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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

No. 94118-1

No. 340228

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

INLAND EMPIRE DRY WALL SUPPLY, CO.

Appellant,

v.

WESTERN SURETY CO.

Respondent

APPEAL FROM SPOKANE COUNTY SUPERIOR COURT
THE HONORABLE JOHN O. COONEY

BRIEF OF APPELLANT INLAND EMPIRE DRY WALL, LLC.

RICHARD D. CAMPBELL, WSBA# 24078
WILLIAM M. HUGHBANKS, WSBA# 45562
Attorneys for Appellant

CAMPBELL & BISSELL, PLLC
820 West 7th Ave
Spokane, Washington 99204
Telephone: (509) 455-7100
Email: rcampbell@campbell-bissell.com
whughbanks@campbell-bissell.com

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I. INTRODUCTION

Appellant Inland Empire Dry Wall Supply Co. ("Inland") filed suit against Respondent Western Surety Co. ("Western"), to recover moneys owed for materials it delivered to a commercial construction project. It subsequently filed a motion for summary judgment on its lien foreclosure claim and Western filed a cross motion for summary judgment seeking to dismiss the case because Fowler General Construction ("Fowler"), the principal on the lien bond, was not joined to the action. The trial court granted summary judgment in favor of Western. Inland filed a motion for reconsideration which was also denied and this appeal timely followed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Inland's motion for summary judgment by letter ruling on October 6, 2015 and in its order dated October 22, 2015.

2. The trial court erred when it granted Western's motion for summary judgment by letter ruling on October 6, 2015 and in its order dated October 22, 2015.

3. The trial court erred when it denied Inland's motion for reconsideration by letter ruling on November 20, 2015 and in its order dated December 16, 2015.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is Inland, a material supplier which supplied materials to a residential construction project, an entity which is entitled to protection under RCW 60.04 *et seq.*? (Assignment of Error 1, 2 and 3).

2. Should Inland's motion for summary judgment have been granted when it proved it complied with the statutory elements of RCW 60.04

et seq. to foreclose its claim against the release of lien bond recorded by Western? (Assignment of Error 1, 2 and 3).

3. Should a bond principal in a surety-principal-obligee relationship be defined as an "owner of the subject property" as contemplated by RCW 60.04.141? (Assignment of Error 1, 2, and 3).

4. Because the legislature did not define "owner of the subject property" in RCW 60.04.141, should the trial court have construed the term against Inland, an entity entitled to protection under the lien statutes? (Assignment of Error 1, 2, and 3).

5. Whether, under a liberal interpretation in favor of a lien claimant, RCW 60.04.141 requires a lien claimant name the principal of a release of lien bond as an indispensable party when the lien statutes do not expressly so require? (Assignment of Error 1, 2, and 3).

6. Was Fowler, the principal on the release of lien bond, an indispensable party to the action when was not impaired or impeded from protecting its interests, it had actual notice of the lawsuit, its own counsel represented the surety, and it actively participated in defense of the lawsuit? (Assignment of Error 1, 2, and 3).

IV. STATEMENT OF THE CASE

Inland is a supplier of drywall materials for use on construction projects. (C.P. 4, 10). On or about October 15, 2012, Inland entered into a credit agreement to sell drywall materials to Eastern Washington Drywall & Paint, LLC (hereafter "EWD&P"). (C.P. 4, 11, 14-15). Thereafter, EWD&P entered into a subcontract with Fowler, the general contractor on the Belle Vista Apartments in Richland, Washington (hereafter "Project") in Richland, Washington for EWD&P to perform drywall construction work. (C.P. 4, 10, 25). On April 14, 2014, EWD&P

made its first of many orders of materials from Inland for the Project. (C.P. 11, 16-17). In total, Inland supplied $124,653.05 worth of drywall to EWD&P which was incorporated into the Project. (C.P. 11, 16-17). EWD&P did not pay Inland for any of the drywall but admits that it owes Inland $124,653.05 for the materials. (C.P. 11, 26).

Inland timely and properly served a pre-claim lien notice to the owner of the Project, Western States Development Corporation, as required by RCW 60.04.031. (C.P. 18-20). On September 26, 2014, Inland timely and properly recorded a lien in Benton County, Washington under auditor's number 2014-024259 as required by RCW 60.04.091. (C.P. 21-22). On November 17, 2014, Fowler recorded a release of lien bond, issued by Western, in the Benton County Auditor's office in the amount of $186,979.57 to release the Project from Inland's lien pursuant to RCW 60.04.161. (C.P. 49-50).

On January 5, 2015, Inland timely filed its summons and complaint to foreclose on its lien. RCW 60.04.141. (C.P. 1-6). On March 26, 2015, Western filed its answer to the complaint. (C.P. 7-9). Western was represented by Timothy Klashke of the law firm Kuffel, Hultgrenn, Klashke, Shea & Ellerd, LLP (the "law firm"). (C.P. 9). The law firm, and Tim Klashke in particular, are Fowler's regular attorneys. (C.P. 86-94). In Western's answer, the law firm denied the validity of the lien and

asserted affirmative defenses which denied Western's and Fowler's obligation to pay Inland. (C.P. 7-9).

On August 6, 2015, Inland filed its Motion for Summary Judgment. (C.P. 37-39). Inland asked the trial court to foreclose on its lien because Inland had complied with the mechanic's lien statutes and proven it is owed the sums claimed in the lien. (C.P. 30-36, 37-39). On August 31, 2015, Western filed a cross-motion for summary judgment, asking the trial court to dismiss the lawsuit solely because Inland had failed to join Fowler as a party and serve it with process within eight months of filing its lien. (C.P. 63-75, 76-77, 43-50, 81-85). The trial court heard oral argument for both motions on October 2, 2015. (C.P. 118-120). At the conclusion of oral argument, the trial court stated it would be taking the matter under advisement and would issue a decision by way of a letter to counsel for the parties. (R.P. 39).

On October 6, 2015, the trial court sent a letter to Inland and Western announcing its ruling that it was granting Western's motion for summary judgment and denying Inland's motion for summary judgment. (C.P. 118-120). In its letter ruling, the trial court stated that pursuant to RCW 60.04.141, "the owner of the subject property" must be served with process within ninety days of the date of filing the action. (C.P. 119-120). The trial court acknowledged that RCW 60.04.141 does not define "owner

of the subject property" but that for purposes of this case, the owner of the subject property was WSDC [the owner of the real property] ..." until such time that the real property was released by the bond. (C.P. 119-120). The trial court went on to conclude that RCW 60.04.141 requires that the "owner of the subject property" be named in the lawsuit and that the release of lien bond was now the "subject property". (C.P. 120). The trial court relied on *CalPortland Co. v. LevelOne Concrete, LLC,* 180 Wn. App. 379, 321 P.3d 1261 (2014) which held that the only the owner of the subject property need not be served with process when a release of lien bond is recorded. (C.P. 120) The trial court also noted that the *CalPortland* decision stated that the only parties with an interest in the bond were the principal and the surety. (C.P. 120). The trial court then reasoned that both the principal and surety were the "owners of the subject property" and both must be named in the lawsuit. (C.P. 120). Because the trial court concluded that one of the owners of the subject property (Fowler) was not served with process within ninety days of filing of the action, Inland's case must be dismissed. (C.P. 120). The order granting Western's motion for summary judgment and denying Inland's motion was entered on October 22, 2015. (C.P. 121-123).

On October 29, 2015, Inland timely filed its motion for reconsideration which was heard by the trial court without oral argument.

(C.P. 124-125, 126-134). On November 20, 2015, the trial court sent a letter to Inland and Western's counsel, denying Inland's motion for reconsideration. (C.P. 151).[1] The order denying Inland's motion for reconsideration was entered on December 16, 2015. (C.P. 153-154). Inland timely initiated this appeal. (C.P. 155-157).

V. SUMMARY OF ARGUMENT

Inland supplied $124,653.05 worth of materials which were incorporated in the Project. (C.P. 11, 16-17). It was not paid for them and, being an entity determined by the legislature to be protected by the lien statutes, filed a lien to secure payment. (C.P. 11, 21-22). Inland, in its motion for summary judgment, proved it met all of the necessary elements to foreclose its claim and prevail on summary judgment. (C.P. 30-36, 10-24, 25-29).

Inland did not name the principal of the bond in the action because the lien statutes, and the cases which interpret them, do not expressly require it to do so. *See* RCW 60.04.141 (service required on the "owner of the subject property"); RCW 60.04.161 (bond in lieu statute does not state a bond principal must be named as a party); RCW 60.04.171 (requiring in any lien action the owner shall be joined as a party); and *CalPortland* at

[1] On that same day, November 20, 2015, the trial court sent a second letter to Western and Inland's counsel, clarifying which pleadings it considered in denying Inland's motion for reconsideration. (C.P. 152)

387-88, 321 P.3d at 1265 (holding the owner does not need to be named as a defendant where a lien bond is filed). Naming only the surety is permitted under general suretyship law. *See section VII. D. infra,* at 21-23. The trial court incorrectly determined that once a release of lien bond was recorded, RCW 60.04.141 requires the owner of the subject property be named in the lawsuit and that, in a release of lien bond scenario, the bond principal is an "owner" and the "subject property" is the bond. (C.P. 120). The trial court should have followed the holding the *CalPortland* case which held that the exact opposite, that the owner of the subject property need not be named in the lawsuit. 180 Wn. App. at 388, 321 P.3d at 1265. The trial court further misinterpreted the *CalPortland* case by determining that the bond was the subject property. (C.P. 120). The trial court failed to analyze whether the bond principal is an indispensable party under CR 19. (C.P. 119-120).

By dismissing Inland's lawsuit, granting summary judgment in favor of Western, and denying Inland's motion for reconsideration, the trial court failed to liberally construe RCW 60.04.141 in Inland's favor, as legislatively mandated by RCW 60.04.900.

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VI. STANDARD OF REVIEW

The trial court engaged in statutory interpretation when it determined a principal on a lien bond is an "owner" for the purpose of RCW 60.04.141 and granting Western's motion for summary judgment as a result. When reviewing a trial court's interpretation of a statute, and when reviewing a ruling made at summary judgment, the standard of review is de novo. *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC,* 171 Wn.2d 736, 744, 257 P.3d 586, 589 (2011). Under a de novo review, the reviewing court engages in the same inquiry as the trial court, meaning it must construe all evidence and inferences in favor of the party against whom summary judgment was entered. *See, Hubbard v. Spokane County*, 146 Wn.2d 699, 706, 50 P.3d 602, 606 (2002).

VII. ARGUMENT

A. Inland is an Entity which is Entitled to Protection under RCW 60.04 *et seq.*

As a preliminary matter, construction material suppliers are entities which Washington's mechanic's lien statutes are intended to protect. *See* RCW 60.04.011(4); *Portland Elec. & Plumbing, Co. v. Dobler*, 36 Wn. App. 114, 117-18, 672 P.2d 103, 104 (1983) (holding that a material supplier is entitled to a lien for materials supplied to a construction project). Inland is a construction materials supplier. (C.P. 4). Because it is an entity intended to be protected under the mechanic's lien statute, the

Court must liberally construe the statutes in Inland's favor. *See* RCW 60.04.900; *Williams v. Athletic Field, Inc.*, 172 Wn.2d 683, 694-98, 261 P.3d 109, 116-18 (2011).

B. Inland's Motion for Summary Judgment should have been Granted because it Complied with RCW 60.04 *et seq.*

For a lien claimant to prevail, it must meet the following statutory elements: (1) Be authorized to assert a lien; (2) Timely file a pre-claim notice; (3) Record the claim of lien in the county where the Project is situated; and (4) File a lawsuit to foreclose within eight months of the recording date. *See* RCW 60.04.021, .031, .091 and .141. In addition, a lien claimant must also show it is entitled to payment for the amounts claimed in the lien. *See Norris Indus. v. Halverson-Mason Constructors*, 12 Wn. App. 393, 399, 529 P.2d 1113, 1117 (1974).

In this case, Inland complied with the lien filing and recording requirements under the lien statutes. First, there is no dispute that as a supplier, Inland is authorized file a lien. *See, Portland Elec.* at 117-18, 672 P.2d at 104; (C.P. 4). Secondly, Inland properly served its pre-claim lien notice to Western States Development Corporation as required by RCW 60.04.031. (C.P. 10-22). Third, Inland timely recorded its lien in Benton County under auditor's file number 2014-024259 pursuant to RCW 60.04.091. (C.P. 21-22). Finally, Inland filed its summons and

complaint to foreclose on its lien and served Western with process within eight months of recording the lien pursuant to RCW 60.04.141. (C.P. 1-6).

After the lawsuit was filed, Inland met its burden to show it is owed the sums claimed in the lien, $124,653.05, by producing records showing the orders made by EWD&P for use on the Project. (C.P. 10-17). Finally Inland provided affidavit testimony from EWD&P admitting this entire amount, $124,653.05 is owed to Inland. (C.P. 25-29). Because Inland complied with all procedural steps required under the lien statutes and met its burden of proof regarding the amounts owed on the lien, the trial court erred in denying Inland's motion for summary judgment.

C. A Bond Principal is not an "Owner" and the Bond is not "the Subject Property" under RCW 640.04.141.

The trial court, erred when it construed an undefined term in Western's favor. Once the trial court determined Inland to be within the category of entities to be protected by the lien statutes, it should have construed the undefined term in Inland's favor. *See Williams,* 694-98, 261 P.3d at 116-18. However, in its October 22, 2015 order, the trial court construed the statutes *against* Inland making the decision contrary to law. Dismissing a valid lien claimant's action resulting in a substantial

forfeiture should never happen on a "technical application" of an undefined statutory term. (C.P. 118-120).

When interpreting a statute, "the court's objective is to determine the legislature's intent." *Olson Eng'g, Inc. v. KeyBank Nat'l Ass'n*, 171 Wn. App. 57, 65, 286 P.3d 390, 394 (2015) (internal citations omitted). The surest indication of legislative intent is the language the legislature enacted. *Id.* Undefined terms are given their plain and ordinary meaning unless a different legislative intent is indicated. *Ravenscroft v. Wash. Water Power, Co.*, 136 Wn.2d 911, 920-21, 969 P.2d 75, 80 (1998). When determining the plain meaning of words used in statutes, the court will look to the text of the questioned provision and "the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281, 283 (2005).

The term "owner" is commonly understood to mean the person or entity who is the owner of record of the real property being liened. *See e.g. Schumacher Painting Co. v. First Union Management*, 69 Wn. App. 693, 694-700, 850 P.2d 1361, 1365 (1993). The person or entity listed as the owner in a public records title search is the person/entity which must be named as a defendant and served with process. *Id.*

The language used by the legislature throughout RCW 60.04 *et seq.* also confirms the legislature's intent that "owner" means the owner of record of the real property being liened. For example, RCW 60.04.151 discusses the rights of the owner of the real property, including the right of the owner to withhold sums of money due to the general contractor. Furthermore, in RCW 60.04.091, the statute requires a lien claimant to name the "owner or reputed owner of the property" if known and record the claim of lien in the county where the "subject property" is located. *See* RCW 60.04.091.

Washington courts have had the opportunity to define a release of lien bond as "the subject property" and have declined to do so. In *CalPortland,* the court held that 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. *Olson Eng'g, Inc. v. KeyBank Nat'l Ass'n,* 171 Wn.App. 57, 66, 286 P.3d 390 (2012). Thus, filing the bond does not destroy the lien entirely but instead transfers the the real property to the bond. *DMB Consulting Eng'gs, Inc. v. U.S. First & Guar. Co.,* 12 Wn. App 35, 42, 170 P.3d 592 (2007) (holding that the "lien bond releases the property from the lien, but the lien is then secured by the bond").

The court clearly differentiated the "subject property" from the bond. This is so because when a release of lien bond is filed, the lien foreclosure action ceases to be an *in rem* action. In fact, in the sole

statutory provision dealing with the bond, the term "owner" is not found. RCW 60.04.161. Nowhere in that provision is the bond equated to "the subject property."

Based on the principles of statutory interpretation, the legislature did not intend the bond principal to be defined as the "owner of the subject property" in RCW 60.04.141.

D. Washington's Lien Statutes does not Expressly Require Bond Principals be named as a Secondary Party.

RCW 60.04.171 states the owner of the real property is the only party that must be joined to a lien foreclosure action. There is no mention of the bond principal anywhere in the lien statutes. When the trial court acknowledged the *CalPortland* holding that the real property owner need not be named in that lawsuit, it nonetheless tried to find an "owner of the subject property" and came up with a forced conclusion that the bond was the subject property and the bond principal was the owner. (C.P. 120). It should not have taken this approach. Instead, the trial court should have recognized that the owner of the subject property need not be named in the lawsuit due to the release of lien bond and should have analyzed whether Fowler was a necessary party using common law principles. It did not do so and thus erred.

The salient question, then, is whether Inland's failure to name Fowler, when not required by the lien statutes, is fatal to its case. The answer is clearly no. Cases that have interpreted this statute have resorted to common law of other bodies of law to determine who else might or might not be a necessary and indispensable party.[2] *See McLaughlin v. Zarbell,* 29 Wn.2d 817, 190 P.2d 114 (1948) (a party purchasing property subsequent to commencement of mechanic's lien foreclosure action may be bound by decree although not a necessary party); *Standard Lumber Co. v. Fields,* 29 Wn.2d 327, 187 P.2d 283 (1947) (a contractor held not necessary party in action foreclosing lien); *Harrington v. Miller,* 4 Wash. 808, 31 P. 325 (1892) (in an action to foreclose against a leasehold interest, the assignor of such interest is not a necessary party); *Harrington v. Johnston,* 10 Wash. 542, 39 P. 141 (1895) (wives of partners not necessary parties to suit foreclosing mechanic's lien against partnership realty); *Littell & Smythe Mfg. Co. v. Miller,* 3 Wash. 480, 28 P. 1035, (1892) (both spouses necessary parties to action foreclosing lien against community realty, to make such judgment valid against community); *see also, Powell v. Nolan,* 27 Wash. 318, 67 P. 712, 68 P. 389 (1902); *Northwest Bridge Co. v. Tacoma Shipbuilding Co.,* 36 Wash. 333, 78 P. 996 (1904).

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[2] Interestingly, in the annotations to RCW 60.04.171, the *CalPortland* case is not listed under "Necessary Parties" but under "Sufficient."

Looking at the common law of suretyship, the weight of authority permits a direct suit against a surety without joinder of the principal. *See, e.g., U.S. v. Aetna Cas. & Sur. Co.,* 5 F.2d 412 (65th Cir. 1925); *Royal Indem. Co. v. Cliff Wood, Coal & Supply Co.,* 10 F.2d 501 (6th Cir. 1925); *Southern Sur. Co. v. Austin*, 22 F.2d 881 (5th Cir. 1928); *Downer v. U.S. Fidelity & Guar. Co. of Maryland,* 46 F.2d 733 (5th Cir. 1931); *American Sur. Co. of New York v. Public Schools of City of Benton Harbor*, 70 F.2d 653 (6th Cir. 1934); *Seaboard Sur. Co. v. U.S., for Use and Benefit of Marshall-Wells Co.,* 84 F.2d 348 (9th Cir. 1936); *Fidelity & Deposit Co. of Maryland v. State of Montana,* 92 F.2d 693 (9th Cir. 1937), affirming 16 F. Supp. 489; *Home Indem. Co. of New York v. O'Brien*, 104 F.2d 413 (6th Cir. 1939); *McAlister v. Fidelity & Deposit Co. of Maryland*, 37 F. Supp. 956 (W.D. S.C. 1941); *Future Fashions v. American Sur. Co. of N.Y.*, 58 F. Supp. 36 (D.C. N.Y. 1945); *Northeast Clackamas County Elec. Co-op. v. Continental Cas. Co.*, 221 F.2d 329 (9th Cir. 1955); *U.S. for Use of Hudson v. Peerless Ins. Co.*, 374 F.2d 942 (4th Cir. 1967); *General Ins. Co. of America v. Hercules Const. Co.,* 385 F.2d 13 (8th Cir. 1967).[3] The obligee (Inland in this case) has two sets of rights, one set against the principal obligor and one set against the secondary obligor, or surety. It would diminish the attractiveness and utility of the surety if the obligee in

[3] Other State's court citations are not listed as they are too numerous.

all instances were obliged first to enforce its right against the principal. Therefore, unless a statute requires a different result, the obligee may choose whether to seek enforcement first against the principal or surety. This makes sense since the surety may seek enforcement of the principal's duty of performance against the principal and indemnitors. In fact, it is because the principal is not an indispensable party that the law allows the surety to assert all of the defenses of its principal and why it is common for a surety to tender the defense to the principal, which occurred in this case. *See, id.*

Moreover, in other bond situations, principals are not necessary parties. For example, in federal construction projects, bond claimants under the Federal Miller Act (40 U.S.C. 3131-3141) need not join bond principals and may proceed directly against the surety alone. *See, e.g., United States ex rel. Henderson v. Nucon Constr. Corp.,* 49 F.3d 1421 (9th Cir. 1995). In Washington state public construction projects, payment bond claimants may also proceed directly against the surety without naming the bond principal. *See, e.g., Rodgers v. Fid & Deposit Co.,* 89 Wash. 316, 154 P. 444 (1916); *Carstens Packing Co. v. Empire State Sure Co.,* 84 Wash. 545, 147 P. 36 (1915); *Indus. Coatings v. Fid. & Deposit Co.,* 117 Wn.2d 511, 817 P.2d 393 (1991). However, in the case of claims under the Washington Contractor Registration Act (RCW 18.27 *et seq.*)

the legislature expressly requires suit to be brought against both the contractor and the surety. *See* RCW 18.27.040(3).

In reviewing RCW 60.04 *et seq.,* and analyzing it pursuant to the plain meaning of the words used, the Washington legislature did not expressly require the bond principal to be named as a defendant. Indeed, if the legislature did have this intent, it could have stated as much, like it did in the contractor registration statute and as numerous other states have done. For example, in Arizona, if a release of lien bond is filed, the claimant has 90 days to:

> [...] cause proceedings to be instituted to add the surety and principal as parties to the lien foreclosure suit. [...] D. The bond shall be discharged and the principal and sureties released upon any of the following [...] 2. *Failure of the lien claimant to name the principal and sureties as parties to the action seeking to foreclose the lien* [...].

See A.R.S. § 33-1004 (C) – (D) (emphasis added).

In New York, the lien bond statute states:

> [...] The plaintiff in such an action must, prior to commencement thereof, file in the office of the clerk of the county where the bond is filed, the summons and complaint and in such action and *shall join as parties defendant, the principal and surety on the bond* [...].

See NY Code § 37 (emphasis added).

Oklahoma's lien bond statute states, in part:

> The only proper parties to an action against [the lien bond] are: the party making the case deposit, the bond principal

> and surety, the party primarily liable for the indebtedness giving rise to the lien; and anyone else who may be liable to the lien claimant for the same indebtedness. *The* [...] *bond principal and surety are necessary parties to an action against the substituted security* [...].

See Okl. St. § 147.1 (emphasis added).

Finally, the Nevada lien bond states:

> If an action by a lien claimant to foreclose upon a lien has been brought: [...] (b) After the surety bond is recorded: [...] *the lien claimant may bring an action against the principal and surety* not later than 9 months after the date that the lien claimant was served with notice of the recording of the surety bond.

Nev. Rev. Stat. § 108.2421 (emphasis added).

Unlike Arizona, New York, Oklahoma and Nevada, the Washington legislature did not mention the bond principal anywhere in 60.04.161. As such, it elected not to require a lien claimant to name the principal as a defendant in a lawsuit to foreclose a lien claim against a release of lien bond. The trial court erred when it construed RCW 60.04 *et seq.* to create this new requirement and harming the very entity the statutes were intended to protect.

E. <u>The *CalPortland* Case Does Not Require the Bond Principal to be Joined as an Indispensable Party.</u>

As a preliminary matter, it is important to note that in the *CalPortland* opinion, the court refers to Ferguson (principal) and Travelers (surety) collectively as "Ferguson." *See CalPortland* at 383,

321 P.3d at 1263. In that case, the lien claimant, CalPortland, filed a mechanic's lien on the subject property owned by Costco. *Id.* at 382, 321 P.3d at 1262-63. The general contractor, Ferguson, obtained a release of lien bond through Travelers. *Id.* CalPortland sued to foreclose on its lien and named Ferguson and Travelers as defendants, among others. *Id.* CalPortland did not name Costco as a party, reasoning that Costco's real property was released from the lien when the bond was filed. *Id.* at 384, 321 P.3d at 1263. The surety and principal then sought to dismiss CalPortland's lawsuit because it did not name Costco as a defendant and serve it with process within eight months after the lien was filed pursuant to RCW 60.04.141. *Id.* at 387, 321 P.3d at 1265.

The *CalPortland* court conducted a very detailed analysis of the mechanic's lien statute in its determination of whether Costco is required to be joined as a defendant when a lien bond was filed. *Id.* at 385-91, 321 P.3d at 1264-67. The *CalPortland* court ultimately held "because the plain language of the statute establishes that Costco's realty was not "property subject to lien" for the purpose of RCW 60.04.141's procedural requirements, we reject Ferguson's [and Traveler's] argument [that Costco must be named as a defendant] and *hold* CalPortland's service of process on Ferguson [and Travelers] *sufficient*." *Id.* at 387, 321 P.3d at 1265 (emphasis added).

It is crucial to recognize the *CalPortland* court did not hold that Ferguson was an indispensable party. The *CalPortland* court provided no analysis on whether Ferguson was a necessary party to the action. Instead, the only holding from *CalPortland* which is applicable to the case at bar is Inland is not required to name the owner of the Project, Western States Development Corporation, as a defendant. *Id.* at 387, 321 P.3d at 1265. The trial court's reliance on *CalPortland* as authority that having an interest in the bond means that a principal is "an owner of the subject property" is an incorrect interpretation of the case. While having an interest in the bond might make Fowler a proper party, it does not, in and of itself, make it an indispensable party.

F. <u>Fowler is Not an Indispensable Party and Its Interests are Sufficiently Protected in this Lawsuit.</u>

Fowler's interests in this action were not been impaired or impeded and pursuant to CR 19, is not an indispensable party to this case.

Whether a party must be joined in a case is determined by CR 19 "Joinder of Persons Needed for Just Adjudication." That rule provides, in relevant part:

> (a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if
> (1) in the person's absence complete relief cannot be accorded among those already parties, or

> (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may
>
> (A) as a practical matter impair or impede the person's ability to protect that interest[.]

The party urging dismissal on the basis of failure to join a necessary party bears the burden of proof. *See Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 495, 145 P.3d 1196, 1202-03 (2006). The Court never addressed the necessary party argument on summary Judgment, and only in a conclusory fashion stated Fowler was a necessary party when it denied Inland's motion for reconsideration. (C.P. 119-120).

In fact, Fowler's ability to protect its interests were not impaired or impeded. First, Western appeared in this lawsuit, denied the claims made by Inland and asserted the same affirmative defenses which Fowler would have raised. (C.P. 7-9). Second, Western filed an opposition to Inland's motion for summary judgment, filed its own motion for summary judgment seeking to dismiss the case and filed an opposition to Inland's motion for reconsideration. (C.P. 51-62, 76-77, 63-75, 43-50, 81-85, 108-117 and 135-144). Third, the law firm are Fowler's regular lawyers and is the same law firm is representing Fowler in its lawsuit against EWD&P. (C.P. 86-94).

When this lawsuit was filed, undoubtedly Fowler was given the option to select the lawyer to represent Western under a tender of defense

agreement and Fowler chose its own law firm. Because the law firm are Fowler's attorneys, it did and undoubtedly will continue to protect Fowler's interest in this matter. Finally, and most importantly, Fowler has actively participated in the defense of this lawsuit by providing declarations in support of Western's motion for summary judgment and in opposition to Inland's. (C.P. 43-50). Clearly, Fowler's interests are being protected by Western. By its own participation in this lawsuit, Fowler has demonstrated that even though it was not named as a defendant in this lawsuit, it is not, from a practical standpoint, impaired or impeded its ability to protect its interests. Fowler was free to petition the court to join as a proper party and did not.

Dismissing Inland's lawsuit over its failure to name a bond principal, where it is undisputed the principal has actively participated in protecting its interest, is the ultimate example of placing form over function.

G. The Trial Court Abused its Discretion by not Granting Inland's Motion for Reconsideration.

The trial court erred in denying Inland's November 2, 2015 motion for reconsideration because the trial court's October 6, 2015 summary judgment ruling and subsequent order was contrary to Washington's mechanic's lien laws and substantial justice was not done. *See* CR

59(a)(7) and (9) (a motion for reconsideration will be granted where the court's decision is contrary to law or where substantial justice was not done). In reviewing a trial court's ruling on a motion for reconsideration, the trial court's ruling will be reversed when there is a manifest abuse of discretion. *See Wilcox v. Lexington Eye Inst.,* 130 Wn. App. 234, 241, 122 P.3d 729, 732 (2005). An abuse of discretion exists where no reasonable person would have taken the view the trial court adopted, the trial court applied the wrong legal standard, or it relied on unsupported facts. *See Fishburn v. Pierce County Planning & Land Servs. Dep't*, 161 Wn. App. 452, 473, 250 P.3d 146, 157 (2011).

Pursuant to the foregoing, the trial court erred in its October 6, 2015 ruling and subsequent order denying Inland's motion for summary judgment and granting Western's motion for summary judgment because the order was contrary to Washington's mechanic's lien laws and by allowing Western to prevail on a mere technicality, substantial justice was not done. For these same reasons the trial court erred and abused its discretion when it denied Inland's October 29, 2015 motion for reconsideration.

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H. Inland is Entitled to its Attorney's Fees and Costs.

Inland is entitled to an award of its reasonable attorney's fees and related costs for filing its lien, its subsequent lawsuit and this appeal. *See* R.A.P. 18.1(a). Pursuant to RCW 60.04.181(3), the prevailing party in any action under RCW 60.04 *et seq,* whether in the superior court, appellate court and/or supreme court, may be awarded, as part of costs of the action, all monies paid for recording the lien and attorneys' fees and necessary expenses incurred in pursuing a lien foreclosure action. *See Diversified Wood Recycling v. Johnson*, at 890, 251 P.3d at 308.

Based on the foregoing, Inland respectfully requests that the Court remand this case back to the trial court with directions to grant Inland's motion for summary judgment for the full amount claimed in its lien, $124,653.05, together with the an award of attorney's fees and costs incurred in filing its lien, at the trial court level and in pursuing this appeal pursuant to RCW 60.04.181(3) and RAP 18.1.

VIII. CONCLUSION

For the foregoing reasons, the trial court erred when it denied Inland's motion for summary judgment, granted Western's motion for summary judgment and denied Inland's motion for reconsideration. Therefore, this Court should reverse the trial court's October 22, 2015 and December 16, 2015 orders and direct the trial court to enter a new order

granting Inland's Motion for Summary Judgment and award Inland its costs in filing its lien and the attorney's fees and costs it incurred at the trial court level and in this appeal.

DATED this 1st day of April, 2016.

CAMPBELL & BISSELL, PLLC

RICHARD D. CAMPBELL, WSBA #24078
WILLIAM M. HUGHBANKS, WSBA #45562
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of April, 2016, I caused to be served a true and correct copy of the foregoing document to the following:

☐	HAND DELIVERY	Timothy G. Klashke
☐	U.S. MAIL	Kuffel, Hultgrenn, Klashke, Shea &
☑	OVERNIGHT DELIVERY	Ellerd, LLP
☐	FACSIMILE	1915 Sun Willows Blvd., Ste. A
☐	EMAIL	Pasco, WA 99301
		Attorneys for Western Surety Company

RICHARD D. CAMPBELL
WILLIAM M. HUGHBANKS

APPENDIX 1

RCW 60.04.091

Recording—Time—Contents of lien.

Every person claiming a lien under RCW 60.04.021 shall file for recording, in the county where the subject property is located, a notice of claim of lien not later than ninety days after the person has ceased to furnish labor, professional services, materials, or equipment or the last date on which employee benefit contributions were due. The notice of claim of lien:

(1) Shall state in substance and effect:

(a) The name, phone number, and address of the claimant;

(b) The first and last date on which the labor, professional services, materials, or equipment was furnished or employee benefit contributions were due;

(c) The name of the person indebted to the claimant;

(d) The street address, legal description, or other description reasonably calculated to identify, for a person familiar with the area, the location of the real property to be charged with the lien;

(e) The name of the owner or reputed owner of the property, if known, and, if not known, that fact shall be stated; and

(f) The principal amount for which the lien is claimed.

(2) Shall be signed by the claimant or some person authorized to act on his or her behalf who shall affirmatively state they have read the notice of claim of lien and believe the notice of claim of lien to be true and correct under penalty of perjury, and shall be acknowledged pursuant to chapter 64.08 RCW. If the lien has been assigned, the name of the assignee shall be stated. Where an action to foreclose the lien has been commenced such notice of claim of lien may be amended as pleadings may be by order of the court insofar as the interests of third parties are not adversely affected by such amendment. A claim of lien substantially in the following form shall be sufficient:

CLAIM OF LIEN

. . . . . ., claimant, vs . . . . . ., name of person indebted to claimant:

Notice is hereby given that the person named below claims a lien pursuant to *chapter 64.04 RCW. In support of this lien the following information is submitted:

1. NAME OF LIEN CLAIMANT: . . . .
TELEPHONE NUMBER: . . . .
ADDRESS: . . . .

2. DATE ON WHICH THE CLAIMANT BEGAN TO PERFORM LABOR, PROVIDE PROFESSIONAL SERVICES, SUPPLY MATERIAL OR EQUIPMENT OR THE DATE ON WHICH EMPLOYEE BENEFIT CONTRIBUTIONS BECAME DUE: . . . .

3. NAME OF PERSON INDEBTED TO THE CLAIMANT:
. . . .

4. DESCRIPTION OF THE PROPERTY AGAINST WHICH A LIEN IS CLAIMED (Street address, legal description or other information that will reasonably describe the property): . . . .
. . . .
. . . .
. . . .

5. NAME OF THE OWNER OR REPUTED OWNER (If not known state "unknown"): . . . .

6. THE LAST DATE ON WHICH LABOR WAS PERFORMED; PROFESSIONAL SERVICES WERE FURNISHED; CONTRIBUTIONS TO AN EMPLOYEE BENEFIT PLAN WERE DUE; OR MATERIAL, OR EQUIPMENT WAS FURNISHED: . . . .

. . . .

7. PRINCIPAL AMOUNT FOR WHICH THE LIEN IS CLAIMED IS: . . . .

8. IF THE CLAIMANT IS THE ASSIGNEE OF THIS CLAIM SO STATE HERE:

. . . .

. . . .

. . . ., Claimant

. . . .

. . . .

(Phone number, address,
city, and
state of claimant)

STATE OF WASHINGTON, COUNTY OF

. . . . . ., ss.

. . . . . ., being sworn, says: I am the claimant (or attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan) above named; I have read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct and that the claim of lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.

. . . . . .

Subscribed and sworn to before me this . . . . day of . . . . . .

. . . . . .

The period provided for recording the claim of lien is a period of limitation and no action to foreclose a lien shall be maintained unless the claim of lien is filed for recording within the ninety-day period stated. The lien claimant shall give a copy of the claim of lien to the owner or reputed owner by mailing it by certified or registered mail or by personal service within fourteen days of the time the claim of lien is filed for recording. Failure to do so results in a forfeiture of any right the claimant may have to attorneys' fees and costs against the owner under RCW 60.04.181.

[1992 c 126 § 7; 1991 c 281 § 9.]

NOTES:

***Reviser's note:** The reference to chapter 64.04 RCW appears to be erroneous. Reference to chapter 60.04 RCW was apparently intended.

APPENDIX 2

RCW 60.04.141

Lien—Duration—Procedural limitations.

No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim of lien has been recorded unless an action is filed by the lien claimant within that time in the superior court in the county where the subject property is located to enforce the lien, and service is made upon the owner of the subject property within ninety days of the date of filing the action; or, if credit is given and the terms thereof are stated in the claim of lien, then eight calendar months after the expiration of such credit; and in case the action is not prosecuted to judgment within two years after the commencement thereof, the court, in its discretion, may dismiss the action for want of prosecution, and the dismissal of the action or a judgment rendered thereon that no lien exists shall constitute a cancellation of the lien. This is a period of limitation, which shall be tolled by the filing of any petition seeking protection under Title Eleven, United States Code by an owner of any property subject to the lien established by this chapter.

[1992 c 126 § 8; 1991 c 281 § 14.]

APPENDIX 3

RCW 60.04.151

Rights of owner—Recovery options.

The lien claimant shall be entitled to recover upon the claim recorded the contract price after deducting all claims of other lien claimants to whom the claimant is liable, for furnishing labor, professional services, materials, or equipment; and in all cases where a claim of lien shall be recorded under this chapter for labor, professional services, materials, or equipment supplied to any lien claimant, he or she shall defend any action brought thereupon at his or her own expense. During the pendency of the action, the owner may withhold from the prime contractor the amount of money for which a claim is recorded by any subcontractor, supplier, or laborer. In case of judgment against the owner or the owner's property, upon the lien, the owner shall be entitled to deduct from sums due to the prime contractor the principal amount of the judgment from any amount due or to become due from the owner to the prime contractor plus such costs, including interest and attorneys' fees, as the court deems just and equitable, and the owner shall be entitled to recover back from the prime contractor the amount for which a lien or liens are established in excess of any sum that may remain due from the owner to the prime contractor.

[1992 c 126 § 9; 1991 c 281 § 15.]

APPENDIX 4

RCW 60.04.161

Bond in lieu of claim.

Any owner of real property subject to a recorded claim of lien under this chapter, or contractor, subcontractor, lender, or lien claimant who disputes the correctness or validity of the claim of lien may record, either before or after the commencement of an action to enforce the lien, in the office of the county recorder or auditor in the county where the claim of lien was recorded, a bond issued by a surety company authorized to issue surety bonds in the state. The surety shall be listed in the latest federal department of the treasury list of surety companies acceptable on federal bonds, published in the Federal Register, as authorized to issue bonds on United States government projects with an underwriting limitation, including applicable reinsurance, equal to or greater than the amount of the bond to be recorded. The bond shall contain a description of the claim of lien and real property involved, and be in an amount equal to the greater of five thousand dollars or two times the amount of the lien claimed if it is ten thousand dollars or less, and in an amount equal to or greater than one and one-half times the amount of the lien if it is in excess of ten thousand dollars. If the claim of lien affects more than one parcel of real property and is segregated to each parcel, the bond may be segregated the same as in the claim of lien. A separate bond shall be required for each claim of lien made by separate claimants. However, a single bond may be used to guarantee payment of amounts claimed by more than one claim of lien by a single claimant so long as the amount of the bond meets the requirements of this section as applied to the aggregate sum of all claims by such claimant. 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. The effect of recording a bond shall be to release the real property described in the notice of claim of lien from the lien and any action brought to recover the amount claimed. Unless otherwise prohibited by law, if no action is commenced to recover on a lien within the time specified in RCW 60.04.141, the surety shall be discharged from liability under the bond. If an action is timely commenced, then on payment of any judgment entered in the action or on payment of the full amount of the bond to the holder of the judgment, whichever is less, the surety shall be discharged from liability under the bond.

Nothing in this section shall in any way prohibit or limit the use of other methods, devised by the affected parties to secure the obligation underlying a claim of lien and to obtain a release of real property from a claim of lien.

[1992 c 126 § 10; 1991 c 281 § 16.]

APPENDIX 5

RCW 60.04.171

Foreclosure—Parties.

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 in the manner prescribed for the judicial foreclosure of a mortgage. The court shall have the power to order the sale of the property. In any action brought to foreclose a lien, the owner shall be joined as a party. The interest in the real property of any person who, prior to the commencement of the action, has a recorded interest in the property, or any part thereof, shall not be foreclosed or affected unless they are joined as a party.

A person shall not begin an action to foreclose a lien upon any property while a prior action begun to foreclose another lien on the same property is pending, but if not made a party plaintiff or defendant to the prior action, he or she may apply to the court to be joined as a party thereto, and his or her lien may be foreclosed in the same action. The filing of such application shall toll the running of the period of limitation established by RCW 60.04.141 until disposition of the application or other time set by the court. The court shall grant the application for joinder unless to do so would create an undue delay or cause hardship which cannot be cured by the imposition of costs or other conditions as the court deems just. If a lien foreclosure action is filed during the pendency of another such action, the court may, on its own motion or the motion of any party, consolidate actions upon such terms and conditions as the court deems just, unless to do so would create an undue delay or cause hardship which cannot be cured by the imposition of costs or other conditions. If consolidation of actions is not permissible under this section, the lien foreclosure action filed during the pendency of another such action shall not be dismissed if the filing was the result of mistake, inadvertence, surprise, excusable neglect, or irregularity. An action to foreclose a lien shall not be dismissed at the instance of a plaintiff therein to the prejudice of another party to the suit who claims a lien.

[1992 c 126 § 11; 1991 c 281 § 17.]

APPENDIX 6

RCW 60.04.900

Liberal construction—1991 c 281.

RCW 19.27.095, 60.04.230, and 60.04.011 through 60.04.226 and 60.04.261 are to be liberally construed to provide security for all parties intended to be protected by their provisions.

[1991 c 281 § 25.]