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NO. 93610-2

SUPREME COURT OF THE STATE OF WASHINGTON

FRANCISCO GUILLEN, ROBERTO GUILLEN, HECTOR FIERRO,
MARTIN GUILLEN, and JOSE TIMOTEO,

Respondents,

v.

MILESTONE AT WYNNSTONE LLC, MILESTONE AT
WYNNSTONE 2 LLC, and RED CANOE CREDIT UNION,

Petitioners,

and

BENJAMIN PEARSON, VULCAN MOUNTAIN
CONSTRUCTION, ABSI BUILDERS, INC., GRAVELLY LAKE
TOWNHOMES, LLC, CBIC, and RLI INSURANCE

Defendants.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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 ORIGINAL

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I. INTRODUCTION

This case concerns whether laborers employed by a registered subcontractor have a right to file chapter 60.04 RCW liens on real property to recover their unpaid wages. The Court of Appeals in *Guillen v. Milestone*, No. 48058-1-II (Wash. Ct. App. August 16, 2016), unanimously held that the statute unambiguously grants employees of registered subcontractors lien rights. Petitioners (“Milestone”) seek review under RAP 13.4(b)(1) on the basis that “[t]he decision of the court of appeals is in conflict with every previous Supreme Court decision regarding the application of the strict construction rule when determining whether persons or services come within the scope of a lien statute.” Petition for Review (“Pet.”) at 4.

The Court of Appeals, however, expressly held that neither a strict nor liberal construction is appropriate where a statute is unambiguous. *Guillen*, slip op. at 9-10. The court quoted *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 432-33, 275 P.3d 1119 (2012), for the proposition that “[n]either a liberal construction nor a strict construction may be employed to defeat the intent of the legislature, as discerned through a traditional processes of statutory interpretation.” If so, then Petitioners’ RAP 13.4(b)(1) argument fails. Yet, Petitioners ignore the Court of Appeals’ holding and its *Estate of Bunch* authority.

There are two disputed lien statute issues. First, whether a laborer may file a lien. *Guillen*, slip op. at 6-7. Second, whether a registered subcontractor is a statutory “construction agent.” *Id.* at 7-9. Each issue was resolved based on unambiguous statutory language, requiring neither a strict nor liberal interpretation. On the first issue, chapter 60.04 RCW lien rights extend to “any person furnishing labor . . . for the improvement of real property,” which unambiguously includes laborers who are framing a house. As discussed *infra*, “labor” is further defined, and, not surprisingly, embraces carpenters who frame a house. Second, “construction agent” is defined to include registered subcontractors.

The Court of Appeals’ decision reversing summary judgment was correct, and it does not conflict with any decision of this Court under RAP 13.4(b)(1). In addition, the case does not present an issue of substantial public interest requiring this Court’s determination under RAP 13.4(b)(4). Accordingly, this Court should deny Milestone’s petition for review.

II. IDENTITY OF RESPONDENT

Respondents are Francisco Guillen, Roberto Guillen, Hector Fierro, Martin Guillen, and Jose Timoteo (hereinafter the “laborers.”)

III. COUNTERSTATEMENT OF THE ISSUES

The issues raised in Milestone’s petition do not merit review under RAP 13.4(b). However, if review were accepted, the issues before this Court would be the following:

1. Whether a contract provision identifying a subcontractor as an independent contractor rather than an agent operates to prevent the subcontractor from being an RCW 60.04.011(1) “construction agent.”

2. Whether laborers employed by a registered subcontractor have a right to file chapter 60.04 RCW liens on real property to recover their unpaid wages, which is comprised of two sub-issues:

- a. Whether laborers were persons intended to be within the protection of chapter 60.04 RCW.
- b. Whether registered subcontractors are “construction agents” under chapter 60.04 RCW or, alternatively, whether registered subcontractors are “construction agents” where they have control over their part of the construction project.

3. Whether this Court’s opinion in *Williams v. Athletic Field Inc.*, 172 Wn.2d 683, 261 P.3d 109 (2011), requires courts to apply a liberal or strict canon of statutory interpretation when the plain language of a statute is unambiguous. If the answer is “yes”, or if the statutory language herein is found ambiguous, whether strict or liberal rules of interpretation apply to the particular issues before the Court, under a *Williams* analysis.

IV. COUNTERSTATEMENT OF THE CASE

This case involves a chapter 60.04 RCW laborers’ wage lien on Milestone’s real property. The laborers were employed by ABSI Builders, Inc. (“ABSI”) to perform framing work on Milestone’s real property. ABSI was a registered Washington contractor. Clerk’s Papers (CP) at 158-62 & 320.

ABSI and Milestone had a contract under which ABSI agreed to perform framing work at Milestone's apartment project. CP at 68-70 & 157. The contract defined ABSI as a subcontractor and independent contractor. CP at 68 (§ 15). The contract specified that ABSI was to "[p]rovide labor, material and equipment to frame [14] buildings." CP at 68. Paragraph 2 of the contract's terms and conditions stated:

Subcontractor Responsible for Its Work. Subcontractor shall be responsible for the design, engineering, construction details and all other aspects of its work hereunder, provided that Subcontractor shall comply with any plans, specifications and other Contract Documents.

CP at 69 (emphasis in original). ABSI was authorized to hire employees to perform the framing labor. CP at 153 & 341.¹

Paragraph 6 of the contract's terms and conditions, entitled "Liens," discusses material and labor liens:

Liens. Payment under this Agreement may be withheld until satisfactory waivers of liens, release of liens or evidence of full payment is furnished from all subcontractors, materialmen, laborers or others who might be entitled to a lien on the premises upon which work is done or materials furnished under this Agreement, for work or material furnished thereon. Builder is authorized to pay directly Subcontractor's materialmen, laborers or subcontractors . . .

¹ ABSI was prohibited from subcontracting out the framing labor without prior authorization from Milestone; ABSI did not seek authorization from Milestone to subcontract out the labor. CP at 153 & 341.

CP at 69 (emphasis in original). Milestone did not obtain lien releases from the laborers, nor did it pay the laborers directly—two options which were available to Milestone under the contract. CP at 154-56 & 342-44.

V. REASONS WHY REVIEW SHOULD BE DENIED

Milestone seeks review under RAP 13.4(b)(1), claiming that the Court of Appeals' unanimous decision is in conflict with a decision of this Court, and under RAP 13.4(b)(4), claiming that their petition involves issues of substantial public interest that need to be resolved by this Court. Neither is an appropriate basis for review.

1. The Decision Below Is Not in Conflict with Any Decision of This Court

Milestone claims the Court of Appeals' decision conflicts with prior decisions from this Court, which allegedly hold courts must apply a strict rule of statutory construction when a statute's plain language is unambiguous. Pet. at 4-6. There is no such conflict. In fact, the Court of Appeals correctly applies case law from this Court holding "the rule of strict construction applies only if a statute is ambiguous." *Guillen*, slip op. at 10. The court stated: "[n]either a liberal construction nor a strict construction may be employed to defeat the intent of the legislature, as discerned through traditional processes of statutory interpretation." *Id.* (quoting *Estate of*

Bunch v. McGraw Residential Ctr., 174 Wn.2d 425, 432-33, 275 P.3d 1119 (2012)).²

The Court of Appeals correctly found chapter 60.04 RCW to be unambiguous on the two issues before it. As to laborers' right to lien, RCW 60.04.021 states:

[A]ny person furnishing labor . . . for the improvement of real property shall have a lien upon the improvement for the contract price of labor . . . furnished at the instance of the . . . construction agent.

² The rules of statutory construction as announced by this Court dictate "where the language of the enactment is plain, unambiguous, and well understood according to its natural and ordinary sense and meaning, the enactment is not subject to judicial interpretation." *State v. Thorne*, 129 Wn.2d 736, 762-63, 921 P.2d 514 (1996). In other words, "[i]f [a] statute is unambiguous, its meaning is [to] be derived from the plain language of the statute alone." *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004) ("If the language is unambiguous, [courts] give effect to that language and that language alone because [courts] presume the legislature says what it means and means what it says."); *accord. Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002) (same).

The Court of Appeals' holding does not conflict with this Court's opinions in *Williams*, *Tsutakawa*, and *De Gooyer*. See *Williams*, 172 Wn.2d 683; *Tsutakawa v. Jumamoto*, 53 Wash. 231, 101 P. 869 (1909); *De Gooyer v. NW Trust & Sate Bank*, 130 Wash. 652, 228 P. 835 (1924). Milestone suggests that these cases stand for the proposition that lien statutes must be strictly construed even when the plain meaning of the statute is unambiguous. See Pet. at 4-6. Milestone is incorrect.

Williams and the other cases cited by Milestone involve the application of a liberal or strict construction to ambiguous statutory provisions. This Court in *Williams* applied a liberal rule of construction after it determined the lien statute at issue was susceptible to two reasonable interpretations. 172 Wn.2d at 693. At issue in *Williams* was whether the lien claimants complied with the lien form requirements under RCW 60.04.091(2). *Id.* at 691. The court concluded the statutory language was ambiguous and then proceeded to determine whether it should liberally or strictly construe the statute. *Id.* at 694. The *Williams* court noted the strict rule of construction applies when determining "whether persons or services came within the statute's protection," and the liberal rule of construction applies to parties "intended to be protected" by the statute, RCW 60.04.900. *Id.* at 696-97; see also *Tsutakawa*, 53 Wash. at 234 (similarly noting the statute must be first found ambiguous before courts construe them); *De Gooyer*, 130 Wash. at 653-54 (similarly noting the legislative intent of the statute was unclear before engaging in statutory construction).

Furthermore, “labor” is defined as “exertion of the powers of body or mind performed at the site for compensation.” RCW 60.04.011(7). Framing carpentry is the epitome of construction labor; without framers a building is a mere pile of wood.³

A “construction agent” includes “any registered or licensed contractor, registered or licensed subcontractor, architect, engineer, or other person having charge of any improvement to real property.” RCW 60.04.011(1). The issue raised in Milestone’s petition for review is whether registered subcontractors are construction agents under chapter 60.04 RCW. The Court of Appeals unanimously held that “all subcontractors that contract to work on a project” are construction agents under RCW 60.04.011(1). *Guillen*, slip op. at 8. The court relied on the plain meaning of RCW 60.04.021 and RCW 60.04.011(1), under which registered subcontractors are deemed to be “construction agents” for the limited purpose of supporting a chapter 60.04 RCW lien claim. *Guillen*, slip op. at 10. It found the language unambiguous. *Id.*⁴

³ Laborers are not only intended beneficiaries, they have 1st priority over all other lien claimants. *See* RCW 60.04.181.

⁴ Alternatively, the court held that the framing subcontractor in fact had control over the framing of the buildings and therefore met the “having charge of any improvement to real property” test under RCW 60.04.011(1), assuming *arguendo* it applied to registered subcontractors. *Guillen*, slip op. at 12.

The court correctly rejected Milestone’s request to strictly construe the lien statute because the statutory language is unambiguous. *Id.* at 10.⁵ Courts are not required to liberally or strictly construe statutes when the plain language is the statute is unambiguous. *See supra* at 6-7 & n. 2.⁶

2. Milestone’s Petition Does Not Raise Issues of Substantial Public Interest That Should Be Determined By This Court.

Petitioners fail in their efforts to find an issue of substantial public interest that should be determined by this Court under RAP 13.4(b)(4). While construction is an important industry, it does not follow that every construction dispute or chapter 60.04 RCW case is reviewable under RAP 13.4(b)(4). Milestone’s specific arguments fail. Paragraph 15 of the contract is a run-of-the-mill “independent contractor” provision.

⁵ Because of this holding, the court did not reach whether the construction agent issue was subject to strict or liberal interpretation under *Williams*, 172 Wn.2d 683 (strict interpretation limited to issues of whether persons or services come within the statutory lien; otherwise statute is to be liberally construed). The laborers contend that the “construction agent” issue—if based on ambiguous statutory language—would require a liberal construction, *i.e.*, it is not an issue of whether persons (laborers) or services (framing) were intended to fit within the protection of the lien statutes.

⁶ Milestone concedes that the Court of Appeals’ application of the last antecedent rule is “correct” and does not argue that the court’s use of the rule is in conflict with an opinion of this Court. Pet. at 9. Instead, Milestone seeks review based on a misreading of a different rule -- *ejusdem generis*. Under *ejusdem generis* “general terms appearing in a statute in connection with specific terms are to be given meaning and effect only to the extent that the general terms suggest similar items to those designated by the specific terms.” *Silverstreak, Inc. v. Dep’t of Labor & Indus.*, 159 Wn.2d 868, 882, 154 P.3d 891 (2007). Under *ejusdem generis*, the general term, “other persons having charge of any improvement to real property,” would be construed in light of the preceding specific terms, to wit: “any registered or licensed contractor, registered or licensed subcontractor, architect, engineer” RCW 60.04.011(1). A registered subcontractor is one of the specific terms and is therefore unaffected by any application of *ejusdem generis*.

Contractors, subcontractors, architects, and engineers will typically be independent contractors—not common law agents of the owner. Their acts do not subject the owner to personal liability. However, RCW 60.04.011(1) makes contractors, subcontractors, architects, and engineers the owner’s “‘construction agent’ . . . for the limited purpose of establishing the lien created by this chapter,” *i.e.*, a statutory claim against real property and not a claim directly against the owner. A contract that defines contractors, subcontractors, architects, or engineers as independent contractors in no way undercuts their status as RCW 60.04.011(1) construction agents. There is no significant issue here, much less an issue of substantial public interest.

Milestone argued below that allowing subcontractor employees and, presumably, material suppliers to lien would create an unwieldy system where an owner would need to get many downstream lien releases on large projects. *See* Br. of Resp’ts in the Court of Appeals, at 10. The Court of Appeals noted that the Milestone-ABSI contract envisioned laborer and material liens and gave Milestone the right to (a) withhold payment until satisfactory material supplier or laborer lien releases were provided, and (b) pay ABSI’s material suppliers, laborers, or subcontractors directly. *Guillen*, slip op. at 14-15. Moreover, owners who hire reputable, solvent general contractors (or subcontractors) will not be at risk, because the downstream

entity will have an obligation to keep the property lien free, either by express or implied contract terms.

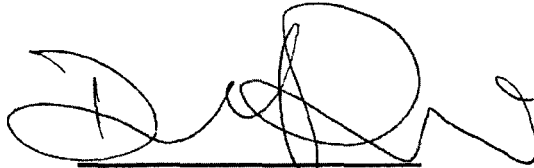
Finally, Milestone attempts to repackage its “in charge of the construction” argument in RCW 60.04.011(1) as a RAP 13.4(b)(4) issue of substantial public interest. According to Milestone only one entity—the entity in charge of “the improvement”—can be the construction agent on a project. The Court of Appeals spent considerable time showing why that argument was inconsistent with the statutory language and case law. *See Guillen*, slip op. at 12-14. Milestone’s argument is wrong on several levels and does not support review under RAP 13.4(b)(4).

The plain language of chapter 60.04 RCW allows those dealing with licensed contractors and subcontracts to lien the buildings which their materials and labor improved. It is that reliance interest that allows construction to flourish. Subcontractors, material suppliers, and laborers do not need to investigate their contracting party’s finances or upstream contracts. They know that at the very least when dealing with registered contractors and subcontractors they have lien claims against the real property to secure payment for their products and labor. Milestone’s desire for a different lien system is not an issue of substantial public interest supporting review by this Court under RAP 13.4(b)(4).

VI. CONCLUSION

The Court of Appeals' decision is not in conflict with any decision of this Court. Milestone's petition does not involve issues of substantial public interest that should be determined by this Court. For the reasons, this Court should deny Milestone's petition for review.

RESPECTFULLY SUBMITTED this 14th day of October, 2016.

A handwritten signature in black ink, appearing to be a cursive combination of the names David N. Mark and Diego Rondón Ichikawa, written over a horizontal line.

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TIMOTEO,

Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 13th of October, 2016, I e-mailed a copy of the
Answer to Petition for Review in this matter to Loren D. Combs at
ldc@vsilawgroup.com and Jennifer Combs at jbc@vsilawgroup.com.

Dated this 13th day of October, 2016.



Diego Rondon Ichikawa, WSBA No. 46814