No. 100862-7
No. 82409-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

GINA J. DOBSON,

Petitioner,

v.

TREFAN ARCHIBALD,

Respondent.

CORRECTED PETITION FOR REVIEW

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IDENTITY OF PETITIONER

Gina J. Dobson asks this Court to accept review of the decision terminating review set forth below.

COURT OF APPEALS PUBLISHED OPINION

Dobson seeks review of the published opinion of the Court of Appeals, Division One, *Dobson v. Archibald*, 82409-1, __Wn.App.2d__, 2022 WL 521496 (Feb. 22, 2022), *reconsideration denied* (March 21, 2022). A copy of the slip opinion is set forth in the Appendix at pages one through nine.

ISSUES PRESENTED FOR REVIEW

1. Whether a person who performs one project, with a very limited scope of work and short time duration, in a five-year period is a "contractor" pursuing an independent business within the meaning of RCW 18.27.010(1)(a).

2. Whether RCW 18.27.080 imposes a burden upon a plaintiff to allege and prove that she did not comply with a statutory prerequisite—or, whether that is an affirmative defense that must timely be pleaded by the defendant or it is waived.

STATEMENT OF THE CASE

Dobson filed suit against Archibald after he breached the parties' contract by refusing to pay Dobson $2,500. CP 2-9.

Without ruling on Dobson's cross motion, the trial court granted summary judgment in Archibald's favor, dismissing Dobson's breach of contract and lien foreclosure claims with prejudice. CP 369-72; VRP 20-21. The Court of Appeals affirmed, holding: (1) RCW 18.27.080 requires a plaintiff to allege and prove "the inapplicability of the registration requirement," which is a prerequisite to suit—not an affirmative defense (Op. at 5); and (2) a person who performed one project, with a very limited scope of work and short time duration, in a five-year period is a "contractor" pursuing an independent business within the meaning of RCW 18.27.010(1)(a). Op. at 7-9.

Division One's published opinion sets forth the facts and procedure below. Op. at 1-2. The opinion omits that Dobson performed ***one*** home repair job in 2015. CP 59. Dobson

performed ***one*** home repair job in 2016. CP 51-52. Dobson became a Registered Longshoreman in 2017 (CP 87), after which Dobson performed ***one*** and ***only one*** home repair job—for Archibald, at Archibald's request.[1] CP 51-52, 59, 87, 99, & 104.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Division One's published opinion directly conflicts with decisions of this Court and those of the Court of Appeals and presents matters of substantial public importance. This Court should therefore accept review. RAP 13.4(b)(1), (2), & (3).

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[1] A longshoreman is "a person who loads and unloads ships at a seaport." DICTIONARY BY MERRIAM-WEBSTER (online ed.).

"Under an established seniority system, waterfront workers begin as 'unidentified casuals,' then become 'identified casuals' ('ID casuals') before gaining registered status, first as a Class B limited-registered worker and finally as a Class A fully-registered worker." *Mulvihill v. Pac. Mar. Ass'n*, 2013 WL 594272, at *1.

1. Division One's opinion is contrary to, and contradicts, this Court's precedents and decisions of the Court of Appeals by erroneously expanding the unambiguous definition of "contractor" set forth in RCW 18.27.010(1)(a).

In derogation of this Court's clear precedents and decisions of the Court of Appeals, Division One improperly invaded the province of the Legislature to legislate an expanded statutory definition of the term "contactor." "When interpreting a statute, this court strives to ascertain and carry out the legislature's intent. If the legislature's intent is clear from the statute's plain meaning, then the court must give effect to that plain meaning." *Porter v. Kirkendoll*, 194 Wn.2d 194, 211, 449 P.3d 627 (2019). "A statute's plain meaning is discerned from the ordinary meaning of the language, the context of the statute, related provisions, and the statutory scheme as a whole." *City of Seattle v. Long*, 198 Wn.2d 136, 148, 493 P.3d 94 (2021).

"In general, words are given their ordinary meaning." *Ctr. for Envtl. Law & Policy v. Dep't of Ecology*, 196 Wn.2d 17, 29, 468 P.3d 1064 (2020). "Legislative definitions included in the

statute are controlling. However, in the absence of a statutory definition, we give the term its plain and ordinary meaning ascertained from a standard dictionary." *Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004), *amended* (July 30, 2004).

Courts "do not construe a statute that is unambiguous." *Whatcom Cty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). "A statute is ambiguous if susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable." *Agrilink Foods, Inc. v. State, Dep't of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005)(quotation marks omitted).

In contravention of the unambiguous statutory language and without citing any authority allowing it to do so, Division One impermissibly and erroneously expanded the definition a contractor set forth in RCW 18.27.010(1)(a). Op. at 7-9. Division One's decision directly conflicts this Court's precedents. Review is therefore warranted. RAP 13.4(b)(1).

"A 'contractor' * * * is any person * * * who * * * in the pursuit of an independent business undertakes to" do one of the activities listed. *Stewart v. Hammond*, 78 Wn.2d 216, 219, 471 P.2d 90 (1970); RCW 18.27.010(1)(a). "Because the term 'business pursuit' is undefined, it should be given its 'plain, ordinary and popular' meaning. In order to determine the plain, ordinary and popular meaning of 'business pursuit,' we may look to both legal and standard dictionaries." *Stuart v. Am. States Ins. Co.*, 134 Wn.2d 814, 820, 953 P.2d 462 (1998). "Standard dictionaries do not define 'business pursuit' as a term unto itself." *Id.* at 821. However, "[c]ommon intelligence and general knowledge provide an understanding that an activity conducted as a business is a systematic, for profit, regularly engaged-in activity as opposed to an irregular, occasional activity." *State v. Postema*, 46 Wn. App. 512, 517, 731 P.2d 13 (1987).

"The term 'pursuit' is defined in pertinent part as 'an activity that one pursues or engages in seriously and continually or frequently as a vocation or profession or as an avocation . . . .'

Webster's Third New Int'l Dictionary 1848 (1986). Black's Law Dictionary provides a precise definition of the term 'business pursuit' stating . . . the term 'denotes continued or regular activity for purpose of earning a livelihood such as a trade, profession, or occupation, or a commercial activity.'" *Stuart*, 134 Wn.2d at 821. Division One's decision is diametrically opposite to these dictates. Division One usurped the authority of the Legislature by legislating a meaning of the term "contractor."

"[I]n order to constitute a business pursuit, the [pursuit] must (1) be conducted on a regular and continuous basis, and (2) be profit motivated. . . . All that is required is that the activity be regular and continuous and that a profit motive exist in conducting the activity." *Id.* at 822.[2] "[P]art-time employment constitutes a business pursuit, so long as it is both conducted on a regular and continuous basis and motivated by profit."

[2] There is absolutely no evidence that Dobson was motivated by profit as Dobson reluctantly agreed to perform the work because of a mutual friend. CP 87-88.

Stoughton v. Mut. of Enumclaw, 61 Wn. App. 365, 369, 810 P.2d 80 (1991)(finding a business pursuit where an individual, motivated by profit, performed work for four hours every weekday for five months).

"An isolated transaction logically refers to a transaction that is not common or repeated by either party. A transaction cannot be isolated if the seller is engaged in the business of that type of transaction." *Dale v. Black*, 81 Wn. App. 599, 601-02, 915 P.2d 1116 (1996); *see Klos v. Gockel*, 87 Wn.2d 567, 570, 554 P.2d 1349 (1976)(when "a person regularly engage[s] in building . . . the sale is commercial rather than casual or personal in nature").

Division One misinterpreted and erroneously applied this Court's holding in *Northwest Cascade* to find that a person who performs an isolated repair job is a contractor. Op. at 7. In *Northwest Cascade*, this Court held, "a person engaging in an *isolated* and *single* ***business venture*** is as subject to the provisions of the registration act as is a party engaging in the construction business on a *regular* and *continuing* basis." *Nw.*

Cascade Const., Inc. v. Custom Component Structures, Inc., 83 Wn.2d 453, 460, 519 P.2d 1 (1974)(emphasis added). This Court's holding was based upon the fact that the parties engaged in a joint business venture by forming a business and sharing profits. *Id*. at 456-57 & 463. A business venture, is undeniably, a business.

A joint business venture, by definition, is an independent business that is established in a single transaction. A joint venture is "[a] joint undertaking, of a business nature, for material gain or profit . . . *even though limited to a single transaction*, as by the law of agency, establishes the right of control" and the parties share profits and losses. *Poutre v. Saunders*, 19 Wn.2d 561, 568, 143 P.2d 554 (1943)(emphasis added). "One distinction between a partnership and a joint adventure lies in the fact that, while a partnership is ordinarily formed for the transaction of a general business of a particular kind, a joint adventure relates to a single transaction." *Zech v. Bell*, 94 Wash. 344, 348, 162 P. 363 (1917)(brackets omitted).

Accordingly, as in *Northwest Cascade*, when construction contracting parties pursue a joint business venture, the venture meets the statutory definition of a contractor because in a single, isolated transaction, the parties pursue an independent business. When there is no business venture, to meet the definition of a contractor, a person must pursue an independent construction contracting business on a regular and continuous basis, motivated by profit. This Court did not hold, nor has it ever held, that an individual who performs an isolated repair job meets the statutory definition of a contractor because that would be contrary to the plain statutory language.

"When the plain language is unambiguous, subject to only one reasonable interpretation, our inquiry ends." *Spokane Cty. v. Dep't of Fish & Wildlife*, 192 Wn.2d 453, 458, 430 P.3d 655 (2018). "As so often has been stated, judicial review of legislation does not carry with it a license to modify or amend legislative enactments." *Frank v. Fischer*, 46 Wn. App. 133, 140, 730 P.2d 70 (1986). Yet, that is exactly what Division One did.

"The Registration of Contractors Act, RCW 18.27, is a comprehensive scheme governing contractors. This act, effective in 1963, defines a contractor, creates categories of exemptions, regulates business practices and requires that contractors be registered." *Int'l Commercial Collectors, Inc. v. Carver*, 99 Wn.2d 302, 304, 661 P.2d 976 (1983). "Chapter 18.27 RCW, which requires a contractor to obtain a license to engage in building enterprises, 'was designed to prevent the victimizing of a defenseless public by unreliable, fraudulent and incompetent contractors, many of whom operated a transient business from the relative safety of neighboring states.'" *Washington State Dep't of Labor & Indus. v. Davison*, 126 Wn. App. 730, 737, 109 P.3d 479 (2005). "The crucial devices utilized by the legislature . . . are designed to provide some protection—albeit minimal—for customers in today's 'market place' against the financially irresponsible contractor." *Bremmeyer v. Peter Kiewit Sons Co.*, 90 Wn.2d 787, 792, 585 P.2d 1174 (1978)(stating contractors

have "inter-trade expertise" while the consuming public lacks this information).

While it is true "that there is little guiding authority on contractor registration requirements." *Davison*, 126 Wn. App. at 736. This is because the plain language of the Registration of Contractors Act ("RCA") applies to individuals and entities engaged in the business of construction contracting. RCW 18.27.010(1)(a); RCW 18.27.080. "RCW 18.27.080 denies to contractors not Duly registered with the state licensing agency the use of the courts for any recovery of sums owing them for contracting services. Such a statute is in derogation of the common law and must be strictly construed." *Andrews Fixture Co. v. Olin*, 2 Wn. App. 744, 749, 472 P.2d 420 (1970); RCW 18.27.080 (bars only a person "engaged in the business or acting in the capacity of a contractor" from bringing suit). "The serious consequences attendant upon a claimed violation of a licensing statute have led the courts to deny recovery with reluctance and only in a very clear case, and then only to the extent necessary."

H.O. Meyer Drilling Co. v. Alton V. Phillips Co., 2 Wn. App. 600, 604, 468 P.2d 1008 (1970). There were no grounds to deny recovery in this case and review is warranted. RAP 13.4(b)(1) & (2).

Individuals performing episodic work cannot be classified as "pursuing an independent business." Division One's decision contravenes clear legislative intent and lacks any rational basis. A more inequitable result than that imposed by Division One's published opinion is difficult to imagine—and if left to stand by this Court, the effects will be far-reaching: any person who performs any work on a building or other improvement, no matter how inconsequential and with no regard to frequency (such as installing a spring on a neighbor's screen door), will have to register as a contractor. Division One's published opinion eviscerates the Legislature's intent, the plain, unambiguous language in the RCA, and is contrary to Washington law. As a matter of important public policy, this Court should therefore grant review. RAP 13.4(b)(3).

2. Despite deciding precisely the same issue based upon nearly identical facts, Division One's published opinion directly conflicts with Division Two's published opinion in *Rose v. Tarman*, 17 Wn. App. 160, 561 P.2d 1129 (1977).

This Court should accept review to settle the direct conflict between Division One's decision in this case and Division Two's published opinion in *Rose*. Division One ignored salient evidence and artificially distinguished facts in order to reach its decision—which directly conflicts with *Rose*. Op. at 8-9. In *Rose*, Division Two held that Rose was "not barred by RCW 18.27.080 from maintaining this action." *Rose*, 17 Wn. App. at 163-64. Instead of analyzing whether Dobson met the definition of a contractor, Division One erroneously concluded that *Rose* "does not provide a safe harbor for Dobson." Op. at 8. Division One ignored the fact that Dobson does not need a "safe harbor" unless Archibald established, as a matter of law, that Dobson performed the work in the pursuit of an independent business—

which Archibald did not do.[3] CP 25-34.

Division One disregarded the following factors set forth in *Rose* in order to reach its clearly erroneous result:

> Our reason for holding the statute inapplicable here in that the evidence is uncontroverted that Rose was *not in the pursuit of an independent business*, as that phrase is understood in plain and ordinary usage. The record indicates that this transaction *between two social friends* was far removed from a typical business enterprise. [1] Rose *did not hold himself out to the public* as a bulldozer operator, [2] *nor did he actively solicit a contract* with Tarman. In fact it was Tarman who initiated this agreement by requesting Rose's services and the use of his bulldozer, and Rose *acquiesced* only after Tarman's persistent efforts. [3] Rose *performed the work at odd hours* in the evenings and in his spare time on weekends; [4] additionally, there was expert testimony that *the alleged agreed-upon price was far below the going rate for similar work*. . . . Furthermore, the avowed purpose of preventing unscrupulous contractors from preying on a defenseless public would *not* be served by denying access to the courts to an individual who *neither sought nor desired* to perform bulldozing services, and did so only when prevailed upon by a friend.

[3] The evidence on this issue was controverted—at best—and summary judgment was erroneous. CP 47-48, 51-52, 59-60, 87-88, & 93.

Rose, 17 Wn. App. at 163-64 (emphasis added). The facts of this case are virtually identical to those in *Rose*. Division One ignored the uncontroverted evidence that (1) Dobson did not hold herself out to the public as a contractor and (2) the agreed-upon price was far below the going rate for similar work. CP 87-88, 93, & 122.

Division One ignored evidence that favored Dobson, erroneously stating: "Admittedly there are superficial similarities between the facts in Rose and the facts herein—like Rose, Dobson performed work during her off hours and did not initiate the contact between the parties. However, unlike in Rose, Dobson and Archibald did not have a preexisting 'social friend[ship]' that removed their transaction 'from a typical business enterprise.' To the contrary, Dobson and Archibald knew each other exclusively through this business transaction." Op. at 8-9. Division One ignored evidence that a mutual friend introduced Archibald to Dobson. CP 88. Accordingly, like in *Rose*, there was a social nexus with a mutual friend.

In *Rose*, "the parties were fellow employees of Tyee Construction Company." *Rose*, 17 Wn. App. at 161. Here, Dobson performed the work because Archibald was a friend of their mutual friend, Dr. Dan, who recommended that Archibald contact Dobson. CP 88. Like in *Rose*: Archibald initiated the contact between the parties. CP 87 & 104. Like in *Rose*: Dobson agreed to perform the work reluctantly, after Archibald's persistent efforts. CP 87-88. Like in *Rose*: "The economic considerations present in the normal business relationship and in Northwest Cascade are absent in this case." *Rose*, 17 Wn. App. at 163.

Like in *Rose*, the purpose of the RCA is not served by denying Dobson access to court. There is no need to protect the public from Dobson, a Longshoreman, who performed a singular, one-off home repair job in the past five years. CP 87 & 93. It was Archibald, who repeatedly solicited Dobson to do a single piece of home repair work and then invoked the RCA to stiff her. It is incredulous that Division One elected to go out of

its way to uphold the erroneous entry of summary judgment against Dobson.

There are no material differences between the facts in *Rose* and this case. Yet, Division One erroneously decided the issue differently—in direct conflict with *Rose*. This Court should accept review to resolve the direct conflict between *Rose* and Division One's clearly erroneous decision in this case. It is a matter of important public policy that this Court settle the law on the definition of "contractor." As the law currently stands, people will have to choose to follow *Rose* or Division One's opinion in this case. Because of the consequences to both people providing services and the consuming public, this Court should grant review. RAP 13.4(b)(2) & (3).

3. Division One's opinion is contrary to, and contradicts, this Court's precedents and decisions of the Court of Appeals by erroneously holding that RCW 18.27.080 requires a plaintiff to allege and prove that she is *not* a contractor.

It is a clearly established precept of Washington law that a party's failure to comply with statutory conditions precedent to

commencing an action is an affirmative defense that must be pleaded and proven by the defendant. "Washington is a notice pleading state and merely requires a simple, concise statement of the claim and the relief sought. CR 8(a)." *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006). "The defendant in his answer must deny the facts alleged in the complaint, or he must state new matter in avoidance or by way of counter-claim." *Puget Sound Iron Co. v. Worthington*, 2 Wash. Terr. 472, 483, 7 P. 886 (1885).

Pursuant to Civil Rule 8, "a party shall affirmatively plead any matter constituting an avoidance or affirmative defense." *Locke v. City of Seattle*, 133 Wn. App. 696, 713, 137 P.3d 52 (2006). "An affirmative defense is a matter asserted by [the] defendant which, assuming the complaint to be true, constitutes a defense to it." *Snohomish Cty. v. Anderson*, 124 Wn.2d 834, 838, 881 P.2d 240 (1994). "Any matter that does not tend to controvert the opposing party's prima facie case as determined by applicable substantive law should be pleaded." *Shinn Irr.*

Equip., Inc. v. Marchand, 1 Wn. App. 428, 430-31, 462 P.2d 571 (1969). "[T]he test of whether matter is new is to be determined by the effect it has upon the issue presented by the complaint; if it controverts the cause of action, and tenders no new issue, it is a traverse; but if, on the other hand, it introduces a new element by way of confession and avoidance, it is new matter, and must be pleaded affirmatively." *Morse v. McGrady*, 49 Wn.2d 505, 507, 304 P.2d 691 (1956).

The RCA states:

> No person engaged in the business or acting in the capacity of a contractor may bring or maintain any action in any court of this state for the collection of compensation for the performance of any work or for breach of any contract for which registration is required under this chapter without alleging and proving that he or she was a duly registered contractor and held a current and valid certificate of registration at the time he or she contracted for the performance of such work or entered into such contract.

RCW 18.27.080.

In derogation of this Court's clear precedents, Division One erroneously concluded: "By its plain language, the statute

creates not an affirmative defense but, rather, a prerequisite to suit" (Op. at 4) because "registration—or, as here, the *inapplicability* of the registration requirement—must be alleged and proved by *the plaintiff*, Archibald was not required to do anything other than deny Dobson's allegations for the matter to be properly put at issue." *Id.* at 4-5 (emphasis added). Division One impermissibly added language to the statute (1) that the legislature chose not to include and (2) which is contrary to well-established principles of law.

"The burden of proof is upon the plaintiff to prove, by a preponderance of the evidence, all the material allegations which are alleged in the complaint and denied in the answer before the plaintiff can recover." *Davidson Fruit Co. v. Produce Distributors Co.*, 74 Wash. 551, 552, 134 P. 510 (1913). "In a breach of contract action, the plaintiff must prove that a valid agreement existed between the parties, the agreement was breached, and the plaintiff was damaged." *Univ. of Washington v. Gov't Employees Ins. Co.*, 200 Wn. App. 455, 467, 404 P.3d

559 (2017). It is elementary that it is incumbent upon a defendant to plead and prove any new matter that seeks to avoid liability and does not go to destroying a cause of action.

Dobson alleged a common law breach of contract claim—not a claim pursuant to RCW 18.27 *et seq*.—because the RCA does not apply to this case. Even if it did apply, Dobson properly pleaded facts that she entered into a contract with Archibald, and Archibald breached the contract, which proximately caused Dobson to suffer damages. CP 2 & 9. Archibald *admitted* to "entering into a contract" with Dobson and not paying Dobson the agreed upon contract price. CP 14-16 & 325-27. Archibald therefore admitted that the allegations that Dobson was required to prove were true. Whether Dobson acted as contractor is extraneous to Dobson's breach of contract claim. Archibald's allegation that Dobson "acted as a contractor . . . and therefore the alleged contract and filed materialman's lien are unenforceable" introduces a new matter and is therefore an affirmative defense that plainly seeks to avoid liability. CP 327.

Accordingly, Archibald had the burden to allege, as an affirmative defense, and prove that the parties' contract was not enforceable because Dobson was a contractor as defined in RCW 18.27.010(1)(a). In his amended Answer, Archibald alleged that Dobson "acted as a contractor and therefore is governed and restricted by RCW 18.27 *et seq*, [*sic*] . . . and therefore the alleged contract and filed materialmen's lien are unenforceable by Plaintiff and of no effect." CP 327. It is crystal clear that through this affirmative defense, which presents an independent legal theory, Archibald sought to avoid his obligation under the contract to pay Dobson the outstanding contract balance. Accordingly, Archibald carried the burden of proof—not Dobson.

Division One erroneously relied upon the allegations that Dobson pleaded that she "is not a specialty contractor" and in a footnote, that she "is not a contractor." Op. at 5; CP 2. These allegations, however, are wholly surplusage and are therefore irrelevant. It is axiomatic that "a plaintiff is required to allege

only facts constituting prima facie a cause of action and need not anticipate or negative defenses. Allegations are not required of a plaintiff in anticipation of matters of defense or to negative the existence of defensive matters, but if pleaded such allegations should be treated as surplusage and disregarded." *Procter & Gamble Co. v. King Cty.*, 9 Wn.2d 655, 659-60, 115 P.2d 962 (1941). Indeed, "he who affirms always has the burden." *Wilder v. Nolte*, 195 Wash. 1, 14, 79 P.2d 682 (1938). Dobson was under no duty "to negative such defenses in advance of their assertion." *Clark v. Eltinge*, 34 Wash. 323, 329, 75 P. 866 (1904). Yet, that is what Division One erroneously ruled she was required to do.

A party is not required to allege and prove something does not exist. A plaintiff that is not a contractor does not need to allege and prove that she is not a contractor in order to prosecute a breach of contract claim. Accordingly, Dobson's extraneous allegations in no way shifted the burden of proof—which

remained with Archibald—to prove that Dobson acted as a contractor in performing the work for Archibald.

Washington law clearly establishes that a party's failure to comply with a statutory prerequisite is an affirmative defense. "Statutes and ordinances requiring the filing of a claim before commencing litigation have been held to be valid conditions on which the sovereign consents to be sued and are a condition precedent to recovery." *Dyson v. King Cty.*, 61 Wn. App. 243, 244, 809 P.2d 769 (1991). The affirmative defense of failure to comply with statutory claim filing requirements "is uniformly pled where pertinent." *See id.* at 244.

This Court has made clear that "plaintiffs bear the burden of showing they have substantially complied with statutory prerequisites, and failure to do so generally bars their claims." *Freedom Found. v. Teamsters Local 117 Segregated Fund*, 197 Wn.2d 116, 137-38, 480 P.3d 1119 (2021). "***But failure to comply with statutory prerequisites remains an affirmative defense that must be timely raised***." *Id.* at 140 (emphasis

added); *see King v. Snohomish Cty.*, 146 Wn.2d 420, 424-27, 47 P.3d 563 (2002); *Procter & Gamble Co.*, 9 Wn.2d 655 (finding that a defendant must plead and prove that the plaintiff is required to obtain a license).

This is consistent with parties raising RCW 18.27.080. For example, in *Rose*, the plaintiff "instituted an action seeking compensation for services rendered, and Tarman answered, pleading as an affirmative defense that Rose was not registered as a 'contractor.'" *Rose*, 17 Wn. App. at 161; *see H.O. Meyer Drilling Co.*, 2 Wn. App. at 601. In *Frank*, the court found that the defendant was "entitled to raise the bar of RCW 18.27.080 against a suit by Frank, a contractor who failed to register under the act." *Frank*, 46 Wn. App. at 142. These are just a few examples of cases that illustrate the universal principle that a plaintiff bears the burden of proving compliance with applicable statutory prerequisites and the defendant bears the burden of proving noncompliance as an affirmative defense.

Division One's opinion directly conflicts with *Davidson v. Hensen,* 135 Wn.2d 112, 954 P.2d 1327 (1998), where this Court found: "Because the parties entrusted the issue of a contractor's compliance with RCW 18.27 to the arbitrator," (*id.* at 115) this Court would not consider the affirmative defense of non-registration because of "our modern court rules which require affirmative defenses to be timely asserted or waived. *See* CR 8(c)." *Id.* at 133. Division One's opinion states that "the Davidson court perhaps unartfully described nonregistration as 'more akin to an affirmative defense than a jurisdictional issue.' The court did not, however, hold that nonregistration is an affirmative defense that must be pleaded by the defendant or be deemed waived." Op. at 4 (citations omitted).

Division One inexplicably ignored the following language in *Davidson*: "Under this modern distinction, an *assertion* of nonregistration is *more akin* to an affirmative defense than a jurisdictional issue. As ***an affirmative defense,*** it must be timely pleaded or it is waived." *Davidson,* 135 Wn.2d at 130-31

(emphasis added; citation omitted). Non-registration is "more *akin* to an affirmative defense than a jurisdictional issue" because "[a]rbitration is a statutory proceeding and the rights of the parties to it are controlled by statutes." *N. State Const. Co. v. Banchero*, 63 Wn.2d 245, 249, 386 P.2d 625 (1963). In arbitration, parties do not submit pleadings (unless authorized by rules or the arbitrator); therefore, there are no affirmative defenses. *See* RCW 7.04A *et seq.* Division One erroneously misconstrued and misapplied *Davidson*, and its opinion directly conflicts with *Davidson*—review is warranted.

Division One's opinion also directly conflicts with *Bosnar*. In *Bosnar*, Division Three concluded that "because Mr. Rawe did not properly raise the registration defense below, under *Davidson*, the defense is waived." *Bosnar v. Rawe*, 167 Wn. App. 509, 512, 273 P.3d 488 (2012). Like *Davidson*, *Bosnar* demonstrates that Division One's decision is erroneous.[4]

[4] Division One misstates the *Bosnar* court's holding.

Pursuant to well-established precedents, Archibald very clearly had the burden to affirmatively prove that Dobson was engaged in business of construction contracting. Division One elected to blatantly ignore this Court's controlling precedent. If this Court allows Division One's erroneous ruling to stand, it will generate profound confusion regarding the burden of proof and non-registration. This Court should therefore grant review. RAP 13.4(b)(1), (2), & (3).

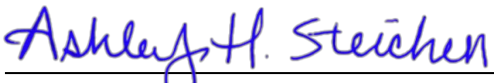
CONCLUSION

Division One improperly invaded the province of the Legislature, and its published opinion eviscerates the Legislature's intent set forth in the plain, unambiguous language of the RCA. Division One failed to follow clearly applicable law and impose the burden of proof on the Defendant. Division One's published opinion is in derogation of this Court's clear precedents and decisions of the Court of Appeals. This Court should grant review.

This Petition contains 5,000 words, excluding words that are exempt from the word count requirement and complies with Rule of Appellate Procedure 18.17.

DATED this 11th day of May 2022.

Respectfully submitted:



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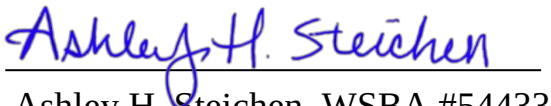
DECLARATION OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on May 11, 2022, I filed a true and correct copy of the foregoing document with the Washington State Appellate Court's Portal. The Court will notify counsel of record of the filing at the following email address:

David C. Hammermaster: david@hammerlaw.org

DATED May 11, 2022 at Seattle, Washington.



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APPENDIX

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FILED
2/22/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GINA J. DOBSON,

Appellant,

v.

TREFAN ARCHIBALD, a citizen of the State of Washington,

Respondent.

DIVISION ONE

No. 82409-1-I

PUBLISHED OPINION

DWYER, J. — Gina Dobson appeals the summary judgment dismissal of her breach of contract action against Trefan Archibald. Dobson contends that she was not required to register as a contractor in order to bring suit and, accordingly, the trial court erred by dismissing her civil action as being foreclosed by her unregistered status. Finding no error, we affirm.

I

In June 2018, Trefan Archibald hired Gina Dobson to refinish his hardwood floors for $3,200. Dobson was not a registered contractor. Indeed, she was employed as a full-time longshoreman. Archibald had been referred to Dobson by Daniel Cabrera, for whom Dobson had done "some repair, remodel, and miscellaneous in-home construction work" in 2016. Cabrera was referred to Dobson by Anna Stoller, who had previously hired Dobson to repair part of a foundation, build and install a drain, and refinish a wood floor. Stoller was referred to Dobson by her realtor, Lisa Sears. Sears had also been Dobson's

realtor and became aware of Dobson's construction and home repair work after she saw improvements Dobson had made to her own home. Sears herself had also previously hired Dobson to do some painting.

Archibald paid Dobson a $700 deposit prior to Dobson commencing her work. Dobson worked on Archibald's floors but at the completion of the project, on July 6, 2018, Archibald was unhappy with the appearance of the floors. Thus, Archibald informed Dobson that he would not pay her the remaining $2,500 of the agreed-upon price.

In response, Dobson recorded a lien against Archibald's property. She then commenced this action on May 31, 2019. Archibald filed his answer on September 13, 2019. On December 8, 2020, Archibald filed a motion for summary judgment, asserting that because Dobson was not a registered contractor, she could not bring suit. Dobson then filed a cross-motion for summary judgment.

In January 2021, Archibald requested leave to amend his answer to include Dobson's status as an unregistered contractor as an affirmative defense. The trial court granted leave to amend. Later that month, the trial court granted Archibald's motion for summary judgment, denied Dobson's motion for summary judgment, and dismissed the case with prejudice.

Dobson appeals.

II

As an initial matter, we address the nature of the nonregistered contractor provisions set forth in RCW 18.27.080. Dobson's contentions on appeal rely on

the notion that nonregistration is an affirmative defense, which must be timely pleaded and proved by the defendant. The language of the pertinent statute, however, does not support this view. That statute, RCW 18.27.080, provides that

> *[n]o person engaged in the business or acting in the capacity of a contractor may bring or maintain any action in any court of this state for the collection of compensation for the performance of any work or for breach of any contract for which registration is required under this chapter without alleging and proving that he or she was a duly registered contractor and held a current and valid certificate of registration at the time he or she contracted for the performance of such work or entered into such contract.* For the purposes of this section, the court shall not find a contractor in substantial compliance with the registration requirements of this chapter unless: (1) The department has on file the information required by RCW 18.27.030; (2) the contractor has at all times had in force a current bond or other security as required by RCW 18.27.040; and (3) the contractor has at all times had in force current insurance as required by RCW 18.27.050. In determining under this section whether a contractor is in substantial compliance with the registration requirements of this chapter, the court shall take into consideration the length of time during which the contractor did not hold a valid certificate of registration.

(Emphasis added.)

In other words, in any action in which the plaintiff seeks compensation for work as a contractor, the plaintiff is required to allege and prove that at the time the work was performed, the plaintiff was a registered contractor with a current and valid certificate of registration.

"Washington contractors cannot sue clients to recover compensation or for breach of contract if the contractors are not properly registered." Coronado v. Orona, 137 Wn. App. 308, 311, 153 P.3d 217 (2007). This prohibition is distinct from the affirmative defense of illegality of contract in that the registration statute does not render the contract

illegal or void. Davidson v. Hensen, 135 Wn.2d 112, 127, 954 P.2d 1327 (1998). Instead, a contractor's failure to comply with registration requirements "merely limits its enforceability for public policy reasons." Bort v. Parker, 110 Wn. App. 561, 571, 42 P.3d 980 (2002). "Effectively, an unregistered contractor has no standing to seek redress from the courts if the person benefiting from the fruits of his unlicensed labor refuses to pay." Bort, 110 Wn. App. at 571. By its plain language, the statute creates not an affirmative defense but, rather, a prerequisite to suit.

Confusion pertaining to the nature of the requirements created by the registration statute appears to arise from two published opinions: Davidson, 135 Wn.2d 112, and Bosnar v. Rawe, 167 Wn. App. 509, 273 P.3d 488 (2012). Both cases address specific factual scenarios that are not here at issue.

In Davidson, our Supreme Court explained that because the registration statute did not render an underlying contract void, it did not impact an arbitrator's jurisdiction when there was an otherwise valid agreement to arbitrate. 135 Wn.2d at 130-32. In this context, the Davidson court perhaps unartfully described nonregistration as "more akin to an affirmative defense than a jurisdictional issue." 135 Wn.2d at 130-31. The court did not, however, hold that nonregistration is an affirmative defense that must be pleaded by the defendant or be deemed waived. See Davidson, 135 Wn.2d at 126-33.

In Bosnar, Division Three of this court initially held that the superior court's de novo review of a small claims court decision was limited to the record before it. 167 Wn. App. at 512. It then further held that, on the record before it, the small claims court had properly "carefully considered the nature of the parties' relationship" and appropriately exercised "its fact-finding and equitable discretion" in determining that the contract at issue was between two contractors and therefore suit was not barred. Rawe, 167 Wn. App. at 512-13. See Frank v. Fischer, 108 Wn.2d 468, 472, 739 P.2d 1145 (1987) (registration prerequisite to suit not applicable to disputes between contractors because "statutory purpose of RCW 18.27 was to protect the public, and the Legislature did not intend to protect contractors from each other or prime contractors from unregistered subcontractors").

Here, Dobson addressed her registration status in her complaint by alleging that she "is not a contractor under RCW 18.27.010(1)(a) and does not need to be licensed as a contractor." Archibald responded to that averment in his answer by stating that he "objects to the compound nature of the averments [in the paragraph in question], lacks sufficient information as to a portion thereof and denies each and every allegation set forth therein." As registration—or, as here, the inapplicability of the registration requirement—must be alleged and proved by the *plaintiff*, Archibald was

not required to do anything other than deny Dobson's allegations for the matter to be properly put at issue.[1]

III

Dobson contends that summary judgment dismissal in favor of Archibald was erroneously granted and that the trial court erred by denying her own motion for summary judgment. Because there were no material questions of fact and because Dobson is not entitled to seek relief on her claim in Washington courts, we disagree.

We review the grant or denial of a motion for summary judgment de novo. This court engages in the same inquiry as the trial court. Benjamin v. Wash. State Bar Ass'n, 138 Wn.2d 506, 515, 980 P.2d 742 (1999). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56(c). All evidence must be viewed in the light most favorable to the nonmoving party. Overton v. Consol. Ins. Co., 145 Wn.2d 417, 429, 38 P.3d 322 (2002).

Here, it is undisputed that Dobson was not a registered contractor, that she agreed to refinish Archibald's floor in exchange for $3,200, that she performed work on Archibald's floor (which he found unsatisfactory), and that he refused to pay her for that work. It is also undisputed that Archibald and Dobson

[1] Accordingly, we need not address Dobson's contention that the trial court erred by allowing Archibald to amend his pleadings to include Dobson's nonregistration as an affirmative defense. The plain language of the statute makes clear that nonregistration is not an affirmative defense, and both Archibald's original and amended answers adequately addressed the issue by denying Dobson's allegation that she was not a contractor.

did not have a preexisting social relationship—rather, Archibald hired Dobson after having been referred to her by Cabrera, for whom Dobson had previously performed some repair, remodel, and miscellaneous in-home construction work. Cabrera's initial connection to Dobson was likewise through a referral from another one of Dobson's former clients.

"Contractor" is defined by statute as including

> any person, firm, corporation, or other entity who or which, in the pursuit of an independent business undertakes to, or offers to undertake, or submits a bid to, construct, alter, repair, add to, subtract from, improve, develop, move, wreck, or demolish any building, highway, road, railroad, excavation or other structure, project, development, or improvement attached to real estate or to do any part thereof including the installation of carpeting or other floor covering, the erection of scaffolding or other structures or works in connection therewith, the installation or repair of roofing or siding, performing tree removal services, or cabinet or similar installation; or, who, to do similar work upon his or her own property, employs members of more than one trade upon a single job or project or under a single building permit except as otherwise provided in this chapter.

RCW 18.27.010(1)(a).

Even a single and isolated business venture is not exempt from the registration requirements of the registration act. Nw. Cascade Constr., Inc. v. Custom Component Structures, Inc., 83 Wn.2d 453, 460, 519 P.2d 1 (1974).

Accordingly, even when the evidence is viewed in the light most favorable to Dobson, it establishes that she was a contractor and was not entitled to relief because she failed to allege and prove that she was properly registered as a contractor. Dobson, in pursuit of her referral-based side business, undertook a project to improve Archibald's building by refinishing the floor of his home.

Dobson disagrees, citing to Rose v. Tarman, 17 Wn. App. 160, 561 P.2d 1129 (1977), for the proposition that she does not fall into the statutory definition of a contractor because she is primarily employed as a longshoreman and the flooring work she performed for Archibald was "an isolated act in her spare time as a favor."[2] But the cited authority does not provide a safe harbor for Dobson.

In Rose, the court explained that the registration requirement was not applicable when two friends with a longstanding social relationship entered into an agreement in which one agreed to provide bulldozing services to the other, because

> the evidence is uncontroverted that Rose was not in the pursuit of an independent business, as that phrase is understood in plain and ordinary usage. The record indicates that this transaction between two social friends was far removed from a typical business enterprise. Rose did not hold himself out to the public as a bulldozer operator, nor did he actively solicit a contract with Tarman. In fact it was Tarman who initiated this agreement by requesting Rose's services and the use of his bulldozer, and Rose acquiesced only after Tarman's persistent efforts. Rose performed the work at odd hours in the evenings and in his spare time on weekends; additionally, there was expert testimony that the alleged agreed-upon price was far below the going rate for similar work. Under these circumstances we do not think that Rose comes within the statutory definition of a contractor as one in the pursuit of an independent business. Furthermore, the avowed purpose of preventing unscrupulous contractors from preying on a defenseless public would not be served by denying access to the courts to an individual who neither sought nor desired to perform bulldozing services, and did so only when prevailed upon by a friend.

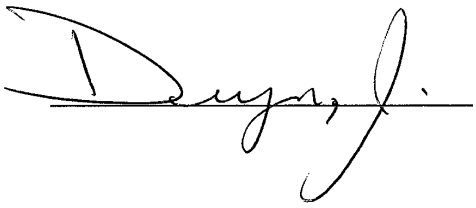
17 Wn. App. at 163.

Admittedly there are superficial similarities between the facts in Rose and the facts herein—like Rose, Dobson performed work during her off hours and did

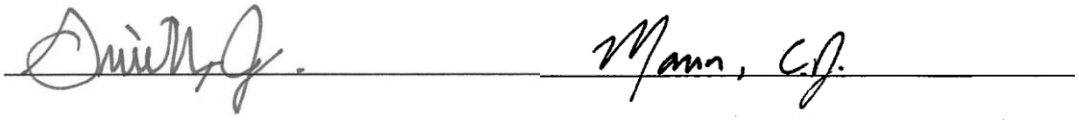
[2] Br. of Appellant at 16.

not initiate the contact between the parties. However, unlike in Rose, Dobson and Archibald did not have a preexisting "social friend[ship]" that removed their transaction "from a typical business enterprise." 17 Wn. App. at 163. To the contrary, Dobson and Archibald knew each other exclusively through this business transaction. It is undisputed that Archibald was referred to Dobson by one of Dobson's former customers, who himself knew Dobson through another former customer. This is consistent with a referral-based independent business. The narrow factual scenario that allowed Rose to avoid the registration bar is simply not applicable to Dobson. Dobson's agreement to refinish Archibald's wood floor for $3,200 was in pursuit of her independent business, regardless of her unrelated full-time employment.

We affirm both the trial court's summary judgment dismissal of the action and its denial of Dobson's motion for summary judgment.[3]



WE CONCUR:



[3] As Archibald was the prevailing party at the trial court and remains the prevailing party on appeal, we reject Dobson's contention that the trial court erred in awarding reasonable attorney fees to Archibald pursuant to RCW 4.84.250 and deny her request for attorney fees on appeal. Archibald does not request an award of attorney fees on appeal, and thus is not entitled to fees on appeal. See RAP 18.1(b) ("The party must devote a section of its opening brief to the request for the fees or expenses.").

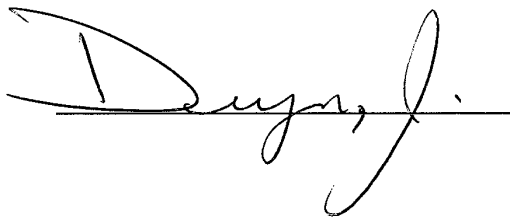
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GINA J. DOBSON, Appellant, v. TREFAN ARCHIBALD, a citizen of the State of Washington, Respondent.	DIVISION ONE No. 82409-1-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration is hereby denied.

FOR THE COURT:



RCW 18.27.010

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1)(a) "Contractor" includes any person, firm, corporation, or other entity who or which, in the pursuit of an independent business undertakes to, or offers to undertake, or submits a bid to, construct, alter, repair, add to, subtract from, improve, develop, move, wreck, or demolish any building, highway, road, railroad, excavation or other structure, project, development, or improvement attached to real estate or to do any part thereof including the installation of carpeting or other floor covering, the erection of scaffolding or other structures or works in connection therewith, the installation or repair of roofing or siding, performing tree removal services, or cabinet or similar installation; or, who, to do similar work upon his or her own property, employs members of more than one trade upon a single job or project or under a single building permit except as otherwise provided in this chapter.

(b) "Contractor" also includes a consultant acting as a general contractor.

(c) "Contractor" also includes any person, firm, corporation, or other entity covered by this subsection (1), whether or not registered as required under this chapter or who are otherwise required to be registered or licensed by law, who offer to sell their property without occupying or using the structures, projects, developments, or improvements for more than one year from the date the structure, project, development, or improvement was substantially completed or abandoned. A person, firm, corporation, or other entity is not a contractor under this subsection (1)(c) if the person, firm, corporation, or other entity contracts with a registered general contractor and does not superintend the work.

(2) "Department" means the department of labor and industries.

(3) "Director" means the director of the department of labor and industries or designated representative employed by the department.

(4) "Filing" means delivery of a document that is required to be filed with an agency to a place designated by the agency.

(5) "General contractor" means a contractor whose business operations require the use of more than one building trade or craft upon a single job or project or under a single building permit. A general contractor also includes one who superintends, or consults on, in whole or in part, work falling within the definition of a contractor.

(6) "Notice of infraction" means a form used by the department to notify contractors that an infraction under this chapter has been filed against them.

(7) "Partnership" means a business formed under Title **25** RCW.

(8) "Registration cancellation" means a written notice from the department that a contractor's action is in violation of this chapter and that the contractor's registration has been revoked.

(9) "Registration suspension" means either an automatic suspension as provided in this chapter, or a written notice from the department that a contractor's action is a violation of this chapter and that the contractor's registration has been suspended for a specified time, or until the contractor shows evidence of compliance with this chapter.

(10) "Residential homeowner" means an individual person or persons owning or leasing real property:

(a) Upon which one single-family residence is to be built and in which the owner or lessee intends to reside upon completion of any construction; or

(b) Upon which there is a single-family residence to which improvements are to be made and in which the owner or lessee intends to reside upon completion of any construction.

(11) "Service," except as otherwise provided in RCW **18.27.225** and **18.27.370**, means posting in the United States mail, properly addressed, postage prepaid, return receipt requested, or personal service. Service by mail is complete upon deposit in the United States mail to the last known address provided to the department.

(12) "Specialty contractor" means a contractor whose operations do not fall within the definition of "general contractor". A specialty contractor may only subcontract work that is incidental to the specialty contractor's work.

(13) "Substantial completion" means the same as "substantial completion of construction" in RCW **4.16.310**.

(14) "Unregistered contractor" means a person, firm, corporation, or other entity doing work as a contractor without being registered in compliance with this chapter. "Unregistered contractor" includes contractors whose registration is expired, revoked, or suspended. "Unregistered contractor" does not include a contractor who has maintained a valid bond and the insurance or assigned account required by RCW **18.27.050**, and whose registration has lapsed for thirty or fewer days.

(15) "Unsatisfied final judgment" means a judgment or final tax warrant that has not been satisfied either through payment, court approved settlement, discharge in bankruptcy, or assignment under RCW **19.72.070**.

(16) "Verification" means the receipt and duplication by the city, town, or county of a contractor registration card that is current on its face, checking the department's contractor registration database, or calling the department to confirm that the contractor is registered.

[**2015 c 52 § 1**; **2007 c 436 § 1**; **2001 c 159 § 1**; **1997 c 314 § 2**; **1993 c 454 § 2**; **1973 1st ex.s. c 153 § 1**; **1972 ex.s. c 118 § 1**; **1967 c 126 § 5**; **1963 c 77 § 1**.]

NOTES:

Finding—1993 c 454: "The legislature finds that unregistered contractors are a serious threat to the general public and are costing the state millions of dollars each year in lost revenue. To assist in solving this problem, the department of labor and industries and the department of revenue should coordinate and communicate with each other to identify unregistered contractors." [**1993 c 454 § 1**.]

Effective date—1963 c 77: "This act shall take effect August 1, 1963." [**1963 c 77 § 12**.]

RCW 18.27.080

Registration prerequisite to suit.

No person engaged in the business or acting in the capacity of a contractor may bring or maintain any action in any court of this state for the collection of compensation for the performance of any work or for breach of any contract for which registration is required under this chapter without alleging and proving that he or she was a duly registered contractor and held a current and valid certificate of registration at the time he or she contracted for the performance of such work or entered into such contract. For the purposes of this section, the court shall not find a contractor in substantial compliance with the registration requirements of this chapter unless: (1) The department has on file the information required by RCW **18.27.030**; (2) the contractor has at all times had in force a current bond or other security as required by RCW **18.27.040**; and (3) the contractor has at all times had in force current insurance as required by RCW **18.27.050**. In determining under this section whether a contractor is in substantial compliance with the registration requirements of this chapter, the court shall take into consideration the length of time during which the contractor did not hold a valid certificate of registration.

[**2011 c 336 § 474**; **2007 c 436 § 5**; **1988 c 285 § 2**; **1972 ex.s. c 118 § 3**; **1963 c 77 § 8**.]

ASHLEY H. STEICHEN

May 11, 2022 - 12:41 PM

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