STATE OF MICHIGAN

COURT OF APPEALS

ARCHIE A. VAN ELSLANDER,

Plaintiff-Appellant,

v

THOMAS SEBOLD & ASSOCIATES, INC., DANIEL S. FOLLIS and MARY ELIZABETH FOLLIS,

Defendants-Appellees,

and

HOME INSPECTORS NORTH, INC., and LINCOLN WOOD PRODUCTS, INC.,

Defendants.

UNPUBLISHED
December 2, 2008

No. 272396
Oakland Circuit Court
LC No. 2003-051583-CZ

ARCHIE A. VAN ELSLANDER,

Plaintiff-Appellee/Cross-Appellant,

v

THOMAS SEBOLD & ASSOCIATES, INC.,

Defendant-Appellee,

and

DANIEL S. FOLLIS and MARY ELIZABETH FOLLIS,

Defendants-Appellants/Cross-Appellees,

and

No. 274966
Oakland Circuit Court
LC No. 2003-051583-CZ

HOME INSPECTORS NORTH, INC., and
LINCOLN WOOD PRODUCTS, INC.,

Defendants.

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

These consolidated appeals involve breach of contract, breach of warranty, and negligence claims related to the purchase and performance of repairs to a residence in Emmett County, "Unit No. 6, The Shores in Bay Harbor, Michigan." In Docket No. 272396, plaintiff appeals as of right, challenging several Oakland Circuit Court orders that ultimately dismissed all counts of plaintiff's complaint against defendant Thomas Sebold & Associates, Inc. (TSA). Plaintiff also challenges a circuit court order awarding TSA case evaluation sanctions.

In Docket No. 274966, after a jury trial, defendants Daniel S. Follis and Mary Elizabeth Follis appeal as of right from a circuit court order entering judgment in plaintiff's favor in the amount of $706,465.30. The judgment effectuated the jury's finding that the Follises breached a contract with plaintiff. Plaintiff cross-appeals, raising various grounds in support of the judgment.

In Docket No. 272396, we affirm the circuit court's orders granting summary disposition in favor of TSA, and its order granting TSA case evaluation sanctions. In Docket No. 274966, we reverse and remand.

I. Introduction

Unit 6 is a six-bedroom, approximately 9,000-square-foot home on the shore of Lake Michigan, in Bay Harbor. The Follises contracted with TSA to construct Unit 6, most of which occurred in 1996 and 1997, as a vacation residence and potential retirement home. In 1998, plaintiff purchased Unit 6 from the Follises for $3 million. In July 2002, powerful storms swept across Lake Michigan, and a tremendous quantity of water entered Unit 6. Plaintiff subsequently discovered that the home had extensive water damage and widespread mold. Significant portions of the home ultimately were removed and rebuilt, at great expense, and this lawsuit followed.

II. The Complaint

Plaintiff commenced this action on August 1, 2003, by filing a complaint against TSA, the Follises, who are husband and wife, and Home Inspectors North, Inc. (HIN).[1] On October 10, 2003, plaintiff filed a substantially similar first amended complaint that added two counts against defendant Lincoln Wood Products, Inc., which manufactured the doors and windows installed in Unit 6.[2] The first amended complaint recounted that on August 14, 1998, plaintiff entered an agreement to pay the Follises $3 million to purchase Unit 6. Count I of the first amended complaint averred that TSA breached its contractual duty to the Follises to construct Unit 6 in conformity with "architectural plans and specifications, applicable codes and other regulations and industry practice," and that plaintiff, "as a subsequent owner of" Unit 6, qualified as "an intended third-party beneficiary" of TSA's contractual guarantees. According to Count I, TSA or its subcontractors breached its warranty by utilizing "methods or materials" that rendered the work defective. Plaintiff identified 12 specific defects, including, by way of illustration, failures to (1) "install appropriate flashing and weep holes in the masonry walls on the exterior of the Residence"; (2) "properly install appropriate waterproofing behind the masonry walls, around windows and under thresholds"; and (3) "construct the exterior masonry wall with the proper and required air space between the masonry wall and the sheathing." The complaint further alleged that TSA "[i]mproperly installed most, if not all, of the windows," "[i]mproperly damp proofed masonry below grade," and "[i]mproperly installed and flashed the roof and chimneys."

Count III set forth a separate breach of contract claim against TSA, asserting that in 1998 TSA had "agreed to repair those items set forth on [a] Schedule executed by Mr. Follis and Mr. Van Elslander at closing," that plaintiff "was an intended and/or foreseeable third party beneficiary to" this agreement, and that TSA's inadequate repairs proximately caused plaintiff to "expend . . . considerable sums of money to repair the construction defects . . . and to repair or replace damaged items . . . ." Lastly regarding TSA, Count II alleged that TSA committed negligence arising from (1) its unreasonably poor original construction of Unit 6, and (2) its inadequate correction of defects that it undertook to repair (a) around the time of the closing in 1998, and (b) after Unit 6 endured storm damage in July 2002.

Count VI[3] maintained that the Follises breached their agreement with plaintiff to "utilize . . . $25,000 placed in escrow, and additional money if necessary, to repair the items set forth on the Schedule attached" to the purchase agreement. Count VII alleged that the Follises engaged in silent fraud because they "knew of many of the defective and adverse conditions prevailing at" Unit 6, but failed to disclose them to plaintiff either "in the written Seller's Disclosure Statement [or] at the time their agent provided responses to specific questions posed by [plaintiff's] representative [after] reviewing" HIN's inspection report.

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[1] The parties later acknowledged that HIN's correct name was Home Inspections North, Inc.

[2] Both HIN and Lincoln Wood Products were dismissed from the case before trial, and neither party raises issues in these appeals.

[3] Counts IV and V involved defendant HIN.

Counts VIII and IX concerned defendant Lincoln, and alleged defects in the home's windows and doors. These defects allegedly required plaintiff to replace the doors and windows, and to "expend[] considerable sums of money to repair or replace damage to the Residence and/or personal property damaged as a result of the defective windows."

III. Summary Disposition-Related Issues in Docket No. 272396

During the more than two years of pretrial proceedings, TSA filed several motions for summary disposition of plaintiff's breach of contract, breach of warranty, and negligence claims.

A. Standards of Review

This Court reviews de novo a circuit court's summary disposition ruling. *Kisiel v Holz*, 272 Mich App 168, 170; 725 NW2d 67 (2006). TSA sought summary disposition of plaintiff's third-party beneficiary and breach of warranty claims pursuant to MCR 2.116(C)(7) (period of limitation) and (8).[4] "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. The motion should be granted only if the claims are so clearly unenforceable as a matter of law that no factual development could justify recovery." *Kisiel*, *supra* at 170. "Only the pleadings may be considered when the motion is based on subrule (C)(8) . . . ." MCR 2.116(G)(5).

In this case, however, both TSA and plaintiff supplied documentary evidence in support of their respective positions, and in granting summary disposition the circuit court plainly considered evidence beyond the pleadings. Although the circuit court "did not specify the basis for its ruling, [the court] apparently denied [TSA's] motion pursuant to MCR 2.116(C)(10), which tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Id.*[5]

To the extent that the circuit court's summary disposition ruling involved issues of statutory construction and contract interpretation, this Court also considers these questions de novo. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003); *Rakestraw v Gen Dynamics Land Systems, Inc*, 469 Mich 220, 224; 666 NW2d 199 (2003).

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[4] We do not address subrule (C)(7) because the circuit court rejected this ground, and the parties do not raise on appeal any challenge to court's period of limitation reasoning.

[5] "A trial court is not necessarily constrained by the subrule under which a party moves for summary disposition. It is well-settled that, where a party brings a motion for summary disposition under the wrong subrule, a trial court may proceed under the appropriate subrule if neither party is misled." *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 312; 696 NW2d 49 (2005). Here, the circuit court's apparent ruling pursuant to subrule (C)(10) misled neither party, given that both TSA and plaintiff appended documentary evidence to their summary disposition briefs.

> In interpreting a statute, our obligation is to discern the legislative intent that may reasonably be inferred from the words actually used in the statute. A bedrock principle of statutory construction is that a clear and unambiguous statute leaves no room for judicial construction or interpretation. When the statutory language is unambiguous, the proper role of the judiciary is to simply apply the terms of the statute to the facts of a particular case. [*Rakestraw, supra* at 224 (citations and internal quotation omitted).]

Similar principles guide this Court's interpretation of contract language.

> Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. The language of a contract should be given its ordinary and plain meaning. [*Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).]

B. Plaintiff's Breach of Contract & Breach of Warranty Claims Against TSA

1. Plaintiff's Third-Party Beneficiary Claim Arising from 1996 Construction Contract

In TSA's first motion for summary disposition, it contended that as a matter of law under MCL 600.1405, plaintiff did not qualify as a third-party beneficiary of the March 6, 1996 construction agreement between TSA and the Follises. Plaintiff responded that he did constitute a third-party beneficiary of the March 1996 agreement because the contract objectively applied to every "Owner" of the home, a class to which he belonged. The circuit court granted TSA's partial motion, explaining in relevant part as follows:

> In this case, the [construction] contract clearly provides that it does not create a contractual relationship of any kind between anyone, other than the owners, Follis and the contractor TSA.
>
> [Plaintiff] argues that the reference to owners creates a class of individuals of which he is a member. However, the owners are described or designated as Mr. and Mrs. Daniel Follis. The agreement does not describe or designate subsequent owners as owner. . . .

In MCL 600.1405, the Legislature has defined, in relevant part as follows, who may claim third-party beneficiary status with respect to an agreement entered by other parties:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.
>
> (2) (a) The rights of a person for whose benefit a promise has been made, as defined in (1), shall be deemed to have become vested, subject always to such express or implied conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject, without any act or knowledge on his part, the moment the promise becomes legally binding on the promisor, unless there is some stipulation, agreement or understanding in the contract to the contrary.
>
> (b) If such person is not in being or ascertainable at the time the promise becomes legally binding on the promisor then his rights shall become vested the moment he comes into being or becomes ascertainable if the promise has not been discharged by agreement between the promisor and the promisee in the meantime. . . .

The Michigan Supreme Court has summarized that "the plain language of this statute reflects that not every person incidentally benefited by a contractual promise has a right to sue for breach of that promise, but rather only if the promisor has 'undertaken to give or to do or refrain from doing something *directly* to or for said person." *Brunsell v City of Zeeland*, 467 Mich 293, 296; 651 NW2d 388 (2002) (emphasis in original). "By using the modifier 'directly,' the Legislature intended 'to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract.'"[6] *Schmalfeldt*, *supra* at 428, quoting *Koenig v South Haven*, 460 Mich 667, 677; 597 NW2d 99 (1999).

On several occasions, the Michigan Supreme Court has explained the interplay between the limited category of directly identified third-party beneficiaries described in MCL 600.1405(1), and the broader category of potential beneficiaries enumerated in subsection (2)(b), on which plaintiff relies in this case.

> Subsection 1405(2)(b)'s recognition that a contract may create a class of third-party beneficiaries that includes a person not yet in being or ascertainable

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[6] As this Court recently summarized,

> Only intended, rather than incidental, third-party beneficiaries may sue when a contractual promise in their favor has been breached. More specifically, an incidental beneficiary has no rights under a contract. A third person cannot maintain an action on a simple contract merely because he or she would receive a benefit from its performance or would be injured by its breach. . . . [*Kisiel*, *supra* at 170-171.]

> precludes an overly restrictive construction of subsection 1405(1). That is, it precludes a construction that would require precision that is impossible in some circumstances, such as would be the case if there were a requirement in all cases that a third-party beneficiary be referenced by proper name in the contract. This is simply to say that the Legislature, in drafting these two provisions, apparently wanted to strike a balance between an impossible level of specificity and no specificity at all. This means that there must be limits on the use of subsection 1405(2)(b) to broaden the interpretation of subsection 1405(1) because otherwise the result is to remove all meaning from the Legislature's use of the modifier "directly." [*Brunsell*, *supra* at 296, quoting *Koenig*, *supra* at 677.]

In determining whether MCL 600.1405 applies to a purported third-party beneficiary, "a court should look no further than the form and meaning of the contract itself," and should view the contract objectively. *Schmalfeldt*, *supra* at 428 (internal quotation omitted).

After reviewing the language employed in the March 6, 1996 construction contract between TSA and the Follises in light of the governing legal principles, we have located no support for plaintiff's contention that he qualifies as a third-party beneficiary of this agreement. The front page of the agreement lists the parties as follows:

BETWEEN the Owner:	Mr. and Mrs. Daniel S. Follis
(Name and address)	72 Touraine Rd
	Grosse Pointe Farms MI 48236
and the Contractor:	Thomas Sebold & Associates, Inc.
(Name and address)	950 N. Hunter Blvd.
	Suite 3
	Bloomfield Hills MI 48304

The contract nowhere contains any reference whatsoever to plaintiff or anyone acting on his behalf.

Plaintiff does not dispute that the 1996 construction contract fails to address or refer to him specifically, but instead contends that consistent with MCL 600.1405(2)(b) the contract creates a class of third-party beneficiaries of TSA's promises, specifically the current and future owners of Unit 6, to which he belongs. But we find unpersuasive plaintiff's suggestion that TSA made promises to future owners of Unit 6 because (1) the contract consistently refers throughout to the singular term "the Owner," which the agreement specifically identifies as "Mr. and Mrs. Daniel S. Follis," nowhere making reference to a plural group of potential contract beneficiaries, and (2) the plain language of the construction contract expressly restricts the scope of the relationships and obligations formed by the agreement:

> 12.2 *The Contract Documents shall not be construed to create a contractual relationship of any kind* (1) between the Architect and Contractor, (2)

> between the Owner and a Subcontractor or (3) *between any persons or entities other than the Owner and Contractor*. [Emphasis added.]

Because the construction contract nowhere provides or suggests that either plaintiff or a class of subsequent homeowners should receive the benefit of TSA's promises, we conclude that "[a]t best, plaintiff is an incidental beneficiary of the . . . contract," who has no rights thereunder. *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 190; 504 NW2d 635 (1993).

Consequently, pursuant to MCR 2.116(C)(10), the circuit court correctly granted TSA summary disposition of plaintiff's breach of contract claim in Count III arising from the 1996 construction contract between TSA and the Follises.

2. Plaintiff's Third-Party Beneficiary Claim Arising from Repairs of 1998 Escrow List Items

Remaining in Count III of the first amended complaint, but moving beyond the 1996 construction agreement, plaintiff also asserted with respect to his breach of contract claim that in early September 1998, the time of the closing on the Follises' sale of Unit 6 to plaintiff, he and TSA entered a separate agreement to repair items identified on an escrow list. The circuit court rejected plaintiff's claim pursuant to the following logic:

> As to Plaintiff's assertion that he entered into a separate contract with TSA, the only evidence in support of this argument is reference to interrogatory no. 9. In the response to that interrogatory, TSA refers to the escrow agreement. The escrow agreement was between the Follises and [plaintiff]. Any work that TSA did in that regard was based upon contractual obligations to the Follises. . . . Plaintiff has not identified a separate contract between him and TSA.

Our review of the record reveals that the agreement to repair 16 items of concern came into existence on September 3, 1998, when plaintiff and David Follis signed an escrow agreement and a two-page "Schedule" identifying the items requiring attention. Neither TSA nor any agent of TSA signed the schedule, and the schedule makes no reference whatsoever to TSA. Because the record is devoid of any evidence that plaintiff and TSA entered an agreement in September 1998, the circuit court correctly dismissed plaintiff's claim that TSA owed him a direct contractual obligation to repair the 16 escrow list items.

Plaintiff further insists in his brief on appeal that he at least qualifies as a third-party beneficiary of the "separate agreement 'Contract 2' which TSA made at the time [plaintiff] purchased the home to repair the items on the escrow Schedule executed at the closing . . . ." Plaintiff's argument confuses the question, however, because the evidence presented, in support of and opposition to TSA's motion for summary disposition of plaintiff's breach of contract claims, fails to substantiate that when plaintiff purchased Unit 6 in 1998, TSA and the Follises entered a new, distinct contract to repair the escrow schedule items.

TSA became involved in repairing the items appearing on the schedule at the request of the Follises. Daniel Sebold, TSA's president, recalled during his deposition that "the Follises requested that I take care of" "some items . . . for the closing on their home." In an affidavit, Sebold averred that he "represented to the Follises on behalf of TSA that TSA would repair or

cause to be repaired those items on the inspection summary that require repair."[7] In additional deposition testimony, Daniel Follis expressed his understanding that Sebold had agreed to make the necessary escrow repairs "based on some warranty." Mary Follis offered similar deposition testimony, recalling her belief that Sebold had agreed to remedy "a list of [minor] things" "because our house was under warranty with" TSA. The Follises both denied ever suggesting to plaintiff that he would have any benefits or rights under the TSA warranty.

Plaintiff hinges his third-party beneficiary claim primarily on isolated statements in the depositions of Daniel Follis and Sebold. When questioned whether he took any measures to facilitate the ultimate release of the $25,000 held in escrow pending the listed repairs, Daniel Follis replied, "No, other than talking to Dan Sebold about getting things taken care of to the satisfaction of Van Elslander." Sebold testified that he understood "that each of those [escrow] items was being addressed for the benefit of Mr. Van Elslander." Plaintiff additionally refers this Court to the first interrogatories he directed to TSA, "Number 9" of which urged, "Identify and produce all documents which refer, relate to or concern any repair or alterations made by TSA to the Residence from the date the Certificate of occupancy was issued through the present . . . ."; TSA responded, "Attached is correspondence from Debbie Van Elslander to Dan Sebold dated March 3, 1999 which lists a number of items to be completed for escrow release. Although defendant cannot now reconstruct precisely what was done in response to various requests, all issues were attended to."

The relevant deposition testimony and other evidence agrees that TSA undertook minor repairs comprising the escrow agreement list on behalf of the Follises pursuant to a warranty that TSA supplied the Follises concerning the original construction of Unit 6. The warranty purportedly derived from the original construction contract, to which plaintiff was neither a party nor a third-party beneficiary. TSA's repairs pursuant to the warranty primarily benefited the Follises by facilitating their sale of Unit 6 to plaintiff. And irrespective whether TSA performed home repairs pursuant to a warranty related to the original construction of Unit 6, or a second and distinct agreement with the Follises, the record simply reveals no reference to plaintiff in the terms of either type of agreement. *Schmalfeldt*, *supra* at 427-428. The deposition testimony of Sebold and Daniel Follis referencing plaintiff reflects that he would derive some enjoyment from TSA's escrow agreement repairs, but plaintiff at most qualifies as an incidental beneficiary of TSA's undertaking of repairs pursuant to its agreement with the Follises. *Kammer Asphalt*, *supra* at 190; *Kisiel*, *supra* at 170-171.

In summary, even viewing the record in the light most favorable to plaintiff, he has produced no objective evidence tending to substantiate (1) any specific agreement between plaintiff and TSA, with respect to the escrow agreement items or otherwise, or (2) that he qualified as a third-party beneficiary of any agreement between TSA and the Follises. Under subrule (C)(10), the circuit court correctly granted TSA summary disposition of these claims.

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[7] Sebold testified that he instructed construction supervisor Randy Moyer to address the escrow list items, and that Moyer reportedly did so.

3. Plaintiff's Warranty Claims Arising from 1996 Construction Contract

In its initial motion for summary disposition, TSA further challenged that plaintiff could benefit from either an express warranty in the original construction agreement, to which plaintiff was neither a party nor a third-party beneficiary, or an implied warranty, which extended solely to the original purchaser of a newly constructed residence. The circuit court agreed: "Further, there being no third-party beneficiary status, any claim for breach of express warranty would also fail. There's no express warranty provision in the agreement. An implied warranty for a residence only applies to the first purchaser of the home."

Contrary to the first amended complaint's contention that plaintiff "is an intended third-party beneficiary to the warrant[ies]" made by TSA in the 1996 construction contract (Count I, ¶ 28), for the reasons discussed immediately above plaintiff constituted at most an incidental, not an intended, third-party beneficiary of the 1996 agreement between TSA and the Follises. Because plaintiff has no right to any express warranties in the 1996 construction contract, the circuit court properly granted TSA summary disposition concerning plaintiff's express warranty claim pursuant to subrule (C)(10).

Furthermore, to the extent that plaintiff suggests he should benefit from an implied warranty by TSA concerning newly constructed Unit 6, we find his contention plainly contradicted by consistent Michigan case law. Plaintiff criticizes and attempts to distinguish *Weeks v Slavick Builders, Inc*, 24 Mich App 621; 180 NW2d 503, aff'd 384 Mich 257; 181 NW2d 271 (1970), on which TSA relied in support of the proposition that no implied warranties extend from a builder to anyone beyond the original owner of a newly constructed home. But plaintiff ignores that this Court has favorably cited *Weeks*, in decisions binding pursuant to MCR 7.215(J)(1), as reflected in the following applicable passage:

> Plaintiffs next argue that the trial court erred in dismissing their claim of breach of an implied warranty of fitness and habitability. We disagree. Such warranties run only to the first purchaser of a home. *Weeks*[, *supra*.] Plaintiffs were not the first purchasers of the house in question. Therefore, summary disposition of this claim was proper. [*McCann v Brody-Built Constr Co, Inc*, 197 Mich App 512, 516; 496 NW2d 349 (1992).][8]

Plaintiff offers no authority supporting his general assertion that the 1994 enactment of the Seller Disclosure Act, MCL 565.951 *et seq.*, somehow should affect the above implied warranty of habitability analysis. Because plaintiff undisputedly did not purchase newly constructed Unit 6

[8] More recently, this Court has favorably cited *Weeks* in concluding "that the implied warranty of habitability that accompanies the sale of new homes applies only to the sale of new homes by a builder-vendor as part of a real estate transaction." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 430-431; 711 NW2d 421 (2006); see also *Kisiel*, *supra* at 173 (reaffirming *Smith* and holding that "[a] general contractor that agrees to construct a new home on land already owned by the purchaser is not a builder-vendor").

from TSA, we conclude that the circuit court also correctly granted TSA summary disposition of plaintiff's implied warranty claim under subrule (C)(10).

C. Plaintiff's Three Negligence Claims Against TSA

With respect to plaintiff's negligence claims in first amended complaint Count II, TSA filed multiple motions for summary disposition. Because the parties submitted documentation concerning each of TSA's motions, it appears that the circuit court decided them pursuant to MCR 2.116(C)(10).

"It is well-established that a prima facie case of negligence requires a plaintiff to prove four elements: duty, breach of that duty, causation, and damages. The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff." *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). "Whether [a] defendant . . . owed a duty to [the] plaintiff is a question of law" that an appellate court considers de novo. *Id*.

In Count II of the first amended complaint, plaintiff raised three distinct allegations of negligence against TSA. First, that TSA breached a duty to plaintiff "to exercise due care in the construction of" Unit 6 (¶ 32); complaint ¶ 33 listed 12 nonexclusive manners in which TSA had breached this first duty. The second and third duties alleged by plaintiff, and their manners of breach by TSA, appear in the following less-detailed complaint paragraphs:

> 34. In September 1998 and July 2002, TSA was requested to investigate certain conditions at the residence and to repair those conditions. TSA had a duty to Mr. Van Elslander to exercise due care in investigating and repairing these conditions.
>
> 35. TSA breached its duty to Mr. Van Elslander, as set forth in paragraph No. 34, above, in the following ways, among others:
>
> a. TSA failed to conduct a reasonable and proper investigation of the conditions identified;
>
> b. TSA failed to report to Mr. Van Elslander the true nature of the construction defects and other adverse conditions at the Residence; and
>
> c. TSA failed to repair the construction defects and adverse conditions.

1. Plaintiff's Negligence Claims Arising from 1996 & 1998 Contractual Obligations to the Follises

The circuit court initially disposed of the first and second negligence subgroups, those complaining that TSA negligently executed or performed its obligations under the original 1996 construction contract with the Follises, and the repairs it performed for the Follises pursuant to the 1998 escrow agreement. The circuit court explained as follows:

> The original contract for construction between TSA and the Follises required that the work be performed in the "best way." TSA made repairs in 1998 as required by the warranty between it and the Follises. With regard to the

> construction of the home and the repairs made in 1998, Plaintiff has failed to demonstrate how the relationship between TSA and Plaintiff gave rise to a duty distinct from the contractual duty. The duties alleged by . . . Plaintiff in the First Amended Complaint relating to the original construction of the home arise from the contract between TSA and [the] Follis[es], the Complaint does not allege a separate distinct duty in that regard. *Fultz v Union-Commerce Assoc*, 470 Mich 460 (2004). However, the Complaint does allege a separate duty relating to the subsequent repairs performed in 2002. The alleged duty to investigate and repair did not arise out of the contractual relationship between TSA and Follis. Rather, TSA assumed this duty with regard to Plaintiff.
>
> Accordingly, the motion is granted with regard to the allegations related to the original construction and warranty work, however, denied with regard to subsequent repairs that were not required under the warranty.

In plaintiff's appellate brief, he maintains that TSA owed him a "common law duty to exercise due care in constructing the house and in undertaking to investigate and repair certain adverse conditions at the residence on [plaintiff's] behalf." Plaintiff and TSA, in the circuit court and this Court, focus their arguments on the Michigan Supreme Court's analysis in *Fultz*, *supra*. In *Fultz*, the Supreme Court summarized as follows the relationship of the parties:

> Plaintiff fell and injured her ankle while walking across defendant Comm-Co's snow- and ice-covered parking lot. Defendant [Creative Maintenance Limited] CML had previously entered an oral contract with defendant Comm-Co to provide snow and salt services for the lot. At the time plaintiff fell, CML had not plowed the lot in approximately fourteen hours and had not salted the parking lot. [*Id*. at 462.]

At the outset of the analysis, the Supreme Court described the nature of the plaintiff's claim, which bears similarity to plaintiff's instant claims against TSA:

> Plaintiff does not claim that any statute or ordinance imposes a duty on CML to maintain the parking lot where she was injured, nor does she claim that she was a third-party beneficiary of the contract between defendant CML and the premises owner. She contends instead that defendant CML, by contracting to plow and salt the parking lot, *owed a common law duty to plaintiff to exercise reasonable care in performing its contractual duties. Plaintiff further alleges that defendant's failure to plow or salt the parking lot breached that duty under the common-law tort principles expressed in Restatement Torts, 2d, § 324A* . . . . [*Id*. at 463-464 (emphasis added).]

The Supreme Court reviewed some basic negligence principles recognized under Michigan law:

> If one voluntarily undertakes to perform an act, having no prior obligation to do so, a duty may arise to perform the act in a nonnegligent manner. *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 529; 538 NW2d 424 (1995); *Osman* [*v Summer Green Lawn Care, Inc*, 209 Mich App 703; 532 NW2d 186 (1995)] . . . .

We described this common-law duty in *Clark v Dalman*, 379 Mich 251; 150 NW2d 755 (1967):

> "Actionable negligence presupposes the existence of a legal relationship between the parties by which the injured party is owed a duty by the other, and such duty must be imposed by law. . . .
>
> * * *
>
> "Such duty of care may be a specific duty owing to the plaintiff by the defendant, or it may be a general one owed by the defendant to the public, of which the plaintiff is a part. Moreover, while this duty of care, as an essential element of actionable negligence, arises by operation of law, it may and frequently does arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract." [*Fultz, supra* at 465, quoting *Clark, supra* at 260-261.]

The Supreme Court noted in *Fultz* that "[i]n defining the contours of this common-law duty, our courts have drawn a distinction between misfeasance (action) and nonfeasance (inaction) for tort claims based on a defendant's contractual obligations." *Id*.

The Supreme Court in *Fultz* rejected "the 'slippery distinction' between misfeasance and nonfeasance," however, because it "obscures the proper initial inquiry: Whether a particular defendant owes any duty at all to a particular plaintiff." *Fultz, supra* at 467. The Supreme Court then offered the following analytical guidance for ascertaining whether a duty exists:

> Accordingly, the lower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis. Specifically, *the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie*.
>
> Applying that analysis here, the Court of Appeals erred in affirming the jury verdict and in holding that "evidence suggested that (CML) engaged in misfeasance distinct from any breach of contract." . . . In truth, *plaintiff claims CML breached its contract with defendant Comm-Co by failing to perform its contractual duty of plowing or salting the parking lot. She alleges no duty owed to her independent of the contract. Plaintiff thus fails to satisfy the threshold requirement of establishing a duty that CML owed to her under the "separate and distinct" approach set forth in this opinion.* [*Id*. at 467-468 (emphasis added).]
>
> * * *
>
> To summarize, if defendant fails or refuses to perform a promise, the action is in contract. If defendant negligently performs a contractual duty or

> breaches a duty arising by implication from the relation of the parties created by the contract, the action may be either in contract or in tort. In such cases, however, no tort liability arises for failing to fulfill a promise in the absence of a duty to act that is separate and distinct from the promise made. [*Id*. at 469-470.]

We do not contest plaintiff's argument that a duty of reasonable care may arise from a building company's undertaking to construct a residence, specifically a duty to use due care in constructing the residence. But pursuant to the analysis promulgated in *Fultz*, allegations that TSA negligently constructed Unit 6 would constitute both a breach of its construction contract with the Follises, and a breach of the concomitant *duty it owed to the Follises* to use reasonable care in constructing their house. Because only the Follises contracted with TSA to build Unit 6, TSA's allegedly negligent performance of the contract would violate the common law duty that TSA owed exclusively to the Follises to use reasonable care in constructing Unit 6.

Furthermore, plaintiff does not allege any statutory duty that TSA purportedly *owed him* in constructing and repairing Unit 6. And plaintiff offers no authority in support of the general proposition that a home construction company, under contractual obligation with an owner to build a residence, may owe a common law duty of care to a potential subsequent purchaser of the home for allegedly negligently performing its contractual duties to the owner. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008) (observing that a party's failure to support an assertion with "citation to an appropriate authority" "constitutes abandonment of the issue").

We additionally observe that in *Kisiel*, *supra* at 168, this Court applied our Supreme Court's holding in *Fultz* in a manner that tends to undercut plaintiff's position that TSA owed it a duty in this case. The plaintiff in *Kisiel* contracted with Holz Building Company to build a residence. *Id*. at 169. Holz subcontracted with GFA Development to excavate and pour concrete, which subsequently developed cracks. *Id*. The plaintiff sued GFA for, among other things, breaching its subcontract with Holz and negligently performing its subcontract. *Id*. at 169-170. This Court initially rejected the plaintiff's position that he qualified as a third-party beneficiary of the subcontract between Holz and GFA. *Id*. at 170-172. The Court next considered the viability of the plaintiff's negligence claim against GFA:

> Plaintiff next argues that he has stated a claim for negligence based on GFA's alleged failure to perform its duties under the subcontract. We disagree.
>
> The failure to perform a contractual duty cannot give rise to a tort action unless the plaintiff alleges a violation of a duty "separate and distinct" from the underlying contractual obligation. This rule applies to a plaintiff who is not a party to the contract but alleges that a contracting party failed to perform its obligation under that contract. *Fultz* [, *supra* at 469-470.] In this case, plaintiff's negligence claim fails as a matter of law because plaintiff does not allege that GFA owed him a duty "separate and distinct" from the contractual obligation

> owed to Holz. Summary disposition was properly granted on plaintiff's negligence claim. [*Kisiel*, supra at 172-173 (citation omitted).][9]

The two cases cited by plaintiff on appeal, in support of his assertion that "Michigan law recognizes that a building contractor has a common law duty to exercise due care in constructing a building," *Johnson v A & M Custom Built Homes of West Bloomfield, PC*, 261 Mich App 719; 683 NW2d 229 (2004); *Baranowski v Strating*, 72 Mich App 548; 250 NW2d 744 (1976), were decided before the Supreme Court decided *Fultz*, and *Baranowski* otherwise is distinguishable from this case on the basis that the contractors in *Baranowski*, *supra* at 550, had entered a home construction contract with the plaintiffs.[10]

To reiterate, plaintiff had no contractual relationship, as a contracting party or a third-party beneficiary, to TSA concerning the original construction of Unit 6 or the 1998 escrow list of repairs undertaken by TSA for the Follises. And plaintiff simply has failed to satisfy "the threshold question . . . whether [TSA] owed a duty to . . . [him] that is separate and distinct from [TSA's] contractual obligations."[11] *Fultz*, *supra* at 467. Because TSA owed no independent

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[9]In two brief orders, the Michigan Supreme Court has similarly invoked *Fultz* in holding against different plaintiffs who failed to allege the defendants owed them any duty "separate and distinct" from the defendants' contractual obligations to third-parties. *Mierzejewski v Torre & Bruglio, Inc*, 477 Mich 1087 (2007); *Banaszak v Northwest Airlines, Inc*, 477 Mich 895 (2006).

[10] In *Johnson*, the plaintiff conservator filed suit on behalf of Daniel Johnson, who had suffered a construction site injury while employed by Wimsatt Building Materials, a subcontractor at the construction site. *Id*. at 720. Johnson "slid off the roof after a toe board installed by another subcontractor . . . dislodged . . . ." *Id*. This Court recognized "the general rule of law in construction site injury cases . . . that only the injured person's immediate employer—and not another subcontractor—is responsible for job safety." *Id*. at 721. The Court held, however, that this general rule did not "absolve a subcontractor—or anyone on a construction job—of liability under the common law theory of active negligence," explaining that "where a subcontractor actually performs an act, it has the duty to perform the act in a nonnegligent manner." *Id*. at 722. *Johnson* has no application here.

[11] Plaintiff's suggestion that TSA admitted it owed an independent duty *to him* entirely lacks merit. Plaintiff relies on first amended complaint ¶ 32, which states the following:

> As a general contractor for the Residence, TSA owed a duty to Mr. Van Elslander, as a foreseeable subsequent purchaser of the Residence, to exercise due care in the construction of the Residence.

Plaintiff also invokes TSA's answer to first amended complaint ¶ 32, which provides as follows:

> Defendant admits the existence of certain duties *but neither admits nor denies the duties asserted or implied in this paragraph, in the manner and form alleged, same being untrue, and/or plaintiff being left to his proofs.* [Emphasis added.]

(continued…)

duty to plaintiff, the circuit court properly determined as a matter of law under subrule (C)(10) that plaintiff could not maintain a tort action against TSA arising from either its original construction of the home or its escrow list repairs, both of which it undertook pursuant to its contractual agreement with the Follises alone.

2. Plaintiff's Negligence Claims Arising after July 2002 Storms

The parties did not dispute that shortly after a severe storm in July 2002 caused substantial water intrusion into Unit 6, Sebold investigated to some degree potential sources of water intrusion. While TSA characterized the investigation as very limited, plaintiff insisted that TSA had agreed to expansively investigate and make recommendations or repairs to prevent water intrusion into any area of the residence, and that TSA breached its obligation.

Ultimately, the circuit court found that TSA had assumed a limited duty of investigation, but that plaintiff had failed to present any evidence that TSA breached its agreement.

> All right. I have before the Court Thomas Sebold and Associates' Motion for Summary Disposition as to the remaining claims against it, negligence arising from the work performed in '02.
>
> The Court previously ruled that . . . plaintiff alleged that TSA assumed certain duties in '02. The evidence reflects that the duty that TSA assumed was to look at three specific areas, that being the [F]rench doors, the drain, and the [window] well.
>
> . . . [P]laintiff has not established that TSA agreed or was asked to do a more extensive investigation. The evidence does not support a genuine issue of material fact that TSA breached the duty that it assumed.

The circuit court thus entered a brief order granting TSA's motion for summary disposition and dismissing with prejudice plaintiff's "remaining claims against" TSA, and also denied a subsequent motion for reconsideration filed by plaintiff.

a. Evidence Regarding TSA's 2002 Duty

In connection with TSA's negligence-related summary disposition motions, the parties presented two written documents specifically referring to TSA's post-July 2002 water intrusion investigation. The primary document constituted an August 14, 2002 memorandum prepared by TSA construction manager Doug Maddelein. The August 14 2002 memorandum, which Maddelein directed to Jason Kelley, plaintiff's property manager, identified three primary areas of concern, providing specifically as follows:

(…continued)

The plain language of TSA's answer italicized above reflects that TSA expressly denied the complaint's allegation that it owed any duty *to plaintiff*.

1. Water coming through the French doors:

We water tested two scenarios, the first was with the screen doors open. Using a hose and sprayer we could not get water to come into the house. There was enough drainage through the weep holes in the doorsill to allow water to flow freely off the threshold. With the screen doors closed, the weather seal on the bottom of the door seals tight to the threshold. This creates a dam and the water builds up to over 2" deep; then it overflows the wood door threshold and flows into the house.

We recommend the screens be removed and the glass panels remain installed on the storm doors.

2. Basement bedroom escape window well:

This was constructed down to the same footing depth as the foundation wall. There is over 2' of drain stone and a drain that connects to the footing drain. The steel grate cover on top used to also have a solid Plexiglas cover to help keep out the rainwater. The footing drains for the house connect to the storm drain in the driveway. From this storm drain, there is a 10"-12" diameter pipe going out to daylight on the beach. The 10"-12" drainpipe is now buried on the beach and will not drain properly. It has 4" of water in it now. This creates a backup in the footing drains. During heavy rain, the water flowing off the roofs on the west side of the house pools in the bushes between the sidewalk and the house and flows into the escape hatch well, where it cannot drain because the drain tile is full of water.

Solutions: a) Clean out 10"-12" of beach—daylight the storm drain.

b) Put a lid on the steel grate at the escape hatch.

c) Make sure the water will drain out of the shrub area before filling up the escape hatch. If it will not flow out fast enough, raise the wall of the escape hatch 8" or so.

d) Add gutters to this area of the house.

3. Stone chimneys:

Besides the loose and missing shingles needing to be replaced, and the chimney flashings maintained annually, the stone on the chimneys and the caps should be sprayed every year or two with a clear sealant made for stone masonry applications. This can be purchased from Western Concrete or Emmet Brick and Block.

With the above items complete, this home should stay dry. Please feel free to call at any time if you have any more concerns or questions.

The second document was an October 30, 2002 invoice that Concrete Paving Systems gave TSA, which summarized the basis for the invoice as Concrete Paving Systems's "[r]epair of iron grate for rain deflecting. Mortar set bricks, raise grate and water proof. Repair cost $250.00."

In explanation of the circumstances leading to the August 2002 memorandum's creation, TSA supplied portions of Sebold's deposition testimony. Sebold recalled that in response to a phone call he received in July 2002 from realtor Wally Kidd advising him "that there was a flood at the Van Elslander home," he paid a visit there. Sebold summarized that after "[re]introducing myself to Mr. and Mrs. Van Elslander," "[t]hey showed me some of the damage and we talked for a few minutes and I showed him . . . . how to secure the [French] doors, talked about what happened, and I . . . may have recommended a company that may be able to help him with cleaning up the water." During the 10- to 15-minute visit, Sebold noticed "[a] lot of water," "[m]ostly in the living room," but also in "the garage and basement area[s]."

When Sebold was questioned about "any additional involvement in regards to the . . . storm damage," he testified, "I was there a couple times at the request of Jason Kelley. I had contact with Art Van's daughter on a couple of occasions. She asked for help and some research and some direction." Sebold recalled that he and Debra Van Elslander discussed "three things," "the drain to the beach, French doors and the [window] well," although he could not remember whether a representative of plaintiff or TSA raised these specific concerns.

Plaintiff attached to his subsequent motion for reconsideration an affidavit of Debra Van Elslander, in which she disputed Sebold's recollections as follows concerning the genesis and the scope of TSA's 2002 investigation:

> 4. At no time did I, nor anyone else acting on behalf of my father, limit in any respect those areas of the home which TSA was to investigate to determine the causes of water intrusion to the residence.
>
> 5. . . . At no time did I identify these three areas [in the August 14, 2002 Maddelein memo] for TSA; limit TSA to investigating these three areas or request that TSA investigate water intrusion in these three areas. Rather, TSA identified on its own these three areas of water intrusion to the home. Dan Sebold represented to me that the repairs recommended in the Memorandum would stop water intrusion at the residence.
>
> * * *
>
> 7. Investigation by others at the residence . . . has identified numerous additional areas of water intrusion to the home which were never identified by TSA.

We find that, viewed in the light most favorable to plaintiff, the evidence submitted in support of the summary disposition-related filings and plaintiff's motion for reconsideration establishes that TSA obligated itself, through the actions of Sebold and Maddelein, on a limited basis by assuming a duty to investigate several discrete potential sources of water intrusion into Unit 6. The relevant deposition testimony, primarily supplied by Sebold, and the August 14, 2002 Maddelein memorandum, agree that, *irrespective whether TSA or plaintiff, through an*

agent, *made the specific selections*, TSA assumed a duty only to consider and to make recommendations concerning potential sources of water intrusion into Unit 6 through the home's (1) exterior French doors, (2) the residence's stone chimneys, and (3) the basement bedroom window well, which apparently led to discovery of the related, clogged drain to the beach. The limited evidence provided by the parties does not support a reasonable inference that TSA undertook the more expansive duty that plaintiff seeks to impose, specifically to perform an all-encompassing assessment of the property and to identify and propose recommendations concerning any potential sources of water intrusion. There is simply no evidence that TSA undertook the duty to perform an in-depth investigation of all sources of water intrusion.

Once TSA came forward with evidence delineating its limited duty after the July 2002 water intrusion episode, to avoid summary disposition it became plaintiff's obligation to present some evidence reasonably tending to suggest that TSA undertook a more extensive investigation obligation, but plaintiff simply failed to satisfy his obligation. MCR 2.116(G)(4). To the extent that plaintiff emphasizes the statement at the bottom of the August 14, 2002 memorandum, "With the above items complete, this home should stay dry," we reject plaintiff's suggestion that this statement implies a more broadly undertaken duty of investigation by TSA. When read in context with the preceding portions of the memorandum, the penultimate sentence simply refers to the duty undertaken with respect to "the above [three] items." We conclude that the circuit court properly found that TSA assumed a limited post-July 2002 duty of inspection and recommendation, but that the court erred to the extent that it omitted chimneys from the scope of TSA's limited duty, which also included the French doors and window well/drain to the beach.

b. Evidence Concerning TSA's Alleged Breach of the Limited Duties Assumed in 2002

In its motion for summary disposition, TSA insisted that no negligence occurred in the manner of the minor window well modification in October 2002, and that apart from the invoice relating to the window well, no documentary evidence existed tending to establish any of the remaining negligence elements (breach, causation, damages) relating to the August 14, 2002 memorandum.

Plaintiff's well-appended brief in opposition included an excerpt of Debra Van Elslander's deposition testimony, which mentioned that in the summer of 1999 plaintiff had hired a landscape company to place additional quantities of sand on the beach in front of the house, and that on an unspecified date thereafter, property manager Kelley had advised Debra "there was a blockage in the drain that went from the driveway down to the beach," which Kelley or Sebold remedied by hiring a different landscaping company to clear out the drain. Plaintiff also attached a 17-page report by Western Waterproofing Company, dated July 15, 2003, which elaborated regarding its "probes" of eight different areas of Unit 6 to ascertain sources of water leakage. Although a thorough report, it simply contains no information supporting a reasonable inference that TSA negligently made any faulty observations or

recommendations in the Maddelein memorandum, prepared almost a year before the Western Waterproofing report.[12]

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[12] The 2003 Western Waterproofing report refers almost exclusively to matters beyond the scope of the August 2002 Maddelein memorandum. That most of the report's investigation focuses on matters beyond the scope of the August 2002 memorandum becomes clear when one reviews the "General Report Findings":

> 1. The water and moisture is entering at various locations throughout the limestone sill condition and once it has entered in it is trapped with no way out.
>
> 2. There are no weep holes for any trapped water to escape nor is there any type of flashing detail through out our findings.
>
> 3. There is no joint sealant sealing the top of the limestone sill to the underside of the metal flashing which is noted on the plans.
>
> 4. The ice and water shield which is manufactured by W.R. Grace . . . is meant to be a roofing underlayment and not a below grade waterproofing or flashing material such as that is manufactured by W.R. Grace. The flashing material would be Perm-A-Barrier Wall Flashing and the below grade waterproofing would be Bituthene.
>
> 5. There is no tie in between the foundation dampproofing and the stone ledge itself.
>
> 6. The form work that was used for the ledge was for a 4" brick ledge and not for a 6"-8" stone ledge that we have on this structure, consequently the stone is cantilevered out in various ways to compensate for the lack of stone support leaving the stone susceptible to heaving in a freeze/thaw condition.
>
> 7. The ice and water shield . . . was installed without the proper laps, corner turnouts, tie ins to the dampproofing, the gaps noted between pieces, pieces missing, not properly sealed off, and there is no pattern to whether the ice and water shield was applied directly to the plywood or to the house wrap, in some cases the house wrap was applied over the top of the ice and water shield and in some cases it was placed under the ice and water shield. There is no pattern or consistency with this detail.
>
> 8. The limestone sills are not pinned and in some cases are loose without a proper bed and head joint of mortar. We have also observed that these limestone sills are sloping to the structure or are laid level or sloped slightly away from the structure. Per the note on the drawings, they should be sloped in an extreme fashion away from the structure.
>
> 9. The door threshold that we observed, the membrane in some cases is

(continued…)

Plaintiff next attached two pages of Sebold's deposition describing the manner in which he and Maddelein water-tested the French doors; Sebold recounted that they "sprayed water through the screen door trying to emulate a heavy rainstorm" and caused water to build "up between the panel of the bottom of the screen door and the French door." When questioned whether he and Maddelein "in any respect test[ed] at that time whether the limestone sill was properly installed in that area," Sebold replied, "Not that I recall. . . . We were looking at the doors." Plaintiff additionally included a dozen pages of deposition testimony by Paul Wild, who prepared the Western Waterproofing report, in which Wild reiterated some of the sources of water intrusion documented in the 2003 report. Plaintiff also attached between 15 and 20 pages of deposition testimony by architect and builder Michael Rupert discussing some sources of leakage reported by Western Waterproofing; Rupert's testimony did not address any items contained in the August 2002 TSA memorandum.

(…continued)

> missing and does not have a turn up at the backside. Although they did turn it up at the edges near the jambs, there is no turn up at the backside. The lack of properly installed materials and the sealing between the units is also lacking.

The only potentially relevant portion of the report, "Probe No. 6," addresses "The Window Well."

> The area was probed due to leakage. We observed that once we removed the pea gravel and sand mixture in the bottom of the window well, approximately 2' deep, we have found that there is a concrete slab in the bottom with a 4" drain in the middle which was clogged with sand and debris, there is also a 6" hole in the foundation wall with a drain tile. We attempted to clean this out but were not able to completely remove the dirt.
>
> The window itself has a deteriorated wood frame around the base, which is rotted, and allowing water to enter in. . . .

The report concluded with respect to the window well as follows:

> The window well will need to remove [sic] the concrete floor, dig down approximately 2', and install pea gravel in the area back up to the old pea gravel elevation. Others will replace the windowsill. The concrete ledge needs to be chipped down and sloped away from the window itself, a stainless steel water shed above the window for any water that comes down into the well, the water shed removes it out away from the window itself.

The report's probe into the window well does not cast doubt on the October 2002 window well modification commissioned by TSA, or the other recommendations concerning the window well that TSA incorporated into the August 2002 memorandum.

Lastly, plaintiff included a "Microbial Testing Report" prepared by Sanit-Air, Inc., and dated "August-December, 2003." A September 3, 2003 letter to plaintiff summarizes the following observations:

> On August 27, 2003, Sanit-Air conducted an inspection and microbial testing in your home on Bay Harbor. The purpose of onsite evaluation was to inspect perimeter walls and floors for signs of unmitigated water damage. . . .
>
> *Observations*
>
> 1. Significant water staining, delaminating wood, and visible growth were observed under the bay window at the north wall in the northwest bedroom. Elevated surface moisture measurements were detected on wood studs, exterior sheathing, and the sub-floor at the north wall of the bay window. The source of moisture appeared to be intrusion through the windows.
>
> 2. Water stains were observed on the tack strip at the west wall under the north-most window in the southwest bedroom. Moderately elevated moisture was detected on the sill plate and stud under the south corner of the window. Visual conditions were consistent with prior water intrusion from the windows.
>
> 3. Water stains were observed on the sub-floor and tack strip on the south wall under the windows in the southeast bedroom. The floor and wall paneling were dry at the time of testing. Visual conditions were consistent with prior water intrusion from the windows.
>
> 4. Water stains were observed on the sub-floor and tack strip at the south wall under the windows in the study. The floor and wall were dry at the time of testing. Visual conditions were consistent with prior water intrusion from the windows.
>
> 5. Stains were observed on the marble at the west wall on both sides of fireplace in the pool room. The observed conditions were consistent with water intrusion at the roof around the chimney. The observed conditions raised concerns regarding the west wall cavity.

Another report summary, dated December 22, 2003, offers the following observations:

> Site inspections conducted after the first phase of remediation in the VanElslander home confirmed the presence of hidden water damage. An area of significant water damage was the exterior sheathing, primarily on the west and north sides of the home. Additional hidden damage was discovered on the exterior sheathing of the bay area in the northeast bedroom, and sheathing under windows throughout the second level.
>
> Source sampling confirmed the presence of fungi that are indicative of water damage. . . . The results confirmed that hidden fungal amplification sites

within cavities were sources of airborne contaminants and fungal propagules on porous contents.

To TSA's reply brief, it attached deposition testimony of engineer Bruce Clarke in which he made the following observations:

> Item number one, putting the glass panels back in the storm doors, to me it seems like a very reasonable solution to the French doors opening—or blowing open. Cleaning out the storm drain, daylighting it, as they refer to it, is practically a necessity if you want that drain to work correctly. And maintaining the chimney, it's just good maintenance, good practice. So no, I don't see anything here that I would disagree with.

Clarke added that placement of a waterproof Plexiglas cover over the window well grate "should be enough" to prevent water buildup in the window well.

In summary, although plaintiff provided abundant evidence with its response to TSA's 2002-negligence-related motion for summary disposition, none of plaintiff's evidence tended to undermine or contradict that TSA agreed to undertake only a limited investigation of the sources of water intrusion, specifically limited to the French doors, the window well and the chimneys. Plaintiff failed to present any evidence tending to prove that TSA breached its limited duty to investigate and repair these areas, or that its payment for the minor modifications to the window well constituted a breach of a duty to repair that area.

After the circuit court's summary disposition ruling for TSA, plaintiff moved for reconsideration, attaching the recent affidavit of Debra Van Elslander, which asserted vaguely that "[t]he repairs recommended by TSA did not stop water intrusion in these areas of the home," but which failed to specifically link any negligent TSA recommendation with consequent water intrusion. The only other new evidence plaintiff supplied in the motion for reconsideration consisted of brief portions of property manager Kelley's deposition testimony, in which he offered no insight into any faulty conduct attributable to TSA.

In conclusion, plaintiff produced evidence documenting the identification of sources of water intrusion into Unit 6, made approximately a year or more after Maddelein prepared the August 2002 memorandum. But we have ascertained nothing in plaintiff's documentation attributing some deficiency or fault to the limited August 2002 recommendations of TSA. Because plaintiff failed to present any evidence tending to link specific fault with any of TSA's August 2002 recommendations, the circuit court correctly determined as a matter of law under MCR 2.116(C)(10) that TSA did not breach the limited duty it undertook after the July 2002 storm-related water intrusion into Unit 6.[13]

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[13] To the extent the circuit court erred by omitting the chimneys from the limited duty TSA assumed in 2002, it nonetheless properly granted TSA summary disposition because no evidence tends to establish that TSA breached its limited duty. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007) (observing that this Court will not a correct result reached (continued…)

D. Amount of Case Evaluation Sanctions

Plaintiff lastly challenges the circuit court's decision to award TSA case evaluation sanctions consisting of expert witness fees and attorney fees. Plaintiff does not dispute TSA's potential entitlement to "actual costs" under MCR 2.403(O)(1) and (2), in the event that we uphold the circuit court's summary disposition rulings. Nor does plaintiff challenge the principle that "[e]xpert witness fees incurred by [TSA] would be part of their 'actual costs' under MCR 2.403(O)." *Elia v Hazen*, 242 Mich App 374, 379-380; 619 NW2d 1 (2000). Plaintiff criticizes only the amounts the circuit court awarded as costs and attorney fees, which "this Court reviews for an abuse of discretion." *LaVene v Winnebago Industries*, 266 Mich App 470, 473; 702 NW2d 652 (2005).

We initially decline plaintiff's invitation that we apply MCR 2.403(O)(11) as a basis for vacating the award of case evaluation sanctions. According to subrule (O)(11), "If the 'verdict' is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs." This Court has recognized several "unusual circumstances" in which a court may refuse actual costs "in the interest of justice": for example, "where a legal issue of first impression or public interest is present, where the law is unsettled and substantial damages are at issue, where there is a significant financial disparity between the parties, . . . where the effect on third persons may be significant," or where the prevailing party engages in misconduct, such as gamesmanship. *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 466; 702 NW2d 671 (2005) (internal quotation omitted).

Here, however, none of these unusual circumstances exist. The case involves no issue of first impression or public significance, settled law governs the disposition of plaintiff's issues, and no significant financial disparity exists between the parties. Furthermore, we detect no hint that TSA engaged in gamesmanship that unduly prolonged the proceedings. The issues raised by plaintiff involved different legal claims arising from different sequences of events, and TSA proceeded without undue delay in raising various motions for summary disposition as discovery proceeded. We conclude that the circuit court acted within its discretion by rejecting the applicability of MCR 2.403(O)(11).[14]

"Expert witness fees are taxable under MCL 600.2164." *Elia*, *supra* at 379. In relevant part, MCL 600.2164(1) provides as follows:

> No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case. . . .

(…continued)

for a wrong reason).

[14] Although we generally review de novo a trial court's decision to grant or deny case evaluation sanctions, "because a trial court's decision whether to award costs pursuant to the 'interest of justice' provision set forth in MCR 2.403(O)(11) is discretionary, this Court reviews that decision for an abuse of discretion." *Harbour*, *supra* at 465.

Although plaintiff objects to the bulk of the expert witness fees sought by TSA on the basis that they were not needed at a trial, the plain "language 'is to appear' in § 2164 applies to the situation at bar in which the case was dismissed before [TSA] had a chance to call its proposed expert witnesses at trial." *Herrera v Levine*, 176 Mich App 350, 357; 439 NW2d 378 (1989). "Furthermore, the trial court was empowered in its discretion to authorize expert witness fees which included preparation fees." *Id*. at 357-358.

Plaintiff also challenged the amount of the expert witness award on the basis that pursuant to MCL 600.2461, the circuit court lacked authority to enter the award. According to MCL 600.2461,

> Every officer authorized to tax costs in any court for services rendered in any proceeding authorized by law, shall examine the bills presented to him for taxation, whether such taxation be opposed or not, and shall be satisfied that the items charged in such bill are correct and legal; and shall strike out all charges for services, which, in his judgment, were not necessary to be performed.

Plaintiff essentially complains that TSA failed to sufficiently document its requested expert witness fees. As the record reflects, however, TSA attached to its motion for case evaluation sanctions (1) a plainly captioned request for expert witness fees or expenses that cited MCL 600.2164, and then listed 15 different dates, between October 31, 2003 and June 28, 2005, and amounts assigned to five different expert witnesses, totaling $20,566.67, and (2) an affidavit of attorney Christopher J. Scott verifying that the items comprising the bill of costs were "correct and ha[d] been necessarily incurred in this action." The transcript of an August 31, 2005 motion hearing additionally reflects that when plaintiff noted TSA's purported lack of substantiation of the expert's "bills" or "invoices," attorney Scott proffered the court a "big stack of invoices" he had used in compiling the fees requested, production of which the court declined. In light of TSA's provision of the itemized list of expert witness expenses during the extensive pretrial proceedings in this case, together with counsel's affidavit attesting to the accuracy of the amounts TSA sought to recover, we cannot conclude that the circuit court's decision to incorporate into the award of taxable costs all the expert witness expenses claimed, fell outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).[15]

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[15] To the extent that plaintiff suggests that TSA had to show that it incurred the expert witness fees it requested because of plaintiff's rejection of the case evaluation award, the plain language of MCR 2.603(O)(6) belies plaintiff's assertion. Subrule (O)(6) provides in relevant part as follows:

> For the purpose of this rule, actual costs are
>
> (a) those costs taxable in any civil action, and
>
> (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge *for services necessitated by the rejection of the*

(continued…)

With respect to the circuit court's award of attorney fees, TSA attached to its bill of costs an attorney fee schedule that itemized 148 billable events between May 11, 2005, the case evaluation acceptance or rejection deadline, and July 13, 2005, the date on which counsel for TSA argued in support of its final summary disposition motion; in total, $14,730.[16] The court explained the basis for its attorney fee award as follows:

> In regard to the attorney fee, there is a request of $14,730. The fees all appear to be accumulated after the acceptance rejection date; which is May 11th, '05. Hourly rate is reasonable, $175, $200 an hour, based on the attorney's [sic] professional standing, experience and skill, time and labor involved, and the questions involved, and the amount of litigation involved in this case.
>
> As far as duplication of services, between counsel . . . there doesn't appear to be any that are unrelated to this case, and they all appear to be—everything—all the services in reviewing the bills appear to be related and necessitated by plaintiff's rejection of case evaluation. And there's nothing that looks improper and excessive . . . .

On appeal, plaintiff primarily criticizes the circuit court for neglecting to hold an evidentiary hearing to address his objection that some of TSA's requested attorney fees were "duplicative."

> As all agree, the burden of proving reasonableness of the requested fees rests with the party requesting them. In Michigan, the trial courts have been required to consider the totality of special circumstances applicable to the case at hand. *Wood* [*v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982),] listed the following six factors . . . to be considered in determining a reasonable attorney fee:
>
> "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." [*Smith v Khouri*, 481 Mich 519, 529 (opinion by Taylor, C.J.); 751 NW2d 472 (2008).]

In this case, we conclude that the circuit court did not abuse its discretion in awarding TSA the $14,700 it requested because (1) TSA supplied a thorough and detailed summary of the legal expenses incurred by its counsel after plaintiff's rejection of the case evaluation award, (2)

(…continued)

case evaluation. . . . [Emphasis added.]

The court rule thus clearly and unambiguously imposes the causal link between a rejection of the case evaluation and the attorney fees requested by a prevailing party, but imposes no such condition or limitation on a prevailing party's requested taxable costs.

[16] The vast majority of the listings identified "CJS," who earned a rate of $175 an hour, but several were denoted as provided by "GWS," who charged $200 an hour.

the court's role as presiding judge over the course of the lengthy and involved pretrial proceedings undoubtedly informed its understanding of the numerous and complex issues in the case, and (3) the court's bench ruling plainly reflects its express consideration of nearly all the *Wood* elements.[17]

IV. Jury Verdict Challenges Raised by the Follises in Docket No. 274966

After TSA's dismissal, the case proceeded to trial solely against the Follises on plaintiff's silent fraud and breach of contract claims. Plaintiff sought more than $1.6 million in damages. After a nine-day jury trial, the jury returned a special verdict rejecting plaintiff's silent fraud claim, but finding that the Follises had breached their responsibility to repair the items in the escrow agreement that plaintiff and Daniel Follis entered in September 1998. The jury awarded plaintiff $680,838 in damages. In August 2006, the circuit court entered a judgment against the Follises for the amount of the verdict plus $25,617.30 in costs, for a total of $706,465.30.

A. Standards of Review

The Follises contend that the circuit court should have granted their motion for a directed verdict at the close of plaintiff's proofs, or their later motions for JNOV, a new trial, or remittitur, on the basis that plaintiff presented insufficient evidence entitling him to recover more than $25,000 in consequential damages arising from the Follises' alleged breach of the escrow agreement.

This Court reviews de novo a circuit court's ruling on a motion for a directed verdict. *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 71; 600 NW2d 348 (1999). In reviewing the circuit court's ruling, this Court examines the evidence presented and all legitimate inferences arising therefrom in the light most favorable to the nonmoving party. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 668; 591 NW2d 438 (1998). "A directed verdict is appropriate only when no material factual question exists upon which reasonable minds could differ." *Candelaria*, *supra* at 71-72. "If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury." *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996). The "appellate court recognizes the jury's and the judge's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of trial testimony." *Zeeland Farm Serv's, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).[18]

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[17] Furthermore, although plaintiff correctly observes that a trial court "should normally hold an evidentiary hearing when the opposing party challenges the reasonableness of a fee request," a court does "not err in awarding fees without having held an evidentiary hearing" when "the parties [have] created a sufficient record to review the issue, and the court fully explain[s] the reasons for its decision." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999). We find that both conditions exist here.

[18] A similar standard governs an appellate court's review of a trial court's ruling on a motion for
(continued…)

According to MCR 2.611(A),

> (1) A new trial may be granted to all or some of the parties, on all or some of the issues, whenever their substantial rights are materially affected, for any of the following reasons:
>
> * * *
>
> (d) A verdict clearly or grossly inadequate or excessive.
>
> (e) A verdict or decision against the great weight of the evidence or contrary to law.

A court faced with a claim of excessive damages under MCR 2.611(A)(1)(d) must review "all of the evidence in the light most favorable to the nonmoving party." *Moore v Detroit Entertainment, LLC*, ___ Mich App ___; ___ NW2d ___ (Docket No. 275157, issued May 27, 2008), slip op at 21 (internal quotation omitted). If an award of damages "falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, the jury award should not be disturbed." *Id*. (internal quotation omitted). When a party challenges a jury's verdict as against the great weight of the evidence, MCR 2.611(A)(1)(e), this Court may overturn the verdict only if it appears manifestly against the clear weight of the entire record, and should not set aside a verdict if there is competent evidence to support it. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). This Court reviews for an abuse of discretion a circuit court's ruling on a motion for a new trial. *Moore*, *supra* at 21.

B. Governing Legal Principles

"The party asserting a breach of contract has the burden of proving its damages with reasonable certainty." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

> In order to be entitled to a verdict, or a judgment, for damages for breach of contract, the plaintiff must lay a basis for a reasonable estimate of the extent of his harm, measured in money. The issue becomes one of sufficiency of proof. The jury should not be allowed to speculate or guess upon this question of the amount of loss [of profits]. [*Fera v Village Plaza, Inc*, 396 Mich 639, 643; 242 NW2d 372 (1976) (internal quotation omitted, emphasis added).]

But "where injury to some degree is found, we do not preclude recovery for lack of precise proof. . . . We do not, in the assessment of damages, require a mathematical precision in situations of injury where, from the very nature of the circumstances precision is unattainable." *Id*. at 648 (internal quotation omitted).

(…continued)

JNOV. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 272; 696 NW2d 646 (2005).

"It is well settled that the appropriate measure of damages for breach of a contract . . . is that which would place the injured party in as good a position as it would have been in had the promised performance been rendered." *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 98; 443 NW2d 451 (1989). "The general rule as to damages is stated . . . in the following terms: A party to a contract who is injured by another's breach of the contract is entitled to recover from the latter damages for all injuries and only such injuries as are the direct, natural, and proximate result of the breach." *Stewart v Rudner*, 349 Mich 459, 468-469; 84 NW2d 816 (1957).

In a breach of contract action, "[d]amages recoverable are those which are a 'direct and proximate result' of the party's breach and were 'within the contemplation of the parties' when the contract was made." *Home Ins Co v Commercial & Industrial Security Services, Inc*, 57 Mich App 143, 146; 225 NW2d 716 (1974). Although breach of contract damages need not be precisely established, "uncertainty as to the fact of the amount of damage caused by the breach of contract is fatal." *Id*. at 147.

In summary,

> The damage which a party ought to receive in respect to such breach of contract may be said to be such as may fairly and reasonably be considered either as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of a breach of it. [*Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 7; 516 NW2d 43 (1994) (internal quotation omitted).]

Thus, plaintiff bore the burden of proving damages that directly and proximately flowed from the Follises' breach of the escrow agreement.

C. Contract at Issue

The parties do not dispute that they entered an "Escrow Agreement" in early September 1998, pursuant to which the Follises agreed that TSA would repair eight exterior and eight interior areas of the home. The "Escrow Agreement," prepared by the Emmet County Abstract & Title Company, identified the Follises as the "Seller," and plaintiff as the "Purchaser," and the Emmet County Abstract & Title Company as the "Escrow Agent." In relevant part, the text of the escrow agreement provides as follows:

> Deposited with Escrow Agent: $25,000.00
>
> Terms and conditions for release of above escrow items are: Upon written request from Art VanElslander funds will be released to Daniel S. and Mary Elizabeth Follis.
>
> SEE ATTACHED EXHIBIT A
>
> Upon the release of the above referenced Escrow Funds and/or Escrow Documents, this Escrow shall terminate and Escrow Agent, shall be released from any further liability. It is expressly understood by Seller and Purchaser, that

Escrow Agent is acting in the capacity of a depository and is not as such responsible or liable for the sufficiency, correctness, genuineness or validity of the Escrow Funds and/or Escrow Documents.

* * *

This agreement may be amended only by a written agreement signed by both Seller and Purchaser and accepted by Escrow Agent.

* * *

Agreed by Seller: [Daniel S. Follis] [Mary Elizabeth Follis]

Agreed by Purchaser: [Archie A. Van Elslander]

The first page attached to the escrow agreement, which plaintiff and Daniel S. Follis signed on September 3, 1998, provides in its entirety as follows:

SCHEDULE

EXTERIOR

1) The furthest stone to the east on the top step of the front entry stairs, on the flight closest to the road, is loose and needs to be resecured.

2) A wooden "shim" is present below the exterior threshold of the south facing dining room entry door. This "shim" can be damaged by the elements or compressed over time. This could allow the threshold to move and open gaps around the perimeter, which may allow water penetration. The inspector recommends that the "shim" be removed and appropriate, permanent support added.

3) The inspector also noted significant amounts of standing water in the "pit." A sump pump, drain or other means of water evacuation should be installed. Water that is allowed to accumulate in the "pit" could leak into the home or cause structural damage, should the water freeze. Mold and mildew can also be expected. The inspector did note elevated moisture readings on the basement wall adjacent to the "pit," however no water stains or other obvious signs of penetration were noted.

4) The exterior louvered port for the dryer, on the west wall needs to be replaced.

5) The weather strip on the bottom of the side entry door, toward the front of the home, is torn and needs to be replaced.

6) The inspector also noted both formal dining room doors bind on their frames and thresholds and need to be trimmed or adjusted.

7) One window in the "library," closest to the front entry, will not close completely and needs adjustment. The inspector also noted on [sic] pane of glass, in the upper "arched" north living room window, is cracked.

8) The chain drive on the north garage door opener "clatters" while the door is opening. It appears the chain or rail needs adjustment.

The second of the two pages attached to the escrow agreement lists the following:

INTERIOR

1) One of the dimmer switches at the bottom of the basement stairs was "warm to the touch" after the basement lights were on for an extended period. The switch in question appears to be the second from the left. The client may wish to have a licensed electrician evaluate the situation to determine if the dimmer switch is defective.

2) The wiring in one of the basement rooms has not been completed. A temporary light is hanging from the ceiling wires and some exposed electrical junctions are present. An additional basement room also has electrical wires hanging from the ceiling. It appears this room may be intended for use as a sauna, however it has not been completed. All electrical wires should be used in compliance with code, or terminated at their power source and removed.

3) The 3-way switch for the hanging light above the upper stairway is defective. The light only activates if switches are in certain configurations. A licensed electrician should rewire this switch so it can be controlled from all switches at all times.

4) The inspector noted several active leaks in the water supply system. Leaks are present at both shut off valves below the half bath, adjacent to the laundry room. The hot water supply pipe below the right hand master bathroom sink leaks, and the cold water supply line leaks beneath the left-hand sink. The drain plug in the left sink is also not operational.

5) Both shut off valves below the northeast upstairs bedroom sink have slight "seeping" leaks, and another leak is present on the cold water shut off valve below the kitchen "bar" sink.

6) The dishwasher near the main kitchen sink is not mounted flush within its opening. Additionally, the cosmetic face piece on the front of the dishwasher is not properly attached.

7) The vent system for the clothes dryer is not properly connected and lint, moisture and warm air are discharged into the laundry room.

8) The backsplashes behind all sinks should be appropriately caulked to prevent moisture from entering the seams. Additionally, caulk should be used to

> seal the edges of all tile floors, and around the interior of all shower doors. Any 90-degree joint between tiled surfaces, such as shower wall corners or wall to floor joints, should be caulked rather than grouted. Caulk will tend to flex, thereby resisting future cracking. Currently, most of these joints are grouted and most are cracked.

The bulk of the testimony and documentary evidence presented over the course of six days during the jury trial related to alleged window and door leakage, improper installation of waterproofing around doors, windows and elsewhere, and several other irregular or improper methods of construction. Plaintiff submitted extensive testimony regarding TSA's failure to properly construct the home, describing in great detail the bases for the allegations contained in Count I of plaintiff's first amended complaint. The voluminous evidence introduced concerning the original construction of Unit 6 primarily related to plaintiff's silent fraud claim against the Follises, which the jury ultimately rejected. This evidence did not concern, however, the 16 items identified in the escrow agreement.

With respect to the jury's verdict that the Follises breached their escrow agreement obligation to repair the 16 items listed therein,[19] the parties did not dispute the initial element of the claim, that they in fact had entered this agreement. Furthermore, plaintiff presented substantial evidence that the Follises breached the escrow agreement, specifically by failing to ensure that TSA repaired the 16 items set forth on the schedule attached to the escrow agreement. At trial, Debra Van Elslander testified that according to her investigation, TSA had failed to adequately repair several escrow list items on the exterior schedule, namely items number one, "the furthest stone to the east on the top step of the front entry stairs"; number two, the wooden "shim" "below the exterior threshold of the south facing dining room entry door"; number three, the window well or egress pit drain; number four, an exterior louvered dryer port needing replacement; number five, the torn "weather strip on the bottom of the side entry door, toward the front of the home"; and number seven, a window "in the 'library,' closest to the front entry, [that] will not close completely and needs adjustment," and a cracked glass pane in an "arched" living room window. Regarding the interior list, Debra believed that numbers one, two, six, and seven were fixed, although she did not know about numbers three, four, five, and eight. Warren Calcaterra, plaintiff's facilities manager, testified that the Follises, through TSA, had failed to properly remedy exterior items one through four and interior items four through eight.

The Follises introduced deposition testimony by TSA construction supervisor Randy Moyer and home inspector Kirk Lieberman confirming that all 16 escrow list items were remedied. But because we must view the evidence in the light most favorable to plaintiff, we accept that TSA failed to repair for the Follises exterior items one through five and seven, and interior items four through eight, thus breaching their contract with plaintiff. Our present

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[19] We remain cognizant that the circuit court granted the Follises summary disposition with respect to the breach of contract claim on a limited basis, specifically concerning exterior schedule item eight, the garage door opener, and interior schedule items one and two, involving a dimmer switch and basement wiring, and that plaintiff did not seek damages at trial arising from these items. For the sake of consistency, however, we continue to refer to all 16 listed items.

analysis focuses on the adequacy of plaintiff's proof regarding the relationship between the breaches of the escrow agreement and the damages claimed at trial.[20]

D. Condition of Window Well, Exterior Item #3 & Related Causation Testimony

At trial, among the unrepaired escrow list items, one that received a great deal of attention was the window well, or egress pit. Sebold testified that in 1998, he instructed construction superintendent Moyer to fix all 16 escrow list items, and that Moyer subsequently reported having done so. With respect to the window well, Moyer described having cleaned debris out of a drain at the bottom of the well, and then having run a hose into the window well for two hours to ensure that the drain cleaning remedied the standing water he initially saw in the bottom of the well.

TSA construction supervisor Maddelein, whose deposition the parties read into the record, recalled that TSA had placed a Plexiglas cover on the window well "towards the end of the job. . . . [t]o keep the rainwater out as much as possible," and denied knowing of water in the window well at any point before July 2002. Sebold insisted that TSA had placed a drain pipe in the bottom of the well during the original construction of Unit 6, and that TSA had installed the Plexiglas shield over the window well "when the Follises owned it."

Maddelein testified that he accompanied Sebold to Unit 6 the day after the July 21, 2002 storm damage. Maddelein described that the entire "basement had gotten very wet, very wet on the floor. . . . It . . . looked like the basement had flooded." Regarding the source of the basement water intrusion, Maddelein related, "Someone pointed . . . out the window—well . . . at the west bedroom in the basement, and I think somehow their thought was that . . . some water may have come in through the garage side of the house." Maddelein added that "we could tell the water came in through the window opening" "[b]ecause of the debris that was in—the water being on the wall and on the window, the fact that everything was wet."

The parties partially read into the record the deposition testimony of Kelley, plaintiff's property manager between summer 2001 and 2003. Kelley recalled that on what "had to be the

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[20] During closing argument, plaintiff's counsel downplayed as follows the notion that the failure to repair several of the escrow list items had injured plaintiff:

> I know you were probably a little confused last week because I was eliciting testimony on items that I concede were insignificant, the face plate on the dishwasher—I'm trying to remember what other ones th[ere] were. Little items that weren't repairs. Are those really significant to our claim, did we occur [sic] any damages as a result of that? No. I wanted that evidence to come in and I wanted you to hear it because we believe that it shows that there was never a sincere effort made to repair any of those items, significant or insignificant.

second time [plaintiff] called [him]," on July 21, 2002,[21] he witnessed water intrusion into the basement. Concerning the bedroom adjacent to the window well, he reported the following:

> I do remember going . . . down in the basement, and there was, David's basement room was, there had to be inches of water on the floor. You could look at the window and see the water to where it was up at. You could tell by looking, and when the water comes down from the glass, you can see how high it was.
>
> *Q*: There was water on the glass portion of the window when you were there?
>
> *Kelley*: You could tell it was there. Then it went down. David's basement room, it was just soaking wet. I believe under [the] ping pong table it was on the floor as well.
>
> * * *
>
> That would be in front of the sauna where the theater is.
>
> * * *
>
> There was [a lot of] water on the floor actually in the kids' bedroom too. The kids' bedroom was across from the bathroom by David's basement bedroom . . . .

Kelley denied that he ever observed a Plexiglas cover over the window well.

Calcaterra, plaintiff's facilities manager for 18 years at the time of trial, testified that in December 2002, he first became involved in overseeing remediation efforts at Unit 6. When Calcaterra first saw the window well in December 2002, it was dry, and covered with a metal grate, with a "piece of plexiglass [sic]" on top of the grate. Calcaterra recalled that because he had "heard about water standing" in the window well, in late 2003 he hired a plumber, with whom he went into the window well, helped pushed aside about 1-1/2 feet of pea gravel, and observed a 4" drain in concrete in the bottom of the well. Calcaterra related that when the plumber had reached his hand about 10" into the drain pipe, it terminated in some dirt. Calcaterra consequently opined that the window well drain "doesn't go anywhere," at least not directly into the drainage system under and away from Unit 6. Calcaterra explained that he and the plumber repaired the window well drain situation by removing the drain pipe and the concrete surrounding it, placing more pea gravel into the bottom of the well, and mounting gutters where two roof lines met directly above the window well, after which no subsequent water buildup occurred. Regarding Moyer's purported repair in 1998, Calcaterra felt it impossible that water would not begin to fill the window well if someone ran a hose into the well

[21] Plaintiff called Kelley to report weather-related water intrusion into Unit 6 on both July 17, 2002 and July 21, 2002. The second instance caused the larger amount of water intrusion.

for two hours, primarily because the 4" drain pipe that he had helped remove had no direct connection to the drainage system below the house. Calcaterra denied knowing of any complaints by plaintiff or his agents concerning standing water in the window well at any point before the July 2002 storms.

Architect Michael Rupert, a 13-year employee of plaintiff's company, testified that at the request of Debra Van Elslander and Calcaterra, he visited Unit 6 on one occasion toward the end of 2002, and that he observed the window well. Rupert recalled seeing a plastic cover on top of the window well. On the basis of Rupert's review of a Western Waterproofing report, which documented that in April 2003 water from a hose began to pool in the well within two minutes, Rupert opined that the drain TSA placed in the window well had not extended to, and connected with, the drainage system below Unit 6. Rupert denied awareness, however, of any Van Elslander complaints about, or any maintenance they may have performed on, the window well between 1998 and the summer 2002 storms.

Wild, an estimator for Western Waterproofing, where he had worked for 28 years, recalled that he received a phone call from Calcaterra on December 6, 2002, prompting him to spend all that day investigating potential sources of water intrusion into Unit 6. Wild testified that, among other areas, he probed the window well. Wild noted rotten wood in the frame of the window, which was positioned about two feet from the bottom of the window well; that the window bore traces of dried tree "seeds" and other debris; and that different roof elements converged above the well. According to Wild, he placed a running hose into the well, which began to accumulate water within a few minutes. Wild acknowledged having stated during his deposition that "we tried to reach our arm in there [a hole in the concrete] and clean out the sand as far as we could and we did feel a drain tile in there," but that he made no further probe to ascertain "where it went, how far it was, what the extent of it was."

Timothy Wise, part-owner of Service Master Priority Care, a cleaning, restoration and mold remediation company, testified that he became involved with Unit 6 sometime before December 2002. After the July 2002 storm-induced water intrusions, plaintiff had contacted Wise's brother to assist in drying and cleaning the house, but Wise received a call to assist when his brother spotted "mold in several locations" inside Unit 6. Wise recalled that on his first visit to Unit 6, he detected signs of water damage in a basement bedroom and a basement bathroom, and also observed apparent mold in the basement bedroom adjacent to the window well.

Indoor air quality specialist Connie Morbach, of Sanit-Air, Inc., testified that she first visited Unit 6 on September 3, 2002, and initially attempted to discover any potential sources of water intrusion. With respect to "the area of the window well," Morbach related the following:

> Yes, that's in the bedroom. I had referred to that as the southwest bedroom in my report. And what I found there were cracks under the window, water stains under the window, and water stains and visible growth on the floor, the lower six inches of the drywall under the window.

Morbach further described in some detail as follows the types of mold she located in the window well area:

Morbach: There was very high growth of aspergillus and penicillium, which are both water damage indicator molds.

Q: Is there anything that you found out from those lab reports of your sampling that would assist you in determining for how long a period of time there was mold growth in that room?

Morbach: I would say with the lab results, as far as the air samples, the information told me that there were indoor sources, and that if I didn't know, I needed to go look for it. So then I went to the surfaces and looked, and when I found tertiary colonizing molds, which are the ones that take no moisture and the longest to grow, such as stachybotrys, I knew that there had been a repeated water damage in this home.

When asked about the significance, if any, of inspector Lieberman's August 1998 observation of "elevated moisture readings" in the window well area, Morbach responded, "If there were elevated moisture measurements at that time [in August 1998], and the source was not corrected and the water damaged building materials [were not] dried within 48 hours there would have been mold in that home." On cross-examination, Morbach conceded that in light of the 1998 inspection report's observation of elevated moisture measurements near the window well, she would have "carefully watched and monitored" that area, had she owned the home.

On redirect, Morbach answered the following hypothetical inquiry from plaintiff's counsel involving the 2002 storm and potential window well-related damage:

Q: I'd like you to assume that there was a great big storm in Bay Harbor in July 2002. I believe someone testified yesterday that the area received three inches of rain at that time. If water came in through the egress window and flooded the basement at that time, would that be consistent with the mold findings that you found the first time you were out there?

Morbach: In that part of the basement, yes, the bedroom, bathroom adjacent . . . .

Morbach added, "You can take out the drywall, you can take out the mold, but you still have an issue of potential ongoing water intrusion if the drain isn't fixed."

Viewed in the light most favorable to plaintiff, the testimony of Morbach, Calcaterra, Wild, Wise and Rupert established that the Follises failed to adequately remedy the "standing water" problem in the basement window well, exterior item three of the escrow schedule. The evidence also established that the breach of this contractual provision resulted in natural and foreseeable consequences, including water leakage and mold in a portion of the home's basement.

E. Condition of "Shim" Under Lake-Facing Dining Room French Door, Exterior Item #2, & Dining Room Doors, Exterior Item # 6, & Related Causation Testimony

Regarding the "shim," one of the exterior items needing repair, the escrow list specified as follows:

> A wooden shim . . . present below the exterior threshold of the south facing dining room entry [French] door. This 'shim' can be damaged by the elements or compressed over time. This could allow the threshold to move and open gaps around the perimeter, which may allow water penetration. The inspector recommends the "shim" be removed and appropriate, permanent support added.

Notably, however, none of the items on the escrow list concerned the ability to properly close, latch or lock the dining room entry French door, or the master bedroom entry French doors facing the lake. As we discuss in greater detail, *infra*, the parties do not dispute that during the July 2002 storms, a significant quantity of water entered the home through the master bedroom's lake-facing French doors, the French doors in the dining room, and the great room doors.

The parties agree that Moyer trimmed the wooden "shim" and caulked around it. Although Sebold opined that Moyer properly and permanently remedied the "shim" issue, Calcaterra disagreed because shims "should . . . go[] under the jamb, not under the threshold." Rupert similarly believed that Moyer had failed to provide the permanent support contemplated in exterior item two. Plaintiff's counsel posed the question to Calcaterra, "Do you have any knowledge of whether water entered in this area," to which Calcaterra responded, without further elaboration, "Yes." Rupert opined that Moyer's "repair" possibly could have resulted in water penetration.

No other testimony at trial specifically referred to the "shim," although abundant testimony and evidence concerned water intrusion into the first floor dining room, as well as several other rooms on the first floor of Unit 6. As noted on the escrow list, the "shim" had been "present below the exterior threshold of the south facing dining room entry door," which the parties agreed faced Lake Michigan. The dining room also had another doorway in the opposite wall, toward the bay.

Substantial trial evidence established that multiple causes existed for the entry of water into the first floor living, dining and bedroom areas. Steven Terry, an ArTek Window & Door service manager, testified that water could have entered the dining room when the storm door contained screens, and not storm windows. However, Terry could not identify with certainty any causes of water entry into the dining room.

According to Terry,

> The dining room door had never been an issue up until Jason [Kelley] called me up and said you have major problems with the floors buckling and you need to come up here and you need to check this out. So I did. I took pictures and some of these pictures right here are referring to that assessment and I had to look at it from the exterior as to what's the real problem. How can a true French

door affect a floor that is 25 feet long and the floor buckling 25 feet away from that French door? How can that French door be the culprit?

Q: Okay. I believe you have pictures that showed that the buckling was not in the vicinity of the door?

Terry: It was in the vicinity of the door, but it was also 20 or 25 feet back from the door, if I remember correctly. This was a very large dining room.

Terry further testified as follows concerning a document that summarized his response to "a complaint from the contractor that the French doors were leaking, a complaint that Terry addressed "over the phone":

Terry: So we're speculating. Basically what I've done here is speculating that we need to install the sill extenders to get that done ASAP because we might be getting a little water in there underneath that sill very possibly. We need to install the storm doors and the screen doors. We need to caulk the sill and just double-check the Astragal weather stripping because there is mention of leaks in the center of the door, but those leaks would have come around the door had the inactive door panel not been locked down. We would have had the leaks in the center of that door. That might not have blown that door open at that point, but at least it would have occurred.

Q: Is it a fair statement sitting here today you don't know whether it was the cause of the leaking or not?

Terry: Exactly. This is all speculation is what I'm getting at.

Terry estimated that unspecified doors of Unit 6 "had blown open and they had snow in that house and rained [sic] and wind in that house prior to them not locking those doors up many times," "[p]robably being conservative, six times. . . . over the course of that six-, seven-year period of time."

The parties also read into the trial record deposition testimony by ArTek Window & Door salesperson William Wolfington, IV. The only concern Wolfington remembered involved

the door issue. How to close and make sure they locked the door. [ArTek or TSA] would get calls on occasion that they weren't you know, these French doors, you have to work the handles properly. If they don't do it, they can come back and wind can blow the doors open and rain can come in or whatever. That was the only problems [sic] that I recall.

* * *

Q: Is it your understanding that someone at ArTek and someone at TSA knew that the Vans were having trouble operating the [door] latching mechanism?

Wolfington: Yes, yes, on more than one occasion from my recollection, which what's so hard? They are door handles.

Kelley described that after plaintiff hired him in the summer of 2001, he occasionally spent between a half-hour and one-hour walking through the residence when no one else was occupying it. Kelley denied recalling any "problems . . . with the [exterior] doors blowing open prior to July 17, 2002."

Kelley recounted that he twice reported to Unit 6 in July 2002 because of weather-generated water intrusions. Kelley first responded to a call from plaintiff on July 17, 2002; when Kelley arrived the next day, he spent about five hours at Unit 6 helping clean up water, which he believed had entered the house "[u]nderneath the doors, . . . through the doors" in the first floor's "dining room," "master bedroom," and "the great room." Kelley also called Great Lakes Superdry for assistance. And after another storm on July 21, 2002, Kelley spent seven hours helping attempt to dry water that had entered the house. When Kelley arrived on July 21, 2002, he noticed that "[i]n the dining room there was standing water. The carpet was wet in the master bedroom. The great room, I don't remember."

During Maddelein's testimony, he recounted, "I do know that there was water in the house on different occasions," "there have been various cases where windows and doors were open during rain storms and water was flying through the first floor of the house." Maddelein recalled that this occurred at least twice when the Follises owned Unit 6, including once during a storm, and that he twice had gone to the house to demonstrate for Mary Follis how to lock the French doors. Maddelein also remembered doors and windows blowing open when plaintiff owned the house. Maddelein testified specifically regarding a conversation he had with plaintiff's son-in-law:

> *Maddelein*: He was just talking about how that's where he used to stay when he came up, when he had had the Scott Schuptrine store, and he was talking about forgetting to close windows and doors when he was away and finding that they were open when he came back.
>
> *Q*: Do you know how long a period of time that [he] would leave them open?
>
> *Maddelein*: It could have been a week or two.

Wild testified regarding his probe of the dining room doors on December 6, 2002, specifically his investigation of the threshold of the south side French doors. Wild recalled that he selected this area because he saw "some green algae . . . staining on the stone sill, . . . a sign of excess water or moisture that is laying . . . in a particular area." After Wild "cut right through the center of the sill," he "observed that underneath the sill they had run some caulking to stop any water from migrating underneath it. Unfortunately, . . . the type of sealant that was used was not compatible with the membrane that was underneath the sill." In part because the sealant had not adhered to the membrane present, Wild "observed some water droplets . . . on the underside of the sill." Wild recounted that he

> also looked at how this membrane that I had talked about came up the foundation wall and it turned in to the . . . where the sill was, but unfortunately through the probe and through the photographs from that, there is no turn-up on the back side.

> So any water that would come down onto this sill, got underneath it, had a free rein into the inside of the structure.

Later, Wild added to his conclusion regarding "any condition in the vicinity of the French doors that would cause water intrusion into the home"; Wild opined "[t]hat in the jamb, meaning the side of the door itself, that there was no seal between the jamb and the masonry work itself, so water had a chance to migrate between the frame and the masonry."

Wild served as plaintiff's sole expert witness regarding the sources of water intrusion into Unit 6. Wild identified a number of construction errors that allowed water to leak into the living areas, including (1) the absence of "joint sealant" between the bottom of the cedar shake shingle flashing and the top of the limestone sill; (2) the sill's installation at an improper angle; (3) employment of the "wrong type of membrane" as a barrier to "keep the structure dry"; (4) the membrane's failure to extend all the way to the foundation; (5) construction of the dining room door sill in disregard of industry standards; (6) the existence of "little recesses" in the mortar holding the chimney stones together, which permitted water to collect; and (7) the lack of an adequate membrane in the area of the balcony over the front door, and the presence of two "scuppers" that did not drain well. Wild also described the repairs accomplished by Western Waterproofing, which included replacement of the wall membrane, creating weep holes around the home's perimeter, and tuck-pointing deteriorated mortar joints.[22]

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[22] When requested to describe briefly "what type of repairs" Wild recommended, he summarized as follows:

> Basically, kind of the project in a nutshell, was that the sills—the sill meaning the stone sill between the cedar shake single and the top of the masonry wall, needed to be addressed so that water wasn't getting into the top of it. The repair that I came up with was to, just like the drawing shows, to tilt that sill so that water would run off of it, tie in the wall membrane, which was a roofing material, which was wrong, we cut that all out and removed it and replaced it with a true waterproofing, and tie in the foundation wall below the ground.
>
> And then we created weep holes, so should any water get into there, it has a way to weep out and drain. And we did that pretty much around the perimeter of the structure.
>
> * * *
>
> [O]ne thing we didn't talk about . . . , in some cases the foundation . . . . in this particular case I had observed, and we probed various areas, where instead of the stone sitting on the seat, the stone was actually out away from the foundation itself.
>
> And in a situation like that, we talked about freeze/thaw situation, where heaving can take place because you're getting the frozen ground under here and

(continued…)

Regarding potential water intrusion through doors and windows, Wild testified that he "[c]ertainly" "agree[d] that if somebody leaves the doors and windows open, that could cause water penetration[.]" Wild further agreed that "if a drain is blocked and water is coming back toward the home, that that can cause a problem[,]" and "that if you don't lock the doors and a huge storm comes up and pours five inches of water into your home, that that is . . . really bad[.]"

Notably, however, neither Wild nor Calcaterra testified that the single door problem mentioned on the escrow list, a wooden "shim" beneath the south facing dining room entry door, had remained in place or had contributed in any manner to the extensive water damage.

Wise also testified concerning his observations of dining-room related water damage during his first visit to Unit 6, on some unspecified occasion before December 2002, when he began assisting Morbach with remediation efforts. According to Wise, "In the dining room off the kitchen there appeared to be extensive water damage from two French doors, one facing lake side, one facing the bay side," specifically "wood floors that were buckling," "moisture present," and what "appeared . . . to be a large—it looked to be mold underneath the wood floor," which Wise revealed by pulling up a couple strips of the floor.[23] Wise explained that in an effort to locate the sources of the apparent water intrusions, he undertook a 10-second, nonscientific test on the two sets of dining room French doors, "which [wa]s to take a garden hose, simulate rain, shooting it up in the air onto the doors and onto the siding of the home." Wise reported the test results as follows:

> Again, it appeared to be either coming in under the threshold, and as well—actually, the way a door is constructed, you've got the bottom plate of a door, there is glass that is inset into that bottom plate and it really—actually, the water was coming right underneath the window and down this kick. So it seemed to be traveling right through a portion of the lower door.

Wise clarified that most of the water entering the house "was below that wood floor," but that "some small amounts" of water visibly collected or puddled on the dining room floor.

After Wise's first visit to Unit 6, he formed the opinion that "it appeared to be a longer term damage, and I can't give an exact date of how long it had been there prior to us . . . ." Wise could offer no opinion precisely when water had entered Unit 6, or whether Unit 6 contained any mold in September 1998. Wise suggested that plaintiff should consult an indoor air quality specialist, and assisted in Morbach's later remediation efforts, which commenced in December

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(…continued)

> lifting and moving and creating problems above. So, yeah, there was [sic] conditions where that should have been noted. In the architectural drawings they show that the stone was supposed to sit completely on the seat and not cantilevered out, . . . away from the wall.

[23] Wise remembered also having seen, as he entered "the master bedroom," that "there was [sic] signs of water damage from the French doors . . . in that room as well."

2002. Wise estimated that "very close to 70 percent" "of the interior of . . . [Unit 6] needed to be removed to remove the mold . . . ."[24]

On cross-examination, Wise discussed as follows the potential for post-storm mold growth under the circumstances of this case:

> *Q*: You would agree that if the—assume that the storm dumped about five inches of water into that home—that that can be an incubator for mold in that five months, from July of '02 to December of '02, part of which is during the heat of the summer.
>
> *Wise*: Okay.
>
> *Q*: Do you agree with that?
>
> *Wise*: I would agree with that.
>
> *Q*: All right. And you agree that there are lots of things that can cause mold, and I understand this isn't exactly your expertise, but you deal with this a lot, so leaving doors and windows open, a huge storm, water down the chimney, a drain backing up, changing the doors causing water to pool between the screen and storm door, those are all things that can contribute to mold, right?
>
> *Wise*: I would say . . . as long as you have temperature, humidity, the right conditions, moisture, certainly.
>
> *Q*: And all the things that I just told you can certainly be causes of mold, right?
>
> *Wise*: Yes, sir.

Morbach began summarizing her September 2002 walk through of the main floor of Unit 6 by reporting that she observed significant

> areas of water intrusion . . . in the master bedroom . . . along the door walls, or the French doors facing north . . . . The subfloor in that area was actually significantly delaminated, which meant it had a lot of water and had swollen up. I also found oxidation and rust on the nails around the tack strip, and found growth and significant staining on the plywood subfloor, as well as the tack strip.

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[24] Wise believed that the original remediation scope eventually expanded to the basement because as the initial efforts proceeded, workers noticed "there were signs of water going down to the finished basement," and confirmed that "the bedroom with the egress window had definite mold down in the basement," as well as "some other areas that had grown in the basement." Morbach also noted in the basement signs of water intrusion "[i]n the garage area by the doors coming in. Also in the furnace room and the storage room adjacent to that garage entry."

Plaintiff's counsel then inquired as follows whether Morbach could pinpoint a time frame during which the damages she saw had taken place:

> *Q*: These observations that you made, is it possible to reach any conclusions—the jury has heard that there was a storm in July of 2002 where water entered in this area. Was it possible for you to determine whether that was the only time there had been water intrusion there?
>
> * * *
>
> *Morbach*: Yes. And based on comparisons of other areas where there was less water damage, this area, as I said was delaminated. This was not associated with a one-time water damage. Plywood does not become delaminated with a one-time water damage. You also don't get the oxidation, rust, on the nails and the growth that was demonstrated on this subfloor with a one-time water damage.

With respect to the dining room, Morbach testified as follows:

> In the dining room area I observed significant contamination under the—there was one hardwood plank that had been pulled up. The underside of that hardwood plank, at the north wall, which is the back, at the door, had significant growth, significant black growth on the underside of that hardwood, as well as on the plywood underneath. This was—there was actually crumbling of the wood. This was representative of a chronic long-term water damage.

Morbach saw near the south-, or lake-side, dining room French doors that "the hardwood was slightly buckling there. Also, there was discoloration on that toe molding there that provided evidence of water intrusion."[25] Morbach characterized the water intrusion into Unit 6 as very pervasive. According to Morbach, laboratory testing later identified mold "growth in the dining room on the floor, as well as on an area by the chimney."[26]

Viewing the testimony of Morbach and Wise in the light most favorable to plaintiff, the testimony of neither witness supports a reasonable inference that the Follises' failure to repair the shim under the south-facing dining room French doors resulted in the extensive damage to the dining room floor, or contributed to the mold in that area.

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[25] Morbach discussed similar findings of water intrusion near the "windows and doors" in the sitting room and the great room on the first floor of Unit 6, and that "[o]n the upper level [she] primarily found signs of water damage on the tack strips and the subfloors at every window."

[26] Morbach returned to Unit 6 on August 27, 2003, after she received photographs "showing . . . significant gross contamination on the exterior sheathing when the stone was removed. So I went to the home to further evaluate some areas that had not been previously evaluated because that growth was basically hidden with[in] the wall cavity."

F. Condition of Loose Stone on Front Stairway, Exterior Item #1

Calcaterra averred that, in addition to the various sources of water intrusion, TSA failed to adequately remedy for the Follises the loose stone "on the top step of the front entry stairs." In support of his opinion, Calcaterra testified that "[t]here's two flights of stairs, steps going up, and they're not built properly. There should be drainage underneath . . . the concrete, and it's not there." Calcaterra denied that Moyer's purported securing of the loose stone constituted a "permanent repair" of the step drainage condition. Calcaterra explained that he had obtained a Western Waterproofing estimate to reconstruct the steps with proper drainage at a cost of $68,000. Wild explained that this estimate encompassed his recommendation "to completely remove the stair, the foundation of it, so that . . . should any water get in, it has to have a way out, because standing water in a freeze/thaw condition . . . will . . . continue to . . . become debonded."[27] Kelley testified that during his tenure as the Unit 6 property manager, "[o]ne of the steps had loose blue stone ad [sic] we repaired it."

Viewing the record in the light most favorable to plaintiff, we once again detect no evidence supporting a reasonable inference that some improper act or omission attributable to the Follises resulted in damage to the front entry stairs.

G. Conditions of Various Other Escrow List Items

Calcaterra averred that he replaced a dryer vent, exterior item number four, on some unspecified occasion. Regarding interior items four and five, Calcaterra testified that in late 2002 or early 2003, he "noticed that all the fittings that the valves were hooked up to had been leaking at one time, because there was calcium around the fitting and around the nut." Calcaterra believed the leakage had taken place sometime after March 1999.[28]

Concerning interior item six, Calcaterra disputed that when he saw the dishwasher it sat flush in its opening, or that its cosmetic front piece was properly attached. Calcaterra added that the clothes dryer vent system, interior item seven, also was improperly connected, and that the caulking identified in interior item eight had not taken place.

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[27] Wild affirmatively answered plaintiff's counsel's question, "[W]ere each of the repairs that you've testified were performed by Western necessary to stop water intrusion into the home?" Wild disbelieved that either the Follises or plaintiff, at any point between 1997 and 2002, could have detected the various deficiencies his investigation uncovered. Wild did believe, however, that "Sebold and his staff" and the "mason who was . . . doing the initial work" should have recognized the potential sources of water intrusion.

[28] Although the transcript is not entirely clear with respect to near which bathroom vanity Morbach noticed some water staining, she had seen "fairly new" water stains under a vanity "that could have come from" a nearby burst pipe.

H. Other General Causation-Related Testimony

On cross-examination, Calcaterra summarized as follows the state of his personal knowledge concerning escrow list repairs by TSA:

> *Q*: Now, in fact, you have no personal knowledge whether those repairs were attempted, do you?
>
> *Calcaterra*: No, I don't.
>
> *Q*: Okay. And as far as what really occurred to those items, the eight interior items and the eight exterior items, between '98—and . . . . December of 2002. So in this period here, you have no idea what happened with those items, those 16 items, do you?
>
> *Calcaterra*: That's correct.
>
> *Q*: And you would agree that all of those conditions could have changed significantly between '98 and 2000—December of 2002, right?
>
> *Calcaterra*: No.
>
> * * *
>
> *Q*: Well, let's just talk about the exterior of the house.
>
> *Calcaterra*: Okay.
>
> *Q*: Do you agree that the exterior—the exterior of that home, where it's located is exposed to a lot of pretty serious weather elements, right?
>
> *Calcaterra*: Yes.
>
> * * *
>
> *Q*: Did anybody—did either Mr. Van Elslander, Debbie, or anybody else from the family call to complain to you about any of the items on either the interior or exterior list in the five-year period that, you know, from '98 until December 2002?
>
> *Calcaterra*: No.

Calcaterra further denied ever hearing, between September 1998 and July 2002, that anyone who occupied Unit 6, or any of plaintiff's maintenance employees (including Kelley), ever voiced concerns about any of the construction problems listed in the first amended complaint, including the window well.

During Rupert's testimony, the following exchange summarized his opinions of the various defective conditions in Unit 6, none of which have any relationship with the 16 escrow list items:

> *Q*: Now, I believe, and I'm going to just try and summarize this quickly if I can sort of go through each individually, you've testified that the windows were not properly flashed or installed, the doors were not properly flashed and installed, there was no masonry on the flashing, there was a problem with the water barrier flashing, the masonry wall wasn't built according to plans and specs, there was [sic] a waterproofing membrane, water came through the improperly-flashed masonry, the doors were not flashed properly, and materials were misapplied?
>
> *Rupert*: Right.

According to Morbach, the laboratory analyses of the air samples she took from Unit 6 revealed the presence of "indoor" molds, "which told [her] that there were indoor sources." Morbach denied knowing whether anyone had mentioned or seen mold inside Unit 6 before July 2002. Counsel for the Follises elicited Morbach's agreement that mold "[a]bsolutely" could have grown inside the drenched house during the six weeks that elapsed between the July 2002 storms and her first visit to the house on September 3, 2002. Morbach denied that the full extent of the mold damage she saw inside Unit 6 could have resulted individually from a clogged storm drain, leaving doors or windows open, or improper caulking of the windows during installation. She did acknowledge, however, that some of these factors could have accounted for some of the water damage and mold she had observed.

Morbach believed that mold had grown "in the non-bedroom areas" of Unit 6's lower level because "it appeared that . . . water had run behind the paneling which would have come from above at the doorwalls." Morbach denied that she could pinpoint precisely the ages of the molds she located inside Unit 6:

> *Q*: Ma'am, can you point on those boards, how many places where you found mold that you can testify with reasonable certainty that that mold was growing in 1998, September of 1998[?]
>
> And by the way, ma'am, while you're thinking, I'm talking about as opposed to 1999 or 2000 or November of 1998. In other words, I want to know, with precision, can you testify to that[?]
>
> *Morbach*: Based on the way you've answered (sic) the question, no.

I. Analysis Regarding Sufficiency of Evidence of Breach of Contract Damages

Plaintiff submitted to the jury a claim for all damages resulting from water intrusion into Unit 6. In exhibits supplied to the jury, plaintiff outlined 13 general categories of damages, some further broken down into subcategories, all of which together totaled more than $1.6 million. The damages sought included reimbursement of the following items: (1) $250,000 paid to Service Master, Wise's cleaning and mold remediation company; (2) $382,000 for replacement

of "personal property," primarily furniture, damaged by mold; and (3) $3,392.54 for services to dry the home after the July 2002 storms.

Plaintiff did not attempt to link the alleged breaches of the escrow list contract with specific damages within the home. Unquestionably, Morbach's and Wise's charges for mold remediation included services provided to areas of the home unrelated to the escrow list items. Similarly, the lump sum requested for replaced furniture plainly included furniture having no relationship to any escrow list items. The jury awarded plaintiff the lump sum of approximately $680,000, without assigning any specific categories of damages to any specific breaches of the escrow agreement.[29]

1. Window Well

The record clearly establishes that at the time of Lieberman's home inspection around August 24, 1998, the window well had standing water. Although Lieberman detected no water-related damage in the area of the window well in August 1998, he cautioned that water permitted to accumulate in the well "could leak into the home or cause structural damage," or generate mold and mildew. Mold expert Morbach agreed with Lieberman's report in these respects, that "you still have an issue of potential ongoing water intrusion if the drain isn't fixed," and, "If there were elevated moisture measurements at that time [in August 1998], and the source was not corrected and the water damaged building materials [were not] dried within 48 hours there would have been mold in that home." Plaintiff theorized that the genesis of mold in the window well, and its spreading throughout the house, thus amounts to either a direct, natural and proximate result of the Follises' breach of the escrow agreement, or at least a consequence reasonably within the parties' contemplation when they entered the escrow agreement as a result of the Follises' failure to repair the window well.

We reject the notion, however, that in "the usual course of things," the Follises' neglect to properly remedy the window well drainage situation in or around September 1998 "fairly and

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[29] We respectfully disagree on legal grounds with the dissent's conclusion that the breach of contract verdict should be affirmed because "[a] reasonable jury could infer from the expert testimony of Wise and Morbach that the disrepair of the dining room doors and basement window well significantly contributed to the resulting mold." *Infra*, slip op at 4. Although the parties could have foreseen that the Follises' failures to properly perform the escrow list repairs would result in some water damage and some mold, we reject that the parties could have contemplated a massive mold infestation throughout this large home arising from the incomplete repair of a single door sill and a single basement window well. Whether the Follises' incomplete repairs "significantly contributed" to the mold might be relevant if the claim at issue were a tort case. *Infra* at 4. But in this breach of contract action, plaintiff must prove that his damages "arise naturally from the breach, or . . . can *reasonably* be said to have been in contemplation of the parties at the time the contract was made." *Lawrence*, *supra* at 13 (internal quotation omitted, emphasis in original); see also 24 Williston on Contracts (4th ed), § 64.13, p 137 ("For a tort, the defendant becomes liable for all proximate consequences, while for breach of contract the defendant is liable only for consequences that were reasonably foreseeable, at the time the contract was made, as likely to result if the contract were broken.").

reasonably may be considered" as leading to plaintiff's ultimate incurrence, in 2002 and beyond, of more than $1.6 million in water damages, mold remediation, and reconstruction costs. We conclude as a matter of law that the damages sought by plaintiff for the Follises' breach of duty in failing to fix the window well, in accordance with escrow list exterior item number three, were not recoverable as directly, naturally, and proximately arising from the neglect of, or improper repairs to, one window well drain, given (1) Wild's identification of numerous other sources of water intrusion; (2) the lengthy period of time between the parties' entry into the escrow agreement and plaintiff's discovery of water damages; and (3) the ultimate necessity of remediating and reconstructing a majority of Unit 6.

The language of the escrow agreement describing the window well issue identified by Lieberman does tend to support plaintiff's claim of entitlement to consequential damages arising from the Follises' failure to fix the window well drain, to the extent that escrow list exterior item three explicitly refers to the potential for mold. But an objective leap from some water and mold damage near the window well to plaintiff's request for more than $1.6 million in consequential damages, or even the jury's award of more than $680,000, remains problematic. As we have observed, permissible consequential damages constitute those "as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of a breach of it." *Lawrence*, *supra* at 7. The record in this case, however, reveals several unrebutted factors that mitigate against a determination that the Follises reasonably could have anticipated the damages plaintiff sought to recover, and that the jury ultimately awarded.

Objectively viewed, the circumstances of this case, even when viewed in the light most favorable to plaintiff, do not establish by a preponderance of the evidence that the Follises knew or should have known in 1998 that a lone malfunctioning window well drain likely would lead to either $1.6 million or $680,000 in damages to Unit 6—especially in light of the fact that the parties placed in escrow $25,000 to ensure proper remedy of all 16 escrow list items.

Plaintiff asserts that *Dierickx v Vulcan Industries*, 10 Mich App 67; 158 NW2d 778 (1968), supports his claim for a full measure of damages caused by the escrow list-related leaks. The plaintiff in *Dierickx* contracted with the defendant "to waterproof a certain portion" of the plaintiff's basement wall, and warranted its work for five years. *Id*. at 69-70. Despite the defendant's efforts, water continued to seep into the plaintiff's basement. *Id*. at 70. Eventually, the plaintiff hired a different contractor, who successfully controlled the seepage after "breaking up a portion of plaintiff's driveway and excavating the outside of the basement wall." *Id*. The plaintiff submitted to the trial court a bill of particulars itemizing each component element of damage, totaling $4795. *Id*. at 70-71. The trial court found that the defendant had breached its contract and awarded the plaintiff only $230, the amount paid to the defendant for its ineffective waterproofing services. *Id*. at 71.

This Court reversed. In relevant part, the Court observed that "[t]he proper measure of damages in this case is the lowest cost of furnishing plaintiff a dry basement for a period of the warranty." *Dierickx*, *supra* at 75. The Court explained that because the defendant expressly had guaranteed the effectiveness of its services for a five-year period, the trial court should have entertained testimony regarding "the costs of the subsequent excavation contract," and should have made findings "as to the expected life of the excavation job as well as when defendant's warranty began to run and what period remained unexpired." *Id*. at 78. Next, in the portion of *Dierickx* emphasized by plaintiff, the Court stated,

> Moreover, it is clear that one who contracts to stop a leak under such a guarantee of success will at least contemplate that if he fails incidental damage may follow from the continuation of the leak. Plaintiff claims such injury did in fact follow by virtue of warped paneling, discolored tile and loss of use and enjoyment of the basement recreation area. Testimony should have been permitted as to the extent of these damages occurring by virtue of defendant's failure, which occurred while the warranty was in effect. [*Id*. at 78-79.]

The evidence in *Dierickx* plainly demonstrated a direct causal connection between the defendant's breach of its warranty and the entirety of the leakage in the plaintiff's basement. Here, although some evidence links the Follises' failure to repair the window well drain and the damage to plaintiff's basement, the evidence does not causally connect the window well problem to the damages incurred in the upstairs of Unit 6, or even in other areas of the basement.

2. Dining Room "Shim" & Doors

Plaintiff also contended at trial that the failure to repair either the "shim" under the south dining room threshold or the binding of both sets of dining room doors resulted in water-related damages. For most of the reasons discussed above, the Follises could not reasonably have anticipated in September 1998 that the two asserted dining room repair failures in 2002 and beyond likely would demand repairs of either $1.6 million or $680,000. The following causation-related concerns mitigate against a finding of consequential damages arising from a failure to repair exterior items 2 and 6: (1) multiple witnesses identified water damage in the vicinity of windows and doors throughout the house; (2) Morbach identified some of this water damage as chronic and repeated, including in the first floor master bedroom, i.e., rooms other than the dining room; (3) plaintiff's guests left windows and doors unlocked, and returned to Unit 6 a week or two later to find doors or windows open to the elements; (4) plaintiff's own failure to lock some doors and windows resulted in the July 17, 2002 and July 21, 2002 storm-related water intrusions, which soaked much of the interior of Unit 6 with 3" to 5" of rain; and (5) after the thorough soaking of Unit 6 in July 2002, including the dining room, the home remained damp and warm over the summer, enhancing mold growth, before remediation began in December 2002.

The "shim" and dining room door binding contributions to causation in this case appear speculative at best because so many other potential causes of water intrusion and damage existed, and, more importantly, because less than a preponderance of the evidence in the vast record tends to specifically link the shim to an identified occurrence of water intrusion into Unit 6, and no evidence linked the dining room door binding to any instance of water intrusion. *Kallabat v State Farm Mut Automobile Ins Co*, 256 Mich App 146, 151; 662 NW2d 97 (2003) ("In determining damages for allowable expenses, the jury must not be allowed to speculate concerning the cost of a particular procedure or service, and a trial court should grant a motion for judgment notwithstanding the verdict if the jury was permitted to engage in such speculation."); *Berrios v Miles, Inc*, 226 Mich App 470, 478; 574 NW2d 677 (1997) (observing that "damages based on speculation or conjecture are not recoverable").

3. Interior Water System Leakages

Irrespective whether the Follises reasonably may have anticipated some consequential damages arising from their failure to adequately fix interior items four and five, our review of the record reveals no evidence whatsoever of any ongoing leaks or water damage arising near the identified water shut-off valves. Viewed in the light most favorable to plaintiff, the record established only that, in Calcaterra's words, "the fittings that the valves were hooked up to had been leaking at one time, because there was calcium around the fitting and around the nut." The only other relevant evidence of water staining near a sink came via Morbach's testimony regarding a "recent" but dried water stain under a vanity. The record simply does not connect the relatively minor 1998 water leakage issues with any resultant mold or other damage requiring additional repair.

4. Loose Stone on Front Steps

During closing argument, counsel for plaintiff urged the jury to award $68,000 to properly repair the front steps in the waterproof manner Wild proposed. But the clear and unambiguous escrow agreement language mandates only that the Follises "resecure[]" the "furthest stone to the east on the top set of the front entry stairs." Furthermore, the record does not support any reasonable supposition by the Follises in 1998 that their neglect to repair one loose stone on the top step of a flight of stairs probably would cause plaintiff to incur $68,000 to entirely rebuild the steps. We emphasize that the record reflects no basis for knowledge by the Follises at any time that the front steps suffered some drainage infirmity.

J. Indecipherability of Jury Award

As we have concluded, the sole potentially appropriate category of consequential damages for which the Follises legally may have some responsibility constitutes water intrusion into the window well. From the special verdict rendered, we simply cannot ascertain to what degree the jury assigned damages to the window well-related breach, and this lone permissible category of consequential damages does not support the entire $680,000 awarded by the jury. We thus are constrained to find that the jury's verdict qualifies as "clearly . . . excessive," pursuant to MCR 2.611(A)(1)(d). See *Davidson v Gen Motors Corp (On Rehearing)*, 136 Mich App 203, 205-206; 357 NW2d 59 (1984) ("Where damages are measured by fixed rules and principles, as in a contract action, the jury's verdict may be set aside as excessive where it can be concluded that the jury must have disregarded such rules and principles."). Because we find it plain that the jury disregarded the applicable rules for calculating contract damages, we hold that the circuit court abused its discretion in denying the Follises' motion for a new trial.

Our finding that a new trial is warranted here leads us to a further consideration regarding the scope of the new trial on remand. In MCR 2.611, the Supreme Court has authorized the granting of a new trial with respect "to all or some of the parties, on all or some of the issues, whenever their substantial rights are materially affected . . . ." "'While permitted by rule, we do not favor partial new trials, limited to damages alone.'" *Garrigan v LaSalle Coca-Cola Bottling Co*, 373 Mich 485, 489; 129 NW2d 897 (1964), quoting *Bias v Ausbury*, 369 Mich 378, 383; 120 NW2d 233 (1963). In Michigan, "[i]t has long been recognized that the questions of liability and damages are so closely intertwined that they may not usually be separated." *Doutre v Niec*, 2 Mich App 88, 90; 138 NW2d 501 (1965). A limited exception to this general rule applies "only .

. . where the liability was clear." *Trapp v King*, 374 Mich 608, 611; 132 NW2d 640 (1965); see also *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 523; 592 NW2d 786 (1999).

In this case, the Follises presented evidence from which a jury could have found that TSA remedied all items on the escrow lists in an acceptable manner. Because the Follises' liability for breaching the escrow agreement does not appear clear, "we cannot order a new trial with regard to the issue of damages alone." *Lagalo*, *supra* at 523. Therefore, we remand for a new trial limited in focus to whether (1) the Follises breached escrow schedule exterior item #3 involving the window well, and (2) this breach occasioned any damages that either "may fairly and reasonably be considered either as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of a breach of it." *Lawrence*, *supra* at 7.

K. Other Questions Presented

We offer the following brief analysis regarding the other questions that the parties raise on appeal. We first find that the Follises erroneously contend that plaintiff's release of the funds held in escrow constituted a release of their potential liability arising from repair of the escrow list items. No terms in the plain language of either of the relevant documents, the September 1998 escrow agreement or plaintiff's March 1999 authorization to release the $25,000 in escrow, purports to shield the Follises from liability. *Genesee Foods Services, Inc v Meadowbrook, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 274517, issued July 17, 2008), slip op at 4 ("If the text in the release is unambiguous, we must ascertain the parties' intentions from the plain, ordinary meaning of the language of the release.").

Concerning the Follises' related waiver and estoppel arguments, we cannot decide these issues as a matter of law because the record contains evidence suggesting that plaintiff did not knowingly relinquish his right to the Follises' repair of the escrow list items, or that plaintiff accepted partial performance of the escrow list repairs. *Sweebe v Sweebe*, 474 Mich 151, 156-157; 712 NW2d 708 (2006) (explaining that waiver is the intentional relinquishment of a known right); *Goldblum v United Automobile, Aircraft & Agricultural Implement Workers of America, Ford Local No. 50*, 319 Mich 30, 37; 29 NW2d 310 (1947) (noting that parties may relax contractual terms by *mutual* agreement).

The circuit court properly rejected the Follises' request that the jury consider apportionment of plaintiff's damages to nonparty TSA, which had won summary disposition of all claims that plaintiff asserted against it. Our Supreme Court recently held that "proof of a duty *is* required before fault can be apportioned and liability allocated under the comparative fault statutes, MCL 600.2957 and MCL 600.6304." *Romain v Frankenmuth Mut Ins Co*, ___ Mich ___; ___ NW2d ___ (Docket No. 135546, decided July 23, 2008), slip op at 2-3 (emphasis in original, internal quotation omitted). Because the circuit court decided correctly that TSA owed plaintiff no duty, "the 'negligent' actor could not have proximately caused the injury and could not be at 'fault' for purposes of the comparative fault statutes." *Id*. at 4.

Lastly, given our conclusion that the record does not support the jury's award of consequential damages, it becomes unnecessary for us to address either the Follises' contention that the circuit court improperly denied their motion for summary disposition of plaintiff's silent

fraud claim, or plaintiff's argument that the circuit court erred by denying his motion to amend the judgment

V. Conclusion

We affirm the circuit court's orders granting TSA summary disposition. We reverse the unsupported jury award of damages against the Follises, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher

STATE OF MICHIGAN

COURT OF APPEALS

ARCHIE A. VAN ELSLANDER,

Plaintiff-Appellant,

v

THOMAS SEBOLD & ASSOCIATES, INC., DANIEL S. FOLLIS, and MARY ELIZABETH FOLLIS,

Defendants-Appellees,

and

HOME INSPECTORS NORTH, INC., and LINCOLN WOOD PRODUCTS INC.,

Defendants.

UNPUBLISHED
December 2, 2008

No. 272396
Oakland Circuit Court
LC No. 2003-051583-CZ

ARCHIE A. VAN ELSLANDER,

Plaintiff-Appellee-Cross-Appellant,

v

THOMAS SEBOLD & ASSOCIATES, INC.,

Defendant-Appellee,

and

DANIEL S. FOLLIS and MARY ELIZABETH FOLLIS,

Defendants-Appellants-Cross-Appellees,

and

No. 274966
Oakland Circuit Court
LC No. 2003-051583-CZ

HOME INSPECTORS NORTH, INC., and
LINCOLN WOOD PRODUCTS, INC.,

Defendants.

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

SCHUETTE, J. (*concurring in part and dissenting in part*).

I concur in the portion of the opinion of my distinguished colleagues, Judges Borrello and Gleicher, that affirms the trial court's grant of summary disposition to Thomas Sebold & Associates, Inc. However, because I would affirm the trial court's judgment effectuating the jury verdict in plaintiff's favor in the amount of $706,465.30,[1] I must respectfully dissent from that portion of the opinion.

I disagree with the majority's conclusion that "[v]iewing the testimony of Morbach and Wise in the light most favorable to plaintiff, the testimony of neither witness supports a reasonable inference that the Follises' failure to repair the shim under the south-facing dining room French doors resulted in the extensive damage to the dining room floor, or contributed to the mold in that area."

"If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury." *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996). This Court may only review questions of fact to determine that the jury verdict is supported by the evidence; and the verdict should not be disturbed if it falls within the range of the testimony given. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 137-138; 680 NW2d 485 (2004).

I find that the expert witness testimony of Wise and Morbach provides sufficient evidence to support that the Follises' failure to repair did contribute to the damage and mold resulting in the dining room and the basement. Also, a reasonable jury could infer from the trial testimony that the disrepair of the dining room doors and the basement window well did indeed contribute to plaintiff's damages.

Wise testified that "there appeared to be extensive water damage from two French doors" and that "it appeared to be either [sic] coming in under the threshold." Wise further stated that there was mold in the area of the south French doors as well as in the basement room with the egress pit. Morbach testified that in the area of the south dining room doors there was "discoloration on that toe molding there that provided evidence of water intrusion." Concerning

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[1] The jury verdict award in favor of plaintiff was for the amount of $680,838.82 at four percent interest for thirteen months, for a total award of $706,465.30.

the basement egress pit, Morbach also testified that "there were cracks under the window, water stains under the window, and water stains and visible growth on the floor, the lower six inches of the drywall under the window." Morbach concluded her testimony by stating that had the person responsible for the repair of the window well fixed it, the repair would have corrected the water intrusion and resulting mold.

Additional testimony regarding the actual billing for the damages linked to the Follises' failure to repair was admitted into evidence as exhibits 307, 316, and 320. The exhibits are the necessary and crucial element to sufficiently find that the jury award was not excessive. At first glance, it may seem difficult to determine the exhibits' room allocations for the billing; however, the exhibits were explained in detail throughout the trial testimony.

Ultimately, the issue of whether the jury award is excessive boils down to whether the Follises' failure to repair can be connected with plaintiff's damages and which exhibits are the accurate and appropriate remediation connected with that failure to repair. A reasonable jury could infer from the expert testimony of Wise and Morbach that the disrepair of the dining room doors and basement window well significantly contributed to the resulting mold. If the minimum attributable damages of that mold are calculated from exhibits 307, 316, and 320, the amount totals $695,956.65. Therefore, the jury verdict for $680,838.82 is within the minimum amount of billing attributable, and is not an excessive award that should be overturned by this Court. For these reasons, I would affirm the circuit court's order effectuating the jury verdict in plaintiff's favor.

/s/ Bill Schuette