

COURT OF APPEALS  
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STATE OF WASHINGTON  
BY gn DEPUTY

No. 35613-9-II

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

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LEE'S DRYWALL CO., INC.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF LABOR &  
INDUSTRIES,

Respondent.

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**REPLY BRIEF OF APPELLANT**

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Appeal from the Board of Industrial Insurance Appeals,  
Docket No. 0514495  
Kathleen A. Stockman, Industrial Appeals Judge

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**TABLE OF CONTENTS**

	<u>Page</u>
<b>I. This Court is asked to address and interpret the proper application of RCW 51.12.070(2) &amp; (3), statutory provisions which, though present elsewhere in the Code, have not previously been formally interpreted by our appellate courts. ....</b>	<b>1</b>
<b>II. This Court is asked to address and interpret the proper application of RCW 51.12.070(2) &amp; (3), statutory provisions which, though present elsewhere in the Code, have not previously been formally interpreted by our appellate courts. ....</b>	<b>1</b>
<b>III. RCW 51.12.070(2) does not require a contractor to prove that a subcontractor’s principal place of business is, in fact, eligible for a business deduction. ....</b>	<b>4</b>
<b>IV. The Department’s interpretation of RCW 51.12.070(3) is “absurd.” .....</b>	<b>7</b>
<b>V. RCW 51.12.070 does not create an “option for collecting premiums for a subcontractor’s work from a contractor where the exception to contractor liability applies. ....</b>	<b>11</b>
<b>VI. The Information Sheet is not “irrelevant” on this appeal. ....</b>	<b>13</b>
<b>VII. Lee’s Drywall Co., Inc.’s constitutional challenges are valid. ....</b>	<b>18</b>
<b>VIII. Conclusion .....</b>	<b>21</b>

**TABLE OF AUTHORITIES**

Page

**Table of Cases**

Federal Cases

*Commissioner of Internal Revenue v. Soliman*, 506 U.S. 168,  
113 S.Ct. 701, 121 L.Ed.2d 634 (1993).....5

*Kurzet v. Commissioner of Internal Revenue*, 222 F.3d 830,  
834 (10<sup>th</sup> Cir. 2000).....6

Washington Cases

*State v. Chenoweth*, \_\_\_ Wn.2d \_\_\_, 158 P.3d 595 (2007).....19

*Littlejohn Construction Co. v. Dept. of Labor and Industries*,  
74 Wn. App. 420, 873 P.2d 583 (1994).....7, 8, 9, 11, 12, 21

*Murphy v. Campbell Inv. Co.*, 79 Wn.2d 417,  
486 P.2d 1080 (1971).....9

*Roberts v. King County*, 107 Wn. App. 806, 27 P.3d 1267  
(2001).....21

*State v. Sauve*, 100 Wn.2d 84, 666 P.2d 894 (1983) .....19

**Statutes**

26 U.S.C. § 280A.....5

RCW 35.05.010 .....13

RCW 50.04.145(2)(c) .....	2
RCW 50.24.130(3).....	2
RCW 51.08.070(2), (3).....	2
RCW 51.08.180(2)(b), (c).....	2
RCW 51.08.195(3), (6).....	2
RCW 51.12.070 .....	<i>Passim</i>
RCW 51.16.070 .....	9
RCW 51.16.150 .....	13
RCW 51.48.040 .....	9, 22

**Other Authorities**

RAP 2.5(a) .....	19
WAC 296-17-352 .....	22
WAC 296-128-025 .....	9

COMES NOW the Appellant, Lee's Drywall Co., Inc., and submits for the Court's consideration this Reply Brief:

**I. THIS COURT IS ASKED TO ADDRESS AND INTERPRET THE PROPER APPLICATION OF RCW 51.12.070(2) & (3); STATUTORY PROVISIONS WHICH, THOUGH PRESENT ELSEWHERE IN THE CODE, HAVE NOT PREVIOUSLY BEEN FORMALLY INTERPRETTED BY OUR APPELLATE COURTS.**

At page 7 and then in footnote 5 at page 22 of the Response Brief, the Department asserts:

Page 7: It should be noted that the subcontractor exception language of subsections (2) and (3) at issue is also found in the same or essentially same form in the following additional statutes, all of relatively long standing in Washington: RCW 50.04.145(2)(c), (f) ... RCW 50.24.130(3), (4) ... RCW 51.08.070(2), (3) ... RCW 51.08.180(1)(b), (c) (sic)<sup>1</sup> ... (and) RCW 51.08.195(3), (6).

Footnote 5 at Page 22: ... Furthermore, in light of the several other statutory contexts in which the identical statutory language appears and no doubt has been implicated in other litigation ..., Lee's claim (that the Dept. has only recently decided to exercise its authority under RCW 51.12.070) is wholly irrelevant.

Contrary to the Department's assertions, that other statutory provisions that are identical to, or substantially similar to the provisions at issue in this appeal, RCW 51.12.070(2) & (3) have been the subject of "other litigation" or otherwise are to be viewed

as “long standing (law)”, this Court may well be the first appellate Court to render an opinion as to the proper interpretation of these statutory provisions.

Each of the other similar statutes contained in the Code, RCW 50.04.145(2)(c), (f); RCW 50.24.130(3), (4); RCW 51.08.070(2), (3); RCW 51.08.180(2)(b), (c) and RCW 51.08.195(3), (6), were either amended to add language that is similar to subsections (2) and (3) of RCW 51.12.070 back in 1981 (the same time when ALL of the exceptions to “prime contractor liability” found in RCW 51.12.070 became law) OR were passed and became law AFTER 1981.<sup>2</sup> Furthermore, no prior appellate court decision interpreting ANY of the aforementioned similar statutes OR interpreting RCW 51.12.070(2) & (3)<sup>3</sup> has been located by either counsel for the Department or the undersigned counsel for the Appellant.

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<sup>1</sup> The Dept. miss-cited this provision, which should read, RCW 51.08.180(2) (b), (c). This section will be cited as the proper subsection (2) in the remainder of this Reply Brief.

<sup>2</sup> The applicable Legislative histories for these statutes are as follows: **RCW 50.04.145(2)(c), (f)** (1983 1st ex.s. c 23 § 25; 1982 1st ex.s. c 18 § 13); **RCW 50.24.130(3), (4)** (Laws 1982, 1st Ex.Sess., ch. 18, § 15, added the second introductory paragraph and subsecs. (1) through (4)); **RCW 51.08.070(2), (3)** (Laws 1981, ch. 128, § 1, added the second introductory paragraph and subsecs. (1) through (4)); **RCW 51.08.180(2)(b), (c)** (Laws 1981, ch. 128, § 2, added subsec. (2) pertaining to application of chapters 18.27 RCW and 19.28 RCW); and **RCW 51.08.195(3), (6)** (1991 c 246 § 1)

The lack of any prior Departmental rule-making outlining the Department's interpretation of just what a contractor, like Lee's Drywall, must establish in order to be eligible for the exemption from "prime contractor liability" as found in the 1981 amendment to RCW 51.12.070 lies at the very heart of this case. The corresponding lack of any appellate court decisions interpreting this statute (or any similar or identical statutory provisions) has only added to the difficulty that the Appellant herein (Lee's Drywall) and other similarly situated contractors have had, with the Departments relatively recent assault on contractors, and has lead the Appellant to bring these issues to this Court (over a claim less than \$8,000.00).<sup>4</sup>

**II. ZAGY'S DRYWALL'S PRINCIPAL WAS NOT AVAILABLE FOR APPELLANT TO CALL HIM OR OTHERWISE SECURE ANY RECORDS HE MAY HAVE HAD FOR THE HEARING BELOW.**

The Department asserts that Lee's Drywall made no effort to present the owner of Zagy's Drywall to testify at the administrative hearing, nor to secure his "books and records". However (and this is

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<sup>3</sup> Other than the *Littlejohn* case, as cited in the Opening Brief of Appellant and discussed in the Brief of Respondent, as well.

<sup>4</sup> The Appellant herein, Lee's Drywall, along with a number of other contractors, have quite a large number of other similar cases pending, wherein the Department, since late 2004 and early 2005, has begun to interpret the provisions of RCW 51.12.070(2) & (3) in

really a part of the frustration that Lee's Drywall has with the Departments actions and attitude in this case), even though the premiums owed by Zagy's Drywall were unpaid for the 2<sup>nd</sup> Quarter of 2003 (i.e., due to the Department by July 31, 2003), Lee's Drywall was not notified of this delinquency, and thus not given the opportunity to seek contact with or secure payment from Zagy's Drywall, until January 2005, many months after Zagy's Drywall was out of business.<sup>5</sup> Additionally, by the time the administrative hearing was held, the principal of Zagy's Drywall was living out-of-state. (See Hearing Exhibit #11)<sup>6</sup>.

**III. RCW 51.12.070(2) DOES NOT REQUIRE A CONTRACTOR TO PROVE THAT A SUBCONTRACTOR'S PRINCIPAL PLACE OF BUSINESS IS, IN FACT, ELIGIBLE FOR A BUSINESS DEDUCTION.**

Subsection (2) of RCW 51.12.070 provides that a contractor is not directly and primarily liable for the premiums of a subcontractor who, *inter alia*, "has a principal place of business which would be eligible for a business deduction for the internal revenue service tax purposes. . . ."

There is no statutory definition of "principal place of business," nor is there any statutory definition of "business deduction for internal

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the manner the Department asserts is appropriate, and which law abiding and otherwise compliant contractors, like Lee's Drywall, find so unrealistic and absurd.

<sup>5</sup> See Hearing Exhibit #5 – Zagy's contractor's license was suspended (or had expired) as of Sept. 2, 2003.

revenue service tax purposes.” There is likewise no definition of “principal place of business” provided by Congress in the federal tax statutes. *Commissioner of Internal Revenue v. Soliman*, 506 U.S. 168, 173-174, 113 S.Ct. 701, 121 L.Ed.2d 634 (1993).

There is some guidance to determine whether a taxpayer’s residence may be considered the taxpayer’s “principal place of business” for purposes of a deduction for a “home office” found in 26 U.S.C. § 280A.

As set out at page 26 of Appellant’s Opening Brief, 26 U.S.C. § 280A (c)(1)(C) provides that “principal place of business” includes “a place of business which is used by the taxpayer for the administrative or management activities of any trade or business of the taxpayer if there is no other fixed location of such trade or business where the taxpayer conducts substantial administrative or management activities of such trade or business.”

If a taxpayer’s “dwelling unit” or “a portion” of the “dwelling unit” is his or her “principal place of business” under 26 U.S.C. § 280A (c)(1)(C), he is eligible for a deduction provided he can establish “that the home office was used ‘exclusively and ‘on a regular basis’ as the principal

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<sup>6</sup> Hearing Exhibit #11 was presented to IAJ Stockman to show that Isaias Guerrero, the owner of Zagy’s Drywall, was no longer in the State of Washington, and thus, was not practically available to be brought before the Industrial Appeals Judge.

place of business.” *Kurzet v. Commissioner of Internal Revenue*, 222 F.3d 830, 838 (10<sup>th</sup> Cir. 2000).

“The taxpayer bears the burden of proving that he is entitled to a deduction for a home office pursuant to § 280A.” *Id.* The entity that has authority to decide whether the taxpayer is, in fact, entitled to a deduction is the IRS. This determination is “primarily a factual question” for the IRS. *Id.* A contractor has no ability or authority to make a determination whether a subcontractor is, in fact, eligible for a home office deduction. Nor does RCW 51.12.070 impose that burden on a contractor: the language of the statute only requires that a subcontractor have a principal place of business that “would be” eligible for such a deduction.

The Department’s argument at page 14 of the Response Brief that “[u]nder Lee’s tautology, one’s toilet, hammock, or family car ‘would be’ eligible as an IRS ‘principal place’ provided that the toilet, hammock, or car ‘complied with provisions of the IRS code’ is puzzling. Section 280A refers to a “dwelling unit” or a “portion” of a “dwelling unit” as possible principle places of business – not to fixtures, furnishings, or automobiles – and certainly not to a “kitchen table.” No toilet, hammock, car, or kitchen table would ever be considered a “dwelling unit” or a “portion” of a dwelling unit, and therefore, could never be a “principal place of business.”

Judge Stockwell’s Finding of Fact Number 5, *i.e.*, that there was not sufficient evidence to show that Zagy’s Drywall had a principal place of business which would be eligible for a business deduction for internal revenue service tax purposes, was based on Ms. Wilcox’s testimony that use of Mr. Guerrero’s kitchen table “precludes any finding that any other portion of his home qualified for the deduction.” AR 24-25.

Ms. Wilcox’s testimony was a misstatement of law: whether use of the kitchen table was “exclusive” for business purposes certainly does not preclude a determination by the IRS that some portion of Mr. Guerrero’s “dwelling unit” qualified for the deduction. There is not substantial evidence in the record to support Finding of Fact Number 5.

The Department utterly failed prior to making the determination of prime contractor liability to investigate whether Mr. Guerrero’s principal place of business – *i.e.*, his “dwelling unit” or some portion thereof – “would be” eligible for a business deduction. By simply “opting” to impose liability on Mr. Lee, the Department shifted its own duty to investigate to Mr. Lee.

**IV. THE DEPARTMENT’S INTERPRETATION OF RCW 51.12.070(3) IS “ABSURD.”**

The Department argues at page 12 of its Brief that the Appellant quoted *Littlejohn v. Dep’t of Labor & Indus.*, 74 Wn. App. 420, 424, 873

P.2d 583 (1994) “to justify ignoring the plain language of subsection (2)” of RCW 51.12.070, that Appellant “omitted . . . footnotes” from the *Littlejohn* quote, and that the *Littlejohn* Court “provided a summary overview of the provisions of the four-part exception to RCW 51.12.070.” The argument is repeated at page 16 regarding subsection (3).

First, the “omitted footnotes” are simply citations to the subsections of RCW 51.12.070. *See Littlejohn*, 74 Wn. App. at 427 fn 4, fn 5, fn 6, 873 P.2d 583 (citing RCW 51.12.070 (2), (3), and (4)).

Second, what the Department characterizes as a “summary overview” of RCW 51.12.070 was in reality a discussion of legislative intent: “To help clarify the original legislative intent of the statute, we may also turn to its subsequent history.” *Id.* at 427, 873 P.2d 583. The *Littlejohn* Court noted that the Legislature “significantly amended” the statute in 1981 “by setting forth the circumstances in which a contractor would not be liable for industrial insurance premiums of subcontractors’ employees,” whereas prior to 1981, a contractor “would have been liable ‘primarily and directly’ for the industrial insurance premiums for *all* work done on its contracts with subcontractors.” *Id.* at 427-428, 873 P.2d 583 (emphasis by Court).

The Department argues that, in order to avoid “render[ing] meaningless the clear language of the statute,” a contractor must provide

proof at an appeal hearing that “its subcontractor’s records reflect *all* items of income and expenses of the business, not just those items of income and expenses of the subcontractor that are tied to the prime contractor.”

Response Brief, page 16.

Such a reading of the statute would shift the Department’s duty to audit a subcontractor’s books to the contractor, contrary to law. *See* RCW 51.16.070; RCW 51.48.040; WAC 296-128-025. “[T]his court has long held that a thing within the letter of the law, but not within its spirit, may be held inoperative where it would otherwise lead to an absurd conclusion.” *Murphy v. Campbell Inv. Co.*, 79 Wn.2d 417, 420, 486 P.2d 1080 (1971).

The conclusion that the Legislative intent behind RCW 5.12.070(3) was to require a contractor to audit the subcontractor’s books in order to “protect himself” from prime contractor liability is absurd in light of the authority granted to the Department to conduct audits.

Further, as noted by the *Littlejohn* Court, “the desirability of efficient revenue collection does not justify reading into the statute a mechanism for collection that the Legislature has not authorized.” *Littlejohn*, 74 Wn. App. at 426, 873 P.2d 583. There is no Legislative authorization for a “mechanism” whereby a contractor audits the books of a subcontractor – particularly before there is even any contractual

relationship between them.

The Department would have this Court absolve it from the duty to determine whether a contractor is exempt from prime contractor liability under RCW 51.12.070. While the burden of proof **on an appeal** from a determination of prime contractor liability is on the contractor, the Department seeks a ruling from this Court that it is not required to conduct a reasonable investigation **prior to** imposing prime contractor liability, arguing that under RCW 51.12.070 it has the “option” to pursue either the contractor or the subcontractor. In effect, the Department wants this Court’s permission to ignore the language that a contractor “is not responsible for any premiums upon the work of any subcontractor” if the requirements for exemption are met. Surely this could not have been the legislature’s intent when it passed the 1981 amendment adding the exception to prime contractor liability.

This Court must interpret RCW 51.12.070(3) to determine the legislative intent behind this seemingly innocuous subsection: was it that a subcontractor must maintain a set of books for his own business, separate from that of the contractor, as one of the requirements for an exception to prime contractor liability, as stated by the *Littlejohn* Court? Or was the legislative intent to require a contractor to conduct an audit of the subcontractors’ books in order to avoid “prime contractor liability,” as

argued by the Department? If this was the legislature's intent, it surely would have authorized such activity and/or required licensed subcontractors to submit to such an intrusion. However, there is no such authorization or requirement to be found.

**V. RCW 51.12.070 DOES NOT CREATE AN "OPTION" FOR COLLECTING PREMIUMS FOR A SUBCONTRACTOR'S WORK FROM A CONTRACTOR WHERE THE EXCEPTION TO CONTRACTOR LIABILITY APPLIES.**

At page 19 of the Response Brief, the Department argues that (1) RCW 51.12.070 "has in some form since the early 1900's state[d] clearly that the liability of the person letting a contract for work is primary and direct, and (2) the statute does not "support Lee's contention that the Department is required to pick one option over another in pursuing recovery of tax assessments due."

Although the statute has indeed included the "primary and direct" language since the early 1900's, as the *Littlejohn* Court noted, "[a]n amendment is presumed to change the meaning of a statute." *Littlejohn*, 74 Wn. App. at 427, 873 P.2d 583. "In this instance, the amendment implies that prior to 1981, the liability of contractors for premiums upon the work of their subcontractors was unlimited," but after the 1981 amendment, "[a contractor] remained primarily and directly responsible

for its subcontractors' employees premiums **unless** it protected itself from liability by being registered itself and insuring that its subcontractors were registered." *Id.* at 427-428, 873 P.2d 583 (emphasis added).

The *Littlejohn* Court stated that by amending RCW 51.12.070 in 1981, "[t]he Legislature **eliminated** liability . . . if the contractor and the subcontractor were (1) registered with the State pursuant to RCW 18.27 or licensed with the State pursuant to RCW 19.28 and if the subcontractor was (2) truly an independent contractor with its own principal place of business, as well as (3) separate books." *Id.* at 427, 873 P.2d 583 (footnotes omitted; citing RCW 51.12.070 (2), (3), and (4)).

There was no "option" created by the 1981 amendment to RCW 51.12.070: a contractor's liability is "primary and direct" unless the exception applies, in which case, liability is **eliminated**. The Department does not have an "option" to pursue the contractor for premiums on the work of the subcontractor where RCW 51.12.070(2) – (4) applies. The Department is effectively asking the Court to rule that it may ignore the 1981 amendment and impose prime contractor liability by whim, choice, or fiat and without any investigation to determine whether the exception applies.

At page 20 of the Department's Brief, it argues that "nothing in [RCW 51.16.200] suggests that the Department must pursue successors to

a subcontractor instead of or in addition to pursuing prime contractors.”  
However, if the contractor’s liability is eliminated under RCW 51.12.070, the Department has no other recourse than to pursue the subcontractor or its successor.

RCW 56.16.150 provides a right of action to the Department to pursue a delinquent subcontractor. The Department implies that the language of RCW 56.16.150 that provides, “any such right of action shall be in addition to any other right of action or remedy” means that the Department may pursue a contractor in addition to filing a civil suit against a delinquent subcontractor. However, if the contractor’s liability is eliminated under RCW 51.12.070, pursuing a contractor is not a right or remedy that is available to the Department.

**VI. THE INFORMATION SHEET IS NOT “IRRELEVANT” ON THIS APPEAL.**

Although the Department denies that its 2005 “Information Sheet” is a rule, it is indeed a rule under the definition set out in RCW 35.05.010(16), and the Department failed to follow required procedures to promulgate the rule that a contractor must make a “physical verification” of a subcontractor’s books and records and their place of business in order to satisfy RCW 51.12.070 (2) and (3).

In its attempt to explain away the “Information Sheet,” the

Department at one point states that contractors do have a “right to examine and verify a subcontractor’s books and records and their place of business” (Response Brief, page 21, footnote 4); but then adds that the “right” consists of the “right to insist in its business relations with every subcontractor that the subcontractor agree to a method for the contractor to verify that the subcontractor meets the four-part test for exemption under RCW 52.12.070.” *Id.*

In another footnote, the Department denies that the information sheet establishes a “mandate” requiring physical verification by a contractor that a subcontractor’s books, records and place of business “meet statutory requirements (Response Brief, page 22, fn 6), but adds “for diligent and cautious contractors, the information sheet would suggest that the contractors would be well advised to exercise their rights to seek voluntary consent from their subcontractors, as part of contract negotiations, to allow the contractors to physically or otherwise verify these things.” *Id.*

This is a mischaracterization of the Information Sheet, which includes the following language:

**You must also physically verify your subcontractors:**

A. Maintain a complete set of books and records that account for all of the business income and expenses.

B. Work out of a principal place of business that qualifies for an IRS business deduction. To qualify, the place of business must be used regularly and exclusively for the business.

**. . . You have the right to examine and verify a subcontractor's books and records and their place of business.**

Assurance that a subcontractor maintains the required records and maintains a principal place of business **can only be achieved by physical verification by you or your representative** (For example your accountant). . . . If you have dealt continuously with a subcontractor and know their business and financial status, you may decide that a continued periodic physical verification may not be necessary.

AR Ex. 12, "Prime Contractor Liability in the Construction Industry"

(emphasis added).

During the During the October 6, 2005 appeal hearing, the Department's counsel questioned Mr. Lee about his business practices prior to those proceedings in hiring a subcontractor, i.e., obtaining a subcontractor's proof of insurance, requiring proof that the subcontractor was a "registered construction contractor with the Department of Labor Industries," making sure they were properly bonded, making sure they had a UBI number. TR 61-62. Counsel then continued, with obvious reference to the Information Sheet:

Q. Now, since all this came up, you've learned some things, right?

A. You're referring to . . . ?

Q. Well, at the time that you were using Zagzy's, you didn't know that anybody thought you had a duty to find out whether Zagzy's books and records were complete, correct?

A. That's correct.

Q. So when you were hiring Zagzy's, you didn't do anything to find out whether his books and records were complete, correct?

A. That's correct.

...

Q. Now, you said that you had known Isaias for several years before 2003 because he had worked for you as an employee and he'd worked for you as a subcontractor.

A. Correct.

Q. Did you know whether he was running his business out of his house or whether he had a storefront?

A. I did not know which of the two, no.

Q. Okay. So even though it's somebody you knew, you hadn't been to his house for dinner or anything like that?

A. No, sir. It was a business relationship.

...

Q. Okay. All right. So in your 24 years as a construction contractor, you've never had a contractor come to you and ask to look at your books and records, right?

A. That's correct.

**Q. And during all that time and until L&I this year told you you were supposed to be looking at other people's records,<sup>7</sup> you'd never looked at any of your subcontractors' records, books and records, correct?**

A. At their place of business, no, I had not.

...

Q. Now, with regard to the office tax deductibility, in your 24 years have you ever had a contractor who was hiring you, to your knowledge, check out your office to determine its tax deductibility?

A. No, sir.

Q. And again, until this came up had you ever even thought about checking out subcontractors' office tax deductibility?

A. No.

TR 62, lines 4-13; page 70, lines 10-19; page 74, lines 5-14; page 75, lines 4-11 (emphasis added).

In her Proposed Decision and Order, Judge Stockman entered Findings of Fact that sufficient evidence was not presented to establish that Zagy's Drywall maintained a separate set of books or records that reflect all items of income and expenses of its business, and that sufficient evidence was not presented to establish that Zagy's Drywall had a principal place of business which would be eligible for a business

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<sup>7</sup> The Information Sheet titled "Prime Contractor Liability in the Construction Industry" was mailed out in 2005, the year of the appeal hearing. *See* AR Ex. 12.

deduction for IRS tax purposes. AR 26.

The “Information Sheet” was without question used as the source of new rules that places new requirements on contractors to qualify for the exception to “prime contractor liability,” and the Department’s argument that “[t]he Department has not attempted to give the force of law to any document it has published to help businesses understand their legal obligations” is not borne out by the Department’s conduct in this case and at the appeal hearing.

Mr. Lee was questioned about his conduct with reference to the Information Sheet at the hearing, and the administrative decision requiring him to pay premiums for work done by Zagy’s Drywall can be traced to the Department’s arguments based on the new “physical verification” requirements set out in the Information Sheet.

The Information Sheet is not “irrelevant” on this appeal, contrary to the Department’s assertions. Mr. Lee was found liable for Zagy’s Drywall premiums because he had not physically verified Zagy’s records and books were complete and did not present Zagy’s records at the hearing, and had not physically verified that Zagy’s place of business was, in fact, eligible for a home office deduction.

**VII. MR. LEE’S CONSTITUTIONAL CHALLENGES ARE VALID.**

First, contrary to the Department's assertion at page 26 of the Response Brief, constitutional issues may be raised for the time at the Court of Appeals. This Court is permitted to review an issue not raised before the trial court if it entails a "manifest error affecting a constitutional right." *State v. Sauve*, 100 Wn.2d 84, 86-87, 666 P.2d 894 (1983); RAP 2.5(a).

Second, it is not necessary to provide a *Gunwall* analysis of the Fourth Amendment right to freedom from unreasonable search and seizure:

It is well established that article I, section 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution. *State v. McKinney*, 148 Wash.2d 20, 29, 60 P.3d 46 (2002). Thus, a *Gunwall* analysis is unnecessary to establish that this court should undertake an independent state constitutional analysis. *State v. Jackson*, 150 Wash.2d 251, 259, 76 P.3d 217 (2003).

*State v. Chenoweth*, \_\_\_ Wn.2d \_\_\_, 158 P.3d 595, 600 (2007).

Third, the Department does (through application of the Information Sheet) "require prime contractors to conduct unconsenting searches of the books and records and premises of subcontractors" in order to satisfy the exception to "prime contractor liability" in RCW 51.12.070, as evidenced by the facts in this case.

The Department's argument that "the statute does not require Lee

to avail itself of the protective options” is sheer sophistry. As evidenced in this case, if a contractor does not enter his or her subcontractor’s home (if s/he has an office therein), and if s/he does not physically inspect his or her subcontractor’s private financial information, then s/he has not “availed [himself or herself] of the protective options” of RCW 51.12.070, and must face the consequence for such failure: “prime contractor liability.”

The new requirements of “physical verification” effectively turn a contractor into an agent of the Department: any “physical verification” of a subcontractor’s place of business or records and books constitutes state action. Contrary to the Department’s assertion at page 29 of the Response Brief, this is, indeed, “an issue of constitutional concern for this Court.”

Mr. Lee raises the issue not on behalf of subcontractors whose privacy rights would be violated by his “physical verification” of their books and records and place of business, but on his own behalf because he does not wish to become an agent of the State for this purpose.

Mr. Lee’s contract with Zagy’s was impaired – even though RCW 51.12.070 was in effect at the time the contract was formed – because the Department put into effect **new** rules (through the Information Sheet) that did not exist at the time Lee’s Drywall and Zagy’s entered into their contract and that changed the legal requirements for exemption from

“prime contractor liability.”

### **VIII. CONCLUSION**

The Department argues that it has no obligation to attempt collection of premiums from subcontractors before imposing liability on contractors. Response Brief at 8 and 19. Yet if that were true, one wonders when subcontractors would **ever** be required to pay premiums. The Department’s argument ignores the plain language of RCW 51.12.070, shifts the burden of performing audits to private contractors, and is not supported by law.

“The desirability of efficient revenue collection does not justify reading into the statute a mechanism for collection that the Legislature has not authorized.” *Littlejohn*, 74 Wn. App. at 426, 873 P.2d 583. *See also Roberts v. King County*, 107 Wn. App. 806, 812, 27 P.3d 1267 (2001) (“An agency’s exercise of discretion does not permit it to disregard the clear language of [a] statute.”).

Here, RCW 51.12.070 initially states that a contractor is primarily and directly responsible for the payment of premiums. Significantly, the statute then goes on to describe an exception where the contractor is **not** primarily and directly responsible. *See* RCW 51.12.070(1) – (4). **The very existence of an exception requires the Department to determine whether the exception applies before imposing liability on the**

**contractor for payment of premiums.** Otherwise, the Department could impose liability on a contractor by “default,” as took place in this case, and the only time that a contractor would not be liable would be when, during the course of an administrative appeal, the contractor could present the kind of evidence that would normally be gathered by the Department during an audit. *See* WAC 296-17-352; RCW 51.48.040. By requiring private contractors to do audits, as well as incur litigation costs to ensure proper enforcement of the statute, the Department would create “a mechanism for collection that the Legislature has not authorized.”<sup>8</sup>

The Appellant notes that requiring the Department to conduct investigations to determine whether the exception granted in RCW 51.12.070 applies in a given case would not change an appellant’s burden of proof in a later challenge of the Department’s determination. It would merely ensure that the Department had a reasonable factual basis on which to make its initial determination, unlike what happened in this case.

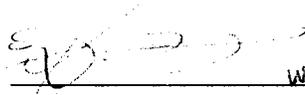
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<sup>8</sup> This is precisely why the Department so fervently denies that by creating a publication explaining how “contractors . . . can protect themselves,” the Department has engaged in unconstitutional rule-making. *See* Response Brief at 8 and 21-22. The publication is evidence that the Department is attempting to increase revenue collection by shifting its investigatory responsibilities to private contractors.

DATED this 17<sup>th</sup> day of **July, 2007**.

Respectfully submitted,

**SNYDER LAW FIRM, LLC**

  
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OF THE STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

LEE'S DRYWALL CO., INC., )  
a Washington corporation )  
  
Appellant )  
  
vs. )  
  
STATE OF WASHINGTON, )  
DEPARTMENT OF LABOR )  
& INDUSTRIES, )  
  
Respondent. )  
\_\_\_\_\_

DECLARATION OF  
MAILING

I certify and declare:

I am over the age of 18 years, make this Declaration based upon personal knowledge and am competent to testify regarding the facts contained herein.

On July 20<sup>th</sup>, 2007, I caused a true and correct copy of  
  
REPLY BRIEF OF APPELLANT

to be delivered by First Class Mail (and via email [jamesj@atg.wa.gov](mailto:jamesj@atg.wa.gov))  
to:

James W. Johnson  
Assistant Attorney General  
Labor & Industries  
PO Box 40121  
Olympia WA 98504

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT. DATED AT SUMNER, WASHINGTON THIS 20<sup>TH</sup> DAY OF JULY, 2007.

  
\_\_\_\_\_  
DENISE F. MANNING