

STATE OF IDAHO  
 COUNTY OF KOOTENAI  
 FILED: *[Signature]*  
 AT 1:55 / O'CLOCK P.M.  
 CLERK, DISTRICT COURT  
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE  
 OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN BANK, a Montana banking corporation,  
 Plaintiff,  
 vs.  
 BRN DEVELOPMENT, INC., an Idaho corporation; BRN INVESTMENTS, LLC, an Idaho limited liability company; LAKE VIEW AG, a Lichtenstein company; BRN-LAKE VIEW JOINT VENTURE, an Idaho general partnership; ROBERT LEVIN, Trustee for the ROLAND M. CASATI FAMILY TRUST, dated June 5, 2008; E. RYKER YOUNG, Trustee for the E. RYKER YOUNG REVOCABLE TRUST; MARSHALL CHESROWN, a single man; IDAHO ROOFING SPECIALIST, LLC, an Idaho limited liability company; THORCO, INC., an Idaho corporation; CONSOLIDATED SUPPLY COMPANY, an Oregon corporation; INTERSTATE CONCRETE & ASPHALT COMPANY, an Idaho corporation; CONCRETE FINISHING, INC., an Arizona corporation; THE TURF CORPORATION, an Idaho corporation; WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation; POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation; TAYLOR ENGINEERING, INC., a Washington corporation; PRECISION IRRIGATION, INC., an Arizona corporation; and SPOKANE WILBERT VAULT CO., a

CASE NO. CV-09-2619  
 MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOLLOWING COURT TRIAL AS TO AMERICAN BANK'S AND WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST'S CLAIMS

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

Washington corporation, d/b/a WILBERT  
PRECAST,

Defendants.

And

TAYLOR ENGINEERING, INC., a  
Washington corporation,

Third-Party Plaintiff,

vs.

ACI NORTHWEST, INC., an Idaho  
corporation; STRATA, INC., an Idaho  
corporation; and SUNDANCE  
INVESTMENTS, LLP, a limited liability  
partnership,

Third-Party Defendants.

And

ACI NORTHWEST, INC., an Idaho  
corporation,

Cross-Claimant,

vs.

AMERICAN BANK, a Montana banking  
corporation; BRN DEVELOPMENT, INC., an  
Idaho corporation; BRN INVESTMENTS, LLC,  
an Idaho limited liability company; LAKE VIEW  
AG, a Lichtenstein company; BRN-LAKE VIEW  
JOINT VENTURE, an Idaho general partnership;  
ROBERT LEVIN, Trustee for the ROLAND M.  
CASATI FAMILY TRUST, dated June 5, 2008;  
E. RYKER YOUNG, Trustee for the E. RYKER  
YOUNG REVOCABLE TRUST; MARSHALL  
CHESROWN, a single man; THORCO, INC., an  
Idaho corporation; CONSOLIDATED SUPPLY  
COMPANY, an Oregon corporation; THE TURF  
CORPORATION, an Idaho corporation;

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER FOLLOWING COURT TRIAL

WADSWORTH GOLF CONSTRUCTION )  
 COMPANY OF THE SOUTHWEST, a Delaware )  
 corporation; POLIN & YOUNG )  
 CONSTRUCTION, INC., an Idaho corporation, )  
 TAYLOR ENGINEERING, INC., a Washington )  
 corporation; PRECISION IRRIGATION, INC., )  
 an Arizona corporation, )  
 )  
 Cross Claim Defendants. )  
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This case involves a sizable foreclosure action of a premier golf course community on Lake Coeur d'Alene. This portion of the case involves the ability of Defendant Wadsworth Golf Construction Company of the Southwest to foreclose on its mechanic's lien. The Plaintiff American Bank claims that the Defendant Wadsworth may not foreclose its lien because the Defendant Wadsworth failed to register as a contractor, used unregistered contractors and the claim of lien does not sufficiently describe the real property. Further the parties asked this Court to address the issue of whether the Defendant Wadsworth waived its claim for retainage.

Randall A. Peterman and C. Clayton Gill, MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD., for Plaintiff American Bank

Edward J. Anson, WITHERSPOON KELLEY, for Defendant Wadsworth Golf Construction Company of the Southwest

**I. INTRODUCTION**

On April 2, 2009, American Bank filed its Amended Complaint in this matter. On May 12, 2009, Wadsworth Golf Construction Company of the Southwest ("Wadsworth") filed its Answer, Counterclaim and Cross-Claims. On May 29, 2009, American Bank filed its Answer to Wadsworth's Counterclaim. After the summary judgment proceedings, on February 2, 2011, this Court entered a Memorandum Decision and Order concluding that American Bank's posting of a lien release bond and the subsequent order from this Court releasing Wadsworth's mechanic's lien, rendered the

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

issue of the priority of Wadsworth's mechanic's lien irrelevant. However, this Court held that the issues of lien validity and amount due and owing were relevant and would be determined at trial.

This Court held a two-day court trial commencing May 2, 2011, between Wadsworth and American Bank. The parties stipulated to findings of fact, and further stipulated to the admissibility of numerous trial exhibits<sup>1</sup>. On May 17, 2011, Wadsworth filed its Post-Trial Brief. On May 26, 2011, both parties filed a Joint Motion to Extend Post-Trial briefing. On June 3, 2011, American Bank filed its Post-Trial Memorandum. On June 7, 2011, this Court entered its Order, wherein it granted the parties additional time to file post-trial briefing. Further, on June 7, 2011, American Bank filed the Affidavit of Keri A. Moody, which included attachments relating to legal descriptions depicted in the (1) Mortgage between BRN Development, Inc. ("BRN Development") and American Bank and (2) Wadsworth's Claim of Lien in different coloring.

On June 10, 2011, Wadsworth filed its Post-Trial Reply Brief. On June 21, 2011, American Bank filed a Motion for Leave to File a Sur-Reply Brief. On June 28, 2011, this Court entered its Order allowing American Bank to file a Sur-Reply Brief, and the brief was filed on June 28, 2011.

This Memorandum Decision shall constitute this Court's findings of fact and conclusions of law, pursuant to I.R.C.P. 52(a). Any of the following findings of fact that

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<sup>1</sup> The following exhibits were admitted into the record via stipulation of the parties: Plaintiff's Trial Exhibit Nos. 1, 3, 5-46, 50, 53-56, 64-65, 70-72, 77-78, 81, 88-89. Defendant's Trial Exhibits A, B, C, D, F, G, H, I, N, O, P, Q, R and S. The following exhibits were admitted via stipulation at trial: 57-61, 72, 91, 92, 96-97, 99-100, 102-104. Plaintiff's Exhibit No. 91 was not submitted for admission and was not admitted.

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

should be denominated as a conclusion of law shall be deemed to be a conclusion of law. Any of the following conclusions of law that should be denominated a finding of fact shall be deemed a finding of fact.

## **II. FINDINGS OF FACT**

1. This action relates to multiple parties involved in the design and construction of a golf course and residential project in Kootenai County, Idaho, commonly referred to as the Black Rock North Construction Project (“Project”). Defendant BRN Development owned the subject real property.<sup>2</sup> BRN Development intended to develop the Project as a high-end residential golf course community. The Project consisted of approximately one thousand (1000) acres located to the north and east of the original The Club at Black Rock development. The Project included the development of three hundred twenty-five (325) residential units segmented into a total of one hundred ninety-eight (198) single family detached lots, ranging in size from 0.9 acres to eleven (11) acres, and one hundred twenty-seven (127) residential units designed for cluster housing, town homes, and condominiums, and a golf course. The golf course traverses through the project and consists of approximately two hundred (200) acres of the one thousand (1000) acre parcel.

2. On January 6, 2009, Wadsworth filed its claim of mechanic’s lien against the entire real property that encompasses the Project. American Bank held a mortgage lien against the same real property (hereinafter the real property upon which American Bank and Wadsworth held competing liens shall be referred to as (“Property”)). The

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<sup>2</sup> On May 19, 2011, the Sheriff of Kootenai County, Idaho, sold the Project to American Bank for a high credit bid of \$18,682,767.78. See *Sheriff’s Certificate of Sale filed on June 7, 2011*.

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

principal amount of Wadsworth's claim of lien is \$2,329,439.72. The mechanic's lien was recorded in the Kootenai County Recorder's Office on January 6, 2009, as Inst. No. 2191381000. *Wadsworth's claim of lien was admitted as Plaintiff's Trial Exhibit No. 53 and Defendant's Trial Exhibit I.*

3. Wadsworth submitted a bid in the summer of 2006 for both construction of the golf course and to conduct mass excavation outside of the golf course boundaries. Ultimately ACI Northwest, Inc. ("ACI") was awarded a contract for the mass excavation and Wadsworth was awarded the contract for construction of the golf course on the Property.

4. On October 10, 2006, BRN Development entered into a letter of intent with Wadsworth, whereby Wadsworth was selected as the de facto general contractor for the golf course construction project. *The letter of intent was admitted as Plaintiff's Trial Exhibit No. 54 and Defendant's Trial Exhibit B.* Between October 2006 and January 2007, BRN Development and Wadsworth negotiated the terms of the final contract culminating in execution of the final contract on or about January 27, 2007 (hereinafter the final contract between Wadsworth and BRN shall be referred to as "Wadsworth Contract"). *The Wadsworth Contract was admitted as Plaintiff's Trial Exhibit No. 1 and Defendant's Trial Exhibit D.* The Wadsworth Contract required Wadsworth to perform certain obligations in exchange for payments from BRN Development.

5. Wadsworth commenced work in October 2006, and continued through December of 2006. The work included shaping two of the proposed eighteen golf holes. In December of 2006, weather halted Wadsworth's construction efforts.

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

6. Wadsworth obtained an Idaho Public Works Contractor's License from the Idaho Public Contractor's License Board on January 30, 2002, which expired on January 31, 2007. Wadsworth obtained a contractor registration license from the Idaho Bureau of Occupational Licenses on January 9, 2007, and this license expired January 9, 2011. *Admitted as Plaintiff's Trial Exhibit 81 and Defendant's Trial Exhibit N.*

7. On February 2, 2007, BRN Development and American Bank executed loan documents, whereby American Bank agreed to lend \$15 million to BRN Development for use in constructing the golf course and surrounding residential community. The loan documents consist of a Revolving Credit Agreement ("Credit Agreement"), a Revolving Credit Note ("Note"), and a Mortgage, Security Agreement and Fixture Filing ("Mortgage") (hereinafter the Credit Agreement, Note, and Mortgage shall be collectively referred to as the "Loan Documents"). *Admitted as Plaintiff's Trial Exhibit Nos. 37-39.* American Bank recorded the Mortgage with the Kootenai County Recorder's Office on February 6, 2007, as Inst. No. 2081643000. *Plaintiff's Trial Exhibit 39.*

8. The Loan Documents granted American Bank a first priority mortgage lien against the real property that is the subject of this action. Further, the Loan Documents required BRN Development to submit loan requests on a form prescribed by American Bank ("Loan Requests"). In those Loan Requests, BRN Development certified to American Bank that lien waivers had been obtained from any person who delivered labor, services, material or equipment to the real property prior to the date of the loan draw request. Over the period March 9, 2007, up through September 9, 2007, BRN

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER FOLLOWING COURT TRIAL

Development submitted seven (7) Loan Requests to American Bank, wherein BRN Development certified to American Bank in each of those seven draw requests that BRN Development had obtained lien waivers from any person who supplied labor, services, material or equipment to the Property prior to the date of the loan draw request. *The seven (7) Loan Requests were admitted as Plaintiff's Trial Exhibit Nos. 40-46.*

9. Wadsworth submitted twenty-five (25) payment applications to BRN Development for Wadsworth's work on the Project. *Admitted as Plaintiff's Trial Exhibit Nos. 3 and 5-28.* BRN Development did not submit any payments to Wadsworth as per the payment applications until Wadsworth submitted a lien waiver to BRN Development. On certain occasions, Wadsworth submitted a release on a form that was attached as Exhibit "B" to the Wadsworth Contract ("Golden Lien Releases"). On other occasions, Wadsworth submitted its own lien waiver that it had used on other construction projects ("Arizona Release"). The Golden Lien Releases contained the following language:

Upon receipt of payment of the sum of \$\_\_\_\_\_, the undersigned waives any and all right to any lien whatever and releases all rights to lien or claim any lien against the real property associated with the above Project by the undersigned in connection with any and all work or labor performed, materials, equipment, goods, or things supplied or furnished, or any other claims or obligations owed through the date shown above, on the above-named project.

The Arizona Releases contained the following language: "This release covers a progress payment for all labor, services, equipment or materials furnished to the jobsite or to Black Rock North Golf Course through [date] only and does not cover any retention, pending modifications and changes or items furnished after that date."

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

10. Each of the lien waivers submitted by Wadsworth with the first twenty (20) payment applications stated words to the effect that “upon payment of the sum of \$\_\_\_\_\_, Wadsworth agrees to . . . .” For the first twenty (20) payment applications, Wadsworth received payment from BRN Development for the full dollar sum that triggered BRN Development’s corresponding obligations in the lien waivers that it executed. Wadsworth’s payment application number twenty (20) and the Arizona Release associated with Wadsworth’s payment application number twenty (20) covered labor, services, materials, and equipment that Wadsworth provided to the Project up through July 31, 2008. *Wadsworth’s payment application number twenty (20) and the Arizona Release were admitted as Plaintiff’s Trial Exhibit No. 23.*

11. Wadsworth submitted six (6) Golden Lien Releases to BRN Development. *Admitted as Plaintiff’s Trial Exhibit Nos. 29-34.* Wadsworth received full consideration for each of the six (6) Golden Lien Releases that Wadsworth submitted to BRN Development. More specifically, for each of the six (6) Golden Lien Releases that Wadsworth submitted to BRN Development, BRN Development paid to Wadsworth the dollar sum that is referenced in each of the six (6) Golden Lien Releases. The date of the last Golden Lien Release is March 19, 2008. *The last Golden Lien Release was admitted as Plaintiff’s Trial Exhibit No. 34.*

12. While Wadsworth received payment in response to the first twenty (20) payment applications, BRN Development withheld 5% of the payment as a “retainage.” Through the first twenty (20) payment applications a total of \$343,985 in retainage accrued. The Wadsworth Contract, as modified, allowed BRN Development to hold 5%

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

back from each Wadsworth payment application as retainage. Wadsworth seeks to recover via foreclosure the total accrued retainage of \$343,985. Wadsworth claims that the retainage amount is for labor, services, equipment and materials that Wadsworth supplied to the Project prior to July 31, 2008.

13. The amount of unpaid retainage that had accrued prior to March 19, 2008, is \$257,043. Wadsworth also seeks to recover via foreclosure of its claim of lien an additional \$257,043, also related to labor, services, equipment and materials that Wadsworth supplied to the Project prior to March 19, 2008.

14. The amount of unpaid retainage that had accrued prior to Wadsworth obtaining its contractor registration license with the Idaho Bureau of Occupation Licenses on January 9, 2007, is \$8,638. Wadsworth seeks to recover via foreclosure of its claim of lien an unpaid retainage amount of \$8,638, related to labor, services, equipment and materials that Wadsworth supplied to the Project prior to January 9, 2007.

15. Wadsworth received payments totaling \$164,137 for labor, services, material, and equipment that Wadsworth supplied to the Project prior to Wadsworth obtaining its contractor registration license with the Idaho Bureau of Occupational Licenses on January 9, 2007.

16. Wadsworth received from BRN Development a \$1 million payment on or about October 30, 2008, and applied this amount as a partial payment on Wadsworth's payment application number twenty-one (21). Since that date, Wadsworth has received no further payments from BRN Development. BRN Development and Wadsworth agree

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

that the principal sum due and owing to Wadsworth in accordance with the Wadsworth Contract is \$2,329,439.72.

17. Wadsworth substantially completed the golf course on October 20, 2008, with final completion occurring on November 21, 2008.

18. Wadsworth subcontracted out a portion of the work that it was obligated to perform as per the Wadsworth Contract. On October 15, 2006, Wadsworth and Precision Irrigation, Inc. ("Precision") entered into a written subcontract agreement (the "Precision Agreement"). *Admitted as Plaintiff's Trial Exhibit No. 65 and Defendant's Trial Exhibit C.* The Precision Agreement obligated Precision to construct an irrigation system for the golf course. Precision billed Wadsworth for over \$2 million worth of work on the Project. Precision never obtained a contractor registration license with the Idaho Bureau of Occupational Licenses at any time. *See Plaintiff's Trial Exhibit 81.* Through its claim of lien, Wadsworth seeks to recover \$139,756.94 for an amount it owes to Precision for unpaid work Precision performed on the Project.

19. Wadsworth entered into a subcontract agreement with Concrete Finishing, Inc. ("Concrete Finishing") to install concrete golf cart paths (the "Concrete Finishing Agreement"). *Admitted as Plaintiff's Trial Exhibit No. 77.* Concrete Finishing obtained its contractor registration license from the Idaho Bureau of Occupational Licenses on September 11, 2007, fifteen days after it began work on the Project. *See Plaintiff's Trial Exhibit 81.* Wadsworth also contracted with Colorado Lining Construction, Inc. ("Colorado Lining"), which never obtained a contractor registration license.

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

20. Rick Sullivan, CEO of Precision, testified at the trial that Steven Harrell, President of Wadsworth, asked Mr. Sullivan if Precision was registered in the State of Idaho as a contractor before signing the Precision Agreement. Mr. Sullivan further testified that he informed Mr. Harrell that Precision was “in the process of registering” and later stated that Precision was registered in Idaho.

21. Mr. Harrell testified at the trial that Wadsworth never intended to circumvent Idaho’s contractor registration laws, and that he knew Wadsworth was registered, in some form, in Idaho. Further, Mr. Harrell testified that he was unaware that there was a requirement to register under the Idaho Contractor Registration Act (the “Contractor Act”) when he signed the letter of intent with BRN Development. He also testified that shortly after signing the letter of intent that he was informed that Wadsworth needed to register as a contractor under the Contractor Act, and he immediately began the registration process. Mr. Harrell testified that Wadsworth was registered as a contractor in January 2007. Mr. Harrell testified that he knew that the Project was *not* a public works construction project. Mr. Harrell testified that he did ask Mr. Sullivan if Precision was registered. The testimony shows that Mr. Harrell testified only that he asked if Precision was “registered,” not registered under the Contractor Act. Further, Mr. Harrell testified that he inquired of Colorado Lining about registration and was informed that Colorado Lining would “look into registration responsibilities.” Mr. Harrell also testified that he spoke with the president of Concrete Finishing in 2011, and informed Concrete Finishing that it needed to be in compliance with Idaho’s registration requirements. Mr. Harrell also testified that he has been involved in 200-300 golf course projects in the

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER FOLLOWING COURT TRIAL

course of his career, and that golf courses are designed to benefit and enhance the value of the entire residential project.

22. This Court recalls that American Bank questioned Mr. Harrell about his intent to evade the Contractor Act's registration requirements many times. Mr. Harrell was adamant that Wadsworth never intended to evade the registration requirements and he believed that Wadsworth was lawfully licensed to begin work in October 2006. This Court finds Mr. Harrell's testimony very credible.

23. At trial, Kyle Capps, BRN Development's Project Manager, testified that the business plan, and the hope of BRN Development, was that the golf course would add value to the Project.

24. At trial, Mr. Capps testified that BRN Development expected Wadsworth to use the lien waiver form that was attached to the Wadsworth Contract (the Golden Release), and that during contract negotiations Wadsworth never requested to use a different lien waiver form than was attached to the contract. Mr. Harrell testified that he did not know that the Golden Releases and the Arizona Releases had different language. Mr. Harrell also testified that he believed the Arizona Release form was a satisfactory replacement for the Golden Release forms. This Court finds Mr. Capps more credible on this issue because both Mr. Capps and Mr. Harrell signed the Wadsworth Contract and initialed the Golden Release form template that was attached the contract as Exhibit B.

### **III. CONCLUSIONS OF LAW**

Initially, the Court notes that an action to judicially foreclose a mechanic's lien is one in equity. *See Jensen v. Bumgarner*, 25 Idaho 355, 137 P. 529, 530 (1913). At trial,

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER FOLLOWING COURT TRIAL

counsel for both parties agreed that the burden of proof in this matter rests with Wadsworth, because Wadsworth desires to foreclose on its lien.

There are essentially four legal issues in dispute: (1) Is Wadsworth's claim of lien barred in whole or part because of its failure to register as a contractor under Idaho's Contractor Act?; (2) Is Wadsworth's claim of lien barred in whole or part because Wadsworth subcontracted with unregistered companies to perform work on the Project?; (3) Does Wadsworth's claim of lien sufficiently describe the real property that Wadsworth improved?; (4) Did Wadsworth waive its right to lien for retainage?

**A. The Idaho Contractor Registration Act**

Initially, Wadsworth argues that the Contractor Act does not render its lien void as Wadsworth was exempt from registration because it held an Idaho Public Works Contractor License when it began work in 2006. Alternatively, Wadsworth argues that if the Court holds that it was not exempt from registration, Wadsworth is entitled to a lien for work or labor it provided subsequent to registration on January 9, 2007.

American Bank argues that there is no good faith exemption from the Contractor's Act based upon lack of intent to evade the Contractor's Act. Additionally, at no time was the construction of the Project a public works project. As such, American Bank argues that Wadsworth's public works license and/or Wadsworth's lack of intent to evade the Contractor's Act did not exempt Wadsworth from the contractor registration requirement. American Bank also argues that Wadsworth claim of lien is barred in its entirety because Wadsworth was not registered under the Contractor's Act *at all times* it performed the work.

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER FOLLOWING COURT TRIAL

## 1. Wadsworth Was Not Exempt From The Contractor's Act.

The purpose of the Contractor's Act, which became effective January 1, 2006, is set forth in Idaho Code §54-5202, which states:

The legislature finds and declares that the practice of construction in the state of Idaho affects the public health, safety and welfare of its citizens. The legislature further finds that it is in the public interest to provide a mechanism to remove from practice incompetent, dishonest, or unprincipled practitioners of construction. To aid in fulfilling these purposes, this chapter provides for the registration of construction contractors within the state of Idaho.

The Contractor's Act also contains an exemption from registration found at I.C. §54-5205(1), which states as follows:

Nothing in this chapter shall be construed to restrict any person licensed, registered, or otherwise regulated by the state of Idaho from engaging in the profession or practice for which they are licensed, registered or otherwise regulated by the state of Idaho including, but not limited to, persons licensed pursuant to chapters 3, 10, 12, 19, 26, 45 and 50, title 54, Idaho Code, nor shall this chapter require such persons otherwise licensed, registered or regulated to obtain such registration as required by this chapter, so long as such person is not acting with the intent to evade this chapter. No such person exempt hereunder may hold himself out as a registered contractor.

I.C. § 54-5205(2) provides, in pertinent part and emphasis added:

In addition to the exemption set forth in subsection (1) of this section, registration as provided for in this chapter shall not be required for the following, so long as such person is not acting with the intent to evade this chapter **and so long as such person does not hold himself out as a registered contractor[]**.

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER FOLLOWING COURT TRIAL

This Court concludes that Wadsworth was not exempt from the registration requirements of the Contractor's Act when it began work on the Project for two reasons. First, Wadsworth was a registered Public Works contractor in 2006, but the Project was not a public works construction project. Therefore, the first part of the I.C. § 54-5205 exemption does not apply. Second, the exemption does not apply because, although this Court finds that Wadsworth did **not** act with the intent to evade as it was registered under I.C. § 54-1901, Wadsworth did hold itself out as a registered contractor when it executed the July 17, 2006, Contractor's Proposal and the September 18, 2006, Conditional Letter of Intent. *Wadsworth's Trial Exhibit A and Wadsworth's Trial Exhibit B*. The Proposal specifically states that Wadsworth, as contractor, was in compliance with all license requirements. *Wadsworth's Trial Exhibit A, at ¶ 3*.

Reading the two requirements together Wadsworth was not exempt from registering under the Contractor Act. Therefore, this Court reduces the amount of Wadsworth's claim of lien by \$8,638.00, the unpaid retainage owing under the Wadsworth Contract before Wadsworth registered under the Contractor Act's.

## **2. Wadsworth may collect on its post-registration work.**

The Idaho Statutes governing mechanic's and laborer's liens are to be liberally construed so as to effect their objects and to promote justice. *Metropolitan Life Insurance Company v. First Security Bank of Idaho*, 94 Idaho 489, at 493, 491, P.2d 1261 (1971). Likewise, in *Park-West Homes, LLC v. Barnson*, 149 Idaho 603, 283 P.3d 203, at 205 (2010) the Idaho Supreme Court stated that "[t]he mechanic's lien statutes are liberally construed in favor of those to whom the lien is granted, and to create a valid lien

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

the claimant must substantially comply with the statutory requirement." In *BMC West, Corp v. Horkley*, 144 Idaho 890, at 893, 174 P.3d 399 (2007), the Idaho Supreme Court stated, "[m]aterialman's lien laws are construed liberally in favor of the person who performs labor upon or furnishes material to be used in the construction of a building." Article VIII, Section 6 of the Idaho State Constitution mandates the State Legislature to provide by proper legislation for the giving to mechanics, laborers, and material men adequate liens on the subject of their labor.

Idaho Code § 54-5204 provides that it is unlawful for a person to engage in the business of a contractor without being registered. As such, contracts with an unregistered contractor would be illegal precluding the unregistered contractor from enforcing the contract.

Idaho Code § 54-5208 precludes the filing of a lien by a contractor who is not registered pursuant to the Contractor's Act. That statute provides:

A contractor who is not registered as set forth in this chapter, unless otherwise exempt, shall be denied and shall be deemed to have conclusively waived any right to place a lien upon real property as provided for in chapter 5, title 45, Idaho Code. This section shall not operate as a denial of lien rights for any subcontractor or independent contractor who is duly registered in accordance with this chapter and who is performing services at the direction of another contractor, nor shall it operate as a denial of lien rights for any employee of any contractor who is not duly registered, or for any supplier of materials to such unregistered contractor, so long as such subcontractor, independent contractor, employee or supplier did not have actual knowledge that such contractor was not duly registered, or who reasonably believed that such contractor was duly registered.

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

This section does not preclude Wadsworth from filing its lien in this matter because the facts establish that at the time the lien was filed, Wadsworth was duly registered.

This Court now turns to the issue of whether Wadsworth may foreclose its lien based upon work performed while not registered. Idaho Code § 54-5217(2) governs when actions may be brought to foreclose a lien. That section provides:

No person engaged in the business or acting in the capacity of a contractor, unless otherwise exempt, may bring or maintain any action in any court of this state for the collection of compensation for the performance of any act or contract for which registration is required by this chapter without alleging and proving that he was a duly registered contractor, or that he was otherwise exempt as provided for in this chapter, at all times during the performance of such act or contract (emphasis added).

Both parties extensively argue that *ParkWest Homes, LLC v. Barnson*, 149 Idaho 603, 238 P.3d 203 (2010), supports the respective positions.

In *ParkWest*, the contractor filed a claim of lien for its unpaid work. The facts established that the contractor was not registered at the time it entered into a contract. However, the contractor was registered during the construction. The district court dismissed the contractor's claims to foreclose its mechanic's lien, holding Idaho Code § 54-5204 barred the contractor's suit because it was not registered at the time it entered into the construction contract and thus its contract was illegal and void. The Idaho Supreme Court reversed.

First, the Idaho Supreme Court noted that the contractor entered into a written contract on March 27, 2006, but the contractor registered on May 2, 2006. However, the contractor did not commence construction on the project until May 22, 2006. The Idaho Supreme Court reversed, holding that the landowner ratified the contract by allowing the

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

contractor to perform and that the contract was legal and enforceable because the contractor “was registered under the Contractor Act at all times during the period that it furnished work or labor or supplied materials in constructing Barnson’s house.” *ParkWest*, 149 Idaho at 608-09, 238 P.3d at 208-09. In reversing the district court, the Idaho Supreme Court held that applying Idaho Code § 54-5208, “the contractor is denied a lien for work or labor done or materials furnished in the construction during the period that the contractor is not registered.” *Id.* at 608, 238 P.3d at 208. Further the Court stated that “the uncontroverted evidence was that ParkWest was registered under the Contractor Act at all times during the period that it furnished work or labor or supplied materials in constructing Barnson’s house. . . .” *Id.* at 609, 238 P.3d at 209. But, the Court also noted that “to hold otherwise would mean that a contractor who violated the Act would be forever barred from obtaining a mechanic’s lien.” *Id.*

In this action, Wadsworth was not registered “at all times during the period that it furnished work or labor or supplied materials in constructing [the golf course]” as required by Idaho Code § 54-5217(2), but the *ParkWest* decision provides some guidance. Another district court also analyzed a similar situation, pre-*ParkWest*, and this Court also finds that analysis instructive. In *MWSH Idaho Falls, LLC v. Lupton*, Bonneville County Case No. CV-09-224<sup>3</sup>, the district court wrote:

In this case, the statutory language clearly provides that Defendant may not seek to foreclose a lien on the property based upon work performed while not registered under the Act. Such a foreclosure action is precluded by the statute. The more difficult issue is whether Defendant, under the

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<sup>3</sup> This Court discovered Judge Tingey’s decision on the District Court (KM) decision bank. At the conclusion of the trial, copies of the decision were provided to the parties’ counsel and they were asked to review the decision and discuss its application to the present matter.

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

circumstances of this case, is entitled to foreclose on a lien for work performed after it became registered.

Again, Plaintiff argues for a statutory interpretation to the effect that if a contractor is unregistered at anytime during a given project, that contractor is not entitled to any recovery for work performed, even work performed after registration. The Court finds a number of problems with such an interpretation and further finds the clause "at all times during the performance of *such act or contract*" in § 54-5217(2) to be ambiguous.

As set out above, statutes should be interpreted to prevent harsh or absurd results. Under Plaintiff's argument, a contractor who fully performed on a contract would not be entitled to recover if for example, its registration was not completed until after the first day of construction. Under this interpretation, non-registration for one hour or even one minute of performance would entirely preclude recovery under a lien. The Court finds such an interpretation and result unreasonable.

Additionally, the penalty provision of § 54-5217 must be construed harmoniously with § 54-5204 regarding illegal contracts, and § 54-5208 which allows the filing of a lien as long as the contractor is registered. In cases such as this, the performance or contract may be divided into pre-registration performance/contract and post-registration performance/contract. Under § 54-5204, post-registration performance/contract is not illegal.

...

Additionally, as previously indicated § 54-5208 does not preclude the filing of a lien as long as the contractor is registered. If under Plaintiff's argument a registered contractor is precluding from foreclosing on a lien because the contractor performed some work while unregistered, the filing of a lien as allowed by § 54-5208 would be meaningless and § 54-5208 would be superfluous. For purposes of construing the statutes harmoniously, the Court finds that under the statutes, a contractor who is registered may file a lien, and then foreclose on the lien for work performed while registered.

Finally, it is important to consider the purpose of the statutory scheme. As set out in I.C. § 54-5202, the purpose of the statute is to

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER FOLLOWING COURT TRIAL

“provide a mechanism to remove from practice incompetent, dishonest, or unprincipled practitioners of construction.” The pending motion is not based upon allegations of incompetency or dishonesty. No purpose or policy is served by precluding recovery by a registered contractor for work performed while registered. Preventing foreclosure of a lien for work performed while registered would instead be unreasonably punitive.

In the present case, if this Court were to adopt American Bank’s interpretation of the Contractor Act, Wadsworth would suffer an unreasonably punitive result. Therefore, this Court, guided by *ParkWest* and *MWSH Idaho Falls*, concludes as a matter of law that Wadsworth is **not** barred from bringing or maintaining any action to collect compensation for any work or labor or material it supplied to BRN Development in constructing the Project.

**B. Unregistered Subcontractors**

American Bank argues that Wadsworth’s claim of lien should be invalidated because Wadsworth used unregistered subcontractors while performing work on the Project. Wadsworth argues that it obtained satisfactory proof (oral representations) that all of its subcontractors were registered and therefore its claim of lien is valid. Further, Wadsworth argues that it is not seeking recovery as to the pre-registration work performed by Concrete Finishing or Colorado Lining, as Wadsworth has been paid for that work. Wadsworth only seeks payment for Precision’s work in the amount of \$139,756.94.

I.C. § 54-5204(2) provides:

It shall be unlawful for a contractor to engage any other contractor who is required by this Chapter to be registered as a contractor unless such other contractor furnishes satisfactory proof to the contractor that he is duly registered under the provisions of this Chapter.

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

Wadsworth argues that certain oral statements made by Precision to Mr. Harrell representing that Precision was registered or was in the process of registering constitutes “satisfactory proof” sufficient to satisfy the requirements of I.C. § 54-5204(2). Wadsworth’s argument fails because: (1) it is not a reasonable interpretation of the Contractor Act that is consistent with the purposes of the Contractor Act; and (2) it fails to give consideration to other applicable provisions of the Contractor Act.

First, Wadsworth’s argument is not a reasonable interpretation that is consistent with the policy of the Act because it ignores the testimony of its president Stephen Harrell, who admitted at trial that there is other more reliable proof of registration, such as registration certificates or wallet-size registration cards, online registration searches that are open and available to the public on the State of Idaho’s webpage, or calling the Idaho Bureau of Occupational Licenses.

When pressed on cross examination, Mr. Harrell conceded that in retrospect he wished he would have checked these more reliable sources before engaging Precision, a contractor for this Project. Further, Wadsworth’s interpretation of the phrase “satisfactory proof” cannot satisfy the legal framework for statutory interpretation because it would allow general contractors to engage unlicensed subcontractors merely by taking them for their word, which is inconsistent with the stated purpose of the Act to “. . . remove from practice incompetent, dishonest, or unprincipled practitioners of construction.” *See* I.C. § 54-5202.

Second, Wadsworth’s argument ignores I.C. § 54-5214, which imposes affirmative disclosure obligations upon a contractor to prove its registration under the

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER FOLLOWING COURT TRIAL

Act. Those affirmative disclosure obligations include the following: “[a] contractor registered pursuant to this chapter shall prominently display his contractor registration number for public view in his place of business, on advertising, contracts, permits, company or business letterheads, and purchase orders and subcontracts within sixty (60) days of issue of registration.” See I.C. § 54-5214(2).

Therefore, because I.C. § 54-5214(2) requires written proof of a contractor registration number, this Court concludes that an oral representation that one has registered under the Contractor Act cannot constitute “satisfactory proof,” and Wadsworth engaged in unlawful activity by failing to obtain “satisfactory proof” of Precision’s, Colorado Lining’s, and Concrete Finishing’s registration under the Act.

The next issue that this Court must determine is what effect Wadsworth’s unlawful activity has on its lien.

American Bank asks this Court to adopt the district court’s holding in *Prowall Drywall & Insulation, Inc. v. Plainridge*, Ada County Case No. CV-0C-2009-01225. In *Prowall*, the district court held that a contractor’s lien was invalid because of the contractor’s use of an unregistered subcontractor.

This Court declines to adopt the reasoning or result of this decision because to do so would result in the inequitable remedy of eviscerating Wadsworth’s claim of lien in its entirety and such a result does not promote justice and does not liberally construe Idaho’s mechanic’s lien statutes in Wadsworth’s favor. The more equitable remedy is to reduce the lien by the amount of unpaid invoices owing to the unregistered subcontractors.

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

Therefore, this Court concludes that Wadsworth's lien is not invalid as it utilized un-registered subcontractors to perform work on the Project. Further, this Court concludes that as only Precision has unpaid invoices remaining, Wadsworth's lien shall be reduced by \$139,756.94.

**C. Sufficient Description**

American Bank argues that Wadsworth failed to carry its burden of proving that it provided this Court with sufficient evidence of an adequate description of the real property upon which Wadsworth's lien rests. As a result, American Bank argues, that Wadsworth's lien is invalid. American Bank makes three arguments: (1) pursuant to I.C. § 45-507(b)(2), Wadsworth must prove that, at the time the original claim of lien was filed in 2008, the legal description of the lien provided sufficient identification; (2) pursuant to I.C. § 45-505, Wadsworth must prove that, at the time of entry of judgment by this Court, this Court had sufficient factual evidence to include the appropriate legal description in its final judgment; and (3) pursuant to I.C. § 45-508, Wadsworth must apportion its lien against the different parcels of the Project.

Wadsworth argues that as to the first issue, American Bank is precluded from raising this issue because the parties stipulated that Wadsworth's claim of lien and American Bank's Mortgage encompassed the entire Project. Wadsworth also argues that this Court should determine the extent of the property embraced by the lien, that the claim of lien is not overly broad, and Wadsworth's claim of lien is valid because Wadsworth performed work that benefited the entire Project (i.e. 1,000 acres).

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

“Stipulations . . . are regarded with favor by the courts and will be enforced unless good cause to the contrary is shown.” Kohring v. Robertson, 137 Idaho 94, 99, 44 P.3d 1149, 1154 (2002), *citing* Conley v. Whittlesey, 126 Idaho 630, 633, 888 P.2d 804, 807 (Ct.App.1995) (further citations omitted). “A stipulation is a contract. The enforceability of a stipulation is determined by contract principles.” Olson v. Idaho Dept. of Water Resources, 105 Idaho 98, 100, 666 P.2d 188, 190 (1983) (citation omitted).

Before trial commenced, the parties filed Stipulated Findings of Fact agreeing that Wadsworth’s claim of lien and American Bank’s Mortgage encompassed “the entire 1000 acres.” At trial, neither party argued that the competing liens contained different legal descriptions. However, on June 7, 2011, American Bank filed the Affidavit of Keri A. Moody, which included the Mortgage and claim of lien with the legal descriptions marked with differing coloring. While this document is interesting, the parties were clearly in agreement that the Mortgage and the claim of lien encompass the same property. Given the clarity of the agreement between the parties, and the respect for contract principles, this Court declines to consider the marked up documents and determines that American Bank is prohibited from making this argument post-trial.

The central issue before this Court is whether or not Wadsworth’s lien was valid and the amount due and owing under the lien. Idaho Code § 45-508 provides:

In every case in which one (1) claim is filed against two (2) or more buildings, mines, mining claims, or other improvements, owned by the same person, the person filing such claim must, at the same time, designate the amount due him on each of said buildings, mines, mining claims, or other improvement; otherwise the lien of such claim is postponed to other liens. The lien of such claim does not extend beyond the amount designated as against other

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

creditors having liens by judgment, mortgage, or otherwise, upon either of such buildings, or other improvements, or upon the land upon which the same are situated.

In *Treasure Valley Plumbing & Heating v. Earth Resources Company*, 106 Idaho 920, 684 P.2d 322 (Ct. App. 1984), a plumbing contractor provided plumbing work to different structures and improvements at the Delamar Silver Mine. The court found that a claim of lien on the entire silver mine did not violate Idaho Code § 45-508 even though it did not describe each and every building or other form of improvement where plumbing work was performed. Further, the Court provided that the Idaho Supreme Court in *Chief Industries, Inc. v. Schwendiman*, 99 Idaho 682, 587 P.2d 823 (1978), explicitly recognized that a claim of lien may include more property than the lien ultimately is determined to cover. *Treasure Valley*, 106 Idaho at 924, 684 P.2d at 326.

In looking at the map (Wadsworth's Trial Exhibit H) of the Black Rock North Conceptual Plan, it is very difficult to believe that BRN Development did not intend for the golf course to benefit the entire 1,000 acre project, although it only encompassed approximately 200 acres. The golf course is centrally located in the Project and the roadways all traverse around and through the course. Therefore, this Court concludes that the course benefited the entire Project and that the lien is not too broad. As a matter of law, then Wadsworth's claim of lien is valid and provides sufficient information about the scope of the real property to which the lien applies.

#### **D. Lien Waiver Forms**

American Bank argues that Wadsworth is bound by the language of the Golden Release to July 31, 2008, the date of Wadsworth's last payment application paid in full,

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

because the Wadsworth Contract required Wadsworth to only submit Golden Lien Release forms and Wadsworth submitted the Arizona Release with its last payment application. As a result, Wadsworth's claim of lien should be reduced by the \$343,985.00 it seeks to recover for work performed prior to July 31, 2008. Alternatively, American Bank argues that Wadsworth was contractually bound by the last Golden Release it executed on March 19, 2008. That release waived any and all right to any lien Wadsworth claims against the property through March 19, 2008, namely the withheld retainage for any labor, services, material or equipment in the amount of \$257,043. Further, American Bank argues that it has standing to enforce the Golden Release.

Wadsworth argues that it did not contractually waive any lien rights for retention because the Wadsworth Contract only required the submission of a lien release form satisfactory to BRN Development. Further, Wadsworth and BRN Development intended, either expressly or via mutual mistake, that regardless of the lien release form used, BRN Development would not retain 5% from any future payment. Lastly, Wadsworth argues that American Bank is not a third-party beneficiary to the Wadsworth Contract and lacks standing to argue that Wadsworth waived its lien rights for retainage.

**1. American Bank has standing to enforce the provisions of the Golden Release and the Contract.**

Wadsworth had two options to recover any unpaid amounts owing for its work on the Project: (1) it could have brought an action to recover its debt against BRN Development, the party it contracted with, outside the lien foreclosure statute (I.C. § 45-515); or (2) it could have brought an action to recover under the lien foreclosure statute (I.C. § 45-501, *et seq.*). Here, Wadsworth proceeded under the second option which is an

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

*in rem* action. Because Wadsworth has chosen to collect its debt from the *res*, American Bank, as a competing mortgage lienhold creditor to the same *res*, has the right to contest the validity and amount of Wadsworth's claim of lien.

Further, Idaho law supports American Bank's assertion that, regardless of its status as a third party beneficiary, it has the right to contest the validity and amount of Wadsworth's claim of lien, including binding Wadsworth to the terms of the Golden Releases. First, Idaho's mechanic lien statutes give American Bank standing as follows: "[a]ny number of persons claiming liens against the same property may join in the same action. . . ." See I.C. § 45-513. Likewise, Idaho's mortgage foreclosure statute gives American Bank standing to contest the validity and amount of Wadsworth's lien.

In any suit brought to foreclose a mortgage or lien upon real property or a lien on or security interest in personal property, the plaintiff, cross-complainant or plaintiff in intervention may make as party defendant in the same cause of action, any person having, claiming or appearing to have or to claim any title, estate, or interest in or to any part of the real or personal property involved therein, and the court shall, in addition to granting relief in the foreclosure action, determine the title, estate or interest of all parties thereto in the same manner and to the same extent and effect as in the action to quiet title.

See I.C. § 45-1302.

As for the amount of Wadsworth's claim of lien, Idaho's mechanic lien statutes expressly provide that the Court must limit such lien to the amount Wadsworth is entitled to recover "according to the terms of his contract." I.C. § 45-511 ("The original or subcontractor shall be entitled to recover, upon the claim filed by him, only such amount as may be due to him according to the terms of his contract. . .") (emphasis added);

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

*Steltz v. Armory Co.*, 15 Idaho 551, 99 P. 98, 101 (1915) (“Of course the extent of the lien when he comes to foreclose it must be measured by the amount found due him on his contract at the time of filing his lien.”). Thus, applying Idaho’s mechanic lien statutes and Idaho’s mortgage foreclosure statutes, American Bank may contest both the validity and amount of Wadsworth’s claim of lien, as part of such foreclosure proceeding and bind Wadsworth to its contractual obligation to use the Golden Releases.

Alternatively, American Bank qualifies as a third party beneficiary of Wadsworth’s contract with BRN Development. The test for determining a party’s status as a third-party beneficiary is whether the agreement reflects an intent to benefit the third party. See I.C. § 29-102; *Partout v. Harper*, 145 Idaho 683, 687, 183 P.3d 771, 775 (2008). Further, the Idaho Supreme Court has enumerated a variety of factors to be considered by the Court when determining if a party is a third party beneficiary.

In order to recover as a third party beneficiary, it is not necessary that the individual be named and identified as an individual although that is usually sufficient; a third party may enforce a contract if he can show he is a member of a limited class for whose benefit it was made. The class may be limited either by a narrow description of the injuries to be guarded against and the damages to be paid, or by a similar description of the class to be protected.

*Just’s, Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 464, 583 P.2d 997, 999 (1978)

As was established at trial through the testimony of Mr. Capps, the Golden Release form was incorporated by reference into Wadsworth’s contract with BRN Development. Further, Mr. Capps testified that BRN Development’s contract required Wadsworth to submit a Golden Release with each payment application it submitted to BRN Development. Further, Mr. Capps testified that: (1) that BRN Development never

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

agreed to accept the Arizona lien releases in lieu of a Golden Release; (2) that BRN Development never waived or agreed to modify Wadsworth's contractual obligation to submit a Golden Release with each payment application; and (3) that Wadsworth never provided additional consideration to effectuate any modification to the contract and thereby allow the use of the Arizona Release in lieu of the Golden Release.

Further, while the language of the Golden Release form does not expressly identify American Bank, it does reflect a waiver or modification of lien rights that is expressly intended to benefit a lien holder. More specifically, the Golden Release form states, "upon receipt of the payment stated above, the undersigned agrees that any lien that may be filed for work performed after said date will only have lien priority from and after the date stated above and will be subordinate to *any liens or encumbrances attaching to the subject property prior to said date.*" *Plaintiff's Trial Exhibit 1 at p.21* (emphasis added). Pursuant to that language, Wadsworth agreed to subordinate its lien priority date to other third party liens that attached to the property prior to the date inserted in the Golden Release. The other language in the Golden Release that waives all lien rights for "all work or labor performed, materials, equipment, goods, or things supplied or furnished, or any other claims or obligations owed through the date shown above," is consistent with the aforementioned subordination clause. The waiver language is consistent because it ensures that Wadsworth cannot lien for work prior to the date inserted in each Golden Release and, thus, cannot claim priority to any lien or encumbrance attaching to the property prior to the date inserted in the Golden Release.

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER FOLLOWING COURT TRIAL

Finally, the Golden Release by its express terms included such subordination and waiver terms for the express benefit of “any liens or encumbrances attaching to the subject property prior to said date,” including American Bank’s mortgage lien. While BRN Development on the one hand entered into a construction contract with Wadsworth that required the use of the Golden Release, BRN Development on the other hand entered into a written loan contract with American Bank that (1) granted American Bank a first priority mortgage lien against the property upon which Wadsworth was making improvements and (2) required BRN Development to certify that it had obtained a lien waiver from its contractors like Wadsworth as BRN Development paid such contractors with the loan proceeds advanced by American Bank.

Lastly, in applying *Just’s* criteria for third party beneficiary status to the facts at hand, American Bank is a third party beneficiary because the aforementioned language of the Golden Release (1) gives a narrow description of the injuries to be guarded against and the damages to be paid and (2) identifies the limited class benefitted.

Therefore, this Court concludes that under Idaho’s mechanic lien statutes and mortgage foreclosure statute, American Bank has standing to enforce the terms of the Wadsworth Contract including the Golden Releases. Alternatively, American Bank qualifies as a third party beneficiary of Wadsworth’s contract with BRN Development.

**2. The March 19, 2008, Golden Release waived Wadsworth’ lien rights for retention and Wadsworth was contractually obligated to submit a Golden Release form with each payment request.**

The evidence admitted at trial establishes that on or about April 11, 2008, Wadsworth received payment of \$242,430.86 from BRN Development, the same amount

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

referenced in the last Golden Release. Further, Wadsworth concedes that the amount of unpaid retainage that had accrued prior to the effective date of the last Golden Release, i.e., up through March 19, 2008, is \$257,043, and that \$257,043 of the \$2,329,439 that Wadsworth seeks to recover via foreclosure of its claim of lien is for unpaid retainage related to labor, services, equipment, and materials that Wadsworth supplied to the Project prior to March 19, 2008. Finally, Wadsworth concedes in its post-trial brief that, “[o]n its face, the BRN prepared form could be read to waive any lien rights for retention.” *Wadsworth’s Post Trial Brief at p. 14.*

Given the aforementioned evidence and applying the last Golden Release according to the plain meaning of the words used therein, this Court concludes that Wadsworth’s claim of lien should be reduced by at least \$257,043, as Wadsworth waived its right to lien for any labor, services, material, or equipment provided to the Project prior to March 19, 2008, and Wadsworth concedes that \$257,043 of its claim of lien is for labor, services, equipment, and materials supplied to the project prior to March 19, 2008.

Wadsworth’s other arguments advanced to nullify the legal effect of the last Golden Release are without merit. First, Wadsworth mischaracterizes American Bank’s waiver argument by suggesting that American Bank is arguing that the Golden Release waived Wadsworth’s right to recover retainage that accrued prior to March 19, 2008. That is not American Bank’s argument. American Bank is simply arguing that Wadsworth waived its right to *lien* for any unpaid labor, services, material, and equipment supplied to the Project prior to March 19, 2008, which by its very nature would include unpaid retainage that accrued prior to March 19, 2008. But American

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER FOLLOWING COURT TRIAL

Bank is not arguing that the waiver barred Wadsworth from bringing other claims, such as a breach of contract claim against BRN Development, for payment of any unpaid retainage. Thus, the fact that BRN Development paid Wadsworth for surplus retainage, some of which accrued prior to March 19, 2008, has no bearing on the legal effect of the last Golden Release or American Bank's argument about the same.

Second, Wadsworth argues that by signing the last Golden Release, Wadsworth did not intend to waive its right to lien for its unpaid retainage that accrued prior to March 19, 2008, due to mutual mistake. Mr. Capps testified that Wadsworth was contractually obligated to execute and deliver a Golden Release with each payment application that Wadsworth submitted to BRN Development and that by doing so Wadsworth was bound by the language contained in such Golden Release. Thus, there is no evidence to support a finding of a mutual mistake of fact that gives this Court grounds to excuse Wadsworth from the legal effect of the Golden Release.

To the extent that Wadsworth offers Harrell's testimony about his understanding of the meaning or legal effect of the Golden Release, that evidence is irrelevant as there is no argument that the waiver language contained in the last Golden Release is ambiguous and, thus, any such parol evidence will not be considered by the Court.

Third, Wadsworth argues that the Golden Releases should fail for lack of consideration. It is true that the general rule in Idaho, as well as all other jurisdictions, is that "an express waiver of a [materialman's] lien must be supported by consideration in order to be effective and binding." *Pierson v. Sewell*, 97 Idaho 38, 42-43, 539 P.2d 590, 594-595 (1975), citing *McCorkle v. Lawson*, 259 S.W.2d 27 (Ky.Ct.App.1953) and

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER FOLLOWING COURT TRIAL

*Beebe Const. Corp. v. Circle R. Co.*, 10 Ohio App.2d. 127 226 N.E.2d 573 (1967). Where such consideration fails, the lien waiver is of no effect. *Pierson*, 97 Idaho at 43, 539 P.2d at 595, citing *10 Thompson on Real Property* (1957).

*Beebe Const. Corp. v. Circle R. Co.* has been adopted in multiple jurisdictions, and cited by the Idaho Supreme Court in *Pierson*. In *Beebe*, the plaintiff performed work for the defendant and the defendant agreed to pay for labor and materials. *Beebe*, 226 N.E.2d at 577, 10 Ohio App.2d at 132. The plaintiff also signed lien waivers and received payment for work and materials in return. *Id.* The *Beebe* court announced that “a waiver of a mechanic’s lien in consideration of payments made by an owner or contractor, which he is legally bound to pay to the claimant, does not constitute valuable consideration so as to make the lien waiver effective and binding.” *Id.* Later in *Steveco, Inc., v. C&G Investments Associates*, 1977 WL 20036, the Court of Appeals of Ohio affirmed *Beebe*, concluding that unless there is a lien waiver provision in the contract between the parties, the lien waiver must be supported by independent consideration.

In the present case, there is a lien waiver provision in the Wadsworth Contract. Further, Wadsworth’s argument is directly contrary to the parties’ stipulated findings of fact, wherein Wadsworth conceded that “Wadsworth received full consideration for each of the six (6) Golden Lien Releases that Wadsworth submitted to BRN.” Consideration was also provided by Wadsworth contractually agreeing to use the Golden Releases as part of its bilateral contract with BRN.

This Court also concludes that the reduction to Wadsworth’s claim of lien should actually be \$343,985, because Wadsworth's payment application number 20, covering

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

Wadsworth's work up through July 31, 2008, was paid in full. Thus, even though Wadsworth submitted an Arizona Release with its payment application number 20, Wadsworth is contractually obligated to submit a Golden Release that should have waived its lien rights for work performed prior to July 31, 2008. Additionally, a reduction of Wadsworth's lien by \$343,985 is appropriate because Wadsworth admits that "\$343,985 of the \$2,329,439 that Wadsworth seeks to recover via foreclosure of its claim of lien is for unpaid retainage related to labor, services, equipment and materials that Wadsworth supplied to the Project prior to July 31, 2008."

This Court will also not deduct from the \$343,985 the \$8,638 (for Wadsworth's pre-registration retainage and the \$6,987.80 (the 5% retainage for Precision's work) because neither were registered at the time of the retention.

#### **IV. CONCLUSION**

Wadsworth was not exempt from registering under the Contractor Act when it performed work on the Project beginning in October 2006, until it registered in January 2007. Therefore, Wadsworth is not entitled to its claim of \$8,638.00, the unpaid retainage owing under the contract before Wadsworth lawfully registered.

Wadsworth's lien is effective for work it performed while it was registered. To hold otherwise would create an unreasonably punitive result that would violate public policy and discourage contractors from registering.

Wadsworth's reliance on oral representations by its subcontractors that they were lawfully registered, as required of the Contractor Act, does not constitute furnishing satisfactory proof that the subcontractor is lawfully registered. This does not, however,

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER FOLLOWING COURT TRIAL

invalidate Wadsworth's claim of lien in its entirety, but the lien is reduced by the amount owing to Wadsworth for Precision's work on the Project by \$139,756.94. Further, Wadsworth may not deduct the 5% retainage (\$6,987.80) owed to Precision, as Precision never complied with the Contractor Act's registration requirements.

Wadsworth's claim of lien is not too broad as the golf course that Wadsworth constructed benefited the entire 1,000 acre project. Further, the lien provides sufficient information to support Wadsworth's foreclosure of its lien. Therefore, Wadsworth's claim of lien is a valid.

American Bank has standing to enforce the Golden Lien Releases. Wadsworth waived its rights to collect retainage because it was contractually bound to utilize only the Golden Lien Release forms. As such, Wadsworth's claim of lien amount is reduced by \$343,985.00.

Therefore, Wadsworth had a valid lien at the time the bond was posted and this Court issued its order. The amount due and owing on the lien, minus deductions as provided above, is \$1,845,697.78.<sup>4</sup>

#### **V. ORDER**

NOW, THEREFORE, it is hereby ORDERED that:

1. Wadsworth's claim of lien is valid.
2. The amount due and owing from BRN Development to Wadsworth is \$1,845,697.78.

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<sup>4</sup> \$2,329,439.72 - \$139,756.94 (Precision's unregistered work) - \$343,985 (waived retainage, with no reductions for retainage during while Wadsworth and Precision were unregistered) = \$1,845,697.78.

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

3. This Court orders post-judgment interest in the amount of 12 % per annum (\$765.84 per day) until paid.
4. Wadsworth may have judgment for said sums as against the bond posted in this matter by American Bank (see February 2, 2011, Memorandum Decision and Order).
5. This Court makes no determination as to the issues of pre-judgment interest, costs and fees, which may be addressed in post-trial motions.
6. Wadsworth shall timely present this Court with a judgment consistent with this Memorandum Decision and Order and I.R.C.P. 54(a).

DATED this 22 day of August, 2011.



John P. Luster  
District Judge

MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER FOLLOWING COURT TRIAL

**CERTIFICATE OF SERVICE**

I certify that on this 22 day of August, 2011, I caused a true and correct copy of MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL AS TO AMERICAN BANK'S AND WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST'S CLAIMS to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

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MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

