

No. 47685-1-II

(Mason County Superior Court No. 12-2-00790-3)

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

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DAVID AND SYLVIA NICHOLS, et al.

*Appellants,*

vs.

PETERSON NW, INC.

*Respondent.*

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**BRIEF OF RESPONDENT PETERSON NW, INC.**

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IN THE COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

DAVID NICHOLS and SYLVIA  
NICHOLS, et al.,

Appellants/Plaintiffs,

v.

PETERSON NW, INC.,

Respondent/Defendant.

NO. 47685-1-II

Mason County Cause No.  
12-2-00790-3

**PETERSON NW, INC.'S  
CORPORATE DISCLOSURE  
STATEMENT**

In accordance with FRAP 26.1, the above-captioned Respondent/Defendant PETERSON NW, INC. states that it is not a public company so there is no such parent corporation or publicly held corporation owing 10% or more of its stock.

DATED this 13<sup>th</sup> day of December, 2016.

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## I. STATEMENT OF THE CASE

Peterson NW, Inc. (“Peterson”) is a small construction company located near Shelton, Washington. It is operated by Bryan Peterson and his wife out of their home. In 2006 plaintiffs contracted with The Home Depot At-Home Services, Inc. (“THD”) to install a new roof at the plaintiffs’ home in Shelton. CP 458, 460, 636. Peterson NW was hired by THD to remove the existing roof. CP 680, 687. Peterson removed the old roof for THD and then THD and its other subcontractors completed the project. CP 638, 674. Plaintiffs had a continuing dispute with THD about alleged roof leaking. CP 638. Years later, after this lawsuit was filed, plaintiffs for the first time claimed that Peterson should have put a tarp over the roof after Peterson had completed its part of the job. Plaintiffs admit that when Peterson’s work was finished, plaintiffs telephoned THD and asked THD to tarp the roof which THD did that weekend. CP 453, 692. Installing tarps was not part of Peterson’s contract with THD and THD never claimed that it was. CP 674. In 2014 when Peterson filed its motion for summary judgment and joined in THD’s summary judgment motion, plaintiffs filed a declaration by Sylvia Nichols for the first time raising the allegation against Peterson that Peterson’s work included “removing the existing ventilation system . . . cutting off the roof peek

[sic] for the ridge vent, extending the dormers, install flashing, and install the underlayment that went underneath the shingles.” CP 452-453. Plaintiffs may have said that based on what was contained in the original “work Order” for Peterson (CP 626) attached to the discovery answers of Peterson and THD. CP 409. However, the actual invoice submitted by Peterson after its work was completed listed everything Peterson actually did at the project. CP 625. That was also part of the discovery production by Peterson and THD. CP 409. It clearly showed that Peterson did not do the things claimed in Ms. Nichols’ Declaration. This was not controverted by THD or by anyone else. CP 409, 674. Ms. Nichols’ Declaration was also contradicted by her oWash deposition testimony. CP 691. In her deposition, she did not know who installed the flashing and that this was done after the tear off of the old roof by Peterson was completed. CP 409-410, 691. Plaintiffs’ case against Peterson is based on that dubious Declaration of Sylvia Nichols. As to the allegation about tarps, Ms. Nichols admitted in deposition that there was no water intrusion due to the roof not being tarped. CP 693.

After the Court denied THD’s Motion for Summary Judgment on the claims of breach of contract and violation of the Washington State Consumer Protection Act by the court’s order of April 3, 2015 (CP 367),

THD entered into a settlement with the plaintiffs for a very substantial amount of money (CP – (Order Approving Report, Dkt. 142)<sup>1</sup>. The settlement was approved by the Court in a reasonableness hearing. CP – (Order on Reasonableness Hearing, Dkt. 141). The Court’s Orders of April 3, 2015 ruled upon the Motion for Summary Judgment filed by THD, the Motion for Summary Judgment filed by Peterson, and the Joinder by Peterson in THD’s Motion for Summary Judgment. CP 330-334, 365-370. In the Court’s oral decision of February 23, 2015, which was reported and is a part of the Clerk’s Papers, the court decided that all negligence claims in the case should be dismissed because the plaintiffs had failed to identify any independent duty that could apply in the case to support a claim for negligence. CP 355-356. That was confirmed in the Court’s Order of April 3, 2015. CP 331. It was also stated in the April 3, 2015 Order denying Peterson’s Motion for Summary Judgment that the Court’s analysis contained in the February 23, 2015 oral decision was incorporated into the order and that it applied to Peterson. CP 367. After the settlement between the plaintiffs and THD, Peterson filed a Motion for Reconsideration. CP 316-329. Peterson’s Motion did not actually ask the

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<sup>1</sup> Please see Peterson NW’s Designation of Clerk’s Papers, filed with Mason County Superior Court.

Court to change its prior rulings in any way. Instead, it asked the Court to act upon its prior ruling that all negligence claims were dismissed and on that basis, dismiss Peterson from the lawsuit. The oral argument of Peterson's motion took place on May 11, 2015. There plaintiffs conceded that they had never pled and were not making any claims against Peterson other than for negligence. It was conceded that there was no claim for breach of contract, breach of warranty, waste, or violation of the Consumer Protection Act. RP 61-62. Because the Court had previously ruled on April 3, 2015 that all claims for negligence were dismissed, the Court dismissed Peterson from the lawsuit in its order of May 11, 2015. RP 68-69. Plaintiffs never moved for reconsideration of the Court's Order of April 3, 2015 and never filed any notice of appeal of that order. At the hearing on May 11, 2015, when the Court granted Peterson's request to be dismissed from the case, there was no argument made or even any suggestion by plaintiffs' counsel to the Court that the prior decision dismissing negligence claims was incorrect or that it was being contested in any way. RP 67-68.

## **II. LEGAL ARGUMENT**

The following legal argument is intended to show why the trial court's decision to dismiss Peterson from the case was correct for many

different legal reasons. “Appellate courts review summary judgment rulings de novo, engaging in the same inquiry into the evidence and issues called to the attention of the trial court.” *Dowler v. Clover Park School Dist. No. 400*, 172 Wash.2d 471, 484, 258 P.3d 676 (2011). The appellate court may affirm the trial court on any basis supported by the briefing and record below. *Huff v. Wiman*, 361 P.3d 727, 730 (2015), citing *LaMon v. Butler*, 112 Wash.2d 193, 200-01, 770 P.2d 1027 (1985). Summary judgment may be affirmed on any ground supported by the record. *Ese-Graham LLC v. Loshbaugh*, 164 Wash.App. 530, 541, 269 P.3d 1038, 1045 (2011), citing *Estep v. Hamilton*, 148 Wash.App. 246, 256, 201 P.3d 331 (2008), *review denied*, 166 Wash.2d 1027, 217 P.3d 336 (2009). The trial court’s summary judgment is supported on the following grounds.

#### 2.1 Dismissal of Negligence Claims Became the Law of the Case

In the trial Court’s order of April 3, 2015 denying Peterson’s Motion for Summary Judgment, the Court’s analysis contained in its February 23, 2015 oral ruling was incorporated in the Court’s Order and the Order specifically stated that it applied to Peterson. CP 331. When Peterson made its Motion for Reconsideration on May 11, 2015 requesting further action from the Court as to Peterson, the Court’s prior decision of April 3, 2015, dismissing all negligence claims, had become the law of the

case. *Estate of Ryder v. Kelly-Springfield*, 91 Wash.2d 111, 114, 587 P.2d 160 (1978). The plaintiffs never asked for nor did they file any motion for reconsideration of the Court's prior decision and Order of April 3, 2015 dismissing the negligence claims. Generally, issues not raised before the trial court will not be considered on appeal. *Fuqua v. Fuqua*, 88 Wash.2d 100, 105, 558 P.2d 801, 804 (1977). The purpose of this rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials. *Estate of Ryder v. Kelly-Springfield, supra*. Finally, when Peterson's Motion for dismissal was heard on May 11, 2015, the time for plaintiffs to appeal the April 3, 2015 Order, on which Peterson's Motion was based, had expired. Plaintiffs never attempted to appeal the court's April 3, 2015 decision.

## 2.2 No Substantial Evidence to Support Plaintiffs' Claim

The January 15, 2015 Declaration of Sylvia Nichols, contradicted by her oWash testimony and unsupported by anything else, is the only basis for plaintiffs' claim that Peterson's work "exposed the roof and home to moisture shortly after the work was performed." RP 63. Peterson's work was completed in 2006. In order to avoid summary judgment, plaintiffs must present *substantial* evidence of *material* facts to support the claim. Conclusory allegations or argumentative assertions are not sufficient. *Ruffer v. St. Cabrini Hosp.*, 56 Wash.App. 625, 784 P.2d

1288 (1990); *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 770 P.2d 182 (1989). There is no evidence at all as to how Peterson's work was done "negligently."

### 2.3 Negligence Requires Breach of a Duty to the Plaintiffs

To prove a negligence claim, a plaintiff must show (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached that duty, and (3) a proximate cause between defendant's breach and plaintiff's injury. *Lawman v. Wilbur*, 178 Wash.2d 165, 169, 300 P.3d 387 (2013). Plaintiffs have failed to cite any authority for their claim that Peterson had a legal duty to the plaintiffs with regard to the quality of Peterson's work. Peterson had a duty to THD by its contract and THD had duties to the plaintiffs by its contract. However, there was no evidence of any accident here. There was no evidence of what standard of care Peterson was required to carry out as to the plaintiffs for Peterson's work. In fact, while the Sylvia Nichols Declaration incorrectly describes the items of work that Peterson performed on this job, there was no evidence at all that Peterson did anything wrong by any standard.

Under tort law, duty questions the nature of the legal relationship between plaintiff and defendant. *Estate of Bruce Templeton v. Daffern*, 98 Wash.App. 677, 990, 1221, 968 (2000). In determining whether a duty is owed to the plaintiff, a court must not only decide who owed that duty, but also to whom the duty was owed and the nature of that duty. *Keller v. City of Spokane*, 146 Wash.2d 237, 44 P.3d 845 (2002). The existence of a

duty is a question of law and depends on mixed considerations of “logic, common sense, justice, policy, and precedent.” *Hartley v. State*, 103 Wash.2d 768, 698 P.2d 77 (1985). The existence of a duty may turn on the foreseeability of the risk created. *Shepard v. Mielkie*, 75 Wash.App. 201, 877 P.2d 220 (1994). That is a question of law for the court. *Tortes v. King County*, 119 Wash.App. 1, 84 P.3d 252 (2003). The court may dismiss a claim based on the lack of a specific duty, even when a general duty does exist. *Zenkins v. Sisters of Providence*, 83 Wash.App. 556, 922 P.2d 171 (1996).

Peterson did not cause any accident on this job. It is uncontroverted that Peterson did the work THD asked it to do. When Peterson left the job site, the work on the house had just begun. Peterson had no legal relationship with the plaintiffs. Their contractor was THD. Peterson had no control over and no knowledge of the other work to be done. Finally, there is no evidence to establish that Peterson had the right to supervise or inspect the work done later by THD and its other subcontractors or that Peterson had the duty to foresee that later work would be done incorrectly or cause leaks.

#### **2.4 Proximate Cause**

Plaintiffs’ case alleged water intrusion and exposure to mold against all the defendants. Washington has consistently recognized the general rule that when a party brings an action in tort, regardless of the

particular theory of liability relied upon, he or she has the burden of showing that:

(1) There is a statutory or common law rule that imposes a duty upon the defendant to refrain from the complained of conduct and that is designed to protect the plaintiff against harm of the general type; (2) the defendant's conduct violated the duty; and (3) there was a sufficiently close, actual *causal connection* between defendant's conduct and the actual damage suffered by plaintiff.

*Hanson v. Washington Natural Gas*, 27 Wash.App. 127, 129, 615 P.2d 1351 (1980) (emphasis added); *McLeod v. Grant County School District*, 42 Wash.2d 316, 255 P.2d 360 (1953). The legal element of proximate cause requires both "cause in fact" and legal causation. *Ang v. Martin*, 154 Wash.2d 477, 482, 114 P.3d 637 (2005). "Cause-in-fact" refers to a physical connection between an act and the injury complained of. *Id.* at 482. The "cause-in-fact" analysis requires that the plaintiffs establish that the harm they suffered would not have occurred *but for* an act or omission of Peterson. *Joyce v. State*, 155 Wash.2d 306, 119 P.3d 825 (2005). "*Cause-in-fact*" is a question of law when the facts, and inferences from them, are plain and not subject to reasonable doubt or a difference of opinion. *Dougert v. Pappas*, 104 Wash.2d 254, 257, 704 P.2d 600 (1985).

In this case the contradictory Declaration of Sylvia Nichols listed items of work she alleged were done by Peterson. The overwhelming evidence shows that this list was incorrect but the point is that there was

no evidence of any kind to establish any causation of the plaintiffs' claims, even if that list of items of work had actually been performed by Peterson. The only other evidence in the case as to Peterson was Sylvia Nichols' assertion that plaintiffs had to telephone THD to have the roof tarped sometime over the weekend after Peterson had finished its removal of the old roof. Ms. Nichols, however, admitted in deposition that no water intrusion occurred during this time period:

10 Q. Okay. And did the tarping over the roof solve your  
11 concern?

12 A. At the time, yes, because I didn't see any  
13 intrusion into the house.

14 Q. Did you ever — so is it correct there was no  
15 water intrusion into the house due to the roofing not being  
16 tarped?

17 A. Not that we know of. We didn't witness it.

CP 693. Thus, there is no evidentiary connection between the limited work done by Peterson and plaintiffs' claims.

This court should consider the reasoning in *Little v. Countrywood Homes, Inc.*, 132 Wash.App. 777, 783-84, 133 P.3d 944 (2006):

[The plaintiff] had not presented evidence sufficient to prove that Countrywood's breach was what caused his injuries. To meet his burden, Little needed to present proof sufficient to allow a reasonable person to conclude that the harm, more probably than not, happened in such a way that the moving party should be held liable. The party who has the burden of production need not provide proof to an absolute certainty, but reasonable inferences cannot be based on conjecture.

**The mere fact that Little sustained an injury does not entitle him to put Countrywood to the expense of trial. He needed to submit evidence allowing a reasonable person to infer, without speculating, that Countrywood's negligence more probably than not caused the accident.**

*Little*, 132 Wash.App. at 781-82, citing *Marshall v. Bally's PacWest, Inc.*, 94 Wash.App. 372, 377, 972 P.2d 475 (1999) (emphasis added). The limited evidence presented against Peterson in this case by the plaintiffs is not sufficient to allow a reasonable person to infer, without speculating, that Peterson's work was a proximate cause of plaintiffs' claimed damages.

## 2.5 Proof of Damages

Plaintiffs have failed to prove actual damages proximately caused by Peterson. This is an essential element of any negligence claim. *Lawman v. Wilbur*, 178 Wash.2d 169, 309 P.3d 387 (2013). Plaintiffs alleged numerous damages but they have never identified any actual damages caused by the work done by Peterson. Plaintiffs are claiming against Peterson all the same unsegregated damages that they alleged against THD and which were paid to plaintiffs by THD in their settlement.

## 2.6 Statute of Limitations

As discussed above, there is no evidence that water intrusion occurred as a result of Peterson's work. However, even if there were any

such evidence, the plaintiffs' claims would be barred by the Statute of Limitations, RCW 4.16.130. It is uncontroverted that Peterson completed its work in 2006. CP 687 Plaintiffs' Complaint was filed in 2012. CP 822-834. The trial court dismissed all negligence claims and therefore did not rule on the part of Peterson's summary judgment motion based on the statute of limitations. Nevertheless, the six-year time period between the completion of Peterson's work and the filing of the complaint would make the plaintiffs negligence action barred by the statute of limitations as to either property damage or injury.

Plaintiffs could conceivably argue that the discovery rule applies to save their claims. Ordinarily, "a cause of action accrues" for purposes of the statute of limitations at the time of the act or omission. *White v. Johnsmansville*, 103 Wash.2d 344, 348, 693 P.2d 687 (1985). The discovery rule may apply, however, where a plaintiff does not immediately discover an injury. *Wallace v. Lewis Kelly*, 134 Wash.App. 1, 13, 137 P.3d 101 (2006). "The discovery rule provides that a cause of action does not accrue until an injured party knows, or in the exercise of due diligence should have discovered, the factual basis of the cause of action." *Doe v. Finch*, 133 Wash.2d 96, 101, 942 P.2d 359 (1997) (quoting *Beard v. King County*, 76 Wash.App. 863, 867, 889 P.2d 501 (1995)).

The discovery rule does not apply, however, if uncontroverted facts show the plaintiffs knew of the potential cause of their damage, as their cause of action accrues when they knew the factual, but not necessarily legal, basis for their claim. *1000 Virginia Ltd. Partnership v. Vertecs*, 158 Wash.2d 566, 576, 146 P.3d 423 (2006); *see also Allen v. State*, 118 Wash.2d 753, 760, 826 P.2d 200 (1992) (which explained that on summary judgment, where there are no genuine issues of material fact, the court may decide that the discovery rule does not apply). Sylvia Nichols clearly testified in her deposition that immediately after Peterson completed its work on the project, plaintiffs were concerned about the possibility of water intrusion. She testified in her deposition that Peterson left on Friday and the roof deck was exposed to rain so she telephoned THD and they came out and tarped over the roof. CP 692. There was no other testimony in the case connecting the specific work done by Peterson to water intrusion. Thus, in 2006, the plaintiffs were aware of the possibility of water intrusion, were concerned about it, and had the opportunity at that point in time to discover any water intrusion that could conceivably have occurred. The discovery rule requires the exercise of due diligence on the part of the plaintiff to discover any damage. Clearly, given the evidence in this case, the discovery rule does not apply as a

matter of law and plaintiffs' claims against Peterson should be barred by the applicable statutes of limitations.

## **2.7 Release of THD**

Plaintiffs are claiming the same damages against Peterson that were alleged against THD. However, plaintiffs were paid a substantial amount of money by THD and released THD from those damage claims. (CP – (Order Approving Report, Dkt. 142). No Washington case has been found directly on this set of facts. However, the case of *Perkins v. Children's Orthopedic Hospital*, 72 Wash.App. 149, 864 P.2d 398 (1993) contains a detailed discussion of Washington law on the effect of releasing one defendant but not the other. The Court, at pp. 402 and 403, recognized that the principles of Washington law provide for full recovery by plaintiffs but do not allow “double recovery.” Plaintiffs have presented no evidence that their claim against Peterson would be anything other than double recovery.

## **2.8 Independent Duty Doctrine**

The prior sections of this brief address why the negligence claim by the plaintiffs should be dismissed. However, the trial court dismissed the negligence claim against all defendants, including Peterson, based on

the independent duty doctrine. The balance of this brief will discuss why that decision of the trial court was correct.

Plaintiffs ask this court to expand the independent duty doctrine far beyond what any Washington court has ever considered. The plaintiffs' theory would have a disastrous effect on Washington law. Plaintiffs' theory would require a subcontractor to not perform what it contracted to do, but instead do non-negligent work. There would be no standard as to what that might be. Presumably, as in tort law, it would be what a jury might, at a much later time, decide was reasonable under the circumstances. That might be more or it might be less than the subcontractor's contract required. That duty might require the subcontractor to do nothing. But all of that would be determined later. Reasonable care would presumably be based on the customer's oWash expectations, which also would be identified later. Each subcontractor would have to bring in a construction expert to opine on that subcontractor's part of the work. And if the subcontractor did not do what the general contractor had asked it to do, the subcontractor would be in breach of contract, or if the subcontractor chose to do more, it would not be paid for that additional work. The plaintiff could sue both the general contractor and the subcontractor and the plaintiff would have an excellent

chance to recover from the general contractor in contract and then an even better chance to recover the same damages from the subcontractor in negligence.

Clearly, plaintiffs' theory would give property owners a claim that they never had before. A plaintiff's best strategy obviously would be to do what the plaintiffs seek to do here: sue the general contractor and settle with the general contractor for unsegregated damages and then sue the subcontractor for the same damages under a less definite and presumably much easier legal theory of negligence. If a plaintiff's conscience was bothered by double recovery, it presumably could ignore the general contractor and sue the subcontractor only.

A review of Washington case law on the independent duty doctrine shows that this theory of the plaintiffs is the opposite of what our courts intend.

Washington does not recognize a cause of action for negligent construction. *Urban Development v. Evergreen Building Products*, 114 Wash.App. 639, 59 P.3d 112 (2002); *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash.2d 406, 417, 745 P.2d 1284, 1290 (1987).

Washington does not recognize a cause of action for negligence construction on behalf of individual

homeoWashers . . . plaintiff homeoWashers faced with losses that are not of their making present a sympathetic case, and we understand the desire of the trial court to fashion a remedy. We must exercise caution, however, that we do not unduly upset the law upon which expectations are built and business is conducted.

*Stuart*, 109 Wash.2d at 417-18.

Washington courts have explicitly adopted an often reiterated that the economic loss rule bars tort claims. *Id.*; *Griffith v. Centex Real Estate Corporation*, 93 Wash.App. 202, 211, 969 P.2d 486 (1998). Rather, defects associated with the quality of workmanship constitute economic loss:

We hold parties to their contracts. If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity. The construction industry in particular would suffer, for it is in this industry that we see most clearly the importance of a precise allocation of risk as assured by contract.

*Berschauer/Phillips*, 124 Wash.2d at 826-27. Washington courts continue to maintain that a builder or subcontractor owes a plaintiff homeoWasher no independent tort duty to avoid defects in construction quality. *Eastwood v. Horse Harbor Found., Inc.*, 170 Wash.2d 380, 390-91, 241 P.3d 1256 (2010), citing *Atherton Condominium Apartment OWashers Association v. Blume Development Co.*, 115 Wash.2d 506, 526, 799 P.2d 250 (1990).

The record on appeal, including the parties' summary judgment briefs and the transcription of the court's oral rulings, make it clear that the court was fully apprised of the Washington case law on the economic loss rule, which is now to be called the independent duty doctrine. Plaintiffs' appellate brief relies upon three Washington cases, all decided in 2010, which distinguished but did not overrule the 1987 decision of *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash.2d 406, 745 P.2d 1284 (1987) or other Washington cases. The *Stuart* case applied and explained the economic loss rule. There a condominium homeowners association attempted to make a negligence claim against the contractor who built the condominium for construction defects that resulted in rotting and impairment of the condominium units. In applying the economic loss rule, the *Stuart* court explained that its intention was to not allow a claim for negligent construction in that case because the homeowners association already had a valid legal claim for breach of warranty to support its claim for money damages. The court refused to allow the use of the tort theory of negligence to create a claim based on the consumer's reasonable expectations. The *Stuart* case was about a defect in the quality of the defendant's work as evidenced by the internal deterioration of the condominium building.

The three Washington cases decided in 2010 did not overrule the *Stuart* case. In *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wash.2d 380, 241 P.3d 1256 (2010), the court said that the “economic loss rule” should be called the “independent duty doctrine.” However, the court still recognized the principle of the economic loss rule. The case of *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 170 Wash.2d 442, 243 P.3d 521 (2010) did also. The discussions of the judges in the majority, concurring and dissenting opinions in those cases were interesting but created a complicated discussion of Washington law. Clearly the purpose of the court was to protect tort law. However, that may not have been necessary since *Eastwood* was not a construction defect case at all, but rather a lessor’s claim against a tenant for waste due to major damage to the leased property done by the tenant’s gross negligence. *Affiliated* was not a construction defect case either. That case involved an accident that occurred when a contractor working on the Monorail negligently set it on fire. There the plaintiffs had no contract remedy and without a negligence claim, possibly had no legal remedy at all. Clearly, both *Eastwood* and *Affiliated* correctly distinguished the *Stuart* case and were correct in not applying what had previously been called the “economic loss rule.”

The case of *Jackson v. City of Seattle*, 158 Wash.App. 647, 224 P.3d 425 (2010) was decided by Division I of the Washington State Court of Appeals just after the *Eastwood* and *Affiliated* opinions had been published. The Court of Appeals' footnote at the end of its decision said:

FOOTNOTES

*See also Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wash.2d 380, 241 P.3d 1256 (2010); *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 170 Wash.2d 442, 243 P.3d 521 (2010). These two decisions, issued after oral argument in this case and cited by Jackson as supplemental authority, confirm our decision and our rationale.

In *Jackson*, a contractor caused a landslide by negligent earthwork done while installing piping in a steep hillside. The landslide damaged the house to which the contractor had connected the pipes. The plaintiffs were subsequent owners of the house and had no contractual claim against the contractor. The court affirmed the economic loss rule as set out in *Stuart* and at the same time, very clearly explained why the *Stuart* ruling did not preclude a negligence claim for the plaintiffs in the *Jackson* case. The court distinguished between defective construction that causes deterioration of the building constructed by the defendants, as in *Stuart*, from accident cases, such as in *Jackson* and *Affiliated*, where negligence causes some violence or collision with external objects and involves

physical injury to third persons or damage to property other than the contractor's oWash work.

The court may also want to consider three subsequent cases. *Elcon Construction v. Eastern Washington University*, 174 Wash.2d 157, 273 P.3d 965 (2012) was a case where a well drilling contractor sued the State of Washington for breach of contract and fraud for failure to disclose a hydrology report. The contract claims between the parties were resolved by arbitration. The court held that the state had a duty not to commit fraud which was independent of its duties under the contract so the contractor could sue for fraud even after the contract issues were resolved in arbitration. *Jackowski v. Borchelt*, 174 Wash.2d 720, 278 P.3d 1100 (2012) reached the same decision: there is an independent duty outside a contract to not commit fraud. In *Key Development v. Port of Tacoma*, 173 Wash.App. 1, 292 P.3d 833 (2013), Division II decided a case where plaintiffs claimed that the Port of Tacoma not only failed to properly perform the contract but that it also committed fraud and misrepresentation. The court there also held that fraud would be a separate cause of action outside the contract.

These three cases are in complete accord with the 2010 cases discussed above. However, no Washington case has held that a plaintiff in

a construction defect claim can ignore what the parties agreed to in the contract and sue under a negligence tort theory.

The last case to be considered is *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wash.2d 84, 312 P.3d 620 (2013). That case involved a dispute between the developer/owner of property and an engineer it hired to perform development services. The claims essentially were for breach of contract and misrepresentation. The issue was whether the independent duty doctrine would allow that plaintiff to make a claim for negligent misrepresentation in addition to its claim for breach of contract. The majority opinion followed the Washington case law discussed above and recognized that misrepresentation can be an independent tort separate from the activities included in the contract and thus be actionable in tort. However, the court remanded the case back to the trial court to determine the exact terms of the contract and specifically what actions or activities were actually to be done under the contract. The majority made it clear that if the alleged misrepresentation occurred in the performance of the contract, then there would be no separate claim for misrepresentation. However, there “*might*” be a misrepresentation claim if the misrepresentation was done prior to or subsequent to the contract activity and thus was a separate activity.

It is respectfully submitted that combining *Jackson, supra*, with *Donatelli, supra*, gives a clear explanation of what Washington courts intend. As explained in *Jackson*, a separate accident or occurrence, such as if Peterson had struck one of the plaintiffs with its truck, would be outside the contract work and would create an independent negligence claim. Accidents, such as the Monorail fire in the *Affiliated* case or a landslide in the *Jackson* case, are not claims for construction defect per the terms of the construction contract. Likewise, fraud and misrepresentation, done before or after and not as part of the construction work, can be separate torts. However, in this case the only claim is about Peterson's work on the house.

In rebuttal plaintiffs may argue that Peterson had no contract with the plaintiffs so plaintiffs should be allowed to sue Peterson in tort for negligent construction. However, the facts here are that Peterson was performing the first step of THD's contract which was taking the old roof off the house. Plaintiffs' lawsuit is based entirely on Peterson's work for THD under its contract. Peterson was responsible for its work to THD and THD was responsible to the plaintiffs for all of the work, including that performed by Peterson. There was no separate activity by Peterson. There was no fraud or misrepresentation by Peterson and there was no accidental

occurrence. Thus, there should be no legal basis for the tort claim of negligence.

### III. CONCLUSION

Plaintiffs would have the court create a new legal duty that would give them a potentially greater claim against the subcontractor than the general contractor. Plaintiffs would deny the subcontractor the protection that the general contractor has under construction contract law. In Washington, the existence of a legal duty is a question of law and “depends on mixed considerations of logic, common sense, justice, policy, and precedent. *Kaltreider v. Lake Chelan Community Hospital*, 153 Wash.App. 762, 765, 224 P.3d 808, 810 (2009); *King v. City of Seattle*, 84 Wash.2d 239, 250, 525 P.2d 228 (1974) (quoting Thomas Atkins Street, *Foundations of Legal Liability* 100, 110 (1906)). Based on the Washington legal precedent discussed above, logic, common sense, justice, and policy are clear in this case. It is not *logical* to create more legal exposure for the subcontractor than the general contractor. It is not *justice* to create a new legal duty that would allow double recovery. It is not good *policy* to take away from a subcontractor the protection of construction law in order to expand tort law. *Policy* is not served by allowing a general contractor to do business planning and risk allocation

under contract but, at the same time, expose the subcontractor to liability under tort law. Construction law requires contractors to perform their contracts. The work is planned and the contract negotiated. Tort law is designed to deal with accidents, which do not typically involve planning or business expectations. Accidents happen unexpectedly and the tort law system deals with them after they occur. Good policy would not turn this simple construction job into a tort.

The legal precedent for negligence requires proof of: duty, standard of care, breach of that duty, proximate cause, and damages. Negligence claims must also be brought within the applicable statute of limitations. Finally, the order of a trial court dismissing all negligence claims had to be appealed within the time limit established by the court rules.

For all these reasons, it is respectfully submitted that the decision of the trial court dismissing Peterson Northwest, Inc. from this case should be affirmed.

RESPECTFULLY SUBMITTED this 15 day of JAN,  
2016.

FALLON MCKINLEY & WAKEFIELD

By R. Scott Fallon

R. Scott Fallon

WSBA #2574

Attorneys for Respondent

Peterson NW, Inc.

**CERTIFICATE OF SERVICE**

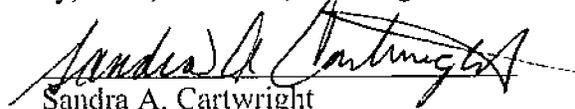
I, Sandra Cartwright, certify under penalty of perjury under the laws of the State of Washington, that on the 12<sup>th</sup> day of January, 2016, I caused the original of the foregoing document, and a copy thereto, to be filed and served by the method indicated below, and addressed to each of the following:

Court of Appeals	<input type="checkbox"/>	U.S. Mail	<input type="checkbox"/>	Facsimile
Division II	<input checked="" type="checkbox"/>	E-File	<input type="checkbox"/>	Messenger
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Tacoma, WA 98402				

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DATED this 13<sup>th</sup> day of January, 2016, at Seattle, Washington.

  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF MASON

DAVID NICHOLS and )  
SYLVIA NICHOLS, et al., )  
  
Plaintiffs, )  
  
v. )  
  
PETERSON NORTHWEST, INC., )  
  
Defendants. )

NO. 12-2-00790-3  
NO. 47685-1-II

VERBATIM REPORT OF PROCEEDINGS

FEBRUARY 17, 2015  
FEBRUARY 23, 2015  
MAY 11, 2015

JUDGE DANIEL L. GOODELL  
MASON COUNTY SUPERIOR COURT

Trial Counsel:

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Court is convened on Monday, February 17, 2015 in the matter of DAVID NICHOLS and SYLVIA NICHOLS, et al. v. THD AT-HOME SERVICES, INC., et al., Mason County Cause No. 12-2-00790-3, before the HONORABLE DANIEL L. GOODELL, Judge; DANIEL A. BERNER and RICHARD T. HOSS, appearing on behalf of the Plaintiffs, DAVID NICHOLS and SYLVIA NICHOLS, et al.; GREGORY S. WORDEN, appearing on behalf of the Defendants, THD AT-HOME SERVICES, INC., and TRAVELERS CASUALTY AND SURETY, CO.; KEVIN SMITH, appearing on behalf of the Defendants, PETERSON NORTHWEST, INC.

THE COURT: Nichols v. THD At-Home Services. This is cause number 12-2-00790-3 before the Court on defendant's motion for partial summary judgment. If the parties would identify themselves for the record.

MR. WORDEN: Good morning, your Honor -- or afternoon, your Honor. Greg Worden for THD Home Depot and for Travelers.

THE COURT: Counsel.

MR. SMITH: Kevin Smith on behalf of Peterson Northwest.

MR. BERNER: Daniel Berner on behalf of the plaintiffs who are also present, Sylvia and Dave Nichols and their children are present.

MR. HOSS: Richard Hoss for plaintiffs.

THE COURT: Are there any preliminary matters that need to be dealt with before this matter is heard?

MR. WORDEN: I don't think so, your Honor. We -- we have a motion to strike that I think I'll address as part of the argument.

1           THE COURT: That makes sense, counsel. The Court's just  
2 going to review the documents that it has reviewed in this matter  
3 for the record. There has been a motion for summary judgment, it's  
4 a partial motion, by THD and Travelers, motion for summary judgment  
5 by Peterson Northwest, a declaration of Kimberly Reppart, a  
6 plaintiffs response to defendants motion with regard to the  
7 Peterson Northwest motion, plaintiffs response to the defendants  
8 motion with regard to THD and Travelers.

9           The Court's also reviewed declaration of Daniel Berner,  
10 declaration of Vincent McClure. There has been a filing of a  
11 declaration of Michael Keep, MD that is unsigned, which is part of  
12 your argument today. There is also a filing of a declaration of  
13 Sylvia Nichols, a supplemental declaration of Sylvia Nichols --  
14 again, the Court recognizes that that is part of an argument today,  
15 a reply in support of partial summary judgment by THD and Travelers  
16 regarding the declarations of Doctor Keep and supplemental  
17 declaration of Sylvia Nichols, as well as a reply to the summary  
18 judgment.

19           There's a declaration of Michael Rhodes, a declaration of  
20 Michael Keep, which was filed as a signed document, a reply in  
21 support of motion for summary judgment by defendant Peterson  
22 Northwest, plaintiffs response to motion to strike, and a  
23 declaration of Daniel Berner. If there's any document that any  
24 party knows of that I haven't mentioned, I'd be glad to hear about  
25 it right now. If not, plaintiff, you may begin.

1           And before you begin, keep in mind that the Court is going to  
2 be having another hearing at 3:00. Do counsel believe that 50  
3 minutes is going to be adequate time for the argument today?

4           MR. WORDEN: I certainly hope so, your Honor. And I'll  
5 try to be efficient.

6           THE COURT: Okay, very good.

7           MR. WORDEN: So today Home Depot and Travelers are asking  
8 this Court grant partial summary judgment to narrow the issues for  
9 trial. And that's appropriate both under Statute of Limitations  
10 grounds and evidentiary grounds. So I want to go through a very  
11 brief recitation of the undisputed chronology, and then to the --  
12 the things that Home Depot and Travelers have moved for summary  
13 judgment on. And of course if your Honor has questions, I'm happy  
14 to address those throughout.

15           Factually speaking, this case arose from a roofing contract on  
16 September 8<sup>th</sup> of 2006 between Home Depot and the Nichols. That  
17 roofing work was done on October 26, 2006. Mr. Nichols signed a  
18 certificate of completion.

19           On January 23, 2007, a few months later, Mr. Nichols went back  
20 and applied for a building permit. The inspection -- the roof was  
21 inspected the next day, January 24, 2007 by the County, and that  
22 inspection didn't pass with a venting issue. Home Depot had  
23 subcontractors come out and install smart vents in February 6,  
24 2007, and then the roof passed final inspection April 26, 2007.

25

1           Then more than four years go by until December of 2011 when the  
2 Nichols complain of alleged mold conditions. And Home Depot comes  
3 out and has subcontractors do additional warranty work. The  
4 complaint is filed on October -- on August 29, 2012.

5           Now from that, Home Depot asks for partial summary judgment in  
6 a number of areas. And I'll go through those one-by-one. The  
7 first I'll address is the -- is the bond for Travelers. That's a  
8 construction bond. And the Statute of Limitations there, RCW  
9 18.27.040 makes it for two years after completion of the project.  
10 And in this case, at the very -- the outer bound for that could be  
11 April 26, 2007 when the house was inspected. You will see our  
12 briefing showcases -- it's stated that once the residence is  
13 livable and can be used for its purpose, is substantially complete.  
14 And I think the undisputed facts show that's the case there. The  
15 Nichols lived in this house from April 26, 2007 to December 2011.

16           So Statutorily, it's very clear that the construction bond  
17 should be dismissed on Statute of Limitation grounds. That's  
18 different. We didn't move for Statute of Limitations on the  
19 contract because that's not appropriate. But for the construction  
20 bond, that should be dismissed.

21           The second Statute of Limitations argument is -- concerns the  
22 Consumer Protection Act claim. And the Consumer Protection Act  
23 claim has a four year Statute of Limitations. And in the complaint  
24 and in discovery, all the conduct that plaintiffs allege in  
25 violating CPA to be wrongful, which was not getting a building

1 permit and allegedly up-selling the venting -- that all happened in  
2 2006, or by early 2007, well more than four years before the  
3 complaint was filed in August of 2012.

4 Home Depot would also argue there's not evidence that supports  
5 the Consumer Protection Act claims. But it's very clear that those  
6 are based on conduct alleged more than four years beforehand. So  
7 it's -- that CPA claim should be dismissed.

8 The next claim The Home Depot will address is the claim for  
9 waste, which is -- which is called a Statutory Trespass. And the  
10 law is very clear that Statutory Trespass is an intentional going  
11 into a place where you're not authorized to do, and creating waste  
12 on the property. And that -- simply is no evidence of that here.  
13 This was a construction contract, a roofing contract, so either  
14 Home Depot or its subcontractors were on the property with the  
15 permission of the Nichols, and pursuant to doing roofing work.

16 The Nichols may dispute whether they think the roofing work was  
17 done correctly, but it doesn't make it a trespass, and there's  
18 certainly no evidence of any intent to cause waste or property. So  
19 that -- the facts of this case simply do not fit into the Waste  
20 Statute, and that should be dismissed and narrowed for trial.

21 THE COURT: On that point, counsel --

22 MR. WORDEN: Uh huh.

23 THE COURT: As I understand the argument contrary to that  
24 is that the fact that there was no building permit granted ahead of  
25 time, there was no authorization under the Statute. How do you

1 deal with the defendants assertion that it wasn't a true  
2 authorization because there was no building permit?

3 MR. WORDEN: I think you go back to the contract. The  
4 contract was for -- the Nichols paid money to Home Depot to put a  
5 roof on, and that's what happened. So to say there wasn't  
6 authorization to go on and do the roof is incorrect.

7 And the second thing would be the building -- there was a  
8 building permit. You know, it was taken out afterwards. And then  
9 the building -- the Home Depot work done after that installing the  
10 vents, that passed inspection. So this is not a situation where  
11 the Waste Statute applies, which is an intentional act to go and  
12 commit intentional damage to other person's property, removing  
13 stuff, taking out trees, that sort of thing. That's what the  
14 Statute goes for.

15 This is a construction contract. And under no view of the  
16 facts can it be said that Home Depot did not have permission to  
17 come on the Nichols property and do the work. Mr. Nichols signed  
18 off on a certificate of completion is another point in that  
19 argument. This is simply not a case where it involves an  
20 unauthorized coming on to the property. At most, you have dispute  
21 on who should have paid for the building permit.

22 THE COURT: If the building permit subsequently wasn't  
23 granted, hypothetically, same argument?

24 MR. WORDEN: Hypothetically even if it wasn't granted, I  
25 still don't think it hits the Waste Statute because the waste is an

1 unauthorized coming onto the property. Here there's a specific  
2 contract between the parties where Mr. Nichols and Ms. Nichols have  
3 authorized Home Depot to come on and have roofing work done. So  
4 under those circumstances, I do not see how the Waste Statute could  
5 ever apply, even if there was a technical deficiency and the permit  
6 was not -- was not gotten, although in this case it eventually was,  
7 and the inspection passed.

8 But even if it didn't, as your Honor hypothetically posits,  
9 it's still not an -- they're on the property by permission as a  
10 business invitee. And there's no case law that we saw where  
11 business invitee could be liable for waste in performing the  
12 contract. I think that would be a stretch of the law that just  
13 would be much too far.

14 THE COURT: Okay.

15 MR. WORDEN: And moving on, the next issue is Home Depot's  
16 move for dismissal of mold related personal injury claims as to  
17 three of the four Nichols children. Mr. and Mrs. -- Mr. and Ms.  
18 Nichols didn't have any such claims. There were claims brought on  
19 behalf of minor and adult children Shyanne, Zachariah, Russell and  
20 Benjamin. And we haven't moved for summary judgment regarding  
21 Russell, but we have moved for summary judgment regarding the other  
22 three on the basis that there's no admissible medical evidence that  
23 ties any health condition caused by alleged mold to Home Depot's  
24 work. And there's no proof on a more probable than not basis from  
25 expert medical testimony that will support that.

1           You'll see in the summary judgment materials there are IMEs  
2 from -- as to those three Nichols children -- we'll call them  
3 children, even though some are technically adults. The IME doctors  
4 did not find any mold related problems as to Zachariah, Benjamin  
5 and Shyanne. And plaintiffs -- and the discovery cutoff ended here  
6 last fall did not provide any reports, any declarations. What they  
7 have provided now are two things. They have a declaration from  
8 Doctor Keep and a declaration -- supplemental declaration from  
9 Ms. Nichols. And our position is that neither of those creates a  
10 question of fact and both should be stricken.

11           As to Doctor Keep's declaration, originally it was unsigned,  
12 and now there's a signed version in. So with the signed version,  
13 I'm not making that objection. But even if you look at the signed  
14 version of it, it doesn't, under ER 702, rise to the level of  
15 creating an issue of fact regarding specific injuries for -- for  
16 the other three children, other than Russell. Doctor Keep doesn't  
17 say what they had. He says they all have -- what'd it say -- that  
18 amongst them they had symptoms. And that's simply not enough. And  
19 particularly when there's no evidence in the record from the Court  
20 regarding Doctor Keep's qualifications to make a diagnosis. And  
21 there's no recitation of what, if anything -- if it was medical  
22 records or things he reviewed.

23           And there's a letter from Doctor Keep that plaintiffs provided  
24 in their motion from October 14, 2014, and that's Exhibit --  
25 Exhibit 2 to declaration of Mr. Berner. And in that letter Doctor

1 Keep says quote, unfortunately I'm unable to correlate signs and  
2 symptoms of mold exposure on the other children to include Shyanne  
3 Willis, Zach Williams, and Benjamin Nichols, of which specialist  
4 consult may be needed if you require further medical assessment.

5 So there's evidence that Doctor Keep has sent a letter  
6 beforehand saying that he can't correlate symptoms, and then the  
7 very conclusory declaration that he finally -- on the signed form  
8 does not create a triable issue of fact as to those three  
9 plaintiffs.

10 Likewise Ms. Nichols has a much more detailed declaration  
11 opining that a variety of medical conditions related to a mold  
12 condition. But she is not qualified as a lay person to make that  
13 medical diagnosis. And the Court is required to strike that and  
14 not consider it. I mean there's a reason that we have the rules  
15 where the medical doctors have to opine on a more probable than not  
16 basis to prevent a person who may legitimately think that, but  
17 don't have the background or the expertise to make such an opinion.

18 So there's really not enough evidence going forward to have  
19 mold -- claims of mold related injury as to all the children except  
20 for Russell.

21 In a -- a similar but somewhat different motion, is a motion  
22 for -- excuse me -- for summary judgment regarding the medical  
23 special damages. Under Patterson v. Horton, to get -- prove  
24 medical specials you have to prove the amount of the bills and to  
25 have a qualified medical writer provide an opinion those bills are

1 reasonable and necessary for the incident, accident, etcetera. In  
2 here there's none of that. The plaintiffs have provided no medical  
3 bills, even though discovery has passed. And -- and have provided  
4 no declaration of any medical provider saying any particular bill  
5 was reasonable and necessary.

6 To say that they gave a stipulation of medical records is  
7 simply not sufficient. This case has been going on for over two  
8 years. Discovery cutoff has passed. They have the burden to  
9 provide this evidence and they have not done so. So because  
10 there's no evidence of medical expenses, it's appropriate to enter  
11 a summary judgment for Home Depot on that grounds.

12 Next thing to move on to is plaintiffs claims for negligence  
13 and a related claim for emotional distress. And those should be  
14 dismissed because there's first, no cause of action for negligent  
15 construction in Washington. And second, plaintiffs have cited the  
16 Independent Duty Doctrine, but they haven't articulated what  
17 independent duty could potentially apply here.

18 This is a contract case where there's a dispute about whether a  
19 roof was properly installed or not. There's been no articulation  
20 of independent tort duty with that relating to Home Depot. And in  
21 the absence of that kind of independent tort duty and of Washington  
22 law saying that there's no tort for negligent construction, their  
23 negligence claims should be dismissed.

24 And then the emotional distress claims dismissal that follows  
25 from that because emotional distress claims are not allowed in

1 contract case. But they mention in their brief that they're  
2 allowed for intentional tort. But there's no evidence here of any  
3 intentional tort. So there's just not a basis, either in the law  
4 or in the facts, to go ahead and have emotional claims.

5 So to kind of sum up and recap what Home Depot's asked for  
6 dismissal of has been the -- the bond claim based on the Statute of  
7 Limitations, the CPA claim based on Statute of Limitations and lack  
8 of evidence, mold or the waste claim based on a lack of evidence,  
9 and the inapplicability of this situation to the Statutory Trespass  
10 Statute; the mold related personal injury claims as to the three  
11 children, other than Russell, the medical -- because of lack of  
12 evidence, the medical special damages claim because of lack of  
13 evidence, particularly no bills and no declaration saying that  
14 denying these bills are reasonable and necessary, and then the  
15 negligence and -- claims and emotional distress claim with a basis  
16 that they've not identified a tort duty there where evidence has  
17 been breached. And there's no basis for emotional distress here.  
18 So unless your Honor has questions, then I'll yield to the other  
19 folks.

20 THE COURT: I have no further questions.

21 MR. WORDEN: Thank you, your Honor.

22 THE COURT: So Mr. Smith.

23 MR. SMITH: Good afternoon, your Honor. We motion to join  
24 our co-defendants motion for summary judgment. And I'll  
25 incorporate his factual recitation in the interest of saving time.

1           Your Honor, Peterson Northwest subcontracted with Home Depot.  
2           And the entirety of their work on this project consisted of the  
3           removal of the tear-off of the existing roof on the Nichols home.  
4           The project commenced in October 2006. And Peterson Northwest's  
5           work was completed during that time. They never returned to the  
6           job site to perform any additional work.

7           The gravamen of plaintiffs allegations against Peterson  
8           Northwest's concern that Peterson, after removing the prior roof,  
9           failed to put a tarp over the open structure. And they allege that  
10          it rained afterwards. And after the weekend they contacted Home  
11          Depot who came out and put a roof -- or excuse me -- put a tarp on  
12          the structure. So that's the gravamen of their claims.

13          And they allege that this gives rise to a property damage and  
14          loss of use cause of action against Peterson Northwest. We allege  
15          that these causes of action are barred under RCW 4.16.130, the two  
16          year Statute of Limitations.

17          It's undisputed that all this work was completed in October,  
18          2006. Plaintiffs might allege that there's some sort of discovery  
19          rule that will apply to save their claims to make them timely.  
20          Well, your Honor, it's clear that they contacted Home Depot in  
21          October of 2006 to complain that Peterson Northwest failed to tarp  
22          the roof. It's also undisputed that they contacted Home Depot a  
23          number of times between 2007 and 2011 to complain of water  
24          intrusion. And Home Depot returned in the interim to perform  
25          repair work on the home.

1           We also argue that their personal injury claim fails for a lack  
2 of proximate cause. As my co-defendant already argued, Washington  
3 doesn't recognize a cause of action for negligent construction.  
4 There's clearly no independent duty owed by Peterson Northwest to  
5 the plaintiffs in this action.

6           Furthermore, the plaintiffs have produced no proximate cause  
7 that ties my clients work tear off to any alleged damages here.  
8 Sylvia Nichols' own deposition testimony establishes that there was  
9 no water intrusion after the -- after Peterson Northwest removed  
10 the original roof and before the tarp was installed. They also  
11 argue that my -- Peterson Northwest performed work other than  
12 tearing off the roof. Well as the interrogatories submitted before  
13 the Court establish, and as the invoice provided to Home Depot  
14 establishes, all Peterson Northwest did was tear off the roof. And  
15 they have simply provided no evidence linking Peterson Northwest  
16 contracted for work to any alleged damages here.

17           THE COURT: Could you articulate your two year Statute of  
18 Limitations? What are you basing the two year Statute of  
19 Limitations upon? What cause of action are you focusing on when  
20 you're saying there's a two year Statute of Limitation?

21           MR. SMITH: It's the claim for injury to real property and  
22 loss of use claims asserted by the plaintiff.

23           THE COURT: Is that RCW 4.24.630?

24           MR. SMITH: I believe so, your Honor.

25           THE COURT: The Waste Trespass Statute?

1 MR. SMITH: I believe so.

2 THE COURT: Okay. And so you're believing that the  
3 Statute of Limitations with regard to that Statute is a two year  
4 Statute?

5 MR. SMITH: We're arguing that it applies -- in addition  
6 to what our co-defendant said, that it applies to the injury for  
7 real property and loss of use, correct.

8 THE COURT: Okay. Okay, anything else?

9 MR. SMITH: No, your Honor.

10 THE COURT: For a moment I'm going to take a pause.

11 Court addresses another matter.

12 THE COURT: Mr. Berner.

13 MR. BERNER: Thank you, your Honor. First there -- I want  
14 to address counsel's recitation of facts. I think there are some  
15 things that are actually in dispute, contrary to what he said. And  
16 that's Mr. Worden. That it's true that the parties contracted in  
17 October of 2006. No permit was ever applied for by Home Depot or  
18 any of its subcontractors. The Nichols did not find out that no  
19 permit was applied for until they attempted to update their  
20 homeowner's insurance and the insurance company told them that they  
21 needed a certificate of completion for the work. And that was in  
22 January of 2007, January 23, 2007, when Mr. Nichols applied for  
23 that permit.

24 With respect to the different Statute of Limitations arguments,  
25 as this Court is well aware, both the discovery -- the discovery

1 rule would apply here, as well as Home Depot's continued work on  
2 this project. As is argued in our briefing, Home Depot continued  
3 to provide work on the Nichols home, up 'til February 2012. And  
4 that is when they replaced the low sloped portion on the roof.  
5 Prior to that, in January of 2012, they re-roofed -- or I'm sorry,  
6 they removed the smart vents from the Nichols home and installed  
7 can vents. So Home Depot continued to do this work -- Home Depot  
8 or its subcontractors, continued to do this work up until that  
9 time, which is when the Statute of Limitations should begin to run.

10 If -- if they -- if that does not apply, then the discovery  
11 rule does apply. And under the discovery rule, a claim does not  
12 accrue until a claimant has the right to apply to a court for  
13 relief. And when -- when we use that discovery rule to the facts  
14 of this case, that occurred in December of 2011, December 7, 2011  
15 is when Mr. Nichols went into the home, was in the hallway outside  
16 the children's bedroom, opened the attic access and saw that there  
17 was mold and wet conditions inside the home. That's -- that's when  
18 they learned that their home was damaged by the work that Home  
19 Depot or its subcontractors did. Prior to that they had no cause  
20 of action, they had no right to apply to the Court for relief. Up  
21 until that point, Home Depot had done work on the home under its  
22 warranty, its peace of mind warranty with the Nichols.

23 And the Nichols thought that everything was fine. They thought  
24 that -- originally they thought that soffit vents were installed.  
25 They were not installed. They didn't find this out until -- I

1 believe it was January or February of 2007 when -- January 2007 --  
2 when they attempt -- when Mr. Nichols attempted to get the permit  
3 and the roof inspection failed.

4 Then Home Depot came out a number of other times, did caulking  
5 on the home, tried to stop the leaks from penetrating the home.  
6 And ultimately what happened was Mr. Nichols discovery of the mold  
7 conditions in December of 2011.

8 The discovery rule also applies to the plaintiffs Consumer  
9 Protection Act claim. And the citation for that -- and I apologize  
10 for not bringing this to the Court earlier in our briefing -- is  
11 Alexander v. Sanford, that's 181 Wn. App. 135, 167, 325 P.3d 341  
12 (2014). And that's --

13 THE COURT: Counsel, would you state the name of that case  
14 again?

15 MR. BERNER: Yes. It's Alexander, A-L-E-X-A-N-D-E-R v.  
16 Sanford, S-A-N-F-O-R-D. And that's a Division I Court of Appeals  
17 decision, your Honor. It -- it could be Division II.

18 THE COURT: Okay.

19 MR. BERNER: Division I. And with respect to plaintiffs  
20 CPA claims, because the discovery rule applies, when the plaintiffs  
21 discovered that Home Depot did all of these acts by trying to  
22 upgrade their -- tried to sell them an upgraded roofing system that  
23 could not be installed, by not getting the permit for the home, by  
24 causing damage to their home, by causing water intrusion into their

25

1 home, although that some of those individual acts occurred before  
2 the December 7, 2011, not all of them did.

3 So plaintiffs discovered the unfair practices that Home Depot  
4 committed after that December 7, 2011 date. Before then they had  
5 no knowledge of some of the acts that Home Depot did that were  
6 unfair or deceptive.

7 The first of -- with respect to the contractor disclosure  
8 statement, none was ever provided. That's a per se violation of  
9 the Consumer Protection Act. And with respect to that violation,  
10 the first through third elements of the Consumer Protection Act are  
11 deemed per se, established.

12 THE COURT: Counsel, can I stop you there?

13 MR. BERNER: Yes.

14 THE COURT: When you look at the Statute, and we're  
15 talking 18.27.350, and that's the Consumer Protection Act. The  
16 language that says the fact that a contractor is found to have  
17 committed a misdemeanor or infraction under this Chapter shall be  
18 deemed to effect the public interest and shall constitute a  
19 violation of the Consumer Protection Act. How do you read the  
20 language, the fact that a contractor is found? Found by whom?

21 MR. BERNER: The Department of Labor and Industries has to  
22 make that finding. But the lack of the finding in this case does  
23 not preclude these facts from establishing that a Consumer  
24 Protection Act violation occurred. And if it does, there's at

25

1 least a question of fact regarding that, which precludes summary  
2 judgment.

3 THE COURT: Okay, you can continue.

4 MR. BERNER: With respect to the bond claim, admittedly I  
5 was unable to find any citation that the discovery rule applies.  
6 But in the opposite of that, I was also unable to find any  
7 authority that the discovery rule does not apply. I don't think  
8 the Statute is clear. And the -- with respect to substantial  
9 completion dates, I would rely on the briefing regarding our  
10 arguments of when the work was actually completed. Although  
11 Mr. Nichols signed a certificate of completion in October of 2006,  
12 there is -- it cannot be reasonably argued that the roofing was  
13 completed. Home Depot didn't even -- or its subcontractors, didn't  
14 even install the intake venting until January of 2007. And then  
15 there were a number of other service and repair works that were  
16 completed up until February of 2012.

17 So I believe the bond claim still is ripe. I -- I apologize to  
18 the Court. I could not find any authority with respect to the  
19 discovery rule.

20 With respect to the waste claim, the defendants are attempting  
21 to create a third element for the waste claim. And if --  
22 plaintiffs have cited to Clipse v. Michels Pipeline. And in that,  
23 the elements for waste are that the defendant intentionally and  
24 unreasonably committed one or more acts, and knew or had reason to  
25 know that he or she lacked authorization for those acts.

1           Here Home Depot or its subcontractors lacked authorization to  
2 complete any of the work without a building permit. They lacked  
3 authorization to install a roofing system that had no intake  
4 venting, and they lacked authorization to complete work that caused  
5 damage to the Nichols home.

6           If we were to take Home Depot's position that a contract would  
7 void this Statute from applying, that -- that makes no sense. If I  
8 were to enter into a contract with a contractor to do work on my  
9 home and they then caused damage to my property by cutting a tree  
10 or by damaging something else, then that would render -- that would  
11 not be a viable cause of action. And that's just simply not the  
12 case.

13           In addition the Home Depot and its contractors were authorized  
14 to comply with code when they installed the roof on the home, and  
15 they did not comply with the code, as plaintiffs complaint alleges.  
16 One of those violations of code was the lack of intake ventilation,  
17 and also the requirement for Mason County for the materials that  
18 are installed to withstand 85 mile per hour winds.

19           THE COURT: Counsel --

20           MR. BERNER: Yes.

21           THE COURT: -- on that issue, how do you respond to  
22 defendants assertion that ultimately a building permit was  
23 obtained, ultimately a ventilation was installed in February of  
24 2007? Does that solve the issue? And if it does solve the issue,  
25 does that hamstring into a Statute of Limitations issue?

1 MR. BERNER: No, your Honor, I do not believe it does  
2 because damage resulted prior to those things occurring. And the  
3 lack of the authorization for the permit and to comply with code  
4 still caused damage. And the fact that Home Depot and its  
5 contractors continued to do work up until February 2012, did not  
6 cause the Statute of Limitations to begin to run on the waste  
7 claim.

8 And I would like to address a cite that the defendant -- that  
9 Home Depot has cited to in their reply briefing, and that is  
10 Colwell v. Etzell. And in that case they -- the Court addressed  
11 the Waste Statute. And what it found in that case is that a  
12 trespass did not occur because the person that did the work on the  
13 property was the owner of the property. There was an easement that  
14 went through his property, so he had a duty to maintain that road  
15 and easement on his property. So he could not have committed  
16 trespass by completing a duty that he had on his own property. And  
17 the facts of that case are clearly inapplicable here.

18 THE COURT: One other question I have on that, counsel,  
19 and that is counsel for Peterson Northwest has come to the analysis  
20 that the two year Statute of Limitations on a waste claim under RCW  
21 4.16.130 apply. Do you agree or disagree with that?

22 MR. BERNER: Your Honor, I disagree. It's my  
23 understanding that the Statute of Limitations for an intentional  
24 tort is three years. And unfortunately I don't have a citation for  
25 that, but I believe that's in the -- the Statutes.

1           With respect to medical specials, the defendant Home Depot has  
2 moved to dismiss plaintiffs medical specials. And they rely on a  
3 case that said that the evidence presented at trial was not  
4 sufficient to establish the medical specials. They have not cited  
5 any case that the defendant -- or that the plaintiffs have to  
6 present this Court at this time on summary judgment with its  
7 medical bills and requirements under the -- excuse me -- the -- the  
8 medical specials.

9           The undisputed facts are that all of the Nichols children were  
10 exposed to the mold and wet conditions in their home. The kids all  
11 saw a number of doctors. For -- for a long time, the Nichols had  
12 no idea what was going on. The -- they experienced symptoms  
13 related to these mold and wet conditions, as indicated in both  
14 Ms. Nichols declarations, and in the -- excuse me -- the  
15 declaration of Doctor Keep. And the Home Depot's own IME expert  
16 acknowledges that Russell was physically impacted, and all of the  
17 kids were emotionally impacted.

18           Lastly with respect to the negligence and emotional distress  
19 claims, it's clear that the Nichols were owed -- owed an  
20 independent duty outside of their contract with both Home Depot and  
21 its subcontractors. The fact that there was a contract does not  
22 eradicate the duties that Home Depot had to not commit waste to  
23 apply for building -- or apply for the permit to comply with  
24 building codes and the other work that they completed that was  
25 negligent that caused damage to the Nichols home.

1 Plaintiffs -- I concede that there is no cause of action for  
2 negligent construction, but there are other causes of actions which  
3 I've just detailed that are encompassed in this negligence and  
4 emotional distress claims.

5 With respect to the emotional distress, this Court has seen  
6 evidence from the Home Depot's own IME expert with respect to the  
7 children that they've all experienced emotional traumas by being  
8 forced to move out of their home after this mold was -- was  
9 discovered in December 2011. This is the exact type of damages  
10 that the Independent Duty Doctrine is created to protect.

11 THE COURT: So counsel on that point then, is it the  
12 plaintiffs position that the independent duty, separate from that  
13 of the contract, is number one, not to commit waste; two, to fail  
14 to apply for the appropriate building permit; and three, failure to  
15 comply with the related building codes. Are those --

16 MR. BERNER: If I could just check my briefing real quick,  
17 your Honor?

18 THE COURT: Sure, you bet.

19 MR. BERNER: Thank you. Your Honor, my briefing does  
20 identify those things that I've identified. In addition, the  
21 defendants also owed a duty not to conceal the work that they  
22 completed, not to try and cover up the fact that they didn't  
23 install soffit vents, that they did not get a permit -- I already  
24 mentioned the permit -- so in addition to those things. And  
25 specifically the issue in this case is the lack of sufficient

1 ventilation in the Nichols home. They've -- they've contracted to  
2 get an upgraded ventilation system on their somewhat old, dated,  
3 home in Mason County. And the Home Depot representative  
4 recommended a soffit vent installation that -- installation that  
5 could not even be installed. So there's -- there's an independent  
6 duty there, which is somewhat tied into the Consumer Protection Act  
7 claims to contract for something that can be installed that can be  
8 used on a home.

9 With respect to Peterson Northwest's summary judgment motion, I  
10 just have a couple of things. A lot of what I've already stated  
11 applies to all of the defendants. But I want to point out to the  
12 Court that the plaintiffs did not discover the mold and water  
13 intrusion until December 2011. They had no reason to believe that  
14 the work that Peterson Northwest did caused any damage to their  
15 home because they -- they hadn't gone into the roof. They  
16 hadn't -- they didn't know about the -- the lack of adequate  
17 ventilation until much later. They -- it was when they discovered  
18 this water and mold intrusion that the Statute of Limitations began  
19 to run with respect to all defendants, or with respect to Home  
20 Depot when Home Depot stopped providing its work in February 2012.

21 And with respect to the Independent Duty Doctrine for Peterson  
22 Northwest, I just want to point out to the Court that the  
23 plaintiffs expert, Vince McClure, attributes at least some of the  
24 damages to the Nichols home based on the work that Peterson  
25 Northwest completed. It's true that Mr. McClure did -- or Doctor

1 McClure did not specifically identify which defendant  
2 subcontractors did work on the Nichols home that caused certain  
3 damage. But there's no requirement for that. The -- the  
4 requirement is that the defendant -- or that the plaintiffs show  
5 that damage was caused by some of these defendants. It's not  
6 proper at this point in summary judgment with respect to who caused  
7 damage because questions of fact exist. The defendants could  
8 depose Mr. McClure, they can ask him questions regarding who caused  
9 what damage, and they have not presented that evidence to the Court  
10 in any way.

11 In closing, taking all evidence and inferences in the light  
12 most favorable to the Nichols, there's at least a question of fact  
13 regarding a number of these claims. And the Statute of Limitations  
14 has not began to run, as I've previously articulated.

15 THE COURT: Counsel, another question, and that is with  
16 regard to intentional tort claim, is there any other intentional  
17 tort that the plaintiffs are arguing outside of the violation of  
18 RCW 4.24.630, the Waste Trespass Statute?

19 MR. BERNER: The plaintiffs allege that the fact that the  
20 work was concealed, that -- covered up -- that defendants covered  
21 up the insufficient venting in the home.

22 THE COURT: Okay, thank you. Rebuttal.

23 MR. WORDEN: Thank you, your Honor. Just to start, to go  
24 back to the -- in order first the bond claim. Plaintiffs  
25 attorney's acknowledged that there's no -- no case citing discovery

1 rule in a bond matter. And the law we cited, particularly this  
2 Dania, Inc. v. Skanska case, which is in our reply at 1011, states  
3 that substantial completion occurs when the entire improvement, and  
4 not just the component part may be used for its intended purpose.  
5 And in this case, the use of the -- the house, at the very latest,  
6 would have been when the smart vents were installed in 2006, and  
7 then were -- passed inspection in April of 2007.

8 So on the -- the bond claim, that would be the very far out --  
9 or place it could have commenced, according to Statute. As counsel  
10 acknowledges, there's no case law applying the discovery rule in  
11 opposition to that Statute.

12 The CPA claim, I think the plaintiffs arguments also show that  
13 it's appropriate to dismiss that on the four year Statute of  
14 Limitations. They've complained about two things regarding CPA.  
15 They've complained a permit was not obtained before the work  
16 started, and they've complained that soffit vents were not  
17 installed. Both of these things happened in 2006 and 2007.

18 Whatever confusion about who obtained the permit was resolved  
19 by January of 2007 when Mr. Nichols applied for the permit and  
20 applied to have the home inspected. And the home was inspected.  
21 Smart vents were put in, and they passed inspection. At that point  
22 in time, plaintiff would have known that there wasn't a --  
23 plaintiff certainly knew a permit has not been gotten by Home Depot  
24 before he got it. And they knew that the original -- the soffit  
25 vents they say should have been sold to them were not installed and

1 smart vents were. And Mr. Nichols was questions about in his --  
2 that in his deposition. So those are the Consumer Protection Act  
3 problems. And those happened more than four years before this  
4 lawsuit was filed.

5 What construction defect things, like saying that the venting  
6 wasn't as good as it could have been, or we -- it didn't work as  
7 well, that's not Consumer Protection Act claims that they've  
8 submitted in their interrogatory responses, or Mr. Nichols  
9 deposition. So they haven't established that.

10 In regard to the medical specials, the summary judgment  
11 standard applies if this were at trial. Under case law at Celotex,  
12 plaintiff has to come in with the evidence that would be sufficient  
13 to survive a defense motion for summary judgment be sufficient to  
14 have a person rule for them at trial. They just can't say we're  
15 going to get it later, which is what the point of this said here.  
16 And we've cited the cases in our brief with that summary judgment  
17 standard, and that's a well known summary judgment standard. In  
18 this case it's not enough to say, we'll get it later. It's just  
19 not -- not applicable.

20 In regard to the Waste Statute, what the plaintiff would have  
21 the Court do here is to vastly expand the Waste Statute to engulf  
22 contract claims. What plaintiff is really saying, and he used the  
23 example of if your contractor came on your property and took a tree  
24 out, that would be waste. And I agree, that would be. That would  
25 be waste if you came in and you damaged the property, not pursuing

1 the contract, you took a tree out, you took a car out. But here  
2 what they're really arguing is that Home Depot didn't perform the  
3 contract work as well as they allege it should have been. There's  
4 a dispute about that, but for summary judgment purposes, that's  
5 what they've established. And to take that contract claim and make  
6 it into a tort statutory trespass claim just doesn't fit.

7 The case law -- the Colwell case is correct that there has to  
8 be a trespass for that for there to be a waste. And there's not a  
9 trespass here. Home Depot came on the property with permission and  
10 did the work they were contracted to do. There may be a dispute  
11 about how well that work was done, but it's still performance of  
12 the contract as a business invitee, not as a trespasser coming in  
13 and creating waste. And it would be a radical departure from  
14 Washington law to apply the Trespass Statute to the contract case.

15 Similarly plaintiffs have not shown an independent duty. And  
16 they've mentioned the permit, and they've mentioned the soffit  
17 vents. The permit's really a non-issue in that sense in that the  
18 permit was obtained in 2006. The venting that they claim was  
19 defective was smart vents were involved -- were installed in 2007  
20 after that permit. And that that venting, which they allege was  
21 improper, passed inspection in April 2007. So that's just not  
22 going to be an independent tort duty. It's a contract claim. And  
23 you can't really by law, not allow to bootstrap tort damages onto  
24 this contract claim. So unless your Honor has questions, then I'll  
25 be finished.

1 THE COURT: I have no questions.

2 MR. WORDEN: Thank you, your Honor.

3 THE COURT: Counsel.

4 MR. SMITH: So I'd just like to address, first of all, the  
5 discovery rule, and then I'll talk about causation. The fact of  
6 the matter is that plaintiffs discovered that my clients alleged  
7 negligence occurred in October of 2006 when they notified Home  
8 Depot that Peterson Northwest failed to put a tarp over the house.  
9 Mrs. Nichols testimony states that between 2007 and 2011, the  
10 Nichols contacted Home Depot a number of times alleging that there  
11 was water intrusion in the house.

12 Peterson Northwest performed its work in October 2006. Trying  
13 to extend the Statute of Limitations until 2011, because other  
14 contractors came back and performed warranty work, just doesn't  
15 comport with the law.

16 Secondly the issue of causation. Plaintiffs simply hasn't  
17 established that Peterson Northwest performed any work that's  
18 caused any of their alleged damages. Mrs. Nichols own testimony  
19 states that there was no water intrusion in the house immediately  
20 after Peterson Northwest removed the roof and the tarp was  
21 installed.

22 Plaintiff also refers to the McClure declaration, who is their  
23 expert. Well the gravamen of Mr. McClure's testimony concerns the  
24 flashing, the roof, and the roof vents. And it's undisputed that  
25 Peterson Northwest had nothing to do with any of those issues. So

1 to just blindly assert that there's causation here just doesn't cut  
2 it under the law. They've really asserted no facts that will  
3 contribute to liability on behalf of my client. That's all I have.

4 THE COURT: Okay. The Court is going to take this matter  
5 under advisement, and intends to render its ruling next Monday at  
6 1:30. Does that work with counsel's schedules?

7 MR. BERNER: Your Honor --

8 THE COURT: Yes.

9 MR. BERNER: Do -- do counsel have to actually come, or  
10 can they call in or --

11 THE COURT: You certainly can call in. There's no  
12 requirement. If you're going to call in and there's four of you,  
13 you guys work on bringing people in on the line. The Court won't  
14 do that. But you can arrange that however you wish. You can be  
15 here in person, or you can make arrangements with court  
16 administration. So --

17 MR. WORDEN: I don't have my schedule with -- on my phone,  
18 your Honor. I think Monday will probably work next week. If not,  
19 Mike Rhodes, my associate, can probably take the -- the decision.

20 THE COURT: Okay. So the Court will provide its decision  
21 next Monday at 1:30.

22 MR. BERNER: Thank you, your Honor.

23 MALE VOICE: At what time?

24 MR. SMITH: Thank you.

25 THE COURT: 1:30.

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MR. WORDEN: Thank you, your Honor.

Matter adjourned.

\* \* \* \* \*

1 Court is convened on Monday, February 23,  
2 2015 in the matter of DAVID NICHOLS and  
3 SYLVIA NICHOLS, et al. v. THD AT-HOME  
4 SERVICES, INC., et al., Mason County Cause  
5 No. 12-2-00790-3, before the HONORABLE  
6 DANIEL L. GOODELL, Judge; DANIEL A.  
7 BERNER, appearing on behalf of the  
8 Plaintiffs, DAVID NICHOLS and SYLVIA  
9 NICHOLS, et al.; MICHAEL K. RHODES,  
10 appearing on behalf of the Defendants, THD  
11 AT-HOME SERVICES, INC., and TRAVELERS  
12 CASUALTY AND SURETY, CO.; KEVIN SMITH,  
13 appearing on behalf of the Defendants,  
14 PETERSON NORTHWEST, INC.

9 THE COURT: Please be seated. This is cause number  
10 12-2-00790-3, David Nichols and Sylvia Nichols, et al. v. THD At-  
11 Home Services, Inc, et al. This comes before the Court today upon  
12 the defendant, THD At-Home Services, d/b/a, the Home Depot At-Home  
13 Services and Travelers Casualty and Surety Company of America's  
14 motion for partial summary judgment, and defendant Peterson  
15 Northwest, Inc., motion for summary judgment and joinder in THD At-  
16 Home Services motion for partial summary judgment.

17 As I understand it, all the representatives that are intending  
18 to be here today are here and present.

19 MR. BERNER: That's my understanding, your Honor. For the  
20 record, Daniel Berner for the plaintiffs.

21 THE COURT: Okay, and sir.

22 MR. RHODES: And my name is Michael Rhodes for THD and  
23 Travelers. There's no one from Peterson Northwest present, as far  
24 as I know.

1 THE COURT: Okay. Have we heard whether counsel for  
2 Peterson Northwest was intending to be here today?

3 MR. RHODES: I haven't heard. I haven't -- I haven't  
4 checked my e-mail, but I haven't heard anything before today about  
5 them being late or not wanting to show up.

6 MR. BERNER: And I haven't heard anything else.

7 THE COURT: And the Court has not heard either, so the  
8 Court will go ahead and proceed. And if they should show up, they  
9 will start catching up when they show up.

10 The motions today are based upon a request for a dismissal of  
11 defendant Travelers Casualty and Surety Company as a defendant in  
12 this matter, along with a dismissal of various claims which were  
13 presented by the plaintiffs, along with defendant Peterson  
14 Northwest joinder in the dismissal of the various claims, and  
15 Peterson Northwest's request that all actions against it also be  
16 dismissed.

17 The standard the Court applied today to a consideration of the  
18 motion for summary judgment is as follows: The party moving for  
19 summary judgment bears the burden of demonstrating there is no  
20 genuine dispute as to any material fact. If the moving party is  
21 the defendant, it may meet this burden by pointing out that there  
22 is an absence of evidence to support an essential element of the  
23 plaintiff's claim. To avoid summary judgment, the plaintiffs must  
24 make out a prima facie case concerning the essential elements of  
25 this claim.

1           If at this point the plaintiff fails to make a showing  
2 sufficient to establish the existence of an element essential to  
3 that parties case, and on which that party will bear the burden of  
4 proof at trial, then the trial court should grant the motion. A  
5 material fact is one upon which the outcome of the litigation  
6 depends in whole or in part. All the prior statements were based  
7 upon the Boguch v. Landover Corporation matter that was briefed by  
8 the parties.

9           In addition, the non-moving parties' rebuttal must involve  
10 specific facts, not speculative or conclusory statements. And that  
11 reference is through Deschamps v. Mason County Sheriff's Office.

12           And finally the Court considers the evidence presented, and the  
13 inferences therefrom, in the light most favorable to the  
14 Plaintiffs, according to Citizens for Clean Air v. Spokane.

15           Based upon a consideration of the evidence presented, the Court  
16 is considering in the light -- the evidence presented in the light  
17 most favorable to plaintiff in this motion as follows: The Court is  
18 making the following general findings, looking at things in that  
19 light.

20           In 2006, the plaintiffs, Dave and Sylvia Nichols, met with a  
21 representative of the defendant, Home Depot At-Home Services, Inc.  
22 Included in the discussion, the representative recommended  
23 insulation of the upgraded ridge exhaust vent and soffit intake  
24 vent to improve the ventilation of the attic and increase the value  
25 of the plaintiffs' home.

1           On September 8, 2006, the plaintiffs and defendant THD,  
2           executed a contract for the installation of the roof. The contract  
3           provided that defendant would furnish, deliver, and arrange for the  
4           installation of all materials, as described in the attached Spec  
5           Sheet Number R 348899. The attached spec sheet was entitled  
6           Roofing Spec Sheet Description of Work. Among other items set  
7           forth in the spec sheet was a category entitled B, ventilation. In  
8           the two boxes below the category title were two sections entitled  
9           exhaust and intake. The exhaust section had a selection, ridge  
10          vent, with a handwritten check next to it. The intake section had  
11          a selection soffit vent, with a handwritten check next to it. No  
12          further explanation of the type or quality of the ventilation is  
13          set forth in the contract, including the spec sheet.

14          On or about December 9, 2006, defendant THD through its  
15          contractor, defendant Peterson Northwest, began removing the old  
16          roofing in preparation for the installation of the new roof. On  
17          the date that defendant Peterson Northwest performed the removal of  
18          the roofing, the roof was exposed to wind and rain. The plaintiffs  
19          then contacted defendant THD who responded by installing tarps over  
20          the roof.

21          On October 25, 2006, upon the urging of defendant THD  
22          subcontractor, plaintiff Mr. Nichols, signed a certificate of  
23          completion, even though the project had not been totally completed.  
24          At some point in later 2006, defendant THD ended work on the  
25          project. At the time that defendant THD ended the work, he was

1 aware that no soffit vent was installed on the project, and did not  
2 inform the plaintiffs of this omission.

3 In January 2007, the Nichols attempted to update their  
4 homeowners insurance and discovered that they needed to finalize  
5 the building permit for the project. At this time, plaintiffs  
6 learned that defendant did not apply or obtain a permit for the  
7 project. The plaintiffs then attempted to obtain a permit from  
8 Mason County. The project initially failed the permit inspection.  
9 A correction notice was issued by the Mason County Building  
10 Department referencing ventilation requirements as a basis for the  
11 violation. It was during the permitting process that plaintiffs  
12 first learned that no soffit vent was installed in the project.

13 Subsequent to the building inspection, Ms. Nichols contacted  
14 defendant THD who informed her that it would not be able to install  
15 the soffit vent in the roofing project. Instead defendant THD  
16 recommended the installation of an alternate ventilation process  
17 entitled smart vents. The smart vents were installed, and on April  
18 26, 2007, the roof passed the building inspection.

19 Between April 2007 and December 2011, Ms. Nichols contacted  
20 defendant THD to remedy small leaks or other issues with the roof.  
21 The remedies included caulking and replacing shingles in attempts  
22 to stop small leaks from occurring.

23 On December 7, 2011, Mr. Nichols discovered mold and wet  
24 conditions in the attic of the home. This is the first time the  
25 Nichols were aware that there was mold in the attic.

1           On January 7 and 10, 2012, a THD contractor removed the smart  
2 vents and installed RVO can vents. On February 27, 2012, a THD  
3 contractor removed and replaced all of the lower low slope roof on  
4 the home.

5           During the remainder of this ruling the Court will address  
6 additional relevant evidence presented. The first item that the  
7 Court's going to consider is the claim against defendant Travelers  
8 Casualty and Surety Company insurance under RCW 18.27.

9           Defendants THD and Travelers Casualty argue that the plaintiffs  
10 claim against the contractors bond issued by defendant Travelers  
11 Casualty, should be dismissed because a complaint was not filed in  
12 a timely manner. RCW 18.27.040(3) states, any person, firm or  
13 corporation having a claim against a contractor for any of the  
14 items referred to in this section, may bring suit against the  
15 contractor and the bond, or deposit in the Superior Court of the  
16 county in which the work was done, or of any county in which  
17 jurisdiction of the contractor may be had. The surety issuing the  
18 bond should be named as a party to any suit upon the bond. Action  
19 upon the bond or deposit brought by a residential homeowner for  
20 breach of contract by a party to the construction contract, shall  
21 be commenced by filing the summons complaint with the clerk of the  
22 appropriate Superior Court within two years from the date the  
23 claimed contract work was substantially completed or abandoned,  
24 whichever occurs first.

25

1           RCW 18.27.010(13) states, substantial completion means the same  
2 as substantial completion of construction in RCW 4.16.310.

3           RCW 4.16.310 states in part, the phrase substantial completion  
4 of construction shall mean the state of completion reached when an  
5 improvement upon real property may be used or occupied for its  
6 intended use.

7           The application of RCW 4.16.310 has been expanded by the case  
8 of Dania, Inc. v. Skanska, as well as the Parkridge Associates v.  
9 Ledcor, which states for contractors who perform final services on  
10 a project, the limitations period begins to run from the date their  
11 last service was provided, so long as that service gave rise to the  
12 cause of action. The language of RCW 4.16.300 describing actions  
13 or claims arising from various services, shows there must be a  
14 nexus between the services performed after the date of substantial  
15 completion, and the cause of action, in order for the termination  
16 services date to extend the limitations period.

17           There is no evidence provided that the plaintiffs residence was  
18 ever not able to be used or occupied for its intended purpose. It  
19 appears that plaintiffs continued to reside at the residence  
20 through the initial roof removal and replacement. The certificate  
21 of completion was signed on October 25, 2006 at the request of  
22 defendant THD's subcontractor, Sloan Roofing, for the work it had  
23 completed. However, the contract required the placement of the  
24 roof and the installation of ventilation system.

25

1           The Court will not adopt the date of the certificate of  
2 completion as the substantial completion date because the  
3 ventilation system was not installed.

4           At some point in the later point of 2006, defendant THD and its  
5 subcontractors left the construction site. At the time that THD  
6 initially stopped working on the plaintiffs' roof, it had not  
7 installed a component to the project; namely, the ventilation  
8 system. There was an awareness of this apparently by both parties  
9 as early as January 15, 2007, and it was noted by the plaintiffs on  
10 the date the building permit application was prepared on January  
11 23, 2007.

12           The project failed the initial inspection by the building  
13 department on January 24, 2007 due to the lack of appropriate  
14 ventilation. The Home Depot At-Home Services Lead Detail Report  
15 No. 2674056 indicates that smart vents, not the contracted for  
16 soffit vents, were installed on the project on or about February 6,  
17 2007, with apparent related work being completed on or about March  
18 23, 2007. The final successful inspection of Mason County Building  
19 Department occurred on April 26, 2007.

20           The date of the commencement of the statute of limitations the  
21 Court is finding is March 23, 2007. This is also consistent with  
22 the Dania case, and potentially expands the substantial completion  
23 date to the date of the installation of the vent system and related  
24 work.

25

1           The plaintiffs argue that the commencement of the statute of  
2 limitations should be further extended to January 10, 2012 when a  
3 THD subcontractor removed the smart vents and installed RVO can  
4 vents. However there is no evidence presented that the  
5 installation of the RVO vents were an attempt at completion. Let  
6 me state that over. However there is no evidence presented that  
7 the installation of the RVO vents were an attempted completion of  
8 an incomplete ventilation system, only a replacement of a  
9 previously installed ventilation system. And the Court does not  
10 find that the work extends the commencement of the statute of  
11 limitations.

12           It also fails the second part of the Dania analysis which  
13 requires that the later service, which is the service provided  
14 after the substantial completion date, gives rise to the cause of  
15 action. Here the alleged damage was discovered in December, 2011,  
16 and the later installation of the replacement vents did not occur  
17 until after that, of January 2012. So the RVO can vents could not  
18 have given rise to the claimed damages.

19           Plaintiffs also argue that the ongoing leak repairs which  
20 occurred after the date of substantial completion of construction  
21 further extended the commencement of the statute of limitations.  
22 However the Court finds that such work was only remedial in nature,  
23 and occurred after the substantial completion construction project,  
24 along with the installation of the ventilation, and were not part  
25 of the initial construction. To find otherwise would serve to

1 extend the bond liability in any given construction project to a  
2 two year period following any warranty work performed by a given  
3 contractor, which goes well beyond the framework of RCW  
4 18.27.040(3) and the Dania analysis. Therefore, the two year  
5 statute of limitations ended on March 23, 2009.

6 The action was commenced on August 29, 2012, so the action was  
7 not filed within the statutory period and the claim against  
8 Travelers Casualty and Surety Company is dismissed.

9 With regard to the Consumer Protection Act Violation, the  
10 plaintiffs argue that -- let me begin over. The defendants argue  
11 that the plaintiffs Consumer Protection Act violation should be  
12 dismissed. The plaintiffs argue that defendants failure to provide  
13 a disclosure statement to the plaintiffs, pursuant to RCW 18.27.144  
14 constituted a per se violation of the Consumer Protection Act, RCW  
15 19.86. Plaintiffs cite RCW 18.27.114(6) for the proposition that a  
16 failure to provide the notice under RCW 18.27.114 constitutes an  
17 infraction under the provisions of the Chapter. RCW 18.27.350  
18 provides in part that the fact that a contractor is found to have  
19 committed a misdemeanor or infraction under this Chapter, shall be  
20 deemed to affect the public interest and shall constitute a  
21 violation of Chapter 19.86 RCW.

22 This statute does not provide for a per se violation of the  
23 Consumer Protection Act without an earlier finding that there was  
24 the commission of a misdemeanor or infraction. Plaintiffs attorney  
25 conceded that this would be a finding of the Department of Labor

1 and Industries. This statute is not worded in a similar matter as  
2 other statutes that do provide a per se violation of the Consumer  
3 Protection Act without a prior finding of fact, such as RCW  
4 18.39.350 which provides in part, any such violation of this  
5 Chapter constitutes an unfair practice under the Consumer  
6 Protection Act. See also RCW 19.09.340, 19.105.500, and 19.102.020  
7 and similar statutes that do provide for per se violations.

8 There is no evidence provided that defendants have been found  
9 to have committed a misdemeanor or an infraction by the Department  
10 of Labor and Industries for failing to provide the statutory notice  
11 required by RCW 18.27.350. Without such a previous finding of a  
12 misdemeanor or an infraction, defendants failure to provide the  
13 plaintiffs the statutory notice is not considered a per se  
14 violation of the Consumer Protection Act under RCW 18.27.350.

15 The plaintiffs further argued that the failure of the  
16 defendants to procure a building permit constitutes a violation to  
17 the Consumer Protection Act. However, the plaintiffs were aware  
18 that the building permit was necessary and was not obtained prior  
19 to commencement of the construction, at least by the time they  
20 apply for the permit on January 23, 2007. And by operation of the  
21 Consumer Protection Act -- and I'll talk about that in a moment.

22 That discovery on January 23, 2007 would preclude recovery --  
23 here it is. RCW 19.86.120, any action to enforce a claim for  
24 damages under RCW 19.86.090 shall be forever barred unless  
25 commenced within four years after the cause of action accrues.

1 Even applying the discovery rule, the discovery of the need to have  
2 a permit occurred on or before January 23, 2007. And the statute  
3 of limitations in such action would have ended on January 23, 2011.

4 The action having commenced on August 29, 2012 was not timely  
5 for a claim based upon the lack of a building permit.

6 The plaintiffs further argue that there was a misrepresentation  
7 in the creation of the contract which provided for the installation  
8 of the soffit vents, which defendants knew or should have known,  
9 was not possible. Along the same lines, when the defendants and  
10 their subcontractors completed the project and left the  
11 construction site, they were aware that the soffit vents had not  
12 been installed, and were aware that the soffit vents were required  
13 by contract.

14 Again, counsel, I am looking at the evidence in light most  
15 favorable to the plaintiffs. And these findings are based upon  
16 such an analysis.

17 It is the plaintiffs contention that the defendants were  
18 deceptive in these acts, and such deception was the basis for their  
19 claim of the violation of the Consumer Protection Act. Arguably,  
20 the installation of the smart vents could be construed as merely an  
21 attempt to mitigate a deceptive act, and did not remedy the  
22 deception.

23 The parties agree to the application of the Hangman Ridge  
24 Training Stables v. Safeco Title Insurance Company analysis to  
25 alleged violations of the Consumer Protection Act. That case

1 defines five elements of the violation of the Consumer Protection  
2 Act as follows: number one, an unfair or deceptive act; number two,  
3 that occurred in trade or commerce; number three, that affects the  
4 public interest; number four, cause an injury to occur to the  
5 plaintiff business or property; and five, there is a causation  
6 between the act and the injury.

7 In considering the evidence and inferences therefrom in the  
8 light most favorable to the plaintiffs, the Court applies the  
9 Hangman Ridge elements as follows: Number one, there is evidence  
10 that supports a plaintiffs contention that the defendants deceived  
11 the plaintiffs in contracting with them for the installation of  
12 soffit vents when they could not be installed in the plaintiffs  
13 roof project, and further deceived them by completing the project  
14 without a soffit vent installation. Defendants may have further  
15 deceived plaintiffs when the project was initially concluded  
16 without installation of the vents.

17 Number two, or with regard to element number two. The sale of  
18 defendants service was directed to and directly affected the people  
19 of the State of Washington. Plaintiffs are residents of the State  
20 of Washington and contracted with the defendants, whose  
21 representative came to their home to discuss the contract.

22 Element number three is that the act affects the public  
23 interest. Hangman Ridge has additional factors to consider for  
24 public interest impact in a private dispute as follows: Number one,  
25 were the alleged acts committed in the course of defendants

1 business; number two, did defendant advertise to the public in  
2 general; number three, did defendant actively solicit this  
3 particular plaintiff in indicating potential solicitation of  
4 others; and number four, the plaintiff and defendant occupy unequal  
5 bargaining positions. None of the factors are dispositive, nor is  
6 it necessary that all be present.

7 With regard to factor number one, the alleged  
8 misrepresentations of the ventilation system were committed in the  
9 course of defendants business.

10 Factor number two, the literature provided by plaintiff in  
11 support of its response to summary judgment motion includes  
12 literature that appears to be online at [www.myhomedepotproject.com](http://www.myhomedepotproject.com)  
13 which sets forth its insulation services promoting the Home Depot  
14 difference on the web to the general public.

15 Number three, the third element, defendant actively solicited  
16 the plaintiffs, meeting with them at their residence, and promoting  
17 the defendants peace of mind warranty.

18 Number four, arguably there was an unequal bargaining position  
19 because the defendants had knowledge of the materials to be  
20 installed in plaintiffs home, and whether the ventilation system  
21 could be installed.

22 Relating back to the original five elements under the Hangman  
23 Ridge, and that is whether there was causation between the act and  
24 the injuries, and the injury existed. Plaintiffs expert, J.  
25

1 Vincent McClure, finds that the vents were installed incorrectly,  
2 contributing to the mold issues.

3 With regard to the timeliness -- back up a moment. Based upon  
4 an analysis of the Hangman Ridge, the Court is finding that looking  
5 at the evidence in the light most favorable to the plaintiff, that  
6 there is adequate evidence for a person to conclude that there was  
7 a violation of the Consumer Protection Act, based upon a deception  
8 with regard to the installation of the vents.

9 With regard to the timeliness of the claim, the Court in  
10 Alexander v. Sanford, 181 Wn. App. 135 (2014) Division I -- that  
11 was a Consumer Protection Act case that did apply the discovery  
12 rule to its analysis of the application of the four year statute of  
13 limitations.

14 While in this case this deceptive act would have occurred in  
15 2006, the mold was not discovered by the plaintiffs until December  
16 7, 2011. And the plaintiffs were unaware of the claim, which would  
17 have been caused by the deceptive act regarding the vents until  
18 that time, thereby tolling the statute of limitations.

19 This Court will apply the discovery rule as described under  
20 Cambridge Townhome v. Pacific Star Roofing, Inc. and find that in  
21 considering the evidence and inferences therefrom in the light most  
22 favorable to the plaintiffs, the statute of limitations be  
23 recommenced upon the discovery of the mold by Mr. Nichols on  
24 December 7, 2011. And the filing of the complaint in this matter  
25

1 on August 29, 2012 was within the four year statute of limitation  
2 period.

3 So with regard to the Consumer Protection Act claim, based on  
4 the allegations of the deception with regard to the vents, the  
5 Court will not dismiss that claim.

6 The next issue is the defendants request to dismiss the claim  
7 under RCW 4.24.630, the waste statute. Plaintiffs argue that  
8 defendants claim under RCW 4.24.630 for damages for waste and  
9 injury to plaintiffs plan -- let me fix that. I'm going to start  
10 that paragraph over. I had the parties mixed. Defendants argue  
11 that plaintiffs claim under 4.24.630 for damages for waste and  
12 injury to plaintiffs plan should be dismissed. RCW 4.24.630(1)  
13 states, every person who goes onto the land of another and who  
14 removes the timber, crops, minerals or other similar valuable  
15 property from the land, or wrongfully causes waste or injury to the  
16 land, or wrongfully injures personal property or improvements to  
17 real estate on the land, is liable to the injured party for treble  
18 the amount of damages caused by the removal, waste or injury. For  
19 purposes of this section, a person acts wrongfully if the person  
20 intentionally and unreasonably commits the act or acts while  
21 knowing or having reason to know that he or she lacks authorization  
22 to so act.

23 In the case cited in the materials, Clipse v. Michels Pipeline  
24 Construction, it states that RCW 4.24.630 requires a showing that  
25 the defendant intentionally and unreasonably committed one or more

1 acts, and knew, or had reason to know, that he or she lacked  
2 authorization.

3 The focus of this argument is on whether the defendants lacked  
4 authorization to go on to the land of the plaintiffs. It is argued  
5 by the plaintiffs that he has authorization referenced in the  
6 statute -- references the defendants authority to act as a result  
7 of external forces, such as not having a building permit or not  
8 following the building code. The defendants, on the other hand,  
9 focus only on the authority granted by the landowner, without  
10 regard to external factors.

11 The statute focuses on persons who go onto the land of another.  
12 In essence, the focus is on trespass. And there's material cited,  
13 Colwell v. Etzell that indicates the court's focus of the statute  
14 is on trespass. Because of this, the authority referenced in the  
15 statute should be based upon the relationship between the land  
16 holder and the person accessing the property.

17 The list of acts alleged by plaintiffs are as follows: Number  
18 one, that defendants started to work without a building permit;  
19 number two, that the defendants installed a new roof in violation  
20 of the building code; and number three, that the defendants failed  
21 to install a contractor for vents.

22 In looking at the proof of lack of authorization, under item  
23 number one, that the defendant started their work without a  
24 building permit, the Court first focuses on the contract between  
25 the parties. The home improvement contract provides that the

1 defendants are authorized to furnish, deliver and arrange for the  
2 installation of all materials for the roof and references matters  
3 such as the disarming of any security system, which clearly  
4 authorizes THD and its contractors to enter upon the plaintiffs  
5 property to perform the work.

6       However, the question is whether the authorization limited to  
7 only work performed pursuant to the defendant first obtaining a  
8 building permit. More succinctly stated, does the contract limit  
9 defendants entry on the plaintiffs land to occur only after a  
10 building permit was obtained. There is no evidence presented on  
11 this issue. The closest evidence is a declaration of Ms. Nichols  
12 who states that she expected THD had already applied for the  
13 permit.

14       In considering the evidence and inferences therefore in the  
15 light most favorable to the plaintiffs, the Court concludes that  
16 the authorization given to defendants in the contract was to  
17 install a roof and ventilation system. And there is no evidence  
18 presented that the defendants entry upon the land was not  
19 consistent with such authorization.

20       The second argument, the installation of a new roof in  
21 violation of the building code. Certainly there was an expectation  
22 that the defendants would perform their services in a manner  
23 consistent with applicable building code. While it may be the  
24 intent of the parties to have the work performed in accordance with  
25 the applicable building code, the Court is not willing to extend

1 the scope of the trespass waste statute to include the performance  
2 of construction contracts which may be a violation of a provision  
3 of any given building code.

4 In addition, while it is correct that it may be interpreted the  
5 initial work that was performed by the defendants was not  
6 consistent with the building code because it did not pass the  
7 building department inspection due to inadequate roof ventilation,  
8 the defendants did perform additional work, and the insulation  
9 passed such inspection on April 26, 2007.

10 The third argument, that there was a failure to install the  
11 contracted for vents. The installation of the ventilation system  
12 was a component of the contract, but not the only requirement of  
13 the contract. Again, the focus is upon whether the entry upon the  
14 plaintiffs land was wrongful. The authorization to enter upon the  
15 plaintiffs land was for the installation of a new roof and  
16 ventilation system. The failure to install a portion of the  
17 contract does not affect the defendants authorization to enter upon  
18 defendants land.

19 The plaintiffs claim, based upon RCW 4.24.630, based upon the  
20 above analysis, is hereby dismissed.

21 The next issue to consider is the tort claim issue. And there  
22 is defendants request that the Court dismiss plaintiffs tort claims  
23 that are based upon negligence. The focus in this analysis is the  
24 independent duty doctrine which governs certain tort claims brought  
25 by parties to a contract. Under the doctrine, a party can seek

1 tort remedies only if the other party violates a duty that exists  
2 independently of the contract. On the other hand, if the contract  
3 creates a duty, the party can seek only contractual remedies, and  
4 the independent duty doctrine bars any tort claims. And that  
5 references the Eastwood v. Horse Harbor Foundation, which was cited  
6 in the materials.

7 In its complaint plaintiffs identified the following as  
8 independent duties that defendants negligently violated. In  
9 section 9.2 they state, by blocking existing ventilation and by  
10 failing to install ventilation required, failing to follow minimum  
11 industry standards and building code requirements, defendants  
12 Peterson, Sloan and Rios were negligent and caused personal injury,  
13 property damage and loss of use to the plaintiffs, and are liable  
14 for those injuries, along with the defendant general contractor.

15 In plaintiffs responsive brief, they did not identify any  
16 additional duties that they claim were violated. In oral argument,  
17 plaintiffs attorney identified the defendants failure to apply for  
18 a building permit, to comply with building codes, to not conceal  
19 work, and to not install the soffit vents as independent duties  
20 that were violated.

21 The Court finds that all of the identified duties of the  
22 defendant -- all identified duties by the plaintiff of the  
23 defendant, were created -- I'm going to state that over. The Court  
24 finds that all the identified duties of the defendant were created  
25 by the contractual relationship between the parties, and were not

1 duties that independently existed from that of the contract. Based  
2 upon this analysis, the Court is dismissing the plaintiffs tort  
3 claims, based upon negligence.

4 The next issue is the medical evidence causation issue. The  
5 defendants claim that the plaintiffs failure to provide them with  
6 documented medical specialists should cause their claim for the  
7 recovery of medical specialists to be dismissed. To avoid summary  
8 judgment, the plaintiff must make out a prima facie case concerning  
9 the essential elements of this claim. And that is upon a defense  
10 motion. If at this point the plaintiff fails to make a showing  
11 sufficient to establish the existence of an element essential to  
12 that party's case, and on which that party will bear the burden of  
13 proof at trial, then the Court shall grant the motion.

14 Summary judgment in this context is warranted, since a complete  
15 failure of proof concerning an essential element of the non-moving  
16 party's case necessarily renders all other facts immaterial. And  
17 again, that's the Boguch v. Landover Corporation previously cited.

18 While proof of medical specialists at the time of trial may be  
19 necessary to establish the total amount of damages that the  
20 plaintiffs are entitled to recover, the Court does not find that  
21 the amount of the damages is an essential element of recovery. The  
22 fact that there are damages may be an essential element of  
23 recovery. However the amount of damages are not.

24 Discovery is an ongoing process. And there may be an  
25 obligation by the plaintiffs to supplement the discovery as the

1 information becomes available under CR 26. And if so, there is  
2 adequate remedy to the defendants, should such information not be  
3 timely provided. Given the evidence and medical treatment of the  
4 plaintiffs, and supplemental declaration of Sylvia Nichols, which I  
5 will address in a moment, indicating that the children were on  
6 Medicaid, and considering the evidence and inferences therefrom in  
7 the light most favorable to the plaintiffs, the Court can infer  
8 that plaintiffs claim for damages may include medical specialists,  
9 and should not be precluded from providing evidence of medical  
10 specialists at the time of trial.

11 There has been a motion to strike a declaration by the  
12 defendants. Defendants have requested that the declaration of A.  
13 Michael Keep, MD, be stricken. The basis for their request is that  
14 the initial declaration, although timely, was filed unsigned. In  
15 addition, defendants claim that Doctor Keep's declaration is based  
16 on pure speculation, as contrary to an earlier writing that he had  
17 authorized. Plaintiffs have explained that the unsigned  
18 declaration of Doctor Keep was filed due to the unavailability of  
19 the witness to sign the declaration in a timely manner. The signed  
20 declaration was provided shortly thereafter when Doctor Keep became  
21 available, and the signed declaration was identical to the  
22 previously provided unsigned declaration.

23 The Court is finding that the subsequent filing of the signed  
24 declaration does not prejudice the defendants in this matter, or  
25 their motion for summary judgment. And given the circumstances,

1 the Court will not strike Doctor Keep's signed declaration based  
2 upon the timeliness of the filing.

3 The remaining arguments related to the obligation of ER 702 go  
4 to the weight and will not cause the declaration to be stricken.  
5 This relates to another argument by defendants that plaintiffs  
6 Shyanne, Benjamin and Zachariah Nichols allege mold related  
7 physical injury claims against the defendant should be dismissed  
8 because there's no evidence of medical causation.

9 The evidence provided by the plaintiffs includes the  
10 declaration of Doctor Keep who provides an opinion on a more  
11 probable than not basis to a reasonable medical certainty that  
12 certain conditions that were experienced by plaintiffs Shyanne,  
13 Benjamin and Zachariah, were caused by their exposure to mold and  
14 wet conditions from the Nichols home. And considering this  
15 evidence and inferences therefore in the light most favorable to  
16 the plaintiff, the defendants motion to dismiss plaintiffs claim  
17 for mold related physical injury claims, based upon lack of medical  
18 causation is denied.

19 The Court is not addressing any issues today with regard to the  
20 recovery of these type of injuries under a contractual analysis.  
21 That is not before the Court.

22 With regard to the strike of supplemental declaration of Sylvia  
23 Nichols. Issues were raised by the defendants that it considered  
24 entitled -- entitled the Court to strike the supplemental  
25 declaration. The Court has reviewed the supplemental declaration

1 of Sylvia Nichols, which was signed on January 15, 2015. And the  
2 Court is finding that there is a lack of foundation and/or hearsay  
3 which exists throughout the declaration. However the entire  
4 declaration should not be stricken.

5 The following areas of the declaration were not considered by  
6 the Court in its analysis today. In paragraph three, the first  
7 sentence, was not considered. Neither was the third sentence or  
8 the fourth sentence of paragraph three. With regard to paragraph  
9 four, the only sentence considered was the final sentence of the  
10 declaration. The Court did not consider paragraph five, or any of  
11 its subparts. With regard to paragraph six, the Court did not  
12 consider the first two sentences, but considered the balance of  
13 paragraph six.

14 With regard to paragraph seven, the Court considered the first  
15 portion of the first sentence; I have been the primary caregiver  
16 for my children since their birth -- that was the entire first  
17 sentence. And then the second sentence, it considered the  
18 following first portion: I know when my children's physical and  
19 medical conditions changed. The Court did not consider the rest of  
20 the second sentence, and the Court considered the entire third  
21 sentence of paragraph seven. And again, the basis for the Court's  
22 consideration was based upon lack of foundation or hearsay.

23 The final issue that the Court's considering is the causation  
24 between the actions of Peterson Northwest and the damages sustained  
25 by plaintiffs. Defendant Peterson Northwest joins in defendant

1 THD's motion for partial summary judgment. And the Court  
2 considered such arguments in the above analysis.

3 In addition, defendant Peterson Northwest argues that  
4 plaintiffs have not provided evidence of causation between the  
5 injuries and damages that they have suffered, and the actions of  
6 the defendant, Peterson Northwest.

7 The Court finds that the above analysis applies to defendant  
8 Peterson Northwest and that there is some evidence that the actions  
9 of defendant Peterson Northwest exposed the roof and home to  
10 moisture shortly after the work was performed.

11 In addition, in the declaration of Sylvia Nichols, she  
12 indicates that Peterson Northwest also -- in addition to removing  
13 the previous roofing material, did prepare the roof deck. They cut  
14 off the roof peak for the ridge vent, extended the dormers,  
15 installed flashing, and installed the underliner that went  
16 underneath the shingles.

17 In addition, the expert opinion by Vince McClure on behalf of  
18 the plaintiffs concludes that the roofing project contracted for by  
19 the Nichols with THD allowed water to enter the building envelope,  
20 and also failed to provide adequate ventilation. This resulted in  
21 the growth of mold and mildew, damage to the exterior paint on the  
22 house, probably, dry rot, damage to sheathing and framing  
23 supporting the house. This opinion does not distinguish between  
24 THD or any of its subcontractors. And in considering this evidence  
25 and inferences therefrom in the light most favorable to plaintiffs,

1 defendants Peterson Northwest's motion to dismiss plaintiffs claim  
2 against Peterson Northwest is denied, except as otherwise set forth  
3 above with relation to defendant THD.

4 I believe I covered all the issues that were presented to the  
5 Court today. As far as timing for presentation of orders? And who  
6 is going to prepare them?

7 MR. RHODES: Your Honor, is it possible that we wait to  
8 get a CD or just reference your findings of fact on the record?

9 THE COURT: The parties can note for presentation at some  
10 later date based upon that time. That would be acceptable to the  
11 Court as well. It was a fairly lengthy response to fairly lengthy  
12 issues that were presented. So any questions from any of the  
13 parties?

14 MR. BERNER: None from the plaintiffs, your Honor. And I  
15 would just thank the Court for the level of detail in its ruling.

16 MR. RHODES: I thank the Court too. Your Honor, we have  
17 an agreed order for leave to file a third party complaint against  
18 some of the other subcontractors. I think it's something that --  
19 we have two signatures, and if we get a third signature, we'd like  
20 to present that to the Court to get it filed today, if the Court's  
21 willing to entertain it. It might take about five minutes of  
22 informal discussion.

23 THE COURT: So this is something that you want to present  
24 before I step down? Or is that something that you just need to --

25

1 I can step back into chambers, you guys can have a discussion, and  
2 you have an order?

3 MR. RHODES: Yes, your Honor. Okay.

4 THE COURT: Okay.

5 MR. RHODES: Sounds good.

6 THE COURT: Off the record.

7 Court adjourns for a recess.

8 RECESS/COURT RECONVENES

9 Court reconvenes on the same  
10 date and the following is heard  
11 in the presence of all parties:

12 THE COURT: Counsel.

13 MR. RHODES: Your Honor, THD has drafted a third party  
14 complaint and an agreed order allowing THD to file a third party  
15 complaint for contribution against some subcontractors that haven't  
16 been named as parties yet. Counsel for both plaintiffs and  
17 Peterson Northwest are present and have agreed, and have signed the  
18 proposed order. If I may approach?

19 THE COURT: You may. Court has reviewed the agreed order  
20 allowing third party complaint for contribution for American West  
21 Roofing, Inc., Sloan Construction, LLC and Modern Home  
22 Improvements, Inc. and is approving the order. And the order is  
23 signed.

24 I don't have any idea where this case is on case scheduling.  
25 Is this going to affect that, or is that something that needs to be

1 addressed? Or that may be something that you can address once you  
2 proceed with bringing in the third party.

3 MR. RHODES: Yes, your Honor. I think it's something that  
4 we can deal with eventually.

5 THE COURT: Okay. Order is signed. Anything else?

6 MR. RHODES: Yes, your Honor. Does the Court have a  
7 preference on how you want the order to look? We had -- counsel  
8 had discussed possibly getting a hearing transcript, and then  
9 attaching it as part of the order. Or would the Court like  
10 something simplified that references the findings of fact on the  
11 record?

12 THE COURT: However the parties want to do that. If the  
13 parties want to just reference the transcript, that would be fine.  
14 The only concern is that there were a few places in the Court's  
15 ruling that I corrected some statements in that process. And so I  
16 would want to make sure that that is somehow dealt with by doing  
17 that. But it wasn't that many places.

18 MR. RHODES: Well I -- I think it would make sense then to  
19 present an order at a later date. We'll get the transcript and  
20 we'll agree to an order.

21 THE COURT: Okay, thank you. As long as we have a clean  
22 record, that's always what the Court's looking to. So okay.

23 MR. RHODES: Thank you, your Honor.

24 MR. BERNER: Thank you, your Honor.

25 Matter adjourned.

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Court is convened on Monday, May 11, 2015 in the matter of DAVID NICHOLS and SYLVIA NICHOLS, et al. v. PETERSON NORTHWEST, INC., et al., Mason County Cause No. 12-2-00790-3, before the HONORABLE DANIEL L. GOODELL, Judge; DANIEL A. BERNER, appearing on behalf of the Plaintiffs, DAVID NICHOLS and SYLVIA NICHOLS, et al.; MICHAEL K. RHODES, appearing telephonically on behalf of the Defendants, THD AT-HOME SERVICES, INC., and TRAVELERS CASUALTY AND SURETY, CO.; RICHARD S. FALLON, appearing on behalf of the Defendants, PETERSON NORTHWEST, INC.

THE COURT: Please be seated. And I believe we're waiting for the call to come back in. They called once before, and I was in another courtroom. So just a moment while we wait for the call to come in before we get started.

Good afternoon, this is Judge Goodell. You're on the record in open court. Who do I have on the phone?

MR. RHODES: This is Michael Rhodes on behalf of THD At-Home Services.

THE COURT: This is cause number 12-2-00790-3. And it comes before the Court on defendant, Peterson Northwest, Inc.'s motion for reconsideration. And would counsel please identify themselves for the record?

MR. FALLON: Good afternoon, your Honor. I'm Bud Fallon representing Peterson Northwest, and it's our motion.

THE COURT: Uh huh.

MR. BERNER: And Daniel Berner for the plaintiffs, your Honor.

1 MR. RHODES: And this is Michael Rhodes for THD At-Home  
2 Services.

3 THE COURT: And the record will reflect that Mr. Rhodes,  
4 you are appearing by telephone. Mr. Fallon --

5 MR. RHODES: Correct.

6 THE COURT: -- since this is your motion, you may proceed.

7 MR. FALLON: Thank you, your Honor.

8 THE COURT: Before we get started, I'm sorry. Mr. Fallon,  
9 if you would grab this microphone. This is for the telephone, and  
10 stick it on your table. That way for certain --

11 MR. FALLON: Is that all I have to do?

12 THE COURT: Yep, just put it right there, thank you.

13 MR. FALLON: I can handle that.

14 THE COURT: Okay. Sorry for the interruption, go ahead.

15 MR. FALLON: Okay. Thank you, your Honor. Well since  
16 this was last before you, the landscape has changed dramatically  
17 because of the settlement by Home Depot with the plaintiffs. We're  
18 here today on behalf of Peterson Northwest. And my client is here,  
19 just in case. But we're not so much asking you to change anything  
20 in the decision that you made on February 22<sup>nd</sup> in response to the  
21 summary judgment motions. Most of your attention, obviously, was  
22 at that time directed to THD Home Depot because they were the  
23 primary defendant.

24 So I guess what we're here today asking for is -- could be  
25 phrased further action based on your decision. You've made a

1 detailed oral decision on February 22<sup>nd</sup>. And I think it was April  
2 3<sup>rd</sup> a written order was submitted by plaintiffs and signed off on by  
3 others. And you dismissed the negligence claims, based on the law  
4 of the State of Washington that we don't have a cause of action for  
5 negligent construction. You dismissed the claims for intentional  
6 waste under the Washington Statute on that subject because the  
7 elements for that were not present. You left open the subject of  
8 the plaintiff's claim for a Consumer Protection Act violation.

9 And we're here today because the plaintiffs' complaint against  
10 Peterson Northwest did not include a CPA claim against Peterson.  
11 Plaintiffs response brief confirms that, saying specifically  
12 that -- on page 3, in quotes, plaintiffs are unaware of any  
13 pleadings which allege violation of the Waste Statute or the  
14 Consumer Protection Act against Peterson Northwest.

15 So I guess in a nutshell, your Honor, the situation now is that  
16 there aren't any legal causes of action against Peterson. And we'd  
17 like you to sign an order dismissing Peterson from the case.

18 THE COURT: Okay. And I'll look to you next, Mr. Rhodes.  
19 Do you have anything to represent to the Court in this regard?

20 MR. RHODES: Good afternoon, your Honor. We did not  
21 submit any briefing, and do not take a position on either the  
22 motion or response.

23 THE COURT: Very good. Mr. Berner.

24 MR. BERNER: Thank you, your Honor. To be frank, I'm --  
25 I'm more than a little confused as to what the defendants Peterson

1 Northwest are seeking today. My understanding in the original  
2 motion for summary judgment was that they were seeking to dismiss  
3 the causes of action which are pled in plaintiffs' complaint on  
4 page -- I'm sorry -- page 9 of that complaint for personal injury,  
5 property damage, and loss of use against subcontractors, which  
6 specifically names Peterson Northwest -- excuse me -- and other  
7 subcontractors that did work on the plaintiffs' home. At no point  
8 was there any argument at that hearing, or in the briefing,  
9 regarding the Consumer Protection Act claim against Peterson  
10 Northwest, or a waste claim. So I don't think that -- one, that it  
11 was originally pled against them, or two, that there was any  
12 briefing before the Court on it. And so I'm not sure really why  
13 we're here on those issues, which is why I pointed that out in our  
14 briefing to this -- in our response to the motion for  
15 reconsideration.

16 If those are the only causes of action that defendant Peterson  
17 Northwest is seeking to have dismissed against them, I would  
18 consent to that because they've never actually been pled against  
19 them.

20 So what I think -- I'm -- I'm more than a little confused as to  
21 what's happening here. My understanding of the Court's ruling was  
22 that you made a ruling regarding Peterson Northwest's motion for  
23 summary judgment on proximate cause related to these causes of  
24 action that were pled in plaintiffs' complaint and had nothing to  
25

1 do with Consumer Protection Act violations, or Waste Statute  
2 violations. Be happy to answer any questions if the Court has any.

3 THE COURT: Mr. Berner, if you could frame for the Court  
4 the theory of liability against Peterson Northwest, based upon the  
5 remaining issues. How would you best characterize the remaining  
6 theory of recovery against Peterson Northwest?

7 MR. BERNER: I think it's -- in summary of our -- of our  
8 briefing on the motions for summary judgment, I would say that it's  
9 property damage due to the work that Peterson Northwest did on the  
10 plaintiffs' home as a subcontractor for the Home Depot. And I  
11 think that the Court's oral ruling is -- provides some information  
12 where -- wherein your Honor provided in your oral ruling that  
13 quote, there is some evidence that the actions of defendant --  
14 defendant Peterson Northwest exposed the roof and home to moisture  
15 shortly after the work was performed. And -- and now a gap in  
16 space.

17 And in considering this evidence and inferences therefrom in  
18 the light most favorable to plaintiffs, defendant Peterson  
19 Northwest's motion to dismiss plaintiffs' claim against Peterson  
20 Northwest is denied, except as otherwise set forth above with  
21 relation to defendant THD. And maybe that's where the confusion is  
22 coming from, because we had separate causes of actions pled --  
23 causes of action pled against separate defendants.

24 But I -- I -- even if this Court were to consider -- reconsider  
25 defendant Peterson Northwest's motion for summary judgment, it'd

1 have to be on the proximate cause issue as to what caused any  
2 damage to the plaintiffs' home. And the defendant's have failed to  
3 meet their burden under CR 59 for -- for this hearing. I think it  
4 should be denied.

5 But with respect to the waste claim and CPA claim, I don't  
6 think that's ever even been before the Court.

7 THE COURT: Okay, thank you. And Mr. Fallon.

8 MR. FALLON: Thank you, your Honor.

9 THE COURT: In looking at the statement of the issues in  
10 the original summary judgment, the first one was the request to  
11 dismiss plaintiff's property damage against Peterson Northwest.  
12 It's untimely under RCW 4.16.130. The Court ruled on that issue  
13 and indicated that there was a tolling.

14 The second issue was should the Court dismiss plaintiff's  
15 negligence claim for lack of proximate cause. So you've heard  
16 Mr. Berner articulate what he believes is the remaining issue  
17 against Peterson Northwest. Is it your argument today that with  
18 the elimination of the other causes of action, there is no ability  
19 for them to pursue a property damage with regard to the work  
20 performed by Peterson Northwest?

21 MR. FALLON: Yes, your Honor.

22 THE COURT: Okay, and the basis for that?

23 MR. FALLON: Well, you have -- before you get to the issue  
24 of proximate cause, you have to have a legal cause of action.

25 THE COURT: Uh huh.

1 MR. FALLON: And we had no contract with them, and you've  
2 dismissed all claims for negligence. So there's no cause of action  
3 against Peterson Northwest based on your rulings.

4 I think that's -- it's almost axiomatic. But if we get past  
5 that, I do have quite a bit to ask you to reconsider with regard to  
6 proximate cause. But first you have to have a legal cause of  
7 action. And the way this has unfolded, there isn't one.

8 THE COURT: So Mr. Berner -- sorry I'm going back and  
9 forth.

10 MR. FALLON: No, that's fine.

11 THE COURT: But I think I need to make sure I get to the  
12 bottom of this so I understand exactly what's being asked of me  
13 today. Mr. Berner, what I'm hearing from Mr. Fallon is that when  
14 you eliminate the negligence claim, the claims based upon waste,  
15 the claims based upon the Consumer Protection Act, there is no  
16 negligence claim remaining, which just leaves a contractual claim.  
17 Is there a contractual claim still remaining? Okay, so first of  
18 all, do you agree with that? And if you disagree with that, why?  
19 And then secondly if there is a contractual claim left, what's the  
20 basis of that?

21 MR. BERNER: Excuse me, your Honor. If I could just have  
22 one moment to --

23 THE COURT: Sure.

24 MR. BERNER: -- review the defendants earlier briefing?  
25 Your Honor, I -- so I -- I think in answer to your first question

1 with regard to the negligence claim, I believe that that's correct,  
2 that -- that it has been dismissed.

3 So the only other cause of action would be relating to the  
4 property damage and loss of use claims, which the defendants argued  
5 in their original motion for summary judgment were untimely. And  
6 in this Court's ruling, the Court tolled that -- tolled the  
7 discovery rule, based upon the plaintiffs discovery of the water  
8 and mold in their home, which occurred in December of 2011. And I  
9 don't believe there's anything in -- in that ruling that was  
10 incorrect. And that defendant Peterson Northwest -- or the  
11 plaintiffs claims against defendant Peterson Northwest should not  
12 have been dismissed at that summary judgment hearing because there  
13 is at -- at least some evidence, which tends to show that the acts  
14 of defendant Peterson Northwest caused property damage to the  
15 plaintiffs home.

16 THE COURT: Does that --

17 MR. BERNER: And then personal injuries -- which resulted  
18 in personal injuries.

19 THE COURT: Does that sound in contract, or does that  
20 sound in tort?

21 MR. BERNER: Tort, your Honor.

22 THE COURT: And if the Court has dismissed the negligence  
23 claim, the waste claim, and the Consumer Protection Act claim,  
24 where is the remaining tort action?

25

1 MR. BERNER: The tort action is for property damage, and  
2 loss of use, and personal injury, which is pled in --

3 THE COURT: I understand you're asking for the recovery  
4 for damages to property, but if that sounds in tort, does that not  
5 sound in negligence?

6 MR. BERNER: I -- I'm -- if I could have just one moment,  
7 your Honor? I need to re-look at these orders.

8 MR. FALLON: Your Honor, while counsel is looking, I have  
9 in my hands a copy of the plaintiffs' complaint. And section 9,  
10 which pertains to Peterson, if you'd like to --

11 THE COURT: I'm looking at it right now, counsel.

12 MR. FALLON: Okay.

13 MR. BERNER: Your Honor, I don't believe that -- I'm just  
14 trying to find the order.

15 THE COURT: I'm just making sure that there's -- it's been  
16 awhile since I ruled on this. And frankly when I reviewed the  
17 motion for reconsideration, I was looking to the remaining cause of  
18 action against Peterson. And I recognize that you did not plead  
19 waste, you did not plead Consumer Protection Act against Peterson.  
20 But when I look at 9.1, it sounds in tort -- it says negligently  
21 perform work. 9.2, it also seems to sound in tort in that  
22 defendants Peterson, Sloan and Rios were negligent and caused  
23 personal injuries, property damage and loss of use. And I just  
24 want to make sure that I'm not missing something here. And I'm  
25 giving you the benefit of --

1 MR. BERNER: Yes.

2 THE COURT: -- telling me which cause of action. It's not  
3 sounding in tort that the property damage in loss of use is lying  
4 upon.

5 MR. BERNER: Your Honor, my understanding, after having  
6 taken a look at all this, is that the Court dismissed the  
7 negligence causes of action against -- or the negligence cause of  
8 action against defendant The Home Depot, THD. And then in the  
9 Court's oral ruling, the only issue before the Court was causation  
10 between the injuries and the damage they have suffered as a result  
11 of Peterson Northwest actions. So -- and that the Court found that  
12 there was at least some evidence to show that defendant Peterson  
13 Northwest -- its actions caused injuries to the plaintiffs and  
14 property damage to their home.

15 THE COURT: Okay.

16 MR. BERNER: And that those causes of action were what  
17 were before the Court for dismissal, and that the Court denied that  
18 motion. And I think that's where the confusion for me at least  
19 comes in as to this Consumer Protection --

20 THE COURT: Okay. I think I've heard enough from counsel.  
21 And in reviewing the motion for summary judgment that Peterson  
22 Northwest brought, it joined the THD request for partial summary  
23 judgment. In addition, it asked that plaintiffs' claim against  
24 Peterson Northwest be dismissed as untimely and lack of proximate  
25 cause.

1           What occurred during the ruling was a focus, as counsel  
2 correctly characterized, the focus was really on THD. When the  
3 Court dismissed out the negligence claims against THD -- and  
4 recognizing, of course, that some of the actions still continued  
5 against THD, but the negligence claim itself did. The Court then  
6 focused on the two issues that were framed in the motion. And that  
7 was the statute of limitations under 4.16.130, and then the second  
8 issue, lack of proximate cause. And by focusing on the proximate  
9 cause, the Court did not go back and take a look at the fact that  
10 the underlying negligence claim was dismissed out. And that is how  
11 the claim against Peterson Northwest is characterized under  
12 paragraph 9 of the complaint.

13           And so based upon that, while there may be some proximate cause  
14 between the actions of Peterson Northwest and ultimately the  
15 injuries and damages suffered by the plaintiffs, given that the  
16 underlying cause of negligence was dismissed itself and they joined  
17 in the action with the defendant THD, the Court has reconsidered  
18 its position with regard to Peterson Northwest and will grant the  
19 motion for summary judgment as it relates to negligence.

20           MR. FALLON: Thank you, your Honor. I have an order here  
21 somewhere.

22           MR. RHODES: Thank you, your Honor. This is Mike Rhodes.  
23 Do you need me for anything else?

24           THE COURT: No, counsel. We're just handing around  
25 paperwork. And I have not seen the order itself. If you want, the

1 Court would be glad to read what the order says to you prior to  
2 signing. Or you can waive that and you can hang up.

3 MR. RHODES: I can waive it. I -- I think I'll --

4 MR. FALLON: I'll send you a copy, Michael.

5 MR. RHODES: I think I know --

6 THE COURT: Okay, you'll get a copy apparently from  
7 counsel, okay?

8 MR. RHODES: Excellent, thank you.

9 THE COURT: Thank you.

10 MR. BERNER: Your Honor, the only issue that I see, and  
11 this came up before, was the order indicates that there's a  
12 reply -- defendant Peterson Northwest has filed a reply to its  
13 motion for reconsideration. I never received that. I don't know  
14 if there's one in the court file.

15 THE COURT: I did not receive a brief.

16 MR. FALLON: Yeah, just strike that out.

17 MR. BERNER: Strike that.

18 THE COURT: Well, I didn't see a reply.

19 MR. FALLON: I couldn't find it, so --

20 MR. BERNER: I wasn't privy to it.

21 THE COURT: Yeah, there's not one filed. Give this to  
22 her, and then you have it.

23 MR. FALLON: Okay.

24 THE COURT: And anything else in this matter?

25 MR. BERNER: No, your Honor.

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MR. FALLON: No, your Honor.

THE COURT: That completes the hearing. We can go off the record.

Matter adjourned.

\* \* \* \* \*



# FALLON AND MCKINLEY

**January 13, 2016 - 4:53 PM**

## Transmittal Letter

Document Uploaded: 3-476851-Respondent's Brief.pdf

Case Name: Nichols v. Peterfson NW, Inc.

Court of Appeals Case Number: 47685-1

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers  Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion:

Answer/Reply to Motion:

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes:

Hearing Date(s):

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other:

### Comments:

No Comments were entered.

Sender Name: Sandra Cartwright - Email: [sandy@fmwlegal.com](mailto:sandy@fmwlegal.com)