

Court Appeals 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

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

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT PROBUILD

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INTRODUCTION

ProBuild is appealing the trial court's conclusion that ProBuild violated the Washington Consumer Protection Act ("CPA") by changing the Top Chord Dead Load ("TCDL") on the Schilling trusses from 15 to 12 without informing the Appellants. As is set forth more fully below, Appellants make absolutely no attempt to defend this decision by the trial court. Instead, Appellants ask this Court to affirm that the trial court "properly issued partial summary judgment" by referencing other alleged "deceptive acts." One of the other deceptive acts was presented to the trial court but was not part of trial court's decision. The other is being presented as a "deceptive practice" under the CPA for the first time in this appeal. Appellants' are therefore asking this Court to affirm a decision that was never made by the trial court.

ProBuild is also appealing the trial court's decision that ProBuild breached the warranty of merchantability based on alleged verbal statements made by a salesman. The plain language of the statute on which this warranty is based makes clear that the oral statements alleged by Appellants do not constitute an implied warranty of merchantability.

Therefore, this Court should reverse these trial court decisions.

I. Appellants Offer No Defense of the Trial Court's Summary Conclusion that ProBuild Violated the CPA by Changing the TCDL on the Schilling Trusses from 15 to 12.

The trial court's decision to grant the Appellants' motion for partial summary judgment was based solely on the trial court's conclusion that someone at ProBuild changed the TCDL on the trusses from 15 to 12 without informing Appellants of this change. CP 1880-1882. The trial court's holding and explanation for that holding is described in detail in the trial court's letter opinion dated October 14, 2014. Id. This letter opinion was attached to the trial court's order, which states that the letter:

outlines the Court's analysis as to facts which were undisputed, and what matters the Court has determined as a matter of law. A copy of the Court's October 14, 2014 letter is attached to this Order as Exhibit 1, and its terms are incorporated herein for purposes of Civil Rule 56(d).

CP 1889. ProBuild's cross appeal seeks reversal of this decision.

ProBuild's Response Brief sets for the reasons the trial court erred. Specifically, ProBuild argues that the "change" in the TCDL: 1) was not a deceptive act under the CPA; 2) that genuine issues of material fact exist as to whether the change in the TCDL had a public interest impact; 3) that genuine issues of material fact exist as to whether the TCDL change injured Appellants; and 4) that genuine issues of material fact exist as to whether any injury to Appellants from the change in the TCDL was caused by ProBuild. ProBuild Response at 41-49.

Appellants do not respond to any of these arguments, and offer no

defense of what the trial court actually decided. Given the complete absence of any supportive arguments from Appellants, the trial court's decision that ProBuild violated the CPA by changing the TCDL should be reversed for the reasons previously provided.

II. Appellants are Once Again Changing their Characterization of Their CPA Claim Against ProBuild in order to Avoid Confronting the Defects in that Claim

Rather than defend the trial court's decision, Appellants are presenting to this Court a version of their CPA claim that is different than the claim upon which the trial court based its decision. This tactic has been used before by Appellants. Rather than respond directly to arguments that challenge the validity of a claim, Appellants simply change the claim.

There are two probable reasons for this change in direction. First, Appellant must realize that the trial court's decision is flawed. Second, Appellants have also apparently realized that the CPA claim they presented to the trial court is barred by the statute of limitations. Their only hope to prevail is to offer a different claim.

A. The First Version of Appellants' CPA Claim Against ProBuild

Appellants' first iteration of their CPA claim was that ProBuild violated the CPA by selling trusses for which the engineering work was not proper. Appellants initially argued that the engineering work was

deficient because MiTek did not review the Schilling house plans before performing the engineering on the trusses. Appellants also argued that a statement on the truss drawings misrepresented that the work of ProBuild had been “directly supervised” by MiTek. According to Appellants, ProBuild was liable under the CPA, because it had sold trusses with this allegedly faulty engineering. CP 1009-1017.

This was the sole basis for the CPA claim Appellants asserted against ProBuild in their first Motion for Partial Summary Judgment. The trial court, however, was not convinced that these alleged acts constituted a CPA claim against ProBuild, and did not grant summary judgment against ProBuild on the basis of these alleged acts. See CP 1880-1882

B. The Second Version of Appellant’s CPA Claim Against ProBuild

After ProBuild raised multiple factual and legal defenses to the CPA claims articulated in Appellants’ Motion for Partial Summary Judgment, Appellants changed course and offered a second CPA claim based on a completely different “deceptive act.” This claim was described for the first time in Appellants’ reply brief in support of their motion for partial summary judgment. See CP 1533-1556.

This second iteration was based on the allegation that someone at ProBuild had “changed” the Top Chord Dead Load on the Schilling trusses from 15 to 12 without informing Appellants that the change had been

made. According to Appellants, the parties met and “agreed upon” a 15 lb. TC DL. CP at 1551. Subsequent to this agreement, Appellants claimed, the “agreed ‘tile dead load specification’ was changed.” CP at 1551. Appellants further asserted that this change occurred “without subsequent notice” to Appellants. CP at 1551.

Appellants also stressed to the trial court that this conduct was a deviation from ProBuild’s normal procedures and was not part of any standard practice. Appellants told the trial court:

Before changing truss specifications (and in particular, where a tile roof is involved, before reducing the roof dead load to 15lb [sic] instead of 15 lb) **it is undisputed that typically, Mr. Suttle [the ProBuild truss plant manager] would contact the assigned ProBuild salesperson and the salesperson would contact the homeowner or the contractor about this proposed change. It is undisputed, however, that contrary to ProBuild’s normal business practice,** someone approved changing the 15 lb tile dead load specification for the Schilling home down to the 12 lb dead load specification, without getting anyone’s permission.

CP at 1538 (emphasis added).

To the trial court, Appellants unambiguously argued that whenever any “change” in truss loading would occur, ProBuild “typically” would inform the customer. Id. Indeed, Appellants told the trial court that informing a customer of a change was ProBuild’s “normal business practice.” Id.

Appellants’ now realize that this second version of their CPA is barred by the four year statute of limitations. Any CPA claim that is based

on ProBuild's changing an "agreed upon" TCDL of 15 to a TCDL of 12 would have been known to Appellants in 2007, when they received the engineered truss drawings. Those truss drawings plainly showed that the trusses were manufactured with a TCDL of 12, not what Appellants claimed was the "agreed" upon TCDL of 15. See CP 1551. Therefore, Appellants clearly knew, or should have known, that this allegedly deceptive "change" had taken place in June of 2007.

Appellants apparently now realize know that because they waited more than four years to file their claim against ProBuild their CPA claim is barred. Appellants' therefore are motivated to come up with a new approach.

C. Appellants' Third Version of Their CPA Claim against ProBuild

Desperate to avoid the consequences of the four year statute of limitations, Appellants offer - for the first time in this case - a third iteration of their CPA claim. Appellants have recast ProBuild's allegedly deceptive conduct from the isolated "changing" of the TCDL from 15 to 12 to a company "plant default practice." Appellants Reply Brief at 23. By describing their claim in these terms, Appellants are positioning themselves to not only avoid the problems with the trial court's decision granting summary judgment, but also to allow Appellants argue that the facts supporting their CPA claim were only recently discovered and thus

avoid the statute of limitations.

Appellants would like this Court to believe this “plant default practice” was the “deceptive act” that formed the basis for the CPA claim on which the trial court granted partial summary judgment against ProBuild. It plainly is not. In fact, in attempting to illustrate how wrongful ProBuild’s “change” in the TCDL was, Appellants argued to the trial court that it this “change” was a deviation from ProBuild’s standard procedures and was NOT part of a common practice. See CP 1538.

In truth and fact, Appellants never presented to the trial court any CPA claim that was based on this alleged deceptive “practice.” It was not articulated in any pleading. Appellants did not assert, as part of its Motion for Partial Summary Judgment, that this “deceptive practice” had even occurred, let alone present arguments as to why this “practice” met all the elements to prevail on a CPA Claim. At no point in this case have Appellants have argued, let alone established as a matter of law, that this “default plant practice” constitutes a “deceptive act or practice” under the CPA, that it “impacts the public interest, or that this “practice” proximately caused an injury to Appellants.

Appellants would also like this Court to believe that it presented evidence of this alleged deceptive “default plant practice” to the trial court and that this evidence was considered by the trial court. An examination of the record proves however, that is was not the case.

The evidence in the record which Appellants cite to this Court concerning this alleged deceptive “practice” was never cited to the trial court as evidence that such a practice constituted a “deceptive act or practice” under the CPA. This evidence also was never cited to the trial court in support of arguments explaining how each element of a CPA claim based on this “practice” was satisfied. Instead, Appellants’ evidence of this “practice” consists of scraps of testimony that just happen to have been included in excerpts that were used to support other, unrelated arguments of Appellants. None of the references offered by Appellants were part of the materials submitted to the trial court in connection with Appellants’ Motion for Partial Summary Judgment. Materials related to that Motion are in the record at CP 985 to CP 1901. The statements cited to this Court as evidence of this alleged “deceptive plant practice” are found at CP191-193; CP 464, 469-70; and CP 2982-2986.

In essence, Appellants have rummaged through the record and found pieces of information which they believe demonstrate that such a practice existed. Appellants argued that because pieces of testimony coincidentally exist in the record, this Court should consider this new CPA claim even though no such claim based on this “practice” was ever pleaded, and arguments supporting such a claim were never presented to or considered by the trial court.

In short, a CPA claim based on a “plant default practice” was never

presented to the trial court as a deceptive act which violated the CPA. It is now being presented to this Court to avoid confronting the fatal defects in the claim Appellants did present.

III. Appellants Have Not Demonstrated That All of the Elements of a CPA Claim Have Been Proven, as a Matter of Law, for Each Alleged Deceptive Act They Raise in this Appeal

In Appellants Reply Brief, Appellants identify two “deceptive acts” by ProBuild which they claim violate the CPA. Appellants invite this Court to decide that the existence of these deceptive acts justify affirming the trial court’s decision to grant summary judgment, even though they were not part of the trial court’s decision.

Assuming that these issues are properly before this Court, Appellants’ arguments fall far short of the showing necessary to demonstrate that they are entitled to summary judgment against ProBuild based on these alleged deceptive acts is appropriate. The standard for granting summary judgment is well known and well established. In order to succeed on a CPA claim Appellants must demonstrate that all of the elements of a CPA claim exist for each deceptive act alleged. Shepard v. Holmes, 185 Wash. App. 730, 742 (Div III 2014). A CPA claim requires a plaintiff to prove: 1) an unfair or deceptive act or practice; 2) occurs in trade or commerce; 3) impacts the public interest; 4) causes injury to the plaintiff to plaintiff’s business or property; and 5) the injury is causally linked to the unfair or deceptive act. Id.

Therefore, to prevail on appeal, Appellants must demonstrate, for each deceptive act, no genuine issue of material fact exists with respect to each element of a CPA claim

A. The “Deceptive Acts” Presented to this Court by Appellants Are Legally Deficient

The first alleged deceptive act is that ProBuild provided Appellants engineered truss drawings that inaccurately described the engineering work that was performed by MiTek. The second alleged deceptive act is that ProBuild had a “default plant practice” that reset truss loading specifications without informing anyone. Appellants have not demonstrated that either of these constitutes a “deceptive act” under the CPA.

Under well established precedent of this Court, Appellants must demonstrate that a “deceptive act” has three distinct characteristics. First, the conduct must be directed at the public. Goodyear Tire & Rubber Co. v. Whiteman Tire, 86 Wn. App. 732, 744 (Div III 1997). Second, the actor must have “misrepresented something of material importance.” Courchaine v. Commonwealth Land Title Insurance Co., 174 Wn.App. 27, 45-46 (Div III 2012). The third characteristic is that the action have the “capacity to deceive a substantial portion of the public.” Evergreen Money Source Mortgage Co. v. Shannon, 167 Wn.App. 242, 260 (Div III 2011)

1. Appellants Have Not Demonstrated That the Statements on the Truss Drawings Constitute a Deceptive Act under the CPA

To begin with, it is important to point out – once again – that Appellants deliberately and repeatedly mischaracterize the statement that appears on the front page of the truss drawings beside the engineer’s stamp. Appellants falsely claim that the statement represents to a reader that MiTek supervised a Lumbermens (ProBuild) employee. It says no such thing.

The process through which the engineered truss drawings are created has been fully explained elsewhere. The full statement actually reads as follows:

The truss drawings referenced below have been prepared by MiTek Industries, Inc. under my direct supervision based on parameters provided by Lumbermen’s Building Ctr-715.

CP 1073. This statement does not have the three required characteristics of a “deceptive act” under the CPA.

To begin with, the statement was not, in any sense, directed at the public at large. In the Goodyear Tire case, the plaintiff (a tire dealer) complained that Goodyear (the tire manufacturer) had misrepresented its expansion plans, threatened its dealers, and manipulated data to induce risky actions by the dealers. Goodyear Tire, 86 Wn.App. at 744. The court held as a matter of law, however, that this alleged conduct was not “directed at the public” and was therefore not actionable under the CPA.

Id. The tire company's tactics and interactions with its dealers, the court held, "had no deceptive capacity affecting the public in general." Id.

Similarly, the statement that appears on its truss drawings is not directed at the public. Instead, it is a statement that is, at most, made by its truss engineering company for consideration of persons who have purchased trusses. It is simply not the type of act the CPA was intended to remedy. See also, Evergreen Moneysource, 167 Wn. App. 242, 260-261 at 261 (Div III 2011) (conduct that is not directed at the public lacks the capacity to impact the public in general).

Second, the statement does not "misrepresent something of material importance." Courchaine at 46 - 48. The statement on the engineered truss drawings is an accurate description of the work that was performed. Appellants have argued elsewhere from time to time that the statement is inconsistent with applicable engineering laws. Nonetheless, it is a statement that accurately describes the work engineering work that was performed, and is not a "material misrepresentation."

Finally, the statement does not have the "capacity to deceive a substantial portion of the public." Evergreen Money Source Mortgage Co. v. Shannon, 167 Wn.App. at 260. In order to demonstrate that an act has the capacity to deceive "a substantial portion of the public", Appellants must offer evidence that other property owners were deceived by ProBuild. Burns v. McClinton, 135 Wn App. 285, 290-91 (2006) (CPA plaintiff must

supply evidence that other customers were deceived to satisfy the first element of a CPA claim). Mere speculation that an act had the capacity to deceive a substantial portion of the public is not sufficient to support a claim for a violation of the Consumer Protection Act. Westview Investments, Ltd v. U.S. Bank National Association, 133 Wn App 835, 854 (2006); Micro Enhancement International, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412 (2002). Appellants have made no such showing.

2. Appellants Have Not Demonstrated That the Alleged “Plant Default Practice” Constitutes a Deceptive Act

Similarly, the recently conjured up “plant default practice” does not bear the characteristics of a “deceptive act or practice” under the CPA. It is not directed to the public (Goodyear Tire at 744) there is no material misrepresentation (Courchaine at 46-48) and Appellants have failed to identify a single other property owner that was affected by this alleged practice (Burns 135 Wn. App. at 290-91).

In place of evidence, Appellants offer rank speculation and vague generalities and conclusory statements.

B. Appellants Have Not Demonstrated that, as a Matter of Law, the Public Interest was Impacted by the Alleged Deceptive Acts

The CPA exists to “protect the general public.” Evergreen Moneysource, 167 Wn.App. at 260. As a result, in order to maintain a claim under the CPA, a plaintiff must prove that the alleged deceptive acts

“affected the public interest.” Id. Typically, private transactions do not affect the public interest so as to bring conduct under the purview of the CPA. Hangman Ridge Training Stables v. Safeco Title Ins. Co., 105 Wn.2d 778, 790 (1986) at 790. Such was the case in the Goodyear Tire, 86 Wn.App. at 745, in which the court held that the interactions between a tire manufacturer and tire dealers did not affect the public interest.

Whether a particular act impacts the public interest is a question of fact. Hangman Ridge, 105 Wn.2d at 789-91. Washington courts employ four factors to determine whether the public interest is impacted by a private transaction. Applied to this case, those factors are: 1) whether the alleged acts were committed in the course of the ProBuild’s business; 2) whether ProBuild advertises to the public in general; 3) whether ProBuild actively solicited Appellants, indicating potential solicitation of others; and 4) whether the parties have unequal bargaining positions. Hangman’s Ridge, 105 Wn.2d at 790; Evergreen Moneysource, 167 Wn.App. at 261.

Appellants make absolutely no attempt to apply the facts of this case to these four factors, and prove to this Court that the public interest element of a CPA claim has been satisfied. See Appellants’ Reply at 26. In contrast, ProBuild demonstrated in its initial brief that three of the four factors are not present in the business relationship between the parties in this case. There is no advertising to the public, ProBuild did not solicit the work in question, and the parties did not have an unequal bargaining

position. ProBuild Response at 44-47.

This element of a CPA has clearly not been demonstrated to be present in this case for any of the alleged deceptive acts.

C. Appellants are Not Entitled to a Summary Determination that They Have Suffered an Injury

In granting Appellants' motion for partial summary judgment, the trial court erroneously concluded that Appellants had suffered an injury cognizable under the CPA. The sole focus of the trial court's decision was that the trusses "were not strong enough to support a tile roof." CP 1880-1882.

The trial court agreed that Appellants demonstrated an injury even though ProBuild provided clear evidence that the trusses would, in fact, support a tile roof. See CP 1036-1040. It is reversible error for the trial court to weigh evidence and determine a disputed issue of fact.

On appeal, Appellants contested they were "injured" because the Schillings' home "market value is diminished" and because Appellants have incurred "investigative fees and costs." Appellants Reply at 27. Both are mere speculation. Neither of the alleged injuries were part of the CPA claim presented to the trial court. Appellants also do not cite this to Court any evidence in the record that can support a summary conclusion that Appellants have suffered these injuries.

As a result, any summary determination that Appellants have

suffered an injury under the CPA is not appropriate.

D. Appellants Also Have Not Demonstrated that the Injuries They Claim to Have Suffered Were Proximately Caused by a Deceptive Act of ProBuild

In order to prevail on their CPA claims, Appellants must demonstrate that each of their alleged deceptive acts proximately caused an injury they claim to have suffered. This too is a question of fact. Indoor Billboard/Washington, Inc. v. Integra Telecommunicates of Washington, Inc., 162 Wn 2d 59, 81 (2007). In this appeal, Appellants have alleged two deceptive acts occurred: 1) a statement concerning engineering; and, 2) a “default plant process” for truss loading. And, they are asserting two injuries: 1) lowered property value; and 2) unspecified investigative costs.

Appellants do not draw a causal causation to either of these injuries from either of the deceptive acts they identify. Instead, they argue only that one of the deceptive acts - the default plant process – produced trusses that won’t support a tile roof. As was shown above, however, a genuine issue of material fact exists as to whether the trusses are sufficiently strong to support a tile roof. ProBuild says that they are. CP 1036-1040. Appellants contend they are not. Given this factual dispute, any summary resolution of this issue is wrong.

Furthermore, ProBuild submitted evidence in response to the Appellants original motion for partial summary judgment that superseding causes produced any injury incurred by Appellants. In particular, the

failure of Appellants' general contractor, project engineer and designer to fulfill their contractual and statutory obligations to ensure that the trusses met the requirements of the Schilling project were the proximate cause of any injury to Appellants. CP 1155-1156. Given that the abject failure of other persons to review and approve the trusses as manufactured supersedes any conduct of ProBuild as the cause of any deficiency in the weight bearing capacity of the trusses.

Appellants have not, to this Court, demonstrated that the "injuries" they identify on appeal (the decline in market value of the residence and the investigative expenses) were, as a matter of law, proximately caused either the engineering statement or the "plant default practice." In fact, Appellants have not explained how the allegedly deceptive engineering statement was the proximate cause of any injury. Therefore, Appellants have failed to satisfy the fourth element of a CPA claim, that deceptive act proximately caused an injury.

IV. Appellants Did Improperly Raise a New CPA in the Reply Brief Filed in Support of Their Motion for Partial Summary Judgment

There is no question that Appellants improperly introduced new claims in its reply brief in support of its motion for partial summary judgment. Contrary to Appellants' contention, no stipulation exists which authorized that deviation from the requirements of CR 56.

Because Appellants appear to have abandoned their defense of the

trial court's decision on the CPA claim that was improperly presented to the trial court, there is no need to further address this issue.

V. Appellants Are Not Entitled to Summary Judgment on Its Breach of Implied Warranty Claim

Appellants want to transform the implied warranty of merchantability into a catch-all warranty that makes any statement about a product into an implied warranty. The law does not support this understanding of the implied warranty of merchantability.

The statutory provision relied on by Appellants for their implied warranty claim is limited and unambiguous. The provision upon which Appellants base their claim requires that the goods: “conform to the promises or affirmations of fact made on the container or label if any.” RCW 62A.2-314(f)(emphasis added). The plain language of this statutory provision does not apply to verbal statements made in the course of transaction. Yet those are the only statements Appellants are relied on in asserting ProBuild had breached this implied warranty. As a result, this provision doesn't support Appellants' claim that verbal statements by a ProBuild employee constitute a warranty of merchantability.

Moreover, the only possible “container or label” that is relevant in this case are the engineered truss drawings. Appellants have never argued that the trusses deviated from the specifications contained in those drawings. Therefore, the trial court's conclusion that the implied warranty

of merchantability was breached is erroneous and should be reversed.

VI. Appellants' Claims are Barred by the Applicable Statute of Limitations

A. Appellants' CPA Claims are Barred by the Four Year Statute of Limitations

The trial court properly held that Appellants' CPA claims against ProBuild were barred by the statute of limitations. The CPA claims Appellants' presented to the trial court in their motion for partial summary judgment were based on two alleged deceptive acts: 1) the "changing" of the TCDL from 15 to 12; and 2) statements about MiTek's engineering work that appeared on the engineered truss drawings.

The truss drawings by themselves contain all the information Appellants needed for their CPA claims against ProBuild. Those drawings were delivered in June, 2007. Had Appellants reviewed the drawings, Appellants would have immediately seen that the TCDL was 12, not 15. Appellant and general contractor Artisan, Inc. (through its president, James Sevigny) testified that he knew and believed at that time that a TCDL of 15 was needed for tile. CP 3111. He even testified that he typically checked truss drawings to verify that the TCDL was correct. CP 3111.

Therefore, upon receipt of the engineered truss drawings in June of 2007, Appellants had all the information they needed to upon which to base their CPA claim that the TCDL was illegally changed from 15 to 12. They were aware of the alleged deceptive act (the change) and the alleged injury

(the trusses wouldn't support a tile roof). Despite having this information, they waited more than four years to file their action.

Similarly, the truss drawings provided all of the information Appellants needed for the CPA claim based on improper engineering. Statements on the truss drawings directly informed Appellants that MiTek performed their engineering work based on information provided by ProBuild and that MiTek was not verifying that trusses were appropriate for the Schillings' residence.

As with their other CPA claim, Appellants should have known at the time they received the truss drawings that the work did not comport with what they believed the engineering laws require (the alleged deceptive act), and that they had been sold trusses that were not properly engineered (their alleged injury).

This situation is indistinguishable from the case of Shepard v. Holmes, 185 Wash.App. 730, 734-735 (Div. III 2014). In that case, a buyer of property purchased property believing that the property consisted of four separate parcels. The buyer was not aware of, and had not been told by the seller, that a deed consolidating the parcels had been recorded prior to her purchase. The buyer filed a CPA claim against the seller five years after purchasing the property based on the seller misrepresenting the nature of the property.

The Shepard court held that claim was barred because the buyer had

constructive knowledge of the elements of the CPA claim at the time the property was purchased, and the four year limitations period had lapsed. The court held that the recorded consolidation deed gave the buyer constructive knowledge that the property did not consist of four separate parcels. According to the Shepard court, the buyer had constructive knowledge of both the deceptive act (misrepresenting the property being purchased) and the injury (having only one parcel instead of four). The court specifically rejected the buyer's argument that the limitations period didn't start running until buyer actually learned of the consolidation deed.

Just as in Shepard, Appellants had constructive (if not actual) knowledge of the facts giving rise to their CPA claims at the time they received the engineered truss drawings. Those drawings informed that the trusses did not have the TCDL they allegedly needed. The drawings further told them the nature and extent of the engineering work that was performed. And, just as in Shepard.

This knowledge of Appellants triggered the running of the statute of limitations, which lapsed eight months before Appellants filed their action.

B. Appellants' Warranty Claims are also Barred by the Statute of Limitations

The statute of limitations for warranty claims is also four years, and began to run when the trusses were delivered. RCW 62A.2-725(1). The beginning of this limitations period is not dependent on any knowledge of

Appellants. The four year period therefore began running in June, 2007, when the trusses and truss drawings were delivered, and expired in June, 2011. Appellants didn't file their action until February, 2012, long after the period had expired. Appellants warranty claims are therefore clearly barred.

CONCLUSION

The trial court's conclusion that ProBuild violated the Consumer Protection Act by changing the TCDL on the Schilling trusses from 15 to 12 should be reversed. Appellants have even abandoned any defense of that decision. Instead, Appellants attempt resuscitate a CPA claim that the trial court ignored and attempt to introduce, on appeal, an additional "deceptive act" that constitutes a violation of CPA. These alternate claims, even if properly before the court, are legally and factually defective, and in any event, should not be decided by summary adjudication.

The trial court's conclusion that ProBuild breached an implied warranty of merchantability should also be reversed. The statute upon which that implied warranty is based does not apply to the verbal statements alleged by Appellants.

Finally, and most importantly, the claims presented to the trial court are clearly barred by the statutes of limitations. All of the information necessary for Appellants to know they had the claims they filed in February of 2012 was provided to them in the engineered truss drawings that they

received in June, 2007. By the time they filed their action, the limitations period had expired. As a result, the trial court's dismissal of Appellant's claims should be affirmed.

RESPECTFULLY SUBMITTED this 9th day of August, 2017

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