

65608-2

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NO. 65608-2

THE COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON,

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STONEWOOD DESIGN, INC.,  
a Washington corporation,

Respondent,

v.

HERITAGE HOMES, INC. DBA OF WASHINGTON d/b/a INFINITY  
HOMES, a Nevada corporation; RICHARD J. GRETSCH and  
MICHELLE H. GRETSCH,

Appellants,

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On appeal from the Superior Court of King County,  
Cause No. 08-2-20278-8 SEA,  
the Honorable Mary Yu presiding

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RESPONDENT'S BRIEF

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## I. INTRODUCTION

Alleging form over substance, the main issue raised by appellants is whether a judgment allowing Stonewood Design, Inc. (“Stonewood Design” or “Stonewood”) to enforce its lien against a release of lien bond fails because the word “execute,” and not “foreclosure,” appears in the judgment. Continuing a pattern of broken promises, empty excuses, obstruction and needless litigation, this frivolous appeal extends a dispute that started in May 2008 when Infinity refused to pay Stonewood’s \$9,148.00 construction claim and refused several offers to compromise. Nearly two years later, after the parties incurred more than \$190,000 in combined attorney fees, Infinity continues to assert baseless claims to prolong the litigation and increase Stonewood’s fees and costs to collect on the contract debt a jury and superior court judge found Infinity Homes justly owes Stonewood.

When this dispute began, Infinity’s intransigence forced Stonewood to file a lien and commence a lawsuit to foreclose that lien. Stonewood sued for breach of contract and lien foreclosure against the general contractor it contracted with (Infinity Homes), the bond company (CBIC), and the property owner (Richard and Michelle Gretsch – owners and officers of Infinity). Instead of settling the claim, appellants played

litigation hardball, filing counterclaims that lacked merit, even disputing Infinity's liability under the contract.

After a four-day trial, a jury found in favor of Stonewood *on all issues* (appellants did not prevail on anything), rejecting all of appellants' arguments and counterclaims. Having reviewed the evidence, extensive briefing and oral argument, the trial court correctly awarded Stonewood a judgment on its lien, ruling it was valid and enforceable and rejecting appellants' claims to the contrary. The trial court ordered that Stonewood has the right to enforce its judgment against CBIC release of lien bond S10245, limited to the amount of the bond (\$18,296.00).

Disregarding the record below and lacking supporting authority, appellants (only the Gretsches and Infinity, but not CBIC) contend the judgment is nevertheless ineffective to allow Stonewood to be paid from the CBIC release of lien bond. Appellants allege that although it says that Stonewood may execute upon the release of lien bond, it is not titled a "decree of foreclosure" and does not explicitly recite Stonewood's lien is "foreclosed." Washington law does not require such language in a judgment on a lien. In a case on point, *DBM Consulting Engineers, Inc.*, 142 Wn. App. 35, 170 P.3d 592 (2007), the court found that it only requires an adjudication of the validity of the lien, which appellants concede happened below. Since the record does not support their claims,

and also because they have no standing to assert defenses of the surety, CBIC (a defendant below that elected not to appeal), this appeal by Infinity and the Gretsches should be denied as a matter of law under *DBM Consulting Engineers*.

This Court should affirm the trial court's judgment on the lien that authorizes Stonewood's judgment to be paid from the CBIC release of lien bond. Further, this Court should award reasonable attorney fees and costs to Stonewood for having to respond to an appeal entirely devoid of merit.

## II. RESTATEMENT OF ISSUES

1. This Court decided in *DBM Consulting Engineers* that to recover payment from a release of lien surety bond, the lienholder must first litigate and obtain an adjudication of the validity of its lien. Appellants admit that (a) Stonewood recorded a lien against the property and then sought foreclosure of that lien in its complaint, (b) the lien was placed into evidence by Stonewood, (c) the trial court adjudicated the validity and enforceability of Stonewood's lien, and (d) the court entered a judgment in favor of Stonewood on the lien and ordered that Stonewood has the right to execute against the lien release bond. Did the trial court err when it entered judgment against CBIC release of lien bond S10245?

2. Under RCW 60.04.161 and *DBM Consulting Engineers*, does the trial court's use of the term "execute" and the absence of the

word “foreclosure” in the judgment relieve the surety from its obligation to pay Stonewood on the release of lien bond as ordered by the court?

3. Appellants failed to raise these issues with the trial court, never claiming the trial court could not enter judgment against the release of lien bond or that the court should award them attorney fees pursuant to RCW 60.04.181(3). On appeal, appellants fail to argue and cite to the record for many, if not all, of the listed assignments of error. (App. Br. 4) Also, appellants have no standing to argue defenses of the surety, CBIC, on its release of lien bond. Do these procedural errors bar appellants from pursuing this appeal?

4. Should this Court award attorney fees and costs to Stonewood and, if warranted, sanctions against the appellants and their attorneys in light of the lack of supporting authority, abandonment of assignments of error listed in appellants’ brief and lack of citation to the record to support them, failure to raise these issues with the trial court, and misrepresentation of the proceedings below attempting to squeeze this appeal into the facts of *DBM Consulting Engineers*?

### III. STATEMENT OF FACTS

**A. Stonewood performed services for Infinity on the Gretsch residence resulting in an unpaid balance of \$9,148. When appellants refused to pay, Stonewood was forced to file a lien and start a lien foreclosure action in superior court.**

Respondent Stonewood Design is a construction contractor in the State of Washington. (CP 4) After successfully completing a tile installation on another Infinity home with no disputes (VRP I<sup>1</sup> at 11), in December 2007, Stonewood entered into a contract with appellant Heritage Homes, Inc. a Nevada corporation doing business in Washington under the name “Infinity Homes.” (CP 305, 506) Infinity Homes builds and sells custom homes in Bellevue, Washington “ranging anywhere from \$2 million to about three and a half million.” (Testimony of R. Gretsch, VRP III<sup>2</sup> at 3) Under the contract, Stonewood agreed with Infinity to construct improvements to a new home owned by Infinity’s president, Richard Gretsch, and his wife, Michelle, located at 9815 N.E. 30th Street, Bellevue, Washington (the “Gretsch residence”).<sup>3</sup> (CP 4-18, 307) Part of the services included installation of tile in the master bathroom. (*Id.*; CP 693 - 7/2/09 entry; CP 458, 461, 469; VRP II<sup>4</sup> at 154 (Christenson))

Stonewood completed the Gretsch residence project in early March 2008, without objections or claims by appellants (or others) that the work

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<sup>1</sup> Verbatim Report of Proceedings dated March 15, 2010, referred to as “VRP I.”

<sup>2</sup> Verbatim Report of Proceedings dated March 17, 2010, referred to as “VRP III.”

<sup>3</sup> Infinity Homes was the general contractor for the Gretsch residence construction project, a fact admitted by appellants Infinity and Gretsch in requests for admissions, an admission which Mr. Gretsch tried to repudiate at trial. (Verbatim Report of Proceedings dated March 18, 2010, referred to herein as “VRP IV” at 5-6) This contradiction was highlighted during cross-examination, and noted by the jury and judge in evaluating Mr. Gretsch’s credibility.

<sup>4</sup> Verbatim Report of Proceedings dated March 16, 2010, referred to as “VRP II.”

was unfinished or unsatisfactory. (CP 307-08; VRP I at 15-16) Under the contract, Infinity was required to notify Stonewood of claims within 5 days of receipt of goods. (CP 307) Mr. Gretsches had no complaints with Stonewood's work; he inspected the work on a daily basis and expressed only praise for the high quality of the work; and the project was completed below the original estimate. (*Id.*; VRP I at 46) Even at trial, Mr. Gretsches testified that when Stonewood completed its work in March 2008, "[t]he work appeared to be acceptable in conforming to the contract." (VRP III at 90) Stonewood invoiced Infinity amounts totaling \$30,625.50 for the construction, which under the terms of the contract were due in full upon installation. Infinity paid Stonewood \$21,447.26, but unilaterally withheld payment on two invoices totaling \$9,148.24. (CP 5; VRP I at 15)

On April 12, 2008, more than a month after project completion, Infinity notified Stonewood it was refusing to pay the balance because of "some pointy tiles and some clean-up and caulking (may take 2 hours max)" and alleged "incorrect measurements" (later conceded to be properly measured). (CP 308) The following month, May 2008, more than two months after completion and after several other subcontractors performed work in the master bathroom, Mr. Gretsches claimed for the first time that 60 glass tiles in the master bathroom were "chipped" and needed to be replaced. Stonewood, however, did not warrant the condition of the

tile (Infinity had procured the tiles and took the responsibility for this) and claims concerning workmanship were required to be made within five days after completion of the work. There was no claim that Stonewood's work caused the alleged chipping. (*Id.*; VRP I at 33-34)

As a business courtesy, Stonewood offered to replace the tiles "without charge" and to reduce the bill by \$2000 if Infinity would pay the adjusted balance within 4 days. (CP 309; VRP I at 38-39) Stonewood also offered to allow Infinity to retain 10% of the contract balance until after final completion of repairs. (*Id.*) When Mr. Gretsches refused Stonewood's offers, Stonewood filed a claim of lien pursuant to Ch. 60.04 RCW against the Gretsches residence on May 30, 2008. (*Id.*, CP 5).

On June 16, 2008, Stonewood filed this action in King County Superior Court. (CP 1) The complaint, titled "Complaint for Foreclosure of Lien and Breach of Contract," asserted claims for breach of contract and lien foreclosure against the named defendants — Infinity Homes, Contractors Bonding and Insurance Company ("CBIC"), and Richard and Michelle Gretsches, the property owners. (*Id.*) At that time, the only bond for Stonewood to seek recourse was Infinity's contractor registration bond under Ch. 18.27 RCW, identified in the caption as CBIC "Bond No. SE8528." (CP 1) Attaching a copy of its recorded lien to the complaint as "Exhibit B" (CP 17-18), Stonewood contended it had "satisfied the

statutory requirements for a Mechanic's and Materialmen's Lien and was entitled to foreclose on the RESIDENCE under Ch. 60.04 RCW to satisfy defendants' outstanding indebtedness to [Stonewood]." (CP 6, ¶3.6)

**B. In pretrial proceedings, appellants took inconsistent positions resulting in terms of \$3,000 being imposed against them. Infinity obtained a release of lien bond through CBIC, already a defendant in the action.**

Appellants' original answer dated August 8, 2008 admitted Stonewood's right to foreclose allegation "in its entirety," but otherwise denied any breach of contract and asserted a counterclaim against Stonewood for "defective and nonconforming work." (CP 21, ¶¶ 3.6, 4.2, 4.3, 5.1, 5.2) No affirmative defenses were pled either then or later. (CP 21)

On September 5, 2008, appellants caused to be recorded a Release of Lien Bond, CBIC Bond No. S10245. (CP 560, 571) The bond in the amount of \$18,296.84 identifies the Gretsche residence as the property liened, Infinity as the principal, Stonewood as the obligee, and CBIC as the surety. (CP 571) At no time did Infinity, CBIC, or any other party raise an issue or defense about nonjoinder of CBIC Bond S10245 from the caption of the Stonewood complaint.<sup>5</sup>

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<sup>5</sup> Counsel for appellants below considered whether nonjoinder of the release of lien bond was an issue, but did not raise it with the trial court. (See CP 722 – 3/24/2010 entry; CP 726 – 5/5/2010 entry)

By amended answer dated July 23, 2009, appellants were allowed to change their prior answers to Stonewood's complaint to allege *inter alia* that (1) "[o]nly defendants Gretsches contracted with [Stonewood]"; (2) Stonewood's right to foreclose allegation (¶3.6) was *denied*;<sup>6</sup> and (3) the Gretsches were entitled to an offset of \$3,140.29 for the alleged "cost to correct [Stonewood's] defective work." (CP 296-298) As with the original answer, no affirmative defenses were alleged in the amended answer. As counterclaims, appellants alleged that Stonewood could not maintain its lien foreclosure action, citing RCW 18.27.114 of the contractor's registration statute and the Consumer Protection Act, RCW 19.86. (CP 298)

On appellants' motion to file a Second Amended Answer and Amended Counterclaim, the trial court granted leave to amend, extended discovery and delayed the trial date, but imposed terms of \$3,000.00 on the grounds that "Defendants' 'evolving' and changing positions is not well taken and such careless pleading has caused the plaintiff to expend time and resources." (CP 302) Previously, in a sworn declaration filed in

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<sup>6</sup> No specific lien defenses were stated in Infinity's amended answer other than "See Plaintiff's Second Set of Interrogatories and request for Production of Documents and Defendants' Answers." (CP 297) Appellants claimed below that "Stonewood did not join a necessary party pursuant to CR 19," the "lien lacks the proper acknowledgement per RCW Chapter 64.08 and RCW 60.04.091" and "Stonewood Design, Inc. failed to provide their [*sic*] customer with disclosure [] statement pursuant to RCW 18.27.114." (CP 452- 454) Appellants do not assert these lien defenses on appeal, but instead claim the validity of Stonewood's lien was not litigated below.

opposition to Stonewood's motion for summary judgment, Mr. Gretsich had stated under penalty of perjury that "Heritage contracted with Stonewood Design, Inc. for the installation of tile at my residence." (CP 456) At his deposition, Mr. Gretsich testified that he "could have answered incorrectly." (*Id.*)

Before the jury trial, Stonewood requested "[t]he right to execute against the surety bond posted by Infinity Homes as permitted under RCW 60.04.161," as well as "[t]he right to execute against Infinity Homes' contractor registration bond as permitted under RCW 18.27.040." (CP 63) Stonewood filed a six-page "Bench Memorandum re: Materialmen's Lien, Ch. 60.04 RCW [and] Contractor's Bond, Ch. 18.27 RCW," (CP 318-323) citing statutes, and case law, including *DBM Consulting Engineers*. (CP 321) Appellants did not cite *DBM* or discuss it in the proceedings below.

**C. Stonewood offered substantial evidence to support its claims for breach of contract and lien foreclosure. The jury awarded Stonewood \$8,878 and gave nothing to appellants on their counterclaims.**

A jury trial was held on March 15 - 19, 2010. (CP 47) During the trial, Stonewood offered as evidence the claim of lien upon which its foreclosure action was based, as well as the CBIC release of lien bond S10245. (CP 34, Exs. 8 & 9) Both exhibits were admitted. (*Id.*; CP 324) During trial Stonewood President, Vladimir Zayshlyy, testified about the validity of the Stonewood lien (Ex. 8) to demonstrate compliance with Ch.

60.04 RCW requirements. (Ex. 8; VRP II at 13) *See* RCW 60.04.021 (lienable services); RCW 60.04.031 (lien form of notice); and RCW 60.04.141 (duration of lien). After describing the tile installation work by Stonewood, Mr. Zayshlyy testified:

Q (Mr. McBroom): ...Your claim for lien here is for your labor performed at the Gretsche residence, is that correct?

A (Mr. Zayshlyy): Yes.

(VRP II at 14: ll. 15-17)

Mr. Zayshlyy provided testimony about the property where the work was done, the filing in King County within 90 days of completion, the identification of Stonewood on the lien, the dates services were provided, and identity of the debtor, Infinity Homes, the location of the property, the identity of the owner, the amount claimed, and the signature on behalf of the owner. (VRP II at 13-14) He further testified the lawsuit to foreclose the lien was brought within eight months after the lien was recorded. (VRP II at 15)

Mr. Zayshlyy testified concerning regarding CBIC release of lien bond S10245 (Exhibit 9) purchased by Infinity Homes as “the bond that this action pertains to in this case.” (VRP II at 16) Answering questions from the bench, Mr. Zayshlyy explained his understanding of the effect of

the release of lien bond was to substitute the bond for the real property in the lien foreclosure action. (VRP II at 117-18)

During deliberations, the jury asked the court “Can the jury award more than actual damages?”<sup>7</sup> (CP 334, 538) In the special jury verdict of March 19, 2010, the jury found that Stonewood and Infinity were the parties to the contract, not the Gretsches. (CP 31, 335) The jury awarded Stonewood the sum of \$8,878.15 and awarded nothing to appellants on the counterclaims. (CP 32, 336)

**D. Following a jury trial, the trial court adjudicated the validity and enforceability of Stonewood’s lien and ordered the judgment be paid from CBIC release of lien bond S10245.**

On April 30, 2010, the Honorable Judge Mary Yu, the same judge who presided over the jury trial, conducted a post-trial hearing to determine any remaining equitable issues relating to Stonewood’s right to execute on the release of lien bond under its lien foreclosure claim. (CP 48, 287)

Prior to the hearing, on April 27, 2010, appellants filed with the court an 11-page memorandum in support of their proposed findings of fact and conclusions of law [unfiled and not part of the clerk’s papers], which challenged the validity of Stonewood’s lien and right to payment from the release of lien bond. (CP 548, 724) Appellants argued

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<sup>7</sup> The court responded “no.” (CP 539)

Stonewood's lien was invalid on three main grounds, none of which are asserted as assignments of error on appeal: (1) Stonewood failed to allege or prove it was a registered contractor; (2) Stonewood failed to allege and prove Infinity was a registered contractor; and (3) the Stonewood lien was not properly acknowledged.<sup>8</sup> (CP 551-57)

The trial court granted Stonewood's motion to strike the memorandum and counsel's supporting declaration on the grounds of it being a substantial late filing, but permitted counsel to argue these lien foreclosure objections at the hearing on April 30, 2010. (CP 573-75; VRP V<sup>9</sup> at 3-4) Stonewood's counsel, Mr. McBroom, argued the lien was valid, and Infinity's objections had no merit. (VRP V at 5-13; 24 - 30) Infinity's attorney, David Linville, was permitted to argue the lien was invalid, citing the same grounds set forth in the April 27 memorandum. (VRP V at 13 - 24) According to defense counsel's billing records filed with the court, the subject of the April 30 hearing before Judge Yu was the "validity of lien and collection against lien release bond." (CP 725)

The trial court rejected every objection asserted by Infinity against the validity of Stonewood's lien. (VRP V at 31-33) The trial court

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<sup>8</sup> Defense counsel's billing records show he thought on March 24, 2010 that the "DBM case on payment bond nonjoinder applies here." (CP 722) However, counsel omitted this argument from his 11-page memorandum and neither cited *DBM Consulting Engineers* nor argued nonjoinder to the trial court.

<sup>9</sup> Verbatim Report of Proceedings dated April 30, 2010, referred to herein as "VRP V."

found the bonds had been introduced during the jury trial and Stonewood had “proven the facts necessary to support execution” upon them. (CP 288-89) It found the notice of claim of lien was properly and timely filed, contained the necessary information, was properly acknowledged, and “the claim of lien is based only upon labor for installation of tiles.” (*Id.*)

Judge Yu found the lawsuit to foreclose was timely filed, the owner timely served, and special notice to the owner and customer was not required. (*Id.*) Finding the liens complied in substance and form with the lien statutes, the trial court ordered that Stonewood “may execute upon the release of lien bond” and “[t]he bond holder shall disperse [*sic*] the funds directly to plaintiff Stonewood Design, Inc. upon its request for payment.” (CP 289-90) The court also ordered that Stonewood “may execute upon the contractor registration bond SE 8528.” (CP 290)

Approving the form of judgment presented by Stonewood, the trial court also entered a Judgment and Order on the Verdict and on the Findings of Fact and Conclusions of Law. (CP 41-45, 573; VRP V at 32) The court awarded judgment to Stonewood against CBIC on both the Release of Lien Bond S10245 and Contractor Registration Bond SE8528 in the amount of \$12,152.92, which included principal and interest. (CP 42-43) The order specified:

ORDERED that plaintiff shall be entitled to execute on Release of Lien Bond #S10245 and Contractor's Bond #SE8528 issued by Contractors Bonding and Insurance Company because plaintiff prevailed in its breach of contract action against Heritage Homes, Inc. DBA of Washington, a Nevada corporation d/b/a Infinity Homes.

(CP 44-45) Appellants failed to raise any issue below with the form of the judgment and order. Appellants do not appeal the trial court's April 30, 2010 judgment. *See* App. Br. at 5; Notice of Appeal dated June 18, 2010 (CP 808).<sup>10</sup>

**E. After awarding attorney fees and costs to Stonewood, the trial court amended its prior judgment and confirmed Stonewood's right to payment from CBIC release of lien bond S10245.**

When Stonewood moved for attorney fees below, Infinity conceded Stonewood was entitled to fees against Infinity under the settlement offer statute, RCW 4.84.260, but they claimed Gretsches were prevailing parties under the same statute because Stonewood recovered nothing against them personally, "nor could have Stonewood Design, Inc. recovered anything against the property interest of Richard and Michelle Gretsche . . . because the effect of recording a lien release is to release the subject property from the effect of the lien."<sup>11</sup> (CP 199-200) Infinity and Gretsche incurred \$94,305 in attorney fees for two years of litigation, trying

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<sup>10</sup> Appellants failed to comply with RAP 9.6(b)(1)(A) by not designating the notice of appeal in their designation of clerk's papers to be transmitted to the appeals court. This notice (CP 808) cannot be construed as a timely appeal of the April 30, 2010 judgment.

<sup>11</sup> Gretsches do not assign error to the trial court's denial of their fee request below. Before the trial court, Gretsches did not seek fees under RCW 60.04.181(3) as they now do on appeal.

to prevent Stonewood from obtaining a judgment on its \$9,148 lien claim.  
(CP 206)

On May 21, 2010, the trial court awarded Stonewood \$95,819 for reasonable attorney fees as prevailing party under RCW 4.84.250 because the jury's award to Stonewood of \$8,878.15 was much more than Stonewood's pre-trial settlement offers. (CP 49-50, 76-77, 278) In addition, the court awarded Stonewood \$17,097 in costs. As with the original judgment, the court reaffirmed Stonewood's right to enforce its judgment against CBIC Release of Lien Bond No. S10245:

ORDERED that plaintiff shall be entitled to execute on Release of Lien Bond #S10245 and Contractor's Bond #SE8528 issued by Contractors Bonding and Insurance Company because plaintiff prevailed in its breach of contract action against Heritage Homes, Inc. DBA of Washington, a Nevada corporation, d/b/a Infinity Homes.

(CP 281, ¶ 6) Despite demand for payment, CBIC has not paid Stonewood on Release of Lien Bond No. S10245.

Appellants filed a Notice of Appeal on June 18, 2010 identifying Heritage Homes, d/b/a Infinity Homes and the Gretsches as the parties appealing. (CP 808) *However, CBIC, the surety for the release of lien bond, is not named as an appellant.* Appellants' Notice of Appeal refers to the First Amended Judgment dated May 21, 2010 (CP 278), but does

not mention the original April 30, 2010 judgment. Appellants do not address the April 30 hearing or judgment in their opening brief.

#### IV. AUTHORITY

A. **Stonewood obtained a “judgment on the lien” as required by RCW 60.04.161 and *DBM Consulting Engineers*. After finding the lien valid and enforceable, the trial court correctly ordered payment from CBIC release of lien bond S10245.**

Relying on *DBM Consulting Engineers, Inc. v. U.S. Fid. & Guar. Co.*, 142 Wn. App. 35, 170 P.3d 592 (2007), *rev. denied*, 164 Wn.2d 1005, 190 P.3d 54 (2008), appellants argue that Stonewood “failed to obtain a *judgment upon the lien*.” (App. Br. at 7, italics added) But this argument squarely contradicts appellants’ admission that “[t]he trial court entered Findings of Fact and Conclusions of Law with regard to the validity and enforceability of Stonewood’s lien.” (App. Br. at 6) More importantly, this argument has no factual or legal basis. By citing and quoting RCW 60.04.181(2), appellants concede the predicate language of the statute, namely, “if the lien is established,” which it was below. (*See* App. Br. at 8; CP 287) Appellants cite to no evidence in the record to demonstrate the lien *was not* established.

In addition, *DBM Consulting* involved procedural circumstances entirely different from the proceedings in this case. In *DBM*, the engineers sued twice in a serial manner: first against Soos Creek, the property

owner, on a breach of contract action (“Case I”); and second to enforce the *in personam* judgment obtained in Case I against Travelers, the surety that put up a lien release bond to enable Soos Creek to sell parcels liened by the engineers (“Case II”). In Case I, “DBM requested foreclosure of the lien in the complaint but never pursued the claim or obtained a ruling on it.” *DBM*, 142 Wn. App. at 38. In Case II, “DBM . . . sued Travelers for payment on the bond,” *id.* at 38, but “did not request foreclosure of the lien in its action against Travelers.” *Id.* at 42 n.3. The surety argued that because the engineers “did not actually litigate the validity of the lien” in Case I, “Travelers is not obligated to pay on the bond.” *Id.* at 38.

This Court held that RCW 60.04.161 “requires that the validity of the lien be adjudicated”: the lien claimant must “actually litigate the validity of the lien” and there must be a judgment on the lien establishing its validity in order to create liability of the bonding company to pay on the release of lien bond. *DBM*, 142 Wn. App. at 38, 40.

DBM could and should have obtained a judgment upon the lien from the trial court in its action against Soos Creek, proving that the services provided were professional services that resulted in an improvement to the property as required by the mechanics' lien statute. RCW 60.04.021. No such judgment was ever obtained, and the failure to do so is fatal to DBM's claim against Travelers.

*Id.* at 41. In Case I, DBM pleaded lien foreclosure in its complaint against Soos Creek, “but in effect abandoned this claim by not obtaining a

judgment on the lien, so it would not be entitled to a second opportunity to pursue this claim.” *Id.* at 42 n.3. Even in Case II, DBM did not plead foreclosure of its lien. *Id.* at 42 n.3. This Court further ruled that DBM could not in the future attempt to foreclose its lien because of *res judicata*, which bars relitigation of claims raised or that should have been raised in a prior action based on the same transaction. *Id.* at 42 n.3.

Unlike *DBM*, the parties in this case fully and fairly litigated Stonewood’s lien foreclosure claim and the trial court adjudicated the validity and enforceability of the Stonewood lien. If *DBM* is “dispositive,” (App. Br. at 6), it only supports Stonewood’s judgment against CBIC Release of Lien Bond S10245.

Attempting to force this case into the facts of *DBM*, appellants make inferential assertions that have no basis in the record and are blatantly untrue:

- that Stonewood only sued Infinity for breach of contract (App. Br. at 7)
- that Stonewood filed a second action to sue CBIC, the bond surety (App. Br. at 7)
- that Stonewood “failed to obtain a judgment on the lien, only obtaining a judgment on the breach of contract claim” (App. Br. at 7)

Unlike *DBM*, Stonewood sued all defendants — the general contractor, the owner, and the surety — in the same action and prevailed

on its claims for breach of contract and lien foreclosure after a full trial on the merits. Appellants argued against lien foreclosure below, claiming Stonewood failed to comply with mechanics' lien statute requirements. (CP 820-21; CP 551-57; VRP V at 13 – 24)

The trial court entered findings of fact and a judgment adjudicating the validity and correctness of the lien, as well as Stonewood's right to payment against CBIC lien release bond S10245 and the \$12,000 contractor registration bond, CBIC SE8528. (CP 278, 287) After proving it provided labor that resulted in improvement to the property as required by RCW 60.04.021, Stonewood established its lien and obtained a judgment on its lien. (CP 278, 287) That is what this Court meant by "foreclosure on the lien":

A lien bond releases the property from the lien, but the lien is then secured by the bond. *While the applicable foreclosure process depends on whether the lien is secured by property (which can then be sold) or by a bond*, in either situation, the lien must be foreclosed upon before the lienholder is entitled to recover on the lien. So in order to be entitled to payment on the bond, DBM needed to foreclose its lien. Because DBM did not obtain a judgment foreclosing its lien, Travelers is not obligated to pay on the lien bond.

*DBM*, 142 Wn. App. at 42 (internal citations and footnote omitted; emphasis added). Here, the trial court appropriately adjudicated the validity of Stonewood's lien and authorized foreclosure of the lien by

execution against CBIC bond S10245. (CP 287) As this Court explained in *DBM*:

Once a lien claim has been filed, a property owner who disputes the correctness or validity of the lien but wishes to release the property from the lien to allow for free alienation of the property can record a bond in lieu of lien claim. The lien is then secured by the bond rather than the property, and the property can be sold without waiting for the lien foreclosure action to be completed. *When the lien claimant does foreclose on the lien, the judgment is paid from the bond.*

142 Wn. App. at 40 (internal citations omitted; emphasis added). Again, this is precisely what Stonewood obtained from the trial court below: after completion of the lien foreclosure action adjudicating Stonewood's lien as valid and enforceable, the trial court provided in its order that Stonewood's judgment be "paid from the bond," *i.e.*, CBIC Bond S10245. (CP 278, 287)

A lien foreclosure action does not terminate as such simply by virtue of a release of lien bond, whether by agreement or lien bond. Cf. *Kinnebrew v. CM Trucking & Constr.*, 102 Wn. App. 226, 232-34, 6 P.3d 1235 (2000) (liberally construing lien statute to protect prevailing lienholder who agreed to release of lien and deposit into registry, fees awarded under RCW 60.04.181(3) because action related to lien foreclosure). In the context of liens, "foreclosure" is generally understood to mean "a legal proceeding to terminate [the owner's] interest in property,

instituted by [the lienholder] either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property.” BLACK’S LAW DICTIONARY 719 (9<sup>th</sup> ed. 2009).

When a release of lien bond replaces real property as the security, there is no longer any reason to terminate the owner’s interest in the real property and have the land sold to satisfy the debt secured by the lien. The release of lien bond, by its terms, is the surety’s conditional promise to pay Stonewood if and when its lien is determined valid, and is purely for the protection of Stonewood. (CP 571) The bond is not property “owned” by Infinity that would be “sold” to satisfy Stonewood’s lien. RCW 60.04.161 only requires a judgment adjudicating the validity of the lien and then an order allowing the judgment to be paid from the bond. These conditions were met here: Stonewood *foreclosed on the lien* and then the trial court ordered Stonewood’s judgment paid from CBIC release of lien bond S10245. (CP 278, 287); *cf.* RCW 18.27.040(6)-(9) (judgment holder authorized to “execute upon the security held by the [Dept. of Labor & Industries]” in form of deposit, assigned savings account or other security in lieu of bond); *Ward v. LaMonico*, 47 Wn. App. 373, 376, 735 P.2d 92 (1987) (predecessor statute).<sup>12</sup> “A judgment . . . that requires

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<sup>12</sup> Infinity does not appeal Stonewood’s judgment against CBIC Bond SE8528, the contractor registration bond required by RCW 18.27.040. Payment by CBIC to Stonewood on May 13, 2010 exonerated that \$6000 bond. *See* RCW 18.27.040(4); Dep’t

payment of money may be enforced by execution.” *In re Young*, 44 Wn. App. 533, 535, 723 P.2d 12 (1986).

A lien is an encumbrance upon property, which secures payment of a debt but confers no property rights or title on the holder. The lien at issue will become a judgment capable of being executed upon only [when four conditions occur]. Only when the lien is capable of being executed upon will it become a judgment entitled to statutory interest.

*Id.* at 536 (citations omitted). The First Amended Judgment entered May 21, 2010 clearly requires the payment of money to Stonewood from CBIC release of lien bond S10245. (CP 279); *see* RCW 4.64.030(2)(a) (judgment which provides for payment of money).

Because “[a] lien foreclosure proceeding is equitable in nature,” the burden of proving defenses to foreclosure is on the party asserting them and cannot be based on mere technical or formal defenses, but requires proof of “[p]rejudice and offense to good conscience and equity.” *Wash. Asphalt Co. v. Amundsen*, 63 Wn.2d 690, 694-95, 388 P.2d 965 (1964) (without producing evidence of prejudice or harm, defendant property owners failed to meet burden of proof on defenses to mechanics’ lien claimant of estoppel, release, waiver, dismissal, or nonjoinder of

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of Labor & Indus. website, Business & Licensing Information for Infinity Homes, UBI No. 60230963, at <https://fortress.wa.gov/lni/bbip/Search.aspx>. As required by the contractor registration act, RCW 18.27.040(3), CBIC was named as a party defendant in the action. RCW 60.04.161, the lien replacement bond statute, contains no similar requirement of naming the release of lien bond surety.

parties, “leav[ing] to speculation any prejudicial or inequitable effect” of alleged defenses).

Here, appellants argue a technical defense, failing to demonstrate any prejudice or harm caused by the wording of the trial court’s orders and judgments. Appellants fail to explain how equity would be served by reversing the trial court and further delaying Stonewood from recovering against the release of lien bond, or from a remand to for the trial court to clarify what the parties have already exhaustively litigated and the trial court has conclusively determined in favor of Stonewood’s right to payment from CBIC S10245. *Cf. Associated Sand & Gravel, Inc. v. Di Pietro*, 8 Wn. App. 938, 941, 509 P.2d 1020 (1973) (in lien apportionment dispute, no good purpose served to remand case for express finding when both parties presented case below and on appeal on assumption subdivision property insufficient to pay off lender and no serious question concerned the insufficiency).

**B. Mechanics’ lien statutes do not require the word “foreclose” or “foreclosure” in awarding the lienholder judgment on the lien.**

**1. Liberally construing the lien statutes to protect Stonewood, nothing requires the term “foreclose” or “foreclosure” in a judgment on the lien where the lien has been substituted with a release of lien bond.**

In construing the mechanics’ lien statute, “statutory provisions must be read in their entirety and construed together, not piecemeal” and

courts “should not read a statute literally if unlikely, absurd, or strained consequences result.” *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 881-82, 155 P.3d 952 (2007), *aff’d*, 166 Wn.2d 489, 210 P.3d 308 (2009). Without citing authority, appellants argue for strict construction of the mechanics’ lien statutes. Even though the trial court here satisfied the strict construction of the statute, nonetheless, clear and direct Washington Supreme Court authority provides just the opposite:

[I]f it is determined a party's lien is covered by chapter 60.04 RCW, the statute is to be liberally construed to provide security for all parties intended to be protected by its provisions.

*Estate of Haselwood*, 166 Wn.2d at 498;<sup>13</sup> *see* RCW 60.04.900 (RCW 60.04.011 through 60.04.226 must be liberally construed); *Northlake Concrete Prods. Inc. v. Wylie*, 34 Wn. App. 810, 818, 663 P.2d 1380 (1983) (legislature intended that lien statutes be “liberally applied” to lien claimants who come within the operation of the act).

Since the trial court determined Stonewood’s lien is covered by Ch. 60.04 RCW, a finding not challenged on appeal, the lien statutes must be liberally construed to provide security to Stonewood, the party protected by the mechanics’ lien statutes. Liberally construing these

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<sup>13</sup> *See also Haselwood*, 137 Wn. App. at 887-88 (“[T]he very reason for establishing mechanics’ liens [is] ‘the equitable principles of paying for work done or materials delivered, prevention of unjust enrichment, and estoppel to deny a benefit,’ as well as preventing detriment to laborers and material suppliers who expend their resources on others’ property.”); *Kinnebrew*, 102 Wn. App. at 234.

statutes supports the trial court's adjudication in favor of Stonewood's lien and ordering payment from CBIC S10245. There is no requirement in the mechanics' lien statutes or case law for an "order, judgment or decree of foreclosure, foreclosing on Stonewood's lien" designated as such.<sup>14</sup> (App. Br. at 8) Citing RCW 60.04.181(2), but without citing to the record or analyzing the statute, appellants argue the trial court failed to provide for "the enforcement [of the lien] upon the property liable as in the case of foreclosure of judgment liens." (App. Br. at 8-9)

There is no merit to this argument either factually or legally. Factually, the trial court authorized Stonewood to enforce its lien "upon the property liable," namely, CBIC release of lien bond S10245, which replaced the property at issue pursuant to RCW 60.04.161. Legally, RCW 60.04.181 is a judgment enforcement statute. By its terms, the statute governs the priority and rank of liens and the order of application of proceeds where there are multiple lien claimants, which was not the case here. The release of lien bond at issue here was written for the express benefit of only a single claimant, namely Stonewood. (CP 571) Appellants cite no case law interpreting this statute to require any particular language to appear in a "judgment on the lien."

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<sup>14</sup> Clearly, the trial court rendered a judgment. See *Wachovia SBA Licensing v. Kraft*, 138 Wn. App. 854, 861, 158 P.3d 1271 (2007), *aff'd*, 165 Wn.2d 481 (2009) ("Judgment," in its legal sense, means "a formal decision or determination given in a cause by a court of law or other tribunal.").

The “judgment of foreclosure” language of RCW 60.04.181(2) cannot be engrafted onto RCW 60.04.161’s “judgment on the lien” language. See *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 842, 215 P.3d 166 (2009) (when legislature uses different statutory language in different statutory provisions, “a difference in legislative intent is evidenced”); *Lundberg ex rel. Orient Found. v. Coleman*, 115 Wn. App. 172, 177, 60 P.3d 595 (2002).

The “entitled to execute on” language used by the trial court correctly provides Stonewood with a right to pursue the security in the lien release bond. The term “execute” is correct because it has long been held that “[a] bond is nothing more or less than a contract, and the sureties to a bond are simply parties to a contract.” *Eureka Sandstone Co. v. Long*, 11 Wash. 161, 164, 39 P. 446 (1895). Washington law merges the legal concepts of judgment, foreclosure and execution.

A judgment lien does not create any right of property or interest in the lands upon which it is a lien. It gives the *right to foreclosure, either by execution or independent suit*, which, when done, will relate back so as to exclude adverse interests subsequent to the fixing of the lien.

*Fed. Intermediate Credit Bank v. O/S Sablefish*, 111 Wn.2d 219, 226, 758 P.2d 494 (1988) (emphasis added), quoting *Mahalko v. Arctic Trading Co.*, 99 Wn.2d 30, 35, 659 P.2d 502 (1983), *overruled on other grounds* in

*Felton v. Citizens Fed. Sav. & Loan Ass'n*, 101 Wn.2d 416, 679 P.2d 958

(1984). A leading treatise in Washington supports this:

If the lien is established, the judgment shall provide for enforcement against the property liable as in the case of foreclosure of judgment liens. The court may order the property sold and the proceeds deposited into the registry of the clerk of the court, pending further determination respecting distribution of the proceeds of the sale.

M.D. ROMBAUER, 27 WASH. PRACTICE, §4.75 at 370-71 (West 1998).

Here, because of the lien release bond, there was no need for the court to order the property sold or the sale proceeds deposited into the court registry, particularly as there were no other claimants to the funds.

RCW 60.04.161 applies here because there was only one lien claimant, Stonewood, and appellants posted a lien release bond in lieu of the real property. (CP 571) The statute provides in pertinent part:

The condition of the bond shall be to guarantee payment of any judgment upon the lien in favor of the lien claimant entered in any action to recover the amount claimed in a claim of lien, or on the claim asserted in the claim of lien.

RCW 60.04.161. Nowhere in this statute does the legislature require the trial court in its *judgment on the lien* (and with the bond substituting for the real property secured by the lien) to use the terms “foreclose” or “foreclosure.” Those terms are not even found in the statute.

The record below is clear that the trial court’s judgment specifically and unequivocally provided for the enforcement of

Stonewood's lien "upon the property liable," the lien release bond. (CP 278, 287); *see* RCW 60.04.181(2). The property liable in this case is CBIC Bond S10245 substituted for the real property. The judgment here provided that Stonewood "shall be entitled to execute on Release of Bond #S10245 . . . issued by Contractors Bonding and Insurance Company." (CP 281) The wording of the judgment on the lien was a matter of discretion based on tenable grounds. Appellants fail to prove an abuse of discretion or clear error. *See Estate of Hansen*, 81 Wn. App. 270, 284, 914 P.2d 127 (1996) ("We are not in the business of substituting our judgment for those discretionary decisions of trial judges which are based on tenable grounds and reasons.").

Appellants argue the trial court did not "award Stonewood attorney fees pursuant to the lien statute, RCW 60.04.181(3)." (App. Br. at 6) Although true, this information is irrelevant — Stonewood did not seek attorney fees below under RCW 60.04.181(3). (CP 46-56) The trial court awarded the full amount of fees Stonewood requested under RCW 4.84.250 *et seq.*, RCW 18.27.040, and CR 37(c). (CP 282-283) Appellants argued below that no award of fees could be based on RCW 60.04.181(3) because Stonewood failed to give fourteen days notice to the owners as required by RCW 60.04.091(2). (CP 198-99) Stonewood responded in its reply brief that it was "not seeking fees under RCW

60.04.181.” (CP 224) The record thus does not support any inference that the lack of an award of attorney fees to Stonewood under RCW 60.04.161 proves there was no “judgment on the lien” as required by RCW 60.04.161 and *DBM*.

**2. Courts refuse to read new and unspecified burdens and requirements into the lien statutes by implication.**

Appellants argue by implication (without citation to authority) that the trial court’s failure to use the term “foreclose” or “foreclosure” in its judgment allowing Stonewood to enforce its lien against the bond renders the judgment void and thus grants Stonewood no rights against the bond. This is untenable. Courts refuse to read new and unspecified burdens and requirements into the lien statutes by implication. For example, in *Skilcraft Fiberglass v. Boeing Co.*, 72 Wn. App. 40, 863 P.2d 573 (1993), the court interpreted the predecessor statute to RCW 60.04.161 and ruled that a wrong year typographical error in the lien release bond and failure to provide recording number did not violate the statute: “[F]ormer RCW 60.04.115, *by its terms, does not require reference to a particular recording number* so long as the description of the lien is sufficiently definite.” *Id.* at 46-48 (emphasis added). Similarly, RCW 60.04.181(2) does not require the trial court to use the term “foreclose” or “foreclosure” in the judgment when granting Stonewood the right to enforce its lien against the bond. Appellants offer no authority that requires such

language in the judgment. As stated previously, because a bond is contractual, the trial court's use of the term "execute" is correct. Under a release of lien bond, "[t]he condition of the bond shall be to *guarantee payment of any judgment upon the lien in favor of the lien claimant entered in any action to recover the amount claimed in a claim of lien, or on the claim asserted in the claim of lien.* RCW 60.04.161 (italics added). Clearly, the trial court intended to allow Stonewood to enforce its lien against the bond.

The remainder of the trial court's order that states, "because plaintiff prevailed in its breach of contract action against Heritage Homes..." (CP 281) is the language necessary to enforce the bond pursuant to RCW 60.04.161. Even if the court's word choice could be considered inartful, because the court's intent is clear, equivocal findings will be interpreted in a manner that sustains the judgment rather than defeats it. See *Choi v. Sung*, 154 Wn. App. 303, 316-17, 225 P.3d 425, *rev. denied*, 169 Wn.2d 1009 (2010).<sup>15</sup>

Here, the record below is clear the trial court found Stonewood's lien valid and enforceable. (CP 287) Appellants concede this twice in their brief. See App. Br. at 6 ("The trial court entered Findings of Fact and

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<sup>15</sup> "Washington courts have long upheld actions taken in substantial compliance with statutory requirements, albeit with procedural imperfections." *Bank of Amer. v. Owens*, 153 Wn. App. 115, 129, 221 P.3d 917 (2009), *rev. granted*, 168 Wn.2d 1039 (2010) (footnote and internal citations omitted).

Conclusions of Law with regard to the validity and enforceability of Stonewood's lien.") & 7 ("The trial court entered Findings of Fact to the effect that Stonewood's lien was valid and enforceable."). Since appellants do not challenge these findings, no reversible error can attach to validity and enforceability language in the First Amended Judgment even if some of the language could be considered superfluous. *See State v. Dodd*, 70 Wn.2d 513, 521, 424 P.2d 302 (1967) (since appellant failed to establish as fact his claim of false or coercive inducement to plead guilty, provision in order denying vacation of judgment held surplusage that neither added to nor detracted from order's operative effect and must be regarded as superfluous); *Wyback v. Bd. of Prison Terms & Paroles*, 32 Wn.2d 780, 783-784, 203 P.2d 1083 (1949) (reference to offenses not convicted of in order revoking first order held mere surplusage, since substantive fact upon which order of revocation was based was violation of prison rules by escape, which appellant did not deny).

Even assuming *arguendo* that the order erroneously described improper or inadequate grounds, the appellate court can still affirm the lower court's judgment on any ground within the pleadings and proof. *See State v. Michielli*, 132 Wn.2d 229, 242-243, 937 P.2d 587 (1997); *Ertman v. Olympia*, 95 Wn.2d 105, 108, 621 P.2d 724 (1980) ("[W]here a judgment or order is correct, it will not be reversed merely because the

trial court gave the wrong reason for its rendition”); *Pannell v. Thompson*, 91 Wn.2d 591, 603, 589 P.2d 1235 (1979) (where trial court’s “ultimate resolution of the total issue is correct, it will not be reversed merely because the trial court gave a wrong or insufficient reason for its rendition”); RAP 2.5(a) (“A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.”).

Here, the trial court’s judgments ordering payment from the release of lien bond (CP 41, 278) cannot be read in a vacuum. *See Bennett Veneer Factors, Inc. v. Brewer*, 73 Wn.2d 849, 853, 441 P.2d 128 (1968) (vague, incomplete or ambiguous trial court finding must be read “in context with the trial court’s other findings and in light of the court’s oral opinion”). They must be read in connection with the trial court’s Findings of Fact, Conclusions of Law, and Order dated April 30, 2010 (CP 287), along with the verbatim report of proceedings from trial and the April 30 hearing, which fully adjudicated the validity and enforceability of Stonewood’s lien. To the extent the trial court’s findings are deemed inartful or equivocal, they must be “given the meaning which sustains the judgment, rather than one which would defeat it.” *Smith v. Shannon*, 100 Wn.2d 26, 35, 666 P.2d 351 (1983), *quoting Shockley v. Travelers Ins. Co.*, 17 Wn.2d

736, 743, 137 P.2d 117 (1943) (also ruling that “[t]he judgment of a trial court is presumed to be correct”).

In a lien foreclosure action, the trial court is not required to include evidentiary facts in its findings, but need only find the ultimate facts upon the material issues. *Whitney v. McKay*, 54 Wn.2d 672, 679, 344 P.2d 497 (1959) (no error for court to state that “lien was duly and timely filed” and plaintiff “was entitled to judgment for the amount due” without specifying dates when work completed or claims filed). Because appellants fail to provide this Court with evidence in the record upon which the trial court’s finding was based, appellants cannot assign error to that finding, and the validity of Stonewood’s lien “must be accepted as a fact of the case.” *Whitney*, 54 Wn.2d at 679.

**3. The language of the surety’s release of lien bond agreement does not support appellants’ argument.**

Nothing in the CBIC release of lien bond requires that the trial court’s judgment on the lien be called a “decree of foreclosure” or include language that Stonewood’s lien is “foreclosed.” The plain language of the bond agreement, consistent with RCW 60.04.161, reflects Infinity’s and CBIC’s agreement that both would be jointly and severally liable for recovery up to the bond amount “in any action brought to foreclose said lien.” (CP 571); see *Colo. Structures, Inc. v. Ins. Co. of the W.*, 125 Wn. App. 907, 915, 106 P.3d 815 (2005), *aff’d*, 161 Wn.2d 577, 167 P.3d 1125

(2007) (bond is contract construed according to the standard rules of contract interpretation). The only reference to a “judgment” in the bond agreement provides:

Now, Therefore, The Condition of this Obligation is Such that, if the Principal shall pay *any judgment upon this lien entered in any action to recover the amount claimed in the notice of claim of lien*, or on the claim asserted in the notice of claim of lien, then this obligation shall be void; otherwise to remain in full force and effect.

(CP 571 italics added) The record amply demonstrates, as appellants concede, that Stonewood’s action was brought to foreclose its lien and the trial court entered a judgment on the lien. Under the unambiguous terms of the bond agreement, CBIC is obligated to pay Stonewood.

**C. Procedural errors also would preclude appellants from arguing that the trial court committed reversible error.**

**1. Appellants failed to raise the issue below and failed to give the trial court an opportunity to correct any alleged deficiency in the form of the judgment.**

Appellants’ argument on appeal must fail because they did not raise it in the trial court and did not assign error to the language of the trial court’s judgment. *See* RAP 2.5(a); *Wise v. City of Chelan*, 133 Wn. App. 167, 173, 135 P.3d 951 (2006) (under RAP 2.5(a), appellate court “will not address arguments not brought to the attention of the trial court and to which no error is assigned”). Because appellants did not raise this issue

below, this Court need not consider it here. *See Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 291, 840 P.2d 860 (1992).

Appellants do not appeal from the trial court's order on bond dated April 30, 2010 (CP 287), did not raise the issue of failure to comply with *DBM Consulting Engineers* with the trial court, and never even brought that case to the trial court's attention. *See State v. Nason*, 168 Wn.2d 936, 940, 233 P.3d 848 (2010) (appellant failed to preserve issue for appeal because no appeal of order complained of and argument not raised below). Unlike their argument on appeal, appellants did not argue below the language used by the trial court in its order and judgment was legally inadequate because it lacked the label "decree of foreclosure" and "did not foreclose Stonewood's lien." (App. Br. at 7-9) Appellants point to nothing in the record that shows they preserved this issue for appeal.

Appellate court review is usually limited to determining whether the trial court's findings of fact are supported by substantial evidence and whether they support the conclusions of law. *See, e.g., Hanson v. Estell*, 100 Wn. App. 281, 286, 997 P.2d 426 (2000). Appellants raise no assignments of error to the trial court's findings of fact and conclusions of law on the validity and enforceability of Stonewood's lien entered on April 30, 2010 (CP 287) that supports the First Amended Judgment (CP

278). Unchallenged findings and conclusions are treated as verities on appeal. See *State v. Stenson*, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997).

**2. Appellants provide no argument or references to the record concerning any of the listed assignments of error.**

Assignments of error must be accompanied by argument with supporting citations to legal authority and references to relevant parts of the record. RAP 10.3(a)(6); *In re Disciplinary Proceeding Against Behrman*, 165 Wn.2d 414, 422, 197 P.3d 1177 (2008) (court declines to address issues or “assignments of error [that] do not have supporting argument or are unaccompanied by citations to the record or to legal authority”). “Without argument or authority to support it, an assignment of error is waived.” *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Appellants provide no argument or references to the record concerning any of their listed assignments of error. (App. Br. at 4, 1(a) – (d)) Instead, appellants merely argue (without referring to the record) that Stonewood has no right to judgment against the lien release bond under authority of *DBM Consulting Engineers*. Accordingly, appellants’ assignments of error are deemed waived or abandoned.<sup>16</sup>

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<sup>16</sup> To demonstrate in the record that appellants’ so-called “issues pertaining to assignment of error” have no basis in fact, Stonewood ordered a verbatim report of proceedings to establish, *inter alia*, that the lien was placed into evidence at trial, the trial court adjudicated the validity and enforceability of the lien, and the trial court effectively foreclosed Stonewood’s lien against the bond.

Appellants' failure to mention in its assignments of error any alleged error by the trial court pertaining to *DBM* and failure to state any issue pertaining to its stated assignments of error is fatal to this appeal. *See* RAP 10.3(a)(4); *Ang v. Martin*, 154 Wn.2d 477, 486-87, 114 P.3d 637 (2005) (none of assignments of error mentioned alleged deficiency in jury instructions or a failure to properly instruct the jury). Appellants' brief contains no argument, citation to authority, or references to relevant parts of the record pertaining to any assignment of error or issue arising from those assignments. Incidental allusion to some error or omission is not adequate briefing and argument. *Ang, supra*. Accordingly, this Court should deny the appeal for inadequate briefing.

**3. Appellants Infinity and the Gretsches have no standing to argue defenses of CBIC, the surety on the lien release bond.**

The only defendants from below designated as "appellants" in this appeal are Heritage Homes Inc. d/b/a Infinity Homes, Richard J. Gretsches and Michelle H. Gretsches. (App. Br. 1; Notice of Appeal – CP 808) CBIC, however, is not an appellant in this appeal. Because appellants seek primarily to vindicate defenses or potential defenses of CBIC, the surety obligated on the bond, by claiming the trial court erred in awarding judgment against the bond, appellants lack standing to bring this appeal. (App. Br. at 4, 8)

“The doctrine of standing prohibits a litigant from asserting another’s legal right.” *West v. Thurston County*, 144 Wn. App. 573, 578, 183 P.3d 346 (2008). “Standing is a ‘party’s right to make a legal claim or seek judicial enforcement of a duty or right.’” *Kim v. Moffett*, 156 Wn. App. 689, 700 n.9, 234 P.3d 279 (2010) (under CR 17 party to contract is real party in interest who has standing to sue to enforce contract, but not party claiming third party beneficiary status when contract benefits are “merely incidental, indirect or consequential”).

Here, appellants seek to invalidate the trial court’s judgment against the CBIC release of lien bond and then bootstrap a claim for an award of attorney fees to the appellants by asserting prevailing party status on appeal under the lien statute, RCW 60.04.181(3). The only case cited in appellants’ opening brief is *DBM*, but in that case the surety, Travelers, *asserted its own defenses as the sole appellant in the case*. Neither the contractor nor the property owner was a party in that appeal. *DBM* is clear indication that a defense under RCW 60.04.161 of no “judgment upon the lien” is properly made by the bond surety and not the property owner or contractor because the effect of the release bond is to release the real property from the lien and the surety’s bond is substituted in its place. *DBM*, 142 Wn. App. at 40. Appellants admitted as much below.

Pursuant to RCW 60.04.161, Richard and Michelle's property (otherwise subject to lien) was released by the purchase and recording of the lien release bond; thus Stonewood Design, Inc. did not, could not and cannot recover any sum against Richard or Michelle Gretsches personally, or against Richard and Michelle's interest (fee) in the subject property that was liened against which Stonewood Design, Inc. recorded its lien.

(CP 201) Appellants did not claim below, and fail to demonstrate on appeal, any pecuniary or proprietary interest in CBIC bond S10245 sufficient to confer standing to assert CBIC defenses to payment on the CBIC bond.

Because Infinity and Gretsches are merely asserting defenses of the surety, they have no standing to appeal. *See Wash. State Liquor Control Bd. v. Wash. State Pers. Bd.*, 88 Wn.2d 368, 376, 561 P.2d 195 (1977) (appellant with no personal stake in proceedings lacks standing to pursue appeal in own name). "Only an aggrieved party may seek review by the appellate court." RAP 3.1. "An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected." *Cooper v. City of Tacoma*, 47 Wn. App. 315, 316, 734 P.2d 541 (1987).

In an analogous case this Court recently ruled the appellant lacked standing as an "aggrieved party" under RAP 3.1. *Cf., Polygon Nw. Co. v. Am. Nat'l Fire Ins. Co.*, 143 Wn. App. 753, 767-68, 189 P.3d 777, *rev. denied*, 164 Wn.2d 1033 (2008) ("[T]he trial court's rulings on another

insurer's policy do not serve to make CUIC either aggrieved or a party within the meaning of RAP 3.1.”). The reasoning in *Polygon* applies here:

Here, the judgment entered by the trial court in no way affects any of CUIC's rights. It does not order CUIC to do anything. It does not order CUIC to pay anything. It does not order CUIC to refrain from doing or paying anything. At the time judgment was entered, CUIC was not a party to this lawsuit. Its interests were in no way affected by the judgment from which it now seeks to appeal.

. . . However, unlike in those cases, nothing in the trial court judgment currently on appeal purports to affect any of CUIC's proprietary or pecuniary interests.

143 Wn. App. at 768-69; *see also Ward v. LaMonico*, 47 Wn. App. 373, 376, 735 P.2d 92 (1987) (contractor and surety providing statutory contractor registration bond “are not qualitatively the same parties”).

Here, as in *Polygon*, appellants cannot be considered “aggrieved parties” challenging the enforceability of Stonewood’s judgment against CBIC bond S10245. Infinity is already bound to pay the full judgment to Stonewood regardless of the release of lien bond. (CP 278) Infinity and the Gretsches have no vested interest in whether Stonewood’s lien is enforceable against CBIC’s bond. A surety bond is expressly for the protection of a third person (the obligee) to whom the principal is obligated and who may be damaged should the principal fail to perform. *Schmitt v. Ins. Co. of N. Am.*, 281 Cal. Rptr. 261, 269, *rev. denied*, 1991 Cal. LEXIS 3892 (Cal. Ct. App. 1991) (“[I]t is not the duty of the surety to

protect the principal . . . the surety's duty runs to the third party obligee . . . .”); see generally *Honey v. Davis*, 131 Wn.2d 212, 217-18, 930 P.2d 908 (1997). Here, only CBIC has a propriety or pecuniary interest in its obligations under the release of lien bond. (CP 571)

**D. Appellants’ claim to attorney fees has no merit.**

To claim attorney’s fees on appeal, a party must devote a section of the brief to the fee request. RAP 18.1(b). “The rule requires more than a bald request for attorney fees on appeal.” *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 704-05, 915 P.2d 1146 (1996). This Court should deny appellants’ “bald request” for attorney’s fees because there is no basis to award fees to them for bringing this appeal.

Appellants cite no cases other than *DBM Consulting Engineers*. In that case in which the surety prevailed, overturning a judgment against the release of lien bond because there was no adjudication of lien validity in the original action, this Court ruled the surety had no right to attorney fees under RCW 60.04.181.

Although Travelers prevailed in this appeal, this is not an action to enforce a lien. Travelers prevailed precisely because DBM did not foreclose its lien.

142 Wn. App. at 42 - 43. By seeking attorney fees under the same lien statute, RCW 60.04.181, under *DBM*, appellants would have to concede this was an action to enforce a lien and Stonewood foreclosed its lien. But

appellants contradict the core of their own appeal: (1) “the trial court did not foreclose Stonewood’s lien” and (2) “Stonewood did not prevail on its lien because the trial court did not enter a decree of foreclosure on Stonewood’s lien.” (App. Br. at 7, 9) Since the prevailing surety in *DBM* had no right to fees under the lien statute, appellants have no right to fees under the same statute, especially since appellants are wrong — the record clearly shows Stonewood enforced its lien below and the lien was foreclosed.

Before the trial court, appellants made no request for an award of fees or costs under the lien statute.<sup>17</sup> (CP 728) By not raising this claim below, appellants waived this assignment of error. *See infra*, Part C(1).

Appellants cannot be considered prevailing party below or on appeal. The record contradicts appellants’ baseless claim that “Stonewood failed to secure judgment and foreclosure on its lien in the trial court.” (App. Br. at 9) The trial court awarded nothing to appellants on any of their claims below, and the jury rejected the Gretsches’ claim that they,

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<sup>17</sup> Recognizing a fee award under RCW 60.04.181(3) “is discretionary” (CP 682 – 2/10/09 entry), appellants likely did not request fees below because they knew it would not be well received by the trial court, which had already awarded sanctions against them for misconduct (CP 302), it was unreasonable to claim defendants prevailed given the jury verdict and the trial court’s orders clearly favoring Stonewood, and it would have forced appellants to clarify to the trial court their “pocketed” defense that the court’s judgment on Stonewood’s lien lacked the “foreclosure” word, which they apparently decided for strategic reasons to raise only on appeal.

rather than Infinity, were the obligated party on Stonewood's contract with Infinity.<sup>18</sup> (CP 31, 278) Appellants did not prevail on anything.

**E. Respondent has a right to attorney fees and costs on appeal.**

Reasonable attorney fees are recoverable on appeal if allowed by statute, rule, or contract and RAP 18.1(a). *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 535, 79 P.3d 1154 (2003). Here, several grounds support Stonewood's claim to fees.

**1. RCW 4.84.250 et seq.**

As found by the trial court, respondent is entitled to attorney fees and costs pursuant to RCW 4.84.250 *et seq.*<sup>19</sup> Below respondent made offers of settlement to all defendants, including CBIC, the surety, in an amount less than the amount awarded by the jury at trial. These offers of settlement were the basis for the trial court's award of fees to Stonewood under RCW 4.84.25 *et seq.* Stonewood, therefore, has a right to an award of reasonable attorney fees and costs against each of the appellants under the same prevailing party statute. *See* RCW 4.84.090 (court deciding

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<sup>18</sup> Stonewood's action to enforce its lien required joining the "owner of the subject property" as a necessary party. *See* RCW 60.04.041; *Schumacher Painting Co. v. First Union Mgmt.*, 69 Wn. App. 693, 699-700, 850 P.2d 1361 (1993). As appellants argued below, "[t]he Gretschs [*sic*] were named as defendants in this action only because they are the owners of the real estate that Stonewood liened." (CP 548) From this nominal status in the lawsuit, Gretsches cannot claim "prevailing party" status under RCW 60.04.181(3).

<sup>19</sup> The trial court awarded attorneys fees to Stonewood pursuant to RCW 4.84.010, 4.84.250-.280, RCW 18.27.040(6), and CR 37(c) (forcing party to prove matters denied by other party in answers to requests for admissions). (CP 282, 284-86) Appellants have not appealed that award.

appeal shall allow to prevailing party such additional amount as the court deems reasonable as attorneys' fees for the appeal); *see Kingston Lumber Supply Co. v. High Tech Dev. Inc.*, 52 Wn. App. 864, 765 P.2d 27 (1988) (awarding fees in mechanics lien foreclosure case for underlying action and appeal pursuant to RCW 4.84.250, *et seq.* and 4.84.290 that mandates award, regardless of discretionary fees awardable under lien foreclosure statute).

## **2. Lien Statute**

RCW 60.04.181 “permits the court to award reasonable attorney fees and costs to the prevailing party in an action to enforce a lien.” *DBM*, 142 Wn. App. at 37, 42; RCW 60.04.181(3) (prevailing party includes “court of appeals”). Since the trial court found Stonewood’s lien valid and enforceable, and appellants do not assign error to that determination, Stonewood has a right to fees on appeal pursuant to RCW 60.04.181(3). *See Haselwood*, 137 Wn. App. at 891 (“The trial court can award RV Associates attorney fees under this statute if it determines that the lien is valid and enforceable.”). By seeking fees under the same statute, appellants concede this is an action to enforce a lien and Stonewood foreclosed its lien. *See DBM*, 142 Wn. App. at 42 - 43.<sup>20</sup>

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<sup>20</sup> Failure to provide a copy of the lien to the owner within 14 days of the filing prevents an award of attorney’s fees only “*against the owner under RCW 60.04.181.*”

### 3. Frivolous Appeal

In addition, this appeal is frivolous because the issues raised are not reasonably debatable and are devoid of merit. RAP 18.9(a) (authorizing terms and compensatory damages for filing frivolous appeal); *see Tiffany Family Trust v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005) (appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and is so totally devoid of merit that there is no reasonable possibility of reversal); *Marriage of Healy*, 35 Wn. App. 402, 406, 667 P.2d 114 (1983) (imposing sanctions and awarding fees for failure to include challenged findings and raising issues devoid of merit); *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998) (awarding fees on appeal where appellant had no standing to pursue action and continued meritless claim through appeal); *Westar Funding, Inc. v. Sorrels*, 157 Wn. App. 777, 787, 239 P.3d 1109 (2010) (attorney fees awarded for frivolous appeal presenting no debatable issues or legitimate arguments for extension of the law).

This appeal completely lacks merit, intended to delay payment to Stonewood and increase the costs of litigation far out of proportion to the original \$9,148 claim. Appellants, Richard and Michelle Gretsch, were not even real parties in interest in the action below because the release of

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RCW 60.04.091(2) (emphasis added). It does not prevent an award against the other appellant here, Infinity Homes.

lien bond released their real property. They have no right to bring an appeal on the release of lien bond to this Court.

Fifteen months into a case involving numerous depositions, interrogatories, requests for production, requests for admission, multiple amendments and dispositive motions, defense counsel compared the litigation to a high-stakes “chess game” involving “great reward, but [also] great risk.” (CP 687 – 5/1/09 entry; CP 702 – 9/17/09 entry) Appellants’ counsel below coached Infinity’s expert witness, interior designer Carolyn Sikkema, to testify a certain way to hide the truth about the condition of the installed tile to avoid inferences favoring Stonewood’s position. (CP 537, 705 – 11/17/09 entry)<sup>21</sup>

Sanctions are also appropriate for this frivolous appeal in furtherance of appellants’ hardball litigation tactics. *See Carson v. Fine*, 123 Wn.2d 206, 233, 867 P.2d 610 (1994) (Johnson, J., dissenting) (“As litigation techniques embrace increasingly aggressive “hardball” tactics, we too must be increasingly vigilant in protecting the rights of litigants in our courts.”); *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 313, 151 P.3d 201 (2006) (award of sanctions against counsel on appeal for opening

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<sup>21</sup> “Calls to/from Carol Sikkema. Adds to gray area. What is rectified, non-rectified, chipped, blunt, old world, casual. Plays into Alex’s [Aleksey Kononov of Stonewood] that he did the best that he could. Their experts say that nothing about rectified, non-rectified. May we remain silent (Carol) unless specifically asked. Need conference call with Joe [Richard J. Gretschi].” (CP 705 – 11/17/09 entry)

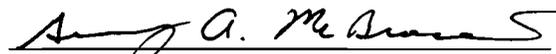
brief that included “numerous misrepresentations and inappropriate quotations taken out of context, causing our court, and presumably [respondent] as well, to waste considerable time checking for their accuracy”).

## V. CONCLUSION

This Court should affirm the trial court’s decision permitting Stonewood to enforce its judgment on the lien against CBIC release of lien bond S10245. This Court should hold that a judgment on the lien that orders payment from a release of lien bond does not need to be labeled a “decree of foreclosure” when the trial court has already fully adjudicated the validity and enforceability of the lien. Appellants prevailed on nothing in the trial court proceedings below, and, therefore, should not be awarded anything. Finally, the Court should award attorney fees and costs to Stonewood for having to respond to this appeal.

DATED this 14<sup>TH</sup> day of February, 2011

LIVENGOOD FITZGERALD & ALSKOG, PLLC



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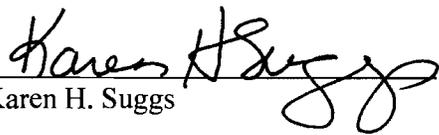
Attorneys for Stonewood Design, Inc.

CERTIFICATE OF SERVICE

KAREN H. SUGGS declares under penalty of perjury of the laws of the State of Washington that I am over the age of eighteen, competent to testify, and make this declaration on my personal knowledge. On the date executed below, I caused Respondents' Brief to be filed and served in the following manner:

Clerk of the Court of Appeals, Division I 600 University St One Union Square Seattle, WA 98101-1176	Messenger Service <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile <input type="checkbox"/>
<i>Attorney for Appellant:</i> Lawrence B. Linville Linville Law Firm, PLLC 800 Fifth Ave., #2850 Seattle, WA 98104	Messenger Service <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile <input type="checkbox"/>

Executed at Kirkland, Washington this 14<sup>th</sup> day of February, 2011

  
Karen H. Suggs