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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON  
NO. 344355-III

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

Appellants/Cross-Respondents

vs.

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

Respondents/Cross-Appellants

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BRIEF OF APPELLANTS/CROSS-RESPONDENTS

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## **A. ASSIGNMENTS OF ERROR**

### *Assignments of Error*

1. The court erred by dismissing the lawsuit's Consumer Protection Act claims against ProBuild.
2. The court erred by dismissing the lawsuit's Consumer Protection Act claims against MiTek.
3. The court erred by dismissing the lawsuit's breach of warranty claims against ProBuild.
4. The court erred by dismissing the lawsuit's breach of warranty claims against MiTek.
5. The court erred by refusing to reconsider the dismissal of those claims which were dismissed by its order of April 15, 2016.
6. The court erred by not ruling in its October 23, 2015 order, that ProBuild breached express warranties.
7. The court erred by ruling in its October 23, 2015 order, that MiTek did not breach implied warranties.

### *Issues Pertaining to Assignments of Error*

1. Did the court err by failing to recognize the lawsuit's Consumer Protection Act (CPA) claims were brought within four years of the date at which each claim was first "discovered" and therefore "accrued?" (RCW 19.86.120). (Error Assignments 1 and 2).

2. Did the court incorrectly decide on summary judgment, material fact disputes about when Schilling and Artisan “knew or should have known,” that each CPA claim existed for Statute of Limitations purposes? (Error Assignments 1, 2, 3, 4 and 5).

3. Did the court err by deciding on summary judgment, material fact disputes about whether ProBuild’s and MiTek’s conduct tolled or equitably prevented the Statute of Limitations from barring the lawsuit’s claims? (Error Assignments 1, 2, 3, 4 and 5).

4. Did ProBuild breach express warranties made to Schilling and Artisan? (Error Assignment 6).

5. Did MiTek breach implied warranties made to Schilling and Artisan? (Error Assignment 7).

## **B. STATEMENT OF THE CASE**

In 2006, Terry and Julie Schilling (together Schilling) contracted with Artisan, Inc. (Artisan) to build a custom home in the City of Union Gap (CUG), Washington. (CP 128; 502; 1319-1323). To build the home, custom trusses had to be designed and the designs had to be stamped by a professional engineer, to be accepted by the CUG and for the trusses to be legally used. (CP 453-454; 502-503; 914; 981; 2141-2142). Under the Artisan contract, Schilling was to directly purchase the trusses from the manufacturer. (CP 502). Artisan recommended that respondent ProBuild

Company, LLC, d/b/a Lumbermens (ProBuild), manufacture the trusses. (CP 503; 914). Schilling ultimately contracted with ProBuild to buy the trusses, together with the necessary engineer-stamped truss plans. (CP 516; 915).

The truss plans sold to Schilling by ProBuild are on a MiTek letterhead document, stamped by a MiTek engineer. In the upper right corner of each plan page, there is the project designation “Artisan/Schilling/070315.” (CP 316-385).

To design the custom trusses, Artisan gave ProBuild a copy of the building plans. (CP 914). ProBuild’s designated project salesman, Mr. George Brooks (Brooks), used this plan information, his knowledge of local building codes, his prior knowledge of the tile that Artisan customarily uses, his prior knowledge of the construction standards that Artisan adheres to, and the site inspection knowledge he gathered to develop the custom truss plans. (CP 472-473; 503; 1558-1559).

To design trusses, ProBuild uses a truss design software product owned by respondent MiTek Industries, Inc. (MiTek). (CP 443; 3513-3516). MiTek’s principal business is the manufacture of truss construction components. (CP 442). To help sell those products, MiTek licenses its software to truss manufacturers on the condition that to use this software, only MiTek’s truss components be used. (CP 982; 3513-3516).

Each custom truss plan created is unique for a particular home. (CP 388; 980). MiTek knows this. (CP 447; 979-984). Because MiTek also knows most jurisdictions require engineer stamped truss plans, as another marketing tool, MiTek employs licensed engineers to stamp those truss plans, which a manufacturer (here ProBuild) sells to a customer as part of a truss order. (CP 455; 821; 982; 1562).

MiTek engineer Palmer Tingey (Tingey) stamped the Schilling truss plans. (CP 316). Tingey has license authority in 14 western states (including Washington) to stamp plans as an engineer. (CP 455). The fee MiTek charges ProBuild to stamp its plans is “negotiated” based upon the volume of truss products ProBuild buys from MiTek. (CP 454-455).

Both Brooks and another former ProBuild salesman, Zoel Morin, confirmed that ProBuild, not MiTek, designs the custom trusses.<sup>1</sup> (CP 390-391; 473; 979-983). In fact, Brooks testified that normally ProBuild starts truss production prior to MiTek having any involvement in the process at all. (CP 393; 475-476; 1561-1562).

For project trusses to comply with specific building plans and location-specific building codes, accurate data has to be entered into MiTek’s software program. (CP 197; 693). MiTek knows that most truss plant employees who use its software are not licensed engineers. (CP 824-

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<sup>1</sup> Factually, MiTek cannot be the truss designer, because it is almost never given a copy of project building plans. (CP 204; 395-396; 482-483).

828). MiTek nevertheless makes no effort to determine whether the person using its software has effective training. (CP 205-206; 408; 481-482). MiTek knows that residential building plans used for design purposes, are also often not prepared by a licensed engineer or architect and instead are usually prepared by an unlicensed “draftsman.” (CP 449-450; 482; 706-707). When MiTek is sent truss plans by its customers, it nevertheless does not verify that proper building codes or truss loadings have been used. (CP 457; 697).

Instead, as long as the truss loadings are at least numerically within those which might be legal for a home built to the lowest code standards allowed by the International Residential Code (IRC), MiTek assumes the truss plans and specifications sent are contract and code compliant, and a MiTek engineer will stamp them. (CP 396-397; 405-407; 457-458; 486-487; 700-702). Tingey testified that for MiTek, he personally reviews and stamps about 6,000 to 7,000 design drawings per week.<sup>2</sup> (CP 112-113).

The CUG building official responsible for the Schilling home was Mr. William Rathbone (Rathbone). (CP 2141). Lacking access to MiTek’s software, Rathbone had no ability to double check the Schilling truss plans stamped by Tingey and sold by ProBuild, for code or contract

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<sup>2</sup> Mathematically, if Tingey never talked on the telephone, never went to meetings, and worked a full 40 hours per week, the average review time he could give per truss plan design, would be about two and one-half minutes.

sufficiency. (CP 695; 705). Instead, Rathbone relied (as did Schilling and Artisan) on the engineering stamp as representing that the engineer had discharged the professional responsibility to make sure the truss designs met applicable local codes and were correct for the building being constructed. (CP 708-709; 2142).

The Schilling building plans called for a tile roof. (CP 473; 915; 1558-1561). The industry standard top chord dead load (TCDL) for a tile roof is 15 lbs. (CP 473; 1558-1561), although different weight tile can change this number. The CUG by ordinance, also specifies a minimum 30 lb. unbalanced snow load truss requirement. (CP 2983-2985).

Although Brooks testified he designed the Schilling trusses to meet contract correct 15 lb. TCDL and 30 lb. unbalanced snow load specifications (CP 1559; 2983-2985), he confirmed that often his supervisor would change his specifications to be a “plant default” 12 lb. TCDL and 30 lb. “live load” (LL). (CP 191-193; 464; 469-470; 2982-2986). ProBuild never told Brooks, Artisan, Schilling or Rathbone before lawsuit delivery, that Brooks’ specifications had been changed to the plant default specifications. (CP 1561). The trusses and plans sold by ProBuild and stamped by MiTek, however, were built to a different 12 lb. TCDL and 30 lb. LL standard. (CP 316-385; 2983-2985).

RCW 18.43.070 specifies what an engineer stamp legally represents. It states:

Such signature and stamping shall constitute a certification by the registrant that the same was prepared by or under his or her direct supervision and that to his or her knowledge and belief, the same was prepared in accordance with the requirements of the statute.

[Emphasis added.]

What constitutes the necessary “direct supervision” is defined by former Washington Administrative Code (WAC) 196-23-030. WAC 196-23-030 states:

Direct supervision is a combination of activities by which a licensee maintains control over those decisions that are the basis for the finding, conclusions, analysis, rationale, details and judgments that are embodied in the development and preparation of engineering or land surveying plans, specifications, plats, reports and related activities.

. . .

Direct supervision requires providing personal direction, oversight, inspection, observation and supervision of the work being certified.

[Emphasis added.]

In the fall of 2006, WAC 196-23-030 was recodified as new WAC 196-25-070 and the following explanatory language was added:

... Drawing or other document review after preparation without involvement in the design and development process as described above cannot be accepted as direct supervision.

[Emphasis added.]

Post-sale, in 2007, on the first page of the Schilling truss plan package, MiTek (and ProBuild as the plan package seller) made the following fact/warranty representations:

The truss drawing(s) referenced below have been prepared by MiTek Industries, Inc. under my direct supervision based on the parameters provided by Lumbermen's Building Ctr. – 715.

. . .

The seal on these drawings indicate acceptance of professional engineering responsibilities solely for the truss components shown. The suitability and use of this component for any particular building is the responsibility of the building designer per ANSI/TPI-2002 Chapter 2. (CP 316). [Emphasis added.]

Rathbone understood this language to mean the MiTek engineer had complied with all statutory stamping obligations and had assumed responsibility for the trusses being code and contract correct, but that whether the trusses would fit onto the building walls below the trusses, would be someone else's responsibility. (CP 497-498).

About one year after the trusses were installed, some minor sheetrock cracking appeared in Schilling's two garage ceilings and was fixed. In early-2011, this troubling sheetrock cracking reappeared in the Schilling's two garage ceilings. (CP 140; 504). ProBuild was accordingly asked to send a representative out to try and determine the cause.

(CP 140; 504-505). Internally, ProBuild questioned whether the truss designs were adequate and might have been influenced by ProBuild's interest in "cost-savings." (CP 521).

Shortly after this inspection, ProBuild told Schilling that it would have a MiTek engineer also investigate the facts. (CP 523). To further look into the problem, Artisan hired a local engineer, Mr. Tim Bardell (Bardell). Bardell's report issued in April 2011 and suggested the truss loadings might not be adequate. (CP 76-80). Bardell's report was provided to ProBuild and MiTek in April 2011. Partially in response, a home meeting was scheduled and occurred towards the end of May 2011. (CP 505). MiTek sent an engineer representative, Mr. Ray Yu (Yu) to that meeting. (CP 505).

During the meeting, ProBuild's representatives and engineer Yu were all adamant the home problems were not the result of insufficient truss design or manufacture. (CP 505; 2923; 3098-3099). An internal email circulated by Yu immediately after the meeting, however, shows that ProBuild and MiTek were trying to conceal or mislead Schilling, Artisan, and Bardell into thinking that the truss system was not the problem. (CP 504-505; 2923). The email states in part:

1. We have convinced the homeowner, the contractor and the EOR the "cracks" in the ceiling is structural system issue instead of truss design issue.

2. We have avoided the possibility that legal process may occur.  
[Emphasis added.] (CP 525).

In February 2012, Schilling and Artisan concluded they were being misled (CP 2920-2925) and filed suit. (CP 3-11; 2920-2925). This original lawsuit alleged a CPA claim against ProBuild only, not MiTek.<sup>3</sup> (CP 3-10).

After lawsuit filing, multiple ProBuild and MiTek witnesses were deposed. This testimony disclosed that MiTek was surprisingly engaged in illegal “plan stamping” and that ProBuild knew what MiTek was doing. (CP 979-984; 1468; 1470; 1473; 1558-1563).

After discovering this new illegal conduct, on May 9, 2014, Schilling and Artisan moved to amend the original complaint to assert new CPA claims against ProBuild and MiTek both. (CP 155-156; 217-229; 2924). On May 20, 2014, the motion to amend was granted. (CP 424). A first amended complaint was then filed on May 21, 2014. (CP 425-435).

On July 23, 2014, Schilling and Artisan moved for partial summary judgment, asking the court to find ProBuild and MiTek liable on the amended complaint’s CPA claims. (CP 985-1024). By its October 14,

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<sup>3</sup> The CPA claim originally alleged, did not assert that ProBuild was engaged in the deceptive practice of having MiTek supply illegally stamped truss plans, as those facts were not known to Schilling and Artisan at the time the lawsuit was filed, and were only first learned during discovery. (CP 155-156; 2924).

2014 Memorandum Decision, the court found ProBuild and MiTek liable for CPA violations and in particular, found MiTek had violated the CPA “per se,” by doing “absolutely nothing to supervise, check or validate the [truss plan] parameters as determined by ProBuild” as required by WAC 196-23-030. (CP 1881).

The court held the post-sale language placed on the truss plan package by MiTek, could not change or “disclaim” what Washington law required before an engineer’s stamp could be affixed. (CP 1882; 1895-1900).

Thereafter, in May 2015, a second partial summary judgment motion was filed, asking the court to find in part, that ProBuild and MiTek had also breached express and implied warranties. (CP 1911-1945; 2154-2165).

By its August 20, 2015 Memorandum Decision, the court held ProBuild’s sale of the trusses with accompanying MiTek-stamped plans, was the sale of goods and therefore the Uniform Commercial Code (UCC) applied. (CP 2602). The court found the engineer’s stamp on the truss plans “lent extrinsic value to the trusses ProBuild sold to Schilling.” (CP 2602). The post-sale language put on the truss plans (which MiTek argues allowed it to engineer-stamp the Schilling plans without providing any “direct supervision”), was held to be at most, an illegal attempt at a

disclaimer. The court held that the engineering stamp constituted “an express warranty” that “the trusses were appropriately engineered and suitable for installation on the envisioned project.” (CP 2603). The court found MiTek’s engineer stamp “express warranty” to be breached, and it held MiTek liable for that breach. (CP 2604). The court, however, held MiTek had not breached implied warranties.

ProBuild was found to have breached its implied warranty of merchantability, by selling trusses which did not conform to the particular requirements of the Schilling home. (CP 2603). The court found the record to be “unclear” as to whether ProBuild had also breached any express warranties. (CP 2603).

The court found that “[t]here are material issues of fact that remain to be determined as to whether the Statute [of Limitations] was tolled by defendants’ actions.” The court held, however, that the question of whether the Statute was tolled could be raised “by subsequent motion or at trial.” (CP 2603; 2605-2612).

Thereafter, on February 26, 2016, ProBuild moved to dismiss all lawsuit claims as being barred by the Statute of Limitations (SOL). (CP 2771; 2779). On February 26, 2016, MiTek joined in this motion. (CP 2613-2626). By its April 4, 2016 Memorandum Decision (CP 3185-3190), the court held the lawsuit’s warranty and CPA claims were barred,

and by order dated April 15, 2016, the lawsuit was dismissed. (CP 3191-3199). On April 25, 2016, Schilling and Artisan moved the court to reconsider its lawsuit dismissal. (CP 3207-3262). On May 2, 2016, the court denied the motion for reconsideration. (CP 3477). This appeal was then filed on May 6, 2016. (CP 3478).

### C. ARGUMENT

#### I. Argument Summary

This appeal, together with ProBuild and MiTek’s cross-appeal, present an important first impression, public interest issue. All rulings now challenged on appeal are connected to, and in most cases controlled by, this first impression issue. The issue (which ProBuild and MiTek want to obfuscate or ignore) is whether “plan stamping” is a deceptive, illegal, and warranty breaching practice, which violates Washington engineering statutes and WACs.

The term “plan stamping” describes the practice of a licensed engineer affixing his stamp to a set of plans, which he has neither created nor “directly supervised” for accuracy. (CP 270-271).

It is undisputed that RCW 18.47.070 says an engineer stamp constitutes a “certification” that the document being stamped was “prepared by or under [an engineer’s] direct supervision.” WAC 196-23-030 (now recodified as WAC 196-23-070) also says “direct supervision”

requires the engineer to provide “personal direction, oversight... and supervision of the work being certified” and that “... review after preparation without involvement in the design and development process... cannot be accepted as direct supervision.”

Accordingly, Washington’s engineering statutes and WACs do make “plan stamping” illegal in Washington state.

Turning to proven record facts, discovery disclosed the Schilling truss plan was created by Brooks (CP 394, 472-473; 503; 1558-1559) who was not a licensed engineer, using MiTek’s truss design software.<sup>4</sup> (CP 394, 1038). Brooks - not MiTek - designed the trusses, because, as between the two, only Brooks had the building plans (CP 688), only Brooks knew in what state and municipality the home was being constructed, and only Brooks knew the local codes and contract requirements, which the truss plans had to meet. (CP 395-397; 692).

As noted, once truss plans are created, normally neither the plans nor the trusses can be used unless a licensed engineer stamps the plans. (CP 453-454; 502-503; 914; 981; 2142). To encourage the purchase of its truss construction components, MiTek employs engineers who are

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<sup>4</sup> MiTek’s own advertising admits that truss company employees, rather than its engineers, design the trusses. “Our engineering department is available to review and seal our customer’s designs.” (CP 821). MiTek’s software training manual similarly states, “As a designer, every moment of your time is valuable.” (CP 824). Tingey testified he has never used MiTek software to actually develop a truss plan package. (CP 689).

licensed in all 50 states to stamp the truss plans created by unlicensed third-party truss company designers. (CP 821).

Before stamping the plans, MiTek engineers perform no acts of “direct supervision” whatsoever. (CP 1881). Indeed, MiTek admitted it does not determine whether the truss company individual using its software has had effective training. (CP 482). It is instead entirely possible for an individual with no formal education, to simply sit through MiTek’s online computer training program to try and become trained. (CP 482). Since MiTek almost never sees the building plans for a particular project (CP 204; 395-396; 482-483), MiTek does not know what truss design information a draftsman has used for design work, and MiTek does not double check any information which a designer supplies, for accuracy. (CP 457; 697). MiTek also does not know, and relies upon the truss designer to accurately identify and use, any required local building code specifications. (CP 484-487).

In spite of the fact that MiTek did not design the trusses, did not see the building plans, did not know what codes actually applied, did not know the qualifications or training of the truss designer, and made no effort to double check any of these crucial pieces of information, on June 1, 2007, Tingey for MiTek, affixed his engineering stamp to the Schilling truss plans. (CP 316).

ProBuild knows MiTek engineers “plan stamp” the truss plans ProBuild’s unlicensed employees create. (CP 979-984; 1468; 1470; 1473; 1558-1563). Nevertheless, to sell trusses, ProBuild warrants that customers will receive a set of “lawfully stamped” truss plans. (CP 1562; 2928). ProBuild then delivers to customers (as it did to Schilling and Artisan), a truss plan package that falsely states the stamping MiTek engineer supposedly designed the trusses after performing the “direct supervision” required by law.<sup>5</sup> (CP 316).

Likewise, MiTek puts on the illegally plan-stamped document, the false statement that purportedly its engineers have “directly supervised” the designs (CP 316). It then states the following: “The stamp indicates acceptance of engineering responsibility solely for the truss components shown.” (CP 316).

Reasonably read, Rathbone understood this language to mean that MiTek had designed the truss plans and that Tingey, as engineer, had discharged his statutory obligations to determine that the trusses were code and contract correct for the Schilling home. (CP 708-709; 2142).

Post-lawsuit, ProBuild and MiTek now assert the second paragraph placed on plan page 1 is intended to “disclaim” MiTek’s responsibility to

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<sup>5</sup> Because MiTek knows that “plan stamping” is illegal, before the Schilling job, it sent a letter to its truss company clients, telling them to in essence, conceal the true facts about who actually designs the trusses. (CP 270-271).

exercise “direct supervision” over the truss plans, before affixing an engineer’s stamp.

Schilling and Artisan contend instead that 1) the language used cannot be read as being a disclaimer; 2) post-sale disclaimers are legally invalid in Washington State (*Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 28 Wn.App. 539, 625 P.2d 171 (1981)); and 3) express warranty and statutory obligations cannot be disclaimed. *Travis v. Washington Horse Breeders Ass’n, Inc.*, 111 Wn.2d 396, 405, 759 P.2d 418 (1988); *Schlener v. Allstate Ins. Co.*, 121 Wn.App. 384, 88 P.3d 993 (2004); *Allstate Ins. Co. v. Welch*, 45 Wn.App. 740, 727 P.2d 268 (1986); *Employco Personnel Services, Inc. v. City of Seattle*, 117 Wn.2d 606, 817 P.2d 1373 (1991); *Potter v. Wilbur-Ellis Co.*, 62 Wn.App. 318, 814 P.2d 670 (1991).

Surprisingly, after ruling that MiTek and ProBuild had illegally “plan stamped” the Schilling plans (CP 1881), when ProBuild and MiTek filed dismissal motions, the lower court held MiTek’s 2007 truss plans disclosed all of MiTek’s illegal CPA and warranty breach conduct and that ProBuild and MiTek’s many concealment acts had not tolled the UCC’s SOL. (CP 3186-3187).

As will be shown, the court erred in its analysis and this error must be reversed.

2. **Appellate Review Standards and Procedures**

On appeal, the review standard for summary judgment orders is de novo and the court accepts as true, all facts and inferences most favorable to the non-moving party. *Transalta Centralia Generation LLC v. Sicklesteel*, 134 Wn.App. 819, 825, 142 P.3d 209 (2006); *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005); *Douglas v. Jepson*, 88 Wn.App. 342, 945 P.2d 244 (1997).

3. **The Trial Court Erred by Dismissing the Amended Complaint's CPA Claims**

CPA liability can arise from different types of deceptive acts. For example, a CPA claim can be predicated upon a “per se” violation of a statute. *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013). Alternatively, liability can be based on unregulated conduct which is still found to violate the public interest. *Klem* at 787; *Panog v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 48, 204 P.3d 885 (2009). Since different types of acts can each establish CPA liability, a separate SOL’s analysis must be applied when multiple deceptive acts are alleged, to properly determine whether CPA liability is time barred.

Under RCW 19.86.120, the SOL for each CPA violation is four years “after the cause of action accrues.” A CPA claim “accrues” when “the claimant discovered or in the exercise of due diligence, should have

discovered” the particular deceptive act on which the claim is based. *Mayer v. STO Industries, Inc.*, 123 Wn.App. 443, 98 P.3d 116 (2004).

Applying a proper SOL analysis, in the initial complaint, a CPA claim was asserted against ProBuild only, because in early-2012, Schilling and Artisan learned the truss loadings used were wrong for the type of tile roof Artisan was to install. (CP 3062-3063). Schilling and Artisan therefore believed ProBuild had acted “deceptively” to sell trusses which could not accommodate the Schilling home’s particular tile roof and had later concealed these facts to try and avoid being sued. (CP 2920-2925).

After lawsuit filing, however, during discovery, it was learned that several additional deceptive acts had occurred, which independently violated the CPA and which separately supported CPA claims against ProBuild and MiTek, regardless of the truss loadings used. (CP 217-229)

Indeed, crucial to a correct SOL analysis is that the loadings chosen by ProBuild could be proven at trial to be correct, yet ProBuild and MiTek would both still be liable for violating the CPA, because the plans sold to Schilling are not lawfully stamped.

This liability is confirmed by Rathbone, who testified that illegally stamped plans are not code compliant. (CP 2142). Accordingly, the Schilling home currently violates CUG codes, causing Schilling damage,

whether or not the truss loadings used would allow for “some” tile roofs.<sup>6</sup> (CP 2142).

One newly discovered “per se” deceptive act was MiTek’s violating Washington statutes and WACs by affixing an engineer’s stamp to the Schilling plans, without “directly supervising” the plans being stamped. (CP 396-397; 403-407; 457-458; 486-487; 636-637; 639-640; 1881). In addition, MiTek acted “deceptively” to falsely represent as fact on the Schilling plans, that they were supposedly prepared by MiTek under Tingey’s “direct supervision,” (CP 316) when actually, Brooks for ProBuild, designed and created the plans without Tingey’s involvement. (CP 472-473; 503; 1558-1559).

One post-lawsuit-discovered ProBuild deceptive act, was its selling the engineer-stamped plans to Schilling despite knowing the plans were illegally stamped, in violation of Washington statutes and WACs. (CP 636-637; 639-640; 979-984; 1037-1038; 1558-1563).

As an additional deceptive act, Schilling and Artisan also learned, after deposing Brooks, that ProBuild had changed Brooks’ correct truss loadings and had replaced them with plant “default” loadings, which were not contract correct. (CP 1558-1563). Since none of these deceptive acts

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<sup>6</sup> Similar illegal plan stamping recently happened in California, causing thousands of homes to violate code, with the result that the market value of these homes was adversely affected. (CP 3065-3066).

were known prior to lawsuit discovery, a motion to amend was made and granted to assert these new CPA claims. (CP 424).

It follows that Schilling and Artisan filed all lawsuit CPA claims well within four years of them being “first discovered,” making the later CPA claims’ dismissal a reversible error.

Wanting to push the “discovery” date for the lawsuit’s CPA claims back to a date before February 16, 2008 (which would be four years before the Schilling/Artisan complaint was filed), MiTek and ProBuild have argued that 1) the plans disclosed that incorrect loadings had been used; and 2) the 2007 “disclaimer” language placed upon the plans’ first page disclosed the illegal “plan stamping” which was occurring. Neither assertion is correct.

First, it is false that the plans disclosed incorrect loadings. Schilling, Artisan, and Rathbone had no reason to question the plan loadings when received, because they did not facially preclude tile use. Indeed ProBuild and MiTek have persistently claimed post-lawsuit that these loadings are actually contract and code correct.<sup>7</sup> (CP 1038).

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<sup>7</sup> Post-lawsuit, MiTek and ProBuild have both asserted the loadings used are contract compliant because they can accommodate “some tile.” (CP 1038). This testimony alone creates a material fact dispute about what the stamped truss plan loadings did or did not communicate to Schilling and Artisan when delivered.

Since it was not thereafter “first discovered” until Brooks was deposed on March 19, 2014 (CP 2925; 2927-2933; 2966-2996) that ProBuild had deceptively changed the plan loadings Brooks had chosen (which Schilling and Artisan now claim make them contract incorrect), this CPA claim is not time barred.

Indeed, to be analytically correct on this point, it is important not to conflate the legal difference between a warranty breach act and a “deceptive” act which accrues CPA liability. (CP 2925; 2927-2933; 2966-2996). The two claims are not synonymous. *Eastlake Const. Co., Inc. v. Hess*, 102 Wn.2d 30, 686 P.2d 465 (1984). While both may occur in the same case, the claims are legally different.

Here, while choosing incorrect loadings may have breached a warranty, it was ProBuild’s different undisclosed change of Brooks’ initial loadings that is CPA actionable deceptive conduct. Since Schilling and Artisan had no knowledge of this deceptive conduct until after the lawsuit was filed (CP 2925; 2927-2933), and since suit was brought within four years of discovering this conduct, this particular deceptive CPA claim should not have been dismissed.

Second, it is false that the 2007 “disclaimer” language placed by MiTek upon the Schilling plans’ first page, disclosed illegal plan stamping was occurring.

The initial plan sentence represents that MiTek purportedly prepared the plans, by Tingey applying “direct supervision.” This declaratory statement tells the reader there has been no “plan stamping,” because Washington statutes were followed. (CP 316).

The first sentence of the second paragraph states: “The seal on these drawings indicate acceptance of professional engineering responsibility solely for the truss components shown.” (CP 316). This tells the reader MiTek is accepting engineering responsibility for the trusses, so again, no illegal “plan stamping” is disclosed.

Contrary to these affirmative fact statements, MiTek and ProBuild now claim the final page sentence must be read to say MiTek (and through it, ProBuild) is nevertheless disclaiming statutory engineer stamp responsibilities. Not so.

To begin with, under Washington law, contract language is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning. *Western Farm Svc., Inc. v. Olsen*, 114 Wn.App. 508, 519, 59 P.3d 93 (2002); *Sons of Norway v. Boomer*, 10 Wn.App. 618, 519 P.2d 28 (1974); *Nashem v. Jacobson*, 6 Wn.App. 363, 367, 492 P.2d 1043 (1972).

If two or more meanings are reasonable, a fact question is presented. *GMAC v. Everett Chevrolet, Inc.*, 179 Wn.App. 126, 135, 317 P.3d 1074, *rev. denied*, 181 Wn.2d 1008, 335 P.3d 941 (2014); *Kries v. Wa-Spok Primary Care, LLC*, 190 Wn.App. 98, 120, 362 P.3d 974 (2015).

Here, the at-issue second sentence not only can be read differently, it was read differently by Rathbone, who understood this sentence to simply mean that whether the trusses would properly fit on top of the building walls, would be someone's responsibility, other than the MiTek engineer. (CP 3388-3389).

On appeal from summary judgment, all facts most favorable to the non-moving party are accepted as true. It follows that since this sentence can be read (and has been read by a knowledgeable witness) as not disclaiming statutory stamping responsibility, this language cannot be read as a disclaimer.

Directly on point is the recent case *Landstar Inway, Inc. v. Samrow*, 181 Wn.App. 109, 325 P.3d 327 (2014). In that case (as here), a non-moving party asked the court to reconsider a summary judgment dismissal order, because the court had mistakenly mischaracterized the language of an at-issue document. The lower court denied reconsideration and the Court of Appeals reversed, holding the erroneous reading of the

document not only justified reconsideration, but the trial court's refusal to reconsider, was itself an "abuse of discretion" mandating reversal.

Finally, summary judgment is proper if the written contract, viewed in light of the parties' objective manifestations, has only one reasonable reading. [Citation.]

. . .

Because more than one reasonable interpretation is possible here, the trial court erred when it granted the County's motion for summary judgment. Accordingly, we reverse and remand for a hearing on the merits.

*Wm. Dickson Co. v. Pierce County*, 128 Wn.App. 488, 494-495, 116 P.3d 409 (2005). [Emphasis added.]

To read the contested plan sentence as a disclaimer, would also violate Washington's contract interpretation rules.

Specifically, Washington courts are required to interpret the language of a writing in a manner which gives effect to all of a writing's provisions, over an interpretation which renders some of the language meaningless. *Newsom v. Miller*, 42 Wn.2d 727, 731, 258 P.2d 812 (1953). Washington courts similarly do not give effect to language interpretations which would render contract obligations illusory. *Taylor v. Shigaki*, 84 Wn.App. 723, 730, 930 P.2d 340 (1997).

Contract language in Washington must also be interpreted as being consistent with the requirements of existing statutes and rules of law. *Bort*

*v. Parker*, 110 Wn.App. 561, 42 P.3d 980, *rev. denied*, 147 Wn.2d 1013, 56 P.3d 565 (2002).

Finally, Washington courts have held that summary judgment requiring the interpretation of a contract provision should be denied when 1) the interpretation depends on the use of extrinsic evidence; or 2) more than one reasonable inference can be drawn from the extrinsic evidence. *Scott Galvanizing, Inc. v. NW Enviroservices, Inc.*, 120 Wn.2d 573, 582, 844 P.2d 428 (1993).

Here, the first sentence of MiTek's plan language says the plans have been prepared by MiTek, *i.e.*, in accordance with Washington's engineer stamping laws. ProBuild and MiTek now say the second sentence of the next paragraph must be read to inconsistently "disclaim" those laws have been followed. Such a reading 1) would make what is written completely inconsistent; 2) would make what is written in conflict with Washington law; and 3) would make ProBuild's contract obligation to provide legally stamped truss plans illusory. It follows that as a matter of law, the disputed sentence is not a disclaimer and does not disclose illegal plan stamping.

Once it is correctly concluded that plan stamping was not disclosed by the 2007 plans, the CPA SOL becomes moot, because the record then

shows it was not until lawsuit discovery in 2013, that the illegal plan stamping conduct was actually first disclosed. (CP 2924; 2932).

It is also Washington law that when a non-moving party “should have discovered” the elements of a cause of action so as to start the running of a SOL, is ordinarily a question of fact. *Adcox v. Children’s Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 34-35, 864 P.2d 921 (1993); *Honcoop v. State*, 111 Wn.2d 182, 194, 759 P.2d 1188 (1988).

So too, whether a plaintiff has exercised “due diligence” to discover particular facts is itself a question of fact, not resolvable by a court on summary judgment. *Mayer v. City of Seattle*, 102 Wn.App. 66, 76, 10 P.3d 408 (2000).

Here, Schilling and Artisan do dispute that they had any knowledge or any reason to know of ProBuild’s and/or MiTek’s illegal plan stamping or load changing practices, until those facts were first disclosed by post-lawsuit depositions. (CP 2924; 2932). Since this testimony must be accepted as true, lawsuit CPA claims should not have been dismissed and the lower court erred by doing so.

4. **The Trial Court Erred in Dismissing the Complaint’s Warranty Breach Claims**

Under RCW 62A.2-725 a claim for warranty breach must be brought within four years from the date goods are delivered.

RCW 62A.2-725(4) provides, however, that state law which tolls SOLs, is not altered by this UCC statute.

The doctrine of tolling has been found to specifically apply to RCW 62A.2-725. *Giraud v. Quincy Farm & Chemical*, 102 Wn.App. 443, 452, 6 P.3d 104 (2000).

When examining tolling conduct, it is important to bear in mind that the knowledge of an employee agent is deemed to be the knowledge of the employer principal. *Miller v. United Pac. Cas. Ins. Co.*, 187 Wash. 629, 60 P.2d 714 (1936); *American Fidelity & Cas. Co. v. Backstrom*, 47 Wn.2d 77, 287 P.2d 124, (1955).

To establish fraudulent concealment or misrepresentation, a plaintiff may affirmatively plead and prove the nine elements of fraud or they may simply show the defendant breached an affirmative duty to disclose a material fact. *Crisman v. Crisman*, 85 Wn.App. 15, 20-21, 931 P.2d 163 (1997).

Under current Washington law, a duty to disclose material facts does not require the existence of a “fiduciary relationship.” Instead, a disclosure duty arises regardless of a fiduciary relationship where the disputed facts at issue are peculiarly within the knowledge of one person and cannot be readily ascertained by the other.

It will thus be seen that the duty to speak does sometimes arise when the parties are dealing at arm's length. That duty arises where the facts are peculiarly within the knowledge of one person and could not be readily obtained by the other; or where, by the lack of business experience of one of the parties, the other takes advantage of the situation by remaining silent.

*Oates v. Taylor*, 31 Wn.2d 898, 904, 199 P.2d 924 (1949). [Emphasis added.] See also, *Ross v. Ticor Title Ins. Co.*, 135 Wn.App. 182, 143 P.3d 885 (2006); *Colonial Imports, Inc. v. Carlton NW, Inc.*, 121 Wn.2d 726, 732, 853 P.2d 913 (1993).

Specifically addressing the issue of “fraudulent concealment,” the court in *Ross, supra*, confirmed the RESTATEMENT (SECOND) OF CONTRACTS §551 (1991) is Washington law. Under §551(2)(b), disclosure by a party is required of “matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading.”

Pertinent to this case, once a party has a duty to disclose, an intentional or negligent omission to disclose material facts is deemed to be the equivalent of a false affirmative statement. *Van Dinter v. Orr*, 157 Wn.2d 329, 333, 138 P.3d 608 (2006).

The Washington Supreme Court in *Liebergesell v. Evans*, 93 Wn.2d 881, 613 P.2d 1170 (1980), has also held:

The law cannot allow contracting parties to deceive one another when there is a duty to act in good faith.  
*Liebergesell* at 892. [Emphasis added.]

In *Liebergesell*, the court confirmed this requirement of contractual “good faith and fair dealing” specifically applies to UCC transactions because §1-203 of the UCC (*i.e.* RCW 62A.1-203) imposes an obligation of “good faith” upon every UCC contract both in its performance or enforcement.

Applying fact to law, just as there can be more than one deceptive act or practice supporting CPA liability, there can be more than one warranty, which can support a warranty breach claim against a defendant. Therefore, properly analyzed, it must first be determined what warranties MiTek and ProBuild gave.

Under RCW 62A.2-313(a), an express warranty is defined to be:

Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain, creates an express warranty that the goods shall conform to the affirmation or promises.

[Emphasis added.]

Here, as part of the truss sale, Brooks for ProBuild, promised Schilling and Artisan 1) they would receive custom trusses which would be contract and code compliant for the Schilling’s specific home; and 2) the physical trusses would be accompanied by lawfully stamped truss plans. (CP 1558-1563).

As part of the truss sale, MiTek, by affixing its engineering stamp, expressly warranted to Schilling that MiTek performed the necessary

“direct supervision” to know that the trusses were both contract and code compliant for the project. (*See*, RCW 18.43.070).

Under Washington law, an express warranty made by another party (here MiTek) is enforceable against the seller of goods, if the facts show the seller specifically adopted the warranty. *Cochran v. McDonald*, 23 Wn.2d 348, 161 P.2d 305 (1945). Here, as part of the truss sale, ProBuild promised to provide its customer (Schilling) with lawful engineer stamped plans. ProBuild accordingly adopted MiTek’s express warranty to discharge its own direct contract obligation to Schilling.

Since multiple warranties were given, a separate SOL tolling analysis must next be applied to determine whether the SOL was later tolled as to each discrete warranty.

Turning first to the warranty the plans sold would be lawfully stamped, the record shows one later affirmative act undertaken by ProBuild and MiTek to keep their illegal acts concealed, was the false written statement placed on the truss plan package, that MiTek, through Tingey, had supposedly prepared the plans by exercising “direct supervision.” (CP 316). That false statement was clearly designed to keep Artisan and Schilling from knowing that Brooks, an unlicensed salesman, had instead created the plans (CP 1558-1563) and MiTek had simply illegally “plan stamped” them. (CP 979-984; 1468; 1470; 1473)

Before making their express warranties, both companies knew the practice of “plan stamping” was illegal. (CP 270-271). Nevertheless, both companies also knew this was the business practice being followed. (CP 979-984; 1468; 1470; 1473; 1558-1563). To conceal this illegal conduct, MiTek instructed truss manufacturers (*e.g.* ProBuild) to conceal from customers, what the actual business practices were. (CP 270-271).

When an undisclosed fact is material, because it substantially and adversely affects or would materially impair or defeat the purpose of a transaction, the law imposes a duty to disclose that fact. *Mitchell v. Straith*, 40 Wn.App. 405, 411, 698 P.2d 609 (1985).

Here, the receipt of lawfully stamped truss plans was central to the parties’ contract, as the trusses could not by ordinance be used without them. (CP 453-454; 502-503; 914; 981; 2141). Accordingly, whether the truss plans were being “plan stamped” was a material transaction fact, and under Washington law, a duty to affirmatively disclose the true facts existed. *Oates, supra*, at 904; *Colonial Imports, supra*, at 732.

Because both ProBuild and MiTek had disclosure duties, the intentional or negligent failure to disclose who actually designed the plans is the equivalent of an affirmative false statement/fraudulent concealment of the relevant facts. *Van Dinter, supra*, at 333.

Beyond acting to conceal by silence, ProBuild and MiTek went further. As noted, the plans delivered represented as fact, that MiTek, through Tingey, had supposedly designed the plans by exercising direct supervision. (CP 316). That affirmative fact representation was false and was intended to keep anyone receiving the plans from knowing that illegal plan stamping was occurring.

When ceiling cracks appeared, resulting in the May 2011 Schilling home inspection, ProBuild and MiTek agents again affirmatively misrepresented that MiTek designed the trusses. (CP 2923; 2928-2929). Schilling and Artisan did not know and had no reason to know when these false affirmative representations were made that illegal plan stamping had occurred. Since MiTek and ProBuild actively engaged in affirmative conduct designed to prevent Artisan and Schilling from knowing that illegal plan stamping (as distinct from bad loading) conduct had occurred, the existence of “fraudulent concealment” conduct has been shown, which is sufficient to toll the SOL for this particular warranty breach. *Giraud, supra*, at 452.

Furthermore, once affirmative acts of concealment are placed of record, under Washington law, whether those acts do toll a warranty SOL is, at worst, a fact question not resolvable by summary judgment. *Doe v.*

*Finch*, 133 Wn.2d 96, 942 P.2d 359 (1997); *Honcoop, supra*, at 194; *Ohlar v. Tacoma Gen. Hosp.*, 92 Wn.2d 507, 510, 598 P.2d 1358 (1979).

Applying the same separate analysis to Schilling and Artisan's truss loading warranty breach claims, as part of the sale ProBuild expressly warranted the custom trusses would be designed to meet the unique contract and code requirements for the Schilling home. (CP 1558-1563). By later affixing its engineer's stamp to the truss plans, MiTek expressly warranted (per Washington statute), the trusses were contract and code compliant for the Schilling home. RCW 18.43.070.

Contrary to its warranty, ProBuild knew it changed Brooks' contract loadings to be ProBuild's plant default loadings. (CP 1558-1563). That ProBuild would use default loadings, was a material fact which had to be disclosed, because it could operate to materially impair or defeat the purpose of the transaction. *Mitchell, supra*, at 411. Since a duty to disclose this fact existed, keeping silent about this fact constituted an affirmative false statement/fraudulent concealment act. *Van Dinter, supra*, at 333.

ProBuild and MiTek now argue, however, that despite not disclosing this information, the loading information actually set forth on the plans supposedly told Schilling and Artisan that contract warranties were breached. This is incorrect. Neither Schilling nor Artisan is an

engineer. They accordingly did not understand what the loadings used meant. (CP 2920-2925; 2927-2933).

Brooks' superior at ProBuild, Dennis Suttle (Suttle), on the other hand, does know what the loadings used mean. In his declaration, Suttle testified that the loadings used for the Schilling trusses can purportedly support a tile roof. (CP 1038 ¶¶ 16-18). Construing these record facts in a manner most favorable to Schilling and Artisan, it follows that nothing about the truss plan loadings shown in 2007, disclosed that load warranties had been breached.

Despite knowing that original contract loadings had been changed, at the May 2011 house meeting, MiTek and ProBuild representatives also affirmatively represented that the loadings actually used were both contract and code compliant. (CP 2920-2925; 2927-2933; 3098).

Two days after the meeting, however, by way of additional investigation, ProBuild and MiTek both determined that for the Schilling contract tile, a 15 lb. TCDL was the correct loading. (CP 2998).

Although this material fact was discovered before the warranty SOL ran (exclusive of tolling) and had to be disclosed to keep ProBuild and MiTek's prior meeting fact representations from being misleading (RESTATEMENT (SECOND) OF CONTRACTS §551(2)(b)), this fact was not disclosed.

ProBuild and MiTek now argue that disclosure was not required, because Bardell already believed the loadings used might be inaccurate.

Bardell, however, lacked access to MiTek's software. (CP 3098). Without that access, he could question, but could not determine, whether the loadings used were or were not correct. (CP 3098-3099).

Because Bardell lacked access to the necessary software information, which would show whether the loadings were correct, at the May 2011 meeting, MiTek and ProBuild "convinced" Schilling, Artisan, and Bardell, that Bardell's opinions were wrong and the necessary facts did not exist to establish a cause of action.

Indeed, as shown by the post-meeting email authored by engineer Yu, at the May 2011 meeting, by affirmative misstatements and by the non-disclosure of material facts, MiTek and ProBuild successfully "convinced" Artisan, Schilling, and Bardell that the truss loadings were, in fact, correct and that no legal claim therefore existed. (CP 525).

Where the existence of facts necessary to establish a cause of action is affirmatively concealed, the SOL is tolled. *Giraud, supra*; *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 10 UCC Rep.Serv.2d 740 (1990); *Schmucking v. Mayo*, 183 Minn. 37, 235 N.W. 633 (1931); *Rindles v. Cole*, 68 Ark. App. 7, 2 S.W.3d 90 (1999); *Hinkle v. Hargens*, 76 S.D. 520, 81 N.W.2d 888 (1957).

The doctrine [of fraudulent concealment] is properly invoked only if a plaintiff establishes “affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief.” *Gibson v. United States*, 781 F.2d 1334, 1345, (9<sup>th</sup> Cir. 1986), *cert. denied*, 479 U.S. 1054, 107 S.Ct. 928, 93 L.Ed.2d 979 (1987).

*Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1415 (1987).  
[Emphasis added.]

Here, after “persuading” Schilling, Artisan and Bardell that the trusses and truss loadings were fine (CP 525), consistently thereafter and up to the present, ProBuild and MiTek have continued to affirmatively assert that the loadings used are contract and code correct and are therefore purportedly not the cause of the Schilling’s observed house problems. (CP 1038; 3097-3109).

Whether this affirmative concealment conduct should and did lead Schilling and Artisan to believe that no claim against MiTek and ProBuild existed is also, at worst, a question of fact not resolvable by summary judgment. *Doe, supra*; *Duke v. Boyd*, 133 Wn.2d 80, 83, 942 P.2d 351 (1997); *Alexander v. Sanford*, 181 Wn.App. 135, 325 P.3d 341 (2014). The court’s order dismissing all lawsuit warranty claims must accordingly be reversed, so these claims can be properly tried.

5. *MiTek and ProBuild are Equitably Barred from Asserting the Statute of Limitations*

As a doctrine independent of tolling, a party can be equitably precluded from asserting the SOL as a defense when the record evidence shows there was bad faith, deception, or false assurances by a defendant. *State v. Duvall*, 86 Wn.App. 871, 874, 940 P.2d 671 (1997); *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998).

For this equitable doctrine to apply, a plaintiff need only show the defendant concealed facts or otherwise induced the plaintiff not to bring suit within the period of the applicable SOL. *Central Heat v. Daily Olympian, Inc.*, 74 Wn.2d 126, 443 P.2d 544 (1968); *see also, Del Guzzi Const. Co., Inc. v. Global Northwest Ltd., Inc.*, 105 Wn.2d 878, 719 P.2d 120 (1986).

The equitable doctrine of estoppel in pais is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations as a defense. *Bain v. Wallace*, 167 Wash. 583, 10 P.2d 226 (1932); 34 Am. Jur. Limitation of Actions §411 (1941); Annot., 130 A.L.R. 15 (1940); Annot. 24 A.L.R.2d 1413 (1952). One such situation exists where the defendant conceals facts or otherwise induces the plaintiff not to bring suit within the period of the applicable statute of limitations. *Robbins v. Wilson Creek State Bank*, 5 Wn.2d 584, 105 P.2d 1107 (1940); *Edwards v. Surety Finance Co.*, 176 Wash. 534, 30 P.2d 225 (1934); *Marshall-Wells Hardware Co. v. Title Guaranty & Sur. Co.*, 89 Wash. 404, 154 P. 801 (1916). *Central Heat* at 134. [Emphasis added.]

Here, prior to the underlying SOL period expiring, a May 2011 meeting was scheduled to exchange information about the Schillings' house problems and how they might be remedied.

ProBuild and MiTek's meeting intentions, however, were not to accurately disclose the information they knew, but to instead deny that the trusses were a problem, so as to persuade Schilling and Artisan not to file suit. (CP 525).

To estop a party from being able to use the SOL, only three elements must be shown. They are 1) an admission, statement or act inconsistent with the claim afterwards asserted; 2) action by the other party on the faith of such admission, statement, or act; and 3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act. *Kessinger v. Anderson*, 31 Wn.2d 157, 196 P.2d 289 (1948).

This estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.

*Kessinger* at 169-170. [Emphasis added.]

All three elements exist here. Specifically, at the May 2011 meeting, MiTek and ProBuild both adamantly claimed the truss loadings

were accurate. (CP 2922-2925; 2929-2933; 3098). As a consequence of those fact representations and lacking the software access to refute them, Schilling and Artisan were persuaded not to file suit. (CP 2922-2925; 2929-2933). Now, post-lawsuit, MiTek and ProBuild inconsistently claim Schilling and Artisan supposedly knew the truss loadings were incorrect, because of the incomplete and contested Bardell information they had available. The post-meeting email authored by Yu, however, confirms that MiTek and ProBuild were successful in getting Schilling and Artisan to rely upon their different fact representations that the loadings were correct. (CP 525).

This is the precise type of affirmative inequitable conduct which the doctrine of estoppel in pais is intended to address. *McDaniels v. Carlson*, 108 Wn.2d 299, 308, 738 P.2d 254 (1987); *Proctor v. Huntington*, 146 Wn.App. 836, 845, 192 P.3d 958 (2008); *see also, Consolidated Freight Lines v. Groenen*, 10 Wn.2d 672, 677, 117 P.2d 966 (1941).

Under Washington law, once supporting estoppel evidence is introduced, whether the elements of estoppel in pais exist is again a question of fact not resolvable by summary judgment. *Pacific Nat. Bank of Wa. v. Richmond*, 12 Wn.App. 592, 530 P.2d 718 (1975). Since record evidence sufficient to support this defense has been introduced, it was

error for the court to dismiss the lawsuit's warranty claims. The error should be reversed and the claims properly remanded back for trial.

6. *The Trial Court Erred by Not Finding ProBuild Breached Express Warranties*

RCW 62A.2-313(a) defines what constitutes an express warranty.

The statute states:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain, creates an express warranty that the goods shall conform to the affirmation or promise.

Here as part of the truss sale, ProBuild promised that Schilling and Artisan would receive a set of truss plans lawfully stamped by a licensed Washington engineer. (CP 1558-1563). ProBuild breached that express warranty when it instead delivered a set of truss plans which were illegally stamped by Tingey, because the "direct supervision" required, never occurred.

ProBuild also warranted (by providing stamped plans) that the manufactured trusses could be lawfully installed and used for the Schilling home. That warranty was breached because a CUG ordinance requires that to be code compliant, manufactured trusses must be lawfully engineer-stamped. (CP 2142).

Once given, under Washington law, express warranties cannot be disclaimed. *Travis*, at 405.

Further, under Washington law, an express warranty made by another party is enforceable against the seller of goods, if the facts show the seller adopted the warranty. *See, e.g., Cochran, supra*. Here, as one sale component, ProBuild contracted to deliver legally stamped plans. To satisfy this direct contractual obligation to Schilling, ProBuild adopted MiTek's plan stamp warranties.

Since it was this independent warranty directly made by ProBuild to Schilling which was breached, the court erred in not finding ProBuild to be liable for breaching express warranties.

7. ***The Court Erred by Not Finding MiTek Breached Implied Warranties***

Under RCW 62A.2-314(2), one implied warranty inherent in any sale of goods is that the goods “(f) conform to the promises or affirmations of fact made on the container or label if any.”

Here, MiTek represented to Schilling and Artisan as part of the truss sale, on the front page of its letterhead truss plan package, that purportedly the truss plans “have been prepared by MiTek Industries, Inc. under my direct supervision...” Those affirmations of fact were false. Therefore, MiTek breached implied warranties.

To try and avoid implied warranty liability, MiTek has claimed the remaining language placed below this sentence, purportedly “disclaimed” any implied warranties. Washington courts have held, however, non-negotiated post-sale attempts at disclaiming a warranty are invalid and unenforceable. *Cox v. Lewiston Grain Growers, Inc.*, 86 Wn.App. 357, 936 P.2d 1191 (1997).

Under Washington law, for an implied warranty to exist, a buyer must make known, expressly or by implication, the particular purpose for which the article is required, and secondly, the buyer must rely on the seller’s skill and judgment when he purchased the article. *Dobias v. Western Farmers Ass’n*, 6 Wn.App. 194, 199, 491 P.2d 1346 (1971).

Both requirements are met here. MiTek knew the custom trusses were required for Schilling home construction. As the stamping engineer, MiTek also knew that Artisan and Schilling were relying upon MiTek’s skill and judgment to use the correct loadings for the trusses being purchased. Indeed, as a matter of law, before MiTek could affix an engineering stamp, it had to know the particular purpose and loadings required for the Schilling home. (RCW 18.40.070). Here, just as in *Dobias, supra.*, MiTek admits it had no real knowledge as to whether the designed trusses would work on the Schilling home. These facts were

deemed legally sufficient in *Dobias, supra.*, to hold the defendant liable for implied warranty breach.

As a second argument, MiTek claims Schilling and Artisan, as “vertical non-privity plaintiffs,” should not be found to have an implied warranty claim. In *Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Const., Inc.*, 119 Wn.2d 334, 831 P.2d 724 (1992), however, the Supreme Court held an end user without direct privity could still prosecute an implied warranty claim, if they were the intended beneficiary of the implied warranty made by the defendant.

Dismissing the warranty claims against Truss-T Structures, the trial court determined that privity did not exist under RCW 62A.2-318 between Truss-T, the manufacturer, and Touchet Valley, the end user. We reverse and reinstate Touchet Valley’s breach of warranty claims. We hold that Touchet Valley is a third party beneficiary of implied and express warranties made by Truss-T Structures to Opp & Seibold, and as such is entitled to raise these warranty claims.

*Touchet Valley* at 344. [Emphasis added.]

In holding an implied warranty claim could be pursued by the plaintiff, the Supreme Court in *Touchet Valley, supra*, cited with approval, the prior case *Kadiak Fisheries, Co. v. Murphy Diesel Co.*, 70 Wn.2d 153, 422 P.2d 496 (1967). Factually in that case, the warranty maker knew the identity, purpose, and requirements of the buyer’s specifications, and it shipped the product directly to the buyer. These same facts are present

here. MiTek knew these were custom trusses for the “Artisan/Schilling/070315” home, it knew the trusses purpose, and before affixing a stamp, it had to know the particular Schilling contract and code requirements (*i.e.* purchaser’s specifications) which had to be met. (RCW 18.40.070). The stamped plans were also shipped with and arrived with the physical trusses, delivered directly to Schilling and Artisan.

Similar facts were before the court in *Touchet Valley, supra*.

Applying the *Kadiak* analysis to the facts before us, we note that Truss-T knew Touchet Valley’s identity, its purpose, and its requirements for the grain storage building. Truss-T designed the building knowing the specifications were the purchaser’s... And, when the first beams buckled in March 1985, Truss-T joined Opp & Seibold to attempt repairs.

*Touchet Valley* at 346-347. [Emphasis added.]

Consistent with these facts, the court in *Touchet Valley, supra*, found implied warranties of merchantability of the fabricated building components and their fitness for the owner’s known particular purpose were given. *Touchet Valley* at 347.

To try and escape implied warranty liability, MiTek also now claims there was no “knowing or voluntary interaction” by MiTek with Artisan and Schilling. That is simply incorrect. MiTek contracted with ProBuild to affix engineering stamps, because it knew its stamped plans were being sold to consumers as part of each truss sale. The Schilling

truss plans are a MiTek letterhead document, which states on each page, they are for the “Artisan/Schilling/07315” project. These record facts establish a knowing and voluntary interaction with Schilling, sufficient to show an implied warranty.

MiTek has also argued UCC implied warranties do not apply because it purportedly is not a product seller. That issue was expressly resolved against MiTek in the 1994 South Dakota case *Lennox v. MiTek*, 519 N.W.2d 330, 25 UCC Rep.Serv.2d 1118 (1994), both factually and legally. MiTek accordingly ignores proven fact and settled law to make this incorrect argument.

MiTek finally has argued that implied warranty liability does not exist because there is purportedly not a sufficient “contractual relationship” between MiTek and Schilling. That too is legally incorrect.

Here, there was a contract between ProBuild and MiTek under which MiTek agreed to engineer-stamp the truss plans which ProBuild designed. (CP 455; 821; 982; 1562). Because ProBuild contracted to provide engineer-stamped plans as part of the truss sale to Schilling, Schilling was the intended beneficiary of the contract arrangement between ProBuild and MiTek.

It follows that applying the tests required by Washington law, implied warranties were made by MiTek to Schilling and as a matter of

law, those warranties were breached. The lower court erred by not finding MiTek liable for an implied warranty breach.

#### **D. CONCLUSION**

Nothing about the delivered 2007 truss plans informed Schilling or Artisan that the loadings used were incorrect or that illegal “plan stamping” had occurred. In particular, ProBuild and MiTek cannot inconsistently claim from the May 2011 meeting to today, that the loadings actually used are contract and code compliant (since they accommodate “some tile”), yet for SOL purposes, assert that Artisan and Schilling should have known the loadings were not contract and code compliant.

Once it is properly concluded the 2007 truss plan document did not disclose the lawsuit’s CPA breaches, or that at a minimum, there are material fact disputes about what Schilling and Artisan knew or should have known from the document, the dismissal of the lawsuit’s CPA claims becomes a proven error which must be reversed.

What the record actually shows is that not until post-lawsuit discovery, did Schilling and Artisan actually first find out illegal plan stamping had occurred and that Brooks’ original correct truss loadings had been changed without notice by ProBuild. Since the “discovery” of those deceptive CPA acts did not first arise until after suit was filed, the four

year SOL applicable to CPA claims simply did not expire and those claims should not have been dismissed.

Lawsuit warranty claims were also wrongly dismissed, because the lower court improperly ignored the multiple “affirmative” acts of concealment and misrepresentation engaged in by ProBuild and MiTek to prevent their illegal conduct from being known or discovered.

This is not a case in which the potential at-fault defendants simply sat silent while Schilling and Artisan tried to determine what might have gone wrong. To the contrary, beyond the case specific home issue presented, the facts show MiTek and ProBuild have intentionally concealed and want to continue to conceal from their customers and the courts, their illegal plan stamping practices.

Beyond concealing their plan stamping practices, MiTek and ProBuild also provably acted to conceal that Brooks’ correct contract loadings were changed by ProBuild, by repeatedly misrepresenting that Tingey and MiTek, not Brooks, had prepared the truss designs. MiTek and ProBuild knew that if the true facts about who had designed the trusses and how they had been designed were disclosed, they would be sued. That is why at the May 2011 meeting, Yu misrepresented that MiTek had designed the plans and (according to Yu) they were able to

successfully persuade Schilling, Artisan, and Bardell that the trusses were correctly designed and there was no factual basis for a suit. (CP 525).

This is precisely the type of inequitable affirmative concealment conduct which the doctrine of tolling and the doctrine of estoppel in pais are designed to address, and although Artisan and Schilling believe the evidence produced is sufficient to establish tolling or estoppel as a matter of law, at the very least, a jury question is presented as to whether MiTek and ProBuild's warranty liability is actually time barred.

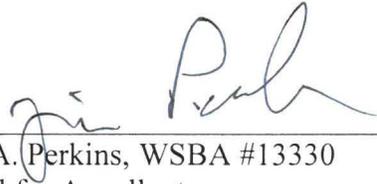
In addition to ProBuild breaching implied warranties, the evidence shows that as part of its sale, ProBuild promised to provide a lawful engineer-stamped set of plans. Because that was part of the contract consideration bargained for, ProBuild adopted MiTek's plan warranty to fulfill its own contract obligation to provide stamped plans. ProBuild should accordingly be found liable for breaching express warranties.

In addition to breaching its express engineer-stamp warranty, MiTek should also be found liable for breaching implied warranties, because Schilling was the intended beneficiary of the existing contract agreement between ProBuild and MiTek, for MiTek to supply ProBuild's customers with engineer-stamped plans. (CP 455; 821; 982; 1562). Therefore, the facts required to establish a vertical privity implied

warranty claim do exist in this case and it was error for the court not to find MiTek liable for implied warranty breach.

RESPECTFULLY SUBMITTED this 9 day of December, 2016.

LARSON BERG & PERKINS PLLC

A handwritten signature in cursive script, appearing to read "Jim Perkins", is written over a horizontal line.

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