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Court of Appeals
Division III
State of Washington

COURT OF APPEALS NO. 344355

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION III

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

Appellants,

v.

MITEK INDUSTRIES, INC., a foreign corporation, and

Respondent/Cross-Appellant

PROBUILD COMPANY, LLC, a Washington limited liability company d/b/a LUMBERMANS,

Respondent/Cross-Appellant.

MITEK'S RESPONDENT/CROSS-APPELLANT'S BRIEF

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I. ASSIGNMENT OF ERROR

A. The trial court erred when it denied MiTek's motion for summary judgment on June 27, 2014, seeking to dismiss Plaintiffs' third party breach of contract and breach of warranty claims against MiTek when the undisputed facts confirm that MiTek did not breach its oral agreement to provide limited truss engineering services to ProBuild.

B. The trial court erred when it granted Plaintiffs' motion for partial summary judgment and concluded that MiTek violated Washington's Consumer Protection Act as a matter of law based on the court's preliminary finding that MiTek violated Washington's Engineering License Law after the court misinterpreted the statutory provisions and incorrectly found it to prohibit acts that do not constitute the "practice of engineering" as defined in RCW 18.43.020.

C. The trial court erred when it granted Plaintiffs' motion for partial summary judgment and concluded that MiTek breached an express warranty under Washington's Uniform Commercial Code Section 2 when MiTek did not sell any goods to Plaintiffs, but rather orally contracted with ProBuild to provide parameter based truss engineering services without any warranties being extended to third parties.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under Washington law, third party beneficiary status is limited to contracts where the third party was specifically contemplated and intended to benefit from the contract at the time of contract execution. The Plaintiffs have not appealed the trial court's dismissal of their third party beneficiary claim thereby confirming it should have been dismissed when MiTek moved for summary judgment on June 27, 2014. (Assignment of Error A.)

2. Washington's Engineer Licensing Law codified at RCW 18.43 *et. seq.* requires engineers to maintain

direct supervision over work constituting the "practice of engineering" as defined in RCW 18.43.020, and expressly provides that the law does not prohibit work commonly performed by other recognized professions or trades. (RCW 18.43.130(1)). MiTek was given certain design parameters, e.g., the weight of roofing material to be supported by trusses, and asked by ProBuild to provide truss designs based on the parameters given. Did MiTek's sealing of truss designs based upon parameters provided by ProBuild, which MiTek was not asked to verify, violate Washington's engineering statutes when (1) the parameters provided by ProBuild did not require the knowledge of advanced mathematical or scientific principles, or the application of engineering training or experience to determine, (2) MiTek's actions complied with national design standards that have been incorporated into Washington's building code, and (3) the same methodologies are used by Plaintiffs' own expert when performing truss engineering services? (Assignment of Error B).

3. Washington UCC 2 express warranty claims are limited to instances where a party purchases goods in reliance on statements made by another. Plaintiffs admit that MiTek did not make any representations to them. Moreover, the parameter based truss designs provided by MiTek to ProBuild expressly stated that they were not intended for any specific building and that the design parameters identified on each design needed to be verified by the building designer before incorporation into any particular building. Can Plaintiffs claim MiTek breached a warranty that was never given? (Assignment of Error C).

4. Washington UCC warranty claims must be brought within four years of the date the goods were delivered. It is undisputed that the Plaintiffs received the ProBuild manufactured trusses on June 6, 2007, and Plaintiffs waited until February 16, 2012, to file their lawsuit. Did the four-year statute of limitations

elapse, mandating a dismissal of all UCC 2 breach of warranty claims? (Assignment of Error C).

III. STATEMENT OF THE CASE

A. OVERVIEW

This case stems from cosmetic cracks that have appeared primarily in the garages of a new home built in Union Gap, Washington for Terry and Julie Schilling ("Schillings") by a home builder, Artisan, Inc. ("Artisan"). The cracks were first discovered in 2008 when the Schillings moved into their home. (CP 6).

Plaintiffs allege that the prefabricated wood trusses[1] used in the construction of the roof of their home, which were designed to support 12 lbs./sq. ft. ("psf") of roofing material[2], are inadequate to support the weight of the roofing material (including roof tile) they contemplated using—which they believe should weigh 15 psf—and that this discrepancy caused the cracks in their home. (CP 60, 77, 220). This is a "red herring" argument as Plaintiffs have always had a composite shingle roof weighing far less than 12 psf, and there is no question that their trusses are capable of supporting the weight of the roofing material actually used. (CP 2739).

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[1] Prefabricated wood roof trusses are components of the structural support systems that are commonly used for supporting the roofs of homes and other buildings throughout the U.S. Prefabricated wood trusses are normally built offsite in factories and then shipped to the construction site for installation and use.

[2] The amount of material permanently installed on top of a truss is generally referred to as the "Top Chord Dead Load" or ("TCDL"). 12 psf means the amount of material which weighs 12 lbs./sq. ft.

This case involves relationships between individuals and entities at two distinct levels of the residential construction market.

At a first or "on-site" level are: (i) the homeowners, Schillings, and their selected builder, Artisan, (collectively, the Plaintiffs and Appellants/Cross-Respondents herein); (ii) the building designer, Altius Construction Services, LLC (a non-party which is related to Artisan and drafted the plans for the Schilling home); (iii) the licensed engineer employed by Artisan, Tim Bardell of B7 Engineering (a non-party who reviewed and professionally sealed Altius' building plans); and (iv) the defendant ProBuild Company, LLC ("ProBuild"), the manufacturer of the wood roof trusses used in the Schilling home.

At a second or "remote" level is ProBuild and defendant MiTek Industries, Inc. ("MiTek") who had an oral agreement under which ProBuild requested MiTek, and MiTek agreed, to provide certain truss component design services to ProBuild based upon parameters[3] provided by ProBuild. (CP 1037-1038, 1529, 2287). MiTek was not involved in the manufacture or sale of the trusses for the Schillings' home; it was not involved in the construction of the

[3] Design parameters are the criteria, e.g., dimensions, properties of materials, support and load conditions, which an engineer inputs into design formulas. (CP 591-592, 1529). The engineer then uses his engineering knowledge, training and experience to analyze and/or predict the performance of materials under conditions defined by the parameters. The key design parameters at issue in this case are (1) the weight of roofing material which Plaintiffs claim should have been 15 psf, and (2) the top chord live load which the trusses were designed to support, which Plaintiffs claim should have been a 30 psf roof snow load.

Schillings' home; it was not aware of any discussions between ProBuild and the Plaintiffs relating to the trusses to be used in the Schillings' home (CP 1037); and, neither MiTek nor the Plaintiffs even knew the other's name until years after the construction of the Schillings' home was completed (CP 118, 144-145).

There is no dispute that MiTek and ProBuild were the only parties to their oral agreement under which ProBuild requested and MiTek provided truss component design services. There is no dispute that ProBuild and MiTek did not intend to make Plaintiffs third party beneficiaries under their oral agreement. (CP 3491). The trial court found that the oral agreement between ProBuild and MiTek to provide parameter based truss designs was not breached (CP 3491), and that finding was not appealed.

Realizing that they had no direct contractual relationship with MiTek, Plaintiffs asserted a third party beneficiary claim. (CP 8-9). The trial court ultimately dismissed that claim on summary judgment because there was no intent for MiTek to assume a direct obligation to the Plaintiffs and there was no breach of the agreement between MiTek and ProBuild under which Plaintiffs' claimed to possess third party beneficiary rights. (CP 3490-3491).

The evidence establishes that Plaintiffs should have known by June 6, 2007 (more than four years before they filed their lawsuit against MiTek): (i) that there was a discrepancy between the design parameters used by MiTek for its component designs and the

parameters Plaintiffs believe ProBuild should have told MiTek to use (CP 716, 3119); (ii) that Plaintiff knew how to review and interpret the design parameters set forth on MiTek's designs to determine whether they conformed with Plaintiffs' wishes (CP 3119); (iii) that MiTek's designs were based upon parameters given to MiTek by ProBuild (CP 715); and (iv) that MiTek's designs had not been prepared for the Schillings' particular home. (CP 715-716). Plaintiffs simply needed to look at the designs given to them by ProBuild to discovery these facts. Ultimately, MiTek is asking this Court to reverse the trial court's ruling that MiTek's actions violated Washington's engineering statute, which in turn would mandate the dismissal of all claims against MiTek.

While this case focuses on the Schilling home, its resolution may have a profound impact upon the practice of all engineering in Washington because of the trial court rulings that in essence prohibit any engineer from preparing plans or designs based on information received from a client.

B. STATEMENT OF FACTS

1. The Schillings contracted with Artisan to design and build their house.

In 2005, the Schillings decided to build a new house in Union Gap, Washington. They hired James and Josh Sevigny d/b/a Artisan, Inc. to manage and oversee construction. (CP 138, 1319-

1323, 1431, 1494). The Schillings hired Josh Sevigny's company, Altius, LLC, to design and prepare the plans for their new home. (CP 1309-1311, 1431, 1494). Artisan agreed to manage the project, review invoices, and advise the Schillings what bills needed to be paid and when. (CP 138, 1319-1323, 1432-1433).

The Schillings relied on Artisan to retain all necessary engineers. (CP 1441). Consistent with that expectation, Artisan hired Tim Bardell ("Bardell") of B7 Engineering as the Schillings' structural engineer to review and stamp the building plans and truss layout, as well as prepare an engineering supplement. (CP 2221-2226, 2229). The building permit identifies Bardell as the Project Engineer. (CP 2229).

Josh Sevigny of Altius (a draftsman but not a licensed architect or engineer) drafted the building plans for the Schilling house. (CP 754-755, 1309-1311, 1431, 1494). The draft plans were provided to Bardell for engineering review and sealing. (CP 754-755). Bardell placed his engineering stamp on the roof plan, along with four other building plan pages, but he failed to specify many of the design parameters he used[4] or even the correct building code. (CP 1688-1690, 2221-2225). Bardell admits that, in doing so, he violated the 2003 version of the International Building Code ("IBC")

[4] For example, the weight of total roofing material called for on the plans.

section 1603.1[5] and that the errors should have been corrected before he stamped Josh Sevigny's plans. (CP 1686-1690).

The building plans sealed by Bardell contemplated the use of prefabricated wood trusses in the roof support system.

2. Plaintiffs purchased their trusses from ProBuild.

The Schillings, through Artisan, contracted with ProBuild to purchase the trusses to support the roof of their house. They did not speak with or know who MiTek was until four years later. (CP 130, 143).

Using generic loading, ProBuild first prepared a preliminary bid for 116 trusses for the Schilling home totaling $12,450.00. (CP 66). At some point ProBuild received and reviewed the Sevigny/Bardell building plans and later sent a truss salesman to meet with Artisan to identify and verify the design parameters that ProBuild felt were necessary and appropriate for the Schillings' home. (CP 1037-1038, 1069). This meeting between ProBuild's salesman and Artisan was in part necessitated by Bardell's failure to identify design loadings on his plans. ProBuild's salesman testified that he understood Artisan expected to use roofing material (including tile) weighing 15 psf on the roof of the home. (CP 1559). The salesman also testified that he initially input a 15 psf roofing load (or "TCDL") into ProBuild's computer system. *Id.*

[5] This was building code applicable when Bardell performed his work. (CP 1030).

ProBuild determined that 12 psf was the appropriate weight for the roofing material contemplated in their agreement with the Plaintiffs. (CP 1037, 2663, 2961). ProBuild internally prepared preliminary roof truss drawings based upon what it believed to be appropriate parameters for the Schilling trusses (CP 1037), and then ProBuild sent the design parameters (but not the preliminary designs it had prepared) to MiTek[6] asking MiTek to prepare and provide it with certain professionally sealed truss component designs based upon the design parameters provided by ProBuild. (CP 1037, 2287). It is undisputed that MiTek performed the limited work ProBuild requested and placed a prominent notice on the designs advising anyone reviewing the designs what the scope of MiTek's engineering work was. (CP 715).

ProBuild employee, George Brooks, testified by declaration that ProBuild manufactured most, if not all, of the Schilling trusses **before** MiTek performed its engineering services for ProBuild. (CP 2962-2963). If true, then the trusses would have been manufactured based on ProBuild's preliminary designs.

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[6] Before the lower court and in their brief herein, Plaintiffs have argued that MiTek did not actually prepare the truss designs it sealed but engaged in the unlawful practice of "plan stamping" by allegedly sealing truss designs prepared by ProBuild. This assertion is based upon the similarity in appearance of the MiTek designs and the ProBuild preliminary designs. Indisputably, certain MiTek designs generally look like some of the ProBuild designs, as both sets of designs were generated using the same computer software. (CP 121-123, 214, 270-271, 627). However, Plaintiffs' argument ignores the undisputed evidence that the respective designs were produced at different times, dates, and places, with different calculations and oversight being used. (CP 2068-2173, 2315-2382).

On or about June 6, 2007, ProBuild delivered 114 types of trusses that it manufactured—along with a package of truss designs containing 59 sealed truss designs prepared by MiTek and 55 unsealed truss designs prepared by ProBuild—to Artisan. (CP 2068-2137, 2315-2382). The truss designs bear dates confirming that the designs prepared by ProBuild were created several days before the MiTek designs. *Id.* All of the designs clearly identified on their face the design parameters upon which they were based, including the two design parameters that are at issue in this matter, namely, a 12 psf top chord dead loading (a "12 psf TCDL") and a 30 psf top chord live loading (a "30 psf TCLL").[7] *Id.*

Jim Sevigny of Artisan admits that he believed at the time the trusses were delivered to the Schilling construction site that the trusses should have been designed for a 15 psf TCDL, and that he knew in 2007, before installing the Schilling trusses, that he knew how to review the truss designs for a 15 psf TCDL. (CP 3119). Nevertheless, Artisan installed the ProBuild trusses when it should have known there was a discrepancy between the 12 psf TCDL that was prominently identified on the MiTek truss designs and the 15 psf TCDL that Artisan admits it knew to look for. (CP 716, 3119).

[7] TCLL stands for "Top Chord Live Load" and is the weight of natural and transitory forces that the truss is designed to support. These natural and transitory forces include workers walking on the roof, snow, wind, and construction material.

After installing the trusses, Artisan took the MiTek truss designs to the City of Union Gap for review and approval by the building official. The building official reviewed the MiTek truss designs and stamped them as approved after confirming that the designs satisfied the City of Union Gap's local building code requirements. (CP 715, 738-741, 744-745). The building official also confirmed that he knew how to interpret the load parameters stated on MiTek's designs, including the 12 psf TCDL and the 30 psf TCLL. *Id.* He also reviewed the designs for a ground snow load of 30 pounds as opposed to the 30 pound roof snow load alluded to at page six of Plaintiffs' brief. (CP 491).

3. ProBuild contracted with MiTek to perform a limited scope of work that was fully performed.

As stated above, ProBuild had an oral agreement with MiTek to prepare individual truss component designs based on parameters provided by ProBuild. (CP 1037).

The agreement between MiTek and ProBuild was not breached. (CP 3491). MiTek was not involved in, or aware of, any communications between ProBuild and the other parties involved with the design or construction of the Schilling home. (CP 1037). MiTek was not aware of the existence of the Schilling construction project and did not know who the Schillings or Artisan were. Plaintiffs admit they had no idea who MiTek was until four years after the trusses were installed. (CP 130, 143-145).

ProBuild transmitted the truss design parameters it selected to MiTek and asked MiTek to prepare 59 individual truss component designs based on ProBuild's specifications. (CP 117, 1037-1038). This transmission consisted of a bunch of numbers, defining such things as the pitch, dimensions, shape, support points and design loads to be used (all data of the type that could be determined by a simple measurement, looked up on plans, or were entirely within the discretion of the specifier, ProBuild). This information was run through MiTek's computer program at MiTek's office, which performed design calculations established by MiTek's engineers, and produced results which were first reviewed for proper format by technicians in MiTek's office. (CP 117, 122-123).

MiTek's engineers supervising the work of MiTek's design technicians then reviewed and sealed each individual design based on their knowledge, training and experience. (CP 121-123, 214, 627). MiTek does not receive, review, or stamp preliminary truss plans or designs developed by ProBuild. (CP 270-271).

MiTek's transmittal letter that accompanied the truss designs sent to ProBuild confirmed MiTek's scope of work and that the design parameters prominently displayed on each design needed to be verified by the building designer before use:

> The truss drawing(s) referenced below have been prepared by MiTek Industries, Inc. under my direct supervision **based on the parameters provided by [ProBuild]**. A-293 [emphasis added].

***

> The seal on these drawings indicate acceptance of professional responsibility 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. [emphasis added].

(CP 715). MiTek's designs also included a prominent "Warning" regarding the scope of its engineering services on each design:

> **WARNING! – VERIFY DESIGN PARAMETERS AND READ ALL NOTES ON THIS TRUSS DRAWING BEFORE USE**. ... This design is based only upon parameters shown and is for an individual building component to be installed and loaded vertically. Applicability of design parameters and proper incorporation of component is the responsibility of building designer.... [emphasis in original].

(CP 1265-1268).

MiTek never certified that it reviewed or approved of the parameters selected by ProBuild, that the truss designs were appropriate for the Schilling residence, or that the truss designs were designed with any particular type of roofing material in mind.[8] (CP 117, 121, 715). Each set of truss component designs also include a sheet identified as "General Safety Notes" that included the following warnings:

[8] Contrary to Plaintiffs' assertion, there is no standard "tile load" in the truss or building industry. (CP 1038, 1711).

> **General Safety Notes**
>
> **Failure to Follow Could Cause Property Damage or Personal Injury**
>
> ...
>
> 3. Never exceed the design loading shown ...
>
> 4. Provide copies of this truss design to the building designer, erection supervisor, property owner and all other interested parties.
>
> ...
>
> 19. Review all portions of this design (front, back, words and pictures) before use. Reviewing pictures along is not sufficient. **[bold in original]**

(CP 718).

Plaintiffs' own engineering expert, Terry Powell, described using the same methods and means as MiTek to prepare truss component designs. (CP 1652-1656). He receives parameters from truss manufacturing companies that include the size and shape of the trusses to be designed, the weight of materials to be placed on the trusses, and design loading, and then uses that information to prepare truss component designs. (CP 1652-1654). He did not verify or review the parameters given to him. *Id.*

Mr. Powell confirmed that he places warnings similar to MiTek's on his truss designs to advise anyone reviewing his

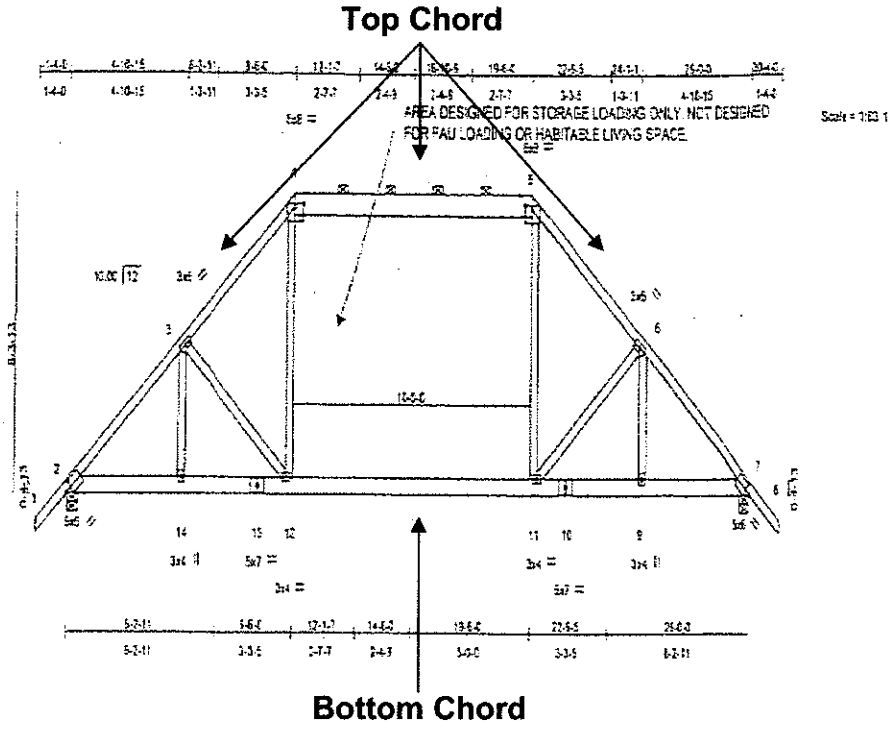
designs that they are parameter based designs that need to be reviewed and approved by the building designer before installation. (CP 1655-1656).

4. Basic information to understand truss designs.

A residential roof system incorporating prefabricated trusses as involved here consists of several parts, including individual prefabricated trusses of various sizes and shapes, roof sheathing, roofing material, and bracing between trusses. (CP 1026). The system works as a unit to provide structural stability when properly integrated into the structural design of the entire house. (CP 1026-1027). To ensure uniformity, national standards have been adopted to regulate the roles and responsibilities of the parties involved in the manufacture, use, and design of prefabricated wood trusses as involved in this case. In Jul 2007, these standards were set forth in a joint publication of the American National Standards Institute ("ANSI") and the Truss Plate Institute, called "ANSI/TPI 1-2002" which publication was incorporated into the 2003 International Building Code and the City of Union Gap building code. (CP 742-743, 1030-1031).

When looking at the individual truss designs involved here, the load parameters specified by ProBuild are at issue. The load parameters specified were the "live loads" anticipated on portions of the truss during use (i.e., loads that are transitory in nature and

come and go such as occupants, workers, and movable objects) and the "dead loads" carried by portions of the truss (i.e., permanent loads such as the weight of the building materials and the truss itself). With respect to the illustrative truss diagram below, the live loads and dead load were specified in pounds per square foot ("psf") on portions of the truss configuration, known as the "top chord" and "bottom chord":



(CP 2114) The loading for the truss designs was designated as **TCLL** for Top Chord Live Load, **TCDL** for Top Chord Dead Load, **BCLL** for Bottom Chord Live Load, and **BCDL** for Bottom Chord Dead Load. Pursuant to IBC 1603.1, the loading requested by ProBuild were then prominently displayed on MiTek's designs:

LOADING (psf)	
TCLL	30.0
TCDL	12.0
BCLL	0.0
BCDL	8.0

(CP 2114).

Bardell confirmed that he only designed the building with a "total roof load" (both top and bottom chord dead loads added together) of 15 psf. (CP 1690-1691). That is less than the 20 psf "total roof load" selected by ProBuild (12 psf TCDL and 8 psf BCDL) and is identified on the subject truss designs. (CP 2068-2137). Bardell admitted knowing it was important that he review the truss designs before they were incorporated into his buildings, but he felt that his "role in [the Schilling] project was [to] provide the engineering required to get the building permit. And maybe I put my head in the sand, but I basically tried to limit it to that, because that's all [Artisan] wanted me to do." (CP 1680).

5. Four years after the trusses were installed, ProBuild asked MiTek to help evaluate the cracking problem in the Schillings' garages.

Plaintiffs falsely claim that MiTek concealed defects in the trusses in an effort to toll the statute of limitations.

The undisputed facts reveal that MiTek did not know who the Schillings were or where the house was located when the MiTek

designs were prepared (CP 118), and MiTek and the Schillings did not know of each other until the Schillings and a MiTek engineer (Redong Yu) met in May of 2011 when MiTek was asked by ProBuild to help determine why there were superficial cracks in the garage ceilings. MiTek could not have misled Plaintiffs at the May 2011 meeting because Mr. Schilling's own recollection of the meeting confirms that he was not mislead because he did not recall or understand what was discussed between the engineers. (CP 3160). He only had a general impression that B7 Engineering and MiTek would exchange information to evaluate the trusses further. (CP 143).

There is no evidence that MiTek made any false representations in this process. The email that Plaintiffs cite to wherein Mr. Yu comments on the "initial success" of the site meeting simply acknowledges Mr. Yu's belief that he was successful in explaining his theory—that the cracking was caused by an issue with the building design as a whole rather than a deficiency in the truss designs—to Bardell. (CP 525).

MiTek also notes that, while the truss designs include the notation "Artisan/Schilling/070315" in the Job Reference section, it is an "optional" box for the truss manufacturer (ProBuild) to use for

internal tracking. The notation is ProBuild's internal identifier that has no significance or meaning to MiTek (CP 118), and does not on its face identify any particular building location.

IV. STATEMENT OF PROCEDURE

Plaintiffs filed suit on February 16, 2012. (CP 3). Plaintiffs alleged they were intended third party beneficiaries under an alleged "truss purchase order contract between...ProBuild and MiTek" because they did not speak to, or contract with, MiTek. (CP 8). They also sought damages from MiTek for breach of express and implied warranties based on Washington's Uniform Commercial Code. (CP 7-9).

MiTek moved for summary judgment to dismiss all of Plaintiffs' claims against MiTek on May 5, 2014. (CP 33). Plaintiffs amended their original complaint to add a Consumer Protection Act (CPA) claim against MiTek on May 9, 2014,[9] in response to MiTek's motion for summary judgment.

The trial court denied MiTek's motion for summary judgment on June 27, 2014. (CP 813-815).

Plaintiffs then moved for partial summary judgment arguing that MiTek and ProBuild violated Washington's Consumer Protection Act. As to MiTek, Plaintiffs asserted that MiTek violated RCW 18.43.070 and WAC 196-25-070, by failing to validate the

[9] The motion to amend was granted on May 26, 2014. (CP 424).

loading parameters selected by ProBuild were appropriate for the Schillings' residence. (CP 1010-1021). On November 6, 2014, the trial court granted partial summary judgment and found that MiTek's conduct of preparing truss designs violated RCW 18.43.070 and WAC 196-25-070 and thereby constituted a per se violation of the CPA. (CP 1895-1901). The trial court found that ProBuild committed a per se violation of the CPA by changing the designed loading from 15 psf to 12 psf without telling the Schillings or Artisan of this change. *Id.*

Plaintiffs then moved for another partial summary judgment order asking the court to find ProBuild and MiTek liable to Plaintiffs on their third party beneficiary and UCC express and implied warranty theories. (CP 2145-2165).

On October 26, 2015, the trial court entered an order finding that ProBuild breached implied warranties and that MiTek breached express warranties based on the use of the engineer's stamp and representations ProBuild made to the Plaintiffs. (CP 3480-3491). On the other hand, the trial court dismissed the Schillings' breach of implied warranty claim based on undisputed evidence that Plaintiffs had no interaction with MiTek (CP 3485-3486). It dismissed the Schillings' third party beneficiary claim against MiTek based on undisputed evidence that MiTek did not breach its oral agreement with ProBuild. (CP 3486). The order further noted that ProBuild and

MiTek were allowed to bring a motion that the Plaintiffs' remaining claims were barred by the statute of limitations. *Id.*

On April 15, 2016, the trial court held that Plaintiffs' remaining claims violated the statute of limitations and dismissed them. (CP 3492-3507).

V. ARGUMENT

A. The standard of review is de novo.

All of the claims at issue in this appeal relate to the trial court's decisions to grant or deny various partial summary judgment motions. As a result, the standard of review for all issues raised in this appeal is de novo. *Washburn v. City of Federal Way*, 178 Wn.2d 732, 752, 310 P.3d 1275 (2013).

B. MiTek satisfied its obligations under Washington's engineering statutes and WAC guidelines.

Plaintiffs' claims against MiTek are premised on the incorrect assertion that MiTek violated RCW 18.43.070 and former WAC 196-25-070[10] by failing to supervise ProBuild's selection of truss parameters. The statute relates only to the "Practice of Engineering" and does not require MiTek to supervise ProBuild's work or to verify the parameters ProBuild asked MiTek to use in preparing the subject truss designs. The statute certainly does not

[10] This was recodified from WAC 196-23-030 in October 2006. The language Plaintiffs identify in their brief at page 7 were not adopted until January 2010.

prohibit engineers from preparing designs based on parameters received from others. This Court must reverse the trial court's ruling that MiTek violated these provisions and grant summary judgment in favor of MiTek based on the undisputed evidence.

Plaintiffs refuse to recognize that MiTek's only client in this transaction was ProBuild. It is undisputed that ProBuild asked MiTek to prepare certain parameter based truss designs to specifications provided by ProBuild. (CP 636-637, 640, 1037, 2312). MiTek performed its work and only certified on its truss designs that: (1) the engineering calculations and use of engineering discretion were correct; (2) each design was based on parameters received from ProBuild; and (3) before any of the trusses were incorporated into a building, the design parameters needed to be reviewed and accepted by the building designer or the engineer of record to ensure the loading met the building design's intent. (CP 715-716). MiTek never certified or represented anything beyond that. MiTek had no involvement with the manufacture or sale of the physical trusses and did not know about, or interact with, the Plaintiffs until four years after the trusses were installed. (CP 118, 144-145).

The trial court failed to recognize that Plaintiffs are not class of people who can maintain a cause of action based on an alleged violation of RCW 18.43 *et. seq.* as explained in *Burg v. Shannon & Wilson, Inc.*, 110 Wn. App. 798, 43 P.3d 526 (2002). In *Burg*, an

engineering firm provided an analysis of ground stability for the City of Seattle. *Id.* at 800. The engineering firm provided advice to the City of Seattle but did not inform local residents of their landslide risk and exposure. *Id.* at 800-01. The owners alleged that the engineering firm violated RCW 18.43 *et. seq.* and was liable to them for failing to advise of the risk to their property for the subsequent landslide that damaged their homes. *Id.* The claims against the engineering firm were dismissed on summary judgment when the trial court found that the engineering firm owed no duty to the landowners under the engineering statutes. *Id.* at 800. That ruling was affirmed on appeal. *Id.*

The *Burg* court held that violations of RCW 18.43 *et. seq.* do not create an independent cause of action for third parties based on engineering malpractice. 110 Wn. App. at 806-07. Instead, the engineering statute and guidelines only create a cause of action that will flow to clients and employers of the engineer. *Id.* It is undisputed that Plaintiffs are not clients of MiTek and did not employ MiTek. Therefore, Plaintiffs cannot maintain a cause of action based on an alleged violation of the engineering statutes.

The trial also exceeded its authority by finding a violation of RCW 18.43 *et. seq.* because the Washington Legislature vested exclusive authority to discipline engineers with the Board for Professional Engineers and Land Surveyors ("Board"). RCW 18.43.030; -.110. WAC 196-27A-010(1). The Legislature also

adopted the complimentary chapter governing disciplinary proceedings in RCW 18.235 *et. seq.* These provisions did not provide an independent cause of action in court. Rather, the statute only allows for a suit to be brought by a licensee who has been disciplined to appeal a Board decision to the Superior Court. RCW 18.235.090. See also *Mulhausen v. Bates*, 9 Wn.2d 264, 270, 114 P.2d 995 (1941) ("[T]he courts will not entertain a bill in equity nor a petition for declaratory judgment designed to call for decision of a case for the determination of which a special statutory method has been provided."). The superior court only had authority to review the Boards disciplinary action, as appealed by a licensee, not to issue a determination on wrongdoing under the professional engineering codes because our legislature has vested sole discretion on such determinations with the Board.

1. Plaintiffs' allegations of misconduct by MiTek are acts that do not constitute the "practice of engineering" and cannot serve as a basis for liability under RCW 18.43 *et. seq.*

The Court must consider what activities constitute engineering because RCW 18.43 *et. seq.* only applies to the "practice of engineering" as defined by RCW 18.43.020(5):

> ... "Practice of engineering" means any professional service or creative work requiring engineering education, training, and experience and the application of special knowledge of the mathematical, physical, and engineering sciences to such

> professional services or creative work as consultation, investigation, evaluation, planning, design, and supervision of construction for the purpose of assuring compliance with specifications and design...

Plaintiffs have asserted that MiTek violated RCW 18.43 *et. seq.* by failing to oversee the selection of the loading parameters e.g. weight of the roofing material and evaluating what live load should have been used to design the Schilling trusses. (CP 1002, 1007). Determining the weight of roofing material that can be placed on a truss, dimensions of a room, and pitch of the roof require no special engineering or mathematical knowledge or application of engineering sciences. (CP 591). These activities can be performed by anyone who is able to read a tape measure, a weight scale, or a product manufacturer's brochure; and who knows what the building owner wants to build and can afford. Such design parameters are routinely provided to engineers by non-professionals in all types of construction, product and system design, and define the data to which an engineer's special knowledge and discretion is applied. The engineer will then be able to advise whether a structure can be built to conform to the basic design parameters chosen by others. (CP 121).

This is why RCW 18.43.130(1) notes that "[t]his chapter shall not be construed to prevent or affect...[t]he practice of any other legally recognized profession or trade" *e.g.*, building designers, general contractors, and truss manufacturers, and why each truss

design provided by MiTek notes "[n]ever exceed the design loading shown." (CP 718).

This makes sense because an engineer will tell a contractor or component manufacturer whether a 10 foot wall built with standard grade 2x4 Doug Fir wood can support 10,000 pounds per linear foot, or if the contractor needs to upgrade to a higher grade of lumber or use larger sizes of wood such as 2x6. The engineer does not tell his client that he can only build a house using cedar shakes, that a house cannot be wider than 20 feet, or that a roof must have a certain shape. Those are decisions an owner makes with their general contractor and building designers. The engineer then uses their special knowledge, discretion, and understanding of mathematical and engineering sciences to determine whether such a design can be created. Similarly, if the Schillings sell their house to another party and that person wants to make a change to the roof, they will need to have their own contractor review the truss designs to evaluate whether they can install a heavier type of material on the roof such as slate or a particular type of tile.[11]

ProBuild's selection of loading parameters, such as the selection of the amount of weight the truss should have been designed to hold, is not the practice of engineering and cannot be

[11] The contractor simply needs to add up the weight of the material to be installed by reviewing the product manufacturer's brochure and combining that with the standard weights of roof sheathing and building paper. So long as that number is less than the TCDL specified on the truss designs, it is safe to proceed.

considered when evaluating whether MiTek's actions complied with the statute. It is the engineer's customer, here ProBuild, who is in the best position to know what they need or want. The engineer's clients know whether they require engineering services for a truss designed to hold 12 psf TCDL, a bridge that can support vehicles weighing 80,000 pounds, or an engine that generates 300 horsepower. The engineer then provides its clients with designs meeting the client's expectations. That is what MiTek did.

2. MiTek complied with the mandates of RCW 18.43.070.

RCW 18.43.070 is limited in scope and governs the licensing of engineers. The statute requires professional engineers to 1) register with the board, 2) obtain a seal, and 3) sign, date, and stamp plans they have prepared. RCW 18.43.070 goes on to require professional engineers to include a certification that the engineering work was prepared under the engineer's direct supervision:

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

It is undisputed that MiTek's truss designs included the signature, date, stamp, and certification of a licensed engineer. (CP 2068-2137). The engineer confirmed that he believed he exercised direct supervision and complied with all statutory requirements. *Id.*

To the extent Plaintiffs want to add additional requirements or intent to the statute, such argument must be rejected because "[c]ourts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute." *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

When looking at a statutory scheme, a court first looks to the plain language of the statute in order to "give effect to its plain meaning." *Cerrillo v. Esparaza*, 158 Wn.2d 194, 201, 142 P.3d 155 (200. The court must also "give meaning to every word in a statute." *Bennett v. Seattle Mental Health*, 166 Wn. App. 477, 484, 269 P.3d 1079 (2012). A statute that is clear on its face must be applied as written. *Harmon v. DSHS*, 13 Wn.2d 523, 530, 951 P.2d 770 (1998) ("[I]f a statute is plain and unambiguous, its meaning must be derived from the language of the statute itself."). Ambiguity is not to be read into a statute. *Id.* A plain reading of RCW 18.43.070 confirms that MiTek's conduct was appropriate.

3. MiTek directly supervised the engineering work they performed.

Plaintiffs' sole argument is that MiTek failed to maintain direct supervision over ProBuild's selection of truss parameters. Plaintiffs' argument misses the point of the statute, which only requires the engineer to maintain direct supervision over the engineering work they are certifying. RCW 18.43.070; WAC 196-25-070. Here that is preparing certain parameter based designs to ProBuild's specifications. (CP 117, 591, 1037-1038).

WAC 196-25-070, which was in effect in 2007 when MiTek's work was performed, defined "direct supervision" as:

> ...a combination of activities by which a licensee maintains control over those decisions that are the basis for the findings, conclusions, analysis, rationale, details, and judgments that are embodied in the development and preparation of engineering ... 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]

Plaintiffs' analysis of this statutory language, which the trial court erroneously adopted, ignores the critical language that an engineer is only required to maintain direct supervision over "the work being certified." The subject truss design documents clearly stated that MiTek's engineer only certified the trusses had been

analyzed and developed based on parameters (design loading information) received from ProBuild. (CP 715). MiTek never certified that the trusses were designed for the Schilling residence or that the loading parameters had been reviewed or approved by MiTek. (CP 715). That is why the truss designs note that the designs need to be reviewed and approved by the building designer before incorporation into a building along with a warning that the design loading must not be exceeded. (CP 718, 2068-2137).

It is undisputed that MiTek's scope of work was limited to preparing designs based on ProBuild's parameters. Plaintiffs' belief that they were entitled to truss designs engineered for their residence is an issue to be addressed between Plaintiffs, Artisan, and ProBuild. MiTek was not involved in that agreement. (CP 130, 144). MiTek does not owe an independent obligation to Plaintiffs here. *Burg*, 110 Wn. App. at 807 ("Appellants have not met their burden of articulating how these statutes and regulations impose a duty on [the engineer] specific to them individually.").

Plaintiffs were warned when they received the truss designs that the designs were not prepared for their particular house:

> 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 2068). They were also told that they needed to have the design parameters reviewed and approved by the building designer:

> **WARNING! – VERIFY DESIGN PARAMETERS AND READ ALL NOTES ON THIS TRUSS DRAWING BEFORE USE**. ... This design is based only upon parameters shown and is for an individual building component to be installed and loaded vertically. Applicability of design parameters and proper incorporation of component is the responsibility of building designer.... (emphasis in original).

(CP 2069).

Plaintiffs' failure to verify the loading parameters, especially when Artisan admits it expected a TCDL of 15 psf and knew how to review that parameter is unconscionable and cannot be projected onto MiTek. (CP 3119).

4. Washington's Board of Registration of Professional Engineers has approved parameter based engineering.

The Board investigated a truss design complaint with a similar fact pattern in 2010, in which the Board found:

> The Engineering Company supplies the truss company with a truss program to do the preliminary design and then is forwarded by email to the engineering company if the client decides to build the project[.] The engineering company then will do all the engineering on the information the truss company supplies them[.]

(CP 1235-1238). After its investigation, the Board, who adjudicates licensing violation claims, found the work performed by the engineer[12] did not violate Washington's engineering rules and regulations. (CP 1238). This also complies with national engineering standards.

Such a result should be expected when Plaintiffs' own expert utilizes the same methods, process, and procedures as MiTek when preparing truss designs. (CP 1652-1654). The trial court erred when it found MiTek violated RCW 18.43.070 and WAC 196-25-030, and those findings must be reversed.

C. The trial court properly dismissed the Schillings' breach of implied warranty claim and should have dismissed the Schillings' breach of express warranty claim as well.

The Schillings' breach of warranty claims are based on Article 2 of Washington's Uniform Commercial Code. (Plaintiff's Brief at 27). These claims fail for four reasons: (1) MiTek was not a seller of goods in this transaction, therefore, Washington's UCC 2 does not apply, (2) UCC 2 has a four-year statute of limitation which bars Plaintiffs' claim, (3) MiTek excluded any warranties in its agreement with ProBuild that was confirmed in writing with the transmission of the truss-component designs, and (4) there was no

[12] This involved a different truss plate manufacturing company than MiTek.

interaction between the Schillings and MiTek, which is a necessary element to give rise to an implied warranty claim.

1. MiTek was not a seller of goods.

Washington's Uniform Commercial Code ("UCC") only applies to the sale of goods and does not apply to MiTek as a provider of services to ProBuild. RCW 62A.2-102; *see also Urban Dev., Inc. v. Evergreen Bldg. Prods, LLC,* 114 Wn. App. 639, 59 P.3d 112 (2002) (holding that construction contracts for work, labor, and materials are not governed by the UCC).

Goods are defined as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action." RCW 62A.2-105(1). The "goods" at issue here are wood trusses manufactured by ProBuild.

MiTek did not manufacture the trusses. MiTek's work was limited to providing parameter based truss design services based on ProBuild's specifications. (CP 294, 636, 640, 1037). MiTek fulfilled its obligations under their agreement. Because MiTek is not the manufacturer of the subject trusses, it could not have violated Washington's UCC 2. Plaintiffs' citation to the South Dakota case of

City of Lennox v. MiTek Industries, Inc., et. al., 519 N.W.2d 330 (Sup. Ct. S.D. 1994) is irrelevant. It is unclear in *Lennox* whether there was an issue with the truss plates sold by MiTek to the truss manufacturer and incorporated into the truss, and the *Lennox* court did not analyze what design work the MiTek entity performed because "the record [was] unclear as to the exact nature of the design services provided by MiTek." *Lennox*, 519 N.W.2d at 332. The case also was limited to deciding whether the four-year statute of limitations in UCC 2-725 applied to bar the action. Based on that narrow issue, it affirmed the dismissal of MiTek based on a violation of the four-year statute of limitation. *Id.* at 332-33.

To the extent Plaintiffs point to the truss plates used by ProBuild in the Schilling trusses, there is no evidence that there is anything wrong or defective in the Schilling truss plates rendering such argument moot.

2. UCC 2 has a four-year statute of limitations which bars the Schillings' UCC claims against MiTek.

RCW 62A.2-725(1) prohibits all UCC 2 warranty claims filed more than four years after the good is delivered. Washington has consistently enforced the requirement that breach of warranty claims be commenced within four years of the date of delivery.

Holbrook, Inc. v. Link-Belt Constr. Equip. Co., 103 Wn. App. 279, 284, 12 P.3d 638 (2000); *Kittitas Reclamation Dist. v. Spider Staging Corp.,* 107 Wn. App. 468, 472-73, 27 P.3d 645 (2001). It is undisputed that the trusses were delivered to the Schillings on June 6, 2007. (CP 2663). They did not file their lawsuit until February 16, 2012. Therefore, the four-year statute of limitations expired before the Schillings filed their lawsuit. *Giraud*, 102 Wn. App. at 453. ("the warranty statute of limitations makes it clear that the discovery rule does not apply to warranty lawsuits.").

Plaintiffs' argument that they did not know the goods were "non-conforming" on delivery is irrelevant because "[a] cause of action [under UCC 2] accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." RCW 62A.2-725(2). *See also Giraud v. Quincy Farm and Chem.*, 102 Wn. App. 443, 451, 6 P.3d 104 (Div. III 2000) ("Significantly, the warranty statute of limitations [under UCC 2] normally commences to run when the product is purchased, even though the buyer does not know that the product is defective.").

Plaintiffs do not dispute that the four-year statute elapsed from the date the goods were delivered. Instead, they seek to argue that MiTek fraudulently concealed defects in the trusses from them

to toll the statute of limitations. (Plaintiffs' Opening Brief at 28-29). This argument is made without any evidence, let alone sufficient evidence to meet the heightened evidentiary standard required for a fraud claim. Plaintiffs were required to present evidence from which "a rational trier of fact could find that the nonmoving party supported his or her claim with clear, cogent, and convincing evidence." *Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P.3d 807 (2008). They did not do so.

To prove fraudulent concealment, Plaintiffs must prove by clear, cogent, and convincing evidence that 1) they were "ignorant of the defect", and 2) MiTek "engaged in some conduct of an affirmative nature designed to prevent the [Schillings] from becoming aware of the defect." *Giraud,* 102 Wn. App. at 452; *Steineke v. Russi,* 145 Wn. App. 544, 190 P.3d 60 (2008)) (citing *Hughes v. Stusser,* 68 Wn.2d 707, 415 P.2d 89 (1966))). Plaintiffs did not present evidence of either element.

First, Plaintiffs cannot claim that they were ignorant of the defect when Artisan expected a 15 psf TCDL, knew to check the TCDL, but failed to do so. (CP 3119). The truss designs clearly identified a TCDL of 12 psf when the truss designs were delivered. (CP 716). Thus, Artisan and the Schillings were on notice upon

delivery that the truss designs did not meet their 15 psf expectation and should have inquired further. Plaintiffs also had notice of the alleged defect when they hired Bardell to evaluate the truss designs and obtained a report identifying his concerns with the trusses in April 2011. (CP 76-80, 143). Possession of the Bardell report, before interacting with MiTek, prohibits the Schillings from asserting they were "ignorant of the defect" when Ray Yu made statements in May 2011. (CP 76-80, 143).

Second, Plaintiffs fail to identify any false or misleading statement made by Ray Yu when he provided his opinions in May 2011. (CP 125). The evidence demonstrates Mr. Yu merely offered his engineering opinions and offered to work with Bardell to identify a solution. (CP 143, 3160). The Schillings offer no evidence that Mr. Yu's statements were false, or that Mr. Yu believed his statements to be false when he made them.

Plaintiffs cannot credibly argue that MiTek concealed their business practices when MiTek includes prominent statements on the front of their designs confirming that the designs were based on parameters received from ProBuild. (CP 715-716). This fact has never been concealed and is a nationwide industry practice that

their own expert uses when engineering trusses. (CP 1654-1655, 1664-1665).

The four-year statute of limitation prohibits all breach of warranty claims against MiTek.

3. MiTek did not expressly warrant any of the trusses.

The statutory language of Washington's UCC 2 states that an express warranty under the UCC can only be "made by the **seller** to the **buyer**." RCW 62A.2-313 (bold added). A seller is defined as "a person who sells or contracts to sell goods," and a buyer is defined as "a person who buys or contracts to buy goods." RCW 62A.2-103. MiTek cannot be a "seller" in the truss transaction because its scope of work was limited to providing engineering services to ProBuild, not the sale of goods (the trusses). The only seller regarding the trusses was ProBuild.

Second, pursuant to UCC 2-313, an express warranty under the UCC is created by an "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." RCW 62A.2-313 (emphasis added). MiTek did not make any affirmations of fact to the Plaintiffs, therefore, it made no express warranties.

Third, MiTek specified on the truss designs that they were not intended to be installed in any particular building unless the

building designer or engineer of record reviewed and approved the loading and other specifications identified on the truss designs first. (CP 715-716). This type of limitation is allowed by RCW 62A.2-316.

MiTek's agreement with ProBuild was limited to preparing truss component designs to ProBuild's specification. MiTek never agreed to warrant the designs to the expectation of a third party. Therefore, no such warranty was ever offered by MiTek. Plaintiffs' belief that they had a warranty is irrelevant because any such belief would be limited to the parties involved in that agreement (the Schillings, Artisan, and ProBuild), not MiTek.

It is important to note that ProBuild manufactured most, if not all, of the trusses before MiTek provided its engineering services. (CP 2962-2963). Thus, MiTek's work could not have caused or contributed to any resulting damage to the Schilling residence.

4. Implied warranties under the UCC require a voluntary interaction between the parties.

A knowing and voluntary interaction between the parties is an essential element for an implied warranty under the UCC. *Urban Dev., Inc. v. Evergreen Bldg. Prods., LLC*, 114 Wn. App. 639, 648, 59 P.3d 112, 117 (2002), aff'd sub nom. *Fortune View Condo. Ass'n v. Fortune Star Dev. Co.*, 151 Wn. 2d 534, 90 P.3d 1062 (2004).

There were no interactions between MiTek and the Schillings until four years after the trusses were installed. (CP 130,

143). Despite this admission, Plaintiffs still seek to argue that they received an implied warranty because the truss designs contained the stamp of a MiTek engineer. (Plaintiffs' Opening Brief at 42). That argument is nonsensical because the stamp alone is meaningless unless Plaintiffs also review the language on the designs confirming what the engineer is certifying. In an effort to avoid the impact of that language, Plaintiffs rely on their purported contract with ProBuild. This misguided belief ignores Washington law requiring Plaintiffs to demonstrate affirmative interactions with MiTek before receiving an implied warranty:

> By contrast, Urban Development had no interactions with either Evergreen or Dryvit, and Dryvit did not design the siding system specifically for Urban Development's requirements. There is thus nothing to suggest Urban Development was an intended beneficiary of implied warranties made by Dryvit or Evergreen to Wall Finishes.

Id. at 648.

Implied warranties are more closely guarded than express warranties. *Tex Enterprises, Inc. v. Brockway Standard, Inc.*, 149 Wn.2d 204, 212, 66 P.3d 625 (2003). The *Tex. Enterprises* court further confirmed that "the plain language of both RCW 62A.2-314 and -315 requires that implied warranties only arise out of contractual relationships." *Id.* at 211. It is undisputed that MiTek

and the Schillings had no contractual relationship and did not interact until four years after the trusses were installed. It is also undisputed that MiTek did not breach its agreement with ProBuild. (CP 3491). There could be no implied warranties here. Plaintiffs' claim for breach of implied warranties was properly dismissed.

D. The trial court properly dismissed the Schillings' remaining claims against MiTek based on the statute of limitations.

The Schillings' Consumer Protection Act ("CPA") claim was also barred by the four-year statute of limitations contained in RCW 19.86.120. Under Washington law, a CPA cause of action accrues when the claimant knew, or through the use of due diligence, should have known of their claim. *Mayer v. Sto Indus., Inc.*, 123 Wn. App. 443, 463, 98 P.3d 116, *rev'd in part on other grounds by* 156 Wn.2d 677 (2004).

It is undisputed that MiTek completed its engineering services on June 1, 2007. (CP 715). The Schillings admit they received the truss designs from ProBuild when they received the actual trusses on or about June 6, 2007. They then waited until February 16, 2012, to file their lawsuit. (CP 3, 2663). Therefore, the four-year statute of limitations elapsed, unless the Schillings can

show that they could not have discovered the defect earlier to toll the statute of limitations:

> The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action. The action accrues when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action. Were the rule otherwise, the discovery rule would postpone accrual in every case until the plaintiff consults an attorney.

Allen v. State, 118 Wn.2d 753, 758, 826 P.2d 200 (1992) (citing *Reichelt*, 107 Wn.2d at 769, 733 P.2d 530; *Gevaart*, 111 Wn.2d at 502, 760 P.2d 348).

The Schillings had numerous opportunities to discover that the trusses were parameter-based designs that were designed to ProBuild's specifications. First, the coversheet stated that the designs were based on specifications received from ProBuild. (CP 715). Second, the coversheet noted that the "suitability and use of [the truss] for any particular building is the responsibility of the building designer." *Id.* Third, each truss design had a "warning" at the bottom noting that the parameters needed to be reviewed and approved by the building designer before incorporation into any particular building. (CP 2068-2137). Fourth, the Schillings' co-plaintiff and building contractor, Artisan, admitted it believed the trusses should have had a 15 psf TCDL but failed to raise any

questions when the trusses clearly stated they were designed with a 12 psf TCDL. (CP 3119). Therefore, Artisan admits it knew in 2007 that the trusses should have been loaded for a 15 psf TCDL. Artisan simply did not care to check the design documents. These undisputed facts prohibit Plaintiffs from establishing that they used any diligence to discover information MiTek allegedly withheld from them. *Giraud*, 102 Wn. App. at 455. Plaintiffs knew, or had access to, the facts underlying the essential elements of their claims. Their failure to speak with an attorney to evaluate these claims does not toll the statute of limitations. See *Green v. APC*, 136 Wn.2d 87, 96, 960 P.2d 912 (1998).

E. MiTek's conduct did not violate Washington's Consumer Protection Act.

The five elements of a consumer protection act claim are well known and are (1) an unfair or deceptive trade or practice, (2) occurring in trade or commerce, (3) public interest impact, (4) injury to the plaintiff's property, and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986). Plaintiffs' CPA claim is premised on the erroneous argument that MiTek violated RCW 18.43 *et. seq.* and that the violation allows Plaintiffs to maintain a CPA claim. (CP 1018). MiTek incorporates by reference its arguments contained in section V B above addressing how MiTek complied with the statute.

MiTek further notes that any alleged violations of RCW 18.43 *et. seq.* or the associated engineering guidelines contained in the Washington Administrative Code are irrelevant because Plaintiffs are not MiTek's clients or employers, therefore, they are not within the class of individuals who can pursue affirmative relief based on statutory violations. *Burg*, 110 Wn. App. at 806-07. MiTek fully disclosed its conduct and actions on the front of the truss design package, complied with national industry practices, and Plaintiffs' own engineer confirms MiTek's work was an acceptable practice. (CP 591, 715, 1652-1656). MiTek's conduct was not deceptive.

1. There is no per se violation of the CPA.

A per se unfair trade violation only occurs when a defendant violates a statute that the legislative body has declared "to constitute an unfair or deceptive act in trade or commerce." *Hangman*, 105 Wn.2d at 786. Our Legislature has not included this language in Chapter RCW 18.43, and Plaintiffs cannot cite this statute for a per se violation. *See* RCW 18.43.010; *see also Hangman*, 105 Wn.2d at 787 (acknowledging that "the Legislature specifically defines the exact relationship between a statute and the CPA[.]").

Plaintiffs cannot rely on the per se violation test in *Magney* because it is outdated and inapplicable. In *Magney*, the court

considered the per se violation test separate from the current, *Hangman* unfair-or-deceptive-act test and focused on whether the action was illegal. *Magney v. Lincoln Mut. Sav. Bank*, 34 Wn. App. 45, 56, 659 P.2d 537 (1983) (citing *State v. Reader's Digest Ass'n*, 81 Wn.2d 259, 276, 501 P.2d 290 (1972) for per se violations). Since then, our Supreme Court has distinguished *Reader's Digest* and stated that "it has become clear that the Legislature, not this court, is the appropriate body to establish that interaction [between certain "illegal" conduct and the CPA] by declaring a statutory violation to be a per se unfair trade practice." *Hangman*, 105 Wn.2d at 786-87.

Even looking at the four-factor test proffered by the Schillings in their underlying motion for summary judgment, they failed to establish (1) that the engineering statute was violated, (2) that the violation of the statute caused Plaintiffs damage, or (3) that the plaintiffs were within the class of people the statute sought to protect. *Magney*, 34 Wn. App. at 57. As explained above, MiTek did not violate the engineering statute.

The Schillings failed to present any evidence that they were damaged as a result of the alleged unfair act of preparing parameter-based truss designs. On appeal, that evidence is still

lacking. The trusses were built before MiTek performed its engineering services. (CP 2962-2963). Therefore, MiTek's work could not have caused or contributed to Plaintiffs' alleged damages because the subject trusses were manufactured before MiTek performed any engineering services.

The Schillings also failed to present any evidence that they are within the class of people the engineering statute was meant to protect. RCW 18.43.010 begins with the broad pronouncement that the statute is intended "to safeguard life, health, and property, and to promote the public welfare." Our appellate courts have already confirmed that the pronouncements of public welfare in RCW 18.43.070 do not create a duty to any identifiable group:

> The broad pronouncements that engineers owe a general duty to the public welfare alone, do[es] not establish that engineers owe a duty to any identifiable group or individual.

Burg, 110 Wn. App. at 807 (citing the same engineering provision that the Schillings rely upon here).

The broad pronouncement contained in RCW 18.43.010 was intended to ensure that the general public can rely on the notion that the engineer stamping a piece of work is qualified. *Id.* Similar language was interpreted in the *Jackson v. City of Seattle* case where the court of appeals noted that:

> The difficulty for [plaintiffs] is the lack of language expressing a purpose to protect a particular class of persons. Building codes and other similar municipal codes do not typically serve as a basis for tort liability because they are enacted merely for purposes of public safety or for the general welfare. *Halvorson v. Dahl*, 89 Wash.2d 673, 677, 574 P.2d 1190 (1978).

Jackson v. City of Seattle, 158 Wn. App. 647, 654, 244 P.3d 425 (2010). Thus, the *Jackson* court found that the building codes did not provide an independent cause of action against the contractor for failing to comply with those codes. *Id.* Here, the engineering statute contains the broad pronouncement that *Burg* and *Jackson* found failed to create a duty to an identifiable group. The trial court should have denied Plaintiffs' motion, granted summary judgment in favor of MiTek, and dismissed the Schillings' CPA claim.

2. Engineer statutes do not create CPA or negligence per se liability.

After a nationwide search, the only case that could be found addressing a similar engineering statute in a CPA-like setting is the Missouri case of *Business Men's Assur. Co. of America v. Graham*, 891 S.W.2d 438 (Mo. Ct. App. 1994) where the court found no case law to support the novel claim that the engineer licensing statute in Missouri (counterpart to RCW 18.43.070) could provide the basis for a negligence per se action:

> Chapter 327 is a licensing statute. BMA cites no cases in which a professional licensing statute forms the basis for a negligence per se action. The overall purpose of Chapter 327 is the protection of members

> of the public who contract for the service of an architect, engineer or surveyor. *Gipson*, 820 S.W.2d at 597. Chapter 327 has its own disciplinary provisions for enforcing that purpose which include censure and license revocation...
>
> The nature of Chapter 327 indicates that § 327.411 was not designed to provide a cause of action for negligence per se but, instead, to insure that the professional persons it regulates display and maintain a certain standard of competence within their profession. The trial court erred in submitting a cause of action for negligence per se to the jury on the basis of Skidmore's alleged violation of § 327.411. BMA did not prove the third requirement of negligence per se, which is that the injury complained of must be of the nature that the statute is designed to prevent.

Graham, 891 S.W.2d at 456.

The Missouri negligence per se test consists of the same elements as Washington's CPA per se violation test, which the Schillings previously asserted. (CP 1017). These factors include: (1) violation of a statute, (2) that the injured party is within the class of people the statute is meant to protect, (3) the injury is of a nature the statute was meant to protect, and (4) violation of the statute is the proximate cause of the injury. *Graham*, 891 S.W.2d at 455.

Chapter RCW 18.43 is a licensing statute, and there is no evidence that a professional licensing statute can be the basis for a per se CPA violation. The overall purpose of Chapter RCW 18.43 is the protection of members of the public from the work of unregistered or unlicensed engineers. (CP 1224). Alleged violations of Chapter RCW 18.43 are adjudicated by the Board of Registration

for Professional Engineers and Land Surveyors ("the Board"), to whom the Legislature has given "sole and final authority" to enforce the statute. RCW 18.43.105 - .120. This Court should reject Plaintiffs' novel expansion of Washington's engineering licensing laws.

Not only should the trial court have denied the Schillings' motion regarding the CPA claim, but it should have granted summary judgment in favor of MiTek on this issue. See *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992) (Ordering summary judgment in favor of the nonmoving party.).

F. The trial court erred in denying MiTek's initial motion for summary judgment on breach of contract.

This issue is admittedly moot in light of the Plaintiffs' failure to appeal the dismissal of the third party beneficiary claim.

G. The trial court erred in denying MiTek's initial motion for summary judgment on the breach of warranty claims.

The facts were not in dispute when the trial court denied MiTek's motion for summary judgment on June 27, 2014. At that time the actions of MiTek had been fully investigated and all MiTek witnesses deposed. The trial court should have granted MiTek's motion and dismissed the Schillings' breach of warranty claims based on the arguments outlined in Section C above which are incorporated by reference. Based on those arguments, the trial court should have granted MiTek's motion on summary judgment

and found that MiTek did not breach any express or implied warranties to the Schillings based on Washington's UCC 2.

VI. CONCLUSION

Plaintiffs' lawsuit is misguided. They have intentionally ignored the roles of the general contractor, building designer, and their own structural engineer in an attempt to cobble together a claim against MiTek. The undisputed facts establish that MiTek was asked by ProBuild to provide certain parameter based truss designs engineered to ProBuild's specifications. The underlying ruling that the oral agreement between ProBuild and MiTek was not breached has not been appealed. Because MiTek performed its work consistently with the terms of its agreement with its only client, ProBuild, this Court must reverse the trial court's ruling that MiTek breached the engineering statutes and affirm the trial court's rulings dismissing all claims against MiTek as a matter of law.

Dated this 27th day of February, 2017.

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

TERRY SCHILLING and JULIE SCHILLING, husband and wife, and ARTISAN, INC., a Washington corporation, Appellants, v. PROBUILD COMPANY, LLC, a Washington limited liability company d/b/a LUMBERMANS, and MITEK INDUSTRIES, INC., a foreign corporation, Respondents/Cross-Appellants.	CASE NO. 344355 DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below, a copy of the

following documents: (1) MiTek's Respondent/Cross-Appellant's Brief, directed to the following individuals:

Via Email with Recipient's Approval and U. S. Mail
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Dated at Seattle, Washington, this 27th day of February, 2017.

Ana I. Todakonzie