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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO: 319172

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RUSSELL TAYLOR AND DIANE TAYLOR
Appellants

vs.

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

BRIEF OF RESPONDENT

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I.

INTRODUCTION

Plaintiffs Russell and Diane Taylor brought this action against Matthew Calene for claimed defects related to fencing and landscaping work done by Matthew Calene at their home in Clarkston, Washington. At all times relevant hereto, Matthew Calene, d/b/a American Sprinkler and Landscape, was insured with Nationwide Mutual Insurance Company and was bonded.

In July of 2010, plaintiffs contracted with Matthew Calene to perform certain landscaping and fencing work on their property. They entered into an agreement for approximately \$18,000 worth of work. The project was about a two month project. There were hundreds of truck loads of dirt brought in and compacted to create a flat back yard. Mr. Calene built a beautiful 6 foot white vinyl fence. He put a cement mow strip underneath the fence. He built an extensive series of curved short walls out of landscape blocks. He built a firepit. He created a garden area over in the corner. He put in river rock and installed a concrete pad the plaintiffs wanted.

When the work was done and the plaintiffs had paid all but approximately \$1,183 of the contract balance, the plaintiffs complained about the work performed. The complaints related to such items as the wrong hardware used to hold gate screws and hinges, some cracks in the concrete of the footing below the vinyl fence, routing done in some of the posts of the vinyl fence, vinyl pieces patched into the vinyl fence and some slight settling of some of the concrete block walls constructed by the defendant. The items

were generally related to levels of craftsmanship and were not defects related to improper construction.

Plaintiffs sought to have all of the concrete block landscaping walls removed, as well as all of the vinyl fence and all of the concrete footings below the fence. After hearing two days of trial testimony and reviewing hundreds of exhibits, the trial judge concluded that the items claimed by the plaintiffs as defects were only levels of craftsmanship and there were no defects. The court concluded that some minor corrective work related to the craftsmanship could be done at a cost of \$1,176. That was approximately equal to the remaining balance owed to the defendant of \$1,183. The court found that neither party was a prevailing party and no judgment would be entered in favor of the plaintiffs or in favor of the defendant. Neither side was found to be in entitled to attorney fees or costs.

Although plaintiffs named CBIC Bonding Company as a defendant, plaintiffs never served the bonding company by serving the Department of Labor and Industries. No bonding company appeared in the action and there was no judgment against a bonding company.

II.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. DOES A LICENSED AND BONDED CONTRACTOR MEET THE REQUIREMENTS OF THE CONTRACTOR REGISTRATION ACT.

B. MUST A PERSON HAVING A CLAIM AGAINST A CONTRACT NAMING HIS BONDING COMPANY BE BROUGHT IN THE MANNER PRESCRIBED BY RCW 18.27.040.

C. IS THE CONSUMER PROTECTION ACT INAPPLICABLE TO A PRIVATE CONTRACT DISPUTE WITH NO POTENTIAL TO DECEIVE A SUBSTANTIAL PORTION OF THE PURCHASING PUBLIC.

D. MAY A COURT ENTER FINDINGS SUPPORTED BY THE EVIDENCE, EVEN IF THE FINDINGS ACCEPT THE TESTIMONY OF CERTAIN WITNESSES, RATHER THAN OTHERS.

III.

STATEMENT OF THE CASE

In July and August of 2010 Matthew Calene was doing business as American Landscape and Sprinkler. (RP 433). He was licensed and bonded at that time. (RP 433). By the time of trial Mr. Calene had changed the name of his business to American Construction. (RP 432). He continued to be currently licensed and bonded with the Department of Labor and Industries at the time of trial. (RP 433).

Because he had constructed the home that the Taylors were living in, they contacted him regarding landscaping work they wanted done. (RP 434). Mr. Calene eventually created a proposed diagram or drawing of the landscaping layout. (RP 434). A major consideration of the Taylors was money; they had a certain amount that they wanted to spend and Mr. Calene was trying his best to keep within that. (RP 435). An agreed drawing was

prepared of how the backyard would lay out. (Exhibit 1). Mr. Taylor said that Matthew did a good job in designing what he did. (RP 277).

Once the plan was approved, Matthew Calene brought in fill dirt, built the retaining walls, then the fence, then the sprinklers, then the sod and he finished with the gates on the fences. (RP 37).

The plaintiffs paid an initial deposit of \$4,500. (RP 439). When the work was completed, photographs show a beautiful vinyl fence. (Exhibits P-27 and P-28). An overhead view, Exhibit P-6, shows that the fence encircled the yard and all of the retaining walls were installed. Exhibits D-201, D-202, D-203 and D-204 show that the vinyl fence and all of the curved retaining walls were installed as shown on the plan.

The Taylors paid Mr. Calene \$16,867.93 of the \$17,900 that was on the bid. (RP 38). They declined to pay the rest, stating that they wanted lien releases. (RP 38). However, Mr. Taylor conceded that no one had put a lien on their property so there were no liens to be released. (RP 285).

Taylors then obtained bids from other contractors to completely remove all of the existing fence and curbing and completely build a new vinyl fence. (Exhibits P-3 and P-4). At trial, plaintiffs called Levi Berquist, the president of Lucky Acres Fencing. (RP 42). Mr. Berquist had submitted a bid to redo the whole vinyl fence for \$11,855. (Exhibit P-3). That did not include removal of the existing fence and curbing or the installation of new curbing. (PR 46). Mr. Berquist testified there was "some poor craftsmanship" in areas on the existing fence. (RP 46). Where boards were

not long enough, filler pieces had been glued in, which was not the best way. (RP 49). Mr. Berquist noted routing that left gaps that should not be “to that extreme”. (RP 52). He testified that wood screws were used in the hardware on the three gates, when his company would use a bigger pinhead screw for cosmetics and durability. (RP 53).

Mr. Berquist testified that the gates had some “craftsmanship issues” (RP 61) and there were some cracks in the curbing. (RP 71). Mr. Berquist said that the latches used on the gates could work, but were not ideal (RP 73) and he would not recommend those hinges. (RP 77). He testified that he would not submit a bid for repairing any of the claimed defects, only for a complete replacement, the reason being that he could not warranty repairs and didn’t carry that exact material. (RP 94).

Mr. Berquist acknowledged that his bid for \$11,855 for fencing was almost double that of Calene’s bid at \$6,100. (RP 98). Mr. Berquist acknowledged Mr. Calene’s bid was a cheap bid for the fence, but he did not know what criteria that Taylors had set. (RP 100). Mr. Berquist said that a contractor can cut corners based on the customer’s expectations. (RP 126).

Mr. Berquist acknowledged that the concrete curbing under the fence was not part of the integrity or structure of the fence and was mostly cosmetic to aid in mowing. (RP 99). Cracks in the cement would not detract from the structural integrity of the fence. (RP 100).

As for the pieces that were glued in, Mr. Berquist said that it was not flawless work, but the fence was not falling down. He acknowledged the fence had been in place for two years and was holding well. (RP 103). As for routing, Mr. Berquist acknowledged that the rails fit, they just didn't look as good. (RP 108). He also said that there were no routing issues on the entire east stretch and that section "looks secure". (RP 108). He said that the fence generally looks good until you get very close, when you see small things. (RP 110).

In testifying about the hardware used on the gates, Mr. Berquist was looking at hardware in bags. (RP 112). It was apparent the hardware had been changed out and he did not know the cost of the hardware, but estimated maybe \$75 for hardware and to install for each gate. (RP 113). Finally, Mr. Berquist said that some contractors might repair the things that he saw, even if he was not willing to. (RP 116).

With regard to the concrete curbing under the vinyl fence, plaintiffs called Brian Andrews of Knox Concrete. (RP 129). His description of the concrete work Mr. Calene had done was that he "didn't think the concrete curbing was that great" and there was some cracking. (RP 131). He had given the Taylors a bid, Exhibit P-4, for \$6,681 which included removing and replacing all 290 lineal feet of curbing. (RP 133). He stated that he would replace the curbing because he didn't know how it was installed. (RP 134).

Mr. Andrews saw no cracks in the curbing on the whole east side run of the fence, only at the two corners. (RP 156). He acknowledged that the fence builder puts the posts in and that the fence does not even have to have a cement curbing at all, but will stand on it's own. (RP 157). He acknowledged the curbing was cosmetic and generally installed for ease of mowing. (RP 158). He did not know if there was rebar in the curbing, but stated that cracks can occur even with rebar (RP 158). Mr. Andrews also said that cracks in the concrete were a level of craftsmanship and were not a defect. (RP 159). As for a cement cap that was installed to close the reveal under the south end of the fence, Mr. Andrews said it would be a proper cap if it was properly bonded. (RP 160). Mr. Andrews said that the reason for taking out all of the curbing was that he didn't know how it was installed. (RP 161). He conceded that most of the fence he saw was "pretty good fence". (RP 162).

As to the short block walls, Taylors called Jeff Cornish of LC Lawn and Landscape. (RP 180). Mr. Cornish testified about proper wall building, including excavating first, setting the grade and putting fill gravel underneath the wall. (RP 183). His practice was to put gravel behind the wall. (RP 184). He was critical of Mr. Calene's method of putting a felt layer behind the wall with sand, rather than gravel. (RP 187). Mr. Cornish had submitted a bid for \$3,500 to "correct the block walls". (RP 188). Mr. Cornish noted one place where the wall was pushing or "bulging" where there was a trailer parked up above, with all of that weight. (RP 197). His

proposal for each wall was to tear it down, put a gravel base under it, compact it all and put gravel behind it, completely rebuilding the wall. (RP 199). In one other place he noted tipping of the wall. (RP 200).

Mr. Cornish stated that his company did all aspects of lawn and landscaping and only Living Waters was bigger than his company. (RP 204). Mr. Cornish said that although he preferred to build walls with gravel, rather than cloth behind them, there were licensed and bonded persons who used methods other than gravel. (RP 208). Mr. Cornish said that he himself had built some walls with felt cloth behind them. (RP 208). He conceded that sand and cloth behind a wall could allow drainage, which was the purpose of the gravel. (RP 209). Mr. Cornish said that other than the wall section to the north that he thought was tipping or settling, all of the other walls were holding up well. (RP 210).

The defense called as it's expert Brian McKarcher, the owner and president of Living Waters Landscape. (RP 345). Living Waters is a full service landscape, construction, installation, irrigation, grounds maintenance and pest control business. (RP 345). Living Waters has a core of 20 to 25 employees and then runs 30 to 35 during the busy season. (RP 346). Mr. McKarcher had been in the business for about 23 years. (RP 346). He was very familiar with the installation of vinyl fencing, including how the fences were built and the types of products available. (RP 347 to 348). Unlike the plaintiffs' experts, Mr. McKarcher had not submitted any bids

to do any work and did not anticipate getting any employment or any work for his company out of having reviewed the Taylor job. (RP 352).

Mr. McKarcher had checked for strength and found no structural issues; the posts seemed to be very secure. (RP 353). What he noticed was esthetics, a difference in craftsmanship. (RP 353). He stated that some areas of the fence could have had tighter gaps and possibly could have been done better depending on the tradesman. (RP 353). He saw no sign of the fence not standing straight and stiff, doing what a fence was intended to do. (RP 353).

As for the concrete footing under the fence, Mr. McKarcher testified the footing typically was nothing more than to close the gap and was not part of the fence itself. (RP 354). While the footing could add additional structure to hold the post, typically the post would go into the ground and be supported by other means. (RP 354). The bottom curb was to keep animals from going under the fence. (RP 354). He noted that the concrete footing was “fine” on the first pour from the north side that ran all along the east side of the property. (RP 354 to 355).

When asked about the additional concrete that was placed on top of the footing at the south end of the yard, Mr. McKarcher said that it was a “secondary pour” made to close the gap and structurally there was no problem with it. (RP 357). He conceded that esthetically, it might bother someone because the concrete does not completely blend with the primary pour. He said that he worked with concrete and worked with lots of

concrete contractors and did not see anywhere that the pour on top of the existing curb was at all compromised and had seemed to bond just fine. (RP 357). He noted that it had been two years since the installation and it was not deteriorating or breaking down. (RP 357).

When asked about cracks in the concrete curbing, he stated that he had noticed a crack which was likely due to movement of the ground, settling or frost heave or any one of those things. (RP 358). However, the post was stout and was in the ground far enough to secure it. (RP 358).

Mr. McKarcher noted an obvious wash out on the south side, but that was due to run off from the neighbor's property. (RP 359). He did not call the washout a defect in Mr. Calene's construction technique. (RP 359). Mr. McKarcher added that footings do not have to have rebar, but a lot of people use a fiber mix in the concrete. (RP 362).

Mr. McKarcher was asked about places where there had been routing to make rails fit in and had seen some. (RP 365). He said that if you look at the entire fence, most of the joints are what you would expect and are fine. (RP 365). There were some joints up by the gate area on the southwest side that had a reveal of maybe half an inch, quarter inch or so and he had observed that. (RP 365 to 366). He described that is a craftsmanship issue that probably wasn't put in as tight as maybe it could have been, but structurally had no issue. (RP 366).

Mr. McKarcher had the same opinion of places in the fence where triangular pieces of vinyl were glued in. He said those would be an esthetics

issue. (RP 367). Mr. McKarcher's opinion was that the fence did not need to be removed and replaced. (RP 367). The issues were only esthetics. (RP 367). As for hinges, they had been replaced before McKarcher went out and he did not know what kind of hinges were there before. (RP 367). He did state that there are a lot of problems with gates whether fences are done professionally or by homeowners. (RP 367).

Mr. McKarcher testified that if someone was terribly unhappy with a section of fence, there is no question that it could be taken out and replaced a piece at a time. (RP 368). However, with 95% of the concrete footing intact and only a couple of places broken and the majority of the fence holding strong for a six foot tall fence, "we're dealing with several areas of esthetics" and the claimed defects were what he called craftsmanship. (RP 368 to 369). Mr. McKarcher said that there were levels of craftsmanship in every area and some people were just better than others. (RP 369). Mr. McKarcher said that as a landscaper he shows up and the customer knows what they want and sometimes they are dealing with a budget. (RP 369). He said you try to deliver what you can within the customer's budget. (RP 369 to 370).

In comparing Lucky Acres, who had submitted a bid to replace the fence, Mr. McKarcher said that he was very familiar with Lucky Acres, a "very high end fencing company" who did a good job and you pay for it. (RP 371).

Mr. McKarcher's company installed retaining walls and he reviewed the numerous short block walls that had been installed by Mr. Calene. (RP 371). He said that a wall had to be "engineered" if it was over four feet tall and none of the walls in the Taylor yard were over four feet. (RP 371 to 372). Mr. McKarcher's initial opinion of the block walls built by Mr. Calene was that it was an attractive design. (RP 394).

Mr. McKarcher had reviewed the method of construction, using a woven cloth material along the wall and observing blocks buried in the ground. (RP 374). He testified in building a block wall you start with the footing that has to be compacted and level and build from the footing up, putting the blocks together and back filling, using different methods, including cloth. (RP 374). While Mr. McKarcher said his company would normally use gravel behind walls, the only reason for the gravel was to keep water moving through them so that there was not a load that would press the wall over. (RP 376). The method Mr. Calene used of putting weed cloth behind the wall was very common, a woven material that lets water through. (RP 376 to 377). He testified there was nothing required that says not to use a kind of fabric behind the wall and fabric was commonly used for some applications. (RP 377). Mr. McKarcher said that back fill is less concern on walls that are four feet and under and only taller walls have more of a risk of the wall falling over. (RP 379).

Mr. McKarcher had observed settling in one section of wall on the north side of the lawn. (RP 380). Exhibit 200. He said the base of the wall

had settled, probably due to the soil underneath it settling and the wall simply sank. (RP 380).

Mr. McKarcher noticed two other places in the whole south wall where there was very minor settling. (RP 382). Mr. McKarcher agreed with Mr. Cornish's estimate of \$840 to repair the settling section of the north wall. (RP 382). Over all, Mr. McKarcher, in examining the walls, saw nothing to lead him to believe that all of the walls should be removed and replaced. (RP 383). He often saw problems needed to be fixed and would just tear down to the footing and rebuild the wall. (RP 383). He did not see anything to make him feel that any of the walls were failing or were going to fall or had any issue with water building up. (RP 384).

Mr. Calene testified that he gives a one year guarantee on his work, but had never been given the chance to come back and look at claimed defects or make repairs. (RP 458 to 459). He was generally pleased with the way the walls looked and the construction of them. (RP 459).

Mr. Calene's actual bid for the fence was without a curbing, but Diane Taylor had wanted some kind of border along the bottom of the vinyl fence. (RP 461). Mr. Calene had ordered a concrete truck in for the posts and had formed up and done the concrete curbing without any extra charge to the Taylors. (RP 461). He had installed 5/8ths inch rebar, two pieces, through the footing and the posts. (RP 464).

Mr. Calene said there were triangular pieces of vinyl that had been patched in because of extreme slopes and the ability to buy only six foot

pickets. (RP 466 to 467). He said they did the best they could by cutting the least amount of material off at the angle and patching with a silicone product. (RP 468).

When the footing that Mr. Calene had not charged for left a gap under the fence, he layered additional concrete over and bonded it to the first layer, again not charging the Taylors. (RP 472 to 473).

Mr. Calene had constructed the gates because they were nicer looking than preconstructed ones. (RP 473). The hinges actually went into wood, rather than vinyl. (RP 473). Mr. Calene had changed the double gate from a ten foot to a fourteen foot because of the size of the Taylor's trailer and did not charge the Taylors anything for that change order. (RP 475 to 476).

As for the licensing and bonding, Mr. Calene's newest license starting July 7, 2011, and was under American Construction. (RP 489). American Landscape and Sprinkler was the name of his business at the time of the Taylor job. (RP 491). Mr. Calene had been bonded by CBIC and denied that his bond was impaired in August of 2010. (RP 494). Exhibit P-171 appeared to show the bond was still effective August 23, 2010.

Despite the claims of the plaintiffs, the court found that the items complained of by the plaintiffs regarding the defendant's work were related to levels of craftsmanship and were not defects related to improper construction. (Finding of Fact 2.12, CP24). The court found there was minor corrective work that needed to be done of a value of \$1,176. (Finding

of Fact 2.14, CP 25). Those items were approximately equal to the remaining balance owed on the Taylor contract to Calene of \$1,183. (Finding of Fact 2.15, CP 25).

The court found that the plaintiffs had not served 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*. (Finding of Fact 2.17, CP25). The court also found that 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. (Finding of Fact 2.20, CP 25).

Having entered its Findings, the court concluded that no action had been commenced under the Contract of Registration Statute, *RCW 18.27*. (Conclusions 3.2, CP 25). There was no violation of the Consumer Protection Act (Conclusion 3.3, CP 25). There was no prevailing party and neither side was entitled to attorney fees or costs. (Conclusions 3.4 and 3.5, CP 26). The court also concluded that whether the defendant was bonded, in addition to having insurance, was irrelevant where no bond company was joined and no judgment was entered that would be a claim against a contractor's bond. (Conclusion 3.6, CP 26). This appeal followed.

IV.

ARGUMENT

A. A LICENSED BONDED CONTRACTOR MEETS THE REQUIREMENTS OF THE CONTRACTOR REGISTRATION ACT.

Appellants argue that Matthew Calene violated the Contractor Registration Act, *RCW 18.27*. *RCW 18.27.030* does require an applicant for registration as a contractor to submit an application that includes the registration information required by the statute. It is not alleged that Mr. Calene failed to register as a contractor.

In fact, he has been registered as a contractor for many years. Exhibit P-171 that appellants rely on, a screen from the Department of Labor and Industries website, shows that American Landscape and Sprinkler had a contractors license since 2002. The same Exhibit shows a license under the name Rain Maker from March of 1995 as well as a license to American Construction from July 7, 2011. That confirmed Mr. Calene's testimony that he previously did business as American Landscape and Sprinkler, but had switched to American Construction in the last couple of years. (RP 432 to 433).

Plaintiffs did not submit any Department of Labor and Industries Information under the business and licensing name of American Construction. More importantly, there were no certified records of the Department submitted at all by any custodian of records. Evidence Rule 803(8) refers to the admission of public records pursuant to *RCW 5.44.040*. *RCW 5.44.040* provides for records of the offices of this state, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, to be admitted in evidence in the court's of this state.

Instead of providing a partial record from one screen of the Labor and Industries website, if Taylors wanted to establish that Mr. Calene was not registered, insured or bonded, they could have produced certified records of the Department. Absent such records, Mr. Calene's testimony that he was currently licensed and bonded with the Department of Labor and Industries and was also bonded at the time of the Taylor job is undisputed. (RP 433).

RCW 18.27.040 requires each applicant for contractor registration to file with the Department a surety bond. It is clear from the evidence that Matthew Calene had a surety bond for American Landscape and Sprinkler when he did business under that name. No search was done of the new company name, American Construction. Mr. Calene had also had a bond in 2002 to 2007 with CBIC. Plaintiffs Taylor originally named CBIC as a defendant in their Complaint, then Old Republic in an Amended Complaint and also Old Republic in the Second Amended Complaint.

As noted in Section B hereinafter, a person making a claim against a bonding company must serve the Department of Labor and Industries so the bonding company can be notified. Had Taylors properly followed the statute, the Department would have sent the process to the bonding company of record and the company could raise an issue if there was no bond. Mr. Calene testified that his bond was in effect throughout the entire Taylor job. He did change the name of his company at some time close thereto. *RCW 18.27.040 (1)* provides:

“A change in the name of a business or a change in the type of business entity shall not impair a bond for the purposes of this section so long as one of the original applicants for such bond maintains partial ownership in the business covered by the bond.”

If Matthew Calene changed the name of his business, but kept the bond under one or other name, he would comply with the section.

Appellants should not be able to bring partial records to the court and then argue that Mr. Calene was not a bonded contractor. A contractor has substantially complied with the provisions of *RCW 18.27.040* when he has secured bonding and insurance even though he inadvertently failed to provide proof of the same. Murphy v. Campbell Inv. Co., 79 Wn.2d 417, 422, 486 P.2d 1080 (1971).

Under *RCW 18.27.040*, if there is a change in the name of the business or a change in the type of business entity, then, as long as one of the original applicants for the bond maintains partial ownership in the corporation, the original bond is not impaired. Leon’s Plumbing and Heating, Inc., v. Aqua Drilling, 26 Wn. App. 789, 793, 614 P.2d 237 (1980).

Appellants erroneously allege a violation of *RCW 18.27.350*. That statute provides that the fact that a contractor is found to have committed a misdemeanor or infraction under the contractor statute is deemed to affect the public interest and to constitute a violation of *Chapter 19.86 RCW* (the Consumer Protection Act). It has not been established that Mr. Calene was a contractor found to have committed an infraction or violation of the Chapter

as set forth in *RCW 18.27.200*. That statute sets forth possible violations of the statute. There is a procedure set forth in *RCW 18.27.230* for the Department to issue a Notice of Infraction if the Department reasonably believes that a contractor has committed an infraction under the Chapter. There is no evidence that any such Notice of Infraction has ever been issued to Matthew Calene by the Department.

B. AN ACTION MAKING CLAIMS AGAINST A CONTRACTOR AND HIS BOND MUST BE BROUGHT IN THE MANNER PRESCRIBED BY *RCW 18.27.040*.

Appellants erroneously allege that the trial court required them to bring an action under the Contractor's Registration Statute, *RCW 18.27*. In fact, the court only found, based on the evidence, that the 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*. (Finding 2.17, CP 25). That lead to the court's Conclusion of Law number 3.2 that no action was commenced and served under the contractor's registration statute, *RCW 18.27*. (Conclusion of Law 3.2, CP 25).

The trial court was accurate in its Findings and Conclusion. *RCW 18.27.040(3)* provides:

“(3) Any person, firm, or corporation having a claim against the contractor for any of the items referred to in this section may bring suit against the contractor and the bond or deposit in the superior court of the county in which

the work was done or of any county in which jurisdiction of the contractor may be had. The surety issuing the bond shall be named as a party to any suit upon the bond. Action upon the bond or deposit brought by a residential homeowner for breach of contract by a party to the construction contract shall be commenced by filing the summons and complaint with the clerk of the appropriate superior court within two years from the date the claimed contract work was substantially completed or abandoned, whichever occurred first. Action upon the bond or deposit brought by any other authorized party shall be commenced by filing the summons and complaint with the clerk of the appropriate superior court within one year from the date the claimed labor was performed and benefits accrued, taxes and contributions owing the state of Washington became due, materials and equipment were furnished, or the claimed contract work was substantially completed or abandoned, whichever occurred first. Service of process in an action filed under this chapter against the contractor and the contractor's bond or the deposit shall be exclusively by service upon the department. Three copies of the summons and complaint and a fee adopted by rule of not less than fifty dollars to cover the costs shall be served by registered or certified mail, or other delivery service requiring notice of receipt, upon the department at the time suit is started and the department shall maintain a record, available for public inspection, of all suits so commenced. Service is not complete until the department receives the fee and three copies of the summons and complaint. The service shall constitute service and confer personal jurisdiction on the contractor and the surety for suit on claimant's claim against the

contractor and the bond or deposit and the department shall transmit the summons and complaint or a copy thereof to the contractor at the address listed in the contractor's application and to the surety within two days after it shall have been received." (Emphasis added).

In the present case, the Taylors named the surety company as a party and commenced their action by filing a Summons and Complaint in the appropriate Superior Court. However, service of process against the contractor and the contractor's bond was required by the statute to "be exclusively by service upon the department", *RCW 18.27.040(3)*.

The plaintiffs were to send three copies of the Summons and Complaint and the fee to the Department of Labor and Industries. Service, according to the statute, was not complete until the Department received the fee and the three copies of the Summons and Complaint. Instead, plaintiffs served Matthew Calene individually. That may have conferred jurisdiction for an individual action against Mr. Calene, but service for purposes of the bonding statute was not completely. There was no service or conferring of personal jurisdiction on the contractor and the surety for suit on the Taylors' claim against the contractor and the bond. *RCW 18.27.040(3)*.

Plaintiffs were seeking to recover on the bond. Their complaint alleged the name and address of the bonding company, CBIC or Old Republic and the bond number. Any Consumer Protection Act claim would require a proper action brought under *RCW 18.27.040*.

Without compliance with the statute, the named bonding company received no notice of the complaint of the Taylors and no opportunity to respond. The surety cannot be responsible for plaintiffs' bond claim where there was no there was no service and no conferring of personal jurisdiction. Similarly, plaintiffs could not be the prevailing party for purposes of attorney fees under *RCW 18.27.040(6)* where there was no action properly filed against the contractor and the contractor's bond. There was no prevailing party in any event, as the court concluded that no judgment would be entered in favor of the plaintiffs against the defendant or in favor of the defendant against the plaintiffs and where there was no prevailing party, neither side was entitled to attorney fees or costs.

Mr. Calene was licensed and bonded and the Taylors never gave the bonding company an opportunity to respond to the complaint.

The court did not find a prevailing party, despite appellants claim. Matthew Calene did not bring a counterclaim, but only presented evidence of the total value of his contract. The court's ruling was that the total cost of any minor repairs for the craftsmanship work was approximately equal to the remaining balance owed to the defendant. As such, there was no prevailing party. (Finding of Fact 2.15, CP 25).

Mr. Calene did not bring or maintain any action in any court for collection of work. There was no violation of *RCW 18.27.080*. Mr. Calene did not have to prove he was registered, where he brought no claim. Taylors had to prove he was not registered and bonded where they made those claims.

C. THE CONSUMER PROTECTION ACT IS INAPPLICABLE TO A PRIVATE CONTRACT DISPUTE WITH NO POTENTIAL TO DECEIVE A SUBSTANTIAL PORTION OF THE PURCHASING PUBLIC.

Under the Consumer Protection Act, *RCW 19.86.020*, unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful.

However, to constitute a violation of the Consumer Protection Act, a simple dispute between a homeowner and contractor hired by the homeowner alleging defects in performance is not sufficient. Plaintiff's Second Amended Complaint for Damages, CP 1 to 4, alleged that the defendant breached his duty to the plaintiffs by failing to perform the contracted work properly. It alleged that as a result of poor workmanship by defendant Calene, the plaintiffs would be forced to make repairs.

In Keyes v. Bollinger, 31 Wn. App. 286, 640 P.2d 1077 (1982), the court held at 289 to 290 that plaintiffs claiming a per se violation of the Consumer Protection Act must show:

“(1) the existence of a pertinent statute; (2) it's violation; (3) that such violation was the proximate cause of damages sustained; and (4) that they were in the class of people the statute sought to protect.

Plaintiffs allege that the defendant was licensed and insured, but not bonded. However, the defendant provided his contractor registration information and a valid contractor number issued by the Department of Labor and Industries. Plaintiffs included that license and bond information in their

Complaint. The defendant provided information from the Washington State Department of Labor and Industries, showing a valid bond in effect. Plaintiffs named bonding company CBIC as a defendant herein. Although plaintiffs contend the defendant was not bonded, they presented no records from the Department of Labor and Industries, but only copied a portion of a website screen in support of their claim.

Furthermore, any claim under the Consumer Protection Act must meet the second criteria of Keyes, being the proximate cause of damages sustained, Keyes, at 290. Here, the court found that the plaintiffs had not sustained any damages and any work still required at their premises was equal to the amount they still owed the defendant. Similarly, in Keyes, at 290, the court noted:

“We also observe the Keyes has not proven any compensable damages proximately caused by Bollinger’s failure to obtain an inspection, independent of the asserted building code violation .”

Keyes showed no damages for repairing alleged construction defects. The trial judge in the present case also found no damages for repairing alleged construction defects.

Keyes v. Bollinger, supra, states that for Consumer Protection Act claims not premised upon a specific statutory violation, there must be a deceptive act that has the tendency or capacity to deceive a substantial portion of the purchasing public. At 290 the Keyes court notes:

“The requisite presence of public interest is demonstrated when...(1) the defendant by unfair or deceptive act or practices in the conduct of trade or commerce has induced the plaintiff to act or refrain from acting; (2) the plaintiff suffers damage brought about by such action or failure to act; and (3) the defendant deceptive acts or practices have the potential for repetition.”

In Keyes, Bollinger violated the Consumer Protection Act by regularly making numerous representations as to completion and repair dates that he did not meet. Bollinger’s failure to comply with these representations were neither isolated occurrences nor de minimis in degree. Indeed, the sheer number of unmet representations of completion and repairs in other buyer’s homes indicates Bollinger made his “estimates” without discernable likelihood he could or would provide the promised performance. Keyes, supra at 291.

In the present case, by contrast, appellants Taylor allege only that the respondent failed to perform the contracted work at their home site properly. They do not allege that any actions by defendant Calene had the potential to deceive a substantial portion of the purchasing public. As such, there is no possible Consumer Protection Act violation.

See also Hambleton Bros. Lumber Co. v. Volkin, 397 F.3 1217 (9th Cir. 2005) where a timber company’s *RCW 19.86.020* claim against a transaction company’s ex-president failed where the timber company offered no evidence of active solicitation or public advertising by the ex-president,

and the evidence showed that the dispute was nothing more than a private dispute over the breach of a private timber sale.

Plaintiff also failed to show public interest impact to make a Consumer Protection Act claim in Campbell v. Seattle Engine Rebuilders, 75 Wn. App. 89, 876 P.2d 948 (1994). In Campbell, the dispute was between a party who purchased a rebuilt engine and the party who had rebuilt the engine. At 96 to 97, the court found that the plaintiff's CPA claim was properly dismissed because she failed to establish public interest impact. (Citing Hangman Ridge v. Safeco, 105 Wn.2d 778, 719 P.2d 531 (1986)).

Hangman held at 780:

“We hold that to prevail in a private CPA action and therefore be entitled to attorney fees, a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.

D. A COURT MAY ENTER FINDINGS SUPPORTED BY THE EVIDENCE, EVEN IF THE FINDINGS ACCEPT THE TESTIMONY OF CERTAIN WITNESSES, RATHER THAN OTHERS.

Appellants argue that the trial court's Findings were not supported by substantial evidence and therefore the Conclusions were not supported by the Findings.

Essentially, plaintiffs are dissatisfied that the court chose to believe expert testimony presented by the defense, rather than expert testimony

presented by the plaintiffs. It has long been the settled law in Washington that where Findings of Fact are amply supported by the proofs, the Findings will not be disturbed on appeal. Even if this court agreed with appellants that the trial court should have resolved the factual dispute the other way, the constitution does not authorize this court to substitute its findings for that of the trial court. Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 575, 343 P.2d 183 (1959).

The reasoning for that principal of law is simple. The trial court has weighed the evidence and decided what its judgment should be. Where the trial court has weighed the evidence, appellate review is limited to determining whether the Findings are supported by substantial evidence and, if so, whether Findings in turn support the trial court's Conclusions of Law and Judgment. Holland v. Boeing Company, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978). Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. Holland, supra at 390.

In the present case, the trial court was entitled to believe that the issues complained of by the plaintiffs, Taylors, were craftsmanship issues only and not defects in the work performed. Plaintiffs did present testimony that the entire fence, all of the curbing and most of the block walls should be removed and replaced. However, it is waste to replace an entire fence and entire walls solely because of quality of craftsmanship. Although plaintiff s' experts promoted removal and replacement of the fence and curbing and most

of the walls, the defense expert, Brian McKarcher, testified that the walls, footings and fence were properly constructed and there were only issues of craftsmanship.

An appellate court does not weigh either the evidence or the credibility of the witnesses, even though it may disagree with the trial court in either regard. In re Sego, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).

This reviewing court cannot retry factual issues. As noted by appellants in their memorandum, 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.” Siting Ridgeview Properties v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. Holland v. Boeing Company, 90 Wn.2d 384, 390, 583 P.2d 621 (1978); Ridgeview Properties v. Starbuck, supra at 719.

Appellants argue that the trial court’s Findings were improper because plaintiffs’ expert testified that the fence work, concrete work and retaining walls were not properly installed and needed to be repaired or replaced. However, the trial court did not have to accept that evidence, but could accept the defense evidence that the claimed defects were merely craftsmanship issues. Where Findings are based upon conflicting evidence, the appellate function begins and ends with a determination of whether the Findings are supported by substantial evidence. Stewart v. Smith, 55 Wn.2d 563, 564, 348

P.2d 970 (1960). The appellate court will not re-try questions of fact involving substitution of the appellate court's judgment for that of the trial court. Stewart v. Smith, supra at 564, citing Thorndike v. Hesperian Orchards, Inc., supra.

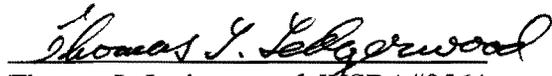
In the present case, there is evidence to support the Findings of the trial court, even if that evidence is contrary to what the plaintiffs produced. In weighing the evidence, trial court is free to put whatever weight it wants on testimony. Testimony of the defense expert may be more believable where Mr. McKarcher is not bidding to receive any work, whereas each of the three plaintiffs' witnesses had submitted bids for thousands of dollars worth of work to the plaintiffs. It is the trial court that weighs the evidence and the credibility of the witnesses. In re Sego, supra.

V.

CONCLUSION

Respondent requests that the decision of the trial court be affirmed.

Respectively submitted this 11th day of April, 2014.


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