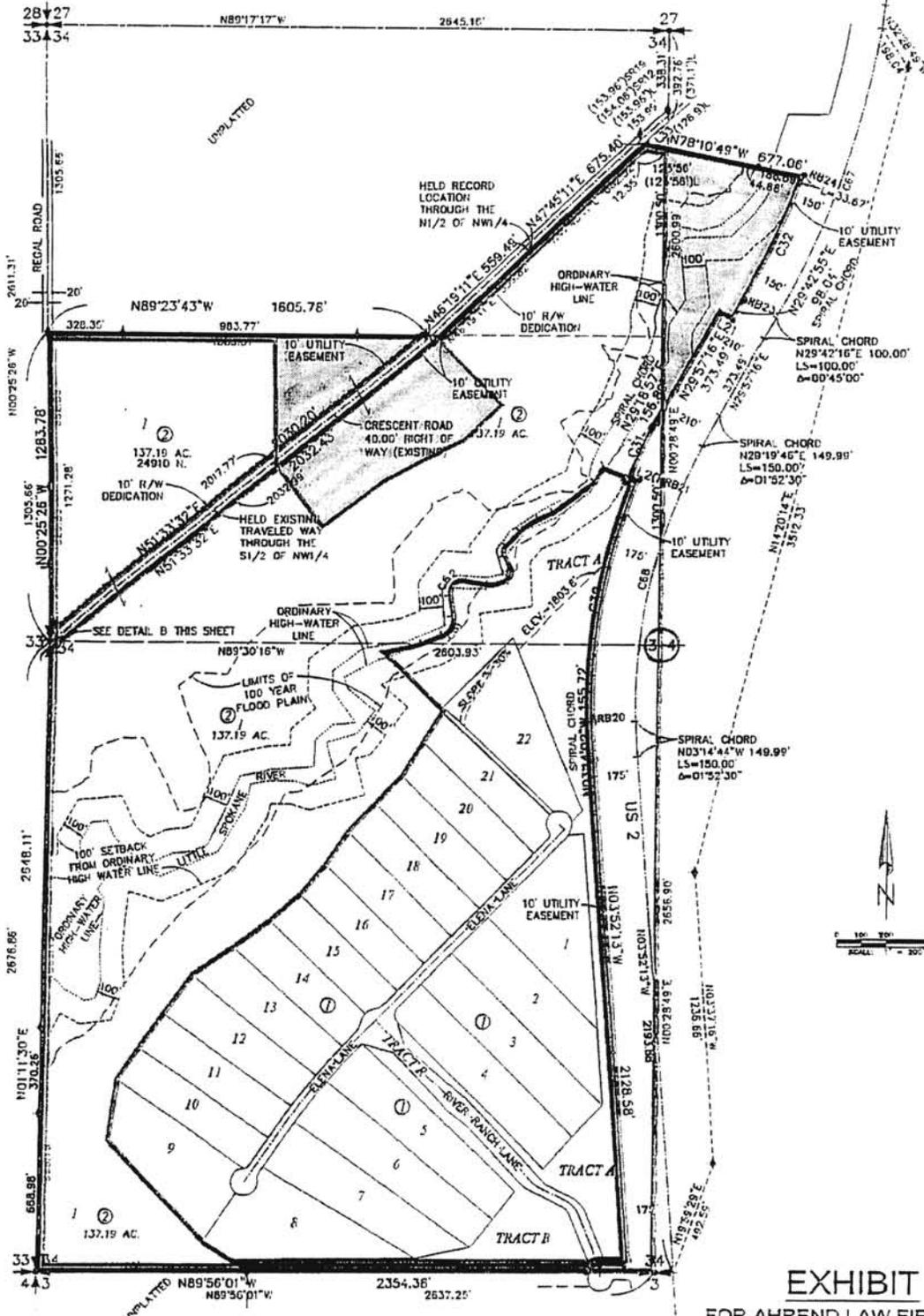


EXHIBIT  
FOR AHREND LAW FIRM PLLC

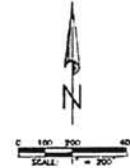
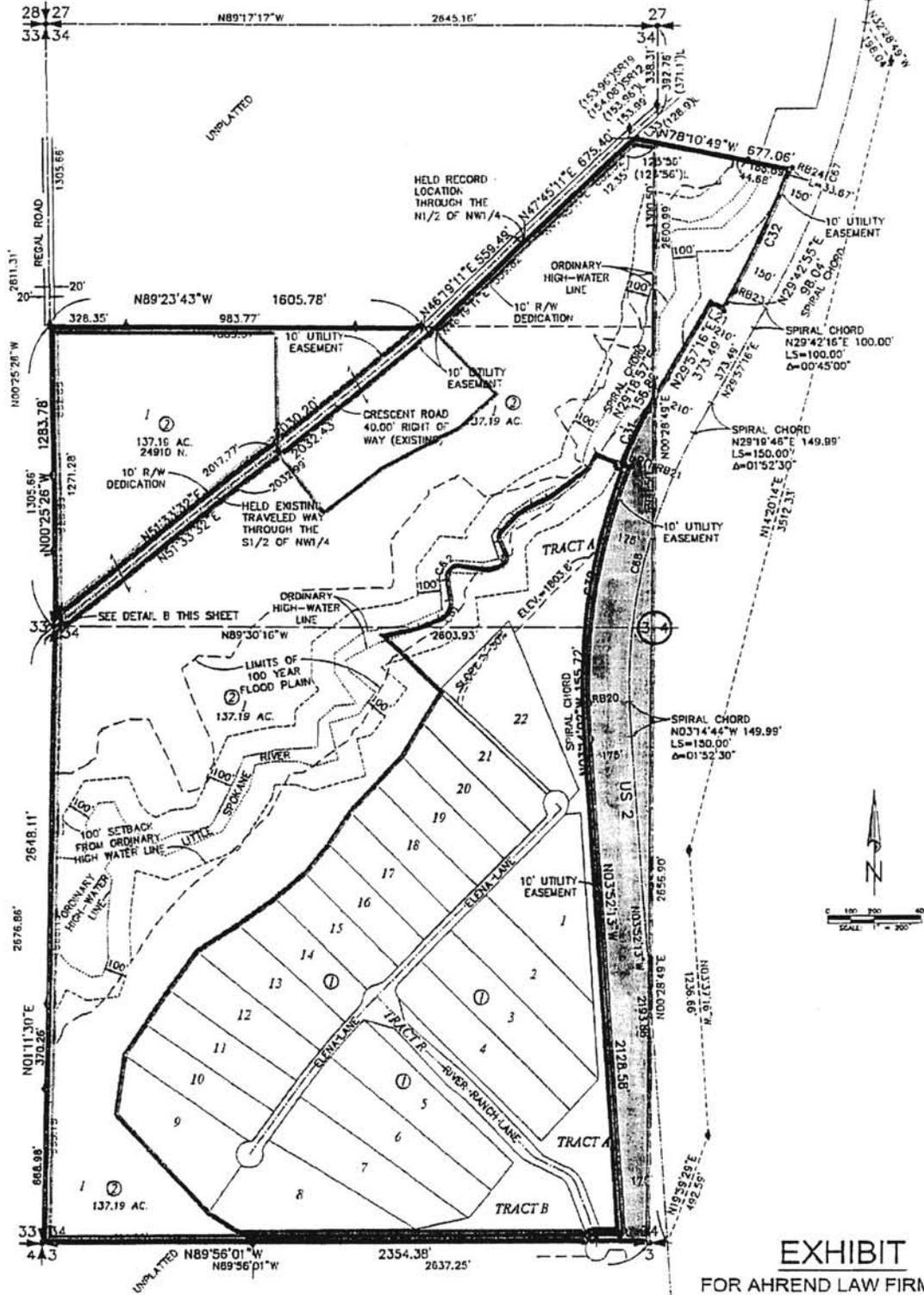
- LEGEND**
- = DEED 5361829 McGARVEY to JOHNSON  
NOTE: STATUTORY WARRANTY DEED 5361829 HAS AN INCORRECT ABBREVIATED LEGAL DESCRIPTION REFERRING TO THE SE1/4 OF SECTION 34. NONE OF THIS PROPERTY IS IN THE SE1/4 OF SECTION 34.
  - = DEED 5493141 JOHNSON to KULEANA, LLC
  - = LEIN 5504627 DIVERSIFIED vs JOHNSON



B-16-11



Appendix E: Property Not Owned by Johnson Sr. or Kuleana subject to Diversified Lien (CP 227, shading added)



**EXHIBIT**  
FOR AHREND LAW FIRM PLLC

**LEGEND**

- = DEED 5361829 McGARVEY to JOHNSON  
NOTE: STATUTORY WARRANTY DEED 5361829 HAS AN INCORRECT ABBREVIATED LEGAL DESCRIPTION REFERRING TO THE SE1/4 OF SECTION 34. NONE OF THIS PROPERTY IS IN THE SE1/4 OF SECTION 34.
- = DEED 5493141 JOHNSON to KULEANA, LLC
- = LEIN 5504627 DIVERSIFIED vs JOHNSON



8-16-11



## Appendix F

### **RCW 60.04.171. Foreclosure--Parties**

The lien provided by this chapter, for which claims of lien have been recorded, may be foreclosed and enforced by a civil action in the court having jurisdiction in the manner prescribed for the judicial foreclosure of a mortgage. The court shall have the power to order the sale of the property. In any action brought to foreclose a lien, the owner shall be joined as a party. The interest in the real property of any person who, prior to the commencement of the action, has a recorded interest in the property, or any part thereof, shall not be foreclosed or affected unless they are joined as a party.

A person shall not begin an action to foreclose a lien upon any property while a prior action begun to foreclose another lien on the same property is pending, but if not made a party plaintiff or defendant to the prior action, he or she may apply to the court to be joined as a party thereto, and his or her lien may be foreclosed in the same action. The filing of such application shall toll the running of the period of limitation established by RCW 60.04.141 until disposition of the application or other time set by the court. The court shall grant the application for joinder unless to do so would create an undue delay or cause hardship which cannot be cured by the imposition of costs or other conditions as the court deems just. If a lien foreclosure action is filed during the pendency of another such action, the court may, on its own motion or the motion of any party, consolidate actions upon such terms and conditions as the court deems just, unless to do so would create an undue delay or cause hardship which cannot be cured by the imposition of costs or other conditions. If consolidation of actions is not permissible under this section, the lien foreclosure action filed during the pendency of another such action shall not be dismissed if the filing was the result of mistake, inadvertence, surprise, excusable neglect, or irregularity. An action to foreclose a lien shall not be dismissed at the instance of a plaintiff therein to the prejudice of another party to the suit who claims a lien.

[1992 c 126 § 11; 1991 c 281 § 17.]