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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 319172

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RUSSELL TAYLOR and DIANE TAYLOR,

Appellants,

v.

MATTHEW S. CALENE d/b/a
American Sprinkler and Landscape, and
CBIC BOND ACCOUNT NUMBER FB4371

Defendant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
 Table of Cases iii
 Statutes and Other Authorities v

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 4
 Assignments of Error 4
 Issues Presented for Review 4

III. STATEMENT OF THE CASE AND FACTS 5

IV. SUMMARY OF ARGUMENT 12

V. ARGUMENT 14

 A) The defendant violated The Contractor Registration Act, RCW 18.27, which controls in this case, and which imposes requirements on contractors to be registered and have a valid bond and insurance. . 15

 B) The trial court erred in requiring Plaintiffs to commence their action against Defendant according to RCW 18.27.040 in order to sustain their Consumer Protection Act (CPA) claim because commencement of an action under RCW 18.27.040 is only required when a plaintiff seeks an action against a contractor's bond and not a requirement for pursuit of actions against a contractor. 17

 C) The trial court erred in holding against Plaintiffs' CPA claim because it placed an erroneous requirement on

the Plaintiff and failed to apply RCW 18.27.350 as a *per se* violation of the CPA. 21

D) The trial court erred in determining that there was not a prevailing party, and therefore no award of attorney fees was made. 25

E) The trial court’s findings are not supported by substantial evidence and the conclusions are not supported by the findings and by the law. 26

VI. CONCLUSION 37

TABLE OF AUTHORITIES

TABLE OF CASES

<i>Ahten v. Barnes</i> , 158 Wash.App. 343, 242 P.3d 35, (2010)	18
<i>Anderson v. Valley Quality Homes, Inc.</i> , 84 Wash.App. 511, 928 P.2d 1143, (1997)	22
<i>Arnold v. Sanstol</i> , 43 Wash.2d 94, 260 P.2d 327 (1953)	27
<i>Burbo v Douglass</i> , 125 Wn.App. 684, 106 P.3d 258 (2005)	30
<i>Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.</i> , 159 Wash.2d 292, 149 p.3d 666, (2006)	19
<i>Fifteen -O-One Fourth Ave. Ltd. Partnership v Dept. of Revenue</i> , 49 Wash. App. 300, 742 P.2d 747 (1987)	19-20
<i>Holland v Boeing Co.</i> , 90 Wn.2d 384, 583 P.2d 621 (1978)	27
<i>HomeStreet, Inc. v. State Dept. of Revenue</i> , 166 Wash.2d 444, 210 P.3d 297, (2009)	19
<i>In re the Marriage of Sager</i> , 71 Wn. App. 855, 263 P.2d 106 (1993)	19
<i>Kelleher v Ephrata School Dist. No. 165</i> , 56 Wn.2d 866, 355 P.2d 989 (1960)	19
<i>Legacy Roofing Inc. v Dep't of Labor and Indus.</i> , 136 Wash. App. 1, 146 P.3d 366 (2005)	27

<i>Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces,</i> 36 Wash.App. 480, 674 P.2d 1271 (1984)	18
<i>Nordstrom Credit, Inc. V Dep't of Revenue,</i> 120 Wn.2d 935, 845 P.2d 1331 (1993)	15
<i>Ridgeview Properties v Starbuck,</i> 96 Wn.2d 716, 638 P.2d 1231 (1982)	27
<i>Saviano v. Westport Amusements, Inc.,</i> 144 Wn.App. 72, 180 P.3d 874 (2008)	27
<i>Soltero v Wimer,</i> 159 Wn.2d 428, 150 P.3d 552 (2007)	14
<i>State v. Roggenkamp,</i> 153 Wash.2d 614, 106 P.3d 196, (2005)	21
<i>Story v Shelter Bay Company,</i> 52 Wn. App. 334, 760 P.2d 368 (1988)	27
<i>Subcontractors and Suppliers Collection Services v. McConnachie,</i> 106 Wash.App. 738, 24 P.3d 1112 (2001)	18
<i>Tex Enterprises, Inc. V Brockway Standard, Inc.,</i> 149 Wn.2d 204, 66 P.3d (2003)	30
<i>Thompson v Greys Harbor Community Hospital,</i> 36 Wn.App. 300, 675 P.2d 239 (1983)	28

STATUTES AND OTHER AUTHORITY

33 Wa. Prac. 16:4 (2012)	30
RAP 9.2(b)	27
RCW 4.84	25
RCW 18.27	4, 12, 15, 22, 23, 34, 35, 6
RCW 18.27.005	15, 16
RCW 18.27.010	15
RCW 18.27.020	15, 23, 25, 35
RCW 18.27.030	26
RCW 18.27.040	3, 12, 16, 17, 18, 20, 21, 22, 25, 26, 29, 33, 34, 36
RCW 18.27.050	16, 26
RCW 18.27.080	13, 26, 33
RCW 18.27.140	12, 15
RCW 18.27.200	35
RCW 18.27.350	13, 16, 20, 21, 22, 23, 25, 34, 35
RCW 18.27.390	16
RCW 19.86	4, 20
RCW 62A.2-313, -318	30

INTRODUCTION

Matthew Calene was a registered and bonded contractor. He started working with sprinkler systems and landscaping in 2002, and expanded his business, American Landscape, to include general construction.

On January 2, 2010, Mr. Calene's bond was cancelled and his license suspended.

In May of 2010, Russ and Diane Taylor purchased a home that Matthew Calene had constructed. The side and back yards were unfinished, and Calene was contacted about doing the landscape and installing a six foot vinyl privacy fence.

In June, Calene drew up a plan, and submitted it as a bid to the Taylors, who accepted it and hired him.

When Calene was finished working at the Taylors, he had built a block retaining wall, landscaping terraces, a vinyl fence with three gates (two built for people, one to span a 14 foot driveway), and a cement curb had been poured below the fence. Due to improper installation, the space between the fence and the curbing (the reveal) varied from zero to five inches. In an attempt to address the variance in the reveal, Calene hand mixed cement and added it to the top of

the poured curbing.

The Taylors were unhappy and unsatisfied with the work that was performed in violation of the accepted trade practices.

The Taylors' complaints include, but are not limited to: the block wall was settling, tipping and bulging to the point it needed to be repaired or replaced; the fence posts had cracked or broken out of the curbing, a portion of curbing was sliding down the hillside and taking the fence with it; the integrity of the fence had been compromised by improper installation; hinges, latches and screws that were designed for wood fencing had been used on the vinyl fencing and had failed; the ground beneath the curbing had not been properly compacted and was undermining; and the list went on. In sum, improper materials were used; materials and construction methods were used that resulted in portions being unfit for their intended purpose; and the shoddy workmanship fell below the accepted trade practice, all in violation of the implied warranties of a contractor.

Russell and Diane Taylor brought this action.

At trial, four experts testified: one was an expert in vinyl fencing (Levi Berquist, on behalf of the Taylors); one was an expert in concrete (Brian Andrews on behalf of the Taylors); and two were

landscaping experts (Jeff Cornish, on behalf of the Taylors, and Brian McKarcher, who was there on behalf of Calene). Both the fencing and concrete experts as well as Mr. Cornish opined that the work done by Calene did not meet the standard of practice for the trade, and that the work needed to be taken out and replaced. Mr. McKarcher agreed that the wall needed to be repaired.

Following trial, the Court adopted Findings and Conclusions proposed by defense counsel, and found that Mr. Calene was an insured contractor; that the items complained of by Plaintiffs were related to craftsmanship and are not defects related to improper construction and only minor corrective work was needed to fix the craftsmanship issues; and that the Department of Labor and Industries had not been served pursuant to RCW 18.27.040.

The Court concluded that since the Department of Labor and Industries had not been served, there was no action under the Contractors Registration Act and therefore no violation of the Consumer Protection Act; that no judgment should be entered in favor of either party, therefore there was no prevailing party and without a prevailing party, no award of attorney fees should be made; finally, the Court concluded that it was irrelevant whether the Defendant was

bonded as no bonding company was joined.

This appeal followed.

ASSIGNMENTS OF ERROR

1. The trial court erred by adopting the Findings of Fact and Conclusions of Law as proposed by the defendant and thereby misapplying RCW 18.27 and RCW 19.86, by failing to award damages to plaintiffs, and failing to find that plaintiffs are the prevailing party.

ISSUES PRESENTED FOR REVIEW

- 1) Does a contractor whose license and bond are not valid and who continues to hold himself out as and work as a contractor, violate the Contractor Registration Act (RCW 18.27)? (Assignment of Error 1.)
- 2) Must a Plaintiff serve the Department of Labor and Industries to sustain an action for violation of the Contractor Registration Act when the contractor's bond is expired? (Assignment of Error 1.)
- 3) When a contractor works without a license or a bond violation

of the Contractor Registration Act, is it also a violation of the Consumer Protection Act? (Assignment of Error 1.)

- 4) Must a contractor have a valid registration and bond in order to maintain a claim against someone? (Assignment of Error 1.)
- 5) When each expert testifies that the work done does not meet the accepted standard of a trade professional, and the contractor uses improper material and the improvement built by the contractor fails, was there substantial evidence to support the Findings of Fact in this case? (Assignment of Error 1.)
- 6) Are the Conclusions of Law in this case supported by the Findings of Fact and by the law? (Assignment of Error 1.)

STATEMENT OF THE CASE AND FACTS

Defendant, Matthew Calene, was the owner of American Landscape and Sprinkler, a business that was first registered with the Dept. of Licensing in 2002. (RP493, II 3 - 16.) Initially American Landscape and Sprinkler was bonded through CBIC, but that either expired or was cancelled. In 2008, Mr. Calene, dba American

Landscape and Sprinkler, got a bond through Old Republic on January 2, 2008. That bond was cancelled January 2, 2010, the same day his license was cancelled. (RP494, II 2 - 16, and Ex P171.)

In June of 2010, Plaintiffs Russell and Diane Taylor hired Calene to landscape the back and side yards of their new home (a home Calene had built), and to install vinyl fencing around their yard. The project was to be completed by July 1, 2010. (RP331, II. 7 - 19.) Calene designed and bid the project, and was hired based on his design and build. (Ex P1, Ex P2)

The project called for a six foot vinyl fence to be installed on three sides of the property, the fence was to have cement curbing beneath it, and there was to be a block retaining wall and landscape terracing.

Calene didn't start any work until the end of June and the work was generally performed in July and August of 2010. (RP433, II. 18 - 22.)

In July, 2011, a year after he worked on the Taylor home, Calene started a new business, American Construction, which became registered and bonded on July 7, 2011. (RP489, II. 16 - 21.)

The work Calene did for the Taylors was replete with problems.

Expert testimony regarding the vinyl fence was provided by Levi Berquist of Lucky Acres Fencing (RP42, II 2), the area's largest distributor of vinyl fencing (RP42, II 18-20) and someone the defense's landscape expert hires to do fencing for him and someone who the defense expert trusts (RP386, II 23 - RP87, II 22).

The problems include: portions of the fence were held together with wood screws (*see i.e.*: Ex P13; Ex P67; Ex P68; Ex P69; Ex P125); slats were too short and had patches glued in (*see i.e.*: RP51, II. 14 - 24; Ex P47; Ex P48; Ex P49; Ex P50; Ex P90; Ex P91; Ex P93) or just left short (Ex P61; Ex P92; Ex P97; Ex P98; Ex P106); holes were routed in posts in violation of standard trade practices (*see i.e.*: RP52, II 19 - 24, Ex P40; Ex P51; Ex P52; Ex P53; Ex P54; Ex P55; Ex P56; Ex P57; Ex P67; Ex P99; Ex P101;); sections were connected to posts in improper ways (RP25, II 25 - RP26, II. 1-12, Ex P50); posts were cemented in place rather than using the accepted trade practice of cementing in metal posts and using the vinyl post as a sleeve (RP462, II 16-25; RP123, II 11-25); the posts were at varying depths leaving the space between the bottom rail of the fence and the concrete curbing inconsistent (*see i.e.*: RP96, II 5-21; RP102, II 1-25;

Ex P85; Ex P87; Ex P117; Ex P124; Ex P125); rails were cut too short and did not fit into the posts and effecting the integrity of the fence (see *i.e.*: RP87, II 3-25; RP103, II 14-20; Ex P58; Ex P62; Ex P63; Ex P69; Ex P64; Ex P102), gates were not built correctly (see *i.e.*: RP61, II 1-5; Ex P59; Ex P60; Ex P65; Ex P66; Ex P103; Ex P108); improper hardware (hinges, latches, etc) was used and was failing, had failed, or had broken out damaging the fence (see *i.e.*: RP48, II 18-25; RP73, II 20 - 25; RP76, II 12-16; RP77, II 10-24; Ex P9 - P21; Ex P24 - P25; Ex P72 - P82; Ex P105; Ex P107-P108); gates were set in the fence with too large or too small of a space for them (Ex P73; Ex P74); a section of the fence in the southeast corner is actually sliding down the hill and is destined to fail (RP117, II 12 - 22; RP118, II 6-9); the southwest corner is going to fail due to undermining problems (RP120, II 3-12); the fence was reduced in height to as little as 4 feet in sections (RP96, II 1-4); the problems with the fence tie into one another to the point that the whole fence needs to be replaced (RP94, II 25 - RP95, II. 1-19).

The work done on the fence did not meet the standard of the trade practice (RP46, II 1-8; RP52, II1-4, 22-24; RP63, II 8-10; RP67, II 18-25; RP69, II 14-16; RP73, II 2-25; RP77, II 2-6; RP96, II 1-4, 19-

21; RP121, II 20-25 - RP122, II 1; RP123, II14-20; RP124, II 21-24; RP125, II 1-19).

Expert testimony regarding the cement work was provided by Brian Andrews of Knox Concrete (RP 129, II 24) a company defendant's landscape expert testified that he trusts (RP389, II 2-4).

The cement work that Calene did is also full of problems: the southeast corner had cracked apart and was sliding down the hill (*see i.e.*: RP136, II 14-19; RP138, II 1-13; Ex P87; Ex P109; Ex P112; Ex P114; Ex P115; Ex P116; Ex P160) is causing the east wall to break (RP139, II 2-14; Ex P161; Ex P162) and the corner will fail (RP139, II 22 - 25); there were sections where the dirt under the curbing is undermining (RP 150, II 9-24; RP143, II 18-22; RP 144, II 2-4; RP172, II 24 - RP173, II 15; Ex P110; Ex P33; Ex P119; Ex P120; Ex P121; Ex P123); the northeast corner of the cement wall is breaking up (RP145, II 10-24; Ex P113); the southwest corner is breaking up (RP153, II 6-24; Ex P125); Calene put a cement cap on top of the curbing in an effort to fix the problems with the reveal, and there are problems with the cap (RP131, II 22-25; RP142, II 8-25; RP144, II 11-20; RP145, II 3-9; RP146, II17 - RP147, II 4; RP148, II 9-17; RP149, II 10-14; RP152, II 7 - RP153, II 5; Ex P26 - P27; Ex P34; Ex P40; Ex P47; Ex

P49; Ex P54; Ex P57; Ex P86 - P88; Ex P90; Ex P94 - P96; Ex P99; Ex P109 - P112; Ex P117 - P118; Ex P122; Ex P124; Ex P160 - P162); and a problem with the cement poured to anchor the driveway gates (RP315; II 16 - RP316, II 4) the problems with the cement work are sufficient that it cannot be repaired and must be replaced (RP153, II 13-25).

The cement work performed by Calene did not meet the standard for a trade professional in the area (RP131, II 19-21; RP145, II 7-9; RP146, II 21-23; RP149, II 13-14; RP153, II 3-5; RP154, II 16 - RP155, II 2).

Expert testimony regarding the block walls was offered by Jeff Cornish of LC Lawn and Landscape, a master wall builder (RP182, 9-12); and by the defendant's expert: Brian McKarcher of Living Waters Landscape, Inc., the largest landscaping company in the quad cities (RP391, II 1-3). Mr. McKarcher expressed the opinion that Mr. Cornish excels in walls, is "very fluent in large walls" and he does good quality work (RP390, II 1-16).

The block walls built by Calene similarly suffered from many problems. A properly built wall will have a six inch gravel base (RP183, II. 7-10), and backfill with 12 inches of gravel behind the wall

(RP184, II 3-17; RP197, II 11-20), and there should not be felt or fabric behind the wall (RP187, II 2-11). The first row of blocks in a wall should be buried (RP192, II 3-16).

The defendant violated all of these rules which resulted in settling, tipping, and bulging and the wall is failing (RP197, II 7-24; RP198, II 20 - RP199, II 2; RP199, II 17-19; RP200, II 12 - RP 201, II 2; RP202, II 13-24; Ex P128 - P129; Ex P159, Ex P163-P165).

Calene added some fabric-like material behind the walls (RP189, II 9 - RP190 II 12; RP97, II 2-6; Ex P8); he failed to use a gravel base (RP194, II 9-13; Ex P130); he failed to put gravel behind the wall (RP199, II 24-16); he failed to bury the first block (RP192, II 3-16; RP193, II 10 - RP194, II 8; Ex P128; Ex P130; Ex P135), and he left other sections incomplete (RP212, II 20-23; Ex P38).

The walls that Calene built need to be pulled down, the ground compacted, and the walls rebuilt with proper techniques (RP199, II 20-24; RP203, II 20-25).

The defense landscape expert, Mr. McKarcher, testified that on the main (north) wall there were more than one place that needed to be repaired (RP417, 8-15). He further testified that Mr. Cornish's bid to pull down the walls and rebuild them for \$3500 is a good price and

that “it sounds reasonable” (RP418, 1-10).

Calene’s work on the block walls did not meet the standard of a trade professional in the area (RP186, II 21 - 23; RP190, II 1-12; RP196, II 22-24; RP203, II15-19). Calene did not even follow manufacturer’s instructions (RP198, II 14-20; RP455, II 14-17).

At the conclusion of trial, the trial court had both parties submit proposed findings and conclusions. The trial court then provided a letter ruling and adopted the findings and conclusions drafted by defendant, with some minor changes.

Plaintiffs now appeal to this court.

SUMMARY OF ARGUMENT

When someone holds himself out as a contractor, the Contractor Registration Act (RCW 18.27) applies to him. The purpose of that Act is to protect the public “from unreliable, fraudulent, financially irresponsible, or incompetent contractors. (RCW 18.27.140.) Calene violated the Contractor Registration Act by holding himself out as a contractor, and performing work as a contractor, while neither registered nor bonded. The trial court erred by holding RCW 18.27.040 requires a plaintiff to use that process to

pursue a contractor (as opposed to pursuing a bond), even when a contractor does not have a bond (as in the instant case).

A violation of the Contractor Registration Act is a *per se* violation of the Consumer Protection Act. (RCW 18.27.350.) The defendant, having violated the Contractor Registration Act therefore violated the Consumer Protection Act, and is liable to the plaintiff for attorney fees and costs, actual damages, and treble damages up to \$25,000. The trial court erred in failing to find the violation of the Consumer Protection Act and in failing to award attorney fees and costs, actual damage, and treble damages up to \$25,000.

The trial court further erred in finding the plaintiffs owed money to the defendant and in using that to off-set the damages owed to plaintiff, and then determining that due to the off-setting amounts owed to the other, there was no prevailing party. The Contractor Registration Act requires that as a condition precedent to bringing or maintaining an action in this state, the contractor must allege and prove that he is duly registered and has a current and valid certificate of registration at the time of contracting. (RCW 18.27.080). Calene was not registered at the time of the contract, and did not prove that he was. Therefore, the plaintiffs were, and should have been found

to be, the prevailing party in this matter and be awarded attorney fees.

Finally, there was not substantial evidence to support the trial court's findings and conclusions. The only fencing expert to testify established that defendant's work fell below the standard of a trade professional in that area. The only concrete expert to testify established that defendant's work fell below the standard of a trade professional in that area. Both landscape/block wall experts who testified established that the defendant's work fell below the standard of a trade professional in that area.

The defendant breached his implied warranty of fitness of materials used. The defendant breached his implied warranty that the work would be performed in accordance with the accepted trade practices. And the defendant breached his implied warranty that the improvements would be suitable for their intended use. Having breached these warranties, the defendant is liable to the plaintiffs, and the trial court erred in failing to so find and hold.

ARGUMENT

When reviewing issues of law, this court reviews them *de novo*. *Soltero v Wimer*, 159 Wn.2d 428, 433, 150 P.3d 552 (2007)(citing

Nordstrom Credit, Inc. V Dep't of Revenue, 120 Wn.2d 935, 942, 845 P.2d 1331 (1993)).

- A. The defendant violated The Contractor Registration Act, RCW 18.27, which controls in this case, and which imposes requirements on contractors to be registered and have a valid bond and insurance.

Every person who engages in the activities of a contractor is presumed to know the requirements of RCW 18.27, the Contractor Registration Act ("CRA" or "the Act"), and the statute is to be strictly enforced. (RCW 18.27.005.) The purpose of the Act is to protect the public from unreliable, fraudulent, financially irresponsible or incompetent contractors. (RCW 18.27.140.)

The Taylors are, without question, members of "the public."

Calene was engaging in the activities of a contractor when he built the block walls, the fence and the curbing under the fence. (RCW 18.27.010; RP433, II 10-12.)

Every contractor must register with the Department of Licensing. (RCW 18.27.020(1).) It is a crime to engage in any contractor activities without being registered as required. (RCW 18.27.020(2).)

In addition to being registered, contractors must be bonded

(RCW 18.27.040) and insured (RCW 18.27.050). These are reasonable requirements to protect the public who interact with a contractor.

The legislature has specifically found that it is contrary to public policy to allow unregistered contractors to continue to do business. (RCW 18.27.390.) And the legislature has declared that a violation of the Contractor Registration Act is a violation of the Consumer Protection Act. (RCW 18.27.350.)

The CRA unquestionably applies to the facts of this case. The statute requires strict enforcement of its terms (RCW 18.27.005), Calene held himself out as a general contractor to members of the public (the Taylors).

Matthew Calene, a Washington contractor, is presumed to know the requirements of the Act. (RCW 18.27.005.) Calene, in fact, had been in compliance with the Act prior to the events of this case. Starting in 2002, he was registered and bonded as required; and although his insurance remained in effect, his bond was cancelled and the license expired on January 2, 2010; six months before the events in this case. (RP491, II 17 - RP 494, II 16.)

When a bond is cancelled, or expires, the contractors

registration is automatically suspended, and the contractor is no longer allowed to perform contracting work in the State until reinstated. (RCW 18.27.040.) Calene was next bonded and licesned in July, 2011; one year later. (RP489, II 9-21.)

Sadly, Calene proved to be unreliable, financially irresponsible, and incompetent; precisely the type of contractor from whom the state sought to protect the Taylors.

Having established that the CRA applies to the case at bar, we turn now to errors of the trial court thereunder.

- B. The trial court erred in requiring Plaintiffs to commence their action against Defendant according to RCW 18.27.040 in order to sustain their Consumer Protection Act (CPA) claim because commencement of an action under RCW 18.27.040 is only required when a plaintiff seeks an action against a contractor's bond and not a requirement for pursuit of actions against a contractor.

The trial court erred in holding that the Taylors must commence an action under RCW 18.27.040 in order to succeed in their Consumer Protection Act violation claim against Calene. The court held this despite the plain language of the statute making such action requisite when one is pursuing the contractor's bond, and despite the fact that Calene did not have a bond to pursue.

Under RCW 18.27.040, a plaintiff is only required to serve process through the Department of Labor and Industries when the plaintiff seeks action against the bond of a contractor. *Ahten v. Barnes*, 158 Wash.App. 343, 353, 242 P.3d 35, 40 (2010). Washington courts have consistently held that after reviewing the entire legislative scheme and the title of the section, the statute gives the requirements to realize on the construction bond, not against contractors in general. See: *Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces*, 36 Wash.App. 480, 674 P.2d 1271 (1984) (where the court held that the service provisions of the statute are clearly limited to suits against the bond); see also *Subcontractors and Suppliers Collection Services v. McConnachie*, 106 Wash.App. 738, 24 P.3d 1112 (2001) (where the court held that the legislative scheme and title of the statute show that RCW 18.27.040 gives the requirements for actions against the bond, not actions against the contractor). The Supreme Court of Washington has concluded that the phrase “filed under this section” in RCW 18.27.040, refers only to actions for recovery against the bonds. *Ahten*, 158 Wash.App. at 356. The Supreme Court further stated, “Nothing in these surrounding subsections [RCW 18.27.040(3)-(5)] suggests that legislature

intended to discuss actions against the contractors. *Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wash.2d 292, 299, 149 p.3d 666, 670 (2006).

In the case at bar, Plaintiffs initially filed a complaint that named CBIC as the bonding company for Defendant. In the Amended Complaint, CBIC was substituted with Old Republic Bond Company. Further investigation resulted in a Second Amended Complaint being filed and alleging that Calene was neither licensed nor bonded and therefore seeking damages under the Consumer Protection Act.

At trial, Ex P171 was admitted to prove Calene's lack of bond and license.

Realizing that the Defendant did not even have a bond for the Plaintiffs to be able to pursue, the trial court erred by requiring that the Plaintiffs seek a judgment against a non-existent bond, which would be a vain and useless act; something which we cannot presume the legislature to have intended. *See: In re the Marriage of Sager*, 71 Wn. App. 855, 859, 263 P.2d 106 (1993); *Kelleher v Ephrata School Dist. No. 165*, 56 Wn.2d 866, 355 P.2d 989 (1960); *Fifteen -O-One Fourth Ave. Ltd. Partnership v Dept. of Revenue*, 49 Wash. App. 300,

742 P.2d 747 (1987).

Plaintiffs decision to not pursue a non-existent bond through the Department does not prejudice their claim under the CPA. In construing a statute, courts first look to the text of the statute itself. *HomeStreet, Inc. v. State Dept. of Revenue*, 166 Wash.2d 444, 451, 210 P.3d 297, 300 (2009). The CRA provides for a *per se* violation of the CPA when a contractor is found to have committed a misdemeanor or infraction under the CRA. (RCW 18.27.350.) The statute states:

The consumers of this state have a right to be protected from unfair or deceptive acts or practices when they enter into contracts with contractors. The fact that a contractor is found to have committed a misdemeanor or infraction under this chapter shall be deemed to affect the public interest and shall constitute a violation of [the CPA] chapter 19.86 RCW. The surety bond shall not be liable for monetary penalties or violations of chapter 19.86 RCW.

RCW 18.27.350. There is no requirement under this statute that an action against the bond be commenced under RCW 18.27.040. The only reference to a surety bond in the statute states that a surety bond *cannot* be liable for violations of the CPA. It is completely inconsistent to require an action be commenced under RCW 18.27.040, an action

only against the bond, but then not allow a bond to be liable for penalties. This would violate the cannon of construction that courts should not construe a statute so as to make it superfluous. *State v. Roggenkamp*, 153 Wash.2d 614, 624, 106 P.3d 196, 201 (2005). If RCW 18.27.040 only allows recovery against a bond, and RCW 18.27.350 does not allow a bond to be liable for violations of the CPA, then the requirement to commence an action against a bond would make RCW 18.27.350 an action without a remedy.

The trial court erred in requiring Plaintiffs to commence an action under RCW 18.27.040 in order to sustain their CPA action because RCW 18.27.040 only allows for recovery against a bond, there is no part of the text of RCW 18.27.350 indicating this requirement, and to read this requirement into the language of RCW 18.27.350 would render it superfluous and without force.

- C. The trial court erred in holding against Plaintiffs' CPA claim because it placed an erroneous requirement on the Plaintiff and failed to apply RCW 18.27.350 as a *per se* violation of the CPA.

The trial court summarily dismissed Plaintiffs' CPA claim based on the erroneous requirement of commencing an action under RCW

18.27.040 as described above. This led to the trial court failing to properly apply RCW 18.27.350 as a *per se* violation of the CPA. A CPA violation has five elements that a plaintiff must prove: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) which affects the public interest, (4) injury to the plaintiff in his or her business or property, and (5) causation.

Under RCW 18.27.350, a contractor who is found to have committed any violation or infraction under the CRS has violated the CPA *per se*. RCW 18.27.350.

While some statutes have similar *per se* assumptions related to the CPA, many only assume *per se* establishment of certain elements of a CPA claim. *Anderson v. Valley Quality Homes, Inc.*, 84 Wash.App 511, 518-520, 928 P.2d 1143, 1146-1147 (1997). However, RCW 18.27.350 differs from these statutes because it assumes all elements of a CPA claim, making it a true *per se* violation of the CPA. *Id.* at 520, 1147. The court in *Anderson* stated, “[h]ere, the Legislature defined the exact relationship between violation of [RCW 18.27] regulations and the CPA: an unremedied violation of the former *is* a violation of the latter that entitles the injured mobile home owner to CPA remedies.” *Id.* (italics in original).

Under the CRA, it is a gross misdemeanor to, “[a]dvertise, offer to do work, submit a bid, or perform any work as a contractor without being registered as required by this chapter...[or]...when the contractor’s registration is suspended or revoked.” RCW 18.27.020. There are also other forms of violations and infractions related to the requirements in the CRA. See generally RCW 18.27, specifically RCW 18.27.020, and 200. According to RCW 18.27.350, a contractor need not be taken to a trial and found guilty of a violation in order to violate the statute, therefore violating the CPA. The Legislature *could* have chosen to declare that a showing of a *conviction* would be the violation; but they chose instead to only require a showing that a contractor *committed* a violation. (RCW 18.27.350.) The evidence presented at trial showed that the Defendant was not a registered and bonded contractor at the time he offered to do work, submitted a bid, and performed work for the Plaintiffs. (Ex P171.) Defendant held himself out to the Plaintiffs as a contractor, but was unregistered and un-bonded, therefore violating RCW 18.27.020 and committing a misdemeanor. Each day’s work was a separate violation and misdemeanor.

The evidence of his cancelled bond and license was introduced

at trial (Ex P171) and was admitted without objection. Further, ER201 authorizes the taking of judicial notice of adjudicative facts when it is either

(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

ER201. In this instance Ex P171, the admission of which was without objection, is a document printed from the Department of Labor and Industries website. The exhibit shows the expiration of Calene's construction contractor's license on 01/02/2010 and the cancellation of the bond on 01/02/2010.

The only other evidence of the status of Calene's license and bond was Calene's self-serving testimony. It is notable that in the defendant's proposed Findings of Fact and Conclusions of Law, there was no finding offered that Calene was licensed and bonded; and, in fact, the Court made no such finding.

It is also notable that in response to discovery requests, Calene did not provide *any* documentation supportive of his claim to be licensed and bonded during this relevant time. (See: RP489, II 12 - RP493, II 18; Ex P171.)

Calene was not licensed or bonded; he therefore violated RCW 18.27.020 and .040 and pursuant to 18.27.350 it is therefore a *per se* violation of the CPA.

Because RCW 18.27.350 creates a true *per se* violation of the CPA, the trial court erred in not finding for the Plaintiffs on their CPA claim and awarding attorney fees and costs, actual damages and treble damages up to \$25,000 to the Plaintiffs.

- D. The trial court erred in determining that there was not a prevailing party, and therefore no award of attorney fees was made.

Washington Code 4.84 provides for the award of fees and costs to a prevailing party. The trial court found that defendant owed plaintiffs \$1176.00 for damages and that plaintiffs owed defendant \$1183.00 (CR25 at 2.15), and concluded that no judgment should be entered for either party and there is essentially no prevailing party. (CR26 at 3.4.) These findings and conclusions are improper.

The CRA 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 ...

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.

RCW 18.27.080.

As has been demonstrated, the defendant did not allege and prove that he had a valid certificate of registration at the time; to the contrary, it was proven that he did not have a valid license or bond and that pursuant to law, his registration was suspended upon the cancellation of the bond.

The defendant did not meet, and could not meet the prerequisite to be able to make a claim against the plaintiffs; therefore, as a matter of law, he could not prevail and plaintiffs should have been awarded attorney fees and costs.

E. The trial court's findings are not supported by substantial evidence and the conclusions are not supported by the findings and by the law.

In order to challenge the findings and conclusions, the Plaintiffs have the duty to first ensure that the appellate record includes “all evidence relevant to the disputed verdict or finding.” RAP 9.2(b). Failure to provide an adequate record will result in the trial court’s decision standing. *Story v Shelter Bay Company*, 52 Wn. App. 334, 345, 760 P.2d 368 (1988).

In the case at bar, the Plaintiffs have provided the full transcript of the trial, and all relevant exhibits. The record is complete and adequate to demonstrate the insufficiency of the evidence.

When a trial court has weighed the evidence, the appellate review is “limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court’s conclusions of law and judgment.” *Ridgeview Properties v Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982); see also: *Legacy Roofing Inc. v Dep’t of Labor and Indus.*, 136 Wash. App. 1, 4, 146 P.3d 366 (2005); *Saviano v. Westport Amusements, Inc.*, 144 Wn.App. 72, 180 P.3d 874 (2008).

Substantial evidence is evidence which is sufficient to persuade a fair-minded person of the truth of the declared premise. *Holland v Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978);

see also: Thompson v Greys Harbor Community Hospital, 36 Wn.App. 300, 302-03, 675 P.2d 239 (1983) (citing: *Arnold v. Sanstol*, 43 Wash.2d 94, 98, 260 P.2d 327 (1953)), substantial evidence must be more than a mere scintilla and be of such character as would convince an unprejudiced, thinking mind of the truth of the declared premise.

Plaintiff assigns error to the following Findings of Fact:

- Finding Challenged:

2.4 Defendant Matthew Calene, in June and July of 2010 and at all times relevant hereto, was a contractor, engaged in landscaping work and doing business in Asotin County, Washington as American Sprinkler and Landscape.

- Error Assigned:

There is no dispute with the fact that Calene was a contractor; but the companion fact is missing: Calene was neither registered, licensed nor bonded during the relevant period. (Ex P171.)

- Finding Challenged:

2.5 At all times relevant hereto, Matthew S. Calene, d/b/a American Sprinkler and Landscape, was insured with Nationwide Mutual Insurance Company, which policy did not expire until December 27, 2010.

- Error Assigned:

There is no dispute with the fact that Calene had liability insurance. However, the companion fact is again missing:

Calene did not have a valid bond, license or registration.
(RP493, II 1 - R49, II 13; Ex P171; RCW 18.27.040.)

- Finding Challenged:

- 2.11 Plaintiffs complaints as to work performed by the defendant included such items as cracks in the concrete footing below the vinyl fence, routing done in some of the posts of the vinyl fence, vinyl pieces patched into the vinyl fence, the types of hinges and latches used on gates in the vinyl fence and some slight settling of some of the concrete block walls constructed by the defendant.

- Error Assigned:

Plaintiffs' complaints are that Calene did not perform the work to the standard of a trade professional in the area: The fence is in failure and needs to be replaced; the concrete is in failure and causing failure in the fence and in other concrete and must be replaced; the block walls were not installed correctly and either were or would be in failure and must be removed and rebuilt using proper methods. As set forth in the Statement of the Case, the problems and errors with the work done by defendant are legion and go to the integrity of each part of the project. The complaints have been set forth at length *supra* with proper references to the record.

- Finding Challenged:

- 2.12 The items complained of by the plaintiffs regarding the defendant's work are related to levels of craftsmanship and are not defects related to improper construction.

- Error Assigned:

As set forth above and identified throughout the record, the defendant's work was replete with errors, problems and use of incorrect material. EVERY expert disagreed with this finding, including defendant's expert.

The fencing expert testified that the fence was not properly built, that it did not meet the standard for a trade professional in the area, and that it needed to be replaced. (RP46, II 1-8; RP52, II1-4, 22-24; RP63, II 8-10; RP67, II 18-25; RP69, II 14-16; RP73, II 2-25; RP77, II 2-6; RP96, II 1-4, 19-21; RP121, II 20-25 - RP122, II 1; RP123, II14-20; RP124, II 21-24; RP125, II 1-19 The defendant's expert testified he had no basis to disagree with the fence expert. (RP419, II 10-15)

The concrete expert testified that the concrete work was not properly done, that it did not meet the standard for a trade professional (RP131, II 19-21; RP145, II 7-9; RP146, II 21-23; RP149, II 13-14; RP153, II 3-5; RP154, II 16 - RP155, II 2) and that it needed to be replaced (RP153, II 13-24).

The defendant's expert testified that he did not know the standard for concrete work and would accept the testimony of the concrete expert. (RP422, II 6-24.)

Both landscape experts testified that all the walls were improperly installed and needed to be repaired. (RP199, II 20-24; RP203, II 20-25; RP417, 8-15; RP418, 2-10.) Mr. Cornish stated that the work did not meet the standard for a trade professional in the area.(RP186, II 21 - 23; RP190, II 1-12; RP196, II 22-24; RP203, II15-19.)

Every contractor makes certain warranties when they undertake a construction contract. These warranties are imposed by operation of law (see: RCW 62A.2-313, -318; *Tex Enterprises, Inc. V Brockway Standard, Inc.*, 149 Wn.2d 204, 208-09, 66 P.3d 625 (2003); *Burbo v Douglass*, 125 Wn.App. 684, 106 P.3d 258 (2005); see also: 33 Wa. Prac. 16:4 (2012)).

These warranties include:

- 1 The fitness of the materials used;
- 2 The work will be performed in accordance with accepted trade practice;
- 3 the building will be in compliance with code regulation; and
- 4 that the resulting building or improvement will be suitable for its intended purpose.

33 Wa. Prac. 16:4 (2012).

In the case at bar, it was, and has been herein, demonstrated that: the materials were not proper (using wood screws, hinges and latches made for wood gates, patches throughout the fencing, lack of rebar in the cement, fabric behind the block walls, failure to put in gravel behind the block walls, etc) and therefore in violation of the first warranty; the work done by Calene was not performed in accordance with the accepted trade practice (as set forth at length above with specific references to the record) in violation of the second warranty; which resulted in a section of the fence beginning to slide down a hill, broken concrete sections sliding down the hill causing the cement retaining wall to break and fail, block walls to fail, all in violation of the fourth warranty.

Having violated three of four warranties, including having failed to meet the applicable standard for a trade professional, the trial court's that conclusion that the problems are related to craftsmanship

and are not defects is incorrect and not supported by substantial evidence. (It should be noted that the term "craftsmanship" as used by the trial court in the finding is without any particular meaning. Theoretically it could have been suggestive of variance of work that can still meet the standard trade practice; but in the instant case, the testimony is clear that Calene's work did not meet the standard trade practice and therefore the term is merely fraught with confusion.)

- Finding Challenged:

2.13 The concrete block walls and vinyl fence installed by the defendant do not need to be completely removed and replaced, as requested by the plaintiffs.

- Error Assigned:

The experts all testified otherwise. Even the defendant himself acknowledged that the whole north wall needed to be pulled down and rebuilt. (RP95, II 1-19; RP153, II 16-24; RP199, II 20-24; RP418, II 2-10; RP457, II 19- RP458, II 22.)

- Finding Challenged:

2.14 The cost to the plaintiffs of the minor corrective work related to craftsmanship issues are as follows:

Retaining wall work:	\$840.00
Latches:	\$300.00
Six additional blocks:	\$ 36.00
Total:	\$1,176.00

- Error Assigned:

First, the work is not "minor corrective work related to craftsmanship issues" but is repair or replacement due to not meeting the standard of a trade professional in the area.

Second, the costs are as follows:

Fencing:	\$11,855.70 (Ex P3)
Concrete:	\$6,681.13 (Ex P4)
Walls:	\$3,500.00 (RP188, II 10-12)
Total:	\$22,036.83

- Finding Challenged:

2.15 The total cost of the said items to the plaintiff of \$1176.00 is approximately the remaining balance owed to the defendant of \$1183.00.

- Error Assigned:

While the math cannot be questioned, the total should be \$22,036.83, which is substantially more than the amount claimed owing to defendant. Further, the defendant cannot maintain a claim against plaintiff (even for money owed under a contract) until he proves he is registered and bonded (RCW 18.27.080)

- Finding Challenged:

2.17 Plaintiffs did not serve any action against the defendant or any named bonding company by service upon the Department of Labor and Industries in the manner required by RCW 18.27.040.

- Error Assigned:

The action was not an action against a bond because defendant did not have a bond. Further, RCW 18.27.040 does not require service on Dept. Of Labor and Industries unless one is pursuing the bond. Plaintiffs may pursue a contractor

(including an unregistered, unbonded contractor) without following RCW 18.27.040

- Finding Challenged:

2.19 Defendant was not asked to perform any corrective work regarding plaintiffs' claimed defects.

- Error Assigned:

First, this claimed fact is irrelevant.

Second, this fact is not supported by the evidence: Calene was shown the problems in the reveal and his "corrective work" was to put an unacceptable cap on the poured concrete, which also did not meet the standard of a trade professional in the area. (RP145, II 3-9; RP146, II 17 - RP147, II 4; RP149, II 10-14; RP152, II 7-11; RP153, II 1-19)

- Finding Challenged

2.20 The relationship between the plaintiffs and the defendant was a private contract dispute that had no potential to deceive a substantial portion of the purchasing public

- Error Assigned:

First, the finding is not supported by substantial facts.

Second, the finding is irrelevant; RCW 18.27.350 makes the committing of a misdemeanor or infraction under RCW 18.27 a per se violation of the Consumer Protection Act.

Third, the defendant held himself out as a contractor and did contracting work for plaintiffs and others during this time when he was not registered or bonded. (RP437, II 4-7; RP441, II 22 - RP442, II 4.)

Plaintiff assigns error to the following Conclusions of Law:

- Conclusion Challenged

3.2 No action was commenced and served under the Contractors Registration Statute, RCW 18.27.

- Error Assigned

This is a statement of fact, not a conclusion of law

- Conclusion Challenged

3.3 Where there is no action under the Contractors Registration Statute, there is no violation of the Consumer Protection Act.

- Error Assigned

This conclusion is legally incorrect. When a contractor does an act that qualifies as a misdemeanor or infraction under RCW 18.27, the contractor is also in violation of the Consumer Protection Act. See: RCW 18.27.350.

As set forth at length above, the defendant's license and bond had been cancelled on January 2, 2010; he continued to work as a contractor, and performed the contractor work for the plaintiffs six months after the license and bond had been cancelled. Working as a contractor while being unregistered and un-bonded is a misdemeanor under RCW 18.27.020. Having committed an acts that qualifies as infractions and misdemeanors (18.27.020 and 18.27.200; and each day worked is a separate offense), the defendant violated the Consumer Protection Act. Therefore, plaintiff is entitled to attorney fees and costs, damages and treble damages up to \$25,000.

The Court should have awarded a judgment in favor of the plaintiffs and against the defendant for actual damages of \$22,036.83, plus \$25,000 under the Consumer Protection Act, plus attorney fees and costs to be proven according to statute.

- Conclusion Challenged

- 3.4 No judgment should be entered in favor of the plaintiffs against the defendant or in favor of the defendant against the plaintiffs. There is essentially no prevailing party.

- Error Assigned

This has been discussed at length in section "C" above. In summary:

the defendant, is incompetent to even seek money from plaintiff as defendant was not licensed, bonded or registered. Given that he cannot prevail in any amount, plaintiffs must be the prevailing party as the court awarded damages.

Second, the trial court failed to award plaintiffs' damages in the amount they were proven, as addressed at length above.

- Conclusion Challenged

- 3.6 Whether the defendant was bonded, in addition to having insurance, is irrelevant where no bonding company was joined and where no judgment has been entered that would be a claim against a contractor's bond.

- Error Assigned

This conclusion is an erroneous statement of the law as discussed *supra*.

First, RCW 18.27.040 requires a contractor to have a valid bond; and provides for automatic suspension of the contractor's registration should the bond be impaired, cancelled or revoked.

Second, RCW 18.27 does not require a plaintiff to pursue a contractor's bond, it is to be one available avenue for a plaintiff

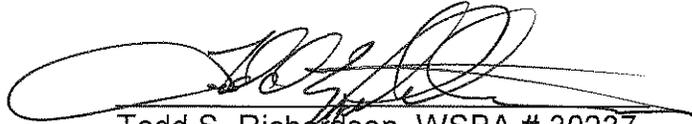
to be able to seek some monetary compensation, not a limitation on a plaintiff's ability to seek compensation.

Third, the adopted conclusion would require the plaintiff to bring a useless suit to pursue a non-existent bond; and the law does not require vain and useless acts.

CONCLUSION

For the foregoing reasons, the judgement of the trial court should be reversed and judgment entered in favor of the plaintiffs.

Respectfully submitted this 10 day of March, 2014.



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