

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

GINA J. DOBSON,

Petitioner,

v.

TREFAN ARCHIBALD,

Respondent.

No. 100862-7

STATEMENT OF  
ADDITIONAL  
AUTHORITIES

Petitioner, Gina Dobson, submits the following additional authorities pursuant to Rule of Appellate Procedure 10.8:

1. 46 No. 15 Construction Contracts Law Report NL 3 (July 22, 2022)(discussing the court of appeals opinion for this case regarding Dobson’s first issue for review: 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); and

2. 43 No. 6 Construction Litigation Reporter NL 10 (June 2022)(discussing the court of appeals opinion for this case regarding Dobson’s first issue for review and Dobson’s second issue: 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)).

These authorities are attached to this statement.

DATED this 8th day of August 2022.



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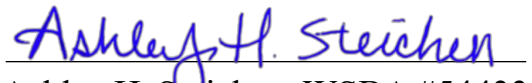
Attorney for Gina J. Dobson

## DECLARATION OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on August 8, 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 August 8, 2022 at Seattle, Washington.

  
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### 46 No. 15 Construction Contracts Law Report NL 3

Construction Contracts Law Report | July 22, 2022

Construction Contracts Law Report

Cases

#### ¶ 96. Washington Court Held Unregistered Repair Person Was Contractor, Thus Statute Prohibited Suit; Unregistered Contractor Lacked Standing To Bring Suit For Breach Of Contract

*Dobson v. Archibald, 21 Wash. App. 2d 91, 505 P.3d 115 (Div. 1 2022)*

By its plain language, the statute prohibiting unregistered contractors from suing to recover compensation or for breach of contract creates not an affirmative defense but, rather, a prerequisite to suit. 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. [Wash. Rev. Code Ann. § 18.27.080](#).

Based on a referral from someone, a homeowner (“Owner”) hired a repair person (“Contractor”) to refinish his hardwood floors for \$3,200. Contractor, in addition to her day job as longshoreman, ran referral-based independent business doing construction and home repair work, but she was not a registered contractor.

Owner paid Contractor a \$700 deposit prior to Contractor commencing her work. After Contractor completed the project, Owner was unhappy with the appearance of the floors, so Owner refused to pay Contractor the remaining \$2,500 of the agreed-upon price. So, Contractor recorded a lien against Owner’s property and commenced this action. Owner filed his answer and later filed a motion for summary judgment, asserting that because Contractor was not a registered contractor, she could not bring suit. Owner later amended his answer to include Contractor’s status as an unregistered contractor as an affirmative defense. The trial court granted Owner’s motion for summary judgment, denied Contractor’s motion for summary judgment, and dismissed the case with prejudice. Contractor appealed to the Court of Appeals of Washington.

First the court had to determine if the plaintiff was a “contractor” and thus subject to the registration requirements of the law. “Contractor” is defined by statute to include:

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. The evidence, viewed in the light most favorable to Contractor, established that she was a contractor as defined by the statute.

The provisions set forth in [RCW 18.27.080](#), [RCW 18.27.080](#), govern unregistered contractors and provide 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.

Put plainly, 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.” (Citation omitted.) 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. A contractor’s failure to comply with registration requirements “merely limits its enforceability for public policy reasons.” (Citation omitted.) “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.” (Citation omitted.) By its plain language, the statute creates not an affirmative defense but, rather, a prerequisite to suit.

Here, Contractor 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.” The inapplicability of the registration requirement must be alleged and proved by the plaintiff. Owner was not required to do anything other than deny Contractor’s allegations for the matter to be properly put at issue.

It was undisputed that Contractor was not a registered contractor, that she agreed to refinish Owner’s floor in exchange for \$3,200, that she performed work on Owner’s floor (which he found unsatisfactory), and that he refused to pay her for that work. It was also undisputed that Owner and Contractor did not have a preexisting social relationship—rather, Owner hired Contractor after having been referred to her by a former client of Contractor, who had likewise been a referral from another one of Contractor’s former clients. Contractor was not entitled to relief because she failed to allege and prove that she was properly registered as a contractor.

**Conclusion**

For those reasons, the Court of Appeals of Washington, Division 1, affirmed. The court held Owner was not required to raise Contractor's lack of contractor registration as affirmative defense, and Contractor was "contractor" within meaning of contractor registration statutes.

**RESEARCH REFERENCES**

West's Key Number Digest, **Licenses** 11(5), 39.43(1), 39.43(2)

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## 43 No. 6 Construction Litigation Reporter NL 10

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Volume 43, Issue 6

Construction Litigation Reporter

Licensing

### A “Side Business” Contractor Must Allege and Prove She Was Registered as a Contractor in Order to Sue the Homeowner for Nonpayment

#### Lack of Registration Not an Affirmative Defense

*Dobson v. Archibald*, 505 P.3d 115 (Wash. App. Div. 1 2022)

#### Holdings

- A contractor suing for nonpayment must allege and prove her registration status as part of her *prima facie* case; her lack of registration was not an affirmative defense the owner had an obligation to raise in a timely manner.
- A contractor suing for nonpayment was required to be registered as a contractor, even though her full-time work was unrelated and the construction services she provided a homeowner were a side business.

#### Summary of Decision

Gina Dobson was employed full-time as a longshoreman. After hours, she would perform small home renovation projects. Upon a friend’s recommendation, Mr. Archibald hired Dobson to refinish the hardwood floors in his house. The owner paid Dobson the deposit and she performed the work. Unhappy with the results, he refused to pay her the balance. Dobson filed a mechanic’s lien, then sued to foreclose.

The owner filed an answer, then moved for summary judgment on the ground that Dobson was not a registered contractor. The owner then requested leave to amend his answer to include Dobson’s status as an unregistered contractor as an affirmative defense. The trial court granted the motion, the answer was amended, and the court granted the owner’s motion for summary judgment. On appeal, Dobson raised two arguments: (1) a contractor’s lack of registration is an affirmative defense which the defendant failed to timely plead and (2) the registration requirement did not apply to her “after hours” side work.

The Washington Court of Appeals affirmed, ruling that Dobson was required to allege and prove she was a registered contractor as a condition to recovery. The contractor registration statute, [RCW 18.27.080](#), provides: “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.” (Emphasis added.) As succinctly stated, “Washington contractors cannot sue clients to recover compensation or for breach of contract if the contractors are not properly registered.” *Coronado v. Orona*, 137 Wash. App. 308, 311, 153 P.3d 217, 218 (Div. 3 2007). Otherwise stated, lack of registration deprives the contractor with standing to seek redress in the form of lost compensation; accordingly, proof of registration was an element of Dobson’s *prima facie* case. Relatedly, a contractor’s nonregistration is not an affirmative defense of illegality of contract, as the registration statute does not render a contract illegal or void. *Davidson v. Hensen*, 135 Wash. 2d

112, 127, 954 P.2d 1327, 1335 (1998), 19 CLR 183 (1998). “By its plain language, the statute creates not an affirmative defense but, rather, a prerequisite to suit,” the *Dobson* court concluded.

The appellate court acknowledged “perhaps unartful[.]” language on this matter in the supreme court’s *Davidson* decision. That case involved a challenge to an arbitrator’s decision. In that context, the high 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. 954 P.2d at 1335. Of relevance here, the *Davidson* court described nonregistration as “more akin to an affirmative defense than a jurisdictional issue.” *Id.* at 1336. Reading this language narrowly, the *Dobson* court emphasized that the supreme court “did not, however, hold that nonregistration is an affirmative defense that must be pleaded by the defendant or be deemed waived.”

The court of appeals then rejected *Dobson*’s alternative argument, that the registration statute did not apply to her as the floor refinishing job was undertaken as a side business, unrelated to her full-time occupation as a journeyman. *Dobson* cited in support *Rose v. Taman*, 17 Wash. App. 160, 561 P.2d 1129 (Div. 2 1977), review denied, 89 Wash. 2d 1005 (1977), where the court refused to apply the registration statute when two friends with a longstanding social relationship entered into an agreement in which one agreed to provide bulldozing services to the other. The *Rose* court reasoned 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. *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 ... 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.

561 P.2d at 1131.

The *Dobson* court acknowledged superficial similarities between the *Rose* case and this one, in that *Dobson* performed the work during her off hours and had not initiated the transaction. However, unlike in *Rose*, *Dobson* and the homeowner did not have a preexisting social friendship that removed their transaction “from a typical business enterprise” (in the words of the *Rose* court). To the contrary—the homeowner knew of *Dobson* only because of her business transactions for other homeowners. In sum, “*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.”

### Comment

For further discussion of the effect of a contractor’s unlicensed status, see 5 Philip L. Bruner & Patrick J. O’Connor, Jr., *Bruner & O’Connor on Construction Law* § 16:17 (Thomson/West 1992; Westlaw 2021) (“The consequences to a design or construction professional for failing to obtain a necessary license are varied, and almost always unpleasant.”) and Frances M. Dougherty, Annotation, *Failure of Building and Construction Artisan or Contractor to Procure Business or Occupational License as Affecting Enforceability of Contract or Right of Recovery for Work Done—Modern Cases*, 44 A.L.R.4th 271 (1986).

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**ASHLEY H. STEICHEN**

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