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

No. 65728-3

2011 FEB 15 10:00 AM  
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R & R Concrete, Inc.

Appellant/ Cross Respondent

v.

Michael and Marilee Coaker Et. Al.,

Respondent/Cross Appellant

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APPEALED FROM KING COUNTY SUPERIOR COURT  
THE HONORABLE CAROL A. SCHAPIRA

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BRIEF OF RESPONDENT/CROSS APPELLANT

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Bradley L. Powell, WSBA No. 11158  
Allison L. Pehl, WSBA No. 43019  
OLES MORRISON RINKER & BAKER LLP  
701 Pike Street, Suite 1700  
Seattle, WA 98101-3930  
Phone: (206) 623-3427  
Fax: (206) 682-6234  
Attorneys for Respondent/Cross Appellant  
Michael and Marilee Coaker

**ORIGINAL**

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**I. ASSIGNMENT OF ERROR**

**No. 1.** The trial court did not error in its decision to admit the expert testimony of Mr. Deress. Respondents Michael and Marilee Coaker (the "Coakers") assign no error to the trial court's decision regarding this matter.

**No. 2.** The trial court erred by refusing to grant a motion to dismiss the appellant's claims in their entirety for lack of sufficient proof of a valid contractor registration held at the time of the parties' contract.

**II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

**No. 1.** The Contractor Registration Act, RCW 18.27.080, requires that a contractor prove that he was a duly registered contractor and held a current registration at the time he contracted or he may not bring or maintain any action on the same contract. Mr. Rausch, owner of appellant R & R Concrete, Inc. ("R&R"), admitted at trial that R & R's contractor registration had been expired, suspended, or had been canceled prior to April 2007, and failed to submit any proof before trial or at trial that R & R's license was valid at the time the Coakers and R & R contracted in September of 2007. Did R & R's failure to submit proof of its

contractor registration violate RCW 18.27.080 and should its claims have been dismissed in their entirety? (Assignment of Error 2)

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

#### **1. Procedural Facts**

On May 28, 2008, R & R filed its complaint for breach of contract against the Coakers requesting judgment against the Coakers in the amount of \$31,725.00 plus pre-judgment interest. CP 1. R & R alleged, in its complaint, that all prerequisites to its suit had been satisfied. CP 1. On August 21, 2008, the Coakers answered the complaint and counterclaimed for breach of contract against R & R. CP 13. The Coakers, in their answer, asserted as an affirmative defense that R & R's complaint and requested recovery were barred by reason of R & R's failure to comply with the provisions of RCW 18.27 of the Contractor's Registration Act. CP 13. The matter went to a bench trial beginning on May 26, 2010, and concluding on May 27, 2010. CP 50A.

On June 22, 2010, the trial court entered judgment in favor of R & R in the amount of \$3,570.00. CP 58. The amount awarded to R & R was reduced for deficiencies by R & R of the construction work performed under the parties' contract. CP 5

Post-trial, R & R filed a motion for reconsideration regarding the admittance of Mr. Deress' expert testimony, which was subsequently denied by the trial court. CP 52. Mr. Deress was a substitute for Ms. Amy Woods whose opinions and identity were disclosed to R & R on January 25, 2010. CP 45. On July 19, 2010, R & R filed its Notice of Appeal to Division One of the Washington State Court of Appeals. CP 60. And on July 29, 2010, the Coakers filed their Notice of Appeal in this action. CP 61.

**2. Counterstatement of Facts Pertaining to R & R's Assignment of Error**

On the second day of trial, Mr. Deress was permitted to testify as an expert for the Coakers over R & R's untimely objection. RP 8:12-13. R & R did not choose to lodge an objection to the admittance of this testimony until after Mr. Deress had already been permitted to give his expert opinion on the deficiencies in R & R's work under the parties' contract for 20 minutes on the record. RP 8:20-22.

Contrary to R&R's misleading assertion, Mr. Deress was not a "newly disclosed expert witness." Mr. Deress was a substitute for Ms. Amy Woods who was previously disclosed as an expert witness in the Coaker's trial witness and exhibit list filed with the

Court and served upon R & R on January 25, 2010. RP 3:7-10. Ms. Woods became unavailable as a witness shortly before trial was scheduled to begin, and counsel for the Coakers promptly contacted R & R to apprise them of this fact, to which R & R's counsel responded "okay, I guess that's all right." RP 6:22-10.

The substitution of Mr. Deress for Ms. Woods was not a random event. Ms. Woods was a member of the firm Wiss, Janney, Elstner Associates, which is the same firm that Mr. Deress is a member of. RP 5:14-17. Mr. Deress served as Ms. Woods' boss during the time period that she performed work for the Coakers in regards to this matter and was available to testify regarding Ms. Woods' report, which was also disclosed to R & R well in advance of the trial date. RP 3:11. Mr. Deress testified wholly consistent with Ms. Woods' prior disclosures regarding the work that she performed on this case, RP 8:22-25, and made a visit to the site of the project to confirm that Ms. Woods' findings were in fact accurate.

The issues that Mr. Deress testified to at trial were all issues that Ms. Woods had previously identified in her report – again, the report made available to R & R well in advance of the trial date. RP 8:22-25. R & R did not conduct a deposition of Ms. Woods that

could have been used in place of Mr. Deress' testimony. Having failed to depose or conduct any discovery of timely disclosed Ms. Woods, R & R can claim no prejudice because it didn't get to depose Mr. Deress. R & R simply chose not to prepare any response to the Coaker's expert disclosures in this matter. The trial court ultimately and correctly concluded that Mr. Deress could testify in regards to Ms. Woods' report and his personal observations made during a site visit he conducted before trial was scheduled to begin. RP 8:13-25. The Coakers assign no error to this finding.

### **3. Facts Pertaining to the Coakers Assignment of Error**

On the first day of trial (May 26, 2010), Mr. Rausch, the owner of R & R concrete testified regarding the parties' contract and the resulting dispute concerning the subject matter and performance of that contract. RP 3:20.

During cross examination, Mr. Rausch was asked by counsel whether R & R's contractor's registration had been expired, been suspended, or had been canceled prior to April of 2007 – just a few months prior to the date in which the parties' contract at issue was entered into. RP 57:24-58:1. Mr. Rausch responded and stated that R & R's contractor's registration had in fact been

suspended prior to April of 2007. RP 58:2. Mr. Rausch also testified that R & R's contractor's registration had been suspended two or three times but that he did not recall the specific dates of those suspensions, but recalled that after each suspension R & R's registration was allegedly reinstated. RP 58:18-20.

Mr. Rausch was also asked during cross-examination whether he was aware that R & R needed to be registered with a valid contractor's license in order to do work as a contractor. RP 74:10-13. To which Mr. Rausch stated that he was in fact aware of the requirement without offering anything further to show that he was in fact licensed during the time he entered into the contract with the Coakers. RP 74:14. R & R ultimately presented no evidence establishing it was properly registered under RCW 18.27 at the time it entered into the contract with the Coakers.

During closing argument on May 27, 2010, counsel for the Coakers requested that the Court dismiss R & R's claim in its entirety for its failure to affirmatively prove, as required under the Contractor's Registration Act, that it was validly registered as a contractor prior to entering into its contract with the Coakers. RP 33:12. The Court erred in not granting the Coakers request that the

claims against it be dismissed for this failure of proof on the part of R & R.

#### IV. ARGUMENT

1. **The Trial Court Did Not Abuse Its Discretion When It Permitted Mr. Deress to Testify in Place of Ms. Woods in this Case.**

The decision to admit or exclude testimony is reviewed for abuse of discretion. *Hough v. Stockbridge*, 152 Wn. App. 328, 338, 216 P.3d 1077 (2009). A court abuses its discretion when its decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Thus, it is only an abuse of discretion when the court bases its decision on an erroneous view of the law. *Hough*, 152 Wn. App. at 338. And the appellate court will only find an abuse of discretion ***when no reasonable person would have taken the position adopted by the trial court.*** *Mayer v. City of Seattle*, 102 Wn. App. 66, 79, 10 P.3d 408 (2000) (emphasis added).

R & R essentially argues that the trial court failed to properly apply King County Local Rule 26 (“KCLR”) and acted erroneously in its admittance of Mr. Deress’ testimony. It is well established that a trial court may, however, admit expert testimony for good cause

and subject to conditions even if a party fails to properly disclose an expert witness in its witness list. *Hough*, 152 Wn. App. at 339 (citing *Stevens v. Gordon*, 118 Wn. App. 43, 51, 74 P.3d 653 (2003)). A trial court must also take care not “to exclude testimony as a sanction absent any showing of ***intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.***” *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1977) (quoting *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 706, 732 P.2d 974 (1987)) (emphasis added). Here, the Coakers properly disclosed Ms. Woods of Wiss, Janney, Elstner Associates as an expert witness and were simply substituting the person who would be relaying the same testimony that Ms. Woods would have given if she had not been unavailable. However, even if the court were to find otherwise, good cause existed to allow Mr. Deress to testify in Ms. Woods’ absence, and the appellant cannot show that the trial court’s decision was manifestly unreasonable or based on untenable grounds. Thus, the appellant cannot meet its burden on this issue.

In support of its argument, R & R cites *Lampard v. Roth*, 38 Wn. App. 198, 684 P.2d 1353 (1984) and *Rupert v. Gunter*, 31 Wn.

App. 27, 640 P.2d 36 (1982). In both cases, however, the trial court's discretionary rulings excluding the late disclosed expert witnesses were affirmed where counsel had no reasonable excuse for the delay. They were not cases where a party simply substituted one member of a firm when another had left, and when the substitute testified to the same issues. Also, because R & R cannot show an intentional or willful violation of the discovery rules, these cases do not apply here and are wholly distinguishable from the facts presented.

In *Lampard*, the plaintiff failed to respond promptly to interrogatories seeking the names of experts expected to be called at trial. The defendant then had to bring a motion to compel discovery. *Lampard*, 38 Wn. App. at 200. Even after the trial court continued the trial date and ordered the plaintiffs to produce a summary of their experts' testimony, the plaintiffs still did not list two experts whom they ultimately called as witnesses. *Id.* Further, the plaintiffs gave no reason for their failure to comply with the order compelling discovery.

Although Ms. Woods was the individual listed on the Coaker's trial witness and exhibit list and she was not the person who was able to testify at trial, R & R has not shown that the

Coakers were employing tactics of evasion or delay or that the nondisclosure caused them any prejudice whatsoever. In fact, they cannot show any resulting prejudice because they had failed to depose Ms. Woods and because Mr. Deress testified as to the exact contents of Ms. Woods' report -- which R & R had received well in advance of the scheduled trial date in this case.

In *Rupert*, another case cited by R & R in its appellate brief, the defendants had served the plaintiff with interrogatories that inquired, inter alia, regarding any expert witnesses expected to be called at trial. *Rupert*, 31 Wn. App. at 30. Not until two days prior to trial did the plaintiff inform the defendants of their general intent to call an appraiser to the stand. And not until 4 pm, the day before the trial, did the plaintiff make arrangements with the appraiser to testify and failed to relay any of those arrangements onto the defendants before trial began. *Id.* Based on these facts, the appellate court affirmed the trial court's decision to exclude the testimony of the appraiser the plaintiff wished to call. *Id.* at 32.

Unlike the plaintiff in *Rupert*, R & R was well aware that the Coakers intended to call an expert witness from Wiss, Janney, Elstner Associates to testify regarding issues identified and encompassed in Ms. Woods' report. The contents of that report

were given to R & R, and Mr. Deress' testimony only concerned that which was already disclosed and identified well prior to trial. The substitution of the individual to give the anticipated testimony changed by no fault of the Coakers, but the substance of that testimony did not. Additionally, counsel for the Coakers advised counsel for R & R as soon as possible regarding the expected change. R & R expressed no concern when told of the change, and again failed to express any concern until after Mr. Deress had proceeded to testify for 20 minutes on the record. Because the Coakers did not do anything to conceal the substance or nature of the testimony R & R should have anticipated, the court's holding in *Rupert* is inapposite and does not apply here.

The KCLR cited by R & R in its brief does not bar the testimony of Mr. Deress in this case. In fact, with regard to alleged discovery violations, "it is an abuse of discretion to exclude testimony as a sanction absent any showing of intentional nondisclosure, willful violation or a court order, or other unconscionable conduct." *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 732 P.2d 974 (1987). Because there has been no affirmative showing that the Coakers acted intentionally to circumvent the discovery rules, the court acted well

within its discretion in admitting the expert testimony of Mr. Deress in this case.

When there has been no resulting prejudice, the expert witness should be permitted to testify. *In re Estate of Foster*, 55 Wn. App. 545, 779 P.2d 272 (1989), the late disclosure of the identity of the defendant's expert witness in an asbestos case, in violation of a "style" order requiring the disclosure of the witness 77 days prior to trial, did not require the exclusion of the expert's testimony. The court rejected the plaintiff's argument that the testimony should have been excluded without a showing of prejudice because the defendant's tardiness in its disclosure was in fact willful. Here, R & R can show neither resulting prejudice from Mr. Deress' testimony nor that the Coakers acted willful and in an attempt to circumvent the discovery rules. Accordingly, the trial court acted within its discretion in permitting Mr. Deress to testify on Ms. Woods' behalf.

Expert testimony should be admitted where a party has at least some notice of the testimony to be received by an otherwise undisclosed expert and counsel acts diligently in disclosing the name of the expert when such name becomes known. *Rice v. Janovich*, 109 Wn.2d 48, 742 P.2d 1230 (1987). In a case factually

similar to the present case, the trial court properly allowed two experts to testify for the plaintiff even though the plaintiff did not provide their names until sometime during the trial.

The court in *Rice* based its decision to admit the testimony on two important factors. First, the court found that because the defense had at least some notice of the type of expert testimony that would be offered it would not be prejudicial to allow the expert to testify at trial. And, second, the court found that the record contained nothing to suggest that the lack of disclosure was due to intentional misconduct or a tactical decision by the plaintiff, and that therefore it was permissible to allow the testimony of the expert witness in that case. *Id.* at 56-7. The court in *Rice* found that counsel had difficulty in determining before trial what experts would be available to testify, and told the opposing counsel the names of the individuals as soon as he was himself certain who would be testifying. *Id.* Similarly, here, R & R certainly had advance notice of the nature of the testimony that Mr. Deress gave in this case. Additionally, R & R cannot point to a single fact which would give rise to the implication that the Coakers intentionally kept the identity of Mr. Deress hidden. Once counsel for the Coakers knew the

name of the individual that would testify at trial, he immediately apprised counsel for R & R of this fact.

Absent any showing of intentional nondisclosure or of resulting prejudice to R & R's case, the trial court was correct in concluding that Mr. Deress should be permitted to testify in Ms. Woods place in regards to Ms. Woods' report and Mr. Deress' personal observations made during his site visit.

**2. The Trial Court Erred When it Failed to Dismiss the Claims of R & R for Its Failure to Prove that it Held a Valid Contractor's License When it Entered into its Contract with the Coakers.**

The legislature enacted the contractor registration statutes to protect the public from unreliable, fraudulent, financially irresponsible, or incompetent contractors. RCW 18.27.140; *Pope & Talbot, Inc. v. Productization, Inc.*, 74 Wn. App. 197, 204, 872 P.2d 78 (1994). RCW 18.27.080, entitled "Registration Prerequisite to Suit," provides in relevant part the following:

**No person engaged in the business or acting in the capacity of a contractor may bring or maintain any action in any court of this state for the collection of compensation for the performance of any work or for the breach of any contract for which registration is required under this chapter *without alleging and proving that he was a duly registered contractor and held a current and valid certificate of registration at the time he contracted for the***

***performance of such work or entered into such contract.***

*Id.* (emphasis added). Thus, RCW 18.27.080 prohibits an unregistered contractor from seeking affirmative relief against a customer, either through a claim or counterclaim unless the above requirements have been met. *Pope*, 74 Wn. App. at 207. The statute is in derogation of common law and must be strictly construed. *Andrews Fixture Co. v. Olin*, 2 Wn. App. 744, 472 P.2d 420 (1970).

The Contractor Registration Act requires a contractor to provide a written statement to the party to the contract disclosing the contractor's registration number, and the contractor's bonded and insured status. *Bort v. Parker*, 110 Wn. App. 561, 42 P.3d 980 (2002). The statute does not render a contract between a homeowner and an unregistered contractor void. *Davidson v. Hensen*, 135 Wn.2d 112, 127, 954 P.2d 1327 (1998). Rather, the contract has limited enforceability as the contractor did not comply with the registration statute. *Id.* Effectively, an unregistered contractor has no standing to seek redress from the courts if the person benefiting from the fruits of his unlicensed labor refuses to pay. *Vedder v. Spellman*, 78 Wn.2d, 834, 838, 480 P.2d 207

(1971). The bar to recovery for unregistered contractors extends to alternative remedies such as unjust enrichment. *Stewart v. Hammond*, 78 Wn.2d 216, 220, 471 P.2d 90 (1970).

The plain language of the statute requires that a contractor prove that it was in compliance with the statute as a prerequisite to maintaining any action on the contract. See RCW 18.27.080. Here, there was no proof submitted at trial that R & R was in strict or even substantial compliance with the contractor registration statute. Again, there was no proof submitted at trial that R & R was a duly registered contractor at the time it entered its contract with the Coakers. In fact, the evidence elicited at trial suggested a whole scale absence of any proof of a valid contractor's license on the part of R & R. As R & R owner, Mr. Rausch, testified at trial that R&R's contractor registration had been expired, suspended, or had been canceled prior to April 2007, and failed to submit any proof before trial or at trial that R & R's license was valid at the time the Coakers and R&R contracted in September of 2007. RP 58:2.

The trial court, in denying Coaker's motion to dismiss all R & R's claims under RCW 18.27, apparently acknowledged the lack of any evidence that R & R was registered at the time of the contract, but felt it was the Coaker's burden to prove that it was in fact not

registered. RP 33:12, RP 58:20-24. The trial court erred in assigning the burden of proof on this issue when it stated that “as to the argument today that he didn’t have registration, it’s certainly arguable that the defendant might have the burden of proof on that.” RP 58:20-24. The statute, RCW 18.27.080, is very clear; no contractor may maintain a suit without “alleging and proving that he was a duly registered contractor and held a current and valid certificate of registration at the time he contracted for the performance of such work or entered into such contract.” This is an affirmative burden of proof placed on a *contractor* attempting to recover on a contract or for work covered by RCW 18.27. R & R failed to meet its burden.

A contractor is denied access to the courts to seek compensation for work (for which registration is required) unless he alleges and proves that he was properly registered. *Mike’s Rental Machinery, Inc. v. Corbett Draw Farms, Inc.*, 44 Wn. App. 257, 721 P.2d 1000 (1986) *citing* 14 Gonz.L.Rev. 647, 648 (1979). Again, in *Cameron v. State*, 15 Wn. App. 250, 548 P.2d 555 (1976), a contractor was found, under the contractor registration statute, to be without standing to sue the State for construction work that he performed on a parking lot on a state college campus, where the

contractor neither alleged nor offered to prove that he was a registered contractor under RCW 18.27.080.

In *Stewart*, the Supreme Court of Washington affirmed the trial court's judgment of dismissal entered against the appellant at the end of its case. *Stewart*, 78 Wn.2d at 217. The facts of *Stewart* are nearly identical to the facts of the present case, and the court's holding highlights that the trial court here erred in its denial of the Coakers' motion to dismiss. In *Stewart*, the respondent moved to dismiss the appellant's case at the end of trial because the contractor failed to allege and prove that he was registered as a contractor pursuant to statute. *Id.* The trial court granted the respondent's motion and the appellant appealed. *Id.* The Supreme Court of Washington affirmed the decision of the trial court to dismiss the appellant's case and held that the appellant was a "contractor within [the] meaning of statute prohibiting any person from bringing action for collection of compensation for performance of any work without alleging and proving that he was [a] duly registered contractor at the time he contracted for performance of such work..." Here, because R & R offered no such proof that it was a duly registered contractor at the time of the parties' contract,

the Coakers' motion to dismiss should have been granted. The trial court's decision in this regard was in error.

#### V. CONCLUSION

The trial court did not error in its decision to permit the expert testimony of Mr. Deress. Mr. Deress testified as to what was in Ms. Woods' report. Ms. Woods was a previously disclosed witness in this matter and her report, upon which Mr. Deress relies, was given to R & R in advance of the scheduled trial date. The opinions expressed by Mr. Deress were consistent with Ms. Woods' report. Not only can R & R not prove the required prejudice needed to exclude this testimony, but they cannot prove that the Coakers acted willfully or intentionally and in an attempt to violate the discovery rules.

The Coakers do find error with the trial court's denial of their motion to dismiss R & R's cause of action in its entirety. R & R failed to submit any proof, as required by the Contractor Registration Statutes, that it held a valid contractor's license at the time it contracted with the Coakers. Because proof of a valid contractor's license is a prerequisite to any subsequent suit on the same contract, the trial court should have granted the Coaker's oral motion to dismiss the claims. RP 33:12.

Pursuant to RAP 18.1, Cross-Appellant seeks the recovery of its attorneys' fees and costs as the terms of the parties' contract provides for the award of attorneys' fees to the prevailing party.

DATED this 14<sup>th</sup> day of February, 2011.

OLES MORRISON RINKER & BAKER LLP

By



Bradley L. Powell, WSBA No. 11158

Allison L. Pehl, WSBA No. 43019

Attorneys for Respondent/Cross Appellant

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the 14<sup>TH</sup> day of February 2011, I caused to be served, via facsimile and first-class United States mail, postage prepaid, true and correct copies of Brief of Respondent/Cross Appellant on:

Justin G. Elsner [X] VIA Facsimile and US Mail  
Elsner Law Firm, PLLC  
1501 North 200<sup>th</sup> Street  
Shoreline, WA 98133  
Fax: 206-324-6321

Richard D. Johnson [X] VIA ABC Legal Messenger  
Court Clerk, WA State Court of Appeals  
Division 1  
600 University St.  
One Union Square  
Seattle, WA 98101-1176

DATED THIS 14<sup>th</sup> day of February, 2011.

  
Carol A. Stewart

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