IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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ROry L. Perry II, Clerk
Supreme Court of Appeals
of West Virginia

L.A. Pipeline Construction Co., Inc.,

Petitioner,

vs.

No 15-0970
(On Appeal from Marshall County Circuit Court, Civil Action Nos. 11-C-70, 11-C-124, 12-C-47)

Glass Bagging Enterprises, Inc.,

Respondents

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

Glass Bagging Enterprises, Inc., (hereinafter, "Glass Bagging"), is a Pennsylvania corporation in the business of supplying and delivering materials, specifically sand sacks used in the installation of pipelines. Joint Appendix (hereinafter, "J.A.") at page 388. L.A. Pipeline Construction Company, Inc., (hereinafter, "L.A. Pipeline"), was an Ohio corporation that entered into a contract with Caiman Energy, LLC and Caiman Eastern Midstream, LLC, (hereinafter, collectively, "Caiman"), to construct a pipeline in Marshall County, West Virginia. J.A. at 21. L.A. contacted Glass Bagging in December 2010 to deliver and supply sand sacks at the rate of $3,180.00 per load. J.A. at 388. From December 17, 2010 to April 8, 2011, Glass Bagging delivered the materials ordered by L.A. Pipeline on 36 purchase orders. J.A. at 77-78, 388. The cost of the material delivered was $155,907.90. J.A. at 399. L.A. Pipeline failed to pay for the materials and does not dispute the amount owing to Glass Bagging. J.A. at 73, 80. To date, L.A. Pipeline has not paid for the deliveries made.

In April 2011, L.A. Pipeline assured payment would be forthcoming on the previous balance and insisted that only 3 more loads were necessary to complete the job. J.A. at 74, 80. L.A. Pipeline offered to pay for the loads by COD. *Id.* Relying on these assurances, on April 16, April 18, and April 20, 2011, the additional loads were delivered and L.A. Pipeline, by its owner, Richard M. West, paid by check. *Id.* All three checks were marked insufficient funds and returned by the bank, each in the amount of $3,180.00. J.A. at 79. To date, L.A. Pipeline has not paid for the three additional loads or the other previously delivered materials.

Glass Bagging filed its Mechanic's Lien on May 24, 2011 in the office of the Clerk of the County Commission of Marshall County, West Virginia of record in Lien Book 8, at page 26. J.A. at 331. Glass Bagging provided a legal description of the property to be charged as

> 1501 Wheeling Avenue, Glendale, Marshall County, West Virginia, including pipeline installed by L.A. Pipeline Construction Co. for Caiman Energy, LLC from December 17, 2010 to April 20, 2011 in Marshall County West Virginia.

J.A. at 331. The lien was asserted in the amount of $165,447.90 for the sand sacks delivered for the construction of the pipeline. *Id.* On or about July 28, 2011, L.A. Pipeline instituted a suit in the Circuit Court of Marshall County, West Virginia, against Caiman Energy, LLC and Caiman Eastern Midstream, LLC based upon claims of breach of contract and to foreclose on its own Mechanic's Lien on the Caiman pipeline at issue. J.A. at 1-7.

L.A. Pipeline included Glass Bagging as a defendant in its Complaint and specifically requested that its mechanic's lien be foreclosed and all liens be marshalled and the priorities determined. J.A. at 6. During the course of the litigation, Caiman and L.A. Pipeline entered into a confidential settlement agreement resolving the issues between them. J.A. at 295. A *Motion to Establish Escrow Fund And/Or Bond and Discharge Mechanics' Lien* was thereafter filed requesting that the court enter an order directing the Circuit Clerk to execute a release of Glass Bagging's Mechanic's Lien and to establish an escrow fund or bond in the amount of Glass Bagging's claimed lien. J.A. at 301. Despite Glass Bagging's objection, J.A. at 306, an order was entered establishing the escrow fund and discharging Glass Bagging's Mechanic's Lien. J.A. at 315. Specifically, the trial court ordered that

> the purported Mechanics' Lien of Glass Bagging Enterprises, Inc. shall constitute a lien on the escrow fund as established in this Court Order in lieu of its Mechanics' Lien on the property of the Defendants Caiman Energy, LLC, and Caiman Eastern Midstream, LLC

J.A. at 316. Following the establishment of the escrow fund, both L.A. Pipeline and Glass Bagging filed competing motions for summary judgment. J.A. at 319-29, 376-386. The Circuit Court of Marshall County entered an Order granting Glass Bagging's Motion, which has formed the basis of this appeal by L.A. Pipeline. J.A. at 494-506. Notably, the Circuit Court's order granting summary judgment also grants Glass Bagging summary judgment on Glass Bagging's breach of contract and unjust enrichment claims. J.A. at 505. L.A. Pipeline has not appealed the judgment entered against it on these two counts.

II. SUMMARY OF ARGUMENT

The central issue in this action is should a materialman be paid from a fund established in the Circuit Court of Marshall County to bond off a mechanic's lien filed by that materialman. Against the public policy of enforcing contracts and preventing unjust enrichment, L.A. Pipeline, an insolvent corporation, erroneously argues that the description contained in Glass Bagging's mechanic's lien was inadequate and unascertainable, that Glass Bagging failed to timely assert its' claim, that L.A. Pipeline, the contractor has standing to contest the validity of the Glass Bagging mechanic's lien, and that the Circuit Court lacked the authority to impose an equitable lien on the fund paid into the Circuit Court of Marshall County. As shown below, these arguments are without merit.

First, the West Virginia Mechanic's Lien statutes only require a description "to be sufficiently accurate only for identification." *H.C. Houston Lumber Co. v. Wetzel & T. Ry. Co.*, 69 W.Va. 682, 72 S.E.786, 789 (1911) (description of "railway of said corporation situate in the counties of Wetzel and Tyler extending from the city of Sistersville in Tyler county to the town of Brooklyn in Wetzel county" sufficiently accurate for identification due to character of railway);

see also W. Va. Code § 38-2-4 (2015). Glass Bagging's mechanic's lien provided adequate notice to the owner and interested parties of the lien and the pipeline on which the lien attached. Coupled with the public records available in the Marshall County Court house upon which all parties are on constructive notice of and the liberal construction required by West Virginia law, the Glass Bagging mechanic's lien contained an adequate and ascertainable description and the Circuit Court's Order granting summary judgment should be affirmed.

Moreover, West Virginia Code section 38-2-34(a) provides that a civil action to enforce a mechanic's lien shall "*inure to the benefit of all other persons having a lien under this article on the same property*". W. Va. Code § 38-2-34(a). In this case, L.A. Pipeline filed an action to marshal and prioritize all liens on the pipeline at issue; this action, pursuant to West Virginia Code section 38-2-34(a) inured to the benefit of all lien holders, including Glass Bagging and there was not need to file a separate civil action or separate counter-claim to assert the same. The issue was already before the Circuit Court of Marshall County.

Finally, weighing the equities in this action, the Circuit Court did not commit error in finding that any perceived irregularities in the Glass Bagging mechanic's lien were waived or correctable in equity. Even if equity could not reform the statutory mechanic's lien, an equitable lien was appropriate under West Virginia law as "a separate and distinct remedy from a statutory construction lien, and from an action seeking monetary damages." Jeffrey S. Wertman, *Equitable Liens on Real Property for Construction Improvements* (March 2009). "Equity will create a lien where there is no valid lien at law and [one] is needed to prevent injustice." *Gormley v. Robertson*, 83 P.3d 1042, 1047 (Wash. 2004). A lien may be based upon the fundamental maxims of equity, may be implied and declared by a court out of general considerations of right and justice as applied

to the relations of the parties and circumstances of their dealings. *Milligan Coal Co. v. Polowy*, 108 W. Va. 458, 151 S.E.429 (1930). Accordingly, the Circuit Court did not commit reversible error in denying L.A. Pipeline summary judgment and in awarding summary judgment on all counts to Glass Bagging.

III. STATEMENT REGARDING ORAL ARGUMENT

Respondent requests oral argument pursuant to West Virginia Rule of Appellate Procedure 20(a) in that this action presents issues of fundamental public importance.

IV. ARGUMENT

A. Standard of Review.

"A circuit court's entry of summary judgment is reviewed *de novo*." *Cunningham v. Herbert J. Thomas Mem. Hosp. Ass'n*, 2012 W. Va. LEXIS 867, *10 (2012). "In conducting this *de novo* review, we recognize that,

> '[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.'

Cunningham, 2012 W. Va. LEXIS 867 at *10-11 (quoting Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992)). Furthermore,

> '[s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.'

Cunningham, 2012 W. Va. LEXIS 867 at *11 (quoting Syl. pt. 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)). "Finally, we note that '[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." *Cunningham*, 2012 W. Va. LEXIS 867 at *11 (quoting Syl. pt. 3, *Painter*, 192 W. Va. 189, 451 S.E.2d 755). In addition, the West Virginia Supreme Court has provided guidance on what constitutes a genuine issue of material fact writing,

> Roughly stated, a "genuine issue" for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.

Jividen v. Law, Syl. pt. 5, 194 W. Va. 705, 461 S.E.2d 451 (1995).

In regard to construing statutes, "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 2, *Cmty Antenna Serv. v. Charter Communs. VI, LLC*, 227 W. Va. 595, 712 S.E.2d 504 (2011) (citations omitted). Additionally, "[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syl. Pt. 4, *id.*, 712 S.E.2d 504 (citations omitted). Finally, "[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 3, *id.*, 712 S.E.2d 504 (citations omitted). Moreover, "[t]he general rule is that a statute is presumed to apply prospectively only. Retroactive application of a statute is warranted only where the legislative intent to do so is clearly indicated." *Woodring v. Whyte*, 161 W. Va. 262, 272, 242 S.E.2d 238, 244 (1978).

B. The Circuit Court's order granting summary judgment should be affirmed because Glass Bagging's Mechanic's Lien is valid and enforceable as it contained an adequate and ascertainable description so as to give proper notice to all interested individuals.

The Circuit Court correctly found that the description contained in the mechanic's lien filed by Glass Bagging contained an adequate and ascertainable description sufficient to give notice to all interested parties. In fact, the mechanic's lien did provide notice as evidenced by the disparate filings in the Circuit Court actions at issue.

West Virginia Code section 38-2-4 authorizes a lien by a materialman for the materials provided to a contractor or subcontractor. W. Va. Code § 38-2-4 (2015). Section 11 requires that the notice served on the owner set out that the materialman furnished materials to the contractor on behalf of the owner for use in the construction of the buildings or other structures on the land to be charged; that the structures must be adequately described in the notice; that the materials were of the nature and were furnished on the dates and in the quantities and at the prices as shown in an itemized account inserted in said notice; that the materialman has not been paid the sum claimed and that it is still due and owing, and that he claims a lien upon the interest of the owner of the land and upon the buildings or other structures and improvements thereon to secure the payment of the said sum. *Id.* at § 38-2-11; *see Gray Lumber Co. v. Devore*, 145 W. Va. 91, 112 S.E.2d 457 (1960). Furthermore, the statute requires that notice of the lien be given to the owner of the property, or his or her authorized agent, within one hundred days of the materialman ceasing to furnish materials to the subject property. W. Va. Code § 38-2-11. The statute further requires that notice of the lien be filed with the clerk of the county commission wherein the property is situate within one hundred days of ceasing to furnish the materials. *Id.* Failing to notify either the property owner or file the lien with the county commission within the stated time period discharges the materialman's lien. *Id.* Further, Section 14 provides, in part:

> The failure of any person claiming a lien under this article to give such notice as is required by section [] eleven ... of this article, or to record such notice ... in the manner and within the time specified in such sections, or the failure of any such claimant of any such lien to comply substantially with all of the requirements of this article for the perfecting and preservation of such lien, ... [shall] operate as a complete discharge of such owner and of such property form all liens....

Id. at § 38-2-14 (2015).

The substance of the lien is only required to *substantially* comply with the statute. *See Harrison Construction Co.* v. *Greyston Hotel Co.*, 99 W. Va. 5, 127 S.E. 641 (1925); *Gray Lumber Co. v. Devore*, 145 W. Va. 91, 112 S.E.2d 457 (1960). The form of the notice need not be followed precisely but the substance of the notice provided by such statute must be contained in the notice and the effect must be the same. *See Forman v. Kelly*, 104 W. Va. 211, 139 S.E 708 (1927). Where it appears from the case that there is a clear right to the lien under the statute and the controversy is whether the lienor has properly proceeded to establish his lien, a liberal construction should be applied. *Fisher v. Reamer*, 146 W. Va. 83, 89, 118 S.E.2d 76 (1961); Syl. Pt. 1, *Pfaff & Smith Builders' Supply Co. v. Mason*, 103 W. Va. 318, 137 S.E. 356 (1927).

A description, to be valid, does not need to state the metes and bounds. Rather, "[i]f there appears enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainly, to the exclusion of others, it will be sufficient." *See Treasure Valley Plumbing and Heating, Inc. v. Earth Resources Co.,* 684 P.2d 322, 324-25 (Id. 1984) (holding description of property as "the 'Salem Bar', situated on the Idaho side of the main channel of the Snake River, one-half mile north or down the river from the mouth of the Grand Ronde, in New Perce county, Idaho" substantially complaint with statute).[1] "The statute requires the description to be sufficiently accurate only for identification." *H.C. Houston*

[1] Idaho Code § 45-507 Claim of Lien statute required "a description of the property to be charged with the lien, sufficient for identification."

Lumber Co. v. Wetzel & T. Ry. Co., 69 W.Va. 682, 72 S.E.786, 789 (1911) (description of "railway of said corporation situate in the counties of Wetzel and Tyler extending from the city of Sistersville in Tyler county to the town of Brooklyn in Wetzel county" sufficiently accurate for identification due to character of railway); *see also* W. Va. Code §38-2-4 (2015).

The fact that a description could have been more precise does not take it out of substantial compliance with the statute. *Treasure Valley Plumbing and Heating, Inc.,* 684 P.2d at 325. As such, a description is sufficient if it enables a party familiar with the locality to identify the property with reasonable certainty upon which the lien is claimed. *Drexel v. Richards*, 70 N.W. 23, 24 (Neb. 1897) (holding "Barlett & Downing Block, Kearney, Buffalo county, Neb" to be a sufficient description of the premises). A description which does not lead an interested party to believe the lien is on a distinct, different property is sufficient. *Buckeye State Hauling, Inc., v. Troy,* 332 N.E.2d 776, 779 (Ohio 1974) ("As the description could not mislead to another property, the question may be pursued regarding whether it was sufficient to lead to the correct property").[2]

A description in a mechanic's lien which identifies a "pipeline" within a specific county during a specific time frame by a specific contractor is an adequate description for identification by the owner or an interested third party. The case of *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.,* dealt with, *inter alia,* a claim that a mechanic's lien did not sufficiently identify a pipeline so as to comply with the statutory requirements. 979 P.2d 627, 637 (Id. 1999). Under Idaho's mechanic's lien statute, the notice must contain "a description of the property to be charged

[2] Ohio Revised Code 1311.06 provided "Every person or his agent or attorney, whether contractor, subcontractor, materialman, or laborer, who wishes to avail himself of section 1311.01 to 1311.24, inclusive, of the Revised Code, shall make and file for record in the office of the county recorder in the counties in which said labor was performed or machinery, material, or fuel furnished, an affidavit showing the amount due over and above all legal setoffs, a description of the property to be charged with a lien, the name and address of the person to or for whom such machinery, material or fuel was furnished and labor performed, the name of the owner, part owner, or lessee, if known, and the name and address of the lien claimant. If the affidavit is recorded, the omission or inaccuracy of any address therein shall not affect the validity of such affidavit . . . ."

with the lien, sufficient for identification." *Id.*; *see also Idaho Code* § 45-507 (1999). The lien was challenged on the basis that the metes and bounds of the pipeline were not provided; the description provided merely referenced "the pipeline." *Great Plains Equipment, Inc.*, 979 P.2d at 637. Reasoning that a description is sufficient if it enables "a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others," the Idaho court found that the description was sufficient because other individuals familiar with the locality were able to identify the property with reasonable certainty, the project was unique to the area, and any person familiar with the area would be able to locate the liened property by use of maps and diagrams referenced or attached in the lien. *Id.* at 637-638. So too here. In fact, the Glass Bagging mechanic's lien did provide actual notice to the owner and other contractors on the pipeline project. As such, the Circuit Court correctly found that the Glass Bagging lien contained an adequate and ascertainable description.[3]

Further, West Virginia law supports the proposition that extraneous proof and other documents of record in the Courthouse can be used to identify the property subject to the lien if metes and bounds are not referenced in the lien. In *Duncan Box & Lumber Co. v. Stewart,* the Court addressed the issue of a property description which identified the entirely wrong lot. 126 W. Va. 871, 30 S.E.2d 391, 392 (1944). In analyzing the description provided, the West Virginia Supreme Court of Appeals noted that

[3] Any assertion that the specific pipeline properties or route was not contained in the Glass Bagging mechanic's lien is a "red herring". First, the pipeline was constructed by L.A. Pipeline for Caiman Energy. That description in and to itself is sufficient to provide notice to the owner and any other interested parties and in this case it did so as evidenced by the multitude of pleadings filed in the Circuit Court. Moreover, upon information and belief, there is not a multitude of pipelines being constructed at the relevant time period in Marshall County. If there were more than one pipeline being constructed in Marshall County, then they were likely not all being constructed by L.A. Pipeline for Caiman Energy. Even if L.A. Pipeline were constructing more than one pipeline for Caiman Energy, it would be impossible for a materialman to know which pipeline the materials were being utilized in. L.A. Pipeline would have unique knowledge of where they buried the materials they purchased but did not pay for.

> Most descriptions used in deeds and trust deeds require the aid of extraneous proof for the purpose of identifying the property intended to be conveyed. If that rule could be applied to the specific notices now before us, we would be inclined to hold them sufficient. But it seems quite clear that the application of that principle could not result merely amplifying or clarifying a description of the improved property contained in the notices, but would definitely result in a direct contradiction thereof.

Id.

Identification of the Caiman pipeline with reasonable certainty could be obtained, if necessary, by use of extraneous documents and other documents available in the Marshall County Courthouse as discussed in *Duncan Box & Lumber Co.* Deeds and other public records such as mechanics' liens could be used to identify the specific pipeline rights-of-ways which Caiman Energy LLC owns, or did own at the time of the lien filing, and the specific property worked on by L.A. Pipeline. *See* J.A. 65 -69 (mechanic's lien of L.A. Pipeline referencing public documents of record). To allow the use of such extraneous documents would serve to amplify or clarify a description of the improved property contained in the notice. *Duncan Box & Lumber Co.,* 123 W. Va. 871, 30 S.E.2d at 392. Further, in contrast to *Duncan Box & Lumber Co.,* Glass Bagging did not identify the entirely wrong lot, but rather, not knowing where L.A. Pipeline placed the materials in Marshall County, identified the entire pipeline installed by L.A. Pipeline for Caiman Energy. Considering public records would not cause the description contained in the Glass Bagging mechanic's lien to fit a different piece of land that was not referenced or mentioned. Rather it would clarify the description provided if there is any question as to what was subject to the mechanic's lien. Employing this analysis and traditional laws on the duty to inquire would further support the argued premise.[4]

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[4] Any argument that the Glass Bagging Mechanic's lien is limited to the property address identified in the lien, "1501 Wheeling Avenue, Glendale" is without merit. J.A. 440. A review of both the property and property records would not lead one to believe the "1501 Wheeling Avenue" contained a pipeline subject to the lien. The description of the pipeline constructed by L.A. Pipeline for Caiman Energy sufficiently puts an interested party on notice of the existence of the lien.

Even if West Virginia did not allow the use of extraneous proof to specifically identify the description of liened property, West Virginia Code addressed the specific issue of a lien of a materialman when the materials provided are used on various improvements in different locations stating,

> Any materialman or furnisher of machinery or other equipment necessary to the performance of any one such general or subcontract, who shall furnish such materials, machinery or other equipment in quantities for use in more than one building or other structure or improvement appurtenant thereto, and any workman, laborer or other person who shall perform work or labor upon more than one such building or other structure or improvement appurtenant thereto, provided for in such contract, ***shall have a lien upon all of such buildings and other structures and improvements into which his materials were put or upon which his work and labor was expended and upon the interest of the owner in and to the lot of ground upon which all of such buildings and structures stand or to which they may be removed, and such lien may be perfected and preserved by one notice thereof to such owner and by one recordation thereof, and it shall not be necessary for such lienor to give and record a notice as to each separate building or structure or improvement thereto.***

W. Va. Code § 38-2-29 (2015) (emphasis added). Under this provision of West Virginia Code, it is unnecessary for a materialman to name or describe every improvement or lot or parcel into which his materials were placed. Instead, the West Virginia Legislature authoritatively provided

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> It is a general rule that whatever puts a party on inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty and would lead to a knowledge of facts by the exercise of ordinary intelligence and understanding. Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have notice of the fact itself. A person is chargeable with notice, which, from the nature of the transaction, a person of ordinary prudence would necessarily have; and a person cannot shut his eyes or ears to avoid information and then say that he had no notice or knowledge

Buckeye State Hauling, Inc., 43 Ohio Misc. at 28 (citing 41 Ohio Jurisprudence 2d Notice, Section 13). *See* Syl. Pt. 1, in part, *Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co.*, 63 W. Va. 685, 60 S.E.890 (1908). ("That which fairly puts a party on inquiry is regarded as sufficient notice, if the means of knowledge are at hand"). A prudent entity or individual would not be misled to believe that the pipeline was situate on "1501 Wheeling Avenue", and would have been put on inquiry as to the correct location of the lien. The inclusion of the "1501 Wheeling Avenue" reference should not be detrimental to Glass Bagging's claim. To adopt this interpretation would set a dangerous precedent that contractors should have their materials delivered to an off-site location to prevent a materialman from knowing the location where the materials are to be used so no mechanics lien could ever be enforced.

that "such lien may be perfected and preserved by one notice thereof to such owner and one recordation thereof." *Id.* ("it shall not be necessary for such lienor to give and record a notice as to each separate building or structure or improvement thereto.") So too here. Materials were provided for Caiman's pipeline in Marshall County. The materials were used by L.A. Pipeline in disparate underground locations throughout Marshall County and the specific locations of the materials were in the unique knowledge of L.A. Pipeline. Pursuant to West Virginia Code section 38-2-29, the notice and description need not name each specific improvements and the generalized description of the pipeline was sufficient to provide notice. As such, the description was adequate and ascertainable and the Circuit Court's decision should be affirmed.

In this case, it is undisputed that Caiman Energy, LLC contracted with L.A. Pipeline for the construction of a pipeline in Marshall County, West Virginia and that L.A. Pipeline ordered, received, and failed to pay for materials delivered by Glass Bagging. J.A. at 8, 72-75, 80-81. As such, a liberal construction of the statute is to be applied. *Fisher*, 146 W.Va. at 89, 118 S.E.2d at 76. Applying the principles of law citing above and a liberal construction, Glass Bagging achieved substantial compliance with the statute and accordingly has a valid Mechanic's lien for the material it provided.[5] Applying a liberal construction to the statutory requirements for properly creating a

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[5] Liberal construction or interpretation, as referenced in Black's Law Dictionary is a "broad interpretation of a text in light of the situation presented and possibly beyond the language's permissible meanings, usually with the object of effectuating the spirit and broad purpose of the text or producing the result the interpreter thinks desirable" INTERPRETATION, Black's Law Dictionary (10th ed. 2014). Further,

> Liberal construction ... expands the meaning of the statute to embrace cases which are clearly within the spirit or reason of the law, or within the evil which it was designed to remedy, provided such an interpretation is not inconsistent with the language used. It resolves all reasonable doubts in favor of the applicability of the statute to the particular case." William M. Lile et al., *Brief Making and the Use of Law Books* 343 (Roger W. Cooley & Charles Lesley Ames eds., 3d ed. 1914).

Id.

lien renders the description provided by Glass Bagging adequate and ascertainable. *See* W. Va. Code § 38-2-11 (2015).

One of the purposes of the mechanic's lien statutes is to give notice of the claim to the owner of the property and other interested individuals so that one familiar with the locality will be able to identify the premises intended to be described with reasonable certainty. *See Treasure Valley Plumbing and Heating, Inc.,* 684 P.2d at 324-325. ("If there appears enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient."); *see also Drexel v.* Richards, 70 N.W. at 24. ("The rule laid down in the adjudicated cases is that a description sufficient to sustain a mechanic's lien is one which enables a party familiar with the locality to identify the property with reasonable certainty upon which the lien is claimed."). The reference of the "pipeline installed by L.A. Pipeline Construction Co. for Caiman Energy LLC from December 17, 2010 to April 20, 2011 in Marshall County, West Virginia" sufficiently describes the liened property and fulfills the intended purpose of notifying both the owner of the property and others with an interest in the property, such as creditors or potential buyers. J.A. 440. Caiman Energy could not in good faith claim to have no idea which property is subject to the claim. Neither can other creditors such as L.A. Pipeline, who used the materials provided by Glass Bagging on the pipeline.[6] The description sufficiently limits the lien to the pipeline installed by L.A. Pipeline and owned by Caiman in Marshall County, West Virginia during a certain time period, thus excluding pipelines being constructed by any other contractor or at other times.

[6] L.A. Pipeline did include Glass Bagging in its complaint to foreclose on its own mechanics' lien, wherein it was represented that "Glass Bagging Enterprises, Inc., may have or claim to have a mechanic's lien on the property." J.A. at 6.

Individuals with an interest in the subject property, or those who desire to obtain an interest would be able to identify the property with reasonable certainty, to the exclusion of other properties.

Finally, applying a liberal construction and finding that Glass Bagging's lien is valid supports one of the other clear purposes of the statute – providing recourse for a materialman for the added value to the subject property. *See Scott Lumber Co. v. Wheeling Cemetery Ass'n*, 117 W. Va. 534, 186 S.E. 117, 118 (1936) ("The lien is extended by statute to the owner's interest in the real estate because of the fact that the materials and labor going into the improvements therein enumerated have added to its value."). Finding the lien invalid would be to allow L.A. Pipeline to benefit from the materials provided by Glass Bagging without just compensation. This outcome would perpetrate the evil the statute was designed to prevent.

Accordingly, the description provided by Glass Bagging in it Mechanic's lien adequately describes the property subject to the lien and is valid and enforceable under West Virginia law and the Circuit Court order should be affirmed.

C. The Circuit Court order finding that Glass Bagging's lien was properly asserted as provided under West Virginia Code section 38-2-34(a) should be affirmed because the suit filed by L.A. Pipeline inured to the benefit of Glass Bagging.

In addition to having an adequate and ascertainable legal description of the property, Glass Bagging's lien was properly asserted within the statutorily prescribed period by the filing of the action by L.A. Pipeline to marshal and prioritize the liens. Under West Virginia Code section 38-2-34(a)

> [u]nless an action to enforce any lien authorized by this article is commenced in a circuit court within six months after the person desiring to avail himself or herself of the court has filed his or her notice in the clerk's office, as provided in this article, the lien shall be discharged;

However, more importantly this code provision provides that

> an *action commenced by any person having a lien shall, for the purposes of preserving the same, inure to the benefit of all other persons having a lien under this article on the same property*, and persons may intervene in this action for the purpose of enforcing their liens.

W. Va. Code § 38-2-34(a) (2015) (emphasis added).

To properly perfect a lien, the lien holder does not need to institute its own suit to enforce its lien within six months of filing the required notice. *Amato v. Hall*, 115 W. Va. 798, 174 S.E. 686, 687 (1934). Rather, the commencement of a suit to enforce a lien *by any other lien holder* prevents the statute from running against the other lien holders of the subject property. *Id.* A lienholder could not be prejudiced by failure to institute a suit in its own name when the suit of another lien holder insures to its benefit. *Hough v. Watson*, 91 W.Va. 161, , 112 S.E. 303, 305 (1922). "In suits to enforce judgment liens, the suit of one inures to the benefit of all, and by statute no other creditor can lawfully institute another suit, but must come into the first suit brought and there litigate his right... ." *Id.* at , 112 S.E.at 305. "The fact that no suit was brought by [Glass Bagging] to enforce [its] lien within six months after [it] docketed the same, is not material. This suit, brought within six months, made [Glass Bagging] a party defendant. That prevented the statute from running against [it]." *Amato*, 115 W. Va. 798, 174 S.E. at 687.

The position of the Petitioner is misguided and invites the Court to adopt a very narrow interpretation of West Virginia Code section 38-2-34 and further misstates the code to support its own argument. Section 38-2-34 does not only inure to the benefit of those lien holders who take some action for the purpose of enforcing a lien as contended by Petitioner. *Petitioner Brief,* at p. 12. Taking some action to enforce a lien is a not a prerequisite to inuring to the benefit provided under the statute. The statute clearly provides "an action commenced by any person having a lien shall, for the purposes of preserving the same, inure to the benefit of all other persons having a lien

under this article on the same property." W. Va. Code § 38-2-34(a) (2015). The institution of this action by L.A. Pipeline was an affirmative action to enforce the liens of all lien holders and establish priority among them, including Glass Bagging's mechanic lien. Petitioner has cited no authority to support its contention and merely pieced together phrases from the statute to support its position.[7]

While Glass Bagging did not specifically file a pleading to enforce its lien, it has persistently defended the validity of its lien. *See Motion to Establish Escrow Fund and/or Bond and Discharge Mechanics' Lien*, J.A. at 301; *Suggested Findings of Facts on Behalf of Glass Bagging*, J.A. at 306; *Order Establishing Escrow Fund and Discharging Mechanics' Lien*, J.A. at 315; *Motion for Prejudgment Attachment on Behalf of Glass Bagging*, J.A. at 396. The validity of the lien would not have been an issue left open to consideration and litigation had the lien not been attempted to be enforced. Glass Bagging has not sat idly by during this litigation, but has continued to defend and pursue the rights under its mechanics' lien. Because the filing of the *Complaint* by L.A. Pipeline inured to the benefit of Glass Bagging, its lien was properly marshalled within the statutory time frame and the decision of the Circuit Court should be affirmed.

D. The Circuit Court was correct in finding that L.A. Pipeline did not have standing to contest the mechanic's lien asserted against Caiman.

Generally, standing is defined as "[a]party's right to make a legal claim or seek judicial enforcement of a duty or right." STANDING, Black's Law Dictionary (10th ed. 2014). As further explained,

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[7] While West Virginia Code section 38-2-34(a) does provide that "a person may intervene in the action for the purpose of enforcing their liens," Glass Bagging did not intervene in the action to enforce its lien because it was a named Defendant in enforcement action filed by L. A. Pipeline against Caiman Energy, LLC, et al. *See* J.A., at 1. Glass Bagging did not need to file pleadings to enforce its claim when the L.A. Pipeline Complaint requested that all liens be marshalled, the pipeline rights-of-ways and pipeline be sold, the priority, validity, and enforceability of all liens be declared and adjudicated and that the proceeds be paid over to the Petitioner and the "other Defendants as their legal interests may appear." J.A. 6-7.

> standing is comprised of three elements: First, the party attempting to establish standing must have suffered an "injury-in-fact" – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.
>
> Syl. Pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002).

Further,

> [s]tanding does not refer simply to a party's capacity to appear in court. Rather, standing is gauged by the specific common-law, statutory or constitutional claims that a party presents. "Typically, ... the standing inquiry requires careful judicial examination ... to ascertain whether the particular plaintiff is entitled to an adjudication of the *particular claims asserted.*"

Id. at 95, at 822. "In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue[.]" *Flast v. Cohen,* 392 U.S. 83, 99–100, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947, 961 (1968) (footnote omitted). *Accord Louisiana Environmental Action Network v. Browner,* 87 F.3d 1379, 1382, 318 U.S. App. D.C. 370, 373 (1996) ("Our standing inquiry focuses on the appropriateness of a party bringing the questioned controversy to the court."); *American Alternative Energy Partners II v. Windridge, Inc.,* 42 Cal.App.4th 551, 559, 49 Cal.Rptr.2d 686, 691 (1996) ("[S]tanding to sue—the real party in interest requirement—goes to the existence of a cause of action, *i.e.,* whether the plaintiff has a right to relief.").

In this case, L.A. Pipeline lacks standing to contest the lien filed against the pipeline as L.A. Pipeline was, and never has been, an owner of the pipeline. The lien was placed against Caiman's pipeline; thus, L.A. Pipeline suffered no "injury-in-fact" as required by West Virginia law. *See* Syl. Pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002).

With respect to mechanics' liens, this Court should adopt a rule that only a party entitled to notice under the statute has standing to challenge the validity of said lien. *See, e.g., Aluma Systems, Inc. v. Frederick Quinn Corp*564 N.E.2d 1286 (Ill. Ct. App. 1990); *Williams & Works, Inc. v. Springfield Corp.*, 257 N.W.2d 160, 163 (Mich. Ct. App. 1977) (stating that "[d]efendant has no standing to complain of procedural deficiencies of which only the owner of the property can complain); *Newman v. Valmar Elec. Co.*, 9 Misc. 3d 450, 454 (N.Y. 2005) (stating that "[t]he validity of petitioners' standing to bring their motion is undermined by petitioners' absence from any mention in the lien except to locate the apartment").

West Virginia Code section 38-2-11 provides the mechanism for providing notice to perfect a materialman's lien created under section West Virginia Code section 38-2-4, stating

> For the purpose of perfecting and preserving his or her lien, every materialman or furnisher of machinery or other necessary equipment who has furnished material, machinery or equipment under a contract with any contractor or with any subcontractor, as set forth in section four of this article, within one hundred days after he or she has ceased to furnish the material or machinery or other equipment shall give to the owner or his or her authorized agent, by any of the methods provided by law for the service of a legal notice or summons, a notice of the lien.

W. Va. Code § 38-2-11 (2015). L.A. Pipeline is and has never been an owner of the liened pipeline. Any procedural or substantive arguments challenging the validity of the Glass Bagging mechanic's lien could and should have been raised by Caiman Energy – the party that would suffer a potential injury in fact and with standing to challenge the lien. As between L.A. Pipeline and Glass Bagging, the recording and service of the mechanic's lien has "no particular efficacy" because the purpose of the West Virginia Mechanic's Lien statute is to provide notice of the owner and other interested parties. *See Pub. Health Trust of Dade Cty. v. Carroll*, 509 So. 2d 1232, 1234 (Fla. Dist. Ct. App. 1987) (finding that patient did not have standing to contest a hospital lien as not timely filed because the recording had no bearing on her obligation to the hospital). L.A. Pipeline breached its

contract with Glass Bagging and the validity or invalidity of the Glass Bagging Mechanic's Lien has not effect on the controversy between L.A. Pipeline and Glass Bagging.

Moreover, L.A. Pipeline waived whatever argument it had in regard to the validity of the Glass Bagging Mechanic Lien when it entered into a confidential settlement with Caiman and arranged the bond that was paid into Marshall County Circuit Court.

> This leaves for consideration the conflicting claims under the mechanic's lien filed by the contractor and those filed by the subcontractors who dealt with him, upon a fund which is insufficient to pay all. When a contractor files his lien he is supposed to file it for the full amount due him, which is all that the owner ought in justice to be required to pay. If the contractor has failed to pay those from whom he bought materials he has included in his lien the amount of these claims, and the material men also are entitled to file liens, and, if they do so, we have a case of double liens which was deprecated in *Hoatz v. Patterson*, 5 W. & S. 537. When the liens of the subcontractors are valid the owner may pay them and is to that extent entitled to a credit upon the claim of the contractor, or if this involves an overpayment he is entitled to recover from the contractor the amount of the excess. The owner and those who claim under him have a right to demand that the valid liens of subcontractors shall be discharged before the contractor shall compel payment of his claim. The contractor is the ultimate debtor of and personally liable to the subcontractors, their lien upon the fund is a security for his debt. To award the fund to the contractor would be to pay him for materials which his subcontractors have furnished. The distribution of the fund to all the liens pro rata might involve a payment to the contractor, taken in connection with the dividend to the subcontractors, of more than he was entitled to receive. This would leave the owner to his remedy against the contractor for the amount received by the latter in excess of the contract price, and the subcontractors would be compelled to bring their actions against the contractor for the balance of their claims. The equities arising out of these claims are to be, so far as possible, adjusted in this proceeding, in order to avoid circuity of action. The claim of the contractor is to be postponed to the liens of the subcontractors, upon the face of the records of which he is the primary debtor.

Keim v. McRoberts, 18 Pa. Super. 167, 171-72 (1901). Since the confidential settlement agreement bonded off the mechanic's lien on the pipeline and transferred the lien to money deposited to the Circuit Court of Marshall County, L.A. Pipeline had an obligation to protect the lien of its subcontractors such as Glass Bagging.

L.A. Pipeline is attempting to "bootstrap" a standing argument. Having no ownership interest in the pipeline, L.A. Pipeline bonded off the lien from the pipeline with confidential settlement proceeds in which it claims an interest. Since it has an interest in these proceeds to pay the multitude of other creditors that L.A. Pipeline owes money to, *post hoc ergo propter hoc*, L.A. Pipeline has standing to challenge the lien. This is incorrect and an attempt to create an injury in fact where none existed before. Whatever standing argument that L.A. Pipeline had was waived when it entered into the confidential settlement agreement with Caiman, received proceeds and paid money into the Circuit Court of Marshall County to bond off the Glass Bagging mechanic's lien. Either L.A. Pipeline defended the lien of its materialman and the fund in Marshall County should be released to Glass Bagging or L.A. Pipeline did not defend and assert the lien of its materialman. If L.A. Pipeline failed to assert and defend the lien of its materialman, then it should not get credit and benefit from its' multitude of wrongs.

E. The Circuit Court was correct in reforming any defects in the Glass Bagging mechanic's lien using equitable principles and instituting an equitable lien on the escrow account because L.A. Pipeline would be unjustly enriched at Glass Bagging's expense.

Glass Bagging has substantially complied with the statutory requirements under Chapter 38 Article 2 Section 14, and accordingly its lien is valid and enforceable. However, if this Court were to decide that either the description was inadequate, or the bringing of the suit was untimely, equitable principles would still hold Glass Bagging's lien valid by either reformation or the imposition of an equitable lien.

A suit to enforce a mechanic's lien is undeniably equitable in nature. *See State ex rel. West Virginia Truck Stops, Inc. v. McHugh*, 160 W.Va. 294, 233 S.E.2d 729 (1977). Despite the view that rules of equity should not be applied to mechanic's liens to reform and make a defective lien valid, where a party's conduct is so outrageous, the court should employ equitable principles to

liened funds sitting in Marshall County Circuit Court, it likely will never be paid despite the fact that L.A. Pipeline has already received the benefit Glass Bagging's materials helped to create. Petitioner will have received a benefit and avoided payment thereof.

If, however, this Court were to find that equity cannot reform Glass Bagging's mechanic's lien, establishment of an equitable lien is appropriate. "An equitable lien is a separate and distinct remedy from a statutory construction lien, and from an action seeking monetary damages." Jeffrey S. Wertman, *Equitable Liens on Real Property for Construction Improvements* (March 2009). "Equity will create a lien where there is no valid lien at law and [one] is needed to prevent injustice." *Gormley v. Robertson*, 120 Wash. App. 31, 39 (2004). A lien based upon the fundamental maxims of equity, may be implied and declared by a court out of general considerations of right and justice as applied to the relations of the parties and circumstances of their dealings. *Milligan Coal Co. v. Polowy*, 108 W. Va. 458, 151 S.E.429 (1930).

Moreover, "[i]t has been held that an equitable lien is a right, that is not recognized at law, to have a fund or specific property, or its proceeds, applied in whole or in part to the payment of a particular debt or class of debts." 51 Am. Jur.2d Liens § 30. "An equitable lien may be imposed in favor of one whose money, materials, or services have benefited the property of another under circumstances entitling him or her to restitution." 51 Am. Jur. 2d Liens §50. "Thus, if a contractor or a materialman supplies labor, materials, or equipment for the improvement of real property, a court of equity may, in appropriate circumstances, impress an equitable lien upon the improved property as security for payment for the improvements." *Id.*

This Court has recognized the validity of equitable liens in the appropriate circumstance. In *Everly v. Schoemer*, this Court wrote,

> An equitable lien arises either from a written contract which shows an intention to charge some particular property with a debt or obligation, or is declared by a court

> of equity out of general consideration of right and justice as applied to the relations of the parties and the circumstances of their dealings. A lien necessarily excludes any idea of ownership by the party claiming it. A lien, whether implied or by contract, confers no right of property upon the holder. It is neither jus ad rem nor jus in re'.

139 W. Va 392, 397-98, 80 S.E2d 334, 338 (1954). In upholding the impressment of the equitable lien, the West Virginia Supreme Court of Appeals wrote that "right and justice" called for the equitable lien in this case. It is undeniable that the materials supplied by Glass Bagging benefitted L.A. Pipeline and that this benefit has gone without compensation. As such, this Court, to prevent a grave injustice, should impose an equitable lien on the Escrow Fund previously established by the Circuit Court of Marshall County in favor of Glass Bagging.[9]

F. The Circuit Court was correct in denying L.A. Pipeline's motion for summary judgment.

For the reasons expressed above, which are incorporated by reference herein, the Circuit Court of Marshall County did not err in denying L.A. Pipeline's motion for summary judgment.

V. CONCLUSION

The Circuit Court was correct in granting summary judgment to the Respondent. The description contained in Glass Bagging's mechanic's lien was adequate and ascertainable as a matter of law. Moreover, due to the filing of L.A. Pipeline's action to marshal and prioritize all of the liens on the Caiman pipeline, there can be no argument that an action was not commenced in the applicable time frame required by West Virginia. Moreover, Caiman, the party upon which the lien attached, did not contest the validity of the mechanic's lien and L.A. Pipeline does not have an injury in fact sufficient to permit it to have standing. Finally, the Circuit Court of Marshall County had the requisite equitable power to weigh the equities in this case and find that any

[9] L.A. Pipeline, Caiman Energy, LLC and Caiman Eastern Midstream, LLC, moved the Court for an order directing the Circuit Clerk to execute a release of Glass Bagging's Mechanic's Lien and instead establish an escrow fund with the Court in the amount of $165,447.90. The Order was entered March 5, 2012. J.A. at 315.

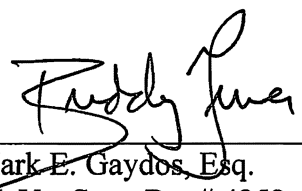
perceived imperfections were waived or belated to prevent unjust enrichment of the party with unclean hands, L.A. Pipeline. Accordingly, this Court should affirm the judgment of the Circuit Court and award the fund presently in Marshall County, West Virginia to the Respondent.

In the event that this Honorable Court would determine that the Glass Bagging's Mechanic's Lien is not valid, the Respondent respectfully requests that this action be remanded to the Circuit Court of Marshall County for a ruling on Respondent's motion for prejudgment attachment and/or equitable lien and such other relief as is just and appropriate.

Respectfully Submitted,

GLASS BAGGING ENTERPRISES, INC.

By Counsel



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CERTIFICATE OF SERVICE

I, Buddy Turner , do hereby certify that I served the foregoing "RESPONDENT'S BRIEF" upon the following, by mailing a copy thereof to each by United States Postal Service or by other indicated express delivery service, postage prepaid, this 10th day of February, 2016.

By U.S. Mail
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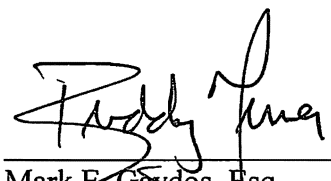

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