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Division II  
State of Washington  
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NO. 53746-0-II

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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DAVID J. DOUGHERTY, an individual,

Appellant/Plaintiff,

v.

SAMANTHA R. POHLMAN, in her capacity as Personal  
Representative of the ESTATE OF RAVEN J. DOUGHERTY,

Respondent/Defendant.

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BRIEF OF RESPONDENT

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## **I. INTRODUCTION**

Estate creditor David Dougherty (“David”)<sup>1</sup> filed the underlying litigation: (1) to enforce an alleged oral promise to convey real property, (2) as payment to him, an unlicensed contractor, (3) after the death of the alleged promisor, his ex-wife, in which (4) only he, the interested claimant, testified on his behalf at trial, for work (5) that last occurred in 2008. The Estate of Raven Dougherty (the “Estate”), the alleged promisor, maintained the dead man’s statute, RCW 5.60.030. At trial, the trial court largely allowed David to testify to his acts of construction that David alleges last occurred in 2008. After David rested, the Estate moved to dismiss, pursuant to CR 41, David’s unjust enrichment and quantum meruit claims that survived to trial. The Estate sought dismissal on three alternative grounds:

1. The statute of limitations;
2. Failure to comply with the Washington Contractor’s Registration Act, RCW Chapter 18.27; and
3. Failure to introduce evidence of the benefit conveyed.

The trial court granted the Estate’s motion citing the statute of limitations. Further yet, the trial court granted the Estate’s motion even after admitting David’s demand letter to Raven which forms the basis of

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<sup>1</sup> Because of similarity of surnames, this Brief uses first names and intends no disrespect.

David's appeal. In short, this case presents the textbook application of Washington's legislatively enacted the dead man's statute. The trial court properly dismissed this action. This Court should affirm and provide finality.

## **II. COUNTERSTATEMENT OF ISSUES RELATED TO ASSIGNMENTS OF ERROR**

1. Did the trial court properly refuse David's offer of proof of alleged conversations between he and Raven under the dead man's statute and hearsay prohibition? Yes.

2. Did the trial court properly rule David's unjust enrichment and quantum meruit claims untimely when the only evidence presented at trial showed David performed the alleged work last in 2008 but only initiated litigation to recover payment in 2018? Yes.

3. Did the trial court properly refuse David's offer of evidence that the first time he and Raven disputed payment for work occurred in 2015 when Raven could have testified, if alive, she told David would not pay him years earlier? Yes.

4. Did the trial court properly refuse David's attempt to back door or admit prohibited inference testimony otherwise prohibited by the dead man's statute when offered under the guise of feelings or impressions? Yes.

5. Did the trial court properly grant the Estate's Motion to Dismiss following the close of evidence when only David testified and he failed to present material proof of evidence of his claims? Yes.

### **III. STATEMENT OF CASE**

Raven and David married in Illinois in 1993. July 31, 2019 Verbatim Report of Proceedings ("VRP") 39:12-17. Raven and David's relationship never resulted in any children. CP 496. Raven, however, came to the relationship with a child from a prior relationship, Samantha Pohlman ("Samantha").

In 2004, David petitioned to divorce Raven in their home state of Illinois. VRP 39:25-40:3. An Illinois court, in 2005, dissolved the couple's marriage and divided the couple's assets. VRP 41:13-19; CP 1. The Illinois court awarded Raven her property located at 12815 – 256<sup>th</sup> Avenue East, Buckley, Washington (the "Property") as her sole and separate property. *See* CP 1. Raven received the Property from her brother as a gift.

Most recently, in 2016, Raven and David engaged in contempt motions practice to enforce the terms of the dissolution before the 22<sup>nd</sup> Judicial Circuit for McHenry County, Illinois.<sup>2</sup> *See* CP 434-62. David's

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<sup>2</sup> The scope of the contempt proceedings became an issue raised in Motions in Limine. CP 415-29. David asked the trial court below to exclude admission of evidence for the issues raised and addressed in Illinois. CP 415-20. The trial court denied David's motion. VRP 8:18-9:16.

Petition alleged Raven failed to pay “for any and all expenses connected to the” Property, including taxes. CP 450. In her own petition, Raven alleged David failed to convey approximately \$124,000.00 in assets awarded to her in the divorce. CP 422-26, 435-438.

The McHenry County Court ultimately dismissed the cross petitions and elected not to order either party to take further action. CP 328. Of note, only David, but not Raven, who labored under a cancer diagnosis, appeared to testify in the proceeding. CP 320-21, 328.

Despite litigation in Illinois in 2016 and a hearing on the evidence in 2017, David never took action here in Washington until after Raven died. *See, e.g.*, CP 1-15, 328, 434-54.

Raven passed away on March 16, 2018. CP 2. Title records show, and David concedes, Raven owned the Property outright at the time of her death. CP 2.

Pursuant to Raven’s Last Will and Testament, the King County Superior Court appointed Samantha Personal Representative of the Estate.<sup>3</sup> CP 2.

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<sup>3</sup> The Will leaves Raven’s estate to her daughter, Samantha.

On May 16, 2018, David filed a creditor claim against the Estate. CP 9-12. David's claim asserted a demand for \$208,372.43. CP 12. David's creditor claim primarily sought reimbursement for

Building materials and supplies, and labor for the construction of the residence located on property owned by Decedent Raven J. Dougherty at 12815 265<sup>th</sup> Ave. Ct. E. in Buckley, Pierce County, Washington 98321 (the "Property").

CP 9.

The Property, which the Personal Representative valued at \$300,000.00, is the sole asset of the Estate. CP 646-50.

The Estate rejected David's creditor claim. CP 3. On August 1, 2018, David filed a Complaint to enforce his rejected creditor claim against the Estate. CP 1-7. David's Complaint alleged "Raven Dougherty was the sole owner in fee simple of" the Property. CP 2. David's Complaint also alleged the claim derived from work and materials delivered by David "from mid-2005 through 2008." CP 2.

David's Complaint asserted claims for:

1. Breach of Contract;
2. Quiet Title;
3. Promissory Estoppel;
4. Unjust Enrichment;
5. Contract Implied in Law; and

6. Contract implied in Fact.

CP 3-6.<sup>4</sup>

On September 14, 2018, the trial court dismissed David's Promissory Estoppel claim. CP 569-71.

After the trial court dismissed David's Promissory Estoppel claim, David filed a new and wholly unrelated TEDRA Petition on January 10, 2019. CP 638-50. David's TEDRA Action asserted a claim against the Estate based on a theory of a committed intimate relationship. CP 640. The trial court ultimately consolidated both David's first Complaint and the TEDRA Petition in a single action. CP 591-94, 606-09.

On February 8, 2019, the trial court dismissed David's breach of contract and quiet title claims via summary judgment. CP 373-75.

On May 31, 2019, the Estate moved to dismiss David's TEDRA Petition and claim of a committed intimate relationship. CP 625-33. After the Estate moved via summary judgment, David voluntarily dismissed his committed intimate relationship claim. CP 654-57, 740-41.

The Estate then filed a final Motion for Summary Judgment to dismiss David's claims for insurance purportedly paid on the Property. CP

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<sup>4</sup> A "contract implied in law" and "unjust enrichment" set forth the same claim. *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008).

625-33. The trial court granted the Estate's motion on June 28, 2019. CP 754-56.

In light of the motions practice, David proceeded to trial only on his claims for unjust enrichment and quantum meruit. *See* CP 497; *see also* CP 569-71, 373-75, 740-41, 754-56.

In the lead up to trial David identified only himself as a potential witness. CP 403. The Estate filed a motion in limine to exclude, or otherwise limit, David's potential testimony under the dead man's statute. CP 402-14.

The trial court orally granted the motion and prohibited David from testifying to transactions with Raven. VRP 23:8-9. However, the trial court clarified David could testify provided the testimony did not violate the dead man's statute. VRP 23:3-24:4. When asked to explain the boundaries of permitted testimony, the trial court advised, "the lawyers are just going to have to continually make objections if they think we're straying too far afield." VRP 25:3-5.

Consistent with David's pretrial filings, David called only himself to testify at trial. VRP 36:11-14. During David's testimony, the Estate raised various objections, some sustained and others overruled. However, the trial court permitted David to testify, in large part, to his alleged acts in

construction of the home on the Property. *See, e.g.*, VRP 62:16, 62:24-63:1; 70:22-24; 71:21-25.

David first testified he worked as a general contractor in Illinois since 1988. VRP 37:1-3, 38:1. Though David testified he worked in the Midwest, David never testified to, or presented evidence of, any contractor registration in Washington. *See generally*, VRP 37:1-3, 38:1.

David then testified to the contents of a journal he testified Raven wrote. VRP 49:19-25, 51:16-18. Despite testifying Raven wrote the journal, David testified he “took the journal” back to the Midwest because he owned the journal. VRP 51:1.

Following brief foundation, David moved to introduce the journal as an exhibit at trial. VRP 53:15-16. Over the Estate’s objections, including hearsay objections, the trial court admitted the journal itself. VRP 56:25-57:2. The trial court admitted the journal finding ER 804(b)(4)’s hearsay exception applied. VRP 60:22-25. Using the journal, David methodically, and the trial court permitted, David to testify to his alleged construction of the home. *See, e.g.*, VRP 62:16, 62:24-63:1; 70:22-24; 71:21-25. Again, the Estate objected but the trial court expressly permitted David to testify to his labor, and explained:

Looking back at the King versus Clodfelter case, if you read a little bit further down from where I believe defense was looking, on page 517, the court says, ‘The testimony

presented may not involve the statements and acts of the decedent. Within these guidelines a claimant may testify about the work and services he performed which benefitted the decedent without thereby testifying about a contract which may have existed between himself and the decedent for the performance of those services.’

I think that's what's going on here. We have a photograph that the witness has testified shows himself doing some labor, and so I'm going to allow him to testify about his labor.

VRP 65:11-24.

Over the Estate’s objection, David also testified he made “arrangements” and “hired” contractors to work on the home. VRP 71:21-72:20; 74:24-75:1; 78:5-7; 84:18-85:4. The trial court explained David’s work and construction with contractors constituted a “transaction[] with third parties” which David could testify to. VRP 72:18-20; 77:7-8 (“I’m going to overrule. I believe he [David] can testify as to transactions with third parties.”)

David never testified he himself paid these contractors, or how, or if, the contractors received payment. *See* VRP 71:21-72:20; 74:24-75:1; 78:5-7; 84:18-85:4.

Over the Estate’s objection, David also testified he lived at a motorhome, and the home after construction, on Raven’s Property. VRP 79:3-17.

At trial, David sought to testify he made a demand made upon Raven to convey an interest in the Property. VRP 91:10-25. In support, David testified his former lawyer, Mr. Brennan, wrote a demand letter to Raven. VRP 91:23-25; Ex. 2 (the “Brennan Letter”). The Estate objected to admission of the Brennan Letter on hearsay and dead man’s statute grounds. VRP 96:7-13. The Court admitted the letter, though excluded the substantive contents of the letter:

MR. NIEMELA: Objection, Your Honor. Hearsay to the extent he's relying on the content of the letter to see who it's sent to. He's not the author of this and doesn't have personal knowledge of it. And to the extent that we're talking about a transaction or things that he may have sent to Raven, that is a transaction under the dead man's statute.

MR. WINSHIP: It's a letter that he has personal knowledge of. He said he received a copy of it. He retained the attorney to send it on his behalf. And he's testifying to a transaction with the attorney who is acting on his behalf. And it's not being issued for the truth of the matter of the contents of the letter. It's being issued to show that it was sent.

THE COURT: I'm going to allow admission for a limited purpose. The letter will be admitted to show the date of his attorney's response such as it is. I'm not going to admit the contents necessarily. I agree that that would be hearsay and also would implicate the dead man's statute.

VRP 96:7-97:1.

David rested shortly thereafter. VRP 105:2-3.

David only offered and admitted three exhibits – (1) the journal, (2) plans for the home, and (3) the Brennan Letter. CP 511-16.

Following David's case in chief, but before presenting evidence, the Estate moved to dismiss David's claims pursuant to CR 41. VRP 105:5-8. The Estate argued three grounds for dismissal:<sup>5</sup>

1. The statute of limitations;
2. The contractor registration act; and
3. The failure to offer any evidence that David paid expenses that formed the basis of his creditor claim.

VRP 105:9-107:5.

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<sup>5</sup> At trial, the Estate first opened with the following oral motion:

Yes, Your Honor. So couple things. Number one, I think there's a statute of limitations issue. As far as we know, all of the work that was done was finished in 2008. Three-year statute of limitations. Here we are, claim was filed in 2018. So I think three years bars all of that.

Number two, we would also have the Contractor Registration Act to the extent that he wasn't a resident and he testified he wasn't residing in the house that he was constructing and he doesn't have a license for that work. We cited material in our brief that would bar that.

And number three, there has been no evidence put on regarding any taxes paid. So I think the taxes portion of the suit should also -- and we certainly don't have any copies of any invoices. I guess going back to the material, we certainly don't have any copies of any invoices or anything to support that. In fact, even the creditor claim wasn't admitted into evidence.

So I think there's no evidence for the material and no evidence for the taxes and, of course, we have the contractor registration bar.

VRP 105:9-106:4.

The trial court only reached the first basis, the statute of limitations, before dismissing David's claim. VRP 108:21-23. The evidence introduced at trial showed David's creditor claim arose, consistent with his Complaint, from work that last occurred in 2008. VRP 105:9-14. The Estate further argued nothing tolled the statute of limitations from running beginning in 2008 for David's claim brought ten (10) years later. VRP 106:8-17.

In response, the trial court suggested the David's demand letter sent in 2015 "raises an issue of [the] discovery rule." VRP 106:18-20. The Estate defended noting David only introduced evidence he made a demand upon Raven but never offered Raven's response. VRP 107:1-5. In addition, the Estate noted the Court excluded the testimonial contents of David's attorney's demand letter. VRP 106:21-107:5. David, in response, argued that his "cause of action did not accrue until [his demand] letter was issued." VRP 107:13-14. David's argument asserted the Brennan Letter came at the first time David learned Raven reputed the "oral agreement or an agreement with Raven." VRP 109:6-11.

The trial court disagreed. VRP 108:7-23. The trial court explained David's argument that he issued the demand at the first sign of disagreement necessarily implicated the dead man's statute. VRP 108:7-23. The trial court reasoned:

If I understand the argument correctly, it sounds as though Mr. Winship [David's attorney] is saying there was a belief on his client's part that there was a disagreement with Raven. And I apologize for using people's first names, but they both have the same last name and I'm not disrespecting anyone.

Unfortunately, that argument sort of depends on knowing what Raven's side of things was, and I think that quite naturally implicates the dead man's statute. Without being able to establish that there was, in fact, an agreement, I don't really have a basis for finding that there was justification for not filing within three years of the date of death or the date of completion of the house.

And so what I'm going to do is grant the motion. The dead man's statute is so limiting in this case, I don't see how you can get around that to argue that the statute of limitations should have been tolled.

VRP 108:7-23.

The trial court further developed its rationale in response to David's continued argument. VRP 109:23-110:11. The trial court explained David's "agreement-tolled-demand" argument necessarily fell within the scope of a barred transaction with Raven, the decedent:

THE COURT: *Isn't that something that Raven herself, if she were alive, could dispute? I mean, she could have said, no, I told him years ago that I wasn't going to sign a deed or whatever. I mean, couldn't she have said that in trial if she were here?*

MR. WINSHIP: *That's certainly possible.* That may not mean that he could at that point in time actually pursue a claim against her because it was the belief that he had that there was a contract which kept him from pursuing any action either at law or in equity.

THE COURT: Thank you. I don't think that changes the analysis. I think that the dead man's statute bars the testimony that we would need to determine if tolling was warranted. And so again, I will grant the motion.

VRP 109:23-110:11 (emphasis added).

#### **IV. ANALYSIS**

This Court should affirm dismissal of David's creditor claim. David failed, at trial, to provide competent evidence in support of his claims that survived to trial. The trial court below correctly refused David's offer of testimony regarding any transaction or agreement David purportedly maintained with Raven. Moreover, the trial court correctly below refused to allow David the opportunity to back door and subvert the dead man's statute through indirect evidence.

Regardless, even if David could present competent evidence at trial, the record supports dismissal on other merits. The Contractor Registration Act, RCW 18.27, *et seq.* bars recovery. Moreover, as a matter of evidence, David failed to provide evidence that he himself conferred a benefit that constituted his creditor claim. Ample reason exists to affirm the trial court.

##### **A. Standards of review.**

The trial court dismissed David's claim after resting pursuant to CR 41(b)(3). Applicable here, "If the trial court dismisses the case as a matter of law, review is de novo and the question on appeal is whether the plaintiff presented a prima facie case, viewing the evidence in the light most

favorable to the plaintiff.” *In re Dependency of Schermer*, 161 Wn.2d 927, 939–40, 169 P.3d 452, 459 (2007).

Separately, however, “the admission or refusal of evidence lies within the sound discretion of the trial court.” *Reese v. Stroh*, 128 Wn.2d 300, 310, 907 P.2d 282 (1995).

Finally, “A trial court judgment may be affirmed by any basis supported by the record.” *Clype v. State*, 61 Wn. App. 94, 98, 808 P.2d 777 (1991); see also *Bavand v. OneWest Bank*, 196 Wn. App. 813, 825, 385 P.3d 233 (2016), *as modified* (Dec. 15, 2016) (“We may affirm on any basis supported by the record whether or not the argument was made below.”).

**B. The trial court admitted the Brennan Letter but correctly refused to admit the letter for any testimonial due to hearsay and dead man’s statute objections.**

David first notes that the trial court “properly admitted the [Brennan Letter] from David’s attorney to Raven.” App. Br. at 13. However, David argues the trial court “failed to consider [the Brennan Letter] when dismissing David’s claims as untimely.” App. Br. at 13.

*1. The record below shows, contrary to David’s claims, that the trial court considered the Brennan Letter in response to the Estate’s Motion to Dismiss.*

Preliminarily, the record below shows David’s contention unmerited. The trial court, in fact, considered the Brennan Letter. See VRP 106:18-20. For example, in response to the Estate’s Motion to Dismiss, the

trial court expressly noted the Brennan Letter “sent in 2015 in December” could implicate “an issue of [the] discovery rule.” VRP 106:18-20. Thus, the record belies David’s contention now on appeal.<sup>6</sup>

2. *David’s argument on appeal actually asserts the trial court erred by refusing to consider the Brennan Letter for testimonial and substantive evidence.*

Presumably, David’s argument on appeal seemingly assigns error to the trial court’s refusal to admit the Brennan Letter for testimonial purposes. The record below confirms the trial court excluded the Brennan Letter on testimonial grounds based on hearsay and the dead man’s statute, both of which withstand scrutiny now. VRP 96:24-97:1 (“I agree that that would be hearsay and would also implicate the dead man’s statute.”).

3. *The trial court correctly considered the Brennan Letter inadmissible hearsay, thereby ending the inquiry.*

David seemingly intends to offer the Brennan Letter for the truth of the matter asserted. More specifically, David seems to argue he could admit the letter to show: (1) an agreement between he and Raven and (2) Raven first told David that she would not convey the Property to him in 2015. *See* Ex. 2, pg. 1 (Mr. Brennan writing, “Only recently, in 2015, did you inform David that you never intended to fulfill your promise to secure his interest in the property.”). Accordingly, the letter constitutes inadmissible hearsay.

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<sup>6</sup> The Estate agrees the trial court could not rely on the Brennan Letter for testimonial evidence for the reasons discussed further.

ER 802 excludes admission of hearsay. ER 801(c) defines hearsay to mean “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” A “statement” may include a “written assertion.” ER 801(a). Further, a party may not back-door admission of evidence, or bolster his testimony, by offering prior out-of-court statements. *Thomas v. French*, 99 Wn.2d 95, 103, 659 P.2d 1097 (1983); *see also Davis v. Fred's Appliance, Inc.*, 171 Wn. App. 348, 358, 287 P.3d 51 (2012) (holding trial court properly excluded letter regarding unemployment eligibility on hearsay grounds); *Patterson v. Kennewick Pub. Hosp. Dist. No. 1*, 57 Wn. App. 739, 744, 790 P.2d 195 (1990) (holding letter that purported to state when act, or delivery, could occur properly excluded).

Here, Mr. Brennan, not Mr. Dougherty, wrote the Brennan Letter. Mr. Brennan never testified at trial. Further, to the extent David intends to offer the letter to establish any terms of an agreement or when Raven first rejected his demand,<sup>7</sup> the Brennan Letter constitutes clear hearsay.<sup>8</sup> David necessarily relies on the letter to assert “the truth of the matter” that Raven

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<sup>7</sup> The Estate continues to deny Raven first rejected David’s demand in 2015.

<sup>8</sup> By rule, a witness must testify based on personal knowledge of the facts perceived by the witness. ER 602. Presumably, Mr. Brennan, whom David never called to testify, at best received his information from David (thereby also constituting double-hearsay). In any event, Mr. Brennan’s lack of personal knowledge further provides a basis to exclude any testimonial purpose of the Brennan Letter.

only told David she would not convey the Property in 2015. Accordingly, the trial court properly refused to consider the truth of the allegations set forth in the Brennan Letter and this Court should affirm the trial court.

4. Alternatively, the trial court properly refused admission of the Brennan Letter because David attempted to assert the letter to back-door the dead man's statute and introduce evidence he could not testify to.

The alternative basis for the trial court's testimonial exclusion, the dead man's statute, equally applies. "Under the dead man's statute, a 'party in interest' is not allowed 'to testify in his or her own behalf' as to any transaction or statement with the deceased." *In re Estate of Miller*, 134 Wn. App. 885, 893, 143 P.3d 315 (2006) (quoting RCW 5.60.030). The dead man's statute itself, RCW 5.60.030, reads in full:

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then **a party in interest** or to the record, shall not be admitted to testify in his or her own behalf as to any **transaction** had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall not apply to parties of record who sue or defend in a representative

or fiduciary capacity, and have no other or further interest in the action.

(Underline and bold added). “For purposes of the dead man's statute, a witness is a party in interest if he or she stands to gain or lose from the judgment.” *In re Estate of Miller*, 134 Wn. App. at 893. “The interest must be a direct and certain interest in the outcome of the proceeding.” *In re Estate of Miller*, 134 Wn. App. at 893. “To make this determination, the court asks whether the witness will gain or lose by the direct legal operation of the judgment rendered in the litigation at hand.” *In re Estate of Miller*, 134 Wn. App. at 893.

A ‘transaction’ under the dead man's statute is broadly defined as the doing or performing of some business between parties, or the management of any affair.” *Estate of Lennon v. Lennon*, 108 Wn. App. 167, 174, 29 P.3d 1258, 1263 (2001), *as amended on denial of reconsideration* (Oct. 2, 2001) (quotes omitted). “The test of a ‘transaction’ is whether the deceased, if living, could contradict the witness of his own knowledge.” *Estate of Lennon*, 108 Wn. App. at 174; *see also In re Shaughnessy's Estate*, 97 Wn.2d 652, 656, 648 P.2d 427, 429 (1982) (“It has often been said that the test of a transaction with decedent is whether the decedent, if living, could contradict the witness of his own knowledge.”).

David clearly falls within the scope of the dead man’s statute. David “stands to gain or lose from the judgment” that he seeks against the Estate for allegedly unpaid labor and materials. *In re Estate of Miller*, 134 Wn. App. at 893. Moreover, discussions regarding: (1) if, or (2) when, David and Raven discussed payment for the labor and materials clearly falls within the scope of a “transaction.” The trial court correctly understood that Raven could contradict David’s self-serving statement that he only first demanded payment in 2015. VRP 109:23-110:2 (trial court hypothesizing that Raven could testify she told David “years ago that [she] wasn’t going to sign a deed or whatever”). Therefore, the dead man’s statute clearly bars admission of any testimony of demands, or rejection of demands, made and particularly the first date of those demands.

5. *Additionally, the record exception to the dead man’s statute that David argues on appeal cannot apply to a self-serving demand letter generated years after the alleged transaction.*

Even if David could overcome the hearsay and substantive dead man’s statute objections, David’s claim still fails. Under developed case law, the document exception to the dead man’s statute remains limited to introduction of: (1) “records kept in the ordinary course of business” and (2) “documents written or executed by the deceased.” *Erickson v. Robert F. Kerr, M.D., P.S., Inc.*, 125 Wn.2d 183, 188, 883 P.2d 313 (1994).

“To qualify for admission under the business records exception, records must be kept in the usual course of business, and hence in no manner self-serving.” *Erickson*, 125 Wn.2d at 189 (quotes removed) (holding contemporaneous medical records admissible).

Moreover, even when properly admitted under the documentary exception, the dead man’s statute “may limit testimony about the documents.” *Thor v. McDearmid*, 63 Wn. App. 193, 202, 817 P.2d 1380 (1991); *see also Kellar v. Estate of Kellar*, 172 Wn. App. 562, 575, 291 P.3d 906 (2012) (“Testimony regarding the intended meaning of those documents may, however, be prohibited.”); *Laue v. Estate of Elder*, 106 Wn. App. 699, 706, 25 P.3d 1032 (2001), *as amended* (Aug. 16, 2001) (“RCW 5.60.030 does not bar documentary evidence although it may limit testimony about the documents.”).

In the seminal case, *Wildman v. Taylor*, the Court of Appeals addressed whether the dead man’s statute barred introduction of: (1) leases and bills of sale and (2) letters, all executed by the decedent. *Wildman v. Taylor*, 46 Wn. App. 546, 550, 731 P.2d 541 (1987). The *Wildman* Court began its analysis citing the purpose and scope of the dead man’s statute:

We should not forget that the statute interposes no obstacle to the establishment of a claim based upon a written contract and under present day conditions, it is probably true that the vast majority of *actual good-faith contracts and business*

transactions are evidenced by some writing or memorandum.

*Wildman*, 46 Wn. App. at 550 (emphasis added; citations and quotes omitted). Turning to the heart of its analysis, the *Wildman* Court explained its holding and rule limiting introduction of written records:

We hold RCW 5.60.030 is inapplicable to the introduction of written documentation, *executed by the deceased*, of a transaction or statement by the deceased. The written lease agreements and subsequent letter from Mr. Eastcott to Mr. Wildman are admissible under RCW 5.60.030. *This does not mean that Mr. Wildman will be permitted to testify about the meaning of the lease provisions or the letter.* Such testimony by Mr. Wildman would be testimony on behalf of himself as to a transaction with or statement to or by the deceased and would violate the statute. Not all testimony by Mr. Wildman will be inadmissible, however. *If there is an adequate foundation laid, he may testify that he received the letter and identify Mr. Eastcott's signature on the letter.*

*Wildman*, 46 Wn. App. at 553-54 (emphasis added).

In this case, even if David sought to avail himself of the document exception to the dead man's statute, his claim still fails. David's attorney, Mr. Brennan, not Raven, wrote the Brennan Letter. Thus, the second prong of the document exception – written or executed by the decedent, cannot apply.

Moreover, the Brennan Letter falls outside of the objective ordinary course of business exception. The Brennan Letter appears wholly different from the objective medical records permitted in *Erickson, supra*, or lease in

*Wildman, supra*. To the contrary, the Brennan Letter – a demand letter – necessarily arose after the alleged transaction which the letter purports to detail. Further, the one-sided demand letter, which portrays only David’s narrative of events, clearly appears “self-serving” – or the documents the dead man’s statute seeks to exclude. *Erickson*, 125 Wn.2d at 189. Additionally, even if admitted, David could not testify to the meaning or contents of the document. *Thor*, 63 Wn. App. at 202. Accordingly, even if David could overcome the hearsay and evidentiary objections, he cannot avail himself of the dead man’s statute record exception. The trial court properly refused to admit the Brennan Letter for evidentiary purposes and the truth of the matters asserted therein.

C. **David cannot rely on the feelings and impressions exception to the dead man’s statute to backdoor and testify to a prohibited transaction.**

David next argues the trial court excluded testimony otherwise admissible under the “feelings and impressions” exception to the dead man’s statute. App. Br. at 15. This argument fails, however, because David merely asserts the same “back door” and “impressions” argument Washington appellate courts reject.

Washington Courts preclude a party from testifying regarding acts or feelings that tend to establish “what the underlying transaction was.” *In re Estate of Miller*, 134 Wn. App. 885, 892, 143 P.3d 315 (2006); *see also*

*Martin v. Shaen*, 26 Wn.2d 346, 353, 173 P.2d 968 (1946) (“an adversely interested party cannot testify indirectly to that to which he is prohibited from testifying directly, and thereby create an inference as to what did or did not transpire between himself and the deceased person”); *Lasher v. Univ. of Washington*, 91 Wn. App. 165, 169, 957 P.2d 229 (1998) (in accord).

The Court of Appeals reversed a trial court’s admission of testimony in *Lappin v. Lucurell*. *Lappin v. Lucurell*, 13 Wn. App. 277, 291, 534 P.2d 1038 (1975). There, the Estate’s administrator brought an action to recover money given to the defendants from the decedent. *Lappin*, 13 Wn. App. at 291. At trial, the court instructed parties to limit testimony according to the dead man’s statute. *Lappin*, 13 Wn. App. at 290. The defendant nevertheless testified, among other statements:

Q: (By Mr. Mertel) Limit your response, what was your impression of the giving of the money to you when it was given to you in Portland?

A: My impression was that it was a gift and if I didn't have that impression I wouldn't be here right now.

*Lappin*, 13 Wn. App. at 290. The *Lappin* Court reversed the trial court’s admission of this testimony, explaining:

Such testimony does not come within the ‘feelings and impressions’ exception to the deadman's statute declared by *Jacobs v. Brock*, *Supra*. It comes squarely within the prohibition of the statute. As held in *Martin v. Shaen*, 26

Wn.2d 346, 353, 173 P.2d 968 (1946) with reference to the deadman's statute:

The rule is well settled that, under statutes like Rem.Rev.Stat., s 1211, **An adversely interested party cannot testify indirectly to that to which he is prohibited from testifying directly, and thereby create an inference as to what did or did not transpire between himself and the deceased person.**

*Lappin*, 13 Wn. App. at 291 (emphasis added).

In *In re Estate of Miller*, the Court of Appeals also reversed a trial court's admission of statements under the "feelings and impressions exception to the dead man's statute." *Estate of Miller*, 134 Wn. App. at 889. In a dispute over whether payments to a decedent arose from loans or gifts, counsel asked an interested witness, "what was our impression of the gifting of the money to you when it was given to you in Portland." *Estate of Miller*, 134 Wn. App. at 892 (italics removed). The witness creditor responded, and testified, "that it was her impression that the money she paid to [to the decedent] was given as loans." *Estate of Miller*, 134 Wn. App. at 889. The *Miller* Court reversed the trial court stating the creditor's "impression testimony made it obvious that she was involved in loan transactions with [the decedent]." *Estate of Miller*, 134 Wn. App. at 892.

Again, in 2012, the Court of Appeals affirmed the trial court's exclusion of statements by the wife concerning her relationship with her deceased husband. *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 576, 291

P.3d 906 (2012). The wife argued her statements fell within the “own acts,” “own impressions,” and “documents exception.” *Kellar*, 172 wn. App. at 576-577. The *Kellar* Court rejected each argument in turn noting the allegations “are statements of what [the decedent] said, and [the decedent] could rebut them if alive.” *Kellar*, 172 wn. App. at 576. The court further rejected arguments concerning “impressions” because the offending declaration referenced specific transactions instead of iterating simple impressions. *Kellar*, 172 wn. App. at 577.

On appeal, David complains the trial court erred in sustaining the Estate’s dead man’s statute objection to two specific questions. For reference, those two questions include:

1. “I want to ask you in all candor, why did you build the Buckley house?”
2. “At some point in your life did you discover that you were not going to be compensated for building the house?”

VRP 90:14-15, 91:2-3.<sup>9</sup>

Preliminarily, neither question asked David to describe his feelings or impressions. To the contrary, these questions clearly invited David to back-door the dead man’s statute. These questions called David to testify

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<sup>9</sup> The later question also violates the prohibition against leading questions on direct examination. CR 611(c) (“Leading questions should not be used on the direct examination of a witness”).

to terms of an alleged oral agreement to convey real property. However, the dead man's statute clearly prohibits David from testifying to the existence of a contract, or other "transaction," with Raven even indirectly.

Moreover, David now on appeal fails to explain what alternative, relevant, admissible, testimony he sought to provide the Court. How David felt about lack of compensation bears no relevance to the operative statute of limitations inquiry that began to run, at the latest, in 2008.

Indeed, David seemingly concedes these questions called for prohibited "transaction" testimony. David asserts "the lack of compensation" called for in the questioning, "could have been established through... the letter written by his attorney." App. Br. at 16. Thus, David insinuates this line of questioning sought only to assert the narrative asserted in the Brennan Letter that the trial court properly excluded.

**D. Neither case cited by David in support of his argument require the trial court to permit David to back-door the dead man's statute.**

To save the back door, leading questions, David cites two cases that purportedly stand for the proposition he could answer the questions complained of above.

First, David cites *King v. Clodfelter*, 10 Wn. App. 514, 518 P.2d 206 (1974) for the proposition that an interested party may "testify to work performed on behalf of a decedent." App. Br. at 14. First, *King, supra*,

never addressed the feelings or impressions analysis. Therefore, *King, supra*, holds no bearing to David’s assignments of error now on appeal.

Second, the trial court knew the holding of *King, supra*, and allowed David to testify regarding his work performed. VRP 65:11-24 (quoting *King*, 10 Wn. App. at 517 and ruling, “I’m going to allow [David] to testify about his labor”). The trial court clearly complied with the holding in *King, supra*, on which David now relies and permitted David to testify about his labor.<sup>10</sup>

Next, David relies on *Jacobs v. Brock*, 73 Wn.2d 234, 437 P.2d 920 (1968). In *Jacobs*, the trial court permitted an interested party to testify that, he “was always given the impression we were getting the lake property for looking after [the decedent].” *Jacobs*, 73 Wn.2d at 237.

First, *Jacobs, supra*, now appears an anomaly in light of more recent case law which ascribe tight limitations to the *Jacobs*’ decision. *Lappin*, 13 Wn. App. at 291; *In re Estate of Miller*, 134 Wn. App. at 892; *Kellar*, 172 Wn. App. at 562.

Second, nothing in the *Jacobs*’ decision indicates the Estate objected to the testimony on grounds it sought to “back-door” the dead man’s statute. *See generally, Jacobs*, 73 Wn.2d at 237-38. More recent decisions make

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<sup>10</sup> David also never testified to his hourly rate for labor or how many hours he purportedly worked.

clear that even despite the feelings and impressions exception demonstrated in *Jacobs, supra*, an interested party may not circumvent the dead man’s statute. See *Kellar*, 172 Wn. App. at 574-75 (citing *Jacobs*, 73 Wn.2d at 237-38 but stating “an interested party may testify as to her own feelings or impressions, so long as they do not concern a specific transaction or reveal a statement made by the decedent”) (emphasis added).

Third, in *Jacobs*, the decedent made statements concerning compensation at issue to third persons not within the dead man’s statute’s bar. *Jacobs*, 73 Wn.2d at 238 (“these statements made by Dr. Brock were not barred by RCW 5.60.030 for the reason that they were made to third persons”). In contrast here, David – and David only – sought to introduce the offending evidence only through his testimony.

Fourth, procedurally, the *Jacobs*’ Court affirmed the trial court’s admission of the statements under an abuse of discretion standard. *Jacobs*, 73 Wn.2d at 238. This Court should, therefore, likewise defer to the trial court’s discretion here in refusing to admit the evidence.

Finally, explained above, David’s feelings or impressions bore no relevance to David’s unjust enrichment or quantum meruit claims. Unjust enrichment only concerns itself with a benefit conferred, not necessarily a reason, agreement, or why enrichment occurred. *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008) (unjust enrichment considers “value

of the benefit... absent any contractual relationship”). Therefore, the answer to “why did you build the Buckley house” carries no probative value. VRP 90:14-15 (emphasis added).

In contrast, quantum meruit grounds itself in contract, or a “request for work” or agreement among the parties. *Young*, 164 Wn.2d at 486. Thus, “why did you build the Buckley house” in regards to quantum meruit only bears relevance if answered with, “because Raven asked me to” or other request for work by Raven. VRP 90:14-15. This hypothetical response about Raven’s request for work or other agreement clearly falls within the scope of a prohibited “transaction.” *Estate of Lennon v. Lennon*, 108 Wn. App. 167, 174, 29 P.3d 1258, 1263 (2001), *as amended on denial of reconsideration* (Oct. 2, 2001) (“A ‘transaction’ under the deadman’s statute is broadly defined as the doing or performing of some business between parties, or the management of any affair.”) (Quotes omitted). In sum, any relevant response to the questions posed necessarily invaded and backdoored the dead man’s statute.

E. **Even if David could testify under feelings and impressions, as a matter of law, tolling will not apply to unjust enrichment claims.**

David’s entire argument on appeal further fails because it assumes David could wait to bring his claim generally until 2018 for work last

performed in 2008. David's argument incorrectly asserts he could toll the statute of limitations for his unjust enrichment claim.

As a matter of law, claims for unjust enrichment and quantum meruit carry a three-year statute of limitations. RCW 4.16.080(3); *see also Davenport v. Washington Educ. Ass'n*, 147 Wn. App. 704, 737, 197 P.3d 686 (2008) (“the statute of limitations applicable to a common law cause of action for unjust enrichment... is three years”); *Puget Sound Alumni of Kappa Sigma, Inc. v. City of Seattle*, 70 Wn.2d 222, 231, 422 P.2d 799 (1967) (three-year statute of limitations on implied contracts).

“[A] cause of action accrues and the statute of limitations begins to run when a party has the right to apply to a court for relief.” *Eckert v. Skagit Corp.*, 20 Wn. App. 849, 851, 583 P.2d 1239 (1978); *see also Schreiner Farms, Inc. v. Am. Tower, Inc.*, 173 Wn. App. 154, 160, 293 P.3d 407 (2013) (“a general breach of contract claim accrues on the date of the breach, not discovery of the breach”); *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 567, 146 P.3d 423 (2006) (stating Supreme Court “clearly rejected a discovery rule approach to the contract action, just as this court had in earlier cases, adding that the fact that damages did not occur until later did not postpone running of the limitations period”).<sup>11</sup>

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<sup>11</sup> In *1000 Virginia Limited Partnership*, the Supreme Court held the discovery rule only applied to those cases which the Legislature or Court expressly extended the

In *Eckert*, the plaintiff developed a device, and eighteen (18) years before filing suit, the defendant began using the device without payment to the plaintiff. *Eckert*, 20 Wn. App. at 850. The plaintiff filed suit claiming the use unjustly enriched the defendant. *Eckert*, 20 Wn. App. at 850. The *Eckert* Court denied relief because the plaintiff accrued the right to recover for the defendant's use more than three years before filing the litigation. *Eckert*, 20 Wn. App. at 851. The *Eckert* Court explained:

Generally, a cause of action accrues and the statute of limitations begins to run when a party has the right to apply to a court for relief. *Haslund v. Seattle*, 86 Wn.2d 607, 547 P.2d 1221 (1976). An action for unjust enrichment lies in a promise implied by law that one will render to the person entitled thereto that which in equity and good conscience belongs to that person. *Hedin v. Roberts*, 16 Wn. App. 740, 559 P.2d 1001 (1977). The promise to pay, implied by law, is the promise that was broken. **While the record does not reflect the precise time of the "breach," it is clear that the fact that Eckert had not been compensated was susceptible of proof during the first 3 years of Skagit's use of Eckert's invention. The cause of action fully matured at that time.** More than 3 years passed between the breach and the commencement of this lawsuit.

*Eckert*, 20 Wn. App. at 851 (emphasis added).

Applied here, David's cause of action – at the latest – ran in 2011.

David's allegations and evidence presented at trial demonstrate he last

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doctrine to. *1000 Virginia Ltd. P'ship.*, 158 Wn.2d at 567. The Supreme Court seemingly never extended the discovery rule to unjust enrichment or quantum meruit claims. See *1000 Virginia Ltd. P'ship.*, 158 Wn.2d at 567 (discussing lower court discussions of extension of discovery rule to tort claims, implied warranty of habitability, and discharge of pollutants).

completed work on the home in 2008. *See* CP at 2 (“From mid-2005 through 2008... Plaintiff invested substantial expertise, time, labor and personal funds to build a house on the Property.”); *see further*, Ex. 109 (Bates P-0193-94) (last journal entries describing construction from February 2007). Thus, like the plaintiff in *Eckert, supra*, David could have brought his claim for unjust enrichment from “mid-2005 through 2008” when he allegedly performed the uncompensated work.<sup>12</sup> CP 2. *Eckert, supra*, squarely controls and demonstrates the Estate need not prove “the precise time of the ‘breach.’” *Eckert*, 20 Wn. App. at 851. Accordingly, the *Eckert* decision obviates David’s tolling and discovery arguments.<sup>13</sup>

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<sup>12</sup> Though David primarily relies upon unjust enrichment, the same analysis applies under a contract/quantum meruit analysis. *Young v. Young*, 164 Wn.2d 477, 486, 191 P.3d 1258 (2008) (“‘quantum meruit’ is founded in the law of contracts, a legally significant distinction”). Assuming David could testify to any terms of “agreement” in light of the dead man’s statute, that agreement necessarily implied Raven agreed to pay David for the requested work. When David purportedly finished work in 2008, yet went unpaid, his claim necessarily accrued. *Schreiner Farms, Inc.*, 173 Wn. App. at 160. Moreover, even if the discovery rule could apply, David certainly knew in 2008 whether Raven paid him or not. Additionally, even if David could testify the agreement required payment years in the future, such “agreement” also violates the statute of frauds. RCW 19.36.010.

<sup>13</sup> Alternatively, even if David argued only repudiation itself started the proverbial clock, David’s arguments still fail. What Raven said to David constitutes both inadmissible hearsay and violates the dead man’s statute. *See* Karl Tegland, *Admissions by Party-Opponent, General Considerations*, 5B WASH. PRAC., EVIDENCE LAW AND PRACTICE § 801.34 (6th ed.) (“Technically, an admission by a predecessor in interest (the decedent) is not admissible against a successor in interest (the estate).”). In fact, David conceded these grounds. VRP 54:25-55:7 (discussing change to federal rules and privity with decedent); VRP 110:3 (agreeing Raven could testify and rebut when David first demanded payment).

F. **Even if David could establish the elements of a claim, evidentiary prohibitions notwithstanding, David’s claim fails due to the prohibition on payment to unlicensed contractors.**

Below, the Estate also urged the trial court to dismiss David’s claim based upon the Contractors Registration Act, RCW 18.27 *et seq.* (the “CRA”).<sup>14</sup> VRP 105:15-19. David failed to plead and prove a valid contractor registration at the time he allegedly constructed the home for which he now seeks reimbursement.

The plain language of the CRA bars persons who engage in the practice of unlicensed contracting from financial recovery. RCW 18.27.080 plainly 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.

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Thus, like the trial court correctly reasoned, the rules of evidence preclude David from asserting any basis to toll an applicable statute of limitations via repudiation.

<sup>14</sup> An appellate court may affirm the trial court on any basis that the record supports. *Bavand*, 196 Wn. App. at 825.

RCW 18.27.080.<sup>15</sup> As a matter of law, “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 v. Parker*, 110 Wn. App. 561, 571, 42 P.3d 980 (2002). “The bar to recovery for unregistered contractors **extends to alternative remedies such as unjust enrichment.**” *Bort*, 110 Wn. App. at 571 (emphasis added).

The definition of “contractor” used with the CRA broadly 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

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<sup>15</sup> Washington law contains multiple bars on recovery absent proper registration. For example, a person engaged in the unauthorized practice of law may not recover for work performed. *Marcussen v. Greenwood*, 54 Wn.2d 136, 138, 338 P.2d 133 (1959). An additional example, among others, a person who fails to obtain a real estate license cannot recover for work performed. *Springer v. Rosauer*, 31 Wn. App. 418, 422, 641 P.2d 1216, 1218 (1982) (“It necessarily follows that Mr. Springer's failure to allege he was a licensed real estate broker is a bar to his claim for compensation under RCW 18.85.100.”).

RCW 18.27.010(1)(a). The definition of “contractor” also extends to those who perform work and repairs for investment purposes. *See* RCW 18.27.010(1)(c).

Washington appellate courts routinely and repeatedly uphold RCW 18.27.080’s bar on recovery. For instance, in *Vedder v. Spellman*, the Supreme Court held a contractor, even one who “did a masterful job and invested a great deal of time and money in the work” cannot recover absent a valid contractor registration. *Vedder v. Spellman*, 78 Wn.2d 834, 838, 480 P.2d 207 (1971).

In this case, the thrust of David’s claim arises from work that falls within the definition of a “contractor” defined by the CRA. To quote RCW 18.27.010(1)(a), David’s creditor claim demands reimbursement for labor and expenses to “construct... improve, develop... any building... or improvement attached to real estate.” *See* RCW 18.27.010(1)(a) (defining “Contractor”). Moreover, David’s creditor claim unabashedly seeks recovery for “building materials and supplies, and labor for the construction of the residence located on” the Property. CP 9. Because David falls within the Definition of a “contractor,” RCW 18.27.080 requires David provide a valid contractor registration before he may seek any recovery for contracting work. David failed to plead and prove he holds a Washington

contractor's registration at trial. Therefore, this Court may affirm dismissal of David's claim on this alternative basis.

**G. David cannot prove any exemption to the CRA.**

In his trial brief, David asserted he fell within the exception set forth in RCW 18.27.090(12) – work on a personal residence.<sup>16</sup> CP 502-05. RCW 18.27.090(12) exempts

Any person working on his or her own property, whether occupied by him or her or not, and any person working on his or her personal residence, whether owned by him or her or not but this exemption shall not apply to any person who performs the activities of a contractor on his or her own property for the purpose of selling, demolishing, or leasing the property.

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<sup>16</sup> David previously argued in this litigation that he fell outside the definition of a “contractor” used in RCW 18.27.010(1)(a) because he never worked in the pursuit of an independent business. If raised, this argument fails for three, clear, reasons.

First, David filed his creditor claim against the Estate for labor and materials. CP 9. David's claim to recover “materials,” “supplies,” and “labor” mirrors any other claim brought by a contractor “in the pursuit of an independent business.” RCW 18.27.010(1)(a).

Second, David testified he works as a contractor in the Midwest. David further testified he built homes – “approximately 30” – for profit in the Midwest. VRP 38:2-8. Stated otherwise, David actually builds homes for a living, or his “independent business,” and asserts a creditor claim for purportedly building the home here. RCW 18.27.010(1)(a).

Third, our Supreme Court previously 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). Thus, David's performance and subsequent demand for payment makes him an individual that perform contracting work in the pursuit of independent business.

Broken into component parts, the statute delineates between work:

(1) on “his or her own property, whether occupied by him or not” and

(2) work on “his or her personal residence, whether owned by him.”

RCW 18.27.090(12).

To the extent David relies on RCW 18.27.090(12) to save his claim, the argument fails for three clear reasons.

1. The trial court dismissed David’s claim for quiet title; therefore, he necessarily worked on the property of another.

First, David himself pled in his Complaint that Raven “was the sole owner in fee simple of” the Property. CP 2. Moreover, the trial court dismissed David’s claim for quiet title (and promissory estoppel and committed intimate relationship). CP 373-75, 740-41. Thus, the trial court necessarily rejected David’s claim he held “a valid subsisting interest in [the] real property, and a right to the possession thereof.” RCW 7.28.010 (stating statutory elements of quiet title action). Therefore, David clearly performed work on the residence of another and RCW 18.27.090(12) – and specifically the “occupied” “own property” prong cannot apply.

2. By use of the word “residence” the statute only applies to and exempts work on an existing structure, not wholesale construction.

Second, the other prong of RCW 18.27.090(12) limits the exception to “work[] on his or her personal residence.” RCW 18.27.090(12)

(emphasis added). The statute operates to protect the tenant performing work on an existing structure, not wholesale construction. *See, e.g., Andries v. Covey*, 128 Wn. App. 546, 548, 113 P.3d 483 (2005) (holding tenants who “[i]n exchange for reduced rent... agreed to make some improvements to the home... meant to increase the sale value” exempt under RCW 18.27.090(12)) (emphasis added); *see also Frank v. Fischer*, 108 Wn.2d 468, 470, 739 P.2d 1145 (1987) (applying RCW 18.27.080 bar and denying recovery to unlicensed contractor who worked to “build a personal residence” for owner on the owner’s land). To this end, by use of the word “residence,” the statute suggests work on an existing structure not wholesale construction.<sup>17</sup>

This analysis further finds support if one applies a plain language, dictionary definition, analysis. “In the absence of a statutory definition, [courts] will give the term its plain and ordinary meaning ascertained from a standard dictionary.” *In re Marriage of Ruff & Worthley*, 198 Wn. App. 419, 425, 393 P.3d 859 (2017) (quotes omitted).

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<sup>17</sup> At trial, David never testified or introduced evidence of a leasehold interest, or other possessory interest in the Property.

Black's Law Dictionary defines "residence" to mean, "A house or other fixed abode; a dwelling." RESIDENCE, Black's Law Dictionary (11th ed. 2019).

One cannot reside, much less personally reside, in a nonexistent home. Therefore, David's purported construction never occurred on his "personal residence" sufficient to avail himself of RCW 18.27.090(12)'s exemption.<sup>18</sup>

3. *Factually, at trial, David testified he lived in a motor home on the property, not in the home which he seeks to claim as his "personal residence" per RCW 18.27.090(12).*

Finally, at trial, David testified he lived in a trailer on the property, not the structure for which he now seeks reimbursement. David testified:

Q. And during the time that you spent working on this project, where did you reside?

A. *In the motor home* on the property.

VRP 79:3-5 (emphasis added). Factually, therefore, and related to the arguments above, David never worked on his "personal residence" during construction. According to David's testimony, David's "personal residence" was the motor home, not the stick built structure that underlies his creditor claim.

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<sup>18</sup> Of course, a homeowner that builds from scratch on his own land, like in *Frank, supra*, falls under the protections of the first prong, "own property," exemption of RCW 18.27.090.

**H. David failed to provide evidence that he actually conferred an uncompensated benefit.**

Finally, the Estate also moved to dismiss on the basis David failed to carry his evidentiary burden. VRP 105:20-106:1.

“Washington law states the measure of recovery for unjust enrichment to a faultless claimant for the claimant's improvement to land is measured in one of two ways.” *Young*, 164 Wn.2d at 487. “It may be measured by the amount which the benefit conferred would have cost the defendant had it obtained the benefit from some other person in the plaintiff's position.” *Young*, 164 Wn.2d at 487 (quotes removed). “Alternatively, it may be measured by the extent to which the other party's property has been increased in value or his other interests advanced.” *Young*, 164 Wn.2d at 487 (quotes removed).

In a successful claim for quantum meruit, “the measure of damages is the costs incurred by the performing party expressed as the cost of labor, materials and a reasonable allowance for profit, not the enhanced value to the estate of the party receiving performance.” *Modern Builders, Inc. of Tacoma v. Manke*, 27 Wn. App. 86, 95 n. 3, 615 P.2d 1332 (1980).

In this case, David never introduced any evidence, testimonial or documentary, of taxes paid on the Property. David, therefore, clearly failed to carry his evidentiary burden in regards to the taxes.

Moreover, David failed to offer and prove the value of any services provided, increase in value of property or similar directly attributable to him.<sup>19</sup> David, despite testimony that he arranged and coordinated contractors, failed to show any evidence of his own personal payment to these contractors or materialmen. Moreover, David failed to introduce at trial any invoices generally for materials and labor used in construction. Because David failed to prove he paid for any work and conferred a benefit upon Raven, David's claim necessarily fails for this alternative basis.

#### **V. CONCLUSION**

This Court should end the litigation between David and the estate of his ex-spouse, Raven, and affirm the trial court for the reasons set forth herein.

DATED this 10th day of January, 2020.

*/s/ Matthew C. Niemela*

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<sup>19</sup> Equally plausible, Raven already paid for the labor, contractors, and materials that David now seeks to recover through his creditor claim.

## DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington, that on the below date she caused to be delivered to the Court and to the persons below, the attached document via the Washington State Appellate Court's Portal:

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DATED this 10th day of January, 2020.

/s/ Teri Parr  
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**January 10, 2020 - 2:42 PM**

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