NO. 95955-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TERRY SCHILLING AND JULIE SCHILLING AND ARTISAN, INC.,

Petitioners,

v.

PROBUILD COMPANY, LLC AND MITEK INDUSTRIES, INC.,

Respondents.

ANSWER TO MOTION FOR PETITION FOR REVIEW

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I. Identity of Respondent

MiTek Industries, Inc., a foreign corporation ("MiTek") was the defendant at the trial court level and respondent in the Court of Appeals, Division Three.

II. Court of Appeals Opinion

The Court of Appeals, Division Three, correctly ruled that:

> Of primary significance to this appeal is the trial court's ultimate order dismissing all claims under the statute of limitations. Having conducted an independent review of the record, we agree with the trial court's statute of limitations analysis. The April 16, 2016, order of dismissal is therefore affirmed and all other summary judgment orders are vacated as moot.

(A-2).[1] Division Three explained that the statute of limitations had run on Petitioners' claims. It was undisputed that Petitioners filed their lawsuit more than four years after the alleged conduct occurred. The only issue addressed on appeal was whether any theory of tolling applied to allow the claims to proceed. Division Three evaluated the evidence in the light most favorable to the Petitioners and confirmed they had sufficient information placing them on inquiry notice in June 2007 and thus no theory of tolling

[1] Attached are appendix documents labeled A-001 to A-051. These documents will be cited as A-2 as cited above.

applied. The trial court's dismissal was affirmed.

Petitioners Terry Schilling and Julie Schilling ("Schilling") and Artisan, Inc. ("Artisan"), ignore Division Three's narrow ruling and instead ask this Court to issue an advisory opinion related to issues the court did not address. That request must be rejected because a ruling on those issues in Petitioners' favor would not provide the Petitioners any relief since their claims would still be barred by the statute of limitations.

III. Restatement of the Case

A. Background Facts

At its core this is a case about construction contracts. "[C]onstruction projects are multi-party transactions, but rarely is it the case that all or most of the parties involved in the project will be parties to the same document or documents. In fact, most construction transactions are documented in a series of two-party contracts, such as owner/architect, owner/contractor, and contractor/subcontractor. Nevertheless, the conduct of most construction projects contemplates a complex set of inter-relationships, and respective rights and obligations." Fundamentals of Construction Law, at 4–5 (Carina Y. Enhada et al., eds., 2001). In such a contract chain the parties bargain and define their rights

and remedies between and amongst themselves.

In this case, Schillings contracted with Artisan and its related company Altius, LLC to design and build their house. Schillings, through Artisan, then contracted with various contractors, such as engineer Timothy Bardell—who reviewed and sealed Altius' building designs; and ProBuild—who manufactured the metal-plate connected wooden trusses.

ProBuild separately orally contracted with MiTek to prepare individual truss designs using the parameters that were specified by ProBuild.[2] The evidence is undisputed that MiTek had no knowledge of the Petitioners, and similarly, Petitioners had no knowledge or interaction with MiTek. Petitioners brief shamelessly ignores three critical facts: (1) MiTek's only client in this transaction was ProBuild; (2) ProBuild contracted with MiTek to perform a limited scope of work; and (3) MiTek fully performed the scope of work it agreed to perform for ProBuild.

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[2] ProBuild's "design parameters" are the criteria, e.g., dimensions, properties of materials, support and load conditions, which an engineer inputs into design formulas. The engineer then uses his engineering knowledge, training and experience to analyze and/or predict the performance of materials under conditions defined by the chosen parameters. The key design parameters at issue in this case are (1) the weight of roofing material which Petitioners claim should have been 15 lbs./sq. ft. ("psf"), and (2) the top chord live load which the trusses were designed to support, which Plaintiffs claim should have been a 30 psf roof snow load.

Petitioners must stop using the term "plan stamping" as it relates to MiTek's conduct. MiTek did not engage in the act of "plan stamping." The undisputed evidence confirms that MiTek received loading and design parameter information from ProBuild, along with a request that MiTek prepare individual truss designs based on ProBuild's specifications. (A-18, A-21-22). MiTek performed its own calculations and prepared designs clearly stating that each design was prepared using parameters and specifications received from ProBuild. (A-4-6). MiTek also added cautionary language on the designs explaining that the truss designs needed to be reviewed and approved by a building designer before being incorporated into any particular building. This written confirmation of MiTek's scope of work placed Petitioners on notice about the limited nature of the engineering work MiTek performed had they bothered to read the design package.

MiTek did not place an engineering seal on, or ever see, ProBuild's preliminary truss designs. MiTek further notes that Petitioner's statement that "a ProBuild salesman designed the Schilling trusses using MiTek software, and a MiTek engineer-

stamped those truss plans" is patently false.[3] Furthermore, the acts of MiTek that Petitioners take issue with: (1) do not constitute the practice of engineering, and (2) are beyond the scope of work that ProBuild contracted with MiTek to perform.

B. Contract Formation Facts

In 2005, Schillings contracted with James and Josh Sevigny of Artisan, to manage and oversee the construction of their house. Schillings also contracted with Josh Sevigny's separate but related company, Altius, LLC, to design and prepare the building plans for their new home. Schillings admit that they exclusively relied on Artisan and the Sevignys to oversee all aspects of construction, including the hiring and retention of any necessary engineers. Artisan hired Timothy Bardell of B7 Engineering as the Schillings' structural engineer consistent with that expectation. The only engineer that Petitioners had a contractual relationship with was Mr. Bardell.

Mr. Bardell failed to specify the design parameters he used, such as the roof loading, nor did he identify the correct building code that he relied upon. Mr. Bardell admitted that in doing so, he

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[3] Appendix A-021-22 is the excerpt of the deposition of MiTek engineer Redong Yu where Petitioners' counsel confirms his understanding that MiTek does not see or seal ProBuild designs.

violated the 2003 version of the International Building Code ("IBC") section 1603.1[4] that required certain loading information be identified on sealed designs.[5]

In 2007, ProBuild provided a bid for a package of roof trusses for the Schilling residence. Artisan accepted the bid on the Schillings' behalf. ProBuild then obtained all of necessary information to determine the size and shape of the trusses it wanted to sell to Schillings, as well as the weight of material it wanted its trusses to withstand. ProBuild determined that a 12 pound TCDL[6] was appropriate. The loading for truss designs are generally designated as **TCLL** for Top Chord Live Load, **TCDL** for Top Chord Dead Load, **BCLL** for Bottom Chord Live Load, and **BCDL** for Bottom Chord Dead Load. ProBuild transmitted the design parameters it selected to MiTek and asked MiTek to prepare individual truss designs conforming to that request.

MiTek performed each and every calculation embodied on its truss designs in its office in California. MiTek's engineer sealed its designs certifying that the calculations used to create MiTek's

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[4] This was building code applicable when Bardell performed his work.
[5] The truss designs prepared by MiTek specifically identified all loading elements required by the IBC and the International Residential Code.
[6] TCDL is the Top Chord Dead Load and is the primary parameter Petitioners take issue with.

design were performed by, or under the supervision of, the engineer.

The designs prepared by MiTek's engineer included clear language on a cover page, as well as on each individual design, advising anyone who bothered to look at them that MiTek's scope of work was limited to preparing individual designs based on parameters provided by ProBuild, and that the designs were not certified to be used for any particular building:

> The truss drawing(s) referenced below have been prepared by MiTek Industries, Inc. under my direct supervision **based on the parameters provided by [ProBuild]**. A-293 [emphasis added].
>
> ***
>
> The seal on these drawings indicate acceptance of professional responsibility solely for the truss components shown. **The suitability and use of this component for any particular building is the responsibility of the building designer**, per ANSI/TPI-2002 Chapter 2. [emphasis added].

At the bottom of each design was the following prominent "Warning" reiterating the limited scope of MiTek's services:

> **WARNING! – VERIFY DESIGN PARAMETERS AND READ ALL NOTES ON THIS TRUSS DRAWING BEFORE USE**. ... This design is based only upon parameters shown and is for an individual building component to be installed and loaded vertically. Applicability of design parameters and proper incorporation of component is the responsibility of building designer.... [emphasis in original].

This language was not a post-sale disclaimer. It was a statement confirming the scope of work that MiTek was asked by ProBuild to perform. ProBuild then delivered the trusses it manufactured along with the truss designs to Artisan in June 2007. Artisan admits that it received the truss designs and knew to how to review the truss loading to confirm whether the TCDL of 15 that it expected was designated on the truss designs. (A-31). It is undisputed that each truss design clearly indicates they were prepared using a TCDL of 12, which should have caused Sevigny to inquire whether the designs conformed to his expectation. He did not. Instead, Sevigny delivered the truss designs to the City of Union Gap who determined that the truss designs complied with the City's building codes and stamped them as approved. (A-23-24). That approval is still in full force and effect.

MiTek also points out that evidence was presented that ProBuild began building the trusses before it received any truss designs from MiTek. Therefore, MiTek's engineering could not have materially impacted the subject trusses.

C. Procedural Posture

Petitioners filed suit on February 16, 2012, alleging violations of Washington's Consumer Protection Act ("CPA"), breach of

express and implied warranties under the Uniform Commercial Code-Sales (UCC 2), and that they were intended third party beneficiaries to the contract between ProBuild and MiTek.[7]

Petitioners moved for partial summary judgment arguing that MiTek and ProBuild violated the CPA. As to MiTek, Petitioners asserted that MiTek violated RCW 18.43.070 and WAC 196-25-070, by failing to validate the loading parameters selected by ProBuild were appropriate for the Schillings' residence. On November 6, 2014, the trial court granted partial summary judgment.

Petitioners then moved for partial summary judgment asking the court to find ProBuild and MiTek liable to Petitioners on their third party beneficiary and UCC 2 warranty theories. On October 26, 2015, the trial court entered an order finding ProBuild breached implied warranties and that MiTek breached express warranties based on the use of the engineer's stamp and representations ProBuild made to the Petitioners. The trial court dismissed the Schillings' breach of implied warranty claim based on undisputed evidence that Petitioners had no interaction with MiTek. It also dismissed the Schillings' third party beneficiary claim against MiTek

[7] Petitioners third party beneficiary cause of action was abandoned because they

based on undisputed evidence that MiTek did not breach its oral agreement with ProBuild. The order further noted that ProBuild and MiTek were allowed to bring a motion that the Petitioners' claims were barred by the statute of limitations.

On April 15, 2016, the trial court held that Petitioners' claims violated the statute of limitations and dismissed the complaint in its entirety. Division Three affirmed the trial courts dismissal of all claims based on the on statute of limitations and vacated all other summary judgment orders as moot. (A-17).

IV. This Court Should Deny Review.

A. Petitioners failed to address the issues decided by the court of appeals and thus their appeal is moot.

The court of appeal decision was limited to evaluating whether or not the statute of limitations was tolled. Division Three found that tolling did not apply and the statute of limitations had run on Petitioners' claims. Despite that clear ruling, Petitioners fail to identify how Division Three erred when it concluded that the discovery rule did not apply and affirmed the dismissal.

The discovery rule provides that "a [CPA] cause of action accrues when the plaintiff, through the exercise of due diligence, knew or should have known the basis for the cause of action."

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did not appeal that decision to the court of appeals below.

Green v. Am. Pharm. Co., 86 Wn. App. 63, 66, 935 P.2d 652 (1997), *aff'd*, 136 Wn.2d 87, 960 P.2d 912 (1998). Petitioners asserted two theories why tolling applied: (1) that they did not know the TCDL should have been 15 instead of 12; and (2) they did not know that MiTek only prepared the designs based on parameters received from ProBuild.

The trial court and Division Three rejected both theories. First, both courts noted that Artisan knew or should have known the anticipated loading of the trusses in June 2007. This was confirmed at the deposition of Jim Sevigny of Artisan who testified that he expected a TCDL of 15 and knew how to look for it when he received truss designs. (A-31). Despite that fact, Jim Sevigny accepted the truss designs received from ProBuild clearly identifying a TCDL of 12.

The truss designs Artisan received also included a certification that the designs were prepared based on parameters received from ProBuild that needed to be reviewed by the building designer before being incorporated into any particular building. Tolling did not apply because Petitioners had adequate information in their possession in 2007:

> The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action. The action accrues when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action. Were the rule otherwise, the discovery rule would postpone accrual in every case until the plaintiff consults an attorney.

Allen v. State, 118 Wn.2d 753, 758, 826 P.2d 200 (1992 (citing *Reichelt*, 107 Wn.2d at 769, 733 P.2d 530; *Gevaart*, 111 Wn.2d at 502, 760 P.2d 348).

As it relates to the breach of warranty claims under UCC 2, the four-year statute of limitation that is codified at RCW 62A.2-725(2), confirms that the statute of limitation begins to run on delivery of the goods regardless of whether a plaintiff knew or should have known of any cause of action. *Kittitas Reclamation Dis. v. Spider Staging Corp.*, 107 Wn. App. 468, 472, 27 P.3d 645 (2001). The only exception to this rule is if the plaintiff can establish fraudulent concealment. *Giruad v. Quincy Farm & Chem.*, 102 Wn. App. 443, 455, 6 P.3d 104 (2000). As explained by Division Three, there is no evidence of fraudulent concealment and certainly Petitioners did not identify any evidence of fraudulent concealment in their petition for review. (A-15-17).

Division Three properly affirmed the trial court's dismissal of all claims based on the statute of limitations.

B. Petitioners fail to identify an applicable RAP 13.4(b) factor that applies to the decision issued by the court of appeals.

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

> (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.

This Court should deny review because Petitioners failed to identify any portion of the opinion that is in conflict with a decision of this Court or a published decision of the court of appeals. The Petitioners also failed to identify any portion of the opinion that raises a significant question of law under the Constitution or raises an issue of substantial public interest.

While Petitioners use the term "substantial public interest" in their issue statements, they do not identify any portion of the

underlying decision that raises public interest concerns. Instead, their concern is that the court of appeals issued its opinion without addressing issue they briefed but were rendered moot when the case was decided on statute of limitations grounds alone.

Petitioners mistakenly argue that Division Three implicitly found that statutory duties can be disclaimed, or that ambiguous contract language was interpreted by the court. Petitioners are confusing the court of appeals finding that there was sufficient information to put them on inquiry notice to prevent the tolling of the statute of limitations from the court rendering a decision on the legal impact of MiTek's written disclosures.

1. The underlying decision does not raise a public interest concern.

Petitioners failed to identify a single sentence in the opinion issued by Division Three raising a question or issue of public interest. Instead, Petitioners seek to raise issues that were not decided by the court of appeals because they were rendered moot when all claims were deemed to be time barred by the statute of limitations.

Division Three's decision does not find, either directly or implicitly, that plan stamping is legal. The decision does not

address that claim. Regardless, MiTek did not engage in the practice of plan stamping because it never saw ProBuild's preliminary designs. Instead, MiTek prepared certain truss designs for its client (ProBuild) based on ProBuild's requested specifications. MiTek performed all necessary calculations and placed cautionary language on the designs explaining the limited nature of MiTek's engineering work. Petitioners were required to review the designs to ensure that they conformed to their contractual expectations between them and ProBuild.

2. Petitioners fail to identify any portion of the opinion conflicting with another case.

Petitioners failed to identify a single sentence in the subject opinion that is in conflict with a decision of this Court of another division of the court of appeals. Instead, the Petitioners make bald statements in their issue statement that Division Three's opinion was in conflict with certain appellate decisions, but they failed to articulate in their petition what the conflict was. At best Petitioners argue that the decision "implicitly finds the disputed plan language...is legally effective, and therefore voided MiTek/Tingey's engineer stamp obligations....[which] conflicts with published case law which holds a disclaimer issued after a sale has occurred is

without legal effect." (Petition at p. 12).

However, MiTek's language is not a post-sale disclaimer. It is a confirmation regarding MiTek's contracted scope of work. Furthermore, whether the language is a disclaimer as to the contract between ProBuild and Schillings was never decided. Instead, Division Three found that the statements put Petitioners on inquiry notice sufficient to start the running of the statute of limitations.

C. The alleged deficiencies against MiTek do not constitute the practice of engineering and thus do not fall under the purview of RCW 18.43 et seq. or WAC 196-25-070.

First, RCW 18.43 et. seq. is a licensing statute designed to ensure that engineers are properly qualified and licensed with the State of Washington. RCW 18.43.010. Notably, the engineering statute does not include a private right of action. This makes sense as *Burg v. Shannon & Wilson, Inc.*, 110 Wn. App. 798, 806-07, 43 P.3d 526 (2002) explains, violations of RCW 18.43 *et. seq.* only allow causes of action to be brought by clients and employers of the engineer. *See also Donatelli v. D.R. Strong*, 179 Wn.2d 84, 93, 312 P.3d 620 (2013) (confirming that the scope of an engineer's obligations is generally set forth in oral or written contracts). Petitioners did not hire or interact with MiTek and therefore they

cannot maintain a cause of action based on alleged violations of RCW 18.43.070 or the associated WAC guidelines. This reasoning is supported by case law from Missouri. *See Business Men's Assur. Co. of America v. Graham*, 891 S.W.2d 438 (Mo. Ct. App. 1994).

Second, the engineering statutes and associated WAC provisions only apply to duties falling under the definition of "practice of engineering" as defined by RCW 18.43.020(5). The statute defines "practice of engineering" as work that requires "engineering education, training and experience and the application of special knowledge of the mathematical, physical, and engineering sciences to such professional services." Activities outside of the practice of engineering do not need to be directly supervised even though they may result in parameters used by an engineer, as expressly codified by RCW 18.43.130(1) which notes that "[t]his chapter shall not be construed to prevent or affect...[t]he practice of any other legally recognized profession or trade."

For instance, building designers, general contractors, truss manufacturers, and other persons do not need to be licensed under the statute to perform activities such as: determining the weight of building materials (e.g., 12 pound per square foot TCDL) which can be derived from product literature; determining dimensional data

which can be derived with a tape measure; determining design properties of various species of lumber which can be looked up in reference manuals; or determining other parameters that can be derived without the use of engineering education, training and experience or the application of special knowledge of the mathematical, physical, and engineering sciences.

MiTek's only obligation was to prepare individual truss designs satisfying ProBuild's request and expectations. That work was completed to ProBuild's satisfaction and MiTek clearly stated the scope of its work on its designs as a caution to anyone reviewing them. MiTek satisfied its contractual and ethical obligations and did not violate Washington's engineering statutes.

D. RCW 18.43 et seq. or WAC 196-25-070 are properly supervised by Washington's Board of Registration of Engineers, who promulgate WAC 196-25 et. seq. and have found MiTek's work to be appropriate.

The Board investigated a truss design complaint with a similar fact pattern in 2010, in which the Board found:

> The Engineering Company supplies the truss company with a truss program to do the preliminary design and then is forwarded by email to the engineering company if the client decides to build the project[.] The engineering company then will do all the engineering on the information the truss company supplies them[.]

After its investigation, the Board, who adjudicates licensing violation claims, found the work performed by the engineer[8] did not violate Washington's engineering rules and regulations. (A-25-27). This method of engineering complies with national standards. Such a result should be expected when Petitioners' own expert admitted to utilizing the same methods, process, and procedures as MiTek when preparing truss designs. (A-28-30).

MiTek's methodologies were appropriate under the circumstances.

V. Conclusion

The Petition for Review is misguided and should be denied. Petitioners have intentionally ignored their role in construction, or evidence that was in their possession when the truss designs were given to them by ProBuild in June 2007. Artisan admits it knew to look for a 15 psf TCDL, but it failed to do so. Artisan also had statements in its possession explaining that MiTek did not prepare the truss designs for any particular residence. These documents should have put Petitioners on notice to inquire further in June 2007, but they did not.

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[8] This involved a different truss plate manufacturing company than MiTek.

Petitioners' claims were properly dismissed by the court of appeals.

DATED this 29th day of June, 2018.

Respectfully submitted,

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Table of Appendices

APPENDIX 1

FILED
MAY 8, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

TERRY SCHILLING and JULIE SCHILLING, husband and wife, and ARTISAN, INC., a Washington corporation, Appellants / Cross Respondents, v. PROBUILD COMPANY, LLC, a Washington limited liability company, d/b/a Lumbermens, and MITEK INDUSTRIES, INC., a foreign corporation, Respondents / Cross Appellants.	)	No. 34435-5-III UNPUBLISHED OPINION

PENNELL, A.C.J. — The parties cross appeal various orders on motions for summary judgment. Of primary significance to this appeal is the trial court's ultimate order dismissing all claims under the statute of limitations. Having conducted an independent review of the record, we agree with the trial court's statute of limitations analysis. The April 15, 2016, order of dismissal is therefore affirmed and all other summary judgment orders are vacated as moot.

FACTS[1]

In September 2005, Terry and Julie Schilling contracted with Artisan, Inc., owned by James Sevigny, to build a custom home in Union Gap, Washington. James Sevigny, through Artisan, was the general contractor for the project. Altius Construction Services, LLC, owned by James Sevigny's son, Josh (who was also an employee of Artisan), was the building designer. Construction of the home began in late 2006.

The roof for the Schillings' home was to be constructed with custom trusses.[2]

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[1] Because our review is limited to the defendants' motion for summary judgment regarding the statute of limitations, all facts are construed in the light most favorable to the plaintiffs. *See Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

[2] A truss is a single plane structural frame, formed by a series of triangles and used to support a building's roof. Trusses, commonly made of wood and connected with metal plates, are designed to support certain vertical weights or "loads." Clerk's Papers (CP) at 1522. The horizontal (or sloping) pieces that form the top and bottom of a truss are called chords. The sloping and vertical pieces of the truss that connect the chords are called the web.

Under the Union Gap Municipal Code, custom truss designs must be certified and stamped by a licensed Washington engineer.[3] Artisan solicited a bid from and contracted with ProBuild Company, LLC, doing business as Lumbermen's, to manufacture the trusses for the Schillings' residence.

Artisan had a longtime working relationship with ProBuild's salesman, George Brooks. Mr. Brooks was not an engineer, but he knew Artisan built high-end homes and that Artisan would expect the "'best of the best'" materials be used in its project. Clerk's Papers (CP) at 1559. Artisan submitted the Schillings' building design to Mr. Brooks so ProBuild could develop appropriate trusses.

The process used by ProBuild to manufacture trusses, such as the ones for the Schillings' residence, lies at the heart of this case. ProBuild's trusses are built with design help from MiTek Industries. MiTek operates in several states and sells metal plates and hardware to truss manufacturers such as ProBuild. As part of the sale of its products, MiTek licenses computer software to its customers to use in developing truss designs.

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[3] CP at 493, 2141-42. *See generally* former UNION GAP MUNICIPAL CODE 14.04.010(a), (b) (2004) (adopting the 2003 International Building Code (IBC) and the 2003 International Residential Code (IRC)).

ProBuild's manufacturing process begins with a ProBuild employee inputting truss design parameters, such as dimensions and load requirements,[4] into MiTek's design software. MiTek's software produces a preliminary truss design, including drawings. According to MiTek's agreement with its customers, if the law in the manufacturer's jurisdiction requires an engineer's stamp on the truss designs, then the truss parameter information can be sent to MiTek electronically for further review. A MiTek engineer will then run the design parameters received from the manufacturer through its software and develop the final designs. Because the same software and data are used for both the preliminary and final truss designs, the designs usually end up looking the same. However, since a MiTek engineer develops the final designs from raw data (the engineer does not review the preliminary drawings developed by the manufacturer), MiTek claims its engineers are able to certify their truss designs.

The design certification signed by a MiTek's engineer is accompanied by written explanations of the certification process. A signed and sealed coversheet states:

> The truss drawing(s) referenced below have been prepared by MiTek Industries, Inc. under my direct supervision based on the parameters provided by [ProBuild].

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[4] The load requirements for a truss refer to the truss's weight-bearing capacity. The appropriate load for a truss can be dictated by either minimum building code requirements (which vary from jurisdiction to jurisdiction) or the unique requirements of a building plan.

> . . . .
> The seal on these drawings indicate acceptance of professional engineering responsibility solely for the truss components shown. The suitability and use of this component for any particular building is the responsibility of the building designer, per ANSI/TPI-2002[5] Chapter 2.

CP at 830.

In addition to the explanation set forth on the cover sheet, the other design pages bear a warning stating:

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[5] TRUSS PLATE INST., ANSI/TPI 1-2002: NATIONAL DESIGN STANDARD FOR METAL PLATE CONNECTED WOOD TRUSS CONSTRUCTION (rev. Jan. 2005) (ANSI/TPI). ANSI/TPI establishes minimum requirements for the design and construction of the same type of trusses used in the Schillings' home. There is a dual purpose of ANSI/TPI chapter two: (1) define the standard duties and professional responsibilities of truss manufacturers and designers, owners, building designers, and contractors and (2) provide requirements to the owner, building designer, and contractor on the use of trusses. *Id.* § 2.1. Accordingly, a building owner, designer, or contractor (not the truss manufacturer or designer) is primarily responsible for all matters of structural system design, including the determination of truss dead loads and live loads. *Id.* §§ 2.3, 2.4, 2.5, 2.5.2. The truss manufacturer is to rely on the information provided, in writing, by the building owner, designer, or contractor, and the structural design documents created by the building designer or contractor. *Id.* §§ 2.5.2, 2.7.5. The truss designer/engineer is responsible for only the singular element of truss design and is entitled to rely on truss design criteria supplied by the owner, building designer, or contractor. *Id.* § 2.8. At the time the Schillings' home was constructed, both state and local law referenced and incorporated the ANSI/TPI. LAWS OF 2003, ch. 291, § 2 (State Building Code Act, chapter 19.27 RCW, adopting the IBC and IRC, both of which reference and incorporate ANSI/TPI); former UNION GAP MUNICIPAL CODE 14.04.010(a), (b) (2004); IBC §§ 2303.4 ("as required by [ANSI/]TPI"), 2306.1 (ANSI/TPI as standard); IRC §§ R106.1, R802.10.2 ("[D]esign and manufacture of . . . trusses shall comply with ANSI/TPI.").

> ***WARNING—Verify design parameters and READ NOTES ON THIS AND INCLUDED MITEK REFERENCE PAGE MII-7473 BEFORE USE.*** Design valid for use only with MiTek connectors. This design is based only upon parameters shown and is for an individual building component. Applicability of design parameters and proper incorporation of component is responsibility of building designer—not truss designer.

CP at 831.

When Mr. Brooks initiated the truss design process for the Schillings' home, he referenced the house design plan supplied to him by Artisan. The plan did not enumerate the load requirements for the roof trusses. Instead, Mr. Brooks supplied the information. Mr. Brooks knew the Schillings' home design plan specified it should allow a "load roof for tile." CP at 2795. Also, because Mr. Brooks knew Artisan planned to use high-end tiles, his preliminary truss design specified that the Schillings' home should be able to bear a "15-pound dead load." *Id.* at 473.[6] This specification would have been designated with the abbreviation 15 TCDL.[7]

Pursuant to ProBuild's standard procedure, Mr. Brooks's initial truss designs were reviewed by a plant supervisor, Dennis Suttle. It was Mr. Suttle's job to ensure designs comported with local code requirements. But according to Mr. Brooks, Mr. Suttle also

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[6] A dead load refers to a permanent load, such as the weight of the building materials. This is contrasted with a live load, which refers to transitory loads imposed by building occupants or moveable objects.

[7] Top chord dead load.

had a practice of changing design specifications to reduce costs. For example, Mr. Suttle would typically lower the TCDL for tile roofs from 15 pounds per square foot to 12. According to Mr. Suttle, many tile roofs are fully supported by a TCDL of 12. Consistent with Mr. Suttle's standard practice, the TCDL for the Schillings' home was lowered from 15 to 12 as a result of revisions made by Mr. Suttle.

ProBuild's final design parameters were eventually sent to MiTek for an engineer's certification. However, ProBuild did not wait for MiTek's certification to begin truss construction. Instead, ProBuild began manufacturing the trusses pursuant to the MiTek software's preliminary designs.

The truss designs for the Schillings' residence were certified by a MiTek engineer on June 1, 2007. Artisan received the certified designs a few days later. Each drawing in the certified truss design includes the parameters used to develop the trusses. Important to this case, each of the 59 drawings in the certified truss design for the Schillings' residence denotes the truss has a dead load capacity of 12 pounds per square foot (12 TCDL). The certified truss design for the Schillings' residence also bore MiTek's standard language regarding the limited nature of the certification and the warning regarding use.

When James and Josh Sevingny received MiTek's certified truss design from ProBuild, they did not review the document in any detail. Both men simply observed the papers contained an engineer's stamp. They then presented the certified design to the Union Gap Building Department examiner for approval. Although, James Sevingny knew back in 2007 that "[t]ypically a tile roof has 15 [TCDL]," CP at 3119, he did not notice that the trusses had been designed with a TCDL of 12 instead of 15. Nothing in the record indicates that either of the Sevingnys or anyone associated with the Schillings ever believed that a TCDL of 12 would have actually been appropriate for the Schillings' home.[8]

James and Josh Sevingny both explained they did not think it was their responsibility to verify that ProBuild's trusses met the design of the Schillings' home or code requirements. According to Josh Sevingny, he expected the truss manufacturer to know what kind of loading is required for a particular house by virtue of the house's location and design plans. James Sevingny explained he believed the engineer responsible for certifying the truss designs would have ensured the trusses met local building codes, local snow loads, and the terms of the building plans. He also believed

[8] To the contrary, the Schillings and Artisan have argued that they contracted for a TCDL of 15.

the local building official would, prior to final approval, make sure the truss designs met "the contract requirements." CP at 2802.

The Schillings moved into their home in the spring of 2008. Although a tile roof had been contemplated for the home, the final structure bore a composite roof. The Schillings' plan was to eventually replace the composite roof with tile, but a composite roof was used in the interim to reduce costs.

Shortly after the Schillings moved into their home they noticed cracks had formed in their garage ceiling. Artisan initially repaired the cracks, but they continued to reappear. After a couple of years, Artisan began to suspect there was a problem with the trusses.

Artisan contacted ProBuild about the cracks in the Schillings' ceiling and a ProBuild representative came out to the home for an inspection. However, the problem was not resolved. Artisan then contacted Tim Bardell, an engineer who had been involved in the design of the Schillings' residence. Mr. Bardell prepared an engineering report, dated April 18, 2011, that concluded the trusses used at the residence did not meet industry standards. Important to this case, Mr. Bardell concluded the trusses were not designed to bear the type of tile roof contemplated by the Schillings.

Mr. Bardell's report was sent to Artisan and also supplied to ProBuild and MiTek. In order to address concerns raised in the report, representatives from ProBuild and MiTek met with Mr. Bardell, the Schillings and James Sevigny at the Schillings' home on May 23, 2011. During this meeting, James Sevigny felt the MiTek representative was trying to convince everyone that Mr. Bardell's report was wrong and the cracks were not attributable to the trusses. Nevertheless, despite this apparent pressure, there is no indication that ProBuild or MiTek tried to confuse the Schillings or Artisan about the limited weight bearing capacity of a 12 TCDL truss. Because the Schillings had not yet installed a tile roof, the parties' debate over the cause of the ceiling cracks had nothing to do with the fact that the trusses were designed with a TCDL of 12 rather than 15.

Although James Sevigny thought the ProBuild and Mitek representatives were trying to mislead the Schillings and Artisan about the cause of the ceiling cracks, there was no sign they were actually misled. Mr. Bardell never changed his position regarding the trusses. The Schillings also were not placated. They hired a second engineer named Terry Powell to review the problem. Mr. Powell largely concurred with Mr. Bardell's analysis. Of particular significance to this litigation, Mr. Powell agreed the trusses on the Schillings' home were not designed to hold a tile roof.

On February 16, 2012, the Schillings and Artisan (the Plaintiffs) initiated suit against ProBuild and MiTek (the Defendants). The Plaintiffs alleged violations of the Consumer Protection Act (CPA), chapter 19.86 RCW, and breach of express and implied warranties under the Uniform Commercial Code—Sales (UCC), chapter 62A.2 RCW. In brief, the Plaintiffs contended (1) the roof trusses were defective because they were not designed to accommodate a sufficient load for the type of tile roof planned for the residence, and (2) the certified truss designs supplied by MiTek were inadequate because they were not signed by an engineer who had verified the appropriateness of the parameter information (such as load capacity) used to design the trusses.

ANALYSIS

The Plaintiffs' claims are all governed by a four-year statute of limitations. RCW 19.86.120 (CPA); RCW 62A.2-725(1) (UCC). Because the Plaintiffs' complaint was filed more than four years after the receipt of the Defendants' trusses and certified truss designs, we must assess whether there is a basis for delaying the accrual of these claims. Our review, under the applicable summary judgment standard, is de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004); *Shepard v. Holmes*, 185 Wn. App. 730, 741, 345 P.3d 786 (2014).

CPA claims

The CPA's four-year statute of limitations "begins to run when a party has the right to apply to a court for relief." *O'Neil v. Estate of Murtha*, 89 Wn. App. 67, 69-70, 947 P.2d 1252 (1997). A party has the right to apply to a court for relief "when the plaintiff can establish each element of the action." *Hudson v. Condon*, 101 Wn. App. 866, 874, 6 P.3d 615 (2000).

The discovery rule, an exception to the general rule of accrual, can apply to CPA claims. *Shepard*, 185 Wn. App. at 740; *Pickett v. Holland Am. Line-Westours, Inc.*, 101 Wn. App. 901, 913, 6 P.3d 63 (2000), *rev'd on other grounds*, 145 Wn.2d 178, 35 P.3d 351 (2001). Where the discovery rule applies, "a cause of action accrues when the plaintiff, through the exercise of due diligence, knew or should have known the basis for the cause of action." *Green v. Am. Pharm. Co.*, 86 Wn. App. 63, 66, 935 P.2d 652 (1997), *aff'd*, 136 Wn.2d 87, 960 P.2d 912 (1998).

The Plaintiffs' first claim is that the Defendants' trusses were not designed with appropriate load specifications for a tile roof. We therefore ask when the Plaintiffs knew, or with due diligence should have known, that the Defendants' trusses were inadequate. There is no dispute that the Plaintiffs did not actually know the loading information was inadequate until shortly before filing suit. So the real question is what the Plaintiffs

should have known and when they should have known it.

The record readily supports the trial court's conclusion that the Plaintiffs, through James Sevigny, should have known about the load limitations of the trusses on the day the certifications were delivered in early June 2007. James Sevigny admitted in his deposition that the type of tile roof planned for the Schillings' residence typically would call for trusses with a TCDL of 15. Yet each drawing in MiTek's certified truss designs plainly states the TCDL for every truss is 12. Had James Sevigny simply read the paperwork provided to him, he would have been alerted to the problem with the trusses on the date of the delivery. Accordingly, the discovery rule provides no basis for delaying accrual of Plaintiffs' claims regarding insufficient load parameters.[9] *Giraud v. Quincy Farm & Chem.*, 102 Wn. App. 443, 449, 6 P.3d 104 (2000) ("To invoke the discovery rule, the plaintiff must show that he or she *could not have* discovered the relevant facts earlier.") (emphasis added).

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[9] Even if Mr. Sevigny had not understood that a 12 TCDL truss was inadequate for a tile roof (a claim in tension with the Plaintiffs' argument that the 15 TCDL was "contract correct," Appellants'/Cross Resp'ts' Reply Br. at 1) the clear warnings on MiTek's certified truss design advised the parameters needed to be verified, as the truss design was based only on parameters provided by ProBuild, not any particular building. Had Mr. Sevigny read MiTek's warning and engaged in due diligence by checking the parameter information, he would have quickly known the trusses were not designed to bear a 15 pound tile roof.

The Plaintiffs also claim the MiTek engineer's truss design certification was inadequate because the engineer who certified the designs never assessed whether the load parameters used to design the Schillings' trusses were appropriate for the Schillings' residence. But again, this information was plainly disclosed on the truss certification paperwork. The certifications supplied by MiTek stated in nontechnical language that MiTek's truss designs were based solely on parameter information provided by ProBuild. The certification also made explicit that MiTek's engineer had not assessed the suitability of its truss designs for any particular building. Although the certification noted the truss designs had been prepared in reference to the Schillings' property in Yakima County, this notation of purchaser information did not in any way suggest that, contrary to MiTek's warning, an engineer had verified the appropriateness of the designs for the Schillings' particular residence.[10] Had Plaintiffs read the paperwork provided to them by MiTek in early June 2007, they would have known MiTek's engineer had not verified the "suitability and use" of its truss design for the Schillings' residence. CP at 830. Given

[10] This limitation is readily apparent from the face of the certification. It is further underscored by the certification's reference to the ANSI/TPI. As set forth in Note 5, *supra*, the ANSI/TPI clearly states the responsibility for determining appropriate truss load criteria falls on the building's owner, designer, or contractor, not the building's truss manufacturer or designer.

this circumstance, the discovery rule also does not apply to delay Plaintiffs' claims with respect to MiTek's design certification.

UCC breach of warranty claims

The UCC's four-year statute of limitations is stricter than the CPA's. Generally, the statute of limitations will begin to run on delivery of goods, regardless of whether a plaintiff knew or should have known about a cause of action. RCW 62A.2-725(2); *Kittitas Reclamation Dist. v. Spider Staging Corp.*, 107 Wn. App. 468, 472, 27 P.3d 645 (2001). However, RCW 62A.2-725(4) provides that the statute does not alter the law on the tolling of the statute of limitations. Thus, the doctrine of fraudulent concealment has been found to apply to RCW 62A.2-725. *Giraud*, 102 Wn. App. at 455.

The Plaintiffs do not dispute the fact they received the engineer-stamped truss designs in early June 2007. However, they allege the Defendants concealed that: (1) the change in the TCDL parameter occurred during ProBuild's preliminary design process, and (2) ProBuild, rather than MiTek, had prepared the truss designs and MiTek illegally plan stamped them. The Plaintiffs maintain these actions tolled the commencement of the statute of limitations until they discovered this information.

Plaintiffs' analysis misses the mark. As noted above, the Defendants have never concealed the actual load information used to design the Plaintiffs' trusses or the way in

which MiTek's engineers sign their certifications. Thus, the Plaintiffs had all the information necessary to file their complaint well within the statute of limitations period. *Giraud*, 102 Wn. App. at 455 (no fraudulent concealment when warning label gave plaintiffs sufficient access to information).

The Plaintiffs claim the Defendants engaged in fraudulent concealment when both MiTek and ProBuild disavowed any connection between the cracking in the Schillings' ceiling and their truss designs. The record does not support this position. It is apparent the Plaintiffs were never convinced by the Defendants' causation analysis. They continued to investigate the possibility of problems with the trusses despite the Defendants' assurances otherwise.

The Defendants' proffer with respect to fraudulent concealment is also inapposite. The allegedly fraudulent causation analysis of the Defendants for the ceiling cracks is unrelated to the Plaintiffs' breach of warranty claims. The damages allegedly suffered as a result of the Defendants' breach of warranty were the inability to install a tile roof and the reduced property value due to the possibility the truss design certification did not comply with local code; they had nothing to do with the Schillings' cracked ceiling. Nothing about the Defendants' conduct or ceiling crack analysis prevented the Plaintiffs

from recognizing their breach of warranty claims within the statute of limitations period and filing suit.

Because the Defendants never concealed the operative facts that would have permitted the Plaintiffs to file their breach of warranty claims within the limitations period, equitable tolling provides the Plaintiffs no relief from the Defendants' statute of limitations argument.

CONCLUSION

We affirm the trial court's April 15, 2016, order granting summary judgment to the Defendants based on the statute of limitations. All previous summary judgment orders issued by the superior court are vacated. We pass no judgment on the validity of any other superior court orders entered prior to the final order on summary judgment.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, A.C.J.

WE CONCUR:

Korsmo, J.

Fearing, J.

APPENDIX 2

designs that have been stamped by an engineer; and if they do that, then I've got an engineer on each side of this equation that are certifying that their particular aspects of the work meet my code.

A. Ultimately the building official has to understand those structural parameters used in the truss design be responsible from either the building official, the building department or the EOR they are using or the drafter has to be able to understand the loading information enough to be able to make the claim.

MiTek in this case, we are receiving those structural parameters from either -- from the truss manufacturers. We don't go in and actually know why this structural parameter is being created. We receive those information. We receive those information electronically. Then we run through the software MiTek designed, and then we check each individual component that way. We don't get into the process of deciding the load information.

Q. And I understand in part the answer you gave, which is that a missing component so far is the truss manufacturer and his representative and that MiTek relies on the accuracy of the information that that individual gets and supplies to MiTek, right?

A. Uh-huh. Yes.

A. I don't know.
Q. Does it say on there what company used the MiTek software to run those?
A. Lumbermens.
Q. Lumbermens. Okay. So assuming that those were diagrams -- secondly, looking at that, can you tell whether this set of diagrams was run by Lumbermens connected to the Artisan project?
A. I can't.
Q. Because it says on the left-hand side at the top Artisan Schilling --
A. Those doesn't mean anything to me. It could be anything.
Q. All right. You agree with me it does say that.
A. It does say Artisan and Schilling.
Q. Yes.
A. But if I review this drawing, Artisan to me just means you design the truss, you want to call it Artisan. I don't know who is Artisan. It's contractor or person's name or building's name. That's why I said those things doesn't mean anything to us.
Q. Okay. So other than the names being obviously similar to the plaintiffs in this particular case, you don't know whether this is the same or isn't the same project.

A. We -- we -- no.
Q. Okay. And that's fair. Looking at the second page of this particular Exhibit 7, in the middle on this one and most of the remaining ones, it says, "Design program review required," right in the middle. Do you see that?
A. Uh-huh. Yes.
Q. Thank you. In the context of the MiTek program, what does that tell you?
A. It tells me this design has a problem. Further review is required. The reason it is required is because the maximum vertical deflection exceeded in span two to four, which means this bottom chord deflected, overdeflected based on the analysis of this program.
Q. Okay. I just want to generically work with this for a moment. You were here in part for Mr. Tingey's testimony about what a customer can do with the software, right?
A. Uh-huh.
Q. You have to say yes. I'm sorry.
A. Yes. I'm sorry.
Q. So if in the Versatruss part of the program I'm a truss company representative and I start moving lengths of wood or start moving interior pieces of the truss and if by doing that I am running afoul of

A. Right.
Q. Okay. And then once they get done with that, it's my understanding that if they send it, hit send, that what comes down to MiTek electronically is the data, the 30 pounds, the 15, the -- whatever the actual numbers are that have been filled into the screens.
A. After they input all those options, fill in the blanks, which is the structural parameters required to do so, then they have to go through the design process. It has to run through the program because they have to see if the truss going to work or not going to work.
Q. Okay. And I understand from their standpoint they will get a picture. I call it the picture of each particular truss.
A. Correct.
Q. So that they can see what the numbers that they put in shows.
A. Correct.
Q. What it's going to look like --
A. Right.
Q. -- potentially manufactured. But in what they send to MiTek, it's my understanding that as opposed to the pictures itself, that it's the data that was put into the software that gets electronically transmitted to you.

A. All the background data.
Q. Yes.
A. They electronically send it to us.
Q. Right. So the essence of my question is the electronic data, the numbers, the electronic numbers, data numbers that were transmitted to MiTek for purposes of then getting pictures from the software --
A. Not getting pictures, no. It has to run through our program here to go through the one more design process. So we are not just create picture. We create the whole design process based on the parameters sended to us, then go through a design phase.
Q. And I understand. I'm just looking at the process. Does the information, the data information that gets electronically transmitted, before you run that data into an actual hard copy of Exhibit 11, do you have a record of that so that you can tell what the numbers were?
A. This set of drawing we do. I'm sure we do.
Q. Okay. So I would be interested to see what the computer screen data from the software was that got transmitted to MiTek which then you would down here run through the program to create the design pictures that you would review further and do other things with, but I'm just looking in each, and the piece of the process,

Q. When you looked at these truss plans that were stamped in July of 2007 that were marked 1671 on, were you satisfied with your review of these plans?
A. Yes.
Q. And if there had been any figures in there that raised a question in your mind, what would you have done?
A. I would have called a responsible party, and I'm not sure who I would have started with as a responsible party. I might have in this case started with whoever submitted the plans and gone from there.
Q. Do you have any personal recollection of doing that in this case?
A. I do not. I don't know who submitted the plans or how I came about to get them at this point.
Q. Okay. And you don't know why this new set of plans were given to you; correct?
A. I don't recall. The timing would suggest somebody was making up for lost time.

MR. BOLSTER: I don't have any further questions.

MR. WERTJES: I just have one question to follow up on what Justin was asking you.

EXAMINATION

BY MR. WERTJES:

Q. I believe you testified that by putting your stamp on the

supplemental set of truss plans, you indicated that you were satisfied with those plans; is that correct?

A. Yes.

Q. And that he then asked you if you had -- he asked you what you would have done if you had any questions regarding those plans, and I believe you answered you would contact a responsible party?

A. Correct.

Q. If you had any open, unanswered questions or concerns, you would not have put your stamp on there, would you?

A. Correct.

MR. WERTJES: Okay. I don't have any other questions.

EXAMINATION

BY MR. PERKINS:

Q. Did you know at the time of receipt of these plans what the contract expectations of the owner was regarding the ability to put any kind of tile roof on that home which they might desire?

A. I don't recall having that -- or knowing about that information.

Q. If you were a truss designer and were told that the homeowner had an expectation of being able to install a tile roof on the home either now or in the future of whatever type of tile they wanted, would that be an important factor

COMPLIANCE TRACKING

PRODUCTION

Search

Maintenance

Create Case

Post Case

Combination Cases

Archive Search

History Search

User Manual

CTE Training

Engineers

Compliance Tracking History

Case Status: Closed

Case: 2010-04-0009-00ENG

Summary	Legal	Activity	General

Item	Date	Activity Desc	Editor	Case Summary	Legal Summary
1	04/26/2010	Complaint received. Allegations that he is not competent in the work he performed.	JPETTAINEN	False	False
2	05/07/2010	Called Central Washington Truss 800-559-4090 to discuss the case and talked to the owner Rick Scheer who stated that he will send me a letter explaining the circumstances. Stated that they normally don't let clients talk to customers but gave him the name and company's phone number in California. Mr. Scheer stated that they were going to pay for it. Said he will try to send the letter or email out today.	DBROWNE	False	False
3	05/07/2010	Sent letters to respondent and complainant.	DBROWNE	False	False
4	05/13/2010	Mr. Carroll called and discussed the case and I emailed him a copy of the complaint letter. Mr. Carroll said it may take a little while to get me all the needed information. He will keep me post on the progress.	DBROWNE	False	False
5	05/17/2010	Received email from Mr Rick Scheer with his response See file for information.	DBROWNE	False	False
6	06/09/2010	The Practice Committee open the case for investigation.	DBROWNE	False	False
7	06/15/2010	Letters sent to respondent and complainant on opened investigation.	DBROWNE	False	False
8	06/22/2010	Received Mr Carroll's responses to the opened investigation letter, see file for details.	DBROWNE	False	False
9	07/09/2010	Case file given to Mr. Fuller for review.	DBROWNE	False	False
10	07/13/2010	Case file copied and mailed to case manager.	DBROWNE	False	False
11	07/29/2010	The case manager requested some additional information from the respondent on calculations. I sent Mr. Carroll an email requesting the additional information. ,	DBROWNE	False	False
12	08/03/2010	Mr. Carroll called and stated he is sending me the requested information by UPS today. Said it took him a little time to it all together. Received email from Mr Carroll's assistant with a PDF letter from Mr Carroll See case file for details, I received by UPS, Mr Carroll's packet with his structural calculations for the involved residence. I received phone call from Mr. Lau on the information I sent him from the Respondent. Mr.	DBROWNE	False	False
13	08/05/2010	Lau is under the impression that the truss company could be doing engineering and could require a cease and desist order if this is actually what they are doing and they don't change their practice. I will set up an appointment with them at the direction of the case manager and go over there process on doing orders and see if they are doing engineering.	DBROWNE	False	False
14	08/09/2010	I mail the case manager the information from Mr Carroll on the calculations he wanted.	DBROWNE	False	False
15	08/12/2010	Received email from the case manager and he said "I am looking for the correspondence that Central Truss WA sent to Mr. Carroll with regard to the dead load to be used for the truss design." Called Mark Jurgewicz from Compotrus Inc to obtain the requested information from the case manager. Mr. Jurgewicz said he will look through the file and send me the information. Said Mr. Carroll will be back on Monday and he will also talk to him about it.	DBROWNE	False	False
16	08/16/2010	Received calculations from Mark Jurgewicz that was requested by the case manager The information was forwarded to case manager for review I received phone call from Mr Lau on the information I sent him from the Respondent Mr Lau is under the impression that the truss company could be doing engineering and could require a cease and desist order if this is actually what they are doing and they don't change their practice Sent up an appointment with them and go over there process on doing orders and see if they are doing engineering At 2:05 PM, Mr Carroll called to check in and see if I needed anything else I asked him if what I received from them this morning (PDF file) was what they receive from the truss company Mr Carroll said that is what they receive and do the work ups from there. Mr. Lau sent the following email; "Per our phone conversation this morning, based on the info submitted, it appears that Central Washington Truss Inc. is performing preliminary engineering work on the truss before submitting to the respondent for his computer analysis confirmation and stamps. The dead load, five loads were all calculated out on the information submitted to the respondent and it would be my opinion that the respondent should at least look at the plan to confirm the loading based on spacing and type of construction material used in confirming the loading provided especially it is provided by a non-engineering company. Please use this as you background info in corresponding with them. I think we should open a case against the truss company and issue an immediate cease and desist order to them for their practice. Call me if any question. Thanks James"	DBROWNE	False	False
17	08/20/2010	Met with Rick Scheer, owner of Central Washington Truss and did a follow-up interview to obtain some additional information. Obtained some additional paperwork and learned that the design program used by them was supplied from the engineering company they use, Compu Truss, Inc. They send the information from the program on the job quote and it is in the format of the design program and then an engineer from the company is assigned and runs all the calculations for the project. The engineer will send it back to the truss company in the same format, stamped.	DBROWNE	False	False
18	08/25/2010	Spoke with Mr Lau about the new information I received from the owner of the truss company and they process of the company The Engineering Company supplies the truss company with a truss program to do the preliminary design and then is forwarded by email to the engineering company if the client decides to build the project The engineering company then will do all the engineering on the information the truss company	DBROWNE	False	False

		supplies them Mr Lau is going to think about it and call Mr Twiss to discuss it with him.			
19	12/17/2010	Meet with Mr. Lau case manager for Scot Carroll, 2010-04-0009. Mr. Lau is going to file charges and the case is being transferred to Legal, Mr. Robert Feller to write up the SOC.	DBROWNE	False	False
20	03/04/2011	Sent draft SOC, AO & Answer to George & Bob for review	SGILLESPIE	False	False
21	07/29/2011	Case manager closed the case at the board meeting with no further action.	DBROWNE	False	False
22	08/02/2011	Letters sent to respondent and complainant	DBROWNE	False	False

10-04-0009

STATE OF WASHINGTON
BOARD OF REGISTRATION FOR
PROFESSIONAL ENGINEERS AND LAND SURVEYORS
P.O. BOX 9025 (Correspondence) • P.O. BOX 9046 (Remittance)
OLYMPIA, WASHINGTON 98507

Board Staff (360) 664-1575
Fax (360) 664-2551
Web Site dol.wa.gov

August 2, 2011

John Glassco
P. O. Box 651
Soap Lake, WA 98851

RE: Complaint against Scott Carroll, PE

Dear Mr. Glassco:

Recently you submitted a complaint against Scott Carroll concerning possible unprofessional conduct and poor truss design. On July 29, 2011, the reviewing Case Manager recommended to the Board that this investigation be closed.

The Case Manager felt there were no violations; accordingly, no further investigation of this matter will be pursued. The truss company supplied Mr. Carroll with the incorrect calculations used for your home which caused the truss failure.

The filing of a complaint does not bind or compel this Board to open an investigation or file charges following a completed investigation. State law (**RCW 18.43.020 and RCW 18.210.010**) vests the Board with the sole and final authority to decide if and how to handle any given complaint. Any Board or committee decision on a complaint is the result of their thorough review of all materials provided to and/or collected by Board staff. Because these decisions are only reached through careful and balanced evaluation, these decisions are considered final and are not subject to appeal to the Board.

Thank you for your cooperation in this matter. If you have any questions or further concerns, please feel free to contact me at (360) 664-1578.

Sincerely,

Robert F. Fuller
Deputy Executive Director

Administrative services provided by the Department of Licensing which has a policy of providing equal access to its services. If you need special accommodation, please call (360) 664-1575 or TTY (360) 664-8885.

open up TSE, correct?
A Not really, because in 1985, Gang-Nail Systems and Hydro-Air Components merged to form, eventually, MiTek Industries. There was some other ownerships in between, but the software that became MiTek software, from my recollection, probably entered sometime after 1990.
Q So after you left the company?
A After I left the company, yeah.
Q And you don't have any firsthand knowledge what the design practice for MiTek engineering was in the California offices in 2007, do you?
A I had no firsthand experience with dealing with MiTek, any of their facilities.
Q And I think we discussed -- earlier you mentioned that you do truss design engineering for a local company here, correct?
A That's correct.
Q I think you said it was Truss Co.?
A The Truss Company, yes.
Q And The Truss Company is the truss manufacturer, correct?
A They are the truss fabricator, yes.
Q And functionally speaking, it's employees of The Truss Company who go out and do the measurements,

review all the building plans, and do they input all the information into a MiTek software at their location?

A They will put in the parameters that they've discovered for the particular project that is being involved or that they are involved with, and that -- those design parameters are transmitted to us, and we have our in-house software here that will retrieve those, and our software will analyze using the same software that they have in their offices. At least, we would expect that they are the same.

Q And The Truss Company employees, they would input the design code that the truss is going to be designed to, correct?

A That's correct.

Q And they would put the, you know, what loading criteria the truss should be designed for, correct?

A That's correct.

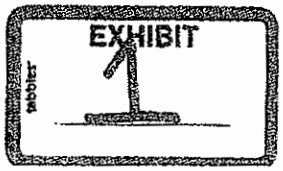
Q And they would input the, you know, the spans and profiles and all the bits and pieces to design a truss, correct?

A That's correct.

Q And then that information gets electronically submitted from The Truss Company to your office, correct?

A That's correct.
Q And that electronic transmission, does that include a picture of the truss?
A That comes across to us?
Q Correct.
A All we have is data.
Q Just a whole bunch of numbers, correct?
A It's -- yes.
Q In your office here, you engineer a truss based on those parameters, correct?
A That is correct.
Q And you understand here in the state of Washington, there is a requirement that engineers maintain direct supervision over the work they perform, correct?
A That's correct.
Q In your opinion, how do maintain direct supervision over the work that you're certifying?
A The way that I assure that I am maintaining that control is I am requiring that we have adequate information provided to us in order to put into our software to generate the truss design drawings under my supervision, under computers that are controlled by me that I am directly involved with or I have people who are capable involved with to assist.
Q And in doing that, do you have the building plans

we, in this litigation?
A. Yes.
Q. And so that's why I'm trying to be clear about at which point you had an understanding of these terms. So back in the 2007 time frame here, did those numbers mean anything to you?
A. No.
Q. So you never looked at the -- looked at those numbers when you were reviewing these bids?
A. You're talking about the TCLL and the TCDL?
Q. Correct.
A. I would have looked at the TCDL.
Q. And why is that?
A. Typically a tile roof has 15 pounds.
Q. And that's something that you were familiar with back in 2007?
A. Yes.
Q. And when the interactions with -- maybe I should ask you. Do you know what information was given, is typically given to the truss manufacturer when they're producing these estimates and ultimately manufacturing trusses for your house?
A. A set of construction drawings is typically provided to the -- when it comes to Lumbermen's, you would take the plans down to the local store and they would --



APPENDIX 3

891 S.W.2d 438
Missouri Court of Appeals,
Western District.

BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA, Respondent–Appellant,
v.
Bruce GRAHAM, et al., Appellants–Respondents.

No. WD 45876.
|
Nov. 8, 1994.
|
Motion for Rehearing and/or Transfer to Supreme Court Denied Dec. 27, 1994.
|
Application to Transfer Denied Feb. 21, 1995.

Synopsis
Appeals were taken from judgment of the Circuit Court, Jackson County, H. Michael Coburn, J., entered on judgment in favor of building owner against architect. The Court of Appeals, Breckenridge, P.J., held that: (1) issue of statute of limitations should have been submitted to jury; (2) architect was not entitled to instruction on comparative fault; (3) building owner could recover economic damages on theory of tort; (4) award of damages for loss of use of money was improper; (5) cost of repair, rather than diminution in value, was proper measure of damages, and (6) there was no basis for recovery on theory of negligence per se.

Reversed in part and remanded.

West Headnotes (40)

[1] Limitation of Actions
⇐ Burden of proof in general

Architect had burden of proving statute of limitations as affirmative defense to claim by building owner. V.A.M.S. §§ 516.100, 516.120.

1 Cases that cite this headnote

[2] Limitation of Actions
⇐ In general;what constitutes discovery

Discovery of damage is not event which triggers statute of limitations; statute of limitations begins to run when right to sue arises.

2 Cases that cite this headnote

[3] Limitation of Actions
⇐ Knowledge as to extent of harm or damage

Damage must be actually sustained and capable of ascertainment before statute of limitations begins to run, but it is the fact of damage, rather than the exact amount, which must be ascertainable.

3 Cases that cite this headnote

[4] Limitation of Actions
⇐ Continuing injury in general

Damage resulting from one wrong which continues and becomes more serious over time does not extend the time within which suit may be brought.

1 Cases that cite this headnote

[5] Limitation of Actions
⇐ Questions for Jury

Evidence that building was completed in 1963, that cracked marble panel on the exterior was replaced in the late 1960's, that there were problems with chipping of marble panels in specific areas of the building as early as the winter of 1966–67, that repair work was done every summer, that building manager was advised of the chipping problem, and that additional panels were purchased by building owner to be used in case of emergency after manager received reports of protruding panels did not establish that action brought in 1986 was barred by five-year statute of limitations, in view of conflicting testimony by building manager, but did raise issue for jury. V.A.M.S. §§ 516.100, 516.120.

1 Cases that cite this headnote

[6] **Limitation of Actions**
Questions for Jury

Statute of limitations issues are to be submitted to the jury if contradictory conclusions can be drawn from the evidence.

3 Cases that cite this headnote

[7] **Negligence**
As Grounds for Apportionment; Comparative Negligence Doctrine

Negligence
Effect of others' fault;comparative negligence

Negligence
Effect of others' fault;comparative negligence

"Comparative fault" is affirmative defense in which party asserting it must prove that actions or omissions or opposing party contributed to loss and negated or reduced asserting parties of legal responsibility.

2 Cases that cite this headnote

[8] **Damages**
Duty of Person Injured to Prevent or Reduce Damage

Negligence
Nature of conduct to which doctrine applies;what constitutes "fault"

Under Uniform Comparative Fault Act (UCFA), failure to mitigate damages is fault which reduces plaintiff's recovery. Uniform Comparative Fault Act, § 1(b).

3 Cases that cite this headnote

[9] **Pleading**
Necessity for defense

Facts supporting affirmative defense must be pled in the same manner as they would be with claims, and mere conclusory allegations constitute inadequate pleadings. V.A.M.R. 55.08.

1 Cases that cite this headnote

[10] **Pleading**
Plea or answer or subsequent pleadings

Plaintiff which did not make motion for more definitive statement in response to defendant's plea of affirmative defense of failure to mitigate which was conclusory and failed to state facts supporting its defense was deemed to have waived the objection. V.A.M.R. 55.08.

2 Cases that cite this headnote

[11] **Negligence**
Effect of others' fault;comparative negligence

Comparative fault instruction must be supported by substantial evidence, which must be viewed in light most favorable to party offering the instruction.

2 Cases that cite this headnote

[12] **Damages**
Mitigation of damages and reduction of loss

Defendant bears burden of proof as to mitigation of damages and must show that injured party had opportunity to mitigate and must also show reasonable prospective consequences.

4 Cases that cite this headnote

[13] **Damages**
Duty of Person Injured to Prevent or Reduce Damage

Rule of mitigation of damages only bars recovery as to those damages which could have been avoided if reasonable precautions, reasonably known to the injured party, had been exercised.

2 Cases that cite this headnote

[14] **Negligence**

Liabilities relating to construction, demolition and repair

Evidence that there was some water damage to building was not substantial evidence of comparative fault on part of building owner in failing to have maintenance plan, so as to preclude its recovery from architect when marble panels on exterior fell from building, as the evidence did not attribute any significant portion of damage to lack of maintenance but instead showed that the real cause of the moisture problem was the design of the panel system which permitted water vapor to get behind the panels, and as there was no evidence that rusting anchors and mold behind the panels were factors in decision to replace marble cladding.

Cases that cite this headnote

[15] **Damages**

Injuries to Real Property

General rule for damages to real property is diminution in value, which is calculated by determining difference between fair market value before and after event causing damage.

2 Cases that cite this headnote

[16] **Damages**

Injuries to Real Property

"Cost of repair test," which is exception to general rule for determining damages to real property, may be used when costs of restoration are less than diminution in value; application of cost of repair test is clearly limited to situations where repairs are only a small percentage of diminution in value.

Cases that cite this headnote

[17] **Damages**

Value of property

To qualify for cost of repair exception to the general measure of damages to property, plaintiff must present evidence showing that cost of repair is insignificant to total market value of the building and, in order to make such comparison, plaintiff's evidence must include evidence of fair market value of the building.

Cases that cite this headnote

[18] **Damages**

Injuries to Real Property

"Fair market value" which is used to determine diminution in value of real property is price at which property could be sold by willing buyer to buyer who is under no compulsion to buy.

1 Cases that cite this headnote

[19] **Damages**

Injuries to Real Property

Particular facts and circumstances of each case dictate whether diminution in value or cost of repair is the proper measure of damages for real property.

4 Cases that cite this headnote

[20] **Damages**

Defects in performance

Although measure of damages available to owner in defective construction case is either cost of repair or diminution in value, which is the same as the general rule for property damages, it is the manner in which the methods are applied that is different; in real property cases, courts generally utilize diminution in value test, turning only to cost of repair test when it constitutes lower amount of recovery whereas, in defective construction cases, cost of repair test is favored, so that courts normally determine damages by assessing cost of correcting the defects or supplying omissions.

3 Cases that cite this headnote

[21] **Damages**

Defects in performance

Exception to general rule for application of the cost of repair test for defective

construction cases occurs when cost of reconstruction and completion in accordance with contract would involve unreasonable economic waste; in instance where cost of repair method would result in destruction of usable property or would be grossly disproportioned to the results obtained, owner's damages should be calculated under diminution in value formula; it is the contractor which has the burden of proving that repairing the defect would result in unreasonable economic waste.

3 Cases that cite this headnote

[22] **Damages**

Defects in performance

Cost of repair, rather than diminution of value, was proper measure of damages in action against architect by owner of building from which marble panels fell where there was no evidence as to the monetary value of the building and no evidence that cost to repair constituted unreasonable waste.

1 Cases that cite this headnote

[23] **Damages**

Construction and operation

Building owner was awarded damages for loss of use of its money, and not improper prejudgment interest, where jurors were instructed to award damages in amount which would fairly and justly compensate the owner for the loss of use of its money, verdict forms required jury to designate separately the damages for costs to repair and loss of use, and court accepted jury verdicts and awarded a judgment in the amount found by the jury, reduced by settlement.

1 Cases that cite this headnote

[24] **Damages**

Loss of or injury to property

Loss of use damages may not be recovered where no expenditure was actually made by the claimant.

1 Cases that cite this headnote

[25] **Action**

Nature of Action

Mere breach of contract does not provide basis for tort liability, but negligent act or omission which breaches the contract may serve as basis for action in tort.

11 Cases that cite this headnote

[26] **Action**

Nature of Action

If duty arises solely from contract, action is contractual, but action may be in tort if party sues for breach of duty recognized by law as arising from relationship or status that parties have created by their agreement.

19 Cases that cite this headnote

[27] **Negligence**

Trades, Special Skills and Professions

When person possesses knowledge or skill superior to that of ordinary person, law requires of that person conduct consistent with that knowledge or skill.

5 Cases that cite this headnote

[28] **Negligence**

Care required in general

Professional person owes client duty of care commensurate with degree of care, skill, and proficiency, and the exercise by ordinarily skillful, careful, and prudent professionals.

9 Cases that cite this headnote

[29] **Negligence**

Architects, designers, and planners

Architect, as a matter of learned and skilled profession, has duty to exercise ordinary and reasonable technical skill as is usually associated with one in that profession.

6 Cases that cite this headnote

[30] **Negligence**
⇐ Architects, designers, and planners

Injury resulting from architect's failure to use due care subjects architect to liability for that injury.

Cases that cite this headnote

[31] **Negligence**
⇐ Architects, designers, and planners

In addition to contractual duties arising from contract between architect and building owner, architect had duty to provide professional architectural services in manner consistent with skill and competence of other members of its profession and to exercise ordinary and reasonable skill in designing building and supervising its construction.

5 Cases that cite this headnote

[32] **Damages**
⇐ Loss of or injury to property

Building owner could recover in tort from architect for economic loss resulting from damage to building due to architect's negligence.

1 Cases that cite this headnote

[33] **Appeal and Error**
⇐ Negligence

Although architect was correct in its contention that building owner did not plead negligence per se, it waived error by failing to object to submission of the issue to the jury.

Cases that cite this headnote

[34] **New Trial**
⇐ Necessity of objection

Party may not utilize motion for new trial to raise objection that should have been raised during trial.

Cases that cite this headnote

[35] **Appeal and Error**
⇐ Necessity of timely objection

Failure to object in timely manner at trial may be deemed waiver or abandonment of objection to instruction.

1 Cases that cite this headnote

[36] **Negligence**
⇐ Violations of statutes and other regulations

Negligence
⇐ Violations of statutes or other regulations

Requirements to establish claim for negligence per se are that there is violation of statute or ordinance, that injured party is within class of persons intended to be protected by statute or ordinance, that injury complained of is of the nature that statute ordinance was designed to present, and that violation of statute or ordinance is proximate cause of injury.

4 Cases that cite this headnote

[37] **Negligence**
⇐ Architects, designers, and planners

Statute providing that personal seal of registered architect is equivalent of his signature and that owner of seal is responsible for whole architectural project is licensing statute, and does not provide basis for claim of negligence per se by architect in design of building or supervision of its construction. V.A.M.S. § 327.411.

1 Cases that cite this headnote

[38] **Appeal and Error**
⇐ Setting out instructions

If point relied on pertains to refusal of instruction, instruction should be set forth in its entirety in the argument portion of the brief, and failure to do so will result in the issue

not being properly before the court for review. V.A.M.R. 84.04(e).

Cases that cite this headnote

[39] **Appeal and Error**
Necessity of objection in general
Appeal and Error
Instructions

Lack of objection at trial on issue of alleged instructional error will not prevent review if the alleged error is otherwise preserved, but reversal on appeal is not warranted unless prejudice is established.

Cases that cite this headnote

[40] **Appeal and Error**
Scope and Effect of Objection

Plaintiff's objection to court's ruling that it would not submit punitive damages in which plaintiff argued that case was one for punitive damages "particularly on a finding of negligence per se," taken in light of language of instruction submitted, demonstrated that only claim upon which issue of propriety of punitive damages was preserved for review was the claim of negligence per se.

1 Cases that cite this headnote

Attorneys and Law Firms

***442** Lawrence M. Berkowitz, Kansas City, for appellant-respondent.

Roy C. Bash, Kansas City, for respondent-appellant.

Before BRECKENRIDGE, P.J., KENNEDY, J., and SHANGLER, Senior Judge.

Opinion

BRECKENRIDGE, Presiding Judge.

Bruce Graham, as the representative of the current partners of Skidmore, Owings & Merrill, appeals from the judgment entered on the jury verdict against Skidmore, and in favor of Business Men's Assurance Company (BMA), in the amount of $5,287,991.87. Skidmore raises seven points on appeal arguing that the trial court erred in: A) denying Skidmore's motion for a directed verdict on its statute of limitations defense; B) refusing to submit Skidmore's statute of limitations defense to the jury as an affirmative defense; C) refusing to give Skidmore's comparative fault instruction; D) submitting the issue of damages to the jury under a cost-of-repair measure of damages and refusing Skidmore's instruction on the issue of damages; E) submitting Instructions 8, 11 and 14 to the jury on the issue of prejudgment interest; F) submitting BMA's negligence and negligence per se claims to the jury because they were based on purely economic loss; and G) submitting BMA's negligence per se claim to the jury because BMA failed to state a claim for negligence per se. [1] BMA cross-appeals from the trial court's refusal to submit its punitive damages claim to the jury.

1 This opinion will refer to Skidmore's points relied on by letter rather than by number because that is the manner in which Skidmore organized its appeal brief.

After granting BMA's motion for a rehearing, this court finds that the trial court erred in failing to submit the statute of limitations issue to the jury, in awarding BMA damages for loss of use of money and in submitting BMA's negligence per se claim to the jury as a cause of action. This court reverses the denial of Skidmore's affirmative defense of statute of limitations and the award of damages for BMA's loss of use of money. We affirm the remaining provisions of the judgment and order that they be held in abeyance, pending remand for a new trial on the issue of statute of limitations only.

In 1960, BMA contracted with Skidmore, an architectural firm, to design the BMA Tower which was to be built in Kansas City, Missouri. Skidmore specifically agreed to furnish professional services to BMA in connection with design and construction of the BMA Tower, including preparation of preliminary design documents and final construction documents, consisting of drawings, outlining specifications, preliminary cost estimates, and models or renderings, working drawings and specifications for architectural, structural, civil, mechanical and electrical engineering work. Skidmore agreed to provide professional services to assist in the taking of bids, selection of contractors and the development of construction contracts, checking of contractors and manufacturer's shop drawings,

approval of material samples, issuance of certificates of payment, and full-time supervision of construction by an architectural superintendent on site who was to be responsible for "the coordination, performance and completion of all architectural, structural, civil, mechanical and electrical engineering work in accordance with approved drawings and specifications." Further, Skidmore agreed to use its best efforts to protect BMA against defects and deficiencies in the work of contractors, ***443** but did not guarantee performance by contractors of their contracts.

Construction of the building began in 1961 and was completed in 1963. The exterior of the building consisted of over four thousand panels of one-and-one-fourth inch thick white marble, described as marble cladding. The building has vertical columns with horizontal cross pieces, called spandrels, connecting the columns at each floor. The marble panels covered all four sides of the building's vertical columns and, at each floor level, marble was installed on the outside face of the horizontal spandrels. The individual pieces of marble were attached to the frame of the building with metal anchors. The windows are set approximately eight feet back from the edge of the building and this overlap is called the gallery.

In May of 1985, three of the marble panels fell from their installed positions. Two of the three panels fell from the spandrels. The third panel fell from the penthouse section of the building.[2] BMA notified Skidmore in June of 1985 that the panels had fallen. BMA also hired Black & Veatch to perform tests on the marble to determine what caused the panels to fall. Black & Veatch discovered that there were significant design problems with regard to the marble and the anchoring system. The thin marble cladding system failed to meet the minimum requirements of the Kansas City Building Code. Black & Veatch also found that the properties of the marble at the original installation date failed to meet industry standards for the early 1960's and, with the passage of time, the marble had warped, cracked and lost strength.

2 The area referred to as the penthouse is on the top of the building and houses much of the building's mechanical equipment.

In addition, Black & Veatch identified workmanship anomalies in that the anchor system for the marble cladding was not constructed in accordance with specifications. At a minimum, twenty-five percent of the anchors specified were either missing or were of an incorrect type. All of the anchors installed were one-sixteenth of an inch thick rather than the specified one-eighth of an inch. A significant number of the anchors were not embedded in the dovetail slot to the required depth, were not even inserted into the dovetail slot or there was was no dovetail slot. Some anchors were not inserted into the slot, but were attached by molding cement or a Ramset nail. In the areas where a wire anchor was specified, in many instances the wire was missing, the wire was not anchored into the dovetail slot or there was no dovetail slot. The bearing of the marble panels on the shelf angles did not meet the specification of three-fourths of an inch. The bearing on quite a few panels was less than one-half inch, some almost zero. Where the marble panels formed a corner around the columns, the specifications called for a stainless steel cramp anchor. Copper was used in every instance instead of stainless steel.

Black & Veatch prepared a report which indicated that it could not guarantee the building's safety. After considering two possible methods of repair, Black & Veatch determined that neither method would guarantee the building's safety and recommended that the panels be removed and replaced. BMA decided to remove the marble panels on the building and replace them with a synthetic crystalline material called neoparium. The cost of the replacement was approximately four million dollars. BMA filed suit against Skidmore on August 12, 1986 for negligence and breach of contract.[3]

3 This suit initially included a number of defendants in addition to Skidmore. Those claims were either settled or dismissed prior to trial. This suit also originally included a count for misrepresentation which was not pursued at trial.

Skidmore moved for summary judgment prior to trial on the basis that §§ 516.100 and 516.120, RSMo 1986,[4] required BMA to file its action within five years of the time when the damage resulting from Skidmore's breach of contract or duty was sustained or capable of ascertainment. Skidmore maintained that BMA's damages were sustained and capable of ascertainment long before August 12, 1981 and, as a result, BMA's claims were barred. BMA opposed summary ***444** judgment and claimed that it would present evidence at trial to dispute Skidmore's contentions. The trial court reserved

ruling on Skidmore's summary judgment motion until trial.

4 All statutory citations are to Revised Missouri Statutes 1986, unless otherwise indicated.

There was evidence at trial that the incidents in May of 1985, although the first time entire panels had fallen from the building, were not the first problems BMA had experienced with the marble panels. A cracked panel, which did not fall from its installed position, was replaced in the late 1960's. As early as the winter of 1966–67, BMA experienced problems with chipping of the marble panels in specific areas of the building. The design of the building included the placement of an aluminum cap over the gap between the gallery edge and the top edge of the horizontal spandrel panels. The cap met the bottom corner of the vertical column panels where the column intersected with the gallery on each floor. The aluminum cap expanded when exposed to heat causing the bottom corner of some column panels to chip and fall to the gallery. After consulting Skidmore, expansion joints were cut in the aluminum caps to remedy this problem. The evidence also showed that, in 1975, the joints between the marble panels and the frame to which they were attached were recaulked.

At trial Skidmore and BMA each offered the testimony of a witness who had responsibility for some aspect of the maintenance of the BMA Tower. Skidmore presented deposition testimony from Robert Hicklin, the maintenance carpenter responsible for maintaining the exterior of the building from 1966 until his retirement in 1983. Hicklin did not work directly for BMA. He was employed first by IT & T and then by Penn Valley Management, both entities owned by BMA.

While he was the maintenance carpenter, Hicklin reported exclusively to Mark Crew, except for the last year of his employment when Crew was retired. Crew was a witness for BMA. Crew served as secretary to the building committee during the time the BMA Tower was being constructed. In that position he was BMA's on-site representative during the construction. After the completion of construction, Crew became building manager. He served in that position until he was promoted to director of BMA Tower services, the position he held at his retirement.

Hicklin testified that every winter during his employment at the BMA Tower, pieces of marble from the corners of the column panels would break off and fall onto the gallery decks. Hicklin testified that some of these pieces were reattached by Carthage Marble. Because Hicklin thought Carthage Marble's method was ineffective and employees of Carthage Marble were only rarely available, he developed his own method of reattaching the broken pieces with Dow Corning 780. During three months of every year when the temperature was over 50 degrees, Hicklin did repair work on the marble. He stated that this repair work began the first day he went to work and continued until the day he retired.

Hicklin testified that each spring, beginning in the first year of his employment, he would inspect the building. In addition to the broken pieces of marble, he noticed marble panels protruding from their original positions about one-half inch. Hicklin observed that the problems with the marble became worse with the passage of time.

Hicklin testified he advised Crew of the chipping problem from the first year of his employment and Crew was aware that he was reattaching the broken pieces. Hicklin also reported to Crew his observations that the marble panels were protruding and warned Crew that it was only a matter of time before an entire panel fell from the building.

Crew's testimony was in conflict with that of Hicklin. Crew testified that the chipping problem at the corners of the marble panels was remedied by the end of 1968 when the expansion joints were cut in the aluminum caps. Crew testified that after the expansion joints were enlarged in 1968 and the panels recaulked in 1975, he had not witnessed any problems with the marble. He also stated that he did not recall having been told of any problems with the marble. He further testified that there was no one in charge of maintenance of the exterior of the building, ***445** because there was not supposed to be any maintenance required.

On the basis of the statute of limitations defense, Skidmore filed a motion for directed verdict at the conclusion of BMA's evidence and at the conclusion of all the evidence. BMA argued in opposition to the motions that Missouri law required the trial court, and not the jury, to decide statute of limitations issues. Skidmore maintained that factual issues regarding the statute of limitations must be submitted to the jury unless the court

directed a verdict in Skidmore's favor on the basis of undisputed evidence. The court submitted the case to the jury on claims of breach of contract, negligence and negligence per se and reserved ruling on the submissibility of the statute of limitations defense and punitive damages. The jury returned verdicts in favor of BMA on its alternative claims of negligence, negligence per se and breach of contract in the amount of $3,995,592.77, the cost of the repair, and $1,710,661.91, the loss of use of money on this expense. The trial court reduced BMA's damage award by $400,000.00, which is the amount BMA received pursuant to a settlement agreement between Winn–Senter Construction Company and Carthage Marble Company. The court further reduced BMA's award for loss of use of money by $18,262.81, which represents receipt and use by BMA of the settlement amount from February 28, 1991, the date of the settlement, to October 23, 1991, the date of the verdict.

After the return of the verdicts, the trial court announced that it would not submit the issue of punitive damages to the jury because it was "not a punitive damages case." The court also decided that the statute of limitations issue was a question of law and should be decided by the court rather than the jury. After discharging the jury, the court heard argument and took additional evidence on the statute of limitations defense. Thereafter, the trial court entered a judgment which found in favor of BMA on the statute of limitations issue and awarded BMA judgment in the sum of $5,287,991.87.

Skidmore filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. BMA filed its motion for a new trial on the issue of punitive damages. The trial court denied these motions. Skidmore filed a timely appeal thereafter. BMA filed a timely cross-appeal.

Skidmore contends in its first point on appeal, Point A, that the trial court erred in denying Skidmore's motion for a directed verdict on its statute of limitations defense because §§ 516.100 and 516.120 provide an affirmative defense to actions for breach of contract or negligence filed more than five years after accrual of the cause of action. [5] Skidmore argues that the undisputed evidence at trial established that, as a matter of law, BMA's claim is barred by the statute of limitations because BMA suffered damage capable of ascertainment more than five years before this action was filed.

5 The parties agree that § 516.100, the five-year statute of limitations, applies to BMA's claims for breach of contract, negligence and negligence per se.

[1] Under §§ 516.100 and 516.120, BMA was required to file its action within five years of the time when the damage was sustained and capable of ascertainment. BMA filed this action on August 12, 1986. If its damages relating to the design and the deficient marble installation were sustained and capable of ascertainment prior to August 12, 1981, its claims in the instant case are barred. Skidmore had the burden at trial of proving the statute of limitations as an affirmative defense. *Stewart v. K–Mart Corp.*, 747 S.W.2d 205, 208 (Mo.App.1988).

[2] [3] [4] In Missouri, discovery of the damage is not the event that triggers the statute of limitations. *Modern Tractor & Supply v. Journagan Const.*, 863 S.W.2d 949, 952 (Mo.App.1993); *Lato v. Concord Homes, Inc.*, 659 S.W.2d 593, 594–95 (Mo.App.1983). The statute of limitations begins to run when the right to sue arises. *Modern Tractor*, 863 S.W.2d at 952; *Lato*, 659 S.W.2d at 594–95. The damage must be actually sustained and capable of ascertainment before the statute of limitations begins to run. *Modern Tractor*, 863 S.W.2d at 952; *Hasemeier v. Metro Sales, Inc.*, 699 S.W.2d 439, 441 (Mo.App.1985). The phrase "capable of ascertainment" ***446** refers to the fact of damage rather than the exact amount. *Modern Tractor*, 863 S.W.2d at 952; *Hasemeier*, 699 S.W.2d at 442. Damage resulting from one wrong that continues and becomes more serious over time does not extend the time within which suit may be brought. *Arst v. Max Barken, Inc.*, 655 S.W.2d 845, 847 (Mo.App.1983). In order to prove that it was entitled to a directed verdict as a matter of law, Skidmore had to present undisputed evidence that BMA could have ascertained the damage prior to August 12, 1981. Skidmore's motion for directed verdict should only have been granted if there were no factual issues remaining for the jury to decide. *Jerry Anderson & Assoc. v. Gaylan Ind.*, 805 S.W.2d 733, 735 (Mo.App.1991).

[5] Skidmore argues that the evidence at trial was undisputed in that the damages from Skidmore's alleged wrongful conduct were sustained and became capable of ascertainment by 1968. Skidmore asserts that Hicklin's testimony was undisputed that pieces of the panels fell from the building continuously from 1966 to 1983. Skidmore also argues that its evidence showed that BMA

was aware during this time that whole panels were misaligned and protruding.

Skidmore's assertions that its evidence at trial was undisputed are without merit. The evidence at trial as to when the damage could have been ascertained was conflicting and could have resulted in opposite conclusions. BMA presented Crew's testimony to contradict the testimony of Hicklin. Crew testified that there were no problems with the panels between 1968 and 1985 when the three panels fell from the building. Crew testified that he had not witnessed chipped, warped or protruding panels, nor had he been told of such. In 1969, BMA purchased six additional panels which it kept on hand in case of an emergency. Hicklin indicated that the panels were purchased after his reports of the protruding panels because BMA was afraid panels were going to fall from the building. Crew contradicted Hicklin's testimony by testifying that Skidmore recommended the purchase of extra panels because the panels might become difficult to find as time passed and because marble purchased several years after the panels on the building would be incompatible due to different veining in marble mined from differing depths.

BMA's evidence contradicted Hicklin's testimony that the damages were ascertainable prior to August 12, 1981. The conflicting testimony created disputed issues of fact which prevented Skidmore from being entitled, as a matter of law, to a directed verdict on its affirmative defense of statute of limitations. The trial court did not err in denying Skidmore's motion for a directed verdict. Point A is denied.

Skidmore argues in Point B that the trial court, having denied Skidmore's motion for a directed verdict on the statute of limitations defense, erred in refusing to submit to the jury Instruction E regarding Skidmore's statute of limitations affirmative defense. Skidmore argues that it was entitled to have this defense submitted to the jury because there was sufficient evidence for the jury to conclude that BMA had suffered damage capable of ascertainment more than five years before it filed this action.

As discussed in Point A, the evidence at trial was conflicting and contradicted as to when BMA could have ascertained the damage. Genuine issues existed regarding when the damage to BMA was sustained and capable of ascertainment. BMA argues that Skidmore failed to establish a causal connection between the chips and cracks in the marble panels and the damage sustained in 1985 when the panels fell from the building. BMA contends that the chips and cracks are completely unrelated to the damage sustained in 1985. Skidmore presented evidence that the falling panels were part of continuing damage which manifested itself in the form of chips, cracks and protruding panels of marble. Hicklin testified that he anticipated and feared, because of the misalignment of the panels, that entire panels would eventually fall. BMA presented the testimony of Crew contradicting Hicklin's testimony. Issues of witness credibility and believability existed which required resolution by the jury.

[6] Statute of limitations issues are to be submitted to the jury if contradictory conclusions ***447** can be drawn from the evidence. *Kansas City v. W.R. Grace. & Co.*, 778 S.W.2d 264, 268 (Mo.App.1989); *Hopkins v. Goose Creek Land Co., Inc.*, 673 S.W.2d 465, 469 (Mo.App.1984); *See also Arst*, 655 S.W.2d at 848. *Grace* is most analogous to the instant case. In *Grace*, there were issues of fact as to when asbestos fibers were released into the environment and when the plaintiff was capable of ascertaining a risk of harm from the release. *Grace*, 778 S.W.2d at 271.

BMA cites *Anderson v. Griffin, Dysart, Taylor, Penner*, 684 S.W.2d 858, 861 (Mo.App.1984), to support its assertion that the issue of accrual of a cause of action is to be decided as a matter of law by the trial judge. *Anderson* is distinguishable from the instant case because it involves a legal malpractice claim in which there were no disputed issues of fact. The trial court granted the respondent's motion to dismiss and no evidence was presented. In doing so, the court assumed that the facts in the petition were true. *Id.* at 859. Unlike *Anderson*, the instant case involves a dispute as to whether the falling panels are a part of the same damage as the chips and cracks, and whether BMA was aware of the protruding panels.

In the instant case, the parties presented contradictory evidence creating disputed factual issues as to when the damage was sustained and capable of ascertainment. As a result, the trial court should have submitted the statute of limitations issue to the jury. *Grace*, 778 S.W.2d at 268. Point B is sustained. The denial of Skidmore's affirmative defense that BMA's claims are barred by the statute of limitation is reversed.

In Point C, Skidmore argues that the trial court erred in refusing to submit Instruction C, a comparative fault instruction proffered by Skidmore. Skidmore asserts that evidence of BMA's negligence in failing to maintain the building entitled Skidmore to have the jury decide whether BMA's acts or omissions contributed to its claimed damages.

BMA argues that Skidmore was not entitled to a comparative fault instruction because it did not plead contributory negligence as an affirmative defense and did not request a comparison of fault in its answer. BMA asserts that Skidmore's evidence fails to establish a causal relationship between its alleged failure to maintain the building and the damages sustained by BMA. BMA also contends that the evidence does not contain expert testimony to support Skidmore's claims that BMA's failure to inspect and recaulk the panels caused damage.

[7] Comparative fault is an affirmative defense in which the party asserting it must prove that the actions or omissions of the opposing party contributed to the asserting party's loss and negated or reduced the asserting party's legal responsibility. *Young v. Kansas City Power and Light Co.*, 773 S.W.2d 120, 126 (Mo.App.1989). Rule 55.08 requires that a party set forth all affirmative defenses in its answer, and the court in *State ex rel. Taylor v. Luten*, 710 S.W.2d 906, 907 (Mo.App.1986), held that Rule 55.08 applies to the assertion of comparative fault.

[8] The Missouri Supreme Court adopted the pure form of comparative fault in *Gustafson v. Benda*, 661 S.W.2d 11, 15 (Mo. banc 1983), and declared that Missouri would follow the Uniform Comparative Fault Act (UCFA), 12 U.L.A. 35 (Supp.1989).[6] Under the UCFA, the failure to mitigate damages is fault which reduces the plaintiff's recovery. *Id.* at § 1(b). The Missouri Supreme Court recognized this interpretation of fault in *Love v. Park Lane Medical Center*, 737 S.W.2d 720, 724 (Mo. banc 1987), when it wrote "[n]egligence is but one type of fault; fault also includes avoidable consequences, including mitigation of damages." *See also Young*, 773 S.W.2d at 125.

6 Subsequent Missouri Supreme Court opinions have indicated that it was not the court's intent in *Gustafson* to enact the UCFA as a virtual statute of the state of Missouri. *Lippard v. Houdaille Industries, Inc.*, 715 S.W.2d 491, 492-93 (Mo. banc 1986). Such holding, however, does not affect the issues in the instant case.

In its answer to BMA's petition, Skidmore pled as its fifth affirmative defense that "BMA failed to mitigate its damages." Skidmore's pleading set forth the specific ground, mitigation of damages, upon which it was entitled to a comparative fault instruction rather than pleading comparative fault generally. ***448** BMA claims that this averment is insufficient.

[9] When a party asserts an affirmative defense, the pleading "shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance." Rule 55.08. Because the purpose of Rule 55.08 is to provide notice to the plaintiff, *Lucas v. Enkvetchakul*, 812 S.W.2d 256, 263 (Mo.App.1991), the facts supporting a defense must be pled in the same manner as they would be with claims. *Ashland Oil, Inc. v. Warmann*, 869 S.W.2d 910, 912 (Mo.App.1994). Mere conclusory allegations constitute inadequate pleadings. *Id.*

[10] In its answer, Skidmore failed to state additional facts pertaining to its affirmative defense of comparative fault. It asserted only the conclusory allegation that BMA had failed to mitigate damages, rather than stating facts which supported this defense. Nonetheless, pursuant to Rule 55.27(d), BMA should have submitted a motion for a more definite statement. Since BMA did not make such a motion, it is deemed to have waived the objection according to Rule 55.27(f). *Clark v. Olson*, 726 S.W.2d 718, 719 (Mo. banc 1987) (holding that the defendant in a fraud action waived its objection to pleadings deficient in particularity, since the defendant failed to make a motion for a more definite statement); *Sirna v. APC Bldg. Corp.*, 730 S.W.2d 561, 566 (Mo.App.1987) (holding that objections to a conclusory pleading which is deficient in matters of particularity and detail are waived without a motion to make a more definite statement or a motion to dismiss).

[11] Having decided that BMA waived its argument against Skidmore's pleadings, this court must next address whether Skidmore was entitled to a jury instruction on comparative fault. A comparative fault instruction must be supported by substantial evidence. *Young*, 773 S.W.2d at 125. "Substantial evidence is that which, if true, has probative force upon the issues and from which the trier of facts can reasonably decide a case." *Sheridan v. Sunset*

Pools of St. Louis, 750 S.W.2d 639, 641 (Mo.App.1988). In examining whether substantial evidence existed, the evidence must be viewed in the light most favorable to the party offering the instruction. *Young*, 773 S.W.2d at 125.

[12] [13] The defendant bears the burden of proof as to mitigation of damages and must show that the injured party had an opportunity to mitigate and the reasonable prospective consequences. *Smith v. City of Miner*, 761 S.W.2d 259, 260 (Mo.App.1988); *Shaughnessy v. Mark Twain State Bank*, 715 S.W.2d 944, 955 (Mo.App.1986). The rule of mitigation of damages only bars recovery as to those damages which could have been avoided if reasonable precautions, reasonably known to the injured party, were exercised. *Fletcher v. City of Independence*, 708 S.W.2d 158, 175 (Mo.App.1986).

[14] Skidmore presented evidence that BMA did not have a regular schedule for maintenance or inspection of the marble. The director of BMA Tower services, Mark Crew, indicated that he knew that it was normal procedure to caulk between the joints of the marble to prevent moisture or water from getting behind the panels. He also testified that caulk needs to be replaced when it is not preventing water and moisture from getting behind the marble panels. The caulking on all the marble panels was, in fact, replaced in 1975.

Hicklin, a maintenance carpenter at the BMA Tower, testified that the only thing wrong with the marble was the sealer which did not keep the water out. He stated:

> Each winter the water would get in behind the marble and as I inspected the building each spring as soon as the weather would permit me doing it I would find pieces of marble that was out a half inch, which I know there was only one thing could have did that and that was a defective caulking that let water in behind it and it froze and it come out some.

Hicklin's testimony as a whole, however, makes it clear that he did not observe water freezing behind the panels. Instead, he formed his opinion that the source of the protruding panels was a failure of the caulking, because he could not see any other cause for the protrusion of the panels.

*449 Joseph Remmers, the Black & Veatch engineer who supervised removal of the marble panels, testified that he observed widespread rust when the marble panels were removed indicating that there had been moisture infiltration behind the panels. Remmers acknowledged that caulking was important to prevent water from getting behind the panels due to the fact that water causes concrete to deteriorate and corrodes most metals. Remmers observed gaps in the existing caulking where panels evidently warped away from the structure, pulled off their anchors and slid out a little. He testified that the caulk also tore when the weight of improperly anchored panels pulled down on the caulking.

Remmers identified the primary source of the moisture behind the panels, however, to be the design of the marble cladding which required caulking on only three sides of each panel. Along the bottom of each panel there was a gap between the panel and the concrete structure of the building which left the anchorage system open to atmospheric conditions, including water vapor.

This evidence supports Skidmore's position that there was noticeable moisture damage behind the panels. The evidence, however, does not attribute any significant portion of the damage to a lack of maintenance. The evidence instead identifies the real cause of the moisture problem to be the design of the panel system which permitted water vapor to get behind the panels. In addition, there is no evidence that the rusting anchors and mold behind the panels were factors in the decision to replace the marble cladding. The evidence does not warrant a jury instruction on comparative fault. Point C is denied.

Skidmore argues in Point D that the trial court erred in submitting the issue of damages by Instructions 8, 11 and 14 and in refusing Skidmore's Instruction D on the issue of damages. Skidmore asserts that the proper measure of damages in the instant case was the lesser of either the cost of repair or the diminution in value. Skidmore claims that the diminution in value should be determined by calculating the difference in 1963 between the value of the building as designed and the value as constructed.

The court instructed the jury that the measure of damages was "the reasonable cost of repairing any damage to the BMA Tower, plus such sum as ... will fairly and justly compensate plaintiff for the loss of use of its money

expended ..." for that repair. The trial court refused Skidmore's Instruction D, which was a modified form of MAI 4.02. Instruction D stated that the measure of damages for breach of contract was the lesser of the cost of repair or the difference in the value of the building as contracted and as built, "measured at the time the Tower was constructed."

[15] [16] [17] [18] The proper measure of damages is a question of law for determination by the trial court. *De Long v. Broadston,* 272 S.W.2d 493, 497 (Mo.App.1954). The general rule in Missouri for damages to real property is the diminution in value test which is calculated by determining the difference between the fair market value before and after the event causing the damage. *Tull v. Housing Auth. of City of Columbia,* 691 S.W.2d 940, 942 (Mo.App.1985). The cost of repair test, an exception to the general rule, may be used when the cost of restoration is less than the diminution in value. *Id.* The diminution in value method measures damages as the difference between the value of the property with the defective work and what the property's value would have been if it had been constructed according to the contract terms. *Lawing v. Interstate Budget Motel, Inc.,* 655 S.W.2d 774, 778 (Mo.App.1983). Under the cost of repair method, damages are measured as the cost of repairing the defects or supplying the omissions to make the building or structure conform to the contract plans and specifications. *Id.; see also White River Dev. v. Meco Systems,* 806 S.W.2d 735, 741 (Mo.App.1991).

Application of the cost of repair test is clearly limited to situations where repairs are only a small percentage of the diminution in value. *Tull,* 691 S.W.2d at 942. To qualify for the cost of repair exception, the plaintiff must present evidence showing that the cost of repair is insignificant to the total market value of the building. *Sharaga v. Auto Owners Mut. Ins. Co.,* 831 S.W.2d 248, 252 (Mo.App.1992); ***450** *DeArmon v. City of St. Louis,* 525 S.W.2d 795, 801 (Mo.App.1975); *De Long,* 272 S.W.2d at 497. In order to make such a comparison, the plaintiff's evidence must include evidence of the fair market value of the building. *De Long,* 272 S.W.2d at 497. Fair market value is defined as the price at which the property could be sold by a willing seller to a buyer who is under no compulsion to buy. *Sharaga,* 831 S.W.2d at 253.

[19] The particular facts and circumstances of each case dictate which measure of damages is appropriate.[7] *Kahn v. Prahl,* 414 S.W.2d 269, 282 (Mo.1967); *Hensic v. Afshari Enterprises, Inc.,* 599 S.W.2d 522, 524–25 (Mo.App.1980). In recent years, appellate courts have found the facts and circumstances of construction cases, where there is substantial but defective performance by a contractor, dictate a measure of damages different from the measure of damages in customary cases involving injury to real property. *Compare White River,* 806 S.W.2d at 741 (holding that the general rule for damages in construction cases is the cost of repair, and that diminution in value is only appropriate where the cost of reconstruction would involve unreasonable economic waste) and *Lawing,* 655 S.W.2d at 778 (holding that the general rule for damages in construction cases is the cost of repair) *with Tull,* 691 S.W.2d at 941–42 (holding that, in non-construction situations, the general test for damages is diminution in value).[8]

7 When there are a number of defects, one method may be appropriate for some, while the other method may be proper for others. *White River,* 806 S.W.2d at 741.

8 An exception exists, however, for cases involving a breach of the implied warranty of habitability in the construction of new residences. In those situations, the general rule applies. *See Major v. Rozell,* 618 S.W.2d 293, 296 (Mo.App.1981); *Ribando v. Sullivan,* 588 S.W.2d 120, 124 (Mo.App.1979); *Matuhunas v. Baker,* 569 S.W.2d 791, 796 (Mo.App.1978); *Stamm v. Reuter,* 432 S.W.2d 784, 786 (Mo.App.1968).

[20] Although the measure of damages available to an owner in a defective construction case is "cost of repair" and the "diminution in value," the same as for general real property, *White River,* 806 S.W.2d at 741; *Lawing,* 655 S.W.2d at 778; *Hensic,* 599 S.W.2d at 524, it is the manner in which these methods are applied that is different. In real property cases, courts generally utilize the "diminution in value" test, turning only to the "cost of repair" test when it constitutes a lower amount of recovery. *Tull,* 691 S.W.2d at 942. In defective construction cases, on the other hand, the "cost of repair" test is favored, so that courts normally determine the damages by assessing the cost of correcting the defects or supplying the omissions. *Stege v. Hoffman,* 822 S.W.2d 517, 520 (Mo.App.1991); *White River,* 806 S.W.2d at 741; *Rust & Martin, Inc. v. Ashby,* 671 S.W.2d 4, 6 (Mo.App.1984); *Lawing,* 655 S.W.2d at 778; *Forsythe v. Starnes,* 554 S.W.2d 100, 109 (Mo.App.1977); *North Cty. Sch. Dist. v. Fidelity & Deposit Co.,* 539 S.W.2d 469, 480 (Mo.App.1976); *Edmonds v. Stratton,* 457 S.W.2d 228, 233

(Mo.App.1970); 13 Am Jur.2d *Building and Construction Contracts* § 79 (1964).

[21] An exception to the general rule for defective construction cases occurs when the cost of reconstruction and completion in accordance with the contract would involve unreasonable economic waste. *White River,* 806 S.W.2d at 741; *Rust & Martin,* 671 S.W.2d at 6–7; *Lawing,* 655 S.W.2d at 779; *Forsythe,* 554 S.W.2d at 109; *North Cty. Sch. Dist.,* 539 S.W.2d at 480; 13 Am.Jur.2d *Building and Construction Contracts* § 79 (1964). In the instance where the cost of repair method would result in the destruction of usable property or would be grossly disproportionate to the results obtained, the owner's damages should be calculated by the diminution in value formula. *White River,* 806 S.W.2d at 741; *Rust & Martin,* 671 S.W.2d at 6–7; *Lawing,* 655 S.W.2d at 779; *Forsythe,* 554 S.W.2d at 109; *North Cty. Sch. Dist.,* 539 S.W.2d at 480; 13 Am.Jur.2d *Building and Construction Contracts* § 79–80 (1964). The contractor has the burden of proving that repairing the defect would result in unreasonable economic waste. *Rust & Martin,* 671 S.W.2d at 8.

[22] Skidmore's argument on appeal, that damages in this case should be measured by using the diminution in value method, is not ***451** advanced by the authorities upon which Skidmore relies. In support of its contention, Skidmore cites *Kahn,* 414 S.W.2d 269, *Evinger v. McDaniel Title Co.,* 726 S.W.2d 468 (Mo.App.1987), *Ribando,* 588 S.W.2d 120, *DeArmon,* 525 S.W.2d 795, *De Long,* 272 S.W.2d 493, and *Gulf, M. & O.R. Co. v. Smith–Brennan Pile Co.,* 223 S.W.2d 100 (Mo.App.1949).[9]

9 Most of these cases are easily distinguishable in that they do not involve defective construction matters: In *Evinger,* purchasers of a tract of land claimed permanent injury to real property because, before they bought the land, the defendant had been negligent in the preparation of their preliminary title report, inducing them to buy the property. Adverse claimants later caused them to suffer from a reformation in title. *Evinger,* 726 S.W.2d at 470; In *DeArmon,* the plaintiff brought suit against a wrecking contractor for damage which occurred to his property during the demolition of an adjacent building. *DeArmon,* 525 S.W.2d at 798; In *De Long,* the owners of an apartment house sued the heating company that installed a gas burner under a contract with the owners in the steam boiler of the owners' apartment house. *De Long,* 272 S.W.2d at 494; And in *Gulf,* the plaintiff sued for damages arising when a truck crossed its bridge carrying a crane, which struck and damaged the support girders and pedestrian walkway. *Gulf,* 223 S.W.2d at 101–02.
In *Ribando,* the plaintiffs did complain of defects arising in the construction of their home, but, because the damage arose during the erection of a new residence, they claimed breach of an implied warranty or condition of good workmanship, requiring a different test for damages than with general defective construction cases. *Ribando,* 588 S.W.2d at 123–24.

Of the cases cited by Skidmore, only *Kahn* involved a true defective construction action, and even *Kahn* did not specify which method of damages was to be applied as a general rule in defective construction cases. *Kahn,* 414 S.W.2d at 282–83. In that case, the owner of an apartment building sued the general contractor for breach of contract alleging that the contractor failed to construct the building in accordance with the architect's plans, drawings, and specifications. *Id.* at 271–72. The court discussed the different methods for measuring damages which were found in the cases cited by the defendant contractor, but noted the "old but still vital legal maxim" that "in the choice of rules for the measurement of damages in building cases, the old saying that circumstances alter cases has particular force." *Id.* at 282 (citing *Hotchner v. Liebowits,* 341 S.W.2d 319, 332 (Mo.App.1960)).[10] The court in *Kahn* concluded that a jury instruction providing for the measure of damages to be determined using the diminution in value method was appropriate because "the evidence here is sufficient to make a case of substantial, *irreparable* damage, the situation in which the [diminution in value damage] instruction is appropriate." *Kahn,* 414 S.W.2d at 283 (emphasis added).

10 *See also, Hammond v. Beeson,* 112 Mo. 190, 197, 20 S.W. 474, 476 (1892) (holding that in ascertaining damages, "[e]ach case must, in a great measure, be determined ... upon the particular facts by which it is attended").

In the instant case, BMA alleged in Count I of its Second Amended Petition that Skidmore breached its construction contract with BMA and was negligent by defectively performing its contract obligations. The parties stipulated at trial that the cost of removing and replacing the marble was $3,995,592.77. Although Michael Kelly, an appraiser, testified at trial that the diminution in value of the Tower could be measured by the cost of replacing the outer surface of the building,

there was no evidence as to the monetary value of the building.[11] Mr. Kelly further testified that the marble panels created a physical hazard to occupants or tenants of the building and the building could not be operated without the repair of the panels.

11 BMA presented evidence that it was damaged in the amount of $3,995,592.77 under either measure of damage, cost of repair or diminution in value. Under the defective construction general rule that cost of repair is the measure of damage unless the contractor proves that the cost of reconstruction and completion of the contract results in unreasonable economic waste, BMA made a submissible case under either measure of damages.

There was also evidence before the jury that J.E. Dunn made a $1,097,000 dollar estimate for repairing the thin marble cladding by bolting the existing marble into place. The cost figure from Dunn was only a preliminary estimate, because there were no specifications for the repair project. In awarding BMA $3,995,592.77 as the reasonable ***452** cost of repair, the jury inherently found that BMA was reasonable in removing the marble rather than repairing it by an alternative method.

There was no evidence that the cost of repair constituted unreasonable waste.[12] In view of the record in this case, Skidmore did not meet its burden of proving that removing and replacing the marble constituted unreasonable economic waste. Therefore, the cost of repair method is the appropriate measure of damages in this case and the trial court correctly submitted damage instructions based on the cost of repair. Point D is denied.

12 During the trial, Skidmore referred to a one million dollar estimate from J.E. Dunn & Co. for securing the marble cladding by the installation of bolts through the marble into the cement structure of the building. The cost figure from Dunn was only a preliminary estimate, because there were no specifications for the repair project.

In Point E, Skidmore claims that the trial court erred in submitting Instructions 8, 11 and 14, regarding BMA's damages on its claims of negligence, negligence per se and breach of contract respectively, because they improperly permitted the jury to award prejudgment interest. Skidmore argues that BMA was not entitled to prejudgment interest on its breach of contract claim or its negligence claims.

[23] BMA makes no claim that it is entitled to prejudgment interest, nor do we find grounds for awarding prejudgment interest. BMA argues instead on appeal that it was awarded damages for the "loss of use" of its money which it contends is distinguishable from prejudgment interest. BMA's contention that the judgment was for loss of use of money is supported by both the jury instructions and the trial court's judgment entry. Instructions 8, 11 and 14 directed the jurors, upon a finding for BMA, to award damages in an amount which would "fairly and justly compensate [BMA] for the loss of use of its money expended for the reasonably necessary repair of damage to the BMA Tower." The three verdict forms required the jury to designate separately the damages for cost of repair and loss of use of money. The trial court accepted the jury verdicts and awarded BMA judgment in the amount found by the jury, reduced by the amount received in a settlement agreement and a corresponding reduction in the damages for loss of use of money.

[24] To support its argument that it is entitled to the award of damages for loss of use of money, BMA cites in its brief on appeal *Killian Const. Co. v. Tri–City Const. Co.*, 693 S.W.2d 819 (Mo.App.1985); *Groppel Co., Inc. v. U.S. Gypsum Co.*, 616 S.W.2d 49 (Mo.App.1981); and *Havens Steel Co. v. Randolph Engineering Co.*, 813 F.2d 186 (8th Cir.1987). BMA cites the additional cases of *Hoelscher v. Schenewerk*, 804 S.W.2d 828, 833 (Mo.App.1991), and *Cal–Val Const. Co., Inc. v. Mazur*, 636 S.W.2d 391 (Mo.App.1982), in its motion for rehearing. The cited cases which were decided by Missouri state courts are factually distinguishable from the case at bar in that each involves an instance where a breach of contract forced the expenditure of funds for the payment of interest. In both *Killian*, 693 S.W.2d at 828–29, and *Groppel*, 616 S.W.2d at 64, a breach of contract compelled a subcontractor to borrow money to complete construction in fulfillment of the subcontractor's own contractual obligations; the interest on such borrowed money was allowed as actual damages. *Hoelscher*, 804 S.W.2d at 833, authorized the recovery of interest the seller had to pay on the seller's mortgage after a purchaser failed to fulfill the parties' contract to purchase a house. The *Cal–Val Const.* court, in a suit for specific performance of a contract for construction and sale of a home, affirmed the award of damages for increased interest rates the purchaser was obligated to pay as a result

of a lost loan commitment. *Cal–Val Const.*, 636 S.W.2d at 392–93.

BMA's claim for loss of use of money is distinguishable from the claims asserted in *Killian, Groppel, Hoelscher* and *Cal–Val Const.*, because BMA did not actually expend any money to pay the interest BMA claims as damages. *Havens,* however, does not require an actual expenditure to qualify for loss of use damages. The federal district court in *Havens* found that the evidence was "less developed than it might have been" in showing ***453** that the subcontractor had actually borrowed all of the money it was required to spend to complete the construction. *Havens Steel Co. v. Randolph Engineering Co.*, 613 F.Supp. 514, 541 (W.D.Mo.1985). The court, however, awarded damages for loss of use of money based on the rationale of a Maryland case, *Md. Port Admin. v. C.J. Langenfelder, etc.*, 50 Md.App. 525, 438 A.2d 1374, 1381–85 (1982), which suggested that it was irrelevant whether the subcontractor borrowed the money or used its own capital. *Havens,* 613 F.Supp. at 541. In affirming the district court, the Eighth Circuit Court of Appeals opined that a Missouri court would apply the reasoning articulated in the Maryland case. *Havens,* 813 F.2d at 188. This court, however, is not inclined to expand the Missouri decisions to award damages for loss of use of money in cases where no expenditure was actually made by the claimant. To so allow would, in effect, permit claimants such as BMA to circumvent the law on prejudgment interest by obtaining interest damages without meeting the criteria for prejudgment interest or in amounts in excess of that authorized by law for prejudgment interest.

BMA's only evidence to support the trial court's award to BMA of $1,692,399.10 was a stipulated calculation in BMA's Exhibit 93. Such calculation determined "the amount BMA would have earned on the money spent to remove and replace the marble facade."[13] There is no evidence, or even a claim by BMA, that it was actually required to expend money for interest payments as a result of Skidmore's breach of contract. Therefore, the trial court erred in awarding BMA damages for loss of use of money. That portion of the judgment allowing BMA such damages is reversed. Point E is granted.

13 A review of Exhibit 93 reveals that BMA's calculation of damages for loss of use of money in Exhibit 93 was based on a compounding of interest. The cases relied upon by BMA for loss of use of money damages are not authority for the compounding of interest in computing such damages.

Skidmore argues in Point F that the trial court erred in submitting negligence and negligence per se to the jury. Skidmore asserts that BMA cannot recover in tort for the purely economic loss claimed in its negligence theories since no evidence of personal injury or damage to other property was presented. Skidmore contends that under Missouri law liability for "economic loss" is contractual rather than in tort. The analysis of Point F is limited to BMA's general negligence claim since BMA's negligence per se claim is disallowed in Point G.

[25] **[26]** In Missouri, a mere breach of contract does not provide a basis for tort liability, but the negligent act or omission which breaches the contract may serve as the basis for an action in tort. *American Mortg. Inv. Co. v. Hardin–Stockton,* 671 S.W.2d 283, 293 (Mo.App.1984). If the duty arises solely from the contract, the action is contractual. *Id.* The action may be in tort, however, if the party sues for breach of a duty recognized by the law as arising from the relationship or status the parties have created by their agreement. *Id.* For example, this court stated in *Hardin–Stockton* that the "failure of a real estate broker to perform his contractual and fiduciary duties supports an action either for breach of contract or for negligence." *Id.* at 290.

[27] **[28]** **[29]** **[30]** When a person possesses knowledge or skill superior to that of an ordinary person, the law requires of that person conduct consistent with such knowledge or skill. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 32, at 185 (5th ed. 1984). A professional person owes a client a duty of care commensurate with "the degree of care, skill and proficiency commonly exercised by ordinarily skillful, careful and prudent professionals." *Murphy v. A.A. Mathews,* 841 S.W.2d 671, 674 (Mo. banc 1992). An architect, as a member of a learned and skilled profession, has a duty to exercise the ordinary and reasonable technical skill that is usually exercised by one in that profession. *Chubb Group of Ins. v. C.F. Murphy & Assoc.*, 656 S.W.2d 766, 774 (Mo.App.1983); *Rowe v. Moss,* 656 S.W.2d 318, 321 (Mo.App.1983). Injury resulting from an architect's failure to use due care subjects the architect to liability for that injury. *Chubb Group,* 656 S.W.2d at 774.

***454** Skidmore contends that Missouri law limits recovery in tort for purely economic damage to those

cases involving personal injury, damages to property other than that sold, or destruction of the property sold due to a violent occurrence. *Clark v. Landelco, Inc.*, 657 S.W.2d 634, 636 (Mo.App.1983). In actions involving architects, Missouri courts have not addressed the question of whether a negligence claim may be maintained for purely economic damages. Although not binding precedent, this court finds persuasive two federal court decisions which have directly addressed this question. In *Bryant v. Murray-Jones-Murray, Inc.*, 653 F.Supp. 1015 (E.D.Mo.1985), the court considered a claim that an architect was negligent for failing to use ordinary care in drawing up plans and supervising construction. The architect argued that Missouri law prohibited recovery for economic loss under a negligence cause of action except in cases involving personal injury or damage to property other than the property at issue. *Id.* at 1015. The court found such rule inapplicable to the "negligent rendition of services by a professional," *id.*, and cited *Aetna Ins. Co. v. Helmuth, Obata & Kassabaum, Inc.*, 392 F.2d 472 (8th Cir.1968), in doing so. *Aetna* allowed a third-party surety of a construction company to recover on a negligence theory for economic loss resulting from an architect's failure to supervise construction. *Id.* at 478. In both *Bryant* and *Aetna*, the federal courts were applying Missouri law.

Skidmore cites *Crowder v. Vandendeale*, 564 S.W.2d 879, 882 (Mo. banc 1978),[14] and *Clark*, 657 S.W.2d at 636, as Missouri authority in support of its argument that BMA cannot recover for economic loss on a theory of negligence. Both *Crowder* and *Clark* involve actions by homeowners against the builder for defects in the quality of the residence. The courts in both cases found that the owners had only a contractual claim under the theory of implied warranty of habitability, rather than a remedy in tort, because the builder had no duty other than its contractual obligations to protect the owners from deterioration or loss of bargain damages. *Crowder*, 564 S.W.2d at 884; *Clark*, 657 S.W.2d at 635. The nature of the claims and the factual situations in *Crowder* and *Clark* make them distinguishable from the case at hand. Unlike the instant case, *Crowder* and *Clark* do not involve claims arising from a professional's common law duty of care.

14 In *Sharp Bros. v. American Hoist & Derrick Co.*, 703 S.W.2d 901, 903 (Mo. banc 1986), the Missouri Supreme Court denied recovery in a products liability case on a theory of strict liability in tort where the only damage was to the product sold. In doing so, the court overruled dictum in *Crowder* indicating otherwise.

[31] [32] The rule asserted by Skidmore, that recovery for economic loss in tort is prohibited except in certain situations, has also been applied in the context of actions against manufacturers of defective products. These cases are distinguishable from the instant case because they either do not involve a professional's common law duty of care or they involve claims asserted under the theory of strict liability in tort. *See Clevenger & Wright Co. v. A.O. Smith, etc.*, 625 S.W.2d 906 (Mo.App.1981); *Forrest v. Chrysler Corp.*, 632 S.W.2d 29 (Mo.App.1982); *Gibson v. Reliable Chevrolet, Inc.*, 608 S.W.2d 471 (Mo.App.1980).

In the instant case, BMA contracted with Skidmore for the rendition of architectural services. In addition to the contractual duties arising from the contract between BMA and Skidmore, Skidmore had a duty to provide professional architectural services in a manner consistent with the skill and competence of other members of its profession. Skidmore owed a duty to BMA to exercise ordinary and reasonable skill in designing the BMA building and supervising its construction. BMA's general negligence claim is based upon Skidmore's common law duty to provide architectural services in a professional manner, and the trial court did not err in allowing BMA to assert such a claim. Point F is denied.

In Point G, Skidmore asserts that the trial court erred in submitting BMA's claim for negligence per se, because BMA failed to state such a claim in that there was no evidence that Skidmore violated any statute, rule or regulation which is an essential element ***455** of such a claim. Skidmore also argues that Instruction 10 contained duties and obligations not present in any statute, rule or regulation so that, even if breached, they would not state a claim for negligence per se.

Skidmore asserts in its brief that BMA failed to plead a claim for negligence per se in any of its petitions filed in this case and, thus, the trial court should not have submitted such a claim to the jury. Examination of BMA's second amended petition leads this court to the conclusion that Skidmore is correct in its contention that BMA did not plead a claim for negligence per se. Skidmore did not, however, at any time before the case was submitted to the jury, object on the ground that such a claim should not be submitted to the jury because BMA had not pled negligence per se.

BMA's evidence supported the other causes of action it pled and, therefore, it is possible that Skidmore did not have notice, until BMA proffered its instruction, that BMA intended to seek recovery under a theory of negligence per se. During the instruction conference, Skidmore's counsel was on notice that BMA intended to submit a claim for negligence per se and had the opportunity to object on the ground that such a cause of action had not been pled by BMA. Counsel for Skidmore did not do so. Skidmore objected to the proffered negligence per se instructions on the ground that negligence per se was "not an appropriate basis for a cause of action." In its motion for new trial, Skidmore argued for the first time that the trial court erred in failing to direct a verdict in its favor because BMA did not plead negligence per se.

[33] [34] [35] Although Skidmore is correct in its contention that BMA did not plead negligence per se, it has waived such error by failing to object to the submission of negligence per se to the jury. A party may not utilize a motion for new trial to raise an objection that should have been raised during trial. *Colley v. Tipton,* 657 S.W.2d 268, 273 (Mo.App.1983). Failure to object in a timely manner at trial may be deemed to be a waiver or abandonment of the objection. *McMillin v. Union Elec. Co.,* 820 S.W.2d 352, 355 (Mo.App.1991). Because BMA's pleading error is not dispositive of this point, this court must now consider whether BMA established a submissible claim against Skidmore for negligence per se.

[36] [37] The following four requirements must be met to establish a claim for negligence per se: 1) a violation of a statute or ordinance; 2) the injured party must be within the class of persons intended to be protected by the statute or ordinance; 3) the injury complained of must be of the nature that the statute or ordinance was designed to prevent; and 4) the violation of the statute or ordinance must be the proximate cause of the injury. *Gipson v. Slagle,* 820 S.W.2d 595, 597 (Mo.App.1991). BMA's evidence at trial did not specify, nor did the trial court's instruction on negligence per se specify, the statute that it claimed Skidmore violated to fulfill the first element of negligence per se. In deciding this case, this court assumes that BMA was relying on § 327.411 because the language of the instruction discusses the placement of the architect's professional seal on architectural drawings, which is the subject matter of § 327.411. Chapter 327 regulates architects, professional engineers and land surveyors. Section 327.411.2 reads as follows:

> The personal seal of a registered architect or professional engineer or land surveyor shall be the legal equivalent of his signature whenever and wherever used, and the owner of the seal shall be responsible for the whole architectural or engineering project or for the entire survey, as the case may be, when he places his personal seal on any plans, specifications, estimates, plats, reports, surveys or other documents or instruments for or to be used in connection with any architectural or engineering project or survey, unless he shall attach a statement over his signature, authenticated by his personal seal, specifying the particular plans, specifications, plats, reports, surveys or other documents or instruments intended to be authenticated by the seal, and disclaiming any responsibility for all other plans, specifications, estimates, reports, or other documents or instruments relating to or intended to be used for any ***456** part or parts of the architectural or engineering project or survey.

Chapter 327 is a licensing statute. BMA cites no cases in which a professional licensing statute forms the basis for a negligence per se action. The overall purpose of Chapter 327 is the protection of members of the public who contract for the service of an architect, engineer or surveyor. *Gipson,* 820 S.W.2d at 597. Chapter 327 has its own disciplinary provisions for enforcing that purpose which include censure and license revocation. In *Hardin–Stockton,* 671 S.W.2d at 294, this court considered and rejected a negligence per se claim, based upon a licensing statute for real estate brokers, which is analogous to the claim made by BMA. This court determined that the licensing statute did not present a basis upon which a claim for negligence per se could be maintained. *Id.* at 295.

The nature of Chapter 327 indicates that § 327.411 was not designed to provide a cause of action for negligence per se but, instead, to insure that the professional persons it regulates display and maintain a certain standard of competence within their profession. The trial court erred in submitting a cause of action for negligence per se to the jury on the basis of Skidmore's alleged violation of § 327.411. BMA did not prove the third requirement of negligence per se, which is that the injury complained of must be of the nature that the statute is designed to prevent. Point G is granted. Because BMA submitted three alternative theories upon which it claimed entitlement to damages from Skidmore for its required repair of the marble panels, a finding by this court that it was not entitled to submit one of the three theories does not entitle Skidmore to relief from the judgment for cost of repair, since the jury found identical damages on each theory of recovery. *See Magnuson by Mabe v. Kelsey–Hayes Co.*, 844 S.W.2d 448, 456 (Mo.App.1992).

Having addressed and decided the points raised by Skidmore, the final matter for consideration by this court is the claim presented by BMA in its cross-appeal. In its sole point relied on, BMA asserts that the trial court erred in refusing to submit BMA's punitive damage claim because Skidmore displayed a conscious disregard for the safety of others. BMA contends that such conscious disregard was manifested by the fact that a Skidmore architect applied his professional seal to drawings and approved shop drawings prepared by others without determining the safety of the design or whether it complied with the Kansas City Building Code. Skidmore raises procedural issues concerning BMA's cross-appeal which are dispositive.

[38] Skidmore first asserts that the punitive damages issue has not been preserved for review because the legal file does not contain BMA's instruction on punitive damages which was refused by the trial court. Rule 84.04(e) requires that if a point relied on pertains to the refusal of an instruction, such instruction should be set forth in its entirety in the argument portion of the brief. Failure to do so will result in the issue not being properly before the court for review. *Henges Assoc. v. Indus. Foam Products*, 787 S.W.2d 898, 901 (Mo.App.1990). BMA set forth its refused punitive damages instruction in its brief and has, therefore, properly placed this issue before this court for review.

[39] Skidmore also argues that the issue of punitive damages was not properly preserved because BMA did not object at the instruction conference to the trial court's refusal of the instruction. Rule 70.03 states that specific objections to instructions need not be made prior to the motion for new trial. The validity of this rule had been called into question by several cases suggesting that specific objections to instructions at trial were necessary to preserve the issue for review. *See Hudson v. Carr*, 668 S.W.2d 68 (Mo. banc 1984); *Fowler v. Park Corp.*, 673 S.W.2d 749 (Mo. banc 1984). More recently, however, the case law evidences a shift back to the principles espoused in Rule 70.03. *See Goff v. St. Luke's Hosp. of Kansas City*, 753 S.W.2d 557 (Mo. banc 1988); *Powers v. Ellfeldt*, 768 S.W.2d 142 (Mo.App.1989). Lack of an objection at trial on an issue of alleged instructional error will not prevent review if the alleged error is otherwise preserved, however, reversal on appeal will not be warranted unless prejudice is established. *Goff*, 753 S.W.2d at 565; *Powers*, 768 S.W.2d at 147. BMA's failure to object to the trial court's refusal to give its punitive damages ***457** instruction does not prevent appellate review since the alleged error has been otherwise properly preserved. [15]

15 This court notes that Rule 70.03 has been revised with the proposed revisions to take effect on January 1, 1994. Contrary to the present language of Rule 70.03 and to the recent shift in the case law, the new Rule 70.03 requires that, in order to preserve error for appeal, objections to instructions must be made prior to submission.

Skidmore further contends that if this court finds the punitive damages issue has been properly preserved for review, the only claim on which it has been preserved for review is negligence per se. Skidmore argues that the instruction set forth in BMA's brief improperly departs from MAI 10.07 because it fails to refer to a specific verdict-directing instruction. Skidmore asserts that because the language in paragraph "First" is almost identical to BMA's negligence per se verdict director, that is the only claim upon which BMA has preserved review.

[40] The record does not support that BMA submitted its punitive damages instruction on any claim other than negligence per se. The punitive damage instruction at issue does not indicate which verdict-directing instruction BMA's punitive damages instruction referenced. After the jury returned its verdicts, the court held a conference with counsel on the statute of limitations and punitive damages

issues. The court ruled that it would not submit punitive damages to the jury. Counsel for BMA objected and stated that this "is a case for punitive damages, particularly on a finding of negligence per se." Counsel's objection to the court's ruling on the punitive damages instruction and the language of the instruction itself support a finding that the only claim upon which BMA has preserved the punitive damages issue for review is its negligence per se claim. In addition, the arguments in BMA's brief only address its negligence per se claim.

Due to the disposition of Point G, in which this court found that the trial court erred in submitting to the jury a cause of action for negligence per se, this court finds BMA's contentions in its cross-appeal to be without merit. Inherent in the finding that BMA was not entitled to submission of its negligence per se claim, is the finding that BMA was not entitled to an instruction on punitive damages on such claim. The cross-appeal is denied.

The judgment is reversed insomuch as it denies Skidmore the affirmative defense of statute of limitations and awards BMA damages for loss of use of money. In the interest of judicial economy, the cause is remanded for retrial on the issue of statute of limitations only, since it is a well-established rule that a new trial may be limited to fewer issues than those originally tried in the case, so long as "one or more of the issues [was] properly considered and determined, and that a new trial limited to the remaining issues will not result in prejudice or injustice to a party." *Artstein v. Pallo*, 388 S.W.2d 877, 882 (Mo. banc 1965); *see also Sunny Baer Co. v. Slaten*, 623 S.W.2d 595, 599 (Mo.App.1981); *Moss v. Greyhound Lines, Inc.*, 607 S.W.2d 192, 196 (Mo.App.1980). The remaining provisions of the judgment are held in abeyance, pending the remand for a new trial, wherein the court is directed to address only the affirmative defense of statute of limitations.

All concur.

All Citations

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TERRY SCHILLING and JULIE SCHILLING, husband and wife, and ARTISAN, INC., a Washington corporation, Petitioners, v. PROBUILD COMPANY, LLC, a Washington limited liability company d/b/a LUMBERMANS, and MITEK INDUSTRIES, INC., a foreign corporation, Respondents.	CASE NO. 95955-2 DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below, a copy of the following documents: (1) Answer to Petition for Review and Appendices; and (2) Declaration of Service, directed to the following individuals:

Via Email with Recipient's Approval
and U. S. Mail
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Dated at Seattle, Washington, this 29th day of June, 2018.

Ana I. Todakonzie

PREG O'DONNELL & GILLETT PLLC

June 29, 2018 - 11:08 AM

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