

COURT OF APPEALS NO. 344355

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

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

Appellants,

v.

MITEK INDUSTRIES, INC., a foreign corporation, and

Respondent/Cross-Appellant

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

Respondent/Cross-Appellant.

MITEK'S RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF

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Table of Contents

I.	REPLY OVERVIEW	1
II.	CLARIFICATION OF FACTS	4
III.	ARGUMENT	6
	A. Washington’s engineering statutes and WAC guidelines do not provide Plaintiffs with a private right of action.	6
	B. MiTek did not violate RCW 18.43.070 or WAC 196-25-070.	7
	1. MiTek was only required to directly supervise its contracted scope of work.....	8
	2. Direct supervision is only required over events that constitute “practice of engineering” under RCW 18.43 <i>et. seq.</i>	10
	3. Parameter based engineering is allowed in the State of Washington.	12
	C. MiTek did not violate the CPA.....	13
	1. There is no per se violation of the CPA.	13
	2. MiTek’s business practices were not deceptive..	16
	3. MiTek’s actions could not proximately cause any damage to Plaintiffs.	18
	D. The trial court should have dismissed Plaintiffs’ breach of express warranty claim.	19
	E. The trial court properly dismissed the Schillings’ UCC 2 and CPA claims based on the statute of limitations.	20

1.	The UCC 2 statute of limitations elapsed.....	21
2.	The CPA statute of limitations also elapsed.	23
IV.	CONCLUSION	24

Table of Authorities

Cases

<i>Burg v. Shannon & Wilson, Inc.</i> , 110 Wn. App. 798, 43 P.3d 526 (2002).....	7, 13, 18
<i>Business Men's Assur. Co. of America v. Graham</i> , 891 S.W.2d 438 (Mo. Ct. App. 1994).....	7
<i>Donatelli v. D.R. Strong Consulting Engineers, Inc.</i> , 2017 WL 2106000 (May 15, 2017).....	8
<i>Giraud v. Quincy Farm and Chem.</i> , 102 Wn. App. 443, 6 P.3d 104 (Div. III 2000).....	21
<i>Haberman v. Washington Pub. Power Supply Sys.</i> , 109 Wash.2d 107, 744 P.2d 1032 (1987).....	16
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986)	13, 14
<i>Hughes v. Stusser</i> , 68 Wn.2d 707, 415 P.2d 89 (1966)	21
<i>Jackson v. City of Seattle</i> , 158 Wn. App. 647, 244 P.3d 425 (2010)	13
<i>Kasper v. City of Edmonds</i> , 86 Wn.2d 799, 420 P.2d 346 (1966) ...	8
<i>Klem v. Washington Mutual Bank</i> , 176 Wn.2d 771, 295 P.3d 1179 (2013).....	14, 15
<i>Marshall v. AC & S Inc.</i> , 56 Wn. App. 181, 782 P.2d 1107 (1989) 17	
<i>McCormick v. Lake Wash. Sch. Dist.</i> , 99 Wn. App. 107, 992 P.2d 511 (1999).....	17
<i>Pacific Boring, Inc. v. Staheli Trenchless Consultants, Inc.</i> , 138 F.Supp.3d 1156 (2015)	14
<i>Ramos v. Arnold</i> , 141 Wn. App. 11, 169 P.3d 482 (2007).....	16
<i>Rush v. Blackburn</i> , 190 Wn. App. 945, 361 P.3d 217 (2015).....	13
<i>Short v. Demopolis</i> , 103 Wash.2d 52, 61, 691 P.2d 163 (1984)....	16
<i>Steineke v. Russj</i> , 145 Wn. App. 544, 190 P.3d 60 (2008)	21
<i>Tacoma Athletic Club, Inc. v. Indoor Comfort Systems, Inc.</i> , 79 Wn. App. 250, 257, 902 P.2d 175 (1995).	19

Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc., 736 F.2d 656
(11th Cir. 1984)..... 18

Statutes

RCW 18.43 *et. seq.*..... passim
RCW 18.43.010..... 7, 14
RCW 18.43.020(5) 10
RCW 18.43.130(1) 11
RCW 19.86.020..... 15, 16
RCW 19.86.093(2) 15

Other Authorities

UCC 19, 20, 21, 22

Regulations

WAC 196-25-070..... 7, 9

I. REPLY OVERVIEW

This appeal is about contractual relationships and the rights and liabilities of parties that are defined by their contracts. If the Schilling residence was not built to their expectations, then they need to turn to Artisan and Altius, the entities that they contracted with to design and build their house, and/or to Timothy Bardell, who was hired to perform engineer-of-record services on the Schilling home. Instead, the Schillings partnered with Artisan to pursue a misguided claim against MiTek, an entity they did not speak or contract with, and who fully performed the terms of its agreement with ProBuild.

As discussed in MiTek's opening brief, there are two levels of contracts at play here. The first is the "on-site" level contracts, which involve individuals and entities who performed services at the construction site. These contracts include agreements between the Plaintiffs, Altius, engineer Bardell and ProBuild.

The second is the "remote" level contracts, which involve entities that did not know who the Schillings were and had no direct involvement with the Schilling property, no interaction with any of the Plaintiffs, and no participation in or knowledge of on-site activities.¹ The "remote" level contracts include the MiTek-ProBuild oral agreement to prepare truss designs meeting ProBuild's parameter specifications. (CP 1037-1038, 1529, 2287). This level would also

¹ ProBuild participated at both levels.

include any contract between ProBuild and its lumber supplier for the wood used to build the trusses that were later sold and delivered to the Schillings.

Three critical facts that Schillings briefs ignore are: (1) MiTek's only client in this transaction was ProBuild; (2) ProBuild contracted with MiTek to perform a limited scope of work; and (3) MiTek fully performed the scope of work it agreed to perform for ProBuild. Plaintiffs argue that Washington law (RCW 18.43 *et. seq.*) requires engineers to perform their work to the expectations of unknown end users, regardless of the scope of work contractually agreed to by the engineer with its client and even though the expectations of such end users may be different than the engineer's contractual obligations Plaintiffs' assertions are without any basis in law or fact.

The subject designs prepared by MiTek's engineer included clear language on a cover page, as well as on each individual design, advising anyone who bothered to look at the designs that MiTek's scope of work was limited to preparing individual component designs based on parameters provided by ProBuild, and that the designs were not prepared for any particular building:

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

The seal on these drawings indicate acceptance of

professional responsibility solely for the truss components shown. **The suitability and use of this component for any particular building is the responsibility of the building designer**, per ANSI/TPI-2002 Chapter 2. [emphasis added].

(CP 715). At the bottom of each design was the following prominent “Warning” reiterating the limited scope of MiTek’s engineering services:

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

(CP 1265-1268).

Plaintiffs erroneously contend the ProBuild job reference file label, reading “Artisan/Schilling/070315,” is a representation by MiTek that the designs were prepared for their particular house because it contains portions of their names. The evidence confirms that this ProBuild job file reference label served merely as a ProBuild internal identifier that had no meaning to MiTek. (CP 118-119). Plaintiffs’ contention overlooks the clear warnings, quoted above, which advise that MiTek’s truss drawings were designed using parameters specified by ProBuild. They were not prepared for Schillings’ particular residence.

II. CLARIFICATION OF FACTS

There are several statements in Plaintiffs' reply brief that need to be corrected:

First, Plaintiffs' continued, intentional blurring of the distinction between the preliminary truss designs prepared by ProBuild and the truss designs prepared and sealed by MiTek's engineer, coupled with its assertion that MiTek engaged in the act of "plan stamping" in preparing its designs needs to stop. While there may be similarities between the preliminary truss designs prepared by ProBuild and the set of truss designs independently prepared by MiTek, the undisputed evidence confirms that MiTek performed its own calculations and prepared its designs in a different location, at a different time, and following different internal guidelines (CP 2068-2173, 2315-2382) than ProBuild did with respect to its preliminary designs. MiTek never saw the ProBuild preliminary designs. Instead, MiTek received a request from ProBuild to prepare certain truss designs based upon parameters provided by ProBuild. (CP 1037, 2287). MiTek performed each calculation that was required to generate its truss designs and its engineer signed and sealed the MiTek designs, in MiTek's business office, entirely independently of ProBuild. (CP 117, 122-123). MiTek then transmitted its sealed designs to ProBuild along with a cautionary statement that the designs were based upon ProBuild's parameters and that the load parameters used for preparing the designs needed to be verified by

the building designer before the designs were used for any particular project. (CP 715). MiTek did not seal ProBuild's preliminary designs. It sealed its own work. It did not engage in the act of plan stamping.

The similarity in appearance between MiTek's sealed designs and ProBuild's preliminary designs, which have never been seen or compared, would merely be the result of both sets of designs having been independently prepared using a common computer design software program. Any similarity in appearance does not mean that the designs were jointly prepared or copied. Instead, the evidence confirms that they were independently prepared.²

Second, the Plaintiffs continue to argue that MiTek's use of a 12 pound per square foot top chord dead load ("TCDL")³ for its designs as opposed to a 15 pound per square foot TCDL⁴ had something to do with the superficial plaster cracking the Schillings have experienced in their house. This is in spite of the fact that the Schilling home has, and has always had, composite shingles, not roof tile, on its roof, which weigh less than the 12 pound per square foot TCDL parameter ProBuild requested. The undisputed testimony

² This is functionally no different than a student and a teacher independently calculating the same mathematical problem using the same model of calculator and reaching the same, or similar, answer. Calculations can look the same and still be independently calculated and performed.

³ This was the weight of roofing materials specified by ProBuild that would be permanently carried by each truss.

⁴ 15 pounds per square foot was the weight of roofing tile that the Schillings said they contemplated placing on the roof of their home at some undetermined, future time.

confirms that “the trusses as they were designed and constructed [were] adequate for a composite roof[.]” (CP 2739). That is, the 12 pound per square foot TCDL loading used was adequate for the roofing material currently installed on the Schillings’ home.

Third, there is no evidence MiTek concealed any information or made misrepresentations to the Schillings. Instead the evidence demonstrates the contrary. MiTek also disclosed its limited scope of work by placing a prominent warning on its truss designs identifying the scope and limits of its engineering services. (CP 715-716).

Fourth, in a desperate attempt to excuse the late filing of their claims against MiTek, Plaintiffs assert, without any evidence, that years after the construction of the Schilling home, MiTek’s engineer Ray Yu “falsely represented that a 12 pound per square foot TCDL was contract correct.” *Schilling Reply Brief* at 48. While MiTek disagrees that such a statement was made by Mr. Yu, it also points out that, even if such statement had been made, it would not have been false, because a 12 pound per square foot TCDL was the loading which MiTek was required to use for its designs under its contract with ProBuild, the only party with whom MiTek contracted.

III. ARGUMENT

A. **Washington’s engineering statutes and WAC guidelines do not provide Plaintiffs with a private right of action.**

RCW 18.43 *et. seq.* is a licensing statute designed to ensure

that engineers are properly qualified and licensed with the State of Washington. RCW 18.43.010. The engineering statute does not include a private right of action.

Plaintiffs are not clients or employers of MiTek and therefore cannot rely on RCW 18.43 *et seq.* or WAC 196-25-070 to support an independent cause of action against MiTek. The *Burg* case is analogous to this case where homeowners alleged that an engineering firm violated RCW 18.43 *et. seq.* *Burg v. Shannon & Wilson, Inc.*, 110 Wn. App. 798, 43 P.3d 526 (2002). *Burg* held that violations of RCW 18.43 *et. seq.* do not create an independent cause of action for third parties. *Id.* at 806-07. Instead, the engineering statute and guidelines only create a cause of action that flows to clients and employers of the engineer. *Id.* Plaintiffs are not clients of MiTek and did not employ MiTek, therefore they cannot maintain a cause of action based on alleged violations of RCW 18.43.070. This reasoning is supported by case law from Missouri that Plaintiffs ignored in their reply. See *Business Men's Assur. Co. of America v. Graham*, 891 S.W.2d 438 (Mo. Ct. App. 1994); *MiTek's Respondent Brief* at 47.

B. MiTek did not violate RCW 18.43.070 or WAC 196-25-070.

The trial court erroneously concluded that MiTek violated RCW 18.43.070 and former WAC 196-25-070 by failing to directly supervise ProBuild's selection of truss parameters or to confirm the

loadings chosen were correct for the contract between ProBuild and the Plaintiffs' (which did not involve MiTek). The Court's decision is particularly egregious when Plaintiffs admit they deferred to ProBuild what load parameters should have been selected under the ProBuild/Plaintiffs contract. *Schilling Reply Brief* at 9.

1. MiTek was only required to directly supervise its contracted scope of work.

As the recent case of *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 2017 WL 2106000 (Wash. Ct. App., May 15, 2017) (unpublished), confirmed, the obligations of engineers are owed to their clients, and then only to the extent the parties agreed to. Here the only parties to the MiTek/ProBuild engineering contract were MiTek and ProBuild who confirm MiTek fully performed its obligations. MiTek owed no duty to the Plaintiffs and this lack of any duty is a critical issue Plaintiffs failed to address or rebut.

Instead, Plaintiffs selectively refer to parts of the statutory language without giving effect to the entire statute as a whole and seek to render key language superfluous. See *Kasper v. City of Edmonds*, 86 Wn.2d 799, 804, 420 P.2d 346 (1966) ("Courts will not ascribe to the legislature a vain act, and '...a statute should, if possible, be so construed that no clause, sentence or word shall be superfluous, void, or insignificant.") (internal citation omitted).

The statute at issue here is RCW 18.43.070 which provides in relevant part:

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.

This statutory provision only notes that the stamping and signing of a document constitutes a certification that the document was (1) prepared under the direct supervision of the stamping engineer, and (2) that the engineer believes their work complied with statutory requirements. There is no dispute that the MiTek engineer believed his work complied with his obligations under the statute.

Instead, Plaintiffs focus only on the direct supervision prong which is not defined by the statute but was defined through the administrative rule making process by Washington's Board of Registration for Professional Engineers ("Board"). WAC 196-25-070, defines "direct supervision" and explains that "**Direct supervision** requires providing personal direction, oversight, inspection, observation and supervision of the work being certified." (emphasis in original). Plaintiffs ignore the critical language that an engineer is only required to maintain direct supervision over "the work being certified." WAC 196-25-070.⁵ Here a parameter based design.

⁵ Later revisions to this WAC provision are inapplicable here but still maintain that same limiting language that direct supervision is only required over the work being certified. See WAC 196-25-070.

Schillings even admit that “it is not illegal for ProBuild to give proposed truss loadings to MiTek, nor is it illegal for MiTek to use those loadings...” *Schilling Reply Brief* at 11. However, Plaintiffs believe MiTek should have gone beyond the scope of MiTek’s contract with ProBuild and verified that ProBuild’s selected parameters met the Schillings’ expectations when the Schillings were not parties to MiTek’s agreement and were totally unknown to MiTek. Plaintiffs’ argument is nonsensical because MiTek was not contracted to perform those services for the Schillings or their residence, and never certified the load parameters were project appropriate. In fact, the truss designs stated that the load parameters needed to be reviewed and approved by the building designer before being incorporated into any particular building. (CP 715). MiTek satisfied its statutory obligations by performing each calculation embodied on the MiTek sealed designs and using language defining and explaining MiTek’s scope of work.

2. Direct supervision is only required over events that constitute “practice of engineering” under RCW 18.43 et. seq.

RCW 18.43 et. seq. only applies to duties falling under the definition of “practice of engineering” as defined by RCW 18.43.020(5). The statute defines “practice of engineering” as work that requires “engineering education, training and experience and the application of special knowledge of the mathematical, physical,

and engineering sciences to such professional services.” Activities outside of the practice of engineering do not need to be directly supervised even though they may result in parameters used by an engineer, as expressly codified by RCW 18.43.130(1) which notes that “[t]his chapter shall not be construed to prevent or affect...[t]he practice of any other legally recognized profession or trade.” For instance, building designers, general contractors, truss manufacturers, and other persons do not need to be licensed under the statute to perform activities such as: determining the weight of building materials (e.g., 12 pound per square foot TCDL) which can be derived from product literature; determining dimensional data which can be derived with a tape measure; determining design properties of various species of lumber which can be looked up in reference manuals; or determining other parameters that can be derived without the use of engineering education, training and experience or the application of special knowledge of the mathematical, physical, and engineering sciences.

Ultimately, MiTek’s only obligation was to prepare designs that met ProBuild’s expectations. MiTek’s certification confirmed the truss designs it sealed were individual parameter based designs prepared to ProBuild’s specifications. This complied with Washington’s engineering statutes as confirmed by Plaintiffs’ own expert who admits to using the same methodology that is accepted in the engineering community. (CP 1652-1654).

3. Parameter based engineering is allowed in the State of Washington.

The broad statement adopted by the court below, and the Plaintiffs argue here, ignores the simple fact that all engineering is based on parameters received from the engineer's client or customer. Parameters define the environment to which an engineer applies his special knowledge, skill, education, and experience in order to evaluate how a structure may react in the real world. For example, an engineer could evaluate how a piston would be expected to perform if installed in a particular engine and run at 5,000 rpms, or how a truss would be expected to perform if a 12 pound per square foot TCDL were applied thereto.

However, if an end user decides to install that same piston in the same engine and runs that engine in excess of 8,000 rpms, or if a contractor decides to apply roofing tile amounting to a 15 pound per square foot TCDL to the truss, this would not mean that the engineer's analysis based upon a 5,000 rps parameter or a 12 pound per square foot TCDL was faulty in any way. The engineer's analysis in either case would simply have been inapplicable, as it would apply to an environment defined by a different set of design parameters.

Consistent with this analysis, Washington's Board of

Professional Engineers has confirmed that an engineer is allowed to prepare component truss designs based on information received from a truss company in Washington. (CP 1235-1238).

C. MiTek did not violate the CPA.

A claim under the CPA requires a showing of: "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). A CPA claim must be established by identifying either the violation of a statute that has been declared to be an unfair trade practice, or by showing conduct that is unfair or deceptive under a case specific analysis. *Rush v. Blackburn*, 190 Wn. App. 945, 962, 361 P.3d 217 (2015). Plaintiffs failed to do either.

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

As noted above, MiTek did not violate RCW 18.43 *et. seq.* Even if the statute was violated, such a violation did not manifest a private right of action to the Plaintiffs or a *per se* violation of the CPA. *Burg*, 110 Wn. App. at 806-07; *See also Jackson v. City of Seattle*, 158 Wn. App. 647, 244 P.3d 425 (2010) (confirming that city municipal codes do not impose a duty on contractors that can be enforced by a homeowner). Whether or not a duty is owed is a threshold question that must be addressed. *Pacific Boring, Inc. v.*

Staheli Trenchless Consultants, Inc., 138 F.Supp.3d 1156, 1165-67 (2015) (rejecting the contention that an engineer owed a duty to a contractor it did not contract with). RCW 18.43 *et. seq.* is a licensing statute that is intended to ensure that engineers are registered and qualified, not to create a private right of action to third parties. RCW 18.43.010.

Per se violations of the CPA occur when the legislative body has declared the violation of a statute “constitute[s] an unfair or deceptive act in trade or commerce.” *Hangman*, 105 Wn.2d at 786. No such declaration is present here. The purpose of RCW 18.43 *et. seq.* is “to promote the public welfare” by ensuring that engineers are “qualified so to practice and [are] registered” with the Board, not by allowing CPA claims to be filed by third parties. RCW 18.43.010. MiTek satisfied these elements because its engineer was qualified and registered.

Plaintiffs’ reliance on the *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013) is misplaced. *Klem* does not support a finding that violations of RCW 18.43 *et. seq.* are *per se* violations of the CPA. Instead, our Supreme Court noted that “[a] signed notarization is the ultimate assurance upon which the whole world is entitled to rely that the proper person signed a document on the stated day and place.” *Id.* at 792. The Court went on to explain that “[a] notary jurat is a public trust and allowing them to validate false information strikes at the bedrock of our system.” *Id.* at 793. In

light of that public policy consideration the Court held that “the act of false dating by a notary...is an unfair or deceptive act or practice and satisfies the first three elements under the Washington CPA.” *Id.* at 794-95. It does not follow that the violations of RCW 18.43.070 alleged constitute an unfair or deceptive act.

First, MiTek did not falsely certify anything. It confirmed that its role was limited to preparing parameter based designs to ProBuild’s specifications. Second, MiTek only contracted to perform the limited scope of work requested by its client, which it indisputably performed. Third, MiTek cautioned any person coming into contact with its truss designs that the parameters upon which they were based needed to be verified as applicable before use. (CP 715), MiTek’s conduct was not deceptive. Plaintiffs expectation regarding what ProBuild would provide is irrelevant to MiTek’s obligations because the Schillings’ expectation is an issue to be resolved between Schillings, Artisan, and ProBuild. It does not involve MiTek.

Plaintiffs’ citation to RCW 19.86.093(2) for the proposition that the violation of any statute with public interest language in it is also a *per se* CPA violation is incorrect. RCW 19.86.093(2) provides:

In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it:

...

(2) Violates a statute that contains a specific legislative

declaration of public interest impact[.]

Thus, violation of a statute with “a specific legislative declaration of public interest impact” only satisfies the public interest element for a CPA claim alleging an unfair or deceptive act. It does not stand for the proposition that violations of a statute with a public interest declaration is a *per se* violation of the CPA.

2. MiTek’s business practices were not deceptive.

Plaintiffs failed to establish that MiTek’s actions were unfair or deceptive under RCW 19.86.020. Plaintiffs recognize that CPA claims are limited to the entrepreneurial or commercial aspects of professional services by trying to claim they are not asserting a general “negligence” or “malpractice” claim. *Schilling Reply Brief* at 44. As our courts have confirmed:

The term “trade” as used by the CPA only includes the entrepreneurial or commercial aspects of professional services, not the substantive quality of services provided. *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wash.2d 107, 169, 744 P.2d 1032 (1987). Entrepreneurial aspects include how the cost of services is determined, billed, and collected and the way a professional obtains, retains, and dismisses clients. *Short v. Demopolis*, 103 Wash.2d 52, 61, 691 P.2d 163 (1984). Claims directed at the competence of and strategies employed by a professional amount to allegations of negligence and are exempt from the Consumer Protection Act. *Short*, 103 Wash.2d at 61–62, 691 P.2d 163.

Ramos v. Arnold, 141 Wn. App. 11, 20, 169 P.3d 482 (2007).

In an effort to circumvent this prohibition, Plaintiffs assert the

following to be deceptive acts at pages 44 and 45 of their reply brief:

- MiTek's representation that it prepared parameter based designs;
- That MiTek purportedly represented that the loading on the truss designs was contract correct as to the ProBuild / Plaintiffs' contract; and
- MiTek failed to tell Plaintiffs that a 15 TCDL was the correct loading for the Schilling project.

These allegations fail. First, MiTek's designs disclosed that design parameters selected by ProBuild were used, the source and identification of each parameter, and that the designs were not reviewed or intended for any particular building. (CP 715-716). There is nothing deceptive about those statements.

Second, MiTek never represented that the 12 TCDL used for MiTek's designs met any requirements of the contract between ProBuild and the Plaintiffs. At his deposition Jim Sevigny confirmed that he only recalled Mr. Yu discussing wind as a potential problem, but he could not recall anything else about Mr. Yu's representations.⁶

⁶ Jim Sevigny's subsequent declaration at CP 2929 cannot contradict his prior depositions testimony that he could not recall what Ray Yu said other than discussing wind as a potential cause of the cracking. Parties are prohibited from offering self-serving declarations in opposition to summary judgment that contradicts prior deposition testimony. *McCormick v. Lake Wash. Sch. Dist.*, 99 Wn. App. 107, 111, 992 P.2d 511 (1999). "When a party has given clear answers to unambiguous ... questions [in a deposition] which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Marshall v. AC & S Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989)

(CP 3152-3151). Moreover, as Ray Yu noted in his May 24, 2011 email to ProBuild that Plaintiffs cite repeatedly, “[on] the tile load, I’ll suggest [ProBuild] discuss with the EOR about the right load to use.” (CP 525). MiTek never said a 12 TCDL was correct vis-à-vis the ProBuild / Plaintiffs contract.

Third, MiTek did not have a relationship with, or duty to, the Schillings or Artisan. *Burg*, 110 Wn. App. at 806-07. Schillings were ProBuild’s clients who did not even know who MiTek was. (CP 130, 144). Finally, any representation that 12 TCDL was contract correct was true vis-à-vis the MiTek-ProBuild contract which was for certain truss designs with a 12 TCDL. Finally, any such representation would have been four years after MiTek performed its work and was not part of MiTek’s engineering services embodied in the 2007 designs.

3. MiTek’s actions could not proximately cause any damage to Plaintiffs.

The evidence presented demonstrated that the trusses were manufactured before MiTek provided any services to ProBuild. (CP 2962-2963). Thus, the engineering work performed by MiTek could not have caused an injury to Plaintiffs’ business or property. That information failed to encourage Plaintiffs to inquire further. MiTek’s work did not cause any damage to the Plaintiffs’ business or property.

(quoting *Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657 (11th Cir. 1984)).

D. The trial court should have dismissed Plaintiffs' breach of express warranty claim.

Plaintiffs did not respond to MiTek's arguments regarding Plaintiffs' UCC implied warranty claim and the trial court's ruling must be affirmed on that issue.

Plaintiffs argue that MiTek was a seller of goods based on the predominant factor test to support their express warranty claim. However, under this test, MiTek is not a seller of goods in the transaction and the UCC does not apply. The predominant factor test focuses on the business transaction in question, here the sale of trusses, which MiTek was not a party to. *Tacoma Athletic Club, Inc. v. Indoor Comfort Systems, Inc.*, 79 Wn. App. 250, 257, 902 P.2d 175 (1995).

As it relates to the subject trusses, MiTek's involvement was limited to providing certain engineering services to ProBuild. Plaintiffs even argue in their brief that MiTek's stamping of the plans is a "professional service" that falls under the "practice of engineering." ProBuild, not MiTek, sold trusses, including the truss plates (or metal connectors) and lumber needed to manufacture the trusses, to Plaintiffs in the transaction at issue. ProBuild, not MiTek, was a product seller in this transaction.

Plaintiffs ignore the predominant factor test's focus on the business transaction in question to instead focus on MiTek's sale of truss plates in bulk to ProBuild, which is yet another misleading argument because there is no allegation that the truss plates were defective, or breached any warranty, which is necessary to support such a cause of action. Further, the Plaintiffs entire brief, as it relates to MiTek, focuses on the engineering work, demonstrating that the predominant factor was MiTek's services, not its independent sale of truss plates. MiTek was not a seller of goods here.

MiTek also did not make any express representations to the Plaintiffs. The only representations made by MiTek on the its designs were that they were based on ProBuild's parameters and were not intended for any particular building. Those representations were true. The breach of warranty claim must be dismissed.

E. The trial court properly dismissed the Schillings' UCC 2 and CPA claims based on the statute of limitations.

Plaintiffs concede that the statute of limitations elapsed on their UCC-2 and CPA claims. In an effort to resurrect the claims, they argue that MiTek and ProBuild fraudulently concealed defects in the trusses in an effort to toll the statute of limitations.

To defeat summary judgment Plaintiffs were required to prove

by clear, cogent, and convincing evidence that Plaintiffs were “ignorant of the defect” and that MiTek “engaged in some conduct of an affirmative nature designed to prevent the [Plaintiffs] from becoming aware of the defect” in order to prove fraudulent concealment. *Giraud v. Quincy Farm and Chem.*, 102 Wn. App. 443, 452, 6 P.3d 104 (Div. III 2000); *Steineke v. Russi*, 145 Wn. App. 544, 561, 190 P.3d 60 (2008) (citing *Hughes v. Stusser*, 68 Wn.2d 707, 709, 415 P.2d 89 (1966)). Plaintiffs cannot meet either element because MiTek fully disclosed the scope of its work, Plaintiffs failed to identify any misrepresentations made by MiTek, and Plaintiffs had an expert report in their possession identifying concerns with the truss designs before talking to MiTek.

1. The UCC 2 statute of limitations elapsed.

Plaintiffs argument that Ray Yu represented that the 12 TCDL was contract correct is irrelevant because at the time that Mr. Yu allegedly made the representations the Plaintiffs were already in possession of a report from their engineer, Tim Bardell, identifying questions about the proper loading. (CP 3503, 3505). This prevents Plaintiffs from showing that they were “ignorant of the defect” at the time the alleged representation was made to them.

Furthermore, MiTek fully believed all of its representations

were accurate and complied with its ethical obligations. (CP 3506). Plaintiffs' own expert confirms that he believed MiTek's actions were appropriate and conformed to industry standards. (CP 1652-1656; 1663-1664, 1667).

Plaintiffs cannot claim that they relied on MiTek to verify the truss loading when almost half of the truss designs they received did not even have an engineer's stamp. (CP 2315-2382). These 55 truss designs were not prepared or reviewed by MiTek. This raises significant questions about Artisan's role overseeing the construction project when it installed trusses without sealed designs.

Plaintiffs fail to identify any false or misleading statement made by Ray Yu when he spoke with them in May 2011. (CP 125). The Schillings offer no evidence that Mr. Yu's statements were false except to claim he somehow "convinced" Plaintiffs that a 12 TCDL was contract correct when Mr. Yu made no such statement. The only statements Plaintiffs can attribute to Mr. Yu are that Mr. Yu "was trying to figure out what could be causing the problem. One of the things he brought up was potentially the wind." (CP 3152).

There was no fraudulent concealment on the part of MiTek and the four-year statute of limitation prohibits all UCC breach of warranty claims.

2. The CPA statute of limitations also elapsed.

Plaintiffs do not dispute that MiTek fully performed its engineering services and that Plaintiffs received the designs from ProBuild in June 2007. *Schilling Reply Brief*, at 42-43. Thus, the four-year statute of limitations for CPA claims elapsed by the time the Plaintiffs filed their lawsuit on February 16, 2012. (CP 1-2).

Instead, Plaintiffs argue that the statute of limitations tolled because they did not find out that a 15 TCDL was the correct loading for their home or the extent of MiTek's conduct until after the lawsuit started. That position is nonsensical when Sevigny admits he knew that a 15 TCDL was a standard tile load in 2007 (CP 3119) and MiTek identified their scope of work on the truss designs along with a caveat that the parameters needed to be reviewed and approved by the building designer before incorporating them into a building. (CP 715).

Schillings and Artisan failed to review the design documents or make any effort to discover information underlying the essential elements of their claim. Even now, Plaintiffs attempt to minimize their own failure by arguing, "Whether Sevigny looked at the truss plans upon delivery or not, he did look at them when Schilling later complained about sheetrock cracking." *Schilling Reply Brief*, at 33. This statement demonstrates Plaintiffs' lack of diligence in reviewing

the design documents given to them in June 2007. As such, Plaintiffs failed to present a valid reason to toll the CPA statute of limitations.

IV. CONCLUSION

The trial court's dismissal of all claims based on the statute of limitations must be affirmed. Plaintiffs' had all of the information in their possession regarding potential claims in June 2007 when the trusses were delivered. Their own contractor claims to have known that the standard load for a tile roof was a 15 TCDL. Despite being provided designs specifying a 12 TCDL he chose to install the subject trusses. Moreover, MiTek owed no duty or obligation to Plaintiffs. MiTek's contract with ProBuild was limited to providing certain parameter based truss designs engineered to ProBuild's specifications. It is undisputed that MiTek performed its work consistently with the terms of its contract with its only client, ProBuild. Therefore, this Court must also reverse the trial court's ruling that MiTek breached the engineering statutes and confirm dismissal of all claims against MiTek.

Dated this 26th day of July, 2017.



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July 26, 2017 - 1:15 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34435-5
Appellate Court Case Title: Terry Schilling, et ux, et al v ProBuild Company, LLC et al
Superior Court Case Number: 12-2-00537-0

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