NO. 91927-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

PEGGY MONTGOMERY, and DWIGHT MONTGOMERY and LISA MONTGOMERY, husband and wife,

Petitioners,

vs.

GLEN L. ENGELHARD, JANE DOE ENGELHARD, and their marital community,

Respondents,

and

WILLIAM M. ADAMS, JANE DOE ADAMS, and their marital community; and TB ADAMS REALTY, LLC, a Washington real estate firm,

Defendants.

APPEAL FROM BENTON COUNTY SUPERIOR COURT
Honorable Carrie Runge, Judge

ANSWER TO PETITION FOR REVIEW

REED McCLURE
By Pamela A. Okano WSBA #7718
John W. Rankin, Jr. WSBA #6357
Attorneys for Respondents

Address:

Financial Center
1215 Fourth Avenue, Suite 1700
Seattle, WA 98161-1087
(206) 292-4900

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Page

Other Jurisdictions

Constitutions

Statutes

Rules and Regulations

Other Authorities

065680.000104/559035

I. NATURE OF THE CASE

The implied warranty of habitability applies in certain situations to builder-vendors. This Court "has not been anxious to extend the [warranty] beyond its present boundaries." *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 415, 416, 745 P.2d 1284 (1987). Yet extend it is just what the petitioners have asked this Court to do.

II. ISSUES PRESENTED

Should this Court review where the Division III decision is mandated by this Court's decision in *Klos v. Gockel* and the Court of Appeals decisions of *Boardman v. Dorsett* and *Donovan v. Pruitt*; and petitioners seek to expand the implied warranty to nonbuilder-vendors?

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS.

In 1997 defendant/respondent Glen Engelhard, a real estate broker, purchased an undeveloped parcel at 625 Meadows Drive South, Richland. Engelhard retained Castle Builders as general contractor. (CP 38, 48, 58)

Castle Builder principal, Bruce Schmidt, later testified his company had "directed the construction work, coordinated subcontractors, ensured the home was built to code, and called for and coordinated the multiple city inspections required during construction." Schmidt further testified Engelhard "did not have any experience in the construction trade"

and "could not have acted as the general contractor or builder on this project." Although Engelhard had developed two or three small commercial projects and bought two houses to be renovated, he had never done the construction or acted as general contractor. (CP 39, 48, 433, 476) Engelhard testified (CP 55, 60):

> ... I didn't know what I was doing , . . . That's why you hire a general contractor.
>
> ....
>
> ...I'm not a contractor, I don't know that stuff.

The City issued a certificate of occupancy in January 1999. Engelhard lived there for two years. Petitioner Dwight Montgomery would later testify that Engelhard was "living in the upstairs" of the house and that he had seen Engelhard paying his bills there. (CP 39, 51, 64, 464)

In April 2002 petitioner Peggy Montgomery entered into a purchase and sale agreement to buy the house from Engelhard. There was no inspection, because she did not think it necessary. (CP 66-69, 83)

In May 2002, before closing, Peggy Montgomery's son and daughter-in-law, petitioners Dwight and Lisa Montgomery, moved in as renters. Closing occurred on July 17, 2003, more than four years after construction was complete. In 2004, Peggy moved into the basement below Dwight and Lisa. (CP 3, 39, 40, 70-79, 83, 90)

B. STATEMENT OF PROCEDURE.

In 2012 petitioners sued Engelhard for breach of the implied warranty of habitability amongst other claims. (CP 1-10)

Engelhard moved for summary judgment. (CP 18-37) Petitioners submitted, among other things, Engelhard's general contractor's declaration, which contained such conclusory statements as (CP 460):

> Mr. Engelhard and I worked together on the project to build [the home in question.] Mr. Engelhard was very involved in the project. Sometimes I was on site at the project, and sometimes Mr. Engelhard was on site at the project. ...

The contractor, Mr. Schmidt, later clarified what he meant in a second declaration in which he testified, among other things (CP 476):

> Like many other homeowners I have built houses for over the years, I worked closely with Mr. Engelhard as my customer because he was very interested in the project, its costs, and selection of finish materials to make it his home. Also like many other customers I have worked with, Mr. Engelhard referred me to subcontractors or materials suppliers he knew of for certain portions of the work, and I would sometimes hire those subcontractors when I felt they could capably perform the work.
>
> Mr. Engelhard was excited about his new home and often came to the jobsite to observe the construction process and progress. He did not perform or direct any actual construction work on the home. ...Castle Builders, as the general contractor for the project, directed the construction work, coordinated subcontractors, ensured the home was built to code, and called for and coordinated the multiple city inspections required during construction.

Engelhard explained why he was sometimes on the site when Schmidt was not (CP 434: lines 4-11):

> ...[O]nce ... the floor was done it was kind of neat to go out there and sit and watch the sunset and have a beer and just hang out.
>
> And then as it—you know, the framing went and the roof got on, I'd walk through and just—You know, rooms look smaller when they're finished. Is this really going to be as big as I think? . . . .

Summary judgment was granted to Engelhard on the implied warranty and certain other claims. Reconsideration was denied. Petitioners' remaining claims were dismissed without prejudice. (CP 481-83, 506-07, 508-09, 511-12)

Division III affirmed. The lead opinion held that Engelhard could not be liable as a matter of law because he was not a commercial builder; and, alternatively, petitioners were not the house's first occupants. The concurring opinion said that if, as petitioners claimed, Engelhard had been a builder as well as a vendor, the statute of repose, RCW 4.16.300-.320, would have barred the claim. The dissent would have reversed and remanded for further proceedings.

IV. ARGUMENT

This Court will review only if one or more RAP 13.4(b) criteria exist. The petition claims that all four criteria exist. The petition is wrong.

A. LAW OF IMPLIED WARRANTY OF HABITABILITY.

In Washington, an implied warranty of habitability attaches to builder-vendors if there was (1) the sale of a new residence (2) the builder-vendor was a commercial builder, and (3) the residence was built for sale, not personal occupancy. *Atherton Condo. Apt. Owners Ass'n Bd. of Dirs. v. Blume Development Co.,* 115 Wn.2d 506, 519 n.7, 799 P.2d 250 (1990). If any of one these three criteria is not met, there is no implied warranty. *See, e.g., Carlile v. Harbour Homes, Inc.,* 147 Wn. App. 193, 194 P.3d 280 (2008) (no implied warranty where plaintiffs were second purchasers, even though defendant was commercial builder). To prevail, petitioners must show a genuine issue of fact as to ***each*** of the three criteria. Petitioners have failed to do so.

1. Engelhard Did Not Build the House.

First, petitioners have no evidence Engelhard ***built*** the house. As this Court explained in *Frickel v. Sunnyside Enters., Inc.,* 106 Wn.2d 714, 725 P.2d 422 (1986):

> As a matter of public policy, determined by this court, it seems apparent that a builder who puts a house on the market, brand new and never occupied, has some responsibility to the ultimate buyer. ***The builder built the thing.*** It was intended to be sold to a buyer for occupancy by the buyer ....

Id. at 717 (emphasis added). In this case, Castle Builders, not Engelhard, built the thing.[1] Indeed, this Court has explained the rationale behind imposing the implied warranty on the builder-vendor:

> As between vendor and purchaser, the builder-vendors, ***even though exercising reasonable care to construct a sound building,*** had by far the better opportunity to examine the stability of the site and to determine the kind of foundation to install.

House v. Thornton, 76 Wn.2d 428, 435-36, 457 P.2d 199 (1969) (emphasis added). It is the builder who can exercise reasonable care to build a sound building. Engelhard indisputably did not have the knowledge or experience and ***never acted as the contractor*** on his few projects. (CP 39, 48, 54-55, 60, 433, 476) Indeed, petitioners admit he always "hired contractors for construction."[2] (Petition for Review 5)

In *Boardman v. Dorsett,* 38 Wn. App. 338, 685 P.2d 615, *rev. denied,* 103 Wn.2d 1006 (1984), Division III faced an argument that the implied warranty applied to a defendant who, unlike Engelhard, had

---

[1] By "builder," this answer does not mean a person who actually pounds a hammer or uses a saw. Rather, a "builder" is "a general building contractor who controls and directs the construction of a building, has ultimate responsibility for completion of the whole contract and for putting the structure into permanent form." *Jeanguneat v. Jackie Hames Constr. Co.,* 1978 OK 31, 576 P.2d 761, 762 n.1 (1978); *accord Kirk v. Ridgway,* 373 N.W.2d 491, 496 (Iowa 1985).

[2] Petitioners' only record reference for their claim that Engelhard was "sophisticated" is their legal memorandum in opposition to summary judgment. (Petition for Review 8) This does not meet their burden of showing a genuine issue of material fact. *Trohimovich v. State,* 90 Wn. App. 554, 558, 952 P.2d 192, *rev. denied,* 136 Wn.2d 1018 (1998).

apparently actually built the home at issue. The court affirmed summary judgment for the defendant because he was not a licensed contractor that had built several homes. This Court denied review.

Thus, Division III did not "create[] an exception to the implied warranty of habitability for vendor-builders who hire licensed contractors." (Petition for Review 9). The court instead held the implied warranty inapplicable since Engelhard was a vendor, not a vendor-builder.

Petitioners also misread the concurrence for allegedly "extend[ing]" the implied warranty "from the activity of selling to the activity of building." (Petition for Review 2, 10) The implied warranty has always applied to an entity that was ***both*** builder and seller. *See, e.g., Atherton,* 115 Wn.2d at 519 n.7; *House v. Thornton,* 76 Wn.2d 428, 435, 457 P.2d 199 (1969). Engelhard was only a seller. While the concurrence cited different grounds than the lead opinion to reach the same result, there was no conflict between them creating need for clarification.

It takes more than the mere ability to write checks to subcontractors and materialmen or to ask that a wall be changed to have the capability to "exercise[e] reasonable care to construct a sound building." *House,* 76 Wn.2d at 435. The undisputed evidence was that Engelhard did not have that capability and thus was not a builder.

2. The Sale Was Not Commercial.

Furthermore, even had Engelhard acted as his own general contractor, this Court's unanimous decision in *Klos v. Gockel,* 87 Wn.2d 567, 554 P.2d 1349 (1976), mandated affirming the summary judgment here. *Klos* reversed a bench trial judgment in favor of plaintiff homeowners and remanded with directions to dismiss the implied warranty of habitability claim against defendant builder-vendor.

In *Klos* defendant and her husband had run a construction business prior to his death. Their practice was to engage in a sequential build and sell: buying several lots, building on one, and occupying that house until they had built on the remaining lots. Then they would sell all the houses.

After her husband's death, defendant employed a variation of the couple's sequential build and sale practice to build three houses on Mercer Island. Specifically, after building the first, she lived in it for a year before selling it to plaintiffs. She then built the second house where she lived before selling it. She then built the third house and lived in it.

Defendant acted as her own general contractor. Although she claimed to have built the first house for her own personal use, this Court noted her conduct in this regard was "somewhat ambivalent." 87 Wn.2d at 570.

Nonetheless, despite defendant's sequential build and sell history and evidence suggesting she contemplated eventual sale, this Court held the sale was not a commercial one. Significantly, this Court declared, "The fact that appellant acted as her own general contractor is not controlling for such is often the case," and "It is not enough ... that [defendant] contemplated an eventual sale of the house." 87 Wn.2d at 570, 571.

Here, unlike the *Klos* defendant, Engelhard did not act as a general contractor. Even if he had, and even had he contemplated eventual sale, *Klos* demonstrates that that is insufficient.

3. Petitioners Were Not First Occupants.

In addition, petitioners had to present factual issues the house was new when bought although it was more than 4 years old. Accordingly, petitioners claim Peggy Montgomery "was the first buyer." (Opening Brief of Appellants 24; *see* Petition for Review 7) But it is the first *occupant*, not necessarily the first *buyer,* who can bring an action under the implied warranty. *See House,* 76 Wn.2d at 436, (implied warranty exists when vendor-builder sells "new house" to "its first intended occupant"); *Gay v. Cornwall,* 6 Wn. App. 595, 494 P.2d 1371 (1972) (implied warranty applied to third owner/first occupant). Indeed, the "new house/first occupant" requirement is so strict that subsequent purchaser-

occupants who are assignees of first occupants cannot recover for breach of implied warranty of habitability. *Carlile,* 147 Wn. App. at 202.

Engelhard was the house's first occupant. He lived there for two years. Petitioner Dwight Montgomery conceded—under oath—that Engelhard was "living in the upstairs" portion of the house and that he, Montgomery, had met Engelhard there before playing golf. (CP 464)

Thus, the lead opinion was simply following Washington precedent by holding that Engelhard was not a commercial builder or, in the alternative, petitioners were not the first occupants.

Because they cannot meet their burden of showing a genuine issue of material fact as to these and, as will be discussed *infra*, the other requirements for the implied warranty, plaintiffs asked the Court of Appeals and now this Court to expand the implied warranty far beyond its present boundaries. For example, petitioners claimed that the implied warranty should apply to Engelhard because he is a licensed real estate agent and allegedly a real estate developer.[3] (Opening Brief of Appellants

---

[3] "Real estate development is different from construction, although many developers also construct." https://en.wikipedia.org/wiki/Real_estate_development; *see generally Rivas v. Overlake Hosp. Med. Ctr.,* 164 Wn.2d 261, 266 n.2, 189 P.3d 753 (2008) (citing Wikipedia for factual statement). Where a developer is also a builder, the implied warranty may properly be imposed on it in an appropriate case. *See, e.g., Atherton,* 115 Wn.2d at 511 (defendant was developer, contractor, and vendor); *Stuart,* 109 Wn.2d at 408-09 (defendant was developer, contractor, and vendor). It is undisputed Engelhard always retained a general contractor on the few projects he attempted.

6, 18; Petition for Review 4-5, 8, 18) But the implied warranty in this state is "a limited one," and "[t]his court has not been anxious to extend the implied warranty of habitability beyond its present boundaries." *Stuart,* 109 Wn.2d at 415-16. This answer will demonstrate there is no reason to do so here.

B. THERE IS NO CONFLICT WITH THIS COURT'S DECISIONS.

1. Implied Warranty of Habitability Cases.

First, petitioners claim the Court of Appeals decision conflicts with *House*, 76 Wn.2d 428. Petitioners contend *House* imposed the implied warranty on a real estate broker who purchased a lot and retained a contractor to build a home on it. Plaintiffs' reliance is misplaced because they deem irrelevant a crucial fact in *House.*

The crucial fact is that defendant real estate broker and his general contractor had "entered into a ***copartnership and agreement*** to construct" the residence. 76 Wn.2d at 429 (emphasis added). Under the then law, the partnership was bound by one partner's wrongful acts, and each partner was jointly and severally liable. 1955 WASH. LAWS ch. 15, §§ 25.04.130, .150(1). Thus, the conduct of the *House* general contractor was imputable to his partner, the real estate broker, as a matter of law. *See Poutre v. Saunders,* 19 Wn.2d 561, 565-66, 143 P.2d 554 (1943). Consequently, neither the parties nor this Court had any reason to discuss whether the

broker, absent the partnership, would have qualified as a builder-vendor subject to the implied warranty. Petitioners' claim that the distinction between hiring a general contractor and entering into a partnership with one to construct a building has no legal significance is baseless.

Even had there not been a partnership, *House* focused on *whether* to impose an implied warranty of habitability on a builder-vendor at all, not on *what* constitutes a builder-vendor. "An opinion which assumes a particular proposition is not an authority supporting that proposition." *In re Estate of Bowers,* 50 Wn. App. 691, 696, 750 P.2d 275 (1988), *rev'd on other grounds*, *Safeco Ins. Co. v. Barcom*, 112 Wn.2d 575, 773 P.2d 56 (1989). Division III's opinion does not conflict with *House.*

Petitioners also claim conflicts with cases from other jurisdictions cited in *Atherton,* 115 Wn.2d at 521, *Frickel,* 106 Wn.2d at 718, and *Klos,* 87 Wn.2d at 570. Whether a Court of Appeals decision conflicts with non-Washington cases is not a criterion for review under RAP 13.4(b).

In any event, *Atherton* did not even decide what a "builder-vendor" is: the defendant there had ***built***, as well as developed and sold, the condominium units, so there was no question it was a builder-vendor. The issue was whether the alleged construction defects violated the implied warranty. The Division III decision here does not conflict with *Atherton.*

Frickel involved whether the sale of an apartment building built by defendant for its own ownership and management had been built for purposes of resale. Defendant was clearly a commercial builder in that it had built over 100 apartment units for its own ownership and management. Nevertheless, this Court held that the implied warranty of habitability did not apply because the building was indisputably not built for the purposes of resale. Whether the sellers were builder-vendors for purposes of the implied warranty was not at issue.

As discussed *supra, Klos* supports Engelhard, not petitioners, with respect to whether the sale was a commercial one. Moreover, Engelhard lived in the house two years, one year more than the *Klos* defendant. There is no evidence his living there was for the primary purpose of promoting the property's sale. Even if Engelhard had contemplated eventual sale, *Klos* says that is not enough. Moreover, unlike the *Klos* defendant, Engelhard retained a general contractor rather than acting as his own. But even had Engelhard acted as his own general contractor, *Klos* says that would not be controlling. That the defendant in *Klos* also engaged in sequential build and sales was also insufficient.

Petitioners claim that "[t]he key inquiry in *Klos* is whether the sale is commercial in nature." (Petition for Review 14) That was true in *Klos* because there was no dispute there that defendant had acted as her own

general contractor. Engelhard did not act as his own general contractor and thus did not qualify as a "builder" for purposes of who is a vendor-builder subject to the implied warranty of habitability.

Thus, Division III's decision does not conflict with any implied warranty of habitability decision of this Court.

2. The Concurrence Does Not Conflict with *Pfeiffer.*

The concurrence in the instant case would have held that assuming Engelhard had been the builder-vendor petitioners claimed he was, petitioners' implied warranty of habitability claim would be barred by RCW 4.16.300-.320, the statute of repose. (A copy of these statutes are set forth in the appendix hereto.) Petitioners do not dispute that if the statute of repose applies to the implied warranty of habitability, it applies here so their case should be dismissed as a matter of law.[4] Rather, petitioners claim that the concurring opinion was wrong in deciding that the statute of repose applies to the implied warranty and that, as such, the concurrence conflicts with *Pfeifer v. City of Bellingham,* 112 Wn.2d 562; 772 P.2d 1018 (1989). Petitioners are wrong. ***If Engelhard qualifies as a builder as well as a vendor***, the statute of repose applies to him.

---

[4] The statute of repose bars defective construction claims against builders that accrue more than six years after substantial completion. RCW 4.16.300-.320. Here substantial completion occurred in January 1999. Petitioners claimed to have discovered water intrusion in 2008, nine years later. (CP 40, 51, 106, 108, 111, 140)

Pfeifer held the statute of repose did not apply to claims arising out of sale, rather than construction, of a building. Thus, the statute of repose did not apply to a concealment claim because that claim arose from alleged misrepresentations made to induce purchase.

Petitioners claim an implied warranty of habitability arises from the sale of the residence, not from its construction, so the concurrence here conflicts with *Pfeifer. House* did say that when a builder-vendor sells a house, there is an implied warranty of habitability. 76 Wn.2d at 436. But *Berg v. Stromme,* 79 Wn.2d 184, 196, 484 P.2d 380 (1971), clarified this:

> [*House*] imposed a rule of strict liability holding the builder-seller to the principle that he was under a duty to supply a structure adequate in foundation and supporting terrain to be used by the buyer for the purposes for which the house and lot had been sold.

In other words, the implied warranty "[does] not arise out of any document evidencing the sale; rather, it came into existence by operation of law by virtue of a common law duty of strict liability that the builder-seller owed to the first purchaser-occupant." *Donovan v. Pruitt,* 36 Wn. App. 324, 328, 674 P.2d 204 (1983) (6-year statute of limitations applicable to actions on written contract inapplicable to implied warranty of habitability claims). Courts created the implied warranty "to meet a felt need to protect new home purchasers from the ruinous potentialities caused by ***construction defects*** 'which vitally affect the structural stability

or preclude the occupancy of the building.'" *Donovan,* 36 Wn. App. at 328 (quoting *House,* 76 Wn.2d at 434)) (emphasis added).

Hence, petitioners' claim arises from the allegedly defective construction. Thus, the concurring opinion does not conflict with *Pfeifer,* and the statute of repose requires dismissal of the implied warranty claim.

C. THERE IS NO CONFLICT WITH OTHER COURT OF APPEALS DECISIONS.

As discussed *supra,* Division III's decision here is consistent with and indeed, mandated by, its decision in *Boardman,* 38 Wn. App. 338, a decision that this Court declined to review. 103 Wn.2d 1006 (1984). Petitioners' argument that Division III's decision conflicts with *Donovan,* 36 Wn. App. 324, and *Carlile,* 147 Wn. App. 193, is also without merit.

Petitioners argue that *Donovan* applied the implied warranty of habitability where the buyers purchased the home two years after completion. Although this is true, it has nothing to do with whether the home was "new", because the buyers in *Donovan* were the home's "first purchasers ***and occupants***." 36 Wn. App. at 325 (emphasis added). As discussed *supra* at 9-10, it is first occupants who can sue for breach of the implied warranty of habitability. Petitioners were not the first occupants.

Division III's opinion does not conflict with *Carlile* either. In that case, the term "developer" was used interchangeably with "builder-

vendor," without mention of a separate general contractor, implying the developer was also the builder. Indeed, the *Carlile* plaintiffs referred to the developer as "the builder" when arguing the economic loss rule did not apply to "claims of subsequent homeowners who did not contract with the ***builder***." *Id.* at 203 (emphasis added). This implies the initial homeowners contracted with the builder by purchasing homes, so the developer-vendor was also the builder. In fact, developer-vendors can often be builders as well. *See Atherton,* 115 Wn.2d at 511; *Stuart,* 109 Wn.2d at 408-09.

The only other Court of Appeals cases petitioners cite as conflicting have nothing to do with the implied warranty of habitability or builder-vendors. Rather, they deal with the summary judgment standard. But as discussed *supra,* there can be no dispute that Engelhard was not the builder or that petitioners were not the house's first occupants. Hence, Division III's decision does not conflict with petitioners' summary judgment cases or raise any issue of substantial public interest.

D. THERE IS NO SIGNIFICANT CONSTITUTIONAL QUESTION.

Petitioners contend the decision presents a significant legal question under article I, section 21, of the State Constitution because the grant of summary judgment in this case deprived them of a jury trial. Under petitioners' reasoning, this Court would have to review virtually

every order granting summary judgment. There is no significant constitutional question within the meaning of RAP 13.4(b)(3).

E. THERE IS NO ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE THIS COURT SHOULD DECIDE.

Finally, petitioners claim there is an issue of substantial public importance this Court should decide. This too is erroneous.

Petitioners make much of the fact that Division III wrote three different opinions. That is not a criterion for accepting review. Indeed, this Court has declined to review such decisions before. *See, e.g., Matthews v. Penn-Am. Ins. Co.,* 106 Wn. App. 745, 25 P.3d 451 (2001), *rev. denied,* 145 Wn.2d 1019 (2002).

Further, petitioners engage in sheer speculation when they argue the opinion would limit the implied warranty "to the point of extinction" or would allow "most vendors of new homes" to avoid the warranty. (Petition for Review 2, 10, 14) The implied warranty of habitability has been in effect in this state for 46 years. *See House,* 76 Wn.2d 428. In that time, which included both economic booms and busts, there has never been a reported Washington decision involving a situation like the one here. In fact, as the cases show, many developers and vendors act as their own general contractor. *See, e.g., Atherton, Stuart.* Petitioners' claim the decision will affect the greater public is without basis.

This Court denied review of *Boardman*, which formed the basis for half of the lead opinion. The other half is based on well-established Washington law that a breach of the implied warranty of habitability claim must be brought by the first occupant, not necessarily the first purchaser. *See House,* 76 Wn.2d at 436.

There can be no dispute petitioners were not the first occupants and Engelhard was neither a licensed contractor nor acting like one. In short, not only was summary judgment correct, but there is no substantial issue of public interest this Court should review.

V. CONCLUSION

The implied warranty of habitability is imposed on commercial builders in certain cases because they have the skill and experience to prevent serious construction errors affecting habitability. But Engelhard admitted, and his general contractor confirmed, that he did not have the skill or experience to be a general contractor.

What petitioners are really seeking is an "exten[sion of] the implied warranty of habitability beyond its present boundaries," something this Court has said it is not anxious to do. *Stuart,* 109 Wn2d at 416. Moreover, the statute of repose would bar the claim in any event.

Review should be denied. Because the purchase and sale agreement includes an attorney fees clause providing for recovery of

reasonable attorney fees and costs, "including those for appeals," Engelhard is entitled to his attorney fees and expenses for responding to the petition. (CP 68) RAP 18.1(j).

Dated this 10th day of September 2015.

REED McCLURE

By Pamela A Okano

Pamela A. Okano **WSBA #7718**
John W. Rankin, Jr. **WSBA #6357**
Attorneys for Respondent

065680.000104/546142.docx

4.16.290 << 4.16.300 >> **4.16.310**

RCW 4.16.300

Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property.

RCW **4.16.300** through **4.16.320** shall apply to all claims or causes of action of any kind against any person, arising from such person having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property. This section is specifically intended to benefit persons having performed work for which the persons must be registered or licensed under RCW **18.08.310**, **18.27.020**, **18.43.040**, **18.96.020**, or **19.28.041**, and shall not apply to claims or causes of action against persons not required to be so registered or licensed.

[2004 c 257 § 1; 1986 c 305 § 703; 1967 c 75 § 1.]

Notes:

Severability -- 2004 c 257: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2004 c 257 § 2.]

Preamble -- Report to legislature -- Applicability -- Severability -- 1986 c 305: See notes following RCW **4.16.160**.

APPENDIX A

4.16.300 << 4.16.310 >> **4.16.320**

RCW 4.16.310

Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property — Accrual and limitations of actions or claims.

All claims or causes of action as set forth in RCW **4.16.300** shall accrue, and the applicable statute of limitation shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW **4.16.300**, whichever is later. The phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred: PROVIDED, That this limitation shall not be asserted as a defense by any owner, tenant or other person in possession and control of the improvement at the time such cause of action accrues. The limitations prescribed in this section apply to all claims or causes of action as set forth in RCW **4.16.300** brought in the name or for the benefit of the state which are made or commenced after June 11, 1986.

If a written notice is filed under RCW **64.50.020** within the time prescribed for the filing of an action under this chapter, the period of time during which the filing of an action is barred under RCW **64.50.020** plus sixty days shall not be a part of the period limited for the commencement of an action, nor for the application of this section.

[2002 c 323 § 9; 1986 c 305 § 702; 1967 c 75 § 2.]

Notes:

Preamble -- Report to legislature -- Applicability -- Severability -- 1986 c 305: See notes following RCW **4.16.160**.

4.16.310 << 4.16.320 >> **4.16.325**

RCW 4.16.320

Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property — Construction.

Nothing in RCW **4.16.300** through **4.16.320** shall be construed as extending the period now permitted by law for bringing any kind of action.

[1967 c 75 § 3.]