

Construction Law

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Chair's Report

by Rob Crick

Welcome to the Construction Law Section Newsletter. The Section includes more than 600 lawyers whose practice to a substantial degree involves advising and assisting construction industry participants. I am honored to serve as the Chair of the Section this year.

Our principal mission is to provide educational opportunities for our members on construction-related topics, primarily regarding court decisions and legislative action. In that regard, the Section presented an all-day CLE on Public Works Contracting in Seattle in June. We also held a Spring Forum in which Rick Slunaker, of the A.G.C., provided an overview of what the Legislature did and did not do for and to the construction industry during the most recent session. Our CLEs and forums are of the highest quality, are well attended, and provide financial support for the Section. In addition, this newsletter, edited by Larry Vance, provides up-to-the-minute analyses of the latest construction-related cases and legislative happenings.

For example, a recent case, *Williams v. Athletic Field, Inc.*, has generated a substantial amount of attention in the industry. There is an article on the case in this newsletter. As well, the Section will be hosting a forum devoted to the case on October 19. An email from WSBA will be sent to each Section member with the date and location. As well, that information will be on the Section's website.

Additionally, the Section has just completed the development of two Model Residential Construction Contracts. The two model contracts are:

Lump Sum Contract: where the owner agrees to pay the contractor a specified amount for completing the scope of work without requiring a detailed cost breakdown; and

Cost Plus Contract: where the owner pays for the actual cost of the work, plus a fee for the contractor's services.

The Section developed these contracts as a public service to the construction industry and its residential consumers and contractors. The contracts were two years in the preparation and have undergone extensive review. They have been approved for posting on the WSBA website by the Board of Governors and are now available for download and use from the Section's website. They may be modified as needed to fit individual circumstances. An email announcement will soon be sent to all Section members by WSBA.

Even though for most people their home is their single largest asset and residential construction is a multi-million dollar industry in the state, up to now there has not been a recognized model contract for residential construction services. There is now.

The Fall Forum will also serve as the Section's Annual Meeting and Election of Officers. This year we will also be voting on a major modification of the Bylaws. Please plan to attend.

The Section has been blessed by having strong leadership since its inception. We are guided by a Board of Trustees which meets monthly. We are all volunteers, who come from all across the state and from firms large and not-so large. Our meetings are open to any Section member who wants to attend. And, we welcome new volunteers to the service of the Section. Contact me if you would like to come to a meeting or volunteer your energies.

I look forward to hearing from you.

Thanks, Rob Crick

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Surety Bonds/Co-indemnitors/ Equitable Contribution/Project- Specific Indemnity

Carpenter v. Remtech, Inc.,
154 Wn. App. 619, 226 P.2d 159 (2010)

by Helaine Honig – Seattle City Attorney's Office

Remtech signed a project-specific guaranteed indemnity agreement ("GIA-1") in order to obtain a contract bond from Hartford. The agreement required the indemnitor to repay any amounts Hartford paid out under the bond. Remtech and Dustcoating together signed a separate project-specific guaranteed indemnity agreement ("GIA-2") for a different project on which Dustcoating would have been a subcontractor. That project was canceled.

Hartford made payments to two subcontractors under the first bond and sued Remtech to recover under GIA-1. Remtech settled with Hartford and then sued Dustcoating for equitable contribution. Remtech argued, and the trial court agreed, that unqualified language in GIA-2 stating that Dustcoating "will indemnify [Hartford] ... from all loss ... because of having furnished any Bond," made Dustcoating a co-surety of Remtech and, therefore, liable for contribution despite the fact that Dustcoating had not signed GIA-1, was not a party to the construction contract, and did not perform any work on that project.

The Court of Appeals, Division III, reversed. The court applied the context rule to conclude that Dustcoating never incurred the obligation to pay Hartford here because Hartford sued only on GIA-1, to which Dustcoating was not a party, and because Hartford did not seek recovery of money it paid on any project Dustcoating had any interest in.

Addressing the nature of a contribution action, the court also noted that underlying this equitable right is the condition that the party against whom contribution is sought was obligated to pay the principal debt in the first place. Since the court determined that GIA-1 created no common obligation between Remtech and Dustcoating, it concluded it would not be equitable to require Dustcoating to contribute.

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Excavation Work/Damage to Private Property/Trespass Claim/Elements of Claim

Clipse v. Michels Pipeline Construction, Inc.,
154 Wn. App. 573, 225 P.3d 492 (February 22, 2010)

by Joe Scuderi – Cushman Law Offices – Olympia, Washington

This Division I case involves application of the Washington State Waste Statute, RCW 4.24.630, as it pertains to contractors and subcontractors performing public utility work on private property. The Court of Appeals addresses what elements are required to establish a statutory trespass under RCW 4.24.630 (this statute potentially allows for recovery of treble damages, fees and costs if its elements are met).

King County engaged Michels to go onto residential property, dig down to the sewer line, perform work, and replace the excavation. Michels subcontracted with Pipe Experts, LLC. It is unclear from the opinion whether or not there was a right of way for the utilities. There was a dispute whether the homeowner, Clipse, had notice or gave permission for the contractor/subcontractor to do work on the subject property. A few days after work was performed, Clipse suffered property damage as a result of backed up wastewater into the home. The cause of the damage was gravel left in the pipe by the subcontractor.

The homeowner brought suit. The trial court initially found a statutory trespass on motion by the homeowner. Upon a motion for reconsideration by the contractor, the trial court reversed itself, in part, finding that additional elements were required to establish liability under RCW 4.24.630 and also finding disputes of material fact. The contractor asked for additional reconsideration, which was denied, but the trial court certified the matter for immediate appellate review.

The Court of Appeals rejected the homeowner's argument and found the subsequent position of the trial court and contractor more persuasive as it pertained to what constituted *wrongfully* under the statute. RCW 4.24.630 establishes liability for three types of conduct: 1) removing valuable property from the land; 2) *wrongfully* causing waste or injury to land; and 3) *wrongfully* injuring personal property or real estate improvements on the land. The appellate court noted that presence on land is required for all three options, but that wrongfulness was only required for the latter two options. Wrongfulness cannot refer to the mere act of entry upon the land.

To discern legislative intent, the appellate court considered the statute's language in the context of related statutes, legislative history, and interpretation of the statute by other divisions (specifically citing to *Borden v. City of*

Olympia, 113 Wn. App. 359, 53 P.3d 1020 (2002)). The Court of Appeals held that RCW 4.24.630 requires a showing that the defendant intentionally and unreasonably committed one or more acts and knew or had reason to know that he or she lacked authorization.

The Court of Appeals remanded consistent with its answer.

Successor Liability Applies in Construction Defect Claims

by Joseph C. Richins, Legal Intern, & John H. Guin, Attorney
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In *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475 (2009), the Supreme Court of Washington imposed liability on a successor corporation for the construction defects of a bankrupt sole proprietorship. In doing so, the Supreme Court also reiterated its position regarding the retroactive impact of RCW 4.16.326(1)(g), which imposes a six-year period of repose for bringing defect claims.

History

A condominium homeowners' association brought a construction defect claim against the general contractor and the developer (hereafter collectively referred to as "Polygon"). *Cambridge Townhomes*, 166 Wn.2d at 479. Polygon settled the claim and then sought damages and indemnification from various subcontractors. One of these subcontractors was P.J. Interprize, Inc. (hereafter "P.J. Inc.").

When the project first began, Polygon entered into a contract with Gerald Utley, who was doing business as P.J. Interprize—a sole proprietorship. Accordingly, when Utley decided to incorporate his business, Polygon and Utley entered into a new contract under the new incorporated business name – P.J. Inc. – to finish out the project.

Before Polygon filed suit, Utley filed a personal bankruptcy and listed the project as a creditor. When Polygon filed the lawsuit, it named only the corporation – P.J. Inc. – as a party to the lawsuit, and did not name the sole proprietorship or Gerald Utley. However, Polygon eventually obtained approval from the bankruptcy court to pursue Utley personally to the extent insurance assets were available. *Id.* at 480-81.

On summary judgment, the trial court dismissed the indemnity claim on the basis that the indemnity agreement only covered claims for tortious conduct, not construction defects. The trial court also held that P.J. Inc. could not be held liable for the debts of the sole proprietorship by virtue of the bankruptcy discharge granted to Utley. The trial court also denied Polygon's request to amend the complaint to name the sole proprietorship as a defendant. *Id.*

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Holdings

The first issue the Supreme Court discussed was the issue of successor liability. The Supreme Court looked at several factors stated in *Cashar v. Redford*, 28 Wn. App. 394, 397 (1981) to determine whether a successor business is a mere continuation of a seller. *Cambridge Townhomes*, 166 Wn.2d at 482. One of the factors to consider is a common identity between officers, directors, and stockholders of the selling and buying companies. *Id.* at 483. P.J. Inc. argued that a corporation cannot be a mere continuation of a sole proprietorship because there is no continuation of officers, directors, or shareholders from a sole proprietorship to a corporation. The Supreme Court rejected this argument by stating that “the continuity of individuals in control of the business ... is not a rigid requirement for finding successor liability.” *Id.* The Supreme Court found that Utley was “at the helm” of both entities, and he simply chose to incorporate his business. *Id.* Additionally, the Supreme Court looked at the clients of the sole proprietorship and the corporation and found the clients were the same. The Supreme Court finished by finding that the corporation simply represented a “new hat” for the sole proprietorship. Therefore, under the theory of successor liability, the corporation assumed all liabilities of the sole proprietorship. *Id.*

The next issue the Supreme Court analyzed was the lower court’s decision not to allow Polygon to amend its complaint to add the sole proprietorship as a defendant. The Supreme Court held that the trial court relied upon “untenable reasons” when denying Polygon’s request to amend its complaint. *Id.* at 484. The trial court stated it was concerned with prejudice and delay. However, the Supreme Court pointed out that Polygon likely still had some discovery it wished to conduct with Utley. Additionally, Utley knew of the lawsuit and the amendment would not cause any unfair surprise to Utley. *Id.*

P.J. Inc. argued that the amendment would have been futile because the claim was time-barred under RCW 4.16.326(1)(g). *Id.* at 484. The Supreme Court rejected this argument, holding that the limitation set forth in RCW 4.16.326(1)(g) was not retroactive and did not apply to Polygon’s claims, which accrued prior to the effective date of the statute. The Supreme Court reiterated the holding in *1000 Va. Ltd. P’ship v. Vertecs Corp.*, 158 Wn.2d 566, 574-75 (2006), which was that RCW 4.16.326(1)(g) was not retroactive. *Id.* at 485.

In this case, the substantial completion of the project was October 1999. *Id.* at 485. Polygon became aware of the defect claim in early 2003, well before the July 2003 effective date of RCW 4.16.326(1)(g). The Supreme Court held that the accrual date, not the date of filing the complaint, determined whether the claim was subject to RCW 4.16.326(1)(g). Since the claim accrued prior to the effective date, the Supreme Court held that RCW 4.16.326(1)(g) did not apply.

As a result, Polygon had six years from the time of accrual of the claim to bring suit against the sole proprietor, rather than six years from substantial completion of the project.

Lastly, the Supreme Court briefly discussed the indemnity clause in the subcontract. P.J. Inc. argued that the indemnity clause applied only to tortious acts because it referred to “negligence” within certain limiting language. *Id.* at 487. However, using basic contract construction and interpretation, the Supreme Court quickly discarded this argument because other clauses of the indemnity clause stated that the subcontractor shall indemnify the contractor “from any and all claims” *Id.*

In summary, the Court held that successor liability was applicable in the changing of the sole proprietorship to the corporation based on the facts presented. The Court held that RCW 4.16.326(1)(g) did not apply because it was not enacted to be retroactive, and the claim accrued before the effective date of the statute. The Court also read the contract’s indemnity claim broadly, declining to limit the indemnity clause only to tort actions.

Condominium Projects/Construction Defect Claims/Dispute Resolution

Satomi Owners Association v. Satomi, LLC – A victory for condominium developers?

by John P. Evans – Williams Kastner – Seattle, Washington

In 1925, Congress passed the Federal Arbitration Act (“FAA”). Among its provisions is language essentially stating that any arbitration provision in a contract evidencing a transaction involving commerce is enforceable.¹

Effective July 1, 1990, the Washington Condominium Act (“WCA”) gave condominium purchasers and their corresponding condominium associations a legislative right to have their claims determined in court rather than by arbitration. Specifically, RCW 64.34.100(2) provides, “any right or obligation declared by this chapter is enforceable by judicial proceeding....” Adding teeth to this and other WCA provisions, another section states that WCA provisions may not be varied by agreement and rights under it may not be waived.²

Eleven years later, a Washington court first addressed the issue whether condominium purchasers were required to arbitrate defect claims against the project developer because the FAA’s arbitration mandate preempted the WCA’s nonwaivable right to litigate. In *Marina Cove Condominium Owners Ass’n v. Isabella Estates*, 109 Wn. App. 230, 34 P.3d 370 (2001), the public offering statement and declaration required arbitration. Relying upon a relatively recent U.S. Supreme Court decision³ that the appropriate test for FAA

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applicability was whether there was a substantial effect on interstate commerce, the court found in favor of the Association and did not require arbitration. Factors it cited in reaching this conclusion were that the condominiums were constructed, marketed, and sold solely within Washington, and the seller and all purchasers were Washington residents.

In 2003, the U.S. Supreme Court revisited the FAA's applicability in *Citizens Bank v. Alafabco*,⁴ holding that the FAA encompasses a wider range of transactions than actually "in commerce," and that it was unnecessary to show a specific effect upon interstate commerce in order for the FAA to apply. With this decision in hand, the Washington Supreme Court considered the potential conflict between the FAA and WCA in three consolidated condominium construction defect cases, *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781 (Dec. 2009).

In each matter, the condominium association had sued the developer/declarant for breach of the WCA implied warranties⁵ with related causes of action on behalf of the individual unit owners, each of whom had agreed to arbitration of their claims in purchase and sale agreements. Citing *Alafabco*, the court first held that the FAA applies to transactions involving an economic activity that, in the aggregate, represent a general practice subject to federal control that bears on interstate commerce in a substantial way. In a footnote, the court noted that the "substantial effects" test applied by the appellate court in *Marina Cove* was now invalid.

The court next considered what constitutes the "transaction" in each case. The condominium associations argued that the transactions were the implied warranties themselves, which were wholly creatures of this state and unrelated to interstate commerce. The court reached the logical conclusion that the transactions were the purchase and sale agreements themselves, which contained arbitration provisions.

With that in hand, the court then examined the evidence for each of the three condominium projects as to whether interstate commerce was involved. The evidence for the Satomi Association was that 70% of the component parts used to build the project originated out of state. In Blakely condominiums, almost a third of the units were purchased by non-Washington residents, and the same percentage obtained loans from out-of-state lenders; and in the Leschi project an unspecified amount of construction materials originated out of state, 4 of 28 units were purchased by out-of-state residents, and 9 of 28 financed by out-of-state lenders. In the court's eye, this evidence was conclusive that interstate commerce was involved. With this holding, it is difficult to imagine any construction project not meeting the test of involving interstate commerce.

The court next determined that the FAA conflicted with the WCA's requirement of securing a "judicial proceeding" for the unit owners' claims, both in its original and 2005 amended form, the latter of which requires arbitration subject to a trial *de novo* in certain circumstances. Since arbitration subject to a trial *de novo* amounts to non-binding arbitration, a conflict with the FAA remained.

The associations raised the argument that they were not bound by arbitration agreements executed by the unit owners. The court rejected this argument because the associations did not own the property subject to the dispute of the defect claims and had brought suit on behalf of the unit owners.

Lastly, the court rejected arguments that requiring arbitration lacked mutuality or was unconscionable even where the developer/declarant retained the unilateral option of requiring arbitration.

While developers and condominium defect insurance defense counsel have hailed *Satomi* as a victory, it may be more hollow than it appears. Traditionally, insurance companies, who are the real parties defending condominium defect claims in most instances, shy away from arbitration in the belief that juries will give their insureds a better and more fair result. They are also likely to consider that the claims will come to a head more quickly in arbitration than waiting for an assigned trial date, as well as the cost of private arbitrators. Hence, even though prudent developers should write arbitration provisions into their condominium purchase and sale agreements, the carriers ultimately defending subsequent condominium association claims may choose to waive arbitration.

1 9 U.S.C § 2.

2 RCW 64.34.030.

3 *U.S. v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995).

4 539 U.S. 52, 123 S. Ct. 2037, 156 L. Ed. 2d 43 (2003).

5 RCW 64.34.445.

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Pre-suit Notice Requirements/ Invalidity

by Alan Bornstein – Jameson Babbitt Stites & Lombard PLLC
– Seattle, Washington

On July 1, 2010, our State Supreme Court, in *Waples v. Yi*, found unconstitutional the statutory pre-lawsuit notice requirement for a plaintiff's professional-negligence action against a health-care provider. Finding the statutory pre-lawsuit notice unconstitutional, the *Waples* court then invalidated the entirety of the pre-lawsuit notice statute.

The controversy in *Waples* arose from the plaintiff's failure to serve a pre-lawsuit notice on her dentist at least 90 days prior to filing her medical-malpractice action against him. Trial courts dismissed plaintiff's action, and that of a companion case, because of a failure to serve the pre-lawsuit notice prior to filing the medical-malpractice action. The appellate court affirmed the trial court's decision for Ms. Waples. The companion case was heard with Ms. Waples' case by the *Waples* court on a discretionary petition for direct review.

The statutory pre-lawsuit notice read: "No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action." RCW 7.70.100(1). The *Waples* court noted the laudable legislative intent of the pre-lawsuit notice to provide medical-malpractice plaintiffs with incentives to settle cases before resorting to court.

The *Waples* court evoked a constitutional rationale for striking down the pre-lawsuit notice that had evaded the trial courts and the appellate court. The rationale evoked was one of separation of powers and its violation by our state legislature and governor by enacting RCW 7.70.100(1). In a nutshell, the *Waples* court declared that the judiciary had the power to create procedural law and had created the procedure to commence an action pursuant to the judicially created Civil Rule 3(a). Civil Rule 3(a) provides for the commencement of an action where a plaintiff files a complaint or serves process upon a defendant.

The legislative and executive branches, said the *Waples* court, violated the primacy of the judiciary to create and enforce procedural laws by enacting RCW 7.70.100(1), the pre-lawsuit notice, which it characterized as a procedural law. Substantive laws, by contrast noted the *Waples* court, were not implicated in a separation of powers conflict.

Therefore, because that statute conditioned commencement of a professional-negligence action, against a health-care provider, upon the timely service of a pre-lawsuit notice, then such a statutory condition precedent to such an action was a procedural hurdle. The *Waples* court found this procedural hurdle contradicted CR 3(a). Hence, the pre-lawsuit notice statute thus violated the separation

of powers doctrine and was an unconstitutional law at its inception.

The relevance of the *Waples* opinion to construction disputes is apparent with regard to RCW 64.50. RCW 64.50 is the statutory scheme enacted by the legislature and governor nearly ten years ago to address construction-defect actions, for economic losses, in the context of residential construction. In particular, RCW 64.50.020, imposes a pre-lawsuit notice requirement similar, but not identical, to the statutory notice struck down by the *Waples* court.

RCW 64.50.020 reads in relevant part:

(1) In every construction defect action brought against a construction professional, the claimant shall, no later than forty-five days before filing the action, serve written notice of claim on the construction professional. ***

(6) Any action commenced by a claimant prior to compliance with the requirement of this section [which involves a detailed list of defects served on the construction professional, and an offer, counter-offer, and settlement process that takes place within the forty-five day deadline stated in subsection (1)] shall be subject to dismissal without prejudice, and may not be recommenced until the claimant has complied with the requirements of this section. ***

(8) Prior to commencing any action alleging a construction defect, or after dismissal of any action without prejudice pursuant to section (6) of this section, the claimant may amend the notice of claim to include construction defects discovered after the service of the original notice of claim

*** Claims for defects discovered after the commencement or recommencement of an action may be added to such action only after providing notice to the construction professional of the defect and allowing the response under subsection (2) of this section.

Given the *Waples* opinion, the obvious question is whether RCW 64.50.020 is a procedural law, and, if so, whether it may be harmonized with CR 3(a). Assuming that RCW 64.50.020 is a procedural law, unlike the mechanic's lien statute (RCW ch. 60.04) that creates and couples the substantive and procedural rights in derogation of common law, then how may a litigant argue for statutory harmony with Civil Rule 3(a) versus an impermissible constitutional breach?

For starters, a party seeking to enforce RCW 64.50.020(1) would start with the language of the respective statutes. Unlike RCW 7.70.100(1), which conditions the filing of a professional-negligence action after the filing of the pre-lawsuit notice, RCW 64.50.020(1) creates no such condition. In other words, the construction-defect action may be

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commenced without it being void at its inception. There are consequences of failing to file a pre-lawsuit notice for such an action, as described by RCW 64.50.020(6),(8), namely dismissal or a limitation on amendments, but that dismissal consequence is not equivalent to an absolute bar on filing the action. This distinction should be enough of a difference to honor CR 3(a) and harmonize it with the will of the citizenry as enacted by a statutory scheme crafted by the legislature and signed by the governor.

Sending Shock Waves Through the Construction Bar

Williams v. Athletic Field, Inc.,
155 Wn. App. 434, 228 P.3d 1297 (2010)

by Robert L. Olson – Schiffrin Olson Schlemlein & Hopkins,
PLLC – Seattle, Washington

In April of this year the Court of Appeals, Division II decided a mechanic’s lien case that began five years ago. The decision has reverberated through the construction bar and has spawned numerous motions to dismiss lien claims filed around the state. Some of the motions have been granted, some have been denied. All of them present challenges to trial courts to decipher exactly what the Court of Appeals’ decision means and what its ramifications are.

In *Williams v. Athletic Field, Inc.*, 155 Wn. App. 434, 228 P.3d 1297 (4/7/10) the Court of Appeals ruled that a claim of lien signed and recorded under RCW 60.04 by a corporate lien service was invalid for failure to utilize a corporate acknowledgment.

Before reviewing the facts of the case and its unusual procedural history, let’s review the requirements of the lien claim statute.

RCW 60.04.091(1) sets forth the required content of a lien claim: identity of the claimant, dates of performance of the work, identity of the person indebted to the claimant, description of the property, identity of the owner, and amount of the claim. RCW 60.04.091(2) then sets forth the requirements for signing an acknowledgment and signing and acknowledging the lien claim. Except for the last sentence, that subsection reads in pertinent part:

The notice of claim of lien ... shall be signed by the claimant or some other person authorized to act on his or her behalf who shall affirmatively state that 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...

The last sentence of subsection (2) states: “A claim of lien substantially in the following form shall be sufficient.” What follows is a fully printed “statutory form” that sets forth the required elements of subsection (1) and that ends with a signature block and a sworn statement followed by a notary subscription:

....., Claimant

.....

.....

(Phone number, address, city, and state of claimant)

STATE OF WASHINGTON, COUNTY OF

....., ss.

....., 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.

.....
Subscribed and sworn to before me this ... day of

Note the discrepancy between the requirement of subsection (2) for an “acknowledgment pursuant to Chapter 64.08” and the acknowledgment in the statutory form. This distinction became the focal point of the Court of Appeals’ decision in *Williams*.

RCW 64.08 contains two forms of “Certificate of Acknowledgment,” one for an individual contained in RCW 64.08.060 and one for a corporation found in RCW 64.08.070 that states:

On this ____ day of _____, 19__, before me personally appeared _____, to me known to be the (president, vice-president, secretary, treasurer, or other authorized officer or agent, as the case may be) of the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof I have hereunto set my hand and affixed my official seal on the day and year first

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above written. (Signature and title of officer with place of residence of notary public.)

RCW 64.08.070 also allows another version of the certificate of acknowledgement to be used after December 31, 1985. That certificate “for an acknowledgment in a representative capacity” is found in RCW 42.44.100(2), which states:

I certify that I know or have satisfactory evidence that (name of person) is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument, on oath stated that (he/she) was authorized to execute the instrument and acknowledged it as the (type of authority, e.g., officer, trustee, etc.) of (name of party on behalf of whom instrument was executed) to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

(Signature)

(Title)_____

My appointment expires:_____

Now, back to the facts of the case. Williams started in December 2004 when contractor Athletic Field filed a claim of lien against the property owned by the Williamses with whom Athletic Field had a contract for site preparation work. Athletic Field hired Lien Data USA, Inc. (Lien Data) to prepare and record the lien claim. The lien claim identified Lien Data as the agent for the claimant, Athletic Field, and was followed by a notarized statement under penalty of perjury taken verbatim from the statutory form contained in RCW 60.04.091(2) followed by a signature of a person named Rebecca Southern.

Williams initially attacked the lien claim as frivolous under the procedure set forth in RCW 60.04.081 and argued, in part, that the lien was invalid because the lien statute required the lien claim to be signed and sworn to by the claimant (or an officer of the claimant corporation) or by its attorney and that attestation by an agent was insufficient. The trial court agreed with Williams, dismissed the lien and awarded attorney fees and costs in the amount of \$10,000. 2005 WL 6466076 (7/15/06).

Athletic Field appealed. In a decision issued four years ago, Division II reversed the trial court, ruling that a claimant’s authorized agent may sign the attestation clause in the lien claim statute. 142 Wn. App. 753, 139 P.2d 426 (8/1/06).

Williams filed a motion for reconsideration based primarily on a case they had cited to the Court of Appeals during oral argument, *Ben Holt Industries, Inc. v. Milne*, 36

Wn. App. 468, 675 P.2d 1256 (1984), to support their argument that the acknowledgment by Rebecca Southern was defective.

The parties waited four years (!) for the court to rule on the motion for reconsideration. Finally, in March 2010, the Court of Appeals granted the motion for reconsideration, withdrew its 2006 opinion, and ruled in favor of Williams. 2010 WL 1076118 (3/24/10). A month later the court withdrew its March 2010 opinion and issued a new one with a more complete analysis of the key issue reaching the same result. 155 Wn. App. 434, 228 P.3d 1297 (4/7/10). The court focused its decision on the *Ben Holt* case and found the Williams’s argument persuasive.

In *Ben Holt*, the Court of Appeals invalidated a lease because the corporate lessor acknowledged the lease using the individual acknowledgment form rather than the corporate acknowledgment form. *Ben Holt* held that four elements are required for a valid corporate acknowledgment, reiterating the requirements found in RCW 64.08.070. Absent a writing affixed to the instrument setting forth these elements, both the acknowledgment and the underlying instrument were held to be invalid. *Ben Holt*, 36 Wn. App. at 472.

After citing and discussing *Ben Holt*, the *Williams* court then held:

Here, the elements of corporate acknowledgment are not satisfied by the attestation clause signed by Rebecca Southern. The form fails to identify her as an officer or employee of Lien Data, fails to characterize the subscription as the free and voluntary act of Lien Data, and fails to set forth Southern’s authority to act on behalf of Lien Data ... Accordingly, on its face the attestation clause does not substantially comply with the requirements of RCW 60.04.091(2).

The *Williams* court then went on to reject Athletic Field’s argument that the statutory form of acknowledgment was sufficient:

But to establish that the claim of lien was properly acknowledged, RCW 60.04.091(2) requires compliance with Chapter 64.08 RCW. Where corporate acknowledgment is required, the sample form cannot be sufficient because it only satisfies the requirements to witness an individual signature. Athletic’s argument fails. The lien was invalid for failure to comply with the statutory attestation requirement.

The court did not further explain why the requirement for an acknowledgement under RCW 64.08 took precedence over the statutory form.

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SENDING SHOCK WAVES THROUGH THE CONSTRUCTION BAR
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The only saving grace for Athletic Field was that the Court of Appeals ruled that its lien was not frivolous (“lack of compliance with RCW 60.04.091(2) renders a lien claim invalid but not necessarily frivolous”), and it reversed the award of attorney fees to Williams.

Athletic Field has filed a petition for review with the Washington Supreme Court. The Association of General Contractors of Washington (AGC) has filed an amicus brief in support of the petition, arguing that the Court of Appeals has failed to adequately address the discrepancy between the corporate acknowledgment requirement and the statutory “safe harbor” form deemed to be “sufficient” under RCW 60.04.091(2), and further, that a lien that uses the statutory form should be sufficient. AGC points to the thousands of liens filed around the state using the statutory form that are now under attack and face the risk of being found invalid because of the *Williams* decision. The Supreme Court docket number for the petition for review is 8455-7. The Court has scheduled a departmental conference to consider the petition on September 8, 2010.

The AGC is expected to promote some form of legislation to change or mitigate the impact of the *Williams* decision. The Construction Law Section is tracking the number and results of the numerous motions to dismiss based on *Williams*. It is holding its Fall Forum on the *Williams* case and plans to have as speakers the attorneys for both Williams and Athletic Field, as well as a representative of the AGC. That Forum will be held sometime during the month of October 2010.

Stay tuned for further developments on this interesting and controversial case.

Your Input Is Needed!

The Construction Law Section Newsletter works best when section members actively participate. We welcome your articles, case notes, comments, and suggestions concerning new developments in public procurement and private construction law. Please direct inquiries and submit materials for publication to:

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Editor's Note

by Larry Vance – Winston & Cashatt – Spokane, Washington

A recent case decided by Division I of the Court of Appeals has questioned the result in the *Williams* case. Even though it is an unpublished opinion, in the case of *North Coast Electric Co. v. Arizona Electric Service*, Docket No. 62969-7-I, the Court of Appeals stated in a footnote:

We also question the result in *Williams*. Division Two relied on a case where the Court of Appeals had invalidated a lease, because the lessor acknowledged a lease using the individual rather than corporate acknowledgment form. (citations omitted). The court in *Ben Holt* determined that both the acknowledgment and the underlying instrument were invalid. (citation omitted). In the lien context, however, there is a strong statutory directive that [RCW 60.04.011 through 60.04.226] be liberally construed to provide security for all parties intended to be protected by their provisions. (citations omitted). The *Williams* decision does not take this directive into account. Neither the signor's identity nor his authority is at issue here, only technical compliance.

Additional Editor's comments and notes

If the AGC or any other group is seriously considering proposed legislation concerning this issue, it should be noted that the statute in question [RCW 60.04.091] probably contains some other apparent errors and/or inconsistencies which they may also want to address:

1) The first error or inconsistency is that the sample form provided in the statute incorrectly recites (at the beginning of the lien claim form) that the lien claim is being asserted pursuant to chapters 64.04 (the Code Reviser has noted this fact and has inserted a comment after the statute indicating that: “the reference in the form to 64.04 RCW appears to be erroneous. Reference to chapter 60.04 RCW was apparently intended.”

2) Secondly, the verification language which is set forth in the body of the statute (specifically Subsec. (2)) is at variance with the verification language which is set forth in the recommended lien claim form. More specifically, subsection (2) of the statute indicates that the person signing the lien shall state that they “have read the notice of claim of lien and believe the claim of lien to be true and correct under penalty of perjury.” In contrast, the sample lien claim form, included in the same statute, contains verification language which indicates that the “lien claimant has either read or heard read the lien, knows the contents thereof, and believes the same to be true and correct and the claim of lien is not frivolous and is made with reason-

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able cause, and is not clearly excessive under penalty of perjury."¹

3) The third error or inconsistency is the one at issue in the *Williams* case where the body of the statute says that the lien claim must be acknowledged pursuant to RCW chapter 64.08; whereas the sample lien claim form [which is part of the very same statute] contains no acknowledgment clause.

Additionally, although apparently not an issue raised by the parties in the *Williams* case, another section of the Mechanics' and Materialmen's Lien Act (RCW 60.04.111) provides that:

"[T]he county auditor shall record the notice of claim of lien in the same manner as deeds and other instruments of title are recorded under chapter 65.08 RCW."

Section 65.08.030 of chapter 65.08 RCW, which is titled: "Recorded Irregular Instrument Imparts Notice," basically provides that even though an instrument "purporting to convey or encumber real estate or any interest therein" may not have been properly executed and acknowledged in accordance with the law, if the instrument is in fact recorded in the county auditor's office, it is deemed to impart the same notice to third parties as if the instrument had been properly executed, acknowledged, and recorded.

Washington case law has also long held that an unacknowledged or improperly acknowledged instrument (such as a deed, deed of trust, or mortgage, etc.), which is required to be recorded in the county auditor's office, is not only enforceable between the parties directly involved in the transaction, but it also conveys constructive notice to third persons subsequently acquiring any interest in the real property. (See, e.g., *Mann v. Young*, 1 Wash. Terr. 454 (1874); *Leighton v. Leonard*, 22 Wn. App. 136 (1978); *Eggert v. Ford*, 21 Wn.2d 152 (1944)). It would thus seem rather odd if an unacknowledged deed, mortgage, or deed of trust which is recorded would be effective between the parties directly involved in the transaction and also impart constructive notice to third parties subsequently acquiring an interest in the property; and yet an unacknowledged or defectively acknowledged lien claim would not be valid.

1 While it is very minor, there is a comma which is probably also misplaced in the verification language of the form. More specifically, the verification language in the form states in pertinent part "I have read or heard the foregoing claim, read and know the contents thereof" The verification language should probably actually state that "I have read or heard the foregoing claim read, . . ."



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