NO. 98655-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals, Division I No. 79296-2-I

PASSION WORKS, LLC and ERIC ROOTVIK,

Petitioners/Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLES OF AUTHORITIES

STATE CASES

FEDERAL CASES

STATE STATUTES

RULES

OTHER AUTHORITIES

APPENDICES

I. IDENTITY OF PETITIONER

The Petitioners are Eric Rootvik and Passion Works, LLC, the business he owns and operates that was the subject of two infractions issued by Department of Labor and Industries that are at issue in this appeal.

II. CITATION TO COURT OF APPEALS DECISION

Petitioners seeks review of the Court of Appeals' decision terminating review filed in Division I on May 13, 2020. A copy of Court of Appeals' decision is attached as *Appendix A*.

III. INTRODUCTION

This matter involves a state agency interpretation broad enough regulate a person who places a thumbtack into a wall to hang picture sold to a customer. The challenged interpretation arises out of the Department of Labor and Industries administration of contractor registration laws. Sanctions for violation of the law include imposition of civil and criminal penalties.

The challenged interpretation erroneously subsumes and reads out of the law an exemption that states:

> (5) The sale of any finished products, materials, or articles of merchandise that are not fabricated into and do not become a part of a structure under the common law of fixtures;

RCW 18.27.090(5). Under the law of fixtures, hanging an object that is easily removed will never arise to a placement of a finished product that

becomes permanently part of a home, *King v. Rice*, 146 Wn. App. 662, 669, 191 P.3d 946 (2008), and so the sale of a finished product that does not become a fixture should not require contractor registration.

In addition, the Department did not show it conducted a reasonable investigation and make a *prima facie* case before issuing the infractions in violation of Petitioners' due process rights. Under L&I's view, the Department's inspector does not need to verify or observe the advertised work of the alleged installation. An inspector can simply review a website, which says nothing about the installation of the advertised product, and conclude there is a violation.

IV. ISSUES PRESENTED FOR REVIEW

1. Should this court grant review when the Department's interpretation of the exemptions to the Registration of Contractors Act found at RCW 18.27.090(5) because it is an issue of substantial public interest?

2. Should this court review the trial courts' decisions when the Department ignores due process requirements found at RCW 18.27.210 and RCW 18.27.104?

V. STATEMENT OF THE CASE

This consolidated case[1] requests review of two separate decisions of the Department's administrative law judges upholding infractions assessed under the Contractor Registration Act.

[1] The Order Consolidating for Trial is AR 136-139.

The first infraction, NCZIK01831 (Docket 11-2016-LI-00303) is for "advertising, offering to do work, submitting a bid or performing work when not registered as a contractor, as required" is found in the record at AR I 250-252 and also alleges a charge of "advertising, offering to do work, submitting a bid or performing work when not registered as a contractor, as required."[2] The second infraction, INCZIK01856 (Docket 12-2016-LI-00332), which alleges a similar charge is found in the record at (AR II 354-356.).

In the case of the first infraction, the Department's investigator, Ms. Zenker, reviewed Appellants' website, titled "Eric the Closet Guy," which makes no reference to installation or how the shelving systems are hung or placed. AR I 51, Ex. 6. The website contains a photograph of a completed walk-in closet with extensive shelving and drawers, but the picture on the website shows a product, not an activity.

Terri Zenker has no first-hand knowledge how the closet systems in each instance were placed. Ms. Zenker testified, "I'm not going – I can't

[2] For the purposes of this Petition citations to the administrative hearing record will be as follows: OAH Docket no. 11-2016-LI-00303 as "AR I;" OAH Docket no. 12-2016-LI-00332 as "AR II." In each instance there are typed numbers and handwritten numbers at the bottom of each page, and following the Department's prior briefing, citation shall be to the handwritten numbers.

give you a description of how you fabricate your work or how you do your product or you install it." AR I 117-118.

Instead, Ms. Zenker relied upon various reviews on Houzz (AR I, 54, Ex. 7, 117-118), Merchant Circle, (AR I, 61, Ex. 8) and Yelp (AR I, 65, Ex. 9). These third-party reviews say nothing about what or how any work was actually performed, or what specific type of shelving system was purchased and placed, and nothing about the technical aspects of the placement.

The Department also points to a Craigslist posting that "emphasized his abilities to create custom closet systems, highlighting the durability of the installations." However, the Craigslist posting says nothing about the manner of the "installations." AR I, 68, Ex. 10.

Ms. Zenker's determination that registration was required was based solely on the website and reviews from customers indicating the product was somehow "installed." AR I 84. In each of the above instances, any reference to "install" or "installation" is clearly colloquial, and does not provide a technical explanation as to how the shelving systems were placed.

In the matter of the second infraction, the Department relies again the Craigslist ad (AR II 89, 359-364 Ex 4), and the testimony of Ursula Haigh and related exhibits.

Ms. Haigh testified that Mr. Rootvik told her he could install the shelving system. AR II 102. By this, she understood him to mean "he was going to build them and then place them in the house, install them." AR II 102. She presumed they would be "affixed to the structure." AR II 105.

The Department submitted an email exchange between the parties that makes reference product choices and dimensions but says nothing about "installation." AR II 107, 365-371, Ex. 5.

The Department points to the invoice sent from Mr. Rootvik to Ms. Haigh as support for its position. But the invoice also says nothing about installation. AR II 110, 372-375, Ex. 6.

In a subsequent email exchange between the parties, reference is made to an "install date" but nothing more specific. AR II 82, 389-397, Ex. 8. But because of a falling out between the parties, no further work was done and no further work, let alone installation work, occurred.

This Petition does not overlook that at each administrative hearing, Mr. Rootvik testified about his shelving systems, but in each case the testimony was not specific to any ad, bid, communication, offer to do work or work performed or with respect to any client or customer and, therefore, does not support the Department's claims. AR I 132-134, AR II 212-215.

VI. ARGUMENT

A. Standard of Review

Under RAP 13.4(b), a petition for review will be granted by the Supreme Court:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

In this matter, review should be granted as the matter involves a substantial public interest and a significant question of law under the Constitution of the State of Washington.

B. Review Should be Granted Because the Department's Erroneous Interpretation of the Exemptions to the Registration of Contractors Act is an Issue of Substantial Public Interest.

In deciding whether a case presents matters of continuing and substantial public interest, three factors are particularly determinative:

> (1) whether the issue is of a public or private nature;
> (2) whether an authoritative determination is desirable to provide future guidance to public officers; and
> (3) whether the issue is likely to recur.
> A fourth factor may also play a role: "the level of genuine adverseness and the quality of advocacy of the issues." Lastly, the court may consider the "likelihood that the issue will escape review because the facts of the controversy are short-lived."

Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 796, 225 P.3d 213 (2009) (*quoting In re Marriage of Horner*, 151 Wn.2d 884, 892, 93 P.3d 124 (2004)). In *Hart v. Department of Social & Health Services*, 111 Wash.2d 445, 448, 759 P.2d 1206 (1988), the Supreme Court stated that all criteria to be considered are "essential" in deciding whether to review a moot case. *Eyman v. Ferguson*, 433 P.3d 863, 867–68 (Wash. Ct. App. 2019).

Here, all factors are met: the issue is public in nature and involves a state agency enforcing the contractor registration statute and related rules against fabricators of finished products, which in light of the 2007 amendments, requires an authoritative determination of the exemptions found at RCW 18.27.090 to provide future guidance to public officers, as this issue is likely to occur, and in the case of Mr. Rootvik has reoccurred. The only discussion to date is found in the unpublished decision, *Eric Rootvik v Department of Labor and Industries*, No. 73828-3-I. **See Appendix B.** Under the constraints of an interlocutory appeal, the court did not explicitly address whether the work must include the sale and delivery of a finished product and creation of fixture. Here, it must and no fixture was created.

Under RCW 18.27.010(1)(a) a contractor is defined as a person who "offers," with respect to an "improvement attached to real estate" to do work, including "cabinet or similar installation."

"Install" is defined to mean to "set up or fix in position for use or service," BLACK'S LAW DICTIONARY, 6th Ed. p. 798. According to the Department, doing work that is the equivalent of selling a picture to a customer and then hanging it with a thumb tack, or wall putty, or 3M strips for that matter, would fall under the meaning of this term and in each instance require contractor registration.

However, the definition of a "contractor" contemplates more significant activity beyond these simple acts and includes the terms "construct, alter, repair, add to, subtract from, improve, develop, move, wreck, or demolish any building... or other structure,... attached to real estate ... including ... cabinet or similar installation...." RCW 18.27.010(1)(a).

It is Appellants' position that the legislature did not intend such a broad reading, and the intent of a more limited reading can be found in the language in the exemptions listed under RCW 18.27.090.

The challenged interpretation of the Department erroneously subsumes and reads out of the law an exemption that states:

> (5) The *sale* of any *finished products*, materials, or articles of merchandise that *are not fabricated into and do not become a part of a structure under the common law of fixtures*;

RCW 18.27.090(5). (Emphasis supplied).

In *Harbor Millwork, Inc. v. Achttien*, 6 Wn. App. 808, 813-814, 496 P.2d 978, 981 (1972), the court considered an earlier version of this exemption found RCW 18.27.090(5), which previously read: "The sale or *installation* of any finished products, materials or articles of merchandise which are not actually '*fabricated into*' and do not become a permanent fixed part of a structure; . . ." (emphasis added). The court also observed the words "installation" and "fabricated" have different meanings, and "installation" requires a certain amount of "fabrication" and to "fabricate into" means something other than "mere attachment:"

> It is clear that 'fabricate into' means something other than mere attachment. The supplier who actually *installs* finished products is required to perform a certain amount of *fabrication* to make the product operational or functional. Nevertheless, he is exempt from registration as a contractor unless the finished product is actually 'fabricated into' and becomes a 'permanent fixed part of a structure.' There is no easy formula by which it can be determined that something has or has not become 'fabricated into' and a 'permanent fixed part of a structure.' Accordingly, each case must be decided on its own facts.

Id. (emphasis added).

The Department makes no distinction between these terms, however. Terri Zenker testified, "We're talking -- installation and

fabrication is the same terminology to me. *It's putting the product in the structure*, offering to do that, advertising." AR I 116-117. (emphasis added). Under the Department's reading simply putting a finished product into a structure constitutes conduct that requires registration. Under this view, if a furniture manufacture delivers a custom sofa to one's home, it must be a registered contractor.

Registration should only be required when something more than mere attachment to a residence occurs, which is why RCW 18.27.090(5) includes the clause that the conduct is exempt if the finished product is "not fabricated into and do not become a part of a structure under the common law of fixtures." As noted in *Arctic Stone, Ltd. v. Dadvar*, 127 Wn. App. 789, 796, 112 P.3d 582, 585 (2005), "There is no easy formula for determining whether something has or has not become 'fabricated into' and a 'permanent fixed part of a structure.' Factors include whether removal of the material would prevent its reuse or cause substantial damage to the structure, whether the material is more of a decoration than an improvement, and the parties' intent. Materials and products that courts have found were not 'fabricated into' and made permanent parts of structures include cold storage machinery that only needed to be bolted to the structure and plugged in, synthetic turf gym flooring that could be removed without damaging the underlying concrete, readily removable carpet, and window and door

shutter frames." *Arctic Stone, Ltd. v. Dadvar,* 127 Wn. App. 789, 796, 112 P.3d 582, 585 (2005) (citations omitted). It is worth noting that, among other findings, the *Arctic Stone* court noted that the invoice for services included the term "installation," unlike here. *Arctic Stone, Ltd. v. Dadvar,* 127 Wn. App. at 799.

In summary, we are told the term "installation" requires a certain amount of "fabrication." That "fabricated into" means something more than "mere attachment." Whether something is "fabricated into" depends on the parties' intent and whether the product can be reused without causing substantial damage to the structure. Contrary to the Department's argument, the 2007 amendment to RCW 18.27.090(5) did nothing to change this analysis.

The Department's reading, "It's putting the product in the structure," effectively eliminates this exemption and the possibility a finished product can be sold and delivered to a home without being fabricated into a residence.

As recognized by the Department, Mr. Rootvik performed all work himself, fabricating the system's components at an off-site location. The only on-site activity consists of merely hanging the shelving on a removeable rail, and the system is intended and designed so the shelving can easily be move from room to room, or from house to house by the

owner, without causing any damage to the structure. AR I 132-134, AR II 212-215. Appellants' activities of placing a shelving system is at most a mere attachment to the structure and in no way amounts to "fabrication," "fabrication into," nor "installation."

C. Review Should be Granted Because the Department Acted in Violation of the Appellants' Due Process and Rights.

Petitioners submit it was error for the two ALJs assigned to the Passion Works appeals to hold that RCW 18.27.310 absolved the Department from making a *prima facie* case as required by the Registration of Contractors Act.

The Department contends Mr. Rootvik violated 18.27.200(1)(a), which provides:

> (1) It is a violation of this chapter and an infraction for any contractor to:
> (a) Advertise, offer to do work, submit a bid, or perform any work as a contractor without being registered as required by this chapter…

Before issuing a Notice of Infraction, the Department is required to conduct an investigation. The investigation requirements are contained within RCW 18.27.210, which provides that:

> (1) The director shall appoint compliance inspectors to investigate alleged or apparent violations of this chapter.
> (a) The … authorized compliance inspector … may inspect and investigate job sites at which a contractor had bid OR presently is working to determine whether the contractor is

> registered in accordance with this chapter or the rules adopted under this chapter or whether there is a violation of this chapter.
> (b) Upon request of the compliance inspector of the department, a contractor or an employee of the contractor shall provide information identifying the contractor…

If the Department reasonably believes an infraction occurred, it can issue a "Notice of Infraction" under RCW 18.27.230 ("Notice of Infraction – Service"), which provides that: "The department may issue a notice of infraction if the department *reasonably believes* that the contractor has committed an infraction under this chapter…." (emphasis added).

RCW 18.27.210 requires the Department to investigate and find evidence of a violation. Reasonable cause must exist. RCW 18.27.215. In addition, RCW 18.27.104(1), titled "Unlawful advertising – Citations", provides:

> If, upon investigation, the director or the director's designee has *probable cause* to believe that a person…acting in the capacity of a contractor who is not otherwise exempted from this chapter, has violated RCW 18.27.100 by unlawfully advertising for work covered by this chapter, the department may issue a citation containing an order of correction. Such order shall require the violator to cease the unlawful advertising.

Id. (emphasis added).

Chapter 18.27 RCW contemplates that a reasonable investigation will take place, as RCW 18.27.210 gives considerable authority to the Director and compliance inspectors to investigate suspected violations.

In this matter, the Department failed to show it conducted a reasonable investigation as to whether shelving was actually "installed," or if "installation services" were advertised. Its inspector was satisfied that a shelf was placed in a home and the customer made comments regarding installation. Appellants' website and invoices say nothing about installations, however, and do not otherwise advertise this service.

The Department cannot rely upon burden shifting to meet this requirement. RCW 18.27.310(2), which discusses the shifting of the burden of proof at the administrative hearing, says nothing about relieving the Department of its initial evidentiary burdens under RCW 18.27.210 or RCW 18.27.104.

This court's review of RCW 18.27 should be guided by our constitution and other, similar statutes, such as RCW 7.80.050, as interpreted by the courts. Simply to state that "RCW 7.80.050 does not apply to this proceeding" as the Court of Appeals did in its Order, ignores these other applicable and persuasive authorities. *See* Appendix A, Order, pp. 7-8; *State v. Duncan*, 146 Wn.2d 166, 43 P.3d 513 (2002); *Post v. City of Tacoma*, 167 Wn.2d 300, 312, 217 P.3d 1179, 1185 (2009) (a City of Tacoma ordinance held to violate Post's due process rights).

In *State v. Duncan*, 146 Wn.2d 166, 43 P.3d 513 (2002), the court held that under RCW 7.80.050, which similarly involves imposition of a

civil penalty, the wrongful action supporting the penalty must be observed in the presence of an officer empowered to issue the civil citation.

In *State v. Duncan*, 146 Wn.2d 166, 43 P.3d 513 (2002), while investigating the possession of an open container in public, a civil infraction, two police officers uncovered a felon in possession of a firearm who was also carrying a purse and credit cards belonging to another individual. The court in *Duncan* went on to explain the applicability of the civil infractions statute by stating that RCW 7.80.050(2) explicitly states, "[a] notice of civil infraction may be issued by an enforcement officer when the civil infraction occurs in the officer's presence." Alternatively, RCW 7.80.050(3) provides that "[a] court may issue a notice of civil infraction if an enforcement officer files with the court a written statement that the civil infraction was committed in the officer's presence or that the officer has reasonable cause to believe that a civil infraction was committed." *Id.* at 178.

On the appeal, the *Duncan* court evaluated whether the misdemeanour occurred in the presence of the officer. *Id.* at 123, 713 P.2d 71. Applying RCW 10.31.100 it held that possessing or consuming alcohol is not committed in an officer's presence if the officer does not witness the person's ingestion of the alcohol, but only senses symptoms indicating that the person is presently intoxicated. *Id.* at 129, 713 P.2d 71. *Id.* at 180. While

the bottle was close to Duncan, the officers did not observe Duncan open, touch or drink from the bottle. Thus, considering the officers did not witness Duncan drinking the alcohol, or holding the bottle, or reacting to their approach, the violation did not occur in their presence. *Id.* at 182. The court concluded by holding that the officers may also have possessed grounds to stop and detain Duncan if the civil infraction either occurred in their presence or they had filed a statement with the court that they had a reasonable basis upon which to believe that a civil infraction had been committed.

Similar to *Duncan*, in this case there is no evidence that a finished product was installed or installation services were advertised. While RCW 7.80.050(2) contains a specific requirement the alleged violation occur in the officer's presence, unlike RCW 18.27.210 or RCW 18.27.104, due process requires more than simply viewing a website, and should require a reasonable investigation to determine how the finished product was placed in the structure and whether it was merely affixed to the premises or installed, or fabricated into the premises before an infraction is issued, which did not occur here.

Our laws also require similar statutes to be construed together. The significance of statutes being in *pari materia* is that they "must be construed together .... and in construing [them] ... all acts relating to the same subject

matter or having the same purpose, should be read in connection therewith as together constituting one law." *In re Yim*, 139 Wn.2d 581, 592, 989 P.2d 512, 517–18 (1999); *see also Waste Management of Seattle, Inc. v. Utilities & Transp. Comm'n,* 123 Wn.2d 621, 630, 869 P.2d 1034 (1994) (stating that this court will read statutes that are relating to the same subject "as complementary, rather than in conflict with each other"); *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974) ("In ascertaining legislative purpose, statutes which stand in *pari materia* are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes."). *Expert Drywall, Inc. v. Brain*, 17 Wn. App. 529, 540, 564 P.2d 803, 809–10 (1977), *dismissed sub nom. Expert Drywall, Inc., et al, Respondents, v. Brain, et al, Petitioners*, 92 Wn.2d 1004 (1978) (contractor registration and mechanics lien acts must be read together). *See also*, RCW 1.12.020 (The provisions of a statute, so far as they are substantially the same as those of a statute existing at the time of their enactment, must be construed as continuations thereof).

Similar to RCW 7.80.050(2), RCW 18.27.210 or RCW 18.27.104 creates constitutionally based protections for a person accused of a civil infraction. The phrases "reasonable belief" and "probable cause" as used in the statute require an initial showing of a "reasonable belief in the

existence of facts on which a claim is based and in the legal validity of the claim itself," or "[a] reasonable basis to support issuance of an administrative warrant based on either (1) specific evidence of an existing violation of administrative rules, or (2) evidence showing that a particular business meets the legislative or administrative standards permitting an inspection of the business premises." Black's Law Dictionary (10th ed. 2014).

In this matter, the courts below did not question whether this threshold requirement was met, and the suggestion all but seems to be ignored by the Department, which appears to take the position it has no obligation under RCW 18.27.210 or RCW 18.27.104, rendering meaningless the phrases "reasonable belief" and "probable cause" as used by the statute, because the Appellants ultimately have the burden at the hearing under RCW 18.27.310.

The question before this court is whether the Department has an obligation to make a *prima facie* case before an infraction is issued where the punishment is punitive. In *Johnson v. Washington Dep't of Fish & Wildlife*, 175 Wn. App. 765, 305 P.3d 1130 (2013) the Court addressed whether the process utilized was adequate. The Court noted that at a minimum due process requires notice and an opportunity to be heard. *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994).

Notice must be reasonably calculated to inform the affected party of the pending action and of the opportunity to object. *State v. Dolson*, 138 Wn.2d 773, 777, 982 P.2d 100 (1999). The opportunity to be heard must be meaningful in time and manner. *Morrison v. Dep't of Labor & Indus.*, 168 Wn. App. 269, 273, 277 P.3d 675, *review denied*, 175 Wn. 2d 1012, 287 P.3d 594 (2012) (*quoting Downey v. Pierce County*, 165 Wn. App. 152, 165, 267 P.3d 445 (2011)). To determine how much process is due, we balance the private interest involved; the risk of erroneous deprivation through the procedures involved and the value of additional procedures; and the government's interest, including the burdens that accompany additional procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Due process is a flexible concept and the procedures required depend on the circumstances of a particular situation. *Mathews*, 424 U.S. at 334, 96 S.Ct. 893.

Courts tend to analyze whether a civil penalty scheme provides sufficient due process by weighing three factors: (1) private property interest; (2) the risk of an erroneous deprivation of such interest through the procedures used, as well as the probable value of any additional safeguards; and (3) the Government's interest in maintaining its procedures, including the burdens that would be imposed by additional procedural requirements. *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 589 (9th Cir. 1998).

Here, Appellants' private property interest consists of monetary fines. The Department's procedure is inadequate because it was ignored and an infraction was issued without a "reasonable investigation" required under RCW 18.27.230. Lastly, and in terms of the Government interest, the procedure in place is insufficient to address this concern, and Appellants' interest, and others similarly situated, warrants changing the current statutory scheme to provide more protections, such as completing and affidavit of probable cause or something equivalent, the burden of which is inconsequential.

V. CONCLUSION

The Department's reading of the statutory exemption is erroneous. Petitioner respectfully requests their Petition be granted, as no court has yet thoroughly examined the exemption statute RCW 18.27.090(5) for its intent and meaning since the revision in 2007, and because of the importance of the issues raised and the number of individuals interested in its outcome.

Passion Works was also not afforded is due process because an infraction was issued without a "reasonable investigation" required under RCW 18.27.230.

RESPECTFULLY SUBMITTED this 12th day of June, 2020.

By _____

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CERTIFICATE OF SERVICE AND MAILING

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I further certify that I caused a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below:

William F. Henry, WSBA No. 45148 WA State Attorney General's Office 800 Fifth Ave Ste 2000 Seattle, WA 98104-3188 Telephone: (206) 464-7740 Email: Willh@atg.wa.gov *Attorneys for Respondent Department of Labor and Industries*	❑ *Legal Messenger* ❑ *Hand Delivered* ❑ *Facsimile* ✓ *U.S. Mail* ❑ *UPS, Next Day Air* ✓ *Email*

DATED at Silverdale, Washington, this 12th day of June, 2020.

Tracey Hamilton-Oril
Legal Assistant

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

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April 13, 2020

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CASE #: 79296-2-I
Passion Works, Inc., et al, Apps/X-Resp v. Wa. St. Dept of Labor & Industries, Resp/X-App
King County, Cause No. 17-2-20160-0 SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

> "We deny discretionary review of the superior court's decision affirming the infractions issued by the Department. We grant discretionary review as to the superior court's reduction of the civil penalty, and we reverse that decision. We remand to the superior court with instructions to reinstate the full $2,000 penalty."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: The Honorable Timothy Bradshaw

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PASSION WORKS, LLC and ERIC ROOTVIK,	)	No. 79296-2-I
	)	(consolidated with 79297-1-I)
Appellants/ Cross-Respondents,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
STATE OF WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES,	)	
Respondent/ Cross-Appellant.	)	

SMITH, J. — The Washington Department of Labor and Industries (Department) issued two infractions with civil penalties of $1,000 each against Eric Rootvik for violation of statutory contractor registration requirements. Rootvik appealed to the Office of Administrative Hearings, which affirmed the infractions and the civil penalties. The superior court also affirmed the infractions but reduced the civil penalties to a total of $1,000. On appeal, Rootvik seeks discretionary review of the superior court's order affirming the infractions. Because he does not satisfy the standards under RAP 2.3, we deny discretionary review. The Department cross appeals the superior court's order reducing the civil penalties assessed to Rootvik. Because the superior court acted without statutory authority and thus substantially departed from the usual course of judicial proceedings, we grant review and reverse the superior court's reduction

of the penalties.

FACTS

Rootvik is "the manager of Passion Works, LLC," doing business as Eric the Closet Guy. He "design[s], engineer[s,] and install[s]" custom closets and shelving. In May 2016, the Department received an anonymous tip that Rootvik was offering these services without a contractor license. Department compliance investigator Terri Zenker began reviewing Rootvik's website in accordance with customary investigation procedure. She discovered that Rootvik was advertising on Craigslist.org and through his company website, Erictheclosetguy.com. The company website showed pictures of significant cabinetry in a walk-in closet. Additionally, the website and advertisement on Craigslist.org directed viewers to third-party reviews on Yelp.com, Houzz.com, and MerchantCircle.com. The reviews discussed installing custom-made closets and shelving. For example, one review stated, "[H]e does everything himself. Designs, measures, builds and installs." Another review said, "[H]e delivered and then installed our new beautiful closets." And finally, a review on Yelp.com stated that the client scheduled an "install date" with Rootvik for custom closets.

Also in May 2016, Ursula Haigh responded to Rootvik's Craigslist.org advertisement and began working with Rootvik to secure a proposal for custom cabinetry in her laundry room.[1] In e-mails to Haigh, Rootvik stated that the "[i]n stall [sic] will probably take four days." When Haigh discovered that Rootvik

[1] The revised drawing that Rootvik provided to Haigh shows substantial cabinetry.

was not a licensed contractor, she submitted a complaint to the Department and attempted to cancel her contract with Rootvik. Zenker investigated this complaint as well.

In July and August 2016, following review of both the anonymous tip and Haigh's complaint, Zenker issued two infractions under RCW 18.27.010(1)(a).[2] Zenker issued the first infraction (Infraction 1) based on her review of Eric the Closet Guy's websites and advertisements and the references therein to "installation of a product that requires contractor registration," specifically, custom closets. Zenker issued the second infraction (Infraction 2) "[p]rimarily based off the notification by the contractor to the consumer that he was going to install this product, along with [Haigh] confirming what their project was." The Department issued the minimum $1,000 fine for each infraction.

Rootvik formally appealed both infractions to the Office of Administrative Hearings (OAH). Separate Administrative Law Judges (ALJs) from OAH were assigned to the appeals.

During the hearing for Infraction 1, Rootvik presented a small model as an example of "the way [the closets] can be installed." He testified that

> [the closet shelving] really can be installed anywhere. And that what it's comprised of -- in this mock wall we have a metal rail, which I call a hang rail. It has a screw hole every inch, and these are attached to the wall with drywall screws where the studs are. And that's the sole connection to the property, the house, or wherever it might be that there is.

When asked by the Department whether the model represented the way in which

[2] RCW 18.27.010(1)(a) provides the definition for a contractor subject to the statutory registration requirements.

Rootvik installed the closets, Rootvik refused to answer and objected to the question. The ALJ overruled his objection and insisted that Rootvik answer. Rootvik responded, "I'm not going to answer it."

The ALJ found that Rootvik had not satisfied his burden of proof. The ALJ thus concluded that "[o]n or about May 13, 2016, [Rootvik] advertised to perform contractor work when not registered as a contractor in violation of RCW 18.27.200(1)(a)." Specifically, she found that "[c]learly when viewing all the websites as a whole, Passion Works LLC dba Eric the Closet Guy, was advertising to design, build and install custom closets." Additionally, the ALJ drew adverse inferences from Rootvik's refusal to answer whether or not his model represents the way in which he installs shelving. The ALJ found no merit in Rootvik's argument that he was exempt from registering under RCW 18.27.090(5).[3] She therefore affirmed the infraction and $1,000 civil penalty issued by the Department.

During the hearing for Infraction 2, Haigh testified that Rootvik said "[t]hat he was going to build [the cabinets] and then place them in the house, install them." Zenker testified that she received information that Rootvik was "going to install the project that" Rootvik agreed to complete for Haigh. Mike Vines, a witness for Rootvik, testified that the cabinets Rootvik installed in Vines' home could be picked up and moved. Rootvik used the same model that he presented

[3] RCW 18.27.090(5) provides that the registration provisions do not apply to "[t]he sale of any finished products, materials, or articles of merchandise that are not fabricated into and do not become a part of a structure under the common law of fixtures."

at the hearing for Infraction 1 as an example and testified that "[e]verything comes in finished pieces, flat form, and then it's assembled, put the verticals on, attach the horizontals, and in the case of Haigh[,] attach the doors, slide in the drawers. . . . But the only attachment to the building is [a] metal rail."

Following the hearing, the ALJ found that "Rootvik posted an advertisement on [C]raigslist.org . . . . He submitted a bid, or estimate to design, build and install a custom closet system for Ursula Haigh." (Emphasis omitted.) The ALJ further concluded that "[t]he installation of custom closet systems that hang from a rail that is screwed into wall studs, comes within the definition of 'contractor' as set forth in RCW 18.27.010." She found that the exemption under RCW 18.27.090(5) did not apply. Thus, the ALJ concluded that "[b]ecause Eric Rootvik advertised, submitted a bid, offered and agreed to perform contractor work, when he was not registered as a contractor under RCW Chapter 18.27, he was in violation of RCW 18.27.200(1)(a) as alleged in the infraction." She affirmed the infraction and monetary penalty of $1,000.

Rootvik appealed both final orders to the superior court, which consolidated the appeals. A hearing took place in November 2018, and the superior court affirmed the infractions but reduced the total amount of the civil penalties from $2,000 to $1,000. Rootvik appeals the infractions, and the Department cross appeals, arguing that the trial court erred in reducing the civil penalties.

ANALYSIS

Discretionary Review

The superior court's decision affirming Rootvik's infractions and reducing the penalty amount is reviewable only via discretionary review under RAP 2.3. RCW 18.27.310(4). The parties contend that discretionary review is warranted under RAP 2.3(b)(1)-(3).[4] These rules provide that this court accept discretionary review in the following circumstances:

> (1) The superior court has committed an obvious error which would render further proceedings useless;
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
> (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court.

RAP 2.3(b). For the reasons discussed below, we deny review of the superior court's decisions affirming the infractions. But we grant review of and reverse the superior court's decision to reduce the penalty amount.

Discretionary Review of the Superior Court's Order Affirming the Infractions

Rootvik contends that the superior court improperly concluded that he violated RCW 18.27.200(a)(1). Rootvik fails to satisfy RAP 2.3(b) with regard to this contention, and we therefore decline to review it.

Chapter 18.27 RCW governs the registration of contractors. A contractor

[4] We acknowledge that Rootvik does not specifically address the merits of discretionary review under RAP 2.3 in his opening brief. However, the brief provides sufficient insight into what he believes were the court's errors warranting discretionary review.

includes a person or entity that "offers to undertake, or submits a bid to, construct, alter, repair, add to, subtract from, improve, develop, move, wreck, or demolish any building, . . . or other structure, project, development, or improvement attached to real estate or to do any part thereof including . . . *cabinet or similar installation*." RCW 18.27.010(1)(a) (emphasis added). And "[i]t is a violation of [chapter 18.27 RCW] and an infraction for any contractor to . . . [a]dvertise, offer to do work, submit a bid, or perform any work as a contractor without being registered as required by [chapter 18.27 RCW]." RCW 18.27.200(1)(a). To establish the commission of an infraction under chapter 18.27 RCW, "[t]he burden of proof is on the [D]epartment . . . , *unless the infraction is issued against an unregistered contractor* in which case the burden of proof is on the contractor." RCW 18.27.310(2) (emphasis added).

Here, Rootvik admits that he was not a registered contractor. Accordingly, he had the burden to establish by a preponderance of the evidence that he did not violate the registration statute. RCW 18.27.310(2). But Rootvik admitted to installing the custom closets and cabinetry which he advertises for, designs, and builds. And those installations fall within the definition of contractor. The cabinetry installation is "cabinet or similar installation," RCW 18.27.010(1)(a), and the closet installation is "similar installation" or its own specialty under Department regulation. See WAC 296-200A-016(7) ("A contractor in this specialty installs, repairs and maintains the lateral or horizontal shelving systems, racks, rails, or drawers involved in a closet or storage system."). Thus, Rootvik

has neither shown that it was an obvious[5] or probable error[6] nor that it was the sanction of a substantial departure from the usual course of proceedings[7] for the superior court to have affirmed the ALJs' determinations that Rootvik violated RCW 18.27.200(1)(a) by failing to register as a contractor.

Rootvik disagrees and contends that he is subject to the exemption under RCW 18.27.090(5). RCW 18.27.090(5) exempts a potential contractor from registration for "[t]he *sale* of any finished products, materials, or articles of merchandise that are not fabricated into and do not become a part of a structure under the common law of fixtures." (Emphasis added.) Rootvik did not sell finished products; he installed them. Given the plain language of the statute, Rootvik failed to show that the superior court committed error in affirming the ALJs' conclusions that the exemption did not apply.[8]

Rootvik cites RCW 7.80.050 for the proposition that the Department must actually witness him performing contractor work. But RCW 7.80.050 does not

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[5] Cf. Dep't of Labor & Indus. v. Davison, 126 Wn. App. 730, 735-37, 109 P.3d 479 (2005) (concluding that discretionary review under RAP 2.3(b)(1) was warranted where the trial court failed to follow case law in reaching its conclusion of law).

[6] See State v. Howland, 180 Wn. App. 196, 205, 321 P.3d 303 (2014) (concluding that because the trial court did not abuse its discretion, "there was no probable error").

[7] Cf. In re Marriage of Folise, 113 Wn. App. 609, 613, 54 P.3d 222 (2002) (holding that "the trial court has 'departed from the accepted and usual course of judicial proceedings' by ignoring unambiguous language in the statutory scheme and case law on the subject").

[8] Rootvik's focus on "the common law of fixtures," RCW 18.27.090(5), is misplaced. The dispositive issue is whether Rootvik was selling his cabinets or installing them. Because he installs them, the exception does not apply, whether or not the cabinets or closets would be considered fixtures under common law.

apply to this proceeding.[9] Instead, RCW 18.27.370 provides the standard for issuance of an infraction under chapter 18.27 RCW. And it requires only that the Department "reasonably believe[ ]" that Rootvik *advertised* or *offered to* install the cabinetry and closets in violation of RCW 18.27.200(1)(a). RCW 18.27.230. The Department viewed Rootvik's websites, the reviews left by those who had hired Rootvik, and the e-mails between Rootvik and Haigh, which provide evidence that Rootvik advertised and offered to install cabinetry or closets. Thus, this contention does not support discretionary review.

Rootvik additionally contends that the contractor registration law violates his right to free speech. But "[t]he government may ban . . . commercial speech related to illegal activity." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 563-64, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). And here, as discussed, Rootvik engaged in illegal activity by advertising and offering to do work that falls within chapter 18.27 RCW without registering as a contractor. And had Rootvik completed the work for which he advertised, it also would have been illegal because he is not a registered contractor. RCW 18.27.200(1)(a). Therefore, Rootvik's asserted First Amendment violation does not support accepting review under any of the standards set forth in RAP 2.3.

Finally, Rootvik contends that the ALJ presiding over the hearing for Infraction 1 violated his right against self-incrimination when she drew negative

[9] The legislature enacted chapter 7.80 RCW to decriminalize some misdemeanors and impose civil infractions instead. RCW 7.80.005.

inferences from his refusal to answer questions during cross-examination. Because the Fifth Amendment does not attach to testimony in a civil proceeding, we decline to review this argument. See Ikeda v. Curtis, 43 Wn.2d 449, 458, 261 P.2d 684 (1953) ("When a witness in a civil suit refuses to answer a question on the ground that his answer might tend to incriminate him, . . . the trier of facts in a civil case is entitled to draw an inference from his refusal to so testify.").

In short, the superior court's decision finding that Rootvik violated RCW 18.27.200(1)(a) was neither an obvious or probable error nor the sanction of a departure from the accepted and usual course of administrative hearings. Therefore, we deny discretionary review of the superior court's order affirming the Department's issuance of the infractions.

Discretionary Review of the Superior Court's Reduction of Civil Penalties

The Department contends that the superior court committed obvious error, warranting discretionary review, when it reduced the civil penalty imposed on Rootvik from $2,000 to $1,000. Because the superior court acted without legal authority and inconsistent with the statutory language under which the Department imposed the civil penalty, we agree and accept discretionary review of the Department's contention. See Folise, 113 Wn. App. at 613 (granting discretionary review under RAP 2.3(b)(3) where the trial court "ignor[ed] unambiguous language in the statutory scheme").

Rootvik, having been "found to have committed an infraction under RCW 18.27.200 for failure to register[,] shall be assessed a fine of not less than one thousand dollars, nor more than five thousand dollars." RCW 18.27.340(3).

However, the Department's "director may reduce the penalty for failure to register, but in no case below five hundred dollars, *if* the person becomes registered within ten days of receiving a notice of infraction and the notice of infraction is for a first offense." RCW 18.27.340(3) (emphasis added).

Here, the Department issued a civil penalty of $1,000 for each infraction. The Department's director did not exercise discretion to reduce the penalty because there is no evidence that Rootvik registered within 10 days of receiving notice of the infractions and there are two infractions in this appeal. But the superior court nevertheless reduced the penalty for both infractions to a total of $1,000. The superior court cited no authority to support its decision to reduce the fine below the statutory minimum, and we have found none that would. Thus, the superior court erred.

We deny discretionary review of the superior court's decision affirming the infractions issued by the Department. We grant discretionary review as to the superior court's reduction of the civil penalty, and we reverse that decision. We remand to the superior court with instructions to reinstate the full $2,000 penalty.

WE CONCUR:

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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CASE #: 79296-2-I
Passion Works, Inc., et al, Apps/X-Resp v. Wa. St. Dept of Labor & Industries, Resp/X-App

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: Reporter of Decisions

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

PASSION WORKS, LLC and ERIC ROOTVIK, Appellants/ Cross-Respondents, v. STATE OF WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES, Respondent/ Cross-Appellant.	)	No. 79296-2-I (consolidated with 79297-1-I) ORDER DENYING MOTION FOR RECONSIDERATION

Appellants/Cross-Respondents, Passion Works LLC and Eric Rootvik, have filed a motion for reconsideration of the opinion filed on April 13, 2020. Respondent/Cross-Appellant, Department of Labor and Industries, has not filed an answer to appellants/cross-respondents' motion for reconsideration. The panel has determined that appellants/cross-respondents' motion for reconsideration should be denied. Now, therefore, it is hereby

ORDERED that appellants/cross-respondents' motion for reconsideration of the opinion filed on April 13, 2020, is denied.

FOR THE COURT:

Smith, J.

Judge

TEMPLETON HORTON WEIBEL PLLC

June 12, 2020 - 2:49 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	79296-2
Appellate Court Case Title:	Passion Works, Inc., et al, Apps/X-Resp v. Wa. St. Dept of Labor & Industries, Resp/X-App

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