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STATE OF WASHINGTON
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NO. 43760-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CALPORTLAND COMPANY, a California corporation,

Appellant,

v.

TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA; a
Connecticut corporation; and FERGUSON CONSTRUCTION, INC., a
Washington corporation,

Respondents.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

	<u>Page</u>
I. ISSUES PRESENTED.....	1
II. STATEMENT OF FACTS.....	2
III. ARGUMENT.....	4
A. CalPortland Has Waived Any Argument Relating To Its Failure To Seek Foreclosure And Adjudication Of The Validity Of Its Lien In Its Complaint.....	4
B. If CalPortland Has Not Waived The Issue, CalPortland Failed To Comply With RCW 60.04.141 and 161 Requiring Foreclosure Of CalPortland's Lien.....	7
1. Actions Under RCW 60.04 Are Special Proceedings That Must Comply With Statutory Requirements.....	7
2. In Order To Enforce Its Claim Against The Lien Release Bond, CalPortland Was Required By RCW 60.04.141 To Foreclose On Its Lien Within 8 Months of Recording.....	8
3. CalPortland Failed To Serve Costco Within 90 Days Of Filing Its Complaint As Required By RCW 60.04.141.....	13
a. There Are Valid Policy Reasons For Requiring Service On The Property Owner.....	16
b. Complying With The Service Requirement In RCW 60.04.141 Is Not Unduly Burdensome.....	18
C. The Statutes At Issue Are Not Ambiguous, So Rules Of Construction Do Not Apply.....	19
1. RCW 60.04.141 And 161 Clearly Required CalPortland To Seek Foreclosure Of Its Lien And To Serve The Property Owner.....	22
D. The Trial Court's Award Of Attorneys' Fees To Travelers And Ferguson Was Proper Under RCW 60.04.181.....	22

1. Awarding Attorneys' Fees Is Appropriate Where CalPortland Failed To Properly Seek Foreclosure Of Its Lien.....	23
2. Awarding Attorneys' Fees is Proper Where A Lien Claimant Fails To Serve The Property Owner.....	23
3. Travelers And Ferguson Are Entitled To Their Fees On Appeal.....	24
IV. CONCLUSION.....	24

TABLE OF AUTHORITIES

CASES

<i>Arborwood Idaho, LLC v. City of Kennewick</i> , 151 Wn.2d 359, 89 P.3d 217 (2004).....	21
<i>Biggs v. Vail</i> , 119 Wn.2d 129, 830 P.2d 350 (1992).....	20, 22
<i>Boyle v. King County</i> , 46 Wn.2d 428, 282 P.2d 261 (1955).....	5
<i>Bob Pearson Construction, Inc. v. First Cmty. Bank of Washington</i> , 111 Wn. App. 174, 43 P.3d 1261 (2002).....	7, 13, 14
<i>Bravo v. Dolsen Cos.</i> , 125 Wn.2d 745, 888 P.2d 147 (1995).....	20
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 103 P.3d 1230 (2005).....	19, 22
<i>Daughtry v. Jet Aeration Co.</i> , 91 Wn.2d 704, 592 P.2d 631 (1979).....	5, 6
<i>Davis v. Dep't of Licensing</i> , 137 Wn.2d 957, 977 P.2d 554 (1999).....	17, 20
<i>DBM Consulting Engineers, Inc. v U.S. Fid. & Guarantee Co.</i> , 142 Wn. App. 35, 170 P.3d 592 (2007).....	8, 9, 10, 11, 12, 13
<i>Diversified Wood Recycling, Inc. v. Johnson</i> , 161 Wn. App. 859, 251 P.3d 293 (2011).....	15, 19
<i>Duke v. Boyd</i> , 133 Wn.2d 80, 942 P.2d 351 (1997).....	18
<i>Five Corners Family Farmers v. State</i> , 73 Wn.2d 296, 268 P.3d 892 (2011).....	17
<i>Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles</i> , 148 Wn.2d 224, 59 P.3d 655 (2002).....	18
<i>Heinsma v. City of Vancouver</i> , 144 Wn.2d 556, 29 P.3d 709 (2001).....	20
<i>Hubbell v. Ernst</i> , 198 Wash. 176, 87 P.2d 985 (1939).....	5
<i>Hutnick v. U.S. Fid. & Guarantee Co.</i> , 47 Cal.3d 456 -63, 763 P.2d 1326, 253 Cal.Rptr. 236 (1988).....	9, 10

<i>Irwin Concrete, Inc. v. Sun Coast Properties, Inc.</i> , 33 Wn. App. 190, 653 P.2d 1331 (1982)	16
<i>Jeffery v. Hanson</i> , 39 Wn.2d 855, 239 P.2d 346 (1952)	5
<i>Kinnebrew v. CM Trucking & Const., Inc.</i> , 102 Wn. App. 226, 6 P.3d 1235 (2000)	23
<i>Lake v. Woodcreek Homeowners Ass'n</i> , 169 Wn.2d 516, 243 P.3d 1283 (2010)	20, 21
<i>Lee v. Kimball</i> , 45 Wash. 656, 88 P. 1121 (1907)	13
<i>Mt. Ranch Corp. v. Amalgam Enters., Inc.</i> , 143 P.3d 1065–69 (Colo.Ct.App.2005)	9
<i>North Coast Elec. Co. v. Arizona Elec. Service, Inc.</i> , 157 Wn. App. 1041 (2010)	17
<i>Olson Engineering, Inc. v. KeyBank Nat. Ass'n</i> , 171 Wn. App. 57, 286 P.3d 390 (2012)	11, 16, 21
<i>Pacific Erectors, Inc. v. Gall Landau Young Const. Co.</i> , 62 Wn. App. 158, 813 P.2d 1243 (1991)	14
<i>Point Roberts Fishing Co. v. George & Barker Co.</i> , 28 Wash. 200, 68 P. 438 (1902)	18
<i>Queen Anne Painting Co. v. Olney & Assocs., Inc.</i> , 57 Wn. App. 389, 788 P.2d 580 (1990)	14, 15
<i>Rest. Dev. Inc. v. Cananwill, Inc.</i> , 150 Wn.2d 674, 80 P.3d 598 (2003)	18, 21
<i>Saviano v. Westport Amusements, Inc.</i> , 144 Wn. App. 72, 180 P.3d 874 (2008)	5
<i>Schumacher Painting Co. v. First Union Mgmt., Inc.</i> , 69 Wn. App. 693, 850 P.2d 1361 (1993)	12, 23
<i>Smith v. N. Pac. Ry. Co.</i> , 7 Wn.2d 652, 110 P.2d 851 (1941)	20
<i>Snyder v. Cox</i> , 1 Wn. App. 457, 462 P.2d 573 (1969)	7
<i>State v. Armendariz</i> , 160 Wn.2d 106, 156 P.3d 201 (2007)	21, 22
<i>State v. Delgado</i> , 148 Wn.2d 723, 63 P.3d 792 (2003)	17

<i>State v. Engel</i> , 166 Wn.2d 572, 210 P.3d 1007 (2009)	21
<i>State v. Ervin</i> , 169 Wn.2d 815, 239 P.3d 354 (2010)	18
<i>State v. Hahn</i> , 83 Wn. App. 825, 924 P.2d 392 (1996)	20
<i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 318 (2003)	17
<i>State v. Jacobs</i> , 154 Wn.2d 596, 115 P.3d 281 (2005)	21
<i>State v. Keller</i> , 143 Wn.2d 267, 19 P.3d 1030 (2001)	20
<i>State v. Neeley</i> , 113 Wn. App. 100, 52 P.3d 539 (2002)	5
<i>State v. Orange</i> , 78 Wn.2d 571, 478 P.2d 220 (1970)	5
<i>State v. Stannard</i> , 109 Wn.2d 29, 742 P.2d 1244 (1987)	20
<i>Stonewood Design, Inc. v. Heritage Homes, Inc.</i> , 165 Wn. App. 720, 269 P.3d 297 (2011)	12
<i>Whatcom County v. City of Bellingham</i> , 128 Wn.2d 537, 909 P.2d 1303 (1996)	17
<i>Williams v. Athletic Field, Inc.</i> , 172 Wn.2d 683, 261 P.3d 109 (2011)	21

STATUTES

RCW 60.04	3, 4, 7, 12, 15
RCW 60.04.021	10
RCW 60.04.051	18
RCW 60.04.091(2)	21
RCW 60.04.100	14
RCW 60.04.130	23
RCW 60.04.141	2, 3, 6, 7, 8, 11, 13, 14, 15, 18, 19, 22
RCW 60.04.161	2, 6, 7, 9, 11, 13, 14, 19, 21, 22
RCW 60.04.171	8
RCW 60.04.181	22, 23, 24
RCW 60.04.181(2)	16, 17

RCW 60.04.181(3).....	22
RCW 60.04.191.....	21

RULES

CR 8.....	13
CR 15(b).....	13
CR 81.....	7, 13
RAP 1.2(a).....	6
RAP 10.3.....	5
RAP 10.3(a)(6).....	5
RAP 10.3(g).....	4
RAP 18.1.....	24

I. ISSUES PRESENTED

- A. Has CalPortland waived any argument relating to its failure to seek foreclosure of its lien in its Complaint under RCW 60.04.141, 161 and 171 by omitting that issue from its assignments of error and statement of issues?
- B. If CalPortland has not waived the issue, was CalPortland required to seek foreclosure of its lien within 8 months of filing the lien as required by RCW 60.04.141 in order to recover against a lien release bond under RCW 60.04.161?
- C. Was CalPortland required to serve the owner of the property against which the lien was filed with a copy of the summons and complaint within 90 days of filing a lien foreclosure action as required by RCW 60.04.141 in order to recover against a lien release bond under RCW 60.04.161?
- D. Are respondents Travelers and Ferguson entitled to their attorneys' fees under RCW 60.04.181 and RAP 18.1?

II. STATEMENT OF FACTS

Ferguson Construction, Inc. was the general contractor for the construction of a new Costco Wholesale Facility in Vancouver, Washington (the "Project"). CP 26. According to the records of Clark County, Costco Wholesale Corporation became the owner of the real property on which the facility was constructed on June 8, 2010. CP 33-38. Ferguson had a subcontract with Defendant LevelOne Concrete, LLC ("LevelOne") pursuant to which LevelOne agreed to perform all of the building concrete work for the Project. CP 26. Plaintiff CalPortland supplied ready-mix concrete to LevelOne for its use in performing the subcontract. *Id.*

Although Costco paid Ferguson, and Ferguson paid LevelOne for the materials that CalPortland supplied to LevelOne, LevelOne failed to pass those payments along to CalPortland, *id.*, such that CalPortland eventually filed a lien against the property in the amount \$327,926.31. CP 39-42. In response to a demand from Costco, Ferguson filed a lien release bond pursuant to RCW 60.04.161, listing Ferguson as the principal and Travelers as the surety, on April 1, 2011. CP 43-48.

On August 15, 2011, CalPortland filed the present action, in which it did not name the Property owner, Costco, as a party, and in which it did not include a cause of action for foreclosure of lien under RCW 60.04.141. CP 5-10. Nor did CalPortland's complaint otherwise request the trial court to adjudicate the validity of its lien. CP 6-10. Rather, it entitled its Fifth Cause of Action "Release on Lien Bond" and said nothing about lien

foreclosure or the validity of its lien.¹ *Id.* CalPortland's Prayer for Relief did not include any reference to its lien, but simply asked for judgment "against Ferguson and Travelers for the principal amount of not less than \$327,576.31." *Id.* After filing the action, there is no record that CalPortland ever served the property owner, Costco, with a copy of the Summons and Complaint as required by RCW 60.04.141. CP 27.

Ferguson and Travelers brought a motion for summary judgment dismissing CalPortland's claims against them on two bases: (1) that CalPortland had failed to commence an action to foreclose its lien within 8 months of recording it as required by RCW 60.04.141; and (2) that CalPortland had failed to serve Costco, the owner of the property subject to its lien at the time it was filed, with a copy of the summons and complaint within 90 days of the commencement of the action as also required by RCW 60.04.141. CP 25-31.

CalPortland's truncated account of the trial court's ruling granting Ferguson and Travelers' motion at page 3 of its Opening Brief is misleading. What the court actually wrote is that CalPortland "did not serve the property owner and did not seek to foreclose on the lien," and that its failure to do those two things meant that CalPortland "failed to satisfy the statutory requirements" of RCW 60.04. CP 145-46. The trial court elaborated, "CalPortland must adjudicate the merits of the

¹ CalPortland did not even allege the lien as a basis for venue in Clark County pursuant to RCW 60.04.141, which requires the action to be brought "in the superior court in the county where the subject property is located to enforce the lien," instead relying on the residences of defendants to establish venue. CP 6.

underlying lien, and must seek to foreclose on it. Suing on the bond itself is insufficient. They must first prove the validity of the underlying lien.” *Id.*

CalPortland’s Assignment of Error “A” states only that the trial court erred “in dismissing CalPortland’s lien claim because CalPortland complied with RCW 60.04 *et seq.*, by bringing its claim against the bond after the real property was released.” Appellant’s Brief (“App. Brief”) at p. 1. It says nothing about the court’s ruling that “CalPortland must adjudicate the merits of the underlying lien, and must seek to foreclose on it.” CP 145-46. Assignment of Error “B” is limited to the issue of attorneys’ fees.

Similarly, CalPortland’s Statement of Issues contains no mention of the necessity of CalPortland seeking foreclosure of its lien and asking the trial court to adjudicate the merits of that lien. Rather, Issue “A” is limited solely to the question of whether it was necessary for CalPortland to serve the property owner, Costco, with its lawsuit, and, again, Issue “B” speaks only to attorneys’ fees.

III. ARGUMENT

A. CalPortland Has Waived Any Argument Relating To Its Failure To Seek Foreclosure And Adjudication Of The Validity Of Its Lien In Its Complaint.

RAP 10.3(g) states in relevant part: “The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.” Washington

courts have applied this rule and declined to consider arguments that are not supported by an assignment of error. *State v. Orange*, 78 Wn.2d 571, 575, 478 P.2d 220 (1970) (citing *Hubbell v. Ernst*, 198 Wash. 176, 87 P.2d 985 (1939); *Jeffery v. Hanson*, 39 Wn.2d 855, 239 P.2d 346 (1952); *Boyle v. King County*, 46 Wn.2d 428, 282 P.2d 261 (1955)). Further, appellate courts will not address issues that a party neither raises appropriately, nor discusses meaningfully with citations to authority. RAP 10.3(a)(6); *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 84, 180 P.3d 874 (2008).

Ordinarily, a party's failure to include an assignment error is treated as a verity on appeal. *State v. Neeley*, 113 Wn. App. 100, 105, 52 P.3d 539 (2002). In *Neeley*, the court held that the appellant waived a particular issue because she did not make a specific challenge to a finding in her assignments of error, and she did not include any challenged findings in her briefing. *State v. Neeley*, 113 Wn. App. at 105.

In its Assignments of Error and Issues Presented, CalPortland does not take issue with one of the two bases for the trial court's dismissal of its claims against Ferguson and Travelers: that CalPortland failed to seek foreclosure of its lien prior to seeking recovery from the lien release bond. It is true that appellate courts will sometimes waive technical violations of RAP 10.3 where the appellant's briefing makes the nature of the challenge perfectly clear, particularly where the challenged finding can be found in the text of the brief. *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 709-

10, 592 P.2d 631 (1979); RAP 1.2(a). But even that exception does not save CalPortland.

The only mention CalPortland makes of the trial court's ruling that CalPortland was required to seek foreclosure of its lien is at pages 13 through 16 of its Opening Brief,² in which it claims to have been deprived of the opportunity to litigate the validity of its lien because the trial court granted summary judgment on what it calls "procedural grounds." As part of this argument, CalPortland asserts almost in passing—and citing no authority—that it was not necessary to plead foreclosure because there was no real property securing the lien at the time it filed suit. App. Brief at p. 16. CalPortland then takes the position that if it wins on the service issue, it will be free to seek a remedy it never sought in the court below: a ruling as to the validity of its claim of lien. *Id.* at p. 17. This it cannot do without challenging—and prevailing on—the trial court's ruling that it failed timely to seek that remedy in its complaint as required by RCW 60.04.141 and 161. As CalPortland has failed to take issue with one of the two express bases on which the trial court dismissed its complaint, this Court must affirm that dismissal.

² At page 5 of its Opening Brief, CalPortland mentions this issue, but only as something that "Ferguson argued," (somewhat misstating the substance of that argument, *see* footnote 4, *infra*) not as a part of the trial court's ruling that it is challenging on appeal.

B. If CalPortland Has Not Waived The Issue, CalPortland Failed To Comply With RCW 60.04.141 And 161 Requiring Foreclosure Of CalPortland's Lien.

As set forth above, nowhere in CalPortland's Opening Brief does it squarely take exception to the trial court's dismissal of its claim on the ground that CalPortland failed to seek foreclosure of its lien in its Complaint, so CalPortland has waived any argument on that issue. In the unlikely event this Court disagrees, however, Travelers and Ferguson offer the following authority supporting that part of the trial court's ruling.

1. Actions Under RCW 60.04 Are Special Proceedings That Must Comply With Statutory Requirements.

"The [1975] amendment [to the lien statute] made clear that lien foreclosures are special proceedings under CR 81, not subject to the Rules of Civil Procedure." *Bob Pearson Const., Inc. v. First Community Bank of Washington*, 111 Wn. App. 174, 178, 43 P.3d 1261 (2002). "The civil rules are inconsistent with the statutory provisions which govern the manner of pleading" in special proceedings. *Snyder v. Cox*, 1 Wn. App. 457, 459, 462 P.2d 573 (1969)³

As set forth below, CalPortland complied with neither the pleading nor service requirements in the lien statute, so the trial court's dismissal of CalPortland's claims against Travelers and Ferguson should be affirmed.

³ CalPortland cites no authority for the assertion at page 15 of its Opening Brief that special proceedings are limited to actions "to obtain judgment from a non-liquid asset." CR 81 certainly contains no such limitation.

2. In Order To Enforce Its Claim Against The Lien Release Bond, CalPortland Was Required By RCW 60.04.141 To Foreclose On Its Lien Within 8 Months Of Recording.

RCW 60.04.171 explicitly spells out that the manner of pleading to enforce a lien is through foreclosure:

The lien provided by this chapter, for which claims of lien have been recorded, **may be foreclosed** and enforced by a civil action in the court having jurisdiction... (emphasis added).

This statute makes clear that a request for foreclosure of the lien is an essential component of any complaint in a special proceeding to enforce a claim of lien.⁴ As stated above, the words “foreclose” or “foreclosure” do not appear anywhere in CalPortland’s Complaint, nor did CalPortland’s Complaint request the trial court to adjudicate the validity or enforceability of its lien using any other words.

In *DBM Consulting Engineers, Inc. v U.S. Fidelity and Guar. Co.*, 142 Wn. App. 35, 170 P.3d 592 (2007), the Washington Court of Appeals addressed a situation remarkably similar to the one here, except that in that case, unlike here, the claimant against a lien release bond (DBM) actually included a claim for lien foreclosure in its original complaint against the owner, but did not pursue that claim to judgment. When the owner refused to pay the judgment DBM obtained on its breach-of-contract

⁴ At page 15 of its Opening Brief, CalPortland erroneously states that “Defendants argued that because CalPortland did not sue to foreclose *on real property*, it is somehow not entitled to the bond proceeds...” (italics added). That is not Ferguson and Travelers’ argument. Ferguson and Travelers’ position is that CalPortland was required to bring an action to foreclose *its lien*, whatever the security for that lien may have been at the time it brought the action.

claims, DBM brought a new suit against the lien release bond surety (Travelers) without requesting foreclosure of its lien,⁵ and the trial court granted judgment against the surety on the bond. The surety appealed, and the Court of Appeals unambiguously held that a successful lien foreclosure action is a prerequisite to payment on a lien release bond.

The court stated as follows:

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. RCW 60.04.161. **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.** See *Mt. Ranch Corp. v. Amalgam Enters., Inc.*, 143 P.3d 1065, 1068–69 (Colo.Ct.App.2005), *cert. denied*, 2006 WL 2864900, 2006 Colo. LEXIS 834 (Colo. Oct. 10, 2006); *Hutnick v. U.S. Fid. & Guar. Co.*, 47 Cal.3d 456, 462–63, 763 P.2d 1326, 253 Cal.Rptr. 236 (1988).

DBM's interpretation of the lien bond statute severs the tie between the lien and the bond in that the lien itself need never be adjudicated, yet the surety is still obligated—as if the lien bond is the same as a judgment bond. But that defeats the purpose of a lien bond. The purpose of such a bond is to transfer the lien from the property to the bond to permit alienation of the property—it is not a concession that the lien is valid and correct.

* * *

DBM could and should have obtained a judgment upon the lien from the trial court in its action against Soos Creek,

⁵ See *DBM*, 142 Wn. App. 35, at f.n. 3: "DBM did not request foreclosure of its lien in its action against Travelers below or here."

proving that the services provided were professional services that resulted in an improvement to the property as required by the mechanic's 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.

* * *

DBM also argues that it would have been impossible to foreclose on the lien once the bond had released it from the property because there was no longer any lien to foreclose upon, but this argument is simply incorrect. A lien bond does not eliminate a lien entirely. A lien bond releases the property from the lien, but **the lien is then secured by the bond.** *Hutnick*, 47 Cal.3d at 463, 253 Cal.Rptr. 236, 763 P.2d 1326.

Id. at 40-42.

CalPortland attempts to distinguish this case on the ground that the lien release bond had not been filed when DBM filed its original complaint. *Id.* at p. 16-17. That may have been true as to the first action, in which DBM obtained judgment against the owner, but the bond was obviously in place when DBM brought the second action against the bond surety. It was in that context that the court held:

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. *Mountain Ranch*, 143 P.3d at 1068-69. **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, at 42 (emphasis added)

In this case, CalPortland tried to do exactly what DBM did: skip foreclosing its lien and go straight for the bond. The *DBM* court unequivocally disapproved that procedure, and this court should do likewise.

This court's recent decision in *Olson Engineering, Inc. v. KeyBank Nat. Ass'n*, 171 Wn. App. 57, 286 P.3d 390 (2012), is completely in accord, stating:

The plain language of the statute [RCW 60.04.161] also implies that to be entitled to the proceeds of the lien release bond, the lien claimant must obtain a favorable judgment on the lien. RCW 60.04.161 (the bond "guarantee[s] payment of any judgment upon the lien"; it does not provide that the lien claimant will otherwise receive any of the bond amount).

The purpose of RCW 60.04.161 is to allow a party to file a bond to support transferring to the bond a lien against the property to allow the party supplying the bond to free up the property for conveyance. Filing such a bond, however, is not a concession by the bond-filer that the transferred lien is valid and correct.

Id. at 66 (citing *DBM Consulting, supra*, 142 Wn. App. at 41).

CalPortland latches onto the courts' mention of "judgment" and argues that the trial court's dismissal of the action on "procedural" grounds prevented it from proceeding to judgment on its lien claim. App. Brief at p. 13. That argument overlooks the fact that CalPortland could *never* obtain a judgment on a claim it failed to plead in the time required by RCW 60.04.141, because there is no relation back of amendments in a

special proceeding. *Schumacher Painting Co. v. First Union Management, Inc.*, 69 Wn. App. 693, 700, 850 P.2d 1361 (1993).

CalPortland relies on *Stonewood Design, Inc. v. Heritage Homes, Inc.*, 165 Wn. App. 720, 269 P.3d 297 (2011), to argue that, in spite of the clear mandate of *DBM*, it is not necessary for a lien claimant to seek foreclosure of its lien in its complaint, but that is not what *Stonewood* says. In that case, an owner appealed judgment against a lien release bond because *the trial court* neglected to use the word “foreclosure” as part of its *judgment*. The Court of Appeals found that “*DBM* does not impose vocabulary requirements **for judgments**,” and upheld the judgment, but only because “Stonewood’s complaint **expressly sought foreclosure of the lien**.” *Stonewood*, 165 Wn. App. at 724. (emphasis added). In discussing this case, CalPortland confuses what is required of the *court* in rendering a judgment with what is required of a *plaintiff* in pleading a special proceeding for lien foreclosure under RCW 60.04. The *Stonewood* court had no patience for the appellant's nitpicking the words the trial court used in its judgment, but it is beyond serious argument that it would not have upheld that court’s judgment if it had not found that “Stonewood’s complaint **expressly sought foreclosure of the lien**.” *Id.* (emphasis added).

There are no Washington cases holding that a lien claimant is entitled to a judgment against a lien release bond when it did not bother to

seek foreclosure of its lien in its pleadings.⁶ As set forth above, Washington law is uniformly and emphatically to the contrary.

CalPortland seems to think it was sufficient that its complaint merely “alleged the existence of its lien.” App. Brief at p. 17. That is clearly wrong. In *DBM, supra*, DBM asserted the existence of its lien, but its claim against the bond was denied because, as here, DBM did not ultimately ask the court to do anything with that lien before seeking judgment against the bond.

3. CalPortland Failed To Serve Costco Within 90 Days Of Filing Its Complaint As Required By RCW 60.04.141.

Even if CalPortland had sought adjudication of the validity of its lien in its Complaint, that claim would be invalid now because CalPortland failed to serve the property owner, Costco, within 90 days of filing suit, as required by RCW 60.04.141. RCW 60.04.161 expressly permits the filing of a lien release bond “either before or after the

⁶ The only case CalPortland can find in support of its argument that it was not obliged to plead foreclosure of its lien is 105 years old, and has nothing in common with the facts of this case. In *Lee v. Kimball*, 45 Wash. 656, 88 P. 1121 (1907), the defendant did not specifically attack the sufficiency of the claimant’s pleadings, as Travelers and Ferguson do here. Rather, “[t]he defendant filed a general demurrer to the complaint, which was overruled. She refused to plead further, and elected to stand on her demurrer.” *Id.* at 658.

On those facts, it is not surprising that the Supreme Court let the judgment for lien foreclosure stand, particularly because that case was decided 68 years before the legislature amended the lien statute and “made clear that lien foreclosures are special proceedings under CR 81, not subject to the Rules of Civil Procedure,” *Bob Pearson Const., Inc. v. First Community Bank of Washington*, 111 Wn. App. 174, 178, 43 P.3d 1261 (2002), which include CR 8’s notice pleading provisions, and CR 15(b)’s automatic amendment of pleadings to conform to evidence to which neither party specifically objected during trial.

commencement of an action to enforce the lien,” but prescribes no different procedure for that action depending upon the time the bond is recorded. Thus, there is no basis for CalPortland’s argument at pages 7 and 8 of its Opening Brief that the procedures are completely different depending on that timing. Rather, regardless of the security for the lien at the time the action is filed, RCW 60.04.161 requires “an action to recover on a lien” to be commenced “within the time specified in RCW 60.04.141” as a condition to continued liability on the bond. RCW 60.04.141, in turn, requires an action “to enforce the lien” within 8 months of filing, and that “service [be] made upon the owner of the subject property within ninety days of the date of filing the action.”

Applying the prior version of the lien statute, the court in *Pacific Erectors, Inc. v. Gall Landau Young Const. Co.*, 62 Wn. App. 158, 165, 813 P.2d 1243 (1991), held: “The 1975 amendments [to the lien statute] created ‘specific rules for filing and service which must be followed in order to preserve a lien claim.’...Thus, commencement of a lien foreclosure action under RCW 60.04.100⁷ is merely tentative until the action is perfected by service’ on all necessary parties. Failure to serve a necessary party⁸ within the statutory period renders the lien foreclosure action *absolutely* void...” *Id.* quoting *Queen Anne Painting Co. v. Olney*

⁷ Now RCW 60.04.141

⁸ “In 1991 and 1992, the legislature again amended the [lien] statute, eliminating the confusion over who were necessary parties by changing ‘necessary parties’ to ‘the owner of the subject property’... Thus, since 1991, a lien claimant must file against and serve the owner to create a valid lien.” *Bob Pearson Const., Inc. v. First Community Bank of Washington*, 111 Wn. App. 174, 178, 43 P.3d 1261 (2002).

& Assocs., Inc., 57 Wn. App. 389, 395, 788 P.2d 580 (1990) (emphasis in original).

In the recent case of *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 251 P.3d 293 (2011), the issue was whether a lien claimant had joined the owner as a party and served the owner within 90 days of filing its lien foreclosure suit, as required by RCW 60.04.141.

The *Johnson* court considered whether an owner must be joined and served in a lien foreclosure action to prevent expiration of the lien. The court ruled that joinder of the owner is not necessary, but that "there is no question that the current deadline for service 'upon the owner' must be strictly enforced and without such service, the lien no longer binds the property." *Johnson*, 161 Wn. App. at 872. The court went on:

The current version of chapter 60.04 RCW does not define "owner," but the term "appears to mean the record holder of the legal title." We accept that definition, and we conclude that RCW 60.04.141 obligated Diversified to serve the foreclosure action upon the record holder of the legal title of the property designated in the claim of lien within 90 days of filing the action, in order to keep the lien alive.

Id. at 875.

It is undisputed that CalPortland failed to serve the property owner, Costco, within 90 of filing its Complaint. Even assuming it had adequately pled an action to foreclose its lien (which it did not), its failure to comply with the service requirement in RCW 60.04.141 has rendered

its action absolutely void. The trial court's dismissal of CalPortland's Complaint against Ferguson and Travelers must therefore be affirmed.

a. There Are Valid Policy Reasons For Requiring Service On Property Owners.

CalPortland's argument that because Costco's land is no longer encumbered by CalPortland's lien there is no reason to serve Costco is misplaced. RCW 60.04.181(2) states that:

[a] personal judgment may be rendered against any party liable for any debt for which a lien is claimed....The amount realized by such enforcement of lien shall be credited upon the proper personal judgment. The deficiency, if any, remaining unsatisfied, shall stand as a personal judgment, and may be collected by execution against any party liable therefore.

That is precisely what the trial court did in *Olson Engineering, supra*. It awarded a total judgment to the lien claimant of \$219,209.64, which included judgment against the bond surety for the full amount of the bond, and a deficiency judgment against the property owner—which had obtained the property through a foreclosure, and therefore had no contract with the lien claimant—for the difference of \$107,446.64. *Id.*, 171 Wn. App. at 64.

That a landowner may be personally liable to a lien claimant over and above any liability on the lien claim itself is also illustrated by *Irwin Concrete, Inc. v. Sun Coast Properties, Inc.*, 33 Wn. App. 190, 653 P.2d 1331 (1982), in which the court found the property owner liable to lien claimants on a theory of unjust enrichment, even though it found their lien claims unenforceable. That being so, the lien law's requirement that the

real property-owner be served—even if a bond has replaced the property as security for the lien—makes sense.⁹

That those reasons may not apply with equal force in a few circumstances does not give this Court license to write the service requirement out of the statute. As the Washington Supreme Court stated in *State v. J.P.*, 149 Wn.2d 444, 69 P.3d 318 (2003):

Just as we “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language,” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003), **we may not delete language from an unambiguous statute:** “‘Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.’” *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)).

Id. at 450 (emphasis added).

Even if serving the owner after a lien bond is filed seems unnecessary in a particular case, as long as there is a conceivable justification for the requirement in general, this Court must respect the legislature’s prerogative to include that requirement. In the recent case of *Five Corners Family Farmers v. State*, 73 Wn.2d 296, 268 P.3d 892 (2011), the Washington Supreme Court stated:

It is true that we “will avoid [a] literal reading of a statute which would result in unlikely, absurd, or strained

⁹ See also, *North Coast Elec. Co. v. Arizona Elec. Service, Inc.*, 157 Wn. App. 1041 (2010) (citing RCW 60.04.181(2) and stating that “posting a bond does not preclude a deficiency judgment against the general contractor or land owner.”)

consequences.” *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). However, this canon of construction must be applied sparingly. *See Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997) (“Although the court should not construe statutory language so as to result in absurd or strained consequences, neither should the court question the wisdom of a statute even though its results seem unduly harsh.” (citation omitted)). Application of the absurd results canon, by its terms, refuses to give effect to the words the legislature has written; it necessarily results in a court disregarding an otherwise plain meaning and inserting or removing statutory language, a task that is decidedly the province of the legislature. *See Restaurant Development Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003) (“[A] court must not add words where the legislature has chosen not to include them.”); *Point Roberts Fishing Co. v. George & Barker Co.*, 28 Wash. 200, 204, 68 P. 438 (1902). This raises separation of powers concerns. Thus, in *State v. Ervin*, 169 Wn.2d 815, 824, 239 P.3d 354 (2010), we held that if a result “is conceivable, the result is not absurd.”

Id. at 311.

RCW 60.04.141 requires service on the "owner of the subject property," which RCW 60.04.051 defines as "[t]he lot, tract, or parcel of land which is improved," within 90 days of filing an action to enforce a lien. CalPortland did not do that, so its lien against the bond on which Travelers is the surety and Ferguson is the principal ceased to exist.

b. Complying With The Service Requirement In RCW 60.04.141 Is Not Unduly Burdensome.

CalPortland's hand-wringing about needless filings and expense if lien claimants are required to serve property owners is spurious for two

reasons. First, the recent case of *Diversified Wood Recycling, Inc. v. Johnson*, held that it is only necessary to *serve* the property owner, not *join* the owner as a party, in order to pursue a valid lien foreclosure action. *Id.*, at 859. That means that if the property owner chooses not to monitor the proceedings, it does not have to incur any expense at all. Moreover, as a practical matter, in asserting claims against lien release bonds, for years experienced Washington construction lawyers have made a practice of complying with the letter of RCW 60.04.141 and 161 and joining and serving property owners, and then stipulating to dismissing them in exchange for the principal and surety's agreement not to base any defense to the bond claim on that dismissal. That simple process is vastly less expensive than arguments like the present one that has resulted from CalPortland's attempt to skirt the plain language of the law.

C. The Statutes At Issue Are Not Ambiguous, So Rules Of Construction Do Not Apply.

CalPortland spends most of its Opening Brief arguing for the application of various rules of statutory construction that it asserts support its strained reading of RCW 60.04.141 and RCW 60.04.161. But CalPortland completely ignores the threshold issue of whether those statutes are ambiguous such that rules of construction even apply. In *Burton v. Lehman*, 153 Wn.2d 416, 103 P.3d 1230 (2005), the Washington Supreme Court left no doubt that that courts are not allowed to resort to rules of construction if a statute is clear:

Where statutory language is plain and unambiguous, a court will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of a contrary interpretation by an administrative agency. See *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 752, 888 P.2d 147 (1995); *Smith v. N. Pac. Ry. Co.*, 7 Wn.2d 652, 664, 110 P.2d 851 (1941). A statutory term that is left undefined should be given its “usual and ordinary meaning and courts may not read into a statute a meaning that is not there.” *State v. Hahn*, 83 Wn. App. 825, 832, 924 P.2d 392 (1996). If the undefined statutory term is not technical, the court may refer to the dictionary to establish the meaning of the word. *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 564, 29 P.3d 709 (2001). In undertaking this plain language analysis, the court must remain careful to avoid “unlikely, absurd or strained” results. *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987).

In contrast, an ambiguous statute requires judicial construction. **A statute is ambiguous only if susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable.** *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). If a statute is subject to more than one reasonable interpretation, the court should construe the statute to effectuate the legislature's intent. *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). **Only where the legislative intent is not clear from the words of a statute may the court “resort to extrinsic aids, such as legislative history.”** *Biggs v. Vail*, 119 Wn.2d 129, 134, 830 P.2d 350 (1992)

Id. at 422-23.

In the more recent case of *Lake v. Woodcreek Homeowners Association*, 169 Wn.2d 516, 243 P.3d 1283 (2010), the Washington Supreme Court repeated some of the same rules and included some others:

“The court’s fundamental objective in construing a statute is to ascertain and carry out the legislature’s intent.” *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004). Statutory interpretation begins with the statute’s plain meaning. Plain meaning “is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). While we look to the broader statutory context for guidance, we “must not add words where the legislature has chosen not to include them,” and we must “construe statutes such that all of the language is given effect.” *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d at 682. **If the statute is unambiguous after a review of the plain meaning, the court’s inquiry is at an end.** *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Id. at 526-27 (emphasis added).¹⁰

This Court repeated those same rules in the even more recent case of *Olson Engineering, Inc. v. KeyBank Nat. Ass’n*, in which the meaning of the very statute at issue here, RCW 60.04.161 was in question. This Court elaborated, “In determining plain meaning, we look to the text of the questioned statutory provision and ‘the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.’” *Id.* at 65 (quoting *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). Applying those rules, this Court held that RCW 60.04.161 is not ambiguous, and that its plain meaning allows parties to dispute the

¹⁰ In *Williams v. Athletic Field, Inc.*, 172 Wn.2d 683, 261 P.3d 109 (2011), the court did not invoke RCW 60.04.191’s rule of liberal construction until it had already determined that the statute at issue was ambiguous: “We conclude that RCW 60.04.091(2) is ambiguous.” *Id.* at 693. “Because the language of RCW 60.04.091(2) is ambiguous, we must look beyond the statute’s plain language to interpret it.” *Id.* at 694.

priority of liens under RCW 60.04.181 after lien release bonds are filed. *Id.* at 71. This Court then declined to go down the road of statutory construction, holding: “Having determined the plain meaning of the statutory provision at issue, we need not address the parties’ other RCW 60.04.161 arguments.” *Id.* at fn. 18.

1. RCW 60.04.141 And 161 Clearly Required CalPortland To Seek Foreclosure Of Its Lien And To Serve The Property Owner.

Because the meaning of these provisions is clear, “the court’s inquiry is at an end.” *State v. Armendariz*, 160 Wash.2d at 110, and it “may not resort to extrinsic aids, such as legislative history.” *Burton v. Lehman*, 153 Wn.2d at 422-23 (quoting *Biggs v. Vail*, 119 Wn.2d 129, 134, 830 P.2d 350 (1992)). In order for this Court to adopt CalPortland’s strained interpretation of these straightforward provisions, it would have to either add alternative means of pleading and procedure that they do not contain, or excuse actions they expressly require. Washington courts have repeatedly held that this Court may not do either of those things.

D. The Trial Court’s Award Of Attorneys’ Fees To Travelers and Ferguson Was Proper Under RCW 60.04.181.

Both bases of the trial court’s dismissal of CalPortland’s Complaint merit an award of its attorneys’ fees and costs under RCW 60.04.181, including the cost of the bond.¹¹

¹¹ RCW 60.04.181(3) specifically allows a party to recover “bond costs.”

1. Awarding Attorneys' Fees Is Appropriate Where CalPortland Failed To Properly Seek Foreclosure Of Its Lien.

Where a claim of lien initiates litigation, “the lien statute is applicable even where the lien is released prior to trial.” *Kinnebrew v. CM Trucking & Const., Inc.*, 102 Wn. App. 226, 232, 6 P.3d 1235 (2000). In *Kinnebrew*, the court awarded attorneys’ fees to the prevailing party under the lien foreclosure statute (RCW 60.04.181) even though the lawsuit was not a lien foreclosure action. Similarly, in *Schumacher*, the court found that an award of attorneys’ fees under RCW 60.04.181 was appropriate where the “claim was related to the lien foreclosure action.” *Schumacher Painting Co. v. First Union Mgmt., Inc.*, 69 Wn. App. 693, 702, 850 P.2d 851 (1941). Here, CalPortland’s claim against Ferguson directly related to its lien on the property (and claimed lien foreclosure action) because CalPortland was attempting to recover against Ferguson’s lien release bond. Importantly, CalPortland assumed that suing on the bond was sufficient under the lien foreclosure statute, thus it also requested attorneys’ fees under RCW 60.04.181.

2. Awarding Attorneys' Fees Is Proper Where A Lien Claimant Fails To Serve The Property Owner.

CalPortland’s failure to serve the property owner warrants an award of attorneys’ fees under the lien foreclosure statute. In *Schumacher*, the court dismissed the lien foreclosure action on the grounds that the property owner was not timely served and awarded attorneys’ fees to defendants under RCW 60.04.181 (former RCW 60.04.130). Here, even if CalPortland had properly pled a lien foreclosure action, its failure to serve

Costco (the property owner) warranted dismissal of its claim. Thus, CalPortland's failure to serve the property owner is an independent basis for an award of attorneys' fees under the lien foreclosure statute.

3. Travelers and Ferguson Are Entitled To Their Fees On Appeal.

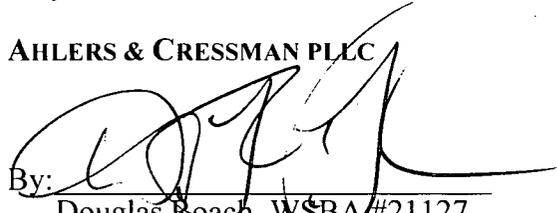
Assuming that this Court will affirm the trial court's well-founded decision, Travelers and Ferguson request their attorneys' fees on appeal pursuant to RCW 60.04.181 and RAP 18.1.

IV. CONCLUSION

CalPortland's lien has expired, both because it never pursued a claim for lien foreclosure, and because it never served its Complaint on Costco, both of which it was explicitly required by statute to do. CalPortland therefore no longer has any claim against the lien release bond or its principal, Ferguson, or the surety, Travelers, and the trial court's dismissal of CalPortland's claims against the bond and those entities must be affirmed.

DATED: This 7th day of February, 2013.

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

NO. 43760-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CALPORTLAND COMPANY, a California corporation,

Appellant,

v.

TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA; a
Connecticut corporation; and FERGUSON CONSTRUCTION, INC., a
Washington corporation,

Respondents.

CERTIFICATE OF SERVICE

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I certify that on Friday, February 8, 2013, I caused *Travelers Casualty & Surety Company of America and Ferguson Construction, Inc.'s Brief of Respondents* to be served on the counsel of record in this action via legal messenger:

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