

Construction Law

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Chair's Report

by Tom Larkin – Fidelity National Law Group – Seattle, WA



Greetings, Section Members! It looks like winter is here!! I hope everyone was able to enjoy the long Thanksgiving weekend. The executive council has been busy as the new calendar year for us began in October. The WSBA recently mailed out license

renewals so do not forget to sign up for the section again.

It was great to see so many of you at our Fall Forum in October, "The New Husky Stadium: A Dawgs' Eye View of the Project." Those in attendance got to visit the field-level Touchdown Terrace suite and see a great presentation by Karin Nyrop, assistant attorney general, UW; Chip Lydum, UW associate director of athletics; and Cindy Edens, Senior Vice President of Wright Runstad & Company on the project delivery method, the unique construction process, and how decisions were made to ensure timely completion. Following the presentation we all got a once-in-a-life time tour of the stadium that included the suites, team meeting rooms, locker room, and a walk



through the tunnel onto the field. Standing at the center of the field and looking up into the stadium is something I will always remember. It was a great evening and I cannot thank Karin and Chip enough for taking the time to talk with us and show us the stadium.

The section is also looking to be on the road again this spring with a CLE in the works for Spokane. Over the past two years the section has traveled to Tri-Cities and Yakima for a CLE covering basic and hot topics regarding construction law. Our plan is to do the same once again and in coming years we plan to visit Bellingham and Vancouver. If you are interested in working with the section this year in

Spokane or in the future in Bellingham and Vancouver, please email me, tom.larkin@fnf.com, or one of the other council members; all contact information for the council members can be found on the bar website.

As always make sure to check out our section webpage at www.wsba.org/Legal-Community/Sections/Construction-Law. There you will find section announcements, past newsletters, our model contracts, our new sample construction

jury instructions, and much more. Have a great holiday and be on the lookout for additional section events in 2014. Go Hawks!!

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Save the Date!

Construction Law Section Dinner Meeting

Thursday, February 6, 2014 – Seattle

McCormick & Schmick's Harborside Restaurant on Lake Union

by Robert Olson – Schlemlein Goetz Fick & Scruggs, PLLC –
Seattle, WA

The Section is holding its first-ever dinner meeting and mini-CLE in February, 2014. If successful, it will likely become an annual event. Join other Section members and members of the Litigation Section on Thursday, Feb. 6, 2014 at McCormick & Schmick's Harborside Restaurant on Lake Union in Seattle for an evening of socializing, entertainment and learning. A no-host cocktail hour will start at 6 pm followed by dinner at 7 pm and an hour-long CLE (1-hour credit pending) at 8 pm presented by Ted Prosize of Tsongas Litigation Consulting, Inc. on "Principles of Persuasion." Plan to attend and save the date now See details below and look for the invitation and sign-up flyer to be sent out in early January.

Principles of Persuasion

Real-life case studies from the construction arena form the basis for this presentation. Learn key principles of persuasion that will compel any decision maker (judge, jury or arbitrator) to rule in your favor. View graphics that provide visual advocacy to add force to your facts and arguments. Participate in an innovative, interactive, non-linear process to translate your facts and points into an effective, graphical presentation.

Speaker Resume

Ted Prosize is vice president and senior consultant at Tsongas Litigation Consulting, Inc. He has a PhD from the Annenberg School for Communication at the University of Southern California. His focus at Tsongas is on helping clients achieve effective advocacy at all stages of litigation. He draws on his academic background, having taught advocacy, argument theory and persuasion at the University of Washington and other schools; his extensive communication research and practical experience with jury behavior. His highly rated seminars and CLEs are sought after both regionally and nationally.

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Professional Services Lien Rights Absent an Improvement

by Michael J. Bond – copyright © 2013

This article addresses the question whether lien rights exist in the work of a design professional where the work did not result in any improvement to real property. That circumstance will arise when, for example, the project does not go into construction and nothing is built. The conventional wisdom says, of course there are lien rights in that case. I believe the issue is not so obvious and hope to generate a discussion about it.

We start with the language of the statute and a few of the cases instructing us how to deal with the statute. Lien rights in our industry are created by RCW 60.04, *et seq.*, Mechanics and Materialmen's Liens. RCW 60.04.021 authorizes a lien:

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

The cases tell us that the lien statute is to be strictly construed because it is in derogation of the common law. *Dean v. McFarland*, 81 Wn.2d 215, 500 P.2d 1244 (1972). And it is well established that only labor resulting in an improvement is subject to the lien law. *Pac. Indus., Inc. v. Singh*, 120 Wn. App 1, 86 P.3d 778 (Div. 1 2003).

A very old Washington case holds specifically that where "the building contemplated has not been erected, no lien for the architect's services in drawing plans can attach to the specific property." *Lipscomb v. Exchange Nat. Bank of Spokane*, 80 Wash. 296, 141 P. 686, (1914). I could find no reported decisions that overrule *Lipscomb*, and I found instead that the Utah Supreme Court relied on *Lipscomb* in 1970 to hold the architect had no lien right where the building was not built in *Zions First Nat'l Bank v. Carlson*, 23 Utah 2d 395, 464 P.2d 387 (1970).

That reading of the statute authorizing a lien is entirely consistent with a strict construction of the words that authorize a lien only to "any person furnishing labor, professional services, materials, or equipment for the improvement of real property."

Former Division 3 Court of Appeals Commissioner Michael F. Keyes, now deceased, wrote at page 18 of his *Construction Lien Practice and Procedure Manual* (3d ed. 1992) that "the new lien law *sub silentio* overrules *Lipscomb*." But where does the lien law say that?

Some of our colleagues have argued to me that the definition of "improvement" and the Notice of Furnishing Professional Services provide the basis for concluding a lien

for professional services attaches where no improvement has resulted.

RCW 60.04.011(5) defines improvement:

(5) "Improvement" means: (a) Constructing, altering, repairing, remodeling, demolishing, clearing, grading, or filling in, of, to, or upon any real property or street or road in front of or adjoining the same; (b) planting of trees, vines, shrubs, plants, hedges, or lawns, or providing other landscaping materials on any real property; and (c) providing professional services upon real property or in preparation for or in conjunction with the intended activities in (a) or (b) of this subsection.

The argument is that part (c), which defines improvement to include "providing professional services upon real property or in preparation for or in conjunction with the intended activities in (a) or (b) of this subsection" means no actual improvement needs to result. But doesn't the addition of the words "in preparation for or in conjunction with the **intended** activities in (a) or (b), which refer only to "constructing on real property" or "planting on real property" serve only to reiterate the rule that there can be no lien absent an improvement to the real property?

The notice requirements are set forth in RCW 60.04.031. Two subsections of the statute are relevant. RCW 60.04.031 Notices-Exceptions (1) states: "Except as otherwise provided in this section, every person furnishing professional services, materials, or equipment for the improvement of real property shall give the owner or reputed owner notice in writing of the right to claim a lien." None of that language suggests a lien attaches in the absence of an actual improvement. The opposite is true.

RCW 60.04.031(5) is set forth in its entirety here:

(5) Every potential lien claimant providing professional services where no improvement as defined in RCW 60.04.011(5) (a) or (b) has been commenced, and the professional services provided are not visible from an inspection of the real property may record in the real property records of the county where the property is located a notice which shall contain the professional service provider's name, address, telephone number, legal description of the property, the owner or reputed owner's name, and the general nature of the professional services provided. If such notice is not recorded, the lien claimed shall be subordinate to the interest of any subsequent mortgagee and invalid as to the interest of any subsequent purchaser if the mortgagee or purchaser acts in good faith and for a valuable consideration.

PROFESSIONAL SERVICES LIEN RIGHTS ABSENT AN IMPROVEMENT *from previous page*

eration acquires an interest in the property prior to the commencement of an improvement as defined in RCW 60.04.011(5) (a) or (b) without notice of the professional services being provided. The notice described in this subsection shall be substantially in the following form:

Does this statute govern anything more than the priority of liens once they attach? By its terms the statute applies where “no improvement has been commenced.” To jump to the conclusion that the words, “has been commenced” means “and was never built” is a very slim reed indeed on which to base an argument that in the case of professional services a lien attaches even where there never was an improvement.

The Court of Appeals recent decision in *Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn.App. 654, 246 P.3d 835 (Div. 3 2011), suggests that the rule in *Lipscomb* requiring an actual improvement result before a lien will attach is still the law in Washington. In *Colorado Structures* the issue was whether a driller who was not paid for his work had lien rights. The court said there were four distinct elements for a valid claim: (1) furnishing services or equipment (2) for improvement of real property (3) at contract prices, and (4) at the behest of the owner or owner’s agent. Even assuming the driller’s work could be considered “professional services” the court held there was no lien right because, “the test holes did not constitute an “improvement” of the land.”

The result in *Colorado Structures* is, without question, a pinched and unfairly strict construction of what an “improvement” is, but it does quite clearly hold that professional services that do not result in an improvement to the real property are not lienable.

I do not favor this outcome. As most readers of this article know, I usually represent the interests of the design professional and my usual client’s interests are better served with an expansive approach to the lien rights. I invite you to help prove the forgoing analysis is wrong.



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Donatelli v. D.R. Strong: Erosion of the Boundary Between Contract and Tort Remedies

2013 WL 6022171, 312 P.3d 620 (November 14, 2014)

by Amber L. Hardwick – Green & Yalowitz, PLLC – Seattle, WA

Summary

The Supreme Court affirmed the trial court's denial of summary judgment seeking the dismissal of tort claims for economic losses. The majority opinion effectively overrules *Berschauer/Phillips* and the bar on parties to a construction project asserting claims against one another for cost overruns.

Background of the Independent Duty Doctrine

The Independent Duty Doctrine arose out of what was formerly known as the Economic Loss Rule. The Economic Loss Rule limited a claimant to contract remedies when seeking to recover purely commercial/economic damages – as distinct from personal or property damages. In 1994, the Washington Supreme Court emphasized the importance of applying the Economic Loss Rule to the construction industry:

If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity. *The construction industry in particular would suffer, for it is in this industry that we see most clearly the importance of the precise allocation of risk as secured by contract.* The fees charged by architects, engineers, contractors, developers, vendors, and so on are founded on their expected liability exposure as bargained and provided for in the contract.

...

We preserve the incentive to adequately self-protect during the bargaining process. *If we held to the contrary, a party could bring a cause of action in tort to recover benefits they were unable to obtain in contractual negotiations.*

Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 826-27, 881 P.2d 986 (1994) (internal citation omitted; emphasis added.) The ruling in *Berschauer/Phillips* dismissed a contractor's direct and assigned tort claims against design professionals, allowing only the breach of contract claims the owner assigned to the contractor. For two decades, the Economic Loss Rule served as the barrier preventing parties on a construction project from suing each other to recover cost overruns.

In November 2010, the Washington Supreme Court called the Economic Loss Rule "a misnomer" and redefined it as the "Independent Duty Doctrine." *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (2010); *Affiliated*

FM Ins. Co. v. LTK Consulting Services, Inc., 170 Wn.2d 442, 243 P.3d 521 (2010). The Independent Duty Doctrine replaces the Economic Loss Rule.

The Independent Duty Doctrine provides that "[a]n injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract." *Eastwood*, 170 Wn.2d at 389. Where the Economic Loss Rule tended to default to contract remedies when both remedies were available, the "Independent Duty Doctrine" defaults to tort remedies. *Elcon Constr., Inc. v. E. Washington Univ.*, 174 Wn.2d 157, 172, 273 P.3d 965 (2012) (Madsen, J. concurring).

Until this month, it was unclear how the opinions in *Eastwood* and *Affiliated* impacted the Supreme Court's prior holdings relating to the construction industry. *Affiliated*, 170 Wn.2d at 450 n.3 ("Our decisions in this case and in *Eastwood* leave intact our prior cases where we have held a tort remedy is not available in a specific set of circumstances."). Many assumed the court's holding in *Berschauer/Phillips* remained intact, in part because both cases favorably cited *Berschauer/Phillips*. See *Eastwood*, 170 Wn.2d at 390-91 ("[In *Berschauer/Phillips*] [w]e reasoned, as a policy matter, that if design professionals were under a tort duty to avoid a risk of increased business costs, the construction industry could not rely on the risk allocations in their contracts and would have an insufficient incentive to negotiate risk."); and see, *Affiliated*, 170 Wn.2d at 452-53 (recognizing that "*Berschauer/Phillips* makes engineers not liable in tort for some classes of harm."). However, in 2011, a Division One ruling in *Donatelli v. D.R. Strong Consulting Engineers, Inc.* challenged that assumption.

Facts of Donatelli

The Donatellis retained defendant D.R. Strong to perform engineering services on a construction project. D.R. Strong began performing without a written contract. The Donatellis alleged that D.R. Strong made oral representations that its scope included whatever necessary to complete the plat, including managing the project through final platting. According to the majority opinion, the Donatellis also contend D.R. Strong promised to complete the project in less than two years. Upon achieving preliminary plat approval, D.R. Strong provided the Donatellis a written contract outlining the scope of services. The contract scope did not include managerial services or an estimated completion time. The contract contained a limitation of liability clause applying to "any error, omission or other professional negligence ...

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DONATELLI V. D.R. STRONG: EROSION OF THE BOUNDARY BETWEEN CONTRACT AND TORT REMEDIES *from previous page*

arising out of performance of our professional services” and limited recoverable damages to the greater of \$2,500 or D.R. Strong’s professional fee. The Donatellis signed the written contract. Later, Mr. Donatelli testified he did not know it was a contract when he signed it but agreed the contract scope was negotiated and that he understood if more services were needed they would be added as “additional services.” The contract included an additional services provision.

During the course of the project, D.R. Strong allegedly “assumed a managerial role over the project” and “ran the daily operations.” D.R. Strong also allegedly invoiced for more than triple the estimated fee outlined in the contract. After a number of delays, the Donatellis were surprised to learn that the preliminary plat approval had expired. As D.R. Strong undertook efforts to obtain re-approval, the real estate market collapsed and the Donatellis brought claims for tort and contract damages against the engineer.

Procedural History

The engineer sought summary judgment on the basis that tort claims were barred by the Economic Loss Rule. The trial court denied summary judgment on the negligence and negligent misrepresentation claims, and the engineer appealed. The Court of Appeals applied *Eastwood* and *Affiliated* and determined the engineer owed an independent duty to its clients “despite the existence of a contract.” *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 163 Wn. App. 436, 443, 261 P.3d 664 (Div. 1, 2011). The engineer sought review by the Washington Supreme Court.

The Supreme Court’s Decision

On November 14, 2013, the Washington Supreme Court issued a decision in *Donatelli*, in which the majority affirmed the denial of summary judgment as to negligence and negligent misrepresentation claims.

The majority opinion held that a court cannot determine whether an engineer owed a duty independent of the contract until the fact-finder has determined the full scope of services the engineer agreed to perform orally or by affirmative conduct. Therefore, on the chance the written contract omitted the full scope of the agreed-upon services, the majority found a factual issue precluded summary judgment. The fact issue was not raised or addressed by either party. (*Madsen, J.* dissenting). Instead, the majority drew this fact issue – that D.R. Strong assumed responsibilities outside the contract – from the Donatellis’ complaint. The complaint alleged D.R. Strong billed more than estimated in the contract and orally agreed to take any action necessary to complete the plat within a given time. In rendering this decision, the Supreme Court suggested that if the contract included an integration cause or merger clause, it *might* have changed their ruling. See *id.* at 624 n. 2, stating the integration clause was “conspicuously absent” from the Donatellis’ contract.)

Unlike the conspicuously absent integration clause, the absence of managerial services or timeline for completion of services was not conspicuous enough to determine that D.R. Strong did not owe extra-contractual duties. With respect to negligent misrepresentation claims, the majority opinion held summary judgment was properly denied because “the duty to avoid misrepresentations that induce a party to enter into a contract arise independently of the contract.”

In a dissent written by Justice Madsen, four justices agreed that negligence claims should have been dismissed on summary judgment because *Berschauer/Phillips* is controlling precedent, stating: “this case is in all relevant respects indistinguishable from *Berschauer/Phillips*.” *Donatelli*, 312 P.2d at 627 (Madsen, J. dissenting). The dissent identified two additional reasons for granting summary judgment: (1) the Donatellis’ claim for solely economic damages represents the type of harm governed by the contract; and (2) the contractual terms, including a limitation of liability and an additional services provision, encompassed any subsequent scope changes. The dissent criticized the majority opinion, stating: “the independent duty doctrine that the majority seeks to apply cannot be harmonized with the parties’ written agreement or with settled principles of contract law.” *Id.*

Conclusion

The majority of the Washington Supreme Court insists “[t]he independent duty doctrine continues to ‘maintain the boundary between torts and contract’ in the place of the economic loss rule.” (*Id.* at 623, citing *Elcon*, 174 Wn.2d, 157, 165. But there is no way to ascertain that boundary outside of litigation. Under *Donatelli*, an owner is no longer barred from asserting tort claims for benefits it could not obtain through contract negotiations. This ruling conflicts with the Supreme Court’s holding in *Berschauer/Phillips*, which dismissed an owner’s assigned tort claims against an engineer in favor of holding parties to their contracts. In the construction industry, the ruling in *Donatelli* suggests that Washington courts may no longer bar a party to a construction project from suing other parties for commercial losses such as cost over-runs or delays.

Can the Deadline for Recording a Lien Claim Be Extended by Agreement?

by Karl F. Oles – Stoel Rives LLP – Seattle, WA¹

An interesting question about liens was recently raised on the Washington Bar Association Construction Section listserve.² The question was whether the 90-day deadline for recording a lien claim can be extended by agreement. The general consensus of responders was “no.” Some of the responses raised additional questions. Here is a summary and amplification of the discussion.

1. The statute (RCW 60.04.091) says that the 90-day deadline “is a period of limitation and no action to foreclose a lien shall be maintained unless the claim of lien is filed for recording within the ninety-day period stated.” There are also a number of cases holding that the statutory requirements for perfecting a lien, and the 90-day deadline in particular, are strictly enforced.³ There is clearly a strong public policy behind the deadline.

2. It is true that lien rights can be waived or released by agreement.⁴ But there are limits to any waiver or release of lien rights. Only those provisions in the lien statute that create rights can be waived. To see how this works, consider RCW 60.04.021, which provides that persons furnishing labor to improve private property “shall have a lien on the improvement.” This section of the statute creates a lien right that can be waived. By contrast, RCW 60.04.091 provides that lien claims must be recorded no more than 90 days after the claimant has ceased to perform work. This provision does not create any lien rights; rather, it limits the lien claimant’s exercise of her rights. Thus the time limit in RCW 60.04.091 (and other procedural aspects of the lien statute) probably cannot be waived, released or varied by agreement. There is no published lien case illustrating this principle in Washington, but the following cases may be applied by analogy:

- In *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 106-07, 297 P.3d 677 (2013), a farmer borrowed money against a deed of trust on his farm and purported to waive RCW 61.24.030, which requires trust deeds on agricultural property to be foreclosed judicially. The court held that the purported waiver was ineffective because that statute did not grant rights; rather, it established limits on the trustee’s power to foreclose.
- In *Bain v. Metro. Mortg. Grp, Inc.*, 175 Wn.2d 83, 104-08, 285 P.3d 34 (2012), the plaintiff borrowed money against a deed of trust and named a corporation (MERS) as the “beneficiary” of the deed of trust. The trust deed statute, RCW 61.24.005(2), defines “beneficiary” as the party holding the debt instrument. MERS never held the note. The court held that the parties could not change the statutory definition by agreement.

- In *Optimer Int’l, Inc. v. RP Bellevue, LLC*, 170 Wn.2d 768, 772-74, 246 P.3d 785 (2011), the court held that parties who agreed to arbitrate a dispute could not effectively waive judicial review of the award as provided in the arbitration statute.

These cases hold that while statutory rights can be waived or released, they cannot be fundamentally changed by agreement. This principle supports the conclusion that the 90-day deadline for recording a lien claim cannot be waived by agreement.

3. If parties were permitted to extend the 90-day deadline by agreement, this would affect persons acquiring interests in real property. A purchaser of property where construction is ongoing or about to be undertaken already knows that liens may be filed that will have priority over his interest.⁵ Even if no activity is visible, prior liens are possible. Because a properly perfected lien relates back to the commencement of work, and because a claim of lien need not be recorded until 90 days after the end of the work, a lender may find its interest subject to an enforceable lien even though a title search revealed no recorded claim of lien.⁶ Allowing agreed extensions to the 90-day period would magnify this risk. A lender or purchaser would not know whether a timely lien claim might be recorded months or even years after its interest attached.

4. To address the uncertainty described in the previous paragraph, it might be suggested that any agreed extensions to the recording date should themselves be recorded so that third parties will have notice. The problem is that a recorded “notice of right to assert a lien in the future” does not appear to be different in effect from a regular recorded claim of lien: both purport to encumber the title.

5. If an owner does not want to have a lien recorded against his property but the recording deadline is running out under RCW 60.04.091, the owner has multiple options. One option is to offer alternative security to the lien claimant, such as a bank line of credit. Another option is to allow the lien claim to be timely filed but then to remove the lien as an encumbrance on the property by recording a lien release bond under RCW 60.04.161.

6. If the 90-day lien recording deadline cannot be changed by agreement, what about the deadline for commencing the foreclosure lawsuit? The statute provides a method of agreed extension: the foreclosure lawsuit must be brought within eight months after the claim of lien is recorded, “or, if credit is given and the terms thereof are stated in the claim of lien, then eight calendar months after the expiration of

continued on next page

CAN THE DEADLINE FOR RECORDING A LIEN CLAIM BE EXTENDED BY AGREEMENT? *from previous page*

such credit.”⁷ The recording requirement is obviously for the information of third parties trying to determine whether or not the property is encumbered.

7. If the parties are interested in extending the eight-month foreclosure deadline by agreement, they should consider drafting or amending the lien claim to reflect “credit given.” Amendments are permitted freely within the 90-day claim-recording deadline.⁸ After that, the law gives no guidance about amendments that would affect the eight-month foreclosure deadline. Given the authorities cited above, there is significant risk that a Washington court would not give effect to such a non-statutory extension, perhaps on the ground that third parties could not reasonably be expected to check the title records continuously over an eight-month period to find out whether the foreclosure deadline had been changed by agreement.

1 The author is in the process of co-writing an updated Washington lien treatise, which will be available later this year. The treatise will address this and other interesting problems in Washington lien law.

2 Members of the Construction Section are automatically enrolled in the listserve. See the section’s website at www.wsba.org/Legal-Community/Sections/Construction-Law for more information.

3 See, e.g., *Intermountain Elec., Inc. v. G-A-T Bros. Constr., Inc.*, 115 Wn. App. 384, 391, 62 P.3d 548 (2003).

4 See, e.g., *Intermountain Elec., Inc. v. G-A-T Bros. Constr., Inc.*, 115 Wn. App. 384, 391, 62 P.3d 548 (2003).

5 An example is a “partial lien release” submitted in exchange for a progress payment. See also RCW 60.04.161, last paragraph, which allows parties to make agreements resulting in the “release of real property from a claim of lien.”

6 See *John Morgan Constr. Co. v. McDowell*, 62 Wn. App. 79, 85, 813 P.2d 138 (1991).

7 See RCW 60.04.141.

8 See *Lindley v. McGlauffin*, 58 Wash. 636, 641, 109 P. 118 (1910). The statute also permits amendments after the foreclosure lawsuit has begun (RCW 60.04.091(2)), but this is not helpful to someone who is trying to extend the time for filing such a lawsuit.

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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Work Under Contract Amendments Relate Back to Original Contract Date for Lien Priority: *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*

176 Wn.App. 335 (August 27, 2013)

by Athan E. Tramontanas – Short Cressman & Burge ss, PLLC – Seattle, WA

There seems to be a theme in this newsletter on lien issues. In August, the Washington Court of Appeals Division II issued its decision in *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn. App. 335 (2013). This case decided issues of lien priority for a design company performing work under contract amendments.

In *Scott's Excavating*, the property owner initially retained Gibbs & Olson Inc. (G&O) in February 2005 to provide preliminary design work for a housing and commercial development. Under the original contract, G&O was also to assist the owner in obtaining government approval and perform further design and engineering work. Based on this initial work, the owner obtained a loan to finance the construction of the development. The bank obtained a deed of trust, but did not obtain a subordination agreement from G&O. Once the owner obtained financing, it retained G&O to provide further design work by executing five amendments to the original contract.

By the end of 2006, the owner defaulted on its loan. The bank foreclosed on its deed of trust. At the same time, the owner was also in arrears of over \$150,000 to G&O. G&O filed a lien and sued to foreclose it. The bank appeared in the foreclosure action, asserting its deed of trust had priority over G&O's lien. The bank argued that the contract and each of the amendments were separate contracts for the purpose of determining lien priority.

In its analysis, the court relied on RCW 60.04.061, which states that lien claims "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 ... by the lien claimant."

The court also relied on language from *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489 (2009) in noting that "if a court determines that a party's mechanics' or materialmen's lien attaches and is covered by chapter 60.04 RCW, then the court liberally construes the statute to provide security for all parties intended to be protected by its provisions." Finally, the court noted that RCW 60.04.061 is an exception to the general rule of "first in time, first in right priority between creditors," and creates "an 'off-the-record' interest that may be senior to interests actually recorded before the lien's recording but after commencement of work on the project."

The court held that the contracts and amendments formed a single contract for the purpose of lien priority, and concluded that G&O's lien had priority over the bank's deed of trust. In coming to this conclusion, the court looked at the intention of the owner and G&O – as stated in the contract – to perform the work in phases. This contract language was sufficient evidence for the court to affirm the trial court's decision that G&O's lien priority for work under the amendments relates back to the work initially performed under the base contract.

This case has lessons for the various participants in the construction process. If the parties to a construction contract intend to add work to a project through amendments, the contract should contain language to that effect. If, however, a new project is added to an existing contract on a property through amendments (or work orders for a master agreement), the parties should be clear in their contract that lien rights do not relate back to work performed for previous projects. Lenders should investigate contracts on a property and obtain subordination agreements before providing financing.

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