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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

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

RESPONDENT WESTERN SURETY CO.'S RESPONSE BRIEF

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TABLE OF CONTENTS

I. **INTRODUCTION** 1

II. **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR** 1

1. Whether Inland, as a lien claimant under RCW Chapter 60.04 et seq., had to fully and timely comply with RCW 60.04.141's procedural requirements in order to enforce its lien against, and potentially obtain payment from, the subject RCW 60.04.161 lien release bond? (Inland's Assignment(s) of Error 1, 2 and 3) 1
2. Whether Inland was required to timely sue and serve the named principal under the subject RCW 60.04.161 release bond in order to comply with RCW 60.04.141's procedural requirements? (Inland's Assignment(s) of Error 1, 2 and 3) 1
3. Whether standard "indispensable party" analysis under CR 19 is inapplicable and improper to engage in for purposes of determining whether Inland failed to comply with RCW 60.04.141's procedural requirements by not suing and serving the naming principal under the subject RCW 60.04.161 release bond? (Inland's Assignment(s) of Error 1, 2 and 3) 2
4. Whether the trial court properly granted Western's *Motion for Summary Judgment*, and properly denied Inland's *Motion for Summary Judgment*, based on Inland's failure to sue and serve the named principal under the subject RCW 60.04.161 release bond? (Inland's Assignment(s) of Error 1, 2 and 3) 2
5. Whether the trial court properly denied Inland's CR 59 *Motion for Reconsideration*? 2

III. **STATEMENT OF THE CASE** 2

IV. **SUMMARY OF ARGUMENT** 8

V. **ARGUMENT** 9

A. Standard of Review 9

B. Inland Had to Fully and Timely Comply with RCW 60.04.141's Procedural Requirements to Enforce its Lien

Against, and Potentially Obtain Payment From, the Subject RCW 60.04.161 Bond.....10
C. Inland Was Required to Timely Sue and Serve Fowler, the Named Principal Under the Subject RCW 60.04.161 Release Bond, in Order to Comply With RCW 60.04.141's Procedural Requirements 12
D. CR 19 Has No Application in Determining Whether Inland Complied With RCW 60.04.141's Procedural Requirements to Enforce its Lien Against the Bond 32
E. Summary Judgment was Properly Granted to Western, and Properly Denied to Inland, Based on Inland's Failure to Sue and Serve Fowler as Principal Under the Subject RCW 60.04.161 Release Bond 38
F. The Trial Court Properly Denied Inland's CR 59 Motion for Reconsideration 41
G. Western is Entitled to an Award of Attorney's Fees 46
VI. SUMMARYAND CONCLUSION.....46

TABLE OF AUTHORITIES

CASES:

Bob Pearson Const., Inc. v. First Community Bank of Washington, 111 Wn. App. 174, 43 P.3d 1261 (2002) 11, 12, 33, 34, 35, 46

CalPortland Co. v. LevelOne Concrete, LLC, 180 Wn. App. 379, 321 P.3d 1261 (2014).....7, 11-19, 23-27, 30, 33, 41

DBM Consulting Engineers, Inc. v. United States Fidelity & Guaranty Co., 142 Wn. App. 35, 170 P.3 592 (2007), *recon. and rev. den'd.*, 164 Wn.2d 1005, 190 P.3d 54 (2008) 19, 20, 27, 28, 29

Diversified Wood Recycling, Inc. v. Johnson, 161 Wn. App. 859, 251 P.3d 293, *as amend.*, *rev. den'd.*, 172 Wn.2d 1025, 268 P.3d 224 (2011) 11, 12

George W. Kane, Inc. v. Nuscope, Inc., 243 Va. 503, 416 S.E.2d 701 (1992) 21, 22

Gildon v. Simon Property Group, Inc., 158 Wn.2d 483, 145 P.3d 1196 (2006) 32

Houk v. Best Development & Const. Co., Inc., 179 Wn. App. 908, 322 P.3d 29 (2014) 10

Mita v. Guardsmark, LLC, 182 Wn. App. 76, 328 P.3d 962 (2014) ... 9, 10

Olson Engineering, Inc. v. KeyBank Nat. Assn., 171 Wn. App. 57, 286 P.3 390 (2012) 18, 27

Schumacher Painting Co. v. First Union Management, Inc., 69 Wn. App. 693, 850 P.2d 1361, *rev. den'd.*, 122 Wn.2d 1013, 863 P.2d 73 (1993) 11, 33, 34, 35

Stonewood Design, Inc. v. Heritage Homes, Inc., 165 Wn. App. 720, 269 P.3 297 (2011) 18

Synchronized Construction Services, Inc. v. Prav Lodging, LLC, 288 Va. 356, 764 S.E.2d 61 (2014) 21, 22

Valencich v. TMT Homes of Oregon, Inc., 193 Or. App. 47, 88 P.3d 300 (2004) 20

Wilcox v. Lexington Eye Institute, 130 Wn. App. 234, 122 P.3d 729 (2005) 40

STATUTES:

A.R.S. § 33-1004(C) and (D) 20

NY Code § 37(7) 20

42 Okl. St. § 147.1 20

Nev. Rev. Stat. 108.2421(2)(b) 20

RCW 60.04.031 11

RCW 60.04.091 11

RCW 60.04.141 .....11, 13, 15, 16, 20, 28, 29, 30, 31

RCW 60.04.161 .....14, 15, 16, 18, 19, 20, 22, 27, 28, 29, 30, 31

RCW 60.04.171.....13, 43

RCW 60.04.181(3) 46

RCW 60.04.900.....12

RULES:

CR 19.....32

CR 56(c) 10

CR 59.....40

CR 81(a) 33

RAP 18.1.....46

I. INTRODUCTION

Respondent Western Surety Company ("Western") respectfully submits this Brief in response and opposition to Appellant Inland Empire Dry Wall Supply Co.'s ("Inland") opening appeal Brief. Inland and Western filed CR 56 cross *Motions for Summary Judgment*. The trial court granted Western's motion and denied Inland's motion, which resulted in the trial court action ordered dismissed with prejudice. After Inland's CR 59 *Motion for Reconsideration* was denied by the trial court, Inland filed this appeal.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Based on Inland's opening Brief, the following five issues addressed in this response Brief pertain to Inland's three Assignments of Error and are subsumed within, and fairly represent and address, Inland's asserted six issues pertaining to those Assignments of Error:

1. **Whether Inland, as a lien claimant under RCW Chapter 60.04 *et seq.*, had to fully and timely comply with RCW 60.04.141's procedural requirements in order to enforce its lien against, and potentially obtain payment from, the subject RCW 60.04.161 lien release bond?** (Inland's Assignment(s) of Error 1, 2 and 3)

2. **Whether Inland was required to timely sue and serve the named principal under the subject RCW 60.04.161 release bond in order to comply with RCW 60.04.141's procedural requirements?** (Inland's Assignment(s) of Error 1, 2 and 3)

3. **Whether standard "indispensable party" analysis under CR 19 is inapplicable and improper to engage in for purposes of determining whether Inland failed to comply with RCW 60.04.141's procedural requirements by not suing and serving the naming principal under the subject RCW 60.04.161 release bond?** (Inland's Assignment(s) of Error 1, 2 and 3)

4. **Whether the trial court properly granted Western's *Motion for Summary Judgment*, and properly denied Inland's *Motion for Summary Judgment*, based on Inland's failure to sue and serve the named principal under the subject RCW 60.04.161 release bond?** (Inland's Assignment(s) of Error 1, 2 and 3)

5. **Whether the trial court properly denied Inland's CR 59 *Motion for Reconsideration*?**

III. STATEMENT OF THE CASE

This appeal and underlying trial court action arise out of an apartment construction project known as Bellavista Apartments Phase II ("Project") located in Richland, Washington. [Clerk's Papers ("CP") at 43 and 63]

Fowler General Construction, Inc. ("Fowler") was the Project's general contractor. [CP at 43 and 63] Fowler subcontracted with Eastern Washington Drywall & Paint LLC ("EWD&P") to provide drywall and taping/texturing labor and materials on the Project. [CP at 43 and 64] EWD&P obtained drywall materials from Inland. [CP at 43 and 64]

Prior to Fowler making a construction draw payment to EWD&P, Fowler contacted Inland to inform it that Fowler would be making a draw

payment to EWD&P and to request a release of liens/claims from Inland as a condition to making that draw payment. [CP at 44 and 64]

After Fowler received and relied on a Conditional Release from Inland, Fowler provided a $158,684.20 draw check to EWD&P on/about July 22, 2014, for the disclosed and intended purpose of EWD&P then paying $83,892.90 to Inland for drywall materials supplied to the Project through June 30, 2014. [CP at 44, 47, and 64]

Following EWD&P's non-performance and defaults under its subcontract with Fowler, EWD&P terminated its work on the Project, which required Fowler to retain another drywall subcontractor to perform and complete such work. [CP at 44 and 64] Fowler then filed and pursued legal action against EWD&P to recover damages as a result of EWD&P's subcontract defaults on the Project and another unrelated construction project. [CP at 44 and 64]

Claiming that EWD&P did not pay it any funds for materials supplied to the Project, Inland recorded a $124,653.05 Claim of Lien ("Lien") pursuant to RCW Chapter 60.04.091 against the Project real property ("Project Property") on September 26, 2014, under Benton County Auditor File No. 2014-024259. [CP at 21-22, 44, and 64]

Because Fowler believed there were valid grounds to dispute the Lien's correctness or validity, and for purposes of releasing the Project

Property from the Lien to dispute the Lien's correctness or validity if Inland affirmatively pursued action against Fowler under RCW Chapter 60.04 to enforce and foreclose the Lien, Fowler purchased and obtained a $186,979.57 Release of Lien Bond ("Bond") **(Appendix 1)** from Western pursuant to RCW 60.04.161 and recorded the Bond with the Benton County Auditor on November 17, 2014, under Auditor's File No. 2014-029064. [CP at 44-45, 49-50, 64-65, 81, and 84-85]

The Bond that Fowler purchased and recorded names Fowler, as "Principal"; Respondent Western, as "Surety"; and Appellant Inland, as "Obligee." [CP at 49-50, 65, 81, and 84-85]

Before filing the underlying lawsuit against Western, Inland's attorneys sent a demand letter to Western seeking direct payment of the Lien from the Bond without filing a lawsuit. [CP at 65-66 and 82] Western promptly responded to that direct payment demand by notifying Inland's attorneys via letter of the following:

> **The referenced bond states that Fowler does not wish to pay the lien until the validity of the lien can be properly determined or adjudicated**. RCW 60.04.161 states that the condition of the bond shall be to guarantee payment of any judgment upon the lien. Thus, **if judgment is entered against Fowler, and Fowler does not satisfy the judgment, then demand can be made against the Release of Lien Bond**. **It does not appear that a lawsuit has been filed nor a judgment entered against Fowler**. **At this time, Western Surety is not obligated to satisfy**

> **<u>your demand for payment to Inland</u>** [...]. (Bold and underline emphasis added)

[CP at 65-66 and 82]

Inland nevertheless filed a lawsuit against Western only in Spokane County Superior Court on January 5, 2015, under Case No. 15-2-00016-5 ("Lawsuit") seeking a money judgment against Western, foreclosure of the Lien against the Bond, and an award of attorney fees and costs. [CP at 1-6 and 66] Inland did not name and include Fowler as a party to the Lawsuit. [CP at 1-6]

Western filed an *Answer and Affirmative Defenses* to Inland's Complaint, and asserted the following affirmative defenses that directly pertained to the summary judgment motions before the trial court and the core issues before this Court on appeal:

1. Inland's Complaint **failed to properly state claims** against Western and/or the Bond upon which relief may be granted,
2. Inland's Complaint **failed to name and include necessary and indispensable party/ies**, and
3. Inland **failed to perform, fulfill and comply with all conditions and requirements under RCW Chapter 60.04 and the Bond** to assert and/or enforce its claims for relief against Western and/or the Bond.

[CP at 7-9 and 66]

After Inland filed a *Motion for Summary Judgment* seeking the relief requested in its Complaint, Western filed a cross *Motion for Summary Judgment* seeking dismissal of the Lawsuit based on Inland's failure to sue and serve Fowler (as named principal under the Bond) with the Lawsuit within the prescribed and required eight months and 90 days limitation periods under RCW Chapter 60.04.141 together with an award of attorney's fees and costs. [CP at 37-39 and 76-77]

The parties' cross motions for summary judgment were heard and argued to the trial court (Honorable Judge John O. Cooney) on October 2, 2015. [CP at 118-120, and Report of Proceedings ("RP") at 1-41] After taking the matter under advisement to more thoroughly review the applicable law, the trial court issued a letter ruling **(Appendix 2)** to the parties on October 6, 2015, that granted Western's *Motion for Summary Judgment* (except for the attorney fee request) and correspondingly denied Inland's *Motion for Summary Judgment*. [CP at 118-120]

In that letter ruling, the trial court discussed and directly relied on the analyses and holdings in *CalPortland Co. v. LevelOne Concrete, LLC*, 180 Wn. App. 379, 321 P.3d 1261 (2014) **(Appendix 3)** to essentially determine and ultimately conclude and rule the following:

1. That the Bond became the **"subject property"** for purposes of RCW 60.04.141;
2. That Fowler, as named principal under the Bond, was an **"owner of the subject property"** that needed to be timely sued and served for purposes of RCW 60.04.141's procedural requirements; and
3. Because Fowler was not timely sued and served with the Lawsuit, **Inland failed to comply with RCW 60.04.141's procedural requirements** which justified and required dismissal of the Lawsuit with prejudice.

[*See* CP at 118-120]

Based on its letter ruling, the trial court entered an *Order Denying [Inland's] Motion for Summary Judgment, and Granting [Western's] Motion for Summary Judgment Dismissing Complaint and Action* on October 22, 2015 **(Appendix 4)**. [CP at 121-123]

Inland then filed a CR 59 *Motion for Reconsideration* on October 29, 2015, which motion the trial court considered and decided on the parties' briefing without oral argument via issuance of a letter ruling to the parties on November 20, 2015, denying the motion. [CP at 124-125 and 151-152] Based on that letter ruling, the trial court entered an *Order Denying [Inland's] Motion for Reconsideration* on December 15, 2015.

[CP at 153-154] Inland then filed a *Notice of Appeal to Washington State Court of Appeals Division III* on January 8, 2016. [CP at 155-162]

IV. SUMMARY OF ARGUMENT

When the Project Property was released from Inland's Lien via Fowler purchasing and recording the Bond pursuant to RCW 60.04.161, the Lien was transferred to the Bond, which then became the "property subject to the lien" for purposes of lien enforcement action under RCW 60.04.141. [*See* Section 5.C, *infra* at 12-32]

Because the Bond became the property subject to Inland's Lien, RCW 60.04.161 and .141 combined to jointly require Inland to file a Lien enforcement action against the "owner of the subject property" within eight months from the date of Lien recording and effectuate service of the action within 90 days thereafter. [*See* Section 5.C, *infra* at 12-32]

By virtue of Fowler purchasing and recording the Bond as named principal thereon, Fowler became an "owner of the subject property" under *CalPortland* for purposes of any lien enforcement action by Inland under RCW 60.04.141. [*See* Section 5.C, *infra* at 12-32]

Because Inland failed to sue and serve Fowler with the Lawsuit, however, Inland failed to comply with RCW 60.04.141's procedural requirements, thereby justifying and requiring dismissal of the Lawsuit

against Western and the Bond with prejudice. [*See* Section 5.C, *infra* at 12-32]

V. ARGUMENT

A. Standard of Review.

Because Inland appeals the trial court's Order on the parties' cross motions for summary judgment, this Court reviews that decision and Order on a de novo basis, essentially performing the same inquiry as the trial court, construing the evidence and reasonable inferences in a light most favorable to the non-moving party. *Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 82, 328 P.3d 962 (2014). Summary judgment is proper if the records on file with the trial court show "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c); *Mita v. Guardsmark, LLC*, *supra*.

This Court's review, however, is limited solely to the evidence and issues called to the attention of the trial court. RAP 9.12 (Special Rule for Order on Summary Judgment); *Mita v. Guardsmark, LLC*, *supra*. Accordingly, this Court does not consider any argument/theory not advanced to the trial court. RAP 9.12; *Houk v. Best Development & Const. Co., Inc.*, 179 Wn. App. 908, 915, 322 P.3d 29 (2014).

B. Inland Had to Fully and Timely Comply with RCW 60.04.141's Procedural Requirements to Enforce its Lien Against, and Potentially Obtain Payment From, the Subject RCW 60.04.161 Bond.

As it unsuccessfully attempted to do at the trial court level, Inland again attempts to justify and excuse its failure to sue and serve Fowler in the Lawsuit by simply asserting that Inland "is an entity intended to be protected" under RCW Chapter 60.04 and that, therefore, this Court "must liberally construe the statutes in Inland's favor" to avoid dismissal of the Lawsuit based on what Inland implores (and needs) this Court to view as an immaterial "technicality." [*See* Appellant's Brief at 15-16 and CP at 127 and 147]

Though Inland (as a construction materials supplier) is an entity generally entitled to claim an RCW 60.04 lien for unpaid materials supplied to construction projects, that general right to claim (and later enforce) a lien is conditioned on Inland (like any lien claimant) fully and timely complying with certain mandatory statutory requirements including, without limitation, the requirements of RCW 60.04.031 (pre-lien notice requirements), RCW 60.04.091 (claim of lien content and recording requirements), **and (significantly pertinent to this appeal) RCW 60.04.141** (lien enforcement action filing and service-of-process

requirements). *See e.g.*, *CalPortland*, 180 Wn. App. at 386-387 (noting that lien claimant must still timely and properly file suit and serve process under RCW 60.04.141 to preserve and enforce lien); *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 871-872, 251 P.3d 293, *as amend.*, *rev. den'd.*, 172 Wn.2d 1025, 268 P.3d 224 (2011); *Bob Pearson Const., Inc. v. First Community Bank of Washington*, 111 Wn. App. 174, 179, 43 P.3d 1261 (2002); and *Schumacher Painting Co. v. First Union Management, Inc.*, 69 Wn. App. 693, 700, 850 P.2d 1361, *rev. den'd.*, 122 Wn.2d 1013, 863 P.2d 73 (1993).

Thus, Inland's failure to timely and properly provide a pre-lien notice required under 60.04.031 and/or failure to timely and properly record a claim of lien under 60.04.091 and/or failure to timely and properly pursue a lien enforcement action under RCW 60.04.141 would prevent Inland from either validly asserting and/or validly enforcing a lien claim despite and notwithstanding the general "liberal construction" provisions of RCW 60.04.900. *See CalPortland*, *supra* at 386-387; *Diversified Wood Recycling*, 161 Wn. App. at 871-872; and *Bob Pearson Const.*, 111 Wn. App. at 179.

In short, as will be more extensively discussed in following Section V.C. and elsewhere hereinbelow, Inland needed to fully and timely comply with RCW 60.04.141's procedural requirements to enforce

its Lien against, and potentially obtain payment from, the subject Bond purchased and recorded by Fowler.

C. Inland Was Required to Timely Sue and Serve Fowler, the Named Principal Under the Subject RCW 60.04.161 Release Bond, in Order to Comply With RCW 60.04.141's Procedural Requirements.

The provisions of the following **two key statutes** within RCW Chapter 60.04 -- together with the above and below-cited Washington caselaw addressing those statutes -- controlled the disposition of the parties' cross motions for summary judgment (and should now likewise control the disposition of this appeal) in Western's favor **as a matter of law**. [CP at 55 and 68]

RCW 60.04.141 **(Appendix 5)** provides in relevant part that:

> **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** [...] **This is a period of limitation** [...]. (Bold and underline emphasis added)

Thus, upon Inland recording its Lien against the Project Property on September 26, 2014, Inland then had eight months to properly file a lien enforcement action and serve the Project Property owner within 90 days thereafter. RCW 60.04.141; *CalPortland*, *supra* at 386; *see also*

RCW 60.04.171 (requiring necessary joinder of property owner as a party to a lien enforcement action and permissive joinder of any other interested party with an interest in the property the lien claimant wants to affect and foreclose). [CP at *Id.*]

Therefore, had the Project Property not been released from the Lien via Fowler's recording of the Bond, Inland would have been required to file a Lien enforcement action in Benton County Superior Court by May 26, 2015, against the Project Property owner and any other person/entity with a recorded interest in the Project Property that Inland wanted to foreclose by the action. [CP at 56 and 68]

Upon Fowler purchasing and recording the Bond, however, the provisions of RCW 60.04.161 **(Appendix 6)** then became applicable, which statute provides in relevant part as follows:

> 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 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. [...] (Bold and underline emphasis added)

[CP at 56 and 68-69]

In combining and applying the provisions of both RCW 60.04.161 and .141 to the case at bar, the net legal effects of Fowler purchasing and recording the Bond were as follows:

1. The Project Property was **released from Inland's Lien**, **the Lien was transferred to the Bond**, and **the Bond became the "subject property" for purposes of any Lien enforcement action** by Inland under RCW 60.04.141;
2. **Fowler** (as principal under the Bond) **created and preserved the right to dispute the Lien's correctness or validity** if/when Inland pursued Lien enforcement action; and
3. **Western** (as surety under the Bond) **assumed the limited obligation and liability to guarantee payment of any unsatisfied judgment awarded to Inland against Fowler**

after litigating with Fowler over the Lien's correctness or validity.

See RCW 60.04.161; .141; and *CalPortland*, *supra* at 386-391. [CP at 56-57 and 69-70]

Thus, after the Project Property was released from Inland's Lien and the Lien transferred to the Bond, Fowler -- as named principal under the Bond it purchased for that purpose in order to dispute the Lien's correctness or validity **if/when** Inland attempted to enforce the Lien – became a necessary party to any action by Inland to enforce the Lien against the Bond. *See* RCW 60.04.161; .141; and *CalPortland*, *supra* at 386-391. [CP at 57 and 70]

Ironically, both Inland and Western cited and relied on *CalPortland* to support their respective motions for summary judgment. [*See* CP at 33-34 and 68-75] Inland cited *CalPortland* to support its unsuccessful position that Western was the only party that Inland needed to timely sue and serve under RCW 60.04.141, whereas Western cited *CalPortland* to support its successful position that Inland also needed to timely sue and serve Fowler with the Lawsuit. [*See* CP at 33-34, 57 and 70-75]

CalPortland represents the only reported Washington appellate court decision directly addressing the following ultimate key question

before the trial court -- and now before this Court: Who must a lien claimant timely sue and serve with a lien enforcement action under RCW 60.04.141 when a release bond is recorded under RCW 60.04.161 **prior to the commencement of the action**? *CalPortland, supra* at 387-388. [CP at 57 and 70] As the trial court ultimately determined, *CalPortland* established Washington precedent that answers that key question in favor of Western's position and against Inland's position. [*See* CP 118-120, 121-123, 151-152, and 153-154]

In *CalPortland*, Division 2 of the Washington Court of Appeals addressed "an issue of first impression" involving which parties a lien claimant needed to timely sue and serve to enforce a lien claim against an RCW 60.04.161 lien release bond obtained and recorded prior to commencement of the lien enforcement action. *CalPortland*, *supra* at 387. [CP at 57 and 70]

Like in the case at bar, a building materials supplier (like Inland) provided materials to a defaulting subcontractor (like EWD&P) and then filed a lien claim against the project property owned by Costco (like Inland did against the Project Property). *Id.* at 382. [CP at 57-58 and 70] Also like in the case at bar, the Costco project's general contractor obtained and recorded an RCW 60.04.161 lien release bond (like Fowler did) that named the general contractor as principal (like the Bond named

Fowler as principal) and Travelers as surety (like the Bond named Western as surety). *Id.* [CP at 58 and 70]

When the *CalPortland* lien claimant sued the general contractor, Travelers, and others to enforce its lien against the release bond, the general contractor asserted the defense that the suit was untimely because the lien claimant failed to also name and serve Costco (the project property owner) with the action within the eight month and 90 day time limitation periods required under RCW 60.04.141. *Id.* at 383. [CP at 58 and 70-71]

The *CalPortland* court rejected that argument, however, holding instead that Costco no longer had any interest in the matter after the bond was recorded and that the general contractor (as named principal under the bond) and Travelers (as named surety under the bond) were **"[t]he only parties with an interest in the bond** (bold and underline emphasis added)" and, therefore, the only parties that the lien claimant needed to timely sue and serve with the action to comply with RCW 60.04.141's procedural requirements. *See id.* at 387-388. [CP at 58 and 71]

Under *CalPortland*, suing and serving only the surety under an RCW 60.04.161 release bond does not comply with RCW 60.04.141's procedural requirements because a surety's liability under a release bond is fully conditional and not triggered until the lien claimant successfully

litigates with the principal under the bond to adjudicate and establish the disputed lien's correctness and validity. *Id.* at 393; *see also* RCW 60.04.161; *Olson Engineering, Inc. v. KeyBank Nat. Assn.*, 171 Wn. App. 57, 66, 286 P.3 390 (2012); *Stonewood Design, Inc. v. Heritage Homes, Inc.*, 165 Wn. App. 720, 725-725, 269 P.3 297 (2011); and *DBM Consulting Engineers, Inc. v. United States Fidelity & Guaranty Co.*, 142 Wn. App. 35, 41, 170 P.3 592 (2007), *recon. and rev. den'd.*, 164 Wn.2d 1005, 190 P.3d 54 (2008). [CP at *Id.*]

The provisions of RCW 60.04.161 -- and a surety's conditional and limited obligations under a release bond issued thereunder -- do not obligate or require the surety to dispute and litigate with the lien claimant over the lien's correctness and validity. See RCW 60.04.161; *DBM Consulting Engineers*, 142 Wn. App. at 40-42. [CP at 58-59 and 71]

Thus, in order for a lien claimant to satisfy the indispensable threshold requirement that it first successfully litigate and establish the lien's correctness and validity before seeking payment from a surety under a release bond, the lien claimant must necessarily sue and serve the principal under the bond with an action to enforce the lien because it is the principal -- not the surety -- who purchased and recorded the bond to dispute the lien's correctness or validity. *See* RCW 60.04.161; *CalPortland*, *supra* at 387-390. [CP at 59 and 71]

Indeed, the principal's mere act of recording a release bond does not in any way constitute the principal's concession that the lien is correct and valid, but rather by purchasing the bond the principal obtains and retains the right to dispute and litigate the disputed lien's correctness or validity if/when the lien claimant attempts to enforce the lien. *See* RCW 60.04.161; *DBM Consulting Engineers, supra* at 41. [CP at 59 and 72]

Thus, under *CalPortland*, Inland simply needed to sue and serve **both Western** (as named surety under the Bond) **and Fowler** (as named principal under the Bond) within the time limitations required under RCW 60.04.141, and Inland's failure to sue and serve Fowler within those time limitations rendered Inland's Lien against the Bond unenforceable and resulted in Western and the Bond being discharged from liability. *See* RCW 60.04.141 and .161; *DBM Consulting Engineers, Id.* [CP at *Id.*]

That result mandated under *CalPortland* is also required under the law of several other states.[1] Virginia is a very noteworthy example of

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[1] *E.g., Valencich v. TMT Homes of Oregon, Inc.*, 193 Or. App. 47, 88 P.3d 300 (2004) (noting that Oregon statutes require that principal under release bond be named as necessary party to action seeking to foreclose lien against bond); A.R.S. § 33-1004(C) and (D) (Arizona statute requiring that both principal and surety under release bond be named as necessary parties to action seeking to foreclose lien against bond); NY Code § 37(7) (New York statute requiring that both principal and surety under release bond be joined as parties to action seeking to foreclose lien against release bond); 42 Okl. St. § 147.1 (Oklahoma statute requiring that both principal and surety under release bond be named as necessary parties to action seeking to foreclose lien against release bond); and Nev. Rev. Stat. 108.2421(2)(b) (Nevada statute requiring that both principal and surety under release bond be named as necessary parties to action seeking to foreclose lien against release bond). [CP at 59-60 and 72]

another state that (like Washington) requires a lien claimant to timely sue and serve both the release bond principal and the surety. *See Synchronized Construction Services, Inc. v. Prav Lodging, LLC*, 288 Va. 356, 764 S.E.2d 61 (2014); and *George W. Kane, Inc. v. Nuscope, Inc.*, 243 Va. 503, 416 S.E.2d 701 (1992). [CP at 59-61 and 72-73]

In *George W. Kane, supra*, a general contractor obtained a bond to release the construction project property from a mechanic's lien filed by a subcontractor. *George W. Kane,* 416 S.E.2d at 702. [CP at 60 and 73] The lien claimant then filed an action to enforce the lien against the bond and named only the general contractor and its sureties as parties to the action. *Id.* [CP at *Id.*] Like in *CalPortland*, the general contractor tried to argue that the project property owner was a necessary party to the action who had not been timely sued and served, and that such failure required lawsuit dismissal. *Id.* at 704. [CP at *Id.*]

Like the *CalPortland* court, the Virginia Supreme Court disagreed with that argument, however, holding that the project property owner was not a necessary party to the action because the bond released the project property from the lien and the bond replaced the property as "substitute security" for the lien claim. *Id.* at 705. [CP at *Id.*]

Also like the *CalPortland* court, the *George W. Kane* court determined and held that the general contractor (as named principal under

the bond) and its bond surety were the necessary parties to sue and serve with the action. *Id.* [CP at *Id.*] With specific regard to the general contractor, the court determined that the general contractor was a necessary party because the general contractor, as principal on the bond, had **acquired "an immediate interest" in the bond and the right to resist any lawsuit by the claimant seeking payment from the bond**. *Id.; see also* RCW 60.04.161 (authorizing a general contractor -- like Fowler -- to record a release bond to release real property from lien to dispute lien's correctness or validity). [CP at *Id.*]

In the more recent case of *Synchronized Construction Services, supra*, the Virginia Supreme Court, after noting that a release bond becomes the "subject matter or res" of any lien enforcement action, again reaffirmed that **the only necessary parties to a lien enforcement action against a release bond are the bond principal and surety because they both have a "pecuniary interest in the bond" that will be affected by the action**. *Synchronized Construction Services,* 764 S.E.2d at 66-67. [CP at 61 and 73]

That same rationale and reasoning was clearly adopted and applied by the *CalPortland* court to address and resolve the issue of who are necessary parties to a Washington lien enforcement action against an RCW 60.04.161 release bond. [CP at 61 and 74] Because the

CalPortland bond did not name Costco (the project property owner) **as a principal or surety**, the court determined that Costco **"did not have an ownership interest in any property 'subject' to the lien within the meaning of RCW 60.04.141** (bold and underline emphasis added)." *CalPortland, supra* at 388. [CP at *Id.*]

Thus, for purposes of RCW 60.04.141's procedural requirement that a lien claimant sue and serve the "owner of the subject property" within eight months and 90 days, *CalPortland* determined that the lien claimant had satisfied that procedural requirement **by suing and serving both the bond principal and surety within such timeframe because they were "[t]he only parties with an interest in the bond"** -- which bond the *CalPortland* court essentially determined (like the Virginia Court) became the **"subject property"** upon the bond's recording and the bond's principal and surety became the **"owner of the subject property"** for purposes of applying RCW 60.04.141 and complying with its procedural requirements. *See id.* at 386-391. [CP at *Id.*]

Inland unsuccessfully attempted in the trial court to avoid Lawsuit dismissal under *CalPortland* by asserting that key components of the *CalPortland* court's analyses and opinion fatal and dispositive to Inland's position were "dicta." [*See* CP at 97 and 103] Specifically, Inland unsuccessfully argued that the *CalPortland* court had not determined and

held that it is necessary to sue and serve the principal (and the surety) under a release bond in order to comply with RCW 60.04.141's procedural requirement that the **"owner of the subject property"** be sued and served within that statute's specified time limitation periods. [CP at *Id.*]

A full reading of the *CalPortland* decision, however, clearly reveals that the court did so determine and so hold. After deciding the threshold issue that Costco (the project property owner) was not a necessary party because the project general contractor had recorded a release bond, the *CalPortland* court then necessarily proceeded to address and decide the inextricably related issue of who, then, was/is a necessary party to a lien enforcement action against a release bond for purposes of complying with RCW 60.04.141's procedural service-of-process requirements. *See CalPortland, supra* at 387-391. [CP at 112-113 and 137-138]

In directly addressing RCW 60.04.141's procedural requirements for purposes of lien enforcement against a release bond, the *CalPortland* court expressly stated that "**<u>we hold</u> CalPortland's service of process on Travelers <u>and Ferguson</u> [the general contractor named as principal under the bond] sufficient** (bold and underline emphasis added)" to satisfy RCW 60.04.141's procedural requirements. *Id.* at 388. [CP at 113 and 138] Thus, *CalPortland* **<u>did clearly determine and did explicitly</u>**

"hold" that it was service of process on both the surety and the principal that constituted compliance with RCW 60.04.141's procedural requirements. *Id.* [CP at *Id.*]

Significantly, the *CalPortland* court further stated that Costco was not a necessary party to the action for the additional and independent reason that "**[t]he bond did not name Costco as a principal or surety** (bold and underline emphasis added)" which the court determined meant that "**Costco did not have an ownership interest in any property 'subject' to the lien within the meaning of RCW 60.04.141** (bold and underline emphasis added)." *Id.* [CP at *Id.*] Thus, the direct inverse of, and necessary corollary to, *CalPortland's* determination on that point is that Costco would have had an **"ownership interest" in "property subject' to the lien"** for purposes of RCW 60.04.141 **if Costco had been named as a principal or surety under the bond**. *See id.* [CP at *Id.*]

For purposes of then addressing the ultimate issue of who had an "ownership interest in property subject to the lien" for purposes of RCW 60.04.141's service-of-process requirements after the release bond was recorded, the *CalPortland* court determined and stated that "**[t]he only parties with an interest in the bond were Ferguson and Travelers: the principal and surety named in the security** (bold and underline emphasis added)." *Id.* [CP at *Id.*]

Thus, *CalPortland* did directly address, did thoroughly analyze, and did expressly determine the issue of who a lien claimant must timely sue and serve for purposes of complying with RCW 60.04.141's procedural requirements when pursuing lien enforcement against a release bond. [CP at 114 and 139] *CalPortland* determined and expressly held that **those necessary parties are the named principal and surety under the bond**. [CP at *Id.*] *CalPortland* therefore established Washington precedent on the core issue of whether Inland needed to timely sue and serve Fowler (as principal under the Bond) in addition to suing and serving Western. [CP at *Id.*]

Because Inland was required under RCW 60.04.141 and *CalPortland* to timely sue and serve Fowler (in addition to Western) with the Lawsuit, Inland's failure to do so released and discharged Western and the Bond from any further obligation pursuant to RCW 60.04.161. *See CalPortland*, *supra* at 386; and *DBM Consulting Engineers, supra* at 39-42. [CP at *Id.*]

Inland also unsuccessfully argued in the trial court that it had no viable cause of action against Fowler upon which Inland could have potentially obtained a judgment against Fowler. [*See* CP at 97-98] That argument was and is incorrect. By Fowler naming itself as principal under the Bond to create and preserve the right to dispute the Lien's correctness

or validity, Fowler obligated itself (to the penal extent of the Bond) to pay the Lien (or portion thereof) **<u>if and after</u> adjudicated to be duly owing as a result of litigation between Fowler and Inland over the Lien's correctness and validity**. *See CalPortland*, *supra* at 390-391 (citing and discussing *Olson Engineering, supra*). [CP at 114]

Put differently, the basis (cause of action) for Inland potentially obtaining a judgment against Fowler was created by the terms and provisions of RCW 60.04.161 and the Bond itself -- wherein Fowler was named as "Principal," Inland named as "Obligee," and expressly stated that **<u>Fowler "does not wish to pay said lien until the validity of the lien can be properly determined or adjudicated</u>** (bold and underline emphasis added)." *See* RCW 60.04.161. [CP at 65-66, 82, 84, and 115]

Thus, Inland could have potentially obtained a judgment against Fowler (for purposes of then potentially obtaining payment from the Bond if that judgment was not satisfied by Fowler) **<u>if -- but only if</u>** – Inland had timely sued and served Fowler under RCW 60.04.141 to adjudicate and establish the Lien's correctness and validity. *See* RCW 60.04.161 and .141; and *DBM Consulting Engineers, supra* at 39-42. [CP at 115]

To address a red-herring issue Inland raised in the trial court (and again in this appeal), the fact that EWD&P acknowledges an unpaid account debt to Inland relating to the Project did not eliminate the need for

Inland to still fully comply with the provisions and procedure contemplated under RCW 60.04.161 and .141 that required Inland to first obtain a favorable judgment against Fowler (as principal under the Bond) adjudicating and establishing the Lien's correctness and validity. *See* RCW 60.04.161 and .141; and *DBM Consulting Engineers, Id.* [Appellant's Brief at 17 and CP at 104-105 and 115]

Fowler purchased the Bond for the intended purpose of disputing and adjudicating the Lien's correctness or validity **if/when** Inland properly pursued action against Fowler to enforce the Lien. [CP 44-45, 49-50, and 115] At most, EWD&P's acknowledgment of a debt to Inland may have had some evidentiary relevance in timely-commenced litigation between Fowler and Inland over the Lien's correctness and validity, but the debt acknowledgment **did not eliminate the need for Inland to timely and fully comply with RCW 60.04.141's procedural requirements to enforce its Lien**. *See* RCW 60.04.161 and .141; and *DBM Consulting Engineers, Id.* [CP at 115]

Western emphasized to the trial court that a court has a paramount duty to effectuate RCW 60.04.161's clear intent and purpose and that, if the court adopted Inland's position that Fowler was not a necessary party to the Lawsuit for purposes of RCW 60.04.141's procedural requirements, the court would be ignoring and rendering RCW 60.04.161's intent and

purpose meaningless by allowing a lien claimant (like Inland) to simply side-step and strategically avoid litigating a disputed lien claim by only suing the surety under a release bond and not suing the very party who obtained the bond for purposes of disputing the lien (i.e., the bond principal, like Fowler). [CP at 115-116 and 139]

It is important to remember that it is the principal under a release bond that is the ultimate financial stakeholder under the bond (and in any action seeking payment from the bond) because it is the principal that is ultimately liable under the bond to indemnify (repay) the surety for any amounts paid from the bond. *See* RCW 60.04.161; and *CalPortland*, *supra* at 390-391. [CP at 116 and 140]

Thus, in order to give full meaning and effect to RCW 60.04.161's provisions creating the right for an interested party (e.g., a general contractor like Fowler) to obtain a bond to release project real estate from a disputed lien for purposes of litigating the lien's correctness and validity, the interested party obtaining the bond (i.e., the named principal) must necessarily be named and included in any lien enforcement action under RCW 60.04.141 seeking payment from the bond. *See* RCW 60.04.161; .141; and *CalPortland*, *supra* at 387-390. [CP at *Id.*]

Indeed, from a purely practical perspective, if a release bond principal is not a necessary party to a lien enforcement action under RCW

60.04.141, how will the correctness and validity of the disputed lien be meaningfully and thoroughly adjudicated in the principal's absence given that a release bond surety has no duty/obligation to dispute the lien and actively litigate with the lien claimant over the lien's correctness and validity? [CP at 116]

Of course, the clear and only logical answer to that question is that a lien claimant must name and include the principal in a lien enforcement action under RCW 60.04.141 in order to effectuate RCW 60.04.161's intent and purpose to provide a process for a disputed lien's correctness and validity to be thoroughly adjudicated between the lien claimant and the party disputing the lien (i.e., the bond principal) prior to the lien claimant seeking any payment from the surety under the bond. *See* RCW 60.04.161, and .041. [CP at *Id.*]

The trial court did not engage – nor did it need to engage -- in any speculation or independent statutory construction to determine that RCW 60.04.141's procedural requirements required Inland to timely sue and serve Fowler (in addition to Western) because *CalPortland* established Washington precedent to guide the court in making that determination. [CP at 117 and 139]

While Lawsuit dismissal may seem harsh at first blush, it must be remembered that it was Inland (as lien claimant) – not Western (as surety)

nor Fowler (as principal) – that had the burden under RCW 60.04.161 to ensure that a lien enforcement action was timely and properly commenced under RCW 60.04.141, and that it was Inland's failure to comply with RCW 60.04.141's procedural requirements (by not suing and serving Fowler) that caused its Lien to become unenforceable and resulted in Western and the Bond being released and discharged from liability. [CP at 117]

D. CR 19 Has No Application in Determining Whether Inland Complied With RCW 60.04.141's Procedural Requirements to Enforce its Lien Against the Bond.

Inland again attempts to create another red-herring issue by trying to divert the Court's attention from the key issue presented by this case **(i.e., whether Inland complied with RCW 60.04.141's procedural requirements)** by engaging in unnecessary and inapplicable CR 19 "indispensable party" analysis. [Appellant's Brief at 27-29 and CP at 95-97 and 108]

At the outset, it is important to note that the only case cited by Inland in support of its CR 19 argument is *Gildon v. Simon Property Group, Inc.*, 158 Wn.2d 483, 145 P.3d 1196 (2006), which case involved a standard run-of-the-mill personal injury premises liability (negligence) action against the manager, operator, and occupier of a shopping mall. *Gildon*, 158 Wn.2d at 486-487. [Appellant's Brief at 27-29 and CP at 95-

97 and 108-109] The defendant in *Gildon* convinced the trial court to dismiss the action because the plaintiff failed to also name and sue the Partnership that owned the mall property within Washington's general 3-year statute of limitations applicable to negligence actions. *Id.* at 491-492. [CP at 109]

The Washington Supreme Court affirmed the Court of Appeals' reversal of the trial court on the basis that the record property owner was not an indispensable party under CR 19, principally predicated on the Court's determination that premises liability is imposed on the possessor of land and one acting on behalf of the possessor, and that possession of land, giving rise to a duty of care, does not require actual title or ownership. *Id.* at 493-497. [CP at *Id.*]

Significantly, however, the Gildon case **did not involve a "special proceeding" under CR 81** like that involved in the construction lien enforcement case of *Schumacher Painting Co.*, *supra*. [CP at *Id.*] The *Schumacher Painting Co.* court determined that Washington's Superior Court Civil Rules **cannot be applied and relied on by a lien claimant to circumvent RCW 60.04's procedural requirements because construction lien foreclosure actions are "special proceedings" under**

CR 81(a).[2] *Schumacher Painting Co.,* 69 Wn. App. at 700-701; *see also CalPortland*, *supra at* 394-395, f.n.2 (lien enforcement actions are "special proceedings" under CR 81); and *Bob Pearson Const., supra* at 178-179 (because "lien foreclosures are 'special proceedings' under CR 81, not subject to the Rules of Civil Procedure," the "civil rules cannot be used to reach a result inconsistent with the lien foreclosure statute"). [CP at *Id.*]

Both *Schumacher Painting Co.* and *Bob Pearson Const.* presented and addressed the same essential issue presented by Inland's CR 19-based argument – i.e., whether Washington's general civil rules can be applied and relied on to excuse and remedy a lien claimant's non-compliance with RCW 60.04.141's procedural requirement that a lien claimant properly sue and serve certain parties within the specified eight month and 90 day time limitation periods. [CP at 109-110]

The plaintiff lien claimants in *Schumacher Painting Co.* and *Bob Pearson Const.* tried to rely on CR 15(c) to amend their complaints after the statutory eight month limitation period expired to remedy their failure to timely sue and serve the property owner (in *Schumacher Painting Co.*) and two mortgage lien holders (in *Bob Pearson Const.*). *Schumacher*

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[2] CR 81(a) provides in relevant part that: "**Except where inconsistent with rules or statutes applicable to special proceedings**, these [standard general civil] rules shall govern all civil proceedings (bold and underline emphasis added)."

Painting Co., *supra* at 700-701; and *Bob Pearson Const.*, *supra* at 176-177. [CP at 110]

Both courts determined that **it is improper to allow CR 15(c) amendments to a lien claimant's complaint because <u>RCW 60.04.141 lien enforcement actions are "special proceedings" in which the general civil court rules cannot be used to reach a result inconsistent with RCW 60.04.141's procedural requirements</u>**. *Schumacher Painting Co.*, *supra*; *Bob Pearson Const.*, *supra* at 178-179. [CP at *Id.*]

Thus, under *Schumacher Painting Co.* and *Bob Pearson Const.*, because **<u>Inland's lien enforcement action was a "special proceeding" subject to CR 81</u>**, it would be improper for the trial court or this Court to engage in standard CR 19 "indispensable party" analysis to determine whether Fowler was a necessary party to the Lawsuit for purposes of RCW 60.04.141's procedural requirements. [CP at *Id.*]

As previously established herein and in Western's trial court briefing, a lien claimant seeking to enforce a lien against an RCW 60.04.161 release bond must commence such action in compliance with RCW 60.04.141's procedural requirements and, under the *CalPortland* decision addressing the interplay of those two statutes, compliance with RCW 60.04.141 requires the lien claimant to timely sue and serve both the named principal and surety under the bond. [CP at *Id.*] Accordingly, CR

19 has no application in determining whether Inland needed to timely sue and serve both Western and Fowler in order to comply with RCW 60.04.141's procedural requirements. [CP at 111]

Even assuming, *arguendo*, that CR 19 may have potential application, Fowler would nevertheless still be a necessary and indispensable party that Inland needed to timely sue and serve with its lien enforcement action for the following reasons:

1. Inland's bare assertions that the status and posture of this case (in terms of party representation, defenses raised, discovery pursued, motions brought, etc.) would be the same even if Fowler had been named a party are based on nothing but pure, self-serving and erroneous speculation/assumption by Inland and, as such, should be ignored and disregarded. As already established, Western and Fowler have distinctly different interests and positions under the Bond and in any lien enforcement action involving the Bond. [CP at *Id.*]
2. <u>Fowler sought and purchased</u> the Bond pursuant to RCW 60.04.161 because Fowler believed there were valid grounds to dispute Inland's Lien's correctness or validity <u>if/when</u> Inland pursued action against Fowler under RCW 60.04.141 to enforce the Lien. [CP at 45 and 111]

3. The right provided under RCW 60.04.161 to obtain a release bond to dispute "the correctness or validity of [Inland's] claim of lien" was exercised and exclusively held by Fowler -- not by Western or any other person/entity. [CP at 111]
4. Western assumed no duty/obligation under RCW 60.04.161 and/or the Bond to advance and protect Fowler's interests by actively engaging in disputed litigation with Inland over the Lien's correctness or validity, but rather the provisions of RCW 60.04.161 and the Bond only imposed a secondary surety duty/obligation upon Western to guarantee payment of an unsatisfied judgment against Fowler following litigation directly between Inland and Fowler to adjudicate and establish the Lien's correctness and validity. [CP at 82 and 111-112]

Accordingly, even under an unnecessary and improper CR 19 analysis, Fowler obtained and held an interest and valuable rights in the Bond that were unique and exclusive to Fowler, and which necessarily required Inland to timely sue and serve Fowler with a Lien enforcement action under RCW 60.04.141 in order for Inland and Fowler to litigate the Lien's correctness and validity prior to Inland resorting to any direct action against Western to obtain payment from the Bond. [CP at 112]

E. Summary Judgment was Properly Granted to Western, and Properly Denied to Inland, Based on Inland's Failure to Sue and Serve Fowler as Principal Under the Subject RCW 60.04.161 Release Bond.

As established by the foregoing, the trial court properly granted summary judgment to Western and properly denied summary judgment to Inland. Indeed, the following two contrasting hypothetical scenarios serve to further highlight the absurdity and fatal flaws in Inland's position that a release bond principal is not a necessary party to a lien enforcement action under RCW 60.04.141:

1. **Scenario #1 (Release Bond Not Obtained):** Assume that Fowler was the owner of the Project Property and acted as its own general contractor to improve that property. Assume further that one of Fowler's subcontractors purchased materials from Inland and that Inland recorded an RCW 60.04 lien against the Project Property, which lien Fowler disputed as to its correctness and/or validity, and that Fowler, rather than obtaining a release bond to release the lien from the Project Property, decided to instead defend and litigate the lien's correctness and/or validity if/when Inland pursued action under RCW 60.04.141 to enforce the lien against the Project Property. [*See* CP at 141]

2. **Scenario #2 (Release Bond Obtained):** Assume the same underlying facts as in Scenario #1 above, but further assume that Fowler obtained a release bond under RCW 60.04.161 (as named principal thereunder) to free the Project Property from the disputed lien to litigate the lien's correctness and/or validity if/when Inland pursued action to enforce the lien against the bond. [*See* CP at *Id.*]

Under Scenario #1, the provisions of RCW 60.04.141 and RCW 60.04.171 would combine to require Inland to timely sue and serve Fowler (as record owner of the Project Property) with a lien enforcement action for purposes of Fowler defending the action and litigating with Inland over the disputed lien's correctness and/or validity. [CP at 141]

However, under Scenario #2 -- <u>if Inland's position is applied</u> – Inland would no longer need to sue and serve Fowler (as named principal under the release bond that replaced the Project Property as the "property subject to the lien" under RCW 60.04.141) with a lien enforcement action against the bond because Inland believes it can avoid having to litigate with Fowler (as principal) over the disputed lien's correctness and/or validity by only suing the bond surety despite the surety having no duty/obligation under a release bond to dispute and litigate with a lien claimant over a lien's correctness and/or validity. [CP at 142]

Because both Scenarios #1 and #2 involve the exact same disputed lien (i.e., Inland's lien) and the exact same party disputing that lien's correctness and/or validity (i.e., Fowler, as Project Property owner in #1 and as named principal under the bond in #2), it is impossible to rationally explain and reconcile the incongruent treatment of Fowler that results by applying Inland's position under those two scenarios in terms of Fowler being a necessary party to a lien enforcement action under Scenario #1 but (in Inland's view) not being a necessary party to an enforcement action under #2.[3] [CP at *Id.*]

Inland clearly (but erroneously) views a RCW 60.04.161 release bond as a lien claimant's quick, easy, and virtually automatic and unimpeded payment source -- which view is evidenced by Inland initially attempting to demand and obtain payment from Western on the Bond without even filing a lawsuit. [CP at 82 and 142-143]

F. The Trial Court Properly Denied Inland's CR 59 Motion for Reconsideration.

Inland assigns error to the trial court's denial of Inland's CR 59 *Motion for Reconsideration*. This Court reviews that trial court decision

[3] *See also* page 25 *supra* discussing the *CalPortland* court's determination that Costco (the real property owner) would have had an ownership interest in "property subject to the lien" and would have therefore been a necessary party to a lien foreclosure within the meaning of RCW 60.04.141 if Costco had been named as a principal or surety under the release bond.

under an abuse of discretion standard. *See e.g.*, *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005).

In Western's Response to Inland's *Motion for Reconsideration*, Western established that the motion was meritless and that the trial court's summary judgment rulings and Order were correct and in full accord with controlling Washington appellate court precedent that addressed and resolved the primary issue before the court on summary judgment – **i.e., Whether or not Inland complied with all necessary procedural requirements under RCW 60.04.161 and .141 to enforce its lien claim and receive payment from the Bond.** [*See* CP at 135-144]

Western pointed out that Inland was erroneously arguing that the trial court improperly "construed" the meaning of the terms **"owner of the subject property"** in RCW 60.04.141 for purposes of a lien enforcement action against an RCW 60.04.161 release bond. [*See* CP at 139-140] There was no need for the trial court to engage in any independent construction over the meaning of, or interplay between, those two key statutes due to already existing analyses and controlling precedent established under *CalPortland*, *supra*. [CP at 139-140]

In its letter ruling, the trial court, after stating that "**[u]ltimately, the question before this Court is who is the 'owner of the subject property [for purposes of RCW 60.04.141's procedural requirements]**

(bold emphasis added),'" went on to state that the Washington Court of Appeals had **"recently analyzed this very issue** (bold emphasis added)" in *CalPortland.* [CP at 120]

A full review of the trial court's thorough letter ruling clearly reveals that the court explained and based its rulings and decision on *CalPortland's* analyses and holdings rather than on the trial court's own independent construction and analyses of RCW 60.04.161 and .141.[4] [*See* CP at 119-120]

Western pointed out to the trial court that *CalPortland* was the "giant elephant in the room" that Inland wanted the court to ignore by again arguing in the *Motion for Reconsideration* that *CalPortland's* analyses and holdings were "dicta" and again arguing that *CalPortland* did not determine and hold that a lien claimant must sue and serve the named principal (along with the surety) under a release bond in order to comply with RCW 60.04.141's procedural requirements. [CP at 137]

Western responded to those misplaced arguments by again discussing *CalPortland* and pointing out to the trial court that the *CalPortland* court addressed, thoroughly analyzed, and ultimately

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[4] It does appear equally clear from that letter ruling, however, that the trial court agreed with *CalPortland's* analyses and would have reached the same rulings even without *CalPortland's* guidance, simply because *CalPortland's* analyses made practical and logical sense, and represents the only way for a court to provide full meaning and effect to the language and provisions of RCW 60.04.161 and .141. [*See* CP at 136-140]

answered the two interrelated questions of **(1) who has an "ownership interest" in an RCW 60.04.161 release bond and (2) who must a lien claimant timely sue and serve for purposes of complying with RCW 60.04.141's procedural requirements when pursuing lien enforcement after the recording of a release bond.** [CP at 137-140] Under *CalPortland*, the answer to both questions is the named principal and the surety under the release bond. [CP at 139]

Inland's *Motion for Reconsideration* also unsuccessfully argued that RCW 60.04.171 **(Appendix 7)** applied and supported Inland's position that only the owner of real property was a necessary party to any type of lien enforcement action under RCW 60.04.141. [CP at 130-131] Western pointed out and established that RCW 60.04.171 has no application/relevancy to lien enforcement actions against a release bond under RCW 60.04.161 and .141 because RCW 60.04.171 only addresses who are necessary and proper parties to lien enforcement actions **against real property**, and that RCW 60.04.171 does not address or impact who are necessary parties to a lien enforcement action **against a release bond under RCW 60.04.161 and .141**.[5] [CP at 140-141]

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[5] Which issue, as previously discussed and established herein, was addressed and resolved by *CalPortland's* determination that the named principal and surety under the bond are necessary parties because they each have an interest in the bond that is the essential equivalent of a real property owner's interest in real property.

Inland also unsuccessfully argued in its *Motion for Reconsideration* (and again argues in this appeal) that the "weight of authority" under the "common law of suretyship" supports Inland's position that RCW 60.04.141's procedural requirements are met by only suing and serving the surety under a release bond. [*See* Appellant's Brief at 22 and CP at 131]

Inland provides a long string citation (with no discussion) to general suretyship caselaw involving various other different types of bonds, though none of those cases involved Washington law, nor did any of the cases involve statutory lien release bonds like a RCW 60.04.161 release bond. [*See* Appellant's Brief at 22 and CP at 131 and 143] Thus, none of those "general suretyship" cases have any relevance/application to Washington lien enforcement actions against release bonds under RCW 60.04.161 and .141. [CP at 143]

There are situations involving other different types of bonds (e.g., payment/performance bonds) that may not necessarily require a bond claimant to sue the bond principal and allow a bond claimant to directly sue the surety only. [Appellant's Brief at 23 and CP at 132 and 143]. However, with specific regard to an RCW 60.04.161 release bond, as previously discussed and established herein, the surety's obligation and potential liability to pay out under such a bond is limited and conditioned

upon the lien claimant first successfully obtaining a judgment against the principal under the bond (i.e., the party who purchased the bond to dispute the lien's correctness and/or validity) and the principal then failing to pay that judgment. [CP at 143]

Inland's demonstrated inability/refusal to grasp that limited and conditional scope of an RCW 60.04.161 release bond surety's potential obligation/liability caused Inland's Lien to become unenforceable and led to Western and the Bond being discharged from liability. Indeed, the express terms of the Bond itself provide that Fowler (as named principal) **"does not wish to pay [Inland's] lien <u>until the validity of the lien can be properly determined or adjudicated</u>** (bold and underline emphasis added)." [CP at 82, 84, and 143]

Thus, under the terms of RCW 60.04.161 and the Bond itself, Western's obligation and potential liability to pay anything to Inland under the Bond was limited and expressly **<u>conditioned upon Inland successfully obtaining a judgment against Fowler (the party who obtained the bond to dispute the Lien's correctness and/or validity) and Fowler then failing to pay that judgment</u>**. [CP at 144]

Accordingly, the trial court properly exercised its discretion based on established and solid legal authority to deny Inland's *Motion for Reconsideration.*

G. Western is Entitled to an Award of Attorney's Fees.

Under RAP 18.1 and RCW 60.04.181(3), Western as prevailing party is entitled to request and receive an award of attorney fees incurred in responding to Inland's appeal. *See e.g., Bob Pearson Const., supra* at 180. Western therefore respectfully requests that the Court award reasonable attorney fees to Western.

VI. SUMMARY AND CONCLUSION

In summary and conclusion, as discussed and established hereinabove, Respondent Western only assumed the limited and conditional obligation/liability under RCW 60.04.161 and the Bond to guarantee payment of an unsatisfied judgment against Fowler in Inland's favor following necessary and indispensable litigation directly between Inland and Fowler (as named principal under the Bond) to adjudicate and establish the correctness and validity of Inland's Lien that Fowler disputed.

Because Western had no obligation/liability under RCW 60.04.161 or the Bond to actively litigate with Inland over the Lien's correctness and validity, Inland had no right or ability under the Bond or statute to directly seek a money judgment only against Western and satisfaction of that judgment from the Bond. Rather, Inland had the affirmative obligation under RCW 60.04.161 and .141 (and under Washington case law

addressing those statutes) to timely sue and serve Fowler with an action to adjudicate and establish the Lien's correctness and validity because Fowler disputed the Lien and had purchased the Bond for that very purpose if/when Inland properly pursued Lien enforcement action.

By Fowler obligating itself under the Bond as named principal, Fowler immediately acquired a legally-recognized pecuniary interest in the Bond and the right to directly participate in and directly contest any action by Inland seeking Lien enforcement and payment from the Bond. Because Inland failed to sue and serve Fowler within the time limitations specified and required under RCW 60.04.141, however, Western and the Bond were released and discharged from any further obligation and liability as a matter of law under RCW 60.04.161.

Accordingly, for the foregoing reasons, Respondent Western hereby respectfully requests that this Court **deny Inland's appeal** by:

1. **Affirming** the trial court's October 22, 2015, decision and *Order Denying [Appellant Inland's] Motion for Summary Judgment, and Granting [Respondent Western's] Motion for Summary Judgment Dismissing Complaint and Action*;
2. **Affirming** the trial court's December 15, 2015, decision and *Order Denying [Appellant Inland's] Motion for Reconsideration*; and

3. **Awarding** to Western attorney fees and costs incurred in this appeal pursuant to RAP 18.1 and RCW 60.04.181(3).

RESPECTFULLY SUBMITTED this 4th day of May, 2016.

KUFFEL, HULTGRENN, KLASHKE, SHEA & ELLERD, LLP
Attorneys for Respondent Western Surety Company
(Bond No. 58717161)

By: _____
TIMOTHY G. KLASHKE
WSBA #19953

APPENDIX 1

Bond No. 58717161

RELEASE OF LIEN BOND

KNOW ALL MEN BY THESE PRESENTS, That Fowler General Construction, Inc.,

as Principal and Western Surety Company, as Surety, are held and firmly

unto Inland Empire Drywall Co.,

as Obligee, in the amount of One Hundred Eighty Six Thousand Nine Hundred Seventy Nine & 57/100 ---- (186,979.57) DOLLARS

AND, WHEREAS, Inland Empire Drywall Co.

on September 26, 2014, filed a Lien Number 2014-024259

against the property known as Bella Vista Apartments Phase II

and owned by Western States Development Corporation,

AND, WHEREAS, Fowler General Construction, Inc. does not wish to pay said lien until the validity of the lien can be properly determined or adjudicated.

NOW, THEREFORE, if the said Principal and Surety shall hold harmless the said Obligee from and against any loss, costs or expenses which may accrue due to the filing of said lien, then this obligation to be null and void, otherwise to remain in full force and effect.

Dated this 10th day of November, 2014

Fowler General Construction, Inc.

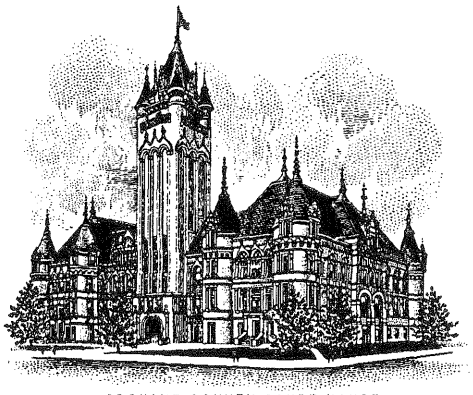
By _____ Principal

Western Surety Company

By _____
Joanne Reinkensmeyer, Attorney-In-Fact

CGB26000ZZ0300f

APPENDIX 2



SPOKANE COUNTY COURT HOUSE

Superior Court of the State of Washington for the County of Spokane

Department No. 9

John O. Cooney

Judge

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Spokane, Washington 99260-0350
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FILED
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Timothy W. Fitzgerald
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October 6, 2015

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Spokane, WA 99204

Timothy Klashke
Kuffel, Hultgrenn, Klashke, Shea & Ellerd, LLP
1915 Sun Willow Blvd., Ste. A
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Re: Inland Empire Dry Wall Supply Co. v. Western Surety Company, Case No. 15-2-00016-5

Dear Counsel,

On October 2, 2015, both parties moved for summary judgment; the Plaintiff, Inland Empire Dry Wall Supply Company, moved on the lien foreclosure claim and the Defendant, Western Surety Company, moved for dismissal of the complaint. Subsequent to the hearing, the Court took these motions under advisement. This letter serves as the Court's ruling on these competing motions.

In making its ruling, the Court reviewed following documents:

- Plaintiff's Motion for Summary Judgment on Lien Foreclosure Claim
- Plaintiff's Memorandum in Support of Motion for Summary Judgment on Lien Foreclosure Claim
- Affidavit of Alejandro Pena in Support of Inland Empire Drywall's Motion for Summary Judgment
- Affidavit of Judy Thomas in Support of Inland Empire Drywall's Motion for Summary Judgment
- Defendant's Motion for Summary Judgment Dismissing Complaint and Action
- Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment Dismissing Complaint and Action
- Declaration of Jeff Durfee in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment
- Declaration of Nancy Stangel in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment
- Response to Western's Motion for Summary Judgment Dismissing Complaint and Action
- Defendant's Response to Plaintiff's Motion for Summary Judgment on Lien Foreclosure Claim
- Reply in Support of Motion for Summary Judgment on Lien Foreclosure Claim

- Affidavit of Richard D. Campbell in Support of Plaintiff's Reply to Motion for Summary Judgment on Lien Foreclosure Claim
- Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment Dismissing Complaint and Action

Summary judgment is proper if the records on file with the trial court show "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." CR 56(c). A material fact is one on which the outcome of the litigation depends. Graham v. Concord Construction, Inc., 100 Wn.App. 851, 854, 999 P.2d 1254, 1266 (2000) (*citing* Doe v. Department of Transp., 85 Wn.App. 143, 147, 931 P.2d 196 (1997)). The trial court must construe all evidence and reasonable inferences in the light most favorable to the nonmoving party. Id. at 854. If the moving party meets this initial showing, the burden then shifts to the moving party to raise an issue of material fact. Young v. Key Pharmaceutical, Inc., 112 Wn.2d 216, 225, 770 Wn.2d 182, 187 (1989). Summary judgment is proper when the only question before the court is one of law. McFarling v. Evaneski, 141 Wn.App. 400, 403, 171 P.3d 497, 499 (2007).

The Plaintiff asks this Court to grant summary judgment by allowing it to foreclose its claim of lien against the recorded release of claim bond. In support of the motion, the Plaintiff allege there is no genuine issue of material fact and they have complied with the requirements of RCW 60.04. The Defendant counters that the general contractor, Fowler General Construction ("Fowler"), is a necessary party as it is the principal of the surety. Because Fowler was not named in the complaint or served, the Defendant asserts the provisions of RCW 60.04.141 have not been complied with, requiring dismissal of this action.

The primary issue for the Court to resolve is whether, in light of the Plaintiff excluding Fowler from this litigation, the Plaintiff complied with the statutes governing mechanics' liens. RCW 60.04.141 outlines the procedural requirements for commencing an action to claim and recover on a mechanics lien. In pertinent part, this statute provides:

> 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.
> RCW 60.04.141 (emphasis added).

There is no genuine issue of material fact that Western States Development Corporation ("WSDC") is the owner of the real property that is the genesis of this action. With the exception of excluding Fowler from this litigation, there is no genuine issue of material fact that the Plaintiff properly recorded a claim of lien against the real property and complied with the procedural requirements of RCW 60.04.141 & .161. Additionally, there is no genuine issue of material fact that Fowler is the principal of a release of lien bond which named the Defendant as surety. Lastly, there is no genuine issue of material fact that Fowler recorded the release of lien bond with the Benton County Auditor, releasing the subject real property from the lien. With these facts being undisputed, the remaining question is whether Fowler is considered the "owner of the subject property" and is therefore a necessary party to this action.

RCW 60.04 does not define "owner of the subject property." However, because RCW 60.04.141 discusses "property subject to the lien," it is clear that the "owner of the subject property" would be the

entity owning the property subject to foreclosure. In this case, for purposes of RCW 60.04.141, the owner of the subject property was WSDC as a notice of claim lien was recorded against the real property it owned. Once the release of lien bond was recorded, the subject real property was released from the claim of lien. Indeed, RCW 60.04.161 provides, "The effect of recording a bond shall be to release the real property described in the notice of claim lien..." If the real property is released from the claim of lien, the real property owner could no longer be the "owner of the subject property" as the "subject" has transferred from the real property to the recorded lien bond. Even though the owner of the real property may be released upon the recording of a bond, the statute still requires service upon the "owner of the subject property" within 90 days. This service provision is not conditional.

Ultimately, the question before this Court is who is the "owner of the subject property?" In CalPortland Co. v. LevelOne Concrete, LLC the Court of Appeals, recently analyzed this very issue, but from a different perspective. CalPortland Co. v. LevelOne Concrete, LLC, 180 Wn.App. 379, 388, 321 P.3d 1261 (Div. 2, 2014). In CalPortland, Costco contracted with Ferguson for the construction of a new store. Ferguson subcontracted with LevelOne for concrete work. LevelOne then contracted with CalPortland for materials. When LevelOne failed to pay CalPortland for the materials, CalPortland filed a lien against the Costco property. Ferguson then recorded a bond in lieu of claim, listing itself as principal and Traveler's Casualty & Surety Company as surety, thereby releasing the Costco property from the claim. CalPortland failed to serve process on Costco within the required 90 days. The issue before the court was whether RCW 60.04.141 required CalPortland to serve Costco as the "owner of the subject property."

The Court of Appeals concluded that once a bond in lieu of claim is recorded, by operation of law the subject real property is released from the lien. Based upon the real property being released from the lien, CalPortland was not required to serve process on Costco. The court further concluded that "[T]he only parties with an interest in the bond were Ferguson and Travelers: the principal and surety named in the security." Id. The court concluded, "CalPortland's service of process on Travelers and Ferguson sufficient." CalPortland, 180 Wn.App. at 388, 321 P.3d at 1265.

Here, there is no genuine issue of material fact that Fowler is the principal and the Defendant is the surety in the release of lien bond. Once the release of lien bond was recorded, it became the subject property in lieu of the real property. The "owners" of the subject property are Fowler (as the principal) and the Defendant (as the surety) as both have an interest in the bond. The Plaintiff failed to name Fowler as a party and failed to serve Fowler within the statutorily required time. For these reasons, the Court concludes that the Defendant is entitled to summary judgment dismissal of this action.

The Defendant requests attorney fees pursuant to RCW 60.04.181. That statute provides the court may allow the prevailing party attorney fees. Here, the Defendant did not prevail on the merits, but rather on a technical application of RCW 60.04.141. Given a number of facts that are not disputed, had the Plaintiff timely named and served process on Fowler there is a likelihood they would have prevailed. Based upon these unique circumstances, the Court is declining the request for an award of attorney fees. The Defendant is instructed to prepare an order reflecting the ruling of the Court as outlined in this correspondence.

Sincerely,

John O. Cooney

APPENDIX 3

CALPORTLAND COMPANY, *Appellant*, v. LEVELONE CONCRETE, LLC, ET AL., *Respondents.*

No. 43760-1-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

180 Wn. App. 379*; *321 P.3d 1261*; *2014 Wash. App. LEXIS 710

March 25, 2014, Filed

PRIOR-HISTORY:

Appeal from Clark Superior Court. Docket No: 11-2-03236-5. Date filed: 07/02/2012. Judge signing: Honorable Richard a Melnick.

SUMMARY:

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: A materials supplier for a subcontractor on a construction project sought to enforce a construction lien that was filed against the project site property. After the lien was filed and before the action to enforce the lien was commenced, the general contractor recorded a bond in lieu of claim under *RCW 60.04.161*. The materials supplier filed the action against the subcontractor, the general contractor, and the bond surety, but not against the property owner.

Superior Court: The Superior Court for Clark County, No. 11-2-03236-5, Richard A. Melnick, J., on July 2, 2012, entered a summary judgment in favor of the general contractor and the bond surety based on the materials supplier's failure to serve the summons and complaint on the property owner and its failure to specifically request foreclosure of the lien in its pleadings.

Court of Appeals: Holding that service of process on the property owner was no longer necessary after the general contractor recorded the bond in lieu of claim, that the materials supplier's complaint sufficiently identified the relief requested, and that none of the parties was entitled to an award of attorney fees and costs on appeal, the court *reverses* the judgment and *remands* the case for further proceedings.

COUNSEL: *Michael E. McAleenan Jr.* and *Russell A. Knight* (of *Smith Alling PS*), for appellant.

Douglas R. Roach (of *Ahlers & Cressman PLLC*), for respondents.

JUDGES: AUTHOR: Thomas R. Bjorgen R Bjorgen, J. We concur: Jill M Johanson, A.C.J., Bradley A. Maxa, J.

OPINION BY: Thomas

OPINION

¶1 BJORGEN, J. -- CalPortland Company provided building materials to LevelOne Concrete LLC, a subcontractor working on the construction of a new Costco building, for which Ferguson Construction Inc. served as general contractor. After LevelOne failed to pay for the materials, CalPortland recorded a lien against the Costco property under chapter 60.04 RCW and later filed this lawsuit. Before the lawsuit was filed, however, Ferguson recorded a bond in lieu of claim under *RCW 60.04.161*, issued by Travelers Casualty and Surety Company, releasing the Costco property from the lien. The trial court granted summary judgment in favor of Ferguson and Travelers because CalPortland had failed to serve the summons and complaint on Costco and had not specifically requested foreclosure of the lien in its pleadings. In this appeal by CalPortland, we hold that service of process on Costco was no longer necessary after Ferguson had recorded the bond and that CalPortland's complaint sufficiently identified the relief requested. Accordingly, we reverse and remand for further proceedings.

FACTS

¶2 The parties do not dispute the underlying facts in their briefing. Costco contracted with Ferguson to build a new store in Clark County, and Ferguson subcontracted

with LevelOne to perform work on the project. LevelOne then contracted with CalPortland for delivery of concrete mix but never paid for the materials delivered.

¶3 CalPortland properly recorded a claim of lien under *RCW 60.04.091* against the Costco property on February 2, 2011. In order to release the Costco property from the lien, on April 1, 2011 Ferguson recorded a bond in lieu of claim under *RCW 60.04.161*, naming itself as principal and Travelers as surety. CalPortland filed its complaint on August 15, 2011.

¶4 CalPortland's complaint named various defendants, including Ferguson, Travelers (collectively Ferguson), and LevelOne, but did not name Costco. CalPortland never served Costco with the complaint. The complaint stated five causes of action, one of which was entitled "Release of Lien Bond" and alleged the facts set forth above, as well as certain other facts bearing on the validity of the lien. Clerk's Papers (CP) at 5-10. In its prayer for relief, CalPortland requested "[j]udgment against Ferguson and Travelers for the principal amount of not less than $327,576.31," but did not specifically seek to "foreclose" on the lien. CP at 10.

¶5 Ferguson answered the complaint, raising various defenses. On March 12, 2012, Ferguson moved for summary judgment on the grounds that

> CalPortland failed to commence a lien foreclosure action within 8 months of recording its claim of lien, and failed to serve the owner of the affected property within 90 days of filing its Complaint ... as required by *RCW 60.04.141* and *60.04.161*.

CP at 25-26. Ferguson and Travelers also requested costs and attorney fees under *RCW 60.04.181*.

¶6 The trial court granted the motion for summary judgment, setting forth the reasons in a memorandum decision. It explicitly based its decision on "reasons provided in the defendants' briefing," and concluded that CalPortland

> failed to satisfy the statutory requirements. First, the plaintiff failed to serve the owner of the subject property within ninety days of initiating an action to enforce a lien. *RCW 60.04.141*. The plaintiff failed to serve Costco. Secondly to prevail, Cal[P]ortland must adjudicate the merits of the 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.

CP at 146. The trial court ultimately entered judgment in favor of Ferguson for costs and attorney fees. CalPortland timely appeals.

ANALYSIS

¶7 CalPortland argues that it complied with the requirements of chapter 60.04 RCW and that the court below therefore erred in granting Ferguson's motion for summary judgment. Specifically, CalPortland asserts that the statute does not require service of process on the owner of the real property improved by a lien claimant's labor or materials once a properly recorded bond in lieu of claim has released the realty from the lien. Ferguson counters that, under the plain language of the statute, the lien expires if the lien claimant does not timely serve the real property owner with the summons and complaint, and thus a claimant who fails to do so cannot seek to collect on the bond. Ferguson further argues that CalPortland did not adequately plead its claim because it did not specifically seek to foreclose on the lien. We agree with CalPortland.

I. Standard of Review

¶8 Summary judgment is warranted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *CR 56*. We review a grant of summary judgment de novo, performing the same inquiry as the trial court. *Torgerson v. One Lincoln Tower, LLC, 166 Wn.2d 510, 517, 210 P.3d 318 (2009)*. A party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990)*. In determining whether summary judgment was proper, we consider all facts, and the reasonable inferences therefrom, in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005)*. A court should grant summary judgment only if reasonable persons could reach but one conclusion from all the evidence. *Vallandigham, 154 Wn.2d at 26*.

¶9 The meaning of a statute is a question of law we also review de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)*. The "fundamental objective" of statutory interpretation "is to ascertain and carry out the Legislature's intent." *Campbell & Gwinn, 146 Wn.2d at 9*. Where a "statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Campbell & Gwinn, 146 Wn.2d at 9-10*.

Such plain meaning "is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Campbell & Gwinn, 146 Wn.2d at 11*. If "the statute remains susceptible to more than one reasonable meaning" after such inquiry, it is ambiguous and we must "resort to aids to construction, including legislative history." *Campbell & Gwinn, 146 Wn.2d at 12*.

II. THE CONSTRUCTION LIEN

¶10 Washington statutes provide that given proper notice to the owner of the improved property,

> any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.

RCW 60.04.021. The statute specifies that

> [t]he lot, tract, or parcel of land which is improved is subject to a lien to the extent of the interest of the owner at whose instance, directly or through a common law or construction agent the labor, professional services, equipment, or materials were furnished.

RCW 60.04.051. These liens were formerly known as "mechanics" or "materialmen's liens" but are now simply referred to as "construction liens." 27 MARJORIE DICK ROMBAUER, WASHINGTON PRACTICE: CREDITORS' REMEDIES--DEBTORS' RELIEF § 4.51, at 347 (1998).

¶11 The statute imposes a time limit on such liens, however, within which the party seeking to collect must file suit and serve process in order to preserve its rights:

> [n]o 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.

RCW 60.04.141. Thus, to preserve a claim against the property, the claimant must file suit within 8 months of recording the lien and then serve the property owner within 90 days of filing suit. *Bob Pearson Constr., Inc. v. First Cmty. Bank, 111 Wn. App. 174, 179, 43 P.3d 1261 (2002)*.

¶12 The statute also allows the owner or certain other interested parties to release the realty from the lien by recording a "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 ... a bond issued by a surety company authorized to issue surety bonds in the state. ... 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.

RCW 60.04.161. The purpose of this provision "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 lien from the real property to the bond. *DBM Consulting Eng'rs, Inc. v. U.S. Fid. & Guar. Co., 142 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").

A. CalPortland's Failure to Serve Process on Costco

¶13 The essence of Ferguson's service-of-process argument, on which the trial court relied in part in granting summary judgment, is that CalPortland's failure to

serve Costco with the summons and complaint "rendered its action absolutely void." Br. of Resp't at 15-16 (citing *RCW 60.04.141*); *Diversified Wood Recycling, Inc. v. Johnson, 161 Wn. App. 859, 251 P.3d 293 (2011)*; *Pac. Erectors, Inc. v. Gall Landau Young Constr. Co., 62 Wn. App. 158, 813 P.2d 1243 (1991)*. Ferguson maintains that this follows from a plain reading of the statute, regardless of whether Costco had any actual interest in the litigation, pointing out that the statute defines the property subject to the lien as "'[t]he lot, tract, or parcel of land which is improved.'" Br. of Resp't at 18 (quoting *RCW 60.04.051*). CalPortland contends that it would have been improper to serve Costco because the lien had already transferred to the bond at the time that CalPortland filed suit, and Costco therefore had no further interest in the matter.

¶14 Ferguson's argument raises an issue of first impression. Although several cases involving chapter 60.04 RCW have turned on questions related to service of process and the filing of a bond in lieu of claim, in none of these has the party seeking to collect filed suit *after* the bond in lieu of claim had already been recorded. Because the plain language of the statute establishes that Costco's realty was not "property subject to the lien" for purposes of *RCW 60.04.141*'s procedural requirements, we reject Ferguson's argument and hold CalPortland's service of process on Ferguson sufficient.

¶15 The analysis must begin with the language of the statute. Ferguson correctly argues that the statute's language clearly establishes its meaning and that this court should therefore not engage in statutory interpretation. Contrary to Ferguson's assertions, however, the statute's plain meaning establishes that CalPortland did not need to serve process on Costco.

¶16 As set forth above, a construction lien cannot bind property for more than eight months unless the claimant files suit within that time and "service is made upon the owner of the subject property within ninety days of the date of filing the action." *RCW 60.04.141*. Under *RCW 60.04.021* and *.051*, also set out above, Costco's realty was the property subject to the lien when it was first recorded. By operation of law, however, Ferguson's act of recording the bond "release[d] the real property described in the notice of claim of lien from the lien and any action brought to recover the amount claimed." *RCW 60.04.161*. As we have noted, "[a] lien bond releases the property from the lien, [and] the lien is then secured by the bond." *DBM, 142 Wn. App. at 42*. As a result, once a bond in lieu of claim is recorded, the lien is transferred to that bond. *Olson Eng'g, 171 Wn. App. at 66*.

¶17 The bond did not name Costco as a principal or surety. Thus, when CalPortland filed suit, Costco did not have an ownership interest in any property "subject" to the lien within the meaning of *RCW 60.04.141*. In fact, the plain terms of the statute rendered Costco's property immune from "any action brought to recover the amount claimed" by CalPortland. *RCW 60.04.161*. CalPortland, therefore, had no duty to serve Costco with the summons and complaint. The only parties with an interest in the bond were Ferguson and Travelers: the principal and surety named in the security. Thus, the trial court erred in relying on CalPortland's failure to serve Costco in granting summary judgment to Ferguson.

¶18 Ferguson points out that in a recent case involving chapter 60.04 RCW, this court accepted the definition of "owner" as "'the record holder of the legal title,'" and held that *RCW 60.04.141* "obligated [the claimant] 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." *Johnson, 161 Wn. App. at 875* (quoting 27 ROMBAUER, *supra*, § 4.52, at 347 n.1). Ferguson argues that this authority required CalPortland to serve Costco.

¶19 The definition employed by the *Johnson* court comes from a leading treatise, in which Professor Rombauer notes that based on the legislative history, the term "owner" in *RCW 60.04.021* "'appears to mean the record holder of the legal title.'" *161 Wn. App. at 875* (quoting 27 ROMBAUER, *supra*, § 4.52, at 347 n.1). The question addressed at that point by Professor Rombauer involved at whose instance the materials or services must be provided in order to give rise to a valid construction lien. 27 ROMBAUER, *supra*, § 4.52, at 347 n.1. Here, no one disputes that CalPortland's provision of materials initially gave rise to a valid construction lien.

¶20 More importantly, the *Johnson* court did not face the issue presented here, because the property owner in that case never posted a bond in lieu of claim at all, let alone prior to the filing of the suit.[1] *161 Wn. App. at 862-66*. In the present appeal, the property designated in the claim of lien had already been released by operation of law from "the lien and any action brought to recover the amount claimed" under *RCW 60.04.161*. After this release, "[t]he lien [was] then secured by the bond rather than the [real] property." *DBM, 142 Wn. App. at 40*. *RCW 60.04.141* requires service on "the owner of the subject property." After the releases triggered by the recording of the bond, Costco could not be deemed the owner of the subject property under *RCW 60.04.141*. The holding in *Johnson* is not to the contrary.

1 If anything, the result reached in *Johnson* tends to support CalPortland's argument, not Ferguson's. The *Johnson* court held the claimant's service of process on one Harold Johnson sufficient, despite the fact that Johnson did not own

the property against which the lien was claimed, because Johnson had held himself out as the owner and shared an address with the actual owner of record, a different person also named Harold Johnson. *161 Wn. App. at 862-66, 884.* Thus, the court refused to allow a technical defect in service of process to defeat a plainly valid claim.

¶21 Ferguson also points out that, under certain circumstances, a property owner could be liable for more than the amount of the release-of-lien bond, and argues that this supports interpreting the statute to require service on the real property owner even where such a bond has been posted. Br. of Resp't at 16-18 (citing *RCW 60.04.181*; *Olson Eng'g, 171 Wn. App. at 64*; *Irwin Concrete, Inc. v. Sun Coast Props., Inc., 33 Wn. App. 190, 653 P.2d 1331 (1982))*. These authorities, though, do not bear on the question presented.

¶22 The first authority cited, *RCW 60.04.181*, lays out the procedure a court must follow when distributing funds after a construction lien is foreclosed and the encumbered property has been sold. It provides that where a "lien is established, the judgment shall provide for the enforcement thereof upon the property liable," and allows for a personal judgment in the amount of the deficiency between the foreclosure sale proceeds and the underlying debt, which "may be collected by execution against any party liable therefor." *RCW 60.04.181(2)*. The statute says nothing about the identity of "the property liable," and thus has no bearing on whom a claimant must serve in order to preserve its lien under *RCW 60.04.141*.

¶23 In *Olson Engineering*, another authority cited by Ferguson, KeyBank had recorded a bond in lieu of claim after it purchased real property subject to a construction lien, and the trial court entered a deficiency judgment against the bank when the bond amount proved inadequate to cover the claimant's attorney fee award. *171 Wn. App at 62-64*. In the other authority cited by Ferguson, *Irwin Concrete*, a trustee's sale following foreclosure on a deed of trust had extinguished a subcontractor's subsequent construction lien against a parcel. We nonetheless held the successful bidder liable to the subcontractor on a theory of unjust enrichment. *Irwin Concrete, 33 Wn. App. at 194-95, 198*. In neither of these cases, however, did the court base the real property owner's liability on the ground that the realty was subject to the construction lien. KeyBank was liable regardless because it had named itself as principal when it recorded the bond in lieu of claim, and the trial court in *Irwin Concrete* relied on unjust enrichment precisely because it had dismissed the lien at issue.

¶24 That the owner of the real property improved could under certain circumstances have personal liability on a claim giving rise to a construction lien, notwithstanding the recording of a bond in lieu of claim, does not illuminate what the "subject property" is for purposes of *RCW 60.04.141*'s service-of-process requirement. CalPortland's failure to serve Costco with the summons and complaint or name it as a defendant might preclude any judgment against Costco, although we make no ruling on that point, but it does not bear on the validity of CalPortland's lien with respect to the bond recorded by Ferguson.

¶25 Because a bond in lieu of claim had already been recorded, the plain meaning of the statutory language did not require CalPortland to serve Costco. We hold that the trial court erred in granting summary judgment on the basis of CalPortland's failure to serve process on Costco.

B. Sufficiency of CalPortland's Pleadings

¶26 The trial court's alternative basis for granting summary judgment to Ferguson is that CalPortland did not seek to foreclose on the lien. CalPortland disputes this ruling, arguing that its complaint properly alleges the existence and validity of the lien. Ferguson argues that the complaint does not properly allege these matters because CalPortland did not specifically plead foreclosure of the lien. CalPortland's position is correct.

¶27 As an initial matter, Ferguson argues that CalPortland has waived any challenge to the trial court's alternative basis for granting summary judgment because it did not properly raise the issue in its briefing. *RAP 10.3(g)* provides that an "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." We generally "do not address issues that a party neither raises appropriately nor discusses meaningfully with citations to authority." *Saviano v. Westport Amusements, Inc., 144 Wn. App. 72, 84, 180 P.3d 874 (2008)* (citing *RAP 10.3(a)(6)*). Where a party's brief makes perfectly clear what part of the decision below is being challenged, however, we will overlook the party's failure to specifically assign error to it, particularly when the text of the brief includes the disputed portion. *In re Disciplinary Proceeding Against Conteh, 175 Wn.2d 134, 144, 284 P.3d 724 (2012)* (citing *State v. Neeley, 113 Wn. App. 100, 105, 52 P.3d 539 (2002))*.

¶28 CalPortland's first assignment of error states that "[t]he trial court erred in granting [Ferguson's] motion for summary judgment ... because CalPortland complied with [chapter 60.04 RCW] by bringing its claim against the bond after the real property was released." Br. of Appellant at 1. The brief specifically identifies and

quotes in full the trial court's alternative basis for its decision, presenting substantial argument as to why that ground did not justify granting Ferguson's motion for summary judgment. Even were we to agree with Ferguson that CalPortland's assignment of error did not specifically challenge the trial court's alternative basis for granting summary judgment, the briefing identifies and reproduces that portion of the trial court's decision and makes the nature of the challenge perfectly clear. *RAP 1.2(a)* mandates that "[t]hese rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." Following that mandate, we address the merits of the issue.

¶29 CalPortland agrees with the trial court that it must establish the validity of its lien before it may recover on the bond but argues that its complaint properly raised the issue. Ferguson contends that the statute required CalPortland to specifically seek "foreclosure" of its lien within eight months of recording it and that failure to strictly comply with the procedural requirement was fatal to the claim because suits to collect on construction liens are "special proceeding[s]." Br. of Resp't at 8-13. Thus, Ferguson argues, the construction lien would necessarily have expired because, in a special proceeding, amendments to the pleadings do not relate back to the time of filing.

¶30 CalPortland counters that the words "foreclose" or "foreclosure" are not required under the statute and would be inappropriate where the lien is not secured by real property. Reply Br. of Appellant at 3-6. Because CalPortland's complaint alleged all the facts needed to establish the validity of its lien, and the request for relief satisfied the requirements of the construction lien statute and the rules of civil procedure, we hold that the trial court erred in granting summary judgment to Ferguson on the basis of the alleged inadequacy of CalPortland's pleadings.

¶31 The law is clear that CalPortland must establish the validity of its lien before it may collect on the bond. *Olson Eng'g, 171 Wn. App. at 66* (interpreting *RCW 60.04.161* such that "to be entitled to the proceeds of the lien release bond, the lien claimant must obtain a favorable judgment upon the lien"). In *DBM*, for example, the construction lien claimant prevailed at trial on its breach of contract claim but did not litigate or obtain judgment on the validity of its lien. *142 Wn. App. at 41*. The *DBM* court held that the claimant could not proceed against the surety named in the bond in lieu of claim because it had not obtained a judgment foreclosing its lien. *142 Wn. App. at 42*. The parties do not dispute this point. The only question is whether CalPortland's complaint adequately raised the validity of the lien and CalPortland's entitlement to the bond proceeds.

¶32 The requirements for a valid construction lien are set forth at *RCW 60.04.051*, and the procedure for recording such a lien appears at *RCW 60.04.091*. In the fifth cause of action stated in its complaint, CalPortland alleges all the facts necessary both to give rise to a valid construction lien and to establish compliance with the recording requirements. The complaint then discusses the bond in lieu of claim, stating that "Defendants Ferguson and Travelers are bound to pay CalPortland any sum as CalPortland may recover as a result of its claim of lien, together with costs of suit." CP at 9. This is a straightforward attempt to litigate the validity of the lien.

¶33 *RCW 60.04.171* provides that "[t]he 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 procedure for judicial foreclosure of a lien or mortgage is set forth at *chapter 61.12 RCW*. Nowhere in that chapter does the statute specify that a party seeking to foreclose must identify the action as a foreclosure.

¶34 According to the leading practitioner's treatise on Washington debtor-creditor law, "foreclosure is a form of lawsuit, subject to the civil rules of procedure." 27 ROMBAUER, *supra*, § 3.5, at 141.[2] With respect to pleadings, the civil rules require only "(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled." *CR 8(a)*. The purpose of this "notice pleading" rule is to "'facilitate a proper decision on the merits.'" *Stansfield v. Douglas County, 146 Wn.2d 116, 123, 43 P.3d 498 (2002)* (internal quotation marks omitted) (quoting *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters, 100 Wn.2d 343, 349, 670 P.2d 240 (1983)*). A chief purpose of the rules of civil procedure is "to eliminate procedural traps." *Gott v. Woody, 11 Wn. App. 504, 508, 524 P.2d 452 (1974)*. To the extent possible, then, "the rules of civil procedure should be applied in such a way that substance will prevail over form." *First Fed. Sav. & Loan Ass'n of Walla Walla v. Ekanger, 93 Wn.2d 777, 781, 613 P.2d 129 (1980)*.

2 Ferguson argues that these are special proceedings under *CR 81*. Assuming this to be the case, that rule does not affect our analysis. *CR 81(a)* states that the civil rules shall govern all civil proceedings, "[e]xcept where inconsistent with rules or statutes applicable to special proceedings." Nothing in relevant statutes or other rules requires explicit mention of "foreclose" or "foreclosure" in proceedings such as this. Therefore, the statutes and civil rules we discuss here resolve this issue.

¶35 Under the heading "Relief requested," the treatise on debtor-creditor law discussed above further specifies that in a judicial foreclosure proceeding,

> [t]he prayer of the complaint must specify the relief sought. A money judgment is prayed for from those defendants alleged to have a monetary liability to the plaintiff; a decree of foreclosure is sought against every entity with either a title interest, a junior encumbrance, or a possessory interest; and the right to recover a deficiency is requested or waived and the appropriate redemption period stated.

27 ROMBAUER, *supra* § 3.5, at 143. Thus, it appears that where the plaintiff asserts only the monetary liability of a defendant who does not have a title or possessory interest, a request for a money judgment would suffice.

¶36 Item nine of the relief requested in CalPortland's complaint is a "[j]udgment against Ferguson and Travelers for the principal amount of not less than $327,576.31." CP at 10. The complaint also requests costs and fees under *RCW 60.04.181*. With this, the complaint contained a concise statement of the nature of the claim and the facts entitling CalPortland to relief, and demanded the remedy to which CalPortland thought itself entitled: a money judgment. The attorney fee request cited to the relevant statute. The complaint gave Ferguson sufficient notice of the nature of the claim and the matters likely to be at issue.

¶37 Requiring dismissal of the claim simply because CalPortland failed to use the word "foreclosure" elevates form over substance. Division One of this court recently rejected a similar argument:

> Infinity contends that while the court's order provides that Stonewood is entitled to "execute" on the bond, the order cannot obligate the surety because it does not specifically "foreclose" the lien as required by *DBM*. This argument elevates form over substance and misreads *DBM*, which requires that the validity of the mechanics' lien be litigated before execution on the release of lien bond is appropriate. *DBM* does not impose vocabulary requirements for judgments.

Stonewood Design, Inc. v. Heritage Homes, Inc., 165 Wn. App. 720, 725, 269 P.3d 297 (2011) (footnote omitted). Nor do we read *DBM* to impose such vocabulary requirements on a party's pleadings.

¶38 CalPortland's complaint specified the appropriate relief and the basis for that relief with sufficient clarity to allow Ferguson to prepare a defense. We reverse the grant of summary judgment and remand for adjudication of the validity of CalPortland's lien.

ATTORNEY FEES

¶39 CalPortland also assigns error to the trial court's award of costs and fees to Ferguson. Because we reverse the trial court's grant of summary judgment to Ferguson, we also reverse the trial court's fee award.

¶40 Both CalPortland and Ferguson request costs and fees on appeal. *RCW 60.04.181(3)* allows for fee awards to the party prevailing before this court in actions involving construction liens. Because we remand for further proceedings, however, the prevailing party remains to be determined, and thus no fee award is warranted. If CalPortland prevails on remand, it will be entitled to the reasonable costs and fees it incurred in this appeal. *See Stieneke v. Russi, 145 Wn. App. 544, 572, 190 P.3d 60 (2008)*.

¶41 We reverse and remand for further proceedings.

JOHANSON, A.C.J., and MAXA, J., concur.

Washington Rules of Court Annotated (LexisNexis ed.)

Annotated Revised Code of Washington by LexisNexis

APPENDIX 4

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OCT 22 2015

SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

INLAND EMPIRE DRY WALL SUPPLY CO., a Washington corporation, Plaintiff, v. WESTERN SURETY COMPANY (Bond No. 58717161), Defendant.	No. 15-2-00016-5 ORDER: 1. DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND 2. GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING COMPLAINT AND ACTION.

THIS MATTER having come on for duly-noted hearing before this Court on October 2, 2015, pursuant to cross-motions for summary judgment filed herein consisting of Defendant Western Surety Company's Motion for Summary Judgment Dismissing Complaint and Action ("Defendant's Motion") and Plaintiff Inland Empire Dry Wall Supply Co.'s Motion for Summary Judgment on Lien Foreclosure Claim ("Plaintiff's Motion"); said Defendant appearing through its attorneys of record, Timothy G. Klashke of Kuffel, Hultgrenn, Klashke, Shea & Ellerd, LLP, and said Plaintiff appearing through its attorneys of record, William M. Hughbanks of Campbell & Bissell, PLLC; and the Court having reviewed the following documents:

- Defendant's Motion for Summary Judgment Dismissing Complaint and Action,

COPY

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1915 SUN WILLOWS BLVD., STE. A
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TELEPHONE: (509) 545-8531

- Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment Dismissing Complaint and Action,
- Declaration of Jeff Durfee in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment,
- Declaration of Nancy L. Stangel in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment,
- [Plaintiff's] Response to Western's Motion for Summary Judgment Dismissing Complaint and Action,
- Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment Dismissing Complaint and Action,
- Plaintiff's Motion for Summary Judgment on Lien Foreclosure Claim,
- Plaintiff's Memorandum in Support of Motion for Summary Judgment on Lien Foreclosure Claim,
- Affidavit of Judy Thomas in Support of Inland Empire Drywall's Motion for Summary Judgment,
- Affidavit of Alejandro Peña in Support of Inland Empire Drywall's Motion for Summary Judgment,
- Defendant's Response to Plaintiff's Motion for Summary Judgment on Lien Foreclosure Claim,
- [Plaintiff's] Reply in Support of Motion for Summary Judgment on Lien Foreclosure Claim,
- Affidavit of Richard D. Campbell in Support of Plaintiff's Reply to Motion for Summary Judgment on Lien Foreclosure Claim, and
- The other records and files herein.

Based upon the foregoing document review and after hearing and considering the oral argument of counsel, the Court has determined that there is/are no genuine issue(s) of material fact that require a trial in this matter, and the Court has further determined and ruled that adequate factual and legal grounds exist to grant Defendant's Motion and deny Plaintiff's Motion.

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NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. Plaintiff's Motion for Summary Judgment on Lien Foreclosure Claim is hereby fully DENIED; and

2. Defendant's Motion for Summary Judgment Dismissing Complaint and Action is hereby fully GRANTED (except as provided in paragraph 3 below), thereby entitling Defendant as a matter of law to the following summary judgment relief hereby awarded and entered in Defendant's favor:

   a. Plaintiff's Complaint and this action are hereby dismissed with prejudice, and

   b. Defendant is hereby fully released and discharged from any further obligation and liability under the above-referenced subject release-of-lien Bond; and

3. Defendant's request for an award of reasonable attorney's fees pursuant to RCW 60.04.181(3) is hereby DENIED.

DATED AND ORDERED this ____ day of _____, 2015.

JOHN O. COONEY

HON. JOHN O. COONEY
Spokane County Superior Court Judge

PRESENTED BY:

KUFFEL, HULTGRENN, KLASHKE, SHEA & ELLERD, LLP
Attorneys for Defendant Western Surety Company
(Bond No. 58717161)

By: _____
TIMOTHY G. KLASHKE, WSBA #19953

REVIEWED AND APPROVED FOR ENTRY AS TO FORM ONLY BY:

CAMPBELL & BISSELL, PLLC
Attorneys for Plaintiff Inland Empire Dry Wall Supply, Co.

By: _____
RICHARD D. CAMPBELL, WSBA #24078
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APPENDIX 5

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 6

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 7

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.]