Introduction

Exposure to mold and mold byproducts has been of concern since the earliest of recorded history. The harmful effects of mold exposure were recognized in the Bible. In the Old Testament, the book of Leviticus Chapter 14, verses 35-48, established a detailed protocol to remediate contaminated structures, including the destruction of dwellings and personal belongings if remediation failed. See Attachment 1.

Today, however, the effects of mold exposure on human health is hotly contested. There is some agreement that mold can cause some adverse health effects to some susceptible persons. Some health professionals agree that mold can exacerbate existing or pre-existing conditions in some susceptible persons. There is no agreement on the amount of exposure necessary to trigger adverse reactions. There is no agreement on the dose required. There is no agreement on the duration required. There is agreement that there is much disagreement about the effects of mold exposure on human beings.

Mold and mold byproducts can invade your being through inhalation, ingestion, or by dermal contact. Mold produces spores, fragments, and metabolites, including mycotoxins and volatile organic compounds (VOC's). Mold and its byproducts can cause adverse health effects by inducing immunological reactions, infections or toxic reactions. Much of what we do know comes from experience with agricultural workers who have been exposed to moldy crops.

There is little consensus as to whether or when toxic mold exposure in an indoor environment may cause or exacerbate a specific adverse health effect in an individual. There are, however, an increasing amount of cases with apparent documentation of adverse consequences of mold exposure. There is certainly more litigation arising from mold exposure.

Toxic mold personal injury claims generally fall into four groups: Allergy, Irritation (mucous membrane and sensory), Infection, and Toxicity.

Allergy

Allergy-like symptoms are the most common response to mold exposure. People may develop allergy symptoms when their respiratory system or skin is exposed to mold or mold byproducts to which they have become sensitized. Increased and permanent sensitization to molds can occur with sufficient exposure – referred to in the literature as various types of hypersensitivity diseases. Allergic reactions can range from mild, transitory responses, to severe, chronic illnesses. Molds, however, are just one of several sources of indoor allergens, which include pollen, dust mites, cockroach droppings, pet dander, and insect parts.

As many as one in five Americans suffer from allergic rhinitis – the single most common chronic disease experienced by humans. Up to 14% of the population suffers from allergy-related sinusitis. Between 10% and 12% of Americans have allergy-related asthma. About 9% experience allergic dermatitis. Less than 1% suffer serious chronic allergic diseases such as allergic bronchopulmonary aspergillosis and hypersensitivity pneumonitis. See the web site for the Institute of Medicine; http://www.doh.wa.gov/ehp/oehas/mold.html Allergic fungal sinusitis is not uncommon in individuals residing or working in moldy environments.

Irritation

Some molds release volatile organic compounds (VOC's) into indoor air as they feed and grow. They may produce alcohols or aldehydes and acidic molecules. These compounds in low but

sufficient aggregate concentrations can irritate the mucous membranes of the eyes and respiratory system. Depending on the makeup of the substrate, some mold can release highly toxic gases. In one case study, mold growing on wallpaper released the highly toxic gas arsine from arsenic containing pigments in the wallpaper. See Gravesen, et al. (1994); http://www.doh.wa.gov/ehp/oehas/mold.html See Attachment 2, Selected Important Molds Found in Damp Buildings.

Mold VOC's may also affect the "common chemical sense," which senses pungency and responds to it. This sense is primarily associated with the trigeminal nerve (and to a lesser extent the vagus nerve). This mixed (sensory and motor) nerve responds to pungency with breath holding, discomfort, paresthesia or odd sensations, such as itching, burning, and skin crawling, changes in sensation, swelling of mucous membranes, constriction of respiratory smooth muscle, or dilation of surface blood vessels. Reactions may also include decreased attention, disorientation, diminished reflex time, and dizziness. [Otto, et al. (1989); http://www.doh.wa.gov/ehp/oehas/mold.html]

Construction materials and finishes in buildings like paints, plastics, insulations and cleaners also emit VOC's, which may make it difficult to determine whether the level of mold-produced VOC's influence the total concentration of common VOC's found indoors to any great extent. High exposure levels of VOC's from any source are mucous membrane irritants, and can have an effect on the central nervous system, producing headaches, attention deficit, inability to concentrate or dizziness.

Some individuals experience strong reactions to mold odors. Some individuals can detect extremely low concentrations of VOC's, others require high levels for perception. Individuals susceptible to mold odors may respond with headache, nasal stuffiness, nausea or even vomiting.

Infection:

Infection from mold in indoor environments is rare, except in certain susceptible individuals (those with compromised immune functions). Aspergillus species are know pathogens (capable of producing disease). Aspergillus funigatus is a weak pathogen though to cause infections (aspergilloses) in susceptible persons. It is known to be a source of nosocomial (hospital born) infections, especially among immune-compromised patients. These infections can affect the skin, the eyes, the lung, or other organs and systems.

Toxicity:

Molds can produce secondary metabolites such as mycotoxins. Mycotoxins are generally cytotoxic, disrupting various cellular structures such as membranes, and interfering with vital cellular processes such as protein, RNA and DNA synthesis. Mycotoxins are also toxic to the cells of higher plants and animals, including humans. Many, but not all, molds produce mycotoxins. Toxigenic molds vary in their mycotoxin production depending on the substrate on which they grow.

Web Sites of Interest

Various pertinent web site addresses concerning mold are contained in Attachment 3.

I. Parties Involved in Litigation

Typically, the parties involved in construction defect and mold litigation include:

(1) owner of the real property at issue

(2) contractors who constructed the property

(3) suppliers of the allegedly defective products

(4) manufacturers of the allegedly defective products

(5) design professionals for the project, and

(6) insurers of the property.

Other potential parties are:

(7) seller of the property

(8) real estate agents involved in the sale,

(9) appraiser, and

(10) inspectors who inspected the property prior to purchase.

After remedial work is performed, still more parties may be involved:

(11) remediation contractor, and

(12) environmental consultant or laboratory.

Each of these parties may have responsibility for some or all of the defects involved. Each of the parties must be investigated to see what role if any the party played in the creation or perpetuation of the defect. Obviously, each case turns on its own facts and present patterns requiring individualized attention.

A. Licensing Issues of Contractors

General contractors do not need licenses in Texas. As a result, there is no Texas state regulation of general contractors.

Plumbers and air conditioning contractors are licensed. The Texas State Board of Plumbing Examiners oversees the work of plumbers, and can handle complaints about shoddy or defective work. The web site for the Texas Board of Plumbing Examiners is: http://www.tsbpe.state.tx.us/

The State of Texas maintains an air conditioning and refrigeration program which regulates contractors who install, repair, or maintain systems related to air conditioning, refrigeration, or heating. The web address is: http://www.license.state.tx.us/acr/acr.htm

Complaints about licensed contractors can be submitted at the following web address: http://www.license.state.tx.us/ComplaintsOnline/

II. Major Causes of Action

A. Negligence

Liability in negligence is premised on duty, a breach of which proximately causes injuries, and damages resulting from that breach. *Thapar v. Zezulka,* 994 S.W.2d 635 (Tex. 1999). Whether a legal duty exists is a threshold question of law for the court to decide from the facts surrounding the occurrence in question. If there is no duty, there cannot be negligence liability. *Id.*

The elements of negligence are the existence of a duty, the breach of that duty, and damages proximately caused by the breach of duty. *Doe v. Boys Clubs of Greater Dallas, Inc.,* 907 S.W.2d 472, 477 (Tex.1995). "Negligent conduct is a proximate cause of harm to another if, in a natural and continuous sequence, the negligent conduct produces an event that causes the harm, and without the negligent conduct such event would not have occurred." *Dunnings v. Castro,* 881 S.W.2d 559, 561-62 (Tex.App.-Houston [1st Dist.] 1994, writ denied) (citing *Lear Siegler, Inc. v. Perez,* 819

S.W.2d 470, 471 (Tex.1991)). The components of proximate cause are cause in fact and foreseeability. *Lee Lewis Construction, Inc. v. Harrison,* 70 S.W.3d 778, 784 (Tex.2001). Foreseeability requires that the actor, as a person of ordinary intelligence, would have anticipated the danger that his negligent act created for others. *El Chico Corp. v. Poole,* 732 S.W.2d 306, 313 (Tex.1987); *City of Gladewater v. Pike,* 727 S.W.2d 514, 517 (Tex.1987). The test for cause in fact is "whether the negligent act or omission was a substantial factor in bringing about injury without which the harm would not have occurred." *Boys Clubs,* 907 S.W.2d at 477 (citing *Prudential Ins. Co. of America. v. Jefferson Assocs., Ltd.,* 896 S.W.2d 156, 161 (Tex.1995)).

The acts of a party may breach duties in tort or contract or simultaneously in both. The nature of the injury most often determines which duty or duties are breached. *Jim Walter Homes, Inc. v. Reed,* 711 S.W.2d 617, 618 (Tex.1986). If the defendant's conduct gives rise to liability independent of the fact that a contract exists between the parties, the plaintiff's claim may also sound in tort. See *id.* As a prerequisite to asserting a claim of negligence, there must be a violation of a duty imposed by law independent of any contract. *Southwestern Bell Telephone Co. v. DeLanney,* 809 S.W.2d 493, 494 (Tex.1991). Where the only duty between parties arises from a contract, a breach of this duty will ordinarily sound only in contract, not in tort. *Id.*

B. Products Liability by Manufacturers and Suppliers

Strict liability for a manufacturing defect and breach of an implied warranty of merchantability are two separate causes of action. See *Otis Spunkmeyer, Inc. v. Blakely,* 30 S.W.3d 678, 690 (Tex.App. – Dallas 2000). However, "depending on the facts of each case, whether a manufacturing defect exists for purposes of products liability often resolves whether a product was

defective and, therefore, breached an implied warranty of merchantability." Id. (citing *Hyundai Motor Co. v. Rodriguez,* 995 S.W.2d 661, 666 (Tex.1999)). Where the defect alleged is the same for purposes of both a strict liability claim and a breach of an implied warranty claim, the defect for both claims can be functionally identical. *Id.* (concluding that " 'defect' " in cookie at issue in claims for strict liability and breach of an implied warranty of merchantability were functionally identical). Also, the proximate causation element of a strict liability claim "subsumes within it the concept of producing cause ('but for' cause)." *Id.* at 691. "An act or defect that is not a producing cause cannot, as a matter of law, constitute a proximate cause." *Id.* The converse is the same; if the defect alleged was a proximate cause of the occurrence at issue, then, as a matter of law, it was a producing cause of the occurrence.

The existence of a duty to warn of dangers or instruct on the safe use of a product is a question of law. *American Tobacco Co. v. Grinnell,* 951 S.W.2d 420, 426 (Tex.1997). A manufacturer has a duty to warn if it knows or should know of potential harm to a user because of the nature of its product. *Id.*; *Bristol-Myers Co. v. Gonzales,* 561 S.W.2d 801, 804 (Tex.1978). Dangers that a seller "should know" include those that are reasonably forseeable or scientifically discoverable at the time the product is sold. See *Borel v. Fibreboard Paper Products Corp.,* 493 F.2d 1076, 1088 (5th Cir.1973). A manufacturer also has a duty to instruct users on the safe use of its product. *Pavlides v. Galveston Yacht Basin, Inc.,* 727 F.2d 330, 338 (5th Cir.1984). In this regard, a manufacturer is held to the knowledge and skill of an expert. *Borel,* 493 F.2d. at 1089. This means that it must not only keep abreast of scientific knowledge, discoveries, and advances, but, more importantly, test and inspect its product. *Id.* at 1089-90. This duty to research and experiment is commensurate with the dangers involved. *Id.* at 1090. A manufacturer may not rely

unquestioningly on others to raise concerns about its product, but must instead show that its own conduct was proportionate to the scope of its duty. *Id.*

Under Section 82.002 of the Texas Civil Practice and Remedies Code, manufacturers have an obligation to indemnify and hold harmless sellers from damages in a products liability action. See Attachment 4.

C. Breach of Warranty - Privity Requirement

The warranties owed by parties are either expressed or implied. In construction, the law implies a warranty of good and workmanlike performance. The Texas Supreme Court has defined "good and workmanlike manner" as the "quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work." *Parkway Co. v. Woodruff,* 901 S.W.2d 434, 446 (Tex.1995); *Melody Home Mfg. Co. v. Barnes,* 741 S.W.2d 349, 354 (Tex. 1987). The implied warranty of "good and workmanlike manner" serves as a "gap-filler" or "default warranty" if the parties do not agree to another standard for the manner, performance, or quality. *Centex Homes v. Buecher,* 95 S.W.3d 266, 273 (Tex.2002) (although warranty cannot be disclaimed, parties can agree to another standard for manner, performance, or quality). Such an implied warranty generally requires the contractor to perform in a manner generally considered proficient by one with knowledge, training, or experience in the trade. *Continental Dredging, Inc. v. De-Kaizered, Inc.,* 2003 WL 22214293 (Tex.App. – Texarkana 2003).

The DTPA provides a cause of action when the cause of the damages is a breach of implied warranty. Tex.Bus.&Com.Code § 17.50(a)(2). This is a separate cause of action from the laundry

list of misrepresentations under Section 17.50(a)(1). See Tex.Bus.&Com.Code § 17.50. The DTPA "does not create any warranties; therefore any warranty must be established independently of the act." *La Sara Grain Co. v. First Nat'l Bank,* 673 S.W.2d 558, 565 (Tex.1984). An implied warranty is derived from either statute or from common law. *Id.* The Texas Supreme Court has held that breach of an implied warranty to repair or modify goods or property in a "good and workmanlike manner" is actionable under the DTPA. *Melody Home Mfg. Co. v. Barnes,* 741 S.W.2d 349, 354 (Tex.1987) (recognizing the implied warranty in construction accompanied by a home sale). A contract may create duties in both contract and tort. *Bekins Moving and Storage Co. v. Williams,* 947 S.W.2d 568, 577 (Tex.App. – Texarkana 1997). "Implied warranties are created by operation of law and are grounded more in tort than in contract." *La Sara Grain Co.,* 673 S.W.2d at 565. Because implied warranties are grounded more in tort, and because the DTPA expressly recognizes breach of an implied warranty as a separate violation from misrepresentations, a contractor may have violated the DTPA if it breached an implied warranty, despite not making any actionable misrepresentations outside the contract.

Generally, in order to recover for breach of an express warranty under the DTPA, a plaintiff must prove (1) he or she is a consumer, (2) a warranty was made, (3) the warranty was breached, and (4) as a result of the breach, an injury resulted. *McDade v. Tex. Commerce Bank, Nat. Ass'n.,* 822 S.W.2d 713, 718 (Tex.App.-Houston [1st Dist.] 1991, writ denied); see Tex.Bus.&Com.Code § 17.50(a)(2) (Vernon Supp.2003). Privity is not required in order to be a consumer under the DTPA. *Amstadt v. U.S. Brass Corp.,* 919 S.W.2d 644, 649 (Tex.1996); *Cameron v. Terrell & Garrett, Inc.,* 618 S.W.2d 535, 540-41 (Tex.1981). Yet, the DTPA does not define or create any warranties. *Parkway Co. v. Woodruff,* 901 S.W.2d 434, 438 (Tex.1995). Warranties actionable under the DTPA,

both express and implied, must first be recognized by common law or created by statute. *Id.* Thus, even in a case where damages are recovered under the DTPA, courts look outside the DTPA to the existing law of warranties to determine if privity is required for express-warranty claims.

Express warranties on goods are defined by the Uniform Commercial Code (UCC). See Tex.Bus.&Com.Code § 2.313 (Vernon 1994). However, the Texas version of the UCC is neutral regarding any privity requirement. *Nobility Homes of Texas, Inc. v. Shivers,* 557 S.W.2d 77, 81 (Tex.1977). In fact, the code specifically "does not provide ... whether the buyer or anyone entitled to take advantage of a warranty made to the buyer may sue a third party other than the immediate seller for deficiencies in the quality of the goods." Tex.Bus.&Com.Code § 2.318 (Vernon 1994). Instead, the code states, "These matters are left to the courts for their determination." *Id.*

The Texas Supreme Court held in 1977 that privity of contract is not required in order to recover purely economic losses from the breach of an implied warranty of merchantability. *Nobility Homes,* 557 S.W.2d at 81; see *Garcia v. Texas Instruments, Inc.,* 610 S.W.2d 456, 465 (Tex.1980) (rejecting privity requirement for UCC implied-warranty personal injury actions). The supreme court, however, has not clearly stated whether privity of contract is required in order to recover purely economic losses for breach of an express warranty, and the courts of appeals are divided on the issue.

In the 1970s, several courts held that privity of contract was required in cases involving purely economic losses and express warranties, and these courts have not addressed the issue since that time. *Texas Processed Plastics, Inc. v. Gray Enter., Inc.,* 592 S.W.2d 412, 415 (Tex.Civ.App.--Tyler 1979, no writ.) ("[I]n situations involving solely economic loss based upon breach of express warranty, privity of contract between the parties is required."); *Henderson v. Ford Motor Co.,* 547

S.W.2d 663, 667 (Tex.Civ.App.-Amarillo 1977, no writ.); *Pioneer Hi-Bred Int'l, Inc. v. Talley,* 493 S.W.2d 602, 607-08 (Tex.Civ.App.-Amarillo 1973, no writ); *Eli Lilly & Co. v. Casey,* 472 S.W.2d 598, 600 (Tex.Civ.App.-Eastland 1971, writ dism'd). The more recent trend among courts of appeals, however, has been to find that privity of contract is not required in this situation. *Edwards v. Schuh,* 5 S.W.3d 829, 833 (Tex.App.-Austin 1999, no pet.) ("Privity is not required to enforce an express warranty under the DTPA."); *Church & Dwight Co. v. Huey,* 961 S.W.2d 560, 568 (Tex.App.-San Antonio 1997, pet. denied); *National Bugmobiles, Inc. v. Jobi Prop.*, 773 S.W.2d 616, 622 (Tex.App.-Corpus Christi 1989, writ denied); *Indust-Ri-Chem Lab., Inc. v. Par-Pak Co., Inc.,* 602 S.W.2d 282, 287-88 (Tex.Civ.App.-Dallas 1980, no writ).

In *U.S. Tire-Tech, Inc. v. Boeran,* 110 S.W.3d 194 (Tex.App. – Houston [1st Dist.] 2003), the court agreed with the reasoning of the more recent cases and held that privity of contract was not required in order to sustain a breach of express-warranty claim for purely economic losses. The court reasoned that to hold otherwise could allow unscrupulous manufacturers who make public representations about their product's performance to remain insulated from express-warranty liability if consumers did not purchase the product directly from them. *Id.* at 198 (citing *Nobility Homes,* 557 S.W.2d at 81-82 (noting possible abuses if privity strictly required); *Indust-Ri-Chem Lab.,* 602 S.W.2d at 287 (applying *Nobility Homes* policy concerns to express warranties)).

D. Deceptive Trade Practices Act Violation

A contractor can be liable for breach of contract. Ordinarily, the contractor will not also be liable for negligence or a breach of the Texas Deceptive Trade Practices – Consumer Protection Act, Tex. Bus. & Com. Code Sections 17.41, et seq. ("DTPA"). A mere breach of contract alone is not

sufficient to be a false, misleading, or deceptive act under the DTPA. *Rocky Mountain Helicopters, Inc. v. Lubbock County Hosp. Dist.,* 987 S.W.2d 50, 53 (Tex.1998); *Crawford v. Ace Sign, Inc.,* 917 S.W.2d 12, 14 (Tex.1996). If the cause of action arises out of the failure to fulfill a promise, the injury is governed by contract law, not the DTPA. *Crawford,* 917 S.W.2d at 14-15. "The determination of whether a breach of contract rises to the level of a misrepresentation sufficient to trigger the DTPA is a fact-driven inquiry." *Munawar v. Cadle Co.,* 2 S.W.3d 12, 18 (Tex.App.-Corpus Christi 1999, no pet.); *Chilton Ins. Co. v. Pate & Pate Enters., Inc.,* 930 S.W.2d 877, 890 (Tex.App.-San Antonio 1996, writ denied). "Whether the facts, once ascertained, constitute a DTPA misrepresentation is a question of law." *Munawar,* 2 S.W.3d at 18. "The nature of the injury most often determines which duty or duties are breached. When the injury is only the economic loss to the subject of a contract itself the action sounds in contract alone." *Bekins Moving & Storage Co. v. Williams,* 947 S.W.2d 568, 577 (Tex.App.-Texarkana 1997, no pet.) (quoting *Southwestern Bell Telelephone Co. v. DeLanney,* 809 S.W.2d 493, 495 (Tex.1991)). Courts have recognized that misrepresentations "outside the contract" may be a violation of the DTPA despite only economic loss. *Bekins,* 947 S.W.2d at 578. In *Bekins,* the court held that misrepresentations made by a moving company that it would use different methods than those actually used was actionable under the DTPA. *Id.* The court's decision rested on the fact the representations were made outside the contract. *Id.* Where all the representations occurred inside the bounds of the contract, any misrepresentations gave rise only to a breach of contract, not a DTPA violation for a false, misleading, or deceptive act.

E. Architect/Engineer Liability

An architect can be liable to a contractor or an owner for delays on a project. The theory for liability to the owner is simple: the architect has breached the owner - architect agreement, and owes the owner the value of the owner's delay damages. The theory for liability to the contractor is more complicated, since the contractor usually does not sign a contract with the architect.

To sue successfully for breach of contract, a plaintiff generally must have a contractual relationship with the defendant. The contractual relationship does not have to be direct. The defendant can promise another party to do something which will directly benefit the plaintiff. If the defendant does not comply as promised, the plaintiff as a third party beneficiary of the defendant's promise may sue the defendant for the breach of promise. Proving that the plaintiff is a third party beneficiary, however, may not be easy since the law has a presumption against third party beneficiary agreements. For example, without evidence to the contrary, a property owner is not a third party beneficiary of a contract between a general contractor and a subcontractor. *Thomson v. Espey Huston & Associates, Inc.*, 899 S.W.2d 415 (Tex.App. -- Austin 1995, no writ). As a result, general contractors and subcontractors are usually unsuccessful in proving that they are third party beneficiaries of the owner - architect agreement.

If an architect is to be liable to a contractor, then, it will probably be for the architect's negligence. Most other jurisdictions impose a duty of care on an architect toward the general contractor and hold the architect liable for its breach of that duty. For example, if the architect negligently prepares plans and specifications, the architect can be liable to the general contractor or subcontractors for resultant delays. *Owen v. Dodd*, 431 F.Supp. 1239 (D. Miss. 1977).

One court aptly described the architect's power over the contractor as follows:

Altogether too much control over the contractor necessarily rests in the hands of the

> supervising architect for him not to be placed under a duty imposed by law to perform without negligence his functions as they affect the contractor. The power of the architect to stop work alone is tantamount to a power of economic life or death over the contractor. It is only just that such authority, exercised in such a relationship, carry commensurate legal responsibility.

United States v. Rogers & Rogers, 161 F.Supp. 132, 136 (S.D. Cal. 1958).

In Texas, however, the answer is not quite so clear. One court has held that an architect owes no general duty to a general contractor without some express agreement to do so. *Bernard Johnson Inc. v. Continental Constructors, Inc.*, 630 S.W.2d 365 (Tex.App. -- Austin 1982, writ ref'd n.r.e.). However, other courts have appeared to impose a duty on an architect to use the skill and care in the performance of his duties commensurate with the requirements of his profession and liability for a breach of that duty. *I.O.I. Sys., Inc. v. City of Cleveland*, 615 S.W.2d 786, 790 (Tex.Civ.App. -- Houston [1st Dist.] 1980, writ ref'd n.r.e.). *Ryan v. Morgan Spear Assoc.*, 546 S.W.2d 678 (Tex.Civ.App. -- Corpus Christi 1977, writ ref'd n.r.e.). Whatever the architect's duty, it will likely be limited to the contracting parties on the project and the architect's agreement with the owner. *Compton v. Polonski*, 567 S.W.2d 835 (Tex.Civ.App. -- Corpus Christi 1978).

To prevail against the architect, the contractor or owner will have to show a causal nexus between the alleged negligence of the architect and specific delay damages that the claimant sustains. In other words, the claimant "must show and connect these delays and hindrances to some act of omission or commission or breach on the individual defendant's part. The damages, if any caused by each defendant must be proved." *City of Beaumont v. Excavators & Constructors, Inc.*, 870 S.W.2d 123, 132 (Tex.App. -- Beaumont 1993)(contractor unable to attribute specific days of delay

to a particular defendant, and lost at trial). The burden rests on the contractor to establish by competent evidence the duration of the delay, the fact of such delay, and that there was no greater fault of the contractor involved, and that there was a causal relationship between such delay and the necessity and reasonableness of additional cost. *Id.*

III. Potential Damages

A. Economic Loss / Property Damage

In a products liability case, the law draws a distinction between tort recovery for physical injuries and warranty recovery for economic loss. *Nobility Homes of Texas, Inc. v. Shivers,* 557 S.W.2d 77, 79 (Tex.1977), quoting *Seely v. White Motor Co.,* 63 Cal.2d 9, 45 Cal.Rptr. 17, 23, 403 P.2d 145, 151 (1965). Where "a product injures a consumer economically and not physically," the consumer may recover under the warranties provided by the Uniform Commercial Code, but not for strict liability in tort. *Nobility Homes,* 557 S.W.2d at 79-81. The Texas Supreme Court has explained the rationale for applying contract law when there is "only economic loss to the purchased product itself:"

> Distinguished from personal injury and injury to other property, damage to the product itself is essentially a loss to the purchaser of the benefit of the bargain with the seller. Loss of use and cost of repair of the product are the only expenses suffered by the purchaser. The loss is limited to what was involved in the transaction with the seller, which perhaps accounts for the Legislature providing that parties may rely on sales and contract law for compensation of economic loss to the product itself.
>
> TEX. BUS. & COM.CODE ANN. § 2.715(b)(2).

Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc., 572 S.W.2d 308, 312-13 (Tex.1978). The economic loss rule applies to negligence claims as well as claims for strict liability. See *Indelco, Inc. v. Hanson Industries North America--Grove Worldwide,* 967 S.W.2d 931, 932-33 (Tex.App.-Houston [14th Dist.] 1998, pet. denied) (economic losses caused by defective product damaging itself are not recoverable through a suit alleging negligence).

Where such collateral property damage exists in addition to damage to the product itself, recovery for such damages are recoverable under Section 402A of the Restatement (Second) of Torts as damage to property or under the Texas Business and Commerce Code, Section 2.715, as consequential damages for a breach of an implied warranty. To the extent that the product itself has become part of the accident risk or the tort by causing collateral property damage, it is properly considered as part of the property damages, rather than as economic loss. *Signal Oil & Gas Co. v. Universal Oil Products,* 572 S.W.2d 320, 325 (Tex. 1978).

As stated by the Texas Supreme Court in *Jim Walter Homes, Inc. v. Reed,* 711 S.W.2d 617, 618 (Tex.1986), "[T]he nature of the injury most often determines which duty or duties are breached." The economic loss rule is a rule of "duty" which focuses on the nature of the loss claimed in order to determine the duty in tort owed by the alleged tortfeasor. See William Powers, Jr. & Margaret Niver, Negligence, Breach of Contract, and the "Economic Loss" Rule, 23 TEX. TECH L. REV. 477 (1992).

The 14th Court of Appeals has addressed the economic loss rule in a series of cases, the most recent of which is *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.,* 29 S.W.3d 282 (Tex.App.-Houston [14th Dist.] 2000, no writ). Coastal Conduit & Ditching, Inc. (Coastal Conduit) was engaged in the business of excavating trenches and ditches. Noram Energy Corp. d/b/a Entex

(Entex) operated gas lines in the general area in which Coastal Conduit performed excavating services. Coastal Conduit alleged that Entex was dilatory and careless in locating and marking its gas lines as required by law in areas where Coastal Conduit intended to excavate. Coastal Conduit asserted that it incurred additional expenses in performing its work because of the deficiencies of Entex's identification and marking. Coastal Conduit sought to recover these additional expenses from Entex under a negligence theory. Entex argued that the economic loss rule barred Coastal Conduit's negligence claim because Coastal Conduit was only seeking to recover economic losses.

The court began its analysis by noting that the economic loss rule has previously been applied in two instances to bar negligence claims: (1) the recovery of economic losses in negligence when the loss is the subject matter of a contract and (2) the recovery of economic losses in negligence against the manufacturer or seller of a defective product where the defect results in damage only to the product and not to a person or to other property. The court was, therefore, faced with the question of determining whether Texas law precludes the recovery of economic damages in a negligence case where the parties are contractual strangers and there is no accompanying claim for damages to a person or property. The court held that the economic loss rule barred Coastal Conduit's negligence action. Citing *Local Joint Executive Bd. v. Stern,* 98 Nev. 409, 651 P.2d 637 (1982), the court reasoned that permitting a tort recovery for purely economic loss would be a duty standard that sweeps too broadly.

When someone suffers personal injuries, the damages fall within two broad categories--economic and non-economic damages. Traditionally, economic damages are those that compensate an injured party for lost wages, lost earning capacity, and medical expenses. Non-economic damages include compensation for pain, suffering, mental anguish, and

disfigurement. "Hedonic" damages are another type of non-economic damages and compensate for loss of enjoyment of life.

B. Attorney Fees

Attorney's fees are recoverable by one party against another with whom the party had a contract under Tex.Civ.Prac.& Rem.Code Section 38.001:

§ 38.001. Recovery of Attorney's Fees

A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:

(1) rendered services;

(2) performed labor;

(3) furnished material;

(4) freight or express overcharges;

(5) lost or damaged freight or express;

(6) killed or injured stock;

(7) a sworn account; or

(8) an oral or written contract.

IV. Handling the Construction Defect / Mold Case

A. Statute of Limitations

A breach of contract action is subject to a four-year statute of limitations. Tex.Civ.Prac.&Rem.Code § 16.004 (Vernon 2002). Limitations is an affirmative defense, which

the asserting party must prove. *Woods v. William M. Mercer, Inc.,* 769 S.W.2d 515, 517 (Tex.1988). Generally, a cause of action accrues, and the statute of limitations begins to run, when facts come into existence that authorize a claimant to seek a judicial remedy. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.,* 962 S.W.2d 507, 514 (Tex.1998). The time for accrual of a cause of action is a question of law. *Moreno v. Sterling Drug, Inc.,* 787 S.W.2d 348, 351 (Tex.1990). A breach of contract claim accrues when the contract is breached. *Stine v. Stewart,* 80 S.W.3d 586, 592 (Tex.2002).

Generally, a cause of action accrues when a wrongful act causes an injury, regardless of when the plaintiff learns of the injury. *Moreno v. Sterling Drug, Inc.,* 787 S.W.2d 348, 351 (Tex.1990). A party need only be aware of enough facts to apprize him of his right to seek judicial remedy. See *Murray v. San Jacinto Agency, Inc.,* 800 S.W.2d 826, 828 (Tex.1990). There are, however, exceptions to this rule. The discovery rule, for example, is a judicially conceived exception to the statute of limitations to be used by courts in determining when a cause of action accrues where the plaintiff is unable to know of his injury at the time it occurs. *Moreno,* 787 S.W.2d at 351. When applicable, the discovery rule tolls the running of the statute of limitations until the plaintiff discovers, or through the exercise of reasonable care and diligence should discover, the nature of his injury. *Moreno,* 787 S.W.2d at 351; *Cornerstones Municipal Utility District v. Monsanto Co.,* 889 S.W.2d 570, 576 (Tex.App. – Houston [1st Dist.] 1994). The discovery rule imposes a duty on the plaintiff to exercise reasonable diligence to discover facts of negligence or omission. *Bayou Bend Towers Council of Co-Owners v. Manhattan Construction Co.,* 866 S.W.2d 740, 742-743 (Tex.App.-Houston [14th Dist.] 1993, writ denied).

The discovery rule applies in cases where the injured party did not and could not know of its

injury at the time it occurred, that is when the injury is inherently undiscoverable. *Bayou Bend,* 866 S.W.2d at 743. Limitations do not begin when the first damage is observed or when the full extent of the damage is known, but rather when the appellants knew or should have known of the facts giving rise to their cause of action. *Tenowich v. Sterling Plumbing Co., Inc.,* 712 S.W.2d 188, 189-190 (Tex.App.-Houston [14th Dist.] 1986, no writ). Although the law is clear, Texas courts have varied in their application of this law, applying the aforementioned rule and arriving at diverging conclusions.

Fraudulent concealment estops a defendant from using limitations as an affirmative defense. *Borderlon v. Peck,* 661 S.W.2d 907, 908 (Tex.1983). Because fraudulent concealment is an affirmative defense to limitations, the burden is on the plaintiff to raise the issue. *Leeds v. Cooley,* 702 S.W.2d 213, 215 (Tex.App.-Houston [1st Dist.] 1985, writ ref'd n.r.e.). Under Texas law, to show that a plaintiff is entitled to the estoppel effect of fraudulent concealment, the plaintiff must show that (1) the defendant had actual knowledge of the wrong, (2) a duty to disclose the wrong, and (3) a fixed purpose to conceal the wrong. *Savage v. Psychiatric Inst. of Bedford, Inc.,* 965 S.W.2d 745, 753 (Tex.App.-Fort Worth 1998, pet. denied).

Unlike the discovery rule, which determines when the limitations period begins to run, the doctrine of fraudulent concealment suspends the running of the limitations period after it has begun because the defendant concealed facts necessary for the plaintiff to know that a claim existed. *Mitchell Energy Corp. v. Bartlett,* 958 S.W.2d 430, 439 (Tex.App.-Fort Worth 1997, pet. denied). But the estoppel effect of fraudulent concealment is not permanent. Knowledge of facts that would make a reasonable person inquire and discover a concealed cause of action is equivalent to knowledge of the cause of action for limitations purposes. See *Borderlon,* 661 S.W.2d at 909;

Bayou Bend, 866 S.W.2d at 747.

The statute of limitations for negligence is two years. Tex.Civ.Prac.&Rem.Code section 16.003. The two years begins to run from the date that the claimant knew or should have known of its claim. The discovery rule is applicable.

In *Baylor Health Care System v. Maxtech Holdings, Inc.,* 111 S.W.3d 654 (Tex.App. – Dallas 2003), the court reviewed the statute of limitations for negligence and the impact of the discovery rule on the accrual of the limitations period. The facts of the case indicated that on June 11, 1999, Baylor Health Care System sued Maxtech Holdings, Inc., Maxim Technologies, Inc., and Maxim Engineers, Inc., (collectively, Maxim) alleging that Maxim negligently performed a pre-purchase environmental site assessment in 1991, which resulted in damages of over $1,000,000 in 1997. The trial court granted Maxim's motion for summary judgment on limitations. On appeal, Baylor contended that the trial court erred (a) in granting Maxim's motion for summary judgment, (b) holding that the discovery rule did not apply, and (c) concluding that, as a matter of law, Baylor discovered, or should have discovered, its injury more than two years prior to filing suit. The court of appeals affirmed. *Id.* at 655. The court of appeals found that a 1996 report suggested that a dry cleaning service had occupied the property, placing Baylor on inquiry, and held that limitations began to run from that point. *Id.* at 658.

The statute of limitations for breach of the DTPA is also two years. Tex.Bus.& Com.Code § 17.565 Limitation, provides:

> All actions brought under this subchapter must be commenced within two years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable

> diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice. The period of limitation provided in this section may be extended for a period of 180 days if the plaintiff proves that failure timely to commence the action was caused by the defendant's knowingly engaging in conduct solely calculated to induce the plaintiff to refrain from or postpone the commencement of the action.

The statute of limitations for breach of warranty is four years if the warranty is part of a contract. Tex.Civ.Prac.&Rem.Code section 16.004.

B. Spoliation of Evidence

Spoliation of evidence is not an independent cause of action, but must be addressed within the suit where the spoliation occurred. In *Trevino v. Ortega,* 969 S.W.2d 950 (Tex. 1998). In Trevino, the Texas Supreme Court stated: "Because we determine that spoliation does not give rise to independent damages, and because it is better remedied within the lawsuit affected by spoliation, we decline to recognize spoliation as a tort cause of action." *Id.* at 951.

The Court observed that evidence spoliation is not a new concept. For years courts have struggled with the problem and devised possible solutions. Probably the earliest and most enduring solution was the spoliation inference or *omnia praesumuntur contra spoliatorem*: all things are presumed against a wrongdoer. See, e.g. *Rex v. Arundel,* 1 Hob. 109, 80 Eng. Rep. 258 (K.B.1617) (applying the spoliation inference); *The Pizarro,* 15 U.S. (2 Wheat.) 227, 4 L.Ed. 226 (1817) (declining to apply the spoliation inference); Brown v. Hamid, 856 S.W.2d 51, 56 (Mo.

1993)(noting that Missouri has recognized a spoliation inference for over a century). In other words, within the context of the original lawsuit, the fact finder deduces guilt from the destruction of presumably incriminating evidence.

The Court then noted that this traditional response to the problem of evidence spoliation properly frames the alleged wrong as an evidentiary concept, not a separate cause of action. Spoliation causes no injury independent from the cause of action in which it arises. If, in the ordinary course of affairs, an individual destroys his or her own papers or objects, there is no independent injury to third parties. The destruction only becomes relevant when someone believes that those destroyed items are instrumental to his or her success in a lawsuit. 969 S.W.2d at 952.

C. Expert Depositions

Under Texas law, a two-part test governs whether expert testimony is admissible: (1) the expert must be qualified; and (2) the testimony must be relevant and based on a reliable foundation. *Helena Chemical Co. v. Wilkins,* 47 S.W.3d 486, 499 (Tex.2001). Whether the trial court properly admitted expert testimony is subject to an abuse of discretion standard of review. *Id.*; *E.I. du Pont de Nemours and Co. v. Robinson,* 923 S.W.2d 549, 558 (Tex.1995). The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles. *Robinson,* 923 S.W.2d at 558; *Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241-42 (Tex.1985). The test is not whether, "in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action." *Robinson,* 923 S.W.2d at 558. A reviewing court cannot conclude that a trial court abused its discretion if, in the same circumstances, it would have ruled differently or if the trial court committed a mere error in judgment. *Id.* Although the trial court serves as an evidentiary

gatekeeper by screening out irrelevant and unreliable expert evidence, it has broad discretion to determine the admissibility of that evidence. *Exxon Pipeline Co. v. Zwahr,* 88 S.W.3d 623, 629 (Tex.2002) (citing *Robinson,* 923 S.W.2d at 556). An appellate court must uphold the trial court's evidentiary ruling if there is any legitimate basis for it. *Owens-Corning Fiberglas Corp. v. Malone,* 972 S.W.2d 35, 43 (Tex.1998).

D. Procedural Issues

The parties should be cognizant of the need for expert testimony. Once experts have been identified, the parties should be aware that the expert may be challenged under *Robinson*. Often cases are won and lost on the expert challenge. The challenge should be filed by motion well in advance of the trial so that the hearing may occur before trial.

E. Joint and Several Liability

Chapter 33 of the Texas Civil & Practice Code applies to tort claims in which a defendant, settling person, or responsible third person is found responsible for a percentage of the harm for which relief is sought. Tex.Civ.Prac.&Rem.Code section 33.002.

By the plain language of section 33.013(b), only one liable defendant may be held jointly and severally liable for the total damages recoverable by the claimant because only one liable defendant may be assigned responsibility greater than fifty percent. *Allied Signal, Inc. v. Moran,* 2003 WL 22014805 (Tex.App. – Corpus Christi 2003). See *Sugar Land Properties, Inc. v. Becnel,* 26 S.W.3d 113, 120 (Tex.App. – Houston [1st Dist.] 2000) (finding a liable defendant jointly and severally liable after its responsibility is determined to be greater than fifty percent); see also *C & H Nationwide, Inc.*

v. Thompson, 903 S.W.2d 315, 321 (Tex. 1994).

F. Settlement

The cost of trying a substantial construction defect or mold case can be significant, and can sometimes exceed the amount in controversy. The parties should consider mediation early in the process so that the cost of defense can be contributed to the settlement.

G. Key Cases

Booker v. Real Homes, Inc., 103 S.W.2d 487 (Tex.App. – San Antonio 2003)

Real Homes built a home for the Bookers, installing windows manufactured and sold by Marvin Lumber and Cedar Company. Construction on the home continued throughout 1997, even though the Bookers moved into the home in 1996. Due to construction defects, water seeped into the house through and around the windows. The Bookers first complained to Real Homes in about September 1997 about the water intrusion. In about November 1997, the Bookers noticed a musty smell coming from the inside of the walls. In about January and April 1998, Real Homes investigated the problem but took no action. In June 1998, the Bookers sent a certified letter to Real Homes and Marvin complaining the water intrusion problems.

Beginning in November 1998, Real Homes and Marvin performed repairs on the house which continued until January or February of 1999. The repair work encompassed leaks on the north wall of the Bookers' family room and the east wall of the house. The Bookers were told the problem had been fixed. The musty odor, however, returned.

In April 1999, Mrs. Booker sent a letter to Real Homes, informing them of the continuing

pervasiveness of the odor. Upon inspection, Real Homes told the Bookers the smell was coming from outside of the house. Real Homes did not respond to further correspondence from the Bookers.

In July 1999, the Bookers cut a hole in the wall underneath the windows in one of their rooms. They discovered "wet and rotten" wood, as well as dampened insulation behind the wall. The seepage had apparently caused extensive water damage inside the walls of the house, and the water damage led to an eventual infestation of toxic mold. The mold, in turn, caused several health problems for the family.

On October 13, 1999, the Bookers filed suit against Real Homes and Marvin, alleging numerous causes of action, including breach of contract, breach of warranty, negligence, gross negligence, negligent misrepresentation, intentional infliction of emotional distress, and violations of the Texas Deceptive Trade Practices Act ("DTPA").

Approximately one month before the case was set to go to trial, Real Homes and Marvin moved for partial summary judgment, contending the Bookers' claims for negligence, gross negligence, negligent misrepresentation, intentional infliction of emotional distress, and violations of the DTPA were barred by the two-year statute of limitations. The trial court granted the motion as to these causes of action. The Bookers appealed.

On appeal, the Bookers argued that the trial court erred in granting the appellees' motion for partial summary judgment because there were genuine issues of material fact concerning the date on which their cause of action accrued under the discovery rule. The Bookers also contended that neither Real Homes nor Marvin successfully negated the application of this rule.

Generally, a cause of action accrues when a wrongful act causes an injury, regardless of when the plaintiff learns of the injury. *Moreno v. Sterling Drug, Inc.,* 787 S.W.2d 348, 351 (Tex.1990).

A party need only be aware of enough facts to apprize him of his right to seek judicial remedy. See *Murray v. San Jacinto Agency, Inc.,* 800 S.W.2d 826, 828 (Tex.1990). There are, however, exceptions to this rule. The discovery rule, for example, is a judicially conceived exception to the statute of limitations to be used by courts in determining when a cause of action accrues where the plaintiff is unable to know of his injury at the time it occurs. *Moreno,* 787 S.W.2d at 351. When applicable, the discovery rule tolls the running of the statute of limitations until the plaintiff discovers, or through the exercise of reasonable care and diligence should discover, the nature of his injury. *Moreno,* 787 S.W.2d at 351; *Cornerstones,* 889 S.W.2d at 576. The discovery rule imposes a duty on the plaintiff to exercise reasonable diligence to discover facts of negligence or omission. *Bayou Bend Towers Council of Co-Owners v. Manhattan Construction Co.,* 866 S.W.2d 740, 742-743 (Tex.App.-Houston [14th Dist.] 1993, writ denied).

The discovery rule applies in cases where the injured party did not and could not know of its injury at the time it occurred, that is when the injury is inherently undiscoverable. *Bayou Bend,* 866 S.W.2d at 743. Limitations do not begin when the first damage is observed or when the full extent of the damage is known, but rather when the appellants knew or should have known of the facts giving rise to their cause of action. *Tenowich v. Sterling Plumbing Co., Inc.,* 712 S.W.2d 188, 189-190 (Tex.App.-Houston [14th Dist.] 1986, no writ). Although the law is clear, Texas courts have varied in their application of this law, applying the aforementioned rule and arriving at diverging conclusions.

In spite of this lack of clarity, it is evident that the statute of limitations could not begin to run until the Bookers knew or, through the exercise of reasonable care and diligence should have known, of the facts giving rise to their cause of action. *Tenowich,* 712 S.W.2d at 189-190. Although

the Bookers argue the statute was tolled until they knew of the exact cause of the leaks and not just the leaks, themselves, all that is required to commence the running of the limitations period is the discovery of an injury and its general cause, not the exact cause in fact and the specific parties responsible. See *Russell v. Ingersoll-Rand Co.,* 841 S.W.2d 343, 344 n. 3 (Tex.1992). The Bookers, however, could not have discovered the injury or its general cause before they were aware of the actual leaks. The discovery rule, therefore, applies, tolling the running of the statute until the date on which the Bookers actually knew of the leaks.

Because the Bookers pled the discovery rule, it was the burden of Real Homes and Marvin to establish when the Bookers discovered, or should have discovered, their injury. The summary judgment proof offered by Real Homes and Marvin established the Bookers were aware of leaks in the windows as early as September of 1997. The Bookers' letter to Real Homes, dated September 15, 1997, established that they were cognizant of problems with the windows leaking even if they were not aware of the possible consequences or the exact cause-in-fact. The Bookers' summary judgment evidence was not sufficient to raise a genuine issue regarding the accrual date. The statute of limitations, therefore, began to run, at the latest, on September 15, 1997, the date the Bookers sent the letter complaining of leaks to Real Homes. The court then overruled the Bookers' first two issues.

In their final issue, the Bookers claimed that the trial court had erred in granting Real Homes' motion for partial summary judgment because the statute was tolled by the fraudulent concealment and intentional misrepresentations of Real Homes and Marvin. The Bookers claimed the misleading conduct of both appellees prevented them from discovering their injury. Specifically, the Bookers asserted that Real Homes and Marvin misrepresented the severity of the problems with the leaks by

failing to reveal the content of service reports, misleading the Bookers as to the source of the odor, and downplaying the seriousness of the problems. The Bookers also contended that Real Homes and Marvin misrepresented the extent of the repairs completed on the house, claiming to have fixed the leaking windows, repaired the water damage, and cleaned the mold infestation when, in reality, several of the issues had not been resolved.

Fraudulent concealment estops a defendant from using limitations as an affirmative defense. *Borderlon v. Peck,* 661 S.W.2d 907, 908 (Tex.1983). Because fraudulent concealment is an affirmative defense to limitations, the burden is on the plaintiff to raise the issue. *Leeds v. Cooley,* 702 S.W.2d 213, 215 (Tex.App.-Houston [1st Dist.] 1985, writ ref'd n.r.e.). Under Texas law, to show that a plaintiff is entitled to the estoppel effect of fraudulent concealment, the plaintiff must show that (1) the defendant had actual knowledge of the wrong, (2) a duty to disclose the wrong, and (3) a fixed purpose to conceal the wrong. *Savage v. Psychiatric Inst. of Bedford, Inc.,* 965 S.W.2d 745, 753 (Tex.App.-Fort Worth 1998, pet. denied).

Unlike the discovery rule, which determines when the limitations period begins to run, the doctrine of fraudulent concealment suspends the running of the limitations period after it has begun because the defendant concealed facts necessary for the plaintiff to know that a claim existed. *Mitchell Energy Corp. v. Bartlett,* 958 S.W.2d 430, 439 (Tex.App.-Fort Worth 1997, pet. denied). But the estoppel effect of fraudulent concealment is not permanent. Knowledge of facts that would make a reasonable person inquire and discover a concealed cause of action is equivalent to knowledge of the cause of action for limitations purposes. See *Borderlon,* 661 S.W.2d at 909; *Bayou Bend,* 866 S.W.2d at 747.

As to Real Homes, the summary judgment evidence showed that Real Homes visited the

Booker home several times during 1997, 1998, and 1999, in an attempt to diagnose and repair the problems in the house. The evidence also showed that employees or representatives of Real Homes actually completed repair work on the house, assuring the Bookers that the leaks, water damage, and mold infestation were remedied. In addition, the Bookers' affidavits indicated that, following the repairs, Real Homes told them the continuing musty smell was coming from outside the house and then failed to respond to several attempts by the Bookers to communicate. Finally, there was summary judgment evidence demonstrating that the Marvin Windows repairman, who reported the situation as "bad," was told by Real Homes to complete work on only two sides of the house, repairing only 26 windows and leaving the remaining two sides as they were. Real Homes then represented that the problems had been fixed and requested the Bookers to endorse a check from Marvin, paying for Real Homes' portion of the repairs.

The Bookers raised evidence showing that Real Homes (1) had actual knowledge of the problems with the windows and the incomplete repairs; (2) a duty, as a professional builder, to disclose any wrongs which the Bookers, as laypeople, would not be able to discover on their own; and (3) a fixed purpose to conceal the wrong because it would cost the builder more money to fix the problems completely.

As to Marvin, even though the Bookers introduced summary judgment evidence showing that Marvin was aware of the wrongs, they failed to introduce evidence indicating that Marvin had a duty to disclose any of these wrongs to the Bookers or that Marvin had a fixed purpose in concealing the wrongs from them. In fact, the majority of Marvin's contact with the Bookers appears to have been indirect, because they were contracted through Real Homes.

The appellate court affirmed the Bookers' third issue as it applies to Real Homes, but

overruled the issue as it applied to Marvin. The court then affirmed the summary judgment in favor of Marvin, and reversed the summary judgment in favor of Real Homes.