

FILED  
FEBRUARY 27, 2017  
Court of Appeals  
Division III  
State of Washington

Court Appeals No. 344355

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

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

Appellant/Plaintiffs

vs.

PROBUILD COMPANY, LLC, a foreign limited liability  
company

Respondent-Cross Appellant/Defendant; and

MITEK INDUSTRIES, INC., a foreign corporation,

Respondent-Cross Appellant/Defendant

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RESPONSE BRIEF OF RESPONDENT-CROSS APPELLANT  
PROBUILD COMPANY, LLC

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ALAN J. WERTJES, WBSA #29994  
ATTORNEY AT LAW  
1800 COOPER POINT ROAD SW, BLDG. 3  
OLYMPIA, WA 98502  
360-570-7488  
ATTORNEY FOR PROBUILD COMPANY, LLC

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## A. ASSIGNMENTS OF ERROR

### Assignments of Error

1. The trial court erred by granting Appellants' motion for partial summary judgment against Respondent ProBuild Company, LLC on Appellants' claims under the Washington Consumer Protection Act.

2. The trial court erred by granting, in part, Appellants' motion for partial summary judgment against Respondent ProBuild Company, LLC on Appellants' claim that Respondent ProBuild Company, LLC breached an implied warranty of merchantability.

### Issues Pertaining to Assignments of Error

1. Whether the trial court erred by concluding that Respondent ProBuild Company, LLC had committed a "deceptive act" under the Washington Consumer Protection Act.

2. Whether the trial court erred by concluding that the alleged deceptive act of Respondent ProBuild Company, LLC had a public interest impact.

3. Whether the trial court erred by concluding that the alleged deceptive act of Respondent ProBuild Company, LLC had caused an injury to Appellants.

4. Whether the trial court erred by concluding that the alleged deceptive act of Respondent ProBuild Company, LLC had, in fact, injured Appellants?

5. Whether the trial court erred by entering an order granting partial summary judgment, over the objection of Respondent ProBuild Company, LLC, that was based on arguments and issues that were raised for the first time in Appellants' reply brief in support of Appellants' motion for partial summary judgment.

6. Whether the trial court erred by concluding that Respondent ProBuild Company, LLC breached an implied warranty of merchantability arising in its agreement to sell trusses.

## INTRODUCTION

Appellants' appeal seeks to void the consequences of their waiting more than four and one half years to bring claims which accrued in June, 2007. Although the technical details of truss manufacturing can be complex and the requirements of engineering statutes can be unfamiliar, the facts underlying the lower court's decision to dismiss the claims in this matter are simple and undisputed. In short, Appellants possessed all the information they needed in June of 2007 to bring their claims. They waited, however, until February 2012 - more than four and one half years to initiate this action, which was far beyond the applicable four year limitations periods. Their attempt to shift the blame for their delay is unfounded and should be rejected.

Respondent/Cross-Appellant ProBuild Company, LLC also seeks the review and reversal of two orders of the lower court which granted motions for partial summary judgment brought by Appellants. Those orders were entered erroneously given the presence of several genuine issues of material fact.

## STATEMENT OF THE CASE

### Factual Background

Defendant ProBuild Company, LLC<sup>1</sup> ("ProBuild") manufactured

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ProBuild is the successor in interest to Lumbermens, Inc., the company that contracted with the Schillings to provide trusses for their project.

and sold trusses to Appellants Terry and Julie Schilling for a residence they constructed at 26 Eagle Drive in Union Gap, Washington. (CP 2771.) The Schillings contracted with Appellant Artisan, Inc. to oversee the construction of their new home, but they purchased materials for the residence directly from various suppliers. (CP 2783-2787.) The materials purchased by the Schillings included trusses from ProBuild. (CP 914.)

The Schillings relied exclusively on their general contractor, Artisan, and the designer of their home, Altius Construction Services, Inc. (“Altius”) to acquire the trusses. (CP 913-914.) The Schillings had no direct communication with ProBuild. (CP 2789-90; 2792.) Rather, James Sevigny, who was, at the time, the president of Artisan, and his son Josh Sevigny, who was an employee, discussed the project with ProBuild. (CP 914.) Josh Sevigny was also the president and sole owner of Altius. (CP 1147.) James Sevigny has worked as a home builder for over 30 years, and has built between 85 and 100 large homes. (CP 913.)

The Schillings and Artisan were parties to an “Owner and Contractor Agreement.” (CP 2783.) In that Agreement, Artisan promised, as the general contractor, that the construction of the Schilling residence would be “performed in conformance with the plans and specifications which are considered a part of this Agreement and which have been provided by the Owner to the Contractor.” (CP 2785.) Artisan also promised to provide all of the “supervision” required to build the home.

(CP 1053.) Among the duties of Artisan was the obligation to build a home for the Schillings that was free from defects. (CP 1053.)<sup>2</sup>

Mr. Sevigny initiated the contact with ProBuild regarding the supplying of trusses for the Schilling residence. A truss is part of the roof system of a structure. It is a structural frame typically consisting of a series of triangles lying in a single plane. A truss supports a structure's roof system, which includes roof sheathing and the selected roofing materials. Trusses are designed to support certain vertical weights or "loads". (CP 1521-1530.)

Neither Artisan nor Altius gave ProBuild any written specifications for the trusses. Artisan did provide a copy of the house plans, but those plans did not contain any specific numerical requirements regarding what weights or "loads" the trusses would be expected to bear. The plans did indicate that the roofing material was going to be tile, but did not specify what type, style or weight of tile would be used. (CP 1054-1055.) Roof tile is supplied in a wide range of weights and styles. (CP 1038.)

Prior to manufacturing the trusses for the Schilling residence, ProBuild obtained engineered truss drawings from MiTek Industries, Inc. As is done throughout the truss industry, ProBuild provided MiTek the

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For whether reason, the Schillings never pursued a claim against their general contractor or their house designer for the problems associated with their home.

parameters for the trusses. Those parameters included the basic dimensions of the trusses, and the loads – or weights – that the trusses were expected to bear. Based on the design parameters provided by ProBuild, MiTek performed the necessary engineering, generated the truss drawings and transmitted those drawings to ProBuild. (CP 1148-1049.) A copy of the engineered truss drawings are part of the record in various locations. (CP 1073-1142)

After receiving the engineered truss drawings, ProBuild manufactured the trusses according to the specifications set forth in the truss drawings. (CP 1149; 1036-39.) There has never been a dispute in this case as to whether the trusses did, in fact, conform to the specifications set forth in the truss drawings.

The trusses were delivered to the Schilling residence in early June, 2007. (CP 1069.) A copy of the engineered truss drawings was delivered to the Schilling residence along with the trusses. (CP 1069.) The truss drawings contain a drawing of every style of truss used on the Schilling residence. (CP 1073-1142.) The drawings depict the truss design configurations, dimensions and other information related to the characteristics of the trusses. (CP 1073-1142.) The drawings also set forth the specific loads the trusses were designed to carry. (CP 1073-1142.)

The “load” that is relevant in this case is the load which indicates

the capacity of the trusses to support the weight of the roof system. That specific loading is connoted next to the acronym "TCDL" which means "Top Chord Dead Load." (CP 2773.) This loading takes into account the weight of the roofing materials that is anticipated will be used on the structure. (CP 2733.)

Each truss drawing of the Schilling trusses contains the TCDL of the truss depicted. Every truss drawing therefore informs the reader that a top chord dead load of "12" was used in designing and manufacturing that truss. In fact, TCDL of "12" is set forth 58 times in the package of truss drawings. (CP 1073-1142.)

Mr. Sevigny, who admitted that he picked up the truss drawings when they were delivered with the trusses, testified that he was familiar with and understood the term "TCDL" as it is used on truss designs. In fact, he admitted in his deposition that the TCDL was something he looked for. He also testified that he understood that a TCDL of 15 was necessary for the heavy tile he planned to use on the Schilling residence:

Question: So you never looked at the – looked at the numbers when you were reviewing these bids?

Mr. Sevigny: You're talking about TCDL and TCDL?

Question: Correct.

Mr. Sevigny: I would have looked at the TCDL.

Question: And why is that?

Mr. Sevigny: Typically a tile roof has 15 pounds.

Question: And that's something that you were familiar with back in 2007?

Mr. Sevigny: Yes.

(CP 3111)

In addition to the technical details of the trusses, the truss drawings also plainly describe the engineering work that was performed by MiTek. The first page of the drawings consists of a cover page from MiTek which describes how the engineering was performed:

**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.**

(CP 1073)

Also included on the cover page, is the engineers's stamp and signature of Palmer Tingey of MiTek. Directly under his stamp is the following statement:

**The seal on these drawings indicate acceptance of professional engineering 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.**

(CP 1073.)

In addition, on the bottom of the following pages – each of which contains the drawing of a single truss – is printed this warning:

**WARNING - Verify design parameters and READ NOTES ON THIS AND INCLUDED MITEK REFERENCE PAGE MMII-7473 BEFORE USE**

**Design valid for use only with MiTek connectors. This design is based only upon parameters shown, and is for**

**an individual building component. Applicability of design parameters and proper incorporation of component is responsibility of building designer--not truss designer. Bracing shown is for lateral support of individual web members only. Additional temporary bracing to insure stability during construction is the responsibility of the erector. Additional permanent bracing of the overall structure is the responsibility of the building designer. For general guidance regarding fabrication, quality control, storage, delivery, erection and bracing, consult ANSI/TP11 Quality Criteria, DSB-89 and BCS11 Building Component Safety Information available from Truss Plate Institute, 583 D'Onofrio Drive, Madison, WI 53719.**

(CP 1074-1141.)

The general contractor, Mr. Sevigny, picked up the truss drawings. However, he did not review any of the information contained on the drawings. (CP 1069-1071.) He did not review the TCDL, even though he knew what that number represented, and even though he knew the relationship between the TCDL and the type of tile that could be used on the structure. He also didn't read any of the information concerning the engineering work that was performed. Nonetheless, Mr. Sevigny presented the truss drawings to the building department to obtain required approvals for the project. (CP 1071). Mr. Sevigny also had the trusses installed on the Schilling project without asking ProBuild any questions about the loading of the trusses.

#### Procedural History

Appellants filed their complaint on February 16, 2012, over four

and one-half years after the trusses and truss drawings were delivered to the Schilling residence. (CP 1). This initial complaint includes a claim against ProBuild for “Contract/Warranty Breach” (CP 8-9) and a claim arising under the “Consumer Protection Act” (CP 10). The contract/warranty claim is based on the alleged failure of ProBuild to provide trusses that met “agreed contract design provisions” and to provide trusses that met standards of the “local building codes” (CP 7-8). Appellants’ Consumer Protection Act claim echoes these allegations, contending that ProBuild “manufactured trusses” that did not “meet contract specifications” or meet “local county code requirements” (CP 10.)

Contrary to Appellants’ representation in their Initial Brief (herein after “IB”) (IB at 10), Appellants never amended their complaint to add claims or change their claims against ProBuild. In fact, in their motion to amend the complaint, Plaintiffs stated:

The Amended Complaint asserts the same claims against the Defendants, but adds a claim for Consumer Protection Act Breach against Defendant MiTek Industries, Inc. (MiTek)

(CP 218)

Appellants went on to state:

Such amendment because the Amended Complaint does not substantially change the allegations found in the original Complaint, but instead only adds a Consumer Protection Act claim, which post-suit discovery facts now support.

(CP 218)

The claims against ProBuild that appear in Appellants' original Complaint are identical to the claims set forth in the Amended Complaint. (Compare CP 1-11 with CP 425-435.) Appellants never presented in any pleading any new claims against ProBuild that were discovered in the course of the litigation.

Appellants filed their first motion for summary judgment in July, 2014, arguing that they were entitled to judgment as a matter of law on their CPA claims. (CP 985) The assertion against ProBuild in this first motion focused on Appellants' claim that MiTek's engineering work done on the trusses did not comply with applicable engineering laws. (CP 1008 - 1010)

Appellants took an entirely different approach to their CPA claim against ProBuild in their reply brief. (CP 1533-1556) In it, Appellants argued that ProBuild had violated the CPA claim by supplying trusses that had a different TCDL than what Appellants believed was required by the contract between ProBuild and the Schillings. In that reply brief, Appellants asserted:

It is therefore undisputed, that custom built trusses meeting a 15-lb. top load dead load specifications, were what the Plaintiffs Schilling contracted to purchase. (Emphasis in original.)

(CP 1538.)

Appellants argued that this contract term resulted from direct contact with

a ProBuild salesman, George Brooks. According to Appellants:

the Schillings' agents instead discussed with Brooks, the type of tile roofing the Schillings wanted the trusses to support and based upon that information, a 15 lb dead load minimum specification was agreed upon.

(CP 1538.)

Appellants then asserted that ProBuild violated the CPA by changing the TCDL from 15 to 12 without "telling" Appellants of this change. As the Reply Brief went on to explain:

someone approved changing the 15 lb. tile dead load specification for the Schilling home down to the final 12 lb dead load specification, without getting anyone's permission.

(CP 1538.)

Appellants continued:

It is an admitted and undisputed fact that without subsequent notice to Schilling, Artisan or even to Brooks, the agreed "tile dead load specification" was changed, so that the constructed trusses currently have only a 12 lb dead load capacity."

(CP 1551)

Appellants then asserted that this "change" in the loading caused damages to Appellants that were recoverable under the CPA, claiming:

**6. There is undisputed evidence that the reduced 12 lb dead load parameters have damaged the Plaintiffs.**

(CP 1551)

The "injury" for which Appellants were entitled to be compensated

was described as follows:

Accordingly, to now install one of the range of tile roofs the Schillings or any subsequent purchaser may reasonably want to install, paying to repair or replace a number of trusses will be required.

(CP 1551)

Therefore, in Appellants' own words, their CPA consists of ProBuild "changing" the agreed upon TCDL of 15 to a TCDL of 12, thereby causing the Schillings to have a home that was not capable of having the type of roof tile they wanted. The allegedly undisclosed TCDL of 12 had caused this injury.

The trial court granted Appellants' motion for partial summary judgment against ProBuild based on the arguments contained in this reply brief. (CP 1895) In an opinion letter, the Court agreed with Appellants' position that the "change" in the TCDL caused an injury to the Schillings. Appendix A-10 - A-12.

Appellants later filed a second motion for partial summary judgment against ProBuild that was based on alleged breaches of warranty. (CP 2154 - 2165). Appellants sought the entry of judgment against ProBuild based on both breach of express warranties and breach of the implied warranty of merchantability. The Court granted this motion with respect to the implied warranty claim but declined to enter judgment on the alleged express warranty. (CP 2605)

Later, ProBuild and MiTek filed separate motions for summary judgment seeking dismissal of Appellants' claims based on the applicable statutes of limitations. (CP 2771 and CPA 2631.) The trial court granted both motions and ordered the case dismissed. At issue in that motion were two statutes of limitation: one applicable to Washington CPA claims, and another one applicable breach of warranty claims.

I. The Trial Court Did Not Err By Dismissing Plaintiff's Consumer Protection Act Claims against ProBuild Based on the Lapsing of the Statute of Limitations.

Summary judgment is appropriate when the pleadings and evidence show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); Evergreen Moneysource Mortgage Co. v. Shannon, 167 Wn. App. 242, 250 (Div. III 2012).

Appellants' Complaint, their first motion for summary judgment, and the associated reply brief, explained Appellants' CPA claims against ProBuild. One CPA claim was grounded on Appellants' argument that without "telling" Appellants, ProBuild provided trusses that were manufactured with a TCDL of 12 instead of the "agreed upon" TCDL of 15. The second CPA claim is based on Appellants' contention that the engineering work performed on the trusses sold by ProBuild was legally deficient.

The facts relied on by the trial court to conclude whether that

statute of limitation barred both of Appellants' CPA claims are concise, straightforward and, most importantly, undisputed. The trusses for the Schilling residence were delivered in June, 2007. (CP 1069) Engineered truss drawings were delivered along with the trusses. (CP 1069) These drawings were picked up by James Sevigny who was the Schillings' general contractor and agent. (CP 1069) At that moment, Mr. Sevigny literally had in his hands all the information the Appellants needed to assert the Consumer Protection Act claims they raised in this action.

A. The Statute of Limitations for Appellants' Claim under the Washington Consumer Protection Act Is Four Years from the date Appellants knew or reasonably should have known of the facts Supporting the Claim

The statute of limitations for a claim under the Washington Consumer Protection Act ("CPA") is four years. RCW 19.86.120. A claim under the CPA is "forever barred" unless commenced "within four years after the cause of action accrues." *Id.* An action accrues, for purposes of the CPA, when a claimant knew or through due diligence should have known of the claim. Mayer v. STO Industries, Inc., 123 Wn App. 443, 463 (2004)(reversed in part on other grounds at 156 Wn.2d 677 (2006).

B. When the Trusses were Delivered in June, 2007, Appellants Either Knew, or Through Due Diligence Should Have Known, that the Alleged Contractual TCDL of 15 Had Been "Changed" to a TCDL of 12

One of Appellants' CPA claims is that ProBuild changed the

TCDL for the trusses from 15 to 12 without disclosing to Appellants that this change had been made. Even if such an unauthorized change occurred, the “change” in the TCDL from 15 to 12 was obvious when the engineered truss drawings were delivered to the Schilling residence in June of 2007. It is undisputed that the truss drawings disclose that a TCDL was, in fact, used for every single truss that the Schillings received.

In their Initial Brief, Appellants contend that they only actually learned of the “change” during a deposition in March, 2014. (IB at 10.) Even if this is true, however, the question of when the Appellants had actual knowledge of the TCDL is not dispositive for purposes of determining when the statute of limitations begins to run. Rather, the inquiry is whether Appellants, through the exercise of due diligence, “should have known” that the TCDL had been changed from 15 to 12. Mayer v. STO Industries, Inc., 123 Wn App. at 463.

In this case, the answer to that question is unquestionably yes. To begin with, Appellants have asserted in this case that they had “agreed” that the TCDL should have been 15. And, even if there wasn’t such an agreement on the use of a TCDL of 15, Mr. Sevigny, the general contractor, testified he believed a TCDL of 15 was necessary for the type of tile he wanted to use on the Schilling residence. Thus, Appellants knew and expected, that the TCDL for the trusses would be 15.

Given these expectations on the part of Appellants, the disclosure

in the trusses drawings that a TCDL of 12 was in fact used should have immediately informed Appellants that a change had occurred. The truss drawings provided to the Schillings with the trusses clearly, accurately and repeatedly disclose on almost every page that the trusses had a TCDL of 12. Indeed, there are 58 pages in the truss drawing packet that show a TCDL of 12 was used. This loading was different than what Appellants contend was “agreed upon,” and different than Mr. Seigny allegedly needed for his choice of roof tile. The truss drawings revealed that the TCDL had “changed.” Therefore, in June, 2007, Appellants did not need any other information to know that the allegedly improper “change” had been made.

Furthermore, Mr. Seigny, who picked up the truss drawings when they were delivered, had the knowledge, expertise and experience to comprehend this purported change in the TCDL. He specifically admitted that he understood the term, he understood that a loading of 15 was needed, and routinely examined truss drawings to check what TCDL was used. (CP 3111) Significantly, and throughout this litigation, Mr. Seigny never retracted or specifically denied this testimony. Mr. Seigny was also an experienced general contractor, having constructed residences for over 30 years, and having built 85 - 100 large homes. (CP 913). Moreover, general contractors are under industry standards, responsible for making sure truss loadings meet a project requirements. (CP 1525-1526)

Upon receipt of the truss drawings, Mr. Sevigny made no effort to confirm that the trusses met Appellants' expectations. The contract between Mr. Sevigny's company, Artisan, Inc., and the Schillings, required Artisan to supervise the project. (CP 1053.) Mr. Sevigny testified that he believed that the contract required him to make sure there were not any defects in the house. (CP 1053.) Despite possessing the truss drawings, Mr. Sevigny did not review the loading information the drawings contained. Had he reviewed the TCDL assigned to the trusses, as he had done on other projects, he would have immediately realized that the TCDL had changed. Put another way, had Mr. Sevigny exercised "due diligence," he would have discovered the change in the TCDL.

These are all simple, undisputed facts. Mr. Sevigny knew that the TCDL should have been 15. Mr. Sevigny also clearly should have known that the TCDL used was 12. The alleged "change" from the expected loading to what was used, was plainly apparent in June of 2007. And this alleged "change" is what led to Appellants' injury. Therefore this CPA accrued in June of 2007, when the Schillings, through their agent general contractor, "should have known" of the change in truss loading. The Schillings waited more than four years after that time to file their claims. By doing so, they allowed their claims to become barred by the statute of limitations.

C. The Trial Court Also Properly Dismissed the CPA Claims Based on Improper Engineering Work Because the Statute of Limitations Period Had Lapsed

To the extent Appellants have asserted a CPA claim against ProBuild based on improper “parameter based engineering”, any such claim is similarly barred. The truss drawings plainly and obviously inform the recipient of those drawings that the drawings are based solely on parameters supplied by the truss manufacturer. Appellants are free to argue that such engineering is improper, but they knew the nature of the engineering work that was performed in June of 2007.

1. Appellants Contend ProBuild Violated the CPA by Supplying Trusses for which the Engineering Work Was Not Legally Performed

Appellants contend that ProBuild’s selling of trusses that were illegally “plan stamped” by a MiTek engineer is a separate violation of the CPA. Appellants have asserted that the MiTek’s engineers were legally obligated to review the Schilling house plans and verify that the trusses were suitable for that project. Appellants claim that MiTek illegally relied on design parameters supplied by ProBuild in creating the truss designs.

2. The Engineered Truss Drawings Accurately Describe the Scope Engineering Work MiTek Performed on the Trusses

The truss drawings delivered in June, 2007 accurately and completely, describe in detail the engineering work that was performed by MiTek. The first page of the drawings consists of a cover page from

MiTek which describes how the engineering was performed:

**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.**

(CP 1073)

Also included on the cover page is the engineer's stamp and signature of Palmer Tingey of MiTek. Directly under his stamp is the following statement:

**The seal on these drawings indicate acceptance of professional engineering 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.**

(CP 1073)

In addition, on the bottom of the following pages – each of which contains the drawing of a single truss – is printed this warning:

**WARNING - Verify design parameters and READ NOTES ON THIS AND INCLUDED MITEK REFERENCE PAGE MMII-7473 BEFORE USE**

**Design valid for use only with MiTek connectors. This design is based only upon parameters shown, and is for an individual building component. Applicability of design parameters and proper incorporation of component is responsibility of building designer--not truss designer. Bracing shown is for lateral support of individual web members only. Additional temporary bracing to insure stability during construction is the responsibility of the erector. Additional permanent bracing of the overall structure is the responsibility of the building designer. For general guidance regarding**

**fabrication, quality control, storage, delivery, erection and bracing, consult ANSI/TP11 Quality Criteria, DSB-89 and BCS11 Building Component Safety Information available from Truss Plate Institute, 583 D'Onofrio Drive, Madison, WI 53719.**

(CP 1074-1141)

This information clearly explains what MiTek did – prepare drawings based on information from ProBuild – and also explains that engineering is solely for the trusses. It is not, according to the plain language contained in the drawings, a representation that the trusses have the correct characteristics for the Schilling project.

It is an unfortunate – and very deceptive – habit of Appellants to inaccurately describe the language that appears on the truss drawings. Appellants repeatedly extract the phrase “under my direct supervision” out of the sentence in which it appears and then use it to completely mischaracterize what work MiTek performed. Appellants attempt to change the scope of what MiTek claims to have done beyond performing engineering work based only on parameters supplied by ProBuild.

3. The Trial Court Properly Recognized That the Truss Drawings Informed of the Engineering Work That Was Performed, and Having Received this Information, Appellants Allowed the Statute of Limitations to Lapse Without Filing a Claim

The truss drawings contained all the information the Appellants needed to know the nature and scope of the engineering work performed by MiTek on the trusses supplied to the Schillings. If Mr. Sevigny had

read the information the drawings contained he would have immediately known that the trusses were designed based on “parameters” supplied by someone else. He also would have immediately realized that MiTek was explicitly informing him that MiTek was not verifying that the truss designs were suitable for the Schilling residence. MiTek’s dependence on design information from ProBuild and MiTek’s disclaiming of responsibility for the appropriateness of the trusses for the Schilling project are the precise conduct Appellants contend violates the CPA.

As the trial court explained, had the Appellants “bothered to look up the Washington engineering statute they would have known about the violation.” (CP 3205). Instead, Appellants waited – even until after this litigation was commenced – to conduct that review. By the time Appellants apparently did so, the statute of limitations had lapsed.

D. The Appellants Did Not “Discover” or Plead any New CPA Claims against ProBuild after the Filing of Their Initial Complaint

In order to avoid the consequences of the four year statute of limitations, Appellants attempt to create the impression that they only recently “discovered” the CPA claims against ProBuild for which they are seeking recovery. They also contend they amended their complaint to add these newly discovered claims. (IB at 10). Both assertions are false. The pleaded CPA claim against ProBuild remains today exactly as it was when the initial complaint was filed. Compare CP 1-10 with CP 425-435. No

amendment to the complaint to include a new claim against ProBuild was ever requested or filed.

Appellants allege in their Initial Brief that they only recently discovered that a ProBuild salesman, George Brooks, had decided that a 15 TCDL was appropriate for the Schilling project, but that the trusses ultimately were designed and manufactured with an TCDL of 12 without disclosing that fact to Appellants. This description of events is not consistent with Appellants' previous characterization of facts underlying their claim. Appellants have previously contended that Appellants and ProBuild specifically "discussed" the design parameters for the trusses with Mr. Brooks and specifically "agreed" that the TCDL for the trusses should be 15. (CP 1538). Since, according to Appellants, the parties "agreed" the TCDL should be 15, this cannot be a "new" discovery by Appellants. At best, the assertions concerning Mr. Brooks' actions are merely an explanation of the CPA claim set forth in their initial pleading, namely, that ProBuild violated the CPA by producing trusses that deviated from the alleged contract specifications.

Furthermore, to the extent that Appellants did uncover a "new" claim during discovery, that new claim should be barred because they never included it in a pleading. Appellants cannot avoid the consequences of the trial court's dismissal of their action by now, on appeal, identifying a claim that was never set forth in a complaint. As this Court in Evergreen

Moneysource Mortgage Co. v. Shannon, 167 Wn App. 242, 256 (2012):

A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was the case all along.

To the extent Appellants uncovered a “new” claim against ProBuild during the course of discovery, they were obligated to assert it in a pleading. They may not simply raise it in the course of briefing to avoid a motion to dismiss the claims that were, in fact, pleaded.

Appellants are attempting to persuade this Court that the statute of limitations on their CPA claim should not begin to run until the time they “discovered” their new claims during the pendency of the litigation. However, Appellants never pleaded these alleged “new claims.” Had Appellants really uncovered a new claim for recovery against ProBuild under the CPA, they could have filed a motion to amend their complaint. They didn’t do so. Instead, they are trying to “finesse” the issue by recasting their claims as newly discovered in avoid the effect of the statute of limitations.

At this juncture, it is too late. Any new claim that was not made prior to entry of summary judgment, but which could have been made, is barred by the principle of res judicata. Yakima County v. Yakima County Enforcement Officers Guild, 157 Wn. App 304, 328 (Div III 2010)

II. The Trial Court Appropriately Dismissed Appellants' Breach of Warranty Claims Because the Appellants' Initiated their Legal Action more than Four Years after the Trusses were Delivered

Appellants also alleged in their Complaint that ProBuild breached express and implied warranties concerning the trusses. Appellants asserted that ProBuild made certain warranties concerning the trusses, including that the trusses would be "contract and code compliant" for the Schillings' home, and that the trusses would be accompanied by lawfully stamped truss drawings. (CP 1-10.)

A. Appellants' Warranty Claims Are Barred Because the Claims Were Not Timely Filed

Claims for breach of warranty must be brought within four years from the date "goods" are delivered. RCW 62A.2-725(1) provides:

An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

Unlike other claims, the accrual of a cause of action for breach of warranty is not dependent on a buyer's knowledge of the breach. RCW 62A.2-725(2) makes this clear:

A cause of action accrues when delivery occurs, regardless of the aggrieved party's lack of knowledge of the breach, or the parties' understanding of the claim.

Appellants commenced their legal action in February, 2012, more than four years after the trusses were delivered in June, 2007. The four

year limitation period applies to all types of warranties. Washington courts have consistently enforced the requirement that suits for warranty claims be commenced within four years from the date goods are delivered. Holbrook, Inc. v. Link-Belt Construction Equipment Company, 103 Wn.App. 279, 284 (2000). In Holbrook, the court confirmed that a cause of action for breach of warranty accrues at the time of delivery, without regard to Claimaint's lack of knowledge regarding the breach. Holbrook, 103 Wn.App. at 283. The certainty of this rule serves the important purpose of providing businesses with a "point of finality" regarding potential claims. Kittitas Reclamation District v. Spider Staging Corporation, 107 Wn. App. 468, 472-473 (2001).

Therefore, the trial court appropriately concluded that all of Appellants' warranty claims are barred under RCW 62A.2-725.

B. Appellants Have Not Offered Any Evidence that ProBuild "Fraudulently Concealed" Information Regarding the Trusses so as to Toll the Running of the Statute of Limitations

In order to establish fraudulent concealment, the Appellants must demonstrate both that they were ignorant of any failure of the trusses to conform to the alleged warranty, and that ProBuild engaged in conduct designed to prevent the Schillings from becoming aware of the problem. Giraud v. Quincy Farm & Chemical, 102 Wn. App. 443, 452 (2000). To meet this standard, the Schillings must demonstrate more than ProBuild

merely withheld information from them. They must demonstrate that they did not have knowledge of the alleged defect, and that they were “reasonably diligent” in their efforts to discover the information they claim was not provided. Id. at 455.

The Schillings cannot, as matter of law, meet these requirements. ProBuild did not “engage in conduct designed to prevent” the Schillings from becoming aware of the weight bearing capacity of the trusses. In fact, complete, accurate information concerning the capacity and characteristics of the trusses was contained in engineered truss drawings that were delivered to the Schilling residence along with the trusses. The Schillings’ agent and contractor, James Sevigny, literally held the information in his hands. He made no effort to review them.

The facts here are similar to those in Giraud. In that case, a potato farmer claimed that a supplier of herbicide fraudulently concealed information that resulted in the potato farmer not filing a breach of warranty claim against the supplier. The potato farmer complained that the supplier knew, but did not tell the farmer, that the herbicide should not have been used on his plants because the plants were too tall.

The Giraud court, however, rejected the farmer’s fraudulent concealment claim, and took special note of two important facts. First, the court observed that it was the farmer’s employees that had applied the herbicide, and as a result, the supplier could not have “concealed” the

height of the plants from the persons who applied the herbicide to those plants. Second, and more importantly, the court noted that the farmer had possession of the label to the herbicide, which contained instructions on how the herbicide should be applied.

Similarly, in this case, the trusses and the truss drawings were delivered to the persons who knew the structure's requirements – the Schillings' contractor and building designer. Just like the farmer's employees, these agents of the Schillings were in the best position to know whether the trusses conformed to the project requirements. And, just like with the herbicide label in Giraud, all of the relevant information concerning the capacity of the trusses was set forth in the truss drawings. All this information was in the hands of Appellants in June, 2007. Therefore, the truss loading information cannot be said to have been "concealed" from Appellants.

The court in Giraud held that, as a matter of law, the supplier did not fraudulently conceal information from the farmer so as to toll the running of the statute of limitations. The farmer's failure to timely file an action therefore barred his claims under RCW 62A.2-725. The Giraud court specifically rejected the farmer's argument that he did not have an obligation to familiarize himself with the information that the supplier had provided on the herbicide's label.

This Court should also reject Appellants' claim that ProBuild

fraudulently concealed problems with the trusses. The Schillings agents – just like the farmer in Giraud - had an obligation to familiarize themselves with information provided by ProBuild in the truss drawings. All of the information which the Schillings needed to determine whether the trusses complied with the alleged warranties is contained in the engineered truss drawings that were delivered to the Schilling residence in June, 2007. The drawings themselves contain the loads which the trusses were designed to carry. The drawings also describe the engineering work that was performed. If either the loading or the engineering breached a warranty – express or implied – Appellants had all the information they needed to reach that conclusion in June of 2007.

Far from exercising reasonable diligence, Appellants' agent did nothing with the information he received. Any lack of information on the part of the Schillings was not the result of ProBuild concealing information. It is the result of their agent failing to even look at the information he was provided. Mr. Sevigny was in physical possession of the TCDL of the Schilling trusses. He understood what those numbers meant and their relevance for the Schilling residence. His failure to even review the drawings doesn't satisfy the "reasonable diligence" standard necessary to sustain a fraudulent concealment defense to the statute of limitations. The knowledge of the agent will be imputed to the principal in situations where the knowledge is relevant to the agency and the matters

entrusted to the agent. Roderick Timber Co. v. Willapa Harbor Cedar Products, 29 Wn. App. 311, 316 (1981).

Appellants failed to bring their action within four years of the delivery of the trusses, and as a result, their claims for breach of warranty are barred under RCW 62A.2-725.

C. ProBuild is not Equitably Estopped from Asserting Statute of Limitations Defense

Appellants' equitable estoppel argument has already been rejected by Washington courts. In essence, Appellants argue that because ProBuild had discussions with them regarding possible repairs and further analysis of the trusses, ProBuild is estopped from relying on the statute of limitations.

This argument is nothing more than an attempt to resurrect the "repair doctrine", which has been rejected by Washington courts as the basis for tolling the limitations period for product warranty claims. Holbrook, Inc. v. Link-Belt Construction Equipment Company, 103 Wash.App. 279, 290 (2000). The Holbrook court explicitly rejected the application of the repair doctrine to the RCW 2A.2-725. The Holbrook court further refused to equate discussions concerning repairs with the "false representations" necessary to sustain an estoppel claim. Even a representation that a particular repair would "cure the defect" is not "deceptive and fraudulent." Holbrook, 103 Wash.App. at 290. The court

explained that allowing offers to repair to toll a limitations period would discourage attempts to correct the defense.

There is no evidence in the record that anyone at ProBuild made false representations during the limitations period that were made, as the Holbrook court required, “with the intent to mislead” Appellants. Appellants do not offer any specific false or deceptive statements by anyone representing ProBuild. Appellants simply have not shown any specific person at ProBuild knowingly made false statements with the intent of inducing Mr. Schilling to delay filing a legal action.

The Schillings’ argument that the doctrine of estoppel bars ProBuild’s statute of limitations defense should be rejected by this court just as a similar argument was rejected in Holbrook.

III. The Trial Court Properly Denied Appellants’ Motion for Summary Judgment in Which They Asserted that ProBuild Breached An Express Warranty Regarding the Engineer Stamp on the Truss Plans

Appellants seek reversal of the trial court’s denial of a motion for summary judgment brought by Appellants on the grounds ProBuild breached express warranties that were made concerning the trusses. The trial court properly denied that motion. (CP 2605-2612.) As noted above, summary judgment is only appropriate where a genuine issue of material fact does not exist.

A. Appellants Have Failed to Establish, as a Matter of Law, that ProBuild made Express Warranties to Appellants.

A “warranty” is a statement or representation referencing the character or quality of goods. Letres v. Washington Cooperative Chick Association, 8 Wn.2d 64, 67 (1941). A claim for breach of warranty is a claim that is separate and distinct from a claim that a party breached some other contractual obligation. Id. at 67-68. Appellants improperly attempted to transform their assertion that MiTek’s engineering was legally improper into a legal claim against ProBuild for failure to fulfill an explicit “statement or representation referencing the character or quality of goods.”

Express warranties are defined in RCW 62A.2-313. An express warranty is created when a seller makes an “affirmation of fact or promise” in connection with the sale of goods. RCW 62A.2-313(1)(a). Appellants have not identified any specific statements by ProBuild that fall within this description. In their Initial Brief, Appellants reference the entire Declaration of George Brooks as evidence that an express warranty was made, but do not cite any particular statement.

Mr. Brooks’ statements in that Declaration do not demonstrate that in this transaction, ProBuild made some explicit representation concerning the trusses that would be supplied to the Schillings. Mr. Brooks merely opines that an engineer’s stamp is needed in certain counties, and describes in general discussions he has had with customers. He also describes general discussions he had with Artisan, Inc. on “prior sales”.

He then assumes that Artisan was therefore “aware” that an engineer would stamp truss drawings on the Schilling project:

With regard to the issue of needing an engineer’s stamp, to my recollection, Yakima County and Moses Lake, in particular always required an engineer’s stamp before the trusses could be used. Accordingly, when negotiating truss sale contracts in those counties, I would confirm for customers that the truss purchase would include the necessary engineer’s stamped drawings. I had those discussions with plaintiff Artisan with regard to prior sales, so to my personal knowledge they were aware that stamped drawings would be supplied as part of the truss purchase from ProBuild for the Sevigny-designed home.

CP 1562.

This narrative by Mr. Brooks does demonstrate not that any express “affirmation of fact” or “promise” was made by ProBuild that would create an express warranty under RCW 62A.2-313. No evidence exists that ProBuild specifically represented to Appellants that an engineer would review and approve their house plans. Express warranties do not arise by operation of law. They also do not arise from a course of dealing or industry practice. Instead, they result from explicit representations made by a seller to a buyer.

Appellants therefore have simply not identified any express warranty that can form the basis for summary judgment, and their motion should be denied.

B. Any Express Warranty Concerning the Engineering Work Performed on the Trusses Was Properly Limited Under RCW 62A.2-316

The truss drawings carefully and accurately describe the engineering services that were performed on the trusses. This description of the work makes clear that ProBuild was not promising that an engineer would review specifications for the Schilling home prior to creating the engineered truss designs. The first page of the drawings is the engineers' stamp and signature of Palmer Tingey of MiTek. Directly under his stamp is the following statement:

**The seal on these drawings indicate acceptance of professional engineering 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.**

CP 1073.

In addition, on the bottom of each of the following pages – each of which contains the drawing of a single truss – is printed this warning:

**WARNING - Verify design parameters and READ NOTES ON THIS AND INCLUDED MITEK REFERENCE PAGE MMII-7473 BEFORE USE**

**Design valid for use only with MiTek connectors. This design is based only upon parameters shown, and is for an individual building component. Applicability of design parameters and proper incorporation of component is responsibility of building designer--not truss designer. Bracing shown is for lateral support of individual web members only. Additional temporary bracing to insure stability during construction is the responsibility of the erector. Additional permanent bracing of the overall structure is the responsibility of the building designer. For general guidance regarding fabrication, quality control, storage, delivery, erection**

**and bracing, consult ANSI/TP11 Quality Criteria, DSB-89 and BCS11 Building Component Safety Information available from Truss Plate Institute, 583 D'Onofrio Drive, Madison, WI 53719.**

CP 1073-1142

This language effectively and properly limits any representation to Appellants concerning the engineering services to be performed. See RCW 62A.2-316(1). It has long been recognized that parties to an agreement may limit the scope of their responsibility. McDonald Credit Services, Inc. v. Church, 49 Wn.2d 400, 402 (1956).

#### CROSS APPEAL

Consistent with its Notice of Cross Appeal filed in this Matter, Respondent/Cross-Appellant ProBuild requests the Court consider and reverse certain decisions made by the trial court.

IV. The Trial Court Erred By Granting Appellants' Motion for Partial Summary Judgment on Appellants' Claims Against ProBuild Under the Under the Washington Consumer Protection Act.

Early in the litigation, the trial court granted Appellants' initial Motion for Partial Summary Judgment which asserted that ProBuild had violated the Consumer Protection Act. (CP 1895-1901)<sup>3</sup> In doing so, the trial court failed to recognize the existence of disputed material facts,

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The trial Court's letter opinion was attached to the original order, but was not included order that was included in the Clerk's Papers. As a result complete order is included in ProBuild's Supplemental Designation and is included in ProBuild's Appendix to this Brief.

resolved disputed issues of fact in favor of Appellants and found that some elements of Appellants' claims had been demonstrated as a matter of law, even though Appellants didn't even raise them. As a result, the order granting that motion should be reversed.

The elements of a Consumer Protection Act claim are well established. A plaintiff must demonstrate: 1) an unfair or deceptive act; 2) which occurred in commerce; 3) affected the public interest, and; 4) proximately caused; 5) damage to the plaintiff. Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co., 105 Wn. 2d 778, 784-85 (1986); Evergreen Moneysource, 167 Wn.App. at 259-260.

A. The Court Clearly Erred By Concluding that ProBuild Committed A Deceptive Act under the Washington Consumer Protection Act.

The first element of a CPA claim is an unfair or deceptive act or practice. The act in question must "have the capacity to deceive a substantial portion of the public." Hangman's Ridge, 105 Wn.2d at 785 (1986). The alleged "deceptive act" in this case was ProBuild's changing the alleged contract required TCDL of 15 to a TCDL of 12 on the Schilling project. The decision of whether a deceptive act has been committed is a question of law only if the underlying facts are undisputed. Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc., 162 Wn. 2d 59, 74 (2007).

In this case, the trial court's granting of Summary Judgment was

not appropriate. Not only was the trial court's decision based on facts that are in dispute, but even if one assumes that there are no disputed facts, the trial court's conclusion is plainly inconsistent with Washington law.

1. The Trial Court Plainly Erred by Concluding that ProBuild Committed an Act that was "Deceptive"

Implicit in the definition of "deceptive" under the CPA is the understanding that the practice misleads or misrepresents something of material importance. Holiday Resort Community Association, 134 Wn. App. 210, 226 (2006). To "deceive" means "to mislead by a false appearance or statement to cause to accept as true or valid what is false or invalid." Dictionary.com.

The gist of Appellants' CPA claim against ProBuild is that ProBuild "deceived" Appellants by changing the loading on the trusses from what was agreed upon to something different. However, accurate loading information was contained in engineered truss drawings that were delivered to and received by Appellants along with the trusses. (CP 1073-1142). Given this disclosure of the loading that was used at the same time the trusses were delivered, any change in the loading can in no sense be considered "deceptive."

Nothing was hidden from Appellants. At the time the truss drawings were received, the Appellants could have – had they bothered to review the truss drawings – simply rejected the trusses as non-conforming

goods. ProBuild made no attempt to convince the delivered trusses that they were something different than what was depicted in the truss drawings.

2. The Court Erred by Concluding That ProBuild's Conduct Constituted an Act That Had the Capacity to Deceive a Substantial Portion of the Public

In order for an act to be deceptive under the Consumer Protection Act, the alleged act must have the capacity to deceive a substantial portion of the public. Hangman Ridge, 105 Wn 2d at 785; Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 170 P.3d 10 (2007). Whether particular conduct has the capacity to deceive a substantial portion of the public is a question of fact. Holiday Resort Community Association v. Echo Lake Associates, LLC, 134 Wn. App. 210, 226-227 (2006).

There is nothing in the record that supports the conclusion that the use of a TCDL of 12 instead of the alleged contract required TCDL of 15, on the Schilling project, had the capacity to deceive the general public. Indeed, the Superior Court's description in its letter opinion as involving one salesman and occurring on "this particular job" undercuts its conclusion that the wider public could have been deceived.

B. The Superior Court Erred by Holding That No Genuine Issue of Material Fact Exists as to Whether the Alleged Conduct of Probuild Had the "Public Interest Impact" Required by the CPA.

This case involves a dispute over a private contract, whereas the CPA exists to “protect the general public.” Evergreen Moneysource, 167 Wn.App. at 260. Typically, a breach of a private contract affecting no one but the parties is not an act affecting the public interest. Hangman Ridge, 105 Wn. 2d at 790. There are four factors that Washington courts have instructed to be used to determine whether the public interest is impacted by a private transaction. They are: 1) Were the alleged acts committed in the course of defendant’s business?; 2) Did the defendant advertise to the public in general?; 3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others?; and 4) Did plaintiff and defendant have unequal bargaining positions? Hangman’s Ridge, 105 Wn.2d at 790; Evergreen Moneysource, 167 Wn.App. at 261.

Whether a particular act impacts the public interest is a question of fact. Hangman’s Ridge, 105 Wn.2d at 789-91. As with the other elements of a CPA claim, it is the burden of the moving party to demonstrate the absence of a genuine issue of material fact in their summary judgment motion. Nowhere in Appellants’ initial memorandum supporting their motion (CP 985-1024), or in Appellants’ reply brief (CP 1533-1557) did they even mention these factors, let alone meet their burden to prove that no issue of fact exists. As this Court stated in Evergreen Moneysource, Appellants, as the moving party, “had to offer evidence to satisfy a Hangman Ridge factor.” Evergreen Moneysource, 167 Wn.App. at 260.

It was clear error for the Court to conclude that the public interest was impacted, when the moving party didn't even mention the factors that must be demonstrated to arrive at such a conclusion.

Moreover, and to the contrary, when examining the four factors in light of the evidence in the record, it is clear that there is no public interest impact present in this case. Although the first factor – the acts occurred in the course of business – is present, the remaining three are not. The second factor, “Did the defendant advertise to the public in general?”, does not apply in this case because the alleged deception does not involve advertising to the public. Evergreen Moneysource, 167 Wn. App. at 261 (conduct that is not directed at the public lacks the capacity to impact the public in general). The third factor to consider is whether “defendant actively solicited this particular plaintiff, indicating potential solicitation of others.” This factor also does not apply in this case because ProBuild did not solicit this project work from these Appellants. Rather, Appellants solicited a bid from ProBuild. This third factor is only satisfied when a defendant “actively solicited this particular plaintiff, indicating potential solicitation of others.” Brote v. May, 49 Wn.App. 564, 571 (1987).

Finally, the fourth factor is also not present because there is not unequal bargaining position. James Sevigny, the person who approached ProBuild regarding the project, has over 32 years of construction experience. He claims to have built 80-100 large custom homes. (CP at

913). “Experienced businessmen [are] not representative of bargainers vulnerable to exploitation.” Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wn.App. 732, 745 (1997)

In sum, there is no demonstration of a public interest impact by Appellants, let alone proof that no issue of fact exists. Appellants completely failed to offer any proof that other people “have been or will be injured in exactly the same fashion.” Brotten v. May, 49 Wn.App. 564, 571 (1987)(emphasis in original); Hangman’s Ridge, 105 Wn.2d at 790. Therefore, the only fair inference from the facts in the record is that the public interest was not impacted for purposes of the CPA.

C. The Superior Court Erred by Holding That No Genuine Issue of Material Fact Exists as to Whether the Appellants Were Injured.

The Superior Court implicitly concluded that the Appellants were injured because the trusses are “insufficient” to support a tile roof and that the Appellants were entitled to, but did not receive, trusses with a 15 pound (as opposed to a 12 pound) top chord dead load. Clearly disputed facts exist, however, that make this conclusion clear error. There is clear evidence in the record that the trusses will, in fact, support a tile roof. Dennis Suttle a ProBuild employee evaluated the building plans, examined the loading information on the trusses and is knowledgeable of the varying weights of roof tile. It was his conclusion that the trusses will support a tile roof. (CP at 1038)

Roof tile come in a wide range of styles and weights. The written plans provided to ProBuild by Artisan, Inc. did not specify what type of tile was to be used. Mr. Suttle's conclusion that the trusses would support a tile roof creates an issue of fact as to whether the alleged injury was actually incurred. (CP 1038)

D. The Superior Court Erred by Holding That No Genuine Issue of Material Fact Exists as to Whether the Alleged Conduct of Probuild Was the Proximate Cause of an Injury to Appellants.

In order to succeed on a CPA claim, Appellants must prove that a "causal link" exists between the deceptive acts and the alleged injury.

Hangman's Ridge, 105 Wn.2d at 793. The Court in Indoor Billboard/Washington Inc. v. Integra Telecommunications of Washington, Inc., 162 Wn.2d 59, 83-84 (2007) refined this element of a CPA claim, holding that a plaintiff must prove that "but for" the deceptive act, the plaintiff would not have suffered an injury. Proximate cause, according to the Indoor Billboard court, is a "cause which in direct sequence, unbroken by any new independent cause, produces the injury complained of and without which the such injury would not have occurred." Whether causation exists is also a question of fact. Indoor Billboard, 162 Wn.2d at 81.

Appellants had the burden to demonstrate that "but for" the conduct of ProBuild, they would not have sustained an injury. Appellants' reply

memorandum contains no explanation as to how ProBuild's conduct led in a "direct" and "unbroken" sequence to Appellants' injury. Appellants therefore failed to satisfy the burden on a party moving for summary judgment to demonstrate that no issue of fact exists on the issue of causation. See Shooting Park Association v. City of Sequim, 158 Wn.2d 342, 350-351 (2006). The record does not support the Superior Court's conclusion that ProBuild caused any injury to Appellants.

Accurate loading information was delivered to the Appellants with the trusses. And, they did nothing with that information. The Superior Court improperly disregarded evidence that the conduct of Artisan and Altius constituted superseding causes that broke the chain of causation. See State v. Meekins, 125 Wn. App. 390 (2005). Artisan and Altius received accurate loading information with the trusses and took no action. As a result, it is their dilatory conduct that is the proximate cause of any injury to the Schillings.

V. The Superior Court Erred by Entering an Order Granting Summary Judgment, over the Objection of Probuild, Based on Issues That Were Raised for the First Time in the Moving Partys' Reply Brief.

The Washington Supreme Court has made it clear that arguments that are raised by the moving party in a reply brief cannot be the basis upon which a motion for summary judgment is granted. R.D. Merrill Co., v. Pollution Board, 137 Wn.2d 118, 147 (1999). As the Washington Supreme Court explained, CR 56(c) only permits a party to raise issues in

the motion and memorandum in support of the motion. Id.; White v. Kent Medical Center, 61 Wn.App. 163, 168-169 (1991).

CR 56(c) explicitly limits the issues to be considered by a court to those issues raised in the opening materials. Id. Additional arguments are permitted in rebuttal materials, but those materials are limited to documents that “explain, disprove or contradict” the other party’s evidence. Id. In White, the court instructed that the trial court should not have considered an issue raised for the first time in a reply brief. Id. Courts have consistently adhered to these limitations.

The Court’s order granting summary judgment is based on the Court’s October 14, 2014 letter opinion. In that opinion the Court stated:

ProBuild violated the CPA by changing the load parameter from 15 to 12 in spite of its salesman’s determination that 15 was the correct number for this particular job where the owner intended to install a tile roof. ProBuild did not tell the salesman or consult with the builder or the homeowner. They did not review the building plans. Plaintiff did not know the trusses were insufficient for the tile roof long after the home was finished.

Appendix A-11<sup>4</sup>

The allegation that ProBuild changed their salesman’s truss design, and that this action constituted a “deceptive act” under the CPA, was raised for the first time in the reply memorandum submitted by Appellants.

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This document has been designated to be included in the record on appeal in the Supplemental Designation of Clerk’s Papers file by Respondent ProBuild Company, LLC.

Compare CP 985-1024 with CP 1533-1557. App. at pp. 64-66. In their opening memorandum, however, the only “deceptive acts” asserted by Appellants against ProBuild were related to representations made by MiTek Industries on the engineered truss drawings. CP at 1008-1022. Nowhere in their initial submission do they make any claims about ProBuild changing parameters or any resulting deception.

After learning in the Superior Court’s letter of October 14<sup>th</sup> that it intended to grant summary judgment on these issues, ProBuild filed a written objection. Appendix A-1. The Superior Court disregarded the objection and entered summary judgment for the reasons stated in the October letter.

Basing summary judgment on issues raised in rebuttal materials is plainly inconsistent with the requirements of CR 56(c).

VI. The Court Erred By Granting Appellants’ Motion for Summary Judgment on the Grounds ProBuild Breached the Implied Warranty of Merchantability.

Appellants have not demonstrated that, as a matter of law, ProBuild breached the implied warranty of merchantability. Appellants completely failed, in their motion, to explain how ProBuild breached this warranty. CP at 2154. Under RCW 62A.2-314(1), any sale of goods by a “merchant” gives rise to an implied warranty that the goods being sold are “merchantable.” RCW 62A.2-314(2) then lists standards which identify characteristics that make an item “merchantable.” The only reference to

any of these standards in Appellants' Motion was a single reference to RCW 62A.2-314(2)(f) CP at 2159. This provision requires that for goods to be "merchantable" the goods must: "conform to the promises or affirmations of fact made on the container or label if any."

Appellants completely fail to demonstrate how the trusses from ProBuild did not "conform" to representations made on a "container or label." The warranty of merchantability is a warranty that requires conformance with representations made by a seller, not by what is required under other statutes. Put another way, RCW 62A.2-314(f) does not create an implied warranty that trusses sold as part of a construction project will comply with the building code or the statute governing engineering services. It is not a catch all provision that ensures that goods sold meet any and all legal requirements related to the manufacture and sale of particular goods. Instead, it is a requirement that the goods conform to what the seller says they are.

Viewed in this light, ProBuild delivered trusses that conformed to all descriptions contained in the engineered truss drawings. RCW 62A.2-314(f) cannot form the basis of a judgment against ProBuild for breach of warranty.

#### CONCLUSION

This Court should reject Appellants' attempt to reverse the judgment of the trial court. The lower court properly held that the

Appellants' claims were barred by statutes of limitation. Appellants' CPA claims are barred because Appellants' claims accrued in 2007, when they were given all the information necessary to state their claims. They waited, however, until 2012, more than the four year limitations period allows. Appellants' warranty claims are also barred because they waiting more than four years after the trusses were delivered to bring a claim for breach of warranty. If the Court reverses the trial court's decision regarding the statutes of limitations, the Court should also reverse the lower court's orders granting partial summary judgment against ProBuild. Those orders were improperly entered given the presence of several genuine issues of material fact.

RESPECTFULLY SUBMITTED this 27 day of February, 2017

WERTJES LAW GROUP, P.S.



Alan J. Wertjes, WSBA No. 29994  
Attorney for Respondent/Cross-Appellant  
ProBuild Company, LLC

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

TERRY SCHILLING and JULIE  
SCHILLING, husband and wife, and  
ARTISAN, INC., a Washington corporation,  
  
Plaintiff,  
  
vs.  
  
PROBUILD COMPANY, LLC, a  
Washington limited liability company, d/b/a  
Lumbermens, and MITEK INDUSTRIES,  
INC., a foreign corporation,  
  
Defendants

Case No. 12-2-00537-0

OBJECTION OF PROBUILD  
COMPANY, LLC TO ORDER  
GRANTING PLAINTIFFS' MOTION  
FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Defendant ProBuild Company, LLC hereby objects to the entry of the proposed order granting Plaintiffs' motion for summary judgment. That proposed order is based on arguments that were raised by Plaintiffs for the first time in Plaintiffs' reply brief. The Washington Supreme Court has made it clear that arguments that are raised by the moving party in a reply brief cannot be the basis upon which a motion for summary judgment is granted. Therefore the Order should not be entered.

The proposed order is based on this Court's October 14, 2014 letter opinion. In that opinion the Court explained the basis for concluding that ProBuild had engaged in deceptive acts that violated the Washington Consumer Protection Act. The Court stated:

A-1

1 ProBuild violated the CPA by changing the load parameter from 15 to 12 in spite of  
2 its salesman's determination that 15 was the correct number for this particular job  
3 where the owner intended to install a tile roof. ProBuild did not tell the salesman or  
4 consult with the builder or the homeowner. They did not review the building plans.  
5 Plaintiff did not know the trusses were insufficient for the tile roof long after the home  
6 was finished.

7 Plaintiffs' arguments and evidence that ProBuild committed a deceptive act by (allegedly)  
8 changing loading parameters for the Schilling trusses were raised for the first time in pages 3 to 5 of  
9 Plaintiffs' Reply Brief. In contrast, the only "deceptive acts" articulated by Plaintiffs in their initial  
10 memorandum relate to representations made by MiTek Industries on the engineered truss drawings.  
11 Those claims are set forth on page 29 of Plaintiffs' Points and Authorities. Nowhere in their initial  
12 submission do they make any claims about ProBuild changing parameters or any resulting deception.  
13 In fact, the Declaration by George Brooks, upon which these arguments are based, was filed on  
14 September 15, 2014, the same day as Plaintiffs' reply brief was filed.

15 An order granting summary judgment can only be based on issues raised in the summary  
16 judgment motion or the memorandum in support of the motion. R.D. Merrill Co., v. Pollution Board,  
17 137 Wn.2d 118, 147 (1999). Issues raised in a reply can "not be a proper basis for summary  
18 judgment." As the Washington Supreme Court explained, CR 56(c) only permits a party to raise  
19 issues in the motion and memorandum in support of the motion. Id.

20 Therefore, because the proposed order granting summary judgment is based on issues not  
21 raised by Plaintiffs in their initial memorandum, the order should not be entered.

22 DATED this 28 day of October, 2014.

23 WERTJES LAW GROUP, P.S.



24 Alan J. Wertjes, WSBA No. 29994  
25 Attorney for ProBuild Company, LLC

FILED  
SUPERIOR COURT

7 Pages

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SUPERIOR COURT  
YAKIMA

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

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

Plaintiffs,

v.

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

Defendants.

NO. 12-2-00537-0

ORDER ON PLAINTIFFS' MOTION  
FOR PARTIAL SUMMARY JUDGMENT

This matter came before the Court on Plaintiffs' Motion for Partial Summary Judgment on September 19, 2014. Terry Schilling and Julie Schilling, husband and wife (Schilling) and Artisan, Inc., a Washington corporation (Artisan) were represented by their attorneys, Larson Berg & Perkins PLLC, by James A. Perkins.

Defendant ProBuild Company, LLC, d/b/a Lumbermens (ProBuild) was represented by its attorneys Wertjes Law Group, P.S., by Alan J. Wertjes, and

ORDER ON PLAINTIFFS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT - 1

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Plaintiffs' MPSJ.doc

LARSON BERG & PERKINS PLLC

105 North Third Street  
P. O. Box 550  
Yakima, WA 98907  
(509) 457-1515  
(509) 457-1027 (fax)

A-3

1 Defendant MiTek Industries, Inc., n/k/a MiTek USA, Inc. (MiTek) was represented by its  
2 attorneys Preg O'Donnell & Gillett PLLC by its attorney Justine E. Bolster. The Court  
3 considered the argument of counsel and the following files and records:

4 **MOTION SPECIFIC PLEADINGS**

- 5 1. Plaintiffs' Motion for Partial Summary Judgment Re Consumer Protection  
6 Act Claim Against Defendant MiTek Industries, Inc. k/n/a MiTek USA, Inc.,  
7 and ProBuild Company, LLC d/b/a Lumbermens (Plaintiffs' MPSJ);  
8  
9 2. Points and Authorities Supporting Plaintiffs' Motion for Partial Summary  
10 Judgment Re Consumer Protection Act Claim Against Defendant MiTek  
11 Industries, Inc. k/n/a MiTek USA, Inc., and ProBuild Company, LLC d/b/a  
12 Lumbermens;  
13  
14 3. Declaration of Zoel Morin Supporting Plaintiffs' Motion for Partial Summary  
15 Judgment;  
16  
17 4. Declaration of James Sevigny Supporting Plaintiffs' Motion for Partial  
18 Summary Judgment;  
19  
20 5. James A. Perkins' Declaration Supporting Plaintiffs' Motion for Partial  
21 Summary Judgment Re Consumer Protection Act;  
22  
23 6. MiTek Industries, Inc.'s k/n/a MiTek USA, Inc.'s Opposition to Plaintiff's  
24 Motion for Partial Summary Judgment (MiTek's Opposition);  
25  
26 7. Declaration of David L. Tran in Support of MiTek's Opposition to Plaintiffs'  
27 Motion for Partial Summary Judgment Re Consumer Protection Act Claim;  
28  
29 8. Declaration of Andrew D. Harold, S.E., P.E. in Opposition to Plaintiff's  
30 Motion for Partial Summary Judgment;  
31  
32 9. Declaration of Justin E. Bolster in Support of MiTek's Opposition to  
33 Plaintiffs' Motion for Partial Summary Judgment RE Consumer Protection  
34 Act Claim;  
35  
36 10. Memorandum of ProBuild Company LLC in Opposition to Plaintiffs' Motion  
37 for Partial Summary Judgment;

ORDER ON PLAINTIFFS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT - 2  
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- 1 11. Declaration of Mark Anderson in Support of ProBuild Company, LLC's  
2 Opposition to Plaintiffs' Motion for Partial Summary Judgment;
- 3 12. Declaration of Dennis Suttle in Opposition to Plaintiffs' Motion for Partial  
4 Summary Judgment;
- 5 13. Declaration of Alan J. Wertjes in Opposition to Plaintiffs' Motion for Partial  
6 Summary Judgment;
- 7 14. James A. Perkins' Supplemental Declaration Supporting Plaintiffs' Motion  
8 for Partial Summary Judgment Re Consumer Protection Act;
- 9 15. Plaintiffs' Reply in Support of Motion for Partial Summary Judgment Re  
10 Consumer Protection Act Claim Against Defendants MiTek Industries, Inc.  
11 k/n/a MiTek USA, Inc., and ProBuild Company, LLC d/b/a Lumbermens;
- 12 16. Declaration of George W. Brooks Supporting Motion for Partial Summary  
13 Judgment;
- 14 17. Plaintiffs Memorandum Reply to ProBuild's Partial Summary Judgment  
15 Response;
- 16 18. Supplemental Brief in Support of MiTek Industries, Inc.'s k/n/a/ MiTek  
17 USA, Inc.'s Opposition to Plaintiffs' Motion for Partial Summary Judgment;
- 18 19. Supplemental Declaration of Justin E. Bolster in Support of MiTek's  
19 Opposition to Plaintiffs' Motion for Partial Summary Judgment Re  
20 Consumer Protection Act Claim (and exhibits thereto);
- 21 20. Supplemental Memorandum of ProBuild Company LLC in Opposition to  
22 Plaintiffs' Motion for Partial Summary Judgment;
- 23 21. Supplemental Declaration of Alan J. Wertjes (and exhibits thereto);
- 24 22. Plaintiffs' Reply Points and Authorities to ProBuild's Supplemental Brief  
25 Opposing Partial Summary Judgment;
- 23 23. Plaintiffs' Reply to MiTek Industries' Supplemental Brief Opposing  
24 Plaintiffs' Motion for Partial Summary Judgment;
- 25 24. James A. Perkins' Second Supplemental Declaration Supporting Plaintiff's  
Motion for Partial Summary Judgment Re Consumer Protection Act;

ORDER ON PLAINTIFFS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT - 3

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P. O. Box 550  
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(509) 457-1515  
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PRIOR FILED PLEADINGS WHICH PLAINTIFFS  
INCORPORATED BY REFERENCE

25. Defendant MiTek Industries, Inc.'s Motion for Summary Judgment;
26. Declaration of Justin E. Bolster In Support of Defendant MiTek Industries, Inc.'s Motion for Summary Judgment;
27. Plaintiffs' First Amended Complaint;
28. Plaintiffs' Points and Authorities Opposing MiTek's Motion for Summary Judgment;
29. Declaration of Terry Schilling Opposing Defendant MiTek's Motion for Summary Judgment;
30. James A. Perkins' Declaration Opposing MiTek's Motion for Summary Judgment;
31. Reply in Support of Mitek's Motion for Summary Judgment;
32. Supplemental Declaration of Counsel in Support of Defendant MiTek Industries, Inc.'s Motion for Summary Judgment;
33. Declaration of Stephen W. Cabler;
34. Plaintiffs' Supplemental Memorandum Opposing MiTek's Motion for Summary Judgment;
35. James A. Perkins' Supplemental Declaration Opposing MiTek's Motion for Summary Judgment;
36. Mitek's Sur-Reply in Support of Summary Judgment;
37. Second Supplemental Declaration of Counsel in Support of Defendant Mitek Industries, Inc.'s Motion for Summary Judgment;
38. Order Denying Defendant Mitek Industries, Inc., k/n/a Mitek USA, Inc.'s Motion for Summary Judgment;
39. Points and Authorities Supporting Plaintiffs' Motion to Amend Complaint;

ORDER ON PLAINTIFFS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT - 4  
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105 North Third Street  
P. O. Box 550  
Yakima, WA 98907  
(509) 457-1515  
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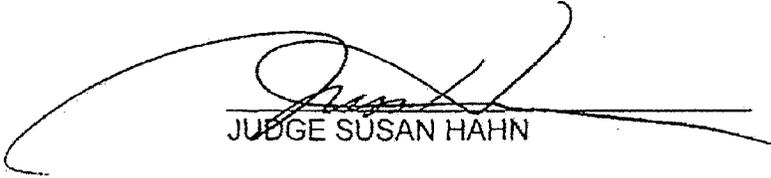
- 1 40. Declaration of James A. Perkins Supporting Plaintiffs' Motion to Amend  
2 Complaint;  
3 41. MiTek's Opposition to Plaintiffs' Motion to Amend The Complaint;  
4 42. Declaration of Justin E. Bolster In Opposition to Plaintiffs' Motion to  
5 Amend the Complaint;  
6 43. Plaintiffs' Reply Re MiTek's Opposition to Motion to Amend Complaint;  
7 and  
8 44. Supplemental Declaration of James A. Perkins Supporting Plaintiffs'  
9 Motion to Amend Complaint.

10 After considering the arguments of counsel and the pleadings records,  
11 declarations and exhibits filed, the Court issued a letter to the parties' counsel dated  
12 October 14, 2014, which outlines the Court's analysis as to facts which were  
13 undisputed, and what matters the Court has determined to be established as a matter of  
14 law. A copy of the Court's October 14, 2014 letter is attached to this Order as **Exhibit 1**  
15 and its terms are incorporated herein for purposes of Civil Rule 56(d).

16 Based on and subject to terms of the Court's October 14, 2014 letter, and being  
17 fully advised, the Court hereby concludes as a matter of law, that Defendants ProBuild  
18 and MiTek have each violated Washington's Consumer Protection Act and the Court  
19 therefore:

20 GRANTS the Motion for Partial Summary Judgment filed by the Plaintiffs.

21 DATED this 6 day of November, 2014.

22  
23  
24   
JUDGE SUSAN HAHN

25 ORDER ON PLAINTIFFS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT - 5  
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P. O. Box 550  
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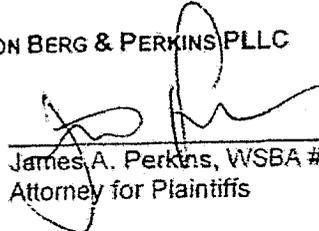
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Presented by:

LARSON BERG & PERKINS PLLC

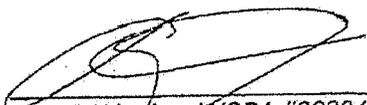
By:

  
James A. Perkins, WSBA #13330  
Attorney for Plaintiffs

Approved as to form and Notice of Presentment Waived:

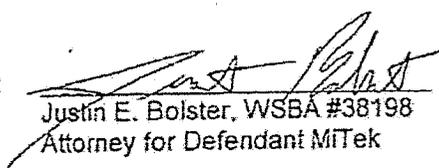
WERTJES LAW GROUP, P.S

By:

  
Alan J. Wertjes, WSBA #29994  
Attorney for Defendant ProBuild

PREG O'DONNELL & GILLETT PLLC

By:

  
Justin E. Bolster, WSBA #38198  
Attorney for Defendant MiTek

ORDER ON PLAINTIFFS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT - 6  
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105 North Third Street  
P. O. Box 550  
Yakima, WA 98907  
(509) 457-1515  
(509) 457-1027 (fax)

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SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

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

NO. 12-2-00537-0

Plaintiffs,

AFFIDAVIT OF ELECTRONIC MAIL  
FILING

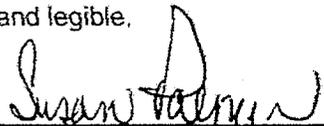
v.

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

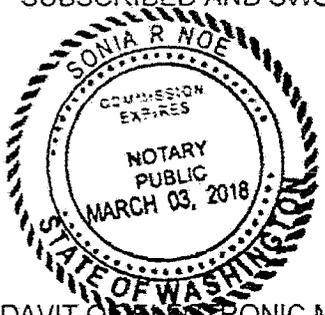
Defendants.

1. My name is Susan S. Palmer, and I am a legal assistant to James A. Perkins,  
attorney of record for plaintiffs, in the above-named action.

2. I have examined the attached *Order on Plaintiffs' Motion for Partial Summary  
Judgment* received by our office via electronic mail and determined that it consists of seven (7)  
pages, including this affidavit, and is complete and legible.

  
\_\_\_\_\_  
Susan S. Palmer

SUBSCRIBED AND SWORN TO before me this 6<sup>th</sup> day of November, 2014.



  
\_\_\_\_\_  
NOTARY PUBLIC in and for  
the State of Washington.  
My commission expires: 030318

AFFIDAVIT OF ELECTRONIC MAIL FILING - 1

LARSON BERG & PERKINS PLLC  
105 North 3rd Street  
P.O. Box 550  
Yakima, WA 98907  
(509) 457-1515  
(509) 249-0619 (fax)

A9



Superior Court of the State of Washington  
for the County of Yakima

Judge Susan L. Hahn  
Department No. 1

128 North 2nd Street  
Yakima, Washington 98901  
(509) 574-2710  
Fax No. (509) 574-2701

October 14, 2014

Mr. James A. Perkins  
Larson Berg & Perkins PLLC  
105 North Third Street  
P.O. Box 550  
Yakima, WA 98907

Mr. Alan J. Wertjes  
Wertjes Law Group, P.S.  
1800 Cooper Point Road SW, Bldg. 3  
Olympia, WA 98502

Mr. Justin E. Bolster  
Preg O'Donnell & Gillett PLLC  
901 Fifth Ave., Suite 3400  
Seattle, WA 98164-2026

**Re: Schilling v. Pro Build, Mitek; Yakima County Case # 12-2-00537-0**

Gentlemen:

This letter constitutes my oral ruling on the Motion for Partial Summary Judgment regarding the CPA claims against the Defendants. Although the Defendants have raised a number of factual issues to persuade the Court that Summary Judgment is not appropriate, the undisputed material facts as stated below fully support Plaintiff's position. Issues of fact presented by the Defendants are not material and thus do not defeat the motion.

***Undisputed Facts***

The Schillings built new custom home in Union Gap. Artisan was the general contractor. Artisan took the plan to Pro Build for a bid on the trusses. Pro Build uses a computer program designed by Mitek to design trusses. Anyone with minor training can use the program which involves the entry of data related to the specific project. Mr. Brown, a salesman for Pro Build, talked to the owner, the builder, looked at the plans and determined the initial parameters for the computer program. He was familiar with the builder and was aware that the owner intended to install a tile roof on the house. Subsequently, another person at Pro Build changed one of Brown's parameters...from a 15 pound top

chord dead load to 12. Mr. Brown was not told of the change. The owner and contractor were not consulted.

Using Mitek's software, Pro Build designed specs for the trusses and began to build them. After the house was completed, the owner and builder discovered the trusses (at 12 instead of 15) were not strong enough to accommodate a tile roof.

Mitek operates in many states and sells plates and hardware to build trusses. To make sure the products are used appropriately, they designed the software mentioned above. Mitek licenses the software to truss designer/builders which is good for them because they don't have to hire expensive engineers for the design. Companies using the software are required to buy the truss hardware from Mitek. In return, Mitek reviews the builders' truss designs by using the same parameters determined by the designer (in this case, Pro Build). The review consists of running those parameters on the software again to see if they match. If they do match, Mitek stamps the plans as approved by an engineer and sends the stamped plans back to Pro Build. This stamp is required by building inspectors. Additionally, when building plans are initially approved, truss design is provisionally approved contingent on the trusses having the engineering stamp.

Mitek does not supervise Pro Build employees at all. They never see the plans. They don't check code requirements. They simply accept Pro Build's parameters. They do not talk to the builder or the home owner. Their engineer stamp contains a disclaimer that the specs are based on parameters determined by others and that they do not warrant the specs will actually be appropriate for the particular project.

In this case, the trusses were already manufactured and partially installed before the plans were stamped by Mitek and sent back.

#### **RULING**

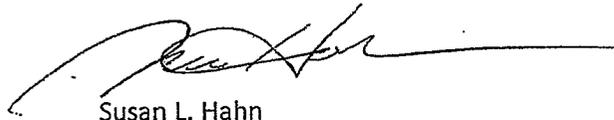
Pro Build violated the CPA by changing the load parameter from 15 to 12 in spite of its salesman's determination that 15 was the correct number for this particular job where the owner intended to install a tile roof. Pro Build did not tell the salesman or consult with the builder or the homeowner. They did not review the building plans. Plaintiff did not know the trusses were insufficient for the tile roof until long after the home was finished.

Mitek violated the CPA by disregarding the WA Engineering statute which requires that the engineer using the approval stamp do so only when he/she directly supervises the work being approved. The statutory and WAC definition of "direct supervision" did not occur in this case. Despite Defendants' arguments to the contrary and regardless of the so called "industry standard", 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...plans." WAC 196-23-030. (Note: WAC 196-25-070 is virtually the same.) As Mitek did absolutely nothing to supervise, check or validate the parameters as determined by Pro Build and that were in fact the basis for its approval of the truss design, their approval of the truss design violated the statute. This violation constitutes a *per se* violation of the CPA because the statute's purpose is to protect public health and safety.

The acts complained of were unfair and deceptive, occurred in trade or commerce, and have a public interest impact. The Defendants were damaged by the actions of the Defendants. Mitek cannot disclaim the requirements of Washington law or its potential liability pursuant to the Washington Consumer Protection Act.

Mr. Perkins, please prepare an order that grants Plaintiff's motion for partial summary judgment. Although findings are not required in a summary judgment order, I thought counsel should be apprised of the basis for my ruling.

Very truly yours,



Susan L. Hahn  
Yakima County Superior Court Judge

A-12

Yakima County Superior Court  
Cause No. 12-2-00537-0

No. 344355

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

---

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

Respondents/Plaintiffs

vs.

MITEK INDUSTRIES, INC., a foreign corporation,

Defendant, and

PROBUILD COMPANY, LLC, a foreign limited liability  
company

Petitioner/Defendant

---

**DECLARATION OF SERVICE**

ALAN J. WERTJES, WSBA #29994  
ATTORNEY AT LAW  
1800 COOPER POINT RD. SW, BLDG 3  
OLYMPIA, WA 98502  
360-570-7488  
ATTORNEY FOR PROBUILD COMPANY, LLC

I, Dana M. Olin, declares:

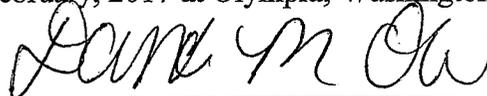
1. I am over 18 years of age, not a party to the above-entitled action, and not interested in the action. I am competent to be a witness in the action.
2. On February 27<sup>th</sup> 2015, I delivered via e-mail, a true and correct copy of **Respondents-Cross Appellant Response Brief** in the above titled action to:

Mr. James A. Perkins  
Larson Berg & Perkins, PLLC  
105 North 3<sup>rd</sup> Street  
Yakima, WA 98907

Mr. Justin Bolster  
Preg O'Donnell & Gillett, PLLC  
901 Fifth Avenue, Suite 3400  
Seattle, WA 98164

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27<sup>th</sup> day of February, 2017 at Olympia, Washington.



Dana M. Olin  
Legal Assistant to Alan J. Wertjes