

No. 47685-1-II

Court of Appeals, Div. II,
of the State of Washington

David Nichols and Sylvia Nichols,

Appellants,

v.

Peterson NW, Inc.,

Respondent.

Reply Brief of Appellants

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1. Introduction

Peterson's response misstates the record, misconstrues Nichols' claim, and misunderstands applicable case law. Peterson owed Nichols an independent, common law tort duty to avoid unreasonable risks of harm to persons and other property caused by Peterson's own work. There is evidence in the record that Peterson breached that duty, proximately causing property damage to other parts of the house and personal injury to members of the Nichols family. Nichols' claim is not barred by the statute of limitations or the independent duty doctrine. Because Nichols' negligence claim is well-recognized in Washington law, *e.g.*, *Jackson v. City of Seattle*, 158 Wn. App. 647, 224 P.3d 425 (2010), and because there are genuine issues of material fact, this Court should reverse the dismissal, reinstate the Nichols' negligence claim against Peterson, and remand for further proceedings.

2. Objection to Peterson's Statement of the Case

Peterson's Statement of the Case refers to the settlement between Nichols and THD, citing to documents that were not called to the court's attention in the summary judgment motions or in Peterson's motion for reconsideration. These documents, and any references thereto, are outside the scope of this Court's review and should not be considered. *See* RAP 9.12. Nichols has separately filed a motion to strike.

Additionally, Peterson attempts to avoid reversal by insinuating that it performed its entire contract with THD, which it claims did not include

protecting the roof or installing flashing. While this may have been Peterson's position at summary judgment, there is evidence in the record that this is not true. Peterson's work order shows a much larger scope of work, including flashing, soffit vents, ridge vents, and laying shingles. CP 626. Ms. Nichols testified that she saw Peterson install flashing and make improper cuts in the roof. CP 452-53. After Ms. Nichols complained to THD about the unprotected roof, THD informed Nichols that Peterson would not be returning and would be replaced with a new contractor. CP 453, 692-93.

Viewed in a light most favorable to Nichols, this evidence raises an inference that Peterson was hired to do the whole job, was responsible for protecting the roof during the course of its work, and was terminated and replaced. Peterson's claim that there is "no evidence" to make Peterson liable for Nichols' damages is simply untrue. There is evidence. The facts are in dispute. A reasonable fact finder could find Peterson liable. Summary judgment was improper.

3. Summary of Argument

This reply follows the arguments raised in Peterson's response brief, addressing each in turn. 1) There is no procedural bar to Nichols' appeal; 2) There is sufficient evidence in the record to create genuine issues of material fact on the elements of Nichols' negligence claim; 3) Peterson owed a duty of care to Nichols and breached that duty; 4) There is evidence that Peterson's breach proximately caused Nichols' injuries; 5) Even though damages were not raised by Peterson in the trial court, there is sufficient

evidence of the fact of damage; 6) The statute of limitations does not bar Nichols' claim because Nichols did not discover their injury or its cause until December 2011; 7) The release of THD was not before the trial court and has no bearing on Peterson's liability; 8) The independent duty doctrine does not bar Nichols' negligence claim; and 9) Peterson fails to address Nichols' arguments regarding the trial court's abuse of discretion in granting Peterson's motion for reconsideration.

4. Argument

4.1 Peterson misunderstands the "law of the case" doctrine, the finality of interlocutory orders, and the rules governing appeal of non-final orders.

Peterson argues that Nichols' appeal is barred because dismissal of all negligence claims "had become the law of the case," and Nichols did not move for reconsideration or immediately appeal. Brief of Respondent at 5-6. Peterson also appears to argue that Nichols failed to raise its issues in the trial court. *Id.* at 6. Peterson is incorrect.

Any order of the trial court that adjudicates "fewer than all the claims or the rights and liabilities of fewer than all the parties" is not a final judgment and "is subject to revision at any time" prior to entry of a final judgment that does adjudicate all claims. CR 54(b). In this way, no trial court decision prior to final judgment ever becomes the "law of the case"—every decision is subject to later revision by the trial court until final judgment.

An non-final order of the trial court is not appealable by right. RAP 2.2. While a party has the *option* of seeking discretionary review, the

party does not lose its right to challenge an interlocutory order by not immediately seeking review. *Saleemi v. Doctor's Assocs.*, 176 Wn.2d 368, 387, 292 P.3d 108 (2013). Appeal from final judgment can address any earlier decisions of the trial court. Even if the trial court's summary judgment decision here had been a final order, Nichols' appeal from Peterson's motion for reconsideration brings with it review of the underlying order, under RAP 2.4(c). Nichols were not required to take any other action to preserve their right to appeal.

Contrary to Peterson's argument, Nichols *did* raise the issues on appeal before the trial court. In response to the summary judgment motions, Nichols argued that both THD and Peterson owed Nichols independent tort duties outside their contract with THD. CP 655, 664. This is precisely the issue Nichols raise in this appeal. Brief of Appellants at 1. There is no procedural bar to this appeal.

4.2 There is evidence in the record of Peterson's negligence.

Peterson argues that there is no evidence of Peterson's negligence. Br. of Resp. at 6-7. However, it is undisputed that Peterson tore off the roof and did not tarp over the roof before leaving the job. *See, e.g.*, Br. of Resp. at 1 ("Peterson removed the old roof. ... Installing tarps was not part of Peterson's contract."). Sylvia Nichols testified that she observed Peterson "completing the tear off of the roof and doing other work, like removing the existing ventilation system, preparing the roof deck, cutting off the roof peek for the ridge vent, extending the dormers, install flashing, and install the

underlayment that went underneath the shingles.” CP 452-53. This is consistent with the work described in Peterson’s final invoice to THD, which included not only the tear-off, but “all repairs to surface, set up and prep – liberty capped – paper dry.” CP 625. Nichols’ expert, Dr. McClure, testified that the roofing and flashing were installed improperly, causing water intrusion and damage to other parts of the house. CP 499-500.

Ms. Nichols further testified that Peterson left the unfinished roof uncovered and exposed to rain and wind over the weekend. CP 453. This exposure was only remedied when THD tarped over the roof. *Id.* Although Peterson claims to have completed everything it contracted to do, THD told Nichols at the time that THD was removing Peterson from the job and would send another contractor to finish the job. *Id.* Peterson’s claim is also inconsistent with its work order for the job, which includes items that Peterson never performed. CP 626.

These are **specific facts**, not merely conclusory allegations or argumentative assertions. These facts are sufficient to create genuine issues of material fact on the elements of Nichols’ claims. Peterson’s argument that “there is no evidence” ignores the facts in the record.

Peterson appears to be arguing, in part, that the Declaration of Sylvia Nichols should be disregarded because it contradicts her earlier deposition testimony. Peterson points to CP 691, where Ms. Nichols testified that she thought, but was not sure, that Peterson installed the flashing. Peterson argues that this deposition testimony contradicts Ms. Nichols’ later recollection of what work Peterson performed. There is no contradiction.

At deposition, Ms. Nichols thought Peterson did the flashing; in her declaration, she was sure of it. Her testimony is consistent.

A later declaration should only be disregarded if there is a clear and material contradiction. *Sun Mt. Prods. v. Pierre*, 84 Wn. App. 608, 617-18, 929 P.2d 494 (1997). Where, as here, a witness is unsure of a fact at deposition, but later relates specific facts in a declaration, there is no specific contradiction and the declaration should be considered. *See Id.* at 619. The rule here in Division 2 is even more liberal, admitting contradictory declarations and viewing them in the light of other testimony to determine if there is an issue of fact to be determined by a jury. *State Farm Mut. Auto. Ins. v. Treciak*, 117 Wn. App. 402, 408-09, 71 P.3d 703 (2003). There is no contradiction in Ms. Nichols' testimony, and it does raise a genuine issue of material fact. The trial court erred in dismissing Nichols' negligence claim against Peterson on summary judgment.

4.3 Peterson owed a duty of reasonable care to Nichols.

Peterson argues that Peterson owed no duty to Nichols with regard to the quality of Peterson's work. Br. of Resp. at 7-8. This argument misses the point, because that is not the duty that Nichols allege. As shown in Nichols' opening brief, Peterson owed a duty of reasonable care to avoid foreseeable injury to Nichols or to other parts of Nichols' home caused by Peterson's own work. Br. of Apps. at 8-10. This duty was recognized in *Jackson v. City of Seattle*, 158 Wn. App. 647, 655-56, 224 P.3d 425 (2010), and is consistent with the Restatement (Second) of Torts § 385; *Eastwood v. Horse*

Harbor Found., Inc., 170 Wn.2d 380, 395, 241 P.3d 1256 (2010); and other Washington precedents. Peterson is simply wrong to argue that Nichols failed to cite authority to support the existence of a duty.

Peterson asserts that it did not cause any accident. However, there is evidence that Peterson failed to prevent water intrusion through the roof, which caused damage to other parts of the house and personal injury to the Nichols family. Peterson tore off the roof but did not cover it over a rainy weekend. CP 453. Peterson installed flashing incorrectly, contributing to water intrusion and damage. CP 499-500. Peterson breached its duty under *Jackson*. The trial court erred in dismissing Nichols' negligence claim.

4.4 Nichols presented evidence of proximate cause.

Peterson argues that there is no evidence of causation. Br. of Resp. at 8-11. Again, Peterson can only do so by ignoring facts in the record. Ignoring its negligent work on the flashing, Peterson argues that there is no evidence that its failure to cover the roof caused any water intrusion. Peterson points to deposition testimony of Ms. Nichols, in which she states only that she did not witness any water intrusion at the time. However, she also testified that Peterson left the roof unprotected over a rainy weekend. Whether this exposure contributed to the water intrusion is a question for the jury.

More importantly, Peterson cannot ignore the specific facts in the record that Peterson installed the flashing; that the flashing was installed incorrectly; and that this defective work did, in fact, cause or contribute to

the water intrusion that damaged Nichols' home and injured the Nichols family. There is not "overwhelming evidence" that Peterson did not install the flashing. There is a genuine dispute of material fact. The trial court was correct when it recognized this genuine dispute as to causation. RP 55-56.

4.5 There is evidence of damages.

Peterson argues that Nichols failed to produce evidence of damages. Br. of Resp. at 11. However, Peterson's motion for summary judgment did not place damages at issue. CP 694-705 (arguing statute of limitations and proximate cause). THD's motion for summary judgment raised only a limited issue of damages, arguing that Nichols had failed to produce evidence of medical specials for the Nichols children's exposure to mold. CP 716-17. Nichols produced evidence of the fact that mold-related injuries occurred. *E.g.*, CP 525 (report of primary care physician, Dr. Keep), 527-29 (report of allergy and immunology specialist, Dr. Larson), 539-42 (report of IME doctor, Dr. Kennedy). Nichols also produced all medical records. CP 516, 569-623. Nichols argued that was all that was required to defeat THD's motion. CP 654-55. The trial court correctly denied that portion of THD's motion. CP 367.

Other than special damages related to the personal injury claims, no damages were at issue in the motions for summary judgment. On review of summary judgment, this Court "will consider only evidence and issues called to the attention of the trial court." RAP 9.12. The broad issue of damages was not called to the trial court's attention. Although this Court is permitted

to affirm on alternate grounds, it cannot do so when the parties have not developed a sufficient record to enable this Court to review the issue. Because damages were not placed at issue below, Nichols were not put to their proof on that issue and did not need to fully develop the record as to their damages. The Court should decline to address this issue.

Peterson complains that Nichols have not segregated the damages and that Nichols have already settled with THD. These issues are not ripe. They were not called to the attention of the trial court. If necessary, and as appropriate, damages can be segregated, or apportioned according to comparative negligence principles, on remand. The effect of the settlement with THD, if any, should also be determined by the trial court in the first instance on remand.

4.6 The statute of limitations does not bar Nichols' claims.

Peterson argues that Nichols' claims are barred by the statute of limitations¹ because Peterson completed its work in 2006 and the complaint was filed in 2012. Br. of Resp. at 12. Peterson argues the discovery rule does not apply. *Id.* at 12-13. Peterson is incorrect.

The purpose of the discovery rule is “to balance the injured claimant's right to legal remedies against the threat of defending stale claims, and to avoid the injustice of having a statute of limitation terminate legal

¹ Peterson cites RCW 4.16.130, the catch-all two-year statute. This is incorrect. The applicable limitation period is found in RCW 4.16.080, the three-year statute for injury to persons or property.

remedies before the claimant knows he or she has been injured.” *Beard v. King Cty.*, 76 Wn. App. 863, 867, 889 P.2d 501 (1995). Under the discovery rule, “the limitation period begins to run when the factual elements of a cause of action exist and the injured party knows or should know they exist.” *Id.* at 868. The time at which a plaintiff knew or should have known of an actual and appreciable injury is a question of fact on which the defendant bears the burden of proof. *See Haslund v. Seattle*, 86 Wn.2d 607, 621, 547 P.2d 1221 (1976). Nichols did not know the elements of their negligence claim existed until December 2011.

Peterson argues that its failure to protect the unfinished roof put Nichols on notice to discover any resulting injury in 2006. Nichols apparently looked but did not observe any water intrusion at that point. *See* CP 693. Having found nothing, Nichols had no reason to believe they had been injured. Peterson fails to point to any evidence in the record that tends to show that Nichols should have known there was an injury.

Nichols did not discover any damage that could be attributed to water intrusion until December 2011, when Mr. Nichols went up to the attic and observed mold and moisture. CP 455. Until that discovery, Nichols did not know that the elements of a cause of action existed—they did not know or have reason to know that there was hidden mold and water damage in the home; that the children’s health issues were caused by that mold; or that the mold and water were caused by Peterson and THD’s work. The discovery rule applies. The limitation period did not begin to run until December 2011. Nichols filed their complaint in 2012, well within the limitation period.

4.7 Peterson’s allegation of double recovery is not ripe for review.

Peterson argues that Nichols are seeking double recovery. Br. of Resp. at 14. Peterson provides no citation to the record to support this argument, other than a reference to documents that were not called to the attention of the trial court in connection with any of the decisions that are before this Court for review. The issue of double recovery was never raised in the trial court. There is not a sufficient record for this Court to determine whether there is any threat of a double recovery.

Peterson’s reliance on *Perkins v. Children’s Orthopedic Hospital*, 72 Wn. App. 149, 864 P.2d 398 (1993), is misplaced. *Perkins* was not simply about “releasing one defendant but not the other.” *Perkins* was about the effect of the release of an agent on the vicarious liability of the principal. Peterson was not a principal to THD, and there is no vicarious liability at issue here. The release of THD has no effect on Peterson’s liability for its own conduct.

To the extent double recovery is a defense, Peterson bears the burden of proof. Peterson must show that there would be a double recovery. Peterson’s argument, that Nichols have failed to prove there is not, improperly reverses the burden of proof. This Court should decline the invitation to address this issue, which is not ripe for review.

4.8 Peterson misapplies the independent duty doctrine.

The remainder of Peterson’s brief is an extended discussion of *Stuart v. Coldwell Banker Commercial Grp.*, 109 Wn.2d 406, 745 P.2d 1284 (1987), and later cases setting forth and applying the independent duty doctrine. Br. of

Resp. at 14-24. This discussion misinterprets the case law and is based on a fundamental misunderstanding of Nichols' claim. Peterson would have the Court believe that Nichols are seeking some new legal remedy against a subcontractor that would not apply to a general contractor and would necessarily lead to double recovery. Peterson's characterization of Nichols' claim is a straw man.

Nichols described their claim simply in their opening brief, at 8-10. A construction contractor (this includes a general contractor as well as a subcontractor) owes a common law duty of care to avoid foreseeable injury to other persons or property caused by the contractor's own work. *Jackson v. City of Seattle*, 158 Wn. App. 647, 655-56, 224 P.3d 425 (2010). Each contractor is liable for damages caused by their own negligent conduct in breach of this duty. *See Id.* at 656.

Nichols seek a tort remedy for injury to persons and to other property caused by Peterson's own, negligent work. Contrary to Peterson's arguments, this well-recognized claim does not create a new legal duty, does not impose new or unique burdens on subcontractors, does not abrogate contract law, and does not lead to double recovery.

Relying on *Stuart*, Peterson argues that a subcontractor does not have an independent tort duty to avoid defects in construction quality. Br. of Resp. at 16-17. Peterson acknowledges that *Stuart* was about a defect in the quality of the defendant's work, as evidenced by the internal deterioration of the work itself. Br. of Resp. at 18. Herein lies Peterson's fundamental

misunderstanding. Peterson would have the Court believe that Nichols' claim is like the claim in *Stuart* for damage to the work itself. It is not.

Nichols' claim arises from damage caused to other parts of the house that were not Peterson's work and for personal injury to members of the Nichols family. The issue in Nichols' claim is not that Peterson's work **was damaged** or failed to meet a subjective standard of quality; the issue is that Peterson's work created unreasonable, foreseeable risks of harm and ultimately **caused damage** to other persons and property. This is an appropriate and well-recognized tort claim.

This is precisely the kind of claim that the court impliedly preserved in *Stuart*, 109 Wn.2d at 418-20 ("courts ... distinguish economic loss from physical harm or property damage. ... Tort law has traditionally redressed injuries properly classified as physical harm."); acknowledged in *Eastwood*, 170 Wn.2d at 395 ("we implied [in *Stuart*] that the builder had an independent duty to avoid unreasonable risks of harm to persons and other property"); and expressly approved in *Jackson*, 158 Wn. App. at 660 ("When a defective product injures something other than itself ... the loss is not merely an economic loss and tort remedies are appropriate. The same is true of a defective installation of a product.").

Peterson cites to *Elcon Constr. v. E. Wash. Univ.*, 174 Wn.2d 157, 273 P.3d 965 (2012); *Jackowski v. Borchelt*, 174 Wn.2d 720, 278 P.3d 1100 (2012); and *Key Den. v. Port of Tacoma*, 173 Wn. App. 1, 292 P.3d 833 (2013); for the proposition that there is an independent duty not to commit fraud. However, none of these cases are helpful here because none dealt with the

duty at issue in this case: the duty to avoid creating unreasonable risks of harm to other persons or property. None of these cases contains any analysis that is informative on the existence or scope of the duty.

Peterson also cites to *Donatelli v. D.R. Strong Consulting Eng'rs, Inc.*, 179 Wn.2d 84, 312 P.3d 620 (2013). *Donatelli* is somewhat informative, though not in the way Peterson claims. *Donatelli* involved claims of professional negligence against design professionals. *Id.* at 89. It is unclear whether those claims involved any property damage or personal injury. *See Id.* The Washington Supreme Court noted that engineers have an independent duty to use reasonable care to avoid risks of property damage and personal injury. *Id.* at 92. The court also held that the independent duty doctrine could not apply to bar the negligence claims “because the record does not establish the scope of [the parties’] contractual duties.” *Id.* at 91. If the rule cannot bar negligence claims without evidence of the scope of a defendant’s contractual duties, surely the rule cannot bar Nichols’ claims where Peterson had no contractual duties to Nichols at all.

Peterson attempts to characterize *Jackson* and *Donatelli* as requiring “a separate accident or occurrence,” by which Peterson appears to mean some occurrence outside the contracted work. However, nothing in the text of *Jackson* or *Donatelli* supports such a requirement. In fact, in *Jackson*, there was no “separate occurrence”—the damage arose from the work. In *Jackson*, the defendants were contracted to install a water line, connect it to the city water main, and backfill any excavations. *Jackson*, 158 Wn. App. at 650. The contractors failed to properly compact the backfilled soil or properly stabilize

the downhill tunnel, causing a subsequent landslide that damaged the home. *Id.* at 651. The contractors’ work itself—not some separate activity—created the unreasonable risk of harm that ultimately led to damage to other property. The same is true here. Peterson’s work itself—failing to protect the unfinished roof and failing to properly install the flashing—created an unreasonable risk of water intrusion, which ultimately caused damage to other parts of the home and personal injury to the Nichols family. Just as the defendants in *Jackson*, Peterson should be held to its common law duty.

Peterson expresses concern that a *Jackson*-style claim does not give contractors any predictable standard of performance. This is not true. In *Jackson*, the court noted that a contractor’s work would have to “meet a standard of safety defined in terms of conditions that create unreasonable risks of harm.” *Jackson*, 158 Wn. App. at 659; *accord Stuart*, 109 Wn.2d at 419 (“He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm.”). Such standards are well-established and understood in the construction industry.

Peterson owed Nichols an independent duty of care. There is evidence in the record that Peterson breached that duty and that Peterson’s breach proximately caused personal injury to the Nichols family and property damage to other parts of the Nichols home. This evidence raises genuine issues of material fact on Nichols’ negligence claim. The trial court erred in dismissing the claim. This Court should reverse and remand for further proceedings.

4.9 Peterson fails to address the trial court's abuse of discretion in granting the motion for reconsideration.

Nichols' opening brief argued that the trial court abused its discretion in granting Peterson's motion for reconsideration for two reasons: 1) Peterson failed to raise the issue on which the trial court ultimately based its decision; and 2) even if the issue had been properly raised, the decision rested on untenable grounds. Peterson's response fails to address these arguments.

Peterson's motion for reconsideration failed to raise the issue of dismissal of Nichols' negligence claim against Peterson. Nichols had no meaningful opportunity to respond to the issue. The trial court should have declined to consider the issue. Granting the motion without giving Nichols a meaningful opportunity to respond was patently unreasonable and an abuse of discretion.

Additionally, the decision was based on untenable grounds. The trial court had dismissed Nichols' negligence claim against THD, holding that any duties arose from the parties' contract. As shown above, this was error because both THD and Peterson owed Nichols independent tort duties under *Jackson*. Even if dismissal had been proper as to THD, the same rationale could not support dismissal of Nichols' claim against Peterson. Peterson's duties to Nichols could not arise from contract, because Peterson did not have a contract with Nichols. *Cf. Donatelli*, 179 Wn.2d at 91 (independent duty doctrine cannot bar a tort claim where there is no evidence of the scope of contractual duties).

5. Conclusion

The trial court erred in dismissing the Nichols' negligence claims under the economic loss rule. Both THD and Peterson owed the Nichols independent, common law tort duties. The trial court abused its discretion in granting reconsideration and dismissing the Nichols' negligence claim against Peterson. Peterson misstates the record, misconstrues Nichols' claim, and misunderstands applicable case law. This Court should reverse, reinstate the Nichols' negligence claim against Peterson, and remand for further proceedings.

Respectfully submitted this 12th day of February, 2016.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on February 12, 2016 I caused the original of the foregoing document, and a copy thereof, to be filed and served by the method indicated below, and addressed to each of the following:

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