

No. 47685-1-II

**Court of Appeals, Div. II,
of the State of Washington**

David Nichols and Sylvia Nichols,

Appellants,

v.

Peterson NW, Inc.,

Respondent.

Brief of Appellants

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1. Introduction

The trial court improperly applied the economic loss rule/ independent duty doctrine to dismiss the Nichols' negligence claims against contractors whose defective work on the roof of the Nichols home caused damage to other parts of the home and personal injury to members of the Nichols family. This Court should reaffirm the principle noted in *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 395, 241 P.3d 1256 (2010), and set forth in greater detail in *Jackson v. City of Seattle*, 158 Wn. App. 647, 655-56, 224 P.3d 425 (2010), that a construction contractor has an independent, common law tort duty to avoid unreasonable risks of harm to persons and other property caused by the contractor's own defective work. This Court should reverse, reinstate the Nichols' negligence claim against Peterson, and remand for further proceedings.

2. Assignments of Error

Assignments of Error

1. The trial court erred in dismissing Nichols' negligence claims on summary judgment.
2. The trial court abused its discretion in granting Peterson's motion for reconsideration and dismissing all claims against Peterson.

Issues Pertaining to Assignments of Error

1. Whether Peterson owed an independent tort duty to Nichols (assignments of error 1 and 2).

3. Statement of the Case

3.1 Peterson performed negligent work on the Nichols' roof, exposing the house to water intrusion and damage.

Dave and Sylvia Nichols purchased their home in Shelton in 2001. CP 452. They have four children, all on the autism spectrum, requiring special attention and care. CP 451. In the winter of 2005-06, the Nichols noticed a leak on the low-slope portion of their roof and decided to hire a contractor to replace the roof. CP 452. The Nichols chose to hire The Home Depot At-Home Services, Inc. (“THD”), which recommended installation of an upgraded ridge exhaust vent and soffit intake vent to improve the ventilation of the attic and increase the value of the home. *Id.* THD hired various subcontractors to do portions of the work. CP 672-73.

THD hired Peterson Northwest, Inc. to remove the existing roof and shingles. CP 674. Peterson removed the roof, existing ventilation systems, prepared the roof deck, cut the roof peak in preparation for the new ridge vents, and installed flashing and felt underlayment in preparation for new shingles. CP 452-53. Peterson installed the flashing improperly and made incorrect cuts in the roof peak. CP 453, 499-500.

After installing the new felt underlayment, Peterson left the job that day without covering the roof and did not show up on the next day, a Friday, to install the shingles. CP 453. Peterson intentionally left the roof exposed to rain and wind and would have left it that way for the whole weekend if Ms. Nichols had not called THD to complain. *Id.* THD tarped the roof, so water

would not continue to penetrate the roof over the weekend, and removed Peterson from the job. *Id.*

THD and subsequent subcontractors failed to install the promised soffit vents, but never informed the Nichols. CP 454. After the Nichols discovered the problem, THD installed “smart vents” because the promised soffit vents were not compatible with the design of the new roof. *Id.* THD performed further warranty repairs to the roof at various times over the next few years. CP 455.

3.2 Water intrusion and mold in the attic caused damage to the home and personal injury to the Nichols children.

The Nichols’ construction defect expert, Vince McClure, PhD., concluded that roofing, flashing, and roof vents were not properly installed, allowing water to penetrate into the Nichols’ home. CP 499-501. Peterson did some of the work that Dr. McClure identifies as the cause of water entering and damaging the Nichols’ home. *Compare Id. with* CP 452-53, 625-28.

Between 2007 and 2011 the Nichols family all experienced various health issues, which they were initially unable to attribute to anything in particular. CP 455. All of the Nichols children experienced general illness, skin conditions and constant infections that did not respond to antibiotics. *Id.*; CP 446-49. On December 7, 2011, Mr. Nichols went into the attic on the landing between the children’s bedrooms to retrieve the family Christmas

decorations and saw for the first time that the inside roof sheeting was covered with water and mold and was very humid. CP 455.

The Nichols' doctors recommended that they stay out of the home until the mold was properly dealt with. CP 455. The Nichols moved out of their home and into a 240 square-foot, fifth-wheel trailer that they moved onto the property. *Id.* The Nichols have not lived in their home since December 17, 2011. *Id.* The loss of their home has caused the Nichols and their children severe emotional distress. CP 449, 455-56.

3.3 The trial court dismissed the Nichols claims against Peterson on a motion for reconsideration after denying Peterson's motion for summary judgment.

The Nichols sued THD, Peterson, and others who worked on the roof project. CP 822-34. The Nichols alleged claims of breach of contract and negligence against THD (CP 825-28); commission of statutory waste by THD under RCW 4.24.630 (CP 828); violation of the Consumer Protection Act by THD (CP 829); and negligence by THD's subcontractors, including Peterson (CP 830).

THD and Peterson moved for summary judgment dismissal. THD argued, among other things, that the Nichols' negligence claims should be dismissed under the economic loss rule. CP 717. Peterson joined in THD's motion, to the extent applicable to claims against Peterson. CP 695. Peterson also argued that the Nichols' negligence claims should be dismissed under the economic loss rule and for lack of evidence of causation. CP 701-04.

The trial court dismissed the Nichols' negligence claims against THD, finding that any duties owed by THD to Nichols "were created by the contractual relationship between the parties, and were not duties that independently existed from that of the contract." RP 50-51; CP 367. The trial court denied Peterson's motion, finding there was some evidence that Peterson exposed the roof and home to moisture, allowed water to enter the building envelope, and resulted in the growth of mold and mildew, causing damage to the home. RP 55-56; CP 332-33. The Nichols subsequently settled with THD. *See* RP 60.

Peterson brought a motion for reconsideration, arguing that the only remaining claim against Peterson was the CPA claim and that Nichols had failed to present sufficient evidence to support such a claim. CP 316-28. The Nichols' responded that there was nothing for the court to reconsider, because they had no CPA claim against Peterson and Peterson had not raised a CPA claim as an issue in its original summary judgment motion. CP 19-22.

At oral argument, Peterson revealed for the first time that it believed the court's summary judgment ruling had dismissed the negligence claim against Peterson. RP 61, 65. The Nichols argued that the negligence claims against THD and Peterson were distinct claims; that the claim against THD had been dismissed but the claim against Peterson had not. RP 68. The court ruled that Peterson's joinder in THD's motion meant that the negligence claim had been dismissed, notwithstanding evidence of causation. RP 69. The court granted Peterson's motion and dismissed all claims against Peterson. CP 18. The Nichols' appeal the dismissal. CP 5-6.

4. Summary of Argument

The trial court erred in dismissing the Nichols' negligence claims against THD on summary judgment under the economic loss rule/independent duty doctrine. Both THD and Peterson owed independent, common law tort duties to Nichols. A construction contractor owes a duty to the homeowner to avoid unreasonable risks of harm to persons and other property caused by the contractor's own work. Because Peterson owed this duty to Nichols, there were no grounds upon which to dismiss the Nichols' negligence claim against Peterson. The trial court abused its discretion when it granted Peterson's motion for reconsideration and dismissed all claims against Peterson.

5. Argument

5.1 Standards of Review

5.1.1 Summary judgment decisions are reviewed de novo.

This Court reviews summary judgment orders de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). This Court engages in the same inquiry as the trial court, considering all facts and reasonable inferences in the light most favorable to the nonmoving party. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 491, 183 P.3d 283 (2008). Summary judgment must be denied if reasonable persons can reach more than one conclusion from the all of the evidence. *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992). This Court should reverse dismissal of the

Nichols' negligence claim because there are genuine issues of material fact and Peterson is not entitled to judgment as a matter of law. *See* CR 56(c).

5.1.2 Decisions on motions for reconsideration are reviewed for abuse of discretion.

Generally, a trial court's decision on a motion for reconsideration is reviewed for abuse of discretion. *Davies*, 144 Wn. App. at 497. A trial court abuses its discretion if its decision is manifestly unreasonable or rests upon untenable grounds. *Id.* However, on appeal of a motion for reconsideration of a summary judgment decision, this Court first reviews the summary judgment decision de novo and only reviews the decision on reconsideration if it raises unresolved material issues. *See Davies* (affirming a summary judgment decision on de novo review, then addressing new evidence and arguments raised on reconsideration for abuse of discretion); *Lilly v. Lynch*, 88 Wn. App. 306, 320, 945 P.2d 727 (1997) (reversing a summary judgment decision in part before addressing a motion for reconsideration).

This Court should first review the trial court's summary judgment decision and reverse dismissal of the Nichols' negligence claims under the economic loss rule/independent duty doctrine. Then this Court should review the trial court's decision on reconsideration for abuse of discretion and reverse because dismissal of the Nichols' negligence claim against Peterson was based on untenable grounds. This Court should remand for further proceedings on the Nichols' negligence claim against Peterson.

5.2 The trial court erred in dismissing Nichols' negligence claims on summary judgment because both THD and Peterson owed Nichols independent tort duties.

A negligence claim requires proof of 1) a duty owed to the plaintiff, 2) breach of that duty, 3) injury, and 4) proximate cause. *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). THD and Peterson moved for dismissal of the Nichols' negligence claims only on the basis of duty and proximate cause. In its summary judgment decision, the trial court correctly found there were genuine issues of fact regarding proximate cause, but erred in holding that THD's duties arose only under contract.

A construction contractor owes a common law duty of care to avoid foreseeable injury to other persons or property caused by the contractor's own work. *Jackson v. City of Seattle*, 158 Wn. App. 647, 655-56, 224 P.3d 425 (2010). The existence of a duty is a question of law. *Pedroza*, 101 Wn.2d at 228. Washington courts follow the lead of the Restatement (Second) of Torts § 385:

One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor.

Under this section, a construction contractor is liable for injury or damage to other property as a result of negligent work. *Jackson*, 158 Wn. App. at 656-57.

THD and Peterson argued that there was no such duty, relying on *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 745 P.2d 1284

(1987), to argue that there is no cause of action for negligent construction. However, “*Stuart* does not stand for the proposition that a building contractor can be sued only for contract remedies.” *Jackson*, 158 Wn. App. at 659. Rather, the *Stuart* court was careful to preserve tort liability for physical damage caused to other property when the contractor’s work product creates unreasonable risks of harm. *Id.* (citing *Stuart*, 109 Wn.2d at 419); see *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 395, 241 P.3d 1256 (2010) (“we implied [in *Stuart*] that the builder had an independent duty to avoid unreasonable risks of harm to persons and other property”).

The key fact in *Stuart* was that there was no allegation of injury beyond the work itself (the condominium) and no damage beyond the cost of repairing the contractors’ work. *Id.*; *Stuart*, 109 Wn.2d at 420-21 (“The nature of the defect here was that the decks and walkways were not of the quality desired by the buyers. The ‘injury’ or damage suffered was that the decks themselves deteriorated.”). In contrast, here the defect was that THD and Peterson’s work on the roof allowed water intrusion into other parts of the home. The damage suffered was damage to the attic and other parts of the home and personal injury to members of the Nichols family. *Stuart* is not a bar to tort liability in this case.

The trial court erred in dismissing the Nichols’ negligence claims on the grounds that THD’s duties were addressed in the parties’ contract. “Economic losses are sometimes recoverable in tort, even if they arise from contractual relationships. ... Thus, the fact that an injury is an economic loss

or the parties also have a contractual relationship is not an adequate ground, by itself, for holding that a plaintiff is limited to contract remedies.” *Eastwood*, 170 Wn.2d at 388-89. It is not enough to superficially determine whether a duty arises from contract. *Affiliated FM Ins. Co. v. LTK Consulting Svcs., Inc.*, 170 Wn.2d 442, 449, 243 P.3d 521 (2010). Instead, under the independent duty doctrine, “an injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract.” *Id.*

As demonstrated above, a construction contractor has an independent, common law tort duty to avoid unreasonable risks of harm to persons and other property caused by the contractor’s own work. *Eastwood*, 170 Wn.2d at 395; *Jackson*, 158 Wn. App. at 655-56. When, as here, a contractor’s negligent work injures something other than itself, such as a person or other property, the loss is not merely an economic loss and tort remedies are appropriate. *See Jackson*, 158 Wn. App. at 660.

In *Jackson*, the court held that tort remedies were not barred when the contractors’ negligence in installing a waterline created a hazardous condition that caused damage, not to the waterline itself, but to the hillside and to the home to which the waterline was connected. Similarly, here, the Nichols’ tort remedies should not be barred when Peterson’s negligence in working on the roof created a hazardous condition that allowed water intrusion and damage, not to the roof itself, but to the attic and other parts of the Nichols’ home, causing personal injury to members of the Nichols family.

The trial court erred in dismissing the Nichols' negligence claims under the economic loss rule. This Court should reverse and reinstate the Nichols' negligence claim against Peterson.

5.3 The trial court abused its discretion when, on reconsideration, it dismissed all claims against Peterson.

The trial court abused its discretion for two reasons: 1) Peterson failed to raise the issue on which the trial court ultimately based its decision; and 2) even if the issue had been properly raised, the decision rested on untenable grounds.

5.3.1 Peterson's motion failed to raise the issue on which the trial court based its decision, giving Nichols no meaningful opportunity to respond.

In any motion, it is the responsibility of the moving party to raise in its motion and supporting documents all of the issues and evidence on which it believes it is entitled to relief. *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991). A court should not consider an issue raised for the first time during oral argument. *State v. Kirwin*, 137 Wn. App. 387, 394, 153 P.3d 883 (2007). "It is particularly unfair to consider an argument when opposing counsel has had no opportunity to prepare a response." *Id.*

Peterson's motion for reconsideration argued that Nichols could not prove a Consumer Protection Act claim against Peterson. Nichols responded that there was nothing to reconsider because there was no CPA claim against

Peterson. Only at oral argument did Peterson reveal that it believed that the Nichols' negligence claim against Peterson had been dismissed on the same grounds (economic loss rule) as the Nichols' negligence claim against THD. The Nichols had no opportunity to prepare a response to this argument, yet the trial court accepted the argument and granted the motion on those grounds. The trial court's decision was manifestly unreasonable because it did not allow the Nichols any meaningful opportunity to respond. The trial court abused its discretion in granting reconsideration. This Court should reverse and reinstate the Nichols' negligence claim against Peterson.

5.3.2 The decision rested on untenable grounds because Peterson owed Nichols an independent tort duty.

Even if the issue had been properly raised, the trial court's decision rested on untenable grounds. The trial court determined that the Nichols' negligence claim against Peterson was dismissed for the same reasons as the Nichols' negligence claim against THD had been dismissed. However, as shown above, the trial court erred in dismissing the Nichols' negligence claims under the economic loss rule. Both THD and Peterson owed the Nichols independent tort duties. The trial court found there were genuine issues of fact as to whether Peterson's conduct proximately caused the Nichols' injuries. Thus, there were no grounds to dismiss the Nichols' negligence claim against Peterson. The trial court abused its discretion in granting the motion for reconsideration.

Even if the trial court's analysis of the Nichols' negligence claim against THD had been correct, that analysis could not serve as grounds for

dismissal of the Nichols' negligence claim against Peterson. The trial court held that any duties owed by THD to Nichols arose from the parties' contract. However, the Nichols had no contract with Peterson. The duties Nichols alleged were owed by Peterson could not have arisen from contract. Peterson owed those duties as tort duties, independent of any contract. The trial court abused its discretion because its decision to dismiss the Nichols' negligence claim against Peterson rested on untenable grounds.

6. Conclusion

The trial court erred in dismissing the Nichols' negligence claims under the economic loss rule. Both THD and Peterson owed the Nichols independent, common law tort duties. The trial court abused its discretion in granting reconsideration and dismissing the Nichols' negligence claim against Peterson. This Court should reverse, reinstate the Nichols' negligence claim against Peterson, and remand for further proceedings.

Respectfully submitted this 14th day of December, 2015.

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I certify, under penalty of perjury under the laws of the State of Washington, that on December 14, 2015 I caused the original of the foregoing document, and a copy thereof, to be filed and served by the method indicated below, and addressed to each of the following:

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