IN THE SUPREME COURT
OF THE STATE OF WASHINGTON
NO. 95955-2

TERRY SCHILLING and JULIE SCHILLING, husband and wife, and ARTISAN, INC., a Washington corporation,

Appellants/Cross-Respondents,

vs.

PROBUILD COMPANY, LLC, a Washington limited liability company, d/b/a Lumbermens, and MITEK INDUSTRIES, INC. a foreign corporation,

Respondents/Cross-Appellants.

PETITIONERS' REPLY TO MITEK'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Carefully read, MiTek's Answer admits that central appeal and petition for review issues are 1) whether by private contract, illegal "Plan Stamping" (Plan Stamping) can be made legal, contrary to RCW 18.43.070, WAC 196-23-030, and WAC 196-25-070 provisions; (Petition issues 1, 3 and 7; MiTek's Answer III A)[1]; and 2) whether MiTek's post-sale contested plan language disclosed MiTek and ProBuild's illegal Plan Stamping business practices for statute of limitation commencement purposes. (Petition issues 2, 4, 5, and 6; MiTek Answer pp. 6-8, 14, 16).[2]

Rather than squarely address these issues, MiTek (and ProBuild) instead now seek to mislead this court by conflating the petitioners' completely distinct lawsuit truss loading claims, with their separate lawsuit Consumer Protection Act (CPA) Plan Stamping claim, for which a separate legal analysis is required.

To be clear, even if the petitioners' separate lawsuit truss loading claims were proven to be entirely invalid, that would not invalidate or

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[1] MiTek says it does not plan stamp, then contradicts itself by saying the disputed truss plan language at issue, supposedly informs customers it does not review for accuracy, the truss plan specifications ProBuild provides, before stamping (*i.e.,* MiTek plan stamps). MiTek cannot have it both ways, yet clearly assumes this Court will not notice or be troubled by this glaring inconsistency.

[2] MiTek's Answer concedes this very point. "... Division III found that the statements [on the MiTek/ProBuild plans] put petitioners on inquiry notice sufficient to start the running of the statute of limitations." MiTek Answer p. 16.

require the petitioners' separate CPA Plan Stamping claim to be dismissed, nor would the respondents' liability for that separate claim be, in any way, affected.

Because MiTek (and ProBuild) continuously conflate the petitioners' separate lawsuit claims, MiTek by answer has now raised several "new" legal issues which petitioners will address.

II. NEW ISSUES RAISED BY MITEK

1. Statute of limitations "tolling". The doctrine of tolling does not apply to petitioners' Plan Stamping claim.

2. The TCDL 12 versus 15 claims dismissal. Dismissing the lawsuit truss loading claims does not make moot, whether the appellate court erred by dismissing the separate Plan Stamping claim.

3. Engineer malpractice/jurisdiction claim. No engineer malpractice claim is or was placed at-issue by the lawsuit or by the Petition, and the Board of Engineers does not have jurisdiction.

III. STATUTE OF LIMITATIONS TOLLING

The statute of limitations "tolling" doctrine is nowhere mentioned in the Petition, because it is legally and factually irrelevant to the petitioners' separate lawsuit CPA Plan Stamping claim.

Summarized, petitioners did not first learn that deceptive and illegal Plan Stamping practices were occurring, until Palmer Tingey,

MiTek's engineer, surprisingly disclosed those practices during his post-lawsuit deposition. At that point, a new Plan Stamping CPA claim against MiTek and ProBuild was amended into the existing lawsuit. The petitioners have never later asserted, either factually or legally, that the "tolling" doctrine has statute of limitations relevance for this post-lawsuit Plan Stamping claim.

MiTek now wrongly argues that because the tolling doctrine is relevant to the lawsuit's different truss loading contract breach and warranty claims, that this necessarily means it has statute of limitations relevance for the lawsuit's CPA Plan Stamping claim. Why this is supposedly the case is not analytically explained by MiTek.

Substantively, the fact MiTek stamped ProBuild's truss plans, which were created using ProBuild's specifications, and said so on the plans, does not and did not disclose illegal Plan Stamping. Illegal Plan Stamping occurs, only if a MiTek engineer did not confirm ProBuild's work as being project correct, before a stamp was applied.

MiTek's contested post-sale plan language specifically says its engineer exercised the necessary statutory "Direct Supervision" review, to make its stamping of ProBuild's work, legal. Accordingly, nothing about MiTek saying on the plans that it stamped ProBuild's work, started the

statute of limitations running on petitioners' separate Plan Stamping legal claim.

Similarly, nothing about the 12 TCDL selected by ProBuild and shown on the delivered plans, informed the petitioners that Plan Stamping was occurring. In fact, the presence of a 12, rather than 15 TCDL did not even inform petitioners that a contract, or warranty breach existed.

Throughout the lawsuit and to this day, MiTek and ProBuild have always claimed that a TCDL of 12 is and was correct for the Schilling home, and will accommodate a tile roof. Both respondents told petitioners this before the lawsuit, and both told the petitioners this after the lawsuit. How does a claimed correct loading inform anyone that legal liability might exist? It does not. That is why MiTek (and ProBuild) continue to intentionally misrepresent Mr. Sevigny's testimony and the meaning to be given the 12 TCDL specification.

Accurately stated, all Mr. Sevigny knew was that a 15 TCDL was an "average" tile loading. He did not expect that to be the Schilling roof loading, he did not know what the Schilling roof loading should be. Neither he nor the Union Gap Building Official, Mr. Rathbone, originally believed the 12 TCDL loading selected was incorrect for tile, and neither had reason to initially disbelieve MiTek or ProBuild when both

respondents later told them post-installation, the 12 TCDL was correct and would support a tile roof.

Particularly pertinent, for almost three years post-installation, MiTek, ProBuild, Rathbone, and Sevigny all carefully looked at the truss plans and not once did MiTek, ProBuild, Rathbone or Sevigny tell the others *i.e.,* "Problem found. The TCDL is 12, when it should be 15." In short, three years of later undisputed truss plan review, including review by experts MiTek and ProBuild occurred, without the 12 TCDL number on the plans being claimed to have any statute of limitation relevance.[3]

More to the point, whether this loading is right or wrong, the plan-disclosed 12 TCDL specification has no statute of limitations connection to the petitioners' separate Plan Stamping claim. Accordingly, if the appellate court, as MiTek now argues, used this disclosed plan loading as a basis for supposedly dismissing petitioners' separate Plan Stamping claim (a separate and distinct claim from the petitioners' lawsuit truss loading and warranty breach claims; *see* MiTek Answer IV(A)), then indeed the Court of Appeals erred and the Petition for Review should be accepted.

Accurately analyzed, to find petitioners' separate Plan Stamping lawsuit claim to be statute of limitations barred, the Court of Appeals

[3] This fact claim was actually only first made by defense counsel, post-lawsuit.

necessarily had to conclude that by private contract, 1) MiTek and ProBuild can make the illegal act of Plan Stamping legal; and 2) the contested post-sale language placed upon the MiTek/ProBuild plans was both legally valid and as a matter of law, disclosed that illegal plan stamping was occurring.

As discussed in the Petition, each of these required legal conclusions is in direct conflict with the specific Washington statutes and prior case law now cited by the Petition.

Summarized, "tolling" is not a Plan Stamping issue. If Plan Stamping is illegal, the statute of limitations for Plan Stamping did not run. If the disputed plan language, as petitioners believe, is unenforceable and/or void, then the Plan Stamping statute of limitations did not run. If there is simply a fact question about what the disputed plan language actually means, then the Plan Stamping statute of limitations did not run and the Court of Appeals' dismissal of petitioners' separate Plan Stamping lawsuit claim was in error and the Petition for Review should be accepted and this error reversed.

IV. 12 TCDL VERSUS 15 TCDL CLAIM

Whether a 12 TCDL or 15 TCDL is required for the Schilling home is a claim unique to the Schilling home. In contrast, whether the illegal practice of Plan Stamping can be made legal by private contract

and/or whether under Washington law the post-sale contested plan language affixed by MiTek was void or actually disclosed MiTek and ProBuild's Plan Stamping practices, are completely separate legal issues, involving a completely separate CPA claim. These different issues have broad public policy importance.

Because the petitioners' lawsuit claims are inherently and legally different, the Petition is specifically and narrowly targeted to address the legal error committed by the appellate court, when it dismissed the petitioners' separate CPA Plan Stamping claim, without performing the independent analysis this separate claim required, and without explaining how it could dismiss this claim and not be in conflict with Washington statutes and prior on-point case law.

The Petition does not ask this Court to differently and/or separately review whether the appellate court had a sufficient legal or factual basis to otherwise dismiss petitioners' contract or warranty breach claims, because of the 12 versus 15 TCDL specification information set forth on the plans.

As a "new" issue raised by its Answer, MiTek now asserts that the facts used by the Court of Appeals to dismiss the petitioners' separate specification-based contract and warranty breach claims, simultaneously justified the dismissal of the petitioners' separate and distinct lawsuit Plan Stamping claim. (MiTek Answer IV(A), (B)). That is simply incorrect.

Assuming (but not admitting) the petitioners "should have known" in 2007 that the 12 TCDL specification chosen might not be correct, that possible contract or warranty error does not concurrently disclose that illegal Plan Stamping had occurred.

Instead, for petitioners' separate Plan Stamping claim, the necessary legal inquiry is when the petitioners "knew or should have known" that instead of *i.e.,* respondents simply making a "one off" specification mistake, the petitioners differently first learned that MiTek and ProBuild were deceptively involved in the illegal practice of Plan Stamping.

Despite wrongly denying that it Plan Stamps, MiTek shamelessly and inconsistently now argues in its Answer, that its plans supposedly do disclose illegal Plan Stamping, sufficient to permit a summary judgment dismissal of the claim. Petitioners disagree for the multiple reasons discussed by the Petition, that this is how MiTek's disputed plan language must, by law, be read.

Because different facts must be shown to dismiss the lawsuit Plan Stamping claim than are required to dismiss Petitioners' contract and/or warranty claims, the fact those claims were dismissed, does not make "moot," whether the appellate court erred in dismissing the petitioners' separate and legally distinct Plan Stamping claim.

V. PETITIONERS PLED A CPA PLAN STAMPING CLAIM AGAINST MITEK, NOT A MALPRACTICE CLAIM AGAINST TINGEY

After the appeal was filed and before oral argument, the American Counsel of Engineering Companies of Washington (ACEC-WA) sought permission to file an amicus brief, arguing that identical to one of MiTek's current "new" Answer assertions, only a malpractice claim (and not a CPA claim) exists, if an employee engineer violates RCW 18.43.070 duties.

Petitioners opposed this amicus brief being filed, because the Washington Supreme Court in the case *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013), dispositively held that 1) a malpractice claim against a licensee who breaches statutory duties at an employer's request, is not required; and 2) if any employer instructs a licensee as part of job duties to violate a statute, the employer does have CPA claim liability.

Appendix A and B to this Reply set forth the argument and case law supporting this conclusion, which petitioners now incorporate by reference.

Attached as **Appendix C** is the Commissioner's ruling in Division III, which confirmed that *Klem, supra,* did decide these issues.

In substance, the Commissioner agreed 1) a malpractice claim against Mr. Tingey was not required to be alleged in this case; 2)

Washington's Board of Engineering did not have jurisdiction over the CPA claim pled, because MiTek is not a licensee; and 3) MiTek as an employer, can be liable under the CPA and *Klem, supra,* for instructing Tingey as part of his job duties, to illegally Plan Stamp.

The ACEC-WA subsequently asked Division III to modify the Commissioner's ruling, but Division III refused to do so. (*See*, attached **Appendix D**). Accordingly, for the reasons identified in Appendix A and B, MiTek's "new" malpractice arguments are wrong.

Addressing also the "new" Answer claim that Tingey's Plan Stamping is not part of the "practice of engineering," Section 802:10.2 of the International Residential Code (IRC) specifically requires that truss plans be engineer stamped. Why? Because reviewing and stamping truss plans, as Washington statutes require, is part of the practice of engineering.

Also, RCW 18.43.020(5) defines the "practice of engineering" to include: "... any professional service... requiring engineering education, training and experience..." [Emphasis added.]

Here, affixing an engineering stamp to truss plans is a "professional service requiring engineering education" and therefore, it is part of the "practice of engineering."

Washington statute RCW 18.43.070, also in part says:

> Plans, specifications, plats and reports prepared by the registrant shall be signed, dated, and stamped with said seal or facsimile thereof. Such signature and stamping shall constitute a certification by the registrant that the same was prepared by or under his or her direct supervision and that to his or her knowledge and belief, the same was prepared in accordance with the requirements of the statute.

[Emphasis added.]

Clearly, as confirmed by this statute, stamping plans is part of the "practice of engineering."

VI. CONCLUSION

The Plan Stamping issues presented by the Petition are matters of broad public policy importance. It is particularly crucial this Court keep in mind that truss plans are more than just a single TCDL specification. Truss plans require pages of specifications in order to be created. Therefore, to protect the public, before an engineer stamp is affixed to such plans, Washington statutes objectively require that an engineer make a due diligence "Direct Supervision" effort to verify that all specifications chosen and used for plan creation are accurate.

Only a person with training and with the necessary software access has the capability of double checking all chosen specifications (not just one variable TCDL specification), which are used to create truss plans.

James and Josh Sevigny do not have access to MiTek software. They are not engineers and do not create truss plans. Mr. Rathbone is not an engineer. He does not have access to MiTek software. To accordingly argue, as MiTek (and ProBuild) now do, that other parties have the education or are in a position to perform a complete Direct Supervision plan review, which Washington statutes require licensed engineers to perform before stamping, is nonsense.

If, as MiTek and ProBuild now claim, they can free themselves by private contract and by ambiguous and/or void post-sale plan statements from all statutory plan review obligations, then there simply is no public protection.

Conversely, if by private contract, MiTek and ProBuild cannot legally avoid statutory truss plan review responsibilities, then nothing on the truss plans in this case, commenced a Plan Stamping claim statute of limitations.

If (as petitioners believe) a post-sale effort to try and make illegal Plan Stamping conduct legal, is contrary to public policy and is, therefore, void and unenforceable, nothing on the plans commenced a Plan Stamping claim statute of limitations. If MiTek's contested plan language can and must be read (applying *i.e.,* Rathbone witness testimony and established case law) to say that Washington statutes are being complied with, then

the Court of Appeals erred by dismissing the petitioners' separate Plan Stamping lawsuit claim and that error should be reversed and the case remanded back to the lower court for trial.

In summary, petitioners are not seeking an advisory opinion. The Court of Appeals erred by not separately analyzing petitioners' post-lawsuit Plan Stamping claim properly for statute of limitations purposes. That error puts the appellate court decision in conflict with current statutes and prior case law, making review appropriate.

Most importantly, the public in Washington, not just the petitioners, is being injured, because the current decision allows MiTek and ProBuild to continue their illegal business practices in violation of Washington law. This means there is no actual truss plan review occurring for the public's protection, for thousands of homes.

Correctly analyzed, applying the proper legal and factual tests, it was error to dismiss the Plan Stamping claim. MiTek's plans simply cannot be read as making legal what is illegal, or as even attempting to make legal what is illegal. The appellate court erred in reaching these conclusions and this error must be reversed if Washington citizens are to be protected as RCW 18.43.070 requires.

RESPECTFULLY SUBMITTED this 13 day of July, 2018.

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APPENDIX A

COURT OF APPEALS, DIVISION III
FOR THE STATE OF WASHINGTON

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. 344355-III APPELLANTS/CROSS-RESPONDENTS' OBJECTION TO AMERICAN COUNCIL OF ENGINEERING COMPANIES OF WASHINGTON'S MOTION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF

Under RAP 10.6, permission to file an amicus curiae brief is allowed "only if all parties consent, or if the filing of the brief would assist the appellate court." Appellants/Cross-Respondents Terry Schilling and Julie Schilling and Artisan, Inc. (Schilling and Artisan) do not consent to the filing of the offered amicus curiae brief, and further believe the offered brief would not assist the court, because it is provably focused on issues already decided by binding Supreme Court precedent.

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1. **There are no "common interests" which Respondents/Cross-Appellant ProBuild Company, LLC (ProBuild) or Respondents/Cross-Appellant MiTek Industries, Inc. (MiTek) share with amicus curiae American Council of Engineering Companies of Washington (ACEC-WA).**

An internet search confirms that neither ProBuild nor MiTek are members of ACEC-WA. Similarly, in none of the briefing filed and nowhere in the record on appeal, is it claimed that ProBuild corporately or MiTek corporately is a licensed engineer. No tort claim against a licensed engineer is set forth by Schilling and Artisan's complaint and no licensed engineer has been sued as a defendant. There is accordingly no ACEC-WA "member interest" at issue in this case, as the motion wrongly suggests.

2. **The main amicus curiae brief issues have already been decided by the Washington Supreme Court and Courts of Appeal.**

As noted, Schilling and Artisan have not filed a tort claim against MiTek engineer Palmer Tingey, nor have they instituted a disciplinary proceeding against Mr. Tingey before the Washington Board of Registration for Professional Engineers and Land Surveyors. Accordingly, the legal issues which the ACEC-WA now wants to address, are not part of this case.

The different legal issue which is presented by the appeal is whether a non-engineer employer can be liable under Washington's Consumer Protection Act (CPA) if, as a business practice, the employer asks its professionally licensed employees to illegally affix their stamp, because this deceptive practice allows it to sell millions of dollars of truss connection metal products to customers.

This particular legal issue has already been decided by the Washington Supreme Court in *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013).

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The facts in *Klem, supra,* are indistinguishable from those now before the court in this case. In *Klem, supra,* a defendant's licensed employee notaries were trained as a business practice, to affix a false notarization stamp on their employer's foreclosure documents.

> This notice of sale was one of apparently many foreclosure documents that were falsely notarized by Quality and its employees around that time. There was considerable evidence that falsifying notarizations was a common practice, and one that Quality employees had been trained to do. While Quality employees steadfastly refused to speculate under oath how or why this practice existed, the evidence suggests that documents were falsely dated and notarized to expedite foreclosures and thereby keep their clients, the lenders, beneficiaries, and other participants in the secondary market for mortgage debt happy with their work.

Klem at 777. [Emphasis added.]

Despite affixing illegal notary stamps, in *Klem, supra,* the notaries were not personally sued for acting illegally. Similarly, no disciplinary proceeding was brought by the plaintiff against any notary for violating Washington's notary statutes or notary professional conduct rules. (*See,* RCW 42.44.010 *et. seq.* or RCW 18.235.005 *et. seq.*).

Instead, suit was filed only against the notaries' employer, Quality Loan Services (Quality), alleging CPA liability, because Quality had knowingly required its employees to affix false notary stamps to its business records, to facilitate its business, and to keep its customers "happy."

Addressing the facts, the *Klem* court stated as follows:

> Klem submitted evidence that Quality had a practice of having a notary predate notices of sale. This is often a part of the practice known as "robo-signing." Specifically, in this case, it appears that at least from 2004-2007, Quality notaries regularly falsified the date on which documents were signed.

Klem at 792. [Emphasis added.]

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Identically, in this case, the record evidence shows that MiTek, for years, has had its licensed employees engage in "plan stamping," a practice by which an engineer affixes his/her stamp to design plans which someone else has prepared and which, in violation of law, he/she has not "directly supervised."

Pertinent to this case, the *Klem* court found as follows:

> This court does not take lightly the importance of a notary's obligation to verify the signor's identity and the date of signing by having the signature performed in the notary's presence. [Citation.] As amicus Washington State Bar Association notes, "The proper functioning of the legal system depends on the honesty of notaries who are entrusted to verify the signing of legally significant documents." Amicus Br. of WSBA at 1. While the legislature has not yet declared that it is a per se unfair or deceptive act for the purposes of the CPA, it is a crime in both Washington and California for a notary to falsely notarize a document.

Klem at 793. [Emphasis added.]

In this case, Schilling and Artisan believe that RCW 18.43.010 differently does substantively make a violation of RCW 18.43.070 (engineer stamping requirements) a per se unfair or deceptive act. Even if this court believes that is not the case, however, at worst, identically to Washington's notary statutes, RCW 18.43.120 specifically says that "Any person who shall violate any of the provisions of this chapter shall be guilty of a gross misdemeanor." (Compare with RCW 42.44.160). In short, like a false notary stamp, it is also a crime for an engineer to falsely stamp plan documents in Washington.

In addition to false stamping being criminal conduct, the *Klem* court stated as follows:

> A notary jurat is a public trust and allowing them to be deployed to validate false information strikes at the bedrock of our system.

. . .

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> [In *Werner v. Werner*, 84 Wn.2d 360, 367, 526 P.2d 370 (1974).] We noted that without the notary's acknowledgment, the documents would not have been valid. *Id.* at 366, 526 P.2d 370.

Klem at 793-794. [Emphasis added.]

The same facts exist in this case. Specifically, both the public and government building officials place great reliance (and necessarily so) upon the legal and factual accuracy of an affixed engineer's stamp on plans. Similarly, the appeal record before this court identically confirms that without an engineer's stamp being affixed to the ProBuild plans, the trusses could not have been legally used, as engineer-stamped truss plans are a Union Gap Building Code requirement.

Consistent with its accurate analysis of the facts and law, the *Klem* court eventually and dispositively held as follows:

> We hold that the act of false dating by a notary employee of the trustee in a nonjudicial foreclosure is an unfair or deceptive act or practice and satisfies the first three elements under the Washington CPA.

Klem at 794-795. [Emphasis added.]

It is this exact issue and no other, which is in part presented by this case. Here, MiTek, the employer, had its licensed engineer (just as Quality had its licensed notary) affix a false stamp as a continuing business practice in order to sell its products.

It follows that completely independent of any tort claims which an injured party may or may not have as against a licensed professional, the Supreme Court in *Klem, supra,* has dispositively ruled that a professional's employer can be liable under Washington's CPA for knowingly having its licensed employees affix an illegal stamp to legally required business documents.

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Ignoring this binding case law precedent, ACEC-WA now wrongly argues that if an engineer affixes a false stamp to plans in violation of RCW 18.43.070 at his employer's direction, the employer is not independently liable under Washington's CPA and instead, a plaintiff's sole recourse is to sue the at-fault engineer or to bring a disciplinary proceeding against that engineer if they can, and these are the only legal claims which Washington law allows. The Supreme Court's decision in *Klem, supra,* disagrees. It has decided this issue and ruled that is simply not the case. Accordingly, the rejected legal arguments now set forth in the proposed amicus curiae brief are not "helpful" and for this sound reason, the motion seeking to file the irrelevant and legally incorrect brief should be denied.

3. ACEC-WA's CPA arguments have also been resolved by Washington courts.

The ACEC-WA implies that only two ways exist to prove CPA liability. This is incorrect. After first noting that the case *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986), should not be read as holding that there are only two ways for a CPA claim to be established (*Klem* at 785), the *Klem* court next stated as follows:

> Any doubt should have been put to rest in *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 48, 204 P.3d 885 (2009), where we discussed both per se and unregulated unfair or deceptive acts. The primary issue in *Panag* was whether a collection agency that used deceptive mailers could be liable to debtors.
>
> . . .
>
> Given that there is "no limit to human inventiveness," courts as well as legislatures must be able to determine whether an act or practice is unfair or deceptive to fulfill the protective purposes of the CPA.

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> To resolve any confusion, we hold that a claim under the Washington CPA may be predicated upon a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest.
>
> We note in passing that an act or practice can be unfair without being deceptive, and Klem and the Washington State attorney general also argue it is sufficient that Quality's conduct was unfair. They point out that the CPA itself declares "unfair acts or deceptive acts or practices" are sufficient to satisfy the acts or practices prong of a CPA action. The "or" between "unfair" and "deceptive" is disjunctive. Washington's CPA is modeled after federal consumer protection laws and incorporates many of [sic] provisions of the federal acts.
>
> . . .
>
> Our statute clearly establishes that unfair acts or practices can be the basis for a CPA action. [Citation.] This case does not give us an opportunity to explore in detail how to define unfair acts for the purposes of our CPA. That must wait for another day.

Klem at 786 – 788. [Emphasis added].

Ignoring the multiple ways in which a CPA claim may be proven, the ACEC-WA next overbroadly and wrongly asserts that for a "per se" CPA violation to exist, a statute must contain as "magic language" that *i.e.*, "a violation of this chapter constitutes an unfair or deceptive act or practice in the conduct of trade or commerce under RCW 19.86." (Amicus Curiae Brief p. 8).

Contrary to brief claims however, statutes which do not contain this language and which instead simply affirm that an at-issue statute "affects the public interest," have also been held to meet the "per se" violation test. (*See, e.g.*, RCW 48.01.030; *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn.App. 323, 2 P.3d 1029 (2000)).

Correctly analyzed, what Washington courts have held is that an act which is illegal and against public policy, because it violates a statute which states it was enacted for the protection of the public, can be a "per se" violation. *See, State v. Reader's Digest Ass'n*, 81 Wn.2d 259,

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501 P.2d 290 (1972); *State v. Ralph Williams' NW Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 553 P.2d 423 (1976) n. 19).

In S*alois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 581 P.2d 1349 (1978), the court confirmed:

> Some statutes contain a specific mandate that commission of a prohibited act shall be a violation of the Consumer Protection Act *e.g.* RCW 19.16.440 governing collection agencies. There is no such connecting link between the insurance code to which defendant is subject and the Consumer Protection Act.
>
> However, RCW 48.01.030 is a clear declaration that there is a public interest in the business of insurance and that is to be conducted in good faith and free from deception.
>
> . . .
>
> Likewise, defendant's actions were against public policy in view of the legislature's mandate of a public interest in the business of insurance. It follows, and we conclude, that the defendant's actions were a per se violation of RCW 19.86.020.

Salois at 359. [Emphasis added.]

Carefully read, the Supreme Court in its later *Hangman, supra,* decision, does not say that a statute must expressly state that a violation also constitutes a concurrent violation of RCW 19.86, *et seq.,* for there to be "per se" liability. Instead, the court more generally held as follows:

> The per se method requires a showing that a statute has been violated which contains a specific legislative declaration of public interest impact.

Hangman at 790. [Emphasis added.]

This focus on whether a statute more broadly declares a "public interest" purpose makes sense, because quite a number of "public interest" statutes were already in existence when the CPA was first enacted in 1961. One such statute is the at-issue statute RCW 18.43.010, which

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was enacted in 1947. It states in pertinent part: "In order to safeguard life, health, and property, and to promote the public welfare..."

Obviously, in 1947, the legislature could not cross-reference that a violation of RCW 18.43.010 *et seq.* would equally violate CPA statutes RCW 19.86.010, *et seq.*, because those statutes did not yet exist.

Accordingly and logically, Washington courts look to see whether a statute declares that it is enacted in the "public interest," and not just at whether RCW 19.86 is explicitly cross-referenced.

The ACEC-WA is correct that since 1961 (as Washington statutes are newly enacted or substantively amended), the legislature has been expressly cross-referencing RCW 19.86.020 when appropriate. Because not all statutes intended to protect the public interest are post-1961 enactments, however, the broader public interest legal test (which has not been overruled) still applies.

Properly applying this test to RCW 18.43.010, and given the clear pronouncement of its purpose "to promote the public welfare," the trial court was correct in finding that a "per se" CPA violation was legally established.

Furthermore, even if a "per se" violation did not exist, sufficient undisputed record facts were given to the superior court, so as to make its finding that the defendants violated the CPA as a matter of law, still a correct decision.

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Specifically, to establish as a matter of law that an unfair or deceptive CPA act occurred, it is not necessary that a plaintiff show the act in question was "intended to deceive." *Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 406, 759 P.2d 418 (1988).

Washington courts have also confirmed as a matter of law, that even accurate information can be misleading for CPA claim purposes.

> Even accurate information may be deceptive if there is a representation, omission or practice that is likely to mislead" a reasonable consumer.

Panag at 50, quoting *Sw. Sunsites, Inc. v. Fed. Trade Comm'n,* 785 F.2d 1431, 1435 (9th Cir. 1986). [Emphasis added.] *See also, State v. Kaiser*, 161 Wn.App. 705, 719, 254 P.3d 850 (2011).

Similarly, proof that a defendant affirmatively made an untrue statement of fact is not required to prove a CPA violation. *Stephens v. Omni Ins. Co.*, 138 Wn.App. 151, 167, 159 P.3d 10 (2007).

In yet another case addressing the CPA, *Deegan v. Windermere Real Estate/Center-Isle Inc.*, 197 Wn.App. 875, 391 P.3d 582 (2017), the Court of Appeals recently confirmed that a CPA violation can be properly proven simply by showing "a knowing failure to reveal something of material importance, since that conduct is deceptive within the CPA."

> An unfair or deceptive act or practice need not be *intended* to deceive--it need only have 'the *capacity* to deceive a substantial portion of the public.' A "knowing failure to reveal something of material importance is 'deceptive' within the CPA.

Windermere at 885. [Emphasis added.]

The court in *Windermere* went on to hold:

> Even accurate information may be deceptive if there is a representation, omission or practice that is likely to mislead.

Windermere at 890. [Emphasis added.]

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Here, the record shows there were both false affirmative statements made by MiTek (which ProBuild adopted for sales purposes) and omissions to disclose material facts.

One false affirmative misrepresentation made was the written statement that the truss plans had been prepared by Mr. Tingey, after exercising his "Direct Supervision." The record before this court instead shows Tingey did not prepare the plans and it is undisputed he exercised no "direct supervision" as Washington's statutes and WACs define that term.

Some material facts which ProBuild and MiTek omitted to disclose, are that actually the relevant plans were created by ProBuild's non-licensed employee, and that plan specifications used had not been "Directly Supervised" by any licensed engineer as the plans and the affixed engineer stamp wrongly represented.

Because Schilling and Artisan clearly established a multitude of unfair and deceptive acts, the superior court, applying existing CPA case law precedent, could decide as a matter of law, whether the CPA was violated, and properly did so. *Leingang v. Pierce Cnty. Med. Bureau*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997); *Kaiser, supra.*

Finally, the amicus curiae brief wrongly argues that even though the delivered plans affirmatively misrepresented that Tingey had prepared them by exercising "Direct Supervision," and even though the affixed stamp falsely supported that misrepresentation (because it could not be lawfully affixed without Direct Supervision having taken place), these acts are not CPA actionable, because the plans referenced a 12 TCDL specification, and this information should have *i.e.* caused Schilling and Artisan to investigate whether "plan stamping" had occurred.

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In *Windermere, supra,* however, the Court of Appeals specifically rejected the argument that a "duty of inquiry" applies to CPA claims.

> The listing agents here argue *Douglas* imposes a duty of inquiry on Deegan and O'Grady for purposes of the CPA and supports the CR 12(b)(6) dismissal. We disagree.
>
> . . .
>
> Specifically, the duty to inquire as applied in *Douglas* is based on fraudulent concealment case law that defects are not actionable if they are apparent or would be disclosed by a careful, reasonable inspection. The listing agents provide no compelling authority that the CPA imposes such a duty to inquire. *Douglas* does not stand for the proposition that the CPA imposes a duty of inquiry.

Windermere at 888-889.

It follows that again, the amicus curiae brief is not "helpful" in its CPA arguments, because it misstates decided Washington law about what a plaintiff's CPA duties are.

ACEC-WA also appears to imply by its brief, that the post-sale language placed by MiTek upon the truss plans, together with the stated 12 TCDL specification, should combined have somehow informed Schilling and Artisan that Mr. Tingey (despite the affixed stamp) was not representing the truss specifications chosen were actually building and contract compliant. In short, it is suggested that these facts should have otherwise "notified" Schilling and Artisan that ProBuild and MiTek might be trying to disclaim or avoid their statutory "Direct Supervision" stamp obligations.

The *Windermere* court resolved this question too, however. Addressing the issue of when the *Windermere* plaintiffs would be deemed to have knowledge that the defendants had violated the law by not making the necessary disclosures, the court held as follows:

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> Washington law generally presumes that people know the applicable laws. But that doctrine is not applied to frustrate the purpose of the discovery rule. Where knowledge of the law itself is critical to learning of an omission of material fact, the discovery rule operates to toll the statute of limitations until a plaintiff knows or reasonably should have learned about the omitted material facts.

Windermere at 893. [Emphasis added.]

Here, Schilling and Artisan, by plan receipt, did not know that engineer Tingey had exercised no "Direct Supervision" over plan creation, as falsely represented by the MiTek plans. Instead, Schilling and Artisan first learned about these omitted material facts (which otherwise established this violation of law) when post-lawsuit discovery disclosed this illegal conduct. It is therefore, legally wrong for ACEC-WA to argue that any information communicated by the truss plans, otherwise precludes or bars Schilling and Artisan's CPA claims.

CONCLUSION

The filed appeal and cross-appeal have already presented this court with a number of legal issues to resolve. To now add others, which are not legally presented by either the underlying facts or by filed lawsuit claims, is not helpful, it is distracting. Here, no tort claim against an engineer has been plead. No disciplinary action against an engineer has been filed. Because there is no tort claim, there is no need for this court to *i.e.,* analyze or apply the "independent duty doctrine" (which is why none of the briefs filed by the appealing parties have so far raised or argued about this doctrine on appeal).

As confirmed by this Supreme Court in *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009), even unregulated conduct can violate the CPA, if it is otherwise proven to be deceptive.

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> By broadly prohibiting "unfair or deceptive acts or practices in the conduct of any trade or commerce," RCW 19.86.020, the legislature intended to provide sufficient flexibility to reach unfair or deceptive conduct that inventively evades regulation. The deceptive use of traditional debt collection methods to induce someone to remand payment of an alleged debt is precisely the kind of "inventive" unfair and deceptive activity the CPA was intended to reach.

Panag at 49. [Emphasis added.]

The non-tort CPA issue which this case presents (*i.e.*, can an employer be liable under the CPA for knowingly requiring as a business practice, that its licensed professionals illegally affix their statutory stamp to business documents) has already been decided by the Washington Supreme Court in *Klem, supra.*

Because engineer tort and disciplinary liability are not issues before this court on appeal, and since *Klem, supra,* specifically affirms that Schilling and Artisan can bring those CPA claims against ProBuild and MiTek which have been alleged, there is nothing "new" or "helpful" which the offered amicus curiae brief now provides.

Further, with regard to CPA law, have the parties not already adequately briefed this law for the court? If so, why is an amicus curiae brief further discussing the CPA either needed or helpful? Furthermore, ProBuild and MiTek have yet to file their final briefs. Therefore, any CPA argument which they think is correctly presented by the ACEC-WA's proposed brief can instead be presented by their final briefs, without need for amicus curiae assistance or intervention.

For all of these reasons, the current motion should be denied.

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Alternatively, if for any reason the Commissioner is not persuaded that the motion should be denied, then Schilling and Artisan would ask that they be given the opportunity to more fully respond to the proposed amicus curiae brief and that a briefing schedule be reasonably set for that purpose.

RESPECTFULLY SUBMITTED this 13 day of July, 2017.

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APPENDIX B

COURT OF APPEALS, DIVISION III
FOR THE STATE OF WASHINGTON

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. 344355-III

APPELLANTS/CROSS-RESPONDENTS' OPPOSITION TO AMERICAN COUNCIL OF ENGINEERING COMPANIES OF WASHINGTON'S MOTION TO MODIFY RULING DENYING PERMISSION TO FILE *AMICUS CURIAE* BRIEF

I. FACT MISSTATEMENTS

Contrary to the brief of American Council of Engineering Companies of Washington (ACEC-WA), respondent/cross-appellant MiTek Industries, Inc. (MiTek) had direct communications with appellants/cross-respondents Terry and Julie Schilling (Schilling) and Artisan, Inc. (Artisan). Specifically, MiTek sent the standard truss plans, which constitute a business document bearing MiTek's letterhead, to Schilling and Artisan, knowing that business document had to accompany the physical trusses. At the top of each truss plan design page, the

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"Schilling project" is specifically referenced. Even if it is true that, as MiTek claims, ProBuild placed that designation on the truss plans, ProBuild did so as an agent for MiTek, because ProBuild would have needed MiTek's authority to put new information on the business document bearing MiTek's letterhead.

ACEC-WA wrongly states that MiTek was not required to verify the suitability of the designed trusses for the Schilling home. This is untrue because MiTek was admittedly hired in part, to affix an engineering stamp of a Washington licensed engineer, to the truss designs. Before that stamp could be legally affixed, Washington statutes required that the stamping engineer "Directly Supervise" (*i.e.*, verify the suitability) of the chosen truss parameters which were being used to manufacture this unique set of trusses intended for a single custom built home. Because the legal obligation to exercise "Direct Supervision" is imposed by statute, no private contract could legally reduce or limit that obligation.

ACEC-WA misstates the complaint's Consumer Protection Act (CPA) claim against MiTek. Correctly stated, MiTek engaged in a CPA violation when it sent "plan stamped" truss designs without its employees doing the "Direct Supervision" work Washington statutes required before a stamp may be affixed. An additional deceptive act was that MiTek, on the plans, misrepresented that its employees exercised "Direct Supervision" over plan creation. In short, MiTek is liable for engaging in CPA violating deceptive acts and practices, regardless of whether the plans eventually stamped were or were not suitable for the Schilling home.[1]

[1] Although Schilling believes the designs were not contract correct, proof of this fact is not required to establish MiTek's deceptive conduct CPA liability.

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MiTek is not an engineer, it is a business. Because MiTek is not an engineer, the Rules of Conduct for Professional Engineers do not apply to it. Nevertheless, as a business, MiTek cannot engage in deceptive business practices. One deceptive business practice which violates the CPA is to have employee engineers "plan stamp" truss plans, which the engineer did not "Directly Supervise."

Fortunately, the Washington Supreme Court has dispositively decided this CPA issue as raised by the Schilling suit. In the case *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013), the Supreme Court specifically held that an employer cannot, as a business practice, ask its professionally licensed employees to violate Washington law, by wrongfully affixing a stamp (in that case a Notary stamp) as doing so makes the employer liable under the CPA for engaging in a deceptive act and practice.

II. ARGUMENT

No malpractice claim against a licensed engineer is presented by the Schilling suit or by this appeal. No disciplinary proceeding has been brought against a licensed engineer nor has any disciplinary remedy been sought. Accordingly, the State Board of Registration for Professional Engineers and Land Surveyors (Board) has no jurisdiction over the lawsuit disputes or claims alleged. It is Washington courts, not the Board, which determines whether a business is or is not liable under the CPA for engaging in "deceptive acts."

Although the *Klem* court did not find the employer to be "per se" liable, it did find that under the facts, the employer was liable as a matter of law for a CPA violation. (*i.e.*, A Notary affixing a false stamp in violation of statutory obligations was a deceptive act and violated the

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CPA as a matter of law.) Similarly here, a licensed engineer affixed his stamp to plans in violation of statutory law, because his employer's (MiTek) business practices required him to do so. These facts applied to the ruling and holding of *Klem,* are directly on point. As a matter of law, this MiTek business practice violated the CPA.

ACEC-WA is wrong to suggest that on appeal, how and/or on what basis the trial court ruled is at all relevant. As this court instead well knows, summary judgment orders are reviewed by the appellate court de novo. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Because review is de novo, the well settled appellate rule has long been that an appellate court may affirm the trial court's decision on any basis within the record. *Davidson Series & Assocs. v. City of Kirkland*, 159 Wn.App. 616, 624, 246 P.3d 822 (2011); *Titan Earthwork LLC v. City of Federal Way*, 2017 WL 4543673 (August 14, 2017).

Because *Klem, supra*, is directly on point both legally and factually, and the record facts show this, the Commissioner was correct, the MiTek CPA issue presented by this case has been decided by the Supreme Court, the different non-CPA issues which are not in the case and which ACEC-WA now wants to raise, are neither relevant nor helpful. Therefore, denying permission to file the amicus brief was the correct decision.

III. CONCLUSION

MiTek and ProBuild are wealthy well-connected companies. MiTek, in particular, is one of the principal members of the non-governmental private industry group Truss Plate Institute, Inc. (ANSI/TPI). (*See,* Exhibit 1 attached to this opposition memorandum, incorporated by reference). In 2002, this private industry group proposed a set of advisory rules which, if

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adopted, would have potentially allowed engineers to "plan stamp." The authors of the Uniform Business Code (UBC) and International Residential Code (IRC) refused to adopt or incorporate by reference into either of those legal codes, the ANSI/TPI proposed exculpatory rules.

Before the trial court, MiTek and ProBuild both tried to argue that the ANSI/TPI proposed exculpatory rules should apply to defeat the Schilling claims even though as noted, they were never adopted or incorporated into either code, nor could any case be found throughout the United States in which a court had found these proposed private organization rules to have any legal effect whatsoever.

ACEC-WA now says that it is the interests of individually licensed engineers, not MiTek, which it seeks to represent. Logically, however, if that were the case, ACEC-WA would and should be differently arguing as follows:

> Our licensed engineer members spent years and thousands of dollars to acquire this specialized training necessary to be able to determine whether proposed custom design plans are safe and project correct. By statute, our members are required to exercise due diligence before affixing an engineer's stamp to make sure that the plan design criteria chosen is both safe and project correct. It is both reckless and absurd for MiTek to argue that unlicensed and untrained homeowners, contractors, or even local building officials have the ability to do a design plan specification review.
>
> Rather than pay our members to do the statutorily required "Direct Supervision" review, MiTek (and ProBuild) instead wants to save what amounts to millions of dollars by having our members simply and illegally "plan stamp" truss plan designs that unlicensed draftsmen of indeterminate education and experience have instead prepared. This employment-required illegal practice is unsafe and deceptive and it is a business practice a member should not be forced to engage in. Because MiTek, the entity employing our licensee members is the party directly responsible for the employment-required deceptive act and practice, we support the Schilling's effort to impose CPA liability upon MiTek and to require MiTek to now allow and pay our licensee members to do the design review work for which they were trained and which Washington's engineering statutes require.

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It is simply not in our licensed engineer members' best interests for an employer (here MiTek) to be able to direct them to violate the law.

Why ACEC-WA is not making this argument and instead arguing that an employer with powerful industry connections (MiTek) should be allowed to instruct licensed engineers to illegally plan stamp, is to say the least, puzzling. The fact remains, however, that Schilling and Artisan have not sued or brought a disciplinary proceeding against a licensed engineer member of ACEC-WA, they instead brought a CPA claim against non-engineer company MiTek and the merits and validity of that claim have already been decided by the Washington Supreme Court through its *Klem* case decision.

RESPECTFULLY SUBMITTED this 3rd day of November, 2017.

LARSON BERG & PERKINS PLLC

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James A. Perkins, WSBA #13330
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EXHIBIT 1

TRUSS PLATE INSTITUTE MEMBERS

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CHEROKEE METAL PRODUCTS
P.O. Box 1520
Morristown, Tennessee 37816

COMPUTRUS, INC.
10370 Hemet Street, Suite 200
Riverside, California 92503

EAGLE METAL PRODUCTS
P.O. Box 1267
Mabank, Texas 75147

MITEK INDUSTRIES, INC.
14515 N. Outer Forty Rd., Ste. 300
Chesterfield, Missouri 63017

ROBBINS MANUFACTURING CO.
P.O. Box 17939
Tampa, Florida 33682

TEE-LOK CORPORATION
818 Soundside Road
Edenton, North Carolina 27932

TRUSWAL SYSTEMS CORPORATION
1101 N. Great Southwest Parkway
Arlington, Texas 76011

TRUSS PLATE INSTITUTE

583 D'Onofrio Dr., Suite 200
Madison, WI 53719
(608) 833-5900

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Appellate Court Case Title:	Terry Schilling, et ux, et al v. ProBuild Company, LLC et al
Superior Court Case Number:	12-2-00537-0

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APPENDIX C

The Court of Appeals
of the
State of Washington
Division III

FILED

SEP 26 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

TERRY SCHILLING, et ux., et al.,

Respondent,

v.

PROBUILD COMPANY, LLC,

Appellant.

No. 34435-5-III

COMMISSIONER'S RULING

American Council of Engineering Companies of Washington (American) seeks permission to file its amicus brief in the appeal and cross-appeal of various Orders the superior court entered in Terry Schilling's, et ux., et al., (Schillings) suit against ProBuild Company, LLC and MiTek Industries, Inc. The Schillings oppose American's motion. The issue is whether the amicus brief will assist the Court to decide the appeal and cross-appeal. *See* RAP 10.6(a).

The Schillings contracted with Artisan, Inc. for construction of a custom home that

included a requirement that Artisan use custom trusses to support a tile roof. The Schillings agreed to purchase the custom trusses direct and deliver them to Artisan to install. To that end, the Schillings entered into a contract with ProBuild Company, LLC. ProBuild used a software product that MiTek had developed to design the trusses. ProBuild then contracted with MiTek to construct the trusses. The completed trusses contained the approval stamp of MiTek's engineer.

The walls of the Schillings' home eventually developed cracks. They sued ProBuild and MiTek, and alleged that the completed trusses did not meet the minimum load requirement for their roof. Among other things, they specifically asserted that MiTek had engaged in illegal stamping of the trusses and that ProBuild knew it. I.e., RCW 18.43.070 states that "stamping shall constitute a certification" that the engineer had direct supervision in manufacture of the product and that the product met the requirements of the statute. Here, the engineer's only involvement was to verify that the truss design was minimally adequate to meet the lowest code standards.

On November 6, 2014, the superior court granted the Schillings' motion for partial summary judgment and held that ProBuild and MiTek had violated the Consumer Protection Act. The court held that MiTek had violated the Act when it disregarded a statute that required direct supervision of a product before it affixed its engineer's stamp of approval on the trusses. And, that violation constituted a *per se* violation of the

Consumer Protection Act. On October 26, 2015, the court granted the Schillings' motion for partial summary judgment that MiTek had violated an express warranty to Schilling, and that ProBuild had violated the warranty of merchantability. In 2016, the court ultimately held that the statutes of limitation barred all of the Schillings' causes of action. The Schillings appealed, and ProBuild and MiTek cross-appealed.

In support of its motion to file an amicus brief, American cites its mission, which is 'to advance and promote the overall business environment for its members in the engineering and professional design community . . .." Motion at 1. And, when the superior court ruled that MiTek *per se* violated the Consumer Protection Act and, therefore was liable for the Schillings' and Artisan's economic losses, it violated Washington law that holds professional rules of conduct do not give rise to a private cause of action because the State Board has exclusive authority to decide and enforce such rules.

The Schillings and Artisan respond that the amicus brief would not assist the appellate court because the Washington Supreme Court has decided the Consumer Protection Act issue the amicus raises. Response at 1. *See Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013). The Schillings have not sued the engineer, and its appeal raises the issue of whether a *non-licensed* employer can be liable under the CPA if, as a business practice, the employer asks its professionally licensed employees to

violate Washington law and thereby allow its product to be sold to Washington consumers. In *Klem,* the defendant's practice was to have its licensed employee notaries affix a false notarization stamp on the employer's foreclosure documents. But plaintiffs had not sued the notaries. Nor had the licensing board moved to discipline the notaries. The court held at 794-95 that "the act of falsely dating by a notary employee of the trustee in a nonjudicial foreclosure is an unfair or deception act or practice and satisfies the first three elements under the Washington CPA."

In light of the holding in *Klem*, American has not persuaded this Court that its brief will assist the panel of judges assigned to decide this case. Accordingly,

IT IS ORDERED, the motion to file an amicus brief is denied.

Monica Wasson
Commissioner

APPENDIX D

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

TERRY SCHILLING, et ux., et al.	)	No. 34435-5-III
	)	
Respondent,	)	
	)	ORDER DENYING
v.	)	MOTION TO MODIFY
	)	COMMISSIONER'S RULING
PROBUILD COMPANY, LLC,	)	
	)	
Appellant.	)	

Having considered American Council of Engineering Companies of Washington's motion to modify the commissioner's ruling of September 26, 2017, the responses thereto, and the file and record herein;

IT IS ORDERED the motion to modify the commissioner's ruling is denied.

PANEL: Judges Lawrence-Berrey, Siddoway and Pennell

FOR THE COURT:

George Fearing

GEORGE FEARING
CHIEF JUDGE

APPENDIX E

WESTLAW

West's Revised Code of Washington Annotated
Title 18. Businesses and Professions (Refs & Annos)
Chapter 18.43. Engineers and Land Surveyors (Refs & Annos)

18.43.020. Definitions

West's Revised Code of Washington Annotated Title 18. Businesses and Professions Effective: July 1, 2008 *(Approx. 3 pages)*

Effective: July 1, 2008

West's RCWA 18.43.020

18.43.020. Definitions

Currentness

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Engineer" means a professional engineer as defined in this section.

(2) "Professional engineer" means a person who, by reason of his or her special knowledge of the mathematical and physical sciences and the principles and methods of engineering analysis and design, acquired by professional education and practical experience, is qualified to practice engineering as defined in this section, as attested by his or her legal registration as a professional engineer.

(3) "Engineer-in-training" means a candidate who: (a) Has satisfied the experience requirements in RCW 18.43.040 for registration; (b) has successfully passed the examination in the fundamental engineering subjects; and (c) is enrolled by the board as an engineer-in-training.

(4) "Engineering" means the "practice of engineering" as defined in this section.

(5)(a) "Practice of engineering" means any professional service or creative work requiring engineering education, training, and experience and the application of special knowledge of the mathematical, physical, and engineering sciences to such professional services or creative work as consultation, investigation, evaluation, planning, design, and supervision of construction for the purpose of assuring compliance with specifications and design, in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works, or projects.

(b) A person shall be construed to practice or offer to practice engineering, within the meaning and intent of this chapter, who practices any branch of the profession of engineering; or who, by verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself or herself to be a professional engineer, or through the use of some other title implies that he or she is a professional engineer; or who holds himself or herself out as able to perform, or who does perform, any engineering service or work or any other professional service designated by the practitioner or recognized by educational authorities as engineering.

(c) The practice of engineering does not include the work ordinarily performed by persons who operate or maintain machinery or equipment.

(6) "Land surveyor" means a professional land surveyor.

(7) "Professional land surveyor" means a person who, by reason of his or her special knowledge of the mathematical and physical sciences and principles and practices of land surveying, which is acquired by professional education and practical experience, is qualified to practice land surveying and as attested to by his or her legal registration as a professional land surveyor.

NOTES OF DECISIONS (2)

(8) "Land-surveyor-in-training" means a candidate who: (a) Has satisfied the experience requirements in RCW 18.43.040 for registration; (b) successfully passes the examination in the fundamental land surveying subjects; and (c) is enrolled by the board as a land-surveyor-in-training.

(9) "Practice of land surveying" means assuming responsible charge of the surveying of land for the establishment of corners, lines, boundaries, and monuments, the laying out and subdivision of land, the defining and locating of corners, lines, boundaries, and monuments of land after they have been established, the survey of land areas for the purpose of determining the topography thereof, the making of topographical delineations and the preparing of maps and accurate records thereof, when the proper performance of such services requires technical knowledge and skill.

(10) "Board" means the state board of registration for professional engineers and land surveyors, provided for by this chapter.

(11) "Significant structures" include:

(a) Hazardous facilities, defined as: Structures housing, supporting, or containing sufficient quantities of explosive substances to be of danger to the safety of the public if released;

(b) Essential facilities that have a ground area of more than five thousand square feet and are more than twenty feet in mean roof height above average ground level. Essential facilities are defined as:

(i) Hospitals and other medical facilities having surgery and emergency treatment areas;

(ii) Fire and police stations;

(iii) Tanks or other structures containing, housing, or supporting water or fire suppression material or equipment required for the protection of essential or hazardous facilities or special occupancy structures;

(iv) Emergency vehicle shelters and garages;

(v) Structures and equipment in emergency preparedness centers;

(vi) Standby power-generating equipment for essential facilities;

(vii) Structures and equipment in government communication centers and other facilities requiring emergency response;

(viii) Aviation control towers, air traffic control centers, and emergency aircraft hangars; and

(ix) Buildings and other structures having critical national defense functions;

(c) Structures exceeding one hundred feet in height above average ground level;

(d) Buildings that are customarily occupied by human beings and are five stories or more above average ground level;

(e) Bridges having a total span of more than two hundred feet and piers having a surface area greater than ten thousand square feet; and

(f) Buildings and other structures where more than three hundred people congregate in one area.

Credits

[2007 c 193 § 2, eff. July 1, 2008; 1995 c 356 § 1; 1991 c 19 § 1; 1947 c 283 § 2; Rem. Supp. 1947 § 8306-22. Prior: 1935 c 167 § 1; RRS § 8306-1.]

Notes of Decisions (2)

West's RCWA 18.43.020, WA ST 18.43.020
Current with all effective legislation from the 2018 Regular Session of the Washington Legislature.

End of Document

West's Revised Code of Washington Annotated
Title 18. Businesses and Professions (Refs & Annos)
Chapter 18.43. Engineers and Land Surveyors (Refs & Annos)

West's RCWA 18.43.070

18.43.070. Certificates and seals

Effective: July 22, 2011
Currentness

The director of licensing shall issue a certificate of registration upon payment of a registration fee as provided for in this chapter, to any applicant who, in the opinion of the board, has satisfactorily met all the requirements of this chapter. In case of a registered engineer, the certificate shall authorize the practice of "professional engineering" and specify the branch or branches in which specialized, and in case of a registered land surveyor, the certificate shall authorize the practice of "land surveying."

In case of engineer-in-training, the certificate shall state that the applicant has successfully passed the examination in fundamental engineering subjects required by the board and has been enrolled as an "engineer-in-training." In case of land-surveyor-in-training, the certificate shall state that the applicant has successfully passed the examination in fundamental surveying subjects required by the board and has been enrolled as a "land-surveyor-in-training." All certificates of registration shall show the full name of the registrant, shall have a serial number, and shall be signed by the chair and the secretary of the board and by the director of licensing.

The issuance of a certificate of registration by the director of licensing shall be prima facie evidence that the person named therein is entitled to all the rights and privileges of a registered professional engineer or a registered land surveyor, while the said certificate remains unrevoked and unexpired.

Each registrant hereunder shall upon registration obtain a seal of the design authorized by the board, bearing the registrant's name and the legend "registered professional engineer" or "registered land surveyor." Plans, specifications, plats, and reports prepared by the registrant shall be signed, dated, and stamped with said seal or facsimile thereof. Such signature and stamping shall constitute a certification by the registrant that the same was prepared by or under his or her direct supervision and that to his or her knowledge and belief the same was prepared in accordance with the requirements of the statute. It shall be unlawful for anyone to stamp or seal any document with said seal or facsimile thereof after the certificate of registrant named thereon has expired or been revoked, unless said certificate shall have been renewed or reissued.

Credits

[2011 c 336 § 482, eff. July 22, 2011; 1995 c 356 § 4; 1991 c 19 § 5; 1959 c 297 § 4; 1947 c 283 § 10; Rem. Supp. 1947 § 8306-27. Prior: 1935 c 167 §§ 8, 13; RRS § 8306-8, 13.]

West's RCWA 18.43.070, WA ST 18.43.070
Current with all effective legislation from the 2018 Regular Session of the Washington Legislature.

End of Document

SUPREME COURT
FOR THE STATE OF WASHINGTON

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. 95955-2 DECLARATION OF SERVICE

On said day below, I sent via Federal Express for service, a true and correct copy of Terry and Julie Schilling and Artisan Inc.'s Reply to MiTek's Answer to Petition for Review to:

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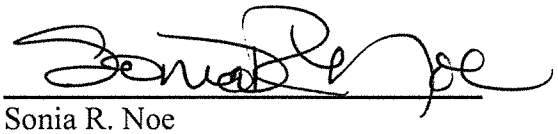
(Attorney for Respondent MiTek)

I declare under the penalty of perjury under Washington State laws, the foregoing is true and correct.

SIGNED this 13th day of July, 2018, at Yakima, WA.



Sonia R. Noe

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July 13, 2018 - 2:07 PM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	Terry Schilling, et al. v. ProBuild Company, LLC, et al.
Superior Court Case Number:	12-2-00537-0

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