

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

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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

Appellants/Cross-Respondents

vs.

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

Respondents/Cross-Appellants

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APPELLANTS/CROSS-RESPONDENTS' REPLY BRIEF TO  
RESPONDENTS/CROSS-APPELLANTS PROBUILD COMPANY, LLC  
AND MITEK INDUSTRIES, INC.'S RESPONSE BRIEFS

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JAMES A. PERKINS, WSBA #13330  
Larson Berg & Perkins PLLC  
105 North Third Street  
Yakima, WA 98901  
(509) 457-1515

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## **I. INTRODUCTION**

This case is first and foremost about ProBuild Company, LLC (ProBuild) and MiTek Industries, Inc.'s (MiTek) illegal "plan stamping" business practices (*see, e.g.*, CP 270-271), which Terry and Julie Schilling (Schilling) and Artisan, Inc. (Artisan) first learned about during discovery. (CP 979-984; 1468; 1470; 1473; 1558-1563). Since a Consumer Protection Act (CPA) claim was pled against both ProBuild and MiTek within four (4) years from the date these illegal practices were first discovered (RCW 19.86.120), Schilling and Artisan's CPA claims were improperly dismissed and this error must be reversed.

Independent of ProBuild and MiTek's illegal "plan stamping" practices, ProBuild and MiTek also violated the CPA by 1) deceptively and falsely representing that a Washington licensed engineer had designed and confirmed (by exercising the Direct Supervision which Washington's engineering statutes require) that the truss designs and loadings chosen were suitable for use on the Schilling home<sup>1</sup> (CP 316); and 2) omitting to disclose that a "plant default" 12 lb. top chord dead load (12 TCDL), rather than a contract correct 15 lb. top chord dead load (15 TCDL) specification, had been substituted for the Schilling home. (CP 1561).

Independent of CPA liability, because the record shows material fact disputes about warranty breach and statute of limitations tolling also exist, all of

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<sup>1</sup> Instead, ProBuild salesman, George Brooks (Brooks), had actually prepared the truss designs and chosen the loadings.

Schilling and Artisan's other warranty and CPA claims against ProBuild and MiTek should not have been dismissed, and that error too must be reversed.

## **II. ARGUMENT**

### **A. Corporate greed vs. public protection.**

The language of the at-issue engineering statute (RCW 18.43.070) and implementing WACs (*e.g.* former WAC 196-23-030) make clear that to protect the public, the legislature obligates a licensed engineer to confirm that the specifications on any plans being stamped are project correct. To comply with the law, before truss software was developed, licensed engineers often prepared the truss plans which they stamped. Engineer time is expensive, however. Truss software can now do the complex mathematical calculations required to develop useable truss plans, provided the software is given project-correct inputs.

To save costs, ProBuild does not want to employ engineers to prepare truss plans, when unlicensed salesmen using truss design software, can less expensively do so. (CP 1036-1037). For trusses to be sellable, however, pursuant to § 802.10.2 of the International Residential Code (IRC), an engineer-stamped set of truss plans is legally required. (CP 453-454; 2141-2142). To solve this business problem and to sell the millions of dollars of the metal truss connecting products which it manufactures (CP 442-443; 981-982), MiTek is willing to have its engineers stamp the truss plans which ProBuild's unlicensed salesmen create. (CP 821). To have its employed engineers take the time to perform those acts of

Direct Supervision which Washington's statutes and WACs require, however (*i.e.* actually confirming that the loadings chosen to create the plans are project correct) would again mean added expense. MiTek too does not want to incur this expense, so in practice, it simply "plan stamps" the ProBuild truss plans.<sup>2</sup>

Ignoring for a moment that plan stamping is statutorily illegal, as noted, trusses designed by an unlicensed salesperson using MiTek's software could be project correct if proper inputs are used. Consumers are placed at risk, however, if, as in this case, to save money, a truss manufacturer decides to use a default loading of 12 TCDL even though a 15 TCDL may be called for.

Under Washington statutes and implementing WACs, this sort of cost savings "cheating" can be discovered and prevented by a licensed engineer if Direct Supervision is exercised before the plans are stamped. If instead there is no Direct Supervision analysis performed, the public has no protection against a manufacturer's "pressure for profit" conduct, causing an unsafe business practice.

Rather than pay to do what the law requires, ProBuild and MiTek jointly decided to illegally plan stamp and now argue that the burden to make sure their work is safe falls upon others (*i.e.* homeowners, building officials, contractors, unlicensed draftsmen, etc.), none of whom are trained engineers, and none of whom have access to the truss design software necessary to double check design accuracy.

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<sup>2</sup> Knowing this is MiTek's business practice, Brooks testified that ProBuild often begins building trusses prior to getting any stamped plans back from MiTek. (CP 393; 475-476; 1561-1562).

Contrary to ProBuild's and MiTek's claims, the record shows that if a licensed engineer can avoid, disclaim, or otherwise not conduct the Direct Supervision required by Washington statutes, there simply is no one else with the education, expertise or software access, involved with most residential projects in Washington who can protect the public. That is what this case is about.

**B. No one besides a stamping engineer is positioned to protect the public.**

Mr. Rathbone (Rathbone), the head building official for the City of Union Gap, could not recall of a single residential home where building plans had been prepared and stamped by a licensed architect. (CP 706). Rathbone confirmed that many, if not most, residential homes are currently constructed without any engineering input whatsoever, other than stamped engineer truss plans. (CP 707; 981-982).

To double check the accuracy of any engineer-stamped truss plans, Rathbone testified that one would need access to the truss design software (which he does not have):

- A. You have to accept that stamp as a representation that that design was executed in accordance with their professional responsibilities and in accordance with the design methods that were on the truss design.
- Q. Would it be your assumption if you received a set of stamped engineering truss design plans that those design plans did meet all applicable codes?

A. Yes. It would be my assumption that the engineer had taken upon himself, you know, through professional responsibility to make sure that that was the case. (CP 708-709; 2142). [Emphasis added.]

Further, MiTek's own engineer, Palmer Tingey (Tingey), confirmed that without access to MiTek's software, even another engineer would find it difficult to double check truss plan specifications for accuracy. (CP 695).

Accordingly and crucially, for almost all homes built in Washington State, there is no other qualified person involved, who can double check the sufficiency of a truss engineer's stamped plans. (CP 981-982).

Consistent with these known industry facts, Washington's engineering statutes place the legal obligation to exercise Direct Supervision<sup>3</sup> upon the stamping engineer before affixing a stamp. This is why Schilling, Artisan and Rathbone understandably believed the engineer's stamp affixed on the Schilling plans meant this legal obligation had been fulfilled for the Schilling trusses. (CP 497-498; 2928).

Did MiTek discharge this statutory/stamp responsibility? Admittedly, it did not. Instead, unlicensed salesman Brooks, for ProBuild, selected the Schilling truss loading specifications and did the Schilling truss designs using MiTek software. (CP 389-391; 473-475; 979-983). ProBuild later changed Brooks' correct 15 TCDL design specification to be a "plant default" 12 TCDL, without

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<sup>3</sup> The engineer must choose or confirm that the truss plan specifications used are correct for the building on which the trusses are to be installed. WAC 196-23-030; *see also*, new WAC 196-25-070.

telling anyone. (CP 1561). MiTek then simply “plan stamped” ProBuild’s changed truss designs, without performing any substantive engineering review whatsoever. (CP 396-397; 405-407; 457-458; 486-487; 697; 700-702).

Carefully read, MiTek and ProBuild do not deny that MiTek exercised no Direct Supervision over ProBuild’s truss design work. They cannot. Instead, what both primarily argue is that certain post-sale language placed upon the Schilling truss plans by MiTek sufficed to avoid or change MiTek and ProBuild’s legal duties. Their argument, however, is based on four false assumptions.

First, the argument falsely assumes that one can avoid a statutory obligation simply by putting language on a document saying one is not doing what one is statutorily required to do. To the contrary, it has long been Washington law that a party’s express warranty and/or statutory obligations cannot be disclaimed. *See, e.g., Travis v. Washington Horse Breeders Ass’n, Inc.*, 111 Wn.2d 396, 405, 759 P.2d 418 (1988); *Potter v. Wilbur-Ellis Co.*, 62 Wn.App. 318, 814 P.2d 670 (1991).

The second false assumption is that a post-sale attempt to avoid or disclaim a legal obligation is either lawful or enforceable. Again, Washington courts have long held that post-sale attempts to disclaim legal obligations are

invalid in Washington State. *Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 28 Wn.App. 539, 625 P.2d 171 (1981).<sup>4</sup>

The third false assumption is that the particular 2002 Chapter 2 ANSI/TPI section referred to by MiTek's post-sale plan language was never adopted by the 2003 IBC (CP 1862-1879) (something ProBuild and MiTek have not denied after Schilling and Artisan's referenced brief was filed). The ANSI/TPI is, therefore, wholly irrelevant to the issues presented by this case, and it certainly did not and could not change the stamping obligations imposed upon engineers by Washington's statutes and WACs.

Fourth and finally, as discussed in Schilling and Artisan's opening brief (on pages 22-27), contrary to ProBuild and MiTek's claims, the MiTek language placed on the Schilling plans does not have either the "notice" or "disclaimer" meaning which ProBuild and MiTek now assert. It follows that nothing about MiTek's plan language made ProBuild and MiTek's illegal "plan stamping" practices legal.

**C. The delivered truss plans did not disclose that ProBuild or MiTek had violated the law or breached warranties.**

Throughout this case, ProBuild has made inconsistent truss loading assertions. On the one hand, ProBuild admits roof tile is supplied in a wide range of weights and styles, and that there is no standard "tile load" for trusses.

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<sup>4</sup> Here, the at-issue language affixed by MiTek to the Schilling truss design plans was affixed post-sale. Therefore, even if it was a disclaimer, it would be without legal effect.

(CP 1038; 1711). In part for this reason, ProBuild's witness Dennis Suttle (Suttle) testified that the 12 TCDL loadings used for the Schillings trusses are contract correct, because 12 TCDL loadings can support some tile roofs. (CP 1038, ¶¶ 16-18).<sup>5</sup> MiTek's engineer, Ray Yu (Yu), similarly testified at deposition that contrary to ProBuild and MiTek's current appeal claims, the 12 TCDL listed on the plans would not have told Artisan or Schilling that tile could not be used.

Q. So let's stop and think about that for a minute. If the contractor plainly says on the plans, and the designer does, that it's going to be a tile roof and so tile is specified - -

A. Yes.

Q. - - and they get back a truss design that says this will hold up 12-pound dead load, how do they know that this doesn't work with tile or might not work with tile.

A. They don't know. Even for tile, you know, light weight tile could be seven, eight pounds per square foot. This 12 maybe still barely covers the tile loading, but then you have tile weighs 20 pounds per square foot. So it really depends on what kind of tile being conveyed to the truss manufacturer.

(CP 1461). [Emphasis added.]

Since a 12 TCDL can support some tile roofs, at the May 2011 meeting held at the Schilling home, Yu later "convinced" Artisan, Schilling, and engineer Tim Bardell (Bardell) that the 12 TCDL truss loadings were in fact, correct, and therefore, no legal claim for selling defective trusses existed. (CP 525).

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<sup>5</sup> ProBuild continues to make this factual/legal argument. See ProBuild's appellate brief hereafter "PBB," pp. 11, 47-48.

When ProBuild considers it convenient to ignore this record testimony given by ProBuild and MiTek's own witnesses, however, ProBuild falsely claims that the 12 TCDL loading on the truss plans differently proves that upon receipt, Schilling and Artisan knew or "should have known," ProBuild's contract and warranties were breached, because a 12 TCDL loading does not support a tile roof. ProBuild's conflicting arguments are facially inconsistent. (CP 1038).

Contrary to ProBuild's claims, Sevigny did not testify that he knew a 15 TCDL was a necessary loading for the Schilling home tile roof. He actually testified the MiTek plan numbers told him nothing, and his limited knowledge was only that an industry average loading for tile was a 15 TCDL. (CP 3119).

Not being an engineer, Sevigny reasonably relied upon ProBuild's experienced truss salesman Brooks, to instead accurately select the correct specific loading for the Schilling tile roof.

ProBuild acknowledged this important fact in its reply to Schilling/Artisan's original motion for summary judgment:

The Schilling's building designer delivered the building plans to ProBuild, and deliberately left it to ProBuild to decide what weight of tile to allow for on the roof.

Having given ProBuild the discretion to make that decision, plaintiffs cannot now claim they were damaged by the choice ProBuild made.

(CP 1154-1155). [Emphasis added.]

This truth, however, is inconvenient for ProBuild and MiTek who both now make the completely different unsubstantiated claim that there was some form of communicated “agreement” between Brooks and Sevigny that a 15 TCDL was going to be used or that Mr. Sevigny supposedly “knew” the necessary TCDL for the Schilling trusses should be 15. These are not the record facts.

The record facts are that Schilling and Artisan gave Brooks the Schilling building plans, and Brooks brought his personal “ProBuild” knowledge and expertise to bear to select the correct Schilling truss loadings. (CP 469-473; 503; 1558-1562). Those loadings which Brooks actually selected in 2007, were not disclosed to Artisan or Schilling. Accordingly, neither had any reason to think the 12 TCDL eventually used was either incorrect, changed, or that contract warranties had been breached or the CPA violated. (CP 464; 1461; 2928).

Because MiTek stamped the plans, Schilling, Artisan, and Rathbone all differently understood the affixed engineer’s stamp to mean that the stamping engineer had verified the loadings chosen, and confirmed the loadings were project correct and code compliant. (*See, e.g.*, CP 709; 2142).

The record shows it was not until after lawsuit filing that Schilling and Artisan first learned a 15 TCDL had been Brooks’ original selection. (CP 2925; 2927-2933). Similarly, not until after lawsuit filing did Schilling and Artisan learn that for the type of tile Sevigny intended to use, a 15 TCDL was actually a correct loading for the Schilling home. (CP 1560; 2922-2925). It follows that

plan delivery did not commence a CPA statute of limitations as ProBuild and MiTek incorrectly assert.

Although legally irrelevant for the reasons discussed in Schilling and Artisan's initial brief, MiTek's disputed plan language similarly did not disclose a CPA breach. To begin with, it is not illegal for ProBuild to give proposed truss loadings to MiTek, nor is it illegal for MiTek to use those loadings, provided the stamping engineer confirms the loadings chosen are correct, by exercising Direct Supervision, before affixing a stamp. (RCW 18.47.070; WAC 196-25-070). That is what MiTek's plan language expressly says it did. (CP 1073).

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). [Emphasis added.]

Because ProBuild and MiTek both represented as fact, by the language used in the plans and by the affixed stamp, that Washington law had been followed, Schilling and Artisan had no reason to believe in 2007 that ProBuild and MiTek had instead engaged in illegal "plan stamping." (CP 2924).

Since nothing in the delivered plans disclosed a violation of law, and to the contrary, since the at-issue plan language actually affirmatively represented the law had been followed (CP 1093), the CPA statute of limitations did not commence in 2007 and instead only commenced when ProBuild and MiTek's

deceptive plan stamping business practices were later disclosed by post-lawsuit depositions. (CP 2924; 2932).

**D. Schilling and Artisan were not required to amend their already-filed CPA claim against ProBuild to specifically assert additional actionable deceptive acts.**

To try and avoid CPA liability, ProBuild now conflates a pled CPA legal claim with the deceptive acts, each of which alone, or all of which collectively, may prove that claim.

Here, the original complaint alleged a CPA claim against ProBuild. (CP 10). Because the claim was originally pled and remained a pled claim in the amended complaint (CP 432), no further CPA pleading against ProBuild was required.

Post-lawsuit, however, Schilling and Artisan learned there were additional independently actionable deceptive acts, which further proved ProBuild's already plead CPA claim liability and which newly supported a CPA claim against MiTek. Schilling and Artisan accordingly amended the complaint to assert a CPA claim against MiTek, within four years of their discovering the additional deceptive acts. (CP 425-435).

Contrary to ProBuild's assertion, additional deceptive acts supporting an already pled CPA claim do not need to be specifically alleged in amended pleadings.

Washington instead is a “notice pleading” state. *Champagne v. Thurston County*, 163 Wn.2d 69, 84, 178 P.3d 936 (2008). Under notice pleading rules, a complaint is sufficient if it presents a concise statement of the claim and the relief sought. CR 8; *Champagne Id.* 84; *see also, Pacific NW Shooting Park Ass’n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006).

Washington courts have confirmed that one purpose for this liberal notice pleading system is to allow plaintiffs to “use the discovery process to uncover the evidence necessary to pursue their claims. *Putman v. Wenatchee Valley Med. Ctr. P.S.*, 166 Wn.2d 974, 983, 216 P.3d 374 (2009). The Supreme Court has confirmed the notice pleading rule actually contemplates that discovery will provide parties with the opportunity to learn more detailed information about the nature of a complaint. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992). The appellate court in *Mose v. Mose*, 4 Wn.App. 204, 209, 480 P.2d 517 (1971) similarly held “Also, the notice pleading concept inherent in the rules anticipates that the issues to be tried will be delineated by pretrial discovery.”

It follows that if a CPA legal claim is generally pled, not every deceptive act which may later establish claim validity is required to be specifically alleged.

Here, in both the original complaint (CP 1-10), and in the later amended complaint (CP 425-435), it was alleged that ProBuild had engaged in deceptive acts and practices in the course of manufacturing the Schilling’s contract trusses, violating Washington’s CPA. This pled CPA claim was legally sufficient to

encompass all later CPA deceptive acts which lawsuit discovery might subsequently disclose.

With regard to all such post-lawsuit discovered deceptive acts, applying a correct statute of limitations analysis, the sole issue is whether a CPA cause of action was pled within four years of the date those illegal acts were first discovered. (RCW 19.86.120).

Here, post-lawsuit, Schilling and Artisan surprisingly discovered that 1) ProBuild and MiTek were engaged in illegal plan stamping (CP 979-984; 1468; 1470; 1473; 1558-1563); 2) ProBuild had a deceptive “plant default” practice of changing Brooks’ loadings (CP 191-194; 464; 469-470; 2982-2986); and 3) without notice, ProBuild had changed Brooks’ correct truss loadings for the Schilling home. (CP 1561). Since the discovery of these independently actionable CPA deceptive acts was already legally encompassed by Schilling and Artisan’s “notice pleading” CPA claim, no amendment of Schilling and Artisan’s claims against ProBuild was either needed or required by Washington law. Further, the statute of limitations for each newly discovered deceptive act did not run, because a CPA claim encompassing that conduct was filed against ProBuild and MiTek within four years of the date this new deceptive conduct was first discovered. *Mayer v. STO Industries, Inc.*, 123 Wn.App. 443, 98 P.3d 116 (2004). The lower court therefore erred by dismissing Schilling and Artisan’s CPA claims.

### III. PROBUILD WARRANTY CLAIM

A. The lower court erred by not granting Schilling and Artisan's motion for summary judgment against ProBuild for breach of express warranties.

The truss sale in this case was a sale of goods. It is therefore governed by Washington's Uniform Commercial Code. Under RCW 62A.2-313, an express warranty is created when the seller makes an "affirmation of fact or promise" in connection with the sale of goods. RCW 62A.2-313(1)(a). Here, the parties' contract agreement required that Brooks, for ProBuild, select the proper truss specifications for the Schilling home. (CP 472-473; 503; 1558-1560). Prior to doing so, Brooks, for ProBuild, warranted that the truss specifications chosen would in effect, be engineer confirmed, as evidenced by the final engineer stamped plans to be provided as part of the sale.

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; 2928). [Emphasis added.]

Consistent with Brooks' testimony, Rathbone testified that legally stamped truss plans were required, for trusses sold for use in Yakima County. (CP 2142).

To comply with the law, ProBuild's witness Suttle testified that prior to the Schilling home, ProBuild contracted with MiTek to provide the required

engineer-stamped truss plans for its customers. (CP 1037-1038). Partially consistent with ProBuild's express warranty, a set of engineer-stamped plans was later supplied as part of the sale to Schilling and Artisan. (CP 316-385).

The issue therefore, is not whether ProBuild expressly warranted that lawfully stamped plans would be provided as part of the sale, the question is whether an express warranty breach occurred, because the plans supplied were not lawfully stamped by an engineer.

Here, the record shows ProBuild's warranty was breached, because MiTek did none of the Direct Supervision required to lawfully stamp the plans. (*See, e.g.*, CP 396-397; 405-407; 486-487; 697; 700-702).

ProBuild also ignores that the engineer's stamp is itself an express warranty, given to its customers, that the engineer's statutory obligations have been met.

Specifically, under Washington law, an express warranty can be a representation or promise attached to the goods being sold. *Cochran v. McDonald*, 23 Wn.2d 348, 161 P.2d 305 (1945). Here, the engineering stamp was attached (affixed) to the plans which were part of the goods being sold. (CP 316-385). ProBuild adopted the engineering stamp warranty affixed to the plans, when ProBuild expressly made its providing lawfully stamped plans a term of its truss sale contract to a purchaser. (CP 1562; 2928).

Since the record facts show unlawfully stamped plans were sold, ProBuild breached its express warranties, and a summary judgment order so stating should have issued.

**B. ProBuild's express warranties could not be limited or disclaimed.**

Under Washington law, disclaimers are not favored. Accordingly, for a disclaimer to be effective, it must be explicitly negotiated or bargained for and it must set forth with particularity, the qualities and characteristics being disclaimed. *Hartwig Farms, Inc., supra*; *Berg v. Stromme*, 79 Wn.2d 184, 484 P.2d 380 (1971); *Dobias v. Western Farmers Ass'n*, 6 Wn.App. 194, 200, 491 P.2d 1346 (1971). Here, pre-sale, ProBuild did not attempt to explicitly negotiate or bargain away supplying the legally required engineer's stamp with its plans.

Washington courts have also specifically held that an attempted disclaimer made after a sale is completed cannot be effective as a matter of law, because, by definition, it is not a part of the bargain between the parties. *Hartwig* at 543; *Dorman v. International Harvester Co.*, (1975) 46 Cal. App.3d 11, 120 Cal. Rptr. 516. The Washington Supreme Court in *Travis, Id.* 405, has also dispositively held express warranties, once made, cannot be negated by a disclaimer.

In direct contradiction to this binding legal authority, ProBuild now states that the disputed post-sale language placed upon the Schilling plans by MiTek, could limit or disclaim the statutory stamp warranty obligations which Washington law imposes. (RCW 18.43.070; WAC 196-23-030; WAC 196-25-

070). That is just not the law. (*See*, Schilling and Artisan’s opening brief, hereafter referred to as SAB pp 39-40).

ProBuild also ignores that the disputed plan language referenced - far from disclaiming or eliminating the engineer’s stamp warranty - informs readers that the law has been followed, by stating in part:

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). [Emphasis added.]

To even make the arguments asserted, ProBuild must misstate the facts and law.

Nonsensically, ProBuild argues that because the disputed plan language says MiTek has used “parameters provided by Lumbermen’s”, this language somehow limited ProBuild and MiTek’s statutory obligations or informs readers that “plan stamping” is occurring. As previously noted, however, ProBuild could select what they believed to be correct truss loading parameters and it would be entirely lawful for MiTek to later use them, provided they were double checked for project adequacy, as part of the Direct Supervision conduct Washington statutes required MiTek engineers to perform. It follows that MiTek’s disputed plan language does not factually or legally limit or “disclaim” its statutory obligations.

**C. The warranty statute of limitations was tolled.**

ProBuild's response brief similarly ignores most of the tolling facts and law cited by Schilling and Artisan.

Fraudulent concealment sufficient to toll a statute of limitations can be proven simply by showing a defendant breached an affirmative duty to disclose a material fact. *Crisman v. Crisman*, 85 Wn.App. 15, 20-21, 931 P.2d 163 (1997). The RESTATEMENT (SECOND) OF CONTRACTS §551 (1991), which is completely ignored by ProBuild, requires disclosure by a party of "matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of facts from being misleading."

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

In this case, the receipt of lawfully stamped truss plans was central to the parties' contract, as the trusses could not, by law, be used without them. (CP 453-454; 502-503; 914; 981; 2141-2142). Accordingly, whether the truss plans were being illegally "plan stamped" was a material transaction fact and under Washington law, a duty to affirmatively disclose the true facts existed. *Oates v. Taylor*, 31 Wn.2d 898, 904, 199 P.2d 924 (1949); *Colonial Imports, Inc. v. Carlton NW, Inc.*, 121 Wn.2d 726, 732, 853 P.2d 913 (1993).

To not constitute a “fraudulent concealment” sufficient to toll the statute of limitations, ProBuild also had an affirmative duty to disclose both to Schilling and to all other customers, that 1) it was Brooks, for ProBuild, who designed the trusses and selected the specifications, 2) that ProBuild had a “plant default” policy of frequently changing Brooks’ different loadings to be a 12 TCDL, and 3) that Direct Supervision of Brooks’ plans by a licensed Washington engineer was not being performed, so as to confirm whether the default truss loadings being used were project correct. (CP 457; 697).

By not disclosing these material and true facts, ProBuild engaged in “fraudulent concealment,” conduct sufficient to toll the UCC’s breach of warranty statute of limitations. RCW 62A.2-725(4).

In its brief, ProBuild does not deny engaging in fraudulent concealment conduct. It instead argues that Schilling and Artisan otherwise “knew or should have known” about ProBuild and MiTek’s illegal plan stamping practices, because of the contested plan language placed on the delivered plans.

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.  
PBB p. 35.

The preceding sections, however, have already established why that assertion is false *i.e.*, the disputed plan language misrepresents that MiTek

prepared the plans after exercising Direct Supervision as Washington statutes required, falsely concealing the true facts. Artisan did not know that a 15 TCDL was needed for the Schilling home, that the 12 TCDL represented a specification change by ProBuild, or that a 12 TCDL would not support the intended tile roof.<sup>6</sup>

ProBuild similarly does not address or distinguish Schilling and Artisan’s case law, or deny that whether affirmative concealment conduct should or does lead a plaintiff to believe no claim exists, is at worst, a question of fact not resolvable by summary judgment. *Alexander v. Sanford*, 181 Wn.App. 135, 325 P.3d 341 (2014). Having essentially “conceded” that Schilling and Artisan’s uncontested concealment facts and law are correct, the lower court’s error in dismissing Schilling and Artisan’s warranty claims must be reversed.

**D. ProBuild is equitably estopped from asserting the statute of limitations.**

Schilling and Artisan’s equitable estoppel argument has nothing to do with a promise to repair. To support an estoppel defense, only three elements must be shown. They are 1) an admission, statement, or act inconsistent with the claim afterwards asserted; 2) action by the other party on the faith of such admission, statement, or act; and 3) injury to such other party resulting from allowing the

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<sup>6</sup> Indeed, ProBuild and its licensed engineers continue to assert even now, the 12 TCDL is both lawful and contract compliant, because a 12 TCDL will support some tile roofs. (PBB pp. 47-48). How can allegedly correct loading information have thus disclosed to Schilling and Artisan that illegal contract breach activity had occurred? It could not and did not. That is why in May 2011, MiTek engineer, Yu, was able to successfully “convince” Schilling, Artisan and Bardell that the truss loadings were correct and could accommodate tile and that accordingly, no legal claim for warranty breach existed. (CP 469; 525).

first party to contradict or repudiate such admission, statement or act. *Kessinger v. Anderson*, 31 Wn.2d 157, 196 P.2d 289 (1948). Contrary to ProBuild's claims, it was not a promise to repair that during the May 2011 house meeting persuaded Schilling and Artisan not to sue, but rather, at that meeting ProBuild and MiTek falsely claimed that MiTek had "prepared" the truss plans and that the loading chosen was correct. (CP 2922-2925; 2929-2933; 3098). By making these false affirmative statements, ProBuild and MiTek were inequitably attempting to hide that illegal plan stamping had occurred, so that a suit might be avoided. (CP 525).

It is this quite different affirmative inequitable conduct, not a "promise to repair" which supports Schilling and Artisan's equitable estoppel defense. ProBuild, however, ignores this applicable equitable estoppel law (*McDaniels v. Carlson*, 108 Wn.2d 299, 308, 738 P.2d 254 (1987); *Proctor v. Huntington*, 146 Wn.App. 836, 845, 192 P.3d 958 (2008)) to instead address an issue Schilling and Artisan have neither raised nor argued.

Since once estoppel evidence is introduced, whether the elements have been proven are a question of fact (*Pacific Nat. Bank of Wa. v. Richmond*, 12 Wn.App. 592, 530 P.2d 718 (1975)), it was error for the lower court to dismiss the lawsuit's warranty claims.

#### **IV. RESPONSE TO PROBUILD'S CROSS-APPEAL**

##### **A. The lower court properly issued partial summary judgment against ProBuild on Schilling and Artisan's CPA claim.**

The record evidence shows Brooks for ProBuild, designed the truss plans. (CP 394; 472-473; 503; 1558-1559). The record shows MiTek did nothing to “directly supervise” ProBuild’s/Brooks’ work. (*See, e.g.*, CP 697; 1881). Direct Supervision before an engineer’s stamp can be affixed, is a Washington statutory requirement (RCW 18.43.070). ProBuild’s knowing participation in this illegal “plan stamping” practice is 1) an unfair or deceptive act; 2) occurring in commerce; 3) affecting the public interest; which 4) proximately caused 5) Schilling and Artisan damage. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-785 719 P.2d 531 (1986). The court order finding ProBuild to have violated the CPA properly issued.

##### **B. ProBuild's plant default practice violated the CPA.**

The undisputed record shows that Brooks properly selected a 15 TCDL for the Schilling home. (CP 1558-1563). ProBuild admittedly had a “plant default” practice of frequently changing Brooks’ properly selected TCDL to a 12 TCDL, not just for the Schilling job, but for other jobs as well. (CP 191-193; 464; 469-470; 2982-2986). This plant-default practice was not disclosed to ProBuild’s customers. (CP 1561). ProBuild, by post-construction investigation, later confirmed that a 15 TCDL was proper for the Schilling home’s intended tile.

(CP 2998). Changing a correct TCDL without notifying customers is 1) an unfair or deceptive act; 2) occurring in commerce; 3) affecting the public interest, which 4) proximately caused; 5) Schilling and Artisan damage. *Hangman Ridge, supra*. The partial summary judgment order finding ProBuild to have violated the CPA properly issued.

**C. To sell trusses, ProBuild told customers that lawfully stamped truss plans would be part of the sale.**

To sell trusses, Brooks promised customers, including Schilling and Artisan, that as part of the sale, a set of engineer-stamped truss plans would be supplied. (CP 1558-1563). The truss plans delivered falsely represented that the plans had been “prepared by MiTek Industries, Inc.” by its exercising Direct Supervision over the “parameters provided by Lumbermen’s.” (CP 1073). ProBuild’s oral sales and written plan representations were false and deceptive. The record proves Brooks, not MiTek, did the truss designs (CP 390-391; 473-474; 979-982). MiTek exercised no Direct Supervision (as defined by Washington law) over the plans and instead, illegally stamped them. (CP 697; 1881). The presale representation that the truss plans sold would be prepared and Directly Supervised by a licensed engineer and the post-sale representation that the plans were in fact prepared by and Directly Supervised by a licensed engineer were 1) false and deceptive acts; 2) occurring in commerce; 3) affecting the public interest; and 4) proximately caused; 5) Schilling and Artisan damage.

*Hangman Ridge, supra.* A partial summary judgment order finding ProBuild to have violated the CPA properly issued.

**D. Each deceptive ProBuild act had the capacity to deceive the public.**

A false statement communicated to even one customer, if contained in a standard form business document, has the capacity to deceive substantial portions of the consuming public. *Potter, Id.* 328. Here, ProBuild gave Schilling truss plans with a standard form statement which falsely said the plans had been prepared by a licensed MiTek engineer who, after exercising Direct Supervision, stamped the plans.

CPA rules also apply to post-sales activity. Accordingly, a CPA claim can be established where a plaintiff shows that after a sale, the defendant failed to affirmatively disclose important material facts.

The CPA applies to activities both before and after a sale, and may be violated by failure to disclose material facts. *Smith v. Sturm, Ruger & Co., Inc.*, 39 Wn.App. 740, 747-48, 695 P.2d 600, *rev. denied*, 103 Wn.2d 1041 (1985).  
*Griffith v. Centex Real Estate Corp.*, 93 Wn.App. 202, 214, 969 P.2d 486 (1998).  
[Emphasis added.]

The post-sale affixing of an illegal engineer stamp facially has the capacity to deceive a substantial portion of the public. By continuously participating in illegal plan stamping, ProBuild's post-sale conduct has deceived hundreds, if not thousands, of its customers.

Under Washington law, where there is no question about what a party did, whether that conduct constitutes an unfair or deceptive act, can be decided as a matter of law. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997); *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn.App. 542, 545-46, 13 P.3d 240 (2000). Where relevant facts are not in dispute, courts can also find as a matter of law that the CPA's public interest test has been met. *State v. Kaiser*, 161 Wn.App. 705, 725, 254 P.3d 850 (2011).

Since the at-issue ProBuild conduct here is undisputed, and since each independently actionable deceptive act has admittedly been repeated for other truss sales transactions, the lower court was correct in finding as a matter of law, the "public interest" test for the CPA was met.<sup>7</sup> The lower court correctly ruled that ProBuild violated the CPA.

**E. The record shows Schilling and Artisan were injured.**

Plans that are not Directly Supervised cannot be lawfully stamped. Unlawfully stamped plans are not building code compliant in Union Gap. (CP 2142). Because the Schilling plans were illegally stamped, the Schilling

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<sup>7</sup> Contrary to ProBuild's assertion, the necessary public impact tests were directly addressed by Schilling and Artisan in their motion briefing. Schilling and Artisan referred the lower court to *Burbo v. Harley C. Douglas Inc.*, 125 Wn.App. 684, 106 P.3d 258 (2005), which ruled as follows:

Factors to be considered in assessing potential public impact are whether the facts suggest a pattern of conduct, the potential for repetition, and the likelihood that others will be affected. [Citation.] Where a private contract is involved, the public interest is impacted if the defendant advertised to the general public and if the parties occupied unequal bargaining positions. *Burbo* at 700. [Emphasis added.] (CP 1015).

home currently violates code and its market value is diminished. Because the Schilling home violates code, the Schillings have been injured sufficient to establish ProBuild's CPA liability.

The Court of Appeals in *Stephens, Id.* 180; (*see also, State Farm Fire & Casualty Co. v. Quang Huynh*, 92 Wn.App. 454, 470, 962 P.2d 854 (1998)), also held that costs incurred in investigating the effect of an unfair or deceptive act or practice, are themselves sufficient to establish the injury element necessary to prove a CPA claim. Here, Schilling and Artisan have incurred substantial investigative fees and costs to uncover the actionable deceptive business practices engaged in by ProBuild and MiTek. There is accordingly, no genuine issue of material fact about whether Schilling and Artisan have been injured, it is only the extent of injury which remains open. Therefore, the lower court correctly ruled that ProBuild violated the CPA.

**F. ProBuild's conduct proximately caused Schilling and Artisan injury.**

The Schilling home currently violates code because the truss plans on file are illegally stamped. (CP 2142). Those plans were illegally stamped because ProBuild and MiTek engaged in illegal "plan stamping" business practices. "But for" ProBuild and MiTek's illegal plan stamping practices, the Schilling home would not currently violate code.

To install the type of tile roof originally intended, ProBuild itself, post-construction, confirmed a 15 TCDL is required. (CP 2998). ProBuild, however,

had a “default” practice of changing an otherwise correct TCDL loading to be a 12 TCDL. As a consequence of this deceptive plant-default practice, Schilling and Artisan did not get what they contractually bargained to purchase, *i.e.*, manufactured trusses which would support the intended tile roof. Since this undisputed record evidence shows the necessary “proximate cause” for the damages suffered, the lower court was correct in finding CPA liability existed.

**G. The lower court did not enter summary judgment based on issues first raised in a reply brief.**

As part of moving for summary judgment on Schilling and Artisan’s CPA claims, Schilling and Artisan realleged and incorporated by reference both their Complaint and all other pleadings previously filed in opposition to MiTek’s motion for summary judgment. As part of those prior pleadings, Schilling and Artisan had stated in part as follows:

Mr. Brooks has testified that even though he would create a design using the accurate building plan code criteria of 15 and 30 (as noted above), to cut costs, his supervisor at ProBuild, Mr. Dennis Suttle (Suttle), routinely changed his design criteria to be a “plant default” 12 lb. TCDL and 30 lb. live load. (Perkins’ Dec. Attachment C, pp. 16-17, 21-26).

(CP 542). [Emphasis added.]

A number of other prior pleadings expressly incorporated by reference (*see, e.g.*, plaintiffs’ points and authorities supporting motion to amend (CP 217-229)), which the lower court also considered as part of Schilling and Artisan’s CPA motion request, also raised and presented this issue. (CP 1883-1894).

Therefore, ProBuild is wrong in claiming that this basis for liability was not raised as part of Schilling and Artisan's initial motion pleadings.

ProBuild is also incorrect in claiming that the procedural rule articulated by *R.D. Merrill Co. v. Pollution Bd.*, 137 Wn.2d 118, 969 P.2d 458 (1999) applies. The factual predicate for the *Merrill* rule does not exist in this case, because here the court made no decision at the time of the initial motion hearing and instead, by party stipulation, the court gave both parties additional time to conduct further discovery and to file additional pleadings. Accordingly, the pleadings now at issue were not Schilling and Artisan's "rebuttal pleadings." Rather, they were instead supplemental to and effectively part of the initial summary judgment pleadings filed. ProBuild neglects to inform this Court that because by mutual stipulation, the original hearing was continued, the parties then later filed what became in effect, the parties' rebuttal pleadings. All of this occurred prior to the court making any motion decision. (CP 1883-1894).

It was only after ProBuild was given a full opportunity to address the specific load changing practices shown, that ProBuild made the spurious argument that 1) the issue had supposedly not been raised as part of initial motion pleadings; and 2) even though it had the opportunity to file later rebuttal pleadings and declarations before any rulings issued, that somehow the *R.D. Merrill, supra*, rule was either factually or legally applicable. Since neither assertion was correct,

the lower court properly rejected ProBuild's objection and a correct summary judgment order issued.

**H. ProBuild did breach an implied warranty of merchantability.**

Under RCW 62A.2-314(2)(f), for goods to be "merchantable," the goods must: "conform to the promises or affirmations of fact made on the container or label if any."

Here, the language placed upon the truss plans specifically represented in part that the truss designs... "have been prepared by MiTek Industries, Inc. under my direct supervision..." Beyond these words, an engineer's stamp was also affixed to the plans.

Contrary to current appeal assertions, MiTek, in its own advertising, admits it does not prepare the truss plans.

Our engineering department is available to review and seal our customers' designs. With offices in NC, Missouri and California, MiTek's professional engineers can furnish seals for all 50 states! (CP 821). [Emphasis added.]

The illegal stamp which MiTek affixes makes the trusses building code deficient and therefore, not "merchantable," because they do not conform to the affirmations of fact made by the accompanying sales paperwork.

These false representations of fact were adopted by ProBuild because, as part of making truss sales, ProBuild promised customers that it would provide a

lawfully stamped set of truss plans to accompany the manufactured trusses. (CP 1562; 2928).

When ProBuild failed to provide what it contracted to provide, and when the trusses sold did not conform to affirmations of fact made in the accompanying plans, ProBuild breached implied warranties, because the trusses were illegal and therefore not “merchantable.” The lower court was correct in finding that ProBuild breached implied warranties.

#### **V. RESPONSE TO MITEK’S CROSS-APPEAL**

##### **A. MiTek’s “Disclaimer” arguments are factually and legally wrong.**

Contrary to ProBuild’s appeal assertions, MiTek agrees that ProBuild salesman Brooks identified and chose the truss design parameters which ProBuild felt were necessary and appropriate for the Schilling home. (CP 1037-1038; 1069). (MiTek appellate brief “MAB” p. 8). MiTek also admits that ProBuild asked it to “plan stamp” the designs Brooks prepared (CP 1037; 2287), which it never double checked for Schilling home sufficiency.

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. (CP 117; 121; 715). (MAB p. 13). [Emphasis added.]

Read carefully, MiTek’s principal defense against liability is that purportedly the post-sale language that MiTek placed on the final plans would tell

a reader that a Direct Supervision review of the parameters ProBuild had chosen was not being done by MiTek.

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).

MAB p. 9.

For all of the reasons addressed by Schilling and Artisan's briefs, however, this principal defense to liability is false, the MiTek plan language misrepresents the work MiTek did by *i.e.*, falsely saying it exercised Direct Supervision. Further, by law, MiTek cannot disclaim Washington statutory obligations.

As a secondary defense, like ProBuild, MiTek next misrepresents that Sevigny supposedly "knew" a 15 TCDL was required for the Schilling home. (MAB p. 10). That again is simply not true for several self-proving reasons. First, if Sevigny knew what TCDL to use, logically that specification would have been put on the building plans. It was not.

Similarly, if Sevigny knew what TCDL to use, Brooks would not have been asked to separately determine that specification. (CP 389-391; 473-475; 979-983). Here, the undisputed facts are that it was Brooks, not Sevigny, who calculated and determined what the appropriate TCDL for the Schilling home should be. (CP 1037-1038).

Whether Sevigny looked at the truss plans upon delivery or not, he did look at them when Schilling later complained about sheetrock cracking. Even then, upon review, it was not clear to Schilling or Sevigny that a 12 TCDL was incorrect. If it had been otherwise self-evident, Schilling and Artisan would not have provably called ProBuild and/or later MiTek to have them come to the Schilling home to investigate the cause of the house problems. The record also shows that for over three years post-construction, despite the exchange of literally hundreds of emails with ProBuild and MiTek, in not one does Sevigny say, *e.g.*, “I asked for a 15 TCDL, but you gave me a 12 TCDL.”

There is only one explanation which accounts for Sevigny not making this statement and for his differently asking that ProBuild and MiTek later investigate to determine the cause of the Schilling home problems. Sevigny did not know a 15 TCDL was a correct specification for the Schilling home. (CP 2927-2942).

For summary judgment, the record facts most favorable to Schilling and Artisan are, that Sevigny had no knowledge that Brooks had selected a 15 TCDL as being contract correct, until after lawsuit filing. (CP 2930-2931).

On a motion for summary judgment, all facts and inferences from the facts most favorable to the non-moving party must be accepted as true. *Jacobson v. State*, 89 Wn.2d 104; 569 P.2d 1152 (1977). Here, abundant evidence supports the conclusion that the 12 TCDL on the plans did not inform Schilling, Artisan or Rathbone that a contract or warranty breach had occurred. Therefore, a statute of

limitations dismissal which wrongly assumes the truss plans conveyed this information to Schilling and Artisan, should not have issued.

**B. The Schilling's pre-lawsuit consultant, Terry Powell, previously worked for and was trained by MiTek.**

Before lawsuit filing, Schilling hired as an engineering consultant, Terry Powell (Powell). Powell worked for MiTek's predecessor and then for MiTek, prior to forming his own company. (CP 1858). At the time Powell was hired, the issue of MiTek/ProBuild plan stamping was unknown. That practice only became known when Tingey's deposition was later taken.

Wanting to later defend ProBuild and MiTek's "plan stamping" business practices, ProBuild and MiTek asked Powell whether his company also stamps plans without performing any Direct Supervision review. Not surprisingly, having been trained by MiTek, Powell testified he follows the same business procedures he learned at MiTek.

Q. Judging from your history, you spent the significant part of, starting as engineer and up until you formed your own company, working with MiTek, correct? And its predecessor company, the whatever – Nails?

A. Correct.

Q. And so is it fair that you learned your truss review practices as part of working for that company? That you learned them and honed them in terms of review and procedures?

A. That's a reasonable assumption.

Q. And when you formed your own business, logically assuming you implemented basically the same practice and procedure for your own business?

A. Pretty much.

Q. Yeah. The only reason I ask is because we do have an issue in this case of whether MiTek's procedures are illegal and if their procedures are illegal, you wouldn't know that, but you have been adopting them?

(CP 1858-1859). [Emphasis added.]

Without telling this Court this important information, MiTek now argues that because Powell uses the same illegal business practices he learned at MiTek, that somehow supports these business practices are legal. (MAB p. 32). That is simply incorrect. Two illegal acts do not make a legal act.

MiTek also continues to conflate illegal "plan stamping" with the issue of whether an engineer can lawfully use loading "parameters" provided by another party. This later practice can be legal and does not violate Washington's engineering rules or regulations provided the stamping engineer exercises Direct Supervision to confirm the loadings chosen are contract correct. It is the failure to exercise required Direct Supervision, not the use of another's loading parameters, which makes ProBuild and MiTek's business practices illegal.

Logically, if Washington's Board of Engineers, as MiTek now claims, had otherwise decided the legal issues now presented on appeal, MiTek would have gotten and presented to the lower court a sworn declaration so stating, from an authorized Board official. The facts are the Board has taken no position about the

issues in this case, because it is for this Court, not the Board, to decide what Washington law requires.

**C. The Board of Engineers does not have exclusive jurisdiction.**

Under RCW 18.43, Washington’s Board of Registration for Professional Engineers and Land Surveyors (The Board) can take disciplinary action against an engineer who violates Washington engineering statutes or WACs. That has nothing to do, however, with whether an employer, who asks an engineer employee to illegally plan stamp as a deceptive business practice, can also be liable, independent of any disciplinary proceeding, for a CPA violation.

Furthermore, the CPA states that when the legislature makes a specific declaration that a statute at issue has been enacted to “protect the public interest,” any member of the public injured by a statutory violation, does have a “per se” CPA claim against the violating party. (RCW 19.86.093(2)).

Examples of statutes that Washington courts have found sufficiently state that they affect the public interest and therefore support a private party’s CPA claim include RCW 46.70.005, RCW 46.80.005, and RCW 48.01.030; *see also*, *Hangman Ridge, supra*.

In this case, RCW 18.43.010 specifically states: “In order to safeguard life, health, and property, and promote the public welfare... [the following] engineering statutes and their requirements have been promulgated.” [Emphasis added.] This express designation by the legislature of a public interest purpose

for the engineering statutes, establishes that plaintiffs are within the class of persons those statutes were enacted to protect.

The case *Burg v. Shannon & Wilson, Inc.*, 110 Wn.App. 798, 43 P.3d 526 (2002), cited by MiTek, is inapposite. In *Burg, stet*, unlike here, there was no contract between the county and the adjacent homeowners which required the county to provide the adjacent homeowners with stamped engineering plans. The engineering firm in *Burg, supra*, was not, as part of a sale of goods, delivering stamped plans directly to the adjacent landowners, to have those landowners rely upon that work. As an additional distinguishing factor, in *Berg, supra*, the claim filed was for engineering malpractice, it was not a CPA or warranty breach claim involving warranty stamp representations made directly to homeowners, by reason of sold plans.

In contrast to *Burg, supra*, in a case both factually and legally on point, the Supreme Court in *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013) found a statutory CPA claim was validly brought against the trustee employer of licensed notaries, when the notaries in that case had made affirmative fact representations by affixing their stamps, which they and the employer knew were false.

Identical to the notaries in that case, here MiTek engineer Tingey, by affixing his engineering stamp, made affirmative representations that he had done what Washington statutes require in order to lawfully affix his stamp. That

affirmative stamp representation was identically false for the same substantive reasons that the affixed notary stamps were proven to be false in *Klem, supra*. Because the *Klem* case is binding precedent, the lower court correctly found MiTek, as Tingey's employer, did breach the CPA and that ruling should be affirmed.

**D. The plans stamped by MiTek are part of the “practice of engineering”.**

If creating the truss design plans now at issue in this case was not part of the “practice of engineering,” then why does Section 802:10.2 IRC require that the truss plans be engineer stamped? (CP 453-454). The answer is self-evident. Local governments do not believe that unlicensed individuals with indeterminate education and training can capably determine what custom truss specifications are required to be.

MiTek also misreads the language of RCW 18.43.020(5). As defined, the “practice of engineering” in part, includes “... any professional service... requiring engineering education, training and experience...” Here, affixing an engineering stamp to truss plans is a “professional service requiring engineering education,” which by contract, MiTek was performing for ProBuild, Schilling, and Artisan.

Under RCW 18.43.070, the statute also in part provides:

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.

[Emphasis added.]

Consistent with this statute's terms, by affixing a stamp to the plans, as a matter of law, MiTek was representing that its engineers had "prepared" those plans by exercising Direct Supervision as the "practice of engineering" requires.

Pause for a moment and consider, MiTek employs engineers to look over (however briefly and inadequately that is done) the truss designs ProBuild creates and then has its engineers stamp those plans as a professional service for customers, and yet according to MiTek, that conduct is not part of the "practice of engineering." Really? Exactly how financially desperate are ProBuild and MiTek to have this Court allow their illegal business practices to continue?

**E. MiTek did not Directly Supervise the engineering work stamped.**

Under WAC 196-25-070, in effect in 2007 when MiTek's work was performed, Direct Supervision required that the engineer in part,

maintains control over those decisions that are the basis for the findings... details and judgments that are embodied in the development and preparation of... plans, specifications... and related activities.

[Emphasis added.]

Believing this Direct Supervision requirement could be further explained, WAC 196-25-070 was later amended to add the following language:

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

[Emphasis added.]

As MiTek itself admits, a statute that is clear on its face must be applied as written. *Harmon v. DSHS*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998).

Reading the statutory language used, an engineer cannot simply accept the “parameter” specifications chosen by an unlicensed truss salesman and then stamp the designs those specifications create, without making any effort to understand why the specifications were chosen or to confirm that, as chosen, the specifications will work for the specific building for which the designed trusses will be installed.

Contrary to what the WACs plainly state, MiTek instead now admits:

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).

It is undisputed that MiTek’s scope of work was limited to preparing designs based on ProBuild’s parameters. Plaintiffs’ belief that 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 30; 144). [Emphasis added.]

MAB p. 30.

What occurred in this case is accordingly clear. MiTek, as a matter of law, by affixing its stamp, directly warranted (and for CPA purposes, represented to Schilling and Artisan) that a truss parameter specifications review and approval

had occurred. That did not happen. Since MiTek's stamping actions violated both warranty and CPA obligations, the lower court order finding MiTek liable, should be affirmed.

**F. MiTek breached express warranties.**

MiTek manufactures and sells the metal connectors which are part of the manufactured trusses being sold. To sell those products, as part of its required exclusive product sales arrangement with ProBuild (and other software-licensed customers), MiTek agrees to also stamp (CP 989), the package of truss designs sold, which are a MiTek letterhead document (*see, e.g.* CP 830-831). Because selling its manufactured metal truss connectors and concurrently selling stamped truss plans are a combined "package" for sales purposes, to determine UCC applicability, both Washington courts and the courts of other states apply a "predominant factor" test to decide whether the business transaction in question involves primarily the sale of goods or services. *Tacoma Athletic Club, Inc. v. Indoor Comfort Systems, Inc.*, 79 Wn.App. 250, 902 P.2d 175 (1995). That test applied to case facts, establishes that MiTek is a seller of goods and therefore the UCC applies.

Because MiTek provides its engineer-stamped plans as an incidental, but component part of selling its metal connectors (CP 442-455; 826), applying the "predominant factor" test, the South Dakota Supreme Court in *Lennox v. MiTek*,

519 N.W.2d 330, 25 UCC Rep.Serv.2d 1118 (1994), previously found MiTek to be a UCC “seller of goods.”<sup>8</sup>

Here, the lower court also correctly found that the engineer stamp was not a mere service, but instead “lent extrinsic value to the trusses ProBuild sold to the Schillings”. (CP 2602). MiTek was properly determined to be a seller of goods to whom the UCC applies.

## **VI. CONCLUSION**

One issue before the court is whether CPA claims were brought against ProBuild and MiTek within four years of the date any of the independently actionable deceptive acts and practices that would support CPA liability were first discovered. (RCW 19.86.120). ProBuild and MiTek’s deceptive business practice of illegal plan stamping, would alone establish CPA liability. Those illegal practices were not first discovered by Schilling and Artisan until ProBuild and MiTek’s witnesses disclosed them during deposition. (*See, e.g.*, CP 396-397; 405-407; 979-980). Those illegal business practices were not disclosed by MiTek’s delivered plans and there was no way Schilling or Artisan could have known about them prior to post-lawsuit depositions. Applying this record evidence in a manner most favorable to the non-moving party (*Barber v. Bankers Life & Casualty Co.*, 142 81 Wn.2d 140, 142, 500 P.2d 88 (1972)) the record

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<sup>8</sup> Indeed, Tingey testified the fee MiTek charged ProBuild to stamp its plans was “negotiated” based upon the volume of metal truss products which ProBuild buys from MiTek. (CP 454-455).

shows the lower court erred by dismissing Schilling and Artisan's CPA claims against ProBuild and MiTek.

Although Schilling and Artisan believe ProBuild and MiTek are liable "per se" for violating Washington's engineering statutes, even if this Court disagreed that these statutes are per se "public interest" statutes, a valid CPA claim would still exist, because the record evidence shows ProBuild and MiTek's business practices "have the potential to affect the public interest" and "have the capacity to deceive a substantial portion of the public." *Holiday Resort Community Ass'n v. Echo Lake Assoc. LLC*, 134 Wn.App. 210, 226-227, 135 P.3d 499 (2006), *rev. denied*, 160 Wn.2d 1019, 163 P.3d 793 (2007); *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 170 P.3d 10 (2007); *Klem, Id.* 787. Washington courts have also held the knowing failure to reveal something of material importance is deceptive within the CPA. *Robinson v. Avis Rent A Car Sys., Inc.*, 106 Wn.App. 104, 116, 22 P.3d 818 (2001).

Here, it is materially important for Washington homeowners to know whether statutory stamping requirements are being followed or whether instead, an engineer's employer is engaged in the illegal business practice of "plan stamping." Because both the requisite "public interest and actual repetition evidence," otherwise necessary to support a valid CPA claim are shown by the record, CPA liability exists, regardless of whether the engineering statutes do or do not establish "per se" liability.

Notwithstanding ProBuild and MiTek's attempts to mischaracterize Schilling and Artisan's claims as being professional "negligence" or "malpractice" claims, that is not what was pled. Mr. Tingey is not being personally sued. It is instead the deceptive business practices employed by MiTek and ProBuild which are at issue for CPA purposes, just as it was the trustee employer's deceptive business practices in having notaries falsely affix their stamps in *Klem, supra*, which the Supreme Court found to be properly CPA-actionable in that case.

MiTek further asserts "Plaintiffs cannot credibly argue that MiTek concealed their business practices..." To the contrary, abundant record evidence establishes multiple MiTek affirmative acts of fact misrepresentation and concealment. As already noted, MiTek's plans affirmatively misrepresent that MiTek supposedly prepared them. (CP 1073).

After that affirmative misrepresentation was made, when Sevigny called MiTek to ask questions about the trusses, he was again falsely informed that MiTek had prepared the plans. (CP 2928 ¶ 5). Further, at the Schilling home meeting on May 23, 2011, MiTek and ProBuild again falsely represented that MiTek had purportedly prepared the truss designs. (CP 2929 ¶ 6-7). At that meeting, Mr. Yu for MiTek, represented the truss loadings set forth in the plans were supposedly project correct and therefore, the Schilling house problems could not be the trusses. (CP 2929 ¶ 9). Within days of the meeting, however, ProBuild

and MiTek determined by further investigation that a 15 TCDL was instead the correct loading for the Schilling home. (CP 2998). That known material information (which had to be disclosed in order to correct Mr. Yu's prior affirmative misrepresentations) was not disclosed, but was instead concealed and not discovered until after lawsuit filing.

ProBuild knew, but concealed that Brooks' original correct loadings had been changed to be a lower plant default loading. That independently actionable deceptive practice, although known to ProBuild, was also not first discovered by Schilling and Artisan until Brooks' post-lawsuit deposition was taken.

Contrary to ProBuild and MiTek's claims, the delivered plans did not disclose these deceptive business practices, because Schilling and Artisan had no idea what loading Brooks had originally chosen as being contract correct. (CP 2925; 2927-2933). Since a 12 TCDL may accommodate some tile roofs, Schilling, Artisan, and Rathbone had no reason to believe this loading could not or would not accommodate the tile Schilling and Artisan intended to use.

As yet another deceptive practice, MiTek vigorously proclaims that "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." (MAB p. 13).

The MiTek plan package, however, is a MiTek letterhead document. On the top of the first page, the plans have the reference “Re: 070315 \*Artisan/Schilling/070315\*.” Each later page in the upper right corner identifies the truss design as “\*Artisan/Schilling/070315\*.” This language informs any reader that the stamped MiTek plans have been prepared specifically for the Schilling home. It is yet another CPA deceptive business practice for this MiTek document to represent by this language, the engineer approved plans are specifically for the Schilling home, if that is not what MiTek and ProBuild intend to convey.

Under Washington law, an at-issue business practice does not have to actually deceive a specific plaintiff, it simply has to have the “capacity to deceive” members of the public in order to be actionable. *Robinson, supra*. Here, the language on MiTek’s business document clearly has the “capacity to deceive” any reader into believing that MiTek prepared plans for a specific job and those plan specifications are contract correct as evidenced by its affixed engineer’s stamp. Analyzing and applying this evidence in a manner most favorable to Schilling and Artisan (as this Court must), it was accordingly error for the lower court to dismiss Schilling and Artisan’s CPA claims and that error must be reversed.

ProBuild and MiTek also argue they engaged in no deceptive business conduct so as to conceal the unfair business practices and/or warranty breaches

which occurred. The record proves otherwise. The ProBuild/Schilling contract required ProBuild to determine the correct loading specifications for the Schilling trusses. ProBuild, through Brooks, warranted that as part of the sale, truss plans lawfully stamped by an engineer would be provided so the trusses would be building code compliant and could therefore be used to construct the Schilling home.

Consistent with contract terms, Brooks obtained the necessary information to properly select the correct 15 TCDL project loading. Unknown to Schilling and Artisan, as one deceptive business practice, ProBuild frequently changed otherwise correct truss loadings to be a plant-default 12 TCDL for tile roofs. This deceptive business practice was concealed by ProBuild and not disclosed to customers. Schilling and Artisan first learned of this practice post-lawsuit, during discovery. (CP 2925; 2927-2933).

As a separate deceptive business practice, ProBuild and MiTek both knew that ProBuild salesmen, not MiTek, were actually doing the truss designs, using MiTek software. Those designs, when completed, were not being subjected to Direct Supervision review by MiTek engineers to confirm specification/loading correctness. Instead, ProBuild and MiTek both knew that MiTek's engineers simply "plan stamped" the ProBuild truss designs, because neither party wanted to pay to have a Direct Supervision review actually performed.

By nevertheless affixing an engineer's stamp to all sold truss plans, ProBuild and MiTek were both actively concealing that a Direct Supervision review had not occurred. The first sentence on the first page of the Schilling plans falsely represents that MiTek, through its engineer, has "prepared" the plans by exercising Direct Supervision, even though the "parameters" have been provided by ProBuild. That affirmative false representation is another act of "concealment," intended to prevent a truss purchaser from discovering that illegal "plan stamping" has occurred.

After the Schilling house problems were experienced, as another affirmative act intended to conceal the illegal plan stamping business practices, ProBuild and MiTek employees both continued to falsely represent to Schilling and Artisan that MiTek had "prepared" the plans and so the specifications were adequate, even though both knew MiTek had not done so.

MiTek engineer Yu, at the Schilling house meeting, also falsely represented that a 12 TCDL was contract correct, when a few days later, further investigation revealed that to be untrue. ProBuild and MiTek admittedly concealed this material fact from both Artisan and Schilling.

Because ProBuild and MiTek's same "concealed" business practices also breached contract warranties given, analyzing the facts in a manner most favorable to the non-moving parties, the statute of limitation for warranty breach

was tolled and Schilling/Artisan's warranty claims should not have been dismissed.

Properly considered, this lawsuit is not limited to just whether a 12 TCDL or 15 TCDL was contractually required for the Schilling home. Independent of that issue are several larger public policy issues. Did Schilling and Artisan receive a lawfully stamped set of truss plans or did they not? Is it a CPA violation for a company to sell engineer-stamped truss plans when the statutory requirements to lawfully affix that stamp have not been followed? Can an engineer legally disclaim the obligation to do what a Washington statute requires before an engineer's stamp is affixed?

After properly deciding many of these issues in Schilling and Artisan's favor, Schilling and Artisan's otherwise valid claims were eventually wrongly dismissed, solely because the lower court incorrectly believed that the contested 2007 plan language used by MiTek had informed Schilling and Artisan that illegal plan stamping had occurred.

As Schilling and Artisan's initial brief also points out, that is not the case. Indeed, applying Washington's contract construction rules, the disputed at-issue language legally cannot be read as some sort of notice or disclosure that those practices are occurring.

It follows that once the statute of limitations dismissals are reversed, the lower court's other legal rulings should be affirmed and this case should be remanded back for trial in accordance with those rulings.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of May, 2017.

LARSON BERG & PERKINS PLLC

A handwritten signature in cursive script, appearing to read "Jim Perkins", written in black ink.

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James A. Perkins, WSBA #13330  
Counsel for Appellants/Cross-Respondents