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# IN THE COURT OF APPEALS OF INDIANA

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| MARY ANN BROWN, MATTHEW BROWN, RYAN BROWN, BY n/b/f MARY ANN BROWN, | ) | |
| Appellants-Plaintiffs, | ) | |
| vs. | ) | No. 87A05-0612-CV-723 |
| GREGORY L. WASSON and WASSON PIONEER REALTY, | ) | |
| Appellees-Defendants. | ) | |

APPEAL FROM THE WARRICK CIRCUIT COURT
The Honorable David O. Kelley, Judge
Cause No. 87C01-0307-PL-310

**November 21, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## Case Summary

Mary Ann Brown, in her personal capacity and as the next best friend of her sons Matthew Brown and Ryan Brown, appeals the trial court's entry of summary judgment in favor of Gregory Wasson and Wasson Pioneer Realty (collectively "the Appellees"). We affirm in part, reverse in part, and remand.

## Issue

Brown raises three issues, which we consolidate and restate as whether the trial court properly concluded that all of her claims are barred by the statute of limitations.

## Facts

On April 11, 1994, Brown purchased a newly constructed house built by the Appellees. Brown and her children, Matthew and Ryan, moved into the house. From April 11, 1994, to August 15, 2001, they were treated for various illnesses. In October 2001, Brown read an article about the dangers of toxic mold and had her house inspected for such. Sometime after October 18, 2001, Brown received a report indicating that she had mold in her house. On June 18, 2003, Brown spoke with a physician regarding mold. That physician issued a handwritten statement on a prescription pad providing, "toxic mold could contribute to Matthew's poor grades, concentration, and abdominal pains in 2000-07."[1] App. p. 33.

[1] Because of the handwritten nature of this statement, it appears that the statement reads "2000-07." App. p. 33. Although such a reading is inconsistent with the 2003 note, based on the nature of these proceedings, we need not definitely decide the contents of this statement.

On July 8, 2003, Brown filed a complaint,[2] alleging that the Appellees failed to install a sump pump or gravity drain in the crawl space, failed to properly grade the crawl space, left an open hole in the rear foundation, improperly installed the bath exhaust fan, failed to complete all of the styrofoam insulation in the crawl space, failed to vent the kitchen exhaust directly through the roof, failed to install fiberglass insulation at the joist ends, and improperly vented the air conditioning drain line into the crawl space. Brown claimed that the faulty construction resulted in breach of the implied warranty of fitness for habitation, negligence, breach of contract, fraud, breach of warranty, and deception.

On December 15, 2004, the Appellees moved for summary judgment. This motion was denied. On July 18, 2005, the Appellees moved for summary judgment again. The Appellees asserted they were entitled to summary judgment on "any and all claims" because pursuant to Indiana Code Section 32-27-2-3 the statute of limitations had run on all claims arising from alleged defects in construction. Appellant's App. p. 35. The Appellees designated Brown's complaint, the real estate agreement between Brown and the Appellees, and a home inspection.[3] On September 16, 2005, Brown responded, alleging that there is genuine issue of material fact as to what constitutes a "major structural defect" for purposes of Indiana Code Section 32-27-2-3. In support of her

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[2] Contrary to Indiana Appellate Rule 50(A)(2)(f), which requires the appellant to include in the appendix pleadings and other documents necessary for the resolution of the issues raised on appeal, Brown failed to include her complaint in her appendix. On July 23, 2007, pursuant to our order, the trial court clerk transmitted a copy of the complaint for our review.

[3] Brown also failed to include in her appendix the Appellees' designated evidence.

argument, Brown designated the complaint, the real estate closing statement, and five home inspection reports.

The trial court held a hearing on the Appellees' second motion for summary judgment. On September 14, 2006, after the hearing, the trial court granted summary judgment, extinguishing all of Browns claims. On October 13, 2006, Brown filed a motion to correct error. The motion was deemed denied, and on December 12, 2006, Brown filed her notice of appeal.

**Analysis**

As an initial matter, we address Brown's claim that the Appellees moved to amend their written motion for summary judgment at the summary judgment hearing over her objection and that the trial court granted this motion. After a careful reading of the transcript, especially the portions cited by Brown, we cannot agree with her characterization of the hearing. There is no indication that the Appellees expressly moved to amend their motion for summary judgment, that Brown expressly objected to such amendment, or that the trial court expressly granted such amendment.

Nevertheless, in their summary judgment motion, the Appellees requested judgment on "any and all claims." App. p. 35. In that vein, we cannot conclude that the trial court erred in hearing arguments as to all claims. Whether the trial court properly granted summary judgment on all claims, however, is another question.

"Our standard of review for summary judgment is that used in the trial court: summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

Bushong v. Williamson, 790 N.E.2d 467, 473 (Ind. 2003) (citing Ind. Trial Rule 56(C)). "All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party." Id. Our review is limited to those materials designated to the trial court. Id. "While the non-movant bears the burden of demonstrating that the grant of summary judgment was erroneous, we carefully assess the trial court's decision to ensure that the non-movant was not wrongly denied his or her day in court." Becker v. Kreilein, 770 N.E.2d 315, 317 (Ind. 2002).

Brown argues that the trial court improperly granted summary judgment on her negligence claim.[4] She asserts that pursuant to the "discovery rule," the statute of limitations did not begin to run until she confirmed there was mold in her home on October 18, 2001. She claims, "Since the tests were not completed until October 18, 2001, this date represents the earliest time that Mary Ann 'should have discovered' that the [Appellees'] tortious acts caused her and her sons injuries." Appellant's Br. p. 12.

Our supreme court has held that for personal injury actions, " the cause of action of a tort claim accrues and the statute of limitations begins to run when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another." Wehling v. Citizens Nat'l Bank, 586 N.E.2d 840, 843 (Ind. 1992). In the medical malpractice setting, our supreme court has also observed, "the question of when a plaintiff discovered facts which, in the exercise of

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[4] Brown's negligence count broadly includes claims of diminution in value, lost wages, mental distress, and personal injuries suffered as a result of the Appellees' alleged negligence. Her appeal focuses on the personal injury aspect of the count. For purposes of this appeal, we consider the negligence count in its entirety as it includes Brown's personal injury allegations.

reasonable diligence, should lead to the discovery of the medical malpractice and resulting injury, is often a question of fact." Van Dusen v. Stotts, 712 N.E.2d 491, 499 (Ind. 1999).

We conclude that for purposes of Brown's personal injury claims there is a question of fact as to when she discovered facts, which in the exercise of reasonable diligence, could have led to the discovery of an injury caused by the tortious act of the Appellees. Thus, whether Brown timely discovered the cause of her injuries within two years of the July 8, 2003 filing of her complaint is a question for the trier of fact. It is not a question to be resolved on summary judgment.

Regarding the application of Indiana Code Section 32-27-2-8, upon which the Appellees rely, and its relation to the 1994 sale of the house, we conclude that this statute applies only to warranties made by the builder of a new home. Indiana Code Section 32-27-2-8 provides:

> (a) In selling a completed new home, and in contracting to sell a new home to be completed, the builder may warrant to the initial home buyer the following:
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> (1) During the two (2) year period beginning on the warranty date, the new home will be free from defects caused by faulty workmanship or defective materials.
>
> (2) During the two (2) year period beginning on the warranty date, the new home will be free from defects caused by faulty installation of:
>
> (A) plumbing;
> (B) electrical;
> (C) heating;
> (D) cooling; or
> (E) ventilating;

> systems, exclusive of fixtures, appliances, or items of equipment.
>
> (3) During the four (4) year period beginning on the warranty date, the new home will be free from defects caused by faulty workmanship or defective materials in the roof or roof systems of the new home.
>
> (4) During the ten (10) year period beginning on the warranty date, the new home will be free from major structural defects.
>
> (b) The warranties provided in this section (or IC 34-4-20.5-8 or IC 32-15-7 before their repeal) survive the passing of legal or equitable title in the new home to a home buyer.
>
> (c) An individual identified in section 7(1), 7(2), or 7(3) of this chapter who is selling a new home shall notify the purchaser of the home in writing on or before the date of closing or transfer of the new home of:
>
> (1) the warranty date (as defined in section 7 of this chapter); and
>
> (2) the amount of time remaining under the warranty.

(Emphasis added). This section describes warranties that a builder may provide to a new home purchaser, the passing of the warranties to a subsequent purchaser, and the notification required to be given to subsequent purchasers. It is not a statute of limitations pertaining to all construction related claims.[5]

This statute is relevant only in considering Count V of Brown's complaint, "Breach of Warranties in New Home Construction." Complaint p. 10. As to this claim,

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[5] Because Brown purchased the house in 1994, the time for filing claims based on the two-year and four-year warranty claims in Indiana Code Section 32-27-2-8(a) has long since passed. Further, even if this statute applies to all of the construction-related claims, we still conclude that there are no genuine issues of material fact regarding whether the mold constitutes a major structural defect.

assuming that the Appellees warranted against major structural defects, Brown has not demonstrated that a genuine issue of material fact exists.

"Major structural defect" is defined as actual damage to the load bearing part of a new home, including actual damage due to subsidence, expansion, or lateral movement of the soil affecting the load bearing function of the house. Ind. Code § 32-27-2-3. Brown relies on the report of Earl Hartgrove, an "engineering associate," to create a genuine issue of material fact. App. p. 73. Although Hartgrove found "[t]he mold and cumulative effect of the defects noted in this report and prior reports are major defects and constitute a structural defect rendering the house uninhabitable[,]" Hartgrove's report does not specifically find the mold to be a "major structural defect" as defined by Indiana Code Section 32-27-2-3. Id. at 75. In fact, the report specifically provides that "the mold is not weakening the structure of the house . . . ." Id. (emphasis added). That the mold rendered the house uninhabitable is not in and of itself a "major structural defect." As a matter of law, Brown may not take advantage of the ten-year limitation on warranties for major structural defects to pursue the breach of new home warranty claim.

Brown's complaint also includes claims for breach of the implied warranty of fitness for habitation, fraud, and deception. On appeal, Brown makes no specific arguments regarding these claims. Although we scrutinize summary judgment rulings carefully to assure that a party was not improperly denied his or her day in court, an appellant bears the burden of demonstrating it was error to grant summary judgment. Bolin v. Wingert, 764 N.E.2d 201, 203 (Ind. 2002). In the absence of any argument

regarding the applicable statute of limitations on these remaining claims, Brown has failed to meet this burden.

In a slightly different context we have observed:

> It is well settled that we will not consider an appellant's assertion on appeal when he has failed to present cogent argument supported by authority and references to the record as required by the rules. If we were to address such arguments, we would be forced to abdicate our role as an impartial tribunal and would instead become an advocate for one of the parties. This, clearly, we cannot do.

Shepherd v. Truex, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004) (citations omitted).

If we were to reverse the trial court's grant of summary judgment on all claims, we would be making arguments where Brown has not done so. We cannot do this. Brown has not established that the trial court improperly granted summary judgment on her remaining claims.

**Conclusion**

Brown has shown that summary judgment is improper as to the negligence claim based on the discovery rule. Brown has not shown that summary judgment on the remaining claims was improper. We affirm in part, reverse in part, and remand for further proceedings on the negligence claim.

Affirmed in part, reversed in part, and remanded.

NAJAM, J., concurs.

RILEY, J., concurs in part and dissents in part with separate opinion.

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| vs. | ) | No. 87A05-0612-CV-723 |
| GREGORY L. WASSON and WASSON PIONEER REALTY, Appellees-Plaintiffs. | ) | |

**RILEY, Judge, concurring in part, and dissenting in part with separate opinion.**

I concur in the majority's decision with regard to Brown's negligence claim and claims for breach of the implied warranty of fitness for habitation, fraud, and deception. However, I respectfully part ways with the majority's application of Indiana Code section 32-27-2-8.

In the present case, Brown purchased and moved into her family's new home in April of 1994. Thus, nearly ten years passed between the warranty date and the filing of her Complaint. *See* I.C. § 32-27-2-7. Accordingly, any claim related to the construction of the home must fall under I.C. § 32-27-28(a)(4) and must be considered a "major structural defect." "Major structural defect" is defined by I.C. § 32-27-2-3 as "actual

damage to the load bearing part of a new home, including actual damage due to: (1) subsidence; (2) expansion; or (3) lateral movement; of the soil affecting the load bearing function." However, as Brown points out, beyond this statute there is virtually no case law to further help define what constitutes a major structural defect.

In my examination of Brown's designated evidence, I find facts that support a conclusion that the defects in the residence purchased from Wasson could constitute "major structural defects." In particular, I highlight the following inspection report, in pertinent part, prepared by Earl Hartgrove of Robert Molzan & Associates after inspecting the residence in February of 2004, as well as July and August of 2005:

> 1. There is no dampproofing on the front foundation wall, which allows ground water to permeate the foundation walls.
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> 2. The downspout splash block at the front right corner of the building slopes into the crawl space due to the negative grade.
>
> 3. The dirt around the front of the house is clay. It has cracked in the summer heat and pulled away from the house, leaving an easily accessible path for the water.
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> * * *
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> Although all of the deficiencies mentioned above have a negative cumulative effect, the most significant is the negative slope at the front of the residence. The necessary amount of dirt was not placed properly around the front of the house when it was built to provide for the natural compaction and settling that occurs over time. Consequently, we see a trough that drains rain water directly into and through holes in the front foundation, and a crawl space that acts like a pit with no way for the water to drain out. After the water problem is solved, the mold issue can be addressed, which would appear to involve removing most of the drywall, decontaminating the structure, and remodeling. The other ventilation and insulation issues, though they may not be the salient issue, are not worth the risk of ignoring considering the seriousness of the mold problem and should also be remedied.

> The mold is not weakening the structure of the house, but it is within the structure of the house and cannot be remedied without major expenditures. The mold and cumulative effect of the defects noted in this report and prior reports are major defects and constitute a structural defect rendering the house uninhabitable.

(Appellant's App. pp. 74-75).

In addition, even the inspection report designated as evidence by Wasson, and prepared by HomeCheck Inspection Service, Inc., indicates several problems with the house, including: "hole in concrete block in rear foundation is allowing soil to wash into crawl space," "crawl space not graded to a central location point," and "holes where sewer pipe and water line penetrate the foundation." (Appellant's App. p. 64). Therefore, at a minimum, the evidence presented by both parties leaves me questioning whether the defects in the construction of the home could be classified as "major structural defects" under I.C. § 32-27-2-8. Consequently, given the absence of case law to help further define such defects and our deficit in knowledge pertaining to proper construction of a home, I agree with Brown that a question of fact remains. As a result, I would conclude that summary judgment was inappropriate in this case.