

NO. 45839-0-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

FILED
COURT OF APPEALS
DIVISION II
2015 JAN 12 PM 2:54
STATE OF WASHINGTON
BY  DEPUTY

THE POINTE AT WESTPORT HARBOR HOMEOWNERS' ASSOCIATION
Washington non-profit corporation,
Appellant,

vs.

DODSON-DUUS, LLC, a Washington limited liability company; HARBOR RESORT HOLDINGS, LLC, a Washington limited liability company; GABE DUUS and JANE DOE DUUS, husband and wife, individually and their marital community; HARBOR RESORT PROPERTIES, INC., a closely-held Washington corporation; MARK DODSON and DESIREE DODSON, husband and wife, individually and their marital community; EDWARD DODSON, JR. and ANN GRIMES DODSON, husband and wife, individually and their marital community; DOE AFFILIATES 1-20; DOE PRINCIPALS 1-10; DOE CONTRACTORS 1-20; DOE DECLARANT AGENTS 1-10; and DOE TRANSFEREES 1-50,

Defendants,

and

ENGINEERS NORTHWEST, INC., P.S., a Washington professional services corporation; THEODORE D. McDONALD and JANE DOE McDONALD, husband and wife, and their marital community,

Appellants,

and

STEVEN P. ELKINS ARCHITECTS, INC., P.S., a Washington professional services corporation; INTEGRITY STRUCTURES, LLC, a Washington limited liability company,

Defendants.

APPEAL FROM GRAYS HARBOR COUNTY SUPERIOR COURT

Honorable Gordon L. Godfrey, Judge

Honorable David L. Edwards, Judge

BRIEF OF APPELLANTS

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

REED McCLURE
By Marilee C. Erickson WSBA #16144
Attorneys for Appellants

701 Pike Street, Suite 1800
Seattle, WA 98101-3929
(206) 624-7990

LEE SMART, P.S., INC.
By Steven G. Wraith WSBA# 17364
Aaron P. Gilligan WSBA #29614
Attorneys for Appellants

TABLE OF CONTENTS

	Page
I. NATURE OF CASE	1
II. ASSIGNMENTS OF ERROR	2
III. STATEMENT OF ISSUES	4
IV. STATEMENT OF FACTS.....	5
A. PLANS FOR THE POINTE.....	5
B. DUUS AND INTEGRITY STRUCTURE’S ROLE DURING CONSTRUCTION	7
C. THE LAWSUIT	8
D. ENW’S MOTION FOR SUMMARY JUDGMENT OF DISMISSAL BASED ON THE INDEPENDENT DUTY DOCTRINE	9
E. COVENANT JUDGMENTS AGAINST DEVELOPER AND GENERAL CONTRACTOR	10
F. PRE-TRIAL MOTIONS IN LIMINE	11
G. DISPUTED ISSUES FOR TRIAL	11
H. TESTIMONY AND EVIDENCE AT TRIAL	12
I. THE HOA’S EXPERT, MR. PAUSTIAN.....	14
J. ENW’S EXPERT, PANOS TROCHALAKIS.....	15
K. EVIDENCE REGARDING FLOOR SHEATHING CHANGE	16
L. STEEL COLUMNS AND BEAMS	19
M. HOLD DOWNS	20
N. EVIDENCE ABOUT INTEGRITY STRUCTURES.....	21
O. COST ESTIMATES	23

P.	JURY INSTRUCTIONS	23
Q.	PROPOSED AND ACTUAL SPECIAL VERDICT	24
R.	ENTRY OF JUDGMENT AND POST-JUDGMENT MOTION	25
V.	ARGUMENT.....	27
A.	THE SUPERIOR COURT ERRED IN DENYING ENW’S MOTION TO DISMISS BASED ON THE INDEPENDENT DUTY DOCTRINE	27
1.	Standard of Review.....	27
2.	The HOA’s Claims against ENW Were Barred under the Independent Duty Doctrine.....	28
3.	The Professional Negligence Claim Against ENW Should Have Been Dismissed Because ENW Did Not Owe a Legal Duty to Dodson-Duus or the HOA and the HOA Could Not Establish Damages.....	30
B.	THE DENIAL OF THE LIMITATION OF MR. PAUSTIAN’S TESTIMONY WAS AN ABUSE OF DISCRETION WHICH MATERIALLY AND ADVERSELY AFFECTED THE CASE OUTCOME	35
C.	PREJUDICIAL ERRORS IN THE JURY INSTRUCTIONS REQUIRE REVERSAL	37
1.	The Failure to Give ENW’s Proposed Instructions No. 10, 12, 13, 16, and 18 Denied ENW the Ability to Argue Its Theory of the Case and Made the Instructions Misleading.....	38
2.	The Court’s Instruction No. 11 on Proximate Cause Misapplied the WPIs, Misstated the Law, and Was Misleading.....	40

3.	The Court’s Instruction No. 18 on Measure of Damages Misapplied the WPIs, Was a Misstatement of Law, and a Comment on the Evidence.....	40
4.	Instructions No. 15 and 16 Added an Immaterial Issue to the Case and Impermissibly Emphasized the HOA’s Theory of the Case	42
5.	The Instructions Improperly Emphasized the HOA’s Case.....	42
D.	BECAUSE THERE WAS EVIDENCE TO SUPPORT FAULT AGAINST ELKINS AND INTEGRITY STRUCTURES, IT WAS REVERSIBLE ERROR TO OMIT THEM FROM THE SPECIAL VERDICT FORM	43
E.	THE SUPERIOR COURT’S INTERJECTION DURING WITNESS TESTIMONY AND JURY INSTRUCTIONS CONSTITUTED IMPERMISSIBLE COMMENTS ON THE EVIDENCE.....	44
F.	ENW WAS SEVERALLY LIABLE ONLY BECAUSE CORSON SWIFT WAS NOT AN ENTITY AGAINST WHOM JUDGMENT COULD BE ENTERED	50
G.	THE JUDGMENT ENTERED AGAINST ELKINS IS INCONSISTENT WITH THE JURY’S VERDICT AND SHOULD BE CORRECTED	52
VI.	CONCLUSION	53
APPENDIX A		
Court’s Instructions to Jury (CP 1427-39)		
APPENDIX B		
ENW Proposed Jury Instructions (CP 1377-1401)		
APPENDIX C		
ENW Proposed Verdict Form (CP 1712-14)		

TABLE OF AUTHORITIES

Washington Cases

	Page
<i>Affiliated FM Ins. Co. v. LTK Consulting Serv., Inc.</i> 170 Wn.2d 442, 243 P.3 521 (2010).....	31, 32
<i>Alejandre v. Bull</i> , 159 Wn.2d 674, 153 P.2d 864 (2007).....	28
<i>Anfinson v. FedEx Ground Package Sys., Inc.</i> , 174 Wn.2d 851, 281 P.3d 289 (2012).....	38
<i>Atherton Condominium Apartment-Owners Ass'n Board of Directors v. Blume Dev. Co.</i> , 115 Wn.2d 506, 799 P.2d 250 (1990).....	29
<i>Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1</i> , 124 Wn.2d 816, 881 P.2d 986 (1994).....	28, 29
<i>Bodin v. City of Stanwood</i> , 130 Wn.2d 726, 927 P.2d 240 (1996).....	38
<i>Brown v. Dahl</i> , 41 Wn. App. 565, 705 P.2d 781 (1985).....	42
<i>Chadwick Farms Owners Ass'n v. FHC, LLC</i> , 166 Wn.2d 178, 207 P.3d 1251 (2009).....	51
<i>Coggle v. Snow</i> , 56 Wn. App. 499, 784 P.2d 554 (1990).....	35, 36
<i>Eastwood v. Horse Harbor Fund</i> , 170 Wn.2d 380, 241 P.3d 1256 (2010).....	28, 29, 30
<i>Egede-Nissen v. Crystal Mountain, Inc.</i> , 93 Wn.2d 127, 606 P.2d 1214 (1980).....	45
<i>Heitfeld v. Benevolent and Protective Order of Keglers</i> , 36 Wn.2d 685, 220 P.2d 655 (1950).....	44, 45
<i>Houk v. Best Dev. & Constr. Co.</i> , 179 Wn. App. 908, 322 P.3d 29 (2014).....	52

<i>In re the Detention of R.W.</i> , 98 Wn. App. 140, 988 P.2d 1034 (1999).....	49
<i>In re Parentage of C.M.F.</i> , 179 Wn.2d 411, 314 P.3d 1109 (2013).....	51
<i>Jarrard v. Seifert</i> , 22 Wn. App. 476, 591 P.2d 809 (1979)	31
<i>Kaplan v. Nw. Mut. Life Ins. Co.</i> 115 Wn. App. 791, 65 P.2d 16 (2003), <i>rev. denied</i> , 151 Wn.2d 1037 (2004).....	27
<i>Kottler v. State</i> , 136 Wn.2d 437, 963 P.2d 834 (1998).....	50
<i>Loyland v. Stone & Webster Eng'g Corp.</i> , 9 Wn. App. 682, 514 P.2d 184 (1973),), <i>rev. denied</i> , 83 Wn.2d 1007 (1974).....	31
<i>Michaels v. CH2M Hill, Inc.</i> , 171 Wn.2d 587, 257 P.3d 532 (2011)	31
<i>Munson v. Gunder</i> , 70 Wash. 629, 127 P. 193 (1912).....	42
<i>Presidential Estates Apartment Assocs. v. Barrett</i> , 129 Wn.2d 320, 917 P.2d 100 (1996).....	53
<i>Queen City Farms v. Central Nat'l Ins. Co.</i> , 126 Wn.2d 50, 882 P.2d 703 (1994).....	36
<i>Samuelson v. Freeman</i> , 75 Wn.2d 894, 454 P.2d 406 (1969)	42, 43
<i>State v. Jackman</i> , 156 Wn.2d 736, 132 P.3d 136 (2006)	46
<i>State v. Jackson</i> , 83 Wash. 514, 145 P. 470 (1915).....	45
<i>State v. Lane</i> , 125 Wn.2d 825, 889 P.2d 929 (1995)	41, 42, 45
<i>State v. Ra</i> , 144 Wn. App. 688, 175 P.3d 609, <i>rev. denied</i> , 164 Wn.2d 1016 (2008).....	44
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971)	36
<i>Stiley v. Block</i> , 130 Wn.2d 486, 925 P.2d 194 (1996)	38
<i>Washburn v. Beatt Equip. Co.</i> , 120 Wn.2d 24, 840 P.2d 860 (1992).....	50

Constitutions

CONST. art. IV §, 16	41, 44
----------------------------	--------

Statutes

Tort Reform Act	
RCW 4.22.070	43, 50
RCW 4.22.070(1)(b)	50, 51
Former RCW 25.15.303, Laws of 2006 ch. 325, § 1	50, 51
RCW 25.15.303	25, 51
Condominium Act	
RCW ch. 64.34.....	8

Rules and Regulations

CR 50	3, 26
CR 59	3, 4, 26
CR 60	4, 27
CR 60(a).....	53

Other Authorities

WPI 1.01	41
WPI 1.02	41
WPI 15.02	40
WPI 15.04	40
WPI 20.01	23
WPI 20.05	39
WPI 30.13	40

6 WASH. PRACTICE, *Washington Pattern Jury Instructions* at 202
(6th ed. 2012).....40

6 WASH. PRACTICE, *Washington Pattern Jury Instructions* at 318
(6th ed. 2012).....40

066050.000001/509042

I. NATURE OF CASE

This case involves claims by a condominium homeowners' association ("HOA") against a structural engineering firm (Engineers Northwest and Theodore McDonald "ENW") for potential property damage to a condominium project. There was no actual damage to the condominium complex. The HOA had no contract with ENW and sued ENW directly for economic damages.

Despite the fact that the HOA was suing only for economic damages and could not establish any duty that ENW owed to it or the developer, the superior court refused to dismiss the case. The case proceeded to a jury trial on a professional negligence claim against ENW and a breach of contract claim against the architect. The HOA had no evidence of actual damages. The architect did not put on a defense. The superior court omitted the general contractor and architect from the special verdict form.

ENW appeals asking this Court to reverse and enter judgment as a matter of law dismissing the HOA's claims in their entirety. Alternatively, ENW asks this Court to reverse and remand for a new trial with proper evidentiary rulings and jury instructions. Also, ENW asks this Court to correct the error in the judgment amounts.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in denying ENW's motion for summary judgment and motion seeking clarification on the independent duty doctrine and allowing the case to proceed to trial on a professional negligence claim. (CP 528-31, 534, 1695-96, 1698-1700)

2. The superior court erred and abused its discretion in denying ENW's motion to limit the scope of testimony for plaintiff's expert, James Paustian, and denying the objections to his testimony. (CP 1402-04; RP 266-67)

3. The superior court erred and abused its discretion and limited ENW's ability to argue its theories to the jury by refusing to give ENW's instructions regarding the claims of the parties and allocation of fault. (CP 1377-1401; RP 1047-52)

4. The superior court erred in giving jury instruction no. 11. (CP 1433; RP 1048)¹

5. The superior court erred in giving jury instruction no. 15. (CP 1434; RP 1050)

6. The superior court erred in giving jury instruction no. 16. (CP 1434; RP 1050)

¹ A complete copy of the court's instructions to the jury is attached at Appendix A.

7. The superior court erred in giving jury instruction no. 18. (CP 1435-36; RP 1051)

8. The superior court erred in refusing to give ENW's proposed jury instruction no. 10. (CP 1393; RP 1052)²

9. The superior court erred in refusing to give ENW's proposed jury instruction no. 12. (CP 1394; RP 1052)

10. The superior court erred in refusing to give ENW's proposed jury instruction no. 13. (CP 1394-96; RP 1051)

11. The superior court erred in refusing to give ENW's proposed jury instruction no. 16. (CP 1394-96; RP 1051)

12. The superior court erred in refusing to give ENW's proposed jury instruction no. 18. (CP 1394-96; RP 1051)

13. The superior court erred in omitting Elkins and Integrity Structures from the special verdict. (CP 1712-14; RP 1054-55)³

14. The superior court erred in entering judgment against ENW on the jury verdict. (CP 1533-35)

15. The superior court erred in entering judgment which held ENW and Corson Swift jointly and severally liable. (CP 1533-35)

16. The superior court erred in denying ENW's CR 50 and CR

² Copies of ENW's proposed jury instructions is attached as Appendices B.

³ A copy of ENW's proposed special verdict form is attached as Appendix C.

59 motion for judgment as a matter of law and/or new trial. (CP 1658-60)

17. The superior court erred in denying ENW's CR 60 motion to amend the judgment. (CP 1939-41)

III. STATEMENT OF ISSUES

1. Should this Court reverse and enter judgment as a matter of law dismissing all claims against ENW because the HOA's claims are barred by the independent duty doctrine?

2. Should this Court reverse and enter judgment as a matter of law dismissing all claims against ENW because ENW did not owe any duty to the HOA to support a professional negligence action?

3. Should this Court reverse and enter judgment as a matter of law dismissing all claims against ENW because if the HOA had standing sue for professional negligence, the claim failed because the HOA had no proof of actual damages, an essential element of a negligence claim?

4. Should this Court reverse and remand for a new trial because ENW was denied a fair trial when the superior court allowed the HOA's expert, Mr. Paustian, to offer speculative and unfounded opinion regarding seismology and the risks posed by earthquakes?

5. Should this Court reverse and remand for a new trial because ENW was denied a fair trial when the superior court failed to instruct the jury on ENW's claims?

6. Should this Court reverse and remand for a new trial because ENW was denied a fair trial when the special verdict form omitted Integrity Structures and Elkins as at-fault entities so the jury could not allocate fault to them?

7. Should this Court reverse and remand for a new trial because ENW was denied a fair trial when the superior court impermissibly commented on the evidence?

8. Should this Court correct and modify the judgment to reflect that ENW is severally liable and not jointly and severally liable with Corson Swift because Corson Swift is an administratively dissolved entity which cannot have judgment entered against it?

9. Should this Court correct the judgment entered against Elkins to be \$100,000, consistent with the jury's verdict?

IV. STATEMENT OF FACTS

A. PLANS FOR THE POINTE.

Dodson-Duus, LLC developed a three-story condominium building called The Pointe at Westport Harbor ("The Pointe"). (RP 60, 86, 589) The developer, Dodson-Duus, contracted with Steven P. Elkins Architects, Inc. ("Elkins") to design the condominium complex. (RP 589-90; Trial Ex. 37) The contract with the architect included design services and structural

engineering. (RP 590-91; Ex. 37; CP 368)⁴

Architect Elkins contracted with Engineers Northwest (“ENW”) for structural engineering services. (RP 420; 699-700; Ex. 38) Elkins prepared the architectural plans. (RP 699; Ex. 6) ENW prepared the structural calculations and drawings. (RP 420) Theodore McDonald was the primary engineer on the project. (RP 698)

In August 2006, ENW issued a set of structural plans for the project. (RP 427, 431-32) The plans were submitted to the City of Westport for a permit. (Ex. 6; RP 426-27) The City retained CWA Consultants to review the plans. (RP 434) In October 2006, CWA requested revisions and additional work on the shear wall calculations and drag strut specifications. (RP 434-35; Ex. 11) CWA requested that ENW finish the lateral calculations and show how the loads were to be transferred from the 2nd floor to the shear walls. (RP 435; Ex. 11) Lateral analysis determines the sideways forces from earthquake and/or wind. (RP 436-37) From the lateral analysis, the structural engineer determines how strong the diaphragms and shear walls must be. (RP 437)

The City of Westport requested supplemental structural plans. (RP 434; Ex. 11) The supplemental plans were approved and specified ¾”

⁴ Harbor Resort Properties was the developer entity named in the contract. Dodson assumed the contract. (RP 590-91; Ex. 37)

floor sheathing. ENW issued a construction set of structural plans with the ¾" floor sheathing specification. The construction set of the plans were dated November 16, 2006. (RP 426-27; Ex. 6)

B. DUUS AND INTEGRITY STRUCTURE'S ROLE DURING CONSTRUCTION.

Gabe Duus was a member of Dodson-Duus, the developer. (RP 584-86) Dodson-Duus contracted with Integrity Structures as general contractor for the construction of the project. (RP 585) Mr. Duus is also a principal of Integrity Structures. (RP 584-85)

As owner of Integrity Structures, Mr. Duus supervised the construction of The Pointe. (RP 586-87) He visited the construction site weekly. (RP 587) He supervised Integrity Structures' superintendent and met with Integrity's project manager. (RP 587) Mr. Duus met with other project owners to discuss the project's progress. (RP 587) He was involved in the construction changes to the project. (RP 587) Integrity subcontracted with Corson Swift Builders for framing. (RP 597)

ENW did not have a contract with Dodson-Duus. (RP 592) Dodson-Duus did not select the structural engineer. (RP 591-92) Mr. Duus learned that ENW had been selected by Elkins. (RP 591-92) Mr. Duus did not recall meeting with ENW; he did have e-mail and telephone communications with ENW. (RP 593-94)

Mr. McDonald's plans included a note for shop drawings. (RP 708) The note required that the structural engineer would review the prints after the contractor's review. (RP 708) The structural engineer reviews shop drawings to ensure that the contractors understand what was intended by the structural engineer drawings. (RP 702) During the project, some shop drawings were submitted for Mr. McDonald's review. (RP 702) Any drawings reviewed by Mr. McDonald had the engineer's initials and ENW's stamp approving the change. (RP 706-08)

C. THE LAWSUIT.

The Homeowners Association of The Pointe ("HOA") sued Dodson-Duus for violation of the warranty of quality under the Washington Condominium Act. (CP 1-27; RP 619) The HOA also sued Integrity Structures. (RP 621-22) The HOA and Dodson-Duus settled their dispute. (CP 651-53; RP 619-20) As part of the settlement, Dodson-Duus assigned to the HOA its rights against ENW, Elkins Architect, and others. (CP 536; RP 620)

In August 2011, the HOA filed an amended complaint suing ENW for negligence. (CP 28-60) The HOA alleged that ENW's failure to comply with code requirements created structural deficiencies made the building "unreasonably dangerous." (CP 54-55) The HOA alleged damages of the cost of determining and repairing defects (CP 56)

In the amended complaint, the HOA also sued Integrity Structures (the general contractor) and Corson Swift (the framers) for negligence. (CP 34, 55-56) The HOA alleged Integrity and Corson breached their duty to install all structural components consistent with the project plans, to identify problems with the plans and drawings, and to seek clarification from the design professionals. (CP 55) The HOA alleged Corson and Integrity's breach of duty proximately caused the project to be unreasonably dangerous to the inhabitants. (CP 55)

Dodson-Duus cross-claimed against ENW for "negligence, contract, and/or equitable or implied immunity." (CP 108-09) ENW answered and denied the HOA's allegations. (CP 100-01) ENW asserted cross-claims against Dodson-Duus and Corson Swift. (CP 104) Elkins, the architect, was added as a defendant in the second amended complaint filed in November 2012. (CP 535-47)

D. ENW'S MOTION FOR SUMMARY JUDGMENT OF DISMISSAL BASED ON THE INDEPENDENT DUTY DOCTRINE.

ENW moved for summary judgment seeking dismissal of the HOA's lawsuit because the claims were barred by the independent duty doctrine and there was no damage. (CP 280-97) ENW also moved for summary judgment dismissing Dodson-Duus's cross-claims on the basis that ENW owed no duty to Dodson-Duus and had not contract with

Dodson-Duus. (CP 280-97)

Dodson-Duus opposed ENW's summary judgment arguing its cross-claim against ENW was for equitable or implied indemnity. It did not address ENW's request to dismiss the breach of contract and negligence claims. (CP 386-93; 9/10/12 RP 10)

In September, 2012, the superior court denied ENW's motion for summary judgment based on the independent duty doctrine. (CP 1695-96)

The court concluded there were factual issues to be resolved at trial.

The basis of the Motion revolves around issues of tort claims, negligence, and breach of contract. Without an overstatement of these issues between the parties and other entities, this motion brings into question factual issues regarding a determination of judicial equity to be resolved.

(CP 1695) ENW moved for clarification. (CP 528-31) The superior court entered an order clarifying that all grounds for ENW's summary judgment motion were denied. (CP 1698-1700)

E. COVENANT JUDGMENTS AGAINST DEVELOPER AND GENERAL CONTRACTOR.

On September 30, 2013, the HOA entered a judgment against Dodson-Duus in the principal amount of \$5,300,000. (CP 1255-58) The HOA also entered a judgment against Integrity Structures in the amount of \$4,100,000. (CP 1259-61) Elkins Architect filed bankruptcy on June 7, 2013. (CP 648-50) Elkins did not participate in the trial. (RP 52-53)

F. PRE-TRIAL MOTIONS IN LIMINE.

ENW moved to limit the testimony from the HOA's structural engineering expert, James Paustian. (CP 1299-1313) ENW argued that because Paustian had not performed analyses, his opinions that the building would collapse and was an imminent threat to life and property were speculative. (CP 1301-02) The superior court denied ENW's motion to limit Paustian's testimony. (CP 1402-04)

G. DISPUTED ISSUES FOR TRIAL.

The case was tried to jury from October 29 to November 7, 2013. (CP 1410, 1426) The HOA and ENW were the only parties involved in the trial. (RP 52-53, 55-56) ENW presented testimony from Mr. McDonald; Robert Raichle, an ENW engineer; James Franzen, the HOA board president; Panos Trochalakis, a structural engineer expert; Brad Kaul, a representative of Elkins Architects; and Richard Witte of McBride Construction. (RP 668, 677, 693, 728, 752, 915)

The HOA presented testimony from Mr. Franzen, Mr. McDonald, Mr. Duus, the developer and principal of Integrity Structures; James Paustian, a structural engineer expert and employee of Pacific Engineering Technology, and Wes Snowden of Charter Construction. (CP 59-60, 95, 351, 419, 467, 584) Both parties presented excerpts of deposition testimony of David Schubert and Marvin Moore regarding the change to

the joists and thickness of the floor sheathing. (RP 569-70, 720-23)

Because the superior court allowed the HOA to pursue a negligence claim, ENW presented evidence regarding liability and damages. ENW disputed there was actual damage to The Pointe. ENW conceded that based on omissions in ENW's plans, it would cost \$550,000 to make The Pointe comply with the 2003 building code. (RP 1124-26) ENW disputed any responsibility for the change in the floor sheathing and widening of the joist spaces, any perceived problems with the structural steel, and the lack of holds downs.

The HOA's theory was ENW breached the standard of care of a design professional by failing to properly design the lateral force resisting system and to specify corrosion resistant paint for the structural steel members of the building. The HOA also claimed that ENW had approved the change to the joist and floor sheathing without increasing the nail length to achieve the proper connection. The HOA presented evidence that although there was no actual damage, it would cost \$1,657,111 to retrofit The Pointe to comply with the building code.

H. TESTIMONY AND EVIDENCE AT TRIAL.

The Pointe is a one-building, three-story condominium located in Westport on a peninsula between the marina and the ocean. (RP 59-60, 64-65) The north side of the complex is two stories with parking below. (RP

61-62) The HOA Board hired David Bach and Associates to do a reserve and warranty study. (RP 68-69)

The Bach study identified potential problems including water intrusion of roof; leaking window flashing, and water on the garage acoustical ceiling tiles. (RP 70) The garage ceiling leak related to a roof flashing gap. (RP 83) When Mr. Franzen, the HOA president, removed the acoustical tile, he saw rust on the beam (RP 59, 71) He did not know whether the rust was a potential issue so the HOA pursued additional investigations. (RP 72) It hired James Paustian of Pacific Engineering Technologies (“PET”). (RP 72) PET and Randy Kent of Charter Construction performed a weather proofing analysis. (RP 73-74) PET concluded the water proofing was faulty, the elevator was rusted, and steel beams and columns were rusting. (RP 74-75) The corroded fixtures and doors did not relate to any structural issue. (RP 82)

PET then performed an investigation focused on structural issues. (RP 76) Structural issues were found. (RP 76-77) The HOA had already pursued and settled its claim against the Dodson-Duus for the weatherproofing issues. (RP 77, 84, 354-55) As part of the settlement, Dodson-Duus also assigned to the HOA its rights against the architect and structural engineer. (RP 77)

Mr. Franzen testified that there was “a very serious life threatening

situation . . . for not only the occupants, but for the structure itself.” (RP 78-79) The structural issues do not restrict occupancy. (RP 79)

I. THE HOA’S EXPERT, MR. PAUSTIAN.

James Paustian of PET testified for the HOA. (RP 95-96) Mr. Paustian is a structural engineer with experience evaluating and determining scope of repair for damaged buildings. (RP 99, 100-01) Mr. Paustian investigated that building envelope system at The Pointe and prepared a scope of repair. (RP 107) He also investigated and prepared a scope of repair for structural deficiencies found The Pointe. (RP 107)

Mr. Paustian opined that the structural engineer was negligent in preparing the lateral force resisting system and failing to specify rust-inhibiting paint on the steel framing. (RP 108-09) He testified the second floor diaphragm was improperly designed because blocking and appropriate nail spacing was not specified in the design. (RP 115) The second floor is missing drag struts or collectors. (RP 116) The shear walls are deficient because the through-floor connectors are inadequate to resist an earthquake load. (RP 116, 125) The shear wall connectors were worsened when the floor sheathing was increased. (RP 116-17) The specification for nailing some of shear walls is deficient and some of the anchor bolts are deficient. (RP 117)

Mr. Paustian testified that as a result of the ENW errors, the

buildings will perform poorly in an earthquake. (RP 118-19) He testified that the north half of the building is in danger of partial collapse. (RP 119) Over ENW's objection, Mr. Paustian offered opinions about the size and type of earthquakes that might occur in Westport. (RP 266-67) He testified that Westport is in a fault area where earthquakes of magnitude 8 to 9 occur. (RP 266-67) Mr. Paustian was allowed to testify about the extent of damage to buildings in an earthquake. (RP 296-97)

J. ENW'S EXPERT, PANOS TROCHALAKIS.

Mr. Trochalakis, a licensed and experienced structural engineer, was ENW's expert. (RP 753) He reviewed records and visited the site. (RP 774, 777) He performed his own lateral calculations and compared them to ENW's calculations. (RP 777-78) Many of ENW's calculations were conservative, i.e. in excess of code requirements. (RP 778)

Mr. Trochalakis testified there is a valid lateral force resisting system from roof to foundation that has performed adequately. (RP 781-82) Some areas did not strengthen. (RP 800) He determined retrofits were necessary to make the lateral force resistance system comply with the building code. (RP 790, 842) He agreed that ENW omitted drag struts, the way the plywood was attached to the framing, and anchor bolt connections to some of the foundation. (RP 836-37) Mr. Trochalakis believed that ENW had some responsibility for the code compliance

deficiencies in the shear wall top connections. (RP 836)

Mr. Trochalakis prepared a scope of repair to the shear walls, the 2nd floor diaphragm, and the drag struts. (RP 790-92, 797) He worked with McBride Construction in determining the cost. (RP 814-15, 935-36) Mr. Trochalakis's scope of repair accomplished the same as Mr. Paustian's scope of repair but with less disruption and cost. (RP 794-95)

Mr. Trochalakis did not address the thicker floor sheathing because his scope of repair was limited to deficiencies shown in the engineer permit drawings. (RP 802) Mr. Trochalakis testified ENW was not responsible for the change in the floor sheathing. (RP 911-12)

K. EVIDENCE REGARDING FLOOR SHEATHING CHANGE.

ENW disputed that it had approved any change to the floor sheathing. (RP 465, 1126-27) Mr. McDonald did not formally approve the change in the thickness of the floor sheathing. (RP 465) Mr. McDonald did not know until the lawsuit that the thicker 1 1/8 inch plywood flooring had been installed. (RP 719)

Mr. McDonald was contacted about a proposal to change the floor sheathing and joists. (RP 462) He received an e-mail from Marvin Moore of the joist supplier who was proposing a different joist spaced wider with thicker plywood flooring. (RP 447-48, 462, 709-10) Mr. McDonald called Mr. Moore to get more information about the proposal. (RP 709-10) He

told Mr. Moore that there were some issues but the change was structurally acceptable. (RP 448, 461, 709-10) The additional cost for the thicker plywood flooring would require approval from the owner and developer. (RP 448) The thicker plywood flooring also required the architect's approval because it added height to the building. (RP 448, 710)

Mr. McDonald spoke with Brad Kaul, an architect at Elkins. (RP 448, 463, 710-11) Mr. McDonald said the architect would need to approve the change. (RP 448) Mr. McDonald expected there would be a formal review and approval before any change was made. (RP 449, 711) He expected to receive shop drawings from the joist manufacturer, as required on the plans. (RP 716)

Mr. McDonald never received any follow-up request. (RP 711) He thought the change was still under consideration. (RP 464) He never received any submission for a design change. (RP 712-14) If he had received a request for a change, Mr. McDonald would have needed to do additional work. (RP 712) He would have been required to re-do the drawings: delete some of the 16-inch on center joists and redistribute evenly the spacing of the joists (19 inches or greater). (RP 713, 715)

Mr. McDonald did not recall ever speaking with any general contractor representative about the proposed change to the flooring. (RP 463, 710-11) He did not recall hearing from any owner or contractor

representative on the subject. (RP 463)

Mr. Duus testified that ENW approved the floor joist change based on seeing the e-mail from the manufacturer to ENW. (RP 611) Mr. Duus recalled a phone conversation with someone whose name he could not recall but whom he believed was the structural engineer for the project.

(RP 612-13) Mr. Duus testified:

I remember a conversation with them saying it was okay and they were fine with it. And then we ordered the plywood for the floor system, because of the difference in the plywood, I wouldn't have ordered \$40,000 or so of plywood without having approval of – from an engineer saying that this will work, this is fine.

(RP 612) Mr. Duus said he told the person that the flooring thickness would be changed. (RP 613)

Brad Kaul never received a request from Integrity to change the floor joist system or increase the floor sheathing thickness. (RP 735) He never authorized a change to the joist system or floor sheathing. (RP 735-36, 750) No change was submitted to the City of Westport for approval. (RP 750-51) The floor sheathing was designed to be ¾” thick and the design was never changed. (RP 736) Mr. Kaul, like Mr. McDonald, did not know that the floor sheathing had changed until after the building was constructed. (RP 740-41)

Mr. Trochalakis testified that the nails have some value despite the

thicker floor sheathing. (RP 813) Had the ¾” floor sheathing been installed, there would not have been any problem. (RP 813-14)

L. STEEL COLUMNS AND BEAMS.

Mr. McDonald believed that the steel was contained in the building so he did not design any measures to protect the structural steel framing from corrosion. (RP 453-54) The architectural plans for the garage called for a Gypsum wall board ceiling. (RP 454) Mr. McDonald acknowledged that while the garage was not a controlled environment, the ceiling was not directly exposed to weather so the Gypsum would protect the steel beams from most moisture. (RP 457-58)

The project architect testified that the Gypsum garage ceiling was intended to protect the structural steel from water vapor. (RP 744-45) He acknowledged that to act as a vapor barrier paint would be needed and no paint was specified in Elkins’ plans. (RP 745)

The structural steel beams in the garage were to have Gypsum sheathing in addition to the Gypsum ceiling. (RP 751) The plans called for the steel beams to be enclosed and the architect did not specify any paint for the steel beams. (RP 751)

Mr. Trochalakis testified that if steel is wrapped in an enclosed space away from the weather, no marine grade paint is required. (RP 803-04) The architect, not the engineer, typically specifies the details for

structural steel. (RP 805) The architectural drawings show both the steel beams and the steel columns completely wrapped. (RP 806, 912-13) The steel beams also had two layers of exterior grade Gypsum board which prevents moisture getting into the cavity. (RP 806) The as-built conditions of the beams and columns do not comply with the architectural drawings. (RP 807-08)

Mr. Duus acknowledged that architectural plans called for wrapping the steel columns in Gypsum. (RP 639-40) He admitted that as constructed, the steel columns were not wrapped in Gypsum. (RP 640) Mr. Duus also acknowledged that there was no written document authorizing deletion of the Gypsum wrap of the steel columns. (RP 640)

The HOA claimed that the steel framing and the bolted connections are “rapidly corroding.” (RP 120) According to Mr. Paustian, the fix for the steel was to expose the steel framing, clean off the rust, and apply rust-inhibiting paint. (RP 120)

M. HOLD DOWNS.

Although the structural plans called for hold downs, hold downs were not installed in some locations. (RP 640-41) ENW acknowledged that the structural design did not include hold downs. (RP 450-51) Mr. McDonald testified he expects an experienced and reasonably prudent contractor to ask questions if plans are missing any details. (RP 451)

Corson Swift, the framing subcontractor selected by Integrity, was responsible for the hold downs and the structural steel. (RP 597, 599, 602-03, 616) If the plan lacked details, Mr. Duus testified that he would expect Corson Swift to try to figure out what to do. (RP 615-16) Corson Swift failed to install hold downs in some locations. (RP 641)

Integrity's superintendent and Mr. Duus reviewed all of Corson Swift's work. (RP 600, 601, 625-26) The superintendent and Mr. Duus addressed things they did not like and things that were not done according to the plans. (RP 600, 601)

Integrity fired Corson Swift and had another framer finish the job. (RP 599, 625) Mr. Duus testified that towards the end of the project "it was obvious [Corson Swift] were making too many mistakes and [Integrity] would be better off to finish [the project]." (RP 625) Mr. Duus admitted that the floor joist/floor sheathing change was not formally submitted to ENW. (RP 631)

N. EVIDENCE ABOUT INTEGRITY STRUCTURES.

Mr. Duus testified he was not aware that the HOA's expert concluded that Integrity did not meet the standard of care for contractors in aspects of the project. (RP 624) Integrity fired its project manager, Mick Martin. (RP 624, 626-27) Integrity was not happy with Martin's skills. (RP 626-27) Integrity had two different project superintendents: Jim Foust

and Brian McMillan. (RP 627) Foust, the project superintendent during most of the framing, was fired for poor scheduling abilities and organizational skills. (RP 627)

Integrity was obligated to construct the project consistent with the plans. (RP 632) The plans required detailed shop drawings be submitted to the engineer for approval. (RP 629-30; Ex. 6) Integrity did not formally submit the floor joist/floor sheathing change to ENW. (RP 631) Mr. Duus acknowledged that the plans specified the steel columns on the walkways would be wrapped in Gypsum. (RP 640) As built, no Gypsum wrapped the columns. (RP 640) There was no written authorization deleting the Gypsum wrap. (RP 640)

Mr. Trochalakis, ENW's expert, testified that when a contractor is not aware or lacks the information about how to install hold downs, the contractor should ask for more information. (RP 811) There was no evidence that the contractor asked for further information. *Id.*

The court prohibited, over ENW's objection, evidence regarding the framing contractor's failure to seek clarification or further details about the nail spacing. (RP 641-47) Architect Kaul testified the plans required any owner or contractor changes be submitted to the architect for approval. (RP 731-32; Ex. 42)

Integrity Structures purchased Ilevel Trus Joist products from Oso

Lumber. (RP 565) David Schubert, the Trus Joist representative, believed that one or a combination of the design professionals (i.e. architect and/or engineer) approved the change for the floor sheathing. (RP 565-66) Mr. Schubert was not certain and acknowledged it was possible that Integrity Structures could have decided to make the change. (RP 569-70)

O. COST ESTIMATES.

McBride Construction prepared a cost estimate based on Mr. Trochalakis's scope of repair. (RP 814-15, 946-47; Ex. 67, Ex. 68) Richard Witte, McBride's president, testified about the estimate. (RP 915, 921) McBride's final cost estimate totaled \$547,857. (RP 989; Ex. 67) The McBride estimate used a 5% contingency. (RP 816, 953-54) The initial estimate had a 10% contingency. (RP 817, 953)

Charter Construction prepared a cost estimate based on Mr. Paustian's scope of repair opinion. (RP 485-86, 524) Wes Snowden of Charter Construction testified Charter spent 181 hours preparing the estimate for the structural repair cost estimate. (RP 507) Charter's estimate assumes the structural repairs will take six months at a cost of \$1,657,111. (RP 510, 526) Charter's estimate included a 10% contingency. (RP 555)

P. JURY INSTRUCTIONS.

ENW proposed instruction no. 13 was based on WPI 20.01. It set forth the issues in the case. (CP 1394-95) The court refused to give

ENW's proposed instruction and instead gave Instruction no. 17. (CP 1435; RP 1051) The court did not give any other allocation instruction, other than no. 12. (CP 1427-39)

Instruction no. 17 set forth what the HOA was required to prove. (CP 1435-36) Instruction No. 17 addressed negligence of defendants. (CP 1435) The court did not give any instruction that included or explained ENW's defenses or claims. (CP 1427-39)

Q. PROPOSED AND ACTUAL SPECIAL VERDICT.

ENW proposed a special verdict form which allowed the jury to decide negligence and proximate cause and then allocate fault to ENW, McDonald, Elkins, Corson Swift, and Integrity Structures. (CP 1712-14) The special verdict form given included only ENW and Corson Swift. (CP 1443-46)

On November 7, 2013, the jury reached its verdict. (CP 1443-46) The jury determined that both ENW and Corson were negligent and their negligence was a proximate cause of damages. The jury assigned 97.5% fault to ENW and 2.5% fault to Corson. The jury determined that damages from ENW and Corson's negligence were \$1,149,322. (CP 1443-46) The jury determined Elkins breached the contract and the breach proximately caused damages. The jury awarded \$100,000 as the breach of contract damages. (CP 1443-46)

R. ENTRY OF JUDGMENT AND POST-JUDGMENT MOTION.

The HOA proposed judgment against ENW in the amount of \$1,140,322.00 – the total amount of the jury’s verdict on the negligence claims. (CP 1458) ENW objected to proposed judgment as inconsistent with the jury’s verdict. (CP 1458-62) The jury determined ENW was 97.5% at fault and Corson was 2.5% at fault so the judgment against ENW was \$1,120,588.95—the 97.5% of the jury’s award. (CP 1445, 1458-62)

ENW established that Corson was an LLC that was administratively dissolved in February 2007. (CP 1453-56) Corson’s certificate of formation was cancelled as of February 2009. (CP 1459) The HOA sued Corson in 2011, after its administrative dissolution was final and after any three year statute to sue dissolved LLCs had expired. (CP 1458-61) ENW maintained that its liability was several only and that Corson was not an entity against which judgment could be entered. *Id.*

The HOA argued, among other things, that the 2010 amendments to the LLC Act (i.e. RCW 25.15.303) applied retroactively to restore Corson to “legal existence.” (CP 1464-82) ENW maintained the statutory amendments were not retroactive and did not resurrect the administratively dissolved Corson. (CP 1502-10)

The court rejected ENW’s objections and entered judgment against ENW and Corson in the total amount of \$1,149,766.91: jury verdict

\$1,149,322; taxable costs of \$254.91, and attorney fees of \$200. (CP 1533-35) The judgment lists ENW and Corson “jointly and severally” as judgment debtors. (CP 1534)

The HOA also proposed a judgment summary against Elkins in the amount of \$1,249,776.91, the total jury award of \$1,149,766.91 on the negligence claims against ENW and Corson and \$100,000 on the breach of contract claim against Elkins. (CP 1483-92) ENW objected to the judgment summary as being inconsistent with the jury’s verdict and the court’s ruling. (CP 1530-32)

The court rejected ENW’s objections and entered judgment against Elkins in the amount of \$1,249,776.91 comprised of the “judgment amount” of \$1,259,322, taxable costs of \$254.91, and attorney fees of \$200. The judgment summary is based on a total of the \$100,000 breach of contract damages and the \$1,149,322 negligence damages awarded against ENW and Corson. (CP 1536-38)⁵

ENW timely filed and served a CR 50 and CR 59 motion for judgment as a matter of law or for a new trial. (CP 1539-60) On January 6, 2014, the superior court denied ENW’s motion. (CP 1658-60) On January 8, 2014, ENW served and filed its Notice of Appeal to Division II of the

⁵ The Index to appellants’ clerk’s papers contains a typographical error of 1536-1558 instead of 1536-1538 for this judgment summary.

Court of Appeals. (CP 1662-88)

Shortly after trial concluded, Elkins assigned its rights against ENW to the HOA. (CP 1849) The HOA then filed a new lawsuit against ENW based on the Elkins' assigned claim. (CP 1847-52) ENW moved under CR 60 for a correction to the clerical error in the judgment summary against Elkins. (CP 1822-30) Pursuant to the jury verdict and the court's oral rulings on the entry of judgment, the Elkins judgment summary should have been limited to the \$100,000 jury award. *Id.* The court denied ENW's CR 60 motion. (CP 1939-41) ENW timely filed a notice of appeal. (CP 1942-47) This Court consolidated the appeals.

V. ARGUMENT

A. THE SUPERIOR COURT ERRED IN DENYING ENW'S MOTION TO DISMISS BASED ON THE INDEPENDENT DUTY DOCTRINE.

1. Standard of Review.

This court reviews de novo a court's ruling on summary judgment. Although appellate courts will not review a denial of a summary judgment motion, appellate review is appropriate where the summary judgment was decided "solely on a substantive issue of law." *Kaplan v. Nw. Mut. Life Ins. Co.* 115 Wn. App. 791, 799, 65 P.2d 16 (2003), *rev. denied*, 151 Wn.2d 1037 (2004). The superior court's ruling on the ENW's summary judgment motion related solely to a legal issue under the independent duty doctrine. This Court's review of the summary judgment order is de novo.

The superior court erred in denying the motion because the HOA's claims against ENW were barred under the independent duty doctrine. Alternatively, the superior court erred in denying summary judgment and refusing to dismiss the case because, assuming there was a professional negligence claim, the HOA could not establish the essential elements of duty and damages.

2. The HOA's Claims against ENW Were Barred under the Independent Duty Doctrine.

The independent duty doctrine, formerly called the economic loss rule, bars recovery for a tort where the parties have a contract and the losses suffered are economic. *Alejandre v. Bull*, 159 Wn.2d 674, 684, 153 P.2d 864 (2007); *Eastwood v. Horse Harbor Fund*, 170 Wn.2d 380, 384, 241 P.3d 1256 (2010). The economic loss rule provided that parties are limited to their contract remedies if a loss potentially implicated tort and contract relief. *Alejandre v. Bull*, 159 Wn.2d at 681. The economic loss rule maintained the "fundamental boundaries of tort and contract law." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 826, 881 P.2d 986 (1994).

In 2010, the Washington Supreme Court recast the economic loss rule as the independent duty doctrine. *Eastwood*, 170 Wn.2d at 388. The *Eastwood* court shifted the focus from the character of the loss claimed to

the basis from which the loss arose. The Court held a party may pursue a tort remedy if a duty independent of the contract has been breached.

When the Washington Supreme Court reclassified the economic loss rule as the “independent duty doctrine,” the Court left intact the existing economic loss rule authorities. The *Eastwood* Court reviewed its prior pronouncements. None of the prior cases were overruled. In discussing the *Berschauer/Phillips* case, the Supreme Court explained that it found no independent tort duty in the construction context. There the general contractor had sued the architect, structural engineer, and inspector for negligence. The general contractor sought only economic losses. The Supreme Court dismissed the contractor’s claims. The *Eastwood* court explained:

[W]e did not automatically dismiss the contractor’s claims. Rather, we carefully weighed the public policy considerations to decide whether the defendants owed an independent tort duty to avoid the contractor’s risk of economic loss. . . . We reasoned, as a policy matter, that if design professionals were under a tort duty to avoid a risk of increased business costs, the construction industry could not rely on the risk allocations in their contracts and would have an insufficient incentive to negotiate risk. **The case might have been different if a structure had collapsed.**

170 Wn. 2d at 390-91 (emphasis added). The *Eastwood* court also explained the holding in *Atherton Condominium Apartment-Owners Ass’n Board of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250

(1990), that there was no claim for negligent construction because the builder did not own an independent tort duty to avoid defects in construction quality and that there was no claim for negligent design. 170 Wn. 2d at 391.

The *Eastwood* court held an injury is remediable in tort if it traces back to a tort duty that is independent of the contract. The existence of an independent duty is a question of law. 170 Wn.2d at 402. *Eastwood* involved a lease and a claim of waste. The court held that the duty to not cause waste was an obligation independent of the contract. *Id.*

Against this backdrop, ENW moved to dismiss the professional negligence claims asserted by the HOA. ENW did not have a contract with Dodson-Duus. ENW did not have a contract with the HOA. The HOA's lawsuit had to be based on duties that ENW owed outside of any contractual obligation. In other words, the HOA had to establish that ENW owed a legal duty to Dodson-Duus and/or the HOA. The superior court should have dismissed all claims against ENW because it did not owe any legal duty to Dodson-Duus or to the HOA. As explained further below, ENW had no duty independent of its contract with Elkins.

3. The Professional Negligence Claim Against ENW Should Have Been Dismissed Because ENW Did Not Owe a Legal Duty to Dodson-Duus or the HOA and the HOA Could Not Establish Damages.

Washington courts have recognized design professionals have a legal duty in tort where personal injury is claimed for the professional's failure to supervise, direct, and administer a construction site- *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 609, 257 P.3d 532 (2011) (design professional's duty of care flows to those working on property where designs are implemented); (*Loyland v. Stone & Webster Eng'g Corp.*, 9 Wn. App. 682, 514 P.2d 184 (1973) (engineer planning and supervising worksite owes duty of care for safety of workman), *rev. denied*, 83 Wn.2d 1007 (1974); where the plaintiff owners hired the design professionals to plan and obtain permit for site, plaintiff had right to rely on acts and judgment of the design professionals. *Jarrard v. Seifert*, 22 Wn. App. 476, 591 P.2d 809 (1979).

A party may seek tort damages where an engineer has breached his duty of reasonable care resulting in actual damages. *Affiliated FM Ins. Co. v. LTK Consulting Serv., Inc.* 170 Wn.2d 442, 460-61, 243 P.3 521 (2010). In *Affiliated FM Ins. CO. v. LTK Consulting Serv., Inc.*, Seattle Monorail Services, a company that operates the monorail sued LTK, an engineering firm that performed monorail maintenance. The monorail is owned by the City of Seattle. The City had contracted with LTK for the monorail maintenance. A fire, presumably caused by a faulty grounding system, damaged the train and caused millions of dollars in losses. Affiliated FM

Insurance, Seattle Monorail Services' insurer, paid the losses. Affiliated, as subrogee of Seattle Monorail Services, sued LTK for negligence. The trial court granted LTK's motion for summary judgment that the action was barred under the independent duty doctrine. On appeal, the Ninth Circuit certified the following question to the Washington Supreme Court: "May party A [i.e. SMS and its subrogee Affiliated] who has a contractual right to operate commercially and extensively on property owned by non-party B [i.e. City of Seattle] sue party C [i.e. LTK] in tort for damage to that property when the A (SMS) and C (LTK) are not in privity of contract?" *Id.* at 447.

The Supreme Court answered the question: yes. *Id.* at 461. It concluded that SMS/Affiliated could sue LTK for negligence because by undertaking engineering services, LTK had assumed a duty of reasonable care which obligated LTK to use reasonable care "with respect to risks of physical damage to the monorail. SMS enjoyed legally protected interests in the monorail, and LTK's duty encompassed these interests." *Id.* at 461.

While the Supreme Court recognized an expanded duty of engineers in *Affiliated*, *Affiliated* did not create an unlimited duty for design professionals. The Court looked specifically at whether the duty extended to a particular set of facts. The Court explained:

[T]he question here is whether an engineer's duty of care

extends to safety risks of physical damage to the property on which the engineer works. We hold it does. . . . Given the safety interest that justifies imposing a duty of care on engineers, LTK was obligated to act as a reasonably prudent engineer would with respect to safety risks of physical damage.

Id. at 456.

Affiliated is specifically limited to its facts. It does not stand for the rule that an engineer owes a duty of care to all persons for any nature of harm or damage. At most, *Affiliated* stands for the proposition that an engineer owes a duty to protect persons from personal injury and actual physical damage. Here, assuming ENW owed any duty to the HOA, the HOA's claim should have been dismissed because there was no physical harm or property damage flowing from ENW's actions.

ENW established on summary judgment there were no factual issues about duty or damages. The record on summary judgment and at trial was clear that there was no physical damage to property at The Pointe. Mr. Paustian referred to a potential for damage, but no actual damage. In the summary judgment opposition, Mr. Paustian submitted a lengthy declaration proffering his opinions that there were structural deficiencies. (CP 483-509) Yet, his eleven-page declaration does not reference a single instance of actual injury or damage.

The HOA failed to come forward with admissible evidence on summary judgment showing any issue of fact regarding ENW's alleged

duty of care to the HOA. The HOA failed to come forward with admissible evidence on summary judgment showing any issue of fact regarding actual injury or property damage to the HOA, an essential element of any negligence claim. The superior court should have granted ENW's summary judgment and dismissed the case.

Tellingly, during the six-day jury trial, the HOA did not present any evidence of actual injury or property damage.⁶ one of the homeowners have been required to move out. (RP 79) All of the units can be occupied. (RP 79) Mr. Paustian, in his broad ranging opinions and lengthy testimony, did not identify any actual damage. He opined there was an imminent threat to life and safety. (RP 361) He acknowledged there was only a potential of partial collapse, no actual collapse or actual damage. (RP 382) The building remains standing even though it has been subjected to wind gusts of 70 m.p.h. (RP 386-87)

Mr. Paustian admitted "the building works as a whole." (RP 384) There are no cracks in the dry wall. (RP 387) The building has not settled. (RP 387) The building is not leaning or tilting. (RP 387) The building is not wracked or twisted. (RP 387-88) The through walls connectors are not

⁶ There was evidence of spots on the acoustical tiles of the garage ceiling which is not related to any structural issues. The stains were from leaks from problems with the roof flashing. (RP 82-83)

failing. (RP 388) Mr. Paustian could not identify any actual damage to The Pointe.

Moreover, Mr. Paustian acknowledged that the structural engineer professional canons require an engineer to inform the appropriate regulatory authority of an imminent threat to life, health, or property. (RP 388-89) Mr. Paustian's August 2012 declaration stated he believed there was an imminent threat to life and property. (RP 391-92) Yet, Mr. Paustian never informed the City of Westport of his opinions. (RP 392) He never directly informed the homeowners he believed there was an imminent threat to life and property. (RP 388-92) Instead, he provided the information to the HOA's attorney. *Id.* Mr. Paustian's lack of reporting belies his dramatic claims of imminent risk to people or property.

And undisputedly, there was no proof of any actual damage. Without admissible proof of actual damage, the HOA failed to establish essential elements of a professional negligence claim. The claims against ENW should have been dismissed as a matter of law.

B. THE DENIAL OF THE LIMITATION OF MR. PAUSTIAN'S TESTIMONY WAS AN ABUSE OF DISCRETION WHICH MATERIALLY AND ADVERSELY AFFECTED THE CASE OUTCOME.

An evidentiary ruling is reviewed for an abuse of discretion. A court abuses its discretion when its decision is based on untenable grounds or for untenable reasons. *Coggle v. Snow*, 56 Wn. App. 499, 506-07, 784

P.2d 554 (1990), citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Expert testimony is properly excluded if it is based on conjecture or speculation. *Queen City Farms v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 102, 104, 882 P.2d 703 (1994).

The superior court's failure to limit Paustian's testimony was an abuse of discretion. It was untenable to rule that Paustian's testimony about potential damages was acceptable. The testimony was speculative. As ENW argued, Paustian had neither performed "an analysis of the actual strength of the lateral force resisting system as a whole" nor identified "an analysis of the structural integrity . . . to determine how the building will actually perform in a seismic or windstorm event." Because Paustian had not performed these analyses, his opinions that the building would collapse and was an imminent threat to life and property were speculative. The HOA conceded in motions in limine briefing that "the building has not suffered consequences yet from the lack of structural support." (CP 1277) Yet the court denied ENW's motion to limit Paustian's testimony.

Mr. Paustian was allowed to testify that The Pointe is an imminent threat of harm to the life and property of the unit owners and that portions of the building could collapse in a code level seismic or windstorm event. Over ENW's objection, Mr. Paustian offered opinions about the size and type of earthquakes that might occur in Westport. (RP 266-67) He testified

that Westport is in a fault area where earthquakes of magnitude 8 to 9 occur. (RP 266-67) Mr. Paustian was allowed to testify the extent of damage to buildings in an earthquake. (RP 296-97) Mr. Paustian has no training as a seismologist. (RP 353)

The admission of Paustian's speculative testimony about the potential of damage was prejudicial error. The jury was left with the impression that potential damage, not actual damage, was sufficient to conclude that ENW had a duty of care which had been breached and which caused damages. Without Paustian's speculative opinions, a jury could have concluded that there was no negligence. The superior court's refusal to narrow and limit Mr. Paustian's testimony was prejudicial error which denied ENW a fair trial.

C. PREJUDICIAL ERRORS IN THE JURY INSTRUCTIONS REQUIRE REVERSAL.

Assuming for sake of argument that the professional negligence claim against ENW was properly submitted to the jury, ENW was denied a fair trial by errors in the jury instructions. The superior court failed to properly instruct the jury on the claims in the case and the elements of a negligence claim. The court's damages instructions were unsupported by the evidence and commented on the evidence. The court's instructions no. 15 and 16 about the City of Westport added immaterial matters into the

case. The superior court's instructions unduly emphasized the HOA's case. These errors were prejudicial and require reversal and remand.

Errors of law in jury instructions are reviewed de novo. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Instructions are sufficient if they (1) allow the parties to argue their theory of the case, (2) are not misleading, and (3) when read in their entirety inform the jury of the applicable law. *Anfinson*, 174 Wn.2d at 860, (*quoting Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)). If any of the three elements is missing, there is instructional error. *Id.* Instructional error requires a new trial where the error is was prejudicial. *Stiley v. Block*, 130 Wn.2d 486, 498-99, 925 P.2d 194 (1996).

The jury instructions did not allow ENW to argue its theory of the case. Instructions no. 11 and 18 on negligence and damages were misleading and commented on the evidence. Instructions no. 15 and 16 about the City of Westport introduced extraneous issues that unduly emphasized the HOA's theory of the case and were an unconstitutional comment on the evidence.

1. The Failure to Give ENW's Proposed Instructions No. 10, 12, 13, 16, and 18 Denied ENW the Ability to Argue Its Theory of the Case and Made the Instructions Misleading.

ENW's proposed instruction no. 13 specified the issues in the case,

including ENW's claims. (CP 1394-96) Proposed instruction no. 13 was based on WPI 20.05. ENW's proposed instruction no. 16 set out its affirmative defenses and burden of proof. (CP 1396-97) The court refused to give these instructions over ENW's objection. (RP 1047-48) There was no instruction given which explained what the HOA was claiming against ENW. And more importantly, there was no instruction explaining ENW's defenses and claims. Without proposed instructions no. 13 and 16, ENW was unable to argue its theory of the case and the instructions in their entirety were misleading.

ENW's proposed instructions no. 10, 12, and 18 set forth the law on negligence. (CP 1393-94). Proposed instruction no. 10 explained the four elements of a negligence claim: duty, breach, resulting damage, and proximate causation between the breach and resulting damage. (CP 1393) Proposed instruction no. 12 further explained proximate cause---that when defects alleged are a result of a contractor's non-compliance with approved structural plans, the plaintiff's damages are not proximately caused by structural defects. (CP 1394) Proposed instruction no. 18 defined the standard of care for an engineer. (CP 1397) The proposed instructions were correct statements of the law. Without these instructions, ENW was not allowed to argue its theory of the case that there was no breach of duty and there was no damage.

2. The Court’s Instruction No. 11 on Proximate Cause Misapplied the WPIs, Misstated the Law, and Was Misleading.

Instruction No. 11 addressed proximate cause. It was derived from a combination of WPI 15.02 and 15.04. The pattern instructions give the option of using the word “injury” or “event.” The Note on Use to WPI 15.04 says to use the bracketed material as applicable. 6 WASH. PRACTICE, *Washington Pattern Jury Instructions* at 202 (6th ed. 2012).

There was no injury claimed here. The HOA was asserting damages from an event. The word “event” instead of “injury” should have been used. The jury was misled by the improper inclusion of the word “injury” in instruction no. 11.

3. The Court’s Instruction No. 18 on Measure of Damages Misapplied the WPIs, Was a Misstatement of Law, and a Comment on the Evidence.

Section 30 of the Washington Pattern Jury Instructions addresses damages. The HOA did not prove any actual, physical damage to personal property. Yet, the closest type of damages was repairs for damage to personal property. WPI 30.13 states that measure of damages: “The reasonable value of necessary repairs to any property that was damaged.” 6 WASH. PRACTICE at 318 (6th ed. 2012).

ENW proposed this language in its instruction no. 23. (CP 1398) Instead of inserting WPI 30.13 into the damages instruction, the superior

court adopted the HOA's proposal and instructed the jury it must award particular damages. (CP 1435-36)

Instruction No. 18 deviates from the pattern instructions. The two categories of "damages" are not proper measure of damages. The two categories of "damages" are not legally recoverable damages. The two categories of "damages" were not established by the evidence. The instruction was an error of law and misleading.

Instruction No. 18 was also an impermissible comment on the evidence. The instruction treats the two categories of "damages" as undisputed "damages." There was substantial dispute about whether there was any safety risk of physical harm to persons or property. There was also substantial dispute about whether the costs to identify any structural defects were recoverable. The court eliminated the dispute by telling the jury it must award the category of "damages" if it found for the HOA.

Instruction No. 18 was an unconstitutional comment on the evidence. The jury is the sole judge of what weight to give evidence. CONST. art. IV §, 16; WPI 1.01; 1.02; Instruction No. 1 (CP 1428) Article IV, Section 16 states: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A superior court violates this constitutional provision when it instructs the jury on what weight to give evidence. *State v. Lane*, 125 Wn.2d 825, 838,

889 P.2d 929 (1995).

Instruction No. 18 removed from the jury the factual issue of what damages to award. Instruction No. 18 told the jury certain damages were undisputed. The instruction was prejudicial error requiring reversal.

4. Instructions No. 15 and 16 Added an Immaterial Issue to the Case and Impermissibly Emphasized the HOA's Theory of the Case.

Instructions No. 15 and 16 discussed the effect of the City of Westport's issuance of a permit and that the City did not owe a duty to ensure compliance with the building codes. The City of Westport was not a party to the lawsuit. No party was asserting that the City of Westport was an at-fault entity. The City of Westport and whether or not it owed any duty was extraneous to the case. These instructions were prejudicial error requiring reversal. *Munson v. Gunder*, 70 Wash. 629, 631-32, 127 P. 193 (1912) (manifestly prejudicial error to instruct the jury on an immaterial matter).

5. The Instructions Improperly Emphasized the HOA's Case.

The instructions as given unduly emphasized the HOA's case. It is error to give instructions which are repetitive and unduly emphasize one party's theory of the case. *Samuelson v. Freeman*, 75 Wn.2d 894, 897, 454 P.2d 406 (1969); *Brown v. Dahl*, 41 Wn. App. 565, 579, 705 P.2d 781 (1985). In *Samuelson v. Freeman*, the Washington Supreme Court ruled:

[I]f the instructions on a given point or proposition are so repetitious and overlapping as to make them emphatically favorable to one party, the other party has been deprived of a fair trial.

75 Wn. 2d at 897. Here the court's instructions listed the HOA's theory of the case. The court's instructions specifically referred to what the HOA was claiming. (CP 1430, 1435) Correspondingly, there was no instruction about ENW's theory of the case.

The instructions also included extraneous mentions about the City of Westport and that the City did not owe any duties. (CP 1434, Instructions 15 and 16) Instructions no. 15 and 16 also implicitly undermined the ENW's defense. The multiple instructional errors require reversal and remand.

D. BECAUSE THERE WAS EVIDENCE TO SUPPORT FAULT AGAINST ELKINS AND INTEGRITY STRUCTURES, IT WAS REVERSIBLE ERROR TO OMIT THEM FROM THE SPECIAL VERDICT FORM.

In a fault based claim, under Washington's Tort Reform Act, a jury is required to allocate fault to all at-fault entities. RCW 4.22.070 provides: "In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages . . ." RCW 4.22.070. This includes all defendants and other responsible parties, including those released by the plaintiff. *Id.*

Here ENW's proposed Special Verdict Form would have allowed

the jury to decide negligence and proximate cause and then allocate fault to ENW, McDonald, Elkins, Corson Swift, and Integrity Structures. The superior court did not give this Special Verdict Form. Without it, the jury had no means of allocating fault to Elkins and Integrity Structures. Because there was evidence to support a finding of negligence and proximate cause against Elkins and Integrity Structures, it was reversible error to decline to give ENW's Special Verdict Form. This Court should reverse and remand for a new trial.

E. THE SUPERIOR COURT'S INTERJECTION DURING WITNESS TESTIMONY AND JURY INSTRUCTIONS CONSTITUTED IMPERMISSIBLE COMMENTS ON THE EVIDENCE.

As a basic premise, “[a] judicial proceeding is valid only if it has an appearance of impartiality, such that a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing.” *State v. Ra*, 144 Wn. App. 688, 705, 175 P.3d 609, *rev. denied*, 164 Wn.2d 1016 (2008). A trial judge is prohibited from commenting on the evidence. CONST. art. IV, s 16 provides that, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”

The object of this constitutional provision is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted.

Heitfeld v. Benevolent and Protective Order of Keglers, 36 Wn.2d 685,

699, 220 P.2d 655 (1950). The reasoning behind the constitutional prohibition of commenting on the evidence has long been a part of Washington law:

Every lawyer who has ever tried a case, and every judge who has ever presided at a trial, knows that jurors are inclined to regard the lawyers engaged in the trial as partisans, and are quick to attend an interruption by the judge, to which they may attach an importance and a meaning in no way intended. . . . On the other hand, a presiding judge has no way to measure the effect of his interruption. The very fact that he takes a witness away from the attorney for examination may, in the tense atmosphere of the trial, lead to great prejudice.

State v. Jackson, 83 Wash. 514, 523, 145 P. 470 (1915).

When a party asserts there was prejudicial interjection by the court during trial, such a charge should not be taken lightly. *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 138, 606 P.2d 1214 (1980). “A trial judge should not enter into the ‘fray of combat’ nor assume the role of counsel.” *Id.* at 141. Although an isolated instance may be deemed harmless, “the cumulative effect of repeated interjections by the court may constitute reversibly error.” *Id.*

A court’s statement is a comment on the evidence if its attitude towards a disputed issue is inferable from its statements. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). It is sufficient to constitute a comment on the evidence if a judge’s personal feelings are merely

implied. *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006). If a remark is determined to be a comment on the evidence, the reviewing court presumes the remark is prejudicial. *Jackman*, 156 Wn.2d at 743. The opposing party must show that the party was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *Id.*

Here the superior court's actions constituted comments on the evidence. The court interjected itself several times during the testimony of the HOA's expert, Mr. Paustian. The court's instructions to the jury also were comments on the evidence.

During Mr. Paustian's direct examination, ENW's counsel objected several times. (RP 198, 203, 266, 267, 296-97, 347-48) Each objection was overruled. Mr. Paustian was permitted to provide his own paraphrase of Mr. McDonald's deposition testimony. (RP 202-03) When ENW's counsel objected that Mr. Paustian mischaracterized Mr. McDonald's testimony, the court overruled the objection stating: "You may cross examine him on that. I will allow the answer." (RP 203)

Also during Mr. Paustian's testimony, the HOA moved to admit exhibit 35. ENW objected to the exhibit as irrelevant and outside the scope of the HOA's damages. The court overruled the objection stating:

I will allow you to cross examine the witness on those issues during cross examination, but his testimony now, is, that the amounts set forth in the exhibit reflect the expenses

related to the investigation of design problems and the development of a scope of repair. So, I will overrule the objection and allow this document to be admitted.

(RP 347-48) These comments had extra emphasis because they were made at the close of Mr. Paustian's direct examination and just before the jury was excused for the day. (RP 348)

Then during ENW's cross-examination of Mr. Paustian, the court admonished ENW's counsel not to interrupt the witness. (RP 358)

Q. You have not performed any testing to determine what's causing the corrosion observed at the steel beams above the garage; is that correct?

A. I haven't performed any testing, but steel –

Q. Thank you. Thank you.

THE COURT: Mr. Gilligan don't interrupt the witness.

MR. GILLIGAN: Don't interrupt? Okay.

THE COURT: If you think his answer is not responsive, you may move to strike, but don't interrupt.

(RP 358) Mr. Paustian was then allowed to give an extended answer to the question. ENW moved to strike as nonresponsive. The court overruled the objection. (RP 358-59) Shortly after this exchange, Mr. Paustian was asked a "yes" or "no" question. He answered "no" and then proceeded to give a long ten-line paragraph answer. ENW's motion to strike as nonresponsive was overruled. (RP 361)

Seven pages later in the transcript, the court interrupted again

during Mr. Paustian's cross-examination. (RP 368-69) The witness was asked whether he had seen a record. Mr. Paustian answered: "No, I have not." ENW's counsel began asking the next question and Mr. Paustian interrupted counsel saying:

A. Excuse me, excuse me, to answer that last question, is, we did not see any written record in the file, but Mr. McDonald, in his deposition, did say—

Q: No, I am asking about written ---

THE COURT: Please take the jury out.

(RP 368) Outside of the jury's presence, the court again admonished ENW's counsel for interrupting the witness's answer. (RP 369)

Less than ten pages later, ENW's counsel moved to strike two separate answers as unresponsive. (RP 374-76) The court overruled both objections. *Id.* Both questions called for a one word "yes" or "no" response. Mr. Paustian answered with lengthy explanations. *Id.* The court again stated the answer was responsive. (RP 376) During the entire cross-examination, the court granted only one of ENW's four requests to strike the answer. (RP 361, 374, 375-76, 379-80)

The court's admonishment of counsel showed the court's attitude about a disputed issue and inferred that Mr. Paustian's testimony was credible and ENW was interfering with credible testimony. The court's interjection was not limited to Mr. Paustian's testimony. There were

further interjections during ENW's case in chief. The court sustained the objections during the direct examination of ENW's expert, Mr. Trochalakis. (RP 808-09, 820-21) During cross-examination, the court overruled ENW's objections. (RP 824, 877, 880-82) When Mr. Trochalakis offered an explanation in his answer to a question on cross-examination, the HOA moved to strike as unresponsive. (RP 891-92) The court granted the motion and stated: "The witness's entire answer will be stricken it's not responsive." (RP 892) Mr. Trochalakis's answer was similar to the long answers Mr. Paustian was allowed to give during his cross-examination. The court's uneven rulings on objections showed bias for the HOA's case and the court's disregard for ENW's case.

As set forth above, the court also commented on the evidence by including references to the City of Westport (Instructions No. 15 and 16; CP 1434) and telling the jury it must include damages that were not established by the evidence. (Instruction No. 18; CP 1435-36) Instruction No. 18 told the jury its verdict "shall include . . . the costs necessary to repair any structural defects that have created a safety risk of physical harm to persons or property; [t]he costs already paid by the Association to identify the structural defects and what repairs are necessary to avoid the risk of physical harm . . ." (CP 1435-6) *In re the Detention of R.W.*, 98 Wn. App. 140, 144, 988 P.2d 1034 (1999). ENW was denied a fair trial.

This Court should reverse and remand.

F. ENW WAS SEVERALLY LIABLE ONLY BECAUSE CORSON SWIFT WAS NOT AN ENTITY AGAINST WHOM JUDGMENT COULD BE ENTERED.

The superior court erred in entering a judgment in the amount of \$1,149,588.95 against ENW. ENW can only be held severally liable for its 97.5% proportionate share of the jury's \$1,149,322 award on the negligence claims. Corson Swift was a dissolved LLC that ceased to exist as of February 2009, therefore, it was not a defendant against whom judgment could be entered.

Washington's Tort Reform statutes abolished joint and several liability except in three limited areas. *Kottler v. State*, 136 Wn.2d 437, 446, 963 P.2d 834 (1998); RCW 4.22.070. The only possible exception here a fault free plaintiff with judgment entered against two or more defendants. RCW 4.22.070(1)(b). Settling or released parties and immune entities are not defendants against whom judgment is entered. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 294, 840 P.2d 860 (1992).

Here Corson was dissolved as a legal entity as of February 2009 pursuant to the then effective statute, RCW 25.15.303. The then effective RCW 25.15.303 provided:

The dissolution of a limited liability company does not take away or impair any remedy available against that limited liability company, its managers, or its members for any

right or claim existing, or any liability incurred at any time, whether prior to or after dissolution, unless an action or other proceeding thereon is not commenced within three years after the effective date of dissolution.

Under that statute, an administratively dissolved LLC ceased to exist unless it sought reinstatement within two years of dissolution. *Chadwick Farms Owners Ass'n v. FHC, LLC*, 166 Wn.2d 178, 188, 207 P.3d 1251 (2009). Corson was administratively dissolved in February 2007 and it did not seek reinstatement. Therefore, it no longer existed as a legal entity as of February 2007. Because Corson was not a legal entity which could be sued, it was not a defendant against whom judgment could be entered. Under RCW 4.22.070(1)(b), there could be no joint and several liability because ENW was the only defendant against whom a judgment was entered. ENW's liability was several only.

The superior court presumably accepted the HOA's argument that Corson remained a valid legal entity based on the 2010 amendment to RCW 25.15.303. The HOA argued the amendment applied retroactively. (CP 1468-82). The amendment added a requirement that an LLC file documentation to trigger the statute of limitations.

Statutory amendments are presumed to apply prospectively only. *In re Parentage of C.M.F.*, 179 Wn.2d 411, 428, 559, 314 P.3d 1109 (2013). The legislature did not include any provision that the 2010

amendment was retroactive. As Division III recently held, the amendment does not apply retroactively. *Houk v. Best Dev. & Constr. Co.*, 179 Wn. App. 908, 915, 322 P.3d 29 (2014). Similarly here, Corson ceased to exist as a legal entity in 2009. Corson was not capable of suing or being sued. Corson was not, therefore, capable of being a defendant against whom judgment is entered. Proportionate liability rules applied. Assuming ENW has any liability in negligence, the liability is several only and limited to the 97.5% of the jury's award. Any judgment entered against ENW is capped at \$1,120,588.95. This Court should reverse and remand.

G. THE JUDGMENT ENTERED AGAINST ELKINS IS INCONSISTENT WITH THE JURY'S VERDICT AND SHOULD BE CORRECTED.

The jury's verdict awarded \$100,000 to the HOA against Elkins for a breach of contract. (CP 1446) When the HOA acted to have judgments entered on the verdict, the court confirmed that the verdict against Elkins was \$100,000 plus costs and fees. (CP 1869) Despite the undisputed amount of the judgment, the HOA presented a judgment summary listing the judgment amount against Elkins as \$1,249,322. (CP 1838-40) Elkins later assigned its rights against ENW to the HOA and the HOA sued ENW seeking to recover a \$1,249,322 judgment. (CP 1847-52) ENW moved to correct the clerical error in the Elkins judgment summary. (CP 1822-30) The court denied the motion. (CP 1939-41) This Court

should reverse that order and correct the judgment amount.

Clerical errors may be corrected to reflect the court's intentions. CR 60(a); *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). Undisputedly the jury awarded damages of \$100,000 against Elkins. The superior court acknowledged as much specifically referencing the amount in an e-mail to counsel. (CP 1869) Despite that clear verdict and judgment amount and direction from the court, the HOA presented and the court signed a judgment summary listing \$1,249,322 as the judgment amount. (CP 1838-40) The \$1,249,322 is a total figure from adding the jury's award against ENW to the jury's award against Elkins. The entry of the judgment summary is an obvious clerical error which this Court should correct.

VI. CONCLUSION

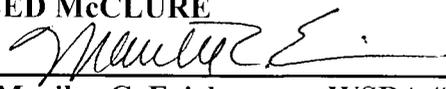
The HOA's claims against ENW should have been dismissed on summary judgment because the HOA could not establish any duty or damages. This Court should reverse the judgment and enter judgment in favor of ENW.

Alternatively, this Court should reverse and remand for a new trial because the superior court committed reversible error in rulings on evidence, jury instructions, and commenting on the evidence. If this Court declines to reverse and remand for a new trial, this Court should modify

and correct the judgment against ENW to be severally only and modify
and correct the judgment against Elkins to the amount of the jury's breach
of contract award of contract award.

Dated this 9th day of January, 2015.

REED McCLURE

By 
Marilee C. Erickson WSBA #16144
Attorneys for Appellants

066050.000001/507502

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE POINTE AT WESTPORT HARBOR
HOMEOWNERS' ASSOCIATION, a
Washington non-profit corporation,

Plaintiff

vs.

No. 10-2-01263-6

COPY

DODSON-DUUS, LLC, a Washington limited liability company; HARBOR RESORT HOLDINGS, LLC, a Washington limited liability company; GABE DUUS and JANE DOE DUUS, husband and wife, individually and their marital community; HARBOR RESORT PROPERTIES, INC., a closely-held Washington corporation; MARK DODSON and DESIREE DODSON, husband and wife, individually and their marital community; EDWARD DODSON, JR. and ANN GRIMES DODSON, husband and wife, individually and their marital community; DOE AFFILIATES 1-20; DOE PRINCIPALS 1-10; DOE CONTRACTORS 1-20; DOE DECLARANT AGENTS 1-10; and DOE TRANSFEREES 1-50; ENGINEERS NORTHWEST, INC., P.S., a Washington professional services corporation; THEODORE D. McDONALD and JANE DOE McDONALD, husband and wife, and their marital community; STEVEN P. ELKINS ARCHITECTS, INC., P.S., a Washington professional services corporation; INTEGRITY STRUCTURES, LLC, a Washington limited liability company; and CORSON SWIFT BUILDERS, LLC, a Washington limited liability company,

Defendants.

COURT'S INSTRUCTIONS TO THE JURY

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence, or have been admitted for illustrative purposes only. The demonstrative exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

INSTRUCTION NO. 2

This lawsuit was brought by THE POINT AT WESTPORT HARBOR HOMEOWNERS ASSOCIATION which may be referred to in these instructions as the "Plaintiff" or the "Association". The Association seeks, among other things, monetary damages for alleged structural defects and deficiencies that were discovered after the homeowners purchased and moved into their condominium units.

Under Washington law, the Association has the duty to maintain, repair, replace and restore all of the common elements and Association property located at The Pointe at Westport Condominiums (the "Project") and the duty to repair, replace and restore damage to any part of the Project.

Under Washington law, the Association has the legal capacity to maintain a lawsuit for damages against the Defendants on behalf of itself and two or more unit owners on matters affecting the condominium.

INSTRUCTION NO. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

The law treats all parties equally whether they are corporations, limited liability companies or individuals. This means that corporations, limited liability companies and individuals are to be treated in the same fair and unprejudiced manner.

INSTRUCTION NO. 5

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 6

Whether or not a party has insurance, or any other source of recovery available, has no bearing on any issue that you must decide. You must not speculate about whether a party has insurance or other coverage or sources of available funds. You are not to make or decline to make any award, or increase or decrease any award, because you believe that a party may have liability insurance available. Even if there is insurance or other funding available to a party, the question of who pays or who reimburses whom would be decided in a different proceeding. Therefore, in your deliberations, do not discuss any matters such as insurance coverage or other possible sources of funding for any party. You are to consider only those questions that are given to you to decide in this case.

INSTRUCTION NO. 7

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a "preponderance" of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

INSTRUCTION NO. 8

An agent is a person employed under an express or implied agreement to perform services for another, called the principal, and who is subject to the principal's control or right to control the manner and means of performing the services. One may be an agent even though he or she receives no payment for services. The agency agreement may be oral or in writing.

Any act or omission of an agent within the scope of authority is the act or omission of the principal.

INSTRUCTION NO. 9

A corporation or a limited liability company can act only through its officers, managers and employees. Any act or omission of an officer, manager or employee is the act or omission of the corporation or of the limited liability company.

INSTRUCTION NO. 10

Under the Washington Condominium Act, "condominium" means real property, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions.

INSTRUCTION NO. 11

The term "proximate cause" means a cause in which in a direct sequence produces the injury complained of and without which such injury would not have happened.

There may be more than one proximate cause of the same injury. If you find that the defendant was negligent and that such negligence was a proximate cause of damage to the plaintiff, it is not a defense that some other cause or the act of some other person who is not a party to this lawsuit may also have been a proximate cause.

However, if you find that the sole proximate cause of damage to the plaintiff was some other cause or the act of some other person who is not a party to this lawsuit then your verdict should be for the defendant.

INSTRUCTION NO. 12

If you find that more than one defendant was negligent, you must determine what percentage of the total negligence is attributable to each defendant that proximately caused the damage to the plaintiff. The court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

INSTRUCTION NO. 13

The Pointe at Westport Condominium was built in 2008. The building code in effect at that time was the 2003 International Building Code ("IBC"). The IBC established minimum strength requirements for the structural components of the building.

INSTRUCTION NO. 14

A violation, if any, of the 2003 International Building Code is not necessarily negligence, but may be considered by you as evidence in determining negligence.

Such a violation may be excused if it is due to some cause beyond the violator's control, which ordinary care could not have guarded against.

The measure of reasonable care for a structural engineer who undertakes to perform engineering services is the degree of care, skill, and learning expected of a reasonably prudent structural engineer in the state of Washington acting in the same or similar circumstances.

INSTRUCTION NO. 15

The City of Westport does not owe any duty to ensure compliance with building codes. No duty is owed by local government to a claimant alleging negligent issuance of a building permit or negligent inspection to determine compliance with building codes.

INSTRUCTION NO. 16

The issuance or granting of a building permit or approval of plans by the City of Westport shall not be construed to be a permit for or approval of any violation of any of the provisions of the building code. Permits presuming to give authority to violate or cancel the provisions of the building code or other law are invalid.

INSTRUCTION NO. 17

The plaintiff has the burden of proving each of the following propositions on its claim that the defendants were negligent:

First, that one or more of the defendants acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting, or failing to act, one or more of the defendants was negligent; Second, that defendants' negligence was a proximate cause of structural defects in the condominium building.

If you find from your consideration of all the evidence that each of these propositions has been proved against one or more of the defendants, your verdict should be for the plaintiff and against the defendant or those defendants. On the other hand, if any of these propositions has not been proved against one or more of the defendants, your verdict should be for that defendant or those defendants.

INSTRUCTION NO. 18

It is the duty of the court to instruct you as to the measure of damages with respect to the Association's claims for negligence. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered on this claim.

If your verdict is for the Association, then you must determine the amount of money that will reasonably and fairly compensate the Association for such damages as you find were proximately caused by the negligence of the defendant. If you find for the Association, your verdict shall include the following items:

1. The costs necessary to repair any structural defects that have created a safety risk of physical harm to persons or property;

2. The costs already paid by the Association to identify the structural defects and what repairs are necessary to avoid the risk of physical harm; and

4. Such other expenses as are necessary and reasonably expected to be incurred as a result of Defendants' negligence.

The burden of proving each element of damages set forth above rests with the Association and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess or conjecture.

INSTRUCTION NO. 19

The plaintiff Association has the burden of proving each of the following propositions on its claim of breach of contract against Defendant Stephen P. Elkins Architects:

- 1) That the Defendant Stephen P. Elkins Architects entered into a contract with the owner of the project, Dodson Duus, LLC;
- 2) That the terms of the contract include a promise by Stephen P. Elkins Architects to provide structural calculations and drawing details for the entire structure in compliance with building code;
- 3) That the Defendant Stephen P. Elkins Architects breached the contract as claimed by the Association;
- 4) That the owner of the project, Dodson Duus, LLC was damaged as a result of Stephen P. Elkins Architect's breach;
- 5) That the Association is the assignee of Dodson Duus, LLC's claim for breach of contract against the Defendant Stephen P. Elkins Architects.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the Association on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for the Defendant Stephen P. Elkins Architects.

INSTRUCTION NO. 20

It is the duty of the court to instruct you as to the measure of damages for breach of contract.

In order to recover actual damages, the Association has the burden of proving that the Defendants Stephen P. Elkins Architects breached a contract with Dodson Duus, LLC, and that Dodson Duus, LLC incurred actual economic damages as a result of the Defendant's breach, and the amount of those damages.

If your verdict is for the Association on its breach of contract claim and if you find that the Association has proved that Dodson Duus, LLC incurred actual damages and the amount of those damages, then you shall award actual damages to the Association.

"Actual damages" for breach of a contract to provide structural engineering services in the design of a building, when the breach results in the reasonably foreseeable incorporation of design defects into the completed building, are the reasonable costs to repair the building so that it complies with the contract requirements.

In calculating the plaintiff's actual damages, you should determine the sum of money that would put Dodson Duus, LLC in as good a position as it would have been in if both it and the Defendants (Stephen P. Elkins Architects) had performed all their promises under the contracts.

The burden of proving damages rests with the Association and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence. You must be governed by your own judgment, by the evidence in the case, and these instructions, rather than by speculation, guess, or conjecture.

INSTRUCTION NO. 21

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. [For this purpose, use the form provided in the jury room.] In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.

Dated: November 6, 2013

A handwritten signature in black ink, appearing to read "J. S. [unclear]", written over a horizontal line.

Judge

FILED
GRAYS HARBOR COUNTY
CLERK

2013 OCT 22 PM 4:00

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE POINTE AT WESTPORT HARBOR
HOMEBOWNERS' ASSOCIATION,
a Washington non-profit corporation,

Plaintiff,

vs.

DODSON-DUUS, LLC, a Washington limited liability company; HARBOR RESORT HOLDINGS, LLC, a Washington limited liability company; GABE DUUS and JANE DOE DUUS, husband and wife, individually and their marital community; HARBOR RESORT PROPERTIES, INC., a closely-held Washington corporation; MARK DODSON and DESIREE DODSON, husband and wife, individually and their marital community; EDWARD DODSON, JR. and ANN GRIMES DODSON, husband and wife, individually and their marital community; DOE AFFILIATES 1-20; DOE PRINCIPALS 1-10; DOE CONTRACTORS 1-20; DOE DECLARANT AGENTS 1-10; and DOE TRANSFEREES 1-50; ENGINEERS NORTHWEST, INC., P.S., a Washington professional services corporation; THEODORE D. McDONALD and JANE DOE McDONALD, husband and wife, and their marital community; STEVEN P. ELKINS ARCHITECTS, INC., P.S., a Washington professional services corporation; INTEGRITY STRUCTURES, LLC, a Washington limited liability company; and CORSON SWIFT BUILDERS, LLC, a Washington limited liability company,

Defendants.

No. 10-2-01263-6

5547293.doc

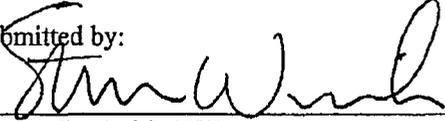
547

ORIGINAL

1377
APPENDIX B

DEFENDANTS ENGINEERS NORTHWEST, INC., P.S.
AND THEODORE MCDONALD'S PROPOSED JURY INSTRUCTIONS

Submitted by:



Steven G. Wraith, WSBA No. 17364

Aaron P. Gilligan, WSBA No. 29614

Attorneys for Defendants

Engineers Northwest, Inc.

LEE SMART, P.S., INC.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929
(206) 624-7990

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE POINTE AT WESTPORT HARBOR
HOMEOWNERS' ASSOCIATION, a
Washington non-profit corporation,

No. 10-2-01263-6

Plaintiff

vs.

DODSON-DUUS, LLC, a Washington limited liability company; HARBOR RESORT HOLDINGS, LLC, a Washington limited liability company; GABE DUUS and JANE DOE DUUS, husband and wife, individually and their marital community; HARBOR RESORT PROPERTIES, INC., a closely-held Washington corporation; MARK DODSON and DESIREE DODSON, husband and wife, individually and their marital community; EDWARD DODSON, JR. and ANN GRIMES DODSON, husband and wife, individually and their marital community; DOE AFFILIATES 1-20; DOE PRINCIPALS 1-10; DOE CONTRACTORS 1-20; DOE DECLARANT AGENTS 1-10; and DOE TRANSFERREES 1-50; ENGINEERS NORTHWEST, INC., P.S., a Washington professional services corporation; THEODORE D. McDONALD and JANE DOE McDONALD, husband and wife, and their marital community; STEVEN P. ELKINS ARCHITECTS, INC., P.S., a Washington professional services corporation; INTEGRITY STRUCTURES, LLC, a Washington limited liability company; and CORSON SWIFT BUILDERS, LLC, a Washington limited liability company,

Defendants.

COURT'S INSTRUCTIONS TO THE JURY

DATED: _____

Hon. David L. Edwards

INSTRUCTION NO. _____

Part 1—Before Voir Dire of Prospective Jurors:

This is a civil case brought by plaintiff The Pointe at Westport Harbor Homeowner's Association against defendants Engineers Northwest, P.S., Inc., Theodore McDonald, Steven P. Elkins Architects, and Corson Swift Builders, LLC. The plaintiff's lawyer is Leonard Flanagan. The lawyers for Engineers Northwest, P.S., Inc. and Theodore McDonald are Steven Wraith and Aaron Gilligan. The lawyer for Steven P. Elkins Architects is Michael Bond. Corson Swift Builders, LLC has not appeared and is unrepresented. The case arises out of the construction of the Pointe at Westport Harbor Condominium, which occurred from 2006-2008 in Westport, Washington.

The plaintiff claims damages for the cost to repair structural deficiencies with the Pointe at Westport Condominium. The plaintiff alleges that Steven P. Elkins Architects, the project architect, breached its contract with Dodson Duus, LLC because the Pointe at Westport Condominium was negligently designed and failed to meet standards of structural strength and lateral shear loads. The plaintiff alleges that Engineers Northwest and Mr. McDonald, the project structural engineers, were negligent with respect to the structural design of the Pointe at Westport Condominium. The plaintiff alleges that Corson Swift Builders LLC, the framing contractor, breached its duty to install all structural components of the project in conformance with the plans and specifications, and breached its duty to identify ambiguities, inconsistencies, or missing details in the construction plans and structural drawings, and seek appropriate clarification and guidance from design professionals. The plaintiff alleges that Dodson Duus is a third party beneficiary of the contract between Steven P. Elkins and Engineers Northwest, and that Engineers breached a contractual duty to Dodson Duus.

Engineers Northwest and Theodore McDonald deny that it has liability for the plaintiff's cost of repair damages. To the extent the jury finds liability, ENW further denies the plaintiff's alleged damages are entirely attributable to Engineers Northwest, and denies that the plaintiff's cost of repair estimate is reasonable.

It is your duty as a jury to decide the facts in this case based upon the evidence presented to you during this trial. Evidence is a legal term. Evidence includes such things as testimony of witnesses, documents, or other physical objects.

One of my duties as judge is to decide whether or not evidence should be admitted during this trial. What this means is that I must decide whether or not you should consider evidence offered by the parties. For example, if a party offers a photograph as an exhibit, I will decide whether it is admissible. Do not be concerned about the reasons for my rulings. You must not reconsider or discuss any evidence that I do not admit or that I tell you to disregard.

The evidence in this case may include testimony of witnesses or actual physical objects, such as papers, photographs, or other exhibits. Any exhibits admitted into evidence will go with you to the jury room when you begin your deliberations. When witnesses testify, please listen very carefully. You will need to remember testimony during your deliberations because testimony will rarely, if ever, be repeated for you.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. However, the lawyers' statements are not evidence or the law. The evidence is the testimony and the exhibits. The law is contained in my instructions. You must disregard anything the lawyers say that is at odds with the evidence or the law in my instructions.

Our state constitution prohibits a trial judge from making a comment on the evidence. For example, it would be improper for me to express my personal opinion about the value of a particular witness's testimony. Although I will not intentionally do so, if it appears to you that I have indicated my personal opinion concerning any evidence, you must disregard that opinion entirely.

You may hear objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

In deciding this case, you will be asked to apply a concept called "burden of proof." The phrase "burden of proof" may be unfamiliar to you. Burden of proof refers to the measure or amount of proof required to prove a fact. The burden of proof in this case is proof by a preponderance of the evidence. Proof by a preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that a proposition is more probably true than not true.

During your deliberations, you must apply the law to the facts that you find to be true. It is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you think it ought to be. You are to apply the law you receive from my instructions to the facts and in this way decide the case.

(The judge explains the procedure for voir dire, and voir dire then begins.)

Part 2—After Voir Dire:

Now I will explain the procedure to be followed during the trial.

First: The lawyers will have an opportunity to make opening statements outlining the testimony of witnesses and other evidence that they expect to be presented during trial.

Next: The plaintiff will present the testimony of witnesses or other evidence to you. When the plaintiff has finished, the defendant may present the testimony of witnesses or other evidence. Each witness may be cross-examined by the other side.

Next: When all of the evidence has been presented to you, I will instruct you on what law applies to this case. I will read the instructions to you out loud. You will have [individual copies of] the written instructions with you in the jury room during your deliberations.

Next: The lawyers will make closing arguments.

Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a "verdict." Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it. "No

discussion" also means no e-mailing, text messaging, blogging, or any other form of electronic communications.

You will be allowed to take notes during this trial. I am not instructing you to take notes, nor am I encouraging you to do so. Taking notes may interfere with your ability to listen and observe. If you choose to take notes, I must remind you to listen carefully to all testimony and to carefully observe all witnesses.

At an appropriate time, the bailiff will provide a note pad and a pen or pencil to each of you. Your juror number will be on the front page of the note pad. You must take notes on this pad only, not on any other paper. You must not take your note pad from the courtroom or the jury room for any reason. When you recess during the trial, please leave your notepad on your chair. At the end of the day, the note pads must be left on your chair. While you are away from the courtroom or the jury room, no one else will read your notes.

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

You are not to assume that your notes are necessarily more accurate than your memory. I am allowing you to take notes to assist you in remembering clearly, not to substitute for your memory. You are also not to assume that your notes are more accurate than the memories or notes of the other jurors.

After you have reached a verdict, your notes will be collected and destroyed by the bailiff. No one will be allowed to read them.

You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning. You may ask questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you ask any questions, remember that your role is that of a neutral fact finder, not an advocate.

Before I excuse each witness, I will offer you the opportunity to write out a question on a form provided by the court. Do not sign the question. I will review the question to determine if it is legally proper.

There are some questions that I will not ask, or will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. If I do not ask a juror's question, or if I rephrase it, do not attempt to speculate as to the reasons and do not discuss this circumstance with the other jurors.

By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.

Throughout this trial, you must come and go directly from the jury room. Do not remain in the hall or courtroom, as witnesses and parties may not recognize you as a juror, and you may accidentally overhear some discussion about this case. I have instructed the lawyers, parties, and witnesses not to talk to you during trial.

It is essential to a fair trial that everything you learn about this case comes to you in this courtroom, and only in this courtroom. You must not allow yourself to be exposed to any outside information about this case. Do not permit anyone to discuss or comment about it in your presence, and do not remain within hearing of such conversations. You must keep your mind free of outside influences so that your decision will be based entirely on the evidence presented during the trial and on my instructions to you about the law.

Until you are dismissed at the end of this trial, you must avoid outside sources such as newspapers, magazines, blogs, the internet, or radio or television broadcasts which may discuss this case or issues involved in this trial. If you start to hear or read information about anything related to the case, you must act immediately so that you no longer hear or see it. By giving this instruction I do not mean to suggest that this particular case is newsworthy; I give this instruction in every case.

During the trial, do not try to determine on your own what the law is. Do not seek out any evidence on your own. Do not consult dictionaries or other reference materials. Do not conduct any research into the facts, the issues, or the people involved in this case. This means you may not use Google or other internet search engines, internet resources to look into anything at all related to this case. Do not inspect the scene of any event involved in this case. If your ordinary travel will result in passing or seeing the location of any event involved in this case, do not stop or try to investigate. You must keep your mind clear of anything that is not presented to you in this courtroom.

During the trial, do not provide information about the case to other people, including any of the lawyers, parties, witnesses, your friends, members of your family, or members of the media. If necessary, you may tell people (such as your employer) that you are a juror and let them know when you need to be in court. If people ask you for more details, you should tell them that you are not allowed to talk about the case until it is over.

I want to emphasize that the rules prohibiting discussions include your electronic communications. You must not send or receive information about anything related to the case by any means, including by text messages, e-mail, telephone, internet chat, blogs, or social networking web sites.

In short, do not communicate with anyone, by any means, concerning what you see or hear in the courtroom, and do not try to find out more about anything related to this case, by any means, other than what you learn in the courtroom. These rules ensure that the parties will receive a fair trial.

If you become exposed to any information other than what you learn in the courtroom, that could be grounds for a mistrial. A mistrial would mean that all of the work that you and your fellow jurors put into this trial will be wasted. Re-trials are costly and burdensome to the parties and the public. Also, if you communicate with others in violation of my orders, you could be fined or held in contempt of court.

After you have delivered your verdict, you will be free to do any research you choose and to share your experiences with others.

Remember that all phones, PDAs, laptops, and other communication devices must be turned off while you are in court and while you are in deliberations.

Throughout the trial, you must maintain an open mind. You must not form any firm and fixed opinion about any issue in the case until the entire case has been submitted to you for deliberation.

As jurors, you are officers of this court. As such, you must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

To accomplish a fair trial takes work, commitment, and cooperation. A fair trial is possible only with a serious and continuous effort by each one of us, working together.

Thank you for your willingness to serve this court and our system of justice.

WPI 1.01 (6th ed. 2005)

INSTRUCTION NO. _____

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not

go with you to the jury room during your deliberations unless they have been admitted into evidence, or have been admitted for illustrative purposes only. The demonstrative exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any

remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

WPI 1.02 (6th ed. 2005)

INSTRUCTION NO. _____

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable

manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. [For this purpose, use the form provided in the jury room.] In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will

then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.

WPI 1.11 (6th ed. 2005)

INSTRUCTION NO. _____

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

WPI 2.10 (6th ed. 2005)

INSTRUCTION NO. _____

You must not discuss or speculate about whether any party has insurance or other coverage available. Whether a party does or does not have insurance has no bearing on any issue that you must decide. You are not to make, decline to make, increase, or decrease any award because you believe that a party does or does not have medical insurance, workers' compensation, liability insurance, or some other form of coverage.

WPI 2.13 (6th ed. 2005)

INSTRUCTION NO. _____

We are about to begin the jury selection process, sometimes called "voir dire." I will ask you as a group to give your oath to tell the truth. After you have done so, you will be asked questions concerning your ability to serve as jurors in this case.

(Oath on voir dire: "Do you solemnly swear or affirm that you will truthfully answer the questions that will be asked of you by the court or the attorneys concerning your qualifications to act as jurors in this case, [so help you God]? Did any of you answer in the negative or fail to respond?")

You will be asked a number of questions as part of the jury selection process. These questions may sometimes involve issues that are sensitive for you. If at any time you are uncomfortable answering a particular question in front of the other jurors, please raise your hand or notify the bailiff. We may then discuss other ways to handle this question.

WPI 6.01 (6th ed. 2005)

INSTRUCTION NO. _____

During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends. This applies to your internet and electronic discussions as well—you may not talk about the case via text messages, e-mail, telephone, internet chat, blogs, or social networking web sites. If anybody asks you about the case, or about the people or issues involved in the case, you are to explain that you are not allowed to discuss it.

Do not allow anyone to give you information about the case, including in your electronic communications. If you overhear a discussion or start to receive information about anything related to this case, you must act immediately so that you no longer hear or see it.

Do not read, view, or listen to any report from the newspaper, magazines, social networking sites, blogs, radio, or television on the subject of this trial. Do not conduct any internet research or consult any other outside sources about this case, the people involved in the case, or its general subject matter. You must keep your mind open and free of outside information. Only in this way will you be able to decide the case fairly based solely on the evidence and my instructions on the law.

WPI 6.02 (6th ed. 2005)

INSTRUCTION NO. _____

I am allowing [this exhibit] [exhibit number ___] to be used for illustrative purposes only. This means that its status is different from that of other exhibits in the case. This exhibit is not itself evidence. Rather, it is one [party's] [witness's] [summary] [explanation] [illustration] [interpretation], offered to assist you in understanding and evaluating the evidence in the case.

Keep in mind that actual evidence is the testimony of witnesses and the exhibits that are admitted into evidence.

Because it is not itself evidence, this exhibit will not go with you to the jury room when you deliberate. The lawyers and witnesses may use the exhibit now and later on during this trial. You may take notes from this exhibit if you wish, but you should remember that your decisions in the case must be based upon the evidence.

WPI 6.05 (6th ed. 2005)

INSTRUCTION NO. _____

You will now be given testimony from a deposition. A deposition is testimony of a witness taken under oath outside of the courtroom. The oath is administered by an authorized person who records the testimony word for word. Depositions are taken in the presence of lawyers for the parties.

The deposition will be read aloud to you. Insofar as possible, you must consider this form of testimony in the same way that you consider the testimony of witnesses who are present in the courtroom. You must decide how believable the testimony is and what value to give to it. A copy of the deposition will not be admitted into evidence and will not go to the jury room with you.

WPI 6.09 (6th ed. 2005)

INSTRUCTION NO. _____

A claim for professional negligence, requires the plaintiff to establish the existence of a duty, a breach thereof, a resulting damage, and proximate causation between the breach and the resulting damage.

Michaels v. CH2M Hill, 171 Wn.2d 587, 605 (2011).

INSTRUCTION NO. _____

The term "proximate cause" means a cause which in a direct sequence produces the event complained of and without which such event would not have happened. There may be more than one proximate cause of an event.

WPI 15.01 (6th ed. 2005); *Jonson v. Chicago, M., St. P. and P.R. Co.*, 24 Wn. App. 377 (1979)(Using WPI 15.01 without the last paragraph is error if there is evidence of more than one proximate cause)

INSTRUCTION NO. _____

Where the defects alleged by the plaintiff are the result of the contractor's noncompliance with the approved structural plans, the plaintiff's claimed damage is not proximately caused by the structural plans of the building.

Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Development Co., 115 Wn.2d 506, 534 (1990).

INSTRUCTION NO. _____

(1) The plaintiff claims that the defendants Engineers Northwest and Theodore McDonald were negligent in failing to meet the degree of care, skill, and learning expected of a reasonably prudent engineer in the state of Washington when providing engineering services for the Pointe at Westport project.

The plaintiff claims that Engineers Northwest and Theodore McDonald were negligent, and that the negligence was a proximate cause of damage for repairs to the project. Engineers Northwest and Theodore McDonald deny that it has liability for the plaintiff's cost of repair damages. To the extent the jury finds liability, ENW further denies that the plaintiff's alleged damages are entirely attributable to Engineers Northwest, and that Integrity Structures (general contractor) and Corson Swift Builders LLC (the framer) also bear liability for the alleged structural deficiencies. Finally ENW denies that the plaintiff's cost of repair estimate is reasonable.

The plaintiff claims that Steven P. Elkins Architects, Inc., P.S. materially breached its contract with Dodson Duus, the project developer, in one or more of the following respects:

- The project was negligently designed and fails to conform with relevant building code requirements and minimum standards of structural strength for lateral shear loads,
- Engineers Northwest, the sub-consultant retained by Steven P. Elkins Architects, Inc. P.S., negligently failed to prepare construction documents and plans setting

forth these requirements for implementation by others, and failed to include certain necessary structural components and specifications in design documents, and failed to review as-constructed building conditions for conformance with the structural design.

The plaintiff claims that one or more of these acts were a proximate cause of damages for repair to the project.

The plaintiff claims that the defendant Corson Swift Builders, LLC was negligent in one or more of the following respects:

- Corson Swift Builders breached its duty to install all structural components of the project in conformance with the plans and specifications.
- Corson Swift Builders breached its duty to identify ambiguities, inconsistencies, or missing details in the construction plans and structural drawings,
- Corson Swift Builders breached its duty to seek appropriate clarification and guidance from design professionals.

The plaintiff claims that one or more of these acts were a proximate cause of damages for repair to the project.

(2) In addition, Engineers Northwest and Theodore McDonald claim and plaintiff denies the following affirmative defense:

- The plaintiff's damages, if any, were caused by individuals or entities over whom Engineers Northwest and Theodore McDonald had no control or which occurred after the completion of work, including but not limited to Integrity Structures, LLC, Corson Swift Builders, LLC, and Stephen P. Elkins Architects.
- Engineers Northwest and Theodore McDonald are entitled to an allocation of fault pursuant to RCW 4.22.070 and judgment against each defendant in proportion to the percentage of fault allocated to that defendant.

(3) Engineers Northwest and Theodore McDonald further deny that the Pointe at Westport Condominium has sustained any damage (i.e. collapse, cracks in the building).

(4) Engineers Northwest and Theodore McDonald further deny the nature and extent of the claimed damages. To the extent the jury finds liability for Engineers Northwest and Theodore McDonald, the jury should adopt the defendants' structural engineer expert scope of repair, and the defendants' construction expert cost estimate.

WPI 20.01 (6th ed. 2005)

INSTRUCTION NO. _____

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

WPI 21.01 (6th ed. 2005)

INSTRUCTION NO. _____

The plaintiff has the burden of proving each of the following propositions:

First, that one or more of the defendants acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting, or failing to act, one or more of the defendants was negligent;

Second, that the plaintiff was damaged.

Third, that the negligence of one or more of the defendants was the proximate cause of the plaintiff's damage. If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendants.

WPI 21.02 (6th ed. 2005)

INSTRUCTION NO. _____

The defendant has the burden of proving the following affirmative defense[s] claimed by the defendant:

- The plaintiff's damages, if any, were caused by individuals or entities over whom

Engineers Northwest and Theodore McDonald had no control or which occurred after the completion of work, including but not limited to Integrity Structures, LLC, Corson Swift Builders, LLC, and Stephen P. Elkins Architects.

- Engineers Northwest and Theodore McDonald are entitled to an allocation of fault pursuant to RCW 4.22.070 and judgment against each defendant in proportion to the percentage of fault allocated to that defendant.
- The Plaintiff failed to properly serve Defendant Theodore McDonald with a summons and complaint.

If you find from your consideration of all the evidence that one or more of these affirmative defenses have been proved, your verdict should be for the defendant.

WPI 21.05 (6th ed. 2005)

INSTRUCTION NO. _____

Before a percentage of negligence may be attributed to any entity that is not party to this action, ENW and Theodore McDonald have the burden of proving each of the following propositions:

First, that the entity was negligent; and

Second, that the entity's negligence was a proximate cause of the plaintiff's damage.

WPI 21.10 (6th ed. 2005)

INSTRUCTION NO. _____

The measure of reasonable care for an engineer undertaking engineering services is the degree of care, skill, and learning expected of a reasonably prudent engineer in the state of Washington acting in the same or similar circumstances.

Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., 170 Wn.2d 442, 456, 243 P.3d 521 (2010)

INSTRUCTION NO. _____

An engineer does not and cannot insure or in any sense guarantee a satisfactory result, nor is the engineer responsible for unsatisfactory results of his work unless his lack of professional knowledge and skill or his negligent failure to exercise it is the proximate cause of

such result. The fact in a particular case that damages resulted is not in itself evidence that the work the engineer performed was improper or that he failed to exercise professional knowledge and skill necessary to proper professional practice, nor is it any evidence that the engineer failed to exercise his skill with reasonable care.

Seattle Western v. David A. Mowat Co., 110 Wn.2d 1, 8, 750 P.2d 245 (1988).

INSTRUCTION NO. _____

An engineer is not liable for an honest error of judgment if, in arriving at that judgment, the engineer exercised reasonable care and skill, within the standard of care he was obliged to follow.

Seattle Western v. David A. Mowat Co., 110 Wn.2d 1, 9, 750 P.2d 245 (1988).

INSTRUCTION NO. _____

Negligence of a construction contractor is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

WPI 10.01 (modified)

INSTRUCTION NO. _____

A builder or construction contractor is liable for injury or damage to a third person as a result of negligent work when it was reasonably foreseeable that a third person would be injured due to that negligence.

Davis v. Baugh Industrial Contractors, Inc., et al, 159 Wn2d 413, 417 (2010).

INSTRUCTION NO. _____

The measure of damage for the plaintiff's negligence claim against Engineer's Northwest and Theodore McDonald is the reasonable value of necessary repairs to any property that was damaged.

WPI 30.13 (6th ed. 2005)

INSTRUCTION NO. _____

If you find that more than one entity was negligent, you must determine what percentage of the total negligence is attributable to each entity that proximately caused the damage to the plaintiff. The court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Entities may include the defendants and entities not party to this action.

WPI 41.04 (6th ed. 2005)

INSTRUCTION NO. _____

The plaintiff, The Pointe at Westport Harbor Homeowners' Association, has the burden of proving each of the following propositions on its claim of breach of third party beneficiary contract:

(1) Defendant ENW and Defendant Steven P. Elkins Architects entered into a contract for ENW to perform engineering services for the Pointe at Westport project;

(2) At the time they entered the contract, ENW and Elkins Architects intended that ENW assume a direct obligation to not only Elkins Architects, but also the owner of the project, Dodson Duus, LLC.

(3) That ENW's intention to assume a direct obligation to Dodson Duus, LLC is clearly worded in the contract.

(4) The contract between ENW and Dodson Duus provides that ENW will provide structural calculations and design for all phases of the Pointe at Westport project;

(4) That Engineers Northwest, Inc. breached the contract in one or more of the ways claimed by The Pointe at Westport Harbor Homeowners' Association;

(6) That Dodson Duus, LLC was damaged as a result of Engineers Northwest, Inc.'s breach.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for The Pointe at Westport Harbor Homeowners'

Association on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for Engineers Northwest, Inc.'s on this claim.

WPI 300.02 (6th ed. 2005); *Warner v. Design and Build Homes, Inc.*, 128 Wn. App. 34, 43 (2005).

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR
COUNTY

THE POINTE AT WESTPORT ET AL
vs
ENGINEERS NW ET AL

Plaintiff/Petitioner
No.10-2-01263-6
DECLARATION OF
EMAILED DOCUMENT
(DCLR)

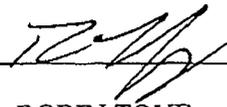
Defendant/Respondent

Pursuant to the provisions of GR 17, I declare as follows:

1. I am the party who received the foregoing facsimile transmission for filing.
2. My address is: 3400 Capital Blvd #103 Tumwater Wa 98501
3. My phone number is (360) 754-6595
4. The e-mail address where I received the document is: oly@abclegal.com.
5. I have examined the foregoing document, determined that it consists of 25 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: 10/22/13, at Olympia, Washington.

Signature: 
Print Name: ROBIN TOYE

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE POINTE AT WESTPORT HARBOR
HOMEOWNERS' ASSOCIATION,
a Washington non-profit corporation,

Plaintiff,

vs.

DODSON-DUUS, LLC, a Washington limited liability company; HARBOR RESORT HOLDINGS, LLC, a Washington limited liability company; GABE DUUS and JANE DOE DUUS, husband and wife, individually and their marital community; HARBOR RESORT PROPERTIES, INC., a closely-held Washington corporation; MARK DODSON and DESIREE DODSON, husband and wife, individually and their marital community; EDWARD DODSON, JR. and ANN GRIMES DODSON, husband and wife, individually and their marital community; DOE AFFILIATES 1-20; DOE PRINCIPALS 1-10; DOE CONTRACTORS 1-20; DOE DECLARANT AGENTS 1-10; and DOE TRANSFEREES 1-50; ENGINEERS NORTHWEST, INC., P.S., a Washington professional services corporation; THEODORE D. McDONALD and JANE DOE McDONALD, husband and wife, and their marital community; STEVEN P. ELKINS ARCHITECTS, INC., P.S., a Washington professional services corporation; INTEGRITY STRUCTURES, LLC, a Washington limited liability company; and CORSON SWIFT BUILDERS, LLC, a Washington limited liability company,

Defendants.

No. 10-2-01263-6

SPECIAL VERDICT FORM

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Were any of the following negligent?

(Answer "yes" or "no" after the name of each defendant and the name of each entity not party to this action..)

ANSWER:

Yes

No

APPENDIX C

1712

Defendant Engineers Northwest, Inc., P.S.:	_____	_____
Defendant Theodore D. McDonald:	_____	_____
Defendant Steven P. Elkins Architects	_____	_____
Defendant Corson Swift Builders, LLC	_____	_____
Non Party Integrity Structures, LLC	_____	_____

(INSTRUCTION: If you answered "no" to Question 1 as to each defendant, sign this verdict form. If you answered "yes" to Question 1 as to any defendant, answer Question 2.)

QUESTION 2: Was such negligence a proximate cause of injury to the Pointe at Westport unit owners or damage to the Pointe at Westport building?

(Answer "yes" or "no" after the name of each defendant and non-party found negligent by you in Question 1.)

ANSWER:	Yes	No
Defendant Engineers Northwest, Inc., P.S.:	_____	_____
Defendant Theodore D. McDonald:	_____	_____
Defendant Steven P. Elkins Architects	_____	_____
Defendant Corson Swift Builders, LLC	_____	_____
Non Party Integrity Structures, LLC	_____	_____

(INSTRUCTION: If you answered "no" to Question 2 as to all defendants, sign this verdict form. If you answered "yes" to Question 2 as to any defendant, answer Question 3.)

QUESTION 3: What do you find to be the plaintiff's amount of damages? (Do not consider the issue of contributory negligence, if any, in your answer.)

ANSWER: \$ _____

(INSTRUCTION: If you answered Question 3 with any amount of money, answer Question 4. If you found no damages in Question 3, sign this verdict form.)

QUESTION 4: Was the plaintiff also negligent?

ANSWER: _____ (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 4, skip Question 5 and answer Question 6. If you answered "yes" to Question 4, answer Question 5.)

QUESTION 5: Was the plaintiff's negligence a proximate cause of the injury or damage to the plaintiff?

ANSWER: _____ (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 5, answer Question 6. If you answered "yes" to Question 5, skip Question 6 and answer Question 7.)

QUESTION 6: Assume that 100% represents the total combined negligence that proximately caused injury to the unit owners or damage the building. What percent of this 100% is attributable to each defendant and non-party whose negligence was found by you in Question No. 2 to have been a proximate cause of the injury to the unit owners or damage the building? Your total must equal 100%.

ANSWER:	PERCENTAGE
Defendant Engineers Northwest, Inc., P.S.:	_____ %
Defendant Theodore D. McDonald:	_____ %
Defendant Steven P. Elkins Architects	_____ %
Defendant Corson Swift Builders, LLC	_____ %
Non Party Integrity Structures, LLC	_____ %
Total:	100%

(INSTRUCTION: Sign this verdict form and notify the bailiff.)

QUESTION 7: Assume that 100% represents the total combined fault that proximately caused the injury to the unit owners or damage the building. What percent of this 100% is attributable to the plaintiff's negligence, what percentage of this 100% is attributable to the negligence of each defendant and non-party whose negligence was found by you in Question No. 2 to have been a proximate cause of the injury to the unit owners or damage the building? Your total must equal 100%.

ANSWER:	PERCENTAGE
Defendant Engineers Northwest, Inc., P.S.:	_____ %
Defendant Theodore D. McDonald:	_____ %
Defendant Steven P. Elkins Architects	_____ %
Defendant Corson Swift Builders, LLC	_____ %
Non Party Integrity Structures, LLC	_____ %
Plaintiff	_____ %
Total:	100%

Dated this _____ day of _____, 2013.

Presiding Juror

WPI 45.27 (6th ed. 2005)

Steven G. Wraith
Aaron P. Gilligan
Lee Smart, P.S., Inc.
701 Pike Street, Suite 1800
Seattle, WA 98101-3929

U.S. Mail Postage Prepaid
 E-mail

Leonard D. Flanagan
Stein, Flanagan, Sudweeks &
Houser PLLC
901 Fifth Avenue, Suite 3000
Seattle, WA 98164-2066

U.S. Mail Postage Prepaid
 E-mail

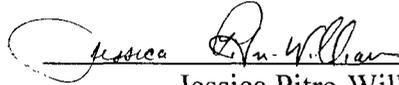
Barnett N. Kalikow
Kalikow Law Office
1405 Harrison Ave NW, Suite 202
Olympia, WA 98502-5327

U.S. Mail Postage Prepaid
 E-mail

A. Grant Ligg
Christopher Matheson
Forsberg & Umlauf, P.S.
901 Fifth Avenue, Suite 1400
Seattle, WA 98164

U.S. Mail Postage Prepaid
 E-mail

DATED this 9th day of January, 2015.



Jessica Pitre-Williams

SIGNED AND SWORN to before me on 1-9-15

by ~~Jessica Pitre-Williams~~.





Print Name: Michael Rogers
Notary Public Residing at Issaquah.
My appointment expires: 8-29-15