

SUPREME COURT OF THE STATE OF WASHINGTON

No. 94118-1

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON, DIVISION III

No. 34022-8-III

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INLAND EMPIRE DRY WALL SUPPLY, CO.,

Respondent,

v.

WESTERN SURETY CO.

Petitioner.

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SUPPLEMENTAL BRIEF OF PETITIONER  
WESTERN SURETY CO.

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Timothy G. Klashke, WSBA #19953  
KUFFEL, HULTGRENN, KLASHKE, SHEA & ELLERD, LLP  
Attorneys for Petitioner Western Surety Co.  
1915 Sun Willows Blvd., Ste. A  
P.O. Box 2368  
Pasco, WA 99302  
Telephone: (509) 545-8531  
Facsimile: (509) 545-3019  
Email: [tklashke@khkslaw.com](mailto:tklashke@khkslaw.com)

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**I. INTRODUCTION, LOWER COURT ERROR, AND  
STATEMENT OF THE CASE.**

Petitioner Western Surety Company (“Western”) submits this supplemental brief in support of its accepted Petition for review.

By accepting review, this Court will address and resolve an issue of significant importance to Washington’s public (and surety and construction industries) as well as resolve the existing conflict between the Washington State Court of Appeals Division II’s published decision in *CalPortland Co. v. LevelOne Concrete, LLC*, 180 Wn. App. 379, 321 P.3d 1261 (2014) (“*CalPortland*”) and Division III’s published decision in *Inland Empire Dry Wall Supply, Co. v. Western Surety Co.*, 197 Wn. App. 510, 389 P.3d 717 (2017) (“*Inland Empire*”), *rev. grant.*, \_\_\_ Wn.2d \_\_\_, 393 P.3d 785 (2017).

In so doing, this Court will necessarily address and resolve the issue of whether specific statutory provisions and requirements in RCW Chapter 60.04 supersede and control over general suretyship law principles. *CalPortland* correctly determined that specific provisions in RCW 60.04.161 and .141 require a lien claimant against a release of lien bond to timely sue and serve both the principal and surety. Conversely, *Inland Empire*’s split-panel majority essentially ignored *CalPortland* and instead incorrectly determined that general suretyship law provisions applied to require a lien claimant to timely sue and serve only the bond surety.

*CalPortland* properly addressed, reconciled, and afforded full meaning and logical effect to related statutes in RCW 60.04, whereas *Inland Empire*'s majority instead improperly and erroneously seized onto selected limited language in RCW 60.04.161 to justify applying general suretyship law principles over normally-applicable RCW 60.04 lien foreclosure procedural requirements that require lien claimants to timely sue and serve the "owner of the subject property."

Western hereby incorporates by reference its Statements of the Case in its *Inland Empire* Response Brief (pp. 2-9) and its Petition (pp. 2-8).

## **II. ARGUMENT.**

### **A. Scope of Review.**

Because this matter arises from the trial court's Order on the parties' cross motions for summary judgment and *Inland Empire*'s reversal of that Order, this Court reviews those decisions and questions of law and statutory construction on a de novo basis, essentially performing the same inquiry as the trial court, construing evidence and reasonable inferences in a light most favorable to the non-moving party. CR 56(c); RAP 9.12; *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002); *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 847, 50 P.3d 256 (2002); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); *Highline*

*Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976);

*Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 82, 328 P.3d 962 (2014).

**B. *CalPortland* Properly Addressed, Reconciled, and Harmoniously Applied the Provisions of RCW 60.04.161 with the Provisions of Other Lien Foreclosure-Related Statutes.**

Ironically, both respondent Inland Empire Dry Wall Supply, Co. (“Inland”) and Western relied on *CalPortland* to support their respective underlying cross-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 it needed to timely sue and serve to reach the bond, whereas Western cited *CalPortland* to support its successful position that RCW 60.04.141 required Inland to also timely sue and serve Fowler General Construction, Inc. (“Fowler”) as named principal under the bond. [See CP at 33-34, 57 and 70-75]

After addressing and deciding the threshold issue that Costco (as owner of the construction property) did not need to be named and included as a party to that lien enforcement action because the recording of an RCW 60.04.161 bond under which Costco was not named as principal or surety had released the property from the lien, the *CalPortland* court then addressed and decided the inseparably related question of who was/is a necessary party to an action against a bond for purposes of complying with RCW 60.04.141’s procedural requirements when the bond is recorded prior

to the action. *See CalPortland*, supra 180 Wn. App. at 387-391. [CP at 112-113 and 137-138]

*CalPortland* answered that question by holding that **the lien claimant’s service of process on the named principal and surety under the bond was sufficient to satisfy RCW 60.04.141’s procedural requirements.** *Id.* at 388. [CP at 113] The court reasoned and determined that the principal and surety were “[t]he only parties with an interest in the bond (bold and underline emphasis added)” and the parties having an “ownership interest” in “property subject to the lien” for purposes of RCW 60.04.141’s procedural requirements. *See id.* [CP at 61, 74 and 113]

Significantly, the *CalPortland* court reasoned that Costco was not a necessary party to the action because “[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.*

Thus, as Chief Judge Fearing noted in his thorough and instructive dissent in *Inland Empire*, *CalPortland* answered the question of who is the “owner of the subject property” for purposes of RCW 60.04.141’s procedural requirements when an RCW 60.04.161 bond is recorded prior to a lien enforcement action. *See Inland Empire*, supra 197 Wn. App. at 533.

As Chief Judge Fearing also noted, foreign case law accords with *CalPortland*, with Virginia being a noteworthy example of another state that requires a lien claimant to sue and serve both the release bond principal and surety because they each have a “pecuniary interest” in the bond that will be affected by the claimant’s action. *See Inland Empire, supra* 535-537. [See CP at 59-61 and 72-73].

In *George W. Kane, Inc. v. Nuscope, Inc.*, 243 Va. 503, 416 S.E.2d 701 (1992), a general contractor obtained a bond to release the construction property from a 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.*]

As in *CalPortland*, the general contractor argued 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 in *CalPortland*, the Virginia Supreme Court disagreed, holding instead that the property owner was not a necessary party to the action because the bond released the 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 in *CalPortland*, the *George W. Kane* court determined and held that the general contractor (as principal under the bond) and its bond surety were the necessary parties to sue and serve with the action. *Id.* [CP at *Id.*] 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 to record a bond to release real property from a lien to dispute its correctness or validity). [CP at *Id.*]

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

In *Johnson Controls, Inc. v. Norair Engineering Corp.*, 86 Va. Cir. 138 (2013), the court held that, when a lien against real property is transferred to a release bond, the bond principal and surety replace the owner(s) of the real property as necessary parties to an enforcement action

against the bond. The court further held that when a claimant seeks enforcement against a statutory lien release bond, the substantive and procedural requirements of the mechanic's lien statutes still apply because the bond merely substitutes the security given to the claimant and does not change the underlying claims or defenses raised by the parties.

*CalPortland* essentially applied the same line of reasoning as the Virginia courts to address and resolve the question of who are necessary parties to a lien enforcement action against an RCW 60.04.161 release bond. [CP at 61 and 74] Consistent with Virginia's courts, *CalPortland* correctly determined that the principal and surety under the bond are necessary parties because they both have an interest in the bond for purposes of RCW 60.04.141's procedural requirements that require a lien claimant to timely sue and serve the "owner of the subject property." *CalPortland, supra* at 388. [CP at *Id.*]

In so doing, the *CalPortland* court fulfilled its duty to address, reconcile, and harmoniously apply the provisions of RCW 60.04.161 and related RCW 60.04.141, thereby giving full meaning and effect to both statutes. *See State v. Haggin*, 195 Wn. App. 315, 319, 381 P.3d 137 (2016) (statutes relating to same subject matter must be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains integrity of the respective statutes).

C. ***Inland Empire's* Majority Erred by Not Addressing, Reconciling, and Harmoniously Applying the Provisions of RCW 60.04.161 with the Provisions of Other Lien Foreclosure-Related Statutes.**

Unlike the *CalPortland* court, *Inland Empire's* majority ignored and failed to fulfill its duty to address, reconcile, and harmoniously apply the provisions of RCW 60.04.161 with the provisions of other lien foreclosure-related statutes in RCW 60.04. See *State v. Haggin*, 195 Wn. App. at 319.

*Inland Empire's* majority instead improperly and erroneously seized onto selected language in RCW 60.04.161 to justify applying general suretyship law principles over established statutory procedural requirements which require lien claimants to timely sue and serve the "owner of the subject property." See *Inland Empire, supra* at 511-519. In so doing, the majority ignored and failed to directly address *CalPortland's* prior determination that both the surety and principal under a release bond have an "ownership interest" in "property subject to the lien" (i.e., the bond) for purposes of RCW 60.04.141's procedural requirements.

*Inland Empire's* majority instead determined that the recording of an RCW 60.04.161 bond "alters the governing legal landscape" and makes that statute the controlling "procedural statute" -- rather than normally-applicable RCW 60.04.141 -- for purposes of lien enforcement actions against release bonds. *Id.* at 516-517.

To reach that result, *Inland Empire's* majority fixated on language in a single sentence in RCW 60.04.161 implicitly requiring that a bond surety be sued in a timely manner to conclude that only the surety must be sued.<sup>1</sup> *Id.* Because RCW 60.04.161 implicitly refers to only timely suing a surety and not the principal or an “owner of the subject property,” *Inland Empire's* majority essentially determined that RCW 60.04.141's requirement that an “owner of the subject property” be timely sued is meaningless and inapplicable for lien enforcement actions against release bonds. *Id.*

However, as Chief Judge Fearing noted in his dissenting opinion, RCW 60.04.161 contains no language about serving or joining the surety in a lien enforcement lawsuit, let alone any language stating that the surety is the only party that needs to be served or joined. *Id.* at 525. Indeed, as Chief Judge Fearing further noted, RCW 60.04.161 contains no language specifying “the parties to invite to the suit” nor any language stating “that only the surety must be sued or that conversely the principal need not be joined in the suit.” *Id.* at 526.

Based on his observations regarding the complete lack of language in RCW 60.04.161 to support *Inland Empire's* majority's determination that

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<sup>1</sup> The language of that sentence in RCW 60.04.161 reads as follows: “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.”

it is the only statute controlling a suit to recover on a release bond, Chief Judge Fearing further appropriately noted that the majority's determination "disregards the connection between the lien release bond and the original construction lien and violates the principle that [the court] construe as one related statutes." *Id.* at 525.

In that regard, Chief Judge Fearing essentially applied the same analytical approach as the *CalPortland* court, which approach requires related statutes to be addressed, reconciled, and harmoniously applied to give full meaning and effect to all related statutes. *See id.* at 520-527.

Though Chief Judge Fearing's approach involved RCW 60.04.141 (**Appendix 1**), RCW 60.04.161 (**Appendix 2**), and RCW 60.04.171 (**Appendix 3**) as being the three key related statutes whereas *CalPortland's* approach focused on RCW 60.04.141 and RCW 60.04.161 as being the two key related statutes, those two slightly different analytical approaches reached the following same end result: (1) RCW 60.04.141's procedural requirements apply to lien enforcement actions against RCW 60.04.161 release bonds, (2) the bond is the "subject property" for purposes of those procedural requirements, and (3) the named principal under the bond is an "owner of the subject property" who must also be timely sued and served with a lien enforcement action against the bond. *See id.; CalPortland, supra* at 385-388.

The key common cornerstone to both approaches is the recognition that the recording of an RCW 60.04.161 release bond does not just *ipse dixit* “alter the governing legal landscape” in terms of dispensing with the need to address and comply with RCW 60.04.141’s procedural requirements to foreclose a lien claim, but rather only results in the bond replacing real property as the “subject property” encumbered by the lien and the bond principal and surety replacing the real property owner as the “owner of the subject property.” *See Inland Empire, supra* at 520-527; *CalPortland, supra* at 385-388.

As Chief Judge Fearing discussed in his dissenting opinion, *CalPortland* and two prior Washington decisions support the proposition that an action to enforce a lien claim against an RCW 60.04.161 release bond is tantamount to an action foreclosing a lien claim and, when read collectively together, demand that a bond principal be included as a party to any enforcement action against a bond. *See Inland Empire, supra* at 532-535.

In *DBM Consulting Engineers, Inc. v. United States Fidelity & Guaranty Co.*, 142 Wn. App. 35, 170 P.3d 592 (2007), *recon. and rev. den’d.*, 164 Wn.2d 1005, 190 P.3d 54 (2008), the court interpreted the following language in RCW 60.04.161: “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.” 142 Wn. App. at 39.

The *DBM Consulting Engineers* court noted that the legal import of such language is that the bond only guarantees payment of a judgment on the lien and that, if a lien claimant successfully forecloses on a disputed lien, the resulting judgment can then be paid from the bond. *Id.* at 39-40. The court further noted that the purpose of a release bond is to transfer a disputed lien from real property to the bond and that, because recording the bond is not a concession by the principal that a disputed lien is valid and correct, the claimant must still successfully adjudicate the lien’s validity and correctness. *Id.* at 40-41. Because the lien claimant failed to successfully adjudicate its lien in a prior lawsuit with the bond principal, the claimant was barred from later seeking payment from the bond and surety. *Id.* at 41.

Similarly, *Olson Engineering, Inc. v. KeyBank National Association*, 171 Wn. App. 57, 286 P.3d 390 (2012) also supports the conclusion that Washington’s construction lien foreclosure statutes control suits on lien release bonds because the bond claimant must still prove the validity and correctness of its lien.

After noting that RCW 60.04.161’s purpose is to allow a lien-disputing party (such as a general contractor, like Fowler in the case at bar) to free real property from a disputed lien, the *Olson Engineering* court then

noted that a lien claimant is entitled to a release bond's proceeds if – but only if -- the claimant establishes the lien's validity and correctness and obtains a favorable judgment on the lien. 171 Wn. App. at 66.

Of significant relevance to the case at bar is the *Olson Engineering* court's determination that RCW 60.04.161's provisions must be interpreted and applied not in a vacuum as a stand-alone statute, but rather in the context of RCW 60.04 as an entire statutory scheme, which view requires other lien foreclosure-related statutes (e.g., RCW 60.04.141, .171, and .181) to be addressed and complied with. *See id.* at 66-71.

Accordingly, since an action to enforce a lien against a release bond is tantamount to foreclosure of a construction lien, the bond claimant must comply with RCW 60.04's procedural requirements, including RCW 60.04.141's requirement that the "owner of the subject property" be timely sued and served. As previously discussed, *CalPortland* determined that the named bond principal and surety are the "owner of the subject property" for purposes of RCW 60.04.141's procedural requirements.

*Inland Empire's* majority erred by ignoring and failing to fulfill its duty to address, reconcile, and harmoniously apply the provisions of RCW 60.04.161 with the provisions of other lien foreclosure-related statutes in RCW 60.04.

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**D. *Inland Empire's* Majority Erred by Relying on Inapplicable General Suretyship Law Principles.**

*Inland Empire's* majority further compounded its above-stated error by relying on inapplicable general suretyship law principles. The majority (and *Inland* herein) erroneously relied on common law general suretyship principles to excuse *Inland's* affirmative election and failure to not sue Fowler as principal under the subject RCW 60.04.161 release bond, which reliance is predicated on the general suretyship law notion that a bond claimant may sue and seek relief solely against the surety because the surety is entitled to assert defenses that its principal could assert. *See Inland Empire, supra* at 517-519.

However, general suretyship law principles can be superseded and rendered inapplicable by contrary statutory requirements or other authority. *See id.* at 518. For example, RCW 18.27.040 (**Appendix 4**) requires a claimant against a contractor's registration bond to timely bring suit against both the contractor and the contractor's bond surety, and the general suretyship law principle that a bond claimant may sue and seek relief solely against the surety could not be properly applied to excuse a claimant's failure to sue both the contractor and its bond surety.

Several other states have lien release bond statutes that likewise override and render that general suretyship law principle inapplicable. *See*

*e.g.*, 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).

As discussed above, consistent with the notion that bond claim statutes can and do render general suretyship law principles inapplicable, *CalPortland*, *Olson Engineering*, and Chief Judge Fearing all recognized the propriety and need to construe and harmoniously apply RCW 60.04.161 and other lien foreclosure-related statutes in RCW 60.04 together as an integrated statutory scheme intended to address the enforcement of a lien regardless of whether enforcement is sought against real property or a release bond. *See supra* at pp. 3-7 and 9-13.

In stark contrast, however, *Inland Empire's* majority erroneously determined RCW 60.04.161 to be a stand-alone and self-effectuating statute, that RCW 60.04.141's procedural provisions requiring timely suit

and service of process against the “owner of the subject property” are superfluous and meaningless for purposes of lien enforcement against a release bond, and that general suretyship law principles (instead of RCW 60.04.141’s procedural requirements) apply to allow a lien claimant to sue and seek relief solely against the bond surety. *See supra* at pp. 8-9.

**E. It is Improper to Apply CR 19 “Indispensable Party” Analysis to Determine Whether a Lien Claimant Complied with RCW 60.04’s Procedural Requirements to Enforce a Lien Against an RCW 60.04.161 Release Bond, But Even if CR 19 Applied, the Principal Would Still Be a Necessary and Indispensable Party to a Lien Enforcement Action.**

Though Inland raised to the *Inland Empire* court the issue of whether CR 19 “indispensable party” analysis can be properly applied to determine whether a lien claimant complied with RCW 60.04’s procedural requirements to enforce its lien against an RCW 60.04.161 release bond, *Inland Empire’s* majority did not address or decide that issue. *See Inland Empire, supra* at 520.

Inland attempts to back-door raise the issue before this Court by citing and discussing CR 19 in its Answer to Western’s Petition though, as Inland also failed to do in its prior briefing, Inland cites no relevant/controllering case authority involving CR 19 to support its claim that a principal is not a necessary/indispensable party to a lien enforcement

action against an RCW 60.04.161 release bond. *See* Inland’s Answer at p. 7; Inland’s Appeal Brief at p. 22; and Western’s Appeal Brief at p. 42.

Inland’s reliance on CR 19 is fully precluded by CR 81<sup>2</sup> because lien foreclosure actions under RCW 60.04 are “special proceedings” in which Washington’s Superior Court Civil Rules cannot be applied to circumvent RCW 60.04’s procedural requirements. *See CalPortland, supra* at 394-395, f.n.2 (lien enforcement actions are “special proceedings” under CR 81); *Bob Pearson Const., Inc. v. First Community Bank of Washington*, 111 Wn. App. 174, 178-179, 43 P.3d 1261 (2002) (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”); and *Schumacher Painting Co. v. First Union Management, Inc.*, 69 Wn. App. 693, 700-701, 850 P.2d 1361, *rev. den’d.*, 122 Wn.2d 1013, 863 P.2d 73 (1993). *See also*, Western’s Appeal Brief at pp. 30-34.

Thus, under CR 81 and Washington decisions addressing that rule in lien foreclosure cases, it is improper to engage in standard CR 19 “indispensable party” analysis to determine whether a principal under a

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<sup>2</sup> 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).”

release bond is a necessary party to a lien enforcement action against the bond for purposes of RCW 60.04's procedural requirements.

However, even assuming, *arguendo*, that CR 19 applied, a principal would still be a necessary and indispensable party to lien enforcement action against a release bond. The principal obtains and holds an interest and valuable rights in the bond, and incurs financial liability risks under the bond, that are unique and exclusive to the principal alone, and which both practically and necessarily require a lien claimant to sue and serve the principal with a lien enforcement action in order for the claimant and the principal to directly litigate between themselves over the lien's disputed correctness or validity as a necessary and indispensable condition precedent to the claimant obtaining payment from the bond. *See* CR 19(a)(2)(A) (a person is a necessary and indispensable party if the "person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect that interest..."); *See also*, *Inland Empire, supra* at 537-538 and Western's Appeal Brief at pp. 34-35.

**F. Western is Entitled to an Award of Attorney Fees.**

Under RAP 18.1 and RCW 60.04.181(3) (**Appendix 5**), Western as prevailing party is entitled to request and receive an award of attorney fees incurred in this matter. *See e.g., Bob Pearson Const., supra*, 111 Wn. App.

at 180. Western therefore respectfully requests that the Court award reasonable attorney fees and statutory costs to Western.

### III. SUMMARY AND CONCLUSION.

As Chief Judge Fearing aptly noted in *Inland Empire*, “[d]emanding that the bond claimant join the bond principal [along with the surety in a lien enforcement action against the bond] imposes minimal burden on the claimant compared to the harm that could result without the presence of the principal in the lawsuit.” *See Inland Empire, supra* at 537-538.

Indeed, within the specific context of this case, Western notified and informed Inland on multiple occasions that Inland needed to sue and serve bond principal Fowler and obtain judgment establishing the disputed lien’s correctness and validity before Western’s potential surety liability to pay under the bond would be triggered. *See id.* at 512-513 and 522. [CP at 82]

Though Inland could have then very easily sued Fowler, Inland made a calculated decision to not do so despite *CalPortland’s* then-existing guidance, thereby assuming all inherent risk that such decision could render its claim unenforceable against the bond. Thus, there are no equitable considerations involved in this matter, as Western was completely clear and upfront with Inland as to what was procedurally required under the bond

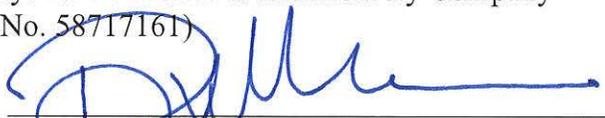
and statute for Inland to potentially obtain payment from the bond. In final analysis, Inland was the sole author of its precarious situation in this matter.<sup>3</sup>

Accordingly, Western respectfully submits that its Petition and the foregoing establish that this Court should resolve the conflict -- and the issue of substantial public interest presented thereby -- between *CalPortland's* and *Inland Empire's* discordant approaches and determinations on the question of who a lien claimant must timely sue and serve with a lien enforcement action against a release bond when the bond is recorded beforehand in favor of *CalPortland's* (and Chief Judge Fearing's) determination; and that this Court should therefore accordingly reverse *Inland Empire's* incorrect contrary determination, affirm and reinstate the trial court's summary judgment to Western, and award Western attorney fees and costs under RAP 18.1 and RCW 60.04.181(3).

**RESPECTFULLY SUBMITTED** this <sup>2<sup>nd</sup></sup> day of June, 2017.

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

By:

  
TIMOTHY G. KLASHKE; WSBA #19953

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<sup>3</sup> As Chief Judge Fearing observed, even RCW 60.04.900's "rule of liberal construction" does not extricate Inland from its procedural noncompliance problem. Despite RCW 60.04.900, lien claimants must still fully comply with RCW 60.04.141's procedural requirements. *See e.g., CalPortland, supra* 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). *See also, Inland Empire, supra* at 527-528.

# APPENDIX 1

## **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 2**

## **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 3

## **RCW 60.04.171**

### **Foreclosure—Parties.**

The lien provided by this chapter, for which claims of lien have been recorded, may be foreclosed and enforced by a civil action in the court having jurisdiction in the manner prescribed for the judicial foreclosure of a mortgage. The court shall have the power to order the sale of the property. In any action brought to foreclose a lien, the owner shall be joined as a party. The interest in the real property of any person who, prior to the commencement of the action, has a recorded interest in the property, or any part thereof, shall not be foreclosed or affected unless they are joined as a party.

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

[ 1992 c 126 § 11; 1991 c 281 § 17.]

# APPENDIX 4

## RCW 18.27.040

### **Bond or other security required—Actions against—Suspension of registration upon impairment.**

(1) Each applicant shall file with the department a surety bond issued by a surety insurer who meets the requirements of chapter 48.28 RCW in the sum of twelve thousand dollars if the applicant is a general contractor and six thousand dollars if the applicant is a specialty contractor. If no valid bond is already on file with the department at the time the application is filed, a bond must accompany the registration application. The bond shall have the state of Washington named as obligee with good and sufficient surety in a form to be approved by the department. The bond shall be continuous and may be canceled by the surety upon the surety giving written notice to the director. A cancellation or revocation of the bond or withdrawal of the surety from the bond automatically suspends the registration issued to the contractor until a new bond or reinstatement notice has been filed and approved as provided in this section. The bond shall be conditioned that the applicant will pay all persons performing labor, including employee benefits, for the contractor, will pay all taxes and contributions due to the state of Washington, and will pay all persons furnishing material or renting or supplying equipment to the contractor and will pay all amounts that may be adjudged against the contractor by reason of breach of contract including improper work in the conduct of the contracting business. A change in the name of a business or a change in the type of business entity shall not impair a bond for the purposes of this section so long as one of the original applicants for such bond maintains partial ownership in the business covered by the bond.

(2) At the time of initial registration or renewal, the contractor shall provide a bond or other security deposit as required by this chapter and comply with all of the other provisions of this chapter before the department shall issue or renew the contractor's certificate of registration. Any contractor registered as of July 1, 2001, who maintains that registration in accordance with this chapter is in compliance with this chapter until the next renewal of the contractor's certificate of registration.

(3) Any person, firm, or corporation having a claim against the contractor for any of the items referred to in this section may bring suit against the contractor and the bond or deposit in the superior court of the county in which the work was done or of any county in which jurisdiction of the contractor may be had. The surety issuing the bond shall be named as a party to any suit upon the bond. Action upon the bond or deposit brought by a residential homeowner for breach of contract by a party to the construction contract shall be commenced by filing the summons and complaint with the clerk of the appropriate superior court within two years from the date the claimed contract work was substantially completed or abandoned, whichever occurred first. Action upon the bond or deposit brought by any other authorized party shall be commenced by filing the summons and complaint with the clerk of the appropriate superior court within one year from the date the claimed labor was performed and benefits accrued, taxes and contributions owing the state of Washington became due, materials and equipment were furnished, or the claimed contract work was substantially completed or abandoned, whichever occurred first. Service of process in an action filed under this chapter against the contractor and the contractor's bond or the deposit shall be exclusively by service upon the department. Three copies of the summons and complaint and a fee adopted by rule of not less than fifty dollars to cover the costs shall be served by registered or certified mail, or other delivery service requiring notice of receipt, upon the department at the time suit is started and the department shall maintain a record, available for

public inspection, of all suits so commenced. Service is not complete until the department receives the fee and three copies of the summons and complaint. The service shall constitute service and confer personal jurisdiction on the contractor and the surety for suit on claimant's claim against the contractor and the bond or deposit and the department shall transmit the summons and complaint or a copy thereof to the contractor at the address listed in the contractor's application and to the surety within two days after it shall have been received.

(4) The surety upon the bond shall not be liable in an aggregate amount in excess of the amount named in the bond nor for any monetary penalty assessed pursuant to this chapter for an infraction. The liability of the surety shall not cumulate where the bond has been renewed, continued, reinstated, reissued or otherwise extended. The surety upon the bond may, upon notice to the department and the parties, tender to the clerk of the court having jurisdiction of the action an amount equal to the claims thereunder or the amount of the bond less the amount of judgments, if any, previously satisfied therefrom and to the extent of such tender the surety upon the bond shall be exonerated but if the actions commenced and pending and provided to the department as required in subsection (3) of this section, at any one time exceed the amount of the bond then unimpaired, claims shall be satisfied from the bond in the following order:

- (a) Employee labor and claims of laborers, including employee benefits;
- (b) Claims for breach of contract by a party to the construction contract;
- (c) Registered or licensed subcontractors, material, and equipment;
- (d) Taxes and contributions due the state of Washington;
- (e) Any court costs, interest, and attorneys' fees plaintiff may be entitled to recover. The surety is not liable for any amount in excess of the penal limit of its bond.

A payment made by the surety in good faith exonerates the bond to the extent of any payment made by the surety.

(5) The total amount paid from a bond or deposit required of a general contractor by this section to claimants other than residential homeowners must not exceed one-half of the bond amount. The total amount paid from a bond or deposit required of a specialty contractor by this section to claimants other than residential homeowners must not exceed one-half of the bond amount or four thousand dollars, whichever is greater.

(6) The prevailing party in an action filed under this section against the contractor and contractor's bond or deposit, for breach of contract by a party to the construction contract involving a residential homeowner, is entitled to costs, interest, and reasonable attorneys' fees. The surety upon the bond or deposit is not liable in an aggregate amount in excess of the amount named in the bond or deposit nor for any monetary penalty assessed pursuant to this chapter for an infraction.

(7) If a final judgment impairs the liability of the surety upon the bond or deposit so furnished that there is not in effect a bond or deposit in the full amount prescribed in this section, the registration of the contractor is automatically suspended until the bond or deposit liability in the required amount unimpaired by unsatisfied judgment claims is furnished.

(8) In lieu of the surety bond required by this section the contractor may file with the department an assigned savings account, upon forms provided by the department.

(9) Any person having filed and served a summons and complaint as required by this section having an unsatisfied final judgment against the registrant for any items referred to in this section may execute upon the security held by the department by serving a certified copy of the unsatisfied final judgment by registered or certified mail upon the department within one year of the date of entry of such judgment. Upon the receipt of service of such certified copy

the department shall pay or order paid from the deposit, through the registry of the superior court which rendered judgment, towards the amount of the unsatisfied judgment. The priority of payment by the department shall be the order of receipt by the department, but the department shall have no liability for payment in excess of the amount of the deposit.

(10) Within ten days after resolution of the case, a certified copy of the final judgment and order, or any settlement documents where a case is not disposed of by a court trial, a certified copy of the dispositive settlement documents must be provided to the department by the prevailing party. Failure to provide a copy of the final judgment and order or the dispositive settlement documents to the department within ten days of entry of such an order constitutes a violation of this chapter and a penalty adopted by rule of not less than two hundred fifty dollars may be assessed against the prevailing party.

(11) The director may require an applicant applying to renew or reinstate a registration or applying for a new registration to file a bond of up to three times the normally required amount, if the director determines that an applicant, or a previous registration of a corporate officer, owner, or partner of a current applicant, has had in the past five years a total of three final judgments in actions under this chapter involving a residential single-family dwelling on two or more different structures.

(12) The director may adopt rules necessary for the proper administration of the security.

[ 2007 c 436 § 4; 2001 c 159 § 3; 1997 c 314 § 5; 1988 c 139 § 1; 1987 c 362 § 6; 1983 1st ex.s. c 2 § 18; 1977 ex.s. c 11 § 1; 1973 1st ex.s. c 153 § 4; 1972 ex.s. c 118 § 2; 1967 c 126 § 1; 1963 c 77 § 4.]

**NOTES:**

*Unpaid wages by public works contractor constitute lien against bond: RCW 39.12.050.*

# **APPENDIX 5**

## **RCW 60.04.181**

### **Rank of lien—Application of proceeds—Attorneys' fees.**

(1) In every case in which different construction liens are claimed against the same property, the court shall declare the rank of such lien or class of liens, which liens shall be in the following order:

- (a) Liens for the performance of labor;
- (b) Liens for contributions owed to employee benefit plans;
- (c) Liens for furnishing material, supplies, or equipment;
- (d) Liens for subcontractors, including but not limited to their labor and materials; and
- (e) Liens for prime contractors, or for professional services.

(2) The proceeds of the sale of property must be applied to each lien or class of liens in order of its rank and, in an action brought to foreclose a lien, pro rata among each claimant in each separate priority class. A personal judgment may be rendered against any party personally liable for any debt for which the lien is claimed. If the lien is established, the judgment shall provide for the enforcement thereof upon the property liable as in the case of foreclosure of judgment liens. The amount realized by such enforcement of the lien shall be credited upon the proper personal judgment. The deficiency, if any, remaining unsatisfied, shall stand as a personal judgment, and may be collected by execution against any party liable therefor.

(3) The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable. Such costs shall have the priority of the class of lien to which they are related, as established by subsection (1) of this section.

(4) Real property against which a lien under this chapter is enforced may be ordered sold by the court and the proceeds deposited into the registry of the clerk of the court, pending further determination respecting distribution of the proceeds of the sale.

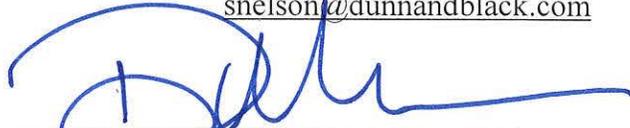
[ 1992 c 126 § 12; 1991 c 281 § 18.]

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2<sup>nd</sup> day of June, 2017, I caused a true and correct copy of the foregoing Supplemental Brief of Petitioner Western Surety Co. (with Appendixes 1 through 5 thereto) to be served on the following attorneys for respondent Inland Empire Dry Wall Supply, Co., VIA:

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT DELIVERY
- FACSIMILE
- EMAIL

John C. Black  
Susan C. Nelson  
Dunn & Black, P.S.  
111 North Post, Suite 300  
Spokane, WA 99201  
[jblack@dunnandblack.com](mailto:jblack@dunnandblack.com)  
[snelson@dunnandblack.com](mailto:snelson@dunnandblack.com)



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TIMOTHY G. KLASHKE