REAL ESTATE AND MOLD: DOES MOLD = NOT SOLD?

2017 Seminar Material
REAL ESTATE AND MOLD: DOES MOLD = NOT SOLD?

Featuring
Michael S. Stocknoff, PE
A&M Engineering Services, Inc.
(Cherry Hill)

Legal Commentary
Stuart J. Moskovitz, Esq.
Law Offices of Stuart J. Moskovitz
(Freehold)

In cooperation with the New Jersey State Bar Association Senior Lawyers Special Committee
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Michael S. Stocknoff, PE

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Stuart J. Moskovitz, Esq.

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Michael S. Stocknoff, PE

• Causes of Mold

Water Leaks

1. Plumbing
   A. Bathrooms
      Toilets
      Sinks
      Bath Tubs/Showers
      Exhaust fans
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- Causes of Mold

Water Leaks

1. Plumbing
   
   B. Kitchens
   
   Sinks
   Dishwashers
   Refrigerators
   Instant Hots
   Garbage Disposals
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• Causes of Mold

Water Leaks

2. Roof
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• Causes of Mold

Water Leaks

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Causes of Mold

Water Leaks

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• Causes of Mold

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• Causes of Mold

Water Leaks
   4. Building Envelopes
      C. Penetrations
         Electrical
         Plumbing
         HVAC
      D. Improper Flashing
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• Causes of Mold

High Relative Humidity
  1. Crawl Spaces
     A. Improper Ventilation
     B. Lack of Vapor Barrier on Floor
     C. Clothes Dryer Exhaust
     D. Well Equipment
     E. Bathroom Exhaust Fans
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• Why is Mold a Concern

1. Health Issues – Acute & Latent
   Most severe with individuals with
   allergies, asthma and lyme disease
   A. Allergens
   B. Respiratory Issues
   C. Toxic
   D. Irritants
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• Why is Mold a Concern

2. Deteriorates Wood
   Floor joists
   Sill plates
   Sheathing
   Roof rafters
   Sub-floors
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• What Should be Done

1. Mold Testing – performed by a company that does not perform remediation
   A. Determines the minimum scope of work
   B. Basis to determine if the mold has been remediated
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Types of Testing

1. Air Sampling
   A. Outside – basis of comparison
   B. Interior
      Basement
      Crawl space
      Attic
      Living Areas
2. Swab/Wipe Sampling – determines the source of the mold
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- Remediation

1. Correct the source of the water/moisture
   A. French Drains
   B. Dehumidifiers
   C. Increase Ventilation

2. Choosing the Right Company
   A. Experience
   B. Insured
   C. Warranty
   Must pass an independent post testing
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• Areas to Remediate

1. Organic Surfaces
   A. Painted foundation walls
   B. Wood
   C. Plastic Electrical wiring – Romex
   D. PVC piping
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• Area to Remediate

2. Insulation – discard
3. Sheetrock – discard
4. Wood paneling
5. HVAC System – clean ducts & humidifiers
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- Post-Remediation Testing

1. A company that did not perform the remediation
2. Provides proof the Remediation was successful
3. Relieves the sellers of future Liability
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CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff lessees, were certified to appeal following dismissal by a trial court (New Jersey) of their action against defendants, a builder and its suppliers, alleging that a defectively-designed water heating system caused serious scalding injuries to their child.

OVERVIEW: Plaintiff lessees, seeking damages for serious scalding injuries to their child, appealed the dismissal of their action against the builder and its suppliers. Plaintiffs contended that defendants installed a defectively-designed boiler and water distribution system that was unreasonably dangerous. The builder contended that its warning to plaintiffs and the obviousness of the danger precluded liability. The trial court held that the builder was not liable for injuries to plaintiffs. The court reversed the judgment, holding that principles of implied warranty and strict liability were applicable to the builder and the obviousness of the danger did not preclude a jury finding of unreasonable risk and negligence. The court affirmed the dismissal of plaintiffs' claims against the suppliers because the defective equipment was installed against their advice.

OUTCOME: The judgment in favor of defendant builder was reversed and the case was remanded for trial because implied warranty and strict liability principles were applicable to defendant. The judgment in favor of defendant suppliers was affirmed because the defective equipment was installed against their advice.

CORE TERMS: builder, vendor's, heating, mixing valve, hot water, installation, manufacturer, warranty, temperature, implied warranty, boiler, strict liability, purchaser, vendee, contractor, installed, domestic, faucet,
constructed, valve, hot, bathroom, deed, recommendation, spigot, comparable, developer, engineer, install, privity

**LexisNexis(R) Headnotes**

**Torts > Negligence > Standards of Care > Reasonable Care > Reasonable Person**

**Torts > Products Liability > Negligence**

[HN1] The negligence principle has been widely accepted in products liability cases; and the bottom does not logically drop out of a negligence case against the maker when it is shown that the purchaser knew of the dangerous condition. Thus if the product is a carrot-topping machine with exposed moving parts, or an electric clothes wringer dangerous to the limbs of the operator, and if it would be feasible for the maker of the product to install a guard or a safety release, it should be a question for the jury whether reasonable care demanded such a precaution, though its absence is obvious.

**Real Property Law > Water Rights > Domestic Use**

**Torts > Negligence > General Overview**

**Torts > Products Liability > Breach of Warranty**

[HN2] When their marketed products are defective and cause injury to either immediate or remote users, manufacturers may be held accountable under ordinary negligence principles as well as under expanding principles of warranty or strict liability.

**Insurance Law > Claims & Contracts > Policy Interpretation > General Overview**

**Real Property Law > Torts > Construction Defects**

**Torts > Products Liability > Strict Liability**

[HN3] There is presumably available to such modern entrepreneurs, as there is in the products liability field generally, wholly adequate extended insurance coverage and the builder vendors are admittedly in much better economic position than the injured party to absorb crippling losses caused by their own negligent or defective construction.

**Torts > Products Liability > Duty to Warn**

**Torts > Products Liability > Strict Liability**

[HN4] The obviousness of a danger does not necessarily preclude a jury finding of unreasonable risk and negligence.

**Torts > Procedure > Multiple Defendants > Alternative Liability**

**Torts > Products Liability > Breach of Warranty**

**Torts > Products Liability > Strict Liability**

[HN5] When a manufacturer presents his products for sale to the public he accompanies them with an implied representation that they are reasonably fit for the intended use, and he is subject to an enterprise liability, the purpose of which is to insure that the cost of injury or damage resulting from defective products is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves.

**Real Property Law > Purchase & Sale > Remedies > Duty to Disclose**

**Torts > Products Liability > Breach of Warranty**

**Torts > Products Liability > Strict Liability**

[HN6] The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected. That being so, warranty or strict liability principles should be carried over into the realty field, at least in the aspect of mass production and sale of homes.

**Real Property Law > Purchase & Sale > Remedies > Liability of Developers & Vendors**

**Real Property Law > Torts > Construction Defects**

**Torts > Products Liability > Strict Liability**

[HN7] When a vendee buys a development house from an advertised model, he clearly relies on the skill of the developer and on its implied representation that the house will be erected in reasonably workmanlike manner and will be reasonably fit for habitation. If there is improper construction, the well-being of the vendee and others is seriously endangered and serious injury is foreseeable. The public interest dictates that if such injury does result from the defective construction, its cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss rather than by the injured party who justifiably relied on the developer's skill and implied representation.

**Commercial Law (UCC) > Sales (Article 2) > Contract Terms > General Overview**

**Torts > Products Liability > Breach of Warranty**

**Torts > Products Liability > Strict Liability**
[HN8] In determining whether a house was defective, the test admittedly would be reasonableness rather than perfection. The comparable warranty of merchantability in the sale of goods means only that the article is reasonably fit for the purpose for which it is sold and does not imply "absolute perfection."

**OPINION BY: JACOBS**

**OPINION**

[*73] [***316] The plaintiffs sued for damages suffered as a result of the severe scalding received by the infant plaintiff [*74] Lawrence J. Schipper, II when he came in contact with excessively hot water drawn from the faucet in the bathroom sink. The trial court dismissed the proceeding at the close of the plaintiffs' case. They appealed to the Appellate Division and [***2] we certified before argument there.

The defendant Levitt & Sons, Inc. is a well-known mass developer of homes, specializing in planned communities. Its homes are generally sold on the basis of advertised models constructed in accordance with Levitt's specifications. One of its communities is at Levittown (now known as Willingboro), New Jersey, where it built thousands of homes, including the home at 81 Shawmont Lane purchased in 1958 by the Kreitzers. This home was evidently built for the Kreitzers after they had selected a model, for Mrs. Kreitzer testified that "we watched the complete building of our home as it was going up." The Kreitzers moved in during November 1958 and received a "Homeowner's Guide" from Levitt which contained a message of welcome to Levittown and various informational items. Under the caption "Heating System" it advised that the "system consists of a gas-fired boiler supplying heating coils imbedded in the concrete floor beneath the tile" and that "as heated water is pumped through these heating coils, the coils warm the concrete in which they are imbedded and the entire floor becomes warm." There was a cautionary note against any attempts [***3] at "adjustments" of the heating unit and instructions to call Public Service Electric and Gas Company "for emergency service." Under the caption "Hot Water," the Homeowner's Guide had the following to say:

"You will find the hot water in your Levittown home much hotter than that to which you are accustomed. Hot water such as this is desirable for clothes washing as well as other uses.

We have provided at each fixture, mixing type faucets so that you adjust the water temperature to suit. The proper procedure at any faucet is to first open the cold water tap part way, and then turn on the hot water. This avoids wasting hot water and yields properly tempered water for bathing and dishwashing."
Mr. Kreitzer testified that he found the domestic hot water to be really hot and that he was burned on several occasions. He complained to Levitt's representatives but was told that they could not reduce the temperature except through "the installation of a mixing valve" in the heating unit. Mr. Kreitzer also complained to the Public Service representatives but they told him that they could make no significant reduction in the temperature of the water. Mrs. Kreitzer testified that the water "was exceptionally hot coming out of the bathroom faucets." She was burned mildly on several occasions and a house guest was "burned pretty badly" when she "didn't have a chance to warn her." Thereafter Mrs. Kreitzer put a handwritten note in the bathroom reading: "Caution. Water Hot. Turn on cold water first." She did not recall whether the note was in the bathroom when the Kreitzers leased their house to the Schippers.

The plaintiff Mr. Lawrence J. Schipper testified that in July 1960 he leased the house at 81 Shawmont Lane from the Kreitzers for a term of one year. He did not recall that his lessors had mentioned anything about the hot water and he did not read the Homeowner's Guide until after the scalding of his son Lawrence J. Schipper, II. When he and his family moved in on August 13, 1960, he turned on the control switch in the closet which contained the gas-fired heating unit and waited for the gas to "cycle through." He then tried the hot water faucet in the bathroom adjacent to the closet and noticed that the water coming from the tap "gave a sort of spitting noise and seemed to be a mixture of gas and steam." He examined the heating unit to see whether it had any mechanism to control the temperature of the water and found none. He cautioned his wife and children that the water was "extremely hot" and that they would have to be careful until he "could find a means of regulating it." He spoke to the realtor through whom he had negotiated his lease and, on the realtor's recommendation, he decided to call Public Service on Monday morning August 15th when he "next expected their services to be available." He did call Public Service at about 8:30 on Monday morning and, in response, its representative made a service call later that morning but found the heating unit to be operating in normal fashion and could make no adjustment which would appreciably affect the temperature of the domestic hot water.

During the morning of August 15th and apparently before the Public Service representative had arrived, the scalding of the infant plaintiff (Larry), who was then sixteen months old, had occurred. Mrs. Schipper testified that she was upstairs when she heard Larry crying. She came downstairs, heard the water running, found the hot water faucet in the bathroom sink turned on, and realized that Larry had been scalded. He was taken immediately to the doctor's office and then to the Cherry Hill hospital where he remained for seventy-four days. Thereafter he was hospitalized on three separate occasions and during two of these, skin grafting operations were performed.

In 1961 the plaintiffs filed a complaint against Levitt & Sons, Inc. and York Shipley, Inc., the company which manufactured the heating unit, and another complaint against Builders Supply Corporation, Levitt's wholly owned subsidiary which had purchased the heating unit from York. Thereafter the matters were consolidated and amendments and other pleadings were duly filed. The plaintiffs charged that, in the construction of the Levittown homes, Levitt had directed and ordered the installation of a gas-fired hot water boiler and water distribution system which was so defectively designed and equipped "that it produced without notice or warning scalding hot water at a temperature that was dangerously high for ordinary domestic use" and that it "knew or should have known of the highly dangerous condition created by it, which involved an unreasonable risk of bodily harm to children of immature years and others, who had no means of discovering the condition or realizing the risks." Similarly, the plaintiffs charged that York had manufactured the improperly designed system and that it knew or should have known of the highly dangerous condition created by it which involved unreasonable risk of harm. The plaintiffs sought damages from Levitt and its wholly owned subsidiary Builders Supply and from York for the injuries sustained by the infant plaintiff as the result of his scalding and also sought consequential damages suffered by his father Lawrence J. Schipper.

In support of their complaints, the plaintiffs introduced expert and other testimony which dealt extensively with the installation and operation of the heating and hot water system. Mr. Witt testified that he was an experienced mechanical engineer, had been employed by Levitt for nine years, and was responsible for the design of the heating and hot water system in the New Jersey Levittown homes as well as in Levittown homes elsewhere. He described the prime component of the system as a boiler manufactured by York to supply both hot water for heating and domestic purposes through the use of an instantaneous hot water coil immersed in the boiler. He recognized that the temperature of the water as it came from the boiler (at 190 degrees Fahrenheit and upward) would be excessively high for domestic use and that since the heating closet in the plaintiffs' home was only six feet away from the bathroom sink, the water coming from the hot water tap on initial draw would be almost at the same temperature as that in the boiler. He acknowledged that York had recommended that a mixing valve be installed at the outside of the boiler to avoid excessively hot water for domestic use and that Levitt
had deliberately not followed the recommendation. Instead, Levitt had merely provided bathroom and sink fixtures which supplied hot and cold water through combination spigots and had cautioned purchasers in its Homeowner’s Guide that the proper procedure at any faucet was first to open the cold tap part way and then turn on the hot water.

Mr. Snyder testified that he had been in the employ of York for fourteen years and was now the chief design engineer for "residential and Jackson & Church Products," a division of York. He was responsible for the design of York's heating units including those sold to Builders Supply for installation in Levittown homes in New Jersey and elsewhere. He testified that several thousand units had been furnished for the New Jersey Levittown homes and that seventeen thousand units of similar design had been furnished for the Pennsylvania Levittown homes. He stated that the normal range for hot water which would come in contact with the person was around 140 degrees and he acknowledged that, on initial draw, water drawn from the boiler might be 190 degrees and higher. It was for this reason that his company strongly recommended to Levitt that it install "a mixing valve which would limit the temperature delivery to the faucets at 140 degrees." In fact, York recommended a particular valve known as "Taco although there are other makes on the market that are normally supplied through plumbing supply houses as a standard animal in the plumbing trade."

Mr. Snyder stated that all manufacturers recommend the use of this type of valve which is a marketed item "normally installed by the installer" and "not an inherent piece of the equipment." When asked why he considered the valve to be not inherently part of its heating unit, he testified that it is a normal trade item such as a circulator or thermostat and that it is unusual for an original heating equipment manufacturer to merchandise items of this type. He stressed that the mixing valve is normally applied to the unit at the time of installation, that "the valve itself has sweat fittings that are normally applied with heat and solder" to the exterior of the boiler, and that it "would not be practical in present known designs" to install the mixing valve in the original manufacture of the boiler.

Mr. Snyder stated further that his company buys mixing valves for about $ 3.60 each, that they probably retail at $ 9 or $ 10, and that they are not expensive to install. The plaintiff Lawrence J. Schipper testified that after the scalding of his son, he installed a mixing valve at a total cost of $ 18 for parts and labor. Mr. Lightner, administrative assistant to the president of York, testified that he had participated in the negotiations for the purchase and sale of the heating units, that William Levitt of the Levitt organization represented it in the negotiations, and that ultimately the purchase order came from Builders Supply, Levitt's purchasing corporation. He estimated that two or three thousand units were sold for the Levittown homes in New Jersey and sixteen or seventeen thousand units for the Levittown homes in Pennsylvania. He stated that his company recommended the use of a mixing valve but that "Levitt was not interested in buying the mixing valve from us for either Pennsylvania or Jersey" although it had purchased mixing valves for its homes at Levittown, Long Island.

Three engineers who testified as experts for the plaintiffs all agreed that while temperatures ranging from 190 degrees and upward were necessary for house heating purposes, temperatures above 140 degrees for domestic purposes involving contacts with the person would be highly dangerous. They all referred to the mixing valve as one of the recognized devices for reducing the temperature of the domestic hot water to acceptable limits. Mr. Baccini testified that for this type of burner a mixing valve "can be either furnished with the unit or it is made available in a piping harness which is sold with the unit." He acknowledged that the plans set up by Levitt for its New Jersey homes did not call for any mixing valves and that Levitt could decide for itself whether to purchase heating units from any particular manufacturer without also purchasing mixing valves from him. Mr. Lerner testified that mixing valves are made by many companies and are available in plumbing supply houses, and that some manufacturers of tankless heaters such as those furnished by York will include mixing valves "as part of their package boiler" while other manufacturers will not if they feel they don't know where the unit is going. He also testified that if the unit is to be installed in a home "engineering practice is definitely that a mixing valve must be on." When asked about the combination spigots which Levitt had installed, he testified that they were not "a substitute for a mixing valve in the line itself" but were simply used as a means of manually controlling temperature below the 140 degree acceptable standard. Professor Edgar testified that he would not accept the combination spigot as a substitute for the mixing valve and that he would consider it "highly unsafe" to have a unit which supplied hot water to the tap at a temperature ranging from 190 degrees upward.

After the plaintiffs had completed their presentation, the defendants moved for dismissal and their motions were granted. Insofar as Levitt was concerned, the trial court considered itself bound by the holdings in Sarnicandro v. Lake Developers, Inc., 55 N.J. Super. 475 (App. Div. 1959), Levy v. C. Young Construction Co., Inc., 46 N.J. Super. 293 (App. Div. 1957), and other grounds 26 N.J. 330 (1958). In Sarnicandro, the court held that a builder vendor was not lia-
ble for injuries suffered by a lessee of the vendee when she fell on steps which had been improperly constructed by the builder vendor. In Levy, a divided Appellate Division held that a builder vendor was not liable to the purchaser for damages resulting from latent defects "in the absence of express warranties in the deed or fraud or concealment." In dealing with Builders Supply, the trial court described it as an alter ego of Levitt and said that it could find no evidence that it had violated any duty "either by way of negligence or by way of breach of warranty" which it owed to the plaintiffs or others. And in dealing with York it said that it could find no evidence of "any duty to the plaintiffs" or for that matter to anyone else concerned.

Under [[**14**] the first point in their brief the plaintiffs contend that Levitt should be liable for "negligence causing injury to the infant plaintiff." They point out that Levitt was not just an ordinary vendor of a house but was "also the architect, the engineer, the planner, the designer, the builder and the contractor." Under the proofs, the decision to install the hot water distribution system without a mixing valve was a deliberate one by Levitt in disregard of York's explicit recommendation to the contrary. The common spigots installed by Levitt were no substitute for the mixing valve and the [[*81**] cautionary instruction in the Owner's Guide was insufficient to advise of the serious dangers attendant upon bodily contact with the water heated to 190-210 degrees. Furthermore, it was entirely foreseeable that the Guide would never come to the attention of many persons who would come in contact with the heated water such as invited guests, and indeed the infant plaintiff himself. See Prosser, Torts § 96, at p. 665 (3d ed. 1964). If ordinary negligence principles are applied, it may readily be found that in view of the likelihood and gravity of the danger and the ease [[*15**] with which it could have been avoided, Levitt had failed to exercise reasonable care in the design and installation to avoid unreasonable risk of harm. See 2 Harper and James, Torts § 28.3 (1956). The fact that Messrs. Kreitzer and Schipper may have known of the dangerous condition would not, as a matter of law, preclude a finding of negligence; Harper and James, supra, § 28.5, at p. 1543 have put it this way:

"Today, however, [HN1] the negligence principle has been widely accepted in products liability cases; and the bottom does not logically drop out of a negligence case against the maker when it is shown that the purchaser knew of the dangerous condition. Thus if the product is a wringer dangerous to the limbs of the operator, and if it would be feasible for the maker of the product to install a guard or a safety release, it should be a question for the jury whether reasonable care demanded such a precaution, though its absence is obvious. Surely reasonable men might find here a great danger, even to one who knew the condition; and since it was so readily avoidable they might find the maker [[**16**] negligent. Under this analysis the obviousness of a condition will still preclude liability if the obviousness justifies the conclusion that the condition is not unreasonably dangerous; otherwise it would simply be a factor to consider on the issue of negligence."


In fulfillment of the deliberate design of its system for distributing hot water for domestic use, Levitt assembled the ingredients, including the heating unit from York, and directed their installation. In this respect it was not unlike the manufacturers of automobiles, airplanes, etc., whose products embody parts supplied [[*17**] by others. [HN2] When their marketed products are defective and cause injury to either immediate or remote users, such manufacturers may be held accountable under ordinary negligence principles (MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (Ct. App. 1916)) as well as under expanding principles of warranty or strict liability. See Henninger v. Bloomfield Motors, Inc., 32 N.J. 358 (1960); Putman v. Erie City Manufacturing Company, 338 F.2d 911 (5 Cir. 1964); Goldberg v. Kollman Instrument Corporation, 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (Ct. App. 1963); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (Sup. Ct. 1962); cf. Santor v. A & M Karagheusian, Inc., 44 N.J. 52 (1965). The plaintiffs urge that the MacPherson principle, imposing liability for negligence, should be applied to a builder vendor such as Levitt. We consider their point to be well taken for it is clear to us that the impelling policy considerations which led to MacPherson and its implementations are equally applicable here. See Foley v. [[**18**]
In Dow a general contractor prepared plans and specifications and built a house for Muth. A heating unit was installed and later proved defective causing deaths in the Dow family, a subsequent purchaser. The California Supreme Court, applying MacPherson, held the general contractor liable for the consequences of his negligence.

In Inman, the infant plaintiff was injured when he fell from a stoop having no railing or other protective device around it. The plaintiffs sued the builder and architect, along with others, alleging that the architect had designed a dangerously defective stoop and that the builder had erected it. The Appellate Division of the New York Supreme Court held that MacPherson was applicable and that the complaint set forth a cause of action. In the course of its opinion, it expressed the thought that there was no valid reason for any distinction between real and personal property so far as the principle of liability is concerned; that the arguments for and against liability are almost precisely the same in each instance; and that the trend of modern scholarship sustains the view that "no cogent reason exists for continuing the distinction." 152 N.Y.S.2d, at p. 83. On appeal, the Court of Appeals agreed that MacPherson was applicable and that "there is no visible reason for any distinction between the liability of one who supplies a chattel and one who erects a structure" (Prosser on Torts, § 21 [2d ed. 1955], § 85, p. 517)." 164 N.Y.S.2d, at p. 703, 143 N.E.2d, at p. 898; see Pastorelli v. Associated Engineers, Inc., supra, 176 F. Supp., at p. 164. However, it reversed because the plaintiffs' complaint contained "no allegation of any latent defect or concealed danger." 164 N.Y.S.2d, at p. 704, 143 N.E.2d, at p. 899. This requirement has been the subject of critical comments which soundly point out that dangers may be unappreciated though patent and risks may be unreasonable though concealed. See Harper and James, supra, § 28.5, at pp. 1542-1546; Noel, supra, 71 Yale L.J., at pp. 836-841; 1 Frumer and Friedman, supra, § 7.02, at pp. 114-115; Clark, J., dissenting in Messina v. Clark Equipment Company, 263 F.2d 291, 293 (2 Cir. 1959). Professor Noel has noted that a definite requirement that the defect or danger be latent would appear to be a reversion to the earlier concept that the chattel must be inherently dangerous whereas now the accepted concept is that the creation of any unreasonable danger is enough to establish negligence; and he has taken [*82] the approach set forth in Harper and James that "even though the absence of a particular safety precaution is obvious, there ordinarily would be a question for the jury as to whether or not a failure to install the device creates an unreasonable risk." 71 Yale L.J., at p. 838.

In Leigh the court applied MacPherson to a builder vendor who had constructed inexpensive houses in Stillwater, Oklahoma and had sold them to various purchasers. One of the purchasers sold his house to a person who leased it to the [*85] plaintiff. The roof of the porch fell on the plaintiff causing injuries for which she sought damages from the builder vendor. The defendant advanced various points including the contention that it owed no duty to the plaintiff and she could not charge him with negligence "because of a lack of privity." All of its points were rejected by the Oklahoma Supreme Court which sustained a jury verdict for the plaintiff. In its opinion it cited the annotation in 38 A.L.R.2d 865, 891 (1958) and placed reliance on the many cases there set forth which have in recent years applied ordinary negligence principles to allow recovery in actions by third persons against building contractors. 361 P.2d, at p. 852.

In Fisher the plaintiffs purchased a house which the defendant builder vendor had newly constructed for sale. After the plaintiffs had occupied the house for a year the
basement floor cracked permitting seepage which caused
damage and required repair. Charging negligent con-
struction, the plaintiffs sued and obtained a judgment
against the defendant. On appeal, the Wisconsin Su-
preme Court affirmed, holding that the defendant builder
vendor was under a duty to exercise ordinary care in
the construction of the building and that acceptance of title
by the vendees did not preclude their subsequent negli-
gence action. The court referred approvingly to the
modern trend towards holding building contractors liable
for their negligent construction even where the injuries
occur after completion of the work and its acceptance by
the owner; and it referred disapprovingly to the Appel-
late Division’s opinion in Levy v. C. Young Construction
Co., Inc., supra, 46 N.J. Super. 293. In Levy there was a
suggestion that real estate transactions [*323] would
become chaotic if vendors were subjected to liability
[***24] after they had parted with ownership and con-
trast of the premises. 46 N.J. Super., at p. 297. The Wis-
consin court considered this reasoning to be wholly un-
convincing, at least when applied to where the injuries
such as the defendant there or Levitt here; it properly
noted that if the same reasoning were applied in products
liability cases generally, manufacturers of chattels would
not be held liable [*86] for negligently made articles
and MacPherson would not be settled law. 112 N.W.2d,
at p. 710; see 1963 Wis. L. Rev. 343. It is worthy of men-
tion that a dissenting judge in Levy would have held the
defendant builder vendor liable for injuries resulting
from breach of an implied representation that the house
was constructed in a proper and reasonably workmanlike
manner (46 N.J. Super., at p. 298) and that, on appeal,
this Court explicitly declined to adopt any of the reason-
ing of the majority below but affirmed on the factual
finding that no negligent or defective construction had
been proved. 26 N.J., at p. 334. See 12 Rutgers L. Rev.
529 (1958); Pinsky, "Real Property," 15 Rutgers L. Rev.
276, 300 (1961).

In Sarnicandro [***25] v. Lake Developers, Inc.,
supra, 55 N.J. Super. 475, the defendant builder vendor
constructed a house and sold it. After the vendees took
possession they complained about defective cellar steps
but the defendant did nothing about the matter. Later a
lessee of the vendees was injured on the steps and insti-
tuted an action grounded in negligence. Her action
was dismissed and this was affirmed by the Appellate
Division’s opinion in Sarnicandro. The court referred
approvingly to the serious scope of the danger when it simply
described the water as much hotter than customary.
Inman requirement of latency. Earlier in this opinion, we
questioned that requirement and indicated our [***27]
support of the position that [HN4] the obviousness of a
danger does not necessarily preclude a jury finding of
unreasonable risk and negligence; in any event the danger
here was not patent in the sense of Inman or in the
sense of the reference in Levitt’s brief to the potential
sources of danger to children which may be found in all
homes, "ranging from stoves and ovens to electrical ap-
pliances, stairways, storm doors and porches
without railings." Those dangers are generally [***324]
incidental to normal living, they generally create no unre-
asonable risks, and there are admittedly no obligations on
builder vendors to make their houses danger-proof or
fool-proof. However, here the hot water faucet had a
special and concealed danger far beyond any danger incident
to contact with normally hot water; certainly no one, whether he be adult or child, would have suspected
from its appearance that the water drawn from it would
be at the dangerously high temperature of 190-210 de-
grees. Even the Homeowner’s Guide gave no true indica-
tion of the serious scope of the danger when it simply
described the water as much hotter than customary.

[*88] While the evidence may indicate that [***28]
Messrs. Kretitzer and Schippers had become aware of the
absence of a mixing valve, they may not have fully ap-
preciated the extraordinary nature of the risk and, in any
event, any omissions or contributory fault on their part
would not preclude a finding that Levitt had been negli-
gent and was to be held responsible to others who fore-
seeably might be injured as a result of its negligence. On the issue of negligence there was clearly enough evidence to go to the jury. Levitt knew that if the hot water faucet in the bathroom sink was first turned on, as it predictably might be, the water on initial draw would be at a dangerously high temperature; and it must have known that its warning about the water being much hotter than customary would from time to time be ineffectual, either because of unawareness or forgetfulness. It could easily and at negligible cost have totally avoided the danger by installing a mixing valve. Despite specific recommendation that it do so, it deliberately chose to rely on ordinary combination spigots and the remarks in its Homeowner's Guide. Surely it could rightly and reasonably be found from all this that Levitt had subjected its vendees and their lessees, [***29] along with their families and guests, to unreasonable risk of harm and should, in all justice, be held accountable for the damages resulting from its negligence.

Under the second point in their brief, the plaintiffs contend that Levitt should be held liable "for a breach of warranty of habitability where a dangerous condition causes injury to a subsequent occupant." They point to the developing law in the products liability field; that law has moved from MacPherson (217 N.Y. 382, 111 N.E. 1050 (1916)), where negligence principles were applied to sustain liability, to Henningsen (32 N.J. 358 (1960)), where a breach of an implied warranty of merchantability was the basis for holding Chrysler liable for injury caused by a defective automobile, to Santor (44 N.J. 52 (1965)), where strict liability was applied to hold the manufacturer of a defective rug liable to a customer who purchased it from a retail dealer. [*89] The plaintiffs acknowledge that in the realty field there has thus far been no comparable movement in our State, but they suggest that it may no longer justly be put off since there is, in today's society, no reason for differentiating mass [***30] sales of homes from advertised models, as in the Levitt operation, from mass sales of automobiles from advertised models, as in the Chrysler operation.

Law as an instrument for justice has infinite capacity for growth to meet changing needs and mores; nowhere was this better illustrated than in Henningsen. There a Plymouth automobile with a defective steering mechanism was sold by Chrysler to one of its dealers who in turn sold it to Mr. Henningsen. While the car was being driven by Mrs. Henningsen, its steering mechanism failed causing serious accident and severe injury. The Henningsens sued the Chrysler Corporation claiming that it had impliedly warranted that when it delivered its automobile it was not defective but was reasonably fit for its intended use, that this warranty had been breached, foreseeably causing injury to an ultimate user of the automobile, and that it should be held strictly responsible for the injury caused by its breach without further [***32] showing of fault or negligence. Their claim was sustained in a comprehensive opinion by Justice Francis which, after contrasting modern mass sales and marketing practices with those of an earlier day when [***31] privity and other restrictive requirements were in vogue, stressed the modern policy considerations which justly dictate that the loss be borne by the responsible manufacturer who placed the dangerous article in the stream of commerce.

Prior to Henningsen many courts had applied its principles in food and drug cases, and as Justice Francis pointed out (32 N.J., at p. 383), there was no rational doctrinal basis for differentiating those situations from a defective automobile. Indeed, the unwholesome food or impure drug might ordinarily harm the individual user himself whereas the defective automobile might ordinarily harm not only the user but many others as well. Subsequent to Henningsen the question [*90] arose in Santor (44 N.J. 65) as to whether its principles were equally applicable where no personal injury had occurred and the sole claim was to recover the price paid for a defectively manufactured rug. In holding that they were, we pointed out that there is no sensible reason for differentiating here between personal injury and property damage claims. We noted that the manufacturer's responsibility to the ultimate consumer presents an ever growing [***32] problem which is properly being dealt with "step by step" and approved, in lieu of warranty terminology, the strict liability in tort terminology voiced in Greenman v. Yuba Power Products, Inc., supra, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897. In summary, we reaffirmed the sweeping implications of Henningsen and reasserted that, [HN5] when a manufacturer presents his products for sale to the public he accompanies them with an implied representation that they are reasonably fit for the intended use, and he is subject to an enterprise liability, the purpose of which is to insure that the cost of injury or damage resulting from defective products "is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves." Santor v. A & M Karagheusian, supra, 44 N.J., at p. 52.

[HN6] The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit [***33] the law should be readily rejected as they were step by step in Henningsen and Santor. We consider that there are no meaningful distinctions between Levitt's mass production and sale of homes and the mass production and sale of automobiles and that the pertinent
overriding policy considerations are the same. That being so, the warranty or strict liability principles of *Henningsen* and *Santor* should be carried over into the realty field, at least in the aspect dealt with here. Incidentally, recent reference to the sweep of Levitt's mass production [*91*] approach may be found in the July 1963 issue of *American Builder*, at pages 42-45 where the president of Levitt, in response to an inquiry as to whether its policy of "no changes" would be applied in the building of its more expensive homes at Long Island, had this to say: "We intend to hold to our mass production approach in Long Island. People buy Cadillacs, don't they, and they're mass produced." See 12 *Rutgers L. Rev.* 529, 532 (1958).

[HN7] When a vendee buys a development house from an advertised model, as in a Levitt or in a comparable project, he clearly relies on the skill of the developer and on [*92*] its implied representation that the house will be erected in reasonably workmanlike manner and will be reasonably fit for habitation. He has no architect or other professional adviser of his own, he has no real competency to inspect on his own, his actual examination is, in the nature of things, largely superficial, and his opportunity [*326*] for obtaining meaningful protective changes in the conveying documents prepared by the builder vendor is negligible. If there is improper construction such as a defective heating system or a defective ceiling, stairway and the like, the well-being of the vendee and others is seriously endangered and serious injury is foreseeable. The public interest dictates that if such injury does result from the defective construction, its cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss rather than by the injured party who justifiably relied on the developer's skill and implied representation.

The arguments advanced by Levitt in opposition to the application of warranty or strict liability principles appear to us to lack substantial merit. Thus its contention [*93*] that *caveat emptor* should be applied and the deed viewed as embodying all the rights and responsibilities of the parties disregards the realities of the situation. *Caveat emptor* developed when the buyer and seller were in an equal bargaining position and they could readily be expected to protect themselves in the deed. Buyers of mass produced development homes are not on an [*92*] equal footing with the builder vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale. Levitt expresses the fear of "uncertainty and chaos" if responsibility for defective construction is continued after the builder vendor's delivery of the deed and its loss of control of the premises, but we fail to see why this should be anticipated or why it should materialize any more than in the products liability field where there has been no such result.

Levitt contends that imposition of warranty or strict liability principles on developers would make them "virtual insurers of the safety of all who thereafter come upon the premises." That is not at all so, for the injured party would clearly have the burden [*36*] of establishing that the house was defective when constructed and sold and that the defect proximately caused the injury. [HN8] In determining whether the house was defective, the test admittedly would be reasonableness rather than perfection. As was pointed out in *Courtois v. General Motors Corp.*, 37 N.J. 525 (1962), the comparable warranty of merchantability in the sale of goods means only that the article is reasonably fit for the purpose for which it is sold and does not imply "absolute perfection." 37 N.J., at p. 543. See *Jakubowski v. Minnesota Mining and Manufacturing*, 42 N.J. 177, 185 (1964). And as Professor Noel has indicated, though the imposition of warranty or strict liability principles to a case of defective design, as alleged against Levitt here, would render unnecessary any allegation of negligence as such, it would not remove the plaintiffs' burden of establishing that the design was "unreasonably dangerous" and proximately caused the injury. *Noel, supra*, 71 Yale L.J., at pp. 877-878; see also Professer, "The Assault Upon the Citadel (Strict Liability to the Consumer)," 69 Yale L.J. 1099, 1114 (1960).


In *Weck* the Illinois court dealt with the plaintiffs' claim for damages based on the breach of an implied warranty by the builder vendor that the house, then under
construction and being purchased by the plaintiffs, would be built in workmanlike fashion. In sustaining the plaintiffs' claim, the court referred to the holdings in the leading English case of Miller v. Cannon Hill Estates, Ltd., supra, and the pertinent American cases, that a contract to purchase a house under construction carries with it an implied warranty of reasonable workmanship and habitability which survives the deed. 184 N.E.2d, at pp. 731-734; cf. Caparrelli v. Rolling Greens, Inc., 39 N.J. 585 (1963); Weinberg v. Wilensky, 26 N.J. Super. 301 (App. Div. 1953). The court also referred to Professor Dunham's summation of the recent cases as imposing on the builder vendor a duty, which continues beyond delivery of the deed, "to make the premises fit for the ordinary purposes for which the building is being constructed [***39] and if the sale is from a model there is a duty to make the building sold conform to [***40] the model and to be reasonably fit for its ordinary purposes." Dunham, supra, 37 Minn. L. Rev., at p. 125.

In Carpenter the purchaser sued the builder vendor for damages resulting from breach of an implied warranty of reasonable workmanship and habitability. The builder vendor contended that, since the house was already completed before the purchaser agreed to buy it, there was no implied warranty within the holdings of Miller and Week. In rejecting this contention, the Colorado court said:

"That a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new house seems incongruous. To say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonableness basis for it. This is pointedly argued in an excellent article, 'Caveat Emptor in Sales of Realty -- Recent Assaults upon the Rule,' by Bearman, 14 Vand. L. Rev. 541 (1960-61.)

We hold that [HN9] the implied warranty doctrine is extended to include agreements between builder-vendors and [***40] purchasers for the sale of newly constructed buildings, completed at the time of contracting. There is an implied warranty that builder-vendors have complied with the building code of the area in which the structure is located. Where, as here, a home is the subject of sale, there are implied warranties that the home was built in workmanlike manner and is suitable for habitation." 388 P.2d, at p. 402.

It is worthy of note that although the 1936 edition of Williston, Contracts, upon which Levitt places reliance, stated flatly that there are no implied warranties in the sale of real estate, the 1963 edition took quite a different approach. 7 Williston, Contracts §§ 926, 926A (3d ed. 1963). In this edition, Professor Jaeger pointed out that although the doctrine of caveat emptor is still broadly applied in the realty field, some courts have inclined toward making "an exception in the sale of new housing where the vendor is also the developer or contractor" since in such situation the purchaser "relies on the implied representation that the contractor possesses a reasonable amount of skill necessary for the erection of a house; and that the house [***41] will be fit for human dwelling." § 926A, [*328] at p. 810. In concluding his discussion of the subject, the author remarked that "it would be much better if this enlightened [***42] approach were generally adopted with respect to the sale of new houses for it would tend to discourage much of the sloppy work and jerry-building that has become perceptible over the years." § 926A, at p. 818; see also, Dunham, supra, 37 Minn. L. Rev., at p. 125; Bearman, supra, 14 Vand. L. Rev., at pp. 570-576; cf. Caporaletti v. A-F Corporation, supra, 137 F. Supp., at p. 16.

It is true, as Levitt suggests, that cases such as Carpenter (388 P.2d 399) involved direct actions by original vendees against their builder vendors and that consequently no questions of privity arose. But it seems hardly conceivable that a court recognizing the modern need for a vendee occupant's right to recover on principles of implied warranty or strict liability would revivify the requirement of privity, which is fast disappearing in the comparable products liability field, to preclude a similar right in other occupants likely to be injured by the builder [***41] vendor's default. Issues of notice, time limitation and measure of proof, which have not really been discussed in the briefs, would seem to be indistinguishable from those which have been arising in the products liability field and are there being dealt with by developing case law and occasional statutory enactment. See 1963 Wis. L. Rev. 343, 352; Courtois v. General Motors Corp., supra, 37 N.J. 525; Jakubowski v. Minnesota Mining and Manufacturing, supra, 42 N.J., at p. 182; Santor v. A & M Karagheusian, Inc., supra, 44 N.J., at p. 52. See also Caparrelli v. Rolling Greens, Inc., supra, 39 N.J., at pp. 592-594.

In the case against Levitt we need not at this stage concern ourselves with these issues for, under the plaintiffs' proofs, the design was a deliberate one, its special danger was not observable on sight, specific notice and complaint with respect to it were brought early to Levitt's attention by the original vendee, injury foreseeably occurred later to an unaware member of a family which had
leased the premises from the original vendee, and suit was instituted shortly after the injury. All in all, the time expiration from [***43] the original conveyance by Levitt to the date of suit was less than three years. We [*96] are satisfied that, in the particular situation here, the plaintiffs may rely not only on the principles of negligence set forth under their first point but also on the implied warranty or strict liability principles set forth under their second point. We note, however, as indicated earlier in this opinion, that [HN10] even under implied warranty or strict liability principles, the plaintiffs’ burden still remains of establishing to the jury’s satisfaction from all the circumstances that the design was unreasonably dangerous and proximately caused the injury. See Noel, supra, 71 Yale L.J., at pp. 877-878; see also Prosser, supra, 69 Yale L.J., at p. 1114.

Under the third point in their brief the plaintiffs contend that Builders Supply should be held liable for Levitt’s negligence and breach of warranty and they quote from Mueller v. Seaboard Commercial Corp., 5 N.J. 28 (1950), where reference is made to cases holding that the corporate cloak may in proper circumstances be disregarded in order to avoid injustice. 5 N.J., at pp. 34-35. Here there is no [***44] indication that the corporate cloak is being used to achieve injustice and there is no showing of any reason for disregarding it. The allegedly dangerous design and installation was not that of the subsidiary corporation Builders Supply but was that of the parent corporation Levitt. So far as appears, Builders Supply simply acted as Levitt’s purchasing agent, followed Levitt’s orders, exercised no discretion of its own, and did not participate at all in the design and installation. There is no suggestion that there would be difficulty in obtaining satisfaction of any judgment rendered against Levitt nor is there reference to any practical purpose which would be served by continuing Builders Supply in this proceeding. The [***29] lower court’s judgment of dismissal as to Builders Supply is sustained.

Under the final points in their brief the plaintiffs contend that, as the manufacturer of the heating unit, York should be held accountable under negligence and warranty or strict liability principles and they rely on both the MacPherson (217 N.Y. 382, 111 N.E. 1050) and Henningsen (32 N.J. 358) [*97] doctrines. But under the plaintiffs’ proofs here it [***45] is Levitt rather than York which stands in a position comparable to the defendants in MacPherson and Henningsen. As did the automobile manufacturers in MacPherson and Henningsen, Levitt designed the system, assembled the parts and had them installed. See Dow v. Hollywood Manufacturing Company, supra, 321 P.2d, at pp. 739-740. York did no assembling or installation at the Levittown houses but simply sold and delivered heating units which met Levitt’s specifications. These heating units were not defective when they were delivered to Levitt and functioning strictly as they were intended to. The defect alleged by the plaintiffs arose not from the heating unit as such but from the later installation which did not include any mixing valve or other tempering device at the boiler. York had furnished suitable installation instructions which “strongly recommended that a mixing valve be installed between the hot and cold domestic water lines.” Levitt deliberately disregarded York’s recommendation and decided upon its own design and installation which included common spigots and cautionary remarks in the Homeowner’s Guide. It is evident from the plaintiffs’ proofs [***46] that neither Levitt nor anyone else placed any reliance on York’s judgment or skill in connection with the over-all design of the system and its installation; that being so there would appear to be no sound basis for invoking principles of implied warranty or strict liability against York. See Henningsen v. Bloomfield Motors, Inc., supra, 32 N.J., at p. 370; N.J.S. 12A:2-314, 315; see also In re Belle-Moc, Inc., 182 F. Supp. 429, 435-436 (D. Me. 1960); 1 Williston, Sales §§ 234, 235 (Rev. ed. 1948).

In Goldberg v. Kollsman Instrument Corporation, supra, 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81, the plaintiff’s daughter, a passenger in an airplane, died as a result of its crash. Suit was instituted by the plaintiff as administratrix against the maker of the airplane, and against a company which supplied one of its component parts, for alleged breach of implied warranty of fitness. The court held [*98] that previous New York decisions discarding the requirement of privity should be extended so as to hold the maker of the airplane accountable under warranty or strict liability principles to remote as well [***47] as immediate users. But it declined for the present to do the same with respect to the maker of the component part, pointing out that “adequate protection is provided for the passengers by casting in liability the airplane manufacturer which put into the market the completed aircraft.” 240 N.Y.S.2d, at p. 595, 191 N.E.2d, at p. 83. Similarly here the plaintiffs have been afforded wholly adequate protection by the holding as against Levitt, the company which built and marketed the house with the allegedly defective design and installation. In any event, we believe that under the plaintiffs’ own proofs it may not fairly be said that York had either breached any implied warranty, or had failed to give reasonably sufficient warning and direction, or had failed to exercise the measure of care required of it. See Watts v. Bacon & Van Buskirk Glass Co., 18 Ill. 2d 226, 163 N.E.2d 425, 428 (Sup. Ct. 1960); cf. Shaw v. Calgon, Inc., 35 N.J. Super. 319, 331-332 (App. Div. 1955); Moschkau v. Sears, Roebuck and Company, 282 F.2d 878 (7th Cir. 1960); Nishida v. E.I. DuPont De Nemours & Company, 245 F. 2d [***48] d 768, 773 (5th Cir. 1957), cert.

It must be borne in mind that York was dealing with Levitt as a highly responsible development company which had extensive experience in the field and which had selected York's heating units for installation in its development houses. Those units were standard in the trade as were the separate mixing valves which were obtainable either from York or from plumbing supply houses generally. According to the testimony, it would not have been practical for York to have installed mixing valves in the initial manufacture of its units nor would it have been feasible to attach the valves to the boilers other than at the time of installation. In any event, Levitt had specifically decided that it did not want mixing valves with the heating units and its purchase order did not include them. Its engineer testified that Levitt had not followed York's recommendation with respect to the valves because Levitt believed that its system of combination spigots and cautionary instructions had operated with sufficient success in the past and that the attachment of mixing valves would present unnecessary service problems. In the developing steps towards higher consumer and user protection through higher trade morality and responsibility, the law should view trade relations realistically rather than mythically. Thus viewed, it is difficult to see how York could reasonably have been expected to do anything other than fill Levitt's purchase order while expressing its recommendation in clear and strong terms as it did. Conceivably it might have refused to sell its heating units unless Levitt also purchased the valves but then Levitt could readily have purchased comparable heating units without valves from other manufacturers. And even if Levitt had purchased the valves from York, there was nothing York could do to compel their attachment or to prevent Levitt from pursuing its own chosen design and mode of installation. All in all, it would appear evident that York had not acted unreasonably, that no defaulting action on its part had proximately caused the injuries, and that no just purpose would be served by affixing responsibility to it in addition to Levitt for the injuries allegedly resulting from Levitt's defective design and installation.

The judgment of dismissal as to the defendant Levitt & Sons, Inc. is Reversed and the cause is Remanded for trial, costs to abide the event; the judgment of dismissal as to the other defendants is affirmed, without costs.
CHICAGO TITLE INSURANCE CO., as subrogee of GOLDEN UNION,  
Plaintiff,  
v.  
UNION AVENUE HOLDING, LLC, JUDAH BLOCH, ARIEL GANTZ AND STUART BIENENSTOCK, Defendants.  
DOCKET NO.: ESX-L-3785-15  
SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY  
2016 N.J. Super. Unpub. LEXIS 1689  
July 14, 2016, Decided

This matter was tried before me as a bench trial on March 8, 2016. In addition to the trial testimony, the parties stipulated that Trial Exhibits 1 through 39 were in evidence, and the deposition transcripts of Stuart Bienenstock, Daniel Turetsky, Stuart Friedman and Ronald Herbst were also in evidence. In addition, there was a stipulation that Plaintiff, Chicago Title, had paid $1.3 million dollars to West 58th St., LLC to resolve a title claim against its policy insuring Golden Union, LLC after a title dispute arose. The claim arose as a result of allegations by West 58th St., LLC that executed discharges of its $1.1 million mortgage and an assignment of leases and rents, presented at the closing of a property purchased by Golden Union, were forged. After Chicago Title paid the claim, as subrogee to West 58th St., it brought the instant lawsuit against the seller. [*2] Union Avenue Holdings, LLC, and UAH's members Stuart Bienenstock, Judah Bloch and Ariel Gantz,

The first witness to testify in Plaintiff's case was Steven Fortunato. Fortunato testified that he formed Golden Union, LLC, for the purpose of purchasing the property located at 380 Union Avenue in Irvington (1T:23-13 to 17). The agreed upon purchase price for the property was $1.4 million. (1T:24-11 to 13). Fortunato identified Exhibit 18 as the title binder provided by Ardent Title Group, which provided a list of items that needed to be cleared in order to convey clear title (1T:26-6 to 23). Fortunato did not intend to purchase the property subject to any of the liens listed in the title binder. Rather, his understanding was that the liens would"absolutely"have to be discharged at or before the closing. (1T:27-1 to 7). One of the liens was a $1.1 mil-

**STATEMENT OF FACTS**

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lion dollar mortgage from West 58th St, LLC. Fortunato testified that he attempted, but failed, to obtain a pay-off of the West 58th St. mortgage prior to closing (1T:27-10 to 18). Instead, he was given repeated assurances from the seller’s attorney, Stephen Friedman, that Friedman would be handling the discharge and pay-off for West 58th [*3] St. (1T:27-21 to 24). Fortunato identified Exhibit P5 as emails from Mr. Friedman as the seller’s attorney that he was assuming responsibility for the pay-offs and discharges. Fortunato then forwarded these confirmations to Ardent for their approval (1T:28-9 to 22).

1 1T refers to the Transcript of Trial dated March 8, 2016.
2T refers to the October 27, 2014 deposition transcript of Ronald Herbst.
3T refers to the November 13, 2014 deposition transcript of Stephen Friedman.
4T refers to the July 30, 2014 deposition transcript of Stuart Bienenstock.
5T refers to the January 12, 2015 deposition transcript of Daniel Turetsky.

Fortunato had conversations with Bienenstock in which Bienenstock was pressuring Golden Union to close. Fortunato indicated that no closing would be scheduled until everything was discharged. In response, a conference call was initiated between Friedman, Fortunato and Bienenstock, in which Fortunato was advised that the mortgages were going to be discharged pursuant to some other business dealings between the parties. Fortunato agreed to schedule the closing on receipt of a copy of the proposed discharges (1T:30-1 to 11). The title company approved the form of the discharges [*4] prior to the closing (1T:30-15 to 22).

Fortunato and his business partner Michael Taormina attended the closing on behalf of Golden Union (1T:31-14 to 18). Stuart Bienenstock and Judah Bloch attended the closing on behalf of Union Avenue (1T:31-19 to 22). Fortunato identified Exhibit 10 as the HUD settlement statement from the closing, which reflected that none of the proceeds of the sale were used to satisfy the West 58th St. mortgage (1T:32-2 to 11). Fortunato testified that Bienenstock brought an executed discharge of the West 58th St. mortgage to the closing (1T:32-12 to 15). The provision of the executed discharge led Fortunato to believe the West 58th St. mortgage was in fact satisfied (1T:32-19 to 22), and that he had thus obtained clear title to the property (1T:34-1 to 4). None of the seller’s representatives told Fortunato at the closing that the discharge of the mortgage was contingent on some future post-closing event (1T:32-23 to 33-15). Fortunato testified that if he had known the West 58th St. mortgage was not satisfied prior to the closing, he would not have gone through with the transaction (1T:33-18 to 21).

On cross-examination, Fortunato indicated that he had been [*5] a practicing attorney since 1996, initially in the field of real estate, but since 2001 he has worked exclusively in the field of real estate development (1T:34-14 to 35-7). His partner Michael Taormina is also an attorney admitted to the bar of New Jersey (1T:35-8). Fortunato confirmed that Exhibit 2 was the August 15, 2011 mortgage held by West 58th St., and that he was aware that the mortgage was a lien on the property (1T:37-11 to 20). Turning to Exhibit 18, the title commitment, Fortunato confirmed that Chicago Title Insurance Company was the entity that would actually issue the title policy. (1T:37-21 to 38-7). Exhibit 19 was an endorsement modifying the original commitment reflecting an assignment of the West 58th St. mortgage to TSR (1T:38-8 to 18; 1T:39-12 to 14). As the closing went on it became unclear whether the assignment had been properly indexed and recorded, so some confusion arose as to the proper method to discharge the mortgage (1T:39-15 to 19). The discharge itself, which was marked as Exhibit 7, was produced by Bienenstock at the closing, and was provided to Mr. Friedman (1T:41-3 to 8). Fortunato confirmed that the signatory for West 58th St. LLC was, according [*6] to the document, Ronald S. Herbst, Authorized Signatory (1T:41-22 to 42-1). Fortunato did not, prior to the closing, investigate whether Herbst was in fact an Authorized Signatory for West 58th St. LLC (1T:43-21 to 44-3). Fortunato confirmed that the acknowledgment section stated, “I certify that Eliezer Swerdlow personally came before me and stated to my satisfaction that this person was the maker of the attached instrument.” (1T:44-4 to 15). Fortunato did not recall whether he noticed that discrepancy at the closing (1T:44-21 to 45-1). Fortunato confirmed that Taormina signed the HUD as the settlement agent and that his responsibilities included clearing title on behalf of the title company (1T:46-6 to 19). It was Bienenstock that signed the deed, the seller’s residency certification, the affidavit of consideration, and the affidavit of title on behalf of Union Avenue Holding (1T:47-6 to 23).

Approximately six months after the closing, Golden Union received a certified letter from Ronald Herbst, Esq. alleging the discharge was forged (T55-6 to 12). At Herbst’s deposition, he testified that although he generally was an authorized signatory for Mr. Turetsky on behalf of West 58th St. [*7] LLC (2T:8-5 to 22), he denied having signed anything on behalf of West 58th St. LLC in connection with the subject closing (2T:9-3 to 18). Herbst denied that the signature on the discharge was his and he claimed that the notarization by Ms. Zion, his associate, was likewise a forgery (2T:36-17 to 9). In that regard, Herbst testified that Ms. Zion denied that the signature was hers. In addition, Herbst testified that he knew that the notary stamp was not Ms. Zion’s stamp because her stamp did not bear an expiration date; rather
she would hand write in the date, whereas the notary stamp on the mortgage discharge bore an expiration date (2T:38-7 to 21). In addition, Herbst stated that the address listed on the discharge for his law firm was incorrect, the firm having moved from that address in October 2010 (2T:40-14 to 41-23).

Stephen Friedman, Esq., the seller's attorney, testified at his deposition that he had been involved in negotiating and preparing the contract of sale, and that both Bienenstock and Bloch were involved in the negotiation of the contract as well (3T:24-4 to 25-3). Friedman, who attended the closing, testified that the allegedly forged discharges of the West 58th St. [*8] and TSR mortgages were delivered to him at the closing, either by Bienenstock or Bloch. Friedman stated that the discharge, which was signed, was presented at the closing table. He did not believe he reviewed the discharges after they were delivered (3T:31-7 to 18). Friedman believed the signatures on the discharge were original signatures; otherwise the title company would not have closed. (3T:11 to 18). Friedman stated that he had prepared the form of the discharge at the request of Bloch and Bienenstock, and after preparing it he forwarded the form discharge via email to both Bloch and Bienenstock with the understanding that they would obtain the signatures required for an effective discharge (3T32-19 to 33-20).

Friedman identified Golden 10, two emails, one of which he sent to Stephen Fortunato stating, "No payoff amount necessary. They are being discharged pursuant to a separate agreement." (3T:34-25 to 36-9). Friedman identified Golden 46, as a September 11, 2012 email he sent to Stephen Fortunato, which included Exception 7 stating, "Seller will be delivering at or prior to closing release/satisfaction of mortgage from TSR Group." (3T48-24 to 49-6). Similarly, Golden 48 was identified [*9] as a September 14, 2012 email that Friedman sent to Mr. Fortunato stating, "I will get the corporate documents and mortgage termination shortly." (3T:52-9 to 15).

Friedman testified that he recalled conversations about the closing proceeds being used to purchase an investment in an Israeli company buying bonds. (3T:66-7 to 14). His conversations about the use of the proceeds was with both Mr. Bienenstock and Mr. Bloch. (3T:66-15 to 18). Friedman confirmed that the closing proceeds of $637,822.27 were insufficient to satisfy the West 58th St. and TSR mortgages. (3T:69-5 to 14).

According to Answers to Interrogatories certified by Daniel Turetsky on behalf of West 58th St. LLC, on August 15, 2011, West 58th St. LLC made a wire transfer in the amount of $1.1 million dollars issued to SJB Capital, LLC for the benefit of Union Avenue, along with the execution of relevant loan documents. (Response to Interrogatory 8). To date, it is undisputed that no payments have been made on the loan. After SJB/UAH defaulted on the mortgage, various proposals to restructure the loan were proposed. The first proposal was that Union Avenue would pay $200,000.00 to West 58th St. in exchange for assignment [*10] of its mortgage and Union Avenue's pledge of two or three new mortgages encumbering additional properties in New Jersey. This arrangement did not reach fruition due to UAH's failure to pay the $200,000.00. Next, UAH proposed to tender a partial payment in the amount of $400,000.00 in exchange for the return of the assignment and the execution of two new mortgages encumbering properties in New Jersey. Again, this proposal did not reach fruition due to UAH's failure to tender the $400,000.00. Finally, most relevant to this case, in mid-September 2012 Turetsky and Bienenstock discussed the possibility of West 58th St. agreeing to discharge its mortgage encumbering the Union Avenue property in exchange for Bienenstock's agreement to fund for Turetsky the acquisition of a United States limited liability company that had bid to purchase publicly traded bonds on the Tel Aviv Stock Exchange for a company with which Mr. Turetsky was affiliated. According to Turetsky, Bienenstock did not disclose that he had already orchestrated a sale of the property without notifying West 58th St., without procuring a discharge from West 58th St., and without satisfying its mortgage. When further discussions [*11] about the proposed debt restructure failed in December 2012, West 58th St. advised Union Avenue that the loan could not be restructured and that West 58th St. would proceed with its remedies. (Response #27 in West 58th St.'s Answers to Interrogatories). It is undisputed that at no time before December 2012 did West 58th St. seek a foreclosure on the mortgage based on the long-term default of Union Avenue, nor did the company pursue a judgment against Union Avenue or any of its principals for the alleged wrongful sale of the property and alleged fraudulent discharge of its mortgage. Nor did West 58th St. seek judgment on the personal guarantees of Messrs. Bienenstock, Bloch or Gantz. Instead, the only remedy sought by West 58th St. based on the alleged wrongdoing of UAH and its members was to seek a declaratory judgment that the discharge of its mortgage was invalid and that its mortgage was still a first lien on the property. In addition, for the first time, West 58th St. sought a judgment of foreclosure based on UAH's default.

The court had an opportunity to review the deposition of Daniel Turetsky. Mr. Turetsky currently resides in Israel. Sovereign Assets is an Israeli publicly traded [*12] company with subsidiaries in the United States (T:13-14 to 17). The purpose of Sovereign Assets is to invest in real estate in the United States and build a portfolio of investment properties primarily in United States
real estate (T:20-8 to 16). Turetsky is the sole owner of West 58th St. LLC (T:19-1 to 6).

Plaintiff next called Ariel Gantz. Mr. Gantz confirmed that he executed a personal guarantee for the payment of the West 58th St. mortgage, which was marked as Exhibit 3 (T:58-5 to 25). Gantz never made any payments on the mortgage, either before or after the sale of the property (T:59-1 to 19). Gantz testified that he did not believe the West 58th St. mortgage would remain a lien on the property after the closing; rather, part of the overall transaction was that the outstanding mortgage was being taken care of by an arrangement whereby money was going to be sent to Israel after the sale of the property to purchase bonds (T:60-11 to 23). Gantz never informed anyone at Golden Union that the West 58th St. mortgage was going to be discharged pursuant to the Israeli bond purchase. (T:61-22 to 62-1).

On cross-examination, Gantz denied any background in real estate transactions or [*13] finance. He was brought in to perform the construction and renovation at the subject property (T:62-8 to 15). He was never a member of Union Avenue Holding or SJB Capital (T:62-16 to 24). He admitted, however, that he had loaned money to either Union Avenue or SJB in advance of the closing to assist in "cleaning up" the company so that he could become an equity partner (T:70-69-10 to 70-4). Gantz did not consult an attorney before signing the guarantee. Gantz testified that he signed the guarantee on the mortgage because Bienenstock said it needed to be done to move forward, and he knew the building was worth more than the note, so he really never thought it would see the light of day (T:63-3 to 13). Judah Bloch, the third signatory, is Gantz's brother-in-law.

Gantz did not communicate with Mr. Friedman nor did he attend the closing. His understanding was that all of the legal aspects of the transaction were being handled by Bienenstock (T:64-22 to 65-9). He denied any knowledge of the allegedly forged discharge, and was unaware that such a document would be produced at closing. His involvement in the sale was to conduct the walk through with Golden Union representatives to record [*14] the current status of the building (T:66-11 to 23).

The sole witness for the defense was Judah Bloch. Mr. Bloch has a degree in economics from the University of Maryland. He does not hold any licenses or certifications in the fields of real estate or real estate finance (T:75-16 to 24). Prior to 2009, the year of this sale, Bloch had not been involved in any real estate related businesses. Bloch testified that he and Stuart Bienenstock grew up in the same neighborhood (T:76-18 to 22). In April 2008, Bienenstock joined Bloch as a member of SJB Capital (T:77-3 to 10). The pair subsequently formed Union Avenue Holding LLC to purchase the property at 380 Union Avenue and two other properties in Irvington (T:77-14 to 23). Bloch confirmed that in 2011 Union Avenue borrowed $1.1 million dollars from West 58th St. LLC; Union Avenue never took a mortgage loan from TSR Group (T:80-4 to 22).

The purpose of the loan according to Mr. Bloch was to buy out partners in an entity, Rockaway Capital, which owned an interest in Union Avenue Holding (T:80-9 to 16). After partially buying out the partners, however, there was insufficient money to make needed renovations, even after bringing in additional [*15] capital for that purpose. Therefore, the renovations were never completed (T:82-2 to 23). Bloch testified that his main role with respect to the property was managing the operational finances including payroll and collecting rents (T:84-9 to 21). Bloch stated that Bienenstock's role was "similar," although Bienenstock took more of an active role in structuring deals (T:84-22 to 85-7), and he had more extensive education in real estate transactions (T:85-8 to 19).

In or about June of 2012, Union Avenue made the decision to sell the 380 Union Avenue property (T:85-20 to 25). To that end, the company retained a broker who marketed the property (T:85-4 to 9). Union Avenue retained Stephen Friedman to represent them in the sale. Bloch believed that it was Stuart Bienenstock that initially contacted Friedman regarding the retention; however, Bloch and Bienenstock jointly agreed to retain Friedman (T:87-6 to 18). At the time of Friedman's retention, Bloch was aware that Friedman had in the past represented West 58th St. in some capacity (T:18-19 to 24).

Prior to the closing, only Bienenstock interacted with Friedman. Bloch, however, attended the closing along with Bienenstock. Bloch [*16] denied telling any representative of Golden Union that any and all liens on the Union Avenue property were going to be satisfied at the closing (T:88-20 to 25). He did not recall seeing the allegedly forged discharge at the closing, stating that "there were a series of documents that went around Stephen Friedman. Some I signed, some I don't even know specifically what went." (T:89-7 to 15). When asked whether he had any understanding prior to the closing as to what would happen to any of [the] liens that attached to the property, Bloch responded "You know, to me there was -- the building and many issues, liens, all sorts of things which I really understood to be technicalities, so I didn't really get into this versus that." Notwithstanding that disavowal of the knowledge of any of the liens, Bloch admitted that there was one particular lien he personally worked on clearing prior to the closing (T:90-5 to 12). Bloch denied having a conversation with Bienenstock about how all of these liens were going to
be satisfied (1T:90-18 to 21). He also denied knowledge of the alleged forgery of the discharge or having been involved in the actual forgery itself (1T:53-9 to 22).

Bloch’s understanding [*17] was that the proceeds of the sale were going to be used to purchase bonds in Israel representing a first debt position for a multi-million dollar company that owned assets in Tennessee and Connecticut, and that the funds were going to be used to purchase the bonds to assist Turetsky and TSR in taking control of this company. Bloch’s understanding was that based on this contribution, Bienenstock and Bloch would become partners in the Israeli company (1T:90-14 to 91-10). Bloch was aware that Turetsky was the principal of West 58th St. LLC. Bloch understood the nature of the transaction to be an asset replacement whereby UAH would sell the building and buy the bonds. (1T:93-19 to 92-4). Bloch’s knowledge was based on “conversations taking place in Israel where we were told by TSR, and that we’re basically doing what we would call like an asset replacement.” (1T:91-21 to 92-1). Bloch stated he was aware of these conversations through Stuart Bienenstock (1T:92-5 to 7). Bloch personally wired the $600,000.00 proceeds of the closing to Israel (1T:92-10 to 22). In addition, Bloch sent an additional $400,000.00 to Israel to effect the purchase of the bonds.

On cross-examination, Bloch admitted [*18] that Turetsky had emailed Bloch to ask him to weigh in on “the arrangements I’m trying to put together.” (1T:95-3 to 20). When asked whether he knew the whether the West 58th St. mortgage was going to be discharged prior to closing, Bloch responded evasively by stating “I did not know specifically what would be satisfied as far as I knew the mortgage holder was TSR.” (1T:96-25 to 97-6). Bloch acknowledged, however, Exhibit 21, an email from Stephen Friedman sent to both Bloch and Bienenstock dated September 11, 2012, nine days prior to the September 20, 2012 closing (1T:97-7 to 11). The email listed the two mortgages, the first listed being the West 58th St. mortgage for $1.1 million. The email further stated: “these need to be released, satisfied by West 58th Street or if there wasn't an assignment recorded by finding recording information and having these re-assessed -- released by TSR Group.” (1T:97-15 to 24). Bloch also admitted that the wire transfer of the money to Israel did not take place for a couple of weeks after the closing because the receiving account was not established at the time of the closing (1T:98-17 to 99-13). Bloch indicated that he did not know whether TSR or [*19] West 58th St. was requesting the money; but it was definitely Danny Turetsky that was requesting the money (1T:99-18 to 24).

Bloch admitted that he knew that the principals of Golden Union believed that upon closing it would own the property free of any liens (1T:100-1 to 11). He denied, however, knowing that the West 58th St. mortgage would not be satisfied at or before the closing (1T:101-21 to 24). Notwithstanding, Bloch admitted that the repayment, if any, to West 58th St. should be effected at the closing with the proceeds of the funds to purchase the bonds. Those proceeds, however, were not paid directly to West 58th St. or even UAH. Rather, they were wired into SJB’s business account. (1T:102-8 to 22). Bloch was aware that other than the $600,000.00 net proceeds of the closing, no other money exchanged hands at the closing (1T:103-4 to 8). Bloch also admitted that he alone had managed SJB’s business accounts since 2010, prior to the 2011 execution of the West 58th St. mortgage (1T:103-9 to 23).

Bienenstock did not testify at trial. At deposition, he testified that there was a partnership agreement between either UAH or SJB and a partnership comprised of Abraham Poznanski, Edwin [*20] Cohen and Daniel Turetsky, whereby the Poznanski partnership committed to a five million dollar investment in UAH/SJB. After the Poznanski group defaulted on the commitment, the parties participated in a Jewish arbitration the result of which was that UAH/SJB ended up losing a property at 404 to 410 Union Avenue to one of UAH/SJB’s other investors, Rockaway Capital. In addition, by virtue of the judgment of the rabbi, UAH/SJB was required to pay Rockaway an additional million dollars. In order to satisfy the judgment, UAH/SJB decided to borrow $1.1 million from Daniel Turetsky in exchange for a mortgage on the 380 Union Avenue property (4T:31-2 to 32 to 18). The closing to the $1.1 million dollar loan was attended by Bienenstock, Bloch, Herbst and Zion. (4T:46-20 to 26). Bienenstock and Bloch were not represented by an attorney; their attorney did not agree to the changes made by Herbst, and their attorney was concerned because there were so many exceptions to title. (4T:47-7 to 17). Notwithstanding, Bloch and Bienenstock made the determination to go forward without representation because they were under the gun and desperate for the money (4T:47-8 to 13).

Bienenstock testified that [*21] at the closing of the subject transaction between Golden Union and UAH, after paying all the expenses and liens, the net proceeds of the sale were approximately $600,000.00. The money was to be forwarded to purchase bonds in Israel from a company called Sovereign Assets. Bienenstock’s understanding was that the payment of the money would result in a partnership between Bloch and Bienenstock as members of SJB and Daniel Turetsky and TSR (4T:48-5 to 24). Consistent with Bloch’s testimony, Bienenstock confirmed that it was Bloch who actually wired the closing proceeds to Israel, to an entity called IBI (4T:74-1 to 17). Bienenstock testified that upon receipt of the funds,
Turetsky was to forgive the $1.1 million dollar mortgage held by West 58th St. (4T:75-3 to 16). Bienenstock testified that Bloch was involved in all aspects of negotiating the Golden Union deal, including attending the closing (4T:152-11 to 19). Gantz, on the other hand, was a very passive member (4T:152-20 to 24).

Bienenstock denied having seen the allegedly forged discharges of the mortgage and assignment of rents, D6 and D7, until after the closing (4T:162-16 to 22). He admitted, however, that the handwriting on the [*22] discharge of rents "looks very similar to my handwriting." (4T:166-23 to 25). He denied delivering the discharge to the closing, contrary to two witnesses, Friedman, who testified the discharge was delivered by either Bienenstock or Bloch, and Fortunato, who testified that Bienenstock delivered the discharge at the closing (4T:13 to 15).

Based on the foregoing evidence, Plaintiff, Chicago Title, seeks a judgment against Defendants UAH, Stuart Bienenstock, Judah Bloch, and Ariel Gantz based on common law fraud, negligent misrepresentation, fraudulent inducement, and fraudulent misrepresentation. In addition, Plaintiff seeks punitive damages.

DISCUSSION

I. Defendants Bloch and Gantz's Motion to Dismiss pursuant to R. 4:40-1

At trial, Defendants Bloch and Gantz moved for a directed verdict pursuant to R. 4:40-1. The court reserved decision on Defendant's motion because it had been provided with five depositions and a binder of trial exhibits that the court had not yet had the opportunity to review. Having now considered all the evidence, it is clear that at the close of Plaintiff's case Chicago Title had established a prima facie case of fraud and therefore the motion will be denied.

The standard for determining [*23] a motion to dismiss at the close of the plaintiff's case is the same as that stated in R. 4:37-2(b), governing determination of a motion for an involuntary dismissal, namely, whether on the basis of the proofs presented and all legitimate inferences therefrom and upon the applicable law, the plaintiff has shown no prima facie case. Pitts v. Newark Bd. of Educ., 337 N.J. Super. 331, 340, 766 A.2d 1206 (App. Div. 2001). Defendants' argument in favor of dismissal is unavailing for the reasons set forth more fully below.

II. Plaintiff's Fraud claims

To establish a claim for common law fraud, Plaintiff must show "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Banco Popular N.A. v. Gandi 184 N.J. 161, 172, 876 A.2d 253 (2005), quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610, 691 A.2d 350 (1997). Fraud may also be committed by intentional concealment of a material fact that the concealing party has a duty to disclose. In the context of a business transaction, such as in the context of a sale of commercial property, the elements of fraudulent concealment are "the deliberate concealment or nondisclosure by the seller of a material fact or defect not readily observable to the purchaser, with the buyer relying [*24] upon the seller to his detriment." State Dep't of Environmental Protection v. Ventron Corp., 94 N.J. 473, 503, 468 A.2d 150 (1983).


The clear and convincing evidence standard of proof is a higher standard of proof than the preponderance of the evidence, but a lower standard than proof beyond a reasonable doubt. Liberty Mut. Ins. Co. v. Land 186 N.J. 163, 169-170, 892 A.2d 1240 (2006). The clear and convincing standard "should produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." In re Purrazzella, 134 N.J. 228, 240, 633 A.2d 507 (1993).

The elements of a cause of action for fraudulent inducement and fraudulent misrepresentation are essentially the same as those for common law fraud. In order to establish such claims, five elements must be shown: (1) a material misrepresentation; (2) made with knowledge of its falsity; and (3) with the intention that the other party rely thereon; (4) resulting in reliance by that party; (5) to his detriment. Metex Mfg. Corp. v. Mansson, No. 05-2948, 2008 U.S. Dist. LEXIS 25107, 2008 WL 877870, at *4 (D.N.J. March 28, 2008). The "deliberate suppression or omission of a material fact that should be disclosed, is equivalent to a material misrepresentation." Strawn v. Canuso, 140 N.J. 43, 657 A.2d 420 (1995). A defendant will not be excused from fraudulent conduct "merely because the plaintiff might have or should [*25] have discovered the fraud by its own diligence or investigation." Jewish Center of Sussex County v. Whale, 86 N.J. 619, 625-26, 432 A.2d 521 (1981).

In this case, as to the first three elements of fraud, unquestionably there was a material misrepresentation by both Bloch and Bienenstock, made with knowledge of its falsity, with the intent that Golden Union and its principals would rely on it. The misrepresentation consisted of the failure of Bloch and Bienenstock to disclose to
Messrs. Fortunato and Taormina what both defendants, clearly and convincingly, knew: that the West 58th St/TSR mortgages were not going to be discharged at or before the closing. The court concludes, for reasons set forth more fully below, that there is insufficient evidence to find that Ariel Gantz participated in the fraud and will dismiss the claims against Mr. Gantz. The court finds the following as facts.

This twisted tale began with a Jewish arbitration resulting in a rabbi entering judgment against Bienenstock and Bloch and their companies, UAH and SJB. The judgment required UAH/SJB to relinquish the property at 404 to 410 Union Avenue to one of UAH/SJB's other investors, Rockaway Capital. In addition, by virtue of the judgment of the rabbi, UAH/SJB was required to pay Rockaway an [*26] additional million dollars. In order to satisfy the judgment, UAH/SJB decided to borrow $1.1 million from Daniel Turetsky via his company, West 58th St. LLC, in exchange for a mortgage on the subject property, 380 Union Avenue (4T:31-2 to 32 to 18). The closing to the $1.1 million dollar loan was attended by Bienenstock, Bloch, Herbst and Zion. (4T:46-20 to 26).

On August 15, 2011, West 58th St. LLC made a wire transfer in the amount of $1.1 million dollars issued to SJB Capital, LLC for the benefit of Union Avenue, along with the execution of relevant loan documents. After SJB/UAH defaulted on the mortgage, various proposals to restructure the loan were proposed. Most relevant to this case, in mid-September 2012 Turetsky and Bienenstock discussed the possibility of West 58th St. agreeing to discharge its mortgage encumbering the Union Avenue property in exchange for Bienenstock's agreement to fund for Turetsky the acquisition of a United States LLC that had bid to purchase publicly traded bonds on the Tel Aviv Stock Exchange for a company with which Mr. Turetsky was affiliated. According to Turetsky, as these discussions were ongoing, Bienenstock did not disclose to Turetsky that he [*27] had already orchestrated a sale of the property.

Bloch and Bienenstock were consistent in their understanding of the details of the proposed debt restructure. Bloch testified that the proceeds of the sale were going to be used to purchase bonds in Israel representing a first debt position for a multi-million dollar company that owned assets in Tennessee and Connecticut, and that the funds were going to be used to purchase the bonds to assist Turetsky and TSR in taking control of this company. Bloch's understanding was that based on this contribution, Bienenstock and Bloch would become partners in the Israeli company (1T:90-14 to 91-10). Bloch was aware that Turetsky was the principal of West 58th St. LLC. Bloch understood the nature of the transaction to be an asset replacement whereby UAH would sell the building and buy the bonds. (1T:93-19 to 92-4). Bloch's knowledge was based on "conversations taking place in Israel in which we were told by TSR, and that we're basically doing what we would call like an asset replacement." (1T:91-21 to 92-1). Bloch stated he was aware of these conversations through Stuart Bienenstock (1T:92-5 to 7), but admitted that Turetsky had emailed Bloch to [*28] ask him to weigh in on "the arrangements I'm trying to put together." (1T:95-3 to 20). Bloch personally received the proceeds of the closing into SJB's business account, an account of which Bloch had exclusive control, and personally wired the $600,000.00 proceeds of the closing to Israel (1T:92-10 to 22). Bloch knew at the time of the closing that the wire transfer of the money to Israel would not take place immediately because the receiving account was not established at the time of the closing. Ultimately the transfer did not occur for two weeks after the closing (1T:98-17 to 99-13). Bloch, Bienenstock and Gantz all knew the critical fact that gives rise to the fraud in this case: that the discharge could not occur until the closing proceeds were wired to Turetsky or his representatives in Israel. Gantz was not familiar with the details of the transaction and may not have understood that the buyer had demanded the discharge of the mortgages at or before the closing. Both Bienenstock and Bloch, however, were well aware that Golden Union had that expectation.

In that regard, Bienenstock and Bloch participated in the negotiation and (failed) execution of the proposed debt restructure. [*29] With respect to Bienenstock, the court finds, clearly and convincingly, that he brought the forged discharge to the closing. Friedman testified that either Bloch or Bienenstock delivered the discharges to the closing, and Fortunato testified that it was Bienenstock that delivered them. The court finds that is highly likely that Bienenstock forged the document himself, based on his own admission that some of the handwriting on the discharge looked remarkably similar to his own. Moreover, Bienenstock's credibility is completely undermined by his denial that he brought the discharges to the closing, which the court finds to be false, and his denial of any knowledge where the discharges came from, which the court finds to be ludicrous. The fact that Bienenstock delivered the forged discharges to the closing, knowing the buyer would not close without a discharge of the West 58th St. mortgage at or prior to closing, knowing that the seller would rely on the discharges in agreeing to close, clearly and convincingly satisfies the first three elements of Plaintiff's fraud claims against Bienenstock.

With respect to Bloch, his self-serving testimony at trial concerning his relative lack of expertise [*30] and his attempts to shift all blame to his partner Bienenstock, the court finds not at all credible. In that regard, Bloch is
a far more educated individual who has a degree in economics, and he testified in great detail and clearly was aware of all the mechanics of the transaction. In addition, Bloch had sole control of the business account of SJB. It was Bloch who took control of the closing proceeds, had them deposited into the SJB business account, and thereafter wired them to Israel in the apparently thwarted expectation of both he and Bienenstock becoming partners in Turetsky's company.

Bloch admitted that he knew the buyer believed the closing would result in his obtaining clear title to the property, which Bloch knew was untrue. Bloch's disavowal of any knowledge that the mortgages were to be discharged at or prior to closing is equally unavailing. Both Bienenstock and Bloch received emails from their attorney, Stephen Friedman, in advance of the closing indicating the necessity of obtaining a discharge of the West 58th St./TSR mortgages. To that end, Friedman had prepared the form of the discharge at the request of both Bloch and Bienenstock. After preparing it, he forwarded [*31] the form discharge via email to both Bloch and Bienenstock with the understanding that they would obtain the signatures required for an effective discharge at the time of closing. The court further finds that Bienenstock and Bloch, desperate to consummate this deal with Daniel Turetsky, each knew that they would be unable to do so without securing the $637,000.00 net proceeds from the closing. Thus, Bloch as well as Bienenstock clearly knew and understood that the buyer expected the mortgages needed to be discharged at or before the closing and would not close unless they were discharged. The court finds that Bienenstock and Bloch made a decision to induce the buyer into believing the mortgages were discharged in order to take possession of the closing proceeds and consummate their deal with Turetsky. Bloch's understanding of this is further supported by his evasiveness when asked at trial whether he knew the West 58th St. mortgage was going to be discharged prior to closing, to which he responded "I did not know specifically what would be satisfied as far as I knew the mortgage holder was TSR." (1T:96-25 to 97-6). Clearly, he understood something was to be discharged at the closing, [*32] and the court finds he actually knew exactly what was to be discharged based on his and his partner Bienenstock's review of the discharges. The discharges were prepared by Friedman at the request of Bloch and Bienenstock, emailed to both Bloch and Bienenstock, and regardless of who forged the document, the court finds both Bloch and Bienenstock knew that to induce the buyer to close, the discharges had to be executed and presented to the buyer at or before closing. Thus, the first three elements of a cause of action are satisfied as to Bloch and Bienenstock.

With respect to Defendant Ariel Gantz, the court reaches a different conclusion. Gantz testified that he did not believe the West 58th St. mortgage would remain a lien on the property after the closing. He evinced some understanding that as part of the overall transaction the outstanding mortgage was being taken care of by an arrangement whereby money was going to be sent to Israel after the sale of the property to purchase bonds (1T:60-11 to 23). It is true that Gantz never informed anyone at Golden Union that the West 58th St. Mortgage was going to be discharged pursuant to the Israeli bond purchase. (1T:61-22 to 62-1). Unlike [*33] Bloch, however, Gantz appeared to have little personal knowledge of the details of the proposed transaction between Bienenstock/Bloch/SJB and Turetsky/TSR. Gantz was not a member of SJB, and he was not a party to the transaction to fund Turesky's purchase of bonds. Gantz had no background in real estate transactions or finance. He was brought in primarily to perform the construction and renovation at the subject property (1T:62-8 to 15). Gantz never communicated with Mr. Friedman, nor did he attend the closing. His involvement in the sale was to conduct the walk through with Golden Union representatives to record the current status of the building (1T:66-11 to 23). Accordingly, the court finds there is insufficient evidence to find that Gantz participated in the fraud, and the claims against him are therefore dismissed.

II. Was Golden Union's reliance reasonable?

The fifth element of fraud, damages, clearly is satisfied. Defendant Bloch urges the court to find, however, that the fourth element of fraud, reasonable reliance, is not satisfied, defeating Plaintiff's fraud claims. In that regard, in order to sustain a fraud claim a plaintiff must prove by clear and convincing evidence that [*34] the plaintiff's reliance on the misrepresented material fact was reasonable. Banco Popular, supra, 184 N.J at 172. Defendants argue that Plaintiff conducted its own investigation into the facts upon which the fraud claim is based and therefore, Defendant cannot be held liable because there is no reliance as a matter of law. Walid v. Yolanda for Irene Couture, 425 N.J. Super. 171, 180, 40 A.3d 85 (App. Div. 2012). Specifically, Defendants allege that Golden Union's subrogee, Chicago Title, had its own settlement agent, Michael Taormina, an attorney and principal of Golden Union, handle the closing, review the documents provided and certify to Chicago Title that all of the insurance commitment requirements were satisfied. Therefore, Defendants contend that Taormina having failed to discern a discrepancy in the signatures on the discharge defeats any finding of reasonable reliance.
In *48 Horsehill, LLC v. Kenro Corp.*, 2006 N.J. Super. Unpub. LEXIS 707, 2006 WL 349739 (App. Div. 2006), plaintiffs brought an action against a vendor alleging fraud and negligent misrepresentation in regards to chemical contamination on the property. The plaintiff alleged the defendant’s failure to disclose that chemical contamination on the property had not been remediated constituted fraud and negligent misrepresentation, and that the seller’s misrepresentation was material to the purchase of the property because plaintiff [*35] known this fact, plaintiff would not have purchased the property. Defendants in *48 Horsehill* argued that because plaintiff commissioned its own inspection of the property, the essential element of reliance was missing. The Appellate Division held that "it is of no consequence that plaintiff conducted its own due diligence because defendants failed to provide all information critical to the evaluation -- a fact upon which plaintiff may have justifiably relied."

Similarly in this case, the court rejects that Plaintiffs did not reasonably rely on Defendants’ misrepresentation. In that regard, a defendant will not be excused from fraudulent conduct "merely because the plaintiff might have or should have discovered the fraud by its own diligence or investigation." *Jewish Center of Sussex, supra, 86 N.J. at 625-26*. Moreover, the court finds that Golden Union acted reasonably diligently in demanding the form of discharge, obtaining the form of the discharge, obtaining approval from the title company for the proposed discharges, and receiving an executed discharge at closing. That Plaintiff did not discern that it was being defrauded by Defendants with a forged discharge, the court concludes, does not defeat Golden Unions claims for fraud. [*36]

In that regard, Fortunato tried, but failed, to obtain a pay-off of the 58th St. mortgage prior to closing (1T:27-10 to 18). Instead, he was given repeated assurances from the seller’s attorney, Stephen Friedman, Esq., that he would be handling the discharge and pay-off for West 58th (1T:27-21 to 24). Friedman emailed Fortunato to assure him that the payoffs and discharges would be effected at or prior to closing. In one of his emails to Fortunato, stated, "No payoff amount necessary. They are being discharged pursuant to a separate agreement." (3T:34-25 to 36-9). On September 11, 2012, Friedman sent an email to Stephen Fortunato stating, "seller will be delivering at or prior to closing release/satisfaction of mortgage from TSR Group." (3T:48-24 to 49-6). On September 14, 2012, Friedman emailed Fortunato stating, "I will get the corporate documents and mortgage termination shortly." (3T:52-9 to 15).

At the closing, Bienenstock delivered an executed discharge of the West 58th St. mortgage (1T:32-12 to 15). The provision of the executed discharge led Fortunato to believe the West 58th St. mortgage was in fact satisfied (1T:32-19 to 22), and that he had thus obtained clear title to the [*37*] property (1T:34-1 to 4). None of the seller’s representatives told Fortunato at the closing that the discharge of the mortgage was contingent on some future post-closing event (1T:32-23 to 33-15), a fact that Bienenstock and Bloch clearly and convincingly both knew. Bienenstock signed the deed, the seller’s residency certification, the affidavit of consideration, and the affidavit of title on behalf of Union Avenue Holding (1T:47-6 to 23).

Although there was a discrepancy between the signature line that was signed by Ronald S. Herbst, Authorized Signatory (1T:41-22 to 42-1), and the affidavit of the notary stating, that it was Eliezer Swerdlow that appeared before her and prepared the instrument, that discrepancy alone does not defeat the fraud claims. Rather, in light of assurances, both explicit and implicit, by Bloch, Bienenstock and their attorney Stephen Friedman that the mortgage was discharged at closing, the court finds that Plaintiff’s reliance on these assurances was reasonable under the circumstances. Based on all the circumstances, the court finds that Golden Union did not know that the discharge was false, nor was the falseness of the discharge obvious.

Relatedly, Defendants [*38*] argue that Plaintiff has failed to establish that the conduct of Union Avenue Holding was the proximate cause of loss. Proximate cause consists of “any cause which in the natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of and without which the result would not have occurred.” *Townsend v. Pierre*, 221 N.J. 36, 51-52, 110 A.3d 32 (2015). Defendants argue that Plaintiff’s own negligence in failing to confirm that the signature on the Discharge Form was that of Mr. Herbst was an “efficient intervening cause.” As an initial matter, the court rejects that in the context of a routine real estate closing the buyer has an obligation to independently investigate and verify the authenticity of every signature on every document presented by the seller or to launch an independent investigation to verify whether the person who purports to be an authorized signatory is so in fact, particularly where the subject of the discharges had been the matter of extensive discussions and reassurances by the seller in advance of the closing. Moreover, as stated in *48 Horsehill, LLC v. Kenro Corp.*, 2006 N.J. Super. Unpub. LEXIS 707, 2006 WL 349739 (2006), "it is of no consequence that plaintiff conducted its own due diligence because defendants failed to provide all information critical to the evaluation—a [*39*] fact upon which plaintiff may have justifiably relied." Defendants attempt to shift the blame onto Plaintiff’s attorney. However, the facts clearly demonstrate that Defendants refused to submit payoff figures
from West 58th St. and prevented Golden Union from obtaining them directly. Therefore, the Plaintiff has established by clear and convincing evidence both reasonable reliance and proximate cause.

Finally, Defendants argue that Plaintiff has failed to prove fraud by Union Avenue Holding. Fraud cannot be committed by an entity, by definition; fraud can only be committed by an individual who has the capacity to consciously engage in an act of deception. The case cited by Defendants NCP Litig. Trust v. KPMG LLP, 187 N.J. 353, 901 A.2d 871 (2006), does not further that proposition. The court was unable to locate anything that would support the claim that a fraud claim cannot lie against an LLC as well as its members, and the court notes that in other contexts such as the Consumer Fraud Act, it is plain that a corporate entity or LLC clearly can be sued for fraud. Accordingly, the court rejects that UAH cannot be held liable for the fraud perpetrated on Golden Union.

For the foregoing reasons, the court finds that Plaintiff has satisfied all of the [*40] requisite elements of all asserted fraud claims against UAH, Bienenstock and Bloch including common law fraud, fraudulent inducement, and fraudulent misrepresentation.

IV. Plaintiff’s Claims for Negligent Inducement

In the second count of the cross-claim directed against Union Ave Holding only, Plaintiff alleges Defendants are liable for negligent inducement. To sustain a claim for negligent misrepresentation, the plaintiff must demonstrate, "(1) defendant negligently made a false communications of material fact, (2) plaintiff justifiably relied upon the misrepresentation; and (3) the reliance resulted in an ascertainable loss of injury." The Supreme Court of New Jersey held in H. Rosenthal, Inc. v. Adler, 93 N.J. 324, 334, 461 A.2d 138 (1983), "a false statement negligently made, and on which justifiable reliance is placed, may be the basis for the recovery of damages for injury sustained as a consequence of such reliance." In examining a negligent misrepresentation claim, the court acknowledged that negligent misrepresentation involves "a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." Id.


Defendants argue, "in a complex commercial real estate transaction such as involved in this case, expert testimony was required to provide the standard of care." Defendants cite to Froom v. Perel, 377 N.J. Super. 298, 872 A.2d 1067 (2005) which held that "jurors could not be expected to know, based on their own common knowledge and experience, whether sophisticated investors would be willing to invest in the acquisition and development of the property and allow the Company to retain a 50% interest while making no monetary contribution to the project." Id. at 318.

At the outset, the court finds that unlike the circumstances in Froom, the underlying transaction was not a complex real estate transaction but a simple sale. Notwithstanding, the court need not address whether expert testimony was needed to support Plaintiff’s claims of negligence because the court finds, as set forth above, that the actions of Bienenstock and Bloch on behalf [*42] of UAH were unquestionably intentional. Accordingly, the claims for negligent misrepresentation, as well as those for negligent breach of covenant, are dismissed.

V. Plaintiff’s Claim for Breach of Covenant

In Count III, Plaintiff alleges that in the deed to Golden Union, UAH warranted that it had done no act to encumber the Property but the mortgage remained a lien on the premises. Thus, Plaintiff asserts that Defendants are liable for breach of covenant because Defendants allowed a lien (i.e. the mortgage) to remain on the property. Defendants argue that Golden Union and its subrogee were clearly aware of the existence of the West 58th Street mortgage and that it needed to be discharged. Defendants claim that neither Plaintiff, nor its subrogee, were misled by anything stated in the deed.

In Mayte v. Nemecz, 131 N.J.L. 173, 35 A.2d 615 (1944), defendants conveyed to the plaintiff a deed that contained a covenant that the premises were not encumbered. Thereafter, plaintiffs found that there were unpaid taxes and water charges due the municipality. The Supreme Court of New Jersey held that "plaintiffs established by the proofs a clear breach of the covenant in the deed since the premises were encumbered when the deed was given, and the [*43] plaintiffs were entitled to judgment." Similarly, in this case, UAH warranted that it had done no act to encumber the Property, but there was an outstanding mortgage on the premises. Under New Jersey Law, if a bargain and sale deed contains a warranty as to the grantor’s acts, and the subject property is encumbered as a result of actions taken by the grantor, then
the grantor is liable to the grantee when the deed is given. *Id.* Additionally, a covenant of good faith and fair dealing is implied in every contract in New Jersey. *Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396, 420, 690 A.2d 575 (1997). A party breaches this implied covenant *if the breaching party exercises its discretionary authority arbitrarily, unreasonably, or capriciously, with the objective of preventing the other party from receiving its reasonably expected fruits under the contract." *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 251, 773 A.2d 1121 (2001).

In this case, the court finds that there is ample credible evidence to support Plaintiff's claims based on the breach of the covenant in the warranty as Defendants conveyed title knowing the West 58th St. mortgage remained as an encumbrance on the property. Contrary to Defendants' arguments, the issue is not whether Plaintiffs were misled, but whether the statements in the warranty were true, which clearly [*44*] they were not. As a result, Plaintiff was deprived of the expected fruits of the contract; namely, clear title to the property. Defendants claim that Plaintiff knew of the existence of the mortgage and the assignment to TSR does not relinquish Defendants from their duties arising from the covenant in the deed.

**IV. Punitive Damages**

In Count IV, Plaintiff seeks punitive damages because Defendants knew that the mortgage would not be discharged prior to or at the closing. Pursuant to N.J.S.A. 2A:15-5.12, punitive damages may be awarded where a plaintiff is damaged by defendant's acts or omissions and those acts or omission were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might have been harmed by those acts or omissions. Plaintiff argues that Defendants never disclosed the fact that the mortgage would not be discharged prior to or at the closing. They went so far as to bring a forged Discharge Form to the closing to conceal that the mortgage was not discharged. Plaintiff states throughout the litigation and the trial, Defendants attempted to blame Golden Union, its principals, and UAH's lawyer for Defendants' own fraudulent conduct.

In *Gennari, supra, 148 N.J. 582*, plaintiffs, [*45*] purchasers of homes in a real estate development, brought action against the real estate brokerage firm that marketed the development. Defendants induced the purchasers to rely on their representations that the contractor was experienced, finished construction on schedule, and was a craftsman. *Id. at 609.* The Supreme Court of New Jersey held that the "sole purpose for Defendants' misrepresentations to plaintiffs was to get them into the development, take their money, and make a profit, without regard to the consequence that plaintiffs would have to live in homes built by inexperienced and careless subcontractors." *Id.*

Although the court has concluded that Defendants Bloch and Bienenstock intentionally defrauded Golden Union and its principals, the court does not find that Defendants' fraudulent acts give rise to a claim for punitive damages. In that regard, unlike *Gennari*, it is clear from the evidence that Bloch and Bienenstock believed that the mortgage would be discharged post-closing after the settlement proceeds were wired to an entity in Israel. Thus, the court finds that their actions were not motivated by actual malice or accompanied by a wanton and willful disregard of potential harm [*46*] to Golden Union. Rather, they believed, incorrectly, that this was a stop-gap measure to facilitate the consummation of their deal with Turetsky and that there would be no long-term harm to Golden Union. For reasons that the court will not speculate upon, Turetsky did not honor his promise to discharge the mortgage, which the court finds Bienenstock and Bloch most likely did not anticipate. Accordingly, the court will not award punitive damages.

**CONCLUSION**

For the foregoing reasons, the court will enter judgment against Defendants Union Avenue Holdings, LLC, Stuart Bienenstock, and Judah Bloch in the amount of $1.3 million dollars plus pre-judgment interest. The claims against Ariel Gantz are dismissed with prejudice. Counsel for Plaintiff are dismissed with prejudice. Counsel for Plaintiff shall forward a form of judgment in accordance with this decision.
WILLIAM S. LAUFER AND DAGNA LAUFER, Plaintiffs-Appellants,
v.
RICHARD A. FANUCCI, JR. AND CHRISTINA C. FANUCCI, BANK OF YORK,
as Trustee for the Certificate Holders CWALT, Inc., Alternative Loan Trust 2006-
17T1, Mortgage Pass-Through Certificate, Series 2006-17T1;
JOHN L. HAGAN, LINDA S. HAGAN, SEAVIEW CORPORATION,
MICHAEL W. HYLAND ASSOC., P.A., LANDAMERICA COMMONWEALTH,
COMMONWEALTH LAND TITLE INSURANCE COMPANY OF NEW JERSEY,
THE TITLE COMPANY OF ATLANTIC COUNTY, DESIGN LAND
SURVEYORS, THOMAS N. TOLBERT, Jointly, Severally and in the Alternative,
Defendants-Respondents.

DOCKET NO. A-3714-13T4

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2015 N.J. Super. Unpub. LEXIS 1113

February 10, 2015, Submitted
May 14, 2015, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.
PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1] On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-4030-10.

CORE TERMS: easement, driveway, omission, deed, sanitary, sewer, encroachment, common law, disclose, summary judgment, withheld, settlement, suppression, undisputed, acres, purported, neighbor, insurer, purchase contract, ascertainable loss, circumstantial evidence, concealment, observable, depicted, encroached, licensed real estate, duty to disclose, material fact, material misrepresentation, unlawful conduct

COUNSEL: Miller, Gallagher & Grimley, attorneys for appellants (George K. Miller, Jr. and Brittany J. Camp, on the briefs).
McCrosen & Stanton, attorneys for respondents John L. Hagan and Linda S. Hagan (Dorothy F. McCrosen, on the brief).

JUDGES: Before Judges Ostrer, Hayden and Sumners.

OPINION

PER CURIAM

Plaintiffs William and Dagna Laufer appeal from the trial court's September 19, 2013, order denying their motion to reconsider the court's June 11, 2013, order granting summary judgment dismissal of their complaint alleging common law and statutory fraud against defendants John and Linda Hagan. The suit arises out of the Laufers' January 2007 purchase of the Hagans' residential property in Egg Harbor Township. The Laufers allege the Hagans withheld information that a neighbor's driveway encroached upon the purchased property pursuant to a purported easement. Having considered plaintiffs' arguments in light of the record and the applicable principles of law, we reverse.

I.

We discern the following facts from the record, extending to plaintiffs all favorable inferences. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540, 666 A.2d 146 (1995). The easement was described in a 1998 subdivision [*2] plan. The easement was depicted as a cross-hatched corridor along the northwest and northern
The area was fere[d] with the use of the insurer on the eve of their sale to the ally referred only to a saniti-

The Hagans knew [*3] the driveway encroached on their property before their transaction with the Laufers. Their neighbor, Richard Fanucci, originally began to install it sometime in 2003, in conjunction with the construction of his house. The Hagans protested. They relied on their February 4, 2000, deed from Seaview Cor-

The Seaview-to-Hagans deed described the metes and bounds of the conveyed property, and generally referred to the subdivision plan, stating:

BEING KNOWN AS Lot 32, Block 9502 as shown on "Proposed Minor Subdivision, Tax Lots 31 and 33, Block 9502, Egg Harbor Township, Atlantic County, New Jersey", as prepared by Michael W. Hyland Associates, said plan dated 8/12/97, last revised 01/27/98 bearing Drawing No. H-4726 and duly filed with the Clerk of Atlantic County.

The deed then referred to the easement, stating, [*4] "THE ABOVE DESCRIBED PREMISES subject to a sanitary sewer easement to the benefit of adjoining Lot 33, Block 9502 and described as follows[.]"

After providing the metes and bounds of the easement area, the deed specifically referred only to a sanitary sewer easement, stating: "THE ABOVE DESCRIBED being a sanitary sewer easement to the benefit of Lot 33, Block 9502, located on Lot 32, Block 9502 and as illustrated on the aforementioned proposed Minor Subdivision prepared by Michael W. Hyland Associates and bearing Drawing No. H-4726."

In response to the Hagans' inquiry, Fanucci asserted he was entitled to construct the driveway. The Hagans did not challenge Fanucci's interpretation of his rights. Rather, they filed a claim against their title insurer, Lawyers Title Insurance Corporation. Their title policy included no reference to the subdivision plan, or the access easement.

3 We express no opinion as to whether the easement did in fact grant the neighbor the right to erect a driveway along its path. The parties do not address whether the "access" easement was limited to the utility's ability to service its facilities within the easement, as opposed to granting the neighbor a right to access [*5] and construct a driveway along the easement -- which conceivably could impede the utility's access.

Relying on an expert appraisal, the Hagans contended the access easement lowered their property's value by $250,000. The Hagans resolved their long-pending dispute with their title insurer on the eve of their sale to the Laufers. The Hagans accepted $83,000 in settlement of their claim two weeks before the closing.

Prior to selling the property, the Hagans did not disclose to the Laufers or the Laufers' attorney their title insurance claim, its settlement, or the fact that the Fanucci driveway was actually situated within the boundary of the Hagan property. Linda Hagan was a licensed real estate agent and served as the listing agent in the sale transaction. Neither of the Hagans, nor anyone on their behalf, expressly informed the Laufers of the purported access easement.

4 We acknowledge that Linda Hagan asserted in discovery that while touring the property with William Laufer, she orally disclosed to him that the driveway was located on her property. However, inasmuch as Laufer denies the conversation, we presume his version for summary judgment purposes.
The Hagans-to-Laufer deed included, [*6] virtually verbatim, the description of the property and easement found in the Seaview-to-Hagans deed. In other words, it referred explicitly and at length to a sanitary sewer easement. It was silent on the existence of an access easement. It included only a non-specific reference to the subdivision plan.

In advance of their closing, the Laufers received two title insurance commitments, one from Surety Title Agency of Atlantic County, effective December 1, 2006, and a second from LandAmerica Commonwealth originally dated December 29, 2006, but then dated January 31, 2007. Both commitments repeated the property description found in the deeds, expressly mentioning the sanitary sewer easement. Neither one expressly referred to an access easement.

The Surety Title commitment included an explicit exception for "encroachments . . . affecting title which would be disclosed by an accurate survey . . ." The LandAmerica commitment did not. Instead, a survey was performed. The February 2, 2007, title insurance policy issued to William Laufer by Commonwealth Land Title Insurance Company, through its agent, the Title Company of Atlantic County, expressly excepted from coverage a "[p]ortion of concrete driveway [*7] erected over sanitary sewer easement" as "shown on a survey made by Thomas N. Tolbert, dated January 8, 2007." However, the Laufers alleged that Tolbert's survey did not accurately locate the easement, and only depicted a small section of Laufer's own driveway within the easement, and none of Fanucci's driveway. [*8]

5 Apparently, LandAmerica Commonwealth and Commonwealth Land are related entities. The Laufers also asserted against them, and Tolbert, which were settled and dismissed in February and March 2013. The Laufers also asserted a claim against the Title Company of Atlantic County, which was dismissed with prejudice in April 2014.

William Laufer noticed the reference to the sanitary sewer easement at the closing. He asked his attorney if he should be concerned about it. His attorney reassured him that the easement was not an issue.

The Laufers first learned that the driveway encroached upon their property several months after the purchase. They had hired an architect for a significant renovation of the home and landscaping. The architect's plans apparently depicted the Fanucci driveway on the easement.

In their July 2010 complaint, the Laufers asserted claims against the Hagans [*8] of common law fraud, equitable fraud, and violation of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -198. The Laufers alleged that the Hagans had a duty to disclose the encroachment of the driveway; they knowingly withheld that information; they did so with the intent to induce the Laufers to purchase the property; and the Laufers relied on that omission to their detriment. The Laufers sought compensatory and punitive damages and attorney's fees. [*9] 6

6 They also sought rescission of the sale, but they appear to have abandoned that claim.

After a period of discovery, the court granted the Hagans' motion for summary judgment dismissal. The court held that even if the Hagans failed to disclose the encroachment and their settlement with LandAmerica, the Laufers could not prevail on their common law fraud claim because the subdivision plan referred to the proposed access and utility easement, and the driveway was in place and readily observable. With respect to the common law claim, the court held, "Even assuming the scienter element of fraud had been established, the Court is not satisfied there was 'justifiable reliance' upon the omission." The Court noted the agreement of sale "was subject to easements [*9] and restrictions of record." The court also found that the Laufers were contractually obligated "to make a reasonable and diligent search of title records that would disclose liens and claims affecting the property."

In dismissing the CFA claim, the court held that it was "not convinced that the omission[ . . .] was made 'knowingly with the intent that others rely upon such an omission' as required by N.J.S.A. 56:8-2." The court denied the Laufers' motion for reconsideration.

On appeal, the Laufers present the following issues for our consideration.

I. THE COURT BELOW MADE A MISTAKE OF LAW IN DENYING PLAINTIFFS CLAIM FOR VIOLATIONS OF THE CONSUMER FRAUD ACT, N.J.S.A. 56:8-2, AGAINST DEFENDANT LINDA HAGAN, A LICENSED REALTOR.

II. THE COURT BELOW MADE A MISTAKE OF FACT IN FINDING THAT THE OBSERVABLE NATURE OF THE DRIVEWAY WAS COMMENSURATE WITH THE EASEMENT AND ENCROACHMENT ALSO BEING OBSERVABLE.

III. THE COURT BELOW ERRED IN APPLYING THE LAW FOR COMMON LAW FRAUD TO THE [UNDISPUTED] FACTS OF THE CASE.
IV. THE COURT BELOW ERRED IN APPLYING THE LAW FOR INTENTIONAL BREACH OF DUTY TO DISCLOSE TO THE UNDISPUTED FACTS OF THE CASE.

V. THE COURT BELOW ERRED IN APPLYING THE LAW FOR FRAUDULENT CONCEALMENT TO THE UNDISPUTED [*10] FACTS OF THE CASE.

II.

We review the trial court’s grant of summary judgment de novo, applying the same standard as the trial court. *Henry v. N.J. Dep’t of Human Servs.*, 204 N.J. 320, 330, 9 A.3d 882 (2010). We determine whether the moving party has demonstrated the absence of genuine issues of material fact, and whether the trial court has correctly determined that movant is entitled to judgment as a matter of law, owing no deference to the trial court’s legal conclusions. *N.J. Dep’t of Envtl. Prot. v. Alloway Twp.*, 438 N.J. Super. 501, 507, 105 A.3d 1145 (App. Div. 2015).

The Laufers’ common law and statutory claims are governed by well-settled principles. The elements of common law fraud are: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610, 691 A.2d 350 (1997).


To state a claim under the CFA, a plaintiff must allege unlawful conduct, an ascertainable loss, and a causal relationship between the unlawful conduct and the loss. *Intl Union of Operating Eng’rs Local No. 68 Welfare Fund v. Merc’k & Co.*, 192 N.J. 372, 389, 929 A.2d 1076 (2007). Unlawful conduct includes the "knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate." *N.J.S.A. 56:8-2*. It is undisputed that the CFA governs the Hagans-to-Laufers sale because Linda Hagan acted as a licensed real estate agent in the transaction. *Vagias v. Woodmont Props.*, 384 N.J. Super. 129, 894 A.2d 68 (App. Div. 2006).

For purposes of this appeal, we accept the Laufers’ allegation that the Hagans withheld information about the purported access easement and the driveway encroachment. However, we recognize that the issue is subject to a genuine dispute, inasmuch as Linda [*12] Hagan asserted in deposition that she orally disclosed the omission. We also assume the Hagans withheld the information knowing the omission created a false impression of the property, intending that the Laufers rely on the omission. The Laufers presented sufficient circumstantial evidence to prove the requisite scienter. See *Millison v. E.I. Du Pont de Nemours & Co.*, 101 N.J. 161, 196, 501 A.2d 505 (1985) (stating that proof of knowledge may be by circumstantial evidence). This circumstantial evidence included the Hagans’ apparent awareness of the omission in the Seaview-to-Hagans deed, and their failure to amend the Hagans-to-Lauffer deed.

The Hagans asserted a claim against their title insurer. They obviously attached great value to the omission, as they claimed $250,000 in damages and ultimately accepted $83,000 in settlement. Given that settlement, the Laufers established for summary judgment purposes that the omission was material, and their reliance resulted in damages or an ascertainable loss.7

7 We recognize that the Hagans’ damages may have been significantly greater than the Laufers’, as a component of their damages was the visual degradation of their property resulting from the installation of the driveway. The Laufers were
aware the driveway existed. [*13] Whether it was located on the other side of the property line may not have had a significant visual impact.

The Hagans essentially ground their request for summary judgment on the claim that the Laufers' reliance on the omission was not reasonable. In support, they assert the driveway was visible; the sale was subject to encroachments that a survey could disclose; the Laufers agreed to obtain a title search; and they had constructive notice of the access easement based on the reference to the subdivision plan in the deed and the title commitments. The Hagans also assert that the Laufers could have discovered the encroachment had they obtained an accurate survey before closing.

We are unpersuaded. The Hagans may not escape liability for their omission by invoking the contract provision that the sale was subject to easements and such state of facts as an accurate survey might disclose. The Hagans had knowledge of the encroachment. Presumably, an accurate survey may have disclosed it. However, the Hagans may not avoid liability for their intentional omission by relying on the buyers' failure to discover it.

Nor may they avoid liability by resting on a contractual provision that absolves [*14] the sellers of responsibility for omissions that the sellers could have discovered by an accurate survey. "[A] party to an agreement cannot, simply by means of a provision in the written instrument, create an absolute defense . . . in an action based on fraud in the inducement to contract." *Bilotti v. Accurate Forming Corp.*, 39 N.J. 184, 204, 188 A.2d 24 (1963) (internal quotation marks and citation omitted). Similarly, a "no representations" clause does not preclude introduction of earlier explicit misrepresentations, if the facts were "peculiarly within that party's knowledge and were, in fact, intentionally misrepresented." *Walid, supra*, 425 N.J. Super. at 185-86.

The Laufers complied with their contractual obligation to obtain title commitments. One of the insurers obtained the Tolbert survey; however, it apparently failed to disclose the encroachment. Thus, this is not a case where a plaintiff's own investigation disclosed the truth. Nor did the general, non-specific reference to the subdivision plan result in actual notice to the Laufers of the "access and utility easement." There is no evidence the Laufers viewed the subdivision plan. Moreover, the reference to the subdivision plan was made only in describing the property in general, and in describing the source of the sanitary sewer [*15] easement. There was no indication in the deed that the plan included additional restrictions on the use of the property.

On the other hand, the title commitment and deed specifically identified and described a sanitary sewer easement. It was silent on the purported right of the neighboring property owner to erect and maintain a paved driveway within the boundary of the purchased property. William Laufer asserted that he was aware of the partial disclosure of a sanitary sewer easement, and relied on assurances that the easement, so limited, was not a matter of concern.

It is of no moment that the driveway was in place when the Laufers agreed to purchase the property. While the driveway was visible, its location within the boundary of the Hagans' property was not discernable to the naked eye. It is the location of the driveway within the easement that was withheld.

In sum, we are satisfied that the Laufers have presented sufficient and competent evidence to permit a jury to find that they have established the elements of common law fraud by omission, and an unlawful practice causing an ascertainable loss under the CFA.

Reversed and remanded. We do not retain jurisdiction.
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HENRY P. MCDONALD AND BARBARA MCDONALD, HIS WIFE, PLAINTIFFS-RESPONDENTS, v. JOSEPH S. MIANECKI AND DELORES MIANECKI, HIS WIFE, DEFENDANTS-APPELLANTS

A-46

Supreme Court of New Jersey

79 N.J. 275; 398 A.2d 1283; 1979 N.J. LEXIS 1194; 16 A.L.R.4th 1227

November 27, 1978, Argued March 6, 1979, Decided


CASE SUMMARY:

PROCEDURAL POSTURE: Defendant builders sought review of a judgment of the Superior Court (New Jersey) that affirmed a trial court judgment in favor of plaintiff buyers in an action for breach of implied warranties with respect to the construction of a well and water system in a new home.

OVERVIEW: Plaintiff buyers purchased a new home constructed by defendant builders. While the home was being completed, plaintiffs visited the property several times and noticed that the sinks and toilet fixtures were discolored and that standing water had a brownish tint to it. The problems with the water continued after plaintiffs moved in; the water had a bad odor and taste and it discolored clothing and dishes. Even after the water was treated, it failed to meet state standards of potability. Plaintiffs sued defendants alleging breach of implied warranties. The trial court entered judgment in favor of plaintiffs, and this was affirmed on appeal. Defendants sought review, and the court affirmed. The court held that the doctrine of caveat emptor no longer was applicable in these instances. Instead, implied warranties arose whenever a consumer purchased a home from an individual who held himself out as a builder-vendor of new homes, regardless of whether the builder was a mass producer or had only constructed one or two homes. Further, the implied warranty of habitability encompassed the potability of the water supply. Therefore, it was proper to find defendants liable.

OUTCOME: Judgment affirming a judgment rendered in favor of plaintiff buyers in their action for breach of implied warranties with respect to the construction of a well and water system in their new home was affirmed. The doctrine of caveat emptor did not apply to a purchase from a builder-vendor; rather, implied warranties arose whenever a home was purchased from someone holding himself out as a builder-vendor.

CORE TERMS: builder, implied warranty, new home, builder-vendor, warranty, caveat emptor, purchaser, buyer, warranty of habitability, constructed, innocent, vendor, built, site, dwelling, seller, new house, deed, potability, water supply, en banc, consumer protection, strict liability, construct, impliedly, consumer, usable, skill, conditioner, water quality

LexisNexis(R) Headnotes

Commercial Law (UCC) > Sales (Article 2) > Warranties > Fitness
Commercial Law (UCC) > Sales (Article 2) > Warranties > Merchantability
Contracts Law > Types of Contracts > Personal Property

Real Property Law > Purchase & Sale > Remedies > Duty to Disclose
Real Property Law > Purchase & Sale > Remedies > Liability of Developers & Vendors
Torts > Strict Liability > General Overview

[HN2] Builder-vendors are strictly liable in tort for injuries caused by defects existing in a newly constructed home.

Real Property Law > Construction Law > Contracts
Real Property Law > Landlord & Tenant > Tenant's Remedies & Rights > Warranty of Habitability
Real Property Law > Purchase & Sale > Remedies > Liability of Developers & Vendors

[HN3] Builder-vendors do impliedly warrant that a house which they construct will be of reasonable workmanship and habitability.

Real Property Law > Construction Law > General Overview
Real Property Law > Purchase & Sale > Remedies > Duty to Disclose
Real Property Law > Purchase & Sale > Remedies > Liability of Developers & Vendors

[HN4] An implied warranty arises whenever a consumer purchases from an individual who holds himself out as a builder-vendor of new homes -- regardless of whether he can be labeled a "mass producer." Whether the builder be large or small, the purchaser relies upon his superior knowledge and skill, and he impliedly represents that he is qualified to erect a habitable dwelling.

Real Property Law > Purchase & Sale > Contracts of Sale > General Overview

[HN5] The implied warranty of habitability encompasses the potability of the water supply.

Torts > Damages > Mitigation

[HN6] Injured parties have a duty to take reasonable steps to mitigate damages.

COUNSEL: Mr. Morris M. Schnitzer argued the cause for appellants (Messrs. Schnitzer and Schnitzer, attorneys).

Mr. William R. Albrecht argued the cause for respondents (Messrs. Schenck, Price, Smith and King, attorneys).

JUDGES: For affirmance -- Chief Justice Hughes and Justices Mountain, Sullivan, Pashman, Clifford, Schreiber and Handler. For reversal -- None. The opinion of the court was delivered by Pashman, J.

OPINION BY: PASHMAN

OPINION

[*277] [**1284] In this case, we are called upon to decide whether an implied warranty of workmanship and habitability arises upon the sale of a home by a builder-vendor, and, if so, whether potability of the water supply is included within the realm of warranted items. For the reasons given herein, [*278] we conclude that both questions must be answered in the affirmative. A further issue is raised regarding the plaintiff's duty to mitigate damages.

I

Factual Background

In 1972 Joseph Mianeciki, one of the defendants herein, placed a newspaper advertisement in which he offered [***2] to build a house on a certain piece of property now identified as 7 Dolores Place, Mine Hill Township. Plaintiffs Mr. and Mrs. Henry McDonald, desirous of purchasing a new home, responded to this advertisement and in July 1972 met with Mianecki at the proposed site and discussed the type of house they wished to have constructed. At that meeting the McDo-nalds were informed that Mianecki had built two other houses in the area. Although Mianeciki was also employed as a construction project engineer by a large commercial contractor, by the start of the present litigation he classified his occupation as that of "builder."

The parties reached agreement as to the dwelling to be erected which was formalized in a written contract dated July 17, 1972. The purchase price was $44,500. The contract provided, inter alia, that the house would be serviced by water from a well to be constructed by Mianecki, and that the well system would be guaranteed for a one- [**1285] year period. The McDonalds had never before had a house built for them nor had they lived in a home serviced by well water.

During the early stages of the construction process, the McDonalds frequently visited the [***3] property to do some painting and perform other odd jobs. At first they cleaned their hands and brushes at a nearby barn as their water supply had not yet been connected. Later, as the house neared completion, the water began to flow and the McDonalds washed up inside the home. They
soon noticed that the sinks and toilet fixtures were becoming discolored and that standing water in the fixtures had a "chocolate brown" tint. The McDonalds [*279] apprised Mianecki of the situation and were told that inasmuch as the well was newly dug there might be some impurities still present. A commercial stain-remover, "Rust-Raze," was supplied to Mrs. McDonald, who cleaned the discolored fixtures. The stains, however, shortly returned.

Due to the continuing discoloration problem, Mianecki arranged to have the water tested. This test was, in any event, a prerequisite to the obtaining of a certificate of occupancy. The test, performed by third-party defendant Duncan Medical Laboratory, indicated an unacceptably high iron content. Mianecki attempted to rectify this situation through the installation of a water soften/conditioner, manufactured and installed by third-party defendant Deran [***4] Sales, Inc. A test performed after the installation of the unit indicated that the water was acceptable and, based upon its results, a certificate of occupancy was granted. Closing of title occurred on November 15, 1972, and two days later the McDonalds settled into their new home.

The problems with the water continued after the McDonalds moved in. Although water tests conducted before March 1973 showed that the water, after passing through the conditioner, met State standards, there was sufficient evidence from which a jury could have determined that the water was non-potable. It is clear that the raw water -- i.e., water before it passed through the conditioner -- never satisfied State standards of potability. There was testimony that, among other things, the staining of the fixtures continued; the water had a bad odor and taste; when left standing the water fizzled like "Alka-Seltzer," gave off a vapor and turned colors; clothes washed in the washing machine became stained, as did dishes and utensils when washed in the dishwasher; and coffee would turn deep black and sugar would not dissolve. Furthermore, according to expert testimony, after March 1973 even the treated [***5] water continued to discontinue using the water for cooking and drinking purposes. The McDonalds testified that in the spring of 1973 they had to discontinue using the water for cooking and drinking purposes, and instead were forced to obtain water by either purchasing it bottled or filling containers at a neighbor's home. Moreover, there was testimony from a real estate agent that the value of the house, assuming a lack of water problems, would be $57,660, but that with such problems the value was only $36,847.

According to plaintiffs, Mianecki was continuously informed about the condition of the water. A number of [*280] unsuccessful attempts were made to alleviate the problem. These included replacement of the heating coils, alteration of the back-flushing cycle on the water conditioner, and the installation of a venting system designed to eliminate gas in the water pipes. By the spring of 1973 the relationship between the parties had deteriorated and no further repairs were attempted. Alternative sources of water were suggested but, due to a variety of circumstances, no viable solution was adopted. Although each party alleged that these failures were due to the other's fault, there is sufficient evidence upon which a jury could have found that plaintiffs did not act unreasonably in their attempts to ameliorate the condition.

On March 25, 1974 the plaintiffs instituted the instant suit for damages against Mianecki. The complaint alleged breach of express and implied warranties, fraudulent and negligent misrepresentations, negligent construction of the well and water system and negligent supervision of the construction [***6] and water testing. At this time plaintiffs were still residing in the Mine Hill house. In December of 1975, however, they moved to Maryland as a result of Mr. McDonald’s job transfer.

Defendant Mianecki, in turn, made claims against the following third party defendants: (1) Bryan Drilling Company, the outfit which had actually drilled the well; (2) Deran Sales, Inc., the company which had [***1286] installed the conditioner and performed tests on the water; (3) Duncan Medical Laboratory, the entity which had conducted the original tests on the water; and (4) Shire National Corporation and Mine Hill Board of Education, which owned the property adjacent to the McDonald's lot suspected of being the source of contamination.

A bifurcated jury trial was ordered and the trial as to liability commenced on January 19, 1976. Prior to submission of the case to the jury, the third party complaints, except that against Deran, were dismissed by the trial judge without objection from the defendants. The jurors were [*281] charged as to fraud and misrepresentation, breach of contract, and breach of implied warranty, and were given special interrogatories to answer. They found that [***7] defendants were liable solely for breach of an implied warranty of habitability. Findings of no cause for action were returned as to the other grounds for liability as well as Mianecki's third-party complaint against Deran.

The case then proceeded to a trial as to damages. Evidence was introduced by plaintiffs with respect to the change in the quality of their lives occasioned by the lack of potable water, and as to the staining and odor. The McDonalds testified that in the spring of 1973 they had to discontinue using the water for cooking and drinking purposes, and instead were forced to obtain water by either purchasing it bottled or filling containers at a neighbor's home. Moreover, there was testimony from a real estate agent that the value of the house, assuming a lack of water problems, would be $57,660, but that with such problems the value was only $36,847.

In order to demonstrate that plaintiffs had failed to mitigate damages, Mianecki testified that on January 14, 1976 he sent, through counsel, a letter to the McDonalds offering to buy the house for $50,000. This letter reached the McDonalds on January 17, 1976, just two days before the trial began and three days [***8] after the trial was originally scheduled to commence. The
proposed contained no mortgage contingency and provided for closing 90 days from the date of the signing of a contract. This offer was refused by the plaintiffs who, on January 20, 1976, signed a contract of sale for the Mine Hill home at a price of $35,000 plus one-half of any excess liability incurred by the McDonalds in paying off the outstanding mortgage and tax assessments. Plaintiffs testified that they had reached oral agreement with the ultimate purchaser prior to receiving Mianecki's proposal and that they understood Mianecki's offer to be an attempt to settle the entire case.

[*282] The trial court charged the jurors that in assessing damages they were to place the McDonalds in the position they would have been in had the implied warranty not been breached. Thus, the judge instructed that the McDonalds should be compensated for all damages proximately caused by the breach and within the reasonable contemplation of the parties at the time that the contract was entered into. He further elaborated on the nature of the damages awardable, charging that the McDonalds were entitled to (1) out of pocket expenses, (**1287) (2) compensation for the deterioration in their quality of life, and (3) the reduction in the fair market value of their home attributable to the defect. Mitigation of damages was explained at length.

1 In this regard it should be noted that diminution in value is a standard measure of damages in breach of warranty cases. See, e.g., Somerville Container Sales, Inc. v. General Metal Corp., 39 N.J. Super. 348, 359, mod. at rehearing, 39 N.J. Super. 562 (App. Div. 1956); N.J.S.A. 12A:2-714(2). In some cases, however, it may be appropriate to utilize cost of repairs as the standard. See 525 Main Street Corp. v. Eagle Roofing Co., Inc., 34 N.J. 251 (1961); Glisan v. Smolenske, 153 Colo. 274, 387 P. 2d 260, 263 (1963). The other items of awardable damages charged were also appropriate as incidental and consequential damages. See, e.g., Collins v. Uniroyal, Inc., 126 N.J. Super. 401, 406 (App. Div. 1973), aff'd, 64 N.J. 260 (1974); N.J.S.A. 12A:2-715.

[**1287] On appeal, defendants sought reversal of the finding of implied warranty of habitability and raised numerous other allegations of error. The Appellate Division affirmed, McDonald v. Mianecki, 159 N.J. Super. 1 (App. Div. 1978), holding that "in a case such as this where a vendor-builder constructs a new house for the purpose of sale, the sale carries with it an implied warranty that it was constructed in a reasonably workman-

like manner and is fit for habitation." Id. at 19. Further, the appellate court concluded that the jury was given a proper opportunity to consider the [*283] question of mitigation and that its determination was supportable by the record. Id. at 24-25. We granted Mianecki's petition for certification. 77 N.J. 498 (1978).

II

Whether an Implied Warranty of Habitability arose Under the Facts of This Case

A. General Legal Background

Prior to the mid-1950's the ancient maxim of caveat emptor ("let the buyer beware") long ruled the law relating [*111] to the sale of real property. Thought to have originated in late sixteenth-century English trade society, the doctrine was especially prevalent during the early 1800's when judges looked upon purchasing land as a "game of chance." Hamilton, "The Ancient Maxim Caveat Emptor," 40 Yale L.J. 1133, 1187 (1931). The maxim, derived from the then contemporary political philosophy of laissez faire, held that a "buyer deserved whatever he got if he relied on his own inspection of the merchandise and did not extract an express warranty from the seller." Roberts, supra note 2, at 836-837.


According to one commentator, [***12] however,

Caveat emptor * * * did not adversely affect the typical buyer of a new house during the nineteenth century. In those days, after all, the home-owner-to-be was commonly a middle-class fellow who purchased his own lot of land and then retained an architect to design a home for him. Once the plans were ready the landowner hired a contractor who built a house according to the plans. Quality control was assured because the builder was paid in stages as he completed each part of the house to the satisfaction of the architect. [*284] If the house did happen to collapse, the homeowner had a choice of lawsuits to recoup his losses: either the plans were defective, in which case the architect had been negligent, or the build-
The irony of this system was that the separate historical development of legal and personal property, 12A:2 liability and often an implied warranty of fitness for a particular purpose.  Today, sale of a chattel generally carries with it an implied warranty of merchantability and often an implied warranty of fitness for a particular purpose.  See U.C.C., §§ 2-314, 2-315 ( N.J.S.A. 12A:2-314, 315).  The resulting distinction between real and personal property -- a distinction which one commentator has labelled a merely fortuitous by-product of the separate historical development of legal [**285] thinking in the two areas, Haskell, supra, 53 Geo. L.J. at 634 -- has been increasingly viewed as anomalous. See, e.g., Wawak v. Stewart, 247 Ark. 1093, 449 S.W. 2d 922, 923 (Sup. Ct. 1970) (contrast between rules deemed indefensible); Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 115 Cal. Rptr. 648, 525 P. 2d 88 (Sup. Ct. 1974) (en banc); Lane v. Trenholm Building Co., 267 S.C. 497, 229 S.E. 2d 728 (Sup. Ct. 1976); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W. 2d 803, 806 (Sup. Ct. 1967); Rothberg v. Olenik, 128 Vt. 295, 262 A. 2d 461, 467 (Sup. Ct. 1970). The irony of this system was that the law "offer[ed] greater protection to the purchaser of a seventy-nine cent dog leash than it [did] to the purchaser of a 40,000-dollar house," [**15] Haskell, supra, 53 Geo. L.J. at 633, and that the buyer of a defective two-dollar fountain pen could "look to the law to get him his money back" but the person who spent his life's savings on a new home whose ceiling collapsed could not. Roberts, supra note 2, at 835-836.


Although major developments in the area of implied warranty have generally been initiated by the judiciary, other branches of government have not been inactive. In this respect, we note that § 2-309 [***1289] of the Uniform Land Transactions Act -- not yet adopted in New Jersey -- provides for implied warranties. The Commissioner's Prefatory Note to this law states that:

[*287] Perhaps the most important example of modernization of real estate law [effected] by this Act is Section 2-309 which imposes implied warranties of quality on persons in the business of selling real estate. For a substantial period of years, the nearly universal opinion of writers on the subject has been that the old rules of caveat emptor were totally out of date [***18] and pernicious in effect.

[Uniform Laws Annotated, Vol. 13, 1979 Pamphlet, at 41]

3 In making new law, courts should always consider the impact of relevant legislative enactments. See Landis, "Statutes and the Sources of Law," Harvard Legal Essays 213 (1934), reprinted in 2 Harv. J. Legis. 7 (1965).

Further, the building industry itself, through the National Association of Home Builders (N.A.H.B.) has promulgated a Home Owners Warranty Program commonly known as H.O.W. See "The National Association of Home Builders, What About H.O.W. -- Home Owners Warranty," (N.A.H.B. Library No. 60.13, 1975), at 5. Although the program has not yet been widely adopted, N.A.H.B. claims that the express warranty is "good for the builder, good for the consumer [and] good for business." Id.

Finally, we would be remiss if we did not note our own Legislature's commendable program of protecting homeowners. It has recently enacted The New Home Warranty and Builders' Registration Act, [***19] N.J.S.A. 46:3B-1 et seq., which provides for the registration of all builders of new homes, N.J.S.A. 46:3B-5, and authorizes the Commissioner of the Department of Community Affairs to establish certain new home warranties, N.J.S.A. 46:3B-3. Claims for breach may be satisfied out of a home warranty security fund after notice and hearing. N.J.S.A. 46:3B-7. The statute specifically states that the protection it offers does not affect other rights and remedies available to the owner, although an election of remedies is required. N.J.S.A. 46:3B-9. The implied warranty which we today find exists in a contract for the sale of a new home thus complements the Act and is, in our opinion, fully in accord with the legislative policy there evinced.

The reasoning underlying the abandonment of caveat emptor in the area of home construction is not difficult to fathom. Tribunals have come to recognize that "[t]he purchase of a new home is not an everyday transaction for the average family[,] * * * in many instances [it] is the most important transaction of a lifetime." Bethlahmy v. Bechtel, supra, 415 P. 2d at 710. See e.g., Hartley v. [***20] Ballou, 20 N.C. App. 493, 201 S.E. 2d 712, 714 (Ct. App); rev'd on other gds., 286 N.C. 51, 209 S.E. 2d 776 (Sup. Ct. 1974); Humber v. Morton, supra, 426 S.W. 2d at 561; Tavares v. Horstman, supra, 542 P. 2d at 1279. Courts have also come to realize that the two parties involved in this important transaction generally do not bargain as equals. The average buyer lacks the skill and expertise necessary to make an adequate inspection. See, e.g., Weeks v. Slavick Builders, Inc., supra, 180 N.W. 2d at 505; Tavares v. Horstman, supra, 542 P. 2d at 1279; Bearman, supra, 14 Vand. L. Rev. at 574; Note, "Expansion of Consumer Protection in the Purchase of New Homes," 3 W. St. U.L. Rev. 106, 109 (1975). Furthermore, most defects are undetectable to even the most observant layman and the expense of expert advice is often prohibitive. See, e.g., Note, "The Doctrine of Caveat Emptor as Applied to Both the Leasing and Sale of Real Property: The Need for Reappraisal and Reform," 2 Rutgers-Camden L.J. 120, 137 (1970).

The purchaser therefore ordinarily relies heavily upon the greater expertise of the vendor to ensure a suitable product, see, e.g., Bearman, supra, 14 Vand. L. Rev. at 545-546; Comment, "Extension of Implied Warranties to Developer-Vendors of Completed New Homes," 11 Urb. L. Ann. at 260 (1976), and this reliance is recognized by the building trade. See, e.g., Pollard v. Saxe & Yolles Dev. Co., supra, 115 Cal. Rptr. at 651, 525 P. 2d at 91.

Aside from superior knowledge, the builder-vendor is also in a better position to prevent the occurrence of major problems. [***290] Elderkin v. Gaster, supra, 288 A. 2d at 776-777; House v. Thornton, 76 Wash. 2d 428, 457 P. 2d 199, 204 (Sup. Ct. 1969). See, e.g., Note,
"The Doctrine of Caveat Emptor as Applied to Both the Leasing and Sale of Real Property: The Need for Reappraisal and Reform," 2 Rutger-Camden L.J. at 137. As one court has stated, "[i]f there is a comparative standard of innocence, as well as of culpability, the defendants who built and sold the house were less innocent and more culpable than the wholly innocent and unsuspecting buyer." House v. Thornton, supra, 457 P. 2d at 204.

It is not in expertise alone that the builder-vendor is generally superior. In the vast majority of cases the vendor also enjoys superior bargaining position. See, e.g., Weeks v. Slavick Builders, Inc., supra, 180 N.W. 2d at 505; Comment, "Expansion of Consumer Protection in the Purchase of New Homes," supra, 3 W. St. U.L. Rev. at 109-110; Note, "The Doctrine of Caveat Emptor as Applied to Both the Leasing and Sale of Real Property: The Need for Reappraisal and Reform," supra, 2 Rutgers-Camden L.J. at 136-137. Standard form contracts are generally utilized and "[e]xpress warranties are rarely given, expensive, and impractical for most buyers to negotiate. Inevitably the buyer is forced to rely on the skills of the seller." Comment, "Extension of Implied Warranties to Developer-Vendors of Completed New Homes," supra, 11 Urb. L. Ann. at 260.

The application of an implied warranty of habitability to sellers of new homes is further supported by the expectations of the parties. Clearly every builder-vendor holds himself out, expressly or impliedly, as having the expertise necessary to construct a livable dwelling. It is equally as obvious that almost every buyer acts upon these representations and expects that the new house he is buying, whether already constructed or not yet built, will be suitable for use as a home. Otherwise, there would be no sale. As the California Supreme Court has noted:

In the setting of the marketplace, the builder or seller of new construction makes implied representations, ordinarily indispensable to the sale, that the builder has used reasonable skill and judgment. * * * On the other hand, the purchaser does not usually possess the knowledge of the builder and is unable to fully examine a complete house and its components. * * * Further unlike the purchaser of an older building, he has no opportunity to observe how the building has withstood the passage of time. Thus he generally relies on those in a position to know and his reliance is surely evident to the construction industry.

That Court has therefore decided that "builders and sellers of new construction should be held to what is impliedly represented -- that the completed structure was designed and constructed in a reasonably workmanlike manner." Id., 115 Cal. Rptr. at 651, 525 P. 2d at 91.

Other considerations also press in favor of an implied warranty of habitability. As previously mentioned, implied warranties of merchantability and fitness have become standard fare in the area of personal property; and the failure to provide similar protection to a family's most important purchase has become increasingly indefensible. Moreover, the existence of warranties may well discourage sloppy building practices and encourage care in the construction of houses. See, e.g., Humber v. Morton, supra, 426 S.W. 2d at 562; 7 Williston, Contracts, § 926A at 818 (3d Ed. 1963). As noted by the Supreme Court of Texas:

The caveat emptor rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices. It does a disservice not only to the ordinary prudent purchaser but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work.
Thus, the application of an implied warranty has the salutary effects of placing liability on the party responsible for placing the defective article in the stream of commerce and encouraging more careful and thorough building practices.

B. New Jersey Case Law: Schipper v. Levitt

New Jersey has not been inactive in charging builders with the responsibility of constructing habitable dwellings. On the contrary, the courts of this State have been leaders in this area, as in other aspects of consumer protection. See, e.g., Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358 (1960); Santor v. A & M Karagheusian, Inc., 44 N.J. 52 (1965). In Schipper v. Levitt & Sons, Inc., 44 N.J. 70 (1965), this Court, in an opinion which has been cited for its "momentous impact on the development of protection for the new home buyer," Comment, "Expansion of Consumer Protection in the Purchase of New Homes," supra, 3 W. St. U.L. Rev. at 111, held that [HN2] builder-vendors are strictly liable in tort for injuries caused by defects existing in a newly constructed home.

The infant plaintiff in Schipper had been badly scalded due to the unusually high temperature of water coming from a "hot" water faucet. After holding that the builder-vendor, Levitt & Sons, Inc., "a well known mass developer of homes," 44 N.J. at 74, could be held liable on negligence principles, id. at 80-88, this Court turned its attention to the areas of warranty and strict liability.

We noted that caveat emptor was an established doctrine in real estate law but emphasized that:

\[\text{the law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected.}\]

\[\text{[Id. at 90]}\]

We then stated that "there are no meaningful distinctions between Levitt's mass production and sale of homes and the mass production and sale of automobiles and the pertinent overriding policy considerations are the same." Id. We found therefore that the warranty or strict liability principles of prior New Jersey personalty cases should be extended to the sale of new homes.

When a vendee buys a development house from an advertised model he clearly relies on the skill of the developer and on its implied representation that the house will be erected in reasonably workmanlike manner and will be reasonably fit for habitation. He has no architect or other professional adviser of his own, his actual examination is, in the nature of things, largely superficial, and his opportunity for obtaining meaningful protective changes in the conveyancing documents prepared by the builder vendor is negligible.

\[\text{[Id. at 91]}\]

The defendant's contention that caveat emptor should determine the Court's decision was disposed of as follows:

The arguments advanced by Levitt in opposition to the application of warranty or strict liability principles appear to us to lack substantial merit. Thus its contention that caveat emptor should be applied and the deed viewed as embodying all the rights and responsibilities of the parties disregards the realities of the situation. Caveat emptor developed when the buyer and seller were in an equal bargaining position and they could readily be expected to protect themselves in the deed. Buyers of mass produced development homes are not on an equal footing with the builder vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale. Levitt expresses the fear of "uncertainty and chaos" if responsibility for defective construction is continued after the builder vendor's delivery of the deed and its loss of control of the premises, but we fail to see why this should be anticipated or why it should materialize any more than in the products liability field where there has been no such result.
Further, the Court denied that it was making developers into "virtual insurers" of the property, noting that the test [*293] of fitness was one of reasonableness and not "absolute perfection." Id at 92.

C. [***29] The Builder's Contractual Liability

Although Schipper was primarily concerned with the tort responsibility of a builder-vendor of new homes, the underlying basis of the Court's decision -- that the outmoded concept of caveat emptor should be abandoned -- is equally applicable in the present context. 4 For the reasons first expressed in Schipper and more fully explicated in Part A of today's opinion, we therefore hold that [HN3] builder-vendors do impliedly warrant that a house which they construct will be of reasonable workmanship and habitability. An implicit understanding of the parties to a construction contract is that the agreed price is tendered as consideration for a home that is reasonably fit for the purpose for which it was built -- i.e., habitation. Illusory value is a poor substitute for quality. The consumer-purchaser should not be subjected to harassment caused by structural defects. He deserves both the focus and concern of the law. Any other result would be intolerable and unjust. See, e.g., Tavares v. Horstman, supra, 542 P. 2d at 1279.

4 Schipper, as noted above, involved an action for personal injuries by a third party not in privity with the builder. Thus, it was natural that the Court would primarily be concerned with tort principles. Nevertheless, it is striking that the Court talked repeatedly of "warranty or strict liability," id. at 90, 91, 92, 96 (emphasis added), cited contract as well as tort cases, and spoke of unequal bargaining power and "the comparable warranty of merchantability in the sale of goods," id. at 92. This could well support an argument that the Court meant to allow recovery on either theory depending upon the facts of the particular case.

[***30] Further, we hold that such [HN4] a warranty arises whenever a consumer purchases from an individual who holds himself out as a builder-vendor of new homes -- regardless of whether he can be labeled a "mass producer." Whether the builder be large or small, the purchaser relies upon his superior [*294] knowledge and skill, and he impliedly represents that he is qualified to erect a habitable dwelling. He is also in a better position to prevent the existence of major defects. Whether or not engaged in mass production, builders utilize standard form contracts, and hence the opportunity to bargain for protective clauses is by and large nonexistent. Finally, it is the builder who has introduced the article into the stream of commerce. Should defects materialize, he -- as opposed to the consumer purchaser -- is the less innocent party.

That a consumer purchases from a "small-scale" builder-vendor does not alter the fact that to him this transaction is one of, if not the, major investment of his lifetime and hence worthy of great protection. Moreover, there is no less need to discourage faulty craftsmanship merely because the builder is not a mass producer. Indeed, a holding that [***31] small builders are exempt from the implied warranty of habitability would encourage the very "unscrupulous, fly-by-night operator[s] and purveyor[s] of shoddy work" which were condemned by the court in Humber v. Morton, supra, 426 S.W. 2d at 562. We shall not place our imprimatur upon a rule which would have such an effect. Finally, it should be noted that tribunals in other jurisdictions have extended warranties to small builder-vendors. See, e.g., Smith v. Old Warson Dev. Co., 479 S.W. 2d 795 (Sup. Ct. Mo. 1972) (en banc); Hartley v. Ballou, supra; Lane v. Trenholm Building Co., supra; Bolkum v. [***1293] Staab, supra. See generally, Roberts, supra note 2 at 863.

We need not here decide whether an implied warranty of habitability applies to every sale of a new home. This is not a case, for example, where an individual builds a house for his own use and later decides to sell. The sale here was "commercial in nature, not casual or personal." Bolkum v. Staab, supra, 346 A. 2d at 211. Mr. Mianecki placed a general advertisement evidencing his willingness to construct a home on a particular plot of land. He had previously built two [***32] homes in the same general neighborhood and so informed plaintiffs. By the time of trial he declared his profession to [*295] be that of "builder." Although he was also employed as a construction engineer, he was nevertheless in "business" as a builder, albeit on a part-time basis. Under these circumstances, we have no hesitation in finding that the doctrine of implied warranty applies. 5

5 In addition to the applicability of warranty to "casual" sales of new homes, we explicitly leave open several other questions. First, as previously mentioned, this case was tried on the theory of implied warranty. We therefore leave unanswered whether strict liability should be applied to other than mass-builders. Differences in the theories might justify differing results. See generally, Roberts, supra note 2, at 863; Comment, "Expansion of Consumer Protection in the Purchase of New Homes," supra, 3 W. St. U.L. Rev. at 118-127. Strict liability has, however, been applied to
small builders. See Patitucci v. Drelich, 153 N.J. Super. 177 (Law Div. 1977). We further decline to consider whether a different result should apply in third party actions. In this case we clearly have privity of contract, which was lacking in Schipper. We therefore leave for more appropriate cases the resolution of the contours of and requirements for suits by injured third parties. Furthermore, we do not address questions regarding the applicability of implied warranties to the sale of used houses. But cf. Weintraub v. Krobatsch, 64 N.J. 445 (1974) (rescission may be predicated upon deliberate concealment of or failure to disclose roach infestation). Finally, we are not in this case called upon to determine whether express disclaimers of implied warranty by builder-vendors void as against public policy or require special procedural safeguards.

D. Whether an implied warranty of habitability should extend to potability of water

Defendants maintain that they should not be held responsible for the lack of potable water inasmuch as the defect was not due to any substandard construction on their part. Although we concede that the considerations in favor of an implied warranty do not weigh as strongly in a case such as this, nevertheless we are convinced that of the two parties the burden should fall on the less innocent defendant.

In Elderkin v. Gaster, supra, the Supreme Court of Pennsylvania considered a closely analogous factual situation. There, the plaintiffs had purchased a lot and home in the ironically named Spring Valley. Water was to be provided by a private system. The quality and quantity of water to be supplied were not mentioned in the contracts and deed. Upon completion of the home, however, it was discovered that the water was unpotable in that it contained excess nitrates and detergents. The Court rejected the builder's contention that no implied warranty should arise, stating that:

In several cases, * * * the implied warranty of habitability was found to have been breached [*34] not because of structural defects, but because of the unsuitable nature of the site selected for the home. This seems to be a natural application of the implied warranty of habitability of the home, since selection and subdivision of the home sites are within the exclusive domain of the builder-vendors. The developer holds himself out, not only as a construction expert, but as one qualified to know what sorts of lots are suitable for the types of homes to be constructed.

Of the two parties to the transaction, the builder-vendor is manifestly in a better position than the normal vendee to guard against defects in the home site and if necessary to protect himself against potential but unknown defects in the projected home site.

While we can adopt no set standard for determining habitability, it goes without saying that a potable water supply is essential to any functional living unit; [*1294] without drinkable water, the house cannot be used for the purpose intended. Accordingly, we find the implied warranty of habitability to have been breached by the appellee in the instant case.

[*288 A. 2d at 777 (citations omitted)]

We note our own Legislature's emphasis on the importance of water quality. The Legislature has declared that "it is a paramount policy of the State to protect the purity of the water we drink * * *." N.J.S.A. 58:12A-2 (part of the Safe Water Drinking Act, N.J.S.A. 58:12A-1 et seq.). Further concern for water quality can be found in the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.

The North Carolina Court of Appeals has reached a similar result. Lyon v. Ward, 28 N.C. App. 446, 221 S.E. 2d 727 (1976). In that case the well failed to deliver an adequate supply of usable water. The Court there held that:

[*297] Because an adequate supply of usable water is an absolute essential utility to a dwelling house, we believe that the initial purchaser of a house from the builder-vendor can reasonably expect that a well constructed on the premises by the builder-vendor will provide an adequate supply of usable water. We hold that at the time of the passing of the deed or the taking of possession the builder-vendor of a house impliedly warrants to the initial purchaser that a well constructed on the
premises by him will provide water for
the dwelling house which is adequate and
usable.

[221 S.E. 2d at 729-730]


Other cases have found a breach of an implied [*36] warranty in analogous defects involving the suitability of the site, even though defendants had not improperly constructed or designed a building. In House v. Thornton, supra, the Supreme Court of Washington held the builder liable for damages resulting from instability of the soil. The court noted that there "was no proof that the defendants failed to properly design and erect the building, or that they used defective materials or in any respect did an unworkmanlike job * * *." Yet

they sold and turned over to plaintiffs a brand-new $ 32,000 residence which turned out to be unfit for occupancy. As between vendor and purchaser, the builder-vendors, even though exercising reasonable care to construct a sound building, had by far the better opportunity to examine the stability of the site and to determine the kind of foundation to install. Although hindsight, it is frequently said, is 20-20 and defendants used reasonable prudence in selecting the site and designing and constructing the building, their position throughout the process of selection, planning and construction was markedly superior to that of their first purchaser-occupant. To borrow an idea from equity, [*37] of the innocent parties who suffered, it was the builder-vendor who made the harm possible. If there is a comparative standard of innocence, as well as of culpability, the defendants [*298] who built and sold the house were less innocent and more culpable than the wholly innocent and unsuspecting buyer. 7

[457 P. 2d at 203-204]

Other courts have reached similar results. See, e.g., F & S Construction Co. v. Berube, 322 F. 2d 782 (10th Cir. 1963) (applying Colorado law); Mulhern v. Hederich, 163 Colo. 275, 430 P. 2d 469 (Sup. Ct. 1967); Glisan v. Smolenske, 153 Colo. 274, 387 P. 2d 260 (Sup. Ct. 1963); Waggoner v. Midwestern Dev. Inc., supra.

7 This equitable sentiment was echoed by the Supreme Court of South Carolina which stated that "liability is not founded upon fault, but because [the seller] has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects." Lane v. Trenholm Building Co., supra, 229 S.E. 2d at 731.

[***38] We agree with the rationale of the above decisions. Accordingly, we hold that [HN5] [**1295] the implied warranty of habitability encompasses the potability of the water supply. 8

8 We also wish to briefly comment as to the time element in this case. As noted above, the quality of the water being supplied to the plaintiffs decreased sharply in the spring of 1973. There is some question as to whether defendants should be held responsible for defects manifesting themselves only months after the sale of the house. We also noted, however, that the jury could well have found that the water was never potable. Moreover, the jury was instructed that in dealing with the change in water quality, the test to apply was one of reasonableness in determining whether the damage was proximate enough to the original defect so as to make the builder liable. We hold that this is the correct standard, see, e.g., Waggoner v. Midwestern Dev., Inc., supra, 154 N.W. 2d at 809; Tavares v. Horstman, supra, 542 P. 2d at 1282; Smith v. Old Warson Dev. Co., supra, 479 S.W. 2d at 801, and that there was sufficient evidence to support the jury's conclusion.

[***39] III

Mitigation of Damages

Defendants maintain that plaintiffs failed to mitigate damages in that they rejected Mianecki's offer of $ 50,000 and sold the home to another purchaser for approximately [*299] $ 35,000. We find that their contention in this regard lacks merit.

It is well settled that [HN6] injured parties have a duty to take reasonable steps to mitigate damages. See, e.g., McGraw v. Johnson, 42 N.J. Super. 267, 273 (App.
In this case, however, there is ample credible evidence from which a jury could have found that plaintiffs did make all reasonable attempts. Defendant’s proposal to purchase the home was made on the eve of trial and could reasonably have been construed by the McDonalds as an offer to settle the entire case. Plaintiffs testified that this was their understanding. If this were true, then plaintiffs would be justified in rejecting the proposal. Moreover, according to plaintiffs’ testimony, they were not apprised of the offer to purchase until after they had reached an oral agreement to sell the house to another individual. This would supply another basis for finding that plaintiffs acted reasonably under the circumstances. [***40] The jury heard both sides of the controversy. Their decision is supportable on the record and thus will not be disturbed.

IV

Conclusion

For the reasons set forth herein, we conclude that (1) the doctrine of implied warranty of habitability applies to the construction of new homes by builder-vendors whether or not they are mass-developers, and (2) potability of the water supply is included within the items encompassed by the implied warranty. Caveat emptor is an outmoded concept and is hereby replaced by rules which reflect the needs, policies and practices of modern day living. It is our conclusion that in today’s society it is necessary that consumers be able to purchase new homes without fear of being “stuck” with an uninhabitable “lemon.” Caveat emptor no longer accords with modern day practice and should therefore be relegated to its rightful place in the pages of history.

[*300] For the foregoing reasons, the judgment of the Appellate Division is affirmed.
NATALIE WEINTRAUB, PLAINTIFF-RESPONDENT, v. DONALD P. KROBATSCH AND ESTELLA KROBATSCH, DEFENDANTS-APPELLANTS, AND THE SERAFIN AGENCY, INC., DEFENDANT-RESPONDENT

[NO NUMBER IN ORIGINAL]

Supreme Court of New Jersey

64 N.J. 445; 317 A.2d 68; 1974 N.J. LEXIS 229

November 20, 1973, Argued March 19, 1974, Decided

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant purchasers sought review of the decision of the appellate court (New Jersey), which affirmed the trial court's entry of summary judgment in favor of respondent seller and directed appellants to pay damages to respondent seller and respondent real estate agency. Respondent seller brought the suit after appellants rescinded on a contract to purchase a house owned by respondent seller.

OVERVIEW: Appellant purchasers contracted to purchase a home owned by respondent seller and, as required by the contract, gave a deposit, which was to be held in escrow on behalf of respondent seller, to respondent real estate agency. Prior to closing, appellants discovered that the house was infested with cockroaches and promptly attempted to rescind the contract. Respondent seller rejected the recission and filed a lawsuit against appellants and respondent real estate agency for damages in the amount of the deposit. Respondent real estate agency filed a cross-claim seeking payment of its commission. Appellants sought review of the appellate court's decision which affirmed the trial court's grant of summary judgment to respondent seller and directed appellants to pay damages to both respondents. The court reversed the appellate court's decision because appellants were entitled to a trial on the issue of whether respondent seller fraudulently concealed a material fact, that the house was infested with roaches, justifying appellants' recision of the contract to purchase the house.

OUTCOME: The court reversed and remanded the appellate court's order, entering summary judgment for respondent seller and real estate agency, because appellant purchasers were entitled to a trial on the issue of whether respondent seller fraudulently concealed a material fact, that the house was infested with roaches, justifying appellants' recision of the contract to purchase the house.

CORE TERMS: purchaser's, seller, broker, nondisclosure, buyer, infested, summary judgment, rescind, termite, Law Division's, fraudulent concealment, concealment, infestation, rescission, grounded, silence, filled, fair dealing, fraudulent, deposit, escrow, present condition, real estate agent, duty to disclose, caveat emptor, unobservable, inspected, disclose, exterminator, real estate broker

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > General Overview

Civil Procedure > Appeals > Standards of Review

[HN1] When a matter is disposed of by summary judgment, a reviewing court must resolve doubts in favor of the appellants and must accept their factual allegations, along with the inferences most favorable to them.

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

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Torts > Business Torts > Fraud & Misrepresentation > Nondisclosure > General Overview

[HN2] Silence may be fraudulent and that relief may be granted to one contractual party where the other suppresses facts which he, under the circumstances, is bound in conscience and duty to disclose to the other party, and in respect to which he cannot, innocently, be silent.

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

[HN3] Fraud may consist of concealment of a material fact.

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

[HN4] One may be guilty of fraud by his silence, as where it is expressly incumbent upon him to speak concerning material matters that are entirely within his own knowledge.

Business & Corporate Law > Agency Relationships > Disclosure > Undisclosed Principal

Real Property Law > Brokers > Discipline, Licensing & Regulation

Real Property Law > Brokers > Fiduciary Responsibilities

[HN5] A real estate agent or broker is not only liable to a buyer for his affirmative and intentional misrepresentations to a buyer, but he is also liable for mere nondisclosure to the buyer of defects known to him and unknown and unobservable by the buyer. The underlying settled rule is that every person connected with a fraud is liable for the full amount of the damages and the wrongdoers, if any, are jointly and severally liable. Whether a matter not disclosed by a real estate broker or agent is of sufficient materiality to affect the desirability or value of the property sold, and thus make him liable for fraudulent nondisclosure, depends upon the facts of each case.

COUNSEL: [***1] Mr. Charles J. Farley, Jr. argued the cause for the defendants-appellants (Messrs. Farley & Farley, attorneys).

Mr. Dean A. Gaver argued the cause for the plaintiff-respondent (Messrs. Hannoch, Weisman, Stern & Besser, attorneys).

Mr. Roger K. Bentley, II argued the cause for the defendant-respondent (Messrs. Zlotkin & Bentley, attorneys).

JUDGES: For reversal and remandment — Acting Chief Justice Jacobs, Justices Hall, Sullivan, Pashman and Clifford and Judge Conford. For affirmance — None. The opinion of the Court was delivered by Jacobs, J.

OPINION BY: JACOBS

OPINION

[*446] [**69] The judgment entered in the Law Division, as modified in an unreported opinion of the Appellate Division, directed that the appellants Donald P. Krobatsch and Estella Krobatsch, his wife, pay the sum of $4,250 to the plaintiff Natalie Weintraub and the sum of $2,550 to the defendant The Serafin Agency, Inc. We granted certification on the application of the appellants. 63 N.J. 498 (1973).

The procedural steps below need not be dealt with at this point, other than to note that oral testimony was never taken and the matter was disposed of by summary judgment [***2] on the basis of meagre pleadings and conclusory affidavits. For present purposes [HN1] we must resolve doubts in favor of the appellants and must accept their factual allegations, along with the inferences most favorable to them. See Ruvolo v. [*447] American Cas. Co., 39 N.J. 490, 499 (1963); Frank Rizzo, Inc. v. Alatsas, 27 N.J. 400, 405 (1958); Heuter v. Coastal Air Lines, Inc., 12 N.J. Super. 490, 495 (App. Div. 1951). On that approach the following appears:

Mrs. Weintraub owned and occupied a six-year-old English-town home which she placed in the hands of a real estate broker (The Serafin Agency, Inc.) for sale. The Krobatsches were interested in purchasing the home, examined it while it was illuminated and found it suitable. On June 30, 1971 Mrs. Weintraub, as seller, and the Krobatsches, as purchasers, entered into a contract for the sale of the property for $42,500. The contract provided that the purchasers had inspected the property and were fully satisfied with its physical condition, that no representations had been made and that no responsibility was assumed [***70] by the seller as to the present or future condition of the premises. [***3] A deposit of $4,250 was sent by the purchasers to the broker to be held in escrow pending the closing of the transaction. The purchasers requested that the seller have the house fumigated and that was done. A fire after the signing of the contract caused damage but the purchasers indicated readiness that there be adjustment at closing.

During the evening of August 25, 1971, prior to closing, the purchasers entered the house, then unoccupied, and as they turned the lights on they were, as described in their petition for certification, "astonished to see roaches literally running in all directions, up the walls, drapes, etc." On the following day their attorney wrote a letter to Mrs. Weintraub, care of her New York law firm, advising that on the previous day "it was dis-
covered that the house is infested with vermin despite the fact that an exterminator has only recently serviced the house" and asserting that "the presence of vermin in such great quantities, particularly after the exterminator was done, rendered the house as unfit for human habitation at this time and therefore, the contract is rescinded." On September 2, 1971 an exterminator wrote to Mr. Krobatsch advising that [***4] he had examined the premises [*448] and that "cockroaches were found to have infested the entire house." He said he could eliminate them for a relatively modest charge by two treatments with a twenty-one day interval but that it would be necessary to remove the carpeting "to properly treat all the infested areas."

Mrs. Weintraub rejected the rescission by the purchasers and filed an action in the Law Division joining them and the broker as defendants. Though she originally sought specific performance she later confined her claim to damages in the sum of $ 4,250, representing the deposit held in escrow by the broker. The broker filed an answer and counterclaim seeking payment of its commission in the sum of $ 2,550. There were opposing motions for summary judgment by the purchasers and Mrs. Weintraub, along with a motion for summary judgment by the broker for its commission. At the argument on the motions it was evident that the purchasers were claiming fraudulent concealment or nondisclosure by the seller as the basis for their rescission. Thus at one point their attorney said: "Your honor, I would point out, and it is in my clients' affidavit, every time that they inspected [***5] this house prior to this time every light in the place was illuminated. Now, these insects are nocturnal by nature and that is not a point I think I have to prove through someone. I think Webster's dictionary is sufficient. By keeping the lights on it keeps them out of sight. These sellers had to know they had this problem. You could not live in a house this infested without knowing about it."

The Law Division denied the motion by the purchasers for summary judgment but granted Mrs. Weintraub's motion and directed that the purchasers pay her the sum of $ 4,250. It further directed that the deposit monies held in escrow by the broker be paid to Mrs. Weintraub in satisfaction of her judgment against the purchasers. See Oliver v. Lawson, 92 N.J. Super. 331, 333 (App. Div. 1966), certif. denied, 48 N.J. 574 (1967); It denied the broker's summary judgment motion for its commission but held that matter for trial. On [*449] appeal, the Appellate Division sustained the summary judgment in Mrs. Weintraub's favor but disagreed with the Law Division's holding that the broker's claim must await trial. It considered that since the purchasers were summarily held [***6] to have been in default in rescinding rather than in proceeding with the closing, they were responsible for the commission. See Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 558-62 (1967). Accordingly, it modified the Law Division's judgment to the end that the purchasers were directed to pay not [***7] only the sum of $ 4,250 to Mrs. Weintraub but also the sum of $ 2,550 to the broker.

Before us the purchasers contend that they were entitled to a trial on the issue of whether there was fraudulent concealment or nondisclosure entitling them to rescind; if there was then clearly they were under no liability to either the seller or the broker and would be entitled to the return of their deposit held by the broker in escrow. See Keen v. James, 39 N.J. Eq. 527, 540 (E. & A. 1885), where Justice Dixon, speaking for the then Court of last resort, pointed out that [HN2] "silence may be fraudulent" and that relief may be granted to one contractual party where the other suppresses facts which he, "under the circumstances, is bound in conscience and duty to disclose to the other party, and in respect to which he cannot, innocently, be silent." 39 N.J. Eq. at 540-41. [***7] See also Grossman Furniture Co. v. Pierre, 119 N.J. Super. 411, 420 (Essex Co. Ct. 1972); Heuter v. Coastal Air Lines, Inc., supra, 12 N.J. Super. at 495-97; 12 Williston, Contracts § 1498 (3d ed. 1970); Prosser, Torts § 99 (4th ed. 1971); Keeton, "Fraud -- Concealment and Non-Disclosure," 15 Tex. L. Rev. 1 (1936); Goldfarb, "Fraud and Nondisclosure in the Vendor-Purchaser Relation," 8 Wes. Res. L. Rev. 5 (1956).

Mrs. Weintraub asserts that she was unaware of the infestation and the Krobatsches acknowledge that, if that was so, then there was no fraudulent concealment or nondisclosure on her part and their claim must fall. But the purchasers allege that she was in fact aware of the infestation and at [*450] this stage of the proceedings we must assume that to be true. She contends, however, that even if she were fully aware she would have been under no duty to speak and that consequently no complaint by the purchasers may legally be grounded on her silence. She relies primarily on cases such as Swinton v. Whittington Sav. Bank, 311 Mass. 677, 42 N.E.2d 808, 141 A.L.R. 965 (1942), and Taylor v. Heisinger [***8] , 39 Misc. 2d 955, 242 N.Y.S.2d 281 (Sup. Ct. 1963). Taylor is not really pertinent since there the court found that the seller had "no demonstrated nor inferable knowledge of the condition complained of." 242 N.Y.S.2d at 286. Swinton is pertinent but, as Dean Prosser has noted (Prosser, supra at 696), it is one of a line of "singularly unappetizing cases" which are surely out of tune with our times.

In Swinton the plaintiff purchased a house from the defendant and after he occupied it he found it to be infested with termites. The defendant had made no verbal or written representations but the plaintiff, asserting that the defendant knew of the termites and was under a duty

In Obde v. Schemeyer, supra, the defendants sold an apartment house to the plaintiffs. The house was termite infested but that fact was not disclosed by the sellers to the purchasers who later sued for damages alleging fraudulent concealment. The sellers contended that they were under no obligation whatever to speak out and they relied heavily on the decision of the Massachusetts court in Swinton (311 Mass. 677, 42 N.E.2d 808, 141 A.L.R. 965). The Supreme Court of Washington flatly rejected their contention, holding that though the parties had dealt at arms length the sellers were under [***11] "a duty to inform the plaintiffs of the termite condition" of which they were fully aware. 353 P.2d at 674; cf. Hughes v. Stusser, 68 Wash. 2d 707, 415 P.2d 89, 92 (1966). In the course of its opinion the court quoted approvingly from Dean Keeton's article supra, in 15 Tex. L. Rev. 1. There the author first expressed his thought that when Lord Cairns suggested in Peek v. Gurney, L.R. 6 H.L. 377 (1873), that there was no duty to disclose facts, no matter how "morally censorable" (at 403), he was expressing nineteenth century law as shaped by an individualistic philosophy based on freedom [*452] of contracts and unconcerned with morals. He then made the following comments which fairly embody a currently acceptable principle on which the holding in Obde may be said to be grounded:

In the present stage of the law, the decisions show a drawing away from this idea, and there can be seen an attempt by many courts to reach a just result in so far as possible, but yet maintaining the degree of certainty which the law must have. The statement may often be found that if either party to a contract of sale conceals or suppresses a [***12] material fact which he is in good faith bound to disclose then his silence is fraudulent.

The attitude of the courts toward nondisclosure is undergoing a change and contrary to Lord Cairns' famous remark it would seem that the object of the law in these cases should be to impose on parties to the transaction a duty to speak whenever justice, equity, and fair dealing demand it. This statement is made only with reference to instances where the party to be charged is an actor in the transaction. This duty to speak does not result from an implied representation by silence, but exists because a refusal to speak constitutes unfair conduct. 15 Tex. L. Rev. at 31.
. . . by the turn of the century, Washington had recognized that "the tendency of the more recent cases has been to restrict rather [*453] than extend the doctrine of caveat emptor." Wooddy v. Benton Water Co., 54 Wash. 124, 127, 102 P. 1054, 1056 (1909). And, "[a]s would be expected when change in the law is taking place, there is no unanimity" in the decisions of other jurisdictions. Keeton, Rights of Disappointed Purchasers, 32 Tex. L. Rev. 1, 4 (1953). However, there is an "amorphous tendency" on the part of most courts to grant relief to a purchaser for nondisclosure of facts which would probably affect the purchaser's decision to purchase. W. Prosser, Torts § 101 (3d ed. 1964). And consistent [***14] with Restatement of Torts § 551, comment b (1938), relief by way of rescission is more readily granted than damages. W. Prosser, Torts § 105 (3d ed. 1964). 491 P.2d at 1314.

In Loghry v. Capel, supra, the plaintiffs purchased a duplex from the defendants. They examined the house briefly on two occasions and signed a document stating that they accepted the property in its "present condition." 132 N.W.2d at 419. They made no inquiry about the subsoil and were not told that the house had been constructed on filled ground. They filed an action for damages charging that the sellers had fraudulently failed to disclose that the duplex was constructed on improperly compacted filled ground. The jury found in their favor and the verdict was sustained on appeal in an opinion which we consider of particular pertinence to the present stage of litigation in the matter before us:

The principles controlling the conduct of a real estate agent or broker in the sale of real estate are well established in this state. [HN5] He is not only liable to a buyer for his affirmative and intentional misrepresentations to a buyer, but he is also liable for mere nondisclosure [***17] to the buyer of defects known to him and unknown and unobservable by the buyer. (Lingsch v. Savage, 213 Cal. App. 2d 729, 29 Cal. Rptr. 201; Crawford v. Nastos, 182 Cal. App. 2d 659, 665, 6 Cal. Rptr. 425; Rothstein v. Janss Investment Corp., 45 Cal. App. 2d 64, 73, 113 P. 2d 465; Rogers v. Warden, 20 Cal. 2d 286, 289, 125 P. 2d 7.) The underlying settled rule is that every person connected with a fraud is liable for the full amount of the damages and the wrongdoers, if any, are jointly and severally liable. (Crawford v. Nastos, supra, 182 Cal. App. 2d p. 665, 6 Cal. Rptr. p. 429; [*455] Swasey v. deL'Eiance, 17 Cal. App. 2d 713, 718, 62 P. 2d 753; Ross v. George Pepperdine

...the court stated [***16] that the plaintiffs were surely not required "to make a night inspection in order to ascertain whether the water situation with reference to this residence was different from what it was during the day." 206 S.W.2d at 297.

In Saporta v. Barbagelata, 220 Cal. App. 2d 463, 33 Cal. Rptr. 661 (1963), the plaintiffs sought to rescind their purchase of a house on the ground that they were defrauded by the seller's real estate agent or broker, "by reason of the concealment and nondisclosure that said house contained an extensive termite and fungus infestation, and by certain representations that said house was not so infested." A summary judgment against the plaintiffs was granted by the trial judge but was reversed on [**74] appeal in an opinion which took note of the general rule that [HN4] "one may be guilty of fraud by his silence, as where it is expressly incumbent upon him to speak concerning material matters that are entirely within his own knowledge." 206 S.W.2d at 296. With respect to the plaintiffs' failure to ascertain the water situation before their purchase the court stated [***16] that the plaintiffs were surely not required "to make a night inspection in order to ascertain whether the water situation with reference to this residence was different from what it was during the day." 206 S.W.2d at 297.

...the lower court dismissed it on the ground that the defendants had not made any written or verbal representations and the plaintiffs had "inspected the property, knew the source of the water supply, [*454] and could have made specific inquiry of these defendants or ascertained from other sources the true situation and, therefore, are estopped." 206 S.W.2d at 296. The dismissal was reversed on appeal in an opinion which took note of the general rule that [HN4] "one may be guilty of fraud by his silence, as where it is expressly incumbent upon him to speak concerning material matters that are entirely within his own knowledge." 206 S.W.2d at 296. With respect to the plaintiffs' failure to ascertain the water situation before their purchase the court stated [***16] that the plaintiffs were surely not required "to make a night inspection in order to ascertain whether the water situation with reference to this residence was different from what it was during the day." 206 S.W.2d at 297.

In Simmons v. Evans, supra, the defendants owned a home which was serviced by a local water company. The company supplied water during the daytime but not at night. The defendants sold their home to the plaintiffs but made no mention of the limitation on the water service. The plaintiffs filed an action to rescind their pur-
teriality in the transaction would clearly not call for judicial intervention. While the described condition may not have been quite as major as in the termite [*456] cases which were concerned with structural impairments, to the purchasers here it apparently was of such magnitude and was so repulsive as to cause them to rescind imme-
diately though they had earlier indicated readiness that there be adjustment at closing for damage resulting from a fire which occurred after the contract was signed. We are not prepared at his time to say that on their showing they acted either unreasonably or without equitable justi-

Our courts have come a long way since the days when the judicial emphasis was [**75] on formal [***20] rules and ancient precedents rather than on modern concepts of justice and fair dealing. While ad-
mittedly our law has progressed more slowly in the real property field than in other fields, there have been nota-
ble stirrings even there. See Schipper v. Levitt & Sons, Inc., 44 N.J. 70 (1965); Reste Realty Corporation v. Cooper, 53 N.J. 444 (1969); cf. Marini v. Ireland, 56 N.J. 130 (1970); Totten v. Gruzen, et al., 52 N.J. 202 (1968). In Schipper we elevated the duties of the builder-
vendor in the sale of its homes and in the course of our opinion we repeatedly stressed that our law should be based on current notions of what is "right and just." 44 N.J. at 90. In Reste we expressed similar thoughts in connection with the lease of real property. We there noted that despite the lessee's acceptance of the premises in their "present condition" (a stipulation comparable to that of the purchasers in their contract here), the landlord was under a duty to disclose a material latent condition, known to him but unobservable by the tenant; we pointed out that in the circumstances "it would be a wholly ineq-
utable application of caveat emptor to [***21] charge her with knowledge of it." 53 N.J. at 453-454. Both Schipper and Reste were departures from earlier deci-
sions which are nonetheless still relied on by the seller here. No purpose would now be served by pursuing any discussion of those earlier decisions since we are satis-
fied that current principles grounded on justice and fair dealing, embraced throughout this opinion, clearly call for a full trial below; [*457] to that end the judgment entered in the Appellate Division is:

Reversed and remanded.
§ 11:5-6.4 Obligations of licensees to public and to each other

(a) All licensees are subject to and shall strictly comply with the laws of agency and the principles governing fiduciary relationships. In accepting employment as an agent, the licensee pledges himself to protect and promote, as he would his own, the interests of the client or principal he has undertaken to represent; this obligation of absolute fidelity to the client's or principal's interest is primary but does not relieve the licensee from the obligation of dealing fairly with all parties to the transaction.

(b) Every licensee shall make reasonable effort to ascertain all material information concerning the physical condition of every property for which he or she accepts an agency or which he or she is retained to market as a transaction broker, and concerning the financial qualifications of every person for whom he or she submits an offer to his or her client or principal. Information about social conditions and psychological impairments as defined in (d) below is not considered to be information which concerns the physical condition of a property.

1. A reasonable effort to ascertain material information shall include at least:
   i. Inquiries to the seller or seller's agent about any physical conditions that may affect the property; and
   ii. A visual inspection of the property to determine if there are any readily observable physical conditions affecting the property.

2. As used in this section, information is "material" if a reasonable person would attach importance to its existence or non-existence in deciding whether or how to proceed in the transaction, or if the licensee knows or has reason to know that the recipient of the information regards, or is likely to regard it as important in deciding whether or how to proceed, although a reasonable person would not so regard it.

(c) Licensees shall disclose all information material to the physical condition of any property which they know or which a reasonable effort to ascertain such information would have revealed to their client or principal and when appropriate to any other party to a transaction. Licensees shall also disclose any actual or potential conflicts of interest which the licensee may reasonably anticipate.

1. With respect to off-site conditions which may materially affect the value of the residential real estate, in all sales contracts involving newly constructed residential real estate they prepare, licensees shall include a statement as set forth below. By including this statement in a contract of sale prepared by the licensee, the licensee shall be deemed to have fulfilled his or her disclosure obligations under (c) above with respect to such off-site conditions. The statement shall be in print as large as the predominant size print in the document and shall read as follows:

Reprinted with permission of LexisNexis and the Office of Administrative Law.
"NOTIFICATION REGARDING OFF-SITE CONDITIONS"

Pursuant to the New Residential Construction Off-Site Conditions Disclosure Act, P.L. 1995, c.253 (C.46:3C-1 et seq.), sellers of newly constructed residential real estate are required to notify purchasers of the availability of lists disclosing the existence and location of off-site conditions which may affect the value of the residential real estate being sold. The lists are to be made available by the municipal clerk of the municipality within which the residential real estate is located and in other municipalities which are within one-half mile of the residential real estate. The address(es) and telephone number(s) of the municipalities relevant to this project and the appropriate municipal offices where the lists are made available are listed below. Purchasers are encouraged to exercise all due diligence in order to obtain any additional or more recent information that they believe may be relevant to their decision to purchase the residential real estate. Purchasers are also encouraged to undertake an independent examination of the general area within which the residential real estate is located in order to become familiar with any and all conditions which may affect the value of the residential real estate.

The purchaser has five (5) business days from the date the contract is executed by the purchaser and the seller to send notice of cancellation of the contract to the seller. The notice of cancellation shall be sent by certified mail. The cancellation will be effective upon the notice of cancellation being mailed. If the purchaser does not send a notice of cancellation to the seller in the time or manner described above, the purchaser will lose the right to cancel the contract as provided in this notice.

Municipality _______________________________
Address _______________________________
Telephone Number _______________________

The statement shall either be included in the text of the contract itself or attached to the contract as an Addendum.

2. In all residential real estate sale contracts they prepare except contracts for newly constructed residential real estate, licensees shall include a statement as set forth below. The statement shall be in print as large as the predominant size print in the document and shall read as follows:

"NOTICE ON OFF-SITE CONDITIONS"

Pursuant to the New Residential Construction Off-site Conditions Disclosure Act, P.L. 1995, c.253 the clerks of municipalities in New Jersey maintain lists of off-site conditions which may affect the value of residential properties in the vicinity of the off-site condition. Purchasers may examine the lists and are encouraged to independently investigate the area surrounding this property in order to become familiar with any off-site conditions which may affect the value of the property. In cases where a property is located near the border of a municipality, purchasers may wish to also examine the list maintained by the neighboring municipality.

The statement shall either be included in the text of the contract itself or attached to the contract as an Addendum.

i. Licensees who possess actual knowledge of an off-site condition which may materially affect the value of residential real estate other than newly constructed properties shall disclose that information to prospective purchasers of such residential real estate affected by the condition. That disclosure shall be made prior to the signing of the contract by a prospective purchaser.

ii. In cases where the licensee did not possess actual knowledge of the presence of an off-site condition which might materially affect the value of the residential real estate, by virtue of including the foregoing statement in a contract of sale prepared by him or her, the licensee shall be deemed to have fulfilled his or her disclosure obligations under (c) above with respect to such off-site conditions.

3. As used in this subsection, the following words and terms shall have the following meanings:

i. "Newly constructed" means any dwelling unit not previously occupied, excluding dwelling units constructed solely for lease and units governed by the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. §§ 5402 et seq.

ii. "Off-site conditions" refers to the following conditions as set forth in the New Residential Construction Off-Site Conditions Disclosure Act, N.J.S.A. 46:3C-3 (P.L. 1995 c.253), or as amended:

(2) The latest sites known to and confirmed by the Department of Environmental Protection and included on the New Jersey master list of known hazardous discharge sites, prepared pursuant to P.L. 1982, c.202 (N.J.S.A. 58.10-23.15 et seq.);

(3) Overhead electric utility transmission lines conducting 240,000 volts or more;

(4) Electrical transformer substations;

(5) Underground gas transmission lines as defined in 49 C.F.R. 192.3;

(6) Sewer pump stations of a capacity equal to, or in excess of 0.5 million gallons per day and sewer trunk lines in excess of 15 inches in diameter;

(7) Sanitary landfill facilities as defined pursuant to section 3 of P.L. 1970, c.39 (N.J.S.A. 13:1E-3);

(8) Public wastewater treatment facilities; and


iii. "Residential real estate" means a property or structure or both which will serve as a residence for the purchaser.

(d) Information about social conditions or psychological impairments of a property is not considered information which affects the physical condition of a property. Subject to (d)3 below, licensees are not required by (c) above to disclose such information.

1. As used in this section, the term "social conditions" includes, but is not limited to, neighborhood conditions such as barking dogs, boisterous neighbors, and other conditions which do not impact upon or adversely affect the physical condition of the property.

2. As used in this section, the term "psychological impairments" includes, but is not limited to, a murder or suicide which occurred on a property, or a property purportedly being haunted.

3. Except as provided below, upon receipt of an inquiry from a prospective purchaser or tenant about whether a particular property may be affected by a social condition or psychological impairment, licensees shall provide whatever information they know about the social conditions or psychological impairments that might affect the property.

   i. In accordance with N.J.S.A. 10:5-1 et seq. (the "Law Against Discrimination"), licensees shall make no inquiry and provide no information on the racial composition of, or the presence of a group home in, a neighborhood. In response to requests for such information, licensees shall inform the persons making the inquiry that they may conduct their own investigation. This paragraph does not apply to the owner of a multiple dwelling or his agent to the extent that such inquiries are necessary for compliance with N.J.A.C. 13:10.

   ii. In accordance with N.J.S.A. 2C:7-6 through 11 ("Megan's Law") and the guidelines promulgated thereunder, licensees shall make no inquiry about and provide no information on notifications from a county prosecutor issued pursuant to that law. In response to requests for such information, licensees shall inform the person making the inquiry that information about registered sex offenders is maintained by the county prosecutor.

(e) In all contracts and leases on residential real estate they prepare, licensees shall include the following statement in print as large as the predominant size print in the document:

   MEGAN'S LAW STATEMENT—Under New Jersey law, the county prosecutor determines whether and how to provide notice of the presence of convicted sex offenders in an area.

   In their professional capacity, real estate licensees are not entitled to notification by the county prosecutor under Megan's Law and are unable to obtain such information for you. Upon closing the county prosecutor may be contacted for such further information as may be disclosable to you.

(f) Unless directed not to do so in writing by an owner as provided herein, every licensee shall fully cooperate with all other New Jersey licensees utilizing cooperation arrangements which shall protect and promote the interests of the
licensee’s client or principal. Collusion and discrimination with respect to commission rates and splits are prohibited as provided in N.J.A.C. 11:5-7.5 and 7.6.

1. The obligation to fully cooperate with all other licensees includes the requirements that listing brokers:

   i. Notify any Multiple Listing System to which a listing is to be submitted of having acquired the listing within 48 hours of the effective date of the listing;

   ii. Transmit to their principal(s) all written offers on their listings submitted by licensees with other firms within 24 hours of receipt of the written offer by their firm; and

   iii. Place no unreasonable restrictions upon the showing of properties listed with them to prospective purchasers who are working through cooperating brokers. A requirement that all appointments for showings must be made through the listing broker’s office is not considered an unreasonable restriction upon showings.

2. All requirements imposed by the obligation to fully cooperate shall be complied with on all listings unless the client or principal, with full knowledge of all relevant facts, expressly relieves the listing broker from one or more of those requirements in writing. Such a writing shall be signed by the owner and made an attachment to the listing agreement. Such a writing shall be made available for inspection by other brokers upon request.

3. All written listing agreements prepared by licensees shall include a provision as set forth below, which provision shall be in print larger than the predominant size print in the agreement. The provision may be included within the body of the listing agreement or attached to the listing as an addendum to it. Where the provision is made an addendum to the listing agreement it shall be signed by the owner at the same time that the owner signs the listing agreement. Prior to securing the owner’s signature on the listing agreement, the listing broker shall specify the complete formula for determining the commission split in the indicated location in the provision.

   **COMMISSION SPLITS**

   LISTING BROKERS USUALLY COOPERATE WITH OTHER BROKERAGE FIRMS BY SHARING INFORMATION ABOUT THEIR LISTINGS AND OFFERING TO PAY PART OF THEIR COMMISSION TO THE FIRM THAT PRODUCES A BUYER. THIS IS GENERALLY REFERRED TO AS THE "COMMISSION SPLIT."

   SOME LISTING BROKERS OFFER TO PAY COMMISSION SPLITS OF A PORTION OF THE GROSS COMMISSION, USUALLY EXPRESSED AS A PERCENTAGE OF THE SELLING PRICE, LESS A SIGNIFICANT DOLLAR AMOUNT. OTHER LISTING BROKERS OFFER A PORTION OF THE GROSS COMMISSION LESS ONLY A MINIMAL LISTING FEE OR LESS ZERO.

   THE AMOUNT OF COMMISSION SPLIT YOUR BROKER OFFERS CAN AFFECT THE EXTENT TO WHICH YOUR PROPERTY IS EXPOSED TO PROSPECTIVE BUYERS WORKING WITH LICENSEES FROM OTHER BROKERAGE FIRMS.

   ON THIS LISTING, THE BROKER IS OFFERING A COMMISSION SPLIT OF _______ MINUS _______ TO POTENTIAL COOPERATING BROKERS.

   IF YOU FEEL THAT THIS MAY RESULT IN YOUR PROPERTY RECEIVING LESS THAN MAXIMUM EXPOSURE TO BUYERS, YOU SHOULD DISCUSS THOSE CONCERNS WITH THE LISTING SALESPERSON OR HIS/HER SUPERVISING BROKER.

   BY SIGNING THIS LISTING AGREEMENT THE OWNER(S) ACKNOWLEDGE HAVING READ THIS STATEMENT ON COMMISSION SPLITS.

4. Should the client or principal direct the listing broker not to cooperate at all with all other licensees, evidence of this intent shall be in writing in the form of a WAIVER OF BROKER COOPERATION as set forth below and signed by the client or principal. Copies of this WAIVER OF BROKER COOPERATION and the listing agreement to which it relates shall be provided to the client or principal and to their authorized representative by the broker. This waiver shall become a part of the listing agreement at the time it is signed, and shall be made available for inspection by other brokers upon request. However, no direction or inducement from the client or principal shall relieve the listing broker of his responsibility of dealing fairly and exercising integrity with all other licensees.

   **WAIVER OF BROKER COOPERATION**
I UNDERSTAND THAT COOPERATION AMONGST BROKERS PRODUCES WIDER EXPOSURE OF MY PROPERTY AND MAY RESULT IN IT BEING SOLD OR LEASED SOONER AND AT A HIGHER PRICE THAN WOULD BE THE CASE WERE MY BROKER NOT TO COOPERATE WITH OTHER BROKERS. I FURTHER UNDERSTAND THAT WHEN MY BROKER COOPERATES WITH OTHER BROKERS, I CAN STILL HAVE THE ARRANGEMENTS FOR THE SHOWING OF THE PROPERTY AND ALL NEGOTIATIONS WITH ME OR MY ATTORNEY MADE ONLY THROUGH MY LISTING BROKER'S OFFICE, SHOULD I SO DESIRE.

However, despite my awareness of these factors, I direct that this property is to be marketed only through the efforts of the listing broker. This listing is not to be published in any multiple listing service. I will only consider offers on this property which are obtained by, and I will only allow showings of this property to be conducted by the listing broker or his or her duly authorized representatives. THE LISTING BROKER IS HEREBY DIRECTED NOT TO COOPERATE WITH ANY OTHER BROKER.

By signing below, the parties hereto confirm that no pressure or undue influence has been exerted upon the owners as to how this property is to be marketed by the Listing Broker.

The owner(s) further confirm receipt of fully executed copies of the listing agreement on this property and of this Waiver of Broker Cooperation form.

Dated: __________

Owner __________________

Owner __________________

Listing Broker ________________

By: Authorized Licensee or Broker __________________

(g) If any offer on any real property or interest therein is made orally, the licensee shall advise the offeror that he is not obligated to present to the owner or his authorized representative any offer unless the offer is in writing. Unless a writing containing or confirming the terms of the listing agreement otherwise provides, the licensee shall transmit every written offer on any real property or interest therein presented to or obtained by the licensee during the term of the listing to the owner or his authorized representative within 24 hours of receipt of the written offer by their firm. For the purposes of this section, the term of a listing shall be deemed to expire either on the termination date established in the listing agreement, or upon the closing of a pending sale or lease. If any acceptance of an offer is given orally, the licensee shall secure the acceptance in writing within 24 hours.

(h) Back-up offers shall be handled as follows:

1. As used in this subsection, the term "back-up offer" shall mean a written and signed offer to purchase or lease an interest in real estate which is received by a licensee at a time when a previously executed contract or lease pertaining to the same interest in real estate is pending and in effect, having survived attorney review if it was subject to such review. Offers obtained while a previously executed contract or lease is still pending attorney review are not considered back-up offers and must be presented as provided in (g) above.

2. Whenever a licensee transmits a back-up offer to an owner, the licensee shall advise the owner in writing to consult an attorney before taking any action on the back-up offer, and shall retain a copy of such written notice as a business record in accordance with N.J.A.C. 11:5-5.4.

3. Whenever a licensee receives a back-up offer, the licensee shall notify the offeror in writing that the property to which the offer pertains is the subject of a pending contract of sale or lease and, in the event that the licensee receiving the back-up offer is not licensed with the listing broker, a copy of that notice shall be delivered to the listing broker at the time the offer is presented. The said notice shall not disclose the price and terms of the pending contract or lease. A copy of such written notice shall be retained by the licensee as a business record in accordance with N.J.A.C. 11:5-5.4.

(i) It shall be the duty of a licensee to recommend that legal counsel be obtained whenever the interests of any party to a transaction seem to require it.

(j) At the time of the taking of any listing of residential property, a licensee shall furnish to the owner a copy of a summary of the New Jersey Law Against Discrimination N.J.S.A. 10:5-1 et seq, which summary shall have been prepared and furnished by the Attorney General of the State of New Jersey, shall state the provisions of the Law Against
Discrimination, and shall state which properties are covered by this law and which properties are exempt from this law. Should the owner profess an unwillingness to abide by or an intention to violate this law then the licensee shall not accept these listings.

(k) No licensee shall deny real estate brokerage services to any person for reasons of race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, sex, gender identity or expression, affectional or sexual orientation, disability, nationality, or source of lawful income used for rental or mortgage payments, and no licensee shall participate or otherwise be a party to any plan, scheme or agreement to discriminate against any person on the basis of race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, familial status, sex, gender identity or expression, affectional or sexual orientation, disability, nationality, or source of lawful income used for rental or mortgage payments. For the purposes of this subsection, the term "disability" shall have the same meaning as the definition of "disability" codified at N.J.S.A. 10:5-5q.

(l) Licensees may engage in brokerage activity in transactions involving the resale of mobile and manufactured homes as provided in N.J.S.A. 39:10-19. Licensees who do so shall be familiar with all laws applicable to such transactions. These laws include N.J.S.A. 39:1-1 et seq. as it applies to the resale of and the transfer of the titles to such motor vehicle units, N.J.S.A. 46:8C-1 et seq., as it applies to the resale of such units when situated in Mobile Home Parks, N.J.S.A. 17:16C-1 et seq., as it applies to the financing of purchases of personal property and New Jersey's Truth in Renting Act, N.J.S.A. 46:8-43 et seq. Licensees who, when involved in transactions of this type, evidence a lack of familiarity with these laws either through acts of omission or commission shall be subject to sanctions by the Commission for having engaged in conduct demonstrating incompetency, in violation of N.J.S.A. 45:15-17(e).

HISTORY:
See: 7 N.J.R. 333(d), 7 N.J.R. 469(c).
See: 7 N.J.R. 567(e), 8 N.J.R. 70(e).
See: 10 N.J.R. 499(a), 12 N.J.R. 44(b).
ALEXANDRA PETROSINO and LOUIS PETROSINO, Plaintiffs-Appellants/Cross-Respondents, v. KEVIN VENTRICE and GRACE VENTRICE, Defendants-Respondents, and KIMBERLY MULLIGAN, COLDWELL BANKER REAL ESTATE, LLC, CHRISTIAN GIAMANCO and BETTER HOMES REALTY, Defendants-Respondents/Cross-Appellants.

DOCKET NO. A-0020-13T1

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2015 N.J. Super. Unpub. LEXIS 2070

September 23, 2014, Argued
August 27, 2015, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.


PRIOR HISTORY: [*1] On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-409-12.

CORE TERMS: elevator's, broker, seller, emotional distress, duty to disclose, discovery, physical condition, psychological, infliction, impairment, unjust enrichment, cab, time of sale, conspiracy to defraud, fair dealing, consumer fraud, conspiracy, spoliation, inspection, disclose, covenant, safe, spoliation of evidence, elevator shaft, dangerously, pled, real estate, good faith, cause of action, unlawful conduct

COUNSEL: Michael Schottland argued the cause for appellants/cross-respondents (Lomurro, Munson, Comer, Brown & Schottland, LLC attorneys; Michael J. Fasano, on the brief).

Patrick A. Robinson argued the cause for respondents Kevin and Grace Ventrice (Robinson Burns, LLC, attorneys; Mr. Robinson, of counsel and on the brief; Jennifer M. Bruder, on the brief).

Marc C. Singer argued the cause for respondents/cross-appellants Kimberly Mulligan and Coldwell Banker Real Estate, LLC (Saiber LLC, attorneys; Mr. Singer, on the brief).

Richard J. Angowski, Jr. argued the cause for respondents/cross-appellants Christian Giamanco and Better Homes Realty (Schwartz, Simon, Edelstein & Celso, LLC, attorneys; Stefani C. Schwartz, of counsel; Mr. Angowski and Jennifer L. Moran, on the brief).


OPINION

PER CURIAM

Plaintiffs Alexandra and Louis Petrosino appeal from a final order dismissing their complaint in its entirety based on their spoliation of evidence.

Plaintiffs purchased a $2,275,000 home in Colts Neck from defendant-sellers Kevin and Grace Ventrice in November 2011. The sellers [*2] used their daughter, defendant Kimberly Mulligan, and her employer, defendant Coldwell Banker Real Estate, L.L.C., as their broker in the transaction. The house had an elevator.
When Mulligan and Kevin Ventrice were showing the home to Louis Petrosino, he asked Mulligan whether the elevator was safe. Plaintiffs had four children between the ages of two and eight and wanted to make sure the elevator posed no risk to them. Ventrice told Petrosino the elevator was safe and demonstrated its operation. On the explicit advice of Coldwell Banker, Ventrice did not tell Petrosino that two little girls of almost the same ages of his children had died horrible deaths in the elevator after getting trapped between the cab and the wall of the elevator shaft nine years before. Mulligan, who had put the question to Coldwell Banker about whether her parents were obligated to disclose the tragedy to potential buyers and received the response that no disclosure was necessary, even if buyers asked, stood by and said nothing.

Plaintiffs thereafter agreed to buy the house. Six days after the closing, their broker, defendant Christian Giamanco of defendant Better Homes Realty, called to tell them he had just [*3] learned of the elevator's tragic history. Giamanco contacted a local elevator company on plaintiffs' behalf and arranged for a mechanic to examine the elevator. The elevator mechanic conducted an inspection and told plaintiffs what he knew of the accident, which had received widespread media coverage when it happened, and explained to them how it had occurred. He also apparently told them that, in his opinion, the cab had never been replaced and was the same one that had crushed the little girls.

Although the mechanic closed and disabled the elevator at plaintiffs' request, they remained so concerned that a similar accident could befall their own children that they moved out of the house and filed this suit. In their complaint filed in January 2012, they alleged they were completely unaware that two little girls had been crushed and killed by the elevator when they purchased the house, that they had specifically inquired of the sellers as to the safety of the elevator, that the sellers falsely represented that the elevator was safe, that at no time prior to their purchase did any of defendants advise them of the elevator's history and that had they known of the accident they would never [*4] have purchased the house. Plaintiffs sued the sellers for affirmative and negligent misrepresentation and fraud, and all defendants for civil conspiracy to defraud, and intentional and negligent infliction of emotional distress. Plaintiffs also sued the Better Homes defendants for breach of the implied covenant of good faith and fair dealing, and both the Better Homes defendants and the Coldwell Banker defendants for negligence, consumer fraud and unjust enrichment.

Defendants filed motions to dismiss. In a comprehensive and well-reasoned written opinion of July 31, 2012, the court denied the motions except as to the two counts for intentional and negligent infliction of emotional distress. Coldwell Banker moved for reconsideration and refused to engage in discovery while its motion was pending. For reasons unclear to us, that motion, initially returnable in September, which the court described as nothing more than the Coldwell Banker defendants' attempt at a "second bite at the apple," was not heard and denied until March 27, 2013. Because of the "stakes of the litigation" and "the delay in deciding the motions," the court granted plaintiffs' cross-motion "to reset the discovery clock [*5] and grant 450 days of discovery from the signing of [the] order." The court wrote:

The complaint in this matter was filed January 26, 2013, and as a Track [3] case, was assigned 450 days of discovery. A good portion of that time has been spent litigating the underlying motion to dismiss as well as the instant application for reconsideration. It would not be reconcilable with the notions of justice to deprive the parties of a full and fair opportunity to litigate this case. Therefore, discovery is extended 450 days.

The court denied plaintiffs' request for depositions on a date certain and granted Coldwell Banker's request that paper discovery precede depositions.

During the protracted delay caused by motion practice, plaintiffs lost the lease of the home they had quickly rented to avoid exposing their children to the elevator. They moved back into the Colts Neck home in July 2012, and later that summer hired a retired Otis Elevator maintenance examiner referred by their counsel to evaluate the elevator. Although all of the access doors to the elevator were screwed shut, prohibiting a full examination, the examiner was able to look at the equipment in the elevator control room and, from [*6] the attic, to view the inside of the elevator shaft, the cab and the inside of one of the access doors. Following that "informal and limited inspection," the examiner signed a certification in September stating that he could not determine if the elevator cab had ever been replaced but that viewing the cab and shaft from the attic, "the current spacing, structure and arrangement of the access doors, the elevator cab and the gate there could be a repeat of the 2002 incident." Specifically, the examiner certified that:

[t]he current spacing coupled with the absence of a safety device which would prevent a child from standing in the space between the elevator cab and access doors, creates a situation that would allow a child to remain in a dangerous area and suffer tragic consequences. I reiterate that...
this was a limited evaluation of the elevator but it appears that the current structural arrangement leaves the elevator in a highly dangerous condition, especially to young children.

Following that inspection, plaintiffs determined to remove the elevator, which they did in January 2013. They did so without notice to defendants, none of whom had inspected the elevator for purposes of the litigation. [*7] The first notice defendants received of the elevator's destruction was a two-sentence letter to their counsel on April 29, in which plaintiffs' counsel wrote:

[P]lease be advised that the Petrosinos are living in the house which is in the process of being renovated. The elevator shaft has been partially removed and the elevator itself has been removed and destroyed.

Defendants thereafter filed motions to dismiss the complaint on the basis of spoliation of evidence, which the court granted after hearing oral argument. Relying on Aetna Life & Cas., Co. v. Imet Mason Contractors, 309 N.J. Super. 358, 366-67, 707 A.2d 180 (App. Div. 1998), the judge found plaintiffs "had a duty to preserve the evidence since they brought the underlying litigation and the elevator is at the center of the dispute."  

Turning to the question of fault, the court considered both the underlying dispute and the length of time the case had been litigated in determining "the fault lies solely with the Petrosinos in this matter." The judge wrote:

While it does appear that the Defendants did not take the opportunity to inspect the elevator in the recent months, the Petrosinos at a minimum should have provided notice to the Defendants of their plans to renovate the house and intention to destroy the evidence. Moreover, the fact that [*8] the Petrosinos waited four months to inform the Defendants of the destruction of the elevator is unacceptable. During that time, the parties litigated the case under the assumption that the elevator was still intact.

The trial court likewise found prejudice to defendants as it is difficult for the Defendants to replicate the discovery using only limited reports, blueprints, and the remainder of the elevator shaft. See Robertet Flavors, Inc. v. Tri-Form Constr., Inc., 203 N.J. 252, 1 A.3d 658 (2010). Since the Complaint at issue alleges that . . . the gap between the elevator shaft and the elevator was unsafe, it is impossible for the Defendants to replicate the elevator as it was installed solely by using construction plans and the like.

Recounting that it had been explicit in its opinion denying defendants' motion to dismiss that "[d]iscovery should be taken to determine whether the elevator was replaced and safety of the current elevator," the court found plaintiffs "were on notice of this court's position that discovery would act as the key factor in establishing their cause of action based on the alleged physical condition of the elevator." Concluding that with the elevator now destroyed and the Defendants unable to inspect same, it is impossible both for the Petrosinos to [*9] advance their claim and the Defendants to defend the claim. Based on the Complaint, the elevator and elevator shaft are the most important pieces of physical discovery in this matter, and the case cannot go forward without them.

The court accordingly dismissed plaintiffs' complaint in its entirety based on spoliation of evidence.

Plaintiffs have appealed from that order as well as from the court's earlier order dismissing their claims for intentional and negligent infliction of emotional distress. The Coldwell Banker defendants and the Better Homes defendants (together the broker defendants) have cross-appealed from the court's denial of their initial motions to dismiss the counts for civil conspiracy, negligence, consumer fraud and unjust enrichment. The Better Homes defendants also appeal from the denial of their motion to dismiss plaintiffs' claim for breach of the implied covenant of good faith and fair dealing.

Having reviewed the parties' arguments in light of the applicable law, we reverse the order dismissing the complaint based on spoliation of evidence. As to the sellers, we find the court should have considered whether a lesser sanction short of dismissal would have provided [*10] a fair and practical remedy, and we remand to
allow the trial court to undertake such an inquiry. As to the broker defendants, because plaintiffs' claims against them rest on administratively-imposed duties and thus survive even absent plaintiffs' evidence regarding the state of the elevator at the time of sale, and because all prejudice to them can be eliminated by suppressing any such evidence, we reinstate the claims for negligence, conspiracy to defraud, consumer fraud, unjust enrichment and, as to the Better Homes defendants, the claim for breach of the implied covenant of good faith and fair dealing. We affirm the court's order dismissing plaintiffs' claims for intentional and negligent infliction of emotional distress. We deny the broker defendants' cross-appeals in their entirety.

Because it is helpful in considering the issues surrounding spoliation to have the elements of the various causes of action alleged fresh in mind, we address the broker defendants' cross-appeals first and consider the court's initial decision denying defendants' motion to dismiss. Of course, in reviewing a decision on a motion to dismiss a complaint under Rule 4:6-2(e), we are not concerned with plaintiffs' [*11] ability to prove the allegations of their complaint but only whether the facts alleged are sufficient to state a cause of action. Printing Mart-Morris v. Sharp Elecs. Corp., 116 N.J. 739, 746, 563 A.2d 31 (1989).

We turn first to the trial court's denial of the broker defendants' motion to dismiss plaintiffs' negligence, conspiracy to defraud and consumer fraud claims. Underlying their position that the complaint fails to state a cause of action as to each of these claims is the broker defendants' contention that the children's deaths in the elevator in 2002 represented only a "psychological impairment" to the Colts Neck property, which they were under no duty to disclose. We conclude they misapprehend both the nature of the condition and their duties to plaintiffs.

The duties owed by licensed real estate agents, such as the broker defendants, to their principals and other parties involved in a real estate transaction have been established by regulation. N.J.A.C. 11:5-6.4(b) requires that

Every licensee shall make reasonable effort to ascertain all material information concerning the physical condition of every property for which he or she accepts an agency or which he or she is retained to market as a transaction broker. . . . Information about social conditions and psychological [*12] impairments as defined in [N.J.A.C. 11:5-6(d)] is not considered to be information which concerns the physical condition of a property.

Under the regulation, a reasonable effort to ascertain all material information entails, at least, making inquiries of the seller about any physical conditions that may affect the property and conducting a visual inspection to determine if there are any readily observable physical conditions affecting it. N.J.A.C. 11:5-6.4(b)(1). The regulation requires specifically that licensees disclose

all information material to the physical condition of any property which they know[,] or which a reasonable effort to ascertain such information would have revealed[,] to their client or principal and when appropriate to any other party to a transaction.

[N.J.A.C. 11:5-6.4(c).]

Information is considered material under the regulation if a reasonable person would attach importance to its existence or non-existence in deciding whether or how to proceed in the transaction, or if the licensee knows or has reason to know that the recipient of the information regards, or is likely to regard it as important in deciding whether or how to proceed, although a reasonable person would not so regard it.

[N.J.A.C. 11:5-6.4(b)(2).]

[*13] The regulation, however, further provides that information about psychological impairments, defined by way of example as including, but not limited to, "a murder or suicide which occurred on a property, or a property purportedly being haunted," is not "considered information which affects the physical condition of a property." N.J.A.C. 11:5-6.4(d). Although licensees need not automatically disclose information regarding psychological impairments,

upon receipt of an inquiry from a prospective purchaser or tenant about whether a particular property may be affected by a . . . psychological impairment, licensees shall provide whatever information they know about the . . . psychological impairments that might affect the property.

[N.J.A.C. 11:5-6.4(d)(3).]

Every licensee shall make reasonable effort to ascertain all material information concerning the physical condition of every property for which he or she accepts an agency or which he or she is retained to market as a transaction broker. . . . Information about social conditions and psychological [*12] impairments as defined in [N.J.A.C. 11:5-6(d)] is not considered to be information which concerns the physical condition of a property.
As a review of the regulation makes clear, the broker defendants' argument that the children's deaths in the elevator in 2002 represented only a "psychological impairment" to the Colts Neck property, which they were under no duty to disclose to plaintiffs is simply wrong.\footnote{ Although we do not agree that the broker defendants are correct in asserting the elevator's history constituted only a psychological impairment of the property, even were that so, they still had a duty to disclose the information to plaintiffs when they asked whether the elevator was safe. See N.J.A.C. 11:5-6.4(d)(3).} The elevator in the Colts Neck property represents a major mechanical system with a history of dangerously defective operation. The issue is not only that two children perished on the property but that they died by being crushed in the malfunctioning elevator. It is simply impossible to imagine that a reasonable buyer would not attach importance to the existence of that fact. That plaintiffs specifically asked about the safety of the elevator, which we accept as true for purposes of review, likewise should have indicated to defendants that these plaintiffs, at least, would attach special significance to the elevator's history. As the history of the elevator's dangerously defective operation is information concerning the physical condition of the property, which would certainly be material to a reasonable person notwithstanding any repair, and was clearly, in any event, important to plaintiffs given their questions as to its safety,\footnote{ The trial judge determined that the "materiality of the 2002 elevator accident is somewhat dependent on the safety and condition of the current elevator," implying that the broker defendants may not have had a duty to disclose if the elevator was "functional and safe" at the time of sale. Although we can imagine that repairs to certain physical conditions of a property, replacement of a crumbling front step, for instance, might affect the materiality of the information, we do not agree that a repair to the elevator would render the information of its history immaterial to the physical condition of the Colts Neck property. Notwithstanding any repair, a reasonable person would attach importance to the fact that the elevator once malfunctioned, killing two children, in deciding whether or how to proceed in purchasing the property. See N.J.A.C. 11:5-6.4(b)(2). In addition, the broker defendants had a duty to disclose, when asked, all psychological impairments to the property, which would no doubt encompass the grisly deaths of two young children in the elevator. See N.J.A.C. 11:5-6.4(d)(3).} we hold the broker defendants had a duty to disclose the information to them.

Having established the broker defendants' duty to disclose the elevator's history of dangerously defective operation, we turn next to consider the broker defendants' arguments that the trial court erred by refusing to dismiss plaintiffs' negligence, conspiracy to defraud and consumer fraud claims. "To prevail \[*16\] on a claim of negligence, a plaintiff must establish that the defendant breached a duty of reasonable care, which constituted a proximate cause of plaintiff's injuries." Cockerline v. Menendez, 411 N.J. Super. 596, 611, 988 A.2d 575 (App. Div.); \textit{internal quotation marks omitted}, certif. denied, 201 N.J. 499, 992 A.2d 793 (2010). As the broker defendants had a duty to disclose the elevator's history, plaintiffs' allegation that they did not do so, resulting in their suffering damages states a claim of negligence which the trial court was correct in refusing to dismiss. See Van Natta Mech. Corp. v. DiStaulo, 277 N.J. Super. 175, 180-81, 649 A.2d 399 (App. Div. 1994).

In addition to arguing lack of duty, the Better Homes defendants also argue the negligence claim should have been dismissed against them for lack of any actual knowledge of the 2002 elevator accident. Specifically, the Better Homes defendants argue there is no proof they knew of the elevator's history prior to closing. They assert they learned of the 2002 accident only after the sale. Although that may ultimately be determined to be the case, there appears at present a genuine dispute over what the Better Homes defendants knew and what they should have known precluding dismissal of the claim or the entry of summary judgment in their favor. \textit{See ibid.}

The trial court's ruling denying the broker defendants' motions to dismiss \[*17\] plaintiffs' claims for conspiracy to defraud and consumer fraud, we find likewise correct. Proof of common law fraud requires the plaintiff to show that the defendants, here the sellers, made a material misrepresentation of a presently existing or past fact, with knowledge or belief of the statement's falsity, intending that plaintiff will rely on it, that plaintiffs reasonably did rely on the statement, and resulting damages. N.J. Dep't of Treasury, Div. of Inv. ex rel. McCormac v. Qwest CommC'ns Int'l, Inc., 387 N.J. Super. 469, 485, 904 A.2d 775 (App. Div. 2006). The "[d]eliberate suppression of a material fact that should be disclosed is equivalent to a material misrepresentation (i.e., an affirmative false statement)." N.J. Econ. Dev. Auth. v. Pavonia Rest., Inc., 319 N.J. Super. 435, 446, 725 A.2d 1133 (App. Div. 1998); see also Strawn v. Canuso, 140 N.J. 43, 62, 657 A.2d 420 (1995). Thus, silence "in the face of a duty to disclose, may be a fraudulent concealment." Pavonia, supra, 319 N.J. Super. at 446 (quoting Berman v. Gurwicz, 189 N.J. Super. 89, 93, 458 A.2d 1311 (Ch. Div. 1981), aff'd, 189 N.J. Super. 49, 458 A.2d 1280 (App. Div. 1979)).

In alleging the sellers’ made false statements and failed to disclose material information about the elevator in the face of a duty to do so resulting in their suffering damages, plaintiffs have stated a claim for common law fraud against the sellers, supplying both the underlying wrong and one overt act in furtherance of the conspiracy. Thus, assuming plaintiffs could plead at least implicit agreement among the parties not to inform plaintiffs of the dangerously defective history of the elevator, the conspiracy claim would stand. *Ibid.*

A review of the complaint and the [*20] motion record clearly establishes that plaintiffs have successfully pled conspiracy claims against the broker defendants. As to the Coldwell Banker defendants, the emails between the sellers’ daughter, defendant Mulligan, and others at Coldwell Banker establish their knowledge of the elevator’s history and their agreement to conceal that history from plaintiffs. As to the Better Homes defendants, plaintiffs allege they were aware of the elevator’s history and chose to join with the sellers in concealing it by not correcting Kevin Ventrice’s statements to plaintiffs about the elevator. As the broker defendants had a duty to disclose the elevator’s history to plaintiffs, N.J.A.C. 11:5-6.4, their silence alone would support a claim for conspiracy to defraud as it provides both an underlying wrong and an act (or omission) in furtherance of the conspiracy. See *Pavonia, supra*, 319 N.J. Super. at 446; *Berman, supra*, 189 N.J. Super. at 93. Because the poor safety record of the elevator is a matter of fact, not opinion, we reject the broker defendants’ argument that Ventrice’s statement about the elevator was only opinion and thus not actionable. *Joseph J. Murphy Realty, Inc. v. Shervan*, 159 N.J. Super. 546, 549-51, 388 A.2d 990 (App. Div. 1978), certif. denied, 79 N.J. 487, 401 A.2d 242 (1979).

Defendants next argue that the trial court erred in not dismissing plaintiffs’ consumer fraud claims as they [*21] contend plaintiffs failed to plead an ascertainable loss or unconscionable business practice sufficient to survive a motion to dismiss. Claims brought under the Consumer Fraud Act require that a plaintiff demonstrate three elements: 1) unlawful conduct by defendant; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss.” *D’Agostino v. Maldonado*, 216 N.J. 168, 184, 78 A.3d 527 (2013) (quoting *Bosland v. Warnock Dodge*, 94 N.J. 64, 468 A.2d 197 (1983)).
Inc., 197 N.J. 543, 553, 964 A.2d 741 (2009)). Under the Consumer Fraud Act, unlawful conduct includes the

[a]ct, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission in connection with the sale or advertisement of any merchandise or real estate[.]  

[N.J.S.A. 56:8-2.]

The broker defendants' argument that plaintiffs have not pled actionable unlawful conduct is without merit. In their complaint, plaintiffs alleged that defendants "withheld information regarding the property from [plaintiffs] which would have impacted upon either the price paid by Plaintiffs or their decision to purchase the property at all." [*22] Plaintiffs further allege that defendants " knowingly concealed, suppressed, or omitted facts material to the [real estate sale] in that they failed to advise Plaintiffs or reveal the horrendous [elevator accident]."

Plaintiffs have obviously pled unlawful conduct under the Act in that they have alleged that defendants " knowingly concealed" the dangerously defective history of the elevator in connection with the real estate transaction, an act which is expressly included within the bounds of unlawful conduct under the Act. N.J.S.A. 56:8-2; D'Agostino, supra, 216 N.J. at 184; see also Mango v. Pierce-Coombs, 370 N.J. Super. 239, 254, 851 A.2d 62 (App. Div. 2004) (to prove consumer fraud against a realtor, a plaintiff must show the realtor "intentionally concealed the information about the defect with the intention that its client would rely on the concealment, and that the information was material to the transaction").

The broker defendants' arguments regarding plaintiffs' alleged failure to plead an ascertainable loss are equally ill-founded. Plaintiffs allege in their complaint that they "suffered an ascertainable loss of money as follows: [t]he value of the home is less than the Plaintiffs paid for it due to its tragic history and the home is potentially unmarketable due to that history." A "demonstration of loss in value will suffice to meet the ascertainable loss hurdle and will set the [*24] stage for establishing the measure of damages." Thiedemann v. Mercedes-Benz USA, L.L.C., 183 N.J. 234, 248, 872 A.2d 783 (2005). Such a loss, to meet the requirements of ascertainability, need only be "quantifiable and measurable" such that "an estimate of damages, calculated within a reasonable degree of certainty" could be produced. Id. at 248-49. As plaintiffs pled a loss that could be quantified and measured within a reasonable degree of certainty, no more was required.  

6 Plaintiffs now assert other damages, including their costs in renting another residence.

Plaintiffs’ claim for unjust enrichment functionally posits that the broker defendants [*25] were paid commissions for the sale of the home that only resulted due to the “fraud” perpetrated on plaintiffs regarding the safety of the elevator. Assuming the fact finder agrees that plaintiffs’ purchase resulted from reliance on the lack of disclosure by the broker defendants, it follows that it would be inequitable and unjust for those defendants to keep their “ill-gotten” gains. Accordingly, plaintiffs’ have pled the elements of a claim for unjust enrichment. See Goldsmith, supra, 408 N.J. Super. at 382.

The Better Home defendants also claim that the trial court erred in upholding plaintiffs’ allegations that defendants violated the covenant of good faith and fair dealing inherent in their contractual relationship. The covenant of good faith and fair dealing is “contained in all contracts and mandates that ‘neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.’” Seidenberg v. Summit Bank, 348 N.J. Super. 243, 253, 791 A.2d 1068 (App. Div. 2002) (quoting Sons of Thunder v. Borden, Inc., 148 N.J. 396, 420, 690 A.2d 575 (1997)). The Better Homes defendants argue that as they had no express contract with plaintiffs outside of the sale contract between plaintiffs and the sellers, there was no contract on which the covenant could be based. We reject that argument.

The Better Homes [*26] defendants admit they agreed to assist plaintiffs in finding a home and received a commission for their efforts. Although the nature and form of their agreement is not clear at this stage of the litigation, plaintiffs’ complaint alleges that there was a binding agreement. They also allege that by deceiving plaintiffs about the elevator’s history in order to gain a commission, the Better Homes defendants acted in bad faith in the performance of that agreement, thus denying plaintiffs its benefits. Accordingly, plaintiffs’ complaint states a claim of breach of the covenant of good faith and fair dealing. See Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assoc., 182 N.J. 210, 224-26, 864 A.2d 387 (2005).

With the elements of plaintiffs’ claims against the broker defendants fresh in mind, we consider whether the trial court was correct in dismissing plaintiffs’ claims against the broker defendants based on plaintiffs’ spoliation of evidence. Where a party to litigation under a duty to preserve evidence destroys that evidence, that party becomes subject to spoliation sanctions. Aetna, supra, 309 N.J. Super. at 365. The existence of a duty to preserve evidence is "a question of law to be determined by the court." Ibid. Such a duty exists where there is

(1) pending or probable litigation involving the defendants, (2) knowledge [*27] by the plaintiff of the existence or likelihood of litigation; (3) foreseeability of harm to the defendants, or in other words, discarding the evidence would be prejudicial to defendants; and (4) evidence relevant to the litigation.

[Id. at 366 (quoting Hirsch v. Gen. Motors Corp., 266 N.J. Super. 222, 250-51, 628 A.2d 1108 (Law Div. 1993)].]

We agree with the trial judge that plaintiffs were under a clear duty to preserve the elevator. At the time the elevator was destroyed, litigation between plaintiffs and defendants had been ongoing for nearly a year, centered on plaintiffs’ claims that they should have been told about the elevator’s history of dangerously defective operation, that the elevator cab was the same one involved in the 2002 accident and that its configuration inside the elevator shaft at the time of sale rendered it unsafe for their small children. Destruction of the elevator would not only affect plaintiffs’ ability to prove their claims but also the sellers’ ability to prove the elevator was safe at the time of sale. The elevator was central to the litigation and thus relevant and material to the claims and defenses. See Hirsch, supra, 266 N.J. Super. at 251. As there is no real dispute that spoliation occurred, the issue on appeal is the wisdom of the sanction.

Trial courts have the “inherent discretionary [*28] power to impose sanctions for failure to make discovery,” including failure caused by spoliation. Aetna, supra, 309 N.J. Super. at 365 (quoting Hirsch, supra, 266 N.J. Super. at 260). Because dismissal with prejudice is “the ultimate sanction,” our Supreme Court has directed that it should be imposed “only sparingly” and “normally . . . ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party.” Robertet, supra, 203 N.J. at 274 (quoting Zaccardi v. Becker, 88 N.J. 245, 253, 440 A.2d 1329 (1982)).

In imposing any sanction for spoliation, a court must evaluate the facts in light of the three goals of the spoliation doctrine: “to make whole, as nearly as possible, the litigant whose cause of action has been impaired by the absence of crucial evidence; to punish the wrongdoer and to deter others from such conduct.” Ibid. As the Court put another way, the focus in selecting the proper sanction is "evening the playing field," Rosenblit v. Zimmerman, 166 N.J. 391, 401, 766 A.2d 749 (2001), or rectifying the prejudice caused by the spoliation so as to

Although we agree with the trial court that defendants' delays in conducting discovery and plaintiffs' concern for the safety of their children and their desire to proceed with renovations to their home do not in any way excuse plaintiffs' conduct, we nevertheless conclude [*29] that as to the broker defendants, the sanction of dismissal was not appropriate.

As our analysis of plaintiffs' claims against those defendants for negligence, conspiracy and consumer fraud make clear, the broker defendants were under a regulatory duty to disclose to plaintiffs all material information affecting the physical condition of the property, as well as to disclose all psychological impairments about which plaintiffs asked, including the elevator. 7 As we have held that the history of the elevator's dangerously defective operation is information concerning the physical condition of the property that was required to be disclosed, the condition of the elevator at the time of sale is not critical to the viability of those claims or to the broker defendants' defenses to those claims, although it could certainly affect a damage calculation. The condition of the elevator at the time of sale is irrelevant to the broker defendants' obligation to disclose, when asked, all psychological impairments to the property. See N.J.A.C. 11:5-6.4(d)(3).

7 As the broker defendants' duty to disclose also underlies the claims for unjust enrichment and breach of the duty of good faith and fair dealing, the same analysis [*30] of the spoliation remedy applies as well.

Because neither plaintiffs' claims against the broker defendants nor their defenses are dependent on the condition of the elevator at the time of sale, dismissal of the claims as to those defendants is too harsh a sanction. Instead, a lesser sanction of suppressing all evidence relating to the elevator after plaintiffs took possession of the property, including but not limited to the two inspections plaintiffs had conducted of the elevator and shaft. Suppression of that evidence would level the playing field by depriving plaintiffs of that which they deprived the sellers - post-sale inspection of the elevator and shaft for purposes of the litigation. Although it may be that plaintiffs cannot prove their claims against the sellers [*32] without that evidence, we cannot conclude that on this record. Indeed, our review of the record suggests that plaintiffs used the same firm to repair the elevator in 2013 that the sellers used to replace the cab after the 2002 accident. If true, that suggests that the firm continues in existence and may have records of its work on the elevator in the Colts Neck property. It is also possible that the parties may be able to depose persons who repaired or maintained the elevator.

The court should ask plaintiffs and the sellers to present what records are available concerning the elevator and their positions as to sanctions short of dismissal. The court should consider the evidence presented and evaluate the prejudice to the sellers in light of the other evidence available, taking testimony if necessary. The court should then be in a position to fashion a sanction consistent with fundamental fairness to both parties.

Finally, we agree with defendants that the trial court properly dismissed plaintiffs' claims for negligent and intentional infliction of emotional distress. Plaintiffs can generally maintain an independent tort for negligent infliction of emotional distress in only two types [*33] of cases. A plaintiff can either "demonstrate that the defendant's negligent conduct placed plaintiff in reasonable fear of immediate personal injury, which gave rise to emotional distress that resulted in a substantial bodily injury or sickness," or by satisfying the four element test laid out by the Court in *Portee v. Jaffee*, 84 N.J. 88, 417 A.2d 521 (1980). *Jablonsowska v. Suther*, 195 N.J. 91, 104, 948 A.2d 610 (2008).
As plaintiffs do not allege that defendants' "negligently with[holding] from Plaintiffs the tragic history of the property" put them in reasonable fear of immediate personal injury to themselves, they must satisfy the Portee test to state a prima facie claim for negligent infliction of emotional distress. See ibid. To establish that claim, plaintiff must show that

(1) the defendant's negligence caused the death of, or serious physical injury to, another; (2) the plaintiff shared a marital or intimate, familial relationship with the injured person; (3) the plaintiff had a sensory and contemporaneous observation of the death or injury at the scene of the accident; and (4) the plaintiff suffered severe emotional distress.

[Id. at 103 (citing Portee, supra, 84 N.J. at 97).]

Plaintiffs' claim that defendants owed them a duty to disclose the prior elevator accident, failed to do so, and as a result of learning the truth, plaintiffs [*34] were put in fear of potential injury or death to their children simply does not state a Portee claim under our law.

8 Plaintiffs' reliance on Strachan v. John F. Kennedy Mem'l Hosp., 109 N.J. 523, 538 A.2d 346 (1988), to argue the Court has done away with the requirement of physical injury, either to the plaintiff or to another with whom the plaintiff shared an intimate, familial relation for any and all claims for infliction of emotional distress is belied by the opinion. See id. at 538 ("We need not decide today whether Portee's abandonment of the physical injury requirement for emotional distress claims should extend to all "direct" claims for emotional distress. We need look no further than the long-recognized exception for negligent handling of a corpse, or the especial likelihood that this claim is genuine, to conclude that plaintiffs need not demonstrate any physical manifestations of their emotional distress here.") (citations omitted).

To establish a claim for intentional infliction of emotional distress, a plaintiff must show that the defendant (1) intentionally or recklessly engaged in (2) extreme and outrageous conduct (3) that was the proximate cause of (4) plaintiff suffering emotional distress so severe that no reasonable person could be expected to [*35] endure it. Buckley v. Trenton Sav. Fund Soc'y, 111 N.J. 355, 366-67, 544 A.2d 857 (1988). Extreme and outrageous conduct is defined as "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Id. at 366 (quoting Restatement (Second) of Torts § 46 comment d (1965)).

Although the facts here support the conclusion that the information as to the elevator's history was intentionally withheld, they do not constitute the sort of atrocious conduct defined by the tort. In short, we agree with the trial court that plaintiffs cannot recover for intentional infliction of emotional distress for failure to disclose a physical condition of property.

To sum up, we reverse the order dismissing the complaint based on spoliation of evidence. As to the sellers, we conclude the court should have considered whether a lesser sanction short of dismissal would have provided a fair and practical remedy, and we remand to allow the trial court to undertake such an inquiry. As to the broker defendants, we reinstate the claims for negligence, conspiracy to defraud, consumer fraud, unjust enrichment and, as to the Better Homes defendants, the claim for breach of the implied covenant [*36] of good faith and fair dealing. We affirm the court's order dismissing plaintiffs' claims for intentional and negligent infliction of emotional distress. We deny the broker defendants' cross-appeals in their entirety.

Affirmed in part; reversed in part; and remanded. We do not retain jurisdiction.
II. Protection Steps for Buyer

A. Need to Inspect


B. Walking Away – Breach of Contract

C. Waiver


D. Home Owner’s Association


E. Spoliation of Evidence
LAUREN LA SANTA and MARC TUAZON, Plaintiffs-Appellants,
v.
MILL POINTE CONDOMINIUM ASSOCIATION, Defendant-Respondent.

DOCKET NO. A-4258-11T3

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2013 N.J. Super. Unpub. LEXIS 428

February 6, 2013, Submitted
February 26, 2013, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]
On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-8699-10.

CORE TERMS: inspection, seller, summary judgment, concealed, termite, asbestos, concealment, inspector, buyer, rescission, pre-existing, water lines, fraudulent concealment, interrogatory, settlement, omission, defeat, closet, floor, condominium unit, latent defects, sales contract, material facts, water damage, asbestos fibers, written opinion, unsubstantiated, nondisclosure, exterminator, infestation

COUNSEL: Jadoo & Zalenski, LLC, attorneys for appellants (Trevor S. Jadoo, on the brief).
Schenck Price Smith & King, LLP, attorneys for respondent (Steven H. Daniels, on the brief).

JUDGES: Before Judges Axelrad and Sapp-Peterson.

OPINION

PER CURIAM

Plaintiffs Lauren La Santa and Marc Tuazon appeal summary judgment dismissal of their complaint against defendant, Mill Pointe Condominium Association, the seller of a condominium unit, seeking damages for fraud, purposeful concealment of latent defects, and violation of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -195, as well as rescission of the sales contract. Plaintiffs asserted before the trial court, and reassert on appeal, that defendant fraudulently concealed and omitted material facts from them about the premises that were germane to the purchase, and plaintiffs' claims were substantiated with expert testimony and proof. The motion judge found plaintiffs failed to present any evidence of defendant's knowledge or omission and relied solely on mere allegations, which were insufficient to defeat a motion for summary judgment. We agree and affirm.

Plaintiff [*2] executed a contract for the purchase of a condominium unit located in Edison in which defendant was the seller.† The April 29, 2010 addendums to the contract of sale provided for the right of plaintiffs to conduct radon gas, wood destroying insect, and home inspections and terminate the contract if not satisfied with the outcome. The second addendum expressly provided that the property was sold "as is" and it was "understood and agreed that no representation, either express or implied, has been made as to the condition of the premises and/or the fixtures therein except as otherwise provided therein." Plaintiffs were represented by counsel in the purchase of the unit.

† Plaintiffs did not provide a copy of the initial sales agreement and makes no reference to its terms.

On May 5, 2010, plaintiffs had a home inspection performed, which included radon testing and a termite inspection, and a report was generated reflecting, for example, inspection of "structural components" and a determination that they were "functional at the time of inspection." Plaintiffs made settlement on June 30, 2010,
and took possession of the property. Shortly afterwards, there was a flood caused by a common element [*3] water pipe and, during clean-up, plaintiffs discovered mold damage in their unit. Further inspection revealed the presence of asbestos and termites. None of these conditions were disclosed prior to sale.

Plaintiffs filed suit for damages and rescission, alleging that "[b]ased on several inspections by mold inspectors" they learned the "Premises experienced flooding prior to their purchase" and "the mold damage was concealed by a fresh coat of paint." They alleged defendant "concealed this pre-existing and defective condition." Plaintiffs also claimed they conducted an inspection for asbestos and confirmed its presence in the unit. Plaintiffs further claimed that an inspection by Terminix revealed that the unit had termites which had "been present for at least five years based on the extent of the wood damage"; plaintiff alleged defendant also "concealed this pre-existing and defective condition."

According to plaintiffs, the mold, asbestos, and water damage resulted in breathing and other health-related problems; defendant purposely concealed latent defects in the unit and negligently provided them false information regarding the condition and state of the unit; and defendant's actions [*4] were "fraudulent, self-dealing and unconscionable," for which they were entitled to compensatory, punitive, and treble damages, as well as rescission of the sales contract.

In response to defendant's motion for summary judgment, plaintiffs presented September 13, 2010 lab certificates identifying mold on samples taken from inside utility closets in the unit and asbestos fibers on samples taken from the mastic on the closet floor; as well as a $998.31 Terminix sales agreement for unidentified pest treatment. Plaintiffs also relied on their responses to interrogatories in which they asserted, for example, that defendant's representatives "should have known" about the pre-existing conditions and that the "proposed testimony" of various of plaintiffs' inspectors will be that the mold and termite damage and prior flooding was purposely concealed by fresh paint, new studs, and new sheet rock. Plaintiffs did not depose any of defendant's representatives and presented no firsthand information with respect to defendant's knowledge of these pre-existing conditions. Nor did plaintiffs submit any corroborative affidavits or reports from their exterminator, inspectors, or contractor. Plaintiffs [*5] also presented no medical documentation.

2 Tuazon's deposition testimony attached to defendant's moving papers refers to a note on the certificate, which is not evident on the copy contained in plaintiffs' appendix, stating "There was no asbestos detected in the floor tile, but it is in the mastic used to put the tiles down on the floor."

Judge Vincent LeBlon granted summary judgment to defendant by order of March 22, 2012, explaining in an appended written opinion that even when viewing the facts in the light most favorable to plaintiffs, the non-moving party, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540, 666 A.2d 146 (1995), plaintiffs "failed to set forth any evidence that the [d]efendant committed fraudulent concealment or misrepresentation of the alleged issues with the real estate property." Plaintiffs provided no expert reports to interpret the mold and asbestos analyses. Moreover, the mold samples were taken from inside the utility closet, to which plaintiffs' home inspector had access prior to settlement.

As noted by the judge, plaintiffs failed to submit any depositions, affidavits, or the like, and relied solely on the allegations contained in their interrogatory answers to support [*6] their claims of knowledge and concealment by defendant, which are insufficient to defeat a motion for summary judgment. See Petersen v. Twp. of Raritan, 418 N.J. Super. 125, 132, 12 A.3d 250 (App. Div. 2011) (reiterating that "[u]nsubstantiated inferences and feelings" or "[b]are conclusions in the pleadings, without factual support in tendered affidavits," are insufficient to defeat a meritorious motion for summary judgment) (internal quotation marks and citations omitted) (second alteration in original).

Judge LeBlon further noted that plaintiffs signed a contract purchasing the unit "as is," which expressly acknowledged that defendant made no representations, either express or implied, as to its condition. Moreover, plaintiffs availed themselves of their contractual right to have inspections performed on the property before closing of title. This appeal ensued.

On appeal, plaintiffs continue to make the unsubstantiated assertions that defendant concealed the previous water damage, presence of asbestos, and mold and termite infestation. Their sole "evidence" is that the unit had been freshly painted and that they observed two water lines (an old and new water line) when they started to clean up [*7] the unit after the water leak. They continue to rely on Weintraub v. Krobatsch, 64 N.J. 445, 449-55, 317 A.2d 68 (1974) in support of their claim of fraudulent concealment and Byrne v. Weichert Realtors, 290 N.J. Super. 126, 135, 675 A.2d 235 (App. Div.), certif. denied, 147 N.J. 259, 686 A.2d 761 (1996) in support of their claim of a knowing omission that has a capacity to mislead as violative of the CFA. Plaintiffs also claim as sufficient to withstand summary judgment the fact that their answers to interrogatories identified the names and addresses of all the inspectors "who will be called as witnesses at trial, if necessary."
We are not persuaded by plaintiffs' arguments and affirm substantially for the reasons set forth in Judge LeBlon's comprehensive written opinion. We add the following brief comments.

"[T]he elements necessary to prove fraudulent concealment on the part of a seller in a real estate action are: the deliberate concealment or nondisclosure by the seller of a material fact or defect not readily observable to the purchaser, with the buyer relying upon the seller to his detriment." State, Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 503, 468 A.2d 150 (1983) (citing Weintraub, supra, 64 N.J. at 455). In Weintraub, [*8] the Supreme Court reversed the grant of summary judgment to the prospective seller for recovery of the buyers' deposit after they sought to rescind the contract prior to closing upon observing that the house was roach-infested and remanded for trial. Id. at 455-57. The buyers had certified that every time they inspected the house prior to this time, the sellers had every light on. Id. at 448. This time, however, the buyers entered the house during the evening, it was unoccupied, and when they turned the lights on, they observed roaches "running in all directions, up the walls, drapes, etc." Id. at 447. The buyers reasoned that by keeping the lights on, it keeps these nocturnal insects "out of sight," and argued that the "sellers had to know they had this problem [as one] could not live in a house this infested without knowing about it." Id. at 448. The Court was convinced the buyers had presented sufficient proof to create genuine issues of fact as to whether the seller deliberately concealed or failed to disclose the roach infestation and whether such concealment or nondisclosure was of such significant danger to justify rescission. Id. at 455.

In contrast here, however, plaintiffs [*9] merely presented the fact of the adverse conditions. Presence of trace amounts of mold, asbestos fibers, or termites, in and of itself, does not impute negligence on the part of defendant. Nor did plaintiffs present any evidence of defendant's representatives' knowledge of the mold, asbestos, or termites in the unit, let alone their intentional concealment of these conditions. The record is devoid of any affidavit or report by an inspector or exterminator causally relating any of these conditions as being attributable to any negligence, wrongdoing, omission, or concealment on the part of defendant's representatives. Moreover, the mere presence of a freshly painted unit or two water lines is insufficient even under a Brill standard to create a debatable issue.

Plaintiffs bought a unit, which according to their pre-settlement inspection, was over twenty-five years old, "as is," with no express or implied representations by defendant as to its condition. They negotiated, with the assistance of counsel, an agreement that gave them the protection of inspections and the ability to terminate the contract if they were not satisfied with the outcome of the inspections. They conducted inspections [*10] and proceeded to settlement. Plaintiffs have failed to proffer anything other than bald allegations to support their claim of liability on the part of defendant.

Affirmed.
BELMONT CONDOMINIUM ASSOCIATION, INC.,
PLAINTIFF-RESPONDENT,
v.
DEAN GEIBEL, METRO HOMES, L.L.C., WATERFRONT MANAGEMENT CORPORATION, COMMERCE CONSTRUCTION MANAGEMENT, L.L.C., BADGER ROOFING CO., INC., LATORRE CONSTRUCTION, MAYITO'S PLASTERING, INC., TAAS CONSTRUCTION CORP., INC., AND TRISTATE SHEARING & BENDING, INC., DEFENDANTS, AND MONROE STATION ASSOCIATES, L.L.C., DEFENDANT-APPELLANT.

DOCKET NO. A-2584-10T3

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

432 N.J. Super. 52; 74 A.3d 10; 2013 N.J. Super. LEXIS 105

April 8, 2013, Argued
July 9, 2013, Decided

SUBSEQUENT HISTORY: [***1]
Approved for Publication July 9, 2013.

PRIOR HISTORY: On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-138-07.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff condominium association brought suit in the Superior Court of New Jersey, Law Division, Hudson County, against defendant developer/builder, alleging negligence and violations of the Consumer Fraud Act (CFA), N.J.S.A. §§ 56:8-1 to 56:8-20. The jury returned a verdict for plaintiff, resulting in treble damages of $5,248,020, plus prejudgment interest and attorney's fees. Defendant appealed.

OVERVIEW: Defendant's marketing materials for the condominium complex stated that buyers would be getting a "Proven Developer and Construction Management Team which has overseen the building and renovation of Over 400 Single Family & Condominium Homes, and over 1,000,000 Sq. Ft. Of Office/Commercial/Retail Development." Actually, the condominium was the first building constructed by defendant. The building was plagued by water leaks. The court held that plaintiff had standing to pursue the CFA claims; however, it lacked standing to sue for damages to the unit windows because they were not common elements. The court rejected defendant's contention that its representations were literally true, because the statements had the capacity to mislead an average reader. The court also rejected defendant's statute of limitations defense under N.J.S.A. § 2A:14-1, finding that the CFA claims accrued when the true nature and extent of the water infiltration problem first became evident. The trial court erred in awarding prejudgment interest on the trebled portion of the award because the purpose and intent of R. 4:42-11 was compensatory, not punitive.

OUTCOME: The court vacated the award for the cost of the replacement windows and vacated the award of prejudgment interest. The case was remanded to the trial court for recalculation of prejudgment interest on only the compensatory portion of the consumer fraud claim verdict.

CORE TERMS: window, unit owner, condominium, repair, infiltration, exterior, misrepresentation, deed, developer, interior, prejudgment interest, apportionment, punitive, roof, ascertainable losses, purchaser, consumer, treble, apportion, roofing, damages award, builder's, certif, leak, award of prejudgment interest, stucco, unlawful practice', remediation, estimate, construction defects

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[HN1] Historically, New Jersey courts have taken a much more liberal approach on the issue of standing than have the federal courts. Both the New Jersey Legislature and its courts have given wide recognition to suits by associations.

[HN2] Pursuant to the New Jersey Condominium Act, N.J.S.A. §§ 46:8B-1 to 46:8B-38, a homeowners' association shall be responsible for the administration and management of the condominium and condominium property, including but not limited to the conduct of all activities of common interest to the unit owners. N.J.S.A. § 46:8B-12. Association is defined as the entity responsible for the administration of a condominium, which entity may be incorporated or unincorporated. N.J.S.A. § 46:8B-3. The association shall be an entity which shall act through its officers and may enter into contracts, bring suit and be sued. N.J.S.A. § 46:8B-15(a). An association may assert tort claims concerning the common elements and facilities of the development as if the claims were asserted directly by the unit owners individually. N.J.S.A. § 46:8B-16(a).

[HN3] The clear import, express and implied, of the New Jersey Condominium Act, N.J.S.A. §§ 46:8B-1 to 46:8B-38, is that the association may sue third parties for damages to the common elements, collect the funds when successful, and apply the proceeds for repair of the property. The statutory provisions empowering the association to sue, imposing the duty on it to repair, and authorizing it to charge and collect common expenses, coupled with the prohibition against a unit owner performing any such work on common elements, are compelling indicia that the association may institute legal action on behalf of the unit owners for damages to common elements caused by third persons.

[HN4] Under the New Jersey Condominium Act, N.J.S.A. §§ 46:8B-1 to 46:8B-38, a condominium association, acting in a representative capacity on behalf of the individual unit owner, has the exclusive right to sue a developer for construction defects related to the common elements, pursuant to N.J.S.A. §§ 46:8B-12, 46:8B-15(a), 46:8B-16(a), and although unit owners may sue the developer for defects pertaining to their units, individual unit owners are prohibited from repairing or altering common elements, pursuant to N.J.S.A. § 46:8B-18, and therefore generally lack standing to sue for damages to the common elements.

[HN5] Where the alleged damages involve a condominium's common elements, nothing in the New Jersey Condominium Act (NJCA), N.J.S.A. §§ 46:8B-1 to 46:8B-38, bars a homeowners' association from bringing a Consumer Fraud Act, N.J.S.A. §§ 56:8-1 to 56:8-20, claim against the developer as well. The NJCA authorizes an association to bring suit in a representative capacity on behalf of the individual unit owners for damages to the common elements. N.J.S.A. §§ 46:8B-12, 46:8B-15(a), and 46:8B-16(a).

[HN6] A condominium association has standing to assert claims for common law fraud and consumer fraud against third-party contractors and materialmen for defects in the construction of the common elements, regardless of whether the association formally existed at that particular point in time.

[HN7] Because the Consumer Fraud Act (CFA), N.J.S.A. §§ 56:8-1 to 56:8-20, allows any person who has suffered an ascertainable loss to sue under the CFA, N.J.S.A. § 56:8-19, an association, charged with the maintenance and repair of the common areas of a condominium, that discovers defects in the construction of its common element areas, has standing to pursue a claim under the CFA.


[HN9] To state a claim under the Consumer Fraud Act, N.J.S.A. §§ 56:8-1 to 56:8-20, a plaintiff must allege three elements: (1) unlawful conduct by the defendants; (2) an ascertainable loss; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss.

[HN10] As to unlawful conduct under the Consumer Fraud Act (CFA), N.J.S.A. §§ 56:8-1 to 56:8-20, a person must commit an unlawful practice as defined in the legislation. The CFA specifies the conduct that will amount to an unlawful practice in the disjunctive.


[HN12] The Consumer Fraud Act (CFA), N.J.S.A. §§ 56:8-1 to 56:8-20, is one of the strongest consumer protection laws in the nation. Courts have emphasized that like most remedial legislation, the CFA should be construed liberally in favor of consumers. A plaintiff need not even show reliance on the violation of the CFA as long as an ascertainable loss resulting from defendant's conduct is demonstrated. Reliance is not required in suits under the CFA because liability results from misrepresentations whether any person has in fact been misled, deceived or damaged thereby. N.J.S.A. § 56:8-2. The
element of traditional reliance required to be pleaded and proven in a common law fraud or misrepresentation case need not be proven in order to recover for damages pursuant to the CFA. In order to prevail, a plaintiff need only demonstrate a causal connection between the unlawful practice and ascertainable loss.

[HN13] A homeowners' association, on behalf of all unit owners, is the proper party in interest to bring construction defect and Consumer Fraud Act, N.J.S.A. §§ 56:8-1 to 56:8-20, claims for damages to the common areas of a condominium sustained by any or all of the unit owners and accordingly may recover all the damages necessary to repair or correct the defects to the common elements and to which it may be statutorily entitled. There is no sound reason in law or policy to reduce the recoverable damages for subsequent purchasers.

[HN14] A claim of literal truth does not constitute a defense to a plaintiff's claim under the Consumer Fraud Act, N.J.S.A. §§ 56:8-1 to 56:8-1-20. A false statement of fact is not an essential ingredient of a plaintiff's cause of action based on affirmative wrongdoing. The capacity to mislead is the prime ingredient of deception or an unconscionable commercial practice. Intent is not an essential element. The question is whether the ad itself is misleading to the average consumer, not whether it can later be explained to the more knowledgeable, inquisitive consumer.

[HN15] A claim of literal truth will not constitute a defense to a charge that the overall impression created by an advertisement is misleading and deceptive to an ordinary reader. If a defendant's statements are found to be misleading and deceptive at trial, then a finding of literal accuracy will not bar a conclusion that they violated the Consumer Fraud Act, N.J.S.A. §§ 56:8-1 to 56:8-20. To determine whether an advertisement or solicitation makes a false or misleading representation, the court must consider the effect that the advertisement, taken as a whole, would produce on one with an ordinary and unsuspecting mind. A court must consider the implications of an advertisement because, if it is designed to deceive the reader, an advertisement may be completely misleading even if every sentence separately considered is literally true. Taking an advertisement or solicitation as a whole means considering not only what it states literally, but also what it reasonably implies.

[HN16] The Consumer Fraud Act, N.J.S.A. §§ 56:8-1 to 56:8-20, is aimed at more than the stereotypic con man. The statutory and regulatory scheme is also designed to promote the disclosure of relevant information to enable the consumer to make intelligent decisions in the selection of products and services.

[HN17] A plaintiff asserting a claim under the Consumer Fraud Act, N.J.S.A. §§ 56:8-1 to 56:8-20, need not demonstrate aggravating factors when the unlawful practice alleged is an affirmative misrepresentation.

[HN18] The Consumer Fraud Act (CFA), N.J.S.A. § 56:8-2 provides, in part, that the act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice. To establish a violation of the CFA, a plaintiff need not prove an unconscionable commercial practice. The CFA specifies the conduct that will amount to an unlawful practice in the disjunctive, and therefore, proof of any one of those acts or omissions or of a violation of a regulation will be sufficient to establish unlawful conduct under the CFA.

[HN19] A breach of warranty, or any breach of contract, is not per se unfair or unconscionable, and a breach of warranty alone does not violate a consumer protection statute. Because any breach of warranty or contract is unfair to the non-breaching party, the law permits that party to recoup remedial damages in an action on the contract; however, by providing that a court should treble those damages and should award attorneys' fees and costs, the Legislature must have intended that substantial aggravating circumstances be present in addition to the breach.


[HN21] A plaintiff's claims under the Consumer Fraud Act, N.J.S.A. §§ 56:8-1 to 56:8-20, require it to prove an ascertainable loss, among other things. The date when a cause of action is deemed to have accrued is the date upon which the right to institute and maintain a suit first arises. Therefore, until a plaintiff has suffered damage, he cannot maintain a suit for damages based on fraud since his cause of action has not yet accrued. It will accrue only when damage is inflicted.

[HN22] Under the discovery rule, the statute of limitations begins to run only when the client suffers actual damage and discovers, or through the use of reasonable
diligence should discover, the facts essential to the malpractice claim. Stated another way, in an appropriate case a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim.

[HN23] Pursuant to the New Jersey Condominium Act, N.J.S.A. §§ 46:8B-1 to 46:8B-38, a condominium association may sue the developer for construction defects related to the common elements, and a unit owner may sue the developer to safeguard his interests in the unit he owns; however, an association may not sue the developer for damages to a unit. The physical extent of a unit depends upon what has been included in the common elements. Whether an item is a common element may be ascertained by examination of the statutory definition and the master deed. N.J.S.A. § 46:8B-3(d).


[HN25] As a general matter, the thrust of the New Jersey Condominium Act, N.J.S.A. § 46:8B-3(d), is to define common elements in general as those elements existing or intended for common use. One easy way to visualize a condominium unit is as a cube of air, the tangible boundaries of which are usually the finished side of the interior sheetrock, ceilings and floors. While many condominiums vary that definition slightly, driven, in part, by allocating maintenance responsibilities, the condominium unit is generally seen by owners as the inside of their structure while the shell and outside of the building is a common element. One can distinguish a common from unit element by examining whether the unit owner or association bears responsibility for repairing those building components.

[HN26] Generally speaking, condominium unit windows are not intended for common use, rather, they are intended for the personal use of individual unit owners.

[HN27] In addition to N.J.S.A. § 46:8B-3(d)(ii), a condominium’s master deed can specify common elements, N.J.S.A. § 46:8B-3(d)(viii).

[HN28] The construction of a written document solely on the basis of its own terms, is a question of law, as is whether a term is clear or ambiguous, and an appellate court reviews legal issues de novo, owing no special deference to the trial court’s interpretation.

[HN29] Condominium unit windows are located within the individual units and are, generally speaking, intended for the use of the individual unit owner. Therefore, claims for damages thereto are not matters of common interest; rather, they are in the nature of individual grievances necessarily left to litigation brought by individual unit owners.

[HN30] A plaintiff must prove damages with such certainty as the nature of the case may permit. New Jersey law favors the apportionment of fault among responsible parties. N.J.S.A. §§ 2A:15-5.1 to 2A:15-5.8. Thus, generally, a plaintiff must apportion or relate damages to a defendant’s wrongful acts.


[HN33] Although rare, cases may arise where it is extremely difficult or impossible to apportion damages. In such cases, the courts favor rough apportionment.

[HN34] At the conclusion of a trial where allocation of damages among multiple tortfeasors is an issue, the trial court is to determine, as a matter of law, whether the jury is capable of apportioning damages. The absence of conclusive evidence concerning allocation of damages will not preclude apportionment by the jury, but will necessarily result in a less precise allocation than that afforded by a clearer record. If the court establishes as a matter of law that a jury would be incapable of apportioning damages, the court is to apportion damages equally among the various causative events. If the court concludes that the jury would be capable of apportioning damages, the jury should be instructed to do so.

[HN35] Apportionment of damages is favored under New Jersey law. When the question of liability is in dispute, a charge on apportionment is generally appropriate. Regardless of which party bears the burden of proof, the quantum of evidence required to qualify for an appor-
tionment charge is low. The law favors apportionment even where the apportionment proofs are imprecise, allowing only for rough apportionment by the trier of fact. Indeed, an arbitrary apportionment, equally among the various causative elements, may be appropriate where the trial court determines, as a matter of law, that the jury would be incapable of making an apportionment.

[HN36] In general, an appellate court reviews awards of interest and the calculation of those awards under an abuse of discretion standard. A reviewing court must not disturb an award of prejudgment interest unless the trial judge's decision represents a manifest denial of justice.

[HN37] N.J.S.A. § 56:8-19, which provides for an award of treble damages, attorney's fees, filing fees and costs, does not specifically provide for an award of prejudgment interest. However, prejudgment interest may be awarded pursuant to R. 4:42-11(b).


[HN39] Although prejudgment interest in a tort action is expressly governed by R. 4:42-11(b), the award of prejudgment interest on contract and equitable claims is based on equitable principles. The equitable purpose of an award of prejudgment interest is compensatory, to indemnify the claimant for the loss of what the moneys due him would presumably have earned if payment had not been delayed. Prejudgment interest is not a penalty but rather its allowance simply recognizes that until the judgment is entered and paid, the defendant has had the use of money rightfully the plaintiff's.

[HN40] The provisions of the Consumer Fraud Act, N.J.S.A. §§ 56:8-1 to 56:8-20, permitting the recovery of treble damages are punitive in nature.

[HN41] Prejudgment interest was not intended by R. 4:42-11(b) to have application to awards of punitive damages. While R. 4:42-11(b) does not expressly except punitive damage awards from its scope, the policy considerations which gave rise to its adoption suggest that result. Prejudgment interest is assessed on tort judgments because the defendant has had the use, and the plaintiff has not, of moneys which the judgment finds was the damage plaintiff suffered. It is thus clearly implied that interest on the loss suffered by a plaintiff as a result of defendant's tortious conduct is what was contemplated by the rule. Interest is not punitive; it is compensatory, to indemnify the claimant for the loss of what the moneys due him would presumably have earned if payment had not been delayed. An award of punitive damages, by its own terms, is punitive in nature and purpose and the award of interest thereon no less so. Such damages do not compensate plaintiff for a loss sustained; their purpose is to punish a defendant for wrongful, malicious conduct and as a deterrent to such conduct in the future.

[HN42] A trial court's evidentiary rulings are entitled to deference absent a showing of an abuse of discretion, for example, there has been a clear error of judgment. On appellate review, a trial court's evidentiary ruling must be upheld unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide off the mark that a manifest denial of justice resulted.

[HN43] Whether evidence should be excluded under N.J.R.E. 403 because its prejudicial effect substantially outweighs its probative value is an issue remitted to the discretion of the trial court.


[HN45] The burden is on the party urging exclusion of evidence to convince the court that the N.J.R.E. 403 considerations should control. The moving party must demonstrate not only that the contested evidence is prejudicial, but that the factors favoring exclusion substantially outweigh its probative value. Evidence claimed to be unduly prejudicial may be excluded only where its probative value is so significantly outweighed by its inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the basic issues of the case.

[HN46] The decision to grant a defendant's motion for a mistrial rests within the sound discretion of the trial court. The standard is whether or not the error is such that manifest injustice would result from continuance of the trial and submission of the case to the jury. The consideration of the mistrial motion, however, has one additional element, namely the court's determination of whether or not the prejudice resulting from the error is of a nature which can be effectively cured by a cautionary instruction or other curative steps. The grant of a mistrial is an extraordinary remedy that should be exercised only to prevent manifest injustice.
[HN47] A jury is presumed to have adhered to a trial court's instruction.

[HN48] It is a fundamental of appellate practice that the Superior Court of New Jersey, Appellate Division only has jurisdiction to review orders that have been appealed to it. Only the judgment or orders designated in the notice of appeal are subject to the appeal process and review.

COUNSEL: Brian D. Barr and Timothy J. O'Shaughnessy (Mauro Lilling Naparty LLP) of the New York bar, admitted pro hac vice, argued the cause for appellant (Cooper Levenson April Niedelman & Wagenheim, P.A., and Mr. O'Shaughnessy, attorneys; Mr. Barr and Caryn L. Lilling, of counsel and on the briefs).

Eileen A. Lindsay argued the cause for respondent.

JUDGES: Before Judges PARRILLO, SABATINO and CARROLL.

OPINION BY: PARRILLO

OPINION

[**15] [*60] The opinion of the court was delivered by PARRILLO, P.J.A.D.

This appeal arises from an action by plaintiff, the Belmont Condominium Association, Inc. (plaintiff or Association), against, among others, defendant Monroe Station Associates, L.L.C. (defendant or Monroe Station), the sponsor, developer and general contractor of the Belmont, a seven-story, thirty-four unit condominium building in Hoboken. The complaint alleged negligence, fraud, and violations of The Planned Real Estate Development Full Disclosure Act, N.J.S.A. 45:22A-21 to -56 (PREDFDA), and the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20 (CFA). All claims arose from the construction of the Belmont, [***2] and from certain pre-construction statements by defendant relating to the developer/builder's experience. The jury returned a verdict in favor of plaintiff on its negligence claim, finding defendant eighty percent responsible.

The jury also found that defendant had made two deceptive statements under the CFA, and pursuant thereto, the court trebled the damages against defendant. Over defendant's objection, the court awarded prejudgment interest on the entire damages award, including the [*61] treble portion. Plaintiff was also awarded attorney's fees, which included prejudgment interest.

On appeal, defendant argues that plaintiff's CFA claims should have been dismissed as a matter of law because: (a) the Association lacked standing to aggregate ascertainable losses of members who did not purchase their units from Monroe Station; (b) the representations in the public offering statement (POS) were true at the time they were made and are not accompanied by "aggravating circumstances"; and (c) the CFA claims, based on the alleged misrepresentations in the POS and accompanying marketing materials pertaining to defendant's background and experience, are barred by the statute of limitations. In addition, [***3] defendant contends that plaintiff also lacks standing because the windows for which plaintiff claims damages are not part of the "common elements" of the condominium. Lastly, defendant attributes error to the court in (a) permitting the jury to apportion the damages; (b) improperly trebling the prejudgment interest on the punitive portion of the CFA damages award; (c) admitting references to the adverse health effects of mold in the Belmont, which unduly prejudiced defendant; and (d) permitting plaintiff to voluntarily dismiss its claim against defendant Commerce Construction Management without prejudice. For reasons that follow, we affirm the damages award in part and reverse in part; reverse the award of prejudgment interest on the punitive portion of the CFA damages award; and remand for the purpose of vacating the award for the cost of the replacement windows and the recalculation of the prejudgment interest award.

Construction of the Belmont began in late 1998 and was completed in early 2000. Subcontractors on the project included Badger Roofing Co., Inc. (Badger Roofing), Mayito's Plastering, Inc. (Mayito's), Taas Construction Corp., Inc. (Taas), Tri-State Shearing & Bending, [***4] Inc. (Tri-State), and Lattore Construction (Lattore). All thirty-four units in the Belmont were sold by defendant to individual purchasers between February and June 2000.

[62] In 1999, as part of the Belmont's development, and before the building was even built, Monroe Station filed a POS [**16] pursuant to the PREDFDA, which provided that "[t]here are no known defects in the building (a part of which) you are purchasing, nor in the common area and facilities, that you could not determine by a reasonable inspection." Attached to the POS were certain marketing materials, which stated that the potential buyers would be getting a "Proven Developer and Construction Management Team which has overseen the building and renovation of Over 400 Single Family Condominium Homes, and over 1,000,000 Sq. Ft. Of Office/Commercial/Retail Development."
Actually, Dean Geibel, who was the owner and general manager of Monroe Station, later admitted, in September or October 2000, that the Belmont was the first building he had constructed. In fact, Geibel did most of the development of the Belmont, which was part of the pre-construction phase of the building process. According to Geibel, he assembled a construction team consisting of himself, Paul Freed, and Aram Papazian, whom he brought on for their combined experience, and made them the project/construction managers. It was the combination of the experience of all three of them that, he believed, supported the representation in the marketing materials that the buyers would be getting a "proven" developer. However, Papazian denied being a part of either the Belmont's "development team" or "construction management team," although that was the original plan. Freed, on the other hand, did have extensive constructive experience before his involvement with the Belmont project.

Practically from the beginning, the building was plagued by water leaks. Christine Sheedy, one of the original unit purchasers and a board member of the Association from 2001 to 2003, experienced water leaking through the molding around her windows sometime in late 2000 or early 2001. She complained about the leaks, but assumed that they were fixed because she did not have any further leaks in her unit until 2007, when she noticed water infiltration into one of her bedrooms. At that time, she also noticed mold growing around the window sills and would scrub it off three or four times a year. However, she had learned that there was mold in the walls of the Belmont back in 2005 or 2006.

Another owner, Eric Barr, who had purchased his unit from one of the original purchasers in January or February 2002, and who served as board president of the Association from July 2005 to May 2009, also experienced water leaking into his unit in December 2003 through the high-hat lighting fixtures in the kitchen. The then property manager, Waterfront Management Corporation, apparently remedied the problem because it no longer leaked when it rained. However, one year later, in December 2004, water infiltrated Barr's unit again, this time into his living room.

Barr immediately notified the new property manager, Realty Express LaBarbera (Realty Express), who learned for the first time about water leaks at the Belmont. Its subsequent investigation had uncovered water infiltrating the two top-floor units of the Belmont through the air conditioning ducts, as well as water leaking into the closet of a fourth floor unit. Realty Express hired a handyman, who applied sealant to the air conditioning ducts on the roof. Realty Express also hired Jetco, an exterior waterproofing company, to help assess the true extent of the problem.

During its investigation, Realty Express also discovered roofing tar product cans left on the roof, which had deteriorated the roofing membrane underneath. Realty Express contacted Badger Roofing, who made the necessary repairs.

[*64] To help identify the source and scope of the water infiltration, Realty Express hired Hudson Chimney and Roofing (Hudson Chimney), and in January 2006, John Estes, a licensed home inspector. Estes performed leak testing that suggested that the leaks were coming from the corner of the building. He also determined that there was a caulking failure in the joint between the Belmont and the adjoining building. Based on Estes's recommendations, Realty Express hired someone to do some repair work.

In June 2006, the Association invited defendant to come inspect the building and help resolve the water infiltration problem. As a result, on June 21, 2008, Art Johnson of Metro Homes and Vincent Martinez, a senior project manager at Kipcon Incorporated, an engineering and inspection firm, met with Estes and Barr to inspect the building. They inspected three units that day, and throughout, Estes pointed out the tops of the balconies and the copings he believed were the source of the leaks; he never indicated the windows, or the areas around them, as the source.

2 After construction of the Belmont, Geibel formed Metro Homes, L.L.C. (Metro Homes) solely for the purpose of "branding" his company, Monroe Station.

Based on his inspection, and the information provided to him by the Association, Martinez could not determine the condition of the building "as built" because repairs and alterations had already been made before the Association ever consulted with the developer, architect or engineer of the building. Nor did the Association or Estes obtain any of the manufacturers' specifications,
such as architectural or engineering drawings, before making the repairs.

Martinez’s inspection revealed several maintenance issues, such as the lack of caulking, caulking issues at the joints, clogging of some of the drains on the roof, and the discharge of water onto the roof from the HVAC unit. Martinez’s company, Kipcon, prepared a report wherein it detailed the results of its investigation and site inspection:

[*65] It is Kipcon’s understanding that the Belmont Condominium Association has employed someone other than Metro Homes, LLC as their management company for approximately the last 2 years. Various building maintenance deficiencies were identified at the time of our June 21, 2006 visit that also have the potential for water infiltration and water infiltration related problems. These included: leaking of the HVAC condenser units and condensate lines on the roof top; cracked, worn caulik at building joints, flashing and seals; leakage stains (old and new) located on the ceilings and ceiling tiles in the condominium units directly located below the roof, etc. No maintenance records were available for our review in order to verify ongoing building maintenance while obvious lack of maintenance existed.

In conclusion, the fact that numerous physical alterations have been made to the building without the opportunity for Metro Homes, LLC, Kipcon, the design architect and engineer or the representative of the material companies to inspect the building prior to these changes, combined with the apparent lack of preventive building maintenance, there is no possible way to conclude that the construction of the building by Metro Homes, LLC created any leaks or mold. Because of the alterations made by Diego under the supervision of Belmont Condominium Association, any suggestion that the apparent water infiltration is a direct cause of the way Metro Homes, LLC built the building can and will only be a speculation. Any changes made to the building should have been inspected, detailed and supervised by qualified professionals. It is realistic to say that the alterations made, if not properly completed, could have and will continue to create damage or water infiltration to the building. It is also a possibility that if the “leak testing” of the building was not done correctly or overseen by a qualified professional, such as an architect or engineer, the test itself could have actually caused damage to the building.

After receiving Kipcon’s report, the Association stopped making repairs, the cost of which up to then had amounted to $111,551. Instead, in January 2007, the Association filed suit against defendant, and eventually the project subcontractors, essentially claiming negligence, fraud and violations of the PREDFDA and the CFA. At the ensuing trial, the testimony focused on the origin and cause of the water infiltration, with the Association’s experts attributing the problem to construction defects and defendant’s experts blaming poor or inadequate maintenance.

Kevin Helsby of Wiss, Janney, Elstner Associates, Inc. (Wiss Janney), an engineering, architecture, and material science consulting firm, was qualified as plaintiff’s expert exterior building envelope consultant. His investigation revealed that there were multiple points of water entry into the Belmont. Unsealed penetrations and a joiner in the metal column cover on the seventh floor balcony were sources of water infiltration. "No flashings were observed at the head, jamb or sill of the windows. There was no sealant applied between the stucco cladding and the window frame. And there was open gaps between the stucco cladding and the window frame.”

Also, there was “no flashing installed between the sheathing and the window frame. There's no gap between the stucco and the frame. And there's absolutely no sealant or any other material to seal that transition between the stucco and the window frame.” He observed wide open gaps between sheets of metal with "no evidence of sealant or anything to prevent water from getting into that gap at any of the locations . . . observed.”

Although Helsby agreed that caulk deteriorates and has to be maintained, he concluded that none of the conditions observed at the Belmont were the result of a lack of maintenance. He believed that the building was improperly constructed and that maintenance was not designed to correct construction deficiencies.

Helsby found that most of the leaking came through the sides of the building with no windows. In fact, none of the forty windows on the back was damaged or had to be repaired or replaced. Many of the forty windows on the front of the building did not need to be replaced ei-
ther. Helsby recommended repair or replacement as necessary based on the conditions at the time of remediation. He did not identify any leak in the roof.

Michael Bressler, [***13] an associate principal at Wiss Janney, was qualified as plaintiff's expert in architecture, with a specialty in building envelope investigations. He had [***19] worked with Helsby and their investigation revealed deficiencies in the construction of the Belmont. Specifically, the exterior insulation and finishing system (EIFS) and stucco were not installed properly. The architectural drawing provided for a gap between the windows and the EIFS or stucco to allow for the installation of backer-rods and sealant; no such gaps were left. Bressler concluded, within a reasonable degree of certainty, that Mayito's failure to leave a gap prevented the proper installation of backer-rods and sealant, which contributed [*67] to water infiltration into the building. He was of the opinion that water migrated into the building around the perimeters of the windows because they were not flashed. Also, the way Mayito's installed the stucco and EIFS against the vents and penetrations contributed to the influx of water into the building because it prevented the proper installation of sealant.

Bressler also concluded that the way Badger Roofing installed the coping covers contributed to the migration of water into the [***14] interior. The nine black metal column posts at the front of the building caused leaks into the building on the front of the building; there was no sealant in the joints, and therefore, they were not installed in compliance with good building practices. However, his investigation did not reveal any leaking in the roof.

Although Bressler agreed that caulk deteriorated over time and needed to be maintained, there was nothing that he observed that led him to believe that the water infiltration problem was caused by a lack of maintenance. He attributed fault for the water infiltration to Badger Roofing, Mayito's, and Taas.

David Kichula, of Air Consulting Services, was qualified as plaintiff's expert in industrial hygiene and mold investigation, identification and remediation. He performed extensive testing at the Belmont and concluded that remediation was necessary; it was not acceptable to leave mold in the walls. The sheathing, insulation and sheetrock had to be removed because there was no way to sanitize them.

Herman Sabath, Ph.D., a board certified microbial consultant, and plaintiff's environmental consultant expert, testified that mold eats the cellulotic fibers in the sheetrock which [***15] leads to deterioration. If left untreated, the insulation materials--gypsum board, sheetrock and other building materials--would all deteriorate. He also noted the potential health problems at the Belmont because of the presence of mold, namely, allergies, infections, immunological problems, and "sick building syndrome." Delay in fixing the water infiltration and mold remediation would add to potential health problems.

[*68] William Pyznar, a professional engineer and managing partner of The Falcon Group, an engineering and architecture consulting firm, was plaintiff's expert in engineering, with a specialty in cost analysis. He was retained by plaintiff to prepare a construction analysis and report for the remedial work relating to the existing water infiltration, construction deficiencies and mold infestation.

According to Pyznar, the total estimated cost to remediate the exterior and interior of the Belmont was approximately $1.825 million, consisting of approximately $984,000 to remediate the exterior and, approximately $615,000 for the interior. Contained in his total estimate was a 20% contingency allowance, a 16.6% engineering design and construction administration allowance and a 2.5% [***16] performance bond.

Pyznar's estimate included the cost of removing all of the EIFS and stucco, 80% of the sheathing, and the replacement of all eighty windows, notwithstanding the [***20] fact that those repairs were beyond the scope of repairs recommended by plaintiff's experts. Also, his estimate included the cost of total remediation of all thirty-four units, notwithstanding the fact that not all of the units were tested and some were tested and determined to be normal.

In contrast to the Association's experts, Russell Burner, defendant's expert engineer in water infiltration investigation and evaluation, concluded that, within a reasonable degree of engineering water infiltration analysis investigation certainty, poor maintenance was a factor in the water infiltration at the Belmont. There was clear evidence that caulking was not maintained; there were failed caulking joints that were not repaired, and there was an open joint in the coping. He was amazed to see that, in 2009, there were still open channels where water could infiltrate the building. He believed that a surface-mounted kind of caulking would have been an acceptable remedy to the water infiltration problem.

Richard Lester, president [***17] of Garden State Environmental, an industrial hygiene consulting firm, was defendant's expert industrial hygienist and environmental consultant, who performed various [*69] environmental tests at the Belmont and reviewed the results of plaintiff's environmental expert's testing. Lester concluded within a reasonable degree of certainty, that there was no evidence that all thirty-four units needed to be remediated. While plaintiff's cost expert made the gen-
eral statement that all units needed to be remediated, none of plaintiff's other experts provided a scope of work of what remediation should be done. Based on all the testing done, including his own, he could not determine the scope of work that should be done as of the time of trial.

John Stevens, vice president and general manager of Kipcon, was qualified as defendant's building inspection and cost estimating expert. From September 2007 through May 2008, he observed plaintiff's engineers from Wiss Janney inspect the building and perform tests. For the most part, he concurred with their recommendations regarding the exterior of the building.

He concluded, however, that repairing the flashing and coping at the balcony levels would correct [***18] the water infiltration problem; he did not believe it was necessary to replace the windows. He recommended covering the window flange with water-proofing membrane or water-proofing flashing, which would seal the windows.

Stevens estimated that it would cost $741,000 to remediate the exterior and interior of the Belmont. His estimate varied significantly from the Falcon Group's estimate in part because he did not allocate any money for replacement windows, while the Falcon Group allocated $240,000 for the replacement of all eighty windows.

Further, his estimate included remediation or partial remediation of seventeen of the thirty-four units, depending on the experts' recommendations; if a unit was not tested or the experts stated that the unit was fine, it was excluded from his calculations. The Falcon Group's estimate included costs for total remediation of all thirty-four units. Finally, the Falcon Group's estimate contained a 30% architect fee; Stevens's estimate did not include such a fee because he did not feel it was necessary.

[*70] As noted, the jury returned a verdict in favor of plaintiff and against defendant Monroe Station, Badger Roofing, and Mayito's; it found Taas not liable. [***19] It also found that plaintiff was not negligent for failing to inspect and maintain the building, and awarded $2,186,675 in damages, [***21] finding defendant 80% responsible ($1,749,340), and Badger Roofing and Mayito's each 10% responsible ($218,667.50).

The jury having found defendant in violation of the CFA, the court trebled the $1,749,340 damages against defendant to a total of $5,248,020, and further awarded prejudgment interest on that entire $5,248,020 damages award in the amount of $1,123,004. Final judgment in the amount of $6,371,024, plus attorney's fees of $865,653.28 (which included prejudgment interest), was entered.

This appeal follows.

I.

(A)

As a threshold matter, defendant contends that the Association lacked standing to aggregate the ascertainable loss of members who were not the original purchasers, and thus failed to demonstrate reliance on the alleged misrepresentations or any causal relationship between defendant's unlawful conduct and plaintiff's ascertainable loss. We disagree.

[HN1] Historically, New Jersey courts have taken "a much more liberal approach on the issue of standing than have the federal [courts]." Crescent Park Tenants Ass'n v. Realty Equities Corp. of N.Y., 58 N.J. 98, 101, 275 A.2d 433 (1971) [***20] (holding tenant's association had standing to maintain action against landlord concerning matters of common interest). And both our Legislature and courts "have given wide recognition to suits by associations." Id. at 109, 275 A.2d 433.

[HN2] Pursuant to the New Jersey Condominium Act, N.J.S.A. 46:8B-1 to -38 (NJCA), the association "shall be responsible for the [*71] administration and management of the condominium and condominium property, including but not limited to the conduct of all activities of common interest to the unit owners." N.J.S.A. 46:8B-12. "Association" is defined as "the entity responsible for the administration of a condominium, which entity may be incorporated or unincorporated." N.J.S.A. 46:8B-3. "[T]he association shall be an entity which shall act through its officers and may enter into contracts, bring suit and be sued." N.J.S.A. 46:8B-15(a) (emphasis added). An association "may assert tort claims concerning the common elements and facilities of the development as if the claims were asserted directly by the unit owners individually." N.J.S.A. 46:8B-16(a) (emphasis added).

[HN3] "[T]he clear import, express and implied, of the statutory scheme is that the association may sue third parties for [***21] damages to the common elements, collect the funds when successful, and apply the proceeds for repair of the property." Siller v. Hartz Mountain Assocs., 93 N.J. 370, 377, 461 A.2d 568, cert. denied, 464 U.S. 961, 104 S. Ct. 395, 78 L. Ed. 2d 337 (1983). In Siller, the Court noted:
The statutory provisions empowering the association to sue, imposing the duty on it to repair, and authorizing it to charge and collect "common expenses," coupled with the prohibition against a unit owner performing any such work on common elements, are compelling indicia that the association may institute legal action on behalf of the unit owners for damages to common elements caused by third persons.

[Id. at 378, 461 A.2d 568 (footnote omitted).]

The Court also explained the policy considerations in support of that conclusion:

Avoidance of a multiplicity of suits, economic savings incident to one trial, elimination of contradictory adjudications, expedition in resolution of controversies, accomplishment of repairs, and the positive [***22] effect on judicial administration are supportive policy reasons. Moreover, the financial burden on an individual owner may be so great and so disproportionate to his potential recovery that he could not or [***22] would not proceed with litigation.

[Id. at 379, 461 A.2d 568 (footnote omitted).]

In concluding the causes of action to remedy defects in the common elements of a condominium development belong to the condominium association, the Court further noted:

[*72] It would be impractical indeed to sanction lawsuits by individual unit owners in which their damages would represent but a fraction of the whole. If the individual owner were permitted to prosecute claims regarding common elements, any recovery equitably would have to be transmitted to the association to pay for repairs and replacements. A sensible reading of the statute leads to the conclusion that such causes of action belong exclusively to the association, which, unlike the individual unit owner, may apply the funds recovered on behalf of all the owners of the common elements.

[Id. at 381, 461 A.2d 568.]

Thus, [HN4] under the NJCA, a condominium association, acting in a representative capacity on behalf of the individual unit owner, has the exclusive right to sue a developer for construction defects related to the common elements, N.J.S.A. 46:8B-12, -15(a), -16(a), and although unit owners may sue the developer for defects pertaining to their units, individual unit owners [***23] are prohibited from repairing or altering common elements, N.J.S.A. 46:8B-18, and therefore generally lack standing to sue for damages to the common elements. Siller, supra, 93 N.J. at 377, 461 A.2d 568; Soc'y Hill Condo. Ass'n v. Soc'y Hill Assocs., 347 N.J. Super. 163, 169, 789 A.2d 138 (App.Div.2002).”

3 Consistent with the NJCA, the Belmont Condominium Master Deed provides that the Association, not the individual unit owners, have the responsibility and authority to make all necessary repairs to the common elements and to bring suit against the developer for defects to the common elements.

By parity of reasoning, [HN5] where the alleged damages involve the common elements, nothing in the NJCA bars the Association from bringing a CFA claim against the developer as well. As noted, the NJCA authorizes the Association to bring suit in a representative capacity on behalf of the individual unit owners for damages to the common elements. N.J.S.A. 46:8B-12, -15(a), -16(a). In fact, we have previously allowed a homeowners association, in its representative capacity, to assert a CFA claim. In Port Liberte Homeowners Ass'n v. Sordoni Constr. Co., 393 N.J. Super. 492, 924 A.2d 592 (App.Div.), certif. denied, 192 N.J. 479, 932 A.2d 30 (2007), [***24] the manufacturer of an allegedly defective exterior moisture barrier system used during construction allegedly made misrepresentations or omissions to the developer in order to [*73] induce the developer to use its product. Id. at 498-500, 924 A.2d 592. That happened before the plaintiff, the homeowners association, was even formed. Id. at 497, 924 A.2d 592.

At issue was whether the homeowners association, formed after the misrepresentations or omissions complained of were made, had standing to assert common law and consumer fraud claims against the manufacturer of a product used by the developer in the construction of the common elements. Id. at 497, 924 A.2d 592. We held "that [HN6] a condominium association has standing to assert claims for common law fraud and consumer fraud against [***23] third-party contractors and materialmen for defects in the construction of the common elements, regardless of whether the association formally existed at the alleged defects. Thus, the defendant's motion to dismiss should have been denied."
that particular point in time." Id. at 501, 924 A.2d 592.

We explained that to hold that the association did not have standing "produces an unjust result and is contrary to the legislative scheme permitting a condominium homeowners association to institute suit to recover damages to the common elements." Id. at 501-02, 924 A.2d 592 (***25) (citing N.J.S.A. 46:8B-14, -15(a), and -16(a)).

For purposes of standing, we perceive no meaningful distinction between Port Liberte and the present matter which, in our view, presents the more compelling case. In the former, the association had to step into the shoes of the developer because the alleged misrepresentations were not made to, or intended for, the plaintiff association or the individual unit owners. Here, on the other hand, the misrepresentations in the marketing materials were made directly to, and intended for, the potential unit owners to induce them to purchase a unit. In either case, the Association represents the unit owners who were harmed by the proven damage to the common elements. Therefore, our holding in Port Liberte has equal, if not more persuasive, application here:

[HN7] Because the CFA allows "any person who has suffered an ascertainable loss" to sue under the CFA, N.J.S.A. 56:8-19, an association, charged with the maintenance and repair of the common areas of a condominium, that discovers defects in the construction of its common element areas, has standing to pursue a claim under the CFA. . . .

[*74] Id. at 505, 924 A.2d 592.

Accordingly, because the Association, through its construction defect and CFA claims, sought to recover for damages to the common elements, it is unquestionably the real party in interest and therefore has standing to pursue its complaint against defendant.

 Defendant's alternative argument that the Association lacked standing because it failed to demonstrate reliance on the alleged misrepresentation is even less persuasive. The Association was not required to demonstrate reliance for defendant to be liable under the CFA.

The CFA provides:

[HN8] Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefore in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

[N.J.S.A. 56:8-19.]

Thus, [***27] [HN9] to state a claim under the CFA, a plaintiff must allege three elements: (1) unlawful conduct by the defendants; (2) an ascertainable loss; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss. N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12:13, 842 A.2d 174 (App.Div.) (citing Cox v. Sears Roebuck & Co., 138 N.J. 2, 24, 647 A.2d 454 (1994), certif. denied, 178 N.J. 249, 837 A.2d 1092 (2003)).

[***24] [HN10] As to "unlawful conduct" under the CFA, the Court in Cox, supra, 138 N.J. at 17, 647 A.2d 454, explained that "a person must commit an 'unlawful practice' as defined in the legislation." The CFA "specifies the conduct that will amount to an unlawful practice in the disjunctive," id. at 19, 647 A.2d 454, providing:

[HN11] The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the [*75] knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact [***28] been misled, deceived or damaged thereby, is declared to be an unlawful practice.

[N.J.S.A. 56:8-2 (emphasis added).]

[HN12] The CFA is "one of the strongest consumer protection laws in the nation." Cox, supra, 138 N.J. at 15, 647 A.2d 454 (internal quotation omitted). "Courts have emphasized that like most remedial legislation, the
[CFA] should be construed liberally in favor of consumers." *Ibid.* "A plaintiff need not even show reliance on the violation of the [CFA] as long as an ascertainable loss resulting from defendant's conduct is demonstrated." *Leon v. Rite Aid Corp.*, 340 N.J. Super. 462, 468, 774 A.2d 674 (App.Div.2001). See also *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 607-08, 691 A.2d 350 (1997) (holding that reliance is not required in suits under the CFA because liability results from "misrepresentations whether 'any person has in fact been misled, deceived or damaged thereby") *(quoting N.J.S.A. 56:8-2); N.J. Citizen Action, supra, 367 N.J. Super. at 15, 842 A.2d 174 ([T]he element of traditional reliance required to be pleaded and proven in a common law fraud or misrepresentation case, . . . need not be proven in order to recover for damages pursuant to the CFA[,]")*. Accordingly, in order to prevail, a plaintiff need only [*77*] demonstrate a causal connection between the unlawful practice and ascertainable loss. *Thiedemann v. Mercedes-Benz USA, LLC.*, 183 N.J. 234, 246, 872 A.2d 783 (2005); *Gennari, supra, 148 N.J. at 604, 691 A.2d 350.*

The present case is analogous to *Gennari, supra, 148 N.J. at 590-92, 691 A.2d 350,* in which purchasers of homes in a real estate development brought an action alleging, among other things, CFA violations against Weichert Realtors (the real estate brokerage firm which marketed the development), as well as the builder, the builder's wife (who was a Weichert agent), and the corporation owned by the builder and his wife. Several Weichert agents affirmatively misrepresented to potential purchasers that "[the builder] was an experienced builder who had built hundreds [*76*] of quality homes throughout New Jersey." *Id. at 592, 691 A.2d 350.* However, the builder generally had always worked under the supervision of others and his workmanship was "disastrous." *Ibid.*

The Court held that Weichert's representations misled the purchasers to believe that Weichert was familiar with the builder and his workmanship, and that the builder was "an exacting and demanding builder of real substance." *Ibid.* In holding Weichert liable under the CFA, the Court determined [*30*] that the Weichert agents had "misled, deceived, and damaged" the plaintiffs. *Id. at 608, 691 A.2d 350.*

The Court also rejected Weichert's argument that the plaintiffs did not rely on its representations because they conducted independent investigations into the builder's qualifications prior to purchasing their [*25*] houses. *Id. at 607, 691 A.2d 350.* Plaintiffs did not need to demonstrate reliance since Weichert's liability arose from the CFA, "which does not require proof of reliance." *Id. at 607, 691 A.2d 350.*


*Society Hill* is easily distinguishable because there, the association's claims admittedly involved damage to individual units rather than to the "common elements." *Society Hill, supra, 347 N.J. Super. at 169-73, 789 A.2d 138.* The court held that the association lacked standing because the claims were "not matters of 'common interest'; rather, they [were] in the nature of 'individual grievances' necessarily left [*31*] to litigation brought by individual unit owners." *Id. at 172-73, 789 A.2d 138.*

Neither *Chattin* nor *Marrone* involved suits brought by a condominium association. Here, plaintiff is an association, which [*77*] consists of all the unit owners in the Belmont. Moreover, plaintiff has demonstrated a causal relationship between the unlawful practice and ascertainable loss. The POS and accompanying marketing materials were distributed to all the original purchasers in order to induce them to purchase their units. Furthermore, while the Association was not required to demonstrate actual reliance on defendant's misrepresentations, it nevertheless produced the testimony of Sheedy, an original purchaser, who testified that she received, read and relied on the POS and the accompanying marketing materials in deciding to purchase her unit in the Belmont.

Finally, on this same point, we address the concern raised that it was only the original purchasers who received the alleged misrepresentations from the developer. Firstly, we reiterate the general principle that [HN13] the Association, on behalf of all unit owners, is the proper "party in interest" to bring construction defect and CFA claims for damages to the common areas sustained [*32*] by any or all of the unit owners and accordingly may recover all the damages necessary to repair or correct the defects to the common elements and to which it may be statutorily entitled. Secondly, we discern no sound reason in law or policy to reduce the recoverable damages for subsequent purchasers. To be sure "[n]o reported New Jersey decision has determined whether damages relating to defects in common elements should be allocated so that the association can only collect on behalf of a certain percentage of the unit owners and not those who purchase after the defects become known." Wendell A. Smith et al., *Estis & Li, New Jersey Condominium & Community Association Law* § 16:4 (Gann 2013), "Whether a deduction should be made for subsequent purchasers from a Consumer Fraud Act award in a
suit brought by an Association against a developer has not yet been addressed by the courts.” *Ibid.* However, the majority of jurisdictions outside of New Jersey have declined to apportion such damages among condominium owners holding undivided interest in the common elements.

[*78] In *Stony Ridge Hill Condominium Owners Ass’n v. Auerbach*, 64 Ohio App. 2d 40, 410 N.E.2d 782, 785-86 (1979), the Ohio Court of Appeals [***33] declined to apportion damages awarded with respect to defective or substandard roofs on the condominium buildings and garage. In rejecting the defendant developer’s argument that not all 24 unit owners were entitled to recover [***26] for the alleged misrepresentations since “only four unit owners of the 24 owners testified that they sustained damage as a result of the alleged misrepresentations pertaining to the ‘twenty-year roof,’” *id.* at 785, the court explained: The Owners Association, on behalf of all unit owners and for each of them, is the proper party to bring an action for damages pertaining to the common area sustained by any or all of the unit owners. Payment by defendants of only one-sixth of the roof damage, representing the share of four unit owners, and the consequent repair of only one-sixth of the roof would still leave the roof in the same leaky condition, and would be the equivalent of giving plaintiff no legal remedy or relief whatever.

[*Id.* at 786 (internal citation omitted).]

In *Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.*, 406 So.2d 515, 519-20 (Fla.Dist.Ct.App.1981), the Florida Court of Appeals refused to apportion damages awarded with respect to defective [***34] or substandard fencing and ceiling roof assemblies. The court explained:

We hold that as to common elements, the [condominium owners] may recover the entire damages on either theory [implicity warranty or negligence], albeit the subsequent or remote purchasers will benefit thereby. To conclude otherwise and apportion the damages would penalize the original purchasers. In order for [the owners] to receive the benefit of their bargain and be made whole, the amount of damages awarded must equal the sum necessary to correct the condition.

[*Ibid.*]

In *Chapman Place Ass’n v. Prokasky*, 507 N.W.2d 858, 863-64 (Minn.Ct.App.1993), the Minnesota Court of Appeals reversed the trial court’s apportionment of damages awarded to a condominium association for defects in the common elements. There, the trial court had reduced the damages awarded for units purchased after the defects had become apparent. *Id.* at 861. The court found that such a reduction created a windfall for the contractor, and also cautioned: "Reduction of damages on this basis could encourage [*79] negligent contractors to prolong litigation with the hope that additional units conveyed will reduce the amount of recoverable damages.” *Id.* at 864. [***35] See also *Starfish Condo. Ass’n v. Yorkridge Serv. Corp.*, 295 Md. 693, 458 A.2d 805, 812-13 (1983) (rejecting the argument that the individual unit owners’ entitlement to damages should be limited by their percentage of ownership). Thus, a majority of jurisdictions outside New Jersey have declined to apportion damages awarded for defects in the common elements among condominium owners, holding that an association can recover all the damages necessary to repair or correct such defects. We are in accord with this view as consistent with the principles underlying both the NJCA and the CFA as well as with sound policy that to otherwise apportion or reduce the damages awarded would create a windfall for the tortfeasor-developer at the expense of innocent consumers. (B)

In its next challenge to plaintiff’s CFA claim, defendant contends that the claim fails as a matter of law because the POS representations were true at the time they were made and are not accompanied by "aggravating circumstances.” We disagree.

[80] In Miller v. American Family Publishers, 284 N.J. Super. 67, 87, 663 A.2d 643 (Ch.Div.1995), the court held that [HN15] "a claim of literal truth will not constitute a defense to a charge that the overall impression created by an advertisement is misleading and deceptive to an ordinary reader." If a defendant's statements are found to be misleading and deceptive at trial, "then a finding of literal accuracy will not bar a conclusion that [they] violate[d] the Consumer Fraud Act." Id. at 85, 663 A.2d 643. The court, citing United States Postal Service v. Allied Treatment, Inc., 730 F. Supp. 738, 739 (N.D.Tex.1990), explained:

"To determine whether an advertisement or solicitation makes a false or misleading representation, the court must consider [***37] the effect that the advertisement, taken as a whole, would produce on one with an ordinary and unsuspecting mind. A court must consider the implications of an advertisement because, if it is designed to deceive the reader, an advertisement 'may be completely misleading' even if 'every sentence separately considered is literally true.' Donaldson v. Read Magazine[, Inc., 333 U.S. 178, 188, 68 S. Ct. 591, 597, 92 L. Ed. 628, 640 (1948)]. Taking an advertisement or solicitation as a whole means considering not only what it states literally, but also what it reasonably implies."

[Miller, supra, 284 N.J. Super. at 86, 663 A.2d 643.]

Defendant's other argument that to support its CFA claim, plaintiff had to demonstrate "aggravating factors" because the [81] alleged misrepresentations constituted a "warranty" is equally unpersuasive. [HN17] A plaintiff need not demonstrate "aggravating factors" when the "unlawful practice" is an affirmative misrepresentation.

[HN18] N.J.S.A. 56:8-2 provides, in pertinent part, that "[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, . . . whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice." "[T]o establish a violation of the [CFA], a [**28] plaintiff need not prove an unconscionable commercial practice." Cox, supra, 138 N.J. at 19, 647 A.2d 454. The CFA "specifies the conduct that will amount to an unlawful practice in the disjunctive." [***39] and therefore, "[p]roof of any one of those acts or omissions or of a violation of a regulation will be sufficient to establish unlawful conduct under the [CFA]." Ibid.

In Cox, the Court explained that

[HN19] "a breach of warranty, or any breach of contract, is not per se unfair or unconscionable . . . and a breach of warranty alone does not violate a consumer protection statute." D'Ercole Sales, [Inc. v. Fruehauf Corp., 206 N.J. Super. 11, 25, 501 A.2d 990 (App.Div.1985)]. Because any breach of warranty or contract is unfair to the non-breaching party, the law permits that party to recoup remedial damages in an action on the contract; however, by providing that a court should treble those damages and should award attorneys' fees and costs, the Legislature must have intended that substantial aggravating circumstances be present in addition to the breach. DiNicola v. Watchung Furniture's Country Manor, 232 N.J. Super. 69, 72, 556 A.2d 367 (App.Div.) (finding that breach of warranty in supplying defective furniture and denying that defect existed was not unconscionable), certif. denied, 117 N.J. 126, 504 A.2d 854 (1989); D'Ercole Sales, supra, 206 N.J. Super. at 31, 501 A.2d 990 (holding that breach of [***40] warranty for malfunctioning tow truck and refusal to repair was not unconscionable practice).

[Id. at 18, 647 A.2d 454.]
Plaintiff is not alleging an unconscionable commercial practice; rather, it is defendant’s alleged affirmative misrepresentations contained in the POS and accompanying marketing materials that form the basis of plaintiff’s CFA claims. Moreover, the alleged misrepresentations were not “homeowner warranties” and, therefore, defendant’s reliance on DiNicola, supra, 232 N.J. Super. at [*82] 69, 556 A.2d 367 and D’Ercole, supra, 206 N.J. Super. at 11, 501 A.2d 990, is misplaced. Furthermore, neither DiNicola nor D’Ercole dealt with affirmative misrepresentation as the basis of a CFA violation.

In sum, literal truth is not a defense to plaintiff’s CFA claims. Furthermore, contrary to defendant’s contention, plaintiff was not required to demonstrate “aggravating factors” to support its CFA claims, which were based on the unlawful practice of affirmative misrepresentation.

(C)

Defendant next contends that plaintiff’s CFA claims based on its representations concerning its “background and experience” are barred by the applicable statute of limitations, because the unit owners knew that those statements were false more than six [***41] years prior to the filing of the complaint. Defendant also argues that claims based on the statement regarding the “no known defects” in the building are barred by the statute of limitations because “all sales [of the units in the building] closed prior to June 30, 2000 with the complaint being filed in January 2007.”

Plaintiff’s CFA claims did not accrue until it suffered an ascertainable loss. Nevertheless, even if plaintiff’s claims accrued at an earlier date, the statute of limitations was properly tolled under the discovery rule.

The applicable statute of limitation is set forth in N.J.S.A. 2A:14-1 (emphasis added), which provides: [HN20] “Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal [**29] property, . . . shall be commenced within 6 years next after the cause of any such action shall have accrued.”

[HN21] Plaintiff’s CFA claims require it to prove an ascertainable loss, among other things. See N.J. Citizen Action, supra, 367 N.J. Super. at 12-13, 842 A.2d 174. "It is also clear that the date when a cause of action is deemed to have 'accrued' is 'the date upon which [*83] the right to institute and maintain a suit first [***42] arises.'” Holmin v. TRW, Inc., 330 N.J. Super. 30, 35, 748 A.2d 1141 (App.Div.2000) (quoting Hartford Accident & Indem. Co. v. Baker, 208 N.J. Super. 131, 135-36, 504 A.2d 1250 (Law Div.1985)), aff’d o.b., 167 N.J. 205, 770 A.2d 283 (2001). Therefore, “[u]ntil a plaintiff has suffered 'damages,' . . . he cannot maintain a suit for damage based on fraud since his cause of action has not yet accrued. It will accrue only when 'damage' is inflicted." Id. at 36, 748 A.2d 1141.

Accordingly, contrary to defendant’s contention, plaintiff’s CFA claim did not accrue when it learned of the falsity of defendant’s representations; rather, the cause of action accrued when plaintiff suffered an ascertainable loss. Plaintiff did not suffer an ascertainable loss until sometime after 2001, most likely 2004, when the true nature and extent of the water infiltration problem became evident, and thus was within six years of the filing of the complaint. See N.J.S.A. 2A:14-1.

Nevertheless, even if plaintiff’s claim accrued on an earlier date, the statute of limitations was properly tolled under the discovery rule. [HN22] Under the discovery rule, “the statute of limitations begins to run only when the client suffers actual damage and discovers, or through the use [***43] of reasonable diligence should discover, the facts essential to the malpractice claim.” Grunwald v. Bronkesh, 131 N.J. 483, 494, 621 A.2d 459 (1993). Stated another way, “in an appropriate case a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim.” Lopez v. Swyer, 62 N.J. 267, 272, 300 A.2d 563 (1973).

In the present case, the discovery rule would act to toll the applicable statute of limitations until 2004, just three years prior to the filing of the complaint, because that was the first time plaintiff, through its new property manager Realty Express, had reason to believe that it had suffered an ascertainable loss.

[*84] II.

In contrast to the standing challenge just discussed, we agree with defendant’s argument that the Association lacked standing to seek damages for the windows because the windows are personal to the unit owners and are not part of the “common elements” of the Belmont. We therefore conclude that the court erred by denying defendant’s motion to dismiss the claim for damages to the windows and by granting plaintiff’s motion holding that it had standing [***44] to pursue that claim.

As previously noted, [HN23] pursuant to the NJCA, a condominium association may sue the developer for construction defects related to the common elements, Siller, supra, 93 N.J. at 377, 461 A.2d 568, and a unit owner may sue the developer “to safeguard his interests in the unit he owns[,]” id. at 382, 461 A.2d 568; however, an “association may not sue the developer for damages to a unit[,]” Society Hill, supra, 347 N.J. Super. at 169, 789 A.2d 138 (citations omitted). Thus, we must
determine whether the windows are part of the individual units or the "common elements" of the building.

"The physical extent of [a unit] depends upon what has been included in [**30] the common elements." Siller, supra, 93 N.J. at 382, 461 A.2d 568. Whether an item is a common element "may be ascertained by examination of the statutory definition and the master deed." Ibid.; see also N.J.S.A. 46:8B-3(d).

The NJCA defines common elements to include:

[HN24] as to any improvement, the foundations, structural and bearing parts, supports, main walls, roofs, basements, halls, corridors, lobbies, stairways, elevators, entrances, exits and other means of access, excluding any specifically reserved or limited to a particular unit or group of units; . . . .

[N.J.S.A. 46:8B-3(d)(ii) [***45]

The failure to specifically include "windows" within common elements in subparagraph (ii) is a telling omission, as is that subparagraph's explicit exclusion from common elements of "entrances, exits and other means of access . . . specifically reserved or limited to a particular unit."

[*85] [HN25] "[A]s a general matter the thrust of [N.J.S.A. 46:8B-3(d)] is to define common elements in general as those elements existing or intended for common use." Society Hill, supra, 347 N.J. Super. at 170, 789 A.2d 138. Therein, we summarized the distinction between common elements and a unit as follows:

One easy way to visualize a condominium unit is as a cube of air, the tangible boundaries of which are usually the finished side of the interior sheetrock, ceilings and floors. While many condominiums vary this definition slightly (driven, in part, by allocating maintenance responsibilities), the condominium unit is generally seen by owners as the "inside" of their structure while the shell and "outside" of the building is a common element.


We emphasized that one can distinguish a common from unit element [***46] by examining whether the unit owner or association bears responsibility for repairing those building components. Id. at 170-71, 789 A.2d 138.

[HN26] Generally speaking, unit windows are not intended for common use, rather, they are intended for the personal use of individual unit owners. If considered part of the "common elements," however, then the Association would be responsible for repairing or replacing any and all windows worn or damaged through ordinary use. Furthermore, the individual unit owners would be prohibited from replacing or altering the windows in their own units without permission from the Association. Such a result seems illogical and, in our view, not within the contemplation of the NJCA's definition of common elements.

As noted, [HN27] a condominium's master deed can further specify common elements, N.J.S.A. 46:8B-3(d)(viii), and the trial judge relied on his reading of this document in determining that he could not find "any clear statement in the master deed from which [it] can draw a conclusion that windows are part of the unit":

[Section 4(c)(2)] of the master deed . . . says . . . the general common elements shall also include by way of description but not [of] limitation . . . to the . . . . exterior wood trim, precast window sills and lintels. . . .

[*86] [Y]ou know what are we to do, bifurcate the sills, the lintels from the claim and say the actual interior window glass, which I don't think is part of this claim? It deals with water infiltration.

[**31] . . .

[T]he [c]ourt finds that substantial components of a window are included as common elements, quite frankly.

Of course, [HN28] the construction of a written document solely on the basis of its own terms, is a question of law, Spinelli v. Golda, 6 N.J. 68, 79-80, 77 A.2d 233 (1950); Hofer v. Carino, 4 N.J. 244, 250, 72 A.2d 335 (1950); Driscoll Constr. Co. v. State of N.J., Dep't of Transp., 371 N.J. Super. 304, 313, 853 A.2d 270 (App.Div.2004), as is whether a term is clear or ambiguous, Nester v. O'Donnell, 301 N.J. Super. 198, 210, 693 A.2d 1214 (App.Div.1997), and we review legal issues de

Turning to the language in the master deed, the trial court was correct in its observation that there was no "clear statement in the master deed from which [it] can draw a conclusion that windows are part of the unit." The inverse, however, is also correct: there is no "clear statement" in the master deed that windows are part of the common element. Our reading of the relevant portions of the document together with the NJCA persuades us that the court erred in concluding that "substantial components of a window are included as common elements" in the master deed.

Article 3 of the Belmont master deed, entitled "Description of the Units," provides:

(a). Boundary. . . . Each Unit is intended to contain all space within the area bounded by the interior surface of its perimeter walls and the lowermost floor and its uppermost ceiling as follows:

(1) Sides. The sides of each Unit are imaginary vertical planes along and coincident with the innermost surface of the studs of the perimeter walls. Where no wall exists, the side is an imaginary vertical plane along and coincident with the exterior surface of the perimeter glass windows or doors located on the perimeter of such Unit. The sides of each such Unit are bounded by the bottom and the top of the Unit.

. . . .

[*87] (4) Items Included in Unit. Each Unit shall include, and each Unit Owner shall be responsible for, all plumbing lines, vent stacks, gas lines, electrical lines, CATV lines, and telephone lines located within the perimeter walls, floors and roof of the Unit (including roof penetrations for same) . . . . In addition and without limitation on the foregoing, each Unit also includes all built-in appliances, fixtures, interior doors, interior walls and partitions, gypsum board and/or other facing material on the walls and ceilings thereof, the inner decorated and/or finished surface of the floors (including all flooring tile, ceramic tile, finished flooring, carpeting and padding) and all other improvements located within such Unit described, which are exclusively appurtenant to such Units, although all or part thereof may not be located within the Unit . . . .

Article 4 of the Belmont master deed, entitled "Description of General and Limited Common Elements," provides:

(a). Common Elements Defined. The "Common Elements" of the Condominium (the "Common Elements") include, but are not limited to, those areas, corridors, spaces and other parts of the Building and all Facilities therein which are not part of the Units and which are for the common use of the Units and the Unit Owners or which are necessary or convenient for the existence, maintenance or safety of the Property.

. . . .

(c). General Common Elements. The General Common Elements shall also include by way of description but not by way of limitation (to the extent the same are applicable to the Condominium):

. . . .

(2) To the extent they are part of the Building: concrete spread footings; Ibeams; footings; masonry walls; exterior
brick; exterior stucco; wire mesh; vapor barriers; exterior wood trim; precast window sills and lintels; fypon trim & cornice work; exterior lighting fixtures; exterior front door and related hardware and mail slot; front door buzzer intercom panel; street numbers; brick sidewalk pavers; concrete curb; vinyl siding, if any; exterior or fencing; roofing membrane system; plumbing, sewer line, and electric and gas conduits running from street service to the Building and/or Units as the case may be; interior hallway lights and heaters; interior or hallway finishes including sheet rock; interior hallway floor tile, carpet, stairs & handrail;

(3) All other Facilities and equipment in the Building that serve or benefit or are necessary or convenient for the existence, maintenance, [***51] operation, or safety of the Property not included in the Units as defined above;

(4) Any and all other Common Elements in the Property not included in the Units . . . .

The master deed is not ambiguous. It simply makes no specific reference to the unit windows. However, the failure of the master deed to specifically list the unit windows as part of the "common [*88] elements" adds substantial support to the conclusion that they are part of the individual units.

Contrary to the trial court's conclusion, the master deed's reference to the "exterior wood trim; precast window sills and lintels" as part of the "common elements" does not support the conclusion that the unit windows are part of the "common elements." "Exterior wood trim, precast window sills and lintels" are not components of a window; rather, they are essentially the "hole" in the wall in which an actual window fits. In contrast, [HN29] unit windows are located within the individual units and are, generally speaking, intended for the use of the individual unit owner. Therefore, claims for damages thereto are not matters of "common interest"; rather, they are in the nature of "individual grievances[s]" necessarily left to litigation brought [***52] by individual unit owners. See Siller, supra, 93 N.J. at 378, 461 A.2d 568 (quoting Crescent Park Tenants Ass'n v. Realty Equities Corp. of N.Y., 58 N.J. 98, 109, 275 A.2d 433 (1971)).

So, although the master deed does not provide a clear answer, when it is read in conjunction with the NJCA, see Siller, supra, 93 N.J. at 382, 461 A.2d 568, it is apparent that unit windows are part of the individual units and not the common elements. Therefore, the Association lacked standing to sue for damages to the unit windows and the award for the cost of the replacement windows must be vacated.

III.

Defendant contends that the court erred by failing to dismiss plaintiff's claim for "interior damages" because plaintiff failed to demonstrate which "construction [**33] defect" caused what interior damages, and failed to attribute damage to either defendant or any of its subcontractors.

The trial court determined that there was "enough evidence and testimony in the record that the jury could determine who was responsible[,]" and therefore reasonably apportioned damages among the defendants, noting:

[*89] They've seen charts how much it's going to cost. You showed them charts how much everything is going to cost. They know who was supposed to do what. They've [***53] seen scope of work, they've seen contracts, they've heard experts, they know who was supervising. I think that's entirely enough evidence presented to the jury to be able to do that.

We agree.


[HN31] The Comparative Negligence Act, N.J.S.A. 2A:15-5.1 to -5.8, mandates the apportionment of fault where "the question of liability is in dispute." N.J.S.A. 2A:15-5.2(a). The law states:

[HN32] a. In all negligence actions . . .
The trier of fact shall make the following as findings of fact:

(1) The amount of damages which would be recoverable by the injured party regardless of any consideration of negligence or fault, that is, the full value of the injured party's damages.

(2) The extent, in the form of a percentage, of each party's negligence or fault. The percentage of negligence or fault of each party shall be based on 100% and the total of all percentages of negligence or fault of all the parties to a suit shall be 100%.

[N.J.S.A. 2A:15-5.2(a).]

"The New Jersey Supreme Court has recognized that, [HN33] although rare, cases may arise where it is extremely difficult or impossible to apportion damages." Boryszewski, supra, 380 N.J. Super. at 375, 882 A.2d 410 (citing Campione v. Soden, 150 N.J. 163, 184-85, 695 A.2d 1364 (1997)). "In such cases, the Court favors rough [***56] apportionment." Ibid. (quoting Campione, supra, 150 N.J. at 184-85, 695 A.2d 1364).

In Campione, the Court articulated the standards for trial courts to follow in cases in which apportionment of fault is either extremely difficult or impossible based upon the evidentiary record developed at trial:

[HN34] At the conclusion of a trial where allocation of damages among multiple tortfeasors is an issue, [***55] the trial court is to determine, as a matter of law, whether the jury is capable of apportioning damages. The absence of conclusive evidence concerning allocation of damages will not preclude apportionment by the jury, but will necessarily result in a less precise allocation than that afforded by a clearer record. If the court establishes as a matter of law that a jury [***34] would be incapable of apportioning damages, the court is to apportion damages equally among the various causative events. If the court concludes that the jury would be capable of apportioning damages, the jury should be instructed to do so.

[Campione, supra, 150 N.J. at 184-85, 695 A.2d 1364 (internal citations omitted).]

In Boryszewski, supra, 380 N.J. Super. at 383-84, 882 A.2d 410, we noted that some governing principles emanate from the apportionment case law:

[HN35] Apportionment is favored under New Jersey law. When the question of liability is in dispute, a charge on apportionment is generally appropriate. Regardless of which party bears the burden of proof, the quantum of evidence required to qualify for an apportionment charge is low. The law favors apportionment even where the apportionment proofs are imprecise, allowing only for rough apportionment [***56] by the trier of fact. Indeed, an arbitrary apportionment--equally among the various causative elements--may be appropriate where the trial court determines, as a matter of law, that the jury would be incapable of making an apportionment.

Here, the issues of liability and damages were interwoven and as a result, the jury was able to apportion damages among the responsible defendants according to their percentages of liability. Its determination was both logical and supported by the record.

In fact, defendant concedes that the "[e]xterior damages were capable of apportionment." "For example, failure to flash around a window could be allocated to the party responsible for that work, i.e. either Monroe Station as general contractor, or the stucco installer. The cost to flash is the measure of damage for that specific defect." However, defendant contends that "no expert or fact witnesses determined what interior damages were caused by what 'construction defect.'" [*91] In essence, there was only one construction defect: the failure to properly seal or waterproof the building. As the jury found, defendants Monroe Station, Badger Roofing and Mayito's all contributed to that failure, and all the damages [***57] to the building resulted from that failure. The distinction that defendant attempts to draw between the interior and exterior damages is not meaningful. All of the "interior damages" were directly caused by the "exterior damages." Because the building was not properly sealed and/or waterproofed (the "exterior damages"), water infiltrated the building, which caused damages to the interior of the building (the "interior damages"). Moreover, it was not necessary, as defendant intimates, to trace every drop of water to ascertain its point of entry into the building since, in a case
like this, "rough apportionment" is favored. Boryszewski, supra, 380 N.J. Super. at 375, 882 A.2d 410 (citing Campione, supra, 150 N.J. at 184-85, 695 A.2d 1364). Thus, we conclude that there was sufficient evidence from which the jury could apportion the liability of the respective defendants, as well as the damages.

IV.

Defendant contends that the court erred by improperly awarding prejudgment interest on the punitive portion of the CFA damages award. We agree.

In awarding prejudgment interest on the entire CFA damages award, the court reasoned:

Considering the legislative purpose of the CFA that it is remedial and should be construed liberally [*35] to accomplish its [*36] objective of deterrence and punishment, it appears that trebling prejudgment interest is appropriate as part of the damages for a CFA injury.


[HN37] N.J.S.A. 56:8-19, which provides for an award of treble damages, attorney's fees, filing fees and costs, does not specifically provide for an award of prejudgment interest. However, prejudgment interest may be awarded pursuant to Rule 4:42-11(b), which provides:

[HN38] Except where provided by statute with respect to a public entity or employee, and except as otherwise provided by law, the court shall, in tort actions, including products liability actions, include in the judgment simple interest, calculated as hereafter provided, from the date of the institution of the action or from a date 6 months after the date the cause [*39] of action arises, whichever is later, provided that in exceptional cases the court may suspend the running of such prejudgment interest. Prejudgment interest shall not, however, be allowed on any recovery for future economic losses.


[HN40] The provisions of the CFA permitting the recovery of treble damages are punitive in nature. See Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 185, 892 A.2d 1240 (2006) ("Treble damages [*93] are intended to punish, and only partly to compensate, and therefore have all the hallmarks of punitive damages.") (Albin, J., dissenting); Furst v. Einstein Mooinji, Inc., 182 N.J. 1, 12, 860 A.2d 435 (2004) ("The purpose of the [CFA] remedies is not only to make whole the victim's loss, but also to punish the wrongdoer and to deter others from engaging in similar fraudulent practices."). "[P]rejudgment interest on punitive damages should not be permitted." Zalewski v. Gallagher, 150 N.J. Super. 360, 373, 375 A.2d 1195 (App.Div.1977).

In Belinski v. Goodman, 139 N.J. Super. 351, 360, 354 A.2d 92 (App.Div.1976), we held "that [HN41] prejudgment interest was not intended by R. 4:42-11(b) to have application to awards of punitive damages and [*36] that the trial court was in error in ruling otherwise." We explained:

While R. 4:42-11(b) does not expressly except punitive damage awards from its scope, the policy considerations which gave rise to its adoption suggest that result. [*61] Prejudgment interest is assessed on tort judgments because the defendant has had the use, and the plaintiff has not, of moneys which the judgment finds was the damage plaintiff suffered. It is thus clearly implied that interest on the
loss suffered by a plaintiff as a result of defendant's tortious conduct is what was contemplated by the rule.

... Interest is not punitive ...; here it is compensatory, to indemnify the claimant for the loss of what the moneys due him would presumably have earned if payment had not been delayed ...

An award of punitive damages, by its own terms, is punitive in nature and purpose and the award of interest thereon no less so. Such damages do not compensate plaintiff for a loss sustained; their purpose is to punish a defendant for wrongful, malicious conduct and as a deterrent to such conduct in the future.

[Id. at 359, 354 A.2d 92 (internal quotations and citations omitted).]

In awarding prejudgment interest on the entire CFA damages award, the trial court incorrectly focused on the purpose and intent of the CFA's statutory treble damages remedy, which is punitive, Liberty Mut. Ins. Co., supra, 186 N.J. at 185, 892 A.2d 1240, and Furst, supra, 182 N.J. at 12, 860 A.2d 435, rather than the purpose and intent of Rule 4:42-11, which is compensatory, not punitive. See Busik, supra, 63 N.J. at 358, 307 A.2d 571; Pressler & Verniero, supra, comment 2 on R. 4:42-11. Since the award of prejudgment interest was granted pursuant to Rule 4:42-11, not the CFA, the court erred by doing so.

The Association has not cited, and our research has failed to disclose, any binding case law that supports an award of prejudgment interest on treble damages. Accordingly, we hold that an award of prejudgment interest is limited to the compensatory portion of a CFA damages verdict. We therefore vacate the award of prejudgment interest in this matter, and remand for recalculation of prejudgment interest on only the compensatory portion of the CFA damages verdict.

V.

Defendant next argues that plaintiff's repeated reference to the negative "health effects" of the mold, throughout the trial, unduly prejudiced defendants and denied them a fair trial. We discern no error here.

At trial, defendants moved to have plaintiff's environmental diagnostic expert, Sabath, barred from testifying about potential health effects from mold in the building, since there were no personal injury claims. The court denied the motion, finding that under N.J.R.E. 403, the *** testimony was "not so overly prejudicial and unfair to be inherently inflammatory." The court allowed Sabath to testify for the limited purpose of explaining why plaintiff claimed it was necessary to remediate the mold, but precluded him from testifying extensively about the details of the potential adverse health effects of mold. Prior to Sabath's testimony, the court gave the following limiting instructions:

I want to instruct the jury that you're going to hear testimony now of plaintiff's expert witness, Dr. Sabath, and the purpose of the testimony is to explain to you why the plaintiff claims that the mold in the Belmont needs to be removed.

[**37] There are no allegations, and I want the jury to be very clear on this, that any resident has become ill or have [sic] any health complaints as a result from existing mold, nor are there any claims for personal injury or illness[, or] any other allegations of sickness involved in this trial.

[***95] Therefore, the jury is to consider the testimony of this witness only for the purpose to explain the reasons why the plaintiff claims that the mold needs to be removed, okay.

Plaintiff's counsel questioned Sabath about "the potential health problems associated with mold that mandate, as [he had opined in his report], that th[e] mold should not be left in the walls of the Belmont." The court overruled defendant's counsel's objection, and permitted Sabath to answer the question:

I'm going to allow it and the jury understands that there are no allegations anyone at the Belmont had any of these health problems. This is just prospective, in case it's not removed what can happen. That's what the plaintiff is alleging.

You'll understand no one claims they've had any of these health hazards, or diseases, or illnesses.

Thereafter, plaintiff's counsel questioned Sabath about the differences between specific types of mold. The court sustained defendant's counsel's objection. Sabath testified that the Belmont was "grossly contaminated with a variety of fungal species, a number of which
have been associated with serious health problems in human beings and progressive material deterioration." When he attempted to name the specific fungal species, defense counsel objected. Plaintiff's counsel indicated that she just wanted Sabath to state the names of the fungal species, and the court said Sabath could name them.

Shortly thereafter, out of the presence of the jury, plaintiff's counsel requested "more guidance" from the court about what testimony was permitted. The court explained that he could testify "that mold causes serious health problems," but that he could not "go into the specific diseases which he's not qualified to testify as to." He could not testify about "each type of mold and what it could cause."

[HN42] A trial court's evidentiary rulings are "entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment." State v. Marrero, 148 N.J. 409, 484, 691 A.2d 293 (1997). See also Verdicchio v. Ricca, 179 N.J. 1, 34, 843 A.2d 1042 (2004) (Admissibility of evidence falls within the broad discretion of the trial judge.). On appellate review, a trial court's evidentiary ruling must be upheld "unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide off the mark that a manifest denial of justice resulted." Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492, 734 A.2d 1147 (1999) (internal quotations omitted).

[HN43] Whether evidence should be excluded under N.J.R.E. 403 because its prejudicial effect substantially outweighs its probative value is an issue remitted to the discretion of the trial court. State v. Wilson, 135 N.J. 4, 20, 637 A.2d 1237 (1994). N.J.R.E. 403 provides:

\[HN44\] Except as otherwise provided by these rules or other law, relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence.

[HN45] The burden is on the party urging exclusion of evidence to convince the court that the N.J.R.E. 403 considerations should control. Rosenblit v. Zimmerman, 166 N.J. 391, 410, 766 A.2d 749 (2001). The moving party must demonstrate not only that the contested evidence is prejudicial, but that the factors favoring exclusion "substantially" outweigh its probative value. Ibid. See also State v. Morton, 155 N.J. 383, 453, 715 A.2d 228 (1998), cert. denied, 532 U.S. 931, 121 S. Ct. 1380, 149 L. Ed. 2d 306 (2001). Evidence claimed to be unduly prejudicial may be excluded only where its probative value "is so significantly outweighed by [its] inherently inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation" of the basic issues of the case. State v. Thompson, 59 N.J. 396, 421, 283 A.2d 513 (1971).

[HN46] The decision to grant a defendant's motion for a mistrial rests within the sound discretion of the trial court. State v. Harris, 181 N.J. 391, 518, 859 A.2d 364 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005). The standard is whether or not the error is such that manifest injustice would result from continuance of the trial and submission of the case to the jury. The consideration of the mistrial motion, however, has one additional element, namely the court's determination of whether or not the prejudice resulting from the error is of a nature which can be effectively cured by a cautionary instruction or other curative steps.

[Pressler & Verniero, supra, comment 5.1 on R. 3:20-1.]


Here, as the court explained, the complained-of evidence was relevant, under N.J.R.E. 401, for the purpose of demonstrating why plaintiff believed it was necessary to remediate the mold in the building, especially given defendant's contrary position. Moreover, prior to allowing the jurors to hear the challenged evidence, the court provided them with a limiting instruction, specifically explaining the limited purpose of the proposed testimony, and explaining that there were no allegations that anybody at the Belmont had become ill and that there were no health related/personal injury claims in the case. [HN47] The jury is presumed to have adhered to the court's instruction. State v. Feaster, 156 N.J. 1, 65, 716 A.2d 395 (1998); State v. Manley, 54 N.J. 259, 271, 255 A.2d 193 (1969).

Finally, defendant's interpretation of the record is substantially at odds with ours. Contrary to defendant's claim, we find no willful violations of the court's evidentiary ruling. Instead, there appeared to be genuine confusion as to what exactly was permitted under that ruling. Indeed, plaintiff's counsel immediately accepted the
court's request for a sidebar to allow her to explain to plaintiff's expert witness what was allowed under the court's prior ruling, and, in fact, asked the court for "more guidance" to avoid any further confusion. Moreover, the court never admonished plaintiff's counsel or expert witness for "stepping over the line." See Barber v. ShopRite of Englewood & Assoc., Inc., 406 N.J. Super. 32, 53, 966 A.2d 93 (App. Div.) [***69] (defendant deprived of fair trial where "plaintiff's counsel persisted in making unwarranted prejudicial appeals to [the] jury' and . . . the trial court did not adequately respond to defendant's objections"), certif. denied, 200 N.J. 210, 976 A.2d 386 (2009).

[**39] [***98] Accordingly, the court did not abuse its discretion in admitting the challenged evidence, Wilson, supra, 135 N.J. at 20 637 A.2d 1237, much less in declining to grant defendants' request for the extraordinary remedy of a mistrial, Ribalta, supra, 277 N.J. Super. at 291, 649 A.2d 862.

VI.

Lastly, defendant contends that the court wrongly permitted plaintiff to voluntarily dismiss its claims against Commerce Construction Management, L.L.C., without prejudice, after failing to prove a prima facie case at trial, arguing that "the claims against Commerce Construction should have been either dismissed with prejudice for failure to prove its case, or ordered counsel to reimburse defense fees and costs in the underlying matter."

Commerce did not file an appeal (or cross-appeal) from the court's judgment or order voluntarily dismissing plaintiff's claim without prejudice. Notwithstanding the fact that defendant would not have had standing to do so, see Rule 4:26-1 (real party in [***70] interest), defendant did not appeal from that judgment or order either; it is not designated in defendant's notice of appeal.


Accordingly, because the issue is not properly before the court, and the court lacks jurisdiction to review it, we do not address it.

VII.

We would be remiss if we did not address an issue raised for the first time at oral argument concerning the ownership, [***99] distribution and use of monies recovered in excess of the actual cost of repairing the water damage to the common elements. At oral argument, the Association's counsel suggested that the treble or punitive portion of the damage award belonged to the unit owners and should be distributed accordingly. She explained [***71] that the Association intended to distribute the excess money to twenty-two current and former unit owners who paid additional assessments as a result of the defects in the common elements.

Although we find no case dealing with the distribution of such excess damages in a condominium context, we are of the view that, as with standing, the Association, acting in a representative capacity, and not the individual unit owners, owns the trebled portion of the CFA damages. This is because the jury awarded damages as a result of defects in the common elements, not in the individual units. Accordingly, because the unit owners were not named plaintiffs and lacked standing to sue for damages to the common elements, the Association, as the real party in interest, is the owner of all the damages awarded for defects to the common elements. The individual unit owners could not have sued in an individual capacity for damages to [***40] the common elements, and therefore they should not be entitled to individual recoveries just because, once the amount needed to make all necessary repairs was trebled under the CFA, it exceeded the amount needed to make the repairs.

4 None of the individual unit owners participat- ed [***72] as a named party in the litigation below or in this appeal.

Thus, as owner of the monies recovered and owing a fiduciary duty to all unit owners, the Association's use and distribution is to be determined by that entity's governing documents, including its Master Deed, Charter and By-laws. For example, Article 15 of the Master Deed, entitled "Damage or Destruction to Property," provides:

If the Building, any improvement or Common Element or any part thereof is damaged or destroyed by fire or casualty, the repair, restoration or ultimate disposition of any insurance proceeds shall be in accordance with the following:

[*100] . . .

(e). Excess Insurance Proceeds. If the amount of available insurance proceeds should exceed the cost of any such recon- struction or repair, the excess shall be re-
tained by the Association and applied by it to reduce the Common Expenses.

Although the Association's Charter and By-laws were not included in the appellate record, in Wendell A. Smith et al., New Jersey Condominium & Community Association Law (Gann 2013), the authors set forth "[a] sample of all basic Master Deed provisions," as well as "[a] sample of all basic [by-law] provisions." Smith, et al., supra, at §§ 6, ***73] 8. Section 8:7.10 of the model by-law provisions set forth in New Jersey Condominium & Community Association Law, entitled "Assessment of Expenses in Actions by or against Association; Allocation of Awards," provides, in pertinent part:

b. Allocation of Awards. Money judgments recovered by the Association in any action or proceeding brought hereunder, including costs, penalties or damages shall be deemed a special fund to be applied to (1) the payment of unpaid litigation expenses; (2) Common Expense Assessments, if the recovery thereof was the purpose of the litigation; (3) repair or reconstruction of the Common Elements if recovery of damages to same was the purpose for the litigation; and (4) any amount not applied to (1), (2), and (3) above shall at the discretion of the Board be treated either as (i) a common surplus which shall be allocated and distributed pursuant to the provisions of Section 6.04 of the Master Deed [see 6:6] or (ii) a set off against the Common Expense Assessments generally. Despite the foregoing, if a Unit Owner(s), the Board or any other person or legal entity affected by any such distribution, shall assert that the damages sustained by a Unit Owner(s) was disproportionate to his allocated amount of any common surplus, the matter shall be submitted to binding arbitration. . . .

This model provision sets forth specifically how the excess money should be used. We do not know whether the Association's By-Laws contain an identical or corresponding provision, although we note that the Association's Master Deed, which was provided, mirrors the provisions set forth in New Jersey Condominium & Community Association Law. In any event, the point is that the Association's governing documents will determine the use of the excess money, which, if similar to the model provision, will most likely be for future repairs and maintenance of the common elements and to set off future common expense assessments.

[*101] And finally, as to defendant's contention that the Association would be reaping a windfall as a result of the award of treble damages, the simple answer is that in New Jersey, the assessment of treble damages and attorney's fees is mandatory when a violation of the CFA has been proven. Skeer v. EMK Motors, Inc., 187 N.J. Super. 465, 468-70, 455 A.2d 508 (App.Div.1982); N.J.S.A. 56:8-19. Indeed, as we have noted, the provisions of the CFA permitting the recovery of treble damages are deliberately punitive. See Liberty Mut., supra, 186 N.J. at 185, 892 A.2d 1240 ("Treble damages are intended to punish, and only partly to compensate, and therefore have all the hallmarks of punitive damages.") (Albin, J., dissenting); Furst, supra, 182 N.J. at 12, 860 A.2d 435 ("The purpose of [the CFA] remedies is not only to make whole the victim's loss, but also to punish the wrongdoer and to deter others from engaging in similar fraudulent practices."). Thus, once a violation of the CFA by defendant was proven, the trial court was required to award plaintiff treble damages.

The jury's damage award is affirmed in part, and reversed in part; we reverse the award of prejudgment interest on the punitive portion of the CFA damages award; and remand for the purpose of vacating the award for the cost of the replacement windows and the recalculation of the prejudgment interest award.
III. Causes of Action

A. Breach of Contract, Breach of Warranty, Common Law Fraud, Consumer Fraud Act, Products Liability (Code Requirements; Drawings; Public Offering Statement; Sales Contract; Advertising)

   * N.J. Stat. §2A:58C-8

B. PFEDRA, Condominium Act


C. Consumer Fraud

   * International Building Code, New Jersey Edition

D. Product Liability/Materialmen

§ 2A:58C-8. Definitions relative to actions against product sellers

As used in this act:

"Manufacturer" means (1) any person who designs, formulates, produces, creates, makes, packages, labels or constructs any product or component of a product; (2) a product seller with respect to a given product to the extent the product seller designs, formulates, produces, creates, makes, packages, labels or constructs the product before its sale; (3) any product seller not described in paragraph (2) which holds itself out as a manufacturer to the user of the product; or (4) a United States domestic sales subsidiary of a foreign manufacturer if the foreign manufacturer has a controlling interest in the domestic sales subsidiary.

"Product liability action" means any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty.

"Product seller" means any person who, in the course of a business conducted for that purpose: sells; distributes; leases; installs; prepares or assembles a manufacturer's product according to the manufacturer's plan, intention, design, specifications or formulations; blends; packages; labels; markets; repairs; maintains or otherwise is involved in placing a product in the line of commerce. The term "product seller" does not include:

(1) A seller of real property; or

(2) A provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill or services; or

(3) Any person who acts in only a financial capacity with respect to the sale of a product.


DOCKET NO. A-5421-11T3

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SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2014 N.J. Super. Unpub. LEXIS 1754

March 24, 2014, Argued
July 17, 2014, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3
FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1] On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-23-04.

CORE TERMS: building code, summary judgment, soil, groundwater, warranty, feet, unit owners, waterproofing, condominium, excavation, developer, tar paper, dampproofing, boring, crawl spaces, basement, negligence claims, architectural, constructed, workmanlike, subsurface, wrap, contractor’s, construct, breached, masonry, barrier, vapor, building paper, warranties

COUNSEL: Gregg S. Sodini argued the cause for appellant (Law Offices of Gregg S. Sodini, LLC, attorneys; Mr. Sodini, on the briefs).

James G. O’Donohue argued the cause for respondent Menk Corporation, Inc. (Hill Wallack, LLP, attorneys; Mr. O’Donohue and Susan L. Swatski, of counsel and on the brief).

Francis X. Donnelly argued the cause for respondent H&H Mason Contractors (Mayfield Turner O’Mara & Donnelly, attorneys; Mr. Donnelly and Andrew A. Keith, on the brief).

JUDGES: Before Judges Yannotti and Leone.

OPINION

PER CURIAM

Plaintiff brought this action against numerous defendants asserting claims arising from the construction of The Saratoga at Toms River, a 376-unit condominium townhouse development. Menk was the general contractor and developer of 232 of the 376 condominium units in the development. [*2] Among other things, plaintiff claimed that the units were experiencing water infiltration. H&H was the masonry subcontractor. Plaintiff resolved all of the claims in the case, with the exception of those asserted against Menk and H&H.

Plaintiff’s claim against Menk pertained to the alleged unauthorized use of black building paper in the construction of the units, for which it sought $1.8 million in compensatory damages. Plaintiff also asserted claims against Menk and H&H for allegedly deficient masonry work, as to which plaintiff claimed $2.8 million in compensatory damages.

Vrom Yegparian was the president of Menk during the construction of those units. Menk hired the Danielian Group, a prominent architectural firm from California, to develop plans to construct those units. Those plans were provided to a local architect, George K. Hoppe, who prepared the necessary architectural drawings, which were used during construction. Hoppe completed the drawings in November 1995. Yegparian reviewed the architectural drawings and plans prior to beginning construction, and as needed throughout the construction.

Among other things, the drawings provided that the buildings be wrapped in “Tyvek Building [*3] Paper or equal.” However, Tyvek was not used during construction. Rather, Vapor-x 14-pound black tar paper was used. It is undisputed that Tyvek is not referenced in the applicable building code, and that 14-pound black tar paper is a “code-compliant” building wrap.

Yegparian testified at his deposition that he made the decision not to use Tyvek on the project, and, notwithstanding the specification on the plan with respect to Tyvek, he said he would never have used Tyvek on the project, “[a]bsolutely not” “I did not even think of Tyvek for this project.”

The drawings also required that a groundwater investigation be performed before any masonry work began. On March 2, 1995, Yegparian faxed Hoppe “Soil
Boring Logs” that referred to samples that had been taken at the development property on March 11, 1981. The Soil Boring Logs indicated that twelve twenty-foot borings had been drilled, and soil samples taken, at various locations throughout the development site. The logs also indicated that ten of the borings had dry soil at a depth of twenty feet; and water was detected at eighteen feet and fifteen-and-a-half feet deep in the other two borings.

Plaintiff’s expert, Andrew Amorosi, from The Falcon [*4] Group, testified that the excavation area for each of the thirty-seven buildings constructed at The Saratoga was approximately 150 feet long, 50 feet wide, and 10 feet deep. The excavation for each building required the displacement of approximately 10,000 cubic feet of soil. There was no evidence of any groundwater surfacing as a result of the excavation.

By contract dated October 10, 1995, Menk retained H&H to perform the masonry work at the development, including laying the foundations and installing the basements, crawl spaces, and exterior steps. Most of the construction on the project occurred in 1996 and 1997, and the project was ultimately completed in 1999.

On December 8, 1995, Menk issued an amended public operating statement (POS), which included the original Master Deed. The amended POS stated that the "[c]onstruction of the Units will be in accordance with the conceptual architectural plans . . . with the working drawings done by George Hoppe[.]"

Menk sold all the units using substantively identical Agreements of Sale, which stated that the "Seller [Menk] agrees to construct a Condominium Unit in accordance with applicable governmental codes and the building plans. . . ." The Agreements [*5] of Sale also provided that the "Seller has the right in its absolute and sole discretion . . . to make substitutions of comparable material or equipment which shall be in compliance with applicable building codes."

Plaintiff retained The Falcon Group, an engineering and architectural consulting firm, to inspect and evaluate the buildings. It performed site inspections at The Saratoga from May 2007 through October 2009, approximately ten years after construction had been completed, and prepared a report dated January 22, 2010.

The Falcon Group report does not address the original construction as it existed when the project was completed. Amorosi testified at his deposition that he could not say that any condition he observed in 2007-2008 at The Saratoga actually existed when the units were constructed or when the project was completed.

Amorosi testified at the Rule 104 hearing that the plans did not specifically require waterproofing. Rather, the plans contained "a detail for dampproofing" and a note relating to investigation of the groundwater conditions to determine if waterproofing was required. The mason contractor was required to determine whether groundwater conditions at the property required [*6] waterproofing, and to communicate its findings to the architect. Amorosi did not know if the mason contractor had communicated its findings to the architect.

The applicable building codes required a subsurface soil investigation to determine the possibility of the groundwater table rising above the proposed elevation of the floor or floors below grade. The Building Officials and Code Administrators (BOCA) Code allowed for different methods of investigating the groundwater conditions and does not require more than a subsurface soil investigation.

One manner in which to accumulate data regarding the groundwater condition is excavation. Amorosi conceded that if H&H had dug the foundation and the construction official had approved it, then H&H had complied with the architect’s note in the plans relating to the groundwater investigation. He also conceded that the 1981 soil boring was a sufficient subsurface soil investigation under the applicable building code. Because the Soil Boring Logs demonstrated dry soil between fifteen to twenty feet deep, the applicable building code required only dampproofing to be applied to the foundation walls, not waterproofing.

Amorosi could cite no violation [*7] of any contract provision or the applicable building code as a result of Menk installing dampproofing as opposed to waterproofing in foundations, crawl spaces, and basements. Moreover, Amorosi’s inspection revealed that the required dampproofing was installed at The Saratoga. The foundation walls were parget coated and a bituminous tar-like material was applied over them.

1 A parget coat is a thin coat of a cementitious or polymeric mortar applied to concrete or masonry.

The applicable building code also required installation of vapor barriers, which were essentially a sheet of plastic that covered the ground of the crawl space. While The Falcon Group’s 2008 inspection revealed that some of the vapor barriers were missing, and others had been damaged, there was no way to determine whether the vapor barrier had been installed by H&H when the units were initially completed in the 1990s. Amorosi conceded that the vapor barriers are often damaged or removed, either intentionally or unintentionally, by the unit owners.

James Milito, another expert for plaintiff, testified that the Vapor-x 14-pound black tar paper used at The Saratoga was not equal to Tyvek. He based his opinion on the perm rating. [*8] which he described as "the
amount of water vapor that can escape through" the material. However, Milito did not measure the perm rating or perform any studies himself, and he could not point to any industry standard, code or publication to support his opinion.

Milito admitted that he had not performed an analysis of the weather resistant qualities of the Vapor-x 14-pound black tar paper versus Tyvek. He did not make any analysis of the permeability of the materials. He conceded that the Vapor-x 14-pound black tar paper was code compliant.

By order entered on April 11, 2005, the trial court granted partial summary judgment to Menk and dismissed plaintiff's claims under the Planned Real Estate Development Full Disclosure Act (PREDFDA), N.J.S.A. 45:22A-21 to -56. The court determined that plaintiff did not qualify as a "purchaser" under PREDFDA. The court also dismissed plaintiff's negligence claims, finding that they were barred by the Economic Loss Doctrine. Therefore, discovery continued and that matter was scheduled for trial in June 2012.


On April 13, 2012, the court heard oral argument on the motions. The court denied plaintiff's motion but reserved its decision on Menk's and H&H's motions pending a Rule 104 hearing to allow examination of Amorosi and Milito.

On May 11, 2012, the court granted summary judgment to Menk and H&H, dismissing plaintiff's complaint in its entirety, and holding that "[t]here was no contractual violation by either Defendant." Concerning the sufficiency of the groundwater investigation, the court stated that the applicable building code was "vague at best, [and] did not require with any specificity as to the extent of [the] groundwater investigation".

The court found that the identification of the borings that had previously taken place on the site, together with the extensive excavation, provided more than ample opportunity to review the groundwater conditions and satisfied the requirements contained in the applicable building code. The court further noted that

[t]here was also recognition by the engineers that prior to the pouring of any of the footings that they were required to be [inspected] [*10] by the township construction code official, that there was never any indication that the foundation or the footings were improperly located, or that there would have to be any remedial measures taken in order to provide for sound foundations in the basements.

On the issue of the installation of black tar paper versus Tyvek building wrap, the court determined that plaintiff had not presented an expert opinion indicating that the tar paper used at The Saratoga was not equivalent to Tyvek building wrap. The tar paper used by Menk complied in every respect with the building code, and aside from plaintiff's expert's personal opinion, there was nothing to suggest that Tyvek building wrap was superior.

The court stated, "[Plaintiff's expert] failed to supply any data, any analysis, any expert test results which would compel . . . the [c]ourt to find that there was at least a factual dispute as to whether or not they were equivalent." After finding that the black tar paper was "substantially equivalent" to the Tyvek building wrap, the court concluded that, without sufficient scientific or engineering data to the contrary, reasonable persons could not find that the two were not substantially equivalent. [*11]

II.

On appeal, plaintiff argues that the trial court erred by granting Menk's motion for partial summary judgment, dismissing its negligence claims and its claims under PREDFDA. We disagree.

Summary judgment shall be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 539-41, 666 A.2d 146 (1995). Furthermore, "[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c).


A. Negligence Claims.

Plaintiff contends that the trial court erred by finding that its negligence claims are barred by the Economic Loss Doctrine. Plaintiff argues that the doctrine does not apply in this case. We do not agree.

In Spring Motors Distributors, Inc. v. Ford Motor Co., 98 N.J. 555, 579-80, 489 A.2d 660 (1985), our Supreme Court explained that the Economic [*12] Loss Doctrine is based on the principle that economic expectations between parties to a contract are not entitled to supplemental protection by negligence principles. The Court noted the difference in the policies underlying tort and contract remedies:

The purpose of a tort duty of care is to protect society's interest in freedom from harm, i.e., the duty arises from policy considerations formed without reference to any agreement between the parties. A contractual duty, by comparison, arises from society's interest in the performance of promises. Generally speaking, tort principles, such as negligence, are better suited for resolving claims involving unanticipated physical injury, particularly those arising out of an accident. Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement.

[Ibid.]

The Court stated that when addressing economic losses in commercial transactions, contract theories were better suited than were tort-based principles. Id. at 580-82.


Plaintiff's cause of action is a breach of contract action, not a negligence action. When "there is no express contractual provision concerning workmanship, the law implies a covenant that the contract will be performed in a reasonably good and workmanlike manner." Aronsohn v. Mandara, 98 N.J. 92, 98, 484 A.2d 675 (1984). Indeed, a home buyer relies on a housing developer's "implied representation that the house will be erected in a reasonably workmanlike manner." Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 91, 207 A.2d 314 (1965)

In Aronsohn, the plaintiff homeowners sued the defendant contractors after they had discovered defects in the patio built before they purchased the home. Aronsohn, supra, 98 N.J. at 96-97. The plaintiffs' suit was based on strict liability, negligence, and breaches of express and implied warranties. Ibid. Regarding the negligence claim, the Court [*14] noted that

what is involved here is essentially a commercial transaction, and plaintiffs' claim [rests] on the violation of the implied contractual provision that the patio would be constructed in a workmanlike fashion. We do not intend to exclude the possibility that a cause of action in negligence would be maintainable. See Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968) (holding valid a negligence suit in which a consumer of water supplied by the city sued the manufacturer of a defective meter which allegedly caused water damage to the meter as well as to his home). However, we do not need to decide the validity of plaintiffs' negligence claim, since, as discussed above, the contractor's negligence would constitute a breach of the contractor's implied promise to construct the patio in a workmanlike manner.

[Id. at 107.]

This case similarly involves commercial transactions between Menk and the unit owners. Their contracts required, among other things, construction of the units in accordance with applicable building codes and the seller's plans. The contracts also required that the units be fit for their intended use, and free of defects in materials and workmanship for a period of two years.

Plaintiff claimed that defendants performed the [*15] contract negligently, that is, that they did not
complete the work in a workmanlike fashion, and/or in accordance with industry standards or accepted practices. Thus, if proven, defendants' alleged negligence would constitute a breach of the express and implied promise to complete the construction in a workmanlike manner. *Ibid.*

We are therefore convinced that plaintiff's allegations essentially sound in contract, not tort. Notwithstanding plaintiff’s arguments to the contrary, the Economic Loss Doctrine applies. We conclude that the trial court correctly determined that Menk was entitled to summary judgment on the negligence claims.

B. PREDFDA Claims.

The trial court found that plaintiff was not a "purchaser" as defined in N.J.S.A. 45:22A-23(d) and therefore could not pursue claims under PREDFDA. On appeal, plaintiff argues that PREDFDA should be interpreted so it can enforce the rights of unit owners to damages to the common elements of the condominium development. It is undisputed that the foundation walls and the building paper in the exterior walls are part of the common elements.

PREDFDA defines a "purchaser" as "any person or persons who acquires a legal or equitable interest in a unit, lot, or parcel [*16] in a planned real estate development." N.J.S.A. 45:22A-23(d). Plaintiff did not acquire a legal or equitable interest in any unit in The Saratoga. However, the New Jersey Condominium Act (NJCA), N.J.S.A. 46:8B-1 to -38, authorizes plaintiff to pursue claims in a representative capacity on behalf of unit owners with regard to common elements in a condominium.

Under the NJCA, an association is "responsible for the administration and management of the condominium and condominium property, including but not limited to the conduct of all activities of common interest to the unit owners." N.J.S.A. 46:8B-12. "Association" is defined as "the entity responsible for the administration of a condominium, which entity may be incorporated or unincorporated." N.J.S.A. 46:8B-3.

Furthermore, the "association shall be an entity which shall act through its officers and may enter into contracts, bring suit and be sued." N.J.S.A. 46:8B-15(a). An association also "may assert tort claims concerning the common elements and facilities of the development as if the claims were asserted directly by the unit owners individually." N.J.S.A. 46:8B-16(a) (emphasis added).

Recently, in *Belmont Condominium Ass'n v. Geibel*, 432 N.J. Super. 52, 72, 74 A.3d 10 (App. Div.), certif. denied, 216 N.J. 366, 80 A.3d 747 (2013), we explained that under the NJCA, a condominium association, acting in a representative capacity on behalf of the individual [*17] unit owner, has the exclusive right to sue a developer for construction defects related to the common elements, N.J.S.A. 46:8B-12, -15(a), -16(a), and although unit owners may sue the developer for defects pertaining to their units, individual unit owners are prohibited from repairing or altering common elements, N.J.S.A. 46:8B-18, and therefore generally lack standing to sue for damages to the common elements.

We therefore conclude that plaintiff, in its representative capacity, has standing to bring PREDFDA claims against Menk, the developer, on behalf of the unit owners for construction defects related to the common elements.

Menk argues, however, that even if plaintiff has standing to bring claims under PREDFDA, the claims are time-barred.

In this case, plaintiff alleged that Menk violated PREDFDA by breaching PREDFDA warranties. As to the breach of the PREDFDA warranties claims, plaintiff alleged:

Menk breached its warranties under N.J.A.C. 5:26-7.1(c) and N.J.A.C. 5:26-7.2(b) (that all of the units were fit for their intended purpose as residential dwelling units and all of the common facilities are fit for their intended use) and N.J.A.C. 5:26-7.3 (that any unit or common element constructed by it would substantially conform to the model, description or plans used to [*18] induce the purchasers to enter into an agreement to purchase a unit unless otherwise noted in the Agreement of Sale) and has refused to repair or correct the defects in the construction, material or workmanship in the common areas installed by it within a reasonable time after notification of the defects in accordance with N.J.A.C. 5:26-7.2(c).

The statute of limitations under PREDFDA is six years measured from the complaining party's "first payment of money to the developer in the contested transaction." N.J.S.A. 45:22A-37(d). However, the applicable regulations state that the warranties under N.J.A.C. 5:26-
7.1 (developer warrants, among other things, that all lots, parcels, units or interests are fit for their intended use) expire after one year, and the warranties under N.J.A.C. 5:26-7.2 (developer warrants, among other things, that the common facilities are fit for their intended use) expire after two years. It is undisputed that plaintiff never made a warranty claim within the one and two-year warranty periods and, therefore, Menk cannot be liable for breach of said warranties in N.J.A.C. 5:26-7.1 and -7.2.

However, unlike N.J.A.C. 5:26-7.1 and -7.2, N.J.A.C. 5:26-7.3 (developer expressly warrants that any lot, parcel, unit, interest, or common facility will substantially conform to the model, description [*19] or plans unless noted otherwise in the contract) contains no express warranty period. Therefore, plaintiff’s breach of warranty claims under N.J.A.C. 5:26-7.3 are governed by the PREDFDA six-year statute of limitations set forth in N.J.S.A. 45:22A-37(d), and were not time-barred.

Here, plaintiff’s warranty claims pertain to the use of the Vapor-x black building paper, rather than Tyvek wrap, in the construction of the units, and certain alleged deficient masonry work. As we explain further on in this opinion, those claims fail as a matter of law. Therefore, the dismissal of the related PREDFDA warranty claims was proper.

We also note that plaintiff also claimed that Menk violated PREDFDA by breaching its fiduciary duty but plaintiff did not address this claim in its brief. Accordingly, this issue is deemed waived. Pressler & Verniero, Current N.J. Court Rules, comment 4 on R. 2:6-2 (2014), See Weiss v. Cedar Park Cemetery, 240 N.J. Super. 86, 102, 572 A.2d 662 (App. Div. 1990) (“The failure to adequately brief the issues requires it to be dismissed as waived.”).

Therefore, we affirm the trial court’s order dismissing plaintiff’s negligence claims and its claims under PREDFDA.

III.

Next, plaintiff argues that the trial court erred by granting summary judgment in favor of Menk on its claims related to the alleged improper [*20] use of Vapor-x black building paper instead of Tyvek in the construction of the units. We disagree.

A. Alleged Breach of Contract.

The architectural plans provided that in the construction of the units, "Tyvek Building Paper or equal" should be used. In addition, the Agreements of Sale provide that the purchasers acknowledge that Menk had "the right in its absolute and sole discretion . . . to make substitutions of comparable materials or equipment which shall be in compliance with applicable building codes."

It is undisputed that the Vapor-x 14-pound black tar paper that Menk used in the construction was "code-compliant" building wrap. Nevertheless, Milito, plaintiff’s expert, testified during the Rule 104 hearing that, in his opinion, the Vapor-x paper was not "equal" to the Tyvek paper and that the Tyvek paper was a superior product.

However, Milito admitted that in making this comparison, he did not conduct any analysis or calculation. He also did not compare the weather resistant qualities of Vapor-x paper and Tyvek. Furthermore, Milito’s statement that Vapor-x paper was not equal to Tyvek was his personal opinion and not supported by any literature on the subject or the applicable building [*21] code.

Even so, plaintiff argues that it presented sufficient evidence to support this claim. Plaintiff relies upon the deposition testimony of Menk’s president, Vrom Yegparian, who testified as follows:

Q. And it would be your understanding that the felt paper would be an equal to Tyvek; correct?

A. It would be equal . . . for purposes of damp proofing.

It would not be its equal for purposes of air infiltration.

Q. But for water-resistant barrier, it would be equal.

A. Yes. And in my personal opinion, many people may disagree, even better for damp proofing, not for air infiltration. . . .

Q. If the plan . . . had just said "Tyvek," would the use of felt paper have been an equal substitute?

A. It would have been an acceptable code substitute. As I said before, it would not be equal for air infiltration, but there is no code requirement for that, not for that type of building. And the other thing is for dampness and waterproofing. It would be equal, in my opinion. Some people will disagree with me.

However, Yegparian was not an expert and he conducted no analysis or comparison of the Vapor-x paper
and the Tyvek material. Moreover, Yegparian was offering his personal opinion on this issue, and [*22] his testimony does not support the conclusion that the Vapor-x paper was not equal to Tyvek.

Therefore, plaintiff did not present sufficient credible, admissible evidence to support his claim that Menk breached the purchase agreements by using the Vapor-x paper rather than Tyvek as a building wrap. The trial court correctly determined that Menk was entitled to summary judgment on the breach-of-contract claims.

B. Consumer Fraud Act.

Plaintiff alleged that Menk violated the Consumer Fraud Act (CFA), N.J.S.A. 56:8-2 to -106, by inducing individuals to purchase the units through misrepresentation, concealment or omission of material facts regarding the common elements. Plaintiff alleged that Menk misrepresented to buyers that the common elements were constructed properly in accordance with the approved architectural plans. Plaintiff claimed that Menk ignored the plans by using the Vapor-x paper rather than Tyvek.

However, as we have explained, plaintiff did not present sufficient admissible, credible evidence to show that the Vapor-x paper was not the equal of the Tyvek material. Therefore, plaintiff did not present sufficient evidence to support its claim that Menk misrepresented, concealed or omitted any material [*23] fact related to use of the Vapor-x material in the construction of the units, and Menk was entitled to summary judgment on the CFA claims.

C. Breach of Express and Implied Warranties.

Plaintiff claimed that Menk breached the express and implied warranties in the Agreements of Sale and the public operating statement by failing to construct and install the common elements in good and workmanlike manner, free from defects and in accordance with the architectural plans. These claims also were based on the alleged improper use of the Vapor-x paper instead of the Tyvek material.

As we stated previously, plaintiff failed to present sufficient admissible, credible evidence that Vapor-x was not "equal" to Tyvek. There also was no evidence showing that the Vapor-x paper was defective or not fit for its intended use. Therefore, the trial court correctly determined that Menk was entitled to summary judgment on these claims.

D. Breach of PREDFDA Warranty.

Plaintiff alleged that Menk breached the PREDFDA warranty under N.J.A.C. 5:26-7.3. The regulation provides that, "The developer shall expressly warrant that any lot, parcel, unit, interest, or common facility will substantially conform to the model, description or [*24] plans used to induce the purchaser to enter into a contract or agreement to purchase unless noted otherwise in the contract."

Plaintiff did not, however, present sufficient admissible, credible evidence that the use of the Vapor-x paper did not "substantially conform to the model, description or plans used." Accordingly, there was insufficient evidence to show that Menk breached the PREDFDA warranty contained in N.J.A.C. 5:26-7.3. We conclude that the trial court correctly determined that Menk was entitled to summary judgment on this claim.

IV.

Plaintiff further argues that "the trial court erred in precluding it from going to trial on its claims under the CFA, for breach of express and implied warranties, and for breach of contract" related to the masonry work. According to plaintiff, defendants failed to construct the foundations in a good and workmanlike manner, free from defects and in accordance with applicable governmental codes and the building plans. Again, we disagree.

A. Breach of Contracts and Building Code.

Plaintiff argues that waterproofing, not dampproofing, of the basement and crawl spaces was required. Plaintiff argues that Menk and/or H&H were required to undertake an appropriate subsurface [*25] groundwater investigation, and if they failed to do so, to waterproof the basements and crawl spaces.

It is undisputed that the basements and crawl spaces were not waterproofed. Plaintiff’s expert, Amorosi, testified at the Rule 104 hearing that the applicable building code required only a subsurface soil investigation, and it allowed for different methods of investigating the groundwater conditions. One of the acceptable methods was excavation.

The excavation area for each of the thirty-seven buildings constructed at The Saratoga was approximately 150 feet long, 50 feet wide, and 10 feet deep. The excavation for each building required the displacement of approximately 10,000 cubic feet of soil. There was no evidence of any groundwater surfacing as a result of the excavation.

Amorosi testified that such excavation complied with the architect’s note in the plans relating to the groundwater investigation. He acknowledged that there was nothing in the applicable building code which said the excavation performed at the property was not a sufficient subsurface soil investigation.
Furthermore, Amorosi conceded that the 1981 soil borings were sufficient subsurface soil investigations under the applicable [*26] building code. Indeed, because the soil boring logs demonstrated dry soil between fifteen to twenty feet deep, the building code required only dampproofing to be applied to the foundation walls, not waterproofing. Amorosi did not identify any violation of a contract provision or the building code as a result of Menk and/or H&H installing dampproofing as opposed to waterproofing in the foundations, crawl spaces, and basements.

Moreover, plaintiff presented no evidence that the vapor barriers, which are a required part of the dampproofing of the basements and crawl spaces, were not properly installed at the time of completion. Amorosi conceded that there was no way to determine if H&H had installed the vapor barriers since they are often damaged or removed, either intentionally or unintentionally, by the unit owners.

Because plaintiff failed to present sufficient admissible, credible evidence that waterproofing, not dampproofing, was required, or that the dampproofing was not properly installed, there was no genuine issue of material fact regarding Menk's and H&H's compliance with the contracts and the applicable building codes. Accordingly, Menk and H&H were entitled to judgment on the [*27] breach-of-contract and building-code claims.

B. Other Masonry-Related Claims.

Plaintiff further alleged that Menk violated the CFA "by inducing homeowners to purchase their units by and through misrepresentation, concealment or omission of material facts regarding Menk's and H&H's compliance with the common elements." Plaintiff claimed that Menk and H&H violated express and implied warranties in the purchase agreements and POS. In addition, plaintiff claimed that Menk breached its PREDFDA warranties.

We are convinced, however, that the trial court did not err in granting summary judgment to Menk and H&H on these claims. As indicated in plaintiff's brief, these claims were all premised on the alleged failure to perform an appropriate subsurface groundwater investigation and to install waterproofing in the basements and crawl spaces. As we have determined, plaintiff did not present sufficient evidence to show that the groundwater investigation was inadequate, or that waterproofing was required. Thus, the related CFA and warranty claims failed as a matter of law.

Plaintiff's other arguments related to these claims are without sufficient merit to warrant comment. R. 2:11-3(e)(1)(E).

We therefore conclude that the trial court correctly granted [*28] summary judgment in favor of Menk and H&H on the masonry-related claims.

V.

Next, plaintiff argues that the trial court erred by limiting the proofs that plaintiff would have been permitted to present at trial. Plaintiff also argues that, in the event of a remand, it should not be precluded from presenting certain mold reports that were submitted after the discovery end date.

A trial court's evidentiary rulings are "entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment." State v. Marrero, 148 N.J. 469, 484, 691 A.2d 293 (1997). See also Verdicchio v. Ricca, 179 N.J. 1, 34, 843 A.2d 1042 (2004) (noting that the admissibility of evidence falls within the trial court's broad discretion). A trial court's evidentiary ruling must be upheld on appeal "unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106, 449 A.2d 1280 (1982).

A. Witnesses Bergen and Finkelstein.

First, plaintiff contends that it should not have been precluded from calling Linda Bergen and Randy Finkelstein as witnesses, or referencing the underlying facts of the prior two litigations relating to their units in building number 33. We conclude that, to the extent this ruling had any bearing [*29] on the summary judgment motions, the ruling was not a mistaken exercise of discretion.

The doctrine on invited error "operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error." Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 503, 677 A.2d 705 (1996). Thus, a defendant cannot ask the trial court to take a certain course of action, and after the court has done so, claim it is error and prejudicial. State v. Pontery, 19 N.J. 457, 471, 117 A.2d 473 (1955).

On August 5, 2011, at the oral argument on Menk's motion, plaintiff's counsel agreed that it would not call either Bergen or Finkelstein at trial. Based on those representations and assurances, the court granted Menk's application and precluded plaintiff from calling Bergen or Finkelstein as witnesses. Plaintiff cannot now argue on appeal that the court erred by doing so. See Brett, supra, 144 N.J. at 503; Pontery, supra, 19 N.J. at 471.

B. Other Evidence Related to Building Number 33.
Plaintiff further argues that the trial court erred by barring testimony and evidence related to problems with other units in Building 33. Contrary to plaintiff's contention, nothing in the court's order precluded plaintiff from calling witnesses other than Bergen or Finkelstein, related to the problems in building number 33.

The record shows that the parties and the court agreed that plaintiff would call one or more of the other unit owners living in building number 33 as trial witnesses. The court's August 5, 2011 order provided: "ORDERED that on or before August 20 Plaintiff shall name other unit 33 witnesses . . . and produce that witness(s) for deposition prior to Sept. 12, 2011[.]

C. Units or Buildings Not Constructed by Menk.

Plaintiff also contends that the trial court erroneously barred it from presenting evidence about buildings at The Saratoga that Menk did not construct. Plaintiff contends that evidence that those buildings never experienced water infiltration problems, while some of the buildings constructed by Menk have, is both probative and relevant.

Notwithstanding plaintiff's arguments to the contrary, evidence concerning units or buildings that Menk did not construct would not have been relevant to any of the issues at trial or at the summary judgment stage of the proceedings. Such evidence was not relevant to the issue of whether Menk breached its contract. N.J.R.E. 401. The trial court did not abuse its discretion by refusing to allow the introduction of such evidence. [*31]

D. The Mold Reports

Plaintiff asserts that its mold reports should not be barred on remand. Since we have determined that Menk and H&H were entitled to summary judgment on all of plaintiff's claims, there will be no remand. Thus, the issue is moot.

We note, however, that the reports in question were submitted in an amendment to interrogatory answers that plaintiff provided six weeks after the discovery end date. Plaintiff was apparently attempting to add a new claim to the case for property damage resulting from the presence of mold in certain units.

Plaintiff's amendment to its interrogatory answers, which contained the mold reports, was prohibited by Rule 4:17-7. The amendment was provided after the discovery end date, and the information contained therein was reasonably available or discoverable prior to the discovery end date through the exercise of due diligence. Ibid.

Affirmed.
ST. LOUIS, L.L.C., Plaintiff-Respondent/Cross-Appellant,
v.
ANTHONY & SYLVAN POOLS CORP., Defendant/Third-Party
Plaintiff-Appellant/Cross-Respondent,
v.
AURORA CONTRACTING, L.L.C., Third-Party Defendant.

DOCKET NO. A-3754-04T3

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2006 N.J. Super. Unpub. LEXIS 1209

May 3, 2006, Argued
June 12, 2006, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.


PRIOR HISTORY: [*1] On appeal from the Superior Court of New Jersey, Law Division, Somerset County, SOM-L-97-01.

CORE TERMS: pool, repair, diminution, contractor, built, new trial, measure of damages, consumer fraud, ascertainable loss, certification, build, expert fees, counsel fees, final judgment, market value, misrepresentation, unconscionable, engineer, glass, affirmative acts, construction defects, fee award, floor, swimming pool, breach of contract, building codes, recover damages, injured party, common sense, defense counsel

COUNSEL: Keith G. Von Glahn argued the cause for respondent/cross-appellant, Anthony & Sylvan Pools Corp. (Wilson, Elser, Moskowitz, Edelman & Dicker, attorneys; Mr. Von Glahn, of counsel; Michael J. Slocum, on the brief).
James E. Mackevich argued the cause for respondent/cross-appellant, St. Louis, L.L.C. (Mackevich Burke & Stanicki, attorneys; Mr. Mackevich, on the brief).

JUDGES: Before Judges Conley, Weissbard and Winkelstein.

OPINION

PER CURIAM

Plaintiff St. Louis, L.L.C. is a limited liability company formed by John Boulton and his wife Prudence Boulton 1 to purchase a forty-eight-acre parcel of land in Franklin Township upon which they constructed a two-story 36,000 square foot glass house. The house cost approximately $ 8.5 million to build and plaintiff sold it during the course of the litigation for $ 2.5 million. The house included a swimming pool and spa that was built by defendant Anthony & Sylvan Pools Corp. Plaintiff alleged Sylvan Pools was negligent in the construction of the pool, breached its contract with plaintiff, made fraudulent misrepresentations to plaintiff and committed consumer fraud. 2

1 References [*2] to "Boulton" in this opinion are to John Boulton.
2 Plaintiff abandoned its claims for negligence and fraudulent misrepresentation during trial.

In August 2004, a jury awarded plaintiff $ 35,000 in compensatory damages for breach of contract and $ 750,000 on its consumer fraud claim which, when tre-
bled, totaled $2,250,000. Following post-verdict motions, the judge awarded plaintiff counsel fees of $117,453.85. Defendant appeals from the March 8, 2005 final judgment that memorialized those awards and plaintiff cross-appeals from a portion of the counsel fee award and from the court's determination not to award prejudgment interest.

On appeal, defendant raises the following issues:

I. The trial court erred in denying Defendant's motion for Judgment Notwithstanding the Verdict because Plaintiff failed to establish the necessary elements of Consumer Fraud.

II. The trial court erred in denying Defendant's motion for Judgment Notwithstanding the Verdict because as a matter of law Plaintiff was not entitled to trebled damages.

III. The trial court erred in denying Defendant's motion for a new trial because the jury's verdict was against the clear weight of the evidence and constituted a miscarriage [*3] of justice.

IV. The trial court erred in denying Defendant's motion for a new trial because the jury was not properly charged.

V. The trial court erred in denying Defendant's motion for a new trial because Plaintiff was improperly permitted to proffer the testimony of two experts whose reports had not been produced in discovery, and Defendant was thereby prejudiced and surprised.

VI. The trial court erred in denying Defendant's motion for a new trial because Plaintiff was improperly permitted to advance inconsistent theories of liability contrary to law.

VII. The trial court erred in denying Defendant's motion for a new trial because Plaintiff's summation was improper and prejudicial.

VIII. The trial court erred in denying Defendant's motion for a new trial because the trial court erred in suggesting a specific sum of damages to the jury and then failed to issue a curative instruction.

IX. The trial court erred in making its award of attorney's fees.

X. The trial court erred in awarding Plaintiff its expert witness fees.

We have carefully considered the arguments of both parties and the controlling law. We affirm the final judgment with the exception of the $28,746.44 portion of the counsel [*4] fee award for expert fees. We remand to the trial court to modify the final judgment accordingly. *

3 Plaintiff also filed lawsuits against the glass installer and the finished floor contractor, obtaining a judgment against the glass installer in August 2004. In a companion appeal heard back-to-back with this appeal, we substantially affirmed that final judgment. See St. Louis, L.L.C. v. Final Touch Glass & Mirror, Inc., 386 N.J. Super. 177, 899 A.2d 1018 (App. Div. 2006). Plaintiff's lawsuit against the finished floor contractor is not before us.

Because many of the underlying facts and legal arguments in this opinion are the same as those in the Final Touch Glass opinion, we quote extensively from that opinion.

I.

Boulton acted as general contractor for the construction of the house, which was to be used initially as a residence and then in connection with the Boultons's child advocacy foundation. Boulton's 1998 contract with Sylvan Pools called for a "commercial public pool" that would meet all applicable building codes. Sylvan Pools was to design a pool and spa and build it to specifications; it was to provide engineering and layout plans for Boulton's approval before construction began.

The house [*5] was two stories; one below ground and one above ground. Each floor was to be 18,000 square feet and had fourteen-foot-high walls. The pool was to be built in the master bedroom of the house, located on the above-ground floor.

Boulton claimed defendant constructed a defective swimming pool. He alleged that defendant: (1) failed to install code-mandated safety components; (2) created a residential pool rather than a commercial pool; (3) provided a different remote control system than the contract specified; (4) failed to repair the leaking, unsymmetrical, loose coping that its subcontractor installed; and (5) provided a different type of plaster than plaintiff contracted for and lied about the reason for doing so. Plaintiff claims the pool was structurally unstable and did not conform to the plans.
A number of plaintiff's witnesses testified that the pool as built differed from that required by the contract. Boulton testified that the pool did not match the agreed design. He testified that as a result of the pool defects, the value of the house was diminished by approximately $700,000. Harry Braich, an expert in structural engineering who examined the pool after it was completed, testified that the pool's support as built was "entirely different than the drawing." He described the structure as built as "totally inconceivable." He said the pool was not properly supported; the blocks that had been cemented together to support it had become loose and moved, making it "structurally unstable."

Boulton was not qualified as an expert in construction; the court permitted him to testify about the physical components of the structure based on his prior experience.

Plaintiff's counsel read the deposition of a Sylvan Pools employee, Leon Psykowsky, who testified that the pool as built deviated from the plans. Bernard Sopko, qualified by the court to testify as a structural engineer on behalf of plaintiff, testified that the stone and block, supporting structure of the pool, moved; he testified that the pool "has the potential for a complete collapse."

Defendant offered testimony that the pool was built correctly, including the testimony of Stephen Pany, a civil engineer. Pany rendered an opinion that the pool and spa "were built in substantial conformance" with the design drawings. He testified that the bulging corrugated metal surrounding the pool did not affect the pool's structural integrity. He opined that the pool had not shifted since it was constructed; it comported with the applicable building code in effect at the time it was built; it complied with industry standards; and it was well-constructed.

Defendant presented testimony to show that plaintiff refused to give defendant an opportunity to fix the alleged defects. After the parties exchanged correspondence concerning plaintiff's allegations that defendant had deviated from the contract specifications, Boulton notified defendant by letter of January 28, 2000, that he was going to use another contractor to complete the work at defendant's expense. When defendant subsequently sent another construction supervisor to the site, Boulton told him that another pool company would complete the work.

Boulton sold the house in October 2003, approximately ten months prior to trial. In Final Touch Glass, supra, we explained the actions Boulton took to market the house.

To assist with the sale, St. Louis first hired Douglas Elliman, a real estate broker for luxury residences, who set an initial listing price of $18 million. . . . Boulton met with many of the prospective buyers and disclosed the presence of the construction defects to them, including the problems associated with the windows and drain pipes, as well as with the indoor pool and the HVAC system. . . . It was Boulton's impression that the defects "spooked people." After approximately one year, Elliman failed to generate a "solid" offer for the property.

Boulton next engaged J.P. King to conduct a public auction of the property. . . . King spent nearly $250,000 advertising the property. . . . [Although fifty or sixty people attended the auction, no bids were offered.]

St. Louis then listed the property with a realtor . . . . More prospective buyers were generated, and Boulton participated in further conversations with them regarding the house and its construction defects. On October 7, 2003, the property sold for $2.5 million.

II.

Against this summary of the facts, we address each of the parties' arguments in turn. We begin with defendant's first point on appeal, that its motion for judgment notwithstanding the verdict should have been granted because plaintiff failed to establish the necessary elements of consumer fraud. Put another way, defendant claims the testimony as to diminution of the house's value was insufficient as a matter of law to prove an ascertainable loss so as to qualify for consumer fraud damages. We are not convinced.

Plaintiff did not call a real estate appraiser to testify as to diminution in value of the property. Boulton gave his opinion relating to diminution in value, and plaintiff called James O'Donnell, a pool company executive, and Thomas Kelly, a construction consultant, to testify as to the cost to repair the damages caused by defendant's actions.
The court declined to allow Boulton to testify as an expert, but found that pursuant to N.J.R.E. 701 he had sufficient knowledge about this particular building to provide an opinion on value, which is what he did. Boulton claimed that the defective pool diminished the value of the house by approximately $700,000. When asked about how the pool affected the value of the house, Boulton stated, "when we thought we would get $18 million and subsequently we got two-and-a-half, you could say that was the difference or you could say that it was the cost of repairs." When pressed to put a dollar amount on the diminution in value, Boulton stated that "[i]t's somewhere around [*10] $700,000." Boulton testified that the house had three major defects, the pool, the HVAC system, and the glass walls, all of which he disclosed to prospective purchasers. He did not explain, however, how each defect affected the diminution in the house's value.

O'Donnell, an executive of a company that designed and built pools, testified that it would cost $108,000 to remedy the construction defects. And Kelly, the construction consultant, testified that to remove and replace the pool would cost $728,198.

To recover damages under the New Jersey Consumer Fraud Act (the CFA), N.J.S.A. 56:8-1 to -20, a plaintiff must prove an "ascertainable loss" that is causally related to an act that constitutes consumer fraud. The CFA reads in pertinent part:

Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplements may bring an action or assert a counterclaim therefor in any court of competent jurisdiction.

[N.J.S.A. 56:8-19.]

To prove an "ascertainable loss," a plaintiff must "produce evidence from which a factfinder [*11] could find or infer that the plaintiff suffered an actual loss." Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 248, 872 A.2d 783 (2005). A plaintiff must demonstrate the loss with some certainty; that the loss is quantifiable or measurable. Ibid. Some "estimate of damages, calculated within a reasonable degree of certainty" will suffice to demonstrate ascertainable loss." Id. at 249 (quoting Cox v. Sears Roebuck & Co., 138 N.J. 2, 22, 647 A.2d 454 (1994)). "In cases involving breach of contract or misrepresentation, either out-of-pocket loss or a demonstration of loss in value will suffice to meet the ascertainable loss hurdle and will set the stage for establishing the measure of damages." Id. at 248.

Defendant claims that cost of repair is not the proper measure of damages; and, if it is, that Boulton's testimony was not competent as to that issue. We addressed these same issues in Final Touch Glass, supra, and incorporate that analysis here.

The purpose of compensatory damages is to put the injured party in as good a position as he would have been if performance were rendered as promised. 525 Main Street Corp. v. Eagle Roofing Co., 34 N.J. 251, 254, 168 A.2d 33 (1961). Specific rules or formulas are "subordinate [*12] to this broad purpose" and should not be invoked if they "defeat[] a common sense solution." Ibid.

[T]he general rule with respect to building contracts is that the disappointed owner may recover the costs of completing the promised performance or making necessary repairs, unless under the facts it is impossible to do so or the costs of completion or repairs would constitute unreasonable economic waste, in which event reference would be made to the difference in value formula.

[Id. at 255.]

Whether the cost of repair or diminution in value is the measure of damages "rests in good sense rather than in a mechanical application of a single formula." Ibid. We have in the past described the appropriate measure of damages for an injury to real property as a "complex subject" that requires a response "in a great variety of ways depending upon the evidence in the particular case." Velop, Inc. v. Kaplan, 301 N.J. Super. 32, 64, 693 A.2d 917 (App. Div. 1997), appeal dismissed, 153 N.J. 45, 707 A.2d 149 (1998).

Generally, either diminution in the value of the property or the reasonable

When a contractor breaches a construction agreement, the non-breaching party is entitled to be placed in as good a position as if the contract had been performed. 24 *Williston on Contracts* § 66:17 (4th ed. 2002).

["U"]sually this will be based on the cost to remedy any defect, rather than the diminution in value between the performance rendered and that promised. In part, this is because the former measure of recovery, in a construction contract setting, will make the owner whole that is, give the owner the benefit of the bargain that he or she made . . . . Thus, if a defect in the contractor's performance is repairable, the basic measure of the owner's damages is usually the cost of repair . . . .

 [*14] *Id.* (footnotes omitted).

These principles are repeated in the Restatement of Contracts.

(2) If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on

(a) the diminution in the market price of the property caused by the breach, or

(b) the [*15] reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.

[Restatement (Second) of Contracts: Alternatives to Loss in Value of Performance § 348 (1981).]
from incomplete, it may not be possible to prove the loss in value to the injured party with reasonable certainty. In that case he can usually recover damages based on the cost to remedy the defects. Even if this gives him a recovery somewhat in excess of the loss in value to him, it is better that he receive a small windfall than that he be undercompensated by being limited to the resulting diminution in the market price of his property.

[Id., comment c (citation omitted).]

The Restatement provides an illustration:

A contracts to build a house for B for $100,000. When it is completed, the foundations crack, leaving part of the building in a dangerous condition. To make it safe would require tearing down some of the walls and strengthening the foundation at a cost of $30,000 and would increase the market value of the house by $20,000. B’s damages include the $30,000 cost to remedy the defects.

[Id., illustration 3.]

Against this legal and factual framework, defendant’s position that plaintiff can only prove damages by showing a decrease in market value is unduly rigid. We conclude that cost of repairs is also an appropriate measure of damages in a case such as this. And, while the judge ruled that the measure of damages would be diminution in value, the judge ruled that the diminution in value could be established by cost of repairs. It is the evidence of those costs that we conclude proved plaintiff’s damages.

[386 N.J. Super. at 188-190.]

Here, we agree with defendant that Boulton’s damages testimony was not sufficient to support the verdict. He essentially repeated what Kelly and others told him. Yet, Boulton did not provide the only damages evidence. Kelly offered competent testimony to support plaintiff’s claim for damages. He was qualified as an expert in construction cost estimating; he testified that the cost to repair the damages caused by defendant would be $728,198. That evidence in itself was sufficient to support plaintiff’s damages claim. To the extent that Boulton’s testimony was speculative, hearsay, or otherwise inadmissible, in light of Kelly’s testimony, Boulton’s testimony was harmless and did not lead to an unjust result. See R. 2:10-2; State v. Macon, 57 N.J. 325, 273 A.2d 1 (1971).

Defendant claims that because the house was sold prior to trial, plaintiff must prove damages by showing a diminution in market value. We are not persuaded. Damages standards should be flexible, so as to present a “common sense solution” that is “fair to the litigants.” 525 Main Street, supra, 34 N.J. at 254, 258. Defendant’s position is too rigid. It rests on a presumption that plaintiff, having sold the house, should not receive the cost to repair the damages because plaintiff is not in a position to have those repairs made. That position ignores the fundamental principle that in a claim for costs of repair as the result of faulty construction, a plaintiff is not required to spend the damages award to actually repair the property. See Greene v. Bearden Enters., Inc., 598 S.W.2d 649, 653 (Tex. App. 1980) (no requirement that damages awarded for cost of repair be spent to make the repairs); [*18] John P. Ludington, Annotation, Modern Status as to Whether Cost of Correction or Difference in Value of Structures is Proper Measure of Damages for Breach of Construction Contract, 41 A.L.R.4th 131 (2005) (same).

In addition, as we explained in Final Touch Glass, supra, defendant’s argument would have the practical effect of penalizing plaintiff and rewarding defendant. Resorting solely to the diminished market value standard would deny plaintiff adequate compensation for defendant’s actions even though plaintiff suffered harm by those actions. Such a solution would be inequitable and contrary to common sense. Cf. Dixon v. City of Phoenix, 173

[386 N.J. Super. at 193.]

Of [*19] course, had the cost of repairs exceeded the value of the house, defendant would have an argument that completion of repairs would constitute an unreasonable economic waste. See Velop, Inc. v. Kaplan, 301 N.J. Super. 32, 64-66, 693 A.2d 917 (App. Div. 1997), appeal dismissed, 153 N.J. 45, 707 A.2d 149 (1998); Correa v. Maggisi, 196 N.J. Super. 273, 285-86, 482 A.2d 192 (App. Div. 1984). That, however, is not what occurred. No evidence was presented during the trial to establish that the $750,000 the jury awarded to repair the swimming pool would have exceeded the value of the house. The house cost approximately $8.5 million to build. No bids for the house were received at public auction. The house sold for $2.5 million. The $750,000 cost of repair did not constitute a windfall to plaintiff.

III.

Next, we address point two of defendant’s brief, its contention that plaintiff was not entitled to treble damages because Boulton did not provide defendant with an opportunity to alleviate the alleged damages before hiring another contractor to do the work. Treble damages are required under N.J.S.A. 56:8-19 if the plaintiff proves both an unlawful practice and an ascertainable loss. Cox, supra, 138 N.J. at 24. While in some cases [*20] a plaintiff may not be entitled to treble damages without a prior demand upon the defendant to be made whole, see Feinberg v. Red Bank Volvo, Inc., 331 N.J. Super. 506, 511, 752 A.2d 720 (App. Div. 2000), this is not such a case. Boulton testified that he had given defendant months to fix the problems. A series of letters were exchanged between Boulton and defendant before Boulton decided to hire another contractor. Boulton testified that defendant had been given multiple opportunities to fix the problem. If the jury believed Boulton’s testimony, which it apparently did, the evidence demonstrated that defendant had an opportunity to remedy the problems, but failed to do so.

IV.

In point four of defendant’s brief, it challenges the court’s consumer fraud charge to the jury. The substance of the charge reads as follows:

There are three possible bases for responsibility under the consumer fraud act. The first and the only one that is relevant relates to that part of the act which states that any unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation is an unlawful practice. These are considered affirmative acts.

The plaintiff claims in this case that defendant [*21] committed what is commonly known as consumer fraud when the defendant substituted or failed to supply certain contract items, did not build a pool in conformity with the design, did not meet certain code requirements, and did not build the pool in a workmanlike manner.

Specifically the defendant allegedly used by means of an affirmative act an unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation in connection with performance of the contract and construction of the pool.

The court then provided the jury with the appropriate definitions to be applied under the CFA.

We find no error in the court’s charge. While in Cox, supra, the Supreme Court recommended that “trial courts frame special interrogatories to the jury” in such a case, which “might also ask whether the unlawful conduct involved an affirmative act, a knowing question, or a violation of a regulation,” 138 N.J. at 20-21, the jury charge here, when read in context against the evidence presented, “clearly and correctly state[d] the principles of law pertinent to the issues . . . .” Kaplan v. Haines, 96 N.J. Super. 242, 251, 232 A.2d 840 (App. Div. 1967), aff’d, 51 N.J. 404, 241 A.2d 235 (1968), overruled on [*22] other grounds, Largay v. Rothman, 110 N.J. 204, 206, 540 A.2d 504 (1988). The judge instructed the jury that defendant allegedly used affirmative acts in connection with the performance of its obligations under the
contract. The jury was told that plaintiff claimed defendant substituted certain contract items for those called for by the contract, did not build the pool in conformity with the design, and did not meet certain building code requirements. In view of the extensive testimony on these issues, the charge was sufficient.

While not dispositive, it is also notable that the charge given was essentially the charge as requested by defense counsel during the charge conference. Counsel requested the following: "I would respectfully request that the wording for Question No. 4 simply be did the defendant commit an unconscionable commercial practice . . . rather than delineating and isolating the -- the various instances that make up a unconscionable commercial practice." Defense counsel went on to say: "Your Honor will . . . I anticipate during the course of [your] charge advise the jury . . . [that] any one of these things if they should so find would constitute an unconscionable commercial practice [*23] rather than spelling them all out in [the charge]." In other words, defendant invited the charge given. Under these circumstances, defendant may not now challenge the charge simply because it was disappointed in the result. See Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 503, 677 A.2d 705 (1996).

V.

Defendant claims in point five of its brief that the court erred in denying its motion for a new trial because plaintiff improperly relied on the reports of experts that had not been provided in discovery. Specifically, defendant alleges that Sopko, one of plaintiff's testifying engineers, improperly relied on the report of other engineers in rendering his opinion during trial as to the construction defects caused by defendant. Defendant claims that as a result, Sopko's testimony should have been suppressed. We disagree.

First, while Sopko did rely, substantially, on Lindner's report, Lindner was an engineer in Sopko's office; and Sopko previously reviewed that report and approved it. Second, the trial judge gave defense counsel an opportunity to review all reports that Sopko would rely upon before cross-examining Sopko, but defense counsel declined to take that opportunity. And finally, Sopko's [*24] testimony was based on his own personal view of the pool, not simply on the observations and conclusions of others. Under these circumstances, we find no abuse of discretion by the trial court in permitting Sopko to testify with reference to the other reports. There was no evidence here of a design to mislead by plaintiff; and, significantly, defendant does not show that Sopko's trial testimony took defendant by surprise or was unduly prejudicial. See Skibinski v. Smith, 206 N.J. Super. 349, 354-55, 502 A.2d 1154 (App. Div. 1985). Thus, we do not find the trial judge to have abused her discretion in allowing Sopko's testimony.

VI.

We next address point seven of defendant's brief, in which it claims that it is entitled to a new trial because of remarks plaintiff's counsel made during summation. Specifically, counsel said:

"You know, if somebody ran me over with a car, I got up, my shoulder hurt a little bit, so what. I'm just going to put my briefcase on the other arm. You knock Derek Jeter over and he can't play ball anymore, big problem, big problem. Can't play ball now.

Needless to say, this case had nothing to do with a personal injury, an automobile accident, or Derek Jeter. Nonetheless, plaintiff's [*25] counsel did not misstate the evidence or distort the facts so as to warrant a new trial based on his closing remarks. Absent a showing of undue prejudice, the use of metaphors in summation is permissible. See Bell Atl. Network Servs., Inc. v. P.M. Video Corp., 322 N.J. Super. 74, 97, 730 A.2d 406 (App. Div.), certif. denied, 162 N.J. 130, 741 A.2d 98 (1999).

VII.

We next turn to the issue of counsel fees, points nine and ten of defendant's brief. Defendant claims that the counsel fee award should not have included the services performed by Frank Tunnero, Esquire, who represented plaintiff from January 2000 through May 2003. Defendant claims that because Tunnero failed to sign the certification of services, the fee application did not comply with Rule 4:42-9(b), which requires all applications for counsel fees to be supported by an affidavit of services.

While defendant is correct that the Tunnero certification presented in plaintiff's application for fees following the jury verdict did not contain a signed certification of the services he provided, the unsigned certification of services that was provided was identical to Tunnero's signed certification that was presented to the court earlier in the litigation. Because [*26] there were no changes between the earlier certification of services, which was signed, and the certification submitted at the end of the case, which was not signed, the court did not abuse its discretion by considering those services in arriving at its award. Defendant's arguments on this issue are, therefore, without merit.

As part of the counsel fee award, the judge awarded expert witness fees of $28,746.44 as a reasonable cost of
suit. Subsequent to the final judgment, the court acknowledged it was "wrong when it awarded expert fees to plaintiff" and desired to correct the record. We agree.

Litigants must pay their own fees and costs, unless by statute, rule or agreement they are permitted to do otherwise. *Josantos Constr. v. Bohrer, 326 N.J. Super. 42, 47-48, 740 A.2d 653 (App. Div. 1999)*. The CFA does not provide that a prevailing party may receive expert's fees. In the nearly six years since *Josantos* has been decided, the Legislature has amended the CFA several times, but has not included a provision that would permit a prevailing plaintiff to recover expert's fees. This failure to amend the CFA is evidence that a prevailing plaintiff, while entitled to counsel fees, is not statutorily entitled [*27] to expert's fees. *See Mass. Mut. Life Ins. Co. v. Manzo, 122 N.J. 104, 116, 584 A.2d 190 (1991)* (failure to modify judicial determination is evidence of legislative support for judicial construction of statute). Hence, plaintiff is not entitled to recover expert's fees.

Finally, the trial judge did not abuse her discretion when she reduced plaintiff's claim for counsel fees based upon the legal services provided by McCarter & English on plaintiff's behalf with regard to the interlocutory appeals taken in this case. The judge had a "real problem" with those fees, reducing them from $51,823.47 to $5600. The judge said she simply found "too many hours, too many people working on the file." Her decision was not an abuse of discretion.

VIII.

The remaining issues raised by defendant, and by plaintiff in its cross-appeal, do not warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*.

Affirmed in part and reversed in part. We remand for amendment of the final judgment consistent with this opinion.
PORT LIBERTE HOMEOWNERS ASSOCIATION, INC.; AND PORT LIBERTE CONDOMINIUM ASSOCIATION I, INC., A NEW JERSEY NON-PROFIT CORPORATION, PLAINTIFFS-APPELLANTS, v. SORDONI CONSTRUCTION COMPANY; SORDONI SKANSA CONSTRUCTION CO.; Z.A.K. CONSTRUCTION, L.P., A PARTNERSHIP; ROMAN ASPHALT CORP.; DOWCON, INC.; GREENE MECHANICAL CORPORATION; D.J. HARTNETT CO., INC.; GRANDVIEW WATERPROOFING, INC.; WATERPROOFING SYSTEMS OF N.J., INC.; MAISONRY PRESERVATION SYSTEMS, INC.; NOVINGERS, INC.; SPERANZA BRICKWORK; QUALITY ROOFING CO., INC.; ALUMEX CORP.; TUSCHYN ROOFING CO.; KADCO CONSTRUCTION ASSOCIATES, INC.; SUPERIOR SHEETMETAL & ROOFING CONTRACTORS, INC.; THREE BROTHERS ROOFING CONTRACTORS, INC.; MAXIMUM AIR CONDITIONING & HEATING CORP.; AUDUBON MILLWORK & SUPPLY; THIELE CONSTRUCTION CO., INC.; J. FLETCHER CREAMER & SON, INC.; ROCKET CONSTRUCTION CO.; AZUR IRON WORKS; DOVER ELEVATOR CO.; MODEL METAL INDUSTRIES, INC.; JOBIN WATERPROOFING CORP.; MORLOT CARPENTRY, INC.; CAMBRIDGE DRYWALL & CARPENTRY; C & D WATERPROOFING CORP.; CRISDELL CONSTRUCTION CORP.; BAD-MAR CORPORATION; GRINNELL, INC.; PHIL NETO CONSTRUCTION CO.; DEL TURCO BROTHERS; RENAISSANCE SECURITY CONSULTANTS, INC.; WATTS ROOFING CO., INC.; THE EHRENKRANTZ GROUP, P.C.; FORMGLASS, INC.; FISHER SKYLIGHTS, INC.; TRINITY INSTALLATION; HASTINGS PAVEMENT CO.; S.M. ELECTRIC CO.; AMERICAN TRIMSTONE; RCRM, INC. WINDOW AND DOOR DISCOUNTERS; LEHR ASSOCIATES; OLKO ENGINEERING; AJ ROSS LOGISTICS, INC.; CASTEELUSA, INC.; ACTIVE GLASS CORPORATION; ARCHITECTURAL WOOD PRODUCTS; CAMPBELL PAINTING; CORD CONTRACTING CO., INC.; WILLIAM B. DAVIS, INC.; FINE PAINTING AND DECORATING; FORTY FORT LUMBER; DAVID FRIEDLAND PAINTING; GENERAL GLASS AND ALUMINUM COMPANY; HUDSON SHATZ PAINT CO.; INDUSTRIAL COATINGS INTERNATIONAL; MET CORP., INC.; PERFECT CONCRETE CUTTING CORP.; PRICE-BERIAN, INC.; W.N. RUSSELL & CO.; SEAPORT CONSTRUCTION, INC.; UNITED CRAFTSMAN; UNIVERSAL BUILDING SUPPLY; AND WHITEHOUSE EAST DEVELOPMENT CORPORATION, DEFENDANTS, AND DRYVIT SYSTEMS, INC., DEFENDANT-RESPONDENT, AND SORDONI CONSTRUCTION COMPANY, DEFENDANT/THIRD-PARTY PLAINTIFF, v. THE SPOERRY GROUP, INC.; PAUL W. BUCHA; HOWARD, NEEDLES, TAMMEN & BERGENDORFF; ROBERT SILMAN ASSOCIATES; GEO-SYSTEMS, INC.; SPENCER, WHITE & PRENTICE; SKYLAND STEEL COMPANY; TNEMEC CO., INC.; TNEMEC EAST, INC.; MCP COATINGS, INC.; MCP FACILITIES, INC.; HOUCK & CO., INC.; DRYVIT SYSTEMS, INC.; TREMCO; PETER CORSELL ASSOCIATES; AUBURN BATH INTERNATIONAL; PETER KASTLE; INTERLOCKING PAVERS, INC.; ROMAN ASPHALT CORPORATION; KILBY MANAGEMENT, INC., THIRD-PARTY DEFENDANTS.

PRIOR HISTORY: On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-5930-92.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, a condominium homeowners association and the condominium association, appealed the order of the Superior Court of New Jersey, Law Division, Hudson County, which granted defendant manufacturer’s motion for summary judgment with regard to plaintiffs’ claims asserting common law fraud and violations of the Consumer Fraud Act (CFA), N.J.S.A. §§ 56:8-1 to -20.

OVERVIEW: The suit arose from problems arising from the installation of defendant’s exterior insulation finish system barriers on plaintiffs’ buildings. The suit actually spanned 11 years of litigation, with plaintiffs’ developer becoming insolvent and plaintiffs gaining control over the association. As to the common law fraud and consumer fraud counts, plaintiffs asserted that defendant falsely advertised its product and knew of its defects. The question presented was whether plaintiffs, non-profit corporations charged with controlling and maintaining a condominium’s common elements, formed after the misrepresentations or omissions complained of were made, had standing to assert common law and consumer fraud claims against defendant, the manufacturer of a product used by the developer in the construction of the common elements. The court held that plaintiffs had sufficient standing to pursue the claims as plaintiffs were the intended beneficiaries of the developer’s actions, regardless of whether plaintiffs existed at the time the developer contracted with any subcontractor or materialman supplying a product for use in the construction of the common elements.

OUTCOME: The court reversed the dismissal of plaintiffs’ common law fraud and CFA claims and remanded the case to the trial court for further proceedings on those claims.

CORE TERMS: condominium, developer’s, misrepresentation, common law, omission, common areas, standing to sue, summary judgment, unit owners, homeowner, consumer, withheld, certif, notice, repair, causes of action, subsequent purchasers, installation, consumer fraud, majority shareholder’s, communicated, beneficiary, contractor, registered, installed, recipient, fiduciary, exterior, covenants, formally

[HN1] A trial court will grant summary judgment to the moving party if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. R. 4:46-2(c). An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact. R. 4:46-2(c).

[HN2] On appeal of a grant of summary judgment, the propriety of the trial court’s order is a legal, not a factual, question. An appellate court employs the same standard that governs trial courts in reviewing summary judgment orders.

[HN3] A condominium association is the intended beneficiary of a developer’s actions; therefore, any subcontractor or materialman entering into a contract or supplying a product for use in the construction of the common elements after the developer registers the condominium with the Department of Community Affairs, pursuant to the Planned Real Estate Development Full Disclosure Act, N.J.S.A. §§ 45:22A-21 to -56, specifically N.J.S.A. § 45:22A-26, is on constructive notice that representations made to, and omissions withheld from, the developer will be deemed as if they were made to, or withheld from, the association, once the association assumes control of the condominium. A condominium association has standing to assert claims for common law fraud and consumer fraud against third-party contractors and materialmen for defects in the construction of the common elements, regardless of whether the association formally existed at that particular point in time.
[HN4] The relationship between a developer and a condominium association is unique as compared to the relationship between a developer and a single-family homeowner. A condominium owner is the holder of a hybrid real property interest consisting of two distinct tenures, one in severalty and the other in common; both types, though well established separately, are inseparably joined in a condominium. A developer remains in control of the association until a specific point in time when the developer relinquishes control to the unit owners. Unit owners other than the developer shall be entitled to elect all of the members of the governing board or other form of administration upon the conveyance of 75 percent of the units in a condominium. N.J.S.A. § 46:8B-12.1(a). Until that point, when the developer becomes insolvent, the developer retains control of the association and elects the majority, if not all of its board members.

[HN5] The unique relationship between a condominium association and a developer, created by statute, allows an association to step into the developer’s shoes when control is passed to the association. N.J.S.A. § 46:8B-12.1(a). The clear import, express and implied, of the statutory scheme is that the association may sue third parties for damages to the common elements, collect the funds when successful, and apply the proceeds to repair the property. Under the New Jersey Condominium Act, N.J.S.A. § 46:8B-12, the association shall be for the administration and management of the condominium and condominium property, including but not limited to the conduct of all activities of common interest to the unit owners. Whether or not incorporated, the association shall be an entity which shall act through its officers and may enter into contracts, bring suit and be sued. N.J.S.A. § 46:8B-15(a). An association may assert tort claims concerning the common elements and facilities of the development as if the claims were asserted directly by the unit owners. N.J.S.A. § 46:8B-16(a).

[HN6] A condominium association has standing to sue for defects that arose prior to the association’s formation.

[HN7] The Consumer Fraud Act (CFA), N.J.S.A. §§ 56:8-1 to -20, is one of the strongest consumer protection laws in the nation. Like most remedial legislation, the CFA should be construed liberally in favor of consumers. In a private cause of action, the CFA provides that any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under the act may bring an action or assert a counterclaim therefor in any court of competent jurisdiction. N.J.S.A. § 56:8-19. The CFA is interpreted as not requiring direct contractual privity between the consumer and the seller of the product or service, thereby allowing indirect suppliers, whose products are passed on to a buyer and whose representations are made to or intended to be conveyed to the buyer, to be sued under the Act. There is no provision in the CFA that the claimant thereunder must have a direct contractual relationship with the seller of the product or service. Because each case is fact sensitive, not all subsequent consumers of a product or service have standing to sue under the CFA.

[HN8] To establish a prima facie case of common law fraud, a plaintiff must show: (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages. Every fraud in its most general and fundamental conception consists of the obtaining of an undue advantage by means of some act or omission that is unconscientious or a violation of good faith. A plaintiff need not hear the misrepresentation from the defendant directly for there to be actionable fraud: Where false representations are made to one person with the intent that they be communicated to others for the purpose of inducing the others to rely upon them, they may form the basis of an action for fraud by those others. A plaintiff must prove that he or she was an intended recipient of the defendant’s misrepresentations.

COUNSEL: Dennis J. Drasco argued the cause for appellants (Lum, Danzis, Drasco & Positan and Kennedy Wronko & Kennedy, attorneys; Mr. Drasco, Paul A. Sandars, III and E. Richard Kennedy, Sr., of counsel and on the brief).

Andrew P. Fishkin argued the cause for respondent (Edwards & Angell, attorneys; Mr. Fishkin and Charles W. Stotter, of counsel and on the brief).

John Randy Sawyer argued the cause for amicus curiae Community Associations Institute (Stark & Stark, attorneys; Mr. Sawyer and Rachael Costigan, of counsel and on the brief).

JUDGES: Before Judges COBURN, R. B. COLEMAN and GILROY. The opinion of the court was delivered by GILROY. J.A.D.

OPINION BY: GILROY

OPINION
[*497] [*595] The opinion of the court was delivered by

GILROY, J.A.D.

Plaintiffs, Port Liberte Homeowners Association and Port Liberte Condominium Association I, appeal from the November 24, 2004, order of the Law Division granting defendant Dryvit Systems, Inc.'s (Dryvit) motion for summary judgment. The question presented is whether plaintiffs, non-profit corporations charged with controlling [***2] and maintaining a condominium's common elements, formed after the misrepresentations or omissions complained of were made, have standing to assert common law and consumer fraud claims against the manufacturer of a product used by the developer in the construction of the common elements. Because we conclude that plaintiffs have sufficient standing, we reverse.

[*498] Port Liberte is a residential condominium development in Jersey City, comprised of single-family detached homes, townhomes, and mid-rise buildings, established pursuant to the New Jersey Condominium Act, N.J.S.A. 46:8B-1 to -38. The developer and original sponsor of Phase I of the development was Port Liberte Partners (PLP). Defendant Dryvit is a corporation in the business of manufacturing and selling Exterior Insulation Finish System (EIFS) 1 barriers, the cladding used on the Phase I buildings. Defendant Sordoni Construction Company (Sordoni) was the general contractor for the project. Defendant Novingers, Inc. (Novingers), was the subcontractor engaged by Sordoni that installed the Dryvit EIFS on the buildings.

1 An EIFS is a multi-component system that serves as one part of a building's exterior envelope.

[***3] PLP began construction of Phase I in January 1986, when it hired Sordoni as its general contractor. On May 30, 1986, PLP registered the project with the Department of Community Affairs (DCA). In July 1986, PLP chose to install Dryvit's EIFS barrier on the exterior of the Phase I buildings, and on July 17, 1986, Sordoni executed a subcontract with Novingers to install the EIFS. Novingers commenced installation of the EIFS in November 1986, and upon completion a year later, [*596] Dryvit issued a three-year warranty on the EIFS cladding.

In the interim, on or about February 26, 1987, PLP filed copies of its Master Deed and Declaration of Covenants with the DCA. On March 10, 1987, the Master Deed and Declaration of Covenants were recorded in the Hudson County Clerk's Office, marking the creation of the plaintiff associations.

Prior to January 1991, PLP had been in complete control of the project. On January 25, 1991, PLP filed for Chapter 11 bankruptcy protection and relinquished control of the project to the associations before 75% of the units had been sold, N.J.S.A. 46:8B-12.1d. After gaining control, plaintiffs discovered defects in the EIFS products, which allegedly had caused significant [***4] water and [*499] structural damage to the buildings. As a result, plaintiffs commenced this action in June 1992 against Sordoni and other parties who had participated in the construction of the common elements.

After eleven years of litigation, six amended complaints, and eight years of mediation, plaintiffs settled with all parties except Dryvit. On June 23, 2003, plaintiffs filed a motion for leave to file a seventh amended complaint to assert claims for common law fraud and consumer fraud. Plaintiffs alleged that prior to Dryvit negotiating and agreeing to supply the EIFS, it had falsely advertised and represented to PLP and/or Novingers that its EIFS was a complete water barrier system when, in fact, it had knowledge that the EIFS products were defective and would not remain water-impermeable when installed over a non-masonry substrate, even when installed in strict conformity with installation specifications; that Dryvit had made false and misleading misrepresentations knowing that Novingers and PLP would rely thereon in recommending, selecting and purchasing Dryvit's products; and that plaintiffs were third-party beneficiaries of the contract between Dryvit and Novingers. On July 21, 2003, Dryvit [****5] filed a cross-motion for summary judgment, seeking dismissal of plaintiffs' sixth amended complaint. Both motions were granted.

On September 24, 2004, Dryvit filed a motion for summary judgment, seeking dismissal of plaintiffs' seventh amended complaint for various reasons, including "that since plaintiffs had not yet even been formally 'established,' they could not have been recipients of Dryvit's alleged misrepresentations or omissions, and therefore, they could not have participated in the decision to utilize Dryvit's EIFS at Porte Liberte." On November 24, 2004, the motion judge granted the motion stating:

Nonetheless, in the case at bar, there is and can be no proof offered to establish that Dryvit intended that anyone other than PLP or Sordoni rely upon its representations regarding the EIFS, nor is there or can there be any proof either that the injured party here, . . . plaintiffs, reasonably relied on those representations or sustained damages as a result of such reliance. The wrongdoing complained of here is that Dryvit allegedly made misrepresentations to PLP or Sordoni in order to induce them to use the EIFS. However,
there is no proof before the court, nor can [***6] there be, to substantiate plaintiffs' claim that the misrepresentations [*500] made by Dryvit were made with the intention that they be communicated to others (there are no "others") for the purpose of inducing the "others" to rely upon them. If by "others" plaintiffs have referenced themselves, then certainly, in the context of the case at bar, there is no proof, nor can there be, to substantiate the necessary elements of a claim for common law fraud that Dryvit made a misrepresentation [***597] about the EIFS to PLP or Sordo-
ni with the intent that the misrepresentation would then be communicated to the Association, which did [not] even exist at the time, for the purpose that of having this non-existent association rely upon the misrepresentation and then use the EIFS in the construction of the project.

On appeal, plaintiffs argue that the trial court erred in granting summary judgment, determining that plaintiffs did not have standing to pursue fraud claims under the common law and Consumer Fraud Act (CFA) 1 against the manufacturer of an allegedly defective product used in the construction of the common elements of the condominium. Plaintiffs contend that upon PLP's filing for bankruptcy [***7] protection and turnover of the condominium, plaintiffs immediately stepped "into the shoes" of PLP. Plaintiffs assert that any misrepresentations and/or omissions of facts made to or withheld from, PLP are as if they were made to or withheld from plaintiffs, PLP's successors, who are the end-users of the EIFS, and the parties adversely affected by Dryvit's fraud. Dryvit counters that the trial court properly dismissed plaintiffs' common law and CFA claims because, as plaintiffs concede, they did not make or participate in the decision to select Dryvit's products at Port Liberte and did not even exist at the time the decision was made.


[HN1] A trial court will grant summary judgment to the moving party "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a [***8] matter of law." R. 4:46-2(c); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523, 666 A.2d 146 (1995).

"An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together [*501] with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c).

[HN2] On appeal, "the propriety of the trial court's order is a legal, not a factual, question." Pressler, Current N.J. Court Rules, comment 3.2.1 on R. 2:10-2 (2006).


We determine that [HN3] a condominium association is the intended beneficiary of a developer's actions; therefore, any subcontractor or materialman entering into a contract or supplying a product for use in the construction of the common elements [***9] after the developer registers the condominium with the DCA, pursuant to the Planned Real Estate Development Full Disclosure Act, N.J.S.A. 45:22A-1 to -56 (PREDFDA), specifically, N.J.S.A. 45:22A-26, is on constructive notice that representations made to, and omissions withheld from, the developer will be deemed as if they were made to, or withheld from, the association, once the association assumes control of the condominium. 1 We hold that a condominium association has standing to assert claims for common [***598] law fraud and consumer fraud against third-party contractors and materialmen for defects in the construction of the common elements, regardless of whether the association formally existed at that particular point in time. To say that plaintiffs do not have standing to sue Dryvit because PLP, the now-bankrupt developer, was the party to whom the misrepresentations were made and not plaintiffs, produces an unjust result and is contrary to the legislative scheme permitting a condominium homeowners association to [*502] institute suit to recover damages to the common elements. N.J.S.A. 46:8B-14, [***10] -15(a), and -16(a).

3 We acknowledge that N.J.S.A. 45:22A-26 is not a notice statute like N.J.S.A. 46:21-1; however, PREDFDA's public policy concerns and its procedural requirements make N.J.S.A. 45:22A-26 akin to a recording statute, thereby placing interested parties on constructive notice of a development's status as a condominium.

[HN4] The relationship between a developer and a condominium association is unique as compared to the relationship between a developer and a single-family homeowner. "A condominium owner is the holder of a hybrid real property interest consisting of 'two distinct tenures, one in severalty and the other in common; both types, though well established separately, are inseparably joined in a condominium." Brickyard Homeowner's
Assn. Mgmt. Cmte. V. Gibbons Realty Co., 668 P.2d 535, 537 (Utah 1983) (quoting 69 A.L.R.3d 1148, 1149 (1976)). A developer remains [***11] in control of the association until a specific point in time when the developer relinquishes control to the unit owners: "Unit owners other than the developer shall be entitled to elect all of the members of the governing board or other form of administration upon the conveyance of 75% of the units in a condominium." N.J.S.A. 46:8B-12.1a. Until that point, or in the present case, when the developer becomes insolvent, the developer retains control of the association and elects the majority, if not all of its board members. Berman v. Gurwicz, 189 N.J. Super. 89, 97, 458 A.2d 1311 (Ch.Div.1981), aff'd o.b., 189 N.J. Super. 49, 458 A.2d 1289 (App.Div.), certif. denied, 94 N.J. 549, 468 A.2d 197 (1983).

In Berman, the Chancery Court compared the developer's control of an association to that of a majority shareholder's control of a corporation's Board of Directors, quoting a Connecticut case, Governors Grove Condominium Ass'n, Inc. v. Hill Development Corp., 36 Conn. Supp. 144, 414 A.2d 1177, 1183-84 (Super.Ct.1980):

The power to control the board of directors created a fiduciary relationship between [the developer] and the association. [***12] . . . The relationship described here between [the developer] and the association is directly analogous to that between a majority shareholder and his corporation just as a majority shareholder is a fiduciary for his corporation so was [the developer], by virtue of its power to control the association's board of directors, a fiduciary for the association. . . .

[Berman, supra, 189 N.J. Super. at 97, 458 A.2d 1311].

The Berman court stated that "[i]n a condominium setting the developer who controls the association at the beginning . . . knows [*503] that the purchasers of the condominium units will control the association eventually. . . ." Ibid.

[HN5] The unique relationship between a condominium association and a developer, created by statute, allows an association to step into the developer's shoes when control is passed to the association. N.J.S.A. 46:8B-12.1a. "[T]he clear import, express and implied, of the statutory scheme is that the association may sue third parties for damages to the common elements, collect the funds when successful, and apply the proceeds to repair the property." Siller v. Hartz Mtn. Assocs., 93 N.J. 370, 377, 461 A.2d 568 (1983). [***13] Under the Condominium Act, the association "shall be [*509] responsible for the administration and management of the condominium and condominium property, including but not limited to the conduct of all activities of common interest to the unit owners." N.J.S.A. 46:8B-12. "Whether or not incorporated, the association shall be an entity which shall act through its officers and may enter into contracts, bring suit and be sued." N.J.S.A. 46:8B-15(a). An association "may assert tort claims concerning the common elements and facilities of the development as if the claims were asserted directly by the unit owners individually." N.J.S.A. 46:8B-16(a).

Although the question presented appears to be one of first impression in New Jersey, the New Hampshire Supreme Court has addressed a similar issue and held that [HN6] a condominium association has standing to sue for defects that arose prior to the association's formation. Border Brook Terrace Condo. Assn. v. Sunner Gladstone & Assocs., 137 N.H. 11, 622 A.2d 1248 (1993).

In Border Brook Terrace, plaintiffs, a condominium association and a representative of a class [***14] of individual unit owners, had sued the defendant developers for defects in the construction of the condominium caused by the defendants prior to the association coming into existence, asserting causes of action sounding in negligence, misrepresentation, and breach of implied and expressed warranties. Id. at 1249. Following a jury verdict, defendants appealed, arguing among other matters, that the plaintiff [*504] association, which came into existence after the defects arose, lacked standing to sue. Id. at 1250. The court held that because an association is charged with the "maintenance, repair, renovation, restoration, and replacement of the condominium['s'] . . . common areas," the association had standing to sue for defects in the construction of those common areas, regardless of whether the association was in existence at the time the defective work was performed. Id. at 1250 (quoting R.S.A. 356-B:41(I)). The court determined that the condominium statute "says nothing about the timing of the defects or of the unit owners' association's creation, and instead describes the association's 'powers and responsibilities . . .' of the common area without limitation. We will [***15] not create a qualification to the Association's authority that has not been plainly mandated by the legislature." Ibid.

Also instructive is Orange Grove Terrace Owners Assn. v. Bryant Properties, Inc., 176 Cal. App. 3d 1217, 222 Cal. Rptr. 523 (1986). In Orange Grove Terrace, the plaintiff homeowners association filed suit against defendant developer and others for the negligent repair of the condominium's common areas. Id. at 523. Following a jury verdict in favor of the plaintiff, defendant moved
for a new trial, arguing that the plaintiff lacked standing to sue for damages that had occurred before the association was formally organized. The trial court granted the motion, determining that the defendants could only be liable to the association for negligence from the date the association took over responsibility for the common areas from the developer to a certain date in the future. *Id. at 524.*

On appeal, the primary issue presented was "whether a homeowners association has a cause of action for damages to the common areas of a condominium project caused by negligent acts or omissions of the developer occurring prior to formal organization [*[*16*] of the association." [*Id. at 524.* In answering the question, the Court of Appeal held that the statute governing condominium associations, *Cal. Civ. Code § 1360 to § 1378* (2007) and former *Cal. Civ. Proc. Code § 374* (1986), now codified under *Cal. Civ. Code § 1375 [*[*505*] (2007), did [*[*600*] not "suggest that the Association's recovery is limited to damages caused by negligent acts occurring during the Association's existence." [*Id. at 526.* The court determined that even though the association was not in existence during the conversion of the building from an apartment building to a condominium, the developer "could reasonably foresee that the Association, which was obligated by the covenants and conditions . . . to maintain and repair the common areas, and to assess the [unit] owners sums sufficient for that purpose, would be damaged by an injury to the common areas caused by the defendants' negligence" during construction. [*Ibid.* We find the decisions in *Border Brook Terrace* and *Orange Grove Terrace* persuasive and supportive of our determination.

Moreover, because the CFA allows "any person [*[*17*] who has suffered an ascertainable loss" to sue under the CFA, *N.J.S.A. 56:8-19,* an association, charged with the maintenance and repair of the common areas of a condominium, that discovers defects in the construction of its common element areas, has standing to pursue a claim under the CFA, even though the misrepresentations or omissions relied upon by the developer arose prior to the creation of the association.

The CFA [*HN7*] is "one of the strongest consumer protection laws in the nation." *Cox v. Sears Roebuck & Co., 138 N.J. 2, 15, 647 A.2d 454 (1994)." *Courts have emphasized that like most remedial legislation, the CFA] should be construed liberally in favor of consumers." [*Ibid.* In a private cause of action, the CFA provides:

Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act . . . may bring an action or assert a counterclaim therefor in any court of competent jurisdiction.

[N.J.S.A. 56:8-19].

We have previously interpreted [*[*18*] the CFA as not requiring direct contractual privity between the consumer and the seller of the product or service, thereby allowing indirect suppliers, "whose products are passed on to a buyer and whose representations are [*[*506*] made to or intended to be conveyed to the buyer," to be sued under the Act. *Perth Amboy Iron Works, Inc. v. American Home Assurance Co., 226 N.J. Super. 200, 211, 543 A.2d 1020 (App.Div.1988), aff'd, 118 N.J. 249, 571 A.2d 294 (1990)." *There is no provision in the CFA] that the claimant thereunder must have a direct contractual relationship with the seller of the product or service." *Neveroski v. Blair, 141 N.J. Super. 365, 376, 358 A.2d 473 (App.Div.1976).* However, because each case is fact sensitive, not all subsequent consumers of a product or service have standing to sue under the CFA. *Chattin v. Cape May Greene, 216 N.J. Super. 618, 524 A.2d 841 (App.Div.), certif. denied, 107 N.J. 148, 526 A.2d 209 (1987).*

In *Chattin,* plaintiffs, the initial and subsequent purchasers of homes in a development, brought suit against the developer who had advertised in its brochure that its homes [*[*19*] came with insulated aluminum windows and doors. *Id. at 622, 524 A.2d 841.* Although the initial purchasers were allowed to pursue their CFA claims, we held that the subsequent purchasers did not have standing because they had not relied on the representations in the brochure. *Id. at 640-641, 524 A.2d 841. See New Jersey Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 15-16, 842 A.2d 174 (App.Div.), certif. denied, 178 N.J. 249, 837 A.2d 1092 (2003) (plaintiffs cannot assert a CFA claim when they had not seen the alleged fraudulent advertisements that they were arguing inflated the cost of prescription [*[*601*] drugs); *Katz v. Schachter, 251 N.J. Super. 467, 473-474, 598 A.2d 923 (App.Div.1991), certif. denied, 130 N.J. 6, 611 A.2d 646 (1992) (subsequent purchasers of a home cannot sue realtors who misrepresented termite damage to previous homebuyers).*

This matter is distinguishable from *Chattin,* *New Jersey Citizen Action* and *Katz.* Plaintiffs are not subsequent purchasers of the condominium property. Under the legislative scheme, they occupy the same role as the developer, having stepped into the developer's shoes after [*[*20*] PLP turned over control of the common elements. Here, the condominium was registered with the DCA [*[*507*] on May 30, 1986. Novingers and Sordoni subcontracted for the installation of the EIFS in July 1986. Novingers began installation of the EIFS in No-
November 1986 and completed the project in November 1987. Dryvit was on notice that the project was a condominium, and that plaintiffs, the end-users of the EIFS, would ultimately govern the common elements upon completion of the construction. N.J.S.A. 46:8B-12.1a. As such, any misrepresentations made to the developer were essentially made to the associations. Had the developer remained solvent and in control of the association at the time the defects were discovered, the association would have had standing to sue. So should plaintiffs, who now stand in the developer's place. Accordingly, we are satisfied the motion judge mistakenly dismissed plaintiffs' CFA claims.

Plaintiffs argue next that the dismissal of their common law fraud claims was error. We agree.

To establish a prima facie case of common law fraud, a plaintiff must show: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant [***21] of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Gennari v. Weichert Realtors, 148 N.J. 582, 610, 691 A.2d 350 (1997). "Every fraud in its most general and fundamental conception consists of the obtaining of an undue advantage by means of some act or omission that is unconscientious or a violation of good faith." Jewish Ctr. of Sussex County v. Whale, 86 N.J. 619, 624, 432 A.2d 521 (1981).

A plaintiff need not hear the misrepresentation from the defendant directly for there to be actionable fraud: "[W]here false representations are made to one person with the intent that they be communicated to others for the purpose of inducing the others to rely upon them, they may form the basis of an action for fraud by those others." Metric Investment, Inc. v. Patterson, 101 N.J. Super. 301, 306, 244 A.2d 311 (App.Div.1968); Judson v. [**508] Peoples Bank & Trust Co., 25 N.J. 17, 134 A.2d 761 (1957) (defendant made false representation to members of a family with the intention that those family members communicate it to other family [***22] members to induce them into selling shares of closely-held corporation at a lower price is enough to support a cause of action for fraud without direct communication between the defendant and the others). However, a plaintiff must prove that he or she was an intended recipient of the defendant's misrepresentations. See Eli Lilly Co. v. Roussel Corp., 23 F. Supp. 2d 460, 493 (D.N.J.1998) (plaintiff pharmaceutical company could not assert common law fraud claims against another pharmaceutical company for alleged misrepresentations to the Federal Drug Administration because plaintiff was not the intended recipient of those misrepresentations).

Here, PLP was in control of the project during the construction of the common elements, particularly when any misrepresentations and/or omissions were made or withheld by Dryvit in furtherance of the sale of its EIFS products. All of PLP's decisions pertaining to the construction of the common elements were made knowing that the associations were the intended beneficiaries of the common elements. Any representations or omissions made to or concealed from PLP were made after the project had been registered with the DCA, placing [***23] Dryvit on notice that the associations were the intended end-users of its products and the entities that would eventually assume control over the common elements. For reasons previously stated, we determine that PLP's reliance on Dryvit's representations is as if relied upon by the associations; therefore, the trial court should not have dismissed plaintiffs' common law fraud claims.

We reverse the dismissal of plaintiffs' common law fraud and CFA claims and remand to the trial court for further proceedings consistent with this opinion.
IV. Litigation Issues

A. Statute of Limitations
   *N.J.S.A. §2A:14-1*
   

B. Statute of Repose
   *N.J.S.A. §2A:14-1.1*
   
   

C. Proof of Damages, Extrapolation, Economic Damages
   
   *Lane v. Oil Delivery*, 216 N.J. Super. 413, 524 A.2d 405
   
   (App. Div. 1987)
§ 2A:14-1. 6 years

Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.

This section shall not apply to any action for breach of any contract for sale governed by section 12A:2-725 of the New Jersey Statutes.

HISTORY: L. 1951 (1st SS), c. 344; Amended by L. 1961, c. 121, p. 723, § 1.

NOTES:

Editor's Note:

Statute of limitations relative to residential mortgage foreclosures, see 2A:50-56.1.

Case Notes

Antitrust & Trade Law: Clayton Act: Remedies: Damages
Banking Law: Depository Institutions: Customer-Bank Relations: General Overview
Unauthorized Acts
Business & Corporate Law: Corporations: Finance: Dividends & Reacquisition of Shares: General Overview
ABRAHAM GRUNWALD, PLAINTIFF-RESPONDENT,

v.

NOAH BRONKESH, ESQ., INDIVIDUALLY, AND SILLS BECK CUMMIS ZUCKERMAN RADIN & TISCHMAN A/K/A SILLS BECK CUMMIS ZUCKERMAN RADIN TISCHMAN EPSTEIN & GROSS, A PROFESSIONAL CORPORATION, DEFENDANTS-APPELLANTS, AND JOHN DOES 1 THRU 4, DEFENDANTS

A-39 September Term 1992

SUPREME COURT OF NEW JERSEY

131 N.J. 483; 621 A.2d 459; 1993 N.J. LEXIS 55

October 26, 1992, Argued
March 22, 1993, Decided

PRIOR HISTORY: [***1] On certification to the Superior Court, Appellate Division, whose opinion is reported at 254 N.J. Super. 530 (1992).

DISPOSITION: Judgment reversed. The judgment of the Law Division is reinstated. No costs.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant attorneys sought review of the decision of the Superior Court, Appellate Division (New Jersey), which reversed the trial court and held that plaintiff client's malpractice action was not time-barred because the statute of limitations, N.J. Stat. Ann. 2A:14-1, had started to run only after the appellate process had been completed in the underlying lawsuit.

OVERVIEW: With the assistance of his fourth attorney, plaintiff client brought a legal-malpractice action against defendant attorneys. The trial court granted summary judgment for defendants, holding that the statute of limitations, N.J. Stat. Ann. 2A:14-1, barred plaintiff's action. The appellate court reversed and applied the discovery rule. The court reversed and held that without the discovery rule, the limitations period ran from the occurrence of the negligent act, and that a scoundrel thus had incentive to conceal facts from the client. Thus,the court held that the statute of limitations ran when the client suffered damage and discovered, or through the use of reasonable diligence should have discovered, the facts essential to the claim and that plaintiff could have avoided maintaining inconsistent positions by moving to stay the malpractice suit pending completion of the appeal on the underlying action. The court concluded that discovery-rule elements, knowledge of injury and of fault, were satisfied and the six-year limitations period began to run more than six years before the action was filed and thus, plaintiff's action was time-barred.

OUTCOME: The court reversed the appellate court's decision and held that although the discovery rule did apply in legal malpractice actions, the elements of the discovery rule, knowledge of injury and of fault, were satisfied and the six-year limitations period began to run more than six years before the action was filed and thus, plaintiff's action was time-barred.

CORE TERMS: malpractice, discovery rule, legal-malpractice, statute of limitations, resort, fault, underlying action, cause of action, advice, cause of action, limitations period, underlying claim, legal malpractice, discover, accrue, accrual, patient, reasonable diligence, time-barred, commence, tolled, limitations begins to run, begins to run, underlying lawsuit, attorney's fees, legal effect, facts underlying, adverse judgment, medical malpractice, legally-cognizable

LexisNexis(R) Headnotes
[HN1] A legal-malpractice action derives from the tort of negligence. Therefore, a legal-malpractice action accrues when an attorney's breach of professional duty proximately causes a plaintiff's damages. At that point, the plaintiff has a right to sue and the statute of limitations begins to run.

[HN2] Under special circumstances and in the interest of justice, the discovery rule is adopted to postpone the accrual of a cause of action when plaintiff does not and cannot know the facts that constitute an actionable claim. The discovery rule is a rule of equity that ameliorates the often harsh and unjust results that flow from a rigid and automatic adherence to a strict rule of law. The discovery rule focuses on an injured party's knowledge concerning the origin and existence of his injuries as related to the conduct of another person. Such knowledge involves two key elements, injury and fault. The limitations period begins to run when a plaintiff knows or should know the facts underlying those elements, not necessarily when a plaintiff learns the legal effect of those facts. Thus, the discovery rule encompasses two types of plaintiffs: those who do not become aware of their injury until the statute of limitations has expired, and those who are aware of their injury but do not know that it may be attributable to the fault of another.

[HN3] The court has applied the discovery rule most frequently in medical-malpractice actions. However, increasing acceptance of the discovery rule has extended the doctrine to contexts unrelated to medical malpractice.

[HN4] Legal-malpractice actions are in the same special "class of cases." In the context of legal counseling, a plaintiff may reasonably be unaware of the underlying factual basis for a cause of action. The inability readily to detect the necessary facts underlying a malpractice claim is a result of the special nature of the relationship between the attorney and client.

[HN5] Inherent in the attorney-client relationship is the fiduciary duty to render full and fair disclosure of all material facts to the client.

[HN6] The discovery rule applies in legal-malpractice actions: the statute of limitations begins to run only when the client suffers actual damage and discovers, or through the use of reasonable diligence should discover, the facts essential to the malpractice claim.

[HN7] The key elements required to satisfy the discovery rule are injury and fault. Legally-cognizable damages occur when a plaintiff detrimentally relies on the negligent advice of an attorney. Actual damages are those that are real and substantial as opposed to speculative. In the legal-malpractice context, actual damages may exist in the form of an adverse judgment. However, a client may suffer damages, in the form of attorney's fees, before a court has announced its decision in the underlying action. It is not necessary that all or even the greater part of the damages have to occur before the cause of action arises. Therefore, although an adverse judgment may increase a plaintiff's damages, it does not constitute an indispensable element to the accrual of a cause of action.

[HN8] Delaying the accrual of a cause of action until the appellate process on the underlying claim has been completed undermines the principle consideration behind statutes of limitations: fairness to the defendant.

[HN9] The discovery rule applies in legal malpractice actions; (2) the six-year limitations period begins to run when the client suffers damage and discovers, or through reasonable diligence should discover, that that damage is attributable to the attorney's negligent advice; (3) because a cause of action on a legal-malpractice claim may accrue while the underlying claim is being litigated, a plaintiff can avoid maintaining inconsistent positions by moving to stay the malpractice suit pending completion of the appeal on the underlying action.

COUNSEL: Philip R. Sellinger argued the cause for appellants (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys; Mr. Sellinger, James M. Hirschhorn, and Mitchel E. Ostrer, of counsel and on the briefs).

Andrew J. Kyreakakis argued the cause for respondent (Ambrosio, Kyreakakis & Dilorenzo, attorneys; Anthony P. Ambrosio, of counsel; Mr. Kyreakakis and Ronald S. Bergamini, on the brief).

JUDGES: For reversal and reinstatement -- Chief Justice WILENTZ and Justices CLIFFORD, HANDLER, POLLOCK and GARIBALDI. For affirmance -- Justices O'HERN and STEIN. The opinion of the Court was delivered by CLIFFORD, J. O'HERN, J., dissenting. Justice STEIN joins in this opinion.

OPINION BY: CLIFFORD
OPINION

[*487]  [**461] This appeal requires the Court to decide when the statute of limitations begins to run on a legal-malpractice action. The trial court held that the six-year statute of limitations on plaintiff's malpractice claim had begun to run when the trial court decided [***2] against plaintiff in the underlying lawsuit. The Appellate Division reversed, concluding that the statute had started to run only after the appellate process had been completed in the underlying lawsuit. Grunwald v. Bronkesh, 254 N.J. Super. 530, 540, 604 A.2d 126 (1992). We granted certification, 130 N.J. 9, 611 A.2d 648 (1992), and now reverse.

I

Plaintiff, Abraham Grunwald, engaged the services of defendant Noah Bronkesh and his law firm, defendant Sills Cummis [*488] Zuckerman Radin Tischman Epstein and Gross (Sills Cummis), to negotiate an option agreement for the sale of certain real property in Atlantic City to Resorts International Hotel and Casino, Inc. (Resorts). Bronkesh prepared an option agreement and attached a contract of sale for Resorts' approval. Resorts signed the option agreement, but instead of initialing the attached contract to indicate acceptance of its form, Resorts signed the contract as well.

Grunwald alleges that Bronkesh did not ask Resorts why it had signed the sales agreement. Rather, Bronkesh advised Grunwald that by signing the agreement [***3] Resorts had entered into an enforceable contract to buy the property. Grunwald claims that in reliance on Bronkesh's advice, he bypassed another opportunity to develop the property. Resorts never exercised its option to buy the property.

Acting on Bronkesh's advice, Grunwald retained another law firm and in April 1984 sued Resorts for specific performance of the sale contract or, in the alternative, compensatory damages for breach of contract. On July 31, 1984, the Chancery Division held the sale agreement unenforceable because Resorts had not intended to purchase the property. The court also concluded that Grunwald had not acted reasonably in relying on Resorts' signature as evidencing its intent to be bound by the contract of sale.

Plaintiff then hired a third attorney, referred to him by Sills Cummis, who advised him to appeal. Grunwald did so, and the Appellate Division, on November 20, 1985, affirmed the Chancery Division judgment in favor of Resorts.

With the assistance of now his fourth attorney, plaintiff brought this legal-malpractice action on September 28, 1990, more than six years after the Chancery Division's decision. Plaintiff claims that defendants erroneously [***4] informed him that Resorts had exercised its option to purchase the property when it signed the sales agreement. He alleges that in reliance on defendants' legal conclusion, he did not pursue an alternative development proposal for the land, and that he has incurred [*489] substantial legal fees in litigation against Resorts. Furthermore, Grunwald contends that neither his trial attorney nor appellate counsel suggested that he had a possible cause of action against Bronkesh and the law firm.

The trial court granted summary judgment for defendants, holding that the statute of limitations, N.J.S.A. 2A:14-1, barred Grunwald's action. Applying the discovery rule, see, e.g., Tevis v. Tevis, 79 N.J. 422, 400 A.2d 1189 (1979); Mant v. Gillespie, 189 N.J. Super. 368, 372, 460 A.2d 172 (App.Div.1983), the court concluded that Grunwald knew or should have known that he had suffered damages attributable to defendants' negligence when he heard the oral decision of the Chancery Division on July 31, 1984. Thus, the court concluded that the statute of limitations had expired six years [***5] after July 31, 1984. The trial court also considered irrelevant the possibility that a successful appeal in the underlying action would have rendered the malpractice action moot.

[**462] The Appellate Division reversed, finding that Grunwald could not have established a prima facie legal-malpractice case until he had exhausted the appellate process in the underlying action. The court held that until the appellate process had run its course, plaintiff's damages were merely speculative, because a favorable resolution of the underlying appeal would have extinguished the damages claimed in the legal-malpractice action. The court thus concluded that the statute of limitations in a legal-malpractice action begins to run only when the appellate process is complete. Because the six-year statute of limitations had not begun to run until November 20, 1985, the date of the Appellate Division's decision in the underlying action, the court held that Grunwald's legal-malpractice claim was not time-barred.

II

-A-

Only three New Jersey cases have considered when a cause of action accrues in a legal-malpractice suit. In Sullivan v. [*490] Stout, 120 N.J.L. 304, 306, 199 A. 1 [***6] (E. & A.1938), the Court held that a cause of action in a legal-malpractice case accrues when the attorney breaches his professional duty and that ascertainment of damages was not prerequisite to the running of the statutory period. In addition, the plaintiff's lack of knowledge concerning the attorney's misconduct or the
existence of damages would not forestall the running of the limitations period. *Id.* at 309-10, 199 A.1.

The holding in *Sullivan* was discounted in *Mant*; *supra*, 189 N.J.Super. at 373, 460 A.2d 172. The Appellate Division concluded that *Sullivan* was in conflict with two well-established principles: (1) damages are an essential element of a tort action, and (2) the discovery rule mandates the existence of both fault and injury.

In *Mant*, plaintiffs entered into a contract to purchase real estate from Carl Healey. Attorney Gillespie represented both the Mants and Healey in that transaction and in the execution of a subsequent extension of a purchase-money mortgage. Healey later filed an action against the Mants, contending that the contract and the conveyance of real estate were the product of undue influence. The trial court determined that the terms of the initial purchase-money mortgage had been "improvident" and that Healey had not received competent independent legal advice; it therefore awarded Healey $30,000 in damages.

Instead of appealing that judgment the Mants sued Gillespie for legal malpractice. The trial court dismissed the complaint as time-barred under the six-year limitations period. According to the trial court, the statute of limitations had begun to run during a pre-trial conference, when Healey and the Mants had reserved the right to pursue a separate malpractice claim against Gillespie. At that time the Mants should have known that there was a basis for an actionable claim.

The Appellate Division reversed, finding that the trial court had not adequately explored or analyzed the facts bearing on the Mants' knowledge of both injury and fault, the two crucial discovery-rule elements. 189 N.J.Super. at 373, 378, 460 A.2d 172. The court noted that the Mants had first been injured when they began to incur legal expenses on behalf of the underlying claim, [***7] and then had suffered a second injury when the trial court announced the judgment against them. *Id.* at 373-74, 460 A.2d 172. The court refused to find that the statute of limitations had started to run when the plaintiffs had begun to incur litigation expenses. *Id.* at 374, 460 A.2d 172. Requiring the Mants to defend the underlying action did not necessarily alert them that Gillespie had committed malpractice, because fault was not implicit in the injury. *Ibid.*

Instead, the court held that the inquiry concerning when the Mants ought to have recognized that their expenses might have constituted legally-recoverable damages turned on when they ought to have recognized the possibility of Gillespie's fault. *Ibid.* In making that determination, the court held that the trial court should have [***463] considered the following factors: when and to what extent the lawyer's conduct was implicated in the prior legal proceedings; when and to what extent the lawyer's malpractice was proved or reasonably apparent during the underlying litigation; what advice the Mants had received from [***9] their trial attorney in the underlying litigation concerning Gillespie's responsibility for the suit; what other facts, if any, should have aroused plaintiffs' suspicions; and whether plaintiffs' reluctance to find fault was reasonable under the circumstances. *Id.* at 377, 460 A.2d 172. The court remanded the case to enable the trial court to apply the discovery rule in conformance with those guidelines. *Ibid.*

In *Aykun v. Goldzweig*, 238 N.J.Super. 389, 569 A.2d 905 (1989), the Law Division again applied the discovery rule in a legal-malpractice suit. Plaintiff alleged that the defendant-attorney had been negligent both in choosing the wrong effective date for equitable distribution in her property-settlement agreement and in failing to file a separate tort action for the batteries that served as the basis for the cruelty count in her divorce complaint. *Id.* at 390-91, 569 A.2d 905. The court held [***492] that a cause of action had accrued when plaintiff had learned at a community-college seminar that her attorney could [***10] have used a different effective date for equitable distribution. *Id.* at 391-92, 569 A.2d 905. At that point, plaintiff "discovered" the facts forming the basis of a malpractice action; the accrual date was not postponed until the plaintiff learned the legal effect of those facts from a lawyer.

-B-


[HN2] Under special circumstances and in the interest of justice, we have adopted the discovery rule to postpone the accrual of a cause of action when a plaintiff does not and cannot know the facts that constitute an actionable claim. See *Lynch v. Rubacky*, 85 N.J. 65, 424 A.2d 1169 (1981); *Tevis v. supra*, 79 N.J. 422, 400 A.2d 1189; *Lopez v. Swyer*, 62 N.J. 267, 300 A.2d 563 (1973); *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277 (1961). The discovery rule is a rule of equity that ameliorates "the often harsh and unjust results [that] flow from a rig-
The discovery rule focuses on "an injured party's knowledge concerning the origin and existence of his injuries as related to the conduct of another person. Such knowledge [*493] involves two key elements, injury and fault." Lynch, supra, 85 N.J. at 70, 424 A.2d 1169.

The limitations period begins to run when a plaintiff knows or should know the facts underlying those elements, not necessarily when a plaintiff learns the legal effect of those facts. Burd v. New Jersey Tel. Co., 76 N.J. 284, 291-92, 386 A.2d 1310 (1978). Thus, the discovery rule encompasses two types of plaintiffs: those who do not become aware of their injury until the statute of limitations has expired, and those who are aware of their injury but do not know that it may be attributable to the fault of another. Ibid.; accord Tevis, supra, 79 N.J. at 432, 400 A.2d 1189; Lopez, supra, 62 N.J. at 274, 300 A.2d 563.


We are satisfied that [HN4] legal-malpractice actions are in the same special "class of cases." Id. at 450, 173 A.2d 277. In the context of legal counseling, a plaintiff may reasonably be unaware of the underlying factual basis for a cause of action. The inability readily to detect the necessary facts underlying a [**[HN5]**] malpractice claim is a result of the special nature of the relationship between the attorney and client. Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal.3d 176, 98 Cal.Rptr. 837, 844, 491 P.2d 421, 428 (1971).

In Neel, supra, the California Supreme Court aptly described the difficulty that a layman might have in detecting injury:

Not only may the client fail to recognize negligence when he sees it, but often he will lack any opportunity to see it. The doctor operates on an unconscious patient; although the attorney, the accountant, and the stockholder serves [sic] the conscious client, much of their work must be performed out of the client's view. In [***15] the legal field, the injury may lie concealed within the obtuse terminology of a will or contract; in the medical field the injury may lie hidden within the patient's body; in the accounting field, the injury may lie buried in the figure of the ledger.

[Ibid.]
As established in Lynch, [HN7] the key elements required to satisfy the discovery rule are injury (we use "damage" interchangeably with "injury") and fault. Legally-cognizable damages occur when a [*465] plaintiff detrimentally relies on the negligent advice of an attorney. Mant, supra, 189 N.J.Super. at 374, 460 A.2d 172. Actual damages are those that are real and substantial as opposed to speculative. See Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241, 57 S.Ct. 461, 464, 81 L.Ed. 617, 621 (1937). In the legal-malpractice context, actual damages may exist in the form of an adverse judgment. Mant, supra, 189 N.J.Super. at 373, 460 A.2d 172. [*18] However, a client may suffer damages, in the form of attorney's fees, before a court has announced its decision in the underlying action. See, e.g., Knight, supra, 553 A.2d at 1235 (holding that "attorney's fees and costs expended as a result of an attorney's alleged malpractice constitute legally cognizable damages for purposes of stating a claim for such malpractice"); Mant, supra, 189 N.J.Super. at 374, 460 A.2d 172 (finding legally-cognizable damages could consist of attorney's fees). "It is not necessary that all or even the greater part of the damages have to occur before the cause of action arises." United States v. Gutterman, 701 F.2d 104, 106 (9th Cir.1983) (applying California law) (quoting Bell v. Hummel & Pappas, 136 Cal.App.3d 1009, 186 Cal.Rptr. 688, 694 (Ct.App.1982)). Therefore, although an adverse judgment may increase a plaintiff's damages, [*496] it does not constitute an indispensable element to the accrual of a cause of action. See Knight, supra, 553 A.2d at 1235, [***19]

The Appellate Division erroneously held that plaintiff's damages were speculative and thus no legally-cognizable injury had occurred until the adverse judgment had been affirmed on appeal, a position that has found support in a number of other jurisdictions. See, e.g., Bowman v. Abramson, 545 F.Supp. 227, 231 (E.D.Pa.1982) (interpreting Pennsylvania law); Haghyegh v. Clark, 520 So.2d 58, 59 (Fla.App.1988); Diaz v. Piquette, 496 So.2d 239 (Fla.App.1986); Neylan v. Moser, 400 N.W.2d 538, 542 (Iowa 1987); Semenza v. Nevada Medical Liab. Ins. Co., 104 Nev. 666, 765 P.2d 184, 186 (1988). We recognize as well that inherent in a system permitting appeals is the possibility that damages may be extinguished or altered retroactively. As in other special cases, a plaintiff may ultimately fail to prove a cause of action or recoverable damages. That circumstance, however, does not alter the time when the underlying injury or harm occurs and becomes cognizable for purposes of triggering the accrual [***20] of a cause of action. See Laird, supra, 279 Cal.Rptr. at 710; Cantu v. St. Paul Cos., 401 Mass. 53, 514 N.E.2d 666, 668 (1987); 2 Mallen & Smith, Legal Malpractice, (3d ed. 1989) § 18.11 at 111-12 (“an injury does not disappear or become suspended because a more final adjudication of the result is sought”). As the District of Columbia Court of Appeals observed: "We do not wish to encourage clients to rush prematurely into court, before their attorney's malpractice can be proved; but that problem is best addressed through proper application of the discovery rule, not through manipulation of the concept of legal injury." Knight, supra, 553 A.2d at 1236.

[HN8] Delaying the accrual of a cause of action until the appellate process on the underlying claim has been completed undermines the principle consideration behind statutes of limitations: fairness [*497] to the defendant. Lopez, supra, 62 N.J. at 274, 300 A.2d 563. As the California Court of Appeals has pointed out:

The purpose of the [***21] statute would not be served if an attorney is kept in a state of breathless apprehension while a former client pursues appeals from the trial court, to the Court of Appeal, to the Supreme Court and then, if the client has the money and energy, to the United States Supreme Court, during which time memories fade, witnesses disappear or die, and evidence is lost.

[Laird, supra, 279 Cal.Rptr. at 711.]


Turning to the element of fault, we start from the previously-stated proposition that a cause of action accrues only when a plaintiff knows or should know that the damage is attributable to the attorney's negligent advice. Depending on the circumstances, knowledge of fault may occur before or during a judicial resolution of the underlying action. See, e.g., Mant, supra, 189 N.J.Super. at 374, 460 A.2d 172 (remanding case so that

Even after an adverse ruling, a litigant may reasonably not associate the injury with an attorney's negligent advice. See United States Nat'l Bank v. Davies, 274 Or. 663, 548 P.2d 966, 969 (1976) ("In many situations the closeness of the legal questions involved would make it impossible to ascertain until the ultimate determination of the case whether it was brought as the result of the attorney's bad advice * * *"); accord Lynch, supra, 85 N.J. at 71, 424 A.2d 1169 (stating that in some medical-malpractice cases "fault is not implicit in injury"). Although litigants are not noted for an ability dispassionately to appraise both sides of their own lawsuits, nevertheless under some circumstances a litigant may conclude that the underlying case was lost on the merits; then, after seeking independent legal counsel regarding an appeal of [***24] the underlying claim, that litigant may become persuaded that the attorney's negligence actually caused the loss. Consequently, we reject the general assumption in Mant, supra, 189 N.J.Super. at 374, 460 A.2d 172, that, at the latest, a litigant should become aware of an attorney's fault when the trial court renders its decision in the underlying action.

Moreover, an allegedly-negligent attorney's continuous representation on the appeal of the underlying claim may prevent a litigant from becoming aware of the key element of fault. See Aykan, supra, 238 N.J.Super. at 392, 569 A.2d 905 (holding that continuing course of negligent representation postpones accrual of cause of action until that representation is terminated unless plaintiff earlier discovers injury or fraudulent concealment); see also Siegel v. Kranis, 29 A.D.2d 477, 288 N.Y.S.2d 831 (1968) (applying continuous-representation rule as adaptation of continuous-treatment rule); Wilson v. Econom, 56 Misc.2d 272, 288 N.Y.S.2d 381 (Sup.Ct.1968) [***25] (same). In the medical-malpractice context we stated that "it would be inequitable for a physician who has given * * * assurances [of [*499] progress towards recovery] to claim that a patient, in relying upon them and not suspecting their falsity or inaccuracy, failed to exercise the 'reasonable diligence and intelligence' required by the discovery rule." Lynch, supra, 85 N.J. at 75, 424 A.2d 1169 (holding that treating physician's continued reassurances that a patient's pain was part of the healing process prevented "discovery.") The reasoning in Lynch is equally applicable in the legal-malpractice context.

Finally, we are aware that application of the discovery rule to legal-malpractice claims may result in a malpractice plaintiff advocating inconsistent positions: appealing an adverse ruling on the underlying claim, the plaintiff claims entitlement on the merits to a favorable decision; simultaneously, in the malpractice action, the plaintiff claims that the attorney's negligence alone caused the unfavorable judgment. Staying the malpractice action pending [***467] completion of the appellate process on the underlying [***26] claim solves that apparent dilemma and, in the process, prevents duplicative litigation and saves plaintiffs the discomfort of maintaining inconsistent positions. See Laird, supra, 279 Cal.Rptr. at 712; cf. Knight, supra, 553 A.2d at 1236 (suggesting that stay is appropriate when client's damages are not finally ascertainable pending outcome of appeal). Exhausting the appellate process in the underlying action also provides a fixed amount of damages for presentation in the malpractice action.

-D-

To summarize our discussion: (1) [HN9] the discovery rule applies in legal malpractice actions; (2) the six-year limitations period begins to run when the client suffers damage and discovers, or through reasonable diligence should discover, that that damage is attributable to the attorney's negligent advice; (3) because a cause of action on a legal-malpractice claim may accrue while the underlying claim is being litigated, a plaintiff can avoid maintaining inconsistent positions by moving to stay the malpractice [***500] suit pending completion of the appeal on the underlying action.

III

Applying the foregoing [***27] principles we conclude that damage occurred when Resorts refused to close on the property after Grunwald had bypassed another offer. Grunwald then suffered further damages in the form of litigation costs in the underlying action. The element of knowledge of fault was satisfied when the Chancery Division delivered its opinion in the underlying action in Grunwald's presence. When that court declared that "Grunwald should not have reasonably relied on the delivery of the option and the agreement as he did," Grunwald knew or should have known that his damages were attributable to Bronkesh's negligent advice. In addition, we find that the Chancery Division's opinion notified Grunwald of the facts underlying a legal-malpractice cause of action. A plaintiff's cause of action is not deferred until he or she learns the legal effect of those facts. Burd, supra, 76 N.J. at 291-92, 386 A.2d 1310.
The discovery-rule elements, knowledge of injury and of fault, were satisfied on July 31, 1984. At that time the cause of action accrued and the six-year limitations period began to run. Plaintiff's malpractice action, commenced on September [***28] 28, 1990, is time-barred.

IV

Judgment reversed. The judgment of the Law Division is reinstated. No costs.

DISSENT BY: O’HERN

O’HERN, J., dissenting.

In essence, the majority holds that a client has reason to believe that he or she is a victim of malpractice when an unfavorable trial court ruling is accompanied by a judicial statement that the attorney's legal reasoning or strategy has [*501] brought about the unfavorable outcome of the matter. The problem with the analysis is that judges, no less than lawyers, are not perfect. That is why we have appeals. Hence, I believe that the Appellate Division correctly concluded that the statute of limitations on legal malpractice is tolled while a client appeals an underlying judgment. 254 N.J.Super. 530, 604 A.2d 126 (1992).


[***468] In a legal-malpractice action the connection is far less obvious. An attorney will often render an opinion that will fall short of acceptance in trial courts. An example is a case such as State v. Bander, 56 N.J. 196, 265 A.2d 671 (1970). Assume that an attorney had given the broker an opinion that to draw a contract between parties in a real estate transaction was permissible because a provision in New Jersey's statute regulating the unauthorized practice of law provided an exemption for such conduct. Assume too that the trial court would rule, [***30] as it did in Bander, that such advice was incorrect and of no effect, resulting in a judgment of conviction of the client who had relied on the attorney's advice. Would the client have suffered compensable injury because the trial court had determined the attorney's opinion was deficient? Would the client have suffered compensable injury because he had to appeal the matter to another court before final vindication?

[*502] Under the majority's reasoning, the action accrues when the client has reason to believe that the attorney's opinion is erroneous and that as a result he has suffered injury, such as an adverse ruling. What are the damages that the client has suffered? Certainly a potential loss of liberty or of a broker's license. Under the majority's theory, however, the client should start the action without knowing what the extent of damages will be, surely an unnecessary court event. Recognizing that no trial may be conducted in such circumstances, the majority suggests that the case be placed on the inactive list of cases until the appeal is resolved. Ante at 499, 621 A.2d at 466. In other words, have two lawsuits and two sets [***31] of lawyers for the client.

A natural reluctance exists to create what may appear to be a special rule of law for lawyers' malpractice. In reality, we would not be creating a special rule but applying the principle that an injury must occur before a tort arises. The law of injury differs in legal malpractice cases because, to paraphrase the immortal words of another professional, the case "is not over until it is over." Legal malpractice is not like a surgical operation on the wrong arm of a patient, nor is it like leaving a support beam out of a bridge. There is no appeal from such mistakes. On the other hand, a lawyer's opinion is as good as or bad as the court of last resort deems it. To convince courts takes longer in some cases than in others. In recent terms of Court alone, we have reversed lower court rulings on a number of occasions. E.g., Jacob v. Norris, McLaughlin & Marcus, 128 N.J. 10, 607 A.2d 142 (1992); Reuben H. Donnelley v. Director, Div. of Tax., 128 N.J. 218, 607 A.2d 1281 (1992); Weiss v. New Jersey Transit, 128 N.J. 376, 608 A.2d 254 (1992); [***32] Zelasko v. Refrigerated Food Express, 128 N.J. 329, 608 A.2d 231 (1992). In turn, we have been reversed on a number of occasions. E.g., Exxon Corp. v. Hunt, 475 U.S. 355, 106 S.Ct. 1103, 89 L.Ed.2d 364 (1986); United Bldg. & Constr. Trades Council of Camden County & Vicinity v. Mayor & Council of [*503] the City of Camden, 465 U.S. 208, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984).

Other jurisdictions have enacted statutes of limitation specifically applicable to attorney-malpractice suits. See Laird v. Blacker, 2 Cal.4th 606, 7 Cal.Rptr.2d 550, 558, 828 P.2d 691, 699, cert. denied, U.S. , 113 S.Ct. 658, 121 L.Ed.2d 584 (1992). For example, California has established a one-year statute of limitations for attor
ne-y-malpractice actions. California Code of Civil Procedure § 340.6 provides that the statute of limitations for malpractice commences when the client discovers or should have discovered the cause of action. The statute of limitations is tolled "during the times, inter alia, (i) the client 'has not sustained actual injury,' (ii) the negligent attorney continues to represent the client, (iii) the attorney willfully conceals facts constituting the negligence, or (iv) the plaintiff is under a disability that restricts the plaintiff's ability to commence legal action." 7 Cal.Rptr.2d at 551, 828 P.2d at 692 (quoting California Code of Civil Procedure § 340.6). In Ohio, "the one-year statute of limitations commences to run either when the client discovers or, in the exercise of reasonable diligence should have discovered, the resulting damage or injury, or when the attorney-client relationship for that particular [**469] transaction or undertaking terminates, whichever occurs later." Omni-Food & Fashion, Inc. v. Smith, 38 Ohio St.3d 385, 528 N.E.2d 941, 944 (1988).

I find myself in agreement, albeit we are both in the minority, with the opinion of Justice Mosk of the California Supreme Court interpreting [***34] the concept of injury under the California Legal Malpractice Act. He would construe the concept of injury in malpractice cases with the purpose of "furthering the policies underlying statutes of limitations: i.e., judicial economy, avoiding stale claims, and fairness to the parties." Laird, supra, 7 Cal.Rptr.2d at 562, 828 P.2d at 703. As he points out:

To force malpractice plaintiffs to file their actions before they know the outcome of the case upon which their claim is based does not promote judicial economy. The status of the malpractice claim is uncertain until the appeal in [*504] the underlying case is resolved, because if it is ultimately decided in the client's favor the malpractice suit may well become moot for lack of damages.

[Id. 7 Cal.Rptr.2d at 563, 828 P.2d at 704.]

See also Vail v. Townsend, 29 Ohio App.3d 261, 504 N.E.2d 1183, 1186 (1985) (concluding that law should not discourage client from giving lawyer an opportunity to correct an error); Hughes v. Mahaney & Higgins, 821 S.W.2d 154, 157 (Tex.1991) [***35] (stating that "limitations are tolled for the second cause of action because the viability of the second cause of action depends on the outcome of the first").

Our Court appears driven to its result at least in part by the familiar parade of horribles -- in this case, the specter of the fifteen-year-old lawsuit, ante at 497, 621 A.2d at 465. Such a result is greatly to be avoided, but I suspect that case is far more the exception than the norm. Hence, I would not fashion a rule that creates the cumbersome necessity of creating a conflict between attorneys and clients. As one commentator noted, the recent Texas Supreme Court decision in Hughes, supra, 821 S.W.2d 154, tolling the statute of limitations for malpractice claims until the parties have exhausted all the appeals of the underlying lawsuit "reflects the growing interest in preserving the attorney-client relationship throughout the appellate process." Dina Bernstein, Recent Development, Limitation of Actions -- Legal Malpractice -- Legal Malpractice Committed While Working On Cases Which Result In Litigation Tolls The Statute Of Limitations For The Malpractice Claim Until All Appeals For The Underlying Causes Of Action Are Exhausted Hughes v. Mahaney, 821 S.W.2d 154 (Tex.1991), 23 St. Mary's L.J. 1185, 1194 (1992). [***36] Like Justice Mosk, "I am convinced the majority err in holding there is actual injury while the client yet awaits the resolution of an appeal of right she has actually pursued." Laird, supra, 7 Cal.Rptr.2d at 564, 828 P.2d at 705. I agree with the Appellate Division, the Texas Supreme Court in Hughes, supra, 821 S.W.2d 154, and Justice Mosk that the statute of limitations on [*505] legal malpractice should be tolled while a client appeals an underlying judgment.

I would affirm the judgment of the Appellate Division.
§ 2A:14-1.1. Damages for injury from unsafe condition of improvement to real property; statute of limitations; exceptions; terms defined

a. No action, whether in contract, in tort, or otherwise, to recover damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property, or for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property, more than 10 years after the performance or furnishing of such services and construction. This limitation shall serve as a bar to all such actions, both governmental and private, but shall not apply to actions against any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought.

b. This section shall not bar an action by a governmental unit:

(1) on a written warranty, guaranty or other contract that expressly provides for a longer effective period;

(2) based on willful misconduct, gross negligence or fraudulent concealment in connection with performing or furnishing the design, planning, supervision or construction of an improvement to real property;

(3) under any environmental remediation law or pursuant to any contract entered into by a governmental unit in carrying out its responsibilities under any environmental remediation law; or

(4) Pursuant to any contract for application, enclosure, removal or encapsulation of asbestos.

c. As used in this section:

"Asbestos" shall have the meaning as defined in subsection a. of section 3 of P.L. 1984, c. 173 (C. 34:5A-34) and any regulations adopted pursuant thereto.

"Environmental remediation law" means chapter 10B of Title 58 of the Revised Statutes (C. 58:10B-1 et seq.) and any regulations adopted pursuant thereto.

"Governmental" means the State, its political subdivisions, any office, department, division, bureau, board, commission or public authority or public agency of the State or one of its political subdivisions, including but not limited to, a county or a municipality and any board, commission, committee, authority or agency which is not a State board, commission, committee, authority or agency.


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WENDY GRECZY, PLAINTIFF-APPELLANT, AND STEVEN FISCHMAN, PLAINTIFF, v. COLGATE-PALMOLIVE, DEFENDANT, AND KLING LINDQUIST, DEFENDANT-RESPONDENT, AND JOHN DOES (1-20) AND ABC CORPS. (1-20), DEFENDANTS.

A-2 September Term 2004

SUPREME COURT OF NEW JERSEY

183 N.J. 5; 869 A.2d 866; 2005 N.J. LEXIS 210

January 3, 2005, Argued
March 21, 2005, Decided


DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: The New Jersey Appellate Court affirmed the trial court's summary judgment grant to defendant staircase designer after plaintiff injured party sued it for injuries she sustained in a fall on a staircase at an office center, one month before the applicable statute of repose expired, and named it in that suit as a fictitious defendant. A year after the statute expired, she amended her complaint and specifically named it as a defendant. She appealed.

OVERVIEW: The injured party tripped and fell on a staircase at an office center. She filed suit to recover damages for her injuries. The lawsuit was filed one month before the 10-year anniversary of the staircase designer substantially completing its work on the staircase. The injured party named the staircase designer as a fictitious defendant in the lawsuit and described the fictitious defendant as a designer of the staircase. Approximately one year later, the injured party filed an amended complaint that explicitly named the staircase designer as a defendant. The trial court granted the staircase designer's summary judgment motion on the ground that it had not been sued within the 10-year statute of repose set forth in N.J. Stat. Ann. § 2A:14-1.1. The appellate court affirmed. On further review, the state supreme court found that the injured party's cause of action was not barred because she sued the staircase designer as a fictitious defendant and described it in her complaint within the 10-year statute of repose period. However, it also found that the trial court had to consider whether she had been diligent in explicitly naming it as a defendant in filing her amended complaint.

OUTCOME: The appellate court's judgment was reversed, and the case was remanded to the trial court for further proceedings.

CORE TERMS: repose, fictitious-party, builder, cause of action, statute of limitations, expiration, designer, fictitious, staircase, architect, summary judgment, discovery, amend, filed suit, improvement to real property, time limit, plain language, cause of action, dispositive, completion, diligence, diligent, fictitious name, substantial compliance, legislative history, true name, medical malpractice, certification, relation-back, commencement

LexisNexis(R) Headnotes
Governments > Legislation > Statutes of Limitations > Time Limitations
Torts > Procedure > Statutes of Repose > General Overview


Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Tolling > Discovery Rule
Governments > Legislation > Statutes of Limitations > Time Limitations

[HN2] The discovery rule provides that the statute of limitations does not start to run until a victim discovers or should have discovered that a wrong has been inflicted. The advent of the discovery rule exposes defendants, including architects and builders, to potential liability for injuries caused by defective workmanship that would last indefinitely, inasmuch as many defects would often not be discovered or give rise to a claim for damages until an injury had in fact occurred.

Civil Procedure > Parties > Capacity of Parties > General Overview
Civil Procedure > Parties > Fictitious Names


Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Tolling > Discovery Rule
Civil Procedure > Parties > Fictitious Names
Governments > Legislation > Statutes of Limitations > Time Limitations

[HN4] The discovery rule does not apply if a plaintiff has properly designated some defendants by fictitious names and then later discovers a cause of action against undescribed defendants whom he then seeks to join. Nor is the rule applicable where a plaintiff is unaware that an injury was caused by an identifiable defendant. Moreover, the rule will not protect a plaintiff who had ample time to discover the unknown defendant's identity before the running of the statute of limitations.

Governments > Legislation > Interpretation
Governments > Legislation > Statutes of Limitations > Time Limitations
Torts > Procedure > Statutes of Repose > General Overview

[HN5] Even statutes of repose, also termed "substantive" statutes, need not necessarily be construed rigidly. The approach of courts to substantive statutes of limitations has evolved to one that recognizes that their application depends on statutory interpretation focusing on legislative intent and purposes.

SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

Greczyn v. Colgate-Palmolive (A-2-04)

Argued January 3, 2005 -- Decided March 21, 2005

LONG, J., writing for a unanimous Court.

In this appeal, the Court addresses the interplay of the statute of repose protecting designers and builders, N.J.S.A. 2A:14-1.1, and the rule governing New Jersey's fictitious-party practice. R. 4:26-4.

On March 11, 1999, Wendy Greczyn, plaintiff, tripped and fell on a staircase in the Colgate-Palmolive office center in Piscataway, New Jersey. On October 3, 2000, Greczyn filed suit against the building owner and several fictitious defendants, identified as the designers and builders of the staircase. During discovery, Greczyn learned that Kling Lindquist was the designer involved in the renovation and construction of that staircase and that Kling Lindquist had substantially completed its work in November 1990, nearly ten years prior to Greczyn's initial complaint. In October 2001, a trial judge granted Greczyn's motion to amend her complaint, substituting Kling Lindquist for a fictitious defendant. Greczyn filed an amended complaint in December 2001, explicitly naming Kling Lindquist in the suit for the first time.

In March 2003, a different trial judge granted Kling Lindquist's motion for summary judgment based on the ten-year statute of repose found in N.J.S.A. 2A:14-1.1. The Appellate Division affirmed, concluding that a statute of repose does not permit "relation back" under fictitious-party practice and that because a statute of repose is substantive, it cannot be tolled under equitable principles.

The Supreme Court granted plaintiff's petition for certification.

HELD: When plaintiff's injury and the filing of a lawsuit occur within the period of repose, utilization of our fictitious-party practice allows a previously un-
known, although functionally identified, designer or builder [*3] to be named after the expiration of the period of repose, so long as plaintiff has acted diligently.

1. Through its statute of repose, New Jersey provides protection from liability for architects and builders after a specific time period. N.J.S.A. 2A:14-1.1. The discovery rule provides that the statute of limitations does not start to run until a victim discovers or should have discovered that a wrong has been inflicted. The "completed and accepted rule" provided that an architect's or a builder's liability for negligent design or construction of a structure "terminated upon the completion of the professional's work and its acceptance by the property owner." E.A. Williams, 82 N.J. 160, 165-166, 411 A.2d 697 (1980). We repudiated the "completed and accepted rule" outright in Totten v. Gruzen, 52 N.J. 202, 245 A.2d 1 (1968), a year after the enactment of N.J.S.A. 2A:14-1.1. (Pp. 4-7)

2. The purpose of the fictitious-party practice rule, R. 4:26-4, is to render timely the complaint filed by a diligent plaintiff, who is aware of a cause of action against an identified defendant but does not know the defendant's name. [*4] A specific claim must be filed against a described, though unnamed party, within the statute of limitations and plaintiff must diligently seek to identify the fictitiously-named defendant. Despite not being called by name, Greczyn's complaint fully identified "persons" by function: those John Does who "designed a certain interior staircase" at the Colgate-Palmolive office complex in Piscataway. In other words, though claiming against as yet "unnamable" persons, Greczyn's action was brought against "persons" nonetheless. (Pp. 8-10)

3. Kling Lindquist suggests that our prior jurisprudence is dispositive of the correctness of the Appellate Division's holding that Greczyn's suit is barred. We disagree. In Rosenberg, the complaint was filed thirty-three years after the "improvement" and in Stix, Hudson County and O'Connor, sixteen, fifteen and eleven years later, respectively. The statute of repose, by its very terms - "no action...shall be brought...more than ten years after...construction" - bars those claims. In contrast to them, Greczyn both was injured and filed an action within the ten-year period of repose. (The Court then discusses out-of-state cases at Pp. [*5] 14-18) (Pp. 10-18)

4. We are satisfied that allowing the use of fictitious-party practice in these circumstances is sound. N.J.S.A. 2A:14-1.1 does not specifically preclude importation of fictitious-party practice, thus rendering it open to interpretation on that issue, and the facts presented are exactly what fictitious-party practice was developed for. The Legislature intended to limit the time within which a cause of action may arise against an architect or builder to ten years from the date construction is substantially completed. Thus, injuries sustained or suits filed after the ten-year period are barred. Greczyn's injury arose, and the complaint was filed, within the prescribed ten-year window under the fictitious-party practice rule. Allowing fictitious-party practice in this context will not subject an architect or a builder to liability for life or even to indefinite vulnerability for a structural defect: A plaintiff who is injured or who files suit after ten years is simply out of time, and a plaintiff who is injured and files within ten years but is dilatory in seeking the fictitious party's name is likewise barred. Where the elements [*6] of timely filing and diligence are satisfied, the potential exposure of a builder or designer is finite and circumscribed, thus meeting the legislative intent underlying N.J.S.A. 2A:14-1.1. (Pp. 18-20)

The judgment of the Appellate Division is REVERSED and the matter is REMANDED to the trial court for further proceedings consistent with this opinion, and in particular for disposition of the question of Greczyn's diligence.

CHIEF JUSTICE PORITZ and JUSTICES LaVECCHIA, ZAZZALI, ALBIN, WALLACE, and RIVERA-SOTO join in JUSTICE LONG's opinion.

COUNSEL: Jared P. Kingsley, argued the cause for appellant (Bumgardner, Ellis, McCook & Kingsley, attorneys).

Andrew J. Carlowicz, Jr., argued the cause for respondent (Hoagland, Longo, Moran, Dunst & Doukas, attorneys).

JUDGES: Justice LONG delivered the opinion of the Court. Chief Justice PORITZ and Justices LONG, LaVECCHIA, ZAZZALI, ALBIN, WALLACE and RIVERA-SOTO.

OPINION BY: LONG

OPINION

[*7] [**867] Justice LONG delivered the opinion of the Court.

On this appeal, we address the interplay of the statute of repose protecting designers and builders, N.J.S.A. 2A:14-1.1 [***7], and the rule governing our fictitious-party practice. R. 4:26-4. The case arose when plaintiff was injured on a staircase in a building approximately nine years after its completion. One month prior to the expiration of the ten-year statute of repose, plaintiff filed suit against the building's owner and several fictitious defendants, identified as the designers and builders of the staircase. A year after the expiration of the ten-year peri-
od, plaintiff amended her complaint, substituting the name of the designer of the staircase for one of the fictitious defendants. The designer moved for summary judgment, which the trial court granted and the Appellate Division affirmed. We granted plaintiff's petition for certification and now reverse.

We hold that, when plaintiff's injury and the filing of her lawsuit occur within the period of repose, utilization of our fictitious-party practice allows a previously unknown, although functionally identified, designer or builder to be named after the expiration of the period of repose, so long as plaintiff has acted diligently.

I

The essential facts in the case are not in dispute. Plaintiff, Wendy Greczyn tripped and fell on a staircase in the Colgate-Palmolive office center in Piscataway on March 11, 1999. On October 3, 2000, Greczyn filed suit to recover damages for personal injuries allegedly arising from that fall. She joined her employer, Colgate-Palmolive, solely for the purposes of discovery and named as additional defendants John Does, one through twenty, and ABC Corps., one through twenty. Greczyn described fictitious defendants eleven through fifteen as the designers of the staircase on which she fell, and then, during discovery, learned that Kling Lindquist was the designer involved in the renovation and construction of that staircase. Kling Lindquist substantially completed its work on the staircase in November 1990, nearly ten years prior to Greczyn's initial complaint. In October 2001, a trial judge granted Greczyn's motion to amend her complaint, substituting Kling Lindquist for a fictitious defendant. Greczyn filed an amended complaint in December 2001, explicitly naming Kling Lindquist in the suit for the first time.

1 Steven Fishman, who was Greczyn's husband, was an original plaintiff. He has since been dismissed from the case.

[***9] In Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84, 117-19, 675 A.2d 1077, 1093-94 (1996), we held that the statute of repose, codified at N.J.S.A. 2A:14-1.1, commences with "substantial completion", i.e., when the certificate of occupancy is issued. The parties stipulate that the certificate of occupancy for the Colgate-Palmolive facility was issued on November 8, 1990. Greczyn's October 2000 filing was therefore within the ten-year statute of repose.

[***868] In March 2003, a different trial judge granted Kling Lindquist's motion for summary judgment based on the ten-year statute of repose found in N.J.S.A. 2A:14-1.1.

The Appellate Division affirmed, relying on the distinction between a statute of limitations and a statute of repose. Acknowledging the considerations undergirding fictitious-party practice, the court nevertheless concluded that a statute of repose does not permit "relation back" under fictitious-party practice because relation back "would result in the complete evisceration of the period of repose the Legislature [***10] intended to confer." Greczyn v. Colgate-Palmolive, 367 N.J. Super. 385, 393, 842 A.2d 895 (App.Div.2004). Moreover, the court concluded that because a statute of repose is substantive, it cannot be tolled under equitable principles. Id. at 394, 842 A.2d at 901. This petition for certification ensued.

II

The parties reiterate the arguments they advanced before the Appellate Division. Greczyn contends that both the accident and the original lawsuit occurred within the ten-year statute of repose and that that is all that is required. She argues that the occurrence of the injury and the filing of suit within the ten-year period is what distinguishes this case from the cases cited by Kling Lindquist and the Appellate Division. She further argues that any concern over endlessly extending the liability of designers and builders into the future are overstated in light of the requirement of diligence in fictitious-party practice. Finally, she urges "substantial compliance" as an alternative ground for reversing the Appellate Division.

Kling Lindquist counters that the plain language of N.J.S.A. 2A:14-1.1 prohibits the importation of the fictitious-party practice rules into the statute of repose; that that statute created substantive rights that we are without power to alter; that our long-standing jurisprudence supports the imperviousness of the statute of repose to Greczyn's attack; and that equitable notions such as substantial compliance have no place in a statute of repose analysis.

III

Through its statute of repose, New Jersey provides protection from liability for architects and builders after a specific time period. N.J.S.A. 2A:14-1.1 provides in relevant part:

[HN1] No action . . . to recover damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property . . . shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction of such
improvement to real property, more than 10 years after the performance or furnishing of such services and construction.

The legislative history of the act is singularly unhelpful. As we observed in Rosenberg v. Town of North Bergen, 61 N.J. 190, 194, 293 A.2d 662, 664 (1972), it is "meager [***12] and unrevealing." See also O'Connor v. Altus, 67 N.J. 106, 121, 335 A.2d 545, 552 (1975) (stating that legislative history is "of little assistance"). We do know this however: the adoption of the discovery rule and the repudiation of the "completed and accepted rule" were two "unrelated [*10] developments in the law [that] may well have provided the motivation for [N.J.S.A. 2A:14-1.1]." Rosenberg, supra, 61 N.J. at 194, 293 A.2d at 664.

[HN2] The discovery rule provides that the statute of limitations does not start to run until a victim discovers or should have discovered that a wrong has been inflicted. [***869] Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961). The advent of the discovery rule exposed defendants, including architects and builders, to "potential liability for injuries caused by defective workmanship [that] would last indefinitely, inasmuch as many defects would often not be discovered or give rise to a claim for damages until an injury had in fact occurred." E.A. Williams v. Russo Dev. Corp., 82 N.J. 160, 165, 411 A.2d 697, 699 (1980) (citing O'Connor v. Altus, supra, 67 N.J. at 117, 335 A.2d at 550-51; Lunch, "Why [***13] Statutes of Limitations?," 22 Consulting Engineer, 70, 70-71 (February 1964)).

The "completed and accepted rule" provided that an architect's or a builder's liability for negligent design or construction of a structure "terminated upon the completion of the professional's work and its acceptance by the property owner." Id. at 165-66, 411 A.2d at 699-700. We repudiated the "completed and accepted rule" outright in Totten v. Gracen, 52 N.J. 202, 245 A.2d 1 (1968), a year after the enactment of N.J.S.A. 2A:14-1.1. As we have pointed out, the "tendency to make the completed and accepted rule was so clearly established as to make it reasonable to assume that the Legislature took that trend into account in enacting the statute." O'Connor, supra, 67 N.J. at 118, 335 A.2d at 551 (citing Rosenberg, supra, 61 N.J. at 197 n.2, 293 A.2d at 666 n. 2). The demise of the "completed and accepted rule" "left those involved in the design and construction of improvements to real property vulnerable indefinitely to liability for injuries arising from a structure's defect." E.A. Williams, supra, 82 N.J. at 166, 411 A.2d at 700 (citing O'Connor, supra, 67 N.J. at 117-18, 335 A.2d at 550-51; [***14] Rosenberg, supra, 61 N.J. at 197-98, 293 A.2d at 665-66). N.J.S.A. 2A:14-1.1 was "a legisla-


IV

The fictitious-party practice rule provides:

[HN3] In any action, irrespective of the amount in controversy, other than an action governed by R. 4:4-5 (affecting specific property or a res), if the defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient for identification. Plaintiff shall on motion, prior to judgment, amend the complaint to state defendant's true name, such motion to be accompanied by an affidavit stating the manner in which that information was obtained. If, however, defendant acknowledges his or her true name by written appearance or orally in open court, the complaint may be amended without notice and affidavit. [***15]

No final judgment shall be entered against a person designated by a fictitious name. [R. 4:26-4.]

The purpose of the rule is to render timely the complaint filed by a diligent plaintiff, who is aware of a cause of action against an identified defendant but does not know the defendant's name. Gallagher v. Burdette-Tomlin Hosp., 318 N.J. Super. 485, 492, 723 A.2d 1256, 1259 (App.Div.1999), aff'd, 163 N.J. 38, 747 A.2d 262 (2000). Judge Pressler's comment to the rule explains what it is not intended to cover:

[HN4] It does not apply if the plaintiff has properly designated some defendants by fictitious names and then later discovers a cause of action against undescribed [***870] defendants whom he then seeks to join. Id. Nor is the rule applicable where a plaintiff is unaware that an injury was caused by an identifiable defendant. See Caravaggio v. D'Agostini, 166 N.J. 237, 244 n.1, 765 A.2d 182[, 185 n. 1] (2001). Moreover, the rule will not protect a plaintiff who had ample time to discover the unknown defendant's identity before
the running of the statute of limitations. See Matynska v. Fried, 175 N.J. 51, 53,

[Pressler, Current N.J. Court Rules,
Comment on R. 4:26-4 (2005).]

Put another way, for the rule to operate, a specific claim must be filed against a described, though unnamed party, within the statute of limitations and plaintiff must diligently seek to identify the fictitiously-named defendant. That is the backdrop for our inquiry. [*12] V

Greczyn's fundamental argument is that this case is a perfect paradigm for invocation of the fictitious-party practice rule in that she sustained an injury and filed suit identifying Kling Lindquist, although not by name—within the ten year repose period. Kling Lindquist counters that the plain language of N.J.S.A. 2A:14-1.1 prohibits any action against a "person" after ten years and that although Greczyn filed suit inside that window, it was not against a "person" within the meaning of the statute. That particular plain language argument is unpersuasive because an entirely different interpretation of the statute is plausible. Despite not being called by name, Greczyn's complaint fully identified "persons" by function: those John Does who "designed a certain interior staircase" at the Colgate-Palmolive [***17] office complex in Piscataway. In other words, though claiming against as yet "unnamable" persons, Greczyn's action was brought against "persons" nonetheless. Therefore, the plain language of the statute is not dispositive of the issue presented here.

VI

We thus look beyond the words of the statute for enlightenment. As we have said, the legislative history, ordinarily a source of information, is not of assistance. Kling Lindquist suggests that our prior jurisprudence is dispositive of the correctness of the Appellate Division's holding that Greczyn's suit is barred. We disagree.

A.

In Rosenberg, supra plaintiff sued for injuries she sustained in 1968 when she caught her heel in a fissure in the roadbed of Bergenline Avenue in North Bergen. The road had been repaved in 1935. The contractors were granted summary judgment under N.J.S.A. 2A:14-1.1. The Appellate Division reversed on the ground that a road is not "an improvement to real property" within the meaning of the act. We granted certification and reversed the [*13] narrow holding of the Appellate Division regarding the sweep of the statute. In so doing, we had occasion to comment on the character [***18] of N.J.S.A. 2A:14-1.1:

It seems important, first, to examine the nature of this law. In an important respect it is unlike the typical statute of limitations. Commonly such a statute fixes a time within which an injured person must institute an action seeking redress, and generally this time span is measured from the moment the cause of action accrues. Here such is not the case. The time within which suit may be brought under this statute is entirely unrelated to the accrual of any cause of action.

Where a claim for redress is based upon negligent injury to person or property, [***871] the cause of action accrues when there has been a negligent act with proximately resulting injury or damage. The careless act itself is not enough to give rise to a cause of action; there must also be consequential injury or damage. Rosenberg v. City of New Brunswick, supra, 51 N.J. [130] at 137-139, 238 A.2d 169 [, 172-74]. Thus plaintiff's alleged cause of action did not arise until she fell and sustained injury. Of course this was many years after the ten-year period fixed by the statute had expired. She claims that the statute, in its application to her, amounts to a deprivation of due [***19] process, since, as she expresses it, the statute bars her cause of action before it has arisen.

This formulation suggests a misconception of the effect of the statute. It does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action, from ever arising. Thus injury occurring more than ten years after the negligent act allegedly responsible for the harm, forms no basis for recovery. The injured party literally has no cause of action. The harm that has been done is damnnum absque injuria—a wrong for which the law affords no redress. The function of the statute is thus rather to define substantive rights than to alter or modify a remedy. The Legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is disturbed.
We went on to hold that plaintiff's action, brought thirty years after the repaving of the roadway, was barred.

In O'Connor, supra an infant plaintiff asserted claims against a builder for injuries that occurred nine years after completion of the structure that she alleged was negligently built. The action was filed sixteen months after the injury, and thus outside the ten-year statute of repose. 67 N.J. at 120, 335 A.2d at 552. The state of the law at the time allowed a personal injury plaintiff to pursue a claim if she asserted it within two years of becoming twenty-one. Ibid. Applying N.J.S.A. 2A:14-1.1's prohibition, and citing Rosenberg extensively, however, we concluded that "the legislature did [*14] not intend the ten-year period after construction to be 'expanded' by reason of one's infancy." Id. at 123, 335 A.2d at 554. Put another way, the infant could not file suit after ten years.

In Hudson County v. Terminal Construction Corp., 154 N.J. Super. 264, 381 A.2d 355 (App.Div.1977), certif. denied, 75 N.J. 605, 384 A.2d 835 (1978), the court declined to extend the statute of repose to allow Hudson County to assert a claim for defects discovered in the county administration building in 1975 against the builder who completed construction in 1960. Hudson County's proposed exception to the ten-year statute of repose for allegations of fraud was unavailing in the face of the court's determination that [*21] "[s]uch an exception would quickly engulf the statute [ ] and render it worthless." Id. at 269, 381 A.2d at 357.

In Stix v. Greenway Development Company, Inc., 185 N.J. Super. 86, 447 A.2d 577 (App.Div.1982), the Appellate Division affirmed a summary judgment dismissing plaintiff's 1980 complaint against a builder for negligent construction of a house completed prior to 1963. The court stated that the "plain [and] unambiguous" language of N.J.S.A. 2A:14-1.1 makes no exception for claims that are filed after expiration of the statute of repose, even those based on a theory of fraudulent misrepresentation. Id. at 89-90, 447 A.2d at 578-79.

[**872] We do not read those cases as dispositive of the issue before us. In Rosenberg the complaint was filed thirty-three years after the "improvement" and in Stix, Hudson County and O'Connor sixteen, fifteen and eleven years later, respectively. The statute of repose, by its very terms--"no action . . . shall be brought . . . more than ten years after . . . construction"--bars those claims. In contrast to them, Greczyn both was injured and filed an action within the ten-year period [*22] of repose.

B. The Appellate Division cited several out-of-state cases as bearing on the issue presented here. In Tindol v. Boston Housing. [*15] Authority, 396 Mass. 515, 487 N.E.2d 488 (1986), a minor plaintiff, scalded in a public housing complex, commenced an action against the Boston Housing Authority in 1979 and in 1984 sought to amend the complaint to add architects and engineers. At the time, the statute of repose for tort actions arising from improvements to real property prohibited any action commenced "more than six years after the performance or furnishing of such design, planning, construction or general administration." Id. at 489 (quoting Mass. Gen. Laws c. 260, § 1c (1984)). The relevant improvement was completed in 1977. Plaintiff argued that the amendment adding an architecture firm and an engineering company "related back" to the original filing. Id. at 490. The Supreme Judicial Court disagreed, concluding, "[A]pplication of the relation-back doctrine would have the effect of reactivating a cause of action that the Legislature obviously intended to eliminate." Id. at 491 (quotation marks omitted).

In Tindol, the court was faced with a complaint [*23] that was filed outside the six-year statute of repose and no fictitious-party filing was implicated. Tindol is thus not of assistance in our present analysis except inso far as we agree that if Greczyn had not commenced her action within the ten-year period, she could not avoid the strictures of the repose statute.

Likewise, in Nett v. Bellucci, 437 Mass. 630, 774 N.E.2d 130 (2002), a minor plaintiff sought to amend a complaint and add a defendant before expiration of the statute of repose but did not file the complaint until after expiration of the statute. 774 N.E.2d at 132-34. The court in Nett discussed statutes of repose:

Both the statute governing medical malpractice tort claims involving minors, G.L. c. 231, § 60D, and the statute governing medical malpractice tort claims generally, G.L. c. 260, § 4, provide that "in no event shall any such action be commenced more than seven years after occurrence of the act or omission which is the alleged cause of the injury upon which such action is based" (emphasis added). Like all the statutes of repose, "[t]he effect [of these statutes] is to place an absolute time limit [*24] on the liability of those within [their] protection and to abolish a plaintiff's cause of action thereafter, even if the plaintiff's injury does not occur, or is not discovered, until after the
The court went on to declare that for the purposes of the statute of repose, a case "commences" [***25] on the date of the filing of a motion for leave to amend a complaint to add a party, thus rendering plaintiff's claim timely. Id. at 143. In so doing, the court rejected a strict definition of commencement (filing of the complaint) stating: "We recognize that statutes of repose are harsh, but we will not adopt a needlessly artificial definition of 'commencement' of actions brought by way of amended complaints that would make a harsh rule even harsher." Id. at 142. Again, as in Tindol nothing in Nett is dispositive of this case in which Greczyn in fact both was injured and filed suit within the time constraints of the statute of repose.

Contrariwise, the Alabama Supreme Court has faced the exact issue that is before us. In Marsh v. Wenzel, 732 So. 2d 985 (1998), plaintiff sued her surgeon and various fictitious physicians in 1995, alleging negligence in failing to identify a tissue mass in her breast as malignant in 1993. Id. at 986. In 1997, plaintiff sought to add as a defendant the pathologist who analyzed the tissue mass. Id. at 987. The Circuit Court granted summary judgment to the pathologist, asserting that [***26] fictitious-party practice cannot be imported into Alabama's Medical Liability Act, Ala. Code § 6-5-482a, a statute of repose that prescribes: "[I]n no event may [an] action be commenced more than four years after [the alleged medical negligence occurred]." The Alabama Supreme Court rejected that notion and determined that the act speaks of the commencement of an action as the necessary operative event. It does not expressly exclude the availability of fictitious-party practice and its doctrine of relation back. Once the plaintiff complies with [Alabama's fictitious-party practice rule], in an action that otherwise is timely filed, the doctrine of [***17] relation back . . . permits the plaintiff to satisfy the prerequisite that the action "be commenced" as set forth in § 6-5-482.

[Id. at 988.]

The court concluded, however, that the plaintiff "knew the identity of the pathologist before the expiration of the four-year period . . . . [The plaintiff] [could not] reasonably [have been] deemed to have been ignorant of matters clearly set forth in the records." Id. at 988. Thus, because she was not [***27] diligent in ascertaining the identity of a fictitious party, the plaintiff was barred from pursuing her otherwise timely claim.

In Oliver v. Woodward, 824 So. 2d 693 (2001), a victim of medical malpractice filed a complaint, including several fictitiously-named doctors, nineteen months after being injured. Id. at 694. After several years of discovery and the expiration of the repose period, plaintiff learned the identity of the emergency-room doctor who had provided treatment. She sought to add the doctor's name the following day. Id. at 696. The trial court granted summary judgment to the physician, but the Alabama Supreme Court reversed, allowing plaintiff to employ fictitious-party practice and amend the complaint after expiration of the period of repose. Id. at 697-98.

VII

We are satisfied that the Alabama approach, allowing the use of fictitious-party practice in these circumstances, is [***874] sound. First, N.J.S.A. 2A:14-1.1 does not specifically preclude importation of fictitious-party practice, thus rendering it open to interpretation on that issue. Second, the facts presented are [***28] exactly what fictitious-party practice was developed for—to protect a diligent [**18] plaintiff who is aware of a cause of action against a defendant but not the defendant's name, at the point at which the statute of limitations is about to run.

3 Although we agree with the Alabama Supreme Court's reconciliation of its fictitious-party practice and statute of repose, we differ with its characterization of the situation as "relation-back". Relation-back is a way of justifying the belated addition of a new claim or a new party. Ficti-
tious-party practice renders the initial filing against the identified but unnamed defendant timely in the first instance, subject only to diligent action by the plaintiff to insert defendant’s real name.

Kling Lindquist properly underscores that N.J.S.A. 2A:14-1.1 is not a statute of limitations but one of repose. However, that distinction does not end the inquiry. Even statutes of repose, also termed “substantive” statutes (when "the time in which the action [...] must be commenced expires, both the remedy and the right are barred[,"] LaFage v. Jani, 166 N.J. 412, 421-22, 766 A.2d 1066[, 1070-71] (2001)), "need not necessarily be construed rigidly. Negron v. Llarena, 156 N.J. 296, 304, 716 A.2d 1158, 1162 (1988)] confirmed that our approach to substantive statutes of limitations has evolved to one that recognizes that their application depends on statutory interpretation focusing on legislative intent and purposes." 4, LaFage supra, 166 N.J. at 422, 766 A.2d at 1071.

Plainly, the Legislature intended to limit the time within which a cause of action may arise against an architect or builder to ten years from the date construction is substantially completed. Thus, injuries sustained or suits filed after the ten-year period are barred. Here, Greczyn's injury arose, and the complaint was filed, within the prescribed ten-year window, under the fictitious-party practice rule. The question is whether allowing that procedure will violate the Legislative intent underlying N.J.S.A. 2A:14-1.1. Negron, supra, 156 N.J. at 304, 716 A.2d at 1162. We think not.

Contrary to Kling Lindquist's view, allowing fictitious-party practice in this context will not subject an architect or a builder to liability for life or even to indefinite vulnerability for a structural defect. Two conditions preclude such endless exposure. The first is the filing within ten years, which is the statutorily authorized [*19] period, and the second is the requirement of due diligence. With respect to the former, a plaintiff who is injured or who files suit after ten years is simply out of time. Regarding the latter, a plaintiff who is injured and files within ten years but is dilatory in seeking the fictitious party's name is likewise barred. Where the elements of timely filing and diligence are satisfied, the potential exposure of a builder or designer is finite and circumscribed, thus meeting the legislative intent underlying N.J.S.A. 2A:14-1.1. Only this reading reconciles the statute and the rule.

VIII

We therefore reverse the judgment of the Appellate Division and remand the case to the trial court for disposition of the question of Greczyn's diligence, an issue that was not reached originally because the court declined to recognize the applicability of fictitious-party practice in these circumstances. This ruling makes it unnecessary for us to address Greczyn's "substantial compliance" argument.

Chief Justice PORITZ and Justices LaVECCHIA, ZAZZALI, ALBIN, WALLACE, and RIVERA-SOTO join in Justice LONG’s opinion.
ROBERT R. DEAN, JENNIFER P. DEAN AND MARY SUE DEAN, PLAINTIFFS--APPELLANTS, v. BARRETT HOMES, INC., LINCOLN WOOD PRODUCTS, INC., STO OF NEW JERSEY, INC., STO EASTERN, INC., ARCHITECTURAL EXTERIOR FINISHES, INC., AND HOUSEMASTER, INC., DEFENDANTS, AND STO CORP., DEFENDANT-RESPONDENT.

A-15 September Term 2009

SUPREME COURT OF NEW JERSEY


January 5, 2010, Argued
November 15, 2010, Decided

ROBERT R. DEAN, JENNIFER P. DEAN AND MARY SUE DEAN, PLAINTIFFS—APPELLANTS, v. BARRETT HOMES, INC., LINCOLN WOOD PRODUCTS, INC., STO OF NEW JERSEY, INC., STO EASTERN, INC., ARCHITECTURAL EXTERIOR FINISHES, INC., AND HOUSEMASTER, INC., DEFENDANTS, AND STO CORP., DEFENDANT-RESPONDENT

PRIOR HISTORY: [***1]
On certification to the Superior Court, Appellate Division, whose opinion is reported at 406 N.J. Super. 453, 968 A.2d 192 (2009).

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff homeowners appealed the judgment of the Superior Court, Appellate Division (New Jersey), which affirmed a trial court judgment that held that the economic loss rule precluded recovery for an allegedly defective exterior finishing system on their home. Plaintiffs brought suit against defendants, a builder, a manufacturer, and others under the Products Liability Act (Act), N.J.S.A. §§ 2A:58C-1 to 2A:58C-11, and asserted other claims.

OVERVIEW: Plaintiffs purchased the home from its original owners. The home was built with an exterior finishing system called synthetic stucco. Plaintiffs claimed that toxic mold was discovered which led to a complete removal and replacement of the product. Plaintiffs’ claims were resolved against all defendants, except for the manufacturer. The lower courts granted the manufacturer summary judgment because the damages sought were purely economic losses. The court identified the clear purposes of the Act and refused to expand it so as to create a new remedy for plaintiffs’ assertions that the product failed to perform as expected. Rather, the court held that the economic loss rule, as embodied in the Act’s definition of harm, precluded plaintiffs from recovering any damages for harm that the product caused to itself. Notwithstanding that, the court also found that the product was not so fully integrated into the structure of the house that the house effectively became the product for purposes of the economic loss rule. Thus, to the extent that the product caused damage to the structure of the house or surroundings, plaintiffs retained a cause of action against the manufacturer.

OUTCOME: The Court reversed the judgment of the Appellate Division to the extent that it concluded that plaintiffs were precluded from pursuing any remedy under the Products Liability Act. The Court remanded the case for further proceedings consistent with the Court's opinion.

CORE TERMS: economic loss, integrated, products liability, exterior, defective product, manufacturer, purchaser, finish, seller's, component parts, tort remedy, cause of action, tort-based, homeowner, consumer, strict
liability, warranty, product rule, commercial transactions, finished product, insulation, finishing, moisture, integral, damaged, barring, exterior walls, tort claim, installed, embodied

LexisNexis(R) Headnotes

Evidence > Procedural Considerations > Burdens of Proof > Allocation
Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence
Torts > Products Liability > General Overview

[HN1] The definition of tort liability found in the Products Liability Act, N.J.S.A. §§ 2A:58C-1 to 2A:58C-11, is broad: a manufacturer or seller of a product shall be liable in a product liability action only if the claimant proves by a preponderance of the evidence that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose. N.J.S.A. § 2A:58C-2. Although broad in scope, the statute defines harm, and does so in terms that are specific. Harm for which there can be compensation under the Act, by definition, is limited to physical damage to property, other than the product itself, and certain personal injuries. N.J.S.A. § 2A:58C-1(b)(2).

Commercial Law (UCC) > Sales (Article 2) > Remedies > Buyer's Remedies > General Overview
Torts > Damages > Economic Loss Doctrine
Torts > Products Liability > Negligence

[HN2] Understanding the economic loss doctrine and its analytical underpinnings is essential to any analysis of the Products Liability Act, N.J.S.A. §§ 2A:58C-1 to 2A:58C-11. The economic loss rule, which bars tort remedies in strict liability or negligence when the only claim is for damage to the product itself, evolved as part of the common law, largely as an effort to establish the boundary line between contract and tort remedies. The economic loss rule has been developed in conjunction with strict liability theories that were a judicial response to inadequacies in sales law with respect to consumers who sustained physical injuries from defective goods made or distributed by remote parties in the marketing chain. Subsequent to the development of the doctrine, most of the protections for commercial transactions were established through the adoption of the Uniform Commercial Code (U.C.C.), N.J.S.A. §§ 12A:1-101 to 12A:12-26. The U.C.C. effectively supplanted strict liability as the mechanism for consumer protection, at least in the context of commercial transactions.

Commercial Law (UCC) > Sales (Article 2) > Remedies > Buyer's Remedies > General Overview
Torts > Damages > Economic Loss Doctrine
Torts > Products Liability > Negligence

[HN3] The Supreme Court of New Jersey has adopted the economic loss rule, initially analyzing the rule as it applied to a large-scale commercial transaction between sophisticated purchasers. The Court has held that commercial buyers seeking damages for economic loss resulting from the purchase of defective goods may recover from an immediate seller and a remote supplier in a distributive channel for breach of warranty under the Uniform Commercial Code (U.C.C.), N.J.S.A. §§ 12A:1-101 to 12A:12-26, but not in strict liability or negligence. In part, that result rested on the view that, as between parties to a commercial transaction seeking recovery for a defect in the product itself, the U.C.C. was a comprehensive system for determining the rights and duties of buyers and sellers with respect to contracts for the sale of goods. The Court has referred to the U.C.C. as the exclusive source for ascertaining when a seller is subject to liability for damages if the claim is based on intangible economic loss not attributable to physical injury to person or harm to a tangible thing other than the defective product itself. That is to say, if the essence of a claim was that there was something wrong with the product itself, the buyer's remedies were found in the U.C.C. because the claim was based, fundamentally, on the contract principles embodied there.

Contracts Law > Remedies > Compensatory Damages > Consequential Damages
Torts > Damages > General Overview

[HN4] Tort principles, such as negligence, are better suited for resolving claims involving unanticipated physical injury. Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement.

Torts > Damages > Economic Loss Doctrine
Torts > Products Liability > Negligence
Torts > Products Liability > Strict Liability

[HN5] When addressing economic losses in commercial transactions, contract theories are better suited than were tort-based principles of strict liability. In adopting the economic loss rule, the United States Supreme Court has described it as springing from the proposition that com-
mercial purchasers cannot hold manufacturers responsible, through principles of negligence or strict liability, for failure to prevent a product from injuring itself. The Supreme Court of New Jersey has subsequently extended the economic loss rule beyond transactions between sophisticated commercial entities, by applying it to transactions involving individual consumers. The Court has concluded that the Uniform Commercial Code, N.J.S.A. §§ 12A:1-101 to 12A:12-26, amply protects all buyers, commercial purchasers and consumers alike, from economic loss arising out of the purchase of a defective product.

Contracts Law > Breach > Causes of Action > Elements of Claims
Torts > Damages > Economic Loss Doctrine

[HN6] In case law, the Supreme Court of New Jersey has made a choice by identifying factors that helped determine which theory, tort or contract, better addressed the claim being asserted, and by considering: (1) the relative bargaining power of the parties; (2) the risk-of-loss allocation implications; and (3) the availability of insurance.

Torts > Damages > Economic Loss Doctrine
Torts > Products Liability > Negligence

[HN7] In enacting the Products Liability Act, N.J.S.A. §§ 2A:58C-1 to 2A:58C-11, and in codifying the economic loss rule within the definition of the harm found in the Act's general provision, N.J.S.A. § 2A:58C-1b(2), the New Jersey Legislature has both recognized and agreed with its designation of the line that divides tort and contract remedies. The economic loss rule is therefore firmly established as a limitation on recovery through tort-based theories, not only because of the Supreme Court of New Jersey's long-standing common law precedents differentiating between remedies sounding in tort and contract, but also through the pronouncement of the Legislature as embodied in the Products Liability Act.

Torts > Damages > Economic Loss Doctrine
Torts > Products Liability > Negligence

[HN8] In recent years, federal courts, including the United States Court of Appeals for the Third Circuit, have begun to expand the economic loss rule through the adoption of an approach referred to as the integrated product doctrine. In short, federal courts have used that theory to extend the economic loss rule to preclude tort-based recovery when a defective product is incorporated into another product which the defective product then damages. By focusing on whether the defective product was integrated into a larger one, the federal courts have concluded that harm to the product itself means harm to whatever else the defective product became integrated into.

Real Property Law > Torts > Construction Defects
Torts > Products Liability > Negligence

[HN9] Deciding whether one product is sufficiently integrated into another for purposes of applying the integrated product doctrine is a significant undertaking. Generally, if component part causes damage to product and if the product is deemed to be an integrated whole, courts treat such damage as harm to the product itself. Particularly in the case of houses, a product that is merely attached to or included as part of the structure is not necessarily considered to be an integrated part thereof. For example, that asbestos has not been deemed to be an integrated product, but instead that most courts have taken the position that contamination constitutes harm to the building as other property.

Contracts Law > Breach > Causes of Action > Elements of Claims
Torts > Damages > Economic Loss Doctrine
Torts > Products Liability > Negligence

[HN10] As comprehensive as the Products Liability Act, N.J.S.A. §§ 2A:58C-1 to 2A:58C-11, is and appears to be, its essential focus is creating a cause of action for harm caused by defective products. The Act's definition of harm so as to exclude damage a defective product does to itself is not merely the New Jersey Legislature's embrace of the economic loss rule, but a recognition that the Act's goal is to serve as a vehicle for tort recoveries. Simply put, the Act is not concerned with providing a consumer with a remedy for a defective product per se; it is concerned with providing a remedy for the harm or the damage that a defective product causes to people or to property. Whether or not the plaintiffs have a contract remedy is irrelevant to whether they have a cause of action under the Products Liability Act. In enacting the Products Liability Act, the Legislature did not intend it to be a catch-all remedy that would fill the gap created when ordinary contract remedies, including breach of contract, statutory causes of action, or express and implied warranty claims, were lost or unavailable. Nor was it designed to transform a contract-like claim, that is, a claim that the product itself in some fashion fails to operate as it should, into a tort claim.
Torts > Damages > Economic Loss Doctrine
Torts > Products Liability > Negligence

[HN11] The New Jersey Legislature's intent in enacting the Products Liability Act, N.J.S.A. §§ 2A:58C-1 to 2A:58C-11, as evidenced by its definition of harm, is to serve the same purposes addressed by the well-established common law economic loss rule of drawing a clear line between remedies available in tort and contract. Simply put, the Legislature does not regard the Act as a means to create an expansive tort remedy that would become available in the event that a plaintiff had no contract remedy or failed to pursue an available contract remedy; instead, it defined the role of tort remedies with care and precision.

COUNSEL: Peter L. Davidson argued the cause for appellants (The Davidson Legal Group, attorneys).

Andrew P. Fishkin argued the cause for respondent (Edwards Angell Palmer & Dodge, attorneys; Mr. Fishkin, David N. Cohen, and Charles W. Storrow, on brief).

John Randy Sawyer submitted a brief on behalf of amicus curiae Homeowners Against Deficient Dwellings (Stark & Stark, attorneys; Mr. Sawyer and Joseph D. Gumina, on the brief).

Anita R. Hotchkiss submitted a brief on behalf of amicus curiae Product Liability Advisory Council, Inc. (Goldberg Segalla, attorneys; Ms. Hotchkiss and Sarah X. Fang, on the brief).

JUDGES: JUSTICE HOENS delivered the opinion of the Court. CHIEF JUSTICE RABNER and JUSTICES LONG, LaVECCHIA, ALBIN, and WALLACE join in JUSTICE HOENS's opinion. JUSTICE RIVERA-SOTO filed a separate opinion concurring in part and dissenting in part.

OPINION BY: HOENS

OPINION

[*288] [**767] JUSTICE HOENS delivered the opinion of the Court.

The Products Liability Act, N.J.S.A. 2A:58C-1 to -11, established a unified theory of recovery for harm caused by products. In enacting that statute, our Legislature carefully defined the kinds of harm needed to support a recovery, specifically embracing a long standing common law theory [*110] known as the economic loss rule. N.J.S.A. 2A:58C-1(b)(2). In this appeal, we consider the continuing viability of the economic loss rule and its application [*289] to a claim arising out of the purchase of a residence, from its original owners, which had been constructed with an allegedly defective exterior finishing system. That context sets this case apart from our existing jurisprudence, in which we considered the remedies available to direct purchasers of products. This dispute, by distinguishing secondary purchasers from those with clearly available contract remedies against the manufacturer of the allegedly defective product, thus presents the question of whether, and in what circumstances, those remote purchasers should be permitted to pursue a tort remedy against that manufacturer.

This appeal also calls upon the Court to consider whether we will adopt the integrated product doctrine, devised in the federal courts, as a corollary to the economic loss rule. Were we to do so, and were we to conclude that the exterior finishing system is indeed integrated into the home itself, the effect would be to preclude these plaintiffs, and any other similarly situated home purchaser, from pursuing [*111] [**768] products liability relief against the manufacturer of an allegedly defective product affixed or adhered to the outside of the home for damage done by the product to the home.

Our consideration of these questions, and of the policies expressed by our Legislature in the governing statute, compels us to conclude that the integrated product doctrine does not apply to the facts before this Court, but that the economic loss rule limits plaintiffs' recovery to damage to the structure other than that sustained by the exterior finishing system itself. We therefore reverse and remand this matter to the Law Division for further proceedings.

I.

Many of the facts relevant to this appeal are contained in the Appellate Division's published majority and concurring opinions, see Dean v. Barrett Homes, Inc., 406 N.J. Super. 453, 968 A.2d 192 (App.Div.2009), as a result of which we will set forth only those facts necessary to explain our decision. Plaintiffs Robert, Jennifer, [*290] and Mary Sue Dean purchased a home in 2002 from its original owners. Id. at 455, 968 A.2d 192. The home had been built in 1995 by defendant Barrett Homes, Inc., with an Exterior Insulation and Finish System (EIFS), which was designed and manufactured by defendant [*112] Sto Corporation (Sto). Ibid. Traditional EIFS, the kind featured on the Deans' home, is sometimes called synthetic stucco. It consists of an adhesive, an expanded polystyrene board, a ground coating with reinforcing fiberglass fabric, a primer, and a synthetic plaster finish coating. Id. at 457, 968 A.2d 192. When it is affixed to the exterior of a building, EIFS operates as a combined insulation and wall finish system.
Prior to the closing, plaintiffs hired defendant HouseMaster, Inc. to perform a home inspection. *Id. at 456, 968 A.2d 192.* The inspection report raised questions concerning the EIFS and recommended that plaintiffs follow up with an expert or the product's manufacturer before proceeding with their purchase. *Id. at 456-57, 968 A.2d 192.* Plaintiffs, however, did not read the report prepared by HouseMaster and did not make the inquiries that report suggested. *Ibid.* At about the same time, plaintiffs learned that their insurer would not transfer their existing homeowner's policy to the new property, purportedly because the insurer would not cover a stucco exterior. *Id. at 456, 968 A.2d 192.* Undeterred, and without any further investigation of the EIFS, plaintiffs obtained insurance from another carrier, proceeded with the purchase, [*133] and moved into the home in May 2002. *Id. at 457, 968 A.2d 192.*

Plaintiffs assert that approximately one year after moving in, they first noticed black lines on the exterior of their home and thought that there might be a problem with the home's finishing system. *Ibid.* Plaintiffs assert that they then began to investigate and learned that if moisture penetrates through the EIFS, it has no means of escape. *Id. at 457-58, 968 A.2d 192.* Moisture penetrating the EIFS therefore becomes trapped behind it and eventually causes the underlying structure to rot or to develop mold. *Id. at 458, 968 A.2d 192.* They further assert that they [*291] hired an industrial hygienist, who inspected their home and found toxic mold that he blamed on leaks in the EIFS. *Ibid.* Although plaintiffs have never claimed that they sustained any personal injuries caused by the mold, they eventually had all of the EIFS removed and replaced. *Ibid.*

Plaintiffs believe that EIFS is defective because it lacks a "secondary weather protection behind the cladding to protect the underlying moisture sensitive substrate" and has "no means of drainage of water [*769] which may penetrate the wall assembly." *Ibid.* Moreover, they assert that it is virtually inevitable that water will penetrate [*14] the EIFS because moisture can enter through any break in the EIFS, including window cracks, holes created during cable installation, or failed sealing joints.

In May 2004, plaintiffs filed their complaint, in which they asserted claims against several defendants sounding in negligence, breach of express and implied warranties, breach of contract, Consumer Fraud Act violations, common law fraud, and strict products liability. *Id. at 459, 968 A.2d 192.* Eventually, plaintiffs resolved their claims against all of the defendants except Sto.

Following discovery, defendant Sto moved for summary judgment. *Ibid.* In granting that motion, the motion court rejected plaintiffs' products liability claim against defendant Sto, because plaintiffs were seeking damages for purely economic losses. *Ibid.* That is, the motion court reasoned that although plaintiffs claimed that the EIFS was defective, they sought to recover the cost of replacing it, resulting in a claim that was statutorily barred. *Ibid.* Because neither plaintiffs nor anyone else had sustained an injury attributable to the product's claimed defect, the court concluded that there was no basis to support any tort theory of recovery. *Ibid.*

Plaintiffs appealed, [*15] arguing that the trial court erred by invoking the economic loss rule and asserting that their products liability claim should be permitted to proceed because they had no alternate contract remedy available. *Ibid.* The Appellate Division affirmed the trial court's grant of summary judgment, rejecting [*292] that argument, along with another statutory claim plaintiffs had raised, which is not germane to this appeal. See *id. at 455, 968 A.2d 192.*

Concerning the products liability claim, Judge Carchman, writing for the appellate panel, concluded that the economic loss rule precluded recovery because plaintiffs' claim for damages was focused on the cost of replacing the defective product itself. *Id. at 467, 472, 968 A.2d 192.* As part of its analysis, the court traced the development of the common law economic loss rule, reasoning that it was designed to disallow a tort-based products liability claim if the parties could have addressed their dispute on contract grounds. *Id. at 463-66, 968 A.2d 192.* The court also considered whether a tort-based theory of recovery should be available where a defective building component damages other parts of the building's structure, concluding that the integrated product doctrine, which would preclude [*16] that relief, is consistent with this Court's precedents. See *id. at 467-68, 470, 968 A.2d 192.* Although recognizing that its approach would foreclose all of plaintiffs' potential remedies against the EIFS manufacturer, the Appellate Division concluded that the economic loss rule and the integrated product doctrine equitably and appropriately balance the different policies served by tort and contract law. *Id. at 470, 968 A.2d 192.*

Two members of the appellate panel filed a concurring opinion, in which they agreed with the ultimate outcome as to plaintiffs' claim, but argued for a different policy approach. *Id. at 473, 968 A.2d 192* (Sabatino, J., concurring). They framed the issue as being "whether the economic loss doctrine shields a manufacturer of ... a faulty component of a house from liability to an innocent consumer for the foreseeable physical damage to other portions of the house or to surrounding landscaping and property." *Id. at 474, 968 A.2d 192.* The concurring panelists essentially argued that the integrated product doctrine should be rejected, so that truly innocent home purchasers would be permitted to [*770] recover in tort
from the manufacturer of a defective component product for damages to the home other than to the product itself. [*294] Defendant argues that the trial court and the Appellate Division correctly granted its motion for summary judgment and refutes each of plaintiffs' three points as being insufficient to warrant relief. First, defendant asserts that the economic loss rule applies to plaintiffs' claim and urges this Court to embrace the integrated product doctrine devised by the federal courts to deny them a recovery conflicts with the Act and cannot be sustained.

Second, plaintiffs argue that damage to their home resulting from the EIFS meets the Act's definition of harm and that the Appellate Division erred when it applied the economic loss rule to them. More specifically, they assert that because their [*295] claim arose in a non-commercial setting, and because the EIFS is a product with a latent defect, the economic loss rule should not apply at all.

Finally, plaintiffs ask us to consider whether the differences between tort and contract remedies that effectuate the goals of risk and loss allocation are fairly served by applying the economic loss rule to them. Because, in their view, there is no legislative remedial scheme sounding in contract that addresses their circumstances, they argue that this Court should use the existing tort-based remedy embodied in the Products Liability Act to create one.

Second, defendant argues that applying the economic loss rule and the integrated product doctrine to plaintiffs would not foreclose [*19] them or similarly situated individuals from recovering. Instead, ordinary warranty and other contract remedies were and are available to a purchaser in plaintiffs' circumstances and would be more appropriate to address the product's alleged shortcomings.

Finally, defendant urges this Court not to lose sight of the fact that plaintiffs had ample opportunities to address the claimed defects in the EIFS prior to their purchase of the home, but failed to pursue any of them. Defendant argues that it would be both unfair and unwise for this Court to excuse that failure by crafting an exception to the tort-based remedial scheme that our Legislature so carefully embodied in the Products Liability Act.

II.

In their petition for certification, plaintiffs assert that this matter raises three issues that this Court should address. First, they ask us to consider whether a house qualifies as a "product" for purposes of relief available under the Products Liability Act, reasoning that if it does not, then the Appellate Division's application of the integrated product doctrine to deny them a recovery conflicts with the Act and cannot be sustained.

Second, plaintiffs argue that damage to their home resulting from the EIFS meets the Act's definition of harm and that the Appellate Division erred when it applied the economic loss rule to them. More specifically, they assert that because their [*18] claim arose in a non-commercial setting, and because the EIFS is a product with a latent defect, the economic loss rule should not apply at all.

Finally, plaintiffs ask us to consider whether the differences between tort and contract remedies that effectuate the goals of risk and loss allocation are fairly served by applying the economic loss rule to them. Because, in their view, there is no legislative remedial scheme sounding in contract that addresses their circumstances, they argue that this Court should use the existing tort-based remedy embodied in the Products Liability Act to create one.

III.

The issues raised by the parties require an analysis of the Products Liability Act. As we have noted, in enacting the Products Liability Act, our Legislature established [*71] "one unified, statutorily defined theory of recovery for harm caused by a product, and that theory is, for the most part, identical to strict liability." In re Lead Paint Liitig., 191 N.J. 405, 436, 924 A.2d 484 (2007) (internal quotation and citation omitted).

[HN1] The definition of tort liability found in the Products Liability Act is broad: "[a] *[*20] manufacturer or seller of a product shall be liable in a product liability action only if the claimant proves by a preponderance of the evidence that the product causing the harm [*295] was not reasonably fit, suitable or safe for its intended purpose . . . ." N.J.S.A. 2A:58C-2. Although broad in scope, it is significant for this dispute that the statute defines harm, and does so in terms that are specific. Harm for which there can be compensation under the Act, by definition, is limited to "physical damage to property, other than the product itself[,]" and certain personal injuries. N.J.S.A. 2A:58C-1(b)(2) (emphasis added).

That definition of harm was not a new one, for it represented a codification of the economic loss rule. [HN2] Understanding that rule and its analytical underpinnings is essential to any analysis of the statute. The economic loss rule, which bars tort remedies in strict liability or negligence when the only claim is for damage to the product itself, evolved as part of the common law, largely as an effort to establish the boundary line between contract and tort remedies. As this Court long ago noted, the economic loss rule was developed in conjunction with strict liability theories [*21] that were "a judicial response to inadequacies in sales law with respect to consumers who sustained physical injuries from defective goods made or distributed by remote parties in the marketing chain." Spring Motors Distrib., Inc. v. Ford Motor Co., 98 N.J. 555, 576, 489 A.2d 660 (1985).
Subsequent to the development of the doctrine, most of the protections for commercial transactions were established through the adoption of the Uniform Commercial Code (U.C.C.), see N.J.S.A. 12A:1-101 to :12-26. The U.C.C. effectively supplanted strict liability as the mechanism for consumer protection, at least in the context of commercial transactions. See W. Prosser & W. Page Keeton, Handbook of the Law of Torts § 95A at 680 (5th ed. 1984).

It was in that context that [HN3] this Court adopted the economic loss rule, initially analyzing the rule as it applied to a large-scale commercial transaction between sophisticated purchasers. See Spring Motors, supra, 98 N.J. at 560, 578-79, 489 A.2d 660. The Court held that commercial buyers seeking damages for economic loss resulting from the purchase of defective goods may recover from an immediate seller and a remote supplier in a distributive [*296] chain for breach of warranty under the U.C.C., [***22] but not in strict liability or negligence. Id. at 561, 489 A.2d 660. In part, that result rested on the view that, as between parties to a commercial transaction seeking recovery for a defect in the product itself, the U.C.C. was a "comprehensive system for determining the rights and duties of buyers and sellers with respect to contracts for the sale of goods." Id. at 565, 489 A.2d 660. The Court referred to the U.C.C. as the "exclusive source for ascertaining when a seller is subject to liability for damages if the claim is based on intangible economic loss not attributable to physical injury to person or harm to a tangible thing other than the defective product itself." Id. at 581, 489 A.2d 660 (quoting Prosser & Keeton, supra, § 95A at 680) (internal quotation omitted). That is to say, if the essence of a claim was that there was something wrong with the product itself, the buyer's remedies were found in the U.C.C. because [*772] the claim was based, fundamentally, on the contract principles embodied there.

The Spring Motors Court looked to the underlying policies differentiating tort remedies from contract remedies, noting:


In other words, the Court concluded that [HN5] when addressing economic losses in commercial transactions, contract theories were better suited than were tort-based principles of strict liability. This Court's approach was embraced by the United States Supreme Court soon thereafter, see E. River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 871, 106 S. Ct. 2295, 2302, 90 L. Ed. 2d 865, 877 (1986), but again, the analysis arose in the context of a commercial transaction between sophisticated business entities. In adopting the economic loss rule, the United States Supreme Court described it as springing from the proposition that commercial purchasers cannot hold manufacturers responsible, through principles of negligence or strict liability, for [*297] failure "to prevent a product from injuring itself." Ibid. (considering federal admiralty law and finding tort remedies inapplicable where defective turbines damaged oil supertankers).

This Court subsequently extended the economic [***24] loss rule beyond transactions between sophisticated commercial entities, by applying it to transactions involving individual consumers. See Alloway v. Gen. Marine Indus., L.P., 149 N.J. 620, 641, 695 A.2d 264 (1997). There, in considering the claim of a purchaser of an allegedly defective boat who sought to recover the cost of repairs or lost trade-in value, the Court concluded that the U.C.C. "amply protects all buyers--commercial purchasers and consumers alike--from economic loss arising out of the purchase of a defective product." Id. at 642, 695 A.2d 264.

This Court's analysis reflects an effort to identify the demarcation line between contract and tort remedies, and to do so by considering questions about the allocation of risk and loss. [HN6] In Alloway, the Court made that choice by identifying factors that helped determine which theory, tort or contract, better addressed the claim being asserted, and by considering: (1) the relative bargaining power of the parties; (2) the risk-of-loss allocation implications; and (3) the availability of insurance. Id. at 628-29, 695 A.2d 264.

In applying those factors, the Alloway Court found that the plaintiff had the resources to purchase a luxury item, was not at a disadvantage when bargaining [***25] for its purchase, and could insure himself against the risk of loss. Id. at 629, 695 A.2d 264. Further, the Court reasoned that a host of statutory contractual remedies adequately protect such consumers against economic losses. Id. at 639-41, 695 A.2d 264 (citing U.C.C., N.J.S.A. 12A:1-103; Consumer Fraud Act, N.J.S.A. 56:8-1 to -20; Truth-In-Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-1 to -18; and Magnuson-Moss Warranty Act, 15 U.S.C.A. §§ 2301-2312). In those circumstances, we described a tort remedy as "superfluous and counterproductive." Id. at 641, 695 A.2d 264.

[Id. at 579-80, 489 A.2d 660.]
[*298] [HN7] In enacting the Products Liability Act, and in codifying the economic loss rule within the definition of the "harm" found in the Act's general provision, N.J.S.A. 2A:58C-1(b)(2), the Legislature both recognized and agreed with its designation [*773] of the line that divides tort and contract remedies. The economic loss rule is therefore firmly established as a limitation on recovery through tort-based theories, not only because of this Court's longstanding common law precedents differentiating between remedies sounding in tort and contract, but also through the pronouncement of our Legislature as embodied in the Products Liability Act.

[HN8] In recent years, federal [*26] courts, including the United States Court of Appeals for the Third Circuit, have begun to expand the economic loss rule through the adoption of an approach referred to as the integrated product doctrine. In short, federal courts have used this theory to extend the economic loss rule to preclude tort-based recovery when a defective product is incorporated into another product which the defective product then damages. See, e.g., King v. Hilton-Davis, 855 F.2d 1047, 1051 (3d Cir.1988) (applying Pennsylvania law; concluding that potato starter fungicide was integrated into potato starters, precluding tort claim for crop failure), cert. denied, 488 U.S. 1030, 109 S. Ct. 839, 102 L. Ed. 2d 971 (1989). By focusing on whether the defective product was integrated into a larger one, the federal courts have concluded that "harm to the product itself" means harm to whatever else the defective product became integrated into. Ibid.

Although the Third Circuit originally used the integrated product doctrine in a case arising under Pennsylvania law, see ibid., more recently, federal courts have employed that theory when called upon to apply New Jersey law as well. See, e.g., Intl Flavors & Fragrances, Inc. v. McCormick & Co., Inc., 575 F. Supp. 2d 654, 662-63 (D.N.J.2008) [*27] (explaining that "damage done to a final product by a defective component or ingredient does not constitute damage to property 'other than to the product itself."); Travelers Indem. Co. v. Dammann & Co., Inc., 592 F. Supp. 2d 752, 762-63 (D.N.J.2008) (barring Products Liability Act claim because [*299] defective vanilla beans were incorporated into vanilla extract and other flavorings); Easling v. Glen-Gery Corp., 804 F. Supp. 585, 590-91 (D.N.J.1992) (rejecting apartment complex purchaser's Products Liability Act claim for damaged studs and interiors caused by defective brick facing because the product was not bricks, but the completed apartment complex); cf. In re Merritt Logan, Inc., 901 F.2d 349, 362 (3d Cir.1990) (precluding tort claim against manufacturer of defective refrigeration system by concluding that damage to food that spoiled was damage of the kind bargained for in commercial transaction).

Our appellate courts have also begun to consider whether to recognize and apply the integrated product doctrine here in New Jersey. Although the decision now before us represents one analysis of the theory, it is not the first. Another appellate panel previously considered and applied [*28] the integrated product doctrine to bar a homeowner's claim for recovery arising from an EIFS exterior that had damaged portions of the home. See Marrone v. Greer & Polman Constr., Inc., 405 N.J. Super. 288, 302-03, 964 A.2d 330 (App.Div.2009). Considering facts nearly identical to the ones that are now before us, that earlier panel rejected the Products Liability Act claims for consequential damages involved in replacing the EIFS. Id. at 304, 964 A.2d 330. That panel, applying the integrated product doctrine, reasoned that "the house is the 'product,' and it cannot be subdivided into its component parts for purposes of supporting a [Products Liability Act] cause of action." Id. at 297, 964 A.2d 330.

The Marrone court concluded that the EIFS was not separate from the house, [*774] but was integrated into it, therefore making the EIFS and the house one "product" for purposes of the Act's definition of harm. Ibid. That led the court to conclude that any damage the EIFS caused to the structure of the house was damage to the "product" itself, with the result that plaintiff was barred from recovery by the economic loss rule. Ibid. Moreover, the Marrone panel reasoned that even if the plaintiff had bought the EIFS separately, the costs [*29] of removing and replacing the [*30] EIFS could not be recovered pursuant to the Products Liability Act. Ibid. In those circumstances, the claim would be barred because "defects in the [EIFS] cladding constitute 'damage ... to the product itself."' Ibid. (quoting N.J.S.A. 2A:58C-1(b)(2)).

Although an earlier decision appeared to reach a contrary conclusion, see Dilorio v. Structural Stone & Brick Co., 368 N.J. Super. 134, 845 A.2d 658 (App.Div.2004) (affirming denial of summary judgment on tort claim against remote supplier of defective stone facade), the Marrone court distinguished that precedent by interpreting it to have been a dispute alleging builder malpractice rather than one about defective goods. Marrone, supra, 405 N.J. Super. at 303, 964 A.2d 330. That analysis finds support in the Dilorio decision, which arose out of the agreement of the parties for the construction of residential premises. Dilorio, supra, 369 N.J. Super. at 136, 845 A.2d 658. In Dilorio, the court concluded that the transaction fell outside of the U.C.C. because it involved the sale of real property or of services rather than goods. Id. at 141-42, 845 A.2d 658. But in addressing the buyer's claim that a stone facade was defective and had damaged other parts of the home as it flaked off, the Dilorio court declined to apply either the integrated product doctrine or the economic
loss rule. Instead, the panel reasoned that the purchaser could proceed against the builder on a professional negligence theory, thus taking the claim outside of both the U.C.C. and the Products Liability Act. *Ibid.*

It is against this historical and analytical background that we consider the questions presented by plaintiffs in their petition for certification.

IV.

This appeal presents us with challenges on two levels. On its surface, the dispute is about whether we will adopt the integrated product doctrine and, if so, whether the EIFS was sufficiently integrated into the home plaintiffs purchased that any recovery for damages to it or to the home is barred by the economic loss [*301] rule. Deciding that question, however, calls upon this Court to consider fundamental issues about the roles played by contract and tort in addressing defective products and in affording a remedy for the losses that are caused by or flow from them.

The three questions presented in plaintiffs’ petition for certification are sufficiently intertwined that we need not address them separately. We begin with [*31] the argument about whether a house qualifies as a "product" for purposes of relief available under the Products Liability Act, N.J.S.A. 2A:58C-1 to -11. Plaintiffs argue that because the Act specifically excludes a seller of real estate from its definition of a "product seller," N.J.S.A. 2A:58C-8 (providing that "product seller" does not include a seller of real property), then all claims relating to houses fall outside of the Act. Plaintiffs further reason that, if a house is not a product within the meaning of the Act, then the Appellate Division's use of the integrated product doctrine to deny them a recovery conflicts with the Act and cannot be sustained.

[*75] Although plaintiffs present the argument as part of their attack on the Appellate Division's application of the integrated product doctrine, in actuality it rests on a flawed reading of the Act's definition of harm. Regardless of whether the Legislature considered a home to be a product when it excluded sellers of real estate from the definition of product sellers, one can easily conceive of circumstances in which a house would not only qualify as a product, but would also create a compensable cause of action in tort. A prefabricated [*32] home that gave off fumes and sickened its residents, for example, would certainly qualify. See, e.g., *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 92-93, 207 A.2d 314 (1965) (explaining certain tort remedies available against builder of home with defective water distribution system that scalded child inhabitant); see also *McDonald v. Mianechi*, 79 N.J. 275, 291-93, 398 A.2d 1283 (1979) (explaining *Schipper* and permitting warranty remedy against builder-vendors of home with defective well and water system). In this appeal, however, plaintiffs purchased the home from its prior owners, not from a product seller or manufacturer, [*302] thus making plaintiffs' argument about whether a house might be a product misplaced. The issue is not whether a home is a product, but whether this Court will adopt the integrated product doctrine to address whether a product, like EIFS, which causes damages to the house, falls within the economic loss rule, thus barring recovery.

Our response to that question is a limited one. Whether we adopt the integrated product doctrine or not, it would not alter the outcome here, because our analysis turns on whether the EIFS was sufficiently integrated into the home to become a part of the structure [*33] for purposes of broadly applying the economic loss rule. [*H9] Deciding whether one product is sufficiently integrated into another for purposes of applying the doctrine is a significant undertaking. The doctrine is referred to in the *Restatement (Third) of Torts: Product Liability § 21*, in a comment relating to the economic loss rule generally. *Restatement, supra, § 21 comment e* (observing generally that if component part causes damage to product and if the product "is deemed to be an integrated whole, courts treat such damage as harm to the product itself"). Particularly in the case of houses, a product that is merely attached to or included as part of the structure is not necessarily considered to be an integrated part thereof.

The *Restatement* points out, for example, that asbestos has not been deemed to be an integrated product, but instead that "most courts have taken the position that contamination constitutes harm to the building as other property." *Ibid.; see, e.g., Tioga Pub. Sch. Dist. # 15 v. United States Gypsum Co.*, 984 F.2d 915, 918 (8th Cir.1993) (permitting recovery through tort for costs of asbestos abatement); *Northridge Co. v. W.R. Grace & Co.*, 162 Wis. 2d 918, 471 N.W.2d 179, 185-86 (1991) [*34] (same); *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369, 371 n. 1 (1990) (holding school to be other property so as to allow recovery for costs of asbestos abatement).

Similarly, the courts in California have declined to apply the integrated product doctrine to products used in building houses. [*303] The California Supreme Court has held that "the economic loss rule does not necessarily bar recovery in tort for damage that a defective product ... causes to other portions of a larger product ... into which the former has been incorporated." *Jimenez v. Superior Court*, 29 Cal. 4th 473, 483, 58 P.3d 450, 457, 127 Cal. Rptr. 2d 614 (2002). Applying that view, the court permitted plaintiff home buyers to recover in strict liability for damage that the windows [*76] caused to other parts of the home, rejecting the argument that the windows were integrated into the home for purposes of
the rule. *Id. at 483-84, 127 Cal. Rptr. 2d 614, 58 P.3d 450.* An intermediate appellate court in California, rejecting arguments similar to the ones advanced before this Court as "intellectual nit-picking," *Stearman v. Centex Homes,* 92 Cal. Rptr. 2d 761, 769, 78 Cal. App. 4th 611, 623 (Cal.Ct.App.2000), concluded that the integrated product doctrine did not preclude [***35] plaintiffs from recovery for damages to their house caused by a faulty foundation. *Ibid.*

We reach the same conclusion in this appeal. As we understand it, the EIFS was affixed to the exterior walls to create a moisture barrier, much like exterior vinyl siding. As such, it did not become an integral part of the structure itself, but was at all times distinct from the house. It remained, therefore, a separate product for purposes of our analysis. That conclusion, however, would not alter the operation of the economic loss rule. Although the EIFS is a separate product, the economic loss rule precludes plaintiffs from recovery on a strict liability theory, meaning that plaintiffs cannot recover under the *Products Liability Act* for damage to the EIFS itself. Instead, their recovery must be limited to such damages as the EIFS caused to the house's structure or to its environs.

Plaintiffs argue that the economic loss rule should not have been applied to them at all. They assert that they are purchasers in a non-commercial setting and that they do not have a contract remedy, contending that these are distinguishing factors that make it inappropriate to apply the economic loss rule to this dispute. [***36] As part of that analysis, plaintiffs ask us to consider [*304] whether the goals of risk and loss allocation as between tort and contract that the economic loss rule was intended to achieve are fairly served by applying that rule to them. They argue that, in the absence of a legislatively-created remedial framework sounding in contract that affords them an avenue for relief, this Court should use the existing tort-based remedy expressed in the Products Liability Act, so as to create one.

The approach urged by plaintiffs, which asks us to find within the Products Liability Act a tort-based cause of action that would permit them to recover all of the costs of removal of the EIFS and repair of the home, is grounded on a fundamental misconception about the Products Liability Act itself. Clarity about what the Act is designed to do, and what it is most certainly not designed to do, will make clear the reasons for the result we reach.

[HN10] As comprehensive as the Products Liability Act is and appears to be, its essential focus is creating a cause of action for harm caused by defective products. The Act's definition of harm so as to exclude damage a defective product does to itself is not merely the Legislature's [***37] embrace of the economic loss rule, but a recognition that the Act's goal is to serve as a vehicle for tort recoveries. Simply put, the Act is not concerned with providing a consumer with a remedy for a defective product per se; it is concerned with providing a remedy for the harm or the damage that a defective product causes to people or to property.

Plaintiffs' suggestion that we interpret the Act to create a remedy for them because they perceive that they have no available contract remedy completely misses the point of the statute by failing to appreciate what it is that the Products Liability Act is designed to do. Indeed, whether or not plaintiffs now have a contract remedy is irrelevant to whether they have a cause of action under the Products [***777] Liability Act. In enacting the Products Liability Act, our Legislature did not intend it to be a catch-all remedy that would fill the gap created when ordinary contract remedies, including breach of contract, statutory causes of action, or express and implied warranty claims, were lost or unavailable. [*305] Nor was it designed to transform a contract-like claim, that is, a claim that the product itself in some fashion fails to operate as it should, [***38] into a tort claim.

Instead, the Legislature did quite the opposite, broadly defining tort remedies, creating a comprehensive framework for causes of action available to injured plaintiffs, and identifying defenses available to product sellers or manufacturers, but doing so with precise focus on the particular harm, namely a tort-based harm, that is permitted to be remedied through the statute. That being so, the answer to plaintiffs' request that we create a tort-like remedy to fill what they perceive to be a gap in otherwise available contract remedies is an obvious one. [HN11] The Legislature's intent in enacting the Products Liability Act, as evidenced by its definition of harm, was to serve the same purposes addressed by the well-established common law economic loss rule of drawing a clear line between remedies available in tort and contract. Simply put, the Legislature did not regard the Act as a means to create an expansive tort remedy that would become available in the event that a plaintiff had no contract remedy or failed to pursue an available contract remedy; instead, it defined the role of tort remedies with care and precision.

There is no room, in light of the clear purposes of [***39] the Products Liability Act, to expand it so as to create a new remedy for plaintiffs' assertions that the product, EIFS, failed to perform as expected. Rather, we conclude that the economic loss rule, as embodied in the Act's definition of harm, precludes plaintiffs from recovering any damages for harm that the EIFS caused to itself. Notwithstanding that, because we also conclude that the EIFS was not so fully integrated into the structure of the house that the house effectively became the product
for purposes of the economic loss rule, to the extent that
the EIFS caused damage to the structure of the house or
its immediate environs, plaintiffs retain a cause of action
pursuant to which they may proceed against the product's
manufacturer.

[*306] V.

We therefore reverse the judgment of the Appellate
Division to the extent that it concluded that plaintiffs
were precluded from pursuing any remedy under the
Products Liability Act and we remand this matter for
further proceedings consistent with this opinion.

CONCUR BY: RIVERA-SOTO [***40] (In Part)

DISSENT BY: RIVERA-SOTO (In Part)

DISSENT

JUSTICE RIVERA-SOTO, concurring in part and
dissenting in part.

To the extent the majority concludes that the eco-
nomic loss doctrine bars recovery in this case, I concur.
In respect of the remainder of the majority’s opinion,
however, I dissent substantially for the reasons so ably
set forth in Judge Carchman’s majority opinion. Dean v.
Barrett Homes, Inc., 406 N.J. Super. 453, 455-73, 968
A.2d 192 (App.Div.2009). I add only the following two
points.

First, the Appellate Division’s decision consists of
both a majority opinion and an opinion concurring in the
judgment only. [*778] That concurring-in-the-
judgment opinion gratuitously addresses a question that,
simply put, is not present in this case. As the concurring
judge explained,

I write separately to express concerns about the scope and application of the
"economic loss" doctrine in circumstances involving a homeowner who, unlike the
insta[l]ent plaintiffs, is unaware of the latent
risks of a defective component product
that was used in the construction of his or
her home. In my view, such an innocent
home purchaser should be able to recover,
under the Product Liability Act, N.J.S.A.
2A:58C-1 to -11 ("PLA"), reasonable
compensation [*41] from the manufactur-
er [*307] of that defective component for
the physical harm the component
cau[se]d to other portions of the home and
to any other property owned by the plain-
tiff.

[Id. at 473, 968 A.2d 192 (emphasis
supplied).]

1 The conflict generated by the Appellate Divi-
sion’s majority and concurring-in-the-judgment
opinions also raises a quarrelsome procedural
point not discussed either by the parties or the
courts. The appellate panel consisted of three
judges: Judges Carchman, Sabatino and Simo-
nelli. The “majority” opinion is signed by Judge
Carchman, while the concurring opinion -- which
concurs only in the judgment -- is signed by
Judge Sabatino and is joined in by Judge Simo-
nelli. That if that is the tally, then how does the "ma-
jority” opinion command a majority of that three-
member panel? Simple arithmetic would require
a result different from that embodied in the Ap-
pellate Division’s dueling opinions, and no satis-
factory answer has been provided to that proce-
dural conundrum.

Thus, to the extent the concurring opinion deals
solely with circumstances other than those presented in
this case, that concurrence in its entirety is dicta, that is,
"something that is unnecessary to the decision in the case and
[***42] therefore not precedential[.]” Lucent
Techs., Inc. v. Twp of Berkeley Heights, 201 N.J. 237,
252, 989 A.2d 844 (2010) (Rivera-Soto, J., concurring)
(quot[ing] Black’s Law Dictionary 1100 (7th ed. 1999));
see also State ex rel. J.A., 195 N.J. 324, 355-56, 949
indifference to faithful and disciplined appellate review
as "relegat[ing] its entire ... analysis to the chia-
roscuro of dicta" and noting that "dicta cannot be res
adjudicata from the very definition of the terms." (quot-
ing J.J. Hockenjos Co. v. Lurie, 12 N.J. Misc. 545, 548,
173 A. 913 (Sup.Ct.1934)).

Second, the majority’s conclusion that "the inte-
grated product doctrine does not apply to the facts before this
Court," ante at 289, 8 A.3d at 768, 2010 N.J. LEXIS
1219 at *11, defies basic common sense. As the majority
must concede, the "product" at issue here is an Exterior
Insulation Finishing System (EIFS), that is, an exterior
finish that is applied permanently to a home. Ante at 289-
90, 8 A.3d at 767-68, 2010 N.J. LEXIS 1219 at *11-12,
See Simmermon v. Dryvit Sys., Inc., 196 N.J. 316, 321,
953 A.2d 478 (2008) (describing "Dryvit" -- a brand of
EIFS -- as "synthetic stucco"); DKM Residential Props.
Corp. v. Twp. of Montgomery, 363 N.J. Super. 80, 83,
as "an exterior, synthetic, stucco-like finish" applied to a
home). As noted in David L. Grenier and William J.

EIFS was first introduced in post-World War II Germany to resurface buildings, which had damaged masonry. It was subsequently introduced in the United States in the late 1960's and its use has become widespread over the past thirty years. Sometimes called "synthetic stucco," EIFS is a multi-layered exterior barrier-type system designed to prevent moisture intrusion into exterior walls. The system consists of four main components:

1) Panels of expanded polystyrene foam insulation installed with adhesive or mechanically fastened to the substrate, usually plywood or oriented strand board (OSB),

2) A base coat that is troweled over the foam insulation panels,

3) A glass fiber reinforcing mesh is laid over the polystyrene insulation panels and fully imbedded in the base coat,

4) A finishing coat is then troweled over the base coat and the reinforcing mesh.

The base coat, mesh, and finishing coat is usually approximately 1/8 to 1/4 inches thick.

To claim that any system so designed and installed is anything other than permanently integrated into the structure to which it is applied simply makes no sense.

As the facts in this case pointedly describe, the EIFS exterior finish permanently was installed when the home was first built; that permanent exterior finish was part and parcel of the home when the original owners of this home purchased it; and that permanent exterior finish obviously remained an integrated part of this home when plaintiffs purchased it from the original owners. In those circumstances, the majority's conclusion that the exterior finish to this home had not "been sufficiently integrated into the home to become a part of the structure for purposes of broadly applying the economic loss rule[.]

the EIFS was affixed to the exterior walls to create a moisture barrier, much like exterior vinyl siding. That is, it did not become an integral part of the structure itself, but was at all times distinct from the house. It remained, therefore, a separate product for purposes of our analysis.

The notion that an exterior finish that can only be removed by extensive demolition work is not "integrated" into the structure to which it is attached is so fanciful, so nonsensical, that it beggars the imagination. It is a conclusion that can germinate only in the minds of lawyers and can find root only in the rarified environment of this Court's decisions; it cannot, however, long survive in the atmosphere of the real world. EIFS is in many relevant respects no different than roofing shingles. Yet, applying the majority's reasoning, the roof of a home is not integrated into that home. See, e.g., Lee Wholesale Supply, Inc. v. Yacos (In re Yacos), 370 B.R. 131, 135 (Bankr.E.D.Mich.2007) (“Existing residential homes, like other buildings, have roofs. Repairing and replacing roofs requires one to put the parts together to form the complete integrated object (i.e., the building). That the roof being repaired or replaced happens to be constructed on an existing home rather than a new home does not make it any less an act of construction of a building.”) There is no kind way to put it: the majority's reasoning simply makes no sense.

Until today, New Jersey courts had embraced the reasonable and logical conclusion that the integrated product/component part rule of the economic loss doctrine forbade the kind of hairsplitting that would permit the result the majority reaches. In Marrone v. Greer & Polman Construction, Inc., 405 N.J. Super. 288, 964 A.2d 330 (App.Div.2009), the Appellate Division recently confronted and readily resolved the very issue that is so vexing to the majority. In that case, a homeowner -- like plaintiffs here -- purchased from the then-owners an existing home that originally had been constructed using an EIFS exterior finish. Id. at 291, 964 A.2d 330. After buying the home, the home-
owner received notice from his homeowner's insurance carrier "threatening to cancel their coverage because of the EIFS cladding on the house." *Ibid.* The homeowner sued and the trial court dismissed the complaint, explaining that "[w]here a component of an integrated product causes injury solely to the integrated product, the damage to the integrated product is not considered separate property damage that would remove the claim from the realm of contract law into the field of tort law. Such is the case here." *Id.* at 293, 964 A.2d 330. The Appellate Division concurred, concluding that, in the circumstances presented, "the house is the 'product'" [****47*] and it cannot be subdivided into its component parts for purposes of supporting a [Products Liability Act] cause of action." *Id.* at 297, 964 A.2d 330. See generally *Alloway v. Gen. Marine Indus.*, 149 N.J. 620, 627, 695 A.2d 264, 267-68 (1997) (explaining that "tort principles are better suited to resolve claims for personal injuries or damage to other property[,] ... [c]ontract principles more [****310*] readily respond to claims for economic loss caused by damage to the product itself" (citations omitted)).

One cannot help but ponder whether -- in the absence of a lawyer's logical whimsy -- everyday homeowners who have exterior finish systems attached to their homes would ever think that those systems are not "integrated" as part of their homes. Because I cannot join in that unexplained, unexplainable and unnecessary departure from reality, I dissent. 2 2 Despite direct authority in our own State to the contrary, the majority nevertheless discards the application of the integrated product rule of the economic loss doctrine in this case based on two California cases that -- incredibly -- hold that neither the windows of a home nor its foundation are "integrated" into the home. *Ante at* 302-03, 8 A.3d at 775-76, 2010 N.J. LEXIS 1219 at *34. In so doing, [****48*] the majority relies on two outlier decisions and ignores the far better reasoned, almost universal weight of authority nationwide that bars plaintiffs' action under the integrated product rule of the economic loss doctrine.

The cases either directly or impliedly supporting the rather unremarkable proposition that an EIFS system is integrated into a building and, hence, is subject to the economic loss rule are legion; the following is not exhaustive, but merely illustrative.

Federal: *Saratoga Fishing Co. v. J. M. Martinac & Co.*, 520 U.S. 875, 117 S. Ct. 1783, 138 L. Ed. 2d 76 (1997) (holding that extra fishing equipment and spare parts, added to ship by user after initial sale, were not part of original ship with a defective hydraulic system that itself caused harm at issue); *E. River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986) (barring recovery in tort for damages caused by defective turbine engines installed by manufacturer in four ships); *HDM Flugservice GmbH v. Parker Hannifin Corp.*, 332 F.3d 1025, 1030 (6th Cir.2003) (barring recovery for damage to helicopter from allegedly defective landing gear under a species of integrated product [****49*] rule); *All Alaskan Seafoods, Inc. v. Raychem Corp.*, 197 F.3d 992, 995 (9th Cir.1999) (referring to integrated product rule as "component part rule" and describing it as "[a] corollary to the economic loss rule"); *In re GMC*, 383 F. Supp. 2d 1340, 1343-44 (W.D.Okla.2005) (noting that "[r]esolution of the issue requires the court to define the relevant product - does it consist of the defective component or the finished product into which the component is integrated[,]" and explaining that "[w]hen addressing claims based on defective components, most courts have held that the relevant 'product' is the finished product into which the component is integrated").

*Alabama: Keck v. Dryvit Sys.*, 830 So. 2d 1, 6, 7 (Ala.2002) (explaining, in context of EIFS system, that "[w]hether an item that is incorporated into real property may be considered [integrated] is determined by whether the item is part of the structural integrity of the house or building that is reasonably expected to last for the useful life of the house or building[,]" describing EIFS as "a multilayered wall system that actually composes the exterior walls of a building. By virtue of the very function of the EIFS as an exterior [****50*] wall system, the EIFS could not be a structural component of a building that one might expect to replace after normal wear and tear. A stucco exterior wall is the equivalent of a brick wall; it is a part of the structural integrity of a house -- a homeowner expects it to be weather resistant and to endure for the entire useful life of the house" and ultimately holding that, for purposes of the economic loss doctrine, an EIFS system is part of the structural integrity of a house).

*Alaska: N. Power & Eng'g Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324, 330 (Alaska 1981) (applying integrated product rule where component parts "are provided by one supplier as part of a complete and integrated package").

damage other than damage to the defective product).

Florida: Casa Clara Condo. Ass’n v. Charley Toppino & Sons, 620 So. 2d 1244, 1245 (Fla.1993) (economic loss doctrine bars claim against concrete provider for building where there was no damage to anything other than building itself); Turbomeca, S.A. v. French Aircraft Agency, Inc., 913 So. 2d 714, 717 (Fla.Dist.Ct.App.2005) [***51] (explaining that "[t]he airframe and engine are not two separate pieces of property - they are one product" and that "[c]ourts have refused to bifurcate products into parts where a component part harms or destroys the finished product"); Jarmco, Inc. v. Polygard, Inc., 668 So. 2d 300 (Fla.Dist.Ct.App.1996) (economic loss doctrine bars claim against distributor of boat resin where only damage was to boat itself); Am. Universal Ins. Group v. Gen. Motors Corp., 578 So. 2d 451 (Fla.Dist.Ct.App.1991) (economic loss doctrine bars claim for loss of engine when damaged by replacement oil pump that was integral component of engine).


Idaho: Tusch Enters. v. Coffin, 113 Idaho 37, 740 P.2d 1033, 1035-36 (Idaho 1987) (holding that "subsequent purchasers of residential dwellings, who suffer purely economic losses from latent defects manifesting themselves within a reasonable time, may maintain an action against the builder (or builder-developer, as the case may be,) of the dwelling based [***52] upon the implied warranty of habitability" but not in tort).


Indiana: Gunkel v. Renovations, Inc., 822 N.E.2d 150, 156 (Ind.2005) (distinguishing between damage caused by "parts of a finished product damaged by components supplied to the seller by other manufacturers and imported into the seller's product" as barred by economic loss doctrine, and damage caused by "property acquired by the plaintiff separately from the defective goods or services" as recoverable "even if the defective product is to be incorporated into a completed product for use or resale").

Kansas: Nw. Ark. Masonry, Inc. v. Summit Specialty Prods., 29 Kan. App. 2d 735, 31 P.2d 982, 988 (Kan.Ct.App.2001) (holding that "damage by a defective component of an integrated system to either the system as a whole or other system components is not damage to 'other property' which precludes the application of the economic loss doctrine") (quoting Waussau Tile, Inc. v. County Concrete Corp., 226 Wis. 2d 235, 593 N.W.2d 445, 452 (1999)).


Michigan: Sullivan Indus., Inc. v. Double Seal Glass Co., 192 Mich. App. 333, 480 N.W.2d 623 (1991) (concluding that sealant used in assembly of insulated glass units was part of integrated product and, thus, tort claim was barred under economic loss doctrine).

Minnesota: S.J. Groves & Sons Co. v. Aerospatiale Helicopter Corp., 374 N.W.2d 431, 432 (Minn.1985) (claim of failed part of helicopter causing crash barred by integrated product rule of economic loss doctrine); Minneapolis Soc’y of Fine Arts v. Parker-Klein Assoc. Architects, 354 N.W.2d 816, 817 (Minn.1984) (materialman providing bricks for non-load bearing facade not liable for failure as facade integrated into building).


North Carolina: Wilson v. Dryvit Sys., 206 F. Supp. 2d 749, 753, 754 (E.D.N.C.2002) (explaining that "North Carolina courts have indicated that when a component part of a product or a system injures the rest of the product or the system, only economic loss has occurred" and determining that EIFS system "is an integral component of plaintiff’s house").

North Dakota: Cooperative Power Ass’n v. Westinghouse Elec. Corp., 493 N.W.2d 661, 667
(N.D.1992) (holding that product manufacturer "may not be held liable in negligence or strict liability for economic loss caused by a failure of a component part of the [product] which causes damage to the [product] only").

South Dakota: City of Lennox v. Mitek Indus., 519 N.W.2d 330, 333 (S.D.1994) ("When a defect in a component part damages the product into which that component was incorporated, economic losses to the product as a whole are not losses ... and are therefore not recoverable in tort.").

Texas: Pugh v. Gen. Terrazzo Supplies, Inc., 243 S.W.3d 84, 92 (Tex.App.2007) (noting that "Texas courts have rejected the argument that damage to a finished product caused by a [***55] defective component part constitutes damage to 'other property,' so as to permit tort recovery for damage to the finished product" and applying integrated product rule of economic loss doctrine to bar tort claim in respect of EIFS system installed on home).


Wisconsin: Linden v. Cascade Stone Co., 2004 WI App 184, 276 Wis. 2d 267, 687 N.W.2d 823, 824 (Wis.Ct.App.2004) (holding that "[t]he integrated system rule holds that once a part becomes integrated into a completed product or system, the entire product or system ceased to be 'other property' for purposes of the economic loss doctrine and concluding that exterior stone stucco and roof systems were integrated into home); Mequon Med. Assocs. v. S.T.O. Indus., 2003 WI App 225, 267 Wis. 2d 961, 671 N.W.2d 717 (Wis.Ct.App.2003) (holding that EIFS system is integral part of building subject to economic loss doctrine); Selzer v. Brunsell Bros., 2002 WI App 232, 257 Wis. 2d 809, 652 N.W.2d 806, 818 (Wis.Ct.App.2002) [***56] (holding that "[t]he integrated system rule holds that once a part becomes integrated into a completed product or system, the entire product or system ceases to be 'other property' for purposes of the economic loss doctrine" and concluding that "windows and siding [are] components of an 'integrated system'"); Bay Breeze Condo. Ass’n v. Norco Windows, Inc., 2002 WI App 205, 257 Wis. 2d 511, 651 N.W.2d 738 (Wis.Ct.App.2002) (holding that "[t]he economic loss doctrine applies to building construction defects when ... the defective product is a component part of an integrated structure or finished product" and concluding that windows are an integral part of a house subject to economic loss rule).

[*313] CHIEF JUSTICE RABNER and JUSTICES LONG, LaVECCHIA, ALBIN, and WALLACE join in JUSTICE HOENS's opinion. JUSTICE RIVERA-SOTO filed a separate opinion concurring in part and dissenting in part.
JEAN FERNANDI AND FRANK FERNANDI, HER HUSBAND, PLAINTIFFS-APPELLANTS,
v. VINCENT L. STRULLY, M.D., CARL L. MAZZARELLA, M.D., AND R. A. PRINCE, M.D., DEFENDANTS-RESPONDENTS, AND VINCENT L. STRULLY, M.D. AND R. A. PRINCE, M.D., THIRD-PARTY PLAINTIFFS,
v. ST. JOSEPH'S HOSPITAL, A CORPORATION, THIRD-PARTY DEFENDANT

[NO NUMBER IN ORIGINAL]

Supreme Court of New Jersey

35 N.J. 434; 173 A.2d 277; 1961 N.J. LEXIS 170

March 7, 1961, Argued
June 30, 1961, Decided

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, injured person and her husband, sought review of an order from the Law Division (New Jersey), which granted the motion for summary judgment that was in favor of defendant physicians based upon expiration of the applicable statute of limitations. While pending in the appellate division, the supreme court certified the case for appeal.

OVERVIEW: Upon the advice of her physician, plaintiff injured underwent a total hysterectomy. During the surgery, defendant physicians accidentally left a wing nut from a retractor in her abdomen. Still complaining of frequent pain three years after her surgery, she had x-rays taken which revealed the existence of the wing nut. She and her husband filed suit shortly thereafter and began depositions which revealed that defendants may have known about the wing nut at the time of the surgery. Defendants filed a motion for summary judgment, claiming that the action was barred by the statute of limitations. The trial court found no evidence of fraudulent concealment and reluctantly granted the summary judgment. The trial court found no evidence of fraudulent concealment and reluctantly granted the summary judgment. While the appeal was pending in the appellate division, the supreme court certified it and heard the matter. The court reversed the lower court, finding that the cause of action accrued upon plaintiff's discovery of the foreign object and therefore was timely. The matter was remanded for trial.

OUTCOME: The supreme court reversed the granting of the summary judgment by the trial court for defendant physicians. The court found that the statute of limitations did not begin to run immediately after the surgery, but when plaintiff injured discovered the existence of the foreign object within her. The court remedied for a trial after it determined plaintiff had not knowingly slept on her rights.

CORE TERMS: statute of limitations, cause of action, doctor's, foreign object, cause of action, period of limitations, malpractice, patient, sponge, instituted, accrual, repose, accrued, surgeon, abdomen, wing nut, Law Division, reason to know, wound, legal action, carelessly, injustice, discovery, obscure, x-rays, tube, summary judgment, time period, class of cases, begin to run

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Governments > Legislation > Statutes of Limitations > Time Limitations

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[HN1] When a plaintiff knows or has reason to know that he has a cause of action and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action. Where, however, the plaintiff does not know or have any reason to know that he has a cause of action until after the period of limitations has expired, the considerations of individual justice and the considerations of repose are in conflict and other factors may fairly be brought into play.

**COUNSEL:** [***1] Mr. Bruno L. Leopizzi argued the cause for the appellants (Mr. Robert P. Alliegro, on the brief).

Mr. John J. McLaughlin argued the cause for the respondents Dr. Strully and Dr. Prince (Messrs. Shanley & Fisher, attorneys; Mr. Frederick B. Lacey, of counsel).

Mr. Adolph A. Romei argued the cause for the respondent Dr. Mazzarella (Messrs. Preziosi and Romei, attorneys).

**JUDGES:** For reversal -- Chief Justice Weintraub, and Justices Jacobs, Francis, Proctor and Schettino. For affirmance -- Justices Hall and Haneman. The opinion of the court was delivered by Jacobs, J. Hall, J. (dissenting). Justice Haneman authorizes me to say that he joins in this dissent.

**OPINION BY:** JACOBS

**OPINION**

[*435] [***278] The Law Division granted the motion by the defendants for summary judgment on the ground that the claim by the plaintiffs was barred by the statute of limitations. The plaintiffs appealed from the ensuing judgment and we certified the appeal on our own motion while it was pending in the Appellate Division.

In 1954 Mrs. Fernandi was told by her family physician Dr. Mazzarella that she needed an operation and that he would send her to Dr. Strully, a surgeon with offices in Paterson. Thereafter Dr. Strully examined her and on April 26, 1955, assisted by Dr. Mazzarella and Dr. Prince, he performed a total hysterectomy upon her at St. Joseph's Hospital, Paterson. Mrs. Fernandi was discharged from the Hospital on May 5, 1955 and received postoperative attention from Dr. Strully. Her last visit to Dr. Strully in that year was on November 14, 1955; she did not see him again until September 1958 although in the intervening period she made many visits to Dr. Mazzarella. During these visits she complained that her back was troubling her and received medication and heat treatments. In August 1958 she discussed with Dr. Mazzarella the desirability of having x-rays of her back. Dr. Mazzarella sent her to Dr. Santoro who took x-rays and told her that in her abdomen there was a foreign object which looked like a wing nut. She showed the x-rays first to Dr. Mazzarella and then to Dr. Strully who examined and told her, according to her deposition, that she had "that wing nut that was missing" but that he did not want her to worry about it because "it is steel and it is sterile." Dr. Strully's deposition indicated that he [***3] had been told by someone at St. Joseph's Hospital that a wing nut on a retractor used during the course of the operation on Mrs. Fernandi had been missing. On
February 16, 1959 Dr. Strully obtained Mrs. Fernandi's signature to a document in the doctor's handwriting which read as follows: "This is to certify that Dr. Strully has told me of the wing nut in my pelvis."

On August 13, 1959, Mrs. Fernandi and her husband filed a complaint in the Law Division naming Doctors Strully, Mazzarella and Prince as defendants. In the first count of the complaint Mrs. Fernandi alleged that she employed Dr. Strully to perform a total hysterectomy on her and that Doctors Mazzarella and Prince were retained to assist him; that in the course of the operation the doctors negligently and carelessly left a wing nut in her body as a result of which she has suffered and will suffer great pain and anguish; and she sought damages for her injuries resulting from the negligence of the doctors. In another count of the complaint she alleged that the doctors had "fraudulently and deceitfully concealed their negligence" and that as a result she was lulled "into a sense of security so as to permit her to allow [***4] the time permitted by the Statute of Limitations to elapse." In still another count of the complaint she alleged that in her treatment after the operation the doctors had "failed to exercise reasonable and ordinary care" in that "they did not take x-rays to determine the cause of her complaints relative to her back." Answers to the complaint were filed by the doctors and in addition Doctors Strully and Prince filed a cross-claim against Dr. Mazzarella [*437] and a third-party complaint against St. Joseph's Hospital. The Hospital filed an answer and cross-claim and thereafter the attorneys for the three doctors served notice that they would move for summary judgment on the ground that the statute of limitations had barred the claim of the plaintiffs.

On July 1, 1960 Assignment Judge Kolovsky, sitting in the Law Division, rendered his opinion in which he stated that he had considered the affidavits and deposition submitted to him, as well as the briefs and argument of counsel; that he did not believe there was much doubt about the presence of a foreign body in Mrs. Fernandi's abdomen and that it could be considered as established, for purposes of the motion, [***279] that [***5] the "foreign body is a wing nut which came from a retractor that was used in the operation"; that more than two years had elapsed between the date of the operation and the institution of the plaintiffs' action; and that while he inclined, on principle, towards a contrary view he considered himself bound to hold under Weinstein v. Blanchard, 109 N.J.L. 332 (E. & A. 1932) and Tortorello v. Reinfeld, 6 N.J. 58 (1930), that the plaintiffs' action, grounded on the charge that the doctors were negligent and careless in the course of the operation, was barred by the statute of limitations. He found no evidence to support the charge of fraudulent concealment of the negligence and expressed uncertainty as to whether the plaintiffs' pleading was intended to allege that Doctors Strully and Mazzarella were guilty of independent negligent acts or omissions during the two-year period before the institution of the action. He concluded that the motion for summary judgment should be granted, reserving to the plaintiffs the right "to file an amendment relating to acts of negligence within two years prior to August 13, 1959, when the complaint was filed." The ensuing judgment dismissed [***6] the complaint, along with the cross-claims and third-party complaint, and thereafter the plaintiffs duly filed notice of appeal from the dismissal of their action against the doctors. At the oral argument, [*438] counsel for the plaintiffs acknowledged that there was insufficient evidence to establish the charge of fraudulent concealment but urged that, under the circumstances, the plaintiffs' negligence action may not justly be deemed to have been barred by the statute of limitations. No question has been raised as to the present appealability of the Law Division's judgment (cf. R.R. 4:55-2) nor has any question been raised as to the status of the cross-claims and third-party complaint although it would seem clear that, if the plaintiffs' action against the doctors is here held not to be barred by the statute of limitations, leave should be granted in the Law Division for reinstatement of the cross claims and third-party complaint.

In Wood v. Carpenter, 101 U.S. 135, 139, 25 L. Ed. 807, 808 (1879), Justice Swayne noted that limitation statutes embody important public policy considerations in that "they stimulate to activity and punish negligence" and "promote [***7] repose by giving security and stability to human affairs." See Board of Trade v. Cayzer, Irvine & Co., [1927] A.C. 610, 628; cf. Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314, 65 S. Ct. 1137, 89 L. Ed. 1628, 1635 (1945); Public Schools v. Walker, 9 Wall. 282, 19 L. Ed. 576, 578 (1870). [HN1] When a plaintiff knows or has reason to know that he has a cause of action and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action. Where, however, the plaintiff does not know or have any reason to know that he has a cause of action, and voluntarily sleeps on his rights, then the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action. Where, however, the plaintiff does not know or have any reason to know that he has a cause of action until after the period of limitations has expired, the considerations of individual justice and the considerations of repose are in conflict and other factors may fairly be brought into play. In some states the legislatures have endeavored to deal directly with the issue. See Mo. Rev. Stat. Ann. § 1012 (1939) cited in Thatcher v. De Tar, 351 Mo. 603, 173 S.W.2d 760 (Sup. Ct. 1943) and Act 58 of 1945, Ark. Stats. [***8] §§ 37-205 cited in Crossett Health Center v. Crosswell, 221 Ark. 874, [*439] 256 S.W.2d 548 (Sup. Ct. 1953). In most of the states, as in New Jersey, the legislatures have not at all expressed themselves on the matter, preferring to leave to judicial
interpretation and application the rather obscure statutory phraseology that the plaintiff's proceeding shall be instituted within a stated period after his cause of action "shall have accrued." See N.J.S. 2A:14-1 et seq.; cf. Note, "Developments in the Law, Statutes of Limitations," 63 Harv. L. Rev. 1177, 1203-1205 (1950).

Most courts, including those in New Jersey, have taken the position that where a plaintiff suffers damage as the result of the defendant's wrong he may be barred [**280] though he does not, during the customary period of limitations, know or have any reason to believe that he has a cause of action. See Sullivan v. Stout, 120 N.J.L. 304 (E. & A. 1938); Gogolin v. Williams, 91 N.J.L. 266 (E. & A. 1917); Martucci v. Koppers Co., 58 F. Supp. 707 (D.C.N.J. 1945). In reaching this result the courts have evidently considered that the obvious injustice [***9] to the plaintiff is outweighed by broader policy considerations favoring the defendant; in Tortorello v. Reinfeld, supra, 6 N.J. 58, the court, in holding that an action against a plastic surgeon who allegedly disfigured the plaintiff, was barred by the two-year period of limitations (calculated from the date of the wrong and injury rather than from the date of the last professional treatment or the date of knowledge of the cause of action), quoted approvingly from an Illinois case where the court remarked that "while hardships may arise in particular cases by reason of this ruling, a contrary ruling would be inimical to the repose of society and promote litigation of a character too uncertain and too speculative to be encouraged." 6 N.J., at p. 67.

Notwithstanding the foregoing, there have been many instances in which courts, in our State as well as elsewhere, have found the particular circumstances and the considerations of individual justice to be sufficiently compelling to dictate a less harsh approach. In Hughes v. Eureka Flint, [*440] &c., Inc., 20 N.J. Misc. 314 (Mercer County Cir. Ct. 1939), the plaintiff in 1938 instituted a common law [***10] negligence action in which he alleged that he was employed by the defendant from 1920 to 1938 and that because of the neglect of the defendant he had contracted silicosis from continued inhalation of dust particles. The defendant contended that even though the plaintiff may have theretofore been wholly unaware of his condition or its cause he was barred by the two-year limitation from asserting any claim with respect to negligence prior to 1936. This contention was rejected by Justice (then Circuit Court Judge) Oliphant who pointed out that New Jersey's statute of limitations does not define the accrual of a cause of action; that "within the limits of the statute an interpretation of the phrase 'cause of action' should be reached which is in favor of the injured party and against the wrongdoer"; and that while it would impose some hardship on the defendant to permit the plaintiff to prove acts of negligence over the period of many years, it would be "even more undesirable and unjust" to bar such proof by the plaintiff. The Justice concluded that the defendant's wrong should be treated as "single and continuous," that no other rule would constitute "substantial justice," and that [***11] the statute of limitations should be viewed as beginning "to run from the last date of employment." See 20 N.J. Misc., at p. 316; cf. Biglioli v. Durotest Corp., 44 N.J. Super. 93, 102 (App. Div. 1957), affirmed 26 N.J. 33, 44 (1958).

In Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949), the plaintiff Urie was employed by the defendant for 30 years and, having contracted silicosis, was forced to cease work in 1940. On November 25, 1941 he instituted a proceeding under the Federal Employers' Liability Act which provides that no action thereunder shall be maintained unless commenced within three years "from the day the cause of action accrued." See 45 U.S.C.A. § 56. The defendant contended that the plaintiff had undoubtedly, though unwittingly, contracted silicosis long before [*441] 1938 and was therefore barred by the three-year period of limitations; in the alternative there was a suggested contention that each inhalation of silica dust was a separate tort giving rise to a fresh cause of action and that the plaintiff was therefore limited to a claim for inhalations within the three-year period immediately prior [***12] to [*281] the institution of his action. In rejecting these contentions Justice Rutledge, speaking for the Supreme Court, had this to say:

"If Urie were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis prior to November 25, 1938, it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obstructed on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability. ***

We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally

The sweep of Justice Rutledge's language raises questions as to earlier decisions which took the position that statutory periods of limitation are generally deemed to run though the plaintiff does not know or have any reason to know that he has a cause of action; but this broader subject with its far-reaching implications need not be pursued here for the foreign object malpractice cases, with which we are particularly concerned, present special considerations which may fairly be said to set them apart. They involve the confidential doctor-patient relationship, the negligent failure to remove a foreign object during the course of the doctor's operation on his patient, the patient's total ignorance during the customary period of limitations of that fact or of circumstances [***42] suggesting it, the later discovery of the foreign object and the material harm it had done and the patient's expeditious institution of legal action thereafter. These circumstances eliminate the danger of a belated false or frivolous claim. Departing from the ordinary rule in this special type of situation [***14] so as to permit the patient to maintain his legal action after he knows or has reason to know of the existence of his claim would avoid flagrant injustice to him without unduly impairing repose or promoting litigation of the character referred to in Tortorello as "too uncertain and too speculative to be encouraged." See 6 N.J., at p. 67; Note, "The Statute of Limitations in Actions for Undiscovered Malpractice," 12 Wyo. L.J. 30, 36 (1957); Note, "Malpractice and the Statute of Limitations," 32 Ind. L.J. 528, 533, 534 (1957); cf. Anderson, "The Application of Statutes of Limitation to Actions Against Physicians and Surgeons," 25 Ins. Counsel J. 237 (1958); Comment, "Statute of Limitations in an Action of Malpractice," 64 Dick. L. Rev. 173 (1960); Annot., "When statute of limitations commences to run against actions against physicians, surgeons, or dentists for malpractice," 144 A.L.R. 209 (1943).

In Weinstein v. Blanchard, supra, 109 N.J.L. 332, two drainage tubes were placed in the plaintiff's side by the defendant-doctor during an operation. One was removed and the other disappeared. The plaintiff's mother, who assisted in dressing [***15] the plaintiff's wound, inquired whether the tube could have slipped into the wound but the defendant told her that it had not, and, if it had, it would dissolve. Years later the plaintiff became ill and x-rays disclosed a tube in his lung which was removed by another doctor. The plaintiff's action was instituted shortly thereafter but the Court of Errors and Appeals held that it was barred by the statute of [***282] limitations. In the course of its opinion it noted that "by the accrual of the cause of action is to be understood the right to institute and maintain a suit" (109 N.J.L., at p. 336) and it took the position that although [***43] he may then know nothing at all about it, a plaintiff has the right to institute and maintain a suit as soon as his wound is closed with a foreign object in it. See 109 N.J.L., at p. 338. The court did not discuss the conflicting policy considerations nor did it deal with the issue of whether and under what circumstances it may fairly be said that the rather obscure legislative terminology is intended to preclude a plaintiff from maintaining an action before he knows or has any reason to know that he has a cause of action. [***16] It is significant to us that in malpractice actions, particularly where, as here, they involve foreign objects, an ever increasing number of jurisdictions have used one just legal approach or other to avoid the truly harsh result reached in Weinstein. See Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (Sup. Ct. 1959); Crossett Health Center v. Croswell, supra, 221 Ark. 874, 256 S.W.2d 548; Bowers v. Olch, 120 Cal. App. 2d 108, 260 P.2d 997 (D. Ct. App. 1953); Adams v. Isorn, 249 S.W.2d 791 (Ky. Ct. App. 1952); Morrison v. Acton, 68 Ariz. 27, 198 P.2d 590, 595 (Sup. Ct. 1948); Rosane v. Senger, 112 Colo. 363, 149 P.2d 372 (Sup. Ct. 1944); Thatcher v. De Tar, supra, 351 Mo. 603, 173 S.W.2d 760; Ehlen v. Burrows, 51 Cal. App. 2d 141, 124 P.2d 82 (D. Ct. App. 1942); Hotelling v. Walther, 169 Or. 559, 130 P.2d 944, 144 A.L.R. 205 (Sup. Ct. 1942); Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (Sup. Ct. 1936); Burton v. Tribble, 189 Ark. 58, 70 S.W.2d 503 (Sup. Ct. 1934); Perrin v. Rodriguez, 153 So. 553 (La. Ct. App. 1934); Bowers v. Santee, 99 Ohio St. 361, 124 N.E. 238 (Sup. Ct. 1919); Gillette v. Tucker, 67 Ohio St. 106, 63 N.E. 865 (Sup. Ct. 1902); cf. City of Miami v. Brooks, 70 So. 2d 306 (Fla. Sup. Ct. 1954); Buck v. Mouradian, 100 So. 2d 70 (Fla. App. Ct. 1958); Sly v. Van Lengen, 120 Misc. 420, 198 N.Y.S. 608 (Sup. Ct. 1923); Note, supra, 63 Harv. L. Rev. 1177, at p. 1203; Note, supra, 12 Wyo. L.J., at pp. 36-38; 35 N.Y.U.L. Rev. 1561, at p. 1563 (1960); 30 N.Y.U. L. Rev. 1621, at p. 1630 (1955).

[***44] In Huysman v. Kirsch, supra, 6 Cal. 2d 302, 57 P.2d 908, the defendant surgeon closed the plaintiff's wound without removing a drainage tube which had been carelessly left in her abdomen. Although she did not institute her action until after the lapse of a year from the date of the operation, the California Supreme Court unanimously held that she was not barred by the one-year statutory limitation. It suggested the following legal theories in support of its holding: (1) [***18] the negligence continued while the tube remained in the plaintiff's body and until its removal and her cause of action "then accrued and would not be barred until one year thereaf-
ter," (2) the operation on the plaintiff may be viewed as not complete until "the wound has been closed and all appliances used in the operation have been removed," (3) the statutory period of limitation may be viewed as not beginning to run until the plaintiff knew or should have known of her condition. See 57 P. 2d., at pp. 912-913. This last approach has been followed in later California cases. See Bowers v. Olch, supra:

"[HN2] If a surgeon performing an operation upon a person leaves a foreign substance in the body, the statute of limitations as to an action against him, based upon alleged malpractice, does not commence to run until the said patient has discovered, or by reasonable diligence should have discovered, that a foreign substance was left in his body. Pellett v. Sonotone Corp., 55 Cal. App. 2d 158, 160, 130 P.2d 181; Costa v. Regents of Univ. of California, 116 Cal. App. 2d 445, 254 P.2d 85; Haysman v. Kirsch, 6 Cal. 2d [***19] 302, 312-313, 57 P.2d 908." 260 P.2d, at p. 1002

In Rosane v. Senger, supra, 112 Colo. 363, 149 P.2d 372, a gauze pad was carelessly left in the plaintiff's abdomen during [***283] an operation performed in 1930. Thereafter she suffered pain and was treated by various physicians. In 1940 the pad was discovered and removed. She instituted her action in 1941 and the defendants contended that it was barred by limitations. In rejecting this contention, the Colorado Supreme Court stated that the statute of limitations was enacted "for the purpose of promoting justice, [*445] discouraging unnecessary delay and forestalling the prosecution of stale claims, not for the benefit of the negligent." 149 P.2d, at p. 375. Although there was no suggestion that the defendants knew of the failure to remove the pad and intentionally concealed that fact from the plaintiff, the court expressed the view that the matter could fairly be treated in the same fashion as the fraudulent concealment cases where the statute is widely deemed to be tolled. See Buchanan v. Kull, 323 Mich. 381, 35 N.W.2d 351 (Sup. Ct. 1949); [***20] Colvin v. Warren, 44 Ga. App. 825, 163 S.E. 268 (Ct. App. 1932). In Burton v. Tribble, supra, 189 Ark. 58, 70 S.W.2d 503, a surgeon carelessly left a ball of gauze in the plaintiff's abdominal cavity and seven years later its presence was discovered and it was removed. In rejecting the contention that the plaintiff's legal action was barred by limitations, the Arkansas Supreme Court took a position comparable to Rosane v. Senger, supra. See also Morrison v. Acton, supra, 68 Ariz. 27, 198 P.2d 590, 595, where the doctor's failure to ascertain and disclose the presence of the foreign object was described as "constructive fraud." See 3 Pomeroy's Equity Jurisprudence § 922 (5th ed. 1941).

In Ayers v. Morgan, supra, 397 Pa. 282, 154 A.2d 788, the plaintiff, in 1948, underwent an operation for a marginal jejunal ulcer. He continued to experience pain for several years and finally it was discovered that his discomfort was the result of a sponge which had been negligently left in his abdomen by the defendant-surgeon. The plaintiff instituted legal action against the defendant who contended that the proceeding [***21] was barred by the two-year statute of limitations. This contention was rejected by the Pennsylvania Supreme Court which stressed that statutes of limitation, as all statutes, must be read in the light of reason and common sense and that in their application they "must not be made to produce something which the Legislature, as a reasonably-minded body, could never have intended." 154 A.2d, at p. 789. See Urie v. Thompson, supra, 337 U.S. 163, 169, 170, 69 S. Ct. 1018, 93 L. Ed. 1282, 1292; [*446] Bayonne Textile Corp. v. American, etc., Silk Workers, 116 N.J. Eq. 146, 151 (E. & A. 1934). In the course of its opinion it stated (1) that the operation was "not completed" until the sponge was removed, (2) that the injury to the plaintiff did not become a reality until "the sponge began to break down [the] healthful tissue within the body," and 3) that the defendant's failure to remove the sponge constituted "blameworthiness which continued" until the plaintiff "learned, or, by the exercise of reasonable diligence, could have learned of the presence of the foreign substance within his body." 154 A.2d, at p. 793. See Mitchell [***22] v. American Tobacco Company, 183 F. Supp. 406 (D.C. Pa. 1960); but cf. Summers v. Wallace Hospital, 276 F.2d 831 (9 Cir. 1960).

In Lindquist v. Mullen, 45 Wash. 2d 675, 277 P.2d 724, 728 (1954), the Washington Supreme Court declined to depart from its earlier holdings that the period of limitations runs from the date of the defendant's wrongful act even in a situation where the defendant-surgeon carelessly left a sponge in the wound and the plaintiff brought his legal proceeding as soon as he became aware of his cause of action. A persuasive dissent by Justice Finley, joined by Chief Justice Grady, pointed out that the Washington Legislature had never defined when a cause of action shall be deemed to accrue and that consequently the matter was one of judicial interpretation; that although the view that a patient has an accrued cause of action, though he does not know or suspect it, may meet some tests of "legal logic or theory," it "would hardly meet the tests of abstract, generally applicable, or lay [***284] standards of justice"; and that although there were conflicting considerations of policy, the circumstances strongly favored [***23] the policy of
affording fair and just opportunity to the diligent plaintiff to present his cause of action. With respect to the suggestion that his position would result in widespread litigation, Justice Finley had this to say:

[*447] "It may be suggested that a result different from that proposed by the majority would open the floodgates to litigation and in effect negative the statute of limitations in personal injury cases where injuries may actually or allegedly be discovered a number of years after the occurrence of an act of negligence. I do not share this view of alarm over the possible consequences of a result in this case different from that agreed upon by the majority. In the first place, this is a malpractice case. The decision of the court in this matter can and should be limited to such cases. In the second place, the facts are unique -- namely, a doctor allowed a surgical sponge to be placed in the body of his patient and to remain there for seven years, examining her and assuring her, during such period, that the incision would heal. The assault, trespass, negligence, or invasion of the patient's right of personality continued for the period of seven [***24] years." 277 P.2d, at p. 733

In *Gillette v. Tucker*, supra, 67 Ohio St. 106, 65 N.E. 865, Dr. Gillette performed an appendectomy on Mrs. Tucker and negligently left a sponge in her abdomen. He performed the operation in November 1897 and she continued as his patient for a year thereafter until he dismissed her from his office in November 1898. In April 1899 another doctor removed the sponge and in June 1899 Mrs. Tucker instituted her legal action against Dr. Gillette. The lower court held that she was not barred by the statutory limitation of one year from the date of the accrual of the cause of action and this was sustained by the Ohio Supreme Court. In the course of his opinion, Judge Price took the position that the doctor's duty of care continued so long as the professional relationship with his patient continued; that the injury to Mrs. Tucker consisted "not so much in leaving the sponge within the cavity, as negligently continuing it there, or allowing it to remain there from day to day for about a year, and until he dismissed her from his attentions"; and that "her right of action became complete when the surgeon gave up the case without performing [***25] his duty." 65 N.E., at pp. 870-871.

In *De Long v. Campbell*, 157 Ohio St. 22, 104 N.E.2d 177, 179 (Sup. Ct. 1952), a sponge was left in the plaintiff's abdomen during the course of an operation performed by [*448] Dr. Campbell in 1942. In 1948 the sponge was discovered and removed by another doctor and the plaintiff then instituted an action against Dr. Campbell. In holding that the action was barred by limitations the court pointed out that unlike the situation in *Tucker*, supra, there was nothing to indicate that Dr. Campbell treated the plaintiff at any time after the 1942 operation. It cited *Amstutz v. King*, 103 Ohio St. 674, 135 N.E. 973 (Sup. Ct. 1921), where the court, with three judges dissenting, refused to extend the holding in *Tucker* to enable the maintenance of an action which was brought as soon as the foreign object was discovered although more than one year after the doctor-patient relationship had terminated. In his majority opinion, Judge Stewart expressed the thought that the plaintiff's contention that it would be a gross injustice to treat her claim as barred by limitations had "much persuasive force" [***26] but he considered that the Ohio Legislature had declared a controlling policy which favored the defendant. In his minority opinion, Judge Middleton dealt with the doctor's wrong as a continuing tort and pointed out that in *Tucker* the court had "found a way to avoid the obviously unreasonable and unjust result of applying the theory that the cause of action accrued at the date of the operation." [***285] He noted that the "logic" which in *Tucker* postponed the commission of the tort to the time of severance of the professional relationship would serve equally to "postpone the running of the statute until it is reasonably possible for the victim of the continuous tortious conduct to discover the wrong." And in response to the suggestion that his position might impair the general effectiveness of statutory periods of limitation, he stressed that the court was dealing solely with a case in which the patient could not have known of the presence of the foreign object within him and that a holding in this "peculiar limited class" of cases to the effect that the statute of limitations does not begin to run "until it is reasonably possible for the patient to discover the wrong" need [***27] have no effect on any other type of case. [*449] 104 N.E.2d, at p. 181. See 35 N.Y.U.L. Rev., supra, at p. 1563; 30 N.Y.U.L. Rev., supra, at p. 1630.

Although New Jersey's Legislature has provided that every action at law for injury to the person shall be brought within two years after the cause of action shall have accrued, it has, as pointed out earlier in this opinion, never sought to define or specify when a cause of action shall be deemed to have accrued within the meaning of the statute, nor has it ever expressed itself as to the effect to be given under the statute ( *N.J.S. 2A:14-2*) to the fact that the injury was not known to or discoverable by the injured party within the period of two years. Cf.
The rather obscure nature of the legislative phraseology is amply attested by the frequency of the cases in which courts have been required to pass on when the cause of action may properly be said to have accrued and the many instances in which they have reached disparate results. See Church of Holy Com’n v. Paterson, etc., R.R. Co., 66 N.J.L. 218 (E. & A. 1901); s.c. 68 N.J.L. 399 (E. & A. 1902); cf. Restatement Torts § 899, comment (e) (1939); 63 Harv. L. Rev., supra, at p. 1200; 9 W. Res. L. Rev. 86, 90 (1957); 49 Mich. L. Rev. 937, 950 (1951). In reaching their results they have exercised what has long been recognized as their proper judicial function; as expressed in Mr. Wood's well known treatise, "[HN3] the question when a cause of action accrues is a judicial one, and to determine it in any particular case is to establish a general rule of law for a class of cases, which rule must be founded on reason and justice." 1 Wood on Limitations § 122a, 685, 686 (4th ed. 1916). See 63 Harv. L. Rev., supra, at p. 1200; cf. 9 W. Res. L. Rev., supra, at p. 97.

The absence of legislative definition and specification, the New Jersey courts have often been called upon to delineate the statute; they have conscientiously sought to apply it with due regard to the underlying statutory policy of repose, without, however, permitting unnecessary individual injustices. In some instances they have determined [*450] that the period of limitations may justly be said to begin to run at a fixed date not necessarily related to the earlier date [*451] of the wrong and injury. See Hughes v. Eureka Flint, etc., Inc., supra, 20 N.J. Misc. 314; cf. Biglioli v. Durotest Corp., supra, 44 N.J. Super. 93, 102, affirmed 26 N.J. 33, 44. In many other instances they have invoked their equitable powers to preclude unjust assertions of the bar of limitations. See Patrick v. Groves, 115 N.J. Eq. 208, 211 (E. & A. 1934); Noel v. Tefteau, 116 N.J. Eq. 446, 448 (Ch. 1934); Howard v. West Jersey, etc., R.R. Co., 102 N.J. Eq. 517, 520 (Ch. 1928); cf. Thomas v. Camden Trust Co., 59 N.J. Super. 142, 150 (Law Div. 1959). In still other instances they have declined to find the bar inapplicable though the plaintiff admittedly knew nothing about the cause of action until shortly before the institution of his action; in reaching this result they were not unaware of the individual injustice to the plaintiff but presumably determined that, on balance, it was outweighed by the need for repose and the danger that a different approach might undermine the statutory goal. See Sullivan v. Stout, supra, 120 N.J.L. 304; [*286] Gogolin v. Williams, supra, 91 N.J.L. 266. For [***30] present purposes we need not question these instances for we are satisfied that the case at hand falls within a special grouping or "class of cases" (1 Wood, supra, at pp. 685, 686) where [HN4] the period of limitations may and should fairly and justly be said to begin to run when the plaintiff knows or has any reason to know about the foreign ob-

ject and the existence of the cause of action based upon its presence; to the extent that Weinstein v. Blanchard, supra, 109 N.J.L. 332, embodies a contrary view, it is hereby disapproved.

It must be borne in mind that Mrs. Fernandi's claim does not raise questions as to her credibility nor does it rest on matters of professional diagnosis, judgment or discretion. It rests on the presence of a foreign object within her abdomen following an operation performed upon her by the defendant-doctors. Here the lapse of time does not entail the danger [*451] of a false or frivolous claim, nor the danger of a speculative or uncertain claim. The circumstances do not permit the suggestion that Mrs. Fernandi may have knowingly slept on her rights but, on the contrary, establish that the cause of action was unknown and unknowable to her [***31] until shortly before she instituted suit. Justice cries out that she fairly be afforded a day in court and it appears evident to us that this may be done, at least in this highly confined type of case, without any undue impairment of the two-year limitation or the considerations of repose which underlie it. If, as is to be hoped, the resulting jeopardy to defendants produces a greater measure of care in connection with surgical operations, so much the better. The summary judgment entered in the Law Division is:

Reversed and the cause is remanded for trial.

DISSENT BY: HALL

DISSENT

HALL, J. (dissenting).

This is without doubt a "hard" case. One's sympathies naturally run with the plaintiff and some sense of revulsion arises when the statute of limitations is even urged as a defense in a case as factually clear-cut as that disclosed by the present record. However, even on this score a more thoughtful analysis indicates that the situation cannot be considered entirely one-sided. A defendant, too, has rights and interests involving the merits which cannot be cast aside. His liability is not absolute but rests on negligence. He must, practically speaking, convince the fact-finder that [***32] he was not negligent under the legal standards of conduct applicable in medical malpractice actions. Evidence to support such a defense must come largely from the oral testimony of those present at the operation. While a plaintiff's essential evidence to establish a cause of action may well be preserved indefinitely, as here by the foreign object's remaining in her body, the defense may be badly hurt by the disappearance of witnesses or dimmed recollections through the passage of time.
But my disagreement with the majority rests on a much more fundamental base. It is unquestionable on the record [*452], before us that the alleged negligence of defendants and the resultant injury happened at one precise moment of time, i.e., when the operation on plaintiff was performed and the wing nut remained within her body, that no inequitable conduct by defendants has occurred which could preclude the application of the statute of limitations, and that the situation does not fall within any of the legislative exceptions. The words of the statute are plain and all-inclusive -- "Every action at law for an injury to the person *** shall be commenced within 2 years next after the cause [***33] of any such action shall have accrued." N.J.S. 2A:14-2. [**287]
The majority concludes that this language should not apply in this foreign object malpractice suit. It says that the language keying operation of the statute to the "accul of the cause of action" is obscure and subject to judicial interpretation on what amounts almost to a case-by-case basis. In essence the decision is a judicial resolution of competing policies in a particular fact situation -- repose against stale claims and the prejudicial consequences of delay to a defendant from fading memories and lost evidence on the one hand, and the rights of an injured person who did not have and could not have had timely knowledge of his right of action on the other. My view is that, as desirable as the result here may appear to be, this is a policy decision which can fittingly be made only by the legislative branch. See Biglioli v. Durtest Corp., 26 N.J. 33, 44 (1958).

Judge Magruder succinctly summarized the thesis in Tessier v. United States, 269 F.2d 305 (1 Cir. 1959), where he was confronted with the identical situation under a comparable federal statute:

"It is argued on [***34] one hand that the statute of limitations expresses a policy of repose and should be interpreted accordingly. Undeniably the legislature intends to strike down all stale claims, meritorious as well as frivolous. On the other hand, it is said that a person has in effect no remedy if his claim is barred before he knows that he has been wronged, and that such a person can not be accused of sleeping on his rights. This court cannot resolve this policy conflict. In the present state of the law we cannot possibly say, contrary to [*453] the plain mandate of 28 U.S.C. § 2401 (b), that Congress intended that the statute be suspended until the plaintiff knows of the wrong; and we cannot remold the statute in the image of the equitable doctrine of laches." (269 F.2d, at p. 310.)

The legal soundness of this conclusion rests on a very solid and enduring foundation. Limitations of actions, created entirely by statute, are peculiarly legislative and not judicial acts. At common law there was no fixed time for the bringing of suits. 53 C.J.S Limitation of Actions § 1, p. 905; Uscienski v. National Sugar Refining Co., 19 N.J. Misc. 240 (C.P. [***35] 1941); Hart v. Deshong, 40 Del. 218, 8 A.2d 85 (Super. Ct. 1939). The judicial branch consequently does not have the responsibility for or freedom of development and change which it does when concerned with common-law principles originally judge made. When the Legislature has spoken clearly and fully, judges are obligated to follow, whether or not as individuals they agree with the enunciated policy either generally or as it may affect a particular case or class of cases.

A statute of limitations, like any line drawn where something which falls on one side is good and something which falls on the other is bad simply because it fails to meet the artificial criterion of the line, is necessarily arbitrary. Such is the very nature of the idea of limitation of actions. The statute bars whether the suit be commenced the day after the time period expires or years later. Contrariwise it has no application even though the action be instituted on the last day before expiration and witnesses are just as unavailable as they would be if the complaint were filed 24 hours later.

The appropriateness of time periods fixed by limitation statutes, as well as the reasons for [***36] the variations therein, which in this state run from two months to at least 20 years (N.J.S. 2A:14-1 to 20 inc.), have always been considered policy questions for the Legislature and not of judicial concern. Union City Housing Authority v. Commonwealth Trust Co., 25 N.J. 330, 342-343 (1957). Similarly, and [*454] of vital importance here, exceptions delaying the commencement or extending the period have long been held to be matters exclusively within the legislative province. In this State they are confined generally to [***288] situations of infancy, insanity, non-residence, death and military service. N.J.S. 2A:14-21 to 23 inc.; 2A:14-26. This fundamental was cogently expressed in the leading case of Board of Chosen Freeholders of Somerset County v. Veghte, 44 N.J.L. 509 (Sup. Ct. 1882) and reiterated by a majority of this court in a slightly different context less than a year ago. Higgins v. Schneider, 61 N.J. Super. 36, 43 (App. Div. 1960), affirmed on appeal below 33 N.J. 299 (1960). In Veghte, Justice Magie quoted a meaningful sentence from an early opinion [Mchver v. Ragin, 2 Wheat. 25, 4 L. Ed. 175] [***37] by Chief Justice Marshall in a case involving what was claimed to be an inequitable result produced by a statute of limitations:
"If this difficulty be produced by the legislative power, the same power might provide a remedy, but courts cannot, on that account, insert in the statute of limitations an exception which the statute does not contain." (44 N.J.L., at p. 513.)

So it seems to me that, as a matter of broad principle, the majority has gone beyond the well established bounds for judicial action in this area where the policy decision peculiarly belongs to the Legislature. I doubt that courts advance the proper relationship between the branches of government under our system or, in the long run, the cause of even, stable and just administration of law in all matters when we decide a case on the tacit, underlying premise that the Legislature, in a field particularly its own, has originally acted unwisely or too strictly and has failed to make corrections as we think it should have.

To turn to the more specific legal basis given for the majority result, it would not seem that there is anything really obscure, in the present context, about what the Legislature [***38] meant in relating the commencement of the time [*455] period to the date of accrual of the cause of action. The selection of the vital event is, of course, also a policy matter within the legislative realm, binding on the judiciary. Our basic statutes (N.J.S. 2A:14-1 and 2), in accord with the pattern in most jurisdictions, were taken from the first English limitation act enacted in 1623. Note, "Developments in the Law, Statutes of Limitations," 63 Harv. L. Rev. 1177, 1178-1179 (1950); Board of Chosen Freeholders of Somerset County v. Veghte, supra (44 N.J.L., at p. 513). The concept of accrual of a cause of action has had a clear and certain connotation in the law from earliest days and there has never been any difficulty in determining what the legislature intended when the statute was first enacted and, absent language change, what it continues to mean. That universal meaning was most recently repeated by this court in Tortorello v. Reinfeld, 6 N.J. 58, 65 (1950) (a malpractice case):

"* * * we consider it to be firmly settled that by the 'accrual' of a cause of action * * * is meant the time when a right first arises to institute and maintain [***39] an action for the invasion of one's rights against the wrong-doer, and the statutory period is computed from that time * * * Any wrongful act or omission resulting in any injury to the person, though slight, for which the law provides a remedy gives rise to a right to institute an action therefor and the cause of action is said to accrue at that time. The statute of limitations attaches at once and commences to run from that time irrespective of the time when the injury is discovered or the consequential damages result."

This is the same definition found in the early landmark case of Larason v. Lambert, 12 N.J.L. 247, 248 (Sup. Ct. 1831) and must have been considered thoroughly settled even then since no authority is there cited to support it.

Our courts have, until the instant case, always followed the concept in applying the bar of the statute to factual settings as [***289] "hard" as the one before us whenever some element of the cause of action was not or could not be discovered until the limitation period had run (unless under equally long established principles the wrong was realistically a [***456] continuing one or there was some inequitable [***40] conduct by the defendant precluding him from asserting the bar). In the medical malpractice field, we have been, heretofore, in agreement with the results reached in the vast majority of jurisdictions (see Annotations 74 A.L.R. 1317 (1931), 144 A.L.R. 209 (1943)) that, where the wrongful conduct consists of a single act, the statute begins to run from the time of that act despite hardship or apparent inequities. Weinstein v. Blanchard, 109 N.J.L. 332 (E. & A. 1932); Tortorello v. Reinfeld, supra; Bauer v. Bowen, 63 N.J. Super. 225 (App. Div. 1960). In other fields, where incidentally I fail to see any difference in principle and therefore equally affected by the majority opinion, see Gogolin v. Williams, 91 N.J.L. 266 (E. & A. 1917) (late discovery of erroneous land survey by surveyor); Sullivan v. Stout, 120 N.J.L. 304 (E. & A. 1938) (late discovery of erroneous title search by attorney); French v. U.S. Fidelity & Guaranty Co., 88 F. Supp. 714, 723-724 (D.C.N.J. 1950) (ignorance of identity of individual participants in alleged malicious prosecution until after statutory period had expired); Stanley Development [***41] Co. v. Millburn Township, 26 N.J. Super. 328 (App. Div. 1953) (late discovery of obstruction of property right). See also Burns v. Bethlehem Steel Co., 20 N.J. 37 (1955), in which this court refused to hold a personal injury claim grounded in contract to be embraced by the six-year statute, as against the two-year period, where it seems probable the damage did not fully manifest itself until after the latter period had expired. It seems safe to conclude that the majority has, in effect, cast aside the firmly entrenched meaning of accrual of a cause of action -- a policy decision which, I repeat, belongs to the Legislature -- and supplanted it with a fluid judicial concept which
The majority's reliance on occupational disease cases (Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949) and the trial court opinion in Hughes v. Eureka [*457] Flint and Spar Co., 20 N.J. Misc. 314 (Cir. Ct. 1939); but see appellate court opinion apparently to the contrary, Biglioli v. Durotest Corp., 44 N.J. Super. 93 (App. Div. 1957), [***42] affirmed 26 N.J. 33 (1958)), as analogous authority to support the result reached seems to me inappropriate. There the far different circumstance of exposure to the damaging agent over a long period of time, as Judge Magrude observed in Tessier, "prevented an accurate determination, even in retrospect, of when the harm to the plaintiff (without which the negligence was not actionable) actually happened." 269 F.2d, at p. 309. To the same effect, see Fowkes v. Pennsylvania Railroad Co., 264 F.2d 397 (3 Cir. 1959). It is interesting to note that our present law in such cases, now wholly covered by workmen's compensation, keys the commencement of limitations to the date on which the employee ceased to be exposed or when he knew or ought to have known the nature of his disablement and its relation to his employment, whichever is the later. N.J.S.A. 34:15-34.

The situation just referred to illustrates that the Legislature has not been static or unmindful with respect to matters of limitation of actions. It has also changed time periods. For example, claims for intentional personal injuries formerly had a four-year limitation (Rev. 1877, [***43] p. 594); now it is two years (N.J.S. 2A:14-2). Slander originally was actionable if the suit was commenced within two years after the speaking of the words (L. 1896, p. 119); presently actions for it or libel must be started within one year of the publication (N.J.S. 2A:14-3). New, particular acts have been adopted to meet situations which the Legislature must have determined [***290] were not justly covered by the general sections. See, for instance, N.J.S. 2A:14-11, enacted in 1950, prescribing that any private claim of right in a public way in which the public rights have been vacated must be asserted within one year of the adoption of the vacation ordinance. And in situations where we must assume sound policy so indicated, it has prescribed different events than the accrual [*458] of the cause of action for the commencement of the statutory period, as in the wrongful death statute, where the time runs from the date of death itself, not from the occurrence of the defendant's act which ultimately caused the demise (N.J.S. 2A:31-3), and as in actions on fiduciaries' bonds, insofar as the surety is concerned, where the limitation commences with [***44] the date of the bond rather than with that of the actionable breach of the condition (N.J.S. 2A:14-16).

To me, all of this leads to the conclusion that so long as our general limitation sections, keyed to the accrual of the cause of action, remain in their present form, they represent continuing determinations of competing policies by the Legislature which the judiciary should not attempt to alter because it considers them unjust in particular situations. Problems of the type involved in this case are not new. The statute has no gaps or broad imprecise language necessitating construction. The appropriate role of the Legislature in making law cannot be disregarded. In spite of common knowledge of the ordinary workings of the legislative process, the judicial branch is bound to assume that the Legislature was and is aware of the problems, that it concluded once that a strict, all-inclusive approach is best on balance and that it has not yet changed its mind in the instant sphere. Until it does, as for example Missouri did by expressly providing that a cause of action accrues when the damage is sustained and is capable of ascertainment (Mo. Code, §§ 516.100, 516.140), the judiciary's [***45] task is to apply the plain words of the statute as they are written and not enter a field of policy determination alien to its allotted function.

I would affirm the judgment of the Law Division.
OIL DELIVERY, INC., DEFENDANT-APPELLANT 

No. A-5632-84T1 

Superior Court of New Jersey, Appellate Division 

216 N.J. Super. 413; 524 A.2d 405; 1987 N.J. Super. LEXIS 1016 

November 13, 1986, Submitted 
January 22, 1987, Decided 


PRIOR HISTORY: On appeal from Superior Court, Law Division, Monmouth County. 

CASE SUMMARY: 

PROCEDURAL POSTURE: Plaintiffs, homeowners and insurer, and defendant oil company both sought review of a decision by the Superior Court, Monmouth County (New Jersey), which found both parties negligent and awarded damages to plaintiffs. Plaintiff homeowners' residence was damaged from a fire and plaintiffs filed suit against defendant. 

OVERVIEW: Plaintiffs, homeowners and insurer, filed a complaint against defendant oil company for losses resulting from a fire at plaintiff homeowners' home. Plaintiff homeowners set forth each item of personalty and their estimated value or the actual cost of the item in a 31-page list. The judge instructed the jury on how to determine damages and gave the jury totals from the list when they asked for them during deliberations. The jury found both parties negligent and awarded damages. Both parties appealed, and the court affirmed the judgment except the jury damage award for personal property, which was reversed and remanded for trial because the trial judge's jury instructions were not an appropriate standard for the jury to use to assess damages. 

OUTCOME: The court affirmed the trial court's decision except the jury damage award for personal property, which was reversed and remanded for trial because the trial judge's jury instructions were not an appropriate standard for the jury to use to assess damages. 

CORE TERMS: personalty, market value, replacement, measure of damages, repair, new trial, wearing apparel, furnishings, household, arriving, retrial, damage award, personal property, reconstruction, corrected, estimated, clothing, column, depreciation, speculation, decorator's, destroyed, repaired, cross appeal, tort damages, item of personalty, issue of damages, compensate, furniture, calculate 

LexisNexis(R) Headnotes 

Torts > Damages > Compensatory Damages > Property Damage > General Overview 

[HN1] The measure of damages for personalty destroyed by a tortfeasor, when there is a market value, is the market value at the time of the loss. 

Torts > Damages > Compensatory Damages > Property Damage > General Overview 

[HN2] When the personalty is household furnishings and wearing apparel and the like, where the market value cannot be ascertained, the measure of damages is the
actual or intrinsic value of the property to the owner, excluding sentimental or fanciful value.

Torts > Damages > Compensatory Damages > Property Damage > General Overview

[HN3] While the element of original cost is relevant, depreciation, age, wear and tear, condition, cost of replacement, and cost of repair are all factors to be considered in assessing the damage sustained.

Torts > Damages > Compensatory Damages > Property Damage > General Overview

[HN4] Where an item is brand new, proof of original cost sustains the owner's burden of proof as to value. While the cost of repair may be the sole proof of damages, depreciation of a repaired object, adequately established, may be an additional relevant factor.

Torts > Damages > General Overview

[HN5] Proof of damages need not be done with exactitude, particularly when dealing with household furnishings and wearing apparel. It is therefore sufficient that the plaintiff prove damages with such certainty as the nature of the case may permit, laying a foundation which will enable the trier of the facts to make a fair and reasonable estimate.

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview
Torts > Damages > General Overview

[HN6] The plaintiff, as owner, may give an opinion of worth although he or she is without expert knowledge. The basis for arriving at the opinion must, however, not be a matter of speculation and the witness must be required to establish the grounds for any opinion given. It is for the jury, with appropriate instructions from the court, to ascertain the probative value of the opinion.

COUNSEL: Wolff, Helies & Duggan, attorneys for appellant (John Peter Duggan on the brief).

Kraft & Hughes, attorneys for respondents (Mark F. Hughes, Jr., on the brief).

JUDGES: King, Havey and Muir, Jr. The opinion of the court was delivered by Muir, Jr., J.A.D.

OPINION BY: Muir

[415] [406] Defendant appeals and plaintiffs cross appeal from a judgment entered on a jury verdict in favor of plaintiffs which was subsequently molded and corrected by the trial court into a $278,677.20 judgment with interest from September 25, 1983.

On August 10, 1983, plaintiffs, William and Betty Lane, and the American National Fire Insurance Company filed a complaint against defendant, Oil Delivery, Inc. The complaint and its later amendment sought damages for losses incurred by the [*416] Lanes in a fire at their home and for the subrogated claim of American for monies paid to the Lanes under a policy of insurance.

The complaint alleged negligence, breach of contract and strict liability in tort as grounds for liability. Defendants answered and [***2] asserted a separate defense of negligence on the part of the Lanes.

The jury, finding negligence of both parties as proximate causes of the fire and damage sustained, determined defendant to be 60% negligent and the Lanes to be 40% negligent. It assessed total damages sustained by the plaintiffs at $425,985.

The trial judge denied motions by the defendant for a new trial or remittitur. He further denied plaintiffs' motion for a new trial, judgment notwithstanding the verdict and additur. However, he granted plaintiffs' motion for correction of mathematical error by the jury, adding $38,477 to the amount of the judgment. The court, relying on R. 4:42-11(b), then awarded interest [407] from September 25, 1983, a date six months after the fire.

On appeal, defendant contends:

I. FINDING DEFENDANT SIXTY PERCENT NEGLIGENT WAS AGAINST THE WEIGHT OF THE EVIDENCE.

II. WHERE AMOUNT OF VERDICT IS SO DISPROPORTIONATE WITH PROOFS AS TO DEMONSTRATE MISTAKE, THE CASE MUST BE REMANDED.

III. TRIAL COURT IMPROPERLY ALLOWED PLAINTIFFS TO RENDER TESTIMONY ON ITEMS OF PERSONALITY.

Plaintiffs, on cross appeal, contend that:
I. THE REPAIRMEN SAW NO RISK IN STORING [*3] LOGS NEAR AN OIL BURNER, SO A JURY SHOULD NOT FIND A HOMEOWNER NEGLIGENT ON THAT BASIS.

II. SERVICEMEN ARE STRICTLY LIABLE IN TORT, SO THE JURY SHOULD HAVE BEEN INSTRUCTED ON ITS HIGHER STANDARDS OF CONTRIBUTORY NEGLIGENCE.

III. CONTRIBUTORY NEGLIGENCE SHOULD USE THE SAME STANDARDS IN NEGLIGENCE ACTIONS AND IN STRICT LIABILITY ACTIONS.

IV. INSURERS HAVE THE RIGHT TO SUE AND THE JURY SHOULD KNOW THAT PART OF ITS VERDICT WILL GO TO THE INSURER.

[*417] V. INTEREST SHOULD RUN FROM THE DATE OF THE FIRE.

VI. OWNERS OF PERSONAL PROPERTY ARE COMPETENT TO TESTIFY AS TO THE VALUE OF THAT PROPERTY.

VII. REPLACEMENT COST IS THE PROPER VALUE FOR DAMAGED PROPERTY.

VIII. THE TRIAL JUDGE PROPERLY CORRECTED HIS ERROR IN SUPPLYING A SUM TO THE JURY AND IN CORRECTING THE VERDICT.

IX. IN THE EVENT OF A RETRIAL, THESE RULINGS SHOULD BE MADE:

A. OWNERS ARE ENTITLED TO DAMAGES FOR THEIR TIME IN BUYING REPLACEMENTS OF THEIR BURNED PERSONAL PROPERTY, FOR LOSS OF USE AND QUALITY OF LIVING AND FRIGHT.

B. THE BOCA CODE CONTROLLED MAINTENANCE, SO IT SHOULD GO INTO EVIDENCE.

C. THE DECORATOR'S TESTIMONY AS TO VALUE WAS ADMISSIBLE.

[We have deleted those portions [***4] of our opinion related to issues other than claims regarding nature of proof and measure of damages for personalty losses sustained by the plaintiffs Lanes.]

III.

We now turn to the defendant's challenge to the damage award by the jury which resulted in the molded, corrected judgment amount of $278,677.20.

The jury set the Lanes' damages at $425,985. This figure represented the total losses claimed for house reconstruction, living expenses during reconstruction, loss of jewelry and personalty replacement costs. The Lanes set out the personalty replacement costs in a 31-page list. Prior to their testimony on the value of the personalty, the trial judge ruled the measure of damages should be the market value at the time of the fire.

The value of personalty the jury accepted came from a total of the figures on the 31-page list. On that list, the Lanes set forth each item of personalty and their estimated value or the actual cost of the item. In their testimony, they did not state how they arrived at the value for each item. Instead, they selected an apparent cross section of the items.

As to the value of items specifically covered, Mr. Lane set the value based on his [***5] experience in buying the articles in the past, [*418] pricing them at stores or in newspaper ads. Mrs. Lane, who testified essentially on her clothing and furniture in the house, based her opinion on her experience as the owner of a retail clothing store and as supervisor of charity flea markets.

[**408] The list did not distinguish actual cost from estimated cost. Instead, it listed figures under the heading "approximate cost."

The judge, in his charge to the jury, stated:

Basically what we are taking as the value is that which existed as of the date of the fire. Now, this may require some effort on your part but I think that as intelli-
gent people you can do this. You are going to have the purchase price, you will have some indication of when the item was purchased or some cases received as a gift. You should be able using common sense to make a determination as to whether that [sic] items depreciated in value or appreciated in value between the time of the acquisition and the time of the fire. If it is an item which was salvageable and has been repaired you can consider the cost of the repairs as the damage sum available arriving from that item. Again, [***6] I’m speaking not of speculation, but of those claims which have been proved by a preponderance of the evidence. And I would add that in speaking to you about damages and how to calculate them, I’m not suggesting to you that necessarily you should find that the situation requires you to award damages. If you should, I have tried to give you an idea of how it is that you should calculate those figures.

During the course of deliberations, the jury sought the totals on the 31-page list. The judge told the jury totals could be provided. The jury then asked, "Are we to add all moneys and if agreed, that would be item three on questions." 1

1 The word "questions" referred to jury interrogatories.

The trial judge sent the following note in response:

The "original cost" column totals $209,615. 2

The "repair cost" column totals $38,477.

Those two columns together total $248,092.

The judge gave no instruction regarding the use of the note.

2 We note here a confusion as to the meaning of the figures in the 31-page list. The figures, according to the Lanes’ testimony, represented estimated costs or, in some instances, actual costs. The trial judge referred to these figures as "original costs."

[***7] All parties agree the jury added the $209,615 for personalty to the $216,370 total of the other three items to arrive at their [*419] verdict. The judge, on plaintiffs’ motion, added the omitted $38,477 in repair costs to arrive at the judgment figure.

Defendant now contends the jury charge on measure of damage so conflicted with the note from the judge on "original costs" that the damage verdict exceeded the proofs at trial. It further argues the trial judge erred in allowing the Lanes to testify as to their valuations of personalty.


[***409] The rationale for such a rule is consonant with the goal of tort damages to fully compensate the injured party, thereby making it possible to replace the lost property with a comparable substitute. 4 Damages in Tort Actions (MB) § 37.22. The market value of wearing apparel and household furnishings cannot compensate the owner for their loss. While there may be a second-hand market value, other items of equal value are not interchangeable. As noted in 4 Damages in Tort Actions (MB) § 37.22[a]:

[*420] The average owner will not replace lost clothing or furniture with second-hand [***9] merchandise, but will instead be "forced" to purchase new substitutes. Consequently, the second hand price does not provide adequate compensation for the loss sustained.
That is not to say the plaintiff is entitled to full replacement cost. *Mullen v. Sinclair Refining Company, 301 N.Y.S.2d at 718.* [HN3] While the element of original cost is relevant, depreciation, age, wear and tear, condition, cost of replacement and cost of repair are all factors to be considered in assessing the damage sustained. *Id.; Saporiti v. Austin A. Chambers Co., 134 Conn. 476, 58 A.2d 387, 388 (1948).*

[HN4] Where an item is brand new, proof of original cost sustains the owner's burden of proof as to value. *Jaklitsch v. Finnerty, 96 A.D.2d 690, 466 N.Y.S.2d 774 (3rd Dept.1983).* Further, while the cost of repair may be the sole proof of damages, depreciation of a repaired object, adequately established, may be an additional relevant factor. *Fanfarillo v. East End Motor Co., 172 N.J. Super. 309, 313 (App.Div.1980).*

[HN5] Proof of damages need not be done with exactitude, particularly when dealing with household furnishings and wearing apparel. It is therefore sufficient [*10*] that the plaintiff prove damages with such certainty as the nature of the case may permit, laying a foundation which will enable the trier of the facts to make a fair and reasonable estimate. *Holmes v. Freeman, 185 A.2d at 91.*

[HN6] In providing such evidence, the plaintiff, as owner, may give an opinion of worth although he or she is without expert knowledge. *Vaughan v. Spurgeon, 308 A.2d 236, 237 (D.C.1973); see also Nixon v. Lawhon, 32 N.J. Super. 351, 356 (App.Div.1954).* The basis for arriving at the opinion must, however, not be a matter of speculation and the witness must be required to establish the grounds for any opinion given. It is for the jury, with appropriate instructions from the court, to ascertain the probative value of the opinion. We do not find *Evid.R. 19* to be to the contrary.

[*421*] The trial judge's jury instructions and subsequent conduct relating to the totals set forth on the 31-page list of personalty fell short of an appropriate legal standard for the jury to properly assess tort damages.

We conclude, therefore, that the matter must be remanded to the trial court for a new trial on the issue of damages for personal property [*11*] destroyed in the fire. A new trial on all issues of damages, as suggested by defendant, is unjustified in light of the fact that defendant raises no issues respecting the damages due for costs of reconstruction, living costs and jewelry lost in the fire, and the fact that the jury method of arriving at that damage award was clearly mechanical and undisputed.

IV.

Plaintiffs' contentions regarding the decorator's testimony may be dealt with by the trial judge on the retrial. Their remaining contentions we find clearly without merit. *R. 2:11-3(e)(1)(E).*

Judgment affirmed in all aspects except the jury damage award for personal property which is reversed and remanded for retrial in accordance herewith.
V. Consumer Fraud Act

A. Applicability and Standards

Belmont Condominium Ass’n, Inc. V. Geibel, 432 N.J. Super. 52, 74 A.3d 10 (App. Div. 2013) [attached previously]

Model Jury Charges 4.43
Consumer Fraud Act, Sections 8-1 and 8-2
Consumer Fraud Act, Section 8-19.1 (brokers)

B. Additional Defendants


C. Enhanced Damages

Consumer Fraud Act, Section 8-19
Consumer Fraud Act, Section 8-14 (Senior Citizens)
Consumer Fraud Act, Section 8-15
ALBERT COX, AS EXECUTOR OF THE ESTATE OF WILLIAM COX, PLAINTIFF-APPELLANT, v. SEARS ROEBUCK & COMPANY, DEFENDANT-RESPONDENT.

A-123 September Term 1993

SUPREME COURT OF NEW JERSEY

138 N.J. 2; 647 A.2d 454; 1994 N.J. LEXIS 845

March 15, 1994, Argued
September 15, 1994, Decided

ALBERT COX, AS EXECUTOR OF THE ESTATE OF WILLIAM COX, PLAINTIFF-APPELLANT, v. SEARS ROEBUCK & COMPANY, DEFENDANT-RESPONDENT

PRIOR HISTORY: [***1] On appeal from the Superior Court, Appellate Division.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff homeowner challenged the order of the Appellate Division of the Superior Court (New Jersey), which affirmed the trial court's award of judgment for defendant contractor notwithstanding the verdict because plaintiff had not proven any loss that entitled him to damages or that defendant's conduct under the contract with plaintiff violated the Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8-1 to 20.

OVERVIEW: Plaintiff homeowner contracted with defendant contractor for home renovations. He was dissatisfied with the work and sued under the Consumer Fraud Act (the Act), N.J. Stat. Ann. §§ 56:8-1 to 20, and for breach of contract. The jury found for plaintiff but the trial court entered judgment for defendant notwithstanding the verdict. The appellate division affirmed because plaintiff had not proven any loss that entitled him to damages or that defendant's conduct violated the Act. On appeal the court reversed and held defendant's conduct was an unlawful practice and that plaintiff suffered a loss caused by defendant's violation of the Act. Plaintiff was entitled to recover attorneys' fees, filing fees, and costs under the Act. When it violated permit regulations defendant violated the Act. Defendant's failure to furnish plaintiff with a safe and usable kitchen did not rise to the level of an unconscionable commercial practice because there was no bad faith or a lack of fair dealing. Plaintiff's loss was measured by the cost of repairing the kitchen. An award of treble damages and attorneys' fees was mandatory because plaintiff proved both an unlawful practice and an ascertainable loss.

OUTCOME: The court reversed the judgment of the appellate division and remanded because defendant contractor's violation of permit regulations was an unlawful act and caused plaintiff homeowner a loss. The cost of repairing the kitchen was the measure of loss.

CORE TERMS: consumer fraud, kitchen, consumer-fraud, unconscionable, attorneys' fees, consumer, renovation, unlawful practice, electrical, cabinet, breach of contract, contractor, repair, contract price, ascertainable loss, filing fees, inspection, treble damages, certificate, omission, wiring, home improvement, breach of warranty, breach-of-contract, inspector, trebled, microwave, installed, remedial, install

LexisNexis(R) Headnotes

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview
Contracts Law > Performance > Substantial Performance
Contracts Law > Remedies > Foreseeable Damages > General Overview

[HN1] To recover under the Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8-1 to 20, a private plaintiff must prove
loss, and a breach-of-contract claim also requires proof of damages.

Contracts Law > Breach > Causes of Action > Breach of Warranty

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

Contracts Law > Defenses > Unconscionability > General Overview

[HN2] Consumer fraud involves at the very least an unconscionable commercial practice, and a breach of warranty or a breach of contract alone is not unconscionable and does not violate the Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8-1 to 20.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview

[HN3] The Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8-1 to 20, confers on the attorney general the power to investigate consumer-fraud complaints and promulgate rules and regulations that have the force of law.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview

[HN4] The definition of unlawful practice includes unconscionable commercial practices.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview


Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview


Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview


Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview

[HN8] Like most remedial legislation, the Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8-1 to 20, should be construed liberally in favor of consumers.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview


Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview


Antitrust & Trade Law > Consumer Protection > Home Solicitation

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview

[HN11] A major purpose of the Home Improvement Practices regulations is to provide objective assurances of the terms and criteria according to which home-improvement work should be done. 17 N.J. Reg. 679 (Mar. 18, 1985). However, the regulations are not meant to be exhaustive, and practices not specified in the regulations may nevertheless constitute unlawful consumer fraud, N.J. Admin. Code tit. 13:45A-16.2(a).

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview

Antitrust & Trade Law > Consumer Protection > Home Solicitation

Real Property Law > Purchase & Sale > Contracts of Sale > Formalities

[HN12] It is unlawful under the Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8-1 to 20: (1) to misrepresent directly or by implication that products or materials to be used in the home improvement meet or exceed municipal, state, federal, or other applicable standards or requirements, (2) to request the buyer to sign a certificate of completion, or make final payment on the contract before the home improvement is completed in accordance with the terms of the contract, (3) for a seller contracting for the making of home improvements to commence work until he is sure that all applicable state or local building and construction permits have been issued as required under state laws or local ordinances, and (4)
for the seller to fail to deliver to the buyer copies of inspection certificates, when midpoint or final inspections are required under state laws or local ordinances, when construction is completed and before final payment is due or the signing of a completion slip is requested of the buyer.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview


Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview

Criminal Law & Procedure > Scienter > Knowledge


Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview

[HN15] A practice can be unlawful under the Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8-1 to 20, even if no person was in fact misled or deceived thereby.

Antitrust & Trade Law > Consumer Protection > General Overview

[HN16] The capacity to mislead is the prime ingredient of all types of consumer fraud.

Antitrust & Trade Law > Consumer Protection > General Overview

[HN17] When the alleged consumer-fraud violation consists of an affirmative act, intent is not an essential element and the plaintiff need not prove that the defendant intended to commit an unlawful act.

Commercial Law (UCC) > General Provisions (Article I) > Definitions & Interpretation > Good Faith

[HN18] When the alleged consumer fraud consists of an omission the plaintiff must show that the defendant acted with knowledge and intent is an essential element of the fraud.

Contracts Law > Breach > Causes of Action > Breach of Warranty

Contracts Law > Defenses > Unconscionability > General Overview

[HN19] Unconscionability is an amorphous concept obviously designed to establish a broad business ethic. The standard of conduct that the term unconscionable implies is lack of good faith, honesty in fact and observance of fair dealing. However, a breach of warranty, or any breach of contract, is not per se unfair or unconscionable and a breach of warranty alone does not violate a consumer protection statute.

Contracts Law > Breach > Causes of Action > Breach of Warranty

Contracts Law > Remedies > Punitive Damages

Contracts Law > Sales of Goods > Damages & Remedies > General Overview

[HN20] Because any breach of warranty or contract is unfair to the non-breaching party, the law permits that party to recoup remedial damages in an action on the contract; however, by providing that a court should treble those damages and should award attorneys’ fees and costs, the legislature intends that substantial aggravating circumstances be present in addition to the breach.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

[HN21] In violations of specific regulations promulgated under the Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8-1 to 20, (the Act) intent is not an element of the unlawful practice, and the regulations impose strict liability for such violations. The parties subject to the regulations are assumed to be familiar with them, so that any violation of the regulations, regardless of intent or moral culpability, constitutes a violation of the Act.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview

[HN22] To establish a violation of the Consumer Fraud Act, N.J. Stat. Ann. § 56:8-1 to -20, (the Act) a plaintiff need not prove an unconscionable commercial practice. Rather, the Act specifies the conduct that will amount to an unlawful practice in the disjunctive, as any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact. N.J. Stat. Ann § 56:8-2. Proof of any one of those
acts or omissions or of a violation of a regulation will be sufficient to establish unlawful conduct under the Act.

**Contracts Law > Breach > General Overview**  
**Contracts Law > Remedies > Punitive Damages**  

[HN23] In an ordinary breach-of-contract case, the function of damages is simply to make the injured party whole, and courts do not assess penalties against the breaching party.

**Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview**  
**Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview**  


**Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview**  
**Civil Procedure > Remedies > Damages > General Overview**  

[HN25] The standard of proof in consumer fraud actions by private plaintiffs is higher than the standard for the attorney general’s enforcement proceedings. Although the attorney general need not prove that a victim was damaged by the unlawful practice, to warrant an award of treble damages a private plaintiff must show an ascertainable loss.

**Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview**  
**Contracts Law > Defenses > Fraud & Misrepresentation > General Overview**  

[HN26] To demonstrate a loss in consumer fraud actions a victim must simply supply an estimate of damages, calculated within a reasonable degree of certainty. The victim is not required actually to spend the money for the repairs before becoming entitled to press a claim.

**Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview**  
**Contracts Law > Defenses > Fraud & Misrepresentation > General Overview**  
**Real Property Law > Nonmortgage Liens > Lien Priorities**  

[HN27] An improper debt or lien against a consumer fraud plaintiff may constitute a loss under the Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8-1 to 20, (the Act) be-
cause the consumer is not obligated to pay an indebtedness arising out of conduct that violates the Act.

**Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview**  
**Contracts Law > Remedies > General Overview**  


**Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview**  
**Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Statutory Awards**  

[HN29] The contract price is not the correct measure of consumer fraud damages when the consumer fraud occurs in the course of performance, not in the actual contracting for the home-improvement work.

**Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview**  
**Civil Procedure > Remedies > Costs & Attorney Fees > Costs > Court & Marshal Fees**  


**Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview**  
**Civil Procedure > Remedies > Costs & Attorney Fees > Costs > Court & Marshal Fees**  

[HN31] A consumer fraud plaintiff can recover reasonable attorneys’ fees, filing fees, and costs if that plaintiff can prove that the defendant committed an unlawful practice, even if the victim cannot show any ascertainable loss and thus cannot recover treble damages.

COUNSEL: Fredric J. Gross argued the cause for appellant (Mr. Gross, attorney; Dennis K. Kuroishi, of counsel).

Allen S. Zeller argued the cause for respondent (Freeman, Zeller and Bryant, attorneys; Mr. Zeller and James W. Burns, on the briefs).
Mary K. Potter, Deputy Attorney General, argued the cause for amicus curiae Attorney [*6] General of New Jersey (Deborah T. Poritz, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel).

Madeline L. Houston, Director of Litigation, submitted a brief on behalf of amicus curiae Passaic County Legal Aid Society.

JUDGES: The opinion of the Court was delivered by CLIFFORD, J. Justices HANDLER, POLLOCK, O'HERN, GARIBALDI, and STEIN.

OPINION BY: Robert L. Clifford

OPINION

[*6]  The opinion of the Court was delivered by

[*7]  CLIFFORD, J.

This appeal, here as of right because of a dissent in the Appellate Division, R. 2:2-I(a)(2), presents important questions under the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20 (the Act). William Cox contracted with defendant for renovations to the kitchen of his home. (Inasmuch as William Cox died after the institution of this suit, his son, as executor of his father's estate, has been substituted as plaintiff. References to "plaintiff" in this opinion, however, are to the original plaintiff, William Cox.) Dissatisfied with the work, plaintiff sued defendant on theories of, among others, breach of contract and violations of the Act. The jury found for plaintiff on both the contract and consumer-fraud causes of action, but the trial court entered judgment in defendant's favor notwithstanding the verdict.

On plaintiff's [***9] appeal a divided panel of the Appellate Division affirmed in an unreported opinion. The court ruled that plaintiff had not established that defendant's conduct violated the Act and had not demonstrated any loss entitling him to damages. Because we [***457] conclude that the majority below erred in respect of both those rulings, we reverse.

I

In August 1988, William Cox, then eighty-two years old, embarked on a renovation project on the kitchen of his forty-year-old house in Clementon, New Jersey, which he had purchased in 1987. In that connection he sought the services of defendant, Sears, Roebuck & Company (Sears). After meeting with a Sears representative and selecting the items he wanted installed, Cox signed a home-repair-proposal contract and financed the entire $7,295.69 cost of the transaction on his Sears credit card. Sears promised plaintiff "satisfaction guaranteed or your money back."

Cox wanted to change the appearance of his kitchen. The contract required Sears to remove old cabinets and install new ones, and to install a vinyl floor, a countertop, a sink and faucet with a full backsplash, wallpaper, a microwave hood, a garbage [*8] disposal, and one additional electrical outlet. The [***10] contract also required Sears to re-install all appliances, to sheetrock walls as necessary, to cover the exhaust fan, and to vent the microwave hood outside.

The bulk of the renovations began on December 5, 1988. On that date, Cox signed an "AUTHORIZATION FOR CHANGE OF SPECIFICATIONS" that Sears subcontractor presented for an additional $1,500 worth of work on the kitchen. That change order provided for rewiring of the kitchen and updating of the electrical work. Sears worked on the kitchen for approximately three weeks, and on December 23, 1988, plaintiff signed a statement that the renovations up to that point had been completed to his satisfaction.

Ultimately, however, Cox was not at all satisfied with Sears' work. During 1989, he made several telephone complaints to Sears about inadequacies in the job relating to the microwave hood and vent, the cabinets, and the vinyl flooring. A Sears repairman made at least four trips to plaintiff's home to address the problems. After Cox retained legal counsel around October 1989, Sears made no further repairs to the kitchen.

Plaintiff thereafter sued Sears for breach of contract and violation of the Consumer Fraud Act, and Sears counterclaimed [***11] for the full contract price, totaling $8,795.69.

The trial record discloses proof from which the jury could have concluded that Sears' work was deficient in that the resulting appearance of the renovations was unattractive, that Sears' rewiring of the kitchen was incomplete and substandard, and that Sears' work failed to comply with building and electrical codes and home-repair regulations. The microwave hood was installed in a lopsided manner and contained a large crack. The door to the microwave slammed shut if not held open. The wallpaper did not cover all wall areas and did not line up evenly with the cabinets. The wood coloring of the cabinets and the trim did not match, and one cabinet had cracks in it. The glue in the cabinet joints was visible and the joints were not clean. Sears improperly reinstalled [*9] the moldings so that they were not flush to the ceiling or walls. The vinyl flooring buckled, and Sears did not install cove molding to keep it in place. The garbage-disposal unit leaked. The microwave vent recirculated exhaust back into the house instead of outside. (Sears has...
Concerning the electrical-wiring [*12] work, plaintiff produced as expert witnesses an electrical sub-code inspector (the inspector) and an electrical contractor and installer (the contractor). The inspector concluded that the entire kitchen had not in fact been rewired. Much of the old wiring remained, and the new wiring did not meet the 1988 building-code requirements. In fact, the contractor explained that what wiring had been completed had been installed haphazardly and unprofessionally, resulting in dangerous, concealed defects. For example, several new outlets accepting three-prong plugs, which must be grounded for safety purposes, had not been grounded. Similarly, the polarity of several wires in the receptacle box were reversed, creating a risk of electric shock.

In addition, plaintiff produced witnesses who testified that for almost all the kitchen [*458] renovations covered by the contract, the municipality required building and electrical permits. For example, Clementon's building inspector explained that the removal of old cabinets and installation of new ones required a building permit. Likewise, the installation of new outlets or lights, a garbage disposal, an exhaust fan, or any other rewiring could not be performed [*13] without an electrical permit. The contractor agreed that electrical, plumbing, building, and construction permits were needed for Cox's renovation. However, no building or electrical permits had ever been requested or issued for the Cox residence before, during, or after Sears' work on plaintiff's kitchen in 1988 or 1989.

The jury returned a verdict in plaintiff's favor on both the breach-of-contract and the Consumer Fraud Act claims. In respect of the contract claim, the jury answered special interrogatories [*10] to indicate its finding that Sears had not substantially performed its obligations under the contract and that that failure was the proximate cause of damages to Cox. It concluded that the damages amounted to the full contract price of $8,795.69 and that Sears was entitled to a credit of only $238 for its work. Finally, it found that Sears had failed to correct the deficiencies in its performance and that Cox was entitled to receive $6,830 to complete and repair the work in his kitchen.

Concerning the consumer-fraud claim, the jury wrote on the verdict sheet that it found that Sears had violated the Act through its "failure to have competent contractors install cabinet work, [*14] plumbing and electrical wiring in a safe, professional manner and in accordance with appropriate regulations." The jury further concluded that as a proximate result of that violation, plaintiff had incurred damages in the amount of $6,830.

Sears moved for judgment notwithstanding the verdict, asserting that the conduct itemized in the jury's recital of what constituted consumer fraud did not in fact violate the Act. Initially the trial court denied the motion and entered judgment of $6,830 for Cox, trebling it to $20,490 as required by N.J.S.A. 56:8-19, and dismissed Sears' counterclaim. Defendant then renewed its motion, and plaintiff filed a cross-motion seeking costs and attorneys' fees in the amount of $56,840.57. The trial court then granted defendant's motion for judgment notwithstanding the verdict and entered a "no cause of action" in favor of Sears on both the contract and Consumer Fraud Act counts. The court left in place its order dismissing Sears' counterclaim and ordered Sears to remove any charges to plaintiff's Sears charge account and any lien on plaintiff's house.

In a letter opinion the trial court concluded that plaintiff had "failed to prove any ascertainable [*15] damage or loss as a result of [Sears'] lack of substantial performance under its contract or [Sears'] violation of the Consumer Fraud Act." It correctly noted that [HN1] to recover under the Act, a private plaintiff such as Cox must prove loss, and that a breach-of-contract claim also required proof [*11] of damages. The court found that the benefit of Cox's bargain was to have Sears renovate his kitchen according to the contract specifications for $8,795.69. Although plaintiff had not paid any money to Sears, he would have to spend $7,130 (a figure different from the jury's calculation) to complete and repair the renovations. The court concluded that because "the amount paid plus the amount needed to put the kitchen in the required condition is less than the contract price," and because the proper measure of damages is the "benefit of the bargain," "it follows that [plaintiff] has not been damaged by [defendant's] breach." The court also rejected plaintiff's claim that the impairment of his credit and Sears' recorded lien on his house constituted sufficient losses under the Act, pointing out that plaintiff had failed to demonstrate any difficulty in obtaining credit at a favorable rate. Last, [*16] the trial court noted that Cox had continued to enjoy the use of Sears' labor and materials since installation. Therefore, the court concluded, plaintiff had proved neither consumer-fraud nor contract damages and could not recover under either theory.

Accordingly, the court denied plaintiff's attorney's application for attorneys' fees, relying on Martin v. American Appliance, 174 N.J. Super. 382, 383-86, 416 A.2d 933 (Law Div:1980), which held that a victim of consumer [*459] fraud who does not prove a loss cannot recover attorneys' fees. (Martin has since been overruled by Performance Leasing Corp. v. Irwin Lincoln-
The majority in the Appellate Division affirmed substantially for the reasons given by the trial court in its letter opinion. The majority first found that defendant's conduct supported a breach-of-contract claim but not a consumer-fraud claim. The court explained that [HN2] "[c]onsumer fraud involves at the very least an 'unconscionable commercial practice,' " [***17] (quoting N.J.S.A. 56:8-2 and Skeer v. EMK Motors, Inc., 187 N.J. Super. 465, 470, 455 A.2d 508 (App.Div.1982)), and that "[a] breach of warranty or a breach [*12] of contract alone is not unconscionable and does not violate the Consumer Fraud Act.'

Next, the majority confirmed that because the evidence supported the jury's finding that Sears' failure to perform amounted to a breach of contract, the jury's decision to allow Sears nothing under the contract and to award it a credit of only $ 238 for the value of the work properly performed was appropriate. The majority further concluded that the jury's award of "compensatory damages" of $ 6,830 to Cox properly put him in as good a position as he would have enjoyed had performance been rendered as promised. (We are unable to unravel the paradox of the Appellate Division's apparent approval of the jury award to plaintiff of $ 6,830 in "compensatory damages," with a credit to defendant of $ 238, with its judgment affirming the trial court's entry of judgment for defendant notwithstanding the verdict, the effect of which, of course, was to wipe out plaintiff's verdict. Because we sit to review [***18] the Appellate Division's judgment, not its opinion, we proceed on the assumption that the court below determined that the trial court's entry of judgment for defendant was the correct result. Moreover, the riddle of is of no moment for purposes of this appeal, inasmuch as plaintiff does not raise any issues concerning his breach-of-contract claim but rather confines his statement of questions presented and his argument to issues under the Act.)

The majority also found that "the facts of this typical breach of contract case do not support a recovery for consumer fraud for the further reason that plaintiff has suffered no loss." The court noted that Cox has been living with the kitchen since Sears installed it and that the entire transaction has cost plaintiff nothing. It also found that Sears had never demanded payment from plaintiff. It reasoned that to allow plaintiff to recover three times the cost of completing the renovations "would distort the Consumer Fraud Act beyond recognition." The majority added that contrary to the dissent's reasoning, plaintiff did not incur a "legal obligation" constituting a loss sufficient to establish his [*13] consumer-fraud claim because plaintiff could [***19] not incur such an obligation absent Sears' performance.

The dissenter below argued that the majority had usurped the province of the jury and had misinterpreted both the Consumer Fraud Act and contract-damage principles. According to the dissent, the jury correctly calculated the contract damages because the verdict awarded plaintiff a sum, $ 6,830, that put him in the position he would have been in had Sears performed the contract. Next, the dissent noted that the jury's verdict "both implicitly and explicitly supports the conclusion that Sears engaged in unconscionable commercial practice," and the jury award "provides plaintiff with the kitchen he would have received from an accurate performance of Sears' renovation contract." On the question of damages the dissent rejected the conclusion that plaintiff had not suffered any loss due to Sears' unlawful conduct, pointing out that a charge on a credit card is a legal obligation amounting to a "loss" under the Act. It noted that many sharp businesses persuade consumers to sign contracts or to pay with credit cards and that those consumers may later refuse to pay, but "the fraud [is] accomplished when the consumer sign[s] what otherwise [***20] would be a binding obligation." The dissent concluded that Cox had "amply proved" a loss as contemplated by the Act. Concerning treble damages and attorneys' fees, the dissent observed that "absent compelling circumstances to the contrary," a court should award treble damages, [**460] attorneys' fees, filing fees, and costs to consumer-fraud plaintiffs.

Addressing the damages issue, the dissenter below claimed that Sears' lack of substantial performance entitled plaintiff to damages in the amount of the full contract price; thus, he concluded that the jury had properly extinguished Cox's indebtedness to Sears. The dissenter further argued that if plaintiff had paid cash rather than charge the cost of the renovations to his credit card, the dissenter would have calculated the consumer-fraud damages as the cash paid, trebled. The cancellation of the debt, according to the dissent, was the equivalent of the return of the cash [*14] payment; therefore, the dissent reasoned, the trial court should have awarded Cox an additional sum equal to double the contract price. It observed that "[b]y limiting plaintiff's remedy to the cancellation of the charge, the judge in effect has nullified the jury's consumer [*21] fraud verdict, and provided only breach of contract damages." The dissent concluded that to dispose of this case properly, the trial court should have cancelled Cox's contract indebtedness, denied Sears any recovery under the contract, and awarded plaintiff his cost of repair as determined by the jury, $ 6,830, trebled to $ 20,490, plus reasonable attorneys' fees, filing fees, and costs. Finally, the dissent concluded that even if Cox had not suffered a "loss" under the Act, the court nevertheless should have awarded him reasonable attorneys' fees.
The initial question that plaintiff raises on this appeal is whether Sears' conduct constituted an "unlawful practice" under the Act. If so, we must determine if plaintiff suffered "any ascertainable loss" due to Sears' conduct. The posture of the case--the Appellate Division's affirmance of the trial court's setting aside a jury verdict for plaintiff and entering judgment for defendant notwithstanding that verdict--requires that we accord plaintiff the benefit of all reasonable and legitimate inferences to be drawn from the evidence. Under that standard we are satisfied that Sears' conduct did constitute an unlawful practice and that plaintiff did suffer a loss caused by Sears' violation of the Act. Finally, we conclude that plaintiff is entitled to recover attorney's fees, filing fees, and costs under the Act.

II

--A--

In 1960, the Legislature passed the Consumer Fraud Act "to permit the Attorney General to combat the increasingly widespread practice of defrauding the consumer." Senate Committee, Statement to the Senate Bill No. 199 (1960). [HN3] The Act conferred on the Attorney General the power to investigate consumer-fraud complaints and promulgate rules and regulations that have the force of law. N.J.S.A. 56:8-4. In 1971, the Legislature amended the Act to "give New Jersey one of the strongest consumer protection laws in the nation." Governor's Press Release for Assembly Bill No. 2402, at 1 (Apr. 19, 1971). The Legislature expanded [HN4] the definition of "unlawful practice" to include "unconscionable commercial practices" and broadened the Attorney General's enforcement powers. Ibid. [HN5] That amendment also provided for private causes of action, with an award of treble damages, attorneys' fees, and costs. Ibid. Governor Cahill believed that those provisions would provide "easier access to the courts for the consumer[,] would increase the attractiveness of consumer actions to attorneys and [would] also help reduce the burdens on the Division of Consumer Affairs." Governor's Press Release for Assembly Bill No. 2402, at 2 (June 29, 1971).

In this case, Cox is a private plaintiff, and the Attorney General did not intervene in the proceedings, confining her participation to that of an amicus curiae in this Court. Therefore, the relevant sections of the Act are N.J.S.A. 56:8-2 and -19. They provide:

[HN6] The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale * * * or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

[N.J.S.A. 56:8-2.]

[HN7] Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act * * * may bring an action * * *. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

[N.J.S.A. 56:8-19.]

Courts have emphasized that [HN8] like most remedial legislation, the Act should be construed liberally in favor of consumers. See Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 69, 494 A.2d 804 [*16] (1985); Levin v. Lewis, 179 N.J. Super. 193, 200, 431 A.2d 157 (App.Div.1981); State v. Hudson Furniture Co., 165 N.J. Super. 516, 520, 398 A.2d 900 (App.Div.1979); Martin, supra, 174 N.J. Super. at 384, 416 A.2d 933. Although initially designed to combat "sharp practices and dealings" that victimized consumers by luring them into purchases through fraudulent or deceptive means, [***25] D'Ercole Sales, Inc. v. Fruehauf Corp., 206 N.J. Super. 11, 23, 501 A.2d 990 (App.Div.1985), the Act is no longer aimed solely at "shifty, fast-talking and deceptive merchant[s]" but reaches "nonsoliciting artisans" as well. Ibid. Thus, [HN9] the Act is designed to protect the public even when a merchant acts in good faith. Ibid. Moreover, we are mindful that the Act's provision authorizing consumers to bring their own private actions is integral to fulfilling the legislative purposes, and that those purposes are advanced as well by courts' affording the Attorney General "the broadest kind of power to act in the interest of the consumer public." Levin, supra, 179 N.J. Super. at 200, 431 A.2d 157.

To those ends the Legislature has given the Attorney General the authority to promulgate regulations, as follows:
To accomplish the objectives and to carry out the duties prescribed by this act, the Attorney General, in addition to other powers conferred * * * by this act, may * * * promulgate such rules and regulations * * * as may be necessary, which shall have the force of law.

[N.J.S.A. [***26] 56:8-4 (emphasis added).]

The Division of Consumer Affairs has enacted extensive regulations, consistent with the foregoing authority, to deal with practices susceptible to consumer-fraud violations, such as may be found under home-improvement contracts. See, e.g., N.J.A.C. 13:45A-16. [HN11] A major purpose of the Home Improvement Practices regulations is to provide "objective assurances" of the "terms and criteria according to which home-improvement work [should] be done." 17 N.J.R. 679 (Mar. 18, 1985). However, the regulations are not meant to be exhaustive, and practices not specified in the regulations may nevertheless constitute unlawful consumer fraud. N.J.A.C. 13:45A-16.2(a).

[*17] In this case, the trial court instructed the jury on certain unlawful practices set forth in the administrative code, namely, those making [HN12] it unlawful under the Act (1) to "[m]isrepresent directly or by implication that products or materials to be used in the home improvement * * * [m]eet or exceed municipal, state, federal, or other applicable standards or requirements," N.J.A.C. 13:45A-16.2(a)2v; (2) to "[r]equest the buyer to sign a certificate of completion, or make [***27] final payment on the contract before the home improvement is completed in accordance with the terms of the contract," N.J.A.C. 13:45A-16.2(a)6v; (3) for a seller contracting for the making of home improvements to commence work "until he is sure that all applicable state or local building and construction permits have been issued as required under state laws or local ordinances," N.J.A.C. 13:45A-16.2(a)10i; and (4) for the seller to fail to deliver to the buyer copies of inspection certificates, when midpointer final inspections are required under state laws or local ordinances, "when construction is completed and before final payment is due or the signing of a completion slip is requested of the buyer." N.J.A.C. 13:45A-16.2(a)10i.

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[HN17] When the alleged consumer-fraud violation consists of an affirmative act, intent is not an essential element and the plaintiff need not prove that the defendant intended to commit an unlawful [*18] act. Chaitin v. Cape May Greene, Inc., 124 N.J. 520, 522, 591 A.2d 943 (1991) (Stein, J. concurring). However, [HN18] when the alleged consumer fraud consists of an omission, the plaintiff must show that the defendant acted with knowledge, and intent is an essential element of the fraud. Ibid.

In respect of what constitutes an "unconscionable commercial practice," this Court explained in Kugler v. Romain, 58 N.J. 522, 279 A.2d 640 (1971), that [HN19] unconscionability is "an amorphous concept obviously designed to establish a broad business ethic." Id. at 543, 279 A.2d 640. The standard [***29] of conduct that the term "unconscionable" implies is lack of "good faith, honesty in fact and observance of fair dealing." Id. at 544, 279 A.2d 640. However, "a breach of warranty, or any breach of contract, is not per se unfair or unconscionable * * * and a breach of warranty alone does not violate a consumer protection statute." D'Ercole Sales, supra, 206 N.J. Super. at 25, 501 A.2d 990. [HN20] Because any breach of warranty or contract is unfair to the non-breaching party, the laws permit that party to recoup remedial damages in an action on the contract; however, by providing that a court should treble those damages and should award attorneys' fees and costs, the Legislature must have intended that substantial aggravating circumstances be present in addition to the breach. DiNicola v. Watchung Furniture's Country Manor, 232 N.J. Super. 69, 72, 556 A.2d 367 (App.Div.) (finding that breach of warranty in supplying defective furniture and denying that defect existed was not unconscionable), certif. denied, 117 N.J. 126, 504 A.2d 854 (1989); D'Ercole Sales, supra, 206 N.J. Super. at 31, 501 A.2d 990 [***30] (holding that breach of warranty for malfunctioning tow truck and refusal to repair was not unconscionable practice).

The third category of unlawful acts consists of [HN21] violations of specific regulations promulgated under the Act. In those instances, intent is not an element of the unlawful practice, and the regulations impose strict liability for such violations. Fenwick, supra, 72 N.J. at
issued for the Cox home, no inspections took place and no certificate was issued. In that regard, [***33] Sears violated N.J.A.C. 13:45A-16.2(a)(10)ii, which requires a contractor to give the owner a copy of an inspection certificate before final payment is due and before the contractor asks the owner to sign a completion slip. In addition, plaintiff presented evidence to support an inference that Sears had asked him to sign a certificate-of-completion form before the work had been completed, a violation of N.J.A.C. 13:45A-16.2(a)(6)v.

Plaintiff also introduced substantial evidence that the kitchen had been rewired incorrectly, creating a dangerous condition. Plaintiff relied on Sears to furnish him with a safe and usable kitchen. By failing to rewire the kitchen properly, Sears breached the contract. Its poor performance created several concealed hazardous defects that could constitute a "substantial aggravating circumstance" warranting a finding of an unconscionable commercial practice. However, because we do not detect any bad faith or lack of fair dealing on the part of Sears, we conclude that the breach of contract does not rise to the level of an "unconscionable commercial practice" in violation of the Act. See, e.g., New Mea Constr. Corp. v. Harper, 203 N.J. Super. 486, 501, 497 A.2d 534 (App.Div.1985) [***34] (finding that poor workmanship and substitution of inferior quality materials in addition to breach of contract constituted unconscionable commercial practice in violation of Act).

Finally, we note that the jury's findings, as revealed on the verdict sheet, were somewhat general. To ensure that the [*21] conduct that a jury concludes amounts to consumer fraud is in fact unlawful under the Act, we recommend that trial courts frame special interrogatories to the jury. For example, in addition to asking a jury what conduct violated the Act, a verdict sheet might also ask whether the unlawful conduct involved an affirmatory act, a knowing omission, or a violation of a regulation. Likewise, requiring a jury to identify the regulations that a consumer-fraud defendant has violated would further refine the verdict.

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We turn now to the issue of damages as provided for under the Act. [HN23] In an ordinary breach-of-contract case, the function of damages is simply to make the injured party whole, and courts do not assess penalties against the breaching party. However, the goals of the Act are different. Although one purpose of the legislation is clearly remedial in that it seeks to compensate a victim's [***35] loss, the Act also punishes the wrongdoer by awarding a victim treble damages, attorneys' fees, filing fees, and costs. In that sense, the Act serves as a deterrent. Therefore, in determining whether plaintiff has
established [**464] a loss under the Act, we are guided by but not bound to strict contract principles.

[HN24] A private plaintiff victimized by any unlawful practice under the Act is entitled to "threefold the damages sustained" by way of "any ascertainable loss of moneys or property, real or personal * * *." N.J.S.A. 56:8-19. Significantly, [HN25] the standard of proof in consumer-fraud actions by private plaintiffs is higher than the standard for the Attorney General's enforcement proceedings. Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 473, 541 A.2d 1063 (1988). Although the Attorney General need not prove that a victim was damaged by the unlawful practice, to warrant an award of treble damages a private plaintiff must show an "ascertainable loss."

Plaintiff has met the first requirement of N.J.S.A. 56:8-19 by proving that Sears committed an unlawful practice. As demonstrated above, that unlawful conduct consisted of Sears' [***36] violation [**22] of consumer-fraud regulations relating to permits, inspections, and certificates. The next question, then, is whether plaintiff suffered any "ascertainable loss," as contemplated by the Act.

The record satisfies us that Sears' failure to comply with the Home Improvement Practices regulations visited an ascertainable loss on plaintiff. The purpose of the regulations is to protect the consumer from hazardous or shoddy work. Had all applicable permits been obtained before Sears began work, the issued permits would have triggered periodic inspections of the renovations. An inspector would have detected any substandard electrical wiring or cabinet work and would not have permitted the work to progress or have issued the required certificates until Sears corrected the deficiencies. Because the inspections did not occur, the wiring remained unsafe, the cabinets remained unattractive, and both resulted in a loss measured by the cost of repairing those conditions.

The Appellate Division majority suggests that because Cox did not spend money to repair or finish the work, he incurred no loss. However, that interpretation of N.J.S.A. 56:8-19 runs contrary to the Act's clearly remedial [***37] purpose. Traditionally, [HN26] to demonstrate a loss, a victim must simply supply an estimate of damages, calculated within a reasonable degree of certainty. The victim is not required actually to spend the money for the repairs before becoming entitled to press a claim. See Berg v. Reaction Motors Div., 37 N.J. 396, 404, 181 A.2d 487 (1962); Tessmar v. Groser, 23 N.J. 193, 203, 128 A.2d 467 (1957). In this case, the testimony specifically addressed the cost of repairs, and the trial court found that Cox had adequately demonstrated those costs. The court also found persuasive that because plaintiff "kept" the kitchen since it had been installed, he did not incur any loss. Obviously, plaintiff had no other choice: he still owned the house. In addition, Cox did not "gain" a kitchen that he had not had before; prior to the renovations, he had a normal, safe kitchen. See 5 Corbin on Contracts § 1091 (Corbin ed. 1964) (stating that "[t]he injured party should not be deprived of damages measured [*23] by the cost of curing defects, merely on the ground that he chooses to use the building in its [***38] defective character"). Therefore, we conclude that Cox's loss amounted to the cost of repairing his kitchen, $6,830, as the jury found.

Moreover, by virtue of his contract with Sears, plaintiff incurred a legal obligation in the form of a debt. That debt was presumptively collectible prior to the lawsuit, and Sears filed a counterclaim demanding payment of the full contract price. Sears also filed a lien on plaintiff's house, thereby encumbering the title. We conclude that [HN27] an improper debt or lien against a consumer-fraud plaintiff may constitute a loss under the Act, because the consumer is not obligated to pay an indebtedness arising out of conduct that violates the Act.

However, in this case, the debt and the lien, although losses to Cox, and properly cancelled by the trial court for Sears' breach of contract, were not the result of Sears' violation of the Act. Rather, those losses occurred before any consumer fraud took place. [HN28] The "causation" provision of N.J.S.A. 56:8-19 requires plaintiff to prove that the unlawful consumer fraud caused his loss. [**465] Ramanadham v. New Jersey Mfrs. Ins. Co., 188 N.J. Super. 30, 33, 455 A.2d 1134 (App.Div.1982); [***39] see, e.g., Meshinsky, supra, 110 N.J. at 474-75, 541 A.2d 1063 (finding that defendant's forgery of plaintiff's signature on loan application, although unconscionable commercial practice, was between bank and defendant and did not cause plaintiff any loss; therefore, plaintiff was limited to damages for defendant's breach of contract). In the case before us, [HN29] the contract price is not the correct measure of consumer-fraud damages because the consumer fraud occurred in the course of performance, not in the actual contracting for the home-improvement work. See Trux v. Ocean Dodge, Inc., 219 N.J. Super. 44, 529 A.2d 1017 (App.Div.1987) (finding that consumer-fraud damages were amount of unconscionable commercial practice of attempted boost in price of $710, trebled to $2,130, and not full contract price). Because the improper debt and lien were not the result of Sears' consumer fraud, plaintiff is not entitled to have [*24] damages trebled as consumer-fraud damages. The proper measure of plaintiff's consumer-fraud damages is the cost of repair as determined by the jury, $6,830, trebled to $20,490.

Although plaintiff's breach-of-contract claim is not before us, we take into account the jury's determination that the value of Sears' performance was $238, and cred-
it that amount against plaintiff's damage award of $20,490, leaving plaintiff with a total award of $20,262.

III

Finally, we determine that [HN30] an award of treble damages and attorneys' fees is mandatory under N.J.S.A. 56:8-19 if a consumer-fraud plaintiff proves both an unlawful practice under the Act and an ascertainable loss. The use of the word "shall" in the statute suggests as much. Skeer, supra, 187 N.J. Super. at 469, 455 A.2d 1134; Ramanadham, supra, 188 N.J. Super. at 32-33, 455 A.2d 1134. Moreover, the legislative history indicates that the provision for attorneys' fees was intended to impose on the defendant in a private action "a greater financial penalty [than in an action brought by the Attorney General] and * * * [to ensure] that the financial cost to the private plaintiff was minimized and compensation maximized." Skeer, supra, 187 N.J. Super. at 471, 455 A.2d 508. Accordingly, we remand [***41] to the trial court to calculate an appropriate award for plaintiff's attorneys' fees, filing fees, and costs.

For the sake of completeness we add that [HN31] a consumer-fraud plaintiff can recover reasonable attorneys' fees, filing fees, and costs if that plaintiff can prove that the defendant committed an unlawful practice, even if the victim cannot show any ascertainable loss and thus cannot recover treble damages. Performance Leasing, supra, 262 N.J. Super. at 31, 34, 619 A.2d 1024 (holding [*25] that where jury found that defendant had committed unconscionable commercial practice and thus had violated Act, but that plaintiff had not been damaged by that violation, strong precedent supported award to plaintiff of attorneys' fees). The fundamental remedial purpose of the Act dictates that plaintiffs should be able to pursue consumer-fraud actions without experiencing financial [***42] hardship.

IV

We reverse the judgment of the Appellate Division and remand to the trial court for entry there of judgment for plaintiff on the sixth count of the Complaint, alleging Consumer Fraud Act violations, the damages to be trebled as provided in this opinion, and for entry of judgment for plaintiff for attorneys' fees, filing fees, and costs as provided herein.
NOTE TO JUDGE

Right to Trial by Jury under the Consumer Fraud Act, N.J.S.A. 56:8-1 et seq.


In Zorba Contractors, Inc. v. Housing Authority, City of Newark, 362 N.J. Super. 124, 138-139 (App. Div. 2003), the Appellate Division noted: “Therefore, even though the Legislature did not specifically refer to the right to a jury trial in the three-sentence provision authorizing private actions under the [Act], a legislative intent to allow jury trials can be reasonably implied from the fact that the relief authorized by this provision is legal in nature.” See Also Debrah F. Fink, D.M.D., MS, PC v. Ricoh Corp., 365 N.J. Super. 520, 575 (Ch. Div., 1972).

In sum, the Committee believes that there is a right to jury trial for a Consumer Fraud Act claim brought by a plaintiff other than the Attorney General.

Format of the Model Charge

There are three possible bases for responsibility under the Act. Two are established by N.J.S.A. 56:8-2; the third is derived from either
specific-situation statutes (such as prize notification under N.J.S.A. 56:8-2.3 or food misrepresentation under N.J.S.A. 56:8-2.9 through 2.13) or regulations enacted under N.J.S.A. 56:8-4, listed in N.J.A.C. 13:45A-1.1 et seq. Page 15 of this Model Charge lists those topics covered by the administrative regulations.

The first of the three alternatives relates to that part of N.J.S.A. 56:8-2 which declares that “any unconscionable commercial practice, deception, fraud, false pretense, false promise [or] misrepresentation” is an unlawful practice. The second alternative relates to a “knowing concealment, suppression or omission of any material fact” under the same statute. The third alternative uses the specific-situation statutes and the administrative regulations.

Under the Act, the term “merchandise” includes any objects, goods, commodities, services or anything offered directly or indirectly to the public for sale. “Merchandise” does not include “securities”. Lee v. First Union National Bank, 199 N.J. 251, 261 (2009).


[The introduction applies to all three alternatives.]

A. Introduction

Many of us have heard the Latin phrase caveat emptor: “let the buyer beware.” That statement allows little relief to a customer. That statement does not reflect current law in New Jersey. Here, we have a more ethical approach in business dealings with one another. Therefore, each of us may rely on representations made by another in a business transaction. This approach is reflected in a statute, New Jersey’s Consumer Fraud Act.
There are three possible bases for responsibility\(^1\) under the Act. The Act itself declares two general categories of conduct as unlawful. The first category makes “any unconscionable commercial practice, deception, fraud, false pretense, false promise or misrepresentation” unlawful. These are considered affirmative acts. The second category involves the “knowing concealment, suppression or omission of any material fact.” These are considered conduct by omission. The third basis for responsibility under the Act involves either a specific-situation statute or administrative regulations enacted to interpret the Act itself. Such statutes and regulations define specific conduct prohibited by law.

\[\text{[Insert Those Definitions Applicable to the Specific Case]}\]

An “affirmative act” is something done voluntarily by a person. The act may be physical but also may be any steps taken voluntarily by a person to advance a plan or design or to accomplish a purpose.

An “omission” is neglecting to perform what the law requires. Liability must be imposed for such inaction depending on whether there is a duty to act under the circumstances.

\[\text{[Return to Charge]}\]

\(^1\) The trial judge may modify the language of this paragraph to address only those bases for responsibility present in the particular case.
Here, plaintiff(s)\(^2\) claim(s) that defendant(s) committed a consumer fraud when defendant(s) (insert description of conduct). The Consumer Fraud Act says that anyone who (insert relevant parts of N.J.S.A. 56:8-2 or other specific statute or regulation) commits a consumer fraud.\(^3\)

**B. First Alternative – Affirmative Act**

Specifically, defendant(s) allegedly used, by means of an affirmative act, an (unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation) in connection with (the sale/advertisement of any merchandise/real estate) (state specifically the factual allegations made by plaintiff).

[Insert Those Definitions Applicable to the Particular Case]

An “unconscionable commercial practice” is an activity which is basically unfair or unjust which materially departs from standards of good faith, honesty in fact and fair dealing in the public marketplace.\(^4\) To be unconscionable, there must be factual dishonesty and a lack of fair dealing.

\(^2\) (Plaintiff) and (defendant) are placed in parentheses to signify that the trial court may refer to the parties by name, rather than status in this litigation, if he or she wishes.

\(^3\) The Act, N.J.S.A. 56:8-1 et seq., includes many specific types of conduct which are designated to be an unlawful practice. For example, see N.J.S.A. 56:8-2.3. If a particular act declared to be an unlawful practice under a specific statute is alleged, the court should note that individual statute to the jury and then refer to the Third Alternative.

“Deception” is conduct or advertisement which is misleading to an average consumer to the extent that it is capable of, and likely to, mislead an average consumer. It does not matter that at a later time it could have been explained to a more knowledgeable and inquisitive consumer. It does not matter whether the conduct or advertisement actually have misled plaintiff(s). The fact that defendant(s) may have acted in good faith is irrelevant. It is the capacity to mislead that is important.

“Fraud” is a perversion of the truth, a misstatement or a falsehood communicated to another person creating the possibility that that other person will be cheated.

“False pretense” is an untruth knowingly expressed by a wrongdoer.

“False promise” is an untrue commitment or pledge, communicated to another person, to create the possibility that that other person will be misled.

A “misrepresentation” is an untrue statement made about a fact which is important or significant to the sale/advertisement, and is communicated to another

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5 The terms “fraud,” “false pretense,” “false promise” and “misrepresentation” have traditionally been defined in this State as requiring an awareness by the maker of the statement of its inaccuracy accompanied by an intent to mislead. However, in Fenwick v. Kay Amer. Jeep, Inc., 72 N.J. 372, 377 (1977), the Supreme Court noted that “the requirement that knowledge and intent be shown is limited to the concealment, suppression or omission of any material fact.” See also, D’Ercole Sales, Inc. v. Fruehauf Corp., supra at 22 (App. Div. 1985). Therefore, the definitions provided for these four terms do not require either intent or knowledge.
person to create the possibility that other person will be misled. A “misrepresentation” is a statement made to deceive or mislead.

A “person” includes not only a human being or his/her legal representative but also a partnership, corporation, company, trust, business entity, association as well as his/her agent, employee, salesperson, partner, officer, director, member, stockholder, associate, trustee or beneficiary of a trust.

A “sale” includes transfer of ownership; rental; distribution; offer to sell, rent, or distribute; and attempt to sell, rent or distribute, either directly or indirectly.

An “advertisement” is a notice designed to attract public attention. Modes of communication include the attempt, directly or indirectly, by publication, dissemination, solicitation, endorsement, circulation or in any way to induce any person to enter or not enter into an obligation, acquire any title or interest in any merchandise, increase the consumption of any merchandise or make any loan.

“Merchandise” includes any objects, wares, goods, commodities, services or anything offered directly or indirectly to the public for sale.

“Real estate” is land and, if there is an improvement on the land, that improvement as well.
It is not necessary for liability under the Act that a person actually be misled or deceived by another’s conduct. It is not necessary for (plaintiff) to show that (defendant) intended that his/her/its conduct should deceive. What is important is that the affirmative act must have had the potential to mislead or deceive when it was performed. The capacity to mislead is the prime ingredient of the affirmative consumer fraud alleged [state the specific unlawful practice]. Intent is not an essential element. [Add if the claim is an affirmative act only: Consumer fraud consisting of an affirmative act does not require a showing of intent.]

The price charged is only one factor in your consideration. For example, if you find that the price is grossly excessive in relation to the seller’s costs and, as well, the goods sold have little or no value to (plaintiff(s)) for the purpose for which he/she/it/they was persuaded to buy the goods and which it appeared they would serve, the price paid by (plaintiff(s)) becomes one factor relevant to weighing the wrong which the statute seeks to prevent and which it prohibits.

Using those definitions outlined earlier, you must decide whether (plaintiff(s)) has/have shown or proven to you that (defendant(s)) used (an unconscionable commercial practice or other applicable characterizing noun) in connection with (the sale or how defendant(s) would act) when (summarize acts alleged). If plaintiff(s) has/have shown that those acts took place and that they
were [an unconscionable commercial practice or other applicable characterizing noun], you must next decide whether that conduct brought about damage to plaintiff(s) and, if so, how much.

[Insert Definition of Proximate Cause and Applicable Instructions on Damages.\(^6\) (See General Statements on Damages at End of Charge.)]

C. Second Alternative – Acts of Omission

Plaintiff(s) allege(s)/further allege(s) that defendant(s) knowingly concealed, hid/suppressed, kept something from being known/omitted, or left out or did not mention an important or significant fact purposely or with the intent that others would rely on that concealment/suppression/omission in connection with (the sale/advertisement of any merchandise/real estate) (how defendant(s) would act or perform after an agreement to buy was made/plaintiff(s) responded to or answered the advertisement).

[Insert Definitions from Below and from First Alternative Applicable to the Specific Case]

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\(^6\) In addition to damages awarded by the jury, the judge may award additional appropriate legal or equitable relief under \textit{N.J.S.A. 56:8-19}.

Damages awarded by the jury are limited to an ascertainable loss of money or property under \textit{N.J.S.A. 56:8-19}. This would not include damages for pain and suffering. \textit{Jones v. Sportelli}, 166 \textit{N.J. Super.} 383, 390-392 (Law Div. 1979).

As directed in \textit{Ramanadham v. N.J. Mfrs. Ins. Co.}, supra at 33 (App. Div. 1982), where there are two or more causes of action, one of which arises under the Act, damages determined under the Act must be separated from and non-duplicative of damages under another cause of action so that only Act damages are trebled.
A person acts “knowingly” if he/she is aware that his/her conduct is of a nature that it is practically certain that his/her conduct will cause a particular result. He/She acts with knowledge, consciously, intelligently, willfully or intentionally.

To “conceal” is to hide, secrete, or withhold something from the knowledge of others or to hide from observation, cover or keep from sight or prevent discovery of. “Concealment” is a withholding of something which one is bound or has a duty to reveal so that the one entitled to be informed will remain in ignorance.

To “suppress” is to put a stop to a thing actually existing, to prohibit or put down, or to prevent, subdue, or end by force. “Suppression” is the conscious effort to control or conceal unacceptable impulses, thought, feelings or acts.

A person acts “purposely” if it is his/her conscious object to engage in conduct that of a certain nature or cause a particular result and he/she is aware of hopes or believes that the attendant circumstances exist.

“Intent” is a design, resolve, or determination with which a person acts. It refers only to the state of mind existing when an act is done or omitted.

[Return to Charge]
It is not necessary that any person be, in fact, misled or deceived by another’s conduct. What is important is that defendant(s) must have meant to mislead or deceive when he/she/it/they acted.

The fact that defendant acted knowingly or with intent is an essential element of acts of omission under the Act. Knowledge or intent must be shown. Where the alleged consumer fraud can be viewed as either an omission or an affirmative act, (defendant) is liable for the conduct as an omission only where defendant committed a consumer fraud by omission and intent is shown.

Considering the above definitions, you must decide whether plaintiff(s) has/have proven to you that defendant(s) knowingly (concealed/suppressed/omitted) an important and significant fact with the intent that [an]other[s] would rely on the facts as communicated to him/her/them without having the opportunity to also consider the other facts which were (concealed/suppressed/omitted) in connection with (the sale or how defendant(s) would act) when (summarize acts alleged). If plaintiff(s) has/have proved that those acts took place and, if so, that those acts were a knowing concealment/suppression/omission of an important fact intended to be relied on

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7 But see, Knapp v. Potamkin Motors Corp., 253 N.J. Super. 502 (L. Div. 1991), where the court reconsidered its own instruction to the jury that “it is not necessary for the plaintiff to prove that he was misled” in a private action brought under the Act.
by others, you must then decide whether that conduct brought about damage to
plaintiff(s) and, if so, how much.\textsuperscript{8}

\textit{[Insert Definition of Proximate Cause and Applicable Instructions on
Damages.\textsuperscript{9} (See General Statements on Damages, Section G of this
Charge.)]}

\textbf{D. Separate Defense Applicable to Owners, Publishers, or
Operators of Instrumentality by Which an Advertisement Is
Conveyed}

(Defendant) says that it, the (owner/publisher of the
newspaper/magazine/publication/printed matter in which the advertisement
appeared) [or] (owner/operator of the radio/television station on which the
advertisement appeared), he/she/it had no knowledge of the intent, design or
purpose of the advertiser. The burden of proving this lack of knowledge by a
preponderance of the evidence rests with (defendant). If you find that (defendant)
proved by the preponderance of the evidence that he/she/it was unaware of what
the advertiser meant to do through the advertisement, the owner/publisher/operator
cannot be held responsible or liable under the Act.

\textsuperscript{8} The burden of proof is on the plaintiff to establish his/her/their claim by a preponderance of
the evidence.

\textsuperscript{9} See footnote 6.
E. THIRD ALTERNATIVE

[Recite Elements of Particular Statute or Regulation as Well as any Applicable Definitions.\(^{10}\)]

In accordance with the previous definitions, you must decide whether (plaintiff(s)) has/have proven that ((defendant)s) [insert conduct]. If plaintiff(s) has/have shown that those acts took place and therefore violated the statute/regulations, you will next decide whether that conduct brought about damage to plaintiff(s) and, if so, how much.

[Insert Definition of Proximate Cause and Applicable Instructions on Damages.\(^{11}\) (See General Statements on Damages, section G of this Charge.)]

**NOTE TO JUDGE**


\(^{10}\) Specific-situation statutes are itemized following the administrative regulation references at the end of this charge.

\(^{11}\) See footnote 6.
GENERAL STATEMENT ON DAMAGES

(Plaintiff(s)) claim that he/she/it/they lost money/property as a result of (defendant’s) conduct. If you decide from the evidence in this case that (defendant) violated the statute or regulation, you have decided that (defendant) committed an unlawful practice. If so, (plaintiff(s)) is/are allowed to receive an award of money for his/her/its/their loss proximately caused by ((defendant)s).

If you find that the Consumer Fraud Act was violated and you award damages, the law requires me to triple whatever amount of damages you award. The tripling of your award is meant to punish ((defendant)s). In addition, if you award damages to (plaintiff(s)), the law also requires me to compel (defendant) to pay whatever reasonable attorney fees (plaintiff) incurred in this case. I will determine at a later time what that amount of attorney fees is.12 These are functions which the court, not the jury, will perform.

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In complex cases involving multiple questions and many parties, the trial court has the discretion to withhold this instruction if it would tend to confuse or mislead the jury or produce a manifestly unjust result. Wanetick, supra at 495.
ADMINISTRATIVE RULES OF THE
DIVISION OF CONSUMER AFFAIRS
N.J.A.C. 13:45A-1 et seq.

SUBCHAPTER 1 - DECEPTIVE MAIL ORDER PRACTICES
SUBCHAPTER 2 - MOTOR VEHICLE ADVERTISING PRACTICES
SUBCHAPTER 3 - SALE OF MEAT AT RETAIL
SUBCHAPTER 4 - BANNED HAZARDOUS PRODUCTS
SUBCHAPTER 5 - DELIVERY OF HOUSEHOLD FURNITURE & FURNISHINGS
SUBCHAPTER 6 - DECEPTIVE PRACTICES CONCERNING AUTOMOTIVE SALES PRACTICES
SUBCHAPTER 7 - DECEPTIVE PRACTICES CONCERNING AUTOMOTIVE REPAIRS AND ADVERTISING
SUBCHAPTER 8 - TIRE DISTRIBUTORS AND DEALERS
SUBCHAPTER 9 - MERCHANDISE ADVERTISING
SUBCHAPTER 10 - SERVICING & REPAIRING OF HOME APPLIANCES
SUBCHAPTER 11 - (RESERVED)
SUBCHAPTER 12 - SALE OF ANIMALS
SUBCHAPTER 13 - POWERS TO BE EXERCISED BY COUNTY AND MUNICIPAL OFFICERS OF CONSUMER AFFAIRS
SUBCHAPTER 14 - UNIT PRICING OF CONSUMER COMMODITIES IN RETAIL ESTABLISHMENTS
SUBCHAPTER 15 - DISCLOSURE OF REFUND POLICY IN RETAIL ESTABLISHMENT
SUBCHAPTER 16 - HOME IMPROVEMENT PRACTICES
SUBCHAPTER 17 - SALE OF ADVERTISING IN JOURNALS RELATING OR PURPORTING TO RELATE TO POLICE, FIREFIGHTING OR CHARITABLE ORGANIZATIONS
SUBCHAPTER 18 - PLAIN LANGUAGE REVIEW

SUBCHAPTER 19 - (RESERVED)

SUBCHAPTER 20 - RESALE OF TICKETS OF ADMISSION TO PLACES OF ENTERTAINMENT

SUBCHAPTER 21 - REPRESENTATIONS CONCERNING AND REQUIREMENTS FOR THE SALE OF KOSHER FOOD

SUBCHAPTER 22 - INSPECTIONS OF KOSHER MEAT DEALERS AND KOSHER POULTRY DEALERS; RECORDS REQUIRED TO BE MAINTAINED BY KOSHER MEAT DEALERS AND KOSHER POULTRY DEALERS

SUBCHAPTER 23 - DECEPTIVE PRACTICES CONCERNING WATERCRAFT REPAIR
LISTING OF SPECIFIC SITUATION STATUTES UNDER THE
CONSUMER FRAUD ACT

(ALTERNATIVE THREE)

56:8-2.1  Operation simulating governmental agency
56:8-2.2  Scheme not to sell as advertised
56:8-2.3  Notification of prize winner
56:8-2.4  Picturing assembled merchandise
56:8-2.5  Selling item without price label
56:8-2.7  False solicitation of contribution
56:8-2.8  Going out of business sale
56:8-2.9  Misrepresentation of food
56:8-2.14 Refund Policy Disclosure Act
56:8-2.22 Providing copy of contract to consumer
56:8-2.23 Soliciting used goods
56:8-21  Unit Price Disclosure Act
56:8-26  Resale of tickets
§ 56:8-1. Definitions

(a) The term "advertisement" shall include the attempt directly or indirectly by publication, dissemination, solicitation, indorsement or circulation or in any other way to induce directly or indirectly any person to enter or not enter into any obligation or acquire any title or interest in any merchandise or to increase the consumption thereof or to make any loan;

(b) The term "Attorney General" shall mean the Attorney General of the State of New Jersey or any person acting on his behalf;

(c) The term "merchandise" shall include any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale;

(d) The term "person" as used in this act shall include any natural person or his legal representative, partnership, corporation, company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestuis que trustent thereof;

(e) The term "sale" shall include any sale, rental or distribution, offer for sale, rental or distribution or attempt directly or indirectly to sell, rent or distribute;

(f) The term "senior citizen" means a natural person 60 years of age or older.


NOTES:

Editor's Note:

Violation of 17:18-19 et seq., pertaining to vehicle protection product warranties, shall be a violation of 56:8-1 et seq., see 17:18-26.

Sale, offer of vehicle protection product by unregistered warrantor, person, deemed unlawful practice, see 56:8-167.

Effective Dates:

Section 7 of L. 1999, c. 298 provides: "This act shall take effect on the 180th day after enactment." Chapter 298, L. 1999, was approved on December 23, 1999.
§ 56:8-2. Fraud, etc., in connection with sale or advertisement of merchandise or real estate as unlawful practice

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice; provided, however, that nothing herein contained shall apply to the owner or publisher of newspapers, magazines, publications or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher, or operator has no knowledge of the intent, design or purpose of the advertiser.


NOTES:

Case Notes

Antitrust & Trade Law: Consumer Protection: General Overview
Antitrust & Trade Law: Consumer Protection: Deceptive Labeling & Packaging: General Overview
Antitrust & Trade Law: Consumer Protection: False Advertising: General Overview
Antitrust & Trade Law: Consumer Protection: False Advertising: State Regulation
Antitrust & Trade Law: Consumer Protection: Vehicle Warranties: General Overview
§ 56:8-19.1. Exemption from consumer fraud law, certain real estate licensees, circumstances

Notwithstanding any provision of P.L. 1960, c. 39 (C. 56:8-1 et seq.) to the contrary, there shall be no right of recovery of punitive damages, attorney fees, or both, under section 7 of P.L. 1971, c. 247 (C. 56:8-19), against a real estate broker, broker-salesperson or salesperson licensed under R.S. 45:15-1 et seq. for the communication of any false, misleading or deceptive information provided to the real estate broker, broker-salesperson or salesperson, by or on behalf of the seller of real estate located in New Jersey, if the real estate broker, broker-salesperson or salesperson demonstrates that he:

a. Had no actual knowledge of the false, misleading or deceptive character of the information; and

b. Made a reasonable and diligent inquiry to ascertain whether the information is of a false, misleading or deceptive character. For purposes of this section, communications by a real estate broker, broker-salesperson or salesperson which shall be deemed to satisfy the requirements of a "reasonable and diligent inquiry" include, but shall not be limited to, communications which disclose information:

(1) provided in a report or upon a representation by a person, licensed or certified by the State of New Jersey, including, but not limited to, an appraiser, home inspector, plumber or electrical contractor, or an unlicensed home inspector until December 30, 2005, of a particular physical condition pertaining to the real estate derived from inspection of the real estate by that person;

(2) provided in a report or upon a representation by any governmental official or employee, if the particular information of a physical condition is likely to be within the knowledge of that governmental official or employee; or

(3) that the real estate broker, broker-salesperson or salesperson obtained from the seller in a property condition disclosure statement, which form shall comply with regulations promulgated by the director in consultation with the New Jersey Real Estate Commission, provided that the real estate broker, broker-salesperson or salesperson informed the buyer that the seller is the source of the information and that, prior to making that communication to the buyer, the real estate broker, broker-salesperson or salesperson visually inspected the property with reasonable diligence to ascertain the accuracy of the information disclosed by the seller.

Nothing in this section shall be interpreted to affect the obligations of a real estate broker, broker-salesperson or salesperson pursuant to the "New Residential Construction Off-Site Conditions Disclosure Act," P.L. 1995, c. 253 (C. 46:3C-1 et seq.), or any other law or regulation.

WILLIAM W. ALLEN AND VIVIAN ALLEN, PLAINTIFFS-RESPONDENTS,
v.
V AND A BROTHERS, INC., D/B/A CALIPER FARMS NURSERY AND
LANDSCAPING SERVICES, DEFENDANTS, AND ANGELO DIMEGLIO,
THE ESTATE OF VINCENT DIMEGLIO, DECEASED; AND THOMAS
TAYLOR, INDIVIDUALLY, DEFENDANTS-APPELLANTS.

A-30 September Term 2010, 066568

SUPREME COURT OF NEW JERSEY

208 N.J. 114; 26 A.3d 430; 2011 N.J. LEXIS 697

February 28, 2011, Argued
July 7, 2011, Decided

PRIOR HISTORY: [***1]
On certification to the Superior Court, Appellate Division, whose opinion is reported at 414 N.J. Super. 152, 997 A.2d 1067 (2010).

CASE SUMMARY:

PROCEDURAL POSTURE: Respondent homeowners sued a corporation and appellants, its owner, the estate of a former owner, and its employee, alleging violations of New Jersey's Consumer Fraud Act (CFA), N.J.S.A. §§ 56:8-1 to 56:8-20. The trial court granted appellants summary judgment and dismissed the claims against them. Respondents appealed; the New Jersey Superior Court, Appellate Division, reversed and remanded the matter. Appellants sought review.

OVERVIEW: Respondents alleged appellants and the corporation violated CFA regulations by failing to execute a written contract (N.J.A.C. 13:45A-16.2(a)(12)); failing to obtain final approval for construction before accepting final payment (§ 13:45A-16.2(a)(10)(ii)); and failing to obtain respondents' consent before modifying the design of a wall and substituting inferior backfill (§ 13:45A-16.2(a)(3)(iv)). The trial court held that the CFA did not create a direct cause of action against appellants. The intermediate appellate court disagreed and remanded the matter for a determination of whether appellants had personally participated in the actions forming the basis for the CFA claims. It barred them from relitigating damages because the jury, in the trial of the CFA claims against the corporation, had already assessed damages. The high court agreed that appellants could be liable individually for a CFA claim based on a regulatory violation, but the determination was fact-sensitive. As the employee and estate were not in privity with the corporation, and there was no evidence the owner exercised control over the litigation, they were not collaterally estopped from relitigating damages.

OUTCOME: The high court affirmed and modified the intermediate appellate court's reversal of the trial court's grant of summary judgment in favor of appellants, reversed the judgment precluding relitigation of the quantum of CFA damages, and remanded the matter to the trial court for further proceedings.

CORE TERMS: individual liability, retaining wall, collateral estoppel, pool, home improvements, backfill, height, personal liability, quantum, affirmative acts, individually liable, veil-piercing, privity, summary judgment, omission, seller, urge, engineer, written contract, consumer, inferior, corporate entities, corporate officers, individually, installed, buyer, individual employees, final approval, failure to obtain, misrepresentation

LexisNexis(R) Headnotes

Governments > Legislation > Interpretation

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[HN1] In interpreting a statute, the court's role is to determine and effectuate the legislature's intent. In doing so, it looks first to the plain language of the statute, seeking further guidance only to the extent that the legislature's intent cannot be derived from the words that it has chosen. In general, the court reads the words that were chosen in accordance with their ordinary meaning, or, in the case of technical terms, in accordance with those meanings, and it does not presume that the legislature intended something other than that expressed by way of the plain language.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation
Governments > Legislation > Interpretation
Governments > Legislation > Types of Statutes

[HN2] New Jersey's Consumer Fraud Act, N.J.S.A. §§ 56:8-1 to 56:8-20, is remedial legislation, which should be construed liberally in favor of consumers.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation


Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation
Contracts Law > Types of Contracts > Construction Contracts


Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation
Contracts Law > Types of Contracts > Construction Contracts

[HN5] New Jersey's Home Improvement Practices regulations set forth a variety of acts or omissions that, by definition, shall be unlawful, N.J.A.C. 13:45A-16.2(a), and that therefore constitute violations of the New Jersey's Consumer Fraud Act (CFA), N.J.S.A. §§ 56:8-1 to 56:8-20.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation
Contracts Law > Types of Contracts > Construction Contracts


Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation
Real Property Law > Zoning & Land Use > Building & Housing Codes


Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation
Contracts Law > Types of Contracts > Construction Contracts

[HN8] N.J.A.C. 13:45A-16.2(a)(3)(iv) begins with a declaration that certain practices are unlawful, one of which is bait selling, and which includes substitution of products or materials for those specified in the home improvement contract, or otherwise represented or sold for use in making of home improvements by sample, illustration or model, without the knowledge or consent of the buyer.

Administrative Law > Agency Rulemaking > General Overview
Administrative Law > Separation of Powers > Legislative Controls > Explicit Delegation of Authority
Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

[HN9] N.J.S.A. § 56:8-2 of New Jersey's Consumer Fraud Act (CFA), N.J.S.A. §§ 56:8-1 to 56:8-20, protects consumers who have fallen prey to three separate kinds of unlawful practices. These are affirmative acts, knowing omissions, and violations of regulations promulgated pursuant to the CFA. The language of the CFA specifically identifies a variety of affirmative acts, including deception, fraud, false pretense, false promise, and misrepresentation, and it also identifies as actionable the knowing concealment, suppression or omission of any material fact, if intentional, § 56:8-2. In addition, by referring to "unconscionable commercial practices," § 56:8-2, and by authorizing the New Jersey Attorney General to promulgate regulations that shall have the force of law, N.J.S.A. § 56:8-4, the CFA permits claims to be based on regulatory violations.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation
Business & Corporate Law > Corporations > General Overview
a person engaged in the business of making or selling home improvements and includes corporations, partnerships, associations and any other form of business organization or entity, and their officers, representatives, agents and employees. N.J.A.C. 13:45A-16.1A.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

Business & Corporate Law > Corporations > General Overview

[HN14] In considering whether there can be individual liability for violations of N.J.A.C. 13:45A-16.2(a)(3)(iv), 13:45A-16.2(a)(10)(ii), or 13:45A-16.2(a)(12), a distinction can be drawn between the principals of a corporation and its employees. The principals may be broadly liable, for they are the ones who set the policies that the employees may be merely carrying out. Therefore, if the principals have adopted a course of conduct in which written contracts are never used, in clear violation of § 13:45A-16.2(a)(12), there may be little basis on which to extend personal liability to the employee who complies with that corporate policy. However, if the employee unilaterally concludes that an inferior product should be used in place of one specified in a contract and does so without the knowledge of the homeowner, in violation of § 13:45A-16.2(a)(3)(iv), there is little reason to construe the New Jersey's Consumer Fraud Act, N.J.S.A. §§ 56:8-1 to 56:8-20, to limit liability to the corporate employer and permit that employee to escape bearing some individual liability. As a result, although the analysis of whether there can be individual liability for regulatory violations is more complex, and although it turns on the particular facts and circumstances of the claim and the regulations, the suggestion that there can be no basis for individual liability cannot be endorsed.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

Business & Corporate Law > Corporations > General Overview

Civil Procedure > Summary Judgment > Standards > Appropriateness

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

[HN15] In determining whether an employee or officer of a corporation may be liable individually under New Jersey's Consumer Fraud Act, N.J.S.A. §§ 56:8-1 to 56:8-20, when the basis for the claim is a regulatory violation, the necessarily fact-sensitive determinations often will not lend themselves to adjudication on a record presented in the form of a summary judgment motion. Indeed, a

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

Business & Corporate Law > Corporations > General Overview

Civil Procedure > Summary Judgment > Standards > Appropriateness

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[HN15] In determining whether an employee or officer of a corporation may be liable individually under New Jersey's Consumer Fraud Act, N.J.S.A. §§ 56:8-1 to 56:8-20, when the basis for the claim is a regulatory violation, the necessarily fact-sensitive determinations often will not lend themselves to adjudication on a record presented in the form of a summary judgment motion. Indeed,
trial court may need to await presentation of all of plaintiff’s proofs about the potential individual liability of corporate officers or employees before there is an adequate record to support a decision. That, however, does not suggest that there will never be a ground on which to conclude that individual claims cannot proceed. Instead, once an adequate record is developed and the evidence assembled, if a trial court concludes that the proofs fail to demonstrate a sufficient basis for imposition of individual liability, the court could direct a verdict in favor of one or more of the individually named defendants. R. 4:40-1.

**Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation**

[HN16] Individual liability for a violation of New Jersey’s Consumer Fraud Act, N.J.S.A. §§ 56:8-1 to 56:8-20, will necessarily depend upon an evaluation of both the specific source of the claimed violation that forms the basis for the plaintiff’s complaint as well as the particular acts that the individual has undertaken.

**Civil Procedure > Equity > General Overview**

**Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel**

[HN17] Collateral estoppel, which is also known as issue preclusion, prohibits relitigation of issues if its five essential elements are met. Those elements are that (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding. Moreover, because it is an equitable doctrine, even if all five elements coalesce, it will not be applied when it is unfair to do so.

**Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel**

[HN18] The New Jersey Supreme Court has identified a variety of fairness factors that favor application of collateral estoppel, including conservation of judicial resources; avoidance of repetitious litigation; and prevention of waste, harassment, uncertainty and inconsistency. It has, likewise, identified factors that weigh against application of collateral estoppel. Those factors include consideration of whether the party against whom preclusion is sought could not have obtained review of the prior judgment; the quality or extent of the procedures in the two actions is different; it was not foreseeable at the time of the prior action that the issue would arise in subsequent litigation; and the precluded party did not have an adequate opportunity to obtain a full and fair adjudication in the prior action. Factors that weigh against preclusion are a concern that treating the issue as conclusively determined may complicate determination of issues in the subsequent action and other compelling circumstances make it appropriate that the party be permitted to relitigate the issue. The ultimate question is whether there is good reason, all things considered, to allow the party to relitigate the issue.

**Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel**

[HN19] In the context of collateral estoppel and res judicata, the concept of privity is necessarily imprecise. It is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata. In general, a relationship is considered "close enough" only when the party is a virtual representative of the non-party, or when the non-party actually controls the litigation. Privity is equated with a finding that a non-party controls or substantially participates in the control of the presentation on behalf of a party. Control of the litigation is regarded as having effective choice as to the legal theories and proofs to be advanced on behalf of the party to the action as well as control over the opportunity to obtain review.

**COUNSEL:** Paul J. Maselli argued the cause for appellants (Maselli Warren, attorneys).

George T. Dougherty argued the cause for respondents (Katz & Dougherty, attorneys; Mr. Dougherty and Jack A. Butler, on the briefs).

Joshua T. Rabinowitz, Deputy Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (Paula T. Dow, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel).

Gavin J. Rooney submitted a brief on behalf of amicus curiae New Jersey Lawsuit Reform Alliance (Lowenstein [*10] Sandler, attorneys; Mr. Rooney and Jamie R. Gottlieb, on the brief).
Eric L. Probst submitted a brief on behalf of amici curiae Northeast Spa and Pool Association, New Jersey Landscape Contractors Association, National Kitchen and Bath Association, Community Builders and Remodelers Association and Builders League of South Jersey (collectively, the "Home Improvement Associations") (Porzio, Bromberg & Newman, attorneys; Mr. Probst and Raquel S. Lord, on the briefs).

JUDGES: JUSTICE HOENS delivered the opinion of the Court. CHIEF JUSTICE RABNER and JUSTICES LONG, LaVECCHIA, ALBIN, and RIVERA-SOTO join in JUSTICE HOENS’s opinion.

OPINION BY: HOENS

OPINION

[***432] [*117] JUSTICE HOENS delivered the opinion of the Court.

This appeal involves two related questions that require us to consider the grounds for imposing individual liability based upon a violation of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20.

The first question concerns the interplay between CFA claims brought against corporate entities and individual employees or officers who are also named as defendants. More specifically, we consider whether, and under what circumstances, the owners and employees of a corporation may be individually liable for CFA violations that [***11] are directly attributable to acts undertaken by them through the corporate entity.

The second, and related, issue concerns whether those individuals may be barred by the doctrine of collateral estoppel from relitigating the quantum of damages assessed by a jury in the context of a trial in which only the corporate defendant was represented.

I.

We derive our recitation of the facts that give rise to the issues on appeal from the testimony offered at trial. In doing so, however, we recognize that the factual record relating to the individual defendants is constrained because the trial proceeded with only the corporation as a defendant. That is, although two of the individual defendants appeared at trial and testified as fact witnesses they did so after they had been dismissed as parties and they were not represented by individual counsel at trial. Moreover, [*118] the record does not reflect that either of them was even present during the trial save for the day on which each was called to testify.

With that caveat concerning the facts that can be derived from the record, it is clear that, at its core, this is a dispute [***433] between plaintiffs William and Vivian Allen and the corporate and individual [***12] defendants they hired to perform work on their house and grounds. Although it is largely a dispute concerning the quality of the work performed, plaintiffs also allege that defendants violated three separate regulations governing home improvements. Those regulatory violations form the basis for plaintiffs’ CFA claims against the corporation as well as the individuals.

A.

Plaintiffs lived in Skillman, during which time an entity known as Caliper Farms performed landscaping work on their property. At all times relevant to this dispute, Caliper Farms was the name through which the corporate defendant, V and A Brothers, Inc., did business. At the time when the events giving rise to this dispute were unfolding, the corporation was wholly owned by two brothers, Vincent and Angelo DiMeglio. After the dispute arose, but before this lawsuit was filed, Vincent passed away, and Angelo purchased Vincent’s shares of V and A Brothers, Inc. from Vincent’s estate, thereby becoming the sole owner of the corporation.

In 2002, plaintiffs purchased a home in Princeton Township that was in need of landscaping. Because they had been satisfied with the work performed by Caliper Farms on their home in Skillman, [***13] they engaged defendant V and A Brothers, Inc. to do the landscaping work at the Princeton property. As part of the work at the residence in Princeton, plaintiffs planned to build an inground swimming pool in the backyard of the home. Because the lot on which the Princeton home was built was steeply sloped, the scope of that work included building a retaining wall and creating a level area on the property where the pool could be installed. Plaintiff [*119] contracted with V and A Brothers, Inc. to level the property and build the retaining wall, but hired a separate company to install the pool.

Angelo testified that his brother Vincent, who was several years older than he, had started the business and acted as the on-site manager for the work that the corporation performed. In contrast, Angelo attended to administrative matters and, although he occasionally visited sites and observed work in progress, he played a more limited role in the field than did Vincent. In addition to Angelo and Vincent, the corporation had one full-time employee, Thomas Taylor. Taylor was their sales representative and served as the corporation’s principal contact with plaintiffs. He was responsible for designing [***14] the landscaping layout and evaluating the way the backyard could be configured to accommodate the pool, a task that was complicated not only by the steep slope at the rear of the property, but by wetlands restrictions and zoning constraints as well.
Plaintiffs assert that they hired V and A Brothers, Inc. to level off the slope and build the retaining wall based on their discussions with Taylor. The parties’ agreement concerning the grading of the slope and the construction of the wall was not reduced to writing, but all parties agree that the estimated price was $160,000. Although V and A Brothers, Inc. designed the layout of the project, defendants relied on their block distributor, E.P. Henry, and an engineering firm, Earth Engineering, for the design of the retaining wall and for the job specifications relating to that aspect of defendants’ work. According to plaintiffs, the agreed-upon work included specifications about the type and quality of backfill that could be used and that fixed the maximum height of the retaining wall. Both the backfill and the wall height eventually became sources of disagreement between the parties.

The construction of the retaining wall required the use of backfill to support the wall. There are, however, many varieties, types, and grades of backfill, each of which is capable of supporting different amounts of weight. As a result, the plans for this retaining wall specified the type of backfill required for the job. Plaintiffs assert that V and A Brothers, Inc. did not use the specified backfill, but instead substituted an inferior grade of fill that defendants trucked to plaintiffs’ property from one of defendants’ other construction sites. Both Angelo and Taylor testified that Vincent was responsible for obtaining backfill that was appropriate for the job.

The plans also specified that the wall would be twelve feet, four inches in height. As the overall project proceeded, however, the construction of the pool changed in two ways. First, the pool installation was impacted by subsurface conditions that were apparently unanticipated. As a result, the other contractor completed the pool installation, the actual elevation of the pool was higher than had been expected. Second, in order to create a large enough area to install the pool, the retaining wall needed to be moved out as compared to the original plan. Moving the wall required that it be located farther down the existing slope on the property. Taken together, these two alterations meant that had the retaining wall been installed as designed, the top of it would have been below the level at which the pool was actually constructed. V and A Brothers, Inc. therefore increased the height of the retaining wall to conform with the elevation of the pool, resulting in a finished wall that significantly exceeded the height specified in the plan.

Rather than the twelve-foot, four-inch height included in the plan, the completed wall was eighteen feet, four inches high. Taylor testified that there was nothing in the engineering plan to indicate that the specified height of the wall represented the maximum permissible height, but he conceded that he did not consult further with the engineers while building a wall that exceeded the planned height by nearly fifty percent.

After V and A Brothers, Inc. completed the work but before it obtained final municipal approval for the construction, plaintiffs paid in full for all of the work that had been performed. It appears from the record that plaintiffs never received final municipal approvals for the work.

According to plaintiffs, not long after the wall was built and the swimming pool was installed, they began to notice defects in the work. First, they observed that the pool began to show signs that it was tilting in place, as evidenced by the fact that they could see that the water level at one side was significantly higher than it was at the other side. That defect was later confirmed by a formal survey. At about the same time, plaintiffs noticed that the retaining wall had developed a visible bulge in its middle section, and that cracks had begun to appear in the face of the wall.

After they saw what they perceived to be evidence of defective work, plaintiffs hired an engineer to investigate. According to their engineer, the retaining wall showed excessive bulging, which was caused by lateral spreading of the blocks at its corner. The engineer opined that this movement of the retaining wall would continue and that it would eventually cause the pool to crack and leak. The engineer attributed the movement of the wall to two causes, each of which he concluded was the fault of V and A Brothers, Inc. In the expert engineer’s opinion, the movement of the retaining wall was directly caused by its excessive height and by the inferior backfill that had been used to support it. Furthermore, the expert engineer concluded that the retaining wall, as constructed, did not comply with industry standards.

B.

Plaintiffs filed their two-count complaint naming both corporate and individual defendants. The first count was directed solely to V and A Brothers, Inc., the corporate defendant. That count alleged that the corporation breached its contract with plaintiffs by improperly constructing the retaining wall and by using inferior backfill, which plaintiffs asserted had resulted in substantial property damage.

The second count of the complaint was directed to the corporation, but also asserted claims individually against Angelo and Vincent’s estate, the two owners of the corporation, and against Thomas Taylor, the company’s employee. That count of the complaint alleged three violations of the CFA: (1) the failure to execute a written contract, as required by N.J.A.C.
13:45A-16.2(a)(12); (2) the failure to obtain final approval for the construction before accepting final payment, as required by N.J.A.C. 13:45A-16.2(a)(10)(ii); and (3) the failure to obtain plaintiffs’ consent before modifying the design of [***19] the retaining wall and substituting the inferior backfill material, as required by N.J.A.C. 13:45A-16.2(a)(3)(iv).

Before trial, the parties filed cross-motions for partial summary judgment. Plaintiffs moved for partial summary judgment against all defendants for the violation of N.J.A.C. 13:45A-16.2(a)(12), based on defendants' failure to provide them with a written contract. The individual defendants moved for summary judgment on all claims against them, arguing that only the corporate entity, V and A Brothers, Inc., could be liable for the claimed violations of the CFA.

The trial court granted plaintiffs’ motion for partial summary judgment against V and A Brothers, Inc., concluding that the corporation's failure to execute a written contract violated N.J.A.C. 13:45A-16.2(a)(12) and entitled plaintiffs to recovery under the CFA.

On the same date, the trial court also granted the motion to dismiss the complaint against the individual defendants. Reasoning that the CFA did not create a direct cause of action against the individuals, the court instead applied a traditional veil-piercing approach to plaintiffs’ claims against the individuals. Because plaintiffs had not alleged that the [***20] individual defendants engaged in common law fraud, used the corporation as their alter ego, misused the corporation, or intentionally made false representations about the corporate status, the court concluded that there was no basis on which plaintiffs could recover from them individually. The trial court's order granting the motion filed by the individual defendants left only the corporate entity as a defendant.

[*123] Plaintiffs' remaining claims, charging the corporation with breach of contract with and against the CFA violations based on the failure to obtain final approval and the failure to secure written consent to alter the wall design and to substitute the different backfill, were tried before a jury in 2008. The jury returned a verdict in favor of plaintiffs and against the corporation on all counts, awarding damages of $100,000 for breach of contract, $25,000 for the failure to execute a written contract, $25,000 for the failure to obtain final approval, and $80,000 for modifying the design and substituting material without plaintiffs’ knowledge or consent.

The damages on the three CFA claims, which totaled $130,000, were trebled, resulting in an award of $390,000. Together with the damages [***21] for breach of contract, the total award was $490,000, to which [***36] attorneys’ fees in the amount of $78,632.10 were added.

After V and A Brothers, Inc.’s motion for a judgment notwithstanding the verdict was denied, it did not pursue an appeal. Plaintiffs, however, appealed the pretrial order granting summary judgment in favor of the individual defendants.

C.

The Appellate Division, in a published opinion, reversed the trial court's order dismissing the claims against the individual defendants. Allen v. V & A Bros., Inc., 414 N.J. Super. 152, 155, 997 A.2d 1067 (App.Div.2010). Finding support for individual liability in the statutory language that defines a violation of the CFA as the commission of an “unlawful practice” by a “person,” id. at 156, 997 A.2d 1067, and relying on precedents in which liability was imposed "upon individuals who were principals or employees of corporations . . . and who directly participated in the conduct giving rise to CFA liability," ibid., the panel found no impediment to plaintiffs’ claims against the individuals, id. at 156-58, 997 A.2d 1067 (citations omitted).

Having concluded that plaintiffs were entitled to proceed on the individual claims that had been dismissed, the panel remanded the [*124] matter [***22] for a determination of whether any of the individual defendants had personally participated in the regulatory violations that formed the basis for plaintiffs’ CFA complaint. Id. at 160, 997 A.2d 1067. In doing so, the panel barred the individual defendants from relitigating damages, noting that “a jury has already determined the quantum of damages flowing from each of the regulatory violations.” Ibid. Thereafter, in an unpublished order, the panel moderated that directive somewhat, recognizing that the liability of any particular individual defendant might not be coextensive with that of the corporation. The panel therefore permitted the individuals to contest the extent of their personal liability on remand, but continued to preclude relitigation of the overall quantum of damages found by the jury in the trial against the corporate defendant.

We granted defendants' petition for certification, in which they challenge the conclusions of the appellate panel as to both the basis for imposing individual liability and the limitation on their ability to litigate the quantum of damages that can be assessed against them individually. 204 N.J. 40, 6 A.3d 443 (2010). We therefor granted leave to the Home Improvement [***23] Associations, the New Jersey Lawsuit Reform Alliance, and the Attorney General of the State of New Jersey to participate as amici curiae.

II.
The individual defendants urge us to reverse the Appellate Division's conclusion that they can be individually liable to plaintiffs for several reasons. First, they argue that the term "person" as used in the CFA should be narrowly construed, asserting that although the panel's decision accords with a literal interpretation of the wording of the statute, it is incompatible with legislative intent. They assert that the CFA's references to persons are not designed to impose individual liability upon principals and employees of corporations. They argue that the term instead serves to prevent corporations from avoiding liability to consumers by disavowing an employee's conduct and to ensure that corporations will [***25] be liable for acts of employees even absent proof of a theory such as negligent supervision or respondent superior.

Second, they contend that the Appellate Division erred by imposing individual liability without requiring plaintiffs to prove [***437] that there are grounds for piercing the corporate veil, thereby interpreting the CFA so as to supplant [***24] the ordinary operation of the Business Corporation Act, N.J.S.A. 14A:1-1 to: 17-18. They assert that the Appellate Division misconstrued precedent that, although permitting CFA claims against a corporation's principal to proceed, rested individual liability not on the statutory definition of "person," but on the veil-piercing conduct of the principal. See New Mea Constr. Corp. v. Harper, 203 N.J. Super. 486, 497 A.2d 534 (App.Div.1985). Moreover, they contend that the panel erred by finding no distinction between imposition of personal liability on individuals based on technical regulatory violations and imposition of personal liability based on an individual's affirmative acts or intentional omissions.

Defendants also urge this Court to conclude that the Appellate Division erred in precluding or limiting their ability to contest the quantum of damages. They argue that the panel's directive circumscribing their proofs violates their right to due process because the only defendant at trial was the corporation and their participation was limited to their appearances as fact witnesses. They further assert that, in the absence of some proof of privity with the corporation, the panel's directive amounts [***25] to an erroneous imposition of collateral estoppel against them. Alternatively, defendants argue that even if the record demonstrated that all the elements of collateral estoppel were present, it would be unfair to apply it against parties who were unrepresented at trial and who could not have known that they were at risk of entry of judgment against themselves personally.

Plaintiffs urge this Court to affirm the Appellate Division's analysis in its entirety. They assert that the plain language of the CFA permits imposition of individual liability and that the Appellate Division's reading of the CFA accords with legislative intent. [*126] They urge this Court to reject defendants' arguments regarding veil-piercing as being irrelevant to the statutory cause of action. In the alternative, they assert that they should be afforded the benefit of veil-piercing because there is ample evidence in the record that these individuals disregarded the corporate form. Further, plaintiffs argue that because the three individual defendants comprised the entire corporation, application of the participation analysis would also result in a finding of individual liability. Finally, plaintiffs urge this Court to [***26] reject the suggestion that there is a ground on which to distinguish between regulatory violations and affirmative acts when imposing individual liability pursuant to the CFA.

Plaintiffs counter defendants' arguments about damages by pointing out that defendants participated in the trial and by arguing that defendants' collateral estoppel arguments are irrelevant because that doctrine did not form the basis of the Appellate Division's decision, substantively, plaintiffs assert that because there is an identity of interest between the corporation and the individual defendants, precluding the individual defendants from relitigating damages is warranted.

Amici Home Improvement Associations urge this Court to reverse the judgment of the Appellate Division, arguing that individual liability for violations of the CFA must rest on a traditional veil-piercing analysis that was absent here.

Amicus New Jersey Lawsuit Reform Alliance also urges us to reverse the panel's judgment, but asserts that the appropriate vehicle for imposition of individual liability for CFA violations is the tort participation theory that this Court has previously adopted in similar circumstances. See Saltiel [***438] v. GSI Consultants, Inc., 170 N.J. 297, 788 A.2d 268 (2002).

Amicus [****27] Attorney General argues that this Court should affirm the Appellate Division's judgment, albeit with some alterations. Although agreeing that CFA violations, including regulatory violations, can support a finding of individual liability, the Attorney General asserts that the participation theory should supplement, [*127] rather than supplant, individual liability pursuant to the CFA and suggests methods to limit the ability of the individual defendants to evade liability.

III.

Our consideration of the appropriate parameters of individual liability requires that we analyze both the language used in the CFA and the traditional theories utilized by courts to impose personal liability in circumstances in which acts are undertaken through, or in conjunction with, a corporation. In this context, we must consider not only the relationship between the CFA and traditional veil-piercing theories, but must look as well to
the alternative approach known as the tort participation theory, see Saltiel, supra, 170 N.J. at 303-05, 788 A.2d 268, that the parties have suggested might be appropriate.

A.

The principles governing statutory interpretation are both well-established and familiar, but bear repeating. [HN1] In interpreting a statute, our role "is to determine and effectuate the Legislature's intent." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553, 964 A.2d 741 (2009). In doing so, we "look first to the plain language of the statute, seeking further guidance only to the extent that the Legislature's intent cannot be derived from the words that it has chosen." Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J. 251, 264, 952 A.2d 1077 (2008). In general, we read the words that were chosen "in accordance with their ordinary meaning." Marino v. Marino, 200 N.J. 315, 329, 981 A.2d 855 (2009), or, in the case of technical terms, "in accordance with those meanings." In re Lead Paint Litig., 191 N.J. 405, 430, 924 A.2d 484 (2007), and we do not "assume that the Legislature intended something other than that expressed by way of the plain language," O'Connell v. State, 171 N.J. 484, 488, 795 A.2d 857 (2002).

[*128] B.

We need not recite the historical underpinnings of the CFA, which have been explained previously by this Court, see Cox v. Sears Roebuck & Co., 138 N.J. 2, 14-15, 647 A.2d 454 (1994), save for the observation that [HN2] the Act is remedial legislation, which "should be construed liberally in favor of consumers." Id. at 15, 647 A.2d 454 (citations omitted). Instead, we begin with the language that the Legislature used [***29] in the CFA, two sections of which are directly relevant to our analysis.

First, the CFA uses the term "person," which the statute itself defines:

[HN3] The term "person" as used in this act shall include any natural person or his legal representative, partnership, corporation, company, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestuis que trustent thereof[.]

[N.J.S.A. 56:8-1(d).]

Second, however, the cause of action that the statute creates, although it utilizes as a central concept the term "person," is broadly defined as follows:

[HN4] The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, [***439] or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice[.]

[N.J.S.A. 56:8-2.]

In [***30] addition to these statutory provisions, our analysis of individual liability in this matter also requires consideration of the three regulations that formed the basis for the CFA claims against the corporate and individual defendants. Each of the regulations was promulgated by the Attorney General, pursuant to statutory authority, see N.J.S.A. 56:8-4 (providing that "the Attorney General, in addition to other powers conferred upon him by this act, may . . . promulgate such rules and regulations, . . . which shall have the force of law"), as part of an effort to regulate the home improvement industry through the "Home Improvement Practices" regulations, see N.J.A.C. 13:45A-16.1 to -16.2.

[HN5] The "Home Improvement Practices" regulations set forth a variety of acts or omissions that, by definition, 'shall be unlawful," N.J.A.C. 13:45A-16.2(a), and that therefore constitute violations of the CFA. The first of the regulations at issue in this appeal relates to the requirement that home improvement contracts, and all changes to those contracts, be in writing, be signed by the parties, and include specific information:

[HN6] Home improvement contract requirements-writing requirement: All home improvement [***31] contracts for a purchase price in excess of $500.00, and all changes in the terms and conditions thereof shall be in writing. Home improvement contracts which are required by this subsection to be in writing, and all changes in the terms and conditions thereof, shall be signed by all parties.
thereto, and shall clearly and accurately set forth in legible form and in understandable language all terms and conditions of the contract, including, but not limited to, the following:

i. The legal name and business address of the seller, including the legal name and business address of the sales representative or agent who solicited or negotiated the contract for the seller;

ii. A description of the work to be done and the principal products and materials to be used or installed in performance of the contract. The description shall include, where applicable, the name, make, size, capacity, model, and model year of principal products or fixtures to be installed, and the type, grade, quality, size or quantity of principal building or construction materials to be used. Where specific representations are made that certain types of products or materials will be used, or the buyer has specified that certain types of products are to be used, a description of such products or materials shall be clearly set forth in the contract;

iii. The total price or other consideration to be paid by the buyer, including all finance charges. If the contract is one for time and materials, the hourly rate for labor and all other terms and conditions of the contract affecting price shall be clearly stated;

iv. The dates or time period on or within which the work is to begin and be completed by the seller;

v. A description of any mortgage or security interest to be taken in connection with the financing or sale of the home improvement; and

[*440] vi. A statement of any guarantee or warranty with respect to any products, materials, labor or services made by the seller.

[N.J.A.C. 13:45A-16.2(a)(12).]

The second of the regulations that is implicated in this appeal relates to obtaining final approval for the work prior to accepting final payment from the customer:

[*130] [HN7] Where midpoint or final inspections are required under state laws or local ordinances, copies of inspection certificates shall be furnished to the buyer by the seller when construction is completed and before final payment is due or the signing of a completion [***33] slip is requested of the buyer.

[N.J.A.C. 13:45A-16.2(a)(10)(ii).]

The final regulation relevant to our analysis addresses substitutions made without the customer’s consent or knowledge. That regulation [HN8] begins with a declaration that certain practices are unlawful, one of which is “bait selling,” and which includes:

Substitut[ion of] products or materials for those specified in the home improvement contract, or otherwise represented or sold for use in making of home improvements by sample, illustration or model, without the knowledge or consent of the buyer[.]


C.

With these essential statutory and regulatory provisions to serve as the guide for our analysis, our consideration of whether individuals who have an ownership interest in, or who are employed by, a corporation can be individually liable for CFA violations must begin with the statutory language. Focusing first on the statute’s definition of person, N.J.S.A. 56:8-1(d), there can be no doubt that the CFA broadly contemplates imposition of individual liability. That definition not only begins with a reference to natural persons, but also identifies numerous other categories into which an individual [***34] might fall, including individuals who are acting through or on behalf of corporations and other business entities. Ibid. The very breadth of the definition itself lends strong support to the proposition that, at least in theory, the CFA permits the imposition of individual liability upon one whose acts are part of a violation by a corporation.

Our analysis of the CFA, however, cannot end there, because the definitional section does not itself create the basis for liability. Defining the term “person” merely identifies the universe of actors who may engage in the behavior that the statute defines to be the violation; it
does not independently create a basis for their liability. See N.J.S.A. 56:8-1(d). Rather, liability can only be imposed in accordance with the operative provision of the CFA, [*131] which has as its focus the "act" that is defined as a violation of the statute's protections. See N.J.S.A. 56:8-2.

In analyzing the meaning of that operative provision of the CFA, we have long recognized that it [HN9] protects consumers who have fallen prey to three separate kinds of unlawful practices. We have described these to be affirmative acts, knowing omissions, and violations of regulations promulgated [***35] pursuant to the statute. See Bosland, supra, 197 N.J. at 556, 964 A.2d 741 (citing Cox, supra, 138 N.J. at 17, 647 A.2d 454). The language of the CFA specifically identifies a variety of affirmative acts, including "deception, fraud, false pretense, false promise, [and] misrepresentation," and it also identifies as actionable "the knowing[ ] concealment, suppression or omission of any material fact," if intentional, N.J.S.A. 56:8-2. In addition, by referring to "unconscionable commercial [***441] practice[s]," ibid., and by authorizing the Attorney General to promulgate regulations that shall have the force of law, see N.J.S.A. 56:8-4, the CFA permits claims to be based on regulatory violations.

[HN10] In light of the broad remedial purposes of the CFA and the expansive sweep of the definition of "person," [***36] it is clear that an individual who commits an affirmative act or a knowing omission that the CFA has made actionable can be liable individually. Although the statute would also impose liability on the individual's corporate employer for such an affirmative act, there is no basis on which to conclude that the statute meant to limit recourse to the corporation, and thereby to shield the individual from any liability in doing so.

On the contrary, we have held that corporate officers and employees could be individually liable pursuant to the CFA for their affirmative acts of misrepresentation to a consumer. See Gennari v. Weichert Co. Realtors, 148 N.J. 582, 608-10, 691 A.2d 350 (1997). Our Appellate Division and our trial courts have likewise recognized that individuals may be independently liable for violations of the CFA, notwithstanding the fact that they were acting through a corporation at the time. See New Mea, supra, [*132] 203 N.J. Super. at 502, 497 A.2d 534 (remanding for consideration of individual liability of corporation's principal); Hyland v. Acquarian Age 2,000, Inc., 148 N.J. Super. 186, 193, 372 A.2d 370 (Ch.Div.1977) (deferring determination of personal liability of corporation's founder pending further proceedings); [***37] Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 251-57, 293 A.2d 682 (Ch.Div.1972) (imposing personal liability on corporate officer).

To be sure, in each of these instances, the individuals were not liable merely because of the act of the corporate entity and no court suggested that they could be. Instead, in each of these circumstances, courts focused on the acts of the individual employee or corporate officer to determine whether the specific individual had engaged in conduct prohibited by the CFA. See, e.g., New Mea, supra, 203 N.J. Super. at 502-03, 497 A.2d 534 (directing court on remand to "assess damages against [corporation's] principal . . . if he finds from a review of the record and his findings that she meets the test for liability under that Act"). Hyland, supra, 148 N.J. Super. at 189, 193, 372 A.2d 370 (concluding that question about whether "founder, president, director of the corporation and its moving force" could be personally subjected to injunctive relief or individually liable for statutory penalty "must be answered affirmatively".

The opinion of the court in Kugler provides us with an illustration of the analysis. The Chancery Division, although applying a rather traditional alter ego approach [***38] to impose individual liability on the founder of a corporation engaged in a pyramid scheme, Kugler, supra, 120 N.J. Super. at 257, 293 A.2d 682 (referring to individual as being "part and parcel" of the scheme), also concluded that claims based on fraud permitted imposition of individual liability notwithstanding the use of a corporation, id. at 256-57, 293 A.2d 682 (citing Vreeland v. N.J. Stone Co., 29 N.J. Eq. 188, 195 (Ch.Ct.) (concluding individual stockholders could be liable for deceit; rejecting defense of corporate shield), aff'd, 29 N.J. Eq. 651 (E. & A.1878)). That analysis fits squarely within the contemplation of the CFA and is consistent with our ordinary approach to [*133] liability for fraud. See Gennari, supra, 148 N.J. at 608-10, 691 A.2d 350. Although one might engage in an alternative veil-piercing approach, nothing in the CFA or the relevant precedents suggests that in the absence of veil-piercing the individual employee or officer will [***442] be shielded from liability for the CFA violation he or she has committed.

The more complicated question, and the one raised directly by the facts before us in this appeal, is whether an employee or officer of a corporation may also be liable individually when the basis for the [***39] CFA claim is a regulatory violation rather than an affirmative act or a knowing misrepresentation. That question is further complicated by the fact that, [HN11] for CFA purposes, regulatory violations are analyzed in terms of strict liability, see Cox, supra, 138 N.J. at 18, 647 A.2d 454 (citing Fenwick v. Kay Am. Jeep, Inc., 72 N.J. 372, 376, 371 A.2d 13 (1977)), thus implicating notions of fairness were a regulatory violation to be utilized to impose individual liability on corporate employees and officers.
As a result, our answer to the question presented cannot be seen as a single and definitive one, because [HN12] individual liability for regulatory violations ultimately must rest on the language of the particular regulation in issue and the nature of the actions undertaken by the individual defendant. Some regulatory violations will be ones over which an employee, for example, will have no input and therefore no control. An employee who merely utilizes a form contract selected by the corporate employer that contains technical violations relating to font size, see, e.g., Kent Motor Cars, Inc. v. Reynolds, 207 N.J. 428, 451, 25 A.3d 1027, 2011 N.J. LEXIS 579 (2011) (describing corporate liability for use of automobile sales form that violated regulation [***40] fixing font size promulgated pursuant to CFA), for example, could not in fairness be held individually liable for the resulting loss suffered by a customer. On the other hand, there are many regulations promulgated pursuant to the CFA that identify prohibited practices of a type that focus on the behavior of individual employees or actors and that therefore might support personal liability.

[***41] In addressing whether these individual defendants may be liable to plaintiffs, it is particularly instructive to consider the three specific regulations on which the complaint was based. The complaint charged the corporate and individual defendants with violating the regulations requiring a written contract, N.J.A.C. 13:45A-16.2(a)(12), prohibiting submission of a final invoice in advance of issuance of a final inspection certificate, N.J.A.C. 13:45A-16.2(a)(10)(ii), and forbidding substitution of a higher retaining wall and inferior backfill without permission, N.J.A.C. 13:45A-16.2(a)(3)(iv). Each of those regulations is included in the "Home Improvement Practices" regulations, and each imposes liability on a "seller." Like the definition of "person" in the CFA itself, however, [HN13] "seller" is broadly defined [***41] to mean [ ] a person engaged in the business of making or selling home improvements and includes corporations, partnerships, associations and any other form of business organization or entity, and their officers, representatives, agents and employees." N.J.A.C. 13:45A-16.1A.

[HN14] In considering whether there can be individual liability for these regulatory violations, a distinction can be drawn between the principals of a corporation and its employees. The principals may be broadly liable, for they are the ones who set the policies that the employees may be merely carrying out. Therefore, if the principals have adopted a course of conduct in which written contracts are never used, in clear violation of the regulation, there may be little basis on which to extend personal liability to the employee who complies with that corporate policy. However, if the employee unilaterally concludes that an inferior product should be used in place of one specified in a contract and does so without [***43] the knowledge of the homeowner, there is little reason to construe the CFA to limit liability to the corporate employer and permit that employee to escape bearing some individual liability. As a result, [***42] although the analysis of whether there can be individual liability for regulatory violations is more complex, and although it turns on the particular facts and circumstances of the claim and the regulations, the suggestion that there can be no basis for individual liability is not one we can endorse.

[***44]  These necessarily fact-sensitive determinations often will not lend themselves to adjudication on a record presented in the form of a summary judgment motion. Indeed, as this dispute demonstrates, a trial court may need to await presentation of all of plaintiff's proofs about the potential individual liability of corporate officers or employees before there is an adequate record to support a decision. That, however, does not suggest that there will never be a ground on which to conclude that individual claims cannot proceed. Instead, once an adequate record is developed and the evidence assembled, if a trial court concludes that the proofs fail to demonstrate a sufficient basis for imposition of individual liability, the court could direct a verdict in favor of one or more of the individually-named defendants. See R. 4:40-1.

This concept of individual liability is neither new nor does it [***43] violate the statutory protections of the Business Corporation Act, N.J.S.A. 14A:1-1 to: 17-18. Instead, it is consistent with the related approach to individual liability that we identified as the tort participation theory. See Saltiel, supra, 170 N.J. at 303-04, 788 A.2d 268. In Saltiel, we reasoned that the officers of a turfgrass corporation could be individually liable for preparation and design of turf specifications for an athletic field, id. at 299, 788 A.2d 268, pursuant to the participation theory, id. at 302, 788 A.2d 268, but only if the claim sounded in tort. As we explained, the "essential predicate for application of the [participation] theory is the commission by the corporation of tortious conduct, participation in that tortious conduct by the corporate officer and resultant injury to the plaintiff." Id. at 309, 788 A.2d 268.

Although the Saltiel theory was based on tort liability, which necessitates a finding "that the corporation owed a duty of care to the victim," id. at 303, 788 A.2d 268, we observed that it is analogous to our imputation of personal liability for statutory violations. In particular, we pointed out that a similar analytical approach based on an individual's participation in a prohibited act had been applied by our [***44] courts in the context of the CFA. Id. at 305, 788 A.2d 268 (citing Kugler, supra, 120
The Appellate Division did not specify the legal theory on which it relied in deciding to limit the proceedings on remand as it did. The individual defendants have assumed that the panel must have based its decision on collateral estoppel, a doctrine they argue has no applicability to this dispute. Plaintiffs, although initially asserting that the appellate panel did not use a collateral estoppel analysis, have urged us to conclude that there was sufficient identity of interests and participation in the trial to make application of that doctrine appropriate.

Although the panel did not refer to collateral estoppel, its order precluded relitigation of the overall quantum of damages, a result that would ordinarily implicate a collateral estoppel analysis. [HN17] Collateral estoppel, which [***47] is also known as issue preclusion, prohibits relitigation of issues if its five essential elements are met. Those elements are that

(1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding. [Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 521, 897 A.2d 1003 (2006) (quoting In re Estate of Dawson, 136 N.J. 1, 20-21, 641 A.2d 1026 (1994)).]

[***138] Moreover, because it is an equitable doctrine, even if all five elements coalesce, it "will not be applied when it is unfair to do so." Id. at 521-22, 897 A.2d 1003 (quoting Pace v. Kuchinsky, 347 N.J. Super. 202, 215, [***445] 789 A.2d 162 (App.Div.2002)). [HN18] We have identified a variety of fairness factors that favor application of collateral estoppel, including "conservation of judicial resources; avoidance of repetitious litigation; and prevention of waste, harassment, uncertainty and inconsistency." Id. at 523, 897 A.2d 1003 (quoting Pace, supra, 347 N.J. Super. at 216, 789 A.2d 162).

We [***48] have, likewise, identified factors that weigh against application of collateral estoppel. Those factors include consideration of whether

the party against whom preclusion is sought could not have obtained review of the prior judgment; the quality or extent of the procedures in the two actions is different; it was not foreseeable at the time
of the prior action that the issue would arise in subsequent litigation; and the precluded party did not have an adequate opportunity to obtain a full and fair adjudication in the prior action.

[Ibid. (quoting Pace, supra, 347 N.J. Super. at 216, 789 A.2d 162).]

Other fairness factors are found in the Restatement (Second) of Judgments, to which we have looked previously when considering the parameters of the doctrine of collateral estoppel, see Hernandez v. Region Nine Hous. Corp., 146 N.J. 645, 659, 684 A.2d 1385 (1996). In particular, the Restatement has identified as factors that weigh against preclusion a concern that "treating the issue as conclusively determined may complicate determination of issues in the subsequent action" and "other compelling circumstances make it appropriate that the party be permitted to relitigate the issue." Restatement (Second) of Judgments § 29. [***49] As the commentary to the Restatement notes, "[t]he ultimate question is whether there is good reason, all things considered, to allow the party to relitigate the issue." Id. at Reporter's Note, cmt. j.

The individual defendants, conceding that the first four of the traditional five elements for application of collateral estoppel are apparent from the record, have limited their dispute to whether there is privity between them and the corporate defendant and [*139] whether, even if there is privity, it would be unfair to apply collateral estoppel against them in these circumstances.

We have described [HN19] the concept of privity as being "necessarily imprecise." Zirger v. Gen. Accid. Ins. Co., 144 N.J. 327, 338, 676 A.2d 1065 (1996). As we have explained, "[i]t is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata." Ibid. (quoting Bruszewski v. United States, 181 F.2d 419, 423 (3d Cir.) (Goodrich, J., concurring), cert. denied, 340 U.S. 865, 71 S. Ct. 87, 95 L. Ed. 632 (1950)). In general, "[a] relationship is . . . considered "close enough" only when the party is a virtual representative of the [***50] non-party, or when the non-party actually controls the litigation." Ibid. (quoting Collins v. E.I. DuPont de Nemours & Co., 34 F.3d 172, 176 (3d Cir.1994)).

In a similar fashion, the Restatement equates privity with a finding that a non-party "controls or substantially participates in the control of the presentation on behalf of a party." Restatement (Second) of Judgments § 39. By way of illustration, the Restatement regards control of the litigation as having "effective choice as to the legal theories and proofs to be advanced [on] behalf of the party to the action [as well as] control over the opportunity to obtain review." Id. at cmt. c.

Applying this analytical framework to the individual defendants, there is no basis in the record to conclude that either Taylor [*446] or Vincent's estate was in privity with the corporate defendant, as a result of which neither of them can be collaterally estopped to contest damages. Taylor, who was an employee of the corporation, participated at trial only by testifying as a witness; there is no evidence in the record to suggest that he exercised any control over the litigation. Nor does the record demonstrate that Vincent's estate controlled the litigation. [***51] Although Vincent was a principal of the corporation during the events that gave rise to the dispute, neither he, nor his estate, were principals of the corporation at the time of trial. Rather, following Vincent's death, Angelo [*140] had purchased Vincent's shares from his estate, thus leaving Angelo as the sole principal of the corporation.

That being so, only Angelo might be found to be in privity with the corporation for purposes of collateral estoppel. Nevertheless, we reject the application of the doctrine against Angelo for three reasons. First, although Angelo was the sole shareholder of the corporation during the litigation and appeared as a fact witness during the trial, the record is not sufficiently clear for us to determine whether he actually exercised control over the litigation. second, although it is a close question, it would not be fair to apply collateral estoppel against Angelo. In light of the trial court's dismissal of the claims against the individuals, the trial proceeded only with the corporation as a defendant. As a practical matter, Angelo may have had little incentive to defend vigorously and might well have made tactical decisions that were different from those [***52] that he would have made if he were participating as a defendant whose individual liability was at stake.

Third, imposition of collateral estoppel as to the overall quantum of damages against Angelo would serve no purpose in the context of the matters to be tried on remand. Given that the other individual defendants will not be estopped to relitigate damages attributable to the CFA violations, there is no efficiency to be achieved by precluding Angelo from doing likewise. On the contrary, were only one defendant precluded on this issue, there would be a very real possibility of confusion of the jury, inconsistent results, and unfairness to the rights of the other individual defendants.

V.

The judgment of the Appellate Division is affirmed and modified in part and reversed in part. We affirm and
modify the reversal of the trial court's grant of summary judgment in favor of the individual defendants; we reverse the judgment precluding relitigation of the quantum of CFA damages; and we remand this [*141] matter to the trial court for further proceedings consistent with this decision.

CHIEF JUSTICE RABNER and JUSTICES LONG, LaVECCHIA, ALBIN, and RIVERA-SOTO join in JUSTICE HOENS's opinion.
§ 56:8-19. Action, counterclaim by injured person; recovery of damages, costs

Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefor in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys’ fees, filing fees and reasonable costs of suit.


CASE NOTES:

Antitrust & Trade Law: Consumer Protection: General Overview
Antitrust & Trade Law: Consumer Protection: False Advertising: State Regulation
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Antitrust & Trade Law: Private Actions: Costs & Attorney Fees: General Overview
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Antitrust & Trade Law: Private Actions: Injuries & Remedies: General Overview
Antitrust & Trade Law: Private Actions: Injuries & Remedies: State Regulation
About the Panelists...

Stuart J. Moskovitz, Law Offices of Stuart J. Moskovitz in Freehold, New Jersey, is a commercial litigator concentrating his practice in construction law, real estate, administrative agencies, environmental and complex litigation. He has served as an assistant attorney general for the Commonwealth of Pennsylvania where, in addition to drafting statutes and regulations, he was the Chief Construction Claims Counsel for the Department of Transportation. Mr. Moskowitz has continued to be actively involved with construction industry and has represented numerous construction managers, contractors, subcontractors, suppliers, owners and architects, and has also served as general counsel for Westinghouse Elevator and Westinghouse Heating and Cooling as well as a municipal attorney for municipalities. He has handled claims on behalf of home owners, condominium associations, buyers, sellers and professionals involved with residential sales.

Mr. Moskovitz is admitted to practice in New Jersey, New York and Pennsylvania, and before the United States District Court for the District of New Jersey, the Middle District of Pennsylvania and the Southern District of New York, the United States Claims Court, the United States Court of Appeals for the Second and Third Circuits, and the United States Supreme Court.

He received his B.A. from Hofstra University and his J.D. from Boston University Law School.

Michael S. Stocknoff, PE is a Professional Engineer for A&M Engineering Services, Inc. in Cherry Hill, New Jersey, which specializes in detailed home and commercial inspections. An experienced professional, he brings his expertise to the forefront in civil litigation cases where technical and scientific answers are needed. He provides opinions as an expert witness on investigation and analysis, reports and testimony, construction inspections, home inspections, product defects, radon and mold, and slips and falls.

Mr. Stocknoff is Certified as an Inspector by the American Society of Home Inspectors. He has taken continuing education courses at Pennsylvania State University, Rutgers University and Camden County College; and graduate courses at the City University of New York and Rutgers University.

Mr. Stocknoff is a graduate of the City College of New York.